

## The New FLIPL: A Primer for Practitioners

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### I. Introduction

You are a hard-charging judge advocate at Fort Hooah who was recently moved from the legal assistance office into a brigade trial counsel slot because the Staff Judge Advocate wants to develop you into a broadly skilled judge advocate. Your experience with Financial Liability Investigations of Property Loss (FLIPL) is minimal—you saw one client with a FLIPL issue during your six months in legal assistance and your best advice to her was to “just pay for it so they will leave you alone.” Today after physical training (PT) with your new brigade, Major (MAJ) Smith slaps you on the back and says, “Nice run, Judge.” As you are walking back to your office feeling good about yourself, MAJ Smith calls out to you, “Hey, by the way, Judge, I need to swing by your office today to talk legal business. The battalion commander just appointed me as a FLIPL investigating officer and I need to get spun up fast. I know your boss, MAJ Jones (the brigade judge advocate (BJA)), is TDY all week so I’ll just talk to you. See you soon!” The pride you momentarily had for smoking everyone on the run slowly dissipates because you know absolutely nothing about FLIPLs and you do not want to disappoint MAJ Smith or your BJA. You think to yourself, “Man, I wouldn’t be in this jam right now if I only had paid more attention during the Judge Advocate Officer Basic Course.”

New judge advocates must understand the legal issues surrounding a FLIPL and how those issues effect Soldiers found financially liable for lost, damaged, destroyed, or stolen property. Although property accountability and the FLIPL process is not a legal function per se, the ramifications and consequences for improperly conducted FLIPLs have far reaching impacts on both commanders and Soldiers entrusted with Government property.<sup>1</sup> Army Regulation (AR) 735-5 requires heavy judge advocate involvement to ensure FLIPLs are conducted efficiently, effectively, and in compliance with the applicable legal standards.<sup>2</sup> A thorough understanding of the process will make judge advocates an important part of the investigative and review team, which improves the overall value of the

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<sup>1</sup> Gordon Block, *Fort Drum Aviation Unit Released from Seven-day Lockdown Amid Outcry from Families*, WATERTOWN DAILY TIMES, Nov. 26, 2013, at A1 (Soldiers of the 277th Aviation Support Battalion were confined in a seven-day lockdown in a cold hangar during search for missing inventory.). *Id.*

<sup>2</sup> U.S. DEP’T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICIES (10 May 2013) (RAR 22 Aug. 2013) [hereinafter AR 735-5].

property-accountability process.

This primer briefly discusses the changes to the property accountability process over the last ten years. It also provides a detailed guide for judge advocates advising FLIPL Financial Liability Officers (FLOs) as well as examines the key legal issues both the judge advocate and FLO must understand before beginning the investigation. Moreover, this primer details the investigation procedures and the post-investigation process for lost property.

### II. Background, Applicability, and Recent Changes

Army Regulation 735-5 contains the Army’s policies and procedures for Government property accountability. It applies to the Active Army, Army National Guard, and the Army Reserve.<sup>3</sup> This regulation, coupled with AR 710-2, provides comprehensive guidance for accounting for Government property.<sup>4</sup> Within this overall framework for property accountability, “a FLIPL is used to document the circumstances concerning the loss, damage, or destruction (LDD) of Government property and serves as, or supports a voucher for adjusting the property from accountable records.”<sup>5</sup> Judge advocates must realize that the FLIPL is only a small part of AR 735-5, while understanding the interplay between the FLIPL and the property accountability system as a whole.

The most recent version of AR 735-5 was published as a Rapid Action Revision (RAR) on 22 August 2013. Prior to this change, Army guidance on how to conduct FLIPLs had not been updated since 28 February 2005.<sup>6</sup> “Old School” Soldiers may even use the term “Report of Survey” to describe the property accountability system.<sup>7</sup> Regardless, the key for practicing judge advocates to understand before advising a FLO is that they must utilize the recent regulatory guidance and realize that there were important changes incorporated in the 2013 version.<sup>8</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP’T OF ARMY, REG. 710-2, SUPPLY POLICY BELOW THE NATIONAL LEVEL (28 Mar. 2008) [hereinafter AR 710-2].

<sup>5</sup> THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK (June 2013) [hereinafter COMMANDER’S LEGAL HANDBOOK].

<sup>6</sup> AR 735-5, *supra* note 2.

<sup>7</sup> *Id.* para. 13-1 (“The financial liability investigation of property loss proscribed by DOD 7000.14-R replaces the report of survey system.”).

<sup>8</sup> *Id.* para. 13-17.

### III. The Investigation

When government property is deemed lost, damaged, destroyed, or stolen, commanders must ensure that administrative action is taken to determine what happened to the property, who is responsible for the loss, the amount of loss to the Government, and that accountable records are adjusted accordingly.<sup>9</sup> The two most common forms used in the determination of Soldier accountability are the Department of Defense (DD) Form 362 Statement of Charges<sup>10</sup> and the DD Form 200, Financial Liability Investigation of Property Loss.<sup>11</sup> Most often, judge advocates are not involved in completing the DD Form 200 and the FLO likely will have this document in hand prior to the initial legal briefing from the judge advocate.<sup>12</sup>

#### A. Pre-Investigation Procedures

Going back to our hypothetical, it is 0900 and MAJ Smith storms in your office as expected. He has two pieces of paper with him: the first is the DD Form 200,<sup>13</sup> the second

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<sup>9</sup> *Id.* para. 12-1c. Judge advocates must be aware that “[a]ll Army property, except real property, is classified for property accounting purposes as expendable, durable, or nonexpendable.” *Id.* para. 7-1. “Army property that becomes lost, damaged, destroyed, or stolen through causes of other than fair wear and tear will be accounted for per paragraph 12-1 of this regulation.” *Id.* If property is suspected as lost, damaged, destroyed, or stolen, units will typically account for the property using the DD Form 200. *Id.* para. 12-1c(1)(c). The DD Form 200 is populated and processed according to chapter 13. *Id.* para. 13-2.

<sup>10</sup> *Id.* para. 12-3. The DD Form 362 is used when the individual admits to liability and offers to pay for the Government property. “If a military member, the charge does not exceed monthly basic pay, or if a civilian, does not exceed 1/12th an annual salary.” *Id.*

<sup>11</sup> *Id.* para. 13-2. The DD Form 200 is the document used to begin the FLIPL process.

A DD Form 200 documents the circumstances concerning the loss or damage of Government property and serves as, or supports a voucher for adjusting the property from accountable records. It also documents a charge of financial liability assessed against an individual or entity, or provides for the relief from financial liability.

*Id.*

<sup>12</sup> Telephone Interview with Lieutenant Colonel Robert Barnsby, Chief, Admin. Law, XVIII Airborne Corps, Fort Bragg, N.C. (Nov. 11, 2013) [hereinafter Barnsby Telephone Interview].

<sup>13</sup> AR 735-5, *supra* note 2, para. 13-9b.

When it becomes known that there will be a requirement to prepare a DD Form 200 to investigate the loss of Government property, a DA Form 7531 (Checklist and Tracking Document for Financial Liability Investigations of Property Loss) will be prepared with elements in part A completed as events occur. When the DD Form 200 is prepared, it will be attached to DA Form 7531, which will be used as a checklist and for tracking events as they occur.

is a copy of his appointment orders.<sup>14</sup> You think to yourself, “Where did these come from?”

Normally, the initiator of the DD Form 200 is the property hand receipt holder, unit commander, accountable officer, or the individual with the most knowledge of the loss, damage, destruction, or theft.<sup>15</sup> Most often judge advocates are not involved in completing the DD Form 200. However, a good practice is to have a system where the unit S-4 works with the judge advocate to ensure the DD Form 200 is completed with accuracy. It is critical that the initiator complete the form in sufficient detail as to allow the appointing authority the option of relieving an individual from financial liability, assessing financial liability against an individual, or appointing a FLO.<sup>16</sup> For the Active Army,

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*Id.*

<sup>14</sup> *See id.* fig.13-12 (sample memorandum for appointment of a FLO). In practice, judge advocates and unit S-4s typically follow this sample memorandum. However, they may wish to tailor the memorandum for their specific unit and insert more guidance as necessary.

<sup>15</sup> *Id.* para. 13-7.

The three types of accountable officers are – (1) a transportation officer, who is accountable for property entrusted to them for shipment. (2) a stock record officer, who is accountable for supplies being held for issue from time of receipt until issued, shipped, or dropped from accountability. (3) a PBO, who is accountable for property at the using unit level on receipt and until subsequently turned in, used (consumed) for authorized purposes, or dropped from accountability. (Hand receipt holders are not accountable officers.).

*Id.* para. 2-10. Typically, the initiator of the DD Form 200 is the company commander or unit S-4. *See* Barnsby Telephone Interview, *supra* note 12.

<sup>16</sup> AR 735-5, *supra* note 2, para. 13-10. For example, assume that a squad leader conducts an equipment inspection of her Soldiers prior to a mission. The squad leader determines that Private (PV2) Moore does not have his Universal Sleeping Bag and questions PV2 Moore about the gear. Private Moore explains that he took the Universal Sleeping Bag on a recent camping trip with his buddies and that someone probably stole it while he was fishing. Upon receiving this information, the squad leader reports the missing equipment to the unit S-4. The S-4 initiates a DD Form 200 and completes blocks 1 thru 11. Block 9 should recite the complete circumstances of the suspected loss of Government property.

Block 9 will contain a description of the events leading to the loss or damage of Government property, with an explanation of how it happened, when it happened, and who was involved, omitting personal opinions and conjectures. The description will provide enough detail to determine the proximate cause of the loss or damage if possible. . . . The initiator of a DD Form 200 must prepare a thorough document in recognition that an investigation by a financial liability officer represents a significant expenditure of time and effort. It may be necessary for the initiator to obtain statements from individuals who were witnesses or who have knowledge of the incident resulting in the loss.

*Id.* para. 13-10b(5).

the DD Form 200 must be initiated and presented to the appointing authority no later than fifteen calendar days after discovery of the loss, damage, destruction, or theft.<sup>17</sup> When reviewing the DD Form 200, adherence to the timeline and compliance with regulatory guidance by the appointing authority are issues to be on the lookout for.<sup>18</sup>

Judge advocates must also check the DD Form 200 to ensure that both the appointing authority and the FLO are proper.<sup>19</sup> By regulation, the appointing authority is an officer designated by the approving authority with responsibility for appointing FLOs.<sup>20</sup> The appointing authority must be at least a lieutenant colonel (LTC) or major filling a LTC billet.<sup>21</sup> On the other hand, the FLO need only be an Army officer or noncommissioned officer in the rank of Sergeant First Class (SFC) or above and must be senior to the individual being investigated.<sup>22</sup> The key takeaway is that the FLO must outrank the individual subject to potential financial liability.<sup>23</sup> In most instances, the

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<sup>17</sup> *Id.* para. 13-8. Notably, there is no punitive provision contained in the regulation for exceeding the fifteen calendar day timeline. In practice, units will often fail to initiate the DD Form 200 within fifteen calendar days. The practical effect is that an individual recommended for financial liability will have equitable grounds in his rebuttal statement to argue for relief of financial liability should the unit greatly exceed the 15 calendar day threshold. See Barnsby Telephone Interview, *supra* note 12.

<sup>18</sup> The judge advocate should review the DD Form 200 to ensure blocks 1 thru 13 are filled out correctly. In the example provided in note 15, a likely scenario would be that the responsible officer (typically the unit commander or S-4), would check “yes” in block 12a; in block 12b he would request an investigation to determine whether PV2 Moore was negligent in losing his Universal Sleeping Bag. He would also explain his rationale for determining why an investigation is warranted. In block 13, the appointing authority “initially makes a decision based upon available evidence whether to appoint a financial liability investigating officer by choosing the correct block in 13c. If an investigating officer is required by the circumstances, the appointing authority completes a memorandum appointing the officer to investigate the circumstances surrounding the loss of government property.” AR 735-5, *supra* note 2, para. 13-10d(13). Again, as noted in footnote 16, there is no punitive provision for incorrectly completing the DD Form 200 or failing to follow regulatory guidance. However, “[a] legal advisor will provide a written opinion as to the legal sufficiency of the [FLIPL.]” *Id.* para. 13-39b. Importantly, “[t]he approving authority will ensure corrective actions are taken before taking final action to assess financial liability.” *Id.* In practice, these deficiencies could significantly delay processing the investigation or may result in an individual being relieved of financial liability.

<sup>19</sup> See U.S. Dep’t of Def., Form 200, Financial Liability Investigation of Property Loss block 13 (July 2009) [hereinafter DD Form 200].

<sup>20</sup> AR 735-5, *supra* note 2, para. 13-17d. Typically, the appointing authority will be the battalion or squadron commander. See Barnsby Telephone Interview, *supra* note 12.

<sup>21</sup> AR 735-5, *supra* note 2, para. 13-17d(1).

<sup>22</sup> *Id.* para. 13-27. For example, in the hypothetical outlined in note 15, the FLO may be a SFC (E-7) since the subject of potential financial liability is a PV2 (E-2). However, if the facts were changed and our subject of potential financial liability was a sergeant major (SGM), then the FLO must be an officer or a SGM (E-9) who is senior-in-grade.

<sup>23</sup> *Id.* para. 13-27b. Importantly,

appointing authority will designate the FLO using a memorandum and notify her that the investigation is her primary duty until complete.<sup>24</sup>

Again, flashing back to our hypothetical, you take a look at MAJ Smith’s papers to determine if the DD Form 200 was completed properly and whether he may serve as a FLO. Both documents check out satisfactorily and you now search your legal repertoire for something intelligent to say. You vaguely recall something about the doctrines of responsibility, culpability, and proximate cause from your basic course instruction in Charlottesville.

### 1. Types of Responsibility

There are five types of responsibility that must be understood before beginning the investigation: (1) command responsibility, (2) supervisory responsibility, (3) direct responsibility, (4) custodial responsibility, and (5) personal responsibility.<sup>25</sup> In general, command responsibility is the obligation of a commander to ensure that Government property within their command is properly used and cared for.<sup>26</sup> Command responsibility cannot be delegated to

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A financial liability officer generally will be senior to any individual subject to the potential assessment of financial liability. The financial liability officer will report to the approving authority, any instances in the course of an investigation that would require the examination of the conduct or performance of duty of senior personnel. The approving authority will exercise the options of replacing the junior financial liability officer with an individual of a senior grade, or directing the junior financial liability officer to continue the investigation. If the financial liability officer is directed to continue the investigation, the approving authority will document the military exigency (urgency) that prevented the appointment of another financial liability officer. This documentation should be attached to the financial liability investigation of property loss as an exhibit.

U.S. DEP’T OF ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER’S GUIDE para. 1-7 (9 Apr. 2007) [hereinafter DA PAM. 735-5].

<sup>24</sup> AR 735-5, *supra* note 2, para. 13-24a. As a practical matter, judge advocates must explain to the FLO that the FLIPL is their primary duty and takes priority over all normal work duties. This is often difficult for the FLO because, in practice, the FLIPL is usually a secondary duty to an already full schedule. Nevertheless, judge advocates and FLOs must remain vigilant in adhering to the required timelines contained in the regulation. See Barnsby Telephone Interview, *supra* note 12.

<sup>25</sup> AR 735-5, *supra* note 2, para. 13-29.

<sup>26</sup> *Id.* para. 13-29a(2). For example, a commander has a duty to ensure that all property within her command is properly issued to Soldiers in that unit. This is often accomplished by hand receipting the unit property to the supply sergeant who in turn hand receipts it to Soldiers during equipment issue. If, however, the commander does not have a policy that all equipment issued to Soldiers will be properly hand receipted, then the commander could be held financially liable under the theory of command responsibility. See Barnsby Telephone Interview, *supra* note 12.

others.<sup>27</sup> Supervisory responsibility is the obligation of a supervisor to ensure that Government property issued to, or used by, her subordinates is properly used and cared for.<sup>28</sup> Direct responsibility, on the other hand, simply results from assignment as an accountable officer whose obligation it is to ensure the proper use and care of property which has been received.<sup>29</sup> Similarly, custodial responsibility typically results from assignment as a supply sergeant or supply clerk and is that individual's obligation to properly care for property in storage awaiting turn-in or issue.<sup>30</sup> Finally, personal responsibility is the obligation of an individual to exercise care for property in her physical possession.<sup>31</sup> Undoubtedly, it is critical that the judge advocate and FLO understand each type of responsibility before beginning the investigation. While, in practice, the FLO should identify every person that has some form of responsibility for the lost, damaged, destroyed, or stolen property, most FLIPLs will involve the concept of personal responsibility for property issued to an individual by utilizing a hand-receipt or for property merely in an individual's physical possession regardless of a hand-receipt.<sup>32</sup>

## 2. Culpability

Before financial liability may be assessed against an individual, the investigation must determine that the individual breached a particular duty involving the property.<sup>33</sup> Culpability is easily described as "blameworthiness" and involves the breach of some affirmative duty.<sup>34</sup> Normally, culpability is shown through either negligence or some willful misconduct by the

individual entrusted with Government property.<sup>35</sup> In terms of negligence, there are two types of negligence involving the loss, damage, destruction, or theft of Government property: simple negligence and gross negligence.<sup>36</sup> Simple negligence is the absence of due care with regard to the loss, damage, destruction, or theft of Government property.<sup>37</sup> In contrast, gross negligence is an extreme departure from due care that results from a reckless or deliberate disregard for the proper care or use of Government property.<sup>38</sup>

A few illustrations may help demonstrate these concepts of negligence. For example, if Private (PVT) Jones became hungry and decided to boil grease to deep fry a chicken, but he forgot about the boiling grease and the kitchen subsequently caught on fire, PVT Jones would have committed an act of simple negligence for his failure to use common sense while boiling grease because most reasonable people understand that you cannot leave boiling grease unattended.<sup>39</sup> In contrast, if PVT Jones became hungry, built a fire pit in the middle of his living room, filled it with firewood, and doused it with gasoline, thereby burning down his barracks room, then PVT Jones would have committed an act of gross negligence for his reckless disregard for the foreseeable consequences of his actions.<sup>40</sup>

## 3. Proximate Cause

The final, but most widely misunderstood,<sup>41</sup> key legal

<sup>27</sup> AR 735-5, *supra* note 2, para. 13-29a(2).

<sup>28</sup> *Id.* para. 13-29a(3). For example, a platoon sergeant has a duty to ensure that the property issued to Soldiers within her platoon is properly safeguarded and cared for. Similarly, a squad leader has a responsibility to ensure the proper use of equipment issued to members of his squad. *See* Barnsby Telephone Interview, *supra* note 12.

<sup>29</sup> AR 735-5, *supra* note 2, para. 13-29a(4).

<sup>30</sup> *Id.* para. 13-29a(5).

<sup>31</sup> *Id.* para. 13-29a(6).

<sup>32</sup> *See* Barnsby Telephone Interview, *supra* note 12. For example, in our hypothetical in footnote 15, PV2 Moore has personal responsibility for his Universal Sleeping Bag because it was sub-hand receipted to him and it is in his physical possession. In addition, PV2 Moore's squad leader has supervisory responsibility for PV2 Moore's Universal Sleeping Bag because the squad leader has the obligation to ensure that her subordinates are safeguarding and properly caring for Government property. Moreover, PV2 Moore's company commander has command responsibility for the Universal Sleeping Bag by virtue of her assignment to a command position. Finally, PV2 Moore's supply sergeant has direct responsibility for the Universal Sleeping Bag because of his duties upon acceptance of the unit's property by hand receipt. *See supra* note 15.

<sup>33</sup> AR 735-5, *supra* note 2, para. 13-29b.

<sup>34</sup> BLACK'S LAW DICTIONARY 385 (9th ed. 2009).

<sup>35</sup> AR 735-5, *supra* note 2, para. 13-29b.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* para. 13-29b(2). For example, simple negligence is easily explained to the FLO as carelessness. In our hypothetical in footnote 15, PV2 Moore exhibited simple negligence if he merely forgot his Universal Sleeping Bag and left it on his camping trip. Importantly, though, negligence can be a "[f]ailure to comply with existing laws, regulations, and/or procedures[.]" DA PAM. 735-5, *supra* note 23, para. 7-1. Therefore, PV2 Moore could be negligent if there were policies that prohibited him from using his Government-issued Universal Sleeping Bag on a personal recreational camping trip.

<sup>38</sup> AR 735-5, *supra* note 2, para. 13-29b(3). "Gross negligence is the extreme departure from the course of action expected of a reasonably prudent person, accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act." DA PAM. 735-5, *supra* note 23, para. 2-1f. For example, in our footnote 15 hypothetical, PV2 Moore would have displayed gross negligence if he used his Universal Sleeping Bag as a means to contain the flames of the open campfire and it caught on fire and was destroyed. Clearly, PV2 Moore recklessly disregarded the foreseeable consequence that the sleeping bag would catch on fire.

<sup>39</sup> 5TH SPECIAL FORCES GROUP (AIRBORNE), GUIDE FOR THE FLIPL INVESTIGATING OFFICER (Nov. 2009) [hereinafter 5TH SPECIAL FORCES GROUP FLIPL GUIDE].

<sup>40</sup> *Id.*

<sup>41</sup> BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 711 (2d ed. 1995) (noting that one commentator rather uncharitably terms proximate

issue for the judge advocate and FLO to grasp is proximate cause.<sup>42</sup> Proximate cause is critical in the FLIPL process because the FLO must determine that an individual's negligence was the proximate cause of the loss, damage, destruction, or theft of the Government property before that individual may be held financially liable.<sup>43</sup> "Proximate cause is the cause, which, in a natural and continuous sequence, unbroken by a new cause, produces loss, damage, destruction, or theft, and without which, the loss, damage or destruction would not have occurred. Stated more simply, proximate cause is the immediate or direct cause of the loss."<sup>44</sup>

Again, a hypothetical may help illustrate this concept of proximate cause. Sergeant (SGT) Snuffy leaves his equipment in his unlocked vehicle in downtown Charlottesville and the equipment is stolen. Sergeant Snuffy's negligence caused the loss of the equipment because he placed the gear in an unlocked vehicle and in a location where it was reasonably foreseeable that it would be stolen. In other words, SGT Snuffy's negligence proximately caused the loss of his equipment.<sup>45</sup> In contrast, SGT Snuffy leaves his equipment in his unlocked vehicle in downtown Charlottesville and it is stolen. The thief then abandons the gear while being chased by police and SFC Samaritan, a fellow Soldier and innocent bystander, recovers the stolen equipment. Subsequently, SFC Samaritan loses the gear before he has a chance to return it to SGT Snuffy or his unit. In this situation, although SGT Snuffy was negligent in leaving his gear in an unlocked vehicle in a questionable location, he was not the proximate cause of the loss because SFC Samaritan's subsequent actions directly contributed to the loss after the property was returned to the control of the Government (i.e. SFC Samaritan). Sergeant Snuffy should not be held financially liable for losing the equipment because he was not the proximate cause of the

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cause "concise gibberish") (citing DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 401 (1963)).

<sup>42</sup> See Captain Daniel D. Maurer, *Working with Proximate Cause: An 'Elements' Approach*, ARMY LAW., Dec. 2011, at 16 (providing a detailed discussion on working with proximate cause).

<sup>43</sup> AR 735-5, *supra* note 2, para. 13-29c. It is not enough to hold an individual financially liable simply because that individual displayed negligence or gross negligence. The Government may only impose financial liability for the loss, damage, destruction, or theft of property if that negligent conduct was also the proximate cause of the loss, damage, or destruction, or theft. *Id.*

<sup>44</sup> DA PAM 735-5, *supra* note 23.

<sup>45</sup> TASK FORCE IRON, FINANCIAL LIABILITY INVESTIGATIONS OF PROPERTY LOSS, GUIDE FOR INVESTIGATING OFFICERS 12 (n.d.) [hereinafter TASK FORCE IRON FLIPL GUIDE]. In this situation, the approving authority could hold SGT Snuffy financially liable for losing his equipment since his actions were the proximate cause of the lost Government property. In addition, "[t]he methodology used for computation of the charges against a single individual is shown at table 12-3." AR 735-5, *supra* note 2, para. 13-32d(6)(c).

loss.<sup>46</sup>

Back to our initial hypothetical, MAJ Smith looks at you and confidently says,

OK, I'm tracking all of these legal issues. Before I can recommend that someone be held financially liable, I need to explain in my report how that particular individual had responsibility for the government property and how that person's negligent conduct was the proximate cause of the loss, damage, or destruction of the property. Sounds easy enough, Judge.

## B. Investigation Procedures

Now that you and the FLO understand the basic concepts of responsibility, culpability, and proximate cause, MAJ Smith says to you, "Now where do I begin my investigation?"

For any fact-finding mission, a thorough investigation is the key to determining what actually happened to the property.<sup>47</sup> Moreover, the FLO must approach the investigation free of any preconceived notions of how the property was lost, damaged, destroyed, or stolen.<sup>48</sup> The FLO must seek out all the facts by examining the property, interviewing witnesses, and obtaining copies of all relevant documents pertaining to the property in question.<sup>49</sup> As a practical matter, the FLO should focus on the six basic questions of any investigation: "who," "what," "where," "when," "why," and "how." For example, who was responsible for the loss, damage, or destruction of the property?<sup>50</sup> What was lost, damaged, destroyed, or stolen?

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<sup>46</sup> TASK FORCE IRON FLIPL GUIDE, *supra* note 45. In this scenario, it is possible that SGT Snuffy and SFC Samaritan are held collectively liable for the lost Government property since, arguably, their actions both contributed to the lost property. "When more than one person's negligent act or willful misconduct is the proximate cause for the loss, those persons should be recommended for assessment of collective financial liability. The term 'collective financial liability' is used when more than one individual is found financially liable for a loss." DA PAM 735-5, *supra* note 23, para. 4-6b(3). In addition, "When two or more entities are held collectively and individually liable for a single loss, their individual financial charge is computed per table 12-4." AR 735-5, *supra* note 2, para. 13-41c.

<sup>47</sup> AR 735-5, *supra* note 2, para. 13-31.

<sup>48</sup> *Id.* ("An investigation should not be started with predetermined ideas as to what caused, or who is to blame for the [loss, damage, or destruction of Government property.]").

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (recognizing the regulation contemplates that an investigation may determine that no one is responsible for the loss, damage, destruction, or theft of Government property). The regulation states, "A thorough

Where was the Government property lost, damaged, destroyed, or stolen? When was it lost? Why was the property lost, damaged, destroyed, or stolen? And finally, how was the property lost, damaged, destroyed, or stolen?

### 1. *Gathering Evidence and Facts*

In order to answer the six basic questions of any investigation, the FLO must collect evidence by interviewing witnesses and obtaining statements from all individuals who are logically connected to the property in question.<sup>51</sup> The FLO will record the witness interviews on a Department of the Army (DA) Form 2823.<sup>52</sup> However, it is important to understand that the statements and evidence collected may be conflicting or even self-serving.<sup>53</sup> It is the FLO's job to sort through all available evidence and resolve conflicts to determine what actually occurred to the lost, damaged, destroyed, or stolen Government property.<sup>54</sup> This evidence will include copies of the hand receipt from the unit S-4 or the Soldier(s) in question.<sup>55</sup> This task is relatively simple when dealing with lost property.<sup>56</sup> Further, the FLO must determine when and where the property was lost, damaged, destroyed, or stolen.<sup>57</sup> This can be

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investigation may establish no fault, or it may establish that financial liability should be recommended." *Id.*

<sup>51</sup> *Id.* para. 3-31. For example, in our footnote 15 hypothetical, the FLO should interview PV2 Moore and anyone that accompanied him on the camping trip. In addition, the FLO should also interview the company commander, the first sergeant, platoon sergeant, and squad leader to determine any additional facts logically related to the lost gear. *See supra* note 15.

<sup>52</sup> AR 735-5, *supra* note 2, para. 3-31.

<sup>53</sup> *Id.* (noting that evidence will often contradict other evidence or even support more than one logical conclusion). It is the FLO's duty to resolve these conflicts by using his best judgment and common sense to arrive at a conclusion that best represents what actually occurred. It is important that the FLO explain in his findings how he resolved any contradictions and why he arrived at a particular conclusion. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* As a practical matter, the FLO should always attempt to first locate lost property by examining the type of property in question and where it was potentially lost by visiting the site and interviewing individuals who were near the area at the time of the loss. The FLO should submit as an exhibit to the FLIPL his attempts to locate the concerned property. The FLO should follow the steps outlined in AR 735-5, para. 14-14, to reestablish accountability if the missing property is located during his search. *See* Barnsby Telephone Interview, *supra* note 12.

<sup>56</sup> *See* Barnsby Telephone Interview, *supra* note 12 (stating that the FLO's job becomes more onerous when dealing with damaged or destroyed property); *see also* AR 735-5, *supra* note 2, para. 13-31 (explaining that the FLO will need to physically inspect the damaged or destroyed property, obtain police reports, obtain estimated costs of repair, seek expert opinion in determining the cause of damage, and release the property for repair or turn-in).

<sup>57</sup> AR 735-5, *supra* note 2, para. 13-31; *see also* Barnsby Telephone Interview, *supra* note 12 (stating that if the FLO cannot determine when the loss, damage, destruction, or theft occurred, the FLO should determine

accomplished by looking at the DD Form 200 or talking to witnesses who have knowledge of the incident or lost property.<sup>58</sup> By gathering evidence and answering the questions of "what," "when," and "where," the FLO is generally able to establish the "who" by simply drawing a reasonable conclusion based on the available evidence.

The final task for the FLO during the investigative phase is determining how and why the Government property was lost, damaged, or destroyed. Normally, these questions will be answered in the process determining the facts surrounding the "who," "what," "where," and "when" issues and then by making logical and reasonable conclusions based on the evidence.<sup>59</sup> If, however, the loss, damage, destruction, or theft is more difficult to determine, the FLO must examine what facts are indisputable and compare them with those in conflict, and then make logical determinations based on all the existing evidence.<sup>60</sup>

### 2. *Finalizing the Investigation: FLO's Conclusions and Recommendations*

Once the FLO finishes the investigative phase, he will enter his findings and recommendations on the DD Form 200, block 15a.<sup>61</sup> The FLO's findings are the conclusions reached during the course of the investigation. They must be based on the facts and circumstances surrounding the lost, damaged, destroyed, or stolen property.<sup>62</sup> The FLO must state the facts and conclusions in his own words rather than reciting the contents of the witness statements.<sup>63</sup> After the FLO records his findings on the DD Form 200, he must then submit logical recommendations based on those findings and conclusions.<sup>64</sup> There are two kinds of recommendations: (1) relieve all individuals of financial liability or (2) recommend financial liability against an individual or individuals. If financial liability against any individual is recommended, the FLO will ensure that the individual completes the

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when the property was last accounted for and by whom. This may assist the FLO in determining additional witnesses to interview).

<sup>58</sup> AR 735-5, *supra* note 2, para. 13-31; *see also* Barnsby Telephone Interview, *supra* note 12 (stating that if, however, the DD Form 200 is not clear on where the property was lost, damaged, or destroyed, the cause could be an accountability problem during the issuance of the property). For example, a Soldier may have signed for the property in question and thereafter issued it to another Soldier, but failed to issue a sub-hand receipt during the latter transaction.

<sup>59</sup> AR 735-5, *supra* note 2, para. 3-31.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* para. 13-32.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

relevant portion of the DD Form 200.<sup>65</sup> The FLO must give that individual a chance to examine the DD Form 200 after the FLO's findings and recommendations have been recorded and an opportunity to submit a rebuttal statement concerning the recommendation of financial liability.<sup>66</sup> The FLO shall explain to that individual the consequences of the recommendation of financial liability and the significance of the rebuttal statement.<sup>67</sup> For example, a subsequent finding of financial liability could expose the individual to forfeiture of one month's basic pay, or worse, the full amount of the Government's loss.<sup>68</sup> On the other hand, a well-crafted rebuttal may convince the approving authority that financial liability is not warranted by the facts and circumstances.

Back to our hypothetical: MAJ Smith turns to you with a quizzical look and asks,

Let me get this straight, Judge; before I submit my findings and recommendations to LTC Fair (battalion commander/appointing authority), I have to explain all

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<sup>65</sup> *Id.* (requiring that the individual charged must complete block 16 of the DD Form 200).

<sup>66</sup> *Id.* para. 13-34; *see also id.* para. 13-35 (stating that "[i]ndividuals have the right to submit a rebuttal statement, or other added evidence, and to have that statement or evidence considered and attached to the financial liability investigation of property loss for consideration by higher authority. Individuals against whom a charge of financial liability is recommended may obtain legal advice from the servicing legal office.").

<sup>67</sup> *Id.* para. 13-34.

<sup>68</sup> *Id.* para. 13-41. "The basic premise on which financial charges are computed is that the charge will represent the actual loss to the Government. The actual loss to the Government is the difference between the value of the property immediately before its loss or damage and its value immediately after." *Id.* app. B, para. B-5. Specifically,

The value of lost, destroyed, or irreparably damaged property will be the actual value of the property at the time of the loss, minus any salvage or scrap value. Actual value at the time of the loss or damage may be computed in one of three ways. The preferred method of determining the value of property at the time of loss or damage is by a qualified technician's two-step appraisal of its fair market value. . . . When determination of fair market value is not possible or equitable, the value at the time of the loss or destruction may be computed by subtracting depreciation from the current FEDLOG or other standard price of a new item. Depreciation is not deducted on loss or damage to new property. . . . When determination of fair market or depreciated value is not possible or equitable, the value of the loss or damage may be computed by subtracting the standard rebuild cost plus any salvage value from the current FEDLOG price for the item.

*Id.* app. B, para. B-2. Judge advocates must be aware that a common mistake by FLOs is that they often use the purchase cost of an item without factoring in depreciation or the actual loss to the Government. *See* Barnsby Telephone Interview, *supra* note 12

of this legal stuff to anyone that I recommend for financial liability? And you are telling me that someone might actually submit a rebuttal statement to me and that I must consider that statement before I make my final recommendation to LTC Fair? Am I tracking, Judge?

As you swell with pride, you confirm MAJ Smith's understanding of the process but continue to explain to him that there is still work to be done before the FLIPL is complete. You explain to MAJ Smith that the post-investigation process is as important as the actual investigation itself.

### C. Post-Investigation Procedures

After the FLO completes the DD Form 200 and receives and considers the respondent's rebuttal statement, the FLO must submit his final report to the appointing authority.<sup>69</sup> The appointing authority must personally review the investigation to ensure that all pertinent instructions have been followed and that the investigation represents a complete and unbiased determination of the facts and circumstances surrounding the loss, damage, destruction, or theft of the property.<sup>70</sup> The appointing authority then has three options: first, the appointing authority can return the investigation to the FLO for additional follow-up or fact-gathering; second, the appointing authority can concur with the FLO's findings and recommendations; or third, the appointing authority can nonconcur with the findings and recommendations of the FLO and substitute his own findings.<sup>71</sup> Upon completion of his review, the appointing authority will forward the DD Form 200 and all exhibits to the approving authority for further review and action.<sup>72</sup>

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<sup>69</sup> AR 735-5, *supra* note 2, para. 13-33; *see also id.* para. 13-10d(13)(b) ("The appointing authority determines, upon receipt or following completion of an investigation, if financial liability should be assessed. When there is no evidence of negligence or willful misconduct, the appointing authority can recommend that all persons be relieved of financial liability.").

<sup>70</sup> *Id.* para. 13-36.

<sup>71</sup> *Id.* para. 13-37.

<sup>72</sup> *Id.*; *see also id.* para. 13-17 (explaining that "[t]he approving authority is defined as an Army officer or DA civilian employee authorized to appoint a financial liability officer and to approve financial liability investigations of property loss. In most cases for Army garrisons, garrison commanders will be the approving authority for financial liability investigations of property loss arising within their command or under their supervision. . . . For financial liability investigations assessing a final loss of \$100,000 or greater, or loss of a controlled item, the approving authority will be the first general officer or SES employee in the rating chain. . . . Army officers in command positions in the grade of colonel or above . . . are approving authorities for financial liability investigations of property loss arising within their command or under their supervision"). The 10 May 2013 AR 735-5 RAR also authorized approving authorities in the rank of colonel to delegate, in writing, approving authority to lieutenant colonels for FLIPLs worth \$5000.00 or less that does include equipment classified as

The approving authority will also personally review all FLIPLs and make an administrative check to determine that the investigation is thorough and complete.<sup>73</sup> Specifically, the approving authority will ensure that contradictory statements and evidence have been resolved and that the FLO has presented logical findings and recommendations.<sup>74</sup> In addition, the approving authority will ensure that individuals against whom financial liability has been recommended received developmental counseling, rights advisement, and an opportunity to submit a rebuttal statement on their behalf.<sup>75</sup> If the approving authority believes that the recommendation of financial liability is correct, he will submit the investigation to the servicing legal office for a written legal opinion.<sup>76</sup> The servicing legal office will provide a written legal opinion discussing the legal sufficiency of the FLIPL and whether the investigation is thorough and complete.<sup>77</sup> If the investigation is found to be legally insufficient, the approving authority will ensure the investigative shortcomings are remedied before assessing financial liability against any individual for the loss, damage, destruction, or theft of Government property.<sup>78</sup> Once the approving authority determines that the FLIPL is complete, he can either adopt the FLO's findings and recommendations or substitute his own findings, which could result in relieving the individual of financial liability or assessing financial liability against a different individual.<sup>79</sup>

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communications security, sensitive items, and/or equipment that contains personal identification information.

<sup>73</sup> *Id.* para. 13-38.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* para 13-39.

<sup>77</sup> *Id.*; *see also id.* para. 13-39c (directing that “[a] lawyer other than the one who advised the respondent in the preparation of the respondent’s rebuttal statement must perform the legal review required by the approving authority”).

<sup>78</sup> *Id.* para. 13-39.

A legal advisor will provide a written opinion as to the legal sufficiency of the financial liability investigation of property loss. If, in the legal advisor’s opinion, the financial liability investigation of property loss is not legally sufficient, the opinion will state the reasons why and make appropriate recommendations. The opinion will be attached to the financial liability investigation prior to the approving authority’s review and decision. The approving authority will ensure corrective actions are taken before taking final action to assess financial liability.

*Id.*

<sup>79</sup> *Id.* para. 13-40; *see also id.* para. 13-10d(14)(c)2 (explaining that “when the approving authority determines the financial liability investigation is complete, the approving authority will adopt the recommendations of the financial liability investigating officer or appointing authority by checking

Flashing back to our initial hypothetical, as you are about to put the finishing touches on your legal brief to MAJ Smith, he stops you mid-sentence and asks, “Judge, do we really have to run this investigation through the battalion commander for the brigade commander’s final decision? That seems a bit excessive to me. There has to be an easier way.” You explain to MAJ Smith that the post-investigative procedures are just as important as the investigation itself. You emphasize that the opportunity for the Soldier to review the FLO’s findings and recommendations before submitting the report to the battalion commander promotes fairness and ensures due process in the system. You continue to explain that the battalion commander serves as an administrative check in the system, which allows him to review the FLO’s work and return the investigation for any necessary follow-up. In addition, after the battalion commander reviews the FLIPL, the brigade commander, as the approving authority, acts as an additional administrative check in the system by also reviewing the investigation to determine if other questions must be answered or more evidence is needed.

Major Smith confirms,

“OK, Judge. That makes sense. The appointing and approving authorities are there to make sure I didn’t miss anything during my investigation. They also have the ability to concur with my findings and adopt my recommendations or they can make their own decisions based on the evidence. That seems fair. What else do I need to know?”

Relieved that MAJ Smith understands your legal brief, you take another deep breath and explain to MAJ Smith that the final piece to the FLIPL is notifying the Soldier if there is a decision to hold him financially liable.

#### D. Notifying the Respondent

There are two instances during the FLIPL process where the Government must notify an individual of an assessment of financial liability. First, the FLO will notify an individual against whom there is a recommendation of financial liability and give him an opportunity to submit a rebuttal statement before the FLIPL is forwarded to the appointing authority.<sup>80</sup> Second, the approving authority will notify a

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the approve box in block 14a and complete blocks 14b through 14h; or make a decision contrary to the financial liability investigating officer or appointing authority’s findings by checking the disapprove box in 14a and either relieving all concerned from financial liability or assessing financial liability against a new individual”).

<sup>80</sup> *Id.* para. 13-34; *see also id.* para. 13-34a(1)–(3) (explaining that the financial liability officer will “(1) Explain to the individual recommended for a charge of financial liability, the consequences of the recommendation, if approved. (2) Explain to the individual the significance of any rebuttal statement submitted by them regarding the possible assessment of financial

respondent if a determination of financial liability was made by the approving authority because there are several rights the respondent may choose to exercise.<sup>81</sup> Those rights include: the right to inspect and copy Army records concerning the assessment of financial liability, as well as to obtain free legal advice from the servicing legal assistance office;<sup>82</sup> the right to request reconsideration of the assessment of financial liability due to some form of legal error;<sup>83</sup> the right to request remission or cancellation of the debt;<sup>84</sup> the right to request an extension of the collection period concerning the debt;<sup>85</sup> and the right to submit an application for correction of military record using a DD Form 149, Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552.<sup>86</sup>

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liability. (3) Consider and attach as an exhibit to the DD Form 200 any statement the individual desires to submit"); *see also id.* para. 13-34b(1)-(3) (explaining that "[t]he financial liability officer will notify the individual by memorandum that they have the right—(1) To inspect and copy Army records relating to the debt. (2) To legal advice as authorized by AR 27-3. Free legal advice from the servicing legal office is normally provided only to military and DOD civilian employees. (3) To submit a statement and other evidence in rebuttal of the financial liability officer's recommendation").

<sup>81</sup> *Id.* para. 13-42.

<sup>82</sup> *Id.* para. 13-42a(1)-(2).

<sup>83</sup> *Id.* para. 13-42a(3); *see also id.* para. 13-43a (stating that "an individual will [s]ubmit requests for reconsideration by memorandum through their immediate commander to the approving authority. Submit requests for reconsideration only on the basis of legal error. When the approving authority does not reverse their original decision to approve financial liability, the request for reconsideration becomes an appeal, which will be forwarded to the appeal authority by the approving authority. The request for reconsideration will set forth, in detail, any new evidence offered, and provide rationale why financial liability is not appropriate. A request for reconsideration stops all collection action pending a decision by the approving authority and/or the appeal authority").

<sup>84</sup> *Id.* para. 13-42a(5). This provision applies only to enlisted personnel under the provision of AR 600-4. In addition, paragraph 13-46 states,

When financial liability assessed through a financial liability investigation causes financial hardship on an enlisted Soldier, they may submit an application for remission or cancellation of the debt, DA Form 3508 (Application for Remission or Cancellation of Indebtedness) through their commander, per AR 600-4. A copy of the approved DD Form 200 assessing financial liability will be submitted with the application.

*Id.* para. 13-46.

<sup>85</sup> *Id.* para. 13-42a(6); *see also id.* para. 13-47 (explaining that "requests for extension of the collection period will be forwarded through the approving authority to the servicing FAO or USPFPO for action. . . . The approving authority will make a recommendation regarding extending the collection period using the following factors as the basis for the recommendation: monthly income, additional income or assets (including spouses), and expenses caused by living standards that are too high or by mishandling of personal funds are not a basis for a hardship determination").

<sup>86</sup> *Id.* para. 13-42a(7). An individual may "[s]ubmit an application in accordance with AR 15-185, DD Form 149 (Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section

Notably, it is important for judge advocates to understand that submission of a request for reconsideration or a request for remission/cancellation of indebtedness stops all collection action on the indebtedness until a decision is made by the appropriate appellate authority.<sup>87</sup> The critical aspect for the judge advocate to remember is that the FLIPL does not end when the approving authority makes his final decision. Individuals have a myriad of legal avenues to challenge any decision to approve financial liability. Proactive judge advocates will remain involved in the process until all challenges and appeals are exhausted and the FLIPL is properly closed out at the unit level.

Several weeks after your initial meeting, MAJ Smith stops by your office. "Hey, Judge. The investigation is done and the boss has let the Soldier know he may have to pay. Thanks for all your help!" As he leaves, you pat yourself on the back for a job well done.

#### IV. Conclusion

The FLIPL process can be an untamed beast unless judge advocates and FLOs clearly understand the nuances and legal principles contained in the regulation. Before the investigation can even begin, judge advocates must ensure the DD Form 200 is accurate and that the FLO has been properly appointed. Getting the FLO to understand difficult legal principles such as responsibility, culpability, and proximate cause can be a tedious task, but spending the time to properly explain these concepts during the legal brief will reap rewards in the end. Judge advocates must guide the FLO during his quest to gather facts and evidence once the investigation is underway. Adhering to the six investigative questions of "who," "what," "where," "when," "why," and "how" will provide the FLO with ample evidence so that he may offer logical conclusions and recommendations to the appointing authority. Judge advocates must ensure that the FLO finalizes the process by providing notice and a rebuttal opportunity for anyone against whom there is a recommendation of financial liability. Finally, the prudent judge advocate will anticipate and plan for all post-investigation issues such as the required legal review and any appellate issues that may be raised by the respondent. The mission is not complete until all loose ends are tied up, the appellate issues are properly resolved, and the FLIPL is closed out at the unit level.

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1552.)" *Id.* In addition, "Individuals assessed financial liability through a financial liability investigation may submit an application, DD Form 149 to the ABCMR if they believe the findings of negligence on their part are unjust. Applications are submitted on DD Form 149, with a complete copy of the DD Form 200 to include all exhibits, attached. Instructions for submitting an application are contained in AR 15-185." *Id.* para. 13-48.

<sup>87</sup> *Id.* para. 13-42b.