2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE DESKBOOK

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2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 1

JURISDICTION

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2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

JURISDICTION

Outline of Instruction

I. INTRODUCTION.

Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status, i.e., that the accused is a servicemember at the time of trial.

A. Sources of Jurisdiction.

1. The Constitution: Article I, section 8, clause 14

2. UCMJ, articles 2, 3 and 36

3. MCM, 1995 ed., RCM 201 - 204

4. Customary international law and treaties

B. Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):

1. Jurisdiction over the offense (subject-matter jurisdiction).

2. Jurisdiction over the person (personal jurisdiction).

3. Court properly composed (military judge and members must have proper qualifications).

a. *United States v. Townes,* 52 M.J. 275 (2000). Staff Sergeant Townes was convicted by a general court-martial composed of enlisted and officer members. The record is clear that he did not personally request, either orally or in writing, that enlisted members serve on his court-martial (as required by Article 25(c)(1)); rather, the trial defense counsel made the election on his behalf. Relying on precedent (*United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985)), the Navy-Marine Court refused to apply a "substantial compliance analysis" and held that the error in forum election was jurisdictional. The CAAF reversed, holding that the military judge erred in failing to elicit the accused's personal selection on the record, but that there was substantial compliance with the requirements of Article 25. "There was sufficient indication by [accused] orally and on the record that he personally requested enlisted members. Accused had been advised of his rights concerning the forum . . . defense counsel [noted accused's desire] to be tried by . . . panel . . . [Accused] testified for an entire day before the court members." The error did not materially prejudice the substantial rights of the accused.

b. *United States v. Turner*, 47 M.J. 348 (1997). Absent evidence of coercion or ineffective assistance of counsel, accused's request to be tried by military judge alone can be inferred from the record of trial. Defense counsel, not the accused, represented for the record, both orally and in writing, that the accused elected to be tried by military judge alone. Even though the accused did not personally make the request, considering the facts in the case, there was substantial compliance to satisfy UCMJ, art 16.

c. *United States v. Seward*, 48 M.J. 369 (1998). Failure to formally request trial by military judge alone prior to assembly was error. However, under the facts of the case, the error was not prejudicial. The accused did not request to be tried by military judge alone until after completion of the sentencing proceedings. The court found that the accused's desire to be tried by judge alone was apparent by the terms of the pre-trial agreement (an agreement to be tried by military judge alone) and the post-assembly written submission to be tried by judge alone.

d. *United States v. Cook*, 48 M.J. 434 (1998). The court-martial did not lack jurisdiction even though there were substitute members detailed to the court-martial who replaced excusals beyond the one-third excusal limitation. Prior to assembly, the SJA excused more than one-third of the total number of members originally detailed. The Convening Authority in turn detailed substitute members to the panel. The court held that the members detailed in excess of the one-third excusal limitation under R.C.M. 505(c)(1)(B)(ii) were not "interlopers" and did not deprive the court-martial of jurisdiction.

e. *United States v. Sargent*, 47 M.J. 367 (1997). The unexplained absence of a detailed member did not deprive the general court-martial of jurisdiction over the accused so long as the statutory quorum was satisfied.

4. Convened by proper authority.

A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), set aside, on other grounds, 36 M.J. 8 (C.M.A. 1992); *accord United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). *See also United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996).

5. Charges properly referred.

a. *United States v. Underwood*, 47 M.J. 805 (A.F. Ct. Crim. App. 1997). Issues of an improper referral for trial are not jurisdictional in nature. It was not an improper purpose to withdraw and re-refer charges to another court-martial because of witness availability.

b. *United States v. Pate*, 54 M.J. 501 (A.C.C.A. 2000). The accused was charged with violating Art. 92(2), failure to obey a lawful order, and pursuant to his proposed pleas in a pretrial agreement, plead guilty by exceptions and substitutions to Art. 92(3), negligent dereliction of duty. The PTA was not signed by the GCMCA, but instead the word "accepted" was circled and a notation made indicating a voco to the SJA. The accused argued that since the CA never signed the PTA, the new charge was never referred and, therefore, the court-martial lacked jurisdiction over that charge. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing and the lack of signature was "insignificant."

II. JURISDICTION OVER THE OFFENSE.

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The "service-connection" test is established.

2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the "service-connection" test, and holds that jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces.

B. **BOTTOM LINE:** Subject matter jurisdiction is established by showing military status at the time of the offense.

C. **Administrative Double Jeopardy Policies.** Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the soldier. This policy is based on comity between the federal government and state or foreign governments. See AR 27-10, para. 4-2; JAGMAN, para. 0124.

D. **Capital Cases:** *Loving v. United States*, 517 U.S. 748 (1996). Justice Stevens (concurring) raises the question of whether a "service connection" requirement applies to capital cases. *See also United States v. Simoy*, 46 M.J. 601 (A.F.Ct.Crim.App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was "service-connected"). *See also United States v. Gray*, 51 M.J. 1 (1999).

E. **Subject Matter Jurisdiction Over Reservists/National Guard:** The offense must be committed while the reservist has military status. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993). *See also United States v. Smith,* Case No. 9500065, unpub. (Army Ct. Crim. App. 1998) (holding there was no court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

III. JURISDICTION OVER THE PERSON.

A. General Provisions: UCMJ, art. 2, provides jurisdiction over categories of persons with military status:

1. Enlistees; Inductees; Academy Cadets/Midshipmen

2. Retirees.

TJAG approval is required before prosecuting retirees. Failure to follow "policy" and obtain OTJAG approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992). Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).

3. Persons in custody

4. P.O.W.'s

5. Persons accompanying or serving with the armed forces in the field in time of war.

6. Reservists.

B. **General Rule:** In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court-martial jurisdiction ends upon delivery of a valid discharge certificate.

C. Inception of Court-Martial Jurisdiction.

1. **Enlistment:** A Contract Which Changes "Status." UCMJ, art. 2(b).

(B) THE VOLUNTARY ENLISTMENT OF ANY PERSON WHO HAS THE CAPACITY TO UNDERSTAND THE SIGNIFICANCE OF ENLISTING IN THE ARMED FORCES SHALL BE VALID FOR PURPOSES OF JURISDICTION UNDER SUBSECTION (A) OF THIS SECTION, AND A CHANGE OF STATUS FROM CIVILIAN TO MEMBER OF THE ARMED FORCES SHALL BE EFFECTIVE UPON THE TAKING OF THE OATH OF ENLISTMENT.

2. **Involuntary enlistment:** *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution -no coercion).

3. **Constructive Enlistment**. The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, art. 2(c) (as amended in 1979):

(C) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PERSON SERVING WITH AN ARMED FORCE WHO—

(1) SUBMITTED VOLUNTARILY TO MILITARY AUTHORITY;
(2) MET THE MENTAL COMPETENCE AND MINIMUM AGE QUALIFICATIONS OF SECTIONS 504 AND 505 OF THIS TITLE AT THE TIME OF VOLUNTARY SUBMISSION TO MILITARY AUTHORITY;
(3) RECEIVED MILITARY PAY OR ALLOWANCES; AND
(4) PERFORMED MILITARY DUTIES;

IS SUBJECT TO THIS CHAPTER UNTIL SUCH PERSON'S ACTIVE SERVICE HAS BEEN TERMINATED IN ACCORDANCE WITH LAW OR REGULATIONS PROMULGATED BY THE SECRETARY CONCERNED.

D. Termination of Jurisdiction Over the Person.

1. **General Rule:** Discharge Terminates Jurisdiction.

2. ETS/EAS by itself does not terminate jurisdiction.

a. RCM 202(a) discussion: "Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention."

b. *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to "some military offenses."

c. RCM 202(b): "Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges." *See United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).

d. *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a "view towards trial" and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a "view towards trial."

e. **Appellate Leave.** *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).

3. When is discharge effective?

a. **On delivery.** *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960).

b. **Valid Discharge Certificate:** Discharge Authority's Intent. Early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (1994). *See also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).

c. **Final accounting of pay.** *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay).

d. **Undergo a clearing process.** *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:

(1) Delivery of a valid discharge certificate;

(2) A final accounting of pay; and

(3) Undergoing a "clearing" process as required under appropriate service regulations to separate the member from military service.

See also United States v. King, 37 M.J. 520 (A.C.M.R. 1993).

e. **At 2400 hours on date of discharge.** *United States v. Melanson*, 53 M.J. 1 (2000). The accused, who was stationed in Germany, became a possible suspect in an assault investigation while he was being administratively separated for drug use. On 20 May 1998, the day he was to fly from Germany, eyewitnesses to the assault identified the accused as the attacker. The accused had already cleared his unit and received a copy of his DD 214 (discharge certificate). Upon the discovery that the accused was the prime suspect, the command revoked the accused's separation orders and apprehended him at the airport. CAAF held that *in personam* jurisdiction still existed because pursuant to AR 635-200, **a discharge takes effect at "2400 hrs. on the date of notice of discharge to the soldier"** and the discharge was therefore not yet effective. *See also, United States v. Williams*, 53 M.J. 316 (2000).

4. **Erroneous Delivery.** Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).

5. **Post-arraignment Discharge.** A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority.

6. **Post-conviction Discharge.** *Steele v. Van Riper,* 50 M.J. 89 (1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental brief, the government concurred. As such, the CAAF denied the accused's writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence.

7. **Execution of Punitive Discharge.** *United States v. Keels*, 48 M.J. 431 (1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of the discharge certificate and final accounting of pay. There is not instantaneous termination of status upon completion of appellate review.

8. **Post-Appeal Discharge.** *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review.

9. Exceptions to General Rule that Discharge Terminates Jurisdiction.

a. **Exception:** UCMJ, art. 3(a).

(A) [A] PERSON WHO IS IN A STATUS IN WHICH THE PERSON IS SUBJECT TO THIS CHAPTER AND WHO COMMITTED AN OFFENSE AGAINST THIS CHAPTER WHILE FORMERLY IN A STATUS IN WHICH THE PERSON WAS SUBJECT TO THIS CHAPTER IS NOT RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR THAT OFFENSE BY REASON OF A TERMINATION OF THAT PERSON'S FORMER STATUS.

Willenbring v. Neurauter, 48 M.J. 152 (1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve component service. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, "clearly provides for jurisdiction over prior-service offenses without regard to a break in service." *But see Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component).

b. **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.

(B) EACH PERSON DISCHARGED FROM THE ARMED FORCES WHO IS LATER CHARGED WITH HAVING FRAUDULENTLY OBTAINED HIS DISCHARGE IS . . . SUBJECT TO TRIAL BY COURT-MARTIAL ON THAT CHARGE AND IS AFTER APPREHENSION SUBJECT TO THIS CHAPTER WHILE IN THE CUSTODY OF THE ARMED FORCES FOR THAT TRIAL. UPON CONVICTION OF THAT CHARGE HE IS SUBJECT TO TRIAL BY COURT-MARTIAL FOR ALL OFFENSES UNDER THIS CHAPTER COMMITTED BEFORE THE FRAUDULENT DISCHARGE.

(1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The 5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

(2) *United States v. Reid*, 46 M.J. 236 (1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, art. 2.

(3) *United States v. Pou*, 43 M.J. 778 (A.F.Ct.Crim.App. 1995). Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, art. 3(b) is inapplicable, and court-martial jurisdiction exists.

c. **Exception:** UCMJ, art. 3(c), deserter obtaining discharge for subsequent period of service.

(C) NO PERSON WHO HAS DESERTED FROM THE ARMED FORCES MAY BE RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER BY VIRTUE OF A SEPARATION FROM ANY LATER PERIOD OF SERVICE.

d. **Exception:** UCMJ, art. 2(a)(7), persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).

(A) THE FOLLOWING PERSONS ARE SUBJECT TO THIS CHAPTER:

(7) PERSONS IN CUSTODY OF THE ARMED FORCES SERVING A SENTENCE IMPOSED BY A COURT-MARTIAL.

e. **Exception:** UCMJ, art. 3(d), leaving a Title 10 status does not terminate court-martial jurisdiction.

(D) A MEMBER OF A RESERVE COMPONENT WHO IS SUBJECT TO THIS CHAPTER IS NOT, BY VIRTUE OF THE TERMINATION OF A PERIOD OF ACTIVE DUTY OR INACTIVE-DUTY TRAINING, RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR AN OFFENSE AGAINST THIS CHAPTER FOR AN OFFENSE AGAINST THIS CHAPTER COMMITTED DURING SUCH PERIOD OF ACTIVE OR INACTIVE-DUTY TRAINING.

E. ***In Personam Jurisdiction in a Foreign Country.*** *United States v. Murphy,* 50 M.J. 4 (1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. The CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is, Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.

IV. COURT-MARTIAL JURISDICTION OVER THE RESERVE COMPONENTS.

A. Historical Overview.

B. **BOTTOM LINE:** Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD).

C. When does jurisdiction exist for IDT individual?

1. Compare UCMJ, art. 2, to service regulations defining IDT.

2. Compare to ADT. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), cert. denied, 493 U.S. 1045 (1990).

3. *United States v. Wall*, 1992 CMR LEXIS 642 (A.F.C.M.R. 1992) (not reported in M.J.).

D. UCMJ, art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member's release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984) and *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).

E. Involuntary Recall to Active Duty. UCMJ, art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for:

1. Article 32 investigation.

2. Trial by court-martial.

3. Nonjudicial punishment.

F. Restrictions on the involuntary recall process.

1. A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, art. 2(d)(4); AR 27-10, para. 21-3.

2. Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:

   a. sentenced to confinement;

   b. forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or

   c. placed in pretrial confinement. UCMJ, art. 2(d)(5).

3. General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).

4. Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, art. 25; R.C.M. 1301.

G. Impact on the National Guard.

1. 32 U.S.C. § 505 - Training in a state status - No jurisdiction.

2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall.

3. Federal status continues until the guard member has completed his period of federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding a state termination of jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

V. PROCEDURAL CONSIDERATIONS.

A. Pleading Jurisdiction. *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).

B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.

C. Burden of Proof:

1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government).

2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for "peculiarly military" offenses like AWOL, an accused's military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders).

VI. APPELLATE JURISDICTION: THE ALL WRITS ACT, 28 U.S.C. § 1651(A).

A. **Introduction.** In 1948, Congress enacted the All Writs Act, which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. The All Writs Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In 1969, the Supreme Court held that the All Writs Act applied to our military appellate courts. *Noyd v. Bond*, 395 U.S. 683 (1969). Consistent with federal courts, our military appellate courts view writ relief as a drastic remedy that should only be invoked in those situations that are truly extraordinary.

B. ***Writ Authority in the Military.***

1. *Morgan v. Mahoney*, 50 M.J. 633 (A.F. Ct. Crim. App. 1999). The government involuntarily recalled the accused (a member of the retired reserves) to active duty to face a court-martial. At trial, the accused challenged the jurisdiction of the court-martial. The military judge denied the accused's motion, and the accused petitioned the Air Force Court seeking an extraordinary writ ordering the military judge to dismiss all charges and specification. The service court held that it had jurisdiction under the All Writs Act to hear the issue and denied the accused's relief. In denying the writ, the court found that the accused was a member of retired reserves, which made him part of the reserve component and subject to lawful orders to return to active duty. Since the accused was in an active duty status at the time of trial, the court-martial did not lack *in personam* jurisdiction.

2. *Clinton v. Goldsmith,* 143 L.Ed.2d 720 (1999). The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the roles of the Air Force. The Supreme Court held that the CAAF lacked jurisdiction, under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls.

3. *United States v. Byrd*, 53 M.J. 35 (2000). The accused petitioned the court, asking review of an ineffectiveness of counsel claim. Unfortunately for the accused, he filed the petition after the government executed his sentence, which included a punitive discharge. Despite the execution of his discharge, the accused petitioned CAAF for review, and review was granted (government did not offer lack of jurisdiction or untimely filing as reasons to deny review). Two years later, and after the case had been remanded to the NMCCA for further consideration, the government requested that appellate review be terminated for lack of *in personam* jurisdiction. The NMCCA held that jurisdiction for continued review ended following the proper execution of the discharge in 1997. CAAF held that the NMCCA erred in concluding that accused's discharge was proper under Article 71. CAAF stated "this Court has jurisdiction to review such a case under the All Writs Act," but declined to decide which standard of review was more appropriate, direct or collateral.

VII. CONCLUSION.

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 2

DEVELOPMENTS IN PRETRIAL PROCEDURES

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LTC John P. Saunders
January 2001

DEVELOPMENTS IN PRETRIAL PROCEDURES

Outline of Instruction

I. INTRODUCTION.

II. COURT PERSONNEL AND PANEL SELECTION ISSUES.

A. Review: An accused has a qualified right to have his case reviewed by an impartial convening authority (CA). Cf. *United States v. Nix*, 40 M.J. 6 (C.M.A 199). A CA may have her discretion limited if she has acted in some fashion that is inconsistent with the impartiality of a CA. A CA may, for example, become an "accuser." An accuser is a person who (1) signs and swears to charges, (2) directs that charges nominally be signed and sworn to by another, or (3) who has an interest other than an official interest in the prosecution of the accused. Article 1(9), UCMJ. See also RCM 601(c) Discussion.

1. A CA who is an accuser is disqualified from referring a case to a SPCM or a GCM. Articles 1(9), 22(b) and 23(b), UCMJ; RCM 601(c). The CA may dispose of the case administratively or dismiss the charges but, if she wishes the case to be tried by a general or a special court-martial, she must forward the case to the next higher commander, noting her disqualification. Articles 22(b), 23(b), UCMJ; RCM 401(c)(2)(A); 601(c).

2. A CA-accuser may be disqualified in either a "statutory" sense (e.g., having sworn the charges) or in a "personal" sense (by virtue of having an other than official interest in the case). McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997). Whether the CA is statutorily or personally disqualified will determine the option available to the CA concerning a particular case.

   a. Statutory disqualification. McKinney v. Jarvis, 46 M.J. 870 (Army Ct. Crim. App. 1997): A convening authority who becomes an accuser by virtue of preferring charges is not, per se, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges.

b. Personal disqualification: Whether a reasonable person could impute to the convening authority a personal interest or feeling in the outcome of the case. *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Gordon*, 2 C.M.R. 161 (1952); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified CAs).

(1) *United States v. Tittel,* 53 M.J. 313 (2000): Accused was convicted of shoplifting and several other offenses and processed for elimination when he was caught shoplifting again from the base PX. The SPCMCA signed an order barring the accused from entering any Navy PX, which the accused violated. The CAAF adopted the Navy court's reasoning that the order was a routine administrative directive and that the CA was not an "accuser" and that, in any event, the accused waived the issue.

(2) *United States v. Haagenson,* 52 M.J. 34 (1999): Case remanded for fact-finding proceeding on issue of whether SPCMCA became an accuser. Accused was a warrant officer. SPCMCA originally referred the accused's case to a SPCM, but withdrew it and forwarded it with recommendation for GCM. Accused alleged on appeal the case was withdrawn and forwarded because base commander's XO, who was the SPCMCA's superior, told SPCMCA "I want [accused] out of the Marine Corps."

3. Failure to raise issue at trial may result in waiver.

a. *See Tittel; United States v. Voorhees,* 50 M.J. 494 (1999): A convening authority is an "accuser" when the convening authority is so closely connected to the offense that a reasonable person would conclude that the convening authority had a personal interest in the matter - that it would affect the convening authority's ego, family, or personal property, or that it demonstrates personal animosity beyond misguided zeal (Here, convening authority did not become an accuser even though he may have threatened to "burn" accused if he did not enter into pretrial agreement; even if he did, the issue was waived).

B. Panel Selection Issues.

a. Convening authority must personally select panel members using the criteria set forth in Article 25, UCMJ. RCM 503(a): "The convening authority shall detail qualified persons as members for courts-martial." The CA must determine who in the CA's *personal* opinion are "best qualified" under the criteria set out in Article 25, UCMJ:

***J*udicial Temperament**
***E*xperience**
***T*raining**
***A*ge**
***L*ength of Service**
***E*ducation**

b. Congress considering random selection.

(1) National Defense Authorization Act for 1997, Section 561. This section required the Secretary of Defense to develop a plan for random selection of members of courts-martial as a potential replacement for the current selection process and present the plan and views of the code committee to the Senate Committee on Armed Services and the House Committee on National Security. The Joint Service Committee has concluded that, after considering six alternatives, the current practice of CA selection best applies the criteria in Article 25(d) in a fair and efficient manner. In Fall 1999 the JSC study was forwarded by the SECDEF to Congress.

2. Inferences of impropriety in the selection based on the array.

a. *United States v. Bertie,* 50 M.J. 489 (1999): Defense challenged selection of panel as improperly selected on the basis of rank (no member was below the grade of O4 or E8). The court noted that deliberate and systematic exclusion of lower grades and ranks is not permissible, nor may the convening authority purposefully stack a panel to achieve a desired result. However, the mere presence of senior ranking members does not create a presumption of court stacking or use of improper selection criteria. The court held there was no evidence presented to establish a court-stacking claim.

3. Inferences of impropriety in the selection based on the nomination process.

a. *United States v. Upshaw*, 49 M.J. 111 (1998): Believing the accused was an E6, the SJA sent out memorandum seeking nominees from the SPCMCAs, requesting nominees in the grade of E7 and above. The court found no error. An element of "court stacking" is improper motive; none was shown here. Defense conceded that the exclusion of technical sergeants (E6) was "just simply a mistake." The CAAF found the evidence did not raise the issue of court stacking. The error was simply administrative and not jurisdictional, and the court found no prejudice to the accused.

b. *United States v. Roland,* 50 M.J. 66 (1999): The SJA solicited court-martial panel nominees by asking that subordinate commanders recommend qualified personnel in grades "E5 to 06." The subsequent memorandum transmitting the list of nominees to the GCMCA indicated that he was not limited to the proposed enlisted members, but could select any enlisted members from his command, provided they met the Article 25 criteria. The court noted that once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred. Here, the court held that the defense had not carried its burden to show that there was unlawful command influence. The record establishes that there was no indication of impropriety in the selection of members. CA convening a court-martial must personally detail panel members.

c. *United States v. Kirkland,* USCA Dkt. No. 99-0651/AF (June 1, 2000): The SJA solicited nominees from subordinate commanders via a memo signed by the SPCMCA. The memo sought nominees in various grades. The chart had a column for E-9, E-8, E-7 but no place to list a nominee in a lower grade. To nominate E-6 or below, nominating officer would have had to modify form. There was no rank listed below E-7. No one below E-7 was nominated or selected for the panel. The CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "'reversal of the sentence is appropriate to uphold the essential fairness. . . of the military justice system.'"

C. Limitations on Joint Commanders.

1. *United States v. Egan*, 53 M.J. 570 (Army Ct. Crim. App. 2000): In a SPCM convened by Air Force colonel (commander of a EUCOM joint unit) accused (soldier) was convicted of drug use and distribution. SPCMCA approved the sentence, which included a BCD. ACCA: The SPCMCA did not have the authority under the applicable joint service directive to convene a special court-martial empowered to adjudge a BCD in the case of an Army soldier. BCD set aside; case further modified on other grounds.

III. COUNSEL.

A. Qualifications.

1. GCM. UCMJ art. 27(b): "Trial counsel . . . detailed for a general court-martial--

a. must be a judge advocate . . . and

b. must be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

2. *United States v. Steele,* 53 M.J. 274 (2000): No error where accused's civilian DC was carried "inactive" by all state bars of which he was member (and such status prohibited him from practicing law). RCM 502(d)(3)(A) requires that a CDC be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by MJ qualified to represent the accused). CAAF looked to federal case law holding that neither suspension nor disbarment creates a *per se* rule that continued representation is constitutionally ineffective (CAAF also noted a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive."). Counsel are presumed competent once licensed.

3. *United States v. McClain*, 50 M.J. 483 (1999): Accused complained his lawyers were conspiring with the trial counsel. The accused also had several disagreements with his defense counsel, and told the military judge his counsel had lied to him. In response, one of his counsel told the military judge that the accused has told "lies here today in court." Nevertheless, the military judge denied counsel's request for release, and accused ultimately requested both counsel represent him. The court held the issue of a conflict of interest (because of a disagreement in strategy) was waived by the accused. The defense was entitled to respond to the accused's assertions.

4. *United States v. Thompson*, 51 M.J. 431 (1999): A pretrial complaint against defense counsel, made by appellant's wife, did not create a conflict of interest disqualifying him from further participation in this case. The court also held that accused was not denied effective assistance of counsel when military defense counsel cautioned him about retaining civilian counsel and discouraged him from getting help from a psychologist.

5. *United States v. Johnston*, 51 MJ 227 (1999): Where detailed defense counsel left active duty prior to preparation of a new SJA recommendation, failure of the convening authority to detail substitute counsel for appellant deprived him of his opportunity for sentence relief with the convening authority and was prejudicial to appellant's substantial rights.

6. *United States v. Murphy,* 50 MJ 4 (1998): The Government called Private (PVT) French as a witness against appellant. French had been one of appellant's pretrial cell mates in the Mannheim Correctional Facility. French allegedly overheard the accused make incriminating comments to another inmate. French related this conversation to his lawyer, CPT S, who later negotiated a PTA for French. CPT S then moved to withdraw from French's case. Later, at accused's trial, French testified. The military judge was the same judge who had presided over French's trial. Defense counsel, of whom CPT S was one, did not impeach the testimony of French, although he had recently been convicted of several crimes involving dishonesty and deceit. Neither counsel nor the military judge discussed the potential conflict of interest on the record. The military judge had a *sua sponte* duty to resolve conflict questions on the record, and defense had a duty to discuss potential or actual conflicts of interest with accused. Such multiple representation creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. The court held that, assuming there was a conflict of interest, it had no impact on the merits portion of the trial, since French's testimony was mostly cumulative. However, the court was less convinced of the lack of impact on the sentence. Case returned to the Army for further proceedings.

7. U*nited States v. Allred,* 50 M.J. 795 (N.M. Ct. Crim. App. 1999): A preexisting attorney-client relationship may be severed by government only for good cause. "Good cause" did not exist where defense counsel had entered into relationship with accused concerning pending charges, charges were dismissed during the time accused was medically evacuated for evaluation of heart problems, and DC was told by SDC that, due to pending PCS, DC would not be detailed to case if charges re-preferred. Court found that DC's commander's finding of unavailability was abuse of discretion. Prejudice presumed and findings and sentence set aside.

8. *United States v. Reist*, 50 M.J. 108 (1999): Assistant TC, a LTC and Director of a Law Center, had signed charge sheet and was present in court, identified as "accuser" on the record, and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), but the court held defense waived the issue, and found no plain error.

IV. COURT MEMBERS.

A. Voir Dire.

1. Control of voir dire.

a. *United States v. Pauling*, Army 9700685 (Army Ct. Crim. App. 15 July 1999) (unpub.). Military judge did not abuse his discretion in prohibiting defense counsel to ask, on voir dire, questions from a member concerning the impact of rehabilitative potential testimony.

b. *United States v. Belflower*, 50 M.J. 306 (1999): Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire.

B. Challenge for Cause.

1. Bases – Actual and Implied Bias.

a. Challenge for cause based on actual bias is one of credibility and is reviewed for an abuse of discretion. Credibility is a *subjective determination* viewed through the eyes of the military judge. The military judge's opportunity to observe the demeanor of court members will be given "great deference" on appellate review.

b. Challenge for cause based on implied bias is reviewed on an *objective standard* through the eyes of the public. Would a reasonable member of the public have "substantial doubt as to the legality, fairness, and impartiality" of the proceedings?"

c. *United States v. Minyard*, 46 M.J. 229 (1997). The military judge should have granted challenge for cause against member whose husband investigated case against accused. A challenge for cause based on actual bias is resolved based on credibility. The military judge's credibility determination will be given great deference on review. A challenge for cause based on implied bias is reviewed under an objective standard viewed through the eyes of the public.

d. *See also United States v. Napoleon*, 46 M.J. 279 (1997) (holding that under both actual and implied bias standard, the military judge properly denied challenge for cause against member who had: *official* contacts with special agent-witness who was "very credible because of the job he has"; and knowledge of case through a staff meeting).

2. Actual Bias.

a. *United States v. Warden*, 51 M.J. 78 (1999): Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial.

b. *United States v. Napolitano,* 53 M.J. 162 (2000): Where member indicated on questionnaire disapproval of civilian DC's behavior in another case, military judge did not abuse discretion in denying challenge for cause; member retracted opinion, stated he was not biased against CDC.

3. Implied Bias.

a. *United States v. Schlamer*, 52 M.J. 80 (1999): Military judge did not abuse his discretion in denying challenge for cause against member who expressed severe notions of punishment ("rape = castration") and granting challenge against member who had received an Article 15 and did "not feel comfortable" sitting in judgment. As to former, military judge found she had not made up her mind and "I believe her;" as to latter member, military judge's grant was in keeping with liberal grant mandate.

b. *United States v. Henley*, 53 M.J. 488 (2000): LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." But he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. Military judge did not err in denying challenge for cause. There was neither actual or implied bias on the part of the member. "There is a substantial difference between a court member who has "friends" who were victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime."

c. Sentencing and "inflexibility."

(1) *United States v. Rolle*, 53 M.J. 187 (2000): Accused, a Staff Sergeant, pleaded guilty to use of cocaine. Much of *voir dire* focused on whether the panel members could seriously consider the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, CSM L stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment." (Although CSM L did note there was a difference between a discharge and an administrative elimination from the Army). Another member, SFC W, stated "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [sic] said that he was guilty."

(a) The military judge denied the challenges for cause against CSM L and SFC W; the CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying. *United States v. Jefferson*, 44 MJ 312, 319 (1996); *United States v. Tippit*, 9 MJ 106, 107 (CMA 1980). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. McGowan*, 7 MJ 205, 206 (CMA 1979).

(b) The CAAF found no error, noting the court was reluctant "to hold that a prospective member who is not evasive and admits to harboring an opinion that many others would share -- such as that a convicted drug dealer should not remain a noncommissioned officer or should be separated from the armed services -- must automatically be excluded if challenged for cause [citations omitted].'" The members did not express a predisposition toward a particular punishment but agreed to follow the military judge's instructions and to not completely exclude the possibility of no punishment. "[W]e have another case of responses to 'artful, sometimes ambiguous inquiries' that do not require the military judge to grant a challenge for cause [citations omitted]."

(2) *United States v. Armstrong,* 54 M.J. 51 (2000): LCDR T stated during voir dire that he worked with SA Cannon, the lead investigator in accused's case. SA Cannon sat at counsel table as a member of counsel team during trial and testified. LCDR T stated he was in intelligence and not law enforcement, that he had no personal involvement in accused's case but had heard it discussed in meetings. He said he could put that aside. The military judge denied the challenge for cause, finding no actual bias. Defense appealed alleging implied bias. The Coast Guard Court, exercising its *de novo* power of review, the court set aside the findings and sentence based upon implied bias. The government argued that the court should test only for plain error, the theory being that defense need not specifically invoke implied bias. The CAAF noted a challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias, and that the CG court did not err in applying RCM 912(f)(1)(N).

B. Peremptory challenges.

1. Peremptory challenges do not have a constitutional foundation. *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000).

2. Order of challenges.

a. *United States v. Gray*, 51 M.J. 1 (1999): The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one peremptory challenge. Neither *Ford*, nor any other case invalidates this judgment of Congress and the President.

3. *Batson v. Kentucky,* 486 U.S. 79 (1986): The Supreme Court held that a party alleging that an opponent was exercising peremptory challenges for the purpose of obtaining a racially-biased jury had to make out a *prima facie* showing of such intent before the party exercising the challenges was required to explain the reasons for the strikes (prosecutor had used peremptory challenges to strike all four of the African-Americans from the venire, with the result that Batson, an African-American, was tried by an all-white jury)).

a. *Batson* in the military. If either side exercises a challenge against a panel member who is a member of a minority group, then the opposing side may object and require a race-neutral reason for the challenge. *United States v. Moore,* 28 M.J. 366 (C.M.A. 1989) adopted a *per se* rule that "every peremptory challenge by the Government of a member of an accused's race, upon objection, must be explained by trial counsel."

b. The accused and the challenged member need not be of the same racial group. *Powers v. Ohio,* 499 U.S. 400 (1991). However, the challenged member must be in the *minority* on the panel (in other words, *Batson* would not apply if the majority of the panel was made up of, say, African American soldiers; *see United States v. Ruiz,* 49 M.J. 340, 344 n. 2 (1998)).

c. *Batson* has been applied to gender-based challenges. *JEB v. Alabama*, 511 U.S. 127 (1994). *JEB* has been applied to the military, and it applies to both trial and defense counsel. *United States v. Witham,* 47 M.J. 297 (1997).

d. There is a different standard for the *government* counsel responding to a *Batson* challenge. A trial counsel who is required to give a race- or gender-neutral reason must give a reason that is not implausible or unreasonable. *United States v. Tulloch,* 47 M.J. 283 (1997). *Tulloch* is a departure from Supreme Court precedent, which requires only that counsel's reason be "genuine." *Purkett v. Elm,* 514 U.S. 765 (1995).

e. *United States v. Norfleet*, 53 M.J. 262 (2000): TC challenged the sole female member of the court and, in response to DC's request for a gender-neutral explanation, stated the member "had far greater court-martial experience than any other member" (and would dominate the panel), and she had potential "animosity" toward the SJA office. Failure of the MJ to require TC to explain "disputes" between member and OSJA was not abuse of discretion. When proponent of peremptory challenge responds to Batson objection with 1) a valid reason and 2) a separate reason that is not inherently discriminatory and on which opposing party cannot demonstrate pretext, denial of Batson may be upheld on appeal.

f. *United States v. Chaney*, 53 M.J. 383 (2000): The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

g. *United States v. Robinson,* 53 M.J. 749 (Army Ct. Crim. App. 2000): Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

V. MILITARY JUDGE.

A. *United States v. Norfleet*, USCA Dkt. No. 98-1131 (August 16, 2000): Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an AF paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of AF judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of MJ's superiors taking themselves out of the decision making process, the full disclosure of the MJ, and opportunity provided to DC to voir dire the MJ, the accused received a fair trial by an impartial MJ.

B. *United States v. Thompson,* 54 MJ 26 (2000): Military judge whose conduct consisted of inappropriate and intemperate statements to DC did not depart from his impartial role to such an extent as to require his recusal. The military judge became concerned with military defense counsel's repeated statements on the record that, since she had become intimidated by the military judge's treatment of her, she was "ineffective." The military judge was concerned with the impact these statements might have on appeal. The military judge was aware that military defense counsel formerly worked at "Defense Appellate Division" and was knowledgeable in ways of preserving issues for appeal. The record reflected the military judge's efforts to clarify and remedy concerns about admissions of ineffectiveness. "While nerves may have become frayed" during this give-and-take between the judge and defense counsel, the CAAF did not find it extraordinary. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

C. *United States v. Lynn,* USCA Dkt. No. 97-1482 (September 29, 2000): Appellate military judge, who had served as Chief, Appellate Government Division, during the time when the accused's record of trial was received by that office, did not abuse his discretion in failing to recuse himself from participating in the case on appeal. The judge had decided not to recuse himself unless an accused filed a brief raising an assignment of error with the Court of Criminal Appeals on or before the day he left the Appellate Government. Since the practice at Appellate Government was to not review the record in such a case until such a brief was filed, or until there was an eighth request for an enlargement of time, and in view of his unrebutted statement that he had no involvement in the present case while at Appellate Government, the CAAF held that a reasonable person would not question the judge's ability to be impartial in the review of accused's case.

D. *United States v. Burton*, 52 M.J. 223 (2000): None of the military judge's questions reflect an inflexible predisposition to impose a bad-conduct discharge. The military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

E. *United States v. Ford*, 51 M.J. 445 (1999): Where government expert testified as to the explosive capabilities of material found in accused's room, the defense failed to make a proper showing of necessity for expert assistance; the defense essentially sought expert assistance to determine whether the government's expert could be contradicted, and there was no showing that the defense had made any effort to find such an expert. The military judge did not abuse his discretion in denying defense's request for appointment of an explosive expert to assist the defense.

F. *United States v. Gray*, 51 M.J. 1 (1999): The accused has a right to necessary investigative assistance, not an unrestricted right to search for any evidence which might be relevant to his case. Here, a substantial basis existed for military judge to deny the defense request for appointment of an investigator to defense team. Defense requested assistance from CID, who went beyond defense counsel's request and questioned a host of other potential witnesses and suspects, to include an entire firm of taxi drivers and appropriate police units, as well as other investigative agencies. "Simply because the results of these inquiries were not helpful to the defense does not render these efforts ineffective or provide a concrete explanation for further assistance."

G. *United States v. Barron*, 52 M.J. 1 (1999): The military judge did not abuse his discretion in denying motion for mistrial where government expert witness passed notes to trial counsel during cross examination of the defense expert. Even though the military judge acknowledged that the expert had virtually become a member of the prosecution team, a mistrial was not *per se* required. Moreover, the judge gave an extensive instruction noting that the expert had a "mark against" her, and granted the defense's alternative request to fully cross-examine this prosecution expert and reveal her pro-prosecutorial conduct to the members. Any bias, beyond that normally attributed to the party who called her, was therefore fully disclosed to the members.

H. *United States v. Harris*, 51 M.J. 191 (1999). The military judge in a child sexual abuse case did not abuse his discretion when he did not declare a mistrial after the government improperly elicited inadmissible credibility testimony and uncharged misconduct evidence from the prosecution's expert witness. The expert was questioned concerning the credibility of the alleged victim and she disclosed alleged threats by the accused. The defense objected, the members were instructed to disregard the question and answer, and, ultimately, trial counsel was removed from the direct examination. Defense counsel stated the accused wished to go forward with the trial and not move for mistrial. The court found no prejudicial error in the manner in which the military judge dealt with the improper credibility evidence or the evidence of alleged threats made by appellant.

I. *United States v. Spann,* 51 M.J. 89 (1999). Where the accused was charged with rape of Ms. R., the military judge erred when he applied the Congressionally-passed "victim of crime bill of rights," 42 U.S.C. Section 10606. During the government's rebuttal case, while a government rape trauma expert was testifying, the complainant and her mother entered the courtroom. The defense moved to sequester the complainant, but the military judge denied the motion based on Section 10606's entitlement for victims who might testify on sentencing to attend all proceedings. The CAAF held this was error, since the statute pledges only the "'best efforts' of certain executive branch personnel to secure the rights listed." The statute did not supplant Mil. R. Evid. 615. While Fed. R. Evid. 615 has been amended, providing an exception to the automatic exclusion provision in Rule 615 for "a person authorized by statute to be present," that amendment has not been adopted in the military. If no action is taken by the President, the amendment will take effect in the military justice system in accordance with Mil. R. Evid. 1102 on 1 June 2000.

J. *United States v. Howard*, 50 M.J. 469 (1999): Accused was convicted at a special court-martial of one specification of AWOL. The military judge who presided had also presided at a prior trial in which the accused was convicted of assault. The military judge announced this on the record at the beginning of trial but the accused maintained he wished to proceed with the present judge. During the defense case on sentencing in the AWOL case, the defense introduced the accused's version of the events underlying the prior convict, and defense argued on sentencing that the facts underlying that conviction showed that accused was only trying to "[do] the right thing in looking out for his junior Marines." The military judge interrupted defense counsel and stated that, although he had awarded appellant "an unusually light sentence for a fractured jaw," he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground, unable to get up. The CAAF held that there was no error: the military judge was under no obligation to recuse himself; he had noted at the beginning of trial his memory of the prior case and defense had indicated its desire to proceed with him. The accused waived his objection to the presence of the military judge.

K. *United States v. Short*, 50 M.J. 370 (1999): The military judge did not err in denying the defense's request for appointment of a government urinalysis expert to assist the defense. Defense counsel refused to talk to the government expert witness, and insisted that he could not support the defense theory, but the witness testified on cross-examination that accused's urinalysis results were consistent with passive inhalation or innocent ingestion. Further, the military judge suggested counsel consult with more experienced counsel and talk to the government expert about the science involved. The military judge gave defense counsel "the tools potentially to gather evidence to lay a foundation for the necessity of an independent [assistant]." Ultimately, defense counsel cross-examined the government expert exhaustively, elicited potentially damaging admissions about problems with testing accuracy in his laboratory, and elicited scientific support for the defense theory of innocent ingestion.

L. *United States v. Watt,* 50 MJ 102 (1999): The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked "What reason did you have to believe she would have sex with you?" His answer would have been that the complainant had a "reputation for being easy."). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused "was left to defend himself without assistance" from defense or military judge. (Sullivan, J., dissented, finding waiver and no prejudice).

M. *United States v. Cooper,* 51 M.J. 247 (1999). Military judge's making allegedly inappropriate comments to defense counsel did not plainly cause him to lose his impartiality or the appearance of his impartiality. The military judge's comments included repeating before the members the fact that defense had "thank[ed] [him] for helping perfect the government's case" through questions of a government witness. Next, the military judge commented disparagingly on the poor quality of the defense counsel's evidence (a videotape made by the accused's wife). The defense did not object to any of the comments, so the court reviewed only for plain error, finding that the military judge's questions were not inappropriate, that he explained the neutral intent of his questions and instructed the members that they should not construe his questions as being pro-prosecution. His expression of irritation with defense, although inappropriate before the members, did not divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of the defense evidence were not impermissible, because just as RCM 920(e)(7) Discussion permits the military judge to comment on the evidence during instructions, so should the military judge be allowed to comment on evidence during trial. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt by the judge's questions.

N. *United States v. Weisbeck*, 50 M.J. 461 (1999). In 1994, accused was tried by GCM for sexually assaulting two teenaged brothers, and he was acquitted. The key to the defense case in the 1994 court-martial was a psychiatric expert. In 1995, at another installation, accused was charged with offenses relating to two other adolescent boys. The military judge ruled the two boys from the 1994 could testify under Mil. R. Evid. 404(b). The civilian attorney from the 1994 court joined the defense team for the 1995 case in October, then requested a delay to permit attendance of the psychiatric expert used in the 1994 court. The military judge denied this request, and the CAAF held that this was error and that the defense request was not unreasonable. Findings and sentence set aside.

O. *United States v. Paaluhi,* 50 M.J. 782 (N.M. Ct. Crim. App. 1999): The military judge did not abandon his impartial role despite accused's claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against appellant and when he instructed appellant to assist the Government to procure the presence of the prosecutrix.

B. *United States v. Rivers,* 49 M.J. 434 (1998): The military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused's in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused's favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused's trial.

VI. OTHER COURT-MARTIAL PERSONNEL.

A. Staff Judge Advocates. *United States v. Jones,* 52 M.J. 60 (1999): Accused was charged with conspiracy to submit a false claim, larceny, and other offenses. His co-accused were offered punishment under Article 15 if they agreed to testify against the accused. When the co-conspirators invoked their rights and seemed hesitant to cooperate, the SJA called the RDC and said that the three soldiers would be court-martialed if they did not testify in accordance with their agreement. The CAAF said the informal agreements were tantamount to a grant of *de facto* immunity, that the President had not formulated rules governing such "informal immunity," but that there was no command influence and no material prejudice to the accused.

B. Article 32 officers and Article 32 investigations.

1. *United States v. Holt*, 52 M.J. 173 (1999): Art. 32 IO recommended accused's case be referred capital for his alleged murder of a fellow-biker. After referral, the Article 32 officer attended a forensic evidence course and, upon returning to the command, gave trial counsel the name and phone number of a forensic expert. Ultimately, this expert testified for the government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. The CAAF noted that an "investigating officer is disqualified" from acting subsequently "in the same case in any other capacity" under RCM 405(d)(1), and that his provision of information solely to the assigned prosecutor may have created at least the appearance of impropriety by providing trial counsel with information that was neither transmitted to the commander who ordered the investigation nor served on the accused. Nevertheless, the court found that the military judge committed no prejudicial error by admitting the scientific tests of the experts' testimony. Most importantly, the decision to submit the jeans for testing and to call the expert witnesses were solely the decisions of the prosecution .

2. *United States v. Diaz*, NMCM No. 00-0903 (N.M. Ct. Crim. App., 1 September 2000): After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first Article 32 was valid and satisfied the requirements of Article 32.

3. Civilian witnesses cannot be subpoenaed to appear at an art. 32 hearing. *Cf. United States v. Johnson,* USCA Dkt. No. 99-0092 (31 August 2000): Accused was convicted, primarily through testimony of his wife, of assaults on his eight month-old daughter. His wife testified against him at the Article 32 hearing, and later at trial. She appeared at the Article 32, UCMJ, hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply. The military judge found that the subpoena was unlawful and issued without apparent legal authority, but found that the accused was not prejudiced by having a witness illegally produced at the hearing. The CAAF agreed with the military judge that the subpoena was unlawful, and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. The CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony at trial because the evidence presented against him was reliable.

VII. PLEAS.

A. Use of plea and providence inquiry.

1. *United States v. Fricke,* 53 M.J. 149 (2000): Military judge did not err in accepting accused's plea to premeditated murder where there was no written record of CA withdrawing capital referral and re-referring as non-capital case. MJ noted noncapital referral on record with no objection of parties.

2. *United States v. Langston,* USCA Dkt. No. 99-0419/AR (August 25, 2000): Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling, incorrectly, that Mil. R. Evid. 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses' testimony went to victim impact.

3. Plea to a lesser included offense may be used to establish common elements of the greater offense. RCM 910(g).

a. Normally, when an accused pleads guilty to a lesser included offense, and the government intends to try to prove the greater offense before a panel, it is incumbent upon the military judge to instruct the panel that they may accept certain previously admitted elements of the greater offense as proven. RCM 913(a) Discussion. In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements of a separate offense. RCM 920(e) Discussion; *cf. United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993). Should the military judge so instruct, it is generally considered error. *Id*.

b. *United States v. Smith*, 50 M.J. 451 (1999): The accused was charged with raping and sodomizing H, his stepdaughter. He was also charged with indecent acts arising from those offenses. He pleaded guilty by exceptions and substitutions to the indecent acts offense (this offense alleged that he had placed his fingers in to – and his penis upon - H's vagina and anus; the accused claimed that he had penetrated her anus and vagina with his fingers and that he had placed his penis on her vulva, but that he had not placed his penis on her anus). He denied ever raping her or attempting to sodomize her). The accused further stated that the actions took place on three different occasions in June, July, and August (he was charged with committing the indecent acts "from…June 1995 to … August 1995"). The military judge instructed the panel that they could consider that the accused's plea to Charge III established certain elements of Charge III, as well as certain elements of Charge I and Charge II (the rape and sodomy offenses). The CAAF treated the issue on appeal as one of instructional error, and, applying the waiver provision of RCM 920(f), found the defense counsel's actions amounted to an affirmative waiver of the requirement for the prophylactic instruction concerning the use of the accused's plea.

c. *See* Colonel Ferdinand D. Clervi*, Annual Review Of Developments In Instructions* — 1999, 2000 ARMY LAW., April, 2000, at 108 (*Smith* "is important in emphasizing the need for all parties to be clear and unambiguous when discussing proposed instructions").

4. *Providence inquiry admissions* should not be admitted on the merits of greater or other charges.

a. *Cf. United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996) (where accused pleaded guilty to lesser offense of wrongful appropriation and government went forward on greater charge of larceny, military judge erred in permitting witness to testify, on merits of greater charges, about accused's admissions during providency).

b. Air Force court does not read *Ramelb* to ban all admission of accused's providency statements. Statements made during a plea inquiry on a lesser included offense may be considered by the finder of fact as those facts relate to an admitted element. *United States v. Grijalva*, 53 M.J. 501 (A.F. Ct. Crim. App. 2000) (accused was charged with attempted premeditated murder; pleaded guilty to assault by intentional infliction of grievous bodily harm; military judge could accept as proven the fact that accused intended to shoot his wife).

c. *United States v. Nelson*, 51 M.J. 399 (1999): Accused sought to enter a plea of guilty to the AWOL, but moved to preclude the use of his statements during providence inquiry on the merits of the other offenses. The military judge denied the motion, the accused entered pleas of not guilty, and he was convicted of all charges. The Army Court of Criminal Appeals affirmed the findings and sentence without opinion. The CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses. The CAAF then set aside the ACCA decision on unrelated grounds.

VIII. PRETRIAL AGREEMENTS.

A. Permissible Terms and Conditions.

1. *United States v. McFadyen*, 51 M.J. 289 (1999): Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. As of 20 November 1999, for all cases in which "a military judge is faced with a pretrial agreement which contains an Article 13 waiver, the military judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13, UCMJ. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (e.g., stripped of rank, prevented from contacting his attorney, and his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of the pretrial confinement in determining the amount of confinement appropriate as a punishment.

2. *United States v. Mitchell*, 50 M.J. 79 (1999): Accused was tried in 1986. Upon his release, the accused wrote over $30,000 in bad checks, was apprehended, and escaped. At his second trial, he negotiated a PTA in which he offered to plead guilty and make restitution within a year, in return for which the CA would suspend any confinement in excess of 60 months and suspend any period of a fine for the period of confinement plus 12 months. One year later, the accused had not made restitution. The CA took action, suspending the sentence, but ordered a vacation hearing. The CA found the accused had not made good faith efforts to make restitution and vacated the suspension. The accused argued he did not have the means to make restitution so the CA's action violated the agreement. The CAAF held the linchpin of the analysis is good faith and that the accused provided sketchy evidence of his net worth at the time of his court-martial and incomplete evidence at his vacation hearing. "The Due Process Clause does not protect an accused who offers to make full restitution, knowing full well that he cannot; nor does it protect an accused who fails to take timely and reasonable steps to safeguard his assets so that he can make restitution as promised." The CA was justified in concluding that appellant either bargained in bad faith by misrepresenting his net worth, or he failed to take reasonable steps to safeguard his assets and convert them to cash after he was convicted and sentenced.

B. Impermissible Terms and Conditions.

1. *United States v. McLaughlin*, 50 M.J. 272 (1999): Accused offered to waive a speedy trial issue in his pretrial agreement (accused had been in pretrial confinement for 95 days). The CAAF held that under the MCM this provision is unenforceable, so the military judge should have declared it impermissible, uphold the remainder of the agreement, and then ask the accused if he wished to litigate the issue. If he declined to do so, the waiver would be clearer. Nevertheless, the accused must make a prima facie showing or colorable claim for relief. Despite 95 day delay, no showing of prejudice. Nothing in record to support such a motion.

2. *United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998): Accused offered to waive all non-constitutional and non-jurisdictional motions. The military judge determined there was a speedy trial issue, and that the term was proposed by the government. The accused had been in pretrial confinement for 117 days at the time of arraignment. The court held that there was a colorable showing of a viable speedy trial claim and that it was not convinced this was harmless error. Finding and sentence set aside.

3. *United States v. Davis*, 50 M.J. 426 (1999): Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and to present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses). The CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *See United States v. Bertelson*, 3 M.J. 314 (CMA 1977). The CAAF cautioned against the use of such a proceeding, which circumvented Article 45(a), but found that the accused's due process rights were not prejudiced, since the military judge properly conducted a *Bertelson* inquiry concerning the stipulation and it was clear the accused entered the agreement knowingly and voluntarily.

4. Stipulations of fact and polygraphs. *United States v. Clark,* 53 M.J. 280 (2000): Accused submitted a false claim, then took a polygraph (which he failed). He was charged and elected to plead guilty. Accused and convening authority agreed to PTA which included a promise to enter into a "reasonable stipulations concerning the facts and circumstances" of his case. MJ at trial noticed the polygraph in the stipulation, noted that appellant had agreed to take a polygraph test and that the "test results revealed deception." There was no objection to the stipulation and he admitted the stipulation into evidence. Applying Mil. R. Evid. 707 and *United States v. Glazier*, 26 MJ 268, 270 (CMA 1988), the CAAF held that it was plainly erroneous for the military judge to admit the evidence of the polygraph, even via a stipulation. However, the facts of the case indicate the military judge did not rely upon the stipulation to accept appellant's pleas as provident. The accused suffered no prejudice.

C. Ambiguous Terms.

1. *United States v. Acevedo*, 50 M.J. 169 (1999): Accused entered into a PTA which provided that " a punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action." The military judge sentenced appellant to confinement for 30 months, total forfeitures, reduction to E-1, and a bad-conduct discharge. The military judge then stated regarding the BCD, "there's nothing [in the PTA] about doing anything to a bad-conduct discharge so that is not suspended. Right?" to which both counsel agreed. The CA approved the BCD. The CAAF held that it appeared that all parties had the same understanding, i.e., that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment. *See also United States v. Gilbert,* 50, M.J. 176 (1999), a companion case to *Acevedo* (BCD could be approved; the military judge recommended suspension of the BCD, which would have been an empty gesture if the PTA already required it).

2. *United States v. Sutphin,* 49 M.J. 534 (C.G. Ct. Crim. App. 1998): Accused entered into a PTA that described five parts of the sentence covered by the agreement. One portion was characterized as the "amount of forfeiture or fine," and it included forfeitures of pay and allowances as being included under the agreement but did not mention the possibility of a fine; the last portion of the PTA stated "any other lawful punishment (which shall expressly include, among others, any enforcement provisions in the case of a fine)." The military judge never inquired whether the accused understood a fine could be approved and imposed. The members adjudged a fine, which, the court ruled, must be disapproved, since the reasonable conclusion was that only forfeitures may be approved.

D. *Sub rosa* agreements.

1. *United States v. Sherman,* 51 M.J. 73 (1999): Accused pleaded guilty to offenses stemming from his insubordinate behavior at an off-duty dinner. After trial, accused told his appellate defense counsel that unlawful command influence had affected his pretrial confinement and his trial but was told that if the defense raised the issue they would lose the favorable pretrial agreement. TC's affidavit noted that he recalled defense raising the possibility of pretrial motions, to include an issue of command influence, but they never discussed waiving those issues as part of a pretrial agreement, and that his understanding was that even after the government agreed to the PTA, "the defense was free to raise the issues it was concerned with without fear of losing the benefits of the agreement." DC's affidavit noted that the TC had implied that he might not recommend a pretrial agreement if the UCI motions were raised, particularly since motions would require delay and the deal would be contingent to going to trial on a date certain. CAAF sets aside the ACCA decision and directed a *Dubay* hearing on whether there was a *sub rosa* agreement.

2. *United States v. Rhule*, 53 M.J. 647 (Army Ct. Crim. App. 2000): Accused attempted to plead guilty to several bad check offenses under Article 123a. He was also charged with larceny and forgery, to which he pleaded not guilty. After the MJ rejected the pleas as improvident, the defense announced the accused requested trial by military judge alone, and the government moved to dismiss the larceny and forgery specifications. Post-trial affidavits showed there was a sub rosa agreement for the government to dismiss the larceny and forgery offenses in exchange for the accused's election for trial by military judge alone and for proceeding to trial that day. This agreement was governed by RCM 705; it should have been in writing and disclosed at trial. Moreover, the TC should not have acted to bind the convening authority. It was clear, however, that the accused's waiver of a panel was knowing, voluntary, and intelligent. There was no prejudice to the accused.

E. Post-Trial Re-Negotiation of Pre-Trial Agreement.

1. *United States v. Pilkington*, 51 M.J. 415 (1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pleaded guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he "limited confinement to 90 days." On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority's obligations under the sentencing provisions of the pretrial agreement. Additionally, the court held that while the trial court did not review the post-trial agreement, the intermediate appellate court always have the opportunity to review such agreements.

2. *United States v. Dawson,* 51 M.J. 411 (1999): Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 1.5 days' restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in "pretrial confinement" (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. The CAAF held that this was a valid post-trial agreement that did not involve post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

F. Unintended Consequences.

1. *United States v. Mitchell*, 50 M.J. 79 (1999): Impact of DoD regulation may invalidate plea. Accused's enlistment was almost over at the time of trial. After trial, he was placed in confinement. His attempt to extend his enlistment was, therefore, invalid, and he went into a no-pay status, thus mooting the PTA term limiting forfeitures. CAAF returned the case for a *Dubay* hearing; if the accused did not receive the benefit of his bargain, the pleas would be treated as improvident, and the findings set aside.

a. The Air Force court found that the approval of the accused's retirement was taken without regard to his pretrial agreement, but that, for a number of reasons, no further relief was required. *Mitchell*, 2000 CCA Lexis 150 (A.F. Ct. Crim. App., May 26, 2000) (unpub.).

2. *United States v. Williams,* 53 M.J. 293 (2000): Prior to trial accused was on legal hold after his term of service expired. Neither the Gov't nor Defense was aware of DOD Reg. which required forfeiture of pay and allowances of servicemembers on legal hold who are later convicted of an offense. Government conceded the PTA, which required the CA to disapprove forfeitures where none will exist after trial, invalidated the providence inquiry. CAAF agreed, case reversed, and rehearing authorized.

3. *United States v. Hardcastle,* 53 M.J. 299 (2000): Accused's PTA required CA to defer and waive forfeitures in excess of $400 per month. After court-martial, accused's enlistment expired, placing him in a no-pay status. The CAAF found the accused had not received the benefit of his bargain, and that the faulty provision had induced his pleas. Case reversed, and rehearing authorized.

IX. CONCLUSION.

X. SUMMARY SHEET.

Panel Selection	⊛ A panel is improperly selected where the convening authority uses inappropriate criteria (e.g., rank) to systematically exclude an otherwise potentially qualified group of servicemembers. ⊛ Generally, the fact that a panel consists of predominantly senior officers or commanders does not, by itself, raise a presumption of improper selection. ⊛ The nomination documents may raise an appearance of exclusion where they purport to limit the pool from which nominees may be selected. *See Kirkland*, p. 5.
Pleas	⊛ Where an accused enters mixed pleas and the prosecution goes forward to "prove up" the offense to which the accused pleaded not guilty, the jury will not be informed of the prior plea of guilty unless either 1) the accused requests that the panel be informed or 2) the accused pleaded guilty to a lesser offense. ⊛ Providence inquiry admissions should *not* be admitted on the merits of a greater or other offense. *But see Grijalva*, p. 23.
Voir Dire and *Batson* Challenges	⊛ Both the government and defense are entitled to one peremptory challenge. ⊛ Where one party exercises a peremptory challenge against a female or a member of a minority group, the opposing party may lodge a *Batson* objection and require the counsel to state a race- or gender-neutral explanation. ⊛ *Batson* only applies where the challenged panel member is in a minority on the *panel*. ⊛ Where one party exercises a peremptory challenge against a female or a member of a minority group, the opposing party may lodge a *Batson* objection and require the counsel to state a race- or gender-neutral explanation. ⊛ Where trial counsel exercises a peremptory challenge against a female or a minority member, and the defense makes a *Batson* objection, the trial counsel must give a race- or gender- neutral explanation that is reasonable and plausible. ⊛ Where trial counsel exercises a peremptory challenge against a female or a minority member, and the defense makes a *Batson* objection, the trial counsel must give a race- or gender- neutral explanation that is reasonable and plausible. ⊛ Occupation-based challenges are permissible. *See Chaney,* p. 14.

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CHAPTER 3

CRIMES & DEFENSES

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MAJ Tim Grammel

January 2001

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CRIMES & DEFENSES

Outline of Instruction

I. INTRODUCTION.

II. CONVENTIONAL OFFENSES.

A. Homicide.

1. "Born Alive" Rule. *United States v. Nelson*, 53 M.J. 319 (2000). The UCMJ does not define "human being" for purposes of Articles 118 and 119, but Congress intended those articles to be construed with reference to the common law. A human being, at common law, must have been "born alive." Under the modern common law view, a child is "born alive if it: (1) was wholly expelled from its mother's body, and (2) possessed or was capable of an existence by means of a circulation independent of that of the mother. Even if the child never took an efficient breath of air from its own lungs, the child's capability to do so is sufficient. The court rejected the Navy court's adoption of a "viability outside the womb" standard to determine whether an infant was "born alive."

2. Involuntary Manslaughter. *United States v. Nelson*, 53 M.J. 319 (2000). Failure of a mother to provide medical assistance and to take steps to ensure medical treatment was available for her newborn infant, resulting in the death of the infant, constituted involuntary manslaughter. The accused concealed her unplanned pregnancy. While on board her ship in its home port, she delivered a full term baby girl. Although medical personnel were on board and a number of people walked nearby, the accused sought no assistance. Without evaluating the condition the newborn infant, the accused place her on a bed, covered her with a blanket, and cut the umbilical cord with a pocket knife. The accused placed the baby in a plastic bag with holes in it, and she carried the bag off the ship. She did not check on the child for over an hour. Twelve hours after the birth, the accused went to an Italian civilian hospital, but the baby was already dead. The child likely died of primary apnea, the failure to take an efficient first breath of air, which is a condition easily corrected with simple stimulation. Evidence of the accused's conscious decision to not invoke medical assistance during her pregnancy or childbirth together with her lack of attentiveness to the health or medical condition of the child for over an hour was legally sufficient to support a finding of culpable negligence. A reasonable factfinder could have found that the death of the child was a foreseeable consequence, even though it was not necessarily a natural or probable consequence.

3. *United States v. Riley*, 52 M.J. 825 (A.F. Ct. Crim. App. 2000). Evidence that the accused stuffed a paper towel into her newborn daughter's mouth to muffle any cries and then applied force to the infant's skull, which resulted in a fatal head injury, was sufficient for a conviction of involuntary manslaughter by culpable negligence.

B. Assault with Intent to Commit Murder. *United States v. Odom*, 53 M.J. 526 (N.M. Ct. Crim. App. 2000). The offense of assault with intent to commit murder, under Article 134, requires a specific intent to kill. An intent only to inflict grievous bodily harm in not sufficient. The portion of the instructions in which the military judge stated that the accused must have had the specific intent to kill *or inflict great bodily harm* was plain error. The Navy court set aside the conviction for this offense, but it affirmed the lesser-included offense of assault in which grievous bodily harm is intentionally inflicted, in violation of Article 128.

C. Assault Consummated by a Battery. *United States v. Johnson*, 54 M.J. 67 (2000). Staff Sergeant Johnson, the accused, was SPC C's squad leader in the band at Fort Drum. She considered the accused a friend. They had engaged in consensual hugs, tickling, and punching fights. The accused rubbed her back while she typed and did other work. She did not like the backrubs, because they interrupted her work and made her feel uncomfortable. She shrugged to get out of the backrubs. Sometimes the accused stopped, but sometimes he rubbed a little more. She never specifically told him to stop, because she did not want to draw attention to herself in the office. Where there was a friendly relationship with numerous other types of touching that were not offensive and the alleged victim never protested against the backrubs, the evidence was legally insufficient to support a conviction for assault consummated by a battery. The government failed to prove that the accused was on notice of lack of consent.

D. Robbery. *United States v. Szentmiklosi*, 52 M.J. 639 (Army Ct. Crim. App. 2000). When the same property is wrongfully taken from two different victims, each with greater possessory right in the property than the accused, two robberies are committed. The accused and a co-conspirator took $36,700 in cash from and physically injured both an AAFES courier and his MP escort. The accused was charged with a separate robbery for each victim. The military judge denied a motion to dismiss one of the specifications on the basis of double jeopardy or unreasonable multiplication of charges, and the accused unconditionally pled guilty to both specifications. In an exercise of judicial discretion, the Army court did not decide the issue on the basis of waiver. Robbery is a compound offense consisting of an assault and a larceny. Under these facts, there were two assaults and one larceny. The more egregious aspect of robbery, however, is the assault component. In crimes of violence against a person, the permissible unit of prosecution is the number of victims. The accused committed two robberies.

E. Kidnapping. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999). The voluntariness of the seizure and detention is the essence of the offense of kidnapping. The duration of the restraint is not germane, except for sentencing purposes. During an argument, the accused's girlfriend jumped out of the accused's truck and started to walk home. The accused pursued her, grabbed her, carried her back to his truck, and threw her in it. He drove to an isolated park where they argued, and then he drove her home. The victim did not tell the accused she wanted to go home and did not try to get out of the truck a second time, but there is no such requirement under the law. Once the accused carried the unwilling victim back to his truck, the offense of kidnapping was complete.

F. Threat.

1. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999). Evidence that the accused got angry at his former girlfriend for ignoring him, hit her in the head with a metal cooking pot, grabbed her by the throat and lifted her off the floor, held her against the wall with one hand, pulled his fist back as if to hit her, said that he could punch her nose into her brains and kill her, and then punched the wall next to her head was sufficient to support a conviction for communicating a threat. His acts and words expressed what he could and would do in the future if she did not acquiesce to his will.

2. *United States v. Hall*, 52 M.J. 809 (N.M. Ct. Crim. App. 1999). The Navy-Marine court held that the following evidence was sufficient to support a conviction for communicating a threat: the accused and victim exchanged heated words and had to be constrained from fighting each other a few minutes earlier; the accused followed the victim to a barracks parking lot; the accused angrily paced back and forth staring at the victim, despite efforts by others to calm him down; and the accused said loud enough for the victim to hear him, "He don't know how bad I want to shoot him. I want to shoot that nigga. You know, I want – you know, I just want to take him out or whatever". In determining whether words expressed a present determination or intent to wrongfully injure, the language used and the surrounding circumstances should be considered. In this case, the court did not consider the fact that the accused retrieved a pistol from his room, because it occurred after he spoke the words of the alleged threat.

G. Sex Offenses.

1. Rape.

a. *United States v. Grier*, 53 M.J. 30 (2000). If a victim is incapable of consenting because she is asleep or unconscious or intoxicated to the extent that she lacks the mental capacity to consent, then the act of sexual intercourse is done without consent and no greater force is required than that necessary to achieve penetration.

b. *United States v. Tollinchi*, 54 M.J. 80 (2000). Sergeant Tollinchi, the accused, was a recruiter. He provided alcohol to a Marine recruit and his 17-year-old girlfriend, encouraged them to engage in sexual activity with each other, and then engaged in several sexual acts with the recruit's girlfriend. The accused was convicted of rape, sodomy, attempted sodomy, two specifications of indecent assault, adultery, and two specifications of violating a general order. Where the alleged victim was aware that the accused was going to penetrate her and she did nothing to express to him her lack of consent, the evidence was legally insufficient to support a conviction of rape. The court affirmed all the convictions except for rape, and it affirmed rape's lesser-included offense of indecent acts for engaging in sexual intercourse in the presence of a third person.

2. Indecent Assault. *United States v. Ayers*, 54 M.J. 85 (2000). Staff Sergeant Ayers was an Initial Entry Training instructor at Fort Lee. He was convicted of two indecent assaults based on the testimony of a trainee, PFC TH. After bed check, PFC TH agreed to meet the accused, and she was a "willing participant" when the accused touched her face, breasts, and buttocks and kissed her. When the accused tried to progress to sexual intercourse by touching her vagina with his penis, she told him she did not want to have sex. He tried to persuade her by telling her to relax, and he continued to touch her vagina with his penis. She persisted in her refusal, and the accused stopped and left the room. In her testimony, PFC TH described it as "when a guy tries to get as far as he can, but it doesn't go anywhere." The court held that the evidence was legally insufficient for indecent assault, because the government failed to prove lack of consent. There was no unwanted sexual touching. The court found that PFC TH drew the line at sexual intercourse, and the accused did not cross that line.

After the incident in the conference room, PFC TH continued the relationship by calling the accused. She agreed to meet him. He touched her face, and he tried to kiss her and touch her buttocks. Her feelings for the accused had changed, and she did not want him to touch her. She backed away, and the accused stopped and left the room. The defense theory was that PFC TH's testimony was "total lurid fiction." The court held that the evidence was legally insufficient for indecent assault. Once PFC TH indicated she did not consent, the accused stopped.

3. Sodomy.

a. *United States v. Allen*, 53 M.J. 402 (2000). Any constitutional right to engage in sexual relations within a marital relationship must bear a reasonable relationship to activity that is in furtherance of the marriage. As part of a pattern of abuse, the accused beat his wife, solicited her to prostitute herself, and anally sodomized her. Prior to the assaults, she had refused anal sodomy, because she was forcibly sodomized as a teenager. After the abuse, she reluctantly allowed the anal sodomy. Under these facts, the sexual act was not in furtherance of the marriage, so the conviction for anal sodomy with his former wife did not violate the accused's constitutional right to privacy.

b. *United States v. Green*, 52 M.J. 803 (N.M. Ct. Crim. App. 2000). The victim's testimony that the accused's head was between her legs, his hands were on her thighs, her legs were spread apart, his mouth was on her vagina, he performed "oral sex," and he "was in between" her was sufficient to prove penetration for the offense of sodomy, under Article 125.

4. Indecent Acts with a Child. *United States v. Thrower*, 53 M.J. 705 (C.G. Ct. Crim. App. 2000). The accused's pushing a ten-year-old girls's head onto his lap, stroking her head and hair, and preventing her from lifting her head, all done with the intent to arouse him sexually and actually having that effect, constituted an indecent act with a child, under Article 134.

5. Indecent Liberties with a Child. *United States v. Lacy*, 53 M.J. 509 (N.M. Ct. Crim. App. 2000). The accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously. He pled guilty to and was convicted of separate specifications of indecent liberties with each child. The Navy-Marine court adopted a "different victims" standard as the unit of prosecution for indecent liberties, because the purpose of the offense is the protection of the individual person. Thus, each offense against a different victim, even when the underlying conduct for each offense is the same, is a separately punishable crime.

H. Crimes Against Property.

1. Larceny.

a. BAH Larceny. *United States v. Phillips*, 52 M.J. 268 (2000). When Congress authorized basic allowance for housing for service members with "dependents," it did not intend to include a person linked to a service member only by a sham marriage. A marriage, as intended by Congress, is an undertaking by two parties to establish a life together and assume certain duties and obligations. A marriage entered into solely for the purpose of obtaining government benefits is a sham marriage.

b. Larceny of Multiple Items.

(1) *United States v. Miller*, 53 M.J. 128 (2000) (summary disposition). The contemporaneous theft of two different victims' checks, which the accused found in one of the victim's drawer, constituted a single larceny.

(2) *United States v. Harris*, 53 M.J. 514 (N.M. Ct. Crim. App. 2000). Where a single act results in the theft of multiple items of personal property, the government can only charge one larceny. Where two checks were stolen from the same page of a ledger and there was no evidence of when the checks were stolen, the court found that the checks were both taken at the same time and consolidated two specifications into one specification.

(3) *United States v. LePresti*, 52 M.J. 644 (N.M. Ct. Crim. App. 1999). The accused fraudulently used another person's credit card to make one order of several auto parts, which were delivered to the accused on two different days because of a back order. The accused was found guilty of two separate specifications of larceny. The Navy-Marine court consolidated them. It held that a single larceny should be charged if: (1) the accused intended to steal several items; (2) the larceny was committed by a single act of fraud; and (3) the owner delivered the items at different times or dates.

c. Credit Card Larceny.

(1) *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000). An intent, at the time of the theft, to pay for or replace the property is not a defense. Where accused forged credit card applications and used the credit cards to purchase merchandise, with the intent to permanently keep the merchandise but pay for it, the plea of guilty to larceny of the merchandise was provident.

(2) *United States v. Hegel*, 52 M.J. 778 (C.G. Ct. Crim. App. 2000). Taking money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount, does not constitute larceny. The accused stole another person's CityBank Visa card and used it to purchase food and jewelry. Because the accused claimed that he intended to pay the Visa bill in full when due, the plea of guilty to larceny of funds from CityBank was improvident. The court affirmed the lesser-included offense of wrongful appropriation.

d. *United States v. Fenner*, 53 M.J. 666 (A.F. Ct. Crim. App. 2000). The accused was the sole lessee of a house. He shared the house with three roommates, who each paid him $225 toward the rent and utilities. After his roommates paid him one month, he told them that someone had stolen all the money, which was a lie. Each of the roommates agreed to pay an extra $75 per month for the next three months to replace the stolen money. The court set aside a conviction of larceny of the initial payments that were not actually stolen. Once the payments were given to him, he became the sole owner of that money, and it was legally impossible for him to steal it from himself. The court did affirm, however, the part of a separate specification that alleged larceny of $75 that one of the roommates paid the accused toward the supposedly stolen rent. The accused did not own that money. The roommate paid the accused $75 under the false pretense that the money had been stolen.

2. Forgery.

a. *United States v. Sherman*, 52 M.J. 856 (Army Ct. Crim. App. 2000). Where the accused and co-conspirator opened savings accounts by falsely and fraudulently signing signature cards, the general bookkeeping, security, and insurance functions inherent in agreeing to maintain a bank account imposed sufficient legal liability on the banks to warrant forgery convictions, even where there was no initial deposit.

b. *United States v. Woodson*, 52 M.J. 688 (C.G. Ct. Crim. App. 2000). A credit application itself is not susceptible of forgery under Article 123, because it, if genuine, would not create any legal right or liability on the part of the purported maker.

I. Offenses Against the Administration of Justice.

1. Obstruction of Justice. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999). An accused can be convicted of obstruction of justice, even if the court-martial acquits him of the offense for which he was under investigation.

2. False Official Statement. *United States v. Nelson*, 53 M.J. 319 (2000). The court had previously, in *United States v. Solis*, 46 M.J. 31 (1997), rejected the application of the "exculpatory no" doctrine to Article 107 and held that statements to investigators could be prosecuted as false official statements. Paragraph 31c(6)(a) of Part IV of the MCM, however, provides that "[a] statement made by an accused or suspect during an investigation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak." Because it is not based on the statutory elements of Article 107, however, it does not impose on the prosecution the affirmative obligation to prove such an independent duty. As it did in *Solis*, the court has refused to decide whether this Manual provision is a procedural right that the accused can invoke or internal guidelines to regulate government conduct that the accused can not invoke. Because the accused did not assert the Manual provision at trial, she did not preserve the issue of whether an accused can invoke the Manual provision to defend against a charge under Article 107.

3. False Official Statement. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App 1999). When AFOSI agents asked the accused, whom they suspected of threatening victims with guns and whose apartment they intended to search, whether his firearms were in his apartment, there was a clear governmental function underway. The accused's false statement to the investigators about the location of the firearms was a false official statement, under Article 107.

4. False Swearing. *United States v. Galchick*, 52 M.J. 815 (A.F. Ct. Crim. App. 2000). The enumerated Article 134 offense of false swearing, as defined by the President in the Manual, does not include statements made in a "judicial proceeding or course of justice." The Manual defines "judicial proceeding or course of justice" as including Article 32 investigations. The accused, during his Article 32 investigation, took an oath swearing to the truth of a previously prepared written statement and submitted it to the IO. The government preferred an additional charge of false swearing based on that statement. The Air Force court found the evidence legally insufficient to support a conviction for false swearing.

5. Apprehension and Confinement.

a. *United States v. McDaniel*, 52 M.J. 618 (Army Ct. Crim. App. 1999). Once lawfully ordered into confinement, unless released by proper authorities, a soldier may be convicted of escape from confinement, regardless of the nature of the facility in which he is held. After preferring charges, the accused's commander ordered the accused into pretrial confinement. The military magistrate found that continued pretrial confinement was warranted. While waiting for transportation to the Regional Confinement Facility at Fort Knox, the accused was held overnight in the company training room on Fort Campbell, under guard and in leg irons. At 0400 hours, he slipped off his leg restraints and escaped through the window of the training room. The plea of guilty to escape from confinement was provident. The accused was under physical restraint, as required for escape under Article 95, and the escape was from confinement rather than custody because of the accused's status at the time.

b. Fleeing Apprehension. *United States v. Pritt*, 54 M.J. 47 (2000). The effective date of the amendment to Article 95, which created the offense of fleeing apprehension, was the date of its enactment, 10 February 1996.

c. Resisting Apprehension. *United States v. Diggs,* 52 M.J. 251 (2000). The prosecution must prove that the accused had "clear notice of the apprehension." SGT (E-5) V. saw his wife emerge partially clad from their bedroom, and he found the accused, SSG (E-6) Diggs, cowering naked in their bedroom closet. SSG Diggs admitted his wrongdoing and stated that he would turn himself in. SGT V. replied, "Yes, he was caught and, yes, he was going to come with me and we both were going to go to the MP station together." The CAAF found the evidence to be legally sufficient, because a rational factfinder could find beyond a reasonable doubt that the accused had clear notice of his apprehension by SGT V.

J. Drug Offenses. *United States v. Manley*, 52 M.J. 748 (N.M. Ct. Crim. App. 2000). The Navy-Marine court refused to follow the rationale of *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977). In *Swiderski*, the defendant and his finacée were both convicted of possessing cocaine with the intent to distribute it. They had purchased the cocaine together, and the cocaine was in his finacée's purse when they were apprehended in his van. The Second Circuit had held that a statutory "transfer" could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use. In this case, the accused was convicted of three specifications of distributing cocaine and two specifications of introduction with the intent to distribute. The court factually distinguished all but one distribution specification from *Swiderski*. The facts surrounding that specification were that the accused and two other sailors went to Tijuana, Mexico. The accused and one of the other sailors purchased cocaine, and the accused carried it back to the other purchaser's barracks room. The accused cut the cocaine, and all three sailors snorted a line. Although the court did not factually distinguish the distribution to the other purchaser from *Swiderski*, it did not apply to rationale of *Swiderski* to these facts, because the Court of Military Appeals declined the invitation to apply the *Swiderski* rationale to a far more compelling set of facts in *United States v. Ratleff*, 34 M.J. 80 (C.M.A. 1992).

III. THEORIES OF CRIMINAL LIABILITY AND INCHOATE CRIMES.

A. Attempt. *United States v. Rothenberg*, 53 M.J. 661 (A.F. Ct. Crim. App. 2000). An attempt, under Article 80, requires an act that goes beyond mere preparation and amounts to a substantial step and a direct movement toward the commission of the intended offense. Merely soliciting another to commit an offense is not sufficient to constitute an attempt. In this case, the accused pled guilty to attempted distribution of ecstasy. The record established that, at an off-base club, a known ecstasy dealer asked the accused if he wanted any ecstasy. The accused turned and asked his friend, whom he knew had used ecstasy in the past, if he wanted any. The accused had money and would have purchased ecstasy and given it to his friend for cost, but his friend declined the offer. The Air Force court found that, as a mater of law, the acts unambiguously failed to establish a direct movement toward the commission of distribution of ecstasy. It held that the guilty plea to attempted distribution was improvident, but it affirmed a conviction of solicitation to possess ecstasy.

B. Conspiracy.

1. Bilateral Theory. *United States v. Valigura*, 54 M.J. 187 (2000). The CAAF rejected the "unilateral" theory of conspiracy and adhered to the traditional "bilateral" theory of conspiracy. Conspiracy, under Article 81, requires a "meeting of the minds" to achieve the purported criminal goal. Where the accused agreed to and did sell marijuana to an undercover government agent, the accused is not guilty of conspiracy. The accused was guilty, however, of attempted conspiracy.

2. Agreement to Commit Multiple Offenses. *United States v. Pereira*, 53 M.J. 183 (2000). A single agreement to commit multiple offenses is a single conspiracy. The accused pled guilty to and was convicted of, *inter alia*, separate specifications of conspiracy to commit murder, conspiracy to commit robbery, and conspiracy to commit kidnapping. During an extensive providence inquiry, the accused consistently responded that he and his co-conspirators formed only one agreement to commit all the underlying offenses. Nothing in the record established separate agreements. The court held that there was only one conspiracy, as a matter of law, and it consolidated the three specifications into one specification.

3. Vicarious Liability. *United States v. Browning*, 54 M.J. 1 (2000). Even if a conspiracy is not alleged on the charge sheet, the government can prove charged offenses, which were actually perpetrated by a co-conspirator, by vicarious liability.

C. Solicitation. *United States v. Williams*, 52 M.J. 218 (2000). An express *or implicit* invitation to join in a criminal plan is a solicitation. The context in which an alleged statement was made can be considered to determine its criminal nature as a solicitation. The accused and the other person had used drugs together and the other person was informed of the accused's international drug smuggling operation, including use of another person for drug buying trips to Turkey for the accused. Therefore, the accused's statement, "Are you ready to go; you got your passport?", which the other person promptly answered with "I'm not going to go," could reasonably be construed as an invitation to join the previously disclosed criminal enterprise.

IV. MILITARY OFFENSES.

A. Disrespect. *United States v. Najera*, 52 M.J. 247 (2000). Courts can consider all the circumstances, including demeanor and context, when determining whether certain language was disrespectful behavior under Article 89, even if the specification alleged disrespect only in language and not deportment.

B. Disobedience.

1. Lawfulness of the Order. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000). Where CID was investigating the accused for writing numerous worthless checks to AAFES and civilian commercial establishments over an eight month period, the company commander's order to cease writing checks was a lawful order. The order had a valid military purpose, and it was not unduly restrictive of the accused's personal liberty.

2. "Ultimate Offense" Doctrine.

a. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000). A commander cannot order a soldier to obey the law and then punish the soldier for both the substantive violation of the law and disobedience of the order. Also, increasing the penalty for an offense it is expected the accused may commit is not a valid military purpose. However, where CID was investigating the accused for writing numerous worthless checks to AAFES and civilian commercial establishments over an eight month period, the company commander's order to cease writing checks was a lawful order. It was not an order to just obey the law; it proscribed all, not just worthless, checks. The order attempted to prevent further conduct that would negatively impact the accused, the unit, AAFES, and other commercial establishments. The order was necessary to promote the morale and discipline in the unit and was directly connected with the maintenance of good order in the service. The accused's defiance of her commander's order was the "ultimate offense" and could be separately charged and punished.

b. *United States v. Balcarczyk*, 52 M.J. 809 (N.M. Ct. Crim. App. 2000). The "ultimate offense" doctrine is a sentencing rule that limits the punishment for certain orders violations where the gravamen of the misconduct committed warrants a lesser punishment under another offense specifically enumerated in the MCM. The accused pled guilty to, *inter alia*, numerous specifications alleging violations of Secretary of the Navy Instruction 5300.26C, which prohibited conduct that is: (1) unwelcome; (2) sexual in nature; and (3) occurs in, or impacts upon, the work environment. The Navy-Marine court found that the gravamen of the accused's misconduct, which included many lewd acts at the barracks and on base, was the creation of a hostile environment, which differentiates the general order prohibiting sexual harassment from other sexual misconduct proscribed in the MCM (i.e. indecent exposure and indecent language in violation of Article 134). The court held that the accused was properly subjected to the greater maximum punishment authorized under Article 92.

C. Assault on a Noncommissioned Officer. *United States v. Diggs*, 52 M.J. 251 (2000). Assault on a noncommissioned officer, under Article 91, requires that the noncommissioned officer be "in the execution of his office." The victim may be subordinate in rank to the accused. SGT (E-5) V. returned home unexpectedly from Bosnia. He saw his wife emerge partially clad from their bedroom, and then he found the accused, SSG (E-6) Diggs, cowering naked in the bedroom closet. SGT V. struck SSG Diggs three or four times, until his wife stopped him. SSG Diggs admitted his wrongdoing and stated that he would turn himself in. SGT V. stated that he would accompany SSG Diggs to the MP station. On the way out of the building, SSG Diggs pushed SGT V. and ran away. The CAAF found the evidence legally sufficient, because a rational factfinder could find beyond a reasonable doubt that SGT V. was acting as an NCO in the execution of his office and not as an avenging cuckold.

D. Divestiture. *United States v. Diggs*, 52 M.J. 251 (2000). If a NCO commits misconduct that divests him of his authority as a NCO, he may regain his protected status by desisting in the illegal conduct and attempting to resolve the matter within appropriate channels. A rational factfinder could find that SGT (E-5) V., who struck SSG (E-6) Diggs after finding him naked with the sergeant's wife in their bedroom, regained his protected status as an NCO after he stopped the assault and informed SSG Diggs that he would accompany SSG Diggs to the MP station.

E. Maltreatment. *United States v. Fuller*, 54 M.J. 107 (2000). Sergeant Fuller, the accused, was a cadre member of the Inprocessing Training Center at Darmstadt, Germany, which conducted a 2-3 week inprocessing and orientation program for soldiers and their families. The accused and another platoon sergeant invited PFC M and PVT I to the accused's apartment. After they all drank, the other NCO and PVT I engaged in sexual intercourse in front of PFC M. When the accused returned to the room, he and PFC M engaged in sexual intercourse. PFC M testified that she willfully engaged in sexual intercourse and the accused had her permission. The accused told the other NCO, "You've gotta get some of this." The other NCO engaged in sexual intercourse with PFC M, and the accused engaged in sexual intercourse with PVT I. The accused was convicted of, *inter alia*, maltreatment of PFC M for "having sexual relations with her after she became extremely intoxicated and sexually harassing her in that he made a deliberate offensive comment of a sexual nature." Article 93 does not punish all improper relationships between superior and subordinates. Although she testified she was embarrassed, she never indicated that the accused used rank or position to threaten or intimidate her. The dominance and control that can be present in such senior-subordinate relationships was not present in this case. Also, the government failed to prove that the accused knew she was "extremely intoxicated," so the evidence was legally insufficient to prove maltreatment on that basis. As for the comment, under these circumstances, there was no evidence that it offended her. Embarrassment is not sufficient for maltreatment by sexual harassment. The court affirmed, however, a lesser-included offense under clause 1 or clause 2 of Article 134.

F. Clauses 1 and 2 of Article 134: Enumerated Offenses.

1. Opening Mail Matter. *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000). Opening another's mail knowingly and without authority, even with a purportedly good intention, is wrongful and violates Article 134. After pleading guilty to the offense of opening mail matter, the accused explained that his purpose in opening the package was to see whether the box had been misaddressed. The accused's professed selfless motive was immaterial, and it did not set up matter inconsistent with his plea.

2. Indecent Acts. *United States v. Tollinchi*, 54 M.J. 80 (2000). Sexual intercourse in the presence of a third person constitutes an indecent act, which is a lesser-included offense of rape.

G. Clauses 1 and 2 of Article 134: Unenumerated Offenses.

1. Clause 1 (Disorders and Neglects to the Prejudice to Good Order and Discipline in the Armed Forces).

a. *United States v. Diggs,* 52 M.J. 251 (2000). Being naked in a subordinate NCO's bedroom with that NCO's partially clad wife constituted an offense under clause 1 of Article 134.

b. Sexual Relations with Subordinate. *United States v. Fuller*, 54 M.J. 107 (2000). SGT Fuller, the accused, had sexual relations with a subordinate, PFC M. After he had sexual intercourse with her, he encouraged SFC Davis to also have sexual intercourse with her. Although the CAAF held that this conduct did not constitute maltreatment, under Article 93, the court had no doubt that it was prejudicial to good order and discipline or service-discrediting, and it affirmed a conviction of a lesser-included offense under Article 134.

2. Clause 2 (Conduct of a Nature to Bring Discredit Upon the Armed Forces).

a. Underage Drinking. *United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000). The Coast Guard court held that openly drinking beer, while under the state drinking age of 21 and in the presence of civilians and other Coast Guard enlisted personnel at a party in the home of an underage civilian whose parents were not present, constituted conduct of a nature to bring discredit upon the armed forces in violation of clause 2 of Article 134.

b. Child Pornography. *United States v. Sapp*, 53 M.J. 90 (2000). After finding that the military judge failed to adequately advise the accused of the elements of federal offense of possession of child pornography, under 18 U.S.C. § 2252(a)(4)(A), which he was charged with violating under clause 3 of Article 134, the Air Force court did not err by affirming the lesser-included offense of service-discrediting conduct, under clause 2 of Article 134. The court affirmed the conviction for three reasons: the accused was on notice that he was charged with a violation of Article 134; the accused admitted his conduct was service-discrediting, even though it was not an element under clause 3; and both offenses were "closely related." *See also United States v. Augustine*, 53 M.J. 95 (2000) (applying the same rationale in a very similar case, where the Air Force court found the guilty plea to a violation of the federal child pornography statute was provident but the CAAF affirmed under clause 2 rather than clause 3 of Article 134).

H. Clause 3 of Article 134: Crimes and Offenses Not Capital.

1. Child Pornography.

a. *United States v. Murray*, 52 M.J. 423 (2000). In a prosecution for a violation of 18 U.S.C. § 2252(a)(2) by knowingly receiving sexually explicit depictions of minors that have been transported in interstate commerce, "knowingly" applies to the sexually explicit nature of the materials and the ages of the subjects. It does not oblige the Government to prove that the accused knew that the sexually explicit depictions passed through interstate commerce. The interstate commerce element is merely jurisdictional. The owner of the Internet service provider (ISP), from which the accused downloaded explicit child-sex files, testified that it received feeds from a larger out-of-state ISP, and a computer crimes expert testified that the accessed newsgroups were worldwide in scope and a user could not restrict downloaded files to files originating within the state. Therefore, the evidence was legally sufficient to prove that the depictions actually passed through interstate commerce.

b. *United States v. Augustine*, 53 M.J. 95 (2000). The CAAF *implied* that storing visual depiction in three or more computer files on the same computer did not constitute a violation of 18 U.S.C. § 2252(a). The Air Force court had affirmed the guilty plea to the offense under clause 3 (crimes and offenses not capital) of Article 134, but the CAAF affirmed under clause 2 (conduct of a nature to bring discredit upon the armed forces).

c. *United States v. James*, 53 M.J. 612 (N.M. Ct. Crim. App. 2000). The Navy-Marine court found that 18 USC § 2252A (Child Pornography Prevention Act) was neither facially overbroad nor vague. The accused downloaded and uploaded, on the Internet, numerous computer files containing pictures of minors engaging in explicit sexual activity. The court found that application of the statute in this case, where the accused admitted during his providence inquiry his belief that at least one of the persons in each of the photographs he possessed or transported was a minor, did not violate the First Amendment.

d. *United States v. Gallo*, 53 M.J. 556 (A.F. Ct. Crim. App. 2000). One of the elements of 18 USC § 2252(a)(4)(B) (Protection of Children against Sexual Exploitation Act) is that each of the alleged items of child pornography traveled in interstate commerce at or before the time the accused possessed them. Proof that the accused shipped or transmitted one of the alleged motion pictures in interstate commerce is not sufficient to prove that three or more of the alleged motion pictures transited interstate commerce.

e. *United States v. Wagner*, 52 M.J. 634 (N.M. Ct. Crim. App. 1999). The preemption doctrine prohibits application of Article 134 to misconduct already covered by Articles 80 through 132. The fact that misconduct may violate a federal non-capital criminal statute does not preempt the government from charging the offense under clauses 1 or 2, rather than clause 3, of Article 134, unless the language or legislative history of the federal statute specifically limits prosecution within a particular field or area to that statute. Nothing in the language nor legislative history indicates that Congress intended to completely occupy the field with 18 USC § 2252(a)(4)(A). Therefore, the preemption doctrine did not apply to a case where accused was charged and convicted, under clauses 1 and 2 of Article 134, for "wrongfully and unlawfully possess[ing] computer floppy disks and computer generated photographs, which contained visual depictions, when the producing of said visual depictions involved the use of minors engaging in sexually explicit conduct, and the visual depictions were of such conduct."

2. Federal Obscenity Statute. *United States v. Gallo*, 53 M.J. 556 (A.F. Ct. Crim. App. 2000). The Air Force court held that the proper community standard by which to determine if the materials the accused received via the Internet, by using his Air Force computer, were obscene, under 18 USC § 1462(a), was an Air Force community standard.

3. Federal Firearms Statute. *United States v. Ivey*, 53 M.J. 685 (Army Ct. Crim. App. 2000). The accused was charged and convicted of three specifications alleging violations of 18 USC § 922(a)(6) by being a "straw purchaser" of firearms. The statute prohibits, in connection with the acquisition of any firearm or ammunition, knowingly making to a false statement, intended or likely to deceive the firearms dealer with respect to any fact material to the lawfulness of the sale. One of the specifications involved a time when the accused took three friends with him to a gun shop. The group spent over an hour in the shop examining and test-firing various handguns. The dealer was aware that the friends could not purchase weapons because they were from out-of-state. The accused purchased three handguns with money that the dealer knew the three friends provided. The dealer explained to the accused how to transfer ownership on the registration documents. The accused completed the required ATF Form 4473, in which he asserted he was the "actual buyer" of the three handguns. The accused later confessed that he bought the guns for his three friends. The Army court reversed the conviction for that specification. It did not find that the statement was intended or likely to deceive the dealer, which is one of the elements of the offense.

4. Threat against the President. *United States v. Ogren*, 52 M.J. 528 (N.M. Ct. Crim. App. 1999). The offense of threatening the President under 18 USC § 871 has two essential elements: (1) the accused's words or actions constituted a true threat; and (2) the accused used those words, or took those actions, knowingly and willfully. A "true threat" means any contextually credible threat to kill, inflict bodily harm upon, or kidnap the President or his successor. It must have been reasonably foreseeable that the accused's statement would be taken as a threat by those to whom he made it. An actual intent to carry out the threat is not required. Evidence that the accused, while in pretrial confinement, stated to brig guards, "[F]--- the President. As a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard!" and "I'm going to find the President, and I'm going to shove a gun up his ass, and I'm going to blow his f---ing brains out. . . . I'm going to find Clinton and blow his f---ing brains out," was legally and factually sufficient to support a conviction under 18 USC § 871.

V. DEFENSES.

A. Mistake of Law. *United States v. Ivey*, 53 M.J. 685 (Army Ct. Crim. App. 2000). The accused was charged and convicted of three specifications alleging separate violations of 18 USC § 922(a)(6) by being a "straw purchaser" of firearms. The statute prohibits, in connection with the acquisition of any firearm or ammunition, knowingly making to a false statement, intended or likely to deceive the firearms dealer with respect to any fact material to the lawfulness of the sale. The accused brought friends, who were unable to purchase firearms because of out-of-state residence or age, to a gun shop. He purchased firearms with money the friends gave him. The accused completed the required ATF Forms 4473, in which he asserted he was the "actual buyer" of the firearms. He later confessed that he bought the guns for his friends. The accused argued that he did not know what was meant by "actual buyer." The Army court called that a mistake of law, which was not a defense. Also, the court held, in line with federal courts, that the "knowing" requirement embraces a reckless disregard for the truth, as well as actual knowledge of the falsity of the statement.

B. Accident. *United States v. Davis*, 53 M.J. 202 (2000). The affirmative defense of accident requires that the accused was not acting negligently. Where the accused admitted that he was negligent by failing to properly secure his infant daughter in her car seat, the military judge did not err by failing to instruct *sua sponte* on the affirmative defense of accident.

C. Statute of Limitations. *United States v. McElhaney*, 54 M.J. 120 (2000). The statute of limitations codified at 18 U.S.C. § 3283, which permits prosecution for offenses involving sexual or physical abuse of children under the age of 18 until the child reaches the age of 25, does not apply to courts-martial. Article 43 provides the applicable statute of limitations for courts-martial.

VI. PLEADINGS.

A. Sufficiency of Charges.

1. *United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000). When the sufficiency of a specification is challenged for the first time on appeal, the specification is viewed with maximum liberality. The specification alleged that the accused "did, at Sturgeon Bay, Wisconsin, on or about 20 February 1999, consume alcoholic beverages while under the age of 21 years, in violation of Section 125.07 of the Wisconsin Statutes." The government proceeded under the theory that it was service-discrediting conduct in violation of clause 2 of Article 134. On appeal, the accused argued for the first time, that the specification lacked words of criminality and the alleged acts were not service-discrediting. The Coast Guard court held that the allegation that the acts violated state law constituted an allegation that they were unlawful.

2. *United States v. Harris*, 52 M.J. 665 (Army Ct. Crim. App. 2000). Where the government was unable to provide a more specific period of time, a specification alleging that the accused raped his stepdaughter sometime within a 23-month period was not so vague as to constitute a violation of due process.

3. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999). A specification that alleged that the accused "was disorderly," but did not identify any specific acts, was not fatally defective. The military has followed the modern tendency toward allowing legal conclusions and eliminating detailed factual allegations. The three-prong test is that the specification must provide: (1) the essential elements; (2) notice to defend the charge; and (3) protection from double jeopardy. The only two elements are that the accused was disorderly and his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The accused did not object at trial and did not seek a bill of particulars. A challenge to a specification for the first time on appeal will be viewed more critically. Under these circumstances, the specification was sufficient to state an offense of disorderly conduct.

B. Joinder of Charges. *United States v. Duncan*, 53 M.J. 494 (2000). Joinder of offenses at a court-martial is more permissive than joinder in federal district courts. The accused was charged with the rape, forcible sodomy, and attempted murder of Ms. DR. He was also charged with the rape, forcible sodomy, and attempted murder of Ms. AM one month after the crimes against Ms. DR. The military judge did not abuse his discretion by refusing to sever the trial of the offenses. Under RCM 906(b)(10), the military judge may sever the offenses "only to prevent manifest injustice." Three factors used by the courts are the admissibility of evidence for certain offense to prove guilt of the other offenses; effectiveness of limiting instructions and bifurcation; and the likelihood of impermissible crossover. In this case, although the evidence concerning the crimes against each of the victims was not admissible for the crimes against the other victim, the military judge gave limiting instructions three times and bifurcated the presentation of evidence and argument. The court was confident that the members would be able to follow the instructions and consider the offenses separately.

C. Multiplicity.

1. Article 133. *United States v. Cherukuri*, 53 M.J. 68 (2000). Where the underlying acts of misconduct are the same, a service disorder or discredit under Article 134 is a lesser-included offense of conduct unbecoming an officer under Article 133. The accused, a lieutenant colonel, was found guilty of four specifications of indecent assaults upon four different women and one specification of conduct unbecoming an officer by abusing his position as a medical doctor to indecently assault the same four women. The military judge erred by not finding these offenses multiplicious, because the underlying acts of misconduct were the same.

2. Drug Offenses.

a. *United States v. Scalarone*, 52 M.J. 539 (N.M. Ct. Crim. App. 1999). Distribution of a controlled substance necessarily includes possession with the intent to distribute. Where accused possessed drugs with intent to distribute the entire quantity and he subsequently did distribute them, the offenses were multiplicious.

b. *United States v. Monday*, 52 M.J. 625 (Army Ct. Crim. App. 1999). The offenses of introduction of a controlled substance, with the aggravating factor of intent to distribute, and distribution of the same controlled substance are not multiplicious.

3. Indecent Liberties with a Child and Indecent Exposure. *United States v. Rinkes*, 53 M.J. 741 (N.M. Ct. Crim. App. 2000). Aware that a 12-year old female was watching from across the street, the accused stood at his window, unzipped his shorts, and masturbated. An adult female also saw the accused. Although the means of taking indecent liberties was accomplished, at least in part, by the indecent exposure, the specifications were not multiplicious. The "elements test" is met, because each offense requires proof of a different element.

4. Unauthorized Absences. *United States v. McGrew*, 53 M.J. 522 (N.M. Ct. Crim. App. 2000). A charge of unauthorized absence for one day was multiplicious with a missing movement charge.

5. Rape and Adultery. *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000). Rape and adultery allegations arising out of the same act of sexual intercourse are not multiplicious. Their factual components are inherently different. Rape requires force, which is not required for adultery. Adultery requires one of the actors to be married, which is not required for rape.

6. Waiver.

a. *United States v. Heryford*, 52 M.J. 265 (2000). An unconditional guilty plea or a failure to make a timely motion to dismiss waives a multiplicity issue, unless it rises to the level of plain error. An accused may demonstrate plain error by showing that the specifications are "facially duplicative," which means factually the same. This determination is made by reviewing the language of the specification and facts apparent on the face of the record. The accused pled guilty to possession with intent to distribute, introduction, and distribution of the same 12 doses of LSD. Although all three specifications allege "on or about 12 July 1997" at the same place, the stipulation of fact and plea inquiry established the accused possessed the LSD at his apartment for two days before the other two offenses. The specification and record permit a finding of possession independent from the introduction and distribution. The accused did not carry his burden of persuasion that there was plain error, so the multiplicity issue was waived.

b. *United States v. Ramsey*, 52 M.J. 322 (2000). Issues of multiplicity are waived by not making a timely motion and pleading guilty unconditionally, unless the offenses could be seen as "facially duplicative," which means factually the same. Even though specifications of solicitation and conspiracy both involved a telephone call the accused made to ask another marine to distribute LSD, the specifications were not "facially duplicative." The same act did not constitute the two offenses. The solicitation was complete with the telephone call, but the conspiracy still required the overt act. It is possible to have a solicitation without a conspiracy and a conspiracy without a solicitation.

c. *United States v. Scalarone*, 52 M.J. 539 (N.M. Ct. Crim. App. 1999). Where the accused possessed drugs with intent to distribute the entire quantity and he subsequently did distribute them, convicting the accused of both possession with intent to distribute and the subsequent distribution violated the Double Jeopardy Clause of the Fifth Amendment. The accused's failure to raise the issue of multiplicity at trial did not control this issue of constitutional dimension.

d. *United States v. Ozores*, 53 M.J. 670 (A.F. Ct. Crim. App. 2000). When multiplicity is not raised at trial, it is plain error for the military judge to accept a guilty plea only if the offenses are facially duplicative. Rape and adultery allegation arising form the same act of sexual intercourse are not facially duplicative.

e. *United States v. Lacy*, 53 M.J. 509 (N.M. Ct. Crim. App. 2000). The accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously. He pled guilty to separate specifications of indecent liberties with each child victim. The accused forfeited the multiplicity issue by not making a timely motion and pleading guilty unconditionally. Also, he failed to establish plain error, because the specifications were not "facially duplicative," as determined by reviewing the language of the specifications and the facts apparent on the face of the record.

f. *United States v. Balcarczyk*, 52 M.J. 809, 812 (N.M. Ct. Crim. App. 2000). The Navy-Marine court stated that, when the accused raises the issue of multiplicity for the first time on appeal, it will not apply forfeiture if the challenged offenses are facially duplicative, which means the specifications repeat each other as a matter of fact and the record demonstrates that they punish the same factual conduct. Once the court elects not to apply forfeiture, it examines the challenged offenses using existing principles in multiplicity jurisprudence to determine whether plain error exists. In this case, the accused was found guilty of several specifications under Article 92 for disobeying an instruction prohibiting sexual harassment, and he was found guilty of the corresponding sexual offenses under Article 134. The military judge found a significant number of the Article 92 offenses and Article 134 offenses to be essentially the same for the purpose of sentencing. For the first time on appeal, the accused argued that the military judge should have dismissed the Article 134 offenses as multiplicious. The Navy-Marine court did not apply forfeiture, because the offenses were facially duplicative. It found, however, no plain error. The offenses were not multiplicious. They were separate offenses, because they possessed distinct and separate elements.

D. Unreasonable Multiplication of Charges.

1. *United States v. Quiroz,* 53 M.J. 600 (N.M. Ct. Crim. App. 2000) (*en banc*), *certification for review filed* 53 M.J. 256 (2000). The prohibition against "unreasonable multiplication of charges," currently stated in the discussion to R.C.M. 307(c)(4), is a distinct concept from multiplicity. "[T]he longstanding principle prohibiting unreasonable multiplication of charges helps fill the gap, particularly after *Teters*, in promoting fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress." The Navy court provided the following 5 non-exclusive factors in determining whether the multiplication of charges and/or specifications is unreasonable:

1. Did the accused make the objection at trial?

2. Is each charge and specification aimed at distinctly separate criminal acts?

3. Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?

4. Does the number of charges and specifications unfairly increase the accused's punitive exposure?

5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

If, after considering these and other factors, the court determines that the "piling on" of charges is extreme or unreasonable, then it should grant an appropriate remedy (e.g. dismissal, consolidation, or consideration of the offenses as one for the purpose of sentencing) on a case by case basis.

Charging a violation of Article 108 by selling military property (C-4 explosive) and a violation of 18 U.S.C. § 842(h) by possessing, storing, transporting, and/or selling the same C-4 explosive was an unreasonable multiplication of charges.

The Navy court stated that, when the issue is raised for the first time on appeal, it would not apply forfeiture unless the accused affirmatively, knowingly, and voluntarily relinquished the issue at trial.

The Navy court also held that specifications alleging possession of marijuana seeds and possession of marijuana plants were both lesser-included offenses of the manufacture of marijuana.

2. *United States v. Butcher*, 53 M.J. 711 (A.F. Ct. Crim. App. 2000). The accused was convicted, *inter alia*, of wrongful possession of Perocet (a Schedule II narcotic), willful dereliction of duty by obtaining the Perocet without authorization, and larceny of the Perocet. Although not raised at trial, the accused argued that the military judge erred by not *sua sponte* dismissing the possession and dereliction charges as an unreasonable multiplication of charges, because they were based on or derived from the same acts that supported the larceny charge. The Air Force court held that failure to raise unreasonable multiplication of charges at trial waived the issue. While the court is not bound to apply waiver when it exercises its Article 66(c) powers, it will do so unless it finds an extreme or unreasonable "piling on" of charges, which it did not find in this case.

3. *United States v. Galante*, 53 M.J. 709 (N.M. Ct. Crim. App. 2000). The accused altered a promotion warrant. At some point over the next five days, he delivered it to his platoon sergeant for entry into the unit diary for pay purposes. The accused was charged and convicted of two separate specifications, under Article 123, for making and then uttering the forged document. The court held that the forgery specifications were not unreasonably multiplied, because they were aimed at distinctly separate criminal acts.

4. Applications of *Quiroz.*

a. *United States v. Rinkes*, 53 M.J. 741 (N.M. Ct. Crim. App. 2000). Aware that a 12-year old female was watching from across the street, the accused stood at his window, unzipped his shorts, and masturbated. An adult female also saw the accused. The accused's convictions of indecent liberties with a child and indecent exposure did not constitute an unreasonable multiplication of charges. There was no objection on this basis at trial. Considering the differing societal goals and victims, the specifications were aimed at distinctly separate criminal acts. The number of specifications did not exaggerate the criminality nor unfairly increase punitive exposure. Also, there was no evidence of prosecutorial abuse or overreaching.

b. *United States v. Lacy*, 53 M.J. 509 (N.M. Ct. Crim. App. 2000). The accused exposed his genitals, masturbated, and showed a pornographic video to two children simultaneously. He pled guilty to and was convicted of separate specifications of indecent liberties with each child. The Navy-Marine court did not find that the specification represented an unreasonable multiplication of charges. The accused did not raise the issue at trial, and the specifications did not misrepresent or exaggerate his criminality, unfairly increase his exposure to punishment, or suggest any prosecutorial abuse of discretion in drafting charges.

c. *United States v. Balcarczyk*, 52 M.J. 809 (N.M. Ct. Crim. App. 2000). The accused was found guilty of several specifications under Article 92 for disobeying an instruction prohibiting sexual harassment, and he was found guilty of the corresponding sexual offenses under Article 134. The Navy-Marine court did not find that the charges were unreasonably multiplied, because the misconduct was beyond the typical indecent act, indecent language, and indecent exposure offenses. "The creation and perpetuation of this offensive and hostile environment eclipsed the individual indignities visited upon each victim."

E. Lesser-Included Offenses.

1. *Carter v. United States*, 120 S.Ct. 2159 (2000). Under the "elements test," the federal offense of bank larceny was not a lesser-included offense of the federal offense of bank robbery, so the defendant was not entitled to a jury instruction on it. A textual comparison of the elements of the two offenses in 18 U.S.C. § 2113 demonstrates that bank larceny requires three elements not required for bank robbery: (1) intent to steal; (2) asportation; and (3) value exceeding $1,000. Although, under the UCMJ, larceny is a lesser-included offense of robbery, the significance of this 5-4 decision is how a majority of the Court mechanically applied the "elements test" by comparing the statutory text.

2. *United States v. Davis*, 53 M.J. 202 (2000). Negligent homicide is a lesser-included offense of unpremeditated murder and involuntary manslaughter, because negligence is a "legally less serious element." When reasonably raised by the evidence, the military judge has a *sua sponte* obligation to instruct on lesser-included offenses. The accused's 9-month old daughter died of a head injury. The government charged the accused with unpremeditated murder, and its theory was that the accused killed his daughter by striking and shaking her. The defense theory was that she was fatally injured because she was not properly secured in her car seat when the accused swerved his car to avoid a traffic accident. The experts disputed whether the injuries could have been inflicted by the traffic accident. The defense counsel requested an instruction on involuntary manslaughter as a lesser-included offense. The military judge gave an instruction on involuntary manslaughter in the commission of an offense directly affecting the person (battery), under Article 119(b)(2). The defense did not request an instruction on negligent homicide, and it did not object to the instructions. The defense did not, however, affirmatively waive an instruction on the lesser-included offense of negligent homicide. Because the evidence raised the possibility that the accused negligently killed his daughter by shaking her or failing to properly secure her car seat, the military judge erred by failing to instruct the members on negligent homicide. The court reversed the conviction.

VII. CONCLUSION.

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 4

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS AND FRATERNIZATION

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MAJ Charles H. Rose III

November 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS AND FRATERNIZATION

Outline of Instruction

I. REFERENCES.

A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (15 July 99)[hereinafter AR 600-20], implementing Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999)[hereinafter DA Message].

2. Manual for Courts-Martial, United States (1998 ed.) [hereinafter MCM].

3. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (7 Dec 1993).

4. Dep't of Army, Pam. 600-XX, Personnel--General: Relationships Between Soldiers of Different Rank (Undated Draft) (available from www.odcsper.army.mil).

B. Navy, Marine Corps, and Air Force References

1. U.S. Navy Regulations, 1990, Article 1165 - Fraternization Prohibited (as amended 25 Jan 1993).

2. OPNAVINST 5370.2A, Navy Fraternization Policy (14 Mar 1994).

3. Marine Corps Manual 1100 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3).

4. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (1 May 1996).

II. INTRODUCTION.

A. Three Separate Concepts.

B. A Spectrum of Misconduct.

III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS.

A. **New DoD Guidance**:

1. Announced by Secretary Cohen on 29 Jul 98 (Appendix 1).

2. Not effective immediately; gave Services 30 days to provide draft new policies to DoD.

3. Does NOT cover all senior / subordinate relationships.

4. Directs Service Secretaries to prohibit by policy:

a. personal relationships, such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service; and

b. personal relationships between recruiter and recruit, as well as between permanent party personnel and trainees.

B. **The Old Army Policy**. Previous AR 600-20 (30 Mar 88), para 4-14. Two Part Analysis:

1. Part One: "Army policy does not hold dating or most other relationships between soldiers [of different ranks] as improper, barring the adverse effects listed in AR 600-20." Old DA Pam 600-35, Para. 1-5(e). Therefore, Army policy did not prohibit dating (even between officers and enlisted soldiers), *per se*.

2. Part Two:

   a. "Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." Old AR 600-20, paragraph 4-14.

   b. "Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers of different rank --

      (1) Cause actual or perceived partiality or unfairness.

      (2) Involve the improper use of rank or position for personal gain.

      (3) Create an actual or clearly predictable adverse impact on discipline, authority or morale."

      Old AR 600-20, para 4-14a.

3. Emphasis on superior-subordinate relationship, e.g., direct command/supervisory authority, or capability to influence personnel or disciplinary actions.

"The authority or influence one soldier has over another is central to any discussion of the propriety of a particular relationship between soldiers of different ranks."

Old DA Pam 600-35, para 1-5(d).

4. Commanders and supervisors will counsel those involved or take other action, as appropriate.

   a. Counseling is usually the "most appropriate initial action" when the relationship does not involve actual partiality or preferential treatment, or actual use of position for personal gain. Old AR 600-20, paragraph 4-14e(8).

   b. If there is more than the above, other adverse administrative or disciplinary sanctions should be considered.

Remember: Old AR 600-20 was not a punitive regulation. The revised paragraphs ARE PUNITIVE.

5. Effective since 1978, disbanding of Women's Army Corps.

   a. Greater integration of women

   b. Fewer direct female mentors / trainers / supervisors for female soldiers

6. Based on reality of changing world.

   "changing relationships -- especially dating -- between soldiers of different ranks are a reality, and a predictable consequence of more women entering the armed forces." Old DA Pam 600-35, para. 1-5a.

   DA PAM 600-35 contains excellent samples of different relationships. Good training tool.

C. **The New Army Policy**. Changes to AR 600-20, paras 4-14, 4-15 and 4-16.

NOTE: The following portion of the outline is based on the Army's new policy. The Army submitted this policy to SECDEF, in response to SECDEF's 29 Jul 98 guidance. SECDEF approved this submission on 3 February 1999, and the Army implemented it on 2 March 1999. A copy of the message announcing the new policy is at Appendix 2.

1. Now a **THREE** Part Analysis:

   a. Part 1: Is this a "strictly prohibited" category?

   b. Part 2: If not, are there any adverse effects?

   c. Part 3: The relationship is not prohibited, absent an adverse effect.

2. Para 4-14: Relationships between military members of different rank.

   a. "Officer" includes commissioned and warrant officers.

   b. Applies to relationships between soldiers, and between soldiers and members of other services.

   c. Is gender-neutral.

   d. (THIS IS PARA 4-14b.) The following relationships between servicemembers of **different ranks** are prohibited:

      (1) Relationships that compromise or appear to compromise the integrity of supervisory authority or the chain of command;

(2) Relationships that cause actual or perceived partiality or unfairness;

(3) Relationships that involve or appear to involve the improper use or rank or position for personal gain;

(4) Relationships that are, or are perceived to be, exploitative or coercive in nature; and

(5) Relationships that cause an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

e. (THIS IS PARA 4-14c.) Certain types of personal relationships between **officers and enlisted** personnel are prohibited. Prohibited relationships include:

(1) Ongoing business relationships (including borrowing or lending money, commercial solicitations and any other on-going financial or business relationships), **except**:

(a) Landlord / tenant; and

(b) One time transactions (such as car or home sales).

(c) All ongoing business relationships existing on the effective date of this prohibition, that were otherwise in compliance with the former policy, will not be prohibited until 1 Mar 00 ("grace period").

(d) This prohibition does not apply to USAR / ARNG soldiers when the ongoing business relationship is due to the soldiers' civilian occupation or employment.

(2) Personal relationships, such as dating, shared living accommodations (other than as directed by operational requirements), and intimate or sexual relationships.

(a) This prohibition does not affect marriages that occur before the effective date of the policy or are entered into before 1 Mar 00, subject to the provision on relationships below.

(b) This prohibition does not address whether a subsequent marriage "insulates" any predicate or subsequent prohibited relationship (Query: can there be an “immaculate” marriage?). Contrast with the Air Force, Navy and Marine Corps policies (marriage does NOT insulate from adverse action for prohibited conduct).

(c) Otherwise prohibited relationships (dating, shared living accommodations (other than directed by operational requirements) and intimate or sexual relationships), existing on the effective date of this prohibition, that were not prohibited under prior policy, are not prohibited until 1 Mar 00.

(d) Relationships otherwise in compliance with this policy **will not** become prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). While not expressed in the policy, this provision is NOT intended to allow continued officer / enlisted dating after the close of the grandfather period.

(e) RC/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on AD or FTNGD other than AT.

(f) AD/RC exclusion when the personal relationship is primarily due to civilian association, unless on AD or FTNGD other than AT.

(3) Gambling. NO EXCEPTIONS.

(4) This subparagraph is not intended to preclude normal team-building associations between soldiers, which occur in the context of activities such as community organizations, religious activities, family gatherings, unit social functions or athletic teams or events.

(5) All soldiers bear responsibility for maintaining appropriate relationships between military members. The senior military member is usually in the best position to terminate or limit relationships that may be in violation of this paragraph, but all soldiers involved may be held accountable for relationships in violation of this paragraph.

(6) Leaders are in the best position to prevent improper relationships through training and leading by example. Commanders have a wide range of options available to them to resolve such situations, including counseling, orders to cease, reassignment or other adverse administrative actions. Leaders must carefully consider all the facts and circumstances in reaching a disposition that is warranted, appropriate and fair. NOTE THE PRIOR LANGUAGE IN PARAGRAPH 4-14 DISCUSSING COUNSELING AS A FIRST OPTION IS NOT IN THIS VERSION OF PARA 4-14.

3. Para 4-15: Other Prohibited Relationships.

a. Trainee / Soldier. Any relationship between IET trainees and permanent party soldiers (not defined) not required by the training mission will be prohibited. This prohibition would apply regardless of the unit of assignment of either the permanent party soldier or the trainee.

b. Recruit / Recruiter. Any relationship between a permanent party soldier assigned or attached to USAREC, and potential prospects, applicants, members of the Delayed Entry Program or members of the Delayed Training Program, not required by the recruiting mission, will be prohibited. The prohibition would apply regardless of the unit of assignment or attachment of the parties involved.

5. Para 4-16: UCMJ. Paragraphs 4-14b. 4-14c and 4-15 are punitive. Violations could be punished as violations of Article 92, UCMJ.

D. **Commander's Analysis**: How does the commander determine what's improper?

1. CYA! Call your attorney!! JAs must cultivate the idea that commanders should consult with OSJA.

2. Use common sense. “The leader must be counted on to use good judgment, experience, and discretion. . . ."

3. Keep an open mind. Don’t prejudge every male/female relationship. Relationships between males of different rank or between females of different rank can be as inappropriate as male/female relations. "[J]udge the results of the relationships and not the relationships themselves." DA Pam 600-XX.

4. Focus on relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship." DA Pam 600-XX. Most likely to generate the AR 600-20 adverse effects.

5. Be wary that **appearances of impropriety** can be as damaging to morale and discipline as actual wrongdoing. BUT, don’t use as easy-out for hard decisions.

E. **Command Response.**

1. The commander has a wide range of responses available to him and should use the one that will achieve a result that is "warranted, appropriate, and fair." Counseling the soldiers concerned is usually the most appropriate initial action, particularly when only the potential for an appearance of actual preference or partiality, or appearance without any adverse impact on morale, discipline or authority.

2. Adverse Administrative Actions: Order to terminate, relief, re-assign, bar to re-enlistment, reprimand, adverse OER/NCOER, administrative separation.

3. Criminal Sanctions: Fraternization, disobey lawful order, conduct unbecoming, adultery.

F. **Commander's Role.**

1. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. AR 600-20, para. 4-14(f).

2. Don't be gun-shy. Mentoring, coaching, and teaching of soldiers by their seniors should not be inhibited by gender prejudices. Old AR 600-20, para. 4-14 (e)(1).

3. Training. DA Pam 600-XX.

IV. FRATERNIZATION AND RELATED OFFENSES.

A. General.

1. Fraternization is easier to describe than define.

2. There is no stereotypical case. Examples include sexual relations, drinking, and gambling buddies.

B. Fraternization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 83b.

2. Elements: the accused

a. was a commissioned or warrant officer;

b. fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c. knew the person(s) to be (an) enlisted member(s); and

d. such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e. under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

3. "Hard to define it, but I know it when I see it."

4. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

5. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 83e.

6. Custom.

a. The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.

b. Customs vary from service to service, and may change over time.

c. Custom of the service must be proven through the testimony of a knowledgeable witness. *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).

7. Factors to Consider in Deciding How to Dispose of an Offense.

a. Nature of the military relationship;

b. Nature of the association;

c. Number of witnesses;

d. Likely effect on witnesses.

C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.

1. Elements. MCM, pt. IV, ¶ 16b(1).

a. There was in effect a certain lawful general order or regulation;

b. the accused had a duty to obey it; and

c. the accused violated or failed to obey the order or regulation.

2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 16e(1).

3. Applications.

a. Applicable to officers and enlisted.

b. Most effective when used to charge violations of local punitive general regulations (for example, regulations prohibiting improper relationships between trainees and drill sergeants).

4. **Remember:** AR 600-20 re: improper relationships is NOW a punitive regulation.

D. Conduct Unbecoming an Officer. UCMJ art. 133.

1. Elements.

a. Accused did or omitted to do certain acts; and

b. That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

2. Only commissioned officers and commissioned warrant officers may be charged under article 133.

3. Maximum punishment: dismissal, total forfeitures and confinement for a period not in excess of that authorized for the most analogous offense for which punishment is prescribed in the Manual, e.g., two years for fraternization.

V. CONCLUSION.

APPENDIX 1

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THE SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1000

29 JUL 1998

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR OF ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Good Order and Discipline

Last July, I directed the Under Secretary of Defense for Personnel and Readiness to lead a Task Force of senior representatives from the Services, the Office of the Secretary of Defense, the Office of the Joint Chiefs of Staff and the DoD Inspector General to determine whether current policies and practices for maintaining good order and discipline in the all volunteer force are fair and effective. This Task Force obtained the views of field commanders, senior enlisted personnel, members of the reserve components, Service chaplains, the Chair of the Defense Advisory Committee on Women in the Services and other interested parties on the content, enforcement, general understanding and perception of our policies.

The information gathered by the Task Force indicated that breaches of good order and discipline in our Services are not widespread. The information further revealed, however, that the Services defined, regulated and responded to relationships between service members differently. Such differences in treatment are antithetical to good order and discipline, and are corrosive to morale, particularly so as we move towards an increasingly joint environment.

In order to support our national objectives, the military Services task organize, deploy and fight predominantly as a unified force. In today's military environment, we owe it to our forces to eliminate as many differences in disciplinary standards as possible and to adopt uniform,

clear and readily understandable policies.

Accordingly, the Service Secretaries will, by policy, prohibit personal relationships such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service. This change will not affect existing marriages.

A more uniform policy is also needed in military recruiting and initial entry training environments. Interaction with recruiters and trainers offers the first examples of professional conduct expected of a military member and creates lasting impressions in new recruits. Similarly, military training and education are the means by which the values of military service are transferred. Because these relationships are so important, the Services shall prohibit personal relationships between recruiter and recruit, as well as between instructors and permanent party personnel with initial entry trainees.

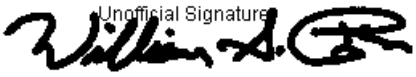
In setting forth rules prohibiting unprofessional relationships, I want to make clear that professional interaction between officers and enlisted members is encouraged.

The best way to curtail inappropriate or unprofessional relationships is, of course, to prevent them through proper training and leadership by example. Should inappropriate relationships occur, commanders must carefully consider all facts and circumstances in reaching a disposition that is warranted, appropriate and fair. The failure to adhere to standards supportive of good order and discipline can often be satisfactorily addressed and corrected by appropriate administrative measures.

For any policy to be effective, it must be clear and understandable. I am directing each Service to prepare training materials explaining the Service's policies and regulations pertaining to good order and discipline, specifically addressing how the policies are applied and written in language that is understandable to all.

Each Service will provide me its draft implementing plans within 30 days and training materials within 60 days.

{PRIVATE}



William S. Cohen

APPENDIX 2

Subject: R U 020804Z REVISED POLICY ON RELATIONSHIPS BETWEEN SOLDIERS OF
>
> RTTUZYUW RUEADWD3952 0612228-UUUU--RUERCOL.
> ZNR UUUUU ZYW ZOC ZEO T ALL US ARMY REPS ANS ACTIVITIES
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> BT
> UNCLAS ALARACT 014/99
> SECTION 01 OF 02
> SUBJECT: REVISED POLICY ON RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS
> 1. REFERENCE AR 600-20, PARAGRAPHS 4-14, 4-15, AND 4-16.
> 2. ARMY POLICY REGARDING RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS HAS BEEN REVISED. THIS MESSAGE CONSTITUTES A PERMANENT CHANGE TO AR 600-20, TO TAKE EFFECT IMMEDIATELY. THIS TEXT WILL BE INCORPORATED INTO THE NEXT PRINTED REVISION OF THIS REGULATION.
> 3. AR 600-20, PARAGRAPH 4-14. RELATIONSHIPS BETWEEN MILITARY MEMBERS OF DIFFERENT RANK.
> A. THE TERM "OFFICER," AS USED IN THIS PARAGRAPH, INCLUDES BOTH COMMISSIONED AND WARRANT OFFICERS UNLESS OTHERWISE STATED. THE PROVISIONS OF THIS PARAGRAPH APPLY TO BOTH RELATIONSHIPS BETWEEN ARMY PERSONNEL AND BETWEEN ARMY PERSONNEL AND PERSONNEL OF OTHER MILITARY SERVICES. THIS POLICY IS EFFECTIVE IMMEDIATELY, EXCEPT WHERE NOTED

> PAGE 02 RUEADWD3952 UNCLAS
> BELOW, AND APPLIES TO DIFFERENT-GENDER RELATIONSHIPS AND SAME-GENDER RELATIONSHIPS.
> B. RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANK ARE PROHIBITED IF THEY:
> (1) COMPROMISE, OR APPEAR TO COMPROMISE, THE
> INTEGRITY OF SUPERVISORY AUTHORITY OR THE CHAIN OF COMMAND.
> (2) CAUSE ACTUAL OR PERCEIVED PARTIALITY OR UNFAIRNESS.
> (3) INVOLVE, OR APPEAR TO INVOLVE, THE IMPROPER USE OF RANK OR POSITION FOR PERSONAL GAIN.
> (4) ARE, OR ARE PERCEIVED TO BE, EXPLOITATIVE OR COERCIVE IN NATURE.
> (5) CREATE AN ACTUAL OR CLEARLY PREDICTABLE ADVERSE IMPACT ON DISCIPLINE, AUTHORITY, MORALE, OR THE ABILITY OF THE COMMAND TO ACCOMPLISH ITS MISSION.
> C. CERTAIN TYPES OF PERSONAL RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED PERSONNEL ARE PROHIBITED. PROHIBITED RELATIONSHIPS INCLUDE:
> (1) ON-GOING BUSINESS RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED PERSONNEL. THIS PROHIBITION DOES NOT APPLY TO LANDLORD/TENANT RELATIONSHIPS OR TO ONE-TIME TRANSACTIONS SUCH AS THE

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> SALE OF AN AUTOMOBILE OR HOUSE, BUT DOES APPLY TO BORROWING OR LENDING MONEY, COMMERCIAL SOLICITATION, AND ANY OTHER TYPE OF ON-GOING FINANCIAL OR BUSINESS RELATIONSHIP. BUSINESS RELATIONSHIPS WHICH EXIST AT THE TIME THIS POLICY BECOMES EFFECTIVE, AND THAT WERE
> AUTHORIZED UNDER PREVIOUSLY EXISTING RULES AND REGULATIONS, ARE EXEMPT UNTIL MARCH 1, 2000. IN THE CASE OF ARMY NATIONAL GUARD OR UNITED STATES ARMY RESERVE PERSONNEL, THIS PROHIBITION DOES NOT APPLY TO RELATIONSHIPS THAT EXIST DUE TO THEIR CIVILIAN OCCUPATION OR EMPLOYMENT.
> (2) DATING, SHARED LIVING ACCOMMODATIONS OTHER THAN THOSE DIRECTED BY OPERATIONAL REQUIREMENTS, AND INTIMATE OR SEXUAL RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED PERSONNEL. THIS PROHIBITION DOES NOT APPLY TO:
> (A) MARRIAGES THAT PREDATE THE EFFECTIVE DATE OF THIS POLICY OR ARE ENTERED INTO PRIOR TO MARCH 1, 2000.
> (B) UNTIL MARCH 1, 2000, RELATIONSHIPS (DATING, SHARED
> LIVING ACCOMMODATIONS, AND INTIMATE OR SEXUAL RELATIONSHIPS) OUTSIDE
> OF MARRIAGE THAT PREDATE THE EFFECTIVE DATE OF THIS POLICY.
> (C) SITUATIONS IN WHICH A RELATIONSHIP WHICH COMPLIES WITH
> THIS POLICY WOULD MOVE INTO NON-COMPLIANCE DUE TO A CHANGE IN STATUS

> PAGE 04 RUEADWD3952 UNCLAS
> OF ONE OF THE MEMBERS (FOR INSTANCE, A CASE WHERE TWO ENLISTED MEMBERS ARE MARRIED AND ONE IS SUBSEQUENTLY COMMISSIONED OR SELECTED AS A WARRANT OFFICER).
> (D) PERSONAL RELATIONSHIPS OUTSIDE OF MARRIAGE BETWEEN MEMBERS OF THE NATIONAL GUARD OR ARMY RESERVE, WHEN THE RELATIONSHIP PRIMARILY EXISTS DUE TO CIVILIAN ACQUAINTANCESHIPS, UNLESS THE INDIVIDUALS ARE ON ACTIVE DUTY (OTHER THAN ANNUAL TRAINING) OR FULL-TIME NATIONAL GUARD DUTY (OTHER THAN ANNUAL TRAINING).
> (E) PERSONAL RELATIONSHIPS OUTSIDE OF MARRIAGE BETWEEN MEMBERS OF THE REGULAR ARMY AND MEMBERS OF THE NATIONAL GUARD OR ARMY RESERVE WHEN THE RELATIONSHIPS PRIMARILY EXISTS DUE TO CIVILIAN ASSOCIATION AND THE RESERVE COMPONENT MEMBER IS NOT ON ACTIVE DUTY (OTHER THAN ANNUAL TRAINING) OR FULL-TIME NATIONAL GUARD DUTY (OTHER THAN ANNUAL TRAINING).
> (F) SOLDIERS AND LEADERS SHARE RESPONSIBILITY,> HOWEVER, FOR ENSURING THAT THESE RELATIONSHIPS DO NOT INTERFERE WITH GOOD ORDER AND DISCIPLINE. COMMANDERS WILL ENSURE THAT PERSONAL RELATIONSHIPS WHICH EXIST BETWEEN SOLDIERS OF DIFFERENT RANKS EMANATING FROM THEIR CIVILIAN CAREERS WILL NOT INFLUENCE TRAINING,
> READINESS, OR PERSONNEL ACTIONS.
>

> PAGE 05 RUEADWD3952 UNCLAS
> (3) GAMBLING BETWEEN OFFICERS AND ENLISTED PERSONNEL.
> D. THESE PROHIBITIONS ARE NOT INTENDED TO PRECLUDE NORMAL TEAM BUILDING ASSOCIATIONS WHICH OCCUR IN THE CONTEXT OF ACTIVITIES SUCH AS COMMUNITY ORGANIZATIONS, RELIGIOUS ACTIVITIES, FAMILY GATHERINGS, UNIT-BASED SOCIAL FUNCTIONS, OR ATHLETIC TEAMS OR EVENTS.
> E. ALL MILITARY PERSONNEL SHARE THE RESPONSIBILITY FOR MAINTAINING PROFESSIONAL RELATIONSHIPS. HOWEVER, IN ANY RELATIONSHIP BETWEEN SOLDIERS OF DIFFERENT GRADE OR RANK THE SENIOR MEMBER IS GENERALLY IN THE BEST POSITION TO TERMINATE OR LIMIT THE EXTENT OF THE RELATIONSHIP. NEVERTHELESS, ALL MEMBERS MAY BE HELD ACCOUNTABLE
> FOR RELATIONSHIPS THAT VIOLATE THIS POLICY.
> F. COMMANDERS SHOULD SEEK TO PREVENT INAPPROPRIATE OR UNPROFESSIONAL RELATIONSHIPS THROUGH PROPER TRAINING AND LEADERSHIP BY EXAMPLE. SHOULD INAPPROPRIATE RELATIONSHIPS OCCUR, COMMANDERS HAVE AVAILABLE A WIDE RANGE OF RESPONSES. THESE RESPONSES MAY INCLUDE COUNSELING, REPRIMAND, ORDER TO CEASE, REASSIGNMENT, OR ADVERSE ACTION. POTENTIAL ADVERSE ACTION MAY INCLUDE OFFICIAL REPRIMAND, ADVERSE EVALUATION REPORT(S), NONJUDICIAL PUNISHMENT, SEPARATION, BAR TO REENLISTMENT, PROMOTION DENIAL, DEMOTION, AND
>

> PAGE 06 RUEADWD3952 UNCLAS
> COURTS MARTIAL. COMMANDERS MUST CAREFULLY CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES IN REACHING A DISPOSITION THAT IS WARRANTED, APPROPRIATE, AND FAIR.
> 4-15. OTHER PROHIBITED RELATIONSHIPS
> A. TRAINEE AND SOLDIER RELATIONSHIPS. ANY RELATIONSHIP BETWEEN PERMANENT PARTY PERSONNEL AND IET TRAINEES NOT REQUIRED BY THE TRAINING MISSION IS PROHIBITED. THIS PROHIBITION APPLIES TO PERMANENT PARTY PERSONNEL WITHOUT REGARD TO THE INSTALLATION OF ASSIGNMENT OF THE PERMANENT PARTY MEMBER OR THE TRAINEE.
> B. RECRUITER AND RECRUIT RELATIONSHIPS. ANY RELATIONSHIP BETWEEN PERMANENT PARTY PERSONNEL ASSIGNED OR ATTACHED TO THE UNITED STATES ARMY RECRUITING COMMAND AND POTENTIAL PROSPECTS, APPLICANTS, MEMBERS OF THE DELAYED ENTRY PROGRAM (DEP), OR MEMBERS OF THE DELAYED TRAINING PROGRAM (DTP) NOT REQUIRED BY THE RECRUITING MISSION IS PROHIBITED. THIS PROHIBITION APPLIES TO UNITED STATES ARMY RECRUITING COMMAND PERSONNEL WITHOUT REGARD TO THE UNIT OF ASSIGNMENT OF THE PERMANENT PARTY MEMBER AND THE POTENTIAL PROSPECTS, APPLICANTS, DEP MEMBERS, OR DTP MEMBERS.
> 4-16. FRATERNIZATION. VIOLATIONS OF PARAGRAPH 4-14B, 4-14C, AND 4-15 MAY BE PUNISHED UNDER ARTICLE 92, UCMJ, AS A VIOLATION OF A LAWFUL GENERAL REGULATION.
> 4. DA PAM 600-35 IS BEING REVISED TO REFLECT THIS CHANGE.
> ADDITIONAL TRAINING MATERIALS PERTAINING TO THIS CHANGE WILL BE ISSUED SEPARATELY.
> 5. POC FOR THIS ACTION IS MAJOR LINDSEY ARNOLD, DAPE-HR-L, DSN 227-6864, COM (703)697-6864, E-MAIL ARNOLLE@HQDA.ARMY.MIL.
> BT

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 5

DEVELOPMENTS IN EVIDENCE

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MAJ Vic Hansen
December 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

DEVELOPMENTS IN EVIDENCE

Outline of Instruction

I. SECTION IV - RELEVANCY AND ITS LIMITS.

A. **Rules 401-403. Relevant Evidence**.

1. *United States v. Burns*, 53 M.J. 42 (2000). Accused charged with conspiracy to commit rape and indecent assault. At the crime scene (the accused's apartment) the police found an unopened condom under the accused's bed. The government introduced a photo of the condom at trial claiming that this sexual paraphernalia was relevant to show the existence of a conspiracy to commit rape. The defense objected on relevancy grounds because there was no link between the condom and the alleged crimes. The CAAF ruled that under 401, this evidence was relevant to corroborate the victim's statement that the rape occurred in the bedroom and as evidence of the conspiracy. The CAAF also noted that the evidence was not unfairly prejudicial and provided a backdrop that is probative of what happened.

2. *United States v. Matthews*, 53 M.J. 465 (2000). Accused tested positive for THC on 29 April 1996. At trial she presented a good soldier defense and testified that she did not use marijuana between 1 and 29 April 1996. She also testified that she had no idea how the test results could be positive. The military judge allowed the government to rebut this good soldier/innocent ingestion defense with positive test results from a command directed urinalysis that occurred 23 days after the first urinalysis. The CAAF reversed the Air Force Court and held that the judge abused his discretion in admitting this 2nd urinalysis. The court said that evidence of an unlawful substance in the urine at a time before the charged offense can not be used to prove knowledge, and evidence of an unlawful substance in the urine after the charged offense *and not connected to the charged offense* may not be used to prove knowing use on the charged date.

B. **Rule 404(a). Character of the Accused/Victim.** *United States v. Dimberio*, 52 M.J. 550 (A.F. Ct. Crim. App. 1999). Accused convicted of aggravated assault against his child. Accused claimed that the mother had equal access to the child and was the real perpetrator. In order to support this defense, the accused wanted to introduce expert testimony that the mother suffered from mental problems including histrionic behavior, poor coping skills, alcoholism and impulsive behavior. The military judge excluded the evidence as irrelevant because there was no link to the mother's impulsive behavior and violence. The Air Force Court affirmed. The court noted that this evidence failed on relevance grounds because what the defense was really trying to do is introduce profile evidence. This is not allowed and not a proper character trait of the witness because under 404(a)(3) and 608, the only relevant character trait is the witness's character for truthfulness. The court also rejected the defense argument that due process requires the court to relax the rules of evidence when evaluating evidence favorable to the defense.

C. **Rule 404(b). "Other Acts" Evidence.**

1. *United States v. Phillips*, 52 M.J. 268 (2000). Accused charged with larceny, conspiracy, and false swearing for entering into a sham marriage in order to live off post and draw BAQ. Government presented evidence of the marriage and on rebuttal introduced evidence of two homosexual relationships that the accused was involved in. The military judge admitted this evidence under MRE 404(b) to rebut the accused's claims that he and his wife had a marriage relationship and to show motive and intent. The court held that the military judge did not abuse his discretion because this evidence was logically relevant to show that the marriage was a sham and the analysis would be the same whether the infidelity was homosexual or heterosexual.

2. *United States v. Henry*, 53 M.J. 108 (2000). Accused convicted of rape and adultery with his 15-year-old stepdaughter. In her pre-trial statement to CID, the victim told the police that the accused made her watch pornographic movies with him. The accused house was searched. No movies were found but two or three pornographic magazines were found, some of which contained order forms for videos. At trial the government admitted this evidence over defense objection under 404(b) to show intent. The CAAF held that the military judge did not abuse his discretion because the magazines were relevant to show intent and possible grooming on the part of the accused. The CAAF also said the evidence was relevant to impeach the victim's in court testimony because on the stand she recanted some of her testimony and denied ever watching movies with the accused.

3. *United States v. Baumann,* 54 M.J. 100 (2000). Accused convicted of sexually molesting his daughter. The CAAF held that it was error (harmless) for the military judge to admit evidence that the accused molested his sisters 25 years ago. The military judge admitted this evidence over defense objection under 404(b), to show the wife's motive for finalizing the divorce and to rebut credibility attacks against her. The evidence was a statement by the accused's mother to his wife that the accused had molested his sisters when he was 13. The CAAF held that the probative value of this evidence was outweighed by the unfair prejudice, particularly because the government had other evidence to explain the reason for the divorce and rebut the defense claim of motive.

4. *United States v. Tanksley*, 54 M.J. 169 (2000). Accused, Navy Captain was convicted of indecent liberties with his child. The government introduced testimony from another daughter that he had sexually abused her 30 years earlier. This evidence was admitted under 404(b) to show the accused's intent. The CAAF held that the military judge did not abuse his discretion in admitting this evidence.

D. **Rules 413 and 414. Evidence of Similar Acts of Sexual Assault and Child Molestation.**

1. Balancing Test.

a. *United States v. Dewrell*, 52 M.J. 601 (A.F. Ct. Crim. App. 1999). In this case, the Air Force Court announced a less restrictive 403 balancing test for evidence admitted under MRE 413 and 414. In the context of MRE 413 and 414, the trial judge will "test for whether the prior acts evidence will have a substantial tendency to cause the members to fail to hold the prosecution to its burden of proof beyond a reasonable doubt with respect to the charged offenses."

b. *United States v. Bailey*, 52 M.J. 786 (A.F. Ct. Crim. App. 1999). Accused convicted of rape, sodomy and other offenses. Court held, consistent with *Dewrell,* that the military judge did not err in admitting MRE 413 evidence. In dicta, the court also noted that the military judge's limiting instruction was not needed to tell the members that they could not use this evidence for the general proposition that the accused is a bad person and therefore committed the charged offenses.

2. Due Process Concerns.

a. *United States v. Wright*, 53 M.J. 476 (2000). The accused pleaded guilty to indecent assault of P. in Oct. 96. He pleaded not guilty but was convicted of indecent assault of D. in April of 96, and housebreaking of P's room in Oct. 96. The government admitted the offense that he pleaded guilty to under MRE 413 to prove propensity to commit indecent assault against D. The defense claimed that 413 was unconstitutional. CAAF rejected this argument, following the rationale of the Federal Circuit Courts on both the due process and equal protection grounds.

b. *United States v. Henley*, 53 M.J. 488 (2000). Accused convicted of committing oral sodomy on his natural son and daughter. At trial, the government introduced incidents outside the statute of limitations under both 414 and 404(b). The trial court admitted it for both purposes. The Air Force Court admitted it under 404(b) and said that they did not need to address the 414 issue. The CAAF agreed with the Air Force Court's approach and affirmed. The CAAF did go on to say, in light of their opinion in *Wright*, that 414 is constitutional and this evidence would have been admissible under that rule as well.

II. SECTION V - PRIVILEGES.

A. **Spousal Privilege**. *United States v. McElhaney*, 54 M.J. 120 (2000). In this case the accused was charged with attempted rape and carnal knowledge against his niece. The accused's wife discovered these incidents when she intercepted letters between the accused and his niece. The wife then confronted the accused with the illicit nature of these letters. The accused admitted to his wife of the long running relationship and his attempts to have sexual intercourse with his niece. The defense sought to suppress these statements between the accused and his wife under the marital privilege. The government contended that the accused had waived any privilege because the accused had disclosed much of his communication with his wife to the victim and the victim's parents. The CAAF agreed. The court noted that a significant portion of the conversation had been disclosed when the accused told the victim in a letter that the cat was out of the bag, that his wife knew almost everything, and that he had told her parents about stolen kisses. The court reasoned that this was more than just telling the victim that a conversation had occurred and, taken in context, it was a significant disclosure of the substance of the conversation.

B. **Psychotherapist-Patient Privilege**.

1. *United States v. Rodriguez*, 54 M.J. 156 (2000). The CAAF affirmed the Army Court's ruling that *Jaffee v. Redmond* did not create a psychotherapist-patient privilege in the military.

2. *United States v. Paaluhi,* 54 M.J. 181 (2000). Consistent with *Rodriguez*, the court ruled that *Jaffe v. Redmond* did not create a psychotherapist-patient privilege in the military. The CAAF reversed the conviction, however, holding it was ineffective assistance for the defense counsel to tell the accused to talk to a Navy psychologist without first getting the psychologist appointed to the defense team.

III. SECTION VI - WITNESSES.

A. **Rule 608(b). Impeachment.**

1. *United States v. Cobia,* 53 M.J. 305 (2000). Accused charged with rape, forcible sodomy with a child, indecent acts, and adultery. Over several years, the accused had sexually groomed his 13 year-old stepdaughter and committed various sexual acts with her including intercourse on several occasions. The accused was tried in state court for these offenses. He was also tried for two of these same offenses at his court-martial. In state court, the accused pleaded guilty, but there was no allocution or providencey inquiry. At his court-martial, the accused denied any wrongdoing and claimed that his civilian guilty plea was a result of coercion and his inability to understand the process. At trial, the defense moved to preclude this evidence. The military judge ruled that the convictions were not admissible under 404(b) but could be used for impeachment. Following the ruling the defense introduced the conviction during their direct examination of the accused and asked him to explain his guilty plea. The CAAF, citing to *Ohler,* held that the defense waived any objection by introducing evidence of the conviction in their direct examination of the accused.

2. *United States v. Jenkins*, 54 M.J. 12 (2000). Accused convicted of larceny and other crimes for his involvement in a scheme to cash government checks with fake I.D. cards. The defense theory was that the accused was framed by the real perpetrators and by his old girl friend. The accused testified and, on cross, the government asked him a number of questions about what other witnesses had testified to and then asked the accused if these witnesses were lying. Defense did object to these questions at trial. On appeal, defense claimed it was improper for the trial counsel to ask these questions. The CAAF ruled that it was error (harmless) for the trial counsel to ask the accused if other witnesses were lying. According to the court, this type of questioning violates the MRE 608 limitations, which allow for opinions on character only. These questions are improper because the witness is becoming a human lie detector and the answers are not helpful.

B. **Rule 609**. **Prior Convictions**. *Ohler v. United States*, 20 S. Ct. 1851 (2000). In a 5-4 decision, the Court affirmed the 9th Circuit and held that if the defense loses a motion *in limine* on excluding FRE 609 evidence against the accused and then brings the conviction out during the direct examination of the accused, they waive any objection to the ruling on appeal.

C. **Rule 615. Witness Sequestration.** *United States v. Langston*, 53 M.J. 335 (2000). Accused entered mixed pleas. During the providence inquiry, the military judge allowed three of the female victims to be present in the courtroom even though some would later be fact witnesses on the contested charges. The military judge ruled that MRE 615 did not apply to providence inquiries. The CAAF held that it was error (harmless) for the judge to allow the witness's to remain in the courtroom, because a providence inquiry was still part of the judicial proceedings. Note, this outcome would not change under the new MRE 615, if the witnesses would be fact witnesses.

IV. SECTION VII - OPINIONS AND EXPERT TESTIMONY.

A. **Qualifications.** *United States v. McElhaney*, 54 M.J. 120 (2000). During the sentencing phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. The CAAF held that it was error for the judge to admit this evidence. Citing to *Houser*, the court noted that the expert lacked the proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

B. **Helpfulness**.

1. *United States v. Grigouruk*, 52 M.J. 312 (2000). Accused charged with molesting his young stepdaughter. The military judge ordered government to provide a defense requested expert witness in child psychology. At trial, the defense did not call the expert. The CAAF remanded the case for further inquiry on the accused's claim of ineffective assistance because of the defense counsel's failure to call the expert.

2. *United States v. Armstrong,* 53 M.J. 76 (2000). Accused charged with indecent acts with his daughter. Accused made a partial confession to the police and, at trial, stated that any contact with his daughter was not of a sexual nature. On rebuttal the government called an expert in child abuse who testified that in her opinion the victim suffered abuse at the hands of her father. The defense did not object. On appeal, the CAAF held that it was reversible error for the expert to testify in this fashion.

3. *United States v. Robbins*, 52 M.J. 455 (2000). Accused charged with two specifications of sodomy with a child under 16. Judge alone case. The victim testified and the government also called a social worker to tell about statements she and her mother made to the social worker. While laying the 803(4) foundation, the expert testified that her job is to do intake interviews and refer cases to a panel of clinicians who substantiate cases. She said that in this case, the allegation was substantiated. A second witness also testified about what the victim told her. This witness testified that when the victim reported the incident to her, she appeared not to be lying. The defense did not object to any of this evidence. The CAAF distinguished this case from prior cases and held that, because this was a judge alone case, and the statements touching on credibility were incidental, there was no error.

C. **Reliability.** *United States v. Huberty,* 53 M.J. 369 (2000). Accused convicted of indecent acts and consensual sodomy. Defense wanted to introduce expert testimony that, based on his testing, the accused could not have exposed himself in public. The expert would also testify that the 17-year-old sodomy victim was manipulative. The military judge did not allow the expert to testify about the results of the test or offer an opinion that the accused could not be an exhibitionist. In rebuttal, the Government called an expert to testify that the accused may have been grooming the 17-year-old for sex. On appeal, defense claimed that the judge erred by limiting the defense expert and allowing the government expert to testify. The CAAF affirmed the conviction. The court noted that the trial judge had properly evaluated the defense expert's opinion under *Daubert* and concluded that his opinions were not generally accepted and had not been subjected to peer review. The court also noted that the expert's opinion that the accused could not be an exhibitionist based on the MMPI was not relevant because such testimony is impermissible profiling.

D. Nonscientific Expert Evidence. Impact of Kumho.

1. Handwriting Analysis. Two more district courts are following the trend to limit the expert's testimony to characteristics and prevent them from either testifying that a certain individual was the author of a questioned document or to their degree of certainty. *United States v. Ruthaford,* 104 F. Supp. 2d 1190 (Dist. of NE 2000); *United States v. Santillan*, 1999 U.S. Dist. Lexis 21611 (Northern Dist. of CA).

2. Eyewitness Identification Experts. *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000). Trial judge abused his discretion by excluding a defense expert on the weaknesses of eyewitness identification. The trial judge's comments that he wanted to "experiment" were indicative of the abuse of his discretion, as was his failure to even conduct a *Daubert* type reliability hearing.

3. Future Dangerousness. *United States v. Latorree*, 53 M.J. 179 (2000). Accused pleaded guilty to sodomizing a 7 year old girl. In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other sexual assaults. On appeal, defense claimed it was error for the expert to provide this information. CAAF ruled that the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*, but any error in admitting the testimony was harmless.

4. *United States v. Hankey,* 203 F.3d 1160 (9th Cir. 2000). In this case, the accused was charged with conspiracy and distribution of drugs. Accused was a member of a gang and a co-accused and other witnesses testified for the defense and denied any wrong doing. In rebuttal, the government called a police officer to render an expert opinion that part of the gang affiliation code was not to testify against another gang member. Defense said that the witness's opinion was not reliable and more prejudicial than probative. 9th Circuit applying *Kumho* said the judge did not abuse his discretion in admitting this evidence.

5. *United States v. Norris*, 217 F.3d 262 (5th Cir. 2000). Trial judge erred in holding that reliability analysis did not apply to video re-enactment. No error, however, because the judge in effect did do a reliability determination before admitting the evidence.

E. Polygraphs.

1. *United States v. Clark*, 53 M.J. 280 (2000). Accused pleaded guilty to larceny and false official swearing. In his judge alone case, the stipulation of fact included information that the accused failed a polygraph test. The CAAF ruled that it was plain error for the military judge to admit this evidence, however, the error did not materially prejudice his rights. Therefore, no relief.

2. *United States v. Southwick*, 53 M.J. 412 (2000). Accused convicted of wrongful distribution of drugs. She sold the drugs to an informant. At trial, the defense attacked the credibility of the informant by trying to demonstrate that the Air Force had not done a proper certification of him. In response, the informant testified that he had been polygraphed before being accepted as an informant. The defense did not object to this evidence. The CAAF held it was harmless error for this evidence to come before the fact finders, because the polygraph was not directly related to any issues at trial or the informant's in court testimony.

3. *United States v. Tanksley,* 54 M.J. __ (2000). Buried on page seven of a nine-page statement to NIS agents, the accused stated that he refused to take a polygraph examination. The government offered the entire statement and the information about his refusal to take a polygraph was not redacted. The defense did not object. The CAAF ruled that any passing reference to a polygraph examination did not materially prejudice the accused.

V. SECTION VIII - HEARSAY.

A. **Rule 803(2) Exited Utterance**. *United States v. Moolick*, 53 M.J. 174 (2000). Accused convicted of rape. Immediately after the victim accused him, the accused claimed that she had grabbed him first. The accused did not testify but the defense wanted to introduce this statement as an excited utterance. The military judge did not admit the statement. The CAAF ruled it was prejudicial error and reversed the conviction.

B. **Rule 807 Residual Hearsay**. *United States v. Pablo*, 53 M.J. 356 (2000). Accused convicted of child abuse. At trial, the victim testified. Government also introduced the testimony of a school counselor under the residual hearsay exception. The CAAF said this was an abuse of discretion and reversed the conviction.

VI. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE.

A. **Rule 103. Rulings on Evidence**.

103(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(2). Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked. <u>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</u>

B. **Rule 404 (a). Character Evidence Generally**. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, <u>or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution</u>.

C. **Rule 701. Opinion Testimony by Lay Witnesses**. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, <u>and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702</u>.

D. **Rule 702. Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, my testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or date, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

E. **Rule 703. Bases of Opinion Testimony by Experts**. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

VII. CONCLUSION.

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 6

SEARCH AND SEIZURE/URINALYSIS

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Major Mike Stahlman

December 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

SEARCH AND SEIZURE/URINALYSIS

Outline of Instruction

I. INTRODUCTION.

A. The Fourth Amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. The Fourth Amendment in the Military.

1. The fourth amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). *But see* Lederer and Borch *Does the Fourth Amendment Apply to the Armed Forces?*, 144 Mil. L. Rev. 110 (1994) (this article points out that the Supreme Court has never expressly applied the fourth amendment to the military).

2. The balancing of competing interests is different in military society. A soldier's reasonable expectation of privacy must be balanced against:

   a. National security;

   b. Military necessity (commander's inherent authority to ensure the safety, security, fitness for duty, good order and discipline of his command).

   c. Effective law enforcement

3. The Military Rules of Evidence (Mil. R. Evid.) codify constitutional law.

a. Military Rules of Evidence which codify fourth amendment principles:

(1) Mil. R. Evid. 311, Evidence Obtained From Unlawful Searches and Seizures.

(2) Mil. R. Evid. 312, Body Views and Intrusions.

(3) Mil. R. Evid. 313, Inspections and Inventories in the Armed Forces.

(4) Mil. R. Evid. 314, Searches Not Requiring Probable Cause.

(5) Mil. R. Evid. 315, Probable Cause Searches.

(6) Mil. R. Evid. 316, Seizures.

(7) Mil. R. Evid. 317, Interception of Wire and Oral Communications.

b. Which law applies - recent constitutional decisions or the Military Rules of Evidence?

(1) General rule: the law more advantageous to the accused will apply. Mil. R. Evid. 103(a) Drafters' Analysis.

(2) Minority view: "These 'constitutional rules' of the Military Rules of Evidence were intended to keep pace with, and apply to the military, the burgeoning body of interpretive constitutional law . . . not to cast in legal or evidentiary concrete the Constitution as it was known in 1980." *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

(3) Some Military Rules of Evidence provide exceptions which permit application of recent constitutional decisions to the military. *See* Mil. R. Evid. 314(k) (searches of a type valid under the Constitution are valid in military practice, even if not covered by the Mil. R. Evid.).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS.

A. Standing or "Adequate Interest."

1. General rule. To raise a violation of the fourth amendment, the accused's own constitutional rights must have been violated; he cannot vicariously claim fourth amendment violations of the rights of others.

a. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Police seized sawed-off shotgun and ammunition in illegal search of car. Only owner was allowed to challenge admissibility of evidence seized. Defendant passenger lacked standing to make same challenge.

b. *United States v. Padilla*, 113 S. Ct. 1936 (1993). Accused lacked standing to challenge search of auto containing drugs driven by a conspirator in furtherance of the conspiracy, despite accused's supervisory control over auto.

2. Lack of standing is often analyzed as lack of a reasonable expectation of privacy. *See United States v. Padilla*, 113 S. Ct. 1936 (1993) and *United States v. Salazar*, 44 M.J. 464 (1996).

B. Motions, Burdens of Proof, and Standards of Review.

1. Disclosure by prosecution. Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused that it intends to offer at trial. Mil. R. Evid. 311(d)(1). See Appendix A for sample disclosure.

2. Motion by the defense. The defense must raise any motion to suppress evidence based on an improper search or seizure prior to entering a plea. Absent such a motion, the defense may not raise the issue later, unless permitted to do so by the military judge for good cause. Mil. R. Evid. 311(d)(2).

3. Burden of proof. When a motion has been made by the defense, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some other exception applies. Mil. R. Evid. 311(e)(1).

   a. Exception. Consent. Government must show by clear and convincing evidence that the consent to search was voluntary. Mil. R. Evid. 314(e)(5).

   b. Exception. "Subterfuge" Rule. If the rule is triggered, the prosecution must show by clear and convincing evidence that the primary purpose of the government's intrusion was administrative and not a criminal search for evidence. Mil. R. Evid. 313(b).

4. Effect of guilty plea.

   a. A plea of guilty waives all issues under the fourth amendment, whether or not raised prior to the plea. Mil. R. Evid. 311(i).

   b. Exception: conditional guilty plea approved by military judge and consented in by convening authority. R.C.M. 910(a)(2).

5. Appellate Standard of Review. For Fourth Amendment issues, the standard of review for a military judge's evidentiary ruling is abuse of discretion. Abuse of discretion occurs if "[T]he military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (1995). "Erroneous view of the law" is defined as *de novo* review. *United States v. Owens*, 51 M.J. 204 (1999).

III. APPLICATION OF FOURTH AMENDMENT.

A. Nongovernment Searches. The fourth amendment does not apply unless there is a *government* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978)

1. Private searches are not covered by the fourth amendment.

a. Searches by persons unrelated to the government are not covered by the fourth amendment.

(1) *United States v. Jacobsen*, 466 U.S. 109 (1984). No government search occurred when federal express opened damaged package.

(2) *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988). United Parcel Service employee opened package addressed to accused as part of random inspection. Held: this was not a government search.

b. Searches by government officials not acting in official capacity are not covered by the fourth amendment. *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986). Search by military policeman acting in non-law enforcement role is not covered by fourth amendment.

c. Searches by informants are covered by the fourth amendment. *But see United States v. Aponte*, 11 M.J. 917 (A.C.M.R. 1981). Soldier "checked" accused's canvas bag and found drugs after commander asked soldier to keep his "eyes open." Held: this was not a government search because soldier was not acting as agent of the commander.

d. Searches by AAFES detectives are covered by fourth amendment. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990). Fourth amendment extends to searches by AAFES store detectives; *Baker* overrules earlier case law which likened AAFES personnel to private security guards.

2. Foreign searches are not covered by the fourth amendment.

a. Searches by U.S. agents abroad. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Fourth amendment does not apply to search by U.S. agents of foreigner's property located in a foreign country.

b. Searches by foreign officials.

(1) The fourth amendment is inapplicable to searches by foreign officials unless the search was "participated in" by U.S. agents. Mil. R. Evid. 311(c) and 315(h)(3).

(a) "Participation" by U.S. agents does not include:

(i) Mere presence.

(ii) Acting as interpreter.

(b) *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982). Fourth amendment did not apply to German search of off-post apartment, even though military police provided German's with information used.

(c) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Military police officer participated in Panamanian search by driving accused to Army hospital, requesting blood alcohol test, signing required forms and assisting in administering test.

(2) A search by foreign officials is unlawful if the accused was subjected to "gross and brutal maltreatment." Mil. R. Evid. 311(c)(3).

B. No Reasonable Expectation of Privacy. The fourth amendment only applies if there is a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347 (1967) (the fourth amendment protects people, not places).

1. For the expectation of privacy to be reasonable:

a. The person must have an actual subjective expectation of privacy; and

b. Society must recognize the expectation as objectively reasonable.

2. Public view or open view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection." *Katz v. United States*, 389 U.S. 347 (1967).

a. Abandoned property. Mil. R. Evid. 316(d)(1).

(1) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.

(2) Clearing quarters. *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). There was no reasonable expectation of privacy in blood stains found in quarters accused was clearing when accused removed majority of belongings, lived elsewhere, surrendered keys to cleaning team, and took no action to protect remnants left behind.

b. Aerial observation.

(1) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.

(2) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.

c. Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (1999). Peering into an open door or through a window of an automobile is not a search. *See also United States v. Richter*, 51 M.J. 213 (1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.

d. The "passerby."

(1) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986). Peeking through a 1/8 inch by 3/8 inch crack in the venetian blinds from a walkway was not a search.

(2) *But see United States v. Kalisky*, 37 M.J. 105 (C.M.A. 1993). Security police's view through eight to ten inch gap in curtains in back patio door was unlawful search because patio was not open to public.

e. Private dwellings. *Minnesota v. Carter*, 119 S. Ct. 469 (1998). Cocaine distributors were utilizing another person's apartment to bag cocaine. The distributors were in the apartment for two and a half hours and had no other purpose there than to bag the cocaine. Supreme Court held that even though they were in private residence at consent of owner, they had no expectation of privacy in the apartment, and police discovery of their activity was not a Fourth Amendment search.

3. Plain view. Mil. R. Evid. 316(d)(4)(c).

a. General rule. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Fogg*, 52 M.J. 144 (1999). Property may be seized when:

(1) The property is in plain view;

(2) The person observing the property is lawfully present; and

(3) The person observing the property has probable cause to seize it.

b. "Inadvertence" is not required for plain view seizure. *Horton v. California*, 496 U.S. 128 (1990).

c. The contraband character of the property must be readily apparent. *Arizona v. Hicks*, 480 U.S. 321 (1987). Policeman lawfully in accused's home moved stereo receiver to see serial number and identify whether receiver was stolen; seizure was unlawful because the serial number was not in plain view.

d. Plain feel. Police may seize contraband detected through the sense of touch during a stop and frisk if its contraband nature is readily apparent. *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993). Police officer felt lump of cocaine in accused's pocket during patdown search and seized it. Seizure was held unconstitutional because the contraband nature of the lump was not "readily apparent."

4. Government computers/diskettes. *United States v. Tanksley*, 54 M.J. 169 (2000). No (or at least reduced) reasonable expectation of privacy in office and computer routinely designated for official government use. Seizure was lawful based on plain view.

5. E-mail/Internet.

a. *United States v. Maxwell*, 45 M.J. 406 (1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored in AOL computers. Like a letter or phone conversation, a person sending e-mail enjoys a reasonable expectation of privacy that police will not intercept the transmission without probable cause and a warrant.

b. *United States v. Monroe*, 52 M.J. 326 (2000). Accused did not have a reasonable expectation of privacy in e-mail mailbox in government computer which was the e-mail host for all "personal" mailboxes and where users were notified that system was subject to monitoring.

c. *United States v. Allen*, 53 M.J. 402 (2000). No warrant/authorization required for stored transactional records (distinguished from private communications). Inevitable discovery exception also applied to information sought by government investigators.

d. FBI's email surveillance system, Carnivore. In September and October 2000, House and Senate committees considered legality of Carnivore. The system consists of hardware box that is attached to internet service providers' equipment and searches for predetermined terms in email/user traffic with specially designed software. Legality as a search/ seizure tool has not been tested in any court.

6. Bank records.

a. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). No reasonable expectation of privacy exists in bank records. Even though records were obtained in violation of financial privacy statute, exclusion of evidence was inappropriate, because statute did not create fourth amendment protection.

b. *United States v. Dowty*, 48 M.J. 102 (1998). Servicemember may avail himself of the Right to Financial Privacy Act (RFPA), to include seeking federal district court judge to quash subpoena for bank records. However, Article 43, UCMJ statute of limitations is tolled during such litigation.

7. Enhanced senses. Use of "low-tech" devices to enhance senses during otherwise lawful search is permissible.

a. Dogs.

(1) *United States v. Place*, 462 U.S. 696 (1983). There is no expectation of privacy to odors emanating from luggage in a public place. "Low-tech" dog sniff is not a search (no fourth amendment violation).

(2) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger fourth amendment.

(3) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). Use of drug dogs at health and welfare inspection is permissible. Dog is merely an extension of human sense of smell.

(4) *See* AR 190-12, Military Working Dogs. Detector dogs are not to be used to inspect people.

b. Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.

c. Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.

d. Cameras. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Aerial photography with "commercially available" camera was not a search, but use of satellite photos or parabolic microphones or other "high-tech devices" would be a search.

e. Thermal Imaging Devices. *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), *cert. granted*, 121 S. Ct. 29 (2000). 9th Circuit ruled that police use of thermal imaging device without a warrant was proper. Heat source was lamps used for growing marijuana is private dwelling. The court found no reasonable expectation of privacy despite fact that information obtained was unavailable to naked eye.

8. Interception of wire and oral communications. Communications are protected by the fourth amendment. *Katz v. United States*, 389 U.S. 347 (1967).

a. One party may consent to monitoring a phone conversation.

(1) *United States v. Caceras*, 440 U.S. 741 (1979). A person has no reasonable expectation that a person with whom she is conversing will not later reveal that conversation to police.

(2) *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992). There is no reasonable expectation of privacy as to contents of telephone conversation after it has reached other end of telephone line.

(3) *United States v. Guzman*, 52 M.J. 218 (2000). There are still regulatory requirements for (one-party) consensual wiretapping but exclusion of evidence is not proper remedy except in cases where violation of regulation implicates constitutional or statutory rights.

b. The "bugged" informant. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979) There is no reasonable expectation of privacy where a "wired" informant recorded conversations during drug transaction.

c. Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers. Rules for video surveillance apply if "communications" are recorded

(1) A federal statute provides greater protections than the fourth amendment. 18, U.S.C. §§ 2510-21, 3117, and 3121-26 (1986).

(a) The statute prohibits the unauthorized interception of wire and oral communications. 18 U.S.C. § 2511 (1986).

(b) The statute contains its own exclusionary rule. 18 U.S.C. § 2515 (1986).

(c) The statute applies to private searches, even though such searches are not covered by the fourth amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).

(2) Approval process requires coordination with HQ, USACIDC and final approval from DA Office of General Counsel. *See* Mil. R. Evid. 317; AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986).

(3) An overheard telephone conversation is not an "interception" under the statute. *United States v. Parillo*, 34 M.J. 112 (C.M.A. 1992).

(4) See Clark, *Electronic Surveillance and Related Investigative Techniques*, 128 MIL. L. REV. 155 (1990).

9. Government property.

a. General rule. Mil. R. Evid. 316(d)(3) and Mil. R. Evid. 314(d).

(1) Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. *United States v. Weshenfelder*, 43 C.M.R. 256 (1971).

(2) A reasonable expectation of privacy normally exists in personal-use items such as footlockers and wall lockers.

b. Government desks.

(1) *O'Connor v. Ortega*, 480 U.S. 709 (1987). Search of desk by employer, for "work-related" purpose, does not require probable cause or warrant.

(2) *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987). No expectation of privacy existed in locked government credenza when commander performed search for an administrative purpose.

(3) *United States v. Craig*, 32 M.J. 614 (A.C.M.R. 1991). No expectation of privacy existed in government desk at installation museum where search was conducted by sergeant major.

c. Barracks rooms.

(1) There generally is a reasonable expectation of privacy in items in a barracks room. *See* Mil. R. Evid. 314(d).

(2) *But see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless intrusion and apprehension in barracks upheld. Court rules there is no reasonable expectation of privacy in barracks.

(3) *But see United States v. Curry*, 46 M.J. 733 (N.M. Ct. Crim. App. 1997) *aff'd* 48 M.J. 115 (1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy.

(4) *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987). Drugs discovered during 0300 hours "inspection" in ship's berthing area and box near a common maintenance locker were admissible because there was no reasonable expectation of privacy in these areas.

(5) *United States v. Moore*, 23 M.J. 295, 299 (C.M.A. 1987) (Cox, J., concurring). "I am unable intellectually to harmonize the implicit assumption . . . that service members have legally enforceable expectations of privacy . . . in barracks rooms."

C. Open fields. The fourth amendment does not apply to open fields. Mil. R. Evid. 314(j).

1. *Hester v. United States*, 265 U.S. 57 (1924). Open fields are not "persons, houses, papers, and effects" and thus are not protected by the fourth amendment.

2. *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by fourth amendment; barn was not within "curtilage."

IV. AUTHORIZATION & PROBABLE CAUSE SEARCHES.

A. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based upon probable cause. Mil. R. Evid. 315.

1. A search *warrant* is issued by a civilian judge; it must be in writing, under oath, and based on probable cause.

2. A search *authorization* is granted by a military commander; it may be oral or written, need not be under oath, but must be based on probable cause.

B. Probable Cause.

1. Probable cause is a reasonable belief that the … evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f). It is a "fluid concept … not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1982).

2. Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1982). Anonymous letter containing details which police corroborated provided probable cause.

a. Probable cause will clearly be established if informant is reliable (*i.e.* believable) and has a factual basis for his or her information under the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

b. Probable cause may also be established even if the *Aguilar-Spinelli* test is not satisfied. *Illinois v. Gates*, 462 U.S. 213 (1982). *But see United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). No probable cause existed to search accused's barracks room because commander who authorized search lacked information concerning informant's basis of knowledge and reliability.

c. *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Evidence that accused manufactured crack cocaine in his house gave probable cause to search accused's auto.

d. *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). Probable cause existed to search accused's quarters where commander was informed that contraband handguns had been delivered to the accused and the most logical place for him to store them was his quarters.

3. Staleness. Probable cause will exist only if information establishes that evidence is presently located in area to be searched. Probable cause may evaporate with the passage of time.

a. *United States v. Henley*, 53 M.J. 488 (2000). Magistrate's unknowing use of information over five years old was not dispositive. In addition, good faith exception applied to agents executing warrant.

b. *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988). Probable cause existed despite delay of two to six weeks between informant's observation of evidence of crime (firearm) in accused's car and commander's search authorization; accused was living on ship and had not turned in firearm to ship's armory.

c. *United States v. Agosto*, 43 M.J. 745 (A.F. Ct. Crim. App. 1995). Probable cause existed for search of accused's dormitory room even though 3 1/2 months elapsed between offense and search. Items sought (photos) were not consumable and were of a nature to be kept indefinitely.

4. *See* Appendix B for a guide to articulating probable cause.

C. Persons Who Can Authorize a Search. Mil. R. Evid. 315(d).

1. Any commander of the person or place to be searched ("king-of-the-turf" standard).

   a. The unit commander can authorize searches of:

      (1) Barracks under his control;

      (2) Vehicles within the unit area; and

      (3) Off-post quarters of soldiers in the unit if the unit is overseas.

   b. The installation commander can authorize searches of:

      (1) All of the above;

      (2) Installation areas such as:

         (a) On-post quarters;

         (b) Post exchange (PX);

         (c) On-post recreation centers.

   c. Delegation prohibited. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981). Power to authorize searches is a function of command and may not be delegated to an executive officer.

   d. Devolution authorized. *United States v. Law*, 17 M.J. 229 (C.M.A. 1983). An "acting commander" may authorize a search when commander is absent. *See also United States v. Hall*, 50 M.J. 247 (1999). Commander may resume command at his discretion. Need not have written revocation of appointment of acting commander.

e. More than one commander may have control over the area to be searched. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992) (Crawford, J.). Three commanders whose battalions used common dining facility each had sufficient control over the parking lot surrounding facility to authorize search there.

2. A military magistrate or military judge may authorize searches of all areas where a commander may authorize searches. *See* chapter 9, AR 27-10, Military Justice (24 June 1996), for information on the military magistrate.

3. In the United States a state civilian judge may issue search warrants for off-post areas.

4. In the United States a federal civilian magistrate or judge may issue search warrants for:

a. off-post areas for evidence related to federal crimes; and

b. on-post areas.

5. Overseas a civilian judge may authorize a search of off-post areas.

D. Neutral and Detached Requirement. The official issuing a search authorization must be neutral and detached. See Mil. R. Evid. 315(d). *See also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (discusses four separate cases where commanders' neutrality was attacked).

1. A commander is not neutral and detached when he or she:

a. Initiates or orchestrates the investigation (has personal involvement with informants, dogs, and controlled buys).

b. Conducts the search.

2. A commander may be neutral and detached even though he or she:

   a. Is present at the search.

   b. Has personal knowledge of the suspect's reputation.

   c. Makes public comments about crime in his or her command.

   d. Is aware of an on-going investigation.

3. Alternatives. Avoid any potential "neutral and detached" problems by seeking authorization from:

   a. A military magistrate.

   b. The next higher commander.

E. **Reasonableness and the "Knock and Announce**." Even if based upon a warrant or authorization and probable cause, ***a search must be conducted in a reasonable manner***.

1. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law requirement that police officers "knock and announce" their presence is part of the reasonableness clause of the fourth amendment.

2. *Richards v. Wisconsin*, 117 S.Ct. 1416 (1997) Every no-knock warrant request by police must be evaluated on a case by case basis. Test for no-knock warrant is whether there is reasonable suspicion that evidence will be destroyed or there is danger to police by knocking. *United States v. Ramirez*, 118 S.Ct. 992 (1998). Whether or not property is damaged during warrant execution, the same test applies – reasonable suspicion.

F. Reasonableness and Media "Ride-Alongs." Violation of Fourth Amendment rights of homeowners for police to bring members of media or other third parties into homes during execution of warrants. *Wilson v. Layne*, 119 S. Ct. 1692 (1999).

G. Seizure of Property.

1. Probable cause to seize. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(b). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). Probable cause existed to seize bloody clothing cut from accused's body during emergency room treatment.

2. Effects of unlawful seizure. If there is no probable cause the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.

H. External Impoundment. Reasonable to secure a room ("freeze the scene") pending an authorized search to prevent the removal or destruction of evidence. *United States v. Hall*, 50 M.J. 247 (1999). But freezing the scene does not mean that investigators have unrestricted authorization to search crime scene without a proper warrant/authorization. *See Flippo v. West Virginia*, 120 S. Ct. 7 (1999) (holding that not general crime scene exception exists).

I. Seizure (Apprehension) of Persons.

1. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. RCM 302(c). *See also* Mil. R. Evid. 316(c).

2. Effects of unlawful apprehension. If there is no probable cause the apprehension is illegal and evidence obtained as a result of the apprehension is suppressed under Mil. R. Evid. 311. *See United States v. Dunaway*, 442 U.S. 200 (1979) (fruits of illegal apprehension are inadmissible).

3. Situations amounting to apprehension.

a. There is a seizure or apprehension of a person when a reasonable person, in view of all the circumstances, would not believe he or she was free to leave.

b. In "cramped" settings (*e.g*. on a bus, in a room), there is an apprehension when a reasonable person, in view of all the circumstances, would not feel "free to decline to answer questions." *Florida v. Bostick*, 501 U.S. 429 (1991).

c. Asking for identification is not an apprehension. *United States v. Mendenhall*, 446 U.S. 544 (1980).

d. Asking for identification and consent to search on a bus is not apprehension. *Florida v. Bostick*, 501 U.S. 429 (1991). There was no seizure under the fourth amendment when police got on bus during stopover at terminal and politely asked for consent to search passenger. No probable cause or reasonable suspicion was needed.

e. A police chase is not an apprehension.

(1) *Michigan v. Chestnut*, 486 U.S. 567 (1988). Following a running accused in patrol car was not a seizure where police did not turn on lights or otherwise tell accused to stop. Consequently, drugs accused dropped were not illegally seized.

(2) *California v. Hodari D*., 111 S. Ct. 1547 (1991). Police officer needs neither probable cause nor reasonable suspicion to chase a person who flees after seeing him. A suspect who fails to obey an order to stop is not seized within meaning of fourth amendment.

f. An order to report to military police.

(1) An order to report for non-custodial questioning is not apprehension.

(2) An order to report for fingerprints is not apprehension. *United States v. Fagan*, 28 M.J.64 (C.M.A. 1989). Accused, who was ordered to report to military police for fingerprinting was not apprehended. Fingerprinting is a much less serious intrusion than interrogation, and may comply with the fourth amendment even if there is less than probable cause.

(3) Transporting an accused to the military police station under guard is apprehension. *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982). When accused is ordered to go to military police station under guard, probable cause must exist or subsequent voluntary confession is inadmissible.

4. Apprehension at home or in quarters: a military magistrate, military judge, or the commander who controls that dwelling (usually the installation commander) must authorize apprehension in private dwelling. RCM 302(e); *Payton v. New York*, 445 U.S. 573 (1980).

a. A private dwelling includes:

(1) BOQ/BEQ rooms.

(2) Guest quarters.

(3) On-post quarters.

(4) Off-post apartment or house.

b. A private dwelling does not include:

(1) Tents.

(2) Barracks rooms. *See United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless apprehension in barracks room was proper.

(3) Vehicles.

c. Exigent circumstances may justify entering dwelling without warrant or authorization. *See* Mil. R. Evid. 315(g). *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). Accused was properly apprehended, without authorization, in transient billets. Exigent circumstances justified apprehension.

d. Consent may justify entering dwelling without proper warrant or authorization. *See* Mil. R. Evid. 316(d)(2). *United States v. Sager*, 30 M.J. 777 (A.C.M.R. 1990), *aff'd on other grounds*, 36 M.J. 137 (C.M.A. 1992). Accused, awakened by military police at on-post quarters, in his underwear, and escorted to police station was not illegally apprehended, despite lack of proper authorization, where his wife "consented" to police entry.

e. Probable cause may cure lack of proper authorization. *New York v. Harris*, 495 U.S. 14 (1990). Where police had probable cause but did not get a warrant before arresting accused at home, statement accused made at home was suppressed as violation of *Payton v. New York*, but statement made at police station was held to be admissible. The statement at the police station was not the "fruit" of the illegal arrest at home.

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT.

A. Exigent Circumstances.

1. General rule. A search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence. Mil. R. Evid. 315(g).

2. Burning marijuana. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). Police smelled marijuana coming from house, looked into a window and spotted drug activity. Police then entered and apprehended everyone in the house, and later obtained authorization to search. Held: this was a valid exigency. *See also United States v. Dufour*, 43 M.J. 772 (N.M.Ct.Crim.App. 1995)(Observed use of drugs in home allowed search and seizure without obtaining warrant.)

3. Following a controlled buy.

   a. *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). Commander and police entered accused's barracks room and searched it immediately after a controlled buy. Held: search was valid based on exigent circumstances.

   b. *But see United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982). OSI agents and civilian police entered accused's off-post apartment immediately after a controlled buy. Search was improper because there were no real exigencies, and there was time to seek authorization.

4. Traffic Stops (Pretextual):

   a. *Whren v. United States*, 116 S.Ct. 1769 (1996). A stop of a motorist, supported by probable cause to believe he committed a traffic violation, is reasonable under the fourth amendment regardless of the actual motivations of the officers making the stop. Officers who lack probable cause to stop a suspect for a serious crime may use the traffic offense as a pretext for making a stop, during which they may pursue their more serious suspicions – using plain view or consent.

b. *United States v. Rodriquez*, 44 M.J. 766 (N.M. Ct. Crim. App. 1996). State Trooper had probable cause to believe that accused had violated Maryland traffic law by following too closely. Even though the violation was a pretext to investigate more serious charges, applying *Whren*, the stop was lawful.

c. Seizure of drivers and passengers. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may, as a matter of course, order the driver of a lawfully stopped car to exit. *Maryland v. Wilson*, 117 S.Ct. 882 (1997). *Mimms* rule extended to passengers. *But see Wilson v. Florida*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) applying *Mimms* and *Wilson* in holding that a police officer conducting a lawful traffic stop may not order a passenger back in the stopped vehicle.

5. Hot pursuit. *Warden v. Hayden*, 387 U.S. 294 (1967). Police, who chased armed robber into house, properly searched house.

6. Drugs or alcohol in the body.

a. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

b. *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Warrantless blood alcohol test was not justified by exigent circumstances where there was no evidence that time was of the essence or that commander could not be contacted.

c. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

d. Nonconsensual extraction of body fluids without a warrant requires more than probable cause; there must be a "clear indication" that evidence of a crime will be found and that delay could lead to destruction of evidence. Mil. R. Evid. 312(d).

B. Automobile Exception.

1. General rule. Movable vehicles may be searched based on probable cause alone; no warrant is required. Mil. R. Evid. 315(g)(3).

a. *Chambers v. Maroney*, 399 U.S. 42 (1970). The word "automobile" is not a talisman, in whose presence the fourth amendment warrant requirement fades away. *See also Pennsylvania v. Labron*, 116 S.Ct. 2485 (1996). The auto exception is not concerned with whether police have time to obtain a warrant. It is concerned solely with whether the vehicle is "readily mobile."

b. Ability to Obtain a Warrant Irrelevant. *Maryland v. Dyson*, 199 S. Ct. 2013 (1999) (per curiam). Police in Maryland waited for 13 hours for suspect to return to state and did not attempt to obtain a warrant. Supreme Court reaffirmed that automobile exception does not require a "separate finding of exigency precluding the police from obtaining a warrant."

c. Rationale:

(1) Automobiles are mobile; evidence could disappear by the time a warrant is obtained.

(2) There is a lesser expectation of privacy in a car than in a home.

2. Scope of the search: any part of the car, including the trunk, and any containers in the car may be searched.

a. *United States v. Ross*, 456 U.S. 798 (1982). Police may search any part of the car and any containers in car if police have probable cause to believe they contain evidence of a crime.

b. *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Military police who had probable cause to search auto for drugs properly searched accused's wallet found within auto.

3. Automobile is broadly defined. *California v. Carney*, 471 U.S. 386 (1985). Recreational vehicle falls within auto exception unless it is clearly used solely as a residence.

4. Timing of the search. *United States v. Johns*, 469 U.S. 478 (1985). Police had probable cause to seize truck but did not search it for three days. There is no requirement that search be contemporaneous with lawful seizure.

5. Closed containers in vehicles may also be searched. *California v. Acevedo*, 111 S. Ct. 1982 (1991). Probable cause to believe closed container located in vehicle contains evidence of crime allows warrantless search of container. This case overruled *United States v. Chadwick*, 433 U.S. 1 (1977), which required police to have warrant where probable cause relates solely to container within vehicle. *Accord United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991).

6. No distinction between containers owned by suspect and passengers: both sorts of containers may be searched. *Wyoming v. Houghton*, 119 S.Ct. 1297 (1999).

7. Applies to Seizure of Automobiles Themselves. *Florida v. White*, 199 S.Ct. 1555 (1999). Automobile exception applies to seizure of vehicle for purposes of forfeitures and police do not need to get a warrant if they have probable cause to believe that car is subject to seizure. If seized, police are then allowed to conduct a warrantless inventory of the seized vehicle.

VI. EXCEPTIONS TO PROBABLE CAUSE.

A. Consent Searches.

1. General rule. If a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. Mil. R. Evid. 314(e).

2. Persons Who Can Give Consent.

a. Anyone who exercises actual control over property may grant consent to search that property. Mil. R. Evid. 314(e)(2). *United States v. Reister*, 44 M.J. 409 (1996). House sitter had actual authority to consent to search apartment, books and nightstand. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988). Estranged husband gave consent to enter apartment and to search wife's closet.

b. Anyone with apparent authority may grant consent.

(1) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Girlfriend with key let police into boyfriend's apartment where drugs were found in plain view. Police may enter private premises without a warrant if they are relying on the consent of a third party whom they reasonably, but mistakenly, believe has a common authority over the premises.

(2) *United States v. White*, 40 M.J. 257 (C.M.A. 1994). Airman who shared off-base apartment with accused had apparent authority to consent to search of accused's bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other's rooms without asking permission.

3. Voluntariness. Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992).

   a. Traffic stop. *Ohio v. Robinette*, 117 S.Ct. 417 (1996). A request to search a detained motorist's car following a lawful traffic stop does not require a bright line "you are free to go" warning for subsequent consent to be voluntary. Consent depends on the totality of the circumstances.

   b. Coerced consent is involuntary. *But see United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991). Accused's consent was voluntary despite fact that he allegedly took commander's request to be an implied order.

   c. It's OK to Trick. United States v. Vassar, 52 M.J. 9 (1999). Accused taken to hospital for head injury and told that a urinalysis was needed for treatment. CAAF held it is permissible to use trickery to obtain consent as long as it does not amount to coercion. Urinalysis admissible, despite military judge applying wrong standard for resolving questions of fact.

   d. Right to counsel. Reading Article 31 rights is recommended but not required. *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987). Request for consent after accused asked for lawyer was permissible. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Commander's failure to give Article 31 warnings did not affect voluntariness of consent to urinalysis test.

4. Scope. Consent may be limited to certain places, property and times. Mil. R. Evid. 314(e)(3).

5. Withdrawal. Consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). *But see United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). Search was lawful where accused initially consented, then withdrew consent, and then consented again.

6. Burden of proof. Consent must be shown by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

7. Consent and closed containers. *Florida v. Jimeno*, 111 S. Ct. 1801 (1991). General consent to search allows police to open closed containers.

B. Searches Incident to Apprehension.

1. General rule. A person who has been apprehended may be searched for weapons or evidence within his "immediate control." Mil. R. Evid. 314(g).

a. Scope of search. A person's immediate control includes his person, clothing, and the area within his wingspan (sometimes expansively defined to include "lunging distance").

b. Purpose of search: to protect police from nearby weapons and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969).

c. Substantial delay between apprehension and seizure will not invalidate the search "incident." *United States v. Curtis*, 44 M.J. 106 (1996) (citing *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234 (1974) (10 hours)).

2. Search of automobiles incident to arrest.

a. When a policeman has made a lawful arrest of an occupant of an automobile he may search the entire passenger compartment and any closed containers in passenger compartment, *but not the trunk*. Mil. R. Evid. 314(g)(2).

b. Search may be conducted after the occupant has been removed from the automobile, as long as the search is "contemporaneous" with the apprehension. Mil. R. Evid. 314(g)(2); *New York v. Belton*, 453 U.S. 545 (1981). Search of zipped jacket pocket in back seat of car following removal and arrest of occupants upheld; new bright line rule established.

c. Arrest means arrest. A search incident to a traffic citation, as opposed to an arrest, is not constitutional. *Knowles v. Iowa*, 119 S. Ct. 484 (1999).

C. Stop and Frisk.

1. General rule. Fourth amendment allows a limited government intrusion ("stop and frisk") based on less than probable cause ("reasonable suspicion") where important government interests outweigh the limited invasion of a suspect's privacy. *Terry v. Ohio*, 392 U.S. 1 (1968); Mil. R. Evid. 314(f).

2. Reasonable suspicion.

a. Reasonable suspicion is specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

(1) Reasonable suspicion is measured under the totality of the circumstances.

(2) Reasonable suspicion is less than probable cause.

b. Reasonable suspicion may be based on police officer's own observations. *United States v. Peterson*, 30 M.J. 946 (A.C.M.R. 1990). Reasonable suspicion existed to stop soldier seated with companion in car parked in dead end alley in area known for drug activity at night; car license plate was out-of-state.

c. Reasonable suspicion may be based on collective knowledge of all police involved in investigation. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Information in police department bulletin was sufficient reasonable suspicion to stop car driven by robbery suspect.

d. Reasonable suspicion may be based on an anonymous tip. *Alabama v. White*, 496 U.S. 325 (1990). Detailed anonymous tip was sufficient reasonable suspicion to stop automobile for investigative purposes. *But see Florida v. J.L.*, 120 S. Ct. 1375, 1379 (2000); anonymous tip needs to be reliable in "its assertion of illegality."

e. Reasonable suspicion may be based on drug courier "profile." *United States v. Sokolow*, 490 U.S. 1 (1988). "Innocent" noncriminal conduct amounted to reasonable suspicion to stop air traveler who paid $2100 cash for two tickets, had about $4000 in cash, was travelling to a source city (Miami), was taking 20 hour flight to stay only 2 days, was checking no luggage (only carry-ons), was wearing same black jumpsuit and gold jewelry on both flights, appeared nervous and was travelling under alias. Cocaine found in carry-on bag after dog alerted was admissible.

f. Reasonable suspicion may be based on "headlong flight" coupled with other circumstances (like nervous and evasive behavior and high-crime area). *Illinois v. Wardlow*, 120 S.Ct. 673 (2000).

3. Nature of detention. A stop is a brief, warrantless investigatory detention based on reasonable suspicion accompanied by a limited search.

a. Frisk for weapons.

(1) The police may frisk the suspect for weapons when he or she is reasonably believed to be armed and dangerous. Mil. R. Evid. 314(f)(2).

(2) Plain feel. Police may seize contraband items felt during frisk if its contraband nature of items is readily apparent. *Minnesota v. Dickerson*, 113 S.Ct. 2130 (1993) (seizure of cocaine during frisk held unconstitutional because the contraband nature of cocaine was not readily apparent). But looking down the front of a suspect's pants to determine if "bulges" were weapons was reasonable. *United States v. Jackson*, No. ACM 33178, 2000 CCA LEXIS 57 (A.F. Ct. Crim. App. Feb. 28, 2000) (unpublished opinion).

b. Length of the detention.

(1) 15 minutes in small room is too long. *Florida v. Royer*, 460 U.S. 491 (1983). Suspect was questioned in a large storage closet by two DEA agents was unreasonable; "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."

(2) 20 minutes may be sufficiently brief if police are hustling. *United States v. Sharpe*, 470 U.S. 675 (1985). 20-minute detention by highway patrolman waiting for DEA agent to arrive was not unreasonable.

c. Use of firearms.

(1) *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982). Pointing shotgun at murder suspect did not turn legitimate investigative stop into arrest requiring probable cause.

(2) *United States v. Sharpe*, 470 U.S. 695 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). Merely displaying handgun did not turn an investigative detention into a seizure requiring probable cause.

(3) *United States v. Alexander*, 901 F.2d 272 (2nd Cir. 1990). Approaching car with drawn guns and ordering driver out of car to frisk for possible weapons did not convert *Terry* stop into full-blown arrest requiring probable cause.

4. Important government interests.

a. Police officer safety. *Terry v. Ohio*, 392 U.S. 1 (1967). Frisk was justified when officer reasonably believed suspect was about to commit robbery and likely to have weapon.

b. Illegal immigrants. *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). But Border Patrol Agent's squeezing of a canvas bag during a routine stop of bus at checkpoint violated Fourth Amendment. *Bond v. United States*, 120 S. Ct. 1462 (2000).

c. Illegal drugs. *United States v. De Hernandez*, 473 U.S. 531 (1985). "[T]he veritable national crisis in law enforcement caused by smuggling of illicit narcotics. . . represents an important government interest." *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

d. Solving crimes and seeking justice. *United States v. Hensley*, 469 U.S. 221 (1985). There is an important government interest "in solving crime and bringing offenders to justice."

5. House frisk ("Protective Sweep"). *Maryland v. Buie*, 494 U.S. 325 (1990). Police may make protective sweep of home during lawful arrest if they have "reasonable belief based on specific and articulable facts" that a dangerous person may be hiding in area to be swept; evidence discovered during protective sweep is admissible.

D. Administrative Inspections.

1. The military's two-part test. Mil. R. Evid. 313(b).

a. Primary purpose test.

(1) Inspection. The primary purpose of an inspection must be to ensure the security, military fitness, or good order and discipline of the unit (administrative purpose).

(2) Criminal search. An examination made for the primary purpose of obtaining evidence for use in a court-martial or in other disciplinary proceedings (criminal purpose) is not an inspection.

b. Subterfuge rule. If a purpose of an examination is to locate weapons and contraband, and if the examination:

(1) Was directed immediately following the report of a crime and not previously scheduled; or

(2) Specific persons were selected or targeted for examination; or

(3) Persons were subjected to substantially different intrusions.

Then the prosecution must prove by clear and convincing evidence that the purpose of the examination was administrative, not a subterfuge for an illegal criminal search.

2. The Supreme Court's test. *New York v. Burger*, 482 U.S. 691 (1987) (warrantless "administrative" inspection of junkyard pursuant to state statute was proper).

   a. There are three requirements for a lawful administrative inspection:

      (1) There must be a substantial government interest in regulating the activity;

      (2) The regulation must be necessary to achieve this interest; and

      (3) The statute must provide an adequate substitute for a warrant.

         (a) The statute must give notice that inspections will be held;

         (b) The statute must set out who has authority to inspect;

         (c) The statute must limit the scope and discretion of the inspection.

   b. A dual purpose is permissible. A state can address a major social problem both by way of an administrative scheme and through penal sanctions.

3. Health and welfare inspections. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989). Stolen toolbox was discovered in short-timer's room. Government failed to show by clear and convincing evidence that examination was an "inspection" and not an "illegal search."

4. Unit urinalysis.

a. Invalid inspection. *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Accused's urinalysis inspection test results were improperly admitted where urinalysis "inspection" was conducted because the first sergeant heard rumors of drug use in his unit and prepared a list of suspects, including accused, to be tested. The military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.

b. Valid inspection.

(1) Knowledge of "Reports." *United States v. Brown*, 52 M.J. 565 (Army Ct. Crim. App. 1999). Commander directed random urinalysis after report that several soldiers were using drugs in the command. The court found that the urinalysis was a valid inspection despite the recent report (proper administrative purpose for inspection).

(2) In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the accused's urinalysis results were properly admitted, despite the fact that the test followed report to commander's subordinate that accused had used drugs. Knowledge of a subordinate will not be imputed to the commander.

(3) Primary Purpose.

(a) *United States v. Shover*, 44 M.J. 119 (1996). The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." This was a proper administrative purpose.

(b) *United States v. Jackson*, 48 M.J. 292 (1998). Commander stated primary purpose of inspection of barracks rooms, less than 2 hours of receiving anonymous tip about drugs in a soldier's barracks room, was unit readiness. Court held inspection was proper. See also *United States v. Brown*, 52 M.J. 565 (Army Ct. Crim. App. 1999)

5. Gate inspections.

a. Procedures. *See* AR 210-10, Installations, Administration (12 Sep. 1977), para. 2-23c (summarizes the legal requirements for gate inspections) (the regulation has been rescinded but is being revised for future promulgation).

(1) A gate search should be authorized by written memorandum or regulation signed by the installation commander defining the purpose, scope and means (time, locations, methods) of the search.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure, either by a sign or a visitor's pass.

(3) Technological aids. Metal detectors and drug dogs may be used. *See* AR 190-12, Military Police Working Dogs (15 Dec. 1984).

(4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.

(5) Female patdowns. Use female inspectors if possible.

(6) Entry inspections.

(a) Civilians: must consent to inspection or their entry is denied; may not be inspected over their objection.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

(7) Exit inspections.

(a) Civilians: may be inspected over objection, using reasonable force, if necessary.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

b. Discretion of inspectors. *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987). Police may use some discretion, per written command guidance, to select which cars are stopped and searched.

E. Border Searches.

1. Customs inspections.

a. Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (longstanding right of sovereign to protect itself).

b. Customs inspections in the military. Border searches for customs or immigration purposes may be conducted when authorized by Congress. Mil. R. Evid. 314(b); *United States v. Williamson*, 28 M.J. 511 (A.C.M.R. 1989). Military police customs inspector's warrantless search of household goods was reasonable since inspection was conducted pursuant to DOD Customs Regulations.

2. Gate searches overseas.

a. General rule. Installation commanders overseas may authorize searches of persons and property entering and exiting the installation to ensure security, military fitness, good order and discipline. Mil. R. Evid. 314(c).

(1) Primary purpose test is applicable.

(2) Subterfuge rule is inapplicable.

b. *United States v. Stringer*, 37 M.J. 310 (C.M.A. 1993). Gate searches overseas are border searches; they need not be based on written authorization and broad discretion can be given to officials conducting the search.

F. Inventories.

1. General rule. Inventories conducted for an administrative purpose are constitutional; contraband and evidence of a crime discovered during an inventory may be seized. Mil. R. Evid. 313(c).

a. Primary purpose test is applicable.

b. Subterfuge rule is inapplicable.

2. Purpose. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Inventories of incarcerated persons or impounded property are justified for three main reasons:

a. To protect the owner from loss;

b. To protect the government from false claims; and

c. To protect the police and public from dangerous contents.

3. Military inventories. Military inventories that are required by regulations serve lawful administrative purposes. Evidence obtained during an inventory is admissible. Inventories are required when soldiers are:

   a. Absent without leave (AWOL), AR 700-84, Issue and Sale of Personal Clothing (15 May 1983).

   b. Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (15 May 1983).

   c. Placed in pretrial or post-trial confinement, AR 190-47, The U.S. Army Corrections System (17 June 1994).

4. Discretion and Automobile Inventories. *Florida v. Wells*, 495 U.S. 1 (1990). When defendant was arrested for DWI and his car impounded and inventoried, the police improperly searched a locked suitcase in the trunk of car despite fact that there was no written inventory regulation. This search was insufficiently regulated to satisfy the fourth amendment.

5. *See* Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95 (1985) (examples and analysis of military inventories).

G. Sobriety Checkpoints.

1. General rule. The fourth amendment does not forbid the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving; neither probable cause nor reasonable suspicion are required as the stop is constitutionally reasonable. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

2. Crime Prevention Roadblocks. *Indianapolis v. Edmond*, 121 S. Ct. __ (2000). Public checkpoints/roadblocks for the purpose of drug interdiction violate the Fourth Amendment. Stops for the purpose of general crime control are only justified when there is some quantum of individualized suspicion.

3. *See* Piepmeier, *Practical Problems of Sobriety Checkpoints*, ARMY LAW., Mar. 1992, at 15.

H. Emergency Searches.

1. General rule. In emergencies, a search may be conducted to render medical aid or prevent personal injury. Mil. R. Evid. 314(i).

2. *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.

3. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). Warrantless entry into accused's apartment by landlord was permissible because apartment was producing egregious odor.

4. *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992). Warrantless entry into accused's apartment was justified by emergency when supervisor thought accused had or was about to commit suicide.

I. Searches for Medical Purposes.

1. General rule. Evidence obtained from a search of an accused's body for a valid medical purpose may be seized. Mil. R. Evid. 312(f). *See United States v. Stevenson*, 53 M.J. 257 (2000) for applicability of medical purpose exception to members of the Temporary Disability Retired List.

2. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). Blood alcohol test of accused involved in fatal traffic accident was medically necessary, despite the fact that the test result did not actually affect accused's treatment. Test result was admissible.

J. School Searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Principal's search of student's purse, which revealed marihuana, was proper. School officials may conduct searches of students based upon "reasonable grounds" as long as the search is not "excessively intrusive."

VII. URINALYSIS.

A. Increase in Use? Army Statistics:

	Active			Guard/Reserve	
	1996	1998	1999	1996	1998
Opiates	421	854	1194	126/37	230/137
PCP	5	23	6	1/1	27/2
Amph	157	689	546	143/32	310/80
Cocaine	1262	1341	1304	983/306	774/369
THC	4111	5121	5393	3008/820	2542/989
LSD	13	17	96	1/0	0/0

B. References.

1. DOD Dir. 1010.1, Drug Abuse Testing Program (28 Dec. 1984).

2. DOD Inst. 1010.16, (9 Dec. 1994)(Red Tape Seal).

3. AR 600-85, Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) (I03, 1 Oct. 1993).

4. Army Center for Substance Abuse Programs, Biochemical Testing Branch, Alexandria, VA. Telephone: (703) 681-9453.

C. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM.

1. What Urinalysis Test Proves.

a. Urine test proves only past use; it proves that drug or drug metabolites (waste products) are in the urine.

b. Urine test does not prove:

(1) Impairment.

(2) Single or multiple usage.

(3) Method of ingestion.

(4) Knowing ingestion.

(a) In the past, presence of an amount of drug metabolite allowed a permissible inference that the accused knowingly consumed a particular drug. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

(b) Based on *United States v. Campbell,* 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), the government's burden is now heavier to raise the permissible inference (three-prong test).

(c) The CAAF has yet to decide any cases where *Campbell* has been applied. *See United States v. Barnes*, 53 M.J. 624 (N.M. Ct. Crim. App. 2000); *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

(d) "Other" evidence under *Campbell*. In *Campbell II*, the court stated that "[i]f the rest results, standing alone, do not provide a rational basis for inferring knowing use, then the prosecution must produce other direct or circumstantial evidence of knowing use in order to meet its burden of proof. *See United States v. Tanner*, 53 M.J. 778 (A.F. Ct. Crim. App. 2000) and *United States v. Phillips*, 53 M.J. 758 (A.F. Ct. Crim. App. 2000). But compare both with United States v. Barnes, 53 M.J. 624 (N.M. Ct. Crim. App. 2000).

2. Drugs Tested.

a. Marihuana (THC metabolite)

b. Cocaine (BZE metabolite)

c. Other drugs tested (each sample, on rotating basis, or at direction of command):

(1) LSD

(2) Opiates (morphine, codeine, 6-MAM metabolite of heroin)

(3) PCP

(4) Amphetamines

(5) Barbiturates

(6) Anabolic steroids

3. Drug Metabolites.

a. Marihuana.

(1) Main psychoactive ingredient is delta 9-tetrahydro-cannabinol (short name: delta-9 THC).

(2) Main metabolite (waste product) of delta-9 THC is delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxyl THC). This is metabolite tested for within DOD.

(3) 9-carboxyl THC is not psychoactive, and is not the only metabolite. Percentage of total metabolites that are 9-carboxyl THC is from 10-90%.

(4) 9-carboxyl THC is found in urine only when human body metabolizes marihuana; it cannot be naturally produced by human body.

b. Cocaine.

(1) Main metabolite is benzoylecgonine (BZE).

(a) This is the metabolite tested for within DOD.

(b) BZE is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body, but can be produced by introducing cocaine directly into urine (no metabolizing needed).

(2) Another metabolite is ecgonine methyl ester (EME).

(a) This metabolite is not tested for within DOD.

(b) EME dissipates from the body more quickly than BZE.

(c) EME is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body and cannot be produced by introducing cocaine directly into urine.

4. Army Testing Procedures. *See* AR 600-85, Appendix E.

a. Unit Alcohol and Drug Coordinator (UADC).

(1) Prepares urine sample bottle by placing soldier's social security number, specimen number and julian date on bottle.

(2) Prepares DD Form 2624 (new chain of custody form) listing up to 12 samples on form.

(3) Prepares urinalysis ledger listing all samples.

(4) Gives soldier bottle in presence of observer. Soldier initials bottle and signs ledger.

b. Observer.

(1) Signs ledger.

(2) Directly observes soldier provide sample and place cap on bottle.

(3) Returns bottle to UADC, signs chain of custody form and initials bottle label.

c. UADC.

(1) Affixes red tape seal.

(2) Signs chain of custody form and initials all bottle labels.

(3) Places bottles in box with chain of custody form.

d. Installation Biochemical Test Coordinator (IBTC).

(1) Receives samples from UADC within 24 hours of urinalysis. Ensures samples and forms are in proper order and signs chain of custody form.

(2) May conduct prescreening test on samples.

(3) Ensures bottles are sealed and mails them to laboratory for testing.

5. Testing Facilities Used by Army.

a. Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Honolulu, HI. Telephone: (808) 433-5176. AC/RC.

b. Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, MD. Telephone: (301) 677-7085. AC/RC

6. Urinalysis Tests Used.

a. Initial screening test used at installation: E.M.I.T. (Syva Co.) or "Enzyme Multiplied Immunoassay Technique" portable tester.

b. Laboratory tests:

(1) Screening test: immunoassay (KIMS Technology).

(a) Used at Army & Air Force laboratories and Northwest Toxicology civilian laboratory.

(b) Test attaches chemical markers to metabolites and measures transmission of light through sample (more light, more positive). Every positive screened twice.

(c) Test is not 100% accurate.

(2) Confirming test: gas chromatography/mass spectroscopy (GC/MS).

(a) Used at Army & Air Force laboratories and Northwest Toxicology civilian laboratory.

(b) GC test measures period of time molecules in sample take to traverse a tube; drug metabolites traverse tube in characteristic period of time.

(c) MS test fragments molecules in sample and records the fragments on spectrum. Metabolite fragments are unique.

(d) Test is 100% accurate.

7. Cut-off Levels. DOD and urine testing laboratories have established "cut-off" levels. Samples which give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening and the confirming test.

a. Cut-off levels for screening tests (EMIT and IA).

Drug	*ng/ml*
Marihuana (THC)	50
Cocaine (BZE)	150
Amphetamines	500
Barbiturates	200

Opiates	2000
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.5

b. Cut-off levels for GC/MS test:

Drug	*ng/ml*
Marihuana (THC)	15
Cocaine (BZE)	100
Amphetamine/methamphetamine	500
Barbiturates	200
Opiates	
Morphine	4000
Codeine	2000
6-MAM (heroin)	10
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.2

8. Drug Detection Times.

a. Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: US Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

Drug:	Retention time (approx.):
Marihuana (THC)(Half-life 36 hrs)	
Acute dosage (1-2 joints)	2-3 days
Marihuana (eaten)	1-5 days
Moderate smoker 4 times per week):	5 days
Heavy smoker (daily):	10 days
Chronic smoker:	14-18 days
(may be longer)	20 days or

Cocaine (BZE)(Half-life 4 hrs)	2-4 days
Amphetamines	1-2 days
Barbiturates	
Short acting (e.g. secobarbital):	1 day
Long acting (e.g. phenobarbital):	2-3 weeks
Opiates	2 days
Phencyclidine (PCP):	14 days
Chronic user:	up to 30 days
Lysergic Acid Diethylamide(LSD)	8-30 hours

b. Factors which affect retention times:

(1) Drug metabolism and half-life.

(2) Donor's physical condition.

(3) Donor's fluid intake prior to test.

(4) Donor's method and frequency of ingestion of drug.

c. Detection times may affect:

(1) Probable cause. Information concerning past drug use may not provide probable cause to believe the soldier's urine contains traces of drug metabolites, unless the alleged drug use was recent.

(2) Jurisdiction over reservists. To prosecute reservist for drug use, government must prove use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993). Court, in dicta, questioned validity of *Chodara* and stated that the body continues to use drugs as long as they remain in the body.

D. COMMANDERS' OPTIONS.

1. Courts-Martial.

a. Court-martial procedures are complex; the Mil. R. Evid. apply.

b. Reservists. Reservists may not be convicted at a court-martial for drug use unless use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (urine sample testing positive for cocaine less that 36 hours after reservist entered active duty was insufficient to establish jurisdiction). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (court, in dicta, questioned the validity of *Chodara* and stated that body continues to "use" drugs as long as they remain in the body).

2. Nonjudicial Punishment.

a. Nonjudicial punishment procedures are relatively simple. *See* AR 27-10, Military Justice (24 June 1996), ch. 3.

b. Mil. R. Evid. do not apply. AR 27-10, para. 3-18j.

c. Burden of proof is beyond reasonable doubt. AR 27-10, para. 3-18l.

d. Reservists. Reservists may not receive nonjudicial punishment under Article 15 for drug use unless use occurred while on federal duty. *See* Article 2(d)(2) (reserve component personnel may be involuntarily recalled to active duty for nonjudicial punishment only with respect to offenses committed while on federal duty) and *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990).

3. Administrative Separations.

a. The following soldiers must be processed for administrative separation IAW AR 600-85, para. 1-11b (I03, 1 Oct. 1993):

(1) Soldiers who abuse drugs one time and are:

(a) Officers and noncommissioned officers (SGT and above);

(b) Other enlisted soldiers with three or more years of service (active or reserve).

(2) Any soldier who abuses drugs two or more times.

b. Rules at administrative separations are simpler. *See* AR 15-6, Procedure for Investigating Officers and Boards of Officers, (11 May 1988).

(1) The Mil. R. Evid. do not apply. AR 15-6, para. 3-6a.

(2) Burden of proof is preponderance of evidence. AR 15-6, para. 3-9b.

c. Reservists. Reservists may be separated for drugs even though use did not occur while on federal duty. *See* AR 135-178, Separation of Enlisted Personnel (1 Sep. 1994) and AR 135-175, Separation of Officer Personnel (1 May 1971).

E. CONSTITUTIONALITY OF URINALYSIS PROGRAM.

1. Probable Cause Urinalysis.

a. A urinalysis test is constitutional if based upon probable cause. Mil. R. Evid. 312(d) and 315.

b. A warrant or proper authorization may be required.

c. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

d. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

2. Inspections.

a. A urinalysis is constitutional if it is part of a valid random inspection.

Mil. R. Evid. 313(b); *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994). The fact that the results of urinalysis inspections are made available to prosecutors did not make the inspection an unreasonable intrusion. *See also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989) (urine tests of train operators involved in accidents are reasonable searches) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (urine testing of employees who apply to carry firearms or be involved in drug interdiction does not require a warrant). *Chandler v. Miller*, 117 S.Ct. 1295 (1997) (to conduct urinalysis without probable cause, must show "special need.")

b. Authority to order urinalysis inspections. *United States v. Evans*, 37 M.J. 867 (A.F.C.M.R. 1993). Commander of active duty squadron to which accused's reserve unit was assigned had authority to order urinalysis inspection.

c. Subterfuge under Mil.R.Evid. 313(b).

(1) Report of Offense. *United States v. Shover*, 44 M.J. 119 (1996). Marihuana was "planted" in an officer's briefcase. Following "report" of an offense and during investigation to find the "planter," the commander ordered a urinalysis. The accused tested positive for methamphetamines. Although the test triggered the subterfuge rule of Mil. R. Evid. 313(b), the government met its clear and convincing burden. The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The judge ruled the primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." CAAF affirmed.

(2) Knowledge of subordinates.

(a) *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994). Urinalysis test results were properly admitted, even though the urinalysis inspection followed reports that accused had used drugs and even though accused's section was volunteered for inspection on basis of reports. Commander who ordered inspection was ignorant of reports.

(b) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis test results were improperly admitted where urinalysis inspection was conducted because first sergeant heard rumors of drug use in unit and selected accused to be tested based on his suspicions. Judge erred in finding that government proved, by clear and convincing evidence, that inspection was not subterfuge for criminal search.

d. Primary Purpose. *United States v. Brown*, 52 M.J. 565 (A.C.C.A. 1999). Several members of unit allegedly were using drugs. Because of this, CDR ordered random 30% inspection. CDR's primary purpose was because he "wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs." Met the primary purpose test of M.R.E. 313(b).

e. Targeting soldiers for inspection. *United States v. Moore*, 41 M.J. 812 (N.M. Ct. Crim. App. 1995). Military judge improperly excluded urinalysis results where accused was placed in nondeployable "legal" platoon after an Article 15, and regimental commander inspected accused's platoon more frequently than others. Commander did not target. More frequent tests were based on disciplinary problems.

3. Consent Urinalysis.

a. A urinalysis is constitutional if obtained with consent. Mil. R. Evid 314(e).

b. Consent must be voluntary under totality of the circumstances. *United States v. White*, 27 M.J. 264 (C.M.A. 1988).

c. Consent is involuntary if commander announces his intent to order the urine test should the accused refuse to consent. Mil. R. Evid. 314(e)(4).

d. Consent is voluntary if the commander does not indicate his "ace in the hole" (authority to order a urinalysis). *United States v. White*, 27 M.J. 264 (C.M.A. 1988). *See also United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989). Consent was voluntary where accused never asked what options were and commander never intimated that he could order him to give a sample. *See also United States v. Vassar*, 52 M.J. 9 (1999). Permissible to use trickery to obtain consent as long as consent was not coerced.

e. If soldier asks "what if I do not consent?"

(1) *United States v. Radvansky*, 45 M.J. 226 (1996). Totality of the circumstances, not a bright-line rule, controls consent to urinalysis in the face of a command request. Notwithstanding First Sergeant's comment that accused could "give a sample of his own free will or we could have the commander direct you to do so" accused volutntarily consented to urinalysis. The mere remark that a commander can authorize a search does not render all subsequent consent involuntary.

(2) *But see United States v. White*, 27 M.J. 264 (C.M.A. 1988). Consent is involuntary if commander replies that he or she will order urine test.

(3) Consent is voluntary if commander meaningfully explains the consequences of a consent sample versus a fitness for duty or probable cause sample. *United States v. White*, 264 M.J. 264, 266 (C.M.A. 1988) (dicta). See also *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990).

f. Probable cause generally will not cure invalid consent. *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990). Urinalysis was inadmissible where consent was obtained involuntarily even though commander had probable cause to order urinalysis. Court stated, however, that probable cause to order urine test may provide an alternative basis upon which to admit urine sample obtained through invalid consent where:

(1) Commander deals directly with accused in requesting consent, and would have authorized seizure of urine based on probable cause but for belief that he or she had valid consent; or

(2) Commander actually orders urinalysis based on probable cause, but relaying official asks for consent (which later is found to be invalid).

(3) Requesting consent is not interrogation under Art. 31 or the fifth amendment. *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Civilian police officer apprehended accused for suspected use of drugs and later asked if he would consent to a urinalysis. This question was not custodial interrogation under the fifth amendment.

(4) Attenuation of taint from prior unwarned admissions. *United States v. Murphy*, 39 M.J. 486 (C.M.A. 1994). Accused's consent to urinalysis test was not tainted by prior admissions obtained prior to rights warnings. Prior questioning was not coercive and consent was given voluntarily.

(5) *Consent. It's OK to Trick. United States v. Vassar*, 52 M.J. 9 (1999). NCO told accused he needed to consent to urinalysis because of a head injury. Permissible to use trickery to obtain consent as long as it does not amount to coercion

4. Medical Urinalysis. A urinalysis is constitutional if conducted for a valid medical purpose. Mil. R. Evid. 312(f).

a. *United States v. Fitten*, 42 M.J. 179 (1995). Forced catheterization of accused did not violate fourth amendment or Mil. R. Evid. 312(f) where it was medically necessary to test for dangerous drugs because of accused's unruly and abnormal behavior. Diversion of part of urine obtained from medical test to drug laboratory to build case against accused was permissible.

b. In the Army, most medical tests may only be used for limited purposes. AR 600-85, paras. 6-4a and 10-3b(1).

5. Fitness For Duty Urinalysis.

a. A commander may order a urinalysis based upon reasonable suspicion to ensure a soldier's fitness for duty even if the urinalysis is not a valid inspection and no probable cause exists. Results of such tests may only be used for limited purposes. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See* AR 600-85, para. 10-3(a); AFR 30-2, para. 5-8.

b. Reasonable suspicion required for a fitness for duty urinalysis is the same as reasonable suspicion required for a "stop and frisk" under the fourth amendment. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

6. Use in Rebuttal.

a. *United States v. Graham,* 50 M.J. 56 (1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result 4 years earlier, of which accused was acquitted in court-martial, after accused stated he was "flabbergasted" at having tested positive.

b. *United States v. Matthews*, 53 M.J. 465 (2000). CAAF set aside the findings and sentence (reversing the AFCCA decision). The main issue in the case concerned the trial judge's decision to allow the government to admit evidence of appellant's use of marijuana that occurred after the date of the charged offense. The appellant was found guilty of a single specification of wrongful use of marijuana (between 1 and 29 April 1996). She testified that she did not use marijuana and that she did not know why she tested positive. The government then asked to use a subsequent command-directed urinalysis (conducted on 21 May 1996) for impeachment. The trial judge admitted the evidence for impeachment and ruled it was also admissible under Mil. R. Evid. 404(b) to show her prior use was knowing and conscious. CAAF disagreed, finding that extrinsic evidence my not be used to rebut good military character (CAAF noted that the trial judge did not consider Mil. R. Evid. 405(a) and he rejected Mil. R. Evid. 608).

7. Results of Violation of Constitution.

a. Administrative Separations. Evidence obtained in violation of the Constitution is admissible, unless it was obtained in bad faith (*i.e.* the officials conducting the urinalysis knew it was unlawful). A urinalysis conducted in bad faith is admissible only if the evidence would inevitably have been discovered. AR 15-6, para. 3-6c(7).

b. Nonjudicial Punishment under Article 15. Evidence obtained in violation of the Constitution is admissible. AR 27-10, para. 3-18j. However, soldier may demand trial by court-martial. AR 27-10, para. 3-18d.

c. Court-martial. Evidence obtained in violation of the Constitution is inadmissible. *See* Mil. R. Evid. 311.

F. LIMITED USE POLICY.

1. Limited Use.

a. Under the limited use policy, the results of the following tests may not be used as a basis for an Article 15 or court-martial or to determine the "character of service" in an administrative separation action. AR 600-85, para. 6-4; AFR 30-2, para. 5-8b.

(1) Fitness for Duty Tests. AR 600-85, para. 6-4a(1).

(2) Medical Tests. The limited use policy applies to tests:

(a) Directed by physician who suspects drug use and orders test to ascertain need for counseling, treatment, or rehabilitation. AR 600-85, paras. 6-4a(1) and 10-3b(1).

(b) Taken in conjunction with soldier's participation in Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). AR 600-85, para. 6-4a(1).

(c) Obtained as a result of soldier's emergency medical care for an actual or possible drug overdose, unless such treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 6-4a(5).

b. If drug use discovered during a limited use test is introduced during an administrative separation, the soldier must receive an honorable discharge.

c. The limited use policy does not preclude use of limited use tests in rebuttal or initiation of disciplinary action based on independently derived evidence. AR 600-85, para. 6-4e.

d. A fitness for duty urinalysis or medical test may serve as the basis for administrative action, to include requesting a second urinalysis. *United States v. Williams*, 35 M.J. 323 (C.M.A. 1992). Exclusionary rule did not preclude admission of accused's incriminating statements or consensual second urinalysis even though questioning and request for urinalysis were based upon prior positive fitness for duty urinalysis. Taint from fitness for duty urinalysis was sufficiently attenuated.

2. Full Use. The limited use policy does not apply to the types of tests listed below. These tests may be used at courts-martial, Article 15 proceedings, and administrative separations:

a. Probable cause tests.

b. Inspections.

c. Consent tests. *United States v. Avery*, 40 M.J. 325 (C.M.A. 1994). Accused was not entitled to protection of Air Force limited use policy, AFR 30-2, which precludes the use of certain evidence derived from a service member's voluntary self-identification as a drug abuser. The accused voluntarily consented to a urinalysis after his wife revealed his drug use to his chain of command. The accused never admitted using drugs.

d. Medical tests which are **not** covered by the limited use policy described above.

(1) Obtained as a result of soldier's emergency medical care for an actual or possible drug overdose, where the treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 6-4a(5).

(2) Routine tests directed by a physician which are not the result of suspicion of drug use and not taken in conjunction with ADAPCP. AR 600-85, paras. 6-4a(1) and 10-3b(1).

3. Command Directed Tests. Be wary of the term "command directed" urinalysis. The ability or inability to use the test results for UCMJ or separation purposes depends on the type of test, not on whether or not it is labeled command directed. *United States v. Streetman*, 43 M.J. 752 (A.F. Ct. Crim. App. 1995) Accused was convicted of marihuana use. The court held that letter reissuing original inspection order but labeled as "Commander Directed" (Air Force equivalent to fitness for duty) and ordering accused to submit to drug testing did not transform prior legitimate random urinalysis inspection into fitness for duty so as to preclude admission of drug test results.

G. PROSECUTING URINALYSIS CASES.

1. Procedures for Taking Test.

a. Observation During Testing. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) Direct observation of officer providing sample by enlisted person did not make collection of urine unreasonable.

b. Refusal to Provide Sample. *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991). Accused's submission of toilet water as urine sample did not constitute obstruction of justice but could have been charged as disobedience of order.

2. Inspection of AWOL (UA) Personnel.

a. Soldiers who are absent without leave may be subjected to compulsory urinalysis testing pursuant to command policy to inspect the urine of such soldiers. *Cf. United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) (compelling soldiers who previously tested positive for drug use to submit to second urinalysis is proper inspection).

b. Such an inspection must be conducted in accordance with command policy.

(1) *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990). Accused, who was late for duty, was not unauthorized absentee within meaning of policy requiring unauthorized absentees to submit to urinalysis; test of accused's urine was not proper inspection.

(2) *United States v. Patterson*, 39 M.J. 678 (N.M.C.M.R. 1993). Testing of soldier returning from unauthorized absence was not a proper inspection because it was not conducted in accordance with instruction requiring such inspections. Commander who ordered test did so based on the "seriousness" of the absence, rather than on a random basis.

3. Retesting Soldiers. Requiring retesting, during next random urinalysis, of all soldiers who tested positive during previous urinalysis is a proper inspection. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). Commander's policy letter which required retesting of soldiers who were positive on previous urinalysis was proper. *See* Appendix A for sample policy letter from U.S. Army Trial Counsel Assistance Program.

4. Retesting Samples. Selection of negative samples for additional testing is improper unless done on a random basis. *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990). Installation alcohol and drug control officer's decision to select urine sample which had pre-tested negative for further testing at drug laboratory based on belief that sample might test positive constituted unreasonable inspection.

5. Deviations in Procedures.

   a. Deviations from regulations generally do not affect admissibility of test results. *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989); *United States v. Timoney*, 34 M.J. 1108 (A.C.M.R. 1992).

   b. Gross deviations from urinalysis regulation may allow exclusion of positive test results. *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990).

   c. Accused randomly selected by computer for urinalysis testing IAW AF Instruction 44-120. Method was proper even if there were minor administrative deviations. *United States v. Beckett*, 49 M.J. 354 (1998).

6. Proving Knowing Ingestion of Drugs.

   a. To be guilty of wrongful use of drugs the accused must know that (1) he or she consumed the relevant substance and (2) the substance was contraband. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

   b. Presence of drug metabolite in urine permits permissible inference that accused knowingly used drug, and that use was wrongful. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

7. Permissive inference of wrongfulness may be sufficient to support conviction despite defense evidence that ingestion was innocent.

a. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Permissive inference overcame accused's suggestion that wife may have planted marihuana in his food without his knowledge.

b. *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993) (dicta) When defense reasonably raises the defense of innocent ingestion, this trumps the presumption of wrongfulness and the accused must be found not guilty as a matter of law unless the government introduces additional evidence to establish the wrongfulness of the use.

c. *See also United States v. Campbell,* 50 M.J. 154 (1999). Evidence was insufficient to permit inference of wrongfulness of use from concentration of lysergic acid diethylamide (LSD) reported in serviceman's urine sample through use of gas chromatography tandem mass spectrometry (GC/MS/MS); prosecution evidence did not prove that cutoff level of 200 picograms per milliliter (pg/ml) established by Department of Defense (DoD), and concentration level of 307 pg/ml reported by laboratory which conducted the test would, in view of margin of error, reasonably exclude possibility of false positive and would indicate reasonable likelihood that at some point a person would have experienced physical and psychological effects of the drug. The decision was reconsidered but not changed. *United States v. Campbell*, 52 M.J. 386 (2000) (supplementing the earlier decision). For a discussion of the impact of *Campbell*, see Major Walter M. Hudson, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38; *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

8. Use of Expert Testimony.

a. Expert testimony required at court-martial. Expert testimony is generally required to prove wrongful use of drugs; result of test alone (paper case) is inadequate. *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987).

b. Expert testimony must establish not only that drug or metabolite was in accused's body but that drug or metabolite is not naturally produced by the body or any other substance but drug in question. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

c. Judicial notice is generally an inadequate substitute for expert testimony. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991*). But see United States v. Phillips*, 53 M.J. 758, 765 (A.F. Ct. Crim. App. 2000) (In Judge Young's concurring opinion, he believes that, in most drug cases, scientific evidence admitted is equivalent to adjudicative facts and, therefore, subject to judicial notice).

d. Stipulations may be an adequate substitute for expert testimony.

(1) *United States v. Ballew*, 38 M.J. 560 (A.F.C.M.R. 1993). A stipulation of expected testimony that expert would testify that accused ingested cocaine was not a confessional stipulation. No providency inquiry was required before the stipulation could be received.

(2) *United States v. Hill*, 39 M.J. 712 (N.M.C.M.R. 1993). Evidence was insufficient to support conviction of use of marihuana where stipulations of fact, documentary evidence and testimony failed to link positive urine sample to accused.

e. More on experts. *See* Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38 and Lieutenant Commander David A. Berger & Captain John E. Deaton, *Campbell and its Progeny: The Death of the Urinalysis Case*, 48 NAV. L. REV. 1 (2000).

f. Burden for expert testimony. Expert evidence other than that used to meet the three-prong standard needs to meet evidentiary requirements of reliability and relevance. *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), *citing Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993); *Kumho Tire C., Ltd. V. Carmichael*, 526 U.S. 137, 153-55 (1999).

g. Experts at counsel table. *United States v. Gordon*, 27 M.J. 331 (C.M.A. 1989). Government urinalysis expert may remain in courtroom while another government expert testifies about lab testing procedures.

h. "Non-expert" expert. *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992). Allowing undercover agent to testify that he had never tested positive for drugs although he was often exposed to them was permissible to rebut accused's defense of passive inhalation.

i. Use & Choice of Experts. *United States v. Short*, 50 M.J. 370 (1999). Defense counsel asked for an expert who was not employed by the DOD drug lab to assess chain of custody and procedures and to assist with scientific evidence. Also raised a passive inhalation defense. Defense failed to show that the case was not "the usual case." Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case." Available government expert from lab was sufficient to provide expert testimony on passive inhalation/innocent ingestion.

9. Negative Urinalysis Results. A urine sample containing drug metabolites in concentrations below the regulatory cut-off level for positive results will be declared negative, even though the sample may indicate drug use.

a. Negative test results are usually inadmissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marihuana three days after last charged use of marihuana. Admission of results of RIA test would have been too confusing. The C.M.A. stated that the Mil. R. Evid. should be used to determine if negative test results are admissible and overruled *United States v. Arguelo* 29 M.J. 198 (C.M.A. 1989) (which prevented government from using negative test results because such use was contrary to regulation).

b. Use of negative test results is permitted in the Coast Guard. *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994) *rev'd on other grounds*, 115 S.Ct. 2031 (1995). Government's introduction of "negative" test results, which showed presence of marihuana, but at amount below cut-off, was not plain error. Results were used to corroborate testimony of witnesses who saw accused smoke marihuana and Coast Guard Regulation did not prohibit use of such test results.

10. Using Positive Test Results as Rebuttal Evidence.

a. *United States v. Graham,* 50 M.J. 56 (1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result 4 years earlier (acquittal) in court-martial, after accused stated he was "flabbergasted" at having tested positive. CAAF held that positive marijuana result was not logically relevant: statistical probability is unknown as to whether accused might test positive twice within 4 years and there is no necessary logical connection between testing positive twice and being flabbergasted.

b. *U.S. v. Matthews*, 53 M.J. 465 (2000). CAAF holds that extrinsic evidence my not be used to rebut good military character (CAAF noted that the trial judge did not consider Mil. R. Evid. 405(a) and he rejected Mil. R. Evid. 608).

11. See generally Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sep. 1988, at 7, and Masterton and Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., Apr. 1995, at 3.

H. DEFENDING URINALYSIS CASES.

1. Defenses.

a. Passive inhalation. For this defense to be successful, a soldier generally must have been exposed to concentrated drug smoke in a small area for a significant period of time. *See* Anderson, *Judicial Notice in Urinalysis Cases,* ARMY LAW. Sep. 1988, at 19.

b. Innocent ingestion.

(1) *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Accused suggested wife planted marihuana in his food without his knowledge.

(2) *United States v. Prince*, 24 M.J. 643 (A.F.C.M.R.1987). Accused's wife allegedly put cocaine in his drink without his knowledge to improve his sexual performance.

(3) *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Accused's roommate testified that she put cocaine in beer which accused unwittingly drank. Government improperly cross examined roommate on prior arrest for conspiracy and attempted burglary, but error was harmless.

c. Innocent inhalation.

(1) *United States v. Perry*, 37 M.J. 363 (C.M.A. 1993). Accused's explanation that he unwittingly smoked a filtered cigarette laced with cocaine 28 hours before test was not credible, given expert's testimony that (1) accused would have to ingest an almost toxic dose of cocaine to achieve the 98,000 ng/ml test result his sample yielded, and (2) cocaine mixed with a cigarette would not work since cocaine will not vaporize or pass through a filter. Erroneous admission of evidence that accused acted as informant was harmless.

(2) *United States v. Gilbert*, 40 M.J. 652 (N.M.C.M.R. 1994). Accused allegedly borrowed cigarettes from a civilian which, unknown to the accused, contained marihuana. At trial, the civilian refused to answer questions about what the cigarettes contained. Defense counsel was ineffective for not seeking to immunize the civilian.

d. Innocent absorption through contact with drugs on currency: unlikely to be a successful defense. *See* Elsohly, *Urinalysis and Casual Handling of Marihuana and Cocaine*, 15 J. Analytical Toxicology 46 (1991).

e. Use of Hemp related products. Hemp products come from the same plant as marihuana: see Note, *The Hemp Product Defense* and *Tips in Hemp Product Cases,* December 1998 Army Lawyer.

f. Switched Samples ("chain of custody" broken).

(1) *United States v. Gonzales*, 37 M.J. 456 (C.M.A. 1993). Where observer had no recollection of how urine was transferred from one container to another, but testified that urine was never out of her sight, military judge properly overruled chain of custody objection.

(2) *United States v. Montijo*, No. 30385 (A.F.C.M.R. 28 Jun. 1994). Government was not required to establish chain of custody for sample bottle from the time of its manufacture until its use.

g. Laboratory Error.

(1) *Unites States v. Manuel*, 43 M.J. 282 (1995). Urinalysis test results were improperly admitted where laboratory failed to retain accused's positive urine sample after test was completed. Regulation requiring retention of sample conferred substantive right upon accused. Conviction set aside.

(2) Problems at Fort Meade Laboratory. On 24 July 1995 the commander of the Fort Meade Forensic Toxicology Drug Testing Laboratory discovered that lab technicians had violated procedures by switching quality control samples. All positive test results are still scientifically supportable, since the GC/MS tests were not affected. *See* Appendix B.

h. Good Military Character. *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985)(good military character is pertinent to drug charges against an accused as it may generate reasonable doubt in fact finder's mind.

2. Defense Requested Tests.

a. Tests for EME metabolite of cocaine.

(1) The government is not required to perform test for EME metabolite requested by defense where sample tested positive for BZE and chain of custody is not contested. *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992); *United States v. Pabon*, No. 29878 (A.F.C.M.R. 25 Mar. 1994), *aff'd* 42 M.J. 404 (1995).

(2) Positive test result for BZE (metabolite tested for within DOD) is sufficient to support conviction for wrongful use of cocaine; test for EME metabolite unnecessary. *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992).

(3) If tests for BZE and EME metabolites conflict, results may be insufficient to support conviction for wrongful use of cocaine. *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991). Test results inadequate where test for BZE was positive and test for EME was negative.

b. Tests for contaminants. *United States v. Mosley*, 42 M.J. 300 (1995). Military judge did not abuse his discretion by ordering retest of accused urine sample for BZE, EME and raw cocaine. Such testes fall into a "middle ground" where military judge may not be required to order test, but does not abuse his discretion if he does.

c. Blood tests and DNA tests. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Military judge did not abuse discretion in denying defense request for secretor test to show accused was not source of positive sample where defense was unable to show discrepancies in collection or testing of sample.

d. Polygraphs. *United States v. Scheffer*, 118 S.Ct. 1261 (1998). Per se rule against admission of polygraph evidence (Mil. R. Evid. 707) in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense to charge that he had knowingly used methamphetamine. Per se rule serves several legitimate interests, such as ensuring that only reliable evidence is introduced at trial. *See also United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994) (Mil. R. Evid. 707 is unconstitutional), *reversed*, No. 945006 (Ct. App. Armed Forces, 29 Sep. 1995) (accused waived issue of admissibility of polygraph because he did not testify).

e. Hair.

(1) *United States v. Bush*, 47 M.J. 305(C.A.A.F. 1997) Accused was convicted of use of cocaine. The Court held that mass-spectrometry hair analysis evidence was sufficiently reliable to be admitted into evidence in court-martial to establish cocaine use, even though there was some disagreement between experts about the procedure.

(2) *United States v. Nimmer*, 43 M.J. 252 (1995). Military judge precluded defense from introducing negative hair test results, because the test would not have ruled out a one-time use of cocaine. Case remanded for relitigation of this issue using the proper standard of *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) and *Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 113 S.Ct. 2786 (1993).

(3) *See* Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10.

3. Experts.

a. Defense consultants. *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994). Defense counsel did not demonstrate necessity of presence of defense urinalysis consultant at trial where he had telephonic access to expert consultant and did not identify any irregularity in test.

b. Expert witnesses. *United States v. George*, 40 M.J. 540 (ACMR 1994). Military judge improperly precluded defense expert from testifying that the presence of cocaine on everyday objects may have led to contamination of the urine sample.

c. Choice of Experts. *United States v. Short*, 50 M.J. 370 (1999). Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case."

4. Use of Negative Urinalysis Results.

a. Negative test results are generally not admissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marihuana three days after last charged use of marihuana. Admission of test results would have been too confusing. Admissibility of negative test results is based on Mil. R. Evid., not DoD and service regulations.

b. The defense may use negative test results only if relevant to the charged use. *United States v. Baker*, No. 28887 (A.F.C.M.R. 30 Nov. 1993). The military judge properly excluded evidence that the accused gave a urine sample which tested negative for use of illegal drugs where the sample was given over a month outside the charged period. The defense failed to show the relevance of the negative test.

5. After *United States v. Campbell,* 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), the best defense may be a good offense. Raising the bar for the government has opened the door for defense to be successful in attacking the government's case primarily on the second prong of *Campbell*. *See United States v. Barnes*, 53 M.J. 624 (N.M. Ct. Crim. App. 2000); *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

6. See generally Impallaria, An Outline Approach to Defending Urinalysis Cases, ARMY LAW., May 1988, at 27, and Masterton and Sturdivant, Urinalysis Administrative Separation Boards in Reserve Components, ARMY LAW., Apr. 1995, at 3.

VIII. EXCLUSIONARY RULE AND ITS EXCEPTIONS.

A. The Exclusionary Rule.

1. Judicially created rule. Evidence obtained directly or indirectly through illegal government conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961) (the exclusionary rule is a procedural rule that has no bearing on guilt, only on respect for "dignity" or "fairness").

2. Mil. R. Evid. 311(a). Evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is inadmissible against the accused.

3. Violation of regulations does not mandate exclusion.

a. Urinalysis regulations.

(1) *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). Deviation from Coast Guard urinalysis regulation did not make urine sample inadmissible.

(2) *But see United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Gross deviations from urinalysis regulation allow exclusion of positive test results.

b. Financial privacy regulations. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). Failure to comply with federal statute and regulation requiring notice before obtaining bank records did not mandate exclusion of records.

B. Exception: Good Faith.

1. General rule. Evidence is admissible when obtained by police relying in good faith on facially valid warrant that later is found to lacking probable cause or otherwise defective.

a. *United States v. Leon*, 468 U.S. 897 (1984). Exclusionary rule was inapplicable even though magistrate erred and issued warrant based on anonymous tipster's information which amounted to less than probable cause.

b. Rationale. Primary purpose of exclusionary rule is to deter police misconduct; rule should not apply where there has been no police misconduct. There is no need to deter a magistrate's conduct.

2. Limitations. *United States v. Leon*, 468 U.S. 897 (1984). Good faith exception does not apply, even if there is a search warrant, where:

a. Police or affiant provide deliberately or recklessly false information to the magistrate (bad faith by police);

b. Magistrate abandons his judicial role and is not neutral and detached (rubber-stamp magistrate);

c. Probable cause is so obviously lacking to make police belief in the warrant unreasonable (straight face test);

d. The place or things to be searched are so clearly misidentified that police cannot presume them to be valid (glaring technical deficiencies).

3. Mil. R. Evid. 311(b)(3): Evidence obtained from an unlawful search or seizure may be used if:

a. "competent individual" authorized search or seizure;

b. individual issuing authorization had "a substantial basis" to find probable cause;

c. official executing authorization objectively relied in "good faith" on the authorization.

4. Good faith exception applies to searches authorized by a commander. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). Good faith exception applied to allow admission of ration cards discovered during search authorized by accused's commander.

5. The good faith exception applies to more than just "probable cause" determinations; it may also save a search authorization where the commander who authorized the search did not have control over the area searched.

a. On-post searches. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). The good faith exception applied where a commander had a good faith reasonable belief that he could authorize a search of an auto in a dining facility parking lot, even though the commander may not have had authority over the parking lot.

b. Off-post searches overseas. *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). The good faith exception applied to search of accused's off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit.

6. The good faith exception may apply even when a warrant has been quashed. *Arizona v. Evans*, 115 S. Ct. 1185 (1995). The exclusionary rule does not require suppression of evidence seized incident to an arrest based on an outstanding arrest warrant in a police computer, despite the fact the warrant was quashed 17 days earlier. Court personnel were responsible for the inaccurate computer record, because they failed to report that the warrant had been quashed.

7. *But see United States v. Maxwell*, 45 M.J. 406 (1996). Anticipatory search of e-mail by online company, at behest of government and prior to service of warrant shows "no reliance on the language of the warrant for the scope of the search." Thus, good faith is not applicable. Evidence suppressed.

C. Exception: Independent Source.

1. General rule. Evidence discovered through a source independent of the illegality is admissible.

a. *Murray v. United States*, 487 U.S. 533 (1988). Police illegally entered warehouse without warrant and saw marihuana. Police left warehouse without disturbing evidence and obtained warrant without telling judge about earlier illegal entry. Evidence was admissible because it was obtained with warrant untainted by initial illegality.

b. Rationale. Police should not be put in worse position than they would have been in absent their improper conduct.

2. Evidence obtained through independent and voluntary acts of third parties. *United States v. Fogg*, 52 M.J. 144 (1999).

3. Search based on both legally and illegally obtained evidence. *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993). Independent source doctrine applied where affidavit supporting search authorization contained both legally and illegally obtained evidence. After excising illegal information, court found remaining information sufficient to establish probable cause.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

D. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means.

a. *Nix v. Williams*, 467 U.S. 431 (1984). Accused directed police to murder victim's body after illegal interrogation. Body was admissible because it would have inevitably been discovered; a systematic search of the area where the body was found was being conducted by 200 volunteers.

b. Rationale. The police should not benefit from illegality, but should also not be put in worse position.

2. Mil. R. Evid. 311(b)(2). Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

3. *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). Illegal search of train station locker and seizure of hashish, which exceeded authority to wait for accused to open locker and then apprehend him, did not so taint apprehension of accused as to make subsequent seizure of drugs after accused opened locker inadmissible. Drugs would have been inevitably discovered.

4. *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985). Evidence found in trunk of accused's car admissible despite invalid consent to search. Evidence inevitably would have been discovered as police had probable cause and were in process of getting search authorization.

5. *United States v. Kalisky*, 37 M.J. 105 (C.M.A. 1993). Inevitable discovery doctrine should be applied to witness testimony only if prosecution establishes witness is testifying of her own free will, independent of illegal search or seizure. Testimony of accused's partner in sodomy should have been suppressed where she testified against accused only after police witnessed sodomy during illegal search.

6. Distinguish between "independent source" and "inevitable discovery."

   a. Independent source deals with *facts*. Did police in fact find the evidence independently of the illegality?

   b. Inevitable discovery deals with hypotheticals. *Would* the police have found the evidence independently of the illegal means?

E. Exception: Attenuation of Taint.

1. General rule. Evidence that would not have been found *but for* official misconduct is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963). Accused's unlawful arrest did not taint his subsequent statement where statement was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later.

2. *United States v. Rengel*, 15 M.J. 1077 (N.M.C.M.R. 1983). Even if accused was illegally apprehended, later seizure of LSD from him was attenuated because he had left the area and was trying to get rid of drugs at the time of the seizure.

3. *But see Taylor v. Alabama*, 457 U.S. 687, 691 (1982). Defendant was arrested without probable cause, repeatedly questioned by police who took fingerprints and put him in line-up without counsel present. Confession was obtained six hours after arrest was inadmissible.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

F. Exception: Impeachment.

1. Illegally obtained evidence may be used to impeach accused's in-court testimony on direct examination or to impeach answers to questions on cross-examination. *United States v. Havens*, 44 U.S. 962 (1980). Defendant's testimony on direct that he did not know his luggage had T-shirt used for smuggling cocaine allowed admissibility of illegally obtained T-shirt on cross-examination to impeach defendant's credibility. *See also Walder v. United States*, 347 U.S. 62 (1954).

2. Mil. R. Evid. 311(b)(1). Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

IX. CONCLUSION.

X. APPENDIX A: SECTION III DISCLOSURE

UNITED STATES	)	
	)	Fort Blank, Missouri
v.	)	
	)	DISCLOSURE OF
William Green	)	SECTION III EVIDENCE
Private (E-1), U.S. Army	)	
A Co., 1st Bn, 13th Inf.	)	22 July 200X
8th Inf. Div. (Mech)	)	

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

1. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as enclosure ___).

2. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____).

3. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____ _____).

A copy of this disclosure has been provided to the military judge.

PETER MUSHMAN
CPT, JA
Trial Counsel

XI. APPENDIX B: GUIDE TO ARTICULATE PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a *reasonable belief*, *based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a. If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b. If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply:

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply:

1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. Witness has given reliable information before; he has a good track record (CID may have records).

3. Witness has no reason to lie.

4. Witness has truthful demeanor.

5. Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

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CHAPTER 7

SELF-INCRIMINATION

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MAJ Tim MacDonnell
December 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

SELF-INCRIMINATION

Outline of Instruction

I. UNITED STATES V. DICKERSON: THE COURT PUTS THE *MIRANDA* DEBATE TO BED.

United States v. Dickerson, 120 S. Ct. 2326 (2000). In *Dickerson* the Supreme Court finally puts to rest the question of whether the procedural safeguard created in *Miranda v. Arizona* were Constitutionally required. The Court concluded they are.

1. **Name**: *US v. Dickerson*.
   Cite: 120 S. Ct. 2326 (2000).
   Facts: the accused was indicted for bank robbery, conspiracy and using a firearm in a robbery. Before trial the accused moved to suppress a statement he made to the FBI claiming he was never read is *Miranda* rights. The trial court suppressed the statement for failure to provide the accused the warning required by *Miranda*. The U.S. Court of Appeals for the Fourth Circuit reversed the District Courts ruling. The Fourth Circuit Court agreed with the District Court that the accused had not received his *Miranda* warnings, but the Fourth Circuit held the statements were admissible under 18 U.S.C. 3501. Shortly after *Miranda* was decided the Congress passed 18 U.S.C. 3501, which stated that if a statement was voluntarily given it would be admissible (regardless of whether *Miranda* warnings were given). The Fourth Circuit concluded that the Supreme Court's decision in *Miranda* was not a Constitutional holding and therefor Congress could legislate this issue.
   Holding: the Supreme Court reversed, holding that *Miranda* was a constitutional holding and as such Congress could not overrule them.
   Law: the Court held that Congress does have the authority to modify or set aside judicially created rules of evidence and procedure that are not required by the Constitution BUT Congress may not legislatively supersede the Court's interpretation of the Constitution. The case turned on whether Miranda and its progeny announced a Constitutional rule or just a regulatory rule for the federal courts. The Court held that Miranda and its progeny were interpretations of the Constitution

II. 5TH AMENDMENT AND *EDWARDS* BAR.

1. **Name:** *U.S. v. Mosley*.
Cite: 52 M.J. 679 (Army Ct. Crim. App. 2000).
Issue: did the judge abuse his discretion in not suppressing the accused statement to investigators when it was made after a previous invocation of the 5th Amendment right to counsel just 24 hours before?
Holdings: no, the judge did not abuse his discretion.
Facts: the accused was questioned by one group of CID agents regarding two larcenies. During the investigation the accused invoked his right to counsel under the 5th Amendment. The CID agents stopped questioning immediately. Two other CID agents, who were working a separate investigation dealing with a larceny, approached the accused the following day (they were unaware that the accused had invoked his right to counsel). The agents read the accused his rights and told him they wanted to search his room. The accused indicated he understood his rights and did not want counsel present. When the accused was asked if he was willing to talk with investigators he responded by saying that the stolen items were not in his room but they were at a off-post apartment. The accused took investigators to the apartment where the stolen property was kept, the agents recovered evidence that incriminated the accused in both investigations. The accused then invoked his right to counsel.
Law: the Army Court begins by stating that once an accused invokes his right to counsel in a custodial setting, all questioning must cease and questioning can not resume unless counsel is present or the accused reinitiates further communication with the police. The court also pointed out that if the Government can demonstrate by a preponderance of the evidence that the accused was not in continuous custody and had a reasonable opportunity to seek counsel during the break in custody, a subsequent waiver by the accused could be valid. Whether the break in custody dissolves the *Edwards* bar is evaluated under a totality of the circumstances test. The court looked at the quality of the accused opportunity to seek legal counsel and found under the totality of the circumstances that the 24-hour break in custody was adequate for the accused to get counsel.

III. ARTICLE 31.

1. **Name:** U.S. v. Ruiz.
Cite: 54 M.J. 138 (2000).
Issue: there were two issues, first did the judge err in not suppressing a statement made by the accused to an AAFES store detective and second, was it error to allow trial counsel to cross examine the accused on why when he was confronted with an allegation of stealing he did not deny it?
Facts: store detectives witnessed the accused shoplift and leave an AAFES store. The store detectives followed the accused to the parking lot and requested that he return to the AAFES office with the detectives. The accused agreed to go. Once the detectives and the accused got to the security office one of the detectives stated "There seems to be some AAFES merchandise that hasn't been paid for." The accused responded "Yes." He took the stolen item out of his pocket and put on the table and said "You got me." At trial the accused testified stating that he had never left the building when the detectives detained him. The accused claimed when he went to the security office he said he could pay for the items he had and the detective said it's too late. On cross-examination the trial counsel asked the accused what too late meant and whether he had protested his innocence. Trial counsel pointed out how unreasonable the accused's version of the facts were. Holding: the statement was admissible and the cross-examination and argument were perfectly appropriate.
Law: the CAAF held that the AAFES detective had not interrogated the accused. Regarding the cross-examination and argument the court concluded that the trial counsel had not been commenting on the accused's right to remain silent but on the credibility of his version of what occurred.

2. **Name:** U.S. v. Swift.
Cite: 53 M.J. 439 (2000).
Issue: did the judge err by not suppressing a statement made by the accused to his first sergeant without the benefit of article 31 warnings and can an unwarned statement be used as the basis for a false official statement charge?
Facts: the accused's commander received a phone call from the accused's wife that she had been called by a woman claiming to be the new Mrs. Swift (the accused's wife was living apart from but had not gotten a divorce from). The first sergeant was informed, looked up bigamy in the MCM and then confronted the accused. The accused claimed to have gotten a divorce from his first wife. The first sergeant reminded the accused just a few months earlier he had stated he was still married to his first wife. The first sergeant demanded the accused produce the divorce decree. After several days the accused produced what he claimed to be a divorce decree (complete with spelling errors) supposedly signed by a county circuit court judge. The accused was charged with making false statements, obstructing justice, and bigamy. The defense sought to suppress the statements the accused made and the divorce decree.
Holding: the statements were suppressed, the divorce decree was admissible. **Law:** the court examined whether at the time of questioning by the first sergeant the accused was a suspect and whether the questioning was for an official or law enforcement purpose. The court first determined that the accused was a suspect at the time of the questioning. Although a mere hunch may not be enough to have an individual be a suspect the first sergeant had plenty of evidence to consider the accused a suspect. Next the court concluded that the Government had failed to overcome the strong presumption that the first sergeant was acting in a law enforcement or disciplinary capacity when question the accused about his alleged bigamy. Next the court states that the Government can not use an unwarned statement as the basis for prosecution for a false official statement. Finally the court concluded that the divorce decree was not protected under article 31 or the 5th Amendment. A document prepared in advance of questioning can not be considered compelled testimony and because the accused had already produced it for DEERs personnel the act of producing the document was not protected either.

IV. IMMUNITY.

Name: *U.S. v. Hubbell*.
Cite: 120 S. Ct. 2037 (2000).
Facts: the accused entered into a pretrial agreement with members of the Independent Counsel's Office regarding his conduct in the Whitewater banking scandal. One aspect of the agreement was that he cooperate with the Government and be truthful. Subsequent to the plea the Independent Counsel's Office served the accused with a subpoena for certain documents, to which the accused invoked his privilege against self-incrimination. The Government gave the accused immunity under 18 U.S.C. 6002 and the accused gave the Government the requested documents. The Government then sought to use the documents against the accused in a subsequent prosecution.
Holding: the Government had violated the accused privilege against self-incrimination.
Law: the Court held that although the documents that the accused turned over were not protected by the 5th Amendment the act of turning them over was testimonial conduct (because the Government did not know that the accused had them) and thus was protected.

V. VOLUNTARINESS.

Name: U.S. v. Murray.
Cite: 52 M.J. 671 (N. M. Ct. Crim. App. 2000).
Issue: could the Government use the accused's testimony from the first trial in the rehearing where the accused's testimony came about as a result of ineffective assistance of counsel?
Facts: the accused was charged with rape, indecent acts, and indecent liberties with a child. The accused was found guilty and sentenced to 20 years confinement, DD, reduction to the lowest enlisted rank and total forfeitures. After the trial was over through a post-trial 39a session and on appeal the accused's sentence and conviction was overturned due to ineffective assistance of counsel. At the second trial the Government used (over defense objection) the accused's testimony from the first trial.
Holding: the Government could not use the testimony from the first trial at the second.
Law: the Navy Court ruled that the testimony in the first trial came about through the ineffective assistance of counsel that caused the first conviction to be overturned. Because the testimony was given in violation of the accused's right to effective assistance of counsel it was not voluntary within the meaning of M.R.E. 310(e).

VI. USE OF INVOCATION OF RIGHTS AGAINST AN ACCUSED.

A. **Name**: *Portuondo v. Agard*.
Cite: 120 S. Ct. 1119 (2000).
Issue: was it constitutional for the prosecutor during argument to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly.
Facts: the accused was tried for forcible sodomy, assault, and several weapons charges. The case came down to a battle of credibility, the accused claimed he had consensual intercourse with the victim. The victim and a friend said it was without consent and under threats of death. Defense focused on credibility during its summation, as did the Government. Government argued (over defense objection) "you know ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?…He's a smart man. I never said he was stupid….He used everything to his advantage." The accused was convicted of one count of sodomy and a weapons charge. The sodomy charge was upheld on appeal.
Holding: the prosecutor's comments were permissible.
Law: Justice Scalia, writing for the majority, pointed out that there was no precedent for what the defendant was asking for. The closest analogy is that from *Griffin v. California*, 85 S. Ct. 1229 (1965). In *Griffin*, the Supreme Court forbid prosecutors or trial courts from encouraging juries to use an individual's silence as evidence of guilt. Here the Defendant argued that *Griffin* should be extended to include the situation where the Government claims the defendant has had the opportunity to tailor his testimony. Justice Scalia pointed out several cases where the Court has held that when a defendant takes the stand he is to be treated just like any other witness. The Government's argument went to the credibility of the defendant.

B. **Name:** *U.S. v. Loomis*.
Cite: Army Ct. Crim. App. 9800077 (August 2000).
Issue: did the judge err by not *sua sponte* declaring a mistrial where the CID agent referred 5 times to the accused invoking his right to remain silent?

Facts: the accused was convicted of assaulting his eight-month-old daughter, an assault that produced a broken arm. He was sentenced to a BCD, total forfeitures for 3 months, reduction to E1, and confinement for 3 months. During the testimony of a CID agent, the agent repeatedly referred to the accused's invocation of his right to remain silent and right to counsel. During direct, the agent stated "he said or indicated that he wanted to speak to an attorney before answering any other questions…the minute he indicated that he needs an attorney or if he wants to talk to an attorney, I cannot ask him anymore question…I know we terminated or we stopped talking at the interview when he said he wanted a lawyer at 1:00." On cross, the agent said,"when the interview terminated, was when he indicated he wanted an attorney…it wasn't until after he had requested an attorney and the interview terminated was when he started talking about how he faked the fall." The accused's civilian defense counsel did elicit some the reference to the accused's invocation of his rights. The accused's military defense counsel did raise the judge's failure to instruct the panel members to disregard the testimony.
Holdings: yes, the findings of guilt were set aside.
Law: a suspect's lawful invocation of his rights to remain silent and or assistance of counsel during an investigation is inadmissible against him. Even if the defense did not object because they wanted the accused's invocation in to evidence, the judge still had a duty to inquire into this area and give a limiting instruction.

VI. CONCLUSION.

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CHAPTER 8

ARGUMENTS

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ARGUMENTS

Outline of Instruction

I. INTRODUCTION.

II. WHEN COUNSEL MAY ARGUE.

A. Argument on Motions. Upon request, either party is entitled to have an Article 39(a) session to present oral argument concerning the disposition of written motions. R.C.M. 905(h).

B. Opening Statement.

1. Timing. Each party may make one opening statement to the court-martial before the presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested or before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times. R.C.M. 913(b)

2. Argument prohibited. Counsel should confine their remarks to evidence they expect to be offered and a brief statement of the issues in the case. Discussion, R.C.M. 913(b).

C. Findings Argument. 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. R.C.M. 919.

D. Sentencing Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and the defense may argue for an appropriate sentence. R.C.M. 1001(g).

1. The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F). *See United States v. McGee*, 30 M.J. 1086 (N.M.C.M.R. 1989). As a general rule, there is no right of government counsel to present rebuttal argument. The propriety of permitting such argument is dependent upon the need to address matters newly raised by the defense in its sentencing argument.

2. Absent "good cause" the military judge should not permit departure from the order of argument set forth in R.C.M. 1001(a)(1).

a. *United States v. Budicin*, 32 M.J. 795 (N.M.C.M.R. 1990). Military judge erred by allowing trial counsel to argue last but defense counsel waived error by not objecting.

b. *United States v. Martin*, 36 M.J. 739 (A.F.C.M.R. 1993). Trial counsel should not be routinely permitted to choose whether to argue first or last on sentencing.

E. Waiver of Argument. Defense counsel should not waive the right to argue.

1. *United States v. McMahan*, 21 C.M.R. 31 (C.M.A. 1956). Defense counsel has a right and duty to argue.

2. *United States v. Sadler*, 16 M.J. 982 (A.C.M.R. 1983). Defense counsel may only waive argument for "good cause."

F. Length of Argument.

1. There is no fixed rule on the length of argument. *United States v. Gravitt*, 17 C.M.R. 249 (C.M.A. 1954). Length of argument within discretion of military judge.

2. The military judge may not arbitrarily limit the defense counsel's argument. *United States v. Dock*, 20 M.J. 556 (A.C.M.R.), *pet. denied* 21 M.J. 159 (C.M.A. 1985).

III. FINDINGS ARGUMENTS.

A. Permissible Argument.

1. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case. R.C.M. 919(b).

2. Counsel may comment on the testimony, conduct, motives, and evidence of malice of witnesses.

3. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them.

B. Common Errors.

1. Counsel may not make inaccurate reference to law (elements, burden of proof, etc.). *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). During argument trial counsel presented a list of facts court would have to find before the panel could find the accused innocent. This was error but was not prejudicial, given lack of defense objection and judge's curative instruction when a court member asked the trial counsel to repeat some of the list.

2. Counsel may not cite legal authority to court with members. *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958). It was error for trial counsel to read from case in the Court-Martial Reports.

3. Counsel not to argue command policies. *United States v. Thomas*, 44 M.J. 667 (N.M.Ct.Crim.App. 1996). Trial counsel argued in drug case that "the CNO . . . has a zero tolerance policy for anyone who uses any kinds of drugs." Court found TC reference improper, and noted, "references to command or departmental policies have no place in the determination of an appropriate sentence in a trial by court-martial." Error for military judge not to give instruction, even though defense counsel failed to object.

4. Counsel may not refer to irrelevant matters. During findings argument, the authorized sentence is generally irrelevant. *But see United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986). Defense counsel should have been permitted to inform members of mandatory minimum life sentence to impress seriousness of offense upon them. However, error was not prejudicial.

5. Counsel may not argue facts not in evidence.

   a. Demeanor of non-testifying accused is not evidence.

      (1) *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman".

      (2) *But see United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.

   b. It is error for counsel to include inadmissible hearsay in findings argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

   c. Counsel may argue facts of other cases which are generally known. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981).

6. Counsel may not argue the lack of evidence after a successful suppression motion. *See ABA Standards for Criminal Justice*, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist."

7. Counsel may not argue personal belief.

   a. Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977).

   b. Counsel may not express personal belief as to truth or falsity of evidence or testimony. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

   c. Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980). Trial counsel's repeated use of term "I think" during argument was improper.

   d. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).

8. Trial counsel may not comment on the accused's exercise of any fundamental right. *Griffin v. California*, 380 U.S. 609 (1965).

   a. Trial counsel may not comment on accused's invocation of right to counsel and right to remain silent.

      (1) *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.

(2) *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985). Government may not bring to attention of trier of fact that an accused invoked right to remain silent and consulted with attorney.

b. Trial counsel may not comment on accused's failure to testify.

(1) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses.

(2) *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and that government case was uncontroverted was impermissible comment on accused's election not to testify.

c. Trial counsel may not comment on accused's failure to call witnesses.

(1) *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses.

(2) *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). Trial counsel's improper comment on accused's failure to produce witness was not prejudicial because defense argued that missing witness would testify favorably to accused.

(3) *But see United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.

9. Counsel may not seek to inflame passions of the court.

a. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). By characterizing accused as a prurient sex fiend and a deviant pervert, trial counsel urged the members to cast aside reason.

b. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989). Court upheld trial counsel's argument comparing the accused to three well-known television evangelists, stating "A criminal trial is not a tea dance."

c. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down.

10. Counsel may not argue evidence beyond its limited purpose. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.

11. Counsel may not make racist comments. *United States v. Lawrence,* 47 M.J. 572 (N.M.Ct.Crim.App. 1997). Trial counsel'' rebuttal argument referring to testimony by the accused and his "Jamaican brothers" was plain error and was unmistakenly pejorative, even if trial counsel did not intend to evoke racial animus.

IV. SENTENCING ARGUMENTS.

A. Permissible Argument.

1. Counsel may recommend a specific lawful sentence.

a. Trial counsel may argue for a specific sentence. R.C.M. 1001(g). *United States v. Capps*, 1 M.J. 1184 (A.F.C.M.R. 1976). It is permissible for trial counsel to inform members of maximum penalty which court-martial may impose.

b. Defense counsel may argue for a specific sentence. *United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991). Defense counsel's argument was held to be proper, although confusing, where he argued "And, members of the court, seven or eight or nine years of punishment is not minor punishment. Is that really necessary in this case? We submit not. We submit that six or seven or eight or nine years might be, in fact, reasonable and just . . .."

2. Counsel may mention sentencing philosophies.

a. Trial counsel may refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).

b. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). General deterrence is a proper subject of argument, though not to the exclusion of other relevant sentencing factors.

3. Counsel may comment on matters introduced pursuant to R.C.M. 1001(b):

a. Character of service.

b. Prior convictions.

c. Aggravation - impact of crime.

d. Extenuation and mitigation.

e. Rehabilitative potential.

4. Trial counsel may comment on the accused's testimony.

a. Commenting on the accused's false testimony on the merits.

(1) Willful, materially false testimony by accused may be considered in sentencing. *United States v. Grayson*, 438 U.S. 41 (1978); *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982) (applies Grayson standard to the military); *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985), *pet. denied* 22 M.J. 345 (C.M.A. 1986) (military judge properly gave the "mendacious accused" instruction over defense objection).

(2) Trial counsel may comment on the accused's false testimony. *United States v. Standifer*, 31 M.J. 742 (A.F.C.M.R. 1990). Trial counsel's argument based on accused's failure to "accept responsibility for his actions" was proper mendacious accused argument, although it came dangerously close to improper comment on accused's failure to admit guilt.

b. Commenting on the accused's unsworn statement in extenuation and mitigation. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981) (it is permissible to contrast unsworn statement with one made under oath). *But see United States v. Brown*, 17 M.J. 987 (A.C.M.R. 1984).

c. Commenting on the accused's lack of remorse.

(1) Trial counsel may comment on the accused's lack of remorse if the accused has either testified or has made an unsworn statement and has either expressed no remorse or his expressions of remorse can be arguably construed as being shallow, artificial, or contrived. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992).

(2) *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993). Trial counsel's comment that the accused did not "acknowledge [the] finding of guilty" in his unsworn statement was not plain error. Such argument may be a proper comment on the accused's lack of remorse.

(3) *But see United States v. Chaves*, 28 M.J. 691, 693 (A.F.C.M.R. 1989). Military judge instructed that absence of a statement of remorse may be considered as an aggravating factor for sentencing where accused made an unsworn statement but did not discuss crime Held: instruction was error but harmless.

5. Counsel may argue common sense. *United States v. Frazier*, 33 M.J. 260 (C.M.A. 1991). It was permissible to argue potential lethal use of claymore mines in the civilian community.

6. Effect of pretrial agreement.

a. Counsel may generally argue for any legal sentence regardless of limitations contained in a pretrial agreement. *United States v. Rivera*, 49 C.M.R. 838 (A.C.M.R. 1975); *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).

b. Counsel may not make misleading arguments. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992)(finding error in government's disingenuous argument for leniency as to confinement which was designed to enhance punishment by operation of the pretrial agreement).

B. Common Errors.

1. Trial counsel may not argue for a quantum of punishment greater than that court-martial may adjudge. R.C.M. 1001(g).

2. Trial counsel may not argue command policies. R.C.M. 1001(g). *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983). Military judge had sua sponte duty to correct counsel's improper comments on Strategic Air Command policies on drugs.

3. Trial counsel may not mention the convening authority.

a. Trial counsel may not purport to speak for the convening authority or any higher authority, or refer to the views of such authorities. R.C.M. 1001(g).

b. *United States v. Sparrow*, 33 M.J. 139 (C.M.A. 1991). It was improper for the trial counsel to mention the convening authority by name and then to tell the members to "do the right thing."

c. *United States v. Simpson*, 12 M.J. 732 (A.F.C.M.R. 1981), *pet. denied,* 13 M.J. 480 (C.M.A. 1982). It was error for trial counsel to argue that referral to special court-martial was exercise of clemency by convening authority.

4. Trial counsel may not mention an accused's exercise of a fundamental right.

a. Right to plead not guilty. *United States v. Jones*, 30 M.J. 898 (A.F.C.M.R. 1990). It was impermissible for trial counsel to argue that accused should not be considered for rehabilitation because he had failed to admit his responsibility by pleading not guilty.

b. Right to confront witnesses. *United States v. Carr*, 25 M.J. 637 (A.C.M.R. 1987). Trial counsel may not argue the adverse impact flowing from the accused's exercise of his constitutional rights to confront and cross-examine witnesses against him.

5. Counsel may not argue evidence beyond its limited purpose. *United States v. White*, 36 M.J. 306 (C.M.A. 1993). In trial for drug use based on positive urinalysis, it was permissible for trial counsel to cross-examine defense character witness regarding uncharged second positive urinalysis, but trial counsel erred by arguing that accused abused drugs twice.

6. Counsel may not improperly incite passions.

a. Counsel may not ask members to place themselves in position of victim. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993) (trial counsel may ask members to "imagine the fear of the victim".)

b. Counsel may not refer to accused in *unduly* demeaning terms.

(1) *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.

(2) *But see United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.

c. Counsel may argue impact of sentence. *United States v. Moody*, 10 M.J. 845 (N.C.M.R. 1981), *pet. denied,* 11 M.J. 348 (C.M.A. 1981). When defense counsel asks court to consider impact of sentence on accused's family, trial counsel may, on rebuttal, ask court to consider impact on victim's family.

d. Counsel may not appeal to personal interests of sentencing authority. *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1985). It was improper for trial counsel to ask the military judge if he wanted the accused walking the streets of the judge's neighborhood.

7. Defense counsel may not argue for reconsideration. *United States v. Vanderslip*, 28 M.J. 1070 (N.M.C.M.R. 1989). The fact that members may reconsider findings does not authorize a request for reconsideration.

8. Counsel may not argue facts not in evidence.

a. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990). Where the government allowed an accused to plead guilty as an aider and abettor in providing the gun to actual shooter, it could not then argue that the accused pulled the trigger.

b. *United States v. Shoup*, 31 M.J. 819 (A.F.C.M.R. 1990). Trial counsel improperly mentioned facts not in evidence by arguing to the military judge "This is the third drug case you have heard this week; there were many before and there will be many more in the future...Over twenty people died in Panama a few weeks ago trying to stop drugs from coming into this country."

c. Counsel may not argue unreasonable inferences. *United States v. Spears*, 32 M.J. 934 (A.F.C.M.R. 1991). Trial counsel's argument that an inspection which revealed a missing meal card had an impact on the entire unit was not a reasonable inference.

d. Counsel may not provide advice on "the average sentence." *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel improperly explained that "average" sentence was mathematical average between no punishment and the possible maximum punishment.

e. Counsel may not argue impact on unit or service absent evidence accused's crimes affected duty. *United States v. Simmons*, 31 M.J. 884 (A.F.C.M.R. 1990). Trial counsel's argument in drug case that "[w]e're going to find out who uses drugs when a plane crashes" was improper where the accused's duty was to clean airplanes and there was no evidence that appellant's use of amphetamines affected his duty.

f. Counsel may mention accused's status as officer or NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991). NCO status of accused was appropriate aggravating factor in drug use case.

9. Defense counsel may not argue for a punitive discharge unless the accused consents.

a. The accused's consent must be indicated on record. *United States v. Holcomb*, 43 C.M.R. 149 (C.M.A. 1971); *United States v. Williams*, 21 M.J. 524 (A.C.M.R. 1985) (argument urging discharge presumed prejudicial unless accused consents); *United States v. Robinson*, 25 M.J. 43 (C.M.A. 1987) (erroneous argument urging judge to adjudge a suspended discharge, despite accused's desire to remain in the service, held not to be prejudicial).

b. The military judge should question the accused to determine whether he concurs with defense counsel's argument for a discharge. *United States v. McNally*, 16 M.J. 32, 35 (C.M.A. 1983) (Cooke, J. concurring).

c. The military judge need not question the accused if a discharge is highly likely. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983).

d. Defense counsel may argue only for a bad-conduct discharge, not a dishonorable discharge or "a punitive discharge." *United States v. Dotson*, 9 M.J. 542 (C.G.C.M.R. 1980) and *United States v. McMillan*, 42 C.M.R. 601 (A.C.M.R. 1970).

10. Trial counsel may not argue for a punitive discharge based on the needs of service. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992). Trial counsel improperly blurred distinction between a punitive discharge and administrative separation by arguing "would you really want this individual working for you? I don't think so. . . . Is this really the individual . . . that we need in the United States Air Force?."

11. Counsel may not make racist arguments. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."

V. REMEDIES FOR IMPROPER ARGUMENT.

A. Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

B. Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A 1980).

C. Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).

D. Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986), *pet. denied* 23 M.J. 266 (C.M.A. 1986).

E. Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

VI. WAIVER.

A. The Waiver Rule. Failure to object to improper argument constitutes waiver. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986).

1. Waiver with respect to findings argument. R.C.M. 919(c).

a. *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Where three possible objections to argument existed and defense counsel only made one, other two were waived.

b. An objection by opposing counsel is the most appropriate response to an erroneous argument. *See United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992).

2. Waiver with respect to sentencing argument. R.C.M. 1001(g); *United States v. Desiderio*, 30 M.J. 894 (A.F.C.M.R. 1990). Defense counsel's failure to object during trial counsel's argument constituted waiver, even though defense counsel stated in his argument, "Now I didn't say anything during [trial counsel's] argument as he stood up and talked about the impact of drug use on the mission and that kind of thing. It probably was objectionable . . .."

3. The Plain Error Exception. Failure to object does not waive plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987). *See also United States v. Young*, 470 U.S. 1 (1985); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). In order to constitute plain error, the error must:

a. Be obvious and substantial; and

b. Have had an unfair prejudicial impact.

4. *But see United States v. Thompson*, 37 M.J. 1023, (A.C.M.R. 1993): prejudice is not always necessary. Trial counsel's racist sentencing argument was found to be plain error, despite the fact that it did not prejudice the accused's sentence.

VII. CONCLUSION.

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CHAPTER 9

SENTENCING PROCEDURES

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MAJ Tyler Harder
December 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

SENTENCING PROCEDURES

Outline of Instruction

I. INTRODUCTION.

II. SENTENCING PROCEDURES.

A. **R.C.M. 1001(b).** Government Pre-Sentencing Evidence.

1. Service data from the charge sheet. **R.C.M. 1001(b)(1).**

   a. Name, rank, age.

   b. Pay and allowances.

   c. Prior and current service.

   d. Restraint.

2. Personal data and character of prior service. **R.C.M. 1001(b)(2).**

   a. "Under regulations of the secretary concerned trial counsel may obtain and introduce from the personnel records of the accused evidence of character of prior service."

   b. These records may include personnel records contained in the OMPF or located elsewhere, unless prohibited by law or other regulation.

(1) US v. Clemente, 50 M.J. 36 (1999). The Government introduced two letters of reprimand over defense objection that the accused had neglected his child and that he had hit his wife. He was found guilty of attempted larceny, larceny, and larceny of mail. The court applied an abuse of discretion standard and held that it was a personnel record that did reflect past behavior and performance, 403 was not abused. This was not like *United States v. Zakaria,* 38 M.J. 280 (CMA 1993), where the evidence admitted was of sexual perversion in a case of the theft of property worth less than $100.

(2) United States v. Ariail, 48 M.J. 285 (1998). National Agency Questionnaire, DD Form 398-2, completed by accused and showing history of traffic offenses, was admissible under RCM 1001(b)(2), where it did not meet admission criteria under RCM 1001(b)(3).

(3) United States v. Davis, 44 M.J. 13 (1996). Court upheld admission of USDB Discipline and Adjustment Board Report as representing accused's "service record as prisoner," based on waiver by defense in failing to object under R.C.M. 1001(b)(2). BUT: see J. Gierke, concurring based on waiver, but distinguishing *departmental* regulations from those of local field commands.

(4) United States v. Fontenot, 29 M.J. 244 (C.M.A. 1989). "Documents," handwritten statements, attached to DD Form 508s not admissible under R.C.M. 1001(b)(2). "Army policy clearly reflects an appropriate sensitivity to the need for some opportunity for the individual to become aware of unfavorable information that will be included in his personnel files and to respond to it." Id. at 248.

(5) United States v. Weatherspoon, 39 M.J. 762 (A.C.M.R. 1994). Admission of record of NJP from "holdings of Investigative Records Repository, U.S. Army Central Security Facility" was improper. R.C.M. 1001(b)(2) permits introduction of personnel records of the accused as evidence of the accused's prior service. ACMR finds that for the purposes of R.C.M. 1001(b)(2), "personnel records" are those contained in the Official Military Personnel File (OMPF), the Military Personnel Records Jacket (MPRJ), and the Career Management Individual File (CMIF).

c. Special foundation for admissibility of Records of Nonjudicial Punishment and Convictions by Summary Court-Martial.

(1) US v. Gammons, 51 M.J. 169 (1999). The accused was court-martialed for various offenses involving the use of illegal drugs. The accused had already received an Article 15 for one of those offenses. At the outset of the trial the trial counsel presented the court with the documents he intended to present during sentencing. When the judge saw the Article 15 he asked the defense counsel if he objected to the Article 15. Defense had no objection, and intended to use the Article 15 themselves. The court noted that there is no double jeopardy issue where an accused is court-martialed for an offense of which they have already received an Article 15. The court went on to point out that under Article 15(f) and *U.S. v. Pierce*, 27 M.J. 369, the defense had a gatekeeping role regarding the Article 15. If defense says the Article 15 is going to stay out, it stays out.

(2) United States v. Kelly, 45 M.J. 259, (1996). Reaffirmed holding in United States v. Mack, 9 M.J. 300 (1980), that "accused may properly object to admission of record of prior nonjudicial punishment [or summary court-martial] which does not recite that he was offered some opportunity to consult with counsel."

(3) United States v. Edwards, 46 M.J. 41 (1997). Whether or not a vessel is operational affects the validity of an Article 15 for its subsequent use at a court-martial. If the vessel is not operational, then for a prior Article 15 to be admissible at court-martial the accused must have had a right to consult with counsel regarding the Article 15.

(4) Must show opportunity to consult with counsel and that accused waived his/her right to demand trial by court-martial. United States v. Booker, 5 M.J. 238 (C.M.A. 1978); United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

(5) Failure to object waives the foundational requirement unless plain error. United States v. Dyke, 16 M.J. 426 (C.M.A. 1983). Admission of record of nonjudicial punishment with no discernible signatures was such a deviation from customary practice that it was deemed plain error. See also United States v. Yarbough, 33 M.J. 122 (C.M.A. 1991). Even though nonjudicial punishment failed to indicate if appeal was complete, defense counsel's failure to object equals waiver.

(6) United States v. Rimmer, 39 M.J. 1083 (A.C.M.R. 1994). Exhibit of previous misconduct containing deficiencies on its face is not qualified for admission into evidence. Record of NJP lacked any indication of accused's election concerning appeal of punishment, and imposing officer failed to check whether he conducted open or closed hearing.

d. No "rule of completeness." TC cannot be compelled to present favorable portions of personnel records if unfavorable portions have been introduced in aggravation. See United States v. Morgan, 15 M.J. 128 (C.M.A. 1983); United States v. Salgado-Agosto, 20 M.J. 238 (C.M.A. 1985). See Analysis to RCM 1001(b)(2).

e. 1001(b)(2) cannot be used as a "backdoor means" of admitting otherwise inadmissible evidence. United States v. Delaney, 27 M.J. 501 (A.C.M.R. 1988) (Cannot use enlistment document to back door inadmissible prior arrests; cannot then use arrest record to rebut accused's attempted explanations of arrests). *Compare with* U.S. v. Ariail, 48 M.J. 285 (1998).

f. MJ must apply Mil. R. Evid. 403 balancing to R.C.M. 1001(b)(2) evidence. See United States v. Zengel, 32 M.J. 642 (C.G.C.M.R. 1991) (suppressing a prior "arrest" that is properly documented in the accused's personnel records). See also United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993); and United States v. Zakaria, 38 M.J. 280 (C.M.A. 1993).

3. Evidence of prior convictions. **R.C.M. 1001 (b)(3).**

a. There is a "conviction" in a court-martial case when a sentence has been adjudged.

b. Juvenile adjudications are not convictions within the meaning of R.C.M. 1001(b)(3) and are therefore inadmissible in aggravation. United States v. Slovacek, 24 M.J. 140 (C.M.A. 1987).

c. Pendency of appeal. R.C.M. 1001(b)(3)(B).

d. United States v. Tillar, 48 M.J. 541 (A.F. Ct. Crim. App. 1998). The AFCCA upheld admission of an 18-year old prior conviction, holding the only time limitation is in the balancing test under MRE 403. Where the accused faced sentencing for larceny and wrongful appropriation of military property, and had a prior conviction at special court-martial for larceny less than $100, the prior conviction was not inadmissible merely due to its age. The court specifically rejected the ten year limitation applicable to convictions for impeachment.

e. United States v. White, 47 M.J. 139 (1997). Accused who testified during sentencing about prior bad check convictions waived issue of proper form of admission of such prior convictions under R.C.M. 1001(b)(3). TC offered in aggravation four warrants for bad checks which indicated plea in civilian court of "*nolo*" by accused. Accused then testified she had paid required fines for offenses shown on warrants, and there was no indication by defense that accused would not have testified to such information if the MJ had sustained the original defense objection to the warrants when offered by the TC. Court noted continuing lack of clarity in what is required to constitute prior conviction.

f. United States v. Glover, 53 M.J. 366 (2000). Accused was convicted of 84 specifications of uttering checks (valued at about $10,000) without sufficient funds. During the sentencing phase of the court-martial, trial counsel sought to introduce evidence of two prior convictions for passing bad checks in different counties in Georgia ten years earlier. It was unclear from the record if the military judge had applied a MRE 403 balancing test. CAAF held it would be error if the military judge did not apply the 403 test to sentencing evidence, but it determined that, even if there was error, it was harmless in this case. (The evidence of the prior convictions was already before the court, and the prior offenses were "insignificant relative to the current offenses.")

4. Evidence in Aggravation. **R.C.M. 1001(b)(4).**

a. United States v. Patterson, 54 M.J. 74 (2000). Accused was convicted of sexual abuse of his 9-year-old daughter over a period of several years. On sentencing, the government called a psychiatrist to testify regarding victim impact. During his testimony, he explained "grooming" (how pedophiles initially engage children and then prepare them for different types of sexual activity) and stated that he saw patterns of grooming in the present case. He further testified that there is no known effective treatment for those who groom young children. CAAF noted that the witness never expressly testified that accused was a pedophile, and, although the testimony regarding the accused's psychological state and lack of rehabilitative potential may be improper, it was not plain error. NOTE: In a concurring opinion, Judges Gierke and Sullivan felt it was error for the witness to stray "from his diagnosis of the victim to describing his 'assumption' that the victim was groomed by the appellant."

b. 1001(b)(4), Discussion: "May include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim . . . and evidence of significant impact on the mission, discipline, or efficiency of the command." As of 1 November 1999, the discussion section of R.C.M. 1001(b)(4) will also include the following, "In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

c. United States v. Mance, 47 M.J. 742 (N.M. Ct. Crim. App. 1997). Where evidence failed to link the accused either to a threatening phone call or to other uncharged assaults, then the evidence failed to meet the requirement of RCM 1001(b)(4) that it *directly related to or resulted from* the offenses of which accused was found guilty. NOTE: The court also noted "convictions on the major themes before the members had already occurred at this point, and . . . little was to be gained by this evidence, and much could be lost if appellant's substantial rights were abrogated."

d. United States v. Sanchez, 47 M.J. 794 (N.M. Ct. Crim. App. 1998). Evidence from assault victim -- including extent of injuries suffered, hospitalization and general adverse effects of assault, pictures of wounds, and record of medical treatment of victim -- showed the seriousness of the underlying offense, and the seriousness of misprision of aggravated assault depends upon the nature and circumstances of the particular underlying aggravated assault. While the evidence in aggravation under R.C.M. 1001(b)(4) did not *result from* the misprision conviction, it did *directly relate* to the offense, and was therefore admissible. The MJ properly overruled the defense objection that such evidence related to the underlying assault, and not to misprision of which the accused was convicted.

e. United States v. Wilson, 47 M.J. 152 (1997). Notwithstanding disrespectful comments made outside presence of individual, impact on that disrespected officer constitutes relevant victim-impact evidence under R.C.M. 1001(b)(4). Accused convicted of disrespect for commenting to another party that, "Captain Power, that #$^%%# %$#^ is out to get me." Disrespected officer testified at sentencing to "concern" statement caused her, and court held directly related sufficiently to constitute proper aggravating evidence.

f. United States v. Jones, 44 M.J. 103 (1996). HIV-positive accused charged with aggravated assault and adultery; convicted only of latter in judge alone trial and sentenced to max. In imposing sentence, military judge (MJ) criticized, "[y]our disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances...." Accused claimed sentenced for offense for which not found guilty, but court held medical condition fact directly related to offense under R.C.M. 1001(b)(4) and essential to understanding of circumstances surrounding offense.

g. United States v. Zimmerman, 43 M.J. 782 (Army Ct. Crim. App. 1996). Accused's motive is a proper and useful factor in determining an appropriate sentence. Evidence that accused was motivated by white supremacist views when he wrongfully disposed of military munitions to what he believed was a white supremacist group constituted aggravating circumstances directly related to the offense. First Amendment was not violated by MJ's instruction that if members believed accused's knowledge was a factor in deciding to give the group munitions, members could consider nature of group for its tendency to put potentially dangerous materials into the civilian community as it bore on accused's sense of responsibility.

h. United States v. Gargaro, 45 M.J. 99 (1996). Army captain charged with number of offenses related to bringing AK-47 rifles back to Fort Bragg from Saudi Arabia. A civilian drug dealer triggered the investigation when he was arrested with an automatic AK-47, and said he obtained it from a Fort Bragg soldier. Gargaro argued there was no showing that rifle was in the batch he shipped from Saudi Arabia, and therefore it was not evidence directly relating to or resulting from his offenses. The court found the evidence showed the extent of the conspiracy and responsibility of the accused commander, and any unfair prejudice that weapon found in hands of drug dealer was outweighed by the probative value showing facts and circumstances surrounding investigation of charged offenses. Also, judge alone case, and court deferred to MJ giving appropriate weight to evidence.

i. United States v. Streetman, 43 M.J. 752 (A.F. Ct. Crim. App. 1995). Accused ordered to submit urine sample as part of random urinalysis. Accused dragged out time in which had to supply sample, and court notes efforts to stall taking of urine specimen to maximize time available for body to rid itself of substance was proper matter in aggravation.

j. United States v. Rust, 41 M.J. 472 (1995). Accused/physician failed to admit/treat soldier's spouse for premature labor, resulting in conviction for dereliction. The baby died three days after birth, and father/lover killed woman and then himself, leaving detailed, poignant note. Prejudicial error to admit note in aggravation phase of physician's trial. Too attenuated *even if* could establish link between accused's conduct and murder-suicide, and clearly fails 403 test.

k. United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985). A reasonable linkage is required between the offense and the alleged effect.

l. United States v. Wingart, 27 M.J. 128 (C.M.A. 1988). Uncharged misconduct is irrelevant for sentencing unless the aggravation directly relates to or results from one of the accused's offenses. Mil. R. Evid. 404(b) evidence no longer admissible unless directly related to offense(s) found guilty. See also United States v. Mullens, 28 M.J. 574 (A.C.M.R. 1989).

5. Evidence of rehabilitative potential. **R.C.M. 1001(b)(5).**

a. "Rehabilitative potential" refers to the accused's potential to be restored . . . to a useful and constructive place in society."

b. May present opinion evidence concerning potential for rehabilitation. R.C.M 1001(b)(5)(A).

c. Sufficient information and knowledge about accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense.". R.C.M. 1001(b)(5)(B).

(1) Quality of the opinion depends on the foundation. United States v. Boughton, 16 M.J. 649 (A.F.C.M.R. 1983). Opinions should be based on personal observation, but may also be based on reports and other information provided by subordinates.

(2) United States v. Powell, 49 M.J. 460 (1998). In laying a foundation for opinion evidence of an accused's rehabilitative potential, a witness may not refer to specific acts. Testimony to the effect the accused "had problems paying his rent," "was late for work and had financial problems," and as to his "loss of military identification card, his financial irresponsibility, and his bad checks," constituted improper foundation evidence.

d. Defense can't sandbag. United States v. Sylvester, 38 M.J. 720 (A.C.M.R. 1994). Opinion evidence regarding rehab potential is not *per se* inadmissible merely because defense counsel establishes on cross examination that witness's assessment goes only to potential for *military* service. Once proper foundation for opinion has been established, such cross examination goes to weight, not to admissibility.

e. Opinion evidence of rehabilitative potential may not be based solely on the severity of the offense. R.C.M. 1001(b)(5)(C); United States v. Horner, 22 M.J. 294 (C.M.A. 1986).

f. The scope of the evidence must be limited to whether the accused has *rehabilitative potential,* not an opinion regarding appropriateness of punitive discharge for accused. R.C.M. 1001(b)(5)(D).

(1) United States v. Williams, 50 M.J. 397 (1999). The Government introduced the testimony of the accused's company commander regarding the accused's rehabilitative potential. After the trial counsel laid a proper foundation for the company commander's opinion the following occurred: Q: "Based on your experience...do you have an opinion as to whether the accused is capable of rehabilitation. And what is it?" A: "No."
Q: "Tell me why."
A: "We have tried. We have spent numerous hours counseling him. We have tried verbal counseling, letters of counseling, letter of reprimand, Article 15's, and they won't work…I just wanted to administratively discharge him.". An opinion offered under R.C.M. 1001(b)(5) is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit. Also witnesses are not allowed to use euphemisms for recommending a punitive discharge such as "No potential for continued service" or "he should be separated." Here the company commander went beyond the scope of what she was allowed to testify about by commenting on why she felt the accused had no potential for rehabilitation. The company commander also used a euphemism to recommend a punitive discharge by stating repeatedly that all she wanted to do was administratively discharge the accused.

(2) United States v. Yerich, 47 M.J. 615 (Army Ct. Crim. App. 1997). It is improper for a witness to use a euphemism for a punitive discharge in commenting on an accused's rehabilitative potential. Whether the words used by the witness constitute a euphemism, however, depends on the circumstantial context. Where a Sergeant First Class testified the accused had no "military rehabilitation" potential, the witness really was commenting on his opinion as supervisor, and not intending euphemistically to encourage a discharge. The court also noted that the NCO testifying before an officer panel did not constitute any exercise of undue influence.

(3) No euphemisms - United States v. Aurich, 31 M.J. 95 (C.M.A. 1990). Aurich's company commander is permitted to testify over defense objection that he does not want Aurich back in his unit. HELD: Absent an explanation, that is not permitted by the rule, the Commander's opinion that he does not want the accused back in his unit "proves absolutely nothing."

(4) Same rules may apply against the defense - "The mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'" United States v. Ramos, 42 M.J. 392, 396 (1995).

g. Specific acts? R.C.M. 1001(b)(5)(E and F).

(1) On direct, may not introduce specific acts of uncharged misconduct that form the basis of the opinion. United States v. Rhoads, 32 M.J. 114 (C.M.A. 1991).

(2) On cross-examination the defense counsel can explore specific incidents of conduct.

(3) If the defense opens the door during cross-examination, on redirect the trial counsel should also be able to address specific incidents of conduct. United States v. Clarke, 29 M.J. 582 (A.F.C.M.R. 1989). See also United States v. Gregory, 31 M.J. 236 (C.M.A. 1990).

h. Rebuttal Witnesses. United States v. Pompey, 33 M.J. 266 (C.M.A. 1991). Rehabilitative potential evidence rules (Ohrt/Horner) apply to government rebuttal witnesses to keep unlawful command influence out of the sentencing proceedings.

i. Absence of rehabilitative potential is a factor for consideration in determining a proper sentence. It is not a matter in aggravation! United States v. Loving, 41 M.J. 213 (C.M.A. 1994), *aff'd,* 116 S.Ct. 1737 (1996). MJ's characterization of accused's disciplinary record and his captain's testimony about accused's duty performance as aggravating circumstances (in a capital case!), was error since lack of rehabilitative potential is not an aggravating circumstance.

j. United States v. Williams, 41 M.J. 134 (C.M.A. 1994). Psychiatric expert's prediction of future dangerousness was proper matter for consideration in sentencing under rule providing for admission of evidence of accused's potential for rehabilitation under RCM 1001(b)(5).

k. US v. Scott, 51 M.J. 326 (1999). Contrary to his pleas the accused was convicted of several offenses to include rape, larceny, robbery and kidnapping. During the presentencing phase of trial the Government offered an expert to testify about the accused's future dangerousness. Defense objected to the witness on the basis that the witness had never interviewed his client so he lacked an adequate basis to form an opinion. The judge overruled the objection. The court held there was no evidence to indicate that the Government witness had examined the full sanity report regarding the accused. Defense's failure to object at trial that there was a violation of the accused's Fifth and Sixth Amendment rights at trial forfeited those objections, absent plain error. The court concluded there was no plain error in this case where the doctor basically testified that based on the twenty offenses the accused had committed in the last two years, he was likely to re-offend.

l. United States v. George, 52 M.J. 259 (2000). A social worker testified that the accused's prognosis for rehabilitation was "guarded" and "questionable." CAAF noted that evidence of future dangerousness is a proper matter under R.C.M. 1001(b)(5).

m. United States v. McElhaney, 54 M.J. 120 (2000). Accused was charged with 11 offenses stemming from a sexual relationship with his wife's minor niece. During the government sentencing case, a child psychiatrist testified regarding specific victim impact and the accused's rehabilitative potential. Despite the fact he had not examined the accused or reviewed his medical or personnel records, and testified he was unable to render a diagnosis of pedophilia without examining the accused, the psychiatrist was permitted to state that the accused's behavior was "consistent" with a pedophile's profile. CAAF held it was error for the military judge to allow the testimony regarding future dangerousness of the accused as related to pedophilia. However, CAAF did not decide whether such testimony materially prejudiced the accused since the sentence was set aside on other grounds. NOTE: Chief Judge Crawford and Judge Sullivan dissented with regard to this issue. They both stated that his testimony regarding the accused's future dangerousness was admissible under R.C.M. 1001(b)(5).

n. United States v. Phelps, No. 9601351 (Army Ct. Crim. App. May 29, 1997). "[N]othing prevents the prosecution from presenting evidence of the accused's rehabilitative potential before the defense raises the issue, as long as the government lays a proper foundation and presents the evidence in proper form."

o. United States v. Hughes, No. 9501978 (Army Ct. Crim. App. May 5, 1997). Where expansive answer by witness to trial counsel's (TC) question was not a clear statement for a punitive discharge, the court held there was not a violation of R.C.M. 1001(b)(5). The court also noted the witness was the unit first sergeant (1SG) testifying before an officer panel, and therefore there was not a command influence problem.

p. United States v. Powell, 45 M.J. 637 (N.M.Ct.Crim.App. 1997). Rehabilitative potential evidence is proper under R.C.M. 1001(b)(5), but it is improper for TC to elicit specific instances of conduct to establish a foundation for the witness's opinion.

6. Additional Matters. R.C.M. 1001(f).

a. Plea of guilty is a mitigating factor.

b. Evidence properly introduced on the merits before findings, including evidence of other offenses or acts of misconduct even if introduced for a limited purpose.

c. Statements made during providence inquiry in guilty plea.

(1) United States v. Figura, 44 M.J. 308 (1996). Court found no demonstrative right or wrong way to introduce evidence from providence inquiry, but MJ should permit parties to choose method of presentation, and defense here chose functional equivalent of oral stipulation of fact conveyed to members by MJ. At sentencing TC sought to introduce part of providence inquiry because stipulation of fact lacked certain information regarding checks written by accused. In order to present information to members, MJ gave defense option of witness who heard inquiry testifying, court reporter testifying, or MJ giving as part of instruction. Defense opted for MJ and waived any objection based on MJ becoming witness to proceeding.

(2) United States v. Holt, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by the accused during providence inquiry may be received as admission at sentencing hearing.

(3) How to do it: authenticated copy, witness, tapes (United States v. Irwin, 42 M.J. 479 (1995).

7. "Aggravation evidence" in stipulations of fact.

a. United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

(1) Inadmissible evidence may be stipulated to (subject to R.C.M. 811(b) "interests of justice" and no government overreaching).

(2) Stipulation should be unequivocal that all parties agree stipulation is "admissible."

b. United States v. DeYoung, 29 M.J. 78 (C.M.A. 1989). Military judge must affirmatively rule on defense objections, even if the stipulation states that the contents are admissible.

c. United States v. Vargas, 29 M.J. 968 (A.C.M.R. 1990). The stipulated facts constitute uncharged misconduct not closely related to the facts alleged; therefore, they were "generally" inadmissible. BUT, the accused agreed to permit their use in return for favorable sentence limits and there is no evidence of government overreaching.

8. Three-step process for analyzing sentencing matter presented by the prosecution via R.C.M. 1001(b):

a. Does the evidence fit one of the enumerated categories of R.C.M. 1001(b)?

b. Is the evidence in an admissible form? United States v. Bolden, 34 M.J. 728 (N.M.C.M.R. 1991).

c. Is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? Mil. R. Evid. 403. United States v. Martin, 20 M.J. 227 (C.M.A. 1985).

B. The Case in Extenuation and Mitigation. **R.C.M. 1001(c).**

1. Extenuation. R.C.M. 1001(c)(1)(A).

a. Serves to explain the circumstances surrounding the commission of the offense, including those reasons which do not constitute a legal justification or excuse.

b. US v. Loya, 49 M.J. 104 (1998). The accused was charged with murder and found not guilty of that offense but guilty of involuntary manslaughter by culpably negligent conduct. The accused accidentally stabbed a fellow soldier in the chest. Defense wanted to introduce testimony that but for improper medical treatment the victim might not have died. The judge refused to allow the testimony, ruling that it was irrelevant. CAAF found that the service court and the trial judge were incorrect. The evidence should have been admitted. The court stated that the testimony of the defense witness would have given a more complete and full picture of the circumstances surrounding the crime. Moreover the defective care given the victim may have contributed to the victim's death, a fact which might logically reduce the accused's blame.

2. Mitigation. R.C.M. 1001(c)(1)(B).

Personal factor(s) concerning the accused introduced to lessen the punishment to be adjudged, e.g., evidence of the accused's reputation or record in the service for efficiency, fidelity, temperance, courage, etc.

a. US v. Pauling, 9700685 (Army Ct. Crim. App. 1999). During the extenuation/mitigation phase of the court-martial defense counsel (after laying a proper foundation) asked a witness about the accused's potential for rehabilitation. The trial counsel objected and the judge sustained the objection. The court stated that an accused's potential for rehabilitation is a proper and frequent component of a court-martial's sentencing procedures. Further, defense witness' opinion as to an accused's rehabilitative potential is proper evidence.

b. United States v. Simmons, 48 M.J. 193 (1998). The MJ prohibition on the accused from offering evidence of a civilian court sentence for the same offenses subject of his court-martial constituted error. By precluding such evidence, the MJ prevented the accused from showing he had already been punished for his misconduct.

c. United States v. Demerse, 37 M.J. 488 (C.M.A. 1993). Counsel should pay particular attention to awards and decorations based on combat service.

d. United States v. Sumrall, 45 M.J. 207 (1996). CAAF recognizes right of retirement-eligible accused to introduce at sentencing evidence that punitive discharge will deny retirement benefits, and with proper foundation, evidence of potential dollar amount subject to loss.

e. United States v. Greaves, 46 M.J. 133 (1997). The MJ should give some instructions when the panel asks for direction in important area of retirement benefits. Accused was nine weeks away from retirement eligibility and did not have to reenlist.

f. United States v. Becker, 46 M.J. 141 (1997). The MJ erred when he refused to allow accused with 19 years and 8-1/2 months active duty service at time of court-martial to present evidence in mitigation of loss in retired pay if discharged. "The relevance of evidence of potential loss of retirement benefits depends upon the facts and circumstances of the individual accused's case."

3. Statement by the accused. R.C.M. 1001(c)(2).

a. It is the accused's choice as to the type of statement made by the accused.

See United States v. Proctor, 34 M.J. 549 (A.F.C.M.R. 1992) (accused makes sworn-narrative statement = disaster).

b. Sworn statement by accused. R.C.M. 1001(c)(2)(B).

(1) Subject to cross-examination by trial counsel, military judge, and members.

(2) Rebuttable by:

(a) Opinion and reputation evidence of character for untruthfulness. RCM 608(a).

(b) Evidence of bias, prejudice, or any motive to misrepresent. R.C.M. 608(c).

(c) Extrinsic evidence of prior inconsistent statements. R.C.M. 613.

c. Unsworn statement by accused. R.C.M. 1001(c)(2)(C).

(1) May be oral, written, or both.

(2) May be made by accused, counsel, or both.

(a) United States v. Grill, 48 M.J. 131 (1998). The right of an accused to make a statement in allocution is not wholly unfettered, but must be evaluated in the context of statements in specific cases. CAAF noted the MJ has an opportunity to place an unsworn statement in context through instructions to the panel, as well as the trial counsel (TC) in rebuttal and closing argument. It was error for the MJ at sentencing to sustain the TC's objection to the accused making any reference to his co-conspirators being treated more leniently by civilian jurisdictions (*i.e.*, not prosecuted, deported, probation). "The mere fact that a statement in allocution might contain matter that would be inadmissible if offered as sworn testimony does not, by itself, provide a basis for constraining the right of allocution."

(b) United States v. Jeffery, 48 M.J. 229 (1998). An accused's rights in allocution are broad, but not wholly unconstrained. The mere fact, however, that an unsworn statement might contain otherwise inadmissible evidence -- *e.g.*, the possibility of receiving an administrative rather than punitive discharge -- does not render it inadmissible. "We have confidence that properly instructed court-martial panels can place unsworn statements in the proper context…."

(c) United States v. Britt, 48 M.J. 233 (1998). There are some limits on an accused's right of allocution, but "comments that address options to a punitive separation from the service . . . are not outside the pale." Thus, it was error for the MJ to restrict the accused from indicating in his unsworn statement that his commander would administratively separate him if the court-martial did not adjudge a punitive discharge.

(3) Not subject to cross-examination.

(a) See United States v. Grady, 30 M.J. 911 (A.C.M.R. 1990). Improper for MJ to question the unsworn accused.

(b) United States v. Martinsmith, 37 M.J. 665 (A.C.M.R. 1993). Accused who makes unsworn statement has no procedural right to respond to questions by the members; discretionary with the military judge.

(4) TC may rebut any statements of fact contained therein (but not opinions).

(a) United States v. Manns, 5454 M.J. 164 (2000). The accused was convicted of indecent acts, indecent assault and disorderly conduct. During presentencing, he made an unsworn statement stating "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country." In rebuttal, the government introduced a psychological evaluation in which the accused admitted to using marijuana prior to enlistment, committing adultery, using prostitutes, and looking at pornography. Accused argued that his statement was not one of fact and not subject to rebuttal. CAAF disagreed, holding that his statement was an assertion of fact and that the accused's admission to marijuana use was permissible rebuttal. They further held that the remaining admissions were admissible not only on the grounds of rebuttal, but also under R.C.M. 1001(b)(4) to show the depth of the accused's sexual problem.

(b) United States v. Willis, 43 M.J. 889 (A.F. Ct. Crim. App. 1996). Accused convicted of premeditated murder offered evidence at sentencing phase to show he expressed profound remorse for murder. Government responded with inconsistent statements made previously by accused, on psychological questionnaire and audio tape of telephone message to brother of victim. Prior statements reflected lack of remorse and gloating triumph over crime. Court held proper rebuttal since accused's statements of remorse constituted statements of fact, enabling government to rebut with contrary evidence.

(c) United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990). "Although I have not been perfect, I feel that I have served well and would like an opportunity to remain in the service...." TC introduces numerous items of uncharged misconduct. HELD: Accused's statement was not a "statement of fact. Instead, in context, it was more in the nature of an opinion--indeed, an argument."

(d) United States v. Thomas, 36 M.J. 638 (A.C.M.R. 1992). Unsworn, accused commented on his upbringing, pregnant girlfriend, reasons for enlisting in the Army, the extenuating circumstances surrounding his offenses, and his apologies to the Army and the victim. TC recalled 1SG, who testified, over defense objection, that accused was not a truthful person. HELD: Improper rebuttal. The accused made no claim of truth or veracity; therefore, his character for truthfulness was not at issue.

4. Relaxed rules of evidence. R.C.M. 1001(c)(3).

MJ may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence (R.C.M. 1001(c)(3)). United States v. Austin, 38 M.J. 578 (A.C.M.R. 1993). Relaxed rules do not remove requirement that evidence be relevant.

5. Witnesses.

a. Who Must The Government Bring?

United States v. Mitchell, 41 M.J. 512 (A.C.M.R. 1994). MJ did not err by denying accused's request for Chief of Chaplains as character witness on sentencing. While acknowledging accused's right to present material testimony, court upheld MJ's discretion in determining the form of presentation. Proffered government stip detailed the witness's background, strong opinions about the accused and government's refusal to fund the witness's travel.

6. The defense may not present evidence or argument which challenges or re-litigates the prior guilty findings of the court. United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

C. Argument.

1. United States v. Jenkins, 54 M.J. 12 (2000). Accused was convicted of wrongfully using and making a military ID card, 37 specifications of larceny, and 25 specifications of forgery. During sentencing argument, the TC argued that the accused "lied on the stand" and "has no rehabilitative potential" referring to him as a "thief" and a "liar." There was no objection to these comments by DC. CAAF seemed to imply, but did not clearly state, the argument was error and, applying "plain error" analysis, found no material prejudice to the accused. Chief Judge Crawford concurred in the result but found no error in the TC's argument.

2. United States v. Baer, 53 M.J. 235 (2000). Accused pled guilty to robbery, aggravated assault, conspiracy, kidnapping, and murder (of a fellow marine). During sentencing argument, the ATC asked members to "imagine being [the victim] sitting there as these people are beating him," and "imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding." DC objected on the grounds of improper argument but the MJ disagreed. CAAF stated that such "Golden Rule arguments" are impermissible, however, when viewing the ATC's argument in its entirety, they found "no basis for disagreeing with the lower court's conclusion that the . . . argument was not calculated to inflame the members' passions." Further, "we do not view the improper Golden Rule argument to have been egregious enough to call for overturning the sentence."
NOTE: In a concurring opinion, Judge Effron (joined by Judge Sullivan) felt the argument, viewed in context, was improper and that the military judge erred in allowing it. The majority opinion also warned that "trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them" are risking reversal.

3. United States v. Stargell, 49 M.J. 92 (1998). During sentencing argument TC argued the appellant "will get an honorable retirement unless you give him a BCD." DC did not object. The appellant had 19 and 1/2 years in service. When, as in this case, an accused is "knocking at retirement's door" the impact of a punitive discharge on retirement benefits is not irrelevant or collateral. In argument the Government can strike hard blows just not foul ones. Counsel may refer to evidence of record and "such fair inferences as may be drawn therefrom". Counsel may also ask members to draw on ordinary human experience and matters of common knowledge in the military community (routine personnel action).

4. United States v. Weisbeck, 48 M.J. 570 (Army Ct. Crim. App. 1998). An accused is only to be sentenced at a court-martial for the offenses of which he is convicted, and not for uncharged or other offenses of which he is acquitted. It is improper argument for trial counsel to refer the panel to other acts of child molestation, of which the accused was tried and acquitted at a previous court-martial. The prior incidents were admitted under MRE 404(b) on the merits, but were not properly a basis for an increased sentence of the accused.

5. United States v. Hampton, 40 M.J. 457 (C.M.A. 1994). Stipulation of expected testimony admitted during presentencing stated that in witness' opinion, accused does not have any rehabilitative potential. During sentencing argument, trial counsel stated that the expected testimony was that accused "doesn't have rehabilitative potential, doesn't deserve to be in the Army." Citing Ohrt, CMA held that even if trial counsel's misstatement is characterized as a reasonable inference drawn from the expected testimony, such argument is still improper. The witness would not have been permitted to make a recommendation for a punitive discharge in the first instance. Accordingly, trial counsel may not put the prohibited recommendation in the witness' mouth in argument.

D. Instructions.

1. United States v. McElroy, 40 M.J. 368 (C.M.A. 1994). During presentencing proceedings, the president asked the MJ about the effects of a punitive discharge on veteran's benefits. The MJ instructed the members that it is not the practice of courts-martial to be concerned with administrative effects of various courts-martial. He added, however, that punitive discharges deprive one of virtually all veterans benefits except those "vested benefits" from a prior period of honorable service. Court found that the MJ's actions did not amount to plain error.

2. United States v. Duncan, 53 M.J. 494 (2000). Accused was found guilty of attempted murder, attempted robbery, attempted forcible sodomy, conspiracy, rape, kidnapping, forcible sodomy, larceny, carrying a concealed weapon, and communicating a threat. At sentencing, the members interrupted their deliberations to ask the military judge if rehabilitation/therapy would be required if the accused were incarcerated, and if parole or good behavior were available to someone with a life sentence. Over defense objection the judge provided an instruction to the members that explained: parole was available, even to someone with a life sentence, but the members should not be concerned with the impact of parole; that appropriate alcohol and sex offense programs were available to the accused should he be confined. CAAF stated that instructions on collateral consequences were permitted, but needed to be clear and legally correct. It was appropriate for the judge to answer questions if he/she can draw upon a reasonably available body of information which rationally relates to sentencing considerations. In this case, the panel's inquiries were related to both aggravation evidence (heinous nature of the crimes) and rehabilitation potential (his potential unreformed release into society.)

III. SENTENCING.

A. What May be Considered. RCM 1006.

1. Notes of the members.

2. Any exhibits.

3. Any written instructions.

a. Instruction must have been given orally.

b. Written copies, or any part thereof, may also be given to the members unless either party objects.

4. Statements made during providence inquiry and properly admitted.

5. Pretrial agreement (PTA) terms.

R.C.M. 705(e). Except in a court-martial without a military judge, **no** member of a court-martial shall be informed of the existence of a PTA.

B. Deliberations and Voting on Sentence. R.C.M. 1006.

Garrett v. Lowe, 39 M.J. 293 (C.M.A. 1994). Members must vote on sentences in their entirety. Accordingly, it was error for the court to instruct jurors that only two-thirds of the members were required to vote for sentence for felony murder, where that sentence must, by law, include confinement for life.

C. Announcement of Sentence. R.C.M. 1007.

1. Sentence worksheet is used to put the sentence in proper form (See Appendix 11, MCM, Forms of Sentences).

2. President or military judge makes announcement.

3. Polling prohibited. Mil. R. Evid. 606.

D. Reconsideration of Sentence. R.C.M. 1009.

1. Time of reconsideration.

a. May be reconsidered any time before the sentence is announced (recent change).

b. After announcement, sentence may not be increased upon reconsideration <u>unless</u> sentence was less than mandatory minimum.

2. Procedure.

a. Any member may propose reconsideration.

b. Proposal to reconsider is voted on in closed session by secret written ballot.

3. Number of votes required.

a. <u>With a view to increasing sentence</u> - may reconsider only if at least a majority votes for reconsideration.

b. <u>With a view to decreasing sentence</u> - may reconsider if more than one-third vote for reconsideration.

(1) For sentence of life or more than 10 years, more than one-fourth vote for reconsideration.

(2) For death sentence, only one vote to reconsider required.

4. Objections Required!

United States v. Moreno, 41 M.J. 537 (N.M.C.M.R. 1994). R.C.M. 1109 does not permit members to consider any punishments increasing a sentence when a request for reconsideration has been made with a view to decreasing the sentence and accepted by the affirmative vote of less than a majority of the members. MJ erred when he indicated that the members could "start all over again" and consider the full spectrum of authorized punishments once any request for reconsideration had been accepted without regard to whether it was with a view to increasing or decreasing the sentence. (But, court rules error harmless in absence of objection by defense counsel!)

E. Impeachment of Sentence. R.C.M. 1008. Same rules as impeachment of findings.

IV. PERMISSIBLE PUNISHMENTS.

A. ***Article 19, UCMJ.*** Congress amended Article 19 (affecting cases referred on or after 1 April 2000) by increasing the maximum authorized period of confinement and forfeitures that a special court-martial can adjudge from six months to one year. Until the President changes R.C.M. 201(f)(2)(B), however, the maximum punishment at a special court-martial will remain the same.

B. Death. R.C.M. 1003(b)(10).

1. Death may be adjudged in accordance with R.C.M. 1004 (mechanics, aggravating factors, votes). Loving v. United States, 116 S.Ct. 1737 (1996).

2. Specifically authorized for thirteen different offenses, including aiding the enemy, espionage, murder, and rape.

3. Requires the concurrence of all the members as to: (1) findings on the merits of capital offense, (2) existence of at least one aggravating factor under R.C.M. 1004(c), (3) that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including aggravating factors, and (4) sentence of death.

4. United States v. Curtis, 46 M.J. 129 (1997). In capital case where accused sentenced to death for two counts of premeditated murder, CAAF found ineffective assistance of counsel in failing to present all available mitigating evidence, and set aside death sentence.

5. United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996). Court approved sentence of death where accused convicted of felony murder, notwithstanding accused did not actually commit murder.

6. United States v. Thomas, 46 M.J. 311 (1997). In capital sentencing procedures under R.C.M. 1004(b)(7), the President extended to capital cases the right of having a vote on the least severe sentence first. At sentencing phase of accused's capital court-martial, the MJ instructed the panel first to vote on a death sentence, and if not unanimous, then to consider a sentence of confinement for life and other types of punishments. CAAF held R.C.M. 1006(d)(3)(A) required voting on proposed sentences "*beginning with the least severe*." The court further noted the particular significance in capital litigation to vote on the least severe sentence first, since a single vote would defeat a sentence of death.

C. Deprivation of Liberty.

1. Confinement. R.C.M. 1003(b)(8).

FY98 Appropriations Act creates new UCMJ article 56a for new punishment of "confinement for life without eligibility for parole."

2. Instruction on Allen Credit.

United States v. Balboa, 33 M.J. 304 (C.M.A. 1991). Proper for military judge to instruct panel that accused would get 68 days Allen credit. Of course, the panel adjudges a BCD, confinement for 12 months and 68 days.

3. Hard labor without confinement R.C.M. 1003(b)(7). (3 months - enlisted only).

4. Restriction. R.C.M. 1003(b)(6). (2 months).

D. Deprivation of pay.

1. Forfeiture of pay and allowances. R.C.M. 1003(b)(2).

a. MCM change effective 1 April 1996: R.C.M. 1003(b)(2,5).

(1) **Art. 58b, UCMJ:** Confined soldiers from GCMs shall, subject to conditions below, forfeit all pay and allowances due them during confinement or parole. Soldiers confined as a result of BCD-SPCM courts, subject to conditions below, shall forfeit 2/3 of pay during confinement.

Sentences covered by above:

(a) Confinement of MORE THAN 6 months, or death, or
(b) ANY confinement AND a DD, BCD, or dismissal.

If accused has dependents, Convening Authority (CA) may waive any/all forfeitures for period NTE 6 months, BUT that money shall be paid to the dependents of the accused.

(2) **Art. 57(a), UCMJ:** ANY forfeiture of pay or allowances (or reduction) in a court-martial sentence takes effect on the earlier of:

(a) 14 days after sentencing, or

(b) date on which CA approves sentence.

On application of accused, CA may defer forfeiture or reduction until approval of sentence, but CA may rescind such deferral at any time and with no due process requirement.

b. United States v. Dewald, 39 M.J. 901 (A.C.M.R. 1994). Forfeitures may not exceed two-thirds pay per month during periods of a sentence when an accused is not in confinement. Accordingly, during periods that adjudged confinement is suspended, forfeitures are limited to two-thirds pay per month.

c. Partial. Must be stated in a whole dollar amount for a specific number of months. See United States v. Riverasoto, 29 M.J. 594 (A.C.M.R. 1989).

d. Must state time certain. United States v. Frierson, 28 M.J. 501 (A.F.C.M.R. 1989).

2. Fine.

a. United States v. Tualla, 52 M.J. 228 (2000). The accused was sentenced to a BCD, 5 months confinement, reduction to E-2, forfeiture of one-third pay/month for 6 months, and a fine of $996.60. The CGCCA disapproved the fine, holding that R.C.M. 1003(b)(3) and the enactment of Article 58b (automatic forfeiture provisions) prevent a SPCM from imposing a sentence that combines a fine and forfeitures. CAAF found the holding to be error, stating that a SPCM is not precluded from imposing a sentence that includes both a fine and forfeitures where the combined fine and forfeitures do not exceed the maximum two-thirds forfeitures that can be adjudged at a SPCM.

b. United States v. Smith, 44 M.J. 720 (Army Ct. Crim. App. 1996). Accused pled guilty to kidnapping, rape and felony murder of child. Sentenced by MJ to DD, confinement for life, total forfeitures, reduction to E-1, and fine of $100,000.00. (Sentence set aside by CAAF on other grounds.)

(1) MJ included fine enforcement provision as follows: "In the event the fine has not been paid by the time the accused is considered for parole, sometime in the next century, that the accused be further confined for 50 years, beginning on that date, or until the fine is paid, or until he dies, whichever comes first."

(2) ACCA found fine permissible punishment:

(a) no legal requirement that accused realize unjust enrichment from offenses committed before fine may be adjudged;

(b) $100,000 fine not excessive and disproportionate given reprehensible nature of offense and fact could have received fine of $250,000 in Federal District Court;

(c) BUT, fine enforcement provision fashioned so as to attempt to defer for years the point at which accused might otherwise be released on parole is not "legal, appropriate and adequate." Fine enforcement provision void as matter of public policy, so court approved sentence, including fine, but without enforcement provision.

c. United States v. Williams, 18 M.J. 186 (C.M.A. 1984). Other than limits on cruel and unusual punishment there are no limits on the amount of fine. Provision that fines are "normally for unjust enrichment" is directory rather than mandatory. Unless there is some evidence the accused was aware that a fine could be imposed, a fine cannot be imposed in a guilty plea case.

d. United States v. Motsinger, 34 M.J. 255 (C.M.A. 1992). MJ's failure to mention fine in oral instructions did not preclude court-martial from imposing fine, where sentence worksheet submitted to court members with agreement of counsel addressed the issue.

e. United States v. Morales-Santana, 32 M.J. 557 (A.C.M.R. 1990). "Because a fine was not specifically mentioned in the pretrial agreement and the military judge failed to advise the accused that a fine might be imposed, the accused may have entered a plea of guilty while under a misconception as to the punishment he might receive." Court disapproved the fine.

f. United States v. Harris, 19 M.J. 331 (C.M.A. 1985). Special and summary courts-martial can impose both forfeitures and a fine in the same case so long as the total amount of money involved does not exceed the total amount of forfeitures authorized.

E. Punitive Separation. R.C.M. 1003 (b)(9).

1. Dismissal - commissioned officers and warrant officers who have been commissioned. See United States v. Carbo, 37 M.J. 523 (A.C.M.R. 1993).

United States v. Stockman, 43 M.J. 856 (N.M.Ct.Crim.App. 1996). Accused warrant officer convicted of various offenses relating to bringing firearms back from Saudi Arabia and sentenced, *inter alia,* to dismissal by court-martial. BUT, at time of trial accused was not a commissioned warrant officer, and therefore only authorized punitive separation was dishonorable discharge. Court defines critical issue as accused's status at time of trial, which after DuBay hearing was determined to be as non-commissioned warrant officer. Court recognized no difference in severity of punishment as between dismissal and dishonorable discharge, and acknowledged intent of court-martial to separate accused from service. Therefore, NMCCA converted adjudged dismissal to dishonorable discharge.

2. Dishonorable discharge - non-commissioned warrant officers or enlisted.

3. Bad-conduct discharge - only enlisted.

4. United States v. Zander, 46 M.J. 558 (N.M.Ct.Crim.App. 1997). Sentence including dismissal was not inappropriately severe for accused convicted of false official statement, conduct unbecoming an officer and wearing unauthorized awards. The court sentenced the accused to dismissal, seven years confinement, total forfeitures; and a pretrial agreement (PTA) suspended all confinement beyond 120 days and forfeitures beyond $750 per month. The court noted the great benefits to accused in the PTA in upholding the dismissal.

F. Reductions in grade - UCMJ art. 58a.

1. "Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes--

a. a dishonorable or bad-conduct discharge;

b. confinement; or

c. hard labor without confinement; reduces that reduces that member to pay grade E-1."

2. Rank of retiree, in Army, may not be reduced by court-martial, or by operation of law. United States v. Sloan, 35 M.J. 4 (C.M.A. 1992).

G. Maximum Punishment. See Manual for Courts-Martial, Appendix 12.

1. Generally - lesser of jurisdiction of court or punishment in Part IV.

2. Offenses not listed in the Table of Maximum Punishments.

a. Included or related offenses.

b. United States Code.

3. Habitual offenders. R.C.M. 1003(d).

a. Three or more convictions within one year - DD, TF, one year confinement.

b. Two or more convictions within three years - BCD, TF, three months confinement.

c. Two or more offenses which carry total authorized confinement of 6 months automatically authorizes BCD and TF.

H. Article 133 punishment.

United States v. Hart, 32 M.J. 101 (C.M.A. 1991). In mega-article 133 specification, the maximum possible punishment is the largest maximum punishment for any offense included in the mega-spec.

I. Prior Punishment Under Art. 15 for Same Offense.

1. United States v. Edwards, 42 M.J. 381 (1995). When accused has received NJP for same offense, MJ may -- upon defense request -- give day-for-day, dollar-for-dollar, and stripe-for-stripe credit, obviating need for CA to do so, when enforcing United States v. Pierce, 27 M.J. 367 (C.M.A. 1989). *See also* United States v. Strickland, 36 M.J. 569 (A.C.M.R. 1992) (Soldier must be given credit day-for-day, dollar-for-dollar, stripe-for-stripe); and United States v. Gammons, 51 M.J. 169 (1999).

2. United States v. Flynn, 39 M.J. 774 (A.C.M.R. 1994). When MJ is sentencing authority, he is to announce the sentence and then state on the record the specific credit given for prior nonjudicial punishment in arriving at the sentence.

3. United States v. Blocker, 30 M.J. 1152 (A.C.M.R. 1990). Accused was entitled to Pierce credit for administrative elimination reduction.

J. Sentence Credit.

1. United States v. Rock, 52 M.J. 154 (1999). The accused was awarded 240 days credit against his adjudged confinement as a result of pretrial conditions on his liberty not amounting to confinement. The military judge credited the 240 days against the accused's adjudged sentence, not the approved sentence. The court held that military judge correctly accounted for the pretrial punishment credit. The court distinguished between actual or constructive confinement credit and pretrial punishment credit. Actual confinement credit and constructive confinement credit are administrative credits and they come off of the approved sentence (i.e. what ever the sentence is after the pretrial agreement has been figured in). Pretrial punishment credit for something other than confinement (like restrictions on liberty that does not rise to the level of being tantamount to confinement) is generally judicial credit and thus comes off of the adjudged sentence. The court uses strong language in the case which might be misleading "No authority has been given to them [military judges] to embellish or embroider these agreements [pretrial agreements]. Thus, credit against confinement awarded by a military judge always applies against the sentence adjudged…unless the pretrial agreement itself dictates otherwise." The fact is, if the military judge determines that Allen, Mason, or Suzuki credit is warranted that sentence credit will be tacked on to the sentence after the pretrial agreement is considered.

2. United States v. Rosendahl, 53 M.J. 344 (2000). The accused's original approved sentence included a BCD, 4 months confinement, and suspended forfeitures in excess of $350 per month for 4 months and suspended reduction below the grade of E-4. The case was returned for a rehearing at which he was sentenced to a BCD and reduction to the lowest enlisted grade. The convening authority approved this sentence, again suspending reduction below the grade of E-4. The accused argued he was entitled to credit (in the form of disapproval of his BCD) for the 120 days confinement he served as a result of his first sentence. CAAF disagreed stating that reduction and punitive separations are qualitatively different from confinement and, therefore, credit for excess confinement has no "readily measurable equivalence" in terms of reductions and separations. NOTE: CAAF declined to address whether a case involving lengthy confinement might warrant a different result. It also distinguished this situation from the "unrelated issue of a convening authority's clemency power to commute a BCD to a term of confinement."

V. CONCLUSION.

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CHAPTER 10

POST-TRIAL PROCESSING

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POST-TRIAL PROCESSING

Outline of Instruction

"It is at the level of the convening authority that an accused has his best opportunity for relief. "-United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

"The essence of post-trial practice is basic fair play -- notice and an opportunity to respond." United States v. Leal, 44 M.J. 235 (1996).

"We are no longer confident that returning cases for a new recommendation and action is a productive judicial exercise in the absence of some indication that the information presented to the convening authority on remand will be significantly different." "[The appellant must] demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." United States v. Chatman, 46 M.J. 321 (1997).

The following is the "process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error. . . . Second, an appellant must allege prejudice. . . . Third, an appellant must show what he would do to resolve the error if given such an opportunity." United States v. Wheelus, 49 M.J. 283 (1998).

"All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT." United States v. Johnston, 51 M.J. 227 (1999).

I. REFERENCES.

A. UCMJ, articles 57-58, 60-67.

B. Manual for Courts-Martial, United States, Chapters XI, XII.

C. Dep't of Army, Regulation 27-10, Legal Services: Military Justice, Chapter 5 (20 August 1999).

D. Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure*, 1991 (vol 2), Chapter 24.

II. GOALS OF THE PROCESS.

A. Prepare a record adequate for appellate review.

B. Identify, correct, curtail or kill incipient appellate issues.

C. Accused's best chance for clemency.

D. Defense notice and opportunity to be heard before convening authority (CA) initial action on a case.

E. Help CA make informed decision when taking initial action on a case.

III. SUMMARY OF THE PROCESS.

A. TC coordinates with unit *before trial* to coordinate transportation to confinement facility.

B. Sentence is announced and the court is adjourned.

C. TC prepares report of result of trial, confinement order.

D. Request for deferment of confinement, if any.

E. Exhibits reproduced.

F. Post-trial sessions, if any.

G. Record of trial (ROT) created, reproduced.

H. TC/DC review ROT for errata.

I. Military judge (MJ) authenticates ROT.

J. SJA signs post-trial recommendation (PTR).

K. PTR, authenticated ROT served on accused / DC.

L. Accused / DC submits clemency petition (R.C.M. 1105 matters) and response to PTR (R.C.M. 1106 matters). Often done simultaneously.

M. SJA signs addendum.

N. *Addendum served on DC and accused if contains "new matter."

O. CA considers DC / accused submissions, takes initial action.

P. Promulgating order signed.

Q. Record mailed.

R. Appellate review.

IV. DUTIES OF COUNSEL (RCM 502(d)(5), (6))(RCM 1103(b)(1))

A. Paragraph (F) of the Discussion to R.C.M. 502(d)(5) addresses the trial counsel's (TC's) post-trial duties.

1. Prepare Report of Result of Trial.

2. Supervise preparation, authentication and distribution of the ROT.

3. Review ROT for errata.

B. Paragraph (E) of the Discussion to R.C.M. 502(d)(6) addresses the defense counsel's (DC's) post-trial duties.

1. Advise the accused of post-trial and appellate rights (not technically post-trial – R.C.M. 1010).

2. Deferment of confinement.

3. Examination of the record.

4. Submission of matters: R.C.M. 1105; 1106(f)(4),(7); 1112(d)(2). *See also* UCMJ, art. 38(c).

5. Appellate rights review and waiver.

6. Examine PTR.

7. *See also United States v. Palenius*, 2 M.J. 86 at 93 (C.M.A. 1977).

   a. Appellate rights and review process advice.

   b. Appellate issues; *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

   c. Act in accused's interest. *See United States v. Martinez*, 31 M.J. 525 (A.C.M.R. 1990).

   d. Maintain an attorney-client relationship. R.C.M. 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Jackson*, 34 M.J. 783 (A.C.M.R. 1992) (some responsibility placed on the SJA).

      United States v. Palenius, 2 M.J. at 93 (C.M.A. 1977). "The trial defense attorney . . . should maintain the attorney-client relationship with his client subsequent to the [trial] . . . until

substitute trial [defense] counsel or appellate counsel have been properly designated and have commenced the performance of their duties. . . ."

C. Effectiveness of counsel in the post-trial area is governed by *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Lewis*, 42 M.J. 1 (1995). *See also United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994). *See also United States v. Brownfield*, 52 M.J. 40 (1999), and *United States v. Lee*, 52 M.J. 51 (1999).

V. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. R.C.M. 1010.

Before adjournment of any general and special court-martial, the MJ shall ensure that the DC has informed the accused orally and in writing of:

A. The right to submit post-trial matters to the CA;

B. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;

C. The right to apply for relief from TJAG if the case is neither reviewed by a Court of Criminal Appeals nor reviewed by TJAG under R.C.M. 1201(b)(1); and

D. The right to the advice and assistance of counsel in the exercise or waiver of the foregoing rights.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and DC and inserted in the record as an appellate exhibit.

VI. REPORT OF RESULT OF TRIAL; POST-TRIAL RESTRAINT; DEFERMENT OF CONFINEMENT. ARTICLES 60 AND 57, UCMJ; R.C.M. 1101.

A. TC notifies accused's immediate commander, CA or designee, and confinement facility of results. (DA Form 4430-R, Department of the Army Report of Result of Trial (AR 27-10)).

B. The accused's commander may delegate to TC authority to order accused into post-trial confinement.

C. Accused may request deferment of confinement.

1. Accused burden to show "the interests of accused and community in release outweigh the community's interest in confinement."

2. Factors CA may consider include: "the command's immediate need for the accused" and "the effect of deferment on good order and discipline in the command."

3. CA's written action on deferment is subject to judicial review for abuse of discretion.

4. CA must specify why confinement is not deferred.

a. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). CA refused to defer confinement "based on seriousness of the offenses of which accused stands convicted, amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command." Accused alleges abuse of discretion in refusing to defer confinement. HELD: Even though explanation was conclusory, it was sufficient. Court noted other matters of record supporting decision to deny deferment.

b. *Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986).

c. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

d. *United States v. Dunlap*, 39 M.J. 1120 (A.C.M.R. 1994). Remedy for failure to state reasons for denying deferment request is petition for extraordinary relief. Failure to do so, however, moots most remedies available. Court reviewed facts and determined that deferment was not appropriate.

e. *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief (no reasons for denial) where deferment would have expired before appellate review. AFCMR recommends that DC ask for "statement of reasons" or petition for redress under Art. 138.

VII. POST-TRIAL SESSIONS ARTICLE 39, UCMJ; R.C.M. 1102, 905.

A. Types of post-trial sessions:

1. Proceedings in revision (to correct an apparent error, omission, or improper or inconsistent action by the court-martial); and

2. Art. 39(a) sessions to inquire into and resolve "any matter which arises after trial and which substantially affects the legal sufficiency of any finding of guilty or the sentence." The MJ "shall take such action as may be appropriate." R.C.M. 1102(b)(2).

United States v. Mayfield, 45 M.J. 176 (1996). Accused's written judge alone (JA) request never signed by parties and made part of record orally confirmed on the record. Before authentication, MJ realized omission and called proceeding in revision, at which accused acknowledged he had made request in writing and that JA trial had been his intent all along. Note: also shows that it does not matter how the post-trial proceeding is labeled, as he called it a post-trial Art. 39(a) session, though the court characterizes it as a proceeding in revision. CAAF reverses Navy Court, which had found it to be jurisdictional error.

United States v. Avery, Army 9500062 (17 May 1996)(unpub.). Post-trial Art. 39(a) called to inquire into allegations that a sergeant major (SGM) slept through part of the trial. Testimony of MAJ H, panel president, about "SGM A's participation during deliberations . . . was relevant and admissible." MJ "properly stopped appellant's trial defense counsel from asking MAJ H about any opinions expressed by SGM A during deliberations."

United States v. Crowell, 21 M.J. 760 (N.M.C.M.R. 1985). Post-trial Art. 39(a) appropriate procedure to repeat proceedings to reconstruct portions of a record of trial resulting from loss of recordings.

3. MJ may, any time until authentication, "reconsider any ruling other than one amounting to a finding of not guilty." R.C.M. 905(f).

B. Timing: MJ may call a post-trial session before the record is authenticated. CA may direct a post-trial session before taking initial action (or anytime if authorized by a reviewing authority).

C. Note that Art. 39(a) requires the accused's presence. *United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979), (post-conviction, post-action hearing held without the accused was "improper and . . . not a part of the record of trial").

D. Limitations. Post-trial sessions cannot: increase the severity of a sentence unless the sentence is mandatory; reconsider a finding of not guilty as to a specification; reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification. *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 400 (C.M.A. 1987).

VIII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; R.C.M. 1103.

A. Requires every court-martial to keep a record of proceedings.

B. *In a GCM*, TC shall, under the direction of the MJ, cause the ROT to be prepared and the reporters' notes, however compiled, to be retained. The ROT must be verbatim if:

1. Any part of the sentence exceeds six months confinement or other punishments which may be adjudged by a SPCM.

2. A BCD has been adjudged.

C. The rule and the Discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10, JAGMAN Sec. 0120, and AF Reg 111-1, para. 15-8.

D. For a special court-martial, if a BCD is adjudged, the transcript is verbatim.

E. Summary court-martial record is governed by R.C.M. 1305. *See* Appendix 15, MCM.

F. Acquittals: Still need a ROT (summarized).

G. What if a verbatim ROT cannot be prepared? *See* R.C.M. 1103(f). *But see United States v. Crowell, supra* (can reconstruct the record of trial to make it "verbatim.")

H. How verbatim is verbatim? No substantial omissions.

United States v. Seal, 38 M.J. 659 (A.C.M.R. 1993). Omission of videotape viewed by MJ before imposing sentence renders ROT "incomplete", resulting in reversal.

United States v. Maxwell, 2 M.J. 1155 (N.M.C.M.R. 1975). Two audiotapes inadvertently destroyed, resulting in loss of counsel's arguments, a brief Art. 39(a) on instructions and announcement of findings. All but DC argument reconstructed. "We do not view the absence of defense counsel's argument as a substantial omission to raise the presumption of prejudice. . . [and] no prejudice has been asserted."

United States v. Sylvester, 47 M.J. 390 (1998). ROT does not contain 1) R.C.M. 1105 / 1106 submissions from his CDC, and 2) request for deferment or the CA's action thereon. HELD: No error for failing to include the R.C.M. 1105 / 1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). CAAF refused to create a requirement that all such discussions be recorded or memorialized in the ROT, but made it clear they prefer written post-trial submissions. CAAF did find error, although harmless, for not including the deferment request and action in the ROT (the accused was released six days after the request).

United States v. Taite, No.9601736 (Army Ct. Crim. App., Nov. 14, 1997) (mem): ROT originally missing three defense exhibits (photo of post office (crime scene), and 2 stips of expected testimony not transcribed). Government recreated the stips, but could replicate photo. HELD: Non-verbatim ROT. If missing exhibit cannot be re-created, a description may be substituted pursuant to a certificate of correction (RCM 1103(b)(2)(D)(v)). In meantime, action set aside

to prepare substantially verbatim ROT for CA. If cannot do so, can only approve SPCM punishment.

I. Additional TC duties:

1. Correct number of copies of ROT specified.

2. Security classification of ROT.

3. Errata

J. Unless unreasonable delay will result, DC will be given opportunity to examine the ROT before authentication.

United States v. Bryant, 37 M.J. 668 (A.C.M.R. 1993). Review by DC before authentication is preferred, but will not result in return of record for new authentication absent showing of prejudice.

K. Videotaped ROT procedures: Authorized by R.C.M. Not authorized in AR 27-10.

IX. RECORDS OF TRIAL: AUTHENTICATION; SERVICE; LOSS; CORRECTION; FORWARDING. ARTICLE 54, UCMJ; R.C.M. 1104.

A. Authentication by MJ or judges in GCM or SPCM with adjudged BCD. Authentication IAW service regulations for SPCM (same as GCM in AR 27-10). Substitute authentication rules provided (*Cruz-Rijos* standard).

1. Dead, disabled or absent: only exceptions to MJ authentication requirement. Art. 54(a). *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).

2. TC may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time.

a. PCS to distant place may qualify as absence. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).

b. An extended leave may be sufficient.

c. A statement of the reasons for substitute authentication should be included in the ROT.

Query: OCONUS judges on CONUS leave, TDY?

B. If more than one MJ, each must authenticate his portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988).

C. TC shall cause a copy of ROT to be served on the accused after authentication. Substitute service rules provided.

1. UCMJ, art. 54(c), requires such service as soon as the ROT is authenticated.

2. In *Cruz-Rijos, supra*, COMA added the requirement that this be done well before CA takes action.

3. Substitute service on the DC is a permissible alternative. *See United States v. Derksen*, 24 M.J. 818 (A.C.M.R. 1987).

D. What to do if the authenticated ROT is lost? Produce a new ROT for authentication.

United States v. Garcia, 37 M.J. 621 (A.C.M.R. 1993): SJA prepared certification that all allied documents were true copies sufficient substitute for original documents.

E. Rules for correcting an authenticated ROT. Certificate of correction process.

F. The authenticated ROT will be forwarded for CA action or referred to the SJA for a recommendation before such action.

X. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; R.C.M. 1105.

"[W]hile the case is at the convening authority . . . the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence." *United States v. Dorsey*, 30 M.J. 1156 (A.C.M.R. 1990), quoting *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958).

A. After being sentenced, the accused has the right to submit matters for the CA's consideration.

1. *See United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (DC's failure to submit under R.C.M. 1105 and failure to mention under R.C.M. 1106(f) that MJ strongly recommended suspension of the BCD amounted to ineffective assistance). See R.C.M. 1106(d)(3()B) that now requires the SJA to bring to the CA's attention recommendations for clemency made on the record by the sentencing authority.

2. *See also United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). DC is responsible for determining and gathering appropriate post-trial defense submissions; *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990). DC sent the accused one proposed R.C.M. 1105 submission. When the defense counsel received no response (accused alleged he never received it), DC submitted nothing; ineffective assistance found; *United States v. Tyson*, 44 M.J. 588 (N.M.Ct.Crim.App. 1996). Substitute counsel, appointed during *15 month* lapse between end of the SPCM and service of the PTR, failed to generate any post-trial matters (in part because accused failed to keep defense informed of his address). No government error, but action set aside because of possible IAC.

3. *United States v. Sylvester*, 47 M.J. 390 (1998): While oral submissions to CA by CDC not improper, CAAF expresses a preference for written submissions, at least to document oral presentation.

B. *Note 1998 change to R.C.M. 1105: Accused can submit anything, but the CA need only consider written submissions. The material may be anything that may reasonably tend to affect the CA action, including legal issues, excluded evidence, previously unavailable mitigation evidence, clemency recommendations. *See United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

Query: How much must he "consider" it? Read it entirely? Trust SJA's (realistically COJ's or TC's) summary? As DC's, what are your options here?

C. Time periods: GCM or SPCM—due on later of 10 days after service of PTR on BOTH DC and the accused and service of ROT on the accused. SCM—within 7 days of sentencing.

The failure to provide these time periods is error; however, the accused must make some showing that he would have submitted matters. *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1986); *see also United States v. Sosebee*, 35 M.J. 892 (A.C.M.R. 1992) ("A staff judge advocate who discourages submissions to the convening authority after the thirty-day time limit but prior to action creates needless litigation and risks a remand from this Court" *Id*. at 894).

D. Waiver rules. The accused may waive the right to make a submission under R.C.M. 1105 by:

1. Failing to make a timely submission;

   a. *United States v. Maners*, 37 M.J. 966 (A.C.M.R. 1993). CA not required to consider late submission, but may do so with view toward recalling and modifying earlier action.

   b. *But see United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Government "stuck and left holding the bag," when defense makes weak or tardy submission, even though no error or haste on part of the government.

2. By making a partial submission without expressly reserving in writing the right to additional submissions;

   United States v. Scott, 39 M.J. 769 (A.C.M.R. 1994).

3. Filing an express, written waiver; or

4. Being AWOL so that service of the ROT on the accused is impossible and no counsel is qualified or available under R.C.M. 1106(f)(2) for service of the ROT. This circumstance only waives the right of submission during the ten day period after service of the ROT.

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER AND DC SUBMISSION. ARTICLE 60, UCMJ; R.C.M. 1106.

A. Requires a written SJA recommendation on a GCM with any findings of guilty or a SPCM with a BCD adjudged before the CA takes action.

B. Disqualification of persons who have previously participated in the case.

1. Who is disqualified? The accuser, IO, court members, MJ, any TC, DC, or anyone who "has otherwise acted on behalf of the prosecution or defense." Article 46.

United States v. Johnson-Saunders, 48 M.J. 74 (1998). The Assistant TC, as the Acting Chief of Military Justice, wrote the SJA PTR. The SJA added only one line, indicating he had reviewed and concurred with the PTR. The DC did not object when served with the PTR. HELD: ATC disqualified to write the PTR. No waiver and plain error; returned for a new SJA PTR and action. The Court stated what may become the test for non-statutory disqualification: whether the trial participation of the person preparing the SJA PTR "would cause a disinterested observer to doubt the fairness of the post-trial proceedings."

United States v. Sorrell, 47 M.J. 432 (1998). CofJ wrote the SJA PTR. Dispute between the accused and the CofJ over whether the CofJ promised the accused he would recommend clemency if the accused testified against other soldiers (which he did). The Court avoids the issue; if there was error, it was harmless because the PTR recommended 6 months clemency, which the CA approved.

2. Also disqualified are the SJA who must review his own prior work (*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976); or his own testimony in some cases (*United States v. Rice*, 33 M.J. 451 (C.M.A. 1991); *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975)). PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA, *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992). R.C.M. 1106(b) discussion.

3. "Material factual dispute" or "legitimate factual controversy" required. *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994*). See United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994) (PTR must come from one free from *any* connection with a controversy); *United States v. Edwards*, 45 M.J. 114 (1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he had preferred the charges, interrogated accused, and acted as evidence custodian in case. Mere prior participation does not disqualify, but involvement "far beyond that of a nominal accuser" did so here. Waiver did not apply, because defense did not know at time it submitted post-trial matters.

4. Who is not disqualified? The SJA who has participated in obtaining immunity or clemency for a witness in the case. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983). Preparation of pretrial advice challenged at trial not automatically disqualifying; factual determination. *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).

5. How do you test for disqualification outside the scope of the rules? Do the officer's actions before or during trial create, or appear to create, a risk that the officer will be unable to evaluate objectively and impartially the evidence? *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). *See United States v. Kamyal*, 19 M.J. 802 (A.C.M.R. 1984) ("a substantial risk of prejudgment"). *United States v. Johnson-Saunders*, 48 M.J. 74 (1998): whether the involvement by a disqualified person in the PTR preparation "would cause a disinterested observer to doubt the fairness of the post-trial proceedings." TC prepares and SJA concurs; CAAF returns for new SJA PTR and action.

6. R.C.M. 1106(c). When the CA has no SJA. If SJA is disqualified (unable to evaluate objectively and impartially), ***CA*** must: Request assignment of another SJA, or forward record to another GCMCA. Make sure documentation is included in the record.

a. Informal agreement between SJAs is not sufficient. *United States v. Gavitt*, 37 M.J. 761 (A.C.M.R. 1993).

b. *United States v. Hall*, 39 M.J. 593 (A.C.M.R. 1994). SJA used incorrect procedure to obtain another SJA to perform post-trial functions. Court holds that failure to follow procedures can be waived.

c. Deputies don't write PTRs**.** *United States v. Crenshaw*, Army 9501222 (Army Ct. Crim. App. 1996) (unpub.). Fact that Deputy Staff Judge Advocate (DSJA) improperly signed PTR as "Deputy SJA," rather than "Acting SJA" did not require corrective action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.

d. Who should author the SJA PTR? The SJA. *United States v. Finster*, 51 M.J. 185 (1999), where a non-qualified individual signed the SJA PTR the court concluded there was manifest prejudice.

C. Form and content: a *concise* written communication to assist in the exercise of command prerogative in acting on the sentence.

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on the multiplicity question arises when DC first raises the issue as part of the defense submission to the CA.

a. Accuracy most critical on charges and specs. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994) (CMA disapproved findings on two specs omitted from PTR).

But see United States v. Ross, 44 M.J. 534, 536 (A.F. Ct.Crim.App. 1996) (improper dates for offense in PTR—July v. Sept.—not fatal when CA action reflected original, correct date of charge sheet; "we are reluctant to elevate 'typos' in dates to 'plain error'" *especially* when waived).

b. Some errors indulged, especially when defense does not notice or point out. *See, e.g., United States v. Royster*, No. 9400201 (Army Ct. Crim. App. 1995) (unpub.); *United States v. Bernier*, 42 M.J. 521 (C.G.C.M.R. 1994); *United States v. Zaptin*, 41 M.J. 977 (N.M Ct. Crim App. 1995).

2. Any clemency recommendations by the MJ or panel. R.C.M. 1106(d)(3)(b) [1995 change]. Do it here, not at the addendum stage.

3. Summary of accused's service record. *See United States v. Austin*, 34 M.J. 1225 (N.M.C.M.R. 1992).

a. *United States v. DeMerse*, 37 M.J. 488 (C.M.A. 1993). Failure to note Vietnam awards and decorations was plain error, requiring that action be set aside.

b. *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993). Error in omitting JSCM waived by failure to comment.

c. *United States v. McKinnon*, 38 M.J. 667 (A.C.M.R. 1993). Failure to comment on omission of several awards and decorations equals waiver.

d. *United States v. Thomas*, 39 M.J. 1078 (C.G.C.M.R. 1994). SJA not required to go beyond ROT and accused's service record in listing medals and awards in PTR.

e. *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994). SJA may rely on accused's official record in preparing PTR. No need to conduct inquiry into accuracy of record, particularly where accused does not question.

f. *United States v. Barnes*, 44 M.J. 680 (N.M.Ct.Crim.App. 1996). "There is no 'hard and fast rule' as to what errors or omissions in a post-trial recommendation so seriously affect the fairness and integrity of the proceedings as to require appellate relief." Accused, USMC staff sergeant with 14 years' service, no record of disciplinary problems, convicted of single use of marijuana. PTR failed to mention his Navy Commendation Medal, awarded for meritorious combat less than a year before trial. Court called the medal a "significant and worthy personal achievement. The failure to include these matters in the [PTR] deprives the [CA] of important information...and may well have affected the outcome of his sentence review. . . It is difficult to determine how a CA would have exercised his broad discretion if all of the information required by R.C.M. 1106(d)(3) had been available to him before he took his action." Here, the failure was prejudicial error, requiring new review and action (R&A). Defense did a good job on appeal in showing value of NAVCOM by offering Navy Instruction setting forth criteria for the award.

g. *United States v. Brewick,* 47 M.J. 730 (N.M. Ct. Crim. App. 1997). SJA PTR failed to list SW Asia service awards. HELD: Waiver by DC, and no plain error. Distinguishes *Demerse*, because those were combat awards, and old, which set Demerse apart from other soldiers (so few remaining on active duty).

4. Nature and duration of any pretrial restraint.

a. "The accused was under no restraint" or

b. "The accused served 67 days of pretrial confinement, which should be credited against his sentence to 8 years confinement."

5. CA's obligation under any pretrial agreement.

6. Specific recommendations as to action.

7. NOTHING ELSE!!!

8. Legal sufficiency need *not* be reviewed. Exceptions:

a. If the SJA deems it appropriate to take corrective action on findings or sentence, or

b. If the accused alleges a legal error in the R.C.M. 1105 submission.

United States v. Drayton, 40 M.J. 447 (C.M.A. 1994). Weighing of evidence supporting findings of guilt limited to evidence introduced at trial.

United States v. Haire, 40 M.J. 530 (C.G.C.M.R. 1994). Legal issues raised in 1105 submission not discussed in SJA recommendation; addressed for first time in addendum. No proof that addendum was served on DC. Action set aside.

9. Additional appropriate matters may be included in the recommendation even if taken from outside the record. R.C.M. 1106(d)(5*). See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also Drayton*, 40 M.J. 447.

D. Two additional tips:

1. Use a certificate of service when providing the defense with the PTR. *United States v. McClelland*, 25 M.J. 903 (A.C.M.R. 1988). This logic should be extended to service of the accused's copy of the SJA PTR. *See* R.C.M. 1106(f). *It is extremely self-defeating and short-sighted for the government not to follow this advice.*

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the PTR/addendum and / or have the convening authority initial and date all documents. *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

Query: What if the CA forgets to initial one written submission, but initials all the others? Have you just given the DC evidence to argue that the CG "failed to consider" a written defense submission?

But see United States v. Blanch, 29 M.J. 672 (A.F.C.M.R. 1989) (government entitled to enhance "paper trail" and establish that accused's 1105 matters were forwarded to and considered by the CA) *and United*

States v. Joseph, 36 M.J. 846 (A.C.M.R. 1993) (SJA's affidavit established that matters submitted were considered by CA before action).

E. Errors in recommendation.

1. Corrected on appeal without return to CA for action. Appellate court tests for error. OR,

2. Return for new recommendation and new action. *See Craig*, at 325, "Since it is very difficult to determine how a convening authority would have exercised his broad discretion if the staff judge advocate had complied with R.C.M. 1106, a remand will usually be in order." (quoting *U.S. v. Hill*, 27 M.J. at 296). *See also United States v. Reed*, 33 M.J. 98 (C.M.A. 1992). *United States v. Hamilton*, 47 M.J. 32 (1997): "This court has often observed that the convening authority is an accused's last best hope for clemency [citation omitted]. Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is particularly serious because no subsequent authority can adequately fix that mistake."

F. No recommendation is needed for total acquittals or other final terminations without findings. THIS NOW INCLUDES FINDINGS OF NOT GUILTY ONLY BY REASON OF LACK OF MENTAL RESPONSIBILITY. *See* R.C.M. 1106(e).

G. Service of PTR on DC and the accused. R.C.M. 1106(f)(1).

1. Before forwarding the recommendation and the ROT to the CA for action, the SJA or legal officer shall cause a copy of the PTR to be served on counsel for the accused. A separate copy will be served on the accused.

United States v. Hickok, 45 M.J. 142 (1996). Failure to serve PTR on counsel is prejudicial error, even though counsel submitted matters before authentication of record and service of PTR. Original counsel PCSd, new counsel never appointed, and OSJA never tried to serve PTR. CAAF finds accused "was unrepresented in law and in fact" during this stage. Fact that R.C.M. 1105 clemency package was submitted at an early stage (and, all conceded, considered by CA at action) cannot compensate for the separate post-trial right to *respond* to the PTR under R.C.M. 1106. *Although*

normally submitted simultaneously, R.C.M. 1105 and R.C.M. 1106 submissions serve different purposes.

2. If it is impracticable to serve the accused for reasons including but not limited to the transfer of the accused to a distant place, his AWOL, military exigency, or if the accused so requests on the record at court or in writing, the accused's copy shall be forwarded to the defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

   a. *United States v. Ayala*, 38 M.J. 633 (A.C.M.R. 1993). Substitute service of ROT and PTR on DC authorized where accused is confined some distance away.

   b. Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address. *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993).

   c. *United States v. Lowery*, 37 M.J. 1038 (A.C.M.R. 1993). Real issue in this area is whether accused and defense counsel have opportunity to submit post-trial matters.

   d. *United States v. Ray*, 37 M.J. 1053 (N.M.C.M.R. 1993). Mere failure to serve does not warrant relief; accused did not offer evidence to rebut presumption that SJA had properly executed duties, did not submit matters that would have been submitted to CA, and did not assert any inaccuracies in the recommendation.

3. The accused may designate at trial *which counsel* shall be served with the PTR or may designate such counsel in writing to the SJA before the PTR is served. Absent such a designation, the priority for service is: Civilian counsel, individual military counsel and then detailed counsel.

   If no civilian counsel exists and all military counsel have been relieved or are not reasonably available, substitute counsel shall be detailed by an appropriate authority. AR 27-10, para. 6-9 says the Chief, USATDS, or his delegee will detail defense counsel. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988).

a. Substitution of counsel problems. R.C.M. 1106(f)(2).

(1) *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978) (substituted counsel must form attorney-client relationship with the accused; absent extraordinary circumstances, only the accused may terminate an existing relationship). *See also United States v. Miller*, 45 M.J. 149 (1996). Substitute defense counsel's failure to formally establish attorney-client relationship with accused found harmless, despite substitute counsel's failure to consult accused or submit clemency package. Detailed counsel (who later ETSd) had submitted clemency materials before service of PTR, and government was not on any reasonable notice that substitute counsel and accused failed to enter attorney-client relationship. In such circumstances, test for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (1997). Rejecting an invitation to overrule *Miller*, the CAAF restates that failure of the substitute DC to contact the client post-trial will be tested for prejudice. "Prejudice" does not require the accused to show that such contact and the resulting submission would have resulted I clemency; it only requires a showing that the accused would have been able to submit something to counter the SJA's PTR.

(3) *United States v. Antonio*, 20 M.J. 828 (A.C.M.R. 1985) (accused may waive the right to his former counsel by his acceptance of substitute counsel and his assent to their representation).

(4) *United States v. Edwards*, 9 M.J. 94 (C.M.A. 1980) (permission of the accused not found in record); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981) (accused's permission presumed under the circumstances).

(5) *United States v. Hood*, 47 M.J. 95 (1997). Even if the substitute counsel does form the required attorney-client relationship, failure to discuss the accused's clemency packet with him prior to submission is deficient performance under the first prong of the *Strickland v. Washington* analysis.

(6) *United States v. Johnston,* 51 M.J. 185 (1999), the convening authority must insure that the accused is represented during post-trial. Submission of R.C.M. 1105 and 1106 matters is considered to be a critical point in the criminal proceedings against an accused.

b. If the accused alleges ineffective assistance of counsel (IAC) after trial, that counsel cannot be the one who is served with the PTR.

(1) *United States v. Cornelious*, 41 M.J. 397 (1995) (Government on notice of likely IAC. Court remanded to determine whether accused substantially prejudiced).

(2) *United States v. Carter* 40 M.J. 102 (C.M.A. 1994). No conflict exists where DC is unaware of allegations.

(3) *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994) (dissatisfaction with outcome of trial does not always equal attack on competence of counsel requiring appointment of substitute counsel).

(4) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993) (substitute counsel not required where allegations of ineffective assistance are made after submission of response to PTR).

(5) *United States v. Leaver*, 36 M.J. 133 (C.M.A. 1992).

4. Upon request, a copy of the ROT shall be provided for use by DC. DC should include this boilerplate language in the Post-Trial and Appellate Rights Forms.

H. Defense Counsel Submission. R.C.M. 1106(f)(4).

"Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

1. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), required service of PTR on the DC before the CA can take action. DC's failure to object to errors in PTR response normally waives such errors. *See also United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

2. Response due within 10 days of service of PTR on both DC and accused and service of authenticated ROT on accused, whichever is later.

3. SJA may approve delay for 1105 (not 1106) matters for up to 20 days; only CA may disapprove.

4. Failure to comment "shall" waive any error in the PTR but plain error. *See United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (DC's failure to object in time to SJA's failure to serve the PTR IAW *Goode* waived any objections); *United States v. Lugo*, 32 M.J. 719 (C.G.C.M.R. 1991); and *United States v. Huffman*, 25 M.J. 758 (N.M.C.M.R. 1987) (plain error where findings and sentence were erroneously reported).

I. Staff Judge Advocate Addendum. R.C.M. 1106(f)(7).

"The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to respond."

1. Must address allegations of legal error. Rationale not required; "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary." *See United States v. McKinley,* 48 M.J. 280 (1998) and Judge Cox's statement in response to an allegation of legal error.

a. *See United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). *See also United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (addendum stating "I have carefully considered the enclosed matters and, in my opinion, corrective action with respect to the findings and sentence is not warranted" was an adequate statement of disagreement with the assertions of accused). Need give no rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b. *United States v. Welker*, 44 M.J. 85 (1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, CAAF looked to record and determined there was no error. Consequently, held no prejudice to the accused. Reaffirms principle that statement of agreement or disagreement, without statement of rationale, is OK. Court will test for prejudice. When (as here) the court finds no trial error, it will find no prejudice. *See also United States v. Jones*, 44 M.J. 242 (1996) (comments on preparation of ROT were "trivial").

c. *United States v. Sojfer*, 44 M.J. 603 (N.M.Ct.Crim.App. 1996). Seven page addendum recited alleged errors and said, "*My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged*... He [SJA] made no other comment regarding the merit of the assigned errors." Government argued that "only inference...is that the [SJA] disagreed with all of the errors that were raised. We agree."

2. Ambiguous, unclear defense submission. If the submission arguably alleges a legal error in the trial, the SJA must respond under R.C.M. 1106 and state whether corrective action needed.

a. *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988);

b. *United States v. Moore*, 27 M.J. 656 (A.C.M.R. 1988).

c. *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993) ("consideration of inadmissible evidence" is sufficient allegation of legal error).

3. 1995 MCM change codifies case law requiring that addenda that contain "new matter" must be served on the defense. R.C.M. 1106(f)(7).

a. *United States v. Leal*, 44 M.J. 235 (1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that it's "between the blue covers," because that would permit government to highlight and smuggle to CA evidence offered but not admitted. Here, the addendum referred to a letter of reprimand; the failure to serve the addendum required a new R&A by a new CA.

b. *United States v. Cook*, 43 M.J. 829 (A.F. Ct. Crim. App. 1996). In two post-trial memos SJA advised CA about the MJ's qualifications, experience, likelihood of accused's waiving administrative separation board, and minimizing effects of BCD. Court disapproved BCD because all of this was obviously outside the record and should have been served on accused with opportunity to comment. Remedy -- set aside BCD.

c. *United States v. Norment*, 34 M.J. 224 (C.M.A. 1992).

d. *United States v. Harris*, 43 M.J. 3 (Army Ct. Crim. App. 1995) (addendum referred first time to an Art. 15; new review and action required).

e. *United States v. Sliney*, No. 9400011 (Army Ct. Crim. App. 1995) (inclusion of letters from victim and victim-witness liaison required re-service; new action required). *Accord United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994).

f. *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum was to 3 thefts, which formed basis for court-martial ("demonstrated by his past behavior that he is not trustworthy") not "new matter."

g. *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum to the PTR that Heirs' admissions during the rejected providence inquiry *could* be used to support the findings of guilty once the accused challenged the sufficiency of the evidence post-trial.

h. *United States v. Trosper,* 47 MJ 728 (N.M. Ct. Crim. App. 1997) CSM's memo to CG that he gave little weight to accused's alleged remorse was not served on DC. Court finds the memo did not constitute new matter, but simply a fair comment on the offense, and was not from outside the record. Even if new matter, NMCCA relies on the requirement from *United States v. Chatman,* 46 M.J. 321 (1997) that appellant demonstrate what he would have submitted to deny, counter, or explain the new matter. Appellate DC failed to do so, by simply repeating the same argument trial DC submitted during clemency.

i. *United States v. Cornwell,* 49 M.J. 491 (1998). CG asks the SJA whether the command supports the accused's request for clemency. The SJA calls the accused's commanders, then verbally relays their recommendations against clemency for the accused to the CG. The SJA then does an MFR to that effect, attaching it to the ROT. The CAAF says the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be matter of which the accused's is not charged with knowledge, under R.C.M. 1107(b)(3)(B)(iii). Again, even if such, CAAF says the defense did not indicated what they would have done in response, so *Chatman* standard not met.

j. *United States v. Anderson,* 53 M.J. ____ (2000). The submission of a note from the chief of staff to the convening authority which states "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter.

4. Addendum should remind CA of the requirement to review the accused's post-trial submissions. *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990); *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993).

a. *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). Appellate courts will presume post-trial regularity if the SJA prepares an addendum that:

(1) Informs the CA that the accused submitted matter and that it is attached;

(2) Informs the CA that he *must consider* the accused's submissions; and

(3) Lists the attachments.

J. What if the accused submitted matters but there is no addendum?

United States v. Godreau, 31 M.J. 809 (A.F.C.M.R. 1990). Two conditions for a presumption of post-trial regularity:

1. There must be a statement in the PTR informing the CA that he must consider the accused's submissions.

2. There must be some means of determining that the CA in fact considered all post-trial materials submitted by the accused. Ideal: list attachments, and CA initials and dates all submissions in a "clearly indicated location."

If *Foy* requirements are not met, or if no addendum and the two *Godreau* conditions are not met, the government must submit an affidavit from the CA. *See United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993).

"The best way to avoid a *Craig* problem is to prepare an addendum using the guidance in *Foy* and *Pelletier* to insure compliance with *Craig* and UCMJ, article 60(c). If this method is used, there will be no need to have the convening authority initial submissions or prepare an affidavit." *Godreau* at 812.

United States v. Buller, 46 M.J. 467 at 469, n.4 (1997): "[L]itigation can be avoided through the relatively simple process of serving the addendum on the accused in all cases, regardless whether it contains 'new matter.'"

K. Common PTR, addendum errors:

1. Inaccurately reflects charges and specs (especially dismissals, consolidations).

2. Inaccurately reflect maximum punishment.

3. Omit, misapply pretrial confinement (*Allen*, R.C.M. 305(k) credit).

4. Omit, misapply Art. 15 (*Pierce*) credit.

5. Approve greater than 2/3 forfeitures for periods of no confinement.

6. Extraneous (and often erroneous) information – *Stick to the Basics!!*

XII. ACTION BY CONVENING AUTHORITY, UCMJ, ART 6; R.C.M. 1107.

A. Who may act: The convening authority. *See United States v. Delp*, 31 M.J. 645 (A.F.C.M.R. 1990) (the person who convened the court).

1. *United States v. Solnick*, 39 M.J. 930 (N.M.C.M.R. 1994). Rule requiring CA to take action unless impractical requires that there be practical reason for transferring case from control of officer who convened court to superior after trial, and precludes superior from plucking case out of hand of CA for improper reason.

2. *United States v. Rivera-Cintron*, 29 M.J. 757 (A.C.M.R. 1989). Acting Commander not disqualified from taking action in case even though he had been initially detailed to sit on accused's panel.

3. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R.), *pet. denied* 31 M.J. 420 (C.M.A. 1990). After considering the Assistant Division Commander's affidavit, the court determines that the acting CA, who approved accused's sentence as adjudged, was not affected by the editorial written by the CA about the "slime that lives among us."

4. *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992). Commander did not lose impartiality by being exposed to three pages of accused's immunized testimony in companion case; commander had no personal interest in the case and there was no appearance of vindictiveness.

B. CA not automatically disqualified simply because prior action set aside.

United States v. Ralbovsky, 32 M.J. 921 (A.F.C.M.R. 1991). Test: Does CA have an other than official interest or was he a member of the court-martial?

C. General considerations.

1. Not required to review for legal correctness or factual sufficiency. Action is within sole discretion of CA as a command prerogative.

2. Cannot act before R.C.M. 1105(c) time periods have expired or submissions have been waived.

3. *Must consider*:

a. Result of trial,

b. SJA recommendation, and

c. Accused's written submissions.

d. How "detailed" must the consideration be? "Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' must be." *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

e. Failure to consider two letters submitted by DC requires new review and action. *United States v. Dvonch*, 44 M.J. 531, 533 (A.F. Ct. Crim. App. 1996).

f. *United States v. Mooney*, Army 9500238 (Army Ct. Crim. App. June. 10, 1996) (memo op on reconsideration). Court determined that fax received "in sufficient time to forward it . . . through the Staff Judge Advocate to the convening authority." "[A]ppellant's articulate and well-reasoned R.C.M. 1105 clemency letter *through no fault of his own* was not submitted to the convening authority on time. We do not have sufficient information to determine [whose fault it was]..as our function is...not to allocate blame. The quality of the clemency letter...gives rise to the reasonable possibility that a [CA] would grant clemency based upon it. Thus...the appellant has been prejudiced..." (emphasis in original). Set aside CA action, return to TJAG for new action.

Moral of story: Even if government not at fault, accused may get new R&A. Send back to CA if record not yet forwarded for appeal.

g. *United States v. Roemhildt*, 37 M.J. 608 (A.C.M.R. 1993). CA and SJA not required to affirmatively state they have considered recommendation of FACMT. *Accord United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994).

h. *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993). There must be *some tangible proof* that CA *saw and considered* clemency materials before taking action.

4. *May consider*: Record of trial, personnel records of accused, and anything deemed appropriate, but if adverse to accused and from outside the record, then accused must be given an opportunity to rebut. *See United States v. Mann*, 22 M.J. 279 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

5. CA need not meet with accused -- or anyone else. *United States v. Haire*, 44 M.J. 520 (C.G.Ct.Crim.App. 1996). CA not required to give personal appearance to accused. Even truer now, as this case relied on *Davis*, in which court had held that CA must consider videotape (no longer good law in light of 1996 statutory change). Requirement to "consider" only pertains to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority."

6. No action on not guilty findings.

7. No action approving a sentence of an accused who lacks the capacity to understand or cooperate in post-trial proceedings.

D. Action on findings not required but permissible.

E. Action on sentence must:

1. *explicitly state approval or disapproval*; *United States v. Schiaffo*, 43 M.J. 835 (Army Ct. Crim. App. 1996). Action did not expressly approve the BCD, though it referred to it in "except for" executing language. Sent back to CA for new action. Note the problem:

> "In the case of ... only so much of the sentence as provides for reduction to Private E1, forfeiture of $569.00 pay per month for six months, and confinement for four months is approved and, *except for the part of the sentencing extending to bad-conduct discharge,* will be executed."
>
> Common Problem: *See also United States v. Reilly*, No. 9701756 (Army Ct. Crim. App., June 12, 1998) and *United States v. Scott*, No. 9601465 (Army Ct. Crim. App., June 12, 1998). Both cases involved errors by the SJA in preparing the CA's action. While the SJA PTR correctly said the CA could approve TF, E1, 15 months and a BCD, the CA's action said "only so much of the sentence as provided for reduction to E1, TF and confinement for 15 months is approved, *and except that portion extending to the Bad Conduct Discharge*, shall be executed." Promulgating order had same ambiguity. HELD: Returned to CA for new unambiguous action.

2. *cannot increase adjudged sentence*; *United States v. Jennings*, 44 M.J. 658 (C.G.Ct.Crim.App. 1996). MJ announced five month sentence, but did not expressly include pretrial confinement (PTC) credit. After issue raised, MJ said on record that he had “considered” the 8 days PTC before announcing the sentence, and the SJA recommended that the CA approve the sentence as adjudged (he did).

"Further clarification by the judge was needed to dispel the ambiguity...created by his remarks." SJA "should have returned the record to the judge for clarification pursuant to R.C.M. 1009(d), rather than attempt to dispel the ambiguity of intent himself." "*In any event, there is no authority whatsoever for a staff judge advocate to make an upward interpretation of the sentence, as was done in this case.*"

3. *may disapprove all or any part* of a sentence for any or no reason. *See United States v. Bono*, 26 M.J. 240 (C.M.A. 1988) (reduction in sentence saved the case when DC found to be ineffective during sentencing).

   United States v. Smith, 47 M.J. 630 (Army Ct. Crim. App. 1997). At a GCM, the accused was sentenced to TF, but no confinement. Neither the DC nor the accused submitted a request for waiver or deferment, nor complained about the sentence. Accused did not go on voluntary excess leave. Fourteen days after sentence, TF went into effect. At action, the CA tried to suspend all forfeitures beyond 2/3 until the accused was placed on involuntary excess leave. HELD: The CA's attempt to suspend was invalid, because the TF was executed (at 14 days) prior to the attempted suspension. The Army Court found the time the accused spent in the unit (5 Jul to 19 Aug) without pay was cruel and unusual punishment; and directed the accused be restored 1/3 of her pay. *See also United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

4. *may reduce a mandatory sentence adjudged*.

5. *change a punishment* to one of a different nature if less severe. *United States v. Carter*, 45 M.J. 168 (1996). CA lawfully converted panel's BCD and 12 month sentence to 24 *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clement, "not 'merely a substitution'" of sentences, but clearly was proper here; BCD was disapproved and accused got his wish to retire, and where, importantly, he neither set any conditions on the commutation (*e.g.*, setting a cap on confinement he was willing to endure), nor protested the commutation in his submission to the CA. But consider the Discussion to R.C.M. 1107(d)(1) that a BCD can be converted to 6 months of confinement.

6. *suspend punishment*. *United States v. Barraza*, 44 M.J. 622 (N.M.Ct.Crim.App. 1996). Court approved CA's reduction of confinement time from PTA-required 46 months (suspended for 12 months) to 14 months, 6 days (suspended for 36 months). Sentence was for 10 years. Court emphasized the "sole discretionary power" of CA to approve or change punishments "as long as the severity of the punishment is not increased." (citing R.C.M. 1107(d)(1)). Also significant that approved confinement was 22 months less than accused sought in his clemency petition.

F. Original dated signed action must be included in the record. *See* R.C.M. 1107(f)(1) and 1103(b)(2)D)(iv).

G. Contents of action. *See* Appendix 16, MCM, Forms for Actions.

H. If confinement is ordered executed, "the convening authority shall designate the place . . . in the action, unless otherwise prescribed by the Secretary concerned."

1. AR 27-10 (para. 5-27) says do not designate a place of confinement. AR 190-47 controls.

2. JAGMAN Section 0123e "*Designation of places of confinement*. The convening authority of a court-martial sentencing an accused to confinement is a competent authority to designate the place of temporary custody or confinement of naval prisoners."

3. AF Reg 111-1, para. 15-10a. "Designated Confinement. Normally, a place of confinement . . . will be named in the . . .[CA's] action."

I. What if an error is discovered after action is taken? R.C.M. 1107(f)(2) provides that:

1. BEFORE publication OR official notice to the accused, CA may recall and modify any aspect of action (including modification less favorable to the accused, such as adding the discharge approval language, ala *Schiaffo* above).

2. IF EITHER publication or official notice has occurred, CA may only make changes that do not result in action less favorable to the accused.

3. CA must personally sign the modified action.

J. Action potpourri.

1. CA must direct in post-trial action award of any R.C.M. 305(k) credit for illegal pretrial confinement. In the interest of discouraging deliberate or negligent disregard of the rules, CMA returns action to CA for correction. *United States v. Stanford*, 37 M.J. 388 (C.M.A. 1993).

2. Message, Headquarters, Department of Army, DAJA-CL, subject: Sentence Credit (221600Z June 94). Effective 1 Aug. 94, CA actions will state number of days of sentence credit for all types of pretrial confinement.

3. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

4. *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994). Court does not have to treat ambiguous action ($214 per month) as forfeiture for one month; may return to CA for clarification of intent.

5. *United States v. Muirhead,* 48 MJ 527 (NMCCA 1998). D sentenced to "forfeit all pay and allowances, which is $854.40 for 2 years," and CA approves the same. HELD: Ambiguous sentence. CA under RCM 1107(d)(1) can return case to court for clarification of ambiguous sentence, if he does not, he can only approve a sentence no more severe than the unambiguous portion. Rather than return to CA court simply affirms unambiguous dollar amount.

XIII. POST-TRIAL PROCESSING TIME.

A. From sentence to action:

1. The old rule: *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (When an accused is continuously under restraint after trial, the convening authority must take action within 90 days of the end of trial or a presumption of prejudice arises).

2. The current rule: test for prejudice. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

   a. *United States v. Williams*, 42 M.J. 791 (N.M.Ct.Crim.App. 1995). Record lost for 5 years after trial, so accused's BCD never executed and he served the 50 days provided in the PTA. Main argument: lost employment opportunities because his company could not bid for government contracts given that he was still on active duty (appellate leave). Court found this insufficient, especially in light of his plea of guilty, but did grant sentence relief, refusing to affirm BCD. Chides USN severely, saying not result of "inexperienced sailors or Marines" but "the inattention, dereliction, or incompetence of legally trained personnel." Suggests that someone "be held accountable for the delays" under Art. 98.

   b. *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993). Claims of lost employment opportunity, inability to participate in state programs for home buying by veterans, and lost accrued leave, all resulting from post-trial delay not sufficient to warrant relief from findings and sentence.

   c. *United States v. Giroux*, 37 M.J. 553 (C.M.A. 1993). Court cautions supervisory judge advocates to avoid over-emphasizing the importance of court-martial processing time to their SJAs (parties entered in post-trial agreement whereby accused would accept responsibility for post-trial processing time in exchange for clemency from CA).

   d. *United States v. Richter*, 37 M.J. 615 (A.C.M.R. 1993). Delay of five months from authentication to action did not prejudice accused.

e. *United States v. Dupree*, 37 M.J. 1089 (N.M.C.M.R. 1993). Delay before CA action warrants relief only if delay is unjustified and inordinate, and there is some demonstrable prejudice to the accused.

3. *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), the Army Court has come up with a new method of dealing with post-trial processing time delay. In Collazo the court granted the appellant 4 months off of his confinement because the Government did not exercise due diligence in processing the record of trial. The court expressly found no prejudice.

4. Reality: Clerk of Court will inquire after 90 days.

XIV. SUSPENSION OF SENTENCE; REMISSION. ART. 71, UCMJ; R.C.M. 1108.

A. The rule requires the conditions of any suspension to be specified in writing, served on the accused, and receipted for by the probationer. *United States v. Myrick*, 24 M.J. 792 (A.C.M.R. 1987) (there must be substantial compliance with RCM 1108). *See*:

1. AR 27-10, para. 5-29;

2. JAGMAN, section 0129; and

3. AF Reg 111-1, para. 15-19.

B. Power of the CA to create conditions.

1. *United States v. Cowan*, 34 M.J. 258 (C.M.A. 1992). The accused asked the CA for a method by which she could serve her confinement and still support her six-year-old child. CA approved the sentence, but suspended for one year confinement in excess of six months and forfeitures in excess of $724.20, suspension of forfeitures conditioned upon:

a. The initiation of an allotment payable to the daughter's guardian of $278.40, for the benefit of the girl; and

b. The maintenance of the allotment during the time the accused is entitled to receive pay and allowances.

HELD**:** Permissible. *Note*. Court recognizes inherent problems; recommend careful use of such actions.

2. *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992). The accused asked for assistance in supporting his dependents. Court upheld CA's suspension of forfeitures in excess of $400.00 on conditions that the accused:

a. Continue to claim on W-4, as long as he can legitimately do so, single with 2 dependents.

b. Initiate and maintain allotment to be paid directly to spouse in amount of $2,500.

C. Period of suspension must be reasonable, conditions must not be "open-ended" or "unachievable."

1. Limited by AR 27-10, paragraph 5-31, on a sliding scale from to 3 months in a SCM to 2 years in a GCM.

2. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). Uncertain and open-ended period of time required to fulfill one of the conditions (self-financed sex offender program) made the period of suspension of the discharge and reduction in grade "unreasonably long." Court, especially Judge Cox, signals approval for parties' "creative" and "compassionate" efforts.

3. *United States v. Ratliff*, 42 M.J. 797 (N.M. Ct.Crim.App. 1995) Eleven years probation not unreasonably long under the circumstances (though would be barred in the Army by AR 27-10).

4. Suspension of period of confinement in conjunction with approved discharge should coincide with serving of unsuspended portion of confinement. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994).

5. *United States v. Wendlandt*, 39 M.J. 810 (A.C.M.R. 1994). Directing that suspension period begin on date later than action is not per se improper.

XV. VACATION OF SUSPENSION OF SENTENCE. ART. 72, UCMJ; R.C.M. 1109.

A. 1998 Change to R.C.M. 1109.

B. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. It authorizes immediate confinement pending the vacation proceedings, if under a suspended sentence to confinement. *See* Appendix 18, MCM.

C. *United States v. Connell*, 42 M.J. 462 (1995), *pet. for cert. pending*, sets out the history of the procedure and defends it well; note Cox concurrence.

XVI. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW. ART. 61, UCMJ; R.C.M. 1110.

A. After any GCM, except one in which the approved sentence includes death, and after a special court-martial in which the approved sentence includes a BCD the accused may elect to waive appellate review.

> Waiver. The accused may sign a waiver of appellate review any time after the sentence is announced. The waiver may be filed only within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* RCM 1110(f)(1):

B. The accused has the right to *consult* with counsel before submitting a waiver or withdrawal.

1. Waiver.

a. Counsel who represented the accused at the court-martial.

b. Associate counsel.

c. Substitute counsel.

2. Withdrawal.

a. Appellate defense counsel.

b. Associate defense counsel.

c. Detailed counsel if no appellate defense counsel has been assigned.

d. Civilian counsel.

C. Procedure.

1. Must be in writing, attached to ROT, and filed with the CA.

2. TDS SOP requires a 72 hour "cooling off" period; recontact after initial request to waive / withdraw. Written statement must include: statement that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights; that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; signature of accused and counsel. *See* Appendix 19 and 20, MCM.

3. The accused may only *file* a waiver within 10 days after he or DC is served with a copy of the action.

United States v. Smith , 44 M.J. 387 (1996). May not validly waive appellate review, under Art. 61, UCMJ, before CA takes initial action in a case. Citing, *inter alia*, *United States v. Hernandez*, 33 M.J. 145 (C.M.A.

1991), court says that Art. 61(a) permits such waiver "within 10 days after the action...is served on the accused or on defense counsel." R.C.M. 1110(f) must be read in this context. Clearly the R.C.M. cannot supersede a statute, but careful reading of the R.C.M. reveals that it may be signed "at any time after the sentence is announced" but "must be *filed* within 10 days after" service of the action (emphasis added).

4. The accused may file a *withdrawal* at any time before appellate review is completed.

5. Once filed in substantial compliance with the rules, the waiver or withdrawal may *not* be revoked.

   a. *United States v. Walker*, 34 M.J. 317 (C.M.A. 1992). Documents purporting to withdraw accused's appeal request were invalid attempt to waive appellate review prior to CA's action.

   b. *United States v. Smith*, 34 M.J. 247 (C.M.A. 1992) (Waiver of appellate representation 58 days before action by CA was tantamount to waiver of appellate review; therefore, was premature and without effect).

   c. *Clay v. Woodmansee*, 29 M.J. 663 (A.C.M.R. 1989). Accused's waiver of appellate review was null as it was the result of the government's promise of clemency.

XVII. DISPOSITION OF RECORD OF TRIAL AFTER ACTION. R.C.M. 1111.

A. General Courts-Martial. ROT and CA's action will be sent to the office of The Judge Advocate General.

B. Special Courts-Martial with an approved BCD will be sent to OTJAG.

C. SPCM with an approved BCD (and waiver of appeal). Record and action will be forwarded to a judge advocate for review (R.C.M. 1112).

D. Other special courts-martial and summary courts-martial will be reviewed by a judge advocate under R.C.M. 1112.

XVIII. REVIEW BY A JUDGE ADVOCATE. ART. 64, UCMJ; R.C.M. 1112.

A. A judge advocate shall review, under service regulations, each case not reviewed under Article 66. AR 27-10, para. 5-35*b* says this review may be done either by a JA in the Office of the SJA of the convening command or by a JA otherwise under the technical supervision of the SJA.

B. No review required for total acquittal or where CA disapproved all findings of guilty.

C. Disqualification of reviewer for prior participation in case.

D. The review shall be in writing. It shall contain conclusions as to whether the court-martial has jurisdiction over the accused and the offenses, each specification states an offense, and the sentence is legal. The review must respond to each allegation of error made by the accused under RCM 1105, 1106(f), or filed with the reviewing officer directly. If action on the ROT is required by the CA, a recommendation as to the appropriate action and an opinion as to whether corrective action is required must be included.

E. The ROT shall be sent to the CA for supplementary action if (1) the reviewer recommends corrective action, (2) the sentence includes dismissal, a DD or BCD or CHL in excess of six months, or (3) service regulations require it.

F. If the reviewing JA recommends corrective action but the convening authority's acts to the contrary, the ROT is forwarded to OTJAG for review under R.C.M. 1201(b)(2). If the approved sentence includes dismissal, the service Secretary must review the case.

XIX. EXECUTION OF SENTENCES. UCMJ, ART. 71; R.C.M. 1113.

A. A sentence must be approved before it is executed (but confinement may be carried out before it is ordered executed).

B. The CA's initial action may order executed all punishments except a DD, BCD, dismissal or death.

C. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. *If on the date of final judgment a servicemember is not on appellate leave* and more than 6 months have elapsed since approval of the sentence by the CA, before a DD or BCD may be executed, the officer exercising GCM jurisdiction over the servicemember shall consider the advice of that officer's SJA as to whether retention would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the CA, and a recommendation whether the discharge should be executed.

XX. PROMULGATING ORDERS. ART. 76, UCMJ; R.C.M. 1114.

A summary of the charges and specifications is authorized (*see* Appendix 17, MCM).

XXI. ACTION BY THE JUDGE ADVOCATE GENERAL. ARTICLES 66 AND 69, UCMJ; R.C.M. 1201.

A. Cases automatically reviewed by a Court of Criminal Appeals (Art. 66).

1. Cases in which the approved sentence includes death.

2. Cases in which the approved sentence includes a punitive discharge or confinement for a year or more.

B. Scope of C.C.A. review: Both law and fact.

1. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). Courts of Military Review need not address in writing all assignments of error, so long as written opinion notes that judges considered assignments of error and found them to be without merit.

2. *United States v. Quigley*, 35 M.J. 345 (C.M.A. 1992) Choice of whether to call appellate court's attention to issue rests with counsel, although choice is subject to scrutiny for effective assistance of counsel in each case.

3. *United States v. Gunter*, 34 M.J. 181 (C.M.A. 1992). Error for CMR to deny accused's motion to submit handwritten matter for consideration by that court (detailed summary by appellate defense counsel not sufficient).

C. Power of Courts of Criminal Appeals. UCMJ, Art. 66(c):

"It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

1. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). "Article 66(c)['s] . . . awesome, plenary, *de novo* power of review" grants C.C.A.s the authority substitute their judgment for that of the MJ. It also allows a "substitution of judgment" for that of the court members.

2. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). A "*carte blanche*" to do justice. Sullivan in dissent notes C.C.A.s are still bound by the law.

3. *United States v. Keith*, 36 M.J. 518 (A.C.M.R. 1992) In appropriate case, Army Court may fashion equitable and meaningful remedy regarding sentence.

4. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). Plenary, *de novo* power of C.C.A. does not include finding facts regarding allegations of which fact finder has found accused not guilty.

5. *United States v. Irvinspence*, 39 M.J. 893 (A.C.M.R. 1994). C.M.R. would not defer to findings on credibility by triers of fact in rape prosecution, but would consider their credibility determination after observing witnesses as factor in court's independent determination of credibility.

6. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). C.M.R. has authority to investigate allegations of IAC, including authority to order submission of affidavits and a hearing before a MJ.

7. *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). In reviewing severity of sentence, C.M.R.'s duty is to determine whether accused's approved sentence is correct in law and fact based on individualized consideration of nature and seriousness of offense and character of accused.

8. *United States v. Gleason*, 39 M.J. 776 (A.C.M.R. 1994). C.M.R. standard for reassessing sentence instead of ordering rehearing: That which the court reliably knows a court would assess if there had not been error.

9. *United States v. Commander*, 39 M.J. 973 (A.F.C.M.R. 1994). C.M.R. may examine disparate sentences when there is direct correlation between each accused and their respective offenses, sentences are highly disparate, and there are no good and cogent reasons for differences in punishment. *See also United States v. Kelly*, 40 M.J. 558 (N.M.C.M.R. 1994).

10. *United States v. Pinegree*, 39 M.J. 884 (A.C.M.R. 1994). Reassess "inappropriately severe" sentence, not approving dismissal; *see also United States v. Hudson*, 39 M.J. 958 (N.M.C.M.R. 1994) (court did not approve BCD).

11. *United States v. Van Tassel*, 38 M.J. 91 (C.M.A. 1993). Standard of review of post-trial evidence of insanity is whether reviewing court is convinced BRD that fact finders would have no reasonable doubt that accused did not suffer from severe mental disease or defect so that accused lacked substantial capacity either to appreciate criminality of conduct or conform conduct to requirements of law, if offenses occurred before effective date of statute making lack of mental responsibility affirmative defense to be proven by defense.

12. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993). Standard for ordering post-trial hearing on issue presented to appellate court.

a. Not required where no reasonable person could view opposing affidavits, in light of record of trial, and find the facts alleged by accused to support claim.

b. Required where substantial unresolved questions concerning accused's claim.

D. Cases reviewed by TJAG (Art. 69(a)).

1. Those GCMs when the approved sentence does not include a dismissal, DD, or BCD, or confinement for a year or more (Art. 69(a)).

2. Those cases where a JA finds, under R.C.M. 1112, that as a matter of law corrective action should be taken and the CA does not take action that is at least as favorable to the accused as that recommended by the JA (R.C.M. 1112(g)(l)).

3. Cases which have been finally reviewed, but not reviewed by a C.C.A. or TJAG (per R.C.M. 1201(b)(1)), may *sua sponte* or upon application of the accused under Art. 69(b) be reviewed on the ground of:

a. Newly discovered evidence.

b. Fraud on the court.

c. Lack of jurisdiction.

d. Error prejudicial to the substantial rights of the accused.

e. Appropriateness of the sentence.

4. TJAG may consider if the sentence is appropriate and modify or set aside the findings or sentence.

5. TJAG has the power to authorize a rehearing.

E. United States Army Legal Services Agency (USALSA).

1. Army Court of Criminal Appeals (Article 66, UCMJ).

2. Defense Appellate Division (Article 70, UCMJ).

3. Government Appellate Division (Article 70, UCMJ).

4. Examination and New Trials Division (Article 69, UCMJ).

XXII. REVIEW BY THE COURT OF APPEALS FOR ARMED FORCES. ARTICLES 67 & 142, UCMJ; R.C.M. 1204.

A. Authorized five judges.

B. Expanded role of Senior Judges.

C. Service of Article III Judges.

D. Cases reviewed:

1. All cases in which the sentence as approved by a Court of Criminal Appeals extends to death.

2. All cases reviewed by a Court of Criminal Appeals which TJAG orders sent to CAAF for review.

3. All cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, CAAF has granted a review.

4. Extraordinary writ authority.

E. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). Equal protection and due process challenge to TJAG's authority to certify issues under Art. 67.

F. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of CAAF usually does not include making sentence-appropriateness determinations. Province of CCA.

XXIII. REVIEW BY THE SUPREME COURT. ART. 67(H)(1), UCMJ; R.C.M. 1205.

A. Decisions of the Court of Appeals for Armed Forces may be reviewed by the Supreme Court by writ of certiorari.

B. The Supreme Court may not review by writ of cert. any action of CAAF in refusing to grant a petition for review.

XXIV. POWERS AND RESPONSIBILITIES OF THE SECRETARY. R.C.M. 1206.

Sentences that extend to dismissal of a commissioned officer, cadet, or midshipman may not be executed until approved by the Secretary concerned or his designee.

XXV. SENTENCES REQUIRING APPROVAL BY THE PRESIDENT. R.C.M. 1207.

That part of a court-martial sentence extending to death may not be executed until approved by the President.

XXVI. FINALITY OF COURTS-MARTIAL. R.C.M. 1209.

A. When is a conviction final?

1. When review is completed by a Court of Criminal Appeals and -

a. The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court;

b. A petition for review is denied or otherwise rejected by CAAF; or

c. Review is completed in accordance with the judgment of CAAF and -

(1) A petition for a writ of cert. is not filed within applicable time limits;

(2) A petition for cert. is denied or otherwise rejected by the Supreme Court; or

(3) Review is completed in accordance with the judgment of the Supreme Court.

2. In cases not reviewed by Court of Criminal Appeals.

a. When the findings and sentence have been found legally sufficient by a JA, and when action by such officer is required, have been approved by the GCMCA, or

b. the findings and sentence have been affirmed by TJAG when review by TJAG is required under R.C.M. 1112(g)(1) or 1201(b)(1).

B. *Berry v. Judges of U.S. Army C.M.R.*, 37 M.J. 158 (C.M.A. 1993). Conviction not final until expiration of Art. 71(c) filing period. Abatement of proceedings appropriate when accused died before end of period.

C. *United States v. Jackson*, 38 M.J. 744 (A.C.M.R. 1993). Abatement after death of appellant, before appeal to Court of Military Appeals.

D. Finality and execution of sentences.

1. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 1209.

2. Dismissal may be approved and ordered executed only by the Secretary concerned.

3. Only President may order execution of death penalty.

XXVII. PETITION FOR A NEW TRIAL. ART. 73, UCMJ; R.C.M. 1210

A. Within 2 years of initial action by the CA.

B. Requirements:

1. Evidence discovered after trial.

2. Evidence not such that it would have been discovered by petitioner at time of trial in exercise of due diligence.

3. Newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

C. Approval authority: OTJAG, C.C.A. or C.A.A.F.

D. Concern for avoiding *manifest injustice* is adequately addressed in three requirements in R.C.M. 1210(f)(2). *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993).

E. *United States v. Hanson*, 39 M.J 610 (A.C.M.R. 1994). Petition for new trial based on newly discovered evidence.

F. *United States v. Niles*, 39 M.J. 878 (A.C.M.R. 1994). Petition for new trial not favored and, absent manifest injustice, will not normally be granted.

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *United States v. Lewis*, 42 M.J. 1 (1995). Counsel's refusal to submit handwritten letter as part of PTM was error. Counsel may advise client on contents of PTM but final decision is client's. CAAF rejects the Army Court of Criminal Appeals' procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989), *review denied*, 32 M.J. 249 (C.M.A. 1990). Trial defense counsel should not be ordered to explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence.

B. *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Two key points:

1. When the accused specifies error in his request for appellate representation or in some other form, appellate defense counsel will, at a minimum, invite the attention of the C.C.A. to those issues and it will, at a minimum, acknowledge that it has considered those issues and its disposition of them.

2. Guidelines for resolving IAC allegations:

a. Appellate counsel must ascertain with as much specificity as possible grounds for IAC claim.

b. Appellate defense counsel then will allow the appellant the opportunity to make his assertions in the form of an affidavit (explaining the affidavit is not a requirement, but also pointing out that it will "add credence" to his allegations.

c. Appellate defense counsel advises the accused that the allegations relieve the DC of the duty of confidentiality with respect to the allegations.

d. Appellate government counsel will contact the DC and secure affidavit response to allegations.

C. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Counsel's request, in clemency petition, for punitive discharge was contrary to wishes of accused and constituted inadequate post-trial representation. Returned for new review and action.

D. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994). Factual dispute as to whether DC waived accused's right to submit matters to the CA. HELD: Where DC continues to represent accused post-trial, there must be some showing of prejudice before granting relief based on premature CA action. Any error in failure to secure accused's approval of waiver not prejudicial in this case.

E. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Where there is no logical reason for counsel's failure to submit matters on behalf of an accused and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome and appellate court should do something to cleanse the record of this apparent error.

F. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). DC submitted no post-trial clemency/response documents. Accused did not meet burden of showing that counsel did not exercise due diligence.

G. *United States v. Carmack*, 37 M.J. 766 (A.C.M.R. 1993). Defense counsel neglected to contact accused (confined at USDB) regarding post-trial submissions. Court admonished all defense counsel to live up to post-trial responsibilities; also, admonished SJAs and CAs to "clean up the battlefield" as much as possible.

H. *United States v. Sander*, 37 M.J. 628 (A.C.M.R. 1993). Court unwilling to adopt *per se* rule that DCs must submit post-trial matters in all cases.

I. *United States v. Jackson*, 37 M.J. 1045 (N.M.C.M.R. 1993). Since clemency is sole prerogative of CA, where defense counsel is seriously deficiently in post-trial representation, court reluctant to substitute its judgment for that of CA.

XXIX. RELEASE FROM CONFINEMENT *PENDENTE LITE*.

A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appeals his rape convictions before NMCMR and seeks release from confinement pending the government's appeal to C.A.A.F. HOLDINGS:

1. Under the All Writs Act, 28 U.S.C. 1651, C.M.R. and C.A.A.F. have authority to order deferment of confinement pending completion of appellate review.

2. If the accused has won a "favorable decision from the Court of Military Review," and "the situation is one in which the Government could establish a basis for pretrial confinement (*see* R.C.M. 305), then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master [for a determination similar to that for pretrial confinement]."

XXX. CONCLUSION.

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 11

ENLISTED

ADMINISTRATIVE SEPARATIONS

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Major Charles H. Rose III
November 2000

ENLISTED

ADMINISTRATIVE SEPARATIONS

Outline of Instruction

I. REFERENCES.

A. AR 135-178, Enlisted Separations (1 Sep 94) (printed in Reserve Components Personnel Update 23), w/ I02 (30 Aug 95).

B. AR 140-111, U.S. Army Reserve Reenlistment Program (1 Sep 94) (printed in Reserve Components Personnel Update 23), w/I02 (30 Aug 95).

C. AR 600-20, Command Policy (30 Mar 88).

D. AR 600-37, Unfavorable Information (19 Dec 86).

E. AR 635-200, Enlisted Personnel (17 Sep 90) (printed w/ changes in Enlisted Ranks Personnel Update 16), w/ I03 (30 Nov 94).

F. Willis, *The Road to Hell Is Paved with Good Intentions: Finding and Fixing Unlawful Command Influence*; The Army Lawyer, August 1992 at 3.

G. Masterton, *Urinalysis Administrative Elimination Boards in Reserve Components*, The Army Lawyer, April 1995 at 3.

H. Reserve Officer Personnel Management Act, Pub. L. No. 103-337, Div. A, Title XVI, § 1611, 108 Stat. 2958 (1994) (codified at 10 U.S.C. §§ 14901-14907 (1996)).

I. Memorandum, Commander, United States Army Reserve Command, AFRC-PRO, to Commanders, USARC MSCs, subject: Delegation of Authority to Initiate and Convene Officer Involuntary Separation Boards (3 July 1997)[hereinafter Delegation Memorandum].

II. ENLISTED ADVERSE SEPARATION ACTIONS.

A. COUNSELING AND REHABILITATIVE TRANSFERS BEFORE INITIATION OF SEPARATION ACTION.

1. Counseling is required <u>at least once</u> before initiation of some separation actions. AR 135-178, para 1-12a.

2. Rehabilitative transfer within commuting distance for a minimum of 2 months is required. However, the separation authority may waive transfer.

B. COMMAND-INITIATED SEPARATION ACTIONS.

1. Notification Procedures. (AR 135-178, chap 2, Section II). Generally, the immediate commander initiates the process by giving written notice. See also NGR 600-200, para 8-4. The notice must contain:

a) Specific allegations on which the proposed action is based.

b) Cite the specific provision in the regulation authorizing separation.

c) Advise the soldier that the separation could result in discharge, transfer to the IRR or being dropped from the roles.

d) State the least favorable characterization of service or a description of separation he or she could receive.

e) The soldier must be advised of the following rights:

(1) To consult with consulting counsel, or to consult with civilian counsel at no expense to the government.

(2) To submit statements.

(3) To obtain copies of documents that will be sent to the separation authority.

(4) To present the case to an administrative board, if he or she has 6 or more years of total Regular and Reserve service or if being considered for a discharge under other than honorable conditions.

(5) To waive these rights in writing.

(6) If an intermediate commander makes a recommendation based upon additional information outside the proposed action he must give written notice to the soldier and afford him/her an opportunity to rebut the additional information. Military counsel will be made available to prepare rebuttal..

f) The soldier will be given 30 days to respond to the notice. Failure to respond to the notice within 30 days constitutes a waiver.

g) The soldier has the right to submit a conditional waiver. Waivers from reservists with more than 18 years but less than 20 years of credible service cannot be accepted. AR 135-178, para 2-11c.

2. Administrative Board Proceedings.

a) Notice must contain the same information as notification procedure for example: basis for separation; authority for initiation of the action; characterization of discharge. The additional notice provisions concerning the intermediate commander are also required here; see para 2-10a(4).

b) All the rights provided in notification procedures.

c) Soldier has a right to representation before the board by military counsel, or by civilian counsel at soldier's expense and no expense to the Government.

(1) .

3. Separation Authority action upon receipt of recommended separation packet when a board is not required. AR 135-178, para 2-7.

a) Determine whether sufficient basis exists to support the separation. Standard of review is a preponderance of the evidence.

b) If there isn't sufficient basis, disapprove the recommendation and return the case to the originating command with reasons for the disapproval.

c) If there is sufficient factual basis for separation, the separation authority must determine whether separation is warranted by applying the criteria in chapter 1 of Section III.

d) Separation Authority may:

(1) Direct retention.

(2) Direct separation.

(3) Suspend separation.

4. Separation Authority's Action on recommended separation packet requiring an administrative board.

a) If there is insufficient factual basis to support separation, return the action to originating command with reasons for disapproval.

b) If there is sufficient factual basis for separation determine whether separation is warranted. If separation is warranted the separation authority must convene a separation board.

C. ACTIONS OF SEPARATION AUTHORITY BEFORE BOARD HEARING.

1. Separation authority must appoint a board of at least three commissioned, warrant or noncommissioned officers. AR 135-178, para 2-12.

   a) At least one member must be a Major or above.

   b) A majority of the board must be commissioned or warrant officers.

   c) Noncommissioned officers may not serve on a board when an OTH discharge could result.

   d) Qualifications of board members.

      (1) Experienced soldier of mature judgment.

      (2) Impartial and fully cognizant of the regulations and policies related to separation actions.

   e) Female or minority representation on the board is not required.

   f) Standing board appointment orders are encouraged for administrative convenience and board member training.

2. Appearance of Respondent's Witnesses. AR 135-178, paras 2-14 and 2-15.

   a) If the appearance will require TDY or invitational travel orders, the request must be in writing and:

      (1) Give a synopsis of the testimony.

      (2) Explanation of relevance of the testimony.

      (3) Explanation why written testimony is not sufficient.

      (4) Convening authority makes the determination.

b) Witnesses not requiring expenditure of funds.

(1) Request must be in writing, and

(2) Specify the type of information the witness will provide.

(3) The board is to secure the attendance of the witness if, reasonably available and the testimony will materially add to the case.

D. SEPARATION AUTHORITY'S ACTION. AR 135-178, para 2-19.

1. Options when board recommends separation.

a) Direct separation for any reason set forth in the notification and established by the evidence.

b) Disapprove the recommendation and direct retention when grounds for separation are not documented in the file.

c) Suspend the execution of the discharge for a period not to exceed 12 months.

2. Options when board recommends retention.

a) Approve recommendation and direct retention, or

b) Request Secretary of the Army to discharge soldier for the convenience of the government.

3. Separation authority cannot direct discharge if a board recommends retention or discharge a soldier with a less favorable characterization than recommended by the board.

4. Options when error or defects in board action.

a) If approving authority determines the errors to be harmless, take final action.

b) If errors are substantial (proper objections by respondent's counsel), such as: failure to make required findings and recommendations; action which materially prejudiced a substantial right of the respondent; or there was fraud or collusion in obtaining the findings of the board the separation authority may:

(1) Direct retention.

(2) Return case to board to make findings and recommendations required by the regulation.

(3) Set aside the proceeding and direct a new board.

E. LIMITATION OF SEPARATION ACTIONS. AR 135-178, para 1-15.

1. No soldier will be considered for separation, if the conduct was subject to a judicial proceeding resulting in an acquittal or "similar action."

2. No soldier will be considered for separation if the conduct was subject to a prior administrative separation board in which the board determined the evidence did not sustain the factual allegation.

3. If the conduct was the subject of a separation action resulting in the separation authority directing retention.

4. Government may not initially introduce limited use information except when the action is under Chapter 8 (drug rehab failure).

5. Unlawful command influence in the administrative separation process may result in voiding separation action as a violation of minimal due process. See Cooney v. Dalton, 877 F. Supp. 508 (D. Hawaii 1995), and AR 15-6, paras. 5-7, 5-8, and AR 135-178, para. 2-15.

F. JUDGE ADVOCATE INVOLVEMENT IN THE SEPARATION PROCESS.

1. Consulting Counsel. The functions of consulting (defense) counsel to respondents are set out in the Consolidated Glossary to the Reserve Component UPDATE 23 (page 9).

2. Counsel for Representation. Performs all the duties and responsibilities of respondent's counsel as listed in the Consolidated Glossary to Reserve Component UPDATE 23 (page 9). Must perform functions in a fully independent manner. See AR 27-26, Rule 5-7.

3. Legal Review [See USARC Legal Review Checklist, Appendix C.]

   a) No pre-board legal review is required at any stage. However, it is strongly recommended that prior to referral of an action to a separation board that a judge advocate review the action to ensure the adequacy of the notice and that there is sufficient factual basis to warrant separation, and so inform the appointing authority in writing.

   b) Post hearing legal review only required in those cases in which the board has recommended an OTH or where the respondent identifies specific legal issue for consideration by the separation authority. AR 135-178, para 2-19.

   c) Delegation of separation authority requires that any separation board conducted under the delegation be reviewed by a judge advocate.

4. Legal Advisor. The appointment of a legal advisor to the board is optional. However, it is recommended that whenever possible a legal advisor will be appointed. Use of Reserve military judges is encouraged; however, they must understand that evidentiary rules are relaxed, and they should not require counsel to submit written briefs on evidentiary questions or dismiss the board members when hearing argument on evidentiary matters.

5. Recorder. A nonvoting recorder may be appointed. The recorder does not have to be a judge advocate, however, it is strongly recommended that the recorder be a judge advocate.

6. Several alternate recorders and legal advisors and additional voting board members should be listed on standing board orders, so that in cases of time conflict or member disqualification, the commanding general appointing authority's staff judge advocate can excuse one and substitute another before the first session of the board, IAW AR 15-6, para 5-2a.

G. REASONS FOR SEPARATION ACTION.

1. Unsatisfactory Performance AR 135-178, Chapter 6.

a) If in the judgment of the commander

(1) The soldier will not develop sufficiently [weight program failure per AR 600-9]; or

(2) soldier's retention would have an adverse impact on discipline, good order and morale.

(3) Soldier would be disruptive.

(4) Potential for advancement or leadership is unlikely.

(5) Second consecutive APFT failure or elimination for cause from NCOES. [New provision.]

b) Generally, notification procedures are used in Chapter 6 actions. No board required unless soldier has more than 6 years of service.

c) Soldier will receive Honorable or General Discharge under honorable conditions.

2. Misconduct. AR 135-178, Chapter 7.

a) Minor disciplinary infractions. Relates to conduct in a military environment.

(1) Counseling is required before separation action may be initiated.

(2) May utilize notification procedures.

b) Pattern of misconduct.

(1) Counseling is required before separation action may be initiated.

(2) Conduct may have occurred in the military or civilian communities.

(3) Involves conduct that does not carry with it a punitive discharge.

(4) Must be more than one incident.

c) Conviction by Civilian Court.

(1) Soldier is convicted by civil authorities and;

(2) A punitive discharge would be authorized for the same or similar offense under the UCMJ or the civil sentence includes confinement for 6 months or more.

(3) Conviction does not have to be final. If the conviction has been appealed or the soldier indicates an intention to appeal and the period for appeal has not expired, the execution of the separation will be held in abeyance until the appeal is finalized.

d) Commission of a Serious Offense.

(1) Commission of military or civilian offense if a punitive discharge is authorized for the same or similar offense under the UCMJ.

(2) Abuse of illegal drugs constitutes serious misconduct.

(a) Separation action must be initiated and the soldier processed for discharge if he or she has 3 years of service. Paragraph 7-11c.1(1) has been amended to coincide with AR 600-85.

(b) Administrative board notification should be used.

(3) Soldier does not have to have been in a Title 10 status at the time of the activity that gave rise to the separation action.

3. Homosexual Conduct. AR 135-178, Chapter 10 [I02, 30 Aug 95].

a) References.

(1) National Defense Authorization Act (FY 1994), 10 U.S.C. § 654.

(2) DoDD 1332.14, Enlisted Administrative Separations, 21 December 1993; C1, 4 March 1994

(3) DEPSECDEF Memorandum, 17 May 1994, subject: Recoupment of Education Assistance Funds, Bonuses and Special Pay from Persons Disenrolled or Separated on the Basis of Homosexual Conduct

(4) DoD General Counsel memorandum, 18 August 1995, subject: Policy on Homosexual Conduct in the Armed Forces

(5) Message, HQDA (DAPE-MP), 010115Z MAR 94, Subject: Administrative Separation for Homosexual Conduct.

(6) Message, HQDA (DAPE-HR-S), 010125Z MAR 94, Subject: Homosexual Conduct Policy.

(7) Memorandum, U.S. Army Deputy Chief of Staff for Personnel (DAPE-MPE), 28 February 1994, Subject: Accession Policy.

(8) Memorandum, U.S. Army Criminal Investigation Command (CIOP-PP-PO), 28 February 1994, Subject: ALCID Memorandum 008-94.

(9) Message, DAJA-ZX, 191425Z MAY 94, Subject: Homosexual Conduct Policy.

b) Grounds for Separation. National Defense Authorization Act FY 94 (10 U.S.C. § 654) (Effective 30 Nov 93). Codifies homosexual exclusion policy. Requires separation of a soldier who:

(1) "... has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts,"

(2) "... has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding ... that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," or

(3) "... has married or attempted to marry a person known to be of the same biological sex."

c) Definitions. Several definitions are key to understanding the new legislation and its implementation. Some of the definitions are found in the statute; others are provided in the implementing DoD guidance.

(1) **Homosexual** means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual act, and includes the terms “gay” and “lesbian”. (From statute).

(2) **Homosexual conduct** means a homosexual act, a statement by the soldier that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. (See refs e and f).

(3) **Homosexual act** means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purposes of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act (described above). (From statute).

(4) **Homosexual statement** means language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (See ref e). Includes statement "I have a homosexual orientation." (See ref d).

(5) **Propensity** to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. (See refs e and f).

d) Investigations.

(1) Only a commander in the chain of command of a suspected homosexual can authorize an investigation or inquiry.

(2) Investigations may be initiated only when there is "credible information that there is a basis for discharge."

(3) "Credible Information ..."

(a) Exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

(b) Does not exist, for example, when "the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct."

(4) Informal fact-finding inquiries and administrative separation procedures are the preferred way of addressing homosexual conduct.

(5) Neither CID nor MPI will conduct investigations solely to determine the sexual orientation of an individual.

(6) If the misconduct is purely private, consensual, adult misconduct, the CID may investigate only if the information is either referred to them by the unit commander, or the local CID unit receives approval to investigate from the commander or deputy commander, USACIDC.

(7) If case involves only statements (e.g., "I am gay"), or only private, consensual, adult sexual misconduct, scope of investigation should be limited to "the factual circumstances directly relevant to the specific allegations."

(8) When interviewing soldiers suspected of homosexual conduct:

(a) The military policy on homosexual conduct should be explained to the soldier before questioning. The interviewer will not ask questions if the soldier indicates a reluctance to talk.

(b) Soldiers will be advised of Art 31 rights if suspected of UCMJ violation.

(c) "Statement" case. May inquire into whether soldier has engaged in, attempted to engage in, or intends to engage in homosexual acts or marriages. May ask soldier why he or she made statement; what he or she means by it.

(d) "Acts" case. Discuss only the alleged conduct. May seek specific details to test credibility, to corroborate statement, to assess criminality of acts, to determine whether aggravating circumstances are present, to obtain information to counter a possible rebuttal by soldier, and to determine possible basis for recoupment by government.

(e) Soldiers shall not be asked to reveal sexual orientation.

e) Separations.

(1) Administrative board procedure used in all enlisted cases.

(2) Soldiers will be separated if there is an approved finding of homosexual conduct. Exceptions:

(a) **Rebuttable Presumption for cases based solely on admissions.** Admission of being a homosexual or having a homosexual orientation creates a rebuttable presumption of propensity or intent to engage in homosexual acts. The burden of proof shifts to the soldier.

(i) In determining whether a soldier has successfully rebutted the presumption, some or all of the following may be considered (this is not an exclusive list):

(a) Whether the member has engaged in homosexual acts.

(b) The member's credibility.

(c) Testimony from others about the members past conduct, character, and credibility.

(d) The nature and circumstances of the member's statements.

(e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.

(ii) To date, no soldier or Marine has successfully rebutted the presumption. The Navy has retained five sailors who have admitted their homosexual orientation; the Air Force has retained two airmen.

(b) Homosexual act committed by a heterosexual. A soldier may be retained after commission of a homosexual act if and only if the following findings are made. The soldier bears the burden of proving all the following items to the board's satisfaction:

(i) Such conduct is a departure from the soldier's usual and customary behavior.

(ii) Such conduct is unlikely to recur.

(iii) Such conduct was not accomplished by use of force, coercion, or intimidation.

(iv) Under the particular circumstances of the case, soldier's continued presence is consistent with the interests of the Service in proper discipline, good order, and morale.

(v) The soldier does not have a propensity or intent to engage in homosexual acts.

(c) Homosexual conduct for purposes of avoiding or terminating military service. If the commander or board believes that the individual is not a homosexual but is merely trying to avoid military service, the soldier does not have to be discharged.

(3) Characterization of service.

(a) Honorable, general, or entry level separation.

(b) Under Other Than Honorable (OTH) conditions. Authorized if, during a current term of service, the soldier attempted, solicited, or committed a homosexual act:

(i) By use of force, coercion, or intimidation.

(ii) With a person under 16 years of age.

(iii) With a subordinate in circumstances that violate customary military superior-subordinate relationships.

(iv) Openly in public view.

(v) For compensation.

(vi) Aboard a military vessel or aircraft.

(vii) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

f) Reporting Requirement.

(1) All Army legal offices (**including reserve component**) are required to *report* pending homosexual discharge cases to OTJAG Administrative Law Division.

(2) Initial report made on initiation of separation action; subsequent report made following ultimate disposition.

(3) Report by fax (703) 693-2518; voice (703) 614-4586).

(4) Separation authority remains with local commanders.

4. Expiration of service obligation. AR 135-178, Chapter 11.

5. Other reasons. AR 135-178, Chapter 12.

a) Medically unfit for retention.

b) Noncitizens who are members of the ARNGUS or USAR.

c) Ministers of religion and divinity students.

d) Attainment of maximum allowable age.

6. Unsatisfactory Participation. AR 135-178, Chapter 13

a) Soldier is determined to be an unsatisfactory participant under provisions of AR 135-91, chap 4:

(1) Nine or more unexcused UTAs/year.

(2) Fails to attend or complete Annual Training.

(3) Soldier verbally or in writing refused to comply with orders or correspondence or a second notice sent by certified mail was refused, unclaimed, or otherwise undeliverable.

b) Administrative board procedures apply, unless an OTH is not warranted or the SM has less than six years total military service.

c) All limitations on separations, rights associated with board actions, appointment of counsel apply.

7. Weight Control Failure. AR 135-178, Chapter 14

a) Applies only to USAR soldiers who have not completed Initial Entry Training (IET) and have not been awarded an MOS.

b) Most USAR soldiers will be transferred to the IRR under the provisions of AR 140-10, or are boarded under Ch. 6, Unsatisfactory Performance, for weight control failure IAW AR 600-9.

III. RECURRING PROBLEMS IN ENLISTED SEPARATION CASES. [APPENDIX B.]

A. Inadequate notice to the soldier.

1. Failure to state the factual basis for the separation action. Notice should tell the soldier the act or acts that were relied upon for the separation.

2. Failure to state the type of discharge.

3. Notification not signed by the "commander."

B. Improper signature in the consulting counsel portion of the notification form.

1. Commanders have signed as consulting counsel. If an individual refuses to consult with counsel the commander is to annotate the form indicating that the soldier declined to consult with counsel. He or she is not to sign as consulting counsel.

2. Other staff officers have signed as consulting counsel.

C. Inadequate evidence to support the separation action.

1. Recorder fails to rebut evidence presented by the respondent. *United States v. Timoney*, 34 M.J. 1108 (ACMR 1992). Held: Command urinalysis results may be admissible in a courts-martial despite the government's failure to fully comply with AR 600-85 command urinalysis SOP, as to observation of soldier urination, proper urine bottle labeling, key control, and illegible SSN on specimen bottle.

2. Failure to submit supporting evidence in the record and connecting the evidence to the respondent. [Recorder need to present live rebuttal witnesses as to soldier conduct, and providing unit urinalysis sign-in roster ledger to respondent's counsel.]

D. Failure to provide counsel or the respondent with all the documentation and evidence that will be presented to the board.

E. Inadequate record of the proceeding.

1. The DA Form 1574 is not the record. There is a requirement that the record reflect the admission of exhibits or documentary evidence (AR 15-6).

2. Testimony of witnesses must be a part of the record. Para 2-16, AR 135-178 requires that the proceeding of the board be summarized as fairly and accurately as possible.

3. Failure to record action by the legal advisor or president on challenges to board members.

4. Failure to show disposition of motions or admissions of items of evidence. Any legal issue raised during the board must be reviewed by a judge advocate. If the record does not contain the basis for the action taken by the legal advisor, how can the review take place or the separation authority determine that the proceedings were conducted properly?

F. Failure to make findings and recommendations in accordance with the regulation.

1. The board must make specific findings on each allegation of the notification. A finding on a more serious allegation does not relieve the board of an obligation to make findings on lesser allegations.

2. The board, if it finds the allegation is supported by a preponderance of the evidence, must determine whether the finding warrants separation.

3. If the board determines the conduct warrants separation it must make a recommendation as to the type of discharge.

4. A finding that an allegation has been proven does not require a finding that the conduct warrants separation. The board is free to find separation is not warranted. However, if they make such a finding they cannot make a recommendation as to the type of separation. The two things are mutually exclusive.

5. Failure of the board to specify the assignment it recommends for a soldier that they have determined should be retained.

G. Making findings and or recommendations not authorized by the regulation.

1. The board cannot make a finding that denies the board's jurisdiction to hear the case.

2. The recommendation of retention cannot be conditioned upon some future action, i.e. completion of a drug rehab program. If a board wishes to ensure proper performance, they can recommend discharge but recommend suspension of the execution of the discharge for up to 12 months.

H. Improper Delegation of Separation Authority.

1. Only delegation authorized is contained in AR 135-178, para 1-25.

2. Separation authorities may not delegate their authority to direct separation, appoint boards, direct retention, or disapprove and return an action to subordinate command, approve the findings and recommendations of a board. The separation authority must personally take these actions.

3. The "For the Commander" authority line will not be used except when the separation authority has personally approved the action but does not sign the document.

I. une 1996.

IV. CONCLUSION.

APPENDIX A

THE TEN COMMANDMENTS of UNLAWFUL COMMAND INFLUENCE FOR RESERVE COMPONENT ADMINISTRATIVE ELIMINATION BOARDS

I. The Commander May Not Order a Subordinate to Dispose of a Case in a Certain Way.

II. The Commander Must Not Have an Inflexible Policy on Case Disposition or Suspension of Execution of Separation.

III. The Commander, If Accuser, Should Not Appoint the Separation Board or Approve the Results.

IV. The Commander May Neither Select Nor Remove Board Members To Obtain A Particular Result In A Particular Separation Board Case.

V. No Outside Pressures May Be Placed on the Board Members or Legal Advisor to Arrive at a Particular Decision in a Separation Board Case.

VI. Witnesses May Not Be Intimidated or Discouraged From Testifying at Separation Board Proceedings.

VII. The Board Alone Determines Findings of Fact (Misconduct), and Recommends Separation or Retention. A Board Respondent May Not Be Unfairly Stigmatized/Punished Prior to their Board Hearing.

VIII. No Person May Invade the Independent Discretion of the Voting Board Members at a Separation Board Hearing.

IX. Commanders May Not Have an Inflexible Policy Towards Clemency.

X. If a Mistake is Made, Raise the Issue Immediately With Your Staff Judge Advocate.

APPENDIX B

USARC GUIDE FOR ENLISTED ADMINISTRATIVE SEPARATION BOARDS

By Major Dan Hossbach, Chief, Military Law Branch (1994, Revised 1998)

1. INTRODUCTION.

This guide was developed by Major Dan Hossbach, formerly Chief, Military Law Branch, USARC SJA, with assistance from Mr. Paul Artzer, CPT Jeff Arnold and the USARC DCSPER staff in 1994. Major Hossbach's comments are still appropriate today. Please direct any comments or corrections to this guide to Lieutenant Colonel Paul Conrad, AGR, Professor, Administrative and Civil Law Division, TJAGSA, ATTN: JAGS-ADA (LTC Conrad), 600 Massie Road, Charlottesville, Virginia 22903-1781, (804) 972-6357, or toll-free (800) 552-3978(ext. 357). I will keep this publication up-to-date. Questions on USARC directed administrative boards should be directed to LTC Woofter, Chief, Military Law, USARC SJA, at Headquarters, USARC, ATTN: AFRC-JA (LTC Woofter), 1401 Deshler Street, S.W., Atlanta, GA 30330-1043, (404) 464-8193.

2. OVERVIEW.

The purpose of this guide is not to dictate how your case should be presented. Rather, it is intended to help you prepare for the many eventuaIities that can occur in the processing of any enlisted administrative separation board. We will give you pointers on both advocacy skills as well as how to ensure that you are not caught unaware. Obviously, we cannot cover everything in great detail, but, we can provide you with our experience and hindsight so as to prevent any further occurrences of problems we have discovered in the past year. Since this guide was first developed, great progress has been made by Reserve Judge Advocate officers in fixing a number of the problems listed below. We wish to thank you for all your hard work in improving the processing of administrative elimination boards. You should also have a copy of Major Masterton's excellent article, " *Urinalysis Administrative Elimination Boards in the Reserve Components*", which appeared in the April 1995 **Army Lawyer**, at page 3. With that in mind, we hope that this guide will provide you information for use in your enlisted administrative board actions.

3. TOP TEN LIST OF PROBLEMS WITH BOARDS.

From the beautiful Camp Creek Business Center in lovely downtown East Point, Georgia, the following are the top ten problems we've found from our review of the enlisted administrative separation boards sent for review:

10. Board members fail to sign the original DA Form 1574;

9. Board members are excused from attending the proceedings by an improper authority, in the alternative, there is no evidence in the record regarding the excusal of members;

8. Board members are added to the appointing order by an improper authority;

7. No reporter detailed to take and prepare summarized transcript;

6. No summarized transcript forwarded with report of proceedings;

5. The local SJA does not review the report of proceedings prior to forwarding to USARC for review;

4. The Legal Advisor to the board allows members to make unauthorized findings and recommendations;

3. Board processing takes longer than it took dinosaurs to become extinct;

2. Recorder enters litigation report from drug lab into evidence and then rests the governments case; and

1. The number one problem with enlisted administrative separation boards is the Recorder's failure to adequately paint a picture of the respondent to the board so as to convince the board to discharge the respondent.

4. SOLUTIONS TO TOP TEN PROBLEMS.

While some of the ten problems listed above are easily solved, others will require a little more ingenuity. Listed below are our solutions to the top ten problems.

10. **Board members fail to sign the original DA Form 1574**. Before the board members leave, the recorder or reporter will type the verbatim findings and recommendations on the DA Form 1574 and the recorder will have the board members sign. This will save many lost hours/days waiting for the reporter to transcribe the record, record it on the DA Form 1574, and then track down and have the members sign the DA Form 1574. The recorder can complete sections I, II, and III afterwards. All that is required for the board members to sign is a verbatim recording in sections IV and V of the boards findings and recommendations.

9. **Board members are excused from attending the proceedings by an improper authority, in the alternative, there is no evidence in the record regarding the excusal of members.** The easy answer to this problem is to read the appointing order. It states that the USARC Staff Judge Advocate has been delegated the authority to excuse board members. Further AR 15-6, Procedure for Investigating Officers and Boards of Officers, 15 April 1992, paragraph 5-2a states that "if the appointing authority is a GCM convening authority or a commanding general with a legal advisor on his or her staff, the authority to excuse individual members before the first session may be delegated to the SJA or legal advisor". For USARC directed boards, that has been accomplished in your convening order. For boards that you convene locally, you must develop a delegation memorandum for your CG to sign delegating excusal authority to your SJA. In either case, the request for excusal and the SJA's approval will be in writing and the SJA excusal will be attached as an exhibit to the record of the proceedings. For using alternate members, look to AR 15-6, paragraph 5-2c. Your convening order will state that the memorandum of appointment may designate alternate members to serve on the board, in the sequence listed, if necessary to constitute a quorum in the absence of a regular member. Finally, if the president is excused, the next senior member will automatically serve as president. This should also be spelled out in your convening order.

8. **Board members are added to the appointing order by an improper authority.** The answer is that only your CG(if you have delegation of authority) or the USARC CG can add members to a board. It is a decision which requires the personal action of the CG; it cannot be delegated. That is not to say that someone with authority to sign for the commander can't sign the order, it just means that the CG has to make the decision.

7. **No reporter detailed to take and prepare summarized transcript**. While I understand the problem of resource allocation and personnel assets, a board requires the use of a recorder. It helps train your NCO's as well as enabling the recorder to concentrate on the job of presenting the governments case. In the event that a reporter is not detailed, then it is the recorders responsibility to ensure that a record of the proceedings is made. I suggest the use of a tape recorder, which is easy to operate and inconspicuous. Afterwards, it will enable the recorder to prepare the summarized transcript that is required. Don't destroy those tapes until after the results of the board have been approved by your CG or the USARC CG or ARPERSCOM, as the case may be.

6. **No summarized transcript forwarded with report of proceedings**. It is a requirement of all boards that a summarized transcript be made and included as part of the record of proceedings. AR 135-178, Separation of Enlisted Personnel, 1 September 1994, paragraph 2-16a requires that "the proceedings of the board will be summarized as fairly and accurately as possible. The proceedings will contain a" **verbatim record of the findings and recommendations" (**emphasis added). For a sample look at Appendix B to AR 635-200, Enlisted Personnel, pages 85-86 (see Enclosure 1). If you follow that format, your records will be complete and accurately reflect what happened at your board. The reason for this requirement is to allow those that will review the proceedings (your SJA, your CG or the USARC CG or ARPERSCOM, and any review board (i.e. ABCMR)) to have a complete record to ensure that the due process requirements of the soldier were protected and that sufficient evidence was introduced to validate the boards findings and recommendations.

5. **The local SJA does not review the report of proceedings prior to forwarding to USARC for Review.** For those cases that are reviewed at USARC, we routinely find that the local SJA has not reviewed the case prior to submission to USARC. for approval. The problem with this practice is that if we find a correctable error, we must send the record back down to the local unit for correction. If the local SJA reviews it first (not the board recorder or legal advisor to the board) they will find the error and correct it before submission. This will shorten the time periods involved in the approval process considerably.

4. **The Legal Advisor to the board allows members to make unauthorized findings and recommendations.** Countless boards have been submitted with unauthorized findings and recommendations. The board will make only 1 of 2 findings. Either the soldier committed the misconduct alleged or he/she did not. The recommendations are governed by AR 135-178, paragraph 2-17. Again there are only three recommendations the board should make; (1) retention (with the type of duty that the board believes the soldier can perform satisfactorily), (b) separated (with the type of characterization of service of Honorable, General, or Under Other Than Honorable Conditions), and (3) separated but with a recommendation that separation be suspended (see AR 135-178, paragraphs 2-17g and 2-17h). If suspension is recommended, the board still must recommend a characterization of service, as the recommendation of suspension is not binding on the separation authority. Finally, the recommendation of suspension can be for no longer than 12 months (see AR 135-178, paragraph 1-16). If the legal advisor to the board reviews the boards findings and recommendations prior to their announcement, any problem as to form can be corrected and the announcement of unauthorized findings and recommendations stopped. The legal advisor should accomplish this before the board reopens for announcement of its findings and recommendations. The legal advisor should review the board's findings and recommendations for proper content and format and then allow the recorder and respondent's counsel to make any objections and they should be put on the record once the board reopens for announcement of its findings and recommendations. This process works well and it ensures that only proper findings and recommendations are made by the board.

3. **Board processing takes longer than it took the dinosaurs to become extinct.** There is no easy answer to this problem. However, several suggestions come to mind that can facilitate the timely processing of your boards. First, set up permanent boards of officers (several if necessary) so all that is required is to appoint a board to hear a case, instead of convening a new board for each case. Second, for those cases where the soldier does not respond within the time allowed, process immediately as a waiver. Be aware of and ensure that all of the requirements are complied with (see AR 135-178, paragraphs 2-6, 2-9, and 2-11). The most important is that if the "soldier refuses to consult with counsel or declines to respond as to the selection of rights, such declination will constitute a waiver of the right to consult with counsel or a waiver of rights. An appropriate annotation will be made on the form provided for the soldier's reply" (AR 135-178, para. 2-6a). The annotation will be made by the soldier's commander. Third, if-you have a backlog, you need to schedule boards as often as possible to try and eliminate the backlog. If you have no backlog, scheduling more than one board per weekend will ensure that your boards become proficient at hearing cases and that your use of your time and funds is maximized.

2. **Recorder enters litigation report from the drug lab into evidence and then rests the governments case.** From our review, the most common approach for "drug" boards is that the recorder enters the litigation packet into evidence and then rests the government case. One can only wonder why this approach is not successful. Despite the evidence of use, the government must overcome the reluctance of the board members to discharge someone with a history of good performance. From my statistics, the average soldier appearing at a "drug" board is a SSG with 11 years of service. This soldier has at least three witnesses to speak on his good duty performance. It is incumbent on the recorder to have someone to testify about why the soldier should be discharged. Usually, this should be the soldiers commander, 1SGT, or first line supervisor. The Recorder should scour the respondent's 201 file and military records for other instances of misconduct or poor judgment. These can be used on rebuttal,
once the soldier gets up nd says what a great guy he is, or can be used to cross-examine the respondent's character witnesses. If you can get the Bn or Bde Commanders to testify, that will also help persuade the board to discharge the soldier. Later in this guide we will give you some advocacy tips that will help you achieve a favorable outcome for the government. From our perspective, it is better to give them an Honorable discharge then it is to see them drilling for years to come.

1. The number one problem with enlisted administrative separation boards is the Recorder's failure to adequately paint a picture of the respondent to the board so as to convince the board to discharge the Respondent. There is no solution, per se, for this problem. In the advocacy tips portion of this article, we will provide you some help in overcoming the "brownie", "passive inhalation", "my spouse spiked my (insert your own answer)", and other weird defenses that have in the past, been so successful. Suffice it to say, there are scientific articles that scientifically prove that it is unlikely that the soldier would test positive on our confirmation test if in fact they were passively exposed to or had a one time use of marijuana or cocaine.

APPENDIX C

USARC INVOLUNTARY SEPARATION BOARD CHECKLIST for Army Regulation 135 Series (Reserve Component) Post-Board Legal Sufficiency Review

[Developed by CPT Jeff Arnold, USARC SJA Office]

REVIEW OF DA FORM 1574:

SECTION I

_____ Is Section I properly completed? (A Board is appointed by a Commander, not a "Headquarters".)

SECTION II

_____ Is Section II properly completed?

_____ Are all board personnel, including Respondent, accounted for?

_____ If a board member is absent, is there an explanation for the absence?

_____ Are absent members properly excused? If not, why ?

SECTION III

_____ Is Section III properly completed (including address of counsel for the Respondent)?

SECTION IV

_____ Were the Findings determined in closed session?

_____ Were the Findings determined by secret written ballot (officer case only)?

_____ Are the Findings verbatim?

_____ Are the Findings in compliance with AR 135-175, paragraph 2-34a (officer) or AR 135-178, paragraph 2-16b (enlisted) ?

SECTION V

_____ Were the recommendations determined in closed session?

_____ Were the recommendations determined by secret written ballot (officer case) ?

_____ Are the recommendations verbatim?

_____ Are the Recommendations in compliance with AR 135-175, paragraph 2-34b (officer) or AR 135-178, paragraph 2-17(enlisted) ?

DA FORM 1574, continued:

SECTION VI

_____ Is the DA Form 1574 signed by the Recorder and all voting members?

SECTION VII

_____ Did dissenting member(s) sign?

_____ Is there an enclosure identifying by number each finding and/orrecommendation in which the dissenting member(s) do(es) not concur[minority report] ?

SECTION VIII

_____ Is the appointing authority's signature block correct?

REVIEW OF SUMMARIZED TRANSCRIPT:

_____ Is there a summarized transcript of the board proceedings?

_____ Does the transcript account for all members, including Respondent, at the beginning of each session, after each break, and after the board returns from closed session to announce the findings and recommendations?

_____ Does the transcript indicate whether the Respondent was given an opportunity to question voting members and the legal advisor for bias?

_____ Does the transcript indicate whether the Respondent challenged any voting member or the legal advisor for cause?

_____ Does the transcript include objections made by counsel for Respondent and the rulings on the objections?

_____ Does the transcript contain the summarized testimony of all witnesses?

_____ Does the transcript indicate the board was opened for announcement of Findings and Recommendations?

_____ Does the transcript indicate whether the board determined Findings and Recommendations in closed session?

_____ Does the transcript in an officer case indicate whether the board determined Findings and Recommendations in closed session by secret written ballot?

_____ Does the transcript contain verbatim Findings and Recommendations?

REVIEW OF ENCLOSURES:

_____ Is the Letter of Appointment enclosed?

_____ Are all board member excusal memoranda enclosed?

_____ Is a copy of the Notification Letter [to Respondent] enclosed?

_____ Are all Government exhibits marked and enclosed?

_____ Are all Respondent exhibits marked and enclosed?

APPENDIX D

ENLISTED AGR COUNSELING BOILERPLATE - DA FORM 4856, General Counseling Form

Part II, Block 8, DATE AND CIRCUMSTANCES. [State date and circumstances of incident resulting in counseling statement, and reference any attached documents and/or statements.]

Part II, Block 9, DATE AND SUMMARY OF COUNSELING.

On [month] [date], 199__, I met with you, [rank] [AGR full name] [Social Security Number], to counsel you regarding the incident outlined in Part II, Block 8, above. Separation action may be initiated under AR 635-200 if this conduct continues. Such separation action may result in a characterization of service of either Uncharacterized, Honorable, General (under honorable conditions), or Other Than Honorable (OTH) Conditions. If you receive an OTH discharge, you would not be eligible for payment of accrued leave, military retirement, wear of the military uniform, admission to a soldiers home, civil service retirement credit, civil service employment preference, unemployment compensation and naturalization benefits. Also, you might not be eligible for many other important veteran's benefits. If you receive a general discharge, you would not be eligible for unemployment compensation and certain other important veteran's benefits. If you receive an honorable discharge, you would be entitled to all benefits. If you received an uncharacterized discharge, you may not be eligible for any benefits. If you receive less than an Honorable discharge, you can expect to encounter significant prejudice in civilian life. Any early separation action might result in recoupment of unearned enlistment bonuses, a loss of G.I. Bill or VEAP educational benefits, and no separation pay, if you were otherwise qualified. You should know that if such conduct continues, you may be subject to a bar to reenlistment under AR 140-111; a written reprimand under AR 600-37; reduction in grade under AR 600-200, Chapter 6; MOS reclassification under AR 140-158; an adverse NCOER evaluation report (if eligible for an NCOER) under AR 623-205, paragraph 4-27; extra training or instruction under AR 600-200, paragraph 4-6; flagging action under AR 600-8-2, and other adverse administrative action. Finally, you should also know that such conduct subjects you to punishment under the UCMJ.

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 12

UNLAWFUL COMMAND INFLUENCE

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LTC Robert A. Burrell
December 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. INTRODUCTION

A. References

1. Manual for Courts-Martial, United States (1995)[hereinafter MCM).

2. Uniform Code of Military Justice [hereinafter UCMJ] arts. 1, 25, 37, 98.

3. Dep't of Army, Reg. 27-10, Legal Services, Military Justice, paras. 5-9, 5-10*c* (24 June 1996) [hereinafter AR 27-10].

B. Keys to understanding unlawful command influence (UCI).

1. See the commander as a **judicial authority**. Be aware that UCI may be actual or apparent.

2. Public interest; high-profile cases, politics.

3. The exercise of UCI is not limited to commanders.

4. **Independent discretion** of 3 key population groups:

   a. Court Members

   b. Subordinate Commanders

   c. Witnesses

5. Dispute over whether, extent to which Art. 37 applies to accusative stage. *See United States v. Drayton*, 45 M.J. 180 (1996).

II. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

A. Each judicial authority, at every level, is vested with independent discretion, **by law**, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander.

B. Lawful Command Actions. The commander MAY:

1. Personally dispose of a case if within commander's authority or any subordinate commander's authority. R.C.M. 306(c).

2. Send a case back to a lower-level commander for that subordinate's independent action. R.C.M. 403(b)(2), 404(b), 407(a)(2). Superior <u>may not</u> make a recommendation as to disposition. R.C.M. 401(c)((2)(B).

3. Send a case to a superior commander with a recommendation for disposition. R.C.M. 401(c)(2)(A).

4. Withdraw subordinate authority on individual cases, types of cases, or generally. R.C.M. 306(a).

5. Escalate a lower disposition. R.C.M. 601(f) ("Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." *Accord United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). <u>EXCEPTIONS:</u>

   a. An executed Article 15 for a minor offense. R.C.M. 907(b)(2)(D)(iv), MCM, Part V, para 1e. *See United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (permissible for superior commander to prefer charge for a major offense even though accused already received Art. 15 for the offense).

b. After evidence is presented at trial, extremely limited authority to escalate disposition, *e.g.*, urgent and unforeseen military necessity. UCMJ, art. 47 (former jeopardy); R.C.M. 604(b), 907(b)(2)(C).

C. Recurring mistakes:

1. Advice before the offense (Policy Letters).

Cannot, *e.g.*, suggest reduction and $500 for NCOs, as a "starting point" for NCOs involved in alcohol-related offenses with no personal or property injury. Base commander published range of appropriate punishments for alcohol offenses, to be "individualized under the guidelines of the UCMJ." *United States v. Martinez*, 42 M.J. 327 (1995).

See also United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956) (Policy of GCM for soldiers with two prior convictions constitutes unlawful interference with subordinate's independent discretion).

2. Advice after the offense.

a. Improper for battalion commander to return request for Article 15 to company commander with comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." *United States v. Rivera,* 45 C.M.R. 582, 583 (A.C.M.R. 1972).

b. *See United States v. Gerlich*, 45 M.J. 309 (1996). COL bde commander/SPCMCA ordered subordinate (MAJ) to set aside Art. 15 after COL received letter from CG (who had received critical letter from IG) directing reinvestigation. Court set aside findings and sentence, notwithstanding COL's and MAJ's claims of continued independence, based on recognized "difficulty of a subordinate ascertaining for himself/herself the actual influence a superior has on that subordinate."

c. *But see United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). Superior learned of additional misconduct by the accused and told subordinate commander, "You may want to reconsider the Article 15 and consider setting it aside based on additional charges." Court, relying on fully developed record at trial, agreed with trial judge that subordinate "exercised his own independent discretion when he preferred charges." *Id*. at 286-87.

III. CONVENING AUTHORITY AS ACCUSER.

A. Accuser is "person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused." UCMJ art. 1(9).

1. Test is whether under the circumstances "a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome. *United States v. Gordon,* 2 C.M.R. 161, 166 (C.M.A. 1952).

2. Convening authority who possesses **more than an official interest** must forward the charges to a superior competent authority for disposition. UCMJ, art. 22(b), 23(b) (GCM and SPCM respectively); *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)(GCMCA was victim of burglary*); United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)(accused attempted to blackmail GCMCA); *United States v. Dingis,* 48 M.J. ___ (1998). D*ubay* hearing ordered to determine whether SPCMCA, who forwarded case to GCMCA with recommendation for GCM, had sufficient personal interest in the case to be disqualified as a convening authority.

B. Exceptions:

1. Violations of general regulations. *United States v. Doyle, 26 C.M.R. 82, 85 (C.M.A. 1958).*

2. Article 15s.

3. Summary Courts-Martial. R.C.M. 1302(b).

C. Disqualified SPCMCA must disclose disqualification even when forwarding charges to GCMCA with recommendation for GCM. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

IV. INFLEXIBLE ATTITUDE MAY DISQUALIFY CONVENING AUTHORITY.

A. Pretrial (generally not disqualified).

1. Pretrial referral is a prosecutorial function, not a quasi-judicial function. *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982).

2. *United States v. Treakle*, 18 M.J. 646, 654-55 (A.C.M.R. 1984)("We do not agree . . . that a convening authority can be deprived of his statutory power to convene courts-martial and refer charges to trial based on lack of judicial temperament").

3. *United States v. Villareal,* 52 M.J. 27 (1999). Pre-referral transfer of jurisdiction to a neutral GCMCA insulated case from unlawful command influence, after initial GCMCA withdrew from pre-trial agreement (PTA) following phone-call with Chief of Staff of higher command.

B. Post-trial.

1. Accused is entitled "as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused's first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge." *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).

2. The presence of an inelastic attitude suggest that a convening authority will not adhere to the appropriate legal standards in the post-trial review process and that he will be inflexible in reviewing convictions because of his predisposition to approve certain sentences. *United States v. Fernandez*, 24 M.J. 77, 79 (C.M.A. 1987)

V. COURT MEMBER SELECTION.

A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ: age, education, training, experience, length of service and judicial temperament.

United States v. White, 48 M.J. 251 (1998). Convening authority's memo directing subordinate commands to nominate "best and brightest staff officers," and that "I regard all my commanders and their deputies as available to serve as members" did not constitute court packing.

B. Staff Assistance.

1. Staff and subordinate assistance in compiling a list of eligible court members is permissible. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992).

2. Commander must beware, however, of subordinate nominations not in accordance with Article 25. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991)(improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of "harsh discipline").

   a. *United States v. Benson,* 48 M.J. 734 (A.F. Ct. Crim. App. 1998). Memorandum from SPCMCA directing subordinate commands to nominate only E-7s and above constituted impermissible shortcut for Article 25(b) criteria.

   b. *United States v. Upshaw*, 49 M.J. 111 (1998) Court concludes that the accused, an Air Force Tech Sergeant (E-6), was not prejudiced by an honest mistake that resulted in the exclusion of E-6s and below from the list of court-martial nominees. At trial, the defense counsel claimed jurisdictional defect, but failed to demand selection of new members, and failed to allege unlawful command influence, after the military judge denied his jurisdiction motion.

C. Replacement of panel also requires that the convening authority use **only** Article 25 criteria. Even then, the convening authority must avoid using improper motives or creating the appearance of impropriety. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ("the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated [to select members with intent to achieve harsh sentences]"); *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (replacement of panel because of "results that fell outside the broad range of being rational").

VI. NO OUTSIDE PRESSURE.

A. Education: AR 27-10, para. 5-10*c*. "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . ." *See also* UCMJ, art. 37(a) and R.C.M. 104 concerning permissible education.

B. Command policy in the courtroom.

1. Military judge's sentencing instruction, which related Army policy regarding use of illegal drugs, implicated unlawful command influence concerns and constituted plain error which was not waived by the accused's failure to object. *United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991).

2. *United States v. Youngblood,* 47 M.J. 342 (1997). Staff meeting at which Wing commander and SJA shared perceptions of how previous subordinate commanders had "underreacted" to misconduct created "implied bias" among three senior court members in attendance.

C. In the deliberation room.

Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. Discussion, Mil. R. Evid. 606; *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985).

D. Command interference with the power of the judge.

United States v. Tilghman 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Trial counsel asked the military judge to place the accused in pretrial confinement overnight. The military judge determined no grounds existed for pretrial confinement and declined to order accused into confinement. Later the same day, the group commander ordered the accused into confinement overnight. Remedy: 18 months credit ordered against accused's sentence.

VII. WITNESS INTIMIDATION.

A. Direct attempts to influence witnesses.

1. *United States v. Gleason*, 43 M.J. 69 (1995). After hearing incriminating tape of SGM, linking him to contract killer, battalion commander (LTC) made clear he believed accused was guilty, characterized TDS as "enemy" and made clear that witnesses should not testify on SGM's behalf (none did). Court found that command influence infected entire process, overturning sentence AND conviction.

2. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told that they had "embarrassed" the unit. Court found UCI necessitated setting aside findings and sentence.

3. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994): An officer witness for the accused testified that members of the Junior Officers Protection Association pressured him not to testify. A petty officer also was harassed and advised not to get involved. Finding: unlawful command influence with regard to the petty officer. No command influence with regard to the officer, because JOPA lacked "the **mantle of command authority;"** instead unlawful interference with access to witnesses. Courts increasingly cite this case as one of UCI landmarks.

4. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). Investigation of Air Force OSI special agent for fraternization was worst in 90 years of service by appellate court; "fragrant with odor of government misconduct" and "rife with witnesses . . .who were targets of unlawful command influence." Findings and sentence set aside.

B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, <u>despite</u> good intentions.

*See *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986). CG addressed groups over several months on the inconsistency of recommending discharge level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message received by many was "don't testify for convicted soldiers." Accordingly, these comments unlawfully pressured court-martial members and witnesses.

VIII. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

A. Mass Apprehension. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment. Violation of UCMJ, art. 13; returned for sentence rehearing.

B. Pretrial Humiliation. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994). Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute unlawful command influence; no showing that any witnesses were persuaded or intimidate from testifying. It did, however, violate Article 13.

IX. INDEPENDENT DISCRETION OF MILITARY JUDGE.

A. Prohibition: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." UCMJ, art. 37(a).

B. Efficiency Ratings: "[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ art. 26(c).

C. Questioning sentences.

United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries which question or seek justification for a judge's decision are prohibited.

D. Subtle pressures.

1. Improper for DSJA to request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983).

2. *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991). Senior judge's letter, written to increase sentence severity, subjected judges to unlawful command influence.

X. RAISE ISSUE IMMEDIATELY.

A. Remedial actions may be taken:

1. Before trial.

a. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). In response to 1SG's criticism that those who testify on behalf of drug offenders contravene Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

b. *United States v. Rivers,* 49 M.J. 434 (1998) Corrective action by military judge at trial overcame three allegations of unlawful command influence (UCI); CG's command memo – "no place in our Army for illegal drugs **or for those who use them;"** Company Commander twice told soldiers to "stay away from those involved with drugs;" 1SG issued rights warnings to four defense witnesses prior to interview.

c. *United States v. Biagase,* 50 M.J. 143 (1999) provide excellent examples of corrective action taken by the government to overcome acts of unlawful command influence.

2. At trial. *United States v. Giarratano*, 22 M.J. 388, 399 (C.M.A. 1986). Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case.

3. Post-trial.

R.C.M. 1102: Anytime before authentication or action the military judge or convening authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

United States v. Bradley, 51 M.J. 437 (1999) After *Dubay* hearing, the court was satisfied that the SJA did not commit UCI:

4. On appeal.

a. New recommendation and action ordered. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974).

b. *DuBay* hearing ordered. *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988).

c. Findings and sentence overturned.

B. Remedial action may not work. Extremely important to litigate (at the trial court level) the adequacy of remedial actions.

XI. YOUR CONCERNS AS A NEW JUDGE ADVOCATE.

A. Prevention.

1. OPDs, staff calls, candid conversations.

2. Coaching, preparing commanders.

B. Detection.

C. Litigation.

D. Get bosses involved when you smell smoke.

E. Remember:

1. Mantle of command authority.

2. Dispute over whether Art. 37 applies to *accusative* stage.

3. UCI frequently correctable when (a) detected early, and (b) appropriate corrective measures are applied.

XII. CONCLUSION.

THE 10 COMMANDMENTS
OF
UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1: **THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.**

COMMANDMENT 2: **THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.**

COMMANDMENT 3: **THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.**

COMMANDMENT 4: **THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.**

COMMANDMENT 5: **NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.**

COMMANDMENT 6: **WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.**

COMMANDMENT 7: **THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.**

COMMANDMENT 8: **RECOGNIZE THAT SUBORDINATES AND STAFF MAY "COMMIT" COMMAND INFLUENCE THAT WILL BE ATTRIBUTED TO THE COMMANDER, REGARDLESS OF HIS KNOWLEDGE OR INTENTIONS.**

COMMANDMENT 9: **THE COMMANDER MAY NOT HAVE AN INFLEXIBLE ATTITUDE TOWARDS CLEMENCY.**

COMMANDMENT 10: **IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.**

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CHAPTER 13

NONJUDICIAL PUNISHMENT

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MAJ O'Brien
December 2000

2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

NONJUDICIAL PUNISHMENT

Outline of Instruction

I. INTRODUCTION.

II. AUTHORITY TO IMPOSE ARTICLE 15s.

A. Who May Impose?

Commanders must be in a title 10 status (AD, ADT, AT, IDT, AGR) when offering or imposing punishment or vacating suspended punishment UP Article 15.

1. **Enlisted soldiers**: either AC or RC commanders may punish RC enlisted soldiers of their commands. AR 27-10, para. 21-6c.

2. **Officers**: either the AC or RC GCMCA or commanding general in the RC officer's chain of command may punish officers. AR 27-10, para. 21-6d.

3. **AGR:** RC commanders cannot impose nonjudicial punishment on AGR soldiers while on IDT. AR 135-18, para. 2-10a.1.

B. Can Article 15 Authority Be Delegated?

1. Article 15 authority may <u>not</u> be delegated.

2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to any deputy or assistant commander or to chief of staff if the chief of staff is a general officer. Delegation must be written.

C. Can Article 15 Authority Be Limited? Yes.

1. Permissible limitations.

a. Superior commander may totally withhold.

b. Superior commander may partially withhold (e.g., over categories of personnel, offenses, or individual cases).

c. Withhold in individual case.

d. No requirement that limitations be written but probably a good idea (e.g., publish in post regulation).

2. Impermissible limitations.

a. Superior commander cannot direct a subordinate commander to impose an Article 15.

b. Superior commander cannot issue regulations, orders, or guides that either directly or indirectly suggest to subordinate commanders that—

(1) Certain categories of offenders or offenses be disposed of under Article 15.

(2) Predetermined kinds or amounts of punishment be imposed for certain categories of offenders or offenses.

III. OFFENSE

A. When is an Article 15 Appropriate?

1. Minor offenses.

2. Correct, educate, reform offenders.

3. Preserve a soldier's record of service from unnecessary stigma.

4. Further military efficiency.

B. Double Jeopardy Issues.

1. Prior trial by civilians. Ordinarily will not be tried as matter of policy. AR 27-10, para. 4-2.

2. Subsequent court-martial. Only if serious offense. United States v. Pierce, 27 M.J. 367 (C.M.A. 1989). Must give complete credit for punishment served and government cannot use Article 15 for any purpose (including impeachment and aggravation evidence).

3. Previous Article 15. Cannot administer another Article 15 for same misconduct. AR 27-10, para. 3-10.

C. RC soldiers must be in title 10 status to receive nonjudicial punishment.

IV. TYPES OF ARTICLE 15s.

A. Formal Article 15.

1. Appropriate if soldier is an officer

or

2. Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

3. Recorded on DA Form 2627.

B. Summarized Article 15.

1. Appropriate where soldier is enlisted <u>and</u> punishment should not exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

2. Recorded on DA Form 2627-1.

V. NOTICE REQUIREMENT. SOLDIER MUST BE NOTIFIED OF THE FOLLOWING:

A. Commander's Intention to Dispose of the Matter under Article 15.

B. Maximum Punishment Which the Commander Could Impose under Article 15.

C. Offense Believed to be Committed.

D. Notice includes Soldier's Rights Under Article 15.

1. Formal.

a. A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.

b. Remain silent.

c. Consult with counsel (usually 48 hours).

d. Demand trial by court-martial (unless attached to or embarked in a vessel).

e. Request an open hearing.

f. Request a spokesperson.

g. Examine available evidence.

h. Present evidence and call witnesses.

i. Appeal.

2. Summarized.

a. Reasonable decision period (normally 24 hours).

b. Demand trial by court-martial.

c. Remain silent.

d. Hearing.

e. Present evidence and call witnesses.

f. Confront witnesses.

g. Appeal.

E. Delegating the Notice Responsibility.

1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified).

2. Good way to involve first sergeant or command sergeant major?

F. How to Give Notice. See Script, AR 27-10, Appendix B.

VI. HEARING.

A. In the Commander's Presence.

B. "Open" v. "Closed" Hearing.

C. Witnesses.

D. Spokesperson.

E. Right to consult with counsel.

1. AGRs or RC personnel on extended active duty will be represented by USATDS.

2. RC commander contacts RC SJA who determines availability of RC defense counsel, either from a court martial defense team or other qualified RC JA.

3. If no RC defense counsel is available, RC SJA should coordinate with AC Trial Defense Service (TDS) personnel.

4. Commanders should be flexible in allowing RC soldiers more time to consult with counsel.

F. Rules of Evidence.

1. Commander is not bound by the formal rules of evidence, except those pertaining to privileges.

2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

G. Decision on Guilt or Innocence.

Proof beyond a reasonable doubt required.

VII. PUNISHMENTS.

A. Maximum Punishment. See Table 3-1, AR 27-10.

B. Four Types of Punishment.

1. Reduction in grade. **RC AGR** soldiers in grade of E6 **cannot** be reduced. AR 140-158, para. 4-2a(3), 7-9a.

2. Loss of liberty punishments.

a. Correctional custody.

b. Extra duty.

c. Restriction.

3. Forfeiture of pay.

a. Forfeitures are based on grade to which reduced, whether or not reduction is suspended.

b. Reconciliation log, DA Form 5110-R, may be used to monitor pay forfeitures.

c. Forfeitures can be applied against retirement pay.

d. Reserve pay: Impose forfeitures using whole dollar amounts based on active duty soldier's pay. See Appendix A to this outline.

4. Admonition and reprimand.

C. Combination of Punishments.

D. Punishment can be carried over from one period of title 10 duty to subsequent periods. IDT cannot be scheduled solely for the purpose of having the soldier serve NJP. RC soldiers cannot be held beyond the end of a normal period of IDT to serve NJP.

VIII. FILING OF ARTICLE 15s.

A. Formal Article 15s.

1. E4 and below.

a. Original DA Form 2627 filed locally in unit nonjudicial punishment files. Copies two and three to the MILPO that services the MPRJ if the punishment includes an unsuspended reduction and/or forfeiture of pay.

b. Destroyed two years after imposition or upon transfer to another general court-martial convening authority if transfer for non-medical reason.

2. All other soldiers.

a. Performance fiche or restricted fiche of OMPF.

b. Imposing commander's determination is final unless soldier has an Article 15, received while he was a sergeant (E5) or above, filed in his restricted fiche - bumps all subsequent 15s to performance fiche.

c. Superior commander cannot withhold subordinate commander's filing determination or change filing decision on appeal.

B. Summarized Article 15s.

1. DA Form 2627-1 filed locally.

2. Destroyed two years after imposition or upon transfer from the unit.

IX. APPEALS.

A. Soldier only has one right to appeal under Article 15.

B. Time Limits to appeal.

1. Reasonable time.

2. After 5 days, appeal presumed untimely and may be rejected.

C. Who Acts on an Appeal?

1. Next superior commander.

2. Any superior commander, senior to the appellate authority, may act on an appeal.

3. Successor in command or imposing commander can take action on appeal.

4. Appellate authority has 5 calendar days to act on formal article 15 appeal; 3 days to act on summarized article 15 appeal.

5. RC commanders can act on an appeal at any time unless vacating a suspension.

D. Procedure for Submitting Appeal.

1. Indicate on DA Form 2627, item 7 or DA Form 2627-1, item 4.

2. Submitted through imposing commander.

E. Action by Appellate Authority

1. May conduct independent inquiry.

2. Must refer certain appeals to the SJA office for a legal review <u>before</u> taking appellate action. See note 9, back of DA Form 2627.

3. May refer an Article 15 for legal review in any case, regardless of punishment imposed.

4. May take appellate action even if soldier does not appeal.

F. Commander's options on appeal.

1. Approve punishment.

2. Suspend (consider vacation if subsequent misconduct or violation of a condition imposed by the commander).

3. Mitigate- reduce quality or quantity of punishment.

4. Remit- cancel unexecuted portion of the punishment.

5. Set Aside- restore all rights, privileges, and property based on a "clear injustice."

Use DA Form 2627-2, if relief granted on appeal after distribution of DA Form 2627 (including copies).

G. Petition to the Department of the Army Suitability Evaluation Board (DASEB).

1. Sergeants and above may petition to have DA Form 2627 transferred from the performance to the restricted fiche.

2. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.

3. Petition normally not considered until at least one year after imposition of punishment.

X. PUBLICIZING ARTICLE 15s.

XI. ADMINISTRATIVE CONSEQUENCES OF AN ARTICLE 15.

A. Formal Article 15 - DA Form 2627.

1. Admissible at trial by court-martial.

2. May be reported to National Criminal Information Center (NCIC).

3. May be considered in administrative proceedings.

4. Not an automatic bar to reenlistment.

B. Summarized Article 15- DA Form 2627-1.

1. Not admissible at trial by court-martial.

2. May be considered in administrative proceedings.

3. Not an automatic bar to reenlistment.

XII. CONCLUSION.

APPENDIX A

EXAMPLE (Calculating Forfeitures for RC Soldiers)

PROBLEM: Field Grade Commander wants to impose forfeitures of $350 per month for 2 months on Specialist (E4) with 2 years time in service.

SOLUTION:

1. Determine amount of base pay for AC soldier of same grade and time in service. ($1176.30)

2. Convert amount forfeited to a percentage: (350/1176.30= 30%).

3. Collect that percent of the soldier's pay for each period of duty performed. (30% of pay for each unit training assembly)

4. Pay may only be collected for duty performed during the stated period of forfeitures (2 months). If the forfeitures have not been satisfied by then, no further collection is authorized.

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CHAPTER 14

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS AND FRATERNIZATION SEMINAR

(Materials will be distributed in class.)

CHAPTER 15

THE LAUTENBERG AMENDMENT

Outline of Instruction

I. REFERENCES.

A. Gun Control Act of 1968, 18 U.S.C. §921-928 (Supp. 1997).

B. The "Lautenberg Amendment" to the Brady Handgun Violence Prevention Act, P.L. 104-208, Title VI, section 658, 110 Stat. 3009.371; codified at 18 U.S.C. §922(d)(9), §922(g)(9), §925(a)(1); (effective 30 Sept. 1996).

C. Department of Defense Implementation:

1. Memorandum, Assistant Secretary of Defense, Force Management Policy, Subject: Interim DoD Policy on Domestic Violence Amendment to the Gun Control Act (22 Oct 1997).

2. Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenberg Amendment (15 Jan. 1998). Copy at Appendix 1.

3. Message, 311108Z Oct 97, Headquarters, Dep't of Army, DAJA-LA, subject: Interim Guidance on Lautenberg Amendment Issues (31 Oct. 1997).

4. Message, 211105Z May 99, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Solders Affected by the Lautenberg Amendment. Copy at Appendix 2.

D. JAGNet site for Lautenberg Amendment database: http://www.jagnet.army.mil/jagnet/lautenasgm.nsf/?Open

II. BASIC PROVISIONS.

A. 18 U.S.C. §922(d) prohibits the transfer of "any firearm or ammunition to any person whom you know or have reasonable cause to believe . . . has been convicted in any court of a misdemeanor crime of domestic violence."

B. 18 U.S.C. §922(g) prohibits "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to receive any firearm or ammunition which has been shipped in interstate or foreign commerce."

C. Violations of either prohibition are punishable by 10 years confinement, $250, 000 fine, or both. 18 U.S.C. §924(a)(2).

D. 18 U.S.C. §925 formerly exempted "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof." This "federal exemption" has been eliminated for individuals "convicted in any court of a misdemeanor crime of domestic violence."

III. ELEMENTS OF A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE," 18 U.S.C. §921(A)(33).

A. The person was convicted of a crime classified as a misdemeanor in the jurisdiction where the conviction was entered.

B. The offense had as an element the use or attempted use of physical force, or threatened use of a deadly weapon.

C. The offender was at the time of the offense:

- A current or former spouse, parent or guardian of the victim;
- A person with whom the victim shared a child in common;
- A person who was cohabiting with or has cohabited with the victim as a spouse, parent or guardian of the victim;
- A person who was similarly situated to a spouse, parent, or guardian of victim.

D. The convicted offender was represented by counsel, or knowingly and intelligently waived the right to counsel.

E. If entitled to have the case tried by jury, the case was actually tried by a jury or the person knowingly and intelligently waived the right to have the case tried by a jury.

F. The conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense or had civil rights restored, unless the pardon, expungement, or restoration of civil rights provides that the offender may not ship, transport, possess, or receive firearms.

IV. DEP'T OF DEFENSE AND DEP'T OF ARMY RESPONSE.

A. Interpretation.

1. Conviction of a misdemeanor crime of domestic violence does not include a summary court-martial conviction or nonjudicial punishment under Article 15.

2. The law does not apply to crew served weapons or major weapons systems (tanks, missiles, aircraft, etc.).

3. The law applies to all other Army issue and privately owned firearms and ammunition.

4. The Army policy applies worldwide (including hostile fire areas).

B. Commander Responsibilities Under January 1998 Interim Guidance.

1. Notify all soldiers that it is unlawful to possess firearms and ammunition if they have a conviction of a misdemeanor crime of domestic violence.

2. Conduct local file checks to identify soldiers who may have disqualifying convictions.

3. Establish procedures to ensure compliance, to include withdrawing privately owned weapons from unit arms rooms. Such procedures should permit soldiers to sell or transfer personal firearms to authorized individuals.

4. Soldiers who have or may have a qualifying conviction should be referred to a legal assistance attorney.

5. Reassign to duties that do not require possession of firearms or ammunition.

6. May initiate adverse administrative action against soldiers solely on the basis of inability to possess a weapon only if the conviction was entered after 30 September 1996 and the soldier has been given a reasonable amount of time to obtain a pardon or other relief.

7. May initiate adverse action on the basis of the underlying misconduct or for civil conviction regardless of when the misconduct or conviction occurred.

C. Commander's Responsibilities Under May 1999 Message

1. Soldiers with disqualifying conviction or *reasonable cause to believe* have a disqualifying conviction are non-deployable or assignable for:

a. Mission requiring Firearms (No Curtailment)

b. Overseas assignments (No Curtailment)

c. TOE/MTOE Units (New Soldiers Only)

d. Service Schools

e. Limited Leadership

2. Enlisted Retention

a. Extension for one year only (does not apply to bared soldiers).

b. No reenlistment.

c. Accept voluntary separation under Chapter 5-3.

3. Reporting:

a. USR Code (other) beginning 15 July.

b. Central reporting, wait.

4. National Guard and Reserves report Semi-annually starting 1 Aug. 1999.

D. Legal Assistance.

1. Personnel who believe they may have a disqualifying conviction will be referred to legal assistance. Legal assistance attorneys will explain the law and potential criminal and administrative consequences of a disqualifying conviction.

2. LA attorneys will assist soldiers, to the extent possible, in obtaining pardons, expungement of records, proof of deferred adjudication, or restoration of civil rights, which would render Lautenberg inapplicable to the client.

3. The scope of legal assistance involving civilian criminal matters is limited by AR 27-3, &3-6j, and clients may need referral to civilian defense counsel.

4. Clients needing advice on criminal law or administrative separation matters should be referred to TDS, IAW AR 27-3, &3-6g(5) & 3-8a(1).

V. CURRENT ISSUES.

A. Litigation. *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998) *reh'g granted,* 159 F.3d 1362, *reversed,* 173 F.3d. 898 (D.C. Cir. 1999). On 28 August 1998 the court held that 18 U.S.C. §925 violates the Equal Protection Clause, because there is no rational basis for prohibiting possession of firearms by officers with misdemeanor domestic violence convictions, while permitting possession by officers with domestic violence felony convictions. On 16 April 1999 the court reversed itself and held that the amendment does not violate the Equal Protection Clause.

B. The Current Policy Debate.

1. Do not expand policy to include felony convictions of domestic violence.

2. Rescind overseas applicability (absent definitive judicial ruling).

3. Provide guidance on foreign convictions.

4. Require certification only for personnel with unsupervised access to weapons and ammunition.

5. Ensure consistent application for military, civilian and contract personnel.

6. Oppose creation of non-weapons-bearing MOSs.

C. Legislative Initiatives.

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CHAPTER 16

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants to Congress the power to ". . . lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ."

2. U.S. Constitution, Art. I, § 9, provides that "[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law."

B. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly:

a. Obligated funds in advance of appropriations;

b. Commingled funds and used funds for purposes other than those for which they were appropriated; and

c. Obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.

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January 2001

2. Congress passed the Antideficiency Act (ADA) to curb the fiscal abuses that frequently created "coercive deficiencies" that required supplemental appropriations. The Act consists of several statutes that mandate administrative and criminal sanctions for the unlawful use of appropriated funds. See 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519.

II. KEY TERMINOLOGY.

A. Fiscal Year. The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. Most appropriations are available for obligation for a limited period of time, *e.g.*, one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation thereafter.

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amounts of orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DOD Financial Management Regulation 7000.14, Vol. 1, p. xxi.

D. Budget Authority.

1. Congress finances federal programs and activities by granting budget authority. Budget authority is also called obligational authority.

2. Budget authority means ". . . authority provided by law to enter into obligations which will result in immediate or future outlay involving government funds . . . ." 2 U.S.C. § 622(2).

a. Examples of "budget authority" include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-34, § 11.2.

b. "Contract Authority," as noted above, is a limited form of "budget authority." Contract authority permits agencies to obligate funds in advance of appropriations but not to pay or disburse those funds absent some additional appropriations authority. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act).

3. Agencies do not receive cash from appropriated funds to pay for services or supplies. Instead they receive the authority to obligate a specified amount.

E. Authorization Act. DFAS-IN Reg. 37-1, ch. 3, para. 0304.

1. An authorization act is a statute, passed annually by Congress, that authorizes the appropriation of funds for programs and activities.

2. An authorization act does not provide budget authority. That authority stems from the appropriations act.

3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.

2. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." The Army receives the bulk of its funds from two annual appropriations acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act. DFAS-IN Reg. 37-1, ch. 3, para. 030701.

3. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, Vol. I, p. 2-13, GAO/OGC 91-5 (1991).

G. Comptroller General and General Accounting Office (GAO).

1. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.

2. Established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.

3. Issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

III. ADMINISTRATIVE CONTROL OF APPROPRIATIONS.

A. Methods of Subdividing Funds.

1. Formal subdivisions: Appropriations are subdivided by the executive branch departments and agencies.

a. These formal limits are referred to as apportionments, allocations, and allotments.

b. Exceeding a formal subdivision of funds violates the ADA. 31 U.S.C. § 1517(a)(2). See DFAS-IN Reg. 37-1, ch. 3, para. 031403.

2. Informal subdivisions: Agencies may subdivide funds at lower levels, *e.g.,* within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets. These limits are **not** formal subdivisions of funds.

a. Targets are referred to as "allowances."

b. Incurring obligations in excess of an allowance is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation may occur, and the person responsible for exceeding the target may be held liable for the violation. DFAS-IN Reg. 37-1, ch. 3, para. 031402. For this reason, Army policy requires reporting such overobligations. DFAS-IN Reg. 37-1, ch. 4, para. 040204.L.

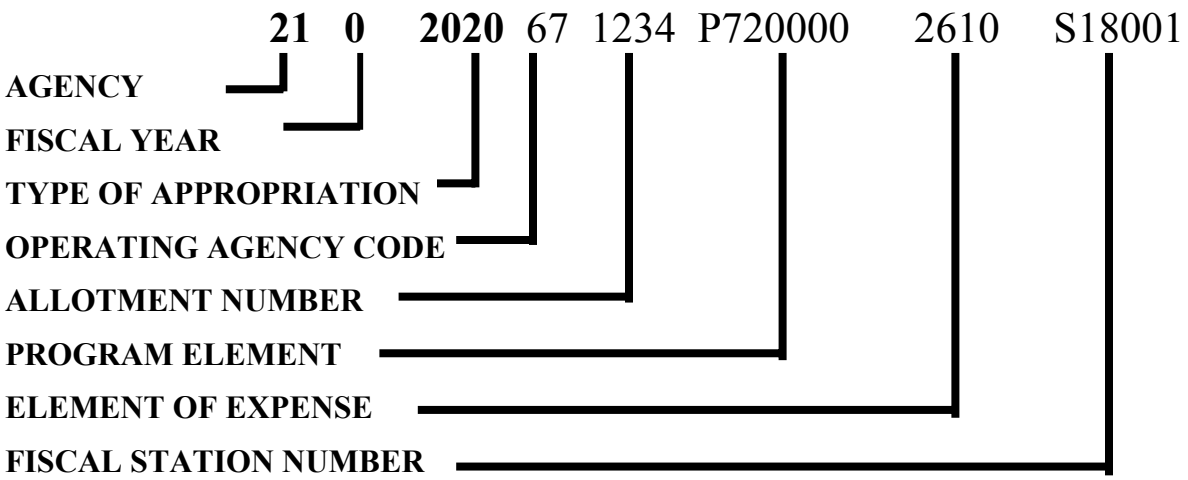
B. Accounting Classifications. See DFAS-IN Reg. 37-1, ch. 5, para. 050102.

1. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to help ensure funds are used correctly.

2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN 37-100-XX, stands for the last two digits of the fiscal year, *e.g.,* DFAS-IN 37-100-00 is the source for accounting classification data for FY 2000 for the Department of the Army. DFAS-IN 37-100-XX is published annually. Go to http://dfas4dod.dfas.mil/centers/dfasin/library/3710000.

C. Understanding an Accounting Classification.

1. The following is a sample fund cite:



a. The first two digits represent the military department. The "**21**" in the example shown denotes the Department of the Army.

b. Other Department codes are:

(1) 17 - Navy

(2) 57 - Air Force

(3) 97 - Department of Defense

c. The third digit shows the Fiscal Year/Availability of the appropriation. The "0" in the example shown indicates Fiscal Year (FY) 2000 funds.

(1) Annual appropriations are used frequently in installation contracting.

(2) Other fiscal year designators encountered in installation contracting, less frequently, include:

(a) Third Digit = X = No Year appropriation, which is available for obligation indefinitely.

(b) Third Digit = 6/0 = Multi-Year appropriation, in this example, funds appropriated in FY 1996 and available for obligation until FY 2000.

d. The next four digits reveal the type of the appropriation. The following designators are used within DOD fund citations:

	ARMY	NAVY/MC	AIR FORCE	OSD
Military Personnel	2010	1453/1105	3500	N/A
Reserve Personnel	2070	1405/1108	3700	N/A
National Guard Personnel	2060	N/A	3850	N/A
O&M*	**2020**	1804/1106	3400	0100
O&M, Reserve	2080	1806/1107	3740	N/A
O&M, National Guard	2065	N/A	3840	N/A
Procurement (Aircraft)	2031	1506	3010	N/A
Procurement (Missiles)	2032	N/A	3020	N/A
Procurement (Weapons & Tracked Vehicles)	2033	1507	N/A	N/A
Procurement (Ammunition)	2034	1508	3011	N/A
Shipbuilding & Conversion	N/A	1611	N/A	N/A
Other Procurement	2035	1810/1109	3080	0300
Research, Development, Test & Evaluation (RDT&E)	2040	1319	3600	0400
Military Construction	2050	1205	3300	0500
Family Housing Constr.	0702	0703	7040	0706
Reserve Construction	2086	1235	3730	N/A
National Guard Constr.	2085	N/A	3830	N/A
Environmental Restoration	0810	0810	0810	0810
Wildlife Conservation	5095	5095	5095	N/A

*Operation and Maintenance: This appropriation provides funding for the operation and maintenance of most Army activities and facilities to include training and the purchase of supplies and some equipment.

IV. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations on Authority.

1. The authority of executive agencies to spend appropriated funds is limited.

2. An agency may obligate and expend appropriations only for a proper **purpose**.

3. An agency may obligate only within the **time** limits applicable to the appropriation (*e.g.*, O&M funds are available for obligation for one fiscal year).

4. An agency must obligate funds within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations -- Purpose.

1. The "Purpose Statute" requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. See 31 U.S.C. § 1301; see also DFAS-IN Reg. 37-1, ch. 8, para. 0803.

2. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

a. Expenditure of appropriations must be for a specified purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation;

b. The expenditure must not be prohibited by law; and

c. The expenditure must not be otherwise provided for, *i.e.*, it must not fall within the scope of another appropriation.

3. Appropriations Acts. DOD has nearly one hundred separate appropriations available to it for different purposes.

a. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.). The major DOD appropriations provided in the annual Appropriations Act are:

(1) Operation & Maintenance -- used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

(2) Personnel -- used for military pay and allowances, permanent change of station travel, etc.;

(3) Research, Development, Test and Evaluation (RDT&E) -- used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and

(4) Procurement -- used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."

b. DOD also receives smaller appropriations for other specific purposes (*e.g.*, Overseas Humanitarian, Disaster, and Civic Aid (OHDACA), Chemical Agents and Munitions Destruction, etc.).

c. Congress appropriates funds separately for military construction.

4. Authorization Acts.

a. Annual authorization acts generally precede DOD's appropriations acts.

b. The authorization act may clarify the intended purposes of a specific appropriation or contain restrictions on the use of the appropriated funds.

C. Limitations -- Time.

1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.

a. Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations or to liquidate prior valid obligations. Again, however, expired funds are not available for new obligations.

b. There are exceptions to this general prohibition against obligating funds for new work following the period of availability.

2. Appropriations are available only for the bona fide need of an appropriation's period of availability. 31 U.S.C. § 1502(a). See Magnavox -- Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953).

D. Limitations -- Amount.

1. The Antideficiency Act, 31 U.S.C. §§ 1341-42, 1511-19, prohibits any government officer or employee from:

a. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).

b. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). See 31 U.S.C. § 1517(a)(2).

c. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).

d. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.

2. Investigating violations. If an apparent violation is discovered, the agency must report and investigate. Violations could result in administrative and/or criminal sanctions. See DOD 7000.14-R, vol. 14; DFAS-IN Reg. 37-1, ch. 4, para. 040204; AFI 65-608, ch. 3, para. 3.1.

a. The commander must issue a flash report within 15 working days of discovery of the violation. Air Force commanders must submit flash reports within 10 working days.

b. The MACOM commander must appoint a "team of experts," including members from the financial management and legal communities, to conduct a preliminary investigation.

c. If the preliminary report concludes a violation occurred, the MACOM commander will appoint an investigative team to determine the cause of the violation and the responsible parties. Investigations are conducted pursuant to AR 15-6, Procedure for Investigating Officers and Boards of Officers.

d. The head of the agency (e.g., SECDEF, for the DOD) must report to the President and Congress whenever a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DOD Directive 7200.1, Administrative Control of Appropriations (4 May 1995), Encl. 5, para. R.

3. Individuals responsible for Antideficiency Act violations shall receive disciplinary action commensurate with the circumstances and the severity of the violation. DOD Directive 7200.1, para. D.5. See 31 U.S.C. §§ 1349(a), 1518[T.H.1].

V. FISCAL LAW RESEARCH MATERIALS.

A. Legislation.

1. Titles 10 and 31, United States Code.

2. Annual Authorization and Appropriations Acts.

B. Legislative History.

1. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

2. The legislative history is not binding upon the Executive Branch. If Congress provides a lump sum appropriation without restricting what may be done with the funds, a clear inference is that it did not intend to impose legal restrictions. See SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD ¶ 203.

C. Decisions.

1. The Comptroller General issues opinions concerning the propriety of appropriated fund obligations or expenditures, except for those described in paragraph 3, below. See 31 U.S.C. § 3529. Activities must request these opinions through finance officer channels in advance of an obligation or expenditure. See DOD 7000.14-R, vol. 5, ch. 1 para. 010403.B.2.

2. The fiscal law decisions of the Comptroller General appear in the Decisions of the Comptroller General of the United States, published by the Government Printing Office. Comptroller General opinions also are available at the General Accounting Office (GAO) website (http:www.gao.gov), through commercial legal research services (*e.g.*, LEXIS, WESTLAW), and in the Comptroller General Procurement Decisions (CPD) reporter.

3. Agency Advance Decisions. See DOD 7000.14-R, vol. 5, ch. 1, para. 010403.B.2 and vol. 5, app. E. Per the General Accounting Office Act of 1996 (Pub. L. 104-316, § 204, 110 Stat. 3826 (1996) (codified at 31 U.S.C. § 3529)) and, as delegated by the Director, Office of Management and Budget (OMB), the following issue advance decisions for designated categories:

   a. DOD: uniformed service member pay, allowances, travel, transportation, and survivor benefits.

   b. Office of Personnel Management (OPM): civilian pay and leave.

   c. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation.

D. Regulations.

1. DOD Financial Management Regulation 7000.14-R (15 Volumes). Go to http://www.dtic.mil/comptroller/fmr.

2. Army: DFAS-IN 37-1, Finance and Accounting Policy Implementation. Go to http://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1.

3. Navy: Navy Comptroller Manual.

4. Air Force: Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (formerly DFAS-DE 7200.1-R and AFR 177-16); AFI 65-608 (Antideficiency Act Violations); Interim Guidance on Accounting for Obligations (formerly DFAS-DE 7000.4-R and AFR 170-8); Interim Guidance on Accounting for Commitments (formerly DFAS-DE 7000.5-R and AFR 170-13); DFAS-DE 7010.1-R (General Accounting and Finance Systems at Base Level); DFAS-DE 7010.2-R (Commercial Transactions at Base Level); DFAS-DE 7010.3-R (Travel Transactions at Base Level). Go to http://dfas4dod.dfas.mil/centers/dfasde/denvercenter/regulations.htm and for AFI 65-608 go to http://afpubs.hq.af.mil/pubfiles/af/65 /afi65-608/afi65-608.pdf.

E. Treatises.

1. General Accounting Office, Principles of Federal Appropriations Law, 2d ed., GAO/OGC 91-5 (July 1991).

2. General Accounting Office, Accounting Guide, GAO/AFMD--PPM-2.1 (September 1990); Policies and Procedures Manual For Guidance of Federal Agencies, Title 7 (February 1990).

3. General Accounting Office, A Glossary of Terms Used in the Budget Process, GAO/AFMD-2.1.1 (July 1993).

F. Internet Services.

1. Defense Finance and Accounting Service. http://dfas4dod.dfas.mil.

2. Other Government Agency Home Pages, *e.g.*, http://www.asafm.army.mil/.

VI. CONCLUSION.

CHAPTER 17

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CHAPTER 17

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. INTRODUCTION.

> *"It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril."* 4 Comp. Dec. 569, 570 (1898) (Comptroller of the Treasury discussing the Purpose Statute, 31 U.S.C. § 1301(a)).

II. STATUTORY FRAMEWORK.

A. The Purpose Statute.

1. 31 U.S.C. § 1301(a) provides:

   Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

2. Congress initially enacted this statutory control in the Act of March 3, 1809, 2 Stat. 535. This act, generally referred to as the "Purpose Statute," was passed as part of a reorganization of the War, Navy, and Treasury Departments to limit the discretion of the Executive Branch in spending appropriations.

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B. Defense Appropriations.

1. Appropriations Acts. The Department of Defense (DoD) has nearly one hundred separate appropriations available to it for different purposes.

2. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.).

a. The major DoD appropriations provided in the annual Appropriations Act are:

(1) Personnel—used for pay and allowances, permanent change of station travel, etc.;

(2) Operation & Maintenance (O&M) — used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

(3) Procurement—used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement;" and

(4) Research, Development, Test and Evaluation (RDT&E) — used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment.

b. DoD also receives smaller appropriations for other specific purposes (e.g., Overseas Humanitarian, Disaster, and Civic Aid, Chemical Agents and Munitions Destruction, etc.).

c. Congress appropriates funds for military construction separately.

C. Implementing the Annual Appropriations—Regulatory Guidance.

1. Accounting Guidance. The various federal agencies implement appropriations acts through funding guidance provided to subordinate activities. Service regulations assign codes for specific purposes. These codes track the various appropriations provided to DoD. The regulations and instructions also provide guidance regarding what types of expenses should be charged to each appropriation.

2. Programs. The accounting regulations of each agency further classify their accounts into programs, budget activities, and program elements for management purposes. Different program elements may or may not represent different appropriations or Congressionally "earmarked" funds within an appropriation. Therefore, charging one program element instead of another may or may not violate the Purpose Statute.

III. DETERMINING THE PROPER PURPOSE OF AN APPROPRIATION.

A. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

1. The expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

B. Determining the Purpose of a Specific Appropriation.

1. Legislation.

a. Organic Legislation. Organic legislation is legislation that creates an agency, establishes a program or prescribes a function. Principles of Fed. Appropriations Law, 2d ed., vol. I, ch. 2, 2-33, GAO/OGC 91-5 (July 1995). For example, the Secretary of Defense has a statutory mission to "identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol." 10 U.S.C. § 1090. (Note: Organic legislation rarely provides any money for the program or activity it prescribes).

b. Appropriations Acts. Examine the language of the appropriations act for the year in question.

(1) When the language of the statute is clear, there is no need to resort to legislative history to determine congressional intent. United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) ("plain meaning" rule); Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 317, 75-2 CPD ¶ 203.

(2) If the statutory language is unclear, or will lead to an absurd result, then consult the statute's legislative history to determine congressional intent. See Mallard v. United States Dist. Court, 490 U.S. 296 (1989); Federal Aviation Admin.—Permanent Improvements to a Leasehold, B-239520, 69 Comp. Gen. 673 (1990) (conference report clearly indicated that $5.7 million were available for a permanent improvement to a leasehold).

c. Authorization Acts.

(1) Annual authorization acts generally accompany DoD's appropriation acts. Other federal agencies usually, but not always, have annual authorization acts. The authorization act may clarify the intended purposes of a specific appropriation, or contain restrictions on the use of the appropriated funds.

(2) Authorizations are not appropriations, and do not provide funding to the agency.

(3) Congress has prohibited the appropriation, obligation, or expenditure of funds for certain purposes (procurement, RDT&E, military construction) without separate statutory authorization. 10 U.S.C. § 114(a).

(4) Frequently, Congress appropriates funds that have not been authorized, or in excess of the amount authorized. Unless otherwise prohibited, agencies may spend such funds. See Principles of Fed. Appropriations Law, 2d ed., vol. I, ch. 2, GAO/OGC 91-5 (July 1991); Civil Rights Comm'n, B-246541, 71 Comp. Gen. 378 (1992). But see 10 U.S.C. § 114(a).

2. Legislative History.

a. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

b. Generally, the pertinent legislative history will consist of:

(1) Text of the bill;

(2) Reports of the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee;

(3) Conference reports;

(4) Floor debates reported in the Congressional Record; and

(5) Hearings.

c. The reports include P-1 and R-1 documents which may shed light on lawful uses of appropriations. ANGUS Chemical Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127. P-1 and R-1 documents are exhibits to DoD's budget submission which provide programmatic details to support the budget request. See generally DoD Fin. Mgmt. Reg., DOD 7000.14-R.

d. The legislative history is not necessarily binding upon the Executive Branch. If Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.

e. Informal approval by Congress does not justify an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.).

3. The President's Budget. The President's budget contains a detailed description of the purpose proposed for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited. The budget contains P-1 and R-1 documents and Congressional Data Sheets.

C. The Necessary Expense Rule.

1. 31 U.S.C. § 1301(a) does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See HUD Gun Buyback Initiative, B-285066, May 19, 2000. See also Department of Labor—Interagency Agreement between Employment and Training Admin. and Bureau of Int'l Affairs, B-245541, 71 Comp. Gen 402 (1992); Department of the Army—Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 (1984).

2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).

3. In some instances, Congress has specifically authorized expenditures as "necessary expenses" of an existing appropriation. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (10 U.S.C. § 1125 authorizes the Secretary of Defense to purchase and award medals, trophies, etc. to members of armed forces for excellence in activities relating to the armed forces); 5 U.S.C. §§ 4501-4507 (Government Employees Incentive Awards Act).

4. Necessary Expense Defined.

   a. "[A]n expenditure is permissible if it is **reasonably necessary** in carrying out an authorized function or will **contribute materially** to the effective accomplishment of that function. . ." Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987)(emphasis added).

   b. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

5. Determinations are fact/agency/purpose specific. See Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 130; Use of Appropriated Funds for an Employee Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

6. Typical Questionable Expenses. Agencies may have specific guidance about "questionable" expenditures. See, e.g., AFI 65-601, vol. I., ch. 4, §§ K-O.

   a. Clothing. Clothing is generally a personal expense. IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized). But see 5 U.S.C. § 7903 (authorizes purchase of special clothing, for government benefit, which protects against hazards); White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (tuxedo rental or purchase for employees authorized); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (safety shoes authorized).

   b. Food.

      (1) Generally, appropriated funds are not available to pay for government employees' food or refreshments within their official duty stations. Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (coffee and donuts unauthorized entertainment expense). However, agencies may pay, under **limited circumstances**, a facility rental fee that includes the cost of food. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999, (unpub.) (payment of fee was proper because fee was all-inclusive, not negotiable, and competitively priced to those that did not include food).

(2) Exceptions.

(a) "Light Refreshments."

(i) The agency may consider the cost of "light refreshments" as part of the agency's overall administrative costs of hosting government-sponsored conferences. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), Part G: Conference Planning, ¶ 2550; Joint Travel Regulation (JTR), Part S: Conference Planning, ¶ 4950.

(ii) The conference must involve attendee travel. JFTR, ¶ U2550, D; JTR ¶4950, D. A "conference" is defined as a "meeting, retreat, seminar, symposium or . . . training activities that are conferences . . ." Id.

(b) Formal Meetings and Conferences. 5 U.S.C. § 4110.

(i) The government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.

(ii) However, this exception does **not apply to purely internal business meetings or conferences sponsored by government agencies**. Pension Benefit Guaranty Corp.—Provision of Food to Employees, B-270199, Aug. 6, 1996 (unpub); Meals for Attendees at Internal Government Meetings, B-230576, 68 Comp. Gen. 604 (1989).

(iii) **NOTE:** This provision applies only to civilian employees. There is no corresponding provision for military members in Title 10 of the U.S. Code. But see ¶ 4510 of the Joint Federal Travel Regulation, that authorizes military members to be reimbursed for occasional meals within the **local area** of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.

(c) Training. 5 U.S.C. § 4109; 10 U.S.C. §4301.

(i) The government may provide meals if necessary to achieve the objectives of a training program. Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).

(ii) However, an agency's characterization of a meeting as "training" is not controlling. Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (quarterly managers meetings of the Corps do not constitute "training"); See also Pension Benefit Guaranty Corp.—Provision of Food to Employees, supra. (food not proper training expense if unnecessary for employee to obtain full benefit of training).

(d) Award Ceremonies. 5 U.S.C. § 4503 (civilian incentive awards); 10 U.S.C. § 1124 (military **cash** awards).

(i) Defense Reutilization and Marketing Service Award Ceremonies, B-270327, March 12, 1997 (agency may spend $20.00 per person for luncheons provided at awards ceremonies pursuant to the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124 which expressly permit agency to "incur necessary expense for the honorary recognition. . ."]).

(ii) **NOTE: 10 U.S.C. § 1125 governs Secretary of Defense's (SECDEF) authority to award medals, trophies, badges, etc. to members/units of armed forces for accomplishments. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124.**

c. Entertainment.

(1) Appropriated funds generally are not available to pay for entertainment. See HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment); See also To the Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

(2) Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv.—Live Entertainment and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (live musical performance generally entertainment; exception for agency EEO cultural and ethnic programs)

(3) It is permissible to expend appropriated funds for entertainment if authorized by statute,. Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (statutory authority to conduct "interpretive demonstrations" includes authority to pay for musical entertainment at the 1988 Annual Golden Spike Railroader's Festival); Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice).

d. Decorations. Agencies may purchase decorative items if consistent with work-related objectives and not for personal convenience. Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (purchase of decorations proper); The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen 382 (1985) (personal Christmas cards not proper expenditure); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee). **NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)**

e. Business Cards. An agency may use appropriated funds to purchase business cards for its employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds for government employees who regularly deal with public or outside organizations is a proper "necessary expense" of the Army O&M account).

(1) This case "overturned" a long history of Comptroller General's decisions holding that business cards were generally a personal expense. See Forest Service – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

(2) Military departments have implemented individual polices on use of appropriated funds for business cards. See AR 25-30, paragraph 11.11, (21 June 1999); AFIC 99-1 to DODD 5330.3/AFSUP; Department of the Navy memorandum, dated 9 March 1999.

f. Telephones. 31 U.S.C. § 1348.

(1) Generally, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences. Centers for Disease Control and Prevention-Use of Appropriated Funds to Install Telephone Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director's residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate); Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed).

(2) But see Federal Communications Commission – Installation of Integrated Services Digital Network, B-280698, Jan. 12, 1999 (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

(3) **NOTE:** DoD has statutory authority to use appropriated funds to install, repair, and maintain telephone lines in residences owned or leased by the U.S. Government and, if necessary for national defense purposes, in other private residences. 31 U.S.C. § 1348(c). Additionally, DoD may install telephone lines in certain volunteers' residences. Such volunteers are those who provide medical, dental, nursing, or other health-care related services; volunteer services for museum or natural resources program; or programs that support service members and their families. National Defense Authorization Act for FY 2000, Pub. L. No. 106-65, § 371, 113 Stat. 512 (1999).

g. Fines and Penalties.

(1) Agencies generally may not use appropriated funds to pay fines and penalties incurred by employees. To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for parking meter fines imposed for parking meter violations); Military members and employees may be reimbursed for paying a fine when the action for which the fine is imposed is a necessary part of the member's or employee's official duties.; To the Acting Attorney Gen., B-47769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee pursuant to agency regulations and instructions).

(2) Agencies may pay fines imposed on the **federal government** when Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

h. Licenses and Certificates.

(1) Agencies generally may not use appropriated funds to pay employees' fees incident to obtaining licenses or certificates. A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals).

(2) Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Dec., B-257895, Oct. 28, 1994 (unpub.) (drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

i. Unit or Regimental Coins and Similar Devices.

(1) Generally, agencies may not use appropriated funds to purchase "mementos" such as regimental coins or similar devices for distribution. Such mementos are unauthorized personal gifts unless there is a direct link between the distribution of the items and the purpose of the appropriation. See EPA Purchase of Buttons and Magnets, B-247686, Dec. 30, 1992.

(2) Congress has provided specific statutory authority for SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

(a) For example, the Army has implemented this statute in AR 600-8-22, para. 11-1, which allows the presentation of awards for "excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition."

(b) Army Regulation 600-8-22, ¶ 11-2 provides: "[h]owever, awards may be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness." These awards could be made in the form of a coin, trophy, plaque or other similar device. The MACOM commander or head of the principal HQDA agency must approve the purchase of coins for distribution as awards. AR 600-8-22, para. 1-7d.

(c) The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28 (1 Aug 97); SECNAVINST 3590.4A (28 Jan 78).

(3) Unit or Regimental Coins. For a detailed discussion of the fiscal issues related to commanders' coins, see Major Kathryn R. Sommercamp, *Commanders' Coins: Worth Their Weight in Gold?*, ARMY LAW., Oct. 1997, at 6.

(4) Similar Devices. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (appropriated funds may be used to purchase belt buckles as awards for the annual "Peacekeeper Challenge).

(5) Comptroller General opinions come to different conclusions concerning awards to civilian employees, awards to military members, and incentive awards, because each has a separate statutory basis. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (appropriated funds may be used to purchase belt buckles as awards for the annual "Peacekeeper Challenge"); Awarding of Desk Medallion by Naval Sea Systems Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements).

j. Use of Office Equipment. Use of Office Equipment in Support of Reserves and National Guard, B-277678, Jan. 4, 1999 (agency may authorize use of telephone and/or facsimile machine to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, dated 3 June 1999, which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions.

7. Miscellaneous Personal Expenses.

a. Use of Appropriated Funds to Provide Fin. Incentives to Employees for Commuting by Means other than Single-Occupant Vehicle, B-250400, May 28, 1993 (unpub.) (if local air pollution control regulations require air pollution abatement plans, agencies may use appropriated funds for plan which subsidizes employees' costs for using other forms of commuting).

b. Smithsonian Institution Use of Appropriated Funds for Legal Representation of Officers and Employees, B-241970.2, 70 Comp. Gen. 647 (1991) (payment of attorney fees improper).

c. Defense Mapping Agency—Use of Imprest Funds for a Dremel Shoe Polisher, 1991 U.S. Comp. Gen. LEXIS 976, July 30, 1991 (unpub.) (shoe polisher not authorized).

d. Department of the Navy—Purchase of Employee Identification Tags, B-237236, 69 Comp. Gen. 82 (1989) (name tags an authorized purchase).

e. Office of Personnel Mgt.—Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (purchase of air purifiers for common areas allowed).

f. Expenditures by Dept. of Veterans Affairs Medical Center, B-247563.3, Apr. 5, 1996, 1996 U.S. Comp. Gen. LEXIS 414 (appropriated funds unavailable for employee participation in local sporting events).

g. Federal Executive Board - - Appropriations - - Employee Tax Returns - Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129 (electronic filing of tax returns is a personal expense).

8. Expenditures for new or additional duties imposed by legislation or executive order with no additional appropriations provided.

a. May current appropriations be charged?

b. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Science Foundation, B-158371, 46 Comp. Gen. 604 (1967).

D. Expenditure Is Not Otherwise Prohibited by Law.

1. Constitutional Prohibitions.

2. Permanent Legislation Prohibitions. See, e.g., 10 U.S.C. § 2246 (prohibition on using appropriated funds to equip, operate, or maintain a DoD golf courses in CONUS unless designated remote and isolated).

3. Annual Appropriation Act or Authorization Act Prohibitions. See, e.g., DOD Appropriations Act, 2000, § 8149 (restriction on use of appropriated funds to pay fines or penalties imposed on DoD or military department arising from environmental violation at a military installation or facility unless payment is specifically authorized by law).

4. Agencies may presume that restrictions in an appropriation act are effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. See Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (1986) (restriction applicable to "this Act or any other Act" does not indicate futurity).

E. Expenditure Is Not Otherwise Provided For in a Separate Appropriation.

1. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds available).

a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

b. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940).

c. Limitation applies even if specific appropriation is included in the more general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941).

2. If there are two appropriations equally available for expenditures not specifically mentioned in either appropriation:

a. The agency may choose either appropriation. Payment of SES Performance Awards of the R.R. Retirement Board's Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 (1989). Agency discretion is not questioned generally. Secretary of Agriculture, A-96689, 18 Comp. Gen. 285, 292 (1938).

b. **BUT**, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. See Funding for Army Repair Projects, B-272191, Nov. 4, 1997. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

c. If Congress authorizes specifically the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. See Funding for Army Repair Projects, supra. See also 10 U.S.C. § 166a (CINC Initiative Funds are in addition to amounts otherwise available for an activity).

IV. AUGMENTATION OF APPROPRIATIONS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount appropriated by Congress originally.

2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

a. Article I, Section 9, Clause 7, of United States Constitution:

No money shall be drawn from the treasury except in consequence of appropriations made by law.

b. 31 U.S.C. § 1301(a) (Purpose Statute):

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

c. 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute):

(1) Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.

(2) See Scheduled Airlines Traffic Offices, Inc. v. Dept. of Defense, 87 F3d. 1356 (D.C. Cir. 1996) (Contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute). (**Note:** In the FY 1999 Defense Authorization Act, Congress enacted statutory language that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts. See 10 U.S.C. § 2646.)

3. Examples of Augmentation.

a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs.—Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1984).

b. Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988); But see Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (31 U.S.C. § 3302 only applies to **monies** received, not to other property or services).

B. Receipts of Funds Authorized by Statutes. Many statutes authorize agencies to retain funds received from sources other than Congress. Some examples include:

1. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. See also 41 U.S.C. § 23 (project orders).

2. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DoD, to carry out the purpose of the Foreign Assistance Act.

3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).

4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv.—Authority to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv.—Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).

5. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.

6. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation's operation and maintenance account. See Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

8. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.

9. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.

11. Host nation contributions to relocated armed forces within a host country. 10 U.S.C. § 2350k.

C. Other Authorized Retention of Receipts and Use of Appropriations. In addition to the statutory authorities detailed above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:

1. Replacement Contracts. An agency may retain recovered excess reprocurement costs to fund replacement contracts. Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sept. 28, 1983, 84-1 CPD ¶ 91.

   a. This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.

   b. The replacement contract must be coextensive with the original contract, i.e., the agency may reprocure only those goods and services which would have been provided under the original contract.

   c. Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

2. Refunds.

   a. Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice—Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org.—Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1983).

   b. Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).

c. Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency—Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).

d. Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Center Contractors, B-217913.3, June 24, 1994 (unpub.); To the Secretary of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law (2d ed.), Vol. II, p. 6-111, GAO/OGC 92-13 (1992), Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed; if debts are written off as uncollectible, a charge must be made to an account that is current at the time of the write off).

3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

5. Nonreimbursable Details.

a. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs.—Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

b. Exceptions.

(1) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm'n on Post Office and Civil Serv., House of Representatives, B-224033, Jan. 30, 1987 (unpub.).

(2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comms., B-230960, Apr. 11, 1988 (unpub.).

(3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Department of Health and Human Servs. Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

V. SPECIAL PROBLEMS.

A. Investment/Expense Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DoD, and are normally financed with O&M appropriations. See DoD 7000.14-R, Fin. Mgmt. Reg., vol. 2A, ch 1. Expenses generally include:

a. Labor of civilian, military, or contractor personnel;

b. Rental charges for equipment and facilities;

c. Food, clothing, and fuel;

d. Maintenance, repair, overhaul, and rework of equipment;

e. Real property maintenance, repair, and O&M funded minor construction projects; and

f. Assemblies, spare and repair parts, and other items of equipment not designated for centralized management and costing **less than $100,000**. The Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8046, 113 Stat. 1212 (1999).

2. Investments are the acquisition costs of DoD capital assets, and are normally financed with procurement appropriations. These costs benefit future periods and tend to have a long-term character. Investments generally include:

a. All equipment items having a system unit cost **equal to or greater than $100,000**; and

b. Construction, including equipment installed and made an integral part of the facilities.

3. Various audits have revealed a systemic problem of local activities using O&M appropriations to acquire computer systems costing more than the investment/expense threshold (currently $100,000). This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

a. Agencies must consider the "system" concept when evaluating the procurement of Information Mission Area (IMA) end items. The determination of what constitutes a "system" must be based on the **primary function** of the hardware and software to be acquired, as stated in the approved requirements document.

b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate "system" for funding purposes, if the primary function of the end item is to operate independently.

d. Include standard off-the-shelf software as part of the total system cost when purchased as part of initial acquisition of equipment.

e. Fragmented or piecemeal acquisition of a documented requirement may not be used to circumvent the "system" concept.

4. **EXAMPLE**—Acquisition of 100 stand-alone computers and software at $2,000 each, purchased primarily to operate as independent workstations. Agencies may use O&M funds for this acquisition.

B. Official Representation Funds.

1. Definition. Representation funds are appropriations made available to the executive branch that may be expended without the normal statutory controls and are appropriated for "emergency and extraordinary expenses." Congress has provided representation funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Representation funds have strict regulatory controls because of their limited availability and potential for abuse.

a. Controls.

(1) Statutory limitations.

(a) 10 U.S.C. § 127. Emergency and extraordinary expenses.

(i) Authorizes the Secretary of Defense and the Secretary of a military department to spend representation funds on "any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers. . ."

(ii) Requires a quarterly report of such expenditures to the Congress.

(iii) Congressional notice requirement. Pub. L. No. 104-106, § 915, 110 Stat 186, 413 (amending 10 U.S.C. § 127).

(a) Amounts in excess of $1 million -- 15 days advance notice prior to obligation or expenditure.

(b) $500 000 - $1 million -- 5 days advance notice.

(c) Exception to notification requirement if Secretary of Defense determines that national security objectives will be compromised.

(b) Other executive agencies may have similar controls. See, e.g., 22 U.S.C. § 2671 (authorizes State Department to pay for "unforeseen emergencies").

b. Appropriations language.

(1) For DoD, Congress provides representation funds as a separate item in the operation and maintenance appropriation. Obligation in excess of the limitation is a violation of 31 U.S.C. § 1341.

(2) Not all agencies receive representation funds. Other appropriations may not be used for representational purposes. See HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); United States Embassy London — Use of Representational Funds for Reimbursement of Rental of Ceremonial Dress, B-235916, 68 Comp. Gen. 638 (1989) (State Department may use its representation allowances to pay the expenses of the Department in providing proper representation of the United States and its interests).

c. Internal agency guidance.

(1) DoD Dir. 7250.13, Official Representation Funds (23 February 1989).

(2) AR 37-47, Representation Funds of the Secretary of the Army (31 May 1996); AFI 65-603, Official Representation Funds: Guidance and Procedures (1 Nov 1997); SECNAV 7042.7, Guidelines for Use of Official Representation Funds (5 Dec 1998).

d. Procedures for Use of Representation Funds.

(1) Administrative categories of representation funds.

(2) Limitation .0012--Miscellaneous Expenses, Category A (Official Representational Funds). AR 37-47, para. 1-5a. These funds are available to extend official courtesies to dignitaries, officials, and foreign governments. AR 37-47, para. 2-1a.

(3) Limitation .0014--Miscellaneous Expenses, Category B (other than official representation, such as Armed Services Board of Contract Appeals witness fees and settlements of claims). AR 37-47, para. 1-5b. Other examples include:

(a) Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);

(b) Reward for search teams at the Gander air crash; and

(c) Mitigation of erroneous tax withholding of soldiers' pay.

(4) Limitation .0015--Criminal Investigation Activities (AR 195-4, CID investigation support). AR 37-47, para. 1-5c. See AFI 71-101, para. 1.12 (use of representation funds to support Air Force OSI operations).

(5) Limitation .0017--Intelligence Contingency Funds (AR 381-141(C)). AR 37-47, para. 1-5d. See AFI 71-101, para. 1.12 (Air Force counterintelligence representation funds).

e. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. AR 37-47, para. 2-1. See AFI 65-603, para.1; SECNAVINST 7042.7J, para. 6. Official courtesies are subject to required ratios of authorized guests to DoD personnel. See, e.g., AR 37-47, paras 2-1b and 2-5. Courtesies are defined as:

(1) Hosting of authorized guests to maintain the standing and prestige of the United States;

(2) Luncheons, dinners, and receptions at DoD events in honor of authorized guests;

(3) Entertainment of local authorized guests for civic or community relations;

(4) New commander receptions;

(5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and foreign vessels to U.S. ports;

(6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and

(7) Dedication of facilities.

f. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

(1) No more than $260.00. See AR 37-47, para. 2-9a(1). See also AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).

(2) No gifts to DoD personnel. AR 37-47, para. 2-9c. See also AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).

g. Levels of expenditures. Levels of expenditures are to be "modest." AR 37-47, para. 2-2a; AFI 65-603, para. 1-2 ($10,000 per event threshold - AR 37-47, para. 2-2b).

h. Prohibitions on Using Representational Funds. AR 37-47, para. 2-10; AFI 65-603, para. 5; SECNAVINST 7042.7J, para. 6d.

(1) Any use not specifically authorized by regulation requires an exception to policy. AR 37-47, para. 2-10; AFI 65-603, para. 10.

(2) In accordance with AR 37-47, para. 2-10 (see AFI 65-603, para. 5), exceptions will not be granted for the following:

(a) Classified projects and intelligence projects;

(b) Entertainment of DoD personnel, except as specifically authorized by regulation;

(c) Membership fees and dues;

(d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);

(e) Gifts and mementos an authorized guest wishes to present to another;

(f) Personal items (clothing, cigarettes, souvenirs);

(g) Guest telephone bills;

(h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and

(i) Repair, maintenance, and renovation of DoD facilities.

(3) Retirements and change of command ceremonies, unless approved in advance by the Secretary of the Army (SA). AR 37-47, para. 2-4g. See AFI 65-603, para. 5.1; SECNAVINST 7042.7J, para. 6d(10); United States Army School of the Americas--Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished from change of command ceremony).

i. Approval and accounting procedures. AR 37-47, Chapter 3. See AFI 65-603, para 4; SECNAVINST 7042.7J, para 8.

(1) Fiscal year letters of authority. AR 37-47, para. 3-1b.

(2) Written appointment of certifying and approving officer.

(3) Written appointment of representation fund custodian.

(4) Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the SA or his designee. AR 37-47, para. 3-1d.

(5) Legal review. AR 37-47, para. 3-1f(2).

2. Community Relations and Public Affairs Funds. AR 360-61, Community Relations (15 Jan. 1987).

a. Public affairs funds are not a separate subdivision of the operation and maintenance account.

b. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

C. Minor Construction.

1. Generally, agencies may not erect, repair, or improve a public building absent a specific appropriation from Congress. 41 U.S.C. § 12; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

2. Congress has given DoD specific statutory authority to use **up to $500,000 in operation and maintenance funds** for unspecified minor construction projects. 10 U.S.C. § 2805(c).

3. The $500,000 limitation applies to each project. A "project" includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (Air Force improperly split project involving a group of twelve related buildings into multiple projects).

D. Deployments. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

1. Construction.

2. Foreign Humanitarian Assistance.

3. Foreign Military Assistance.

4. U.S. Military Training.

VI. CONCLUSION.

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CHAPTER 18

AVAILABILITY OF APPROPRIATIONS AS TO TIME

I. INTRODUCTION. Following this instruction, the student will understand:

A. The various time limits on availability of appropriated funds;

B. The Bona Fide Needs Rule and some common exceptions to that rule;

C. The rules concerning availability of funds for funding replacement contracts; and

D. The general rules concerning use of expired appropriations.

II. KEY DEFINITIONS.

A. **Appropriations Act**. An appropriations act is the most common form of budget authority. It is a statutory authorization by an Act of Congress to incur obligations and make payments out of the U.S. Treasury for specified purposes.

B. **Authorization Act**. An authorization act is a statute, passed by Congress, that authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems only from the appropriations act.

C. **Period of Availability.** The period of time for which appropriations are available for obligation. If activities do not obligate the funds during the period of availability, then the funds expire and are generally unavailable for further obligation.

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January 2001

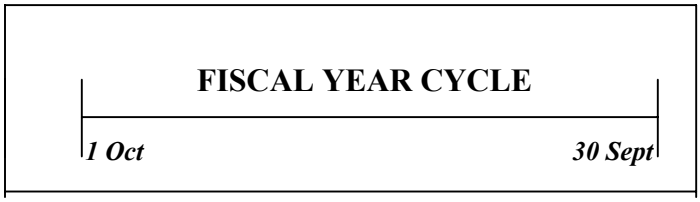
D. **Bona Fide Needs.** The balance of an appropriation is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made during the period of availability. 31 U.S.C. § 1502(a).

E. **Expired Appropriations.** Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a).

F. **Closed Appropriations.** Appropriations that are no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a).

III. LIMITATIONS BASED UPON THE TYPE OF APPROPRIATION.

A. General.



1. The Time Rule: An appropriation is available for obligation for a definite period of time. Agencies must obligate appropriations during this period of availability, or the authority to obligate expires. 31 U.S.C. § 1552.

2. Government agencies may not obligate funds prior to signature of the appropriations act **and** receipt of the funds from the Office of Management and Budget through higher headquarters. 31 U.S.C. § 1341(a)(1)(B). But see Cessna Aircraft, Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997) aff'g Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912 (holding that option exercised after Presidential signature of appropriations act but before OMB apportionment was proper.) Agencies must avoid situations that require "coercive deficiency" appropriations. Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 (1980).

3. Generally, the time limitations apply to the obligation of funds, not the disbursement of them. Secretary of Commerce, B-136383, 37 Comp. Gen. 861, 863 (1958).

4. Absent express statutory authority in the appropriations act itself, agencies may not obligate funds after their period of availability expires. 31 U.S.C. §1502; National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991).

B. Period of Availability for Various Appropriations.

1. Funds are presumed to be available for obligation only during the fiscal year in which they are appropriated. 31 U.S.C. § 1502; DFAS-IN Reg. 37-1, para. 080302; DFAS-DE/Air Force Interim Guidance on Accounting for Obligations (hereinafter DFAS-DE Interim Guidance), Section 2.D.

2. The annual DOD Appropriations Act typically contains the following provision:

   No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided herein. See, e.g., DOD Appropriations Act, 2000, Pub. L. No. 106-79, § 8003, 113 Stat. 1212 (1999).

3. The appropriations act language controls other general statutory provisions. National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991) (holding that general statutory language making funds available until expended is subordinate to appropriations act language stating that funds are available until a date certain).

4. Multiple year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. Office of Management and Budget Circular A-34, Instructions on Budget Execution, § 21.1 (August 1985). See Section VII, infra.

C. Types of Appropriations Described by Period of Availability.

1. The largest annual DOD appropriations are:

   a. Operations & Maintenance (O&M); and

   b. Personnel.

2. The major multiple year appropriations usually provided to the Department of Defense, and their periods of availability, are:

   a. Research, Development, Test and Evaluation (RDT&E) Appropriations - 2 years;

   b. Procurement Appropriations - 3 years;

   c. Shipbuilding and Conversion, Navy - 5 years, except that the Navy may incur certain obligations over longer periods;

   d. Military Construction Appropriations - 5 years;

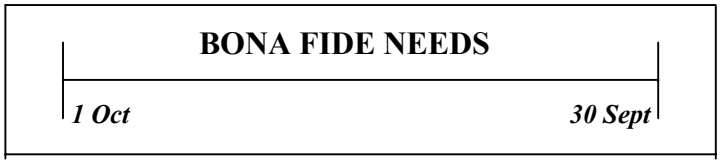
   e. Chemical Agents and Munitions Destruction, Defense - various periods.

   f. Multiple Year - Varies up to five years depending on the program. DOD receives a variety of special purpose appropriations, some of which are available for more than one year. For example, DOD has a two-year appropriation for overseas humanitarian, disaster, and civic aid.

   g. Stock and Industrial Funds (Working Capital Funds) - indefinite (No Year).

3. The language typically used by the Congress is "[T]o remain available for obligation until September 30, XXXX." Defense Technical Information Center--Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989).

IV. LIMITATIONS BASED UPON THE BONA FIDE NEEDS RULE.



A. Statutory Basis. The Bona Fide Needs Rules states:

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

31 U.S.C. § 1502(a).

B. General.

1. Agencies may obligate appropriated funds only for properly incurred expenses of the period of availability of the appropriation. That is, the requirement must represent bona fide needs of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995); Magnavox—Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); DFAS-IN 37-1, para. 080302; DFAS-DE/ DFAS-DE/Air Force Interim Guidance on Accounting for Obligations,

2. The Bona Fide Needs Rule applies only to appropriations with limited periods of availability for obligation.

C. Practical Considerations.

1. The term "bona fide needs" has meaning only in the context of a fiscal law analysis. A bona fide needs analysis is separate and distinct from an analysis of contract specifications and whether they are a legitimate expression of the government's minimum requirements (needs).

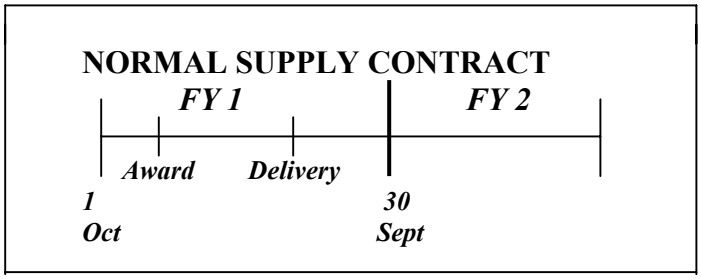
2. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government. DFAS-IN Reg. 37-1, para. 070501.

3. The government must intend that the contractor start work promptly and perform in accordance with the contract terms. DOD Reg. 7000.14-R, Financial Management Regulation, vol. 3, para. 080303; DFAS-DE 7000-4, para. 7c.

4. The requirements of the government and the nature of a product or service determine when bona fide needs arise.

5. Determining the bona fide needs for an acquisition requires the exercise of judgment.

D. Bona Fide Needs Rule Applied to Supply Contracts.



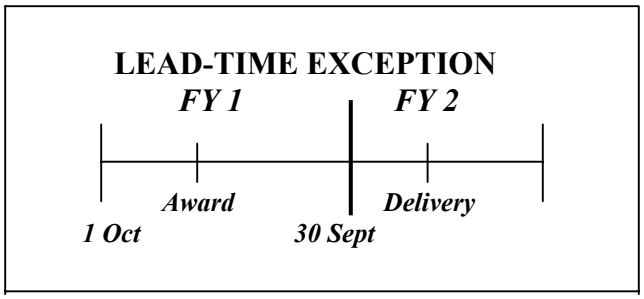
1. Generally, bona fide needs are determined by when the government actually requires (will be able to use or consume) the supplies being acquired.

2. Accordingly, agencies generally must obligate for the fiscal year in which the supplies will be used. Betty F. Leatherman, Dep't of Commerce,

B-156161, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Admin., B-155876, 44 Comp. Gen. 399 (1965); Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 (1957).

3. Supply needs of a future fiscal year are the bona fide needs of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock-level exception. DOD Reg. 7000.14-R, vol. 3, para. 080303; DFAS-DE 7000-4, para. 4c(1).

4. *Lead-Time Exception to the Bona Fide Needs Rule*. There are two variants that comprise the lead time exception.



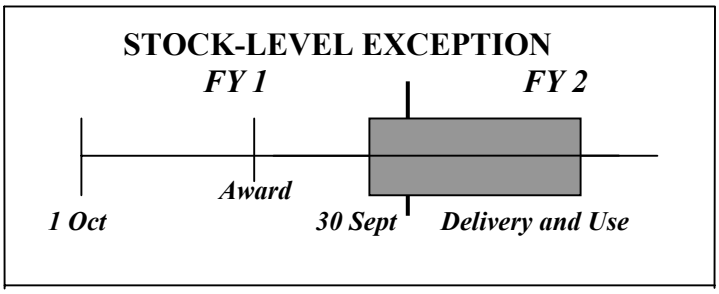
a. Delivery Time. This aspect of the exception recognizes that the agency has a need for, but cannot obtain the item, in the current FY. In this situation, if an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the Bona Fide Needs Rule. However, the time between contracting and delivery must not be excessive and the procurement must not be for standard, commercial items readily available from other sources. Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 (1959); DFAS-DE 7000-4, para. 4c(1).

b. Production Lead-Time. This aspect of the exception permits the agency to consider the normal production lead-time in determining the bona fide needs for an acquisition. Thus, an agency may contract in one FY for delivery in the second FY if the material contracted for will not be obtained on the open market at the time needed for use, so long as the intervening period is necessary for the production. Chairman, Atomic Energy Commission, B-130815, 37 Comp. Gen. 155, 159 (1957).

(1) For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of FY 2000 funds is appropriate for a delivery on or before a required delivery date of 14 November 2000. (Remember 1 October 2000 is the beginning of FY 2001). This represents the bona fide needs of FY 2000. However, if the government directs the contractor to withhold delivery until after 14 November 2000, there is not a bona fide need for the item in FY 2000 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2001.

(2) If the government establishes a delivery date for an item that is beyond the normal lead-time and in the next fiscal year, then the government must use funds for the next fiscal year. In the example above, if the government does not require until after 14 November 2000, then the government must use FY 2001 funds.

5. *Stock-Level Exception to the Bona Fide Needs Rule*. The stock level exception permits agencies to purchase sufficient supplies to maintain adequate and normal stock levels. DFAS-DE 7000-4, para. 4c(1).



a. The government may use current year funds to replace stock consumed in the current fiscal year, even though the government will not use the replacement stock until the following fiscal year.

b. For example, the government may award a contract to maintain the normal, authorized stock levels of repair parts in August 2000 and may require delivery in September 2000, using FY 2000 funds, even if the government knows that the government will not use the repair parts until early October 2000 (i.e., FY 2001).

c. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited. Mr. H. V. Higley, B-134277, Dec. 18, 1957 (unpub.).

E. Bona Fide Needs Rule Applied to Service Contracts.

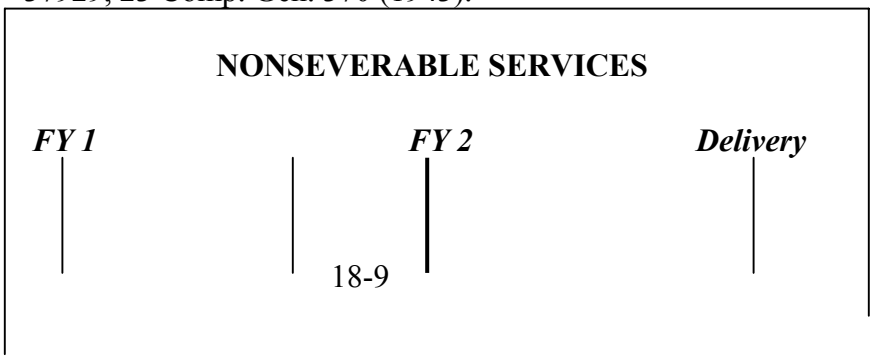
1. *General Rule*: Bona fide needs for services do not arise until the services are rendered. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985).

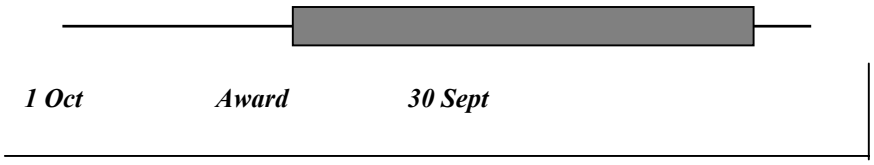
2. *Types:* For purposes of the Bona Fide Needs Rule, services fall into two broad categories:

a. Nonseverable service contracts; and

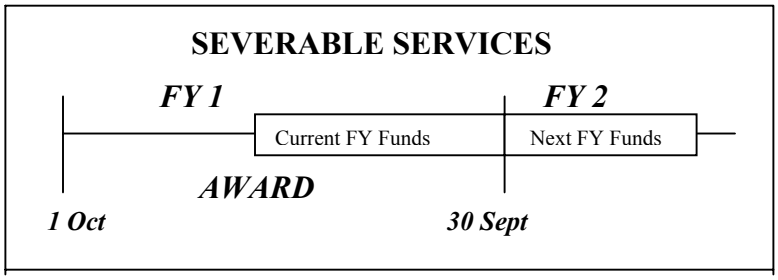
b. Severable service contracts.

3. *Nonseverable Services*: A service is nonseverable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years. Thus, the government must fund the entire effort with dollars available for obligation at the time the contract is executed, and the contract performance may cross fiscal years. DFAS-IN 37-1, tbl. 8-1; DFAS-DE 7000-4, para. 4c(2); Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986); Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 (1943).





4. *Severable Services*: A service is severable if it can be separated into components that independently meet a separate need of the government. As a general rule, severable services are the bona fide needs of the fiscal year in which performed. Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, 65 Comp. Gen. 154 (1985). Thus, funding of severable service contracts generally may not cross fiscal years, and agencies must fund severable service contracts with dollars available for obligation on the date the contractor performs the services. DFAS-IN 37-1, para. 080603, tbl. 9-1; DFAS-DE Interim Guidance, Section 2.D.5.



5. *Statutory Exception*. DOD agencies (and the Coast Guard) may obligate funds current at the time of contract award to finance any severable service contract with a period of performance that does not exceed one year. 10 U.S.C. § 2410a. Similar authority exists for non-DOD agencies. 41 U.S.C. § 253*l*. In essence, this authority allows an agency to fund severable service contracts that cross fiscal years with funds current at the time of award. Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247 (the "Kelly Air Force Base" case).

F. Bona Fide Needs Rule Applied to Training Contracts. Training courses that begin on or about 1 October may constitute a bona fide need of the prior year if the scheduling of the course is beyond the control of the agency and the time between award of the contract and performance is not excessive. DFAS-IN 37-1. tbl. 8-1; DFAS-DE Interim Guidance, Section 2.D.5.c.; Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238940, 70

Comp. Gen. 296 (1991); Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-277886.2, Aug. 3, 1989 (unpub.).

G. Bona Fide Needs Rule Applied to Construction Contracts.

1. Contracts for construction must fulfill a bona fide need arising within the funds' period of availability. A determination of what constitutes a bona fide need of a particular year depends upon the facts and circumstances of a particular year. Associate General Counsel Kepplinger, B-235086, Apr. 24, 1991 (unpub). Construction contracts may constitute a bona fide need of the fiscal year in which the contract is awarded even though performance is not completed until the following fiscal year.

2. In analyzing bona fide needs for construction contracts, the agency should consider the following factors:

a. Normal weather conditions. A project that cannot reasonably be expected to commence on-site performance before the onset of winter weather is not the bona fide need of the prior fiscal year.

b. The required delivery date.

c. When the government intends to make facilities, sites, or tools available to the contractor for construction work.

d The degree of actual control the government has over when the contractor may begin work. For example, suppose a barracks will not be available for renovation until 27 December 2000 because a brigade is deploying on 20 December and cannot be disrupted between 1 October and 20 December. If the normal lead-time for starting a renovation project of this type is 15 days, then the renovation is a bona fide need of FY 2001 and the contract should be awarded in FY 2001. Accordingly, use of FY 2000 funds under these facts violates the Bona Fide Needs Rule.

H. Multiple Year Appropriations.

1. The Bona Fide Needs Rule applies to multiple year appropriations. Defense Technical Information Center-Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989); Chairman, Committee on Appropriations, House of Representatives, B-132900, 55 Comp. Gen. 768 (1976).

2. Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. See, e.g., DOD Reg. 7000.14-R, Financial Management Regulation, vol. 2A, Budget Formulation and Presentation; DFAS-DE Interim Guidance, para. 8; AR 70-6.

V. FUNDING REPLACEMENT CONTRACTS/CONTRACT MODIFICATIONS.

A. General. There are four important exceptions to the general prohibition on obligating funds after the period of availability:

1. Bid Protests;

2. Terminations for Default;

3. Terminations for Convenience; and

4. Contract Modifications.

B. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the General Accounting Office (GAO), or in a federal court. 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080608.

C. Terminations for Default.

1. If a contract or order is terminated for default, and bona fide needs still exist for the supplies or services, then the originally-obligated funds remain available for obligation for a reprocurement, even if they otherwise

would have expired. The agency must award the reprocurement contract for substantially the same item or service without undue delay. DFAS-IN 37-1, para. 080607; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).

2. If additional funds are required for the replacement contract, and the funds have otherwise expired, then the original year's funds may be used to fund the additional cost (and if insufficient or unavailable, then current funds may be used). See DFAS-IN 37-1, tbl. 8-7.

D. Terminations for Convenience of the Government.

1. *General Rule*: A termination for the convenience of the government generally extinguishes the availability of prior year funds remaining on the contract. In most instances, such funds are not available to fund a replacement contract in a subsequent year. DFAS-IN 37-1, para. 080606.

2. *Exceptions.*

a. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract is terminated for convenience pursuant to a court order or to a determination by the GAO or other competent authority that the award was improper. DFAS-IN 37-1, para. 080606, tbl. 8-7; Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).

b. This exception includes terminations for convenience resulting from a contracting officer's determination that the award was clearly erroneous. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; DFAS-IN 37-1, para. 080606.

3. If the original award was improper and the contract is terminated for convenience, either by the contracting officer or by judicial order, then the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:

a. The original award was made in good faith;

b. The agency has continuing bona fide needs for the goods or services involved;

c. The replacement contract is of the same size and scope as the original contract;

d. The contracting officer executes the replacement contract without undue delay after the original contract is terminated for convenience. DFAS-IN 37-1, para. 080606, tbl. 8-7.

E. Contract Modifications Affecting Price.

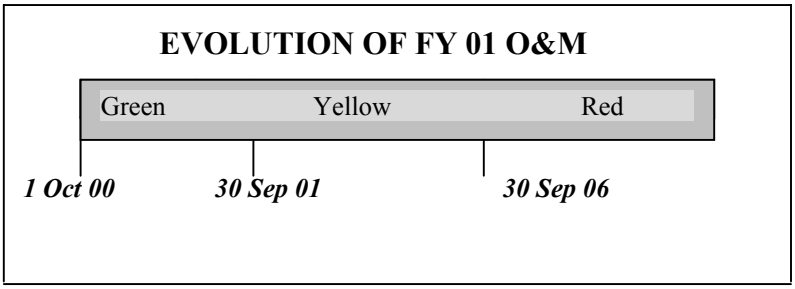
1. General. Contract performance often extends over several fiscal years, and modifications to the contract occur for a variety of reasons. If a contract modification results in an increase in contract price, and the modification occurs after the original funds' period of availability has expired, then proper funding of the modification is subject to the bona fide needs rule.

2. When a contract modification does not represent a new requirement or liability, but instead only modifies the amount of the government's pre-existing liability, then such a price adjustment is a bona fide need of the same year in which funds were obligated for the original contract. When a price adjustment is attributable to "antecedent liability," then original funds are available for obligation for the modification. Recording Obligations Under EPA cost-plus-fixed-fee Contract, B-195732, 59 Comp. Gen. 518 (1980); Obligations and Charges Under Small Business Administration Service Contracts, B-198574, 60 Comp. Gen. 219 (1981).

3. If a modification exceeds the scope of the original contract (e.g., changes to the quantity of the item being delivered), then the original funds are not available for obligation. Such a modification amounts to a new obligation, and is chargeable to funds current at the time the modification is made. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995); Magnavox—Use of Contract Underrun Funds, B-207433, 83-2 CPD ¶ 401 (1983).

VI. USE OF EXPIRED/CLOSED APPROPRIATIONS.

A. Definitions.



1. **Current Appropriations**. Appropriations whose availability for new obligations has not expired under the terms of the applicable appropriations act.

2. **Expired Appropriations**. Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a).

3. **Closed Appropriations**. Appropriations that are no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a).

B. Expired Appropriations.

1. Some adjustments are possible after the end of the period of availability, but before an account closes. 31 U.S.C. § 1553(a); AFI 65-601, vol. 1, para. 6.4.

   a. Appropriations retain their complete accounting classification identifiers throughout the entire five year period;

   b. Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account. 31 U.S.C. § 1553(a).

2. If the appropriation has expired and if an obligation of funds from that appropriation is required to provide funds for a program, project, or activity to cover a contract change:

   a. The head of the agency must approve all changes in excess of $4 million.

   a. For all changes exceeding $25 million, the head of the agency must take the following actions: notify Congress of an intent to obligate funds and wait 30 days before obligating the funds. 31 U.S.C. § 1553(c); DOD 7000.14-R, vol. 3, paras. 100204-05.

3. For purposes of the notice requirements discussed in the preceding paragraph, a "contract change" is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract. 31 U.S.C. § 1553(c)(3).

4. The heads of the defense agencies are required to submit annual reports on the impact of these revisions to the procedures for accounting for expired funds and for closing accounts.

5. For DOD, there are additional restrictions on using pre-FY 1992 expired appropriations. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1004, 106 Stat. 2481 (1992).

C. Closed Appropriations.

1. On 30 September of the fifth year after the period of availability of a fixed appropriation ends:

   a. the account is closed;

   b. all remaining obligated and unobligated balances in the account are canceled; and

   c. no funds from the closed account are available thereafter for obligation or expenditure for any purpose. 31 U.S.C. § 1552.

2. Agencies will deposit collections authorized or required to be credited to an account, but received after an account is closed, in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(d); Appropriation Accounting - Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130.

3. After an account is closed, agencies may charge obligations (and adjustments to obligations) formerly chargeable to the closed account and not otherwise chargeable to another current agency appropriation to any current agency account available for the same general purpose. 31 U.S.C. § 1553(b).

4. Charges shall be limited to the lesser of:

   (1) the unobligated expired balance of the original appropriation available for the same purpose; or
   (2) one percent (1%) of the current appropriation available for the same purpose. 31 U.S.C. § 1553(b)(2).

VII. MULTIPLE YEAR FUNDS AND MULTIPLE YEAR CONTRACTS.

A. References.

1. AR 70-6.

2. AFI 65-601.

3. DOD Reg. 7000.14-R, Financial Management Regulation, vol. 2A, Budget Formulation and Presentation.

B. Introduction.

1. There is a clear distinction between fiscal law and contract law regarding multiple year appropriations. Proper analysis requires consideration of fiscal law issues independently from the type of contract used.

2. We will not consider the contract law issues concerning multi-year contracting and contracts containing options in this course.

C. Basic Concepts.

1. Multiple year appropriations are those appropriations that expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. OMB Circular A-34, Instructions on Budget Execution (Aug. 1985).

2. The multiple year appropriations usually provided to the Department of Defense include the following:
   a. Overseas, Humanitarian, Disaster, and Civic Aid: 2 years.

   b. Procurement: 3 years.

c. Shipbuilding and Conversion, Navy: 5 years, except that certain obligations may be incurred for longer periods.

d. Research, Development, Test, and Evaluation (RDT&E): 2 years.

e. Military Construction: 5 years.

D. Statutory Controls.

1. The Bona Fide Needs Rule applies to multiple year appropriations. Defense Technical Information Center-Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989). A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 1999 RDT&E Army Appropriation, which is available for obligation until 30 September 2000, may be obligated for the needs of FY 1999 and 2000; it is not available for the needs of FY 2001.

2. The exceptions to the Bona Fide Needs Rule relating to acquisitions to maintain stock levels and lead time for special goods also apply. This statutory rule is limited by administrative policies, discussed later.

E. Administrative Controls: Program Objectives.

1. *Procurement Appropriations*: Program managers using procurement appropriations want to have all the necessary funding in hand before they obligate funds on a procurement contract. Having all of the funds helps to ensure stable production runs and lower costs. This policy is referred to as "full funding." DOD Reg. 7000.14-R, vol. 2A, para. 010202.

2. *RDT&E Appropriations*: Program managers using RDT&E may prefer to dribble out funding among various programs, giving more to those programs showing progress and withholding from other programs.

3. The managers of procurement appropriations and RDT&E appropriations have diametrically opposing outlooks on funding programs within their purview. As a result, two different funding policies exist.

F. Full Funding Policy.

1. DOD Reg. 7000.14-R, vol. 2A, para. 010202.C.6. describes the full funding policy as follows:

> At the time of contract award, funds are available to cover the total estimated cost to deliver the contract quantity of complete, militarily usable end items. If a future-year appropriation is required for delivery of the end items, then the end items are not fully funded.

2. The purpose of the full funding policy is to ensure that the amount requested each year will buy a specific quantity of end items. Absent this policy, agencies might conceal the total cost of an end item by splitting the costs among fiscal years or by budgeting for end items piecemeal.

3. Full Funding and Contract Terms.

a. Full funding is primarily a budgeting concept. An agency may initiate an acquisition for a procurement item only if the funds for the total estimated cost of the contract quantity are available for obligation.

b. The acquisition need not be for the total quantity or for usable end items. For example, the government may divide the annual procurement quantity among several contracts. Similarly, the government may award several contracts for both component parts and for the ultimate end items, and then furnish as government-furnished property (GFP) the component parts to the producers of the ultimate end items. A program is not "fully funded" only if delivery of usable end items requires a future-year appropriation.

4. Efficiency dictates two general exceptions to the full funding policy. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.

a. Advance procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than the year the government acquires the related end item.

b. To be eligible for advance procurement, long lead-time items must have a significantly longer lead time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item. An annual budget request must include at least the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.3.

c. Advance economic order quantity (EOQ) procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal-year program increments to obtain the economic advantage of multi-year procurements. The advance procurement may obligate the termination costs, or, if cheaper, the entire cost. The government may also include EOQ costs in an unfunded cancellation clause. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.4.

d. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Antideficiency Act. Newport News Shipbld'g and Drydock Co., B-184830, Feb. 27, 1976, 76-1 CPD ¶ 136 (holding option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).

G. Incremental Funding Policy.

1. The government executes the Research, Development, Test, and Evaluation Program by incremental funding of contracts and other obligations. DOD Reg. 7000.14-R, vol. 2A, para. 010211; DFAS-DE 7000-4, para. 8; AR 70-6, para. 2-2.

2. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year. Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. The government obligates funds for succeeding years during later years. Through the incremental funding policy, the government maintains very close control over R&D programs by limiting their funding.

3. Contract Provisions.

   a. An incrementally-funded cost-reimbursement contract contains FAR 52.232-22, Limitation of Funds. This provision limits the government's obligation to pay for performance under the contract to the funds allotted to the contract. The contract also contains a schedule for providing funding. Typically, the contractor promises to manage its costs and to perform the contract until the government provides the next increment.

   b. Incrementally funded fixed-price contracts contain a similar clause, Limitation of Government's Obligation, pursuant to a DFARS interim rule. See DFARS Part 232.7 and DFARS 252.232-7007.

   c. The government allots funds to the contract by an administrative modification identifying the funds.

   d. To prevent funding gaps associated with late appropriations, the contracting officer may use current funds research and development funds to fund contract performance for 90 days into the next fiscal year. AR 70-6, para. 2-2c.(4).

4. Incremental funding transforms two-year RDT&E appropriations into one-year funds. However, the government may obligate RDT&E funds during their second year of availability. Frequently, agencies receive permission from the appropriation manager to obligate funds during the second year where problems prevent obligating an annual increment during the first year. Defense Technical Information Center--Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989).

VIII. CONTRACT FORMATION AND TIME LIMITATIONS

A. References.

1. FAR Subpart 17.2.

2. FAR Subpart 32.7.

3. FAR Subpart 37.1.

B. Options.

1. Contracts with options are one means of ensuring continuity of a contractual relationship for services from fiscal year to fiscal year. The contract continues to exist, but performance must be subject to the availability of funds. Contel Page Servs., Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,450; Holly Corp., ASBCA No. 24795, 83-1 BCA ¶ 16,327.

2. There are restrictions on the use and exercise of options. FAR Subpart 17.2.

   a. The government must have synopsized the contract with the option(s) in the Commerce Business Daily, and must have priced and evaluated the option at the time of contract award. FAR 17.207(f). If the government did not evaluate the option at the time of the award, or if the option is unpriced, then the government must justify the exercise of the option IAW FAR Part 6 (the contracting activity must obtain approval for other than full and open competition through the justification and approval (J&A) process).

   b. The government cannot exercise the option automatically.

c. The government must determine that the option is the most advantageous means of filling a requirement.

d. The government must have funds available.

e. The contract must contain the Availability of Funds clause. FAR 32.703-2. Cf. Blackhawk Heating, Inc. v. United States, 622 F.2d 539 (Ct. Cl. 1980).

f. The government must obligate funds for each option period when proper funds become available. After it exercises the option, the government may fund the option period incrementally, i.e., during continuing resolution (CR) periods, the government may provide funding for the period of the CR. United Food Servs., Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding that if the original contract contains the Availability of Funds clause and the government exercises the option properly, funding the option period in multiple increments does not void the option).

g. The government must obligate funds consistent with all normal limitations on the obligation of appropriated funds, e.g., Bona Fide Needs Rule, period of availability, type of funds.

C. Requirements or Indefinite Quantity Contracts.

1. Requirement contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. FAR Subpart 16.5.

2. Use of the "availability of funds" clause is mandatory. FAR 32.705-1.

3. The government obligates funds for each delivery order using funds available for obligation at the time the government issues the order.

D. Contracts on the Fiscal Year Cycle.

1. The government may award contracts with terms that coincide with the fiscal year, i.e., from 1 October to 30 September.

2. This technique burdens contracting offices and invites fiscal problems when Congress delays passing appropriations acts and when CR periods or funding gaps occur.

3. Within DOD, consider using the authority of 10 U.S.C. § 2410a to award severable service contracts that cross fiscal years. Civilian agencies should consider using 41 U.S.C. § 253*l* for the same purpose. The Coast Guard, of course, may rely on 10 U.S.C. § 2410a(b).

IX. CONCLUSION

A. Basic Rules Relating to Time.

1. Agencies may not obligate funds before they are appropriated.

2. Agencies may not incur new obligations after the period of availability ends.

3. Appropriations are presumed to be one-year funds, unless expressly stated otherwise.

4. Different appropriations have different periods of availability.

B. Bona Fide Needs Rule.

1. Agencies may obligate funds only for the bona fide needs of the period of availability of the appropriation.

2. "Supply" exceptions to the Bona Fide Needs Rule (lead time and stock level) authorize obligation during the period of availability and delivery of the supplies in a subsequent fiscal year.

3. Severable services are the bona fide need of the year in which performed (though 10 U.S.C. § 2410a permits the award of contracts for such services across fiscal years). Contracts for nonseverable services may obligate current funds for performance to be completed in a subsequent fiscal year.

C. Multiple-Year Funds.

1. Appropriations are presumed to be annual. Multiple-year appropriations are identified specifically as such in appropriations acts.

2. The Bona Fide Needs Rule applies to multiple-year appropriations.

3. Administrative regulations may impose strict controls on the use of multiple year appropriations in the "out years." These restrictions may be more stringent than those imposed by statute.

D. Rules Governing Expired and Closed Appropriations.

1. Agencies may use expired funds only to liquidate or adjust prior obligations.

2. Fixed appropriations are canceled for all purposes five years after the period of availability ends.

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DEPLOYMENT CONTRACTING

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students should:

1. Understand the importance of planning for contracting operations during deployments.

2. Understand some of the commonly encountered funding issues that arise during deployments.

3. Understand the more frequently used methods of acquiring supplies and services during deployments.

4. Understand the ratification process used to correct irregular procurements.

B. Background.

C. Applicable Law During a Deployment.

1. International Law.

a. The Law of War—Combat.

b. The Law of War—Occupation. This body of law may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope and Kosovo.

MAJ Kevin M. Walker
Contract & Fiscal Law Department
2001 JAOAC
January 2001

c. International Agreements.

2. U.S. Contract and Fiscal Law.

a. Armed Services Procurement Act of 1947, as amended. 10 U.S.C. § 2301-31.

b. Federal Acquisition Regulation (FAR) and Agency Supplements.

c. Fiscal Law. Title 31, U.S. Code; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DA Pam 37-100-95.

D. Wartime Funding. Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit.

E. Wartime Contract Law. Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. 50 U.S.C. § 1431-35; Executive Order 10,789 (Nov. 14, 1958); FAR Part 50.

II. PREPARATION FOR DEPLOYMENT CONTRACTING.

A. General Considerations.

1. Plan early for contracting during a deployment.

2. Identify and train personnel necessary for effective contracting in an overseas theater.

3. Plan to deploy contracting personnel/teams with units to hit the ground first.

4. Allocate assets necessary to support contracting efforts from current unit resources.

B. Contracting Officer/Ordering Officer Support.

1. Identify contracting officer/ordering officer support requirements.

2. Ensure proper appointment and training of contracting officers and ordering officers.

a. Only contracting officers and their authorized representatives may obligate government funds.

b. Contracting officers may receive their appointments from a Head of a Contracting Activity (HCA), an attaché, a chief of a foreign mission (Army), or certain officials in the Army Secretariat. FAR 1.603; AFARS 1.603-2.

c. Ordering officers normally receive their appointments from a chief of a contracting office. AFARS 1.602-2-91.

(1) Responsibilities. AFARS Manual No. 2, Appendix E.

(2) "Class A" paying agents may not be ordering officers. AFARS Manual No. 2, para. 1-2.i.

d. Contracting officers and ordering officers are subject to limitations in appointment letters, regulations, and statutes.

e. Training for contracting personnel must include procurement integrity and standards of conduct training. FAR 3.104; DOD Dir. 5500.7-R, Joint Ethics Regulation.

f. Appointing authorities may limit contracting authority by dollar amount, subject matter, purpose, time, etc., or they may provide unlimited authority. Typical limitations are restrictions on the types of items that may be purchased, and on per purchase dollar amounts. FAR 1.602-1.

g. Contracting officers execute, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

C. Administrative Needs.

1. Deployable units should assemble contracting support kits. Administrative needs forgotten may be difficult to obtain in the area of operations. Kits should contain a 90-day supply of administrative needs.

2. Legal references.

a. Statutes: Titles 10, 31, and 41 of the U.S. Code.

b. Regulations: FAR; DFARS; AFARS/AFFARS/NAPS; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DA Pam 37-100-99; and command supplements to these publications.

c. CD-ROM contract references and LEXIS/WESTLAW software.

d. Access to Internet.

3. Contract forms.

a. DD Form 1155, Purchase Order.

b. Standard Form 44, Purchase Order-Invoice-Voucher.

c. Standard Forms 26, 30, 33, and 1442.

d. Form specifications for common items.

(1) Subsistence items, such as bottled water, fruit, etc.

(2) Labor and other services.

(3) Fuel.

(4) Billeting.

(5) Construction materials: plywood, gravel.

(6) Common items, such as fans, heaters, air-conditioners, etc.

e. Translations of contracting forms and provisions.

4. Portable office equipment and office supplies.

5. Personnel, including typists and translators.

D. Finance and Funding Support.

1. Certified funding. A deployable unit should coordinate to have funds certified as available in bulk to support deployment purchases. The Finance Officer should provide a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C), to any deploying unit.

2. Imprest funds. FAR Subpart 13.4; DFARS Subpart 213.305-3; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901-020908.

a. The installation commander may establish imprest funds of up to $10,000.

b. Cashiers must receive adequate training.

c. The fund operates like a petty cash fund, and is replenished as payments are made.

d. Ordering officers make purchases and provide receipts to cashier.

e. The fund should include local currency.

3. "Class A" paying agents. Units must ensure personnel are properly appointed and trained. See DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, para. 020604.

III. CONTRACTING DURING A DEPLOYMENT.

A. Training and Appointing Contracting Personnel.

1. Units should ensure that contracting personnel have received necessary training. If time permits, provide centralized refresher training.

2. Review letters of appointment for contracting officers and ordering officers. Ensure that personnel know the limitations on their authority.

B. Contracting Support Kit. Review contents of the kit. Ensure that references include latest changes.

C. Requirements Generation.

1. Verification. Ensure that the G-4/J-4 for the operation reviews and approves requirements, to avoid purchases better filled through the supply system. AFARS Manual No. 2, paras. 2-3, 2-4.

2. Statement of Work (SOW) development. See AFARS Manual No. 2, para. 7-5.

D. Competition Requirements.

1. The government must seek competition for its requirements; normally full and open competition, affording all responsible sources an opportunity to compete, is required. 10 U.S.C. § 2304; FAR 6.003. There is no automatic deployment contracting exception.

a. The statutory requirement for full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead-time (PALT).

b. The 45-day PALT results from a requirement to publish notice of proposed acquisitions for 15 days (synopsizing the contract actions), and then to provide a minimum of 30 days for offerors to submit bids or proposals.

c. Three additional time periods extend the minimum 45-day PALT:

(1) time needed for requirement definition and solicitation preparation;

(2) time needed for evaluation of offers and award of the contract; and time needed for delivery of supplies; or

(3) contractual performance of services.

2. Exceptions to the rule.

a. Unusual and compelling urgency. 10 U.S.C. § 2304 (c)(2); 41 U.S.C. § 253 (c)(2); FAR 6.302-2.

(1) This exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2.

(2) This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be injured seriously by this delay. It also allows preparation of written justifications after contract award. FAR 6.302-2(c)(1).

b. National security may provide a basis for limiting competition. It may apply if contingency plans are classified. FAR 6.302-6.

c. Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7.

d. Use of the unusual and compelling urgency, national security, and public interest exceptions requires a Justification and Approval (J&A). FAR 6.303. Approval levels for justifications are (FAR 6.304):

(1) Actions under $500,000: the contracting officer.

(2) Actions from $500,000 to $10 million: the competition advocate.

(3) Actions from $10 million to $50 million: the HCA or designee.

(4) Actions above $50 million: the agency acquisition executive.

e. Contract actions made and performed outside the United States, its possessions, or Puerto Rico, for which only local sources are solicited, are exempt from compliance with the minimum 45-day PALT time period, but not from the requirement for competition. See FAR 5.202 (a)(12); FAR 5.203(e); see also FAR 14.202-1(a) (thirty-day bid preparation period only required if solicitation is synopsized). Use bid boards and local advertisements to obtain competition under these circumstances. AFARS Manual No. 2, para. 4-3.e.

E. Contract Type. Although the contracting officer may select from a variety of contract types, firm-fixed-price contracts are used most often during deployments. See FAR Part 16; AFARS Manual No. 2, para. 9-2. However, LOGCAP and Force "Sustainment" contracts are cost-plus-award-fee contracts.

F. Methods of Acquisition.

1. Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. FAR Part 14.

2. Negotiation: award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the low-cost, technically acceptable solution to the government's requirement, or the one representing the best cost – technical tradeoff, even if it is not lowest in cost. FAR Part 15.

3. Simplified acquisition procedures: used for the acquisition of supplies, nonpersonal services, and construction in amounts below the simplified acquisition threshold. FAR Part 13.

G. Sealed Bidding as a Method of Acquisition.

1. Contracting officers must use sealed bidding procedures if the four conditions enumerated in the Competition in Contracting Act are present. 10 U.S.C. § 2304(a)(2)(A); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

a. Time permits the solicitation, submission, and evaluation of sealed bids;

b. Award will be based only on price and other price-related factors;

c. It is not necessary to conduct discussions with responding sources about their bids; and

d. There is a reasonable expectation of receiving more than one sealed bid.

2. Use of sealed bidding allows little discretion in the selection of a source. A clear description or understanding of the requirement is necessary to avoid discussions.

3. Sealed bidding normally is not used in deployment contracting, at least until the tactical situation stabilizes. It requires more sophisticated contractors, because minor errors in preparing bids will prevent government acceptance; it also requires substantial bid preparation time.

H. Negotiations as a Method of Acquisition.

1. Units use negotiations, which are sometimes called competitive proposal procedures, when sealed bidding is not appropriate. 10 U.S.C. § 2304(a)(2)(B).

2. Letter contracts and oral solicitations can expedite the contracting process under negotiation procedures.

a. Letter contracts are preliminary contractual instruments that permit a contractor to begin work immediately. Approvals for use at the HCA level are required. See FAR 16.603; AFARS Manual No. 2, para. 9-2.d(5).

b. Oral solicitations are permissible when the delay in preparing a written solicitation would be harmful to the government. Use of oral solicitations does not excuse compliance with normal contracting requirements.

3. Negotiations permit greater discretion in the selection of a source.

a. Because the government evaluates other criteria in addition to price in a negotiated procurement, substantial time may be required to obtain and evaluate all required information before making an award decision.

b. Negotiations procedures permit the government to use a "best value" basis for awarding a contract, and pay more to obtain a better product.

c. Offers are solicited by use of a Request for Proposals (RFP) or a Request for Quotations (RFQ).

I. Simplified Acquisition Procedures. Simplified Acquisition is used almost exclusively. Neither sealed bidding nor contracting by negotiation are needed with the availability of LOGCAP contract and a $200,000 threshold.

1. Activities may use simplified acquisition procedures to acquire supplies and services that are not estimated to exceed the simplified acquisition limitation. FAR 13.103(b); All Star Carpet & Bedding, Inc., B-242490.3, Apr. 4, 1991, 91-1 CPD ¶ 352.

a. A simplified acquisition is a procurement of supplies, services, and construction in the amount of $100,000 or less using simplified acquisition procedures. FAR 13.003.

b. Authority to use simplified acquisition procedures for procurements up to $200,000.

(1) During a contingency operation as defined in 10 U.S.C. § 101(a)(13), or in peacekeeping or disaster relief operations, the simplified acquisition threshold for contracts awarded and performed outside the United States increases from its normal ceiling of $100,000 to $200,000. 10 U.S.C. § 2302(7); DFARS 213.000.

(2) DOD has benefited from this increased threshold several times.

2. Choice of method. Contracting officers shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003.

a. Purchase orders. FAR 13.302; DFARS Subpart 213.5; AFARS Subpart 13.5.

b. Government credit card/micropurchase program. Authorized card holders may acquire goods and services up to $2,500. FAR 13.301; AFARS Subpart 13.9.

c. Blanket purchase agreements (BPA). FAR 13.303; AFARS 13.203.

d. Imprest funds. FAR 13.305; DFARS Subpart 213.305-3; AFARS Subpart 13.4; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901 to 020908; AR 37-103.

3. Competition requirements.

a. Up to $2,500 ("micropurchases"). Only one oral quotation is required, if the contracting officer finds the price to be fair and reasonable. FAR 13.106-2. Northern Va. Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. Such purchases must be distributed equitably among qualified sources. FAR 13.202(a)(1). Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practical, a quotation shall be solicited from other than the previous supplier before placing a repeat order.

b. Over $2,500 and up to the simplified acquisition threshold. Contracting Officers shall solicit quotations orally to the maximum extent practicable. FAR 13.106-1; Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Normally soliciting three sources is reasonable. FAR 13.104(b). Do not omit incumbent contractors without good reason. See J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

c. Units may not break requirements aggregating more than the simplified acquisition dollar limitation into several purchases to permit the use of simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003.

d. Publication of notices. Subject to the following exceptions, the contracting officer is not required to publicize contract actions that do not exceed the simplified acquisition threshold.

(1) Public posting of a request for quotations for 10 days is required if the order is estimated to be between $10,000 and $25,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101(a)(2).

(2) For a CONUS contract action, the contracting officer must publish a synopsis of all contract awards exceeding $25,000 in the Commerce Business Daily. 15 U.S.C. § 637(e); FAR 5.101(a)(1).

(3) There is no requirement to publish a synopsis for a defense agency contract that will be made and performed outside the United States, its possessions or Puerto Rico, and for which only local sources will be solicited. FAR 5.202(a)(12).

4. Scenario: A Special Forces Team is training a foreign unit. The team leader wants to buy $2,000 worth of materials to support the training from a local store. The team has an ordering officer and a Class A agent. How do they buy the materials the team needs?

J. Using Existing Contracts to Satisfy Requirements. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may already be available to meet recurring requirements, such as fuel and subsistence items.

1. Investigate existing contracts with contracting offices of activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombassa, Kenya. This contract was used to provide services to aircraft crews during Operation Provide Relief.

2. Determine whether warranty requirements for major end items require the contractor to provide repair and maintenance service in the deployment region.

K. Contract Administration, Changes, Quality Assurance, and Terminations. FAR Parts 42, 43, 46, and 49.

1. Awarding contracts is only half the battle in deployment contracting operations. Contracting personnel must monitor performance closely to ensure the desired goods or services are actually delivered in a timely fashion. AFARS Manual No. 2, para. 9-6.

a. Requiring units should provide personnel, such as contracting officer's representatives, to assist in monitoring contractor performance to the extent necessary. AFARS Manual No. 2, para. 7-6.c.

b. For larger or more complex requirements, Defense Contract Management Command has trained inspectors and administrative contracting officers to assist with contract administration. FAR Part 42.

c. For most contracts, the government relies on the contractor to perform detailed inspections and tests necessary to ensure conformance with contract quality requirements. FAR 46.202-1.

2. Under the Changes clause (see, e.g., FAR 52.243-1, Changes-Fixed-Price), the government has authority to require contractors to perform work necessary to achieve the overall purpose of the contract, even if the work actually needed differs somewhat from that specified in the original contract. The contract price is adjusted (a fair increase or decrease in price for the cost of the changed work, plus a reasonable adjustment to profit), if the government directs a change under the Changes clause. See AFARS Manual No. 2, para. 9-6.e.

3. Government terminations.

a. Termination for Convenience clauses (FAR 52.249-1 through 52.249-6) give the government the right to terminate contracts without cause when doing so is in the government's interest. The contractor recovers its costs plus a reasonable profit on those costs in a convenience termination, but no anticipatory profits.

b. Termination for Default clauses (see, e.g., FAR 52.249-8, Default (Fixed-Price Supply and Service)) provide the government with the right to terminate a contract for cause.

(1) The three general bases for default termination are:

(a) Failure to deliver or perform on time;

(b) Failure to make progress which endangers performance; or

(c) Failure to perform any other material provision of the contract.

(2) Contractors may raise defenses to terminations for default (e.g., excusable delay, unreasonable inspections). If a contractor prevails on a defense, then its remedy is normally conversion of the default termination action to a termination for convenience.

(3) If the government terminates a contract for default successfully, the contractor generally receives payment only for goods actually delivered, and is subject to a later assessment of reprocurement costs (i.e., the cost of cover).

4. Practical problems in awarding and obtaining performance under government contracts in overseas theaters. AFARS Manual No. 2, paras. 3-3, 3-7, 9-2.d.(6).

L. Alternative Methods for Fulfilling Requirements.

1. LOGCAP Contract. In 1997, the Army Material Command (CECOM) awarded a cost-plus-award-fee LOGCAP (Logistics Civil Augmentation Program) contract to DynCorp. LOGCAP contract provides for comprehensive logistics and construction support to a deployed force anywhere in the world. Use of this contract to provide logistics support to a deployed force permits a commander to perform a mission with a smaller force than otherwise needed. See AR 700-137; see also GAO/NSIAD-97-63, Contingency Operations, and, Fiscal Year 2000 Contingency Operations Costs and Funding, GAO/NSIAD-00-168, June 2000

a. Civilian contractor.

b. Provides logistics/engineering services to deployed forces, in such places as Somalia, Haiti, Rwanda, and Bosnia.

c. Balkans Force Sustainment Contract. In an effort to maintain continuity, the prior LOGCAP contractor, Brown & Root Services Corporation (BRSC), continues to provide logistics support for US forces in the Balkan theater of operations. See, Army Should Do More to Control Contract Cost in the Balkans GAO/NSIAD-00-225, September 2000.

2. Economy Act. 31 U.S.C. § 1535.

a. Executive agencies may transfer funds to other executive agencies, and obtain goods and services provided from existing stocks or by contract. For example, the Air Force may have construction performed by the Army Corps of Engineers, and the Army may have Department of Energy facilities fabricate special devices.

b. Procedural requirements for Economy Act orders are set forth in FAR Subpart 17.5 and DFARS Subpart 217.5.

c. General officer approval is required before placing Economy Act orders outside of DOD. See AL 94-5, Economy Act Orders Outside DOD (4 Aug 94).

3. Acquisition & Cross-Servicing Agreements (ACSA). 10 U.S.C. §§ 2341-2350.

a. Acquisition & Cross-Servicing Agreements provide DoD with authority to acquire logistic support without resort to commercial contracting procedures (as well as to transfer support to other coalition forces).

b. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services.

c. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.

4. Extraordinary Contractual Actions. Pub. L. No. 85-804; 50 U.S.C. § 1431-35; FAR Part 50.

a. The Secretary of the Army has broad residual powers to initiate extraordinary contractual actions to facilitate national defense.

b. Procedures for requesting use of these powers are set forth in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 50.4.

M. Leases of Real Property.

1. Authority to lease is delegated on an individual lease basis. AR 405-10, para. 3-3b.

2. The Corps of Engineers using area teams negotiates most leases.

3. Billeting services are acquired by contract, not lease.

IV. POLICING THE CONTRACT BATTLEFIELD.

A. Ratification. FAR 1.602-3.

1. Only certain officials (e.g., the chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), or Head of a Contracting Activity (HCA)) may ratify agreements made by unauthorized persons.

2. There are dollar limits to the authority to ratify unauthorized commitments (AFARS 1.602-3(b):

a. $10,000 or less -- Chief of Contracting Office.

b. $100,000 or less -- PARC.

c. Greater than $100,000 -- HCA.

3. A ratifying official may ratify only when:

a. The government has received the goods or services.

b. The ratifying official has authority to obligate the United States now, and could have obligated the United States at the time of the unauthorized commitment.

c. The resulting contract would otherwise be proper, i.e., adequate funds are available, the contract is not prohibited by law, etc.

d. The price is fair and reasonable.

4. Scenario: A brigade supply officer was swamped with requests for blankets when the desert nights turned unseasonably cold. He located a blanket factory with 1500 blankets in stock, and arranged delivery after agreeing that the U.S. government would pay the wholesale price of $12 per blanket. What should the division finance officer do when the factory owner shows up with an invoice for $18,000 worth of blankets and wants to be paid?

B. Extraordinary Contractual Actions. FAR Part 50.

1. If ratification is not appropriate (e.g., no price agreement with supplier), informal commitment procedures may allow compensation. FAR 50.302-3.

2. Requests to formalize informal commitments must be based on a request for payment made within six months of furnishing the goods or services; also, normal contracting procedures must have been impracticable at the time of the commitment to use extraordinary procedures. FAR 50.203(d).

3. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR ¶ 16 (1966)); in the Dominican Republic (Elias Then, Dep't of Army Memorandum, 4 Aug. 1966); Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Office of the Gen. Counsel, Dep't of Army Memorandum, Jan. 1990).

C. General Accounting Office (GAO) Claims.

1. The GAO has broad authority to settle claims against the United States. 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984). The procedures are set forth in 4 C.F.R. Part 30 and in GAO Policies and Procedures Manual for the Guidance of Federal Agencies, Title 4.

2. Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. See 31 U.S.C. § 1342; see also Voluntary Payments-Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953). A limited exception to this rule applies to urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property; Meals-Furnishing-Gen. Rule, B-177900, 53 Comp. Gen. 71 (1973); and, unforeseen impediments to completion of an urgent agency mission; Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, supra.

3. If the GAO believes that it cannot pay a meritorious claim because an appropriation is not available for its payment, GAO reports to Congress. 31 U.S.C. § 3702(d). This report may form the basis for congressional private relief legislation.

D. Claims Under the Contract Disputes Act. FAR Subpart 33.2.

1. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, provides a statutory framework for resolution of claims arising under, or relating to, a government contract.

2. General procedures under the CDA.

a. Contractor or the government asserts a claim, which the contracting officer reviews and evaluates for a decision;

b. The contracting officer renders a final decision on the claim; and

c. The contractor may appeal the final decision to either the U.S. Court of Federal Claims or the agency board of contract appeals.

E. Redeployment. Ensure payments are finalized and recorded before redeployment. Coordinate for transfer of files to parent contracting organization for holding and resolution of issues that arise after redeployment.

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FISCAL LAW IN CONTINGENCY OPERATIONS

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FISCAL LAW IN CONTINGENCY OPERATIONS

I. SUPPORTING MULTILATERAL PEACE & HUMANITARIAN OPERATIONS

A. UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.

1. Scope. Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of armed forces under Chapter VII of the UN Charter—

   a. Details of Personnel. Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.

   b. Supplies, Services, & Equipment. Furnishings of facilities, services or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.

2. Reimbursement. Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. This requirement to receive reimbursement <u>is not</u> limited to assistance provided under the UNPA, but applies to <u>any</u> authority under which assistance may be provided to as assessed peacekeeping operation.

3. Delegation of authority. The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206 ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

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B. Drawdowns.

1. *Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1).* Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to $100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).

2. *FAA § 506(a)(2), 22 U.S.C. §2318(a)(2*). Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to $200M from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, migrant and refugee assistance, antiterrorism, and non-proliferation assistance. (The Security Assistance Act of 2000 increased the amount from $150M to $200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than $75M may come from DOD resources; not more than $75M may be provided for counternarcotics; and not more than $15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. *See* Defense and Security Assistance Improvements Act, Pub. L. 105-164 (1996).

3. *FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2)*. Authorizes the President to direct the drawdown of up to $25M in any fiscal year of commodities and services from any federal agency for unforeseen emergencies when deemed important to U.S. national interests.

C. Reimbursable Support.

1. *FAA § 607, 22 U.S.C. § 2357* - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.

2. *FAA § 632, 22 U.S.C. § 2392* - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.

3. *Economy Act, 31 U.S.C. § 1535* - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (*e.g.,* Department of State).

4. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA) §§ 21-22, 22 U.S.C. §§ 2761-62* - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.

5. *Leases - AECA §§ 61-62, 22 U.S.C. §§ 2796-2796a* - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.

6. *Acquisition & Cross-Servicing Agreements (ACSA) - 10 U.S.C. §§ 2341-2350* - DoD authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the AECA. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.

II. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS

A. Appropriations. $55.9M in FY2001 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under 10 U.S.C. §§ 401 (only for humanitarian demining), 402, 404, 2547, and 2551.

B. Humanitarian & Civic Assistance (HCA). 10 U.S.C. § 401. *See also*, DOD Dir. 2205.2, 6 Oct 1994; DOD Inst. 2205.3, 27 Jan 1995.

1. Need for Express Authority.

   a. *41 U.S.C. § 12*: "No contract shall be entered into for the erection, 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.*

   b. *63 Comp. Gen. 422 (1984)*: "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)."

2. Scope of Authority. Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote

   a. The security interests of the U.S. and the country where the activities will be carried out; and

   b. The specific operational readiness skills of the servicemembers who will participate in the activities.

3. Limits.

   a. May not duplicate other forms of U.S. economic assistance.

   b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

   c. SecState must specifically approve assistance.

   d. Must be paid out of funds appropriated for HCA.

e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operations), or provide such assistance as part of a military operation not involving U.S. forces.

4. Definition. HCA means—

a. Medical, dental, veterinary care in rural areas;

b. Construction of rudimentary surface transportation systems;

c. Well drilling and construction of rudimentary sanitation facilities;

d. Rudimentary construction and repair of public facilities; and

e. Detection and clearance of landmines, including education, training, and technical assistance.

5. Exercise-Related Construction (ERC) distinguished. 10 U.S.C. § 2805(a)(2).

a. "Funds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program.*" --S. Rep. 355, 102d Cong., 2d Sess. 10 (1992)(emphasis added).

6. Appropriations. Specifically fenced O&M for HCA. Demining, however, uses OHDACA.

C. Transportation of Humanitarian Relief Supplies for NGOs. 10 U.S.C. § 402.

1. Scope of Authority. SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

2. Preconditions. Before transporting supplies, SecDef must determine—

a. The transportation of the supplies is consistent with U.S. foreign policy;

b. The supplies to be transported are suitable for humanitarian purposes and are in usable condition;

c. A legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;

d. The supplies will, in fact, be used for humanitarian purposes; and

e. Adequate arrangements have been made for the distribution of the supplies in the destination country.

3. Limits. Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

D. Foreign Disaster Assistance - 10 U.S.C. § 404.

1. Scope of Authority.

a. General. President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

b. Delegation of Authority. President delegated to SecDef authority to provide disaster relief with SecState's concurrence and in emergencies when insufficient time to seek SecState concurrence (provided SecDef seeks SecState concurrence as soon as practicable thereafter). Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).

2. Types of Assistance. Transportation, supplies, services, and equipment.

3. Notice to Congress. Within 48 hours of commencing relief activities, President must transmit a report to Congress.

4. Appropriations. Funded from the OHDACA appropriation.

E. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2547.

1. Scope of Authority. SecDef may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under statute transferred to DoS, which is responsible for the distribution of the supplies.

2. Limits. Statute does not constitute authority to conduct any activity that, if carried out as a DoD intelligence activity, would require notice to the intelligence committees under 50 U.S.C. §§ 413 et seq.

3. Definition. "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death.

F. Humanitarian Assistance. 10 U.S.C. § 2551.

1. Scope.

a. General. To the extent provided in authorization acts, funds appropriated to DOD for humanitarian assistance shall be used for providing transportation of humanitarian relief and *other* humanitarian purposes worldwide.

b. Availability of Funds. To the extent provided in the appropriations acts, funds appropriated for humanitarian assistance remain available until expended .

2. Reports. Statute contains detailed annual reporting requirements.

3. Appropriations. Funded from the OHDACA appropriation.

4. § 2551/§ 401 Distinguished. If it fits § 401 in each and every particular, it's § 401 HCA. If not (but for humanitarian purpose) it's § 2551 HA.

III. SPECIAL AUTHORITIES.

A. CinC Initiative Funds (CIF). 10 U.S.C. § 166a. *See* DoD Appropriations Act for FY 2001, Pub. L. No. 106-259 (2000) ($25M for CIF in FY 2001 in Defense-wide O&M); DoD Dir. 7280.4, 26 Oct 1993; CJCSI 7401.01A, 30 Jan 1999.

1. Scope. CJCS may provide to CinCs (including NORAD) sums appropriated for the following activities:

a. Force training.

b. Contingencies.

c. Selected operations.

d. Command and Control.

e. Joint Exercises (including participating expenses of foreign countries).

f. Humanitarian and Civic Assistance (HCA).

g. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).

h. Personnel expenses of defense personnel for bilateral or regional cooperation programs.

i. Force protection.

2. Priorities. CJCS should give priority consideration to requests for funds that would (1) enhance warfighting capability, readiness, and sustainability of forces assigned to the commander requesting the funds; (2) be used for activities in a CinC's AOR that would reduce threats to, or enhance, U.S. national security.

3. Relationship to Other Funding. Any amount provided as CinC initiative funds for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."

4. Limits. 10 U.S.C. § 166a(e). Of funds made available—

   a. No more than $7M may be used to buy end items with a cost greater than $15,000;

   b. No more than $1M may be used to pay the expenses of foreign countries participating in joint exercises;

   c. No more than $2M may be used for education and training to military and related civilian personnel of foreign countries; and

   d. No funds may be used for any activity for which Congress has denied authorization.

B. Emergency & Extraordinary (E&E) Expenses. 10 U.S.C. § 127.

1. General. Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated). 10 U.S.C. § 127(b).

2. Congressional Notification. DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of $1 million and five days advance notice for expenditures or obligations between $500K and $1M. Pub. L. No. 104-106, § 915 (1996).

3. Appropriations. $10.616M for Army; $5.146M for Navy and Marine Corps; $7.878M for Air Force; and $30M for SecDef. DoD Appropriations Act for FY 2001, Pub. L. No. 106-259 (2000).

C. Contingency Operations Funding Authority. 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996).

1. Applicability. Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed $50 M, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of $100M. Does *not* apply to operations with incremental costs not expected to exceed $10M.

2. Consequences.

a. Waiver of Working Capital Fund (WCF) Reimbursement. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)

b. Transfer Authority. Authorizes SecDef to transfer up to $200M in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.

3. Congressional Notification & GAO Compliance Reviews. Statute contains provisions for both.

4. Overseas Contingency Operations Transfer Fund (OCOTF). DoD Appropriations Act for FY 2001, Pub. L. No. 106-259, Title II (2000). Appropriates $3.94B of "no-year" funds "for expenditures directly relating to Overseas Contingency Operations by U.S. Military Forces." These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds. H.Rep. 106-754, the Conference Report accompanying the Appropriations Act, states this amount covers the estimated costs of continuing operations in Bosnia, Kosovo, and Southwest Asia. See, DoD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 17, Contingency Operations (June 2000) and DoD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency Operations (Sep 1996).

IV. SECTION 8070 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY 2001, PUB. L. NO. 106-259, § 8070 (2000).

A. General. Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See also* DoD Appropriations Act for FY 96, Pub. L. 104-61 § 8117 (1995).

B. Notice Requirement. The notice required includes.

1. A description of the articles or services to be transferred;

2. The value of the articles or services; and

3. With respect to a proposed transfer of supplies and equipment, a statement of

a. Whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and

b. Whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.

C. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126) which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations,* such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).

D. President's Interpretation. In "acquiescing" in the Appropriations Act, the President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

E. Scope.

1. Included Activities. Section 8070 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include—

a. Acquisition and Cross-Servicing Agreements during peace and humanitarian assistance operations. 10 U.S.C. §§ 2341-2350.

b. Drawdowns for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).

c. Humanitarian & Civic Assistance (HCA). 10 U.S.C. §§ 166a(b)(6), 401.

d. Transportation of humanitarian assistance to the extent the service is provided to another nation or an international organization. 10 U.S.C. § 2551.

e. Excess non-lethal supplies for humanitarian relief. 10 U.S.C. § 2547.

f. Reimbursable support to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent the DoD transfers articles or services to another nation or international organization. 31 U.S.C. § 1535; FAA § 632.

g. Landmine clearance activities. FY 1995 DoD Authorization Act, Pub. L. No. 103-337, § 1413 (1994).

2. Excluded Activities. Section 8070 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include—

a. Exercises in which the DoD pays the incremental expenses of participating developing countries—including Partnership for Peace (PFP) exercises. 10 U.S.C. § 2010.

b. SOF training. 10 U.S.C. § 2011.

c. Bilateral/regional conferences and seminars unconnected with peace and humanitarian assistance operations. 10 U.S.C. § 1051.

d. LATAM Coop unconnected with peace and humanitarian assistance operations. 10 U.S.C. § 1050.

e. Military to military contacts. 10 U.S.C. § 168.

f. EDA authorities (FAA § 516) which already have congressional notice requirements equal to or in excess of 15 days.

g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (e.g. coalition operations in time of war).

F. Compliance. DoD complies with section 8070 by—

1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or

2. Transferring supplies and services in such operations without congressional notification when—

a. Providing disaster relief;

b. Providing support *without* using funds appropriated to DoD (e.g. "advance of funds" basis); or

c. Providing support under an FMS case.

V. CONCLUSION.

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CHAPTER 20

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II. REFERENCES.

A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).

B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).

C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).

D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).

E. OMB Cir. A-34, Instructions on Budget Execution (Dec. 1995).

F. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 (Aug. 1995) [hereinafter DOD 7000.14-R]. Go to http://www.dtic.mil/comptroller/fmr.

G. Air Force Instr. (AFI) 65-608, Antideficiency Act Violations (May 1998).

H. Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (October 1999) [hereinafter Air Force Procedures for Administrative Control of Appropriations] available at http://dfas4dod.dfas.mil /centers/dfasde/denvercenter/regulations.htm.

I. Defense Finance and Accounting Service--Indianapolis Reg. (DFAS-IN) 37-1, Finance and Accounting Policy Implementation. Go to http://dfas4dod.dfas.mil /centers/ dfasin/library/ar37-1.

J. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

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III. FISCAL CONTROLS AT THE APPROPRIATION LEVEL. THE FIRST LEVEL -- 31 U.S.C. § 1341.

A. In Excess of. An officer or employee may not make or authorize an obligation or expenditure that exceeds an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A). Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

1. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations. Matter of Adjustment of Expired and Closed Accounts, B-253623, Sept. 28, 1994 (unpub.); The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).

2. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts and obligations that violate specific statutory restrictions on obligations or spending. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981).

B. In Advance of. An officer or employee may not involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

C. Sequestered Funds. An officer or employee may not make or authorize an expenditure or obligation, or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(c) and (d).

D. Exceptions. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.

1. The statute specifically must authorize entering into a contract in advance of or in excess of an appropriation. The Army Corps of Eng'rs' Continuing Contracts, B-187278, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

   a. Example: 41 U.S.C. § 11 permits the DOD and the Coast Guard to contract without an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current fiscal year (FY). Report use of this authority to the next higher level of command. See DOD 7000.14-R, vol. 3, ch. 12, para. 120207; DFAS-IN 37-1, ch. 8, para. 0818 (requiring local commanders to forward reports through command channels).

   b. The authority conferred by 41 U.S.C. § 11 is "contract" authority, and does not authorize disbursements. See Air Force Procedures for Administrative Control of Appropriations, § 4, para. E.

2. Certain statutes authorize the execution of multiyear contracts. See, e.g., 10 U.S.C. §§ 2306(g), 2306b, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).

E. Contracts Conditioned Upon the Availability of Funds. See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).

1. Activities may initiate certain contracting actions prior to an appropriation if the solicitation and contract include the clause, FAR 52.232-18, Availability of Funds. See To Charles R. Hartgraves, B-235086, Apr. 24, 1991 (unpub.) (award without clause violated the ADA).

2. The government may not accept supplies or services under these contracts until the contracting officer has given notice that funds are available.

F. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See FAR 32.703-2(b).

IV. APPORTIONMENT. THE SECOND LEVEL -- 31 U.S.C. §§ 1512 - 1513; 1517(A)(1).

A. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated this authority to the Office of Management and Budget (OMB).

B. Definition. An apportionment is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or objects. OMB Cir. A-34, para. 21.1.1.

C. Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. 31 U.S.C. § 1512.

1. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

   a. Military and civilian pay increases;

   b. Laws enacted after budget submission which require additional expenditures; or

   c. Emergencies involving life or property.

2. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. To John D. Dingell, B-218800, 64 Comp. Gen. 728 (1985); To the Postmaster Gen., B-131361, 36 Comp. Gen. 699 (1957).

D. Prohibitions.

1. An officer or employee of the United States may not make or authorize an obligation or expenditure that exceeds an apportionment. 31 U.S.C. § 1517 (a)(1).

2. The statute does not prohibit obligating **in advance of** an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997); but see Air Force Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are apportioned).

V. ADMINISTRATIVE DIVISION OF APPORTIONMENTS. THE THIRD LEVEL. 31 U.S.C. § 1514.

A. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:

1. OMB Cir. A-34, Instructions on Budget Execution, para. 31.5. This circular applies to all agencies and requires OMB approval of fund control systems.

2. DOD Dir. 7200.1, Administrative Control of Appropriations; DOD 7000.14-R, vol. 14, app. A.

3. DFAS-IN 37-1, Finance and Accounting Policy Implementation; Air Force Procedures for Administrative Control of Appropriations (superseding DFAS-DE 7200.1-R); NAVCOMPT 7300.101; MCOs P4200.15 and P7300.8.

B. Administrative Subdivisions of Funds. OMB Cir. A-34, para. 21.1; DOD 7000.14-R, vol.14, app. A.

1. Allocations and Allotments. DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).

2. Allowance/Target/Advisory Guide. DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6 para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.

3. An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal subdivision established by regulations. See 31 U.S.C. §1517(a)(2).

Discussion Problem: On 30 August, Fort Tiefort had $170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for $170,000 using these funds, but the Defense Accounting Office recorded this obligation as $120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had $50,000 left in the O&M allowance. In order to avoid losing this money, the contracting officer awarded a contract on 20 September obligating $50,000 in O&M. Is there an ADA violation?

VI. ANTIDEFICIENCY ISSUES.

A. Purpose Statute. 31 U.S.C. § 1301(a). A violation of the Purpose Statute also may lead to a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141; To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984). Officials **may** be able to avoid an antideficiency violation if:

1. Proper funds were available at the time of the erroneous obligation;

2. Proper funds were available continuously from the time of the erroneous obligation; and

3. Proper funds were available for the agency to correct the erroneous obligation.

See Air Force Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation)

Discussion Problem: The Adjutant General (AG) of the State of Minnesota asked his best fishing buddy, the CG at Ft. Tiefort, for some help. The AG was planning a big bash to celebrate the 100th anniversary of the Minnesota National Guard. As part of this effort, the AG needed his public affairs office (PAO) personnel to perform a lot of work publicizing the occasion. Unfortunately, he did not have enough funds left in his budget to fund the extra drill periods required. After pondering the problem, the CG hit upon the ultimate solution. He arranged to have the National Guard PAO personnel brought on active duty for two weeks at Ft. Tiefort. When they reported for duty, the CG sent them to the AG's office to work on the birthday party. These personnel spent the entire two-week active duty period working on this project. Any ADA problems here?

B. "Bona Fide Needs Rule."

1. A violation of the Bona Fide Needs Rule, i.e., 31 U.S.C. § 1502, also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803; Air Force Procedures for Administrative Control of Appropriations, § 10, para. G.

2. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process used for correcting a purpose violation.

C. Operation and Maintenance (O&M) Funds.

1. There is a limitation of $500,000 on the use of O&M funds for construction. This is a "per project" limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See DOD 7000.14-R, vol. 14, ch. 10; cf. Air Force Procedures for Administrative Control of Appropriations, § 6, para. C.6 ("Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation."). See also The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable).

2. DOD activities may use O&M funds for purchase of investment items costing less than $100,000. See Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8046, 113 Stat. 1240 (1999). Use of O&M in excess of this threshold is a purpose violation and may trigger an antideficiency violation. See DOD 7000.14-R, vol. 14, ch. 10; Air Force Procedures for Administrative Control of Appropriations, § 6, para. C.2.

Discussion Problems:

--- On 3 August 1999, the Fort Tiefort contracting officer awarded a contract for 50 off-the-shelf computers for a total of $110,000. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 1999. Any fiscal issues here?

--- On 1 July 1999, the Fort Tiefort contracting officer awarded a $435,000 contract for the construction of a storage facility. The contract was funded with FY 1999 O&M funds. Things went smoothly until 8 October 1999 when the contracting officer issued what she thought was an in-scope contract modification increasing the contract price by $50,000. The contracting officer cited FY 1999 O&M funds on the modification. On 28 October, the Army Audit Agency (AAA) conducted a random audit of the Fort's contracting process and determined that the 8 October modification was outside the scope of the original contract. Any fiscal issues here?

D. Indemnification Provisions. Open-ended indemnification provisions violate 31 U.S.C. § 1341. See United States Park Police Indemnification Agreement, B-242146, Aug. 16, 1991 (unpub.); Project Stormfury, B-198206, 59 Comp. Gen. 369 (1980). To Howard Metzenbaum, B-174839.2, 63 Comp. Gen. 145 (1984); Assumption by Gov't of Contractor Liability to Third Persons, B-201072, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, Jan. 8, 1982 (unpub.). There are statutory exceptions to this rule. See, e.g., 10 U.S.C. § 2354 (research/development contracts may contain indemnity provisions for unusually hazardous risks); 50 U.S.C. § 1431 (President may exempt certain defense-related agreements from Antideficiency Act); 42 U.S.C. § 2210(j) (NRC and DOE may initiate indemnification agreements).

E. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. This is not a violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).

F. Option Penalties. Contracts that include separate charges for failure to exercise options violate the Antideficiency Act. Honeywell Info. Sys., Inc., B-186940, 56 Comp. Gen. 167 (1976); Burroughs Corp., B-186313, 56 Comp. Gen. 142 (1976).

G. Augmentation. An ADA violation may arise if an agency retains and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, Feb. 24, 2000 (unpub.).

H. Unauthorized Commitments. Would an unauthorized commitment trigger an antideficiency violation? See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E.

Discussion Problem: SGT Jones, who has no authority to make purchases on behalf of the government, goes to the local parts store and charges a new diesel engine to the government. Is this a problem?

VII. LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342.

A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

1. Voluntary services are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).

2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.

B. Examples of Voluntary Services Authorized by Law.

1. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).

2. 5 U.S.C. § 3111 (student intern programs).

3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

4. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).

5. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

6. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

C. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

D. Gratuitous Services Distinguished.

1. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

2. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev. -- Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program -- State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). Cf. Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

Discussion Problem: For the last year, Ft. Tiefort's MACOM (Major Command) has been pushing subordinate commands to implement the MACOM Voluntary Services Program (VSP). Authority for the VSP flows from 10 U.S.C. § 1588, which permits the Secretary of the Army to accept voluntary services for programs that support members of the armed forces and their families (such as family support, child development and youth services, and employment assistance for spouses). The VSP has worked so well at Ft. Tiefort that the CG there decided to expand the program. Under Ft. Tiefort's Improved VSP (IVSP), volunteers have painted offices, straightened out the post HQ's filing system, and refurbished a dilapidated old building completely (to include putting on a new roof) using materials donated by local merchants. Any ADA issues?

VIII. VOLUNTARY CREDITOR RULE.

A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.

B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, July 21, 1999 (unpub.) (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, Aug. 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, Dec. 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, July 22, 1991 (unpub.). See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:

1. The underlying expenditure is authorized;

2. The claimant shows a public necessity[T.H.1];

3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

IX. PASSENGER CARRIER USE. 31 U.S.C. § 1344; 41 C.F.R. Subparts 101-6.4 and 101-38.3.

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not antideficiency violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.

   a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).

   b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).

2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, Dec. 8, 1983 (unpub.).

C. Penalties.

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a $10,000 fine).

X. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS.

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518; AFI 65-608, para. 4.11.

1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office. DOD Dir. 7200.1; DOD 7000.14-R, vol. 14, ch. 9; Memorandum, Comptroller, Dep't of Defense, subject: Violations of the Antideficiency Act (19 Dec. 1994).

2. Good faith or mistake of fact does not relieve an individual from responsibility for a violation. Factors such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A knowing and willful violation of the Antideficiency Act is a Class E felony. See 18 U.S.C. § 3559(a)(5). Punishment may include a $5,000 fine, confinement for two years, or both. Knowing and willful concealment of a violation is a felony. 18 U.S.C. § 4.

XI. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1, DOD 7000.14-R, vol. 14, chs. 4-7; Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995) [hereinafter Supplemental Guidance]; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3,4.

A. Flash Report. The commander of an Army activity at which a suspected violation occurs must send a flash report through command channels to DA within 15 days of discovery. DFAS-IN 37-1, ch. 4, para. 040204.B. For the Air Force, suspected violations must be reported within 10 working days to the cognizant MAJCOM, Field Operating Activity (FOA), or Direct Reporting Unit (DRU) Financial Management organization. See AFI 65-608, para. 3.3.

B. Investigations.

1. The first step is a preliminary review. The MACOM Commander (or commander at next higher level above the activity where the violation occurred) must appoint a team of experts consisting of an individual with resource management experience, an attorney, and an individual with expertise in the functional area in which the violation occurred. This team must conduct the preliminary review to determine whether an Antideficiency Act violation has occurred. For Army activities, the results of the preliminary review must reach DA not later than 90 days from the date of discovery of the potential violation. See Supplemental Guidance. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date.

2. If the preliminary review determines that a violation occurred, the appointing authority must appoint an investigative team to conduct a formal investigation. In the Army, formal investigations are conducted under the provisions of AR 15-6. See Supplemental Guidance; see also DOD 7000.14-R, vol. 14, chs. 4-6. Air Force investigators follow the guidance in AFI 90-301. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months of the date of discovery of the violation. See DOD 7000.14-R, vol. 14, ch. 5.

3. If the investigating officer believes criminal issues may be involved, he should suspend the investigation immediately and consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. See DOD 7000.14-R, vol. 14, ch. 5.

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.

2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. "However, the investigation shall attempt to discover the specific act -- or failure to take an action -- that caused the violation and who was responsible for that act or failure to take an action." DOD 7000.14-R, vol. 14, ch. 5, para. I.

a. Generally, the responsible party will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. Cf. To Dennis P. McAuliffe, B-222048, Feb. 10, 1987 (unpub.).

b. There often will be officials who had knowledge of either factor. The person in the best position to prevent the ultimate error, however, is the highest ranking official who was aware of both factors.

D. Reports to the President and Congress.

1. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-34, para. 32.2; DOD 7000.14-R, Vol. 14, Ch. 7, para. E.

2. Contents of the report.

a. Administrative information;

b. Nature of the violation;

c. Identification of the responsible individual;

d. Cause and circumstances of the violation;

e. Administrative discipline imposed;

f. Actions taken to correct the violation; and

g. Statement of the responsible individual.

XII. CONTRACTOR RECOVERY WHEN THE ACT IS VIOLATED.

A. Recovery Under the Contract.

1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. American Tel. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. See, e.g., Ross Constr. v. United States, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (1965).

3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the "invalid" option. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; Department of Labor--Request for Advance Decision, B-211213, 62 Comp. Gen. 337 (1983).

C. Referral of Claims to Congress. The GAO may refer non-payable claims to Congress. 31 U.S.C. § 3702(d); Campanella Constr. Co., B-194135, Nov. 19, 1979, 79-2 CPD ¶ 361.

Final Discussion Problem: For years, the Army owned an administrative office building adjacent to Fort Mojave. Several months ago, the MACOM Facilities Inspection Team directed the Commander of Fort Mojave to make several upgrades to the building. Fort Mojave's Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that $70,000 O&M was available for the project. Two months later, the contracting officer awarded an $82,000 contract to Constructors, Limited. To date, the contractor has received $40,000 in progress payments. Yesterday, the Engineer learned that, in keeping with the installation closure plan, the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any problems here?

XIII. CONCLUSION.

CONTRACT LITIGATION

I. INTRODUCTION.

II. THE CONTRACT PROCESS.

A. Formation vs. Performance. See page 10.

B. Authority.

1. Constitutional. As a sovereign entity, the United States has inherent authority to contract to discharge governmental duties. United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831). This authority to contract, however, is limited. Specifically, a government contract must:

   a. not be prohibited by law; and

   b. be an appropriate exercise of governmental powers and duties.

2. Statutory.

   a. Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. §§ 2301 - 2316.

   b. Annual DOD Authorization and Appropriation Acts.

3. Regulatory.

   a. Federal Acquisition Regulation (FAR).

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b. Agency supplements (DFARS, AFARS).

III. DISTINGUISHING PROTESTS FROM DISPUTES.

A. Protests. Contract Formation (at or prior to award).

B. Disputes. Performance (after award).

IV. BID PROTESTS.

A. Agency. FAR 33.103; Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

1. Army Material Command (AMC).

2. Army Training and Doctrine Command (TRADOC).

3. National Guard Bureau (NGB).

B. General Accounting Office (GAO).

1. Jurisdiction.

a. The Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-56.

b. Protester must show:

(1) Interested party status.

(2) Timeliness.

(3) Agency violation of procurement statute or regulation, arbitrary or capricious action, or abuse of discretion.

(4) Prejudice.

2. Rules.

a. 4 C.F.R. Part 21.

b. http://www.gao.gov/decisions/bidpro/new.reg/highlite.htm.

3. Process.

a. Protester submits protest in writing.

b. GAO notice/protective orders.

c. Agency's corrective action (ends protest) or administrative report.

d. Protester and Intervenor Comments.

e. Hearing (in selected cases).

f. Decision.

(1) Within 100 days of protest filing.

(2) Express option. Within 65 days.

g. Request for reconsideration.

h. Remedies.

(1) If GAO "sustains" a protest, it then recommends agency actions:

(a) Issue new solicitation;

(b) Terminate contract;

(c) Recompete contract;

(d) Payment of reasonable attorneys' fees and costs and/or bid or proposal preparation.

(2) Agencies generally follow GAO's recommendations.

C. U.S. Court of Federal Claims (COFC).

1. Jurisdiction.

a. Tucker Act. 28 U.S.C. § 1491(b).

b. Administrative Dispute Resolution Act (ADRA) of 1996.

2. Process

a. General Order No. 38.

b. TROs and Preliminary injunctions.

c. Review conducted under Administrative Procedures Act.

d. Administrative record.

e. Limited discovery.

f. Hearings.

g. Post-hearing Briefs.

D. District Courts.

1. Jurisdiction. Does it still exist?

a. Administrative Procedure Act under Scanwell.

b. Administrative Dispute Resolution Act of 1996.

(1) Subsume Scanwell?

(2) ADRA sunset Jan 1, 2001.

2. Procedures are those generally followed in civil litigation.

V. CONTRACT DISPUTES.

A. Armed Services Board of Contract Appeals (ASBCA).

1. Jurisdiction.

a. Contract Disputes Act of 1978 (41 U.S.C. §§ 601-13).

b. ASBCA Charter – broader than CDA.

2. Remedies.

a. Monetary.

b. Nonmonetary.

(1) Contract terminations.

(2) Rights in property.

(3) Compliance with cost accounting standards.

3. Personnel.

a. Army represented by trial attorneys with the Contract Appeals Division.

b. Contractor represented by officers of the business entity or counsel.

c. One Board judge assigned to the case; three judges involved in a decision.

4. Process. See page 9.

a. Timeline can be normal, expedited ($50,000 or less-decision w/in 120 days), accelerated ($100,000 or less-decision w/in 180 days).

b. Before appeal there must be a proper claim and a Contracting Officer's Final Decision

c. Rules. See <http://www.law.gwu.edu/asbca>.

(1) Notice of Appeal.

(2) Pleadings/Agency Rule 4 File.

(3) Discovery.

(4) Hearing (supplement the fact record).

(5) Briefs (proposed facts and argument).

B. U.S. Court of Federal Claims.

1. Jurisdiction.

a. Tucker Act. 28 U.S.C. § 1491(a)(1).

b. Contract Disputes Act of 1978. 28 U.S.C. § 1491(a)(2).

2. Remedies.

a. Monetary.

b. Nonmonetary.

(1) Contract terminations.

(2) Rights in property.

(3) Compliance with cost accounting standards.

3. Personnel.

a. Army represented by attorneys with the DOJ and Army Litigation Division.

b. Contractor represented by counsel.

c. One judge.

4. Process. See <http://www.law.gwu.edu/fedcl/>.

a. Rules. See Rules of the Court of Federal Claims (RCFC).

b. Pleadings/DOJ Call letter/Agency Litigation Report.

c. Discovery.

d. Trial.

VI. APPELLATE AUTHORITY.

A. U.S. Court of Appeals for the Federal Circuit (CAFC) (except for admiralty cases decided at ASBCA-appeal to U.S. District Court).

B. U.S. Supreme Court.

VII. RESOURCES

A. TJAGSA Course Materials.

1. Click on "Publications" at www.jagcnet.army.mil/TJAGSA.

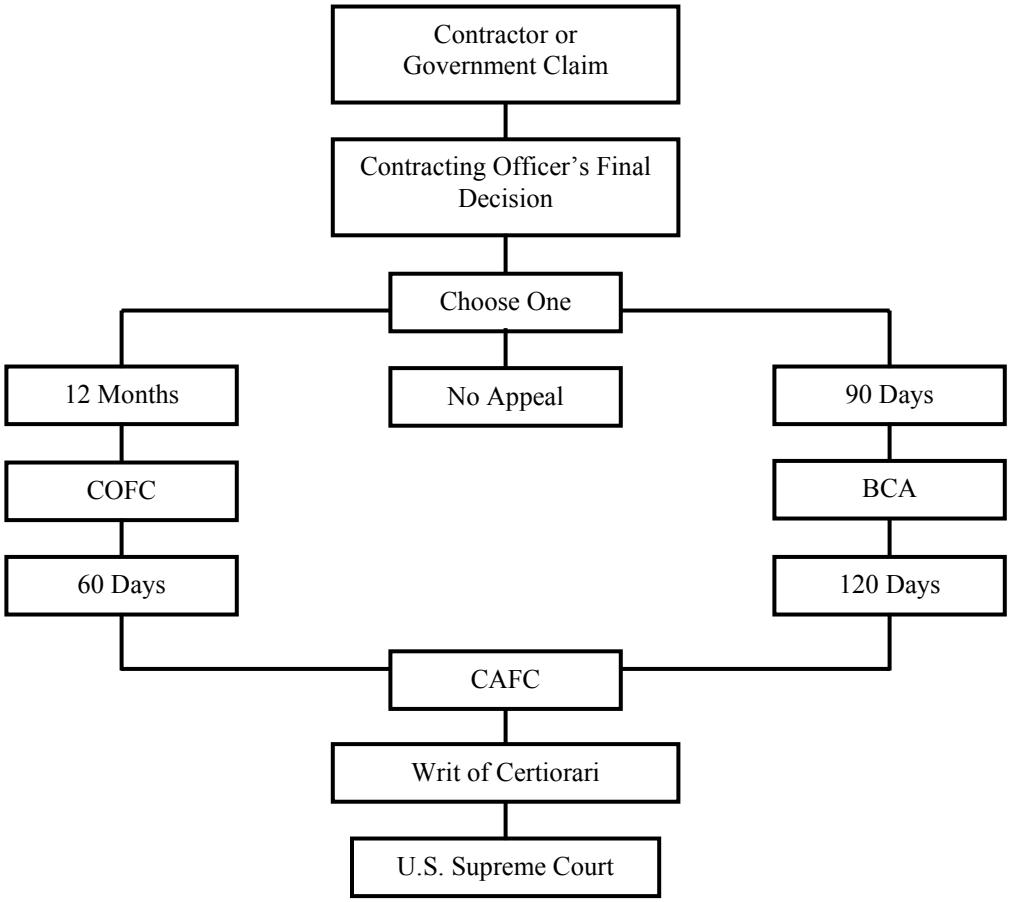
2. Contract Attorneys Course.

B. Contract Litigation Course- held in March of even years.

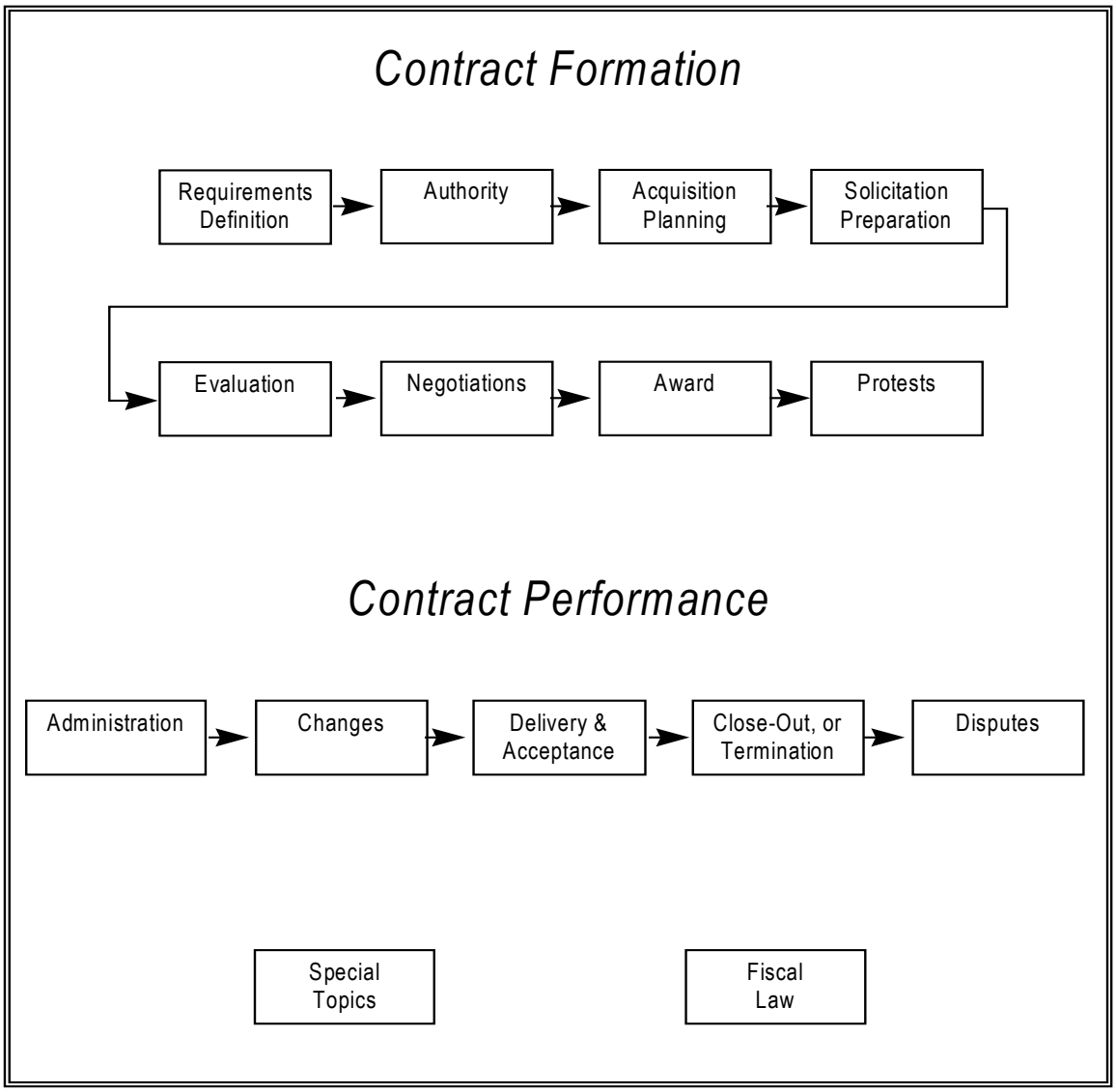
C. LEXIS: Public Contracts Decisions from Comptroller General, BCAs, All Federal Courts.

VIII. CONCLUSION.

The Disputes Process



The Contracting Process



CHAPTER 22

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CHAPTER 22

COMPETITIVE SOURCING[1] AND PRIVATIZATION

In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.[2]

I. INTRODUCTION. Objectives: Following this block of instruction, students will understand:

A. The policies and procedures applicable to competitive sourcing.

B. The policies and procedures applicable to the inventorying of federal positions.

C. The policies and procedures applicable to military housing and utility privatization.

II. COMPETITIVE SOURCING: BACKGROUND.

A. Origins.

1. 1955: The Bureau of Budget issued a bulletin establishing the federal policy to obtain goods and services from the private sector.

2. 1966: The Office of Management and Budget (OMB) issued OMB Cir. A-76, which restated this policy but justified using outsourcing for cost-savings. OMB revised the Circular again in 1967, 1979, 1983, and 1999.

[1] "Competitive sourcing" is the latest term for "outsourcing" and "contracting out."

[2] FEDERAL OFFICE OF MANAGEMENT AND BUDGET CIRCULAR [OMB] A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, ¶ 4.a (Aug. 4, 1983) [hereinafter OMB CIR. A-76].

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3. 1996: The OMB issued a Revised Supplemental Handbook containing new guidance for OMB Cir. A-76. The OMB updated the Revised Supplemental Handbook in June 1999.

B. Past Legislative Roadblocks.

1. National Defense Authorization Act for FY 1988-89 allowed installation commanders to decide whether to study commercial activities for outsourcing. Codified at 10 U.S.C. § 2468(a), this law expired on 30 September 1995. Most commanders opted not to pursue outsourcing for the following reasons:

a. Disruptions to the workforce.

b. Cost of conducting the outsourcing studies.

c. Loss of control over workforce.

2. Other Roadblocks.

a. Department of Defense Appropriations Act for FY 1991 and subsequent DOD appropriations acts prohibited funding OMB Cir. A-76 studies.

b. National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost studies done under OMB Cir. A-76.

C. New Direction for OMB Cir. A-76.

1. 1993: National Performance Review: Reinvent government.

2. 1996: Defense Science Board Task Force on Outsourcing and Privatization: DOD could save 20-40 percent by outsourcing support activities.

3. 1997: Quadrennial Defense Review (QDR): Maintain combat readiness means cutting support functions.

4. 1997: Defense Reform Initiative (DRI): Expanded upon the QDR to propose more streamlining and outsourcing.

III. COMPETITIVE SOURCING GENERALLY.

A. Defined. Competitive Sourcing is the analysis and if appropriate, the transfer of a function previously performed "in-house" by government employees to an private entity, or vice-versa.

B. Policy. See OMB Cir. A-76, para 5. It is the policy of the U.S. Government to:

1. Rely on the commercial sector to provide commercial products and services.

2. Retain inherently governmental functions in-house.

3. Achieve economy and enhance productivity through the use of cost comparisons.

C. Authority and Tools. OMB Cir. A-76; OMB Cir. A-76 Revised Supplemental Handbook (Mar. 1996; Revised 1999).

1. OMB Cir. A-76 embraces the idea of using the commercial sector to provide certain supplies and services for the government if more economical. OMB Cir. A-76, para. 4.a.

a. In its simplest terms, OMB Cir. A-76 is a process for agencies to use to determine if it is cheaper for either the government or the private sector to provide supplies or services.

b. In this process, both the government private sector offerors prepare proposals and submit estimates for the product or service.

2. The Revised Supplemental Handbook to OMB Cir. A-76 attempts to do the following:

   a. Balance the interests of the parties involved,

   b. Provide a level playing field between public and private sector offerors,

   c. Seek the most cost effective means of obtaining commercial products and support services that are needed on a recurring basis, and

   d. Provide new administrative flexibility in the government's make or buy decision process.

3. Scope. The policies and procedures of OMB Cir. A-76 and the Revised Supplemental Handbook apply to all federal executive agencies unless otherwise excluded by law. However, OMB Cir. A-76 and the Revised Supplemental Handbook <u>do not</u>:

   a. Provide authority to enter into contracts.

   b. Authorize contracts that create an employer-employee relationship between the government and the contractor employees.

   c. Justify conversion to contract solely to avoid personnel ceilings or salary limitations.

D. Key Definitions. The heart and soul of competitive sourcing rests on whether an activity is commercial or inherently governmental.

1. Commercial Activity. A commercial activity is one which is operated by a federal agency and which provides a product or service that is or could be obtained from a private sector source. OMB Cir. A-76, para. 6.a; Revised Supplemental Handbook, Appendix 1. Some examples include the following: automatic data processing; audiovisual products and services; food services; maintenance services; transportation services. OMB Cir. A-76, Attachment A; Revised Supplemental Handbook, Appendix 2.[3]

2. Inherently Governmental Function. An inherently governmental function is one so intimately related to the public interest as to mandate performance by government employees. OMB Cir. A-76, para. 6.e; Revised Supplemental Handbook, Appendix 1; OFPP Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101. Inherently governmental functions fall into two broad categories:

   a. The act of governing via the discretionary exercise of government authority. Examples include criminal investigations, prosecutorial and judicial functions, managing and directing the armed forces, and combat, combat support, and combat service support roles.[4]

   b. Monetary transactions and entitlements. Examples include tax collection and revenue disbursements, control of treasury accounts and money supply, and administering public trusts.

E. Exemptions. OMB Cir. A-76, para 7.c. The following activities are exempt from OMB Cir. A-76 and the Revised Supplemental Handbook:

1. Inherently governmental functions.

2. DOD in times of declared war or military mobilization.

3. The conduct of research and development.

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[3] The OMB list is not exhaustive. The OMB cautions agencies to use its suggested list of commercial activities only as a guide.

[4] For a complete list of inherently governmental functions, *see* OMB Cir. A-76, para. 6.e(1). *See also* OFPP Policy Letter 92-1, *Inherently Governmental Functions*, Appendix A. For example, other inherently governmental functions include conducting foreign policy, determining agency policy, approving contract documents, determining contract costs, awarding contracts, and budget decision. OFPP Policy Letter 92-1 also contains a list of services and actions not considered inherently governmental. *Id*. at Appendix B.

F. Exceptions. OMB Cir. A-76 and the Revised Supplemental Handbook permit exceptions to the general policy of relying on the private sector. These exceptions include the following:

1. No Satisfactory Commercial Source Available. OMB Cir. A-76, para. 8.a; Revised Supplemental Handbook, Part I, Chapter 1, para. C.5; FAR 7.303; AR 5-20, para. 2-3, 4-29b; AFI 38-203, para. 1.1.

2. National Defense. National defense interests may justify performing the activity in-house. OMB Cir. A-76, para. 8.b; Revised Supplemental Handbook, Part I, Chapter 1, para. C.1. This exception includes selected military training in military skills, deployable activities, and rotation base.

3. Patient Care. Patient care performed at a government-operated hospital can be retained in-house, if an agency determines that in-house performance would be in the best interest of direct patient care. OMB Cir. A-76, para. 8.c; Revised Supplemental Handbook, Part I, Chapter 1, para. C.2.

4. Cost Comparison. When a cost comparison demonstrates that in-house performance would be cheaper than contractor performance, the government may retain an activity in-house. OMB Cir. A-76, para. 8.d; Revised Supplemental Handbook, Part I, Chapter 1, para. C.8.

5. Core Capabilities. The agency must maintain a minimum core capability of specialized employees to ensure that it can fulfill its mission responsibilities and emergency requirements. Revised Supplemental Handbook, Part I, Chapter 1, para. C.3.

G. DOD Commercial Activities Program: The implementation of OMB Cir. A-76.

1. Authority and Tools: OMB Cir. A-76; Revised Supplemental Handbook; DODD 4100.15; AR 5-20; AFPD 38-6; AFI 38-203, para 1.1.

2. Policy. DODD 4100.15, para D. When implementing a commercial activities program, DOD components must consider the following policy guidance:

a. Ensure DOD mission accomplishment.

b. Achieve economy and quality through competition.

c. Retain governmental functions in-house.

d. Rely on the commercial sector, except when required for national defense, no satisfactory source is available, or when in the best interests of patient care.

e. Delegate decision authority and responsibility to lower organizational levels to give commanders freedom to "intelligently use their resources" while preserving essential wartime capability.

f. Provide placement assistance for displaced federal employees.

IV. THE A-76 STUDY PROCESS.

A. Generally. The A-76 study process sets forth whether—and if so, how—to perform a cost comparison study for a commercial activity. The A-76 study process falls into the following broad areas:

1. Conducting the inventory and review (figuring out what we have).

2. Identifying the players (the team).

3. Preparing the plans.

4. Seeking offers.

5. Choosing a winner.

6. Understanding the post-award review options.

7. Final Decision and implementation.

B. Conducting the Inventory and Review.

1. The Inventory Requirement. 10 U.S.C. § 2468(b); DOD Instr. 4100.33, para. 9. An inventory is a listing of all in-house and contracted commercial activities on an installation. Each agency evaluates all its activities and functions to determine which are inherently government functions and which are commercial activities.

2. The Review Requirement. DOD Instr. 4100.33, para. 9.

a. The agency must review its existing in-house commercial activities to determine whether it should convert them from in-house to contract status. This involves a two-step approach:

(1) The agency must first determine whether the activity must remain in-house for reasons other than lower cost, such as no commercial source available, patient care, etc.

(2) If the agency determines that a commercial activity does not fit one of the categories above, then it may face the requirement of a cost comparison study.

b. Direct Conversions. Activities with 10 or fewer full time equivalent employees may be converted without cost comparison, if the contracting officer determines that fair and reasonable prices cannot otherwise be obtained. Revised Supplemental Handbook, Part I, Chapter 1, para. C.6. The annual Defense Appropriations Act generally prohibits conversions involving more than 10 DOD civilian employees. See Section 8014 of the FY 2000 Defense Appropriations Act, Pub. L. No. 106-76, 113 Stat. 1212, 1234.

c. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of OMB Cir. A-76. Revised Supplemental Handbook, Part II, Chapter 5. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding that there is no requirement for a management plan or MEO as part of streamlined cost comparisons).

C. Identifying the Players.

1. Congress. The installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons perform the function proposed for OMB Cir. A-76 study. DOD in turn, must notify Congress. 10 U.S.C. § 2461(a).

2. Cost Comparison Study Team. A group of functional experts in the agency who prepare several plans (discussed in paragraph H.4, infra) and develop the agency's cost estimate, known as the Most Efficient Organization (MEO).

3. Unions. At least monthly, the installation must keep affected DOD employees notified of developments. 10 U.S.C. § 2467(b).

D. Preparing the Plans.

1. Performance Work Statement (PWS). The PWS serves as the heart of the possible future solicitation. DOD Instr. 4100.33, para. 15(d)(2). The PWS defines the agency's needs, the performance standards and measures, and the timeframe for performance. The PWS is a budget driven document. DOD Instr. 4100.33, para. 17B; Revised Supplemental Handbook, Part I, Chapter 1, para. I.

2. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, para. D.

3. Management Plan. The management plan defines the overall structure for the MEO. This organizational structure serves as the government's proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, para. E; DOD Instr. 4100.33, para. 15(d)(3).

4. Most Efficient Organization (MEO). The MEO describes the way the government will perform the commercial activity and at what cost.

E. Seeking Offers.

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods under the FAR. Revised Supplement Handbook, Part I, Chapter 3, para. H.1.

   a. Sealed bidding.

   b. Two-Step.

   c. Negotiated procurements.

2. Issue the solicitation. The agency issues the solicitation to seek offers from the private sector.

3. Negotiated Procurement. Special rules apply if the agency chooses negotiated procurements. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.

   a. Source Selection Authority (SSA). The Source Selection Authority reviews contract offers and identifies the offer that represents the "best value" to the government. See NWT, Inc; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158. The contracting officer then submits to the Source Selection Authority the government's in-house offer (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, paras. H.3.c-d.

   b. Independent Review. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the Independent Review Officer. This review assures that the government's in-house cost estimate is based upon the same scope of work and performance levels as the best value contract offer. Revised Supplemental Handbook, Part I, Chapter 3, para. H.3.e.

F. Choosing the Winner.

1. The private offeror "wins" the OMB Cir. A-76 study if it beats the in-house or MEO estimate by a minimum cost differential of the lesser of

   a. 10 percent of personnel costs, or

   b. $10 million over the performance period. The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part I, Chapter 4, para. A.1.

2. Otherwise, the MEO "wins" and the installation keeps the commercial activity in-house.

G. Post-Award Review.

1. The Agency Appeal Process. FAR 7.307; DOD Instr. 4100.33, para. 18; Revised Supplemental Handbook, Part I, Chapter 3, para. K.

   a. OMB Cir. A-76 requires agencies to develop an internal appeal process to challenge cost comparison decisions.

      (1) The agency must receive appeal within 20 calendar days of announcement of tentative decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.b. <u>But</u> <u>see</u> <u>Apex Int'l Management Servs., Inc.</u>, B-228885.2, Jan. 6, 1988, 88-1 CPD ¶ 9 (finding low bidder <u>not</u> bound by agency time limits when rebutting challenge to its standing to receive award); FAR 52.207-2 (providing for a public review period of 15-30 <u>working</u> days, depending upon the complexity of the matter);

      (2) The appeal must be based on noncompliance with the requirements and procedures of OMB Circular A-76 or specific line items on Cost Comparison Form; and

(3) The appeal must demonstrate that information has been wrongly withheld or the result of appeal would change cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. K.1.

b. Only "interested parties" may submit agency appeals. This encompasses directly affected parties: federal employees and their representative organizations; bidders; and offerors. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.

c. Decision on Appeal. The agency should provide for a decision within 30 days after the Appeal Authority received the appeal. Revised Supplemental Handbook, Part I, Chapter 3, para. K.8.

2. Protests to the General Accounting Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.

a. Standing.

(1) Only an "interested party" as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).

(2) Unlike the agency appeal process, "interested party" does not encompass affected employees or their labor unions. See Part V.B.2., infra.

b. Timing.

(1) The protester must exhaust the agency appeal process. See Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process); Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 (dismissing cost comparison protest as premature).

(2) The protester must file the protest within 10 working days of agency decision. See Base Services, Inc., B-235422, Aug. 30, 1989, 89-2 CPD ¶ 192 (finding a protest filed during the 15-day review period mandated by FAR 7-307 was timely); Northrop Worldwide Aircraft Servs., Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (finding appeal filed 10 working days after agency decision); Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (finding irrelevant if the protester requests reconsideration by agency). Note: New bid protest rules have reduced the time for filing a protest to 10 calendar days.

c. Standard of Review. When reviewing cost comparison decisions, the GAO applies the following standard of review:

(1) To determine "whether the comparison was conducted reasonably";

(2) To determine if the agency complied with applicable procedures; and

(3) If the agency failed to follow procedures, to determine if the failure could have materially affected the outcome of the cost comparison.

d. Trends. From the GAO cases decided since late 1998, several trends have emerged in A-76 study process protests.

(1) The A-76 process is a contracting process and the GAO will treat it as such. See, e.g., NWT, Inc., PharmChem Laboratories, Inc., B-282988, B-280988.2, Dec 17, 1998, 98-2 CPD ¶ 158 (holding that agencies could apply best value to cost comparison studies); Omni Corp., B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (applying agency debriefing requirement to cost comparison studies).

(2) As a contracting process, the cost study procedures must be fair. See, e.g., Rice Servs, Ltd., B-284997, June 29, 2000, 2000 U.S. Comp. Gen. LEXIS 106 (finding that the Navy failed to evaluate fairly the contractor and government proposals); IT Facility Services-Joint Venture, B-285841, Oct. 17, 2000 (determining if a conflict of interest existed for government evaluators in the cost comparison process); DZS/Baker LLC, Morrison Knudsen Corp., B-281224, et seq., Jan. 12, 1999, 99-1 CPD ¶ 19 (analyzing conflicts of interest in cost comparison studies).

(3) Within reason, the GAO will accord agencies discretion in their cost studies. See RTS Travel Serv., B-283055, Sept. 23, 1999, 99-2 CPD ¶ 55 (holding agency did not err in adding contract administration costs to the contractor's proposal); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (holding agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the management plan and MEO; Bay Tankers, Inc., B-230794, July 7, 1988, 88-2 CPD ¶ 18 (holding that the GAO will not look at MEO staffing pattern absent fraud or bad faith).

(4) The General Accounting Office will not review the agency's decision not to issue a solicitation for cost comparison purposes. Inter-Con Security Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187.

3. Court Challenges.

a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provide the U.S. Court of Federal Claims (COFC) and the district courts of the United States with concurrent jurisdiction to hear pre-award and post-award bid protests. Specifically, each court independent of the other has jurisdiction to hear protests that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).

b. Standing.

(1) Only an "interested party" under the ADRA has standing to challenge procurement decisions, though the term is not limited to just those parties covered by CICA. See e.g., Phoenix Air Group, Inc. v. United States, 46 Fed. Cl. 90 (2000); Winstar Communications, Inc. v. United States, 41 Fed. Cl. 748 (1998); CCL, Inc. v. United States, 39 Fed. Cl. 780 (1997).

(2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities. See Part V.B.3., infra.

H. Final Decision and Implementation.

1. Once the appeal period has expired, then the Decision Summary is sent to the agency for approval by the Secretary of Defense and notice to Congress. 10 U.S.C. § 2461(a).

2. The approval is either for award to the contractor or retention in house.

3. If the MEO wins the cost study, then it will be implemented upon the commander's approval.

4. Contractor Implementation.

a. Reviews. Contracted commercial activities will be continually monitored to ensure that performance is satisfactory and cost effective.

b. If contractor defaults during the first year:

(1) Award to the next offeror in line at an adjusted price for the remainder of the contract term.

(2) If the MEO is the next low, implement the MEO if feasible.

(3) If contract cannot be performed by the next offeror or MEO (as above), issue a new solicitation without a cost comparison study, reprocure from an original contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house. Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.

(4) If the contractor defaults after the first year, seek interim contract support and solicit a new contractor, reprocure from a contractor offering a reasonable price, or initiate a transfer cost comparison to bring the activity back in house.

5. MEO Implementation: Post-MEO Performance Reviews.

a. When services are performed in-house following a cost comparison, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented and deficiencies are not corrected, re-award to the next offeror if feasible, or initiate a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1.

b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year. If changes in functions or workloads occur, the performance work statement (PWS) should be modified and such modification should be fully documented.

c. Reviews will be conducted on at least 20 percent of the in-house functions after a full year of performance. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

V. CIVILIAN PERSONNEL ISSUES.

A. Civilian Personnel Management.

1. The servicing Civilian Personnel Office must coordinate with management officials, employees, and union officials to minimize personnel turbulence and adverse effects on employees. AR 5-20, para. 3-1; AFCAPI, para. 8.4.4.

2. Commanders must ensure that the Civilian Personnel Office is brought into the planning, review, and conduct of cost comparison studies from the beginning. AR 5-20, para. 3-1; AFCAPI, para. 8.4.1.

3. As noted earlier, the installation must notify DOD, through channels, of its intent to conduct a cost comparison if 50 or more persons (civilians) perform the function proposed for OMB Cir. A-76 study. DOD, in turn, must notify Congress. 10 U.S.C. § 2461(a).

4. At least monthly during the conduct of a cost competition or direct conversion study, commanders shall consult with civilian employees who will be affected by the study and consider their views on the development and preparation of the performance work statement and the management study. 10 U.S.C. § 2467.

   a. At the earliest possible stages, affected parties will have the opportunity to participate in the development of documents and proposals, including the performance standards, performance work statement, management plans and the development of in-house cost estimates. Revised Supplemental Handbook, Part I, Chapter 1, para. G.

   b. Upon issuance, a solicitation used in a cost comparison will be made available to directly affected employees and their representatives for comment. They will be given sufficient time to review the document and submit comments before final receipt of offers from the private sector. Revised Supplemental Handbook, Part I, Chapter 1, para. G.

5. Reduction-in-Force Planning. The Civilian Personnel Office must provide sufficient lead-time to issue Reduction-in-Force (RIF) notices to ensure a timely transition for the cost comparison decision. Every reasonable effort will be made to place or retrain displaced civilian employees. If no vacancies exist or are projected, coordinate with state employment offices for retraining opportunities under the Job Training Partnership Act. Commanders should make every effort to help separated employees find continuing employment elsewhere, especially through the right of first refusal. See generally AR 5-20, para. 3-4; AFCAPI, para. 8.4.4.1.1.

B. Federal Employee/Union Remedies.

1. Agency Appeals. Federal employees and their representative organizations are interested parties for purposes of agency appeals of cost comparison commercial activity studies. Revised Supplemental Handbook, Part I, Chapter 3, para. K.2.

2. GAO Protests. Federal employees, as well as labor unions representing potentially displaced federal workers, do not have standing to challenge a procurement to contract out services that were previously performed by government employees, because they are not "actual or prospective bidders." American Fed'n of Gov't Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed'n of Gov't Employees, B-223323, 86-1 CPD ¶ 572; American Fed'n of Gov't Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.

3. Court Challenges. Federal employees and labor unions have had limited success challenging an agency decision to outsource positions.

a. AFGE, AFL-CIO, AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000)(holding that federal employees and their unions lacked standing as they were not within the zone of interests protected by the statutes that they alleged were violated).

b. AFGE v. United States, 104 F. Supp. 2d 58 (D.C. Dist. Ct 2000) (holding that federal employees and their unions did have standing to challenge a direct conversion to preferentially-treated Native American firms pursuant to Section 8014 of the FY 2000 Defense Appropriations Act).

c. AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding that displaced federal employees and their unions did not have standing under 10 U.S.C. § 2462 to challenges the Army's decision to award two contracts to private contractors, but had standing here under the Arsenal Act (10 U.S.C. § 2542)).

d. AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding that governmental employees and their labor union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).

e. National Air Traffic Controllers Ass'n v. Pena, 78 F.3d 585 (6th Cir. 1996)(not recommended for full-text publication)(holding that employees had standing to challenge the agency's determination that their positions were not inherently governmental functions).

f. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding that the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).

g. NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding that displaced federal workers and their unions do not have standing to challenge the A-76 cost comparison process).

4. Grievances. OMB Cir. A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

C. Right of First Refusal: Generally. FAR 52.207-3.

1. The clause reads as follows:

> The Contractor shall give the Government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards. Within 10 days after contract award, the Contracting Officer will provide to the Contractor a list of all Government employees who have been or will be adversely affected or separated as a result of award of this contract.

2. The right of first refusal extends only to permanent employees. It does not extend to temporary employees. A union has associational standing to challenge the granting of this right. See National Maritime Union of America v. Commander, Military Sealift Command, 824 F.2d 1228 (1986). The contractor shall report to the Contracting Officer the names of individuals identified in the list who are hired within 90 days after contract performance begins. This report shall be forwarded within 120 days after contract performance begins.

D. Right of First Refusal: Relationship with Conflict of Interest Laws.

1. In most instances, federal employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact when and if they may exercise their right of first refusal.

2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.

   a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during an OMB Cir. A-76 study.

b. Reporting Employment Contacts (41 U.S.C. § 423(c)).

(1) FAR 3.104-3 generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:

(a) Management studies;

(b) Preparation of in-house cost-estimates;

(c) Preparation of the MEO; or

(d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

(2) MEO role. Probably not required to report employment contacts.

(3) PWS role. Consider employee's role: technical only?

c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding $10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding $10 million;

(ii) Award modification of contract or subcontract exceeding $10 million;

(iii) Award task or delivery order exceeding $10 million;

(iv) Establish overhead rates on contract exceeding $10 million;

(v) Approve contract payments exceeding $10 million; or

(vi) Pay or settle a contract claim exceeding $10 million.

(2) No exception to one-year ban for offers of employment pursuant to right of first refusal. Thus, employee performing any of the listed duties or making the listed decisions on cost comparison resulting in a contract exceeding $10 million is barred for one year after performing such duties from accepting compensation/ employment opportunities from contract via the right of first refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.[5]

   a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.

   b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the "intent to influence."

   a. The ban may be lifetime, for two years, or for one year, depending on the employee's involvement in the matter.

   b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves "specific parties."

   c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the right of first refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

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[5] In January 1999, the GAO sustained a cost comparison study protest because 14 of the 16 agency evaluators held positions subject to being contracted out. The GAO found an organizational conflict of interest under FAR Subpart 9.5. DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19. OMB subsequently issued guidance stating that it is a "better business practice" to limit participation on source selection teams of those personnel whose jobs are involved in a cost comparison. OMB Circular No. A-76 (Revised) Transmittal Memorandum No. 22 (Aug. 31, 2000), 65 Fed. Reg. 54,568-70 (2000). Accordingly, "individuals who hold [affected] positions in an A-76 study should not be members of the Source Selection Team, unless an exception is authorized by the head of the contracting activity." *Id.* In October 2000, the GAO found that source selection evaluation board evaluators whose positions would not be directly affected by the cost comparison study did not have conflict of interests. IT Facility Services-Joint Venture, B-285841, Oct. 17, 2000.

VI. FEDERAL ACTIVITIES INVENTORY REFORM ACT (FAIR ACT) OF 1998," Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

A. Generally. The FAIR Act addresses certain parts of the competitive sourcing process.

1. Key features:

a. Codifies the definition of "inherently governmental function." The "new" statutory definition mirrors the definition of inherently governmental function already found in OFPP Policy Letter 92-1, Inherently Governmental Function, para. 5.

b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities) performed by federal (civilian) employees. After mutual consultation, both OMB and the agency will make the list public. The agency will also forward the list to Congress.

c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers:

(1) A private sector source that is:

(a) an actual or prospective bidder for any contract (or other form of agreement) to perform the activity, and

(b) has a direct economic interest in performing the activity that would be adversely affected by a decision not to procure the activity from the private sector;

(2) A representative of any business or professional group that includes those private sector sources in its membership;

(3) An officer or employee of an organization within an executive agency that is an actual or prospective offeror to perform the activity; and

(4) The head of any labor organization referred to in 5 U.S.C. § 7103(a)(4) that includes within its membership those officers or employees.

d. Requires agencies to use a competitive process to select a private sector source, except as provided by law, regulation, or circular.

e. Requires agencies to conduct "realistic and fair" cost comparisons when deciding whether to contract with a private sector source.

B. OMB Guidance on the FAIR Legislation.

1. Congress directed the OMB to issue guidance to implement the FAIR. On 1 March 1999, the OMB issued draft guidance for public comment. The draft guidance is at 64 Fed. Reg. 10031 (March 1, 1999). After receiving public comments, the OMB issued its final guidance on 24 June 1999. 64 Fed. Reg. 33927 (June 24, 1999).

2. To implement the FAIR, the OMB changed both OMB Cir. A-76 and its Revised Supplemental Handbook. The key provisions of the OMB guidance are as follows:

a. *Revised Supplemental Handbook, Part I, Chapter 1, para. A:* The OMB Guidance added a reference to the FAIR Act in the first sentence. As revised, Part I of the Revised Supplemental Handbook states that it contains the "principles and procedures" for implementing the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 1.

b. *Revised Supplemental Handbook, Part I, Chapter 1, para. B:* The OMB Guidance added a reference to the FAIR Act's definition of inherently governmental function. As revised, the Revised Supplemental Handbook states that its definition of inherently governmental function conforms with the one in the FAIR Act. A similar revision is found in OMB Cir. A-76, para. 6.e.

c. *Revised Supplemental Handbook, Part II, Chapter 1, para. A.1:* The OMB guidance added a reference to the FAIR Act in the first sentence. As revised, the Revised Supplemental Handbook states that it contains the "generic and streamlined cost comparison guidance" to comply with the FAIR Act.

d. *Revised Supplemental Handbook, Appendix 2:* The OMB guidance changed the name from the OMB Circular No. A-76 Inventory" to the "Commercial Activities Inventory." The OMB guidance further revised Appendix 2 as follows:

(1) *Paragraph A*: The OMB Guidance added the FAIR Act's inventory requirement and 30 June due date. It also added two additional data elements to the agency's description of a commercial activity: the year the activity first appeared on the inventory under FAIR, and the agency point of contact responsible for the activity. A similar revision is found in OMB Cir. A-76, para. 10.

(2) *Paragraph G (new):* The OMB guidance added the FAIR Act's requirements to review and publish the inventories and the process "interested parties" can use to challenge the inventory. A similar revision is found in OMB Cir. A-76, paras. 6.h, 10.

(3) *Paragraph H (new):* The OMB guidance added the FAIR Act's requirements for agencies to review their inventories and use a competitive process, with a cost comparison procedure, when considering contracting with the private sector for the performance of an activity on the inventory.

C. The FAIR Lists.

1. Under the OMB guidance, agencies are required to list the "noninherently governmental activities," using "reason" and "function" codes.

   a. The reason codes would show whether or not the agency believed that the commercial activity would be subject to a cost study, and would include those commercial activities that cannot be competed because of a legislative or other exemption.

   b. The function code characterizes the type of activity that the agency performs.

2. The OMB has released the names of the agencies that have published their lists. See 64 Fed. Reg. 52,809 (1999) (providing notice of the first 52 agencies that have published their lists); 64 Fed. Reg. 58,641 (1999) (providing notice that NASA and the Department of Energy have published their lists); 64 Fed. Reg. 73,595 (1999) (providing notice that DOD published its list).

3. Several interested parties have challenged FAIR Act inventories from certain agencies, such as NASA, the Environmental Protection Agency, and the Department of Commerce.

D. Reactions to the FAIR Act Lists.

1. General Accounting Office. The GAO has released several reports assessing how agencies have implemented the FAIR Act.[6] The reports have noted the following issues and deficiencies:

   a. The decisions agencies made about whether or not activities were eligible for competition and the reasons for those decisions.

   b. The processes agencies used to develop their FAIR Act inventories.

[6] GENERAL ACCOUNTING OFFICE, COMPETITIVE CONTRACTING: PRELIMINARY ISSUES REGARDING FAIR ACT IMPLEMENTATION, REPORT NO. GAO/T-GGD-00-34 (Oct. 28, 1999).

c. The usefulness (or uselessness) of the FAIR Act inventories.

d. The need for additional information in future FAIR Act inventories.

2. Congressional Testimony. Several individuals testified before the House Committee on Government Reform on 28 October 1999 about the FAIR Act implementation. These comments may be summarized as follows:

a. The OMB guidance is inadequate and did not carry out the intent of Congress when it passed the FAIR Act.

b. The completed lists are difficult to access and the OMB should make them centrally available.

c. Congress should impose a moratorium on outsourcing until a complete picture of the true size of the federal contracting workforce is available.

VII. DOD COMPETITIVE SOURCING REPORTS/STUDIES.

A. Early on in the competitive sourcing fray, the General Accounting Office reviewed the DOD's cost savings efforts with mixed results.[7] The General Accounting Office noted that DOD faced several challenges in conducting cost studies with the goal of saving significant dollars. Some of the challenges the General Accounting Office spotted included the following:

1. Costs savings of 20-40 percent overstated for several reasons:

a. DOD derived the projected savings from limited database information; and

b. DOD has the potential to save money with large omnibus contracts, but these tools have their own constraints.

[7] *See* GENERAL ACCOUNTING OFFICE, OUTSOURCING DOD LOGISTICS: SAVINGS ACHIEVABLE BUT DEFENSE SCIENCE BOARD PROJECTIONS ARE OVERSTATED, Report No. GAO/NSIAD-98-48 (Dec. 8, 1997); GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, Report No. GAO/NSIAD-97-86 (Mar. 11, 1997).

2. Historical impediments to competitive sourcing, such as:

a. Lack of resources to conduct OMB Cir. A-76 studies as a result of downsizing and civilian personnel cuts.

b. Time limits for studies are short. The Revised Supplemental Handbook contains limits for cost comparison studies: 18 months for single activities, 36 months for multiple activities. DOD is also constrained by statutory time limits. See Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8026, 112 Stat. 2279, 2302 (1998).

c. Legislative constraints on competitive sourcing, such as congressional notification of cost studies and annual reports to Congress. In addition, 10 U.S.C. § 2465 precludes outsourcing of firefighters and security guards, except under limited circumstances.

B. The General Accounting Office evaluated DOD's competitive sourcing efforts and assigned DOD a "report card" of sorts.[8] The General Accounting Office reviewed completed competitions between October 1995 and March 1998; reviewed the completion time, savings produced; and identified problems in implementing the results. Some of the key results the General Accounting Office focused on are as follows:

1. Completed cost studies totaled 53, involving 5757 positions (3226 military and 2531 civilian). Of the 53 competitions, 43 involved single functions (such as grounds maintenance) and 10 involved multiple functions (such as base operating support contracts). Of the completed cost studies, 85 percent belonged to the Air Force. The private sector won 60 percent of the completed cost studies.

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[8] GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: RESULTS OF RECENT COMPETITIONS, Report No. GAO/NSIAD-99-44 (Feb. 23, 1999). For a companion GAO report, see GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: QUESTIONS ABOUT GOALS, PACE, AND RISKS OF KEY REFORM INITIATIVE, Report No. GAO/NSIAD-99-46 (Feb. 22, 1999). The GAO has issued other recent reports. See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, GAO/NSIAD 99-152 (July 21, 1999); GENERAL ACCOUNTING OFFICE, A-76 NOT APPLICABLE TO AIR FORCE 38TH ENGINEERING INSTALLATION WING PLAN, Report No. GAO/NSIAD-99-73 (Feb. 26, 1999); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: KEY ELEMENTS OF FEDERAL BUILDING AND FACILITY PARTNERSHIPS, Report No. GAO/GGD-99-23 (Feb. 3, 1999); GENERAL ACCOUNTING OFFICE, DEFENSE HEADQUARTERS: STATUS OF EFFORTS TO REDUCE HEADQUARTERS PERSONNEL, Report No. GAO/NSIAD-99-45 (Feb. 17, 1999); GENERAL ACCOUNTING OFFICE, GOVERNMENT MANAGEMENT: OBSERVATIONS ON OMB'S MANAGEMENT LEADERSHIP EFFORTS, Report No. GAO/T-GGD/AIMD-99-65 (Feb. 4, 1999)

2. DOD performed the cost studies generally within the established time frames. The average completion time was 18 months for single functions and 30 months for multiple functions.

3. DOD's projected cost savings of $528 million is subject to change over time.

4. DOD has experienced few problems implementing the results of the cost studies. To date, however, many of the completed studies have been in effect for an average of 15 months or less. Thus, the General Accounting Office noted that it could not offer a meaningful assessment of performance.

C. Lessons Learned.

1. In 1999, the GAO also evaluated the DOD's competitive sourcing process for lessons learned.[9]

2. The report offered the following observations:

a. The DOD has improved its competitive sourcing studies, but needs to devote more time to identify and disseminate best practices DOD-wide.

b. The DOD has improved the quality of the performance-based work statements for the cost studies, but has limited efforts to develop standard.

VIII. HOUSING PRIVATIZATION.

A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership, control and responsibility, and not just a transfer of performance.

[9] GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS, REPORT NO. GAO/NSIAD 99-152 (July 21, 1999).

B. Authority. 10 U.S.C. §§ 2871-85 provides temporary authority for military housing privatization. This legislation expires in 2001 (although the draft FY 2001 National Defense Authorization Act plans to extend such authority for an additional five years).

1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

2. Secretary may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:

   a. Direct loans and loan guarantees to private entities.

   b. Build/lease authority.

   c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

   d. Rental guarantees.

   e. Differential lease payments.

   f. Conveyance or lease of existing properties and facilities to private entities.

3. Establishment of Department of Defense housing funds.

   a. The Department of Defense Family Housing Improvement Fund.

   b. The Department of Defense Military Unaccompanied Housing Improvement Fund.

C. Goals and Projects.

1. Goals. The DOD goals for the housing privatization process are twofold:

   a. The stated goal is to eliminate all inadequate family housing by 2010.

   b. The unstated goal is to get the services out of business of family housing ownership.

2. Current Army Housing Privatization Projects.

   a. Ft. Carson awarded a 50-year contract on September 30, 1999, for the privatization of 1,823 existing family housing units, and the construction of 840 new units.

   b. Ft. Hood awarded a 50-year contract on June 28, 2000, for the privatization of 5,482 existing family housing units, plus the construction of 1149 new units.

   c. Ft. Lewis awarded a 50-year contract on August 30, 2000, for the privatization of 3,589 existing family housing units, plus the construction of 759 new units.

   d. Ft. Meade (2,862 existing units, plus 308 new units): currently accepted proposals from contractors.

   e. The Army is proposing 16 additional family housing privatization projects from FY02 to FY05.

D. Implementation.

1. The service conveys ownership of existing housing units, and leases the land upon which they reside for up to 50 years.

2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.

3. The contractual agreement may include provisions regarding:

a. The amount of rent the contractor may charge military occupants (rent control).

b. The manner in which soldiers will make payment (allotment).

c. Rental deposits.

d. Loan guarantees to the contractor in the event of a base closure of realignment.

e. Whether soldiers are required to live there.

f. The circumstances under which the contractor may lease units to nonmilitary occupants.

E. Issues and Concerns.[10]

1. Loss of control over family housing.

2. The affect of long-term agreements.

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[10] *See* GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE, Report No. GAO/NSIAD-00-71 (March 30, 2000); GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: PRIVATIZATION OFF TO A SLOW START AND CONTINUED MANAGEMENT ATTENTION NEEDED, Report No. GAO/NSIAD-98-178 (July 17, 1998).

a. Future of installation as a potential candidate for housing privatization.

(1) DOD must determine if base a candidate for closure.

(2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.

b. Potential for poor performance or nonperformance by contractors.

(1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

(2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

3. Affect on federal employees.

a. The privatization of housing will result in the elimination of those government employee positions which support family housing.

b. Even other garrison directorates/activities that support family housing will result in the elimination of jobs/positions (e.g., DECAM).

4. Prospects of civilians living on base.

a. Civilians allowed to rent units not rented by military families.

b. This prospect raises some issues, such as security concerns and law enforcement roles.

IX. UTILITIES PRIVATIZATION.

A. Authority. 10 U.S.C. 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.

B. Implementation.

1. The DOD goal is to privatize all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique security reasons or when privatization is uneconomical. Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems. While DRID #49 does not specifically direct the privatization of steam, hot and chilled water, and telecommunications at this time, it does not prohibit such privatization. The overall objective is to get DOD "out of the business" of owning, managing, and operating utility systems by privatizing them.

2. In FY99, the Army privatized (or exempted) 37 systems. Current plans are to privatize 100 systems in FY00, 100 systems in FY01, and 83 systems in FY02.

3. Requests for exemption from utility systems privatization must be approved by the Secretary of the Army. Exemption request, which must be forwarded through the appropriate MACOM to OACSIM, must include:

a. Letter from installation commander to MACOM request exemption from privatization;

b. Endorsement by MACOM to OACSIM;

c. Written synopsis of process conducted to solicit for award, including analysis, alternatives, feasibility, and results;

d. Completed economic analysis; and

e. Separate letters from the contracting officer and legal counsel concurring with the analysis, review, and decision to request exemption. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).

4. Installations shall use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C. §2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. §2688(c)(3).

5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. §2688(c).

6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.

7. Installations must submit notice to Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of the utility privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the Department concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. §2688(e).

C. Current Legal Issues.

1. The Affect of State Law and Regulation. State utility law and regulation, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply to federal utility privatization. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding that 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Bundling. An agency may employ restrictive provisions or conditions (such as bundling) only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.

3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are but one option. Presently, the Army General Counsel's Office does not favor the use of reversionary clauses as the means to accomplish this end.

4. Affect of A-76. Privatization of Army-owned utility systems does not involve OMB A-76 (no cost comparison required).

5. Right of First Refusal. Presently, private sector companies already operate many Army installation utility plants. As the OMB Circular A-76 rules do not apply to utility privatization actions, there is no automatic "right of first refusal" for affected government employees. However, the privatization negotiations may include the placement of current personnel.

6. Model Solicitation for Utilities System Privatization. The Defense Energy Support Center (DESC) is presently working on a model solicitation that installations may use for utility system privatization efforts.

X. CONCLUSION.

A. Service contracting plays a major role in installation contracting, especially in the wake of the competitive sourcing push. Moreover, competitive sourcing and privatization projects are prevalent within DOD.

B. As attorneys, you may find yourself advising commanders and functional experts on the competitive sourcing and privatization process. Thus, you should familiarize yourself with several substantive areas, such as labor, standards of conduct, and contracting.

APPENDIX A

COMPETITIVE SOURCING AND PRIVATIZATION REFERENCES

1. 10 U.S.C. §§ 2460-2469.
2. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382.
3. Federal Office of Management and Budget Circular A-76 (4 Aug. 1983; Revised 1999), Performance of Commercial Activities.
4. Federal Office of Management and Budget Circular A-76 Revised Supplemental Handbook, Performance of Commercial Activities (March 1996; Revised 1999).
5. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 7.3 (June 1997).
6. General Servs. Admin., et.al., Federal Acquisition Reg. Subpt. 9.5 (June 1997).
7. General Servs. Admin., et.al., Federal Acquisition Reg., Pt. 37 (June 1997).
8. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).
9. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985).
10. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct 1997).
11. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (July 1998).
12. Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracts, 59 Fed. Reg. 26,818 (1994).
13. Office of Federal Procurement Policy Letter 92-1, Inherently Governmental Functions, 57 Fed. Reg. 45,101 (1992).
14. Office of Federal Procurement Policy Letter 91-2, Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (1991).
15. U.S. Dep't of Defense Reform Initiative Directive #49-Privatizing Utility Systems (23 Dec. 1998).
16. Memorandum, Acting General Counsel, U.S. Dep't of Defense Office of the General Counsel to the General Counsels of the Military Departments, subject: The Role of State Laws and Regulations in Utility Privatization (24 Feb 2000).
17. U.S. Dep't of Army, Privatization of Army Utility Systems Brochure (May 1999).
18. U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000).
19. U.S. Dep't of Air Force Pol. Dir. 38-2, Manpower (Mar. 1995).
20. U.S. Dep't of Air Force Pol. Dir. 38-6, Outsourcing and Privatization (Sep. 1997).
21. U.S. Dep't of Air Force Instr. 38-203, Commercial Activities Program (Apr. 1994).
22. U.S. Dep't of the Air Force, Commercial Activities Program Instruction (AFCAPI) (July 1998)
23. U.S. Dep't of Navy, Secretary of the Navy Instr. 4860.44F, Commercial Activities (Sep. 1989).

APPENDIX B

COMPETITIVE SOURCING WEB SITES

http://www.defenselink.mil (General topics of interest in DOD)

http://www.hqda.army.mil/acsim (Army competitive sourcing)

http://www.afcqmi.randolph.af.mil (Air Force competitive sourcing)

http://www.fac131.navfac.navy.mil/csso (Navy competitive sourcing)

http://www.arnet.gov (Acquisition reform network)

http://www.acq.osd.mil/iai/hrso (DOD housing privatization home page)

http://gao.gov (GAO reports and decisions)

CHAPTER 23

MILITARY LITIGATION IN FEDERAL COURTS

I. REFERENCES.

A. Federal Civil Judicial Procedure and Rules (West 2000).

B. DOD Directive 5405.2, Release of Official Information in Litigation and Testimony by DOD Personnel as Witnesses (23 July 1985) (reprinted in Appendix C, AR 27-40).

C. DOD Directive 5145.1, General Counsel of the Department of Defense (15 December 1989).

D. Army Regulation No. 27-40, Litigation (19 September 1994).

E. SECNAV Instruction 5820.8A, Release of Official Information for Litigation Purposes and Testimony by DON Personnel (27 August 1991).

F. Manual of the Judge Advocate General (JAGMAN), JAGINST 5800.7C (3 OCT 90).

G. Air Force Instruction 51-301, Civil Litigation (25 July 1994).

H. United States Attorney's Manual, Department of Justice (OCT 1997 w/ June 1998 Update).

II. INTRODUCTION.

III. RESPONSIBILITY FOR LITIGATION.

A. United States Department of Justice.

1. Department of Justice (DOJ) exercises plenary authority over litigation involving the interests of the United States.

> "Except as otherwise authorized by law, the conduct of litigation in which the United States, any agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General." **28 U.S.C. § 516.**

"Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties**." 28 U.S.C. § 519.**

2. Organization of the Department of Justice

a) General.

b) Civil Division.

(1) Federal Programs Branch.

(2) Torts Branch.

(3) Commercial Branch.

(4) Appellate Staff.

B. United States Attorneys.

1. One United States Attorney appointed by the President for each judicial district. **28 U.S.C. § 541.**

2. Assistant United States Attorneys (AUSA) are appointed by the Attorney General. **28 U.S.C. § 542.**

3. Responsibility of the United States Attorney.

a) General.

"[E]ach United States Attorney, within his district, shall . . . (2) prosecute and defend for the Government, all civil actions, suits or proceedings in which the United States is concerned." **28 U.S.C. § 547.**

b) Retained and delegated cases.

4. Organization of the United States Attorney's Office.

C. Department of Defense. Office of General Counsel.

1. Provide Litigation Coordination Among Military Departments and with DOJ.

2. Determine DoD Position and Resolve Disagreements on Specific Legal Issues

D. Department of the Army.

1. "Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General counsel, TJAG is responsible for litigation in which the Army has an interest." Army Regulation 27-40, para. 1-4b.

2. Within DA, the Chief, Litigation Division, has primary responsibility for supervising litigation of interest to the Army. AR 27-40, para. 1-4d

3. Only attorneys designated by TJAG may appear as counsel before any civilian court or in any preliminary proceeding (i.e. deposition) in litigation in which the Army has an interest. AR 27-40, para. 1-6a. Requests for appearance as counsel are processed through Litigation Division to the Personnel, Plans, and Training Office, OTJAG. AR 27-40, para. 1-6b.

4. Special Assistant U.S. Attorneys (SAUSAs) and DOJ Special Attorneys. See AR 27-40, para. 1-4e. Army judge advocate attorneys and civilian attorneys, when appointed as SAUSAs under 28 U.S.C. § 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

a) Felony and misdemeanor prosecutions in Federal Court.

b) SAUSAs for civil litigation.

c) Special Attorneys assigned by DOJ (only in civil litigation).

5. Additional areas of DA involvement in litigation include:

a) Contract Law Division, OTJAG.

b) Legal Representatives of the Chief of Engineers.

c) Contract Appeals Division, USALSA.

(1) Trial Branch I and Bid Protest

(2) Trial Branch II

(3) Trial Branch III

d) Regulatory Law and Intellectual Property Law Division, USALSA.

(1) Regulatory Law Office

(2) Intellectual Property Law Office

e) Labor and Employment Law Office, OTJAG.

f) Procurement Fraud Division, USALSA.

(1) Remedies Branch

(2) Litigation Branch

g) Environmental Law Division, USALSA.

(1) Compliance and Policy Branch

(2) Litigation Branch

(3) Restoration and Natural Resources Branch

h) Criminal Law Division, OTJAG.

i) Litigation Division, USALSA.

(1) Military Personnel Branch.

(2) Civilian Personnel Branch.

(3) Torts Branch.

(4) General Litigation Branch.

j) Responsibilities of Installation Staff Judge Advocates (SJA).

(1) Establish and maintain liaison with United States Attorney. AR 27-40, para. 1-5b.

(2) Advise Litigation Division by telephone of significant cases and those requiring immediate attention (e.g., temporary restraining orders, habeas corpus, cases with short return dates, cases alleging individual liability arising from performance of official duties, etc.). AR 27-40, paras. 3-1 and 3-3a.

(3) Forward by FAX or express mail to HQDA, a copy of all process, pleadings, and other related papers. AR 27-40, para. 3-3b.

(4) Notify the appropriate local U.S. Attorney upon receipt of process or initiation of court proceedings involving the installation or its activities and provide necessary assistance. AR 27-40, para. 3-3c.

(5) Assist federal employees sued for actions taken within the course and scope of their employment in securing DOJ representation. AR 27-40, paras. 3-4 and 4-4.

(6) Prepare investigative reports in appropriate cases. AR 27-40, paras. 3-9 and 4-4.

(7) Represent the United States in litigation when directed by the Chief, Litigation Division. AR 27-40, para. 1-4f.

E. Department of the Navy.

1. Navy JAGS

a) Military Justice

b) Administrative Law

c) Civil Law

(1) General Litigation – Code 14

(2) Tort Claims and Litigation – Code 15

(3) Admiralty Litigation – Code 11

d) Operational/International Law

2. Navy General Counsel

a) Business & Commercial

b) Environmental

c) Civilian Personnel

d) Real Property

e) Patents

f) Procurements

3. SJAs Provide Litigation Reports IAW JAG Manual, Chapter II, 0210.

F. Department of the Air Force – AFI 51-301

1. General Litigation – JACL

2. Tort Claims and Litigation – JACT

3. Commercial Litigation – JACN

4. Environmental Litigation – JACE

5. Alternative Dispute Resolution – JACR

IV. TYPES OF SUITS FILED AGAINST MILITARY DEPARTMENTS AND THEIR OFFICIALS.

A. Subject-matter of Litigation.

1. Enlistments, inductions, activations.

2. Discharges.

3. Transfers and assignments.

4. Promotions.

5. Personnel policies.

6. Military programs.

7. Civilian personnel actions.

8. Installations management decisions.

9. Environmental compliance and remediation.

10. Bankruptcy (as a creditor).

11. Personal injury, death, or property damage caused by the negligence of Federal employees.

12. Civil challenges to courts-martial convictions (habeus actions, corrections of military records).

13. Contract disputes.

14. Freedom of Information and Privacy Act.

15. Federal and state administrative activities.

B. Types of Relief Sought.

1. Damages.

2. Mandamus.

3. Habeas corpus

4. Injunction

5. Declaratory judgment.

Perform a "systematic analysis"of the lawsuit: identify any legal theory which provides a basis for a dispositive motion **or** narrows the legal dispute to the advantage of the United States.

V. METHOD OF ANALYSIS.

A. Sovereign Immunity: has the plaintiff asked for relief properly within a statutory waiver of sovereign immunity?

1. Grants of jurisdiction.

a) Constitutional original jurisdiction. U.S. Const. Art. III. § 2.

b) Statutory grants.

(1) Federal Question Jurisdiction, 28 U.S.C. § 1331, is not a general waiver of sovereign immunity (see infra at "B").

2. Justiciable case or controversy. Is the matter a controversy appropriate for judicial inquiry? "Justiciability" is the term of art used to express the dual limitations imposed upon the federal courts by the Case or Controversy Doctrine. A two pronged doctrine:

a) Adversarial.

(1) Advisory opinions.

(2) Ripeness.

(3) Mootness.

(4) Standing.

b) Political question.

B. Jurisdiction: the authority or power of the federal court to decide the case before it. Related to Sovereign Immunity; focuses on whether the court can grant the relief requested.

1. Illustrative statutory grants of jurisdiction (limited waivers of Sovereign Immunity).

a) The Tucker Act. 28 U.S.C. §§ 1346(a)(2) and 1491.

b) The Federal Tort Claims Act. 28 U.S.C. §§§ 1346(b) 2671-2680.

c) Other Specialized Statutes.

(1) Government information management statutes (the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a).

(2) The Civil Rights Act. 28 U.S.C. § 1983.

(3) The Civil Rights Act of 1991. 42 U.S.C. § 1981.

(4) The Back Pay Act (civilians). 5 U.S.C. § 5596(b).

(5) The Military Pay Statute. 37 U.S.C. § 204.

(6) The Equal Access to Justice Act. 28 U.S.C. §§ 2412(b) and (d); 5 U.S.C. §504.

(7) The Administrative Procedures Act. 5 U.S.C. §§ 701-706 (see below at "d)(3)").

d) Commonly asserted statutes that do not waive sovereign immunity for money damages:

(1) The Federal Question Jurisdiction Statute. 28 U.S.C. § 1331.

(2) The Civil Rights jurisdiction statute. 28 U.S.C. § 1343.

(3) The Mandamus statute. 28 U.S.C. § 1361.

(4) The Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202.

(5) The Administrative Procedures Act. 5 U.S.C. §§701-706 (waiver only for nonmonetary claims).

(6) The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

2. Types of remedies (what did the plaintiff ask for; does his cited basis permit it?).

a) Damages.

b) Mandamus.

c) Habeas corpus (see 28 U.S.C. §§ 2241-2255).

d) Injunctions (see Fed.R.Civ.P. 65).

e) Declaratory judgment.

C. Exhaustion of administrative remedies: has the plaintiff pursued all intra-agency remedies?

1. Basic doctrine.

2. Remedies available.

3. Caveat: Darby v. Cisneros, 509 U.S. 137 (1993).

4. Exceptions.

D. Official Immunity and Judicial Bar.

1. Common Law Tort Lawsuit.

a) Statutory immunity under provisions of the Federal Employees Liability Reform and Tort Compensation Act (the "Westfall Act"), 28 U.S.C. § 2679.

b) Judicial Bar when the plaintiff is a service member and injury incident thereto. Feres v. United States, 340 U.S. 135 (1950).

2. Constitutional Tort Lawsuit.

a) Judicial qualified immunity—Harlow v. Fitzgerald, 457 U.S. 800 (1982).

b) Exceptions to mere qualified immunity—Judicial Bar:

(1) Judicial Bar when the activity is quasi-judicial, quasi prosecutorial. Butz v.Economou, 438 U.S. 486 (1978).

(2) Judicial Bar when the plaintiff is a service member and injury incident thereto (Feres analysis applied in constitutional tort setting). Chappell v. Wallace, 462 U.S.486 (1983).

(3) Judicial Bar when the plaintiff is a civilian employee and the claim is subject to the Civil Service System. Bush v. Lucas 462 U.S. 367 (1983).

E. Reviewability: should the court review and decide the issues in controversy? Typical situations: challenges to court-martial jurisdiction over the person; alleged violation of the Constitution, a statute, or regulation.

1. Administrative Procedure Act, 5 U.S.C. § 701—exceptions to the general rule of applicability to the military:

a) Military Claims Act, 10 U.S.C. §§ 2733, 2735.

b) National Guard Claims Act, 10 U.S.C. § 715.

c) Civil Service Reform Act, 5 U.S.C. §§ 4301-4305.

d) Is action committed to agency discretion by law? 5 U.S.C. § 701(a)(2).

2. The "Mindes Test." Establishes a framework for courts to determine the reviewability of military activities. The Supreme Court has not explicitly adopted the "Mindes Test" and there is a split among the Circuits as to its applicability.

a) Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

(1) Threshold allegations.

(a) Violation of a constitutional, statutory, or regulatory provision.

(b) Exhaustion of administrative remedies.

(2) Balancing factors:

(a) Nature and strength of plaintiff's claim.

(b) Potential injury to plaintiff if review is refused.

(c) Interference with the military function.

(d) Degree of military expertise and discretion involved.

b) Examples: Diekan v. Stone, No. 92-11309-Z, 1992 WL 390749 (D. Mass. 1992), aff'd, 995 F.2d 1061 (1st Cir. 1993); Guerra v. Scruggs, 942 F.2d 270 4th Cir. 1991).

c) Application of Mindes in the federal courts.

(1) Courts that follow Mindes:

(a) 1st Circuit: Wright v. Park, 5 F.ed 586 (1st Cir. 1993); Diekan v. Stone, No. 92-11309-Z, 1992 WL 390749 (D. Mass. 1992), aff'd, 995 F.2d 1061 (1st Cir. 1993); Navas v. Vales, 752 F.2d 765 (1st Cir. 1985).

(b) 4th Circuit: Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985).

(c) 5th Circuit: West v. Brown, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978); but see Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986).

(d) 8th Circuit: Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983).

(e) 9th Circuit: Christoffersen v. Washington State National Guard, 855 F.2d 1288 (1988); Sandidge v. Washington, 813 F.2d 1025 (9th Cir. 1987); Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir. 1985), aff'd, 787 F.2d 1288 (1986); Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983); Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983); but see Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (Mindes doctrine does not apply to equitable estoppel against the military), cert. denied, 111 S.Ct. 384 (1990).

(f) 10th Circuit: Costner v. Oklahoma Army National Guard, 833 F.2d 905 (10th Cir. 1987); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

(g) 11th Circuit: Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988);

(2) Courts that may follow Mindes:

(a) 6th Circuit: Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983); Renicker v. Marsh, 640 F. Supp. 244 (N.D. Ohio 1986).

(b) 7th Circuit: Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985). Contra Knutson v. Wisconsin Air National Guard, 995 F.2d 765 (7th Cir. 1993), cert. denied, 114 S. Ct. 347 (1993). See also Wronke v. Marsh, 603 F. Supp. 407 (C.D. Ill. 1985), rev'd on other grounds, 787 F.2d 1569 (Fed. Cir. 1986), cert. denied, 479 U.S. 853 (1986).

(c) D.C. Circuit: Bois v. Marsh, 801 F.2d 462, 474-75 (D.C. Cir. 1986) (Wald, J., dissenting); Kreis v. Secretary of the Air Force, 648 F. Supp. 383 (D.D.C. 1986), aff'd in part rev'd in part, 866 F.2d 1508 (D.C. Cir. 1989).

(3) Courts that do not follow Mindes:

(a) 2d Circuit: Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976); Mack v. Rumsfeld, 609 F. Supp. 1561 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986). But see Furman v. Edwards, 657 F. Supp. 1243 (D. Vt. 1987) (suggesting Mindes consistent with 2d Circuit decisions).

(b) 3d Circuit: Jorden v. National Guard Bureau, 799 F.2d 99 (3d Cir. 1986); Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981).

(c) Federal Circuit/Court of Federal Claims: Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

F. Scope of review: to what extent should the federal court substitute its judgment for that of the military decision-maker? The unique character of the armed services influences the scope of review.

"We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters."

Orloff v. Willoughby, 345 U.S. 83, 93 (1953)

Typical situations: enlistment contracts, recruiter representations, conscientious objector determimations, challenges to agency interpretations of regulations or agency policies.

G. Trial on the merits.

V. CONCLUSION.

CHAPTER 24-A

ARMY REPORTS OF SURVEY

Outline of Instruction

I. REFERENCES.

A. AR 37-1, Army Accounting and Fund Control, 30 Apr 91.

B. AR 600-4, Remission of Indebtedness for Enlisted Members, 1 April 1998.

C. AR 735-5, Policies and Procedures for Property Accountability, 31 January 1998.

D. DA Pam 710-5, 15 April 1987, Unit Commander's Supply Handbook.

E. DA Pam 735-5, 1 March 1997, Survey Officer's Guide.

II. INTRODUCTION/PURPOSES OF THE REPORT OF SURVEY SYSTEM.

A. Applicability.

B. Purposes.

III. ALTERNATIVES TO REPORTS OF SURVEY THAT COMMANDERS SHOULD CONSIDER.

A. Statement of Charges/Cash Collection Voucher (AR 735-5, para. 12-2) when liability is admitted and the charge does not exceed one month's base pay. (These two functions have been combined in the new DD Form 362)

B. Cash sales of handtools and organizational clothing and individual equipment (AR 735-5, para. 12-2b).

C. Unit level commanders may adjust losses of durable handtools up to $100 per incident, if no negligence or misconduct is involved (AR 735-5, para. 14-25).

D. Abandonment order (AR 735-5, para. 14-22) may be used in combat, large scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

E. Recovery of property unlawfully held by civilians is authorized (AR 735-5, para. 14-11) -- show proof it is U.S. property and do not breach the peace.

F. AR 15-6 investigations and other collateral investigations can be used as a substitute for the report of survey investigation (AR 735-5, para. 13-26).

G. Short Survey (AR 735-5, para. 13-22). If the commander determines that no negligence was involved in the damage to the property no report of survey is required as long as the approving authority concurs.

IV. THE REPORT OF SURVEY SYSTEM (AR 735-5, CH. 13 AND 14).

A. Initiating the Report of Survey.

1. Active Army commanders will initiate the report of survey within 15 calendar days of discovering the loss or damage (USAR guideline is 75 days, ARNG guideline is 45 days).

2. The goal is a thorough investigation.

3. Mandatory initiation for a report of survey or AR 15-6 investigation. (AR 735-5, para. 13-2)

   a. Individual refuses to admit liability and negligence or misconduct is suspected.

   b. Anytime a higher authority or other DA regulations directs a report of survey.

   c. Whenever a sensitive item is lost or destroyed.

   d. Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

   e. When the amount of loss or damage exceeds an individual's monthly base pay, **even** if liability is admitted.

   f. When damage to government quarter's or furnishings exceeds one month's base pay.

   g. When the loss involves certain bulk petroleum products.

4. In the Active Army, reports of survey will normally be processed within 75 days (USAR guidelines provide 240 days, ARNG guidelines provide 150 days) [AR 735-5, para. 13-5].

B. Appointing Authority (AR 735-5, para. 13-16).

1. The appointing authority appoints report of survey investigating officers. The appointing authority also reviews all reports of survey initiated within his or her command or authority.

2. Generally, a lieutenant colonel (05) commander is both appointing and approval authority.

3. When approving authority is retained at the colonel (06) level or above, the approving authority may designate as appointing authority a lieutenant colonel (05) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above.

C. Approving Authority (AR 735-5, para. 13-16).

1. The approving authority is normally a battalion (05) or brigade (06) commander, but may be any commander, chief of a HQDA staff agency, director of a MACOM staff office, chief of a separate MACOM activity in the grade of O-5 or higher, or a DA civilian employee in a supervisory position in the grade of GS-15 or above.

a. Does not have to be a court-martial convening authority.

b. Takes final action by authority of the Secretary of the Army.

2. Regardless of who initiates the report of survey, it will be processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5.

3. If negligence or no negligence is clearly established on the report of survey, the approving authority may recommend liability without appointing a surveying officer. The approving authority is then responsible for ensuring that the charges are properly computed and the individual held financially liable is properly notified.

D. Surveying Officer Qualifications (AR 735-5, para. 13-26).

1. The surveying officer will be senior to any person subject to potential financial liability, "except when impractical due to military exigencies."

2. The following individuals may be appointed as survey officer:

a. Army commissioned or warrant officers;

b. Army NCOs E-7 and above;

c. Civilian employees GS-7 and above, or wage leader and wage supervisory employees;

d. In joint DOD service activites any assigned DOD commissioned or warrant officer, or NCO E-7 or above;

e. Foreign national employees (GS-7 equivalent or above) for reports of survey origninating within Civilian Support Centers.

3. Consult AR 600-8-14, table 8-6 for the grade equivalency between military personnel and civilians employees.

4. The investigation is the surveying officer's primary duty.

5. The surveying officer should get a briefing from a judge advocate.

V. VALUING THE LOSS.

1. Loss. Loss is the **loss of**, **damage to**, or **destruction of** government property under the control of the Army. This includes actual loss or loss of accountability.

a. Actual loss. Physical loss, damage or destruction of the property.

b. Loss of accountability. Due to the circumstances of the loss, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

2. **Actual value** determination at the time of the loss is the **preferred method** (AR 735-5, App. B, para. B-2a).

   a. Technician determines the condition of the item at the time of the loss or damage.

   b. Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.

3. Depreciation.

   a. If an appraisal is not possible or equitable, consider depreciation.

   b. Compute the charge according to AR 735-5, App. B, para B-2b.

4. Limits on financial liability (AR 735-5, para. 13-39).

   a. The **general rule** is that an individual will pay the amount of the loss, or one month's base pay, whichever is less.

      (1) Charge is based upon the soldier's base pay **at the time of the loss**.

      (2) For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

   b. **Exceptions** to the general rule, there are times when personnel are liable for the **full amount of the loss**. (AR 735-5, para. 13-39a)

      (1) Military personnel are liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.

(2) Any person is liable for the full loss of public funds.

(3) Accountable officers will be held liable for the full amount of the loss.

(4) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.

5. Collective Financial Liability: Two or more persons may be held liable for the loss as long as negligence or misconduct against each respondant is established.

(1) There is no comparative negligence.

(2) The financial loss is apportioned according to AR 735-5, Table 12-4.

(3) Collective Liability of Non-federal employees. (AR 735-5, Para. 13-39d) Divide the total dollar amount of the loss by the number of respondents. This is the maximum assessed, capped by 1 month's base pay for soldiers or DoD civilians.

B. Involuntary Withholding of Current Pay.

1. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

2. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Chapter 15.

3. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).

4. No involuntary withholding for the loss of MFO property.

VI. IMPOSING LIABILITY.

A. Responsibility For Property (AR 735-5, paras. 2-8 & 13-28)

1. Command Responsibility.

a. The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.

b. Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at <u>any</u> level.

2. Supervisory Responsibility.

a. The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by subordinates. It is inherent in all supervisory positions and is not contingent upon signed receipts or responsibility statements.

b. If supervisory responsibility is involved, consider the following additional factors.

(1) The nature and complexity of the activity and how that affected the ability to maintain close supervision.

(2) The adequacy of supervisory measures used to monitor the activity of subordinates.

(3) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

3. Direct Responsibility.

a. An obligation of a person to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.

b. Direct responsibility results from assignment as an accountable officer, the receipt of formal written delegation, or the acceptance of the property on a hand receipt from an accountable officer.

4. Custodial Responsibility.

a. An obligation of a person to ensure proper care, custody and safekeeping for property in storage or property awaiting issue or turn-in.

b. Custodial responsibility results from assignment as a supply sergeant, supply custodian, supply clerk, or warehouse person, and is rated by and answerable directly to the accountable officer or the individual having direct responsibility for the property.

5. Personal Responsibility.

a. The obligation of an individual for the proper use, care, and safekeeping of government property in their possession, with or without a receipt.

B. Negligence (AR 735-5, paras. 2-9 & 13-28b).

1. Simple negligence -- the failure to act as a reasonably prudent person would have acted under similar circumstances.

a. A reasonably prudent person is an average person, not a perfect person. Consider also:

(1) What could be expected of the person considering their age, experience, and special qualifications.

(2) The type of responsibility involved.

(3) The type and nature of the property. More complex or sensitive property will normally require a greater degree of care.

b. Examples of simple negligence.

(1) Failure to do required maintenance checks.

(2) Leaving weapon leaning against a tree while attending to other duties.

(3) Driving too fast for road or weather conditions.

(4) Failing to maintain proper hand receipts.

2. Gross negligence - an extreme departure from the course of action to be expected of a reasonable prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

a. Reckless, deliberate, or wanton -

(1) These elements can be express or implied.

(2) Does not include thoughtlessness, inadvertence, or error in judgment.

b. Foreseeable consequences.

(1) Does not require actual knowledge of actual results.

(2) Need not foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

c. Examples of gross negligence.

(1) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.

(2) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.

3. Willful misconduct - any intentional or unlawful act.

a. Willfulness can be express or implied.

b. Includes violations of law and regulations such as theft and misappropriation of government property.

c. A violation of law or regulation is not negligence per se.

d. Examples of willful misconduct.

(1) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and as a result, the tent burns to the ground.

(2) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

C. Proximate cause - the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the direct, and immediate cause of the loss.

1. The damage arises out of the original act of negligence or misconduct.

2. A continual flow or occurrence of events from the negligent act or misconduct.

3. Use common sense.

4. Examples of proximate cause.

a. Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.

b. Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

5. Independent intervening cause - an act which interrupts the original flow of events or consequences of the original negligence. It may include an act of God, criminal misconduct, or negligence.

VII. RIGHTS OF THE RESPONDENT.

A. General Information.

1. Respondent is term for a person recommended for financial liability.

2. The report of survey form (DA Form 4697) contains a rights notice.

B. Rights (AR 735-5, para. 13-32 and figure 13-11).

1. An opportunity to examine the report of investigation.

2. Right to submit for consideration any statement the respondent desires to submit. Time limits for submitting rebuttal statements (AR 735-5, para. 13-33):

   a. 7 calendar days -- when survey and investigation are hand delivered to the respondent.

   b. 15 calendar days -- when respondent is unavailable but in the same country and the survey and investigation are mailed.

   c. 30 calendar days -- when respondent is unavailable and in a different country and the survey and investigation are mailed.

3. Explanation of the consequences of a finding of gross negligence for a survey involving government quarters, furnishings and equipment.

4. Right to assistance of a JAG officer.

VIII. RELIEF FROM REPORTS OF SURVEY.

A. Appeals (AR 735-5, paras. 13-48, 13-49).

1. **Appeal authority** is the next higher commander above the approving authority (normally the brigade commander).

2. Respondent has 30 days to appeal unless he or she shows good cause.

3. Two step process:

   a. Submit request for reconsideration to approval authority.

   b. Approving authority forwards the request for reconsideration to the appeal authority as an appeal.

4. If the approving authority denies reconsideration the following actions are required before forwarding to the appeal authority:

   a. Prepare a memorandum giving the basis for denying the requested relief.

   b. The approving authority must personally sign the denial.

5. Action by the appeal authority is final.

B. Reopening Reports of Survey (AR 735-5, para. 13-46).

1. Not an appeal.

2. Authority to reopen rests with the approval authority.

3. May occur:

   a. As part of an appeal of the assessment of financial liability.

   b. When a response is submitted to the survey officer from the person charged subsequent to the approving authority having assessed liability.

   c. When a subordinate headquarters recommends reopening based upon new evidence.

   d. When the property is recovered.

   e. When the approving authority becomes aware than an injustice has been perpetrated against the government or individual.

C. Remission of Indebtedness (AR 735-5; AR 600-4).

1. Enlisted soldiers only.

2. Only to avoid extreme hardship.

3. Only unpaid portions can be remitted. Suspend collection action long enough for the soldier to submit his request for remission of the debt.

4. Must request reconsideration before submitting request for remission of indebtedness.

D. Army Board for the Correction of Military Records (ABCMR) (AR 15-185).

E. Civilian employees may avail themselves of the grievance/arbitration procedures.

F. Lawsuits (with civilian counsel).

IX. JUDGE ADVOCATE'S ROLE.

A. For the Approving Authority (AR 735-5, para. 13-36).

1. Before approving authority takes action, a judge advocate must review the survey and investigation for legal sufficiency.

2. The approving authority is not bound by the survey officer's or the judge advocate's recommendations.

B. For the Appeal Authority (AR 735-5, para. 13-49b).

1. Before appeal authority takes action on an appeal, a judge advocate must review it.

2. Judge advocate must be different than the one who reviewed the survey and investigation for the approval authority.

X. LEGAL ASSISTANCE ATTORNEY CONSIDERATIONS.

A. Initially

1. What stage in the process has been reached?

a. Statement of Charges/Cash Collection Voucher

b. Liability Recommended by Survey Officer

c. Liability Assessed by Approving Authority

d. Although held liable long ago, the soldier only now has found cause to question the assessment.

2. Does the client have all the documentation?

B. Analyze the facts

1. Do they demonstrate by a preponderance?

a. Responsibility.

b. Negligence.

c. Proximate Cause.

2. What evidence is available to rebut?

3. Does the evidence better support a finding that another individual should be liable?

C. If a basis for liability is established?

1. Can liability be shared?

2. How was value of the loss calculated?

   a. Consider actual value versus depreciation.

   b. Do not always assume calculated correctly.

3. Have caps on liability been applied?

4. Is remission of indebtedness a possibility?

5. Can the property be found?

D. If liability is imposed but basis for liability is lacking.

1. Is there additional or new evidence?

2. Has a request for reconsideration/appeal been filed?

3. Has a petition for ABCMR review been considered?

XI. CONCLUSION.

CHAPTER 24-B

LINE OF DUTY INVESTIGATIONS

AND DETERMINATIONS

Outline of Instruction

I. REFERENCES.

A. 10 USC §§ 972, 1201-1207 and 1219.

B. 38 USC §§ 101 and 105.

C. AR 600-8-1, Army Casualty and Memorial Affairs, Chapters 37-41 (18 Sept 1986).

D. ACIL-ST-231, Reports of Survey and Line of Duty Determinations.

II. INTRODUCTION/PURPOSE.

III. LINE OF DUTY DETERMINATIONS.

A. In Line of Duty (ILD)

B. Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM)

C. Not in Line of Duty-Due to Own Misconduct (NLD-DOM)

D. Two question process

1. Status: where the soldier is supposed to be or authorized to be

2. Conduct: soldier's misconduct the cause of the injury, disease

IV. IMPACT OF DETERMINATIONS.

A. In Line of Duty (ILD)-Soldier may be entitled to:

1. Army Disability Retirement or Separation Compensation

2. VA Compensation and Hospitalization Benefits

3. Incapacitation Pay (ARNG/USAR)

B. Not in Line of Duty - Not Due to Own Misconduct (NLD-NDOM) and Due to Own Misconduct (NLD-DOM):

1. If on active duty, denies disability retirement or separation compensation

2. If disabled after leaving AD, may deny VA disability or hospitalization benefits

3. May deny civil service preference

4. ARNG/USAR may be denied incapacitation pay

C. Not in Line of Duty-Due to Own Misconduct (NLD-DOM):

1. Days lost > 1 added to service obligation

2. Days lost > 1 may be excluded from computations for pay and allowances

3. May result in loss of pay where disease (not injury) immediately follows intemperate use of drugs (includes alcohol)

V. PROCEDURES.

A. The process begins with an ILD presumption

1. UNLESS substantial evidence shows otherwise

2. Burden is "evidence that is of greater weight than supports any different conclusion"

3. Always look for specific rules of Appendix F too

B. Informal Investigation <u>by the Unit Commander</u> when:

1. No misconduct is suspected

2. No negligence is suspected

3. Formal investigation is not required

4. Informal investigation can **only** result in a ILD determination

C. Formal Investigation by an Appointed Investigating Officer (IO) [AR 15-6] when:

1. Unusual or doubtful circumstances exist

2. Case complexity warrants

3. Injury or disease apparantly due to misconduct or willful negligence

4. Self-Inflicted Injuries or Suicide

5. AWOL Status

6. USAR/ARNG Travel To or From Duty

7. Death cases: Do investigation but make no LOD determination

VI. DUE PROCESS.

A. No requirement to make a statement against interest

B. Unwarned or involuntary statement invalid for making the LOD determination (10 USC ə 1219)

C. If IO anticipates adverse finding, soldier gets notice and opportunity to respond in writing

D. If Approval Authority makes adverse decision, soldier gets notice of the determination

E. Appellate Rights

VII. JUDGE ADVOCATE CONSIDERATIONS.

A. Advising the IO

B. Understanding the Burdens

1. "Greater weight than supports any different conclusion"

2. Balancing the ILD presumption with specific rules

C. Legal Review on Behalf of the Command

1. Have requirements been complied with?

2. Is there error?

3. Are findings supported by substantial evidence?

4. Are potential claims involved?

D. The Legal Assistance Perspective

VIII. CONCLUSION.

CHAPTER 25

DEPLOYMENT CLAIMS

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

A. Foreign Claims Act, 10 U.S.C. § 2734.

B. International Agreement Claims Act, 10 U.S.C. §§ 2734a & b.

C. Federal Tort Claims Act, 28 U.S.C. §§ 2671-80.

D. Personnel Claims Act, 31 U.S.C. § 3721.

E. Military Claims Act, 10 U.S.C. § 2733.

F. AR 27-20, Claims, Chapters 7 & 10 (31 December 1997).

G. DA Pam 27-162, Claims, Chapters 7 & 10 (1 April 1998).

H. Disaster Claims Handbook (November 1998).

I. JA 422, Operational Law Handbook, Chapters 9 and 32 (page 549) (2001).

J. JAGMAN, Chapter VIII.

MAJ Holly O'Grady Cook
January 2001

K. JAGINST 5890.1, Enclosure 2.

L. AFI 51-501, Tort Claims, Chapter 4 (1 May 1996).

M. DoD Directive 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996).

N. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (NATO SOFA) (Article VIII).

O. Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature, 3 August 1959, 14 U.S.T. 631, T.I.A.S. No. 5351, 481 U.N.T.S. 262 (Supplementary Agreement or SA) (Article 41).

III. CLAIMS LAWS APPLICABLE IN MILITARY OPERATIONS.

A. Federal Tort Claims Act (FTCA). 28 U.S.C. §§ 1346(b), 2402, 2671-80; 28 C.F.R. Part 14; AR 27-20, chapter 4; JAGINST 5890.1, Encl (1); AFI 51-501, chapter 2.

1. The Federal Tort Claims Act provides a limited waiver of sovereign immunity to compensate eligible claimants for damage to property, personal injury, or death based upon the negligent or wrongful acts or omissions of servicemembers or federal civilian employees acting within the scope of employment.

2. Overseas Exception.

a. The United States has not waived its immunity from suit for claims arising in a "foreign country."

b. A "foreign country" is any land area outside the control of the United States. Smith v. United States, 507 U.S. 197 (1993) (Antarctica); Meredith v. United States, 330 F.2d 9 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964) (grounds of American embassy abroad); Miller v. United States, 73 F.3d 878 (9th Cir. 1995) (military hospital in Japan); Callas v. United States, 253 F.2d 838 (2d Cir. 1958) *cert. denied,* 357 U.S. 936 (1958) (U.N. trusteeship); Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996); Kinsley v. United States, 817 F. Supp. 680 (S.D. Ohio, 1993); Pignataro v. United States, 172 F. Supp. 151 (E.D.N.Y. 1959) (air space over foreign countries).

c. The overseas exception does not bar torts occurring on the high seas or in aircraft flying over the high seas. Maritime statutes will usually govern resolution of the claim in these situations. 46 U.S.C. §§ 741-752 (Admiralty Act); 46 U.S.C. §§ 781-790 (Public Vessels Act).

d. Exception to the exception. In re Paris Air Crash, 399 F. Supp. 732 (C.D. Calif. 1975) (where negligence occurs in the United States but the effect occurs in a foreign country, the claim is not barred).

3. Disaster Relief Operations Involving Debris Removal. (Stafford Act, 42 U.S.C. §§ 5121 et. seq.).

a. By administrative agreement, states assume responsibility for processing claims in the aftermath of "major disasters" under 42 U.S.C. § 5173.

b. States indemnify the United States as a condition to receiving federal assistance. 42 U.S.C. § 5173(b).

c. Applies to debris removal only, but other claims may be barred by the FTCA's discretionary function exception.

B. Personnel Claims Act (PCA). 31 U.S.C. § 3721; AR 27-20, chapter 11; JAGINST 5890.1, Encl (5); AFI 51-502.

1. Limited protection to service members and certain civilian employees for loss or damage to tangible personal property that occurs incident to service.

2. Applies worldwide.

3. PCA claims that arise in deployments include loss of equipment and personal items during transportation, certain losses while in garrison quarters, losses suffered in an emergency evacuation, losses due to terrorism directed against the United States, and the loss of clothing and articles being worn while performing military duties.

4. Maintains positive morale.

5. Normally the statutory limit for payment is $40,000. The National Defense Authorization Act for Fiscal Year 1996 allows for payment of up to $100,000 for claims arising from emergency evacuation or from extraordinary circumstances.

6. Claims offices should make maximum use of small claims procedures when appropriate. AR 27-20, paras 2-17 and 11-10b; DA Pam 27-162, paras 2-17 and 2-42.

   a. The small claims procedure applies to claims that do not require extensive investigation and can be settled for less than $1000.

   b. Evidentiary requirements are relaxed, with greater emphasis placed on using catalog prices, telephone calls to confirm prices, and agreed cost of repairs and loss of value procedures. Remember, however, that estimates are required for repairs over $100.00.

   c. Where local finance procedures permit, small claims should be approved on the spot, and the claimant allowed to hand-carry the voucher for immediate cash payment.

C. Military Claims Act (MCA). 10 U.S.C. § 2733; AR 27-20, chapter 3; JAGINST 5890.1, Encl (2); AFI 51-501, chapter 3.

1. A claim for personal injury, death, or damage to or loss of property is payable when:

   a. Caused by a negligent or wrongful act or omission of military personnel or DA civilians acting within the scope of employment; or

   b. Incident to the noncombat activities of the Department of the Army.

2. Applies worldwide.

   a. CONUS tort claims must first be considered under the FTCA.

   b. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA).

   c. Most common applications of the MCA.

      (1) Medical malpractice on family members overseas.

      (2) Property damage claims by service members not payable under the PCA or FTCA.

3. Not a waiver of sovereign immunity.

4. Applicable law.

   a. General principles of law applicable in a majority of American jurisdictions.

   b. Contributory negligence. Apply the law of the place of the occurrence, including the law of foreign countries when the claim arises in a foreign country.

D. Foreign Claims Act (FCA). 10 U.S.C. § 2734; AR 27-20, chapter 10; JAGMAN, chapter VIII; AFI 51-501, chapter 4.

1. History.

a. Act of 18 April 1918.

b. WWII changes.

c. The Foreign Claims Act comes of age.

2. Purpose.

a. "To promote and to maintain friendly relations through the prompt settlement of meritorious claims." 10 U.S.C. § 2734(a).

b. Claim must be "meritorious." Undue emphasis should not be placed on the promotion and maintenance of friendly relations alone. Claims that are not meritorious will be denied even though payment might promote friendly relations.

3. Scope.

a. Applies only overseas. Claim must arise outside the U.S., its territories, Commonwealths, or possessions.

b. Includes places under the jurisdiction of the United States in a foreign country.

c. Maritime claims.

(1) Incidents occurring within the territorial waters of the United States do not give rise to FCA claims.

(2) Chapter 8, AR 27-20 governs maritime claims. Claims cognizable under this chapter will not be processed under the FCA without the express authorization of the Commander, U.S. Army Claims Service.

4. Proper claimants.

a. Governments of foreign countries and political subdivisions thereof.

b. "Inhabitants" of foreign countries.

(1) Citizenship or legal domicile not necessary.

(2) Mere presence insufficient.

(3) Can include U.S. citizens residing overseas.

c. Corporations.

5. Improper claimants.

a. Enemy or "unfriendly" nationals.

b. Insurers and subrogees.

c. U.S. military personnel, Federal civilian employees, and their family members residing overseas primarily because of their own or their sponsor's duty or employment status.

d. Other residents of the United States; i.e, visitors, tourists, and persons employed overseas.

6. Claims payable.

a. Noncombat activities. This includes personal injury, death, personal property damage, and damage to real property that occurs connection with training, field exercises, or maneuvers or other activities which are distinctly military in nature.

b. Negligent or wrongful acts of U.S. military personnel or civilian employees.

(1) If the civilian employee is a U.S. citizen or foreign national recruited or transferred from a country other than the one in which he or she is employed and where the incident occurred, the negligent or wrongful act need not be within scope of employment.

(2) If the civilian employee is a foreign national recruited in the country in which he or she is employed and where the incident occurred, claim is payable only if the negligent or wrongful act was within scope of employment. Exception for vehicle claims. AR 27-20, para 10-3.

(3) Distinction relates back to the purpose of the FCA. Maintaining friendly relations with foreign countries and their inhabitants is not furthered by accepting responsibility for the off-duty torts of employees who are in a foreign country through no act of the United States.

7. Claims excluded. AR 27-20, para 10-4.

a. Claims under status of forces or other international agreements.

b. "Enemy action" - direct and indirect combat activities. United States v. Marks, 187 F.2d 724 (9th Cir. 1951), *cert. denied*, 342 U.S. 823 (1951).

(1) Includes preparation for, movement to, and return from combat.

(2) Aircraft en route exception.

c. Contracts and domestic obligations.

d. Real estate claims founded upon contract. *See* AR 405-15.

e. Not in best interests of U.S. or contrary to public policy, general principles of equity, or the basic intent of FCA.

8. Procedures.

a. Presentation of Claim.

(1) "Normally" in writing to U.S. or authorized official.

(2) Within two years of accrual.

(3) Must state:

(a) The time, place, and nature of the incident.

(b) The nature and extent of damage, loss, or injury.

(c) The amount of compensation claimed.

b. Claims Settlement - Foreign Claims Commissions (FCC).

(1) FCA claims are settled and paid by FCCs.

(2) Appointment authority. AR 27-20, para 10-6.

(a) Senior Judge Advocate of a command having a command claims service. May be delegated to commander or chief of the command claims service.

(b) Commander, U.S. Army Claims Service.

(3) Composition. AR 27-20, para 10-7.

(a) One-member FCC. May be a commissioned officer or claims attorney.

(b) Three-member FCC. At least two members must be JAs or claims attorneys.

(4) Investigation.

(a) Normally, the FCC is responsible for the investigation of all claims referred to it.

(b) Can request assistance from units.

(c) AR 27-20, Chapter 2 and local procedures apply.

(5) Applicable law. The law and custom of the country where the incident occurred, including laws and customs pertaining to contributory or comparative negligence and joint tortfeasors.

(6) Payments.

(a) Made in the currency of the country in which the incident occurred or where the claimant resided at the time of the incident.

(b) Punitive damages, interest, court costs, bail, costs of filing a claim, and similar fees are not allowed.

(c) Deduct amounts paid by tortfeasor, other third parties, and insurance companies.

(d) Advance payments up to $10,000 permitted in limited circumstances.

(e) Generally, payments are final and not subject to appeal.

(7) Approval authorities. AR 27-20, para 10-9.

(a) One member FCC.

(i) If JA or claims attorney, may pay up to $15,000 regardless of amount claimed. May also disapprove any claim presented in an amount not over $15,000.

(ii) Other one-member FCCs may pay claims presented in an amount not exceeding $2,500. No denial authority.

(b) Three member FCC.

(i) May disapprove claims presented in any amount.

(ii) May pay claims filed in any amount which, after adjudication, are deemed to be meritorious in an amount not exceeding $50,000.

(c) TJAG, TAJAG, and the Commander, U.S. Army Claims Service.

(i) May disapprove any claim.

(ii) May approve any claim where the amount awarded does not exceed $100,000.

(d) Secretary of the Army, Assistant Secretary of the Army, or designee approves all payments in excess of $100,000.

IV. CLAIMS UNDER STATUS OF FORCES (SOFA) AND OTHER INTERNATIONAL AGREEMENTS

A. 10 U.S.C. § 2734a.

B. Required Provisions.

1. Is there an agreement?

2. Does it contain claims provisions?

3. Does it provide for cost sharing?

C. Preferred Provisions.

1. Do claims provisions mandate host country adjudication?

2. Is the agreement reciprocal?

D. NATO SOFA Model. Article VIII.

1. Provides for host nation adjudication.

2. NATO SOFA is reciprocal. Guidance on processing claims arising out of the acts or omissions of members of a NATO military force or civilian component present in the United States is found in AR 27-20, chapter 7, section II.

3. Claims between Contracting Parties. Art. VIII, paras 1-4.

a. Claims for damage to military property.

(1) Wholly waived.

(2) The military property damaged or the military personnel causing the damage must have some relationship with the operation of the Treaty.

(3) NATO connection presumed when military property belonging to a NATO sending state is located within the territory of a NATO receiving state.

b. Claims for damage to nonmilitary property.

(1) Limited waiver for damage to property owned by a Contracting Party but which is not used by that Party's armed services.

(2) Personnel causing the damage must have some relationship with the operation of the Treaty.

(3) Waiver only applies if damage is less than $1,400; liability for greater damages is split in accordance with SOFA formula.

c. Claims for injury to or death of a service member.

(1) Wholly waived.

(2) Injury or death must occur while service member is performing official duties, but such duties need not have any connection with the operation of NATO.

(3) Waiver does not extend to civilian employees.

(4) Waiver extends only to claims between Contracting Parties. It does not affect third party claims under Article VIII.

4. Third Party Scope Claims. Art. VIII, para 5.

a. Proper claimants include persons and entities that are not Contracting Parties or members of the force or civilian component.

(1) Includes tourists and business travelers from the United States.

(2) Also includes inhabitants of foreign countries.

(3) May include family members of sending state forces.

b. Claim is payable if damage, injury, or death results from an act or omission done by a member of the force or civilian component in the performance of official duties or under circumstances that would make the force otherwise "legally responsible" under the law of the receiving state.

(1) Sending state makes the scope of employment determination.

(2) Normally, the sending state's determination is final. Rare disputes are settled by arbitration.

c. Claims are filed with receiving state authorities. The receiving state must designate offices where claims may be presented. Example: In Germany, claims are filed with the Defense Cost Office, a subsidiary of the Ministry of Finance.

d. Time limits for filing third party scope claims are often substantially less than the two years allowed under the FCA or MCA. Example: The DCO in Germany requires that a claim be filed within 90 days of the date it accrues.

e. Upon receipt of a claim, the receiving state investigates. The sending state cooperates in the investigation, providing information about the involvement of its forces and issuing a scope of employment certification.

f. Receiving states adjudicate the claim under their domestic law. If deemed meritorious, the receiving state makes the award and pays the claimant.

g. The receiving state reports all payments to the sending state, proposes distribution of the costs incurred, and requests reimbursement. Normally costs are split as follows: 75% sending state; 25% receiving state.

5. Nonscope Claims. Art. VIII, paras 6-7.

a. Often referred to as *ex gratia* (out of grace) payments. Do not confuse with solatia payments discussed later in the outline.

b. Nonscope claims arise in two situations.

(1) Tortious off-duty conduct by members of the force or civilian component.

(2) Unauthorized use of sending state vehicles.

c. Receiving states accept, investigate, process, and evaluate nonscope claims.

d. After assessing the claim's merits (including the measure of damages, if any), the receiving state forwards the claim with a recommendation to the sending state.

e. The sending state then reviews the claim and the receiving state's recommendation to determine if an *ex gratia* payment will be offered.

(1) In the case of the United States as sending state, nonscope claims are adjudicated by FCCs appointed pursuant to the FCA.

(2) In adjudicating the claim, the sending state is not bound by the advice and recommendation of the receiving state.

(3) If payment is approved, the sending state bears the entire cost.

V. SINGLE-SERVICE RESPONSIBILITY.

A. Department of Defense Directive 5515.8 (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996) assigns to each service exclusive responsibility for settling foreign claims in certain countries.

B. Army - Albania, Austria, Belarus, Belgium, Bosnia, Bulgaria, Czech Republic, El Salvador, Estonia, Germany, Grenada, Haiti, Honduras, Hungary, Korea, Latvia, Lithuania, Marshall Islands, Moldova, Poland, Romania, Slovakia, Slovenia, Switzerland, Ukraine, Receiving Office in U.S. for NATO SOFA.

C. Navy - Bahrain, Iceland, Israel, Italy, Portugal.

D. Air Force - Australia, Azores, Canada, Cyprus, Denmark, Egypt, France, Greece, India, Japan, Luxembourg, Morocco, Nepal, Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Tunisia, Turkey, United Kingdom, CENTCOM, USSOC.

E. Interim single-service claims responsibility. Unified and Specified Commanders may assign interim responsibility in countries where such assignment has not been made under the DoD directive. They must seek immediate confirmation and approval of such assignments from the DoD General Counsel.

VI. SOLATIA. AR 27-20, PARAS 10-17 AND 13-13.

A. Definition. Payment (not necessarily in money) to a victim or a victim's family as an expression of sympathy or condolence. Common in certain parts of the Far East and Southwest Asia.

B. Local custom determines when solatia applies and customary amount for specific case.

C. Not an admission of liability.

D. Paid from command operating funds, not Claims Expenditure Allowance.

VII. CONCLUSION.

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APPENDIX A

SINGLE SERVICE CLAIMS PROCESSING ASSIGNMENTS, CINCUSNAVEUR AOR a/o Jul 99

EUROPE/LEVANT

Country	Assignment	Authority
Albania	Army	Approval, John H. McNeill, 17 April 1996
Armenia		
Austria	Army	DoD Directive 5515.8 (encl. 1), 9 June 1990
Azerbaijan		
Azores	Air Force	DoD Directive 5518.8 (encl. 1), 9 June 1990
Belarus	Army	Approval, John H. McNeill, 17 April 1996
Belgium	Army	DoD Directive 5515.8 (encl. 1), 9 June 1990
Bosnia-Herzegovina	Army	Memo, David A. Koplow, 7 July 1999
Bulgaria	Army	Approval, John H. McNeill, 17 April 1996
Canada	Air Force	DoD Directive 5518.8 (encl 1), 9 June 1990
Croatia	Army	Memo, David A. Koplow, 7 July 1999
Cyprus	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990
Czech Republic	Army	Approval, John H. McNeill, 17 April 1996
Denmark	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990
Estonia	Army	Approval, John H. McNeill, 17 April 1996
Finland		
France	Air Force	Memo, William H. Dalton, 25 November 1996
Georgia		
Germany	Army	DoD Directive 5515.8 (encl. 1), 9 June 1990
Greece	Navy	Memo, John H. McNeill, 01 September 1994
Holy See		
Hungary	Army	Approval, John H. McNeill, 17 April 1996
Iceland	Navy	DoD Directive 5518.8 (encl. 1), 9 June 1990
Iraq	Air Force	Approved, Terrence O'Donnell, 14 June 1991
Ireland		
Israel	Navy	DoD Directive 5515.8 (encl. 1), 9 June 1990
Italy	Navy	DoD Directive 5515.8 (encl. 1), 9 June 1990
Latvia	Army	Approval, John H. McNeill, 17 April 1996
Lebanon		
Lithuania	Army	Approval, John H. McNeill, 17 April 1996
Luxembourg	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990
Macedonia	Army	Memo, David A. Koplow, 7 July 1999
Malta		

Moldova	Army	Approval, John H. McNeill, 17 April 1996
Montenegro	Army	Memo, David A. Koplow, 7 July 1999
Netherlands	Army	Memo, John H. McNeill, 01 September 1994
Norway	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990
Poland	Army	Approval, John H. McNeill, 17 April 1996
Portugal	Navy	DoD Directive 5515.8 (encl. 1), 9 June 1990
Romania	Army	Approval, John H. McNeill, 17 April 1996
Serbia	Army	Memo, David A. Koplow, 7 July 1999
Slovak Republic	Army	Approval, John H. McNeill, 17 April 1996
Slovenia	Army	Approval, John H. McNeill, 17 April 1996
Spain	Navy	Memo, John H. McNeill, 01 September 1994
Switzerland	Army	DoD Directive 5515.8 (encl. 1), 9 June 1990
Sweden		
Syria		
Turkey	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990
Ukraine	Army	Approval, John H. McNeill, 17 April 1996
United Arab Emirates	Navy	Approved, John H. McNeill, 6 June 1996
United Kingdom	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990

AFRICA

Country	Assignment	Authority
Algeria		
Angola		
Benin		
Botswana		
Burundi		
Burkina Faso		
Cameroon		
Cape Verde		
Central African Rep.		
Chad		
Congo		
Cote d'Ivoire		
DROC		
Equitorial Guinea		
Gabon		
Gambia, The		
Ghana		
Guinea		
Guinea-Bissau		
Lesotho		
Liberia		
Libya		

Malawi		
Mali		
Mauritania		
Morocco	Air Force	DoD Directive 5515.8 (encl. 1), 9 June 1990
Mozambique		
Namibia		
Niger		
Nigeria		
Rwanda	Army	Memo, John H. McNeill, 1 September 1994
Senegal		
Sierra Leone		
South Africa		
Swaziland		
Tanzania		
Togo		
Tunisia	Air Force	Approval, John H. McNeill, 17 April 1996
Uganda		
Zambia		
Zimbabwe		

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APPENDIX B

PRACTICAL "TIPS" FOR CONDUCTING EFFECTIVE DEPLOYMENT CLAIMS OPERATIONS

I. PREDEPLOYMENT.

A. Training. Ensure that all parties concerned are properly trained. This should be an ongoing part of your daily mission.

1. Soldiers. Preventing and reporting damage. Soldiers should be aware of equipment operating and handling techniques to help them reduce the damage they may cause. This includes such practical matters as knowing the limitations of their equipment in various environments and climates. Soldiers should also be alerted to the importance of documenting pre-existing damage in their areas of operations.

2. Unit Claims Officers (UCO) and Maneuver Damage Claims Officers (MDCO). Claims personnel should insure that UCOs and MDCOs understand the proper procedures for investigating claims, compiling evidence, and completing reports and forms.

3. Legal NCOs, JAs, and Claims Attorneys.

a. Know and understand the polices and procedures for serving as Foreign Claims NCOICs, FCCs, and staffing Special Claims Processing Offices.

b. Know the environment you are entering. Ensure all claims personnel are properly licensed to drive available vehicles. Determine anticipated force protection requirements and ensure all personnel are weapons qualified (e.g., 9mm, M16, and SAW). Ensure soldiers supporting the claims mission receive combat lifesaver training.

B. Appointment orders for UCOs, MDCOs and FCCs. Units will appoint UCOs and MDCOs. Be ready to assist them with formats for orders. Appointment orders for FCCs will come through SJA channels. Know the procedures and have orders processed in advance of deployment when possible.

C. References. Take your references with you. They are often difficult to acquire on site.

1. International agreements. Obtain copies of pertinent SOFAs and other international agreements. Do they have claims provisions? Do the provisions comply with the International Agreement Claims Act?

2. Single-service responsibility. Who has single service responsibility for the area? If it is another service, do you have copies of their regulations and procedures? Do you know how to apply them? If single-service responsibility has not been designated for that area, obtain interim responsibility.

3. Command Claims Service regulations/policies/directives. Does a Command Claims Service cover the area? If so, coordinate with them for local policies and points of contact.

4. Local law. How does host nation law apply?

D. Packing List.

1. Cameras and lots of film.

2. Necessary forms.

a. DA Form 200 - Transmittal Record

b. DA Form 1208 - Report of Claims Officer

c. DA Form 1666 - Claims Settlement Form

d. DA Form 1667 - Claims Journal

e. DA Form 1668 - Small Claims Certificate

f. DD Form 1131 - Cash Collection Voucher

g. DD Form 1842 - Claim for Loss or Damage to Personal Property Incident to Service

h. DD Form 1844 - Schedule of Property and Claims Analysis Chart

i. SF 95 - Claim for Damage, Injury, or Death

j. SF 1034 - Public Voucher

k. Property receipts for requisitioned property. These receipts are provided to the property owner by the unit requisitioning the property. A copy is also submitted to the claims office for use in investigating claims for use or damage to this property.

3. Laptop computer with claims software. If you bring a digital camera, ensure you have software, disks, and all other necessary equipment.

E. Money.

1. Plan budget management.

2. Watch Claims Expenditure Allowance carefully.

3. Properly monitor deposits for FCA payments. Keep accounts separate.

4. In areas where there is a Command Claims Service, do not stockpile unpaid claims. Forward them for appropriate processing.

5. Class A agents - NOT FCC or claims officer. Make sure a Class A agent is designated to disperse money. The finance office may not provide one.

II. DEPLOYMENT

A. Coordinate with host nation claims authorities as soon as possible. This relationship will become very important when dealing with issues such as nonscope claims and *ex gratia* payments.

B. Claims office location.

1. Centrally located is best. Try to get the claims office co-located with finance and the CMO office if possible. This will make your job much easier.

2. Tent is fine, but for long term deployments where mobility is not essential attempt to procure something more substantial and permanent.

C. Intake procedures. Coordinate a system to keep track of claims. How will you do intake when there is a language barrier or when the claims forms are in a different language? Should there be different procedures in that case?

D. Publicity. After you have a location, you will need to publicize where you are and what you do. CMO/G5 will help you find a way to do this without disrupting operations.

1. Location, hours of operation, procedures.

2. Coordinate with PAO, CMO, embassy (if available), and units.

E. Translators. You must be able to communicate with local nationals to properly investigate their claims. CMO can be a big help in this arena. Get claims forms printed in the host nation language.

F. Local attorneys. Coordination is important. You may need help with local law and custom.

G. Vehicle support for investigations. Not only will you need vehicles, your personnel must be licensed to drive and trained to maintain them.

H. Control UCOs and MDCOs. These folks are out there with the units. They can do a lot of the investigation for you. If they are only doing intake you may not be making the most effective use of a primary resource.

I. Security. Establish procedures for maintaining the security of your site. You may be holding and dispersing large sums of money.

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CHAPTER 26
COMMAND AUTHORITY

I. SOURCES OF COMMAND AUTHORITY

A. Constitution:

1. Article 1, Section 8: "Congress shall have the power to ... declare war ... raise and support Armies ... make rules for the Government and regulation of the Land and Naval forces ...."

2. Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States."

B. Statutes, e.g., 10 U.S.C. sections 1071-1104, "under regulations to be prescribed by the Secretary of Defense," active duty military entitled to medical and dental care in any facility of the uniformed services.

C. Regulations:

1. DoD Directives, DoD Instructions

2. Service Regulations:

a) Army, AR 600-20 (15 July 1999);

b) Navy, Navy Regulations (1990), SECNAVINST, OPNAVINST;

c) Air Force, Air Force Instructions (AFI);

d) Marines, Marine Corps Orders (MCO)

3. Local regulations, policies, directives.

D. Inherent Authority. Recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)(power of a commander over an installation is "necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand"). See also Greer v. Spock, 424 U.S. 828 (1976)(commander has the "historically unquestioned power" summarily to exclude civilians from the area of his command; "There is nothing in the Constitution that disables a military commander from acting to

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avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command").

II. **DELEGATION OF COMMAND AUTHORITY**: "Any duties of an installation commander may be delegated except those which are imposed upon installation commander by law, such as those mentioned in the Uniform Code of Military Justice, appropriation acts, other statutory provisions and regulations, or other directives that specifically prohibit delegation." AR 210-10, para 2-5. (Now rescinded) AFI 51-604, Appointment to & Assumption of Command; Navy Reg. Art. 0802.

III. **USE OF COMMAND AUTHORITY TO REGULATE**:

A. Speech

1. Nature of Forum:

a) Public Forum: Traditionally used for free speech activities, such as public streets and sidewalks. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Capitol Square Review & Advisory Board v. Pinette, 115 S. Ct. 2440 (1995)(state owned plaza surrounding Statehouse in Columbus, Ohio). Test is whether principal purpose is free exchange of ideas, evidenced by long-standing historical practice of permitting speech. But see U.S. v. Kokinda, 497 U.S. 720 (1990)(sidewalk used solely as a passage for postal patrons not a public sidewalk); Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992)(airport terminals not public forum).

b) "Created" Public Forum: a.k.a. "limited" or "designated." Government property set-aside for free speech activities. E.g., Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S.384 (1993)(school district opened school facilities for use after school hours by community groups for wide variety of social, civic, and recreational purposes); Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995)(university's Student Activities Fund, funded by mandatory student fees, paid for, inter alia, student group publications on student news, information, opinion, entertainment, or academic communications). Intent & extent of use granted is key

c) Nonpublic Forum. Public property which is not by tradition or designation a forum for public communication may be reserved for its intended purpose so long as "regulation on speech is reasonable and not an effort to suppress expression merely because public

officials oppose the speaker's view." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)(selective access to school mailboxes did not transform property into public forum). See also Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985). Public access such as at open house is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8th Cir. 1982). Contra, U.S. v. Albertini, 710 F.2d 1410 (9th Cir. 1983), rev. on other grounds, 472 U.S. 675 (1985).

2. Content-based Restriction:

a) Public Forum: strict scrutiny (necessary to serve a compelling state interest and narrowly drawn to achieve that end).

b) "Created" Public Forum: same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, supra (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional). Accord Lamb's Chapel v. Center Moriches Union Free School District, supra (prohibiting after hours access to school property to groups with religious viewpoints).

c) Nonpublic Forum: reasonable for forum. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977)(ban on inmate solicitation to join prison inmate "labor union" and group meetings rationally related to reasonable objectives of prison administration).

3. Unprotected Speech including Dangerous Speech:

a. Fighting Words, i.e., those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971)(simply wearing jacket bearing words "F*** the Draft" may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace;" upheld conviction for calling another "damned racketeer" and "a damned Fascist").

b. Pornography. Roth v. U.S., 354 U.S. 476 (1957)(1st Amendment does not protect obscenity, i.e., material which deals with sex in a manner appealing to prurient interest).

c. Dangerous Speech:

(1) Civilian Standard: whether words used under circumstances are such as to create a clear and present danger, Schenck v. U.S., 249 U.S. 47 (1919); clear and present danger means directed to inciting or producing imminent lawless action and likely to do so. Brandenburg v. Ohio, 395 U.S. 444 (1969)(mere abstract teaching of propriety or necessity to resort to force and violence not the same as preparing group for and steeling it to violent action).

(2) Military Standard: speech which undermines the effectiveness of response to command is constitutionally unprotected. Parker v. Levy, 417 U.S. 733, 758 (1974)(different character of the military community and mission requires different application of 1st Amendment protections; "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it"). Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977)(affirmed Vietnam era court-martial conviction of seaman for publishing newsletter for active duty military urging desertion to Canada; 1st Amendment test in military is that words "tended to interfere with responsiveness to

command or to present a clear danger to military, loyalty, discipline, or morale").

4. Prior Restraint. DoDD 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (1 Oct 96); AR 600-20, Army Command Policy; AFI 51-903, Dissident & Protest Activities; MCO 5370.4A, Dissident & Protest Activities; OPNAVINST 1620.1A, Guidelines for Handling Dissent & Protest Activities Among Members of the Armed Forces.

a. Approval in advance to determine whether publication presents clear danger to loyalty, discipline, or morale of military personnel or if distribution would materially interfere with mission is authorized. Prior approval requirement upheld in Greer v. Spock, supra (unsuccessful challenge to regulation prohibiting distribution of political literature on post); Brown v. Glines, 444 U.S. 348 (1980)(unsuccessful challenge to regulation requiring airmen to obtain prior approval from installation commander prior to distributing literature on installation).

b. Limitations: Cannot pull individual issues of materials distributed through PX or library.

B. Solicitation

1. Charitable. DoDD 5035.1, Fund-Raising Within the Department of Defense; AR 600-29, Fund Raising within the Department of The Army; SECNAVINST 5340.2C, Fundraising & Solicitation of Dept of Navy Military & Civilian Personnel. On-duty solicitation authorized only for Combined Federal Campaign and military relief & aid agencies, e.g., in Army, Army Emergency Relief. Limited off-duty local fund raising may be authorized, e.g., for MWR activities, on-post private organizations, and other limited fund raising to assist the unfortunate such as veteran organization "poppies" and collection boxes for food or goods.

2. Commercial. DoDD 1344.7, Personal Commercial Solicitation on DoD Installations; AR 210-7, Commercial Solicitation on Army Installations; SECNAVINST 1740.2D, Solicitation & Conduct of Personal Commercial Affairs.

3. No right to solicit; must be authorized. Army permits in writing and valid for up to one year. (Navy/MC by local reg). Door-to-door solicitation prohibited. By appointment only; limited to family quarters or other designated areas.

4. Highly regulated to maintain discipline, protect property, and safeguard personnel. List of forbidden practices includes mass solicitation and retirees using IDs to get on post to solicit. Additional requirements for life insurance/securities. Violators can lose solicitation privileges; receive due process in form of notice and opportunity to be heard. Nature varies with service, e.g., Army has "show cause" hearing; Navy/MC informal.

C. Political Activities: DoDD 5500-7.R, Joint Ethics Regulation; DoDD 1344.10, Activities by Members of the Armed Forces on Active Duty; AR 600-20; MCO 5370.7A, Political Activities; AFI 51-902, Political Activities by Members of the USAF.

1. Soldiers, Sailors, Airmen & Marines: Traditional concept is that military members do not engage in partisan political activity. Examples: Voting and expressing personal opinion on candidates and issues authorized, as are contributions to a political party. Prohibitions include: no public demonstrations (partisan and nonpartisan) while on duty, in uniform (Locks v. Laird, 300 F.Supp. 915 (D.Colo. 1969)), or in a foreign country (Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir 1977)); no distribution of partisan political literature; no participation in partisan political management, campaigns, or convention.

2. Civilians: Hatch Act, 5 U.S.C. Sections 7324-27. No political activity on duty, in office space, while wearing uniform or indicia of government position, or using government vehicle. Political activity means partisan, i.e., representing a party. Less restrictive than DoD is for military. 1-800-85-HATCH (854-2824)

3. Recurring Issue: bumper stickers & signs:

a) Small bumper sticker on private vehicle is authorized; large sign or poster is not.

b) Bumper stickers disrespectful to President can be banned. Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995)(order barring civilian from displaying on his truck stickers embarrassing or disparaging to the President not violative of 1st Amendment).

c) Lawn Signs in Government housing areas. Local policy usually controls. Appropriate limitations authorized.

4. Extremist Organizations.

a) See DoDD 1325.6; AR 600-220; AFI 51-903; MCO 5370.4A; OPNAVINST 1620.1A. (Prohibiting active participation in organizations which espouse supremacist causes, attempt to create illegal discrimination, advocate the use of force or violence, or otherwise engage in efforts to deprive others of their civil rights.)

b) Army: AR 600-20; HQDA Message, DAPE-ZA, dated 20 Dec 96. Subject: Revised Army Policy on Participation in Extremist Organizations or Activities.

(1) Participation in extremist organizations or activities is incompatible with military service.
(2) Extremism includes advocating racial, gender or ethnic hatred or intolerance.
(3) Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline/mission accomplishment; attending meetings under certain circumstances, e.g., in violation of commander's order.
(4) Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, morale within the command.

D. Religion

1. Constitutional test. Lemon v. Kurtzman, 403 U.S. 602 (1977)(three part test: proposed government action must have a secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and not involve excessive government entanglement with religion)

a) Applied:

(1) Religious displays. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986)(city nativity scene in front of city hall unconstitutional); Jewish War Veterans v. United States, 695 F.Supp. 3 (D.D.C. 1988)(65-ft cross in front of HQ on military installation unconstitutional).

(2) Holiday displays. Lynch v. Donnelly, 465 U.S. 668 (1984)(secular holiday display which included nativity scene not unconstitutional).

(3) Invocations. Lee v. Weisman, 505 U.S. 577 (1992)("nonsectarian" prayer at middle and high school graduation ceremonies impermissible establishment of religion). See also Santa Fe Independent School District v Jane Doe, 120 S.Ct. 2266

(4) Day care. Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995)(Army regulations prohibiting Family Child Care providers from having any religious practices during their day-care program unconstitutional; relationship between Army and provider is solely one of regulator and regulatee and does not create an unconstitutional entanglement).

b) Exceptions:

(1) Army Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

(2) Opening legislative sessions with invocation constitutional. Marsh v. Chambers, 463 U.S. 783 (1983). Army

Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

2. Statutes

a) Religious Freedom Restoration Act, 42 U.S.C. section 2000bb (Government shall not substantially burden exercise of religion, even from a rule of general applicability, except in furtherance of a compelling governmental interest and through the least restrictive means). Compelling governmental interest test applies to the military, but intent is for courts to grant authorities significant deference in effectuating military interest in maintaining good order, discipline and security. 1993 U.S. Code Cong. & Admin News 1892. RFRA ruled unconstitutional in Boerne v. Flores, 1997 W.L. 34532 (U.S., June 25, 1997)

b) 10 U.S.C. section 774, legislatively overruling Goldman v. Weinberger, 475 U.S. 503 (1986)(granting great deference to professional judgment of military authorities on matters of military interest and holding that 1st Amendment did not prohibit AF regulation preventing wearing of yarmulke while on duty and in uniform). Statute provides for wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty.

3. Regulation & Policy. DoDD 1300.l7, Accommodation of Religious Practices Within the Military Services; AR 600-20; SECNAVINST 1730.8, Accommodation of Religious Practices.

a) Policy is to approve requests for accommodation of religious practices when it will not have an adverse impact on readiness, safety, discipline, etc. Commander responsibility but soldier can have denial reviewed: Army (HQDA Committee for Review of Accommodation of Religious Practices in U.S. Army); Navy/Marine ((for wear & appearance denial) CNO/CMC)

b) Specific practices:

(1) Worship: worship requirements that conflict with normal availability for duty will be accommodated unless precluded by military necessity.

(2) Dietary: exception to policy to ration separately and take personal supplemental rations in field/combat environment.

(3) Medical practices: in Army, no accommodation in lifethreatening situations; otherwise, medical board will consider request.

(4) Wear and appearance: neat and conservative items of religious apparel may be worn except if it would interfere with performance of duty.

IV. **AUTHORITY OFF THE INSTALLATION: THE ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB).** Joint Reg: AR 190-24/ OPNAVIST 1620.2A/ MCO 1620.2B/ AFI 31-213.

A. Mission: to make recommendations on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.

B. Duties: include taking action on reports of negative conditions, liaison with civil authorities, recommendations to commander.

C. Composition: representatives include law enforcement, legal, health and environment, equal opportunity, and safety.

D. Sanction: may recommend off-limits area, i.e., any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the off-limits period.

E. Due process provided in form of notice and opportunity to be heard at board.

F. Loss to business from order is not a "taking" for which damages accrue. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946).

G. Enforcement: Violation of off-limits is UCMJ offense.

V. Uses of Command Authority

A. Installation Protection

1. Limitations on Access (Bars, 18 USC 1382)

2. Limitations on Use (Facilities, Vehicles on the Installation)

B. Limits to Individual Conduct

1. Body piercing, tattoos and clothing

2. Inoculations

C. Authority Off-Post

1. Inspections

(a) Residence

(b) Vehicles

2. Weapons Registration

CHAPTER 27

STANDARDS OF CONDUCT

I. REFERENCES.

A. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.

B. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635 (Office of Government Ethics Rules).

C. DOD 5500.7-R, JOINT ETHICS REGULATION (JER), 30 Aug 93. Change 4, effective 6 August 1998. Note: Recent Changes marked with an asterisk (*).

II. BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER EXECUTIVE ORDER 12674 (also reproduced on the last page of this outline).

1. Public Service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

III. JOINT ETHICS REGULATION (JER).

A. Overview. A single, comprehensive regulation covering more than traditional standards of conduct.

B. Applies OGE rules to DoD. Specifically applies many of the OGE rules to enlisted members. Rules printed in ***bold italics*** are general orders--they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, UCMJ.

C. Rescinds Army-specific Standards of Conduct rules once found in AR 600-50, Standards of Conduct. Now all services use the same rules.

D. Key definitions under the JER

1. DOD Employee (JER 1-211). The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:

a. Any DOD civilian officer or employee (including special Government employees) of any DOD Component (including any nonappropriated fund activity).

b. Any active duty Regular or Reserve military officer, including warrant officers.

c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

d. Any Reserve or National Guard member on active duty under orders issued pursuant to title 10, United States Code.

e. * Any Reserve or National Guard member while performing official duties or functions under the authority of either title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]

2. Designated Agency Ethics Official (DAEO) (JER 1-209): A DOD employee who is responsible for the implementation and administration of the component's ethics program.

3. Ethics Counselor (EC) (JER 1-214): A DOD employee appointed in writing to generally assist in implementing and administering the command's or organization's ethics program and to provide ethics advice to DOD employees in accordance with the JER.

a. Communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications.

b. ECs advise and assist on issues, such as:

(1) acceptance of gifts and gratuities;

(2) business visitors (e.g., product demonstrations and capabilities briefings);

(3) ethics training;

(4) participation in or dealings with private and professional associations, such as AUSA;

(5) review of public (SF 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests;

(6) post-Government employment restrictions; and

(7) use of Government resources and time.

c. EC's advice *generally* precludes disciplinary action against an employee who follows EC's advice (5 C.F.R. § 2635.107(b)).

4. Agency Designee (JER 1-202): The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervision of the DOD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

IV. USE OF GOVERNMENT RESOURCES.

A. * Official Use. Punitive provision, restricting use of communication systems (telephones, facsimile machines, electronic mail, internet systems, etc.) for official uses only - with exceptions. (JER 2-301). Official use may include deployed employee's use to enhance MWR. This requires theater commander approval.

B. Permits Agency Designee to authorize personal (non-official) use, only IF:

1. there is no adverse effect on duty performance;

2. the duration and frequency are reasonable (if possible while off duty - during breaks or after normal work hours);

3. a legitimate public interest is served (keeping employees at their desks; education/familiarization with communication systems; enhancing professional skills; job search in response to downsizing);

4. use does not reflect adversely on DOD (no pornography, chain letters, advertising, soliciting, or selling (unless on authorized bulletin boards), etc.);

5. use does not overburden Government communication systems; and

6. use creates no significant additional cost to DOD (no long distance charges to the Government).

C. * Monitoring Use. Employees' use serves as consent to monitoring of any type of use, including incidental and personal uses, whether authorized or not.

D. * Other Use. Agency Designees may permit employees limited use of items, such as typewriters, calculators, libraries, and other similar resources and facilities, if:

1. use does not reflect adversely on duty performance;

2. use is of reasonable duration and made during personal time;

3. use serves a legitimate public interest (supports local charities or community volunteers, enhances professional skills, or job search relative to downsizing, etc.);

4. use does not reflect adversely on DOD; and

5. use creates no significant additional DOD cost.

E. Employee Support. Employees (such as secretaries, clerks, and military aids) may not be used to support the unofficial activity of another DOD employee in support of non-Federal entities. (JER 3-305).

V. GIFTS FROM OUTSIDE SOURCES (JER, CHAPTER 2).

A. Basic Punitive Prohibition on Gifts From Outside Sources. A soldier shall not, directly or indirectly, solicit or accept a gift:

1. from a prohibited source (e.g., someone who has an interest in the performance of official Army missions); or

2. because of the employee's official position.

B. Practical Approach. Three questions:

1. Is the item actually a gift? The term "gift" includes almost anything of monetary value, but not these (*exemptions*):

   a. Coffee, donuts, and similar modest items of food and refreshments when offered other than as part of a meal;

   b. Greeting cards and most plaques, certificates, and trophies;

   c. Rewards and prizes in contests open to the public;

   d. Commercial discounts available to the general public or to all Government or military personnel;

   e. Commercial loans, and pensions and similar benefits;

   f. Anything paid for by the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute; and

   g. Anything for which the employee pays market value.

2. If the item is a gift, does an exception apply? Common ***exceptions*** when an employee may accept:

   a. unsolicited gifts with a market value of $20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a year does not exceed $50;

   b. gifts based on an outside relationship, such as a family relationship or personal friendship;

   c. discounts and similar benefits offered to groups in which membership is not related to Government employment (or "Government discounts" where the same offer is broadly available to the public through similar groups), and certain benefits offered by professional associations or by persons who are not prohibited sources;

   d. legitimate awards that are part of a regular and established program of recognition for meritorious public service;

e. gifts resulting from the outside business activities of employees and their spouses;

f. * free attendance (not travel or lodging) paid by the sponsor of a widely-attended gathering, speaking engagement, or other event if the agency determines an interest in the event (attend in personal capacity) [Rule amended: 61 Fed. Reg. 42965 (20 Aug 96) allows payment by other than the sponsor if >100 people attend and the cost is <$250; also allows spouse or other guest to attend];

g. food, refreshments, and entertainment at certain social events extended by persons who are not prohibited sources, where no one is charged a fee to attend the event;

h. unsolicited gifts of free attendance for DOD employees (and spouses) at events sponsored by state or local governments or non-profit, tax exempt civic organizations, where the agency has determined its community relations interests in the event (JER 2-202a); and

i. certain educational scholarships or grants for DOD employees and dependents (JER 2-202b).

3. Would using the exception undermine Government integrity? Even if a gift is covered by one of the exceptions, do not accept it if it will undermine Government integrity.

a. Cannot use official position to solicit a gift or force someone to give a gift.

b. Any gift is illegal if it is in exchange for an official action.

c. Some gifts may be prohibited by other statutes (such as procurement integrity contract laws).

d. Finally, gifts may not be accepted so frequently that anyone would question whether influence is being bought. For example, a Federal building manager cannot accept a free sandwich every week from a lunch counter operating in the building.

C. Handling Improper Gifts (5 C.F.R. § 2635.205). When an employee cannot accept a gift:

1. First and foremost, if possible, refuse the offer of an improper gift. Diplomatically explain that Federal employees may not accept certain gifts.

2. The employee should pay the donor its market value; or

3. If the gift is a tangible item, the employee may instead return the gift.

4. Subject to approval, perishable items may be donated to a charity, shared within the office, or destroyed.

VI. FOREIGN GIFTS. (U.S. CONST. ART. I, §9, CL. 8; 5 U.S.C.A. §7342, AND JER §2-300.)

A. Gifts from foreign governments.

1. Can accept a "gift of minimal value" (i.e., one having a retail value in the United States not in excess of $260 at the time of acceptance. "Minimal value," based on the Consumer Price Index.)

2. Gifts valued above "minimal value" can only be accepted on behalf of the U.S. Report to and deposit these with Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA, 22332-0474 for disposal, official use, or forwarding to the General Services Administration.

3. * Aggregate the value of gifts from different officials during the same presentation.

4. * Gifts from spouses of foreign officials are deemed gifts from the foreign official.

5. * Gifts to employees' spouses are deemed gifts to the employee.

6. * Gifts received at separate presentations are separate gifts - their values are not aggregated (even if from the same official and on the same day).

7. * When more than one gift is given at a single presentation, the employee may retain only those with an aggregate of less than "minimum value." The remainder (valued over "minimal value") may not be kept by the employee.

B. Gifts to deployed personnel. Apply general gift analysis, unless gift is from a foreign government, then apply those rules.

VII. GIFTS BETWEEN EMPLOYEES (JER CHAPTER 2)

A. General Punitive Rules. An employee shall not:

1. give a gift or solicit a contribution for a gift for an official superior (i.e., supervisor or those in supervisory chain); or

2. accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

B. Exceptions.

1. Gifts may be given on an occasional basis, including traditional gift-giving occasions, such as birthdays and holidays.

   a. This includes minor contributions of food which will be consumed at the office, meals at someone's home (of a type and value customarily provided to personal friends), and customary gifts, such as a bottle of wine brought when invited to another's home.

   b. This also includes infrequent gifts having a value of less than $10 on appropriate occasions, such as Christmas or birthdays. Such gifts may not become "routine."

2. A subordinate may give or donate toward a gift to a superior on special infrequent occasions, such as, marriage PCS, or retirement.

   a. Gifts on special infrequent occasions that do not terminate the superior subordinate relationship are limited to $300 in value per gift per donating group (JER 2-203).

      (1) Donating group is comprised of all contributors to that group gift.

      (2) If one contributor contributes to two donating groups, then value of gifts from groups with a common contributor is aggregated as if from a single donating group--$300 limit applies to total value (JER 2-203a(2)).

b. * Special infrequent occasion gifts that terminate the superior, subordinate relationship (retirement, resignation, transfer) may exceed $300 per donating group if they are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same. (Changed on 2 January 1997.)

c. An employee cannot solicit more than $10 from another employee for a group gift to the contributing employee's superior (JER 2-203b).

d. Solicitations for gifts to a superior must be completely voluntary. Solicited individual may decline to contribute.

e. To avoid improper pressure, the collection should be handled by someone junior in the organization.

GIFTS SUMMARIZED

Methodology	Gifts from Outside Sources	Gifts Between Employees
Prohibited (***Punitive***)	Yes if from prohibited source, or given because of off. psn § 2635.202	Yes if from subordinate or solicited for superior § 2635.302
A gift?	Nongifts - exemptions (§ 2635.203): 1. nonmeal food/refreshments 2. cards, plaques 3. bank loans 4. paid for by Government 5. paid market value	
Exceptions?	§ 2635.204 Examples: 1. $20/50 rule 2. personal relationship 3. discounts/benefits 4. awards/degrees 5. outside bus. relations 6. widely attended event 7. social invitations 8. local Govt/civil events 9. scholarships/grants	§ 2635.304 Two categories: 1. occasional basis ($10 or less; food refreshments; hospitality; leave transfers) 2. special infrequent occasions (gift appropriate to occasion - max $300 (unless event terminates superior/subordinate relationship) from single donating group; $10 max on solicitation per person)
Limitations	§ 2635.202(c) 1. no bribes 2. no gift solicitations 3. reasonable person test 4. no statutory violations	§ 2635.302(c) 1. no coercion 2. common member in donating groups

Citations to 5 CFR § 2635 reprinted in the Joint Ethics Regulation, chapter 2. Provisions on accepting or soliciting gifts are punitive. Violations may result in UCMJ actions.

VIII. OFFICIAL TRAVEL.

A. Air Travel.

1. First class. On official business, use coach, unless:

   a. No other reasonably available accommodations exist.

   b. Travel by an employee whose physical condition necessitates first-class travel.

   c. Exceptional security circumstances.

2. Report all *purchased* first-class travel to GSA within 60 days of the end of each fiscal year.

3. Premium class (other than first class, such as business class) may be used, **if**:

   a. Regularly scheduled flights along the required route only provide premium-class seats.

   b. No space is available in coach, and travel is urgent and cannot be postponed.

   c. Travel involves an employee with a disability substantiated in writing by competent medical authority. An attendant may accompany him in premium class, if necessary.

   d. Security purposes or exceptional circumstances exist.

   e. Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.

   f. Overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.

g. Travel costs are paid by a non-Federal source. Payments from a non-Federal source may not be used for first-class travel, only coach or premium-class.

h. Travel which is in excess of 14 hours and begins/ends in a foreign country is now only authorized premium upgrade in limited circumstances.

B. Payment for ***Official*** Travel Expenses From Non-Federal Sources (31 U.S.C. § 1353; JER 4-101; JFTR, Chapter 7, Part W, §§ U7900-7908; JTR, Chapter 4, Part Q, §§ C4900-4908; HQDA Letter 55-96-1, Subject: Acceptance of Payments From a Non-Federal Source for Official Travel Expenses (30 October 1996); 41 C.F.R. Part 304).

1. Gift requiring approval of normal travel approving official.

2. Unsolicited gift may be accepted under 31 U.S.C. § 1353. Consultation with Ethics Counselor required. Payment may be accepted for travel, subsistence, and related expenses.

3. Deciding official must determine acceptance does not appear to jeopardize integrity of agency. Standard: reasonable person with knowledge of relevant facts. Deciding official considers (31 C.F.R. Part 304):

a. Source of offer/payment;

b. Purpose of meeting or similar function;

c. Identity of other expected participants;

d. Nature and sensitivity of any matter pending at agency affecting the offeror;

e. Significance of traveler's role in any offeror's pending matter; and

f. Monetary value and character of travel benefits offered.

4. After travel, traveler reports acceptance if over $250 through the approval authority and the local Ethics Counselor to DAJA-SC.

5. Payments from a non-Federal source may not be used for first-class travel, only coach or premium class less than first class (JFTR, §§ U7902D, U3125 (7/1/94), JTR; §§ C4902.4, C2205).

IX. INCIDENTAL TRAVEL BENEFITS (JER, CHAPTER 4, SECTION 2; JFTR §§ U3125 AND U2010; JTR § C2205; AND SECARMY TRAVEL POLICY (APRIL 1999)).

A. Federal Government Property. Anything that a DOD employee receives as a result of official travel belongs to the Federal Government unless it falls under a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2).

1. Frequent Traveler Benefits (JER 4-201).

a. **Frequent flyer mileage credits earned on official travel belong to the Federal Government and may only be used on subsequent official travel. First consideration must be to offset future official travel. If credits **cannot** be used to offset future travel (i.e., they will expire or go unused), then they may be used for upgrades (airline, rental car, or hotel).

(1) When the benefits cannot be used to offset future travel, frequent flyer benefits may be used for upgrade to premium class or clipper/business class, but *not* to first class.

(2) If there is no premium class, then they may not be used for airline seat upgrades at all.

b. When personal and official miles have been commingled in the same account to the extent that they are indistinguishable, all miles belong to the Government and may only be used for official travel.

2. Awards and prizes (merchandise) from travel services on official travel belong to the Federal Government.

B. Personal Property. Benefits that can't be used for official purposes may be accepted if a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2) applies.

1. On-the-spot upgrades (JER 4-202). May be accepted if they meet the gift exceptions.

a. May accept if generally available to the public, all Federal employees, or all military members.

b. Do not accept if offered because of traveler's rank or official position.

c. **Upgrades while traveling in uniform--OK to accept an offer, unless it is given because of your official position. <u>However, Army employees may not travel in premium or higher class in uniform</u>.

2. Cash or credit rebates from personal credit cards used on official travel are not the property of the Federal Government and may be accepted (Comp. Gen. Decision B-236219, Matter: Use of Discover Charge Cards, May 4, 1990).

3. Getting "bumped" on official travel.

a. Benefits, such as free tickets, as a result of being <u>*involuntarily*</u> bumped from an overbooked flight on official travel belong to the Government (traveler remains on Government time).

b. Benefits as a result of <u>*voluntarily*</u> relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler is on his own time and may not give up the seat if it would interfere with mission accomplishment.

X. TRANSPORTATION. (<u>See</u> DOD 4500.36-R; SecArmy Memo, Policy For Travel By DA Officials (April 1999); and AR 58-1, July 1999.)

A. Home-to-Work Transportation.

1. Generally not available.

   a. Designated position exception:

      (1) Field work (i.e., duty requires employee to travel to various other duty sites from primary duty location, e.g., recruiter).

      (2) Intelligence, counterintelligence, protective services, or criminal law enforcement duties.

   b. Statutory exception: special determinations based on clear and present danger, emergency, or compelling operational considerations. (SECARMY approval 15-calendar day periods, 90-calendar day extensions possible.)

2. SECARMY approval (DCSLOG responsibility).

B. Spouse Transportation.

1. **General rule: spouses do not accompany soldiers-sponsor on official business <u>at Government expense</u>. Exceptions:

   a. Invitational travel orders for "unquestionable official participation" requirement. Spouse must actually participate or presence is deemed in national interest because of diplomatic or public relations. Transportation only (no per diem).

   b. "Non spouse" travel where spouse is conferring with DOD officials on DOD matters (e.g., substantive spouse agenda).

2. Unaccompanied Spouse Travel. Authorized when spouse is a subject matter expert under JTR, except for Family Programs. (April 99 SecArmy Memo.)

3. Nontactical vehicles. Space available with sponsor when vehicle used to transport Army personnel to an official function <u>and</u> the transportation of the spouse does not result in additional expense.

XI. PARTICIPATION IN PRIVATE ORGANIZATIONS (PO).

A. * **AR 210-1 rescinded**. See ACSIM Memo of 20 April 1998. See also Private Organizations Reference Guide, distributed separately.

1. Installations must "develop a prescribed plan to administer and execute a local process for approving or disapproving requests from private organizations." Policies must be consistent with JER and DoD Instruction 1000.15, Private Organizations on DoD Installations (23 October 1997).

2. **"Informal funds" - Office funds, including coffee, cup and flower, and annual picnic funds. No monetary minimum/maximum, unless established by local command. See AR 600-20, para 4-21 (15 July 1999).

B. Official Participation (JER chapter 3, section 2).

1. Membership. Liaison where significant and continuing DOD interest served by representation (JER 3-201).

2. Management.

a. * JER 3-202, Management of Non-Federal Entities by DOD employees acting in their official capacities. Implements provisions from the NDAA of 1998 codified in 10 USC 1033, 1589, and 2012.

b. DOD DAEO (General Counsel) authorization required to participate as official military representative in PO management. With authorization, may represent DOD in discussions of mutual interest, participate in determinations and conclusions, and vote on such matters.

c. Sec Army, w/ DOD GC approval, may designate personnel to serve in their official capacities without compensation as an officer, director, or otherwise participate in the management of an NFE designated by DODGC (see below);

d. Personnel may serve only to provide oversight and advice to NFE—not day-to-day operations. Sec Army must delineate specific duties;

e. DOD GC designation of entities:

(1) Military Welfare Societies: Army Emergency Relief; Air Force Mutual Aid Society, Inc.; Navy-Marine Corps Relief Society; Coast Guard Mutual Assistance.

(2) Other entities which:

(a) regulate service academy athletics, international athletic competitions, and performance, standards, and policies of military health care; or

(b) accredit service academies & other DoD schools.

3. Meeting Attendance. Personnel may attend at Government expense when information gained will "substantially benefit the approving authority's mission" (see AR 1-211, Attendance of Military and Civilian Personnel at Private Organization Meetings (1 Jun 84)). AR 1-211, Table 1:

If the meeting -	***Then the individual may***
Is of direct and substantial benefit to the approving authority and to DOD and Government funds are available	be authorized travel expenses and per diem and permitted to attend in a TDY status.
Is of a quasi-official nature and the approving authority will receive some benefit from attendance which is not direct or substantial	be authorized attendance in a permissive TDY status without payment of travel expenses, per diem, or other reimbursable entitlements.
Is of marginal or no benefit to the approving authority	be authorized leave and incur all expenses connected with travel.

4. Endorsement. Punitive prohibition: employees may not use their official capacities, titles, positions, or organization names to suggest official endorsement or preferential treatment of a non-Federal entity, event, product, service, or enterprise. Employees may only use their titles, positions, or organization names to identify themselves relative to performance of official duties. (JER 3-209.)

Note: NG may offer a State's SGLI-equivalent to the same extent as SGLI.

5. Support.

a. Impartiality required (JER 3-204).

b. JER 3-211 authorizes limited support when commander determines:

(1) the support does not interfere with official duties and does not detract from readiness;

(2) the private organization is not affiliated with the Combined Federal Campaign (CFC), or approval has been obtained from the CFC Local Federal Coordinating Committee;

(3) legitimate DOD interests, such as community relations, are served;

Practice Tip: Must identify the specific community relations or public affairs interest involved. Coordinate w/ PAO.

(4) the event is appropriate for DOD support;

(5) the event is of interest to the civilian or military community as a whole;

(6) the DOD organization is willing to provide similar support to other similar events so as to avoid the appearance of unduly favoring one organization over another;

Practice Tip: The problem is giving special treatment to one organization over other similarly-situated organizations. It's important to define the category of organizations similarly-situated. Any non-preferential selection system (first-come, first-served; lottery) is appropriate.

(7) there are no statutes or regulations restricting the support; **and**

(8) either no admission fee is charged for the event, no fee is charged for the supported portion, or DOD support is incidental to the event.

Note: "Commander" for NG units is the State TAG, per Change 3 to JER.

6. Fundraising. (JER 3-210 and 211)

a. Logistical Support. Limited support of a charitable fundraising event allowed when commander determines:

(1) Factors (1) through (6) above are met; and

(2) The organization is not affiliated with the Combined Federal Campaign (CFC), or approval has been obtained from the CFC Local Federal Coordinating Committee, unless the fundraising occurs "outside the federal workplace," as determined by the commander.

b. Endorsement. No official endorsement (or the appearance of endorsement) of PO fundraising or membership drives authorized unless an exception exists. Exceptions:

(1) * Listed special organizations, like CFC, AER, and organizations composed of DOD employees or dependents when fundraising among their own members for their own benefit when commander approves.

(2) * [For NG members when covered by the JER] Charitable, community, or civic organizations, as identified in 32 USC § 508 and DoD Directive 1100.20 when approved by the cdr after consultation with the EC; BUT no member of the NG may be ordered , coerced, or compelled to participate in or contribute to any fundraising or membership drives.

Note: "Commander" for NG units is the State TAG, per Change 3 to JER.

7. * On-post POs. Installations must establish local policies concerning authorizing PO's to operate on the installation. (AR 210-1 rescinded.)

C. Personal Participation (JER, chapter 3, section 3).

1. Membership (JER 3-301). Generally okay.

2. Management (JER 3-301). Okay, unless offered because of official Government position.

3. Endorsement (JER chapter 2, 5 C.F.R. § 2635.702(e)). Generally okay, with caution--personal capacity. (JER 3-300a(1): Colonel Smith, U.S. Army.)

Note: JER 2-304 allows retirees and RC members not on active duty to use their titles in connection w/ a commercial enterprise if they indicate their retired/reserve status; but, use may not discredit DoD or appear to be a DoD endorsement.

4. Support (JER 3-300c) - community support activities that promote civic awareness (e.g., disaster relief events).

5. Fundraising (JER 3-300a). Okay ***if*** commander authorizes outside Government workplace (e.g., public entrances, in community support facilities, and in personal quarters) and purely in personal capacity (e.g., off duty, not in uniform).

6. Representational Activities. 18 U.S.C. 205 prohibits DOD employees from acting as agent for a PO before the Government.

a. The only permissible contacts on behalf of a PO are those that are "ministerial" in nature: conveying purely factual information; delivering or receiving materials or documents; answering (without advocating for a particular position) requests for information; or signing a document that attests to the existence or non-existence of a given fact (PO rep's attestation that a given signature is valid).

b. * May, however, represent certain non-profit organizations before the Government, (request support for scouts).

Note: 18 USC 205 is N/A to enlisted. § 205 applies to Special Gov't Employees generally only when the employee was personally and substantially involved in the matter in his or her federal capacity. SGE includes a Reserve officer, or an officer of the NG of the US, unless otherwise an officer or employee of the United States, when on active duty solely for training; when voluntarily serving a period of extended active duty less than 130 days; and when serving involuntarily. (18 USC 202. *See also*, JER 5-403.)

XII. JER CHANGES NOT COVERED ABOVE.

1. Financial Disclosure Reporting

a. Threshold Filing Increase. JER 7-300b increases the presumptive threshold for required OGE 450 filing to $2,500 per purchase and $20,000 per year. This conforms the JER to the definition of "micro purchases" in the Federal Acquisition Streamlining Act.

b. * Forms. OGE Form 450 in; SF 450 out. OGE Optional Form 450A, Confidential Certificate of No New Interests, authorized, but must use DoD version and attach copy of last OGE 450.

c. * SF 278 Filers. Note: Goes to DA through the Ethics Counsel, who prepares DA Form 4971-R (Nov 94, reproducible form in AR 27-1). Late Reports: $200 penalty paid by the filer unless waived by OGE.

(1) **New Entrant Report.** File within 30 days of appointment (actual promotion). **For RC personnel**. Old Rule was DoD imposed--file within 30 days of promotion to BG. New Rule comports w/ OGE rule--file in the first year the officer conducts 61 or more days in federal service (Title 10). Report due 30 days after the 61st day.

(2) **Annual Report.** Due by 15 May of each year for the previous calendar year. File only if the officer conducted 61 or more days in a Title 10 status.

(3) **Termination Reports.** Due not sooner than 15 days before but not later than 30 days after termination from a covered position. Not required of RC GO's serving not more than 60 days on active duty in a calendar year in which the officer is transferred to the retired reserve. Watch out for terminal leave.

Practice Tip: Many NG GO's probably will not have to file a 278 because they are most often in a Title 32 status. Title 10 status is most common for mobilization and overseas deployments. Many "Assistant to TAGs" get 61 or more days of federal service.

Practice Tip: If RC GO does not have to file an SF 278 because of less than 61 days of active federal service, the officer probably still has to file an OGE Form 450.

2. * Annual Ethics Training. (JER 11-302)

a. Annual ethics training may now be presented in person by a Qualified Individual or by telecommunications, computer-based methods, or by recorded means prepared by a qualified Individual.

b. If the DAEO determines, SGEs and RC personnel serving on AD less than 30 consecutive days may be trained by "other means."

3. * 18 U.S.C. §208 Regulations (Conflict of Interest) 5 C.F.R. Part 2640.101 (JER 5-200). Supersedes TAB D of JER.

XIII. CONCLUSION.

PERSONAL OUTSIDE ACTIVITIES SUPPLEMENT

A. Personal and Financial Conflicts of Interest

1. An employee may not personally and substantially participate in an official capacity in a matter in which he (or certain others) has a financial interest if participation will have a direct and predictable affect on that interest.

2. An employee also may not personally and substantially participate in a matter if it involves a person or entity with whom the employee has a special relationship--called a "covered relationship." This includes a nonfinancial, yet personal, conflict of interest.

3. Personal Financial Interests imputed to you (i.e. you generally may not participate in matters involving these entities):

   a. The interests of a company or business you work at, own as a partner, or serve as an officer (imputed for one year); or a company you own stock in (unless worth less than $5,000).

   b. The interests of your spouse and children.

   c. The interests of "members of your household" or those with whom you have a "close, personal relationship."

   d. The interests of an organization you serve as an officer or director (imputed for one year)

e. The interests of an organization you "actively participate" in; includes serving as an officer or committee chair or otherwise directing the organization's activities (may include aggressive endorsement). Active participation means more than mere membership.

4. Appearance Problem-Consideration of appearances of a conflict of interest by an employee.

a. A conflict of interest also occurs where a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter--the mere appearance of a conflict invokes the rules.

b. Employee may still act on the matter when agency designee issues a written authorization after considering the matter. Obtain Ethics Counsel opinion.

5. Job-Hunting. Prohibitions against working on a matter involving a company with which you are seeking employment.

6. Example. Employee who moonlights as a salesperson at XYZ Computer Store may not be involved personally and substantially in the procurement of computers for the office from XYZ Computers.

7. Example. President of the local AUSA chapter (or unit sub-chapter) may not, in an official capacity, approve a request for use of DoD space by the Association.

B. Private Businesses (JER para. 2-205).

1. **Punitive provision**: DoD employees may not solicit or make any solicited sales to personnel who are junior in rank, grade, or position to them

2. May also not solicit or make solicited sales to the family members of the junior employee.

3. Applies on and off duty.

4. Exception: As long as there is no coercion or intimidation, it is okay to:

a. Make sales off-duty from an off-post retail establishment.

b. Sell or lease your own personal property or real estate.

C. Employment Prohibitions.

1. During Your Federal Service.

a. May not engage in any outside employment if it conflicts with your federal duties.

b. Commands may require pre-approval for outside employment. Filers of financial disclosure forms must obtain prior approval.

c. General Officers may not sit as an officer or director of an outside organization for compensation.

d. May not receive improper supplementation of your federal salary for performing your official duties (18 USC § 209).

2. After Your Federal Service.

a. May not "switch sides" and work for a contractor on the same matter you handled as a DoD employee.

b. DoD personnel involved working with contractors have special rules under the Federal Acquisition Regulation. Contract personnel should consult their Ethics Counselor for post-employment issues.

D. Honoraria and Teaching, Speaking, and Writing.

1. Statutory ban on Honoraria--that is, compensation for a lecture, speech, or writing-- was "effectively eviscerated" by the U.S. Supreme Court. (See JER 3-307c.)

2. Prohibitions remain, however, on "Teaching, Speaking, and Writing."

a. May not receive compensation for teaching, speaking, and writing related to your official duties, i.e., cannot re-package your federal work and profit from it.

b. Does not preclude teaching, speaking, and writing in an inherent area of your expertise based on your education or experience even though it may deal generally with a subject within your official responsibility/

c. May receive compensation for teaching courses at certain educational institutions even if the subject is related to your official duties. Seek ethics counselor advice.

d. May not use your rank or official position to promote your teaching, speaking, and writing. May include it in a title or bio and, if the subject deals with an ongoing agency program or policy, must include a disclaimer.

E. Political Activities (JER 6-300; DoD Directive 1344.10; AR 600-20, para 5-3 and Appendices B & C).

1. Soldiers may not engage in partisan political politics.

2. May not use your position to solicit votes or contributions.

3. Registering to vote, voting, expressing an opinion, making monetary contributions are generally okay.

F. Gambling (JER 2-302). Punitive Provision.

1. Gambling is prohibited on federally-owned or leased property or anywhere while on duty.

2. Rule allows private wagers in housing areas if based upon a personal relationship if IAW local laws. But: UCMJ may prohibit if a violation of punitive provisions regarding gambling with a subordinate.

PRINCIPLES OF ETHICAL CONDUCT

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

CHAPTER 28

GOVERNMENT INFORMATION PRACTICES

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FREEDOM OF INFORMATION ACT

Outline of Instruction

I. FREEDOM OF INFORMATION ACT.

A. Primary References:

1. Freedom of Information Act, 5 U.S.C. § 552, as amended.

2. Department of Defense Directive No. 5400.7, DOD Freedom of Information Act Program (29 September 1997).

3. Department of Defense Regulation No. 5400.7-R, DOD Freedom of Information Act Program (4 September 1998) (includes 1996 amendments to the Freedom of Information Act).

4. Army Regulation No. 25-55, The Department of the Army Freedom of Information Act Program (14 April 1997) (does not include 1996 amendments to the Freedom of Information Act).

5. Air Force Supplement to DOD 5400.7-R (22 July 1999), *superseding* AF Instruction 37-131 (16 February 1995) [hereafter DOD5400.7-R/AFSUP1].

6. Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program (6 January 1999); JAGINST 5720.3 (10 May 1991) (Assigns responsibility within OJAG).

7. Marine Corps Order 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (22 August 1983) (W/CH1 2 August 1991); Marine Corps Order P5720.56A, Availability to Public of Marine Corps Records (26 February 1985).

B. Secondary References:

1. Freedom of Information Act Guide & Privacy Act Overview (May 2000), a biennial Department of Justice publication (available on the World Wide Web at http://www.usdoj.gov/foia -- requires an Acrobat reader) [hereinafter DOJ FOIA Guide].

2. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.

3. Freedom of Information Case List (September 1998), a biennial Department of Justice publication.

4. FOIA UPDATE, a newsletter issued quarterly by the Justice Department's Office of Information and Privacy (OIP), Suite 570 FLAG, Washington, D.C. 20530.

5. Web Site Resources:

a. Army FOIA/Privacy Website - <http://www.rmd.belvoir.army.mil/FOIAMain.htm>

b. Navy FOIA Website – <http://foia.navy.mil/resources.html> (links to FOIA sites of major Navy commands).

c. Marine Corps FOIA Website – <http://www.hqmc.usmc.mil/foia.usf>

d. Air Force FOIA Websites –

(1) <http://www.foia.af.mil/>

(2) < https://wwwmil.acc.af.mil/ja/foia.htm > – This site provides guidance based on the specific type of record requested. Good starting place, but not the definitive answer in all cases.

II. FOIA INTRODUCTION.

A. History.

B. Key Concepts.

1. Disclosure is the rule, not the exception.

2. The status and purpose of a requester are irrelevant.

3. The government has the burden to justify withholding of information.

4. The requester may seek administrative and judicial relief if access to government information is improperly denied.

III. FOIA RELEASE OF AGENCY RECORDS.

A. Publication. § 552(a)(1) (Requires disclosure of agency procedures, substantive rules, functions, organization and general policy through Federal Register publication).

1. How to obtain information from the agency: DOD Reg. 5400.7-R, AR 25-55, DOD 5400.7-R/AFSUP1, SECNAVINST 5720.42F, and MCO 5720.63.

2. Rules of procedure and how to make submissions to the agency: Federal Acquisition Regulation (FAR), DOD FAR Supp., and Army FAR Supp. (AFARS).

3. Substantive rules of general applicability. NI Industries v. United States, 841 F.2d 1104 (Fed. Cir. 1988); Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982); United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991

B. "Reading Room" Materials. § 552(a)(2) (Requires agency to make "available for public inspection and copying" records of final opinions, agency orders, and frequently requested material.).

1. Final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals. Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164 (D.C. 1989).

2. Copies of disclosed records, frequently requested under FOIA. Stanley v. Department of Defense, et al., No. 98-CV-4116 (S.D. Ill. June 22, 1999) (military hospital operational manuals are "internal housekeeping rules" as opposed to the kind of material of interest to the general public.)

3. Reading Room records created after 1 November 1996 must be available on an agency's web site.

4. The agency does not need to make available materials "related solely to the [agency's] internal personnel rules and practices." Hamlet v. United States, 63 F.3d 1097 Fed. Cir. 1995), see, DOJ FOIA Guide.

5. Index for Public Inspection.

C. Release Upon Request. § 552(a)(3).

1. Applies to "agency records."

Congress is not an agency for purpose of FOIA. Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990).

a. What is an "agency?" § 552(f). An Agency is a Department of the Executive Branch. Does not include: Congress, Judiciary, Office of the President (including Advisors). Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990) (Congress is not an agency for FOIA); Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 1842 (1997). Dong v. Smithsonian Inst., 125 F.3d 877 (D.C. Cir. 1997) cert. denied, Dong v. Smithsonian Inst., 524 U.S. 922 (1998). (holding that Smithsonian lacks both the "authority" necessary for it to qualify as an "authority of the government of the United States" under § 551(1) and the executive department status necessary under § 552(f)).

b. What is a "record?" - "Readily Retrievable and Reproducible." Examples include: Paper records, photographs, maps and e-mail messages." DOD Reg. 5400.7-R, para. C1.4.3.1; AR 25-55, para. 1-402(a) ("machine readable materials … regardless of physical form"); DOD5400.7-R/AFSUP1, para. SECNAVINST 5720.42F, para. 4b(1); MCO P5720.56A, para. 2001.

c. What is not a "record?" Physical Objects (e.g. structures), Personal Records. DOD Reg. 5400.7-R, para. C1.4.3.2; AR 25-55, para. 1-402(b); DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 4b(2); MCO P5720.56A, para. 2001.

d. An agency must possess and control the record. DOD Reg. 5400.7-R, para. C1.4.3.3; AR 25-55, para. 1-402(c). AFR 12-30, para. 2j; SECNAVINST 5720.42F, para. 5f; MCO P5720.56A, para. 2003. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989).

(1) Other agency records. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).

(2) Records generated from sources outside the Government. Records must be either government-owned or subject to substantial government control or use. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996); Hercules, Inc. v. Marsh, 838 F.2d 1027 (4th Cir. 1988).

(3) Personal records. Documents created or maintained without official requirement for the convenience of the creator as a memory refresher and not shared with others for agency use. DOD Reg. 5400.7-R, para. C1.4.3.2.3; Gran Cent. Partnerships, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) (holding affidavit by supervisor stating subordinates' handwritten notes were "personal records" was insufficient to prove them to be not "agency records") Bureau of Nat'l Affairs v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984).

(4) Research Data. Amendment to the Fiscal Year 1999 Omnibus Appropriations Bill required modification of OMB Circular A-110 to allow private parties access to non-profit grantee-held research data through FOIA request (modifying Supreme Court decision in Forsham v. Harris, 445 U.S. 169 (1980)).

2. FOIA does not require agencies to create or retain records. DOD Reg. 5400.7-R, para. C1.4.3.2.3; AR 25-55, para. 1-506; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 5f; MCO P5720.56A, para. 2003.

a. A request for uncompiled data (selective information) is not a request for records. Borom v. Crawford, 651 F.2d 500 (7th Cir. 1981) (affirming summary judgment order denying request for parole data compiled by race when no such compilation existed); Krohn v. DOJ, 628 F.2d 195 (D.C. Cir. 1980).

b. The 1996 amendments to the Freedom of Information Act (the Electronic Freedom of Information Act Amendments, or "EFOIA") require "reasonable efforts" in conducting electronic searches, and give the requester choice of format, where readily reproducible. Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998).

c. DOD components may create a new record when more useful to requester or less burdensome to agency. DOD Reg. 5400.7-R, para. C1.5.7; AR 25-55, para. 1-506; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 5f.

d. Note: while FOIA does not require agencies to create or retain records, the Federal Records Act (now known as the National Archives Act), 44 U.S.C. § 2101 et seq., does require record retention pursuant to National Archives and Records Administration schedules. When this outline was printed, the National Archivist was involved in litigation over his orders concerning the retention/destruction of electronic mail/messages.

D. Other Factors Affecting Release.

1. Rule of Segregability. § 552(b); DOD Reg. 5400.7-R, para. C5.2.4.

a. Must segregate and release portions of agency records not subject to a withholding exemption. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993).

b. Nonexempt material is not "reasonably segregable" when efforts to segregate amount to an inordinate burden on the agency. Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979).

2. Status and purpose of requester.

a. As a general rule, status and purpose of the requester are not considered by the agency except in deciding procedural matters such as fee issues. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

b. A foreign government is a person under the Act. DOD Reg. 5400.7-R, para. C5.1.3; Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).

3. Discretionary Release of exempt records -- the "foreseeable harm" standard, or "Reno Rules."

a. DOJ policy: the Attorney General (AG) has stated that the FOIA's "primary object" is to achieve "maximum responsible disclosure of government information." The AG stated "it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." The AG "strongly [encourages] FOIA officers to make 'discretionary disclosures' whenever possible under the Act." The AG does, however, recognize a presumption of "foreseeable harm" attaches to exemptions 1,3,4,6, and 7(C). When an agency concludes that requested information falls within a "foreseeable harm" exemption, it is not appropriate for discretionary FOIA disclosure. This is because the "foreseeable harm" exemptions correspond to other distinct prohibitions on information disclosure that operate independently of the FOIA. Sources: Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (October 4, 1993); Freedom of Information Act Guide & Privacy Act Overview (May 2000), "Discretionary Disclosure and Waiver"; Attorney General's Memorandum (September 3, 1999) (reiterating Clinton Administration's "openness-in-government" policy).

b. DOD policy: DOD Reg. 5400.7-R para. C1.5.5. DOD policy conforms to DOJ policy and favors release of exempt material unless there is "foreseeable harm to the government." The presumption of "foreseeable harm" includes exemptions 1,3,4,6, 7(C), and 7(F).

c. When a DOD agency determines that requested information clearly falls within exemptions 1,3,4,6,7(C), and 7(F), it cannot make a discretionary disclosure.

d. Exemptions 4, 6 and 7(C) cannot be asserted when the requester is the submitter of the information. DOD Reg. 5400.7-R para. C1.5.5

E. Reasons For Not Releasing a Record. DOD Reg. 5400.7-R, para. C5.2.2.

1. No responsive records after a “reasonable” search.

2. Record transferred.

3. Agency neither controls nor otherwise possesses record.

4. Insufficient description of record.

5. Failure to comply with agency's procedural requirements.

6. Request is withdrawn.

7. Fee dispute.

8. Duplicate Request.

9. The information is not, definitionally, a "record." Oglesby v. U.S. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

10. The request is denied in whole or part IAW with FOIA.

IV. FOIA EXEMPTIONS.

A. Exemption 1: Classified Records.

1. Executive Order (EO) 12,958 (April 17, 1995), 3 C.F.R. § 335 (1996); 50 U.S.C. § 435 (1996); implemented by DOD 5200.1-R, AR 380-5, AFR 205-1, and OPNAVINST 5510.1. Current order superseded EO 12,356 (1982).

   a. Security classifications: Confidential, Secret, Top Secret.

   b. For official use only (FOUO). See DOD Reg. 5400.7-R, C4.1.2; and C4.2.1; AR 25-55, ch. IV; SECNAVINST 5720.42F, para. 10; MCO P5720.63W/CH1, para. 4c. While not an Exemption 1

2. Proper classification.

a. Court conducts "de novo" review of both procedural and substantive propriety of classification. Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980).

b. Court may conduct "in camera" inspection in its sound discretion, although the court should give substantial weight to agency affidavits. Young v. CIA, 972 F.2d 536 (4th Cir. 1993).

c. Courts will give great deference to agency's expertise and judgment on classification. Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998), cert. granted, 120 S. Ct. 34 (1999), cert. dismissed and vacated, 120 S.Ct. 577 (1999)(Court dismisses for mootness, but vacates 9th Circuit's holding that classification decisions are not given deference unless agency first makes acceptable showing of harm.); Goldberg v. Department of State, 818 F.2d 71 (D.C. Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982).

3. Segregability applies even in Exemption 1 cases. Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

4. Operational Security.

a. Post-request classification is authorized. E.O. 12,958, section 1.8(d), DOD Reg. 5400.7-R, para. C3.2.1.1, No. 1, AR 25-55, para. 5-100c; DOD5400.7-R/AFSUP1, C3.2.1.1.2; SECNAVINST 5720.42F, Enclosure (2), para 1.

b. Compilation/Mosaic Theories of classification (circumstances when apparently harmless items of information, assembled together, reveal classified information). American Friends Serv. Comm. v DOD, 831 F.2d 441 (3d Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980). Is not limited only to Exemption 1 situations.

c. Previous Release of Classified Records Does Not Prevent Subsequent Withholding of Similar Type of Information. Aftergood v. CIA, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 15, 1999)(CIA properly withheld it's fiscal year 1999 total budget request because it may damage national security and reveal "intelligence sources and methods" even though it released the previous two years' budgets).

5. Glomar denial/Glomarization (agency refusal to confirm or deny the existence/nonexistence of requested information whenever the fact of its existence/nonexistence is itself classifiable). DOD Reg. 5400.7-R, para. C3.2.1.1.1, Number 1(a); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Is not limited only to Exemption 1 situations.

B. Exemption 2: Internal Personnel Rules and Practices.

1. Trivial matters - "low 2." DOD Reg. 5400.7-R, para. C3.2.1.2.2; Department of the Air Force v. Rose, 425 U.S. 352 (1976); Pruner v. Department of the Army, 755 F.Supp. 362 (D. Kan. 1991).

2. Circumvention of agency regulation - "high 2."

a. Proper: Kaganove v. EPA, 856 F.2d 884 (7th Cir. 1988); Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981)(en banc) (withholding from ex-con who seeks ATF surveillance manuals); DOD Reg. 5400.7-R, para. C3.2.1.2, No. 2;AR 25-55, para. 3-200, No. 2; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, Enclosure (2); MCO P5720.56A, para. 6002, subpara. 2. See also Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).

b. Improper: Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998)(holding that medical malpractice settlement statistics in electronic database were not "internal personnel rules or practices," even though disclosure "would compromise the government's bargaining position.").

C. Exemption 3: Other Federal Withholding Statutes.

1. FOIA Exemption 3 permits withholding of information prohibited from disclosure by another statute. One of two disjunctive requirements must be met to withhold under this exemption: the withholding statute must either "(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding <u>or</u> refer to particular types of matters to be withheld." A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.

2. Examples of commonly used federal withholding statutes:

   a. 42 U.S.C. § 290dd-3, Confidentiality of patient records in an alcohol and drug treatment program.

   b. 10 U.S.C. § 1102, DOD Medical Quality Assurance Records.

   c. 10 U.S.C. § 2305 and 41 U.S.C. § 253b, prohibiting release of certain contractual proposals.

   d. 10 U.S.C. §130(b), allows withholding of information on personnel of overseas, sensitive, or routinely deployable units.

3. Statutes <u>commonly</u> <u>mistaken</u> for Exemption 3 withholding statutes:

   a. 18 U.S.C. § 1905. The Trade Secrets Act (not an Ex. 3 statute).

   b. 5 U.S.C. § 552a. The Privacy Act (not an Ex. 3 statute).

D. Exemption 4: Trade Secrets, and Commercial and Financial Records.

FOIA permits withholding records that are "trade secrets and commercial or financial information obtained from a person that are privileged or confidential;"

1. From a person. Generally, all but the Federal Government are "persons" subject to Ex. 4 protection. Nadler v. FDIC, 92 F.3d 93 (2d Cir. 1996); Stone v. Export-Import Bank of United States, 552 F.2d 132 (5th Cir. 1977).

2. Trade Secrets. A narrow definition for purposes of FOIA. Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

"[A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."

OR

3. Commercial or financial information. Nonprofit entities can submit commercial information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992); American Airlines, Inc. v. National Mediation Bd., 588 F. 2d 863 (2d Cir. 1978).

   a. Privileged information. Rarely used as a basis for withholding. Sharyland Water Supply Corp. v. Black, 755 F.2d 397 (5th Cir.); Indian Law Resource Center v. Department of the Interior, 477 F. Supp. 144 (D.D.C. 1979).

   b. Confidential information. Key definition used as a basis of withholding. Case law has differentiated between "Required" and "Voluntary" submissions of information. Discussed below. DOD 5400.7-R, para. C3.2.1.4, No. 4; AR 25-55, para. 3-200, No. 4; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, Enclosure (2), para. 4; MCO P5720.56A, para. 6002, subpara. 4.

      (1) *REQUIRED* Information. National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

         (a) The National Parks test.

(i) Would disclosure likely "impair ability of agency to obtain necessary information in the future"? See Orion Research Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980).

OR

(ii) Would disclosure likely cause "substantial harm to the competitive position of the person from whom the information was obtained"? See Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (holding no competition for Radford Army Ammunition Plant contract); Gulf & Western Industries Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979).

(b) How does agency determine confidentiality? See EO 12,600 (June 23, 1987) and DOD Reg. 5400.7-R, para. C3.2.1.4.8; AR 25-55, para. 5-207; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 9N(1); MCO P5720.56A, para. 4006, subpara. 8.

(c) Must develop and implement procedures to create a complete “administrative record” that will support the agency’s decision to release the requested information under FOIA. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) ("Reverse FOIA" case). See Federal Electric Corp. v. Carlucci, 866 F.2d 1530 (D.C. Cir. 1989) (An example of failing to create an Agency Record).

(d) Case law analyses of the "substantial harm to the competitive position of the person from whom the information was obtained."

(i) Cases finding competitive harm: McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999)(holding that release of unit price in rocket contract substantiates substantial competitive harm allowing customers to "ratchet down" prices); Gilmore v. United States Dep't of Energy, No. 95-0285 (N.D. Cal. Mar. 13, 1998); RMS Indus. v. DOD, No. C-92-1545 (N.D. Cal. Nov. 24, 1992): Gulf & Western Indus. v. United States, 615 F.2d 527 (D.C. Cir. 1979); National Parks, supra).

(ii) Cases finding *no* competitive harm: GC Micro Corp. v. DLA, 33 F.3d 1109 (9th Cir. 1994); Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345 (9th Cir. 1990) (reverse FOIA); Hercules, Inc., supra.

(e) FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), now requires disclosure of unit prices, upon request, in government contracts solicited after 1 January 1998. Unit prices (as well as other items in an unsuccessful proposal) of unsuccessful offerors are not releasable. 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b(m)(2).

4. *VOLUNTARILY* Submitted Information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992).

a. The Critical Mass test.

(1) Was the information provided voluntarily?

Contract bids and proposals are considered "required submissions" and therefore releasability is analyzed under the National Parks analysis. McDonnell Douglas Corp. v. NASA, 981 F.Supp 12 (D.D.C. 1997) (Information provided in response to a Request for Proposals is a required submission); see also DFOISR Memorandum, SUBJECT: FIOA Policy on DOD application of Critical Mass (etc.), 93-CORR-014, 27 July 1993; DFOISR

Memorandum, SUBJECT: Internal Guidance on DOD Application of Critical Mass (etc.), 93-CORR-094, 23 March 1993.

AND

(2) Is it the kind of information that the provider would not customarily make available to the public? Animal Legal Defense Fund v. Dep't of the Air Force, 44 F.Supp. 2d 295 (D.D.C. 1999)(holding that the Vaughn declaration regarding the withholding of records about Chimpanzee disposal failed to meet voluntariness test because it did not explain: 1)"commercial" nature of record, 2) that the information was provided voluntarily or 3) that the submitter customarily withholds such information from the public).

5. Determining whether business information is exempt--notice of proposed release to the submitter of information--"Reverse FOIA" (Should you disclose purportedly exempt (b)(4) information?). EO 12,600 (July 23, 1987); DOD Reg. 5400.7-R, para. C3.2.1.4.8 and C5.2.8.; AR 25-55, para. 5-207.

a. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Discretionary release permissible if otherwise "authorized by law."

(1) Reverse FOIA. Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985).

(2) Standard of review of agency action under Administrative Procedure Act (APA)--review on the administrative record using the arbitrary and capricious standard. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988); General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).

b. Trade Secrets Act. 18 U.S.C. § 1905; CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

(1) Trade Secrets Act applies broadly to virtually all business information and prohibits agency disclosure except as "authorized by law."

(2) FOIA provides such "authority" to disclose business information only if it is nonexempt. CNA Fin. Corp., supra.

(3) Submitter notice (i.e., notice of proposed release to the submitter of information) for disclosure of contractor's unit price not required because disclosures pursuant to a properly promulgated and statutorily based agency regulation, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), are "authorized by law." Chrysler Corp. v. Brown, 441 U.S. 281, 295-316 (1979).

c. DOD solution. DOD Reg. 5400.7-R, paras. C3.2.1.4 and C5.2.8.1 – C5.2.8.3. (Compare AR 25-55, para. 3-101 (No release absent "compelling public interest")). Remember, DOD presumption of "foreseeable harm" concerns exemptions 1,3,4,6,7(C), and 7(F). The DOJ presumption of "foreseeable harm" concerns exemptions 1,3,4 6, and 7(C).

E. Exemption 5: Privileged Memoranda & Internal Agency Communications.

The FOIA permits withholding records that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency;"

1. Purpose.

2. Scope.

a. Deliberative Process Privilege.

(1) Purpose--to encourage open, frank discussions between subordinates and superiors; protect against premature disclosure of proposed policies before they are adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for the agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982); Judicial Watch, Inc. v. United States Dep't of Justice, No. 97-2869 (D.D.C. Feb 22, 2000)(deliberative process privilege protects handwritten notes by the Attorney General which reflect distillations of issues that she memorialized for later reference as part of her decision making process.).

(2) "Factual-deliberative" distinction.

(a) Deliberative process privilege does not generally protect purely factual matters. EPA v. Mink, 410 U.S. 73 (1973).

(b) Can withhold facts if they are "inextricably intertwined" with deliberative material. Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980); Jowett, Inc. v. Dep't of Navy, 729 F. Supp. 871 (D.D.C. 1989).

(c) May withhold facts if release would disclose "deliberative process." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977) (holding that "Exemption five is intended to protect the deliberative process of government and not just deliberative material. . . . In some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5).")

(3) "Predecisional v. Postdecisional" distinction.

(a) May withhold predecisional documents. NLRB v. Sears, 421 U.S. 132 (1975); To determine whether a document is "predecisional," ask, "Was it prepared to assist an agency decision maker in arriving at a decision rather than support a decision already made?" Lurie v. Dep't of the Army, 970 F.Supp. 19, 28 (D.D.C. 1997).

(b) Cannot withhold predecisional materials when final decision-maker "expressly adopts or incorporates them by reference." NLRB v. Sears; Swisher v. Department of the Air Force, 660 F.2d 369 (8th Cir. 1981).

(4) Memoranda prepared by outside consultants fall within the privilege. Formaldehyde Inst. v. HHS, 889 F.2d 1118 (D.C. Cir. 1989).

b. Attorney Work-Product Privilege.

(1) Materials "prepared in anticipation of litigation or for trial by or for [a] party or by or for that...party's representative (including the...party's attorney, consultant, ...or agent)." Fed.R.Civ.P. 26(b)(3); FTC v. Grolier, 462 U.S. 19 (1983); Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991).

(2) Courts have recognized that the privilege extends to prepared in anticipation of litigation even when no specific claim is pending. Schiller v. NLRB, 964 F.2d 1205 (D.C Cir. 1992) (holding that documents that provide tips on handling future litigation are covered by the work product privilege).

c. Attorney-Client Privilege. The confidential communications from clients to the counsel made for the purpose of securing legal advice or services; and the communications from attorneys to their clients if the communications rest "on confidential information obtained from the client." In re Sealed Cases, 737 F.2d 94, 98-99 (D.C. Cir. 1984). Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

d. Trade Secrets Or Commercial Information Privilege. Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979); Morrison-Knudsen Co. v. Department of the Army, 595 F. Supp. 352 (D.D.C. 1984), aff'd 762 F.2d 138 (D.C. Cir. 1985) (table cite).

e. Protection Of Certain Confidential Witness Statements. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984); Ahearn v. Department of the Army, 583 F. Supp. 1123 (D. Mass. 1984).

F. Exemption 6: Protection of Personal Privacy.

FOIA permits withholding records that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

1. Threshold determination- "personnel and medical files and similar files..." Department of State v. Washington Post Co., 456 U.S. 595 (1986); Department of the Air Force v. Rose, 425 U.S. 352 (1976); New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).

2. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). See also, Bibles v. Oregon Natural Desert Association, 117 S.Ct. 795 (1997).

   a. Invasion of privacy -- define privacy interest involved.

      (1) Deceased persons have no privacy rights. Na Iwi O Na Kupuna v. Dalton, 894 F.Supp 1397 (D. Hi. 1995) (Reverse FOIA suit).

      (2) Next-of-kin may have, in rare situations, a colorable privacy interest. New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc). But see, Outlaw v. Department of the Army, 815 F.Supp. 505 (D.D.C. 1993).

b. Public interest in disclosure -- the Reporters Committee decision has limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "[shed] light on an agency's performance of its statutory duties." Information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve."

3. Application of the balancing test.

a. Articulate the privacy interest involved.

b. Articulate the public interest involved.

c. Strike the balance.

4. Examples. FLRA v. DOD, 114 S.Ct. 1006 (1994) (a leading case delineating the "core interests" of FOIA; thorough balancing of interests analysis); Sheet Metal Workers Int'l Ass'n. v. United States Air Force, 63 F.3d 994 (10th Cir. 1995) (Sheet Metal Workers union engaged in "Davis-Bacon" monitoring--release of payroll records with names and addresses of workers employed on government contracts constitutes a clearly unwarranted invasion of personal privacy); McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (names of persons exonerated by investigation protected from disclosure); Providence Journal Co. v. Department of the Army, 981 F.2d 552 (1st Cir. 1992) (the higher the rank, the greater the public interest might be in release of agency record concerning disciplinary action); Chin v. Department of the Air Force, No. 97-2176 (W.D. LA June 24, 1999) (deciding two issues: 1) that privacy outweighed the public interest in withholding of identities in general request ro fraternization investigations and 2) that entire investigation can be withheld in request for specific investigation); Mueller v. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999) (denial of request for dismissed non-judicial punishment proceeding documents because public interest was minimal and would shed little light on Air Force's overall conduct).

5. Privacy Glomarization. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993); DOD Reg. 5400.7-R, para. C3.2.1.6.5.1-2.

G. Exemption 7: Law Enforcement Records.

1. Records or information compiled for law enforcement purposes.

   a. Only applies to investigations conducted for a law enforcement purpose. Compare Irons v. Bell, 596 F.2d 468 (1st Cir. 1979) with Church of Scientology v. Department of the Army, 611 F.2d 738 (9th Cir. 1980). See AR 25-55, para. 1-407.

   b. Information that was originally compiled for law enforcement purposes, but later summarized in a new document not prepared for law enforcement purposes, is protected under the exemption. Abramson v. FBI, 456 U.S. 615 (1982).

   c. Exemption will protect non-law enforcement records that are "recompiled" for law enforcement purposes. John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).

2. May withhold records under this exemption, but only to the extent disclosure:

   "(A) could reasonably be expected to interfere with enforcement proceedings,

   "(B) would deprive a person of a right to a fair trial or an impartial adjudication,

   "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

   "(D) could reasonably be expected to disclose the identity of a confidential source. . . in a criminal or national security investigation . . . or information furnished by a confidential source,

"(E) would disclose techniques and procedures or would disclose guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law, or

"(F) could reasonably be expected to endanger the life or physical safety of any person."

3. Glomar Responses are also appropriate to protect privacy under Exemption 7(C). DOD Reg. 5400.7-R, para. C3.2.1.7.1.3.1-3.

4. Exemption 7(C) may protect privacy of the close survivors of the deceased. Accuracy in Media v. National Parks Serv., 194 F.3d 120 (D.C.Cir. 1999)(hodling that autopsy photos could be withheld because of the privacy interests of the spouse, parents, and children of the deceased").

H. Exemptions 8 (Financial Institutions Information).

I. Exemption 9 (Geological and Geophysical Information).

V. FOIA EXCLUSIONS.

A. Exclusion 1.

1. Investigation or proceedings involving possible violation of criminal law, and

2. Subject unaware of pendency of investigation or proceedings, and

3. Disclosure of existence of records could reasonably be expected to interfere with enforcement proceedings.

B. Exclusion 2.

1. Informant records maintained under informant's name or personal identifier, and

2. Maintained by a criminal law enforcement agency,

3. Unless informant's status as an informant has been officially confirmed.

C. Exclusion 3.

1. Records maintained by FBI, and

2. Pertaining to foreign intelligence or counterintelligence, or international terrorism, and

3. Existence of records is classified.

VI. FOIA REQUEST PROCESS.

A. What Is A Proper Request?

1. Must request an "agency record." DOD Reg. 5400.7-R, para., 1-402; AR 25-55, para. 1-402; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 4b; MCO P5720.56A, para. 2001.

2. Must reasonably describe the record. DOD Reg. 5400.7-R. para., 1-507; AR 25-55, para. 1-507; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, paras. 5e and 9a(2); MCO P5720.56A, paras. 7a(2), 7h(3). See Ruotolo v. Department of Justice, 53 F.3d 4 (2d Cir. 1995); AFGE v. Department of Commerce, 907 F.2d 203 (D.C. Cir. 1990); Mason v. Calloway, 554 F.2d 129 (4th Cir.).

3. Must comply with agency rules.

a. Written request required. DOD Reg. 5400.7-R, para. 1-401 ("written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.") AR 25-55, paras. 1-401 and 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(1); MCO P5720.56A, paras. 2003 and 4000.

b. Must express willingness to pay fees. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503 1-509; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(3); MCO P5720.56A, paras. 2003 and 4000.

c. Must direct request to the proper custodian. DOD Reg. 5400.7-R, 1-503; AR 25-55, para. 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7h(1); MCO P5720.56A, para. 4003, subpara. 4.

d. Must expressly or impliedly invoke FOIA or an implementing regulation. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(1); MCO P5720.56A, paras. 2003 and 4000.

B. What Must The Agency Do In Response?

1. Statutory time limits. 5 U.S.C. §§ 552(a)(6)(A)(i), (ii); 552(a)(6)(B)(i).

a. Initial agency response - 20 working days.

b. Time period for processing a FOIA request may be extended by 10 working days by written notice to the requester explaining why an extension is needed and stating when a determination will be made on the request.

c. Requester dissatisfied with agency response - shall be advised to file an appeal so that it reaches the agency appellate authority no later than 60 calendar days from the date of receipt of the agency response. DOD Reg. 5400.7-R, para. 5-302; AR 25-55, para. 5-302.

d. Agency response to Appeals - 20 working days.

e. If agency shows failure to meet time limits was result of exceptional circumstances and it is applying due diligence in processing request, then court can allow additional time for administrative processing of request. §552(a)(6)(C). Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

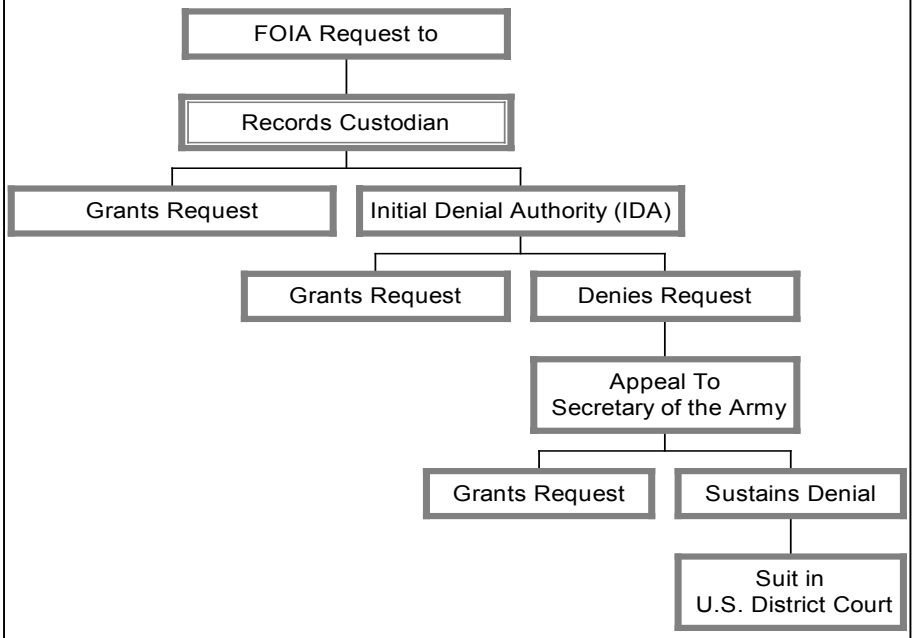
f. An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review. § 552(a)(6). See, Spannaus v. United States Dep't of Justice, 824 F. 2d 52 (D.C. Cir. 1987).

2. Agency must make "reasonable efforts" to locate records and court may require agency to demonstrate adequacy of search Valencia-Lucena v. United States Coast Guard, 180 f.3d 321 (D.C. Cir. 1999) (agency failed to conduct reasonable search for missing pages of ship's logbook); Dayton Newspapers, Inc. v. Department of the Air Force, 35 F.Supp. 2d 1033 (S.D. Ohio 1998)(holding that 51 hours of electronic searching and assembly is "small price to pay); Oglesby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Marks v. United States, 578 F.2d 261 (9th Cir. 1978). But see Ruotolo v. Dep't. of Justice, 53 F.3d 4 (2d Cir. 1995).

3. Agency must **segregate and releas**e nonexempt information. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Dynalectron Corp. v. Department of the Air Force, No. 83-3399 (D.D.C. Oct. 30, 1984).

4. Service's release and processing procedures. DOD Reg. 5400.7-R, ch. 5; AR 25-55, ch. V; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 8; MCO P5720.56A, ch. 4.

FOIA PROCESSING CHART



Fees and Fee Waivers. DOD Reg. 5400.7-R, ch. 6.

5. Fee charges are based on status and purpose (motive) of requester - three categories of requesters.

   a. First - Most favored category: (1) educational or noncommercial scientific institutions (whose purpose is scholarly or scientific research) or (2) representatives of the news media are charged only for duplication costs after the first 100 pages. National Security Archive v. Dep't of Defense, 880 F.2d 1381 (D.C. Cir. 1989); Stanley v. Department of Defense, et al. No. 98-CV-4117 (S.D. Ill. June 22, 1999).

   b. Second - Least favored category: requesters of records for commercial use are charged for search, duplication, and review.

   c. Third category: All other requesters are charged for search after the first 2 hours and duplication after the first 100 pages.

6. Fee waiver, unlike the substantive FOIA analysis, is based on status and purpose (motive) of requester.

   a. Fee waiver standard. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) (applying and implicitly approving DOD's regulatory implementation of fee waiver provision).

   b. "$15.00 Rule." Automatic waiver applies if costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. When assessable costs for a FOIA request total $15.00 or less, fees hall be waived automatically for all requesters, regardless of category. DOD Reg. 5400.7-R, para. 6-103, AR 25-55, para. 6-103.

   c. "$250.00 Rule." When the agency estimates or determines that allowable charges are likely to exceed $250.00, notify the requester and obtain satisfactory assurance of full payment, or for advance payment of up to full amount in the case of requester with no history of payment. DOD Reg. 5400.7-R, para. 6-104b(6). AR 25-55, para. 6-104b(6).

VII. FOIA LITIGATION.

A. Requester Must Exhaust Administrative Remedies. 5 U.S.C. § 552(a)(6)(C)(i); Ogelsby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

B. Circumstances Authorizing Stays Were Narrowed by E-FOIA Amendments. 5 U.S.C. § 552(a)(6)(ii); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

C. Judicial Review. 5 U.S.C. § 552(a)(4)(B); DOD Reg. 5400.7-R, ch. 5, sec. 4.

1. Scope of review - de novo.

2. In camera inspection is "within the broad discretion of the court." Quinon v. FBI, 86 F.3d 1222 (D.C. Cir. 1996).

3. Vaughn index. A court may order an agency to submit a detailed index of the documents it seeks to withhold and the reasons justifying such withholding. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Compare, Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) with Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993).

4. Burden of proof. Burden is on the government to establish that a document is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

D. Attorney Fees and Costs. § 552(a)(4)(E). Weisberg v. DOJ, 848 F.2d 1265 (D.C. Cir. 1988).

1. Attorney fees are within the discretion of the court when a FOIA plaintiff "substantially prevails." State of Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991); Education/Instruction, Inc. v. HUD, 649 F.2d 4 (1st Cir. 1981).

2. Four factors that courts will generally consider to determine whether an award of fees and costs is appropriate under FOIA after determining the requester's eligibility:

a. Benefit to the public derived from the case,

b. Commercial benefit to the requester,

c. Nature of requester's interest in the records sought, and

d. Whether the agency's withholding of records had a reasonable basis in law.

Church of Scientology v. USPS, 700 F.2d 486 (9th Cir. 1983); LaSalle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980).

3. Test to determine whether a plaintiff "substantially prevailed" involves showing that prosecution of action was needed and that action had causative effect on delivery of information. DOJ v. Weisberg, 848 F.2d 1265 (D.C. Cir. 1988).

4. Commercial Requesters--those requesters seeking information for commercial gain should be allowed attorney fees only where there is clear and positive benefit to the public and where the agency withheld information without a reasonable basis in law. Tax Analyst v. U.S. Department of Justice, 965 F.2d 1092 (D.C. Cir. 1992); *Cf.* Aviation Data Service v. FAA, 687 F.2d 1319 (10th Cir. 1982).

5. No attorney fees for pro se litigants. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996).

E. Six year statute of limitations for filing FOIA lawsuits. 28 U.S.C. § 2401; Spannus v. DOJ, 824 F.2d 52 (D.C. Cir. 1987).

VIII. FOIA ANALYSIS TEMPLATE. (APPENDIX A)

THE PRIVACY ACT

Outline of Instruction

IX. PRIVACY ACT (PA).

A. Primary References.

1. The Privacy Act of 1974, 5 U.S.C. § 552a, as amended.

2. Privacy Act Implementation, Office of Management and Budget, 40 Fed. Reg. 28948 (9 July 1975) as amended 40 Fed. Reg. 56741 (4 December 1975).

3. Dep't of Defense Directive No. 5400.11, Department of Defense Privacy Program (13 December 1999).

4. Dep't of Defense Regulation No. 5400.11-R, Privacy Program (31 August 1983).

5. Army Regulation No. 340-21, The Army Privacy Program (5 July 1985).

6. Dep't of Army Pamphlet 25-51, The Army Privacy Program -- System Notices and Exemption Rules (21 September 1988).

7. Air Force Instruction 33-332, The Air Force Privacy Act Program (12 Oct 1999) *superseding* Air Force Instruction 37-132, The Air Force Privacy Act Program (11 March 1994).

8. Secretary of the Navy Instruction 5211.5D, Personal Privacy and Rights of Individuals Concerning Records Pertaining to Themselves (17 July 1992).

9. Marine Corps Order P5211.2B, The Privacy Act of 1974 (4 September 1997).

B. Secondary References.

1. Defense Privacy Office Web Page--to research current Privacy Act System of Records Notices and other Privacy Act guidance and information-- http://www.defenselink.mil/privacy.

2. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1 (18 April 1992).

3. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.

4. Freedom of Information Act Guide and Privacy Act Overview (May 2000), an biennial Department of Justice publication (available on the World Wide Web at http://www.usdoj.gov/foia -- requires an Acrobat reader).

5. Websites:

   a. Army: <www.rmd.belvoir.army.mil/foiamain.htm> (does not contain Army systems notices – for Army systems notices use <www.defenselink.mil/privacy> and follow hyperlinks).

   b. Navy: <privacy.navy.mil> (many hyperlinks to specific areas, including both Navy and Marine System Notices).

   c. Air Force: < https://aflsa.jag.af.mil> (general site that requires FLITE password – follow hyperlinks to FOIA/Privacy information sites)

X. PRIVACY ACT INTRODUCTION.

A. History of the Act.

B. Congressional Concerns.

C. Policy Objectives.

1. Restrict Disclosure of Personal Information Maintained by Agencies.

2. Allow Individuals Access to Records about Themselves.

3. Allow Individuals Ability to Amend Records about Themselves.

4. Establish Fair Collection, Maintenance and Dissemination Practices.

XI. SCOPE OF THE PRIVACY ACT.

A. Generally Applicable to Agency Records within a "System of Records." Manuel v. Veterans Administration Hospital, 857 F.2d 1112 (6th Cir. 1988).

B. Key Definitions.

1. Agency.

a. Privacy Act adopts the FOIA definition. § 552a(a)(1).

b. Government contractors and their employees are covered by the civil and criminal penalties of the Act, if provided for by the contract. § 552a(m).

2. "Individual" means a citizen or alien lawfully admitted for permanent residence. § 552a(a)(2).

   a. Deceased personnel. Crumpton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995).

   b. Does not include corporations or business enterprises. St. Michael's Convalescent Hospital v. California, 643 F.2d 1369 (9th Cir. 1981).

3. "Maintain" means to maintain, collect, use, or disseminate. § 552a(a)(3).

4. "Record" means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or other identifying characteristic. § 552a(a)(4). See Unt v. Aerospace Corp., 765 F.2d 1440 (9th Cir. 1985); see also Tobey v. NLRB, 40 F.3d 469 (D.C. Cir. 1994).

   a. Entrepreneurial information -- Distinction between individuals and sole proprietorships. Sole proprietors are not "individuals" under the Privacy Act. See St. Michaels Convelescent Hosp.v. California, 643 F.2d 1369 (9th Cir. 1981).

   b. Personal notes - DOD Reg. 5400.7-R, para. 1-402b(3); AR 25-55, para. 1-402b(4); SECNAVINST 5211.5D, para. 11a(10). See Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 38:

      Personal notes of unit leaders or office supervisors concerning subordinates ordinarily are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as a "group of any records under the control of any agency…from which information is retrieved by the …[individual's] identifying particular…" [citation omitted]…Personal notes that are *merely an extension of the author's memory*, if maintained properly, will not come under the provisions of the Privacy Act or the Freedom of Information Act [citation omitted] (emphasis added)."

      To avoid being considered agency records, personal notes must meet certain requirements. *Keeping notes must be at the sole discretion of the author*. Any requirement by superior authority,

whether by oral or written directive, regulation or command policy, likely would cause the notes to become official agency records. *Such notes must be restricted to the author's personal use as memory aids*. *Passing them to a successor or showing them to other agency personnel would cause them to become agency records* (emphasis added*)*. Chapman v. National Aeronautics and Space Administration, 682 F.2d 525 (5th Cir. 1982).

Even if personal notes do become agency records, they will not be within a system of records and subject to the Privacy Act unless they are retrieved by the individual's name or other personal particular. Thus if they are filed only under the matter in which the subordinate acted or in a chronological record of office activities, the Privacy Act would not apply to them. However, [they] would be subject to disclosure under the FOIA.

Individuals who maintain personal notes about agency personnel should ensure their notes do not become records within systems of records. Maintaining a system of records without complying with the Privacy Act system notice requirement could subject the individual to criminal charges and a $5,000.00 fine. [citation omitted]. See also Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989); Kalmin v. Dep't of Navy, 605 F. Supp. 1492 (D.D.C. 1985).

c. May incorporate personal notes into agency records in a timely manner. Compare Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982) with Thompson v. Dep't of Trans., 547 F. Supp. 274 (D. Fla. 1982).

5. A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual. § 552a(a)(5). Manuel v. VA, 857 F.2d 1112 (6th Cir. 1988); Crumpton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995). Henke v. United States Dep't of Commerce, 83 F.3d 1453 (D.C. Cir. 1996). (holding that the test is whether the information is actually retrieved, not retrievable, by use of the individual's name or identifier). Smith v. Henderson, 1999 U.S. Dist. LEXIS 17575 (N.D. Cal. Oct. 29, 1999) (holding postal supervisor's "never-never drawer" not subject to the Privacy Act).

XII. PA PUBLIC NOTICE OF SYSTEMS OF RECORDS. § 552A(E)(4).

A. Publication Requirement (Federal Register and DA Pam 25-51; AF Pam 12-36; MC Bulletin 5211; and OPNAVNOTE 5211.

1. No longer an annual requirement.

2. New or altered system. § 552a(r); AR 340-21, para. 4-6; AFI 33-332. para. 6.2; SECNAVINST 5211.5D, Encl 2.

-- Advance notice to Congress and OMB is required.

B. Content of a system notice. § 552a(e)(4); AR 340-21, para. 4-6a.

C. Systems Notice Example

A0190-45 DAMO
System name:
Offense Reporting System (ORS) (February 22, 1993, 58 FR 10002).
System location:
Decentralized to Army installations which created the Military Police Report; copy may be sent to the U.S. Army Crime Records Center, Baltimore, MD, dependent on nature of crime (see Army Regulation 190-45, Records and Forms). A cross-reference index is either manual or automated media may exist at intermediate and higher command levels. In addition, information is stored on computer media at the four Army Information Processing Centers located at: Chambersburg, PA 17201-4150; Huntsville, AL 35898-7340; Rock Island, IL 61299-7210; and, St. Louis, MO 63120-1798.
Categories of individuals covered by the system:
Any individual who is the subject, victim, complainant, witness, or suspect in a criminal, civil, or traffic offense.
Categories of records in the system:
Criminal information or investigative files involving the Army which may consist of Military Police Reports (DA Form 3975) or similar reports containing investigative data, supporting or sworn statements, affidavits, provisional passes, receipts for prisoners or detained persons, Reports of Action Taken (DA From 4833), and disposition of cases. Information contained on the DA Forms 3975 or 4833 may be provided by paper records, the Offense Reporting System (ORS), ORS-2, or Simplex Automated Military Police System (SAMPS). Personal information includes, but is not limited to name, Social Security Number, home address, telephone number, category of offense, involvement, and case number.
Authority for maintenance of the system:
10 U.S.C. 3013 and E.O. 9397 (SSN).
Purpose(s):
To provide detailed information necessary for Army officials and commanders to discharge their responsibilities for maintaining discipline, law, and order through investigation of complaints and incidents and possible criminal prosecution, civil court action, or regulatory order.
This system contains information which may be used, as permitted by the Privacy Act and other pertinent laws, for employee personnel actions and determinations concerning, but not limited to security clearances, recruitment, retention, and placement. Statistical data are derived from individual report and stored in automated media at major Army commands and Headquarters, Department of the Army, for the purposes of: (1) Developing crime trends by major categories (e.g., crimes against persons, drug crimes, crimes against property, fraud crimes, and other offenses), and (2) developing law enforcement and crime prevention programs to reduce or deter crime within Army communities.
Routine uses of records maintained in the system, including categories of users and the purposes of such uses:
In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows: Information may be disclosed to federal, state, and local (including Foreign Government) agencies for investigation and prosecution when cases are either within their jurisdiction or when concurrent jurisdiction applies. These include: Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Customs Service, Bureau of Alcohol, Tobacco and Firearms, U.S. District Courts, U.S. Magistrates.
The `Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.
Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:
Storage:
Paper records in file folders; microfiche; magnetic tapes/discs; punched cards; computer printouts.
Retrievability:
By individual's name, date of birth, Social Security Number, and case number.
Safeguards:
Access to information is controlled; limited to authorized personnel having official need therefor. Regional Data Centers are contractor-operated under an Army approved security program. Contractor personnel participate in an on-going security education program under the Regional Data Security Officer. Regional Data Centers are connected through a communications network to 44 distributed data processing centers at Army installations. Technical, physical, and administrative safeguards required by Army Regulation 380-19 are met at installation data processing centers. Data are available only to installation personnel responsible for systems operation and maintenance. Terminals not in the data processing center are under the supervision of a terminal area security office at each remote location protecting them from unauthorized use. Access to information is also controlled by a system of assigned passwords for authorized users of terminals.
Retention and disposal:
Information is destroyed after 5 years except for that required by Army Regulation 190-45 to be sent to the Crime Records Center where it is retained 40 years following final action.
System manager(s) and address:

Deputy Chief of Staff for Operations and Plans, ATTN: DAMO-ODL, Headquarters, Department of the Army, Washington, DC 20310-0440.

Notification procedure:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the commander of the installation where the incident occurred.

If more than five years have elapsed since the occurrence, Individual should address written inquiries to the U.S. Army Crime Records Center, Baltimore, MD.

Individual should provide the full name, Social Security Number, date and place of the incident, and a notarized signature.

Record access procedures:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the commander of the installation where the incident occurred.

If more than five years have elapsed since the occurrence, Individual should address written inquiries to the U.S. Army Crime Records Center, Baltimore, MD.

Individual should provide the full name, Social Security Number, date and place of the incident, and a notarized signature.

Contesting record procedures:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340-21; 32 CFR part 505; or may be obtained from the system manager.

Record source categories:

From the individual; witnesses; victims; Military Police and/or U.S. Army Criminal Investigation Command special agents; informants; investigative and law enforcement persons of Federal, state, local and foreign government agencies; any source that may supply pertinent information.

Exemptions claimed for the system:

Part of this system may be exempt under 5 U.S.C. 552a(j)(2), as applicable.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 505. For additional information contact the system manager.

XIII. PA COLLECTION AND MAINTENANCE OF INFORMATION. § 552A(E).

A. **Collect Only Relevant and Necessary Information to Accomplish an Agency Purpose as Defined by Statute or Executive Order**. § 552a(e)(1); AR 340-21, para. 4-1c; AFI 33-332, para. 1.1.3.2; SECNAVINST5211.5D, para. 7(b)

B. **Collect Information to Greatest Extent Practical Directly from the Individual**. §552a(e)(2).

1. Collect from the Subject First when the information sought is "objective and unalterable." Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989); Dong v. Smithsonian, 943 F. Supp. 69 (D.D.C. 1996), rev'd on other grounds, 125 F.3d 877 (D.C. Cir. 1997) (holding that concerns over Plaintiff's possible reaction to an unpleasant rumor" does not excuse requirement of collection from the individual).

2. Collect from third parties when:.

a. Verifying information (Security or Employment).

b. Seeking Opinion or Evaluation.

c. Unable to Contact Subject.

d. Collecting is Exceptionally Difficult (Unreasonable cost or delay).

e. Consent or Subject Asks for Third Party Collection.

See, AR 340-21, para. 4-1d; AFI 33-332, para. 3.1; SECNAVINST 5211.5D, para. 10(b)

C. **Maintain No Records Regarding How an Individual Exercises First Amendment Rights**. § 552a(e)(7); AR 340-21, para. 4-5; SECNAVINST 5211.5D, para. 7d(1).

1. Exceptions.

a. Authorized by statute. Hass v. United States Air Force, 848 F. Supp. 926 (D. Kan. 1994).

b. Consent of the subject.

c. Pertinent to and within the scope of an authorized law enforcement activity. Compare Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982) with Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982).

2. Applies to All records regardless of where maintained. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983)(holding that PA prohibition regarding collecting First Amendment information applied even when record not maintained in a system of records).

D. **The Privacy Act Advisement**. § 552a(e)(3); AR 340-21, para. 4-2; AFI 33-332, para. 6.1; SECNAVINST 5211.5D, para. .

1. When required.

a. To individuals. When collecting personal information to be kept in a system of records. AR 340-21, para. 4-2a.

b. To third party sources of information. Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981).

2. Content.

a. Authority.

b. Principal Purpose.

c. Routine uses.

d. Voluntary or mandatory.

e. Effect of not providing.

3. Location of Advisement. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 18.

E. **Accuracy Requirements**.

1. Maintain records used to make determinations about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination. § 552a(e)(5). Perfect records are not required; reasonableness is the standard. Doe v. United States, 821 F.2d 694 (D.C. Cir. 1987)(en banc); Edison v. Dep't of the Army, 672 F.2d 840 (11th Cir. 1982).

2. Before disseminating the record to a person other than an agency, unless disseminated pursuant to FOIA, the agency will make reasonable efforts to ensure the records are accurate, complete, timely and relevant for agency purposes. 5 U.S.C. § 552a(e)(6).

XIV. PA ACCESS TO AND AMENDMENT OF RECORDS. § 552A(D).

A. References: §§ 552a(d)(1) and (2); AR 340-21, Ch. 2; SECNAVINST 5211.5D, Ch.. ; AFI 33-332, Ch. 4 (Access) and Ch. 5 (Amendment).

B. Each agency that maintains a system of records **shal**l:

1. Access: "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made . . . ." § 552a (d)(1)

2. Amendment: "permit the individual to request amendment of a record pertaining to him . . ." § 552a(d)(2).

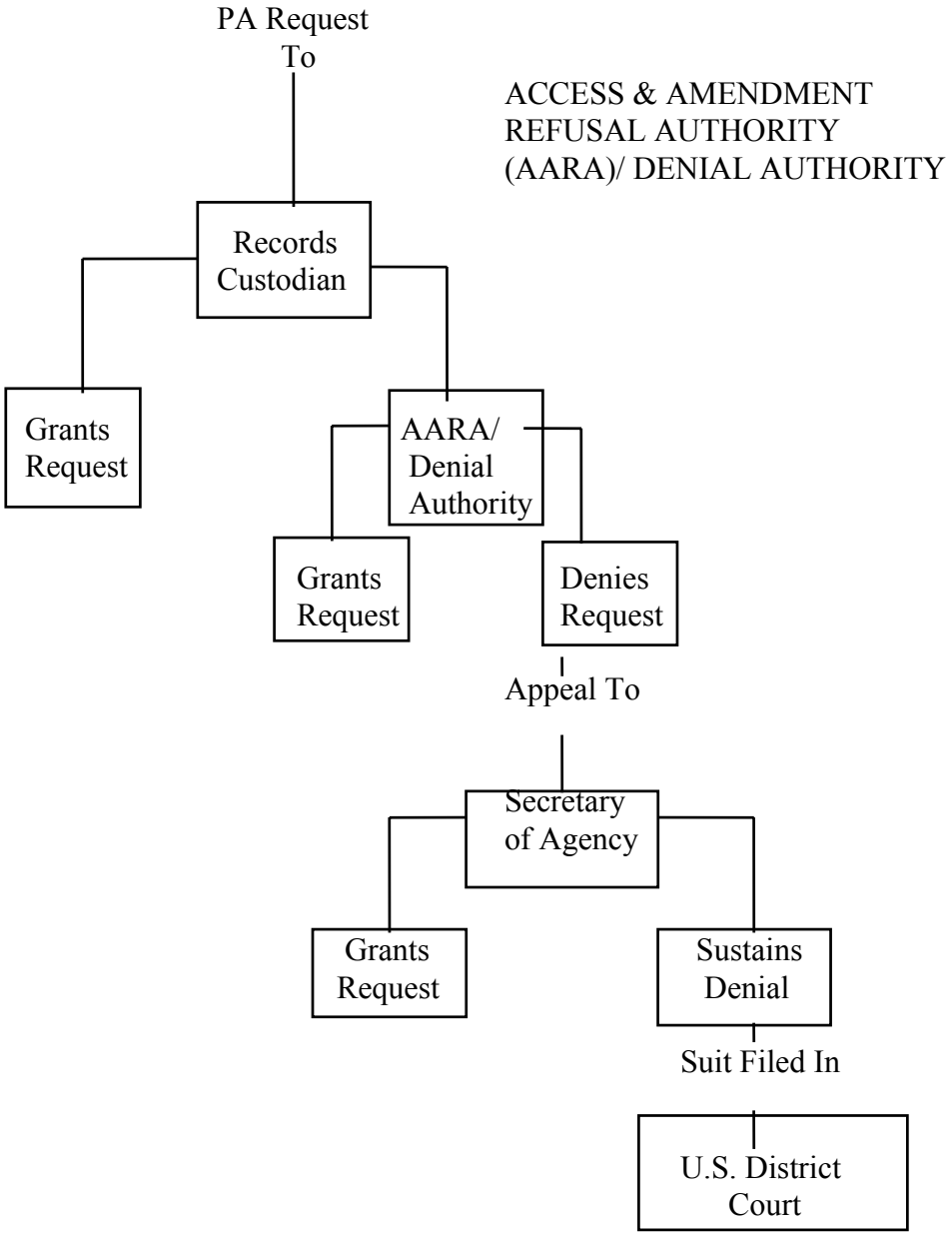
C. Burdens of Proof.

1. Access. § 552a(g)(3)(A). Burden on agency with de novo review.

2. Amendment. § 552a(d)(2)(B)(i). Burden on plaintiff to prove record not accurate, relevant, timely or complete. Mervin v. FTC, 591 F.2d 821 (D.C. Cir. 1978).

D. Processing an Access or Amendment Request.

ACCESS & AMENDMENT REQUEST



E. Time Limits.

1. Access. 10 work days to acknowledge request. Release within 30 workdays. AR 340-21, paras. 2-2 & 2-9 (5 workdays to forward denial recommendation to AARA); AFI 33-332, para. 4.2.3; SECNAVINST 5211.5D, para. 11b(12).

2. Amendment.

   a. Custodian/System Manager: 10 workdays to acknowledge, 30 workdays to make final response. § 552a(d); AR 340-21, para. 2-11, AFI 33-332, para. 5.2.3; SECNAVINST 5211.5D, para. 12f.

   b. Denial/Refusal Authority

      (1) Army - Access and Amendment Refusal Authority (AARA) – Army AR 340-21, para. 1-7. No specified time limit.

      (2) Air Force - Denial Authority, AFI 33-332, para. 5.3. No specified time limit.

      (3) Navy/Marines – Denial Authority, SECNAVINST 5211.5D, para. 6(e).

   c. Appeal:

      (1) Requester – 60 calendar days to appeal. AFI 33-332, para. 5.5; SECNAV 5211.5D, para. 13a(1).

      (2) Review Authority:

         (a) Army – DA Privacy Review Board w/ OGC concurrence. 30 workdays (30 more for "good cause") AR 340-21, para. 2-11h.

         (b) Air Force – Through HQ AFCIC/ITC to SAF/GCA. No time limit to respond. AFI 33-332, para. 5.5.2

(c) Navy/Marine – ASN, NJAG, OGC, OPM. 30 working days to respond. SECNAVINST 5211.5D, para. 13f.

F. Access Issues.

1. Third party information in the subject/requester's file.

a. Definition of a "record." Is the information "about" the requester?

b. If not, see Voelker v. IRS, 646 F.2d 332 (8th Cir. 1981); compare DePlanche v. Califano, 549 F. Supp 685 (W.D. Mich. 1982).

2. Medical records of minors. DOD Reg. 5400.11-R, ch. 3, para. 6e; see also AR 40-66, chapter 2; SECNAVINST 5211.5D, para. 11a(8); AFI 33-332, para. 9.5.

a. The Privacy Act applies to "[citizens] of the United States or [aliens] lawfully admitted for permanent residence." Minors are protected by the Act because minority is not a disqualifier. § 552a(a)(2), see also Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 9.

b. The Privacy Act provides that "the parent of any minor…may act on behalf of the individual." § 552a(h).

c. Stateside.

(1) Definition of minor? State law.

(2) If a minor, may release records to parents unless prohibited by state law. AR 40-66, para. 2-5(a)(1); DA Pam 340-6, No. 27.

(3) Look to the law of the state in which the records are located--the states differ on the question of access to a minor's medical records based, in part, on subject matter (e.g., psychiatric records, treatment records for drug and alcohol abuse, sexual hygiene/reproductive records).

d. Overseas.

(1) Definition of minor? The Army deems the age of majority to be 18 years. DA Pam 340-6, No. 45.

(2) Parental access. Parents have a general right of access to medical records of minors.

(3) Parents may be denied access only if **all** of the following four conditions are met:

(a) Minor was between ages 15 and 17 at the time of treatment.

(b) Treatment sought in program that promised to keep treatment records confidential.

(c) Minor specifically requested confidentiality.

(d) Parent did not have the minor's written authorization or a court order.

3. Access denied under PA, but accessible under FOIA.

a. PA is not a FOIA exemption 3 withholding statute. Provenzano v. DOJ, 717 F.2d 799 (3d Cir. 1983), vacated as moot, 469 U.S. 14 (1984).

b. Clarified by Legislation. CIA Information Act, Pub. L. No. 98-477, § 2(c), 98 Stat. 2211, 2212 (1984) (codified at 5 U.S.C. § 552a(t)(2)).

G. Amendment Issues.

1. No Collateral Attack.

a. Issues already the subject of judicial or quasi-judicial action. Spurge v. Derwinski, 26 F. 3d 8 (2d Cir. 1994).

b. Issues for which adequate judicial review is available. Henderson v. Social Security Administration, 908 F.2d 559 (10th Cir. 1990).

c. Exhaustion of administrative remedies. Cargill v. Marsh, 902 F.2d 1006 (D.C. Cir. 1990)

2. Facts v. Judgment.

a. May only correct facts, not judgments, under the Act. AR 340-21, para. 2-10a; Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 4; Hewitt v. Grabicki, 794 F.2d 1373 (9th Cir. 1986).

b. Can amend judgments only if all underlying facts are discredited. RR v. Dep't of Army, 482 F. Supp. 770 (D.D.C. 1980) (dictum).

XV. PA EXEMPTIONS. §§ 552A(J) AND (K).

A. Exemptions Deny a Subject Access to His Own Records.

B. Claiming Exemptions.

1. Exemptions are not automatic.

2. Agencies are not entitled to improperly claimed exemptions. Ryan v. Dep't of Justice, 595 F.2d 954 (4th Cir. 1979).

C. Two General Exemptions. § 552a(j)(1)-(2).

1. What records are exempt?

   a. Maintained by the CIA. § 552a (j)(1).

   b. Maintained by an agency/component thereof which performs as its principal function any activity pertaining to law enforcement. § 552a (j)(2)

2. According to the Defense Privacy Board, the exemption does not follow the record. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 31. But see Doe v. FBI, 936 F.2d 1346 (D.C. Cir. 1991).

D. Seven Specific Exemptions. § 552a(k)(1)-(7).

1. What records are exempt?

   a. Classified information (simply incorporates FOIA exemption 1 protections in the Privacy Act context).

   b. Investigatory material compiled for law enforcement purposes not covered by § 552a(j)(2).

   c. Protective services to the President.

   d. Statistical records.

   e. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts or access to classified material. Limited to the protection of a confidential source who provided the information pursuant to an express promise of confidentiality.

      (1) Also includes material compiled to determine whether a federal grant will be awarded. Henke v. United States Dep't of Commerce, 83 F.3d 1445 (D.C. Cir. 1996).

(2) Applicable even though the source of the confidential information is known to the requester. Volz v. Dep't of Justice, 619 F.2d 49 (10th Cir.).

f. Testing or examination material used solely to determine individual qualifications for appointment/ promotion in Federal service.

g. Evaluation material used to determine potential for promotion in the armed services. Limited to the protection of a confidential source. May v. Dep't of Air Force, 777 F.2d 1012 (5th Cir. 1985).

E. One Special Exemption. § 552a(d)(5).

1. Information compiled in reasonable anticipation of civil litigation.

2. Self-executing.

3. Applies to administrative proceedings. Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 27.

XVI. PA DISCLOSURE OF INFORMATION SOR, § 552A(B).

A. Disclosure Prohibited. The "no disclosure without consent" rule:
"No agency shall disclose any record . . . except pursuant to a written request by or with the prior written consent of the individual to whom the records pertains, unless an exception applies."

1. Disclosure must be from a system of records.

a. Pertains to information initially retrieved from a system of records. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983).

b. Personal opinion or knowledge from memory not from a system of records. Kline v. HHS, 927 F.2d 522 (10th Cir. 1983) (holding that verbal information about employee derived from independent knowledge and not from an agency system of records are not subject to the Privacy Act.).

2. A later release of information previously known does not violate the Privacy Act. Hollis v. Department of the Army, 856 F.2d 1541 (D.C. Cir. 1988). (holding that when a release of servicemember's child care allotments consisted merely of information . . . which the recipient of the release already knew, the Privacy Act is not violated"); FDIC v. Dye, 642 F.2d 833 (5th Cir. 1981). But see Pilon v. Department of Justice, 73 F.3d 1111 (D.C. Cir. 1996) (holding that faxing a PA protected document to a person with familiarity of its existence does not remove it from PA protection).

3. Privacy Act is not limited to extra-judicial disclosures; it applies even where a disclosure to a court during the course of litigation is undertaken. See Laningham v. Navy, 813 F.2d 1236 (D.C. Cir. 1987) (per curium) (holding that Navy did not intentionally and willfully disclose disability board information in civil trial in violation of PA).

B. 12 Exceptions to the "no disclosure without consent" rule permit access to information without prior written consent of the subject of the record. § 552a(b)(1)-(12).

1. Exception 1. Disclosure within the agency (DOD) to those having a need to know the information in performing their duties.

a. Contractors who operate a system of records to accomplish an agency mission are considered part of an agency. See Coakley v. Department of Transportation, No. 93-1420 (D.D.C. Apr. 7, 1994); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 16; But see Taylor v. Orr, (D.D.C. Dec. 5, 1983).

b. Lists of nonparticipants/nonmembers.

(1) Savings bond programs. Parks v. IRS, 618 F.2d 677 (10th Cir. 1980); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 37.

(2) Officers' Clubs.

(3) AUSA.

2. Exception 2. Disclosure required by FOIA.

a. FOIA and Privacy Act interface.

(1) FOIA Exemption 6: Protection of Personal Privacy.

(2) FOIA Exemption 7(C): Records or Information Compiled for Law Enforcement Purpose.

b. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

-- Public Interests in Disclosure v. Invasion of Privacy.

c. Specific applications of the balancing test.

(1) Some information normally is releasable:

(2) Most interests will not outweigh the invasion of personal privacy.

d. No discretionary release.

(1) No agency "discretionary disclosure" of information that is exempt under FOIA and subject to the Privacy Act. DOD v. FLRA, 510 U.S. 487 (1994).

(2) Agency must have an actual FOIA request to rely on exception 2. OMB Memorandum for the Senior Agency Officials for Information Resources Management, SUBJECT: Privacy Act Guidance - Update, dtd 24 May 1985; Compare Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984) with Cochran v. United States, 770 F.2d 949 (11th Cir. 1985).

e. Categorical Balancing Requiring Release. Military personnel information, such as: name, rank, gross salary, duty assignments, duty telephone, etc., may be released. AR 340-21, para. 3-3.

3. Exception 3. Disclosure for routine use.

a. Specific routine uses as listed in systems notices, DA Pam 25-51, AFP 12-36, OPNAVNOTE 5211, MCBUL 5211.
CAUTION: Printed systems notices are often out of date. Use on-line sources for most current systems notices.

b. Compatibility requirement. Disclosure of record must have compatible purpose for which it was collected. § 552a(a)(7). Britt v. Naval Investigative Service, 886 F.2d 544 (3rd Cir. 1989) (holding that transfer of Marine Reservist's military criminal investigation file did not meet PA compatibility requirement); Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989).

c. General/blanket routine uses. AR 340-21, para. 3-2. These include:

(1) To law enforcement agencies when record indicates a violation or potential violation of law.

(2) To other federal agencies on request for hiring, retention, security clearance, or licensing decisions by those agencies.

(3) Congressional inquiries and private relief legislation. Pellerin v. VA, 790 F.2d 1553 (11th Cir. 1986). But see Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989) (disclosure beyond scope of inquiry).

(4) Required by international agreement.

(5) To DOJ for litigation.

(6) Counter-intelligence purposes or enforcing laws which protect the national security.

4. Exception 4. Bureau of Census.

5. Exception 5. Statistical research.

6. Exception 6. National Archives.

7. Exception 7. Law enforcement. Disclosure may be made without the consent of the subject of a record in response to the request of a law enforcement agency. The request must be submitted in writing form the head of the agency.

8. Exception 8. Compelling circumstances affecting health or safety of the individual.

   a. Case law emphasizes emergency nature of exception.

   b. Disclosure notification must be sent to last known address.

   c. Individual about whom records are disclosed need not necessarily be the individual whose health or safety is at peril; e.g., release of records on several individuals in order to identify an individual who was injured in an accident. See OMB's Privacy Act Guidelines, 40 Fed. Reg. 28,955 (1975); DePlanche v. Califano, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982).

9. Exception 9. Congress. Disclosure may be made to "either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee [thereof]."

10. Exception 10. Comptroller General.

11. Exception 11. Pursuant to the order of a court of competent jurisdiction.

12. Exception 12. Credit reporting agencies.

C. Accounting for Disclosure. § 552a(c).

1. Disclosure accounting is required unless the record is disclosed within the agency (exception 1) or pursuant to FOIA (exception 2). AR 340-21, para. 3-4, AFR 12-35, para. 19(d).

2. Accounting must include the date, nature, and purpose of disclosure and the name and address of the recipient.

3. Uses of Disclosure Accounting Record (DA Form 4410-R).

XVII. SOCIAL SECURITY NUMBERS.

A. Section 7(a)(1). (Enacted as part of the Privacy Act, but not codified.). No Federal, State, or Local Governmental Agency can Deny a Right, Privilege or Benefit Because of Refusal to Disclose Social Security Account Number, unless

1. Required by Federal statute, or

2. Disclosure was required under any Federal, state, or local statute or regulation in existence and operating before 1 January 1975 to verify the identity of the individual.

B. Requests by agency for SSN requires informing whether disclosure is mandatory or voluntary, by what statutory authority, and what use will be made of it. Sec. 7(b).

XVIII. PA CRIMINAL PENALTIES. § 552A(I).

A. Knowingly/Willfully Making Prohibited Disclosure. See, e.g., United States v. Trabert, 978 F.Supp 1368 (D.Colo. 1997)

B. Willfully Maintaining a System of Records Without Complying with Notice Requirements.

C. Knowingly/Willfully Requesting/Obtaining Information Under False Pretenses.

D. Action is against the individual and not the agency.

XIX. PA CIVIL REMEDIES.

A. Statutory. § 552a(g).

VIOLATION	REMEDY
Wrongful refusal to amend. § 552a(g)(1)(A). § 552a(g)(2).	Enjoin/order amendment; attorney fees/costs.
Wrongful denial of access. § 552a(g)(1)(B)	Enjoin from withholding; provide in camera inspection; attorney fees/costs. § 552a(g)(3).
Failure to maintain accurate, timely, complete, and relevant records resulting in an adverse determination. § 552a(g)(1)(C).	If agency acted in an intentional/willful manner, U.S. is liable for: a) Actual damages but not less than $1,000. b) Attorney fees and costs. § 552a(g)(4).
Failure to comply with another provision causing an adverse effect. § 552a(g)(1)(D).	If agency acted in an intentional/willful manner, U.S. liable for: a) Actual damages but not less than $1,000. b) Attorney fees/costs. § 552a(g)(4).

1. Civil remedies are solely against the agency.

2. Courts are not free to create remedies greater than those granted by the statute. Edison v. Dep't of Army, 672 F.2d 840 (11th Cir. 1982).

3. Intentional/willful refers to the intentional or willful failure to abide by the Act. Andrews v. VA, 838 F.2d 418 (10th Cir. 1988); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987); Albright v. U.S., 732 F.2d 181 (D.C. Cir. 1984).

4. Privacy Act does not mandate agency to create and maintain files, and destruction of an official record does not give right to a Privacy Act cause of action. Tufts v. Dep't of Air Force, 793 F.2d 259 (10th Cir. 1986).

5. Damages. Alexander v. FBI, et al., 193 F.R.D. 1 (D.D.C. March 29, 2000)(compelling further discovery regarding "Filegate" letters in PA suit for damages against the Executive Office of the President); Tripp v. Executive Office Of The President, et al., 104 F. Supp. 2d 30 (D.D.C. June 14, 2000) (denying motion to recuse in PA damages suit against EOP and DoD).

6. Attorney's Fees.

   a. Purpose of granting attorney fees. Anderson v. Dep't of Treasury, 648 F.2d 1 (D.C. Cir. 1979).

   b. Threshold requirement: plaintiff must substantially prevail. Sweatt v. U.S. Navy, 683 F.2d 420 (D.C. Cir. 1982).

   c. Factors considered in granting this discretionary remedy. Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981).

   d. Only permitted for litigation; not administrative actions. Kennedy v. Andrus, 459 F. Supp. 240 (D.D.C. 1978), aff'd, 612 F. 2d 586 (D.C. Cir. 1980)(table cite).

   e. Not paid to a pro se litigant even if plaintiff is an attorney. Manos v. Department of the Air Force, 829 F. Supp. 1191 (N.D. Cal. 1993).

7. Two-year statute of limitations governs Privacy Act actions. § 552a(g)(5). Bower v. Department of Air Force, 875 F.2d 632 (7th Cir. 1989); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987).

B. Constitutional Tort. Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985).

   a. The Privacy Act is not intended as an exclusive remedy.

b. Recording and disseminating derogatory information without notice and the opportunity to refute may amount to a violation of due process guaranteed by the Fifth Amendment.

c. Individual defendants are subject to qualified immunity and personal liability. Note that liability is limited by Chappell v. Wallace, 462 U.S. 296 (1983), and Bush v. Lucas, 462 U.S. 367 (1983).

XX. CONCLUSION.

CHAPTER 29-A

DOD FAMILY SUPPORT PROGRAMS

Outline of Instruction

I. INTRODUCTION.

II. DOD POLICY.

III. AIR FORCE IMPLEMENTATION OF DOD POLICY.

A. Reference: AFI 36-2906 (1 OCT 95); 32 C.F.R. Part 818.

B. "The Air Force expects its members to provide regular and adequate support, either direct or in kind, based on the needs of the dependents and the ability of the member to provide."

C. No authority to order a specific dollar amount of support.

D. BAQ at the with-dependents rate will be terminated if the member refuses to use the money to support family members.

E. Paternity: the issue must be resolved in civil court.

IV. MARINE CORPS IMPLEMENTATION OF DOD POLICY.

A. New Reference: Chapter 8, Legal Admin Manual.

B. Effective Date: **1 April 1998**.

C. Guidelines--§8002

1. GENERAL RULE: The greater of $200.00 per supported family member, or BAH, up to 1/3 of gross pay.

2. **GROSS PAY** is defined as basic pay, basic allowance for housing.

3. Rules for Single Family Units.

   a. SINGLE FAMILY IN GOVERNMENT HOUSING: Support will be $200.00 per supported person up to 1/3 of gross pay.

   b. SINGLE FAMILY NOT IN GOVERNMENT HOUSING: Support will comply with the general rule.

4. Rules for Multiple Family Units.

   a. Do not include a spouse if the spouse is a member any U.S. Armed Force.

   b. Support will comply with the general rule.

5. Military Couples.

   a. NO CHILDREN OF THE MARRIAGE: There is no support obligation regardless of disparity in pay-grade.

   b. ALL CHILDREN OF THE MARRIAGE IN CUSTODY OF ONE SPOUSE: General rule applies.

   c. SPLIT CUSTODY: General rule applies.

D. Punitive Regulation.

1. Para. 8001 makes a violation of the guidelines a violation of Article 92, UCMJ.

2. Duration of support: Support amounts paid under the interim support requirements apply until a court order or written agreement is obtained.

E. In-kind Payments.

1. In-kind payment is authorized.

2. Not limited to non-governmental housing costs. Could also be for charge accounts, or car payments, etc.

3. Commander must authorize the in-kind payment as complying with the regulation requirements.

F. Release from Obligation.

1. Commander can release a Marine from the interim support obligations established by the regulation.

2. §8003.5 specifies 4 reasons for release.

a. Marine cannot determine the whereabouts and welfare of the child concerned.

b. Person requesting support for the child does not have physical custody of the child.

c. Marine is the victim of a substantiated case of physical abuse by the spouse requesting support.

d. The dependent is in jail.

3. §8004.4 establishes one reason for release.

a. Spousal Misconduct. A Marine can allege marital desertion or adultery by the spouse as a means of release from the spousal portion of support.

b. The request for release goes to the Marine's Commanding Officer who forwards it to the General Court Marital authority for approval of the waiver.

G. Paternity.

1. Civil Matter. Marine commanders do not make paternity determinations in the absence of an acknowledgment by the Marine or a court order of paternity.

2. If a Marine acknowledges paternity or a court adjudicates him the father of an illegitimate child, the Marine owes an obligation of support under the regulation.

V. NAVY IMPLEMENTATION OF DOD POLICY.

A. Reference: 32 C.F.R. Part 733.

B. Support amounts in the absence of an agreement or a court order:

1. Spouse only: 1/3 of gross pay.

2. Spouse and one child: 1/2 of gross pay.

3. Spouse and two or more children: 3/5 of gross pay.

4. One child (no spousal support): 1/6 of gross pay.

5. Two children (no spousal support): 1/4 of gross pay.

6. Three or more children (no spousal support): 1/3 of gross pay.

C. "Gross pay" means basic pay, BAQ and VHA but not BAS or other pay entitlements.

D. These are only guidelines, and a commander can require a member to pay can be more or less, based on all the facts of the case.

E. The spousal support obligation (not the child support obligation) may be waived by the Director, DFAS - Cleveland based on the spouse's desertion without cause, physical abuse or infidelity. The commander has discretion to withhold administrative or disciplinary action when the whereabouts and welfare of the child cannot be determined or where the person seeking payment does not have physical custody of the child.

F. Paternity.

1. In disputed cases, the issue must be resolved by a civil court.

2. Support must be paid in accordance with any applicable court order, or agreement between the parties, or the above guidelines.

VI. COAST GUARD IMPLEMENTATION OF DOD POLICY.

A. Reference: Personnel Manual, Chapter 8, -- Support of Dependents.

B. Members are expected to "provide continuous and adequate for lawful dependents."

1. If, after counseling, the member demonstrates a pattern of non-support and/or failure to obey civil court support orders, the member is subject to administrative discharge for unfitness.

2. Non-support that is "notorious" and discrediting to the coast Guard can be the subject of court martial or other disciplinary proceedings.

C. Court orders for support are normally binding on members. If, however, a "member acting on <u>good</u> <u>faith</u> and <u>on the express advice of qualified legal counsel</u> disputes such a claim, the commanding officer may withhold disciplinary /administrative action against the member for a reasonable length of time . . . ." (emphasis in original).

D. Where there is no court order or agreed to level of support, the following scale is used:

1. Spouse only -- BAQ and VHA, plus 20% of basic pay.

2. Spouse and 1 minor child -- BAQ and VHA, plus 25% of basic pay.

3. Spouse and 2 or more minor children -- BAQ and VHA, plus 30% of basic pay.

4. One minor child -- 1/6 of basic pay.

5. Two minor children -- 1/4 of basic pay.

6. Three of more minor children -- 1/3 of basic pay.

E. Defenses to non-support (in accordance with Coast Guard guidelines):

1. Spousal non-support -- infidelity or desertion.

2. Child non-support --

a. Inability of the member to ascertain the whereabouts and welfare of the child.

b. Where the person seeking payment does not have physical custody of the child.

F. Paternity -- a civil matter.

-- If there is no court ordered amount of support and no agreement with mother of the child then the guidelines apply.

VII. ARMY SUPPORT REQUIREMENTS.

A. AR 608-99 (1 NOV 94). Six Key Points.

1. The support requirement imposed by the Army regulation applies only to "family members."

2. The regulation itself defines "family members" and this definition may differ from other definitions of “dependents” or “family members” used for other benefits such as identification cards and BAQ entitlement.

3. The regulation creates an "interim support requirement" that applies **ONLY** when there is no agreement between the parties or no court order. [This interim amount is not intended to necessarily provide adequate support and it should not be used as a guideline for civilian agencies or courts in establishing support requirements.]

4. The regulation creates no authority for the Army to take money from a soldier and pay it to family members. It does, however, create a military obligation to pay support, and the Army can punish a soldier for failing to comply. And, of course, the Army (as well as other branches of service) will comply with valid civilian garnishment or wage assignment orders.

5. Enforcement authority is the military commander.

6. Basic Allowance for Quarters (BAQ) is used by the Army as a **yard-stick** (it is not a cap on payments) for determining the interim support obligation; actual receipt of BAQ is **not** a prerequisite to the requirement to pay support to family members.

B. The Support Obligation--Who is Covered? -- **Family Members!**

1. Current spouse,

2. Minor children (under 18) of the current marriage and of past marriages (including children adopted by the soldier).

3. Minor children born out of wedlock to--

a. a woman soldier.

b. a male soldier IF paternity is established by court order and a support obligation is judicially established.

4. Any other person the soldier is obligated to support by applicable state law.

a. Stepchildren: no, unless required by state law to support.

b. Parents: same as for stepchildren.

C. The Support Obligation--How Much?

1. Soldiers must comply with provisions of any support order.

2. Absent a support order, soldiers must pay in accordance with any written support agreement entered into.

3. If no written agreement, should pay in accordance with any oral agreement regarding support.

4. If there is no support order nor a written or oral agreement, or if there is any dispute regarding an oral agreement, then as a minimum the soldier must pay in accordance with the Army's interim support requirement.

D. Foreign Court Orders. AR 608-99, para. 2-4 b.

1. Soldier cannot be ordered to comply with a court order of support issued by a foreign court **UNLESS**:

a. the foreign court order is domesticated by a U.S. state court, OR

b. a treaty or international agreement exists between the U.S. and the foreign country to honor court orders. The U.S. has such an agreement with Germany ONLY WHILE THE SOLDIER IS STATIONED IN GERMANY.

2. Soldiers should know that this lack of authority to require them to comply does not relieve them of the foreign court obligation if they ever come under the jurisdiction of the foreign court or the foreign court order is later domesticated in the U.S.

3. Soldiers must still comply with the interim support requirements of AR 608-99 even if the foreign court order cannot be enforced.

E. The Interim Support Requirement. AR 608-99, para. 2-6.

1. Purpose: to insure some family support while the parties are seeking to reach an agreement or initiating litigation.

a. BAQ-WITH - The full basic allowance for quarters with dependent rate for the service member's pay grade.

b. BAQ-DIFF - The difference between basic allowance for quarters with dependents and the basic allowance for quarters without dependents for the service member's pay grade.

c. Pro-rata Share - Basic allowance for quarters with dependents rate for the service member's pay grade divided by the total number of family members.

2. EFFECT OF NEW BASIC ALLOWANCE FOR HOUSING (BAH).

a. Effective 1 January 1998, all service members receive BAH instead of BAQ at the with or without rate and VHA. BAH is a combined figure of the old BAQ rate and VHA rate for the service members locale.

b. AR 608-99 still applies. Use DFAS BAH Table II and Differential for the equivalent BAQ-WITH rates and BAQ-DIFF rates for a particular rank. A copy of the 1999 BAH Table II is attached.

3. Single Family Situations.

a. Family **living in government quarters**--BAQ-DIFF.

b. Family **living off-post**--full BAQ-WITH

c. Family members residing in **different locations**--pro-rata share to those not in government quarters and BAQ-DIFF for members residing in government quarters.

4. Military Couple Situations.

a. If there are no children, neither spouse has any obligation to provide support for the other.

b. If there are children and all are in the custody of one of the spouses, the noncustodial spouse pays support equal to BAQ-DIFF.

c. If there is a split of custody regarding two or more children, neither spouse pays any support to the other.

5. Multiple Family Situations.

a. "Multiple family situations"--family members from different relationships (possibly living at varying locations).

b. Generally, each supported family member gets a pro-rata share of BAQ-WITH.

(1) REMEMBER THAT ALL SUPPORT ORDERS MUST BE COMPLIED WITH.

(2) REMEMBER THAT WHERE FAMILY MEMBERS LIVE ALSO PLAYS INTO WHAT AMOUNT OF SUPPORT THEY RECEIVE.

c. Examples:

(1) Soldier has two children by a previous marriage with no court order for support, and a current family of a wife and one child. Total family members: 4, so each gets 25% of an amount equal to the soldier's BAQ at the with-dependent rate. If the BAQ rate is $300, the current family gets $150 (25% x 2 people x $300).

(2) Same as above except the two children live with their mother and stepfather, who is also in the Army, in government quarters. Their support is the difference between BAQ "with" and "without." The current spouse and child together still get 50% of the BAQ "with" rate.

(3) Same as above except there is a court order requiring payment of $150 per month per child for each of the two children of the previous marriage. The "interim standards" are not applicable to them, and the regulation commands that the soldier pay in accordance with the order. The current spouse and child still receive their pro rata share of the BAQ "with" amount.

6. When the Interim Requirement Is Not Acceptable.

a. Soldiers and supported family members who believe the interim requirement is not enough or excessive must obtain a court order or enter an agreement to change the support obligation of the soldier.

b. Commander has **NO** authority to order support less than or in excess of the interim requirement amount found in AR 608-99.

F. Payment of Support. AR 608-99, para. 2-7.

1. Cash

a. Personally delivered to an adult

b. Receipt

2. Check

3. Money Order

4. Voluntary Allotment

5. All payments are due first day of the month following the month to which the support payment pertains.

G. Payment In Kind. AR 608-99, para. 2-7d & e.

1. Allowed only in cases of interim support unless the court order or written agreement allows for payment in kind.

2. Limited to payment of non-government housing expenses for a dwelling in which the supported family members reside.

a. Rent.

b. Real property taxes and property insurance, mortgages

c. DOES NOT include utilities, cable T.V.

3. Soldier must make up any shortfall between payment in kind and actual support obligation.

4. Other support in kind such as car payments, insurance and credit card obligations requires written consent of the supported family members.

H. Release From Support Requirements. AR 608-99, para. 2-11.

1. Battalion commanders **ONLY** have the authority to release a soldier from support obligations. Battalion commander MUST consult with the SJA before releasing the soldier. (AR 608-99, para. 2-10b (2)c)

2. *Order has been issued by a court without jurisdiction*. Release from the requirement to support in accordance with the terms of a court order is only appropriate when jurisdiction is clearly lacking and the soldier has continuously provided support in accordance with a written agreement or the interim requirements of AR 608-99.

3. *A court order does not contain a financial support provision*. There is a judicial proceeding underway and at least one court order issued but there is NO language of support addressed in the order(s). Release under this authority is limited and should be discussed with the servicing SJA office.

4. *The income of the spouse exceeds the military pay of the soldier*. Release from **spousal support**, not child support, and only applies in the absence of a court order or written separation agreement. The soldier must show the spouse makes more than the soldier's military pay (defined as military base pay only).

5. *The soldier has been the victim of a substantiated case of physical abuse*. The abuse must be documented by a court or a Family Advocacy Case Management Team (FACMT) and not involve a mutual affray or abuse of the spouse by the soldier. This exception authorizes release from regulatory requirements of **spousal support**, not child support.

6. *The supported family member is in jail*. This exception applies to any penal institution, regardless of the reason for incarceration.

7. *The supported child is in the custody of another who is not the lawful custodian*. This limited exception applies only when the soldier is the lawful custodian and is diligently pursuing physical custody.

I. Raising the Issue of Non-Support.

1. Communicating with the nonsupporting soldier is the initial option. If it is obvious that the nonpayment of support is intentional, or if there is no satisfactory response from the soldier, write to the soldier's immediate (i.e., unit) commander.

2. The commander is required to counsel the soldier, ascertain his/her intentions re: support, and respond to the writer. The commander may also impose sanctions for non-support.

J. Sanctions for Non-Compliance.

1. AR 608-99 is punitive regarding paragraphs 2-6 and 2-9.

2. Administrative:

a. Reprimand,

b. Adverse information in official file,

c. Bar to Reenlistment,

d. Administrative Elimination.

3. Punitive:

a. Article 15

b. Courts-Martial.

4. The decision to impose sanctions is entirely within the commander's discretion.

K. BAQ Entitlement. DOD Financial Management Regulation. Generally, allowances received by soldier based on the existence of dependents must be paid for their support. Failure to pay such amounts in support can lead to recoupment and charges based on fraud.

VIII. CONCLUSION.

1999 BAH Table II and Differential

GRADE	FULL (BAQ/WITH)	DIFFERENTIAL
0-7 To 0-10	$1081.20	$202.80
06	$973.50	$167.70
05	$938.40	$162.30
04	$827.10	$108.00
03	$684.30	$107.70
02	$584.40	$127.20
01	$522.60	$137.40
03E	$735.30	$112.80
02E	$663.60	$134.70
01E	$613.20	$158.10
W5	$798.30	$67.50
W4	$732.00	$83.10
W3	$670.80	$125.40
W2	$616.80	$132.60
W1	$533.70	$128.10
E9	$702.60	$169.50
E8	$647.70	$158.40
E7	$601.50	$183.60
E6	$555.60	$177.30
E5	$499.80	$150.90
E4	$434.40	$130.80
E3	$404.40	$106.80
E2	$385.20	$143.40
E1	$385.20	$169.50

CHAPTER 29-B

CIVILIAN FAMILY SUPPORT ENFORCEMENT MECHANISMS

I. INTRODUCTION.

II. CIVILIAN FAMILY SUPPORT ENFORCEMENT MECHANISMS.

A. Involuntary Allotments.

1. Citations.

a. 42 U.S.C. § 665.

b. 32 C.F.R. Part 54 (DOD implementing regulations).

c. 33 C.F.R. Part 54 (Coast Guard implementing regulations).

2. Basic requirements for initiation of an involuntary allotment.

a. A state court or administrative support order that includes a child support component.

b. An arrearage equal to or exceeding the support required for a 2-month period.

3. Procedure.

a. A state (but not a foreign) child support enforcement agent (or court) sends a letter (or order) to the military finance center stating that the requisite arrearage exists and requesting that a "mandatory allotment" be started.

b. The finance center notifies the member's commander and the member concerning the request.

c. Absent presentation of an adequate and timely defense by the soldier, the allotment is started.

(1) The allotment will be for the amount of the monthly support obligation, payable in accordance with the request and continuing until the requester advises that it should stop.

(2) Arrearages can be collected, but the there must be second court order requiring payment of the arrearage by involuntary allotment (a letter from a CSE agent asking for arrearages is insufficient).

4. Limitations.

a. If the member is supporting other family members, the maximum amount of the involuntary allotment is 50% of disposable earnings.

(1) "Disposable earnings" is basic pay plus most bonuses and special pay, minus taxes and other deductions.

(2) The term also includes BAS for officers and warrant officers, and BAQ for members with dependents and all members in the grade of E-7 and above. See 32 C.F.R. § 54.6(b).

b. If the member is not supporting other family members, the maximum is 60% of disposable earnings.

c. An additional 5% is tacked on to the maximum (i.e., the maximum is boosted to 55% or 65%) if "the total amount of the member's support payments is 12 or more weeks in arrears." 32 C.F.R. § 54.6(a)(5)(iii).

5. Strategies for the member.

a. Show that information in the request is in error. 32 C.F.R. § 54.6(d)(5).

(1) Member must submit an affidavit and evidence to support the claim of error.

(2) Must provide this information to the finance center within 30 days of the notice sent by the finance center.

(3) Examples of errors.

(a) The arrearage doe not equal or exceed 2 months' worth of support.

(b) The support order itself has been amended, superseded, or set aside.

b. Are defects in jurisdiction that affect the validity of the underlying support order a defense? It is unclear whether the finance center will act on such an allegation.

c. Negotiate a mutually acceptable resolution with the child support agency or the custodial parent.

d. Do not start a voluntary support allotment upon receiving notification of an involuntary allotment action--the result will simply be two allotments deducted from military pay.

6. Helping the custodial parent.

a. He or she must first have a child support order issued by (or registered with) a U.S. court.

b. Two approaches to getting an involuntary allotment.

(1) Ask the applicable CSE agency to submit the request.

(a) "Applicable" agency does not have to be the state where the order was issued.

(b) This approach usually works well if the order calls for payments to be made through the court or agency so they have a record of the arrearage.

(c) Problems develop if the agency has no payment records; however, some may be willing to act on a sworn affidavit of nonsupport supplied by the custodial parent.

(2) Or, submit a request directly to the court that issued the order, asking it to request initiation of an involuntary allotment.

(a) The court will need a sworn representation from the custodial parent alleging the appropriate arrearage.

B. Garnishment for Family Support.

1. References.

a. 42 U.S.C. § 659-662.

b. 5 C.F.R. Part 581.

c. 1993 Garnishment Equalization Act.

2. Historically, there was no "federal garnishment law."

   a. The garnishment statute is merely a waiver of federal sovereign immunity, allowing state garnishment orders to be served on federal officials.

   b. The garnishment statute applies to active duty and retired military pay, reserve drill pay, and current and retired federal civilian employee salaries.

   c. The federal statute currently provides that federal agencies need only comply with garnishment order for child support or alimony obligations.

   d. The garnishment can be for current support, or support arrears, or both, according to state law.

   e. The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the federal Consumer Credit Protection Act (CCPA) (15 U.S.C. § 1673).

      (1) CCPA provides for garnishment of a maximum of 50% of disposable earnings if the member is supporting other family members and 60% if he or she is not; an additional 5% can be garnished if the support obligation is more than 12 weeks in arrears.

      (2) Disposable pay includes basic pay and most bonus and special pay entitlements, but not BAQ or BAS.

3. Defenses for the member.

   a. The finance center will not entertain defenses raised by the member in garnishment actions from U.S. courts.

   b. Disputes must be litigated in the state that issued the garnishment order.

c. If the member is supporting family members other than those to whom the garnishment order pertains, make sure the finance center knows this since it can affect how much money is deducted from the member's pay.

4. German garnishment orders.

a. The finance center honors support garnishments issued by German courts against members (and family members, etc.) while they are stationed in Germany.

b. The garnishment should stop upon the member's reassignment out of Germany.

c. Members need to understand that termination of the German garnishment upon DEROS does not terminate the underlying support obligation.

(1) German agencies can later pursue collection of current support and arrearages through U.S. courts.

(2) German courts will collect current support and arrearages (through garnishment) if the member is later reassigned to Germany.

5. "Garnishment Equalization Act." Access to Government Employee Pay Opened Up to Non-Family Support Creditors.

a. Impact on family support creditors minimal. Family support garnishments have priority.

b. Family creditors may also benefit.

C. Wage Assignment Orders.

1. These are created by state law and can be used to enforce support obligations against civilian and military parents.

   a. The trigger for a wage assignment generally is an arrearage of not more than 30 days.

      (1) Some states currently have automatic wage withholding that takes effect immediately upon issuance of the support order, whether or not there is an arrearage.

      (2) The Family Support Act of 1988 requires that all states implement automatic wage withholding in phases (based on varying categories of obligees) by 1994.

   b. In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment and, if no defense is presented (i.e., disputing the arrearage), notice of assignment is sent to the employer.

   c. <u>All</u> employers must honor wage assignment orders; DOD agencies process them as if they were garnishment orders.

2. Assisting the absent parent.

   a. Upon receipt of notice to initiate a wage assignment...

      (1) Notify the agency of any error in alleged arrearages.

      (2) Notify the agency of modifications of the underlying support order or other facts which negate the support obligation.

   b. Ensure the finance center knows that the soldier is supporting other family members.

c. If a soldier is paying support by allotment and a decree or support order is pending in a state with automatic wage assignments, stop the allotment several months before the decree will be issued.

3. Assisting custodial parents obtain support--refer them to the nearest state or county child support enforcement office. **See Section IV.**

D. Uniformed Services Former Spouses' Protection Act.

1. Citations.

a. 10 U.S.C. § 1408.

b. 32 C.F.R. Part 63.

2. In effect, the USFSPA's "direct payment" provisions authorize wage withholding against military retired pay for support enforcement.

a. The support obligation must be contained in a final decree of divorce, dissolution, annulment, or legal separation; a simple support order or paternity decree is not sufficient.

b. The custodial parent simply sends the appropriate finance center a request for direct payment.

(1) The controlling statutory provision is 10 U.S.C. § 1408(d).

(2) The maximum amount recoverable under a USFSPA direct payment is 50% of disposable retired pay.

c. There is no requirement that any arrearage be accrued.

d. Alternatives mechanisms.

(1) Garnishment.

(2) State wage assignments (if state law defines "wages" broadly enough to encompass retired pay).

E. The Uniform Interstate Family Support Act (UIFSA) - URESA's replacement has been adopted by all 50 states as of 1 January 1998.

1. Copies of the UIFSA are available in hard copy or e-mail from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, telephone (312) 915-0195.

III. HELP FOR CUSTODIAL PARENT SOLDIERS SEEKING CHILD SUPPORT.

A. Soldiers can use the "IV-D" program in the state in which they are assigned. See 42 U.S.C. §§ 651-657 (1988).

B. Under the IV-D program, for a minimal fee -- not exceeding $25.00, a state's attorney will pursue the soldier's support claim, even if the non-supporting ex-spouse is located in a different state.

C. The IV-D program requires that all states enact a wide variety of tools to ensure that adequate levels of child support are ordered and paid. States are now required to have legislation authorizing:

1. Income tax refund intercept programs to collect arrearages in IV-D cases.

2. Recording of personal and real property liens to enforce child support obligations.

3. The reporting of child support arrearages exceeding $1000 to credit bureaus upon request of any consumer reporting agency.

4. Absent special circumstances, immediate wage withholding in all IV-D cases in which a child support order is issued or modified after November 1, 1990, and in all cases in which a new child support order is issued on or after January 1, 1994.

5. Promulgation, and revision, at least every four years, of child support guidelines with the force of rebuttable presumptions.

6. Periodic review and adjustment of IV-D child support orders pursuant to the state's support guidelines.

7. Genetic testing provided upon the request of either party to a contested paternity action.

IV. PROCEDURAL ISSUES IN FAMILY SUPPORT ENFORCEMENT.

A. Jurisdiction--Who Has It?

1. UIFSA has extensive long arm jurisdiction.

2. UIFSA long-arm jurisdiction.

a. Past domicile in the state with the child

b. Residence in the state and providing prenatal expenses or support to the child.

c. Sexual relations leading to conception.

d. Consent.

e. Child resides in the state as a result of the acts or directives of the nonresident individual.

3. Long-Distance Service of Process.

a. Personal Service. Generally required in all states for initial case of support or paternity.

(1) Personal service of process within the United States. All services prevent military personnel from acting as process servers. However, on concurrent jurisdiction and exclusive federal jurisdiction installations (where the state reserved the right to serve process) all services allow for state process servers subject to appropriate time, place and manner restrictions.

(2) Personal service of process overseas. All services prevent their military personnel from being process servers. Generally, the servicemember is offered the opportunity to voluntarily accept service of process. (See, e.g., Army Regulation 27-40, Litigation) Otherwise, service of process must be accomplished through international agreements like the Hague Convention.

b. Service by mail.

(1) Service by military mail (i.e., APO and FPO) may be sufficient under state law.

(2) Service by regular mail to overseas locations may be invalid (depending on state law), and it is illegal in some countries.

4. The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad.

a. Cite: TIAS 6638, 20 UST 361, 15 Nov 65.

b. Text reprinted in:

(1) Martindale-Hubbell, Volume VIII.

(2) Appendix to Fed. Rule of Civil Procedure 4, West's U.S. Code Annotated (U.S.C.A.).

c. Procedure.

(1) For signatory nations, plaintiff's attorney fills out a request on a Form USM 94, Request for Service Abroad of Judicial or Extrajudicial Documents, available from the nearest U.S. Marshall's Office, and mails it with documents to the "Central Authority" for country where the defendant resides, and it is served in accordance with local law.

(a) For service on a person in Great Britain or Israel, there must be a court order requiring the service, and the documents should be mailed by the clerk of the court.

(b) If serving a soldier in Germany, documents should reflect soldier status to ensure service through NATO SOFA channels.

(2) Some documents may have to be translated into local law; U.S.C.A. materials explain this.

(3) The coordinating agency in the U.S. is the Department of Justice. Addresses and other information are available in U.S.C.A. and from the Department of Justice Office of Foreign Litigation in Washington, D.C. at (202) 514-7455.

d. For assistance regarding nonsignatory nations and for problem cases, contact the Office of Citizens Consular Services at (202) 647-3444.

5. Service of process from U.S. courts by consular personnel--they will not provide this service unless expressly authorized to do so by the State Dept.

6. Commercial services - check state bar journals and national process servers associations and listings.

B. Avoiding the Need for Long-Distance Service.

1. Ask the CSE agency for the state or country where the absent parent lives, or perhaps where the custodial parent is domiciled, to handle the case.

2. In Germany there are two other approaches involving host-nation agencies.

a. Seek the assistance of:

Deutsches Institut fur
Vormundschaftswesen
Postfach 10 20 20
69010 Heidelberg
Federal Republic of Germany
011-49-6221-98-18-25
FAX: 011-49-6221-98-18-28

(1) A quasi-governmental agency.

(2) Operates on an informal or semi-formal mutually cooperative basis with a number of states and foreign nations in child support matters.

b. Or, if the state where the absent parent resides has an agreement with Germany, seek the assistance of:

Generalbundesanwaltshaft
beim Bundesgerichtshof
Zentrale Behoerde -
Neuenburger Str. 15
10969 Berlin
011-49-30-25-96-1
FAX: 011-49-30-25-96-397

(1) These agreements bring the German government CSE agency within URESA and RURESA.

(2) As of 7 January 1997, the following 47 states have reciprocal agreements with the FRG: AK, AZ, AR, CA, CO (child support only), CT, DE, FL, GA, HI, ID, IL, IA (child support only), IN, KS, KY, LA, MA, ME, MD, MI, MN, MO, MT, NE, NV, NJ, NM, NH, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, UT, VT, VA, WA, WI, WV, & WY.

C. Obtaining Evidence in International Cases.

1. Consider the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.

a. TIAS 7444, 23 UST 2555, 18 Mar 1970.

b. Text and sample form available at 28 U.S.C.A. § 1781.

(1) Any court of a signatory nation can send a "letter rogatory" to a court of another signatory nation. The "letter" asks the receiving court to order a person within its jurisdiction to produce evidence.

(2) This treaty has been used by German courts in paternity actions to obtain blood samples from putative fathers located in the U.S.

D. Avoiding Problems with the Soldiers' and Sailors' Civil Relief Act.

1. Stay of Proceedings (50 U.S.C. app. § 521).

a. Who? - any active duty defendant or plaintiff.

b. What Proceedings?

(1) Civil Court Hearings - yes.

(2) Bankruptcy Debtor/ Creditor Meeting - yes.

(3) **Administrative Hearing - no**.

c. When may you request a stay?

d. Duration of stay.

e. Burden of Proof - The Military Member must show by a preponderance of the evidence that military service has adversely affected the ability to appear, *Boone v. Lightner*, 319 U.S. 561 (1943).

(1) Unsuccessful attempts.

(a) *Underhill v. Barnes*, 288 S.E. 2d 905 (1982) - soldier made no showing of attempt to request leave, court took judicial notice of leave statutes and regulations and assumed he had 50 days accrued based on leave accrual and length of service.

(b) *Palo v. Palo*, 299 N.W. 2d 577 (S.D. 1980) - both parties were service persons assigned to Germany. Wife took excess leave and emergency loan to travel to CONUS for hearing. Husband made no showing of inability to do the same.

(2) Successful Attempt - *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) - sailor deployed at sea sends affidavit from superior officer attesting to inability to appear.

(3) Problem - Courts sometimes find the service person is not a necessary party and therefore their rights are not materially affected by inability to appear. *Bubac v. Boston*, 600 So.2d 951 (Miss. 1992). Military father not necessary party in proceeding by mother challenging retention of kids by paternal grandmother.

(a) *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989). As general rule, temporary modifications of child support do not materially affect rights of military defendant as they are interlocutory and subject to modification.

(b) *Riley v. White*, 563 So.2d 1039 (Ala. Civ. App. 1990). Trial court did not abuse discretion in refusing putative father's request for stay, after father left with military unit for overseas duty without submitting to required blood test. Father was aware of proceedings, was represented by attorney, received previous delay and left for Germany without informing court.

E. Default Judgments (50 U.S.C. app. § 520).

1. Affidavit.

a. Must be prepared and filed by plaintiff.

b. Effect of failure to file = voidable judgment.

c. Court-Appointed Attorney.

(1) Purpose - at a minimum, determine if requesting a stay is appropriate.

(2) Compensation?

(3) Effect of failure to appoint = voidable judgment.

2. Reopening Default Judgments, 50 U.S.C. app. § 520(4) .

a. Judgment must have been entered during term of service or within 30 days after termination of service.

b. Application must be made to court during term of service or within 90 days of termination.

c. The service person cannot have made **any** appearance.

(1) Filing an answer either pro se or through counsel is an appearance.

(2) Letter from Legal Assistance Attorney to court may be an appearance!

(3) Some things are not appearances:

(a) Letter from Commander to court. *Cromer v. Cromer*, 278 S.E.2d 518 (N.C. 1981) (court does not explicitly rule on re-opening under the SSCRA, but does remand case "in the interests of justice").

(b) Letter to opposing counsel.

d. Criteria to re-open default.

(1) Military service prejudiced ability to defend, AND

(2) Meritorious Defense - Defendant must reveal the defense to all or part of the original action.

V. ANALYSIS OF DEFENSES TO SUPPORT OBLIGATIONS.

A. Inability to Pay.

1. Federal law requires states to treat each monthly support payment as a judgment when it becomes due. 42 U.S.C. § 466(a).

   a. Payments must be enforceable as judgments.

   b. Payment/judgments must be entitled to full faith and credit.

   c. Payment/judgments must not be retroactively modifiable.

2. Consequently, an obligor should immediately get a support order amended if (s)he suffers a change in financial circumstances; arrearages cannot be excused. Current problem -- reservists.

B. Interference With Visitation.

1. General rule: interference with visitation rights is not a defense to nonpayment of support.

2. Concealment of a child to prevent visitation may have a different result when arrearages are sought. E.g., Washington ex rel. Burton v. Leyser, 196 Cal. App. 3d 435, 241 Cal. Rptr. 812 (1987) (based on estoppel and waiver theories, court denied custodial parent's request for arrearages for a period of time during which she had concealed the child from the father).

C. Emancipation of Children.

1. Effect of emancipation on support orders.

   a. In some jurisdictions, the support order can remain in effect until it is modified, regardless of the child's age.

(1) Explicit: "Pay child support of $150 per month until further order of this court"

(2) Ambiguous: "Pay child support of $150 per month."

b. In other jurisdictions, the support obligation automatically terminates at the age of majority, regardless of the wording of the court order (unless the order is based on an agreement between the parties).

2. Emancipation due to marriage and childbirth: these events do not necessarily terminate a support obligation.

a. An annulment of a marriage while the child is under the age of majority may revive the parents' support obligation. Eyerman v. Thias, 760 S.W.2d 187 (Mo. Ct. App. 1988).

b. A minor child's giving birth may not constitute an emancipation event for support purposes. Doerrfeld v. Konz, 524 So.2d 1115 (Fla. Dist. Ct. App. 1988).

3. Emancipation and arrearages: emancipation may affect the custodial parent's ability to enforce a support obligation after the child has reached the age of majority.

D. Payment Other Than As Ordered by the Court.

1. Mutual agreement to terminate payments.

a. Problem: honoring such an agreement ignores the strictures concerning retroactive modifications, but it also provides the custodial parent a financial windfall.

2. Mutual agreement to change custody.

a. Problem: honoring such an agreement violates strictures against retroactive modifications, but ignoring it provides the custodial parent with a financial windfall.

VI. THE IMPACT OF EXECUTIVE ORDER 12953.

A. Designation of the Executive Department as a "Model Employer" for Purposes of Facilitating Child Support Enforcement.

B. No Exemption for DOD.

C. Designation of Agency Points of Contact for Assistance with Service of Process on Agency Employees.

VII. WELFARE REFORM ACT.

A. President Clinton signed the Welfare Reform Act 22 August 1996.

B. MAJOR changes in child support enforcement under Title III of the Act.

1. Establishing Paternity.

a. Voluntary acknowledgments.

(1) Offered in all hospital births.

(2) A signed voluntary acknowledgment of paternity is a legal judgment 60 days later--subject to challenge only for fraud, duress or material mistake of fact.

(3) Health & Human Services will specify minimum requirements for an affidavit of voluntary establishment of paternity.

b. Coordination of acknowledgments with birth records.

(1) A father must establish paternity either voluntarily acknowledging or in a legal process to include his name on the birth certificate.

(2) Birth record agencies must offer voluntary paternity establishment services as well as hospitals.

c. Streamlined legal processes.

(1) Requires a party seeking or opposing paternity to set forth in a sworn statement reasonable facts supporting the existence or nonexistence of requisite sexual contact before genetic testing.

(2) States must pay costs of genetic testing ordered by a State agency with possibility of recoupment.

(3) Directs states to reform evidentiary rules making genetic tests and voluntary acknowledgments of paternity more easily admissible.

(4) Prohibits right to jury trial in paternity cases.

d. Cooperation determinations.

2. Child Support Provisions.

a. General Enforcement Provisions.

(1) License and passport revocation laws.

(2) Denial of other federal benefits to delinquent noncustodial parents.

b. Automation and Location of Delinquent Parents.

(1) Expands the Federal Parent Locator Service.

(a) Federal Case Registry of Child Support Orders.

(b) National Directory of New Hires.

(2) State Registries.

(a) Each state must establish a central state case registry of support orders or modifications.

(b) State Directory of New Hires.

(3) Centralized State Disbursement Units.

c. Uniform Laws.

(1) Adoption of Uniform Interstate Family Support Act.

(2) Full Faith and Credit for Child Support Orders Act strengthened.

(3) Uniform forms developed by Health and Human Services.

C. Enforcement of Support Obligations Directed at Military Members.

a. DOD locator system.

b. New hire registry.

c. Regulations facilitating the granting of leave for support hearings. No SSCRA protection for administrative hearings.

VIII. CONCLUSION.

APPENDIX

REQUIREMENTS AND REMEDIES

TYPE	Obligor Receives Notice	Defenses	Pay Subject	Limits	Arrears	Time Limits	Collect Court Costs
IA	Yes	No Arrears or Mod	AD Pay Only(1)	CCPA (50-65%)(2)	Yes Need 2d Court Order	None	No
GAR	? of State Law	? of State Law	Pay only(3)	Lower of State or CCPA	? of State Law	? of State Law	If Court orders as a Spt Oblig.
WAO	Yes	No Arrears or Mod	Pay Only (3)	Lower of State or CCPA	No	None	No
FSPA	No	No	Dispos-able Retired pay	50% D.R.P.	No	None	No

NOTES:
(1) Basic, BAS, BAQ (with dependents and all soldiers E-7 and above), Bonus
(2) CCPA allows max of 50% if obligor is supporting other family members--60% if not. Add an additional 5% if more than 12 weeks in arrears
(3) Basic, Bonus

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CHAPTER 30

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

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CHAPTER 30

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Outline of Instruction

I. INTRODUCTION.

A. What the USFSPA Does:

1. Allows states to treat disposable military retired pay as marital property or community property.

2. Allows former spouses in some cases to receive their share of military retired pay directly from military finance centers.

3. Allows some former spouses to continue to receive military benefits (commissary and PX/BX privileges as well as health care).

4. Allows former spouses to be designated as SBP beneficiaries.

B. What the USFSPA Does Not Do:

1. Does not require courts to divide military retired pay.

2. Does not establish a formula or award a predetermined share of military retired pay to former spouses.

3. Does not require an overlap of military service and marriage as a prerequisite to division of military retired pay as property.

II. HISTORY.

A. McCarty v. McCarty, 453 U.S. 210 (1981) (states are preempted from dividing nondisability military retired pay)

B. Congress Acts--the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451; see 32 C.F.R. Part 63 (rules regarding direct payment from military finance centers).

1. The USFSPA overrules McCarty by providing that state courts may treat disposable retired pay as marital property. 10 U.S.C. § 1408(c)(1)

2. Effective date: 1 Feb. 83.

C. Gross Pay vs. Disposable Pay

1. What pay is divisible--gross retired pay or "disposable retired pay?"

a) Significance :

[In the following table, assume retired pay is divided equally by the court and that neither party has any other income or are claiming any withholding exemptions]

	Retiree	**Spouse**
Gross retired pay	$ 2,000	
VA Disability pay	$361	
Waived retired pay	($361)	
Disposable retired pay	$1,638	
Division of D.R.P	$819	$819
Tax (15% rate)	($123)	($ 123)
Net after taxes	$ 1,057	$696

b) The arguments:

(1) Disposable: McCarty said courts cannot divide military retired pay, but the USFSPA then said states could divide "disposable retired pay" (DRP); thus, there is no authority to divide anything except the DRP amount.

(2) Gross: notwithstanding the language about DRP, Congress intended to fully overrule McCarty, and thus states are free to do as they please.

c) The result--several jurisdictions developed case law upholding authority to divide gross pay.

D. Mansell v. Mansell, 490 U.S. 581 (1989).

1. Retired soldiers who are moderately disabled can receive disability benefits from the Veterans Administration; in order to receive these VA benefits, however, they must first waive an equivalent amount of military retired pay.

   a) These VA benefits are not taxable.

   b) The VA benefits are not retired pay or "disposable retired pay." See 10 U.S.C. §1408 (a)(4).

   c) The money waived to receive the VA benefits is excluded from the term "disposable retired pay."

2. Facts of Mansell : Major Mansell divorced his wife in California prior to the McCarty decision. After 23 years of marriage and service, the trial court split the military retirement 50/50. When MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following USFSPA, Major Mansell went to court trying to use the act to limit the amount paid to his former spouse.

3. U.S. Supreme Court Holding: the language of 10 U.S.C. § 1408(c)(1) preempts states from dividing the value of the waived military retired pay because it is not "disposable retired pay" as defined by the statute.

4. Dissent.

   a) This is unfair to former spouses because it allows members unilaterally to shift money from the spouse to the member.

   b) This is too narrow a view of the USFSPA; it was intended to completely overrule McCarty and restore to states full authority to divide military benefits in any manner they felt appropriate.

III. JURISDICTION.

A. Courts that can divide military retired pay.

1. A court of competent jurisdiction of any state, DC, PR, Guam, Am. Samoa, the Virgin I., N. Mariana I., & the Trust Terr. of the Pacific.

2. Any federal court of competent jurisdiction.

3. Any foreign court of competent jurisdiction IF there is a treaty requiring the U.S. to honor court orders of such nation.

--But no such treaty is in force regarding court orders of any nation.

B. Special jurisdictional requirements.

1. There is no USFSPA limitation on a court's jurisdiction in awarding a portion of retired pay for child support or alimony purposes.

2. If retired pay is to be divided as a matter of **property settlement**, jurisdiction is limited to jurisdiction based on one of the following:

a) Domicile in the territorial jurisdiction of the court, or

b) Residence within the state other than because of military assignment, or

c) Consent to jurisdiction.

(1) A general appearance constitutes "consent"; the member need not specifically consent to jurisdiction to divide the pension. See, e.g., Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).

(2) Continuing jurisdiction may also constitute "consent."

(a) Bumgardner v. Bumgardner, 421 So.2d 668 (La. Ct. App. 1988) Court retained continuing jurisdiction to partition military retired pay after the divorce.

(b) McDonough v. McDonough, 184 Cal. App. 3d 45, 227 Cal. Rptr. 872 (1986) Court found that it had continuing jurisdiction to partition military retired pay.

(c) But Note Tarvin v. Tarvin, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (1986) No continuing jurisdiction over a nondomiciliary, nonresident retiree to partition military retired pay after the decree is final.

IV. DIVISIBILITY OF RETIRED PAY.

A. Whose Law Controls?

1. No federal right to a portion of retired pay is created; within broad limitations set by the USFSPA, state law controls whether and how much to divide military retired pay.

   a) Division to enforce child support obligations.

   b) Division to enforce alimony obligations.

   c) Division for property settlement purposes.

2. With the release of significant decisions from the Alabama and Mississippi Supreme Courts in 1993 and 1994, almost every state has now clearly ruled that military retired pay is divisible for property settlement purposes (as well as alimony and child support in appropriate cases). The primary exception to the rule is Puerto Rico, although several states continue to impose a vesting requirement

B. What is the significance of "vesting"?

1. In some states vesting is a prerequisite to division and vesting can occur at different points in the military career (e.g., 18 or 20 years).

2. The majority of the states will generally divide vested or nonvested pensions. Several states require vesting in some form as a prerequisite to division (e.g., Arkansas, Indiana and North Carolina).

C. Disposable Retired Pay.

1. 10 U.S.C. § 1408(c)(1): ". . . a court may treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

2. USFSPA, 10 U.S.C. § 1408(a)(4): "Disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which -

   a) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

b) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

c) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed under the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

d) are deducted because of an election under chapter 73 of this title [10 U.S.C.S. § 1431 et seq.] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

3. "Typical" formula for dividing retired pay is a creation of state law - THERE IS NO FORMULA PROVIDED IN FEDERAL LAW!!!.

$$1/2 \times \frac{\text{Length of overlap of marriage and service}}{\text{Time in service}} \times 100 = \%$$

Variations on the standard formula:

$$1/2 \times \frac{\text{Length of time the marriage overlaps with military service}}{\text{Length of military service at separation or divorce}} \times 100 = \text{spouse's } \%$$

$$\frac{\text{Spouse's \% using standard formula} \times \text{retired pay for rank held at time separation\divorce}}{\text{Actual Retired Pay}} = \%$$

V. DIRECT PAYMENT TO THE FORMER SPOUSE.

A. For **all** direct payment orders, there must be:

1. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement.

2. A statement in the order that the soldier's Soldiers' and Sailors' Civil Relief Act rights were observed (if he or she was not represented in court).

B. The maximum amount of money directly payable to the former spouse is 50% of the retiree's disposable retired pay.

1. This is a limit on how much retired pay must be paid to satisfy judgments awarding a share of military retired pay as property.

2. Single or multiple judgments awarding military retired pay as property are considered to be fully satisfied by payments that total 50% of "disposable retired pay."

C. For direct payment of retired pay awarded as **property**, the following additional requirements apply.

1. A "10 year" test has to be met; there must be at least 10 years of marriage which overlap with 10 years of service creditable toward retirement.

2. The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.

3. The order must show that the court has jurisdiction over the soldier in accordance with USFSPA provisions.

D. Note - there are no special requirements for a former spouse to receive direct payment of child support and alimony awards.

E. Tax Treatment of Divisions.

1. As a result of 1992 amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree by the military services. Direct payments of retired pay received from finance by the former spouse are now subject to withholding.

2. Withholding - The finance center will withhold taxes on amounts paid directly to ex-spouses. Separate W-2 forms are issued to the retiree and the former spouse.

VI. ADDITIONAL BENEFITS FOR FORMER SPOUSES.

A. Commissary and PX/BX.

1. 10 U.S.C. §1062: "...an unremarried former spouse...is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."

2. Requirements to qualify.

a) Unremarried means "unmarried" for these benefits; termination of a subsequent marriage does revive them.

b) 20/20/20 test.

(1) 20 years of creditable service by the member, **and**

(2) 20 years of marriage, **and**

(3) 20 years of overlap between marriage and the creditable service.

c) The date of the divorce is irrelevant

B. Medical Benefits.

1. 10 U.S.C. §§ 1072, 1078 & 1086.

2. Three categories of health care.

a) Full military health care program, including CHAMPUS coverage (up to age 62) and in-patient and out-patient care at military treatment facilities.

b) Transitional health care: full coverage for one year after the divorce, with the possibility of limited coverage for an additional year.

c) The DOD Continued Health Care Benefit Program (CHCBP) insurance plan that has been negotiated by DOD.

3. Requirements to qualify for **full military health care** program.

a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does **not** revive health care benefits, but an annulment does.

b) 20/20/20 test (or, 20/20/15 test and divorce dated before 1 April 1985).

c) Not enrolled in an employer-sponsored health insurance plan.

d) As in the case of commissary and PX benefits, the date of the divorce is irrelevant.

4. Requirements for **transitional health care**.

a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does **not** revive health care benefits, but an annulment does.

b) 20/20/15 test.

(1) 20 years of creditable service by the member, **and**

(2) 20 years of marriage, **and**

(3) 15 years of overlap between marriage and the creditable service.

c) Not enrolled in an employer-sponsored health insurance plan.

d) To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).

5. Requirements for **DOD Continued Health Care Benefit Program** (CHCBP).

a) Eligibility: anyone who loses entitlement to military health care (e.g., former spouses, non-career soldiers and their family members, etc.)

b) Concept: premium based temporary health care coverage program designed to mirror the benefits offered under the basic CHAMPUS program (it is not, however, part of CHAMPUS).

(1) Facilitates retention of medical insurance coverage until alternative coverage can be obtained (former spouses and others who no longer qualify as dependents qualify for 36 months coverage).

(2) Primary advantage: guaranteed eligibility for most people if they enroll within 60 days of losing CHAMPUS benefits.

(3) Not free to the individual - premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs).

VII. SURVIVORS' BENEFIT PLAN.

A. Original USFSPA provisions.

1. Member could designate a former spouse as an SBP beneficiary, but only on the basis of a person with an insurable interest.

2. The designation had to be voluntary: "Nothing in this chapter [USFSPA] authorizes any court to order any person to elect under [10 U.S.C. § 1448(b)]...to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such an election."

B. Amendments to the original provisions.

1. Now a former spouse can be designated an SBP beneficiary in the same category that applies to current spouses, so the "natural person with an insurable interest" offset does not apply.

2. Additionally, a court can now order a retiring soldier to designate the former spouse as an SBP beneficiary--the election need not be voluntary.

a) This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order. 10 U.S.C. § 1450(f)(3)(A).

b) Once a timely request is made, the finance center will flag the service member's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary.

VIII. USFSPA AND SEPARATION INCENTIVES.

A. In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are being offered annual payments (voluntary separation incentive or VSI) or a lump sum (special separation benefit or SSB) if they elect to leave active duty voluntarily. Are these payments divisible as marital property?

1. Clearly they are not "disposable retired pay" and therefore do not fall under the USFSPA.

2. Trend is to divide these benefits using rationale of USFSPA cases.

a) Marsh v. Wallace, 924 S. W.2d 423 (Tex. Ct. App. 1996). Texas court divided lump sum SSB payment giving former spouse the same percentage of the SSB she would have received of retirement pay. The court found that the SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future."

b) Kelson v. Kelson, 675 So. 2d 1370 (1996), rehearing denied. Overruling an earlier ruling in this case, the court divided VSI benefits with former spouse. While specifically finding the VSI payments were not covered by the USFSPA, the court did find that as a practical matter VSI payments "are the functional equivalent of the retired pay in which [the former spouse] has an interest."

c) But See McClure v. McClure, 647 N.E. 2d 832 (Ct. App. Ohio 1994). The court found VSI payments to be like severance pay and since the VSI payments came after the divorce proceedings began they were separate property of the husband.

3. There is no federal preemption. The statutes authorizing VSI/SSB do not preclude the states from treating the payments as marital property.

IX. USFSPA AND DOMESTIC ABUSE CASES.

A. 10 U.S.C. §1408(h). Allows for former spouses to collect their portion of retirement pay (and other benefits) even though the service member does not retire due to domestic abuse.

B. Requirements to qualify.

1. Court order awarding as **property settlement** a portion of disposable retired pay.

2. Military member is eligible **by years** for retirement but loses right to retire due to misconduct involving dependent abuse.

3. The person with the court order was either the victim of the abuse or the parent of the child who was the victim of the abuse.

C. Benefits.

1. Retirement pay as certified by the Secretary of the Service determined by amount member would have received if retired upon date eligible.

2. PX.

3. Commissary.

4. Medical and Dental.

5. Legal Assistance.

6. These benefits terminate upon remarriage but can be revived by divorce, annulment or death of the subsequent spouse.

D. Procedures.

1. DFAS treats these just like any other **direct payment** request.

2. Must meet the requirements for direct payment of property settlement, remember the 10 year test.

3. Use the same USFSPA application for payment as any other former spouse.

X. FY 97 CHANGES TO USFSPA.

A. Service on DFAS.

1. Original provisions required return receipt requested certified mail for all service on DFAS.

2. Now amended to allow for regular mail, e-mail, fax, or certified mail service on DFAS. This will ease communications between former spouses, service members and DFAS.

B. Multiple Court Orders.

1. New amendments prohibit DFAS from honoring an out of state modification of an order upon which 1408 payments are based unless the out of state court has jurisdiction over both the military member and the spouse or former spouse by domicile, residence other than by military assignment or consent.

2. Prohibits forum shopping and confusion resulting in delay of payments administered by DFAS.

C. Civil Service and Federal Retirement.

1. Amendments to 5 U.S.C. §8332 (Civil Service Retirement Act) and 5 U.S.C. §8411 (Federal Employees Retirement Act).

2. Can no longer count your years of military service towards a civilian federal retirement unless you authorize the Office of Personnel Management (OPM) to deduct an amount for the former military spouse.

3. OPM must promulgate rules for execution of this provision.

XI. CONCLUSION.

APPENDIX A

Uniformed Services Former Spouses' Protection Act[1]	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes[3]			
	Number of Years			
Benefits for Former Spouses[2]	**0 to <10**	**10 to <15**	**15 to <20**	**20 or more**
Division of Retired Pay[4]	X	X	X	X
Designation as an SBP Beneficiary[5]	X	X	X	X
Direct Payment[6]				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division[7]		X	X	X
Health Care[8]				
Transitional[9]			X	
Full[10]				X
Insurance[11]	X	X	X	X
Commissary[12]				X
PX[12]				X
Dependent Abuse				
Retired Pay Property Share Equivalent[13]		X	X	X
Transitional Compensation[14]	X	X	X	X

FOOTNOTES

[1.] Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

[2.] For guidance on obtaining a miliary identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.

[3.] Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).

[4.] At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985).

[5.] Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.

[6.] See 10 U.S.C. ǝǝ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

[7.] While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

[8.] To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. ǝǝ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

[9.] "Transitional health care" was created by Pub. L. 98-625, ∋ 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, ∋ 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. ∋ 1078a.titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. ∋ 1072(2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

[10.] "Full health care" includes health care at military treatment facilities and that provided through the CHAMPUS insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. ∋ 1076(b)(2).

[11.] Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal Year 1993 (see 10 U.S.C. ∋ 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the basic CHAMPUS program, but CHCBP is <u>not</u> part of CHAMPUS. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

[12.] Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, ∋ 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, ∋ 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act ∋ 1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations my be restricted by host-nation customs law.

[13.] When a retirement-eligible member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the members retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, ∋ 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, ∋ 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

[14.] The National Defense Authorization Act, Fiscal Year 1994, ∋ 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

APPENDIX B

State-by-State Analysis of the Divisibility

Of Military Retired Pay[1]

On 30 May 1989, the United States Supreme Court announced its decision in Mansell v. Mansell.[2] In Mansell, the Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits that are received in lieu of military retired pay.[3] The Court's decision clarifies that states are limited to dividing disposable retired pay, as defined in 10 U.S.C. § 1408(a)(4).[4] When using the following materials, remember that Mansell effectively overrules some of the listed caselaw predating the decision, at least to the extent a case suggests state courts have the authority to divide more than disposable retired pay. Since Mansell, courts have generally recognized the limitations of the disposable retired pay definition found in Title 10. For example, in Torwich v. Torwich, a New Jersey appellate court wrestled with the impact that waiver of military retired pay associated with receipt of VA benefits has on disposable retired pay.[5] Also, in Knoop v. Knoop,[6] the North Dakota Supreme Court addressed a situation involving the impact of the Dual Compensation Act[7] on disposable retired pay.[8]

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[1]This note updates the Note, "State-by-State Analysis of the Divisibility of Military Retired Pay," ARMY LAW., Jul. 1994, at 41. It was developed with the assistance of military attorneys, active and reserve, and civilian practitioners located throughout the country. In a continuing effort to foster accuracy and timeliness, updates and suggested revisions from all jurisdictions are solicited. Please send your submissions to the Administrative and Civil Law Department, The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

[2]490 U.S. 581 (1989).

[3]Id. at 594.

[4]Id. at 589.

[5]660 A.2d 1214 (N.J. Super. 1995). See also TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce*, Army Law., Oct. 1995, at 28.

[6]542 N.W.2d 114 (N.D. 1996).

[7]5 U.S.C.A. §§ 5531-5404.

[8]See also, TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*, Army Law., Mar. 1996, at 133.

Alabama

Divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property, Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with Vaughn are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay, Underwood v. Underwood, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), cert. denied, 453 U.S. 922 (1982). Non-vested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987). Note also Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (the trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension--the pension would be suspended if the employee continued working; on appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay; in reaching this result, the court cited the California Gillmore decision). Also see Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992) which held that while Mansell precludes division of disability benefits received in lieu of retirement pay, it does not preclude consideration of these payments when making an equitable division of marital assets.

Arizona

Divisible. DeGryse v. DeGryse, 135 Ariz. 335, 661 P.2d 185 (1983); Edsall v. Superior Court of Arizona, 143 Ariz. 240, 693 P.2d 895 (1984); Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not he or she does retire at that point.

Arkansas

Divisible, but watch for vesting requirements. Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); but see Durham v. Durham, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce, and therefore the military pension had not "vested"). Also see Burns v. Burns, 31 Ark. 61, 847 S.W.2d 23 (1993) (In accord with Durham, but strong dissent favors rejecting 20 years of service as a prerequisite to "vesting" of a military pension).

California

Divisible. In re Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); In re Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). A non-resident servicemember did not waive his right under the USFSPA to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues, Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) and Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible; In re Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). In re Mansell, 265 Cal. Rptr. 227 (Cal. App. 1989) (on remand from Mansell v. Mansell, 490 U.S. 581 (1989), the court held that gross retired pay was divisible since it was based on a stipulated property settlement to which res judicata had attached). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay (In re Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); In re Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), but the Mansell case raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes eligible to retire, or anytime thereafter, even if the member remains on active duty. In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); see also In re Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

Colorado

Divisible. In re Marriage Of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (nonvested military retirement benefits constitute marital property subject to division pursuant to § 14-10-113, C.R.S. (1987 Repl.Vol. 6B)). See also In re Hunt, 909 P.2d 525, (Colo. 1996), reversing a previous decision of its own, the Colorado Supreme Court holds that post-divorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula to define the marital share. In the formula discussed, final pay of the member at retirement is multiplied a percentage defined by 50% of a fraction wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member.

Connecticut

Probably divisible. Conn. Gen. Stat. 46b-81 (1986) gives courts broad power to divide property. Note Thompson v. Thompson, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Divisible. See Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in Pastore v. Pastore, 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided). This interpretation was recently adopted by the court in Deloach v. Deloach, 590 So.2d 956 (Fla. Dist Ct. App. 1991).

Georgia

Probably divisible. Cf. Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations) see also Hall v. Hall, 51B.R. 1002 (1985) (Georgia divorce judgment awarding debtor's wife 38% of debtor's military retirement, payable directly from the United States to the wife, granted the wife a nondischargeable property interest in 38% of the husband's military retirement); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," citing Stumpf and Courtney, but then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce).

Hawaii

Divisible. Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1981); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986). In Wallace v. Wallace, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a Public Health Service employee (who is covered by the USFSPA) to pay a share of retired pay upon reaching retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the court affirmed the order. In Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that Mansell's limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that Mansell applies to military disability retired pay as well as VA benefits.

Idaho

Divisible. Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by Griggs v. Griggs, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent Mansell's limitation on dividing VA benefits by using an offset against other property. Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989). See Leatherman v. Leatherman, 122 Idaho 247, 833 P.2d 105 (1992). A portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit and thus subject to statute relating to modification of divorce decrees to include division of military retirement benefits. Also see Balderson v. Balderson, 896 P.2d 956 (Idaho Sup. Ct. 1995)(cert. denied by the U.S. Supreme Court, 116 S.Ct. 179 (mem.) (affirming a lower court decision ordering a servicemember to pay spouse her community share of the military pension, even though he had decided to put off retirement), Mosier v. Mosier, 122 Idaho 37, 830 P.2d 1175 (1992), and Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991).

Illinois

Divisible. In re Brown, 225 Ill. App. 3d 733, 587 N.E.2d 648 (1992); the Court cites Congress' enactment of the Spouses' Protection Act (Pub.L. No. 97-252, 96 Stat, 730-38 (1982) as the basis to permit the courts to treat pay of military personnel in accordance with the law of the jurisdiction of the court (In re Dooley, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985)). The court in Brown held that a military pension may be treated as marital property under Illinois law and is subject to the division provisions of 5/503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). See In re Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). Korper points out that under Illinois law a pension is marital property even if it is not vested. In Korper, the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement (even if he or she does not retire at that point); see In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule. Note also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible, but watch for vesting requirements. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, inter alia, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share (Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990)), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. In re Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989). See also Arthur v. Arthur, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). But see Sable v. Sable, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Divisible. See especially In re Howell, 434 N.W.2d 629 (Iowa 1989). In Howell, the member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code..." (emphasis added). The U.S. Supreme Court's Mansell decision may have overruled state court decisions holding courts have authority to divide gross retired pay.

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See In re Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994), applying Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). The Iowa Court of Appeals ruled: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.")

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987), effective July 1, 1987 (vested and nonvested military pensions are now marital property); In re Harrison, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. Jones v. Jones, 680 S.W.2d 921 (Ky. 1984); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); Ky. Rev. Stat. Ann. § 403.190 (1994), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. Swope v. Mitchell, 324 So. 2d 461 (La. 1975); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); Warner v. Warner, 651 So. 2d 1339 (La. 1995) (confirming that 10-year test found in 10 U.S.C. § 1408(d)(2) is a prerequisite to direct payment, but not to award of a share of retired pay to a former spouse); Gowins v. Gowins, 466 So. 2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); Jett v. Jett, 449 So. 2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So. 2d 485 (La. Ct. App. 1983). See also Campbell v. Campbell, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can not divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the Mansell concerning divisibility of gross retired pay).

Maine

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987). See also Me. Rev. Stat. Ann. tit. 19, §722-A(6) (1989) (provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

Maryland

Divisible. Nisos v. Nisos, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits; such benefits are marital property under Maryland law; see Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981)). See also Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. Andresen v. Andresen, 317 Md. 380, 564 A.2d 399 (1989).

Massachusetts

Divisible. Andrews v. Andrews, 27 Mass. App. 759, 543 N.E.2d 31 (1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife [as property]."

Michigan

Divisible. Keen v. Keen, 160 Mich. App. 314, 407 N.W.2d 643 (1987); Giesen v. Giesen, 140 Mich. App. 335, 364 N.W.2d 327 (1985); McGinn v. McGinn, 126 Mich. App. 689, 337 N.W.2d 632 (1983); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978). Note also Boyd v. Boyd, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible, but what is a vested right is discussed broadly and discretion over what is marital property left to the trial court).

Minnesota

Divisible. Military retired pay not specifically addressed in statute. Case law has treated it as any other marital asset, subject to equitable division. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but Mansell may have overruled state court decisions that they have the authority to divide gross retired pay. Note also Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. Powers v. Powers, 465 So. 2d 1036 (Miss. 1985). In July, 1994, a deeply divided Mississippi Supreme Court formally adopted the equitable distribution method of division of marital assets. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), and Hemsley v. Hemsley 639 So. 2d 909 (Miss. 1994). Marital property for the purpose of a divorce is defined as being "any and all property acquired or accumulated during the marriage." This includes military pensions which are viewed as personal property and while USFSPA does not vest any rights in a spouse, a military pension is subject to being divided in a divorce. Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995). In Pierce, the Court expressly held that a claim for division of property can only be viewed as separate and distinct from a claim for alimony. Since property division is made irrespective of fault or misconduct, military pensions may be divided even where the spouse has committed adultery, assuming that the facts otherwise justify an equitable division of property.

Missouri

Divisible. Only disposable retired pay is divisible. Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990). Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. In re Marriage of Kecskes, 210 Mont. 479, 683 P.2d 478 (1984); In re Miller, 37 Mont. 556, 609 P.2d 1185 (1980), vacated and remanded sub. nom. Miller v. Miller, 453 U.S. 918 (1981).

Nebraska

Divisible. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 756 (1986); Neb. Rev. Stat. § 42-366(8) (1993) (military pensions are part of the marital estate whether vested or not and may be divided as property or alimony).

Nevada

Divisible. All retirement benefits are divisible community property, whether vested or not, and whether matured or not. Forrest v. Forrest, 608 P.2d 275 (Nev. 1983). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. Gemma v. Gemma, 778 P.2d 429 (Nev. 1989); Sertic v. Sertic, 901 P.2d 148 (Nev. 1995). Partition of previously undivided benefits was considered doubtful, under a case that held a silent decree to be *res judicata* of **non-**division of the retirement benefits. Tomlinson v. Tomlison, 729 P.2d 1303 (Nev. 1986). However, without mentioning that opinion, the Nevada Supreme Court has since held that the parties t a divorce remain tenants in common of all assets omitted from the decree, whether by fraud or simple mistake. Amie v. Amie, 796 P.2d 233 (Nev. 1990); Williams v. Waldman, 836 P.2d 614 (Nev. 1992).

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets...belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes...employment benefits, [and] vested and non-vested pensions or other retirement plans.... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution...." N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision was relied on by the New Hampshire Supreme Court in Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990), when it overruled Baker v. Baker, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. Castiglioni v. Castiglioni, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); Whitfield v. Whitfield, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), aff'd, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible; Moore v. Moore, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (N.M. 1983)(USFSPA applied); Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969). See also White v. White, 105 N.M. 800, 734 P.2d 1283 (Ct. App. 1987) (court can award share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay). In Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (1987), in dicta the court cited the California Gillmore case with approval, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire - even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; see, e.g., Damiano v. Damiano, 94 A.D.2d 132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; e.g., Lydick v. Lydick, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); Gannon v. Gannon, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; West v. West, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. pp. Div. 1984).

North Carolina

Divisible. The vesting requirement contained in the old N.C. Gen. Stat. § 50-20(b) (1988) which expressly declared vested military pensions to be marital property; **was changed by new legislation. For all equitable distribution cases filed after 1 October 1997, there is no vesting requirement to divide military pensions.** For cases filed prior to 1 October 1997 old vesting rules apply. Those old rules require the pension be vested as of the date the parties separate from each other. In Milam v. Milam, 373 S.E.2d 459 (N.C.App. 1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. In George v. George, 444 S.E.2d 449 (N.C.App. 1994), the court held that an enlisted member's right to retirement benefits vests when he/she has completed twenty years of service. In Lewis v. Lewis, 350 S.E.2d 587 (N.C.App. 1986) the court held that a divorce court can award a spouse a share of gross retired pay, but, because of the wording (at that time) of the state statute, the amount cannot exceed 50% of the retiree's disposable retired pay; Mansell, 490 U.S. at 589, may have overruled the court's decision in part as to dividing gross pay. The parties are not, however, barred from a consensual division of military retired pay, even though it is "nonvested" separate property, and an agreement or court order by consent that divides such pension rights will be upheld. Hoolapa v. Hoolapa, 412 S.E.2d 112 (N.C.App. 1992). Attorneys considering valuation issues should also review Bishop v. Bishop, 440 S.E.2d 591 (N.C.App. 1994), which held that valuation must be determined as of the date of separation and must be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

North Dakota

Divisible. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984). See also Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay, so 17.5% award to 17-year spouse is affirmed), and Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirms that definition of "disposable retired pay" as defined in 10 U.S.C. § 1408 provides a limit on what states are authorized to divide as marital property, but holds that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay." Knoop is also of interest because it addresses a waiver of retirement pay associated with the Dual Compensation Act, and the court acknowledges that once 50% of "disposable retired pay" is paid out in satisfaction of one or more orders dividing military retired pay as property, the orders are deemed satisfied by federal law (referencing 1990 amendment to 10 U.S.C. § 1408(e)(1)).

Ohio

Divisible. See Lemon v. Lemon, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property **where some evidence of value demonstrated**). But also see, King v. King, 78 Ohio App. 3d 599, 605 N.E.2d 970 (1992) (Trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years where no evidence of value demonstrated); Cherry v. Figart, 86 Ohio App. 3d 123, 620 N.E.2d 174 (1993) (distinguishing King by affirming division of nonvested pension where parties had agreed to divide the retirement benefits and suit was brought for enforcement only - the initial judgment incorporating the agreement had not been appealed); and Ingalls v. Ingalls, 624 N.E.2d 368 (Ohio 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial).

Oklahoma

Divisible. Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law. Only a pension vested at the time of the divorce, however, is divisible, Messinger v. Messinger, 827 P.2d 865 (Okla. 1992). A former spouse is entitled to retroactive division of retiree's military pension pursuant to their property settlement agreement that provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

Oregon

Divisible. In re Manners, 68 Or. App. 896, 683 P.2d 134 (1984); In re Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980). See also In re Richardson, 307 Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Divisible. Major v. Major, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation can be found at 119 P.R.Dec. 765), overruling Torres v. Robles, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. In overruling Torres, the court in Delucca reestablished retirement pensions as separate property of the spouses consistent with its earlier decision in Maldonado v. Superior Court, 100 P.R.R. 369 (1972). Also see Carrero v. Santiago, 93 JTS 103 (1993) (citation to original Spanish version; English translation not yet available), which cites Delucca v. Colon with approval. Note that pensions may be considered in setting child support and alimony obligations.

Rhode Island

Divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution. Implied consent by the soldier cannot be used, however, to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). Flora v. Flora, 603 A.2d 723 (R.I. 1992).

South Carolina

Divisible. Tiffault v. Tiffault, 401 S.E.2d 157 (S.C.1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution. Nonvested military retirement benefits are also subject to equitable division, Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (NCO acquired a vested right to participate in a military pension plan when he enlisted in the army; this right, which is more than an expectancy, constitutes property subject to division). But see Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Divisible. Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible--in this case, it was reserve component retired pay where the member had served 20 years but had not yet reached age 60); Radigan v. Radigan, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, post divorce efforts); Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, and this award was not challenged on appeal); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). See generally Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) specifically defines all vested pensions as marital property. In 1993, the Tennessee Supreme Court affirmed a trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). In 1994, the Tennessee Court of Appeals held that the Tennessee code's reference to vested pensions was illustrative and not exclusive. As a result, the court determined that non-vested military pensions can properly be characterized as marital property. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn.Ct.App. 1994).

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)(Supreme Court upheld exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran. Justice White in dissent argued unsuccessfully that the state's authority was preempted by the bar to garnishing VA disability payments, and federal discretion to divert some of the VA benefits to family members in certain cases.))

Texas

Divisible. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). See also Grier v. Grier, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property; Mansell may have overruled Grier in part). Pensions need not be vested to be divisible. Ex Parte Burson, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling is in accord with Mansell.

Utah

Divisible. Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988). The case clarifies that non-vested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay. But see Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount he had overwithheld from his retired pay for taxes).

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by...equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property." The Conneticut Supreme Court recently held in Krafik v. Krafik, 21 Fam. Law Rep. 1536 (1995), that vested pension benefits are divisible as marital property in divorce. Although the issue was not raised in Krafik, the court noted that the legislative and logical basis for dividing vested pension benefits would apply to unvested pension benefits as well.

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. See also Mitchell v. Mitchell, 4 Va. App. 113, 355 S.E.2d 18 (1987); Sawyer v. Sawyer, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division). Also see Owen v. Owen, 419 S.E.2d 267 (Va.Ct.App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay - held not to violate Mansell).

Washington

Divisible. Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973); In re Smith, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay)

Wisconsin

Divisible. Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983). See also Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible) and Rodak v. Rodak, 150 Wis. 2d 624, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned before marriage is included in marital property and subject to division).

Wyoming

Divisible. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property; 10-year test is a prerequisite to direct payment of military retired pay as property, but not to division of military retired pay as property). See also Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (Affirms award of 100% of "disposable retired pay" to former spouse as property, but acknowledges that only 50% of this award can be paid directly. Note that this holding is inconsistent with 1990 amendment to USFSPA at 10 USC § 1408(e)(1) which deems all orders dividing military retired pay as property satisfied once a threshold of 50% of the "disposable retired pay" is reached - see the discussion in Knoop v. Knoop referenced under the North Dakota section of this guide.)

Canal Zone

Divisible. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

Appendix C

Extract From Army OTJAG Message
Subject: Division of Military Retirement/VSI/SSB in Divorce Proceedings
(Minor editing to incorporate changes in state court positions incorporated by The Judge Advocate General's School, Administrative & Civil Law Dept.)

HQ DA WASH DC //DAJA-LA//

UNCLAS

FOR SJA/JA/LEGAL COUNSEL

SUBJECT: DIVISION OF MILITARY RETIREMENT PENSIONS/VSI/SSB IN DIVORCE PROCEEDINGS

1. LEGAL ASSISTANCE ATTORNEYS (LAA'S) ADVISING CLIENTS CONTEMPLATING SEPARATION OR DIVORCE MUST DISCUSS THE ISSUE OF THE DIVISIBILITY OF THE SERVICE MEMBER'S MILITARY RETIREMENT PENSION REGARDLESS OF WHICH SPOUSE IS BEING ADVISED. SOME GENERAL KNOWLEDGE REGARDING THE HANDLING OF THIS ISSUE BY THE VARIOUS STATES IS THEREFORE ESSENTIAL. THE PURPOSE OF THIS MESSAGE IS TO ALERT YOU TO SOME RECENT--AND NOT SO RECENT-- DEVELOPMENTS IN THIS AREA.

2. SOME SERVICE MEMBERS WITH "NONVESTED PENSIONS" (ALSO CALLED "UNVESTED") MAY WISH TO RELY ON THE LAWS OF THOSE STATES THAT, ALTHOUGH THEY ALLOW MILITARY PENSION DIVISION, DO SO ONLY IF THE PENSION IS VESTED. THESE STATES WILL NOT DIVIDE A MILITARY PENSION UNLESS IT HAS VESTED BY THE "DATE OF CLASSIFICATION". THE DATE OF CLASSIFICATION IS THE DATE OF THE EVENT UNDER APPLICABLE STATE LAW THAT DETERMINES HOW THE COUPLE'S PROPERTY WILL BE CLASSIFIED FOR PURPOSES OF DISPOSITION IN THE DIVORCE. THIS MAY BE THE DATE OF MARRIAGE BREAKDOWN, SEPARATION, SUMMONS ISSUANCE, OR DIVORCE. VESTING UNDER STATE LAW USUALLY OCCURS AT THE EIGHTEENTH OR TWENTIETH YEAR OF MILITARY SERVICE--THAT IS WHEN A MEMBER IS "LOCKED IN" AND IS "ENTITLED" TO SERVE UNTIL RETIREMENT. IF VESTING HAS NOT OCCURRED BY THE APPLICABLE DATE OF CLASSIFICATION, THEN THE SERVICE MEMBER CAN AVOID DIVISION OF THE PENSION. STATES THAT REQUIRE VESTING OF MILITARY RETIREMENT PENSIONS INCLUDE NORTH CAROLINA, ARKANSAS, INDIANA, TENNESSEE, AND COLORADO. (CHECK THE MOST RECENT FAMILY LAW GUIDE'S "STATE-BY-STATE ANALYSIS" PUBLISHED BY TJAGSA TO GET A COMPLETE LIST OF STATES.)

3. THE VAST MAJORITY OF STATES DO NOT RELY ON "VESTING" BY THE APPLICABLE CLASSIFICATION DATE IN ORDER TO DIVIDE A MILITARY PENSION. IN

NEW HAMPSHIRE, FOR EXAMPLE, WHERE BOTH VESTED AND NONVESTED PENSION RIGHTS ARE DIVISIBLE (N.H. REV. STAT. ANN. 458.16-A), A DIVORCE COURT DIVIDED THE PENSION RIGHTS OF AN AIR FORCE MAJOR WITH TEN YEARS OF CREDITABLE SERVICE (HALLIDAY V. HALLIDAY, 593 A.2D 233 (N.H. 1991)). IN A NEW JERSEY CASE, AN APPELLATE COURT HELD THAT THE NONVESTED MILITARY RETIREMENT RIGHTS OF A SERGEANT WITH 16 YEARS OF ACTIVE DUTY WERE DIVISIBLE MARITAL PROPERTY. WHITFIELD V. WHITFIELD, 222 N.J. SUPER. COURT. 36, 535 A.2D 986 (N.J. SUPER. CT. APP. DIV. 1987).

4. ALTHOUGH OVERTURNED BY SUBSEQUENT MISSISSIPPI DECISIONS RECOGNIZING THE AUTHORITY TO DIVIDE MILITARY PENSIONS AS PROPERTY, THE MISSISSIPPI SUPREME COURT'S DECISION IN FLOWERS V. FLOWERS, S.CT. MISS, NO. 91-CA-1154, 1993 MISS. LEXIS 426 (SEP 30, 1993) IS INSTRUCTIVE ON THE ISSUE OF CHOICE OF LAW. LAA'S WHO READ THE OPINION CLOSELY WILL APPRECIATE ITS EMPHASIS ON "CHOICE OF LAW" IN PENSION DIVISION LITIGATION: "WHERE THE SERVICEMAN HAD HIS DOMICILE IN A COMMUNITY PROPERTY STATE FOR ALL OR PART OF THE TIME HE SERVED IN THE ARMED FORCES, THIS STATE WILL RESPECT RIGHTS THE LAW OF SUCH STATE VESTS IN THE SERVICEMAN'S FORMER SPOUSE." DO NOT ALWAYS ASSUME THAT THE LAW OF THE FORUM GOVERNS IN PENSION DIVISION. LOOK AT THE LAW OF THE SERVICE MEMBER'S DOMICILE AND, IF DIFFERENT FROM--AND MORE FAVORABLE THAN--THAT OF THE FORUM, MAKE AN ARGUMENT, WHEN DRAFTING SEPARATION AGREEMENTS, FOR APPLYING "DOMICILE LAW" TO THE ISSUE RATHER THAN "FORUM LAW."

5. LAA'S SHOULD ALSO BE PREPARED TO ADDRESS THE ISSUE OF THE DIVISIBILITY OF VOLUNTARY SEPARATION BONUSES (I.E., THE VOLUNTARY SEPARATION INCENTIVE (VSI) AND THE SPECIAL SEPARATION BENEFIT (SSB)) WHEN COUNSELING CLIENTS ABOUT DIVORCE AND WHEN PREPARING SEPARATION AGREEMENTS.

A. THERE IS AN ISSUE AS TO WHETHER THE VSI OR SSB IS DIVISIBLE MARITAL PROPERTY BASED ON THE WORDING OF 10 U.S.C. SEC. 1408(C)(1), WHICH LIMITS STATES TO THE DIVISION OF "DISPOSABLE RETIRED PAY." THUS, THE LAW WHICH APPLIES TO SEPARATION BONUSES IS PRE-UNIFORMED-SERVICES-FORMER-SPOUSES'-PROTECTION-ACT (USFSPA) LAW UNDER THE MCCARTY DECISION, LEAVING THE BONUSES (PROBABLY) NOT DIVISIBLE UNLESS CONGRESS SAYS OTHERWISE. CONGRESSWOMAN SCHROEDER SPONSORED AN AMENDMENT TO H.R. 5006, THE D.O.D. REAUTHORIZATION BILL FOR FY 1993, WHICH WOULD HAVE MADE THE USFSPA APPLICABLE TO BOTH VSI AND SSB. ALTHOUGH SUPPORT ON THE HOUSE ARMED SERVICES COMMITTEE FOR PASSAGE OF THIS AMENDMENT AT THAT TIME APPARENTLY WAS LACKING, IT WILL PROBABLY BE REINTRODUCED IN THE 103RD CONGRESS.

B. DESPITE 10 U.S.C. SEC. 1408(C)(1), SOME COURTS ARE DIVIDING VSI AND SSB IN DIVORCE CASES (SEE, E.G., "COURT GIVE EX-SPOUSES PART OF EXIT BONUSES," NAVY TIMES, 16 AUG 93, AND DRINGMAN V. DRINGMAN, PIMA COUNTY (ARIZONA) SUPERIOR COURT NO. D-70901, JUDGMENT FILED 10 AUGUST 1993). A RECENT TEXAS CASE ALSO DIVIDED THE VSI AS A COMMUNITY PROPERTY

ASSET. SOME SERVICE MEMBER CLIENTS MAY HAVE EXISTING COURT ORDERS FOR PENSION DIVISIONS AND INQUIRE AS TO WHETHER THEY CAN NOW "DEFEAT" THIS DIVISION BY ACCEPTING A VSI OR SSB. WITHOUT STATUTORY AND/OR CASE LAW AUTHORITY WHICH PROVIDES THAT SUCH PAYMENTS ARE NOT DIVISIBLE AS MARITAL PROPERTY, THE CLIENT SHOULD CONSIDER THAT A JUDGE MIGHT INCLUDE THE SEPARATION BONUS UNDER THE EXISTING ORDER.

C. IF A COURT, REGARDLESS OF STATUTORY AUTHORIZATION OR FEDERAL PREEMPTION, DIVIDES VSI AND SSB, THEN SEVERAL ANALYSES ARE POSSIBLE AS BASES FOR THE DIVISION. SOME COURTS HAVE HELD THAT SEVERANCE PAY IS NOT MARITAL PROPERTY SINCE IT TAKES THE PLACE OF FUTURE COMPENSATION, RATHER THAN BEING FOR PAST SERVICES (LIKE RETIREMENT PAY AND OTHER DEFERRED COMPENSATION BENEFITS). IN RE MARRIAGE OF DE SHURLEY, 255 CAL. RPTR. 150, 207 CAL.APP.3D 992 (1989) AND IN RE MARRIAGE OF LAWSON, 256 CAL.RPT. 283, 208 CAL.APP.3D 446 (1989).

D. IF, ON THE OTHER HAND, VSI AND SSB ARE SEEN AS AN ECONOMIC BENEFIT EARNED DURING THE MARRIAGE AND ATTRIBUTABLE TO MARITAL WORK, EFFORTS, AND LABOR, THEY MAY BE SEEN AS DAMAGES FOR AN ECONOMIC LOSS TO THE MARRIAGE. THIS IS CALLED THE "ANALYTIC APPROACH" AND IS MOST OFTEN APPLIED IN THE PERSONAL INJURY AREA. JOHNSON V. JOHNSON, 317 N.C 437, 846 S.E.2D 430 (1986). IN AN ARKANSAS CASE INVOLVING SEVERANCE PAY, THE WIFE WAS GRANTED ONE-HALF OF THE HUSBAND'S LUMP-SUM PAYMENT BECAUSE THE JUDGE DETERMINED THAT THE BENEFIT WAS EARNED BY SERVICE DURING THE MARRIAGE. DILLIARD V. DILLIARD, 772 S.W.2D 355 (ARK.CT.APP.1989) SEE ALSO CHOTINER V. CHOTINER, 829 P.2D 829 (ALASKA 1992). EVEN IF THE PAYMENT IS MARITAL PROPERTY AND THEREFORE DIVISIBLE, ONE WOULD NEED TO APPLY THE MARITAL FRACTION (YEARS OF MARITAL SERVICE OVER TOTAL YEARS OF SERVICE) TO THE LUMP-SUM PAYMENT TO ARRIVE AT THE PORTION THAT IS MARITAL.

E. SOME COURTS IN "VESTING STATES" TAKE THE POSITION THAT THE SEVERANCE PAY MUST BE AUTHORIZED OR RECEIVED ON OR BEFORE THE DATE OF CLASSIFICATION (AS DISCUSSED IN PARAGRAPH 2 ABOVE) IN ORDER FOR THE COURT TO BE ABLE TO DIVIDE IT; IF IT IS AUTHORIZED OR RECEIVED AFTER THAT DATE, IT IS NOT MARITAL PROPERTY AND IS NOT DIVISIBLE. (SEE, E.G., BOGER V. BOGER, 103 N.C.APP 340, 450 S.E. 2D 591 (1991).

F. LAA'S SHOULD BE AWARE THAT DFAS WILL NOT GARNISH VSI OR SSB UNDER 10 U.S.C. SEC. 1408(D) PURSUANT TO COURT ORDERS FOR PROPERTY DIVISION. ONLY MILITARY RETIREMENT PAY CAN BE GARNISHED UNDER 10 U.S.C. SEC. 1408(D). THERE ARE SEVERAL OTHER ALTERNATIVES FOR GARNISHING THE VSI AND SSB. PUBLIC LAW 103-94, WHICH PROVIDES FOR INVOLUNTARY ALLOTMENTS FROM MILITARY PAY FOR JUDGMENT INDEBTEDNESS, MAY BE USED AFTER APRIL 1994 FOR GARNISHING PURSUANT TO A COURT ORDER DIVIDING THE VSI OR SSB. IF THE COURT ORDER IS FOR CHILD SUPPORT AND/OR SPOUSAL SUPPORT THE VSI AND SSB CAN BE GARNISHED UNDER EITHER 42 U.S.C. SEC. 659, WHICH IS THE GARNISHMENT STATUTE OR 42 U.S.C. SEC. 665, WHICH IS THE INVOLUNTARY ALLOTMENT STATUTE.

6. WHEN COUNSELING CLIENTS ABOUT DIVORCE, LAA'S MUST CONSIDER ALL THE OPTIONS AVAILABLE TO THE CLIENT AND TO THE CLIENT'S SPOUSE. IN MANY MARRIAGES THE MILITARY PENSION OFTEN IS THE LARGEST ASSET OF THE PARTIES. RECOMMENDING A CLIENT FILE A DIVORCE IN A PARTICULAR JURISDICTION FOR FAVORABLE TREATMENT IN PENSION DIVISION MAY ULTIMATELY COST OR SAVE A CLIENT HUNDREDS OF THOUSANDS OF DOLLARS OVER A LIFETIME. IT MAY ALSO RESULT IN LITIGATION, PERHAPS NEEDLESS, IN MORE THAN ONE JURISDICTION OVER THE DIVORCE, PROPERTY RIGHTS, AND RELATED MATTERS.

7. IN TWO COMMUNITY PROPERTY STATES, COURTS HAVE REOPENED DIVORCE CASES FROM 1966 (CALIFORNIA) AND 1973 (NEW MEXICO) AND DIVIDED MILITARY PENSIONS WHERE THE ORIGINAL PROPERTY SETTLEMENTS DID NOT ADDRESS THE MILITARY RETIREMENT PENSION. BOTH COURTS RELIED ON THE FACT THAT THE SETTLEMENT FAILED TO MENTION THE MILITARY RETIREMENT PENSION AS MARITAL PROPERTY (SEE 1993 CAL. LEXIS 217. THE NEW MEXICO CASE IS NOT YET PUBLISHED.) MILITARY RETIREES WITH PRE-EXISTING PROPERTY SETTLEMENTS PREDATING THE USFSPA SHOULD BE REFERRED TO CIVILIAN ATTORNEYS WHO ARE VERY FAMILIAR WITH SUCH ISSUES IN THE APPLICABLE JURISDICTIONS.

8. LAA'S SHOULD CLEARLY ADDRESS THE MILITARY PENSION BENEFITS, THE VSI, AND THE SSB IN SEPARATION AGREEMENTS. THE MILITARY PENSION BENEFITS, THE VSI, AND THE SSB SHOULD BE BE DIVIDED, NOT DIVIDED (WITH INTERESTS WAIVED), OR JURISDICTION OF THE ISSUES RESERVED FOR FUTURE NEGOTIATION REGARDLESS OF WHICH SPOUSE THE LAA IS ASSISTING. DRAFTING A SEPARATION AGREEMENT THAT IS SILENT ON SUCH ISSUES, REGARDLESS OF WHICH SPOUSE IS REPRESENTED, OPENS THE DOOR TO A LEGAL MALPRACTICE CLAIM. NEVERTHELESS, IF FOR A TACTICAL REASON A LAA PREPARES A SEPARATION AGREEMENT THAT IS SILENT ON THE ISSUES OF VSI AND SSB, THE LAA SHOULD COUNSEL THE CLIENT APPROPRIATELY AND MAKE A MEMORANDUM FOR THE RECORD ABOUT THE COUNSELING.

APPENDIX D

OJAG Legal Assistance (Code 36)
(703) 325-7928/DSN 221-7928
8 July 1994

QUICK GUIDE TO UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Note: This **Quick Guide to USFSPA** was first issued, in a slightly different version, for distribution at the Navy JAG Conference in March 1992. Following modest revision to include points of contact for other than the naval services, it was published in **The LAMPlighter**, a quarterly newsletter published by the American Bar Association Standing Committee on Legal Assistance for Military Personnel (Vol. 4, No. 1 - Fall 1992). It is intended to serve as a desktop guide and starting point for research into the regulations and interpretive case law that flesh out USFSPA.

Background:

The Uniformed Services Former Spouses' Protection Act (USFSPA), passed by Congress in 1982 and amended a number of times since then, is intended to place the former spouse in substantially the same position that he or she would have been in during the military retirement period had the marriage not been ended by divorce, dissolution or annulment. The statute seeks to accomplish this by:

1. Allowing the states to treat disposable military retired pay as marital or community property, per each state's law; note that there is no federal right to *any* portion of military retired pay under USFSPA.
2. Allowing certain former spouses to receive their share, up to a ceiling of 50%, of disposable military retired pay directly from military finance centers.
3. Allowing some former spouses to continue receiving commissary, exchange, and health care benefits.
4. Allowing former spouses to be designated as Survivor Benefit Plan beneficiaries.
5. Authorizing certain former spouses who are victims of abuse to receive a court-ordered share of military retired pay even though the military member was not retired, but rather was punitively or administratively because of the misconduct involving abuse (special rules and requirements apply).

Discussion:

A. KEY CONCEPTS AND TERMS

1. ***Disposable Retired Pay***. 10 U.S.C. § 1408(a)(4), 32 C.F.R § 63.6e(2), *Military Retired Pay Manual*, DoD 1340.12M. This is gross retired pay entitlement less various authorized deductions. A change in 10 U.S.C. § 1408(a)(4) (amendment of 5 November 1990, Pub.L. 101-510, § 555; 104 Stat. 1569) modified the definition of disposable retired

pay for divorces final after 3 February 1991 to include only the following authorized deductions:

a. Amounts owed by the member to the United States that are related to the receipt of retired pay (e.g., recoupment of overpayments).
b. Forfeitures ordered by a court-martial.
c. That portion which is military disability retired pay under 10 U.S.C. Chapter 61.
d. That portion which is waived in favor of accepting Veterans' Affairs disability pay.
e. Premiums paid for Government life insurance, or deductions to provide SBP annuity coverage in favor of a current or former spouse.
f. Other amounts required by law to be deducted that relate to a person's entitlement to retired pay (e.g., dual compensation restrictions).

For divorces final prior to 3 February 1991, the authorized deductions to compute disposable retired pay differ significantly, and include: Federal employment taxes and income taxes withheld, including properly documented supplemental withholding consistent with the member's expected tax liability; and State employment taxes and income taxes withheld when the member voluntary requests same and the military service has entered into an agreement with the particular State to withhold from retired pay.

2. ***20/20/20 Former Spouse***: the military member has completed at least 20 years of creditable service; the spouse has been married to the military member for at least 20 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 20 years. Certain "basic benefits" accrue to 20/20/20 former spouses; see next section.

3. ***20/20/15 Former Spouse***: the military member has completed at least 20 years of creditable service; the spouse has been married to the military member for at least 20 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 15 years. Limited "basic benefits" accrue to 20/20/15 former spouses; see next section.

4. ***10/10 Former Spouse***: the spouse has been married to the military member for at least 10 years at date of final decree of divorce, dissolution, or annulment; and the period of marriage overlaps the period of creditable service by at least 10 years. The *only* significance of this status is that it is the minimum eligibility criteria for obtaining direct payment from the military finance center of a former spouse's court-ordered share of disposable retired pay.

B. **BASIC BENEFITS**

1. ***Commissary and Exchange Benefits***. 10 U.S.C. §§ 1062 and 1072(2)(F). Unremarried former spouse is treated the same as the military retiree; i.e., the 20/20/20 former spouse is authorized full commissary and exchange benefits. While these benefits are suspended upon subsequent marriage, the privileges "revive" when the subsequent marriage is terminated in any manner. These benefits are not available to 20/20/15 former spouses.

2. ***Medical Benefits***. 10 U.S.C. §§ 1072(2)(F), 1076 and 1086. Unremarried former spouse is treated the same as the spouse of deceased military retiree. The 20/20/20 former spouse (and a 20/20/15 former spouse whose divorce was final prior to 1 April 1985) is authorized full medical care, including space-available inpatient and outpatient care at military treatment facilities, and CHAMPUS coverage (until the former spouse becomes eligible for Medicare). These benefits are *extinguished* upon subsequent marriage, so the privileges will not "revive" when the subsequent marriage is terminated by any cause other than annulment. The unremarried 20/20/15 spouse is entitled to full military medical benefits only for a transitional period of 1 year, after which the former spouse may purchase a DoD-negotiated conversion health policy. The current conversion policy is Uniformed Services Voluntary Insurance Program (U.S. VIP) with Mutual of Omaha; current rates, a coverage description, and a reproducible application form may be obtained from each service's coordinator for the former spouse program.

3. ***Retired Pay Benefits***. 10 U.S.C. § 1408; and 32 C.F.R. Part 63.

a. The issues of whether military retired pay will be treated as marital or community property (*vice* as an income component for computing alimony or support payments), and whether and in what amount military retired pay will be divided between the two parties, will be decided *according to state law*; while USFSPA permits military pay to be treated as marital or community property, it does not so mandate.

b. USFSPA does not create a federal right in favor of the former spouse to receive any portion of a member's military retired pay, nor does the statute mandate or suggest a maximum, minimum or typical amount, percentage, or formula for computing a former spouse's share. The court exercising jurisdiction over the case will determine whether to divide military retired pay between the parties and, if so, in what amounts or percentages, using that state's laws, regulations, and procedures, and weighing the evidence and arguments advanced by each of the parties. If a court awards a portion of military retired pay to a former spouse, but the member is still on active duty, the effect of the court order is stayed until retirement occurs - the member will not be forced to retire to satisfy a court order.

c. USFSPA affords a right to receive direct payments from the DFAS center of the portion of a military member's disposable retired pay ordered in favor of a former spouse by a court having appropriate jurisdiction over the member. This direct payment option is limited those former spouses who meet *at least* the 10/10 criteria, is subject to a ceiling of 50% of disposable retired pay, and may require a court order that

expresses the former spouse share either as a whole dollar amount or as a specific percentage of the member's disposable retired pay.

4. ***Survivor Benefit Plan (SBP)***. 10 U.S.C. §§ 1447(6), 1448(b), and 1450.

a. SBP is an annuity that allows retired members (both active duty and reserve) to provide continued income to named beneficiaries in the event of the retiree's death. A retiring member will be enrolled in SBP unless the member declines to participate. This election must be made before retirement occurs; once a determination whether to participate in SBP is implemented, the election is, with very limited exceptions, irrevocable.

b. A retiring member may elect coverage in favor of a former spouse, either to comply with a court order mandating the election, or to honor an agreement between the parties, or voluntarily. If coverage is elected, the amount of the premium may then be deducted when computing disposable retired pay.

c. If divorce occurs after retirement, and the member did not elect to participate in SBP when retiring, the divorce does not "revive" the option to participate. Thus, state divorce courts should not order these retirees to provide SBP protection for former spouses because Federal law will not permit the retirees to comply.

d. If divorce occurs after retirement and the member had initially elected to participate in SBP when retiring, the dissolution terminates that former spouse's eligibility to be a SBP beneficiary under the member's initial election in favor of the "spouse," and it constitutes a ground for the member to revoke entirely the election to participate in SBP. A court may order continued participation by the member in favor of the former spouse, or the member may wish to continue such coverage, in which case *former spouse coverage* must be elected within one year of the date of the final divorce decree.

e. There is no possibility under current law to split SBP between a current spouse and a former spouse.

C. **REFERENCES**

Many notes and articles have appeared in law reviews and other professional publications commenting on various aspects of USFSPA. An excellent comprehensive treatment of USFSPA has been published by the Army JAG School: *Uniformed Services Former Spouses' Protection Act (Outline and Reference Materials)*, Publication JA-274.

D. **POINTS OF CONTACT**

1. USFSPA benefits and eligibility questions.

a. For Navy, contact Coordinator, Former Spouse Program, Bureau of Naval Personnel (PERS 334C), Washington, DC 20370-5641, telephone 1-800-443-9297, (703) 614-4261/3808, DSN 224-4261/3808.

b. For Marine Corps, contact Marine Corps Retired Affairs Office (Code MMSR-6), HQMC, Washington DC 20380-0001, 1-800-336-4649, (703) 614-1958, DSN 224-1958.

c. For Army, contact Office of General Counsel, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-DG), Indianapolis IN 46249-0160, (317) 542-2155, DSN 699-2154.

d. For Air Force, contact HQ AFMPC/DPMDOP, Randolph AFB TX 78150-6001, (512) 652-2089, DSN 487-2089.

2. Retired pay questions.

a. For Navy, contact Defense Finance and Accounting Service - Cleveland Center (Code DG), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2055, telephone (216) 522-5396, DSN 580-5396.

b. For Marine Corps, contact Defense Finance and Accounting Service - Kansas City Center (Code DG), Kansas City, MO 64197-0001, telephone (816) 926-7103, DSN 465-7103.

c. For Army, contact Retired Pay Operations, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-R), Indianapolis IN 46249-1536, (317) 542-2931, DSN 699-2931.

d. For Air Force, Defense Finance and Accounting Service - Cleveland Center (Code DG), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2055, telephone (216) 522-5396, DSN 580-5396.

3. SBP questions.

a. For Navy, contact Defense Finance and Accounting Service - Cleveland Center, Retired Pay Department (Code JR), Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, OH 44199-2058, telephone (216) 522-5535, DSN 580-5535.

b. For Marine Corps, contact Defense Finance and Accounting Service - Kansas City Center (DFAS-KC/ER), Kansas City, MO 64197-0001, telephone (816) 926-7196, DSN 465-7196.

c. For Army, contact Office of General Counsel, Defense Finance and Accounting Service - Indianapolis Center (Code DFAS-IN-DG), Indianapolis IN 46249-0160, (317) 542-2151, DSN 699-2151.

d. For Air Force, contact Defense Finance and Accounting Service - Denver Center (Code RT), Denver CO 80279-5000, (303) 676-6139, DSN 926-6139.

CHAPTER 31

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OUTLINE OF INSTRUCTION

I. GOALS OF INSTRUCTION.

A. Identify the Rules that apply to Reserve Component Judge Advocates.

B. Understand the duties of supervisory Judge Advocates.

C. Investigate current ethical issues in Army practice.

D. Understand rules regarding referral and fee arrangements that apply to Reserve Component Judge Advocates.

E. Understand the professional responsibility discipline system.

II. REFERENCES.

A. Primary.

1. AR 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).

2. American Bar Association Model Code of Professional Responsibility (1970 and amendments).

3. American Bar Association Model Rules of Professional Conduct (4th ed. 1999).

4. American Bar Association Standards of Criminal Justice (2d. ed.).

5. American Bar Association Code of Judicial Conduct (1972 ed.).

B. Secondary.

1. AR 27-1, *Legal Services - Judge Advocate Legal Service* (3 Feb 95).

2. AR 27-3, *Legal Services - The Army Legal Assistance Program* (10 Sep 95).

3. AR 27-10, *Legal Services - Military Justice* (24 Jun 96).

III. APPLICABLE STANDARDS.

A. The Importance of Knowing the Standards

1. Failure to comply with obligations and prohibitions imposed by a Rule is a basis for discipline. AR 27-26, para. 7f.

2. Courts have found that professional malpractice can form the basis for a charge of dereliction of duty. *See United States v. Rust*, 38 M.J. 726, 728 (AFCMR 1993), *aff'd* 41 M.J. 472 (CAAF 1995)(Holding that "medical malpractice by an officer whose military duties require him to provide medical care may be punished as dereliction of duty under Article 92(3), UCMJ, 10 U.S.C. § 892(3).")

3. Resolving conflicts between the lawyer's duties to client, the law and legal system, and her own beliefs. *See* AR 27-26, para. 6g.

B. Army Rules of Professional Conduct. Apply to all judge advocates and civilian attorneys working under approval authority of The Judge Advocate General.

1. The Army Rules also apply to civilian attorneys practicing before tribunals conducted pursuant to the UCMJ and the Manual for Courts-Martial.

2. Army Rules apply to all Reserve Judge Advocates while performing duties under the cognizance of TJAG.

C. Scope of the Rules.

1. Provide a basis for taking action should a lawyer fail to comply or meet the standard. Do not provide a basis for a civil cause of action against either the Army or an attorney.

2. Comments are non-binding guidance.

3. The Army Rules are only one source of rules governing the conduct of judge advocates (*See, e.g.*, UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).

D. Other Applicable Standards.

1. ABA Standards for Criminal Justice.

2. Regulatory and statutory standards (e.g., UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).

3. Ethics opinions and standards promulgated by State Bar and TJAG.

4. Another state's ethical standards if the attorney is licensed to practice or practicing within another jurisdiction.

E. Limiting Applicability of State Rules

1. Attempts to Exempt Federal Lawyers from State Rules Fail: "[N]othing in any of these sections expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States." United States *ex. rel.* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998), *reh'g and suggestion for reh'g en banc denied* (April 8, 1998).

2. Citizens Protection Act of 1998 (Pub. L. No. 105-277)

a. Known informally as the "McDade Amendment"

b. Makes federal lawyers (for DOJ) subject to state laws and rules as well as to local federal court rules governing lawyer conduct

c. Contained in the Justice Department appropriations provisions in the massive Omnibus Consolidated and Emergency Supplemental Appropriations bill for fiscal year 1999 (Pub. L. No. 105-277), which President Clinton signed Oct. 21

d. The new law specifically directs the attorney general to "make and amend rules of the Department of Justice to assure compliance with this section."

F. Resolving Ethical Conflicts.

1. Military Rule 8.5 provides that although attorneys remain subject to the Rules in effect in their licensing jurisdictions, the Military Rules supersede in case of a conflict.

2. ABA Model Rule (old approach in comment to Model Rule 8.5).

a. Apply principles of conflicts of laws.

b. Most significant relationship test.

3. ABA Model Rule 8.5 as amended August 1993. Disciplinary Authority must make a choice of law:

a. For conduct in connection with a court action - apply the rules of the jurisdiction where the court sits.

b. For other conduct - apply the rules of the jurisdiction in which the lawyer principally practices.

G. Practical Approach.

1. Follow the most restrictive rule.

2. Seek alternate solutions.

a. Request that a different attorney be appointed to the case.

b. Request an opinion or waiver from the state ethics review panel. ***CAUTION***: Coordinate with technical chain of command.

c. If the conflict is irreconcilable - follow Army Rule 8.5 which states it is controlling.

IV. DUTIES OF SUPERVISORS AND SUBORDINATES.

A. Supervisors Must Ensure Subordinates Comply With Rules (Rule 5.1).

1. Includes non lawyers under supervision. *See* Rule 5.3 and volunteers in legal offices, AR 27-3, para. 4-3*e*.

2. Staff Judge Advocates should provide practice-oriented classes on professional responsibility. *See* AR 27-1, para. 7-2c.; AR 27-3, paras. 1-4*g*(2)(j) & 2-4*a*.

3. A Supervisor Assumes Imputed Responsibility for Acts of Subordinates if (s)he:

a. Orders or ratifies a subordinate's violation, or,

b. Fails to take remedial action to avoid or mitigate the consequences of a violation.

B. Subordinates Are Bound by the Rules of Professional Conduct (Rule 5.2).

1. Subordinate may rely on ethical judgment of a supervisor if the issue is subject to question.

2. If the ethical question can be answered only one way, subordinate must comply with the Rules even if supervisor directs a contrary course of conduct.

3. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence (Rule 5.4(e)).

V. CURRENT ETHICAL ISSUES.

A. Confidentiality (Rule 1.6).

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.

a. No distinction between confidences and secrets.

b. Applies to information obtained prior to formation of attorney-client relationship.

c. Applies to all office personnel, including volunteers.

d. Supervisors should ensure procedures are in place to ensure confidentiality. AR 27-3, para. 4-9*b*(4).

(1) Separate administrative and confidential files. AR 27-3, para. 5-5*c*.

(2) *See also*, OTJAG Standards of Conduct Office, *Professional Responsibility Note*, ARMY LAW, Oct. 1993, at 47-48. (State bar opinions regarding management of office waste and FAX machine security).

(3) SRP Confidentiality.

(4) E-mail/Technology Concerns

2. Exceptions to confidentiality.

a. A client may consent to disclosure of confidences (Rule 1.6). AR 27-3, para. 4-8*a* strongly suggests having authorization in writing.

b. Disclosure is also authorized when needed to carry out the representation.

(1) Office communications.

(2) Reading files.

(a) Supervisors of LAA's are permitted to review office files to ensure adequate legal representation.

(b) Both supervisors and subordinates need to be sensitive to potential for conflicts of interest inherent in reviewing reading files.

c. Disclosure is permitted to establish a claim or defense in a controversy with a client.

d. Intention to commit a crime. Army Rule 1.6(b)(1) mandates disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to--

(1) result in imminent death or substantial bodily harm, or

(2) impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(3) There is no authority for revealing information of other potential offenses under the Army Rules.

B. The Lawyer as Advisor.

1. Lawyers Should Provide Complete Advice.

a. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Rule 2.1).

b. Rule 2.1 sets forth a permissive standard.

2. Lawyers Must Provide Independent Advice.

a. When advising individual clients, lawyers are required to exercise unfettered loyalty and professional independence (Rules 2.1 and 5.4).

b. A lawyer who cannot provide independent advice must seek to withdraw from the representation of an individual client.

c. LAAWS-LA software represents Army policy on the proper form of documents, but is not a substitute for an attorney's independent professional judgment. AR 27-3, para. 4-4*a*.

C. Army as the Client (Rule 1.13).

1. Provides that the Army, acting through its authorized officials, is the client.

2. Rule rejects the concept that the government as a whole is the client.

3. Attorneys may be authorized to represent individual clients as legal assistance attorneys (AR 27-3) or as Trial Defense Attorneys (AR 27-1).

4. If an official of the military (e.g., a commander) is acting illegally or intends to act illegally, and if the action reasonably might be imputed to the military, the lawyer shall:

a. Proceed as is reasonably necessary in the best interest of the applicable service.

b. Consider taking the following measures:

(1) Ask the official to reconsider.

(2) Advise the official to get a separate legal opinion.

(3) Advise the official that his or her personal legal interests are at risk and he or she should consult counsel.

(4) Refer the matter to or seek guidance from higher authority in the technical chain of supervision.

c. If unsuccessful in taking these efforts, the Army lawyer may terminate representation with respect to the matter in question.

d. Rule 1.13 does not require that an attorney report the official's misconduct or violation of law. A requirement to disclose misconduct may arise, however, under other laws or regulations. *See, e.g.*, Joint Ethics Regulation.

D. Fees and Self-Referral (Rule 1.5).

1. A lawyer shall not accept a gratuity, salary or other compensation from a client for services performed as an officer of the U.S. Army.

2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.

3. A RC Legal Assistance Attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Rule 1.5, *see also*, AR 27-26, para. 4-5*d,e* (legal assistance referrals to RC attorneys in RC Directory will be on a no-fee basis), 4-7*d* (no LAA authorized to accept a gratuity for Legal Assistance Services).

   a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity concerning new matters.

   b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.

4. An RC Judge Advocate, whether listed in the RC Directory or not, may accept a referral EITHER for retirement points (no fee) or for a fee.

   a. "Same General Matter" is the key. Items that fall within the same area of the legal assistance program (*See* para. 3-6, AR 27-3) are considered the same general matter. Para. 4-7d.(2), AR 27-3.

   b. If the RC Judge Advocate accepts the case as a legal assistance case (for points, no fee)

      (1) The attorney must see the accepted action through to completion without charging a fee.

(2) The attorney may not charge a fee to represent that client on "the same general matter" as the accepted legal assistance case. (They may represent them on a no fee basis).

c. If the RC Judge Advocate accepts the referral from and AC LAA for a fee, the attorney must,

(1) Acknowledge the fact that the referral is for fee *at the outset of representation*,

(2) Ensure that the client fully understands the referral is for fee at the outset of representation, and,

(3) Obtain client consent to the representation.

E. Conflicts of Interest (Army Rules 1.7, 1.8 & 1.9).

1. Directly adverse to the current client . A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless

a. the lawyer reasonably believes the representation will not adversely affect the other relationship, and

b. each client consents after consultation (Army Rule 1.7(a)).

c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw. The Army Rules adopt an objective approach. Relevant factors in determining whether multiple representation should be undertaken include:

(1) duration and intimacy of the lawyer's relationship with the clients involved,

(2) likelihood actual conflict will arise, and

(3) likely prejudice to the client if conflict does arise.

d. Potential conflicts in legal assistance:

(1) Estate planning.

(2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, 456 A.2d 20 (1983) (no conflict) *with Hill v. Okay Construction Co.*, 256 N.W. 2d 107 (1977) (conflict).

(3) Domestic relations. *Coulson v. Coulson*, 448 N.E.2d 809 (1983); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

e. Potential conflict in criminal practice -- representing multiple accused.

(1) Ordinarily a lawyer should refuse to act for more than one of several co-defendants (Comment to Army Rule 1.7). *See* Standards for Criminal Justice 4-3.5(b).

(2) Consult AR 27-10 and USATDS SOP for procedures on handling co-accused situation. Generally:

(a) Co-accused will initially be contacted by separate defense counsel.

(b) Co-accused may submit request for the same individual military counsel.

(c) Chief, USATDS decides whether to grant the request. No request will be granted unless each co-accused has signed a statement reflecting informed consent to multiple representation and it is clearly shown that a conflict of interest is not likely to develop.

2. Representation materially limited. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Army Rule 1.7(b)). Example: Defense counsel materially limited by loyalty to Army. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).

   a. A possible conflict does not preclude representation.

   b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.

3. Business transactions. A lawyer shall not enter into a business transaction with a client (Army Rule 1.8).

4. Former client. A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Army Rule 1.9).

F. Imputed Disqualification (Army Rule 1.10).

1. Lawyers working in the same military law office are not automatically disqualified from representing a client. A functional analysis is required (Army Rule 1.10. Compare ABA Model Rule 1.10.)

2. Army policy may discourage representation of both parties in certain instances, e.g. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute discouraged).

VI. OVERVIEW OF AR 27-1 INVESTIGATIONS – PROFESSIONAL RESPONSIBILITY COMPLAINTS.

A. Reporting Requirements.

1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness must report the violation (Rule 8.3).

a. Knowledge = actual knowledge or knowledge inferred from the circumstances.

b. Substantial = material matter of clear and weighty importance and does not refer to the quantum of evidence presented.

2. Rule 8.3 does not require disclosure of information protected under Rule 1.6. (confidentiality).

B. Professional misconduct defined (Rule 8.4).

1. Violating or attempting to violate the Rules of Professional Conduct, or knowingly assisting or inducing another to do so;

2. Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

a. Not all criminal offenses constitute professional misconduct.

b. Concept of offenses involving moral turpitude is rejected under Rule 8.4.

3. Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

4. Stating or implying an ability to influence improperly a government agency or official; or

5. Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

C. Professional Misconduct distinguished from personal misconduct.

1. Cases Normally in the scope of AR 27-1.

a. Dishonesty – false claims, shoplifting, obtaining false official orders, firearms violations, stalking, or illegal surveillance.

b. Sexual misconduct – Bigamy, sexual relationships that involved a conflict of interest, sexual crimes.

c. Insulting Behavior – Mismanaging by uttering insulting ethnic or sexual comments, displaying offensive visual material or by inappropriate touching of subordinates, clients, witnesses, or staff workers.

d. Dealing with Subordinates – Mismanaging by having personal business transactions with subordinates or imposing on subordinates for personal favors.

2. Cases normally not in scope of AR 27-1.

a. Discretionary Administrative Action – OERs, NCOERs, award recommendations, pass, or leave actions.

b. Personal Misconduct or questionable sexual activity (including adultery) unless it involves mismanagement or is a criminal act that reflects on fitness to practice law.

c. DWIs or minor traffic offenses.

d. Insulting Behavior – rudeness and name-calling unless directed toward judges or investigating officers or identified above.

e. Conduct is being investigated as criminal misconduct, punishable under the UCMJ.

D. Processing Complaints (AR 27-1, Chap. 7, *See* Appendix A, Processing Chart).

1. Supervisory lawyers at all levels are responsible for reviewing all alleged or suspected violations of the Army Rules of Professional Conduct for Lawyers, or other applicable ethical standards that come to their attention.

a. Any credible alleged or suspected violation that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer shall be reported through technical channels to the Chief, Standards of Conduct Office.

(1) Credible = reasonable belief that a violation occurred.

(2) Allegations may be resolved at the local level if there is no credible evidence of misconduct. Maintain a copy of any response sent to complainant and all associated documentation in office files.

b. Several supervisory JAs review allegations up to and including TAJAG before a formal preliminary screening inquiry (PSI) is ordered.

(1) Each level conducts a credibility check.

(2) No credible evidence – process stops.

(3) Credible evidence – forward up the chain.

2. Preliminary Screening Inquiry.

a. Purpose: To assist senior supervisory JAs in determining whether the questioned conduct occurred and, if it did, whether it constituted a violation of AR 27-26, or other applicable ethical standards.

(1) Not intended to constitute an ethical investigation that most licensing authorities normally require lawyers to report.

(2) But, it is the responsibility of the subject to know and comply with the reporting requirements of their licensing jurisdiction.

b. Procedures.

(1) OTJAG tasking to conduct an inquiry.

(2) Senior Supervisory JA (MACOM SJA or other JA in an equivalent supervisory position) appoints PSI officer (senior to subject).

(3) PSI officer.

(a) Procedures set forth in AR 27-1 or AR 15-6 for informal investigations.

(b) Determine facts and circumstances of alleged or suspected violation.

(i) Can delegate a subordinate officer to gather facts, question individuals, and collect documents.

(ii) PSI officer must independently review the facts.

(c) PSI officer provides written report to Senior Supervisory JA.

(i) Summarize facts.

(ii) Provide conclusions as to whether a violation occurred.

(a) Preponderance of the evidence.

(b) Evidence points to a particular conclusion as being more probably than any other conclusion.

(iii) Recommend corrective or disciplinary action, if appropriate.

(iv) Attach any documentary evidence or witness statements.

c. Senior Supervisory JA action.

(1) Determine if the report is complete, if not return to PSI officer.

(2) Action on a complete report.

(a) If no violation occurred, coordinate with Chief, SOCO and close the case and notify subject and complainant in writing and provide a copy of the report and correspondence to TJAG.

(b) If only a minor or technical violation.

(i) Determine if counseling is appropriate.

(ii) If so, coordinate with SOCO and refer a copy of the report to the subject for comment.

(iii) Ensure counseling takes place.

(iv) Inform the complainant in writing of final action.

(v) Provide copy of PSI report and subsequent correspondence to TJAGSA.

(c) More than a minor or technical violation.

(i) Refer the PSI report to OTJAG for further action.

(ii) OTJAG will refer the file to the subject for comment.

E. OTJAG Action.

1. TAJAG action.

a. Return the file to the senior supervisory JA for further inquiry.

b. Appoint a new inquiry officer for a supplemental inquiry.

c. Determine there was no violation and return to Chief, SOCO to close.

d. Determine that minor or technical violation occurred and either take appropriate action or direct referral to appropriate supervisory JA for specified action.

e. Determine a substantial violation is clearly shown, take appropriate action and refer the file to TJAG for possible referral to state bar.

f. Determine a substantial violation appears to have been committed and refer the file to the Professional Responsibility Committee for an opinion.

2. TJAG action.

a. If file is referred by TAJAG or the PRC committee, determine the appropriate action to be taken.

b. Determine whether the conduct should be reported to the subject's licensing authority.

(1) Notify subject of intended action.

(2) Allow subject 10 days to show cause.

F. DUE PROCESS.

1. If action is to be taken at OTJAG.

a. Subject will get a reasonable time (usually 14 to 21 days) to provide comments.

b. Extensions may be granted for good cause by Chief, SOCO.

c. Failure to provide comments in the time provided, will constitute waiver.

2. The subject is responsible to know and comply with the requirements of his or her licensing jurisdiction. The finding of even a minor or technical violation may trigger a reporting requirement by imposed by subject's licensing authority even if the initiation of the inquiry didn't.

G. FILING AND RELEASE OF INFORMATION.

1. SOCO maintains the files.

a. No PSI necessary – 3 years.

b. PSI conducted – 10 years.

(1) Shortened to 5 years pending approval of National Archives and Records Administration unless:

(a) Subject remains in JALS, or

(b) Is the subject of another monitoring, open, or founded file within 5 years of the closed date.

(2) Shortened to 3 years if unfounded or inquiry-not-warranted.

(3) One years after subject leaves JALS (founded files will be kept a minimum for 5 years after the closed date).

2. TJAG or TAJAG may file substantiated allegation in Career Management Information File (CMIF).

a. Relevant to individual's potential as a member of JALS.

b. Documents available to personnel managers.

(1) Subject provided notice IAW AR 600-37.

(2) Opportunity to rebut filing.

3. Release.

a. Release IAW with AR 25-55 and AR 340-1.

b. Normally, will not release outside DoD.

c. May release to civilian licensing authority if serious professional misconduct.

d. May release to decision-makers within DoD.

(1) Promotion to Colonel/General.

(2) Involuntary Separation for professional dereliction.

VII. CASE LAW NEW DEVELOPMENTS IN PROFESSIONAL RESPONSIBILITY.

A. ATTORNEY-CLIENT. *United States v. Spriggs*, 52 M.J. 235 (2000). Release of TDS counsel from active duty constitutes good cause for severance of the attorney-client relationship when an ongoing attorney-client relationship had not been established. TDS counsel represented Spriggs at a prior court-martial resulting in an acquittal. After additional investigation charges were preferred a second time, including a perjury charge based upon testimony at the first court-martial. The original TDS counsel was on terminal leave and had begun work at a civilian law firm when the new charges were preferred. A new TDS attorney was detailed to represent Spriggs. Spriggs spoke telephonically with his first TDS counsel on several occasions regarding the new court-martial. Spriggs asked the first TDS counsel to represent him in the second court-martial. At trial Spriggs accepted the second TDS counsel as his detailed counsel, and made an IMC request for the TDS counsel from his first trial. The request was forwarded to the reserve commander at the Army Reserve Personnel Center. He contacted the first TDS counsel who indicated he was not willing to absent himself from his private law firm. Accordingly, the reserve commander denied the IMC request. CAAF affirmed the decision of the ACCA, holding that Spriggs had not met the threshold burden of proving whether he had an ongoing attorney-client relationship with the TDS counsel from his first court-martial. Since Spriggs did not prove an ongoing attorney-client relationship, the TDS counsel's release from active duty constituted good cause for severing the relationship. CAAF left open the question of whether release from active duty would terminate the attorney-client relationship under all circumstances.

B. ATTORNEY-CLIENT. *United States v. Golston*, 53 M.J. 61 (2000). Prejudice does not exist merely because trial counsel represented the spouse of the accused in a legal assistance matter. Golston was convicted of indecent acts with two minor children. His wife testified on behalf of her husband that one of the minor girls had a crush on him. During cross-examination the assistant trial counsel brought up a prior incident where Mrs. Golston had been accused of theft. After the case recessed for the day, Mrs. Golston told her husband's trial defense counsel that the trial counsel had represented her with regard to the theft incident in his prior capacity as a legal assistance attorney. Trial defense counsel made a motion for a mistrial the next day, and requested in the alternative that Mrs. Golston's cross-examination be stricken. The military judge questioned trial counsel and assistant trial counsel. He determined that the information about Mrs. Golston was not gleaned from any confidential discussions with her. The military judge denied the motion based upon his questioning of the trial counsel and assistant trial counsel. CAAF held that the trial counsel failed in his duty to avoid the appearance of impropriety concerning his attorney-client relationship with Mrs. Golston. The court specifically noted the failure of the trial counsel to affirmatively raise this issue to the court and opposing counsel. The court found, however, that Golston was not prejudiced by trial counsel's failure to disclose the possible conflict of interest. Affirmed.

C. INEFFECTIVE ASSISTANCE OF COUNSEL. *United States v. Grigoruk*, 52 M.J. 312 (2000). Defense counsel's failure to use a child psychologist, or any other expert, to challenge complainant's credibility in prosecution for sex offenses raises sufficient claim of ineffective assistance of counsel to require additional inquiry. Grigoruk was charged with sexual molestation of his stepdaughter. He wanted the convening authority to employ Dr. Underwager, a child psychologist, as an expert witness for the defense. The military judge ordered the Government to produce Dr. Underwager or a suitable substitute. Grigoruk's defense counsel never called Dr. Underwager or any other doctor. The case was a classic credibility contest with the accused denying anything happened and a complete lack of physical evidence supporting sexual abuse. After conviction, Grigoruk asked his defense counsel why Dr. Underwager was not called to rebut the allegations of the stepdaughter. Defense counsel explained that he did not call Dr. Underwager because trial counsel had evidence that would make the doctor look like a hired gun. CAAF held that Grigoruk had met the threshold requirement of demonstrating ineffective assistance of counsel for failing to call Dr. Underwager as a defense expert. Accordingly, CAAF remanded the case to the court of criminal appeals to obtain additional evidence including an affidavit from trial defense counsel explaining his failure to call a defense expert. Reversed.

VIII. NEWS FROM SOCO.

A. Information paper – `Ethics and Mismanagement Case Activity,` Appendix C.

B. Information paper - Use and Release of Information in Professional Conduct Files, Appendix D.

C. Hot Topics from SOCO (See Appendix C,D and E).

1. Communicating with represented parties.

2. Representation of commanders on personal misconduct.

   a. TJAG written permission required.

   b. See links page on JAGC net.

3. Information Disclosure.

   a. FOIA.

   b. Privacy Act request.

   c. Discovery.

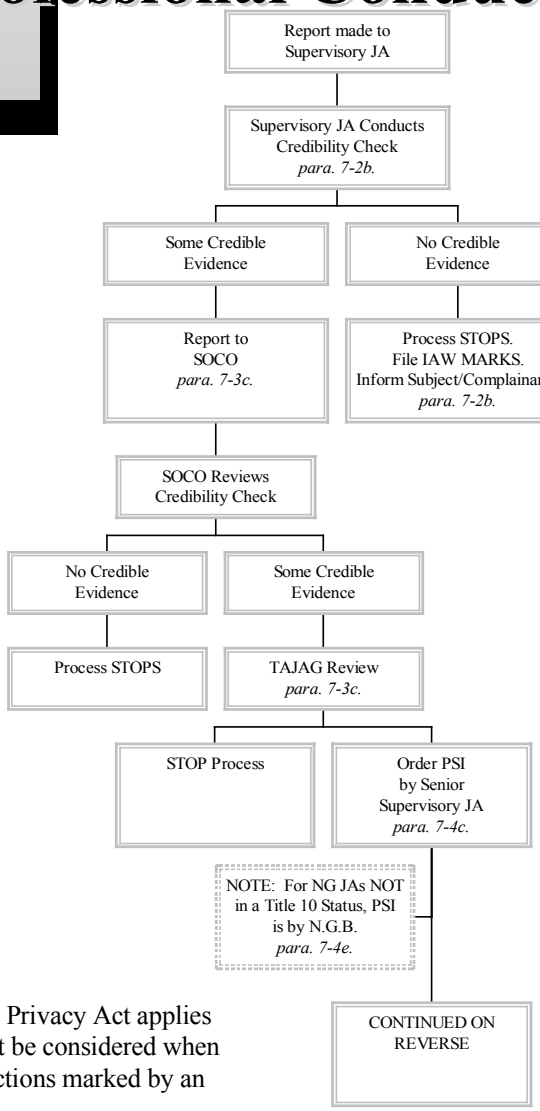
   d. Discovery issues in civilian personnel sector. Government refuses to disclose (labor law attorney) Privacy act, FOIA.

IX. CONCLUSION.

APPENDIX A

Chapter 7, AR 27-1, 3 Feb 1995

Professional Conduct Inquiries



Notes

⇒Standard: Preponderance of Evidence (para. 7-3d.).

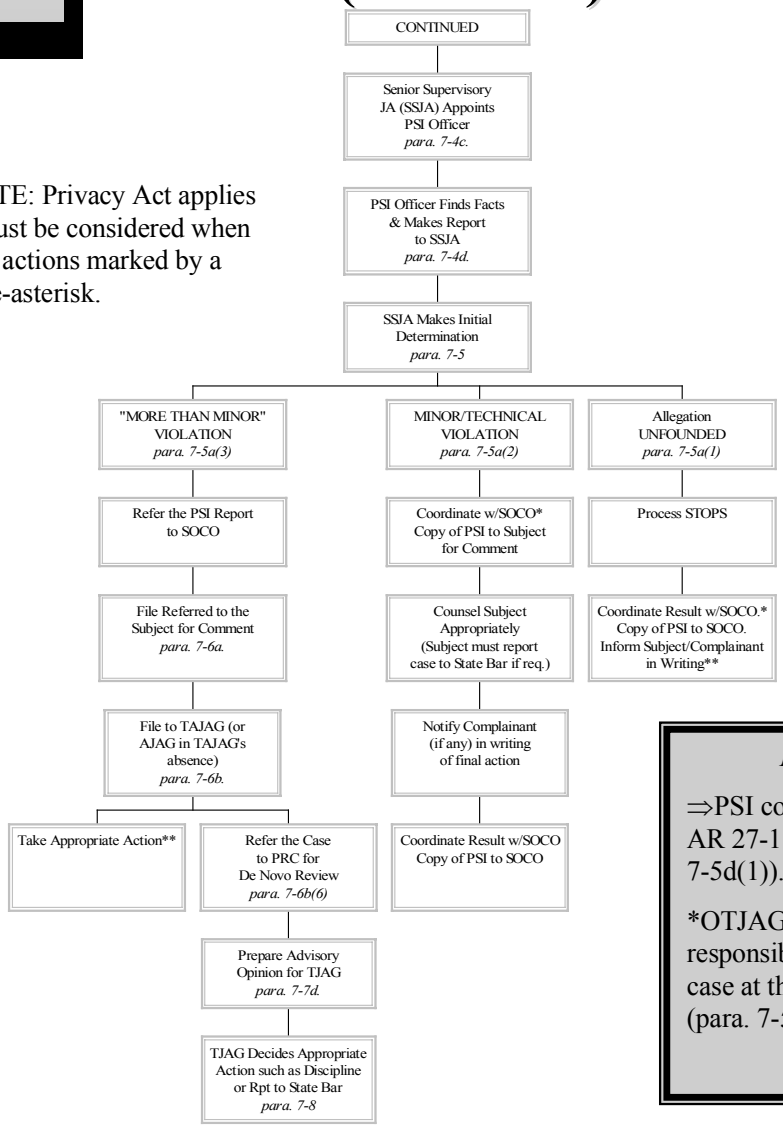
⇒Allegation is "credible" if info provides "reasonable belief." (para. 7-2b.)

*NOTE: Privacy Act applies and must be considered when taking actions marked by an asterisk.

Chapter 7, AR 27-1, 3 Feb 1995

Professional Conduct Inquiries (continued)

**NOTE: Privacy Act applies and must be considered when taking actions marked by a double-asterisk.



Notes

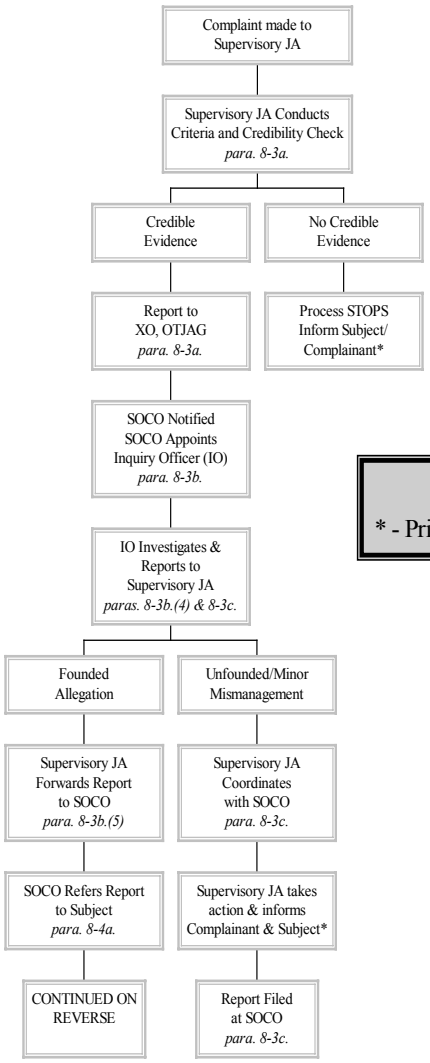
⇒PSI conducted IAW AR 27-1 & 15-6(para. 7-5d(1)).

*OTJAG may assume responsibility for the case at this point. (para. 7-5b.)

APPENDIX B

Chapter 8, AR 27-1, 3 Feb 1995

Mismanagement Inquiries

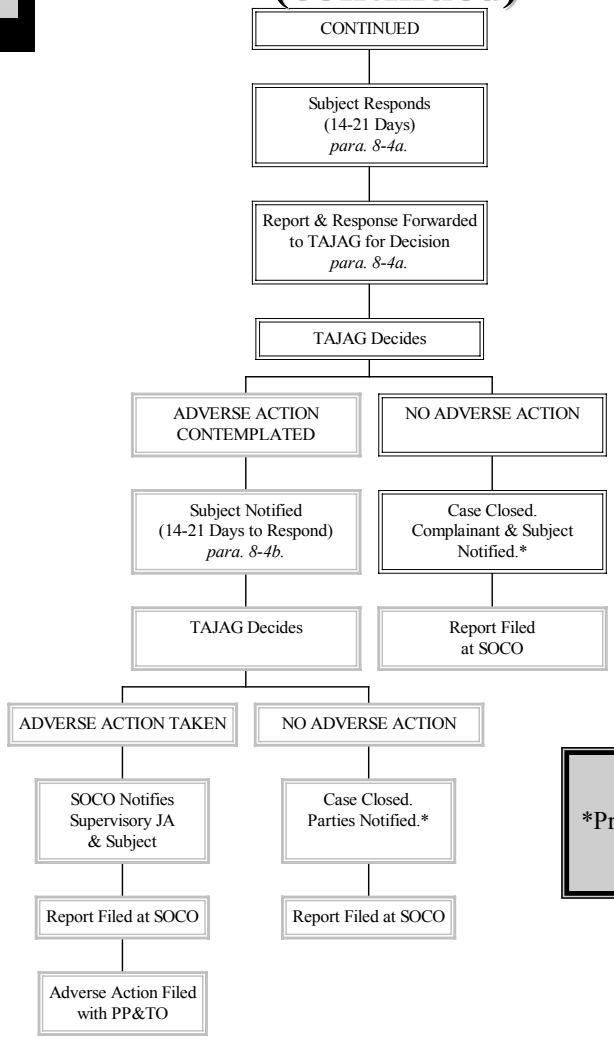


Notes

* - Privacy Act Applies

Chapter 8, AR 27-1, 3 Feb 1995

Mismanagement Inquiries (continued)



Notes

*Privacy Act Applies.

APPENDIX C

INFORMATION PAPER

DAJA-SC
30 August 2000

SUBJECT: Ethics and Mismanagement Case Activity

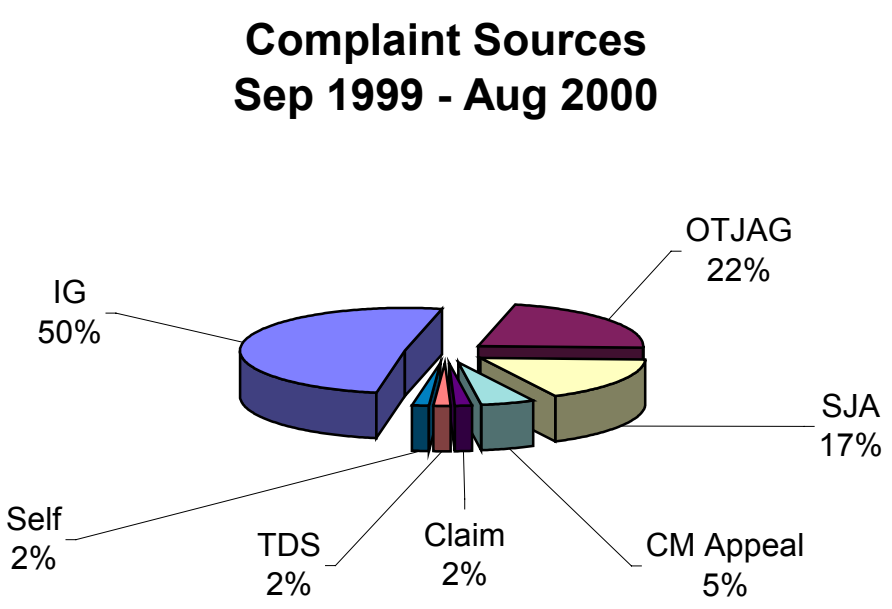
1. Purpose. To report the Army Standards of Conduct Office's (SOCO) case activity for September 1999 through August 2000.

2. Facts.

a. Under AR 27-1, chapters 7 and 8, SOCO's Professional Conduct Branch maintains records on allegations of JALS attorneys' unethical conduct and mismanagement.

b. During the past year, SOCO and supervisory JAs closed a total of 59 ethics and mismanagement cases. 30 complaints came from the IG, 16 complaints were made directly to OTJAG, 9 came from SJAs, 3 from appeals, 1 from a claim, 1 from TDS, and 1 was a self-report. Only eight cases were founded—seven ethics cases and one mismanagement case.

c.



IG	OTJAG	SJA	CM Appeal	Claim	TDS	Self	Total
30	13	10	3	1	1	1	59

c. Seven Founded Ethics Cases.

Three active duty JAs were sanctioned:

- *Departing primary duty as command's attorney (conflicts of interest communicating & advising alleged rapist and victim—both personal acquaintances of the command's attorney—; failing to provide Art. 31 warnings; breaching confidentiality)*—written reprimand.
- *Plagiarism (newspaper article*)—counseling by SJA.
- *Incompetence (separation agreement)*—counseling by SJA.

Four RC JAs were sanctioned at the state level:

- *Mismanaging client's trust*—state bar public reprimand (NG attorney self-report).
- *Neglecting and abandoning civilian clients, not refunding fees*—state bar 91-day suspension (Retired Reserve attorney—reported to AR-PERSCOM).
- *Sexually abusing, forcibly sodomizing, and enticing natural children*—thirteen years' imprisonment following state conviction (Reserve IMA attorney—TAJAG withdrew certification to practice law in the Army and permanently suspended the attorney from practicing before Courts-Martial & ACCA—notified AR-PERSCOM).
- *State Ass't AG's illegally sharing evidence of an undercover sting operation with attorney-companion*—state indictment & community service diversion (NG attorney).

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APPENDIX D
INFORMATION PAPER

DAJA-SC
24 May 2000

SUBJECT: Use and Release of Information in Professional Conduct Files

1. Purpose. To explain the policy on the use and release of professional conduct files.

2. Facts.

a. The Standards of Conduct Office (SOCO) maintains all preliminary screening inquiries (PSI) and related documents, including those in which the allegations were unfounded or in which only minor or technical violations were founded.

b. Currently, SOCO destroys professional conduct case files where no PSI was necessary after three years. SOCO destroys PSI files after ten years.

c. Shortened retention periods, pending approval of National Archives and Records Administration:

Five years. Destroy a founded file five years after the closed date, unless the subject either:

(1) remains in The Judge Advocate General Legal Service (JALS), or

(2) is the subject of another monitoring, open, or founded file within five years of the closed date.

Three years. Destroy an unfounded or inquiry-not-warranted (INW) file three years after the closed date.

One year after leaving JALS. Destroy a founded file one year after a JALS subject has left the JALS (except that a founded file will be kept for a minimum of five years after the closed date).

d. Supervising judge advocates must forward copies of all PSIs, including those where the allegations are determined to be unfounded, to SOCO. SOCO retains the files under 10 U.S.C. § 3037(c); R.C.M. 109, Manual for Courts-Martial, 1984; AR 690-300, Position Management; Chapter 7, AR 27-1, Judge Advocate Legal Service; and the Privacy Act systems notice published in the Federal Register at 65 FR 3215 (20 Jan 2000). Retention of these records serves the following purposes—

(1) To assist The Judge Advocate General (TJAG) in evaluating, managing, and regulating the delivery of legal services by personnel under his jurisdiction.

SUBJECT: Use and Release of Information in Professional Conduct Files

(2) To compile monthly and yearly statistics.

(3) To respond to inquiries concerning Army lawyers applying for employment or bar membership. Employers normally ask applicants if they have ever been investigated and, if so, by what agency. With the consent of the applicant, SOCO will related the circumstances of the inquiry to the potential employer or bar.

(4) To protect both the attorneys who were the subjects of allegations and the Army from allegations that the complaints were ignored or not investigated.

(5) To dispose of repetitive allegations.

e. TJAG or The Assistant Judge Advocate General (TAJAG) may file substantiated allegations and other information that is relevant to an individual's potential as an Army lawyer in the Career Management Information File (CMIF). Personnel managers may review information in the CMIF.

f. Individuals have the opportunity to rebut any proposed CMIF filing. This practice parallels the protection of the Privacy Act that allows individuals to amend their records.

g. SOCO may release professional conduct files to decision-makers within DoD. Examples include release of files pertaining to individuals pending promotion to colonel or general officer or facing involuntary separation for professional dereliction. SOCO will disclose on a need to know basis and comply with the Promotion Integrity Act and Privacy Act.

h. Normally, SOCO will not release professional conduct files outside DoD. SOCO may release files pertaining to serious professional misconduct to civilian licensing authorities.

i. These policies reflect a careful balance between individual privacy and use of relevant information in accord with law and regulations.

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APPENDIX E

INFORMATION PAPER

DAJA-SC
24 May 2000

SUBJECT: Hot Topics

1. Purpose. To report hot topics affecting JAs.

2. Facts.

a. *Mandatory Appointments in South Carolina.* Effective 1 July 2000, South Carolina Rule 608 requires all in-state South Carolina attorneys to accept appointments to serve as counsel or guardians ad litem for indigent persons in the circuit and family courts. On 29 Aug 2000, SOCO learned that the Supreme Court of South Carolina has denied the requests for exemptions of in-state, U.S. Navy attorneys. Rule 608(d)(1)(A) exempts "Members who are prohibited by federal or state law from taking such appointments." The rule contains no blanket exemption for Army lawyers. JALS members must have written consent of TJAG before engaging in the private practice of law. The Anti-Deficiency Act and Joint Ethics Regulation (JER) establish conditions for using *official* time and resources. Stay tuned to JAGCNET <http://www.jagcnet.army.mil/Ethics-Prof>.

b. *Volunteerism.*

(1) Executive Order 12988 (5 February 1996) provides that "All Federal agencies should develop appropriate programs to encourage and facilitate PRO BONO legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline."

(2) In late 1995, the ABA approved a resolution urging state bars to admit military lawyers specially for the purpose of providing pro bono publico services in association with organized legal service programs. In February 1996, the General Counsel of the Department of Defense, circulated the resolution seeking the service TJAGs' comments. At the time, the General Counsel expressed reservations about military lawyers, not licensed in a particular state, providing services to clients not entitled to military legal assistance. MG Nardotti opposed "any effort to expand pro bono publico services by military lawyers (including during their 'off-duty time') beyond the limits of 10 USC 1044."

(3) In October 1997, another effort was initiated to establish a pro bono policy. PPTO prepared a draft proposal and with TJAG's concurrence circulated it for comment. The draft proposal encouraged judge advocates and civilian attorneys to provide pro bono legal and volunteer services. This effort did not result in any established policy.

SUBJECT: Hot Topics

(4) *Bottom Line.* TJAG permits pro bono work by judge advocates and civilian attorneys on a case by case basis. Attorneys must seek permission in writing to perform outside employment. (Page 56-57 of the JAGC Personnel Policies).

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Judge Advocate Officer Advanced Course
RESERVE COMPONENT MILITARY PERSONNEL LAW

Outline of instruction

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I. INTRODUCTION.

Commanders have a spectrum of administrative military personnel actions which they can use to motivate, improve, and rehabilitate soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit's mission. If soldiers fail to respond to motivation and rehabilitation, other administrative tools are available which commanders can use to take appropriate remedial or adverse action, or to separate soldiers from the Army.

This outline should be supplemented by reference to the applicable regulation, to appropriate local regulations and policies, and any guidance from senior commanders.

II. DUE PROCESS OF LAW - THE STARTING POINT.

A. The Constitution.

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.

2. Fifth Amendment Due Process—When a life, liberty, or property interest is at stake, it can only be taken with some due process. Civilian courts look at whether military administrative actions truly involve such interests, with mixed results.

B. Administrative Procedures and Military Regulations.

1. Federal courts will seldom reverse military personnel decisions, but are more willing to intervene when the military fails to follow its own regulations.

2. Courts usually expect to see "Minimum" due process: notice of allegations and an opportunity to be heard.

III. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).

A. Purpose.

1. A suspension of favorable personnel actions (or "flag") is an administrative hold placed on a soldier. It prevents most favorable personnel actions (promotion, awards, school attendance, payment of reenlistment bonuses, etc.). It remains in place only while the soldier's chain of command completes an investigation, determines whether or what adverse action to take against the soldier, and completes the adverse action.

2. A flag itself is not an adverse action, because it can be removed as easily as it can be initiated. But since it prevents virtually all favorable action on a soldier, it can have a very adverse effect on the soldier's career.

3. Properly administered, a flag has two (previously three) components:

   a. A SIDPERS (Standard Installation/Division Personnel System) transaction which codes a soldier's records in the Army's automated personnel database and prevents favorable personnel transactions.

   b. [Marking and physically segregating the soldier's Military Personnel Records Jacket (MPRJ) at the military personnel records center, to alert personnel clerks that the soldier was flagged, thus preventing manual favorable personnel transactions at the personnel service company. The elimination of the MPRJ will remove this safeguard and put more emphasis on unit-level management of personnel actions.]

   c. Battalion S1 (or equivalent) unit management of the flagging system, to keep unit leadership and unit personnel clerks aware of the flag, and lift it when appropriate.

B. Reference. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS), 30 Oct 87. I01, Apr 94.

C. Procedure.

1. Any commander (or general officer staff head) directs the flag.

2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits SIDPERS transaction.

3. Unit notifies soldier.

4. Flag types and effects:

a. Regular ("non-transferable") flags. Suspends Appointment, reappointment, reenlistment, extension, entry on active duty or active duty for training, reassignment, promotion or reevaluation for promotion, awards and decorations, attendance at civil or military schools, unqualified resignation or discharge, retirement, advance or excess leave, payment of enlistment or selective reenlistment bonus, assumption of command, family member travel to an overseas command and command sponsorship of family members overseas when sponsor is overseas.

b. APFT (Army Physical Fitness Test) failure ("transferable") flags. Promotion, reenlistment, and extension.

c. Weight control ("transferable") flags. Attendance at schools, promotions, assumption of command, awards and decorations, and reenlistment or extension. Message, DAPC-MSP, 011500Z MAR 88, subject: Suspension of Favorable Personnel Actions (FLAGS) - FLAG Conversion Message Number 3.

5. Unit or battalion manages SIDPERS C95 report, which lists all flagged soldiers.

6. Lift flag when appropriate.

D. Approval Authority. Any commander or general officer staff head.

E. Appeal. None.

F. Records. DA Form 268 maintained only so long as soldier is flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

IV. EXTRA TRAINING.

A. Purpose. An effective, nonpunitive corrective measure.

B. Reference. AR 600-20, para 4-6b.

C. Formal Procedure: None.

1. Any leader may order a soldier to train to overcome a deficiency.

a. Must be directly related to the deficiency.

b. Must be aimed at improving the soldier's performance.

2. Not punishment; must stop when deficiency is overcome.

D. Approval Authority. Any commander. An "inherent power of command." May be delegated.

E. Appeal. No specific procedure.

F. Records. None; *however*. . .

1. "Deficiencies *satisfactorily corrected* by means of training and instruction will be not noted in the official records of the soldier concerned." AR 600-20, para 4-6b(2) (emphasis added).

2. If the problem merits it, consider documenting with a counseling with a view towards separation. Destroy the counseling if the problem truly is cured; otherwise, proceed to separation.

Caution: Inappropriate extra training may expose the command to allegations of punishment without due process

V. REVOCATION OF PASS PRIVILEGES.

A. Purpose. Commanders should grant passes (defined as short, nonchargeable, authorized absences from post or place of duty during normal off-duty hours) to those soldiers whose performance of duty and conduct merits approval. If a soldier's performance of duty and conduct do not merit approval, do not approve a pass.

B. Reference. AR 600-8-10, chap 5, section XIV.

C. Procedure. No formal procedure. Regular passes usually do not require a DA Form 31 (although one may be used). If a soldier's pass privileges are revoked, the soldier's immediate commander or his or her representative should inform the soldier in writing. If DA Form 31 is used for regular passes, indicate disapproval on the form.

D. Approval Authority. Any commander.

E. Appeal. No special procedures.

F. Records. None required. Consider documenting with a counseling with a view towards separation.

G. Caution: Withholding of regular passes to extreme limits (i.e. to billets) may cause allegations of punishment without due process.

VI. COUNSELING WITH A VIEW TOWARDS SEPARATION.

A. Purpose. An administrative prerequisite to many administrative separations, counseling with a view towards separation serves as a "final warning" to a soldier to improve performance or face discharge. It also is an attempt by the Army to protect its investment in the soldier's recruiting and training costs. *Compare with* general counseling (AR 600-20, para 2-1e) (basic leadership tool used to assist soldiers in professional growth; not necessarily adverse).

B. Reference. AR 135-178, para 1-12.

C. Procedure.

1. ***May*** be used at any time. At least one recorded counseling is ***required*** as a prerequisite for these grounds for discharge under AR 135-178:

a. Involuntary separation due to parenthood, para 4-10.

b. Personality disorder, para 4-8a(4).

c. Entry level performance and conduct, chap 5.

d. Unsatisfactory performance, chap 6.

e. Minor disciplinary infractions or a pattern of misconduct, para 7-11a and 7-11b.

f. Failure of an ARNGUS soldier to meet body fat standards, para. 4-25

2. Any responsible person will advise the soldier of:

a. The reason for counseling.

b. The fact that separation may be initiated if behavior continues.

c. The type of discharge that could result from possible separation.

d. The effect of each type.

D. Give the soldier a reasonable opportunity to overcome the deficiencies.

E. Approval Authority. None. Counseling may be conducted by "a responsible person." AR 135-178, para 1-12b.

F. Appeal. None.

G. Records.

1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.

2. DA Form 4856 (General Counseling Form) normally should be used for this purpose.

3. Filed in unit personnel files - not in MPRJ (Military Personnel Records Jacket) or OMPF (Official Military Personnel File). No permanent, long-term record, unless incorporated into separation action. Maintain until soldier departs unit; destroy one year later IAW MARKS.

4. Commander's Notebook. Beware of Freedom of Information Act access. Generally, no right to access under FOIA if:

   a. Prepared voluntarily.

   b. Used only as a memory aid by preparer.

5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself. Solution: have legal clerk/legal center prepare DA Form 4856 to accompany each Art 15.

VII. REHABILITATIVE TRANSFER.

1. Basic Rule: A soldier must be reassigned to a new unit, if available in commuting distance, for two months at least once before the following types of separation action can be initiated under AR 135-178:

   a. Involuntary separation due to parenthood, para 4-10.

   b. Personality disorder, para 4-8a(4).

   c. Entry level performance and conduct, chap 5.

   d. Unsatisfactory performance, chap 6.

   e. Minor disciplinary infractions or a pattern of misconduct, para 7-11a and 7-11b.

   f. Failure of an ARNGUS soldier to meet body fat standards, para. 4-25

2. May waive requirement for rehabilitative transfer. If no other unit available, "proper alternate rehabilitation measures" should be taken.

VIII. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.

A. Purpose.

1. Documents misconduct or poor performance in official files.

2. Leadership tool or career threatening adverse action, depending on filing decision.

3. Be wary of information originating *solely* from intelligence and personnel security files: this information requires special handling (*See,* e.g., AR 600-37, para. 4-6; AR 380-67, ch. 8).

B. References.

1. AR 600-37.

2. AR 25-400-2, The Modern Army Recordkeeping System (MARKS), para B-80 and Table B-91, 26 Feb 93 (regarding MARKS number 640a).

C. Procedure.

1. Drafting and initiating the letter.

a. For enlisted soldiers. Initiated by the person's immediate commander, any higher commander in the chain of command, a supervisor, school commandant, general officer, or GCMCA.

b. For officers. As above, less “supervisor,” plus any rating official.

2. Contents.

a. Reason for reprimand.

b. The statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15. AR 27-10, para 3-3.

c. If the reprimand is intended for filing in the OMPF, either the reprimand or the document referring the reprimand should indicate where the drafter desires to file the reprimand.

COMPANY A
16TH SIGNAL BATTALION, 29TH SIGNAL GROUP
FORT ARLINGTON, VIRGINIA 11111

ABCD-EF-B 6 June 1996

MEMORANDUM FOR PV2 Kathleen B. Nash, Company A, 16th Signal Battalion, 29th Signal Group, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 22, 24, 26, and 31 May 1996, you were absent without authority from your appointed place of duty. You failed to report to the unit supply room at Company A, 16th Signal Battalion, 29th Signal Group, at the appointed time, 0800, to begin your duties on those dates. Further you were formally counseled on a number of prior occasions and orally admonished for similar offenses. You are hereby reprimanded for your conduct on 22, 24, 26, and 31 May.

2. You are expected to be at your appointed place of duty at the appointed time unless excused by proper authority. Your persistent tardiness will not be tolerated in this unit.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, article 15.

4. I intend to file this written reprimand in your unit personnel file. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider your response.

HARD CHARGER
Captain, SC
Commanding

Figure 3

3. Notice and rebuttal by the soldier. Paras 3-2 & 3-6.

a. Notice (a copy of the reprimand).

b. Rebuttal (by endorsement).

c. No right to counsel in regulation, but counsel routinely made available.

D. Appeal. Depends on the filing of the letter.

1. Local filing. No formal appeal process.

2. OMPF filing. Appealed to DA Suitability Evaluation Board (DASEB).

a. Removal. Grounds: document is untrue or unjust. Normally, consideration of these appeals is restricted to SSG and above.

b. Transfer from P-fiche to R-fiche. Grounds: untrue, unjust, or that the reprimand has served its intended purpose. Again, appeals normally restricted to SSG and above. If basis is that reprimand has served its intended purpose, soldier must wait at least one year since imposition of the reprimand and have received at least one OER or NCOER.

E. Records. Memorandum maintained in local unit files until 12 months after a soldier's departure, or permanently on the OMPF.

IX. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT.

A. BARS TO REENLISTMENT. AR 140-111, Section VII (for USAR soldiers) NGR 600-200 (for ARNG soldiers).

1. A bar to reenlistment is not a punitive action. It is designed to put the soldier on notice that he or she:

   a. Is not a candidate for reenlistment, and

   b. May be separated if the circumstances that gave rise to the bar are not overcome.

2. When may a bar be initiated?

   a. Bars normally are not imposed when:

      (1) A soldier has been assigned to the unit for less than 90 days, or

      (2) During the last 90 days (30 days for AGRs) before the soldier is discharged, transferred from the command or released from active duty.

   b. Rules related to retirement eligibility. If a bar is initiated against a soldier who at least 18 but less than 20 years qualifying years at ETS, and no action has been taken to extend the soldier to retirement eligibility, final approval must come from OCAR.

3. Who may initiate a bar?

   a. Any commander in the soldier's chain of command.

   b. Any commissioned officer in the soldier's chain of command on a headquarters staff, agency or activity for soldiers he/she has supervisory responsibility.

   c. The chief of an enlisted management division under ARPERSCOM.

4. What are the categories of soldiers that should be considered for a bar?

a. Untrainable soldiers. Individuals who lack the ability, aptitudes or motivation to qualify for an MOS.

b. Unsuitable soldiers.

(1) Single soldiers/in-service couples with dependents who fail to put a family care plan in place.

(2) Persons who exhibit interests or habits detrimental to the maintenance of good order and discipline.

(3) Paragraph 1-30c, AR 140-111 contains a long, but not exclusive, list of conditions that are adequate basis for initiation of bar.

c. AGR soldiers who are not suited for further AGR service but are qualified for continued Reserve service may be barred from AGR service only.

5. Who may approve a bar?

a. Soldier with less than 10 years of service at ETS: first commander in rank of LTC or SPCMCA.

b. Soldiers with 10 to 18 years; those with more than 20 years of qualifying service; those with 18 to 20 years when action has to taken to extend the soldier to qualify for retirement: first general officer or the GCMCA.

c. Soldiers with 18 to 20 years, when not extended to achieve retirement eligibility: OCAR.

6. What are procedural rights of soldier?

a. Notice must be provided by officer initiating the bar.

b. Soldier has 30 days to respond. AGR soldiers have 7 days.

c. May request voluntarily REFRAD or discharge.

d. Appeal the bar.

7. When must the bar be reviewed?

a. At least 6 months after approval and each 6 months thereafter.

b. At least 30 days before the soldier's scheduled departure from the unit, REFRAD or discharge from USAR.

8. Who must act on appeals?

a. Soldiers with less than 10 years the first general officer or GCMCA.

b. Soldiers with more than 10 years --OCAR.

c. If OCAR approved the bar no appeal is authorized.

B. USAR AGR Qualitative Management Program (QMP)

1. Enhance the quality of the AGR enlisted force by screening out the "nonprogressive and nonproductive" soldiers.

2. QMP HQDA imposed Bar to Reenlistment removes soldier from the AGR program, but does not preclude their reenlistment in another USAR status (TPU or IRR).

3. Screening done at PERSCOM (USAR) Command Sergeant Major and Sergeant Major selection boards and PERSCOM (USAR) AGR Enlisted Promotion Boards for Sergeants and above with 11 or more years of total military service (AC/RC). Based upon board review of the soldier's OMPF Performance fiche, and board submissions such as official photograph.

4. QMP bar to reenlistment is effective on the date of the bar to reenlist memorandum from the Commander, ARPERSCOM to the individual soldier.

5. The first LTC (or above) in the effected AGR soldiers chain of command is sent the memorandum and supporting documents, and is required to personally counsel the soldier, using a DA Form 4856 (General Counseling Statement). The counseling officer must have the soldier fill out a Statement of Options (DA Form 8029-R). The supervisor must explain the impact of the QMP bar to reenlistment, discharge options, and appellate rights.

6. The soldier or the commander may appeal the QMP bar to Commander, ARPERSCOM, on the grounds that the soldier has overcome the deficiencies listed as the basis for the bar action, and/or material error in the soldier's records that were reviewed by the selection board. An appeal stays the REFRAD/discharge process, until the appeal has been finalized or the soldier elects REFRAD or discharge.

   a. Soldier has 90 days from date of receipt of the Statement of Options (DA Form 8029-R) to submit appeal.

   b. Commander (LTC or above) can also initiate appeal. Also has 90 days from receipt of the QMP memorandum, which is processed through the chain of command to the first General Officer, who sends it to the Commander, ARPERSCOM.

c. The Commander, ARPERSCOM, sends all QMP appeals to a PERSCOM (USAR) Standby Advisory Board (STAB), in conjunction with the next scheduled USAR promotion board, and the STAB reviews the basis for the QMP action and the appellate submissions de novo. The STAB appeal decisions are provided to the Commander, ARPERSCOM, who notifies the AGR soldier's commander (LTC or above).

7. The AGR soldier's commander is required to initiate involuntary discharge or REFRAD proceedings per AR 635-200 NLT 60 days following the date the soldier is notified of the QMP bar, unless the soldier elects to retire, appeal or voluntary REFRAD or discharge. If a soldier appeals, the 60 day limit is tolled until the date of appeal denial notification. The separation authority need not separate the soldier.

C. A decision by a separation authority to retain a soldier, or recommendation by an administrative separation board to retain a soldier, does **not** require the removal of a QMP bar to reenlistment.

X. THE ARMY WEIGHT CONTROL PROGRAM.

A. Purpose. To ensure that all soldiers:

1. Are able to meet the physical demands of their duties under combat conditions.

2. Present a trim military appearance at all times.

B. Reference.

1. AR 600-9, The Army Weight Control Program, 1 Sep 86 (as published in All Ranks Personnel Update 15, 1 Oct 90). I01, 4 Mar 94 (exp 4 Mar 96). New version of AR 600-9 pending. Expected publication was Summer 1995.

2. National Academy of Sciences Institute of Medicine, Body Composition and Physical Performance: Applications for the Military Services (Bernadette M. Marriott and Judith Grumstrup-Scott eds., 1992) (study commissioned by the US Army Medical Research and Development Command which criticizes the Army's weight control program).

C. Procedure.

1. Commanders and supervisors will monitor soldiers to ensure that they maintain proper weight. At minimum, soldiers will be weighed when they take the APFT or at least every 6 months. Commander may direct weight check if soldier presents an unmilitary appearance.

2. Soldiers exceeding the screening table weight will be tested for body fat (tape measure).

3. Overweight personnel will be flagged IAW AR 600-8-2. They are:

a. Nonpromotable.

b. Will not be assigned to command positions.

c. not authorized to attend professional military schooling. All soldiers scheduled to attend professional military schooling will be screened before departure. If the soldier exceeds the screening table weight, he will not be allowed to depart unless his commander determines that he meets body fat composition standards

d. Will not be allowed to reenlistment or extend unless:

(1) The GCMCA approves an extension of a soldier who either has a temporary medical condition that precludes weight loss or is pregnant and otherwise qualified for reenlistment.

(2) The GCMCA approves an extension of a soldier who has completed a minimum of 18 years active federal service. Application for retirement will be submitted at the time the extension is approved.

4. Will be enrolled in a weight control program.

a. Overweight soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to reenlistment or will have separation proceedings initiated against them. Satisfactory progress is 3-8 pounds per month. Commander must notify the soldier in writing that separation is being considered and consider the soldier's response. If response is not satisfactory, initiate separation. Separation for USAR TPU and ARNGUS soldiers is effected UP AR 135-178, chap 14. Results in an honorable discharge.

b. Overweight soldiers who successfully complete a weight control program, but within 12 months after removal from the program again exceed body fat standards, will be processed for separation.

D. Approval Authority.

1. Authority to place a soldier in the weight control program: company-level commander.

2. Separation or bar authority same as other separations for USAR TPU and ARNG enlisted soldiers. For USAR AGRS:

a. LTC-level commander if soldier has less than six years active and reserve service (notification procedure used).

b. SPCMCA if soldier has six or more years service (administrative board procedure used).

E. Appeal. No specific procedure.

XI. DRUNK OR DRUGGED DRIVING - ADMINISTRATIVE SANCTIONS.

A. Purpose. Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not.

B. Reference.

1. AR 190-5 (paragraph citations in this section are to AR 190-5).

2. AR 600-85.

C. Applicability:

1. AR 190-5 applies to AGR soldiers, and Reserve soldiers apprehended for DUI while in a duty status. Driving privilege suspension/revocation on Army installations applies to all persons, military or not. States need not apply AR 190-5 (traffic regulation) on State installations.

2. AR 600-85, Chapter 9 lays out procedures applicable to soldiers on duty for 30 days or more.

D. Procedures.

1. Withdrawal of installation driving privileges. AR 190-5, para 2-5.

a. **Suspension** is immediate pending resolution of drunk driving charges brought in the following circumstances:

(1) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs.

(2) Operating a motor vehicle with a blood alcohol content (BAC) of 0.10% by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the installation.

(3) Operating a motor vehicle with a BAC of at least 0.05% by volume but less than 0.10% blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated, if the jurisdiction imposes a suspension solely on the basis of the BAC.

(4) On an arrest report or other official documentation of the circumstances of an apprehension for intoxicated driving.

b. **Limited hearing**. Para 2-6. A person whose driving privileges are suspended has ten days in which to request a hearing. If requested, must be conducted by the installation commander or delegate within ten days. A decision must issue within ten duty days of the hearing. Issues addressed:

(1) Did the law enforcement official have reasonable grounds to believe person was DWI or in actual physical control of motor vehicle while under the influence of alcohol or other drugs?

(2) Was the apprehension or citation lawful?

(3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?

(4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine; fail to complete the test; or complete the test and the result was .10% or higher BAC, or showed results indicating the presence of other drugs for an on-post apprehension or in violation of state laws for an off-post apprehension?

(5) Was the testing method used valid and reliable and were the results accurately evaluated?

c. **Revocation** for period of one year. Para 2-5.

(1) Lawfully apprehended for DWI and refused to submit to or to complete a test to measure the alcohol content in the blood, or detect the presence of any other drug.

(2) Conviction, NJP, or military or civilian administrative action resulted in suspension or revocation of a driver's license for DWI.

(3) Compute from date of original suspension, exclusive of periods when full driving privileges restored pending resolution of charges.

d. **Restricted privileges**. Para 2-11.

(1) May be requested at any time.

(2) GCMCA acts on all DWI/DUI requests for restricted privileges.

2. Referral to ADAPCP. Para 2-9.

   a. Mandatory (within 10 days).

   b. Enrollment is discretionary.

3. General Officer Written Reprimand. Para 2-7. (See Figure 5, p. 3-31).

   a. Mandatory for active duty Army commissioned and warrant officers and NCOs, including corporals. OPTIONAL otherwise.

   b. General officer will sign.

   c. Based on:

      (1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation.

      (2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs.

      (3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.10% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws, irrespective of other charges.

(4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully requested chemical tests reflect the presence of illegal drugs.

d. Filing is IAW AR 600-37.

(1) Decide to not file.

(2) Unit Personnel File.

(3) OMPF.

4. Consider other administrative actions. Para 2-7c.

a. Administrative reduction per AR 600-200.

b. Bar to reenlistment.

c. Administrative discharge.

Department of the Army
52d Infantry Division (Mechanized) and Fort Arlington
Fort Arlington, Virginia 11111-1111

ABCD-EF-G 15 June 1996

MEMORANDUM FOR 1LT Gideon Pillow, Company A, 2d Battalion, 11th Infantry,
Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 1 June 1996 you were apprehended at approximately 2200 while driving your privately owned vehicle on Fort Arlington. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 June 1996, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court on Fort Arlington. I hereby reprimand you for your conduct.

2. Your conduct on 1 June 1996 demonstrates a serious disregard for your own safety and that of others. It raises grave doubts as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence that the President of the United States has reposed in you as a commissioned officer. I charge you to conduct yourself in a manner that is worthy of an officer in the United States Army.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your Official Military Personnel File. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response, if any, should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider any response you may make.

RICHARD J. HALFTRACK
Major General, USA
Commanding

Figure 5

XII. USAR ENLISTED REDUCTION IN GRADE.

A. Purpose. Reserve soldiers can be administratively reduced in grade for, among other reasons, civil convictions, inefficiency, or unsatisfactory participation.

1. Civil conviction. A soldier convicted by a civil court (domestic or foreign) or adjudged a juvenile offender by a civil court (domestic or foreign) will be reduced or considered for reduction. AR 140-158, para 7-9.

2. Inefficiency. Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include an act or conduct that clearly shows that the soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. Commanders may consider misconduct, including conviction by a civil court, as bearing on efficiency. A soldier may be reduced under this authority for long-standing unpaid personal debts that he or she has not made a reasonable effort to pay. AR 140-158, para 67-10.

B. Reference AR 140-158, Chapter 7.

C. Authority to Reduce.

1. PV2, PFC, and SPC/CPL - Company, troop, battery, and separate detachment commanders.

2. SGT and SSG - Field grade commander of any organization authorized a LTC or higher grade commander.

3. SFC, MSG/1SG, and SGM/CSM - Commanders of organizations authorized a COL or higher grade commander.

D. Procedure.

1. Civil Court Conviction (domestic or foreign, or adjudication as a juvenile offender). AR 140-158, table 7-1.

   a. Will be reduced to PVT, E-1, if sentence includes death or confinement for one year or more (not suspended). Board action not required.

   b. Will be considered for reduction (one or more grades) if sentenced to confinement for more than 30 days but less than one year (not suspended) or confinement for one year or more (suspended). Board action required for SGT or above.

   c. May be considered for reduction - all other offenses. Board action required for SGT or above.

2. Inefficiency. Para 7-10.

   a. Cannot perform duties and responsibilities of the grade and MOS. Inefficiency includes long standing unpaid debts that the soldier has not made a reasonable effort to pay.

   b. Document inefficiency. Should establish a pattern of inefficiency rather than identify a specific incident. A single act of misconduct is <u>not</u> a sufficient basis for reduction for inefficiency.

   c. Soldier must have been in unit at least 90 days.

   d. May reduce only one grade.

3. Soldier gets notice and opportunity to respond.

   a. SPC/CPL and below - no board.

b. SGT and above - reduction board is usually required (exceptions noted above). Board appearance may be declined in writing, which will be considered acceptance of the reduction board's action.

4. Reduction Boards. Paras 7-6 to 7-8.

a. Must have both officers and enlisted members.

b. At least three voting members.

c. Members impartial.

d. Recorder without vote appointed.

e. Board has officer or enlisted soldier or both of same sex as soldier being considered for reduction.

f. For inefficiency cases only, one board member will be familiar with soldier's MOS or field of specialization.

g. If soldier is minority and requests minority member on board, generally must provide minority member.

E. Appeal.

1. SSG and below - next higher authority.

2. SFC and above - next higher authority who is a general officer.

F. Records. Filed in OMPF.

XIII. RELIEF FOR CAUSE/RETIREMENT GRADE DETERMINATIONS

A. RELIEF FOR CAUSE. AR 600-20, para 2-15; AR 135-18, Table 2-6, Rule I; AR 635-105, para. 5-18, and AR 623-205.

1. Serious action taken against a commanding officer or senior non-commissioned officer for failure in the performance of their duty. Duty performance is defined in AR 623-105, para 5-18, as the "completion of assigned tasks in a competent manner and compliance at all times with the accepted professional officer standard shown in Part IV, DA Form 67-8. These standards apply to conduct both on and off duty."

2. Relief is generally at the discretion of the relieving commander, subject to requirements of prior formal written counseling, if appropriate to the circumstances (substandard performance). Relief action against commanders may not be taken until the relieving commander has received written approval from the first general officer in the chain of command of the subject officer, unless the relieving official is a general officer, whereby no further approval would be required.

3. An officer or noncommissioned officer evaluation report will be done in all cases where a soldier is relieved for cause, IAW AR 623-105 (officers) or AR 623-205 (enlisted).

4. If relief for cause is based upon the findings and recommendations of an informal AR 15-6 investigation, the referral procedures of that regulation must be complied with prior to initiating any relief for cause action, even if the relief evaluation report is referred to the subject. A relieving commander may temporarily suspend from assigned duties an officer or NCO pending completion of AR 15-6 procedural safeguards (rebuttal).

B. REQUEST FOR ARMY GRADE DETERMINATION REVIEW BOARD (AGDRB) of SOLDIER/OFFICER SEPARATED FOR SERIOUS MISCONDUCT. AR 15-80, Army Grade Determination Review Board (28 October 1986) and AR 135-180, Qualifying Service for Retired Pay Nonregular Service, (22 Aug. 1974).

1. Army National Guard and Army Reserve officers and soldiers who are administrative discharged for serious misconduct, who qualify for Reserve retirement pay, receive their full retirement pay at their last highest pay grade.

2. Exception: Enlisted soldiers who receive an OTH discharge in an administrative separation for serious misconduct are reduced to Private E-1, which impacts upon their retirement pay. See AR 140-158, para. 7-12a, NGR 600-200, para., 6-44c., and AR 135-178, para. 2-20. No such reduction for officers who receive OTH for serious misconduct.

3. The AGDRB may reduce the final retirement grade of an RC officer who was found to have served unsatisfactorily in their last pay grade. AR 15-80, para. 7c. Such findings can include the record of an administrative separation board where findings of illegal drug use or other serious misconduct were made or GOMOR.

CHAPTER 33

ARMY OFFICER AND NONCOMMISSIONED OFFICER EVALUATION REPORT APPEALS

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APPENDIX A. Guide for Preparation of Evaluation Report Appeals (Officer).

OUTLINE OF INSTRUCTION

I. REFERENCES.

A. AR 623-1, Academic Evaluation Reporting System, 31 Mar 92.

B. AR 623-105, Officer Evaluation Reporting System, 31 Mar 92.

C. AR 623-105, Officer Evaluation Reporting System, 1 Oct 97 w/Change 1, 1 April 1998. Paragraph references to this regulation throughout this outline will be made to "NEW 623-105." The change referenced here contained no substantive changes. It merely clarified the "phased" applicability of the new OER system for Reserve Components.

Remember that the applicable regulation for reports and appeals of those reports is the regulation in effect *at the time the report is issued*. Thus, you must be familiar with BOTH the old and new systems and maintain copies of the old regulation.

D. AR 623-205, Noncommissioned Officer Evaluation Reporting 31 Mar 92.

E. Internet Resources:

1. PERSCOM On-line: http://www-perscom.army.mil

2. DA Publications Home Page: http://www-usappc.hoffman.army.mil

II. INTRODUCTION – THE NEW OER SYSTEM.

III. PURPOSE OF THE APPEAL PROCESS. (AR 623-105, Para. 9-1; NEW AR 623-105, para. 6-2; AR 623-205, Para. 4-1.)

A. Protects Army's interest.

B. Ensures fairness to the rated soldier.

C. Ensures fairness to rating official.

IV. EXCEPTIONAL PROCESSING PROCEDURES.

A. Referred reports (officers only) (AR 623-105, para. 4-27; NEW AR 623-105, paras. 3-32 & 3-33)

1. Reports containing negative comments or ratings must be referred to rated officer for acknowledgment and comment.

2. Rated officer's comments are attached to the report but do not constitute an appeal.

3. NEW AR 623-105 has some fairly specific criteria for referral in para. 3-32.

B. Relief for cause reports. (AR 623-105, para. 5-18; NEW 623-105, para. 3-50; AR 623-205, para. 2-10.)

C. Commander's inquiry. (AR 623-105, paras. 3-15 and 5-30; NEW 623-105, paras. 6-3 & 6-4; AR 623-205, para. 2-15.)

1. Commanders are required to look into alleged errors, injustices, and illegalities.

2. Not a prerequisite for appeal.

3. Informal procedures are used.

4. Results can be forwarded to HQDA and may become part of the OMPF.

D. Modifications to Submitted Reports. (AR 623-105, Chapter 5, Section V; NEW AR 623-105, Chapter 3, Section X.)

1. Basic rule - OERs and NCO-ERs received by HQDA are presumed complete and accurate.

2. Requests to withdraw or modify report will not be granted unless new or unverified information would change rating.

   a. If new information is favorable, follow regular appeal procedures.

   b. If new information is derogatory, prepare an addendum, refer to rated officer, and submit.

V. EVALUATION REPORT APPEALS (AR 623-105, Chapter 9; NEW AR 623-105, Chapter 6; AR 623-205, Chapter 4.)

A. Types of Appeals.

1. Administrative (AR 623-105, para. 9-2h.; NEW AR 623-105, paras. 6-6h.; AR 623-205, para. 4-2h.)

   a. Errors in parts I, II, IIIb, and Va of DA Form 67-8 (OER); parts I, II, IIIb, c, d, and IVc of DA Form 67-9 (NEW OER); parts I and II of DA Form 2166-7 (NCOER); or similar items on other forms.

   b. Includes such things as deviation from the established rating chain, insufficient period of observation by the rating officials, and errors in the period covered.

2. Substantive (AR 623-105, para. 9-2i.; AR 623-205, para. 4-2i.)

   a. Bias or prejudice

   b. Inaccurate or Unjust Ratings

   c. Any other matter that is not administrative.

   d. NOTE: APFT Score & Height weight data are SUBSTANTIVE for NCOERs!

3. Combined Administrative & Substantive.

B. Potential Bases for the Appeal.

1. Deviation from regulation.

a. Report refers to conduct outside rating period. (AR 623-105, para. 4-17; NEW 623-105, paras. 3-24; AR 623-205, para. 6-4)

b. Comments are not limited to the forms. Report cannot contain continuation sheets. (AR 623-105, para. 4-18; NEW 623-105, paras. 3-25; *see* AR 623-205, para. 6-8)

c. Narrative gimmicks are contained in the report. (AR 623-105, para. 4-19; NEW 623-105, paras. 3-26; AR 623-205, para. 6-7d.)

d. Reference is made to unproven derogatory information. (AR 623-105, para. 4-21; AR 623-205, para. 6-5)

e. A rating official has been required to change a report. (AR 623-105, para. 4-20; NEW 623-105, paras. 3-27; AR 623-205, *see* para. 3-10c.(1)(c))

f. Inappropriate comments have been included. (AR 623-105, paras. 4-21.1 & 4-21.2; NEW 623-105, paras. 3-28 – 3-31; AR 623-205, para. 2-17, 6-6, 6-13, 6-14)

g. Adverse report not referred to officer for comment. (officers only) (AR 623-105, para. 4-27; NEW 623-105, paras. 3-32)

2. Error in the senior rater profile. (*See* AR 623-105, para. 4-16; NEW AR 623-105, para 3-22.)

3. Failure to counsel or to comply with support form procedures. (*See* AR 623-105, paras. 4-4 - 4-8.1; NEW 623-105, Chapter 3, Sections II & III; AR 623-205, para. 6-2)

4. Mistake made in preparing or typing the report.

5. Bias or prejudice on the part of a rating official.

C. Who may File the Appeal? (AR 623-105, para. 9-2,; NEW 623-105, para. 6-6c.; AR 623-205, para. 4-2.)

1. The rated officer;

2. Other interested parties in certain offices and agencies (e.g., Personnel Command (PERSCOM), Office of Deputy Chief of Staff for Personnel (ODCSPER), or TJAG).

3. Other interested individuals must contact one of the above.

D. Standard of Evidence and Burden of Proof. (AR 623-105, para. 9-7; NEW AR 623-105, para. 6-10; AR 623-205, para. 4-7.)

1. OER/NCO-ERs received at HQDA are presumed administratively correct, prepared by proper officials, and accurate.

2. Appellants have the burden of proving by clear and convincing evidence that:

a. Presumption of regularity should not apply.

b. Action is warranted to correct a material error, inaccuracy, or injustice.

3. Evidence must be competent, material, and relevant to the claim.

4. Examples of insufficient evidence: (Not in NEW AR 623-105).

a. Rated officer's statement.

b. Statement from rater alleging error in judgment, administrative oversight, or typographical error.

c. Statements or documents showing outstanding performance during unrelated periods.

5. NEW 623-105 prohibits appeals based on improper sequencing of OERs for new senior rater profiling. (NEW AR 623-105, para. 6-10f.)

E. When Must the Appeal be Filed? (AR 623-105, para. 9-3; NEW 623-105, para. 6-7; AR 623-205, para. 4-3)

1. Administrative appeals: No prescribed time limit.

2. Substantive appeals:

a. DA Form 67-8: Must be filed within 5 years of the completion date of the report absent exceptional circumstances.

b. DA Form 67-9: Must be filed within 3 years of the completion date of the report absent exceptional circumstances.

F. Preparing the Appeal.

1. Military memorandum format. (AR 623-105, Appendix N; NEW AR 623-105, Appendix F & Figures in Chapter 6; AR 623-205, Appendix F.)

a. Include name, rank, branch, SSN, period of report, and priority of the appeal.

b. Prepare a concise explanation of defect and requested corrective action. (Attach supplemental statement if lengthy).

2. Attach supporting documentation, statements, and the contested OER/NCO-ER.

a. Statements must be the originals.

b. Other documents must be certified copies.

3. JAG offices will assist soldiers who request advice about preparing and submitting appeals. (TJAG Policy Letter 84-2 and AR 27-3).

4. Practical advice. (AR 623-105, Appendix N; NEW 623-105, para. 6-12 & Appendix F; AR 623-205, Appendix F.)

G. Processing the Appeal.

1. Appeals based on administrative error.

a. Adjudicated by Appeals and Corrections Branch, Personnel Command (PERSCOM) for OERs (AR 623-105, para. 9-2; NEW AR 623-105, para. 6-6h.) and by NCO Evaluation Report Appeals Section (Active Army), U.S. Army Records and Evaluation Center (USAREC) for NCO-ERs (AR 623-205, para. 4-2).

b. Errors in parts verified by rated officer accepted only under unusual circumstances.

c. Correction of minor errors will not invalidate an entire OER or NCO-ER.

d. Prove errors with certified copies of appropriate documents.

2. Appeals based on substantive error. (AR 623-105, para. 9-5; NEW AR 623-105, paras. 6-6i. & 6-11; AR 623-205, para. 4-9)

a. Screened by PERSCOM (OERs) or USAREC (NCO-ERs).

b. OERs adjudicated by DCSPER Officer Special Review Board (OSRB) (AR 623-105, para. 9-2; NEW 623-105, para. 6-11). NCO-ERs adjudicated by DCSPER Enlisted Special Review Board (ESRB) (AR 623-205, para. 4-2).

(1) Composed of at least three senior officers for OER appeals and three senior noncommissioned officers for NCO-ER appeals.

(2) Senior to the appellant and one with similar background if possible.

(3) Board recommendation based on majority vote.

c. DCSPER board procedures. (AR 623-105, para. 9-8; NEW AR 623-105, para. 6-11b.; AR 623-205, para. 4-8.)

(1) Administrative, nonadversarial.

(2) Not bound by rules of evidence.

(3) No right to appear in person.

(4) May contact interested parties directly.

d. Evidence required to support substantive error.

(1) Original typed statements from third parties, rating officials, and knowledgeable observers.

(2) Other documents from official sources.

H. Resolution of the Appeal. (AR 623-105, para. 9-5; NEW 623-105, para. 6-8; AR 623-205, para. 4-5.)

1. Priority system for resolving appeals. (AR 623-105, para 9-6; NEW AR 623-105, para. 6-9; AR 623-205, para. 4-6.)

a. First Priority.

(1) Officers and NCOs twice nonselected for promotion with mandatory release date within six months.

(2) Certain officers and NCOs selected for involuntary discharge within six months.

(3) Officers identified for referral within six months by a DA Active Duty Board or a AGR continuation board.

(4) Officers recommended for elimination board including officers denied Voluntary Indefinite (VI) status.

b. Second Priority.

(1) Officers and NCOs once nonselected for promotion.

(2) Officers pending promotion list removal

c. Third Priority: all others.

2. An appeal may be approved in whole or in part.

a. The relief may be different than that requested.

b. Board will not usually worsen appellant's position.

3. If the appeal is approved:

a. Document is either corrected or deleted.

b. Memo is placed in OMPF performance fiche.

c. If appellant is a promotion passover, OSRB/ESRB determines whether to grant a relook board.

4. If the appeal is denied:

   a. Notification letter is sent to the appellant.

   b. Copy of letter is placed in OMPF performance fiche.

   c. Appeal correspondence placed in restricted OMPF.

5. A case summary of board's consideration is available to the appellant.

I. Reconsideration of Appeals.

1. No provisions for requesting reconsideration for OER appeals.

2. Appellants may submit a new appeal to the OSRB/ESRB based on new information or additional evidence. (AR 623-105, para. 9-5; NEW AR 623-105, para. 6-8f; AR 623-205, para. 4-5)

3. Appellants may appeal Board's decision to the Army Board for Correction of Military Records (ABCMR).

VI. OTHER REMEDIES (IF THE APPEAL FAILS)

A. The Army Board For Correction Of Military Records (ABCMR).

1. ABCMR may correct any military record when necessary to correct an error or remove an injustice. (10 U.S.C. § 1552; AR 15-185).

2. Consult AR 15-185 for procedures.

3. ABCMR has broad power to recommend corrective action and fashion an appropriate remedy.

   a. Claimants must specifically request monetary settlements.

b. The Secretary of the Army approves ABCMR recommendations on OER/NCO-ER appeals.

B. Judicial Review.

1. Jurisdiction over OER/NCO-ER Appeals.

a. U.S. Court of Federal Claims has jurisdiction over money claims founded upon the Constitution, any Act of Congress, or any regulation of an Executive Department. (28 U.S.C. § 1491).

b. U.S. District Courts have concurrent jurisdiction of money claims under $10,000. (28 U.S.C. §1346).

2. Exhaustion of administrative remedies.

a. General Rule: "'A party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.'" Howell v. Immigration & Naturalization Service, 72 F.3d 288, 291 (2d Cir. 1995) (Howell contains a good summary of the exhaustion requirement.)

b. Supreme Court Limitation on Exhaustion: Federal courts may not require exhaustion of available administrative remedies under the APA before judicial review of agency action where exhaustion not expressly required by statute, Darby v. Cisneros, 113 S.Ct. 2539 (1993). Note that this is an exception for the APA, NOT a blanket reversal of the exhaustion doctrine. *See* Howell above.

c. ABCMR specifically:

(1) Majority view - appellant must exhaust ABCMR remedies. Exhaustion applied strictly in military cases. Guitard v. Sec'y of the Navy, 967 F.2d 737 (2d Cir. 1992); *see also* Horn v. Schlesinger, 384 F.Supp. 506 (E.D. Mo. 1974), aff'd 514 F.2d 549 (8th Cir. 1985).

(2) Minority view - exhaustion of ABCMR remedy is permissive only. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982). But note that the Federal Circuit is in accord with the minority view, Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983).

3. Laches.

a. An OER must be challenged within a reasonable time after it is issued. Adkins v. United States, 328 Ct. Cl. 909 (1981).

b. Government is entitled to dismissal of an OER appeal if it can show inexcusable delay and prejudice. Pepper v. United States, 794 F.2d 1571 (F. Cir. 1986).

4. Standard of Review.

a. Decisions of the ABCMR are reviewable in federal court. Jamison v. Stetson, 471 F. Supp. 48 (D.C. N.Y. 1978). *See also*, Randall v. United States, 95 F.3d 339, 348 (4th Cir. 1996).

b. Decisions by Service Secretaries to follow/not follow ABCMR advice may be reviewable as well. Adkins v. United States, 68 F.3d 1317, 1322-23 (Fed. Cir. 1995).

c. A party is bound by the ABCMR decision unless the decision is unsupported by substantial evidence or is arbitrary, capricious, or contrary to law. Randall, *supra*, at 348, *citing* Chappell v. Wallace, 462 U.S. 296, 303 (1983); Robbins v. U.S., 29 Fed. Cl. 717, 725 (1993).

d. Courts apply a strong but rebuttable presumption that officers have discharged duties correctly, lawfully, and in good faith. Guy v. United States, 608 F.2d 867 (Ct. Cl. 1979).

e. Courts will not interfere with rating process unless there is clear and convincing evidence of factors affecting ratings which had no place in the rating process. Savio v. United States, 213 Ct. Cl. 737 (1977).

5. Examples of Successful Appeals.

a. Labeling an OER as an "Adverse Efficiency Report" by mistake. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982).

b. OER downgraded on mistaken belief superiors would not approve a high rating. Skinner v. United States, supra.

c. Signing blank OER, rating downgraded by another. Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980).

d. Violation of regulation. Riley v. United States, 608 F.2d 441 (Ct. Cl. 1979).

6. Examples of Unsuccessful Appeals.

a. Plaintiff did not show that ABCMR acted arbitrarily or capriciously in denying challenge based on racial discrimination. Randall, *supra*.

b. Intentional downgrade in rating to show future job progression. Stewart v. United States, 611 F.2d 1356 (Ct. Cl. 1979).

c. Using words and phrases from previous OERs and endorser's instructions to rater to downgrade rating. Gruendyke v. United States, 639 F.2d 745 (Ct. Cl. 1981).

d. Rater claiming he rated appellant too low. Tanaka v. United States, 538 F.2d 348 (Ct. Cl. 1976). See also Savio v. United States, supra.

e. Contested OER inconsistent with prior and subsequent OERs. Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).

7. Judicial Remedies.

a. Courts may award backpay to successful appellant. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).

(1) Award is offset by civilian pay earned.

(2) Award cannot be based on an anticipated promotion.

b. Courts may order removal of an OER/NCO-ER. Skinner v. United States, supra.

c. Appellants can be reinstated in the service with their consent. Yee v. United States, 512 F.2d 1383 (Ct. Cl. 1975).

d. Courts may order that a nonprejudicial statement be placed in appellant's file. Sanders v. United States, supra; Yee v. United States, supra.

e. Under limited circumstances, courts may void promotion passovers and order relook boards.

(1) Harmless error standard applied. Riley v. United States, supra.

(2) Appellants must show a nexus between the board's action and the defective OER/NCO-ER. Hary v. United States, supra; Sanders v. United States, supra.

f. Courts will not:

(1) Order promotions be made. Yee v. United States, supra; Skinner v. United States, supra.

(2) Reconstruct a report or order the Army to prepare a favorable OER to replace a defective OER. Turner v. Dept. of Army, 447 F. Supp. 1207 (D.D.C. 1978).

VII. CONCLUSION

CHAPTER 34

ADMINISTRATIVE INVESTIGATIONS

I believe that the role of the commander's legal advisor is to ensure that the process of gathering facts, of advising on the correct standards for evaluating those facts, and for ensuring the correct application of those standards, is professionally and thoroughly accomplished. Why is this important? I only state the obvious when I tell this audience that we, as lawyers, are expected to get it right. This does not mean a result that is necessarily immune from public criticism, for such criticism is bound to come from some quarter. It means a result that will withstand critical, objective scrutiny.

Ms. Judith Miller, General Counsel, U.S. Department of Defense, Federal Bar Association Speech, 8 April 1997

I. **AR 15-6 INVESTIGATIONS.** AR 15-6, Procedure For Investigating Officers And Boards Of Officers (11 May 88, w/ch1, 30 Sep 96)

A. FUNCTION: to ascertain facts, make recommendations and report them to the appointing authority

B. APPLICABILITY: investigations or boards appointed under a specific regulation or directive (e.g., AR 635-200) may make AR 15-6 applicable. In case of conflicting provision, the more specific regulation overrules AR 15-6. Even when not specifically applicable, AR 15-6 may be used a guide but its provisions would not be binding.

C. TYPES: FORMAL OR INFORMAL

1. Formal:

a) Generally used to provide a hearing; extensive due process rights: include president with voting members, recorder, notice to respondent with right to counsel, challenges for cause, entitlement to be present at all open sessions, put on evidence, cross-examine witnesses, make argument.

b) Example: An administrative separation board conducted UP AR 635-200 is also a formal AR 15-6.

2. Informal:

a) May be used to investigate individual conduct. Para 1-6: "The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual." Para 1-4b(2): Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual, formal procedures not mandatory unless required by other regulations or by higher authority.

b) Great flexibility: one IO, proceedings not open to public, statements taken at informal sessions, no right to counsel unless required by Art 31(b), UCMJ; no right to cross-examine, etc.

D. APPOINTING AN INFORMAL 15-6

1. Authority: Includes a commander at any level or a principal staff officer or supervisor in grade of major or above. Change 1 authorizes GS-14 agency head or division chief to appoint either formal or informal. Appropriate appointing authority can ratify.

2. Method: May be oral but not recommended; written memorandum of appointment preferred. Should specify purpose and scope of investigation and nature of findings and recommendations required. [Model appointment memorandum at Appendix A.] The appointment directive is important. You should work with your Judge Advocate in drafting it.

3. Who should be the Investigating Officer? Break the Duty Roster Mindset!

a) Commissioned/Warrant Officer/GS-13, senior to soldier whose conduct is under investigation; **best qualified** by reason of education, training, experience, length of service and temperament.

b) Change 1 requires IO to **consult with OSJA for legal guidance before beginning informal investigation**. IO should continue to consult with OSJA during the entire investigation process, including the development of findings and recommendations.

E. SPECIAL CASES:

1. Only a GCMCA can appoint AR 15-6 if:

a) Property damage of $1M or more;

b) Loss or destruction of Army aircraft or missile;

c) Injury or illness likely to result in death or permanent total disability.

2. Investigation into fratricide/friendly fire incident forwarded after action to next higher Army HQs for review.

3. Special requirements for Military Whistleblower Protection Act cases, at AR 600-20 (15 Jul 99), paras. 5-8 and 5-12.

4. Special reporting and processing requirements for Sex Harassment cases, at AR 600-20 (15 Jul 99), Appendix E.

F. CONDUCTING THE INVESTIGATION

1. The investigating officer should immediately set a briefing with the advising Judge Advocate officer for the command to understand the rules and legal concerns for AR 15-6 investigations and to set up an investigation plan. Make sure the Investigating Officer gets an Investigating Officer Handbook with checklist [Appendix B].

2. Investigation Plan.

a) Purpose of the Investigation. What is the timeline? See Appointment Memorandum.

b) Facts Known

c) Potential Witnesses

d) Physical and Documentary Evidence

e) Possible Criminal or Counter-Intelligence implications? Article 31 warnings?

f) Any civilian employees as witnesses? Weingarten rights.

g) Regulations and Laws involved

h) Order of interviewing witnesses

i) Chronology

G. FINDINGS AND RECOMMENDATIONS

1. Findings

a) Clear concise statement of fact readily deduced from evidence in record. Includes negative findings. Should not exceed scope of appointment. Should refer back to evidence gathered in the investigation such as Statement of LTC __, or Photograph 1 at TAB C.

b) Standard is preponderance of evidence: more likely than not; greater weight of evidence than supports a contrary conclusion. Weight not determined by number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, other indications of credibility.

c) Investigating Officer should work with JAG advisor to develop the findings based upon the record of investigation facts and the commander's appointment memorandum.

2. Recommendations Consistent with findings. Can be negative, e.g., no further action taken. Make sure they make sense and are supported by the record of investigation. Beware of making mental health evaluation recommendations without evidence in the ROI. See Appendix C, Military Mental Health Evaluation Protection Act.

H. ACTION BY APPOINTING AUTHORITY

1. Options:

a) Approve as is.

b) Disapprove, and/or return for additional investigation. May consider all relevant information, even information not considered by IO. Unless otherwise provided by another directive, appointing authority is not bound by findings or recommendations; may take action less favorable than recommended.

c) Substitute Findings and Recommendations.

2. Legal review before action recommended. Not the same attorney that advised the investigating officer. Required in serious or complex cases:

a) Incident being investigated resulted in death or serious bodily injury;

b) Where findings & recommendations may result in adverse administrative action or will be relied upon by higher HQs.

I. ADVERSE ADMINISTRATIVE ACTION

1. No adverse administrative action may be taken by a commander based upon an informal AR 15-6 investigation until:

a) **Notice** is given to the subject of the investigation of the allegations against them. The subject is given a copy of the investigation subject to any redactions required.

b) The subject is given a **reasonable opportunity to rebut** the allegations.

c) The **Commander must consider the subject's rebuttal** to the investigation, if submitted in a timely manner, **before taking any adverse action**.

2. The federal courts have routinely upheld adverse administrative actions (based upon AR 15-6 investigation) taken against military members as long as the subject received notice, a chance to rebut the allegations, and command consideration of the rebuttal prior to the adverse action taking place.

J. CRITICISMS OF AR 15-6 INVESTIGATION PROCESS

1. Subject to abuse: Appearance of whitewash when trying to keep "in-house," e.g., if used when criminal investigation is more appropriate or too junior of investigating officer appointed.

2. Subject to command influence, even unintentional ("signal reading" by IO).

3. Lack of IO training and experience: Junior officers appointed. Little guidance on "how to." Recent changes to overcome this weakness: IO hand-picked as best qualified; coordination with JAG now required for informal investigations; OTJAG publication of an Investigation Guide for Informal Investigations (available at local OSJA).

4. Fewer protections for subjects of informal investigation:

a) Failure to inform of why under investigation.

b) Failure to provide Art 31 rights.

c) Improper collection of evidence.

d) No "exclusionary rule" for abuses in investigative process.

II. **INSPECTOR GENERAL INVESTIGATIONS.** AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, 15 MARCH 1994.

A. IGs should not normally investigate when substantiation of allegations likely to establish criminal misconduct or likely to result in adverse action against individual. Two forms of investigative mechanisms:

1. Investigative inquiries: informal fact-finding process to gather information needed to resolve allegations or issues when investigative techniques are appropriate but circumstances do not merit an IG investigation. Inquiries conducted into "improprieties." If inquiry develops evidence to substantiate as misconduct, inquiry ends---matter may be referred to CID, or commander may appoint AR 15-6 investigation, or, in rare instances, may become an IG investigation. Only substantiated inquiries need to have a written legal review.

2. Investigations: fact-finding examination by detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Normally address allegations of wrongdoing by an individual. IG must obtain written directive by appointing authority. Written legal review required. Verbal notification required of the commander/supervisor of nature of allegations against the subject/suspect, and verbal notification of the results to commander/supervisor. Should <u>not</u> contain recommendations for adverse action against suspect/subject.

3. What sort of issues are good issues for IG investigations?

a) Dereliction of Duty (Non-UCMJ Action)

b) Regulatory violations--systematic command problems

c) Ethics violations (JER)

d) Conduct Unbecoming An Officer (Non-UCMJ Action)

B. Benefits: trained, thorough investigators; keeps matter in-house, at least to start with; may otherwise have problem designating good, sufficiently senior AR 15-6 IO who can take the necessary time. Disadvantages: restrictions on release; cannot use evidence for adverse action without TIG authorization; may be necessary to duplicate IG work with AR 15-6 to obtain usable evidence.

C. Problem: IG investigations and inquiries being used for purposes not originally intended when HQDA command and promotion boards review candidates for suitability. IG records are available within DA for those having need for the record "in the official performance of their duties." AR 20-1, para. 3-4.

D. Special reporting and investigating requirements for allegations against GO, BG selectee, SES or equivalent.

1. All must be reported to DAIG. Investigation by DAIG or (rarely) DODIG.

2. All allegations, whether eventually substantiated or nonsubstantiated, are maintained in database, for use during background checks.

3. Adverse comments: If unfavorable information obtained which may result in adverse comment in ROI and individual not informed of unfavorable information during investigation, IG will advise of substance before investigation completed and provide opportunity to comment on unfavorable information.

4. Problem: May a General Officer receive a Memorandum of Reprimand based upon a DAIG Investigation (ROI)? Yes. Such use must be authorized by the SA, US of A, CSA, VCSA, or TIG. AR 20-1, para. 3-3. Does the DAIG have to release the entire ROI to the reprimanded General Officer, so he may rebut the allegations raised in the report? OTJAG says no. No obligation to release IG records for personal use, including responding to an adverse action. AR 20-1, para. 3-4a(2).

III. COMMANDER INQUIRY.

A. OERs (AR 623-105, para 6-3); NCOERs (AR 623-205, para 1-4, 2-15). When OER/NCOER by subordinate or member of subordinate command may be illegal, unjust, or otherwise violate regulation. Confined to matters relating to clarity of report, its facts, compliance with regulation, and conduct of rated soldier and members of rating chain.

1. As formal or informal as commander thinks appropriate to include telephone and personal discussions. Not an AR 15-6 investigation generally.

2. Inquiry by commander in chain of command above designated rating officials involved in allegations. NCOER: commander (major or above); may appoint an officer senior to designated rating officials involved in allegations to make inquiry.

3. Primary purpose to provide greater degree of command involvement in preventing injustices and errors before they become a matter of permanent record. May also occur after report is accepted at DA but not intended to substitute for appeal.

B. R.C.M. 303 Preliminary Inquiry (Criminal).

1. Normally this inquiry will consist of review of alleged charges and MPI/CID report of investigation. Not the same as an Article 32 (UCMJ) investigation. Should gather all reasonably available evidence on:

a) Guilt or innocence

b) Aggravation

c) Extenuation and Mitigation.

2. In serious or complex cases, commanders should consult with law enforcement personnel to conduct the inquiry or investigation.

3. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general courts-martial [R.C.M. 504(c)(1)]. Any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and prefer charges, if necessary.

C. Examination into Article 138 complaint. Art. 138, UCMJ; AR 27-10, chapter 20. GCMCA examines complaint submitted by soldier UP AR 27-10 for any act or omission by a commander that soldier believes to be wrong and for which redress has been requested and refused. Examination may be delegated but not to subordinate of respondent in chain of command and not to person junior in grade. Delegated examinations conducted UP AR 15-6.

D. Safety & Collateral Investigations-Accidents. AR 385-40.

1. Safety Investigations. The sole purpose is to prevent future accidents. Safety investigations are oriented at discovering what caused accident, e.g., equipment failure, pilot error, or weather conditions. Required for all flight and fratricide/friendly fire accidents. Authorized in other complex accident cases. Safety investigations have priority over collateral investigations. AR 385-40, para. 1-8. Safety investigation results cannot be used as the basis for adverse administrative action or UCMJ action. Safety investigation reports are not to be enclosed or incorporated into any non-safety investigation, including collateral investigations of the same incident. Information gathered from such investigations has restricted release requirements IAW AR 385-40, para. 1.10.

2. Collateral Accident Investigation. AR 385-40, para. 1-8. Such investigations can be used as the basis for adverse administrative action or UCMJ action. Such investigations often parallel safety investigation facts. Investigators must work with JAG advisor on getting facts, e.g., names of witnesses (but not witness statements), physical evidence from safety investigation team. Safety Board experts not to give opinions of what caused accident to collateral investigators, just factual information. No requirement to follow AR 15-6 procedures, but a good idea.

E. EO Investigations (AR 600-20, Appendix E). Equal opportunity investigations can be a source for criminal or adverse administrative action. Procedurally, most EO investigations follow the format of AR 15-6. Special requirements as to processing times and reports exist, UP 10 U.S.C. section 1561.

F. Reports of Survey (AR 735-5). AR 15-6 or collateral accident investigation may be used as substitute for ROS investigation. Survey officers are not required to follow AR 15-6 informal investigation procedures. Survey reports are recorded upon a DA Form 4697, Report of Survey Form. The regulation provides guidance to commanders that survey officers should be senior in rank to the person subject to possible financial liability. Unlike AR 15-6, a survey investigating officer may be an NCO (E-7 or above). Like AR 15-6 informal investigations, for a report of survey to pass legal sufficiency the person subject to financial liability must be given notice of the allegations of negligence, the right to rebut the survey findings in a reasonable period, and to have the rebuttal considered prior to assessing financial liability. A Survey Officer 's Guide has been developed by the Army, as DA Pam 735-5 (10 March 1997).

IV. CONCLUSION.

APPENDIX A

Sample AR 15-6 Informal Investigation Appointment Memorandum

S: 25 March 1999

AFVA-JA (15-6) 15 March 1999

MEMORANDUM FOR: MAJ Frederick Factfinder, DISCOM Plans Officer, 46th Infantry Division (M), Fort Wahoo, Virginia 22330

SUBJECT: Investigating Officer Appointment, G Company, 123d Forward Support Battalion Sex Harassment Complaint

1. Appointment. You are hereby appointed an investigating officer pursuant to Army Regulation (AR)15-6, Procedure for Investigating Officers and Boards of Officers, and Army Regulation 600-20, Command Policy, Chapter 6 (Equal Opportunity Program in the Army), to conduct an informal investigation into allegations of gender bias, and unfair treatment of female soldiers as to promotions and extra duty. A copy of anonymous 6-Boss line message received on 8 March 1999 is enclosed. This investigation is your primary duty and takes precedence over all other duties assigned.

2. Legal Orientation. Before you begin your investigation, you must receive a briefing from the Office of the Staff Judge Advocate, Administrative Law Section. Captain Cheever J. Loophole is your legal advisor. You must have your legal briefing completed no later than 17 March 1999. Call 287-9426 to schedule an appointment. You will consult with Captain Loophole regarding all aspects of this investigation, including developing an investigation plan, determining whether witnesses need to be advised of their rights under the UCMJ, Article 31 or the Fifth Amendment, special procedures for interviewing Department of the Army civilian employees, and preparing findings and recommendations. Captain Loophole will provide you with a 46th Division Investigating Officer's Guide and several forms and regulations necessary for you to complete your investigation.

3. Procedures. You are to conduct this investigation using the informal procedures outlined in Chapter 4, AR 15-6. No individual has been named as a respondent at this time. All witnesses will be sworn prior to their interview. You are to thoroughly document all witness interviews in writing, preferably on a DA Form 2823 (Sworn Statement). You will interview all witnesses in person, if practical. If in the course of your investigation you come to suspect that certain people may have committed criminal conduct, you must advise them of their rights under Article 31, UCMJ, or the Fifth Amendment, U.S. Constitution, as appropriate. Witness waivers of their Article 31 or Fifth Amendment rights will be documented on a DA Form 3881 (Rights Warning Procedure/Waiver Certificate). In addition, you may need to provide a witness with a Privacy Act statement before you solicit any information. You are to maintain a daily written chronology of your actions on this investigation. You are strongly encouraged to consult your legal advisor if you have any questions regarding these procedures.

4. Report of Investigation. The report of investigation must include, but is not limited to, findings on the following issues:

a. Whether the G Company, 123d FSB chain of command fairly treats its female soldiers, including if any member of the chain of command has violated any regulations, laws or command policies in its treatment of female soldiers. You must designate which regulations, laws and/or command policies were violated, if any.

b. Whether any female members of G Company, 123d FSB, were subjected to any form of sexual harassment by the chain of command or non-commissioned officers in violation of federal law and AR 600-20, chapter 6, in the past twelve months. Provide specific examples of any such harassment, if it exists within G Company. If you find any incidents of sexual harassment, you must immediately contact your legal advisor and my office, so that this information may reported pursuant to federal law.

c. Whether any female members of G Company, 123 FSB, were unfairly denied promotion opportunities IAW AR 600-8-19, Enlisted Promotions and Reductions, and the equal opportunity policy of AR 600-20, Change 4, paragraph 6-3 in the past twelve months. Give concrete examples, if you find such conduct.

d. Whether any female members of G Company, 123 FSB, were unfairly assigned extra duties in the past twelve months. You will examine the whether the duty roster is run in accordance with AR 220-45;Duty Rosters; whether any assigned "extra training" is conducted in compliance with AR 600-20, paragraph 4-6, and AR 27-10, Military Justice, paragraph 3-3c; and whether any "extra duty" assigned as nonjudicial (Article 15) punishment complies with AR 27-10, paragraph 3-19(b)(5). Give concrete examples, if you find such conduct.

e. Determine if the G Company, 123 FSB officers and noncommissioned officers have exhibited improper attitudes and/or conduct towards female soldiers in the command. Give concrete examples, if you find such conduct.

Provide me with recommendations to resolve any issues or problems raised by your findings. You will consult with your legal advisor in developing your findings and recommendations. Submit your findings and recommendations on a DA Form 1574 (Report of Proceedings by an Investigating Officer/Board of Officers) to the Brigade S-1 no later than 25 March. Submit any requests for modification of this suspense or the scope of your investigation to me, through your legal advisor.

5. Expert Assistance. You should consult with the 123 FSB Equal Opportunity Advisor, and the 46th Division Equal Opportunity Officer in determining whether gender bias exists in G Company, 123 FSB.

6. Criminal Misconduct. If you determine through your investigation that possible criminal conduct has occurred, immediately notify your legal advisor before proceeding any further with your investigation

PAUL E. BRAVEHEART
COL, AR
Commanding

APPENDIX B

OTJAG
Investigating Officer Handbook

ARMY REGULATION 15-6

INVESTIGATION GUIDE

FOR

INFORMAL INVESTIGATIONS

JANUARY, 1997

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INTRODUCTION

1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

2. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an investigating officer are:

a. to ascertain and consider the evidence on all sides of an issue,

b. to be thorough and impartial,

c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and

d. to report the findings and recommendations to the appointing authority.

3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, *or DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above* may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

PRELIMINARY MATTERS

1. Appointing authority.

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- *a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.*

b. *Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of $1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.*

2. Appointment procedures. Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. Obtaining assistance. The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include*

those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.

4. Administrative matters. As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

5. Concurrent investigations. *An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible.* If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.

CONDUCTING THE INVESTIGATION

1. Developing an investigative plan.

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

2. Obtaining documentary and physical evidence.

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of

investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

3. Obtaining witness testimony.

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

4. Rights Advisement.

a. All soldiers suspected of criminal misconduct must first be advised of their rights.
DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

5. Scheduling witness interviews. The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed

with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. Conducting witness interviews. Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

7. Rules of Evidence: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

8. Standard of Proof. Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

CONCLUDING THE INVESTIGATION

1. Preparing Findings and Recommendations. After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

- Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

2. Preparing the Submission to the Appointing Authority. After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,

- initial information collected,

- rights warning statements,

- chronology, and

- exhibits (with an index).

3. LEGAL REVIEW:

a. AR 15-6 does not require that all informal investigations receive legal review. *The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters.* Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,

- the effects of any errors in the investigation,

- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. Preliminary Matters:

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

2. Investigative Plan.

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

3. Conducting the Investigation.

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

4. Preparing Findings and Recommendations.

a. Is the evidence assembled in a logical and coherent fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. Final Action.

a. Was an appropriate legal review conducted?

b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

c. Have the necessary taskers been prepared to implement the recommendations?

APPENDIX C

Military Mental Health Evaluation Protection Act

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PL 102-484, 1992 HR 5006

<< 10 USCA § 1074 NOTE >>

SEC. 546. MENTAL HEALTH EVALUATIONS OF MEMBERS OF ARMED FORCES.

(a) REGULATIONS.--Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise applicable regulations to incorporate the requirements set forth in subsections (b), (c), and (d). In revising such regulations, the Secretary shall take into account any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian health organizations.

(b) PROCEDURES FOR OUTPATIENT AND INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4), a commanding officer shall consult with a mental health professional prior to referring a member of the Armed Forces for a mental health evaluation to be conducted on an outpatient basis.

(2) The revisions required by subsection (a) shall provide that, except as provided in paragraph (4)--

(A) a mental health evaluation of a member of the Armed Forces conducted on an inpatient basis shall be used only if and when such an evaluation cannot appropriately or reasonably be conducted on an outpatient basis, in accordance with the least restrictive alternative principle; and

(B) only a psychiatrist, or, in cases in which a psychiatrist is not available, another mental health professional or a physician, may admit a member of the Armed Forces for a mental health evaluation to be conducted on an inpatient basis.

(3) The revisions required by subsection (a) shall provide that, when a commanding officer determines it is necessary to refer a member of the Armed Forces for a mental health evaluation, the commanding officer shall ensure that, except as provided in paragraph (4), the member is provided with a written notice of the referral. The notice shall, at a minimum, include the following:

(A) The date and time the mental health evaluation is scheduled.

(B) A brief explanation of why the referral is considered necessary.

(C) The name or names of the mental health professionals with whom the commanding officer has consulted prior to making the referral. If such consultation is not possible, the notice shall include the reasons why.

(D) The positions and telephone numbers of authorities, including attorneys and inspectors general, who can assist a member who wishes to question the referral.

(E) The rights of the member under the revisions required by subsection (a).

(F) The member's signature attesting to having received the information described in subparagraphs (A) through (E). If the member refuses to sign the attestation, the commanding officer shall so indicate in the notice.

(4) The revisions required by subsection (a) shall provide that, during emergencies, the procedures described in subsection (d) shall be followed in lieu of the procedures required by this subsection.

(c) RIGHTS OF MEMBERS.--The revisions required by subsection (a) shall provide that, in any case in which a member of the Armed Forces is referred for a mental health evaluation other than in an emergency, the following provisions apply:

(1) Upon the request of the member, an attorney who is a member of the Armed Forces or employed by the Department of Defense and who is designated to provide advice under this section shall advise the member of the ways in which the member may seek redress under this section.

(2) If a member of the Armed Forces submits to an Inspector General an allegation that the member was referred for a mental health evaluation in violation of the revised regulations, the Inspector General of the Department of Defense shall conduct or oversee an investigation of the allegation.

(3) The member shall have the right to also be evaluated by a mental health professional of the member's own

choosing, if reasonably available. Any such evaluation, including an evaluation by a mental health professional who is not an employee of the Department of Defense, shall be conducted within a reasonable period of time after the member is referred for an evaluation and shall be at the member's own expense.

(4)(A) No person may restrict the member in communicating with an Inspector General, attorney, member of Congress, or others about the member's referral for a mental health evaluation.

(B) Subparagraph (A) does not apply to a communication that is unlawful.

(4) In situations other than emergencies, the member shall have at least two business days before a scheduled mental health evaluation to meet with an attorney, Inspector General, chaplain, or other appropriate party. If a commanding officer believes the condition of the member requires that such evaluation occur sooner, the commanding officer shall state the reasons in writing as part of the personnel record of the member.

(5) In the event the member is aboard a naval vessel or in a circumstance related to the member's military duties which makes compliance with any of the procedures in subsection (b) impractical, the commanding officer seeking the referral shall prepare a memorandum setting forth the reasons for the inability to comply with such procedures.

(d) ADDITIONAL RIGHTS OF MEMBERS AND PROCEDURES FOR EMERGENCY OR INVOLUNTARY INPATIENT EVALUATIONS.--(1) The revisions required by subsection (a) shall provide that a member of the Armed Forces may be admitted, under criteria for admission set forth in such regulations, to a treatment facility for an emergency or involuntary mental health evaluation when there is reasonable cause to believe that the member may be suffering from a mental disorder. The revised regulations shall include definitions of the terms "emergency" and "mental disorder".

(2) The revised regulations shall provide that, in any case in which a member of the Armed Forces is admitted to a treatment facility for an emergency or involuntary mental health evaluation, the following provisions apply:

(A) Reasonable efforts shall be made, as soon after admission as the member's condition permits, to inform the member of the reasons for the evaluation, the nature and consequences of the evaluation and any treatment, and the member's rights under this section.

(B) The member shall have the right to contact, as soon after admission as the member's condition permits, a friend, relative, attorney, or Inspector General.

(C) The member shall be evaluated by a psychiatrist or a physician within two business days after admittance, to determine if continued hospitalization and treatment is justified or if the member should be released from the facility.

(D) If a determination is made that continued hospitalization and treatment is justified, the member must be notified orally and in writing of the reasons for such determination.

(E) A review of the admission of the member and the appropriateness of continued hospitalization and treatment shall be conducted in accordance with procedures set forth in the regulations as required under paragraph (3).

(3) The revised regulations shall include procedures for the review referred to in paragraph (2)(E). Such procedures shall--

(A) specify the appropriate party (or parties) who is outside the individual's immediate chain of command and who is neutral and disinterested to conduct the review;

(B) specify the appropriate procedure for conducting the review;

(C) require that the member have the right to representation in such review by an attorney of the member's choosing at the member's expense, or by a judge advocate;

(D) specify the periods of time within which the review and any subsequent reviews should be conducted;

(E) specify the criteria to be used to determine whether continued treatment or discharge from the facility is appropriate;

(F) require the party or parties conducting the review to assess whether or not the mental health evaluation was used in an inappropriate, punitive, or retributive manner in violation of this section; and

(G) require that an assessment made pursuant to subparagraph (F) that the mental health evaluation was used in a manner in violation of this section shall be reported to the Inspector General of the Department of Defense and included by the Inspector General as part of the Inspector General's annual report.

(e) CONSTRUCTION.--Nothing in the regulations prescribed under this section shall be construed to discourage referrals for appropriate mental health evaluations when circumstances suggest the need for such action.

(f) PROHIBITION AGAINST THE USE OF REFERRALS FOR MENTAL HEALTH EVALUATIONS TO RETALIATE AGAINST WHISTLEBLOWERS.--(1) The revised regulations required by subsection (a) shall provide that no person may refer a member of the Armed Forces for a mental health evaluation as a reprisal for making or preparing a lawful communication of the type described in section 1034(c)(2) of title 10, United States

Code, and applicable regulations. For purposes of this subsection, such communication also shall include a communication to any appropriate authority in the chain of command of the member.

(2) Such revisions shall provide that an inappropriate referral for a mental health evaluation, when taken as a reprisal for a communication referred to in paragraph (1), may be the basis for a proceeding under section 892 of title 10, United States Code. Persons not subject to the Uniform Code of Military Justice who fail to comply with the provisions of this section are subject to adverse administrative action.

(g) DEFINITIONS.--In this section:

(1) The term "member" means any member of the Army, Navy, Air Force, or Marine Corps.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978; and

(B) an officer of the Armed Forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the Armed Forces.

(3) The term "mental health professional" means a psychiatrist or clinical psychologist, a person with a doctorate in clinical social work or a psychiatric clinical nurse specialist.

(4) The term "mental health evaluation" means a psychiatric examination or evaluation, a psychological examination or evaluation, an examination for psychiatric or psychological fitness for duty, or any other means of assessing a member's state of mental health.

(5) The term "least restrictive alternative principle" means a principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate and therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such placement are warranted by the proposed plan of treatment.

(h) REPORT.--At the same time as the regulations required by this section are revised, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report describing the process of preparing the regulations, including--

(1) an explanation of the degree to which any guidelines regarding psychiatric hospitalization of adults prepared by professional civilian mental health organizations were considered;

(2) the manner in which the regulations differ from any such civilian guidelines; and

(3) the reasons for such differences.

(j) CONFORMING REPEAL.--Subsection (g) of section 554 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510) is hereby repealed.

COMMANDERS' CHECKLIST - MMHEPA

*Developed by CPT Daniel A. Lauretano, 46th Graduate Course

***** = The Military Mental Health Evaluation Protection Act (MMHEPA), National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992); DoD Instruction (DoDI) 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, (28 Aug. 1997); and DoD Directive (DoDD) 6490.1, Mental Health Evaluations of Members of the Armed Forces, (1 Oct. 1997). *See also* DA Message, 080700Z Mar 96, DAPE-HR-L, subject: Mental Health Evaluations (Clarification)(ALARACT 21/96)(8 Mar. 1996).

1 = Paragraph D.3.e. of the DoDD, excludes the following referrals, evaluations and interviews from the procedural requirements of the MMHEPA:

Voluntary self-referrals.

Sanity & competency inquiries in accordance with (IAW) Rules for Courts-Martial 706.

Referrals to Family Advocacy Programs (these normally involve medical assessments and treatment of family members by trained personnel). See DoD Directive 6400.1, Family Advocacy Program, 6.1 (23 Jun. 1997) and Army Regulation 608-18.

Referrals to drug and alcohol abuse rehabilitation programs. These normally take place during the "intake procedures." Intake procedures require a psychological evaluation to assess the soldier's need for detoxification and potential for rehabilitation. See DoD Directive 1010.4, Alcohol and Drug Abuse by DoD Personnel, E.3.b(2)(a) (25 Aug. 1980); DoD Instruction 1010.6, Rehabilitation Referral Services for Alcohol and Drug Abusers (13 Mar. 1985); and Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program, para. 3-10 (21 Oct. 1988).

Referrals for diagnostic evaluations made by non-command and non-mental health care providers, and with soldier's consent.

Non-discretionary evaluations required by regulation or for special duties or occupational classifications. According to para. D.3.e of the DoDD, if a regulation requires a commander to refer a soldier for a mental health evaluation, the referral is not discretionary.

Examples of non-discretionary referrals not falling within the DoD procedural requirements and made IAW Army Regulations:

Security Clearance Evaluations IAW Army Regulation 380-67;
Personnel Reliability Program Evaluations IAW Army Regulation 380-67;
Evaluations made IAW Army Regulation 135-178;
Discharge for the good of the service IAW Army Regulation 635-200, para. 1-34b and Chapter 10, and when the soldier requests a medical examination;
Misconduct IAW Army Regulation 635-200, para. 1-34b, and Chapter 14, section III;
Unsatisfactory performance IAW Army Regulation 635-200, para. 1-34b, and Chapter 13;
Homosexuality IAW Army Regulation 635-200, para. 1-34b, and Chapter 15;

Examples of discretionary command referrals falling within the DoD procedural requirements when made as part of an administrative elimination are:

Personality disorders IAW Army Regulation 635-200, para. 5-13, when made to determine if the soldier has a personality disorder.
Parenthood IAW Army Regulation 635-200, para. 1-34b, and para. 5-8;
Alien unlawfully admitted IAW Army Regulation 635-200, paras. 1-34b and 5-10;

Concealing arrest record IAW Army Regulation 635-200, paras. 1-34b and 5-14;
Fight training disqualification IAW Army Regulation 635-200, paras. 1-34b and 5-12;
Separations IAW Army Regulation 635-200, paras. 1-34b, 5-16 and 5-17;
Dependency or hardship IAW Army Regulation 635-200, para. 1-34b, and Chapter 6;
Defective enlistment, reenlistments and extensions IAW Army Regulation 635-200, para. 1-34b, and Chapter 7;
Pregnancy IAW Army Regulation 635-200, para. 1-34b, and Chapter 8;
Entry level separation IAW Army Regulation 635-200, para. 1-34b and Chapter 11;
Conviction by civil court IAW Army Regulation 635-200, paras. 1-34b, 14-5b, and Chapter 14, section II; and
Failure of body fat standards IAW Army Regulation 635-200, para. 1-34b, Chap. 18.

2 = According to Section 546(b)(2)(A) of the MMHEPA, you may only refer a soldier for an inpatient mental health evaluation if an outpatient evaluation is not reasonable IAW the "least restrictive alternative principle." Section 546(g)(5) of the MMHEPA defines "least restrictive alternative principle" as:

> A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

Page 2-1 of the DoDD expands this definition to include,
"Such treatments form a continuum of care including no treatment, outpatient treatment, partial hospitalization, residential treatment, inpatient treatment, involuntary hospitalization, seclusion, bodily restraint, and pharmacotheraphy, as clinically indicated." A mental health care provider should advise you on the appropriate "therapeutic setting and treatment."
IF IN DOUBT, PRIOR TO MAKING A NON-EMERGENCY INPATIENT REFERRAL, CONSULT YOUR LEGAL ADVISOR.

3 = Page 2-2 of the DoDD and the DoDI define a "mental health care provider" (MHCP) as "a psychiatrist, clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist." The DoDD and DoDI require commander's to consult with an MHCP before referring a soldier for a mental health evaluation, treatment, or hospitalization falling within the DoD procedural requirements. If no MHCPs are available, the commander must consult with a physician or the "senior privileged non-physician provider present." Page 2-3 of the DoDI defines a "senior privileged non-physician provider present" as "in the absence of a physician, the most experienced and trained health care provider who holds privileges to evaluate and treat patients, such as clinical social workers, a nurse practitioner, an independent duty corpsman, etc." You must then document the results of your consultation and provide a copy to the MHCP performing the evaluation.

4 = Paragraph D.8. of the DoDD requires you, upon receiving the MHCP's recommendations, to "make a written record of the actions taken and reasons thereof." If the MHCP recommends that your soldier be separated from the service and you elect to retain the soldier, you must document your reasons and forward a memorandum to your superior within two business days of receiving the MHCP's recommendations.

5 = Paragraph D.2.c. of the DoDD requires you to refer soldiers for emergency mental health evaluations when one of your soldiers, by acts or words, is likely to cause injury to himself or herself, or others. You must also make an emergency referral whenever you believe your soldier is suffering from a mental disorder. Before making the emergency referral, you must make every effort to consult with an MHCP. If time and the nature of the emergency do not permit you to consult with an MHCP, you must consult with an MHCP at the MTF or clinic where the MHCP will evaluate your soldier. You must explain to the MHCP your reasons justifying the emergency evaluation. You must then document your conversation with the MHCP and forward a copy of the memorandum to the MHCP. If you are unable to consult with an MHCP prior to or at the MTF or clinic, para. F.1.a(5)(e) of the DoDI, allows you to document your reasons for the emergency evaluation and then forward a copy of the memorandum (via facsimile, overnight mail or courier) to the MHCP. This exception is a limited one.

<u>*6*</u> = If after the emergency evaluation, an MHCP involuntarily hospitalizes your soldier, in addition to providing the soldier notice of the referral and his or her rights, para. F.2.b(1) of the DoDI requires you to inform the soldier of the "reasons for and the likely consequences of the admission." Para. F.2.b(2) also requires you to advise your soldier that he or she may call a family member, friend, chaplain, attorney, or IG.

SOLDIER'S COUNSEL CHECKLIST

*Developed by CPT Daniel A. Lauretano, 46th Graduate Course

I. The DoD Directive implementing the Military Mental Health Evaluation Protection Act (MMHEPA) references the Guidelines For Involuntary Civil Commitment[1] (Guidelines) as one source attorneys should use when representing soldiers pending mental health evaluations, treatment or hospitalization. Paragraph E.2 of the Guidelines provides, "for attorneys to assume the proper advocacy role, the attorney must advise the respondent of all available options, as well as the practical consequences of those options . . . the attorney should advocate the position that best safeguards and advances the client's interest." In order to best represent the interests of your client, counsel should use the following suggested approach in accordance with paragraph E1-E7 of the Guidelines.

II. Review of Non-emergency Outpatient and Inpatient Referral Procedural Requirements.

A. In order to determine whether the commander complied with the procedural requirements of the MMHEPA and the DoD Directive and Instruction:

First, meet with your client and determine whether the commander informed your client of the reasons for the referral. You can do this by reviewing the "referral and rights" memorandum provided to the soldier. Ensure your client understands the commander's reasons for the referral.

Second, assess whether the commander based the referral on the immediate facts and circumstances of the case (e.g., client's behavior, client's statements, witness statements, mental health care provider's (MHCP) assessment, etc.). If the commander based the referral on facts and circumstances occurring several days or weeks ago, the referral may be stale and improper. In addition, assess whether the information the commander provided to the MHCP is accurate and complete.

Third, determine whether the commander complied with the consultation requirement. If the commander consulted with an MHCP, contact the MHCP and ensure he or she agreed with the referral. If the commander did not consult with an MHCP, review the "referral and rights" memorandum and determine whether the commander explains his or her reasons for not consulting an MHCP. If the commander failed to comply with the consultation requirement, the referral is procedurally improper.

Fourth, if the referral is for inpatient evaluation, ensure it complies with the "least restrictive alternative principle" (LRAP). The MMHEPA defines the LRAP as:

> A principle under which a member of the Armed Forces committed for hospitalization and treatment shall be placed in the most appropriate therapeutic available setting (A) that is no more restrictive than is conducive to the most effective form of treatment, and (B) in which treatment is available and the risks of physical injury or property damage posed by such personnel are warranted by the proposed plan of treatment.

See National Defense Authorization Act of 1993, Pub. L. No. 102-484, § 546(g)(5), 106 Stat. 2315, 2419 (1992).

Fourth, assess whether the commander informed your client of the following rights:

The right to speak with a legal assistance attorney about the propriety of the referral;

The right to speak to a civilian attorney of the client's own choosing and expense, about the propriety of the referral;

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[1] NATIONAL TASK FORCE ON GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT (Joseph Schneider, et al. eds., 1986). For more information or to order copies of the Guidelines call 1-800-877-1233.

The right to file a complaint with either the DoD or Army IG alleging that the referral was in reprisal for making or preparing a protected communication.

The right to file a complaint with either the DoD or Army IG alleging that the referral for a mental health evaluation was improper.

The right to be evaluated by an MHCP of the client's own choosing and expense.

The right to discuss the referral with an IG, attorney, member of Congress, or others.

The right to seek assistance from the IG, legal assistance office or the chaplain on rebutting the referral.

If the commander failed to notify your client of the above rights, the referral is procedurally improper.

Fifth, determine whether the commander formally requested the evaluation. If the commander failed to formally request the evaluation, the referral is procedurally improper.

III. Review Client's History and Explore Alternatives.

A. After assessing whether the commander complied with the procedural requirements for the referral, review your clients psychiatric history and explore alternative resolutions to the referral.

First, discuss with your client the facts and circumstances of the referral. While discussing the facts and circumstances of the referral with your client, you should keep in mind that your client may be suffering from a mental disorder or disability. You should, consequently, evaluate your client's information objectively for accuracy and completeness. Ask your client to provide you with names of MHCPs, that have dealt with your client in the past. In addition, ask your client to provide you with names of co-workers, friends, family and other character witnesses.

Second, review your client's medical and any psychiatric records (outpatient and inpatient). In particular, review the client's past psychiatric counselings, treatment and hospitalization.

Third, interview all MHCPs, if any, that examined or treated your client in the past. These MHCPs may provide you insight on possible alternatives to the command referral (e.g., outpatient vs. an inpatient evaluation).

Fourth, interview all witnesses involved with the referral. If the facts and circumstances suggest that the referral is improper, consider presenting these witnesses to the commander, the MHCP, or the reviewing officer to rebut or prevent the referral.

Finally, use information gathered from records, witnesses, MHCPs and your client to explore alternative resolutions to the referral. For example, a counseling session with a chaplain may suffice rather than an outpatient mental health evaluation. Likewise, an outpatient mental health evaluation may be more appropriate than an inpatient evaluation, treatment or hospitalization. Before recommending that your client follow an alternative option, counsel should discuss all alternatives with either the MHCP the commander consulted, or an independent MHCP.

B. After reviewing your client's psychiatric history and exploring alternative resolutions to the referral, explain the effect and any stigma any alternative resolution may have on your client once he or she leaves the Army. For example, the MHCPs negative findings may affect soldier's ability to acquire future employment.

C. If the client consents, discuss the alternative options with the commander and the MHCP consulted, and negotiate an appropriate resolution for your client.

IV. Emergency Evaluations, Treatment and Hospitalization.

If your client is being referred for an emergency evaluation, treatment or hospitalization, in addition to taking the above steps, counsel should consider the following issues.

First, determine whether the commander informed your client of the reasons for the emergency referral.

Second, determine whether the commander based his or her reasoning for the emergency referral on the DoD's "clear and reasoned judgment" standard.

Third, if the commander did not consult with an MHCP prior to the referral, determine whether the commander "made every effort" to do so. In addition, was the reason for not consulting with an MHCP documented and a copy provided to the MHCP that performed the evaluation. If the commander did consult with an MHCP, ensure the MHCP concurred with the referral.

Finally, if the MHCP hospitalizes your client, ensure an MHCP reviews the propriety of continued hospitalization within twenty-four hours after admittance.

V. Review of Referral, Evaluation and Continued Hospitalization.

A. If an MHCP decides to hospitalize your client, the medical treatment facility (MTF) or clinic commander must appoint an independent medical reviewing officer (RO) within seventy-two hours.

B. Once appointed, the RO must review the propriety of the referral, evaluation and hospitalization. The RO must also assess the propriety of continued hospitalization. Finally, the DoD Directive requires the RO to speak to your client during the review.

C. Since your client has the right to have counsel present and assist the client in the review, counsel should use this opportunity to advance the best interests of the client.
Counsel should consider:

1. Presenting witnesses and documentary evidence to the RO suggesting that continued hospitalization is unnecessary.

2. If the RO decides to keep your client hospitalized, ensure the RO specifies when the next review will occur. The MMHEPA and the DoD Directive mandate that the next review occur within five business days.

SAMPLE COMMANDER'S NOTICE
TO SOLDIER OF REFERRAL AND RIGHTS

(Office Symbol) (Date)

MEMORANDUM FOR _____
(Soldier's name, rank, and SS#)

SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

References: (a) DoD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces, 1 October 1997.

(b) DoD Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces, 28 August 1997.

(c) Section 546 of Public Law 102-484, National Defense Authorization Act for Fiscal Year 1993, October 1992.

(d) DoD Directive 7050.6, Military Whistleblower Protection, 12 August 1995.

1. In accordance with paragraph F.1.a(4) of reference (b), I am referring you to a mental health care provider for a mental health evaluation.

2. I direct you to meet with _____(name & rank of mental health care provider(s) at _____(MTF or clinic) on _____(date) at _____hours.

XXXX-XX
SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights
3. I am referring you for a mental health evaluation because of your behavior and/or statements on _____(date(s)). On the stated date(s), you (brief description of behaviors and statements):
_____
_____
_____
_____
_____
_____
_____
_____

4. In accordance with paragraph F.1.a(2) of the DoD Instruction 6490.4, before the referral, **(**on _____ (date) I consulted with _____(name, rank, branch
of each mental health care provider consulted) from the _____(MTF clinic) about your recent behavior and/or statements and _____ _____ (name and rank of each mental health care provider) (did) (did not) concur(s) that a mental health evaluation is necessary**)** or **(**I was unable to consult with a mental health care provider because _____
_____
_____
_____**)**.

5. In accordance with paragraph F.1.a(4) of reference (b), and reference (a) and (c), you have the following rights:

a. The right to speak with a legal assistance attorney for advice on how to rebut this referral if you believe it is improper.

b. The right to speak to a civilian attorney of your own choosing and expense, for advice on how to rebut this referral if you believe it is improper.

c. The right to submit to the DoD or the Army Inspector General a complaint that your mental health evaluation referral was a reprisal for making or preparing a protected communication to a statutory recipient. Statutory recipients include members of Congress, an IG, and personnel within DoD audit, inspection, investigation or law enforcement organizations. Statutory recipients also include any appropriate authority in your chain of command, and any person designated by regulation or other administrative procedures to receive your protected communication.

d. The right to submit to the DoD or the Army Inspector General a complaint that your mental health evaluation referral was in violation of reference (a), (b), or (c).

e. The right to be evaluated by a mental health care provider (MHCP) of your choosing and expense, provided the MHCP is reasonably available. If reasonably available, your MHCP must perform the evaluation within a reasonable period of time (not to exceed 10 business days). The evaluation performed by your MHCP will not delay or substitute for an evaluation performed by a DoD mental health care provider.

f. The right to communicate, provided the communication is lawful, with an IG, attorney, Member of Congress, or others about your referral for a mental health evaluation.

g. If applicable, in accordance with 4-2 of the DoD Instruction 6490.4, since you are (deployed) (in a geographically isolated area) because of circumstances related to military duties, compliance with the following procedures _____
_____
are impractical for the following reasons_____
_____.

h. The right, except in emergencies, to have at least two business days before the scheduled mental health evaluation to meet with an attorney, IG, chaplain, friend or family member.

XXXX-XX
SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights

6. You may seek assistance from a military or Army employed civilian attorney assigned to the **Legal Assistance Office** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____ (phone number).

7. You may seek assistance from the **installation IG** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may call for assistance at _____(phone number). You may also seek assistance from the **DoD IG** at 1-800-424-9098.
8. You may seek assistance from the **Chaplain** located in building number _____, Monday through Friday from _____ hours to _____ hours. You may also call for assistance at _____(phone number).

_____
(Name)

_____
(Rank/Branch)
Commanding

I have read, understood and received a copy of this memorandum.

Soldier's signature_____. Date_____.

XXXX-XX
SUBJECT: Commander's Notice of Referral for a Mental Health Evaluation and Notice of Soldier's Rights[2]

IF SOLDIER DECLINES TO SIGN

The soldier declined to sign this memorandum containing the notice of referral and notice of soldier's rights because_____ _____(e.g., gave no reason, quote reason or otherwise). After the witness signed this memorandum, I provided a copy of this memorandum to the soldier.

Witness's signature_____. Date_____.

Print witness's rank and name_____.

[2] This sample form was adapted from enclosure 4 of U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES, 4-1 to 4-3 (28 Aug. 1997) and modified for Army use.

CHAPTER 35

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

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UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149, mostly codified at 38 U.S.C. §§ 4301-4333.

B. Practices and Procedures for Appeals Under The Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act, 5 CFR Part 1208 (2000)

C. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces, 32 C.F.R. Part 104 (2000).

D. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (10 Sep 95).

E. Restoration to Duty from Uniformed Service, 5 C.F.R. Part 353 (1999).

F. Note, *Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty*, The Army Lawyer, December 1996, at 22.

G. Note, *Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Act*, The Army Lawyer, September 1997, at 47 [Appendix A].

H. Note, *Interpreting USERRA "Mixed Motive" Discrimination Cases*, The Army Lawyer, December 1997, at 30.

I. Note, *Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees*, The Army Lawyer, February 1998, at 33 [Appendix D].

J. Note, *Jury Trials for USERRA Cases*, The Army Lawyer, June 1998, at 15.

K. Note, *How Do You Get Your Job Back?* The Army Lawyer, August 1998, at 30.

L. Note, *The 1998 USERRA Amendments*, The Army Lawyer, August 1999, at 52.

II. OVERVIEW.

A. What are the prerequisites (i.e., requirements) for a returning service member to gain the protections of USERRA?

B. What are the protections granted by USERRA?

C. How are the USERRA protections enforced if an employer doesn't comply with the law?

III. PREREQUISITES FOR APPLICATION OF STATUTE. [38 U.S.C. § 4312].

A. Employee must have held a civilian job.

1. USERRA applies to virtually all employers: the federal government, state governments, all private employers. No exemption for small size, etc.

2. Overseas employees working for American controlled businesses or the federal government, including NAFIs such as AAFES, are now covered by the USERRA. See 38 USCA Sections 4303(3) and 4319 (1999), and 64 F.R. 31485 (11 Jun 99) (to be codified at 5 C.F.R. Section 353.103).

3. Even a temporary job may get USERRA protections, if there was a "reasonable expectation that employment will continue indefinitely or for a significant period." Burden is on employer to prove that the job was not permanent. Temporary Federal appointments are suspended during term of military service, and resume with reemployment. 5 CFR 353.103 (a)

4. Certain Federal employees may be excluded from active duty and maintained in the Standby Reserve, if they are designated "key employees" under DoD Directive 1200.7, Screening the Ready Reserve, (6 Apr 84), and AR 135-133, Ready Reserve Screening, (10 Jul 89). ***See Dew v. United States***, 1998 WL 159060 (S.D.N.Y. 1 Apr. 98) (FBI policy that no Special Agents may serve in the Ready Reserve because of a "blanket" key employee designation. Suit under USERRA dismissed for failure to exhaust administrative remedies), *affirm'd, on other grounds*, 192 F.3d. 366, 1999 U.S. App. LEXIS 23710 (2d Cir. 28 Sep. 99) (FBI agents are intelligence agency employees under 38 USC 4325, and thus are not able to sue in federal court, and have no right to judicial review of agency USERRA decisions). ***See also Thomsen v. Dep't of the Treasury***, 169 F.3d 1378 (Fed. Cir. 5 Mar. 99) (Reservists have no right to be a member of the Selected Reserve, and may be required to serve in the Standby Reserve if designated "key employees").

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice: it doesn't require that notice be written; written notice, however, will minimize proof problems. See Appendix B, USERRA Employer Notice Letters.

2. Notice may be given by the soldier or by a responsible officer from the soldier's unit.

3. Exceptions: "military necessity" precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise "unreasonable." Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. Soldier should give notice as soon as possible.

C. Employee's period of military service cannot exceed five years [Appendix B].

1. Five year limit on military service is cumulative.

2. The five-year clock restarts when employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five year calculation.

4. Five year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from old VRR law's four year service calculations.

D. **Employee's service must have been under "honorable conditions" - that is, no punitive discharge, no OTH discharge, and no DFR.** For service of 31 (or more) days, employer can demand proof of honorable conditions. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

E. Employee must report back or apply for reemployment in a timely manner.

1. If service up to 30 days, must report at next shift following safe travel time plus 8 hours (for rest).

2. If service 31 days to 180 days, must report or reapply within 14 days.

3. If service 181 days (or more), must report or reapply within 90 days.

4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that you formerly worked there, are returning from military service, and request reemployment pursuant to USERRA. The request need not be in writing. Written request for reemployment, however, will avoid proof problems. ***See Mc Guire v. United Parcel Service, Inc.***, 1997 WL 543059 (N.D. Ill. 1997) (unpub.), *aff'd*., 152 F.3d. 673 (7th Cir. 1998).

6. A soldier who fails to comply with USERRA's timeliness requirements doesn't lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. PROTECTIONS AFFORDED BY THE STATUTE. [38 U.S.C. §§ 4311-18.]

IF THE EMPLOYEE MEETS THE FIVE REEMPLOYMENT PREREQUISITES DISCUSSED ABOVE, THE EMPLOYEE IS ENTITLED TO **SEVEN** BASIC ENTITLEMENTS**: PROMPT REINSTATEMENT; STATUS; ACCRUED SENIORITY; HEALTH INSURANCE COVERAGE; TRAINING, RETRAINING, OR OTHER ACCOMMODATIONS; AND SPECIAL PROTECTION FROM DISCHARGE (EXCEPT FOR CAUSE)**. NOTE THAT THESE REQUIREMENTS APPLY TO ALL EMPLOYERS: BOTH PUBLIC (FEDERAL, STATE, & LOCAL) AND PRIVATE. UNLIKE MANY OTHER FEDERAL LAWS, THERE IS NO "SMALL COMPANY" EXCEPTION.

A. **Prompt Reinstatement.** If the employee was gone 30 (or fewer) days, the employee must be reinstated immediately; if gone 31 (or more) days, the reinstatement should take place within a matter of days.

B. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

1. "Assistant Manager" is not the same as "Manager," even if both given the same pay.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (from day to night, for example) can be challenged.

4. Civilian flight instructor assigned non-flight duties upon his return from Reserve active duty, upon RIF action which abolished his position, made nonfrivolous complaint that he was not assigned to a position of "like status and pay". See *Groom v. Dep't of Army,* 82 M.S.P.R 221 (1999); *Rogers v. Dep't of Army*, 82 M.S.P.R. 670 (1999); *Heidel v. U.S. Postal Service*, 69 M.S.P.R. 511, 516 (1996); and 5 C.F.R. Section 353.209(a).

C. **Seniority.** If the employer has any system of seniority, the employee returns to the "escalator" as if he or she had never left the employer's service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to same "or like" job (status and pay), at employer's option, plus seniority [See Appendix C].

2. Seniority applies to pension plans as well (including TSP for Federal employees). The seniority principle protects the employee for purposes of both vesting and amount of pension.

   a. If employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.

   b. If pension depends on a variable that is hard to estimate because of the employee's absence (e.g., amount of accrual pension depends on % of commissions earned by employee), employer may use what employee did in the 12 months before service to determine pension benefits. Employer may not, in any case, use military earnings as basis to figure civilian pension accrual.

c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. No interest may be charged by employer. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part1620, as amended by interim rule published 60 F.R. 19990 (21 Apr. 95), and final rule published 62 F.R. 18234 (14 Apr. 97). See also 64 F.R. 31052 (9 Jun 99) (new TSP loan policy for employees returning from military duty) (to be codified at 5 C.F.R. Part 1620, Subparts E and H)[See Appendix I--Federal Employee Reemployment Benefits.]

D. Health Insurance.

1. Immediately upon return to the civilian job, the employee (and his/her family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.

2. USERRA provides for continued employer health coverage, at the option of the employee, during the military service. [Federal employees should refer to 5 C.F.R. Part 890 (1999); see also 64 F.R. 1485 (11 Jun 99).]

   a. Employers must, if requested, continue employee and family on health insurance up to first 30 days of service. Note: CHAMPUS does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.

   b. Employees may request coverage beyond 31 days. Employer must provide this coverage up to 180 days or end of service (plus reapplication period), whichever occurs first. However, employers may charge employees a premium not to exceed 102% of total cost (employee + employer) of the entire premium.

E. **Training, Retraining, and Other Accommodations.** An employee who returns to the job after a long period of absence may find his/her skills rusty or face some new organization or technology. An employer must take "reasonable efforts" to requalify the employee for his/her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act.

2. If the employer cannot accommodate the employee, employer must find a position which is the "nearest approximation" in terms of seniority, status, and pay.

F. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

1. For service 181 days (or more), the subsequent protection lasts a year.

2. For service of 31 days to 180 days, the subsequent protection lasts for 180 days.

3. There is no special protection for service 30 (or less) days. However, the statute's general prohibition against discrimination or reprisal applies.

4. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or **any other benefit of employment** because of military service.

a. Not only are current Active and Reserve Component military members covered by this provision, but so are former members--veterans. **See *Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996). Neither widows nor spouses of prior service members are covered by the USERRA anti-discrimination provision. *Lourens v. MSPB*, 193F 3d. 1369, 1999 U.S. App. LEXIS 25515 (Fed. Cir. 13 Oct. 1999).

b. There is no exhaustion of administrative remedies requirement to receive relief under USERRA before the MSPB. *Roche v. MSPB*, 1998 U.S. App. LEXIS 1775 (Fed. Cir. 1998) (unpub.). However, if a federal employee chooses to seek DOL assistance by filing a complaint with the Secretary of Labor UP 38 USC Section 4322, the employee must wait until the completion of that process before requesting relief from the Board. See *Milner v. Dep't of Justice*, 77 M.S.P.R. 37, 46-47 (1997) and 38 USC Section 4324(b).

c. Employers cannot require someone to use vacation time/pay for military duty [§ 4316(d)]. **See** Veterans' Benefit Improvement Act of 1996, Pub. L. No. 104-275, § 311, 110 Stat. 3322 (9 Oct. 96), and ***Graham v. Hall-McMillen Company, Inc.***, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)

d. An agency cannot treat employees who are absent because of military leave like those employees who are non-military leave of absence when the result is to deny Reserve employees any legally required benefits, including promotions or lateral assignments the employee would prefer and had seniority over other employees, e.g., a change from night to day shift. *Allen v. U.S. Postal Service*, 142 F.3d. 1444 (Fed Cir. 1998).

e. Employers may not take adverse action against anyone (not just the military employee) because that person takes action to enforce rights under USERRA or testifies or assists in a USERRA action or investigation.

f. Employees may use a USERRA claim as an affirmative defense against an agency in challenging an adverse action before the MSPB UP 5 USC Section 7701(c)(2)(C). *Yates v. MSPB*, 145 F.3d. 1480, 1484 (Fed. Cir. 1998) and *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). The theory is that any agency adverse action that fails to address an employee's military status under USERRA is "an agency decision not in accordance with the law". See also *Bodus v. Dep't of Air Force*, 82 M.S.P.R. 508 (1999), and *Metzenbaum v. Dep't of Justice*, 82 M.S.P.R. 700 (1999) (Where there is an independent appealable action for MSPB jurisdiction and a USERRA claim, the USERRA claim is an affirmative defense to the action).

g. Such a defense may be implied by the factual record, without the claimant having to expressly mention USERRA in his/her complaint to the MSPB. *Yates*, supra; *Roberson v. U.S. Postal Service*, 77 M.S.P.R. 569 (1998); *Jasper v. U.S. Postal Service*, 73 M.S.P.R 367 (1998); *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999); and *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1 (1999). All a claimant must allege to make an implied prima facie case of discrimination under USERRA is:

(1) Allegation that he performed duty in a uniformed service of the United States.

(2) That he was denied a benefit of employment

(3) That the benefit was denied upon the basis of his duty performance in the uniformed services.

h. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. **See** ***Robinson v. Morris Moore Chevrolet,*** 974 F. Supp. 571 (E.D. Tex. 1997); ***Gummo v. Village of Depew,*** 75 F.3d 98 (2d Cir. 1996); ***Novak v. Mackintosh,*** 919 F. Supp. 870 (D.S.D. 1996); ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443 (N.D. Miss. 1996); ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996); and ***Hanson v. Town of Irondequoit***, 896 F. Supp. 110 (W.D. N.Y. 1995). Such cases are proven by direct evidence of discrimination (*Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367, 370-371 (1998)) or by indirect circumstantial evidence of discrimination (***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86, 93-94 (1997)). The administrative judge must so inform a claimant of the two methods of proof, and provide him time to develop the record. *Jasper*, supra at 371; and *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999).

i. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. ***Chance v. Dallas County Hospital District***, 1998 WL 177963 (N.D. Tex. 6 Apr. 98) (unpub.), *aff'd,* 176 F.3d 294 (5th Cir. 1999).

j. Military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. **See** ***Petersen v. Dep't of Interior,*** 71 M.S.P.R 227 (1996).

G. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service. For federal employees, see 64 F.R. 31485, 31487 (11 June 1999), to be codified at 5 C.F.R. Section 353.106c.

1. Examples: ESOP, disability coverage, low cost life insurance, Christmas bonus, holiday pay, etc. [Appendix H for Federal Thrift Savings Plan].

2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.

3. The employee may waive the right to these benefits if the employee states, in writing, that he/she does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he "change his mind" and seek reemployment.

V. ASSISTANCE AND ENFORCEMENT. [GENERALLY, 38 U.S.C. §§ 4322-24].

A. The National Committee for Employer Support of Guard and Reserve (1-800-336-4590). DoD agency. Provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. National and state ombudsman program first step to resolve employer-employee USERRA disputes. Website: http://www.ncesgr.osd.mil

B. **The Veterans' Employment and Training Service (VETS) (1-202-219-9110).** Department of Labor agency. Primary responsibility to formally investigate claims of USERRA violations. Website: http://www.dol.gov/dol/vets/. The Office of Special Counsel has responsibility to represent federal employees before the MSPB on USERRA violations, if they do not elect private counsel or desire to represent themselves. Website: http://www.access.gpo.gov/osc/.

1. If the VETS investigation establishes a violation probably occurred, VETS will refer the case to the Office of Special Counsel (OSC - employer a federal executive agency) [Appendix F] or Department of Justice (DOJ) for other employers. See also 64 F.R. 31485 (11 Jun 99) (to be codified at 5 C.F.R. Section 353.210) (DOL-VETS will assist federal employees with USERRA complaints, and when asked, refer such cases to the OSC for MSPB representation).

2. National Guard technicians do not have the right to appeal reemployment rights claim decisions made by their State Adjutant General to the MSPB, but may file complaints directly with the federal court. See 38 USCA 4323 (1999) and 64 F.R. 31485, 31487 (11 June 99) (to be codified at 5 C.F.R. Section 353.211). As the result of recent Eleventh Amendment cases and amendment of 38 USC 4323 [Appendix J], National Guard technicians may only sue their states under USERRA through the DOL-VETS and the U.S. Department of Justice. **Cf.** *Larkins v. Dep't of Mental Health*, 1999 U.S. Dist. LEXIS 9137 (M.D. Ala. 1999).

3. The OSC or AG may provide counsel for representation free of charge. If they do not, the individual may hire private counsel. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers). MSPB regulation providing for USERRA case attorney fee awards is at 62 F.R. 17046 (9 Apr. 97) (to be codified at 5 C.F.R. § 1202.202(a)(7)) and 63 F.R. 41177 (3 Aug. 98).

4. The MSPB has recognized that it has appellate jurisdiction over probationary, and non-probationary federal employees for USERRA claims. **See also** ***Petersen v. Dept of Interior***, 71 M.S.P.R. 227 (1996); ***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86 (1997); ***Botello v. Dep't of Justice***, 76 M.S.P.R.117 (1997); ***Jasper v. U.S. Postal Service***, 73 M.S.P.R. 367 (1997) [probationary employee]; ***Wright v. Dep't of Veteran's Affairs***, 73 M.S.P.R. 453 (1997) [probationary employee]; ***Roberson v. U.S. Postal Service***, 77 M.S.P.R. 569 (1998)[probationary employee]; and *Yates v. MSPB*, 145 F.3d 1480 (Fed. Cir. 1998) [probationary employee]. For purposes of USERRA complaints, a federal employee does not need to meet the one year of current continuous service as a preference eligible employee under 5 USC Section 7511(a)(1)(B), to have jurisdiction before the MSPB. *Yates*, supra; and *Matir v. Dep't of Navy*, 81 M.S.P.R. 421 (1999).

5. There are no time limits for individuals to file USERRA discrimination claims before the MSPB, notwithstanding prior MSPB policies. 5 CFR 1208.12 (2000), Watkins v. USPS, 85 MSPR 141 (2000).

6. The 1998 Amendments to USERRA [Appendix J] provided at 38 USC Section 4324(c) that the MSPB may now hear complaints "without regard as to whether the complaint accrued before, on, or after October 13, 1994"[Day before USERRA enacted]. The MSPB has interpreted this provision not to create any retroactive application of USERRA to pre-USERRA cases, but rather to allow the MSPB to hear and the OSC to represent federal employees in VRRA (predecessor statute) cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRA cases before the MSPB. *Williams v. Dep't of Army*, 83 M.S.P.R. 109 (1999) and *Venters v. U.S. Postal Service*, __M.S.P.R. __, 1999 MSPB LEXIS 1304 (21 Sep. 1999).

7. VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel. Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's "counsel." **See also** AR 27-3, The Army Legal Assistance Program, para 3-6e(2), concerning limits on Army legal assistance in USERRA cases.

8. The USERRA adds several new "teeth" to the enforcement of reemployment rights.

   a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.

   b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgement interest), attorney's fees, and litigation costs. **See** 62 F.R. 17046 (9 Apr. 97), to be codified at 5 C.F.R. § 1201.202(a)(7), and ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 446-447 (N..D. Miss. 1996).

   c. Employees who can demonstrate that reinstatement is not a viable remedy may seek “front pay” damage remedies. **See *Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443-446 (N.D. Miss. 1996).

VI. CONCLUSION.

- **DOL Non-Technical Guide to the USERRA - Appendix C.**
- **NCESGR Handouts on USERRA - Appendix E.**

APPENDIX A

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed. The new Title 10 section numbers are noted in italics and underlined.

2. The term "Reservist" means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

3. State call-ups of National Guard members are not protected under USERRA.

4. The symbol "§" means "section."

Title 38, U.S. Code § 4312(c) "...does not exceed five years, except that any such period of service shall not include..."

Obligated Service -- 4312(c)(1)

Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release -- 4312(c)(2)

Self explanatory. Needs to be documented on a case-by-case basis.

Training Requirements -- 4312(c)(3)

10 U.S.C. §270(a) *(10147)*----------regularly scheduled inactive duty training (drills) and annual training.

10 U.S. C. §270(B) & (c) *(10148)*----------ordered to active duty up to 45 days because of unsatisfactory participation.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

32 U.S.C§502(a)----------NATIONAL GUARD regularly scheduled inactive duty training and annual training.

32 U.S.C.§503----------NATIONAL GUARD active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions -- 4312(c)(4)(A)

10 U.S.C.§672(a) *(12301(a))*----------involuntary active duty in wartime.

10 U.S.C.§672(g) *(12301(g))*----------retention on active duty while in a captive status.

10 U.S.C.§673 *(12302)*----------involuntary active duty for national emergency up to 24 months.

10 U.S.C.§673b *(12304)*----------involuntary active duty for operational mission up to 270 days.

10 U.S.C.§673c *(12305)*----------involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C.§688----------involuntary active duty by retirees.

14 U.S.C.§331----------COAST GUARD involuntary active duty by retired officer.

14 U.S.C.§332----------COAST GUARD voluntary active duty by retired officer.

14 U.S.C.§359----------COAST GUARD involuntary active duty by retired enlisted member.

14 U.S.C.§360----------COAST GUARD voluntary active duty by retired enlisted member.

14 U.S.C.§367----------COAST GUARD involuntary retention of enlisted member.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

14 U.S.C.§712----------COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt form the 5 year limit, ***whether voluntary or involuntary activation***.

Certain Operational Missions --4312(c)(4)(C)

Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under Title 10, U.S. Code Section 673b *(12304)* is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §673b *(12304)*. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5 year limit, ***whether call-up is voluntary or involuntary***. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. Chapter 15----------NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C.§§3500/8500 *(12406)*------ARMY/AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces

APPENDIX B

REEMPLOYMENT POSITIONS UNDER USERRA

IF PERIOD OF SERVICE WAS FOR LESS THAN 91 DAYS

1. Escalator Position

   if not qualified for this position after reasonable effort then

2. Position Held at Beginning of Service

   if can't become qualified for position 1 or 2 with reasonable effort then

3. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

IF PERIOD OF SERVICE IS MORE THAN 90 DAYS

1. Escalator Position or

2. Position of Like Seniority, Status and Pay

   if not qualified for either position 1 or 2 after reasonable effort then

3. Position Held at Beginning of Service or a Position of Like Seniority, Status, and Pay

   if not qualified for any of the above after reasonable effort then

4. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

PERSONS WITH SERVICE RELATED DISABILITY

1. Escalator Position (with reasonable accommodation)

   if not qualified for this position after effort to accommodate disability then

2. Any Other Position Equivalent in Seniority, Status, and Pay Qualified to Perform with Reasonable Effort

   if no such position exists or if not employed as above then

3. Nearest Approximation to Equivalent Position (consistent with person's circumstances with full seniority)

APPENDIX C

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

The U.S. Department of Labor
Veterans Employment and Training Service

April 1999

Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive syatem, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov.*

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute or the official USERRA Handbook.

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Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment?{tc \l1 "Who's eligible for reemployment?}

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.
- Army National Guard or Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The new law provides an exemption for preservice positions that are "brief or nonrecurrent and that cannot reasonably be expected to continue indefinitely or for a significant period."

Advance Notice{tc \l1 "Advance Notice} (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or
- the giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exemption is to be defined in regulations of the Secretary of Defense. These regulations will be immune from court review.

Duration of Service{tc \l1 "Duration of Service} (Section 4312(c))

The cumulative length service that causes a person's absences from a position may not exceed five years.

Most types of service will be cumulatively counted in the computation of the five-year period.

Exceptions{tc \l2 "Exceptions}. Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312 (c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five year limit (Section 4312(c)(2)).** For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.
Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The recent U.S. military involvement in support of restoration of democracy in Haiti ("Uphold Democracy") was such an operational mission as is the current (as of 1998) operation in Bosnia ("Joint Endeavor").

This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

<u>Disqualifying service</u> (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping a individual from the rolls when the individual has been absent without authority for more than three months or who is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

<u>Reporting back to work{tc \l1 "Reporting back to work}</u> (Section 4312(e))

Time limits for returning to work now depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work day that would fall eight hours after the end of the calendar day. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.
If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible. If the 14th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service. If the 90th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

<u>Documentation upon return</u> (Section 4312(f)){tc \l1 "<u>Documentation upon return</u> (Section 4312(f))}

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation{tc \l2 "Unavailable documentation}. **Section: 4312(f)(3)(A)**. If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Pension contributions. Section 4312(f)(3)(B). Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to place eligible persons in a job{tc \l1 "How to place eligible persons in a job}

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. **Section 4313(a)(2)**. The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A)**. In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4)**. If the employee cannot become qualified for the position either in (A) or (B) above: in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

"Escalator" position{tc \l2 ""Escalator" position}. The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment{tc \l1 ""Prompt" reemployment}. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities incurred or aggravated while in Military Service{tc \l1 "Disabilities incurred or aggravated while in Military Service} Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims{tc \l1 "Conflicting reemployment claims} Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed circumstances{tc \l1 "Changed circumstances} Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship{tc \l1 "Undue hardship} Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons{tc \l1 "Rights of reemployed persons}

Seniority rights Section 4316(a){tc \l2 "Seniority rights Section 4316(a)}

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the most favorable treatment must be accorded the service member.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. **Section 4316(b)(4)**. Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans{tc \l2 "Pension/retirement plans}

Pension plans, **Section 4318,** which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

- **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

- **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

- **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate among the participating employers the liability of the plan for pension benefits accrued by persons who are absent for military service. If no cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay{tc \l2 "Vacation pay} Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, it continues to be the law that service members cannot be forced to use vacation time for military service.

Health benefits{tc \l2 "Health benefits} Section 4317

The law provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.) **Section 4317(a)(1).**

If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). A waiting period or exclusion cannot be imposed upon reinstatement if health coverage would have been provided to a person had the person not been absent for military service. However, an exception applies to disabilities determined by the Secretary of Veterans' Affairs (VA) to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge{tc \l2 "Protection from discharge}

Persons returning from active duty for training were not explicitly protected under the old law. Under USERRA, a reemployed employee may not be discharged without cause as follows:

- **Section 4316(c)(1)**. For one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more).

- **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not be protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation{tc \l1 "Protection from discrimination and retaliation}

Discrimination -- Section 4311.

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;

- promotion;

- reemployment;

- termination; and

- benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service. The burden of proof is on the employer once a *prima facie* case is established.

The enacted law clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Both the standard and burden of proof now set out in the law apply to all cases, regardless of the date of the cause of action, including discrimination cases arising under the predecessor ("VRR") law.

Reprisals{tc \l1 "Reprisals}

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- who exercises any right provided under the law.
- whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statue. Previously, the Secretary lacked such authority. However, certain publications issued by the U.S. Department of Labor had been accorded "a measure of weight" by the courts.

Veterans' Employment and Training Service{tc \l1 "Veterans' Employment and Training Service}. Reemployment assistance will continue to be provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates

complaints and attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions{tc \l1 "Government-assisted court actions}

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions{tc \l1 "Private court actions} **Section 4323(a).**

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(c)(1)(A)(iii). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(c)(2)(B). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(c)(4). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgements to determine potential claims of employees.

Service Member Checklist{tc \l1 "Service Member Checklist}

Service Member Obligations	Yes	No	Comments	Reference
1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)				Page 1
2. Did the service member notify the employer that he/she would be leaving the job for military training or service?				Page 2
3. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)				Page 2
4. Was the service member discharged under conditions other than disqualifying under section 4304?				Page 4
5. Did the service member make application or report back to the pre-service employer in a timely manner?				Page 4
6. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?				Page 5
7. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.				Page 11

Employer Obligations{tc \l1 "Employer Obligations}

Employer Obligations:	Yes	No	Comments	Reference
1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)				Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.				Page 11
3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?				Page 6
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations.				Page 9
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?				Page 5
6. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?				Page 2
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?				Page 8
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?				Page 7

9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?				Page 10
10. Did the employer offer COBRA-like health coverage upon request of a service member whose leave was more than 30 days? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?				Page 11
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute.				Page 13
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for military service.				Page 12
13. Did the employer satisfy the burden of proof where employment, reemployment or other entitlements are denied or when adverse action is taken when a service connection is the motivating factor in the denial or adverse action? Did the employer provide documentation that the action would have been taken in the absence of such membership?				Page 13

APPENDIX D

Office of the Special Counsel Considerations Regarding MSPB Representation

OFFICE OF THE SPECIAL COUNSEL & USERRA

1. What is the Office of Special Counsel?

The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:

a. Prohibited Personnel Practices (PPPs) under 5 U.S.C. Section 2302(b).

b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.

c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.

d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

2. What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?

a. 38 U.S.C. Section 4324(a)(1):

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

b. 38 U.S.C. Section 4324(a)(2)(A):

If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

c. **38 U.S.C. Section 4324(a)(2)(B):**

If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

3. What action does the Office of Special Counsel take upon referral?

a. Obtains the DOL-VETS investigative file and report/memorandum from the Office of the Solicitor, Department of Labor.

b. Reviews the entire investigative file in detail.

(1) Direct Evidence of Military Status Discrimination

(2) Circumstantial Evidence of Military Status Discrimination

A. Statements of Animus

B. Agency's Explanation

C. Disparate Treatment

D. Time Chronology

E. Conduct of the Veteran/Reserve Component Employee

c. Reviews the legal analysis from Secretary of Labor, Office of the Solicitor

d. Determines if further investigation is needed

e. Conducts their own legal analysis of the facts and law

4. What is the legal standard for a finding of military status discrimination?

a. The employee's affiliation (or former affiliation) with the active component Armed Forces or the Reserve Components of the Armed Forces (including the National Guard) played **a "substantial or motivating" part** in the agency's adverse action against the employee.

b. A "substantial or motivating factor" must be more than "some weight", but less than the "sole reason" for agency adverse action against an employee. Each case is examined on its unique facts. The employee must show by a preponderance of evidence (>50%) that military status was a "motivating" or "substantial" basis for adverse agency action. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); *Accord,* Gummo v. Village of Depew, New York, 75 F.3d 98, 106 (2d Cir. 1996)

c. Once an employee raises a USERRA claim of military status discrimination, the agency must prove that **it would have taken the same action against the employee even if the employee had no military affiliation**. The employee can then rebut the agency's claims by use of direct or circumstantial evidence, showing the agency's defense is really a **pretext for discriminatory conduct**. 38 U.S.C. Section 4311(b).

5. What would be considered "direct evidence" of military status discrimination?

a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.

(1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."

(2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")

b. Direct evidence is gathered from documents, witness statements, independent sources (internal inspector general investigations/audits), and agency policy and conduct/past practices.

6. What constitutes "circumstantial evidence" of military status discrimination?

a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting

analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a ***prima facie*** case that:

(1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,

(2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and

(3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran. Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996).

b. Once the employee has met the initial burden of proof, the burden "shifts" to the **agency to articulate a legitimate, nondiscriminatory reason for its action**. The agency meets this burden when it introduces evidence, which, on its face, would lead a fact finder to conclude that the agency had a nondiscriminatory basis for its action, regardless whether the agency proves the reason.

c. One the agency has raised a legitimate nondiscriminatory defense for its action, the employee must show that the agency's stated reason was really a **pretext for prohibited discrimination**. The employee must show both that the agency's stated reason was not the real reason for its action and that military status discrimination was a motivating factor for the adverse action.

d. Several types of information help the reservist or veteran prove his case:

(1) Statements of animus. Statements of animus are statements by supervisors and agency officials indicating a strong dislike of someone because of military or veteran status. In the Peterson case, the employee was a Vietnam veteran who was subjected to continuous abusive name calling by his supervisors and co-workers, such as "Psycho" and "Babykiller". Other common agency manager statements would be to disparage Reservists as "unreliable" or "disloyal", "non-team players", and "double dippers".

(2) Disparate Treatment. A good example is where a Reservist on active duty is denied an annual bonus, but a woman employee on pregnancy leave is given the annual bonus.

(3) Time Sequencing/Chronology. Where an agency immediately disciplines or fires an employee after he has asserted his USERRA rights or returned from military duty, despite agency protests of non-discriminatory purpose, a strong inference of discriminatory

conduct may be found. *Accord*, Robinson v. Morris Moore Chevrolet, 974 F. Supp. 571 (E.D. Tex. 1997).

7. Does a Reserve or National Guard employee have an obligation to minimize the burden upon the agency by rescheduling military duty or training that conflicts with his agency job demands?

a. Practically speaking, the answer is generally yes. Whenever possible, Reserve and National Guard members should work with their commands to avoid unnecessary conflicts between their military duty and civilian work schedules. This is particularly true in shift work type jobs, such as firemen, policemen, prison guards, postal workers, and hospital workers. Employees should provide their agencies with as much advance notice as possible to avoid scheduling conflicts. Still, military employees do not always have a say as to when they must participate in military training or activations.

b. Agency management must understand that they cannot refuse to allow their military member employees to attend military duty or training for agency convenience. The military mission is paramount. *See* H. Rep. No. 103-65, 103d Cong., 1st Sess., at 30 (1993):

> [T]here is no obligation on the part of the service member to rearrange or postpone already scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience.

c. There are no reported MSPB cases where the Board has endorsed adverse action against an employee for failing to minimize the frequency, timing or duration of their military training or duty. The statute, 38 U.S.C. ∋ 4312(h), makes clear that civilian employers, including the federal government, do not decide when, where, or how often employee Reservists do their military duty or training. As Congress observed in creating this section of the Act:

> This section makes clear the Committee's intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(C) and the servicemember has complied with the requirements under sections 4312(a) and (e).

H. Rep. No. 103-65, 103d Cong., 1st Sess., at 30 (1993). *See also* OPM Regulation, 5 C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c) provision should not be used as a test to determine whether the service member's military duty was "reasonable" or "fair to the agency", or whether the OSC should represent a federal employee with a USERRA issue.

8. How do you contact the Office of Special Counsel?

The OSC has a website at http://www.access.gpo.gov/osc . You can also contact the OSC senior counsel for USERRA cases, at telephone (202) 653-6005. Merit Systems Protection Board regulations and cases may be found at the MSPB website, http://www.access.gpo.gov/mspb .

APPENDIX E

DoD National Committee for Employer Support of the Guard & Reserve (NCESGR) Materials for Service Members and Employers

USERRA Facts for Employers

Note: This material is for information only and should not be considered a legal authority. While this factsheet is directed to civilian employers of members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

If you need more information concerning specific situations, please E-mail: NCESGR's WebMaster or call the National Committee at (800) 336-4590.

Note: Where applicable, a relevant section number of Title 38, United States Code, is provided in parentheses after the answer.

1. Is there a law governing a servicemember's right to reemployment rights after his or her completion of military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR). On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act – a comprehensive revision of the VRR, USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43. (Sections 4301 through 4333)

2. Who is eligible for reemployment rights under USERRA following military service?

The individual must meet five conditions, or "eligibility criteria." The individual:
a. must hold or have applied for a civilian job. (Note: Jobs employers can show to be held for a brief, nonrecurrent period with no reasonable expectation of continuing for a significant period do not qualify for protection.)
b. must have given written or verbal notice to the civilian employer prior to leaving the job for military training or service except when precluded by military necessity.
c. must not have exceeded the 5-year cumulative limit on periods of service.
d. must have been released from service under conditions other than dishonorable.

e. must report back to the civilian job in a timely manner or submit a timely application for reemployment. (generally, Section 4312)

3. Are there reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA does not apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state or territory involved. (Section 4303)

4. When is prior notice to the civilian employer required? How is such notice to be given?

The person who is performing the service (or an official representative of the uniformed service) must give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but the Department of Defense advises members of the National Guard and Reserve that they should provide their employers as much advance notice as they can. (Section 4312)

5. Is an employer entitled to proof that military duty for which an employee was granted a leave of absence was actually performed?

Yes. USERRA provides that following periods of military service of 31 days or more, the returning employee must, upon the employer's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment. Reemployment may not be delayed, however, if such documentation does not exist or is not readily available. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for reemployment: discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority.
While USERRA does not address documentation of shorter periods of military service, if doubt exists, an employer could contact the employee's military command with questions about a specific period of service. (Section 4312)

6. How is the 5-year limit computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative 5-year limit of military service a person can perform while retaining rights under USERRA. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.
USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of the individual) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties).
b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.
c. Service performed during time of war or national emergency or for other critical missions/contingencies/military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of the mission/contingency/military requirement is also exempt. (Section 4312)

7. Can an employee be required to use earned vacation while performing military service?

No. As under the VRR law, a person may not be forced to use earned vacation. Employees are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and an employee's period of military service happens to coincide with that period. (Section 4316)

8. Now that USERRA has been enacted, can a person serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits contained in the old law. (transition rules—not codified)

9. How much time off is an employee entitled to prior to reporting for military service?

Although an exact amount of time is not specified in USERRA, an employee, at a

minimum, needs to be given sufficient time to travel to the place where the military duty is to be performed.

10. After the completion of military service, what is the time frame within which a person has to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, the person must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of the employee, he or she must report back as soon as possible after the expiration of the 8-hour period.

After a period of service of 31-180 days, the person must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a person was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military service. (Section 4312)

In either case, the person does not automatically forfeit the right to reemployment, but will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." (Section 4312)

11. Does USERRA give a person the right to benefits from the civilian employer during a period of military training or service?

Yes. USERRA gives an employee the right to elect continued health insurance coverage, for himself or herself and his or her dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require the person to pay only the normal employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge the person up to 102 percent of the entire premium. If the employee elects coverage, the right to that coverage ends on the day after the deadline for him or her to apply for reemployment or 18 months after the absence from the

civilian job began, whichever comes first.

USERRA gives an employee and previously covered dependents the right to immediate reinstatement of civilian health insurance coverage upon return to the civilian job. The health plan cannot impose a waiting period and cannot exclude the returning employee based on preexisting conditions (other than for those conditions determined by the Federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service. (Section 4317)

To the extent that an employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or a leave of absence, the employer is required to provide those same benefits to an employee during a period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (e.g., jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. An employee may waive his or her rights to these other non-seniority benefits by knowingly stating, in writing, his or her intent not to return to work. However, such statement does not waive any other rights provided by USERRA. (Section 4316)

12. What is an employer required to provide to a returning servicemember upon reemployment?

There are four basic entitlements (if the eligibility criteria in answer #2 are met):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on the length of absence).
b. Accrued seniority, as if continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year. (generally, Section 4313)

13. Is the returning employee always entitled to have the same job back?

No. USERRA provides that, if the period of service was less than 91 days, the person is entitled to the job he or she would have attained absent the military service, provided the person is, or can become, qualified for that job. If

unable to become qualified for a new job after reasonable efforts by the employer, the person is entitled to the job he or she left.

For periods of service of 91 days or more, the employer may reemploy the returning employee as above (i.e., position that would have been attained or position left), or in a position of "like seniority, status and pay" the duties which the person is qualified to perform. (Section 4313)

14. What if a person is not qualified for the reemployment position?

If a person has been gone from the civilian job for months or years, civilian job skills may have been dulled by a long period without use. A person must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify that person. "Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If a person can't become qualified in the positions described in #13 after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority. (Section 4313)

15. What if a returning servicemember is disabled?

USERRA also requires the employer to make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during military service. If a person returns from military service and is suffering from a disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed. (Section 4313)

16. How does the new law address discrimination by an employer or prospective employer?

Section 4311(a) of USERRA provides as follows:

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an

employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:
"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against employer discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. (Section 4311)

17. Who has the burden of proof in discrimination cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken by an employer will be unlawful if a service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership or obligation." (Section 4311)

18. Where do I go for information or assistance?

Employers should contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. As mediators, they act as neutrals, with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Sometimes, employers are particularly inconvenienced by the timing of proposed military duty by an employee-Reservist. For example, a scheduled drill weekend by a "key" employee may disrupt a major project, special product promotion, annual inventory, etc.

In such cases, NCESGR suggests employers contact the military commander involved

to seek relief from the impending hardship. Experience has shown that commanders are sensitive to employer concerns and can often assist, when military requirements permit, by rescheduling the proposed military duty or assigning someone else to perform it.

Ombudsman Services

National Guardsmen, Reservists, or their employers who experience problems resulting from employee participation in the National Guard or Reserve, may request assistance from one of NCESGR's ombudsmen.

Ombudsmen provide information about rights and responsibilities under the law and seek a solution through mediation that can provide quick problem resolution. This service (whether local or national) is informal; discussions are not entered into personnel records. The objective is to eliminate misunderstandings and resolve difficulties to the satisfaction of all.

Each of the 54 ESGR committees have trained ombudsmen who are ready to assist in resolving employer-reservist conflicts. Most state committee ombudsmen are local business leaders; they understand both sides of the problem and can help mediate. State committee ombudsmen may be identified through unit commanders, state Adjutants General, or by calling the toll-free number below.

The first attempt to resolve a problem should be made at the employer-employee an atmosphere of mutual cooperation. If that fails, unit commanders should be consulted. Commanders have a vested interest in the problem and may be able to explain the situation or suggest compromises that will satisfy everyone's needs.If those efforts fail, e-mail us at the address below and we'll put you in touch with an ombudsman who is qualified to help and is sympathetic to the needs of both employers and employees. As with all communications, you should provide full details of the problem and an address and telephone number where you can be reached.

For more information about ESGR Ombudsman Services, NCESGR's WebMaster
National Committee for Employer
Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
Toll-Free: 800-336-4590

Please note: NCESGR's ombudsmen handle only employer-employee conflicts involving military service. Recruiting and inspector general complaints should be forwarded to the appropriate agencies. None of the sources listed above have authority to enforce the law. Cases that require legal advice or assistance are referred to the United States Department of Labor.

Employment and Reemployment Rights Questions and Answers for National Guard and Reserve Members

NOTE: This material is for information only and should not be considered a legal authority. While this factsheet is directed to members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

1. Is there a law governing reemployment rights after military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR) law. On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act, a comprehensive revision of the VRR law. USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code at chapter 43.

2. Am I eligible for reemployment rights under USERRA if I perform military service?

Yes, provided you meet five conditions, or "eligibility criteria":

a. You must hold a civilian job. (Note: Jobs that are held for a brief, nonrecurrent period with no reasonable expectation that the employment will continue indefinitely or for a significant period do not qualify for protection.)
b. You must give notice to your civilian employer that you will be leaving the job for military training or service.
c. You must not exceed the 5-year cumulative limit on periods of service.
d. You must be released from service under "honorable conditions."
e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

3. Do I have reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA doesnot apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state involved.

4. When is prior notice to my civilian employer required? How is such notice to be given?

It is necessary that the person who is performing the service (or an official representative of the uniformed service) give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but you should give your employer as much advance notice as possible.

5. How is the 5-year limit computed?

Service that you have performed, except the service described below, counts toward the cumulative 5-year limit of service you can perform while retaining rights under USERRA. When you start a new job with a new employer, you receive a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.

USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of yours) to obtain orders releasing you from service or service in excess of five years to fulfill an initial period of obligated service, generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties.

b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.

c. Service performed during time of war or national emergency or for other critical missions, contingencies, or military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of a mission, contingency, or military requirement is also exempt.

6. I am a Federal employee, and I receive 15 days of paid military leave each year. My agency's personnel office has informed me that I have no right to time off from work for military training or service beyond this 15 days. Is that right?

No. As a Federal employee, you have the right to 15 days of paid military leave each fiscal year, under Title 5 U.S. Code. When you have exhausted your right to paid leave under Title 5, you still have the right to use your accrued civilian leave or unpaid leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers.

If you wish to continue your civilian pay uninterrupted and you have annual leave on the books, you can use that annual leave for your military training or service. USERRA gives you the explicit right to do this.

If your employer is a state or local government that grants paid military leave, the result would be the same. Most states and many local governments do grant employees paid military leave. When you have exhausted your paid leave, USERRA gives you the right to use of accrued vacation or unpaid leave of absence.

7. Can I be required to use my earned vacation while performing military service?

No. As under the VRR law, you may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and your period of military service happens to coincide with that period.

8. Now that USERRA has been enacted, can I serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits in the old law.

9. After military service, how long do I have to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or verbal, with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of your own, you must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, you must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which you were hospitalized for or convalescing from a service-connected injury or illness.

10. What if I am late in reporting back to work or applying for reemployment without a valid excuse?

In either case, you do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

11. Does USERRA give me the right to benefits from my civilian employer during my military training or service?

Yes. USERRA gives you the right to elect continued health insurance coverage, for yourself and dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share, if any, of the cost of such coverage.

For longer tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage, your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There must be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right is not contingent on your having elected to continue that coverage during your period of service.

To the extent that your employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length.

12. To what am I entitled upon my application for reemployment?

You have four basic entitlements (if you meet the eligibility criteria in answer #2):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on your length of absence).
b. Accrued seniority, as if you had been continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods

of service of 181 days or more, it is one year.

13. When I return from military duty will I get my old job back?

USERRA provides that, if your period of service was less than 91 days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you as above (i.e., position you would have attained or position you left), or in a position of "like seniority, status and pay" the duties of which you are qualified to perform.

14. What if I'm not qualified for my reemployment position? What if I'm injured or disabled?

If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified in the positions described in #13 after reasonable efforts by your employer and you are not disabled, you must be employed in any other position of lesser status and pay, the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from military service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay.
A disability need not be permanent in order to confer rights under USERRA. For example, if you break your leg during your annual training, your employer may have an obligation to make reasonable efforts to accommodate your broken leg, or to place you in another position, until your leg has healed.

15. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) of USERRA provides the following:

"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA.

16. Who has the burden of proof in these cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken against you by an employer will be unlawful if your service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership ... or obligation."

17. Where do I go for information or assistance?

National Guard and Reserve members with questions or concerns about their civilian job rights should first consult with their command.

For assistance, contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. If you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, you should contact the Veterans' Employment and Training Service of the United States Department of Labor.

APPENDIX F

USERRA and Federal Thrift Savings Plans

Summary of Uniformed Services Employment And Reemployment Rights Act (USERRA) As It Pertains To Thrift Savings Plans (TSPs)

This reference guide and example are provided as clarification of **TSP Bulletin 95-13**. It is not intended to replace the bulletin. Please refer to TSP Bulletin 95-13 for more detailed information.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted on October 13, 1994, includes provisions to allow all eligible employees the opportunity to make up any Thrift Savings Plan (TSP) contributions that were not made to their TSP accounts because they separated (or were in a leave-without-pay status) to perform military service. TSP Bulletin 95-13 defines eligible employees as persons who separated (or entered in a leave-without-pay status) to perform military service and who were restored or reemployeed under Chapter 43 of Title 38, U.S.C. on or after August 2, 1990. Personnel offices may solicit self identification of employees in addition to automated methods to identify potentially eligible employees. When the employee has been identified, the personnel representative may make an appointment with him or her to explain the impact of USERRA. This is an opportunity to advise the employee of the amount of retroactive agency automatic 1% contributions. To assist the employee in making an informed decision, the personnelist may compute an estimate of retroactive employee contributions based on the employee's election.

Employees have until April 21, 1996 or one year from the date of reemployment, whichever is later, to submit a written request to the personnel office to make up the missed employee contributions, or their rights are forfeited. Agency Automatic 1% contributions should be forwarded to TSP by June 20, 1995. Belated submissions will continue to accrue lost earnings at the cost of the employing agency.

1. Employee Contributions: Eligible employees may choose to make retroactive contributions to their TSP accounts. Such contributions are made via payroll deductions from the employee's biweekly pay. The rate(s) of basic pay for the retroactive period must be furnished to employee's civilian payroll office. For the portion of the retroactive period when the employee did not receive a civilian salary, the rate of basic pay used to calculate TSP contributions, including the Agency Automatic 1%, is the basic pay to which the employee would have been entitled had he or she remained continuously employed. TSP Bulletin 95-13, Paragraph II.F., defines the retroactive period. Employees may change the amount of their contributions one time for each TSP Open Season during which they were eligible to participate, except that they were separated from civilian employment (or on LWOP) to perform military duty. An election to make a retroactive open season election is treated similarly to the error correction process. The fund allocations for all contributions must be identical to those indicated on the most current TSP-1.

2. Government Matching Contributions: Matching is available only to FERS employees if they choose to make retroactive contributions. If employees are currently contributing to TSP, government matching contributions will be invested in accordance with current allocations. Lost earnings will be paid on the retroactive government matching contributions (see paragraph 4 below).

3. Agency Automatic 1%: The personnel office is responsible for determining the retroactive period and for submitting corresponding basic pay rates to payroll. The personnel representative should find this information in the OPF. Payroll will submit the appropriate amount to the National Finance Center (NFC) to be invested in accordance with the current TSP-1.

4. Lost Earnings: A lost earnings record will be submitted by the employee's civilian payroll office for each pay period covered by the retroactive period. The TSP will calculate lost earnings on all retroactive agency contributions using the G-Fund rate of return unless the employee submitted one or more interfund transfer requests during the period of separation. In this case, lost earnings will be calculated using the G-Fund rate of return until the first interfund transfer request was processed. Contributions subject to lost earnings will be moved to the investment funds indicated on interfund transfer requests and lost earnings will then be calculated based on those investment funds. The contribution is traced through any additional interfund transfers that were processed during the lost earnings calculation period.

5. Forfeitures: If a FERS employee separated to perform military service before he or she was vested and thus forfeited agency automatic contributions, he or she is entitled to have these funds restored. It is incumbent on the employee to notify the personnel office of the forfeiture. TSP-5-R has been issued by TSP to be used to request restoration. Please refer to TSP Bulletin 95-18 for procedures to request restoration of forfeited funds.

6. Withdrawals: If the employee received an automatic cash out or was required to withdraw his or her TSP funds prior to March 1995, he or she may elect to reinvest the full amount of the withdrawal back into TSP. In certain cases, if a taxable distribution was declared on a TSP loan and the employee returns the amount of the withdrawal to the TSP, the taxable distribution that was declared on the loan may be reversed. In such a case, regular loan payments are resumed.

EXAMPLE #1:

In July 1991 TSP Open Season Mike submits a TSP-1 to contribute 3% of basic pay, allocating 100% to C-Fund. On October 1, 1991 Mike enters LWOP status to perform military duty. Mike returns to his civilian job March 12, 1992. At this time he resumes contributions at the 3% rate with 100% in the C-Fund. He has made no change since. On June 1, 1995 he is contacted by his employing agency and notified of his right to make retroactive contributions under USERRA.

--Mike has the opportunity to make retroactive contributions which will be based on the TSP-1 on file, at the 3% rate, 100% in the C-Fund. Mike will be entitled to the Agency Automatic 1% and Agency matching. Lost earnings will be calculated at the G-Fund rate of return only on the Agency Automatic 1% and on the Agency Matching Contributions. Retroactive contributions will be invested according to his current contribution allocation which is still 100% C-Fund.

--A TSP Open Season occurred during Mike's LWOP. Thus, he may submit a TSP-1 to change the amount of the contribution. However, the contributions will be invested according to

the allocations indicated on his current TSP-1. If, for example Mike wants to make retroactive contributions at 5% of Basic Pay (instead of 3%), this change would be effective the first full pay period in January and would end with the pay period prior to the first full pay period in July 1992. Effective with the July 1992 open season, Mike's contributions would return to 3%. (Reason: Mike had an opportunity to make an open season election in July 1992 yet remained at the 3% contribution level.)

--The personnel office should provide the payroll office with the period during which agency automatic 1% contributions are due. In this case that period of time begins on October 1, 1991 and terminates at the end of the pay period prior to the pay period in which Mike returned to duty. The personnel office should also provide the payroll office with the period during which agency matching contributions must be calculated. In the above example, the periods are from October 1, 1991 through December 1991, at 3% and January 1992 through June 1992, at 5%. Applicable salary rates should be provided for each period individually.

EXAMPLE #2

Pat is a CSRS employee contributing 2% of basic pay to TSP with 100% invested in the G-Fund. Pat is placed on LWOP in February 1994 to perform military service. He returns to duty in June 1994. In June 1995 Pat's employing office notifies him of his rights under USERRA.

--Pat may reinstate the TSP-1 election that was in effect in February 1994. As no open season occurred during Pat's leave, he does not have the option to change the contribution amount. He is locked into the 2% contribution rate. Pat is not entitled to the Agency Automatic 1% or the Agency Matching because he is covered under CSRS.

EXAMPLE #3

Debbie was first employed on October 1, 1992. November 1, 1992 she enters LWOP to perform military service. She remains on LWOP until she returns to her civilian position on June 2, 1993. During the July 1993 open season she enrolls in TSP for the first time.

--Debbie may not make retroactive contributions under the USERRA provisions. This is because she was not eligible to participate in TSP until the July 1993 Open Season.

EXAMPLE #4

Colette is a FERS employee who, prior to her separation on February 15, 1992 to perform military service, participated in TSP (5% of Basic Pay with 50% in the G-Fund and 50% in the F-Fund). Colette is reemployed on July 1, 1995 under Chapter 43 of Title 38, U.S.C.

--Immediately upon reemployment, Colette's agency will give her the opportunity to submit a Form TSP-1 to make current contributions. The fund allocation she requests will be the prospective investment allocation as well as the investment allocation for retroactive contributions. Within 60 days of becoming reemployed Colette's agency should advise her of her opportunity to make retroactive contributions. If she chooses to make retroactive payments, she is locked into the 5% contribution amount until her open season opportunity in July 1992. She can change the amount of her contribution for each open season during which she was separated in order to perform military service.

--The agency determines the retroactive period and the basic pay amounts on which the agency automatic 1% will be computed and submits this information to the civilian payroll office.

APPENDIX G
OPM News Release (1995): Benefits For Federal Employee Reservists Outlined

NEWS RELEASE

FOR IMMEDIATE RELEASE
December 28, 1995

CONTACT: Sharon J. Wells
(202) 606-1800, fax: 606-2264

BENEFITS FOR FEDERAL EMPLOYEE RESERVISTS OUTLINED

Washington, D.C.--Office of Personnel Management Director Jim King yesterday issued a notice to heads of Executive departments and agencies providing a summary of the rights and benefits of those federal employees who, as military reservists, are being called to assist in the international efforts in former Yugoslavia. This mobilization is called "Operation Joint Endeavor."

"The Federal Government is by far the largest single employer of members of the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis," said Director King.

The package contained specifics on the rights and benefits of federal civilian employees who perform active military duty including information on:

- Employee Assistance Programs (EAP's);
- pay;
- military leave;
- annual and sick leave;
- lump-sum leave payments;
- health benefits;
- life insurance;
- retirement; and,
- return to civilian duty.

On the last point, an employee on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.

"Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected," Jim King continued.

Agencies were urged to share the information with all affected employees as soon as possible.

Office of Personnel Management
Theodore Roosevelt Building
1900 E. Street, NW
Room 5F12
Washington, D.C. 20415-0001

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR
MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
FROM: JAMES B. KING, DIRECTOR
SUBJECT: Operation Joint Endeavor

Pursuant to section 12304 of title 10, United States Code, and Executive Order l2982 of December 8, 1995, the Secretary of Defense has delegated to the Secretaries of the Military Departments the authority to order to active duty Selected Reserve units and individual members not assigned to units for a period of up to 270 days to assist in the international efforts in former Yugoslavia. This mobilization is called "Operation Joint Endeavor."
The Federal Government is by far the largest single employer of members o£ the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis. Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected. Federal law provides many important rights and benefits for Federal employees who perform active military duty. An overview of these rights and benefits, including changes made necessary by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), is provided in attachment 1. I urge agencies to share this information with all affected employees as soon as possible.

USERRA generally requires an agency to place an employee entering the military on leave without pay unless the employee requests to be separated. Employees may also choose to be placed on military leave or paid leave, as appropriate. In any event, an employee entering on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.
Finally attachment 2 reminds agencies of their authority and obligation to provide certain premium pay benefits to civilian employees who perform emergency work in support of Operation Joint Endeavor.

Attachments

Attachment 1

EMPLOYEE RIGHTS AND BENEFITS OF FEDERAL CIVILIAN EMPLOYEES WHO PERFORM ACTIVE MILITARY DUTY

Civilian Federal employees who are members of the Uniformed Services and who are called to active duty (or volunteer for active duty) are entitled to the following rights and benefits:

1. EMPLOYEE ASSISTANCE PROGRAMS(EAPs). Employee Assistance Programs can be very helpful to employees and their families in coping with the stress and disruption associated with a call to active military duty. EAP's provide short-term counseling and referral services to help with financial, emotional, and dependent care problems. These services are available to employees who have been called to active military duty (or who volunteer for such duty) and to employees who are family members of those who are performing active military duty. In addition, many EAP's offer services to family members of employees.

2. PAY. Employees performing active military duty will receive compensation from the Armed Forces in accordance with the terms and conditions of their military enlistment or commission. They will now receive any compensation from their civilian employing agency unless they elect to use military leave, annual leave, or sick leave as described in paragraphs 3 and 4 below. As usual, agencies should continue the payment of annual premium pay for administratively uncontrollable overtime (AUO) work, availability pay for criminal investigators, regularly scheduled standby duty, or Sunday premium pay (when Sunday is part of the employee's regularly scheduled non-overtime civilian tour of duty) on days of military leave, annual leave, or sick leave.

3. MILITARY LEAVE. Employees who perform active military duty may request the use of paid military leave, as specified in 5 U.S C. 6323(a). Under the law, an eligible full-time employee accrues 15 calendar days of military leave each fiscal year, and any unused military leave at the end of the fiscal year (up to 15 calendar days) is carried forward for use in addition to the 15 days credited at the beginning of the new fiscal year. Part-time career employees accrue military leave on a prorated basis. Full-time employees may have up to 30 calendar days of military leave for use during a fiscal year. However, an employee who has more than 15 calendar days of unused military leave must use the excess amount of leave before the end of the fiscal year in order to avoid forfeiture. Employees who elect to use military leave will receive full compensation from their civilian position for each workday charged to military leave, in addition to their military pay for the same period.

Employees who perform active military duty in support of Operation Joint Endeavor may not be granted an additional 22 days of military leave under 5 U.S.C. 6323 (b) because that type of military leave is for the purpose of providing military aid to assist domestic civilian authorities to enforce the law or protect life and property.

4. ANNUAL AND SICK LEAVE. Employees who perform active military duty may request the use of accrued and accumulated annual leave to their credit (under 5 U.S C. 6303 and 6304). and such requests must be granted by the agency. Requests for sick leave (under 5 U.S.C. 6307) may

be granted if appropriate under the normal requirements for such leave. In addition, requests for advanced annual or sick leave may be granted at the agency's discretion. Employees who use annual leave or sick leave will receive full compensation from their civilian position for all hours charged to annual or sick leave in addition to their military pay for the same period. Generally, employees do not earn annual or sick leave while in an extended nonpay status (e.g., LWOP for 2 weeks (80 hours) or more for most full-time employees)

5. LUMP-SUM PAYMENTS. Employees who enter into active military duty may choose (1) to have their annual leave remain to their credit until they return to their civilian position, or (2) receive a lump-sum payment for all accrued and accumulated annual leave. There is no requirement to separate from the civilian position in order to receive a lump-sum leave payment under 5 U.S.C. 5552.

6. HEALTH BENEFITS. Individuals performing active military duty under orders specifying a period of more than 30 days are provided medical and dental services, and their dependents are covered by care within an active military medical facility or the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). If an employee covered by the Federal Employees Health Benefits Program (FEHBP) is separated or placed in an LWOP status to perform military service, his or her health benefits enrollment continues for up to 18 months, unless elects in writing to have the enrollment terminated. If the FEHBP enrollment continues, the employee is responsible for paying the usual enrollee share of the premium for the first 12 months of absence for military duty and 102 percent o£ the full premium (Government and enrollee shares) for the final 6 months of continued coverage. However, employees may incur a debt during the first 12 months of such absence, rather than paying concurrently.

Termination. If an employee elects in writing to have the FEHBP enrollment terminated or if the enrollment automatically terminates after 18 months of separation or LWOP related to military duty, the employee and the covered family members have a 31-day temporary extension of coverage to convert to a non-group policy. These employees are not eligible for temporary continuation of coverage (TCC) at the end of the 18-month period of continued FEHEP coverage.

7. LIFE INSURANCE. If an employee is separated or placed in an LWOP status for reasons related to military service, his or her Federal Employees' Group Life Insurance (both basic and all forms of optional coverage) continues for up to 12 months at no cost to the employee. If the life insurance coverage is terminated after 12 months of such absence, the employee has a 31-day temporary extension of coverage for conversion to a non-group policy.

8. RETIREMENT. An employee who is placed in an LWOP status while performing active military duty continues to be covered by the retirement law--i.e., the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) Death benefits will be paid as if he or she were still in the civilian position. If the employee becomes disabled for his or her civilian position during the LWOP and has the minimum amount of civilian service necessary for title to disability benefits (5 years for CSRS, 18 months for FERS), the employee will become entitled to disability benefits under the retirement law. Upon eventual retirement from civilian service, the period of military service is creditable under either CSRS or FERS, subject to the normal rules for crediting military service.

If an employee separates to enter active military duty, he or she generally will receive retirement credit for the period of separation when the employee exercises restoration rights to his or her civilian position. If the separated employee does not exercise the restoration right, but later re-enters Federal civilian service, the military service may be credited under the retirement system, subject to the normal rules governing credit for military service. However, if an employee covered by CSRS is separated to enter active military duty during a period of war or national emergency as declared by Congress or proclaimed by the President, the employee is deemed not to be separated from his or her civilian position for retirement purposes, unless the employee applies for and receives a refund of his or her retirement deductions.

Thrift Savings Plan. For purposes of the Thrift Savings Plan (TSP), no contributions can be made, either by the agency or the employee, for any time in an LWOP status or for a period of separation. However, if employees are subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S C. chapter 43, they may make up missed contributions. FERS employees are entitled to receive retroactive Agency Automatic (1 percent) Contributions and, if they make up their own contributions, retroactive Agency Matching Contributions.

Also, if FERS employees separate and their Agency Automatic (1 percent) Contributions and associated earnings are forfeited because they did not meet the TSP vesting requirement, the employees are entitled to have these funds restored to their accounts after they are reemployed. In addition, if employees separate and their accounts are disbursed as automatic cashouts, the employees may return to the TSP an amount equal to the full amount of the payment after they are reemployed.

For more information, see TSP Bulletins 95-13, Implementation of the Uniformed Services Employment and Reemployment Rights Act of l994, and 95-20, Interim Regulations and Fact Sheet on Thrift Savings Plan Benefits Resulting from the Uniformed Services Employment and Reemployment Rights Act of 1994.

9. RETURN TO CIVILIAN DUTY. An employee who enters active military duty (voluntarily or involuntarily) from any position, including a temporary position, has full job protection, provided he or she applies for reemployment within the following time limits:

(A) Employees who served less than 31 days must report back to work at the beginning of the next scheduled workday following their release from service and the expiration of 8 hours after a time for safe transportation back to the employee's residence.

(B) Employees who served more than 30 days, but less than 181 days, must apply for reemployment within 14 days of release by the military.

(C) Employees who served more than 180 days have 90 days to apply for reemployment. Employees who served less than 91 days must be restored to the position for which qualified that they would have attained had their employment not been interrupted. Employees who served more than 90 days have essentially the same rights, except that the agency has the option of placing the employee in a position for which qualified of like seniority, status, and pay.

Upon return or restoration, an employee generally is entitled to be treated as though he or she had never left for purposes of rights and benefits based upon length of service. This means that the employee must be considered for career ladder promotions, and the time spent in the military

will be credited for seniority, successive within-grade increases, probation, career tenure, annual leave accrual rate, and severance pay. An employee who was on a temporary appointment serves out the remaining time, if any, left on the appointment. (The military activation period does not extend the civilian appointment.)

An employee performing active military duty is protected from reduction in force (RIF) and may not be discharged from employment for a period of 1 year following separation (6 months in the case of a Reservist called to active duty under 10 U.S.C. l2304 for more than 30 days but less than 181 days or ordered to an initial period of active duty for training of not less than 12 consecutive weeks), except for poor performance or conduct or for suitability reasons.

NOTE: Employees in the intelligence agencies have substantially the same rights. but are covered under agency regulations rather than the Office of Personnel Management's regulations and have different appeal rights.

10. APPEAL RIGHTS. An employee or former employee of an agency in the executive branch (including the U.S. Postal Service) who is entitled to restoration in connection with military duty may appeal an agency's failure to properly carry out the law directly to the Merit Systems Protection Board (MSPB), or the employee may first submit a complaint to the Department of Labor, which will attempt to resolve it. If resolution is not possible, the Department may present the case to the Office of the Special Counsel, which may represent the employee in an appeal to the MSBP. Appeals to the Board must be submitted within 30 calendar days after the effective date of the action being appealed.

11. DOCUMENTING PERSONNEL ACTIONS.

Leave without Pay. LWOP must be documented on an SF 50, Notification of Personnel Action, with nature of action 473/LWOP-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. (Note: ZJU is a new legal authority that has been established to enable OPM and agencies to identify reservists who are involved in the international effort under Operation Joint Endeavor.) These same two authorities must also be used on the 292/RTD action when the reservist returns to civilian employment.

Health Benefits and Life Insurance. For those reservists with health benefits coverage while absent for reasons related to military duty, enter in block 45 of the SF 5 0 remark B66:

> "Health benefits coverage will continue for 18 months unless you elect to cancel coverage You are liable for the employee share of the premiums for the first 365 days and for 102% of the full subscription charge after 365 days. Payment for coverage after 365 days must be made on a current basis; payment for the first 365 days may be made while you are absent or when you return."

For those reservists with Federal Employees' Group Life Insurance (FEGLI) coverage, enter in block 45 of the SF 50 remark B39:

> "FEGLI coverage continues for up to 12 months in a nonpay status."

Separations. If the reservist requests separation rather than LWOP, the separation must be documented with nature of action 353/Separation-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. Follow the instructions in Chapter 9 or 11 (as appropriate) of *The Guide to Processing Personnel Actions*, to document the reservist's restoration upon completion of his or her military service.

12. CONTACTS. For further information on employment rights and benefits of civilian Federal employees who perform active military duty, agencies should contact the following offices:
--For information on pay, military leave, and annual and sick leave, contact OPM's Compensation Administration Division, (202) 606-2858.
--For information on health benefits, life insurance, and retirement, contact the Insurance Officer or Retirement Counselor of your agency. Retirement Counselors may contact OPM's Agency Advisory Services Division, (202) 606-0788. Insurance Officers may contact the Office of Insurance Programs, Insurance Policy and Information Division, (202) 606-0191.
--For information on the Thrift Savings Plan, agency headquarters personnel offices may contact the Federal Retirement Thrift Investment Board, (202) 523-7507 Field installations should contact their headquarters TSP Coordinator for guidance.
--For information on return to civilian duty and appeal rights, contact OPM's Staffing Reinvention Office, (202) 606-0830.

--For information on documenting actions related to entering active military duty, contact OPM's Personnel Records and Systems Division. (202) 606-4415.

--For information on labor-management relations issues, contact OPM's Labor-Management Relations Division, (202) 606-2930.

Attachment 2

PREMIUM PAY FOR FEDERAL CIVILIAN EMPLOYEES WHO PERFORM EMERGENCY WORK IN SUPPORT OF OPERATION JOINT ENDEAVOR

The purpose of this attachment is to provide information about premium pay for civilian employees who perform emergency work in connection with "Operation Joint Endeavor." Agencies are reminded of their authority under the law (5 U.S.C. 5547(b)) and OPM regulations (5 CFR 550.106) to make exceptions to the bi-weekly maximum earnings limitation. (Please note that overtime pay under the Fair Labor Standards Act of 1938, as amended, does not count toward this limitation) When the head of an agency or his or her designee determines that an emergency posing a direct threat to life or property exists, an employee who is performing work in connection With the emergency must be paid premium pay under the annual limitation of GS-15, step 10, rather than the GS-15, step 10, biweekly limitation. However, law enforcement officers (LEO's) are covered by the higher biweekly limitation in 5 U.S.C. 5547(c) and are not covered by the authority to apply the annual limitation during emergencies.
OPM encourages agencies to exercise their authority in the case of employees (other than LEO's) who perform emergency work in connection with Operation Joint Endeavor. Agency heads are required to make a determination as soon as practicable and to make entitlement to premium pay under the annual limitation effective as of the first day of the pay period in which the emergency began. Questions may be referred to OPM' s Compensation Administration Division on (202) 606-2858.

CHAPTER 36

ARMY ENVIRONMENTAL LAW: INTRODUCTION

I. A BRIEF HISTORY.

A. American society's widespread concern about the environment is a relatively recent development that has fueled rapid growth in environmental regulation. In 1970, there were only 500 pages in the Code of Federal Regulations (C.F.R.) devoted to environmental protection. Today, there are thousands of pages of environmental regulations in the C.F.R. implementing over 70 pieces of environmental legislation. In addition, many states have enacted environmental regulatory schemes that rival their federal counterparts in scope and complexity.

B. DOD installations must interact with multiple sources of environmental regulators.

1. At the federal level, most environmental statutes are primarily administered and enforced by the Environmental Protection Agency (EPA). EPA has divided the country into 10 regions. While subject to direction from EPA National Headquarters in Washington, D.C., each EPA region has a distinctive "personality" that is often displayed when enforcing environmental requirements at federal facilities.

2. Increasingly, state and local agencies are administering and enforcing environmental requirements that impact on federal facilities. Some of these requirements are based on federal programs that have been delegated by EPA or other federal agencies to the state. Other requirements are unique to the state, or products of local initiatives. Typically, states assign principal responsibility for environmental regulation to various branches or divisions within their existing Departments of Natural Resources or Health.

3. Compliance with U.S. environmental laws overseas.

a. With the exception of the National Environmental Policy Act (NEPA) and its application to Antarctica, there is no direct application of U.S. laws to overseas operations (*see infra* Chapter II, section X). DOD has, however, decided to apply many U.S. standards via DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).

(1) Applies to all DOD components, including the Unified Combatant Commands.

(2) Explicitly does not apply to:

(a) The operations of U.S. military vessels or aircraft;

(b) Off-installation operational and training deployments; or

(c) The investigation or execution of remedial or cleanup actions necessary to correct environmental problems arising from past DOD activities.

b. DOD establishes an overseas "baseline" document. The baseline will consist of standards applicable to similar operations conducted in the U.S.

(1) Once developed, the baseline will be compared with existing host nation law to develop country-specific environmental standards (i.e., Final Governing Standards (FGS)).

(2) After consultation with the U.S. Diplomatic Mission in the host country, the "Executive Agent" will determine whether to apply baseline standards or host nation standards. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS.

c. Waivers from applicable standards can be obtained from the Executive Agent where "compliance with the standards at particular installations or facilities would seriously impair their actions, adversely affect relations with the host nation or would require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or . . . realignment. . . ." Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.

d. Disposal of hazardous wastes in the host country will be limited to instances where:

(1) Disposal complies with the baseline guidance and any applicable international agreements; or

(2) Disposal complies with the baseline guidance and host nation authorities have concurred with disposal in their country.

C. The Unitary Executive Doctrine.

1. In most cases, federal environmental laws apply to federal agencies and their facilities. Enforcement of federal law against noncomplying federal agencies, however, has sometimes proven problematic. EPA cannot sue another federal agency and has been able to unilaterally issue compliance orders or assess fines only in very limited circumstances because of the "unitary executive doctrine." In 1987, Henry Habicht III, then the Department of Justice's Assistant Attorney General for the Land and Natural Resources Division, described the unitary executive doctrine as follows:

> [T]he President has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibilities under Article II, even though Executive branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered to comply with an administrative order *without the prior opportunity to contest the order within the executive Branch*. (Emphasis in original).

--Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 210 (1987).

2. To resolve the inherent tension between the unitary executive doctrine and EPA's duty to regulate federal agencies, President Carter issued Executive Orders 12,088 and 12,146. Collectively these Executive Orders provide federal agencies with a dispute resolution process that offers federal agencies the opportunity to challenge the terms of an EPA proposed order through various levels of EPA's regional and national bureaucracy.

   a. Executive Order 12,088 provides in relevant part:

      (1) 1-602. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation [of an applicable pollution control standard] between Executive Agencies. . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

      (2) 1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

   b. Executive Order 12,146 provides in relevant part:

      (1) 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

      (2) 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding into any court, except where there is specific statutory vesting of responsibility for resolution elsewhere.

c. Note that under Executive Order 12,088, resolution of disputes by OMB rests upon request of the EPA Administrator. Under Executive Order 12,146, on the other hand, either of any two disputing Federal agencies can submit the case to the Department of Justice (DOJ).

3. Although the unitary executive doctrine does preclude civil judicial enforcement by EPA as an enforcement option against federal agencies, the Administrator may, however, request that DOJ initiate a civil suit against the contractor who administers any portion of the installation's environmental program.

D. States have also experienced problems trying to force federal facilities to comply with state environmental requirements. While Congress has included a waiver of sovereign immunity provision in nearly all environmental legislation, courts have frequently found that the waivers were not broad enough to permit effective enforcement. Initially, disputes focused on whether federal facilities were required to obtain state issued permits. For example, in Hancock v. Train, 426 U.S. 167 (1976), the Court held that the waiver provision in the Clean Air Act (CAA) did not constitute the "clear and unequivocal waiver" required to constitutionally subject federal facilities to state permitting requirements. Congress responded to Hancock by amending the CAA waiver and ensuring that all environmental statutes passed or amended subsequently contained waivers of immunity that clearly required federal agencies to obtain applicable state permits. Congress' response to Hancock did not, however, answer the issue of whether or not states can impose fines on federal agencies for CAA violations at federal facilities. This and other sovereign immunity issues are addressed *infra* at section VI, para. D.

E. DOD places considerable emphasis on dealing with environmental problems caused by past practices and in ensuring that current environmental standards are achieved at all facilities subject to regulation. More importantly, DOD's leadership has demanded that protection of the environment be considered part of the military's mission. As Secretary Cheney said in a 1989 memorandum to the Service Secretaries:

> Federal facilities, including military bases, must meet environmental standards. Congress has repeatedly expressed a similar sentiment. As the largest Federal agency, the Department of Defense has a great responsibility to meet this challenge. It must be a command priority at all levels. We must demonstrate commitment with accountability for responding to the Nation's environmental agenda. I want every command to be an environmental standard by which Federal agencies are judged.

F. The U.S. Army's Environmental Philosophy. In 1992, then Army Chief of Staff General Sullivan announced that as part of the Army's Environmental Strategy into the 21st Century that, "The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission."

II. THE JUDGE ADVOCATE'S ENVIRONMENTAL ROLE.

A. Army Regulation 200-1, Environmental Protection and Enhancement, 21 February 1997, makes JAGs responsible for:

1. Providing advice and guidance to commanders on their legal responsibilities for complying with <u>all</u> applicable environmental requirements.

2. Providing guidance and legal opinions to commanders on the applicability of federal, state, local, and host nation laws and regulations governing hazardous materials for Army installations.

B. In addition to the responsibilities outlined in AR 200-1, installation JAG offices should consider the following general guidance.

1. Each installation is to have an environmental law specialist (ELS).

2. The ELS should be proactively involved in installation activities with potential environmental consequences. Starting point—membership on the installation Environmental Quality Control Committee (EQCC).

3. Moreover, to protect the commander and ensure decision makers have the information they need to make good environmentally sound decisions, the ELS should:

a. Review environmental documentation and plans prepared by other agencies (e.g., Corps of Engineers and tenant commands).

b. Be advised of all environmental inspections by federal, state, local, or Army agencies.

c. Participate in most environmental inspections from outside agencies, as well as internal and external Environmental Compliance Assessment System (ECAS) audits.

d. Receive a copy of all inspection reports, notices of violation, administrative orders, etc.

e. Participate in all environmental consultations.

f. Review all command environmental responses.

4. The ELS must be familiar with all federal, state, and local environmental compliance requirements affecting their installation. Equally important, the ELS must be fluent in the Army's program and requirements for environmental compliance.

5. To be effective, an ELS must be actively involved in internal environmental compliance inspections/audits of installation activities and facilities.

a. By virtue of their training and experience, there are usually a number of personnel at an Army installation better qualified than the ELS to conduct an audit of an installation's activities for compliance with environmental requirements.

b. At a minimum, however, the ELS should meet with the audit team prior to the audit's initiation, review the audit protocol(s), and ensure that the audit team understands the environmental requirements applicable to the activities and facilities scheduled for auditing.

c. The ELS should stress during the pre-audit meeting that:

(1) Any limitations in conducting the audit should be clearly stated in the audit report (shortage of time, lack of supporting documentation, unavailability of key personnel, etc.).

(2) All documents reviewed and persons interviewed that become the basis of findings should be clearly identified. Particularly significant documents should be copied and attached as enclosures.

(3) All conclusions stated in the audit report should be based on facts. Facts relied on should be cited as justification for each conclusion.

(4) Anecdotal information should be clearly identified and qualified as appropriate (e.g., "It was reported by Mr. John Smith, the assistant Sewage Treatment Plan Operator, that over the last year. . . .").

(5) Recommendations for site-specific corrective action and ways to avoid or minimize future risks of noncompliance should be included as part of the audit report.

(6) The audit team should be primarily concerned with making **factual** observations and conclusions; **legal** conclusions **should not** be made a part of the audit report unless first reviewed for accuracy by an attorney.

d. The ELS should also be familiar with the purpose of and procedures applicable to the Environmental Compliance Assessment System (ECAS) and participate in the ECAS process as appropriate. The Environmental Assessment Management (TEAM) Guide is the standard DOD protocol manual used by ECAS auditors. The TEAM Guide contains federal regulations, DOD Directives, and Executive Orders and is supplemented with an Army Manual and a state and local manual.

(1) The ECAS is a centrally funded Department of the Army program established in 1992 and managed by the Army Environmental Center (AEC).

(2) MACOMs coordinate the scheduling of the triennial ECAS, provide oversight, and assist in the identification, planning, and programming for necessary corrective actions discovered in the ECAS process.

(3) The program is intended to provide installation commanders with a tool for attaining, sustaining, and monitoring compliance with all applicable environmental laws and regulations.

(4) External ECAS audits, using a team of independent assessors not associated with the installation, will be conducted at active Army installations every three years. Installations must develop management and funding plans to correct deficiencies identified during external assessments.

(5) In addition to external audits, installations are responsible for performing annual internal audits, except in years when an external assessment is conducted. Installation personnel conduct internal assessments. Deviations from the annual internal audit cycle require MACOM justification and HQDA approval.

(6) In the Reserve Component, the ECAS is known as the Environmental Compliance Assessment Army Reserve (ECAAR) and Environmental Compliance Assessment System - Army National Guard (ECAS-ARNG).

III. THE ENVIRONMENTAL QUALITY CONTROL COMMITTEE (EQCC).

A. Every installation, major subordinate command, and MACOM is required by AR 200-1, para. 15-11, to have an EQCC. Overseas, the EQCC may be organized at the military community level. The EQCC must include representatives from each major, sub-installation, and tenant activity. The EQCC membership will include representatives of the operational, engineering, planning, resource management, legal, medical, and safety interests of the command.

B. The purpose of the EQCC is to advise the installation commander on environmental priorities, policies, strategies, and programs. The EQCC also coordinates the activities of environmental programs covered in AR 200-1.

C. The installation commander or his designated representative **must** chair the EQCC. It is important that any delegate also be given authority to assign coordination responsibilities to resolve problems that are identified. The EQCC should normally meet monthly.

D. At many installations, meetings of the entire EQCC on a monthly basis may not be practical. At a minimum, however, the ELS should meet formally on a monthly basis with the installation's environmental coordinator; representatives from the safety, training, and preventative medicine offices; and also with the direct overseers of the installation's building and maintenance activities. This "mini-EQCC" should examine all ongoing and upcoming installation activities for their environmental impacts and determine what, if any, permits or corrective actions are required. Informal discussion between members of the mini-EQCC should occur frequently on an "as needed" basis.

E. Minutes of all EQCC and mini-EQCC meetings should be taken and maintained. A summary of the minutes should be provided to the chairman of the EQCC. The summary should highlight problems identified and recommend courses of action to resolve those problems. Problems that could result in adverse publicity for the installation or command should be discussed thoroughly with the installation's public affairs officer.

IV. ADDRESSING ENVIRONMENTAL NON-COMPLIANCE.

A. Federal facilities are required to comply with applicable federal law and also state environmental laws that are encompassed by a waiver of sovereign immunity. A sample waiver of sovereign immunity reads as follows: "Each Federal agency shall be subject to and comply with all Federal, State, interstate, and local requirements, both substantive and procedural, respecting abatement and control of [air, water, etc.] pollution in the same manner, and to the same extent, as any person is subject to such requirements."

--Caution: this is a *sample* waiver provision. Each statutory waiver has its own unique language, and the applicable waiver must be reviewed in analyzing any specific problem.

B. In determining whether or not a state environmental requirement is binding on a federal facility, use the following analysis:

1. Starting point: Hancock v. Train. Bottom line we need not comply unless Congress has relinquished federal supremacy -- (and we *cannot* pay money to the state unless Congress has authorized the expenditure).

   a. Identify exactly what it is that the state is requiring us to do.

   b. What waiver of federal supremacy is the state relying on?

   c. Does the state requirement fit within the federal statutory program that creates the waiver? *See*, *e.g.*, Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985) (Clean Water Act (CWA) waiver does not render federal agency liable for violation of state law designed to protect underground water because the CWA generally does not address underground water issues); Goodyear Atomic Corp. v. Miller, 406 U.S. 174, 185-195 (1988) (dissenting opinion) (state work place regulatory scheme is not encompassed within the federal waiver of sovereign immunity regarding workman's compensation laws).

2. Are there other "defenses?"

   a. What about exclusive federal legislative jurisdiction? While it should insulate a federal facility from state regulation, DOJ has declined to raise this defense.

   b. Typical waiver language: ". . . in the same manner, and to the same extent as any person . . . ." Does state law discriminate (e.g., are municipalities or state agencies exempted)?

   c. Does the state's law or regulation embody a "requirement" that is encompassed within the limits of the waiver of sovereign immunity?

(1) Based on language in Hancock, some courts have distinguished between environmentally protective provisions of state law and remedial provisions, finding that the latter do not constitute "requirements." *See*, *e.g.*, Florida Dep't of Envir. Reg. v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985) (state provision creating liability for environmental damage held not to be a "requirement" for purposes of the Resource Conservation and Recovery Act (RCRA)).

(2) Has the requirement been regularly promulgated through a routine administrative process, or is it *ad hoc*?

(3) Does the requirement mandate "relatively precise standards capable of uniform application?" Romero-Barcelo v. Brown, 643 F.2d 835, 855 (1st Cir. 1979*), rev'd on other grounds, sub nom*. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (criminal and civil nuisance statutes held not to create specific standards that a federal agency must adhere to); *see also* Kelley v. United States, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (state statute proscribing discharging "any substance which is or may become injurious to the public health, safety or welfare" does not create a "requirement" that a federal agency must comply with).

C. If We Must Comply.

1. Make arrangements to do so, or

2. If there are problems, seek to negotiate a delayed compliance agreement with the state.

3. If only a portion of the state's requirements can be achieved immediately, negotiate a compliance timetable for actions that cannot be accomplished immediately.

4. **Caution:** do not negotiate an agreement with obligations that the command cannot meet.

5. **Caution:** note the fiscal law considerations discussed in Section IV F., below.

6. Should we try to comply with state requirements even if we are not required to as a matter of law? Ask:

   a. Will it improve our relationship with the regulators?

   b. Is it the smart thing to do:

      (1) Environmentally.

      (2) Economically.

D. Reporting Potential Liability of Army Activities and Personnel. *See*, AR 200-1, para. 15-7.

1. Criminal indictments or information against Army and civilian personnel for violations of environmental laws must be reported through command channels.

   a. Criminal actions involving Civil Works activities or personnel will be reported to the Director of Civil Works.

   b. Other criminal actions will be reported to the Director of Environmental Programs (DEP) and the Environmental Law Division (ELD).

2. Enforcement action will be reported through the Army Compliance Tracking System Report (ACTS) to the AEC within 48 hours and any fine or penalty within 24 hours. Tenants are expected to notify the installation commander of enforcement actions with 24 hours.

3. Any actual or likely enforcement action not involving Civil Works that involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact will be reported through technical legal channels through the MACOM ELS to ELD within 48 hours, followed by written notification within 7 days. Subsequent reports should be provided whenever there is a significant development.

4. In accordance with AR 27-40, the ELD must be notified immediately of any service of summons, complaint, or other process or pleading commencing civil litigation against the United States or a soldier or employee. Actions involving Civil Works employees must be reported to the Chief Counsel, U.S. Army Corps of Engineers (USACE).

E. Within 45 days of receiving a notice of violation (NOV), the installation will forward through command channels a plan for corrective action. The plan will include corrective milestones, cost estimates, and any associated 1383 report numbers.

F. If an installation cannot immediately comply with state or federal environmental requirements, the ELS will help negotiate a delayed compliance schedule that can be achieved.

1. Compliance orders/agreements may shield the command from citizen suits and other enforcement actions.

2. On the other hand, the order/agreement can result in an obligation enforceable in court, through injunctions and possibly penalties for violations.

3. **Compliance orders, consent agreements, and settlements are negotiated at the installation level, but must be coordinated with the ELD prior to being signed by the installation commander.** AR 200-1, paras. 1-7.d. and 15-8.

4. **Caution:** the Anti-Deficiency Act, 31 U.S.C. § 1341 (ADA). Negligent violations of the ADA trigger a requirement that administrative discipline (up to removal from office) be imposed against the violator. Knowing and willful violation of the ADA can expose violators to possible criminal sanctions. 31 U.S.C. §§ 1349, 1350 and 1518, 1519. To avoid ADA violations:

a. Observe the limitations on using OMA funds for construction projects.

b. Avoid incurring an unconditional obligation to install pollution control equipment or otherwise spend money in future fiscal years in advance of an appropriation of funds.

c. Include a condition that the required actions will be taken subject to availability of funds.

(1) If possible, condition actions upon the installation receiving funding that Congress authorizes **for the specific project necessary to achieve compliance**.

(2) Alternatively, make actions subject to funding that Congress authorizes for the project coupled with a commitment to request such funds (and then ensure that they are requested).

(3) Alternatively, condition actions upon the availability of funding allocated to the installation that can be used for the project.

(4) Alternatively, make actions subject to the availability of **any** funding that can used for the project. This provision, if used, typically requires the installation to seek funding directly from its MACOM. It is particularly important, therefore, to coordinate closely with the MACOM before proposing the use of such a provision.

5. What about Presidential exemptions?

a. The President may exempt federal activities from compliance with most environmental requirements for up to a year at a time if this would be in the paramount interests of the U.S. *See*, *e.g.*, 42 U.S.C. § 7418(b); and 42 U.S.C.§ 6961(a).

b. Presidential exemptions have been granted in a limited number of situations.

(1) President Carter exempted Fort Allen, Puerto Rico, from selected provisions of the CWA, RCRA, the CAA, and the Noise Control Act of 1972, in order to facilitate the relocation and temporary housing of Haitian and Cuban refugee. *See*, Executive Order 12244, Exemption for Fort Allen, 3 October 1980, 45 Fed. Reg. 66,443.

(2) Pursuant to 40 C.F.R. § 1506.11, DOD was permitted to execute two missions in support of Desert Shield/Desert Storm without complying with the formal documentation requirements of the National Environmental Policy Act. DOD was, however, required to use "alternative methods of considering environmental impacts." *See,* Swenson, Desert Storm, Desert Flood: A Guide to Emergency and Other Exemptions from NEPA and Other Environmental Laws, 2 Fed. Facility Envtl. J. 3 (1991).

(3) More recently, President Clinton, for national security reasons, exempted the United States Air Force's operating location near Groom Lake, Nevada (Area 51?), from selected provisions of RCRA. *See,* Presidential Determination No. 95-45, Presidential Determination on Classified Information Concerning the Air Force's Operating Location Near Groom Lake, Nevada, 29 September 1995; Presidential Determination No. 96-54, Presidential Determination on Classified Information Concerning the Air Force's Operating Location Near Groom Lake, Nevada, 28 September 1996; and, Presidential Determination No. 97-35, Presidential Determination on Classified Information Concerning the Air Force's Operating Location Near Groom Lake, Nevada, 26 September 1997. *See also*, Kaza v. Browner, 133 F.3d 1159 (9th Cir. 1998).

c. Absent a war or other exigent circumstances, however, it is highly unlikely that Presidential exemptions will be sought in the future to excuse federal facilities from complying with federal, state, or local environmental requirements.

V. FUNDING AND FEES VERSUS TAXES.

A. In the Army, funding for environmental compliance and restoration (cleanup) can come from four sources:

1. The Defense Environmental Restoration Account (DERA).

2. Operations and Maintenance Account (OMA).

3. Research, Development, Testing, and Evaluation (RDT&E).

4. Military Construction Account (MCA).

B. The DERA was established by the Superfund Amendments and Reauthorization Act (SARA) § 211 (10 U.S.C. § 2703). Beginning in FY 97, Congress devolved the Defense Environmental Restoration Program (DERP), authorizing and appropriating funds for individual transfer accounts for the Army, Navy, Air Force, Defense Agencies, formerly used defense sites (FUDS), and the Office of the Deputy Under Secretary of Defense for Environmental Security (ODUSD (ES)).

1. The Army's transfer account is the Environmental Restoration, Army (ER, A) account.

2. The ODUSD (ES) establishes cleanup goals for the Services and provides program management oversight, but the individual Services program, budget and manage their respective transfer accounts.

3. Although the AEC develops the Army's installation restoration budget, ER, A funds are managed and distributed by the MACOM.

4. Environmental Restoration (ER) funds shield installations from the immediate impact of funding environmental cleanups. Instead of using OMA or RDT&E money, ER funds are used to finance most installation-level restoration activities.

5. Many restoration actions, however, will require long-term operation to be effective (*e.g.*, groundwater pump and treat operations). Current DOD policy is that ER funds can be used to finance operation and maintenance of restoration projects for 10 years. After that, operational and maintenance expenses must be funded with OMA money.

C. Current compliance requirements (including training) must be satisfied through use of OMA money.

D. Budgeting for major environmental compliance projects is accomplished pursuant to the A-106 process (Environmental Program Requirements Report (EPR), formerly the Environmental Pollution Prevention, Control, and Abatement at DOD Facilities Report (RCS 1383)). AR 200-1, para. 13-5.

1. Commanders must ensure that **all** pollution control projects and programs needed to achieve and maintain environmental compliance for the next 5 years are identified. Items identified (to include training) are divided into three categories:

   a. Category I is for "must fund" requirements. Included within Category I are items necessary to resolve NOVs, necessary to meet promulgated standards whose implementation deadline has already passed, will pass in a current budget cycle, or are needed to support a signed compliance agreement.

   b. Category II is for items necessary to meet established standards whose compliance date falls in a future budget cycle.

   c. Category III is for items which will require replacement in the future because of physical or technological obsolescence, or needed to demonstrate environmental leadership.

2. The EPR Report satisfies the requirement in Executive Order 12088 that federal agencies submit to EPA detailed plans showing how they are budgeting sufficient funds to achieve and maintain environmental compliance. Installation compliance with the EPR process is likely to receive increased scrutiny in the future as compliance costs/demands increase and available funds decrease. The EPR Report also accompanies the President's annual budget submission to Congress. In imposing this requirement, Congress stated: **"[K]nowing that their input on environmental funding requirements is going to subject [them] to Congressional oversight will provide a greater incentive to base commanders to improve the accuracy and realism of their funding estimates."** *National Defense Authorization Act For Fiscal Year 1991: Report of the House of Representatives Armed Services Committee on H.R. 4739*, 101st Cong., 2nd Sess. 250 (1990).

3. ELSs must play a prominent role in ensuring that the command understands what the **current** requirements are. To the extent possible, ELSs should also assist the command in forecasting **future** environmental requirements.

E. Fees and Taxes.

1. The Army's policy is to pay all nondiscriminatory administrative fees and assessments imposed by state and local governments for state and local permits and to defray the costs of their environmental programs.

2. Sovereignty, however, has not been waived for state taxation. "Excessive" environmental permitting and operating fees can constitute disguised taxes. States and local governments often assess three generic types of "fees" against federal facilities, which do not normally constitute reasonable service charges:

   a. Remedial Fund Fee - Fees that fund cleanup activities, or mini-superfunds, do not constitute reasonable service charges and should not be paid. DOD conducts its own cleanups and receives no benefits from programs funded by these fees.

   b. Broad "Program" Fees - States typically establish broad programs to address particular environmental media. Some program elements, such as permit review and processing, inspections, and compliance monitoring, may be paid as reasonable service charges. Other portions, such as special grant or loan programs of which we cannot take advantage, are objectionable and should not be paid. Commands must analyze these programs on a case-by-case basis and negotiate with regulators to determine the proportion of the fee to be paid.

   c. Insurance-type programs - Many states require regulated facilities of certain types, especially underground storage tanks, to pay into an insurance fund that is available to help pay the cost of pollution caused by the facility. Because DOD funds its own cleanup efforts, payment of the fee violates the second prong of the Massachusetts test and the fiscal self-insurance rule.

3. The label placed on the requested payment is not important. A fee is an amount that, if calculated correctly, allows an agency to recover a reasonable approximation of the costs it incurs in acting on a license request and providing a benefit or a service. A tax is an enforced contribution to provide for the general support of the government.

4. A three-step test is used to determine if a "fee" is actually a tax (*see* Massachusetts v. United States, 435 U.S. 444, 464-67 (1978)). Under the Massachusetts test, determine whether or not:

   a. The fee is imposed in a nondiscriminatory manner; i.e., are local governmental or other entities exempted?

      --Theory: a tax can be discriminatory, but a valid permit fee or user fee cannot.

   b. The fee is a fair approximation of the cost of the benefit received. The "benefit" is generally the overhead expense for operating the permit system and the costs of conducting inspections.

   c. The fee is not structured to produce revenues that will exceed the total cost to the state of the "benefits" it confers. Fees that are structured to produce excess revenue are often structured so that all funds received are channeled into the state's general revenue fund.

5. If the charge is nondiscriminatory, a fair approximation of the cost of the benefit received, and not structured to produce revenues that will exceed the total cost to the state of the benefits it confers, then it will normally be a permissible fee.

6. **REMEMBER!** Unless the fee is discriminatory, some portion (i.e., the reasonable portion) of a state imposed fee is payable.

VI. ENFORCEMENT OF ENVIRONMENTAL LAWS.

A. EPA Enforcement Options. EPA has the primary regulatory authority and responsibility for the enforcement of most environmental statutes. EPA has three basic enforcement options when dealing with federal facilities: criminal prosecution (against individuals); civil judicial action (only against government contractors); or administrative enforcement actions.

B. EPA's Enforcement Objectives:

   1. Ensure that the alleged violator is and will be in compliance;

2. Punish noncompliance;

3. Deter the alleged violator and others from not complying; and

4. Correct the harm caused by the noncompliance.

--EPA Enforcement Manual (1995).

C. EPA Enforcement Preferences.

1. Administrative and civil enforcement actions employ a strict liability standard and are, thus, generally favored over criminal enforcement actions that require a greater showing of culpability. Criminal enforcement actions are, however, normally initiated where there is egregious conduct and/or clearly culpable conduct that results in significant harm to human health and/or the environment.

2. Administrative cases are generally favored over civil enforcement actions because:

   a. The proceedings at an administrative hearing are much less formal than those employed in the judicial process;

   b. The Presiding Officer is an EPA employee as opposed to a district court judge; and

   c. Civil judicial cases require review and approval by DOJ and EPA, as opposed to administrative determinations that require approval at the EPA Region level.

3. In addition, because the unitary executive doctrine precludes civil judicial action against federal facilities (except government contractors), administrative enforcement actions are the most common enforcement actions taken against federal facilities.

D. State Enforcement Actions.

1. Most environmental statutes contain provisions allowing EPA to delegate permitting, oversight, and enforcement responsibilities to the states, and the clear trend is to allow even greater state control and authority over federal activities and installations.

   a. This system of delegation is known as "cooperative Federalism." Under this system, the federal government establishes minimum standards and procedural requirements based on statutory mandates and the states develop implementation and enforcement programs that are no less stringent.

      (1) Once the state has demonstrated that its program is no less stringent and capable of enforcement, the state assumes, subject to EPA oversight and right of revocation, enforcement authority. Once approved, actions taken under the state program have the same effect as if the EPA had taken the action. Even after delegation, however, EPA reserves parallel enforcement authority if it is dissatisfied with a State response.

      (2) Delegation authority exists in RCRA, CAA, CWA, and the Safe Drinking Water Act (SDWA).

   b. Some environmental statutes permit states to operate, subject to general preemption principles governing impediments to federal goals and procedures, a parallel program that is completely independent of the equivalent federal program.

   c. Regardless of the type of program administered by the state, EPA will always retain at least concurrent inspection and enforcement authority.

2. In addition, explicit waivers of sovereign immunity have exposed federal installations to fines and penalties by the states, a trend that is also likely to continue.

a. In 1992, the Federal Facility Compliance Act (FFCA) (Pub. L. No. 102-386, 106 Stat. 1505) explicitly waived the federal government's sovereign immunity for violations of RCRA. Prior to the enactment of the FFCA, the Supreme Court had held that the waiver of sovereign immunity in RCRA was not sufficiently explicit enough to allow states to impose punitive fines for past violations of RCRA. *See* United States Department of Energy v. Ohio, 503 U.S. 607 (1992). Note: the FFCA waived the sovereign immunity provisions of RCRA that are applicable to the management of solid and hazardous waste, but not the sovereign immunity provisions applicable to the management of underground storage tanks.

b. The government's sovereign immunity for violations of Subchapter IV of the Toxic Substance Control Act (TSCA) was waived by the Lead Based Paint Hazard Reduction Act of 1992 (Pub. Law No. 94-469 (1992)).

c. In 1996, the sovereign immunity provisions of the SDWA were amended to allow for the imposition of fines and penalties by the states.

d. There is currently legislation before Congress to amend the sovereign immunity provisions of both the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to permit fines and penalties by the states for violations by federal agencies.

e. As to the CAA, the current DOD position is that the waiver of sovereign immunity is not so explicit as to permit fines and penalties against federal agencies. This position is discussed in greater detail at Chapter IV, section III. E., *infra*.

E. Administrative Enforcement Actions.

1. Payment of fines and penalties. Penalties imposed by the EPA are typically assessed by determining a gravity-based penalty for a particular violation, considering any economic benefit, and adjusting the penalty for special circumstances. *See*, *e.g.*, EPA, Revised RCRA Civil Penalty Policy (October 29, 1990*), reprinted in,* 21 Envtl. L. Rep. (Envtl. L. Inst.) 35,273 (October 1990).

2. The gravity-based penalty is determined by reference to a matrix that considers both the potential for harm and the extent of deviation from the RCRA requirement. Each violation is characterized as either “major,” “moderate,” or “minor” under each factor. The results are then compared on a matrix to determine the appropriate penalty range.

a. The "potential for harm" factor considers both the risks to human health and the environment and the adverse impact the violation may have on the RCRA regulatory process. As used in the penalty matrix, the different degrees of “potential for harm” are defined as follows:

(1) Major: the violation creates a substantial likelihood of exposure to hazardous waste (HW) or may have a substantial adverse effect on purposes or procedures for implementing RCRA.

(2) Moderate: the violation creates a significant likelihood of exposure to HW or may have a significant adverse effect on purposes or procedures for implementing RCRA.

(3) Minor: the violation creates a relatively low likelihood of exposure to HW or may have an adverse effect on purposes or procedures for implementing RCRA.

b. "Extent of deviation from the requirement" measures the degree to which the violation renders the requirement inoperative. As used in the penalty matrix, the different degrees of deviation are defined as follows:

(1) Major: the violation constitutes substantial noncompliance.

(2) Moderate: the violation significantly deviates from the requirement, but some of the requirements are implemented as intended.

(3) Minor: the violation deviates from the requirement somewhat, but most of the requirements are met.

3. Multiple penalties for each violation are a distinct possibility: "A separate penalty should be assessed for each violation that results from an independent act (or failure to act) . . . [that] is substantially distinguishable from any other charge." For example, where different elements of proof are required, multiple penalties are appropriate.

4. Multi-day penalties are also distinct possibilities. They "should generally be calculated in the case of continuing egregious violations. However, per day assessment may be appropriate in other cases."

5. EPA also attempts to recoup, as part of any penalty assessed, the Economic Benefit of Noncompliance.

    a. The "benefit" is calculated based on computation of interest earned on avoided costs during period of noncompliance and marginal tax rate of company.

    b. It would seem to be inappropriate for application to federal facilities.

6. There are a number of penalty adjustment factors.

    a. Good faith effort to comply/lack of good faith can justify 25-40% reduction/increase in otherwise appropriate fine. Examples of good faith efforts:

        (1) Self-audits.

        (2) Internal disciplinary action.

        (3) Anything else you're not *required* by RCRA to do to comply, *e.g.*, the EQCC or any of its working groups.

    b. Degree of willfulness and/or negligence.

        (1) Mitigation or aggravation of 25-40% may be justified.

(2) Factors: control over events, speed of remedy, foreseeability, and precautions.

c. History of noncompliance (upward adjustment only, of 25-40%): "The [EPA] may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate wide indifference to environmental protection." As a result of this, an installation's past compliance problems could subject it to a substantially enhanced fine.

d. "Other unique factors" provision may permit argument of military-unique factors, e.g., short-notice deployment of personnel contributed to violation. These factors can either result in reduction or enhancement of the fine.

7. Sources of funds to pay fines and penalties.

a. Congress prohibits the use of Environmental Restoration funds to pay fines and penalties for violations of environmental requirements (s*ee*, *e.g.*, National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 321, 108 Stat. 2663 (October 5, 1994)).

b. As a result, it is likely that fines and penalties will be paid out of O&M funds.

F. Criminal Enforcement. Each of the major environmental statutes contain provisions that provide for criminal sanctions, including fines and/or imprisonment.

1. Fines and penalties.

a. Federal employees can be held individually liable for fines and penalties resulting from violations of most environmental statutes.

b. Currently, only three statutes specifically provide that federal employees cannot be held individually civilly liable for environmental violations resulting from performance of their official duties; *see* 33 U.S.C. § 1323 (CWA); 42 U.S.C. § 7418(a) (CAA); and 42 U.S.C. § 6961 (RCRA).

2. Criminal liability.

a. Generally.

(1) While all major environmental statutes have criminal provisions for knowing violations, some permit prosecution for merely negligent acts. *See* CWA, 33 U.S.C. § 1319 (negligent release of a contaminant into navigable waters of the United States); and CAA, 42 U.S.C. § 7413(c)(4) (negligent release of a hazardous pollutant into the ambient air that places others in imminent danger).

(2) In most cases, to establish a knowing violation, the government need only prove knowledge of the actions taken, not knowledge of the environmental statute itself. In addition, responsible officials who have knowledge of a wrongful act and the authority to take action, but fail to do so may also face prosecution.

b. Trends.

(1) The number of federal criminal prosecutions has been increasing steadily. Moreover, jail time adjudged by federal judges and actually served by individual defendants has also been increasing.

(2) EPA has shifted its enforcement strategy from a quantitative pursuit of as many indictments and convictions as possible to a more qualitative pursuit of egregious conduct and environmental damage.

(3) EPA has shifted its focus from corporate liability to personal liability.

c. Although the number of DOD personnel criminally prosecuted for violations of environmental statutes has been few compared with the overall number of federal and state prosecutions, to date sixteen DOD personnel have been prosecuted. Thirteen of the prosecutions were federal, and ten of the thirteen were convicted. Of the three prosecuted in state courts, two were convicted; the complaint against the third was dismissed after removal to Federal Court.

(1) United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (the "Aberdeen Case"). In May 1989, three civilians (SES, GM-15, GM-14) of the Army Chemical Research and Development Command, Aberdeen Proving Ground, were convicted of various RCRA violations involving illegal treatment, storage, and disposal of hazardous wastes. The three were sentenced to three years of probation and 1,000 hours of community service. DOJ denied requests to reimburse them for attorney fees of about $108,000 each. Matter of: William Dee, et al. -- Requests for Payments of Attorneys' Fees, Comp. Gen. Op. B-242891 (Sep. 13, 1991).

(2) United States v. Carr, 880 F.2d 1550 (2d Cir. 1989). Mr. David Carr, a civilian range foreman at Fort Drum, was initially charged with 37 counts of violation of the Clean Water Act, four counts of illegal disposal of hazardous wastes in violation of RCRA, and the two CERCLA counts for which he was convicted. The indictment charged Carr with the supervision and direction of other civilian employees in the disposal of about 100 to 150 five-gallon cans of paint into a pond on the base. In December 1988, Carr was sentenced for two violations of CERCLA for twice failing to report a spill of hazardous substances. On each count, imposition of a prison sentence was suspended. Carr was given one year of probation; he also paid $300 in fines and assessments.

(3) United States v. Bond, Cr. 91-0287-GT, S.D. Cal (Apr. 9, 1991). Mr. Cletus Bond, a civilian employee of the Navy, pled guilty to one count of negligent discharge of pollutants (radiator fluid contaminated with anti-freeze) in violation of the Clean Water Act. He was sentenced to one year of probation and a $500 fine. Mr. Bond was a supervisor at the Navy Exchange Auto Repair Facility, San Diego, California. The radiator fluid was discharged into a storm drain and flowed into a nearby Creek.

(4) United States v. Pond, Cr. S-90-0420, D. Md. (Apr. 17, 1991), 21 Env. L. Rep. 10444 (1991). Mr. Richard Pond, civilian manager of the wastewater treatment plant at Fort Meade, was convicted in January 1991 of one felony count of violating a Clean Water Act permit, eight felony counts of making false statements on discharge monitoring reports, and a misdemeanor violation for theft of government property by using government lab equipment to analyze water samples for a privately owned wastewater treatment plant. Pond was sentenced to eight months in prison, followed by one year of supervised release (including four months of home detention), 60 hours of community service, and restitution of $99.99.

(5) United States v. Curtis, 988 F.2d 946 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 177 (1993). From 1986 to 1989, John Curtis was the director of the fuels division at Adak Naval Air Station, Alaska. Among his responsibilities was the operation of several miles of pipelines. Over a five-month period spanning from October 1988 to February 1989, Curtis ignored repeated employee warnings of a pipeline leak. As a result, thousands of gallons of fuel flowed into an inlet of the Bering Sea. The employees finally took Curtis to the site of the leak, but the pipeline was not turned off until the base environmental manager was told what was happening. In October 1991, Curtis was indicted on five felony counts for knowing violations of the CWA. He was convicted in March 1992 of three violations of the CWA, one felony count for a knowing violation, and two lesser-included misdemeanor counts for negligent violations. Curtis was sentenced to serve 10 months in jail.

(6) United States v. Dunn, Larimore, and Divinyi, Cr. No. 92-117-COL (JRE) (M.D. Ga. 1992). Three civilian employees (two GS-12s and one GS-11) at Fort Benning, Georgia, were indicted on 29 January 1992 for one count of conspiracy to violate the Endangered Species Act. Two of the individuals (the chief of the natural resources management division and the forestry supervisor) were also indicted on six counts of making false official statements. The chief of the environmental management division was also indicted on one count of making a false official statement. The offenses revolved around requests submitted from 1985-1989 for commercial timber harvesting at Fort Benning, on which requests defendants are alleged to have knowingly failed to note habitat of the red-cockaded woodpecker, an endangered species.

(7) California v. Hernandez, No. 25148 (Riverside Mun. Ct. May 11, 1992). In March 1991, Mr. Andy Hernandez, sewage treatment plant foreman at March AFB, changed sludge test results for biochemical oxygen demand to bring the results within the level authorized by the plant discharge permit. Hernandez made these changes without doing any additional tests. In May 1992, Hernandez pled guilty to falsifying a wastewater test record. He was given a suspended sentence to pay a $5,000 fine and placed on probation for 18 months.

(8) United States v. Lewis, Cr. 3-88-50, S.D. Ohio (Dec. 14, 1988). Mr. Lewis, an Army employee and former Radiation Protection and Safety Officer at Wright Patterson Air Force Base, pled guilty to unlawful possession of a radioactive byproduct material.

(9) United States v. Shackelford, E.D Va. (Feb. 27, 1992). Mr. Henry E. Shackelford, Jr., an employee at Langley Air Force Base, pled guilty to improper use and disposal of a pesticide.

(10) United States v. Ferrin, S.D. Cal. (Aug. 15, 1994). Mr. James A. Ferrin, a supervisor at San Diego Naval Station, was convicted of disposing hazardous waste, treatment without a permit, and false statement.

(11) California v. Lam, (Cal. State) (May 29, 1992). Mr. Sam Lam, an environmental manager at the Marine Corps' El Toro Air Station, was initially charged with felonies based on reports he caused to be dumped in a municipal landfill ninety 55-gallon drums containing leaded paint waste and heavy metals. In May 1992, Lam was convicted of five misdemeanor counts each for unlawful transportation and disposal of hazardous waste. He was sentenced on one count to pay a $5,000 fine, ordered to complete a hazardous materials handling course, and placed on probation for three years. Sentencing on the remaining nine counts was suspended for the period of probation. The Navy/USMC concluded that while Lam's conduct was negligent, he had acted in good faith and, therefore, was within the scope of his employment. As a result, they supported his request that DOJ pay his private attorney's fees. DOJ approved Lam's request, authorizing payment of attorney's fees of up to $90.00 per hour.

3. Representation. If a federal employee is indicted for an environmental crime, and it is a:

a. Federal prosecution: representation will normally be provided by a private attorney hired at the employee's expense. *See* 28 C.F.R. § 50.15.

b. Representation by the U.S. Army Trial Defense Service (TDS).

(1) Military personnel facing a criminal investigation conducted by EPA or other federal law enforcement agencies may request representation by TDS but "representation and advice will be limited to that required to protect the client from pending or potential judicial, nonjudicial or adverse administrative actions within DA." TDS counsel are not authorized to advise military clients concerning concurrent civilian court or grand jury proceedings. *See* Standard Operating Procedures, U.S. Army Trial Defense Service (USATDS SOP), para. 1-6 (1 June 1994).

(2) TDS counsel are able to provide "suspect counseling" in the critical period when an investigation is in its early stages; but once it is clear that adverse actions are going to be pursued outside the military; TDS counsel must withdraw from representation. *See* USATDS SOP, para. 1-5b(1)(j).

c. State prosecution: representation by DOJ is possible if it is in the government's best interests (i.e., acting within scope of duties and not in violation of federal law). *See* 28 C.F.R. § 50.15.

(1) Satisfying the second prong of the test (not in violation of federal law), however, may prove especially difficult since many state environmental statutes are modeled after federal statutes.

(2) The Marine Corps, however, was recently able to persuade DOJ to pay (up to $90.00 per hour) to represent a civilian employee charged with criminal violations of California environmental law. *See* discussion of California v. Lam at page 31 of this chapter.

4. Attorney-client privilege.

a. There is no attorney client privilege between an attorney and a commander on environmental compliance issues -- at least in cases involving federal investigations and prosecutions.

b. Note, however, that the initial communication between a service member and a legal assistance or TDS attorney is privileged, but once it is determined that representation by a military attorney will no longer be available, the attorney-client relationship ends and further communications will not be covered by the privilege.

5. Official immunity in the environmental arena.

a. Basic requirements.

(1) Actions are necessary and proper; i.e., they are reasonably required to accomplish a government objective, task, or mission and they are taken with due regard for the safety, well-being, and property interests of others.

(2) The actions that were taken did not violate federal law.

b. Immunity is not available in federal criminal prosecutions; it is theoretically available in state prosecutions. Because most state environmental requirements are based on federal requirements, however, immunity will likely be precluded.

CURRENTLY "HOT" ENVIRONMENTAL LAW ISSUES

VII. MUNITIONS AND RANGE ISSUES

A. Military Munitions Rule

1. 1992 amendments to Resource Conservation and Recovery Act (RCRA) directed EPA, in consultation with DoD, to promulgate regulations identifying when military munitions become hazardous wastes, subject to regulation under RCRA

2. Promulgated in Feb 97, the Military Munitions Rule excludes training (including firing, RDT&E, and range clearance on active/inactive ranges) and materials recovery activities from being classified as waste management activities; it also allows DoD storage and transportation standards to supplant environmental regulations under certain conditions

3. The Rule has withstood litigation challenges and is being adopted by more and more states, mostly without significant changes

   a. Adopted with no changes: 29 states with delegated programs and 3 states with federal program; 7 states are considering adoption without substantial changes

   b. Adopted with amendments: OR, AZ

   c. Likely to be adopted with significant changes: CA, CO, WA, UT

B. Range Rule

1. Background: EPA postponed the decision regarding the status of military munitions on closed, transferred, and transferring (CTT) ranges pending DoD's publication of the Range Rule which would govern military munitions at those areas

2. DoD published the Proposed Range Rule in 1997

3. Status: DoD, EPA, and the other Federal Land Managers are participating in discussions with the Office of Management and Budget as part of the interagency review process regarding the Draft Final Range Rule, the final step before promulgation of the Rule; publication is expected in January 2001

4. Much is at stake because of this Range Rule

   a. For the Army and DOD

   b. For EPA and the state regulators

   c. For states and localities

   d. For the development community

   e. For business and industry

5. Litigation challenging any final rule is almost a certainty

C. Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges ("Management Principles")

1. Joint DoD-EPA interim measure signed in Mar 00 effective until DoD issues the final Range Rule; Army forwarded to field in Aug 00 with implementing guidance

2. MACOMs and field organizations must consider Management Principles in planning and execution of response actions at CTT ranges

   a. Management Principles adopt a process consistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address unexploded ordnance (UXO) at a CTT range

(1) Response activities include removal actions, remedial actions, or a combination of both, when necessary to address explosive safety, human health and the environmental hazards associated with a CTT range

(2) Installations must resolve any concerns regarding EPA requests that are deemed unsafe

(3) Consultation with regulators and other stakeholders on all response phases, except for certain emergency response actions

D. Massachusetts Military Reservation (MMR) and Army-Wide Implications

1. UXO and its constituents were identified as possible contributing sources of contamination of groundwater and soils associated with a sole-source aquifer that supplies local drinking water

2. Acting under authority of the Safe Drinking Water Act (SDWA), EPA issued two Administrative Orders (AO), providing for extensive EPA participation and oversight of the response action, establishing a citizens advisory committee to monitor the work, and ordering all use of lead ammunition, high explosive artillery and mortars propellants, and demolition of ordnance or explosives, (except for UXO clearance) to cease; in a third AO, EPA has ordered feasibility studies and removal of contaminated soil

3. EPA's actions at MMR have Army-wide implications because other installations have training areas that overlay sole-source aquifers or other environmentally-sensitive conditions; this has raised concerns about how to assess and moderate the impacts of military training elsewhere

VIII. ARMY FACILITIES AND ENVIRONMENTAL PENALTIES

A. Background

1. Application of the Principle of Cooperative Federalism in the field of environmental law generally: centrality of enforcement mechanisms

2. Piecemeal and patchwork nature of sovereign immunity provisions under different environmental statutory regimes (SEE ATTACHED TABLE SUMMARIZING AUTHORITY-TO-FINE STATUS)

3. Waivers of sovereign immunity must be "unequivocally expressed," strictly construed in favor of the sovereign and not "enlarged beyond what the language requires." *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992).

4. Army's (and the other Services') relationships with EPA, states and localities

   a. Sovereign immunity issues only apply to authority to pay punitive fines; Army installations are required to comply fully with substantive and procedural environmental requirements

   b. Where sovereign immunity precludes payment of a fine, it should be used as a shield---not a sword; it is a very limited and problematic defense

      (1) State and local regulators view the ability to fine as synonymous with the ability to regulate

      (2) Violations at an installation where fines cannot be paid call into play the best negotiating efforts of the ELS, environmental staff, and command to quickly remedy any noncompliance and take affirmative steps (short of paying fines) to demonstrate the installation's commitment to environmental stewardship

      (3) Aside from maintaining good relations with state and local regulators in general, failure to diplomatically assert sovereign immunity defense will cause state and local regulators to simply refer enforcement actions to EPA Regions, who delight in imposing large penalties

B. Developments Concerning Underground Storage Tank (UST) Penalties

1. December 1998 deadline to bring all Army USTs into compliance with RCRA has passed: EPA assessing fines for violations

2. Legal dispute over whether sovereign immunity has been waived for these penalties

   a. Army's view (consistent with the other Services) is that the specific UST provision of RCRA subjecting federal facilities to federal, state, interstate and local requirements (42 U.S.C. § 6991f) was not amended by the Federal Facilities Compliance Act of 1992 to allow the assessment of fines and penalties

   b. EPA's view (pushed by their Federal Facilities Enforcement Office (FFEO)) is that the FFCA's general waiver of sovereign immunity for the management of solid and hazardous waste (42 U.S.C. § 6961) is a sufficiently "clear statement" to provide the requisite authority for UST penalties

3. UST penalties dispute recently resolved

   a. Installations in all of the Services have been assessed EPA penalties (Army: Walter Reed AMC and Fort Drum)

   b. In Apr 99 the DoD General Counsel forwarded a letter and legal memorandum to the Attorney General (Office of Legal Counsel (OLC)) requesting resolution of the interagency UST dispute

   c. For the UST enforcement cases that were pending before EPA Administrative Law Judges (ALJs)

      (1) DoJ asked DoD to request stays in the proceedings until OLC issued its decision

      (2) DoJ asked EPA not to oppose the stay requests

      (3) Prior to the Air Force submitting a stay request in one of its cases, the ALJ issued an opinion adopting DoD's arguments; EPA appealed the decision to the Environmental Appeals Board (EAB) before requesting a stay

   d. EPA continued to issue new fines for UST violations

e. On 14 Jun 00, OLC opined that RCRA contains a clear statement allowing EPA to impose punitive fines against federal facilities for UST violations

f. Air Force pursued relief from the EAB who did not address the merits of the case directly, but found there was no compelling reason to dismiss the OLC opinion

g. Lesson learned: the experiences of all the Services in contesting EPA's UST authority via the EPA administrative litigation process has been uniformly positive; our conclusion is that the EPA administrative law judges are remarkably independent and impartial and that greater use of this forum should be explored in other appropriate cases

C. Developments Concerning Clean Air Act (CAA) Penalties

1. The CAA's federal facilities provision (42 U.S.C. § 7418(a)) contains a limited waiver of sovereign immunity with respect to state, interstate, and local air pollution control laws

a. Requires federal agencies to comply with air pollution control programs "to the same extent as any nongovernmental entity" and

b. Subjects them to the "process and sanctions" of regulators

2. The terms "process and sanctions" were interpreted **in the context of the Clean Water Act** by the Supreme Court in *DOE v. Ohio* (see above): the Court distinguished between

a. "Punitive fines" imposed as a penalty for past violations (no waiver of sovereign immunity) and

b. "Coercive fines" imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively (sovereign immunity is waived)

3. Split in authority over the interpretation of very similar sovereign immunity waiver provisions (the CAA provision cited above and the CWA interpreted in *DOE v. Ohio*)

a. District Courts applying *DOE v. Ohio* and holding there is no waiver under the CAA for punitive fines

(1) *U.S. v. Georgia Department of Natural Resources*, 897 F.Supp 1464 (N.D. Ga. 1995)

(2) *People of the State of California ex rel. Sacramento Metropolitan Air Quality Management District v. U.S.*, 29 F.Supp.2d 562 (E.D. Cal. 1998)

b. A Sixth Circuit Case, *U.S. v. Tennessee Air Pollution Control Board*, No. 97-5715, 1999 U.S. App. LEXIS16863 (6th Cir. Jul, 22, 1999), muddied the waters by holding that the CAA's savings clause in its citizen suit provision contains an independent waiver of sovereign immunity authorizing punitive fines against federal facilities; DoJ did not appeal that case because there was no split in the Circuits

c. Further confusion has recently been caused by the Ninth Circuit's treatment of the *Sacramento MAQMD* case noted above

(1) The Ninth Circuit vacated the district court decision and remanded the case because it found that the district court was without jurisdiction to hear the case as it had been improperly removed to federal court (215 F.3d 1005 (14 Jun 00))

(2) DoJ is seeking en banc review of the initial 9th Circuit's decision, and will likely pursue the case to the U.S. Supreme Court as the sweeping opinion on the removal issue stands to affect DoJ's ability to defend the United States in federal court on many environmental issues

(3) This setback means that resolution of the underlying sovereign immunity issue is likely several years away

ARMY AUTHORITY TO PAY PUNITIVE FINES
and YEAR AUTHORITY WAS RECEIVED
Updated: 10 Aug 00

STATUTE	IMPOSED BY STATE	IMPOSED BY EPA
Resource Conservation and Recovery Act (RCRA) [Subtitles C and D only--re hazardous and solid waste] 42 U.S.C. §6961	YES—1992	YES—1992
RCRA [Subtitle I only—re underground storage tanks] 42 U.S.C. §6991f	NO	YES—2000[1]
Safe Drinking Water Act (SDWA) 42 U.S.C. §300j-6	YES—1996	YES—1996
Clean Air Act (CAA) 42 U.S.C. §7418	NO[2]	YES—1997[3]
Clean Water Act (CWA) 33 U.S.C. §1323	NO	NO

NOTES:

1. DoD disputed EPA's assertion that it has authority to assess fines against federal facilities for UST violations and referred the issue to the Department of Justice (DoJ) in Apr 99. On 14 Jun 00 DoJ released an opinion that concluded that amendments to RCRA in 1992 gave EPA the authority to assess UST fines against federal facilities. The issue was also challenged before EPA's Environmental Appeals Board, who deferred to the DoJ opinion.
2. Many states dispute the United States' position on this, and issue notices of violation that include assessments of fines. This issue was expected to have been settled through litigation in the 9th Circuit Court of Appeals, but that court recently issued a surprise ruling that the case should not have been removed from state court and remanded without addressing the central issue. DoJ will likely appeal to the Supreme Court on the issue of removing cases to federal courts. It will probably be several years before the sovereign immunity issue is settled nationwide. In the interim, installations will continue to assert the position of the United States (i.e., the sovereign immunity defense) except in the four states (KY, OH, MI, TN) of the 6th Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for CAA violations.
3. The authority of EPA to impose fines stems from an amendment to the CAA in 1990. A DoD challenge to that authority was resolved in favor of EPA in a 1997 opinion by DoJ.

IX. CONGRESSIONAL OVERSIGHT OF ENVIRONMENTAL FINES

A. The Catalyst: Fort Wainwright, Alaska (FWA)

1. Aug 99: EPA Region 10 asserted a $16 million Clean Air Act penalty against FWA – the largest penalty ever asserted against a federal facility

2. Penalty was based almost entirely two types of "business penalty" criteria

   a. Two-thirds of the fine sought to recover the "economic benefit of noncompliance"---charged to FWA but designed to recapture the net gain realized by the "Federal Government" (i.e., taxpayers) as the result of FWA's delayed and avoided costs of compliance

   b. Nearly one-third of the penalty was based on the "size of the business," a 50% penalty surcharge intended to ensure that businesses feel the deterrent sting of enforcement in proportion with their wealth (i.e., capital assets that can be liquidated to pay for compliance or fines)

3. This is a test case for HQ EPA's new two-pronged strategy for enforcing environmental laws against federal facilities

   a. First, EPA asserts the statutory maximum fines in its complaints, regardless of whether the alleged violation is major or minor, and then uses business penalty criteria to develop a highly inflated amount as a "negotiating position"

   b. EPA regions now generally refuse to provide penalty calculations, often making it difficult to determine the degree to which business criteria have been used to inflate the asserted penalty

   c. This "inflate and then stonewall" tactic has made local good faith resolution of civil enforcement actions extremely difficult

   d. The Army and DoD view business penalties as a floodgate for greatly increased fines by employing means that are inapplicable to federal facilities for both legal and policy reasons

B. The Reaction: FY 00 Defense Appropriations Act Rider

1. The enormity of the asserted penalty and the application of business penalty criteria in the FWA case prompted Senator Stevens (Chair, Appropriations Committee) to add a rider to the FY00 Defense Appropriations Act that prohibited DoD from paying any environmental fine without Congressional approval

2. DoD neither requested nor endorsed the rider; this provision has slowed down Army's ability to conclude enforcement actions with all regulators in both large and small cases

3. Intended as a warning to EPA about its new enforcement strategy, this rider was attacked by EPA as a measure that would encourage DoD to relax its compliance responsibilities

4. State government leaders also vigorously protested against this legislation as a direct attack on their ability to regulate DoD.

C. The Next Round: FY 01 Defense Authorization Act?

1. Senate Armed Services Committee (SASC) proposed a permanent requirement in the FY 01 Defense Authorization Act (Section 342, supported by Senator Stevens) requiring Congressional approval prior to payment of any environmental penalty in excess of $1.5 million

2. As originally written, Section 342 would have also prohibited payment of any environmental penalties, regardless of amount, that were based in whole or part on "the application of economic benefit criteria or size-of-business criteria" unless Congress specifically approved payment

3. In its report, the SASC noted that business penalty criteria are designed for "market-based activities, not government functions subject to Congressional appropriations" and that it would not approve penalties that were based on business criteria

4. On 12 Jul 00, in a compromise between Senators Stevens and Kerry, the Senate agreed to delete any mention of business penalties; in addition, the Senate modified the provision requiring Congressional approval prior to payment of a fine in excess of $1.5 million in two ways:

a. It converted the requirement from a permanent provision to a three year trial period

b. It made the restriction applicable only to fines imposed by a federal environmental agency

5. On 13 Jul 00, the Authorization Bill passed the Senate and was sent to joint conference

a. The House version of the FY 01 Authorization Act contains no provision on these issues, so it is uncertain how Section 342 will fare

b. Recently, EPA has made efforts to staff within the Administration a letter to the joint conference in opposition to Section 342, as amended, as well as the original SASC report on it; DoD has objected to EPA's attempts to finesse its views on business penalties as those of the Administration

D. The Future of Business Penalties---The Centerpiece of EPA's New Strategy?

1. If Congress enacts Section 342, as amended, it is not expected to have much impact on the administrative litigation pending between EPA Region 10 and FWA – although the $1.5 million threshold for Congressional approval of a fine or penalty may serve as a negotiating cap

2. Even if the settlement is below the "cap," but above the figure that a normal "gravity based penalty" would warrant, EPA will likely take the view that such a settlement could have at least been influenced by business penalty criteria; accordingly, a settlement in that range could encourage EPA to continue its efforts to apply business penalty criteria to federal facilities

3. If FWA is unable to reach a settlement with EPA based only on gravity penalty criteria, it will press for a hearing on the issue before an EPA administrative law judge

4. Although DoD has made efforts to resolve the issue of business penalties within the Administration, the issue has yet to be fully vetted; in light of the political situation that accompany an election year, it is unlikely that this avenue will lead to a resolution of the controversy between DoD and EPA

5. At present, the principal avenue for addressing the legal concerns raised by EPA's enforcement strategy is through the EPA administrative litigation process

X. ROLE OF THE ENVIRONMENTAL LAW SPECIALIST (ELS)

A. Background

1. TJAG Policy Letter 85-7 (13 Dec 85)

   a. Designate Army lawyer for "comprehensive legal services to the command on environmental matters" at each installation

   b. Ensure ELS is qualified and appropriately trained

   c. Emphasize importance of environmental matters to commanders

2. Updated Policy Letter by message of 30 Oct 92

   a. Advised of passage of the Federal Facilities Compliance Act and the broad waiver of sovereign immunity for punitive fines for violations related to solid and hazardous waste requirements

   b. Reminded SJAs of imperative to have ELS designated to assist the command on environmental matters

3. TJAG Policy Memorandum 94-7 (2 May 94)

   a. Reemphasized importance of designating and training an ELS at every Army installation

b. Encouraged proactive role of SJA and ELS in keeping command informed of potential impacts of environmental requirements on military activities

c. Requested ELSs to effect early coordination of environmental issues through MACOM and Regional Environmental Offices technical chains

4. Current TJAG Requirements (Article 6 Checklist for SJAs) further stresses importance of developing strong ELS capabilities at installations

a. Detailed guidance on importance of and role of ELS in all aspects of environmental law at the installation level

b. Emphasizes ELS involvement in planning, execution, and monitoring of environmental programs; practicing of preventive law to keep thorny scenarios from developing

c. Reminds of requirements to report and coordinate enforcement actions through MACOMs to ELD (AR 200-1)

B. Role of the Environmental Law Division (ELD) vis-à-vis the ELS

1. Advise and assist, in coordination with or through MACOM ELS and, in appropriate cases, Regional Environmental Office counsel, on substantive environmental legal issues

a. Done on ad hoc basis and through routine efforts: monthly ELD Bulletin and news flashes; semi-annual workshop for MACOM ELSs

b. Some issues, such as challenges to environmental fees, require close coordination with other Army and DoD installations in the state, and with non-DoD facilities; this is done with the assistance of Regional Environmental Offices

c. Reduced manning at ELD requires leveraging of technology

(1) All ELSs have access to Air Force environmental materials on FLITE at no cost (POC at ELD is MAJ Liz Arnold, 703-696-1593 elizabeth.arnold@hqda.army.mil for accounts and passwords)

(2) Need email for every installation ELS to allow electronic transmission of bulletins, news flashes, and to enhance ability to pass information to ELS on case-specific issues (POC is MAJ Arnold)

(3) Useful websites---springboards to environmental law:

(a) Air Force FLITE-environmental law: http://envlaw.jag.af.mil/

(b) DENIX (every ELS should be a subscriber to this site = Defense Environmental Network): http://www.denix.osd.mil/denix/DOD/dod.html

(c) EPA home page: http://www.epa.gov/epahome/locate1.htm

(d) State regulatory references: http://www.sso.org/ecos/states.htm

(e) EPA Administrative Law Judge decisions: http://www.epa.gov/oalj/index.htm

(f) Environmental Appeals Board decisions: http://www.epa.gov/eab/

2. Enforcement action expectations

a. ELD is not staffed with a "SWAT" team to respond to enforcement actions by state or EPA regulators; the installation ELS is the point-person on each case; the ELD action officer for enforcement issues stands in an advise-and-assist role

b. In cases where an issue of Army-wide importance is raised, ELD often ghost-writes motions and briefs for the ELS and may assist in arguing cases before administrative tribunals; otherwise, ELD travel in connection with an enforcement action is rare

c. Enforcement actions should be closely coordinated with ELD, in association with the MACOM ELS, so that the benefits of a litigation team approach can be achieved

Chapter 37

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

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CHAPTER 37

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

OUTLINE

I. INTRODUCTION.

A. Structure of the Act.

1. Article I - General Provisions.

2. Article II - General Relief - reduced interest rate, stay of court proceedings, default judgment protection.

3. Article III - Special Protection - landlord tenant issues, mortgage foreclosure, installment contracts.

4. Article IV - Tax Protection, Powers of Attorney, Professional Liability Insurance Protection.

5. Others - The SSCRA contains other provisions such as life insurance guarantees (Article IV) and provisions regarding public lands (Article VI). These other protections are beyond the scope of this outline. [This outline is keyed to the current SSCRA statute sections at 50 U.S.C. App. §500 et. seq., rather than to the sections of the original SSCRA.]

6. Best Sources of SSCRA Guidance: LAAWS BBS/JAGNET, and JA 260, SSCRA Guide.

7. SSCRA Amendments.

a) Future Financial Arrangements - added 50 U.S.C. App. § 518. Future Protection for Persons using the SSCRA. The fact that a person has availed himself of protection under the Act may not be reported as adverse information against him and used to deny him credit in future financial arrangements. CAVEAT: This "safe-harbor" does not prevent an institution from reporting a failure to comply with an underlying obligation.

b) Added U.S. Air Force and Reserve Component coverage explicitly to the Act.

c) Durable Powers of Attorney for MIA's. All POA's for military are deemed durable for the entire period of imprisonment for POW's notwithstanding expiration dates contained in the document itself.

d) Added 50 U.S.C. App. § 592 - Professional Liability Insurance for Certain Persons Ordered to Active Duty in the Armed Forces.

(1) Applies to health care professionals or other persons as determined by the Secretary of Defense [possibly including Reserve Component attorneys].

(2) Who had liability coverage in force before coming on active duty.

(3) Allows for suspension of policy while on active duty, refund of premiums attributable to active duty time and guarantees reinstatement of insurance at termination of active duty.

e) Added 50 U.S.C. App. § 593 - Reinstatement of Health Insurance Coverage upon release from Service.

II. ARTICLE I - GENERAL PROVISIONS OF THE SSCRA.

A. Purpose: The Purpose of the Act is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. The Act should be read "with an eye friendly to those who dropped their affairs to answer their country's call." Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

B. Constitutionality: The SSCRA is constitutional. Although it arguably interferes with the administration of justice within the states, courts have found that this interference is permissible as an exercise of Congress' power to raise and support the military forces under Article I, § 8 of the Constitution. *See, e.g.*, Radding v. Ninth Federal Savings & Loan Assoc., 55 F. Supp. 361 (D.C. N.Y. 1944).

C. Protected Persons .

1. Active Duty.

2. Reserves while in active federal service.

a) Annual Training - applicable due to language of the Act - The term "person in the military service" includes "... federal service on active duty with any branch of service heretofore referred to... (§ 511) "... and any member of a reserve component of the Armed Forces who is ordered to report for military service shall be entitled to such relief and benefits...." (§ 516).

b) In re Brazas, 662 N.E.2d 559 (Ill. 1996). Appellate court holds that trial court abused its discretion by holding a hearing on divorce case issue when judge and opposing counsel were aware defendant on Reserve Active Duty for Training (ADT) status. See also United States v. Stephan, 490 F.Supp. 323, 325 (W.D. Mich. 1980).

3.

National Guard - Only if in active federal service.

a) DAJA-AL 1991/1884 21 June 1991 - State national guard personnel on full-time state duty are not covered by SSCRA.

b) Research Tip - Do not overlook state protections such as LA Rev. Stat 29: §§ 401-425, and PA. Code Vol. 51, PA-C.S.A. §§ 7309-7316 (1990) which provide similar relief to military persons in state service.

4. Dependents - For Article III protections - protection available in their own right (other protections may be derivative).

5. Others - sureties, guarantors, etc. - 50 U.S.C. App. § 513.

D. Period of Coverage.

1. Commencement.

a) Active Duty - date of entry.

b) Inductees - date of receipt of orders.

c) Reserve Components - date of receipt of orders for Articles I-III, date of reporting for all other protections.

2. Termination.

a) Ordinary - Date of discharge terminates some coverage. Some protections extend for a limited time beyond discharge but are tied to discharge date.

b) Misconduct.

(1) Court-Martial - Soldier serving sentence for violent assault has divested himself or herself of protections of the Act. Mantz v. Mantz, 69 N.E. 2d 637 (Ohio C.P. 1946).

(2) AWOL - Depends on reasons for AWOL.

(a) Soldier who "extended furlough" to attend birth of child still entitled to protection. Shayne v. Burke, 27 So.2d 751 (Fla. 1946).

(b) Soldier AWOL with whereabouts unknown not entitled to SSCRA protection. Harriott v. Harriott, 511 A.2d 1264 (N.J. 1986), and U.S. v. Hampshire, 95 F.3d 999 (10th Cir. 1996), ***related case***, Marriage of Hampshire, 934 P.2d 58 (Kan. 1997).

(c) Self-inflicted injury. Marine who was hospitalized as a result of a self-inflicted gunshot wound not entitled to use SSCRA to stay judicial proceedings. Burbach v. Burbach, 651 N.E.2d 1158 (Ind.App., 1995).

c) Waiver.

(1) Written [50 U.S.C. App. Section 517].

(2) Executed after effective date of coverage.

(3) Specific - Waiver of one provision does not waive others. *See* Harris v. Stem, 30 So.2d 889 (LA Ct. App. 1947). Court held that waiver of rights against seizure of property did not affect tolling of statute of limitations.

3. Jurisdiction .

a) Applies in all courts in United States.

b) Collateral Review of State decisions in Federal Court? - NO - Shatswell v. Shatswell, 758 F. Supp 662 (D. Kan. 1991). *See also* Scheidegg v. United States, 715 F. Supp. 11 (D. N.H. 1989)(SSCRA is not a grant of subject matter jurisdiction to seek review of state court decisions in federal court).

c) Private Cause of Action ? - Generally no independent cause of action for SSCRA.

(1) United States v. Bomar, 8 F. 3d 226 (5th Cir. 1993). United States Attorney pursued criminal sanction for violation of Act.

(2) McMurtry v. City of Largo, 837 F. Supp. 1155 (M.D. Fla. 1993). No federal cause of action for federal jurisdiction. Soldier's failure to use remedy under SSCRA does not permit later cause of action to retrieve the lost remedy.

(3) Use the remedy of the SSCRA in the applicable action or combine it with other causes of action as an equitable argument. Garramone v. Romo, et. al., 94 F.3d 1446 (10th Cir. 1996) (Plaintiff may assert SSCRA rights as part of a civil rights action under 42 U.S.C. Section 1983.)

(4) Moll v. Ford Consumer Finance Company, Inc., __ F. Supp. __, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998). A district court has held that the 1991 Amendments to the SSCRA [ə518(2)(B)] create a private cause of action for recouping interest charged above the 6 % interest cap [ə526].

III. ARTICLE II - GENERAL RELIEF (50 U.S.C. APP. §§ 520-527).

A. Key Concept - Material affect requires a showing that the service member's military service has materially affected the service member's ability to fulfill the civil obligation.

B. 6% Interest Cap (50 U.S.C. App.§ 526).

1. Limits interest to 6% for duration of military service.

2. Criteria.

a) Applies only to obligations incurred before entry onto active duty.

b) Service member now on active duty, and,

c) Military service materially affects ability to pay. Fed. Home Loan Mortgage Corp. v. Sincaban (unpublished) (U.S. Dist. Ct. W. D. WI. Order # 93-C-0090-C 13 Dec 93). Reserve doctor called to AD with reduced income. Creditor Bank discovered she had substantial investment income in millions - HELD - no material affect. Judge indicates that creditors may look at "totality of circumstances" to determine material affect, including spouse's income, and accumulated assets.

d) Effective at entry on active duty/notice of activation. not at time of invocation of right

3. Notice to lender. [Sample Letter to Lender at Appendix A.]

a) With copy of orders.

b) Burden. On lender to seek relief in court if lender asserts no material affect

C. Issue of how to implement 6% reduction.

1. Various asserted methods.

a) Forgive all interest above 6% (DOD/DOJ position).

b) Reduce rate but not payment. [This ploy was discouraged by the Comptroller of the Currency. *See* Advisory Memo, 1991 OCC CB LEXIS 13 (1991).]

c) Add interest above 6% to loan balance.

2. DOD/DOJ position adopted during Desert Shield/Storm by national lending associations. [Joint Hearing before the House and Senate Veteran Affairs Committees on SSCRA, 101st Cong., 2d Sess. (12 Sep. 1990), *as reported in* The Army Lawyer, p. 50, Nov. 1990.]

3. SSCRA does not apply to federally guaranteed student loans (according to DOE interpretation).

a) Title 20, U.S. Code Section 1078(d). (Federally insured student loans are not subject to any interest rate limits.) Memorandum, Department of Education (DOE), to the Office of the Staff Judge Advocate, Camp Lejune, North Carolina (1 April 1993); DOE Memorandum, GSL Borrowers Adversely Affected by the Recent U.S. Military Mobilizations (29 August 1990).

b) Military deferments are no longer granted for student loans but soldiers may have loan payments deferred for up to six months or more for economic hardship upon request to lender/DOE IAW 34 C.F.R. § 682.211.

4. *See also* United States ex. rel. Bennett v. American Home Mortgage, (D. N.J.) (unpublished) (settled out of court after U.S. Attorney initiated suit on behalf of service member against lender that refused to lower payment).

5. Responses to Creditor Refusal to honor 6% interest provision. Pottorff, James P., "*Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*," 132 MIL. L. REV. 115 (1991).

6. Moll v. Ford Consumer Finance Company, Inc., __F.Supp. __, 1998 U.S. Dist. LEXIS 3638 (N.D. Ill. 1998). Military members may file private cause of action to enforce the 6% interest cap provision of 50 U.S.C. App. ∋ 526.

D. Stay of Proceedings (50 U.S.C. app. § 521).

1. Who.

a) Both military plaintiff and defendant may request.

b) But not plaintiff's attorney if the attorney is the person called to active duty. Salazar v. Rahman, 1993 WL 22085 (Tex. Ct. App. 1993)(unpublished).

c) And not if a service member is a material witness - not a party. Ohio v. Gall, 1992 WL 217999 (Ohio Ct. App. 1992)(unpublished).

2. What Proceedings.

a) Civil Court Hearings.

b) Bankruptcy Debtor/ Creditor Meeting ?- Yes - In re Ladner, 156 B.R. 664 (Bankr. D. Colo., 1993).

c) Administrative Hearing? No. ISSUE: The new Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325,363, 110 Stat. 2105 (1996), requires states to set up administrative proceedings to expedite handling of child support and paternity claims which are not subject to SSCRA stay protection. Drafters ignored DoD request to include SSCRA stay protections for such hearings.

3. When may you request a stay? Soldier may make the request at any stage of the proceedings. ISSUE: What is the impact of the Internet, video teleconferencing, video depositions on determinations of unavailability?

a) *But see* Massey v. Kim, 455 SE2d 306 (Ga. Ct. App. 1995) (Military defendant seeks stay to delay civil discovery until completion of overseas tour. Court rejects request pointing out improvements in modern communications since the passage of the SSCRA.);

b) Keefe v. Spangenberg, 533 F.Supp. 49 (W.D. Okla. 1981) (Court denies stay request to delay discovery and suggests that service member agree to video tape deposition, IAW Fed. R. Civ. P. 30(B)(4)); and

c) In re Diaz, 82 B.R. 162, 165 (Bankr. Ga. 1988) ("Court reporters may take depositions in Germany including videotape depositions for use in trials in this country.").

4. Duration of stay - Period of service plus 60 days. Key = Reasonableness!! Keefe v. Spangenberg, 533 F.Supp. 49, 50 (W.D. Okla. 1981). Court grants soldier stay request for a one month continuance, but denies soldier request for a stay until his expected date of discharge three years later.

5. Burden of Proof - Boone v. Lightner, 319 U.S. 561 (1943) - at discretion of trial court.

a) As a practical matter - assume the burden is on the service member to show service has materially affected the ability to appear in court.

b) Military member must show material affect:

(1) Unavailability to Appear [no ability to take leave]: ISSUE: The new Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for service members to appear in court and administrative paternity and child support hearings. *See* Pub. L. No. 104 - 193, § 363, 110 Stat. 2105 (1996).

(a) Unsuccessful.

(i) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) - Court affirms adverse judgment against overseas soldier where soldier failed to use 38 day leave stateside to resolve pending support modification action.

(ii) Underhill v. Barnes, 288 S.E. 2d 905 (1982). Soldier made no showing of attempt to request leave, court took judicial notice of leave statutes and regulations and assumed he had 50 days accrued based on leave accrual and length of service.

(iii) Palo v. Palo, 299 N.W. 2d 577 (S.D. 1980) - Both parties were service members assigned to Germany. Wife took excess leave and emergency loan to travel to United States for divorce hearing. Husband made no showing of inability to do the same.

(iv) Rogers v. Tangipahoa Parish Sheriff's Office, 1997 WL 466922 (E.D. La. 1997); Bowman v. May, 678 So.2d 1135 (Ala. Civ. App. 1996); and Judkins v. Judkins, 441 S.E.2d 139 (N.C. 1994). (Soldier must make an actual showing of unavailability, including an effort to obtain leave. No showing and stay request denied.)

(b) Successful.

(i) Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (Sailor deployed at sea sends affidavit from superior officer attesting to inability to appear or take leave for a limited period because of military sea duty.)

(ii) Cromer v. Cromer, 278 SE2d 518 (N.C. 1981) (Sailor deployed on nuclear submarine has letter and affidavit from commander attesting to his inability to take leave until the submarine got to port.)

(2) Actual Prejudice resulting from Non-Appearance.

(a) Sole issue at trial-uncontested facts=NO STAY.

(i) Real Property Valuation. Cooper v. Roberts, 722 SW2d 910 (Ky. Ct App. 1987).

(ii) Child Support Determination based upon income formula, where income is not disputed, or by Revised Uniform Reciprocal Enforcement of Support Act. Jaramillo v. Sandoval, 431 P2d 65 (N.M. 1967); 42 U.S.C. §§ 651-667 (1990); State *ex. rel.* Adams v. Adams, 455 NW2d 227, 230 n.2 (S.D. 1990)[RURESA]; *But see* Schmidt v. Schmidt, 444 NW2d 367, 372-73 (S.D. 1989) (Henderson, J., dissenting).

(iii) Uncontested Divorce Hearings. Palo v. Palo, *supra*.

(iv) Appeal of Judgment. Kesler v. Kesler, 682 SW2d 44, 45 n.1 (Mo. Ct. App. 1984).

(b) Service Member not Real Party in Interest=NO STAY.

(i) Tort Liability-Soldier Defendant Insured

(a) Boone v. Lightner, 319 U.S. 561, 569 (1943).

(b) Underhill v. Barnes, 288 SE2d 905, 907 (Ga. Ct. App. 1982) (Service Member defendant not prejudiced where plaintiff has agreed to limit tort recovery to insurance policy limits.)

(c) Hackman v. Postel, 675 F.Supp 1132 (ND Ill. 1988) (Service member is only nominal defendant in personal injury action, and insurance company may not assert the SSCRA.)

(ii) Subrogation Cases. Murphy v. Wheatley, 360 F2d 180 (5th Cir. 1966).

(iii) Custody Cases-Not a Necessary Party. --Bubac v. Boston, 600 So.2d 951 (Miss. 1992). Military father not necessary party in proceeding by mother challenging retention of kids by paternal grandmother.

(iv) Temporary Modification of Support. --Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989). As general rule, temporary modifications of child support do not materially affect rights of military defendant as they are interlocutory and subject to modification.

(c) Service member bad faith=NO STAY.

(i) Riley v. White, 563 So2d 1039 (Ala. Civ. App. 1990) (Soldier failed to submit to blood test in paternity action before going overseas, when aware of court proceedings, had attorney representation, and was previously given a delay by court to take test, denied stay.)

(ii) Hibbard v. Hibbard, 431 NW2d 637 (Neb. 1988) (Soldier for three years in contempt of court for refusing to comply with visitation orders of court, denied stay in ex-spouse's change of custody action.)

(iii) Judkins v. Judkins, 441 S.E.2d 139 (NC 1994). (Soldier receives several continuances because of military duty during Persian Gulf war, has attorney, fails to comply with court discovery orders, and seeks addional stay/continuances after discovery order disobedience.)

(3) What Type of Cases WILL courts find actual prejudice/material affect for SSCRA Stay?

(a) Personal Injury Claims-Plaintiff/Actual Defendant. Starling v. Harris, 151 SE2d 163 (Ga. Ct. App. 1966) (Soldier only eyewitness to tort other than other party.)

(b) Large Financial Disputes. Mays v. Tharpe & Brooks, Inc., 240 SE2d 159 (Ga. Ct. App. 1977) (Service member sued on guaranty on $50,000 promissory note. Stay granted.)

(c) Contested Divorce, Custody, Paternity Cases.

(i) Smith v. Smith, 149 SE2d 468, 471 (Ga. 1966) (Error to deny stay in divorce action where alimony at issue.)

(ii) Lackey v. Lackey, 278 SE2d 811 (Va. 1981) (Change of child custody action involving servicemember's children, while he was unavailable to defend and had requested a stay, reversed).

(iii) Mathis v. Mathis, 236 So2d 755 (Miss. 1970) (Service member's absence in paternity action materially affects ability to defend, unless specific findings made otherwise.)

(4) Court discretion- if court finds material affect, the court must order a stay. If the stay request is denied, the court must make findings of fact about lack of material affect, or ensure that there is sufficient evidence in the record to warrant denial. Olsen v. Olsen, 621 NE2d 830 (Ohio 1993).

6. Default Judgments (50 U.S.C. app. § 520).

a) Affidavit.

(1) Must be prepared and filed by plaintiff.

(2) Must state sufficient facts to give court reasonable basis to determine whether the respondent is in the military. Mill Rock Plaza Associates v. Lively, 580 N.Y.S.2d 815, 153 Misc.2d 254 (N.Y. City Civ. Ct. 1990)

(3) Effect of failure to file.

(a) No entry of judgment until judge determines that the defendant is not in the military and has not requested a stay. *But see* Interinsurance Exchange Auto. Club v. Colllins, 37 Cal. Rptr.2d 126 (Cal. App. 1994) (Clerk of Court may not refuse to enter a default judgment because no SSCRA affidavit is filed with the pleadings.)

(b) Remedy is not available to persons who are not in the military!

(c) Judgment obtained without affidavit is voidable not void.

(d) False affidavit subject to criminal penalties. 50 U.S.C. App. § 520(2).

(4) Court-Appointed Attorney.

(a) Purpose. Ascertain whether the defendant is in the service and if so to request a stay on the defendant's behalf. *See* State *ex rel*. Burden v. Smith, 1994 WL 714505 (Ohio App 10 Dist., 22 Dec. 1994) (unpublished).

(b) Compensation: No specific provision in SSCRA - look to state attorney appointment and compensation powers.

(c) Effect of failure to appoint. Most cases, no sanctions against judge and failure to appoint is not an abuse of discretion or reversible error unless respondent can show he was prejudiced by the failure to appoint counsel. Marriage of Lopez, 173 Cal. Rptr. 718 (Ca. App. 1981); McDaniel v. McDaniel, 259 S.W.2d 633 (Tex. Civ. App. 1953) (Prejudicial error to approve judgment in child support modification case contested by the parties, without determination that party to action was in the military.)

(d) Judgment obtained without appointment is also only voidable, not void.

7. Reopening Default Judgments, 50 U.S.C. App. § 520(4) .

a) Judgment must have been entered during term of service or within 30 days after termination of service.

b) Application must be made to court during term of service or within 90 days of termination.

c) The service member cannot have made any appearance.

(1) Filing an answer either pro se or through counsel is an appearance.

(2) Letter from Legal Assistance Attorney to court may be an appearance!

(a) Skates v. Stockton, 683 P.2d 304 (Ariz. Ct. App. 1984) (Even though court did not otherwise have personal jurisdiction, it determined that legal assistance attorney's letter requesting a stay constituted an appearance sufficient to give it personal jurisdiction; attorney failed to reserve defenses including jurisdiction). [hm1]

(b) Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750 (Wis. Ct. App. 1989) (Legal assistance attorney requested a stay, but did not invoke SSCRA in request; court determined defendant had made an appearance and refused to reopen subsequent default judgment). *But see* Kasubaski v. Kasubaski, 1996 Wis. App. LEXIS 1014 (Wis. Ct. App. 1996) (unpublished) (Court criticizes the reasoning of Artis-Wergin, and suggests it was wrongly decided.)

(c) *But see* Kramer v. Kramer, 668 S.W.2d 457 (Tex. Ct. App. 1984); Marriage of Lopez, 173 Cal. Rptr. 718,721 (Ca. App. 1981) (Appellate courts hold that defendant's letter or legal assistance attorney letter invoking SSCRA and requesting a stay did not provide personal jurisdiction that was otherwise lacking).

(3) There is hope - some things are not appearances!

(a) Letter from Commander to court. Cromer v. Cromer, 278 S.E.2d 518 (N.C. 1981) (Court does not explicitly rule on re-opening under the SSCRA, but does remand case "in the interests of justice").

(b) Letter to opposing counsel. Sacotte v. Ideal-Werk Krug, 359 NW2d 393 (Wis. 1984). (Letter to opposing counsel asserting SSCRA does not constitute an appearance.)

(c) Sample SSCRA letters to opposing counsel and for Commanders to assert stay at Appendix A.

d) Criteria to re-open default.

(1) Military service prejudiced ability to defend, AND

(2) Meritorious Defense - Defendant must reveal the defense to all or part of the original action.

8. Stay or Vacation of Judgments, Attachments & Garnishments (50 U.S.C. § 523).

a) Military service materially affects ability to comply with judgment, court-ordered attachment, and/or garnishment, e.g. child support orders.

b) Court may stay execution of any judgment or court order entered against service member. Court may vacate or stay any court-ordered attachment or garnishment of property, wages, or money in the hands of another either before or after judgment. ISSUE: Administratively determined involuntary allotments for child support arrears enforcement not subject to this provision. See 42 U.S.C § 665; 5 C.F.R. § 581.302(b)(4); 32 C.F.R. § 584.9; 32 C.F.R. Part 541 (1996); and Welfare Reform Act of 1996, Pub. L. No. 104-193, §§ 325, 363, 110 Stat. 2105 (1996).

c) DFAS, which processes all military garnishment requests for support orders, has rarely seen this SSCRA provision asserted by military members or legal assistance counsel.

9. Assessing the default judgment case.

a) Can you afford to do nothing?

b) Material affect and meritorious defense?

c) Adverse action from default - garnishment or involuntary allotment? [Involuntary Allotment of military pay affects only RC soldiers on active duty > 180 days. DOD Dir. 1344.9, and DOD Instr. 1344.12.]

IV. INVOLUNTARY ALLOTMENTS AND THE SSCRA.

A. HATCH ACT REFORM AMENDMENTS - 1993.

1. Law prior to 1993 - Sovereign immunity prevented garnishment of federal employee pay except for family support. See, e.g., Omega v. Koller, 503 F. Supp. 149 (D.C. Md, 1980) (Consumer Credit Protection Act held not a specific waiver of sovereign immunity for garnishment).

2. Garnishment Equalization Act - Introduced as S. 316 in 101st Congress (Chief sponsor - Sen. Craig). Reintroduced as S. 253 in 102d Congress. Merged into Hatch Act Reform Amendments, P.L. 103-94; signed by President on October 11, 1993. Now codified at 5 U.S.C. § 5520a.

   a) Waived sovereign immunity for civilian federal employee pay.

      (1) Estimated annual defaulted debt of federal employees $1.3 Billion.

      (2) Estimated number of federal employees with defaulted debt based on Postal Service experience - 2% of federal workforce, including military.

b) Directed DoD to promulgate regulations providing for involuntary allotment of military pay to account for "the procedural requirements of the Soldiers and Sailors Civil Relief Act...and in consideration for the absence of a member of the uniformed services from an appearance in a judicial proceeding resulting from the exigencies of military duty."

B. INVOLUNTARY ALLOTMENTS FOR CREDITOR JUDGMENTS - DOD DIRECTIVE 1344.9; DOD INSTRUCTION 1344.12.

1. Initiation Procedure.

a) Final order of court with specific money award, and DD Form 2653.

b) Served on designated agent - DFAS - Cleveland.

2. Certifications [DD Form 2653]:

a) Judgment not modified or set aside.

b) Not issued while service member was on active duty. If the service member was on active duty, the SSCRA was followed fully.

c) State law allows garnishment of a similarly situated civilian.

d) Debt has not been discharged in bankruptcy or barred by other legal impediment.

e) Creditor agrees to repay service member within 30 days if payment to creditor is erroneous.

f) DFAS Information Sheet- Appendix C.

3. Amounts Available.

a) Pay includes - Disposable (generally taxable) pay (only).

b) Maximum amount of allotment - 25% of disposable pay or lower if state law provides for lower amount. The states of NC, SC, NH, PA, TX do not allow garnishment of wages for commercial debts, thereby precluding involuntary allotment actions from debt actions in those states.

c) Creditors now charged a $75 processing fee out of their 25% pay allotment per the DoD Authorization Act of Fiscal Year 1996, Pub. L. No. 104-106, § 643, 110 Stat. 368, codified at 5 U.S.C. §§ 5520a (j)(2), (k)(3), and (l) [1996]. *See also* 61 Fed. Reg 53722 (15 Oct. 1996). This provision is being contested by creditors, as DoD is the only federal agency to deduct fees from the judgment amount.

4. DFAS action.

a) Facial review.

b) Mail notice [DA Form 2653] to service member [90 day clock starts].- No time limit for DFAS to issue notice. Mail two additional copies to the "immediate commander" with DD Form 2654.

5. Command action ("Immediate Commander").

a) Serve service member with copy of notice and DD Form 2654 (Rights Warning Form) [5 day req.]

b) Inform service member of rights to contest the involuntary allotment [15 days to respond].

c) Grant 30 day extension to respond if necessary. No response back to DFAS within 90 days from initiation of process results in automatic involuntary allotment.

6. Service member's actions.

a) Consent.

b) Seek legal assistance.

7. Service member defenses:

a) The SSCRA was not followed in the underlying judgment.

b) Military exigency caused the absence of the service member from appearance in a judicial proceeding which forms the basis of the judgment.

c) The application for allotment is false or erroneous in material part.

d) The judgment has been satisfied, set-aside, or modified.

e) A legal impediment (e.g. bankruptcy) prevents processing the allotment.

f) "Other appropriate reasons..." Violation of consumer law-underlying judgment.

8. Immediate Commander Response.

a) Rule on military exigency defense only.

(1) Standard of review - preponderance.

(2) Definition - "[M]ilitary assignment or mission essential duty that, because of its urgency, importance, duration, location or isolation, necessitates the absence of a member of the military service from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally to be presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."

b) Provide name and address of appellate authority for military exigency appellate determination by creditor.

c) Forward debtor response to DFAS. Debtor failure to timely respond results in automatic initiation of involuntary allotment.

9. DFAS decides all other defenses, except military exigency. No appeal of DFAS determinations.

V. SUSPENSION OF STATUTES OF LIMITATION (50 U.S.C. APP. § 525).

A. Tolls the running of the statutes.

1. During the service person's period of service.

2. With respect to civil and administrative proceedings.

3. Involving the service member as either plaintiff or defendant.

4. Except for the internal revenue laws! 50 U.S.C. App. § 527.

B. Issues.

1. Career Military - Conroy v. Aniskoff, 507 U.S. 511, 113 S. Ct. 1562, 123 L.Ed.2d 229 (1993).

   a) The tolling applies regardless of whether the service member is inducted, volunteers, is a one-termer or a career military member.

   b) In addition, court held no requirement to show material affect.

2. Does "all proceedings" mean all?

   a) Board for Correction of Military Records - tolled. Detweiler v. Pena, 38 F. 3d 591 (D.C. Cir. 1994) ("any" means "any"). Detweiler overrules other case law that indicated the BCMR statute was not tolled. (Allen v. Card, 799 F. Supp. 158 (D.C. 1992) (pre Conroy), Miller v. United States, 29 Fed. Cl. 107 (1993)(post Conroy)). Department of Defense requested a legislative override of Detweiler, which was included in the FY 1997 DoD Authorization Act bill, but was deleted in conference committee.

   b) Merit Systems Protection Board - tolled, Davis v. Dep't of the Air Force, 51 M.S.P.R. 246 (1991).

   c) Bankruptcy - tolled, In re A.H. Robins v. Dalkon, 996 F.2d 716 (4th Cir. 1993). "The statute contains no exceptions and is drafted in extraordinarily broad terms...The broad, unqualified and mandatory language of section 535 leaves little room for judicial interpretation...." Id. at 718.

3. Laches. The SSCRA provision does not prevent assertion of the equitable principle of laches. See Detweiler v. Pena, 38 F 3d 591, 595 (D.C. Cir. 1994). Laches = inexcusable delay by petitioner plus prejudice to respondent's ability to defend.

VI. ARTICLE III - RENT, LEASES, INSTALLMENT CONTRACTS, MORTGAGES, LIENS AND ASSIGNMENTS (50 U.S.C. APP. §§ 530-536)

A. Protected Persons - Active Duty personnel and dependents in their own right.

B. Protection from Eviction from Leased Housing (50 U.S.C. App. § 530).

1. Premises occupied - must be a dwelling place of the service member or dependents.

2. Rent may not exceed $1200 per month. - changed from $150 by Desert Shield/Storm amendments.

3. Judicial Relief Available. Court shall upon application of service member or eligible dependent, and may, on its own motion grant the following:

a) Stay of eviction proceedings for up to 3 months, or,

b) Make any other "just" order.

c) Unless the court finds no material affect.

d) Criminal Sanctions for Landlord “self-help” eviction.

C. Termination of Pre-Service Leases (50 U.S.C. App. § 534).

1. Purpose: to permit lawful termination of a pre-service lease of premises by a service member entering active duty [or by his or her dependent in their own right (see § 536)].

2. Criteria for relief.

a) The service member need NOT show material affect.

b) The service member need only show:

(1) The lease was entered into prior to entry into military service,

(2) The lease was executed by or on behalf of the service member,

(3) The leased premises were occupied for dwelling, professional, business, agricultural, or similar purposes by the service member or the service member and his or her dependents, and

(4) The service member is currently in military service.

c) Landlord may seek "equitable offset" for unreasonable costs/expenses incurred as the result of early military tenant termination, e.g., realty fees, cost of special fixtures installed at tenant request, etc. Such landlord equitable offset may be greater than the amount of tenant rent and security deposit remaining under the lease term. Omega Industries, Inc., v. Raffaele, 894 F.Supp. 1425 (D. Nev. 1995). *See also* Conrad, Note, *Pre-Service Lease Terminations May Be Subject to Landlord "Equitable Offsets"*, The Army Lawyer, April 1997, at 153.

VII. INSTALLMENT CONTRACTS AND AUTO LEASES (50 U.S.C. APP. § 531).

1. Applies only to **pre-service obligations** by either service member or spouse who can show material affect as to ability to pay on installment contracts such as appliances, furniture, and motor vehicles.

2. Prohibits self-help repossession of items purchased on installment contract.

a) Leased automobiles or other items included if Option to Purchase Clause in lease agreement.

b) SSCRA does not terminate automobile lease!

3. Criminal penalties for violating repossession provisions of this section.

4. Upon service member showing of material affect to a court a stay may be granted and the creditor may only seek repossession of the item purchased on installment contract by obtaining a court order after obtaining a judgment on the debt.

5. Practice Pointer in Auto Lease Cases: While you may not threaten criminal action to settle a civil matter, you may point out any potential violations of this section to a creditor or their counsel (self-help repossession), and suggest a possible settlement of the matter, by allowing the soldier to voluntarily surrender the vehicle in return for the creditor waiving all early lease termination penalties.

VIII. ENFORCEMENT OF STORAGE LIENS (50 U.S.C. APP. § 535).

A. General: Persons with storage liens on property of service members may not exercise any right to foreclose or enforce any lien during the service member's period of military service and for three months thereafter except upon court order.

B. Judicial Relief.

1. Court shall (upon application by service member) and may upon its own motion,

a) Stay proceedings, or

b) Grant other equitable relief to conserve interests of all parties.

c) unless there is no "material affect" (if the service member's ability to pay the storage charge is not materially affected by service).

C. Criminal Sanctions. Any person who knowingly takes any action contrary to this section, or attempts to do so, shall be fined as provided in 18 U.S.C., or imprisoned for not to exceed one year, or both. 50 U.S.C. app. § 535(3). *See,* United States v. Bomar, 8 F.3d 226 (5th Cir. 1993). [Note that the United States prosecuted criminally this case on behalf of the soldier].

IX. MORTGAGES, TRUST DEEDS, ETC. (50 U.S.C. APP. § 532).

A. In court actions to enforce mortgage obligations, court shall (upon application by service member) and may (upon its own motion) grant relief to service member [or dependent pursuant to § 536] unless military service does not materially affect ability to comply with obligation.

B. Criteria for relief.

1. Obligation is secured by a mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property,

2. Obligation entered before entry into military service,

3. Property owned by service member [or dependent] before entry into military service

4. Property is still owned by service member or dependent at time relief is sought, and

5. Military service materially affects ability to comply with terms of obligation, such breach occurring prior to or during period of such military service.

C. Judicial relief:

1. Court shall (upon application by service member) and may upon its own motion,

a) Stay proceedings, and/or

b) Grant other equitable relief to conserve interests of all parties (i.e., reduce or suspend installment payments)

c) unless there is no "material affect."

2. No sale, foreclosure, or seizure of property shall be valid if made during the period of military service or within 3 months thereafter, except pursuant to an agreement (§ 517), unless upon an order previously granted by the court and a return thereto made and approved by the court.

X. ARTICLE VII - FURTHER RELIEF [50 U.S.C. APP. § 590].

A. Stay of Enforcement of Obligations, Liabilities, Taxes (50 U.S.C. App. § 590).

1. Person may, at any time during military service or within 6 months thereafter, apply to court for relief of any obligation or liability incurred by such person prior to active service or in respect to any tax or assessment whether falling due prior to or during active military service.

2. Court may grant stays of enforcement during which no fine or penalty shall accrue if service materially affected ability to comply with obligation or pay tax or assessment.

a) There need be no default or legal action pending to get protection, but applicant must prove "material affect." Application of Marks, 46 N.Y.2d 755 (1944).

b) Dependents receive protection. Morris Plan Indus. Bank of N.Y. v. Petluck, 60 N.Y.2d 162 (1946).

B. Real World Problem : Reserve soldier (Physician) had pre-service BMW auto lease (7 series) he could not afford while on active duty during Desert Storm. He voluntarily gave it back to the dealer. After he returned from Desert Storm, the dealer sued him for $31,000 deficiency. What should the soldier have done to try and prevent this? He should have used § 590 to get prospective relief from the lease obligation.

XI. CONCLUSION

SIGNIFICANT SSCRA PROVISIONS

SSCRA Provision:*	Pre-Service Obligation	Service Obligation	Post-Service
6% Interest Cap [Section 526]	Yes.	No.	No.
Civil Court Stay [Section 521]	No.(Only applies Active Duty)	Yes.	Yes. Up to 60 days
Reopen Judgment [Section 520(4)]	No.	Yes.	Yes. Judgments up to 30 days from discharge. Reopen up to 90 days from discharge.
Toll Statute of Limitation [Section 525]	No.	Yes. Civil & Admin Actions.	No.
Eviction Protection [Section 530]	No.	Yes. Rent<1200/mo	No.
Termination of Lease [Section 534]	Yes. Residential, Commercial/Prof.	No.	No.
Mortgage Foreclosure [Section 532]	Yes. Obligation was pre-service .	No.	No.
Storage Liens Protection	Yes.	Yes.	Yes. Up to 3 [Section 535(2)] months from discharge.
Installment Contract/ Auto Leases [Section 531]	Yes. (Pre-service only)	No.	No.
Anticipatory Relief [Section 590]	Yes. (Pre-service obligation, liability,penalty or tax)	Yes. (Service obligation Liability, penalty or tax)	No. May apply during service or up to 6 months after to court.

*Section Numbers keyed to SSCRA as codified at 50 App. U.S. Code.

APPENDIX A

SAMPLE SSCRA LETTERS

Sample Letter to Creditor
Reduction of Interest Rate

[LETTERHEAD]

[Date]

Legal Assistance Office

[CREDITOR ADDRESS]

Dear **[Sir or Madam]**:

I am a legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** informs me that **[he/she]** is currently obligated to your company for a loan bearing an interest rate of **[%]**. I further understand that this obligation was entered into on **[DATE]**.

Since incurring this obligation, **[CLIENT]** has entered the active military service of the nation in the U.S. **[SERVICE]** on **[DATE]**. This entry into active military service has materially affected **[CLIENT]=s** ability to meet this obligation. Under these circumstances, federal law prescribes the maximum interest rate which **[CLIENT]** may be charged.

The Soldiers and Sailors Civil Relief Act (50 U.S.C. App. э 526) prescribes a ceiling of 6% annual interest on any obligation under the circumstances described above. This interest rate must be maintained for the entire period that **[CLIENT]** is on active duty. The percentage cap includes all service charges, renewal charges, and fees. The rate is applied to the outstanding balance of the obligation as of the date of entry onto active duty mentioned above. Any interest charge above this statutory ceiling must be forgiven, not accrued.

Please ensure that your records reflect this statutory ceiling and that any charges in excess of a 6% annual rate are withdrawn. You should also be aware that federal law (50 U.S.C. App. э 531) circumscribes the manner in which you may enforce certain rights under the contract, including any right to repossession of property.

I thank you in advance for your attention to this matter. Should there be any questions, please feel free to contact me at the address above.

Sincerely,

[ATTORNEY NAME]
[RANK], U.S. Army

Sample Letter to Opposing Counsel

Requesting a Stay of Proceedings

[LETTERHEAD]

[Date]

Legal Assistance Office

[COUNSEL'S ADDRESS]

Dear **[Sir or Madam]**:

I am a military legal assistance attorney writing on behalf of **[CLIENT]**. **[CLIENT]** is the defendant in an action you filed on behalf of **[OPPOSING PARTY]** in **[COURT]**. The mission of our office is to provide initial counseling to soldiers to help them make more informed decisions about their legal obligations. We are not allowed to represent soldiers in any fashion in these types of civil actions. [ELAP jurisdictions delete the prior sentence.] I am not **[CLIENT]=s** attorney for the underlying matter and this letter should not be construed as an appearance or submission to jurisdiction. Rather, I am simply assisting **[CLIENT]** in protecting his interests until such time as he can obtain proper legal counsel.

[CLIENT] is currently in the active military service of the nation in the U.S. **[SERVICE]**. Federal law affords such service people certain rights prescribed by the Soldiers and Sailors Civil Relief Act. Among these rights is the stay of all legal proceedings during the period of active service when the service members ability to conduct a defense is materially affected. 50 U.S.C. App. э 521. In this case, **[CLIENT]** informs me that he will not be able to attend any proceedings and protect his interests until **[DATE]**. This inability to appear is caused by **[REASONS]**, direct results of his military service. **[CLIENT]=s** inability to attend is supported by the attached memorandum from his commanding officer.

Because **[CLIENT]=s** military service prevents his appearance, I request that you advise the court of **[CLIENT]=s** status and request a stay until **[DATE]**. I further request that you advise **[CLIENT]** of any action you take at **[ADDRESS]**.

Thank you in advance for your help in affording **[CLIENT]** an opportunity to participate in the legal process while meeting his obligations to the defense of our nation.

Sincerely,

[ATTORNEY NAME]
[RANK], U.S. Army

Sample Letter to the Clerk of Court

Requesting a Stay of Proceedings

(NOTE: This letter should be prepared for the signature of the client's commanding officer. At least one court has construed a letter directly from a legal assistance attorney to be an appearance causing the client to lose valuable rights!)

[LETTERHEAD]

[Date]

Commander

[CLERK OF COURT ADDRESS]

Dear **[Sir or Madam]**:

I am an officer in the U.S. **[SERVICE]** writing on behalf of **[CLIENT]**, who is the defendant in an action now pending before your court, **[CASE ID NUMBER]**. **[CLIENT]** is currently serving in the active military service of the nation at **[INSTALLATION]**. He is assigned to my command.

[CLIENT] will be unable to attend any hearings, present any type of defense, or effectively protect his interests in the matter in question until **[DATE]** because of his military duties. Until this date, **[CLIENT]** is needed by this unit to/because **[REASONS]**[1]**. I am advised by legal counsel that federal law allows a stay of proceedings for service members on active duty when their ability to defend themselves is materially affected by their military service (50 U.S.C. App. э 521). In this instance, [CLIENT]**=s critical role in the national security mission of this command precludes his participation in court proceedings until **[DATE]**. He will be unable to present any defense at all due to his duties.

---

[1] **AReasons≅ should clearly outline the duties to which the soldier must attend and why he cannot take leave. Examples would be Ato participate in a unit deployment to the National Training Center,≅ Ato deploy to Bosnia as part of the UN Implementation Force,≅ or Ato prepare forces for deployment to Haiti.≅ Whatever reason is given, the reasons why the soldier is critical to this mission must be explained.**

Request that you grant a stay in the proceedings until **[DATE]** to allow **[CLIENT]** to properly attend to both of his obligations. I will personally ensure that he is placed on leave immediately following the completion of the duties described above, so that he may appear at the next scheduled court date after **[DATE]**. I should note that I am not an attorney and am not making this request based on any attorney-client relationship between myself and **[CLIENT]**. I am not representing **[CLIENT]** with regard to the proceedings pending in your court. This letter should not be considered an appearance by **[CLIENT]**. Rather, it is a request in my capacity as a commander, charged with a mission supporting the national security of this nation, that you delay the proceedings to allow this soldier to perform his critical part in that mission.

Thank you in advance for your assistance in this matter. I request that you inform myself or **[CLIENT]**, at the above address, of any action taken regarding this request.

Sincerely,

[COMMANDER NAME]
[RANK], U. S. Army
Commanding Officer

APPENDIX B

INVOLUNTARY ALLOTMENT INFORMATION

from DFAS

Military Commercial Debt Allotments

Commonly Asked Questions
----

1. How do I apply for an involuntary allotment?

A creditor may initiate this process against a military member by submitting an Involuntary Allotment Application (DD Form 2653) along with a certified copy of a final judgment issued by a civil court. An original and three copies of both the form and the judgment are required. Also, the application must contain the member's full name and social security number for positive identification. The completed package should be sent to the following address:

Defense Finance and Accounting Service-Cleveland Center
Attention: Code L
P.O. Box 998002
Cleveland, OH 44199-8002

A blank DD Form 2653 may be obtained by writing the address above or by calling (216) 522-5301. Please be sure to include your return address on any correspondence, not just on the mailing envelope.

2. How much time does it take after I send in the application to DFAS before payments begin?

The regulation which establishes the procedures DFAS must follow when processing these applications contains mandatory time allowances that the military member must be given to respond prior to an involuntary allotment being started. This will normally prevent DFAS from establishing an involuntary allotment until 90 to 120 days after the application is received. However, if the member responds quickly and does not contest the allotment, this time could be shorter.

3. How much of the member's pay can I get each month? What if there are other allotments in place?

The Consumer Credit Protection Act, 15 U.S.C. 1673, establishes the maximum amounts that may be withheld from individual's pay for garnishments or other legal process to satisfy commercial debts. This amount is 25 percent of the individual's disposable pay. Disposable pay is the gross pay minus certain authorized deductions such as income tax withholding or debts owed to the government. If the member already has other involuntary allotments in place, it is possible that you will have to wait until that debt is paid prior to receiving any money for your application. Also, if deductions are being made to satisfy child support obligations, it is possible there will be no funds available to satisfy commercial debts for many years to come. In this case, you will be notified by DFAS of the status of your application.

4. What is the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA)? How does it affect my application for involuntary allotment?

The SSCRA is a federal law which applies at all times, not just when we are at war. It was designed to protect the legal rights of those who have been called upon to serve their country in the military. There are many provisions in the SSCRA. Most of them allow a service member to delay certain legal actions if his military service affects his ability to participate in the proceeding. There are also provisions which affect a member's financial transaction, such as allowing for lowered interest rates on loans while a member is serving on active duty.

However, the portion that is relevant to military commercial debt allotments is 50 U.S.C. App. Sec 520. This section basically says that in any proceeding where the defendant has failed to make any appearance, prior to any default judgment being issued, the plaintiff must file an affidavit with the court stating whether or not the defendant is in the military service, or that the plaintiff is unable to determine that fact after a reasonable effort. If the plaintiff states either that the defendant is in the military service, or that they are unable to determine whether or not the defendant is in the military service, prior to any default judgment, the court shall appoint an attorney to represent the defendant and protect his interest.

The fact that a plaintiff or court do not follow this mandatory procedure does not make the judgment void. It does make the judgment voidable at the court's option upon a proper showing of certain proof by the defendant. However, in order to use the military involuntary allotment process, an applicant must comply with the statute. Pursuant to the implementing regulation, DFAS has been given the responsibility to ensure that the procedural provisions of the SSCRA have been complied with prior to starting an involuntary allotment for commercial debt against a military member.

Therefore, a judgment issued by a court against a military member, where SSCRA was not complied with, is unenforceable against the military pay of that member. Also, because the SSCRA says these procedures must be followed prior to a default judgment being issued, there is no way to go back, aside from vacating the judgment and starting the process again, to comply with the SSCRA after the fact.

5. Is there any fee for establishing the involuntary allotment?

Yes. Recent legislation has given DFAS the authority to collect an administrative fee for processing military commercial debt allotments. The fee is currently $75.00. This fee will be deducted from the amount that is paid to the creditor. So, if you send in an application for an involuntary allotment to collect a judgment for $500.00, and an involuntary allotment is established, you will receive $425.00.

DFAS Home | Garnishment

Send E-mail comments to dfaslane@cleveland.dfas.mil

June 5, 1997
URL - http://www.dfas.mil/money/garnish/mcda-qa.htm

ESTATE PLANNING FOR MILITARY MEMBERS
PART A

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ESTATE PLANNING FOR MILITARY MEMBERS
PART A

Outline of Instruction

I. INTRODUCTION.

A. The need for coordinated military estate planning.

B. Understanding the estate planning process:

"The process by which an arrangement for the use, conservation, and transfer of one's wealth is created."

C. Primary objectives of estate planning are:

1. To secure to the property owner during his lifetime maximum benefits from the possession and use of his property, and

2. To enable that property owner to transfer that property to surviving beneficiaries with a minimum of shrinkage from death taxes and other transfer costs.

D. Goals of military estate planning.

1. Effective planning, or

2. Informed referral expertise.

II. ESTATE PLANNING GOALS.

A. Lifetime Estate Planning.

1. Maximize accumulation of wealth ("Estate Building").

2. Protect estate from loss ("Asset Protection").

   a. Plan for contingencies.

   b. Incapacity or disability.

B. Dispositive Estate Planning ("Wealth Transfer").

1. Provide for the transfer of property according to the decedent's wishes.

2. Minimize delay and inconvenience.

3. Reduce administrative costs.

4. Provide liquidity during probate of the estate.

5. Reduce federal and state tax liability.

6. Provide for the care of minor children and their property.

7. Finally, the estate planner wants to prepare effective documents, which contain the client's intent and carry out the client's desires.

III. ESTATE PLANNING STEPS.

A. Consider Ethical Preliminaries.

"In all professional functions a lawyer should be competent, prompt, diligent, and honest. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client, except so far as disclosure is required or permitted . . ." (AR 27-26, para 6c).

1. Competence (Rule 1.1).

   a. Legal assistance attorneys must provide competent representation.

      (1) No special training required.

      (2) Consists of skill, knowledge, thoroughness, and preparation necessary for representation.

   b. Supervisors determine subordinates competency to perform duties.

   c. Lawyers should refer matters outside their competence, i.e., complex estate planning, to specialists in the civilian community (AR 27-3, para 3-7h).

2. Communication (Rule 1.4).

   a. A lawyer must keep a client reasonably informed about the status of a matter.

   b. A lawyer must explain a matter to a client to the extent necessary to permit the client to make an informed decision regarding representation.

   c. Communicate effectively, use checklists (see appendices), listen to the client's desires, and establish scope of representation.

d. Competency of the client.

(1) A lawyer shall attempt to maintain normal lawyer-client relationship with a client even if the client's ability to make decisions is impaired.

(2) A lawyer may seek guardianship or other protective action if the lawyer reasonably believes the client cannot act in the client's best interests (Rule 1.14).

3. Conflicts of interest.

"Conflict questions may also arise in estate planning. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise" (Rule 1.7, Comment).

a. Dual representation in estate planning generally accepted. Prior to undertaking representation, the lawyer should obtain each client's consent after full consultation. A sample multiple-representation letter is at Appendix A.

b. Watch for conflicts that cannot be resolved.

4. Terminating the relationship.

a. A lawyer may have a duty to advise a client of any changes that might defeat a client's testamentary goals (ABA Formal Op. 210).

(1) Ensure the client understands when the attorney-client relationship is terminated.

(2) “Debrief” the client.

b. A lawyer must take reasonable steps to protect the client's interests upon termination to include giving notice and surrendering all papers and property (Rule 1.16).

5. Potential Malpractice Areas.

a. Faulty drafting.

b. Failure to revise plan.

c. Improper execution.

d. Failure to complete documents.

e. Failure to understand and implement substantive law.

B. Gather Information on the Client and Family.

1. Use a checklist (see Appendix B).

2. Conduct a thorough client interview using an estate-planning questionnaire (see Appendix C).

a. Development of a sound estate plan depends on full disclosure by the client.

b. The attorney should probe into the members of client's family and determine their strengths, weaknesses, and goals.

c. Develop and use an estate-planning questionnaire for your clients.

3. Some specific areas of inquiry.

a. Is client married?

(1) Is there an ante-nuptial agreement?

(2) Does the spouse have right of election?

(3) Does the spouse have any special needs?

(4) Is the spouse a non-U.S. citizen?

(5) Is either spouse a domiciliary of a community property state?

b. Has client been divorced?

(1) Review separation agreement or divorce decree.

(2) Does ex-spouse have any claim to the estate?

(3) Are there any children by a former marriage?

c. Does the client have children?

(1) Are any children under a disability?

(2) Does the client intend to benefit after-born children?

(3) Are children all born of present marriage?

C. Obtain a Complete Inventory of Assets.

1. Detailed information on the client's assets (and spouse if dual representation) (See Appendix C).

2. Distinguish type of ownership.

3. Estimate present value and probable date of death value of all assets (estimate "gross estate") (See Estate & Gift Taxation outline).

4. Determine if any property will require ancillary probate proceedings.

5. Ascertain if there are restrictions on the ability to transfer any asset.

6. Classify assets according to how they will be distributed.

   a. Probate.

   b. Non-probate property.

D. Develop an Appropriate Estate Plan.

1. Establish client's needs and goals.

2. The estate owner's objectives are the most important step in the estate planning process. To formulate a sound estate plan, the plan must be constructed on the foundation of the owner's objectives. See Appendix D, Beneficiary Objectives.

3. At least five professions are involved in estate planning:

   a. The attorney,

   b. The accountant,

   c. The life insurance underwriter,

   d. The trust officer, and

   e. The financial planner.

   f. In addition, an investment adviser and an appraiser may from time to time become involved in the estate planning process.

g. While each of these practitioners has different duties and responsibilities, a team approach should be encouraged. In this way, the estate owner will benefit from the expertise of each profession, and each practitioner will contribute his or her knowledge and skills to the best advantage or the public.

4. Suggest methods of reducing liabilities.

5. Consider methods to increase value of the estate or improve liquidity.

6. Consider using alternatives to probate.

E. Prepare, review, and properly execute documents to implement and coordinate the estate plan.

F. Complete the Representation.

IV. MILITARY ESTATE PLANNING.

A. Scope of Services.

1. Regulatory guidance

a. Army: see AR 27-3 at Appendix E.

(1) Estate planning services provided: see paragraph 3-6b.

(2) Limitations on estate planning services: see paragraph 3-6b.

"Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources."

b. Navy-Marine Corps, see JAGINST 5801.2 at Appendix F.

(1) Estate planning services provided: see paragraph 7-2a-d.

(2) Limitations on estate planning services: see paragraph 7-2a-d.

c. Air Force, see AF Instruction 51-504 at Appendix G and TJAG Policy Number 18 at Appendix H.

(1) Estate planning services provided: see AFI 51-504, paragraph 1.3.1; AF TJAG Policy No. 18, paragraph 5.

(2) Limitations on estate planning services: AF TJAG Policy No. 18, attachment on Will Preparation and Execution Guidelines.

d. Coast Guard: see COMDTINST 5801.4C at Appendix I.

(1) Estate planning services provided: see paragraph 6.

(2) Limitations on estate planning services: see paragraph 7d.

2. Legal assistance will be provided on:

a. Wills.

(1) Testamentary trusts for the benefit of minors.

(2) Guardianships.

(3) Life insurance beneficiary designations (SGLI).

b. Advance Medical Directives.

(1) Living Wills.

(2) Health Care (Durable) Powers of Attorney.

c. Durable Power of Attorney (general or specific).

d. Anatomical gift designations.

3. Optional services (consult applicable service legal assistance regulation for limitations).

a. Wills.

(1) Credit Shelter or by-pass trusts.

(2) Use of disclaimers.

(3) Marital Deduction Trust.

(a) Qualified Terminable Interest Property (QTIP) trust.

(b) Qualified Domestic Trusts (QDOTs).

(4) Special needs trusts.

b. Tangible Personal Property Memorandums (TPPMs).

c. Letter or memorandum to personal representative or executor.

d. Review and update beneficiary designations.

e. Review and update property ownership.

f. Mortuary planning document.

g. Inter vivos trusts.

h. Life insurance trusts.

i. Probate.

B. Deployment preparation of estate planning documents.

1. Attorneys may draft powers of attorney and simple wills during deployment processing. They should, however, follow up to ensure that soldiers return for more complete legal assistance (AR 27-3, para 3-6b(2)(a)).

2. Commanders should not require soldiers to complete legal documents. Client determines whether (s)he wants legal document(s) prepared.

3. It is not appropriate to interview for or draft wills during deployment exercises unless it is done while maintaining client confidentiality. Moreover, there must be sufficient time to conduct an interview (AR 27-3, para 3-6b(2)(a)).

4. Priority and allocation of legal services should be based on need (AR 27-3, para 3-6b(2)(b)). When legal resources are limited, the following service members should receive priority for drafting and executing wills:

   a. Those who have a minor child;

   b. Those whose primary beneficiary is a minor;

   c. Those whose net estate (excluding insurance, jointly owned property, and other non-probate property) is valued at more than $10,000; or

   d. Those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will.

5. How to handle more complex estates during deployment preparation of estate planning documents?

6. Same standards for professional responsibility apply to deployment scenarios as standard preparation of documents.

C. Preventive law programs.

1. Legal assistance offices should make an aggressive effort to ensure that service members and their families are adequately prepared for deployment (installation newspaper, command bulletin, radio, TV, Internet websites, etc.).

2. Inform service members and their families about the advisability of keeping their personal affairs current. Remind them about the need for periodically reviewing their wills, powers of attorney, and insurance beneficiary forms.

3. Unit presentations.

4. Annual legal checkups.

D. Improving Office Efficiency.

1. Specialization.

2. Referrals (see AR 27-3, para 3-7h).

3. Computer assisted wills.

4. Use handouts and videotapes.

V. DL WILLS PROGRAM.

A. Trusts:

1. Testamentary trusts (including for minor children).

2. Marital Deduction trust. The Marital Deduction Trust may be QTIP, QTIP with a limited power of appointment, general power of appointment, or "estate trusts." Qualified Domestic Trust (QDOT) provisions may be included. Two marital deduction trusts may be provided to facilitate allocation of the Generation Skipping Tax exemption.

3. Credit Shelter Trusts (both formula trusts and disclaimer trust). Credit shelter trust may be pre-residuary, residuary or fractional shares of the residuary.

4. Pour-Overs to Inter vivos trusts.

5. Provisions granting or exercising powers of appointment, purchases of annuities, and charitable trusts.

6. The residuary may be divided into equal shares with each share being given to the beneficiaries outright or in a variety of trusts. Trusts may be terminated or partially liquidated at specific ages.

B. Guardian for minor children.

C. Other options address disposition of realty, personal effects, cash bequests, sprinkling trusts, presumptions of survivorship, fiduciary bonds, disclaimers, disinheritance, pension plans, oil and mineral rights, apportionment of taxes, etc.

D. The program also prepares:

1. Advance Medical Directives (Living wills) and health care documents.

2. Powers of Attorney.

3. Asset summaries.

4. Execution checklists.

5. Tangible Personal Property Memorandums (TPPM).

VI. SUMMARY OF ESTATE PLANNING MULTI-STEP PROCESS

A. Education.

B. Ascertain.

C. Plan.

D. Draft.

E. Explain and review.

F. Revise and refine.

G. Execute.

VII. CONCLUSION.

APPENDIX A

SAMPLE DUAL REPRESENTATION LETTER FOR NEW ESTATE PLANNING CLIENTS

Re: Your Estate Plan

Dear Mr. and Mrs. _____:

This will confirm the following:

1. You have requested that I represent each of you and advise you on certain estate planning matters.

2. It is contemplated that the matters to which my representation will extend will include the following: (Choose from the following or modify as appropriate.)

a. Analysis of your existing wills, codicils, trust agreements, and property agreements if any;

b. Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the nature in which title was then held;

c. Analysis of all property now owned by each of you, including consideration of its fair market value, the manner in which title to such property is now held, and a categorization of such property as separate, community, or quasi-community property;

d. Discussions about the manner in which you wish to dispose of any property over which you may have any power of disposition at the time of your death;

e. Analysis of the tax impact of such disposition and recommendations for alternative dispositions; and

f. Preparation of the documents necessary to accomplish the desired disposition, including the drafting of wills, trusts, property agreements, and other documents as may be required.

3. I have advised each of you that, during the course of the estate planning work, conflicts may arise between you with respect to the ownership of your property (separate, community, or quasi-community property) and its desired disposition during your lifetimes and at your deaths. Differences of opinion on the disposition of the property, under ethical rules, do not prevent me from continuing to represent both of you. However, during the course of the estate planning, conflicts of interest between you may arise, such as issues regarding the ownership of certain property.

Ordinarily, under such circumstances, one attorney cannot represent both of you. It may be better for each of you, under such circumstances, to have separate independent counsel to avoid the possibility that my advice to one of you is influenced by my representation of the other. Nevertheless, you have requested, with a full understanding of your right to, and the advantages of, independent counsel, that I represent both of you in all of the above matters.

4. Although I doubt that it will happen, if conflicts do arise between the two of you of such a nature that I believe it impossible, in my judgment, for me to perform any obligations to either of you in accordance with this letter, I will withdraw from all further dual representation of both of you in this matter at that time and advise one or both of you to obtain independent counsel.

5. You have each agreed that there will be complete and free disclosure and exchange of all information that I receive from either or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the date of this letter.

Sincerely,

(Attorney's Signature Block)

APPROVED THE ___day of _____, 19__

(Signature of husband; typed name below)

(Signature of wife; typed name below)

APPENDIX B

ESTATE PLANNING CHECKLIST

1. General.

(a) Has/Have the estate(s) wisely used the marital deduction and given adequate consideration to the use of trusts that will provide income for life to the surviving spouse, but enable maximum use of the unified credit by the estate of the first spouse to die? [Failure to qualify sufficient property for the marital deduction may result in an unnecessary tax burden at the estate owner's death. Over-qualification will tend to increase the federal estate tax due upon the surviving spouse's death.]

(b) Would a gift program be advisable?

(c) Is either the husband or wife the current or anticipated beneficiary of other estates or trusts? Has the effect of potential inheritances been considered in the planning process?

(d) Are there any business interests or other assets that would require immediate attention following the estate owner's death?

(e) Has a current inventory of estate assets been prepared to assist the executor?

(f) Are the estate owner's wishes regarding burial and other personal matters (as opposed to binding dispositions of property) reflected in a letter or written memorandum kept with other important papers?

(g) Are liquid assets available?

(h) Are the names of all beneficiaries correct? [This is especially important with respect to charities.]

(i) Has the corporate fiduciary, if any, been informed of its selection, reviewed the instrument, and accepted the instrument?

(j) Have the settlor's insurance policy beneficiaries been changed in accordance with the estate plan?
For example, are policies made payable to the estate or the trustee if called for in the plan?)

2. Wills and trusts.

(a) Have current dispository instruments been executed by both husband and wife?

(b) Have the formalities of execution required by the state of domicile been *met?*

(c) Will ancillary administration be required?

(d) If an individual executor or trustee has been notified, has he or she agreed to accept this responsibility? Have an alternate and/or a successor been designated? Will the individuals named as executor and trustee, if any, qualify under the laws of decedent's domicile?

(e) Has a guardian been appointed (or nominated) for minor children? Will the guardian qualify under the laws of decedent's domicile?

(f) If a corporate fiduciary has been designated, will the corporate fiduciary qualify under the laws of decedent's domicile?

(g) Is the fiduciary to be bonded?

3. Property ownership.

(a) Is title to any property held in joint tenancy with right of survivorship? Does the estate plan contemplate the fact that joint tenancies may nullify certain testamentary dispositions and may result in unintentional over-qualification for the marital deduction?

(b) Are any assets held as community property? One-half of each asset held as community property is "owned" by each spouse by operation of law. This fact is important in valuing the estates of community property state domiciliaries.

(c) Do the estate owners hold a beneficial or reversionary interest in any property? Such interests are easily overlooked unless specific inquiries are made. Their effect on the potential estate tax and the liquidity requirements of the estates of both husband and wife should be considered.

4. Military, veterans, and social security benefits.

(a) Has a schedule of potential benefits to survivors been prepared? [The nature, amounts, and eligibility requirements for these benefits are subject to frequent modification.]

(b) Has a survivorship annuity been elected under the Survivor's Benefit Plan?

(c) Are beneficiary designations for all military and veteran's benefits current?

(d) Has the estate owner been reminded that eligibility for certain social security and veteran's benefits may be forfeited if the surviving spouse supplements other income by working?

(e) Are any benefits available to the estate owner's survivors by virtue of any civilian employment in which he or she has engaged?

5. Life insurance.

(a) Has the ownership of policies on the estate owner's life been ascertained? Are contingent owners designated? Would transfers of ownership be advantageous?

(b) Does the estate owner hold any policies on the lives of others? Would contingent ownership be advisable to keep such policies out of the estate owner's probate estate?

(c) Are all beneficiary designations current and properly designated?

(d) Has the use of settlement options been considered? Even when the proceeds are to be paid in a lump sum, it is often advisable for the insured to elect to have the proceeds placed under the "interest only" option, giving the beneficiary full withdrawal rights and the right to elect other options. This gives the beneficiary maximum flexibility. It assures that interest will be credited from the date of death to the date of actual withdrawal, and gives the beneficiary time to obtain advice before being required to make any irrevocable decisions with regard to the ultimate disposition of the proceeds.

(e) Do any settlement options elected by the insured include "spendthrift" provisions?

(f) Do policy provisions and the provisions of state law regarding presumptions as to survivorship coincide with any presumptions established in the dispositive instruments? Has a "delay" clause been considered? "Delay" clauses provide for payment to the primary beneficiary only if such beneficiary survives the insured by a specified period of time. A clause of this type is frequently used to avoid adding to the costs of probating the beneficiary's estate when the beneficiary's death occurs shortly after that of the insured. Periods of 30 to 180 days are usually specified. The proceeds will not qualify for the marital deduction, however, if the survivorship requirement exceeds 180 days.

(g) Will policy loans or collateral assignments interfere with the planned distribution of insurance proceeds?

(h) Have any policies on the insured's life been transferred for valuable consideration? Such a transfer may cause part of the death proceeds to be taxed as ordinary income to the beneficiary (See I.R.C. § 101(a)).

(i) Do any policies include options, endowment features, conversion privileges, supplemental benefits, or other provisions that deserve special consideration or require action by the policy owner? An Automatic Premium Loan, for example, is included in many policies to prevent the policy from lapsing due to the insured's failure to make a scheduled premium payment prior to the expiration of the grace period. If it is not included in the policy at the time of issue, most companies will add it, without cost, at the policy owner's request.

(j) Are policy dividends being applied under the most favorable dividend options? Which dividend option is "most favorable" will depend upon the insured's situation. If an individual's longevity is significantly impaired, he or she should consider having dividends applied toward the purchase of paid-up additional insurance.

(k) Is additional insurance needed to ensure estate liquidity or to provide a guaranteed level of income for surviving family members? Have all aspects of the estate plan been coordinated (or reviewed) by an attorney who is thoroughly conversant with the laws of the jurisdiction in which probate proceedings will be carried out?

APPENDIX C

1

ESTATE PLANNING SCREENING QUESTIONNAIRE

PERSONAL INFORMATION

NAME:_____DATE: _____

Circle or fill in your answers	
1. Do you have a will or trust now?	Yes No
2. If married, is your spouse a U.S. citizen?.....	Yes No
3. Do you have children other than from your current marriage?	Yes No
4. .Are you receiving or do you expect to receive property or money from (circle all that apply): If so, approximately how much?	Trust Inheritance Gift Lawsuit Other
5. Do own a home or other real property?	Yes No
6. If you own a home or other real property, what is the approximate equity value?	$
7. Do own investments? (stocks, bonds, mutual funds, etc…).....	Yes No
8. If you own investments, what is the approximate value?	$
9. Do own life insurance?	Yes No
10. If you own life insurance, what is the face value of all policies?	$
11. Do you have a retirement account (401(k), TSP) or more than 20 years time in service?	Yes No

JOINT SERVICES PENTAGON LEGAL ASSISTANCE OFFICE

WILLS, LIVING WILLS, AND POWERS OF ATTORNEY

CLIENT QUESTIONNAIRE
FOR: _____
DATE AND TIME OF APPOINTMENT

_____
ATTORNEYS NAME

_____

PENTAGON
ROOM 1D738
(703) 693-0107

INSTRUCTIONS FOR OBTAINING A WILL

1. Please complete the attached will worksheet to the best of your ability prior to your appointment with a legal assistance attorney from the Joint Services Pentagon Legal Assistance Office in room 1D738.

2. You may schedule an appointment to see an attorney by calling 703/693-0107 or -0110 (DSN 223-0107 or -0110), or you can stop by room 1D738.

3. Please be prompt for your appointment. If you are delayed or cannot make your appointment, please call us as soon as possible to cancel, reschedule, or let us know how late you will be.

4. An attorney must interview each person before the will is prepared. If both you and your spouse need a will, you may be seen together so long as you have both seen and discussed each other's worksheets, and agree on the contents. Also, please let us know when you schedule your appointment if you would like to be seen together.

5. Please bring the following documents with you for your appointment:

a. A completed will worksheet. (A separate worksheet is needed for the preparation of each person's will.)

b. A **copy** of your current will, if possible (for reference purposes only). Please avoid bringing any existing, original will, and do not mark on it in any case, because doing so could invalidate it.

c. A list of any questions you may have for the attorney.

d. Your military identification card.

6. During your appointment, an attorney will review the will worksheet with you and answer any questions that you may have. After your appointment, we will prepare a draft copy of your will and either mail it to you or call you to pick it up from our office. Once you have reviewed the draft of your will, you can call us to make any minor corrections and to schedule an appointment to execute your will. If major corrections or changes are needed, please call for a follow-up appointment with the attorney that you have already seen. Will execution sessions are scheduled every Wednesday for 0830, 0930, 1030, and 1130.

7. The final step is the "execution" or signing of your will. The will execution session requires certain formalities to include a final review of the documents, the administration of oaths, the actual signing of the will, and the witnessing of such signatures, and a final briefing, all of which are time consuming. You should show up 15 minutes before your execution appointment to review the final version of your documents if you asked us to make changes to your will when you called to schedule your execution appointment. Plan on spending about one hour for the

actual execution session. We schedule up to four clients for each will execution session. Each person signs their own documents and acts as a witness for two of the others. This avoids the need for you to bring your own witnesses or to rely on our staff to act as witnesses. If you would prefer to bring your own witnesses, or you cannot possibly make a will execution session on a Wednesday, your attorney can arrange a special appointment for you to execute your documents at another time.

8. You must bring your military identification card with you to all appointments, even when in uniform. This is necessary to verify the client's identity for our notary publics and to determine eligibility for legal assistance. Due to the nature of legal assistance appointments generally, and the will execution session specifically, our office is regrettably unable to accommodate small children. This prohibition also allows us to provide faster and more efficient service to all of our clients.

Your cooperation is important and allows us to provide you the best in legal assistance. Please let us know how we may better serve your needs.

WILL TERMINOLOGY

WHAT IS A WILL? A will is a legally effective declaration of a person's wishes as to the disposition of his/her property upon his/her death. It must be executed with the formalities required by statute. The provisions of a wills do not take effect until after the death of the maker. A will never disposes of the proceeds of insurance policies with named beneficiaries, nor does it dispose of some items of property which are held under various forms of special ownership, such as joint tenancy with a right of survivorship, or tenancy by entirety. In a will, you will designate an executor/trix, and if minor children are involved, a guardian (see definitions below). It is important that you contact the prospective executor/trix and guardian prior to the preparation and execution of the will to ensure that he/she/they is/are willing to accept the position.

WHO IS THE BENEFICIARY? Anyone to whom the maker of a will (testator/trix) leaves a portion of his/her property.

WHAT DOES BEQUEATH MEAN IN A WILL? To give personal property by will.

WHAT IS A BOND? Money put up by a guardian or executor to insure against loss occasioned by their negligence or theft.

WHAT IS DOMICILE? A person's permanent home. The place to which, whenever he/she is absent, he/she has the intention of returning. You can have more than one residence, but you can only have one domicile. Your intent, voting, paying taxes, registering automobiles, obtaining a driver's license, and location of assets are factors considered in determining domicile. For military members, your domicile is often your legal residence (e.g., your home of record), not the place you are currently living.

WHAT IS AN ESTATE? All property, real and personal, in which a person has an interest, such as money, savings accounts, stocks, house, furniture, insurance policies, etc.

WHAT DOES RESIDUARY ESTATE MEAN? Residuary is a derivative of the word "residue." It means what is left over. Your residuary estate is the portion of your estate that is left over when everything else is disposed of.

WHAT DOES EXECUTION MEAN? To validate a will by correctly signing it and having it witnessed.

WHO IS THE EXECUTOR/TRIX? The person named in a will to carry out the wishes expressed in the will. An Executor is male; an Executrix is female. Upon the death of a maker of a will, the Executor/trix must take the will to the proper court for probate. Once the court accepts the will as valid, the court officially appoints the person as Executor/trix. An Executor/trix may be entitled to compensation for his/her services. Individuals serving in this capacity serve subject to court approval. While most courts follow the desires of the Testator/trix in his/her will, they are not bound to do so. A bond may be required of an Executor/trix. In some states the term "Personal Representative" means the same thing as Executor/trix.

WHO IS A GUARDIAN? One who is responsible for caring for the person and/or property of a minor child. Individuals serving in this capacity serve subject to court approval. While most courts follow the desires of the Testator/trix in his/her will, they are not bound to do so. Courts can require guardians to post a bond.

WHO IS THE TESTATOR/TRIX? You, the person making the will. A Testator is male; a Testatrix is female.

WHAT IS PERSONAL AND TANGIBLE PROPERTY? Property which is moveable.

WHAT IS A PROBATE? A court proceeding where the Executor/trix seeks to establish a will as genuine, settle all the debts of an estate, and distribute the property in the estate to the heirs according to the wishes of the will maker as expressed in the will.

WHAT IS A PROBATE ESTATE? The portion of an estate that requires court supervised administration to effect transfer of title. It does not include property transferred at the time of a person's death by other means, such as property held as joint tenants with right of survivorship, or life insurance paid to a designated beneficiary. For tax purposes, all property which the decedent owned or in which he/she had an interest, may be included in the taxable estate, although some of it is not within the probate estate.

WHAT IS REAL PROPERTY? Property that has a fixed location, such as land or a house.

WILL QUESTIONNAIRE WORKSHEET

1.) **PERSONAL INFORMATION:**

a.) Name (first, middle, last): _____

b.) Social Security Number: _____

c.) Are you a U.S. citizen? _____ yes _____ no

d.) Is your spouse a U.S. citizen? _____ yes _____ no

e.) State of legal residence: _____

f.) Current address: _____

_____

g.) Home telephone: _____ Work telephone: _____

2.) **MARITAL STATUS:**

_____ Married once, and my spouse is alive.

_____ Presently married, and had a prior marriage (previous spouse is deceased or divorced).

_____ Widow/ widower

_____ Divorced, not presently married.

_____ Single, never married.

NOTE: If both you and your spouse will be seeing the same attorney for your wills, you will both need to read and complete Appendix B.

3.) **CHILDREN:**

a.) How many children do you have (including adopted & stepchildren)? _____

b.) If you have adopted children or stepchildren, do you wish to treat them as natural children?

_____ yes _____ no

c.) Is any child a minor? _____

4.) **VALUE OF ESTATE:**

To determine what type of will is appropriate for you, you need to provide a rough estimate of the value of your estate. For this purpose, include the value of all of the property you own in your name, and if married, the value of your spouse's property. If any of your property secures a debt (for example, a mortgage on your home), include your equity in the property. Also include the value of your life insurance policies (SGLI, VGLI, etc.). Note that life insurance ordinarily does **not** pass according to your will; it will go to the beneficiaries you designated on the insurance forms. However, the value of the insurance is typically included in determining whether estate taxes will apply in your case.

Approximate values of your estate (not including life insurance): $_____

Approximate value of your spouse's estate (not including life insurance): $_____

Value of life insurance (self and spouse): $_____

Total value of both your and your spouse's estate including life insurance: *$_____

*If the value of your estate is over $675,000 (or $1 million if you are married), please consult a civilian attorney about your will. Estates over this threshold will be subject to estate taxes and you will need estate planning advice to prepare your will properly. **NOTE:** If you need an emergency will generated by this office, you will need to read and complete Appendix A.

5.) **FAMILY FARM / FAMILY-OWNED BUSINESS:**

Do you have a farm or family-owned business? _____ yes _____ no

6.) **REAL ESTATE:**

a.) Do you own real estate? _____ yes _____ no

b.) If yes, how do you wish to give your real estate?

_____ All to my spouse.

_____ Different properties to different beneficiaries (below, please list each person, their relationship to you, and which piece of property they are to receive):

_____

_____

_____ To pass with the rest of my estate.

_____ My home to my spouse and the rest of my real estate to pass with the rest of my estate.

_____ My home to my spouse for as long as my spouse lives there and then my home and the rest of my real estate to pass with the rest of my estate.

7.) **PERSONAL EFFECTS AND TANGIBLE PERSONAL PROPERTY:**

How do you wish to give your personal property?

_____ All to my spouse.

_____ Specific items are to go to specific individuals, with all items not listed passing to my spouse. (Please attach detailed list of items, beneficiaries, and relationship to you.)

_____ Specific items are to go to specific individuals, with all items not listed passing with the rest of my estate. (Please attach detailed list of items, beneficiaries, and relationship to you.)

_____ To pass with the rest of my estate.

_____ Some other scenario not provided here (please explain): _____

_____

_____

_____

8.) **SPECIFIC BEQUESTS:**

You may elect to make specific gifts of cash, real estate, or personal property to specific people or charities in you will. However, these bequests will be distributed first and may deplete your estate. Also, specific bequests may complicate the probate of your estate if the property given cannot be found at your death. Therefore, if you make any specific bequests, you should only give property or amounts of cash that you are reasonably sure you will possess at the time of your death. If you make no specific bequests, all of your property will pass to your primary beneficiaries.

Note that you may leave a separate writing with your will, typically called a "letter of instruction," in which you give specific directions to your Executor/trix about funeral and burial arrangements, notifications to family and friends, upbringing of your children, etc. While this instruction is not legally binding in most states, your Executor should try to comply with your desires.

Many states also allow you to make a "personal memorandum," in which you can give specific items of personal property to named beneficiaries in a separate writing. While in most states memorandum gifts are not legally binding, your executor will give these gifts as much weight as state law allows.

a.) Do you wish to make any specific bequest in your will? _____ yes _____ no

b.) If yes, please list your specific bequest(s): _____

_____

_____

_____

9.) **RESIDUARY ESTATE:**

The residuary estate is whatever property remains in your estate after debts and expenses of administration have been paid, and any specific bequests have been paid. Because many people do not make specific bequests, "residuary estate" usually describes all the property that you will leave to your beneficiaries.

a.) To whom do you want to leave your residuary estate?

_____ All to my spouse if he/she survives me, and if not, then to my children and issue.

_____ A minimum bequest to my spouse, disinheriting him/her to the fullest extent of the law, with the remainder going to some other person(s).

_____ All to one specific beneficiary other than my spouse.

_____ To more than one beneficiary.

b.) If you have more than one beneficiary, are they:

_____ Specific people who are to share equally.

_____ A group of people described as a class (e.g., "my brothers and sisters") who are to share equally.

_____ Some other unequal division between the beneficiaries (e.g., 50% to one beneficiary and 25% each to two others).

_____ Some other arrangement (please explain): _____

_____

_____

_____

c.) If any of your beneficiaries is a minor, at what age do you want them to receive their gift?

_____ 18

_____ 21

_____ Some other age (please indicate the age): _____ (NOTE: Selecting an age greater than 21 will likely require the creation of a trust, which will cause your estate to incur additional expenses for the administration of the trust. These expenses would therefore diminish the amount available for your beneficiaries.)

10.) **EXECUTOR:**

The executor (or in some states, "personal representative") is the person who makes sure your estate is settled upon your death. This ordinarily involves going through probate, which is a court-administered procedure for settling an estate. Probate involves petitioning a court for letters of appointment, settling creditor claims, finding and distributing assets, and filing any necessary tax returns. Any adult may serve as your executor, although many states have a preference for or require an executor who is a legal resident of the state where probate is conducted. Therefore, if possible, you should select family members or responsible friends who are residents of the same state you claim as your legal residence or the state where you own real estate.

Whom do you wish to have as your executor?

_____ My spouse.

_____ My spouse and a co-executor.*

_____ My spouse and a successor executor.**

_____ One executor other than my spouse.

_____ Two co-executors, neither of whom are my spouse.*

_____ One executor and a successor executor, neither of whom are my spouse.**

*This option is not usually recommended because conflicts can arise between the executors that will complicate the administration of your estate.

**The successor will act only if your first choice is unable to act as your executor.

11.) **GUARDIAN:**

If your children are minors at the time of your death and if the other natural parent of the children is not alive or for any reason cannot act as guardian, the court will normally appoint the person(s) you name below to act as legal guardian(s) of the children. The individual(s) named below will have physical control and custody of the children until they reach age 18. If you are divorced, keep in mind the court will ordinarily appoint your former spouse to be the guardian (as the children's other natural parent), notwithstanding your direction here. You should still select a guardian, however, in case your former spouse predeceases you or for any reason cannot act as the children's guardian.

Do you wish to appoint:

_____ One guardian for any child when I die.

_____ One guardian and a successor guardian.

_____ Two co-guardians

_____ No guardian is to be appointed under this will.

If you wish to appoint a guardian or guardians, whom do you wish to have named? (Please list name and relationship):

1st choice: _____

2nd choice (optional): _____

3rd choice (optional): _____

12.) **TRUSTS (OPTIONAL):**

Instead of giving your estate directly to a beneficiary, you may elect to give your estate to a person designated as a trustee, to hold IN TRUST, for the benefit of your beneficiary/ies until he/she/they reach(es) the age you designate. The trustee will manage the trust under court supervision. Although the trustee's primary purpose is to safeguard the inheritance, the money can also be used for any beneficiary's health, education, welfare, or maintenance, at the trustee's discretion. Also, you may create a trust that "pools" your estate. Through pooling, your estate and insurance proceeds remain in a single trust until **all** the beneficiaries reach the age you choose. The trustee may provide funds from the trust to each beneficiary as each has a need. Thus, not all beneficiaries will receive equal amounts from the trust. Such an arrangement is useful where some beneficiaries will likely need more financial assistance over a longer period of time than other beneficiaries will. A trust is also advantageous where there is a need to protect the assets of your estate from third parties who may have claims to the assets of one of your beneficiaries.

For many people, a trust is unnecessary because, under the Uniform Gifts to Minors Act (UGMA) language that we include in your will, gifts to beneficiaries under the age of 18 (or, if you prefer, under the age of 21) will be controlled by your executor/trix initially, and guardian after probate, without establishing a trust. The executor/trix and/or guardian can still use the child's inheritance for the benefit of the child, and this arrangement is ordinarily less complicated and less expensive than establishing a trust. Therefore, unless you have children from a prior marriage, handicapped children, or a very large estate, a trust is generally not necessary to manage a child's inheritance.

One disadvantage, however, to the UGMA is it does not allow "pooling" of your estate. Put simply, under the UGMA your estate will be divided in as many equal shares as there are minor beneficiaries designated; each beneficiary will receive the remainder of his or her share as they turn 18 or 21, at your option. In a nutshell, a trust may be more appropriate if you want the trustee/guardian authority to spend more money on one child than another (e.g., a disabled child).

a.) Do you want a trust? _____ yes _____ no (If "no," skip to Item 13.)

If yes, would this be:

_____ one trust for the benefit of all beneficiaries.

_____ individual trusts for each of the beneficiaries.

b.) At what age would you like the trust(s) to terminate?
_____ 18 _____ 21 _____ other (please designate the age): _____

c.) Whom do you wish to have named as Trustee? (Please list name and relationship):

1st choice: _____

2nd choice (optional): _____

3rd choice (optional): _____

d.) Do you want the trustee to have the power to dissolve the trust if it becomes uneconomical to maintain it? _____ yes _____ no

e.) Do you want the trustee to exercise this power only if the trust is below a specific amount?
_____ yes _____ no

If so, what amount? $_____

13.) **DISINHERITING SOMEONE:**

a.) Do you wish to disinherit someone other than your spouse? _____ yes _____ no

If so, whom (please provide the name and relationship to you.)? _____

b.) Do you wish to disinherit anyone who contests your will? _____ yes _____ no

c.) If you wish to disinherit your spouse, do you want your executor to have the authority to distribute your property, outright or in trust, to minimize any right of election your spouse might have under the laws of any jurisdiction? _____ yes _____ no

14.) **DISTRIBUTION OF ESTATE TO CHILDREN:**

a.) With regard to minors who may inherit under your will, do you want their gifts to be:

_____ Paid at the election of the executor (the executor may pay the child some or all of the gift, at various times, as the executor sees fit, even though the child is a minor).

_____ Held in trust until the child is no longer a minor.

b.) Hypothetically speaking, if you were to have stepchildren or adopted children, would you want to:

_____ Expressly include them in your will (treat them the same as natural children).

_____ Expressly exclude them from your will.

_____ Have the will remain silent as to stepchildren and adopted children.

c.) Is any child of yours in fact a stepchild or adopted child? _____ yes _____ no

15.) **FAMILY MEMBERS:**

a.) What is your spouse's name: _____

Please list your children's names, ages, and whether they are your biological, adopted, or stepchildren:

_____

_____

_____

_____

_____

16.)**MILITARY STATUS:**

I am: _____ Active duty military.

_____ Retired from the military.

_____ Married to someone on active duty.

_____ Married to a military retiree.

_____ A dependent of someone on active duty

_____ A dependent of a military retiree

_____ Other (please specify): _____

If you are on active duty or are the spouse or dependent of an active duty military member, where are you, your spouse, or your sponsor stationed?

_____

17.) **CHOICE OF EXECUTOR:**

If your primary beneficiary could qualify as your executor, you should consider appointing him or her as your first choice. This is more convenient and will avoid putting a third party between your beneficiary and the gift. In some states (such as Virginia), it is necessary that your executor (or if you indicated you wanted co-executors in Item 10 above, then one of your co-executors) be a resident of the state where your will is going to be probated. If you indicated earlier that you wanted co-executors, please indicate so again below.

Whom do you wish to have named as your executor? (Please list name and relationship):

1st choice: _____

2nd choice (optional): _____

3rd choice (optional): _____

18.) **PRIMARY BENEFICIARIES:**

a.) Whom do you want to receive all (or the majority) of your estate?

_____ My spouse, if he/she survives me, and if not, then my children.

_____ Disinherit spouse (to the fullest extent permitted by law).

_____ My children.

_____ My parents in equal shares, or if not, then my siblings in equal shares (please provide names and relationships):

_____

_____

_____

_____

_____ To the following beneficiaries (list name, relationship, and percentage of estate to each of the beneficiaries):

_____

_____

_____

_____

b.) If any of the above beneficiaries predecease you and leave descendants (issue), do you want the share of the deceased beneficiary to pass to their issue, or to pass only to the beneficiaries you have indicated above? (For example, if one of your child predeceases you and leaves children, do you want the share of your deceased child to pass to their children (your grandchildren) or to go only to your surviving children?)

_____ To the children of any deceased beneficiary.

_____ Only to the beneficiaries listed above.

19.) **SECONDARY BENEFICIARIES:**

If all of the primary beneficiaries you designated in Item 18 predecease you or die within 30 days of you, to whom do you wish to leave your estate (please provide name, relationship, and percentage of inheritance or list of which item(s) are to go to which individuals)?

_____

_____

_____

20.) **LIVING WILLS:**

A living will is not part of your will at all! But this is a good time to consider whether you want a living will, which is more accurately called an advance medical directive or declaration. This document states that in the event you have a terminal, incurable medical condition and your life is only being prolonged by means of artificially provided life support, and if you cannot communicate your desires at that point, the living will "speaks for you" so your doctors know and can act upon, your desires regarding the termination of life support.

The conditions that trigger the living will, and the extent of the medical care to be withdrawn, vary from state to state. Therefore, you should carefully review the language of the living will for the state you have chosen and decide if it truly reflects your choice for discontinuing life support. Once executed, the document is effective until it is revoked, which you may do at any time by physically destroying the document, or in an emergency, by verbally revoking it before witnesses who can testify that you did in fact revoke it.

Do you want a living will? _____ yes _____ no

21.) **SPECIAL POWER OF ATTORNEY FOR MEDICAL CARE:**

Another important health care document is the special power of attorney for medical care. You may execute this document in addition to, or in lieu of the living will.

This document appoints someone to make medical care decisions for you in the event that you cannot make your own medical decisions. It applies to more situations than the living will, which addresses only the issue of continued life support if you have a terminal condition. The power of attorney for medical care gives the person you designate as your agent the authority to make a wide range of medical decisions on your behalf. It also gives your agent access to your medical information and authority to fully participate with your treating physicians in deciding the care to be provided to you. Obviously, the person you designate to be your agent should be someone you trust with life and death decisions. Like the living will, the power of attorney is usually drafted in accordance with the laws of the state where you are residing.

a.) Do you want a Medical Power of Attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address, phone number, and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, phone number, and relationship of your second choice of agent:

_____

_____

_____

_____

d.) Do you wish to specify that you desire to donate your body organs for transplant upon death? _____ yes _____ no

If yes, are you also willing to donate organs and tissue for medical, educational, or scientific purposes? _____ yes _____ no

e.) Do you wish to specify that, if possible and if it does not place an undue burden upon your family, that you prefer to die at home rather than in a hospital? _____ yes _____ no

If you currently live in a state other than the one in which you are a legal resident, you may want your living will to be drafted in accordance with the laws of the state where you actually live and not your state of legal residence, because it is more likely to be used where you currently live.

f.) Do you wish to have the living will governed by the laws of the state where you currently live? _____ yes _____ no We will ask you more about this below.

22.) **SPRINGING DURABLE GENERAL POWER OF ATTORNEY:**

Your will enables you to dispose of your property as you wish after your death. While you are living, you have the right to decide what happens to that property so long as you are of sound mind. But if you ever become incapacitated, whether through illness or accident, and are unable to handle your own affairs, a court order may revoke your right to manage your own money and appoint a guardian or conservator. To protect yourself from this eventuality, you can appoint an agent for yourself through a power of attorney.

A power of attorney is simply a written authorization for someone to act on your behalf, for whatever purpose you designate in writing. Ordinarily, a power of attorney expires if you become mentally disabled – the time when you need help the most. A **springing, durable** power of attorney can take effect when you **become** unable to manage your own personal and financial affairs and will last as long as you are alive or until you revoke it. As long as you are mentally competent, you can revoke a durable power of attorney whenever you like simply by destroying the document.

If you choose to have a springing durable general power of attorney, remember to name someone who you trust as your attorney-in-fact. Your attorney-in-fact will have great authority over your affairs. Not only can they keep your affairs in order, but they have the potential to abuse this document at your expense and his or her gain.

a.) Would you like a springing durable general power of attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want:

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, and relationship of your second choice of agent:

_____

_____

_____

_____

d.) If you selected your spouse to act as your agent, at what telephone number can her or she be reached?

_____

23.) **FUNERAL ARRANGEMENTS:**

You may have a strong desire regarding funeral arrangement (for example, burial or cremation). As a practical matter, your funeral arrangements are likely to have been carried out already by the time your will is read. Finding out after the fact that the arrangements were contrary to your will may cause some dismay for your survivors. Therefore, it is recommended that you communicate your desires to your next of kin at your earliest opportunity. If you wish, however, your preference may also be recorded in the will.

You may express your desires regarding the disposition of your remains (e.g. cremation, military honors, or burial at a certain location or gravesite). However, if you elect to state your desires in your will, do not rely on your will alone to communicate those desires, as wills may not be read prior to the funeral! You should tell the appropriate family members of your desires NOW!

_____ I do not wish to express my desires concerning my remains in my will and leave this decision to those who survive me. (Go to Item 24.)

At the time of death, I prefer:

_____ To be cremated.

_____ To have my body given for medical or scientific purposes.

_____ To be buried at a specified gravesite or location. (Please specify location): _____

_____

_____ To be buried at sea.

_____ To be buried with full military honors. (You may select this option in addition to one of the above.)

_____ Other: _____

24.) **ONE MORE QUESTION:**

The living will is ordinarily drafted in accordance with the laws of the state where you are currently living, because the laws of the state where you are hospitalized control the effectiveness of the living will.

Which state's laws do you want to govern your living will? _____

REMINDERS:

If the value of your estate is over $675,000 (or $1 million if you are married), and you would still like a will generated by this office, please read and complete Appendix A.

If both you and your spouse will be seeing the same attorney for your wills, please read and complete Appendix B.

PRIVACY ACT STATEMENT

AUTHORITY: 10 USC 8013, F110 AFJAA, and EO 9397

PURPOSE: Used by attorney and client within attorney-client relationship to assist in providing a will and other related legal documents.

ROUTINE USES: Information will be used to aid attorneys and paralegals in drafting wins, living wills, and durable health care powers of attorney. Disclosure is voluntary, but if you do not provide the requested information, this office will be unable to prepare a will or other related documents for you.

APPENDIX A – Waiver of Liability

Dear Client:

Because of the value of your estate, and the concomitant adverse tax consequences associated with such an estate, it is the recommendation of this office that you see an estate planner to assist you in drafting your will. The costs associated with seeing a civilian attorney qualified to construct a will specifically tailored to your particular situation are far outweighed by the savings such a will can garner for you. Despite this recommendation, and with full awareness of the adverse tax consequences of doing so, you have requested a will drafted by this office, even though such a will does not have any tax avoidance features.

Very respectfully,

ATTORNEY NAME
Legal Assistance Attorney

I (we), (please print your name(s)) _____ (and _____) have read the foregoing letter, understand the same, and still desire to have a will prepared by (please print attorney's name) _____, of the Joint Services Pentagon Legal Assistance Office. I fully understand that this will does not take into account the effect of tax consequences on my estate or utilize any estate planning devices to minimize my estate's tax liability.

APPROVED THE _____ day of _____, 2000

_____
Client

_____
Client

APPENDIX B – Dual Representation Authorization

Dear Clients:

You and your spouse have indicated that you both wish to meet together with the same attorney to discuss your will and ancillary documents. Due to the potential for conflicts of interest, it is the policy of this office to raise this issue with you and require your informed consent to proceed. Therefore, your signature below will confirm the following:

(1) You have requested that the same legal assistance attorney represent each of you and advise you both on certain estate planning matters.

(2) It is contemplated that the matters to which this representation will extend will include the following:

- Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the nature in which title was then held;

- Analysis of all property now owned by each of you, including consideration of its fair market value, the manner in which title to such property is now held, and a categorization of such property as separate, community, or quasi-community property;

- Discussions about the manner in which you wish to dispose of any property over which you may have any power of disposition at the time of your death; and

- Preparation of the documents necessary to accomplish the desired disposition, including the drafting of wills, trusts, property agreements, and other documents as may be required.

(3) You are aware that, during the course of the estate planning work, disagreements may arise between you and your spouse with respect to the ownership of your property (separate, community, or quasi-community property) and its desired disposition during your lifetimes and at your deaths. Differences of opinion on the disposition of the property, under ethical rules, do not prevent the same attorney from continuing to represent both of you. However, during the course of the estate planning, conflicts of interest between you and your spouse may also arise, such as issues regarding the ownership of certain property.

(4) Ordinarily, under such circumstances, one attorney cannot represent both of you. It may be better for each of you, under such circumstances, to have separate, independent counsel to avoid the possibility that my advice to one of you is influenced by my representation of the other. Nevertheless, you have requested, with a full understanding of your right to, and the advantages of, independent counsel, that you both be represented by the same legal assistance attorney in all of the above matters.

(5) Although they rarely occur, if a conflict of interest does arise between the two of you of such a nature that I believe it impossible, in my judgment, for me to perform any obligations to either of you in accordance with this letter, I will withdraw from all further representation of either of you in this matter at that time and advise both of you to obtain independent counsel.

(6) You have each agreed that there will be complete and free disclosure and exchange of all information I receive from either or both of you in the course of my representation of you, and that such information shall not be confidential between you irrespective of whether I obtain such information in conferences with both of you or in private conferences with only one of you, including any conferences that may have taken place before the date of this letter.

Very respectfully,

ATTORNEY NAME,
Legal Assistance Attorney,

We, (please print your names) _____ and _____, have read the foregoing letter, understand the same, consent to the disclosure and exchange of all information received by _____, our legal assistance attorney from either one of us, with the other one of us, and consent to our legal assistance attorney representing each and both of us in the aforementioned estate planning services.

APPROVED THE _____ day of _____, 2000

_____
Client

_____
Client

Dear Legal Assistance Clients:

To help us serve you better, please take a few minutes to complete this Client Satisfaction Survey. All of the questions may not apply, but please answer the ones that do. Your honest and constructive responses will help us provide quality legal services to our clients. Please mark the appropriate blocks and deposit the survey in our suggestion box located in the waiting room or ask the receptionist for help.

Thank you for your assistance.

Sincerely,

ATTORNEY NAME
Legal Assistance Attorney

Name and phone number (optional) _____

1. Date of your visit: _____

2. Reason for your visit:

_____

3. Attorney seen: _____

3. Your branch of service: ____ Army ____ Navy ____ Air Force ____ Marines _____ Coast Guard

4. Your grade: _____ 5. Where are you stationed?

_____

6. How did you hear about our service?

_____

7. Were you referred to us by another Legal Assistance Office? _____ yes _____ no

If yes, please tell us why. _____

_____

8. The length of time it took to get an appointment was: _____ walk-in _____ within 3 days _____ within 10 days _____ over 10 days

Comments: _____

_____

9. How were you treated by the receptionist? _____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

10. How were you treated by the legal technician? ____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

11. How were you treated by the Notary? _____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

12. How clear was your attorney's advice to you? _____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

13. How well did the attorney answer your questions? _____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

14. How did your attorney treat you? _____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

15. If the attorney prepared documents for you, how long did you have to wait? _____ less than 3 days _____ less than 10 days _____ more than 10 days

Comments: _____

_____

16. How would you rate our services overall? _____ Great _____ Good _____ Fair _____ Poor

Comments: _____

_____

17. What can we do to serve you better? _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

JOINT SERVICES PENTAGON LEGAL ASSISTANCE OFFICE

COMPLEX ESTATE

PLANNING WORKSHEET

CLIENT'S NAME: _____

DATE AND TIME OF APPOINTMENT: _____

_____

PENTAGON
ROOM 1D738
(703) 693-0107

ESTATE PLANNING FINANCIAL QUESTIONNAIRE

PERSONAL INFORMATION

Name of husband: _____

Are you a U.S. Citizen or U.S. National? _____ yes _____ no

Name of wife: _____

Are you a U.S. Citizen or U.S. National? _____ yes _____ no

Current address: _____

Phone #s: (home): _____ (husband's office): _____ (wife's office): _____

E-mail: (husband's): _____ (wife's): _____

City and state of domicile (planned permanent residence): _____

Name your children, indicate whether they are natural children, adopted, or stepchildren, and provide their dates of birth:

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

EXECUTOR: This is the person who presents your will to the court for probate, ensures that your wishes are carried out, and that your estate is settled upon your death. Whom do you wish to have serve as your executor (generally spouses can name each other as their primary executor)?

Husband:
Primary:_____

Alternate:_____
Alternate:_____

Wife:
Primary:_____

TRUSTEE: This is the person who supervises the management of any trusts created by your will. Whom do you wish to have serve as your trustee? (Spouses can name each other as their primary trustee.)

Husband:
Primary:_____

Wife:
Primary:_____

Alternate:_____
Alternate:_____

GUARDIAN: This is the person whom you would wish to raise your children should both you and your spouse die while the children are still minors; both of you should agree upon the choice(s). If you have minor children, whom do you wish to have serve as their guardian?

Primary:_____
Alternate:_____

FINANCIAL QUESTIONS

Please detail any special circumstances or general estate planning concerns about which you may have questions.

_____

_____

1. <u>Asset Valuation Summary:</u>

To accurately determine the estate and gift tax consequences, if any, resulting from the distribution of your property, please provide the information requested below. You need only provide approximate figures. If you prefer, you can provide us with a recent financial statement that accurately reflects the current value of your joint and individual assets and liabilities.

	Joint	Husband	Wife	Total
Checking accounts				
Savings accounts				
Residence(s) equity				
Other real estate equity				
Investments (excluding retirement benefits)				
Closely-held business(es)				
Life insurance death benefits				
Vehicles				
Other personal property (e.g., furniture, jewelry, etc.)				
Other assets (list)				
Other assets (list)				
Other assets (list)				
Total				

Have you ever filed an IRS Form 709 "U.S. Gift (and Generation-Skipping Transfer) Tax Return?"

_____ yes _____ no

2. <u>Residence Information</u>.

A. Primary Residence: (address): _____

_____

Estimated Value	Amount of Mortgages	Equity	Monthly Mortgage Payment	Owned By (husband, wife, jointly)

(So that we can properly plan for its disposition, please provide us a copy of the deed and mortgages for this primary residence.)

Original Purchase Price: $_____ Cost of Additional Improvements: $_____

How long do you plan on retaining this as a primary residence? What are your plans for this property?

_____

_____

B. Secondary Residence: (address): _____

_____

Estimated Value	Amount of Mortgages	Equity	Monthly Mortgage Payment	Owned By (husband, wife, jointly)

(So we can properly plan for its disposition, please provide us a copy of the deed and mortgages for this secondary residence.)

Original Purchase Price: $_____ Cost of Additional Improvements: $_____

How long do you plan on retaining this as a primary residence? What are your plans for this property?

_____

_____

_____

_____

Do you rent out this secondary residence? _____

3. <u>Other Real Estate Information (other than residences)</u>.

A. Other jointly owned real estate (i.e., in both husband's and wife's names).

Location	Estimated Value	Amount of Deeds of Trust	Equity	Other Co-Owners?
Total				

B. Other real estate owned by husband only.

Location	Estimated Value	Amount of Deeds of Trust	Equity	Other Co-Owners?
Total				

C. Other real estate owned by wife only.

Location	Estimated Value	Amount of Deeds of Trust	Equity	Other Co-Owners?
Total				

4. <u>Investment Account Information (other than retirement accounts)</u>.

A. Jointly owned investment accounts, mutual funds, etc. (i.e., in both husband's and wife's names).

Location	Estimated Value	Amount of Margin Loans	Net Value	Other Co-Owners?
Total				

B. Investment accounts owned by husband only.

Location	Estimated Value	Amount of Margin Loans	Net Value	Other Co-Owners?
Total				

C. Investment accounts owned by wife only.

Location	Estimated Value	Amount of Margin Loans	Net Value	Other Co-Owners?
Total				

5. Retirement Benefits.

A. Husband's retirement benefits.

Description	Current Value	Beneficiary
Total		

B. Wife's retirement benefits.

Description	Current Value	Beneficiary
Total		

C. Please provide below any other information regarding retirement accounts and other deferred compensation arrangements:

_____

_____

_____

_____

_____

6. <u>Liability Information</u>.

A. Joint liabilities (i.e., those liabilities for which both husband and wife are responsible), other than those listed previously.

Creditor	**Liability Amount**	**Payment Amount**	**Payment Frequency**	**Secured?**
Total				

B. Husband's liabilities, other than those listed previously.

Creditor	**Liability Amount**	**Payment Amount**	**Payment Frequency**	**Secured?**
Total				

C. Wife's liabilities, other than those listed previously.

Creditor	**Liability Amount**	**Payment Amount**	**Payment Frequency**	**Secured?**
Total				

7. Life Insurance Information.

A. Joint life insurance policies (i.e., life insurance insuring both husband's life and wife's life). (Please indicate those policies not owned by husband or wife with "*".)

Company	Type	Face Amount (Death Benefit)	Cash Surrender Value	Beneficiary
Total				

B. Husband's life insurance policies; i.e., life insurance insuring husband's life. (Please indicate those policies not owned by husband with "*".)

Company	Type	Face Amount (Death Benefit)	Cash Surrender Value	Beneficiary
Total				

C. Wife's life insurance policies (i.e., life insurance insuring wife's life). (Please indicate those policies not owned by wife with "*".)

Company	Type	Face Amount (Death Benefit)	Cash Surrender Value	Beneficiary
Total				

D. Please provide any other information concerning the above life insurance policies which may be helpful (i.e., outstanding policy loans, whether pledged as collateral, whether owned by a trust, whether financed under a "split dollar" arrangement, etc.).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

8. <u>Miscellaneous Information</u>. Please provide below any other information relating to your assets or liabilities which may have an impact on your estate planning.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

9. Living Will:

A living will is not part of your will at all! But this is a good time to consider whether you want a living will, which is more accurately called an advance medical directive or declaration. This document states that in the event you have a terminal, incurable medical condition and your life is only being prolonged by means of artificially provided life support, and if you cannot communicate your desires at that point, the living will "speaks for you" so your doctors know and can act upon, your desires regarding the termination of life support.

The conditions that trigger the living will, and the extent of the medical care to be withdrawn, vary from state to state. Therefore, you should carefully review the language of the living will for the state you have chosen and decide if it truly reflects your choice for discontinuing life support. Once executed, the document is effective until it is revoked, which you may do at any time by physically destroying the document, or in an emergency, by verbally revoking it before witnesses who can testify that you did in fact revoke it.

Do you want a living will? _____ yes _____ no

10. Special Power Of Attorney For Medical Care:

Another important health care document is the special power of attorney for medical care (SPOAMC). You may execute this document in addition to, or in lieu of the living will. This document appoints someone to make medical care decisions for you in the event you cannot make your own medical decisions. It applies to more situations than the living will, which addresses only the issue of continued life support if you have a terminal condition. The SPOAMC gives the person you designate as your agent the authority to make a wide range of medical decisions on your behalf. It also gives your agent access to your medical information and authority to fully participate with your treating physicians in deciding the care to be provided to you. Obviously, the person you designate to be your agent should be someone you trust with life and death decisions. Like the living will, the power of attorney is usually drafted in accordance with the laws of the state where you are residing.

a.) Do you want a Medical Power of Attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please list the name, address, phone number, and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, phone number, and relationship of your second choice of agent:

_____

_____

_____

_____

d.) Do you wish to specify that you desire to donate your body organs for transplant upon death?
_____ yes _____ no

If yes, are you also willing to donate organs and tissue for medical, educational, or scientific purposes?
_____ yes _____ no

e.) Do you wish to specify that, if possible and if it does not place an undue burden upon your family, that you prefer to die at home rather than in a hospital? _____ yes _____ no

If you currently live in a state other than the one in which you are a legal resident, you may want your living will to be drafted in accordance with the laws of the state where you actually live and not your state of legal residence, because it is more likely to be used where you currently live.

f.) Do you wish to have the living will governed by the laws of the state where you currently live?
_____ yes _____ no

We will ask you more about this below.

11. <u>Springing Durable General Power Of Attorney:</u>

Your will enables you to dispose of your property as you wish after your death. While you are living, you have the right to decide what happens to that property so long as you are of sound mind. But if you ever become incapacitated, whether through illness or accident, and are unable to handle your own affairs, a court order may revoke your right to manage your own money and appoint a guardian or conservator. To protect yourself from this eventuality, you can appoint an agent for yourself through a power of attorney.

A power of attorney is simply a written authorization for someone to act on your behalf, for whatever purpose you designate in writing. Ordinarily, a power of attorney expires if you become mentally disabled – the time when you need help the most. A **springing, durable** power of attorney can take effect when you **become** unable to manage your own personal and financial affairs and will last as long as you are alive or until you revoke it. As long as you are mentally competent, you can revoke a durable power of attorney whenever you like simply by destroying the document.

If you choose to have a springing durable general power of attorney, remember to name someone who you trust as your attorney-in-fact. Your attorney-in-fact will have great authority over your affairs. Not only can they keep your affairs in order, but they have the potential to abuse this document at your expense and his or her gain.

a.) Would you like a springing durable general power of attorney? _____ yes _____ no

b.) Do you want your spouse to act as your agent? _____ yes _____ no

Unless you have selected your spouse to act as your agent **and** your spouse has the same address you do, please provide the name, address, telephone number and relationship of your first choice of agent:

_____

_____

_____

_____

c.) If you have a second choice, do you want:

_____ both agents to have the authority to act separately.

_____ to require both agents to act jointly unless one is incapacitated.

_____ the second agent to be as a successor, acting only if the first choice is incapacitated.

Please provide the name, address, telephone number, and relationship of your second choice of agent:

_____

_____

_____

_____

e.) If you selected your spouse to act as your agent, at what telephone number can her or she be reached?

_____

ONE MORE QUESTION:

The living will is ordinarily drafted in accordance with the laws of the state where you are currently living, because the laws of the state where you are hospitalized control the effectiveness of the living will.

Which state's laws do you want to govern your living will? _____

PRIVACY ACT STATEMENT

AUTHORITY: 10 USC 8013, F110 AFJAA, and EO 9397

PURPOSE: Used by attorney and client within attorney-client relationship to assist in providing a will and other related legal documents.

ROUTINE USES: Information will be used to aid attorneys and paralegals in drafting wins, living wills, and durable health care powers of attorney. Disclosure is voluntary, but if you do not provide the requested information, this office will be unable to prepare a will or other related documents for you.

APPENDIX D

ESTATE OWNER'S BENEFICIARY OBJECTIVES

I. ESTATE OWNERS OBJECTIVES.

The estate owner's objectives are the most important step in the estate planning process. To formulate a sound estate plan, the plan must be constructed on the foundation of the owner's objectives.

II. BENEFICIARY OBJECTIVES:

A. Planning for the spouse: In planning for his or her spouse, the estate owner must decide how much of the estate is to be left to the spouse and the manner in which it should pass to such spouse. The following questions will help the estate owner make these decisions:

1. What portion of the estate should go to the spouse in preference to other beneficiaries? If the estate owner has difficulty arriving at a conclusion, the following subsidiary questions will be helpful.

    a. What are the financial needs of the spouse compared to the needs of other beneficiaries?

    b. What is the degree of love and affection for the spouse?

    c. What are the feelings of the estate owner regarding the possibility of the spouse remarrying?

    d. What is the likelihood the spouse will care for the children and other relatives out of the share left to such spouse?

2. Of the portion or the estate going to the spouse, should it, apart from any tax considerations, go outright or in trust? Subsidiary factors to consider are:

    a. What is the financial ability and experience of the spouse?

b. Would the spouse consider outright ownership to be a burden?

c. Does the estate owner want to control the eventual disposition of the principal not used by the spouse during such spouse's lifetime?

3. If there is the a trust for the spouse, then

a. Who is to be the trustee?

b. Should the spouse receive all the income currently or should income distributions be discretionary with the trustee?

c. Should principal be available to the spouse?

d. If principal is to be available for the spouse, but the spouse is not to be the trustee, should the amount of the distributions be in the sole control of the trustee or should the spouse have an independent power of withdrawal, perhaps to a specified maximum?

e. Should the trust continue on the same terms for the spouse in the event of such spouse's remarriage?

f. On the surviving spouse's death, is the balance of the trust to go to named beneficiaries or to the surviving spouse's appointees?

4. Should gifts of life insurance or other assets be made to the spouse during the estate owner's' lifetime or should the entire estate pass only after the owner's death?

B. Planning for the Children**:** The estate owner must consider questions such as the following, to formulate planning objectives with regard to children:

1. What are the financial needs of the children?

2. What portion of the estate should go to the children in preference to other beneficiaries?

3. Of the portion of the estate going to the children, should an equal share go to each child or do any of the children have special needs?

4. Should the children receive at least some benefit from the estate while the surviving spouse is still living or should they wait until both parents die?

5. Should the children's shares be placed in trust or distributed outright?

6. If there is to be a trust for the children, then

    a. Who is to be the trustee?

    b. Should the children receive the income currently or should income distributions be discretionary with the trustee?

    c. At what ages should principal be distributed to the children?

7. If a child does not survive until the age of distribution, who is to receive his or her share- the child's children, the child's spouse, the estate owner's other children, or other beneficiaries?

8. If any of the children are minors, who should be nominated as the guardian or the children?

9. Should gifts be made to the children during the owner's lifetime or should the estate pass to them only on the owner's death?

C. Other Individual Beneficiaries: Other individuals whom the estate owner may wish to provide for may be his or her grandchildren, parents, brothers, sisters, and sons- and daughters-in-law. Also, he or she may wish to include more distant relatives such as nieces, nephews, and cousins or a good friend or loyal employee. The following are a few questions which will stimulate the estate owner's thinking in this regard:

1. Should a portion of the estate be left directly to the grandchildren even if the children survive the estate owner?

2. Are there any needs that the estate owner is supporting during his or her lifetime that will need funds after his death?

3. Are there any persons whom the estate owner wishes to "remember" in the estate plan, even in a token way, to repay a kindness or perhaps to spare a person from feeling slighted if left out?

4. To whom does the estate owner wish to leave the estate, if his or her primary beneficiaries, such as his or her spouse and issue, do not survive the owner?

D. Charitable Beneficiaries**:** A few questions should be considered to ascertain the owner's real objectives in this regard:

1. Should a portion of the estate be left on the estate owner's death to charity in preference to other beneficiaries?

2. If a part of the estate is to be left to charity, to which charities should it be left?

3. Should the charitable bequests be outright or restricted to specific purposes?

4. Should a charity be designated as a contingent beneficiary in the event the primary beneficiaries do not survive?

5. Should charitable gifts be made during the owner's lifetime?

E. Retirement Objectives: Consider objectives regarding retirement to help plan for that period of the owner's life. The following questions are useful in this regard:

1. Does the estate owner have a strong desire to retire?

2. What is his or her anticipated lifestyle during retirement?

3. How much annual income will be needed during retirement?

4. At what age would he or she like to retire?

5. To what extent is the estate owner willing to save now, to create an adequate estate for retirement, either voluntary or forced by age or disability?

APPENDIX E

EXTRACT OF AR 27-3

Current AR 27-3, para 3-6b provision:

(b) *Estates*. Legal assistance will be provided on wills, testamentary trusts for the benefit of minors, guardianships, and the designation of beneficiaries under life insurance policies (including the Servicemen's Group Life Insurance (SGLI)). Legal assistance will also be provided on preparing AMDs and anatomical gift designations. Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources.

(1) Every service member for whom a will is prepared will be provided legal advice on designating beneficiaries under SGLI (or other insurance policies, as applicable) that will best carry out the service member's intent in light of his or her personal situation. As a matter of Army policy, attorneys will not recommend so-called "by-law" or "by-will" (or "to my-estate") SGLI beneficiary designations to any service member, regardless of military service affiliation. Where the insured is a soldier, "by-law" and "by-will" designations are prohibited. See AR 600-8-1 (20 Oct 94) and Appendix C of this regulation for guidance on assisting service members with SGLI beneficiary designations. Non-Army clients who indicate that they have directed their SGLI benefits to be distributed "by-law" should be advised of the effect this direction has on distribution of SGLI proceeds. In cases where an existing designation does not comport with a service member's wishes, or simply needs revision in the case of a soldier who has not replaced an existing "by-law" or "by-will" designation, the service member will be assisted on executing VA Form SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate). This form may be obtained through normal publications channels. The form for soldiers will be executed in accordance with AR 600-8-1. Any designation or change of beneficiary by a soldier on a SGLV-8286 is not effective unless received by the custodian of the soldier's DA Form 201 (Military Personnel Records Jacket (MPRJ), U.S. Army) before the soldier's death. All clients should be advised to file newly executed forms in their military records. They should also be provided the telephone and room and building numbers (or address) of the custodian for those records.

(a) Attorneys who provide legal assistance should maintain sufficient copies of SGLV-8286 for use by their clients. Attorneys should not use any other form or continuation form to designate SGLI beneficiaries unless specifically approved by the proponent for AR 600-8-1 (20 Oct 94).

(b) Those providing legal assistance to soldiers during EDREs, REMOBEs, MODREs, SRPs, and NEOs should request to be stationed before the personnel and finance sections so that soldiers can receive legal advice before they designate SGLI and final pay beneficiaries. This advice will be made available to soldiers regardless of whether or not wills are prepared for them.

(2) No will may be executed until an attorney interviews the client and reviews the will. An attorney shall be present to supervise the execution of the will and to review the will after the client and witnesses have signed it. The attorney who drafts the will shall insert his or her name on the will as its drafter, together with the designation for a state or other legal bar of which he or she is a member, using the following language: "This document was prepared under the authority of 10 U.S.C. § 1044 and implementing military regulations and instructions by *(name of attorney*), who is licensed to practice law in (*name of one State or other legal bar*)."

(a) When providing routine legal assistance, attorneys should encourage eligible clients who meet any of the criteria in para 3-6b(2)(b) to obtain wills, and should provide wills to all those who request them. The same legal and professional standards that apply to preparing and executing wills within an Army legal office apply to those that are prepared and executed during EDREs, REMOBES, MODREs, SRPs, and NEOs. Where those standards cannot be met, follow-up legal assistance appointments should be made to prepare or execute wills for soldiers who need them. In appropriate cases, soldiers may be encouraged to have wills (or new wills) drafted and executed following their mobilization or deployment.

(b) During mobilization or deployment, the priority and allocation of legal resources should be based on need. The absence of a will does not make a service member non-deployable. The need for a routine will by a service member being mobilized or deployed must be weighted against the needs of other service members for wills and other legal services (for example, resolving child custody, landlord-tenant, or consumer law problems). When legal resources are limited, the priority for drafting and executing wills should be given to service members to whom any of the following applies: (1) those who have a minor child; (2) those whose primary beneficiary is a minor; (3) those whose net estate (excluding insurance, jointly-owned property, and other non-probate property) is valued at more than $10,000 (or a higher dollar limit if applicable law allows small estate administration for estates of lesser amounts); or (4) those who desire their property to be distributed in a manner different from that which would occur under the applicable laws of intestate succession or under an existing will. The drafting and execution of wills (or new wills) for all other service members may be delayed until such time that legal resources are available following mobilization or deployment.

(c) The execution of preprinted fill-in-the-blank wills is limited to clients domiciled in states that specifically authorize the execution of such wills. If authorized by statute, a properly drafted and executed fill-in-the-blank will complies with JAGC standards.

(3) Consistent with this regulation, every effort will be made to assist PNOK in probating wills and settling estates (particularly uncontested or exempt-from administration proceedings) of service members who die while in a military duty status. (See paras 2-5a(9) and 3-7g(2)(d)). When available resources, personnel, or expertise are insufficient to provide the legal assistance required, clients should be referred to other attorneys who provide legal assistance or to civilian lawyers in accordance with para 3-7h. Attorneys assisting a PNOK with a problem related to a service member's designation of SGLI beneficiaries should review the provisions of Chapter 38, Code of Federal Regulations, Part 9 (Servicemen's Group Life Insurance and Veterans' Group Life Insurance) for restrictions on beneficiary entitlements.

(4) Priority will be given to handling the special needs of clients with life-threatening injuries or illnesses. With regard to service members, attorneys providing legal assistance should be generally familiar with the benefits payable from the military, the Department of Veterans' Affairs, and the Social Security Administration to the survivors of service members who die while on active duty or in a retired status. They should also be generally familiar with the reasons for carrying out so-called "death-bed retirements." Assistance in such cases may be obtained from the installation Physical Evaluation Board Liaison Officer, the installation Retirement Services Officer, or Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington DC 20310-2200. See AR 600-87, appendix C for a description of the Survivor Benefit Plan, and AR 40-3, chapter 8 regarding referral of cases to physical evaluation boards.

ESTATE PLANNING FOR MILITARY MEMBERS
PART B

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ESTATE PLANNING FOR MILITARY MEMBERS
PART B

Outline of Instruction

I. INTRODUCTION.

II. SERVICEMEN'S GROUP LIFE INSURANCE (SGLI)

A. Servicemen's Group Life Insurance (SGLI); 38 U.S.C. §§ 1965-1976; 38 C.F.R. Part 9; Veterans' Benefits Act of 1992, § 201. Office of SGLI (OSGLI), phone number: 1-800-419-1473.

B. Importance of SGLI in Legal Assistance.

C. SGLI is group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.

D. Soldiers Covered.

1. Active Component.

a. Active duty soldiers are automatically insured for $200,000 ($250,000) unless they opt out in writing.

b. Soldier can elect lower coverage or no coverage by completing VA Form SGLV-8286.

2. Reserve Component.

a. Certain reservists are eligible for full-time coverage.

(1) Unit soldiers of the ARNG and USAR and –

(a) Unit soldier in pay status.

(b) Delayed entry soldiers.

(2) IRR or IMA soldiers attached for training in a non-pay status to units that are scheduled for at least 12 periods of IDT annually.

(3) Reservists who have completed 20 years of creditable service, but have not begun receiving retired pay.

b. Part-time coverage is also available during periods of AT and ADT.

E. Scope Of Coverage.

1. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations

2. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120 day period. Soldier may convert to Veteran's Group Life Insurance (VGLI) within 120 days of separation.

3. Soldiers may lose entitlement to SGLI based on:

   a. their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or

   b. other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes). See AR 608-2, paras. 2-5 and 2-7.

4. Cause of death, however, is not relevant to the payment of SGLI proceeds.

5. Soldiers may convert to Veterans Group Life Insurance (VGLI) within 120 days of separation. No person may carry a combined amount of SGLI and VGLI in excess of $200,000 at any one time.

6. Amount is included in decedent's estate for purposes of federal estate tax, but generally exempt from the claims of creditors and other taxes, including federal income tax.

7. No loan, cash, paid-up, or extended insurance value.

F. Eligible Beneficiaries.

1. Any person or legal entity designated by the soldier on appropriate VA form (Active Component: VA Form SGLV-8286). SGLI Act gives service member absolute right to choose beneficiary. Ridgway v. Ridgway, 454 U.S. 46 (1981).

2. If no designation, or "By Law" designation, then proceeds are paid according to SGLI statute:

   a. All to spouse, but if none, then

   b. All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then

   c. All to parents (equally divided), but if none, then

d. All to executor of soldier's estate, but if none, then

e. Next of kin under state law.

3. Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. See AR 27-3, para 3-6b(1) (10 Sep 95); AR 600-8-1 (20 Oct 94).

4. SGLI definition of "parents" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(9), the term "parent" is limited to the father/mother of a legitimate child, the father/mother of an adopted child, and mother of an illegitimate child. The father of an illegitimate child is considered the parent also, but only if

a. acknowledged in signed writing prior to death;

b. judicially decreed either to be the father or to provide support; or

c. proof of paternity is established from official records (e.g., birth, school or welfare records) which show that, with his knowledge, claimant was named father.

See Lanier v. Traub, 934 F.2d 287 (11th Cir. 1991) (Despite fact service member raised by stepfather, "by law" designation precluded stepfather from sharing in SGLI proceeds, which went to natural father and mother).

5. SGLI definition of "children" for purposes of beneficiary designations. Pursuant to 38 U.S.C. § 1965(8) the definition of "child" is limited to a legitimate child or a legally adopted child. An illegitimate child is also included within the term if the insured is the child's mother or, if the insured is the father, the relationship meets the requirements of para. a.(1) through a.(3), above.

G. Currency of Designation.

1. Soldiers should be cautioned to keep their SGLI form updated.

2. Ridgway v. Ridgway, 454 U.S. 46 (1981) (A spouse was designated by name on SGLI election form. Soldier did not change election following subsequent divorce; ex-spouse was entitled to all the proceeds).

3. Zawrotny v. Brewer, 978 F.2d 1204 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1418 (1993). (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of previous spouse. Court of Appeals held Oklahoma statute ineffective to change ex-spouse designation on SGLI form.).

H. Minors as Beneficiaries.

1. OSGLI will not pay to a minor (except a minor spouse).

2. Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.

3. SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (see AR 600-8-1, figures 11-12 to 11-14):

a. Testamentary Trust for Children:

(1) "My trustee to fund a trust established for the benefit of my children under my will."

(2) A soldier who wishes to designate a trustee under a trust established in a will (a testamentary trust) as a primary or contingent beneficiary will be advised that before completing the SGLV-8286, the soldier must have a will prepared that contains a trust, and the soldier must sign (execute) the will. The trust in the will may be established for minors or adults, regardless of their relationship, if any, to the soldier. The soldier will be further advised of the following--

(a) Advantages are--

(i) The need and (related expense) of maintaining a surety bond may be waived in the will.

(ii) The trustee can use the SGLI proceeds for the benefit of the minor for the period of time, and in the manner specified, in the will. Direct distribution of SGLI proceeds may be delayed beyond the 18th birthday of the minor (e.g., upon completion of college, or age 25, which ever occurs first).

(b) Disadvantages are--

(i) The will, which might not have otherwise required probate (e.g., because of the small amount of other property in the soldier's estate), will have to be probated and the court will need to appoint the trustee before the designated trustee may receive the SGLI proceeds. Court and legal expenses will have to be paid.

(ii) The distribution of SGLI proceeds will be delayed.

(iii) There is no surety bond required that could protect the minor's funds from theft, fraud, waste, and other such acts by the trustee.

b. The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb, ..."

I. Settlement options.

1. Accelerated Death Benefits under SGLI/VGLI for servicemembers in terminal condition (within nine months of death).

2. Soldier may elect lump sum or 36 monthly installments.

3. If no election, beneficiary may elect type of settlement.

4. Alliance Account & financial services.

J. Apply for benefits by submitting VA Form 29-8283, Claim for Death Benefits, to OSGLI, 212 Washington Street, Newark, N.J. 07102-2999.

III. PROBATE VS. NON-PROBATE ESTATE.

A. Probate estate consists of property in the client's name only, with no contractual beneficiary designation, or property that would pass by intestacy if not for a will.

B. Non-probate estate consists of property that passes due to some sort of beneficiary designation or by operation of law.

1. Jointly owned property with a right of survivorship—including bank accounts, stocks, or realty.

2. Totten Trusts – "in trust for" bank accounts that pass to beneficiary.

3. Insurance proceeds.

4. Employee benefits that pass to beneficiaries –IRAs, pension plans, TSP, SBP for military members.

5. Property in Revocable/Irrevocable Inter Vivos Trusts.

IV. UNIFIED TRANSFER TAX SYSTEM

A. Concept.

B. Lifetime and Testamentary Transfers - aggregated and taxed at unified tax rates (I.R.C. § 2001).

Marginal Tax Rates

Minimum Rate	Maximum Rate
37% over $675,000	55% over $3,000,000

C. Unified Credit.

Year	Unified Credit	Gross Estate Equivalent
1997	$192,800	$ 600,000
1998	$202,050	$ 625,000
1999	$211,300	$ 650,000
2000 and 2001	$220,550	$ 675,000
2002 and 2003	$229,800	$ 700,000
2004	$287,300	$ 850,000
2005	$326,300	$ 950,000
2006	$345,800	$1,000,000

V. THE FEDERAL ESTATE TAX.

A. Scope. An excise tax on the transfer of property at death.

B. Property Included in the Gross Estate (§§ 2033 - 2046). The gross estate is a combination of both the probate and non-probate estates. Determining the gross estate is essential to determine whether the client needs additional estate planning beyond a simple will.

1. Property decedent owns at death.

2. Life insurance.

3. Annuities (e.g., SBP).

4. Property transferred with certain "strings attached."

5. Joint property.

a. The value of property decedent owned in joint tenancy with a right of survivorship, except to the extent it can be shown that the surviving co-tenant contributed to the acquisition of the property.

b. Special rules apply to certain joint interest held by spouses, in which each spouse will be considered as owning one-half interest in the joint property for estate tax purposes.

(1) The estate of the first spouse to die includes only one-half of the value of a “qualified joint interest” in property regardless of which spouse furnished the consideration for the property. For purposes of this provision, “qualified joint interest” is defined as any interest in property held solely by spouses as joint tenants with the right of survivorship or as tenants by the entirety. I.R.C. § 2040(b).

(2) For gifts made to noncitizen spouses after July 14, 1988, the entire value of jointly held property is includible in the deceased spouse's estate, reduced by the portion of the property for which consideration was received. I.R.C. § 2056(d)(1)(B).

6. The value of all property with respect to which the decedent had a general power of appointment at death.

7. The value of certain transfers of life insurance by the insured; releases or exercises of general powers of appointment; and releases of certain powers in property interests retained from previous inter vivos transfers (within three years before death).

8. How much is too much?

   a. Single client. Someone with over $675,000 in a gross estate would benefit from additional estate tax planning.

   b. Married client. Consider the **combined gross estate** of the married couple in figuring the $675,000 limit.

   c. Decision is the client's after full disclosure of the limitations of a simple will versus the other estate planning options. If a client wants a simple will consider having them sign a memo to the effect they were counseled on the limitations and agree to have you draw up a simple will.

C. Deductions from the Gross Estate (I.R.C. §§ 2051- 2056).

1. Expenses and indebtedness (I.R.C. § 2053).

2. Losses (I.R.C. § 2054).

3. Charitable bequests (I.R.C. § 2055).

4. Marital deduction (I.R.C. § 2056).

a. Eligibility.

(1) U.S. citizen spouses get an unlimited marital deduction.

(2) Non-U.S. citizen spouses do not get a marital deduction. (However, can set up a Qualified Domestic Trust - § 2056A).

b. Effects.

(1) Any amount given during life (I.R.C. § 2523) or at death (I.R.C. § 2056) to a surviving U.S. citizen spouse escapes federal estate tax at decedent's death.

(2) Tax deferral for survivor's lifetime.

(a) The unlimited marital deduction for a citizen spouse permits the first spouse to die to pass his or her entire estate to the surviving spouse without any federal estate tax being due.

(b) At the surviving spouse's death, however, a federal estate tax will be due on whatever property the surviving spouse still owns or has the right to benefit from.

(c) Because the property passing under the marital deduction will be diminished by the estate taxes payable at the later death of the second spouse, some planning may be appropriate.

D. Additional Federal Estate Tax Rules.

1. Inherited property is not income to the recipient.

2. Inherited property gets a stepped-up basis.

VI. ESTATE PLANNING FOR SERVICE MEMBERS.

A. When is more detailed estate planning necessary?

1. Gross estate > unified credit.

2. Non U.S. spouse.

3. "Mixed or blended" families.

4. Minor children or a disabled child.

B. "Legal assistance may be provided on other aspects of estate planning based on the availability of expertise and resources." – ***As a supervisor, where will you draw the line?***

VII. EXECUTION OF THE WILL.

A. Will Execution Procedure (See Appendix A.)

1. Attorney must supervise entire execution ceremony in the Army under AR 27-3.

2. The attorney (draftsman) will include his name, rank, and state of admission are indicated on the document. AR 27-3, para. 3-6b(2). (The attorney may have to provide testimony in a will contest or construction proceeding.)

3. Testator should orally declare document to be last will and testament.

4. Testator should sign at the end of the will proper in front of all witnesses.

5. Execute one will (not copies) and do not permit alterations.

6. Do not ever remove staples or take apart will and re-assemble.

B. Witnesses.

1. Use at least two young, disinterested witnesses. The attorney drafting the will can be one of the witnesses.

2. Avoid mass will executions and having deploying soldiers serve as witnesses if at all possible.

3. All witnesses should sign the will and self-proving affidavit in presence of the testator and of each other in an attestation clause after the testator's signature.

4. Self-Proving Affidavits.

a. Only go to due execution.

b. They will not avoid a contest on the lack of testamentary capacity, undue influence or fraud.

c. In the event testimony of witnesses will be necessary, or will you find the military witnesses?

d. Military Testamentary Instruments (See Appendix B).

C. Debriefing Clients.

1. Advise the client where to safekeep the will. Make it very clear to the client not to keep the will with him.

2. Explain circumstances and situations where updating the will would be beneficial.

3. Explain how to revoke the will and caution about unintentional revocation.

a. Revocation by Operation of Law.

(1) Marriage.

(2) Divorce.

(3) Birth of child.

b. Intentional Revocation

(1) Destruction with intent to revoke.

(2) Revocation by subsequent will or document executed with same formality as will.

(3) The client may not always desire to destroy a previous will when executing a new one. Can be important to show intent or plan.

4. Explain the termination of the attorney-client relationship.

5. Explain that copies are not kept in the legal assistance office.

6. Allow only executed wills to leave your office and execute only one document.

VIII. CONCLUSION.

APPENDIX A

STANDARD OPERATING PROCEDURE FOR EXECUTING WILL

The following, or a procedure covering substantially the same points, is recommended as standard operating procedure with respect to the execution of wills:

a. If the will consists of more than one page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists. This page numbering should not include the self-proving affidavit, which is not part of the will.

b. The testator should read the will in its entirety and the legal assistance attorney should ensure that the testator understands the terms of the will.

c. The testator and two persons who have no interest, vested or contingent, in the property disposed of by the testator's will or in the testator's estate in the event of intestacy, along with the legal assistance attorney supervising the execution of the will, should be in a room from which everyone else is excluded, and should remain therein until the execution is completed.

d. The legal assistance attorney supervising the execution of the will should ask the testator the following question: "Do you (state the name of the testator) declare in the presence of (name the witnesses) that the document before you is your will, that you have read the document, that you understand the document, and that the document expresses your desires as to the disposition of the property referred to therein upon your death?" The testator should answer "yes" and the answer should be audible to the two mentioned witnesses. The legal assistance attorney should also ask if the testator is executing the document voluntarily, without any duress or coercion. The testator should again make an audible "yes" response.

e. The testator should initial or sign on the margin of each page of the will. This is done for purpose of identification and to prevent the subsequent substitution of pages. The testator should then sign his or her name at the end of the will. The three witnesses should be standing or sitting so that all can see the testator sign.

f. The legal assistance attorney supervising the execution of the will should then ask the testator the following question: "Do you request (names of witnesses) to witness the signing of your will?" Again the testator should answer "yes", and the answer should be audible to the three mentioned witnesses.

g. The legal assistance attorney should ask the witnesses if the testator appears to be of sound mind, to understand the nature of his or her actions, and to be under no duress or coercion.

h. One of the witnesses should then read aloud the attestation clause.

i. Each witness should declare that the attestation clause is a correct statement.

j. Each witness should then sign his or her name in the place provided for the signatures of the witnesses following the attestation clause. As each witness signs, the testator and the other two

witnesses should be so placed that each one can see the witness sign. The witness should place his or her full address and social security number opposite the signature. If the witness is in the military service, grade should also be included opposite the signature.

APPENDIX B

H.R.4205

Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Placed on the Calendar in the Senate)

SEC. 541. RECOGNITION BY STATES OF MILITARY TESTAMENTARY INSTRUMENTS.

(a) IN GENERAL- Chapter 53 of title 10, United States Code, is amended by inserting after section 1044c the following new section:

`Sec. 1044d. Military testamentary instruments: requirement for recognition by States

`(a) TESTAMENTARY INSTRUMENTS TO BE GIVEN LEGAL EFFECT- A military testamentary instrument--

`(1) is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State; and

`(2) has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.

`(b) MILITARY TESTAMENTARY INSTRUMENTS- For purposes of this section, a military testamentary instrument is an instrument that is prepared with testamentary intent in accordance with regulations prescribed under this section and that--

`(1) is executed in accordance with subsection (c) by (or on behalf of) a person, as a testator, who is eligible for military legal assistance;

`(2) makes a disposition of property of the testator; and

`(3) takes effect upon the death of the testator.

`(c) REQUIREMENTS FOR EXECUTION OF MILITARY TESTAMENTARY INSTRUMENTS- An instrument is valid as a military testamentary instrument only if--

`(1) the instrument is executed by the testator (or, if the testator is unable to execute the instrument personally, the instrument is executed in the presence of, by the direction of, and on behalf of the testator);

`(2) the instrument is executed in the presence of a military legal assistance counsel acting as presiding attorney;

`(3) the instrument is executed in the presence of at least two disinterested witnesses (in addition to the presiding attorney), each of whom attests to witnessing the testator's execution of the instrument by signing it; and

`(4) the instrument is executed in accordance with such additional requirements as may be provided in regulations prescribed under this section.

`(d) SELF-PROVING MILITARY TESTAMENTARY INSTRUMENTS- (1) If the document setting forth a military testamentary instrument meets the requirements of paragraph (2), then the signature of a person on the document as the testator, an attesting witness, a notary, or the presiding attorney, together with a written representation of the person's status as such and the person's military grade (if any) or other title, is prima facie evidence of the following:

`(A) That the signature is genuine.

`(B) That the signatory had the represented status and title at the time of the execution of the will.

`(C) That the signature was executed in compliance with the procedures required under the regulations prescribed under subsection (f).

`(2) A document setting forth a military testamentary instrument meets the requirements of this paragraph if it includes (or has attached to it), in a form and content required under the regulations prescribed under subsection (f), each of the following:

`(A) A certificate, executed by the testator, that includes the testator's acknowledgment of the testamentary instrument.

`(B) An affidavit, executed by each witness signing the testamentary instrument, that attests to the circumstances under which the testamentary instrument was executed.

`(C) A notarization, including a certificate of any administration of an oath required under the regulations, that is signed by the notary or other official administering the oath.

`(e) STATEMENT TO BE INCLUDED- (1) Under regulations prescribed under this section, each military testamentary instrument shall contain a statement that sets forth the provisions of subsection (a).

`(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a testamentary instrument that does not include a statement described in that paragraph.

`(f) REGULATIONS- Regulations for the purposes of this section shall be prescribed jointly by the Secretary of Defense and by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Department of the Navy.

`(g) DEFINITIONS- In this section:

`(1) The term `person eligible for military legal assistance' means a person who is eligible for legal assistance under section 1044 of this title.

`(2) The term `military legal assistance counsel' means--

`(A) a judge advocate (as defined in section 801(13) of this title); or

`(B) a civilian attorney serving as a legal assistance officer under the provisions of section 1044 of this title.

`(3) The term `State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and each possession of the United States.'.

(b) CLERICAL AMENDMENT- The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 1044c the following new item:

`1044d. Military testamentary instruments: requirement for recognition by States.'.

CHAPTER 39

CURRENT ISSUES IN LABOR AND EMPLOYMENT LAW

I. MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000 (PENDING)

A. On 25 July 2000 the House of Representatives passed an amended version of Senate Bill 768 (**Appendix A**). The Bill is currently in the Senate for action. The Senate Bill amended the UCMJ to provide court-martial jurisdiction over civilians. The House amendments eliminate this controversial provision.

B. The Act establishes federal criminal jurisdiction over dependents, civilian employees, and contractors accompanying the force outside the United States.

C. Offenses covered are those punishable by imprisonment for more than 1year if the conduct had been engaged in within the United States.

D. The current version of the House Bill provides Military Counsel for any proceeding conducted outside the United States.

E. A version of the House Bill is expected to pass. If enacted, the Military Extraterritorial Jurisdictional Act of 2000 fills a major jurisdictional gap created by the Supreme Court's decision in Reid v. Covert, 354 U.S. 1 (1957).

1. The Act increases the options available to a commander overseas.

MAJ David Caldwell
MAJ Holly O'Grady Cook
January 2001

2. A prime example of the need for this legislation was recently addressed by the U.S. Court of Appeals for the Second Circuit in *U.S. v. Gatlin*, NEW YORK LAW JOURNAL, June 21, 2000, *available at* LEXIS, All Sources Legislative News Stories. The Court reluctantly held the District Court lacked jurisdiction over a military dependent that plead guilty to sexually assaulting a minor while accompanying his spouse in Darmstadt, Germany. The Military Jurisdiction Act of 2000 would fill this jurisdictional gap.

II. ALTERNATIVE DISPUTE RESOLUTION

A. Agencies must establish an Alternative Dispute Resolution (ADR) Program during the EEO pre-complaint and formal complaint process. 29 C.F.R. 1614.102(b)(2). The EEOC issued a primer outlining the revised regulatory requirements for ADR. **Appendix B.**

B. The Department of Defense has a Working Group for ADR. An ADR Point of Contact list for most DOD Agencies is at **Appendix C.**

C. Air Force Alternative Dispute Resolution Program.

1. A description of the Air Force ADR Program and a FY 99 review of the program are at **Appendix D**. For example, in FY 99 the Air Force program reduced the number of Formal EEO Complaints filed by 30%.

2. The Air Force has developed an extensive guide to mediating civilian personnel workplace disputes. The guide includes techniques, processes, and forms to use in a program. This guide is an excellent starting point for any installation starting the ADR Program. **Appendix E**.

D. The Navy established an EEO Complaint Pilot Dispute Resolution Process that is very aggressive and subject to criticism by the EEOC. **Appendix F**. The Pilot Program is designed to dramatically reduce the time it takes to resolve an EEO complaint. The EEOC believes the Navy program reduces a complainant's ability to seek EEOC review. **Appendix G**. Labor Counselors and Chiefs of Administrative Law should watch the issue develop, as the word on the street is the Navy is seeking a legislative fix. The proposed legislation could reduce, if not eliminate, EEOC involvement if a case follows the ADR path.

E. Alternative Dispute Resolution is here to stay. The Army is currently fine-tuning the Army Program. Alternative Dispute Resolution is a growth industry that the Army, by necessity, must be good at if we want to prevail. What does this mean for SJAs?

1. In an era of reduced courts-martial and administrative boards, ADR allows an SJA another avenue to train JAGs. The material attached is great for your LPD program.

2. Labor Counselors must get involved with EEO and work through the ADR Program at the installation. If they do not, the EEO office will develop a program and the SJA office will be in a reactionary mode.

3. The Senior Officers coming through The Judge Advocate General's School are briefed on the mandatory ADR Program. Many are very interested, which means they will come to the SJA office for answers.

III. 29 C.F.R. 1614-ONE YEAR LATER

A. The changes intended to streamline the process made little impact. The EEOC developed a primer that outlines the major changes and why they were made. **Appendix H**. However, the process is still cumbersome, expensive and time consuming. The chart at **Appendix I** provides a visual representation of the EEO complaint process.

B. One of the major changes in 1614 was the requirement that Agencies appeal to the EEOC any Administrative Judge's decision they do not intend to implement. The standard of review on appeal is de novo. The appeal provision changed the previous practice of Agencies writing a Final Agency Decision that did not implement the AJ's findings. Even though this appears to be a significant change the Army has filed only one appeal in the last year. 29 C.F.R. 1614.107.

C. Because most AJ decisions are not appealed, the role of the Labor Counselor in the EEO process is critical. Early intervention and active participation with the EEO office can significantly reduce adverse decisions and help resolve complaints at an earlier stage. The Labor Counselor's role has always been important, but it is more significant after the changes to 1614.

IV. MIDTERM COLLECTIVE BARGAINING

A. Duty to Bargain. The Federal Service Labor-Management Relations Statute (FSLMRS) requires federal agencies and their employees' unions to meet and negotiate for the purposes of arriving at a collective bargaining agreement (CBA). 5 U.S.C. §7114(a)(4).

B. When to Bargain.

1. Contract: Management must negotiate with a new exclusive representative at the inception of a new contract and before renewal of an existing contract.

2. Mid-Contract: When appropriate, management must continue to negotiate during the life of the contract.

a. Either party may refuse to bargain over issues covered by the CBA. Health and Human Services and AFGE, 47 FLRA 1004 (1993).

b. Both sides must negotiate over management-initiated midterm proposals.

c. Effective February 2000, unions also have the statutory right to initiate midterm bargaining. Department of the Interior and NFFE, Local 1309, 56 FLRA 45 (2000) (concluding that an agency must bargain over a proposal that obligates it to bargain over midterm issues not covered by the CBA).

C. Preventive Measures.

1. Waiver provisions. *See* Internal Revenue Service and NTEU, 29 FLRA 162 (1987) (explaining that a union can contractually waive its right to initiate bargaining); *but see* Department of the Interior and NFFE, Local 1309, 56 FLRA 45 (2000) (refusing to resolve whether waiver provisions are mandatory or permissive subjects of bargaining).

2. Covered-by Doctrine. *See* Department of Health and Human Services, Social Security Administration, 47 FLRA 1004 (1993) (establishing a three-prong test for determining when something is covered-by a CBA).

V. PARTNERSHIP UPDATE

A. Executive Order 12,871 (1 October 1993).

Sec. 2. Implementation of Labor-Management Partnerships Throughout the Executive Branch. *The head of each agency subject to the provisions of chapter 71 of title 5, United States Code shall:*

(a) create labor-management partnerships by forming labor-management committees or councils at appropriate levels, or adapting existing councils or committees if such groups exist, to help reform Government;

(b) involve employees and their union representatives as full partners with management representatives to identify problems and craft solutions to better serve the agency's customers and mission; . . .

(e) evaluate progress and improvements in organizational performance resulting from the labor-management partnerships.

B. Reaffirmation of Executive Order 12,871 (28 October 1999). *See* **Appendix J**.

1. Annual reports due 14 April.

2. Reports must be prepared with the involvement and input of unions.

3. Contents of the report.

a. Agencies shall describe the nature and extent of their efforts to comply with the Executive Order.

b. Agencies shall identify specific improvements in customer service, quality, productivity, efficiency, and quality of worklife that have been achieved as a result of partnership.

VI. ENVIRONMENTAL DIFFERENTIAL PAY UPDATE

A. Requirement.

1. Wage grade employees must be paid environmental differential pay (EDP) when they perform duty that "involves unusually severe working conditions or unusually severe hazards." 5 USC § 5343(a); 5 CFR § 532.511.

2. General Schedule employees must be paid a hazardous pay differential (HPD) when they are exposed to similar hazards. 5 USC § 5545(d); 5 CFR pt. 550.

3. Amount of pay differential depends on the type of employee and the type of hazard to which he is exposed.

4. Exposure to "airborne concentrations of asbestos" may result in 8% pay differential.

B. Amount of Exposure.

1. Agencies should include quantitative level of exposure that can be used to assess employee entitlement to pay differential in CBA.

2. If no quantitative amount in CBA, then arbitrators have broad discretion to determine appropriate level.

C. Arbitration Awards.

1. Local OMA funds used to pay awards and settlements.

2. Back pay limited to six years. *See* Interim Rule, Pay Administration; Back Pay; Holidays; and Physicians' Comparability Allowances, 64 Fed. Reg. 72,457 (28 December 1999) (clarifying that back pay awards are subject to a six year statute of limitations unless a shorter statute of limitations period applies).

VII. DUTY TO BARGAIN NEW EMPLOYEE BENEFITS

A. Duty to Bargain.

1. Personnel policies, practices, and matters that affect conditions of employment are generally negotiable. 5 USC § 7103(a)(14).

2. Matters contrary to statutory management rights are not negotiable. 5 USC § 7106(a) (e.g., mission, budget, organization, and internal security practices).

3. Management must usually negotiate "impact and implementation" of a nonnegotiable management rights decision. 5 USC § 7106(b)(2) & (3).

B. Giving new employee benefits may trigger statutory duty to engage in impact and implementation bargaining.

1. Bargaining obligation.

a. Give notice and opportunity to bargain. Union does not have to accept.

b. Implementation of new programs should be delayed until labor obligations have been fulfilled.

2. Examples of new employee benefits.

a. Mass transportation and vanpool transportation subsidies.

(1) EO 13,150 (21 April 2000).

(2) 5 USC § 7905.

(3) DoD Policy.

b. Expansion of NAF health care benefits.

(1) Appropriated fund employees have sick leave for family care purposes. *See* Final Rule, Sick Leave for Family Care Purposes, 65 Fed. Reg. 37,234 (13 June 2000).

(2) The NAF Office (ASA(M&RA)) has administratively adopted this regulation for NAF employees effective 2 August 2000. *See* **Appendix K**.

VIII. GENERAL COUNSEL GUIDANCE ON NEGOTIABILITY AND EEO LAWS.

A. Dispute Between Federal Labor Relations Authority (FLRA) and Equal Employment Opportunity Commission.

B. Federal Labor Relations Authority.

1. On January 26, 1999, the FLRA General Counsel issued detailed guidance to Regional Directors on how to apply the requirements of the FSLMRS to processing EEO complaints and bargaining over EEO issues. *http://www.access.gpo.gov/flra/gc/gc_eeo1.html*

2. Specific matters addressed in the guidance include:

a. The duty to bargain over changes in conditions of employment that are made as a result of terms contained in an EEO settlement agreement;

b. When the union has a right to be represented at meetings where EEO complaints are a topic of discussion;

c. What, if any, rights the union has to EEO-related information under the FSLMRS; and

d. Strategies for avoiding unfair labor practices and contract disputes arising in the context of processing an EEO complaint.

3. An agency committed an unfair labor practice by holding a formal discussion with a bargaining unit employee without affording the union notice and an opportunity to be represented at the discussion. Luke Air Force Base, Arizona, and AFGE, Local 1547, 54 F.L.R.A. No. 75 (1998) (*pending 9th Circuit review*) (finding that a mediation/investigation session of an EEO complaint was a formal discussion).

C. Equal Employment Opportunity Commission.

1. July 1999 – EEOC issues Final Rule for Federal Sector Equal Employment Opportunity. *See* 29 CFR pt. 1614.

2. In the introduction to the final rule, the EEOC disagrees with FLRA General Counsel by stating:

Any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act.

IX. LABOR AND EMPLOYMENT WEB SITES.

A. Labor Law Web Sites

1. Office of Personnel Management <www.opm.gov>.

2. Merit Systems Protection Board <www.mspb.gov>.

3. Equal Employment Opportunity Commission <www.eeoc.gov>.

4. DOD Civilian Personnel Management System <www.cpms.osd.mil>.

5. Army Civilian Personnel Office <www.cpol.army.mil>.

6. Federal Labor Relations Authority <www.flra.gov.>

B. Alternative Dispute Resolution Web Sites.

1. The Alternative Newsletter – A Resources Newsletter of Dispute Resolution <http://www.mediate.com/tan/>.

2. American Arbitration Association <http://www.adr.org/>.

C. ADR Resources

1. http://adrr.com

2. Center for Public Resources (CPR) <http://www/cpradr.org>.

3. Federal Judicial Center Publications <http://air.fjc.gov/public/fjcweb.nsf/pages/173>.

4. US Air Force ADR Site <http://www.adr.af.mil>.

5. The Mediation Center, Eugene Oregon <http://www.mediate.com/resolution.cfm>.

6. IOC Partnering Site <http://www.ioc.army.mil/others/Gca/partnering/index.htm>.

7. Society of Professionals in Disputes Resolution (SPIDR) <http://www.spidr.org>.

8. US Navy ADR Site <http://adr.navy.mil>.

9. Defense Logistics Agency <http://www.dscc.dla.mil/offices/doccr/adr/adr.html>.

10. Section on Public Contract Law, American Bar Association (ADR Committee) <http://www.abanet.org/contract/special/altdisp/home.html>.

11. ADR Interagency Working Group <http://www.financenet.gov/iadrwg.htm>.

12. Lycos ADR Resources <http://dir.lycos.com/Society/Law/Legal_Support/Dispute_Resolution_Services/Private_Mediation/>.

13. Northern Virginia Mediation Service <http://www.gmu.edu/departments/nvms/>.

14. Mediation Information & Resource Center (MIRC) <http://www.mediate.com>.

15. ADR World <http://www.adrworld.com/>.

X. CONCLUSION

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CHAPTER 40

DOD HIV/AIDS POLICY AND THE LAW

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A. DoD Directive 6485.1, Human Immunodeficiency Virus-1 (HIV-1), 19 March 1991 1
B. Army Regulation 600-110 1
C. Air Force Instruction 48-135 1
D. SECNAV Instruction 5300.30C & 12792.4 1
E. Centers for Disease Control and Prevention. HIV/AIDS Surveillance Report, 1999 1

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Outline of Instruction

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II. REFERENCES.

A. DoD Directive 6485.1, Human Immunodeficiency Virus-1 (HIV-1), 19 March 1991.

B. Army Regulation 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (22 April 1994).

C. Air Force Instruction 48-135, Human Immunodeficiency Virus Program (1 August 2000).

D. SECNAV Instruction 5300.30C, Management Of Human Immunodeficiency Virus-1 (Hiv-1) Infection In The Navy And Marine Corps (14 March 90); 12792.4, Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome in the Department of the Navy Civilian Workforce (12 January 1989).

E. Centers for Disease Control and Prevention. HIV/AIDS Surveillance Report, 1997; Vol. 9, No.1. (Copies of the HIV/AIDS Surveillance Report are available free from the CDC National AIDS Clearinghouse, P.O. Box 6003, Rockville, MD 20849-6003; telephone 1-800-458-5231 or 1-301-519-0023.)

III. THE DISEASE.

A. In General.

B. Disease Progression.

C. Detection.

D. Transmission.

E. Classifications. DODD 6485.1, E2.2; AR 600-110, para. 2-1b. See also Appendix A, this outline.

IV. DOD AND SERVICE POLICIES.

A. Accession Testing. HIV positive personnel are not eligible for enlistment or appointment in the military, both Active and Reserve Component. DODD 6485.1, para. 4.1; AR 600-110, para. 1-14a.

1. HIV screening for enlisted applicants is conducted at Military Entrance Processing Stations (MEPS). DODD 6485.1, para. 4.2; AR 600-110, para. 3-3b.

2. Officer applicants are screened during pre-contracting, pre-scholarship, or pre-appointment physical examinations. DODD 6485.1, E5; AR 600-110, para. 3-3h.

a. U.S. Military Academy cadets, midshipmen and persons attending the Uniformed Services University of Health Sciences are separated and discharged with an honorable discharge if HIV positivity is the sole basis for discharge. The Superintendent may delay separation until the end of the current academic year or allow graduation in final year. DODD 6485.1, para. E5.1.3; AR 600-110, para. 3-3h(1).

b. ROTC cadets are disenrolled at the end of the academic term in which the HIV infection is confirmed. No recoupment action is initiated. DODD 6485.1, para. E5.1.2; AR 600-110, para. 3-3h(2).

c. OCS candidates who are in their initial entry training are disenrolled from the program and discharged with an honorable or entry level separation, as appropriate. DODD 6485.1, para. E5.1.1; AR 600-110, para. 3-3h(3).

d. OCS candidates who have completed entry level training are disenrolled, reassigned in their original enlisted specialty and administered in accordance with Service regulations for enlisted personnel. DODD 6485.1, para. E5.1.1 AR 600-110, para. 3-3h(3).

e. No waiver for HIV infection is authorized.

f. All personnel disenrolled from officer programs who are separated shall be given preventive medicine counseling and advised to seek civilian treatment.

3. Prior service personnel required to meet accession medical fitness standards must have a negative HIV test no more than 6 months before enlistment in the Selected Reserves. Active duty soldiers transferring to or enlisting in the Selected Reserves without a break in service must have a negative HIV test within the preceding 24 months. AR 600-110, para. 3-3g.

B. Disease Surveillance.

1. DOD Policy (DODD 6485.1, para. E6.2) requires periodic testing with the following priority for military personnel:

a. Deployed or deploying to high HIV risk area,

b. Permanent assignment overseas,

c. Temporary deployment overseas,

d. Specific categories (medical personnel, drug and alcohol rehab, prenatal patients) per service regulation, and,

e. All remaining personnel per service regulation.

2. Army. Active duty and Reserve Component soldiers are periodically screened for evidence of HIV infection.

a. All active duty soldiers are tested routinely at least biennially. AR 600-110, paras. 2-2h and 2-7. Testing is keyed to birth month screening. AR 600-110, para. 2-7b.

b. Active duty and Reserve Component soldiers who PCS to overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia) must have a negative HIV test within the 6 months prior to their portcall. AR 600-110, paras. 2-2k and 2-7e.

c. Active duty soldiers who are scheduled for overseas TDY or deployment that will not exceed 179 days must have a negative HIV test within the 24 months prior to the departure date. AR 600-110, para. 2-2k(1).

d. Active duty personnel scheduled for overseas TDY or deployment exceeding 179 days must have a negative HIV test within the 6 months prior to departure date. AR 600-110, para. 2-2k(2).

e. Reserve Component soldiers are tested every 5 years. Reserve Component soldiers may also receive testing during their periodic physicals. AR 600-110, paras. 2-2i and 2-8.

f. Reserve Component personnel scheduled for overseas duty: Less than 30 days - 24 months prior to departure date. Greater than 30 days - 6 months prior to their reporting date. AR 600-110, para. 2-2k(3).

3. Navy. SECNAVINST 5300.30C, para. 5

a. Assigned to a deployable unit or stationed overseas (including Reserves) - annual testing.

b. PCS Orders – within 12 months prior to report date.

c. Treated for STD, drug/alcohol abuse, or pregnancy.

d. All others, during routine physical.

4. Air Force. AFI 48-135, para. 3.2.

a. Every 5 years during physical exam (flight physical every 3 years).

b. Prior to overseas assignment.

c. Treatment for pregnancy, STD, or drug/alcohol abuse.

5. Family members and other health care beneficiaries are not required to have an HIV test. However, DA policy is to routinely inform patients that physicians will order any necessary clinically indicated tests, to include HIV, unless the patient specifically declines such tests. DODD 6485.1, para. E6.2.5. Generally, HIV testing is "clinically indicated" under the circumstances listed below:

a. All blood donors;

b. All patients with suspicious illnesses;

c. All persons admitted to Army hospitals unless tested during the proceeding twelve months;

d. All persons seen at sexually transmitted disease clinics;

e. Certain blood recipients;

f. Sexual partners of HIV-infected individuals;

g. All pregnant women at the time of their initial prenatal evaluation and at time of delivery, if the mother is identified as being at high risk;

h. All persons enrolled in alcohol and drug rehabilitation programs (Tracks II or III);

i. Adults undergoing physical examinations;

j. All persons presenting at emergency rooms with evidence of trauma, such as shootings, stabbings, IV drug use, and rape;

k. All persons with acute or chronic hepatitis B infection; and

l. All persons who are dead on arrival or who die in emergency rooms.

6. DOD Civilians.

a. Civilian employees and applicants for employment may not be mandatorily tested for HIV except to comply with valid host nation laws. DODD 6485.1, para. 6.10.

b. HIV-positive civilian employees are treated no differently than other employees. They are permitted to work as long as their performance is acceptable and they do not pose a significant safety or health threat to themselves or others. They are considered handicapped employees within the meaning of the Rehabilitation Act of 1973 and are entitled to a reasonable accommodation if otherwise qualified. AR 600-110, paras. 1-14k, l, and m.

C. Health Education. DODD 6485.1, para. E6.3.

1. Upon identification, military health authorities will counsel the individual and others at risk regarding:

a. Significance of a positive antibody test;

b. Mode of transmission of the virus;

c. Appropriate precautions, personal hygiene, and measures required to minimize transmission;

d. Need to advise any past and future sexual partners of their infection;

e. That they are ineligible to donate blood, organs, or semen;

f. To always use condoms (except with a spouse who is fully informed of the soldier's condition).

g. Counseling is recorded on DA Form 5669-R. Commanders will receive a copy of this form. AR 600-110, para. 2-14d.

h. Soldiers who violate the preventative medicine counseling are subject to administrative separation. AR 600-110, paras. 4-12e and 4-13c.

2. The medical assessment of each exposure to or case of HIV infection includes an epidemiological assessment (EPI) of the potential transmission of HIV to other persons. AR 600-110, para. 7-3.

3. Commander's Counseling. Unlike the Air Force and Navy, the Army specifically provides for Commander Counseling. AR 600-110, para. 2-14.

   a. Commanders formally counsel soldiers who test positive for the HIV antibody immediately after the post-diagnosis preventive medicine counseling. Commander counseling includes:

      (1) A direct order to verbally advise all sexual partners of their infection prior to engaging in intimate sexual behavior or other behavior involving a significant risk of HIV transmission (such as behavior that would result in the exchange of blood or seminal fluid between persons);

      (2) A direct order to use condoms when engaging in sexual relations (including, but not limited to, sexual intercourse, oral-genital, or anal-genital contact) with persons other than their spouse or with their spouse unless the spouse freely and knowingly consents to such relations after being informed of the soldier's infection (See also AR 600-110, para. 2-13b(9);

      (3) A direct order not to donate blood, sperm, tissues, or other organs; and

      (4) A direct order to inform all health care workers of their infection when seeking medical or dental treatment.

   b. Commanders record counseling on DA Form 4856 (General Counseling Form) (see Appendix B, this outline). AR 600-110 includes a reproducible sample form. (**NOTE:** The form is not completely consistent with the 1994 update to AR 600-110. *Compare* DA Form 4856 *with* AR 600-110, para. 2-14c.

c. Commanders maintain the counseling form in unit personnel files. Upon reassignment, commanders forward the form in a sealed envelope to the gaining commander. AR 600-110, paras. 2-14d and 2-17.

d. Air Force Instruction includes a sample order for infected personnel to 1) inform sex partners prior to relations, 2) use transmission protection during sex (e.g. condom), 3) inform emergency care providers of HIV status, 4) inform medical providers of HIV status, and 5) not donate blood, sperm, tissue or organs. AFI 148-135, A14.

e. Navy regulation does not provide for command counseling or a formal preventative HIV order.

D. Retention.

1. Repeal of 10 Feb 96 statute mandating immediate discharge of HIV-positive service members. Repeal of amendments to 10 U.S.C. § 1177 effective 24 Apr 96.

2. Current Policy.

a. Active duty personnel with evidence of HIV infection are referred for medical evaluation board to evaluate and document their fitness for continued service regardless of clinical staging. DODD 6485.1, para. 4.3 and E2.4.2

b. HIV positive service members are managed in the same manner as personnel with other progressive illnesses.

c. Soldiers meeting medical retention standards may reenlist, if otherwise eligible. AR 600-110, para. 4-5a.

d. Personnel showing no evidence of clinical illness (generally associated with WR-1 or WR-2 stages) or other indications of immunologic or neurologic impairment related to HIV infection are not separated solely on the basis of HIV positivity. DODD 6485.1, para. 4.3; AR 600-110, para. 1-14d.

e. Reserve Component soldiers with serologic evidence of HIV infection have 120 days to complete a medical evaluation to determine their fitness for continued reserve service. Reservists found medically fit are permitted to serve in the Selected Reserves in a nondeployable billet, if available. AR 600-110, para. 5-17.

E. Assignment Limitations - Current Policy.

1. HIV-positive service members are not deployed overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia). DODD 6485.1, para. 6.16; AR 600-110, paras. 1-14e and 4-2a.

2. Soldiers confirmed HIV positive while stationed overseas are reassigned to the United States as soon as possible, regardless of PCS rules. AR 600-110, para. 4-7.

3. HIV-positive soldiers are NOT assigned to:

a. Any TOE or MTOE unit. AR 600-110, para. 4-2b. Installation commanders may reassign any HIV-infected soldier from such units to TDA units on their installation, provided the soldier has completed a normal tour. AR 600-110, para. 4-2b; or

b. USAREC, Cadet Command, or ARNG Full Time Recruiting Force if the soldier's medical condition requires frequent follow up and the unit is not near an Army MTF capable of providing such treatment. Commanders must report these soldiers to PERSCOM for assignment instructions. AR 600-110, para. 4-2b(3).

c. Military education programs resulting in additional service obligation. AR 600-110, para. 4-2b(2). This limitation does not apply to military schools required for career progression, such as an advanced course or CGSC. See also AR 600-110, para. 4-4.

4. Assignment preclusion from units, programs, organizations, or schools other than those listed in the regulation require HQDA (DAPE-HR) approval. AR 600-110, para. 4-2c.

5. Commanders may not change the assignment of an HIV-infected soldier unless required by this regulation or the soldier's medical condition. AR 600-110, para. 4-2d.

6. Commanders may not group HIV-infected soldiers into the same unit, duty area, or living area unless no other unrestricted units, positions, or accommodations are available. AR 600-110, para. 4-2d.

7. Commissioned officers in DOD sponsored professional education programs are disenrolled from the program at the end of the academic term in which the HIV infection is confirmed. Any additional service obligation incurred by participation in the program is waived. Financial assistance received is not subject to recoupment. AR 600-110, para. 4-2b(2).

8. Family members who are confirmed as HIV positive may accompany their sponsor overseas. The sponsor may request deletion from the overseas assignment based on compassionate reasons or may request an "all others" tour. If the initial diagnosis of a family member occurs while overseas, the sponsor may apply for a compassionate reassignment to the United States. Mandatory PCS of the sponsor will not occur based solely on the HIV positivity of the family member. AR 600-110, para. 4-3 and 6-12.

9. Comply with host nation requirements of HIV screening for DOD civilians. DODD 6485.1, para. 4.10

F. Separation.

1. "Individuals with serological evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of …HIV-1 infection." DODD 6485.1, para.4.3

2. Regular and Reserve Component service members who are determined to be unfit for further duty due to progressive clinical illness or immunological deficiency due to HIV infection are processed for separation or retirement. DODD 6485.1, para. 4.5.

a. Regular Army and Reserve Component commissioned and warrant probationary officers, who are confirmed HIV positive within 180 days of their original appointment or who report for initial entry training in an AD status (other than ADT) and are confirmed HIV positive within 180 days of reporting to AD, are processed for discharge under the provisions of AR 635-100, Chapter 5, section IX (Elimination of Probationary Officers). AR 600-110, para. 4-12d.

b. Enlisted soldiers, confirmed HIV positive within 180 days of initial entry on AD, are separated for the convenience of the government for failure to meet procurement medical fitness standards under the provisions of AR 635-200, paragraph 5-11. See AR 600-110, para. 4-13b.

c. HIV-positive military personnel who fail to comply with lawfully ordered preventive medicine procedures, including the commander's "safer sex" order, are subject to appropriate administrative and disciplinary actions, including separation. AR 600-110, paras. 4-12e, 4-13c, and 2-14c.

d. HIV-positive military personnel may request separation from the service for the convenience of the government. AR 600-110, paras. 4-12a, b, and 4-13a, b.

G. Limited Use Policy.

1. DOD policy (DODD 6485.1, para. E3) prohibits the use of HIV testing information and information obtained during the EPI as an independent basis for adverse administrative or disciplinary action, except for:

a. Accession separations;

b. Voluntary separations;

c. Armed Service Blood Look Back activities;

d. Rebuttal or Impeachment purposes consistent with law or regulation;

e. For administrative or disciplinary actions resulting from disobeying preventative medicine order; and

f. As an element of proof or aggravation in administrative or criminal action.

2. **Adverse personnel actions** include: court-martial; nonjudicial punishment; line of duty determination; involuntary separation action (other than for medical reasons); administrative or punitive reduction in grade; denial of promotion; a bar to reenlistment; as the basis for an unfavorable entry in a personnel record; as a basis to characterize service or to assign a separation program designator; or in any other action considered an adverse personnel action (e.g., OER or NCO-ER). DODD 6485.1, para. E3.2.1; AR 600-110, para. 7-3b.

3. The limited use policy does not apply to:

a. The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) is first introduced by the soldier.

b. Disciplinary or other action based on independently derived evidence.

c. **Nonadverse personnel actions** include such as reassignment; disqualification (temporary or permanent) from a personnel reliability program; denial, suspension, or revocation of a security clearance; suspension or termination of access to classified information; and removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness such as explosive ordnance disposal (a medical evaluation board must determine whether removal from flight status or a similar position is necessary). DODD 6485.1, para. E3.2.3; AR 600-110, para. 4-6.

d. Any evidence or information derived from sources independent of the epidemiological assessment. AR 600-110, para. 7-4d.

H. Release of Information.

1. HIV data on a soldier is covered by the Privacy Act (5 U.S.C. § 552a).

2. Release is on an internal agency "need to know basis." 5 U.S.C. 552a(b)(1).

3. The service regulations stress the need for extra precautions in protecting HIV records. See, e.g., AR 600-110, paras. 1-12g, 1-13f, 1-14n, and 1-14o(3).

   a. All soldiers are individually and privately notified of all positive HIV test results in a face-to-face interview with a designated physician. AR 600-110, para. 2-12.

   b. Unit commanders will accompany HIV-positive soldiers to the initial notification by medical personnel. Unit commanders will not remain for the EPI. AR 600-110, para. 1-13d.

   c. MEDDAC/MEDCEN will notify commander if HIV-positive soldier requires change in profile status.

4. IAW AR 600-110, para. 2-12f, information concerning an individual's HIV positivity is only released outside DOD in the following circumstances:

   a. Military health care beneficiaries who are determined "at risk" (e.g., spouse of an HIV-positive soldier; See also AR 600-110, para. 6-9) are contacted directly by medical authorities and advised to seek medical evaluation;

   b. Individuals who are not military health care beneficiaries, who are determined "at risk" (e.g., sexual partner of an unmarried HIV-positive soldier), are contacted through the local public health authorities, unless disclosure to the civilian health authorities is itself prohibited by the jurisdiction.

   c. Release of information to local (including host nation) health authorities, concerning the identity of HIV-positive individuals, is done in accordance with the reporting requirements of the local jurisdiction.

5. Spouses of Reserve Component HIV-positive soldiers are notified and offered an opportunity for voluntary HIV testing and counseling. AR 600-110, para. 6-9b.

V. CONCLUSION.

APPENDIX A

WALTER REED STAGING CLASSIFICATION SYSTEM

Stage	HIV Antibody	Chronic Lymph-aden-opathy	T Helper Cells/ mm^3	DHS	Thrush	0.I.
W R 0	–	–	>400	NI	–	–
W R 1	+	–	>400	NI	–	–
W R 2	+	+	>400	NI	–	–
W R 3	+	+ / –	<400	NI	–	–
W R 4	+	+ / –	<400	P	–	–
W R 5	+	+ / –	<400	P / C	+ / –	–
W R 6	+	+ / –	<400	P / C	+ / –	+

- indicates that this criterion is required for the given stage

Suffixes:

K - Kaposi's sarcoma, indicate presence by adding "K" (e.g., WR4K)

B - The suffix "B" should be added in the presence of constitutional symptoms (i.e., T > 100.5 for 3 weeks weight loss > 10% of body weight over 3 months, night sweats for 3 weeks, or chronic diarrhea for greater than 1 month).

WR 0 - designates high risk contacts (sexual contacts, newborns, and recipients of blood products from patients documented to have AIDS [antibody + or virus isolation +])

WR 5 - the occurrence of either complete anergy and/or thrush (i.e., DHS = P/"Thrush +" or C/"Thrush -" or C/"Thrush +"

HIV Antibody - defined by the presence of antibody to the HIV as determined by the Western Blot technique (gp 41 is a requirement for diagnosis: "+" = present, "-" = absent)

Chronic lymphadenopathy - defined as two or more extrainguinal sites w/lymph nodes > 1 cm in diameter persistent for > 3 months ("+" = present, "-" = absent)

T Helper Cells - Quantitative depletion (<400 cells/cu.mm.) must be present for at least 3 months for WR 3 classification.

DHS - (Delayed Hypersensitivity) **NI** - normal DHS is defined as an intact cutaneous response to at least two of the following 4 test antigens: tetanus, trichophyton, mumps, and candida. P = 5 by 5 mm response to one of the above antigens. C - "complete" cutaneous anergy (no response to any antigen).

Thrush - Clinical oral candidiasis including + KOH prep.

O.I. - (Opportunistic infection): pneumocystis carinii pneumonia, CNS or disseminated toxoplasmosis, chronic cryptosporidiosis, candida esophagitis, disseminated histoplasmosis, CNS or disseminated cryptococcosis, disseminated atypical mycobacterium disease, extra-pulmonary tuberculosis, disseminated nocardiosis, disseminated CMV, or chronic mucocutaneous herpes simplex. Other disseminated or chronic non self-limited infections with agents in which CMI plays a pivotal role in host defense should be anticipated to cause opportunistic disease in patients with stages WR5 and WR6. Kaposi's sarcoma alone does not fulfill staging criteria for WR6.

APPENDIX B

GENERAL COUNSELING FORM

For use of this form, see AR 635-200; the proponent agency is MILPERCEN

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, 10 USC 3012 (G).
PRINCIPAL PURPOSE: To record counseling data pertaining to service members.
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

PART I - BASIC DATA

1. NAME		3. GRADE	4. SEX
Doe, John Q.	123-45-6789	E4	Male

5. UNIT	*FOR TRAINING UNITS ONLY*	
	6. WEEK OF TRAINING	7. TRAINING SCORES
HHC, 1st Training Brigade		HIGH ____ MED ____ LOW ____

PART II - OBSERVATIONS

8. DATE AND CIRCUMSTANCES

The purpose of this command counseling is to inform you of DA and command policy regarding your responsibilities as a result of testing positive for the Human Immunodeficiency Virus (HIV) antibody. This counseling supplements and complements the preventive medicine counseling you received on 20 Dec 87.

9. DATE AND SUMMARY OF COUNSELING

I have been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. You were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. While I have great concern for your situation and needs, in my capacity as a commander, I must also be concerned with, and ensure the health, welfare, and morale of the other soldiers in my command. Therefore, I am imposing the following restrictions:

a. You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.

b. You will not donate blood, sperm, tissues, or other organs since this virus can be transmitted via blood and body fluids.

c. You will notify all health care workers of your diagnosed condition if you seek medical or dental treatment, or accident requires treatment. If you do not understand any element of this order, you will address all questions to me. Failure on your part to adhere to your preventive medicine counseling or the counseling I have just given you will subject you to administrative separation and/or punishment under the UCMJ, as I see fit.

DISPOSITION INSTRUCTIONS
This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement

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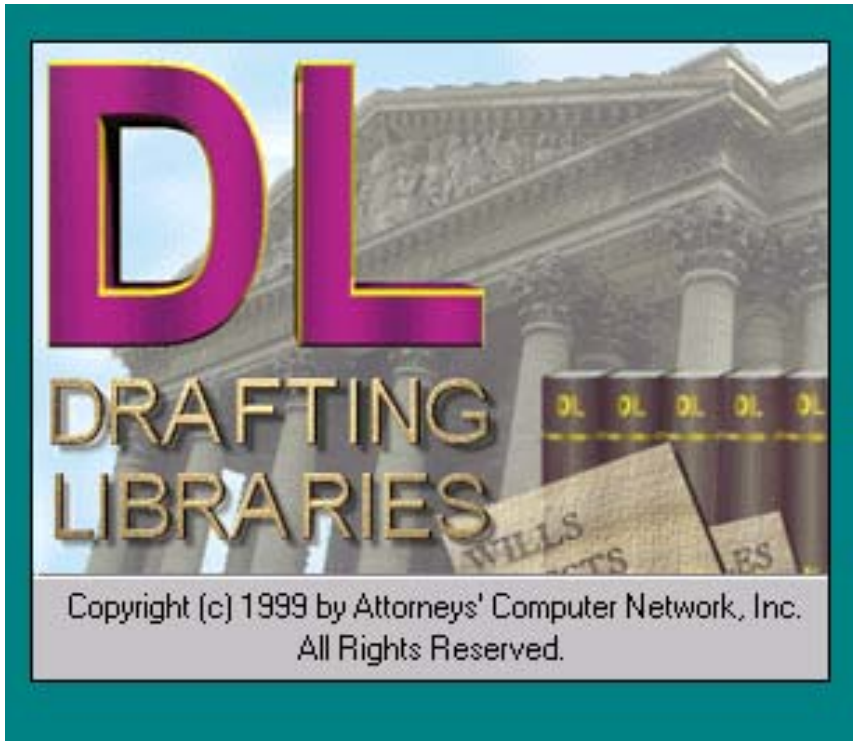
Using Drafting Libraries (DL)



MAJ Rick Rousseau

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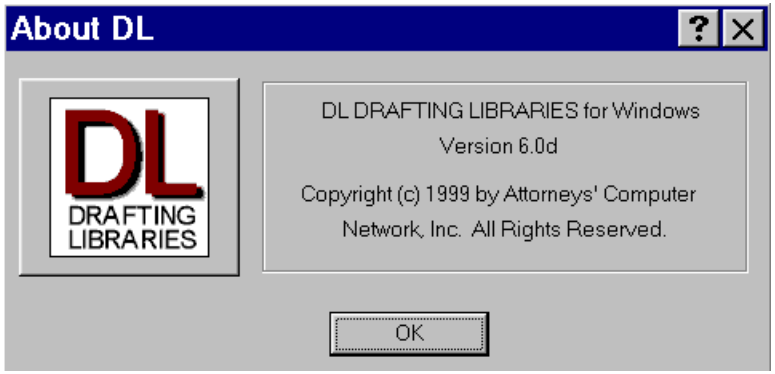
- DL "*Screen Shots*"
  - Reporting Installation
  - Set Up
  - Getting Started
- Estate Planning with DL
  - Ancillary Documents
  - *Smart Will* Templates
- Conclusion



JAGCNet & DL

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03/09/2000 **DVLPRS Information Paper 00-01 (Mar 00)**
Maintaining Access databases - repairing & compacting

10/04/99 **DVLPRS Information Paper 99-01 (Sep 99)**

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Select an application to download:

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- Patch for Patriot Expert System ver 2.0b (September 99)
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- Client Information System - version 2.20
- Case Tracking System - version 1.13

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- Lotus Domino R5 Client Version 5.0.3 (Apr 00) Update
- Adobe Acrobat Reader 4.05

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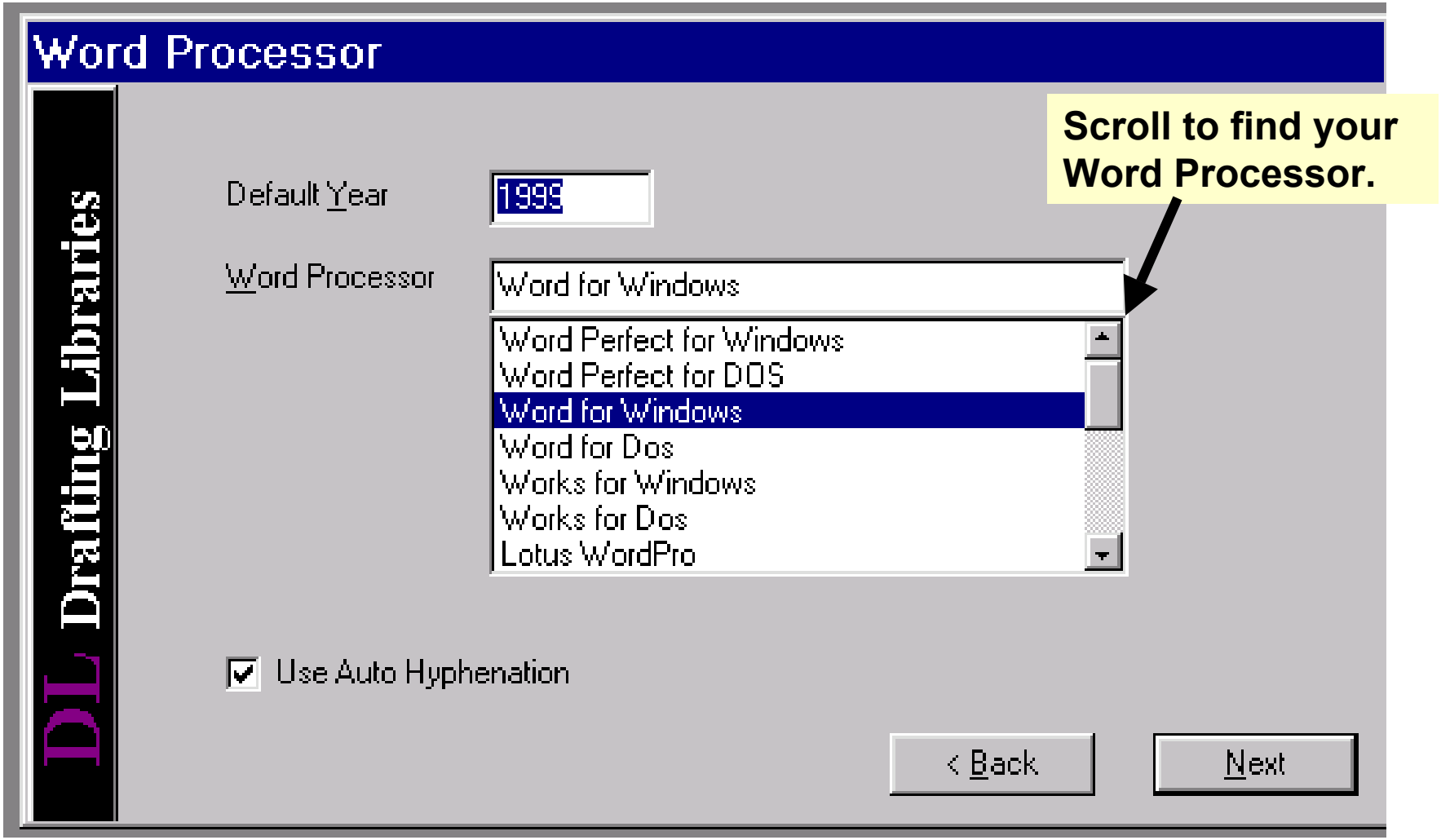
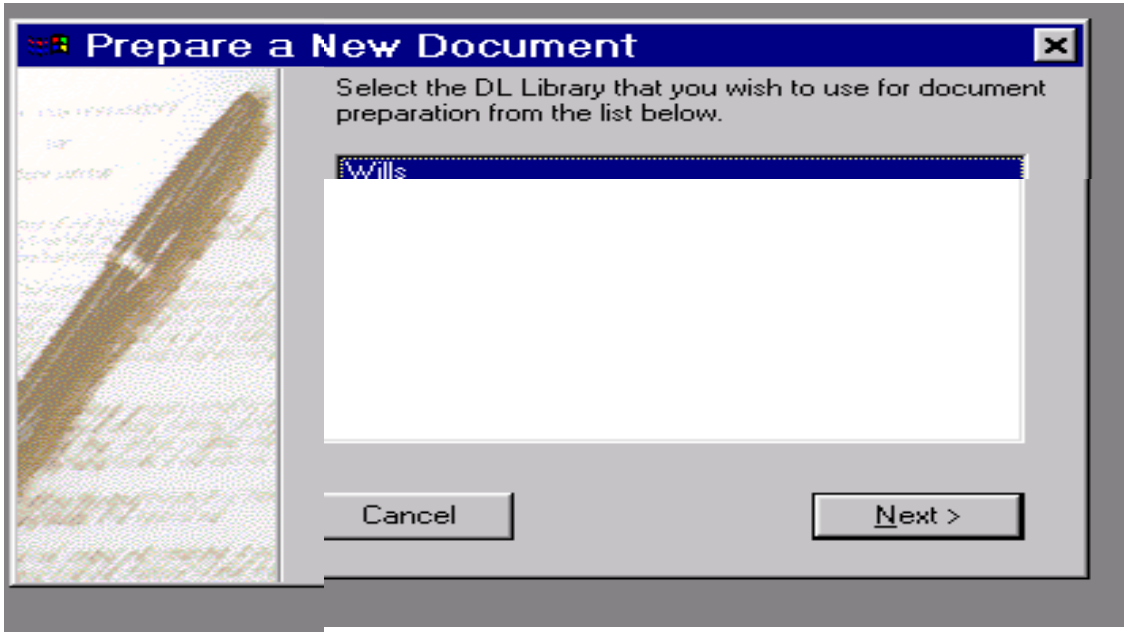
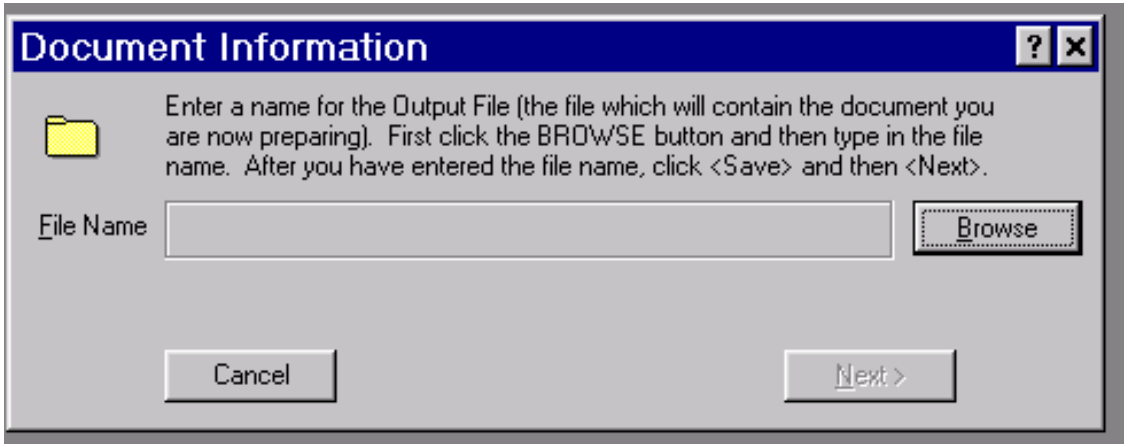
Set Up - Word Processor Choice



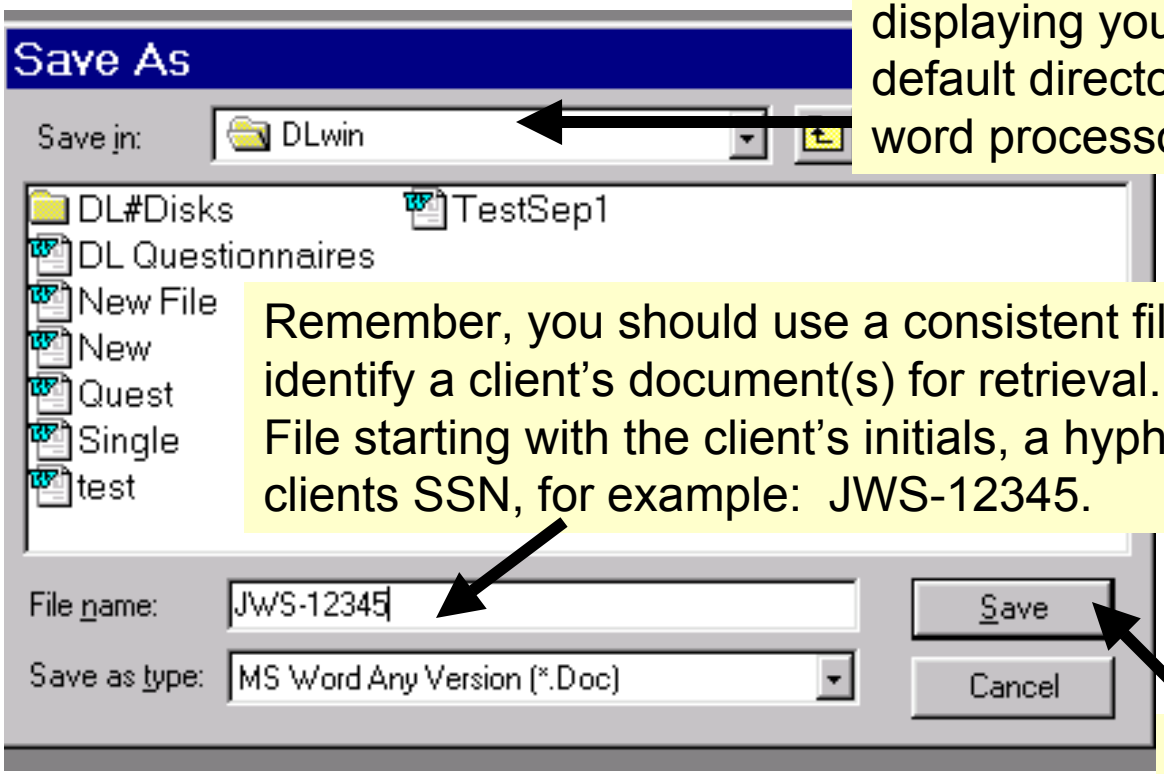


Prepare a New Document - Starting Screen - pick the DL Wills Library to advance to the next screen.



Select **Browse** - to see the existing files prepared in earlier uses of DL Wills & to get a window to name the file you are creating.

Selecting **Browse** on the previous screen will open your DLwin subdirectory displaying your previous files. This is the default directory associated with your word processor.



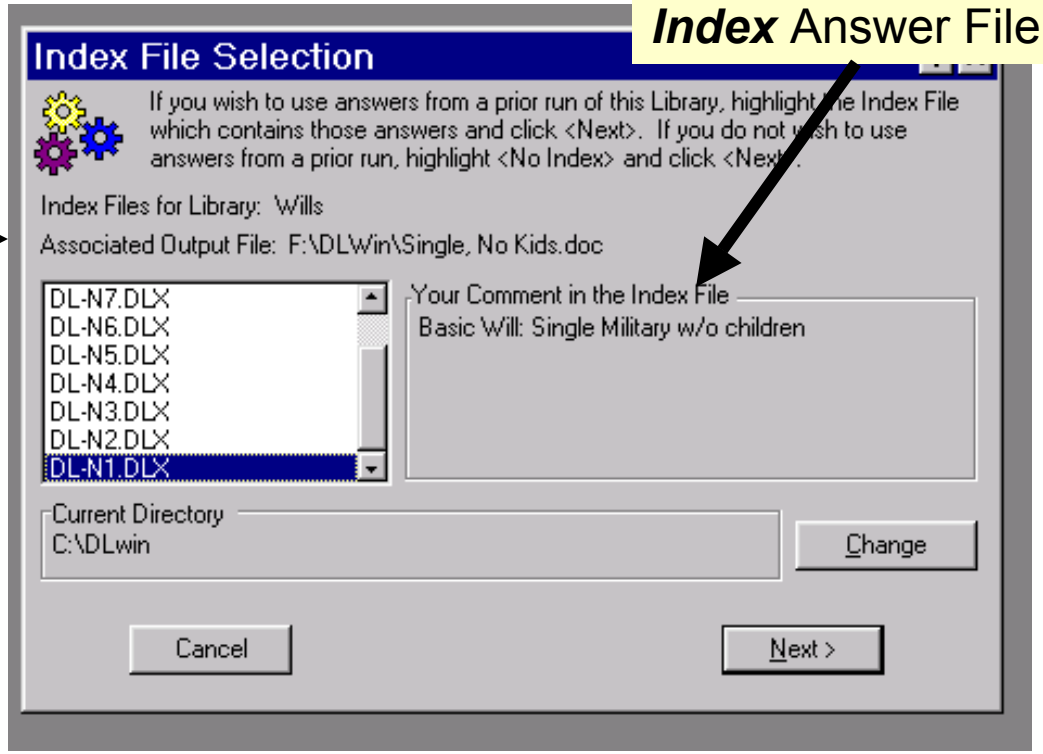
Remember, you should use a consistent file naming convention to easily identify a client's document(s) for retrieval. Consider naming the Output File starting with the client's initials, a hyphen, and the last 5 digits of the clients SSN, for example: JWS-12345.

After entering a file name, select **Save** to advance to the next screen.

After naming the file you are about to prepare, DL Wills asks if you desire to use answers (stored in an **Index File**) from a previous use of DL Wills. If you do, scroll down the **Index File** name list to find the desired **Index File**. This is where you retrieve a ***Smart Will*** template.

Note **Comment** describing the ***Index*** Answer File.

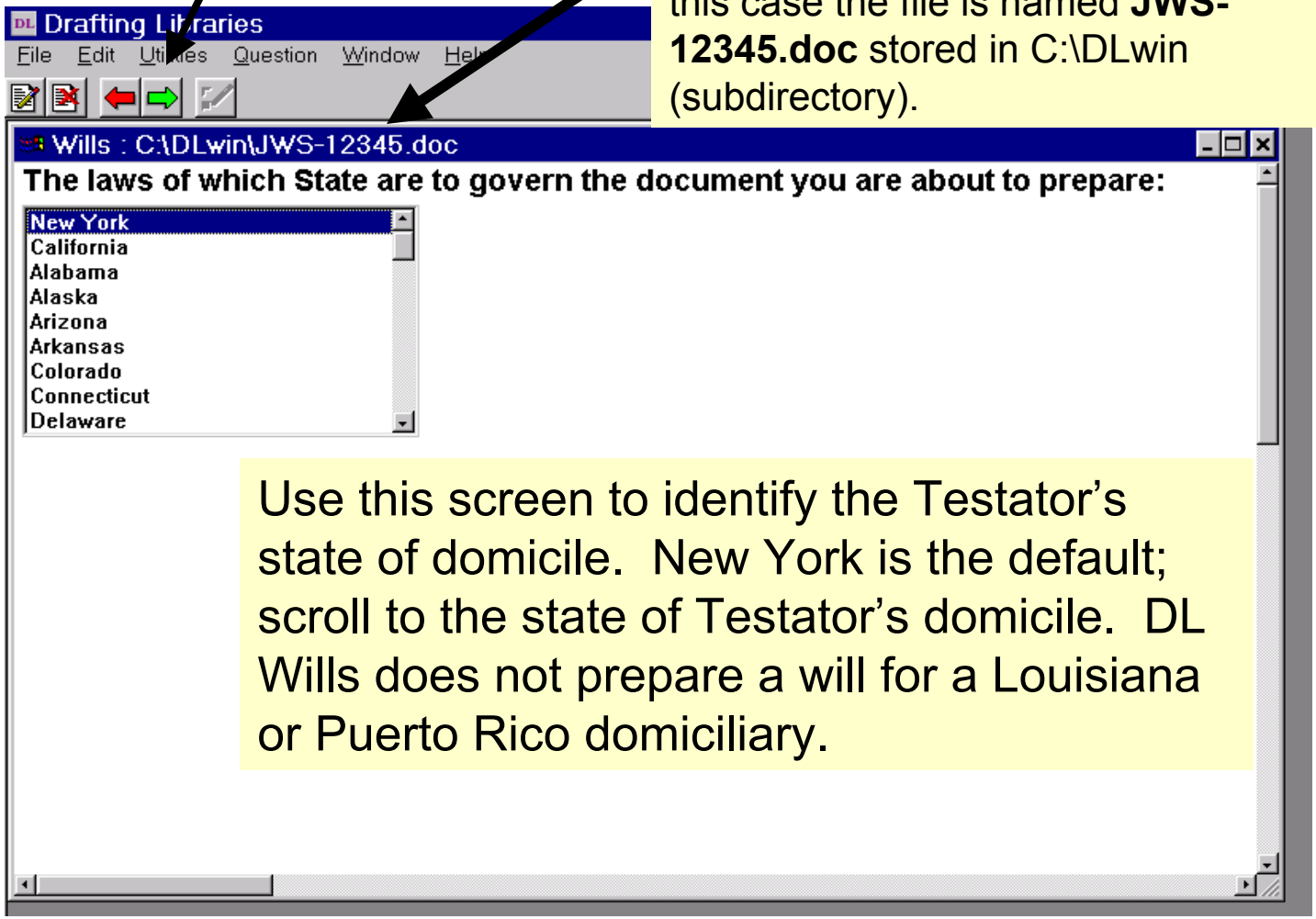
Note **Associated Output File -** it shows the location of the documents created using this highlighted ***Index*** Answer File.



Use the Green Arrow to advance to the next menu screen accepting the default answer.

File name and directory location for document(s) you are preparing - in this case the file is named **JWS-12345.doc** stored in C:\DLwin (subdirectory).

Use the Red Arrow to return to the previous menu screen.



Use this screen to identify the Testator's state of domicile. New York is the default; scroll to the state of Testator's domicile. DL Wills does not prepare a will for a Louisiana or Puerto Rico domiciliary.

After identifying the Testator's domicile (Virginia here), DL Wills presents this choice screen for selecting documents you intend to prepare.

Having selected Virginia as the Testator's domicile, DL Wills reminds you here:

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

NOTE: The documents you are about to prepare are for a person who is domiciled in Virginia. [The person may be stationed or temporarily living elsewhere.]

DO YOU WISH TO PREPARE:

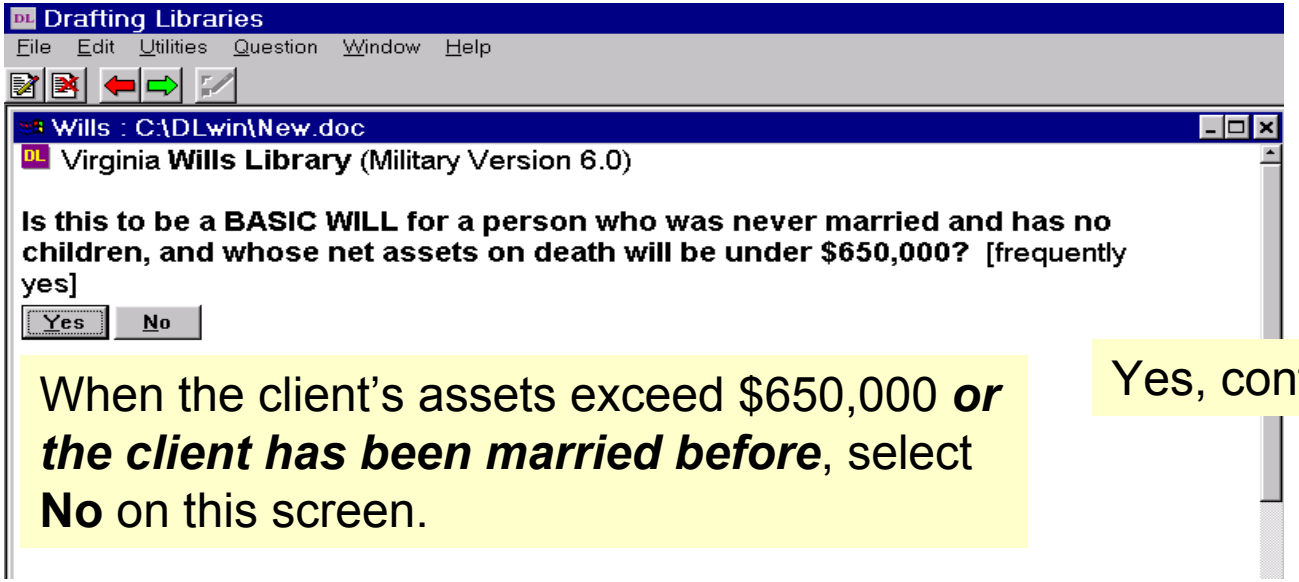
A a Will (and selected ancillary documents) [frequently <A>]
B just a Will
C just a Living Will (and/or an appointment of an agent for health care decisions)
D just a general Power of Attorney
E a Codicil
F a client interview questionnaire

A B C D E F

Note the default answer from the Index File is indicated by a dotted line on the letter choice.

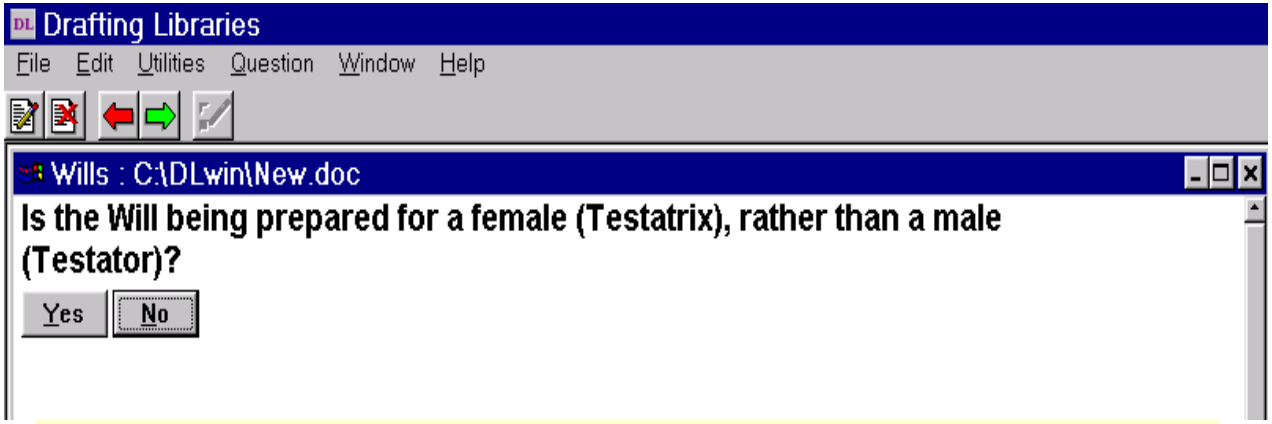
Note the option to prepare a Client Interview Questionnaire that you may use as a checklist for your interview with your client.

Screen shots of next two screens:



When the client's assets exceed $650,000 ***or the client has been married before***, select **No** on this screen.

Yes, confirms Basic Will.



Sets Testator's gender status - *male* in this example.

Describes Testator's current family situation. Married once and wife alive indicated here.

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

The Testator is:

A married once and his wife is alive [frequently <A>]

B married and wife is alive, but he was married before (a prior wife died or was divorced)

C a widower (his wife has died)

D previously married, but now divorced

E single and not previously married

A B C D E

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

Indicate whether the Testator has children. Include adopted children (and stepchildren) if they are to be treated like natural children. If there are no children, but children are anticipated, elect the option at the bottom of this list.

Does the Testator have:

- NO children
- 1 child
- 2 children
- 3 children
- 4 children
- 5 children
- 6 children
- 7 children
- 8 children

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

An estimate of the combined assets of the Testator and his wife affects the types of provisions which should be in the Will. For example, you won't be asked about creating a credit shelter trust if the assets are under $500,000 (i.e., clearly under the unified credit which is $650,000 in 1999 and thereafter increases to $1,000,000 by 2006). Clients frequently undervalue or fail to include relevant assets (such as life insurance proceeds or inheritance from others), so you may want to give a higher estimate.

The estimated value of the combined assets of the Testator and his wife, upon death, probably will be:

A **under $500,000 [frequently <A>]**
B **between $500,000 and $1,000,000**
C **over $1,000,000**
D **over $2,000,000**
E **over $4,000,000**

A B C D E

This screen appears after you answered No on the Basic Will Question (slide 17)

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

How are the personal effects and other tangible personal property of the Testator to be bequeathed:

A all to the wife, if she survives the Testator [frequently <A>]

B as per a schedule of specific bequests (with items which are not listed passing to the wife, if she survives the Testator)

C as per a schedule of specific bequests (with items which are not listed passing as part of the residuary estate)

D as provided with regard to the residuary estate

A B C D

Similar screens -- above when married; below when not

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\JWS-12345.doc

How are the personal effects and other tangible personal property of the Testator to be bequeathed:

A all to one beneficiary

B as per a schedule of specific bequests (with items which are not listed passing as part of the residuary estate)

C as provided with regard to the residuary estate [frequently <C>]

A B C

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

Most wills do NOT contain the following provisions:

-- a pour over to an existing inter vivos trust

-- the exercise or release of a power of appointment (given to the Testator by some third party)

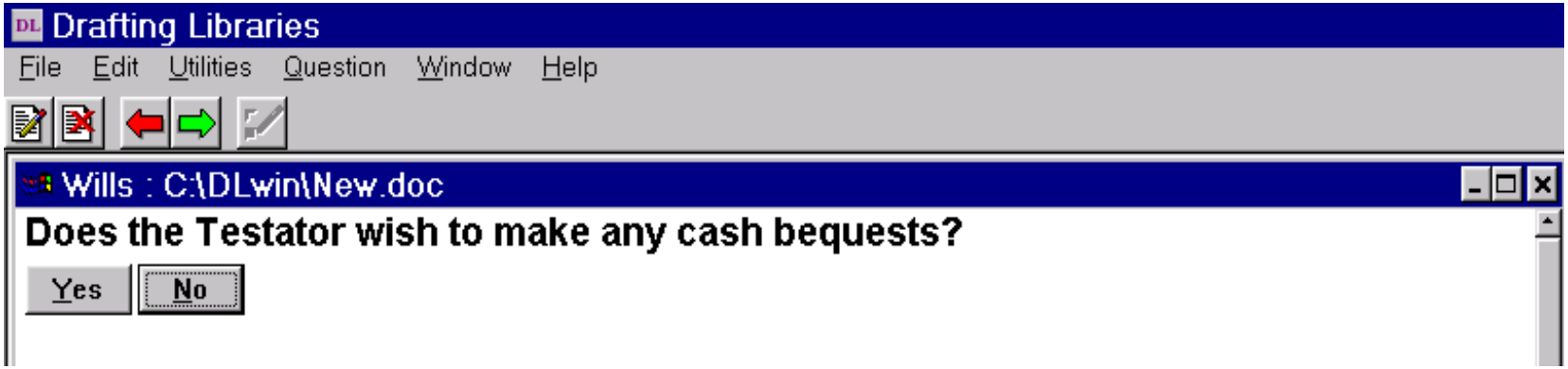
-- the creation of a charitable trust

-- a purchase of an annuity

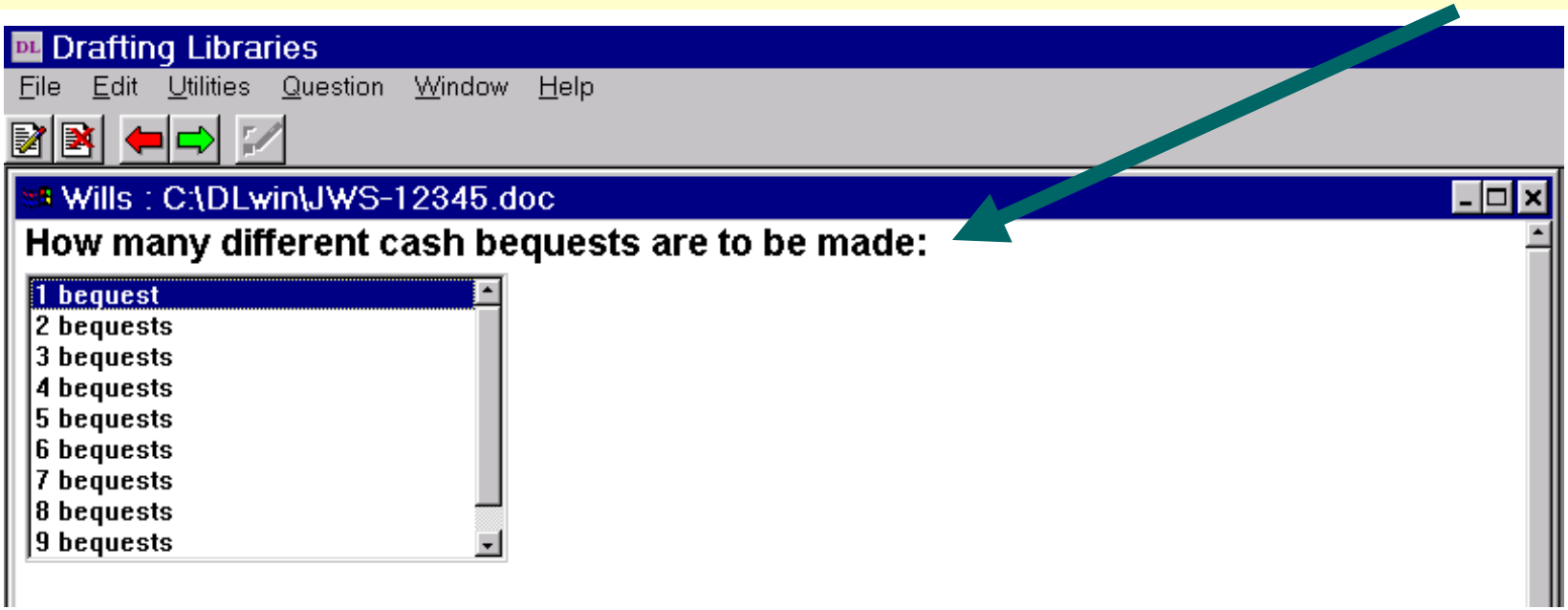
Is this Will to contain any of these provisions? [usually no]

Yes No

If yes, you are asked which items are to be included on the next few screens (omitted here).



If yes, answer how many different cash bequests - next screen



Next two are similar -- first -- ***married*** Testator

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

How is the residuary estate of the Testator to be bequeathed:

A to the wife outright if she survives the Testator (or if she predec the Testator to the children and issue, per stirpes*) [frequently

B a marital deduction trust f/b/o the wife (or, if she predeceases, to the children and issue)

C a minimum bequest to the wife (disinheriting her to the extent pe by law), and the balance to the children or other beneficiaries

D various other types of dispositions

* or to the children per capita, if desired

A B C D

Use this menu, choice B to include a marital deduction or QDOT trust.

Second of two similar screens -- here Testator ***un***married

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

How is the residuary estate to be disposed of:

A to one beneficiary outright [frequently <A>]

B to more than one beneficiary outright (in equal or unequal shares)

C to one beneficiary in an express trust*

D to more than one beneficiary (in equal or unequal shares), with an express trust for one or more of the beneficiaries*

* NOTE: If you elect <C> or <D>, an express trust will be created (e.g., a trust until the beneficiary reaches a specific age). If the beneficiary is a minor, it may be better to elect <A> or <B> instead. If the beneficiary is a minor when the Testator dies, electing <A> or <B> will give the Executor broad discretion to hold the bequest or to disburse it to custodians, etc. This may be better than creating an express trust with it associated expenses.

NOTE

A B C D

Use choice C or D on this menu to include a trust.

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

A beneficiary must have attained what age to be entitled to receive a bequest outright:

A eighteen (18) [usually <A>]
B twenty-one (21)
C twenty-five (25)
D thirty (30)
E twenty-five (25), but one half of the legacy is to be released from trust when he becomes 21
F thirty (30), but one third of the legacy is to be released when 21, and another one third when 25
G thirty-five (35), but one third of the legacy is to be released when 25, and another one third when 30
H OTHER

NOTE: Selecting an age greater than 21 will force the creation of an express trust, the administration of which can be expensive. Selecting <A> or <B> can avoid these expenses.

A B C D E F G H

Trustee choices --

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Does the Testator wish to appoint:

A **one Trustee [frequently <A>]**

B **two co-Trustees (with or without any successors)***

C **one Trustee and a successor Trustee**

* If a Trustee is also to be a beneficiary, an independent co-Trustee should be appointed so that discretionary disbursements may be made to the Trustee who is a beneficiary.

A B C

Note choice C warning --

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

If the beneficiary predeceases the Testator, the residuary estate is to pass:

A to the issue of the beneficiary [frequently <A>]
B to one or more alternate beneficiaries
C as if the Testator died intestate and unmarried
D the legacy expressly is not to lapse
E the legacy is to be silent as the death of the beneficiary (e.g., the beneficiary is not an individual)

A B C D E

This menu accounts for predeceased beneficiary options.

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

If the beneficiary predeceases the Testator, the residuary estate is to pass:

A to the issue of the beneficiary [frequently <A>]
B to one or more alternate beneficiaries
C as if the Testator died intestate and unmarried
D the legacy expressly is not to lapse
E the legacy is to be silent as the death of the beneficiary (e.g., the beneficiary is not an individual)

a

If said issue are minors, should any bequest to said issue expressly be held in trust (rather than giving broad discretion to hold or disburse the bequest)? [usually no]

Yes No

Trust option if minor contingent beneficiary.

Guardianship Options

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married, w-kids.doc

The Testator may wish to appoint a Guardian for a child who is a minor upon his death (in case his wife dies).

Does the Testator wish to appoint:

A **one Guardian for any child who is a minor when the Testator dies [frequently <A>]**

B **a Guardian and a successor Guardian**

C **two co-Guardians (with or without any successors)**

D **no Guardian is to be appointed in the Will**

A B C D

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

Click the [NEXT QUESTION] arrow if you wish to just "fill in the blanks" in the document.

DO YOU WISH TO:

A BOTH further tailor the document AND fill in the blanks
B further tailor the document, without filling in blanks
C just fill in the blanks **[frequently <C>]**
D merely produce a basic form

A B C D

Single vs. Separate Trust Choice

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married, w-kids.doc

Rather than having separate trusts for each child, you can create a single trust. This may reduce the Trustee commissions and other expenses to be paid, and enables the Trustee to make unequal payments based upon the needs of each child. A single trust, however, will continue until all children attain twenty-five (25) years of age.

If any child of the Testator is under twenty-five (25), are the bequests to all of the children to be held in a single trust for the children, rather than having a separate trust for each child under twenty-five (25)?

Yes No

More complex estate planning . . .

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

Most wills of the type you are preparing do NOT contain any of the following provisions:

apportionment of estate taxes; make a 2207A election re estate taxes on a QTIP trust; require a bond from the Executor; request the Executor to waive commissions; pay bank's commission as per its schedule; waive an inventory and accounting; express directions to pay or prepay debts; expressly disinherit someone (other than the wife); cut off a beneficiary who contests the will; a "virtual representation" clause;

Is this Will to contain any of these provisions? [usually no]

Yes No

If yes, other screens inquire for specifics . . .

Testator's Military Connection

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married, w-kids.doc

Is the Will to recite that the Testator is:

A in the military service [frequently <A>]
B retired from military service
C married to a wife who is in the military service
D married to a wife who is retired from military service
E a dependant of someone in the military service
F a dependant of someone retired from military service
G NONE of the above (or status is not to be recited)

A B C D E F G

Alternate Beneficiaries

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married, w-kids.doc

The wife and issue of the Testator may predecease him.

Does the Testator wish to designate one or more alternate beneficiaries?

Yes No

Trust Options

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married-Noncitizen Spouse.doc

Does the Testator wish:

A BOTH a credit shelter trust for the benefit of the wife* and a marital deduction trust [frequently <A>]

B just a marital deduction trust

C a credit shelter trust f/b/o the wife* and the balance outright to the wife

D a credit shelter trust f/b/o the children (not the wife) or a credit shelter cash bequest to the children [with the balance to the wife or some other beneficiaries]

E other options

* If you elect <A> or <C> above, questions will let you make the credit shelter trust f/b/o the children as well as the wife, or create a credit shelter trust funded only to the extent the wife disclaims her bequest.

A B C D E

Estate Tax & Trust Funding

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married-Noncitizen Spouse.doc

The unified credit will increase from $650,000 in 1999, to $675,000 in 2000, to $700,000 in 2002, to $850,000 in 2004, to $950,000 in 2005 and to $1,000,000 in 2006. Although these increases arguably parallel anticipated inflation, you might want to put a dollar cap on the amount of the credit shelter trust if you are concerned that the amount of the credit shelter trust will become unnecessarily large.

Do you want the Will to state a maximum dollar amount for the credit shelter trust? [usually no]

Yes No

Estate Tax & Trust Funding

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married-Noncitizen Spouse.doc

Is the credit shelter trust to be:

A funded using a formula that fully funds the trust based upon available unified credit ($650,000 for 1999, increasing to $1,000,000 by 2006) [frequently <A>]

B funded only to the extent that the wife elects to disclaim all or a part of her interests under the marital deduction trust*

C funded with a specific dollar amount [rarely]

* Option <B> gives the wife discretion to determine what is best for her after the death of the Testator (but relies upon her to make a proper decision).

A B C

Survivorship Preference

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\Married-Noncitizen Spouse.doc

You may want the Will to provide that, if the Testator and his wife die in a common accident, the wife shall be deemed to have survived the Testator. This may reduce the aggregate estate taxes to be paid by the couple. The appropriateness of such a provision depends on factors such as the relative values of the assets of the Testator and his wife, as well as the dispositive provisions of their wills. Generally, if the estate of the Testator is sizable and his wife's estate is modest, it is desirable to include such a provision.

Do you want the Will to provide that in the event of death in a common accident the wife shall be deemed to have survived the Testator?

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Does the Testator wish to appoint:

A one Executor

B two co-Executors (with or without any successors)

C one Executor and a successor Executor [frequently <C>]

A B C

Executor choices . . .

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New File.doc

Does the Testator wish to appoint as the Executor:

A his wife

B his wife and a co-Executor (with or without any successors)

C his wife and a successor Executor [frequently <C>]

D one Executor other than his wife

E two co-Executors neither of which is his wife (with or without any successors)

F one Executor and a successor Executor neither of which is his wife

A B C D E F

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\JWS-12345.doc

Is the Will to recite that the Testator is:

A in the military service [frequently <A>]

B retired from military service

C a dependant of someone in the military service

D a dependant of someone retired from military service

E NONE of the above (or status is not to be recited)

A B C D E

Choice A or C (above) results in the screen below covering domiciliaries outside the Testator's state of domicile.

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the Will to be executed OUTSIDE OF VIRGINIA (the domicile of the Testator) because of such military service?

y

Enter the base or place where the Testator is stationed.

Stationed at:

Use this menu to enter the names of the Executor and alternate or successor Executor

Drafting Libraries

File Edit Utilities Question Window Help

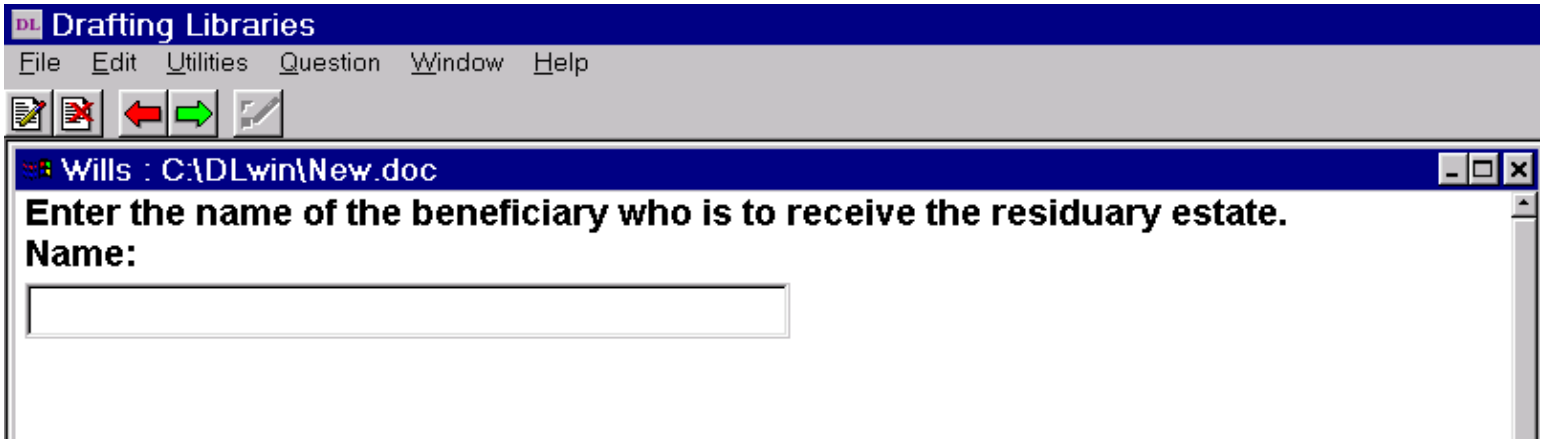
Wills : C:\DLwin\New.doc

NOTE: When answering the fill-in-the-blank questions which follow, you may precede the name with the relationship of the person, if any, to the Testator (e.g., "my brother John Doe"). Omission of the comma prior to the name is suggested.

Name of Executor:

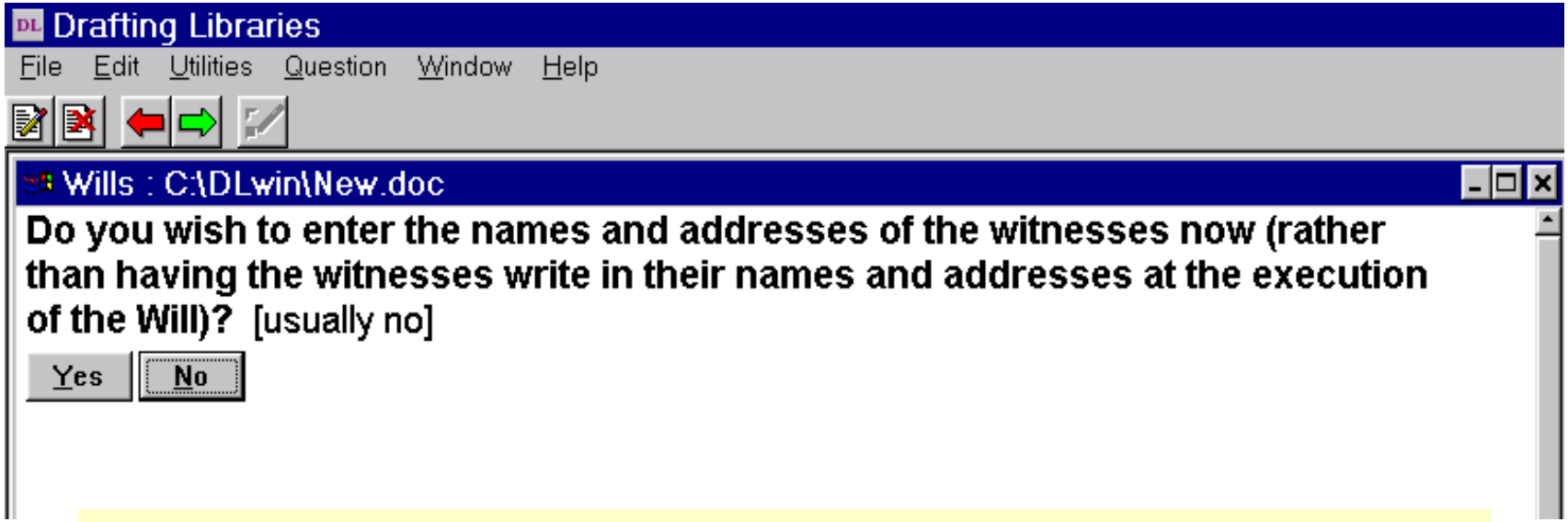
Name of successor Executor:

Name the Beneficiary



41

Witnesses



Where you know in advance who will serve as witnesses it will save time to name them here – names can be recalled for other wills.

Ancillary Estate Planning Documents

Screens following this one illustrate the menu choices to prepare:

- **Advance Medical Directive/Living Will**
- **Health Care Power of Attorney**
- **General Power of Attorney**
- **Family Tree Affidavit**
- **Asset List**
- **Execution Checklist**
- **Legal Term Explanatory Memorandum**

Living Will & Health Care Proxy

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Does the Testator wish to make a Living Will (a declaration that if he is terminally ill and in a coma, medical treatment should NOT be given to prolong his life) and/or an appointment of an agent to make health care decisions? [frequently yes]

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Some clients want to appoint an agent to make health care decisions, but (for religious or other reasons) do not want a Living Will.

Does the Testator want just an agent to make health care decisions (BUT NOT a Living Will)? [usually no]

Yes No

Naming Health Care Proxy

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Do you know who the Testator wishes to designate as his agent to make health care decisions? [frequently yes]

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Name of Agent:

Street Address:

City, State ZIP:

Tele. No. (or click the [NEXT QUESTION] arrow):

Naming Second/Successor Health Care Proxy

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

With regard to the appointment of a SECOND agent to make health care decisions:

A a second agent is NOT to be designated [frequently <A>]

B a second agent is to be designated, and either agent can act separately

C a second agent is to be designated, and the agents must act jointly unless one is incapacitated [rarely]

D a second agent is to be designated, and the second agent is to act (as successor) only if the first is incapacitated

A B C D

Agent's Authority

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is said agent to be authorized to donate organs of the Testator for transplants? [frequently yes]

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the authority to be limited to organ transplants, rather than giving broader authority to donate organs and tissue for other medical, educational or scientific purposes? [frequently yes]

Yes No

Living Will Features

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the living will to express a desire by the Testator to die at home rather than in a hospital?

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

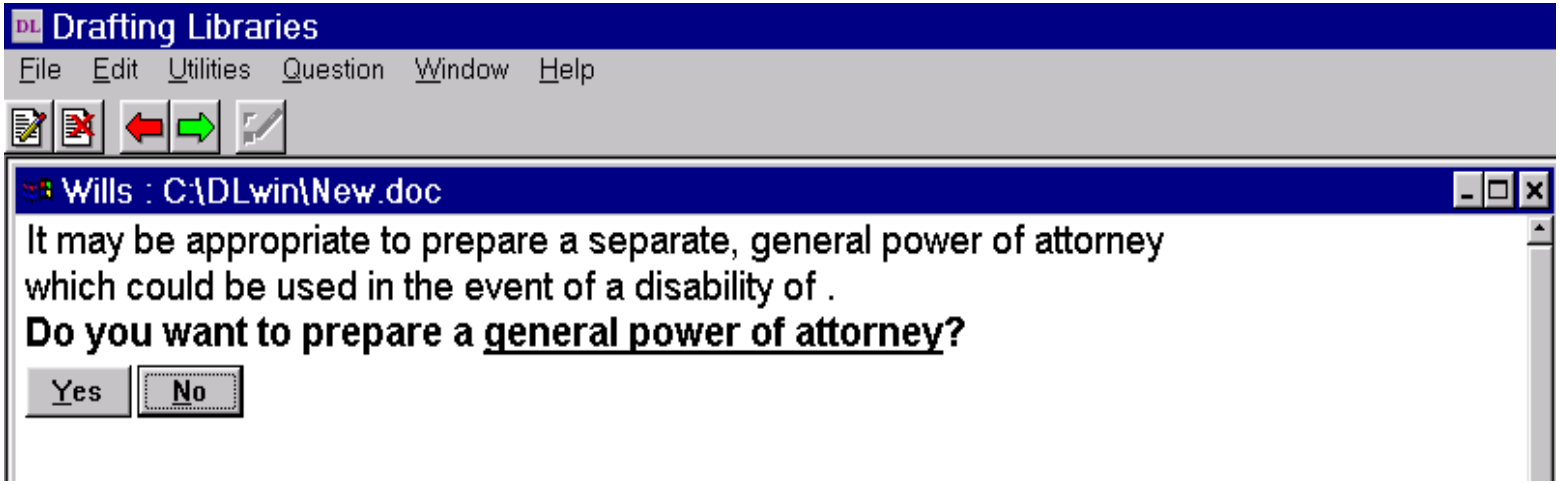
Choice of Law

Wills : C:\DLwin\New.doc

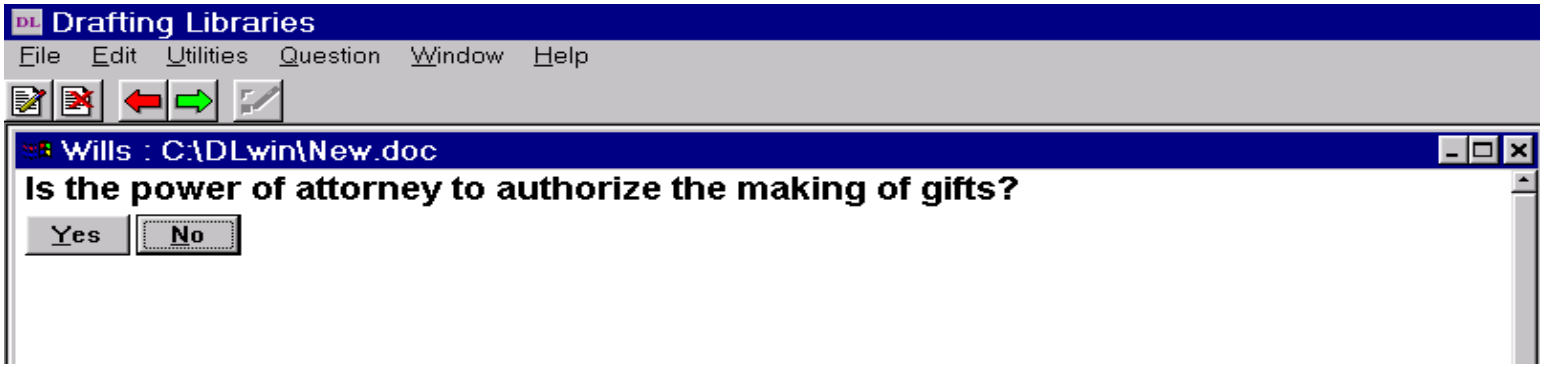
The Will you are preparing is for a resident of **Virginia**. The living will could be governed by the laws of some other State. For example, if the Testator probably would be hospitalized in a State other than Virginia, you might wish to have the living will governed by the laws of the State in which that hospital is located.

Do you wish to have the living will governed by the laws of a State OTHER THAN VIRGINIA?

Yes No



If yes, answer a series of questions about the POA- next screen



More specifics on General POA -

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

A power to revoke an inter vivos trust may be appropriate if property in the trust is to be used for gifts.

Is the power of attorney to authorize the revocation or amendment of revocable inter vivos trusts?

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the power of attorney to authorize transfers to an existing inter vivos trust?

Yes No

More specifics on General POA -

Drafting Librar

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the power of attorney to authorize payment of taxes, filing of returns and other tax matters?

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the power of attorney to provide detailed powers with respect to retirement benefit plans and IRA's?

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the power of attorney to authorize sell or dispose of a specific parcel of real estate?

Yes No

More specifics on General POA -

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Is the power of attorney:

A **to expressly survive the incompetence or disability of the Testator**

B **to become effective only in the event of such incompetence or disability [frequently <B>]**

C **to be silent regarding incompetence or disability**

A B C

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Should the power of attorney terminate on a specific date? [usually no]

Yes No

Attorney-in-fact

Drafting Libraries

File Edit Utilities Question Window

Wills : C:\DLwin\New.doc

Enter the name of the attorney-in-fact.
Name:

Street Address:

City, State ZIP:

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

With regard to the appointment of a SECOND attorney-in-fact:

A a second attorney-in-fact is NOT to be designated [frequently <A>]

B a second attorney-in-fact is to be designated, and either attorney-in-fact can act separately

C a second attorney-in-fact is to be designated, and they must act jointly unless one is incapacitated [rarely]

D a second attorney-in-fact is to be designated, and the second attorney-in-fact is to act (as successor) only if the first is incapacitated

A B C D

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Enter the address of the Testator.
Street Address:

City, State ZIP:

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Does the Testator wish to express his desires regarding funeral arrangements?
[usually no]

Yes No

Not usually a good idea to include in the will - better to indicate in a letter of instruction.

Execution Details

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

Are acknowledgments to be taken by a person authorized under 10 U.S.C. 1044a, rather than a notary public?

Yes No

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\New.doc

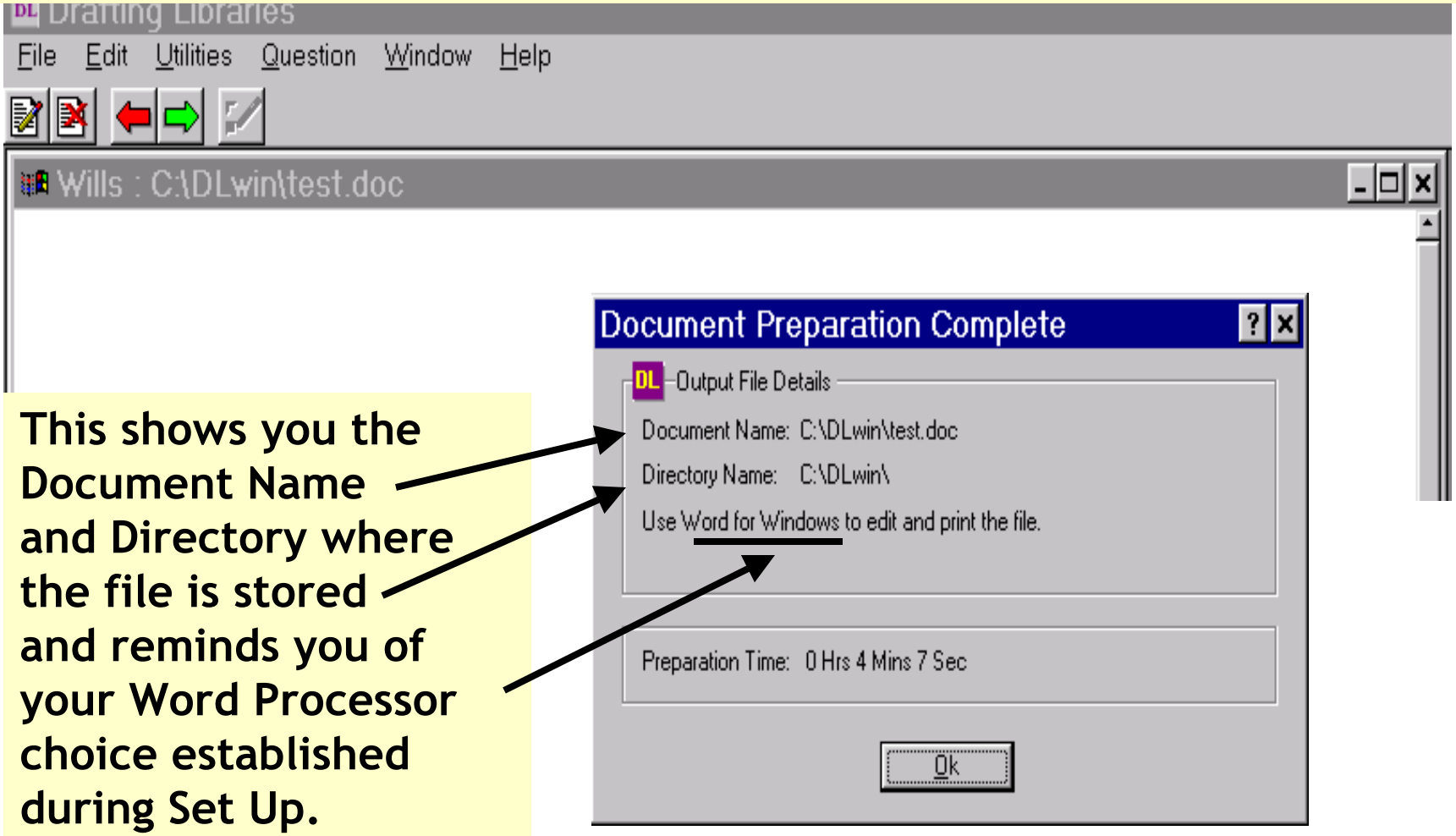
A "venue" precedes acknowledgments and sworn statements to identify the place where the document is executed. Since the Will is being executed outside of Virginia the proposed venue will be blank (other than the ss.), like the following sample, unless you elect to change it:

, ss.

Do you wish to fill in the venue? [frequently yes]

Yes No

After finishing the will (and ancillary documents), *DL Wills* shows you this completion notice.



This shows you the Document Name and Directory where the file is stored and reminds you of your Word Processor choice established during Set Up.

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\RC Workshop Will.doc

Question

Would you like to save the answers you have entered for this document?

Yes No

Network ID: ADA12 Num Ins Scr

Start Microsoft P... Inbox - Micr... CD Player - ... Drafting ... 6:06 PM

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\RC Workshop Will.doc

Save Index

If you wish to save the answers for the document you just prepared, click the <Save> button, otherwise click <Cancel>. You can add a comment to help you identify the answers.

Index File Name: DL-N22.DLX

Current Directory: C:\DLwin

Change

Comment:

Cancel

Save

Network ID: ADA12

Num Ins Scr

Start Microsoft P... Inbox - Micr... CD Player - ... Drafting ... 6:07 PM

Drafting Libraries

File Edit Utilities Question Window Help

Wills : C:\DLwin\RC Workshop Will.doc

Save Index

If you wish to save the answers for the document you just prepared, click the <Save> button, otherwise click <Cancel>. You can add a comment to help you identify the answers.

Index File Name: DL-N22.DLX

Current Directory: C:\DLwin

Change

Comment: COL HARDCHARGER

Cancel

Save

Network ID: ADA12

Num Ins Scr

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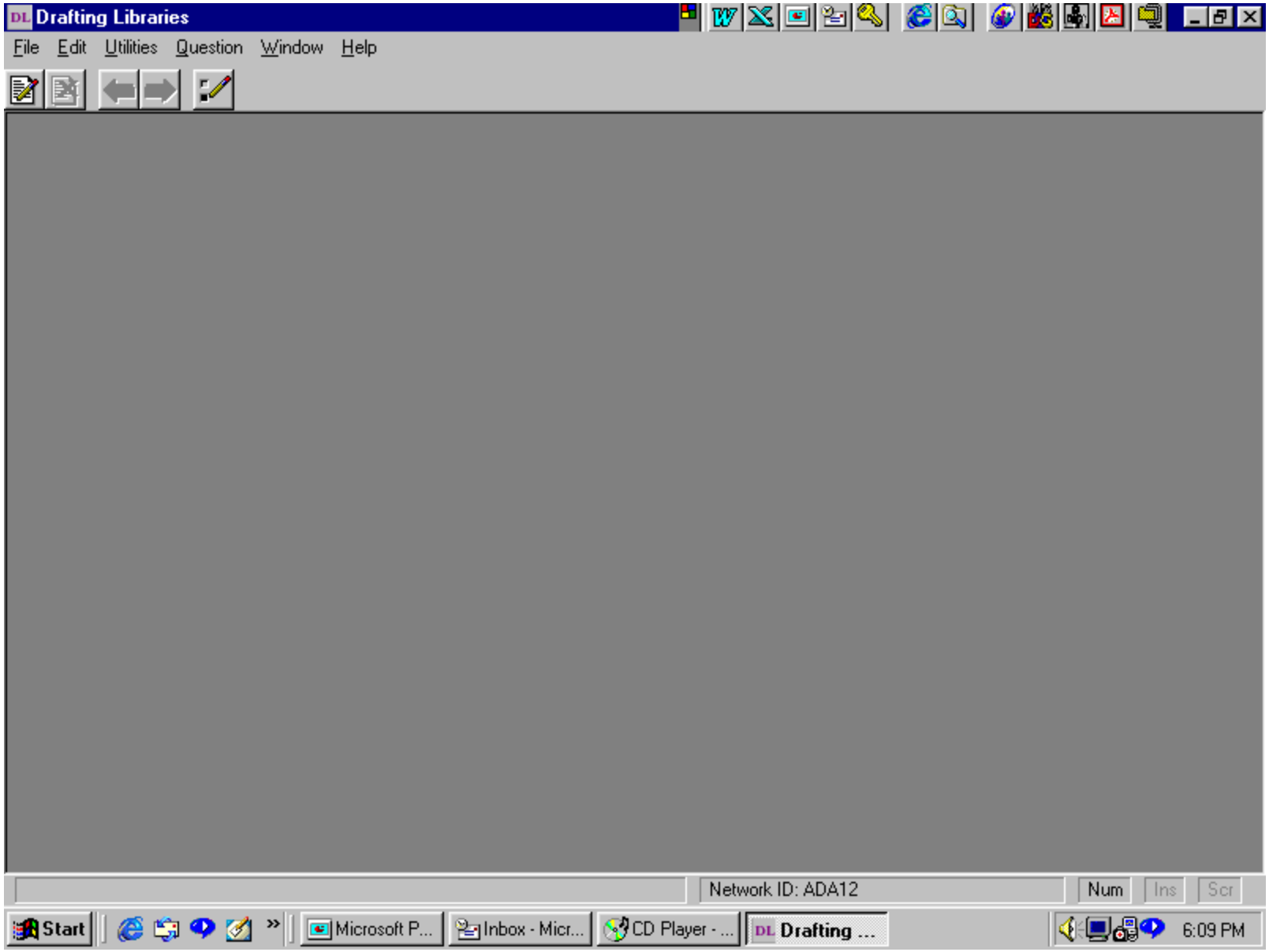
Drafting Libraries
File Edit Utilities Question Window Help
Network ID: ADA12
Num Ins Scr
Start
Microsoft P...
Inbox - Micr...
CD Player - ...
Drafting ...
6:09 PM

Drafting Libraries

File Edit Utilities Question Window Help

Microsoft Word

Network ID: ADA12 Num Ins Scr

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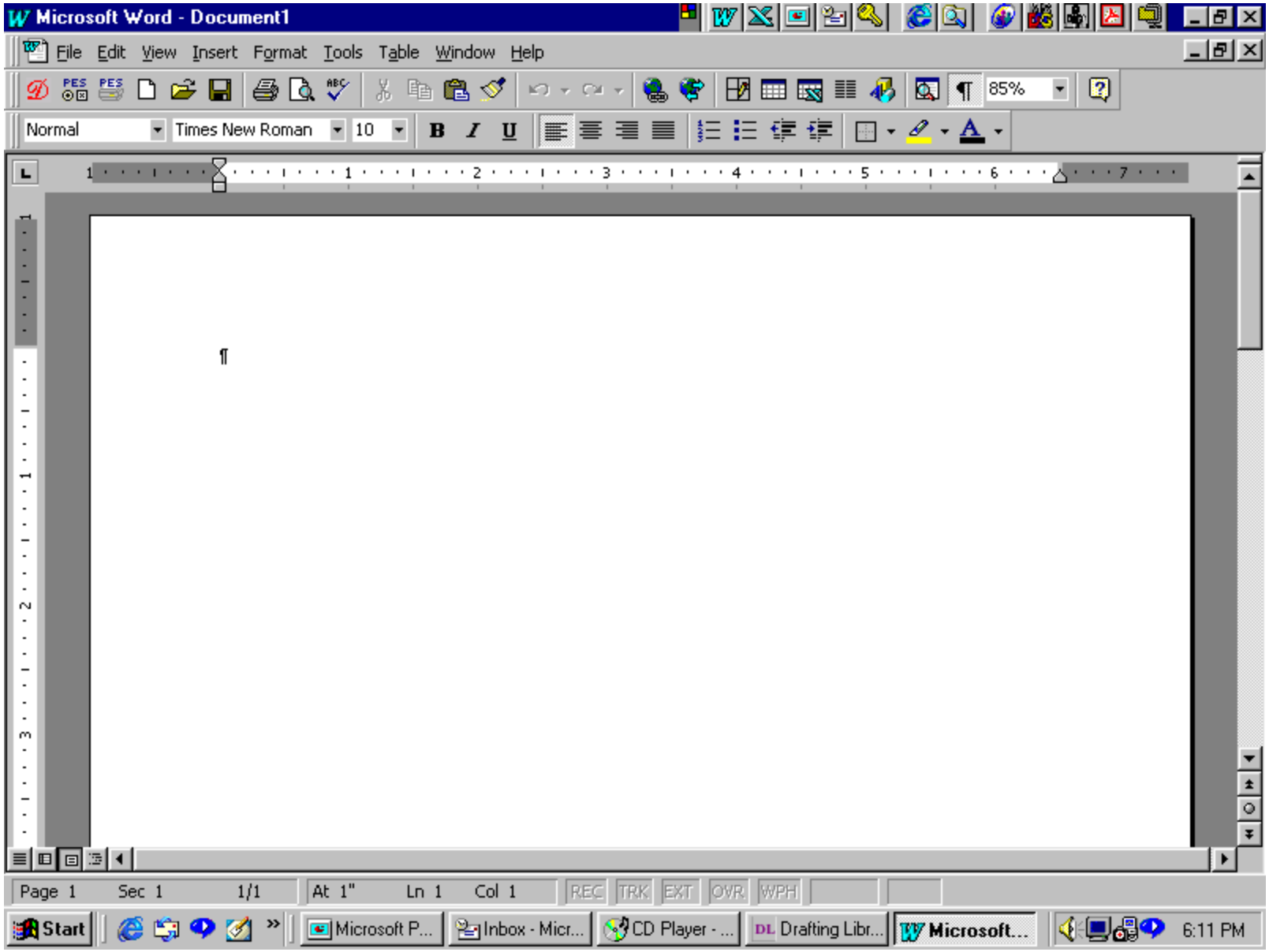
Microsoft Word - Document1
File Edit View Insert Format Tools Table Window Help
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10
Page 1 Sec 1 1/1 At 1" Ln 1 Col 1 REC TRK EXT OVR WPH
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6:11 PM

Microsoft Word - Document1

File Edit View Insert Format Tools Table Window Help

New... Ctrl+N
Open... Ctrl+O
Close

Save Ctrl+S
Save As...
Save as HTML...
Versions...

Page Setup...
Print Preview
Print... Ctrl+P

Send To
Properties

1 C:\...\Will Questionaires from Parker...
2 C:\...\Will Worksheet for DL Wills.doc
3 C:\...\laaws xxi - jagcnet databases ...
4 C:\WINDOWS\...\JAGCNetIntranet[1]

Exit

85%

Page 1 Sec 1 1/1 At 1" Ln 1 Col 1 REC TRK EXT OVR WPH

Start Microsoft P... Inbox - Micr... CD Player - ... Drafting Libr... Microsoft... 6:12 PM

Microsoft Word - Document1

File Edit View Insert Format Tools Table Window Help

Normal | Times New Roman | 10 | 85%

Open

Look in: (C:)

!My Documents	My Music	AUTOEXEC.BAT	
CCHWIN	NCDTREE	AUTOEXEC.DLY	
DLwin	PARATOOL	autoexec.nav	
DMI	Program Files	AUTOEXEC.UTS	
FormFlow	RECYCLED	BOOTLOG.PRV	
FORMMENU	UTS99	BOOTLOG.TXT	
HP_INFO	WINDOWS	BOOTSECT.F16	
LAN	ASD.LOG	CLOSEUP.EXE	
Lotus	AUTOEXEC.001	COMMAND.COM	
MOUSE	AUTOEXEC.ADT	CONFIG.001	

Open | Cancel | Advanced...

Find files that match these search criteria:

File name: | Text or property: | Find Now

Files of type: All Files | Last modified: any time | New Search

33 file(s) found.

Page 1 Sec 1 1/1 At 1" Ln 1 Col 1 REC TRK EXT OVR WPH

Start | Microsoft P... | Inbox - Micr... | CD Player - ... | Drafting Libr... | Microsoft... | 6:14 PM

Microsoft Word - Document1

File Edit View Insert Format Tools Table Window Help

Normal | Times New Roman | 10 | 85%

Open

Look in: DLwin

- poa gift.doc
- RC Workshop Will.doc
- require debts.doc
- RR 15 MAR 00.doc
- sample 17 april 2000.doc
- sample1.doc
- SHIFFLETT AMD DPOAHC.doc
- Star3333.doc
- Star3333-1.doc
- Star3333-99.doc
- tax apportionment.doc
- UNBORN CHILD PROVISION.doc
- unborn children.doc
- Uninst.isu

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LAST WILL AND TESTAMENT

OF

COL R.C. WORKSHOP

I, a resident of the State of New York, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me. I am in the military service of the United States.

FIRST: I direct that the expenses of my last illness and funeral, the expenses of the administration of my estate, and all estate, inheritance and similar taxes payable with respect to property included in my estate, whether or not passing under this will, and any interest or penalties thereon, shall be paid out of my residuary estate, without apportionment and with no right of reimbursement from any recipient of any such property.

SECOND: I give all tangible personal property owned by me at the time of my

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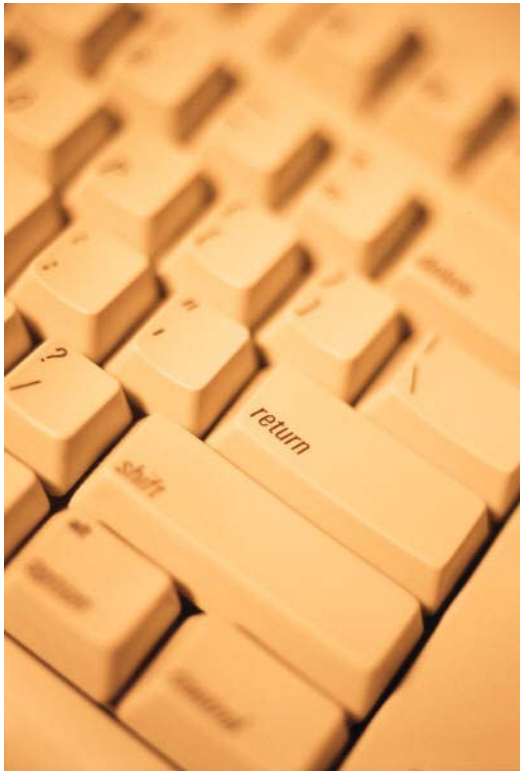
Smart Will Templates

- Sample "answer" files
  - Single soldier
  - Married soldier
  - Others
- Software Caveat



Conclusion

- DL Wills is a powerful estate planning tool
- Attorney prepares, crafts the will (and other estate planning documents) using the tool

Judge Advocate Officer Advanced Course 2001

CONSUMER LAW FOR SUPERVISORS

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INTRODUCTION

I. ANALYZING CONSUMER PROTECTION PROBLEMS[1]

A. How did the transaction take place?

1. FTC Door-to-Door Sales Rule
2. FTC Telemarketing Rule
3. Truth-in Lending Act Cooling Off Period
4. Unconscionability/Traditional Contract Law
5. UDAP laws

B. Is their a problem with the goods that might justify relief?

1. Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301-12)
2. Uniform Commercial Code Warranty Provisions (§§ 2-312 - 2-318)
3. State Warranty Laws/"Lemon" Laws

C. How were the goods financed?

1. Consumer Leasing Act
2. Truth-in-lending Act
3. Fair Credit Billing Act
4. Electronic Funds Transfer Act

D. What are the downstream consequences for the consumer?

1. Fair Debt Collection Practices Act
2. Fair Credit Reporting Act

[1] For a detailed treatment of areas in the analysis that I do not cover in this outline, see JA 265, Consumer Law Guide on JAGCNet.

II. THE LEAST SOPHISTICATED CONSUMER

A. "The most widely accepted test for determining whether a collection letter violates § 1692e is an objective standard based on the 'least sophisticated consumer.'" *Clomon v. Jackson,* 988 F.2d 1314 (2d Cir. 1993).

B. "This standard has been adopted by all federal appellate courts that have considered the issue. *See Smith v. Transworld Systems, Inc*., 953 F.2d 1025, 1028 (6th Cir.1992); *Graziano v. Harrison*, 950 F.2d 107, 111 (3d Cir.1991); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174-75 (11th Cir.1985); *Baker v. G.C. Services Corp*., 677 F.2d 775, 778 (9th Cir.1982). *But see Blackwell v. Professional Business Services, of Georgia, Inc.*, 526 F.Supp. 535, 538 (N.D.Ga.1981) (applying "reasonable consumer" standard)." *Clomon, supra.*

C. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law. The Supreme Court has noted that:

> *[t]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious.*
>
> -- *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116, 58 S.Ct. 113, 115, 82 L.Ed. 141 (1937) (finding encyclopedia-selling scheme in violation of Federal Trade Commission Act).

D. The 2d Circuit has a great quote in one of their cases: "the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 et seq., was not made " 'for the protection of experts, but for the public--that vast multitude which includes the ignorant, the unthinking and the credulous.' " ***1319** Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.2d 676, 679 (2d Cir.1944), quoting Florence Manufacturing Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir.1910)."

III. RESOURCES

A. National Consumer Law Center Publications

1. ADDRESS: 18 Tremont ST, Boston, MA 02108-2336
2. PHONE: (617) 523-8089

3. INTERNET: www.consumerlaw.org

B. Commerce Clearing House CD-ROM

1. ADDRESS: 4025 West Peterson Avenue
2. PHONE: (800) 835-0105
3. INTERNET: www.cch.com

C. Federal Trade Commission

1. ADDRESS: Office of Public Affairs, Washington, DC 20580
2. PHONE: (202) 326-2180
3. INTERNET: www.ftc.gov

D. Federal Reserve Board: www.bog.frb.fed.us

E. Better Business Bureau: www.bbb.org

F. GSA Consumer Information Center: www.pueblo.gsa.gov

G. National Fraud Information Center (National Consumer League): www.fraud.org (Links to AG Sites on the Web)

H. Securities & Exchange Commission: www.sec.gov

THE TRANSACTION

I. FEDERAL TELEMARKETING RULE

A. References.

1. 16. C.F.R. Part 310.

2. 15 U.S.C. §§ 6101 - 08 (1996).

B. Purpose.

1. The Rule implements the Telemarketing & Consumer Fraud and Abuse Protection Act which was enacted to "offer consumers necessary protection from telemarketing deception and abuse."

2. The Rule prohibits certain telemarketing practices and prescribes certain disclosures.

C. Key Definitions:

1. MATERIAL means likely to affect a person's choice of, or conduct regarding, goods or services.

2. CUSTOMER means any person who is or may be required to pay for goods or services offered through telemarketing.

3. SELLER means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

4. TELEMARKETER means any person who, in connection with telemarketing, initiates or receives telephone calls to or from the customer.

D. Scope.

1. Telemarketing under the Rule is:

a. Any plan, program or campaign . . .

b. which is conducted to induce the purchase of goods or services . . .

c. by use of one or more telephones . . .

d. AND which involves more than one interstate telephone call.

2. Specifically excluded are:

a. Catalog sales where

(1) The catalog:

(a) Contains written description or illustration of goods

(b) Gives the business address of seller

(c) Contains multiple pages of written material and illustrations; and

(d) Is issued at least once per year.

(2) AND the seller only RECEIVES calls initiated by consumer to take orders without further solicitation.

b. Sale of pay-per-call services (already regulated under 16 C.F.R Part 308).

c. Sale of franchises (already regulated under 16 C.F.R. Part 436).

d. Calls where the sale is not complete until after a face-to-face presentation by the seller.

e. Calls initiated by consumer:

(1) Without any solicitation on the part of the seller;

(2) In response to an advertisement through any media, EXCEPT:

(a) investment opportunities

(b) Services to remove derogatory credit information

(c) Services to assist in the return of money or value for previous telemarketing transactions

(d) Ads that promise a high degree of success in obtaining or arranging extensions of credit.

(3) In response to a direct mail solicitation that clearly, conspicuously, and truthfully discloses all material information required by the Rule.

f. Calls between a telemarketer and any business (except for the sale of nondurable office or cleaning supplies).

E. Prohibitions of the Rule.

1. Deceptive Telemarketing Acts or Practices (16 C.F.R. § 310.3).

a. Failure to disclose:

(1) Total costs of transaction

(2) All material restrictions, limitations, and conditions of transaction.

(3) Any policy of not making refunds.

(4) All material terms and conditions of any refund, cancellation, or repurchase policy that IS mentioned in the call.

(5) In a prize promotion, the odds of receiving a prize and all material conditions or costs to receive or redeem the prize.

b. Misrepresenting, directly or by implication:

(1) Total costs of transaction

(2) Any material restrictions, limitations, and conditions of transaction.

(3) Any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services.

(4) Any material terms and conditions of any refund, cancellation, or repurchase policy

(5) Any material aspect of a prize promotion.

(6) Any material aspect of an investment opportunity.

(7) Seller's affiliation with any government or third party organization.

c. Obtaining or submitting for payment a form of negotiable paper without the person's express verifiable authorization. Authorization is verifiable if it is:

(1) Express and in writing.

(2) Express and made orally and is tape recorded

(3) Written confirmation of the transaction has been sent to the customer PRIOR TO submission for payment and the confirmation includes all disclosures required under the Rule.

d. Making a false or misleading statement to induce any person to pay for goods or services.

2. Abusive Telemarketing Acts or Practices.

a. Threats, intimidation, profane, or obscene language.

b. Requesting or receiving payment for goods and services to fix credit reports UNLESS:

(1) The time frame in which the seller is supposed to have provided all goods and services has passed AND

(2) The seller provides the person with documentation of success in the form of a credit report having been issued more than 6 months after the results were achieved.

c. Requesting or receiving payment for goods and services represented to return money or other value from a previous telemarketing transaction until 7 business days after the money or other item is returned to the consumer.

d. A PATTERN OF PHONE CALLS that is:

(1) causing the phone to ring repeatedly and continuously with intent to annoy, abuse, or harass any person at the called number OR

(2) Initiating a call with a person who has previously stated that he or she does not wish to receive calls made by or on behalf of the seller whose goods or services are being offered. EXCEPT, seller or telemarketer is not liable under this practice IF:

(a) It has established and implemented WRITTEN procedures to comply with this rule;

(b) It has trained its personnel on these procedures;

(c) The seller or telemarketer has maintained a list of those who may not be called; AND

(d) The subsequent call is a result of error.

e. Calls made earlier than 8:00 a.m. or later than 9:00 p.m. at the called person's location UNLESS the person consents to calls outside that time frame.

f. Failure to make the following oral disclosures:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods and services;

(3) The nature of the goods and services; AND

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered.

3. Record Keeping Requirements:

a. Seller or telemarketer must keep for 24 months:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for all prizes represented to have a value of $25 or more.

(3) The name and address of each customer who purchases goods, the date the goods were shipped, and the amount paid.

(4) The names and addresses of all current and former employees directly involved in telephone sales.

(5) All verifiable authorizations (for cashing checks, etc.) required by the rule.

b. Records may be kept in any form as the seller or telemarketer keeps similar records in the ordinary course of business.

F. Enforcement of the Rule.

1. Violation of the Rule is an unfair and deceptive act or practice under the 15 U.S.C. § 57a.

2. Any state officer can bring an action on behalf of consumers.

3. Private causes of action ARE authorized.

4. Prior to initiating an action (if feasible), notice is to be given to the FTC.

THE PAYMENT

I. CONSUMER LEASING ACT

A. References

1. Chapter 5 of the Truth in Lending Act, codified at 15 U.S.C.A. §§ 1667a-f (West 1997).

2. Regulation M, 12 C.F.R. Part 213.

3. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING Chapter 9 (3d. ed. 1995 & Supp. 1997).

B. Purpose

1. To ensure that lessees of personal property receive meaningful disclosures that enable them to compare lease terms with other leases and, where appropriate, with credit transactions;

2. To limit the amount of balloon payments in consumer lease transactions; and

3. To provide for the accurate disclosure of lease terms in advertising.

C. Key Definitions (12 C.F.R. § 213.2)

1. "Open-end lease" means a consumer lease in which the lessee's liability at the end of the lease term is based on the difference between the residual value of the leased property and its realized value.

2. "Closed-end lease" means a consumer lease other than an open-end lease as defined in this section.

3. "Realized value" means:

a. The price received by the lessor for the leased property at disposition;

b. The highest offer for disposition of the leased property; or

c. The fair market value of the leased property at the end of the lease term.

4. "Residual value" means the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment.

D. Scope

1. Requirement 1: A "consumer lease". These are contracts in the form of a bailment or lease for the use of personal property

a. By a natural person

b. Primarily for personal, family, or household purposes,

c. For a period exceeding four months, and

(1) Rent-to-Own appliance leases that can be terminated at any time *without penalty* have been held to NOT meet this requirement. Thus, the Act would not apply to them.

(2) However, if there is a penalty, the Act has been held to apply.

d. For a total contractual obligation not exceeding $25,000

(1) Total Contractual Obligation is not defined in the statute or rule.

(2) EFFECTIVE 1 JAN 1997: A new provision in the Official Staff Commentary, however, indicates that the total contractual obligation is not necessarily the same as the total of payments disclosed under §213.4(e). The total contractual obligation includes nonrefundable amounts a lessee is contractually obligated to pay to the lessor, but excludes items such as:

(a) Residual value amounts or purchase-option prices;

(b) Amounts collected by the lessor but paid to a third party, such as taxes, license and registration fees.

(3) This requirement exempts many automobile leases from the Act. STATE LAW may help here.

e. The applicability of the Act does NOT depend on whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease.

2. Requirement 2: The lease is made by a "lessor". This is:

a. A person who regularly leases, offers to lease, or arranges for the lease of personal property under a consumer lease.

b. A person who has leased, offered, or arranged to lease personal property more than five times in the preceding calendar year or in the current calendar year is subject to the act

E. Exclusions

1. The Act does NOT apply to "credit sales" under Regulation Z (12 CFR 226.2(a)).

2. It also does not apply to leases for agricultural, business, or commercial purposes or a lease made to an organization.

3. The Act does not apply to a lease transaction of personal property which is incident to the lease of real property and which provides that:

a. The lessee has no liability for the value of the personal property at the end of the lease term except for abnormal wear and tear; and

b. The lessee has no option to purchase the leased property.

F. Requirements of the Act

1. Disclosures. There is a new Regulation M (12 C.F.R., Part 213) that substantially changes disclosures under the Act. The new regulation was effective 31 Oct 1996, but compliance was made optional until 1 Oct 1997. 61 Fed. Reg. 52246 (Oct. 7, 1996). Compliance has since been extended to 1 January 1998. CCH, Consumer Credit Guide Newsletter, Issue #771, Oct. 7, 1997.

a. Form of Disclosures (12 C.F.R. § 213.3)

(1) The disclosures shall be made

(a) clearly and conspicuously,

(b) in writing

(c) in a form the consumer may keep.

(2) The writing must

(a) be dated

(b) identify the lessor and the lessee.

(3) Disclosures may be made:

(a) in the contract or other document evidencing the lease.

(b) in a separate statement that identifies the consumer lease transaction.

(c) Disclosures required to be segregated may be provided in a separate dated statement that identifies the lease, and the other required disclosures may be provided in the lease contract or other document evidencing the lease.

(4) Timing of disclosures. A lessor shall provide the disclosures to the lessee prior to the consummation of a consumer lease.

(5) Minor variations. A lessor may disregard the effects of the following in making disclosures:

(a) That payments must be collected in whole cents;

(b) That dates of scheduled payments may be different because a scheduled date is not a business day;

(c) That months have different numbers of days; and

(d) That February 29 occurs in a leap year.

b. Content of disclosures. 12 C.F.R. § 213.4. For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable.

(1) *Segregation of certain disclosures.* The following disclosures shall be segregated from other information and shall contain only directly related information. The disclosures shall be provided in a manner substantially similar to the applicable model form in appendix A to Regulation M (The Federal Box). (2) §§213.4(b) through (f), (g)(2), (h)(3), (i)(1), (j), and (m)(1).

(a) Amount due at lease signing. The total amount to be paid prior to or at consummation, using the term "amount due at lease signing." The lessor shall itemize each component by type and amount.

(b) Payment schedule and total amount of periodic payments. The number, amount, and due dates or periods of payments scheduled under the lease, and the total amount of the periodic payments.

(c) Other charges. The total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments.

(d) Total of payments. The total of payments, with a description such as "the amount you will have paid by the end of the lease." This amount is the sum of the amount due at lease signing (less any refundable amounts), the total amount of periodic payments (less any portion of the periodic payment paid at lease signing), and other charges. In an open-end lease, a description such as "you will owe an additional amount if the actual value of the vehicle is less than the residual value" shall accompany the disclosure.

(e) Payment calculation. In a motor-vehicle lease, a mathematical progression of how the scheduled periodic payment is derived. The calculation must show the following 11 steps:

(i) *Gross capitalized cost.* If requested by the lessee, an itemization shall be provided before consummation.

(ii) *Capitalized cost reduction.* "the amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost."

(iii) *Adjusted capitalized cost.*

(iv) *Residual value.*

(v) *Depreciation and any amortized amounts.* The difference between the adjusted capitalized cost and the residual value.

(vi) *Rent charge.* This is the difference between the total of the base periodic payments over the lease term minus the depreciation and any amortized amounts.

(vii) *Total of base periodic payments.*

(viii) *Lease term.*

(ix) *Base periodic payment.*

(x) *Itemization of other charges.* An itemization of any other charges that are part of the periodic payment.

(xi) *Total periodic payment.* The sum of the base periodic payment and any other charges that are part of the periodic payment.

(f) Early-termination notice. In a motor-vehicle lease, a notice substantially similar to the following: "Early Termination. You may have to pay a substantial charge if you end this lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater this charge is likely to be."

(g) Notice of wear and use standard. In a motor-vehicle lease, a notice regarding wear and use substantially similar to the following: "Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use." The notice shall also specify the amount or method for determining any charge for excess mileage.

(h) Purchase Option at End of lease term. Notice of the purchase price and when the lessee may exercise this option.

(i) Statement referencing nonsegregated disclosures. A statement that the lessee should refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable.

(j) Rent and other charges. The rent and other charges, paid by the lessee and required by the lessor as an incident to the lease transaction, with a description such as "the total amount of rent and other charges imposed in connection with your lease [state the amount]."

(2) Other (Non-segregated) Disclosures

(a) Description of property. A brief description of the leased property sufficient to identify the property to the lessee and lessor.

(b) Conditions and disclosure of charges for early termination-- A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term; and the amount or a description of the method for determining the amount of any penalty or other charge for early termination, which must be reasonable.

(c) Maintenance responsibilities. The following provisions are required:

(i) Statement of responsibilities. A statement specifying whether the lessor or the lessee is responsible for maintaining or servicing the leased property, together with a brief description of the responsibility;

(ii) Wear and use standard. A statement of the lessor's standards for wear and use (if any), which must be reasonable

(d) Purchase option during the lease term. A statement of whether or not the lessee has the option to purchase the leased property and, if prior to the end of the lease term, the purchase price or the method for determining the price and when the lessee may exercise this option.

(e) Liability between residual and realized values. A statement of the lessee's liability, if any, at early termination or at the end of the lease term for the difference between the residual value of the leased property and its realized value.

(f) Right of appraisal. If the lessee's liability at early termination or at the end of the lease term is based on the realized value of the leased property, a statement that the lessee may obtain, at the lessee's expense, a professional appraisal by an independent third party (agreed to by the lessee and the lessor) of the value that could be realized at sale of the leased property. The appraisal shall be final and binding on the parties.

(g) Liability at end of lease term based on residual value.

(h) Fees and taxes. The total dollar amount for all official and license fees, registration, title, or taxes required to be paid to the lessor in connection with the lease.

(i) Insurance. A brief identification of insurance in connection with the lease including:

(i) Voluntary insurance. If the insurance is provided by or paid through the lessor, the types and amounts of coverage and the cost to the lessee; or

(ii) Required insurance. If the lessee must obtain the insurance, the types and amounts of coverage required of the lessee.

(j) Warranties or guarantees. A statement identifying all express warranties and guarantees from the manufacturer or lessor with respect to the leased property that apply to the lessee.

(k) Penalties and other charges for delinquency. The amount or the method of determining the amount of any penalty or other charge for delinquency, default, or late payments, which must be reasonable.

(l) Security interest. A description of any security interest held or to be retained by the lessor; and a clear identification of the property to which the security interest relates.

2. Limits on Advertisement (12 C.F.R. § 213.7)

a. General rule. An advertisement for a consumer lease may state that a specific lease of property at specific amounts or terms is available only if the lessor usually and customarily leases or will lease the property at those amounts or terms.

b. Clear and conspicuous standard. Disclosures required by this section shall be made clearly and conspicuously.

(1) Amount due at lease signing. Any affirmative or negative reference to a charge that is a part of the total amount due at lease signing shall not be more prominent than the disclosure of the total amount due at lease signing.

(2) Advertisement of a lease rate. If a lessor provides a percentage rate in an advertisement, the rate shall not be more prominent than any of the disclosures required to accompany the rate; and the lessor shall not use the term "annual percentage rate," "annual lease rate," or equivalent term.

(3) Advertisement of terms that require additional disclosure.--

(a) Triggering terms. An advertisement that states any of the following items shall contain the disclosures required by paragraph (2):

(i) The amount of any payment;

(ii) The number of required payments; or

(iii) A statement of any capitalized cost reduction or other payment required prior to or at consummation, or that no payment is required.

(b) Additional terms. An advertisement stating any item listed in paragraph (1) shall also state the following items:

(i) That the transaction advertised is a lease;

(ii) The total amount due at lease signing, or that no payment is required;

(iii) The number, amounts, due dates or periods of scheduled payments, and total of such payments under the lease;

(iv) A statement of whether or not the lessee has the option to purchase the leased property, and where the lessee has the option to purchase at the end of the lease term, the purchase-option price;

(v) A statement of the amount, or the method for determining the amount, of the lessee's liability (if any) at the end of the lease term; and

(vi) A statement of the lessee's liability (if any) for the difference between the residual value of the leased property and its realized value at the end of the lease term.

(c) Alternative disclosures -- merchandise tags. A merchandise tag stating any item listed in paragraph (1) may comply with paragraph (2) by referring to a sign or display prominently posted in the lessor's place of business that contains a table or schedule of the required disclosures.

(d) Alternative disclosures -- television or radio advertisements.--

(i) Toll-free number or print advertisement. An advertisement made through television or radio stating any item listed in paragraph (1) complies with paragraph (2) if the advertisement states the items listed in paragraphs (2)(a) - (c), and:

(a) Lists a toll-free telephone number along with a reference that such number may be used by consumers to obtain the other information required; or

(b) Directs the consumer to a written advertisement in a publication of general circulation in the community served by the media station, including the name and the date of the publication, with a statement that information required by paragraph (2) is included in the advertisement. The written advertisement shall be published beginning at least three days before and ending at least ten days after the broadcast.

(ii) Establishment of toll-free number.

(a) The toll-free telephone number shall be available for no fewer than ten days, beginning on the date of the broadcast.

(b) The lessor shall provide the information required by paragraph (d)(2) of this section orally, or in writing upon request.

II. TRUTH IN LENDING ACT (TILA)

A. REFERENCES.

1. 15 U.S.C. §1601-1667.

2. Regulation Z (12 C.F.R. Part 226).

3. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (4th ed. 1999).

B. PURPOSE.

1. Economic stabilization and competition is strengthened by informed use of credit by consumers.

2. TILA requires "meaningful disclosure of credit terms."

3. TILA also designed to protect consumer against inaccurate and unfair credit billing and credit card company practices.

4. TILA is to be liberally construed in favor of consumers, with creditors who fail to comply with TILA in any respect becoming liable to consumer regardless of nature of violation or creditors' intent.

C. SCOPE.

1. TILA **applies to**:

a. Each individual or business that offers or extends credit when 4 conditions are met:

(1) Credit offered or extended to consumers,

(2) Done "regularly" - extends credit more than 25 times (or more than 5 times for transactions secured by dwelling) per year,

(3) Subject to a finance charge or is payable by written agreement in more than 4 installments, and

(4) Primarily for personal, family, or household purposes.

b. If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge, is not payable by agreement in more than 4 installments, or if the credit card is used for business purposes.

c. Also, certain requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers.

2. **Foreign applicability**. (FRB Official Staff Commentary)

a. Regulation Z applies to all persons (including branches of foreign banks and sellers located in the United States) that extend consumer credit to residents (including resident aliens) of any state, the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession of the United States.

b. If an account is located in the United States and credit is extended to an U.S. resident, the transaction is subject to the regulation. For example, an U.S. resident's use in Europe of a credit card issued by a bank in the consumer's home town is covered by the regulation.

c. The regulation **does not apply** to a foreign branch of an U.S. bank when the foreign branch extends credit to an U.S. citizen residing or visiting abroad or to a foreign national abroad.

3. TILA is **inapplicable to**:

a. Creditors who extend credit primarily for business, commercial, agricultural, or organizational purposes or other purposes that are otherwise regulated, such as securities brokers.

b. Student Loan Programs.

c. Credit transactions, over $25,000.00, **except** those involving a security interest in real property or personal property (e.g., mobile home or condominium) used or expected to be used as the principal dwelling of the consumer.

D. MATERIAL DISCLOSURES REQUIRED.

1. Required disclosures must be made clearly and conspicuously, in meaningful sequence, in writing, and n a form the consumer may keep.

2. FRB promulgates model disclosure forms, but where they would be misleading, lenders should provide tailored notice consistent with TILA.

3. Texas Attorney General settled deceptive trade practices lawsuit with H&R Block, Inc. forcing tax return company to advertise its "Rapid Refund" program is actually a loan program charging customers up to 150% in annual interest. Filed as UDAP suit. [Case reported in National Association of Attorneys General Consumer Protection Report (Sep. 1993)]

E. OPEN-END CREDIT TRANSACTIONS:

1. Definition: Open-end credit includes bank and gas company credit cards, stores' revolving charge accounts, and cash-advance checking accounts.

a. Typical features: (12 C.F.R. § 226.2(a)(20)).

(1) Creditors reasonably expect the consumer to make repeated transactions.

(2) Creditors may impose finance charges on the unpaid balance.

(3) As the consumer pays the outstanding balance, the amount of credit is once again available to the consumer.

b. Disclosures:

(1) Annual percentage rate including applicable variable-rate disclosures,

(2) Method of determining finance charge and balance upon which finance charge imposed, as explained in 12 C.F.R. § 226.6,

(3) Amount or method of determining any membership or participation fees,

(4) Security interests if applicable to transaction, and

(5) Statement of billing rights.

c. Other requirements include furnishing consumer with a periodic statement of the account.

(1) 12 C.F.R. § 226.12 details special credit card provisions, including liability of cardholder and assertion of claims and defenses against card issuer (see Fair Credit Billing Act section of this outline).

(2) 12 C.F.R. § 226.13 details billing error resolution (see Fair Credit Billing Act section of this outline).

F. CLOSED-END CREDIT TRANSACTIONS:

1. Definition: "other than open-end credit" - Credit is advanced for a specific time period and, the amount financed, finance charge, and schedule of payments are "agreed upon" by the creditor and the consumer. (See 12 C.F.R. § 226.2(a)(10)).

2. Closed End Disclosures:

a. Identity of the creditor,

b. Amount financed,

c. Itemization of amount financed,

d. Annual percentage rate, including applicable variable-rate disclosures,

e. Finance charge,

f. Total of payments,

g. Payment schedule,

h. Prepayment/late payment penalties, and,

i. If applicable to the transaction:

(1) Total sales cost,

(2) Demand feature,

(3) Security interest,

(4) Insurance,

(5) Required deposit, and

(6) Reference to contract.

G. VIOLATIONS OF TILA.

1. Creditors are liable for violation of the disclosure requirements, regardless of whether the consumer was harmed by the nondisclosure, **UNLESS**:

a. The creditor corrects the error within 60 days of discovery and prior to written suit or written notice from the consumer, or,

b. The error is the result of bona fide error. The creditor bears the burden of proving by a preponderance of the evidence that:

(1) The violation was unintentional.

(2) The error occurred notwithstanding compliance with procedures reasonably adapted to avoid such error (error of legal judgment with respect to creditor's TILA obligations not a bona fide error).

2. Civil remedies for failure to comply with TILA requirements:

a. Action in any U.S. district court or in any other competent court within one year from the date on which the violation occurred. This limitation does not apply when TILA violations are asserted as a defense, set-off, or counterclaim, except as otherwise provided by state law.

b. Private remedies - applicable to violations of provisions regarding credit transactions, credit billing, and consumer leases.

(1) Actual damages in all cases.

(2) Attorneys' fees and court costs for successful enforcement and rescission actions.

(3) Statutory damages.

(a) Individual actions - double the correctly calculated finance charge, but not less than $100 or more than $1,000 for individual actions.

(b) Class actions - an amount allowed by the court with no required minimum recovery per class member to a maximum of $500,000 or 1% of the creditor's net worth, whichever is less.

(c) Can be imposed on creditors who fail to comply with specified TILA disclosure requirements, with the right of rescission, with the provisions concerning credit cards, or with the fair credit billing requirements.

c. Enforcement by administrative agencies.

(1) Who:

(a) Banks - Federal Reserve Board, the Federal Deposit Insurance Corporation, and other agencies.

(b) Others not subject to the authority of any specific enforcement agency - Federal Trade Commission.

(c) 9 separate agencies currently have enforcement responsibilities.

(2) What Can - Enforcement Agencies Do:

(a) Issue cease and desist orders or hold hearings pursuant to which creditors are required to:

(i) Adjust debtors' accounts (15 U.S.C. § 1607(e)(4)(A), (B)) to ensure that the debtor is not required to pay a finance charge in excess of the finance charge actually disclosed or,

(ii) the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(b) If the FTC determines in a cease and desist proceeding against a particular individual or firm that a given practice is "unfair or deceptive," it may proceed against any <u>other</u> individual or firm for knowingly engaging in the forbidden practice, even if that entity was not involved in the previous proceeding.

3. Criminal penalties - Willful and knowing violations of TILA permit imposition of a fine of $5,000, imprisonment for up to 1 year, or both.

4. Rescind the contract (see below).

H. TRUTH IN LENDING ACT RESCISSION RIGHTS: 3-DAY COOLING OFF PERIOD (15 U.S.C. § 1635; 12 C.F.R. § 226.15).

1. Under TILA, a consumer may rescind a consumer credit transaction involving a "non-purchase money" security interest in the consumer's **principal dwelling**

   a. **Within 3 business days** if all TILA disclosure requirements are met, or

   b. During an extended statutory period for TILA disclosure violations:

      (1) Failure to give adequate **notice** of right to rescind,

      (2) Failure to give adequate TILA credit term **disclosures**.

2. Rescission **voids the security interest** in the principal dwelling.

   a. Consumer must have ownership interest in dwelling that is encumbered by creditor's security interest. Consumer need not be a signatory to the credit agreement.

   b. TILA rescission rights do not apply to business credit transactions, even if secured by consumer's principal dwelling.

3. Scope of Rescission Rights (WHAT).

   a. Applies to loan involving a <u>non-purchase money security interest</u> in consumer's principal residence (i.e., home equity loans/lines of credit/home improvement loans, etc.).

   b. A consumer can have only <u>one</u> principal dwelling at a time. A vacation or other second home is not a principal dwelling. A transaction secured by a second home cannot be rescinded even if the consumer plans to reside there in the future.

4. Time to Exercise Right to Rescind (WHEN).

a. Right to rescind until midnight of third business day following the later of:

(1) Consummation of transaction,

(a) In the case of closed-end credit, when the credit agreement is signed.

(b) In the case of open-end credit, the occurrence giving rise to the right to rescind:

(i) Opening the plan,

(ii) Each credit extension above previously established credit limit,

(iii) Increasing the credit limit,

(iv) Adding to an existing account a security interest in the consumer's principal dwelling, and

(v) Increasing the dollar amount of the security interest taken in the dwelling to secure the plan.

(2) Delivery of the required rescission right notice, or

(3) Delivery of all material disclosures.

b. Extended right to rescind.

(1) Continuing right to rescind if required disclosures not made or made incorrectly, but...

(2) Statutory cut-off of extended right to rescind at 3 years after consummation.

(3) Will be cut off earlier by transfer of all consumers' interest in the property (including involuntary transfer such as foreclosure), or sale of the property.

(4) Violations Giving Rise to An Extended 3-Year Right to Rescind.

(a) Failure to give proper rescission notice.

(b) Creditors are required to deliver two copies of the right to rescind to each consumer entitled to rescind.

(c) Notice must disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling,

(ii) The consumer's right to rescind,

(iii) How to exercise the right to rescind, with a form for that purpose, setting forth the creditor's business address,

(iv) The effects of rescission, and

(v) The date the rescission period expires.

(vi) Failure to disclose credit terms of the transaction in accordance with TILA (i.e., interest, payment terms, etc.).

5. Waiver of the Right to Rescind.

a. Consumers may modify or waive right to rescind credit transaction if extension of credit is needed to meet bona fide personal financial emergency before end of rescission period.

b. Consumer must provide creditor with dated written statement describing emergency:

(1) Specifically modifying or waiving right, and

(2) Signed by all consumers entitled to rescind.

c. Borrower's waiver because of imminent foreclosure ineffective because under terms of mortgage, foreclosure could not occur before two months [at time of waiver] thus, there was no bona fide emergency.

6. Delay of Performance.

   a. Unless the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party,

      (1) Disburse advances to the consumer,

      (2) Begin performing services for the consumer, or

      (3) Deliver materials to the consumer.

   b. During the delay period, a creditor may:

      (1) Prepare cash advance check (or loan check in the case of open-end credit),

      (2) Perfect the security interest and/or

      (3) Accrue finance charges,

      (4) In the case of open-end credit, prepare to discount or assign the contract to a third party.

   c. Delay beyond rescission period.

      (1) Creditor must wait until he/she is reasonably satisfied consumer has not rescinded.

      (2) May do this by:

         (a) Waiting reasonable time after expiration of period to allow for mail delivery, or

         (b) Obtaining written statement from all eligible consumers that right not exercised.

7. Mechanics of Rescission Process.

   a. Consumer sends or delivers written notice to creditor.

   b. When consumer rescinds, the security interest becomes void and consumer is not liable for any amount, including finance charges.

      (1) Within 20 calendar days after receiving notice of rescission, creditor must:

(a) Return any property or money given to anyone in connection with the transaction,

(b) Take whatever steps necessary to reflect termination of the security interest.

(2) When creditor meets its obligations, consumer must tender the money or property to creditor, or if tender not practicable, its reasonable value.

(3) If creditor fails to take possession of tendered money or property within 20 days, consumer may keep it without further obligation.

c. Court may modify procedures.

(1) Court has power to exercise equitable discretion and condition rescission of a loan upon the return of the loan proceeds.

(2) *See* Reynolds v. D & N Bank, 792 F. Supp. 1035 (E.D. Mich. 1992). Consumer canceled home improvement contract 14 months after signed; 4 TILA violations; creditor failed to respond (did not return money or cancel security interest); consumer sued to enforce recession, obtain damages, and **keep value of property purchased rather than tender it to creditor**. Court gave creditor 20 days to comply with its obligations, which creditor then failed to do. Court, in unreported opinion, then granted consumer's request. Creditor blew second chance! (See NCLC Reports, Vol. 11, March/April 1993).

8. Particular Types of Transactions.

a. Refinancing and Consolidation.

(1) Rescission rights **do not** apply to refinancing or consolidation by same creditor of an extension of credit already secured by consumer's principal dwelling.

(2) Rescission rights **do** apply to extent new amount exceeds unpaid balance, any earned unpaid finance charges on existing debt, and amounts attributed solely to costs of refinancing or consolidation.

b. Open-end line of credit secured by home used to pay off loan **not** originally secured by home requires complete rescission rights.

c. Door-to-door sales.

(1) When home solicitation sale is financed with second mortgage loan, consumer may be entitled to two separate rights to cancel when the transactions are independent.

(2) When consumer offers to obtain his/her own financing independent of assistance or referral from seller, sale and financing are separate transactions.

(3) When there are separate transactions,

(a) FTC Rule (Cooling Off Period for Door-to-Door Sales) applies.

(b) TILA requires 3-day rescission period (unless extended for TILA violation).

(c) Seller bound by consumer's timely cancellation regardless of which party receives notice of cancellation.

(4) For single transactions (seller arranged financing), look to state home solicitation law to determine whether transaction still covered by state's home solicitations statute 3-day cooling off period.

(a) When seller finances or arranges financing with second mortgage, this is considered a single transaction.

(b) When there is a single transaction, TILA rescission rights apply, but not FTC Rule 3-day cooling off period.

(i) FTC Rule does not apply to transactions in which there is a TILA right to rescind (i.e., second home mortgage transactions).

(ii) Therefore, consumer has only TILA right to rescind and not the additional 3 day cooling off period rights under FTC Rule.

(c) But, state cooling off periods may apply even when TILA rescission rights are available.

III. FAIR CREDIT BILLING ACT (FCBA)/ELECTRONIC FUND TRANSER ACT

A. REFERENCES.

1. 15 U.S.C. § 1666

2. 12 C.F.R. part 205 (EFTA) & § 226.13 (FCBA)

3. National Consumer Law Center, Truth in Lending (3d ed. 1995).

B. REFRESHER

	Fair Credit Billing Act	Electronic Fund Transfer Act
Applicability	Open-end consumer credit transactions (i.e., credit cards, store charge accounts).	Fund Transfers directly from accounts using an electronic device (i.e., ATM machines, debit cards, etc.)

	Fair Credit Billing Act	Electronic Fund Transfer Act
Billing Errors	Bills for transactions that never occurred. Transactions by unauthorized people. Bills for erroneous amounts. Bills for goods/services that were not delivered or were not accepted. Failure to credit account properly. Computation errors. Bills sent to incorrect addresses, provided that the creditor received notice of the change of address at least 20 days before the end of the billing cycle for which the statement was sent out.	An unauthorized electronic fund transfer, An incorrect electronic fund transfer to or from consumer's account, Omission from a periodic statement of an electronic fund transfer to or from consumer's account that should have been included, Computational or bookkeeping error made by financial institution relating to an electronic transfer, Consumer's receipt of an incorrect amount of money from an electronic terminal, An electronic fund transfer not identified in accordance with regulations, or, A consumer's request for any documentation required to be given by the financial institution, or additional clarification concerning an electronic transfer. Does not include routine inquiry about the balance of account.

	Fair Credit Billing Act	Electronic Fund Transfer Act
Billing Error Resolution	Notify IN WRITING w/I 60 days of transmittal of periodic statement. Consumer may withhold payment. Paying may waive some claims & defenses. Card Issuer must do reasonable investigation and resolve complaint within 2 billing cycles (no more than 90 days.)	Notify ORALLY or in writing w/I 60 days. Access Device Issuer must resolve complaint within 10 (20) days or 45 (90) days if they provisionally recredit.
Unauthorized Use	No actual, implied, or apparent authority	No **actual** authority
Liability for Unauthorized Use	$50 maximum	Three-Tiered Liability Notice w/i 2 Business Days: $50 2 Bus. Days<Notice<60 days from transmittal of statement: $500 Notice>60 days - Unlimited
Other Provisions	Claims & Defenses IF: K entered W/I 100 miles or same state as billing address K >$50	

C. APPLICATION.

1. Telephone Cards

2. Barracks Thief (stealing ATM & Credit Cards). Think help for the victim as well as punishment for the perpetrator.

DOWNSTREAM CONSEQUENCES

(FAIR CREDIT REPORTING ACT (FCRA))

I. REFERENCES.

A. 15 U.S.C. §§ 1681-1682t.

B. Omnibus Consolidated Appropriations Bill, 110 Stat. 3009; 104 Pub. Law 208 (Sept. 30, 1996).

C. Consumer Credit Reporting Reform Act of 1996, Pub. L. 104-208 (Sep. 30, 1996).

D. National Consumer Law Center, Fair Credit Reporting Act (3d ed. 1994) and Cumulative Supplement.

II. INTRODUCTION.

The Omnibus Appropriations Act referenced above contained, among other consumer protection legislation, the Consumer Credit Reporting Act of 1996 which makes changes to the Fair Credit Reporting Act. In general, the changes became effective **September 30, 1997**.

III. MAJOR CHANGES.

A. **Adverse Action**[2] defined. It means:

1. The same as the term means under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(6), which provides that:

> *For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal*

[2] Note that the term "adverse action" was not defined in the original version of the statute. However, there were requirements imposed by the statute for taking "adverse action." Having the definition should put consumers in a better position to assert their statutory rights when a User takes "adverse action."

to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

2. The term is also given specific additional meaning within the definition section of the FCRA. It also means:

   a. a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for . . . ;

   b. a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

   c. a denial or cancellation of an increase in any charge for, or any other adverse or unfavorable change in the terms of, any [government] license or benefit . . .; and

   d. an action taken or determination that is--

      (1) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, . . .; and

      (2) adverse to the interests of the consumer.

B. NEW CONDITIONS ON PERMISSIBLE RELEASES

1. EMPLOYMENT PURPOSES:

   a. The User must certify to the CRA that they have:

      (1) Given a clear and conspicuous written disclosure to the consumer, in a document that consisted solely of the disclosure, that a consumer report may be obtained for employment purposes and the consumer has given the User written authorization to procure the report; AND

      (2) That they will comply with the obligations of a User who takes adverse action based upon a consumer credit report; AND

(3) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation.

b. The CRA must provide with the report a summary of the consumer's rights under the FCRA.

2. CREDIT OR INSURANCE TRANSACTIONS NOT INITIATED BY THE CONSUMER.-- The CRA may issue the report only if:

a. The consumer authorizes the agency to provide the report to such person; OR

b. The transaction consists of a "firm offer of credit or insurance" (defined in the statute) and

(1) The CRA has complied with any election made by the consumer regarding exclusion from lists , and

(2) The information consists solely of

(a) The name and address of a consumer;

(b) An identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(c) Other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) The CRA may NOT furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

3. REPORTS CONTAINING MEDICAL INFORMATION: A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction or a direct marketing transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

4. LEGITIMATE BUSINESS NEED

a. The legitimate business need must be in connection with a business transaction that is initiated by the consumer; or

b. To review an account to determine whether the consumer continues to meet the terms of the account..

C. EXPANDED CONSUMER PROTECTIONS:

1. Requirements When Users Take **ADVERSE ACTION**.

a. Requirements apply to any "adverse action" as that term is defined under the statute.

b. The User MUST:

(1) Provide oral, written, or electronic notice of the adverse action to the consumer; AND

(2) Provide to the consumer orally, in writing, or electronically--

(a) The name, address, and telephone number of the CRA (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; AND

(b) A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; AND

(c) Provide to the consumer an oral, written, or electronic notice of the consumer's right--

(i) To obtain a FREE copy of a consumer report from the CRA, including notice that the request must be made with 60 days; AND

(ii) To dispute the accuracy or completeness of any information in the consumer report.

c. Special Rule for Adverse Action in EMPLOYMENT Situations. **Before taking any adverse action** based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(1) A copy of the report; AND

(2) A description in writing of the rights of the consumer under the FCRA.

2. Protection Against Obsolete Information.

a. Unless otherwise specified, the following information is considered "obsolete" and cannot be included in a CRAs consumer report (Note: this is adverse information; favorable information that is old may be included in the report):

(1) Bankruptcy adjudications more than 10 years old.

(2) Other categories for 7 years. Included are:

(a) Paid tax liens,

(b) Accounts placed for collection or charged to profit and loss,

(c) Records of criminal **arrest**, indictment, or conviction which, from the date of disposition, release, or parole, antedate the consumer report by more than 7 years,

(d) Suits and judgments which, from date of entry, antedate the consumer report by more than 7 years or until the governing statute of limitations has expired, whichever is the longer period,

(e) Any other adverse item of information which antedates the consumer report by more than 7 years.

b. Inclusion of "adverse" obsolete information. "Obsolete" information **CAN** be included in the consumer report IF the report is intended for use involving (15 U.S.C. § 1681c):

(1) The consumer's participation in a credit transaction of $150,000 or more.

(2) Issuance of life insurance coverage on the consumer of $150,000 or more.

(3) Employment of the consumer at an annual salary of $75,000 or more.

3. ACCESS TO INFORMATION: Upon request, the consumer would formerly obtain only a summary of the nature and substance of the information in the CRAs files. Now, the consumer may get **ALL** information in their file, except for credit scores or other risk scores or predictors.

4. FEES

   a. A CRA may charge a reasonable fee for the disclosures to the consumer. The reasonable fee cannot exceed $8. (Which amount will be adjusted by the FTC each January 1 for inflation based upon the CPI).

      (1) The fee shall be disclosed to the consumer prior to issuing the information.

      (2) Free reports will be given during any 12 month period to anyone:

         (a) Who is unemployed and intends to apply for employment within the next 60 day period (certified by consumer)

         (b) Is receiving welfare;

         (c) Has reason to believe the inaccurate information in the file is the result of fraud.

   b. If adverse action has been taken, the consumer is entitled to a free copy of the credit report.

5. Still have 100-word statement. Think help for the victim!

D. New Section Imposing Duties on Those Supplying Information To CRAs

1. Requirements to provide accurate information.

   a. Prohibitions

      (1) A person shall not report information if they know *or consciously avoid knowing* that the information is inaccurate.

         (a) However, they can avoid this requirement by providing an address for consumers to notify them of errors.

(b) They are NOT required to provide such address, but if they do, they fall under paragraph 2 below.

(2) A person shall not report information if

(a) the consumer has notified them (at the address the person has specified for this purpose) that specific information is not accurate; AND

(b) The information is in fact not accurate.

b. Duties to correct and update information

(1) Applies ONLY to persons who "regularly and in the ordinary course of business" furnish information to CRAs AND who have reported information that they determine is not complete or accurate.

(2) Such persons MUST

(a) Notify the CRA.

(b) Provide the CRA with necessary corrections or additional information.

(c) NOT provide the inaccurate information thereafter.

c. Duties to provide CRAs with certain notices.

(1) Any person who provided information to CRAs must provide notice that the accuracy of the information is disputed if the person providing the information is notified of the dispute.

(2) Any person who regularly and in the ordinary course of business notifies CRAs of info regarding a consumer who has a credit account with that person, SHALL notify the CRA if the consumer voluntarily closes the account.

(3) Any person who notifies a CRA that a delinquent account is being placed in collection MUST, with 90 days, notify the CRA of the month and year of the delinquency which immediately preceded the action.

2. Duties When Notified of a Dispute. After receiving proper notice of a dispute, the person providing the information SHALL:

a. Conduct an investigation with respect to the disputed information;

b. Review all relevant information provided by the CRA pursuant to the dispute procedure in the FCRA.;

c. Report the results of the investigation to the CRA; and

d. If the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.

e. The person MUST complete all investigations, reviews, and reports required within 30 days from the receipt of notice of the dispute.

E. CHANGES TO THE DUTIES OF CRAs

1. New Procedures For Handling Disputed Information. The changes to the law add much more specificity to the requirements of the statute.

a. REINVESTIGATION: If the completeness or accuracy of any item of information contained in a consumer's file at a CRA is disputed by the consumer and the consumer notifies the agency directly of such dispute, the CRA SHALL

(1) Reinvestigate free of charge and record the current status of the disputed information, OR

(2) Delete the item from the file within 30-days of the CRA receiving notice of the dispute from the consumer. (This period may be extended not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation. However, NO extension may be used if the CRA finds during the 30 days that the information is inaccurate, incomplete, or cannot be verified.

b. DETERMINATION THAT DISPUTE IS FRIVOLOUS OR IRRELEVANT.

(1) A CRA may terminate a reinvestigation of information disputed by a consumer if they reasonably determine that the dispute by the consumer is frivolous or irrelevant. This includes a failure by the consumer to provide sufficient information to investigate the disputed information.

(2) Upon making this determination, the CRA shall notify the consumer of their determination not later than 5 business days after making the determination, by mail or, if authorized by the consumer for that purpose, by any other means.

(3) The notice shall include:

(a) The reasons for the determination; AND

(b) Identification of any information required to investigate the disputed information.

c. NOTICE TO PROVIDER OF INFORMATION.

(1) Within 5 business days of receipt of the consumer's notice, the CRA SHALL

(a) Provide notification of the dispute to any person who provided any item of information that is disputed.

(b) The notice shall include all relevant information regarding the dispute that the agency has received from the consumer.

(2) Promptly after the initial 5 business day notice, but before the end of the 30 day period for investigation, the CRA must provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer.

d. RESULTS OF THE REINVESTIGATION

(1) Inaccurate or unverifiable information. Any item of the information found to be inaccurate or incomplete or which cannot be verified, SHALL be promptly deleted from the consumer's file or modified, as appropriate, based on the results of the reinvestigation.

(2) NOTICE OF RESULTS.

(a) The CRA must provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.

(b) The notice must contain:

(i) A statement that the reinvestigation is completed;

(ii) A consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;

(iii) If requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information, including the business name and address of any furnisher of information contacted and their telephone number if reasonably available;

(iv) A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and

(v) A notice[3] that the consumer has the right to request that the CRA notify the following persons of any notation regarding disputed information provided that the consumer specifically designate this person to receive notice.

(a) A user who received a consumer report for employment purposes within the prior two years.

(b) A user who received a consumer report for any other purpose within the last six months.

[3] The notice provision is new and takes effect on 30 September 1997. However, the right to require the CRA to give notice of disputed information exists under current law.

e. AUTOMATED REINVESTIGATION SYSTEM.--Any **CRA that compiles and maintains files on consumers on a nationwide basis** (See definitions above.) shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

2. REINSERTION OF PREVIOUSLY DELETED MATERIAL. Before reinserting material, the following must occur:

   a. The person who furnishes the information must certify that the information is complete and accurate.

   b. The CRA must notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

   c. The CRA must provide with the notice above (in writing not later than 5 business days after the date of the reinsertion) the following:

      (1) A statement that the disputed information has been reinserted;

      (2) The business name and address of:

         (a) Any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or

         (b) Any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and

         (c) A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

3. EXPEDITED DISPUTE RESOLUTION.--If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved by the deletion of the disputed information by not later than 3 **business** days after the date on which the agency receives notice of the dispute from the consumer, then the CRA does not have to:

a. Notify the furnisher of the information;

b. Formally notify the consumer of the results; or

c. Provide a description of the reinvestigation procedure.

d. However, they MUST still provide:

(1) Prompt notice of the deletion to the consumer by telephone;

(2) In the notice a statement of the consumer's right to request that the CRA notify the following persons of any notation regarding disputed information provided that the consumer specifically designate this person to receive notice.

(a) A user who received a consumer report for employment purposes within the prior two years.

(b) A user who received a consumer report for any other purpose within the last six months.

(3) Written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 **business** days after making the deletion.

4. PROCEDURES TO PREVENT REAPPEARANCE.--A CRA shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant the dispute procedure (other than information that is reinserted in accordance with the above rules).

F. Identity Theft.

1. Identity Theft and Deterrence Act, 1998. Made it a federal offense for anyone who: "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under applicable state law."

2. Identity Theft Prevention Act, 2000.

a. Proposed legislation that would strengthen protections available to victims of identity theft.

b. Bill would provide for free annual credit reports; require credit card issuers to advise a consumer if a request to change the address on an account; restrict the release of information through the sale of "credit header" information.

c. Impact on Credit Reporting Agencies

PROCESSING REQUESTS FOR DEBT COLLECTION ASSISTANCE

IV. REFERENCES.

A. 32 C.F.R. § 43a, Indebtedness of Military Personnel (1990).

B. DOD Directive 1344.9.

C. AR 600-15, Indebtedness of Military Personnel (14 March 1986).

V. A PROCESS FOR ANALYSIS.

A. STEP 1: Should this person even be calling me?

1. Requests from Debt Collectors. Remember that debt collectors are limited in contacting third parties. (See Above.) As a general rule, we do not assist debt collectors, only creditors.

2. Requests from Creditors.

a. A "creditor" is a person or organization to whom or to which a debt is owed.

b. Creditors <u>are</u> entitled to contact third parties for assistance <u>unless</u> state law precludes such contact. DOD installations in those states will follow state law because it does not infringe upon significant military interests.

3. Credit Unions and Banks:

a. Those serving DOD must conform to Standards of Fairness. (*See* AR 600-15, App. B)

b. Commanders will answer all check complaints.

c. No mention that they are exempt from state law prohibiting third party contact.

B. STEP 2: Consult with Your Servicing Judge Advocate and Review DOD/Army Policy and Regulations.

1. Department of Defense Directive 1344.9.

a. DOD Definitions.

(1) **Just Financial Obligations.** A legal debt acknowledged by the military member in which **there is no reasonable dispute as to the facts or the law**; or one reduced to judgment which conforms to the SSCRA, if applicable.

(2) **A Proper and Timely Manner.** A manner which under the circumstances does not reflect discredit on the military service.

(3) **Debt Collector.** Same as FDCPA.

b. General Policies.

(1) Members are expected to pay just financial obligations in proper and timely manner.

(2) Services have no legal authority, except in the case of court ordered alimony or child support, to require members to pay a private debt or to divert any part of their pay for its satisfaction.

(3) Enforcement of private obligations of a military member is a matter for civil authorities.

c. Processing debt complaints will not be extended to those:

(1) Who have not made a bona fide effort to collect the debt directly from the military member;

(2) Whose claims are patently false and misleading;

(3) Whose claims are obviously exorbitant.

2. Army policy reflects that of DOD and adds some other specifics.

a. We will assist creditors only. We will NOT assist debt collectors.

b. To receive assistance, creditors must provide commanders with the following information (AR 600-15, para. 4-3).

(1) Certificate of Compliance with ONE of the following:

(a) DOD Standards of Fairness

(b) The Truth in Lending Act (TILA)

(c) State Regulations

(d) Creditors not subject to the TILA (such as public utility companies) may submit a certificate that certifies that they charged no interest, finance charge, or other fee that violates the laws of the state where the service they provided was requested.

(2) A true copy of the signed contract.

(3) The general and specific disclosures given to the soldier.

(4) A copy of a judgment or written permission from the soldier allowing employer contact **if state law requires it**. (Contact your servicing SJA office for advice on this.)

(5) Proof of efforts by the creditor to collect directly from the soldier.

c. Foreign owned companies must submit with their requests for assistance:

(1) Copy of terms of the debt (English translation), and

(2) Certification it has subscribed to DOD Standards of Fairness.

C. STEP 3: Provide/Deny Assistance IAW Policy

1. Advise creditors who have not met requirements what the requirements are and that the commander will provide no assistance until those requirements are met. (Form letters to do this are included in AR 600-15).

2. For creditors who HAVE met requirements, Commanders shall:

   a. Review facts surrounding transaction forming basis of complaint, to include:

      (1) Member's legal rights and obligations,

      (2) Member's defenses or counterclaims.

   b. **Advise member** that:

      (1) Just financial obligations are expected to be paid in proper and timely manner, and

      (2) Financial and legal counseling services are available.

   c. Notify claimant that soldier told of complaint, summarizing soldier's intentions if soldier gave permission to release that information.

   d. Assistance should be provided within 45 days (for the contiguous 48 states) or 60 days (all other locations). AR 600-15, para. 4-3e.

3. Commanders will not:

   a. Arbitrate disputed debts, or

   b. Admit or deny the validity of the claim.

   c. Try to judge or settle disputed claims or admit or deny validity. If soldier denies debt, notify creditor that disputed debts must be handled by civil authorities.

   d. Commanders' responses will not indicate whether any action has been taken against a member as a result of the complaint.

4. Commanders May Deny Assistance to Creditors.

   a. When the claimant, having been notified of the DOD requirements, refuses or repeatedly fails to comply;

   b. When the claimant, regardless of the merits of the claim, clearly shows an attempt to unreasonably use the processing privilege.

D. STEP 4: Take Disciplinary Action Where Appropriate.

1. Commanders may take administrative or disciplinary action against members who fail to meet their just financial obligations in a proper and timely manner.

2. Commanders should see the guidance in AR 600-15, Chapter 3 and consult with their servicing judge advocate before proceeding with disciplinary action.

3. Commanders may consider:

a. Placing Adverse Information into Soldier's Records (AR 600-37),

b. Denying reenlistment (AR 601-280),

c. Administrative separation (AR 635-100 (officer) or 635-200 (enlisted)),

d. Punitive action under UCMJ, articles 92,123,133, or 134.

E. Bankruptcy. Care must be taken not to infringe on the rights of soldiers under bankruptcy law.

F. Debt Collection Assistance Officers.

1. TRICARE related debt issues.

2. Scope of DCAO Program.

3. Interface with Legal Assistance.

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, Virginia

U.S. NATIONAL SECURITYSTRATEGY AND STRUCTURE

REFERENCES

1. U.S. Constitution.
2. National Security Act of 1947, P.L.80-253 (1947).
3. National Security Act Amendments of 1949, P.L. 81-216 (1949).
4. Department of Defense Reorganization Act of 1958, P.L. 85-599 (1958).
5. Goldwater-Nichols Department of Defense Reorganization Act of 1986, P.L. 99-433 (1986).
6. U.S. Code, Title 10, Chapter 2, *Department of Defense.*
7. U.S. Code, Title 10, Chapter 5, *Joint Chiefs of Staff.*
8. U.S. Code, Title 10, Chapter 6, *Combatant Commands.*

I. NATIONAL COMMAND STRUCTURE

A. Constitutional Provisions

1. Article I, Section 8: Congress shall have the power:

   a. To raise and support Armies, but no appropriation of money to that use shall be for a longer Term than two Years;

   b. To provide and maintain a Navy;

   c. To make Rules for the Government and Regulation of the land and naval Forces.

2. Article II

   a. Section 1: The executive Power shall be vested in a President of the United States.

   b. Section 2: The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

B. Legislative History

1. Early History

a. August 7, 1789: "There shall be an executive department to be denominated the Department of War, and there shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeable to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military or naval affairs . . . as the President of the United States shall from time to time order or instruct." 1 Stat. Sess. 1, Ch. 8 (1789).

b. April 30, 1798: "There shall be an executive department under the denomination of the Department of the Navy, the chief officer of which shall be called the Secretary of the Navy, whose duty it shall be to execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials, and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." 1 Stat. Sess. II Ch. 35 (1798).

(1) Specifically removed the Secretary of War's powers over naval affairs to the Secretary of the Navy.

2. National Security Act of 1947.

a. Created the National Security Council.

(1) Members: President, Secretary of State, Secretary of Defense, Secretaries of the Army, Navy, and Air Force, and Chairman of the National Security Resources Board (created by this Act).

b. Created the Central Intelligence Agency.

c. Created the National Military Establishment, headed by the Secretary of Defense.

(1) Purpose: To establish general policies and exercise general direction over departments and agencies.

(2) Departments of the Army (renamed from the Department of War), Navy, and Air Force (created by this Act) remained as executive departments.

d. Created the Joint Chiefs of Staff (JCS)

(1) Members: Service Chiefs, less Commandant.

(2) Purpose: act as principal military advisors to the President and Secretary of Defense.

e. Created the Joint Staff under the JCS, limited to 100 officers.

3. National Security Act Amendments of 1949

a. National Security Council: added the Vice President as a member; deleted the Secretaries of the Army, Navy and Air Force.

b. Changed the National Military Establishment into the Department of Defense.

c. Changed the Departments of the Army, etc., into military vice executive departments (i.e., removed them from the Cabinet), and made them subordinate to the Secretary of Defense.

d. Created the Chairman of the Joint Chiefs of Staff.

(1) Presides over the JCS, but without a vote.

e. Expanded the Joint Staff to 210 officers.

4. Department of Defense Reorganization Act of 1958

a. Directed the President to establish unified and specified combatant commands.

(1) Responsible "for such military missions as may be assigned to them."

(2) Exercise full operational command over those forces assigned to them. Forces not assigned remain under the operational control of their respective military departments.

b. Gave the Chairman of the JCS a vote.

c. Expanded the Joint Staff to 400 officers.

(1) The Joint Staff shall not operate as a General Staff and shall have no executive authority.

d. Established the National Guard Bureau.

5. Goldwater-Nichols Defense Reorganization Act of 1986

a. Intent of Congress (Sec. 3):

(1) To reorganize the Department of Defense and strengthen civilian authority in the Department;

(2) To improve the military advice provided to the President, the National Security Council, and the Secretary of Defense;

(3) To place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands;

(4) To ensure that the authority of the commanders of the unified and specified combatant commands is fully commensurate with the responsibility of those commanders for the accomplishment of missions assigned to their commands;

(5) To increase attention to the formulation of strategy and to contingency planning;

(6) To provide for more efficient use of defense resources;

(7) To improve joint officer management policies; and

(8) Otherwise to enhance the effectiveness of military operations and improve the management and administration of the Department of Defense.

b. Chairman of the JCS replaces collective JCS as the principal military advisor.

(1) The JCS members (now including the Commandant) are military advisors.

(2) No requirement for a vote of JCS before Chairman presents his advice.

(3) Created office of Vice Chairman.

(4) Joint Staff expanded to 1627 officers (size limitation later removed in 1990).

c. Expanded the authorities and responsibilities of combatant commanders.

d. Restricted the authorities of the Services.

C. Combatant Commands

1. President's role: "With the advice and assistance of the Chairman of the Joint Chiefs of Staff, the President, through the Secretary of Defense, shall establish unified combatant commands and specified combatant commands to perform military missions." 10 U.S.C §161(a).

   a. Only limit on the President's discretion contained in 10 U.S.C §167: ". . . the President . . . *shall* establish . . . a unified combatant command for special operations forces." (emphasis added)

2. Unified Command Plan: biennial Presidential direction on the existence, responsibilities, and force structure of the various combatant commanders.

3. Unified command: a military command which has broad, continuing missions and which is composed of forces from two or more military departments.

   a. Geographic Combatant Commands

      (1) US Atlantic Command (USACOM, Norfolk, Va.). Forces in the U.S. and the Atlantic Ocean.

      (2) US European Command (USEUCOM, Stuttgart, Germany). NATO, some Middle East , and most African countries.

      (3) US Pacific Command (USPACOM, Camp Smith, Hawaii). Pacific Rim countries and some along the Indian Ocean.

      (4) US Southern Command (USSOUTHCOM, Panama). Central and Latin America and the Caribbean.

      (5) US Central Command (USCENTCOM, MacDill AFB, FL). SW Asia and Joint Operations in the Arabian Sea, and part of the Indian Ocean.

   b. Supporting Combatant Commands.

      (1) US Transportation Command (USTRANSCOM, Scott AFB, IL). Global, air, land, and sea transportation.

(2) US Special Operations Command (USSOCCOM, MacDill AFB, FL). Trained and equipped special operations forces.

(3) US Space Command (USSPACECOM, Peterson AFB, CO). Air, missile and space defense.

(4) US Strategic Command (USSTRATCOM, Offutt AFB, NE). Deters military attack on the U.S. and allies.

4. Specified Command: military command which has a broad, continuing mission and which is normally composed of forces from a single military department.

a. Currently, there are no specified commands.

D. Military Chain of Command

1. "Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs—(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command." 10 U.S.C §162(b).

2. "National Command Authorities—The President and the Secretary of Defense or their duly deputized alternates or successors. Also called NCA." Joint Pub 0-2, DoD Dictionary of Military and Associated Terms.

3. Note that Service Secretaries and Chiefs are not in the chain of command.

4. The Chairman of the JCS is also not in the chain of command, but communications are transmitted through him. 10 U.S.C §163(a).

E. Assignment of Forces

1. ". . . The Secretaries of the military departments shall assign all forces under their jurisdiction to unified or specified commands or to the United States element of the North American Aerospace Defense Command to perform missions assigned to those commands. Such assignments shall be made as directed by the Secretary of Defense, including direction as to the command to which forces are to be assigned." 10 U.S.C §162(a).

   a. The Secretary of Defense assigns forces in his annual "Forces For" memorandum.

2. "A force assigned to a combatant command . . . under this section may be transferred from the command to which it is assigned only—(A) by authority of the Secretary of Defense." 10 U.S.C §162(a)(3).

   a. Deployment orders (issued by the Chairman at the direction of the Secretary of Defense) are the vehicle used to transfer forces outside of the Forces For process.

F. Powers of CINCs

1. Goldwater-Nichols attempted to align the authority of combatant commanders with their responsibilities.

2. Combatant Command (COCOM): Nontransferable command exercised only by commanders of unified or specified combatant commands unless otherwise directed by the President or the Secretary of Defense. Combatant command (command authority) cannot be delegated and is the authority of a combatant commander to perform those functions of command over assigned forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned to the command. Combatant command (command authority) provides full authority to organize and employ commands and forces as the combatant commander considers necessary to accomplish assigned missions. Operational control is inherent in combatant command (command authority). See Joint Pub 0-2, *Unified Action Armed Forces.*

3. Specific powers enumerated in 10 U.S.C §164:

a. Giving authoritative direction to subordinate commands, including authoritative direction over all aspects of military operations, joint training, and logistics;

b. Prescribing the chain of command;

c. Organizing the command and forces as he considers necessary;

d. Employing forces as he considers necessary;

e. Assigning command functions to subordinate commanders;

f. Coordinating administration and support;

g. Selecting subordinate commanders, selecting combatant command staff, suspending subordinates, and convening courts-martial.

G. The Services.

1. Mission:

a. Army: "It shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land." 10 U.S.C §3062(b).

b. Navy: " . . . combat incident to operations at sea." 10 U.S.C §5062(a).

c. Air Force: " . . . offensive and defensive air operations." 10 U.S.C §8062(c)

d. Marine Corps: " . . . provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval bases and for the conduct of such land operations as may be essential to the prosecution of a naval campaign." 10 U.S.C §5063(a).

2. Secretarial Authority

a. The Secretary is responsible for, and has the authority necessary to conduct, all affairs of the Department, including:

(1) Recruiting;

(2) Organizing;

(3) Supplying;

(4) Equipping (including research and development);

(5) Training;

(6) Servicing;

(7) Mobilizing;

(8) Demobilizing;

(9) Administering;

(10) Maintaining;

(11) The construction, outfitting, and repair of military equipment;

(12) The construction, maintenance, and repair of buildings, structures, and utilities.

(13) Army: 10 U.S.C §3013; Navy: 10 U.S.C §5013; Air Force: 10 U.S.C §8013.

b. However, the provision of administration and support to forces assigned to a combatant command are "[s]ubject to the authority, direction, and control of the Secretary of Defense and subject to the authority of commanders of combatant commands." 10 U.S.C §165(b).

II. NATIONAL STRATEGY

A. National Security Strategy.

1. Submitted by the President in accordance with section 603 of Goldwater-Nichols.

2. "A National Security Strategy for a New Century," December 1999.

a. Core objectives of the Strategy:

(1) Enhance security with effective diplomacy and ready military forces;

(2) Bolster America's economic prosperity; and

(3) Promote democracy abroad.

b. Strategic priorities to advance core objectives:

(1) Help foster a peaceful, undivided, democratic Europe;

(2) Reinforce ties with Pacific nations;

(3) Prosper in the global economy;

(4) Continue to be an unrelenting force for peace around the world;

(5) Counter weapons of mass destruction, terrorism, international crime, drugs, illegal arms trafficking, and environmental damage; and

(6) Maintain a strong and ready military, and renew commitment to diplomacy.

B. National Military Strategy.

1. Chairman's and JCS's advice on the strategic direction of the armed Forces in implementing the National Security Strategy.

2. "Shape, Respond, Prepare Now—A Military Strategy for a New Era," 1997.

a. Objective: "To defend and protect U.S. national interests, our national military objectives are to Promote Peace and Stability and, when necessary, to Defeat Adversaries."

b. Elements of Strategy:

(1) Shaping the International Environment—through deterrence, peacetime engagement, and active participation and leadership in alliances.

(2) Responding to the Full Spectrum of Crisis—from humanitarian assistance to fighting and winning major theater wars.

(3) Preparing Now for an Uncertain Future—exploiting the Revolution in Military Affairs.

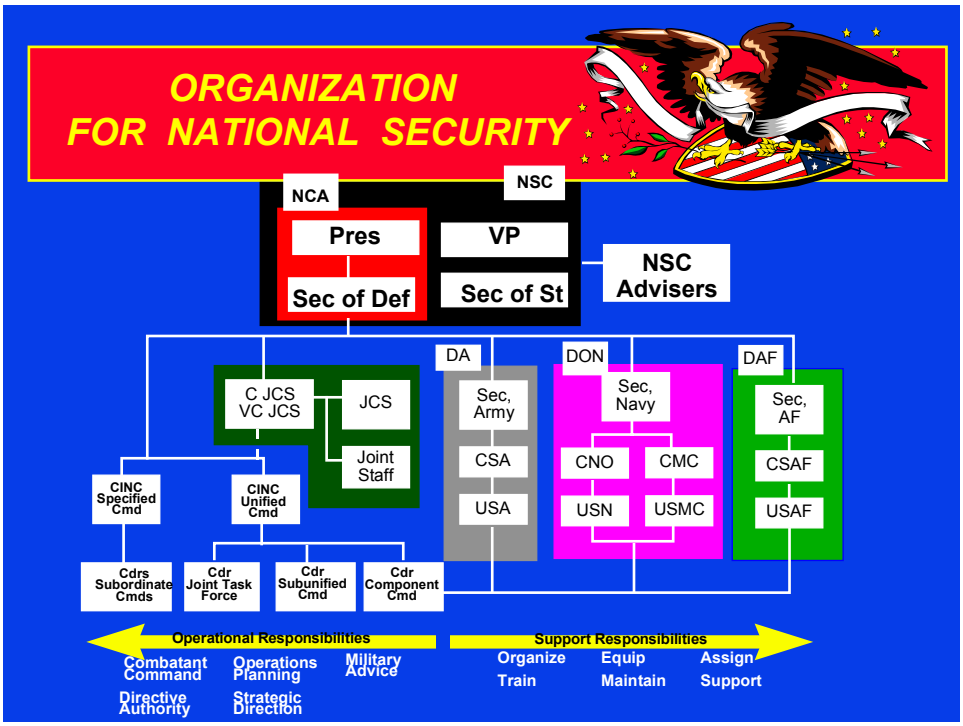
c. Strategic Concepts:

(1) Strategic Agility.

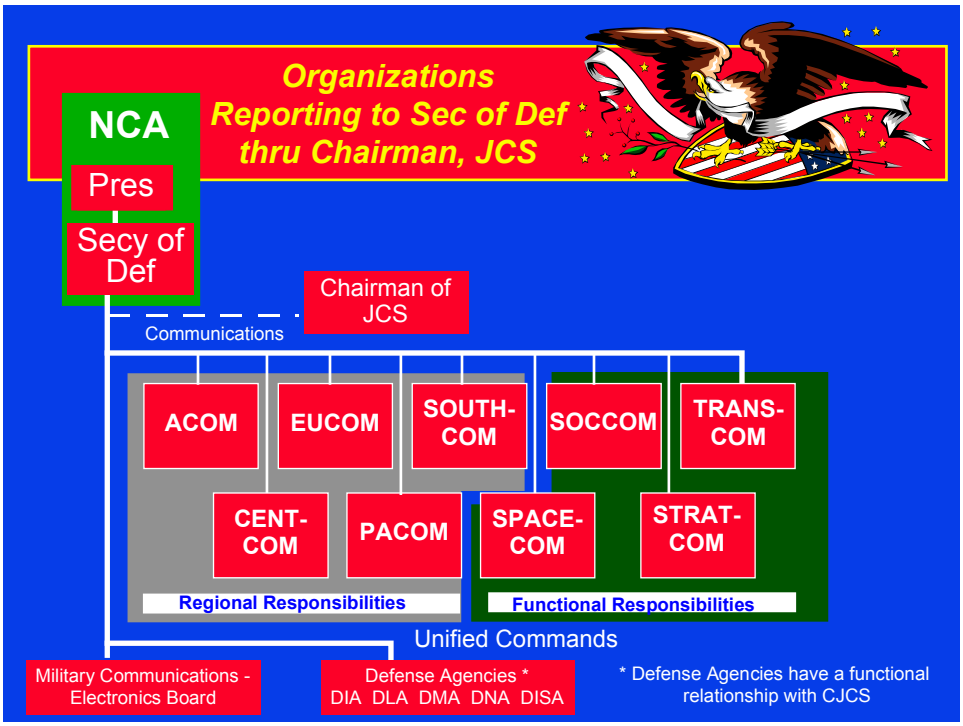
(2) Overseas Presence.

(3) Power Projection.

(4) Decisive Force.



Organization for National Security



Organizations Reporting to the Secretary of Defense

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, VA

RULES OF ENGAGEMENT: DEVELOPMENT, TRAINING, INTEGRATION, AND SYNCHRONIZATION

REFERENCES

1. CJCSI 3121.01A, Standing Rules of Engagement for U.S. Forces, 15 January 2000.
2. CJCSI 3121.02 ,Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States, 31 May 2000.
3. DoD Instruction 5100.77, DoD Law of War Program, 9 Dec 1998.
4. DoD Instruction 5210.56, Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties, 25 February 1992.
5. Joint Publication 1-04, Joint Tactics, Techniques, and Procedures (JTTP) for Legal Support to Military Operations (30 June 1998), Draft Copy.
6. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993).
7. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATONS (31 May 1997)
8. Mark S. Martins, Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering, 143 MIL. L. REV. 3 (1994)
9. CENTER FOR ARMY LESSONS LEARNED, ROE TRAINING, Newsletter No. 96-6 (May 1996)
10. CENTER FOR ARMY LESSONS LEARNED, PEACE OPERATIONS TRAINING VIGNETTES, Newsletter No. 95-2 (Mar 1995)
11. XVIII AIRBORNE CORPS RAMP/RULES OF ENGAGEMENT TRAINING PACKAGE, AMEDMENT TO XVIII AIRBORNE CORPS AND FORT BRAGG REGULATION 350-41, TRAINING THE CORPS (Dec 1996)
12. Operational Law Handbook, The Judge Advocate General's School.
13. LTC Michael Kelly & MAJ Mark Phillips of the Australian Army, The Application of Live, Virtual and Constructive Simulation to Training for Operations Other Than War, Draft Copy

I. INTRODUCTION

A. Objectives.

1. Understand the purpose of having standing rules of engagement.

2. Become familiar with the structure of the Standing Rules of Engagement (SROE).

3. Understand self-defense from both a collective and unit perspective.

4. Recognize the need for training the Judge Advocate on the ROE and various methodologies for doing so.

5. Become familiar with "RAMP" and consider the necessity to train rather than teach ROE.

6. Consider the need to integrate and synchronize the Battlefield Operating Systems with regard to the ROE.

B. Agenda.

1. Purpose of ROE.

2. Standing Rules of Engagement for U.S. Forces (SROE).

3. Concept of self-defense.

4. Training the Judge Advocate.

5. Introduction to RAMP.

6. Training by Battlefield Operating System.

7. ROE training in the Future.

II. PURPOSE OF ROE

A. "Rules of Engagement—Directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered. Also called ROE." Joint Pub 1-02, *DoD Dictionary of Military and Associated Terms.*

B. Purpose:

1. Control of military operations by the Civilian and Military Chain of Command.

2. Implements the inherent right of self-defense.

III. STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (SROE)

A. Purpose: "to provide implementation guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense. In the absence of superseding guidance, the SROE establish fundamental policies and procedures governing the actions to be taken by U.S. force commanders in the event of military attack against the United States and during all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States."

B. Structure.

1. Short covering instruction, with actual content in the Enclosures.

2. Enclosure A: Standing Rules of Engagement for U.S. Forces. General, unclassified discussion of concepts and terms. It is "intended to be used as a coordination tool with U.S. allies for the development of combined or multinational ROE consistent with [the] ROE."

3. Numerous classified Enclosures, some with Appendices, treat the concepts discussed in the unclassified Enclosure A in greater depth, or deal with the ROE applicable to specific mission areas.

4. Enclosure J: Supplemental Measures.

   a. Includes an extensive listing of specific ROE measures that may be used as required for mission accomplishment.

   b. Also includes message formats to be used in requesting and authorizing supplemental ROE, and examples.

5. Enclosure K: Combatant Commander's Theater-Specific ROE. When promulgated, includes additional guidance applicable within a Combatant Commander's Area of Responsibility.

6. Enclosure L: Rules of Engagement Process. This Unclassified enclosure "provides guidelines for incorporating ROE development into the crisis action planning (CAP) and deliberate planning processes by commanders and staffs at all levels." It also discusses the ROE Planning Cell. Such a cell is the responsibility of the J-3 (generally when engaged in CAP) or J-5 (generally when engaged in deliberate planning), with the assistance of the Staff Judge Advocate.

7. Glossary. Contains useful definitions.

C. Applicability. Guidance for U.S. forces:

1. In the event of military attack on the United States.

2. During all military operations, contingencies, terrorist attacks, or prolonged conflicts <u>outside</u> the territorial jurisdiction of the United States, including Puerto Rico and the Northern Marianas, U.S. possessions, and U.S. territories.

3. Exceptions:

a. When the SROE are superseded by higher guidance.

b. Multinational Force (MNF): if U.S. forces are assigned to the operational control of an MNF, they will comply with the MNF ROE if authorized by the National Command Authorities (NCA). The self-defense concepts discussed in the SROE will always be applicable.

c. Units under the operational control of the USCG apply portions of the USCG use of force doctrine. The self-defense concepts discussed in the SROE will always be applicable.

IV. CONCEPT OF SELF DEFENSE

A. Self defense is treated generally in Enclosure A.

B. THESE RULES DO NOT LIMIT A COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF DEFENSE OF THE COMMANDER'S UNIT AND OTHER U.S. FORCES IN THE VICINITY.

C. Key concepts.

1. Self defense.

a. Unit self defense: Defense of a particular unit of U.S. forces, including elements or personnel thereof, and other U.S. forces in the vicinity, against a hostile act or hostile intent.

(1) Vicinity: generally, the reach of the available weapon systems.

(2) Individual self defense:

(a) A subset of unit self defense.

(b) Individual's right to defend himself and others on the vicinity.

(c) Commanders must ensure that individuals understand and are trained on when and how to use force in self defense.

(d) An individual's right of self-defense may be subject to appropriate superior orders.

b. National self defense: Defense of the U.S., U.S. forces, and in certain circumstances, U.S. citizens and their property, and U.S. commercial assets from hostile acts or hostile intent.

(1) Responsibility for HN national protection resides with the HN unless the HN unable or unwilling to do so.

(2) Collective self-defense: defense of designated non-U.S. forces, foreign nationals, and their property.

(a) Subset of National self defense.

(b) Authority to exercise collective self-defense retained by the NCA.

2. Necessity and Proportionality.

a. The requirements of **necessity** and **proportionality** will be the basis for the judgment of the commander as to what constitutes an appropriate response to a particular hostile act or demonstration of hostile intent.

b. The use of force is normally a measure of last resort. Attempts should be made to control the situation without the use of force.

c. If force is necessary, the nature, duration and scope of the response should not exceed that required to decisively counter the hostile act or intent.

d. Deadly force (attack to disable or destroy): authorized when such action is the only prudent means by which the hostile act or intent can be prevented or terminated.

3. Hostile Force: generic term applied to any force (civilian, paramilitary, or military) that has committed a hostile act or demonstrated hostile intent.

a. Declared hostile force: once declared hostile by appropriate authority, U.S. forces need not observe a hostile act or demonstration of hostile intent before engaging. Basis of the engagement shifts from conduct to status.

b. Hostile force can be engaged even where not involved in hostile activity. For example, unarmed troops in the mess hall behind their lines are a legitimate target if they have been declared hostile.

4. Hostile Act: an attack or use of force against U.S. forces. Also includes force used to impede or preclude the mission or duties of U.S. forces.

a. Hostile Intent: The threat of imminent use of force. Also includes the threat of force used to impede or preclude the mission or duties of U.S. forces. Hostile intent is fact-specific. Although there is guidance throughout the classified portions of the SROE pertaining to the factors that may constitute evidence of hostile intent in various situations, the ultimate decision rests with the commander against whom the potential hostile intent is being demonstrated.

V. SUPPLEMENTAL MEASURES AND MISSION ACCOMPLISHMENT

A. Supplemental measures are issued, as necessary, for mission accomplishment. In many cases, the base-line concepts established in the SROE are sufficient guidance to the operational commander, and supplemental measures will not be promulgated.

B. Supplemental measures may **not** a limit the inherent right and obligation of self defense. For example, assume that in a particular operation there is a supplemental measure restricting the use of crew-served weapons. The commander must observe this restriction while accomplishing the mission. However, if the commander needs to defend his unit (because his unit has become the object of either hostile intent or a hostile act), he may employ crew-served weapons if they are otherwise a necessary and proportional response.

C. Supplemental measures may be requested by commanders at any level.

D. Appendices to Enclosure J contain a list of standardized measures from which individual measures may be selected

1. Lists are grouped by the authority (NCA, Combatant Commander, Subordinate Commanders) who may authorize the particular Measure.

2. Those measure which are reserved to the NCA or Combatant Commander are generally <u>restrictive</u> in nature. That is, they relate to a action, operation, or weapon system that must be affirmatively approved for use before a field commander may execute or utilize them.

3. The remainder of the supplemental measure (those that may be approved by subordinate commanders) are permissive in nature. That is, a commander may utilize a particular tactic or weapon system unless he is told that he cannot do so. In some cases, a supplemental measure from this series may be used to authorize a particular tactic or weapon system when it is necessary to clarify it use, or to authorize something that had previously been restricted.

4. Spares are included for novel measures.

5. Supplemental measure numbers and text are unclassified when referenced separately, but are at least Confidential when the two are linked.

E. ROE requests rise through the chain of command to the appropriate approval authority. Intermediate commanders may disapprove supplemental measure requests.

F. ROE Message Formats.

1. Contained in Appendix F to Enclosure J.

2. Messages are classified at least Confidential.

3. All requests and approvals should be serialized by unit. This is especially important for JTF and higher headquarters which are promulgating/approving ROE. For example, a unit which received CINC ROE Approval Serial 005 should ensure that they are in possession of Approval Serials 001-004 (unless the latest message is a total restatement of all previously approved ROE).

4. Requests for supplemental ROE should *always* include the justification for the request.

VI. TRAINING THE JUDGE ADVOCATE

A. "A soldier that just happens to be a lawyer."

B. The Judge Advocate General's School.

1. Basic Course.

2. Graduate Course.

3. Continuing Legal Education.

a. Law of War Workshop.

b. Operations Law Seminar.

C. Military Education.

1. CAS3.

2. CGSC.

D. In house training program.

1. Can be simple.

a. How to pack a ruck.

b. How to rig a parachute.

c. How to field strip a squad automatic weapon (SAW).

2. Can be more involved.

a. Land Navigation.

b. Drafting a five-paragraph operations order.

c. Mission planning sequence.

3. "Leather personnel carriers."

E. Field Training Exercises.

F. The Center for Law and Military Operations.

1. After action reports.

2. Lotus Notes.

3. Combat Training Centers.

a. One of, if not the most significant event in a commander's tour.

b. Commander needs a trained lawyer on his staff.

(1) Command and staff must learn to work with attorney.

(2) Legal observer controllers are part of the mix.

VII. INTRODUCTION TO RAMP

A. "A Matter of Training Not Lawyering." See generally, Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training Not Lawyering,* 143 MIL L. REV. 3 (1994).

B. The Legislative Model.

1. Problems in creation.

a. Unrealistic assumption that leaders can create ROE the way legislators create law.

b. "Overpopulation." Rules undergo revision by as many as nine levels of command.

c. Multiple ROE cards for same set of rules, inconsistency between units, "countless and changing shapes, colors, and flavors."

d. Only constant, self-defense boilerplate.

2. Problems of interpretation.

a. Unrealistic assumption that soldiers can interpret ROE the same way governments can interpret laws.

b. No system of rules can ever eliminate all inappropriate uses or failures to use force.

(1) Troops respond too timidly.

(a) "Toss the willing firers out of an action and there can be no victory." S.L.A. MARSHALL, MEN AGAINST FIRE: THE PROBLEM OF BATTLE COMMAND IN FUTURE WAR 56-57 (1978).

(b) Many infantrymen in World War II did not fire their weapons even when confronted by hostile enemy forces. *Id.*

(2) Troops respond too aggressively.

(a) "Don't one of you fire until you see the whites of their eyes." William Prescott at the Battle of Bunker Hill, June 17, 1775.

(b) ROE is not a four-letter word.

(3) Not a substitute for proper training in fire discipline.

3. Problems in Enforcement.

a. Poor dissemination of the facts surrounding criminal allegations.

b. Soldiers and media may believe that prosecution will follow every decision to fire.

c. Turns military doctrine into legal doctrine.

4. Problems in Land Force Doctrine.

a. No real doctrine on training ROE.

b. Hard to train at the last minute.

5. Neglect of Cognitive and Environmental Dimensions.

a. Harsh environment unlike civil society.

b. Often ROE briefed not trained.

C. Curative Approach.

1. Best prescription for improving decision making under stressful situations is training.

a. "Suspended agony."

b. Law Enforcement.

(1) Technology, role-play.

(2) Rules never change.

2. Adopt a training model of Land Force ROE.

a. Pass out rules far in advance of operation.

b. Key core concepts never change, predictability.

(1) Flexibility through structure of alert conditions.

(2) Flexibility through supplements.

3. Internalized principles rather than external written texts.

a. Not like interpreting the tax code.

b. Decision time reduced.

4. No criminalization of violations of the rules except for those that go beyond a good faith interpretation.

5. Comprehensive system for organizing key principles.

D. RAMP

1. The source rules.

a. **R**eturn fire with aimed fire. Return force with force. You always have the right to repel hostile acts with necessary force.

b. **A**nticipate attack. Use force first if, but only if, you see clear indicators of hostile intent.

c. **M**easure the amount of force that you use, if time and circumstances permit. Use only the amount of force necessary to protect lives and accomplish the mission.

d. **P**rotect with deadly force only human life, and property designated by your commander. Stop short of deadly force when protecting other property.

2. The RAMP rules are default settings based on the core functional areas of the SROE, self-defense, proportionality, and military necessity.

a. Especially beneficial where the OPLAN/ORDER is received just hours before execution.

b. In the event a soldier forgets the specific rules, application of RAMP will generally cause compliance with most specific ROE systems.

c. A "key word" or "mnemonic device" to be used as a means of organizing the rules in memory for quick retrieval during stressful situations.

(1) SPORTS and the M-16, METT-T, SALUTE.

(2) Soldiers accustomed to the key word approach.

(3) Experts say assists in memorization and recollection.

3. Standards with which leaders can supervise "judgmental" type training.

4. Core set of rules which can be supplemented to fit the actual mission specific ROE.

a. **A**nticipate attack, for example, could be supplemented to indicate that hostile intent is to be presumed where a crew served weapon is manned.

b. **P**rotect property could be supplemented to include using deadly force to protect weapons and ammunition.

E. ROE Alert Conditions (ROECON).

1. Ten functional types of ROE.

a. Type I - Hostility Criteria.

b. Type II - Scale of Force/Challenging Procedure.

c. Type III - Protection of Property and Foreign Nationals.

d. Type IV - Weapons Control Status/Alert Conditions.

e. Type V - Arming Orders.

f. Type VI - Approval to Use Weapons Systems.

g. Type VII - Eyes on Target.

h. Type VIII - Territorial or Geographic Restraints.

i. Type IX - Restrictions on Manpower.

j. Type X - Restrictions on Point Targets and Means of Warfare.

2. RAMP embodies only the core rules, depicted in functional areas I through III.

3. ROECON is a system whereby commanders may use all ten types of ROE in complex combined arms teams operations.

F. ROECON's are established and incorporated in the tactical standing operating procedures (TACSOP).

1. ROECON GREEN.

a. Applies when no discernible threat of hostile activity exists.

b. Places forces in a routine security posture (SROE).

c. Involves minimal arming and protection of only the force and key facilities.

2. ROECON AMBER.

a. Applies when a discernible threat of hostile activity, but not justifying ROECON RED.

b. Does not generally apply where higher headquarters has formally identified a hostile force.

c. Provides for arming of additional key personnel, establishment of roadblocks or barriers, security patrols, and increased availability of ordinance.

3. ROECON RED.

a. Applies when an actual attack on U.S. forces occurs, a threat of imminent attack exists, or higher headquarters has formally identified a hostile force in theater.

b. Directs the force to continue the protection measures detailed in the lower ROECON's while arming all personnel and lowering the levels of approval authority on certain weapons systems.

c. Provides specific hostility criteria.

4. May have preprinted ROE cards for each ROECON, organized in RAMP format.

G. Standard Formats for ROE annexes.

1. Each division prepares an ROE annex for every contingency plan that contributes to the unit's mission essential task list (METL).

2. Build on and reinforce RAMP and ROECON's.

3. Can "tailor" using preestablihed ROECONS and RAMP.

a. Optional Measures.

b. Format rules to soldiers based on RAMP.

c. ROE Matrix.

(1) Chart used to indicate levels of authority required for use of particular weapons systems.

(2) Matrix may change with ROECON.

H. Other recommendations.

1. Keep the RAMP and ROECON's unclassified while classifying the ROECON level.

2. Mastery of RAMP should be a battle task.

a. A task which must be accomplished by a subordinate unit if the next higher is to accomplish its METL.

b. Command climate the key.

c. A critical individual task monitored and graded by NCO's.

3. Training Scenarios.

a. Experience is the best trainer.

b. Training is the answer for shortfalls in experience.

c. "It was stated time and time before us that when it comes to training on the ROE, briefings and lectures are insufficient. The training has to be ingrained and instinctive, so that the soldier is able to react." *Dishonoured Legacy: The Lessons of the Somalia Affair,* 2 Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Minister of Public Works and Government Services Canada 616 (1997).

4. Scenarios can be found in articles, AAR's, and other sources.

a. Can use scenarios in classroom, then move to individual testing and finally STX's for small units.

b. Build into FTX and CPX scenarios.

5. Thoroughly integrate RAMP in training.

a. Level I: Classroom training for leaders and soldiers by division operations lawyer. (Can be brigade judge advocate).

b. Level II: Individual common task training using RAMP. (Lawyer and legal NCO may draft task condition and standard, graded by unit personnel using check sheet).

c. Level III: Collective lane training by squad or platoon using RAMP. (Lawyer may draft scenario package, lane run by unit personnel. JAG may observe and offer suggestions or supply answers to the hard hypotheticals)

d. Level IV: Collective lane training by section, squad or platoon using RAMP supplemented by real world ROE. (Same as above).

e. Level V: Leader training using RAMP supplemented by real world mission-specific ROE. (Taught by Ops lawyer or brigade legal counsel).

6. RAMP rules are of no value without practice in an environment that simulates what the soldiers may face

I. Potential Concerns.

1. RAMP is not a substitute for ROE.

a. Training device for assisting soldiers to understand, remember and apply ROE in a stress filled environment.

b. RAMP is supplemented by ROE and presented to soldiers in RAMP format.

2. Too complicated?

3. Ignores nuances of specific units.

a. Not doctrine.

b. Develop own.

(1) ARMED.

(2) HAND SALUTE.

c. Combined and Joint Operations.

VIII. TRAINING BY BATTLEFIELD OPERATING SYSTEM

A. During the planning sequence, Battlefield Operating Systems (BOS) typically break off and plan their own part of the mission.

B. Commander may have several non-organic support units assigned.

1. Brigade Combined Arms Team may include non-direct support (DS) assets such as close air support (CAS), Army Aviation, Naval Gunfire (NGF), Corps Fire Support (FS) assets, Special Operations Forces (SOF), etc.

2. The commander and staff may not be accustomed to working with these specialized "slice" units.

a. For example, Naval Gunfire has a very flat trajectory. Therefore, extremely accurate from a vertical standpoint but can over or undershoot a target. Danger close is 600 meters rather than the standard 400 meters.

b. Air Force CAS may have a set of criteria for determining hostile intent different than Army aviators.

C. In a mid to high intensity conflict, the large weapons systems are likely to inflict the greatest casualties and friendly fire incidents.

1. On the modern battlefield, all of the unit's intelligence and fire support assets are used to locate, box in, block or fix the enemy so that the enemy can be destroyed with as little direct contact as possible.

2. While the rifleman will always remain the focus, especially in OOTW, he will likely inflict a far smaller percentage of casualties in mid to high intensity conflicts than in the past.

D. A great deal of attention is spent on training the rifleman, but what about the BOS?

E. There is arguably a need to "train" or to integrate and synchronize the application of the ROE by BOS.

1. Integration is the idea that all separate systems should work together; they should be on the same set of music.

2. The BOS elements should synchronize the execution of the plan. They should insure that the timing of the application of the use of force enables the commander to maximize his use of combat power through surprise and mass producing a synergistic effect.

3. Practicing this in peacetime will facilitate real world execution.

F. No current doctrine on how to integrate and synchronize ROE.

1. Joint Pub. 1-04, *Joint Tactics, Techniques, and Procedures (JTTP) for Legal Support to Military Operations* (Draft Pub) introduces the concept of an ROE planning cell in the joint task force (JTF) environment.

a. At the JTF level, integrates key staff members during the planning phase, focusing on the impact of the ROE. Does not include all BOS.

b. Does not address integration and synchronization during the execution phases.

2. Consider creating an ROE planning cell at all levels of command.

a. Include all BOS elements.

b. Prior to mission execution, hold ROE integration and synchronization meetings.

(1) How will each BOS determine hostile intent? On the modern battlefield where enemy forces can be located beyond the capabilities of the human eye, what factors are going to be used?

(2) What types of optics will be used? During JUST CAUSE in Panama, an AC 130 unintentionally fired on U.S. ground forces. The solders had GLINT tape on their helmets. However, as the smoke of battle intensified, the AC 130 switched from infrared (IR) to thermal sights making it impossible to determine friend from foe.

(3) What type of munitions will be employed? If aviation assets are taking out an insurgent command and control bunker in a small village and there is a Special Forces team near by with eyes on target, could the bunker be taken out with a hellfire missile rather than aerial bomb in order to reduce the odds of fratricide and collateral damage?

(4) How is eyes on target interpreted? Satellite? Counter battery radar, Q36, Q37?

G. Situation Awareness.

1. Commander relies on the staff to keep him apprised of what is actually happening on the battlefield.

2. Judge Advocate can and should assist with situation awareness.

a. During operations, JAG is the person most likely to have time to act as an additional set of eyes.

(1) Is the engineer overlay accurate?

(2) Has the maneuver BOS been adequately informed as to where the family of scaterable mines (FASCAM) has been placed before he begins offensive operations?

(a) Tube launched, delivered by aircraft or vehicle.

(b) Unmarked minefields.

(c) Dud factor.

(3) Does the fire support BOS know where SOF special reconnaissance (SR) teams are located?

(4) After offensive operations, has the G5 checked the overlay to determine where the unmarked FASCAM minefields are located?

b. Assist the battle captain in logging and posting message traffic.

IX. ROE TRAINING IN THE FUTURE

A. Standardized v. Ad Hoc Training.

1. "Training in the law of armed conflict is of critical importance to effective peacekeeping: it cannot continue to be provided in an ad hoc manner. A clear responsibility center must ensure that sufficient and effective training is conducted throughout the Canadian Forces." LTG J. Dangerfield, P. LaRose-Edwards & R. Weeks, *Non-Traditional Military Training for Canadian Peacekeepers.* Minister of Public Works and Government Services Canada 73 (1997).

2. "Ad Hoc supplements embedded training."

B. Lane training realism limited by logistic, financial, environmental and coordination factors.

1. Environmental, psychological and physical limitations are also benefits justifying live training.

2. Difficult to set up if last minute training required.

C. "Virtual" and "Constructive" computer simulations may be a valuable supplement to live training by adding another level of realism. LTC Michael Kelly & MAJ Mark Phillips, *The Application of Live, Virtual and Constructive Simulation to Training for Operations Other Than War*, Draft.

1. Purpose still to provide experiential rather than intellectual model.

2. Cannot recreate the stench and noise of the real world, but may be able to raise the level of stress through sensory overload.

3. Numerous permutations off single scenario.

a. Different languages.

b. Various environmental aspects, day v. night.

c. Pulls out a wallet, then pulls out a gun.

4. Can be individual, squad or platoon sized.

5. Experiential sensory level for the soldier, command and control environment for the commander/BOS.

6. If there is a centralized method of training, satellite-training centers could be linked to a central hub.

7. Permits "distance learning."

X. CONCLUSION

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DOMESTIC SUPPORT OPERATIONS

CAPT MEYER

REFERENCES

1. 18 U.S.C. § 1385, Posse Comitatus Act.
2. 10 U.S.C. §§ 371-382, Chapter 18, Military Support For Civilian Law Enforcement Agencies.
3. 10 U.S.C. §§ 331-334, Chapter 15, Insurrections
4. 32 U.S.C. § 112, Drug Interdiction and Counter-Drug Activities
5. 42 U.S.C. § 5121, et seq., as amended, Stafford Act
6. 50 U.S.C. § 2311, Response to Threats of Terrorist Use of Weapons of Mass Destruction
7. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, as amended, Additional Support for Counter-Drug Activities
8. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
9. National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85, Section 1033, Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia
10. DoDD 3025.15, *Military Assistance to Civil Authorities*, 18 February 1997
11. DoDD. 3025.1, *Military Support to Civil Authorities*, 15 January 1993.
12. DoD 3025.1M, *Manual for Civil Emergencies*, June 1994.
13. DoDD. 3025.12, *Military Assistance for Civil Disturbances*, 4 February 1994.
14. DoDD. 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials* (w/change one), 21 February 1986.
15. DoDD 5525.10, *Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions*, 17 September 1990
16. NGR 500-1/ ANGI 10-8101, *Military Support to Civil Authorities*, February 1996
17. NGB 500-2/ ANGI 10-801, *National Guard Counterdrug Support to Law Enforcement Agencies*, September 1993
18. CJCS Instruction 3710.01, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel*, 28 May 1993.
19. AR 500-51, *Support to Civilian Law Enforcement*, 1 August 1983.
20. AR 700-131, *Loan and Lease of Army Material*, 4 September 1987
21. SECNAVINST 5820.7B, *Cooperation With Civilian Law Enforcement Officials*, 28 March 1988
22. OPNAVINST 3440.1C, *Navy Civil Emergency Management Program*, 10 March 1995
23. AFI 10-801, *Air Force Assistance to Civilian Law Enforcement Agencies*, 15 April 1994.
24. AFI 10-802, *Military Support to Civil Authorities*, 23 February 1994
25. AFI 31-202, *Military Working Dog Program*, 1 August 1996
26. DoD Civil Disturbance Plan GARDEN PLOT
27. FM 100-19, Domestic Support Operations, July 1993.
28. Office of the Defense Coordinator for Drug Enforcement Policy and Support Policy of 26 Jan 95, *Priorities, Policies, and Procedures for Department of Defense Counterdrug Support to Domestic Drug Law Enforcement Agencies*.
29. National Security Act of 1947, 50 U.S.C. § 401 *et seq*.

30. Title V of the National Security Act of 1947, 50 U.S.C. § 413.
31. Executive Order 12333, *United States Intelligence Activities*, 4 Dec 4 1981, 46 Fed.Reg. 59941.
32. DoDD 5240.1, *DoD Intelligence Activities*, (25 Apr 1988)
33. DoD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons* (7 Dec 1982).
34. AR 381-10, *U.S. Army Intelligence Activities* (1 Jul 84).
35. AFI 14-104, *Conduct of Intelligence Activities* (1 Nov 93)
36. SECNAVINST 3820.3D, *Oversight of Intelligence Activities within the Department of the Navy* (26 Aug 88)
37. DIA, *Intelligence Law Handbook* (Sept. 1995) [hereinafter ILH].
38. USAINSCOM Pamphlet 27-1, *Intelligence Law Handbook*, 31 Jan 86.

I. OBJECTIVES

A. Become familiar with DoD's role overall in domestic operations.

B. Become familiar with the Posse Comitatus Act.

C. Become familiar with DoD's role in disasters and emergencies.

D. Become familiar with DoD's role in civil disturbances.

E. Become familiar with DoD's role in providing support to law enforcement.

F. Become familiar with DoD's role in counterdrug support.

G. Become familiar with limitations on DoD's role in collecting intelligence concerning U.S. personnel.

II. OVERVIEW

A. General: The military's mission is to fight and win the nation's wars. DoD will cooperate with civil authorities, but the relationship is generally one of <u>support</u>—the civilian authorities retain <u>primary</u> responsibility.

B. Starting point for <u>all</u> DoD support: DoDD 3025.15.

C. Limitations on provision of support imposed by the Posse Comitatus Act, 18 U.S.C. § 1385.

D. Allowable military support to domestic operations.

1. Civil disasters and emergencies; Stafford Act (42 U.S.C. §§ 5121, et.seq.), DoDD 3025.1;

2. Civil disturbances; Insurrection Act (10 U.S.C. §§ 331-34), DoDD 3025.12;

3. Support to civilian law enforcement

a. Loan of equipment; 10 U.S.C. § 372, DoDD 5525.5;

b. Expert advice and training; 10 U.S.C. § 373, DoDD 5525.5;

c. Sharing information; 10 U.S.C. § 371, DoDD 5525.5

4. Counterdrug support

a. Detection and monitoring; 10 U.S.C. § 124;

b. Training and other support; Section1004, FY 91 NDAA; CJCSI 3710.01.

5. Miscellaneous support

a. Sensitive support; DoDD S-5210-36;

b. Law enforcement detachments; 10 U.S.C. § 379;

c. Emergencies involving chemical or biological weapons; 10 U.S.C. § 382;

d. Miscellaneous exceptions.

III. GUIDE FOR PRACTICE

A. Respond to situations requiring immediate action to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions. Notify the appropriate approval authority as soon as possible.

B. Consult DoDD 3025.15.

1. Review the 6 criteria for support: legality, lethality, risk, cost, appropriateness, and readiness.

2. Note that SECDEF has, in certain circumstances, changed the approval authority (i.e., he has reserved the authority to himself).

C. Consult the appropriate DoD/Service regulation.

D. Find and forward the requests to the appropriate approval authority.

E. Remember the fiscal implications: most support is reimbursable, so ensure costs are captured.

IV. DODD 3025.15

A. Governs all DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, U.S. possessions and territories.

B. Provides criteria against which all requests for support shall be evaluated. The directive addresses them to approval authorities, but commanders at all levels should use them in providing a recommendation up the chain of command.

1. Legality - compliance with the law.

2. Lethality - potential use of lethal force by or against DoD forces.

3. Risk - safety of DoD forces.

4. Cost - who pays, impact on DoD budget.

5. Appropriateness - whether the requested mission is in the interest of DoD to conduct.

6. Readiness - impact on DoD's ability to perform its primary mission.

C. Approval Authority. The directive changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable.

1. SECDEF is the approval authority for:

a. Civil Disturbances.

b. Responses to acts of terrorism.

c. Support that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.

2. When CINC-assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff. CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected CINC.

3. Immediate response authority in the local commander is not affected.

V. POSSE COMITATUS ACT

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1385.

A. History.

1. posse comitatus *po.si komitei.tAs, -tius* , [med. (Anglo) L., force of the county: see prec. and county.] 'The force of the county'; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or 'raise' to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff. Oxford English Dictionary Online.

2. In the United States the posse comitatus was perhaps most important on the Western frontier (there known as a posse), but it has been preserved as an institution in many states. Sheriffs and other peace officers have the authority to summon the power of the county. In some counties it is a crime to refuse assistance. In general, members of a posse comitatus have been permitted to use force if necessary to achieve a posse's legitimate ends, but state laws differ as to the legal liability of one who in good faith aids an officer himself acting beyond his authority. "posse comitatus" Britannica Online.

3. Congress sought to terminate the prevalent use of federal soldiers in civilian law enforcement roles in the South during the Reconstruction Period following the Civil War.

4. Act of 1878 created general prohibition against use of military personnel in civilian law enforcement.

5. Sought to preserve American tradition of military subordination to a strong civil authority.

B. To Whom the PCA Applies.

1. Active duty personnel in the Army and Air Force.

a. Most courts interpreting the Posse Comitatus Act have refused to extend its terms to the Navy and Marine Corps. (United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986); United States v. Mendoza-Cecelia, 736 F.2d. 1467 (11th Cir. 1992)).

b. 10 U.S.C. § 375 directed SECDEF to promulgate regulations forbidding direct participation "by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." SECDEF has done so in DoDD 5525.5. Therefore, the proscription has been extended by regulation to the Navy and Marine Corps. (See DoDD 5525.5, para. B(1), and enclosure 4, para C.). SECDEF and SECNAV may grant exceptions on a case by case basis. DoDD 5525.5, Encl. 4, para. C., SECNAVINST 5820.7b, para. 9c.

2. Reservists on active duty, active duty for training, or inactive duty for training.

3. National Guard personnel in Federal service (Title 10 status).

4. Civilian employees of DoD when under the direct command and control of a military officer. (DoDD 5525.5, encl. 4; AR 500-51, para. 3-2; SECNAVINST 5820.7B, para. 9b(3)).

C. The Whom the PCA does NOT Apply:

1. A member of a military service when off duty and acting in a private capacity. [A member is not acting in a private capacity when assistance to law enforcement officials is rendered under the direction or control of DoD authorities]. (DoDD 5525.5, Encl. 4; AR 500-51 para. 3.2; SECNAVINST 5820.7B, para. 9b(4)); AFI 10-801.

2. A Member of the National Guard when not in Federal Service.

3. A member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training.

4. Members of the Coast Guard during peacetime (14 U.S.C. § 2). Jackson v. Alaska, 572 P.2d 87 (Alaska 1977).

D. To What the PCA Applies.

1. Prohibits direct law enforcement assistance, including:

a. Interdiction of a vehicle, vessel, aircraft, or other similar activity;

b. A search or seizure;

c. An arrest, apprehension, stop and frisk, or similar activity; and

d. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DoDD 5525.5, Encl. 4, para. A.3.

2. Analytical framework. There are three separate tests which courts apply to determine whether the use of military personnel has violated the PCA.

a. FIRST TEST: whether the action of the military personnel was "active" or "passive." United States v. Red Feather, 392 F. Supp. 916, at 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, at 892 (D.D.C. 1988); United States v. Rasheed, 802 F.Supp. 312 (D. Hawaii 1992).

b. SECOND TEST: whether use of the armed forces pervaded the activities of civilian law enforcement officials. United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) *cert. den*. 459 U.S. 1170 (1983); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990);.

c. THIRD TEST: whether the military personnel subjected citizens to the exercise of military power which was:

(1) Regulatory (a power regulatory in nature is one which controls or directs);

(2) Proscriptive (a power proscriptive in nature is one that prohibits or condemns); or

(3) Compulsory (a power compulsory in nature is one that exerts some coercive force). United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977). United States v. Yunis, 681 F. Supp. 891, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).

3. The PCA does NOT apply to actions furthering a military or foreign affairs function of the Untied States. This is sometimes known as the "Military Purpose Doctrine." The primary purpose must be to further the military interest. The civilians may receive an incidental benefit. DoDD 5525.5, Encl. 4, para. A.2.a. Such military purposes include:

(1) Investigations and other actions related to enforcement of the UCMJ. United States v. Thompson, 33 M.J. 218 (CMA 1991), *cert. denied*. 502 U.S. 1074 (1992).

(2) Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding.

(3) Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility. Harker v. State, 663 P.2d 932 (Alaska 1983); Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988); Eggleston v. Department of Revenue, 895 P.2d 1169 (Colo. App 1995). Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution. Applewhite v. United States, 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994).

(4) Protection of classified military information or equipment.

(5) Protection of DoD personnel, DoD equipment, and official guests of the DoD.

(6) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

E. Where the PCA Applies. (Extraterritorial Effect of the PCA)

1. A 1989 DOJ Office of Legal Counsel opinion concluded that the Posse Comitatus Act does not have extraterritorial application. Memorandum, Off. Legal Counsel for General Brent Scowcroft, 3 Nov. 1989. This opinion also states the restrictions of 10 U.S.C. §§ 371 - 381, specifically 10 U.S.C. § 375, were also not intended to have extraterritorial effect. Id. at 21.

2. Some courts have also adopted the view that the Posse Comitatus Act imposes no restriction on use of U.S. armed forces abroad, noting that Congress intended to preclude military intervention in domestic affairs. United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). (Note: both Chandler and D'Aquino involved law enforcement in an area of military occupation.) But see, United States v. Kahn, 35 F.3d 426, 431 n. 6 (9th Cir. 1994) (In a case involving the applicability of the PCA to Navy activities in support of maritime interdiction of a drug-smuggling ship, the government maintained the PCA had no extraterritorial effect. While the court stated that issue had not been definitively resolved, it did state that 10 U.S.C. §§ 371-381 did "impose limits on the use of American armed forces abroad.")

3. Note, however, that DoD policy, as contained in DoDD 5525.5, which incorporates restrictions of 10 U.S.C. § 375, applies to all U.S. forces wherever they may be. Two weeks after the promulgation of the Barr memo, Secretary Cheney amended the Directive to read that, in the case of compelling and extraordinary circumstances, SECDEF may consider exceptions to the prohibition against direct military assistance with regard to military actions outside the territorial jurisdiction of the U.S..

F. What is the effect of violating the PCA.

1. Criminal Sanctions. 2 years imprisonment, fine, or both.

2. Inability to Convict Offenders:

a. Exclusionary rule. In general, courts have not applied the exclusionary rule to cases in which the PCA was violated, using the following rationales:

(1) The PCA is itself a criminal statute, so there is no need to use the deterrent of the exclusionary rule. However, since there have been no prosecutions under the PCA, its deterrent effect is questionable. State v. Pattioay, 896 P.2d 911 (Hawaii 1995); Colorado v. Tyler, 854 P.2d 1366 (Colo. Ct. App. 1993), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994); Taylor v. State, 645 P.2d 522 (Okla. 1982).

(2) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant. United States v. Walden, 490 F.2d 372 (4th Cir. 1974), *cert. denied* 416 U.S. 983 (1974).

(3) Violations of the PCA are neither widespread nor repeated, so the remedy of the exclusionary rule is not needed. Court will apply the exclusionary rule when the need to deter future violations is demonstrated. United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied* 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).

b. Failure to prove an element of offense. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element. United States v. Banks, 383 F. Supp. 368 (1974).

3. Dismissal of charges. Not likely to be considered an appropriate remedy. United States v. Rasheed, 802 F. Supp 312 (D. Hawaii 1992).

4. Civil Liability.

a. PCA violation as a private cause of action: No. PCA is a criminal statute; Congress did not intend to create a private cause of action. Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 511 (2nd Cir. 1994) *citing* Lamont v. Haig, 539 F. Supp. 552 (W.D.S.D. 1982).

b. PCA violation as a constitutional tort ("Bivens suit"): An evolving area. Applewhite v. United States Air Force, 995 F.2d. 997 (10th Cir. 1993)(finding PCA not violated, and conduct of military personnel did not otherwise violate 4th or 5th Amendment rights); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986)(finding a private right of action under the 4th Amendment).

c. Federal Tort Claims Act: Military personnel acting in violation of the PCA may not be found to be acting "within the scope of their employment," and therefore may be subject to individual personal liability. Wrynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961).

VI. DISASTER & EMERGENCY RELIEF

A. References.

1. Law: Disaster Relief Statutes (Stafford Act), 42 U.S.C. §§ 5121, et seq.

2. DoD.

a. DoDD 3025.1, DoD 3025.1-M.

b. NGR 500-1/ANGI 10-8101.

3. Services.

a. AR 500-60.

b. OPNAVINST 3440.1C.

c. AFI 10-802.

B. Stafford Act. Provides four means by which the federal government may become involved in the relief effort:

1. President may declare the area a major disaster (42 U.S.C. § 5170).

   a. Follows a natural catastrophe.

   b. Requires a request for the declaration from the governor.

   c. State must have executed its own emergency plan and require supplemental help.

2. President may declare the area an emergency (42 U.S.C. § 5191).

   a. Same criteria as for a major disaster, except also requires that governor define the type and amount of federal aid required. Total federal assistance may not exceed $5 million.

   b. Operationally, no significant distinction between an emergency and a major disaster.

3. President may send in DoD assets on an emergency basis to "preserve life and property." 42 U.S.C. § 5170b(c).

   a. Done before any Presidential declaration, but still requires a governor's request.

   b. Lasts only 10 days.

   c. Used to clear debris and wreckage and to temporarily restore essential public facilities and services—very limited authority.

4. President may send in federal assets where an emergency occurs in an area over which the federal government exercises primary responsibility by virtue of the Constitution or federal statute. 42 U.S.C. § 5191(b).

   a. Does not require a governor's request, although the statute directs consultation with the governor, if practicable.

   b. Results in a Presidential declaration of an emergency.

c. President Clinton exercised this authority on April 19, 1995 in the case of the bombing of the Murrah Federal Building in Oklahoma City, OK.

C. The Federal Response.

1. The Federal Emergency Management Agency (FEMA) directs and coordinates the federal response on behalf of the President.

2. FEMA has prepared the *Federal Response Plan*, which defines 12 Emergency Support Functions (ESF's) for which certain federal agencies have either a primary or supporting role. DoD (Corps of Engineers) is the primary agency for ESF #3, Public Works and Engineering. DoD is a supporting agency for all others.

3. FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene.

4. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is generally drawn from the CONUSA headquarters. The DCO will be the FCO's single point of contact for DoD support.

5. The FCO issues Mission Assignments, defining the task and maximum reimbursement amount, to the federal agencies. Federal agencies that exceed the reimbursement amount, or execute tasks not within the Mission Assignment, may not be reimbursed.

D. The DoD Response.

1. The Secretary of the Army is the DoD Executive Agent for disaster relief operations. As such, he is the approval authority for all such support, unless it involves CINC-assigned forces (see discussion of DoDD 3025.15, above).

2. The Director of Military Support (DOMS) is the Secretary of the Army's action agent. DOMS coordinates and monitors the DoD effort.

3. USACOM (CONUS, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plan and for the execution of those plans. They may form a Joint Task Force for this purpose.

E. Immediate Response Authority.

1. Authorizes local military commanders to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters.

2. Types of support authorized include:

a. Rescue, evacuation, and emergency treatment of casualties.

b. Emergency restoration of essential public services.

c. Emergency removal of debris and explosive ordnance.

d. Recovery and disposal of the dead.

3. This type of support is provided on a reimbursable basis, but assistance should <u>not</u> be denied because the requester is unable or unwilling to commit to reimbursement.

4. NOTE: This is a very limited authority that should only be invoked in bona fide emergencies. Contemporaneous coordination with DOMS should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities.

F. Disaster Support Involving Law Enforcement Activities.

1. The Stafford Act is not an exception to the Posse Comitatus Act. Therefore, any support that involves direct involvement in the enforcement of the civil law must undergo the PCA analysis discussed below. Typical areas of concern include:

a. Directing traffic.

b. Guarding supply depots.

c. Patrolling.

2. National Guard personnel, acting in their Title 32 (State) status should be the force of choice in these areas.

3. Law enforcement duties that involve military functions may be permissible (i.e., guarding a military supply depot).

VII. CIVIL DISTURBANCES

A. References.

1. Constitution: Article 4, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

2. Law: Insurrections, 10 U.S.C. §§ 331-335.

3. DoD.

a. DoDD 3025.12.

b. DoD Civil Disturbance Plan GARDEN PLOT.

B. The maintenance of law and order is primarily vested in state and local officials. Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The probable order of employment of forces in response to a certain situation will be:

1. Local and state police.

2. National Guard in their state status.

3. Federal civil law enforcement officials.

4. Federal military troops (to include National Guard called to active federal service).

C. The insurrection statutes permit the President to use the armed forces to in the following circumstances:

1. An insurrection within a State. The legislature or governor must request assistance from the President. § 331.

2. A rebellion making it impracticable to enforce the laws of the United States (i.e., federal law) by the ordinary course of judicial proceedings. § 332.

3. Any insurrection or domestic violence which:

a. opposes or obstructs federal law; or

b. hinders the execution of State law so that the people are deprived of their Constitutional rights, <u>and</u> the State is unable or unwilling to protect those rights. § 333.

D. The Federal response.

1. The Attorney General coordinates all federal government activities relating to civil disturbances.

2. If the President decides to respond to the situation, he must first issue a proclamation to the insurgents, prepared by the Attorney General, directing them to disperse within a limited time. § 334. At the end of that time period, the President may issue an execute order directing the use of armed forces.

3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

E. The DoD Response.

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.15). The Secretary of the Army had previously been the approval authority (DoDD 3025.12)

2. Although the civilian authorities have the primary responsibility for response to civil disturbances, military forces shall remain under military command and control at all times.

3. The Secretary of the Army, along with DOMS, in coordination with CJCS, directs the required DoD assistance, normally by designating supported and supporting CINC's.

4. GARDEN PLOT is the standing Operation Plan for response to civil disturbance. It is a comprehensive plan. Detailed Use of Force Policy / ROE is found in Appendix 8 to Annex C.

F. Emergency Employment of Military Forces.

1. Military forces shall not be used for civil disturbances unless specifically directed by the President (pursuant to 10 U.S.C. §§ 331-334), <u>except</u> in the following circumstances:

   a. To prevent the loss of life or wanton destruction of property or to restore governmental functioning, in cases of civil disturbances, if the duly constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization.

   b. When duly constituted state or local authorities are unable or decline to provide adequate protection for Federal property or functions.

2. Note that this is limited authority.

G. Other Considerations. Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much a possible. Our role is to support the civilian authorities, not replace them. Civilian authorities have more experience in law enforcement than does the typical service member.

VIII. SUPPORT TO CIVILIAN LAW ENFORCEMENT

A. Although the following activities can be considered law enforcement type activities, they do not violate the PCA as they do not involve use of military personnel to provide direct assistance.

B. Loan of Equipment and Facilities.

1. References.

a. Law: 10 U.S.C. § 372, § 374.

b. DoD.

(1) DoDD 5525.5, Enclosure 3.

(2) NGB 500-1/ANGI 10-8101.

c. Services.

(1) AR 500-51, Chapter 2, Section 2.

(2) SECNAVINST 5820.7B, para. 8.

(3) AFI 10-801, Attachment 4.

2. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to Federal, State, or local law enforcement officials for law enforcement purposes.

3. There must be no adverse impact on national security or military preparedness.

4. Approval authority.

a. SECDEF. Any requests for potentially lethal support, including loans of:

(1) Arms.

(2) Combat and tactical vehicles, vessels, or aircraft.

(3) Ammunition.

b. Army:

(1) HQDA (DALO-SMS). Non-lethal equipment in excess of 60 days. Installation Commander can approve all other equipment requests if loan/lease is for 60 days or less.

(2) HQDA (DAMO-ODS). Requests for use of installation or research facilities. AR 500-51, para. 2-5.

c. Navy & Marines: Assistant SECNAV (Manpower and Reserve Affairs) for non-lethal equipment for more than 60 days. All other requests may be approved as specified in SECNAVINST 5820.7B, para. 9e(3).

d. Air Force: Ass't SECAF for Manpower, Reserve Affairs, Installations, and Environment for all nondrug related requests. See AFI 10-801, Attachment 4.

e. National Guard: Loan of weapons, combat/tactical vehicles, vessels and aircraft require approval of the service secretary or their designee. Requests for loan/lease of NG equipment that require HQDA or HQAF approval will be reviewed by NGB. NGB 500-1/ANGI 10-8101, para. 3-1.

5. In addition to loan/lease authority, The National Defense Authorization Act of 1997 added a new section to Title 10. Section 2576a, "Excess Personal Property; Sale or Donation for law enforcement activities," permits DoD to provide excess personal property suitable for use in counter-drug and counter-terrorism activities to federal and state agencies.

a. This includes authority to furnish small arms and ammunition.

b. The Defense Logistic Agency manages this program as of 1 October 1995. Memorandum of the Secretary of Defense for the Under Secretary of Defense for Acquisition and Technology, 26 June 1995.

c. The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, Los Angeles) actually provide this excess property.

C. Expert Advice and Training.

1. References.

a. Law.

(1) 10 U.S.C. §§ 373, 375, 377.

(2) 50 U.S.C. §§ 2312, 2315.

b. DoD: DoDD 5525.5, Enclosure 4.

c. Services.

(1) AR 500-51, Chapter 3.

(2) SECNAVINST 5820.7B, para. 9.a.(4) and (5).

(3) AFI 10-801.

2. Military personnel may be used to train civilian law enforcement personnel in the use of equipment that we provide. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations.

   a. Note that the Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training US forces may provide. The policy is based on prudential concerns that advanced training could be misapplied or misused by CLEAs, resulting in death or injury to non-hostile persons. The memo permits basic military training such as basic marksmanship, patrolling, medical/combat lifesaver, mission planning, and survival skills. It prohibits what it terms "advance military training," which is defined as "high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training.

   b. A single general exception exists to provide this advanced training at the US Army Military Police School. In addition, USCINCSOC may approve this training, on an exceptional basis, by special operations forces personnel.

3. Military personnel may also be called upon to provide expert advice to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited.

   a. A specific example of this type of support is military working dog team support to civilian law enforcement. The dogs have been analogized to equipment and its handler provides expert advice. See DoDD 5525.10, Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions, 17 Sept. 1990; Military Working Dog Program, AFI 31-202.

b. Weapons of Mass Destruction. Congress has directed that DoD provide certain expert advice to federal, state, and local agencies with regard to weapons of mass destruction (WMD). This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

(1) 50 U.S.C. § 2312: Training in emergency response to the use or threat of use of WMD.

(2) 50 U.S.C. § 2315: Program of testing and improving the response of civil agencies to biological and chemical emergencies. (Department of Energy runs the program for responses to nuclear emergencies.)

4. Approval Authority.

a. SECDEF.

(1) Training or expert advice to law enforcement in which there is a potential for confrontation between the trained law enforcement and specifically identified civilian individuals or groups.

(2) Assignments of 50 or more DoD personnel or a period of assignment of more than 30 days. The Assistance Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority for any other assignment.

b. Army. DOMS is the approval authority. AR 500-51, para. 3-1d.

c. Navy & Marines. The Secretary of the Navy is the approval authority. SECNAVINST 5820.7B, para. 9.e.

5. Funding. Support provided under these authorities are reimbursable, unless:

a. The support is provided in the normal course of training or operations; or

b. The support results in a substantially equivalent training value.

D. Sharing Information.

a. References.

(1) Law: 10 U.S.C. § 371

(2) DoD: DoDD 5525.5, Enclosure 2.

(3) Services.

(a) AR 500-51, Chapter 2, Section 1.

(b) SECNAVINST 5820.7B, para. 7.

(c) AFI 10-801, Chapter 4.

b. Any information collected in normal course of military operations may be provided to appropriate civilian law enforcement agencies.

c. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials shall be taken into account in planning and execution of military training and operations. 10 U.S.C. § 371(b).

IX. COUNTERDRUG SUPPORT

A. References.

1. Law.

a. 10 U.S.C. § 124.

b. 32 U.S.C. § 112.

c. Section 1004, FY91 NDAA

d. Section 1031, FY97 NDAA

e. Section 1033, FY98 NDAA

2. DoD.

a. DEP&S Policy of 26 Jan 95.

b. CJCSI 3710.01.

c. NGB 500-2/ANGI 10-801.

B. General.

1. Counterdrug support operations have become an important activity within DoD. All DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)).

2. What separates counterdrug support from most other areas of support is that it is non-reimbursable. For FY99, Congress appropriated nearly $725 million for DoD counterdrug support. DEP&S channels that money to the providers of counterdrug support.

C. Detection and Monitoring.

1. 10 U.S.C. § 124 made DoD the lead federal agency for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States. D&M is therefore a DoD mission.

a. Although a mission, D&M is to be carried out in support of federal, state, and local law enforcement authorities.

b. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican border).

c. Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities.

2. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily USN vessels), and land-based radar (to include Remote Other The Horizon Radar (ROTHR)) sites.

D. National Guard.

1. 32 U.S.C. § 112 provides federal funding for National Guard counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.

2. The State must prepare a drug interdiction and counter-drug activities plan. DEP&S reviews each State's implementation plan and disburses funds.

E. Additional Support to Counterdrug Agencies.

1. General. Congress has given DoD additional authorities to support federal, state, local, and foreign agencies that have counterdrug responsibilities. These are in addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above). Congress has not chosen to codify these, however, so it is necessary to refer to the public laws instead. Many of these are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.

2. Section 1004.

a. Section 1004 is the primary authority used for counterdrug operations. The statute permits broad support to the following law enforcement agencies which have counterdrug responsibilities:

(1) Federal, State, and Local.

(2) Foreign, when requested by a federal counterdrug agency. (Typically the DEA or member of the State Department Country Team that has counterdrug responsibilities within the country.)

b. Types of support:

(1) Maintenance and repair of equipment.

(2) Transportation of personnel (U.S. & foreign), equipment, and supplies CONUS/OCONUS.

(3) Establishment of bases of operations CONUS/OCONUS.

(4) Training of law enforcement personnel, to include associated support and training expenses.

(5) Detection and monitoring of air, sea, surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.

(6) Construction of roads, fences, and lighting along U.S. border.

(7) Linguist and intelligence analyst services.

(8) Aerial and ground reconnaissance.

(9) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

c. These authorities are <u>not</u> exceptions to the Posse Comitatus Act. Any support provided must comply with the restrictions of the PCA. Additional, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

d. Approval Authorities: CJCSI 3710.01.

(1) Non-Operational Support.

(a) That which does not involve the active participation of DoD personnel, to include the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDD 5525.5 and implementing Service regulations, discussed above.

(2) Operational Support.

(a) The Secretary of Defense is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

(b) SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation, but no lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission. See CJCSI 3710.01. Example: For certain missions along the southwest border, the delegations run from SECDEF to ACOM to FORSCOM to Joint Task Force SIX (JTF-6).

e. Requests for DoD support must meet the following criteria:

(1) Support requested has clear counterdrug connection,

(2) Support request must originate with federal, state or local agency having counterdrug responsibilities,

(3) Request must be for support DoD authorized to provide,

(4) Support must clearly assist with counterdrug activities of agency,

(5) Support is consistent with DoD support of the National Drug Control Strategy,

(a) DEP&S Priorities for the provision of support:

(i) Multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA)

(ii) Individual agencies in a HIDTA

(iii) Multi-jurisdictional, multi-agency task forces not in a HIDTA.

(iv) Individual agencies not in a HIDTA

(6) All approved CD operational support must have military training value.

3. Other Statutes.

a. Section 1206, FY 90 NDAA. Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas.

b. Section 1031, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation, and photo equipment.

c. Section 1033, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. The additional support is similar that provided to Mexico under Section 1031, but also includes boats suitable for riverine operations.

X. MISCELLANEOUS SUPPORT

A. Sensitive support: DoDDS-5210.36

B. Law Enforcement Detachments

1. Law: 10 U.S.C. § 379.

2. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as Law Enforcement Detachments (LEDET's).

3. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a "constructive" Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, the law enforcement duties should be left to the Coast Guard personnel. Military members should offer necessary support.

C. Emergencies Involving Chemical or Biological Weapons

1. Law: 10 U.S.C. § 382.

2. In response to an emergency involving biological or chemical weapons of mass destruction that is beyond the capabilities of the civil authorities to handle, the Attorney General may request DoD assistance directly.

3. The assistance provided includes monitoring, containing, disabling, and disposing of the weapon.

4. Regulations, required by the statute, implementing the authority, have not yet been promulgated.

D. Miscellaneous Exceptions. DoDD 5525.5, Encl. 4, para. A.2.e., contains a list of statutes which contain express authorization for the use of military forces to enforce the civil law. Among them are:

1. Protection of the President, Vice President, and other dignitaries.

2. Assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials

XI. COLLECTION OF INTELLIGENCE CONCERNING U.S. PERSONS

A. Background

1. After World War II, the National Security Act of 1947 fundamentally reoriented the U.S. intelligence effort to one that functions during times of peace. The creation of the Central Intelligence Agency (CIA) is but one indication of the new orientation.

2. Unfortunately some of the fears of critics of standing intelligence organizations came true, mostly in the aftermath of the Vietnam War. A succession of investigations of the CIA by the President (Rockefeller Commission) and Congress (Church and Pike Commissions) detailed abuses. In response, and in an effort to preclude restrictive legislation, a series of Executive Orders were issued: E.O. 11905 by President Ford, E.O. 12306 by President Carter, and E.O. 12333 by President Reagan.

3. E.O. 12333 remains the authoritative source in this area. The order assigns intelligence responsibilities among various government agencies and, most important to this subject, provides guidance on the collection of intelligence on U.S. persons. In addition, the order contained certain specific prohibitions which are applicable in other contexts.

a. Specific prohibitions.

(1) Assassination. E.O. 12333, para. 2.11.

(2) Special activities (covert actions), unless specifically approved by the President and Congress is notified pursuant to 50 U.S.C. § 413.

(a) Normally only the CIA is authorized to conduct special activities. *See* E.O. 12333, para. 1.8(e).

(b) DoD intelligence components are prohibited from conducting or providing support to Special Activities except in time of war.

(c) Special activities (covert actions) defined: activities of the U.S. government to influence political, economic, or military conditions abroad, where it is intended that the role of the U.S. will not be apparent or publicly acknowledged. Does not include "traditional" intelligence, counterintelligence, diplomatic, military, law enforcement, operational security, and administrative activities.

(3) DoD intelligence components requesting any person to undertake any activity prohibited by E.O. 12333 or its implementing directives. DoD 5240.1-R, Proc. 1, § A.4.

4. Each agency within the intelligence community was directed to prepare implementing instructions. DoD accomplished this with DoDD 5240.1. That directive authorized the publication of DoD 5240.1-R, which contains detailed guidance. Each Service has, in turn, promulgated its own implementing regulation or instruction. AR 381-10, for example, re-promulgates DoD 5240.1-R in full, inserting Army-specific guidance throughout in bold-faced type.

5. DoD 5240.1-R is unusual in its format. Rather than being broken up into chapters, it is broken up into "Procedures." For example, Procedure 5 is a chapter entitled "Electronic Surveillance." Practitioners in this area, and this outline, will always refer to the applicable procedure.

B. General Rule.

1. DoD intelligence personnel may intentionally collect information that identifies a U.S. person *only* if the collection is necessary to conduct a function assigned to the collecting component, *only* if the collection falls within one of 13 authorized categories of collectable information, <u>and</u> *only* if the collection utilizes the least intrusive method consistent with accomplishing the mission.

2. The collection of information must:

a. Not infringe on the constitutional rights of any **U.S. person**;

b. Be conducted to protect the privacy rights of all persons entitled to such protection;

c. Be based on a lawfully assigned function;

d. Use the least intrusive technique; **and,**

e. Comply with the appropriate agency/service regulatory requirements.

3. Procedures 2 through 4 provide the **sole** authority by which intelligence components may collect, retain and disseminate information concerning U.S. persons. DoD 5240.1-R, Proc. 1, § A.1.

4. These procedures do not apply to intelligence components conducting law enforcement activities, including civil disturbances.

C. Collection of Intelligence on U.S. Persons (PROCEDURE 2).

1. Threshold Question #1: Is information being "Collected"?

a. Definition of Collection. Information is considered collected only when it:

(1) Has been received for use by DoD intelligence component;

(2) In the course of official duties; **and**

(3) There is an intent to use or retain the information. DoD 5240.1-R, Proc. 2, § B.1.

b. Unless it meets all three prongs above, it is not considered collected. Examples:

(1) An FBI undercover officer provides information about a terrorist group. This information is not "collected" until the information is included in a report, entered into a database, or there is an intent to retain that information.

c. Information held solely for the purpose of making a determination about its collectability, not otherwise disseminated, is not collected. Such information can be held up to 90 days pending this determination. DoD 5240.1-R, § B.1.

2. Threshold Question #2: Is the collection on a "U.S. Person"?

a. U.S. Person defined:

(1) U.S. citizen;

(2) Known permanent resident alien - a foreign national lawfully admitted into the U.S. for permanent residence;

(3) Unincorporated association substantially composed of U.S. citizens or permanent resident aliens; or

(4) Corporations if:

(a) Incorporated within U.S.

(b) Not directed and controlled by a foreign government.

b. Examples of non-U.S. persons for purposes of intelligence collection:

(1) A non-immigrant foreign student attending college in the U.S.;

(2) A corporation chartered in a foreign country, even if it's a subsidiary of a U.S. corporation;

(3) A U.S. corporation controlled by a foreign government

c. Key Presumptions.

(1) Any person/organization located outside the U.S. is presumed **NOT** to be a U.S. person unless there is specific information to the contrary. DoD Dir. 5240.1-R, Appendix A (Definitions),¶ 25.

(2) An alien in the U.S. is presumed NOT to be a U.S. person unless there is specific information to the contrary. DoD 5240.1-R, Appendix A, ¶ 25.

3. Is the proposed collection within the unit's mission?

a. Mission: a duty assigned to a military unit/command.

b. Does the unit have proper authority to collect the information? Authority is typically supplied by regulation or other formal documents.

4. Are the appropriate types of information being collected?

a. Intelligence components are only authorized to collect information essential to the conduct of its mission <u>and</u> qualifies to be collected. DoD 5240.1-R, § C. Collectable Categories of Information include:

(1) Obtained with consent.

(2) Publicly available.

(3) Foreign Intelligence.

(a) Officers or employees, or acting on behalf of a foreign power.

(b) Organization reasonably believed to be controlled, directly or indirectly, by a foreign power.

(c) Persons or organizations reasonably believed to be engaged or about to engage in international terrorist or narcotics activities.

(d) POW/MIAs; or targets, hostages, or victims of international terrorist organizations.

(e) Corporations or commercial organizations believed to have some connection with foreign powers, organizations, or persons. See below for limitation on collecting foreign intelligence information in the U.S..

(4) Counterintelligence collection on U.S. persons must be limited to:

(a) Persons are reasonably believed to be engaged in, or about to engage in intelligence activities on behalf of a foreign power or international terrorist activities.

(b) Persons in contact with the above groups (in order to identify and assess).

(5) Potential Sources of Assistance. (Limited to the purposes of assessing their suitability or credibility)

(6) Protection of Sources and Methods. Within the U.S., collection limited to:

(a) Present and former DoD employees;

(b) Present and former DoD contractors; and

(c) Applicants for employment with DoD or with a DoD contractor.

(7) Physical Security.

(8) Personnel Security Investigation.

(9) Communications Security Investigation.

(10) International Narcotics.

(11) International Terrorism.

(12) Overhead Reconnaissance not directed at a specific person.

(13) Administrative Purposes.

b. All factual predicates must be supported by "reasonable belief."

c. What to do when there is doubt about the collectability of information?

(1) Refuse to accept.

(2) Destroy the information.

(3) If the information pertains to another governmental function, send it to them.

(4) Seek a collectability determination.

5. How will the information be collected?

a. Least Intrusive Means. Hierarchy of methods:

(1) With consent or publicly available;

(2) Cooperating sources;

(3) Techniques not requiring a judicial warrant or Attorney General approval (no expectation of privacy); and

(4) Techniques requiring a judicial warrant or Attorney General approval (expectation of privacy).

b. Collection of Foreign Intelligence From U.S. Persons Within U.S.

(1) Use overt techniques where possible.

(2) If it cannot reasonably be obtained through overt techniques:

(a) The information sought must be significant and not for the purpose of acquiring information concerning the domestic activities of any U.S. persons;

(b) FBI coordination is required; and

(c) The Director, DIA, or the Director, Defense HUMINT, must approve in writing the use of other than overt means. A copy of this approval must be forwarded to ASD(P) and reflect coordination with DIA General Counsel. *See* DoD 5240.1-R, Proc. 2, § E and ILH ¶ 3-14c.

D. Retention of Information (Procedure 3).

1. Applies only to information collected <u>without</u> the consent of the target.

2. Does not apply to retention required by law, court order, or solely administrative purposes. DoD 5240.1-R, Proc. 3, § A.

3. Retention means retention plus retrievability by the person's name or other identifying data (i.e., SSN). DoD 5240.1-R, Proc. 3, § B.

4. Information may be retained if:

   a. Collected under Procedure 2;

   b. Acquired incidentally to authorized collection if the information:

      (1) Could have been collected intentionally under Procedure 2;

      (2) Is necessary to understand/access foreign intelligence or counterintelligence;

      (3) Is foreign intelligence or counterintelligence collected from electronic surveillance IAW Procedure 5; or,

      (4) Indicates involvement in activities that may violate federal, state, local, or foreign law.

   c. Relates to functions of other U.S. agencies; or

   d. Retention is only temporary (up to 90 days).

5. Other information may be retained only in order to report it for oversight purposes and for subsequent proceedings.

6. Information about U.S. persons must be reviewed periodically to determine whether the retained information still serves the purposes for which it was originally retained, and is still necessary to the conduct of authorized functions. *See* DoD 5240.1-R, Proc. 3, § D.

E. Dissemination of Information. (Procedure 4)

1. Refers only to dissemination outside of DoD intelligence component that originally collected the information.

2. Applies only to information collected without the consent of the target.

3. Does not apply to retention required by law, court order, or solely for administrative purposes.

4. Information may be disseminated outside the component if:

a. Information collected under Procedures 2 or 3; **and**

b. Recipient has a need for the information in the performance of a lawful governmental function **and** the recipient is:

(1) DoD employee or contractor;

(2) Federal, state, or local law enforcement agency;

(3) Intelligence community agency;

(4) Non-law enforcement, non-intelligence agency of the federal government; or

(5) Foreign government.

5. Other dissemination requires approval of component legal office and consultation with Department of Justice and DoD General Counsel. DoD 5240.1-R, Proc. 4, § C.

F. What To Do When Things Go Wrong.

1. Questionable Activities (DoD 5240.1-R, Proc. 15).

a. Defined. Any conduct that constitutes, or is related to an intelligence activity that may violate the law (any Executive Order or Presidential directive, DoD policy, and Service regulations). Must be reported to HQDA within five calendar days after discovery.

b. Investigations.

(1) Conducted by command or IG.

2. Reporting Federal Crimes to the Department of Justice.

a. 28 U.S.C. § 535 requires expeditious report to Attorney General of violations of federal law by federal employees, unless authority is assigned elsewhere (e.g., UCMJ violations).

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LEGAL FRAMEWORK OF THE LAW OF WAR

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REFERENCES:

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362. (GWS)
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, August 12, 1949, T.I.A.S. 3363. (GWS Sea)
3. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364. (GPW)
4. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949 T.I.A.S. 3365. (GC)
5. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, *reprinted in* 16 I.L.M. 1391, DEP'T OF ARMY, PAMPHLET 27-1-1 (GP I & II).
6. Commentary on the Geneva Conventions, (Pictet ed. 1960).
7. DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE, (7 Dec. 1956).
8. DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS of 12 August 1949 (1 Sept. 1979).
9. DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (23 Oct. 1962).
10. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956).
11. NAVAL WARFARE PUBLICATION 1-14/MCWP 5-2.1/COMDTPUB 5800.7 THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Oct. 1995).[(FORMERLY NWP 9/FMFM 1-10 (REVISION A),
12. AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW - THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (19 Nov. 1976).
13. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE (1959).
14. DIETRICH SCHINDLER & JIRI TOMAN, THE LAW OF ARMED CONFLICT (1988).
15. HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW, (1990).
16. HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, (1986).

I. OBJECTIVES.

A. Become familiar with the primary sources of the law of war.

B. Become familiar with the "language" of the law.

C. Understand how the law of war is "triggered."

D. Become familiar with the role of the 1977 Protocols to the Geneva Conventions of 1949.

E. Be able to distinguish "humanitarian" law from human rights law.

II. <u>THE LANGUAGE OF THE LAW</u>. THE FIRST STEP IN UNDERSTANDING THE LAW OF WAR IS TO UNDERSTAND THE "LANGUAGE" OF THE LAW. THIS REFERS TO UNDERSTANDING SEVERAL KEY TERMS AND CONCEPTS THAT ARE WOVEN THROUGH THIS BODY OF LAW.

A. Sources of Law.

1. Customary International Law. This can be best understood as the "unwritten" rules that bind **all** members of the community of nations. Many principles of the law of war fall into this category of international law.

2. Conventional International Law. This term refers to codified rules binding on nations based on express consent. The term "treaty" best captures this concept, **although other terms are used to refer to these: Convention, Protocol, and Attached Regulations.**

   a. Norms of customary international law can either be codified by subsequent treaties, or emerge out of new rules created in treaties.

   b. Many law of war principles are both reflected in treaties, and considered customary international law. **The significance is that once a principle attains the status of customary international law, it is binding on all nations, not just treaty signatories.**

B. The "Big Three." While there are numerous law of war treaties in force today, the "three" that provide the vast majority of regulation are: the **Hague Convention of 1907 (and Annexed Regulations), the Four Geneva Conventions of 1949, and the 1977 Protocols to the 1949 Geneva Conventions.**

1. **The Targeting Method.** This prong of the law of war is focussed on regulating the **methods and means** of warfare, *i.e.* tactics, weapons, and targeting decisions.

   a. This method is exemplified by the Hague law, consisting of the various Hague Conventions of 1899 as revised in 1907, plus the 1954 Hague Cultural Property Convention and the 1980 Conventional Weapons Convention.

2. **The Protect and Respect Method.** This prong of the law of war is focussed on establishing non-derogable protections for the "victims of war."

   a. This method is exemplified by the 4 Geneva Conventions of 1949. Each of these four "treaties" is devoted to protecting a specific category of war victims:

      (1) GW: Wounded and Sick in the Field.

      (2) GWS: Wounded, Sick, and shipwrecked at Sea.

      (3) GP: Prisoners of War.

      (4) GC: Civilians.

   b. The Geneva Conventions entered into force on 21 October 1950. The President transmitted the Conventions to the United States Senate on 26 April 1951. The United States Senate gave its advice and consent to the Geneva Conventions on 2 August 1955.

3. The "Intersection." In 1977, two treaties were created to "supplement" the 1949 Geneva Conventions. These treaties are called the 1977 Protocols (I & II).

   a. While the purpose of these "treaties" was to supplement the Geneva Conventions, they in fact represent a mix of both the Respect and Protect method, and the Targeting method.

   b. Unlike The Hague and Geneva Conventions, the U.S. has never ratified either of these Protocols.

C. Key Terms.

1. Part, Section, Article . . . Treaties, like any other "legislation," are broken into sub-parts. In most cases, the **Article** represents the specific substantive provision.

2. "Common Article." This is a critical term used in the law of war. It refers to a finite number of articles that **are identical in all four of the 1949 Geneva Conventions.** Normally these related to the scope of application and parties obligations under the treaties. Some of the Common Articles are identically numbered, while others are worded virtually the same, but numbered differently in various conventions. For example, the article dealing with special agreements if article 6 of the first three conventions, but article 7 of the Fourth Convention.

3. Treaty Commentaries. These are works by official recorders to the drafting conventions for these major law of war treaties (Jean Pictet for the 1949 Geneva Conventions). These "Commentaries" provide critical explanations to many treaty provisions, and are therefore similar to "legislative history" in the domestic context.

D. Army Publications. There are three primary Army sources that reflect the rules that flow from "the big three:"

1. FM 27-10: The Law of Land Warfare. This is the "MCM" for the law of war. It is organized functionally based on issues, and incorporates rules from multiple sources.

2. DA Pam 27-1. This is a verbatim reprint of The Hague and Geneva Conventions.

3. DA Pam 27-1-1. This is a verbatim reprint of the 1977 Protocols to the Geneva Conventions.

III. HOW THE LAW OF WAR IS TRIGERRED.

A. The Barrier of Sovereignty. Whenever international law operates to regulate the conduct of a state, it must "pierce" the shield of sovereignty.

1. Normally, the concept of sovereignty protects a state from "outside interference with internal affairs." This is exemplified by the predominant role of domestic law in internal affairs.

2. However, in some circumstances, international law "pierces the shield of sovereignty, and displaces domestic law from its exclusive control over issues. The law of war is therefore applicable **only after the requirements for piercing the shield of sovereignty have been satisfied.**

3. The law of war is a body of international law intended to dictate the conduct of state actors (combatants) during periods of conflict.

a. Once triggered, it therefore intrudes upon the sovereignty of the regulated state.

b. The extent of this "intrusion" will be contingent upon the nature of the conflict.

B. The Triggering Mechanism. The law of war includes a standard for when it becomes applicable. This standard is reflected in the Four Geneva Conventions.

1. Common Article 2 -- International Armed Conflict: **"[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. "**

a. This is a true *de facto* standard. The subjective intent of the belligerents is irrelevant. According to the Commentary, the law of war applies to: **"any difference arising between two States and leading to the intervention of armed forces."**

b. Article 2 effectively requires that the law be applied broadly and automatically from the inception of the conflict.[1] The following two facts result in application of **the entire body of the law of war:**

(1) A dispute **between states, and**

(2) **Armed conflict** (see FM 27-10, paras. 8 & 9).

(a) De facto hostilities are what are required. The drafters deliberately avoided the legalistic term war in favor of the broader principle of armed conflict. According to Pictet, this article was intended to be broadly defined in order to expand the reach of the Conventions to as many conflicts as possible.

c. Exception to the "state" requirement: Conflict between a state and a rebel movement recognized as belligerency.

(1) Concept arose as the result of the need to apply the Laws of War to situations in which rebel forces had the de facto ability to wage war.

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[1] HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 11 (1986). See also Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague), in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 97 (1988).

(2) Traditional Requirements:

(a) Widespread hostilities - civil war.

(b) Rebels have control of territory and population.

(c) Rebels have de facto government.

(d) Rebel military operations are conducted under responsible authority and observe the Law of War.

(e) Recognition by the parent state or another nation.

(3) Recognition of a belligerent triggers the application of the Law of War, including The Hague and Geneva Conventions. The practice of belligerent recognition is in decline in this century. Since 1945, full diplomatic recognition is generally extended either at the beginning of the struggle or after it is successful (EX: The 1997 recognition of Mr. Kabila in Zaire).

d. Controversial expansion of Article 2 -- Protocol I Additional (1977).

(1) Expands Geneva Conventions application to conflicts previously considered internal ones: "[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination." Art 1(4), GPI.

(2) U.S. has not yet ratified this convention because of objections to article 1(4) and other articles. The draft of Protocol I submitted by the International Committee of the Red Cross to the 1974 Diplomatic Conference did not include the expansive application provisions.

e. Termination of Application (Article 5, GWS and GPW; Article 6, GC).

(1) Final repatriation (GWS, GPW).

(2) General close of military operations (GC).

(3) Occupation (GC) -- The GC applies for one year after the general close of military operations. In situations where the Occupying Power still exercises governmental functions, however, that Power is bound to apply <u>for the duration of the occupation</u> certain key provisions of the GC.

2. **The Conflict Classification Prong of Common Article 3** -- Conflicts which are <u>not</u> of an international character: "Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .."

a. These types of conflicts make up the vast bulk of the ongoing conflicts.

b. Providing for the interjection of international regulation into a purely internal conflict was considered a monumental achievement for international law in 1949. **But, the internal nature of these conflicts explains the limited scope of international regulation.**

(1) Domestic law still applies - guerrillas do not receive immunity for their war-like acts, as would such actions if committed during an international armed conflict.

(2) Lack of effect on legal status of the parties. This is an essential clause without which there would be no provisions applicable to internal armed conflicts within the Conventions. Despite the clear language, states have been reluctant to apply Article 3 protections explicitly for fear of conferring a degree of international legitimacy on rebels.

c. What is an "internal Armed Conflict?" Although no objective set of criteria exist for determining the existence of a non-international armed conflict, Pictet lists several suggested criteria:

(1) The rebel group has an organized military force under responsible command, operates within a determinate territory, and has the means to respect the Geneva Conventions.

(2) The legal Government is obliged to have recourse to the regular military forces against the rebels, who are organized and in control of a portion of the national territory.

d. Protocol II, which was intended to supplement the substantive provisions of Common Article 3, formalized the criteria for the application of that convention to a non-international armed conflict.

(1) Under responsible command.

(2) Exercising control over a part of a nation so as to enable them to carry out sustained and concerted military operations and to implement the requirements of Protocol II.

C. What is the Relationship with Human Rights?

1. Human Rights Law refers to a totally distinct body of international law, intended to protect individuals from the arbitrary or cruel treatment of governments **at all times.**

2. While the **substance** of human rights protections may be synonymous with certain law of war protections, **it is critical to remember these are two distinct bodies of international law. The law of war is triggered by conflict. No such trigger is required for human rights law.**

   a. These two bodies of international law are easily confused, especially because of the use of the term "humanitarian law" to describe certain portions of the law of war.

D. How do the Protocols fit in?

1. As indicated, the 1977 Protocols to the Geneva Conventions of 1949 are supplementary treaties. Protocol I is intended to supplement the law of war related to international armed conflict, while Protocol II is intended to supplement the law of war related to internal armed conflict. Therefore:

   a. When you think of the law related to international armed conflict, also think of Protocol I;

   b. When you think of the law related to internal armed conflict, also think of Protocol II.

2. Although the U.S. has never ratified either of these Protocols, there relevance continues to grow based on several factors:

   a. The U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law.

   b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain strength.

   c. These treaties bind virtually all of our coalition partners.

   d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

IV. OTHER KEY LAW OF WAR CONCEPTS.

A. Protected Person. This is a legal "term of art" under the law of war. It refers to an individual vested with the maximum benefit under a given Geneva Convention. Each Convention defines which individuals fall within this category.

B. Protecting Power. This refers to an agreed upon neutral state responsible for monitoring compliance with the Geneva Conventions and Protocols. Such agreements are rarely reached.

C. Combatant Immunity. Perhaps the greatest benefit granted to combatants by the law of war, it refers to the immunity afforded by international law for warlike acts committed during international armed conflict. There are two critical caveats:

1. This immunity is not "absolute." It extends only to acts that are consistent with the law of war. Therefore, a combatant who violates the law of war receives no immunity for that conduct.

2. Combatant Immunity applies **only to international armed conflict.** The inability of international law to extend combatant immunity into internal armed conflicts is perhaps the greatest manifestation of the limited scope of law of war regulation during internal conflicts.

D. Reprisal. "[A]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare." [Para. 497, FM 27-10]

1. The concept of reprisal is considered the one true "self-help" mechanism built into the law of war.

2. The right of reprisal has been severely restricted by Protocol I. This was a major motivation behind the U.S. decision not to ratify this treaty.

E. War Crime. While war "legalizes" many acts that would be unlawful in peacetime, it does not "legalize" everything unlawful in peacetime. War is not a license to kill, but a limited authorization to kill. War crimes are simply those acts that are unlawful in peacetime, and remain unlawful in wartime.

F. Special Agreements. These are agreements the parties concluded during actual hostilities. The drafters of the Conventions recognized that they could not envision every circumstance that would arise regarding POWs, wounded and sick, and civilians. Thus, they sanctioned the use of special agreements.

G. Grave Breaches of the Geneva Conventions: violations of the law of war involving any of the following acts, if committed against persons or property **protected by the Conventions**: willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a POW or protected civilian to serve in the armed force of a hostile power, depriving a POW or protected civilian of the rights of fair or regular trial as prescribed in the Conventions, unlawful deportation or transfer or unlawful confinement of a protected civilian, taking hostages.

H. Respect for the Conventions (Common Article 1). Establishment of the basic obligation of signatories of the Geneva Conventions to implement the provisions. The term "respect" was intended to emphasize the humanitarian and unilateral nature of the obligation undertaken by Parties to the Conventions to comply with its provisions.

1. The drafters intended "ensure respect for" to advise the Parties of their continuing obligation to oversee the effective implementation of the Conventions. The term has also been interpreted in the Commentary to include an obligation on the Parties to see that other Parties are complying with the Conventions.[2]

[2] In May 1983, the ICRC appealed to the Parties to the Geneva Conventions to bring influence to bear on both Iran and Iraq to better comply with the Law of War during their ongoing conflict. GEOFFREY BEST, LAW AND WAR SINCE 1945 146 (1994).

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LAW OF WAR TREATY UPDATE

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of the Air Force, Air Force Publication 110-31, International Law--The Conduct of Armed Conflict and Air Operations (19 November 1976) [hereinafter AFP 110-31].
16. Dep't of Defense Instruction 5000.1, Defense Acquisition (15 March 1996) [hereinafter DoD Instr. 5000.1].

I. WEAPONS/TREATY UPDATE

A. "The rights of belligerents to adopt means of injuring the enemy is not unlimited." (HR, art. 22.)

B. Legal Review. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. (DoD Directive 5000.1, "Defense Acquisition," of March 15, 1996, para. D2j., AR 27-53, and SECNAVINST 5711.8A.) A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoD Directive 5000.1, para. D2j.) Legal review of new weapons required also under Article 36 of GP I.

1. The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? (DoD Directive 5000.1, "Defense Acquisition," of March 15, 1996, para. D2j.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon is needless, superfluous, or grossly disproportionate to the advantage gained by its use?

2. Weapons may be illegal:

a. *Per se*. Those weapons calculated to cause unnecessary suffering, determined by the "usage of states." Examples: lances with barbed heads, irregular shaped bullets, projectiles filled with glass. (FM 27-10, para. 34.)

b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering.

c. By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

C. Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). Prohibited by late 19th century treaties (of which US was never a party). US practice, however, accedes to this prohibition as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).

1. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international and the treaties mentioned above. There are situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).

2. High Velocity Small Caliber Arms

   a. Early controversy about M-16 causing unnecessary suffering.

   b. "Matchking" ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.

3. Sniper rifles, .50 caliber machine guns, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

D. Fragmentation (FM 27-10, para 34.)

1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).

2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

E. Landmines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

1. Indiscriminate. Primary legal concern: indiscriminate use that endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of "civilian concentration", when combat between ground forces is not on-going or imminent.

   a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.

   b. Non-remotely delivered mines, booby traps, and other devices. Can't be used in towns or cities or other places where concentrations of civilians are present, unless:

      (1) they are placed in the vicinity of a military objective under the control of an adverse party; or

      (2) measures are in place to protect civilians from their effects (posting of signs etc.).

2. Booby Traps. Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects (art. 6).

3. Amended Protocol II (Mines Protocol). The President transmitted the ratification package on amended Protocol II, to the Senate on 7 January 1997. (1) Expands the scope of the original Protocol to include internal armed conflicts. (2) Requires that all remotely delivered APL be equipped with self-destruct devices and backup self-deactivation features. (3) Requires that all nonremotely delivered APL not equipped with such devices ("Dumb Mines") be used within controlled, marked, and monitored minefields. (Falls short of Presidents APL policy statement of 16 May 1996 that prohibited U.S. military use of "Dumb" APL except in the Korean Peninsula and in training. (4) Requires that all APL be detectable using available technology. (5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use. Provides for means to enforce compliance. In his letter of Transmittal, the President emphasizes his continued commitment to the elimination of all APL.

4. U.S. policy on anti-personnel land mines. U.S. forces may no longer employ "dumb" (those that do not self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy:

   a. Use of "dumb" mines on the Korean Peninsula to defend against and armed attack across the DMZ; and

   b. Use of "dumb" mines for training purposes.

5. Ottawa Process. Initiated by the Canadian Foreign Minister. One hundred nations and assorted NGOs met in Oslo, Norway in September 1997 to draft the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction. The Convention was signed in Ottawa, Canada in December 1997. As of March 1998, 124 nations had signed the convention and 5 had ratified it. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of smart APL.

6. U.S. Developments. On 17 September 1997, the President announced the following U.S. initiatives in regards to anti-personnel land mines:

   a. Develop alternatives to APL by the year 2003, field them in South Korea by 2006.

   b. Appointed a Presidential advisor on land mines.

   c. Pursue a ban on APL through the U.N. Conference on Disarmament.

   d. Increase demining programs.

7. APL moratorium. Section 580 of the Foreign Operations Authorization Act of 1996 (110 Stat. 751) would have established a moratorium on the use of antipersonnel land mines for one year beginning 12 February 1999. Section 1236 of the FY 99 Authorization Act repeals Section 580, no moratorium will take place.

F. Incendiaries. (FM 27-10, para. 36.) Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering." (See also para 6-7, AFP 110-31.)

1. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.

2. White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.

3. Protocol III of the 1980 Conventional Weapons Convention. Prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S. The U.S. is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

G. Lasers. US Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by U.S.). The Senate is reviewing the protocol for its advice and consent for ratification.

H. Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem -- once unleashed it is hard to control. (HR, art. 23a.)

1. The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts.

a. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

b. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.

c. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a "transient" effect -- and thus are NOT incapacitating agents. Therefore, their use in war is not prohibited by the treaty. (Other nations disagree with interpretation.) There are, however, policy limitations that are discussed below.

d. Under the Geneva Protocol of 1925 the U.S. reserved right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b, change 1.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) HOWEVER THE US RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS "SECOND" USE.

e. Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.

2. Riot Control Agents (RCA). U.S. RCA Policy is found in Executive Order 11850. Applies to use of Riot Control Agents and Herbicides; requires Presidential approval before first use in an armed conflict. (However, see paragraph "3b" below, concerning the 1993 Chemical Weapons Convention's prohibition against the use of RCA as a "method of warfare.")

a. Riot Control Agents: renounces first use in armed conflicts except in defensive military modes to save lives such as:

(1) controlling riots;

(2) dispersing civilians where the enemy uses them to mask or screen an attack;

(3) rescue missions for downed pilots, escaping PWs, etc.; and

(4) for police actions in our rear areas.

b. Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.)

3. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by U.S. and came into force in April 1997.

a. Provisions (twenty four articles).

(1) Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a "method of warfare."

(2) Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.

(3) Article III. Requires parties to declare stocks of chemical weapons and facilities they possess.

(4) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.

(5) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).

(6) Article IX. Establishes "challenge inspection", a short notice inspection in response to another party's allegation of non-compliance.

b. RCA Controversy. Convention prohibits RCA use as "method of warfare." "Method of warfare" may be interpreted to include any actions that involve combatants - including traditional hostage rescue/SAR missions and human shield scenarios previously allowed by EO 11850.

(1) The rationale for the prohibition - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. However, any use in which "combatants" may be involved will most likely not be approved

(2) The Senates resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, s3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the U.S. is not restricted by the CWC in its use of riot control agents, including the use against "combatants" in any of the following cases:

(a) when the U.S. is not a party to the conflict

(b) in consensual (Chapter VI, UN Charter) peacekeeping, and

(c) in Chapter VII (UN Charter) peacekeeping.

(3) The implementation section of the resolution requires that the President not modify E.O. 11850. (*see* S. Exec Res. 75, section 2 (26)(b), s3378)

(4) The Presidents certification document of 25 April 1997 states that "the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces."

(5) Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it is unlikely that the NCA will approve the use of RCA in situations where "combatants" are involved due to the CWC's prohibition on the use of RCA as a "method of warfare." (Thus, use of RCA unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850 .)

I. Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)

J. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.

K. Nuclear Weapons. (FM 27-10, para. 35.) Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defense, in which the very survival of the state would be at stake. (35 I.L.M. 809 (1996).)

II. TACTICS

A. Psychological operations. Gulf War - US PSYOPS leaflet program - PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender." Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

B. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith). Examples of Ruses.

1. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

World War I - Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider Kormoran passed itself off as a Dutch merchant when approached by the Australian cruiser Sydney. Once close enough to open fire she hoisted German colors and fired, sinking Sydney with all hands. See C. John Colombos, *The International Law of the Sea* 454-55 (1962).

World War II - Britain: British Q-ship program during WWII. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant mariners. When spotted by a surfaced U-boat, the disguised merchant would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks. LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, Nav. War. Coll. Rev., Summer 1989, at 60.

2. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit. (FM 27-10, para. 51.) Some examples follow:

World War II - Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies, through the use of false radio transmissions and false references in bona

fide messages, created a fictitious First US Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful. John Keegan, *The Second World War* 373-79 (1989).

Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, *Crusade*, 331-33 (1993).

3. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:

a. Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform lose their PW status if captured and risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6.)

World War II - Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150th SS Panzer Brigade. Several of his men were captured in US uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war. (DA Pam 27-161-2 at 54.)

For listing of examples of the use of enemy uniforms see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990).

For an argument against any use of the enemy's uniform see Valentine Jobst III, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?,* 35 Am. J. Int'l L. 435 (1941).

b. Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the US interprets the "improper use" of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5.). Note the Protocol I position on this issue in paragraph (d) below.

c. Equipment. Must remove all enemy insignia in order to fight with it. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR, art. 53).

d. Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. (*see* NPW 1-14M, para 12.5.3.) Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The U.S. does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. (GP I, art 39(3); NWP 1-14M, para. 12.5.1.)

C. Use of Property. (*See*, Elyce Santere, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L. Rev. 111 (1989).) Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.

D. Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).

1. Condemnation. Condemnation of perfidy is an ancient precept of the LOW - derived from principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace. (Michael Bothe, et. al., *New Rules for Victims of Armed Conflicts*, 202 (1982); FM 27-10, para. 50.)

2. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. Note that in order to be a violation of GP I, Article 37 the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, *The Modern Law of Land Warfare* 320-21 (1959). Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

3. Protocol I. According to GP I, Article 37(1), the **killing, wounding, or capture via** "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts]." (U.S. considers customary law.) Article 37(1) does not prohibit perfidy per se, only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. (Bothe, *supra*, at 203.) Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. (*Id.* at 204-05.) Note, however, that the US view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. (FM 27-10, para 50.)

4. Feigning incapacitation by wounds/sickness. (GPI, art. 37(1)(b).) Whiteman says HR, Article 23b also prohibits this, e.g. if shamming wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.

5. Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)

   a. Falklands War - British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group of Argentines was attempting to surrender, but not another group. The Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. This incident emphasizes the rule that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward. *See* Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, Mil. Rev., Oct. 1984, at 49.

   b. Gulf War - Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward when action began was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed turret is not a recognized symbol of surrender *per se*. "Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only on a clear indication of hostile intent, or some hostile act." Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 621 (1992).

   c. Gulf War - On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street. Id.

d. Gulf War - On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed. Id.

6. Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard." (GP I, art 37(1)(c); NWP 1-14M, para. 12.7.)

7. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. (GP I, art 37(1)(d).)

a. As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drove up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French Peacekeepers without firing a shot. Joel Brand, *French Units Attack Serbs in Sarajevo*, Wash. Post, May 28, 1995, at A1.

b. As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GPI. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition that has only arisen on one occasion: the Korean War. Michael Bothe, *et. al*., *New Rules for Victims of Armed Conflicts* 206 (1982).

8. Misuse of Red Cross, Red crescent, cultural property symbol.

a. Designed to reinforce/reaffirm HR, Article 23f.

b. GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, US aircraft took fire from the Richmond Hills Hospital, and consequently engaged it. (DA Pam 27-161-2, p. 53, n. 61.)

c. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. (Bothe, *supra*, at 209.)

9. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.

10. Booby Traps. Certain uses of booby-traps prohibited by the 1980 Conventional Weapons Convention would otherwise be perfidious. Under this convention, it is prohibited to booby trap dead bodies; sick and wounded; burial sites and graves; medical facilities, supplies, or transportation; and historic monuments, works of art that constitute the cultural heritage of a people.

E. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.

F. Espionage. (FM 27-10, para. 75; GP I, art. 46.) Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage.

1. Espionage is not a law of war violation.

2. No protection, however, under Geneva Conventions for acts of espionage.

3. Tried under the laws of the capturing nation. E.g., Art. 106, UCMJ.

4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.

G. Reprisals. (FM 27-10, para 497.) An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.

1. Reprisals are authorized if the following requirements are met:

a. it's timely;

b. it's responsive to enemy's act;

c. must first attempt a lesser form of redress; and

d. must be proportional.

2. Prisoners of war and persons "in your control" can not be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56).

3. US policy is that a reprisal may be ordered only at the highest levels (NCA).

H. Rules of Engagement. Defined: Directives issued by competent superior authority that delineate the circumstances and limitations under which US forces will initiate and/or continue engagement with other forces.

1. ROE are drafted in part based upon the LOW. Drafted considering LOW, political policy, public opinion and military operational constraints. ROE are usually more restrictive than what the LOW would allow.

2. Targeting rules are often incorporated within ROE for a given operation.

3. JCS Standing ROE (CJCS Instruction 3121.01 dtd 1 Oct 94): Guidance as to course of action in specific situations. "Inherent Right of Self-Defense" for both individual and the unit is the foundation of document.

III. CONCLUSION

A. Principles

B. Targets

C. Weapons

D. Tactics

LAW OF WAR SEMINAR

SCENARIO

In the fall of 2002, North Korea faced its seventh year of famine and another grim winter. The isolated and impoverished Stalinist outpost has been steadily destabilizing since the 1970s when higher oil prices and a growing technological gap undermined its industrial strategy. North Korea exacerbated its economic problems when it spurned economic and agricultural reform, while maintaining rigid state control and high levels of military spending. By 1980, North Korea had defaulted on all of its foreign loans except those from Japan.

In July 1994, Kim Il Sung, the self-styled "Great Leader" died after dominating the political, economic, and cultural life in North Korea for almost fifty years. Control of the country passed to his son, Kim Jong-il, an individual widely perceived to be weak and ineffectual. Following Kim Jong-il's succession, North Korea experienced a series of natural disasters and sank into famine. By 1998, experts estimated that more than two million people had starved to death. Foreign aid has slowed to a trickle due to persistent allegations that the North Korean Government was diverting the aid to its military apparatus while starving the civilian population. By the year 2000, only the on-going military and financial aid from China sustained the North Korean regime.

On 15 August 2002, Chen Shui-bian, the President of Taiwan was reelected with an 80% majority vote. As early as June 2000, Chen Shui-bian openly questioned whether China possessed the military capabilities to successfully invade Taiwan. Interpreting his margin of victory as a clear mandate, he declared Taiwan an independent nation and applied for membership in the United Nations. Chinese President Jiang Zemin immediately called for the use of military force to return the "renegade province" of Taiwan to China. Jiang Zemin then notified Kim Jong-il that, in order to ensure the concentration of scarce resources for the upcoming conflict with Taiwan, the massive aid from China to North Korea would cease immediately.

In desperation, Kim Jong-il began negotiations for increased aid from South Korea. South Korean President Kim Dae Jung perceived this request as an opportunity to use economic incentives to end hostilities and eventually move toward reunification. He agreed to an extensive aid package on the condition that Kim Jong-il sign an agreement to work toward the reunification of the divided peninsula. On the evening of 1 September 2002, South Korean media played a news clip of Kim Dae Jung and Kim Jong-il solemnly shaking hands, smiling, and toasting each other with champagne. Kim Dae Jung then announced the implementation of a $200 million dollar aid package to North Korea by November 2002.

Kim Dae Jung's announcement touched off a firestorm. Disgruntled workers and unemployed citizens rioted in the streets of South Korea, protesting the additional financial burden and demanding the $200 million dollars be spent revitalizing the battered South Korean economy. In the ensuing melee, five strikers were killed and hundreds of others were injured when they clashed with South Korean riot police.

Using inflammatory language, Lee Min-Jae, the charismatic leader of the Korean Brotherhood of Trade Unions and the chairman of the Korean Labor Party (KLP), accused President Kim Dae Jung of using the blood and sweat of the South Korean workers to prop-up the North Korean dictatorship. His speech incited on-going and extensive protests, during which excited crowds attacked municipal government buildings and local police stations. The increasingly militant demonstrators quickly overwhelmed the South Korean riot force. President Kim Dae Jung finally ordered the arrest of Lee Min-Jae. Escaping the arrest attempt, Lee and his supporters fled to Pusan, far from President Kim Dae Jung's stronghold in the Cholla region. In Pusan, Lee Min-Jae established a base of operation and transformed the Korean Labor Party to the Korean Labor Party Irregular Force (KLPIF). The KLPIF began to assert authority over local territories and attacked specific military targets in an effort to incite a general uprising against the central government. President Kim Dae Jung quickly ordered the Republic of Korea (ROK) Army to enter into Pusan to eliminate the KLPIF. After two short and intense encounters resulting in over 200 ROK and 3000 KLF members killed, Lee Min-Jae and his primary military advisors were arrested and brought to Seoul for trial. Politically weakened by the KLPIF uprising, President Kim Dae Jung lacked the clout to push through the proposed aid package for North Korea. By the end of November, Kim Jong-il was angered and humiliated when the promised aid from South Korea failed to materialize.

Within days, Radio PyongYang began broadcasting lengthy diatribes by Kim Jong-il. He called Kim Dae Jung a "Capitalist Blood Sucker" who deliberately intensified North Korean famine by promising vital food aid, then reneging on his promise at the last minute. Kim Jong-il claimed this was a calculated move to starve the North Korean people during the winter of 2002 and thus lay groundwork for a South Korean military invasion in the spring of 2003.

250348 December 2002: North Korean Special Forces units infiltrated South Korea from a maze of underground tunnels and advanced toward their objectives. Shortly after midnight, reports of sporadic violence began to trickle into Seoul. Several police stations, government buildings, airports and rail lines were damaged or destroyed by explosions. Power lines fell and major power stations in Tongduchon, Kumchon, Chuchon, Uijongbu, and Seoul were destroyed, leaving a large civilian population without power and forcing many military facilities to switch to back-up systems. Several key leaders in the South Korean Government and business community were killed or captured. Strangely, reports from the demilitarized zone (DMZ) did not indicate any unusual activities.

250500 December 2002: Radio PyongYang announced that the glorious Korean People's Army (KPA) had finally entered South Korea "in self-defense against future aggression by the South Korea Government" and would liberate their oppressed brothers and sisters. The radio message urged all "oppressed South Koreans to rise up and overthrow the decadent regime of President Kim Dae Jung and evict the American Imperialists soldiers from the Korean peninsula." Shortly after the radio message, explosions simultaneously rocked Camp Casey, Camp Red Cloud, and Camp Humphreys. Despite the deafening noise and billowing smoke, no actual destruction appeared to have occurred. Minutes later, soldiers of the 4th Chemical Company at Camp Casey realized that the incoming cloud was not smoke, but Sarin gas, a colorless, odorless nerve agent far deadlier than cyanide gas. Within minutes, nerve gas casualties overwhelmed the health clinics. When medical personnel attempted to coordinate

movement of casualties to nearby civilian hospitals, they found many of these hospitals heavily damaged by car bombs.

250545 December 2002: Simultaneous reports arrived from several points in the DMZ confirming North Korean columns attacking across the 38th parallel. Without prior mobilization, the KPA attacked from the march. On the border between Kimpo and Kaesong, the Republic of Korea (ROK) 12th Regiment was heavily engaged by North Korean units led by armor columns containing the newest Chinese tanks. To the east, the KPA 3rd and 4th Divisions led the attack against the ROKA 7th Division. Several US military members of the Special Forces Detachment-Korea, serving as special liaisons between the Korean Special Forces and the US military, were in overrun forward positions and presumed to have been killed or captured. Aside from the military activities, USFK also received information that starving North Korean civilians were following the regular North Korean troops across the 38th parallel in very large numbers. Most appeared to be looting for food. However, some reports also indicated isolated instances of arson and violence.

250600 December 2002: The USFK staff received notice that sensor satellites detected a launch of ten missiles and possible launch of a dozen more from North Korean territory. The Nodong medium range missiles first struck Osan Airbase, home of the U.S. 7th Air Force, then Kusan, where the 8th Fighter wing resides. Although most of the airplanes remained safe in their hardened bunkers, air control facilities and runways in Osan and Kusan were severely damaged. A number of missiles missed their intended targets and slammed into civilian residential areas around the airfields.

26 December 2002: The United Nations Security Council met in emergency session and adopted Security Council Resolution 3050 (copy attached).

27-28 December 2002: The KPA continued their advance into South Korea, pushing the retreating South Korean and U.S. forces southward in front of them.

29 December 2002: The United Nations Security Council again met in emergency session and adopted Security Council Resolution 3051 (copy attached).

30 December 2002: The remnants of the U.S. 2nd Infantry Division and ROK forces fell back to the city of Seoul. Poor logistics and inadequate supplies slowed the advance of the KPA. The U.S. 101st Airborne Division, 82nd Airborne Division, 25th Infantry Division, and II Marine Expeditionary Force are mobilized and preparing to reinforce the retreating 2nd Infantry Division. The U.S. 1st Cavalry, 4th Infantry Division (Mechanized) and I Marine Expeditionary Force are on tap as follow-on forces.

United Nations **S/RES/3050 (2002)**

Security Council

Distr.: General
26 December 2002

Resolution 3050 (2002)

Adopted by the Security Council at its 6015 meeting, on 26 December 2002

The Security Council,

Recalling the findings of the General Assembly in its resolution 293 (IV) of 21 October 1949 that the Government of the Republic of Korea (South Korea) is a lawfully established government having effective control and jurisdiction over that part of Korea in which the great majority of the people of Korea reside, and that this Government is based on elections which were a valid expression of the free will of the electorate of that part of Korea.

Alarmed by the invasion of South Korea on 25 December 2002 by the military forces of the Democratic People's Republic of Korea (North Korea),

Determining that there exists a breach of international peace and security as regards the North Korean invasion of South Korea,

Determined to bring the invasion and occupation of South Korea by North Korea to an end and to restore the sovereignty, independence and territorial integrity of South Korea,

Acting under Chapter VII of the Charter of the United Nations,

1. *Condemns* the North Korean invasion of South Korea,

2. *Demands* that North Korea withdraw immediately and unconditionally all of its forces to the positions they occupied prior to 25 December 2002,

3. *Decides* that all states shall prohibit and prevent the import of all commodities originating in North Korea and any activities by their nationals which promote the

export of any commodities to North Korea or the sale or supply of any commodities, including weapons or any other military equipment to North Korea,

4. *Calls* upon all states to act strictly in accordance with the provisions of the present resolution,

5. *Decides* to meet again as necessary to consider further steps to ensure compliance with this resolution and the restoration of international peace and security.

United Nations **S/RES/3051 (2002)**

Security Council

Distr.: General
29 December 2002

Resolution 3051 (2002)

Adopted by the Security Council at its 6016th meeting, on
29 December 2002

The Security Council,

Reaffirming its Resolution 3050 (2002) of 26 December 2002, demanding that the Democratic People's Republic of Korea (North Korea) withdraw immediately and unconditionally its forces from the territory of the Republic of Korea (South Korea), and imposing economic sanctions under Chapter VII of the Charter of the United Nations,

Noting that, despite all efforts by the United Nations, North Korea refuses to comply with its obligation to implement Resolution 3050 (2002) of 26 December 2002,

Mindful of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

Determined to secure full compliance with its decision,

Acting under Chapter VII of the Charter of the United Nations,

Demands that North Korea comply fully with Resolution 3050 (2002) of 26 December 2002,

Authorizes Member States cooperating with the Government of South Korea to use all necessary means to uphold and implement Security Council Resolution 3050 and to restore international peace and security in the area,

Requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this resolution,

Decides to remain seized of the matter.

LAW OF WAR SEMINAR

PROBLEMS

1. After CINC, USFK received confirmation that sarin gas was used by the North Koreans to attack Camp Casey, Camp Red Cloud, and Camp Humphreys, he asks his legal staff to brief him on his authority to use "like-kind chemicals" against the North Koreans.

2. Following the North Korean sarin gas attack upon Camp Casey, Camp Red Cloud and Camp Humphreys, satellite intelligence assets located what appears to be a chemical munitions factory near a residential area of the city of Kanggye, North Korea. A captured KPA MI colonel and a high level political deserter both confirm that this factory is a North Korean chemical and conventional munitions factory at which the agent sarin is developed, stored, and processed. According to the new intelligence, this is Kanggye Factory No. 26, which employs approximately 250 workers. In addition to its illicit chemical production, this factory is also used to produce the riot control agent CS gas for North Korean law enforcement use, various pesticides for commercial and military usage, and a number of conventional munitions. Several thousand civilians, mostly dependents of factory workers, reside in an area near the factory.

A. Members of the coalition forces' Joint Targeting Cell hotly debate whether to add Factory No. 26 to the target list for attack. The targeteers propose to employ a mixture of air delivered incendiary and high explosive munitions in the attack against the factory. Prior to making his recommendation to CINC USFK, the J-3 asks you to prepare a memorandum on the law of war (LOW) principles relevant to the process of targeting. Brief the J-3 on the LOW principles implicated by the possible attack of Factory 26 and how they are employed in the targeting analysis.

B. Following the conduct of the weaponeering process, the Targeting Cell recommends to CINC USFK that Coalition Forces employ a mixture of air delivered incendiary weapons and high explosive munitions. The J-3 argues that use of incendiary weapons against Factory 26 will substantially reduce the risk of civilian casualties resulting from a possible chemical release into the environment. Are there any legal prohibitions upon the use of incendiary weapons?

3. The CG, 2nd Infantry Division is concerned about the KPA using South Korean citizens as human shields when they attack Seoul. He wants authority to use riot control agents (RCA) if such a possibility arose. He argues that using RCAs is a good way to prevent injury to the South Korean hostages while protecting the life of his soldiers. Advise the CG on the international law and domestic law and policy on employing RCA under these circumstances.

4. The CG, 2nd Infantry Division also wants to use non-self destructing, i.e., "dumb" anti-personnel landmines (APL) to protect the perimeters of Seoul. However, he is unsure about his legal authority in light of the various landmine treaties, executive orders, and moratoriums he has heard about. Brief the CG on the law and policy relevant to APL employment.

5. Aerial photographs and other intelligence assets disclosed the following possible targets in Pyongyang, North Korea. You are the Operational Judge Advocate advising the targeting cell as it examines whether to add the particular item to the Coalition force's target list for attack. Review the following missions and targets for compliance with the law of war and advise the USFK planners accordingly.

A. A large power plant located at the northeast edge of Pyongyang, North Korea, which serves not only the North Korean KPA military headquarters, but also all of the civilian hospitals and residential areas of the city.

B. Troop billets (located in citizens' homes) in the southern part of the city. A large church located in the center of the billeting area.

C. A barracks complex at the western edge of the city which is marked with the Red Cross emblem on all its buildings. Intelligence assets have not determined whether this barracks complex has actually been converted into a hospital.

D. A 40 ft. statue of the North Korean Leader, Kim Il Sung, located by itself in a large park.

E. A railroad station located in the center of the city. A residential area surrounds the station. The station is located in such a manner that the rail line could be effectively interrupted at this point. The risk of Coalition casualties is minimal. The railroad crosses several bridges outside the city. Destroying the railroad and the bridges would entail the use of the same amount of ordnance and would have the same effect as destroying the tracks at the rail station, but would also bring Coalition aircraft within range of SAM sites and significantly increase the risk of friendly casualties. By the same token, this attack will significantly reduce the risk of civilian casualties. Does the Law of War require CINC USFK to choose one target over the other?

6. As the operational law attorney for the 82nd Airborne Division, you have been asked to review the ROE before the unit deploys to Korea. The 82nd Airborne Division's assigned area of operations will contain few, if any, friendly forces or civilian populace. The commander seeks to incorporate the following language into the Rules of Engagement for designated areas, such as the fields of fire around the Division's nighttime perimeters. What do you think?

> **"SPECIFIED STRIKE ZONES: Areas designated by the Division Commander in which there are no friendly forces or civilian populace and in which all targets may be attacked on the initiative of individual soldiers. There is no requirement for further clearance or coordination prior to the initiation of combat activity."**

7. Assume that Coalition forces have stopped the North Korean Army and begun to gain momentum, pushing the retreating KPA northward in front of it. Converging on Highway 1, the shortest route back to North Korea, KPA troops are flooding northward toward the Uijongbu Corridor and the 38th parallel. USFK planners intend to allow KPA forces to withdraw along the highway and then fix them in place utilizing air-dropped land mines. Once the KPA is fixed in place, air assets can then conduct massive aerial attacks against these forces, utilizing the full arsenal of weapons. The operation is called "Operation TURKEYSHOOT." Is this plan lawful?

8. While coordinating with the JA on changing the name from "Operation Turkeyshoot" the USFK PAO wants to discuss the following issue. Intelligence reports indicate a labyrinth of KPA fortified tunnels in and around Pyongyang which are probably impervious to airstrikes and indirect fire weapons. Therefore, USFK is considering utilizing blade tanks to employ the "plow tactic" made famous during DESERT STORM. The PAO is concerned about the lawfulness of this tactic, not to mention the public affairs angle. What's the deal?

LAW OF WAR SEMINAR

INSTRUCTORS' GUIDE

1. After CINC, USFK received confirmation that sarin gas was used by the North Koreans to attack Camp Casey, Camp Red Cloud, and Camp Humphreys, he asks his legal staff to brief him on his authority to use "like-kind chemicals" against the North Koreans.

Answer:

In 1975, the United States ratified the "Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous of other Gases, and of Bacteriological Methods of Warfare" of 1925 (Geneva Gas Protocol). Under this protocol, the United States reserved the right to retaliate in kind if chemical warfare agents were first used against our forces or allies.

The United States ratified the Chemical Weapons Convention (CWC) in April 1997. Under the CWC, the United States agreed not to use, develop, produce, acquire, stockpile, or retain chemical weapons for any reason. The CWC mandates that existing stockpiles of chemical weapons must be dismantled (within a certain number of years) and implements an aggressive international inspection regime for purposes of verification.

Chairman of the Joint Chiefs of Staff Instruction 3110.07A, "Nuclear, Biological, and Chemical Defense; Riot Control Agents; and Herbicides," 15 December 1998, implements the United States' obligations under the CWC.

Analysis:

Under the CWC, any use (or even retention) of chemical weapons is unlawful. The U.S.' treaty obligation under the CWC is inconsistent with our 1975 reservation to the 1925 Geneva Gas Protocol. The U.S. will not use chemical weapons under any circumstances, including in retaliation for a first use against the U.S. or U.S forces. CINC USFK's legal staff should advise him accordingly.

2. Following the North Korean sarin gas attack upon Camp Casey, Camp Red Cloud, and Camp Humphreys, satellite intelligence assets located what appears to be a chemical munitions factory near a residential area of the city of Kanggye, North Korea. A captured KPA MI colonel and a high-level political deserter both confirm that this factory is a North Korean chemical and conventional munitions factory at which the agent sarin is developed, stored, and processed. According to the new intelligence, this is Kanggye Factory No. 26, which employs approximately 250 workers. In addition to its illicit chemical production, this factory is also used to produce the riot control agent CS gas for North Korean law enforcement use, various pesticides for commercial and military usage, and a number of conventional munitions. Several thousand civilians, mostly dependents of factory workers, reside in an area near the factory.

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air delivered incendiary and high explosive munitions in the attack against the factory. Prior to making his recommendation to CINC USFK, the J-3 asks you to prepare a memorandum on the law of war (LOW) principles relevant to the process of targeting. Brief the J-3 on the LOW principles implicated by the possible attack of Factory 26 and how they are employed in the targeting analysis.

Comment:

This question is designed to familiarize students with principles of the law of war which are relevant to the process of targeting and to provide the student with an example of the legal analysis based on those principles.

Answer:

Fundamental rules of the law of war form the foundation for lawful targeting during armed conflict:

1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. (Customary International Law (CIL))

2. The right of belligerents to adopt means of injuring the enemy is not unlimited. (HR, art 22).

3. It is prohibited to launch attacks against the civilian population as such. (CIL, codified in GP I, art. 51 (2)). Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible. (CIL, codified in GP I, arts. 57(1) & 57(4)).

These fundamental rules express the following basic principles of the law of war:

1. Principle of **Military Necessity**.

This principle justifies those measures, not forbidden by international law, which are indispensable for securing the complete submission of the enemy as soon as possible. (FM 27-10, para 3). A military necessity must exist to conduct a contemplated attack (HR, art. 23). Military necessity relates to the **military advantage** offered by the attack. Only **Military Objectives** offer a military advantage and may be attacked. The contemplated military objective must not be prohibited under international law and its destruction must be indispensable to the submission of the enemy. Military Objectives include combatants and certain objects.

- **Combatants.** Combatants include belligerent military forces (HR, art. 1), but depending upon the circumstances, may also include unprivileged combatants, such as civilians taking an **active part** in hostilities.

- **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 offers a definite **military advantage** to the attacker in the **circumstances ruling at the time** are military objectives (CIL; GP I, art. 52(2)). Military advantage may involve a variety of considerations, including the security of the attacking force. Furthermore, military advantage need not necessarily refer to the isolated attack under consideration, but may relate to the attack in the context of the overall operational plan or war strategy.

2. Principle of **Distinction**.

This principle requires that military forces **distinguish combatants from non-combatants and military objectives from civilian objects**. Parties to a conflict may direct their operations only against combatants and military objectives (CIL; GP I, art 48). Indiscriminate attacks are those which fail to make these distinctions. An attack may be indiscriminate because it is not directed at a military objective; because it employs a means or method which cannot be directed at a military objective; or because the effects of the means or method cannot be limited to a military objective (CIL; GP I, art 51(4)).

- **Civilians and civilian objects** may **not** be made the object of intentional (direct) attack (CIL, GP I, art. 51(1)).

Civilians lose their immunity from direct attack when they take an active part in hostilities. Note that GP I, art 51(3), employs a "direct part" rather than "active part" standard for determining when civilians become unprivileged combatants and legitimate objects of direct attack.

Civilian objects consist of all civilian property and activities other than those used to support and sustain the enemy's war-fighting capability (CIL; GP I, art. 52(1)(2)).

The intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited. (CIL; GP I art. 54(4)).

Civilian vessels, aircraft, vehicles, and buildings may only be lawfully attacked if they are used for military purposes, including the housing of military personnel, equipment or supplies, or are otherwise associated with combat activity inconsistent with their civilian status **and** if collateral damage and incidental injury would not be excessive in relation to the direct and concrete military advantage anticipated from the attack (CIL, GP I, art 52)(See Proportionality discussed below).

Hospital ships, medical units, medical vehicles and aircraft, non-interfering neutral vessels, civilian churches and chapels, civilian educational institutions, and cultural objects may not be attacked unless they are being used by the enemy for prohibited (military) purposes (CIL, GP I, art. 21-27, 52, 53).

3. Principle of **Proportionality**.

This principle recognizes the fact that under the law of war it is not unlawful to cause **incidental injury or death to civilians**, or **collateral damage to civilian objects**, during an attack upon a legitimate military objective. The Principle of Proportionality requires, however, that the incidental loss of civilian life, injury to civilians, or damage to civilian objects, or a combination thereof caused by the attack, must not be excessive in relation to the **concrete and direct military advantage** anticipated from the attack. (CIL, GP I, arts. 51(5)(b) & 57(2)(a)(ii) & (iii)).

Commanders must take all reasonable precautions to keep civilian casualties and damage to civilian objects to a minimum consistent with mission accomplishment and security of the force. (CIL, GP I, art 57). Note that GP I, art. 57(2)(a)(ii) requires military forces to "take all feasible precautions." To the extent this purports to establish a standard more stringent than "reasonable precautions" (as stated in GP I, art 57(4)), the U.S. rejects it.

If civilian casualties and damage are likely as a result of a contemplated attack, the Commander must consider whether to adopt an alternative method of attack, if reasonably available, to reduce

such casualties and damage. In making this determination, a Commander may consider the need to conserve resources needed to accomplish the mission and the security of the force. The fact that a military force possesses precision guided munitions (PGMs), for example, does not **necessarily** indicate that it must employ such weapons in a particular attack, even if such employment would reduce incidental injury to civilians and collateral damage to civilian objects. Furthermore, a military force need not **necessarily** employ a means or method of attack, which might reduce civilian casualties or collateral damage, if this would also increase friendly casualties. Casualty avoidance and resource conservation, as well as military advantage in the context of the operational and strategic plan, are all legitimate considerations in determining a method of attack. (This issues is discussed further in question 5E below).

Commanders must determine whether the possible incidental death or injuries to civilians and collateral damage to civilian property would be excessive, on the basis of all facts reasonably available at the time (Rendulic Rule). If the anticipated military advantage (target value) is high, the deaths and injuries of civilians, and damage to civilian property must be commensurably high in order to be excessive.

4. Principle of **Unnecessary Suffering**.

This principle prohibits the employment of arms, projectiles, or material calculated to cause unnecessary suffering (HR, art. 23e).

Analysis:

Key facts indicate that Factory 26 employs approximately 250 workers and is located "near" a residential area of the city of Kanggye, North Korea, where several thousand civilians reside. The factory produces conventional munitions and chemical products for commercial and law enforcement usage, in addition to its production of the unlawful nerve agent sarin. The proposed attack contemplates a mixture of incendiary and high explosive munitions.

The Judge Advocate should assist the Commander and targeting cell in conducting a targeting analysis in order to determine the lawfulness of the proposed attack against Factory 26.

The first issue is to ask whether Factory 26 is a **military objective** and whether a **military necessity** exists to conduct the attack. Factory 26 is a military objective; it is an object, the purpose and use of which clearly make an effective contribution to North Korean military action. Furthermore, its total or partial destruction will offer a definite military advantage to Coalition Forces under the circumstances. Factory 26 produces lawful chemical agents for commercial usage, in addition to its production of conventional munitions and the unlawful nerve agent Sarin. The North Korean's have employed Sarin as a chemical weapon against Coalition Forces. Destruction of the sarin gas production and storage facility is indispensable to submission of an enemy that has already demonstrated its intention to level its disadvantage in conventional weapons through employment of asymmetric means, including chemical weapons. A military necessity exists for Coalition Forces to render the North Koreans incapable of further chemical weapons use.

Since it has a legitimate non-military purpose, as well as a military purpose, Factory 26 may be considered a **"dual use" target**. The fact that the factory has a civilian, as well as a military purpose, does not render it immune from attack, but immediately implicates the need to conduct a proportionality analysis (discussed below).

In assisting the Commander and targeting cell, the Operational Judge Advocate must conduct a thorough map study. In this case, assume that the factory is located less than 500 meters from the leading edge of the residential area. It is immediately apparent that an attack against Factory 26 may very well result in incidental injury or death of civilians and/or collateral damage to their property. This fact, like the "dual use" nature of the target, implicates the need to conduct a proportionality analysis (discussed below).

If an attack is likely to result in incidental injury or death to civilians or collateral damage to civilian property, the Commander **must** conduct a **Proportionality Balancing Test:** the Commander must determine whether the possibility of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, would be excessive in relation to the direct and concrete military advantage anticipated from the attack.

If the anticipated incidental injury or death to civilians or collateral damage to their property would be excessive in relation to the anticipated military advantage, then the attack is considered "indiscriminate" and is prohibited under CIL & GP I, art. 51(4).

Even if an attack does not violate the Proportionality Balancing Test, the Commander must take all "practicable" precautions to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. This is the U.S.' view of the CIL standard. Note that GP I, art. 57(2)(a)(ii) purports to impose a standard of "all feasible precautions."

CINC USFK must conduct a Proportionality Balancing Test. In order to do so, he must possess sufficient information to ensure the target is a military objective within the meaning of CIL and GP I, art 52(2). Two North Korean sources indicate that Factory 26 is a sarin gas production and storage facility, and satellite imagery seems to confirm it is a chemical munitions factory. Whether CINC USFK possesses sufficient information at this time to conduct the attack is a matter of judgment. Clearly, the prudent Commander must employ all reasonable methods/sources of information to verify the nature of a contemplated target. Under the "Rendulic rule," a commander's decision to conduct an attack is judged based upon the information he possessed at the time, as long as he made reasonable efforts to obtain sufficient information.

Given the nature of the proposed target (a lethal and non-lethal chemical production and storage facility and munitions factory); its location (within 500 meters of an area inhabited by thousands of non-combatants) and its staffing (possibly by 250 civilians), a likelihood exists that its attack will cause incidental injury or death of civilians and collateral damage to their property.

Attack of Factory 26 may cause release of the nerve agent sarin gas, as well as CS gas, and other chemicals into the environment. Further, its attack with high explosive conventional weapons may result in secondary explosions when its munitions (and related sub-products) are detonated. This raises questions of "weaponeering" discussed below.

The concrete and direct military advantage anticipated from the attack of Factory 26 is very high since this Factory produces and stores a lethal nerve agent that could be devastatingly employed against Coalition Forces as a weapon of mass destruction (WMD). The advantage is not speculative, as North Korea has already displayed the will to use these chemical weapons in their sarin gas attack against 2nd Infantry Division soldiers.

Since the target value is so high, the collateral deaths, injuries, and damage to civilians and their property must be commensurably high in order to be excessive. While an absolute prediction of the harm civilians may suffer may not be possible, depending upon the information available to targeteers, reasonable estimates of such harm may be possible.

In order to determine a reasonable estimate of possible civilian harm, the Commander and targeteers (with the Judge Advocate's assistance) must conduct a process sometimes referred to as "weaponeering." Weaponeering is an inherent part of the targeting analysis necessary any time a proportionality analysis is required (i.e., any time civilians or their property may be impacted by a proposed attack).

Weaponeering is complex and requires both "operational" and legal analyses. The operational analysis includes the process of matching the appropriate weapons platform and munitions to a contemplated target. This process requires examination of a number of factors, including: the nature of the target (what it is, what it is made out of, how it is housed, what is in it, what will happen if it is hit (or missed), etc.); its location (e.g., in a concentration of civilians); the accuracy and blast impact radius of the contemplated munitions, and other factors.

The legal analysis includes the issue of whether the weapons systems and munitions contemplated for use in the attack are lawful. The contemplated weapons may not be prohibited by international or domestic law (e.g., the use of chemical weapons). The LOW provides that arms, projectiles, or material calculated to cause unnecessary suffering are prohibited. (Hague IV, art. 23 (e)). Further, lawful weapons may not be used in an unlawful manner. For example, it is unlawful to employ incendiary weapons against dismounted troops in the open, when other weapons systems are available and viable.

In conducting the Proportionality Balancing Test, CINC USFK must determine whether the possibility of incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, caused by the attack of Factory 26 would be **excessive** in relation to the direct and concrete military advantage anticipated from the attack. The term "excessive" was purposely left vague in GP I. Under CIL, what constitutes "excessive" civilian harm is entirely dependent on the military advantage anticipated from the attack. As the value of the contemplated target rises, the "excessive" standard will correspondingly rise. Though U.S. practice is to take extraordinary measures to minimize civilian harm, the practice of nations during armed conflict through time demonstrates that significant civilian harm is not unlawful if the military advantage is sufficiently great. Furthermore, in determining the military advantage anticipated, CINC USFK is not balancing the value of this attack in isolation, but rather in the context of the overall operational plan or war strategy.

As part of his Proportionality Balancing Test, CINC USFK must examine the possibility of harm of harm to all non-combatants. This includes those in the residential area near Factory 26, and the Factory workers themselves. The CIL LOW principle of Distinction, and its codification in GP I, prohibit making civilians the object of intentional attack. A question arises as to the lawfulness of direct attack against the civilian factory workers. Under the U.S. view of the CIL standard, civilians lose their immunity from direct attack when they take an "**active part"** in hostilities. GP I, art 51(3), however, employs a **"direct part"** rather than "active part" standard for determining when civilians become unprivileged combatants and legitimate objects of direct attack.

The commentary to GP I defines taking direct part as **committing a hostile act against the person of an enemy.** This standard seemingly requires that an individual "pull the trigger" or other similar combatant activity.

Thus, under the GP I "direct part" standard, the workers in the factory retain their protected status. Although they are supporting the war effort, they are not taking "direct part." The practice of nations, however, has been to target munitions factories as military objectives since they make an effective contribution to the military action. Thus, employing the GP I standard, the possibility of incidental injury or death to these factory workers must be considered during the conduct of the Proportionality Balancing Test. If they were present during the attack (a factor which must be considered) and were injured or killed, this possibility (coupled with any other possible civilian harm) must be balanced against the anticipated military advantage. The civilian injury and deaths would not be unlawful unless the civilian harm is excessive in relation to the direct and concrete military advantage.

The U.S. approach to this issue recognizes the modern practice of employing civilian "contractors" in various capacities on the battlefield. Today, civilians perform critical combat support and combat service support roles that would otherwise require a uniformed military member. Desert Storm saw the U.S. employ civilians on the battlefield in a myriad of roles, including aircraft avionics repair, computer system operations, and numerous other functions, such as truck convoy drivers, etc. Not only were they present, in some cases, they were suited in camouflage uniforms and armed for personal safety. From the enemy's perspective, they were legitimate targets. A military force may not employ a subterfuge to gain immunity from direct attack by employing civilians to perform roles that would otherwise require uniformed military members.

Under the U.S. "active part" standard, in light of CIL LOW analysis, the civilians at Factory 26 arguably retain their immunity from direct attack. However, in the U.S.' view, the emerging doctrine recognizes a right to directly attack civilians performing a military role on the battlefield (i.e., taking an "active part" in hostilities). The classic example is the civilian military convoy driver. Under the U.S. view the driver may be the object of direct attack and not just "the victim" of incidental injury in an attack upon the truck itself. If civilians may be directly attacked, then their injury or death is like that of a combatant and is not factored into the Proportionality Balancing Test.

It is important to note the responsibilities that CIL and GP I impose upon the defender in addition to those it imposes upon the attacker. Under CIL and Article 58, GP I, parties to the conflict must endeavor to remove the civilian population and civilian objects under their control from the vicinity of military objectives (Article 58(b)). The parties must also avoid locating military objectives within densely populated areas. In this case, North Korea violated the LOW by locating a high-value chemical and munitions plant near a residential area and by failing to remove the civilian population from the vicinity of this military objective. The North Korean violation, however, does not relieve the Coalition Forces of their responsibilities under the LOW.

Clearly, destruction of the North Korean's capacity to employ Sarin gas as a WMD has critical implications for continued war efforts on both sides. The conduct of the Proportionality Balancing Test and corresponding weaponeering process may conclude that attack of Factory 26 may cause dozens of civilian casualties (or more) and moderate collateral damage (or more), but the advantage anticipated by its destruction is to save thousands of lives (and material and

national treasure) on both sides. CINC USFK may conclude that the attack of Factory 26 is lawful.

If CINC USFK decides to conduct the attack he must consider his obligation to warn the civilian population prior to the attack. CIL, codified in HR, art. 26 and GP I, art 57(2)(c) imposes a duty upon an attacking force to issue a warning of an impending attack. HR, art 26 provides that the commander of an attacking force, "must, before commencing a bombardment, **except in cases of assault**, do all in his power to warn the authorities." GP I, Article 57(2)(c) requires "effective advance warning shall be given of attacks which may affect the civilian population, **unless circumstances do not permit**." The U.S.' view of the caveat in the language of each treaty permits a commander to forego any warning in a case in which the security of the attacking force might be jeopardized by an advance warning. Today, should a military force employ over-the-horizon (OTH) stand-off weapons such as Tomahawk Land Attack Missiles (TLAM), arguing that surprise is essential for force security in order to avoid issuing a warning may be disingenuous.

B. Following the conduct of the weaponeering process, the Targeting Cell recommends to CINC USFK that Coalition Forces employ a mixture of air-delivered incendiary weapons and high explosive munitions. The J-3 argues that use of incendiary weapons against Factory 26 will substantially reduce the risk of civilian casualties resulting from a possible chemical release into the environment. Are there any legal prohibitions upon the use of incendiary weapons?

Answer:

The U.S. is a party to the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (The Certain Conventional Weapons Convention or CCW).

Protocol III to the CCW is known as the *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III). Protocol III prohibits the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians.

In terms of Protocol III, an "**Incendiary weapon** means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target."

Incendiary weapons include, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.

Incendiary weapons **do not** include munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems or munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions, in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

Protocol III, art 2(1) prohibits making the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons. Article 2(2) prohibits making any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.

Thus, Protocol III would prohibit the contemplated use of incendiaries against Factory 26. However, the U.S. is presently not a party to Protocol III. The President has transmitted the Protocol to the Senate for its advice and consent to ratification of the Protocol. In so doing, the President recommended that the U.S. take a reservation to the Protocol that would permit air-delivered incendiary weapons use within areas of civilian concentrations, if their use will result in fewer civilian casualties.

Analysis:

The J-3's recommendation to employ incendiaries is not a *per se* violation of international law. The U.S. is not a party to Protocol III, nor is incendiary weapon use under these circumstances a violation of any CIL obligation. During the weaponeering process, Coalition force targeteers would seek a method of destroying the target while minimizing the risk of civilian harm. The reason for employing incendiaries against Factory 26 is that, in theory, the heat generated by the incendiary detonation will burn the chemicals on the spot and prevent their release into their environment. Conversely, high explosive conventional munitions employment alone would likely disperse the chemicals. FM 27-10, para. 36 states that incendiaries should not be used in such a way as to cause unnecessary suffering.

As in all coalition operations, differing legal obligations resulting from various nations' treaty undertakings, may complicate planning and execution of military operations.

3. The CG, 2nd Infantry Division is concerned about the KPA using South Korean citizens as human shields when they attack Seoul. He wants authority to use riot control agents (RCA) if such a possibility arose. He argues that using RCAs is a good way to prevent injury to the South Korean hostages while protecting the life of his soldiers. Advise the CG on the international law and domestic law and policy on employing RCA under these circumstances.

Answer:

The U.S. is a party to the 1993 *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction* (Chemical Weapons Convention or CWC)

CWC Article I (5) provides that **["e]ach State Party undertakes not to use riot control agents as a method of warfare."** This language has caused a tremendous amount of consternation within the United States and internationally. Its meaning is of absolutely critical importance to the U.S. military and the way in which we conduct armed conflict and Military Operations Other than War.

CWC Article II (7) defines **Riot Control Agent** (RCA) as "[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure. " This would include

agents such as CS gas, as well as Oleoresin Capsicum (i.e., cayenne pepper spray) commonly used by U.S. military forces.

The use of RCAs during armed conflict (in war) is addressed in **Executive Order 11850**. President Ford promulgated Executive Order 11850 in 1975. In E.O. 11850, the **US renounces first use of RCAs in war except in defensive military modes to save lives. EO 11850 lists examples of potential defensive uses**:

E.O. 11850 provides that: "The US renounces as a matter of national policy . . . first use of RCAs in war except in defensive military modes to save lives **such as**: [*"Such as" indicates the listed uses are intended as examples and not to be an exhaustive list*]

(a) Use of RCAs in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war;

(b) Use of RCAs in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided;

(c) Use of RCAs in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners;

(d) Use of RCAs in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations."

Background on E.O. 11850: Use of riot control agents in war was the subject of international and domestic debate for years prior to CWC negotiations. The Nixon and Ford administrations carried out extended dialogue with the Senate Foreign Relations Committee in the context of ratifying the *Geneva Gas Protocol of 1925*, which bans the "use in war of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials or devices." The U.S. maintained since the 1960's that the *Geneva Protocol* applied only to lethal and incapacitating chemical agents and not to RCAs. The U.S. therefore contended that RCAs could be used during armed conflict. The Executive branch sought a legal interpretation that the *Geneva Protocol* did not apply to RCAs; the Senate Foreign Relations Committee favored a U.S. ban on the use of RCAs in war. In response, the Ford Administration developed E.O. 11850 as part of a compromise in the President's efforts to obtain Senate consent to ratification of both the Geneva Protocol and the Biological Weapons Convention

Executive Order 11850 announced U.S. policy on the use of herbicides and RCAs in war. It prohibited RCA use in war, except in defensive military modes to save lives. This position constituted the basis by which the Ford administration obtained Senate approval and consent to ratification of the Geneva Protocol and Biological Weapons Convention. The text of E.O. 11850 has remained unchanged since its promulgation in 1975. As the four example uses expressed in the Executive Order make clear, the U.S. made a strong distinction between battlefield use of RCAs in an offensive mode, which was prohibited, and more limited, humanitarian uses in war, which were permitted. This distinction would eventually form the central tenet of the U.S. negotiating position during CWC Geneva Conference.

During the Geneva Conference at which the CWC was negotiated and signed, the U.S. remained fully committed to its view that the humanitarian uses of RCAs contemplated under E.O. 11850, permitting use of RCAs in war in defensive military modes to save lives, was consistent with the CWC prohibition in Article I (5).

The phrase "method of warfare" was apparently selected as compromise language precisely because constructive ambiguity surrounded the phrase and it lacked a commonly accepted definition. Intentionally chosen, it permitted various nations with divergent views, including the U.S. and U.K., to sign the treaty, an action perceived by the participants at the Conference as in all nations' best interests. It was on this basis that the U.S. delegation agreed to the textual language on RCAs and signed the CWC text in 1993. Clearly, the U.S. signature on the CWC document in Paris was made with the understanding that the treaty allowed for the use of RCAs as permitted under Executive Order 11850.

The U.S. position was then and continued to be a subject of extensive international and domestic debate until the U.S. ratified the treaty in 1997. The ratification process between the U.S. Senate and Executive branch was also marked by considerable U.S. internal debate.

On 24 April 1997, the U.S. Senate published Senate Executive Resolution 75 – (Senate Report, S3373) Relative to the Chemical Weapons Convention, in which the Senate provided its advice and consented to ratification of the CWC, subject to 28 conditions. The Senate's Resolution provided in relevant part that:

> [Condition] (26) RIOT CONTROL AGENTS – (A) PERMITTED USES – Prior to the deposit of the United States instrument of ratification, **the President shall certify to Congress that the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases:**
>
> (i) UNITED STATES NOT A PARTY- The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict (such as recent use of the United States Armed Forces in Somalia, Bosnia, and Rwanda).
>
> (ii) CONSENSUAL PEACEKEEPING – Consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter.
>
> (iii) CHAPTER VII PEACEKEEPING - Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter. . . .
>
> (B) IMPLEMENTATION - **The President shall take no measure, and prescribe no rule or regulation, which would alter or eliminate Executive Order 11850 of April 8, 1975. . . ."**

Responding to the Senate's condition to its advice and consent to ratification, on 25 April 1997, the President's submitted his Letter of Certification to the Senate. This letter states, "the resolution . . . contains 28 different Conditions covering virtually every issue of interest and concern. I will implement these provisions. I will, of course, do so without prejudice to my Constitutional authorities, including for the conduct of diplomatic exchanges and the implementation of treaties. A Condition in a resolution of ratification cannot alter the allocation of authority under the Constitution."

In a letter the same day to the Congress, the President stated: "In accordance with the resolution of advice and consent to ratification of the Convention . . . adopted by the Senate of the United States on April 24, 1997, I hereby certify that . . . . **In connection with Condition (26), Riot Control Agents, the United States is not restricted by the Convention in its use of riot**

control agents, including the use against combatants who are parties to a conflict, in any of the following cases: [restates those instances enumerated by the Senate in its resolution]. . . . In accordance with Condition (26) on Riot Control Agents, I have certified that the United States is not restricted by the Convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the United States is not engaged in a use of force of a scope, duration and intensity that would trigger the laws of war with respect to U.S. forces."

To clarify and implement U.S. policy on RCA employment under the CWC and E.O. 11850, the Chairman of the Joint Chiefs of Staff promulgated Chairman of the Joint Chiefs of Staff Instruction (**CJCSI**) **3110.07A**, "Nuclear, Biological, and Chemical Defense; Riot Control Agents; and Herbicides" on 15 December 1998.

CJSCSI 3110.07A provides in relevant part: The CWC prohibits the use of RCAs as a "method of warfare." **US policy distinguishes between the use of RCAs in war and in situations other than war. Approval to use RCAs is dependent on the situation in which their use is contemplated . . . ."**

"Use in War: The Armed Forces of the US are prohibited from using any RCA or chemical herbicides in war unless the President approves such use in advance. The term "war" means a use of force of a scope, duration, and intensity that would trigger the laws of war with respect to US forces . . . . Requests to use RCAs in war shall be submitted IAW [EO 11850] and [CJCSI 3121.01, SROE]. The approval of any requested use will be assessed case by case based on applicable domestic and international law and relevant policy and operational considerations. . . . During war, use of RCAs outside a war zone is authorized as prescribed for peacetime."

"**Peacetime Military Operations and Operations Other Than War: IAW [*Presidential Letter to the Congress of the US, 25 April 1997*] the US is not restricted by the CWC in its use of RCAs, including against combatants who are a party to a conflict, in any of the following cases. . .: The conduct of peacetime military operations within an area of ongoing armed conflict when the US is not a party to the conflict; Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the UN Charter; Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN Charter. The subparagraphs above do not constitute an exhaustive list of authorized occasions for peacetime use of RCAs. Other scenarios, such as maritime interdiction / interception operations or other sanctions enforcement, may have to be evaluated on a case by case basis to determine whether Presidential authority is required under Executive Order 11850.**

Analysis:

The CG seeks to use RCAs during war and within the war zone, where civilians are being used to mask or screen an attack and civilian casualties can be reduced or avoided. His contemplated use of RCAs falls within one of **E.O. 11850's "defensive military modes to save lives."**

Whether this contemplated use constitutes a "method of warfare" in terms of Article I (5) of the CWC (and is therefore prohibited under international law) is subject to extensive international and domestic debate. Whether or not it constitutes a method of warfare, only the President can

authorize the use of RCAs during armed conflict. The CG must submit an ROE Supplemental Measures Request IAW CJCSI 3121.01A *, The Standing Rules of Engagement for U.S. Forces*, up the chain of command. RCAs may be employed in this situation (during war) only with the President's specific approval.

4. The CG, 2nd Infantry Division also wants to use non-self destructing, i.e., "dumb" anti-personnel landmines (APL) to protect the perimeters of Seoul. However, he is unsure about his legal authority in light of the various landmine treaties, executive orders, and moratoriums he has heard about. Brief the CG on the law and policy relevant to APL employment.

Answer:

The CG has the authority to use non-self destructing (dumb) APL because he is defending against armed attack by the KPA across the DMZ.

Analysis:

On 16 May 1996, President Clinton issued **Presidential Decision Directive 54**. In PDD 54, the President promulgated U.S. policy on the employment of non-self- destructing (dumb) APL. PDD 54 provides that U.S. forces may no longer employ dumb APL except in the Korean Peninsula to defend against armed attack across the DMZ and for training purposes.

The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction **(The Ottawa Process or Landmines treaty).** This convention prohibits the use, stockpiling, production, and transfer of APL. As of March 2000, 160 nations have signed the convention and 60 states have ratified it. The treaty entered into force on 1 March 1999. The U.S. declined to sign the treaty when other countries would not include an exception within its terms permitting employment of non-self-destructing APL in Korea and other uses of self-destructing (i.e., "smart") APL.

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II or Amended Mines Protocol II). The U.S. is a party to Protocol II to the 1980 Certain Conventional Weapons Convention. Protocol II: (1) requires that all remotely delivered APL be equipped with self-destruct devices and back-up self-deactivation procedures; (2) requires that all non-remotely delivered APL not equipped with self-destruct / deactivation devices (i.e., dumb mines) be used within controlled, marked, and monitored minefields.

Protocol II actually permits employment of dumb mines within certain parameters, however, U.S. forces are constrained by the President's more restrictive U.S. policy expressed in PDD 54.

5. Aerial photographs and other intelligence assets disclosed the following possible targets in Pyongyang, North Korea. You are the Operational Judge Advocate advising the targeting cell as it examines whether to add the particular item to the Coalition force's target list for attack. Review the following missions and targets for compliance with the law of war and advise the USFK planners accordingly.

A. A large power plant located at the northeast edge of Pyongyang, North Korea, which serves not only the North Korean KPA military headquarters, but also all of the civilian hospitals and residential areas of the city.

Answer:

This power plant would be lawful target if it is essential to the operation of the North Korean military headquarters and the principle of proportionality is not violated.

Analysis:

A military necessity exists to conduct an attack against a power plant which serves the North Korean KPA HQ. The power plant is a military objective since it is an object whose purpose and use make an effective contribution to the enemy's military action and its destruction would offer Coalition forces a definite military advantage (i.e., the KPA HQ is powerless and can't communicate, etc. with North Korean forces).

The power plant, however, is a "dual-use" target. As such, civilians are immediately impacted by an attack against it. Therefore, the Commander must perform a Proportionality Balancing Test in order to determine if the risk of incidental injury or death to civilians or collateral damage to their property would be excessive in relation to the direct and concrete military advantage anticipated by attacking the power plant.

As part of his targeting analysis, the Commander must consider whether alternatives exist to attacking the power plant, which will thereby minimize resulting civilian harm? What about attacking the KPA HQ directly, rather than the power plant? During the conduct of the weaponeering process, targeteers might consider employing "soft kill" rather than "hard kill" technology against certain portions of the Pyongyang power grid which could reduce civilian harm.

During the Gulf War, the U.S. destroyed the Baghdad electric power plant supplying power to Iraqi command and control facilities. The power outage disabled water pumps, which also impacted civilians, who suffered from lack of water. Evidently, water-borne diseases spread among the civilian population due to the damage. This is now arguably a foreseeable result which Commanders must factor into consideration as part of their Proportionality Balancing Test.

B. Troop billets (located in citizens' homes) in the southern part of the city. A large church located in the center of the billeting area.

Answer:

Troop billets in non-combatant residences: Possibly lawful targets, however, Commander must attempt to verify the information that these are, in fact, troop billets.

Analysis:

The fact that the enemy chooses to place its military targets amongst the civilian population does not immunize the targets. Their military use by the enemy makes an effective contribution to military action (i.e., housing military forces) and transforms these civilian objects into military objectives, and their total or partial destruction, capture or neutralization would offers a definite

military advantage to Coalition forces. However, if other civilian homes not being used for military purposes will be impacted by the attack, then the Commander must perform a Proportionality Balancing Test.

Answer:

Church: Probably unlawful.

Analysis:

Providing the church is not being used for military purposes it is a protected place and may not be targeted. CIL, as codified in HR, art 27 requires that "all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, an places where the sick and wounded are collected, provided that they are not being used at the time for military purposes." However, the presence of church does not immunize those civilian houses being used for military purposes. However, id the church may be damaged as a result o the attack, then the commander must conduct a proportionality balancing test.

Coalition forces must also consider the warning requirement (CIL, codified by HR, art 26; and GP I, art 57(2)(c)). Attackers have a general requirement to warn before a bombardment - but only when civilians are present. The exception to this rule is when the attack is an **assault** (any surprise attack or an attack where surprise is a key element).

C. A barracks complex at the western edge of the city which is marked with the Red Cross emblem on all its buildings. Intelligence assets have not determined whether this barracks complex has actually been converted into a hospital.

Answer:

Preemptively unlawful.

Analysis:

A presumption of protection exists when the Red Cross / Red Crescent emblem is displayed. An attacking force **must warn** prior to attacking a hospital that is committing "acts harmful to the enemy." The hospital must then receive a "reasonable time to comply" before commencing the attack (GWS, art. 21). The only exception to the warning requirement arises when an enemy is firing from that hospital. In this case, fire may be returned immediately without prior warning.

D. A 40 ft. statue of the North Korean Leader, Kim Il Sung, located by itself in a large park.

Answer:

The statute may be a lawful target.

Analysis:

The issue is whether this is a military objective and whether a military necessity exists to attack it. Is this statute an object that makes an effective contribution to the enemy war effort? The

only possible military advantage that might be gained from its destruction is some unquantifiable and speculative impact upon morale. Is civilian morale a legitimate target? Intentional attacks against civilian morale are intentional and unlawful attacks against civilians. Furthermore, history has repeatedly demonstrated that such attacks do not result in civilian capitulation, and in fact, frequently strengthen their resolve. The only justification for the statue's destruction is some negative impact upon North Korean military morale.

Note that under the 1954 Hague Cultural Property Convention (submitted to the Senate for advice and consent to ratification, but not yet ratified by the U.S.), the statue would probably not be protected as cultural property. Article 1 of this Convention defines cultural property as movable or immovable property of great importance to the cultural heritage of every people. In the eyes of most of the world's people, a statue of Kim Il Sun would not satisfy this requirement.

E. A railroad station located in the center of the city. A residential area surrounds the station. The station is located in such a manner that the rail line could be effectively interrupted at this point. The risk of Coalition casualties is minimal. The railroad crosses several bridges outside the city. Destroying the railroad and the bridges would entail the use of the same amount of ordnance and would have the same effect as destroying the tracks at the rail station, but would also bring Coalition aircraft within range of SAM sites and significantly increase the risk of friendly casualties. By the same token, this attack will significantly reduce the risk of civilian casualties. Does the Law of War require CINC USFK to choose one target over the other?

Answer:

No clearly correct (or wrong) answer, though both the railroad station and the railroad bridges are lawful targets.

Analysis:

Military necessity exists to attack either the railroad station or the bridges. This will disrupt North Korean lines of communication (LOC), critical to supply and reinforcement of their Army in the South. Both objects are military objectives. Each makes an effective contribution to the North Korean's war fighting capability, and the total or partial destruction or neutralization of either would constitute a definite military advantage to Coalition forces under the circumstances.

The railroad station is located within a residential area within the city. Attack of the railroad station will create a risk of incidental death or injury to civilians and collateral damage to their property. Therefore, the Commander must conduct a proportionality balancing test.

Attack of the railroad bridges will accomplish the same military purpose (severing the enemy's LOC), without the risk of civilian harm, but with increased risk of friendly casualties.

It is important to note that GPI, art 57(3), provides: "When a choice is possible between several military objectives for obtaining a **similar military advantage**, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." Does this then require Coalition forces to choose the bridges rather than the railroad station?

GP I, art 57(3) certainly seems to indicate that the answer is yes. Recent state practice, however, has not clearly supported the concept of reducing civilian casualties at the risk of increasing friendly casualties. For example, during Operation Allied Force, NATO aircraft frequently delivered ordnance against targets from an altitude beyond the reach of Serbian air defenses (15,000+ feet). This may have meant that in some cases a target could not be verified with the naked eye and that the risk of civilian harm was increased, but the risk of friendly casualties was thereby reduced.

Clearly, Commanders must take all reasonable precautions to keep civilian casualties and damage to civilian objects to a minimum. In light of state practice, to what extent this requires a commander to absorb additional casualties is uncertain.

There is no clear official U.S. policy pronouncement on this issue.

In the past, however, U.S. Law of War experts examining the issue have articulated the position that a "similar military advantage" is not achieved when a force will suffer more casualties in one attack relative to another. It is important to consider that in determining the military advantage to be gained from a particular attack a commander is not examining alternatives (military objectives and methods of attack) in a vacuum. While he must strive to reduce civilian harm and select a military objective or method of attack that supports these efforts, he can only determine military advantage by examining a myriad of factors related to the overall operational strategy. These factors include security of the force and conservation of material, as well as mission accomplishment in the context of the overall operational and/or strategic plan.

Employing this view, attack of the railroad bridges is likely to increase friendly casualties and loss of Coalition aircraft as a result of the surrounding SAM threat, but reduce civilian harm. Alternatively, attack of the railroad station is likely to increase civilian harm, but reduce friendly losses. The military advantage gained from attack of the railroad bridges relative to attack of the railroad station will be substantially less if Coalition assets suffer such losses. Thus, this attack does not offer a "similar military advantage" in the language of GP I, art. 57(3). In conducting his proportionality balancing test, CINC USFK may consider the reduced military advantage offered by attack of the railroad bridges relative to that offered by the railroad station as he balances the risk of civilian harm against this anticipated military advantage. The commander has to make a difficult judgment call.

Recall that the Law of War imposes obligation upon the defender, as well as the attacker. Under GP I, art 58, North Korean forces must: remove civilians and civilian objects as much as possible from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; take the other necessary precautions to protect the civilian population from the dangers of military operations.

The Consider must also consider the warning requirement before attack. (See earlier discussion in question 5B).

6. As the operational law attorney for the 82nd Airborne Division, you have been asked to review the ROE before the unit deploys to Korea. The 82nd Airborne Division's assigned area of operations will contain few, if any, friendly forces or civilian populace. The commander seeks to incorporate the following language into the Rules of Engagement for designated areas, such as the fields of fire around the Division's nighttime perimeters. What do you think?

"SPECIFIED STRIKE ZONES: Areas designated by the Division Commander in which there are no friendly forces or civilian populace and in which all targets may be attacked on the initiative of individual soldiers. There is no requirement for further clearance or coordination prior to the initiation of combat activity."

Answer**:**

There is nothing thing *per se* unlawful about the ROE.

Analysis**:**

The only problem is that it may create a "free-fire zone" mentality (anything that moves is a target). Troops should realize that only military objectives are targets. In this case, military objectives include combatants (anyone—including civilians—who engage in belligerent activities on behalf of a party to the conflict), defended places, and objects which by their nature, use, location, or purpose make an effective contribution to military action. Protected persons (civilians not participating in the hostilities and, sick and wounded former combatants who are hors de combat), protected places, and protected property such as medical and cultural property are not lawful targets.

7. Assume that Coalition forces have stopped the North Korean Army and begun to gain momentum, pushing the retreating KPA northward in front of it. Converging on Highway 1, the shortest route back to North Korea, KPA troops are flooding northward toward the Uijongbu Corridor and the 38th parallel. USFK planners intend to allow KPA forces to withdraw along the highway and then fix them in place utilizing air-dropped land mines. Once the KPA is fixed in place, air assets can then conduct massive aerial attacks against these forces, utilizing the full arsenal of weapons. The operation is called "Operation TURKEYSHOOT." Is this plan lawful?

Answer:

Providing, the proportionality principle is satisfied with respect to any civilians impacted by the attack, this is a lawful targeting plan.

Analysis.

Standard targeting analysis pertains. Indeed, this is an ideal place to target KPA combatants. Military necessity exists to destroy the combatant force and its warfighting capability. Given the location with few, if any non-combatants, the risk of civilian harm is low.

Mines. The dropping of APL in this case is lawful. There appears to be little if any chance of indiscriminate damage to civilian lives or property given that the mines will dropped on the road at or near the position of the retreating forces, presumably to "fix" the forces in place. U.S. practice is to employ self-destructing mines. The Operational Judge Advocate should encourage operators to set the mines for self-destruction / deactivation for the shortest period of time consistent with mission accomplishment and force protection. (See earlier discussion relative to landmines).

Surrender. Surrendering to an aircraft presents obvious practical difficulties. Questions exist as to whether an aircraft must (or even has the capability to) accept an offer to surrender. HR, art

23 prohibits killing or wounding **"an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion."** What discretion means is unclear. The Hague Regulation it says nothing regarding ceasing fire to give the enemy an opportunity to surrender, i.e., the laying down of arms. It may be unclear whether the combatants are gesturing (or waving white flags) in hopes the aircraft commander will not shoot and then return to their withdrawal maneuver once the aircraft departs or are genuinely attempting to surrender.

Waving a white flag simply means a desire to communicate with the enemy. U.S. forces are not required to cease fire upon seeing a white flag. It's only when the unit becomes *hors de combat*, by ceasing resistance and offering themselves to the control of U.S. forces, that they become protected.

The traditional rule was that aircraft did not have the capability to accept a surrender and therefore were not required to halt their attack. During the Gulf War, though, many Iraqi soldiers "surrendered" to Coalition aircraft. But what should the aircrew do if half the line surrenders during the bombardment and the other half does not? This is probably more of a moral question than a legal one. The enemy must convey its clear intent to surrender. If only half the line throws down its arms, then to the extent practicable, avoid bombing them. Hopefully the unarmed individuals will then do a good job of avoiding bombardment. If the enemy is merely retreating, then they are still in combat since they may rejoin their forces later.

The issue must be addressed on a case by case basis. It would be helpful if Psychological Operations forces had already instructed enemy ground forces to take certain steps to indicate surrender (white flags, abandonment of weapons and vehicles, and walking in a certain direction). Clarify the extent to which we anticipate the enemy will be unable to resist and ensure that aircrews performing the mission are sensitive to signs of surrender. Once the enemy is incapable of further resistance, it may be consistent with the principle of avoidance of unnecessary suffering to wait for signs of surrender (depending on the circumstances at the time).

There is concern over the plan's reference to the use of the "full arsenal of weapons." Under Department of Defense Directive 2000.2, Feb 91, "the Head of each DoD component will ensure that the Judge Advocate General of the Component conducts a legal review of all weapons intended to meet a military requirement of the Component to ensure that the intended use of the weapon in armed conflict is consistent with the obligations assumed by the United States . . . . under all applicable treaties, with customary international law, and, in particular, with the laws of war."

Weapons and weapons systems must receive legal review prior to their employment. Furthermore, lawful weapons must not be employed in an unlawful manner. The Operational Judge Advocate must assist the operators in complying with these requirements.

Lastly, as part of the USFK legal staff, the Operational Judge Advocate should coordinate with the PAO and J-3 about changing the title of this operation from "Operation Turkeyshoot" to something else.

8. While coordinating with the JA on changing the name from "Operation Turkeyshoot" the USFK PAO wants to discuss the following issue. Intelligence reports indicate a labyrinth of KPA fortified tunnels in and around Pyongyang which are probably impervious to airstrikes and indirect fire weapons. Therefore, USFK is considering

utilizing blade tanks to employ the "plow tactic" made famous during DESERT STORM. The PAO is concerned about the lawfulness of this tactic, not to mention the public affairs angle. What's the deal?

Comment:

This question highlights the public affairs importance of methods and means of warfare. Although a method of warfare may not be illegal, it may create a public affairs issue. When responding to the DESERT STORM employment, DoD spokesman Pete Williams said that there "is no nice way to kill someone."

Answer:

The PAO should be told that our forces complied with the law of war and that every opportunity was given to the enemy to surrender. Absent their surrender, combatants, regardless of being under-equipped, poorly trained, and in vulnerable tactical settings—are proper targets.

Comment.

The issue here is whether or not the tactic used by the CINC is calculated to cause unnecessary suffering. Clearly not. The law of war is not based on a "sporting" theory of warfare that requires one side to expose itself to an equal risk of high casualties. Death by being buried alive is not less inhumane than by being gored by a bayonet or shot with a round from an M-16.

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COMBATING TERRORISM

MAJ SMIDT

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I. HISTORICAL USE OF TERRORISM

A. Terrorism can be traced back to the Ancient Greek and Roman Republics. According to its classical definition, the assassination of Julius Caesar on the Ides of March in 44 B.C. was an act of terrorism.[1]

B. The Zealots-Sicarii, a Jewish group, lead a campaign against Roman and Greek occupation forces in Judea. Their technique was to murder individual victims using daggers or swords in an attempt to incite a mass uprising. They later turned to open warfare. Their activities had various unintended consequences such as the destruction of the Jewish Temple and the mass suicide at Masada.

C. The word "assassin" is a literal translation of the Arab phrase "hashish-eater" or "one addicted to hashish." From 1090 to 1275, a group of sectarian Moslem fanatics, while under the influence of drugs and motivated by political and religious zeal, spread terror among Christian forces as a result of their unconventional acts of extreme violence. Their objective was to establish a "purified" version of Islam. These Assassins, the Ismalis-Nizari, would stab their victims in broad daylight, which made their escape impossible. Much like today's modern car bombers, they considered their lives a worthwhile sacrifice.

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[1] *See generally,* ROBERT A. FRIEDLANDER, TERROR-VIOLENCE, ASPECTS OF SOCIAL CONTROL 7-58 (1983), and JESSICA STERN, THE ULTIMATE TERRORISTS 15-17 (1999). The information in this portion of the outline was primarily taken from these two excellent works on the subject.

D. During the Sixteenth and Seventeenth Centuries in Europe, assassination became a relatively common ideological and political tool. Citing the Bible as authority, certain radical groups and individuals thought of themselves as the instruments of popular will, authorized to kill tyrannical political leaders that had become the true enemies of the state.

E. A religiously fanatic group known as the "Thugs" was active in India for over 600 years and well into the 1800's. Motivated by a desire to provide human sacrifices to the Hindu goddess Kali, they typically robbed, strangled, dismembered and buried their victims. Believing that Kali enjoyed seeing terror in the sacrificial victim's, the Thugs often attempted to prolong the agony of death to the extent possible.

F. In America, leaders of the American Revolution believed that the British Government no longer respected certain natural and unalienable rights and therefore had become an illegitimate regime. Although the Revolutionary forces generally tended to comply with the customs of war, guerrilla tactics were employed by some units. Shortly after the Civil War, John Wilkes Booth shot Abraham Lincoln, believing that he was ridding the nation of a tyrant.

G. The first use of the word "terrorism" occurred during the French Revolution. "Guerrilla" warfare and terrorism became virtually synonymous as Spanish Guerrillas attempted to remove Napoleonic forces from the Iberian Peninsula. The term guerrilla means, "little war."

H. "Macedonia for Macedonians" was the cry of the Internal Macedonian Revolutionary Movement (IMRO) in the 1890's. The IMRO, sponsored by states such as Bulgaria, marked the beginning of 20th Century insurgencies that relied on unconventional tactics such as murder, bombings and kidnappings to create terror among the Turkish occupation forces.

I. Terrorist bands, supported by Bulgaria, Serbia, and Greece operated in the Balkans prior to World War I. The Death Society, also known as the Black Hand, was sponsored by the Serbian Government. On June 28, 1914, the Archduke Franz Ferdinand was assassinated by a young nineteen year old trained by the Black Hand, which set into motion the events leading up to the First World War.

J. The first international response to terrorism was the 1937 Convention for the Prevention and Punishment of Terrorism. It was promulgated as a result of the assassination of King Alexander of Yugoslavia in 1934. The treaty was ratified by only one state and never came into force.

K. Until the 1983 attack on the Marine barracks in Beirut, most Americans felt insulated against terrorist attacks. The U.S. Government began establishing programs to deal with terrorism. The bombings of the World Trade Center and the Federal Building in Oklahoma City suddenly caused Americans to realize that it was not just U.S. citizens overseas that were now subject to terror tactics.

L. On February 23, 1998, Usama Bin Laden, the 17th son of a wealthy Saudi Arabian construction magnate, called on all Muslims everywhere to attack U.S. citizens, civilian and military, anywhere in the world. On August 7, 1998, the bombings of two U.S. Embassies located Africa demonstrated Bin Laden's global reach.

II. WHAT IS TERRORISM?

"There is another type of warfare--new in its intensity, ancient in its origin -- war by guerrillas, subversives, insurgents, assassins; war by ambush instead of by combat, by infiltration instead of aggression, seeking victory by eroding and exhausting the enemy instead of engaging him…It preys on unrest…"[2]

A. There is no generally accepted definition of international or domestic terrorism. However, attempting to define terrorism is not merely an academic exercise.

1. Definitions drive intelligence collection activities, which in turn affects decisions relating to National Security. For example:

   a. The U.S. State Department and the Central Intelligence Agency are concerned only with international terrorist incidents.

   b. The FBI collects intelligence related to domestic terrorism.

   c. No governmental organization collects intelligence on terrorism in both the United States and overseas.

2. Categorizing terrorism as a crime or as an act of aggression impacts on permissible responses.

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[2] John F. Kennedy, Address to the Graduating Class, U.S. Naval Academy, 6 June 1962. *Quoted in* Joint Pub 3-07.2, Joint Tactics, Techniques, and Procedures for Antiterrorism I-1.

a. If terrorism is a merely a crime rather than an armed attack which would authorize the use of military force, the Department of Justice, FBI, state and local law enforcement would be the appropriate agencies to prevent, deter, and respond to terrorism.

b. If terrorism is purely criminal, then military forces, despite their technological know how and ability to manage catastrophic situations, would be limited in how they could respond. This would be so even in cases where Weapons of Mass Destruction (WMD) were used by terrorists and the number of casualties approached the numbers of a "major regional conflict."

c. On the other hand, if terrorism is defined in the international community as an unlawful aggressive act of force, then military forces could be used where authorized by the United Nations Security Council or unilaterally in collective or individual self-defense. This may be true even where terrorist cells, the potential target, are operating in the United States under the control of international organizations or states.

d. If terrorism is warfare, then are terrorists entitled to prisoner of war status and combatant immunity for their pre-capture warlike acts?

B. Disagreements as to the proper definition of terrorism exist even within the United Government.

1. Terrorism as a domestic crime, the definition relied on by DOJ, is an act that, "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct: and is a violation of…." (A laundry list of domestic and international crimes follows).

2. The Department of State (DOS) defines terrorism[3] as, "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience."

[3] Patters of Global Terrorism 1999, United States Department of State, p. viii (April 2000), *citing* 22 U.S.C. § 2656f(d).

a. DOS interprets "non-combatant" to include military personnel who at the time of the incident are unarmed or not on duty. For example, the State Department considers the following to be the victims of terrorism: the 19 airmen killed in the bombing of Khobar Towers in June 1996; COL James Rowe, killed in Manila in April 1989; CPT William Nordeen, US defense attaché killed in Athens in June 1988; the two servicemen killed in the La Belle discotheque bombing in West Berlin in April 1986; and the four off-duty US Embassy Marine guards killed in a café in El Salvador in June 1985.

b. DOS also considers attacks on military installations or personnel to be terrorism where perpetrated when a state of hostilities does not exist at the site.

3. The Department of Defense Definitions.[4]

a. Terrorism. "The calculated use of violence or threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."

b. Domestic Terrorism. "Terrorism perpetrated by the citizens of one country against fellow countrymen. That includes acts against citizen of a second country when they are in the host country, and not the principal or intended target."

c. International (or Transnational) Terrorism. "Terrorism in which planning and execution of the terrorist act transcends national boundaries. In defining international terrorism, the purpose of the act, the nationalities of the victims, or the resolution of the incident are considered. Those acts are usually planned to attract widespread publicity and are designed to focus attention on the existence, cause, or demands of the terrorists."

C. Taking into consideration all of the above definitions of terrorism, there appear to be three essential elements:[5]

[4] DODD 2000.12, DoD Combating Terrorism Program, Encl. 2 (15 Sep 1996).

1. *Violence,* whether actual or threatened;

2. *Political*, objective, however conceived; and

3. An *intended audience*, typically though not exclusively a wide one.

D. International Terrorism can be distinguished from domestic terrorism when it meets one of the following conditions:

1. The target of terrorism is selected from a country other than that of the terrorists themselves;

2. The commission of terrorism involves crossing national borders; or

3. Participating members and/or sponsors of terrorist activity are from more than one country.[6]

E. The Department of Defense further divides terrorism into two categories for the purpose of defining the role of the military.

1. Counterterrorism (CT). Offensive actions against terrorist groups.

2. Antiterrorism (AT). Defensive protective measures.

III. THE TERRORIST THREAT

"The question is not if but where and when a terrorist attack will occur."

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[5] ANTHONY CLARK AREND AND ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE, BEYOND THE UN CHARTER PARADIGM 141 (1993).

[6] HENRY HAN, TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF CONTROL 69 (1993). The author uses the conjunctive "and" for the three criteria. I believe this disjunctive "or" is more accurate.

A. According to U.S. Department of State statistics,[7] there were 392 international terrorist attacks during 1999, 273 in 1998 and 304 in 1997. Most targets were businesses and the preferred method was bombing, 186 were used. However, 233 persons were killed and 706 injured compared with the 1998 attacks where 741 individuals were killed and 5,952 were injured. This decrease in numbers of casualties is as a result of a lack of mass casualty attacks in 1999.

1. In 1998, most of these casualties were as a result of the attacks on the U.S. Embassies in Kenya and Tanzania where 291 were killed and about 5,000 injured.

   a. Twelve U.S. citizens were killed in the bombings.

   b. Eleven were wounded.

2. The number of terrorist attacks increased in every region of the world in 1999, except the middle east, where fewer than six attacks occurred.

3. In Europe, there were dozens of attacks linked to the NATO bombing campaign in Serbia and the capture of Abdullah Ocalan of the Kurdish Workers' Party by Turkish authorities.

4. In Nigeria, radical youth gangs captured and held for ransom more than three dozen foreign oil workers.

5. About 52%, or 169, of the attacks were directed against U.S. targets. This was up from last year's figure of 111 attacks or approximately 40% of the total attacks.

   a. The majority, about 91, were bombings or other attacks against a multinational oil pipeline in Colombia.

   b. In Greece anti-NATO attacks were frequently directed against American interests.

   c. In Nigeria and Yemen, U.S. citizens were abducted.

[7] Patters of Global Terrorism 1999, *supra* note 3, p. 1-3.

d. Five U.S. citizens were killed in these attacks.

(1) The Revolutionary Armed Forces of Colombia (FARC) kidnapped three U.S. citizens working with Native Colombians. Their bodies were found on 4 March.

(2) A group of Rwandan Hutu rebels kidnapped and killed two U.S. citizens in the Bwindi Impenetrable National Park in Uganda.

6. There were no international acts of terrorism in the United States in 1999.

a. Most terrorists in the United States are here to:

(1) Raise money.

(2) Provide communications.

(3) Collect intelligence.

(4) Obtain weapons.

b. The openness of American society makes it particularly vulnerable to the above listed acts.

B. On November 4, 1998, indictments for Usama Bin Laden, his military commander, Muhammad Atef, and al-Qaida members Wadith El Hage, Fazul Abdullah Mohhamed, Mohammed Sadeek Odeh, and Mohammed Rashed Daoud al-Owhali were returned before U.S. District Court for the Southern District of New York. Odeh and al-Owhali were turned over to U.S. authorities in Kenya and are now awaiting trial. Mamdouh Mahmud Salim was arrested in Germany and extradited to the U.S. On December 16, 1998, five others were indicted.

C. On May 1999, the U.S. District Court in the Southern District of New York unsealed an indictment against Ali Mohammed, a member of Usama Bin Ladin's al-Qaida terrorist organization, for conspiracy to kill U.S. nationals overseas.

D. On October 5, 1999, Khalfan Khamis Mohamed, wanted in connection with the US Embassy bombing in Dar Es Salaam Tanzania, was arrested in South Africa in a joint investigation by U.S. and South African authorities.

E. Three additional persons convicted in the bombings of the World Trade Center in 1993 were sentenced in 1998. In October of 1999, Siddig Ibrahim Siddig Ali was sentenced to eleven years in prison for his role in a plot to bomb New York City Landmarks and to assassinate Egyptian President Hosni Mubarak in 1993.

F. "A critical factor in understanding terrorism is the importance of the emotional impact of the terrorist act on an audience other than the victim…. Terrorism has become a media event and, as such, a phenomenon of our time."[8]

G. The real weapon of terrorism is terror or fear. By hitting weak, vulnerable and sympathetic targets, the terrorist seeks to psychologically multiply the actual damage of an attack as a method of manipulating larger power groups that the terrorist lacks the ability to attack directly or control politically.

1. Terrorists generally lack the military strength to attack an enemy military force or objects directly.

   a. They must operate in clandestine cells.

   b. Their weapons, communications, tactics, training and intelligence systems are almost always inferior to organized military forces.

2. Most of their actions, if they occurred during an armed conflict, would constitute war crimes.

   a. As a general rule, they attack civilians or off duty military forces.

   b. Terrorists tend to target dual use or purely civilian targets.

   c. Transnational terrorist often attack targets in countries not directly involved in a conflict with the group or target country.

[8] Joint Pub 3-07.2, *supra* note 2, p. II-1.

d. Therefore, even if terrorists meet the *Jus ad Bellum,* justness of war, prong, they almost always fail the *Jus in Bello,* justness in war prong of international law.

3. As with most politically motivated groups, terrorists typically have short, intermediate and long term goals. They are either unwilling or unable to achieve these goals through political processes. Terrorists therefore turn to violence as an alternative means of achieving their goals. Terrorism is therefore, is purposeful rather than random violence. Motivations to use violence at a given place and time include:

a. Attract publicity for the group's cause.

b. Demonstrate group's power.

c. Show existing government's lack of power.

d. Exact revenge.

e. Obtain logistical support.

f. Build sympathy by baiting government into overreacting.

H. Terrorist Tactics.

1. Assassination.

a. Prominent persons.

(1) The psychological impact on the target audience by killing a prominent person may be significant.

(2) High value in terms of the intimidation of other leaders, judges often the target.

(3) There is also however significant risk to the terrorist group from the state where a high level leader is targeted by the terrorists.

b. Symbolic enemies.

c. Traitors and defectors from the group.

2. Arson.

a. Generally involves low risk to the perpetrator because the perpetrator generally has time to escape.

b. Low level technology is required and readily available.

3. Bombing.

a. The clear weapon of choice, especially the car bomb. Over half of all terrorist acts involve bombs.

b. Inexpensive to produce. A bomb like the one used in Oklahoma City can be built for a few thousand dollars.

c. Low risk to perpetrator with some detonation devices. (Cannot however overlook the appeal of suicide bombing to some).

(1) Can be out of area.

(2) Have others unwittingly or wittingly place bomb.

(3) Generally leave less evidence leading to an individual or group.

d. Attention-getting capacity is very high.

(1) Media interest.

(2) Explosives create a great deal of terror and paranoia.

(3) Terrorists seek to instill in the citizenry a belief that the government is powerless to protect them.

e. Control of casualties through placement and timing.

4. Hostage Taking.

a. The overt seizure of one or more individuals with the intent of gaining publicity or concessions such as release of prisoners.

b. Dramatic. Extremely high media interest.

c. Risky to perpetrators.

5. Hijacking or skyjacking.

a. Spectacular hostage situation. Media worthy.

b. Sometimes employed as a means of escape.

c. The car bomb of the ‘60’s and ‘70’s.

d. Busses, trains, ships and aircraft (most popular).

6. Seizure.

a. Usually building or object with high public value.

b. Risk to perpetrators especially if no innocent lives involved.

7. Raids or Attacks on Facilities.

a. Access to radio or television broadcast media to make a statement.

b. Demonstrate the government's inability to secure critical facilities.

c. Acquire resources (Banks).

8. Sabotage.

a. Demonstrates the vulnerability of a government or society to the terrorist group.

b. Industrial societies more at risk.

c. Utilities, computer networks, communications, and transportation facilities.

(1) Disruption of one disrupts all.

(2) Immediate public attention.

d. Military facilities.

9. Hoaxes.

a. Groups with established credibility can successfully employ hoax.

b. Requires devotion of time and resources by the government to respond to the hoax.

c. May cause huge delays or even shut down certain activities.

d. Degrades readiness (Crying wolf).

10. Weapons of Mass Destruction (WMD).

11. Environmental Destruction.

a. Has not been widely used.

b. Dumping hazardous chemicals into city water supply.

c. Destruction of oil tanker.

12. Use of Technology.

a. Car bomb of the 21st Century?

b. Terrorists can buy a PC for the price of an AK-47.

c. Power grids, police and fire services, communications, airport traffic controllers, communications, railways, banks, stock exchanges, can all be attacked.

d. Very hard to trace, safety for the perpetrator.

(1) Attack routed through numerous servers.

(2) In the United States, computer attacks are generally treated as a crime rather than an attack.

I. Terrorism, a Changing Phenomenon.

1. In the 60's, 70's and 80's, terrorism was largely conducted by leftist radicals, with political motives as their driving force.

a. Many of these groups were supported, sponsored or even directed by states.

b. Even the most brutal of these groups, however, tended to avoid tactics that created mass casualties.

(1) Mass casualties may have caused the alienation of political sympathizers and potential recruits.

(2) Terrorist groups that were willing to kill or injure large numbers of people ran the risk of unfettered reprisal by the state.

(3) Increasing number of casualties does not necessarily result in greater influence.

(a) Terrorists were generally looking for specific concessions.

(b) They were attempting to foment or block political or social change.

(c) It is difficult to direct social change with a mass killing.

(4) Large casualties may cause dissension within the terrorist organization.

c. These groups were generally well organized with a command and control structure similar to that of a military or paramilitary organization.

2. Some of the reasons for the changing face of terrorism include.

a. Disintegration of the Soviet Union and the decline of communism.

(1) Changing motives. The spread of international communism is becoming less attractive and therefore leftist terrorist groups are dwindling in number.

(2) Fewer groups receiving state support.

(3) It is easier for the international community to have impact on terrorist groups when the groups are sponsored by states.

(a) Diplomatic efforts.

(b) States that sponsored terrorism tended to limit and reign in groups to avoid linkage to the group's activities and thereby reduce the possibility of international intervention.

b. Religious and ethnic fanaticism on the rise.

c. Availability of weapons.

d. Proliferation of technologies of mass destruction.

e. Increased access to information technologies.

f. Acceleration of centralized vital components. As control over critical infrastructure becomes more automated and centralized, terrorists have a greater opportunity for synergistic impact.

3. Although the leftist organizations still exist today, especially in Central and South America, terrorist groups tend to be very loosely organized and radically religious.

a. In 1968, a Rand Corporation study, no terrorist groups were classified as religious. In 1994, the Rand Corporation classified one third of the active 49 international terrorist groups as being religiously motivated.[9]

[9] STERN, *supra* note 1, p. 7.

b. In 1995, only 25% of terrorist attacks were by religious groups but were responsible for 58% of the deaths.[10] Religious groups seem to be far less concerned with causing mass casualties.

c. Many groups are ad hoc, often operating on a stand-alone basis, sometimes loosely affiliated under some umbrella organization.

(1) World trade Center bombing the result of such a group.

(2) Usama Bin Laden and his followers.

(3) No central command and control structure.

(a) Able to spread the word and incite acts over the Internet.

(b) Operate on a global scale.

(c) Very hard to track and conduct intelligence operations on.

(d) Hard to direct acts against, especially where there is no state sponsorship.

4. Terrorist groups are likely more willing to participate in mass casualty activities.[11]

a. Religious motivation.

(1) Violence as a sacramental act, divinely inspired or required.

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[10] *Id.* at 8.

[11] *Id.;* RICHARD A. FLAKENRATH, ROBERT D. NEWMAN, AND BRADLEY A. THAYER, AMERICA'S ACHILLES HEEL, NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK 179-202 (1998).

(2) Attempting to recruit only the most dedicated.

(3) Only complete and total victory is acceptable, compromise or acquiescence is domination of the ungodly.

(4) Targets are typically dehumanized as infidels, satanic or even non-human.

(5) Primary purpose of violence is not to obtain political concession, but the fulfillment of a sacred obligation.

(6) Believe they are operating consistent with God's law.

(a) No regard for the laws of men.

(b) Law provides little deterrence to someone who is willing to blow him or herself up while delivering a car bomb.

(i) Already involved in a life or death struggle.

(ii) Only reason to fear law for such a person, is the realization that the mission will be thwarted if caught.

(iii) See the reward being a higher state in the next life.

(7) Loss of popular support is of little or no concern. Acting for God not popular opinion.

(8) Millennial and Apocalyptic Cults on the rise.

b. Intensifying Efforts to Rid Southwest Asia of U.S. Presence.

(1) Religious and political motives one in the same for many Islamic terrorist groups.

(2) There is no State/Church Distinction. Wish to eradicate secular governments and return Islam to its fundamentalist beliefs.

(3) There is no recognition of "universal human rights" by such groups.

(4) Determined to rid Arab lands of corrupting Western, and primarily, U.S. influence.

(a) Hold U.S. responsible for poverty and lack of political power.

(b) See U.S. as abetting secular government.

(5) U.S. forces in six moderate Arab countries. None of them are overly happy with this fact.

(6) The bombing of the offices of the U.S. program manager for security assistance with the Saudi Arabian National Guard 1995, and the attack in 1996 of the Khobar Towers by suspected transitional Shi'ite extremists, appear to have been motivated by groups wanting the U.S. out of the Middle East. [12]

c. Increasing Numbers of Domestic Terrorist Groups.

(1) Extreme left wing.

(2) Extreme right wing.

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[12] *Id.* at 190. Although the Saudi government arrested and promptly beheaded four radical Sunni's after they confessed following a prolonged interrogation, U.S. investigators did not have the opportunity to interview the alleged perpetrators of the 1995 incident. The Saudi's have asserted that the Khobar towers incident involved radical Saudi Shi'ite operating out of Lebanon. The F.B.I. has not been able to confirm this assertion and it is possible that the perpetrators were state-sponsored actors from Iran or Iraq.

(3) Militant animal rights, anti-technology, and conservation groups.

d. Increasing numbers of "Amateur" Terrorist Groups.

(1) McVeigh, Unibomber?

(2) Centennial Park during the Atlanta Olympic Games.

(3) School shootings and bombings.

(4) Random violence for the sake of violence?

e. Large-Scale Ethnic Wars.

(1) Mass casualties, ethnic cleansing is the goal.

(2) Mutual fear of one another requires complete annihilation of the other.

IV. INTERNATIONAL RESPONSE TO TERRORISM

A. *"One man's terrorism is another man's patriotism."*[13]

B. Three questions at the outset should be considered:

1. Is Terrorism unlawful under international law?

2. Can a state legally use military force to respond to terrorism?

3. If force is lawful, how much force can be used?

[13] HENRY HAN, *supra* note 6, at 7.

C. Two basic paradigms have developed over time in the international community for handling terrorism. The first treats terrorism as international crime and tends to approach it from a law enforcement standpoint. The second views terrorism as a species of warfare and tends to look to deterrence and the use of military force as the method best suited to combating terrorism. Most countries, including the U.S. follow a hybrid methodology. Consider the handling of Usama Bin Laden. The U.S. has used both military force and law enforcement actions to counter the threat Bin Laden and his organization represent.

D. Terrorism as form of warfare.

1. Natural law. Many believe that customary and conventional norms include the right of self-determination. Certainly the United States was founded on the notion that individuals have the right to remove governments from power that fail to respect certain unalienable rights. The right of insurgency is arguably affirmed in the second paragraph of the Declaration of Independence of the United States.

2. *Jus ad Bellum* and terrorism. Many nations do not consider politically motivated acts of violence, especially against colonialism and for national liberation, as being within the scope of terrorism and a violation of international law.

   a. Proponents of a political question exclusion from the definition consider only those acts motivated by personal gain or acts of violence totally devoid of any political purpose as being unlawful.

   b. For proponents of such a definition, letter bombs, hijackings of airplanes, kidnappings, attacks on innocent civilians are not considered terrorist acts if committed in furtherance of a "just cause."

3. *Jus in Bello* and terrorism. For most however, in defining terrorism out of legitimate warfare, the justness of the cause is irrelevant. The justness of the means becomes the focus. No matter how just the cause may be, if the insurgency fails to satisfy the *Jus in Bello* prong of the law of war, it becomes a terrorist organization, incapable of waging legitimate warfare.

a. Some have described terrorism as acts that take place in peacetime that would constitute war crimes if they took place in war. Terrorists should no more be able to get away with taking hostages and executing them for political purposes in peacetime than military commanders during war. One commentator described terrorism as bit by bit genocide.

b. The targets of terrorism tend to be innocent civilians and civilian objects rather than lawful military targets. Sporadic acts of violence, as opposed to continuous and sustained military operations, against military targets during peacetime, would also be considered as terrorism by most.

c. Terrorist acts may take place during armed conflict but the majority do not.

E. Terrorism as a crime.

1. Should terrorism be considered within traditional international criminal norms? Should the traditional criminal law paradigms be applied?

a. If it were purely criminal, would the use of force only be authorized during the actual commission of the act itself?

(1) Is there such a concept as anticipatory self-defense in criminal law?

(2) Would the means used to eradicate terrorists be limited to apprehension followed by trial?

b. Are terrorists that are willing to blow themselves up in attacking a target with a car bomb likely to be deterred by criminal law?

(1) Terrorists are usually dedicated to some ideological, religious, or political cause.

(2) They generally believe what they are doing is right and transcends the criminal law.

2. Should someone that is willing to detonate a weapon of mass destruction in New York City be treated the same in the law as one that kills a 7/11 store clerk for money?

   a. The World Trade Center bombing resulted in 6 killed, 1,000 injured and an estimated $500,000,000 in total costs. The longest sentence thus far has been for one of the perpetrators was 240 years.

   b. Recently a convicted convenience store robber was executed here in Virginia. He stole $200 and shot and killed two clerks in 1983.

F. Are Terrorist Activities Unlawful Under International Law?

1. Philosophical discussions aside, most terrorist acts are illegal under domestic law and morally and socially repugnant. This does not necessarily mean however that they are automatically unlawful under international law. Although an act may be unlawful under domestic law, thereby granting a state the power to deal domestically with a domestic terror attack, a state should look for an international source of law if it intends to respond internationally.

2. Before a lawful response to an act of terrorism can be formulated, the act itself must be characterized. Lawyers then should endeavor to characterize terrorist acts with as much precision as possible.

3. There are primarily three sources of International Law.

   a. International treaties or conventional law.

   b. International custom, as evidence by the practice; and

   c. The general principles of law recognized by civilized nations.[14]

[14] Statute of the International Court of Justice, Art. 38, para. 1, secs. a, b, and c.

4. As a general principle of law, virtually all states have outlawed the acts associated with terrorism. For example, murder, kidnapping, assault, maiming, arson, sabotage, and vandalism are illegal in virtually all countries. Therefore, although a treaty banning a certain terrorist act may not exist, the underlying act may fall into the "general principle of law" category. However, because of the political character of terrorism, many states have refused to categorize acts, which would ordinarily be criminal, as criminal if committed by terrorist groups with political motivations.

5. As a matter of customary international law, many terrorist acts could be considered unlawful if they fall within one of the previously recognized categories of international crime.

   a. Piracy.

   b. Slavery.

   c. Hijacking.

   d. Crime against peace, or conducting an aggressive war.

      (1) Historically has only applied to state actors.

         (a) Need an international armed conflict.

         (b) State could be charged where a state directs an aggressive terrorist attack.

            (i) International armed conflict not determined by length or intensity of the conflict, only that states are involved in an armed conflict.

            (ii) The state would have to be involved in the planning and decision to attack.

         (c) Rarely prosecuted.

(i) Only in war crimes tribunals following WWII.

(ii) Not listed in the statutes for the International Criminal Tribunals in Rwanda and the Former Yugoslavia.

(iii) Listed as a crime in the International Criminal Court statute but not yet defined.

(2) Punishes the instigation of aggressive war, *Jus ad Bellum,* and not improper conduct during the war, *Jus in Bello.*

(a) The brutality of the terrorist act would not be criminal, the planning and decision to attack would.

(b) The actual perpetrator, unless a high level planner, cannot be guilty of a crime against peace.

e. Violations of the laws and customs of war.

(1) Must have an "armed conflict."

(a) International.

(i) State v. State.

(ii) Non-state actors sponsored by a state?

(iii) If international, all violations of the laws and customs of war apply.

(b) Not of an international character.

(i) Violations of Common Art. 3 of the Geneva Conventions.

(ii) Some violations of the laws and customs of war apply. *See ICTY, Tadic;* and the International Criminal Court Statute.

(2) Single act of terrorism, unless state directed, would generally not rise to the level of an "armed conflict." Such conduct would be considered a sporadic act of violence, a domestic rather than international crime.

(3) However, where a state responds to a terrorist act with the military and where the group has committed acts in the past or clearly announces an intention to continue to commit such acts, an "armed conflict" may exist for the purposes of finding the terrorist acts to be war crimes.

(a) Most terrorist acts against non-combatants.

(b) Non-state actors can be liable for violating Common Art. 3.

f. Crimes against humanity.

(1) Historically, had to be tied to an international armed conflict.

(2) Now, the only requirement is that the crime be "widespread and systematic."

(a) A single WMD terrorist act may be widespread but is it systematic?

(b) A series of terrorist acts, especially if similar in M.O., i.e. car bomb, may rise to the widespread and systematic level.

g. Genocide.

(1) The destruction, whole or in part, of an ethnic, racial or religious group.

(2) Historically was a subset of crimes against humanity and required an armed conflict.

(3) Now, a separate crime, similar to crimes against humanity, the destruction must be widespread and systematic.

(4) If terrorist tactics are used to ethically cleanse an area during an armed conflict, or where used as part of a lager systematic and widespread attempt to cleanse an area ethnically, an act of terrorism could be prosecuted as an act of genocide.

(5) Arguably, if a WMD were used to ethnically cleanse a fairly large area, only one such act may constitute the crime of genocide. Destruction, in whole or in part, of an ethic group is genocide.

6. Conventional or Treaty Based Law.

a. As a result of the numerous terrorist acts of the 1960's and 70's, the international community of states determined that there was a need to criminalize "international terrorism." A number of agreements were entered into outlawing certain specific acts of terrorism. Two such examples are the Hague Convention on Aircraft Skyjacking, and the Montreal Convention on Aircraft Sabotage. However, there is still no comprehensive treaty covering all acts of terrorism.

b. Most of these treaties cover areas or spaces not traditionally within the territorial control of sovereign states such as international airspace or international waters.

c. A significant number of these treaties contain provisions that ban enforcement during time of war.

d. Terrorism that occurs solely within one state is generally immune from the coverage of current international agreements. Prosecution is left to the domestic law of the state involved.

e. None of these treaties create an enforcement mechanism. Rather, parties agree to criminalize certain terrorist acts domestically and then agree to investigate, "extradite or prosecute" those that violate these treaties.

f. The United States is a party to more than 100 extradition treaties. Generally, extradition treaties require a state to extradite persons within their jurisdiction when the requesting state demonstrates that the wanted person has been charged or convicted of a crime in the requesting state and had the person done the same in the sending state, it would have been criminal there as well.

g. Extradition of a terrorist can be difficult.

(1) Some states will not extradite if the death penalty is possible.

(2) The state may be supporting the terrorist group and unwilling to extradite.

(3) If not supporting directly, the state may be acquiescing to the group's presence out of concern that they may be the next victim if they take action.

(4) Some states will not extradite if they believe the terrorist was motivated by political goals. The doctrine of "political offense" varies from state to state. Generally, a "political offense" exists where:

(a) The accused is involved in an ongoing conflict;

(b) The alleged terrorist act took place as part of the conflict;

(c) The accused is a member of an organization with a command structure;

(d) The accused was acting on orders.

(5) Some states have excluded certain offense from the political exception doctrine. Murder, kidnapping, hostage taking, and the use of or manufacture of explosives are some examples.

h. United Nations (UN) and the United Nations Charter.

(1) In response to the Libya's initial refusal to extradite two Libyan nationals charged with participation in downing of Pan Am Flight 103 over Lockerbie Scotland, the United Nations Security Council issued Resolution 748 which states in part:

"[I]n accordance with the principle in Article 2, paragraph 4 of the Charter of the United Nations, every state has the duty to refrain organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force."

(2) UN General Assembly resolutions are not binding. However, they are thought to be aspirational. The General Assembly has also resolved that states should refrain from organizing, instigating, assisting, or participating in, or acquiescing to, terrorist acts or groups located within their boundaries.[15]

G. International Law and the Use of Force.

[15] G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/RES/40/61 (1986).

1. In terms of the legality of a military response, should there be any difference between handling a terrorist incident and an aggressive act by a state actor?

    a. In 1986, Libyan sponsored terrorists bombed a discotheque frequented by American soldiers, two were killed, several others were injured. Once Libyan sponsorship was established, the U.S. ordered carrier based aircraft to strike the Libyan capital of Tripoli.

    b. In 1993, the U.S. launched Tomahawk missiles at an Iraqi intelligence complex in Baghdad once sponsorship was established between the agency and terrorists that attempted to assassinate former President George Bush.

    c. The U.S. faced very little international criticism for its recent attacks against Usama Bin Laden facilities in Afghanistan and Sudan, even where the U.S. made no claim of state sponsorship.

2. Non-forcible responses such as diplomacy or economic sanctions are not likely to be effective unless state sponsorship exists to a high degree. Certain non-forcible responses may actually play into the terrorist portrayal of outside governments being the root of the host state's problems.

3. The United Nations (UN).

    a. Collective state action was to replace unilateral responses to aggression.

    b. The UN was to be a global organization with a monopoly on the use of force.

4. UN Charter.

    a. Article 2(3). "All Members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

b. Article 2(4). "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

(1) Applies to non-member states as a matter of customary international law.

(2) Questionable whether applies to non-state actors.

(3) Therefore, whether host state violates Article 2(4) often depends on the degree of support provided to the terrorist group. The UNSC voted 10-0-5 to impose economic sanctions against Libya for its refusal to extradite two Libyan nationals alleged to have participated in the downing of Pan Am Flight 103 over Scotland in 1988.

c. Article 2(7). "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state…; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

(1) Criminal organizations within the territory of a state are typically within the sole province of the state.

(2) However, the United Nations Security Council (UNSC) may take action in what appears to be domestic business if there is a threat to international peace and security pursuant to Article 49 of Chapter VII of the Charter.

(3) The issue is what happens when the state and the UNSC cannot or will not suppress a terrorist organization?

d. Article 51. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

(1) Self-defense permitted if there is an armed attack. Does an act of terrorism rise to the level or an armed attack?

(a) The International Court of Justice, in the Case Concerning Military and Paramilitary Activities in and against Nicaragua indicated that dispatching armed bands into another state for a particularly "grave" use of force constitutes an armed attack. However, merely supplying or training non-state paramilitary forces does not constitute an armed attack.[16]

(b) In the Case Concerning United States Diplomatic and Counselor staff in Tehran, the ICJ likened the takeover of the U.S. embassy and its staff to an "armed attack."[17]

(c) When elements in the Iraqi government directed that President Bush be assassinated in Kuwait in 1993, was that an armed attack as defined by Article 51?

[16] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (Merits).
[17] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29, 42 (May 24) (Merits).

(i) Does the fact that President Bush was a past President make him different that the average American for the purposes of an armed attack?

(ii) Is an attack on a former President and attack on the political independence of the United States as is prohibited by Art? 2(4)?

(2) What level of state sponsorship, if any, must exist before a state's territorial integrity can be breached to respond to an armed attack by terrorists?

(a) Some suggest that Art. 2(4) would be gutted unless a requirement for state sponsorship exits.

(b) Must there be control by a state over the terrorist agents to constitute an armed attack opening the door to military force in the harboring state's territory?

(i) Is such a use of force against a terrorist organization in a host state the same as using force against the host state?

(ii) Following the attack on the chemical weapons facility in Sudan allegedly operated by Usama Bin Laden, certain members of the Sudanese government asserted that President Clinton should be indicted as a war criminal by the International Criminal Court for launching an aggressive war against Sudan.

(c) Should the severity of the attack alone, not sponsorship, qualify a terrorist attack as an armed attack? A state should be able to defend itself against such an attack whether or not sponsored by a state.

(3) State Sponsorship, Support and Self-defense.

(a) Diplomacy with the actual terrorist organization will rarely if ever work.

(b) All terrorist activities have some connection or association with a state. Presence in a state either unwilling or unable to disband the group creates a strong presumption of state responsibility.

(c) The degree to which terrorists are tolerated, supported or sponsored differs:

(i) Terrorist acts by actual state officials, state terrorism;

(ii) State employment of unofficial agents for terrorists acts, direct support;

(iii) State supply of weapons and explosives;

(iv) State provision of Intelligence Support;

(v) State supply of logistical and transportation support;

(vi) Provision of training (specialized terrorist and basic military training);

(vii) State provision of technological assets;

(viii) Provision of financial support;

(ix) Diplomatic and or rhetorical support;

(x) State acquiescence to the presence of terrorists bases; and

(xi) No support.

(d) Generally speaking, *state sponsorship,* means the state is contributing to the "planning, direction, and control" of terrorist operations. *State support,* consists of the provision of "intelligence, weapons, diplomatic assets, funds or rhetorical endorsement." And finally, *state toleration,* is a condition where the state neither supports nor sponsors groups within its boundaries but acquiesces to its existence or fails to suppress the organization.[18]

(e) The higher the level of support, the lower the odds of being able to deal with a terrorist through an international law enforcement paradigm.

(f) The U.S. State Department has determined that the following countries actively sponsor terrorism:

(i) Cuba.

(ii) Iran.

(iii) Iraq.

(iv) Libya.

(v) North Korea.

(vi) Sudan.

(vii) Syria.

(g) DOS says that Afghanistan is not fully cooperating with U.S. antiterrorism efforts.

[18] ANTHONY CLARK AREND AND ROBERT J. BECK, *supra* note 5, at 142.

(4) Factors to consider as to whether a specific terrorist attack has risen to the level of an armed attack.

(a) Level of support by the state.

(b) Number of attacks.

(c) Magnitude of attack.

(i) Tactics.

(ii) Number threatened by the harm.

(iii) Value of the target, President, Nuke Sub.

(5) Temporal duration

(6) Promise of future attacks

(7) Level of action by the state

5. Customary Right of Self-Defense

a. According to most, customary right not replaced by Article 51 of the Charter.

(1) The UN Charter does not adequately address low intensity violence and attacks by non-state actors.

(2) States have traditionally defined their right to self-defense to include defense of its military, citizens, commerce, and property from attack even where their territory or political independence is not at risk.

(3) May use force to protect essential rights.

(a) Not limited to defense against an "armed attack."

(b) Any other approach would give states that resort to terrorism a tremendous advantage over democracies that attempt to comply with international rule of law.

(4) The customary law right of defense recognizes the right of "Anticipatory Self-Defense."

(a) States have the right to launch preemptive strikes against a hostile party if attack is imminent.

(b) According to the *Caroline Incident*, a widely cited authority dealing with anticipatory self-defense, states may resort to force even where not actually under attack if there is "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." It must be proportional, "not unreasonable or excessive."

(5) A state has the right to use forcible means to protect itself or its citizens, particularly where the international community or the host state is unwilling or unable to quash terrorism. Since 1945, states have relied on the following measures to respond to terrorism:

(a) Abduction of suspected terrorists;

(b) Aircraft interceptions;

(c) Assassinations of particular terrorists;

(d) Military strikes against terrorist bases; and

(e) Military strikes against states allegedly involved in terrorism.[19]

(6) A state may invade the sovereign territory of another state to defend itself if the other state has violated international custom by supporting terrorists within its borders.

b. The issue of timing and self-defense.

(1) May a state only defend itself against an on-going attack?

(2) How quickly after a terrorist incident must a state attack to be construed as self-defense?

(3) The closer in time the response is to the attack, the more it looks like self-defense.

(a) Some scholars assert that it must be on the spot to meet the "imminence" requirement.

(b) Others say for true self-defense to exist, there is a need for both short-term prevention and long term deterrence. Therefore there is no need for an immediate response.

(4) Due to the clandestine nature of terrorism, it often takes time to determine who the perpetrator was and whether there was state sponsorship involved.

(5) Easier to respond to individual than state/organization

6. Reprisal. The law of reprisal presents an alternative to, and expansion of traditional self-defense theory.

[19] ANTHONY CLARK AREND AND ROBERT J. BECK, *supra* note 5, at 147.

a. A reasonable reprisal can be characterized as a deterrent action against a violent breach of international law in the context of a continuing conflict.

b. Traditionally used as a deterrent to *Jus in Bello* rather than *Jus ad Bellum* breaches of international law.

c. Similar to anticipatory self-defense, a reprisal must be necessary and proportional.

d. As a result of the UN Charter, reprisal as a deterrent to unlawful aggression is generally considered improper by the international community.

(1) The punitive nature of reprisal does not comport with the provision for the peaceful settlement of disputes. Although self-defense is a unilateral right, punishment is a matter for the international community as a whole.

(2) Primary purpose is not unilateral self-defense but deterrence through punishment or even mere revenge.

(a) Seeks to force future compliance with the law.

(b) Self-defense seeks to protect essential rights such as territorial integrity during the time of an attack.

(3) The UN Security Council and states acting pursuant to Art. 51 of the Charter are the contemplated responses to unlawful aggression.

e. Arguably however, the concept of reprisal does not apply to non-state actors. Reprisal is an intentional violation of international law to deter another from violating international laws. To say that it is even possible to conduct a reprisal against a terrorist is to raise the status of the terrorist to state actor level.

f. Modern military actions against terrorism blur the lines between self-defense, deterrence, retribution, and punishment. Punishment may be an effective method of deterrence, which then translate to self-defense against continuing or future attacks.

(1) Some advocate the use of reasonable and proportional reprisals to terrorism.

(2) Terrorism does not fit nicely into the Charter paradigm.

(a) The UN Charter was drafted prior to the onslaught of low intensity conflicts.

(b) The Charter was intended to regulate states not non-state actors.

(3) Advocates of reprisal say we should dispense with labels. Call it what you want, but the authority to conduct defensive armed reprisals, post attack measures short of war, should be authorized under international law.[20]

7. Necessity.

a. A "state of necessity" is a situation in which the state's "sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State".[21]

b. Advocates of the doctrine of necessity assert that although it is similar to self-defense, it differs in that there is no need to show state sponsorship of the terrorists before military force is used.[22]

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[20] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE (1988).
[21] International Law Commission, [1980] 2 Y.B. Int'l L. Somm'n 34, U.N. Doc. A/CN.4/Ser.A/1980/Add.1 (pt. 2).
[22] John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of State of Necessity,* 87 Geo. L.J. 1023, 1046 (1999).

8. A Response to Terrorism Falling Below the Threshold of Force Envisioned in the Charter.

a. Article 2(4) of the Charter prohibits the use or threat of force against the territorial integrity or political independence of another Member state.

b. Some scholars suggest that certain counterterrorist activities do not rise to the level of force described and generally prohibited in Art. 2(4).

(1) For example, the use of a very small special mission unit to rescue hostages held by a terrorist group does not arguably constitute a threat to the territorial integrity or political independence of a state where the state is failing to suppress terrorist activities within its territory.

(2) Even the precise and surgical use of a military weapons system to take out a terrorist chemical weapons facility that the host nation cannot or will not address is arguably not the type of force the drafters intended to restrict.

H. Factors to consider in deciding whether to respond with military force to a terrorist act:

1. The support of the host state;

2. The magnitude of the terrorist act;

3. The locus of the attack;

4. The degree of force to be used.

a. Rescue mission.

b. Attack on terrorist base.

c. Interception of aircraft or vessels at sea.

d. Attacks on state sponsor.

e. Covert assassination of terrorist leaders.

f. Overt assassination of terrorist leaders.

I. How much force should be used?

1. The response must be proportionate.

a. Some assert that the response must not be greater than the actual terrorist act. The "Eye for an Eye" test of proportionality.

b. Cumulative Proportionality. Proponents of this methodology argue that a response is proportional as long as it is not greater than the aggregate cumulative affect of the terrorist acts committed by the target group.

c. Still others argue that proportionality need not ignore deterrence. Deterrent Proportionality adherents say the response should be proportionate to the potential threat faced by the victim.

2. Proper targets.

a. The law of war principle of distinction stands for the proposition that an attacker must discriminate between legitimate military targets and civilian objects. Only the terrorists and objects directly linked to the terrorists should be targeted.

(1) Should be zealously applied in the context of a self-defense response to terrorism.

(2) The law of war will not normally apply to counterterrorist attacks as a matter of law. However, as a matter of policy, the U.S. will generally apply the law of war to attacks on terrorists as a matter of policy.

(a) The law of war principle of distinction applies to the U.S. in counterterrorist operations by virtue of DODD 5100.77, and CJCSI 5810.01.

(i) As a matter of policy, the U.S. applies the law of war in all armed conflicts, however characterized, and the principles and spirit of the law of war in all operations other than war.

(ii) The principle of distinction requires attackers to distinguish between military objectives and civilians and civilian objects.

(iii) Although terrorists are civilians and the law of war generally protects civilians against being targeted, terrorists clearly forfeit any protection they may have under the law by taking a direct part in hostile acts against another.

b. The line between military objectives and civilian objects may become very blurred in counterterrorist activities. The required link between the target and the group may be broader where the state is sponsoring or supporting the terrorist group.

V. UNITED STATES REPONSE TO TERRORISM

A. "It is the policy of the United States to deter, defeat and respond to all terrorist attacks on our territory and against our citizens, or facilities, whether they occur domestically, in international waters or airspace or on foreign territory. The United States regards all such terrorism as a potential threat to national security as well as a criminal act and will apply all appropriate means to combat it. In doing so, the U.S. shall pursue vigorously efforts to deter and preempt, apprehend, and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks.

We shall work closely with friendly governments in carrying out our counterterrorism policy and will support Allied and friendly governments in combating terrorist threats against them.

Furthermore, the United States shall seek to identify groups of states that sponsor such terrorists, isolate them and extract a heavy price for their actions.

It is the policy of the United States not to make concessions to terrorists."[23]

B. Transnational terrorism occurring in the United States is a federal crime by virtue of 18 U.S.C. § 2332b.

1. The statue lists a serious of acts that are deemed to be terrorist acts if transnational in nature.

2. The illegal activity must take place within U.S. territory, territorial seas or airspace.

3. The death penalty is authorized if the terrorist act results in a death.

C. It is a federal crime to use a WMD against a U.S. national at home or overseas where such use lacks "lawful authority." For a domestic violation, use of the WMD must affect interstate commerce. 18 U.S.C. § 2332a. For the purpose of this statute, a WMD includes:

[23] Unclassified extract from Presidential Decision Directive (PDD) 39, United States Policy on Counterterrorism.

1. Chemical weapons that cause death or serious bodily injury;

2. Weapons involving a disease organism;

3. Any weapons designed to release radiation or radioactivity at a level dangerous to human life; or

4. A “destructive device” which includes;

   a. Any explosive, incendiary, or poison gas --

      (1) Bomb.

      (2) Grenade.

      (3) Rocket having a propellant charge of more than four ounces.

      (4) Missile having an explosive or incendiary charge of more than one-quarter ounce.

      (5) Mine.

      (6) Device similar to the above 5.

   b. Firearms and similar weapons (other than a shotgun shell for sporting purposes) with a bore more than one-half inch in diameter. (Does not include devices neither designed nor intended to be used a weapons, for example flare guns) 18 U.S.C. § 921.

5. Punishable by death if death results.

6. In *United States v. McVeigh*, 940 F. Supp. 1571 (D. Colorado 1996), the district court determined that an explosive device placed in a truck designed for use as a weapon against a federal building killing and injuring hundreds of victims was a "destructive device" for the purposes of 18 U.S.C. § 921 and did in fact disrupt interstate commerce as required for a conviction pursuant to 18 U.S.C. § 2332a,

D. For the purposes of the Foreign Intelligence Surveillance Act (FISA), groups involved in international terrorism or in acts in preparation therefor, are specifically defined as "foreign powers." Therefore, FISA warrants are available to federal agencies involved in gathering intelligence on groups involved in international terrorism in the United States. Of course, federal agencies involved in law enforcement activities against terrorist groups have all the search and seizure tools available in tradition law enforcement activities as well. 50 U.S.C. § 1801.

E. The "Combating Proliferation of Weapons of Mass Destruction Act of 1996," 50 U.S.C. §§ 2301 et seq, establishes a prevention and response plan for WMD incidents in the United States.

F. Title 22, U.S. Code, Foreign Relations and Intercourse, contains numerous laws with regard to relations with states and terrorism. For example:

1. 22 U.S.C. § 2371, prohibits certain agricultural or Peace Corps assistance to countries that have "repeatedly provided support for acts of international terrorism."

2. 22 U.S.C. § 2780, prohibits transactions involving munitions to countries supporting acts of terrorism.

3. 22 U.S.C. § 2349aa-7, describes the coordination required for terrorism-related assistance to foreign governments combating international terrorism.

4. The Department of State conducts an "awards" program for countries involved in the prevention of acts of international terrorism, international narcotics trafficking, and other related criminal acts. 22 U.S.C. § 2708.

G. Federal Agency Roles in Combating Terrorism.

1. The National Security Council (NSC) formulates U.S. policy for the President on terrorist threats that endanger U.S. interests, including international terrorism. NSC's Coordinating Sub-Group of the Deputies Committee:

   a. This Committee is comprised of representatives from State, Justice, DoD, CJCS, CIA and FBI.

   b. The Sub-Group deals with and tries to reach consensus on terrorism policy and operational matters and makes recommendations to the Deputies Committee or through the National Security Advisor to the President.

2. The Department of State (DOS) is the lead federal agency[24] for response to terrorism that takes place outside the United States, other than incidents on US flag vessels in international waters.

   a. Because of a Memorandum of Understanding between DOS and the Department of Defense (DOD) however, DOD has responsibility for terrorism against the U.S. interests on the Arabian Peninsula.

   b. Once military force is directed, however, the National Command Authority exercises control of the U.S. military force.

3. The Department of Justice (DOJ) is the lead agency for terrorism within the United States. The FBI is the lead agency within DOJ for operational response to terrorist incidents and is the designated investigative federal agency for terrorism. DOJ is responsible for using all legal means to exclude or remove from the United States, persons who pose a terrorist threat. DOS is the lead for acts not under FBI responsibility.

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[24] *Id.* For a general breakdown on agency responsibilities with regard to combating terrorism, *see generally,* Joint Pub 3-07.2, *supra* note 3.

a. When a terrorist incident occurs, the lead official is generally the Special Agent in Charge (SAC) of the field office nearest the incident and is under supervision of the Director of the FBI. The FBI maintains liaison at each governor's office. Because of the presence of concurrent jurisdiction in many cases, the FBI cooperates with state and local law enforcement authorities on a continuing basis.

b. In accordance with the Atomic Energy Act of 1954, the FBI is the agency responsible for investigating a threat involving the misuse of a nuclear weapon, special nuclear material, or dangerous radioactive material. For an emergency involving terrorism or terrorist acts involving chemical or biological weapons of mass destruction the FBI also has the lead.

c. In these efforts, the FBI cooperates with the Departments of Energy, DOD, the Nuclear Regulatory Commission, and the Environmental Protection Agency as well as several states that have established nuclear, chemical & biological and/or weapons of mass destruction threat emergency response plans.

4. The Department of Energy (DOE). The Department of Energy has important national security responsibilities. The Office of Defense Programs maintains the safety, security and reliability of the U.S. nuclear weapons stockpile, without underground nuclear testing. The Office of Emergency Responses is prepared to respond to any nuclear or radiological accident or incident anywhere in the world. The are seven sub-offices within the Office of Emergency Responses.

5. The Department of Transportation (DOT) and/or Federal Aviation Administration (FAA) are the federal agencies responsible for responding to terrorist incidents on aircraft in flight within US jurisdiction. The FAA has exclusive responsibility in instances of air piracy for the coordination of law enforcement responses. The FBI maintains procedures, in coordination with the DOS and DOT, to ensure efficient resolution of terrorist hijackings.

6. DOT, through the US Coast Guard (USCG), is responsible for reducing risk of maritime terrorist acts within the territorial seas of the United States. (Twelve nautical miles) The FBI is the lead agency for responding to terrorist attacks within the territorial seas of the United States. The USCG and FBI have an interagency agreements cooperate when coordinating counterterrorism activities. (USCG Commandant Instruction 16202.3a).

7. The Department of the Treasury is responsible for preventing unlawful traffic in firearms and explosives, and by protecting the President and other officials from terrorist attacks.

8. The Director, Central Intelligence is the lead in the Intelligence Community for reducing vulnerabilities through aggressive foreign intelligence collection, analysis, counterintelligence, and covert action in accordance with the National Security Act of 1947 and E.O. 12333.

9. In the event of a terrorist WMD attack, the Federal Emergency Management Agency (FEMA) manages the support provided by other agencies and the coordination with state and local authorities. FEMA relies on the Federal Response Plan to coordinate support for consequence management.

10. DOD is not the lead agency for combating terrorism. It is responsible for protecting its own personnel, bases, ships, deployed forces, equipment, and installations. DOD is also responsible for providing technical assistance or forces when directed by the NCA. DOD has also been designated as the lead federal agency for carrying out a program to train civilian personnel in the federal, state and local governments dealing with WMD.

    a. DoD Directive 2000.12 now proscribes that the Assistant Secretary of Defense (Special Operations and Low Intensity Conflict - ASD-SO/LIC) has the lead role within the Department of Defense in countering domestic terrorist incidents where U.S. forces may be used.

    b. The Combating Weapons of Mass Destruction Act of 1996 calls for the military to maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of DOD with the appropriate expertise.

c. DOD has technical organizations and tactical unit that can assist the FBI on site in dealing with chemical and biological incidents, such as identification of contaminants, sample collection and analysis, limited decontamination, medical diagnosis and treatment of casualties and render safe procedure for WMD devices.

d. DOMS will serve as the executive agent for all domestic consequence support. However, the Attorney General, through the FBI, will remain responsible for coordinating:

(1) The activities of all Federal agencies assisting in the resolution of the incident and in the administration of justice in the affected areas.

(2) These activities with those state and local agencies similarly engaged.

VI. THE ROLE OF THE DEPARTMENT OF DEFENSE

A. U.S. Armed Forces are prepared, on order, to attack terrorists or states involved in sponsoring terrorism. This is especially true in an asymmetrical attack against the United States, where an enemy uses both terrorist organizations and conventional military forces against targets overseas and or in the United States. Terrorist attacks on critical infrastructure at home may prevent U.S. forces from deploying.

B. Offensive operations against terrorists are generally referred to Counterterrorism (CT). These special activities are generally within the province of certain Special Operations Forces or Special Mission Units. Defensive measures used to reduce vulnerability of individuals and property to terrorist acts, to include limited response and containment by local military forces are referred to as Antiterrorism (AT). "Every commander, regardless of echelon of command or branch of service, has an inherent responsibility for planning, resourcing, training, exercising, and executing antiterrorism measures for the security of the command."[25]

[25] Joint Pub 3-07.2, *supra* note 3, at vii.

C. DOD is not the lead agency for combating terrorism. DOD is responsible for protecting its own personnel, bases, ships, deployed forces, equipment, and installations. DOD is however requested from time to time to provide various forms of assistance to other federal, state, and local agencies both in the continental United States (CONUS) and overseas (OCONUS).

D. Limits to Military Support to Civil Authorities. The fundamental restrictions on the use of the military in domestic law enforcement are contained in the Posse Comitatus Act (PCA), 18 U.S.C. § 1385 which prohibits the use of Army and Air Force personnel to execute the civil laws of the United States. The law has been extended to the Navy and Marine Corps as a matter of policy. Similarly, although the PCA does not apply overseas as a matter of law, it has been extended to overseas operations by policy. DODD 5525.5.

1. The primary prohibition of the PCA is against direct military involvement in law enforcement activities. Terrorist activities are criminal. Moreover, because DOJ and the FBI are the lead agencies for acts of terrorism in the United States, the PCA impacts on DOD's participation in combating terrorism in the United States.

2. Members of the National Guard or reserve components, when not in a Federal Service in a "Title 10 Status," are not within the coverage of the PCA. This makes reserve component personnel particularly well suited for use against terrorism in the United States.

3. There are however, numerous specific exceptions to the PCA where members of the U.S. Armed Forces can perform law enforcement type roles.

E. Constitutional Exceptions. The President, based on his inherent authority as the Executive, has the authority to use the military in cases of emergency and to protect federal functions and property. Military commanders, by extension of this authority, may respond in such cases as well (Immediate Response Authority). In the case of civil disturbances, which may result from a terrorist act, military commanders may rely on this authority, which is contained in DoD Directive 3025.12.

1. Generally, to cope with domestic emergencies and to protect public safety an Emergency Rule has evolved: When the calamity or extreme emergency renders it dangerous to wait for instructions from the proper military department, a commander may take whatever action the circumstances reasonably justify. However, the commander must comply with the following:

a. Report the military response to higher headquarters, e.g. in the Army, the Director of Military Support (DOMS) at HQDA, DCSOPS should be contacted.

b. Document all facts and surrounding circumstances to meet any subsequent challenge of impropriety.

c. Retain military response under the military chain of command.

d. Limit military involvement to the minimum demanded by necessity.

e. Emergency situations include, but are not limited to, the following:

(1) Providing civilian or mixed civilian and military fire-fighting assistance where base fire departments have mutual aid agreements with nearby civilian communities.

(2) Providing emergency explosion ordnance disposal (EOD) service.

(3) Using military working dog (MWD) teams in an emergency to aid in locating lost persons (humanitarian acts) or explosive devices (domestic emergencies).

F. Statutory Exceptions.

1. Federal Primary Responsibility. 42 U.S.C. § 5191(b).

a. President may declare an emergency (not a major disaster) regarding a situation for which the primary responsibility for response rests with the United States because the emergency involves a subject area which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.

b. This authority was exercised for the first time following the bombing of the Murrah Federal Building in Oklahoma City, OK, on April 19, 1995. One week later, the President declared a major disaster under the provisions of 42 U.S.C. § 5170.

2. President's Emergency 10-day Authority. 42 U.S.C. § 5170(c). May use DOD for work "essential for the preservation of life and property."

3. Presidential Declaration of a Major Disaster. 42 U.S.C. § 5170.

a. Must be at the request of the Governor.

b. Must find federal assistance is required, beyond the ability of the state to handle.

4. Presidential Declaration of an Emergency. 42 U.S.C. § 5191(a).

a. Must be at the request of the Governor.

b. Must find that it is beyond the state's ability to handle.

G. 10 U.S.C. §§ 331-334 is the primary statutory exception pertinent to terrorism scenarios. A terrorist incident may well qualify as a civil disturbance. Triggering these statutes permits the active component to take on law enforcement function, subject to the policy considerations discussed in the preceding section. Federalization of the National Guard, in such a case, will not affect the Guard's functioning as they would, obviously, not be excepted from the PCA as well. There are generally three scenarios where federal troops can be used in civil disturbances:

1. An insurrection within a state where the Governor requests assistance.

2. A rebellion which makes it impracticable to enforce the laws of the United States (federal law).

3. Any insurrection or domestic violence which:

   a. Opposes or obstructs federal law; or

   b. Hinders the execution of State law so that the people are deprived of their Constitutional rights, and the State is unwilling to protect those rights.

H. Statutory exceptions, in addition to some lesser known statutes, that contain exceptions to the PCA:

1. To assist the Department of Justice in cases of offenses against the President, Vice President, members of Congress, the Cabinet, a Supreme Court Justice, or an "internationally protected person." 18 U.S.C. §§ 351, 1116, 1751.

2. To assist the Department of Justice in enforcing 18 U.S.C. § 831, dealing with prohibited transactions involving nuclear materials. This statute specifically authorizes the use of DoD assets to conduct arrests and searches and seizures with respect to violations of the statute in cases of "emergency," as defined by the statute.

3. 18 U.S.C. § 382 allows DoD to assist the Department of Justice in enforcing 18 U.S.C. § 175 & 2332, during an emergency situation involving chemical or biological weapons of mass destruction. DoD support in WMD situations also appears in 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996. These statutes specifically authorize the use of DoD assets and in very limited situations provide authorization for DoD to arrest, search and seize.

I. Vicarious Liability. Commanders at all echelons should be aware of the legal principle of vicarious liability in planning and implementing antiterrorist measures. This principle imposes indirect Legal responsibility upon commanders for the acts of subordinates or agents. For example, willful failure on the part of the commander or a subordinate to maintain a trained and ready reaction force as required by regulation, could be construed as an act taking the commander out of the protected position found in being an employee of the Federal Government; thus making the commander subject to a civil suit by any hostages injured. Civil or criminal personal liability may result from unlawful acts, negligence, or failure to comply with statutory guidance by subordinates or agents.

1. With the increasing number of civilian contract personnel on military installations and the sophistication of terrorist organizations, commanders should pay particular attention to meeting regulatory requirements and operating within the scope of their authority.

2. The legal principle of vicarious liability, long established in the civilian community, has only recently applied to the military community. In this right, the command legal adviser has become increasingly important to the commander in planning, training and operational phases of the antiterrorist program.

J. Jurisdiction of Federal Property. In determining whether a Federal or state law is violated, it is necessary to look not only to the substance of the offense but to where the offense occurs. In many cases, the location of the offense will determine whether the state or Federal Government will have jurisdiction to investigate and prosecute violations. There are four categories of Federal territorial jurisdiction: exclusive, concurrent, partial, and proprietary.

1. Exclusive jurisdiction means that the Federal Government has received, by whatever method, all of the authority of the state, with no reservations made to the state except the right to serve criminal and civil process. In territory that is under the exclusive jurisdiction of the United States, a state has no authority to investigate or prosecute violations of state law. The Assimilative Crimes Act, 18 U.S.C. § 13, however, allows the Federal Government to investigate and prosecute violations of state law that occur within the special maritime and territorial jurisdiction of the United States.

2. Concurrent jurisdiction means that the United States and the state each have the right to exercise the same authority over the land, including the right to prosecute for crimes. In territory that is under the concurrent jurisdiction of the United States and a state, both sovereigns have the authority to investigate or prosecute violations of Federal and state law respectively. In addition, the Federal Government may prosecute violations of state law under the Assimilative Crimes Act.

3. Partial jurisdiction refers to territory where the U.S. exercises some authority and the state exercises some authority beyond the right to serve criminal and civil process, usually the right to tax private parties. In territory that is under the partial jurisdiction of the United States, a state has no authority to investigate or prosecute violations of state law, unless that authority is expressly reserved. The Federal Government may, however, prosecute violations of state law under the Assimilate Crimes Act.

4. Proprietary jurisdiction means that the United States has acquired an interest in, or title to, property but has no legislative jurisdiction over it. In territory that is under the proprietary jurisdiction of the United States, the United States has the authority to investigate and prosecute non-territory-based Federal offenses committed on such property, such as assault on a Federal officer. This authority does not extend to investigations and prosecution of violations of state laws under the Assimilative Crimes Act and Federal Crimes Act of 1970. The state has the authority to investigate and prosecute violations of state law that occur on such territory.

K. Federal Authority. Several Federal criminal statutes apply to terrorist activities committed in the U.S. or against U.S. nationals or interests abroad. Some deal with conduct that is peculiar to terrorism, for example, 18 U.S.C. § 2332 prohibiting murder or assault of U.S. nationals overseas, when the AG certifies that the crime was intended to coerce, intimidate, or retaliate against a civilian population. Other federal statutes prescribe conduct that is a crime for anyone but in which a terrorist may engage to accomplice his purposes, for example, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities, 18 U.S.C. § 1203 (hostage taking), and 49 U.S.C. § 46502 (aircraft piracy).

1. The Assimilative Crimes Act, finally, will allow the Federal Government to investigate and prosecute violations of state law regarding terrorist acts or threats that occur within the exclusive concurrent, or partial jurisdiction of the United States, thereby giving the Federal Government investigative and prosecutorial jurisdiction over a wide range of criminal acts.

2. Once a violation of Federal law occurs, the investigative and law enforcement resources of the FBI and other Federal enforcement agencies become available, and prosecution for the offense may proceed through the Office of the United States Attorney.

L. Federal and State Concurrent Authority. In some cases, terrorist acts may be violations of state law as well as Federal Law. In the situation, both state and Federal enforcement authorities have power under their respective criminal codes to investigate the offense and to institute criminal proceedings. If a terrorist act is a violation of both Federal and state law, then the Federal Government can either act or defer to the state authorities depending on the nature of the incident and the capabilities of local authorities.

1. Even where the Federal Government defers to state authorities, it can provide law enforcement assistance and support to local authorities on request.

2. The choice between Federal or state action is made by the prosecuting authority. However, successive prosecutions are possible even where Federal and state law proscribes essentially the same offense, without contravening the Fifth Amendment prohibition against double jeopardy. (Recall Federal and state prosecutions re: Oklahoma City Bombing) Two relevant factors regarding law enforcement responsibility for a given incident are:

a. The capability and willingness of state or Federal authorities to act.

b. The importance of the state or Federal interest sought to be protected under the criminal statute.

M. PDD-39 directs federal agencies to ensure that the people and facilities under their jurisdiction are protected against terrorism. This applies to DoD facilities both abroad and in the U.S. In response to a Downing Assessment Task Force recommendation concerning the Khobar Towers bombing, DoD and the DOS are reviewing their responsibilities to protect U.S. military and personnel assigned overseas.

N. Incidents involving U.S. military installations. Although the FBI has primary law enforcement responsibility for terrorist incidents in the United States (including its possessions and territories), installation commanders are responsible for maintaining law and order on military installations.

1. Contingency plans should address the use of security force to isolate, contain, and neutralize a terrorist incident within the capability of installation resources.

2. In the United States, installation commanders will provide the initial and immediate response to any incident occurring on military installations to isolate and contain the incident. The FBI will take the following steps:

   a. The senior FBI official will establish liaison with the command center at the installation. If the FBI assumes jurisdiction, the FBI official will coordinate the use of FBI assets to assist in resolving the situation; e.g., hostage rescue team, public affairs assets.

   b. If the FBI assumes jurisdiction, the Attorney General will assume primary responsibility for coordinating the Federal law enforcement response.

   c. If the FBI declines jurisdiction, the senior military commander will take action to resolve the incident.

   d. Even if the FBI assumes jurisdiction, the military commander will take immediate actions as dictated by the situation to prevent loss of life or to mitigate property damage before the FBI response force arrives.

   e. In all case, command of military elements remains within military channels.

   f. Response plans with the FBI and Service agencies should be exercised annually at the installation and base level to ensure the plans remain appropriate.

O. Incidents overseas involving U.S. personnel or installations. For foreign incidents, the installation commander's responsibilities are the same as for domestic incidents—with the added requirement to notify the host nation and DoS.

1. Notification to DOS is made at the combatant commander level. In all AOR's, existing contingency plans provide guidance to the installation commander regarding notification procedures. DOS has the primary responsibility for dealing with terrorism involving Americans abroad.

2. The installation's response is also subject to agreements established with the host nation. Such agreements, notwithstanding, the Standing Rules of Engagement (CJCS Instruction 3121.01, para 1.d.), make it clear that the commander retains the inherent right and obligation of self-defense even in such situations.

3. The response to off-installation foreign incident is the sole responsibility of the host nation. U.S. military assistance, if any, depends on the applicable status-of-forces agreement (SOFA) or memorandum of understanding (MOU) and coordination through the U.S. embassy in that country.

   a. Military forces will not be provided to host-nation authorities without a directive from the Department of Defense that has been coordinated with DoS.

   b. The degree of DoS interest and the involvement of U.S. military forces depend on the incident site, nature of the incident, extent of foreign government involvement, and the overall threat to U.S. security.

VII. WEAPONS OF MASS DESTRUCTION (WMD).

A. For the purposes of International Terrorism,[26] a Weapon of Mass Destruction is "any weapon of device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of:"

1. Toxic or poisonous chemicals or their precursors;

2. A disease organism; or

[26] Weapons of Mass Destruction are defined differently in various sections of the United States Code. For example, Weapons of Mass Destruction include certain conventional explosive devices, depending on their makeup and size, in 18 U.S.C. §§ 921, 2332a.

3. Radiation or radioactivity.[27]

B. Nuclear weapons release vast amounts of kinetic energy through either fission, splitting the nuclei of elements, or through fission and fusion, which is the combining of hydrogen nuclei. First generation fission bombs were used on Japan by the United States toward the end of World War II. Fusion bombs require much greater technology and the ability to generate heat nearly the equivalent of the sun. Not all radiological weapons require a nuclear explosion to be effective. Radiological or "dirty bombs" can be constructed using conventional explosive to disperse radiological elements.

C. Biological weapons disseminate pathogenic microorganisms or biologically produced toxins, which may cause human, animal and or plant life illness or death. Normal diseases begin in small pockets and spread through natural processes. A biological WMD generally involves concentrated amounts delivered by an aerosol spray or introduced in a water supply. An attack, for example, on American stockyards with biological weapons could be significant.

D. Chemical weapons are extremely lethal and generally come in one of four types:

1. Choking agents, which damage lung tissue.

a. Chlorine.

b. Phosgene.

2. Blood agents, which block the use of transport of oxygen.

a. Hydrogen cyanide.

3. Vesicant agents, which cause burns and damage to tissue, especially the skin, nose, eyes and lungs.

a. Mustard gas.

[27] Title 50, War and National Defense, Chapter 40, Defense Against Weapons of Mass Destruction, Subchapter I, Domestic Preparedness, Section 2311. (50 U.S.C. § 3211)

4. Nerve agents, which disable a crucial enzyme in the nervous system.

   a. Tabun.

   b. Sarin.

   c. VX.

5. An attack on an industrial chemical plant with a conventional car bomb may lead to the same results as the actual use of a chemical weapon.

E. The possibility of terrorists using WMD has increased in recent years.

1. The technology and required materials to construct a WMD is becoming increasingly available. The technology for WMD is more than 50 years old. If a terrorist can acquire a Personal Computer, most of the technology is available right off the Internet. The technology needed for battlefield WMD is far more sophisticated than that needed for terrorist WMD's.

2. Many of the raw materials needed for a WMD are readily available from commercial sources. Acquiring a small number of improvised devices would arguably be much easier than creating and maintaining the type of arsenal needed for state nuclear programs. This also translates into less of a signature and greater difficulty in detection. Weapons that would be too small in terms of power, or too unstable for battlefield use, may be suitable for terrorists.

3. The disintegration of the former Soviet Union has increased the possibility of WMD's, or the materials needed to construct a device, making their way to states or non-state actors that have not previously had the ability to construct WMD. The factors leading to possible acquisition of nuclear weapons or fissile material by terrorist groups include:

   a. Disruption of command and control systems.

   b. Deficiencies in accountability for and security of weapons and fissile materials.

(1) Soviets did not tend to guard facilities, they tended to guard their population. Soviet Union tended to protect facilities by preventing citizens from moving about.

(2) Very poor security and accountability exists. Some weapons have been stored in gym type lockers with bicycle locks and no security systems. The U.S. government has been lending expert advice in the area of weapons security.

c. Economic hardships.

(1) Governments need money, plenty of stock is available.

(2) Scientists need jobs.

d. Significant gaps in border control among the states of the former Soviet Union.

e. Increase in organized crime and corruption.

f. Potential for increase in the proliferation of WMD and related materials.

4. Many states posses WMD.[28] The U.S. government has identified North Korea, Iraq, and Libya as hostile states that sponsor terrorism and have WMD and are developing others. This means that certain terrorist organizations clearly have the wherewithal to acquire WMD or WMD materials from or for and in behalf of states acting as proxies.

a. The following states claim to possess nuclear weapons:

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[28] The information relied on for this paragraph in the outline comes from various media reports following the recent nuclear weapons tests by Pakistan and India and FLAKENRATH, NEWMAN, and THAYER, *supra* note 11 at 64, *citing* U.S. Congress, Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks* p. 80-82 (August 1993); Dep't of Defense, *Proliferation: Threat and Response* (November 1997); GORDON M. BURCK AND CHARLES C. FLOWERRE, INTERNATIONAL HANDBOOK ON CHEMICAL WEAPONS PROLIFERATION 164-65 (1991).

(1) China, France, India, Pakistan, Russia, United Kingdom, United States.

(2) Although it has never declared itself a nuclear power, Israel is suspected of possessing nuclear WMD.

(3) Iran, Iraq, Libya, and North Korea are all suspected of attempting to acquire or develop nuclear weapons.

b. India, Russia, and the United States have declared that they have chemical weapons. (All scheduled to destroy these weapons as signatories to the Chemical Weapons Convention).

c. China, Cuba, Egypt, Iran, Iraq, Israel, Libya, Myanmar, North Korea, Pakistan, Syria, Taiwan, Yemen, and the former Yugoslavia are all suspected of having chemical weapons programs. In 1997, Secretary of Defense, William Cohen, put the number at about 30 in terms of countries with suspected chemical weapons programs.[29]

d. China, Egypt, Iran, Iraq, Israel, North Korea, Russia, South Korea, Syria, Taiwan, and Vietnam are suspected of possessing biological weapons. Libya is believed to be attempting to acquire biological weapons.

e. Many other states have had or have pursued development of WMD but have now abandoned or reversed their programs.

5. Because of the apparent increased willingness on the part of terrorists to cause mass casualties, WMD are becoming more attractive to terrorists. This means that not only are military targets at risk to a WMD attack, civilian and dual use targets are becoming even more vulnerable.

a. Religious fanaticism.

b. Psychological impact of a small WMD is more terrifying than conventional weapons even if the actual results are not.

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[29] STERN, *supra* note 1, p. 49.

(1) Reaction to a WMD may be more catastrophic than the detonation itself.

(2) Media coverage of the use of even a small WMD will certainly be intense.

c. Merely by possessing WMD, terrorists may obtain the results without actually using a WMD.

6. Facilities required for the production of chemical or biological WMD are much more difficult to detect than radiological WMD facilities. The availability of the materials necessary to construct chemical and biological WMD is greater. The cost of these types of weapons is much less than nuclear devices as well.

7. Covert or unconventional means of delivery of WMD include cargo ships, passenger aircraft, commercial and private vehicles and vessels. Many times WMD cargo is routed through several commercial carriers through multiple destinations making it very had to detect, intercept, or trace to the source if intercepted. WMD can be delivered in ways that are "virtually indistinguishable from the normal background of civilian traffic and commerce, making detection likely only after he weapon has been detonated or the harmful agent released."[30] Terrorists WMD would likely be of a smaller size than that of a state created WMD and therefore the delivery systems need not be as large or as detectable. A nuclear device carried in a backpack across the U.S. Mexican border may be of little value to a state but of significant value to a terrorist group.

F. Potential Damage.

[30] FLAKENRATH, NEWMAN AND THAYER, *supra* note 11, at 100.

1. A small, by military standards, one-kiloton nuclear device detonated in New York at the Empire State Building would "ignite a fireball 300 feet in diameter that would demolish the Empire state Building and the 20,000 people that work there, leaving in its place a crater 120 feet wide. Much of the building, and everyone in it would be vaporized by the intense heat… Buildings within 600 feet would collapse, as would the underground infrastructure of subways, wiring, and pipes. Gas mains would rupture, causing widespread fires…." The death toll could reach as high as 200,000.[31]

2. The fallout from "Dirty Bombs." If a homemade terrorist nuclear device failed to reach nuclear detonation, the results of nuclear contamination may still be significant. Or, if a conventional device were laced with radiological materials, the fallout effects would similar to that of a nuclear device. If a Dirty Bomb with six pounds of plutonium exploded in Washington D.C., an estimated 45,000 people would have to remain inside for an undetermined period of time.

3. In March of 1995, five members of the Aum Shinrikyo cult boarded subway trains in Tokyo Japan. Each carried two plastic containers of sarin nerve gas and an umbrella to puncture the containers at the proper time. Once the plastic containers were punctured, the five terrorists ran from the trains and subway. Ultimately, 12 people died, some suffered permanent disability, and 5,000 became ill. The attack completely filled Tokyo area hospitals with the victims. This was the first known use of a WMD by a terrorist group.

    a. Aum allegedly attempted to attack the Japanese parliament in 1990 with botulinum toxin aerosol.

    b. In 1993, the cult attempted to attack the wedding of the crown prince in a similar manner.

    c. Later that month, followers allegedly attempted to spray anthrax spores from the roof of a building in Tokyo.

[31] STERN, *supra* note 1, at 1,2.

d. Although none of these attacks resulted in casualties, it is also believed that the cult experimented with mustard gas, cyanide, and VX. The group was actually successful in procuring a Russian made military helicopter and was considering attempting to purchase nuclear devices and enriched uranium in Russia.

e. During subsequent police raids, the group used biological and chemical weapons during the raids. After the arrest of Asahara, the Aum leader, additional attacks using WMD were attempted but failed.

G. How real is the risk? There is a great deal of debate as to how real the threat of the use of WMD by terrorists actually is. Some argue that use of WMD is imminent and certain, while others point to numerous problems for terrorist groups actually wanting to use WMD.

H. To date, the total damage inflicted by WMD is very low in comparison to the damage inflicted by conventional means. One in 400 Americans are injured each year lying in bed, one in a 1,000,000 suffered lethal injuries in the bath or shower, 1 in 1,100 died as a result of injuries or illnesses at work. Having cereal and milk for breakfast subjects one to a risk of exposure to toxins found in grains and milk products.[32] In fact, on average, more Americans die each year from deer accidents, lightning strikes, or peanut allergies than from attacks by terrorists.[33]

1. Other than the Aum Shinrikyo sarin incident, there have not been any other uses of WMD by terrorist groups. There is almost no evidence that traditional terrorists groups such as Hezbollah or the Irish Republican Army have attempted to acquire WMD.

2. Mass destruction is possible without weapons of mass destruction.

3. WMD can be very expensive in comparison to conventional weapons. For a few thousand dollars, you can create a bomb like one used to destroy the Federal Building in Oklahoma City.

4. The acquisition and use of WMD possesses additional risks to terrorists.

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[32] *Id.* at 32-33.

[33] John Mueller and Karl Mueller, *Sanctions of Mass Destruction,* 78 FOREIGN AFFAIRS 43 (JUNE 1999).

a. Difficult to manage, deploy and control.

b. Health risks to the terrorists.

c. Greater risk of detection.

d. State response to terrorist use of WMD likely to be overwhelming.

5. Questionable effectiveness compared to conventional weapons.

a. Biological Weapons.

(1) To produce mass casualties, biological weapons need to be dispersed in dense low altitude aerosol clouds.

(2) Generally need aircraft.

(3) Explosive methods of dispersal tend to kill the microorganisms. In fact, biological agents are extremely susceptible to destruction by the environment. Temperature, wind, and water are all elements that may destroy the lethality of biological agents.

(4) Except for Anthrax, long term storage in a warhead is virtually impossible.

(5) Even if refrigerated, very limited shelf life.

(6) Unless wind and weather conditions are particularly suitable, very hard to ensure intended target is hit and can spread back on the attacker.

(7) The effects are often hard to predict, usually gradual, and susceptible to counter measures.

b. Chemical Weapons.

(1) Virtually incapable of killing large numbers of people in open areas unless massive quantities are used. For a one kilometer square in an open area, it would take an estimated 300 heavy artillery shells or seven 500 pound bombs, neither of which are typically within a terrorist's arsenal.[34]

(2) According to one congressional study, a ton of sarin gas perfectly disseminated over a heavily populated area would produce between 3,000 and 8,000 deaths. If there were a moderate wind of if the sun were out, the number would be a tenth as great.[35]

c. Nuclear Weapons.

(1) Although a small nuclear detonation or use of a dirty bomb could produce massive casualties, obtaining the material is still believed to be difficult.

(2) Extremely hard to manage technologically speaking.

(3) Need some type of delivery system.

VIII. HOMELAND DEFENSE INIATIVE (HDI)

A. Due to the increased availability of WMD and the increased threat of terrorist acts at home and abroad, the U.S. Government and its agencies are taking a closer look at how the United States can best protect itself against both traditional and terrorist attacks.

B. Agencies such as DOJ, DOD, Department of Energy (DOE), the Intelligence Community, Federal Emergency Management Agency (FEMA), Department of the Treasury, Department of Transportation (DOT), Department of Health and Human Services (DHHS), Environmental Protection Agency (EPA), and the Federal Aviation Administration, are working together on a project referred to as the Homeland Defense Initiative (HDI).

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[34] *Id.* at 46.
[35] *Id.* at 47.

C. HDI is an integrated and coordinated plan to defend against and respond to attacks against the United States homeland. For the purposes of HDI, attacks include terrorist acts, information warfare, ballistic missile attacks, transnational threats, attacks on critical infrastructure and WMD incidents.

1. HDI participants are working to strengthen the federal, state and local governments' ability to defend the United States territory and citizens from attack, to coordinate crisis and response management of WMD incidents, and to protect critical assets including critical infrastructure and cyber-based systems.

2. HDI may be extended to counterdrug, disaster relief, migrant operations and civil disobedience operations.

D. With the exception of defending against direct attack, providing direct attack deterrence, and protecting critical national defense assets, DOD's role in HDI primarily involves providing military forces in support of civilian federal, state, and local agencies.

1. However, a simultaneous domestic terrorist attack on critical infrastructure during overseas operations could have a significantly negative affect on the ability of the United States to commit the strategic reserve.

2. Attacks on domestic roadways, airports, communications systems, electrical power plants, and computer networks, would, in many cases, delay or prevent the deployment of United States combat power.

3. Although domestic terrorism is generally viewed as criminal activity, the ramifications of such an attack directly impact force projection capabilities as well as raising force protection issues. This is especially true where the terrorism is state sponsored or where WMD are involved.

E. The nature of a WMD attack places a burden on the local response community that it may not be able to bear. Conversely, DoD may need the assistance of civilian assets in the event of an attack on or near a military installation. DOD is postured to support local, state and federal government agencies in planning for and responding to domestic emergencies.

1. Active Duty, National Guard, and Reserve forces posses expertise, trained manpower, and equipment that can support response to chemical, biological, radiological attacks at DOD installations and in civilian communities.

2. Expert and capable response organizations like Explosive Ordinance Disposal teams, the Army's Technical Escort Unit, and the Marine Corps Chemical Biological Incident Response Force have been involved in the development of response plans and procedures.

F. For the purpose of HDI, a definition of WMD may include "any weapon or device that has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors; a disease organism; or radiation or radioactivity. Actions with respect to a WMD incident can be divided into two tracks.

1. Crisis Management is the actions taken to prevent WMD attacks, activities taken against the perpetrators and efforts to combat the civil unrest that may follow.

   a. Crisis management is within the purview of local, state and federal law enforcement. Within the federal government, the FBI is the lead agency.

   b. DoD support in this area is generally provided through the Military Support to Civil Authority and Military Assistance for Civil Disturbances.

   c. When directed by the NCA, certain Special Operations Forces provide assistance to civilian law enforcement involved in crisis management.

2. Consequence Management on the other hand is those activities taken in response to reduce or limit the affects of a WMD incident on the population and environment. FEMA is generally the lead agency in Consequence Management operations. DOD expertise and technology is particularly valuable in the area of consequence management.

3. When directed by the NCA, USCINCACOM, through FORSCOM, establishes and deploys a Response Task Force{ XE "Response Task Force" } (RTF) to the designated Joint Operations Area (JOA) to support the Lead Federal Agency (LFA) in crisis and consequence management during a WMD incident. There are two RTF's under FORSCOM's control; RTF West, composed of Fifth U.S. Army assets, and RTF East, First U.S. Army forces.

4. Below is a chart depicting the makeup of an RTF broken down by function and element. The RTF is task organized depending on the crisis:

IX. CONCLUSION

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INFORMATION OPERATIONS

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I. "KEY TERRAIN"

A. Understand the evolving role for Information Operations considerations as an integral part of the operational planning and review process.

B. Introduce the doctrinal definitions and operational concepts in the area of Information Operations.

C. Be familiar with the relevant international and domestic legal considerations inherent in the practice of Information Operations.

D. Have a functional awareness of the issues affecting your installation.

E. Be alert for currently recommended changes in the UCMJ, as well as the organizational structures charged with conducting Information Operations.

II. INFORMATION OPERATIONS – BACKGROUND

A. Introduction. "Computers and computer-dependent systems permeate everyone's daily life. From local, state, and federal government decision-makers to warfighters, businessmen, lawyers, doctors, bankers, and individuals—everyone relies upon information and information systems that involve the acquisition, transmission, storage, or transformation of information. . . . Anyone with a computer has access to instantaneous worldwide communications and a wealth of resources on the internet. Instead of human watch standers, computerized sensing and control devices now monitor transportation, oil, gas, electrical, and water treatment systems throughout our Nation. Satellites serve as the backbone of our telecommunication systems and our economic well-being. The Global positioning System (GPS) guides virtually all of the commercial aircraft in the world."[1]

[1] W.G. SHARP, CRTITICAL INFRASTRUCTURE PROTECTION: *A NEW ERA OF NATIONAL SECURITY*, THE FEDERALIST SOCIETY INTERNATIONAL AND NATIONAL SECURITY LAW NEWS, Vol.2, at 1 (Summer 1998).

1. "The Department of Defense is heavily dependent upon timely and accurate information and is keenly focused on information operations and information assurance. . . . Over 95% of Department of Defense telecommunications travel over commercial systems, and the interdependence of our civilian infrastructure and national security grows dramatically on a daily basis. In a few short decades, the global networking of computers via the internet will very likely be viewed as the one invention that had the greatest impact on human civilization—and perhaps the greatest challenge to our national security.[2]

2. "All of these computers and computer-dependent systems are vulnerable to physical and electronic ["cyber"] attack—from the computers on which individuals store and process classified information, privileged attorney-client information, or proprietary data, to our nationwide telecommunication and banking systems. Indeed the year 2000 {"Y2K"] problem demonstrates that we are even vulnerable to our own misfeasance and poor planning. A single non-nuclear, electromagnetic pulse can destroy or degrade circuit boards and chips, or erase all electronic media on Wall Street, in the Pentagon, or your local bank. The loss of a single satellite can terminate service for over 90% of the 45 million pagers in the United States, as well as interrupt thousands of cable television stations and credit card transactions. GPS signals can be spoofed or degraded, or used as part of highly accurate targeting systems. Advanced computer technology can help build nuclear weapons. Internet and computer crime is so simple that two teenagers in Cloverdale, California with a mentor in Israel can break into sensitive national security systems at the Department of Defense. Information warfare experts can use global television to selectively influence political and economic decisions or produce epileptic-like spasms in viewers. Cyber warfare of the 21st century could significantly impact the daily lives of every man, woman, and child in America."[3]

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[2] *Id.*
[3] *Id.*

B. **The Information Age and Information Technology**: **Revolutions in Military and Business Affairs**. Successful military commanders have always depended on the best quality and quantity information to make effective decisions. For thousands of years, the means to transmit and use information remained essentially unchanged. However, the advent of electronics-based communications over the last 150 years has dramatically increased the variety, volume, accessibility, and speed of transmitting and using information. The telegraph, telephone, radio, and television have greatly changed the nature and pace of warfare. Since World War II, advances in digital electronic data processing and the speed and transmission methods of telecommunications have been applied widely and with dramatic success as force multipliers in the information systems that support military organizations and functions. Information systems include organizations, components, and the entire infrastructure that act upon information—including people.[4]

1. Nations, corporations, and individuals each seek to increase and protect their own store of information while trying to limit and penetrate the adversary's. Since around 1970, there have been extraordinary improvements in the technical means of collecting, storing, analyzing, and transmitting information.[5]

2. There is a technological revolution sweeping through information systems and their integration into our daily lives leading to the term "Information Age." Information-related technologies concentrate data, vastly increase the rate at which we process and transmit data, and intimately couple the results into virtually every aspect of our lives. The Information Age is also transforming all military operations by providing commanders with information unprecedented in quantity and quality. The commander with the advantage in observing the battlespace, analyzing events, and distributing information possesses a powerful, if not decisive, lever over the adversary.[6]

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[4] Chairman of the Joint Chiefs of Staff (CJCSI) brochure, *Information Operations: A Strategy for Peace, The Decisive Edge in War*, March 1999, (*hereinafter*, CJCSI brochure*, Information Operations*).
[5] Dep't of the Air Force brochure, *Cornerstones of Information Warfare*
[6] *Id.*

3. We must distinguish between *information age warfare and information operations*. Information age warfare uses information age technologies as tools to better perform combat operations. For example, cruise missiles exploit information age technologies to put a bomb on target. Ultimately, information age warfare will impact all combat operations. In contrast, information operations, view information itself as a separate realm, potent weapon, and lucrative target. Information, is technology dependent. Information age technology is turning a theoretical possibility into fact: directly manipulating the adversary's information.[7]

4. As reliance upon electronic information systems grows, their value is matched by their significance as targets and as weapons. The opposing information systems must be attacked; our information systems must be protected. Attacking adversary information and information systems while defending one's own information and information systems is referred to as Information Operations (IO).[8]

5. Our reliance on technology makes protecting critical US infrastructure against hostile IO a paramount mission. Concurrently, developing US capabilities for IO in peacetime engagement activities, smaller scale contingencies, and major theater war is critical. The capability to penetrate, manipulate, and deny an adversary's battlespace awareness is of utmost importance. IO must orient not just on the technology, but on the most crucial factor in all aspects of warfare—the human element. The ultimate targets of IO are the will and ability of decision makers, leaders, and commanders to observe, interpret, reason, and make and implement sound decisions.[9]

6. To achieve the greatest effect, all types of military operations at every level of war must include IO. In the hands of a commander, IO are a valuable instrument in every national security situation, including peace, pre-crisis, conflict and combat, and return to stability and peace.[10]

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[7] *See generally, Id.*
[8] CJCSI brohcure, *Information Operations*.
[9] *Id.*
[10] *Id.*

C. Information Technology: Simultaneously Enhancing and Threatening US Economic Potential. Along with the tremendous economic potential offered by use of the internet, reliance on computers and computer-dependent systems produces significant national security vulnerabilities. The Information Age marks the end of the physical sanctuary that the United States has enjoyed for two hundred years. Now, the low cost of developing the tools to operate in the electronic environment has decreased the threshold of what it takes to be an active and capable player on the global scene.[11]

1. Our military power and national economy are increasingly reliant upon interdependent critical infrastructures—the physical and information systems essential to the operations of the economy and the government. They include telecommunications, energy, banking and finance, transportation, water systems and emergency services. It has long been the policy of the United States to assure the continuity and viability of these critical infrastructures. But advances in information technology and competitive pressure to improve efficiency and productivity have created new vulnerabilities to both physical and information attacks as those infrastructures have become increasingly automated and interlinked. If we do not implement adequate protective measures, attacks on our critical infrastructures and information systems by nations, groups or individuals might be capable of significantly harming our military power and economy.

2. On 15 September 1993, President Clinton established the "United States Advisory Council on the National Information Infrastructure" by **Executive Order 12864**. This Advisory Council was tasked to advise the Secretary of Commerce on a national strategy and other matters related to the development of the National Information Infrastructure (NII). The Council's reports included, "A Nation of Opportunity: Realizing the Promise of the Information Superhighway" and "A Framework for Global Electronic Commerce" concerning the Administration's strategy for the development of global electronic commerce. These reports recognized that as our nation recognizes the enormous economic potential of the world-wide web, we also increase our vulnerabilities.[12]

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[11] American Bar Association, National Security Law Report, Vol. 20, No. 2, May 1998, summarizing comments of Professor Daniel T. Kuehl, Professor at the National Defense University's School for Information Warfare and Strategy, made during the ABA Standing Committee on Law and National Security's Sixth Annual Conference Reviewing the Field of National Security Law.

[12] *See generally*, SHARP, CRTITICAL INFRASTRUCTURE PROTECTION: *A NEW ERA OF NATIONAL SECURITY*.

3. The US is enhancing its ability to defend against hostile information operations, which could in the future take the form of a full-scale, strategic information attack against our critical national infrastructures, government and economy—as well as attacks directed against our military forces. As other countries develop their capability to conduct offensive information operations, we must ensure that our national and defense infrastructures are well protected and that we can quickly recognize, defend against and respond decisively to an information attack.[13]

B. Identifying National Security Vulnerabilities. Recognizing the vulnerabilities created by US dependence upon information technology, on 15 July 1996, President Clinton promulgated **Executive Order 13010**, establishing the "President's Commission on Critical Infrastructure Protection" (CIP). EO 13010 declared that certain "national infrastructures are so vital that their incapacity or destruction [by physical or cyber attack] would have a debilitating impact on the defense or economic security of the United States." EO 13010 listed eight categories of critical infrastructures: telecommunications; electrical power systems; gas and oil storage and transportation; banking and finance; transportation; water supply systems; emergency services (including medical, police, fire, and rescue); and continuity of government. Recognizing that many of these infrastructures are owned and operated by the private sector, the EO noted that, "it is essential that the government and private sector work together to develop a strategy for protecting them and assuring their continued operation."[14]

1. The President's Commission determined that widespread capabilities to exploit US infrastructure vulnerabilities exist and are growing at an alarming rate and for which we have little defense. The Commission identified potential threats, including insiders, recreational and institutional computer hackers, organized criminals, industrial competitors, terrorists, and states.[15]

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[13] A National Security Strategy for a New Century, The White House, October 1998.
[14] *See*, SHARP, CRTITICAL INFRASTRUCTURE PROTECTION: *A NEW ERA OF NATIONAL SECURITY*
[15] *See, id.*.

2. The President's Commission made seven findings: information sharing is the most immediate need; responsibility is shared among owners and operators and the government; infrastructure protection requires integrated capabilities of diverse agencies, and special means for coordinating federal response to ensure these capabilities are melded together effectively; the challenge is one of adapting to a changing culture; the federal government has important roles in the new infrastructure protection alliance with industry and state and local governments; **the existing legal regime is imperfectly attuned to deal with cyber threats**; research and development are not presently adequate to support infrastructure protection.[16]

3. The President's Commission adopted recommendations for a national strategy to deal with infrastructure protection. These recommendations included strengthening the existing international and domestic legal regimes for federal response to and deterrence of cyber threats.[17]

C. Defending U.S. Critical Infrastructure and Information Systems:

[16] *See, id*.
[17] *See, id.*

1. **The 1998 National Security Strategy[18] (NSS).** The 1998 NSS recognizes that the U.S. faces diverse threats requiring integrated approaches to defend the nation, shape the international environment, respond to crises and prepare for an uncertain future. The NSS declares that "[t]hreats to the national information infrastructure, ranging from cyber-crime to a strategic information attack on the United States via the global information network, present a dangerous new threat to our national security. We must also guard against threats to our critical national infrastructures—such as electrical power and transportation—which could increasingly take the form of a cyber attack in addition to physical attack or sabotage, and could originate from terrorist or criminal groups as well as hostile states."[19] The NSS further provides that "[o]ur military power and national economy are increasingly reliant upon interdependent critical infrastructures—the physical; and information systems essential to the operations of the economy and government. . . . [A]dvances in information technology and competitive pressures to improve efficiency and productivity have created new vulnerabilities to both physical and information attacks as those infrastructures have become increasingly automated and interlinked. If we do not implement adequate protective measures, attacks on our critical infrastructures and information systems by nations, groups or individuals might be capable of significantly harming our military power and economy."[20]

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[18] www.whitehouse.gov/WH/EOP/NSC/html/documents/nssrpref.html
[19] A National Security Strategy for a New Century, The White House, October 1998.
[20] *Id.*

2. **The 1997 National Military Strategy (NMS).**[21] The 1997 NMS listed Information Operations as a key capability which the US military must provide in order to give the national leadership a range of viable options for promoting and protecting US interests in peacetime, crisis, and war. According to the NMS, Information Operations are an integral component of modern military operations because "[s]uccess in any operation depends on our ability to quickly and accurately integrate critical information and deny the same to an adversary. We must attain information superiority through the conduct of both offensive and defensive information operations. Information operations are, however, more than discrete offensive and defensive actions; they are also the collection and provision of that information to the warfighters. Superiority in these areas will enable commanders to contend with information threats to their forces, including attacks which may originate from outside their area of operations. It also limits an adversary's freedom of action by disabling his critical information systems. We are developing joint doctrine for offensive and defensive information operations that assigns appropriate responsibilities to all agencies and commands for assuring committed forces gain and maintain information superiority. This emerging joint doctrine must fully integrate interagency participation allowing us to leverage all existing information systems."[22]

3. **Presidential Decision Directive (PDD) 62, *Combating Terrorism* and Presidential Decision Directive 63, *Critical Infrastructure Protection***. To enhance US ability to protect critical infrastructures, on 22 May 1998, President Clinton promulgated two Presidential Decision Directives to build the interagency framework and coordinate our critical infrastructure defense programs.

   a. **PDD 62** focuses on the growing threat of all unconventional attacks against the United States such as terrorist acts, use of weapons of mass destruction (WMD), assaults on critical infrastructures, and cyber attacks.

   b. **PDD 63** calls for immediate action and national effort between government and industry to assure continuity and viability of our critical infrastructures. PDD 63 makes it US policy to take all necessary measures to swiftly eliminate any significant vulnerability to physical or information attacks on critical US infrastructures, particularly our information systems.

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[21] www.dtic.mil/jcs/core/nms.html
[22] The 1997 National Military Strategy of the United States

D. Information Operations in Current US Military Operational Policy, Strategy and Doctrine.

1. **Department of Defense Directive (DODD) S-3600.1**, "Information Operations," and **Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3210.01A**, "Joint Information Operations Policy," outline general and specific information operations (IO) policy for Department of Defense (DOD) components and delineate specific responsibilities. **CJCSI 6510.01B**, "Defensive Information Operations Implementation," provides specific policy concerning defensive IO.[23]

2. **IO apply across all phases of an operation, throughout the range of military operations, and at every level of war.** Information warfare (IW) is conducted during time of crisis (including war) to achieve or promote specific objectives over a specific adversary. Defensive IO activities are conducted on a continuous basis and are an inherent part of force deployment, employment, and redeployment across the range of military activities.[24]

3. **IO may involve complex legal and policy issues** requiring careful review and national-level coordination and approval. IO planners must understand the **legal limitations** that may be placed on IO across the range of military operations. IO planners at all levels should consider the following broad areas: (1) **Domestic and international criminal and civil laws** affecting national security, privacy, and information exchange. (2) **International treaties and agreements** and customary international law, as applied to IO. (3) Structure and relationships among US intelligence organizations and general interagency relationships, including nongovernmental organizations.[25]

4. **IO focus on the vulnerabilities and opportunities** presented by the increasing dependence of the United States and its adversaries or potential adversaries on information and information systems.[26]

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[23] THE JOINT CHIEFS OF STAFF, JOINT PUB 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS, 9 Oct 1998 (*hereinafter*, Joint Pub 3-13).
[24] *Id.*
[25] *Id.*
[26] *Id*

5. IO contribute to the **integration of aspects** of the military element of national power with all other elements of national power to achieve objectives. IO can support the overall USG strategic engagement policy throughout the range of military operations. The effectiveness of **deterrence, power projection**, and **other strategic concepts** is greatly affected by the ability of the United States to influence the perceptions and decision making of others. In times of crisis, **IO can help deter adversaries from initiating actions** detrimental to the interests of the United States or its allies and/or coalition partners. . . . **IO can make an important contribution to defusing crises**; reducing periods of confrontation and enhancing the impact of informational, diplomatic, economic, and military efforts; and forestalling or eliminating the need to employ forces in a combat situation. Thus IO . . . **require close coordination among numerous elements of the USG**, to include the Department of Defense. Command, control, communications, and computers (C4) and intelligence provide crucial support to IO.[27]

6. **Information Warfare (IW) can be waged in crisis or conflict** within and beyond the traditional battlespace. IW may be conducted to shape the battlespace and prepare the way for future operations to accomplish US objectives.[28]

7. **CJCSI 3210.01A** sets forth specific US IO policy, including the following:

   a. **Offensive IO** will be employed to achieve mission objectives when deemed appropriate.[29]

   b. **Information, information systems, and information-based processes** (such as Command and control (C2)) used by US military forces will be protected relative to the value of the information they contain and the risks associated with their compromise or loss of access.[30]

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[27] *Id.*
[28] *Id.*
[29] Chairman of the Joint Chiefs of Staff Instruction 3210.0A, *Joint Information Operations Policy* (*hereinafter*, CJCSI 3210.0A), *quoted in* Joint Pub 3-13.
[30] *Id.*

c. **Intelligence requirements** in support of IO will be articulated with sufficient specificity and timeliness to the appropriate intelligence production center or other intelligence organizations to meet the IO demand.[31]

d. **Technology** that affects an adversary's information and information systems and protects and defends friendly information and information systems will be pursued at every opportunity to ensure the greatest return on investment.[32]

e. **Joint and Service school curricula** will ensure personnel are educated in the concepts of IO, to include an appreciation of the vulnerabilities inherent in information systems and the opportunities found in adversary systems.[33]

f. **Combatant commanders** will incorporate offensive and defensive IO into deliberate and crisis action planning to accomplish their assigned missions.[34]

g. The growth in **IO-related technology and capabilities and associated legal issues makes it critical for commanders at all levels of command to involve their staff judge advocates in development of IO policy and conduct of IO.**[35]

8. **DODD S-3600.1, CJCSI 3210.01A**, and **CJCSI 6510.01B** assign specific unclassified responsibilities for IO within DOD. Among those responsibilities are:

a. **Chairman of the Joint Chiefs of Staff**:

(1) Serves as the principal military advisor to the Secretary of Defense on IO matters.

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

(2) Establishes doctrine to facilitate the integration of IO concepts into joint warfare.

(1) Ensures plans and operations include and are consistent with IO policy, strategy, and doctrine.

b. **Combatant Commanders**:

(1). Plan, exercise, and conduct IO in support of national goals and objectives as directed by the Joint Strategic Capabilities Plan (JSCP).

(2). Integrate capabilities into deliberate and crisis action planing to conduct IO in accordance with appropriate policy and doctrine to accomplish their Unified Command Plan (UCP) assigned missions.

c. **Chiefs of the Services and Commander in Chief, US Special Operations Command**:

(1) Conduct research, development, testing and evaluation, and procurement of capabilities that meet validated Service and joint IO requirements.

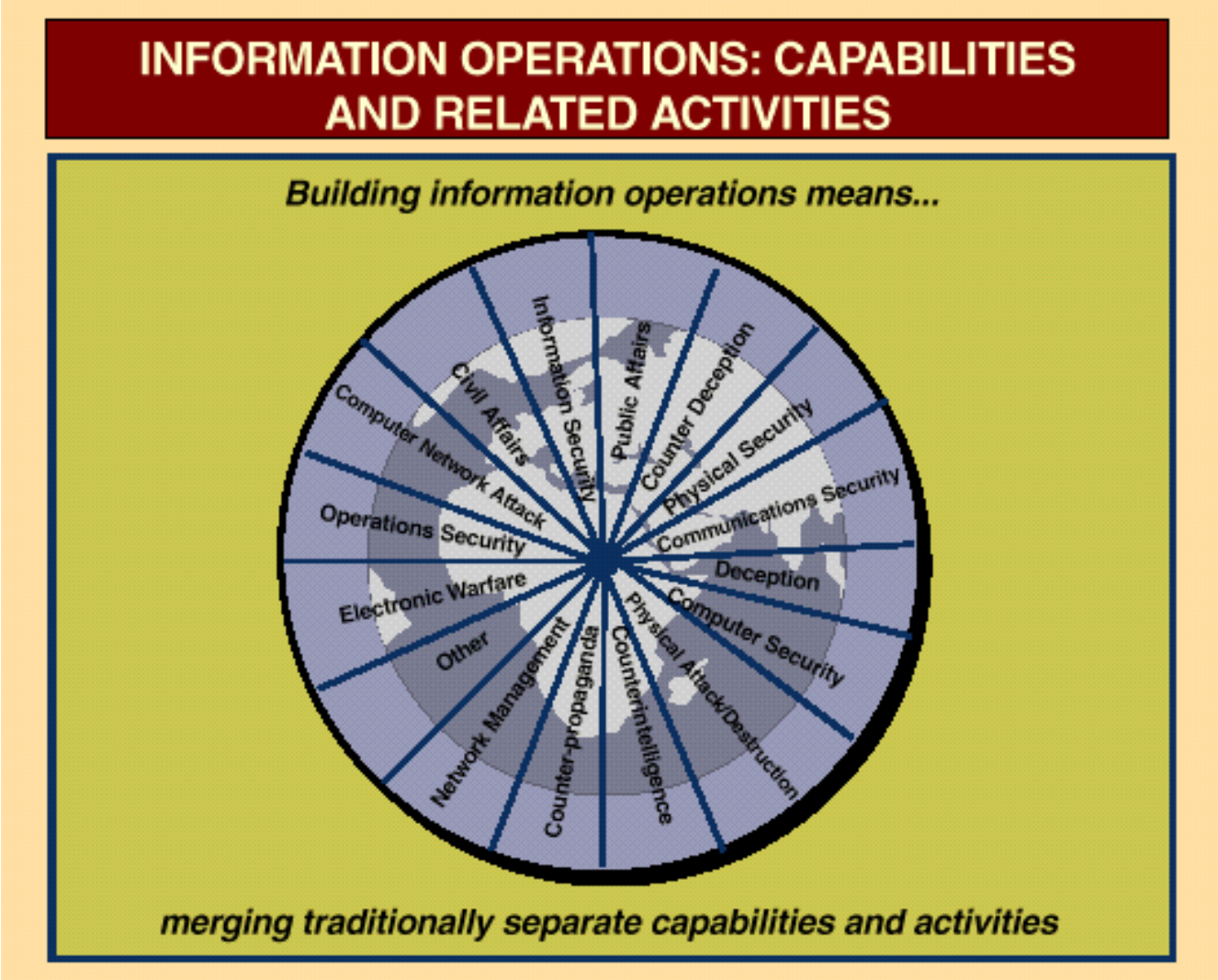
(2) Incorporate IO into Service school curricula and into appropriate training and education activities.

(3) Organize forces with capabilities to conduct IO. Train forces to conduct IO. Ensure Services' forces and planning capabilities effectively support the combatant commanders through the appropriate Service component commanders.

d. **All DOD Elements**: Adopt a risk management approach to the protection of their information, information systems, and information-based processes based on potential vulnerability to IO.

IV. BASELINE DEFINITIONS AND CONCEPTS
(drawn from Joint Pub 3-13)

A. "**Information Operations**" **are actions taken to affect adversary information, and information systems, while defending one's own information and information systems**. IO require the close, continuous integration of offensive and defensive capabilities and activities, as well as effective design, integration, and interaction of Command and control (C2) with intelligence support. IO are conducted through the integration of many capabilities and related activities. **Major IO capabilities** to conduct IO include, but are not limited to, **operations security** (OPSEC), **psychological operations** (PSYOP), **military deception**, **electronic warfare** (EW), and **physical attack** and/or **destruction**, and could include **Computer Network Attack** (CNA). **IO-related activities** include, but are not limited to, **public affairs** (PA) and **civil affairs** (CA) activities.



1. At the grand strategy level, nations seek to acquire, and protect information in support of their objectives. This exploitation and protection can occur in the economic, political, or military arenas. Knowledge of the adversary's information is a means to enhance our own capabilities, degrade or counteract enemy capabilities, and protect our own assets, including our own information.[36]

2. There are two major subdivisions within IO: **offensive IO** and **defensive IO**.

B. "Offensive IO" involve the integrated use of assigned and supporting capabilities and activities, mutually supported by intelligence, to affect adversary decision-makers and achieve or promote specific objectives. These assigned and supporting capabilities and activities include, but are not limited to, OPSEC, military deception, PSYOP, EW, physical attack and/or destruction, and special information operations (SIO), and could include CNA.

1. **Offensive IO principles** include the following:

a. The human decision making processes are the ultimate target for offensive IO. Offensive IO involve the integration and orchestration of varied capabilities and activities into a coherent, seamless plan to achieve specific objectives.

b. Offensive IO objectives must be clearly established, support overall national and military objectives, and include potential spectrum of IO objectives ranges from peace to war.

c. Selection and employment of specific offensive capabilities against an adversary must be appropriate to the situation and consistent with US objectives. These actions must be permissible under the law of armed conflict, consistent with applicable domestic and international law, and in accordance with applicable rules of engagement.

d. In order to efficiently attack adversary information and information systems, it is necessary to be able to do the following:

(1) Understand the adversary's or potential adversary's perspective and how it may be influenced by IO.

[36] Dep't of the Air Force brochure, *Cornerstones of Information Warfare*

(2) Establish IO objectives.

(3) Identify information systems value, use, flow of information, and vulnerabilities.

(4) Identify targets that can help achieve IO objectives.

(5) Determine the target set.

(6) Determine the most effective capabilities for affecting the vulnerable portion of the targeted information or information systems.

(7) Predict the consequences of employing specific capabilities with a predetermined level of confidence.

(8). Integrate, coordinate, and implement IO.

(9) Obtain necessary approval to employ IO.

(10) Evaluate the outcome of specific IO to the predetermined level of confidence.

2. **Offensive IO Capabilities**. When employed as an integrating strategy, IO weave together related capabilities and activities toward satisfying a stated objective. Offensive IO applies perception management actions such as PSYOP, OPSEC, and military deception, and may apply attack options such as EW and physical attack/destruction to produce a synergistic effect against the elements of an adversary's information systems.

a. **OPSEC** contributes to offensive IO by slowing the adversary's decision cycle and providing opportunity for easier and quicker attainment of friendly objectives. OPSEC denies the adversary critical information about friendly capabilities and information needed for effective and timely decision making, leaving the adversary vulnerable to other offensive capabilities.

b. **PSYOP** are actions to convey selected information and indicators to foreign audiences. They are designed to influence emotions, motives, reasoning, and ultimately, the behavior of foreign governments, organizations, groups, and individuals.

c. **Military Deception** targets adversary decision makers through effects on their intelligence collection, analysis, and dissemination systems.

d. **EW**. There are three major subdivisions of EW. They are **electronic attack** (EA), **electronic protection** (EP), and **electronic warfare** support (ES). All three contribute to both offensive and defensive IO.

(1) **EA** is any military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy. EA involves actions taken to attack the adversary with the intent of degrading, neutralizing, or destroying adversary combat capability to prevent or reduce an adversary's effective use of the electromagnetic spectrum.

(2) **EP** involves such actions as self-protection jamming and emission control taken to protect friendly use of the electronic spectrum by minimizing the effects of friendly or adversary employment of EW that degrade, neutralize, or destroy friendly combat capability.

(3) ES contributes to the Joint Force's situational awareness by detecting, identifying, and locating sources of intentional or unintentional radiated electromagenetic energy for the purpose of immediate threat recognition.

e. **Physical attack/destruction** refers to the use of "hard kill" weapons against designated targets as an element of an integrated IO effort.

f. **CNA.** See item D below.

C. "**Defensive IO"** integrate and coordinate policies and procedures, operations, personnel, and technology to protect and defend information and information systems. Defensive IO are conducted and assisted through **information assurance** (IA), **OPSEC**, **physical security**, **counterdeception**, **counterpropaganda**, **counterintelligence** (CI), **EW**, and **Special Information Operations** (SIO). Defensive IO ensure timely, accurate, and relevant information access while denying adversaries the opportunity to exploit friendly information systems for their own purposes. Offensive IO can support defensive IO.

1. Defensive IO integrate and coordinate protection and defense of information and information systems.

2. Defensive IO must be integrated with offensive IO to provide a timely response against identified and potential threats to friendly information and information systems.

3. **Defensive IO capabilities.**

   a. **OPSEC** is a process of identifying critical information and subsequently analyzing friendly actions attendant to military operations and other activities to identify those actions that can be observed by adversary intelligence systems; determine indicators adversary intelligence systems might obtain that could be interpreted or pieced together to derive critical information in time to be useful; and select and execute measures

   b. **EW**. EA, EP, and ES are examples of EW capabilities contributing to protection and defense of information and information systems.

   c. **Counterdeception** supports defensive IO by negating, neutralizing, or diminishing the effects of—or gaining advantages from—a foreign deception operation.

   d. **Counter-propaganda Operations.** Activities identifying adversary propaganda contribute to situational awareness and serve to expose adversary attempts to influence friendly populations and military forces.

   e. **CI** activites contribute to defensive IO by providing information and conducting activities to protect and defend friendly information systems against espionage, sabotage, or terrorist activities.

D. "Computer Network Attack" is defined as operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks or the computers and networks themselves.

E. "Information" is defined as facts, data, or instructions in any medium or form. It is the meaning a human assigns to data by means of the known conventions used in their representation.

F. "Information assurance" is defined as IO that protect and defend information systems by ensuring their availability, integrity, authentication, confidentiality, and nonrepudiation. This includes providing for restoration of information systems by incorporating protection, detection, and reaction capabilities.

G. "Information-based processes" are processes that collect, analyze, and disseminate information using any medium or form. These processes may be stand-alone processes or sub-processes which, taken together, comprise a larger system or systems. Information-based processes are included in all systems and components thereof that require facts, data, or instructions in any medium or form to perform designated functions or provide anticipated services. For purposes of IO, examples range from strategic reconnaissance systems, to a key adversary decision-maker, to a local traffic control point in an austere overseas joint operations area (JOA).

H. "Information environment" is the aggregate of individuals, organizations, or systems that collect, process, or disseminate information, including the information itself.

I. "Information superiority" is the capability to collect, process, and disseminate an uninterrupted flow of information while exploiting or denying an adversary's ability to do the same.

J. "Information system" is the entire infrastructure, organization, personnel, and components that collect, process, store, transmit, display, disseminate, and act on information. The information system also includes the information-based processes.

K. "Information warfare" (IW) is information operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries.

1. IW consists of targeting the enemy's information and information systems, while protecting our own, with the intent of degrading his will or capability to fight. IW may involve actions to deny, exploit, corrupt, or destroy the enemy's information and its functions; protecting ourselves against those actions; and exploiting our own information systems.

2. IW is any attack against an information system, regardless of the means. Bombing a telephone switching facility is IW. So is, destroying the switching facility's software.

3. IW is any action to protect our information or information systems, regardless of the means. Hardening and defending the switching facility against air or ground attack is IW. So is using an anti-virus program to protect the facility's software.

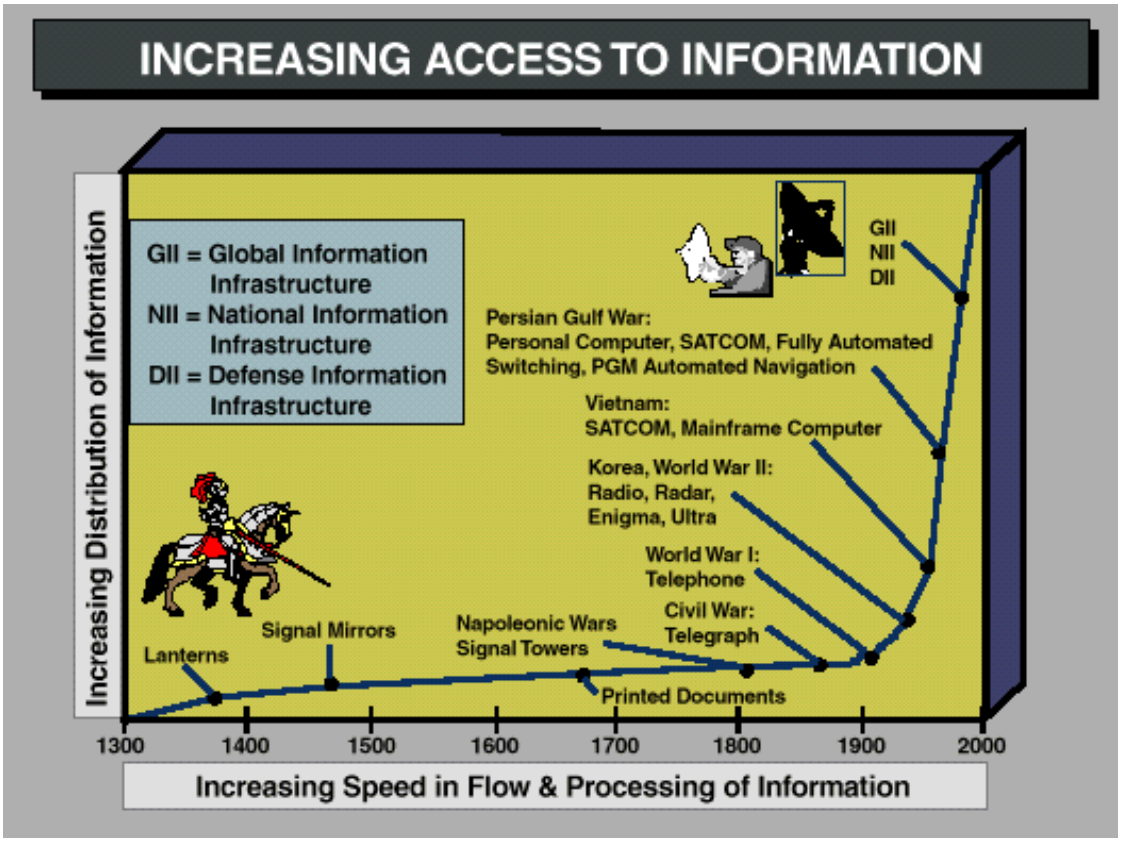
4. IW is a method of warfare to achieve objectives, rather than an objective in itself, in precisely the same manner that air or ground warfare are methods of warfare to achieve objectives. The means of conducting IW are varied and range from kinetic attack (e.g., iron bombs on target) through Computer Network Attack (CNA). We may use IW as a method to conduct strategic attack and interdiction, just as we may use air or ground warfare to conduct strategic attack and interdiction.

L. "Special information operations" are IO that, by their sensitive nature and due to their potential affect or impact, security requirements, or risk to the national security of the US, require a special review and approval process.

III. FUNDAMENTALS OF INFORMATION OPERATIONS
(drawn from Joint Pub 3-13)

A. General.

1. **Increasingly complex information systems** are being integrated into traditional warfighting disciplines such as mobility; logistics; and command, control communications, computers, and intelligence (C4I). Many of these systems are designed and employed **with inherent vulnerabilities** that are, in many cases, the unavoidable consequences of enhanced functionality, interoperability, efficiency, and convenience to users. The **broad access** to, and use of, these information systems enhances warfighting. However, **these useful capabilities induce dependence, and that dependence creates vulnerabilities**. These information systems are a **double edged sword**—on one edge representing areas that warfighting components must protect, while on the other edge creating new opportunities that can be exploited against adversaries or used to promote common interests.



2. **IO capitalize on the growing sophistication, connectivity, and reliance on information technology**. IO target information or information systems in order to affect the information-based process, whether human or automated. Such information dependent processes range from NCA-level decision making to the automated control of key commercial infrastructures such as land and space-based telecommunications and electric power.

3. Many different **capabilities and activities must be integrated** to achieve a coherent IO strategy. **Intelligence and communications support** are critical to conducting offensive and defensive IO. The thoughtful design and correct operation of information systems are fundamental to the successful conduct of IO. Moreover, to be successful, **IO must be integrated with other operations** (air, land, sea, space, and special) and contribute to national and military objectives.

4. IO support the national military strategy but **require support, coordination, and participation by other USG departments and agencies** as well as commercial industry. Although much of DOD information flows depend on commercial infrastructures, in many cases the protection of these infrastructures falls outside the authority and responsibility of DOD.

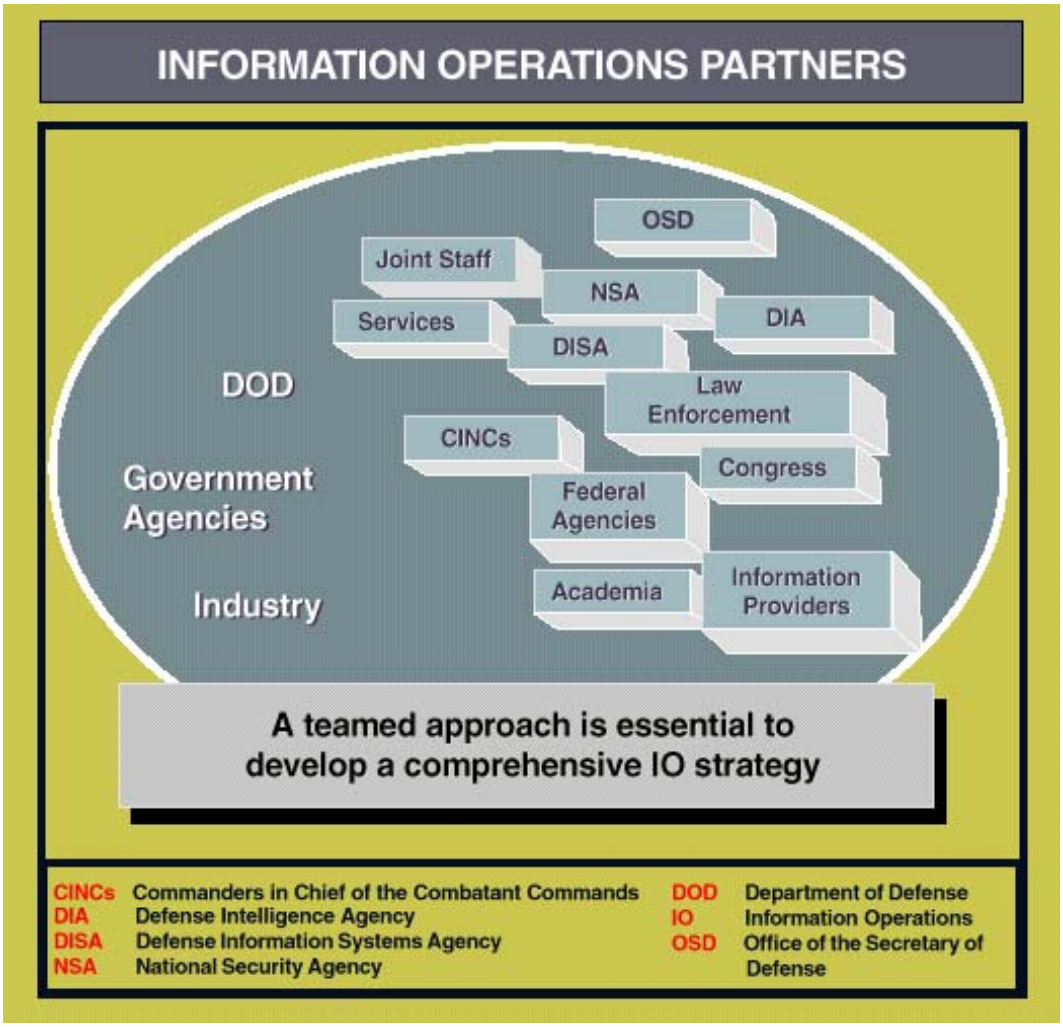
5. Several **fundamental legal considerations** must be taken into account during all aspects of IO planning and execution. The staff judge advocate should be an integral part of the planning and execution of such operations. Legal considerations include, but are not limited to, an assessment of the following:

   a. The different legal limitations that may be placed on IO in peacetime, crisis, and conflict (to include war). Legal analysis of intended wartime targets requires traditional Law of War analysis.

   b. The legal aspects of transitioning from defensive to concurrent offensive operations.

   c. Special protection for international civil aviation, international banking, and cultural or historical property.

d. Actions that are expressly prohibited by international law or convention. Examples include, but are not limited to: (1) Destruction resulting from space-based attack (Convention on International Liability for Damage Caused by Space Objects); (2) Violation of a country's neutrality by an attack launched from a neutral nation (Hague Convention V); and (3) PSYOP broadcasts from the sea, which may constitute unauthorized broadcasting (UN Convention on the Law of the Sea).



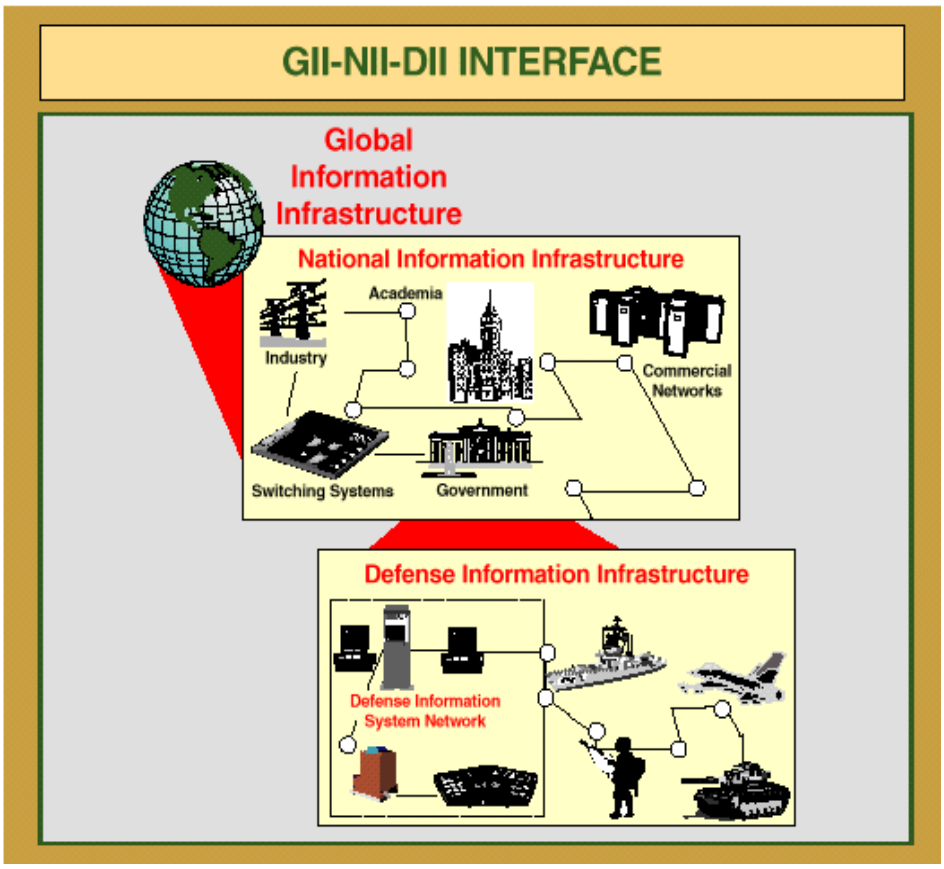
B. Information Environment.

1. The growth of information systems and technologies offer **continuing potential for exploiting the power of information in joint warfighting**. **Open and interconnected systems are coalescing into a rapidly expanding global information infrastructure (GII)** that includes the US national information infrastructure (NII) and the defense information infrastructure (DII).

2. **The GII is the worldwide interconnection of communications networks, computers, databases, and consumer electronics** that make vast amounts of information available to users. It encompasses a wide range of equipment, including cameras, scanners, keyboards, facsimile machines, computers, switches, compact disks, video and audio tape, cable, wire, satellites and satellite ground stations, fiber-optic transmission lines, networks of all types, televisions, monitors, printers, and much more. The GII includes more than just the physical facilities used to store, process, and display information. The personnel who make decisions and handle the transmitted information constitute a critical component of the GII.

3. The **NII** is similar in nature and purpose to the GII but relates in scope only to a **national information environment**, which includes all government and civilian infrastructures.

4. **The DII is embedded within and deeply integrated into the NII**. Their seamless relationship makes distinguishing between them difficult. The DII is the shared or interconnected system of computers, communications, data applications, security, people, training, and other support structures serving DOD local, national, and worldwide information needs. The DII connects DOD mission support, C2, and intelligence computers through voice, telecommunications, imagery, video, and other multimedia services. It provides information processing and services to subscribers over the Defense Information Systems network. It includes C2, strategic, tactical, intelligence, and commercial systems to transmit DOD information.



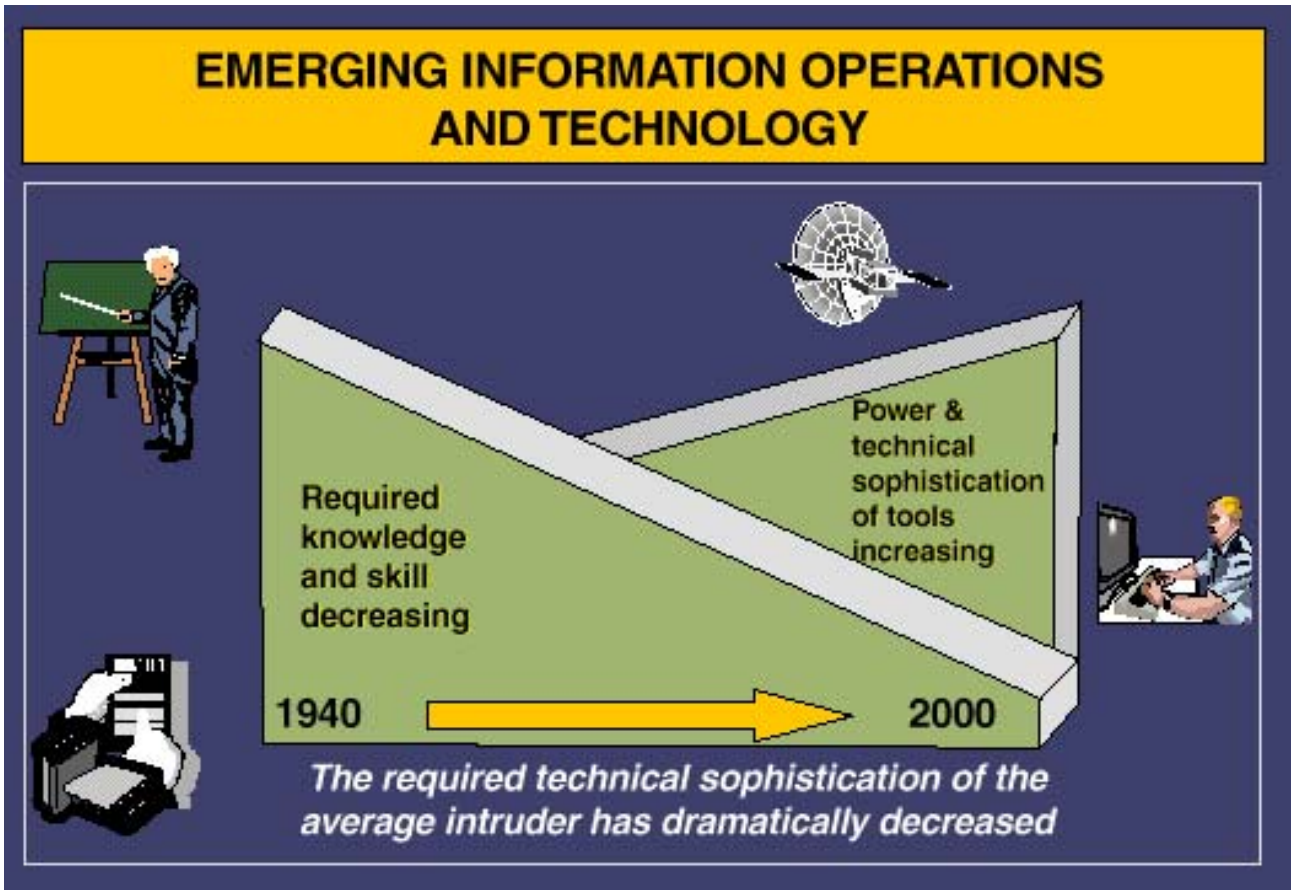
C. Reachback Dependencies.

1. Military planners at all levels of command should understand the nature, complexities, and dependencies of the GII, NII, and DII.

2. The successful conduct of operations requires **access to information available outside the operational area**. Information infrastructures no longer parallel traditional command lines, and warfighters need **frequent, instant, and reliable access to information** at locations in the continental United States as well as in theater. For example, mobility and sustainment of forces are highly dependent on commercial infrastructures that include international telecommunications, the public switched network, commercial satellites and ground stations, transportation systems, and electric power grids. Joint forces require secure video teleconferencing, database connectivity, direct downlink, and broadcast/receive capabilities for reachback access to intelligence, logistics, and other essential support data.

3. Providing capabilities to support crises and contingency operations requires the **expansion of our information infrastructure beyond the established peacetime information environment**. Joint forces must have assurance that this expanded infrastructure can attain the level of protection required to assure mission success.

4. **US dependence on information and information systems**, and the resultant vulnerabilities this entails, **exposes the United States to a wide range of threats**. These threats include, but are not limited to, computer hackers, criminals, vandals, terrorists, and nation states, and have brought focus and compelling relevance to our vulnerabilities to emerging technologies. The dramatically increased power and availability of computers and their telecommunications connections and computer applications have set in motion revolutionary capabilities that will enhance and support all aspects of military operations.



D. IO Target Set. IO targets are determined by the Joint Force Commander's objectives and operations concepts and are largely influenced by in-depth intelligence analysis. The Joint Force must determine the vulnerabilities and critical elements of friendly and adversary information, information-based processes, and information systems.

1. **Early identification of critical elements** with respect to specific IO targets is essential for successful offensive and defensive IO. Understanding the nature of the threat will help defend and protect against adversary IO.

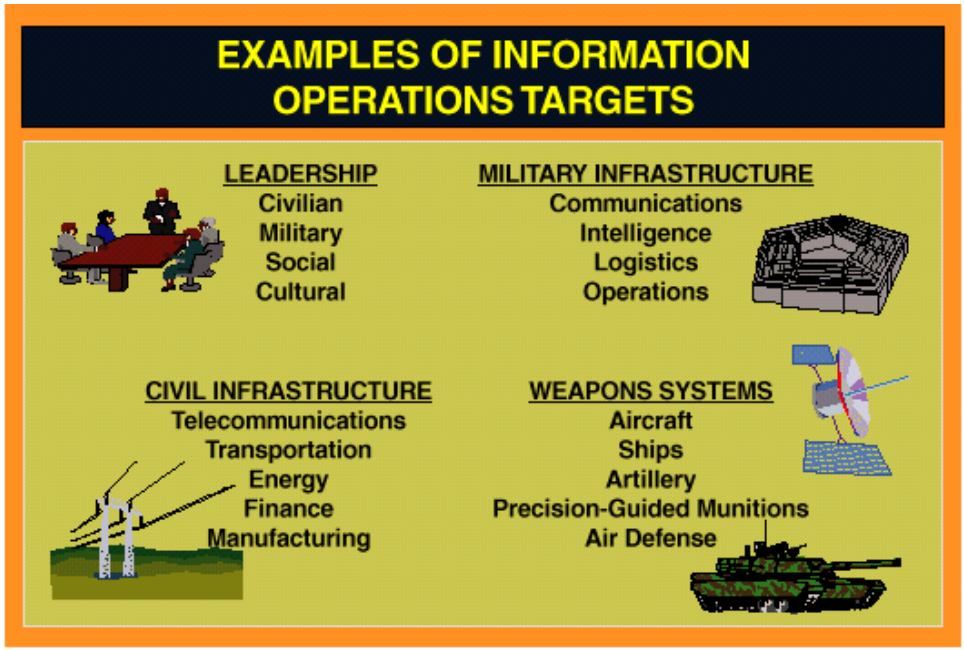
   a. **Offensive IO may target only a key element** of a specific critical adversary target set and attain great success.

   b. Conversely, understanding the nature of the threat will help defend and protect against adversary IO. An IO threat should be defined in terms of a specific adversary's intent, capability, and opportunity to adversely influence the elements of the friendly information environment critical to achieving objectives.

   c. An **IO threat** is an adversary that is organized, resourced, and politically sponsored/motivated to affect decision-makers. Hackers, criminals and organized crime, insiders, industrial and economic espionage, and, in some cases, terrorism constitute a general threat to the protected information environment. This general threat requires monitoring for indications of a specific IO threat and subsequently may require additional defensive IO measures.

2. **Command and control (C2) remains a substantial target for IO**. Commercial communications systems linked to friendly and adversary C2 systems offer unique challenges to offensive targeting and defensive protection.

3. **Examples of key areas of warfare support** comprising potential offensive target sets and requiring protection include, but are not limited to, **logistics, intelligence**, and **non-C2 communications systems**. Friendly commercial infrastructures also may be targeted by an adversary's offensive capabilities, just as friendly offensive capabilities may target an adversary's commercial infrastructures.



E. Special Operations Forces Support to IO. The unique capabilities of SOF enable the Joint Forces Commander to access, alter, degrade, delay, disrupt, deny, or destroy adversary information systems throughout the range of military operations and all levels of war.

F. Activities Related to IO. The following activities relate to and support the conduct of IO.

1. **Public Affairs (PA)**. **PA seek a timely flow of information** to both external and internal audiences. PA programs contribute to information assurance by disseminating factual information. Factual information dissemination counters adversary deception and propaganda. Coordination of PA and IO plans is required to ensure that PA initiatives support the commander's overall objectives, consistent with the DOD principles of information. PA and IO efforts will be integrated consistent with policy or statutory limitation and security.

2. The **news media** and **other information networks'** increasing availability to society's leadership, population, and infrastructure can have significant impact on national will, political direction, and national security objectives and policy.

3. **Civil Affairs (CA)**. **CA activities are an important contributor to IO** because of their ability to interface with key organizations and individuals in the information environment. CA activities can support and assist the achievement of IO objectives by coordinating with, influencing, developing, or controlling indigenous infrastructures in foreign operational areas.

G. Intelligence Support. **Intelligence support is critical to the planning, execution, and assessment of IO**.

1. The conduct of IO requires unique and detailed intelligence never before asked of intelligence collection agencies and activities. Intelligence preparation of the battlespace (IPB) is vital to successful IO. Support from non-DOD and non-US sources may also be required.

2. IO products must support IO planning, execution, and assessment; provide analysis of a potential adversary's IO capabilities and intentions; and help support the indications and warning (I & W) process.

H. IO as an Enabler to Combatant Commanders.

1. Rapidly advancing information-based technologies and an increasingly competitive global environment have thrust information into the center stage in society, government, and warfare in the 21st century. Information and information-based technologies are pervasive and impact every facet of warfighting from planning, deployment and sustainment, post-conflict, and redeployment process to the plethora of forces and weapons systems employed by Joint Forces.

2. All forms of national power, to include military operations in particular, are dependent on many simultaneous and integrated activities that, in turn, depend on information systems. This is especially true of those activities associated with critical C2 processes. Some of these activities include conducting strategic deployment, sustaining theater forces, ensuring force protection—both in garrison and in forward-deployed areas, preserving theater strategic C2, and developing strategic and theater intelligence.

3. Information itself is a strategic resource vital to national security. This reality extends to warfighters at all levels. Increasingly complex information systems are being integrated into traditional disciplines such as mobility, logistics, and C4I.

4. If carefully conceived, coordinated, and executed, IO will make an important contribution to combatant commanders' efforts to defuse crises and return to peace, reduce periods of confrontation, enhance the impact of other elements of national power, and forestall or eliminate the need to employ forces in combat situations. Simultaneously, IO also must prepare the battlespace for conflict and should enhance the ability of all components to conduct successful combat operations.

OUTLINE OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS (drawn from DOD General Counsel paper, *An Assessment of International legal Issues in Information Operations, except as otherwise footnoted*)

We can make some educated guesses as to how the international legal system will respond to information operations, but the direction that response actually ends up taking may depend a great deal on the nature of the events that draw the nations' attention to the issue. If information operations techniques are seen as just another new technology that does not greatly threaten the nations' interests, no dramatic legal developments may occur. If they are seen as a revolutionary threat to the security of nations and the welfare of their citizens, it will be much more likely that efforts will be made to restrict or prohibit information operations by legal means.[37]

I. INTRODUCTION

A. Sources and Application of International Law.

1. Sovereign states are legally equal and independent actors in the world community; and assume legal obligations only by affirmatively acting.

2. States may be legally bound by:

   a. Treaties/International agreements (whether bilateral or multilateral);

   b. Customary international law, which consists of practices that have been so widely followed by the community of nations, with the understanding that compliance is mandatory, that they are considered to be legally binding.

   c. International institutions (like the United Nations) created by treaty and invested with legislative authority to create binding legal obligations.

[37] U.S. DEP'T OF DEFENSE, OFFICE OF GENERAL COUNSEL, PAPER, *AN ASSESSMENT OF INTERNATIONAL ISSUES IN INFORMATION OPERATIONS*

3. Voluntary compliance is the primary mechanism that makes Int'l Law effective. Enforcement mechanisms in International law include:

   a. Threat of sanctions.

      (1) UN Security Council is invested with coercive authority to maintain or restore International peace and security.

      (2) Possibility of international litigation before the International Court of Justice and other judicial tribunals also exists.

   b. Self-help enforcement mechanisms, including:

      (1) The right to use force in individual and collective self-defense; and

      (2) The right (in some circumstances) to repudiate treaty obligations violated by another party.

   c. An aggrieved nation's withdrawal from voluntary relationships involving diplomatic representation and most kinds of commerce.

   d. Public complaint to exact diplomatic costs against offending nations.

4. International legal obligations and international enforcement mechanisms apply to sovereign states and generally do not apply to individual persons except where a nation enforces certain principles of international law through its domestic criminal law, or in a very limited class of serious offenses (war crimes, genocide, crimes against humanity, and crimes against peace) that nations have agreed may be tried and punished by international criminal tribunals.

B. Essentials of Treaty Law.

1. Under US domestic law important distinctions exist between Treaties and Executive Agreements. The distinction primarily involves issues of Constitutional authority within the US government, but is of little importance internationally.

2. Treaty obligations are binding on their parties, but international law recognizes certain circumstances in which a nation can regard a treaty obligation as suspended, modified, or terminated.

   a. Generally, unless the terms of the agreement establish a right of unilateral withdrawal, a nation may not unilaterally repudiate or withdraw from a treaty unless it has a basis for doing so that is recognized under international law.

   b. A fundamental change of circumstances may justify a party to regard its treaty obligations as suspended or terminated.

      (1) Initiation of armed conflict may constitute such a change.

         [a] Some international agreements specifically provide that they will remain in effect during armed conflict between the parties, such as law of war treaties and the UN Charter.

         [b] Most treaties are silent on the issue.

         [c] Issues further complicated when the relevant treaty is multilateral rather than bilateral.

         [d] Where parties to a multilateral agreement are engaged in armed conflict, the treaty may be suspended as between the belligerents, but remain in effect among belligerents and other parties.

c. US is party to a variety of bilateral and multilateral agreements containing obligations that may affect information operations.

(1) SJA must determine which agreements are likely to remain in effect during hostilities.

(2) Test for continuing effect:

[a] Does specific treaty language address effect of hostilities? If not,

[b] Is treaty's object and purpose compatible with a state of armed hostilities between the parties?

C. New Legal Challenges presented by Information Operations.

1. Application of international law to some traditional military activities now associated with "information operations" and "information warfare" is reasonably well settled. These include **physical attack on information systems by kinetic means**, **psychological operations**, **military deception**, and **jamming radar** and **radio signals**. Similarly, existing legal principles may well apply to use of **electromagnetic pulse** (EMP) **weapons** and **directed energy weapons** such as lasers, microwave devices, and high-energy radio frequency (HERF) guns. On the other hand, it may not be as easy to apply existing international legal principles to a form of information attack doctrinally referred to as **computer network attack (CNA).** CNA operations employ electronic means to gain access to, disrupt, degrade, or destroy information resident in computer networks, or the computers and networks themselves (i.e., "hacking" or "cyber attack." of another nation's computer systems).

2. Global communications are almost seamlessly interconnected and virtually instantaneous, making distance and geographical boundaries essentially irrelevant to CNA.

a. Equipment necessary for CNA is readily available and inexpensive, and access to many computer systems can be obtained through the Internet.

b. Result: many information systems are subject to CNA anywhere and anytime.

[1] Actor may be a foreign state, an agent of a foreign state, an agent of a non-governmental entity or group, or an individual acting for purely private purposes.

[2] Major implications:

[A] **Attribution** of attack to a foreign state and **characterization** of intent and motive underlying attack may be very difficult.

[B] Attacker may not be physically present at situs of attack.

[C] Means of attack, except in form of anonymous and invisible radio waves or electrons, may not be tangibly present.

3. All of this significantly complicates application of traditional international law principles which developed in response to territorial invasions and attacks by troops, aircraft, vehicles, vessels and kinetic weapons that the victim could see and touch, and whose sponsor was usually readily apparent.

4. For purposes of addressing how existing international legal principles may apply to information operations, the following analysis initially assumes away issues of attribution and characterization, but will return to them later.

II. THE LAW OF WAR

A. Essentials of the Law of War (LOW).

1. LOW applies during international armed conflict.

   a. LOW comprised of treaties & customary international law.

   b. US is party to 16 LOW treaties, annexes and protocols and several are pending Senate advice and consent to ratification.

2. **General Principles of the LOW** include:

   a. **Distinction of combatants from noncombatants**:

      (1) Combatants must distinguish themselves from noncombatants and may not use noncombatants or civilian property to shield themselves from attack.

      (2) Combatant immunity: combatants may not be punished for combatant acts consistent with the LOW.

      (3) Persons committing combatant acts without authorization are subject to prosecution.

   b. **Military necessity**:

      (1) Enemy combatants are declared hostile and they, their equipment and stores may be attacked at will.

      (2) Civilians and civilian property making a direct contribution to the war effort may be attacked, along with objects whose damage or destruction would produce a significant military advantage because of their location, purpose, or use.

(3) Noncombatants and civilian objects making no direct contribution to the war effort and whose damage or destruction would produce no significant military advantage, are immune from deliberate attack.

c. **Proportionality**.

(1) Collateral injury and damage to noncombatants and civilian property is not unlawful.

[a] Forseeable collateral damage must not be disproportionate in relation to the direct and concrete military advantage anticipated from the attack.

[b] Attacker has a responsibility to take reasonable steps to determine what collateral damage may result from a contemplated attack.

[c] Commander ordering attack must make proportionality judgment.

[d] Enemy failure of duty to separate troops/equipment from noncombatants and civilian property may affect calculus.

(2) "Military advantage" refers to an attack considered as a whole, in the full context of the war strategy, rather than merely the tactical gains anticipated from an isolated attack or particular parts of a specific attack.

d. **Superfluous injury**. Nations have agreed to ban certain weapons because they cause superfluous injury. Included among these are "dum-dum" bullets, projectiles filled with glass or nondetectable fragments, poisoned weapons, and laser weapons specifically deigned to cause permanent blindness to unenhanced vision.

e. **Indiscriminate weapons**. Nations have agreed to ban certain weapons because they cannot be directed with any precision against combatants. Included among these are bacteriological weapons and poison gas.

f. **Perfidy**.

(1) LOW provides visual and electronic symbols to identify persons and property protected from attack.

[a] Among these are prisoners of war (POW), POW camps, the wounded and sick, and medical personnel, vehicles, aircraft, and vessels.

[b] Any misuse of protected symbols to immunize a lawful military target from attack constitutes the war crime of **perfidy**. Known misuse of symbols may lead combatants to disregard them.

(2) It is unlawful to feign surrender, illness, or death to gain an advantage in combat, as well as to broadcast a false report of a cease-fire or armistice.

g. **Neutrality**.

(1) Traditionally, nations not engaged in armed conflict may declare themselves neutral and are entitled to immunity from belligerent attack, so long as they do not assist a belligerent.

(2) Neutral nations unable or unwilling to prevent a belligerent from use of the neutral's territory in a manner that gives it a military advantage to that belligerent may be subject to attack by an opposing belligerent.

(3) Considerable support exists for argument that neutrality has no application during a conflict in which force is employed pursuant to UN Security Council Chapter VII mandate.

B. Application of LOW to Information Operations.

It is not clear what information operation techniques will be considered to be "weapons," or what kinds of information operations may be considered to constitute armed conflict. **However, if the deliberate actions of one belligerent cause injury, death, damage, and destruction to the military forces, citizens, and property of another belligerent, those action are likely to be judged by applying traditional LOW principles. *DOD GC adopts a "results test."**

1. **Distinction of combatants from noncombatants**.

(a) Conduct of Computer network attack (CNA) launched far from its target makes it of no practical significance whether "combatants" distinguish themselves from noncombatants.

(b) **However**, LOW requires lawful combatants distinguish themselves from noncombatants by wear of a uniform, be trained in LOW, and serve under effective discipline, and responsible command.

(1) Thus, combatant information operations during international armed conflict must be conducted only by uniformed members of the armed forces.

(2) Combatant acts (including CNA) by non-military forces therefore are a violation of LOW.

[A] Individuals conducting such acts may be subject to criminal prosecution by the enemy or an international war crimes tribunal.

[B] Long-distance and anonymous nature of CNA may make detection and prosecution unlikely.

2. **Military necessity.**

(a) Both military and civilian infrastructures are vulnerable to CNA.

(b) During armed conflict, virtually all military infrastructures are lawful targets, but purely civilian infrastructures may not be attacked unless their location, use, or purpose makes an effective contribution to the enemy's war effort and their damage, destruction, or neutralization offers a definite military advantage to the attacker.

[1] Stock exchanges, banking systems, universities, and similar civilian infrastructures may not be attacked simply because a belligerent has the ability to do so.

[2] In long, protracted conflicts, damage to enemy's economy and research and development capabilities may well undermine its war effort, but in short and limited conflict it may be difficult to articulate any expected military advantage from attacking economic targets.

(c) Targeting analysis must be conducted for CNA just as it has traditionally been conducted for attacks using traditional kinetic weapons.

3. **Proportionality**.

(a) Attacks upon "dual-use" infrastructures (those used for both military and civilian purposes) require that commanders make reasonable efforts to discover forseeable collateral damage. Commanders must consider whether system contemplated for attack is essential to public health and safety.

(b) Proportionality principle operates in the same way whether an attack is conducted using traditional kinetic weapons or in the form of CNA.

(c) LOW places much responsibility for collateral damage upon a defending force that fails to separate military targets from noncombatants and civilian property.

[1] Military forces using civilian infrastructure for military purposes (or vice-versa) may make such infrastructure a lawful military target.

[2] Such use may be unavoidable, as when military traffic must move on civilian highways and railroads or military use of civilian communications systems.

[3] Where a choice exists, military systems should be kept separate from infrastructures used for essential civilian purposes.

(d) Military command and control (C2) systems are lawful targets. Civilian media generally are not, but circumstances may make them so. (Exp. Rwanda and Somalia, where civilian broadcast urged civilian population to commit acts of violence against members of other tribes, or against UN-authorized forces, respectively).

[1] Civilian media broadcasts directly interfering with mission accomplishment may present grounds for use of minimum necessary force to shut them down.

[2] The international community has yet to authoritatively determine lawfulness of use of force for psychological operations purposes, such as shutting down civilian media broadcasts for the sole purpose of undermining civilian population morale.

4. **Superfluous injury**.

(a) To date, no known information operations weapon or device exists that has potential for causing superfluous injury.

(b) However, all new weapons and weapon systems must be reviewed for compliance with domestic and international law, including the LOW, in accordance with DOD Directives and service implementing regulations.

5. **Indiscriminate weapons**.

(a) The LOW prohibition upon indiscriminate weapons may apply to IO techniques such as malicious logic, as when malicious logic launched against a military information system spreads to other information systems used by noncombatants to provide essential services, or by neutral or friendly nations.

(b) This LOW principle might be violated indirectly if the consequences of CNA was to release dangerous forces, such as opening floodgates of a dam, causing an oil refinery in a populated area to explode in flames, or causing release of radioactivity.

6. **Perfidy**.

(a) Combatant vessel or aircraft broadcast of agreed identification signals for medical vessel or aircraft constitutes a war crime.

(b) "*Morphing*" techniques used to create an image of the enemy's chief of state, etc. informing troops that an armistice or cease-fire agreement exists, if false, constitutes a war crime.

7. **Neutrality**.

(a) A belligerent nation has a right to demand that a neutral nation prevent belligerents from using its information systems that generate information, rather than merely relay communications.

[1] For example, belligerents may demand that neutrals not provide satellite imagery of that belligerent's forces, real-time weather information, precision navigation services, or other kinds of intelligence-producing systems such as intelligence and hydrophonic systems.

[2] If neutral is unable or unwilling to do so, other belligerent(s) may have limited right of self-defense to take necessary and proportionate action against neutral, (e.g., jamming) to prevent such use by the enemy.

(b) A limited exception exists for **communications relay systems**.

[1] Articles 8 and 9 of 1907 *Hague Convention respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land* (US is a party) provides that "A neutral Power is not called upon to forbid or restrict the use on behalf of belligerents of telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to Companies or private individuals," so long as such facilities are provided equally to both belligerents.

(c) **International consortia** present special problems.

[1] Where an international communications system is developed by a military alliance, such as NATO, few neutrality issues are likely to arise.

[2] Other international consortia provide satellite communications and weather data used for both civilian and military purposes and are comprised by membership that virtually guarantees not all members of the consortium will be allies in future conflicts. Current examples include" INTELSAT, INMARSAT, ARABSAT, EUTELSAT, and EUMETSAT.

[3] Consortia have attempted to deal with this possibility by limiting system uses during armed conflict. **Example:** INMARSAT agreement provides that its mobile communications service may be used "exclusively for peaceful purposes." However, INMARSAT nations have determined that this language permits use by UN Security Council authorized forces, even while engaged in armed conflict.

C. **Assessment**. Novel features of information operation exist and will require expansion and interpretation of established principles of the LOW. Nevertheless, the outcome of this process by extrapolation appears reasonably predictable. The LOW is probably the single area of international law in which current legal obligations can be applied with the greatest confidence to information operations.

III. INTERNATIONAL LAW GOVERNING THE USE OF FORCE AMONG NATIONS IN "PEACETIME."

This section focuses on the application of international law principles outside the context of international armed conflict and where no UN Security Council Chapter VII mandate exists, that is, during peacetime, including during the conduct of military operations other than war.

This section explores the manner in which international law on the use of force among nations is likely to apply to peacetime computer intrusions.

A. International Law Concerning the Use of Force among Nations.

1. "**Act of war**." An act of war is a violation of another nation's rights under international law so egregious that the victim would be justified in declaring war.

   (a) Declarations of war have fallen into disuse, and the *act of war* concept plays little role in the modern international legal system.

   (b) In any event, significant sanctions follow from much less serious violations of another nation's rights that would not traditionally be regarded as *acts of war*.

2. **UN Charter Article 2(4)** requires that UN member states "refrain in their international relations from the **threat or use of force** against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

3. States may lawfully employ armed force in two circumstances.

   (a) **UN Security Council (UNSC) authorization under Chapter VII**. Articles 39, 41 and 42 of Chapter VII of the UN Charter provide that the UNSC may authorize use of coercive measures, including military force, to maintain or restore international peace and security, where it determines a threat to the peace exists, or a breach of the peace, or act of aggression has occurred.

[1] There is no requirement that a "threat to the peace" take the form of an armed attack, a use of force, or any other condition specified in the Charter. The UNSC has plenary authority to conclude that virtually any conduct or situation constitutes such, in response to which it can authorize remedial action of a coercive nature.

[2] The UNSC could determine that a CNA constituted a "threat to the peace."

[A] It seems unlikely that UNSC would take action on an isolated case of state-sponsored computer intrusion producing little or no damage.

[B] But, a CNA causing widespread damage, economic disruption, and loss of life might well precipitate UNSC action. Debate in such case might center upon the offender's intent and the **consequences** of the offending action, rather than upon the means employed.

(b) **Individual or collective self-defense**. Article 51 provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an **armed attack** occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

[1] Article 51's language seems to limit its effect to attacks and invasions using traditional weapons and forces.

[2] Article 51, however, did not create right of self-defense; rather, it recognized a preexisting and inherent right that is broader in some respects than Article 51's language. "Inherent right of . . . self-defense" refers to right as it existed at customary international law, which included doctrines of "**anticipatory self-defense**" and "**self-defense in neutral territory**."

[A] **Anticipatory self-defense** permits a nation to strike the first blow if it has good reason to conclude that it is about to be attacked. **CJCSI 3121.01** (Standing Rules of Engagement for US Forces) implement this doctrine in their authorization of the use of force in response to an adversary's demonstration of "**hostile intent.**"

[i] State activities that convey hostile intent constitute a threat to use force, and a state which is the object of that hostile intent has the right to use necessary and proportional force to respond in anticipatory self-defense."[38]

[B] **Defense of nationals** is the right of a state to use force to neutralize a continuing threat located in the territory of a neutral state, but not acting on its behalf, when the neutral state is unable or unwilling to execute its responsibility to prevent the use of its territory as a base or sanctuary for attacks on another nation.

[3] **Acts of self-defense must satisfy the tests of necessity and proportionality, but need not use the same means as the provocation, nor be conducted against a similar type of target.** Further, past US actions in Libya in 1986, Iraq in 1993 and in Afghanistan and Sudan in 1998, seem to suggest that self-defense actions need not be contemporaneous with the provocation, particularly if the attacker is responding to a continuing course of conduct. The latter point is, however, subject to significant international debate and seemingly inconsistent with the traditional customary international law principle requiring that the necessity for self-defense action be "instant, overwhelming, and leaving no choice of means, nor moment for deliberation."

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[38] SHARP, CRITICAL INFRASTRUCTURE PROTECTION: *A NEW ERA OF NATIONAL SECURITY* at 95.

4. "While the phrase 'use of force' is commonly understood to include a military attack of one state by the organized military of another state, i.e., an *armed attack*, some coercive state activities that fall short of an armed attack may also cross the thresholds of Article 2. The phrase 'use of force also applies to all agencies and agents of a state government, such as the organized military, militia, security forces, police forces, intelligence personnel, mercenaries, and other surrogate forces of volunteers."[39]

   (a) "The Article 2(4) prohibition on the use of force also covers physical force of a non-military nature committed by any state agency. . . . [U]narmed, non-military physical force may produce the effects of an armed attack prompting the right of self-defense laid down in Article 51."[40]

   (b) "Any destructive state activity intentionally caused within the sovereign territory of another state is an unlawful use of force."[41]

   (c) "A state never loses its right to use force in self-defense in response to a use of force within the meaning of Article 2(4), however, the right of self-defense under customary international law may not always justify an armed response."[42]

5. "The best way . . . to accurately predict what may be considered a use of force and an armed attack within the meaning of Articles 2(4) and 51 is by studying state practice. In addition to traditional, universally accepted examples such as an armed cross-border invasion, an armed attack may occur when a use of force or an activity not traditionally considered an armed attack is used in such a manner that it becomes tantamount in effect to an armed attack."[43]

B. Acts Not amounting to a Use of Force.

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[39] *Id* at 82.
[40] *Id* at 101.
[41] *Id.*
[42] *Id* at 143.
[43] *Id* at 115.

1. "Violations of international law are not *per se* a use of force and the unlawfulness of those violations follows from international norms other than [UN Charter] Article 2(4)."[44]

2. In its 1949 decision in the Corfu Channel Case, the ICJ ruled that the intrusion of British warships into Albanian territorial waters, which it found without justification under international law, constituted a violation of Albania's sovereignty. The result seems to be recognition of a general international law of trespass, although the remedy may be limited to a declaratory judgment that the victim's rights have been violated.

3. The Permanent Court of International Justice, in its 1928 Chorzow Factory decision, declared that reparations were due to any nation whose rights under international law were violated by another nation. This concept is often referred to as the Doctrine of State Responsibility.

4. International law generally recognizes the right of a nation whose rights under international law have been violated, to take **countermeasures** against the offending state, in circumstances where neither the provocation nor the response involves the use of armed force. Example: In 1978 an arbitral tribunal ruled appropriate the US suspension of French commercial flights into Los Angeles after France suspended US flights into Paris.

   (a) The Doctrine of countermeasures distinguishes between those that would otherwise be violations of treaty obligations or of general principles of international law and **retorsions -** actions which may be unfriendly or even damaging, but which do not violate any international obligation.

   (b) The use of countermeasures is subject to the requirements of necessity and proportionality.

   (c) Examples of countermeasures accepted as lawful include: suspension of diplomatic relations, trade and communications embargoes, cutting off foreign aid, blocking assets belonging to the other nation, and prohibiting travel to or from the other nation.

5. A trend in international law is to provide a remedy for every violation of a nation's rights under international law.

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[44] *Id* at 97.

(a) Some remedies are in the nature of self-help, such as armed self-defense, the interruption of commercial or diplomatic relations, or public protest.

(b) Other remedies may be sought from international institutions, such as an imposition of coercive measures by the international tribunal.

(c) Victim nation must choose the most effective available sanction.

(d) Nations contemplating actions that may violate rights of another nation under international law must attempt to accurately predict what sanctions such action may provoke.

C. Application of International Law to Computer Network Attacks.

1. How these principles of international law will be applied to CNA by the international community is unclear. Much will depend on how nations and international institutions react to the particular circumstances in which the issues are raised for the first time.

2. It seems likely that the international community will be more interested in the **consequences** of a CNA than in the means used.

(a) Principles of international law **may** be seen to place "far-reaching restrictions on a state's activities in CyberSpace that 'attack' the critical infrastructure of another state and cause destructive effects. A state can cause significant property and economic damage, as well as human fatalities, in another state by utilizing the Internet to cause

[1] flooding by opening the flood gates of a dam,
[2] train wrecks by switching tracks for oncoming trains,
[3] plane crashes by shutting down or manipulating air traffic control systems,
[4] large chemical explosions and fires by readjusting the mix of volatile chemicals at an industrial complex,
[5] a run on banks or a massive economic crisis by crashing stock exchanges,

and any number of other examples that are limited only by the imagination of the state actors. . . The effect can be the same, if not more severe, as if the destruction was caused by conventional kinetic means of warfare."[45]

(b) State activities in CyberSpace that constitute a use of force within the meaning of Article 2(4) may be conducted by any state agent—not just the military."[46]

(c) "[A]ny state activity in CyberSpace that intentionally cause any destructive effect within the sovereign territory of another state are an unlawful use of force."[47]

(d) "*Any* computer network attack that intentionally causes *any* destructive effect within the sovereign territory of another state is an unlawful use of force within the meaning of Article 2(4) that **may** produce the effects of an armed attack prompting the right of self-defense."[48]

3. If a CNA results in widespread civilian deaths and property damage, it **may** well be that the international community would not challenge the victim nation if it concluded that it was the victim of an armed attack, or an equivalent of an armed attack. Even if the systems attacked were unclassified military logistics systems, an attack upon such systems might seriously threaten a nation's security.

4. If a particular CNA is considered an armed attack or its equivalent, it would seem to follow that the victim nation would be entitled to respond in self-defense by CNA or by conventional military means to respond in self-defense.

(a) A state might respond in self-defense to disable the equipment and personnel used to mount the offending attack.

(b) In some circumstances it may be impossible or inappropriate to attack the specific means used, where for example, the personnel and equipment cannot reliably be identified, or an attack would not be effective, or an effective attack might result in disproportionate collateral damage.

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[45] *Id* at 101-102.
[46] *Id* at 143.
[47] *Id* at 102.
[48] *Id* at 140.

(c) In such cases, any legitimate military target could be attacked, as long as the purpose of the attack is to dissuade the enemy from further attacks or to degrade the enemy's ability to undertake them (i.e., not in "retaliation" or reprisal).

(d) A nation considering such action must make its best judgment on how world opinion, or the UNSC or ICJ is likely to apply self-defense doctrine to electronic (CNA) attacks.

5. It seems beyond doubt that any unauthorized intrusion into a nation's computer systems would justify that nation in taking self-help action to expel the intruder and to secure the system against reentry.

6. Though the issue has yet to be addressed in the international community, unauthorized electronic intrusion may be regarded as a violation of the victim's sovereignty, or even as equivalent to a physical trespass into that nation's territory. Such intrusions create vulnerability, since the intruder had access to information and may have corrupted data or degraded the system.

7. As a minimum, a victim nation of an unauthorized computer intrusion has the right to protest such actions if it can reliably characterize the act as intentional and attribute it to agents of another nation.

D. An "Active Defense" against Computer Network Attacks.

The initial discussion assumes knowledge of the computer attacker's identity and confidence in US ability to characterize his intent.

1. Persistent unauthorized foreign intrusions into a nation's computer systems **may** indicate a continuing danger that requires coercive measures to stop the intruder's pattern of conduct.

2. Similarly, a single foreign electronic attack causing significant damage to a system critical to national security or data stored in it, or where an intruder's conduct or the context of the activity clearly manifest malicious intent, may justify a nation in taking self-defense action.

(a) A victim nation may be justified in launching a computer attack in self-defense, intended to disable the equipment used by the intruder.

(b) A responsive CNA, as a measure in self-defense against foreign CNA, minimizes issues of proportionality relative to the application of traditional military force (e.g., launching a cruise missile at the building housing the offending system).

(1) Any response to foreign CNA is likely to be analyzed under traditional self-defense criteria of necessity and proportionality.

(2) Any legitimate military target may be attacked in self-defense, if it is impractical to focus an attack on the equipment used in the provocation.

[a] However, the ability to demonstrate a nexus between the provocation and the responsive action is important in the court of world opinion, as well as under the international law principles of self-defense.

[b] The next most attractive target may be the offending nation's communications systems or military intelligence chain of command.

The above legal analysis may change if the identity and location on intruder is uncertain, or if his intent is unclear.

3. **Attribution problems**. Identification of a CNA originator has often been a difficult problem, especially when the intruder has used a number of intermediate relay points, when he has used an anonymous bulletin board whose function is to strip away all information about the origin of messages it relays, or when he has used a device that generates false origin information.

(a) However, progress has been made in this area and reliable identification of the computer that originated a message may soon be routinely available.

(b) Locating an originating computer does not entirely resolve attribution problems, since a computer may have been used by an unauthorized user, or by an authorized user for an unauthorized purpose.

(c) Thus, the US must act cautiously in implementing "active defense" systems for government computers. Nevertheless, circumstances may arise in which the urgency of protecting critical information systems may warrant adoption of a properly deigned "active defense."

4. **Characterization problems**. Characterization of an intruder's intentions may be difficult. However, factors such as persistence, sophistication of methods used, targeting of especially sensitive systems, and actual damage done may persuasively indicate both the intruder's intentions and the dangers to the system in a manner that would justify an "active defense."

5. **State-sponsored actor problems.** A determination that a CNA was originated from a foreign country is only a partial solution to the attribution problem, since the attack may or may not have been state-sponsored.

(a) **State-sponsored attacks** may generate the right of self-defense, while attacks that cannot be shown to be state-sponsored generally do not.

(b) **State sponsorship** might be persuasively established by signals or human intelligence, the location of the offending computer within a state-controlled facility, or public statements by officials. It might also be inferred from the state of relationships between the countries, the prior involvement of the suspect state CNA, the nature of the systems attacked, the nature and the sophistication of the methods and equipment used.

(c) **Non-State-sponsored CNA**. When individuals carry out malicious acts for private purposes against the interests of one state from the territory of a second state, the aggrieved state does not generally have the right to use force in self-defense against either the second state itself or the offending individual.

(a) A state in which a responsive attack was conducted (if it became aware of it) could argue that its sovereignty and territorial integrity had been violated.

(b) The general expectation in international law is that a nation whose interests are damaged by the private conduct of an individual who acts within the territory of another state will notify the government of that nation and request its cooperation in stopping the offending conduct.

(c) Only if the requested nation is unable or unwilling to prevent recurrence does the doctrine of self-defense permit the injured nation to act in self-defense inside the territory of another nation.

[1] At some point, providing safe refuge for those who conduct attacks against another nation becomes complicity in those attacks.

[2] At a minimum, the offended nation is authorized to attack its tormentors, the terrorists.

[3] As complicity shades into the kinds of active support that are commonly called "state sponsorship," military and leadership targets of the host state may themselves become lawful targets for acts of self-defense.

[4] Attacks on insurgents or on terrorists and other criminals using a neutral nation's territory as a refuge may also be justified when the neutral state is unable to satisfy its obligations.

6. The international law of self-defense would not generally justify acts of "active defense" across international boundaries unless the provocation could be attributed to an agent of the nation concerned, or until the sanctuary nation had been put on notice and given the opportunity to put a stop to such private conduct in its territory and has failed to do so, or the circumstances demonstrate that such a request would be futile.

(a) Nevertheless, the National Command Authorities (NCA) might decide to take self-defense action by attacking a computer system in a foreign nation and take the risk of having to apologize or pay compensation to the offended government.

(b) In making this decision, the NCA might consider the danger presented to US national security from continuing attacks, whether immediate action is necessary, how much the sanctuary government is likely to object, and how the world community is likely to respond.

7. Use of a nation's public communications networks as a conduit for an electronic attack would not be a violation of its sovereignty.

   (a) No established principle of international law prohibits routing a destructive message through a nation's communications networks.

   (b) Even during an international armed conflict international law does not require a neutral nation to restrict the use of public communications networks by belligerents.

   (c) A transited state would have grounds to complain if the attacking state obtained unauthorized entry into its computer systems as part of the path to the target computer.

      [1] A transited state would be even more offended if malicious logic directed against a target computer had harmful effects against its own equipment, operating systems, or data.

      [2] The launching state must consider the possibility of collateral damage to transited systems as part of its targeting analysis.

8. It may be possible to specify certain information systems that are vital to national security—both government systems and key civilian infrastructure systems.

   (a) This process should serve both to give such systems high priority for security measures and to identify a class of systems any attack on which would immediately raise the issue of whether an active defense should be employed.

   (b) This would not eliminate consideration of using active defense against attacks on systems not on such a "vital systems" list where the circumstances justify action.

9. It would be useful to create a process for determining when the response to a computer intrusion should shift from the customary law enforcement and counter-intelligence modes to a national defense mode.

10. A variety of treaty obligations, discussed below, must be considered before adopting an "active defense" against foreign CNA. Additionally, a variety of domestic legal concerns may impact information operations.

E. **Assessment**. It is far from clear the extent to which the world community will regard CNA as "armed attacks" or "uses of force," and how the doctrine of self-defense will be applied to CNA. The most likely result is an acceptance that a nation subjected to a state-sponsored CNA can lawfully respond in kid, and that in some circumstances it may be justified in using conventional military means in self-defense. Unless nations decide to negotiate a treaty addressing CAN, international law in this area will develop through the actions of nations and through the positions the nations adopt publicly as events unfold. US officials must be aware of the implications of their own actions and statements in this formative period.

IV. SPACE LAW

A. Introduction.

1. International law regulating activities in outer space is important to information operations because space segments are critical to so many information systems.

   (a). The exclusive functions of both military and civilian satellites are to gather and relay information. These systems perform such functions as communications relay, imagery collection, missile warning, navigation, weather forecasting, and signals intelligence.

   (b). In the conduct of information operations, there will be strong imperatives to interfere with the adversary's space-based information systems, and to defend one's own.

2. One approach to attacking space systems is by targeting their ground stations. Another approach is to jam or "spoof" their communications links. Such actions are subject to the normal international law principles governing other terrestrial activity.

3. Sometimes, however, it may be more effective to attack the satellite or satellites that form the space segment of the system. Activities in space are subject both to general principles of international law and to a number of treaty obligations that apply specifically to space activities.

B. Space Law Treaties.

1. Four treaties, taken together, provide the foundations of existing space law.
   (a) *The Treaty on Principles Governing the Activities of States in the Exploration of Outer Space, including the Moon and Other Celestial Bodies* (the Outer Space Treaty, 1967).
   (b) *The Agreement on the Rescue of Astronauts, Return of Astronauts, and the return of Objects launched into Outer Space* (the Rescue and Return Agreement, 1968).
   (c) *The Convention on International Liability for Damages Caused by Space Objects* (the Liability Convention, 1972).
   (d) *The Convention on the Registration of Objects Launched into Outer Space* (the Registration Convention, 1975).

2. These treaties establish the following principles, now generally regarded as constituting customary international law.

   (a) Space is free for exploration and use by all nations. It is not subject to national appropriation by claim of sovereignty, use, occupation, or any other means.

   (b) Activities in space shall be conducted with due regard for the interests of other states.

   (c) States that launch space objects are liable for any damage they may do in space, in the air, or on the surface of the Earth.

      (1) A "fault" standard is applied where damage is done to other items in space.

      (2) An absolute liability standard is applied where damage is done on the surface of the Earth or to aircraft in flight.

   (d) Space activities are subject to general principles of international law, including the UN Charter.

3. The international legal regime regulating the use of force among nations during peacetime (discussed in Part III) applies fully to activities in outer space.

(a) States are obligated not to use force in their relations with each other unless they are acting in self-defense or when authorized by the UN Security Council.

(b) As with other forms of information operations, however, the issue remains what actions by or against objects in space will be considered uses of force.

(1) The world community would likely regard as uses of force, the destruction of a satellite by a missile or laser, or the taking control by one nation of another nation's satellites by electronic means, thereby causing the satellite to fall out of orbit (if this could be proven).

(2) The world community might consider lesser kinds of interference as not constituting a use of force, as where one nation by electronic means were to suspend the operations of another nation's satellite for a brief period, after which it returned it to service undamaged. This might, however, be considered a breach of the launching nation's sovereign rights.

4. During international armed conflict, the law of war would apply unless it was trumped by the principle of noninterference with space systems.

(a) Resolution of this issue depends on whether the four space treaties are considered to apply during armed conflict.

(1) None of the space treaties contains any specific provision indicating whether the parties intended that the agreement apply in wartime.

(2) A strong argument exists that the principle of noninterference established by these agreements is inconsistent with a state of hostilities, at least where the systems concerned are of such high military value that there is a strong military imperative for the adversary to be free to interfere with them, even to the extent of destroying the satellites in the system.

(b) It seems most likely that these agreements will be considered to be suspended between belligerents for the duration of any armed conflict, at least to the extent necessary for the conduct of the conflict.

(c) If the principle of noninterference is regarded as suspended for the period of the conflict, it also seems likely that the liability provisions in these agreements would also be suspended, at least between the parties. This would not, however, excuse belligerents from liability to neutral nations if their actions caused damage to their citizens or property.

C. **Specific Prohibitions of Military Activities in Space**.

1. Existing treaty restrictions on military operations in space are very limited and are included in the space treaties previously listed and in various arms control agreements.

2. The **Outer Space Treaty** provides that parties will not "place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies [i.e., the moon, planets, and asteroids], or station such weapons in outer space in any other manner."

(a) The OST also prohibits the establishment of military bases, the testing of weapons, and the conduct of military maneuvers on the moon or other celestial bodies.

(b) The OST permits these activities in orbit around the Earth, and in other places in outer space.

(c) The OST does not prohibit establishment of military space stations or operating other satellites with offensive or defensive capabilities.

3. The *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water* (the Limited Test Ban Treaty, 1963) prohibits all nuclear explosions in outer space.

   (a) Parties may not lawfully explode a nuclear device in outer space in order to disable an adversary's satellites by means of the **electromagnetic pulse** (EMP) generated by a nuclear explosion, or by its own effects.

   (b) A nation operating its own satellites are unlikely to take such action since its satellites (unless hardened against blast/EMP effects) would be subject to the same effects as its adversary.

4. The *Treaty on the Limitation of Anti-ballistic Missile Systems* (the ABM Treaty, 1972) provides that no party may "develop, test or deploy space-based ABM systems or components."

5. Under a 1997 theater missile defense (TMD) agreement not yet ratified by the Senate, the US and Russia agreed not to place in space theater missile defense interceptor missiles "or space-based components based on other physical principles, whether or not part of a system, that are capable of substituting for such interceptor missiles."

6. A number of arms control agreements provide that no party will interfere with the others' "national technical means of verification." Translated, this means no interference with the orbiting imaging systems used to monitor the strategic arms of another party.

7. Read together, these agreements permit the development, testing, and deployment of anti-satellite and satellite-defense systems unless they involve either the stationing or testing of nuclear devices in outer space or the orbiting of systems that also have ABM or ATM capabilities.

   (a) Anti-satellite and satellite defense system use id subject only to:

      (1) The general principles of international law relating to the use of force;

(2) The principle of non-interference with the space systems of other nations in peacetime, subject to the right to use force in self-defense and when authorized by the UN Security Council;

(3) The law of war during international armed conflicts; and

(4) Obligations under relevant arms-control agreements not to interfere with other parties' national technical means of verification.

(b) This leaves a very broad range of permissible "space-control" systems of operations.

8. In non-nuclear conflict, the Parties might very well determine that the treaty prohibitions against placing nuclear weapons in orbit, against exploding nuclear devices in outer space, and against placing ABM components and ATM interceptors in orbit remain consistent with a state of limited armed conflict.

(a) Those obligations may well serve to avoid escalation of the conflict to the nuclear level.

(b) The parties' conclusions as to the obligation not to interfere with other parties' national technical means of verification will probably depend to a great extent on the circumstances of the conflict.

D. **Domestic Law and Policy**.

1. A federal statute, 18 USC 1367, makes it a felony to intentionally or maliciously interfere with a communications or weather satellite, or to obstruct or hinder any satellite transmission.

2. US domestic policy on developing space control capabilities has been inconsistent.

(a) Following US Air Force development and testing of an anti-satellite missile in the 1980s, Congress decreed that no appropriated funds were to be used to test any weapon against an object in orbit.

(b) Later, following US Army testing of lasers as anti-satellite weapons, Congress prohibited the use of appropriated funds to illuminate any object in orbit with a laser.

(c) In the FY 98 DOD Authorization Act, Congress authorized funds for development of a Kinetic Energy Anti-Satellite Missile, which President Clinton vetoed with his short-lived line item veto authority.

(d) In the FY 99 DOD Authorization Act Congress authorized funds for space control projects and urged expenditure of the FY 98 funds restored following the Supreme Court's ruling that the line item veto was unconstitutional.

3. The US has not arrived at a consensus on the fundamental policy issues concerning space control. It seems likely that development of such systems will continue.

E. International Efforts to Control "Weaponization of Space."

1. Growing international support exists for a treaty banning weapons in space.

2. In December 1998, the UN General Assembly approved a resolution by a vote of 165-0-4 entitled "Prevention of an arms race in outer space." This resolution calls for reestablishment of a Conference on Disarmament (CD) Ad Hoc Committee on the prevention of an Arms race in Outer Space that existed in prior years.

F. Assessment.

1. No legal prohibition exists against developing and using space control weapons, whether employed in orbit, from an aircraft in flight, or from the Earth's surface.

2. Placing nuclear weapons in orbit and detonating a nuclear explosion in outer space are prohibited

3. The use of space control systems in peacetime would be subject to both the general principles of international law and to treaty obligations not to interfere with other nations' space systems and national technical means of verification.

4. These obligations would probably be suspended during international armed conflict, during which the parties' conduct would be governed primarily by the LOW.

5. US domestic policy on space control is unsetteled.

V. COMMUNICATIONS LAW

A. International Communications Law.

1. International communications law consists primarily of a number of bilateral and multilateral communications treaties.

   (a) The *International Telecommunications Convention of 1982 (ITC)* (the Nairobi Convention) is the most significant.

      [1] The ITC is the latest of a series of multilateral agreements which establish the International Telecomunication Union (ITU) (a specialized agency of the UN).

      [2] These agreements invest the ITU with the authority to formulate telegraph and telephone regulations, which become binding legal obligations upon formal acceptance by ITU member nations.

      [3] These agreements establish mutual legal obligations among parties, several of which are directly relevant to information operations.

   (b) **ITC Article 35** provides that all radio "stations, whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognized private operating agencies, which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations."

      (1) **Annex 2 to the ITC** defines "harmful interference" as "interference which endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radio communication service operating in accordance with the Radio Regulations."

(2) This provision would appear to restrict information operations techniques that involve the use of radio broadcasting, for example, jamming or "spoofing" of a radio navigation service.

(c) **However**, **ITC Article 38** provides a specific exemption for military transmissions: "members retain their entire freedom with regard to military radio installations of their army, naval and air forces."

(1) Article 38 further provides: "Nevertheless, these installations must, so far as possible, observe . . . the measures to be taken to prevent harmful interference, and the provisions of the Administrative Regulations concerning the types of emission and the frequencies to be used, according to the nature of the service performed by such installations."

(2) This provision indicates that military installations do not have carte blanche to interfere with civilian communications, but the phrase "so far as possible," read together with the specific exemption for military radio installations, provides considerable room for military forces' information operations.

(d) The ITC permits member nations to interfere with international communications in certain circumstances:

(1) Article 19 allows members to "stop the transmission of any private telegram which may appear dangerous to the security of the State or contrary to their laws, to public order or to decency, provided that they immediately notify the office of origin of the stoppage of any such telegram or part thereof, except when such notification may appear dangerous to the security of the state."

(2) Article 19 also permits members to "cut off any private telecommunications which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency."

(3) Article 20 reserves the right of members "to suspend the international telecommunications service for an indefinite time, either generally or only for certain relations and/or certain kinds of correspondence, outgoing, incoming or in transit, provided that it immediately notifies such action to each of the other members through the medium of the Secretary-General."

(e) It seems clear that ITC provisions apply primarily in peacetime. The treaty does not specifically state whether it applies during armed conflict.

(1) Ample precedent exists, however, in which nations have demonstrated conclusively that they regard international communications conventions as suspended between belligerents engaged in armed conflicts.

(2) Many parties to the ITC and other multilateral communications conventions will be neutrals in armed conflicts.

(3) Most ITC obligations will be considered suspended between the belligerents, but will remain in effect between each belligerent and the neutral parties, as well as among the neutral parties.

(f) The US has negotiated a number of bilateral communications agreements with nations where US military forces are stationed. Potential exists for such agreements to restrict or facilitate US military information operations.

B. Domestic Communications Law

ITC obligates each member nation to suppress acts by individuals or groups within its territory that interfere with the communications of other members.

(1) **47 USC § 502** implements this treaty obligation. It provides, "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition . . . made or imposed by any international radio or wire communications treaty or convention, or regulation annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

(2) Department of justice, Office of Legal Counsel issued a written opinion providing in effect that 47 USC § 502 does not apply to actions of the US military executing instructions of the President acting within his constitutional powers to conduct foreign policy and to serve as Commander-in-Chief.

C. Assessment.

1. Neither international nor domestic communications law presents any significant barrier to US military information operations.

2. International Communications law contains no direct and specific prohibition against the conduct of information operations by military forces, even in peacetime.

3. Established state practice evidences that nations regard telecommunications treaties as suspended among belligerents during international armed conflict.

4. Domestic communications laws do not prohibit properly authorized military information operations.

VI. IMPLICATIONS OF OTHER TREATIES

The US is party to literally thousands of multilateral and bilateral international agreements. The US State Department compiles a list of all such agreements entitled *Treaties in Force.* Based on sheer numbers alone, it seems likely that some of these agreements will affect particular information operations activities. This section attempts only to highlight certain kinds of "typical" agreements that are likely to contain obligations relevant to the conduct of information operations.

A. Mutual Legal Assistance Agreements.

Mutual legal assistance agreements obligate parties to gather and provide evidence located in its territory concerning litigation or criminal prosecutions that occur within the jurisdiction of another party requesting such assistance. The US is party to several dozen legal assistance agreements.

B. Extradition Agreements.

Extradition agreements obligate parties in certain circumstances to deliver persons accused of crime to the other party for criminal prosecution. The US is party to more than 100 bilateral extradition treaties.

C. The United Nations Convention on the Law of the Sea (UNCLOS).

1. US is a signatory, but not a party. The treaty is before the Senate for advice and consent.

2. Many provisions of this treaty are considered to express customary international law.

3. **UNCLOS Article 19** obligates vessels exercising the right of innocent passage through a nations' territorial sea not to engage in activities "prejudicial to the peace, good order, or security of the coastal State." Prejudicial activities listed in Article 19 include:
   (a) "-any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international embodied in the Charter of the United Nations

(b) -any act aimed at collecting information to the prejudice of the defence or security of the coastal State

(c) -any act of propaganda aimed at affecting the defence or security of the coastal State

(d) -any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State."

4. **UNCLOS Article 109** provides that all "States shall co-operate in the suppression of unauthorized broadcasting from the high seas" and defines unauthorized broadcasting as "the transmission of sound radio or television broadcasts from a ship or installation on the high seas intended for reception by the general public contrary to international regulations."

(a) "International regulations" refers primarily to the Nairobi Convention and the ITU's radio Regulations discussed in section V above.

5. UNCLOS Article 113 requires parties to adopt domestic criminal legislation punishing willful or culpably negligent damage to submarine cables belonging to other parties by ships or persons under their jurisdiction.

6. These UNCLOS provisions have the potential to affect only a narrow category of information operations, but must be considered at least during peacetime, to those to which they do apply.

7. State practice conclusively establishes that Article 19's regime governing innocent passage through territorial seas will be suspended between belligerents. Likewise Article 113's protections for submarine cables would be considered as suspended between belligerents.

D. Treaties on Civil Aviation.

1. The US is **party** to a number of treaties concerning civil aviation, the most significant of which is the 1944 *Convention on International Civil Aviation* (the Chicago Convention).

2. The **Chicago Convention** establishes the International Civil Aviation Organization (ICAO) and provides a basic legal framework for international civil aviation.

(a) Chicago Convention does not directly apply to state aircraft, except for the obligation stated in Article 3(d).

(b) **Article 3(d)** provides: 'The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft."

(c) **Article 28** provides that each party will provide navigation and communications services as agreed upon through ICAO procedures.

(d) **Article 37** provides that parties will comply with "international standards and recommended practices and procedures" on a variety of subjects including communications systems and air navigation aids.

3. The ICAO Council has adopted 18 technical Annexes to the Chicago Convention.

(a) **Annex 10**, Aeronautical Telecommunications, contains agreed provisions on aeronautical communications, navigation and surveillance. While military aircraft are not directly bound by these provisions, their obligation of "due regard" for the safety of civil aircraft generally includes an obligation not to interfere with these systems.

4. Chicago Convention **Article 89** addresses the Convention's application during armed conflict, providing, "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council."

(a) Many Convention provisions are inconsistent with a state of armed conflict, including the principle that aircraft not engaged in scheduled airline service have the right of free passage into or through the airspace of parties. These provisions would be considered suspended between the belligerents.

(b) However, other Convention provisions are not incompatible with a state of armed conflict and their obligations should not be considered as suspended. For example, Parties' obligations to carry out combatant activities with due regard for the safety of civil aviation.

F. Treaties on Diplomatic Relations.

1961 ***Vienna Convention on Diplomatic Relations.*** US is a party to this treaty which establishes obligations concerning the treatment of diplomatic personnel and premises.

1. Among the protections afforded a party's diplomatic mission in the territory of another state are the right to inviolability of:

   (a) **Article 2**: the premises of the mission;

   (b) **Article 24**: its "archives and documents";

   (c) **Article 30**: the private residences, papers, correspondence, and property cf diplomatic agents; and

   (d) **Article 27**: diplomatic communications. The treaty further provides that the mission may communicate with its government and other missions and consulates of its government by "all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State."

2. The treaty imposes certain duties on diplomatic missions.

   (a) **Article 41** provides that mission personnel must respect the laws and regulations of the receiving State, that they may not interfere in the receiving state's internal affairs, and that the "premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and receiving States."

   (b) **Article 45** provides that the duties of the receiving state continue in force even in the case of armed conflict between the parties, or if diplomatic relations are broken off between them, even though the staff of the mission is recalled.

3. Any information operations activity involving diplomatic premises, persons, archives, documents, or communications, either as an instrument or as a target of the operation, must take into account these international legal obligations.

F. Treaties of Friendship, Commerce, and Navigation.

1. These bilateral agreements provide reciprocal arrangements for tourism, trade and transportation between parties.

2. Most FCN agreements contain no specific provisions on telecommunications and constitute the archetype agreement likely regarded as suspended during armed conflict.

G. Status of Forces and Stationing Agreements.

When military forces of one nation are present in the territory of another with its consent, the countries customarily execute written agreements establishing the rights and obligations of the parties concerning the visiting parties.

1. **Stationing agreements** establish the host nation's consent to foreign troop's presence, including agreements on numbers, equipment, permissible activities and facilities for their use.

2. **Status of forces agreements (SOFAs)** address the allocation of various kinds of legal jurisdiction over the visiting forces.

   (a) US is a party to 103 SOFAs, most following the general pattern of the 1951 *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces* (NATO SOFA).

   (b) SOFAs are necessary because of an overlap of legal jurisdiction exercised by the **sending** and **receiving states**. The receiving state has jurisdiction over persons and activities within its territory, while the sending state has both the right and duty to exercise control over its armed forces.

   (c) SOFAs allocate criminal and civil court jurisdiction between the two states and exempt the visiting force from certain taxes, customs fees and procedures, immigration formalities, and most host nation licensing and inspection requirements.

   (d) SOFAs typically contain administrative claims procedures established for personal injuries and property damage caused by the visiting force.

(e) SOFAs contain provisions requiring visiting force members "respect" host nation laws.

3. SOFAs and stationing agreements contain provisions that must be taken into account if US military forces intend to engage in information operations while present in the territory of the receiving state. US forces must determine whether such agreements require host nation notification or consent.

(a) Such agreements frequently require that the US notify the host nation of any significant change in capabilities or uses of installations made available for US use.

(b) **Stationing agreements** often provide that US forces may install and use various communications equipment, but that such equipment must not interfere with host nation communications systems and must be in accordance with host nation laws and regulations. If equipment is to be used for information operations, US forces must determine whether contemplated activities are consistent with these obligations.

(1) Stationing agreements often authorize or obligate the visiting force to use the receiving state's military and civilian communications systems.

(2) US forces must consider the possibility that offensive information operations through host nation communications systems (if even permissible) may subject the host nation to countermeasures and acts of self-defense in peacetime, and may make them legitimate military targets during an armed conflict.

4. If a host nation discovers that its territory and facilities have been used without its knowledge as a base for US information operations of a nature that may tend to involve it against its will in a conflict or dispute, US diplomatic and military relations with the host nation are likely to suffer.

(a) While as a practical matter, CNA are difficult to identify, trace, and attribute, it will not always be impossible to do so.

(c) Accordingly, decisions to engage in information operations from its territory without the host nation's knowledge and consent, must be made at senior policy levels.

VII. FOREIGN DOMESTIC LAWS

A. Introduction.

1. Foreign domestic laws, like US criminal statutes addressing computer-related offenses, space activities, communications, and the protection of classified information, may have important implications for US forces' conduct of information operations.

2. The state of domestic laws dealing with high-tech misconduct varies enormously from country to country. This has important implications for US information operations because:

   (a) The state of a nation's domestic criminal law directly impacts the assistance that the nation's public officials can provide in suppressing certain behavior by persons operating in its territory; and

   (b) The state of the nation's domestic criminal law may have a significant effect on US information operations conducted in the nation's territory or involving communications through the nation's communications systems.

B. Cooperation in Investigations and Prosecutions.

1. Law enforcement officials may not prosecute an individual for conduct that is not defined as a crime in the applicable state.

2. Similarly, in most constitutional governments, law enforcement officials may conduct criminal investigations unless the alleged conduct constitutes a crime.

3. Domestic laws of some nations may permit the use of devices specifically designed to frustrate attempts to trace Internet communications to their source.

   (a) Devices such as anonymous remailers, strip of all information about the originator of a message, and make it possible for a computer "hacker" located anywhere— even in the US – to avoid identification by routing a message through the device.

(b) In this way, weaknesses in domestic law of one state may provide impunity to hackers everywhere. The weakest link therefore threatens law enforcement even in countries with robust and sophisticated laws.

C. Effect of Foreign Domestic Law on US Information Operators' Actions.

1. US forces must determine whether local laws prohibit contemplated information operations activities. These prohibitions are important because:

   (a) Individuals who order or execute prohibited activities might be subject to prosecution in a host nation criminal court; and

   (b) Commanders might feel obligated on a policy basis to refrain from issuing such an order.

2. US military members who order or execute acts in the course of their official duties overseas, that are a crime under host nation law, may be subject to prosecution in that nation's criminal courts.

   (a) Under many US SOFAs, official acts fall within the primary jurisdiction of the sending state (US), but only where such act is a crime under both US and host nation law, or only under US law.

   (b) The host nation has exclusive jurisdiction to prosecute where the alleged conduct constitutes an offense only under its law.

      (1) US has consistently maintained that foreign criminal prosecution of a US military member for performing acts lawful under US law in the execution of official duties would be intolerable.

(2) Theoretically, this problem might arise, for example, where a host nation had sophisticated computer crimes laws impacting various contemplated information operations, with no counterpart under US law, or where US statutes contained a specific statutory exemption or had been authoritatively interpreted not to apply to US military actions. Theoretically, therefore, the host nation would have exclusive jurisdiction to prosecute. However, the US may always contend that any host nation offense without a US counterpart (UCMJ or otherwise), is "service discrediting" under Article 134. But, this is not a basis to knowingly violate the host nation's law.

(3) In practice, such prosecutions are unlikely. US military authorities are unlikely to order certain information operations when they are aware that performance of such activities within the territory of a specific host nation, or that produce harmful effects within its territory, will subject US military personnel to possible host nation criminal prosecution.

(4) Where time and circumstances permit, Commanders contemplating information operations that may conflict with host nation law might choose to consult with host nation officials. Otherwise, Commanders may consider whether such activities should be conducted outside host nation territory, and in a manner that would not make use of or affect host nation communications systems.

VIII IMPLICATIONS OF ESPIONAGE LAW

A. Espionage under International Law.

1. Espionage may be defined as covert collection of intelligence about other nations.

2. Espionage is much narrower than "intelligence," much of which is collected via open source information, voluntary exchanges of information among nations, and technical means such as satellite imagery and signals intelligence that are generally accepted as legal by the international community.

3. Covert methods of collecting intelligence are in most cases designed to go undetected by their target, and if detected are designed to be unattributable to the sponsoring state. Nevertheless, discovery, attribution, and public disclosure occur fairly frequently.

B. Espionage during Armed Conflict.

1. The 1907 Hague Convention IV explicitly recognizes the lawfulness of intelligence collection activities.[49]

2. A "spy" is defined in the LOW as any person who, when acting clandestinely or under false pretenses, obtains or endeavors to obtain information in the area controlled by the belligerent, with the intention of communicating it to a hostile party.[50]

   (a) A spy may be a military member or a civilian, and his citizenship is irrelevant.

   (b) Military personnel captured while wearing their uniforms are not considered spies, even if they are collecting intelligence behind enemy lines.

   (c) Under the LOW, only persons captured while relying on protected civilian status or while wearing an enemy uniform are considered spies.

2. Information operations during an armed conflict will not raise any issue of spying under the LOW unless they involve the presence of individuals inside enemy-controlled territory who:

   (a) Are engaged in collecting information with the intent of communicating it to a hostile party, and

   (b) Are wearing civilian clothing or enemy uniforms.

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[49] *See* Hague Convention IV respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex (Regulations), arts. 24, 29-31, 36 Stat. 2295, 1 Bevans 643, *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 2d ed. 1989) at 48, 53-54.
[50] *See id*.

3. It seems unlikely that the notions of "electronic presence" or "virtual presence" will find their way into the LOW concept of spying because:

   (a) Individuals conducting intelligence collection through electronic means are generally not physically located in enemy controlled territory; and

   (b) No issue exists of acting under false pretenses by abusing protected civilian status or by wearing the enemy's uniform.

4. If captured in enemy territory, a spy may be punished under the domestic law of the captor.

C. Espionage in Peacetime.

1. The international legal system generally imposes no sanctions upon nations for acts of espionage, except for the political costs of public denunciation.

   (a) There have been many domestic criminal trials of peacetime spies in many countries, including the US.

   (b) However, there has been almost no activity concerning peacetime espionage within the international legal system except for public complaints and the expulsion of implicated diplomats.

2. Individuals (other than those with diplomatic status) caught spying, however, may be tried for whatever crimes their conduct may constitute under the victim nation's domestic law.

   (a) Such persons might be charged with espionage, unlawful entry into the nation's territory, or with a common crime such as burglary, murder, theft, bribery, obtaining unauthorized access to state secrets, or unauthorized computer intrusions.

   (b) A widespread practice exists of assigning intelligence operatives to embassy staff positions in which they enjoy diplomatic immunity from prosecution. The only remedy for an offended host nation is to declare such persons *personna non gratta*, which obligates the sending nation to remove them from the country.

3. How the world community will react to information operations activities is likely to depend on the practical consequences of the activity. Such activities may be regarded much as is espionage—not a major issue unless significant consequences can be demonstrated.

4. An information operator who may later come into the custody of a victim nation in which he engaged in information operations, might be subject to prosecution of that nation's criminal laws.

   (a) As a practical matter, however, the problems of detection and attribution of information operations at the national level are daunting; the likelihood of being able to prove in court that an individual engaged in certain information operations activity seems unlikely.

   (b) There exists within the US a division of labor between the intelligence community and the uniformed military forces concerning the conduct of "covert Action." The intelligence community generally conducts covert actions in peacetime that do not consist of traditional military activities.

D. Assessment.

1. Information operations activities are unlikely to fall within definition of spying in wartime, although a limited category of activities related to information operations may so qualify.

2. Information operations activities are more likely to fall within the category of peacetime espionage.

3. The reaction of the world community to information operations that do not generate widespread dramatic consequences is likely to be very similar to its reaction to espionage.

IX OBSERVATIONS

There seems to be little likelihood that the international legal system will soon generate a coherent body of "information operations" law.

The most useful approach to the international legal issues raised by information operations activities will continue to be to break out the separate elements and circumstances of particular planned activities and then make an informed judgment as to how existing international legal principles are likely to apply them.

In some areas, such as the law of war, existing legal principles can be applied with considerable confidence.

In other areas, such as the application of use of force principles to adopting an "active defense," it is much less clear where the international community will come out. The result will probably depend much more on the perceived equities of the situations in which the issues first arise in practice.

The growth of international law in these areas will be greatly influenced by what decision-makers say and do at those critical moments.

There are no "show stoppers" in international law for information operations as now contemplated by DOD. There are, however, many areas where legal uncertainties create significant risks, most of which can be considerably reduced by prudent planning.

Since so many of these potential issues are relatively novel, and since the actions taken and public positions announced by nations will strongly influence the development of international law in this area, the involvement of high-level policy officials in planning and executing information operations is much more important at present than is the case with more traditional military activities.

The Framework of peacetime International law

Relevant Multilateral Treaties

1. The International Telecommunications Convention of 1982 (Nairobi Convention).[51] This treaty establishes the International Telecommunications Union, which seek to enhance international interoperability and prevent states from interference with the electromagnetic spectrum. The International Frequency Regulation Board is a regulatory body that allocates the electromagnetic spectrum to prevent interference, but has no enforcement powers over violators.[52] Though some IO activities may violate treaty provisions, violations are more likely to be viewed as contractual violations rather than acts of war.

Art 2 of the Convention defines Harmful Interference as that which "endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radio communication service operating in accordance with the Radio Regulations."

a. Art. 19 allows states to "stop the transmission of any private telegram which may appear dangerous to the security of the state or contrary to their laws" and to "cut off any other private telecommunications which may appear dangerous to the security of the state or contrary to its laws, to public order or to decency."[53]

b. Art. 35, ¶ 158, requires that states and broadcasters must establish and maintain stations "in such a manner as not to cause **harmful interference** to the radio services or communications of other Members or of recognized private operating agencies, or of other duly authorized operating agencies which carry on radio service."

c. Art. 38, ¶ 164, states that even military installations must observe the measures taken to prevent unlawful interference, "so far as possible."

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[51] Senate Treaty 99-6, 99th Cong., 1st Sess. (1982)(entered into force for the US on 10 Jan. 1986)(*hereinafter* ITC).
[52] Sara Anne Hook, *Comment, Allocation of the Radio Spectrum: Is the Sky the Limit*?, 3 IND. INT'L & COMP. L. REV. 319, 325 (1993).
[53] ITC, *supra* note 8, Art. 19, ¶¶ 132-3.

2. The United Nations Convention on the Law of the Sea.[54]

a. Art. 17 allows ships of all States "the right of innocent passage through the territorial sea." This language mirrored the earlier provisions of Art. 14(2) of the Convention on the Territorial Sea and the Contiguous Zone.[55] Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal nation.

b. Art 19 lays out an "exhaustive list of activities that would render passage not innocent."[56] The listed restrictions include several with potential impact on IO activities:

(1) Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation.

(2) Any exercise or practice with weapons of any kind.

(3) Intelligence collection activities detrimental to the security of that coastal nation.

(4) Any act aimed at interfering with any system of communication of the coastal nation.

(5) Any act of propaganda aimed at affecting the defense or security of the coastal nation.

(6) Any other activity not having a direct bearing on passage.

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[54] U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (10 Dec. 1982).
[55] 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205 (29 Apr. 1958).
[56] CENTER FOR OCEANS LAW AND POLICY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 2.3.2.1 n.27 (15 Nov. 1997).

c. Art. 109 provides that all States shall cooperate in the "suppression of unauthorized broadcasting from the high seas" and defines such broadcasting as transmissions which would violate the Nairobi Convention.

3. Space Law. Orbital surveillance is legal and common.[57] Space is used for military communications, command and control, navigation, and weapons guidance. Many IO activities would clearly be permissible within the parameters of the "peaceful use" required by the relevant treaties.

a. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.[58]

(1) This Treaty mandates that all nations are free to explore and use Outer Space on a basis of equality.

(2) No state may place into earth orbit any objects carrying nuclear weapons or any other kind of "weapon of mass destruction."[59]

(3) Requires states to conduct activities in Outer Space in accordance with international law, to include the United Nations Charter. **NOTE**: This allows a wide range of IO activities which are characterized as either under the authority of the Security Council or are taken pursuant to the rights of individual or collective self defense contained in the Charter.

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[57] Glenn H. Reynolds, *International Space Law: Into the Twenty-First Century*, 25 VAND. J. TRANSNAT'L L. 225, 230 (1992).
[58] 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (27 Jan. 1967).
[59] *Id.* art 3(3).

b. The 1971 Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT)[60] and The 1976 Convention on the International Maritime Satellite Organization (INMARSAT)[61] require that space be used for "other than for military purposes" and "peaceful purposes" respectively. State practice has established that these conventions are relevant to IO only because they establish the principle of nondiscrimination among states that use satellites.[62]

IO versus The Proscriptive Threshold of the UN Charter

4. Preamble (emphasis added)➔

We the peoples of the United Nations, determined to
save succeeding generations from the scourge of war …
and for these ends
to *unite our strength to maintain international peace and security*,
and to ensure,
by the *acceptance of these principles* and the *institution of methods, that armed force shall not be used*, save in the common interest …

5. Article 1 of the Charter describes the purpose of the United Nations.

"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Prohibitions on the Use of Force.[63]

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[60] 23 U.S.T. 3813, T.I.A.S. No. 7532 (20 Aug. 1971), *reprinted in* 10 I.L.M. 909 (1971).
[61] 31 U.S.T. 1, T.I.A.S. No. 9605, 1143 U.N.T.S. 105 (3 Sept. 1976).
[62] LAWRENCE T. GREENBERG ET AL, INFORMATION WARFARE AND INTERNATIONAL LAW 22 (1998).
[63] *See also* G.A. Res. 2625, U.N. GAOR, 25th Sess. (1970); G.A. Res. 3314, U.N. GAOR, 29th Sess. (1974)(defining aggression as "the use of armed force by a state against the sovereignty, territorial integrity, or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations).

6. Article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

7. Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

8. Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[64] or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. Art.

Chapter VII Enforcement Authority of the Security Council

9. **Article 41** has particular relevance to the practice of IO: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include **complete or partial interruption** of economic relations and of rail, sea, air, postal, **telegraphic, radio, and other means of communication**, and the severance of diplomatic relations." (emphasis added)

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[64] *See generally Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 108, U.N. Doc. A/6014 (1965)(states may not "intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are condemned.")

10. **Article 42 is the Meat of Chapter VII**: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

VIII. INFORMATION OPERATIONS AND THE LAW OF WAR

Expansion of the Kinetic View of Warfare. Protocol I, Art. 49(1) defines "attacks" as "acts of violence against the adversary, whether in offence or defence."

1. Difficulty of Discrimination in offensive IO: Prot. I, Art. 48 mandates that Parties to the conflict distinguish between the civilian population and combatants at all times and between civilian objects and military objectives and direct operations only against military objectives.

2. **THE PROBLEM OF UNANTICIPATED CONSEQUENCES**:[65]

   a. Prot I, Art. 51(2) "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

   b. Hague IV, Art. 22 "The right of belligerents to adopt means of injuring the enemy is not unlimited."

   c. Prot I, Art. 57(2)(a)(ii), those who plan or decide upon attack shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event, to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects."

The Law of Neutrality[66]

[65] *See, e.g.*, Prot. I, Annex I, arts. 7-13.

3. As a general rule, all acts of hostility in neutral territory, including neutral lands, waters, and airspace are prohibited. In theory, using the wires or digital cables of a network associated with a neutral Party as a conduit for information operations would jeopardize that State's neutrality. If the neutral nation is unable or unwilling to affirmatively maintain its neutrality, the belligerents are allowed to take such measures as are necessary to negate the enemy efforts.[67]

4. Specific IO Related Prohibitions with Regard to Neutral States.

   a. Hague V, Art. 3 forbids a belligerent from erecting a "wireless telegraphy station or other apparatus for the purpose of communicating" on the territory of the neutral, and forbids belligerents from using "<u>any installation of this kind</u> established by them before the war … for purely military purposes." (emphasis added)

   b. Likewise, Art. 5 mandates that the neutral state prevent any belligerent from allowing belligerents to establish communications equipment on its territory, in its airspace, or in its waters.

5. Lawful Activities with IO Implications. Hague V, Art. 8 mandates that a neutral power is not required to "forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals"

Perfidy versus Lawful Deception

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[66] *See* Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, UST 540.
[67] CENTER FOR OCEANS LAW AND POLICY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.3 (15 Nov. 1997).

6. Prot. I, Art. 37 prohibits belligerents from killing, injuring, or capturing and adversary by perfidy. The essence of this offense lies in acts designed to gain advantage by falsely convincing the adversary that applicable rules of international law prevent engaging the target when in fact they do not.

7. Examples of Perfidy:

   a. The feigning of an intent to negotiate under a flag of truce or surrender.

   b. The feigning of an incapacitation by wounds or sickness.

   c. The feigning of noncombatant status.

   d. The feigning of protected status by the use of signs, or either UN or neutral parties.

8. IO applications:

   a. The use of enemy codes and signals is a time-honored means of tactical deception. However, misuse of distress signals or of signals exclusively reserved for the use of medical aircraft would be perfidious.[68]

   b. The use of deception measures to thwart precision guided munitions would be allowed, while falsely convincing the enemy not to attack a military target by electronic evidence that it was a hospital would be perfidious.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under

[68] Prot. I, Art. 38(1).

the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

IX. STATUTORY TOOLS FOR DEFENSIVE INFORMATION OPERATIONS

Telecommunications Statutes

1. Electronic Communications Privacy Act of 1986.[69] Enacted 18 U.S.C. §§ 2701-11, §§ 3121-27, § 1367, § 3117, § 2521, and made numerous amendments to provisions of the Communications Act of 1934.

   a. § 107 of the Act specifically limits its statutory application to law enforcement functions. "Nothing contained … constitutes authority for the conduct of any intelligence activity."

   b. Unlawful for "any person" to "intentionally intercept, use, or disclose or endeavor to intercept, use, or disclose any wire, oral, or electronic communication." 18 U.S.C. § 2511
   NOTE: Must distinguish between real-time interception which is governed by 18 U.S.C. § 2511 and stored communications such as E-Mail that is governed by 18 U.S.C. § 2703.

   c. 9 Statutory Exceptions (of which three are central to IO):

      (1) System Administrator "while engaged in any activity which is necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service." 18 U.S.C. § 2511(2)(a)(i)

      (2) Not unlawful "where such person is a party to the communication or one of the parties has given consent to such interception." 18 U.S.C. § 2511(2)(c)

[69] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

(3) Not unlawful pursuant to a court order directing such assistance signed by the authorizing judge or a certification in writing by a person designated in 18 U.S.C. § 2518(7) or the Attorney General that no court order is required by law and that all statutory requirements have been met. 18 U.S.C. § 2511(2)(a)(ii)

2. 18 U.S.C. § 2709 Counterintelligence access to telephone toll and transactional records.

a. The Director of the FBI or his designee in a position not lower than Deputy Assistant Director has authority to require a wire or electronic communication service provider to produce subscriber information and toll billing records information or electronic communication transactional records.

b. The FBI must certify that the information sought is relevant to an authorized foreign counterintelligence investigation and there are specific and articulable grounds to believe that the person or entity to whom the information pertains is a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801.

3. Computer Crimes[70]

a. 18 U.S.C. § 1029 prohibits a wide range of offenses dealing with knowingly and with intent to defraud using counterfeit access devices (a)(1); trafficking in or using one or more unauthorized access devices during a one year period (which can include unauthorized use of passwords)(a)(2); possessing 15 or more unauthorized or counterfeit access devices (a)(3); or a variety of other offenses dealing with the unlawful procurement of telecommunications services.

(1) Offenses are punishable by either 10 or 15 years confinement with fines.

[70] *See generally* Scott Charney and Kent Alexander *Computer Crime*, 45 EMORY L.J. 931 (1996).

(2) The term "access device" means any card, plate, account number, electronic serial number, personal identification number, or other means of account access that can be used to obtain money, goods, services, or initiate a transfer of funds. (e)(1)

(3) The term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

(4) 1998 amendments to the act broadened its coverage to include all telecommunications service as defined in section 3 of title I of the Communications Act of 1934[71] (*codified at* 47 U.S.C. § 153).

b. Computer Fraud and Abuse Act, (*codified as amended at* 18 U.S.C. § 1030). Eleven specified crimes, 6 felony offenses, 5 misdemeanor offenses.

(1) Computer Espionage (a)(1): knowing access or exceeding authorized access obtaining information and willfully communicating, delivering, transmitting to any person not authorized to receive it with reason to believe that the information could be used to the injury of the United States.

(2) Financial Records (a)(2): intentional access without authorization or exceeding authorized access to information from any departement of the US, computer records of financial institutions, or information from a protected computer involved in interstate commerce.

(3) Government Computers (a)(3): intentional access to any nonpublic computer exclusively for the use of the United States or affecting the United States use of the system.

(4) Intent to Defraud (a)(4): knowingly and with intent to defraud accessing a protected computer.

[71] 48 Stat. 1064 , *codified as amended* 47 U.S.C. 151 – 614.

(5) Unlawful Computer Trespassers (a)(5): knowingly causes the transmission of a program, information code, or command and as a result of such conduct, intentionally causes damage to a protected computer.

(6) Password Trafficking (a)(6): knowingly and with intent to defraud traffics (as defined in 18 U.S.C. § 1029) in any password or similar information in any government computer, or in a computer which affects interstate commerce.

(7) Extortion (a)(7): knowingly and with intent to defraud transmits any communication containing a threat to cause damage to a protected computer.

Information Offenses

4. Gathering, Transmitting, or Losing Defense Information, 18 U.S.C. § 793. The information need not be classified to constitute a violation of this statute if the information is not generally accessible to the public.[72] The accused must have had an intent or reason to believe that the information "is to be used" to the injury of the United States.

5. Gathering or Delivering Defense Information to Aid Foreign Government. 18 U.S.C. 794

6. 18 U.S.C. § 798 Disclosure of Classified Information which is "for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution."[73]

7. The Economic Espionage Act of 1996.

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[72] United States v Allen, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 309 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992).

[73] *See also* 50 U.S.C. § 783, Communication of Classified Information by Government Officer or Employee.

a. 18 U.S.C. § 1831 prohibits knowing theft, appropriation, duplication, communication, receipt, purchase, or possession of a trade secret intending or knowing that it will benefit any foreign government, instrumentality, or agent.

b. 18 U.S.C. § 1832 prohibits theft of trade secrets without requiring the intent to benefit a foreign government, instrumentality, or agent.

8. Intelligence Identities Protection Act of 1982 (*codified at* 50 U.S.C. §421-26).

a. Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $ 50,000 or imprisoned not more than ten years, or both.

b. Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $ 15,000 or imprisoned not more than three years, or both.

Information Operations Warrants for Law Enforcement Purposes.

9. Searching Records and Databases

a. 18 U.S.C. § 2703(c): with subpoena the government can obtain the name, address, local and long distance telephone billing records, telephone number or other subscriber information. The government entity receiving such information is not required to provide notice to the consumer.

b. 18 U.S.C. § 2703(d) allows a court to issue an order for disclosure if the government offers specific and articulable facts that there are reasonable grounds to believe that the contents of electronic communication or the records within the service provider's database or other information sought are relevant and material to an ongoing criminal investigation.

(1) The service provider may move to quash or modify the order if the request is unusually voluminous or would cause an undue burden on the carrier.

(2) § 270 is the mechanism for obtaining subscriber connection logs, sending IP addresses, receiving IP addresses, times of access and log on, content of saved communications, and more.

10. Interception of Wire, Oral, and Electronic Communications.

a. Within DoD, the relevant guidance is contained in DoD.D 5505.9 Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes, (20 Apr. 1995)[74] and DoD 0-5505.9-M Procedures for Wire, Electronic, and Oral Interceptions for Law Enforcement Purposes (May 1995).
NOTE THE IMPACT OF THE COMMUNICATIONS ASSISTANCE FOR LAW ENFORCEMENT ACT: The procedures for authorizing a court order for electronic surveillance fit hand in glove with the legal obligation for telecommunications carriers to maintain a technical capability for "expeditiously isolating and enabling" the government to obtain the information sought by court order.[75]

[74] <http://web7.whs.osd.mil/pdf/d55059p.pdf>
[75] Pub. L. No. 103-414, 108 Stat. 4279, *codified at* 47 U.S.C. 1001-21.

b. 18 U.S.C. § 2518 implements a higher standard than normal Fourth Amendment analysis. The DoD guidance implements the Title III standards.

c. The Process to Obtain an Intercept:

(1) The Officer prepares a detailed affidavit showing probable cause that the target is used to facilitate specific, serious, indictable crime. 18 U.S.C. § 2516 prescribes the list of offenses for which intercept authority can be sought.

(2) The US Attorney prepares an application for a Court Order based on the affidavit. The application must contain a full explanation of the information required by statute. *See* 18 U.S.C. § 2518(1).

(3) The Attorney General, Deputy Attorney General, or other designated individual must approve the application.

(4) The judge authorized to issue a court order for electronic surveillance will conduct an *ex parte* proceeding, and issue an order detailing the information required by statute. 18 U.S.C. 2518(4).

The Foreign Intelligence Surveillance Act of 1978[76] (FISA)

11. FISA revolves around the core definition of **FOREIGN INTELLIGENCE INFORMATION**; Information that relates to the ability of the US to protect against the following: Attack or hostile act of a foreign power or agent, Sabotage or international terrorism, Clandestine intelligence activities by an intelligence network or service of a foreign power or by an agent, or Information on foreign power or foreign territory relative and necessary to the national defense and security of the U.S. or the foreign affairs of the U.S.

[76] Pub. L. No. 95-511, 92 Stat. 1783 (1978), *codified as amended* 50 U.S.C. §§ 1801-29. *See also* 18 U.S.C. § 2232 regarding prohibitions on warning an individual of surveillance authorized under the Foreign Intelligence Surveillance Act.

12. FISA is the statutory mechanism for obtaining two major categories of information related to defensive IO:

a. Acquisition of a "nonpublic communication" by electronic means[77] without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic communication, without the consent of a person who is visibly present at the place of the communication.

b. Physical searches seeking to obtain foreign intelligence information.

13. 50 U.S.C. § 1804 outlines the requirements for the order sought from the FISA court.

a. The identity of the federal officer making the application.[78]

b. A statement showing that the President has delegated authority to the Attorney General to approve such applications.

c. The application must have been approved by the Attorney General.

d. The identity or description of the target must be given.

e. Facts and circumstances relied on by the applicant supporting the belief that the target is a foreign power or the agent of a foreign power and each of the facilities or places at which the warrant is directed is being used or will be used by the foreign power or the agent of a foreign power.

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[77] Such means include wiretaps of phones, teleprinter, facsimile, computers, computer modems, radio intercepts, microwave eavesdropping,

[78] *See* Exec. Order 12,139, 44 Fed. Reg. 30,311 (1979), *reprinted in* 50 U.S.C. § 1803 nt, for a list of federal officals authorized to apply for warrants under FISA.

f. An application must state the minimization procedures to be used.

g. A detailed description of the nature of the information sought and the communications to be monitored also must be included.

h. The Assistant to the President for National Security, or his designee, must certify that the information is foreign intelligence information, and is obtainable by no other means or investigative techniques.

i. Finally, the application:

(1) Must state the past history of applications on the target.

(2) Whether physical entry is necessary to accomplish the electronic surveillance.

(3) The types of devices to be used, the way they will be installed.

(4) The time for which the surveillance is to be monitored. Up to ninety days. (For an official foreign power, it can be for a year). *See* § 1805(d)(1).

X. COMSEC MONITORING.

This is a clearly defined, bright line exception to the general limitations on content monitoring. § 107(b)(1) of the Electronic Communications Privacy Act specifically allows activities intended to "intercept encrypted or other official communications of United States executive branch entities or United States Government contractors for communications security purposes."

1. NSA is the proponent under National Telecommunications and Information Systems Security Directive (NTISS) Directive No. 600, Communications Security Monitoring.

2. COMSEC is one of the tools available to fulfill the DoD mandate to accredit automated information systems and ensure "compliance with automated information systems security requirements."[79]

Implemented within the Army by the newly revised AR 380-53.[80] Information Systems Security Monitoring will be conducted only in support of security objectives. Information Systems Security Monitoring will not be performed to support law enforcement or criminal or counterintelligence investigations. The results of Information Systems Security Monitoring shall not be used to produce foreign intelligence or counterintelligence, as defined in Executive Order 12333.

3. Assigns Functional Responsibility for Specific Parts of the COMSEC Program.

a. Assigns the Judge Advocate General responsibility for coordinating issues with the Office of the General Counsel, ensuring compliance with public laws and applicable regulations, and reviewing all requests to conduct Information Systems Security Monitoring exercises based upon a MACOM request to the DCSINT.

b. CG, U.S. Army Intelligence and Security Command provides the Army support to the Joint COMSEC Monitoring Activity, through the Director, Land Information Warfare Activity (LIWA), develops and disseminates techniques for conducting security penetration and testing.

c. CG, U.S. Army Training and Doctrine Command develops and fields an exportable training package to address the requirements of para. 3-3. The regulation requires that persons conducting Information Systems Monitoring receive formal training in the procedures outlined in AR 380-53, the provisions of AR 381-10, the provisions of AR 381-12, para. 3-1, the provisions of AR 190-53, and the provisions of applicable Federal laws (18 U.S.C. §§ 2510, etc.)

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[79] U.S. DEP'T OF DEFENSE, DIR. 5200.28, SECURITY REQUIREMENTS FOR AUTOMATED INFORMATION SYSTEMS (21 Mar. 1998).
[80] U.S. DEP'T OF ARMY, FIELD MANUAL 380-53, INFORMATION SYSTEMS SECURITY MONITORING (29 Apr. 1998). <http://www.acert.belvoir.army.mil/ar380_53.pdf>

d. MACOM Commanders will implement procedures to ensure all personnel to include contractors are aware of the provisions of AR 380-53. MACOM commanders will submit certification to the DCSINT on an annual basis of the notification procedures followed within the command.

4. Prerequisites for Information Systems Monitoring.

a. **NOTIFICATION**: Users of official DOD telecommunications will be given notice that-(1) Passing classified information over nonsecure DOD telecommunications systems, other than protected distribution systems or automated information systems accredited for classified processing,is prohibited.(2) Official DOD telecommunications systems are subject to Information Systems Security Monitoring at all times.(3) Use of official DOD telecommunications systems constitutes consent by the user to Information Systems Security Monitoring at any time.

b. **CERTIFICATION:** The Office of the General Counsel has certified the adequacy of the notification procedures in effect, and the OGC and TJAG have given favorable legal review of any proposed Information Systems Security Monitoring that is not based on a MACOM request. *See* para. 2-4 for a specific list of information required prior to certification.

c. **AUTHORIZATION:** The Deputy Chief of Staff for Intelligence has authorized Information Systems Security Monitoring to be conducted within the MACOM involved.

5. Notification Guidance for Automated Information Systems

a. Mandatory forms of notification.

(1) Telephone or communications directory notice.

(2) DD Form 2056. (a) The DD Form 2056 will be applied to the front of all tele-phones(except tactical telephones) within the U.S. Army.(b) The DD Form 2056 will also be applied to the front of all Secure Telephone Units (STUs); however the banner at the top ofthe form containing the words DO NOT DISCUSS CLASSIFIED INFORMATION will be removed or obliterated.(c) The DD Form 2056 will be applied to the front of all datafacsimile devices except those that are an internal part of another device (for example, a facsimile card in a personal computer). The DD Form 2056 will also be applied to the front of all secure datafacsimile devices, but the words DO NOT DISCUSS CLASSIFIEDINFORMATION will be removed.

(3) Computers log-on banner notice. All computers attached or accessible through Government-owned or -leased telecommunications networks must display the banner below. The banner will be placed on the computer in such a way that the user must press a key to get beyond it, thereby demonstrating his or her acceptance of its provisions.(a) The warning banner is not required on computers that are an integral portion of a tactical weapons system, electronic personnel access control system, or intrusion detection system and stand-alone computers not connected to a telecommunications network.(b) Security warning banners for publicly accessible, nonrestricted U.S. Army World Wide Web sites will be in accordance with the current provisions of HQDA, DISC4, Web-site management policy.

ATTENTION! THIS IS A DOD COMPUTER SYSTEM. BEFORE PROCESSING CLASSIFIED INFORMATION , CHECK THE SECURITY ACCREDITATION LEVEL OF THIS SYSTEM. DO NOT PROCESS, STORE, OR TRANSMIT INFORMATION CLASSIFIED ABOVE THE ACCREDITATION LEVEL OF THIS SYSTEM. THIS COMPUTERSYSTEM, INCLUDING ALL RELATED EQUIPMENT, NETWORKS AND NETWORK DEVICES (INCLUDES INTERNET ACCESS) ARE PROVIDED ONLY FOR AUTHORIZED U.S. GOVERNMENT USE. DOD COMPUTER SYSTEMS MAYBE MONITORED FOR ALL LAWFUL PURPOSES, INCLUDINGTO ENSURE THAT THEIR USE IS AUTHORIZED, FOR MANAGEMENTOF THE SYSTEM, TO FACILITATE PROTECTION AGAINST UNAUTHORIZED ACCESS, AND TO VERIFY SECURITY PROCEDURES, SURVIVABILITY, AND OPERATIONAL SECURITY. MONITORING INCLUDES, BUT IS NOT LIMITED TO, ACTIVE ATTACKS BY

AUTHORIZED DOD ENTITIES TO TEST OR VERIFY THE SECURITY OF THIS SYSTE M. DURING MONITORING, INFORMATION MAY BE EXAMINED, RECORDED, COPIED, AND USED FOR AUTHORIZED PURPOSES. ALL INFORMATION, INCLUDING PERSONAL INFORMATION, PLACED ON OR SENT OVER THIS SYSTEM MAY BE MONITORED. USE OF THIS DOD COMPUTER SYSTEM, AUTHORIZED OR UNAUTHORIZED, CONSTITUTES CONSENT TO MONITORIN G. UNAUTHORIZED USE OF THIS DOD COMPUTER SYSTEM MAY SUBJECT YOU TO CRIMINAL PROSECUTION. EVIDENCE OF UNAUTHORIZED USE COLLECTED DURING MONITORING MAY BE USED FOR ADMINISTRATIVE, CRIMINAL, OR OTHER ADVERSE ACTION. USE OF THIS SYSTEM CONSTITUTES CONSENT TO MONITORING FOR ALL LAWFUL PURPOSES.

(4) Periodic notices. Periodic notices will be published at least quarterly in command bulletins.

(5) Initial briefing. Initial briefings to all new personnel will include informing personnel that their use of telecommunications systems constitutes consent to Information Systems Security Monitoring.

b. Optional forms of notification.

(1) Periodic briefings and training classes for all assignedersonnel.

(2) Special memorandums from the commander or responsible senior staff officer to all personnel.

(3) Local notification and consent procedures.

(4) Statements in standing operating procedures (SOPs), signal operation instructions (SOIs), and similar publications or documents.

(5) The following statement may be placed on facsimile coversheets:

ATTENTION! DO NOT PROCESS, STORE, OR TRANSMIT CLASSIFIED INFORMATION ON UNSECURED TELECOMMUNICATIONS

SYSTEMS. OFFICIAL DOD TELECOMMUNICATIONS SYSTEMS, INCLUDING FACSIMILE MACHINES, ARE SUBJECT TO MONITORING FOR INFORMATION SYSTEMS SECURITY MONITORING AT ALL TIMES. USE OF THIS SYSTEM CONSTITUTES CONSENT TO INFOR M ATION SYSTEMS SECURITY MONITORING.

6. Use of Information Acquired During Information Systems Security Monitoring. See para. 2-8(c)(3) for required procedures if materials are required as evidence.

(1) The results of Information Systems Security Monitoring may not be used in a criminal prosecution without prior consultation with the OGC and TJAG. (para. 2-8(5)).

(2) Information obtained through Information Systems Security Monitoring may be used in connection with disciplinary or administrative action against Department of the Army personnel for knowing, willful, or negligent actions that result in the unauthorized disclosure of classified information (*see* AR 380-5, paras 14-101a n d 14 - 102). In this case, the Information Systems Security Monitoring element is authorized to release names, or recorded media, of the telecommunications involved to the supported commander or designated representative for use as evidence. Procedures will be strictly adhered to as follows:

Note the specific requirement in the regulation for JA coordination. Para. 2-8(a)(1)

(a) **The supported commander, after having consulted with the servicing judge advocate (JA), will provide the Information Systems Security Monitoring element with a written request, specifically identifying the telecommunications messages or communications required. The request will identify the servicing JA consulted**.

(b) The Information Systems Security Monitoring element will obtain a signed receipt from the supported commander or designated representative for the requested materials. The receipt will include a statement that the commander or representative is familiar with and will comply with the security requirements and privacy restrictions applicable to the material.

(c) The Information Systems Security Monitoring element will immediately notify its chain of command that the material has been requested and

(d) The Information Systems Security Monitoring unit commander will notify HQDA (DAMI-CHI), in writing, within 5 working days of providing the material to the supported command.

(3) Information may be obtained incidental to an authorized Information Systems Security Monitoring mission that relates directly to a serious crime such as sabotage or threats or plans to commit offenses that threaten a life or could cause significant damage to or loss of Government property (this includes data on Government AIS). This information will be reported immediately by the senior member of the Information Systems Security Monitoring team present when the information is discovered, as follows:

(a) Crimes or incidents identified in AR 381-12, at chapter 3, or AR 381-20, paragraph 4-2, will be reported under the provisions of AR 381-12.

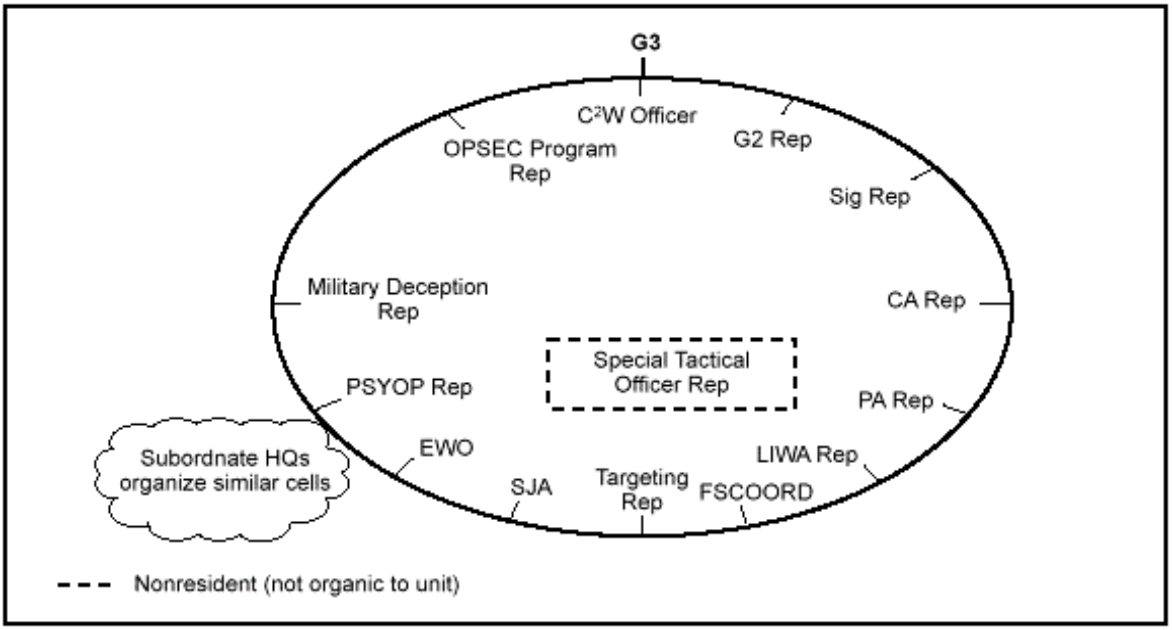
(b) Questionable activity and information relating to violations of Federal law as addressed in procedure 15 of AR 381-10 will be reported under the provisions of AR 381-10.

(c) When evaluating or assessing the security of U.S. Army AIS, Information Systems Security Monitors may detect computer anomalies that could potentially be unauthorized intrusions into Army AIS . When Information Systems Security Monitors detect such anomalies, they must contact the system administrator and ACERT[81] immediately. The system administrator will then follow the procedures of AR 380-19 by taking measures to ascertain that the anomaly is in fact an unauthorized intrusion, notifying counterintelligence (CI) and criminal investigation division (CID) so that the offices may conduct an investigation of the incident.

(d) Information Systems Security Monitors should not support the process of determining if the investigation is properly a law enforcement or intelligence matter, and must discontinue monitoring the suspected intrusion as soon as the system administrator or ACERT has interceded In no case may the Information System Security Monitors continue monitoring the anomaly for more than 24 hours. Data pertaining to the anomaly or suspected intrusion recorded during the 24-hour period will not be accessed until the appropriate legal authorization is obtained to further investigate the activity.

XI. CONCLUSIONS

[81] The Army Computer Emergency Response Team (ACERT) conducts command and control protect operations in support of the Army to ensure the availability, integrity, and confidentiality of the information and information systems used in planning, directing, coordinating, and controlling forces in the accomplishment of the mission across the full spectrum of support to military operations. *See* < http://www.acert.belvoir.army.mil/> Contact at COMM 1-888-203-6332/ DSN 235-1113.


G3
C²W Officer
OPSEC Program Rep
G2 Rep
Sig Rep
Military Deception Rep
CA Rep
Special Tactical Officer Rep
PSYOP Rep
PA Rep
Subordnate HQs organize similar cells
EWO
LIWA Rep
SJA
Targeting Rep
FSCOORD
Nonresident (not organic to unit)

CHAPTER 51

LEGAL AUTOMATION ARMY WIDE SYSTEMS (LAAWS)/ JAGCNET ORIENTATION

(Materials will be distributed in class.)