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Khobar Towers' Progeny: The Development of Force Protection

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As the United States military engages in operational missions at a record pace, the need for commanders to understand their force protection responsibilities has never been greater. Force protection responsibility for deployed personnel is one of the most confusing and contentious issues in every military operation. Because terrorism is a constant concern, commanders agonize over their force protection responsibilities and demand that the boundaries of their force protection authority be defined with laser-like preciseness. As confusing as force protection issues may first appear, the basic legal structure creating force protection responsibility is actually quite simple. Once understood, the framework establishing force protection responsibility will become an ally in the battle to protect American troops from terrorism.

Since 1977, terrorist attacks have claimed the lives of over 300 Department of Defense (DOD) affiliated personnel.[1] Despite this fact, the recent high-priority emphasis on force protection did not occur until after the 1995 and 1996 terrorist attacks against American military forces in Saudi Arabia. The first attack was the 13 November 1995 car bombing of the Riyadh headquarters of the Office of the Program Manager, Saudi Arabian National Guard (OPM/SANG), which killed five Americans and injured thirty-five others.[2] Less than eight months later, on 25 June 1996, terrorists conducted a more devastating attack on United States Air Force personnel living in the Khobar Towers[3] complex in Dhahran, Saudi Arabia. Terrorists detonated a fuel truck loaded with 20,000 pounds of explosives, killing nineteen Air Force members and wounding hundreds of others.[4] Afterwards, Secretary of Defense William J. Perry declared that "the Khobar Towers attack should be seen as a watershed event pointing the way to a radically new mindset and dramatic changes in the way we protect our forces deployed overseas from this growing threat."[5] This "watershed event" has led to the new emphasis on how the military exercises its force protection responsibilities. Because the greatest emphasis is placed on protecting troops when they are in foreign countries, this article will address the aspects of force protection for DOD personnel located overseas.

Background

Prior to the Khobar Towers bombing, military members rarely heard the words "force protection." "Anti-terrorism" was the expression used to describe the measures taken to prevent terrorist attacks. After Khobar Towers, "force protection" overtook "anti-terrorism" as the term of choice, and became familiar to every military member located overseas. In every operational mission that takes place today, force protection is an overriding concern that often dictates how the mission is performed, where military personnel live, and how military personnel conduct themselves on and off duty.[6]

Force protection is not a synonym for "anti-terrorism." Instead, force protection is a larger effort designed to provide comprehensive security for military members, with "anti-terrorism" being a subset of force protection.[7] The DOD definition of force protection is:

> [T]he security program designed to protect soldiers, civilian employees, family members, facilities, and equipment, in all locations and situations, accomplished through

1. CHAIRMAN, JOINT CHIEFS OF STAFF HANDBOOK 5260, COMMANDER'S HANDBOOK FOR ANTITERRORISM READINESS 1 (1 Jan. 1997) [hereinafter CJCS HANDBOOK 5260].

2. *Id.*

3. Khobar Towers is a housing compound built by the Saudi Arabian government near Dhahran, Saudi Arabia. The compound consists primarily of high-rise apartment buildings. These buildings were the residential quarters of the personnel assigned to the 4404th Air Wing (Provisional).

4. CJCS HANDBOOK 5260, *supra* note 1, at 1.

5. Honorable William J. Perry, REPORT ON THE PROTECTION OF UNITED STATES FORCES DEPLOYED ABROAD (15 Sept. 1996) (on file with author).

6. Jennifer Bauduy, *U.S. Troops Rebuilding Haiti Watch Their Backs*, WASH. TIMES, May 25, 1999, at 19. Because of unrest in Haiti, the 500 American troops stationed there have been barred from taking recreational excursions and can only leave Camp Fairwinds for mission essential tasks.

7. CJCS HANDBOOK 5260, *supra* note 1, at 20. For instance, "anti-terrorism" and "counter-terrorism" both fall under the umbrella of force protection, but they are two very different things. "Anti-terrorism" actions are defensive measures used to reduce the vulnerability to terrorism, to include limited response and containment. "Counter-terrorism" actions are offensive measures taken to prevent, deter, and respond to terrorism. Force protection is even used to describe protective health measures. When the recent announcement was made regarding mandatory anthrax vaccinations for DOD personnel, it was described as a "force protection" issue.

> planned and integrated application of combating terrorism (antiterrorism and counterterrorism), physical security, operations security, personal protective services, and supported by intelligence, counterintelligence, and other security programs.[8]

Before "the security program designed to protect" can be put into place, a determination must be made as to who is responsible for establishing and administering this "program." For personnel located overseas, the law provides a simple answer. Without exception, the responsibility belongs to either the Secretary of State or the geographic commander in chief (CINC).

The Secretary of State

The force protection role of the Secretary of State is directly provided for in The Omnibus Diplomatic Security Act of 1986 (Omnibus). This Act directs the Secretary of State to develop and implement policies and programs to provide for the security of United States government operations of a diplomatic nature, to include the protection of all government personnel on official duty abroad.[9] Although the term "all government personnel" includes military personnel, the statute goes on to specifically exclude "personnel under the command of a United States area military commander."[10] The area military commander refers to the combatant commanders of the combatant or unified commands.[11] Because these commanders are assigned a geographically specific area of responsibility, they are also referred to as geographic commanders or geographic CINCs.[12]

At first glance, it appears that the Secretary of State may have been assigned a task by Congress for which he is ill-prepared and ill-equipped to execute. However, the Secretary of State does not have to perform this force protection mission by himself. The law provides that through the use of inter-agency agreements, to the maximum extent possible, other federal agencies must support the Secretary of State in his effort to protect United States government personnel.[13] Furthermore, the Secretary of State may agree to delegate operational control of his security and protection responsibilities of other federal agencies to the heads of those federal agencies.[14]

The Secretary of State cannot manage every minute detail of his assigned security functions for every country in the world. The Secretary needs and has an individual in each country who serves on his behalf. In each foreign country, the chief of mission[15] acts on behalf of the Secretary of State for the direction, coordination, and supervision of all government executive branch employees.[16]

Secretary of Defense and the Geographic CINC

The Secretary of Defense is responsible for establishing DOD policies and assigning responsibilities to implement the DOD Force Protection Program.[17] From the Secretary of Defense, various specific responsibilities flow down through the under secretaries of defense, the secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, and eventually reach the geographic CINCs.[18] Although DOD policy is that force protection is the responsibility of anyone in a command position,[19] the geographic CINC is the only DOD figure who is given force protection responsibility by statute. The combination of the Omnibus and Title 10 of the United States

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8. *Id.*

9. 22 U.S.C.A. § 4802 (West 1999).

10. *Id.*

11. CJCS HANDBOOK 5260, *supra* note 1, at 34. These unified commanders which would also be area military commanders are United States Commander in Chief, Europe (USCINCEUR); United States Commander in Chief, Pacific (USCINCPAC); United States Commander in Chief, Atlantic Command (USCINCACOM); United States Commander in Chief, Central Command (USCINCCENT); and United States Commander in Chief, Southern Command (USCINCSO).

12. For the remainder of this article, the unified commander will be referred to as the geographic CINC.

13. 22 U.S.C.A. § 4805(a).

14. *Id.*

15. The chief of mission is the senior ranking American at the embassy or consulate, usually the ambassador.

16. 52 U.S.C.A. § 3927 (West 1999).

17. U.S. DEP'T OF DEFENSE, DIR. 2000.12, DOD ANTI-TERRORISM/FORCE PROTECTION PROGRAM (15 Sept. 1996) [hereinafter DOD DIR. 2000.12].

18. *Id.*

19. U.S. DEP'T OF DEFENSE, DIR. 2000.16, DOD COMBATING TERRORISM PROGRAM STANDARDS para. 4.1.3 (15 Sept. 1996) [hereinafter DOD DIR. 2000.16]. This statement is taken to mean that every commander, down to the lowest level, is responsible for the protection of the personnel under his command. It is expected that he will take appropriate measures to protect his troops from problems ranging from terrorism to disease.

Code gives the geographic CINC the force protection responsibility for all personnel under his command.[20] Although the Secretary of Defense remains at the top of the responsibility pyramid for personnel overseas, the geographic CINC is responsible for the success or failure of the force protection program.

The idea that the geographic CINC is not responsible for all military personnel stationed or deployed within the geographic CINC's area of responsibility is a difficult concept to grasp. Title 10, U.S.C.A. § 1062 states: "Except as directed by the Secretary of Defense, all forces operating within the geographic area assigned to a unified combatant commander shall be assigned to, and under the command of, the commander of that command."[21] This may very well be the source of the incorrect belief that the geographic CINC has command of, and thus force protection responsibility over, all military personnel operating in the CINC's area of responsibility. The simple explanation is that the Secretary of Defense has "directed" that certain military personnel operating in the CINC's area of responsibility will not be assigned to the geographic CINC, and thus are not under his command. These individuals are the force protection responsibility of the Secretary of State, unless the Secretary delegates the responsibility back to the Secretary of Defense.[22] Individuals assigned to a United States embassy in organizations such as the Marine Security Guard Detachment, the Defense Attaché Office, or the Office of Defense Cooperation are typical examples of military personnel not "under the command" of the geographic CINC.

Ensuing Confusion

As a result, the statutes create two categories of DOD personnel stationed overseas: those who are the force protection responsibility of the chief of mission and those who are the force protection responsibility of the geographic CINC. The geographic CINC has force protection responsibility for DOD personnel directly under his command, and the chief of mission is responsible for everyone else, with the proviso that the Secretary of State may agree to delegate force protection responsibility to the Secretary of Defense.[23]

As simple as the arrangement sounds, there were several problems with this approach. In some countries, there were disputes between the Department of State and the DOD over who had force protection responsibilities for certain DOD organizations. In the case of some countries, no one had a list of all the DOD organizations actually stationed within the country,[24] making it difficult to identify who had force protection responsibility for whom. In Spain, the American Embassy's "1995 Annual Report of DOD Elements Under [Command] Authority" listed a total of sixty DOD military and civilian personnel who were the force protection responsibility of the chief of mission.[25] The American Embassy in Madrid conducted a recount, this time counting all DOD personnel who were not under the command of the "area military commander," or geographic CINC. By using the correct counting method, the number of DOD personnel for whom the chief of mission had force protection responsibility rose from what was originally thought to be sixty to 962.[26] A Secretary of State message to all diplomatic and consular posts addressed this confusion.[27] The message stated that because the Secretary of State, and by extension the chief of mission, "has ultimate responsibility for the protection of all United States government employees who are not clearly repeat clearly the authority of an area military commander, it is crucial that you be completely familiar with the situation in your country of assignment."[28]

After Khobar Towers, the need to address these issues and replace the old memorandum of understanding (MOU) between the Department of State and the DOD became obvious. The first step was a MOU on the security of DOD elements and personnel on the Arabian Peninsula. The Secretary of State and the Secretary of Defense signed this agreement on 15 September 1996, less than three months after the attack on Khobar Towers.[29] The second step was a new "Universal" MOU between the Department of State and the DOD, signed on 16 December 1997.[30]

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20. *See* 22 U.S.C.A. § 4802 (West 1999); 10 U.S.C.A. § 164 (West 1999).

21. 10 U.S.C.A. § 1062(a)(4).

22. 22 U.S.C.A. § 4805(a).

23. *Id.*

24. For instance, in the United Kingdom there are over 150 different DOD units or elements scattered across the country.

25. Message, 220752Z Aug 96, American Embassy, Madrid, subject: Com[mand] Authority Over and Responsibility for [United States government] Executive Branch Employees–Spain (22 Aug. 1996).

26. *Id.*

27. Message, 301519Z Jul 96, Secretary of State, subject: Chief of Mission Authority Over and Responsibility for [United States government] Executive Branch Employees (30 July 1996).

28. *Id.* In fairness to the Madrid Embassy, this same confusion was experienced by many embassies around the world.

The MOU for the Arabian Peninsula

After the Khobar Towers incident, the Secretary of Defense created the Downing Commission to investigate the causes of that attack.[31] The Commission found that the division of responsibility for force protection in the 1992 Department of State and the DOD MOU did not adequately support American forces in countries with a large American military presence.[32] In the case of Saudi Arabia, the Commission found that some forces fell into a "seam," where neither the chief of mission nor the geographic CINC exercised force protection responsibility.[33] The purpose of the MOU for the Arabian Peninsula was to eliminate "gray areas" by clearly assigning security responsibilities for all DOD elements and personnel either to the DOD or to the Department of State.[34]

The countries to be covered by the MOU for the Arabian Peninsula were Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Yemen,[35] all of which are located in the United States Central Command area of responsibility. A "bright-line" rule was established giving the DOD responsibility for all DOD elements and personnel on the Arabian Peninsula, except for Defense Attaché Offices, Marine Security Guard Detachments, and DOD personnel detailed to other United States government agencies.[36] An exceptions mechanism allowed the force protection responsibility for a DOD element to revert back to the chief of mission when it was the most reasonable or practicable arrangement.[37] The reallocation had to be specific and in writing.[38]

The next step was for the chief of mission in each of these countries to negotiate a memorandum of agreement with United States Commander in Chief, Central Command, (USCINCCENT) regarding the security responsibility for each DOD element within that country. The standard format for each of these memorandums of agreement is approximately two pages outlining responsibilities, roles, and relationships, followed by two annexes. The two annexes specifically list every DOD element within the country and assign them, for force protection purposes, to either the chief of mission or USCINCCENT.

Once the agreements were signed, a fundamental problem became apparent. In the Kingdom of Saudi Arabia the senior military officer in the country was to assume force protection responsibility for all DOD elements in Saudi Arabia that were not the responsibility of the chief of mission. For Saudi Arabia, USCINCCENT delegated this task on 14 July 1996[39] to the Commander, Joint Task Force, Southwest Asia (JTF/SWA).[40] United States Commander in Chief, Central Command, Operation Order (OPORD) 1-96 gave the Commander, JTF/SWA, force protection responsibility for the DOD elements assigned in Saudi Arabia, which were not the force protection responsibility of the chief of mission. The problem with this approach was that the Commander, JTF/SWA, only exercised tactical control over air assets being used in Operation SOUTHERN WATCH.[41] The Commander, JTF/SWA, would need either operational control or tactical control over the units located in Saudi Arabia to authoritatively direct specific force protection measures. This created an untenable problem if left unresolved.

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29. Message, 190156Z Sep 96, Secretary of State, subject: DOD Elements and Personnel on the Arabian Peninsula (19 Sept. 1996) [hereinafter Secretary of State Message].

30. Message, 162100Z Dec 97, Secretary of Defense, subject: MOU between [Department of State] and DOD on Security of DOD Elements and Personnel in Foreign Areas (16 Dec. 1997) [hereinafter Secretary of Defense Message].

31. The Secretary of Defense appointed General Wayne Downing, the retired former Commander-in-Chief of U.S. Special Operations Command, to conduct an assessment of the Khobar Towers bombing. His investigation into the bombing is referred to as the "Downing Commission."

32. THE DOWNING COMMISSION REPORT, executive summary at ix (on file with author).

33. *Id.*

34. Secretary of State Message, *supra* note 29, para. 2.

35. *Id.* para. 7.

36. *Id.* para. 2.

37. *Id.*

38. *Id.*

39. United States Commander in Chief, Central Command, OPORD 1-96, Force Protection (14 July 96) (replacing USCINCCENT Letter of Instruction for Force Protection in Kingdom of Saudi Arabia (12 Apr. 96)).

40. The Commander, JTF/SWA, was an Air Force major general. The only other permanently assigned general officers in country were the Commander, United States Military Training Mission (an Army major general), and the Commander, 4404th Wing in Dhahran (an Air Force brigadier general).

41. This meant that the commander of JTF/SWA basically controlled aircraft while they were in the air in the Persian Gulf region. He had no control over support units on the ground in the Persian Gulf region. SOUTHERN WATCH is the name of the mission to enforce the no-fly zone over southern Iraq.

The initial effect of OPORD 1-96 was to give force protection responsibility to a commander who had no authority to order specific force protection measures.[42] Since this was the commander who would be held accountable if there was a successful terrorist attack on DOD personnel in Saudi Arabia, the policy amounted to liability without authority. The issue was finally resolved by what is known as "dual-hatting." The Commander, JTF/SWA, was appointed to also serve as the Commander, Central Command Air Forces (CENTAF)[43] Forward. As Commander, CENTAF Forward, the Commander, JTF/SWA, was given the command authority needed to resolve force protection issues. When a force protection issue arose, he could take off his JTF/SWA "hat" and put on his Commander, CENTAF Forward "hat," and he would have the appropriate authority to direct the necessary force protection measures.

The Universal MOU

A more difficult task was to draft a new MOU that could be applied on a world-wide basis yet still be acceptable to both the Department of State and the DOD. On 16 December 1997, Secretary of Defense William Cohen and Secretary of State Madeline Albright co-signed a "Universal" MOU to "clearly define the authority and responsibility for the security of DOD elements and personnel in foreign areas not under the command of a geographic CINC."[44] By allowing the transfer of operational force protection authority for DOD elements and personnel back and forth between the geographic CINC and the chief of mission, the Universal MOU provided a more logical allocation of force protection responsibilities between the geographic CINCs and the chiefs of mission. In some countries, the chief of mission might have had the force protection responsibility for a DOD element, even though the geographic CINC might have been in the best position to provide this assistance, or vice versa. The Universal MOU was designed to rectify this problem, and establish the principle that force protection for DOD elements should be assigned to either the geographic CINC or the chief of mission, based on who is in the best position to provide force protection.[45]

This new Universal MOU on force protection adapted and superseded the 1996 Arabian Peninsula MOU.[46] Initially, the Universal MOU applied to nine countries: Bahrain, Kuwait, The Republic of the Marshall Islands, Oman, Qatar, Saudi Arabia, Turkey, United Arab Emirates, and Yemen.[47] For these countries, the geographic CINC and the chief of mission had either negotiated or started negotiations on country-specific memorandums of agreement regarding the force protection of military elements and personnel. After the initial MOU, other countries were to be added to the "covered countries" list once the country-specific memorandums of agreement were signed. The DOD gave priority to certain countries by providing a list of "intended countries" that were to be added to the Universal MOU.[48] The Secretary of Defense emphasized that there was an urgency in finalizing the memorandums of agreement for the "intended countries," and gave a target date of six months from the signing of the Universal MOU to complete the country-specific memorandums of agreement.[49]

Before a country can be added to the "covered country" list in the Universal MOU, the geographic CINC and the country's chief of mission must negotiate a memorandum of agreement. Each memorandum of agreement outlines the chief of mission's responsibility, the geographic CINC's responsibility, responsibility for temporary duty personnel, direction for the Emergency Action Committee (EAC), and direction on coordination.[50] As described above, each memorandum of agreement must also include an "Annex A" and an "Annex B." Annex A consists of an inventory of the DOD elements and personnel for whom the chief of mission retains or assumes force protection responsibility.[51] Annex B consists of an inventory of

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42. For instance, since he only had tactical control over air assets while they were flying in support of SOUTHERN WATCH, the Commander, JTF/SWA, could not have ordered the 4409th Operations Group in Riyadh, Saudi Arabia, to increase security police patrols, set up barricades, build walls of sandbags, and the like.

43. The United States Central Command Air Forces (CENTAF) is headquartered at Shaw Air Force Base, South Carolina. This is the air arm of the United States Central Command.

44. Secretary of Defense Message, *supra* note 30.

45. *Id.* para. 4.

46. *Id.* The message stated that for the original seven countries on the Arabian peninsula, there was to be no change to the security relationships that had been worked out with the respective chiefs of mission.

47. *Id.*

48. *Id.* The intended countries were Djibouti, Ethiopia, Kenya, Jordan, Eritrea, Pakistan, Egypt, Rwanda, Algeria, Spain, Belgium, Israel, United Kingdom, Bosnia, Morocco, Croatia, Serbia, Italy, Germany, Netherlands, Greece, Cyprus, and Japan.

49. *Id.* The Universal MOU was signed on 16 December 1997. *Id.* At the six-month point, the memorandum of agreement process had been completed for only one country on the intended country list, Cyprus.

50. Memorandum of Understanding Between the Department of State and the DOD on Security of DOD Elements and Personnel in Foreign Areas (16 Dec. 1997).

51. Secretary of Defense Message, *supra* note 30.

the DOD elements and personnel for whom the geographic CINC retains or assumes force protection responsibility.[52] Annex B includes CINC-assigned forces for which the geographic CINC has always had force protection responsibility, as well as the non-CINC-assigned forces which were previously the force protection responsibility of the chief of mission.

Once a memorandum of agreement is negotiated between the chief of mission and the geographic CINC, the chief of mission must submit the draft memorandum of agreement to the Department of State for approval. In contrast, the geographic CINC is not required to submit the document to the DOD for approval.[53] The chief of mission and geographic CINC will sign but not date the document. After the signing, the chief of mission and geographic CINC will transmit messages to the Department of State and the DOD respectively, stating that the country-specific memorandum of agreement has been signed. The Department of State and the DOD will then act to place the country on the "covered countries" list in the Universal MOU. The effective date for adding a country to the "covered country" list is the date the memorandum was signed by the Secretaries of State and Defense or their representatives, unless the parties agree to a different effective date.[54] Once signed, the date is annotated on the country-specific memorandum of agreement. This date indicates when the memorandum of agreement went into effect. The Department of State and the DOD will then transmit messages informing the chief of mission and the geographic CINC of the date when the country in question was placed on the "covered country" list.[55]

The Universal MOU includes provisions to remove a country from the "covered country" list. The first step is for the party who desires the removal, either the Department of State or the DOD, to give written notice to the other party. Either the Secretary of Defense or the Secretary of State, or their designated representatives, must sign this notice. The country in question will be deleted from the "covered country" list effective sixty days from the date of the original notice, unless the parties agree to a different time period.[56]

Dispute resolution is addressed in the Universal MOU. If the chief of mission and the geographic CINC are unable to resolve an issue, they are to refer the issue to the Secretary of Defense and Secretary of State-designated representatives in Washington, D.C. If these designated representatives fail to resolve the problem, the issue will then be forwarded to the Under Secretary of State for Management and the Under Secretary of Defense for Policy. If the matter cannot be resolved at this level, the final step is to refer the issue directly to the Secretary of Defense and the Secretary of State.[57]

The Universal MOU itself may be terminated. Termination occurs sixty days after one party gives notice to the other party of its intention to withdraw from the agreement, unless the parties agree to a different termination date.[58]

Force Protection and Command Relationships

When a geographic CINC assumes force protection responsibility under a country-specific memorandum of agreement for DOD elements and personnel not in his chain of command, another problem is created: the geographic CINC assumes responsibility for forces with which he has no command relationship. Another big issue is who has force protection responsibility for personnel who are either in a temporary duty status in or who are passing through a foreign country. Some of the possible scenarios that are potential problem areas are Joint Task Forces (JTFs), naval personnel making port calls, Air Mobility Command aircrews transiting through a geographic CINC's area of responsibility, personnel assigned to the North Atlantic Treaty Organization (NATO), peacekeepers, and even DOD contractors. The crux of the problem is that when a geographic CINC assumes force protection responsibility through a country-specific memorandum of agreement for military personnel not normally under his command, the geographic CINC does not have any inherent command authority over those forces.[59] This is the same problem encountered on the Arabian Peninsula: without command authority over these forces, the geographic CINC cannot give the necessary orders to ensure that force protection measures are taken.

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52. *Id.* The inventory in Annex B is made up of two categories of DOD personnel. The first category consists of CINC-assigned forces for which the geographic CINC has always had force protection responsibility. The second category consists of the non-CINC-assigned forces that were previously the force protection responsibility of the chief of mission but by agreement are now the force protection responsibility of the geographic CINC.

53. *Id.*

54. Memorandum of Understanding between the Department of State and the Department of Defense on Security of DOD Elements and Personnel in Foreign Areas (16 Dec. 1997).

55. Secretary of Defense Message, *supra* note 30.

56. *Id.*

57. *Id.*

58. Secretary of Defense Message, *supra* note 30, para. X, A.

59. Message, 220043Z Apr 98, Joint Staff, subject: Clarification of Policy in DOD 2000.12 and 2000.16 (22 Apr. 1998).

Types of Command Authority

To better understand the dilemma, it is necessary to review the types of command authority and their definitions. There are four basic types of command relationships: combatant command; operational control; tactical control; and support.[60] Combatant commanders, that is, geographic CINCs, exercise combatant command[61] over forces assigned or reassigned by the National Command Authority.[62] Combatant command is the authority 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."[63] Combatant command authority cannot be delegated or transferred.[64]

Operational control is the command authority that may be exercised by commanders at any echelon at or below the level of combatant commander.[65] Operational control gives a commander the authority to perform virtually the same tasks as listed above for combatant command, with the very important difference that operational control can be transferred or delegated.[66]

Tactical control is command authority over assigned or attached forces or commands, that is "limited to the detailed and usually local direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks."[67]

"Support" is a relationship established by a superior commander between subordinate commanders when one organization should aid, protect, complement, or sustain another force.[68]

When military units are operating within a geographic CINC's area of responsibility, unless the President or the Secretary of Defense directs otherwise, these forces are to be assigned or attached to the command of the CINC.[69] For instance, during the Persian Gulf War, units that were deployed to the United States Central Command area of responsibility from the European Command were assigned or attached to the command of the United States Commander in Chief, Central Command. However, transient forces, such as transient aircrews, do not come under the chain of command of the geographic CINC solely by their movement across area of responsibility boundaries.[70] The elements and personnel that are the force protection responsibility of the chief of mission are in this position because the Secretary of Defense has "directed otherwise," that is; they have been assigned to someone other than the geographic CINC. If a geographic CINC does not have command authority (operational or tactical control) over a unit, then he lacks the necessary authority to order that unit to take specific force protection actions.

The Proposed Solution

The Joint Staff decided to use the same solution that was used on the Arabian Peninsula. On 15 October 1996, Secretary of Defense William J. Perry delegated to the United States Commander in Chief, Central Command, tactical control over non-CINC assigned forces for force protection purposes.[71] This authority covered all DOD personnel assigned or temporarily assigned to the Arabian Peninsula. In April 1998, the Joint

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60. JOINT PUBLICATION 0-2, UNIFIED ACTION ARMED FORCES (UNAFF) III-3, fig. III-2 (24 Feb. 1995) [hereinafter JOINT PUB. 0-2].

61. 10 U.S.C.A. § 161 (West 1999). Two types of combatant commands are established by statute: unified combatant commands and specified combatant commands. A unified combatant command has broad, continuing missions and is composed of forces from two or more military departments. A specified combatant command also has a broad, continuing missions but is composed of forces from a single military department. For the purposes of this article, references to the combatant commander refer to a unified combatant command.

62. JOINT PUB. 0-2, *supra* note 60, at III-3.

63. *Id.* at GL-4.

64. *Id.* at III-5.

65. *Id.* at III-8.

66. *Id.*

67. *Id.* at III-9.

68. *Id.* at III-10.

69. *Id.* at III-5. The various military organizations that are normally the force protection responsibility of the chief of mission have not been assigned or attached to the command of the geographic CINC by the Secretary of Defense.

70. *Id.* A typical example of this situation would be when a Transportation Command C-141 stops at Rota Naval Air Station (NAS), Spain, to refuel and spend the night while on its way to Saudi Arabia. Rota NAS is in the EUCOM area of responsibility, but the C-141 is flying to Saudi Arabia to conduct operations in the CENTCOM area of responsibility. This C-141 aircrew is not in the EUCOM chain of command while it is on the ground at Rota NAS.

Staff responded to an inquiry from United States European Command with a message stating that the Secretary of Defense "will delegate" tactical control for force protection to the geographic CINCs.[72] This delegation did not officially occur until 28 September 1998, when Secretary of Defense William Cohen sent a memorandum to the geographic CINCs informing them of their new authority to exercise tactical control for force protection purposes.[73] Once the responsibility for non-CINC assigned personnel is transferred from the chief of mission to the geographic CINC under the country-specific memorandum of agreement process, the geographic CINC may exercise tactical control for force protection purposes over these personnel.[74]

Tactical control for force protection enables the geographic CINCs to "order implementation of force protection measures and to exercise the security responsibilities outlined in the MOU."[75] The authority also applies to DOD personnel temporarily assigned to the geographic CINC's area of responsibility, "to include aircraft and their aircrews."[76] The Secretary of Defense's memorandum also authorized the geographic CINCs to "change, prescribe, modify, and enforce force protection measures for covered forces," "inspect and assess security requirements," and "direct immediate force protection measures (including temporary relocation) when, in the judgment of the responsible CINC, such measures must be accomplished without delay to ensure the safety of the DOD personnel involved."[77] With this solution, the geographic CINCs now had the force protection authority they had previously lacked.

Accountability Review Boards

The negotiating and signing of all memoranda of agreement was halted in June 1998 because of a concern by DOD attorneys that the geographic CINCs could become subject to State Department Accountability Review Boards (ARB).[78] Federal statutes direct the Secretary of State to convene an ARB in "any case of serious injury, loss of life, or significant destruction of property at or related to a United States [g]overnment mission abroad."[79] The ARB consists of four members appointed by the Secretary of State and one appointed by the Director of the Central Intelligence Agency.[80] This Board has the power to administer oaths, order depositions, and require the attendance and testimony of individuals, as well as the authority to make findings and recommendations.[81]

A concern arose over who would conduct an investigation if a terrorist attack was made against one of the elements for which force protection responsibility had transferred from the chief of mission to the geographic CINC. The DOD did not like the idea of a geographic CINC having to answer to a Department of State ARB. Part of the problem may have been caused by a clause in the Universal MOU that states:

> [I]t is understood between the parties that all DOD elements and personnel in the covered countries identified as not under CINC command remain under [chief of mission] authority, as provided in Section VI, but that security responsibility for such elements and

71. Memorandum, Secretary of Defense to the Commander in Chief, United States Central Command, subject: Delegation of Force Protection Responsibility and Authority for the Arabian Peninsula (15 Oct. 96). This action should not be confused with the action USCINCCENT took with respect to the Commander, JTF/SWA, discussed earlier. In each case, there was a problem of a lack of a command relationship with the DOD elements for which the commander was being assigned force protection responsibility. Although each problem was solved by different methods, the net result was that each commander was given the authority to exercise force protection responsibility over DOD elements with which he previously lacked a command relationship.

72. Message, 220043Z Apr 98, Joint Staff, subject: Clarification of Policy Described in DOD Directive 2000.12 and 2000.16 (22 Apr. 1998).

73. Memorandum, Secretary of Defense to the Commanders in Chief, United States Atlantic Command, United States Central Command, United States European Command, United States Pacific Command, United States Southern Command, subject: Delegation of Outside Continental United States Force Protection Responsibility and Authority to Geographic Combatant Commanders (28 Sept. 1998).

74. *Id.* The qualifier in this case is that force protection responsibility for these personnel must first be transferred from the chief of mission to the geographic CINC under a country-specific memorandum of agreement. The geographic CINC does not have force protection responsibility for the transferred forces until the memorandum of agreement is signed and placed on the covered country list.

75. *Id.*

76. *Id.*

77. *Id.*

78. Message, 181352Z Aug 98, United States Commander, Europe, subject: COM-CINC Agreement on Security (18 Aug. 1998) [hereinafter COM-CINC Agreement on Security Message].

79. 22 U.S.C.A. § 4831 (West 1999). The Secretary of State may also authorize a board in any case of a serious breach of security involving intelligence activities of a foreign government directed at a United States government mission abroad.

80. *Id.* § 4832.

81. *Id.* § 4833.

> personnel is assumed by DOD, unless security responsibility is otherwise allocated pursuant to their MOU.[82]

While the issue was pending resolution, a decision was made to continue with the memorandum of agreement process for the countries where there would not be a transfer of security responsibility.[83]

On 22 March 1999, the Secretary of Defense announced that the issue had been resolved.[84] The Departments of State and Defense agreed that DOD would "conduct investigations under existing defense regulations for incidents which would normally require the Secretary of State to convene an ARB."[85] This agreement applies to DOD personnel who for force protection purposes have been transferred from the chief of mission to the geographic CINC.[86]

Taking Care of the Strays

As force protection responsibilities were sorted out, difficult questions arose regarding who had the responsibility for the various "stray" units that are routinely spread across a geographic CINC's area of responsibility. These "strays" include personnel assigned to the military arm of NATO, "stovepipe" organizations,[87] "peacekeepers," and even DOD contractors. Typically, these issues are handled as they arise on a case-by-case basis.

NATO Personnel

When United States military personnel are assigned to NATO, they do not have a command relationship with the United States Commander in Chief, Europe (USCINCEUR) unless they are "dual-hatted."[88] "Dual-hatted" in this case means that a United States service member could fill a NATO billet, while at the same time filling a United States billet. If the United States half of the "dual-hatted" position is in the USCINCEUR chain of command, then it is through this United States billet that USCINCEUR will exercise force protection responsibility over that individual. If the United States service member in this example is not "dual-hatted" and belongs solely to NATO, then he becomes the force protection responsibility of the chief of mission.[89] The United States Commander in Chief, Europe, is responsible for all personnel with whom he has a command relationship, and the chief of mission is responsible for the remaining military personnel within that country. In the case of NATO-assigned personnel, this could create a situation where a United States service member is the force protection responsibility of USCINCEUR, while the United States service member in an office across the hallway is the responsibility of the chief of mission. This is precisely the situation that the Universal MOU, along with the country-specific memorandums of agreement, was designed to correct. Unfortunately, the Memorandum of Agreement for Belgium, where a significant number of NATO personnel are stationed, has not been negotiated. However, the issue was addressed in the Memorandum of Agreement for Turkey, which has been negotiated, signed, and is in effect. United States Commander in Chief, Europe, and the chief of mission for Turkey agreed to assign force protection responsibility for all NATO assigned personnel in Turkey to USCINCEUR.[90] When the Memorandum of Agreement for Belgium is completed, it is probable that, similar to the Turkish agreement, most NATO personnel will be assigned to USCINCEUR for force protection purposes.

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82. Memorandum of Understanding Between the Department of State and the DOD on Security of DOD Elements and Personnel in Foreign Areas, para. VII, C (16 Dec. 1997).

83. COM-CINC Agreement on Security Message, *supra* note 78. Many of these countries are in Africa, where the only DOD presence in the country is at the United States Embassy.

84. Message, 221200Z Mar 99, Secretary of Defense, subject: Resolution of Accountability Review Board (ARB) Requirements Under the 1997 DOS/DOD Universal MOU on Security of DOD Elements and Personnel in Foreign Areas (22 Mar. 1999).

85. *Id.*

86. *Id.*

87. Stovepipe organizations are military units that are stationed outside the United States and are thus within a geographic CINC's AOR. However, the stovepipe organization's chain of command does not go through the geographic CINC, but instead goes directly back to a parent organization in the United States.

88. Interestingly enough, USCINCEUR is also dual hatted. United States Commander in Chief, Europe, is not only the combatant commander of United States European Command (USEUCOM), commanding all United States' military personnel assigned to him in the USEUCOM theater, he also serves as the Supreme Allied Commander, Europe (SACEUR), commander of NATO's military arm. However, the fact that USCINCEUR is also SACEUR does not change the force protection relationships for NATO-assigned personnel.

89. Message, 011614Z Jun 98, Joint Staff, subject: Responsibility for Force Protection of NATO Assigned Forces (1 June 1989).

90. Memorandum of Agreement between Commander in Chief, United States European Command and Chief of Mission, American Embassy, Ankara, subject: Security and Force Protection of DOD Elements and Personnel in Turkey, annex B. The American personnel assigned to NATO billets in Turkey are located in Ankara and Izmir.

Peace Observers

United States military personnel assigned as peace observers are another group that occasionally falls through the force protection net. These personnel are assigned to multinational United Nations organizations and are usually in remote locations far from other DOD personnel.[91] The normal rules for force protection responsibilities apply to peace observers; since they are not under the command of the geographic CINC they are the responsibility of the chief of mission. However, in the case of the multinational force observers (MFO) stationed in the Sinai Peninsula of Egypt, the Department of the Army provided force protection[92] because the Egyptian chief of mission was uncomfortable accepting force protection responsibility of such a large and combat-like unit. The United States Commander in Chief, Central Command (USCINCCENT) had not performed these duties in the past due to political sensitivities.[93] Following establishment of the MFO, political sensitivities changed and a recommendation was made to reassign force protection responsibility to USCINCCENT.[94]

Another interesting issue arose concerning peacekeeping forces in Morocco, which is in the USEUCOM area of responsibility. Approximately thirty United States military personnel are assigned to a United Nations operation known as the Mission for a Referendum in Western Sahara (MINURSO). This peacekeeping force operates in a disputed area of Morocco, referred to as the Western Sahara. Originally twenty-six countries contributed over 1700 military observers, 300 policemen, and 800 to 1000 civilian personnel to MINURSO. Because the sovereignty of the Western Sahara was in dispute, the chief of mission in Morocco did not normally exercise security functions in the disputed region, which meant that the chief of mission would not exercise force protection responsibility for the thirty American personnel assigned to MINURSO.[95] However, an agreement was reached that directed the chief of mission in Morocco to assume force protection responsibility for all personnel assigned to or on temporary duty (TDY) with MINURSO.[96]

DOD Contractors

Another complex issue regarding force protection responsibility involves contractors hired by the DOD. Oftentimes, contract employees will accompany United States forces on contingency operations and provide services such as food preparation, computer support, and engineering support. For example, the engineering firm of Brown and Root provided support to deployed United States forces in contingency operations in Somalia and Bosnia. Contractors will oftentimes eat, work, and live alongside deployed military personnel. The question is "who provides force protection for these contractors?"

By law, the chief of mission has responsibility for DOD contractors and their employees.[97] There does appear to be an exception for situations that are declared a "crisis" by the National Command Authority (NCA) or the geographic CINC.[98] When a "crisis situation" is declared, the DOD components work with contractors performing essential services to develop and implement plans and procedures to ensure the contractor can continue to perform.[99] Although vague, the DOD guidance can be interpreted as direction to DOD components to provide force protection for contractors when either the NCA or the geographic CINC declares a crisis. In routine cases, however, the DOD has no legal obligation to provide force protection for contractors or their employees unless specific language is included in the contract.[100] The DOD attempted to strengthen force protection for contractors performing outside of the United States by requiring them to do the following:

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91. Some of these multinational peacekeeping forces are located in Guatemala, Georgia, Western Sahara, Jerusalem, Iraq/Kuwait, and Egypt.

92. Memorandum, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, to the Secretary of Defense, subject: Force Protection Responsibilities for Peace Observer Forces (6 May 1997).

93. *Id.* It should be noted that USCINCCENT would have lacked a command relationship with U.S. personnel in the MFO-Egypt, and thus would not have had the authority to exercise force protection responsibilities.

94. *Id.*

95. Message, 102133Z Mar 98, Secretary of State, subject: State-DOD MOU on Security–Rabat (10 Mar. 1998).

96. *Id.*

97. Message, 201545Z Jan 98, United States Commander in Chief, Europe, subject: Anti-terrorism Force Protection Guidance for DOD Entities Employing DOD Contractors (20 Jan. 1998) [hereinafter USCINCEUR Message].

98. U.S. DEP'T OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES (26 Jan. 1996) [hereinafter DOD INSTR. 3020.37]. This Instruction defines "crisis situation" as "Any emergency so declared by the National Command Authority or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international conflict presenting a serious threat to DOD interests." *Id.*

99. *Id.* para. D.3.

100. USCINCEUR Message, *supra* note 97.

1. If the contractors are U.S. companies, affiliate with the Overseas Security Advisory Council;

2. Ensure U.S. national personnel register with the U.S. Embassy and that their third-country nationals comply with the requirements of the Embassy of their nationality;

3. Prior to their travel outside the United States, provide [anti-terrorism/force protection] awareness information to personnel commensurate with that which DOD provides to the military, DOD civilian personnel, and their families to the extent such information can be made available; and

4. Receive the most current [anti-terrorism/force protection] guidance for personnel and comply with the DOD Foreign Clearance Guide (DOD 4500.54-G), as appropriate.[101]

Other than the provisions listed above, the DOD cannot force contractors and their employees to follow all DOD force protection guidelines in a foreign country, unless these requirements are specified in the contract. While DOD wants to strengthen force protection measures used by contractors operating overseas, contractors and their employees cannot force DOD to provide them force protection.

Force Protection and International Agreements

When DOD personnel are assigned to an overseas location, they must abide by the laws of the United States as well as the laws of the host nation. A force protection program must operate within the same restraints. Multilateral and bilateral international agreements create the framework within which overseas force protection programs must operate. All actions to combat terrorism outside the United States must comply with applicable Status of Forces Agreements (SOFA), international agreements, and memoranda of understanding.[102]

One of the most basic principles of international law is a nation's right to control its sovereign territory.[103] This means that the host nation has the ultimate responsibility to prevent terrorist attacks against American installations overseas.[104] Overseas, American forces are normally allowed to police inside the fence at American installations, while the host nation is responsible for policing everything outside of the installation. When a host nation fails to control its territory, it can have disastrous results for American military installations. The failure by the Saudi Arabian government to control a public parking lot next to the Khobar Towers complex was perhaps the major factor in the failure to prevent that terrorist attack. Terrorists were able to park an explosives-laden truck in a parking lot only eighty feet from the building they ultimately destroyed.[105] On two previous occasions, officials from the 4404th Wing in Dhahran had asked the Saudi government to move the parking lot fence in order to create a larger buffer zone between the parking lot and the installation's buildings.[106] The Saudi government refused both requests, presumably because the parking lot serviced a public park and a mosque.[107]

The NATO SOFA

The largest number of United States military personnel stationed overseas are found in European countries that are members of NATO.[108] Their status in NATO countries is controlled by the NATO SOFA.[109]

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101. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 252.225-7043, FORCE PROTECTION FOR DEFENSE CONTRACTORS OUTSIDE THE UNITED STATES (Jan. 13, 1999) [hereinafter DFARS]. *See* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Interim Antiterrorism/Force Protection (AT/FP) Policy for Defense Contractors Overseas (28 Jan. 1998). This Memorandum defines a defense contractor as:

> Any individual, firm, corporation, partnership, association, or other legal nonfederal entity that enters into a contract directly with DOD or a DOD component to furnish services, supplies, or both, including construction. Thus, Defense Contractors may include [United States] nationals, local citizens, or third country nationals. For purposes of this interim policy, Defense Contractors do not include foreign governments or representatives of foreign governments that are engaged in selling to DOD or a DOD component or foreign corporations wholly-owned by foreign governments.

The policy set out in the Memorandum was to be incorporated in the new version of *DOD Directive 2000.12*.

102. U.S. DEP'T OF DEFENSE, INSTR. 2000.14, DOD COMBATING TERRORISM PROGRAM PROCEDURES para. D.1.c (15 June 1994) [hereinafter DOD INSTR 2000.14].

103. Island of Palmas Case (United States v. Netherlands), 2 R.I.A.A. 829, (Perm. Ct. Arb. 1928).

104. U.S. DEP'T OF DEFENSE, HANDBOOK O-2000.12-H, PROTECTION OF DOD PERSONNEL AND ACTIVITIES AGAINST ACTS OF TERRORISM AND POLITICAL 4-3 (Feb. 1993) TURBULENCE [hereinafter DOD O-2000.12-H].

105. Matt LaBash, *Scapegoat: How a Terrorist Bombing Destroyed a General's Career*, A.F. TIMES, Dec. 8, 1997, at 10.

106. *Id.* at 14.

107. *Id.*

The NATO SOFA provides a good example of the relationship the United States has with most nations hosting American personnel. Provisions in the NATO SOFA create the framework by which American installations are protected.[110] Article VI of the NATO SOFA allows members of a visiting force to possess and carry arms if authorized in their orders.[111] The NATO SOFA further provides that military units or formations have the right to police any installations that they occupy pursuant to an agreement with the receiving state, or host nation.[112] "To police" means that the visiting American forces can "take all appropriate measures to ensure the maintenance of order and security on such premises."[113] American forces may police outside of American installations only if an arrangement or agreement has been made with the host nation.[114] Originally, the concept of American forces patrolling or policing outside of an installation was limited to American military police attempting to quell disorders caused by American personnel.[115] With the advent of force protection, this Article of the NATO SOFA can be used as the authority by which the host nation can allow American forces to police and patrol more broadly outside of overseas American installations. However, American forces arresting non-Americans on foreign soil is a major stumbling block. The NATO SOFA does not give American forces the authority to arrest a national of the host nation while he is on an American installation, except in an emergency situation.[116]

Outside of an American installation, the general rule is that American forces have the authority to arrest American personnel only.[117] The only exception to this rule appears to be if American military forces arrest a foreign national while he is in *flagrante delicto*.[118] For instance, if American military police caught a terrorist outside of an American installation placing a bomb next to the perimeter fence, the military police would be within their rights to arrest the terrorist and then hand him over to the law enforcement authorities of the host nation.[119] In Germany, under certain conditions, American military authorities may take into "temporary custody" a person not subject to their jurisdiction.[120] The person must be caught or pursued in *flagrante delicto*, and either their identity cannot be established immediately or there is reason to believe the person will flee from justice.[121] The German government can also request that the American military authorities make such an arrest.[122] American military authorities may also take a person into temporary custody if there is danger in delay, a German police

108. Approximately 110,000 U.S. personnel are stationed in the European theater. Congress has mandated that this number be reduced to 100,000.

109. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

110. The discussion about the NATO SOFA also applies to the Partnership for Peace (PFP) SOFA, since the PFP SOFA and the NATO SOFA have identical terms. As of 1 February 1998, the PFP SOFA is in effect in the following countries: Albania, Austria, Bulgaria, Czech Republic, Estonia, Finland, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Slovak Republic, Slovenia, Sweden, and Uzbekistan.

111. NATO SOFA, *supra* note 109, art. VI.

112. *Id.* art. VII, para 10(a).

113. *Id.*

114. *Id.* art. VII, para 10(b).

115. SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 254 (1971).

116. *Id.* at 252.

117. *Id.* at 254.

118. *Id.* at 255. In *flagrante delicto* is defined as "in the very act of committing the crime." The Japanese government expressly granted American Forces in Japan the right to arrest in *flagrante delicto*. In *flagrante delicto* is not mentioned in the NATO SOFA, but it is alluded to in a statement made by the Juridical Sub-Committee (negotiating the NATO SOFA) that if the military authorities of the sending state arrest a national of the receiving state, the arrestee must be handed over immediately to the receiving state police.

119. An interesting issue arises over who has the right to prosecute the terrorist in this example, especially if the terrorist succeeded in killing an American national. Once again, the issue of territorial sovereignty arises, which gives the nation where the crime was committed the primary jurisdiction in prosecuting the crime. However, the United States has enacted 18 U.S.C. § 2332, which makes it a violation of United States law to kill, conspire to kill, or cause serious bodily injury to a United States citizen when he is outside of the United States. The United States Attorney General must certify in writing that in his judgement the offense was intended to coerce, intimidate, or retaliate against a government or civilian population. This legislation gives the United States the extraterritorial jurisdiction it needs to prosecute terrorists in its own courts, but it does not solve the problem that this principle is not generally accepted in international law, i.e., many nations will not hand jurisdiction over to the United States.

120. The Supplementary Agreement to 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, 3 Aug. 1959, amended 21 Oct. 1971, and 18 May 1981), 1 U.S.T. 531.

121. *Id.* art. 20, para. 1(a).

122. *Id.* art. 20, para. 1(b).

officer cannot be called in time, and the person has committed or is attempting to commit an offence within, or directed against an American installation.[123] This second provision only applies if the person is a fugitive from justice or there are good reasons to fear that he will seek to evade criminal prosecution after committing the offence.[124] Under both exceptions, the military authorities taking the individual into temporary custody may disarm the detainee.[125] They may also search for and seize any items in the possession of the detainee that may be used as evidence.[126] The detainee then must be delivered without delay, along with the seized weapons and evidence, to the nearest German public prosecutor or police officer.[127]

The NATO SOFA also requires that the host nation and the sending state "seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations . . . of other [c]ontracting parties, and the punishment of persons who may contravene laws enacted for that purpose."[128]

The Middle East

Some countries where DOD personnel are stationed do not have official agreements with the United States. Many countries in the Middle East either do not have a status of forces agreement with the United States or have an agreement that is classified. A classified agreement makes it difficult for the personnel deployed to or stationed in these countries to know the limitations of their force protection authority.

One Middle Eastern country that does have an unclassified agreement with the United States regarding status of forces is Egypt.[129] Throughout the agreement with Egypt, United States military personnel are referred to as "special missions." The only section of the agreement that addresses force protection is a statement that the Egyptian government "shall spare no effort, as far as possible, in providing assistance for the safety of the members of the special missions in carrying out their activities mentioned in this Agreement."[130] The assistance is to conform to all Egyptian laws and regulations.[131] The Agreement limits the "policing" powers of the American military in Egypt. While on Egyptian military facilities, American military police "may take all appropriate measures over United States personnel to ensure the maintenance of order and security."[132] Outside of Egyptian military facilities, American military police may be employed only as necessary to maintain order and discipline among American troops, and only by prior arrangement with the appropriate Egyptian authorities.[133] This agreement seems to allow American military police in Egypt the right to police its own forces for the maintenance of order and discipline, and little else.

When American forces are based on overseas installations, they must rely on the local government for force protection support. Because of the limited American authority outside of an installation, the host nation authorities have to provide the essential security outside the fence line, or through an agreement, allow the American forces the authority to do so. Even if the host nation refuses or fails to protect an American installation, the United States always reserves the right of self-defense to protect American facilities, property, and personnel.[134] All overseas installations need some type of agreement with the local authorities to delineate the type of support that will be provided by the host nation and the amount of authority that will be granted to American forces policing outside the installation fence.

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123. *Id.* art. 20, para. 2.

124. *Id.* This second exception for arresting a person not subject to United States jurisdiction in Article 20, paragraph 2, is very similar to the exception in paragraph 1. Paragraph 1 has the in *flagrante delicto* requirement, while paragraph 2 seems to allow the taking into custody of a person who has already committed the offence, with the proviso that it must be dangerous to delay the arrest because the person will probably flee.

125. *Id.* art. 20, para. 3.

126. *Id.*

127. *Id.* art. 20, para. 4.

128. NATO SOFA, *supra* note 109, art. VII, para. 11.

129. Agreement Concerning Privileges and Immunities of United States Military and Related Personnel in Egypt, with Related Letter and Agreed Minute, Exchange of Notes at Cairo on 26 July 1981; *entered into force* 5 Dec. 1981, 33 U.S.T. 3353, T.I.A.S. 10349.

130. *Id.* para. II, (B).

131. *Id.*

132. *Id.* para. II, (F), 9, A.

133. *Id.* para. II, (F), 9, B.

134. DOD O-2000.12-H, *supra* note 104.

The Protection of the Force

The signing of the Universal MOU and the subsequent negotiations were a significant step forward, but these steps only relate to who has responsibility for the force protection of military units. The Universal MOU and country-specific memorandums of agreement do not provide specific guidance as to "how" to protect DOD personnel. The "how to" guidance is found in a series of DOD directives and instructions. These publications begin by creating a hierarchy of responsibility and then devolve down into the specifics of protecting the force.

Department of Defense Directive 2000.12

The publication that establishes the DOD force protection program is *DOD Directive 2000.12*.[135] The primary purposes of this Directive are to assign responsibilities for the protection of DOD personnel and their families, facilities, and other resources from terrorism; to establish the Chairman, Joint Chiefs of Staff, as the focal point in DOD for force protection issues; and to expand the responsibilities of the combatant commanders "to ensure the force protection of all DOD activities in their geographic area of responsibility."[136]

The Directive assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense (Comptroller), the Under Secretary of Defense for Acquisition and Technology, the Under Secretary of Defense for Policy, the Assistant Secretary of Defense for Force Management Policy, the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, the Director, Defense Intelligence Agency, the Secretaries of the Military Departments, and last but probably most importantly, the Commanders of the Combatant Commands–that is, the geographic CINCs.[137]

The first responsibility listed for the geographic CINCs is to review the force protection status of all military activities within their geographic area of responsibility.[138] Other requirements include identifying force protection resource requirements, assessing command relationships as they relate to force protection,[139] identifying predeployment training requirements,[140] establishing command policies and programs for force protection,[141] assessing the terrorist threat and disseminating that information to subordinate commanders,[142] and coordinating force protection measures with the host nation.[143]

Department of Defense Instruction 2000.14

More responsibilities are spelled out for the geographic CINCs in *DOD Instruction 2000.14*.[144] This Instruction implements *DOD Directive 2000.12* by establishing policy, assigning responsibilities, and prescribing procedures.[145] Broad policy concepts are stated, such as "it is DOD policy to protect DOD personnel and their families, facilities, and other material resources from terrorist acts."[146] *DOD Instruction 2000.14* assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Commanders of the Unified Combatant Commands, and the Assistant Secretary of Defense for Command, Control, Communication, and Intelligence.[147] Many of the responsibilities assigned by *DOD Instruction 2000.14* to the parties listed above are similar to the responsibilities assigned to the same parties in *DOD Directive 2000.12*. For instance, *DOD Directive 2000.12* assigns the secretaries of the military

135. DOD DIR. 2000.16, *supra* note 19, para. 4.1.3. At the time this article was written, a draft revision of this Directive was pending but not finalized.

136. *Id.* para. A.

137. *Id.*

138. *Id.* para. E, 9.

139. *Id.* para. E, 9, d.

140. *Id.* para. E, 9, f.

141. *Id.* para. E, 9, g.

142. *Id.* para. E, 9, h, i.

143. *Id.* para. E, 9, j.

144. DOD INSTR. 2000.14, *supra* note 102.

145. *Id.* para. A.

146. *Id.* para. D, 1, a.

147. *Id.* para. E.

departments the task of providing "resident training to personnel assigned to high-risk billets and others, as appropriate."[148] This task is given a bit more specificity in *DOD Instruction 2000.14*, where the secretaries of the military departments are directed to ensure high-risk personnel and individuals assigned to high-risk positions attend the "Individual Terrorism Awareness Course."[149] The Instruction also includes a list of fourteen anti-terrorism related courses and schools.

Department of Defense Instruction 2000.16

The main purpose of this Instruction, *DOD Combating Terrorism Program Standards*, is to implement policy and prescribe performance standards for the protection of personnel as directed by *DOD Directive 2000.12*.[150] This Instruction only assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and the heads of other DOD components.[151] The prescribed procedures are found in enclosure 1 of the Instruction. These prescribed procedures are set out in the form of thirty-three program or "DOD Standards." These standards affirmatively require that certain actions be taken. These standards are addressed to two categories of people or organizations: (1) "combatant commanders, chiefs of service, and directors of DOD agencies and field activities," and (2) commanders.[152] These standards range from broad generalizations, such as: "Combatant commanders . . . are responsible for the implementation of DOD antiterrorism/force protection (AT/FP) policies within their organizations"[153] to more specific requirements, like a "CINC . . . shall ensure that an AT/FP officer . . . is assigned at each installation or base, and deploying organization ([for example] battalion, ship, squadron)."[154]

This Instruction also has some requirements that are certain to be difficult to establish and enforce. Department of Defense Standard 19 requires a commander in an area with a medium, high, or critical terrorist threat level, to "conduct physical security assessments of off-installation residences for permanently assigned and temporary-duty DOD personnel."[155] After the review is completed, the commander will recommend to the appropriate authorities, as necessary, the lease or construction of housing in safer areas.[156] Department of Defense Standard 19 is difficult to comply with in countries like Italy and Germany, where thousands of DOD families live off base on the civilian economy. Many commanders will not have the time, money, or manpower to conduct such assessments. Another difficult standard to comply with is DOD Standard 33, which states that "commanders at levels shall take appropriate measures to protect DOD personnel and reduce the vulnerability to terrorist use of [weapons of mass destruction (WMD)]."[157] This standard is vague as to precisely what is required of commanders. It also creates a potentially expensive requirement without any recommendation regarding how to fund such measures.

Department of Defense Standard 5 creates a requirement that each geographic CINC publish an AT/FP plan or OPORD.[158] The plan is to be clear in its intent and should be written from the geographic CINC level down to the installation or base level.[159] Although the format of the plan or OPORD is not specified, the plan must include procedures to collect and analyze terrorist threat information, procedures to analyze vulnerabilities to terrorist attacks, procedures for enhanced antiterrorism protection, and procedures for responding to terrorist attacks.[160] In USEUCOM, the geographic CINC has issued USCINCEUR OPORD 98-01 that implements the guidance in *DOD Directive 2000.12*, *DOD Handbook O-2000.12-H*, and the standards in *DOD Instruction 2000.16*.[161]

148. *See* DOD DIR. 2000.12, *supra* note 17, para. E, 8, e.

149. DOD INSTR. 2000.14, *supra* note 102, para. E, 2, a. There are many similarities between *Department of Defense Directive 2000.12* and *Department of Defense Instruction 2000.14*, but they are separate and not combined for a reason. *Department of Defense Directive 2000.12* was issued by the Secretary of Defense, William Perry. *Department of Defense Instruction 2000.14* was issued by the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict, as part of his responsibilities assigned to him under *Deparment of Defense Directive 2000.12*.

150. DOD DIR. 2000.16, *supra* note 19, para. 1.1.

151. *Id.* para. 5.

152. *Id.* at enclosure 1. The term "commanders" is not well defined in this Instruction. Paragraph 5.3.3. states "[t]he [h]eads of [o]ther DOD [c]omponents shall: [i]dentify the level of command (i.e., the specific subordinate commanders) required to meet these standards."

153. *Id.* para. E1.1.1. (DOD STANDARD 1).

154. *Id.* para. E1.1.23. (DOD STANDARD 23).

155. *Id.* para. E1.1.19. (DOD STANDARD 19).

156. *Id.*

157. *Id.* para. E1.1.33. (DOD STANDARD 33).

158. *Id.* para. E1.1.5. (DOD STANDARD 5).

159. *Id.*

The OPORDs produced by the geographic CINCs must meet all the requirements contained in *DOD Directive 2000.12* and *DOD Instruction 2000.16*.

The new guidance did not clearly address whether the DOD personnel assigned to the chief of mission for force protection had to comply with the standards established in *DOD Instruction 2000.16*. The Instruction also required the geographic CINC to review the force protection status of all DOD personnel assigned within the geographic CINC's area of responsibility. The Joint Staff finally concluded that DOD personnel under the force protection responsibility of the chief of mission must follow and meet the State Department Overseas Security Policy Board standards.[162] There is no additional requirement that these personnel meet DOD force protection standards. The geographic CINC should periodically review the force protection status of all DOD personnel who are the responsibility of the chief of mission.[163] If the geographic CINC has a concern over the force protection provided by the chief of mission, the CINC and the chief of mission must try to work out their differences. If the problem cannot be resolved, the issue must be forwarded through DOD and Department of State channels for resolution.[164]

Department of Defense Handbook O-2000.12-H

The DOD publication that provides the nuts and bolts guidance for force protection is the handbook known as *DOD O-2000.12-H*. The handbook is published under the authority of *DOD Directive 2000.12*, to serve as the practical companion to that directive. The stated purpose of this handbook is to serve as a reference document for the military services.[165] Several hundred pages of material provide information to help develop programs for antiterrorism awareness, education, and training.[166] Topics covered range from broad, general areas such as the methodology behind terrorist threat analysis to more specific subjects, such as how to properly plug a sewer pipe. This vast amount of material has become the basis for most antiterrorism training programs, as it is the most comprehensive, practical, and useful DOD publication regarding force protection measures.

Financing Force Protection

A sticking point in almost any modern military plan or operation is "how do you pay for it?" There are now several options when it comes to paying for force protection measures. Force protection measures can always be funded in the same way most military projects are funded, which is through the Programming, Planning, and Budgeting System (PPBS).[167] However, this method can take years to produce a tangible result. The stated purpose of the PPBS planning phase is to define "the national military strategy necessary to help maintain national security and support U.S. foreign policy two to seven years in the future."[168] Many force protection problems are time sensitive, and this two to seven-year time lag is unresponsive to time sensitive situations. Two better alternatives remain for funding force protection measures: the CINC Initiatives Fund[169] and the Combating Terrorism Readiness Initiatives Fund.[170]

CINC Initiatives Fund

The CIF allows the military, under special circumstances, to obtain funds quickly and avoid the time-consuming PPBS process. The stated purpose of this fund is "to support unforeseen contingency requirements critical to CINC joint warfighting readiness and national security interests."[171] Funds may be pro-

160. *Id.*

161. USCINCEUR Operations Order 98-01, Antiterrorism/Force Protection (21 Feb. 1998).

162. Message, 182225Z Aug 98, Joint Staff, subject: Applicability of DOD Instruction 2000.16 Standards to DOD Personnel Under the Force Protection Responsibility of a Chief of Mission (18 Aug. 1998).

163. *Id.*

164. *Id.*

165. DOD O-2000.12-H, *supra* note 104, at 1-3.

166. *Id.*

167. U.S. DEP'T OF DEFENSE, DIR. 7045.14, THE PLANNING, PROGRAMMING, AND BUDGETING SYSTEM (22 May 1984) [hereinafter DOD DIR. 7045.14].

168. *Id.* para. 4.1.

169. 10 U.S.C.A. § 166(a) (West 1999). *See* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 7401.01, CINC INITIATIVES FUND (11 June 1993) [hereinafter CJCSI 7401.01].

170. CHAIRMAN, JOINT CHIEF OF STAFF INSTR. 5261.01, COMBATING TERRORISM READINESS INITIATIVES FUND, (1 Aug. 1998) [hereinafter CJCSI 5261.01].

171. CJCSI 7401.01, *supra* note 1

vided for nine authorized activities listed in the statute enacting the CIF.[172] The ninth item on the authorized activities list is "force protection."[173] Force protection was not one of the original authorized activities when the statute was enacted in 1991, but was added by amendment in 1997, in the wake of the Khobar Towers bombing.[174]

Requests for funds must be submitted in a specific format found in *Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01*, Enclosure B. Before the submission can be forwarded to the Joint Staff for action, either the geographic CINC or his deputy must approve it.[175] Once the request reaches the Joint Staff, the Chairman of the Joint Chiefs of Staff is the final approval authority.[176] Although funds can be obtained for force protection purposes by using the CINC Initiative Fund, the Combating Terrorism Readiness Initiatives Fund has been the preferred method of obtaining money for force protection projects. It should be noted that the most recent version of *CJCSI 7401.01* is dated 11 June 1993, and does not reflect the 1997 amendment to 10 U.S.C. § 166(a), which added "force protection" as an activity authorized to receive CINC Initiative Fund.

Combating Terrorism Readiness Initiatives Fund

The Combating Terrorism Readiness Initiatives Fund[177] can be used in situations characterized as "unforeseen," "emergency," and "unanticipated." The Combating Terrorism Readiness Initiatives Fund policy statement makes clear that this fund is only to be used "to fund emergency or other unforeseen high priority combating terrorism requirements,"[178] or to allow a geographic CINC to "react to unanticipated requirements from changes in terrorist threat level or force protection doctrine/standards."[179] These exigent circumstances must be legitimate, and should not be a cover to "subsidize ongoing projects, supplement budget shortfalls, or support routine activity that is normally a service responsibility."[180]

The process begins when the service components within a geographic CINC's area of responsibility submit a request that a project be approved for funding under the Combating Terrorism Readiness Initiatives Fund.[181] *Chairman, Joint Chief of Staff Instruction 5261.01*, Enclosure A, requires that each request follow a specific format.[182] The geographic CINC or his deputy will review the request, approve or disapprove it, and then forward the request to the Chairman of the Joint Chiefs of Staff.[183] The forwarded request remain in the same format found in Enclosure A. The Chairman of the Joint Chiefs of Staff is the final approval authority for Combating Terrorism Readiness Initiatives Fund requests.[184] The Chairman is to evaluate each request on its individual merit, and is not to apportion a fixed percentage of the Combating Terrorism Readiness Initiatives Fund to each geographic CINC.[185]

All Combating Terrorism Readiness Initiatives Funds are in the operation and maintenance (O&M) appropriation. The restrictions placed on the use of O&M funds also apply to the use of the Combating Terrorism Readiness Initiatives Fund.[186] Expenditure of the Combating Terrorism Readiness Initiatives

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172. 10 U.S.C.A. § 166(a). The nine activities are force training, contingencies, selected operations, command and control, joint exercises, humanitarian and civic assistance, military training and education of foreign personnel, personnel expenses of defense personnel for bilateral or regional cooperation programs, and force protection.

173. *Id.*

174. *See* 10 U.S.C.A. § 166(a) amends.

175. CJCSI 7401.01, *supra* note 169, at 2.

176. *Id.*

177. CJCSI 5261.01, *supra* note 170.

178. *Id.* para. 4.a.

179. *Id.* para. 4.b.

180. *Id.*

181. For instance, in the EUCOM area of responsibility, United States Army Europe (USAREUR), United States Air Force Europe (USAFE), and United States Navy Europe (NAVEUR), must all submit their requests to EUCOM for initial review and approval before the requests are forwarded to the Joint Chiefs of Staff. Naturally, the very beginning of the process is when someone at the local base level identifies a problem or a need, which is then submitted by the local commander to the component command.

182. CJCSI 5261.01, *supra* note 170, at A-1.

183. *Id.* para. 4.g.

184. *Id.* para. 4.h.

185. *Id.* para. 4.c.

Fund is limited to things such as equipment, minor construction, supplies, materials, rent, communication, and utilities.[187] Although exceptions may apply, the Combating Terrorism Readiness Initiatives Fund should not normally be used to fund civilian personnel positions.[188] The key fiscal law concept that must be remembered is that the Combating Terrorism Readiness Initiatives Fund must be obligated before the end of the fiscal year for the bona fide needs of that fiscal year.[189] To make certain that this principle not be forgotten, the Joint Staff sent a message to the unified commands. The primary purpose of this message was to remind the unified commands to obligate funds received for fiscal year 1998 before the end of the fiscal year.[190]

Conclusion

The emphasis on force protection is not a passing fad. As long as terrorist attacks remain a threat, force protection will remain an essential feature of military life. The foundation for the DOD force protection program is a scattered mishmash of messages, agreements, statutes, and regulations.

The first and most important step in any force protection program is to determine who is responsible for every military unit located overseas. If another terrorist attack similar to the Khobar Towers attack occurs, the chain of responsibility will be analyzed first. After the Khobar Towers attack, Congress put "considerable pressure" on then Secretary of Defense William Perry to find someone culpable.[191] The result was that Brigadier General Terryl Schwalier, the Commander of the 4404th Wing Provisional in Dhahran, Saudi Arabia, was denied promotion to Major General by Secretary of Defense William Cohen.[192] There is no reason to think that after the next terrorist attack the reaction will be any different.

186. *Id.* para. 4.d. The fiscal principles that apply to the Combating Terrorism Readiness Initiatives Fund also apply to the CINC Initiative Fund.

187. *Id.* para. 4.e.

188. *Id.* para. 4.d.

189. *Id.*

190. Message, 310045Z Jul 98, Joint Staff, subject: CBT Readiness Initiatives Fund Obligation (31 July 1998).

191. *See* LaBash, *supra* note 105, at 11.

192. *Id.*

United States Magistrate Judges and Their Role in Federal Litigation

The Honorable Jacob Hagopian
United States Magistrate Judge
United States District Court of Rhode Island

Introduction

Some twenty-five years ago, while the federal magistrates system was in its infancy, the late Chief Judge William H. Becker[1] delivered a reverberating charge in a memorandum to the judges of his court. What he then observed and said resounds today with vindicating support found in decisions of constitutional and statutory dimension.

> As a statutory judge the judicial allegiance of a full-time magistrate is to the (1) Constitution of the United States and the (2) governing statutes as interpreted by (a) the Supreme Court of the United States, [and] (b) the Court of Appeals for the Eighth Circuit. . . . If neither (a) nor (b) . . . exist then he is governed by his judicial interpretation of the Constitution and statutes as he concludes they should be interpreted from the relevant available legal materials. In determining the governing law he is a judge who is not subject to personal direction by any other judge or justice, district, appellate or supreme. If he errs, the review processes may correct the error, as our errors are corrected by formal review.
>
> The statutes, legislative history and documents show that a full-time United States Magistrate is a Judge of the United States, who within his jurisdiction is entitled to the same respect, freedom from influence, dictation, or coercion, and freedom of individual judgment that we district judges, the judges of the courts of appeals, and the justices of the Supreme Court enjoy. A full-time magistrate enjoys tenure and is paid a salary of $30,000 per year, a measure of his worth in the eyes of the law.
>
> A full-time magistrate is not our errand boy, a supernumerary law clerk, an administrative inferior subject to orders of any other judge while performing his duties, or an employee liable to be scolded by any other judge after he has rendered his judgment.
>
> Anyone holding the office of full-time magistrate who has any other view of the office is not worthy of the position.[2]

The magistrate judge's primary role and function is to assist and directly support the mission of the district judge as the latter determines appropriate. The growth and development of that role since the late Chief Judge Becker's commentary are measures of his prophetic insight into the full potential of the office of magistrate judge. Chief Judge Becker extended unselfish recognition of the judicial office of a magistrate judge.

The system of United States magistrate judges has undergone tremendous change and growth in development since its inception in 1968. In the thirty-one years of its existence, the office of United States magistrate judge has evolved into a system of primarily full-time judicial officers empowered in their support role to conduct a broad range of matters, including civil jury and non-jury trials and other dispositions upon consent of the parties. United States magistrate judges play an important role in every aspect of federal court litigation.

Litigation Involving the United States Military

Last year, magistrate judges handled some 612,440 matters in cases before the United States district courts.[3] Due to the vast number of matters that magistrate judges handle, it is important for all litigants to understand the role and function of the United States magistrate judge. This understanding is especially important for the United States military since it is frequently in federal court.

1. Western District of Missouri.

2. 2 THE BULL. OF THE NAT'L COUNCIL OF U. S. MAGISTRATES, Mar. 1974, at 3.

3. *See* Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts*, ANN. REP. OF THE DIRECTOR 32 (1998).

The military has been a party to a variety of litigation in federal court. For example, federal courts have reviewed military discharges[4] and military board decisions.[5] The military has also been a litigant in federal court for tort claims[6] and civilian employee suits pursuant to Title VII[7] and the Age Discrimination in Employment Act.[8] Additionally, the military has also been a party to suits that have challenged the constitutionality of military regulations.[9] These examples demonstrate that the military is a frequent federal court litigant.

With the wide variety of cases involving the military in federal court and the vast number of matters the magistrate judge handles, a military lawyer is certain to meet the magistrate judge at some stage of litigation. Accordingly, the military lawyer should be knowledgeable about and understand the important role of the United States magistrate judge.

The Office of the United States Magistrate Judge

Magistrate Judge Defined

A United States magistrate judge is a judicial officer of the United States district court who is appointed for a statutory term of office by majority vote of the judges of each district court.[10] Full-time magistrate judges serve eight-year terms, and part-time magistrate judges serve four-year terms. The position of U.S. magistrate judge was created in 1968. The position was designed by Congress "to reform the first echelon of the [f]ederal judiciary into an effective component of a modern scheme of justice."[11]

The office of United States magistrate judge is constitutionally distinguishable from that of United States district judge. District judges are appointed under Article II, Section 2 of the United States Constitution[12] and enjoy the salary diminution and tenure protections of Article III, Section 1 of the United States Constitution.[13] By contrast, magistrate judges serve for fixed terms, and their salaries, which are set by the Judicial Conference pursuant to statute,[14] are potentially subject to diminution by Congress.

United States magistrate judges are not judicial officers of a separate court, but rather serve "as an integral part" of the United States district court.[15] Accordingly, rulings by United States magistrate judges constitute rulings of the United States district court and are so noted on the dockets of civil and criminal cases of that court.

Appointment and Removal

To ensure a high caliber of service, the Federal Magistrates Act[16] provides specific procedures for the selection and appointment of United States magistrate judges. Under pertinent statutes and regulations in effect since 1980, public notice is given of all vacancies, and "merit selection panels"–composed of both attorneys and non-attorneys–are established to screen, interview, and recommend applicants on behalf of each federal court.[17] Once the merit selection panel has designated nominees, a final selection is made following a majority vote of the district judges of the district court.[18] The minimum statutory qualifications for the office of United States magistrate

4. *See* Henry v. United States Dep't of the Navy, 77 F.3d 271 (8th Cir. 1996); St. Clair v. Secretary of the Navy, 155 F.3d 848 (7th Cir. 1998).

5. *See* Barber v. Windall, 78 F.3d 1419 (9th Cir. 1996).

6. *See* Whitley v. United States, 170 F.3d 1061 (11th Cir. 1999).

7. *See* Warren v. Department of the Army, 867 F.2d 1156 (8th Cir. 1989); Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997).

8. *See* Dilla v. West, 4 F. Supp. 2d 1130 (M.D. Ala. 1998).

9. *See* Secretary of the Navy v. Huff, 444 U.S. 453 (1980); Able v. United States, 155 F.3d 628 (2d Cir. 1998).

10. *See* The Federal Magistrate Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, codified as amended at 28 U.S.C. § 604, §§ 631-639 and 18 U.S.C. §§ 3401-3402 (1991).

11. S. REP. NO. 90-371 at 8 (1967), *reprinted in* 1968 U.S.C.C.A.N. 4252-70.

12. *See* 28 U.S.C.A. § 133 (West 1999).

13. *See id.* § 134, § 135.

14. *See id.* § 634(a).

15. Wharton-Thomas v. United States, 721 F.2d 922, 927 (3d Cir. 1984).

16. *See* 28 U.S.C.A. § 631.

17. *See id.* § 631(b)(5).

18. *See id.* § 631(a).

judge include at least five years as a member of the bar of the highest court of a state.[19] In considering the re-appointment of magistrate judges, the court may follow a similar procedure, where the merit selection panel reviews the incumbent magistrate judge's past record of service and reports thereon to the court.

Full-time magistrate judges may not engage in the practice of law or "in any other business, occupation or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers."[20] Part-time magistrate judges may engage in the practice of law or other employment, subject to special conflict of interest regulations.[21]

Upon retirement (after fourteen years or more of creditable service), a magistrate judge is entitled to draw a lifetime annuity equal to the salary of the position, payable upon reaching the age of sixty-five.[22] A retired magistrate judge may be recalled by the judicial council of the circuit in which the magistrate judge is to serve.[23] In a few of the districts (for example, District of Rhode Island and the Southern District of Florida), a magistrate judge recalled for service is referred to as a Senior United States Magistrate Judge. Compensation for the recalled service is reduced by the magistrate judge's retirement annuity. A magistrate judge may be removed from office prior to the expiration of his term only for "incompetency, misconduct, neglect of duty, or physical or mental disability."[24]

In 1998, a total of seventy-two full time magistrate judges were appointed, forty-four of them by reappointment.[25] Of the twenty-eight new full time appointments, ten were for new positions.[26] During the same period, fourteen individuals were appointed to part time magistrate judge positions, seven of them by reappointment.[27] Of the seven new appointments, one was to a new position.[28]

Through its September 1998 session, the Judicial Conference authorized 440 full-time magistrate judge positions and sixty-nine part-time positions.[29]

Jurisdiction and Powers

The core statute delineating the jurisdiction of United States magistrate judges is 28 U.S.C. § 636. This provision, which was substantially expanded in 1976 and 1979, establishes the framework within which each federal court assigns duties to magistrate judges. The specific powers of federal magistrate judges in individual districts are set forth in the local rules for each district.

Development of Jurisdiction Since 1968

The Federal Magistrate Act[30] established the initial powers and duties of United States magistrates, as they were then called. These powers and duties included the following:

> (1) All of the powers and duties formerly exercised by the United States Commissioners (primarily involving initial proceedings in federal criminal cases);
> (2) The trial and disposition of criminal "minor offenses";
> (3) "Additional Duties" to assist district judges with their case loads, including:
> (a) the conduct of pretrial and discovery proceedings in civil and criminal cases;
> (b) preliminary review of prisoner habeas corpus petitions;
> (c) special master duties; and

19. *Id.* § 631(b).

20. *Id.* § 632(a).

21. *Id.* § 632(b).

22. *Id.* § 377.

23. *See id.* § 375, § 636(h); *see also id.* § 377 (setting forth the regulations of the Judicial Conference of the United States, which establishes standards and procedures for the recall of United States Magistrate Judges, as amended on 21 September 1987, and 12 September 1990).

24. *Id.* § 631(i).

25. *See* Admin. Off. Of the U.S. Courts, *supra* note 3, at 47.

26. *See id.* at 47-48.

27. *See id.* at 48.

28. *See id.*

29. *See id.*

30. 28 U.S.C. §§ 631-639 (1968).

(d) such "additional duties" as are not inconsistent with the Constitutional laws of the United States.

In 1976, the Act was amended to clarify and expand jurisdiction of magistrate judges. In particular, Section 636(b) of the 1968 Act was completely replaced by a new jurisdictional section authorizing district judges to designate magistrate judges to handle virtually any pretrial matter in the district courts. The 1976 amendments authorized the use of magistrate judges as follows:

> (1) Non-case dispositive pretrial matters. To hear and determine procedural motions, discovery motions and other non-dispositive pretrial matters in civil and criminal cases.
> (2) Case-dispositive motion. To hear motions for dismissal and for summary judgment and certain prisoner litigation matters and to submit recommended findings of fact and proposed disposition of such matters to district judges for the latter's determination.
> (3) To serve as special masters.
> (4) As under the 1968 Act, magistrates judges were authorized to perform "any other duties not inconsistent with the Constitution and laws of the United States."

The House Report on the 1976 Amendments encouraged district judges "to experiment with the assignment of other functions in aid of the business of the courts."[31] Many district courts did so successfully, and as a result, the powers and duties of United States magistrate judges were substantially expanded in 1979 in recognition of their growing importance and role in the federal district courts.[32] The 1979 amendments[33] expanded the trial jurisdiction of magistrate judges in criminal cases from "minor offenses" to include all federal misdemeanors and to include jury as well as non-jury trials, where appropriate. The jurisdiction was to be exercised upon written waiver of the right to trial by a district judge and consent to trial by a magistrate judge. In addition, the amendments authorized full-time magistrate judges to exercise case-dispositive jurisdiction over any civil case pending in the district court upon either the designation of the magistrate judge by the district court to exercise such jurisdiction and on the consent of the litigants.[34] This specific civil consent jurisdiction and the procedures for implementing it were codified in a new subsection (c) of Section 636 of Title 28.[35]

As a further indication of the increasing stature and role of United States magistrate judges, the 1979 amendments also provided for the institution of specific procedures for the selection and appointment of United States magistrate judges, as noted above.

Present Jurisdiction

There are two overall attributes concerning the character of a magistrate judge's jurisdiction. First, it is important to distinguish between consensual and non-consensual exercise of jurisdiction by magistrate judges. A magistrate judge serves to assist district judges in conducting particular proceedings in a case or presides in lieu of a district judge in disposing of entire cases with consent of the parties. Second, the authority exercised by a magistrate judge in any given matter is shaped by the scope of the designation and reference from the district judge.[36] There are several types of specific jurisdiction.

Misdemeanor Trial Jurisdiction

United States magistrate judges specially designated by the district court may conduct jury or non-jury trials in, or otherwise dispose of, misdemeanor and petty offense cases upon the written or oral consent of the defendant on the record.[37] This includes the power to sentence defendants convicted in such cases and to grant and revoke probation. Appeals are to a district judge, who accords the same review as that given by the circuit to a district court judgment.[38]

The consent of the United States is not required for this jurisdiction. The district court, however, may order that a particular misdemeanor case be conducted before a district judge rather that a magistrate judge–notwithstanding a defendant's consent–

31. H.R. REP. NO. 94-1609, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162-74.

32. *See* Peter G. McCabe, *The Federal Magistrate Act of 1979,* 16 HARV. J. ON LEGIS. 343 (1979).

33. *See* 28 U.S.C.A. § 636 (West 1999).

34. Part-time magistrate judges could likewise be authorized to exercise this jurisdiction upon certification by a district court that no full-time magistrate judge was reasonably available.

35. *See* Pub. L. No. 94-577, 90 Stat. 2729 (1976), codified at 28 U.S.C.A. § 636(c).

36. *See* Paul W. Goodale, *Federal Magistrates Play Major Role in U.S. District Court*, 13 MASS. LAW. WKLY 556, Jan. 21, 1985.

37. *See* 18 U.S.C.A. § 3401 (West 1999); FED. R. CRIM. P. 58.

38. *See* 18 U.S.C.A. § 3402.

upon the court's own motion or, for good cause shown, upon motion of the government.[39]

Magistrate judges in all districts exercise this jurisdiction in accordance with their local designation. Generally, petty offense and misdemeanor cases are referred automatically by the court to magistrate judges for disposition upon consent of the accused. New comprehensive procedures to be followed in misdemeanor and petty offense cases conducted by magistrate judges as well as district judges are found in Rule 58 of the Federal Rules of Criminal Procedure.[40] During the statistical year ending 30 September 1998, magistrate judges handled 96,832 misdemeanor and petty offense cases nationally.[41]

Preliminary Criminal Proceedings

Magistrate judges conducted 262,600 felony pretrial actions in criminal cases during 1998.[42] These included accepting criminal complaints, issuing search and seizure warrants, conducting initial appearances, probable cause and bail hearings, detention hearings and removal hearings in cases involving defendants charged in another district, and extradition hearings. In some districts, the magistrate judges rotate as emergency or "duty" magistrate judges, handling initial proceedings in criminal cases.[43]

Pretrial Matters and Motions

Section 636(b)(1) sets forth the authority of magistrate judges to handle specific pretrial matters in civil or criminal cases, including motions and pretrial status or scheduling conferences pursuant to Rule 16 of the Federal Rules of Civil Procedure, upon referral by a United States district court judge. As with the preliminary criminal duties just noted, this jurisdiction does not depend upon the consent of the parties. This jurisdiction may be exercised by a full-time magistrate judge or by a part-time magistrate judge subject to the code of conduct limitations. A magistrate judge's authority under this subsection to handle pretrial motions depends on whether or not they are "dispositive" of the case. Under Section 636(b)(1)(A) magistrate judges may hear and decide any "non-dispositive" pretrial motion. For example any motion which, regardless of its resolution, will not dispose of any or all of a party's claims, in a civil or criminal case. Pretrial matters handled by magistrate judges under this provision include hearing and determining procedural and discovery motions and conducting various civil pretrial conferences, such as scheduling conferences and settlement conferences. A district judge may reconsider the magistrate judge's determination of a non-dispositive pretrial matter where the ruling is shown to be "clearly erroneous or contrary to law."[44] This may be accomplished through a motion for reconsideration filed by an aggrieved party.[45]

In contrast, Section 636(b)(1)(B) authorizes magistrate judges, when designated, to report proposed findings of fact and recommendations on: (1) "dispositive" motions (such as motions for summary judgment, motions to dismiss or motions to suppress evidence); (2) prisoner petitions challenging conditions of confinement; and (3) habeas corpus cases brought under 28 U.S.C. § 2254 and § 2255. Section 636(b)(1)(c) requires the magistrate judge to file any proposed findings and recommendations with the court and to mail a copy to all parties. A dissatisfied party may file and serve written objections to the magistrate judge's report. The district judge then makes a *de novo* review of the findings and recommendations to which objection is made. Rule 72(b) of the Federal Rules of Civil Procedure, as supplemented by each district's local rules, contains procedures to be followed by a party who objects to a magistrate judge's recommendation. In 1998, magistrate judges handled some 69,517 motions.[46]

Civil Consent Trials

Section 636(c) of Title 28 provides that when specially designated by the district court, United States magistrate judges may conduct any and all proceedings in a civil case, including trial and entry of judgment, on the consent of all parties. In 1998, magistrate judges disposed of 10,339 consent cases.[47] Appeal of such judgment is made directly to the circuit or to a district judge sitting as an appellate court.

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39. *See id.* § 3401(f).

40. *See* FED. R. CRIM. P. 58 advisory comm. notes.

41. *See* Admin. Off. Of the U.S. Courts, *supra* note 3, at 33, tbls. M-1, M-1A.

42. *See id.* at 33, tbl. M-3.

43. *See* 28 U.S.C.A. § 636(a)(1), (2) (West 1999); *see also* 18 U.S.C.A. § 3142, § 3184; FED. R. CRIM. P. 1, 3-5.1, 40-1, 58.

44. 28 U.S.C.A. § 636(b)(1)(A).

45. *See* FED. R. CIV. P. 72(a).

46. *See* Admin. Off. Of the U.S. Courts, *supra* note 3, at tbl. M-4A.

47. *See id.* at 42, tbl. M-4A.

Magistrate judges' authority to try and dispose of civil cases upon consent of the parties was by far the most significant expansion of jurisdiction granted by the 1979 amendments[48] to the Federal Magistrates Act.[49]

Special Master References

Title 28 U.S.C. § 636(b)(2) authorizes a magistrate judge, when designated by a district judge, to serve as a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure. Moreover, upon consent of the parties, a judge may designate a magistrate judge to serve as a special master in any case without regard to Rule 53, that is, without regard to whether complicated issues or exceptional circumstances are present in the case. Again, local rules implement this authority in the individual districts.

"Additional Duties"

Section 636(b)(3) provides that "[a] magistrate [judge] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The legislative history to the Federal Magistrates Act indicates that the purpose behind this grant of open-ended jurisdiction was to encourage the courts to continue "innovative experiments" in the assignment of duties to magistrate judges.[50] Additional duties assigned to the magistrate judges over the years include conducting arraignments in felony cases, reviewing administrative determinations regarding the grant of benefits to claimants under the Social Security Act, and administering the Oath of Allegiance to new citizens at naturalization proceedings. Local rules in the various districts set forth these types of duties, tailored to each district's needs. The United States Supreme Court has interpreted the "additional duties" provision of Section 636 as authorizing the conduct of jury selection and voir dire in criminal felony trials with the consent of the parties. In *Gomez v. United States*,[51] the Court prohibited the conduct of voir dire proceedings by a magistrate judge where the parties did not consent, stating that such proceedings were outside the magistrate's jurisdiction.[52] Two years later, however, in *Peretz v. United States*,[53] the Court upheld the delegation of the same duty–the conduct of jury selection and voir dire–where the parties had consented. The Court deemed this exercise of jurisdiction constitutional, noting that the parties had freely waived their personal rights to an Article III judge for this procedure and that the structural (non-waivable) protections of Article III were not implicated.[54]

According to the United States Supreme Court, consent and the availability of review by a district judge are critical to the authority of magistrate judges to conduct proceedings in civil or criminal trials. In *Peretz* and *Gomez* the Court noted the consent provisions of the jurisdiction of magistrates judges to conduct civil trials under Section 636(c) as well as the availability of review by a district court judge.

Contempt

Acts or conduct which if committed before a district judge would constitute contempt of court will constitute contempt when committed before a magistrate judge. Magistrate judges do not, however, possess the power to punish directly contempts committed before them.[55] Upon commission of any such act or conduct the magistrate judge is required to certify the facts to a district judge of the district court and order that person to appear before the district judge who then hears the evidence and decides what sanction, if any, is warranted. Contempts committed before magistrate judges are punishable in the same manner and to the same extent as contempts committed before district judges.[56]

Magistrate Judge's Significant Role in Civil Cases

In two particular areas of federal litigation magistrate judges have assumed a significant role. The first involves the referral of civil cases to magistrate judges for pretrial proceedings pursuant to Federal Rules of Civil Procedure Rule 16(b). The second concerns the jurisdiction of magistrate judges under 28 U.S.C. § 636(c), sitting in lieu of a district judge, to conduct jury or non-jury civil trials or otherwise dispose of civil cases.

48. *See* 28 U.S.C.A. § 631.

49. *See infra* note 61 and accompanying text for a discussion of this jurisdiction.

50. S. REP. NO. 94-625, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162-74.

51. 490 U.S. 858 (1989).

52. *See id.* at 876.

53. 501 U.S. 923 (1991).

54. *See id.*

55. *See* 28 U.S.C.A. § 636(e) (West 1999).

56. *See id.*

Both types of assignments are of importance to attorneys who practice in federal district courts.

Rule 16(b) Referrals

In 1983, Federal Rule of Civil Procedure Rule 16 was substantially amended and expanded in order to promote greater judicial management and earlier judicial involvement by a judge in civil cases. These amendments in effect abolished the previous practice by federal district courts of issuing a standard six-month (or other fixed time period) discovery order in every civil case and instead called for more active supervision and scheduling by judicial officers in the pretrial phase of such cases.[57] As amended, Rule 16 *requires* the entry of a scheduling order within 120 days of the filing of the complaint and strongly encourages the holding of one or more "scheduling conferences" in all civil cases except those exempted by local rule.

Rule 16(b) specifically permits a magistrate judge "when authorized by local court rule" to conduct such conferences and to enter scheduling orders.[58] The jurisdiction of magistrate judges to conduct such proceedings is found in 28 U.S.C. § 636(b)(1), (3) and in each district's local rules.

A "Rule 16(b) referral," or general reference, is distinct from the assignment to magistrate judges of individual motions or other specific matters for hearing and determination. Rather, it involves the reference of almost the entire pretrial segment of a case, in which the magistrate judge conducts scheduling conferences, enters scheduling orders, and rules on non-dispositive pretrial motions. Dispositive motions (such as motions to dismiss or motions for summary judgment) are reserved for the district judge, although the magistrate judge may report and recommend rulings on such motions.[59] In certain cases, the magistrate judge may inquire as to the possibility of an early settlement. The magistrate judge tracks the case from the filing of pleadings until it is ready for a final pretrial conference and trial before a district judge.

The conduct of Rule 16(b) proceedings by magistrate judges has proved to be of enormous benefit to those federal district courts making such referrals. The availability of magistrate judges to assist with civil pretrial proceedings provides the courts with additional flexibility in handling their caseloads. District judges making such referrals have been able to devote more of their time to other matters, including the trial of civil and criminal felony cases.

Civil Consent Jurisdiction

The 1979 amendments to the Federal Magistrate Act[60] gave United States magistrate judges the jurisdiction to try or otherwise dispose of any civil case and to enter judgment upon consent of all of the parties.[61] The judgment entered by the magistrate judge is appealable directly to the appropriate Court of Appeals. Pursuant to this jurisdiction, a magistrate judge specially designated by the district court may not only conduct civil trials (with or without a jury) on consent of the parties, but may also hear and *decide* dispositive motions (for example, a motion to dismiss for failure to state a claim or a motion for summary judgment) and thereby dispose of cases without trial. This consensual jurisdiction is thus distinct from a magistrate judge's power to report and recommend on the disposition of such motions without the consent of the parties pursuant to Section 636(b)(1)(B).

The civil consent jurisdiction of magistrate judges represents an unprecedented and historic grant of power by Congress to non-article III judicial officers. This extraordinary authority was granted for the purpose of creating "a vehicle by which litigants can consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of resolving their civil controversies" in federal court.[62]

The 1979 amendments provide that a magistrate judge may exercise this jurisdiction only after having been either appointed or re-appointed pursuant to Judicial Conference selection regulations or certified by the appropriate circuit as qualified to exercise such jurisdiction.[63] All magistrate judges are now eligible to exercise civil consent jurisdiction. Most have been designated to exercise this jurisdiction.[64]

The constitutionality of magistrate judges' civil consent jurisdiction has been upheld by courts of appeals for every circuit that has addressed the issue.[65] All of these courts have found the civil consent jurisdiction of magistrate judges to be

57. *See* FED. R. CIV. P. 16.

58. *Id.* 16(b).

59. *See supra, Pretrial Matters and Motions*.

60. *See* 28 U.S.C.A. § 631.

61. *See id.* § 636(c).

62. H. R. REP. NO. 96-287, at 2 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469-87.

63. *See* ADMINISTRATIVE OFF. OF THE U.S. CTS., A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGE SYSTEM 36 (1995).

64. *See* 28 U.S.C.A. § 636(c)(1).

distinguishable from the plenary jurisdiction of federal bankruptcy judges struck down in *Northern Pipeline Construction Co. v. Marathon Pipe Line Construction Co.*[66] In *Goldstein v. Kelleher*, for example, the First Circuit found Article III interests to be adequately protected under the statute, noting that, "[t]he litigants' interests are safeguarded by the consensual nature of the reference; the institutional interests of the judiciary are secured by the district court's control over both the references and appointments, and by the availability of appeal to an Article III court."[67]

The procedures for the exercise of a magistrate judge's civil dispositive jurisdiction are set forth in somewhat overlapping fashion in 28 U.S.C. § 636(c), Rule 73 of the Federal Rules of Civil Procedure, and in the local rules of the various districts. Attorneys who contemplate consenting to such jurisdiction should review the statute and rules. Essentially, the procedures to be followed include: (1) notice to the parties of the opportunity to consent, (2) the consent, (3) reference of the entire case by a district judge, (4) proceedings before the magistrate judge, and (5) (if necessary) appeal.

Notice—Under the pertinent statute and rules, the clerk of court must notify the parties at the time an action is filed that they may consent to have a magistrate judge conduct any and all proceedings in a case and enter final judgment.[68]

Consent—As noted above, Section 636(c) was amended in 1990 to encourage federal court litigants to consent to the disposition of their case before United States magistrate judges where appropriate. The amendment specifically provides that either a district court judge or a magistrate judge may again advise the parties of the availability of a magistrate judge to exercise this jurisdiction, while at the same time assuring the parties that they may withhold consent without adverse consequences. Local rules of court governing the references of civil cases to magistrate judges "shall include procedures to protect the voluntariness of the parties consent."[69]

The prohibition contained in the statute and rules against attempts by a judicial officer "to persuade or induce" parties to consent to references to magistrate judges is not intended to preclude a district judge or magistrate judge from informing or reminding the parties of their option to proceed before a magistrate judge. Such a reminder might be appropriate, for example, in the course of a rule 16 scheduling conference conducted before a district judge or magistrate judge, so long as it is made clear that the decision is entirely voluntary.

Reference by District Judge—Once the parties consent to a magistrate judge's civil dispositive jurisdiction, a district judge approves or "ratifies" the reference of the case to a magistrate judge. Although not expressly required by statute or rule, approval of each reference by a district judge is based on recognition of the policy consideration that each district judge ultimately controls his or her own case calendar. Moreover, Section 636(c)(4) provides that a district judge may vacate a reference of a civil case to a magistrate judge, sua sponte for good cause, or upon motion by any party showing extraordinary circumstances. This provision "makes clear the [district judge's] court's inherent power to control its own docket."[70]

Proceedings Before Magistrate Judge—Once the case is before the magistrate judge pursuant to Section 636(c), the case proceeds as any other case before the district court. Depending on how far the case has progressed at the time consent is given, the magistrate judge will order completion of pretrial discovery, rule on any dispositive motions, hold a final pretrial conference, and have the case proceed to jury or non-jury trial.[71] Title 28 U.S.C. § 636(c)(5) provides for the means of making a record in a case referred to the magistrate judge. The magistrate judge must determine whether the proceedings are to be taken down by a court reporter or recorded by electronic recording equipment.

Appeal—28 U.S.C. § 636(c)(3) provides that "an aggrieved party may appeal directly to the appropriate United States Court of Appeals from the judgment of a magistrate judge in the same manner as an appeal from any other judgment of the district court."[72] The Advisory Committee note to rule 73(c) provides that the same procedures and standards of appealability that govern appeals from district court judgments govern appeals from magistrate judges' judgments. Presumably, interlocutory appeals may be taken when appropriate as well.

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65. *Accord* Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983); Fields v. Washington Metro. Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Collins v. Forman, 729 F.2d 108 (2d Cir. 1984); Puryear v. Ede's Ltd., 731 F.2d 1153 (5th Cir. 1984); Gouge v. Carter Cty. Bd. of Ed., 738 F.2d 439 (6th Cir. 1984); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Lehman Bros, Kuhn, Loeb, Inc. v. Clark Oil & Refining Co., 739 F.2d 1313 (8th Cir. 1984) (en banc); Pacemaker v. Instromedix Inc., 725 F.2d 537 (9th Cir. 1984) (en banc); Campbell v. Wainwright, 734 F.2d 1480 (11th Cir. 1984).

66. 458 U.S. 50 (1982).

67. *See* 728 F.2d 32, 36 (1st Cir. 1984).

68. *See* 28 U.S.C.A. § 626(c)(2) (West 1999).

69. *Id.*

70. S. REP. NO. 96-74, at 14 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469-87.

71. Limitations on the contempt power of magistrate judges are fully applicable to their civil consent jurisdiction. *See* 28 U.S.C.A. § 636(e).

The opportunity to consent to disposition of a civil case by a magistrate judge provides federal court litigants with an additional means of securing prompt adjudications of their claims. The civil consent jurisdiction has been extensively used in a number of federal districts.

Alternative Dispute Resolution

The United States magistrate judge plays an active role in alternative dispute resolution (ADR) in the district courts.[73] Alternative Dispute Resolution can occur at any stage of the litigation at the request of the parties or can be mandatory under local court rules. The magistrate judge's primary objective in ADR is to dispose of the case with the consent of the parties. Additionally, ADR serves to (1) aid respective counsel in identifying the issues, (2) promote settlement dialog between them, (3) facilitate the negotiation process, and (4) provide the parties and counsel a neutral assessment of the case on the merits.

As an example of the importance the magistrate judge plays in ADR, magistrate judges in the United States District Court for the District of Rhode Island conducted 314 ADR conferences during 1998.[74] Forty-five percent of those cases settled. Nationally, magistrate judges conducted some 23,113 ADR conferences last year.[75]

Growth in Stature and Importance of the Office of Magistrate Judge

There have been many changes to the character and scope of the office of magistrate judges over the years. Magistrate judges' salaries have reached 92% of district judges' salaries.[76] In 1988 the magistrate judges' Committee of the Judicial Conference of the United States endorsed the wearing of robes by magistrate judges.[77] The robing endorsement changes the Committee's earlier position taken in 1973 when the matter was left to be decided by each district court. In its endorsement, the Judicial Conference Committee recognized that magistrate judges, under 18 U.S.C. § 3401 and 28 U.S.C. § 636 (c), often serve in lieu of district judges and exercise full case-dispositive jurisdiction. As further justification for its robing policy the Committee stated that "even when not exercising case-dispositive jurisdiction [magistrate judges] conduct district court proceedings of the utmost importance."[78] All ninety-four federal district courts accept and follow the Judicial Conference Committee's policy and endorsement of magistrate judges wearing robes.

In addition, the Judicial Improvements Act of 1990[79] contained several provisions intended to further underscore the role and reemphasize the judicial stature of United States magistrate judges in Federal District Courts. In one provision of the Act, Congress abolished the magistrate and created a judge.[80] In recognition of the importance which the office had achieved, the title and the address of the Unites States magistrate was statutorily changed to United States magistrate judge. The legislative history of the Judicial Improvements Act of 1990 makes clear the import of this change.

> 'Judge' is an appellation commonly assigned to non-article III adjudicators in the federal court system. Examples include Claims Court Judges, Tax Court Judges and Bankruptcy Judges. Accordingly, appending 'judge' to the magistrates' title renders it consistent with adjudicators of comparable status. Moreover, United States magistrates are commonly addressed as 'judge' in their courtrooms, so that the change of designation provided for in this section largely conforms to current practice. The provision is one of nomenclature only and is designed to reflect more accurately the responsibilities and duties of the office.[81]

72. FED. R. CIV. P. 73(c).

73. *See* 28 U.S.C.A. § 653.

74. Mediation Settlement Conference Activity Report 1998/9, United States District Court, District of Rhode Island (on file with the author).

75. Admin. Off. of the United States Courts, *supra* note 3, at 32.

76. 28 U.S.C.A. § 634.

77. Memorandum from Judge Joseph W. Hatchett, Chairman of the Magistrates Committee (Dec. 8, 1988) (reprinted as Section II of the Policies of the Judicial Conference of Magistrates Committee regarding Magistrate Judge Utilization) (on file with the author).

78. *Id.*

79. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

80. *See id.*

81. *See id.* § 204.

The Act also amended 28 U.S.C. § 636(c) to encourage consent by litigants to civil trials and/or other dispositions by United States magistrate judges. Congress, through the Act, called on the federal courts to utilize magistrate judges to play an important role in implementing Title I of the Judicial Improvements Act of 1990, the Civil Justice Reform Act.[82] The Civil Justice Reform Act was intended to expedite federal civil litigation and to reduce costs and delay inherent in such litigation.

Conclusion

The history of the role and character of the magistrate judge is a history rich in contribution of assisting district judges in doing justice in individual cases in the federal courts. The United States Supreme Court recently noted that, in light of growing number of cases before the district courts, "the role of the magistrate [judge] in today's federal judicial system is nothing less than indispensible."[83] The Court also pointed out that their recent decisions have reemphasized the importance, which Congress placed on the role of the magistrate judge.[84] The need for the enhanced use of magistrate judges by district judges is an issue that continues to knock at the doors of Congress and is not likely to disappear given the onslaught of case filings nationwide.

The United States district courts of this nation have, at their immediate disposal, a variety of statutorily authorized means through which to enhance the support and assistance role played by the magistrate judge in the United States' Court system. The Supreme Court in *Peretz* applauded and encouraged the liberal employment of the "additional duties" statutory clause in using magistrate judges. The Court declared that "Congress intended to give federal [district] judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen."[85] Lastly, the Court observed that "we should not foreclose constructive experiments that are acceptable to all participants and are consistent to the basic purposes of the statute."[86]

82. Title I of the Judicial Improvements Act of 1990 consists of the Civil Justice Reform Act, codified in 28 U.S.C.A. §§ 471-482 (West 1999).

83. Peretz v. United States, 501 U.S. 928 (1991) (quoting Government of the Virgin Is. v. Williams, 892 F.2d 305, 308 (3d Cir. 1989).

84. *See id.* at 927 n.5.

85. *See id.* at 931.

86. *Id.*

TJAGSA Practice Note

Faculty, The Judge Advocate General's School

From the Army Review Boards Agency

Enlisted Retirement Grade Determinations

The Army Grade Determination Review Board (AGDRB) reviews applications from warrant officer and enlisted retirees who retired at a grade lower than the highest grade served. When these retirees' total of creditable service years plus time on the retired list reaches thirty years, they are eligible to apply for retirement at the higher-grade level. For example, a person who retired with twenty-one years and five months creditable service must be on the retired list for eight years and seven months before becoming eligible to apply. A common misconception is that these thirty-year grade determination reviews are accomplished automatically. These reviews are not automatic, individuals must apply to initiate review.

If the individual was a member of the regular Army, or Reserve Component who at the time of retirement served on active duty (or in the case of members of the National Guard, was on full-time National Guard duty), then *Army Regulation 15-80*[1] authorizes the AGDRB to make final determinations on the highest grade satisfactorily served on active duty. To apply, the individual should complete Department of Defense Form 149, Application for Correction of Military Record.[2] The form should be mailed to the Army Review Boards Agency Support Division, ATTN: SFMR-RBR-SL, 1 Reserve Way, St. Louis, Missouri 63132-5200. That division will attach the applicant's military records to the request and forward the case to the Army Review Boards Agency in Arlington, Virginia. There, the AGDRB, consisting of three field grade officers, will convene and determine the highest grade that was satisfactorily served. Because applicants are not entitled to personally appear before the AGDRB, they should attach any relevant documents to their application form.

If the individual served in and retired from the Reserve Component, *Army Regulation 135-180*[3] authorizes the Army Reserve Personnel Command to make final grade determinations on the highest grade served *when misconduct is not an issue*. The individual should apply to the Commander, Army Reserve Personnel Command, ATTN: ARPC-PSD-T, 1 Reserve Way, St. Louis, Missouri 63132-5100. The letter should explain the circumstances surrounding his promotion, what grade he retired at, and the highest grade he held. The letter should also include the applicant's full name, social security number, and service number, if applicable. If misconduct was an issue that caused retirement at a lower grade, then the individual's application will be forwarded to the AGDRB or the individual can apply directly to the AGDRB. Colonel Serene and Lieutenant Colonel Conrad.

1. U.S. Dep't of Army, Reg. 15-80, Boards, Commissions, and Committees: Army Grade Determination Review Board (28 Oct. 1986).

2. U.S. Dep't of Defense, DD Form 149, Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552 (Sep. 1997).

3. U.S. Dep't of Army, Army National Guard and Army Reserve: Qualifying Service for Retired Pay Nonregular Service (1 Aug. 1987).

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

The Art of Storytelling[1]

> *The art of storytelling is essential to effective and evocative communication. A good story is a cliff-hanging distillation of a series of events that, by themselves, suffer from too much complication over too long a period of time. A great story is like a well-crafted joke–deliciously brief, immediately memorable, eminently repeatable, and virtually impossible to dismiss.*[2]

I am sitting on the edge of my oldest son's bed telling my children a bedtime story. Both boys are huddled in their beds with their heads barely peaking out from under their covers. They are wide-eyed and attentive–hanging on to every word I say. I soften my voice. My boys sit up to hear my words. Abruptly, I slap my leg, simulating the sound of the hand of the one-eyed pirate smashing against the side of the ship. Both boys jerk. I pause, then finish my story as my children listen intently. I conclude my tale by uttering the words, "and everyone lives happily ever after." There is a slight delay, then in unison my kids beg for another story.

If only the court-martial members would listen to me like my children listen to my bedtime stories. Maybe I should rethink my approach. Surely if I can persuade a seven and nine year-old to sit quietly and listen to me for ten minutes, I ought to be able to grab the attention of an adult. So why not use the same influential techniques?

During a court-martial, a trial attorney has two golden opportunities to communicate to the fact-finder about the case–opening statement and closing argument. The more persuasive the counsel is in telling the story, the more likely the fact-finder will find in favor of the advocate's position.[3] The purpose of this note is to encourage counsel to adopt a storytelling approach to their advocacy. In the process, this note highlights three basic storytelling techniques that a practitioner can employ to make his recitation of the case, either in opening or closing, more persuasive: tell the story in the present tense; speak in clear, active English; and engage the listener through the senses.[4]

Finally, the time has come for you to advocate. The military judge turns to you and states, "Counsel, do you care to make an opening statement?" You confidently respond, "Yes your honor," and position yourself in the "well" of the courtroom. You know the story; you have the listener's attention; now you must tell the story. A subtle, yet extremely effective, way to tell a story is to use the present tense. This is a difficult technique that requires practice. When we think of a prior event, it is only natural to talk about the event in the past tense. The goal, however, is to place the panel members at the scene and have the event unfold before their eyes. To do this, the story must be told in the present tense.

By way of illustration, consider a robbery case. When told in the past tense, the story may go: "Mr. Smith was standing at the ATM machine when he felt a hand on his shoulder. He turned to his left and saw a large man with a stocking cap pulled over his face. The man was holding a knife in his left hand." Now change the tense to the present: "Mr. Smith *is* standing at the ATM machine when he *feels* a hand on his shoulder. He *turns* to his left and *sees* a large man with a stocking cap pulled over his face. The man *is* holding a knife in his left hand." By using the present tense, the listener lives the story as it unfolds. Try it; you will see the results. The members will lean forward and really listen to what you are saying.

Another subtle, yet powerful skill to use when telling a story is proper word choice. Use clear, active English. Carefully choose words (verbs, nouns, and adjectives) that bring your story to life. Do not use words that are boring or confusing. As attorneys, we use jargon that is unique to our profession, com-

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1. In the acknowledgment section of his book, *McElhaney's Litigation*, Professor James McElhaney discussed an inescapable aspect of writing about trial advocacy. "Everything in [this book] came from someone else. That kind of massive appropriation of other people's material is called scholarship." JAMES W. MCELHANEY, MCELHANEY'S LITIGATION ix (1995). This article requires a similar disclaimer. I have tried to acknowledge various sources. Beyond these direct citations, I also acknowledge lessons repeated herein that were learned from previous supervisors, colleagues, and opponents in the courtroom.

2. Kenneth Albers, Actor and Associate Artistic Director, Milwaukee Repertory Theater, *reprinted in* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK (3d ed. 1994).

3. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 45 (2d ed. 1988).

4. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 25 (2d ed. 1997). *See also* Joshua Karton, *On Paper vs. In Person: From Writer to Actor, Communication Techniques for Successful Pre-Trial and Courtroom Advocacy* 17 (1994) (on file with the Criminal Law Department, The Judge Advocate General's School). There are more skills involved in telling a persuasive story than the three addressed in this article. Skills such as voice inflection, eye contact, positioning, body movement, theme and theory use, and sincerity are also important skills that advocates must employ to enhance the delivery of the story. The three skills discussed in this note are ones that are often overlooked, and when used, significantly strengthen the story.

monly referred to as legalese. There is nothing that alienates a listener faster than a speaker who uses unclear or unfamiliar language. Consider again the robbery scenario. By using clear, active language the story improves: "Mr. Smith is standing *quietly* at the *neighborhood* ATM machine. *Suddenly,* a *powerful* hand *grabs* his shoulder. He *spins* to his left and *discovers* a *huge* man with a stocking cap pulled over his face. The man is holding an *eight-inch* knife in his left hand."

Strengthen the story even more by engaging the listener's senses. By evoking a panel member's sense of sight, smell, or touch (in addition to the sense of hearing) you can help the member better experience the story.[5] You can easily activate these senses with photographs, diagrams, models, transparencies, and videotapes.[6] You can also do it with speech. By using "sensory-awakening" words or experiences, you can also stimulate a variety of senses.[7] For example, the mention of a freshly baked apple pie awakens the sense of smell. Likewise, the description of a day so cold that the snow crunched underfoot evokes the sense of touch. Both of these examples do not actively engage the sense; rather, through memory, the sense is resurrected.

To illustrate this technique further, consider the robbery scenario once again. In addition to using the present tense and clear, active English, I will also engage the senses. "October 5th is a *brisk*, autumn evening. Mr. Smith is standing quietly at the neighborhood ATM machine. Instinctively he *punches* the buttons, and the machine mechanically *spits* out ten, crisp $20.00 bills. Suddenly, like a *jolt of electricity,* a powerful hand grabs his shoulder. He spins to his left and discovers a huge man with a stocking cap pulled over his face. Immediately, Mr. Smith focuses on the *shiny,* eight-inch long knife the man clutches in his left hand." Just by employing three simple storytelling techniques, a past event transforms into a living story.

For me, telling a story to my children is very rewarding. Not only do I get to spend quality time with my kids, but I can also cultivate my storytelling techniques–like using the present tense, speaking in clear, active English, and engaging the senses. These are techniques that I can use in my court-martial practice to enhance my persuasiveness. For those trial lawyers who do not have children, practice on anyone who will listen. The advantage you gain through effective storytelling may be enough to tip the scale in your favor. Major Sitler.

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5. *See* Karton, *supra* note 4.

6. Counsel should inform the military judge and opposing counsel that he intends to use exhibits during the opening statement. The military judge may require counsel to offer and admit the exhibits into evidence first.

7. Karton, *supra* note 4, at 17.

Environmental Law Division Notes

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

Regulatory Fees . . . or Taxes? Sorting Out the Difference

In recent months, several installation environmental law specialists (ELSs) have contacted ELD concerning potential payment of various fees imposed by states for environmental services. The fees vary in name and type to include "hazardous waste management fees," "water pollution protection fees," and "fees for environmental services." This article re-examines the familiar issue of federal liability for state imposed regulatory fees and taxes. The first section provides a review and update of the law of fee/tax liability. The second section outlines the steps to obtain Headquarters, Department of the Army approval to refuse payment of state imposed fees after an ELS has concluded that a state or local regulator has imposed an unlawful tax.

Fee/Tax Liability

General

In general, the federal government is immune from state requirements including fees and taxes. This immunity is constitutionally established through the Supremacy Clause,[1] and the Plenary Powers Clause.[2] In addition, the Supreme Court established very early that "the Constitution and the laws made in pursuance thereof are supreme . . . and control the laws of the respective states, and cannot be controlled by them."[3]

Regarding taxes, the federal government cannot be made to pay a tax without a clear "congressional mandate."[4] Likewise, the federal government is not subject to state requirements unless it has clearly consented to such in an unequivocal waiver of sovereign immunity.[5] These waivers cannot be implied,[6] and must be strictly construed in favor of the United States.[7]

Statutory Scheme

Among the major environmental laws, there are four waivers of sovereign immunity concerning the issue of fees.

Clean Water Act (CWA): Congress waived immunity for "all [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent as any non-governmental entity including the payment of reasonable service charges."[8]

Resource Conservation and Recovery Act (RCRA): Federal facilities' solid and hazardous waste programs must comply with "all [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges."[9] Unlike the CWA, the RCRA further defines these "reasonable service charges" to include:

". . . fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed . . . ."[10]

1. U.S. CONST. art. VI, cl. 2.
2. U.S. CONST. art. I, § 8, cl. 17.
3. McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.) (1819).
4. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954).
5. Hancock v. Train, 426 U.S. 167, 198 (1976).
6. Missouri Pac. R.R. Co. v. Ault, 256 U.S. 554 (1920).
7. United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992).
8. 33 U.S.C.A. § 1323(a) (West 1999).
9. 42 U.S.C.A. § 6961(a) (West 1999).
10. *Id.*

Safe Drinking Water Act (SDWA): The 1996 amendments to the SDWA added a waiver as to regulatory fees that is virtually identical to the RCRA waiver.[11]

Clean Air Act (CAA): The CAA waiver may be broader than those found in the CWA, RCRA, or SDWA, because it omits the word "reasonable" from its waiver that requires compliance with:

> [A]ll [f]ederal, [s]tate, interstate, and local requirements, . . . in the same manner, and to the same extent as any non-governmental entity. The preceding sentence shall apply . . . to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program . . . .[12]

Fees v. Taxes

All of the above waivers of sovereign immunity only concern fees assessed by states against the federal government. Fees are charges for services rendered by state or local governments in administering their environmental programs. As one court put it, the "classic regulatory fee" is a levy "imposed by an agency upon those subject to its regulation" and used to raise money that is then placed into "a special fund to defray the agency's regulation-related expenses."[13] Besides such indirect regulatory purposes as targeted revenue raising, fees may also accomplish a direct regulatory purpose such as encouraging or discouraging certain behavior (for example, waste reduction). By contrast, taxes are enforced contributions to provide for the general support of the entire community. The environmental waivers quoted above do not waive sovereign immunity for state taxation.

Drawing the distinction between a fee and a tax is legally important, but is often difficult to accomplish. In 1978 the Supreme Court in *Massachusetts v. United States*[14] established a test for analyzing all government-imposed fees for services. Under the *Massachusetts* test, if a fee satisfies all of the following three prongs it may be paid as a reasonable service charge:

> (1) Is the assessment non-discriminatory?
> (2) Is it a fair approximation of the cost of the benefits received?
> (3) Is it structured to produce revenues that will not exceed the regulator's total cost of providing the benefits?

The Department of Defense (DOD) issued a guidance document in June 1984 stating that all environmental service charges levied by a state should be evaluated against the three *Massachusetts* criteria.[15] In 1996, a DOD instruction[16] incorporated these criteria with others in guidance on when environmental fees are payable. Although the waivers of sovereign immunity noted above were passed after *Massachusetts*, they are consistent with it and may reflect an attempt by Congress to codify at least part of the test.[17] Moreover, the Department of Justice (DOJ) has adopted the *Massachusetts* standard as the method for analyzing fee/tax issues. For example, in litigation involving state hazardous waste fees in New York, the DOJ argued that the test was applicable to bar the state from imposing the fees.[18]

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11. *Id.* § 300j6(a).

12. *Id.* § 7418(a).

13. Maine v. Department of the Navy, 973 F.2d 1007, 1012 (1st Cir. 1992).

14. 435 U.S. 444 (1978). *Massachusetts* involved state immunity from federal taxation. The Court recognized that the states have a qualified immunity from federal taxation and established a three-pronged test to determine whether the immunity applies. By analogy the same principle may be applied in the context of state taxes on federal facilities. The use of the analogy was adopted by the First Circuit in *Maine v. Department of the Navy.* It should be noted, however, the test was not adopted by the Eighth Circuit in *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990).

15. Memorandum, Assistant Secretary of Defense for Installations to Service Secretaries, subject: State Environmental Taxes (4 June 1984). Although this memorandum does not specifically mention the *Massachusetts* case, it details the *Massachusetts* criteria as the basis for determining whether fees from a state are reasonable service charges or taxes.

16. U.S. DEP'T OF DEFENSE, INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE (24 Apr. 1996). This states that it is DOD policy to:

> 4.7. Pay reasonable fees or service charges to State and local governments for compliance costs or activities except where such fees are:
> 4.7.1. Discriminatory in either application or effect;
> 4.7.2. Used for a service denied to a Federal Agency;
> 4.7.3. Assessed under a statute in which the Federal sovereign immunity has not been unambiguously waived;
> 4.7.4. Disproportionate to the intended service or use; or
> 4.7.5. Determined to be a State or local tax. (The legality of all fees shall be evaluated by appropriate legal counsel).

17. For example, the fee waivers in RCRA and SDWA define reasonable service charges to include "nondiscriminatory charges," an apparent codification of the first prong of the *Massachusetts* test. These statutes also enumerate several types of fees that are payable, which may reflect a conclusion as to the benefits that such fees would provide to regulatory programs (i.e., addressing the second and third prongs of the test).

Analysis under Massachusetts

Each of the prongs of the *Massachusetts* test has been further illuminated by litigation concerning environmental fees.

Discrimination Prong: Under *Massachusetts* the federal government must not be treated any differently in the enforcement of the fee requirement than other regulated entities. For example, in a case involving the imposition of RCRA hazardous waste fees, a federal district court summarily found that a state, which exempted itself from imposition of the fees, violates the nondiscrimination prong of the *Massachusetts* test.[19] Although analysis of this prong under the CAA may lead to a contrary result,[20] installations should nevertheless be alert to discriminatory air program fees.

The practice of states exempting their own programs is not uncommon. A recent ELD review of a Kansas statute revealed exactly this discrimination.[21] Analysis under the discrimination prong is generally the easiest aspect of fee/tax review because a problem may be plain from statutory text. An ELS reviewing a state statute should be careful to look for any provisions of state law which exempt out any particular entity: government or private. If the entity is in the same legal position as the federal government (that is, a user of regulated substances, generator of regulated pollutants, or an applicant for environmental permits) it must be subject to the same fees.[22]

Benefits Prong: The fee charged must be a fair approximation of the benefits received to be considered "reasonable." In announcing the three-part test in *Massachusetts,* the Supreme Court stressed that "[a] governmental body has an obvious interest in making those who *specifically benefit* from its services pay the cost . . . ."[23] Indeed, courts have determined that the "benefits to be examined in applying the test are those on whom the charges are imposed, not merely benefits to the public at large."[24] Over the years, however, a strict application of the benefits prong has eroded. Litigation in New York illustrates this point, where a federal district court found that hazardous waste generator and transporter fees were permissible even though federal facilities did not receive specific service.[25] According to the court "the second prong of the *Massachusetts* test does not require an exact correlation, . . . between the costs of the overall services provided and the fees assessed for such services."[26] The court noted that whether a federal entity actually uses any state services is irrelevant, because they constitute a "benefit" as long as the United States *could* use the state's services in the future, if needed. Likewise, a simple showing that the dollar value of specific services rendered by the state was less than charges for those services was not enough to establish a lack of benefit. Such a showing does not take into account "overall" benefits that facilities receive as a result of program availability.[27] According to the court, the state need only show "a rational relationship between the method used to calculate the fees and the benefits available to those who pay them."[28] The First Circuit pursued similar reasoning in a RCRA fee case.[29]

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18. New York State Dep't of Envtl. Conservation v. United States Dep't of Energy, 850 F. Supp. 132, 135 (N.D. N.Y. 1994). The case involved fees imposed prior to a 1992 amendment to RCRA that created the waiver quoted above. The court was construing a previous waiver that obligated the federal government to pay "reasonable service charges." *Id*.

19. New York State Dep't of Envtl. Conservation v. United States Dep't of Energy, 89-CV-194 to 197, 1997 U.S. Dist. LEXIS 20718, at *22 (N.D. N.Y. Dec. 24, 1997). Ironically, the court ordered the United States to pay the fees because the state had corrected the discriminatory practice by retroactively paying the fees during the litigation.

20. United States v. South Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990). The court held that it was not discriminatory to exempt a state from air fees while the United States must pay. The court reasoned that the CAA waiver of sovereign immunity was "to the same extent as any non-governmental entity . . ." *Id.* Accordingly, under the CAA, a state may be treated differently as it is considered a "governmental entity."

21. Memorandum, Environmental Law Division, subject: Kansas Solid Waste Tonnage Fee (2 Aug. 1999). Referring to Kansas statute (65-3415b(a), the memorandum notes that "[t]he State of Kansas has established a statutory scheme that allows for the collection of solid waste tonnage or 'tipping' fees of $1.00 for each ton of solid waste disposed in any landfill in the state." Referring to Kansas statute (65-3415b(c)(5), the statute provides, however, that these fees do not apply to "construction and demolition waste disposed of by the state of Kansas, or by any city or county in the state of Kansas, or by any person on behalf thereof." The memorandum concludes that the fee is discriminatory and should not be paid.

22. The DOD success in encouraging the state of California to revamp its hazardous waste fees to remove discriminatory provisions is another example of this approach.

23. Massachusetts v. United States, 435 U.S. 444, 462 (1978) (emphasis added).

24. United States v. Maine, 524 F. Supp. 1056 (D. Me. 1981).

25. New York State Dept. of Envtl. Conservation v. United States, 850 F. Supp 132 (N.D. N.Y. 1994).

26. *Id.* at 142.

27. *Id.* at 136.

28. *Id*. at 143.

The federal government has had little success in challenging environmental fees on the basis that they are excessive or do not approximate the costs of benefits received. The cases noted above demonstrate that federal courts may be expected to apply deferential standards when analyzing the "reasonableness" of environmental fees. An installation contesting a fee solely on the basis that there are little or no benefits should be alert to these broad standards. Given the current state of the law, the overwhelming majority of "benefits" analyses will lead to the conclusion that the state may levy the fee.

Fee Structure Prong: Is the fee structured to produce revenues that will not exceed the total cost to the state of the benefits supplied? If this prong is addressed strictly in terms of total program revenues as compared to expenditures, relief from payment of fees will be unlikely as long as there is a "rough relation between state regulatory costs and the fees charged."[30] This analytical approach has not received much attention in practice probably because obtaining the fiscal information necessary to pursue it successfully would be difficult.

Problems associated with the third prong are more easily identified when a state fails to restrict the use of environmental fees to related environmental programs. For example, ELD concluded that installations in Georgia should not pay certain hazardous waste fees because these revenues are placed into a fund from which the state legislature may make general appropriations. Similarly, DOJ's Office of Legal Counsel opined that a District of Columbia CAA program of charging monthly fees for parking spaces was essentially designed to create a subsidy for its mass transit system.[31] Environmental law specialists should raise concerns whenever state statutes allow environmental fees to be used for broad purposes or to be co-mingled with unrelated state funds.

Procedures for Approval to Not Pay Unlawful Fees

In resolving environmental fee/tax issues, it is essential that all DOD facilities within a state act in unison. Inconsistent approaches among installations to a fee/tax issue are a recipe for long-term contentious relations between the non-paying installation and the regulatory agency. To maintain an installation's credibility and to avoid acrimony that can spill over into all media programs, thorough coordination among all DOD (and, preferably, all federal) installations and with headquarters is required before deciding to not pay fees. Moreover, the ability of the United States to successfully litigate fee/tax cases may be thwarted by installations that take inconsistent positions on issues that arise.

As noted at the outset, the four environmental statutes discussed above all contain waivers of immunity for the payment of regulatory fees. In practice, installations should be paying all environmental fees assessed by states under these programs unless ELD, in consultation with other DOD services, makes a written determination that they are unlawful taxes. In general, when a state agency requests the payment of a regulatory fee, the installation ELS should be the first to analyze the issue of liability using the chart contained in the previous section. The ELS should research the state law, make copies of relevant statutes, and examine prior versions of the statutes to determine if there has been a recent change. In addition, the ELS should determine whether the installation has paid the fee in the past, and note any other relevant background information.

If the ELS concludes that the fee should not be paid, the ELS should diplomatically ask the regulatory agency to delay enforcement of the fee until it has been reviewed by higher federal authorities. Often times the state agencies will not be familiar with the concept of sovereign immunity, or the *Massachusetts* test. The ELS should explain the laws and request cooperation. The ELS should stress that the installation has a duty and obligation to maintain compliance with all state laws and regulations, but that a sovereign immunity issue affects the installation's authority to pay the fee, and must be addressed at higher levels.[32]

The ELS should next forward the ELS's legal opinion detailing the specific statutory sections and relevant facts to the servicing Army regional environmental coordinator (REC) and the major command. The Army REC should alert the ELD and all Army installations within the jurisdiction to the issue and find out whether each installation has been paying the fees in question. Based on input from other Army installations, the Army REC should augment the factual summary and legal opinion with additional information and legal analysis. The Army REC then coordinates the issue with the designated DOD REC,[33] who has responsibility for developing a DOD position on issues of common concern to all military installations and RECs.[34] The DOD REC should serve as the primary point of contact with the state on the issue, to ensure that all military installations speak with one voice.[35] Should differences arise among

29. Maine v. Department of the Navy, 973 F.2d 1007 (1st Cir. 1992). *See* New York State Dep't of Envtl. Conservation v. United States, 772 F. Supp. 91 (N.D. N.Y. 1991) (discussing the second and third prongs of the *Massachusetts* test).

30. *Maine v. Navy*, 973 F.2d at 1013.

31. Whether the District of Columbia's Clean Air Compliance Fee May Be Collected from the Federal Government, Op. Office of Legal Counsel, DOJ, 1996 OLC LEXIS 10 (23 Jan. 1996). This opinion, while it did not specifically track with the structure of the *Massachusetts* test, is an excellent discussion of the legal principles that support it.

32. William D. Benton & Byron D. Baur, *Applicability of Environmental "Fees" and "Taxes" To Federal Facilities*, 31 A.F. L. REV. 253, 261 (1989). This article includes many practical tips on resolving fee/tax issues.

DOD services as to whether a fee in question should be paid, the DOD REC will have the primary responsibility to resolve those differences.

As noted above, Army RECs should coordinate factual summaries and legal opinions with the ELD as well as the DOD REC. This will allow ELD to make coordination with the headquarters elements of the other DOD services, if needed.[36] In addition, for RCRA fee/tax questions, ELD effects any necessary policy coordination with the Army secretariat (the DOD-designated executive agent for RCRA issues)[37] through the Army General Counsel. The Environmental Law Division also consults with DOJ to determine if a particular position will be supported in case of litigation over RCRA-based fees.

The key to resolving fee/tax issues efficiently is the initial research and opinion by the ELS, followed by further development and active coordination of the issue by both the Army and DOD RECs. Following the procedures outlined above will allow the installation to resolve each fee/tax issue while minimizing damage to working relationships with regulators. That is, regulators should be instructed that fee/tax issues are significant legal and policy matters that are addressed by "higher headquarters," and that decisions to withhold payments for particular fees are not made at the installation level. Major Cotell and Lieutenant Colonel Jaynes.

33. Where the Army REC is also the DOD REC, that office would perform dual functions. *See* U.S. DEP'T OF DEFENSE, INSTR. 4715.2, DOD REGIONAL ENVIRONMENTAL COORDINATION para. 4.3.1 (3 May 1996). Under this Instruction, the Army REC also serves as the DOD REC for EPA Regions 4, 5, 7, and 8. Air Force RECs are also DOD RECs for Regions 2, 6, and 10. Navy RECs are also DOD RECs in Regions 1, 3, and 9. *Id.* para. 3.1.

34. *Id.* para. 5.4.1. Under this policy, the DOD REC for each region is responsible for monitoring and coordinating the consistent interpretation and application of DOD environmental policies on military installations.

35. *Id.* para. 5.2.1.

36. Coordinating fee/tax issues typically results in the ELD preparing legal opinions on whether a particular fee is payable. Sample analyses for fee issues in Georgia, California, and Kansas are available on request.

37. U.S. DEP'T OF DEFENSE, INSTR. 4715.6, ENVIRONMENTAL COMPLIANCE, enclosure 2 (24 Apr. 1996).

Fee/Tax Template

The following summarizes the foregoing discussion into a template for analyzing fee/tax issues:

A. *Closely examine the applicable waiver of sovereign immunity.*
That is, look at the waivers reviewed above for the CWA, RCRA, SDWA, or CAA to see if the fee in question is clearly within the general scope of the waiver.

B. *Does the levy pass each of the prongs in the* Massachusetts v. United States *test?*

The following three prongs reflect a lens for further examining waivers of sovereign immunity for regulatory fees based on judicial decisions. If the answers to all three of the primary questions are yes, then the fee is a payable service charge, not an unlawful tax.

1. Is the levy imposed in a nondiscriminatory fashion?
-- Are there regulated entities within the state on whom the fee is not imposed?
-- Are those entities similarly situated with the federal government (i.e., do they generate regulated substances and apply for environmental permits)?
-- Is the state government required to pay its own fees?

2. Is the levy based on a fair approximation of the costs of the benefits (i.e., is it associated with a discernible benefit to the payor)?

-- Characteristics associated with benefits to the payor (i.e., "user" fees):
- payments are made in return for government-provided benefits
- duty to pay arises from voluntary use of services (e.g., receipt of a permit)
- failure to pay results in termination of services
- levy is imposed by an *agency* in capacity as vendor of goods and services
- payments are calculated to recoup actual costs of regulating the payor
- services, though not actually used by payor, are available to the payor
- payments, though not actually equal to direct services received, support overall general benefits of the regulatory program

-- Characteristics not associated with benefits to the payor (i.e., taxes):
- liability arises from status (e.g., assessments for property owners)
- failure to pay results in penalties
- duty to pay arises automatically, regardless of services provided
- levy is imposed by the *government* in capacity as a sovereign agent
- payments are fixed and charged the same to all users
- payments are used to provide benefits to the public at large
- services are not available to the payor

3. Is the levy structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied to the payor?
-- Does it demonstrably support only the cost to the state of administering the regulatory program?
-- Does it produce net revenues to the state for potentially unrelated uses (i.e., non-regulatory government programs or the general public)?

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division
Office of The Judge Advocate General, U.S. Army

GRA On-Line!

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

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

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

Mrs. Debra Parker,.....parkeda@hqda.army.mil
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The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1999-2000 Academic Year On-Site CLE Training

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

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

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call COL Tromey, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6381 or (800) 552-3978, ext. 381. You may also contact Colonel Tromey on the Internet at trometn@hqda.army.mil. Colonel Tromey.

USAR/ARNG Applications for JAGC Appointment

Effective 14 June 1999, the Judge Advocate Recruiting Office (JARO) will process all application for USAR and ARNG appointments as commissioned and warrant officers in the JAGC. Inquiries and requests for applications, previously handled by GRA, will be directed to JARO.

Judge Advocate Recruiting Office
901 North Stuart Street, Suite 700
Arlington, Virginia 22203-837

(800) 336-3315

Applicants should also be directed to the JAGC recruiting web site at <www.jagcnet.army.mil/recruit.nsf>.

At this web site they can obtain a description of the JAGC and the application process. Individuals can also request an application through the web site. A future option will allow individuals to download application forms.

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1999-2000 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
25-26 Sep	Pittsburgh, PA 99th RSC	AC GO BG Barnes RC GO BG DePue GRA Rep Dr. Foley	Patriot Wills Major Curtis Parker CLE Int'l & Operational Law LTC Supervielle	POC: 1LT Ivor Jorgensen 99th RSC (724) 693-2151 ivor.jorgensen@usarc-emh2.army.mil Host: COL Tom Brown
24-26 Sep	Park City ARNG Conference	BG Marchand is attending this conference.		Host: COL Bruce Reading (801) 576-3600
30-31 Oct	West Point ARNG Conference	BG Barnes and BG O'Meara are attending this conference.		Host: COL Randy Eng (718) 520-2848
6-7 Nov	Minneapolis, MN 214th LSO	AC GO BG Marchand RC GO BG O'Meara GRA Rep TBD	International Law: ROE Law of War Criminal Law: NJP, fraternization	POC: CPT Todd Corbo 214th LSO (612) 596-4753 Host: COL Don Betzold (612) 566-8800
13-14 Nov	New York 77th RSC/4th LSO	AC GO BG Barnes RC GO BG O'Meara GRA Rep TBD	Administrative & Civil Law: Admin Boards (incl Hemp Defense) Contract Law	POC: LTC Don Lynde 77th RSC (718) 352-5106 Host: COL Henry Wysocki (212) 612-9316
21-23 Nov	LSO/MSO Conference St. Petersburg, FL	BG Romig and BG DePue are attending this conference.		Host: COL Bob Yerkes (904) 346-3160
8-9 Jan 2000	Long Beach, CA 78th MSO	AC GO MG Altenburg RC GO BG O'Meara GRA Rep TBD	Administrative & Civil Law (4 hrs): Separation Boards Criminal Law (2 hrs): Urinalysis Testing	POC: MAJ Jacqueline Jackson (619) 594-2012 corlett@rohan.sdsu.edu Host: COL Dan Allemeier (310) 317-5851
7-9 Jan	New Orleans, LA 90th RSC/1st LSO	AC GO MG Huffman RC GO COL (P) Walker GRA Rep TBD	International & Operational Law (4 hrs): Law of War Criminal Law (2 hrs)	POC: LTC William Baker (405) 377-8644 Host: COL Mark Livingston (580) 442-5846
29-30 Jan 2000	Seattle, WA 6th MSO/70th RSC	AC GO MG Altenburg RC GO COL (P) Walker GRA Rep TBD	Criminal Law International & Operational Law	POC: LTC Scotty Sells (360) 336-9462 scottys@co.skagit.wa.us Host: COL Matt Vadnal (206) 553-0940

5-6 Feb	Columbus, OH 9th MSO	AC GO BG Barnes RC GO COL (P) Walker Contract Law Int'l Law GRA Rep TBD	Contract Law Administrative Law	POC: LTC Mark Landers (937) 255-3203, ext. 215
19-20 Feb	Salt Lake City, UT 87th MSO/UTARNG	AC GO BG Marchand RC GO COL (P) Walker GRA Rep TBD	Criminal Law: Fraternization Administrative & Civil Law	POC: MAJ Jay Woodall (801) 531-0435 Host: COL Christiansen ((801) 366-7861
26-27 Feb	Indianapolis, IN INARNG	AC GO BG Barnes RC GO COL (P) Walker Criminal Law Int'l & Op Law GRA Rep TBD	CLAMO: Legal Issues in JRTC Training Criminal Law Professional Responsibility tape to be shown.	POC: LTC George Thompson (317) 247-3491/3449 Host: COL George Hopkins (765) 457-4349
4-5 Mar	Washington, DC 10th MSO	AC GO BG Barnes RC GO BG DePue Criminal Law Int'l & Ops Law GRA Rep TBD	Criminal Law Administrative & Civil Law	MAJ Gerry P. Kohns kohnsg@hq.navfac.nav.mil Host: COL Jan Horbaly (202) 633-9615
11-12 Mar	San Francisco, CA 75th LSO	AG CO BG Romig RC GO BG O'Meara GRA Rep TBD	Contract Law Administrative & Civil Law: POR--How to get ready to deploy	POC MAJ Douglas Gneiser (415) 673-2347 Host: COL Charles O;Connor (415) 436-7180
18-19 Mar	Chicago, IL 91st LSO	AC GO BG Marchand RC GO BG DePue	Contract Law International & Operational Law	POC: MAJ Tom Gauza (312) 443-1600 Host: COL Johnny Thomas (210) 226-5888
25-16 Mar	Charleston, SC 12th LSO	AC GO MG Altenburg RC GO BG DePue Int'l & Operational Law Criminal Law GRA Rep TBD	International & Operational Law Criminal Law: Fraternization	COL Robert P. Johnston (704) 347-7800 Host: COL Dave Brunjes (912) 267-2441
1-2 Apr	Orlando, FL FLARNG	AC GO BG Romig RC GO BG O'Meara Criminal Law Int'l & Operational Law GRA Rep TBD	Administrative & Civil Law Contract Law	Ms. Cathy Tringali (904) 823-0132 Host: COL Henry Swann (904) 823-0132
16-20 Apr	Spring Workshop GRA			
21-23 Apr	Easter Weekend			

29-30 Apr	Newport, RI 94th RSC	AC GO MG Huffman RC GO BG O'Meara GRA Rep TBD	Int'l & Operational Law: ROE Criminal Law: New Developments requested. (But a possible substitution by CLAMO was discussed with a focus on Domestic Operations)	POC: MAJ Jerry Hunter (978) 796-2140 1-800-554-7813
6-7 May	Gulf Shores, AL 81st RSC/ALARNG	AC GO BG Barnes RC GO BG DePue GRA Rep TBD	Criminal Law Adminstrative & Civil Law	Host: COL Bernard Pfeiffer (706) 545-3285
12-14 May	Omaha, NE 89th RSC	AC GO BG Romig RC GO COL (P) Walker	Contract Law Administartive & Civil Law	POC: LTC Jim Rupper (316) 681-1759, ext. 1397 Host: COL Mark Ellis (402) 231-8744

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

Please notify COL Tromey if any changes are required, telephone (804) 972-6381.

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

1999

October 1999

4-8 October	1999 JAG Annual CLE Workshop (5F-JAG).
4-15 October	150th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15 October-22 December	150th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
~~12-15 October~~	~~72nd Law of War Workshop (5F-F42).~~

Note: The 72nd Law of War Workshop course has been cancelled. The 73rd Law of War Workshop is the next scheduled course from 7-11 February 2000.

18-22 October	45th Legal Assistance Course (5F-F23).
25-29 October	55th Fiscal Law Course (5F-F12).

November 1999

1-5 November	156th Senior Officers Legal Orientation Course (5F-F1).
15-19 November	23rd Criminal Law New Developments Course (5F-F35).
15-19 November	53rd Federal Labor Relations Course (5F-F22).
29 November-3 December	157th Senior Officers Legal Orientation Course (5F-F1).
29 November-3 December	1999 USAREUR Operational Law CLE (5F-F47E).

December 1999

6-10 December	1999 USAREUR Criminal Law Advocacy CLE (5F-F35E).
6-10 December	1999 Government Contract Law Symposium (5F-F11).
13-17 December	3rd Tax Law for Attorneys Course (5F-F28).2000

January 2000

4-7 January	2000 USAREUR Tax CLE (5F-F28E).
10 January-29 February	1st Court Reporter Course (512-71DC5).
9-21 January	2000 JAOAC (Phase II) (5F-F55).

Note: See paragraph 5 below for adjusted JAOAC suspense dates. The course was scheduled originally for 10-21

January 2000

10-14 January	2000 USAREUR Contract and Fiscal Law CLE (5F-F15E).
10-14 January	2000 PACOM Tax CLE (5F-F28P).
10-28 January	151st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
18-21 January	2000 Hawaii Tax Course (5F-F28H).
26-28 January	6th RC General Officers Legal Orientation Course (5F-F3).
28 January-7 April	151st Offier Basic Course (Phase II, TJAGSA) (5-27-C20).
31 January-4 February	158th Senior Officers Legal Orientation Course (5F-F1).

February 2000

7-11 February	73rd Law of War Workshop (5F-F42).
7-11 February	2000 Maxwell AFB Fiscal Law Course (5F-F13A).
14-18 February	24th Administrative Law for Military Installations Course (5F-F24).
28 February-10 March	33rd Operational Law Seminar (5F-F47).
28 February-10 March	144th Contract Attorneys Course (5F-F10).

March 2000

13-17 March	46th Legal Assistance Course (5F-F23).
20-24 March	3rd Contract Litigation Course (5F-F102).
20-31 March	13th Criminal Law Advocacy Course (5F-F34).
27-31 March	159th Senior Officers Legal Orientation Course (5F-F1).

April 2000

10-14 April	2nd Basics for Ethics Counselors Workshop (5F-F202).
10-14 April	11th Law for Legal NCOs Course (512-71D/20/30).
12-14 April	2nd Advanced Ethics Counselors Workshop (5F-F203).
17-20 April	2000 Reserve Component Judge Advocate Workshop (5F-F56).

May 2000

1-5 May	56th Fiscal Law Course (5F-F12).
1-19 May	43rd Military Judge Course (5F-F33).
8-12 May	57th Fiscal Law Course (5F-F12).
31 May-2 June	4th Procurement Fraud Course (5F-F101).

June 2000

5-9 June	3rd National Security Crime & Intelligence Law Workshop (5F-F401).
5-9 June	160th Senior Officers Legal Orientation Course (5F-F1).
5-14 June	7th JA Warrant Officer Basic Course (7A-550A0).
5-16 June	5th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
12-16 June	30th Staff Judge Advocate Course (5F-F52).
19-23 June	4th Chief Legal NCO Course (512-71D-CLNCO)
19-23 June	11th Senior Legal NCO Management Course (512-71D/40/50).
19-30 June	5th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
26-28 June	Career Services Directors Conference.

26 June- 14 July	152d Basic Course (Phase I, Fort Lee) (5-27-C20).

July 2000

5-7 July	Professional Recruiting Training Seminar.
10-11 July	31st Methods of Instruction Course (Phase I) (5F-F70).
10-14 July-	11th Legal Administrators Course (7A-550A1).
10-14 July	74th Law of War Workshop (5F-F42).
14 July- 22 September	152d Basic Course (Phase II, TJAGSA) (5-27-C20).
17 July- 1 September	2d Court Reporter Course (512-71DC5).
31 July- 11 August	145th Contract Attorneys Course (5F-F10).

August 2000

7-11 August	18th Federal Litigation Course (5F-F29).
14 -18 August	161st Senior Officers Legal Orientation Course (5F-F1).
14 August- 24 May 2001	49th Graduate Course (5-27-C22).
21-25 August	6th Military Justice Managers Course (5F-F31).
21 August- 1 September	34th Operational Law Seminar (5F-F47).

September 2000

6-8 September	2000 USAREUR Legal Assistance CLE (5F-F23E).
11-15 September	2000 USAREUR Administrative Law CLE (5F-F24E).
11-22 September	14th Criminal Law Advocacy Course (5F-F34).
25 September- 13 October	153d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
27-28 September	31st Methods of Instruction (Phase II) (5F-F70).

October 2000

2 October- 21 November	3d Court Reporter Course (512-71DC5).
9-6 October	2000 JAG Annual CLE Workshop (5F-JAG).
23-27 October	47th Legal Assistance Course (5F-F23).
13 October- 22 December	153d Officer Basic Course (Phase II, (TJAGSA) (5-27-C20).
30 October- 3 November	58th Fiscal Law Course (5F-F12).
30 October- 3 November	162d Senior Officers Legal Orientation Course (5F-F1).

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
13-17 November	54th Federal Labor Relations Course (5F-F22).
27 November- 1 December	163d Senior Officers Legal Orientation Course (5F-F1).
27 November- 1 December	2000 USAREUR Operational Law CLE (5F-F47E).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
7-19 January	2001 JAOAC (Phase II) (5F-F55).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8-26 January	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8 January-27 February	4th Court Reporter Course (512-71DC5).
16-19 January	2001 Hawaii Tax Course (5F-F28H).
24-26 January	7th RC General Officers Legal Orientation Course (5F-F3).
26 January-6 April	154th Basic Course (Phase II, TJAGSA) (5-27-C20).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

5-9 February	75th Law of War Workshop (5F-F42).
5-9 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
12-16 February	25th Admin Law for Military Installations Course (5F-F24).
26 February-9 March	35th Operational Law Seminar (5F-F47).
26 February-9 March	146th Contract Attorneys Course (5F-F10).

March 2001

12-16 March	48th Legal Assistance Course (5F-F23).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

16-20 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
18-20 April	3d Advanced Ethics Counselors Workshop (5F-F203).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-4 May	59th Fiscal Law Course (5F-F12).
30 April-18 May	44th Military Judge Course (5F-F33).

May 2001

7-11 May	60th Fiscal Law Course (5F-F12).

June 2001

4-8 June	4th National Security Crime & Intelligence Law Workshop (5F-F401).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June - 13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.

July 2001

2-4 July	Professional Recruiting Training Seminar.
2-20 July	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase II) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
20 July-28 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

3. Civilian-Sponsored CLE Courses

1 October ICLE	Trial Techniques - Advocacy from the Inside Out Atlanta Marriott Century Center Atlanta, Georgia
14 October ICLE	Effective Legal Negotiation and Settlement Sheraton Buckhead Hotel Atlanta, Georgia
15 October ICLE	Criminal Law Sheraton Buckhead Hotel Atlanta, Georgia
22 October ICLE	Professional and Ethical Dilemmas Marriott Gwinnett Place Hotel Atlanta, Georgia
4 November ICLE	American Justice System Kennesaw State University Kennesaw, Georgia
19-20 November ICLE	Alternative Dispute Resolution Institute Calloway Gardens Pine Mountain, Georgia
2 December ICLE	Environmental Law Marriott Gwinnett Place Hotel Atlanta, Georgia
2 December ICLE	Professionalism and Ethics: Judges and Lawyers Marriott Gwinnett Place Hotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually

Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

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

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

All students currently enrolled in the RC-JAOAC Phase I (Correspondence Phase), who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) this coming 9-21 January 2000, must submit all Phase I requirements to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 1 November 1999***. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

If you have to retake any subcourse examinations or "re-do" any writing exercises, you must submit them to the Non-Resident Instruction Branch, TJAGSA for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 1999***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense. Students who fail to complete Phase I correspondence courses and writing exercises by these deadlines, will not be allowed to enroll for Phase II (Resident Phase), RC-JAOAC, 9-21 January 2000.

If you have any further questions, contact LTC Paul Conrad, JAOAC Course Manager, (800) 552-3978, extension 357, or e-mail <conrape@hqda.army.mil>. LTC Goetzke.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of the TJAGSA Materials Available through the DTIC, see the September 1999 issue of *The Army Lawyer.*

*AD A366526	Consumer Law Guide, JA 265-99 (118 pgs).

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

For detailed information, see the September 1999 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide System Bulletin Board Service

For detailed information, see the September 1999 issue of *The Army Lawyer.*

4. TJAGSA Publications Available Through the LAAWS BBS

For detailed information, see the September 1999 issue of *The Army Lawyer.*

5. Articles

The following information may be useful to judge advocates:

Daniel Pickard, *When Does Crime Become a Threat to International Peace and Security*, 12 FLA. L. REV. (Spring 1998).

Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) - A Metamorphosis of the Uniform Child Custody Jurisdiction (UCCJA)*, 75 N.D. L. REV. 301 (1999).

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and Pentium PCs in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We have migrated to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, 800-552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Mr. Al Costa.

7. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDS, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.