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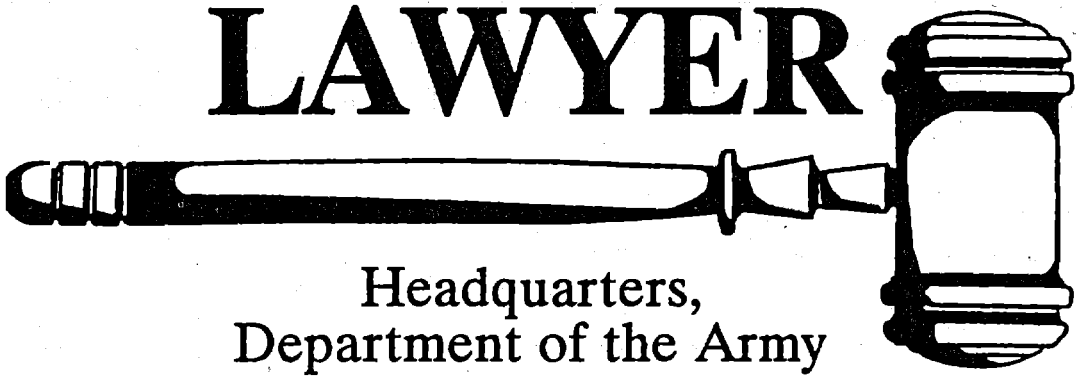

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The Legal Status of Foreign Military Personnel in the United States

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Introduction

Background

Americans have accepted the stationing of friendly foreign military forces in the United States since the arrival of the French and other allies during the War for Independence over 200 years ago. Although legal issues surrounding the status of foreign friendly forces in the United States reach back to the very birth of the nation, these issues have not previously presented a serious problem. Indeed, since World War I the United States government and military have been more concerned with the issues involving the legal status of American troops overseas.

The United States has consistently demanded, and received from foreign governments, legal protection for American troops on a unilateral basis, except with North Atlantic Treaty Organization (NATO) countries, where the basic legal rights are reciprocal. But even in NATO countries, the United States has obtained additional benefits for American troops under unilateral supplemental agreements—benefits it has been unwilling to grant its NATO allies.

In recent years, foreign countries—including close allies such as Germany, Australia, and Israel—have requested that their troops located in the United States be treated in the same manner as United States troops are treated in their countries. Additionally, countries that have not previously sent troops to the United States—such as the eastern European members of the "Partners for Peace" program, Russia, and nations that have troops with peacekeeping experience—are projected to send military personnel to the United States for interoperability training and other purposes, and will seek reciprocal treatment.[1] Thus, the status of friendly foreign forces in the United States has become a serious legal and foreign policy issue for the United States.

This article, after discussing competing jurisdictional interests and the historical development of status of forces agreements (SOFA), concludes that United States national interests would be better served by adopting a new policy of reciprocal SOFAs. Such a policy would reflect a recognition of greater jurisdictional equality between nations. The article recommends that the new policy be implemented by enacting legislation that would permit the President to grant reciprocal SOFA rights to other nations by means of executive international agreements.

Definitions

The terms below are used throughout the paper to mean the following:

Sending and Receiving States—The sending state is the nation that sends military personnel on official business, whether as part of a force or as an individual, at the invitation of the receiving state. The receiving state is the nation that invites and accepts visiting foreign military personnel into its territory for authorized official purposes.

Status of Forces Agreement—This article uses the term "Status of Forces Agreement" in its broadest sense to mean any type or form of internationally binding agreement that purports to order and arrange the competing jurisdictional interests between a sending state and receiving state. Specifically, a SOFA sets forth the rights and obligations of each state, as well as of the individuals from the states.

Overlapping Jurisdictional Claims

Governments invite foreign military personnel into their territory during peacetime for numerous reasons, including military assistance, a show of force to deter potential aggressors, humanitarian aid, combined training exercises, and military education and training programs. Sometimes, a military force requests permission to enter a foreign country simply to provide rest and recreation for its troops.

The introduction of friendly foreign military personnel into the territory of another country necessarily brings divergent state claims of jurisdiction into conflict, as various state interests overlap. Invariably, to protect their state interests in common matters, both the receiving state and sending state will seek to exercise maximum jurisdiction. To maintain friendly relations, however, the states must order and arrange their exercise of jurisdiction in a manner acceptable to both sides.

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[1] Telephone Interview (June 17, 1993) and meeting (Mar. 1, 1994) with Mr. Frank Stone, Assistance Director, Office of the Assistant Secretary of Defense, International Security Affairs, Foreign Military Rights Affairs (FMRA) [hereinafter Stone Telephone Interview]. Foreign Military Rights Affairs is the Defense Department's direct liaison with the State Department on all matters concerning the rights of United States service members abroad and foreign military personnel in the United States. As of March 1, 1994, the Partners For Peace nations included: Albania, Bulgaria, Poland, Hungary, Slovakia, Romania, Lithuania, Estonia, Latvia, and the Ukraine.

It might be simpler at this point to label each state's claim to jurisdiction as stemming from the concept of state "sovereignty" and quickly move on to discuss how SOFAs attempt to resolve the competing "sovereign" claims. This shortcut approach, however, would miss the core interests that are really at issue. A state asserts jurisdiction in furtherance of national interests. Over the years, general international jurisdiction principles have evolved that articulate the core interests at stake. These principles provide the underlying legal basis for claims of jurisdiction. One must understand how these fundamental and important principles are used by states to assert jurisdiction before one can intelligently discuss the United States policy concerning foreign troops on its soil.

General International Jurisdictional Principles

States exercise power by prescribing, adjudicating, and enforcing laws in a variety of substantive jurisdictional areas including criminal, civil, immigration, customs, and taxation, among others. What international principles support the exercise of state power in these substantive areas?

Four recognized general international jurisdiction principles exist which justify the affirmative exercise of jurisdiction by a state: (1) the principles of territory; (2) nationality; (3) passive personality; and (4) protection. Additionally, the principle of sovereign immunity is relevant as a defensive rationale to avoid the exercise of another state's jurisdiction.

The territorial principle originates from the most basic and obvious element related to the concept of what constitutes a state. Simply put, a state has supreme jurisdictional interest over anything that happens in its territory.[2] Thus, a state may lawfully exercise any and all forms of jurisdiction over any and all persons and property within its borders.

One of the strongest jurisdictional principles is the nationality principle, which stems from a state's inherent interest in exercising jurisdiction over persons or things possessing its nationality.[3] For example, this principle permits a state to exercise jurisdiction when its nationals are accused of misconduct wherever they may be throughout the international community. Related to the nationality principle is the passive personality principle, which originates from a state's desire to provide certain protection to its nationals. Although this principle lacks the solid foundation of the better established nationality principle, it serves to highlight a state's interest in the welfare of victims which are its nationals.

The protection principle maintains that a state has an interest in protecting itself against acts that threaten its existence or its proper functioning as an independent, sovereign nation, wherever the act may occur.[4] The threatened state may exercise the necessary jurisdiction to protect itself.

The thread that ties all principles of jurisdiction together is the principle of sovereign immunity. Based on the premise that all states are equal, sovereign immunity simply means that no state may exercise authority over any other.[5] States have traditionally relied on this principle to avoid another state's attempt to exercise jurisdiction over its citizens and property.

Originally, states applied the principle of sovereign immunity in an absolute fashion. With increased interaction and interdependence between states, however, limitations on an absolute interpretation of sovereign immunity slowly evolved. Indeed, although a state is always free to waive all or a portion of its immunity, customary international law has chipped away at an absolute interpretation of sovereign immunity.

Receiving State Application of General International Jurisdiction Principles

The receiving state relies primarily on the jurisdictional principle of territoriality because the visiting foreign military force is in the receiving state's territory. Under this principle, the receiving state claims a broad right of jurisdiction over all persons and all things within its territory, including any visiting forces. The receiving state uses this principle to support prescription, adjudication, and enforcement of all acts and omissions within its borders.

Because the territoriality principle is so broad, easy to understand, and well established, alternative legal theories for asserting jurisdiction are not often suggested as a basis for receiving state jurisdiction. The receiving state, however, does not have to rely on the territoriality principle alone. Depending on circumstances, the principles of nationality, passive personality, and protection may be sufficient in their own right to support a receiving state's claim to jurisdiction over members of a visiting force.

Criminal Jurisdiction

Perhaps the single most difficult subject area to harmonize between the sending and receiving state is that of criminal jurisdiction over foreign military personnel.[6] This is an inher-

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[2] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1986) [hereinafter RESTATEMENT].

[3] *Id.* § 402(2).

[4] *Id.* § 402(3).

[5] LOUIS HENKIN ET AL., INTERNATIONAL LAW, CASES AND MATERIALS 891 (2d ed. 1987).

[6] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 43 (1971).

ently difficult subject area to reach agreement on because it involves situations that spark strong nationalistic emotions, chief of which relate to the question of alleged criminal activity by a foreign soldier. For example, injury to a local citizen by a visiting soldier always will spark a strong emotional response by citizens of the receiving state. Invariably, the demand will be unrelenting—the receiving state must bring the foreign soldier to justice. Other jurisdictional subject areas—such as civil, immigration, customs, and taxation—pale when compared to the issue of criminal jurisdiction.

Under the territorial principle, the receiving state argues that it has the primary interest in enforcing its criminal jurisdiction against a member of the visiting force to maintain order in its territory. As stated, the territorial principle is so broad that the receiving state's option in some instances to rely on the passive personality principle for asserting criminal jurisdiction is usually not necessary. For example, if a visiting military member robs a local man, the receiving state, with the intent of protecting its citizens, could rely on the passive personality principle to assert criminal jurisdiction against the accused visiting soldier, in addition to the territoriality principle.

While the passive personality principle concentrates on correcting wrongs against the individual, the protective principle theory is concerned with threats to the peace and security of the receiving state as a whole. Thus, if a member of the visiting force conducts espionage against the receiving state, or sells weapons to terrorist groups in the receiving state, the receiving state would seek to exercise criminal jurisdiction based on the protective principle. The visiting force member's conduct would be viewed as a direct threat to the receiving state.

Civil, Immigration, Customs, and Tax Jurisdiction

Claims for damages arising from activities involving the visiting force or its members and occurring in the receiving state, should be settled peacefully and equitably. The receiving state relies on the following: (1) territory; (2) nationality; and (3) passive personality principles to obtain civil jurisdiction over the visiting force and its individual members for the settlement of such claims. If the event occurred *in* the receiving state, then under the territoriality principle, the receiving state automatically claims the most interest in resolving the matter. Under the nationality principle, if the claimant is the receiving state or one of its nationals, then the receiving state argues that it should apply its civil jurisdiction to resolve the dispute, to ensure a fair and impartial hearing which the sending state authorities might not be able to provide.

Applications of immigration, customs, and tax jurisdictions rely on the principle of territoriality. A receiving state has a very strong interest in controlling its borders. To do so, it must apply immigration and customs jurisdiction to all persons and things that enter and exit the country. Application of such immigration and customs jurisdictions means imposing restrictions and conditions on the entry and exit of persons and things into and out of the country. A state's tax jurisdiction is the principal means used by states to finance their operations. States traditionally assert the authority to tax residents and activities within their territory. Thus, any person or property—including a foreign force and its members—within the territory of the state, generally are considered as legitimate targets for the application of immigration, custom, and tax jurisdictions.

Other Areas of Jurisdiction

Other areas of jurisdiction—traffic laws, vehicle registration laws, laws on carrying weapons, and laws on the wearing of military uniforms—require detailed agreement when a visiting force enters the receiving state. The receiving state may rely on all four principles of jurisdiction—territory, nationality, passive personality, and protection—to justify its assertions of jurisdiction in these areas.

The receiving state's position is that the visiting force and its members, as guests, must follow the local rules. The principle of territoriality, supplemented by the principles of nationality and protection, provides legal justification for jurisdiction over the visiting force and its members by the receiving state.

Sending State Application of International Jurisdiction Principles

The sending state sees things differently. The sending state does not seek jurisdiction to adjudicate or enforce its laws against citizens of the receiving state. Instead, the sending state wants to be able to exercise jurisdiction over its own force while in the receiving state. The sending state also wants to exclude the exercise of jurisdiction by the receiving state over its military personnel and property located in the receiving state. Because the visiting force is by definition outside of its own territory, the sending state must rely on the protection and nationality principles as the affirmative arguments for asserting jurisdiction over its armed forces and individuals. It also relies on the principle of sovereign immunity as the defensive rationale for avoiding receiving state jurisdiction.

Criminal Jurisdiction

One of the most fundamental institutions of the national entity is the military establishment. Most states need an effective military force to provide a national defense. To be effective, a military force must be disciplined. The national entity must be able to command complete and immediate obedience from its military force at all times and in all places. The need for military discipline ensures that soldiers will be able to function properly under the tremendous stress of the combat environment. The laws of war require such discipline.

To ensure proper discipline, the visiting force carries laws and rules governing the behavior of its individual members

wherever it goes. This concept is referred to as the "Law of the Flag" principle.[7]

On closer inspection, the Law of the Flag principle is really an outgrowth of the broader protective principle. Under the protective principle, the sending state is concerned with national security. Thus, the sending state's national security is weakened if it does not maintain a disciplined and effective fighting force. It cannot maintain such a force if it is not able to exercise jurisdiction over its military personnel even when the force is in the territory of another state.

Under the nationality principle, the sending state makes the argument that in *inter se* cases—cases where both the accused and the victim are members of the sending state—the sending state has the strongest interest in applying its criminal jurisdiction, even though the crime occurred in the territory of the receiving state.

In cases when the victim is from the receiving state and the accused is a member of the visiting force, under the passive personality principle, the sending state has an interest in applying its criminal jurisdiction to ensure the trial of the accused will be in accordance with the legal values of the sending state. From the sending state's perspective, a visiting force soldier might not necessarily receive a "fair" trial in the local courts of the receiving state if the victim is a citizen of the receiving state.[8] To "protect" the rights of its soldiers, the sending state would want to assert its adjudicative jurisdiction to settle the accusation.

The individual troops of the sending state, as well as the sending state itself, may have legitimate grounds to be concerned about the fairness of a trial in the receiving state. Differences in the language, culture, and the judicial system might unfairly prejudice the accused service member. Language and cultural differences between accused and trier of fact could result in a very different appreciation of the seriousness of the offense and of possible circumstances in mitigation. Accused soldiers might not be afforded the kinds of procedural safeguards that they are entitled to in their country. Communication with counsel might also be a problem. These problems might lead to lower troop morale and less political support at home for the mission. For all of these reasons, a sending state argues that it should exercise exclusive or primary criminal jurisdiction over its own troops.

Finally, the sending state may rely on the doctrine of sovereign immunity as a defensive proposition for avoiding the receiving state's criminal jurisdiction. The basic idea behind sovereign immunity is that all states are equals on the international legal stage and, as equals, no state can exercise jurisdiction over another state.

The idea of sovereign immunity is related to the Law of the Flag doctrine discussed above.[9] As applied to visiting forces, the sovereign immunity aspect of the Law of the Flag doctrine asserts the following:

> The consent of a state to the entry of a foreign armed force on its territory *ipso facto* confers on the force an absolute immunity from local jurisdiction. The sending state thus retains exclusive jurisdiction over offenses committed by members of its forces. The principle of the law of the flag has been extrapolated by American writers from *dicta* in the *Schooner Exchange* case.[10]

Chief Justice John Marshall wrote an opinion often cited in support of the Law of the Flag principle:

> All writers, more particularly American writers, quote to justify the dogma of immunity of jurisdiction [for a visiting force] a decision rendered by the Supreme Court of the United States in 1812, in "Schooner Exchange vs M'Faddon" (7 Cranch 116). This decision has since then been "the guide of the legislative and the judiciary" in the United States.[11]

In *Schooner Exchange,* Chief Justice Marshall asserted the idea of absolute territorial jurisdiction, stating that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[12] He qualified his broad statement by declaring that in certain situations, every sovereign "is understood to cede a portion of his territorial jurisdiction . . . where

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[7] *Id.* at 11.

[8] The receiving state may take the position that its national's rights as a victim will not be fairly compensated or vindicated by the judicial authorities of the sending state.

[9] This paper defines the Law of the Flag principle broadly, encompassing both the sending state's affirmative interests for exercising criminal jurisdiction over its force based on the protection principle *and* its defensive argument of sovereign immunity for avoiding all types of receiving state jurisdictions.

[10] JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 170 (1993).

[11] LAZAREFF, *supra* note 6, at 13.

[12] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 135 (1812).

he allows the troops of a foreign prince to pass through his dominion."[13]

Although many writers have taken Chief Justice Marshall's dicta to support the idea of the Law of the Flag and absolute sovereign immunity for visiting forces,[14] the facts of *Schooner Exchange* can be distinguished. In *Schooner Exchange,* the issue revolved around whether an American court could assert jurisdiction over a French warship temporarily in an American port seeking shelter from a storm. This is quite a different matter from the intentional stationing, for months or years, of foreign forces and military personnel in receiving states. In the latter case, the foreign presence is deliberate, for a much longer time, and results in a more serious overlap of jurisdictional interests.

Civil, Immigration, Customs, and Tax Jurisdiction

The sovereign immunity principle also might be relied on by the sending state to avoid civil, immigration, customs, tax, and other jurisdictions of the receiving state. In addition to the sovereign immunity principle, the sending state also may argue—under the protection principle—that the visiting force will not be able to perform its national defense function as efficiently if subject to the civil, immigration, custom, and tax jurisdictions of the receiving state. If the visiting force's efficiency is degraded, then so is the sending state's defense capability. The same sovereign immunity argument used to avoid civil, immigration, customs, and tax jurisdictions would apply to the sending state's desire to be immune from the traffic, weapons, and other laws of the receiving state.

Because the receiving state invited the visiting force in furtherance of its own national defense interests, it would have an interest in removing possible obstacles and distractions that might hinder the visiting force from accomplishing its mission in the most effective manner possible. The receiving and sending states share common *defense* interests. If they did not, they would not send troops to each others countries. What they must harmonize are the *jurisdictional* interests.

Status of Forces Agreements

This cursory review shows that both receiving and sending states have legitimate reasonable arguments, based on recognized international jurisdictional principles, for claiming an interest—perhaps a primary interest—over common jurisdictional subject areas *vis a vis* the other state. How have states resolved these differences? They have done so through the negotiation and conclusion of SOFAs.

Historical Background

Customary International Law

Prior to the nineteenth century, with the limited exception of naval shore leave visits, foreign military forces usually were not welcomed guests. "[P]eaceful military occupation was practically unknown in the olden times, very rare until the end of the Eighteenth Century. Generally speaking, foreign forces were, until 1914, present only as forces of occupation, either during wartime . . . or during peacetime."[15] On rare occasions a situation would arise, however, where a foreign military force entered the territory of another state with the latter state's consent. Without an agreement in place, what was the status of these forces under customary international law?

Due to the lack of consensus from legal scholars and the lack of precedents, no clearly established principles of customary international law on this subject existed. Far from consensus, the legal scholars seemed to be split along the following two opposing views:

> The first, generally supported by American writers or by other writers prior to the Second World War, support in the field of jurisdiction the competence of the Law of the Flag [that is, the sending state retains exclusive jurisdiction over its force and members]. The second, essentially British, advocate the adjustment of the principle of territorial sovereignty and, as a consequence, the division of jurisdiction between the courts of the receiving state and the authorities of the sending state.[16]

In short, by the start of the twentieth century, no clear customary international law rule existed on the status of visiting friendly foreign forces. Neither the principle of absolute territoriality nor of the Law of the Flag (encompassing the protective, nationality, and sovereign immunity principles) had emerged as the prevailing view. At the outbreak of World War I, therefore, states found it necessary to create positive international law to resolve the uncertainty. Thus, states negotiated SOFAs.

International Law Based on Agreements

States concluded some of the earliest SOFAs during World War I:

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[13] *Id.* at 138.

[14] LAZAREFF, *supra* note 6, at 15.

[15] *Id.* at 7.

[16] *Id.* at 11.

> In the First World War agreements, the principle of the law of the flag predominated. [T]he majority of writers then felt that fighting forces were not subject to territorial sovereignty. The rationale was that the jurisdictional power cannot be separated from the exercise of disciplinary power that is an essential part of military organization.[17]

Consistent with its long-standing policy, the United States argued for, and received, exclusive jurisdiction over its forces in France. Indeed, most of the other allies also obtained exclusive jurisdiction from France.

The situation in France during World War I from a jurisdictional standpoint was unique. The front lines remained relatively static during most of the war. Allied troops were assigned a sector or zone to defend. Within these zones, the local French population had been evacuated. In effect, the visiting forces acted as the de facto sovereign within their own zones of operations. No significant overlap of jurisdictional interests between the visiting forces and France existed.[18] This unique situation, along with France's strong desire to receive allies, made it easy for France to yield its interests based primarily on the territorial jurisdictional principle to the allies' interests (based primarily on the Law of the Flag principle). France was in a weak bargaining position: she was fighting for her life, and desperately needed the allies' presence.

In Great Britain, the situation was quite different. First, relatively few allied visiting forces mixed with the local British population. Surrounded by water, no ground combat or sense of imminent danger in Great Britain existed. Second, unlike France, "the United Kingdom always insisted on the principle of territorial sovereignty."[19] The United States, nevertheless, pressed Great Britain to grant it exclusive criminal jurisdiction over members of its force under the Law of the Flag principle. Great Britain, consistent with its policy of relying on the territorial principle, refused. The negotiations dragged on until the end of the war, at which time they ended without reaching a conclusion.[20]

During World War II, the situation was radically different for Great Britain. Large numbers of allied troops from countries overrun by the Nazis sought refuge in Great Britain. These "visiting" forces mixed freely with the local population. In 1940, Great Britain

> adopted the Allied Forces Act. This Act . . . gave jurisdiction to the Allied Military Courts only for "questions of discipline and administration regarding the members of the forces." Offenses punishable under the law of the Receiving state [Great Britain,] and under the law of the Sending state were cases of concurrent jurisdiction. However, crimes of murder and of rape were subject to the exclusive jurisdiction of the British courts.[21]

The allied forces, with no place else to go, were in a weak bargaining position relative to the host British government. "On the basis of [the Allied Forces Act] several agreements were entered into by the United Kingdom with exiled Governments."[22]

The American troops did not arrive until later in the war, and well after the arrival of other allied forces. The United States again demanded exclusive jurisdiction over its forces.[23] This time, in contrast to World War I, Great Britain found itself in a more precarious situation. Unlike most other allied forces in Great Britain, the American forces were not beaten troops seeking refuge from the Nazis. Instead they were the nonfascist world's best hope for survival. Great Britain acceded to the American demand.

> [D]iplomatic notes were exchanged on the subject. These notes were annexed to the "United States of America (Visiting Forces) Act, 1942." This Act provided that: "Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America."[24]

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[17] *Id.* at 19.

[18] *Id.* at 22. Jurisdictional conflicts only arose outside these zones, essentially concerning personnel on leave.

[19] *Id.* at 21.

[20] *Id.* at 22.

[21] *Id.* at 24.

[22] *Id.* Some countries that signed bilateral SOFAs with the United Kingdom under the Allied Forces Act included Belgium, Free France, Norway, the Netherlands, and Czechoslovakia.

[23] *Id.*

[24] *Id.*

Acting more out of symbolism than necessity, the United States, after much political pressure from Great Britain and some hesitation, agreed to reciprocal treatment of British forces in the United States. The Americans ultimately stated that "under international law and the law of the United States, United Kingdom service tribunals *already* had primary jurisdiction on criminal cases over members of the United Kingdom Armed Forces stationed in or passing through United States territory."[25] On the surface it appeared that the United States decided to stick to its absolute interpretation of the Law of the Flag principle, presumably based on the *Schooner Exchange* decision. Under the apparent American rationale, exclusive jurisdiction of British forces in the United States by Great Britain was unrelated to the British agreement to grant the United States exclusive jurisdiction of its forces in Great Britain. British jurisdiction in the United States depended on customary international law and common law of the United States.[26]

Great Britain, predisposed toward the territorial principle of jurisdiction, apparently felt uneasy with the American rationale and insisted on a "written guarantee." In 1944 the United States acceded to British pressure and passed a law "to recognize the exclusive right of jurisdiction of British military tribunals over British military personnel."[27]

Initial American hesitance to recognize British exclusive jurisdiction of its forces in the United States is not the only example of a powerful nation claiming more for itself than it is prepared to grant to others. Despite Great Britain's insistence on the territoriality principle when discussing the presence of allies in the United Kingdom, she nevertheless argued for, and received, exclusive jurisdiction for her forces in the United States, Belgium, China, Ethiopia, and Portugal.[28] Thus, a reality of SOFA negotiations seems to be that "these agreements reflect the respective political situations of the States concerned. Every State, indeed, may have adopted a traditional policy, but in fact, it applies it on a case to case basis."[29]

Three basic lessons concerning SOFAs emerge from the experience of both World Wars. First, a nation's preference toward a jurisdictional principle—territoriality or Law of the Flag—depends on whether the nation is primarily a military force exporter or importer. The United States as an exporter favored the Law of the Flag, Great Britain as primarily an importer favored the territoriality principle.[30] Second, regardless of a nation's general policy on this matter, nations were prepared to temporarily adopt the opposite position in a particular situation if it suited their needs. Finally, the structure of the jurisdictional formula reached in a SOFA often will depend on the relative bargaining power of each party. "Whenever both States are not politically and economically equal, the more powerful state will obtain a broader right of jurisdiction, even in peacetime."[31] The more a nation needs the presence of foreign troops, the more jurisdiction it likely will have to grant the sending state.

In 1948, the Soviet Communist threat spurred the creation of a multilateral defense alliance embodied in the Brussels Treaty, consisting of Belgium, France, Luxembourg, the Netherlands, and Great Britain, signed on March 17, 1948. This alliance contemplated the stationing of allied troops in each other's countries for an indefinite period of time. Thus, in 1949, the parties agreed to a SOFA. This post-World War II attempt to address the harmonization of common jurisdictional matters became the forerunner to the NATO SOFA, and as such, deserves a closer look. The Brussels Treaty SOFA began with a recognition of the territoriality principle. Article 7 said:

> It is the duty of "members of a foreign force" to respect the laws in force in the "receiving State" and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity. . . . Members of a foreign force who commit an offense in the "receiving State" against the laws in force in that state can be prosecuted in the courts of the "receiving State."[32]

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[25] *Id.* at 25 (emphasis added).

[26] Despite the formal assertions by the United States concerning international law and common law of the United States, one wonders if the American position would have been the same if the country making a demand for exclusive jurisdiction had not been Great Britain. The British situation was special. Besides the unique historical links between the United States and Great Britain, the British already had granted the United States exclusive jurisdiction for a much larger number of American troops.

[27] LAZAREFF, *supra* note 6, at 25.

[28] *Id.* at 28 n.33.

[29] *Id.* at 28.

[30] Even though British forces were scattered all over the world, they were, for the most part, stationed and present in British colonies, not in other sovereign nations.

[31] LAZAREFF, *supra* note 6, at 45.

[32] The United States was not a party to this treaty.

Having established the territoriality principle as the point of departure, the Brussels SOFA stated that if the act is an offense against the laws of the sending state—especially offenses against the security or property of the sending state, or against a member of the force to whom he belongs—the receiving state will only prosecute "if they consider that special considerations require them to do so."[33] Article 7, while maintaining the ultimate supremacy of the receiving state,[34] "distributed the right of jurisdiction according to the degree of damage done to either state and, therefore, on the basis of the respective interests of the Receiving and Sending state."[35]

The Brussels Treaty defense alliance quickly evolved into the NATO defense alliance. "Although never put in force, [the Brussels SOFA Agreement] allowed its signatory members to define a common attitude on the subject [of SOFAs], an attitude which allowed them to go to the London negotiations on the Status of the NATO Forces with a common approach."[36]

The NATO SOFA[37] *as the Benchmark*

The NATO SOFA "has proved to be the prototype of many bilateral SOFAs."[38] It remains as the benchmark from which all other SOFAs are measured. Furthermore, in any discussion of how the NATO SOFA harmonizes competing jurisdictional arguments, the United States, with its predisposition toward the Law of the Flag principle, had a significant impact on modifying the Brusseis Agreements SOFA.

How the NATO SOFA Harmonizes Competing Jurisdictional Arguments

Criminal Jurisdiction

Criminal jurisdiction over military members of the sending state is often the most difficult competing jurisdictional issue to resolve, as it attracts more emotional debate than the other shared jurisdictional interests. The NATO SOFA provides exclusive jurisdiction in those cases where only the laws of one state were broken. In all other cases, the NATO SOFA provides concurrent criminal jurisdiction. Specifically, the concurrent jurisdiction formula calls for the sending state to exercise primary criminal jurisdiction over its personnel for official duty offenses[39] and for offenses against it or members of the sending state force.[40] The receiving state retains primary jurisdiction in all other cases.[41] The state with *primary* criminal jurisdiction has the option to exercise that jurisdiction first, as compared to the other state, or waive such primary jurisdiction and permit the other state to proceed.[42] The state with primary jurisdiction must give sympathetic consideration to a request by the other state to waive its primary right, but is not required to grant the request.[43]

Civil Jurisdiction

Concerning the shared jurisdictional stake in civil jurisdiction, the NATO SOFA provides the sending state and its individuals with immunity for acts done in the course of official duties.[44] Acts committed by members of the visiting force that are outside of official duties may be the subject of civil litigation.[45] Nationals of the receiving state must follow the administrative claims procedure agreed on by the two states.[46]

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[33] *Id.*

[34] LAZAREFF, *supra* note 6, at 47. The supremacy of territorial jurisdiction was so paramount in the Brussels Agreements that no case exists in which the sending state enjoyed an exclusive right of jurisdiction.

[35] *Id.* at 46.

[36] *Id.* at 45.

[37] The Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1794 [hereinafter NATO SOFA].

[38] WOODLIFFE, *supra* note 10, at 169.

[39] NATO SOFA, *supra* note 37, art. VII 3a(ii), 4 U.S.T. at 1800. The term "official duty" is difficult to define precisely in each and every case. Clear examples may help to illustrate: A soldier driving a truck from a warehouse to his unit as part of his job is an action conducted as part of the soldier's "official duties." The same soldier, driving that truck to a local bar to have a few drinks at the end of the day before driving to his barracks, would not be part of his "official duties."

[40] *Id.* art. VII 3a(i).

[41] *Id.* art. VII 3b.

[42] *Id.* art. VII 3c.

[43] *Id.*

[44] *Id.* art. VIII, 4 U.S.T. at 1802.

[45] *Id.*

[46] *Id.*

Immigration Jurisdiction

The NATO SOFA also addresses control over entry into and departure from the receiving state. It exempts the visiting force from passport and visa requirements.[47] All that it requires is a form of personal identification, usually a military identification card, and documentation showing that the individual has official military business in the receiving state.[48] This SOFA compromise solution serves the interests of the sending state and its individuals by avoiding the time consuming and costly process of obtaining passports and visas. At the same time this arrangement serves the receiving state's interest by maintaining a reliable system of control over who enters and exits its borders. In this context, the receiving state still may screen those individuals who are deemed unacceptable.

Receiving states may impose reasonable restrictions on members of the visiting force for entry into the country and permission to stay, based on health and safety concerns. For example, a receiving state may require the sending state to test members of the visiting force for the AIDS infection.

Customs Jurisdiction

Members of a NATO force are subject to the receiving state's customs inspection laws and rules. The NATO SOFA exempts, however, the sending state and members of a visiting force from custom duties.[49] Thus, the sending state may import equipment and supplies it needs to conduct its business in the receiving state free from import tariffs and duties. Troops from the sending state may import personal items reasonably necessary for their individual needs while in the receiving state on official duties.[50]

Tax Jurisdiction

The NATO SOFA exempts visiting force members from taxation on income received for performance of official military duties and on personal property temporarily in the receiving state.[51] The receiving state may, however, tax other income and property.

Other Jurisdictions

The NATO SOFA delineates the extent to which the sending state may take precautions to protect its personnel and sensitive equipment. Because public safety is an important interest of a state, ultimate police power will remain with the receiving state. In some cases, because of particularly dangerous environments or especially dangerous or sensitive equipment that must be protected, receiving states may yield a limited amount of their exclusive police power and permit the visiting force to carry and use weapons in limited situations.

When the sending state has established a permanent base or facility, SOFAs contain a great deal of "housekeeping" provisions that cover such topics as local labor arrangements, procedures for arrest and service of process on the base or post by receiving state authorities, procurement contracting, postal regulations, and other related subjects.

NATO SOFA Supplements

The NATO SOFA provides a blueprint of the basic jurisdictional formulas in various subject areas. It was not intended to, and does not, provide the details of how to implement the formulas. Thus, each member of NATO may negotiate multilateral or bilateral supplements to implement the underlying SOFA.

The United States has many more troops stationed in NATO states than its NATO partners have. To cover these troops, the United States has negotiated numerous bilateral NATO SOFA supplements.[52] The United States only recently agreed, however, to its first NATO SOFA supplement to cover a NATO member's troops in the United States.[53] This imbalance of supplemental agreements reflects the general American policy of resisting reciprocity in SOFA matters, even when an underlying reciprocal treaty already exists.

Non-NATO United States Bilateral SOFAs

Except for the NATO SOFA, all other SOFAs to which the United States is a party are bilateral agreements. They are part of mutual defense agreements,[54] military bases agree-

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[47] *Id.* art. III 1, 4 U.S.T. at 1796.

[48] *Id.* art. III 2.

[49] *Id.* art. XI, 4 U.S.T. at 1812-16.

[50] *Id.* art. XI 4-6, 4 U.S.T. at 1812-14.

[51] *Id.* art. X, 4 U.S.T. at 1810-12.

[52] Examples of some bilateral NATO SOFA supplements covering United States troops in NATO countries include agreements between the United States and Iceland (May 8, 1951, 2 U.S.T. 1533); Turkey (June 23, 1954, 5 U.S.T. 1465); Canada (Apr. 28 and 30, 1952, 5 U.S.T. 2139); Netherlands (Aug. 13, 1954, 6 U.S.T. 103); and Greece (Sept. 7, 1956, 7 U.S.T. 2556). Germany executed a multilateral NATO SOFA supplement on August 3, 1959, T.I.A.S. No. 5351.

[53] Agreement on Defense Cooperation Between The United States of America and the Kingdom of Spain, Dec. 1, 1988, U.S.-Spain, ch. V [on file with FMRA].

[54] Examples of these agreements include, Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, regarding facilities and areas and the status of United States armed forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, T.I.A.S. No. 4510, as amended; and Status of United States Forces in Korea, July 9, 1966, 17 U.S.T. 1677, T.I.A.S. No. 6127, as amended.

ments,[55] agreements permitting United States military forces access to facilities and training areas,[56] or stand-alone SOFA documents.[57] At a minimum, these bilateral SOFAs set forth the criminal and civil jurisdiction arrangement between the United States as the sending state, and the host country as the receiving state, over the visiting United States forces. Most of these bilateral status agreements also contain provisions on immigration, customs, taxes, and other overlapping jurisdictional matters.

Many factors—to include diplomatic relationship, internal politics, and the size, nature, and duration of the visiting force's presence—will determine the type and content of the agreement. As discussed above, a direct correlation exists between the desire of the receiving state to accept the visiting force and its willingness to accommodate the jurisdictional interests of the sending state.

Comprehensive Bilateral SOFAs

Some United States bilateral SOFAs are comprehensive SOFAs, modeled after the NATO SOFA with regard to jurisdictional formulas. Unlike the NATO SOFA, however, these agreements are *nonreciprocal.* The United States is the sending state, and the second state is the receiving state. No agreement exists concerning the second state's forces in the United States.

The United States is party to several comprehensive bilateral SOFAs with major allies including Australia, Japan, Korea, and Panama.[58] While the details vary, the formulas for sharing various areas of substantive jurisdiction basically are the same as under the NATO SOFA.

Variations on the Comprehensive Bilateral SOFA

The United States uses comprehensive SOFAs in situations where it maintains a continuous and large military presence in the receiving state. Not all United States military forces, however, establish a large permanent presence in the receiving state.

Mini-SOFAs

When the United States force is permanently present in the receiving state, but is small; or when it only visits the receiving state periodically without maintaining a permanent presence, a mini-SOFA may be used. A mini-SOFA usually arranges only the most fundamental shared jurisdictional interests, such as criminal, civil, immigration, customs, and taxes, in the same manner as under the NATO SOFA. Administrative housekeeping provisions found in comprehensive SOFAs, such as postal regulations, procurement rules, and local labor matters, generally are not included.

Sometimes the United States maintains a small permanent military presence in a foreign country to supervise local workers that service American warships and aircraft on a regular basis. In these situations, the United States and the host government may include a mini-SOFA as an appendix to the underlying service agreement. If the frequency of use by the United States military is too low to maintain permanent personnel, the United States may seek an agreement giving it preauthorized access or simplified procedures for access to sea and air ports. In these cases, a mini-SOFA could be included as an appendix to the access agreement. Such access agreements contemplate the regular entry and temporary use of receiving state facilities by United States visiting forces, without permanent presence.

Finally, some states want to make it easier for the United States to deploy troops to their countries for humanitarian reasons, such as providing aid following a natural disaster. The easier it is for the United States to send troops, the quicker American military aid might arrive. Examples of mini-SOFAs concluded for this purpose include SOFAs with Western Samoa and Papua New Guinea.[59] These mini-SOFAs exist as stand-alone agreements rather than as appendices to more basic agreements.

Temporary SOFA Provisions

Sometimes the United States wants to send a small number of troops to a foreign country, for a limited time, to conduct a

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[55] For an example, see Agreement between the Philippines and the United States concerning Military Bases, Mar. 14, 1947, T.I.A.S. No. 1775, as amended [expired December 31, 1992].

[56] For an example, see Status of United States Forces in Australia, May 9, 1963, 14 U.S.T. 506, T.I.A.S. No. 5349.

[57] For an example, see Status of United States Forces in Western Samoa, June 25, 1990 [on file with FMRA].

[58] *See supra* notes 56, 54. Until the end of 1992, the United States had a comprehensive SOFA with the Philippines as part of the larger Military Bases Agreement dating back to 1947. *See supra* note 55. When the Philippine government refused to renew the lease for the American bases, the SOFA expired along with the bases agreement. The United States continues to send visiting forces to the Philippines on a regular, yet nonpermanent, basis. The need for a SOFA exists and both sides are discussing the matter.

[59] Western Samoa SOFA, *supra* note 57, Status of United States Forces in Papua New Guinea, Feb. 28, 1989 [on file with FMRA].

specific training activity with the receiving state's military. The scope of these combined activities ranges widely from combat training, to military engineer road construction, to medical activities.[60] When planning for these types of nonrecurring activities, the United States and the receiving state usually want some form of written agreement as to the purpose and the responsibilities of each side concerning the activity. For example, location, duration, and transportation all must be worked out in advance. In these situations, a temporary military-to-military agreement may be used.

Along with other provisions, the military-to-military agreement also may contain an appendix pertaining to the legal status of the visiting United States military personnel. The SOFA appendix may use the same abbreviated format and substantive provisions found in the mini-SOFA discussed above, or an even simpler variation. Because the SOFA provisions are part of a temporary agreement between the United States and the receiving state, they expire at the conclusion of the activity.

The legal effectiveness of these temporary international military-to-military agreements is not as clear as that of the permanent agreements negotiated with the receiving state's agency responsible for foreign affairs. The United States President has delegated to the Department of Defense authority to negotiate and conclude international agreements concerning military operations and exercises.[61] The United States military, following State Department approved procedures, has authority to commit the United States to the terms of these agreements. The receiving state military authorities, however, might not have equally clear authority to bind their government. Thus, with regard to the SOFA provisions, the receiving state's courts, as well as immigration, customs, and tax authorities, may hold the agreements invalid under their domestic law.

Administrative and Technical (A&T) Agreements

When the receiving state has an exceptionally strong desire to accept a foreign military presence, it may be willing to grant the visiting military personnel status equivalent to the status enjoyed by the administrative and technical staff of the sending state's embassy under the Vienna Convention on Diplomatic Relations.[62] Status equivalent to A&T status provides the visiting force general criminal and civil immunity for acts done during official duties.[63] This type of agreement represents the greatest degree of accommodation by the receiving state of its criminal and civil jurisdiction in favor of visiting military personnel. While A&T does not provide exclusive jurisdiction in the sending state, it comes close.

Because a visiting force is not in the definition of diplomatic personnel, this type of agreement does not confer actual administrative and technical diplomatic status as provided for under the Vienna Convention on Diplomatic Relations, but rather, status equivalent to it. This agreement may be reached by a simple exchange of diplomatic notes or a short memorandum of agreement, or may be incorporated into the full SOFA, mini-SOFA, or temporary agreements. Interestingly, a United Nations model SOFA—referred to as a Status of Mission Agreement (SOMA)—used by United Nations peacekeeping forces, contains similar kinds of criminal and civil jurisdictional formulas for members of United Nations peacekeeping forces.[64]

Summary

International legal principles on the status of foreign military forces underwent significant modification and development during this century. Before World War I, customary international law was divided between the view favoring the primacy of the territoriality principle and the view favoring

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[60] Title 10, United States Code, § 401, authorizes the Secretary of a military department statutory authority to conduct humanitarian activities in conjunction with any military operations overseas.

> The law authorizes four types of humanitarian and civic activities: (a) medical, dental, and veterinary care in rural areas, (b) construction of rudimentary surface transportation systems, (c) well drilling and construction of basic sanitation facilities, and (d) rudimentary construction and repair of public facilities.

The Secretary of the concerned military department, however, must determine that the activities will promote (A) the security interests of both the United States and the country in which the activities are to be carried out; and (B) the specific operational readiness skills of the members of the armed forces who participate in the activities. *Id.* Additionally, Congress limited this authority by providing that the humanitarian activity must complement, not duplicate other United States government provided social or economic assistance, cannot be provided to military or paramilitary individuals or groups, and must receive specific approval from the Secretary of State. *Id.*

[61] Department of Defense, Directive 5530.5, International Agreements (June 11, 1987).

[62] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[63] *Id.*

[64] *Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General, U.N. GAOR,* 45th Sess., Agenda Item 76, U.N. Doc. A/45/594 (1990). Specifically, paragraph 47(b) states that "[m]ilitary members of the military component of the United Nations peace-keeping operation shall be subject to the *exclusive* jurisdiction of their respective participating States in respect of *any* criminal offence which may be committed by them in [host country/territory]" (emphasis added). Under paragraph 49(a), civil proceedings against a member of the United Nations peace-keeping operation which arose out of official duties will be discontinued and referred to a standing claims commission composed of mixed members for settlement.

the Law of the Flag principle, based on the protection, nationality, and sovereign immunity principles. During the World Wars, SOFAs helped narrow the gap between the different views, each side retreating from demanding absolute jurisdiction. Finally, with the conclusion of the NATO SOFA and its offspring, major international powers agreed on a multilateral reciprocal formula for sharing jurisdiction.

Did the NATO SOFA represent a consensus on customary international law in this field? Probably not. The NATO SOFA "marks a sharp break from previous practice and in no sense can be taken to consolidate rules of customary international law."[65] A reading of the NATO SOFA itself supports this view. "The third preambular paragraph of the NATO-SOFA expresses the desire of the parties 'to define the status of such forces while in the territory of another party,' thereby implicitly recognising the existence of a legal vacuum."[66] While it may extreme to say that a legal vacuum existed, it is safe to say that no international consensus existed.

Many SOFAs have been concluded since the completion of the NATO SOFA in 1951. The NATO SOFA has been the model for most SOFA negotiations since 1951, even among communist countries of the Warsaw Pact.[67] Were the NATO SOFA jurisdiction formulas so widely accepted that they should now be considered representative of binding customary international law in the absence of a specific agreement? The practice of states seems to suggest that they do not accept this position. Most states still require, or at least prefer, the conclusion of a SOFA for visiting forces, if the visiting forces expect to be treated differently from other foreign visitors. The better view, therefore, is that the NATO SOFA and its offspring, created a world consensus that the NATO formulas should serve as models from which to *begin* negotiations, but not as *binding law* in the absence of an agreement.

What about foreign forces in the United States? Without SOFAs, the United States and its allies must rely on general international jurisdiction principles to support their interests. Reliance on these principles to regulate the status of foreign troops in the United States is more likely to lead to disagreements and bad feelings than if the troops were covered by a SOFA. The customary international law on this subject is not sufficiently clear to operate independently.

The United States traditionally has insisted on obtaining SOFAs for its troops overseas, yet steadfastly resists providing foreign military personnel in the United States SOFA protection. The NATO SOFA is the only fully reciprocal SOFA the United States is a party to. Other than the NATO exception, the United States consistently has negotiated nonreciprocal SOFAs to cover its troops overseas. While international communism threatened the "free world," many non-NATO allies accepted American troops under unilateral SOFAs because the trade-off to them was worthwhile: American presence and protection at the cost of partial waiver of jurisdiction over the American troops in favor of the United States, without reciprocal rights for their troops in the United States.

With the end of the Cold War, the need for United States military presence, while still important in a real sense, may not seem as obvious to citizens of foreign countries. Foreign politicians may be less willing to pay the domestic political costs of giving the United States nonreciprocal SOFAs. The United States might be asked to scale back its jurisdictional demands, or offer reciprocity in exchange for getting the kind of jurisdictional concessions that it wants from the receiving state.

Current United States Policy: Resist Reciprocal SOFAs

Regardless of the substantive content, a SOFA operates either reciprocally or nonreciprocally. The nonreciprocal SOFA covers only the relationship between one state as the sending state and another state as the receiving state. Under a nonreciprocal SOFA, military personnel of the receiving are not provided SOFA protection if they visit the sending state.

A reciprocal SOFA contemplates that two or more nations simultaneously will play the role of a sending and receiving state. The provisions concerning the ordering of competing jurisdictional interests are consistent for all parties to the SOFA. In effect, only *one* agreement exists, and determination of which state is the sending state and which is the receiving state depends on the particular situation. This built-in equality provides reciprocal SOFAs with a universal sense of fairness not found in nonreciprocal SOFAs. The reciprocal aspect of SOFAs "serves to emphasize the equality of the contracting parties. By comparison, the terms of [nonreciprocal] bilateral SOFAs frequently reflect the unequal bargaining power of the States concerned."[68]

Possible Arguments Supporting United States Policy

The arguments in support of the United States policy against reciprocal SOFAs are not spelled out clearly or com-

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[65] WOODLIFFE, *supra* note 10, at 172.

[66] *Id.* at 191 n.26.

[67] *Id.* at 173. The jurisdictional provisions of the NATO-SOFA have exercised a powerful influence on the pattern of subsequent bilateral SOFAs, notably those concluded by the Soviet Union with its Warsaw Pact allies in the late 1950s. It also provides the model for the 1960 United States-Japan Security Treaty and the 1977 Panama Canal Treaty between the United States and Panama. Significantly, the United States in 1965 and 1979 amended its 1947 Military Bases Agreement with the Philippines in line with the jurisdictional scheme of the NATO-SOFA. British treaty practice in this field closely models the NATO-SOFA (citations omitted).

[68] *Id.* at 172-73.

piled in an official declaration or document.[69] We must deduce these arguments from the various United States government responses to allied requests for reciprocity and from direct interviews with United States government officials. At the risk of oversimplification, the United States arguments against reciprocity fall into two categories: (1) practical and (2) legal/political.

Practical Arguments

Disparity in Numbers of Troops Overseas

The United States has large numbers of troops stationed and otherwise present overseas. Nonreciprocal SOFAs that define the legal status of American troops serve a practical necessity. Without such SOFAs, the United States and the foreign government would be in constant discussion at high levels to resolve a multitude of major and even more minor jurisdictional problems. For the sake of administration, a SOFA is highly desirable. Allied and friendly nations, by contrast, maintain few personnel in the United States.[70] Thus, a SOFA for these personnel would have a very limited practical impact in terms of personnel affected. The few jurisdictional problems that arise on occasion always have been dealt with through informal diplomatic channels.

Disparity in Need for Visiting Troops

From the end of the World War II until the collapse of the Soviet Union, the United States led the "free world" against the Communist threat. During this period of time, American allies invited United States military forces into their countries primarily to help provide military protection. Conversely, America invited very small numbers of foreign military personnel into the United States, primarily to provide the visiting foreign military personnel training and education. To the foreign countries, the United States military presence was a matter of national security. To the United States, the visiting foreign military personnel were only one component of a much larger structure of military alliances. In other words, the foreign nations needed the presence of American troops in their countries much more than the United States needed the presence of foreign military personnel in the United States.

Additionally, the United States carried a disproportionately high cost of maintaining the defense against the Communists. Some American officials viewed the waiver of partial jurisdiction in the United States favor through nonreciprocal SOFAs as partial compensation for the higher costs that the United States paid in other areas.

Disparity in Perceived Fairness of Legal Systems

United States lawmakers assume American legal systems, including the criminal justice system, will treat the parties equitably, whatever their nationalities. Often, the inverse assumptions are made about foreign legal systems, especially foreign criminal legal systems. These assumptions led American lawmakers to conclude that foreign troops in the United States need not be concerned about being treated equitably by American courts even without a SOFA. American troops overseas, on the other hand, needed a SOFA to guarantee minimum due process fairness, at least in some countries. Even concerning the Western countries of NATO, American lawmakers, during the NATO SOFA ratification, expressed fear "that U.S. servicemen would receive second-class justice at the hands of foreign courts."[71]

Legal/Political Arguments

Legal Procedures of the United States

Under United States legal procedures, international agreements may be implemented as treaties, through legislation, or as executive agreements. United States government officials have formulated an argument against reciprocal SOFAs based on the American legal procedure. First, they correctly note that reciprocal SOFAs would necessarily conflict with existing federal and state laws. Second, they have taken the position that sole executive SOFAs are not effective to override existing federal or state laws.[72] This leads to the conclusion that the only way to legally implement a reciprocal SOFA for it to override conflicting federal and state law would be to submit every reciprocal SOFA proposal for approval as a treaty or for legislation. This procedure, they argue, would be absolutely impracticable. In essence, they say that even if the United States wanted reciprocal SOFAs, they would be too hard to implement because of American domestic legal procedures.

Jurisdictional Interests Run with a Visiting Force, Not Visiting Individuals

As previously discussed, the international jurisdictional principle of the Law of the Flag supports a state's interest in

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[69] Stone Telephone Interview, *supra* note 1.

[70] Memorandum from Phillip E. Barringer, Director, FMRA, Status of German Forces in the U.S., (Sept. 3, 1991) (on file with FMRA) [hereinafter Barringer Memorandum]. "Over the years, an average of 2500 [German] military personnel, mostly unaccompanied military members, have been present in the U.S. for training purposes." *Id.* Only about 15 other countries have sent at least 200, but in no case more than 900 military personnel for training and education to the United States in a given year. Thus, at any one time, there will not be more than about 10,000 foreign troops in the United States. The actual number probably will be considerably smaller, because many of the foreign troops come to the United States for less than a full year.

[71] WOODLIFFE, *supra* note 10, at 182.

[72] Memorandum from Philip E. Barringer, Director, FMRA, to Myra Rowling, Defense Policy Counselor, Embassy of Australia: Status of Australian Personnel in the United States, (Aug. 26, 1991) (on file with FMRA); Interview with James Allen, Assistant General Counsel, Department of Defense (Nov. 4, 1993).

maintaining control over a military *force,* even while visiting a foreign country. Does the same reasoning apply to individual members of a sending state's military who are in the United States not to perform duties as part of a force, but are present to attend school or receive training on an individual basis?

The vast majority of foreign military personnel present in the United States on a long term basis attend military schools in an individual capacity.[73] In sharp contrast, the vast majority of United States military personnel overseas are there as part of a combat or support force. Thus, the United States could argue—although it has not done so—that from an international law perspective, its jurisdictional interest as the sending state runs much stronger in favor of its force, as compared to a foreign state's individual military personnel present in the United States for education and training.[74]

Counter Arguments to United States Policy

American allies with military personnel in the United States have the same desire to exercise jurisdiction over their forces as the United States desire to exercise jurisdiction over its forces overseas. The allies also want to afford their troops maximum legal benefits when in the United States, just like the United States wants for its troops when overseas.

Responses to United States Arguments Based on Practicality Grounds

Response to Disparity in Numbers of Troops

Foreigners may reject the notion that absolute numbers of troops should determine whether a SOFA is reciprocal or not. The United States maintains a large military force. Most countries with military personnel in the United States have very small military establishments. In relative terms, foreign military personnel in the United States from a particular country may represent a larger proportion of their force than a numerically larger, yet proportionately smaller, number of American troops present in that country.

Additionally, some NATO countries have extremely small numbers of military personnel in the United States, much smaller than many other non-NATO countries. These non-NATO countries may argue that if the United States agreed to reciprocity for these NATO countries that have such a small presence in the United States, fairness requires that they be given reciprocity too.

Response to Disparity in Need for Visiting Forces

American allies might argue that the United States focus on the relative value of having United States forces in their country versus the need to have foreign forces in the United States is misplaced. The focus should be the mutual need of the United States and the foreign country to be able to send troops to the other's country. During the Cold War, and today, the United States strategy is to maintain a military presence deployed overseas on land or on the sea. With the closing of large military bases overseas, the United States need for more access agreements is even greater today. These access agreements with new allies will contain mini-SOFAs or SOFA provisions. The United States still has a strong desire to deploy troops overseas.

Response to Perceived Disparity in Fairness of Legal Systems

To the foreign soldier in the United States facing criminal or civil liability without reciprocal SOFA protection and benefits, the promise that the American legal system is fair may seem less than comforting. As far as the foreign soldier is concerned, the protection and benefits offered by a SOFA offer something concrete and important.

Foreigners may question the hypothesis that the American jury system is necessarily fair to foreigners. Most foreign military personnel in the United States are unfamiliar with the American criminal justice system and the jury system.[75] They also are concerned with American civil law tort and contract litigation. These troops and their nations are concerned that differences in culture and language will create obstacles to a fair and impartial trial. The United States jury system is founded on the principle that persons should be tried by a jury of their *peers;* an American jury, however, would not be peers of a foreign soldier in some sense. While the written law of the United States may be very similar to that of a foreign country, cultural differences significantly impact the weight given factors in determining guilt or innocence and aggravation and mitigation.

Additional concerns include finding a lawyer and communicating with him and the court. For all these reasons, it would be presumptuous to assume that foreign troops will automatically receive a "fair" trial in the United States.

Unlike some of the individual states of the United States, some foreign governments, especially European governments,

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[73] Barringer Memorandum, *supra* note 70.

[74] But would not the United States want protection for its individual students overseas too, not just members of an operational force?

[75] Many civil law and Islamic law countries do not use juries during criminal trials.

object to capital punishment. From the standpoint of foreign governments and their troops present in the United States, they might view the death penalty as a serious breach of human rights from which they would want protection.

Responses to United States Arguments Based on Legal/Political Grounds

Response to Federal Structure of the United States Argument

That the United States executive branch chooses to negotiate and conclude most of its international SOFA agreements via the "executive only" route instead of going to the additional trouble of using the treaty or legislative routes, should not be used as an excuse for not granting reciprocal SOFA rights. As discussed in more detail below, the United States government could submit a proposed SOFA to the Congress as a formal treaty or seek authorizing legislation. Either of these actions would make the reciprocal SOFA supreme over existing federal and state law. Furthermore, one may contend that certain executive international agreements could supersede existing federal and state law anyway, especially if preauthorized by legislation.

Response to the Sovereignty Interests Run with a Visiting Military Force Argument

Historically, nations always have considered it a part of their sovereign right to protect their nationals from unfair punishment imposed by other sovereigns.[76] A state not only cares about the control and discipline of its "force," it also has regard for the individual members of its military, whether as part of a military force or as individuals. The military individual is overseas serving his or her country and is owed the appropriate degree of concern from his or her state. The nature of the person's duties while in the United States should not determine their access to SOFA protection and benefits. For example, the military capabilities of a state with only fifty highly trained fighter pilots could be significantly affected if two were imprisoned by the United States, even if they were in the United States for brief training sessions.

In short, some foreign governments may believe that the United States, unable to articulate a principled rationale for continuing to demand a favorable jurisdictional formula for its troops—while refusing to grant reciprocal treatment of foreign troops in the United States—is behaving like a neocolonial superpower. The United States willingness to grant reciprocity only to its NATO allies can add a false perception of racial or cultural bias to the underlying resentment.

Toward a New Policy of Equality Through Reciprocal SOFAs

With the recent collapse of communism and the Soviet Union, the United States quite suddenly finds itself as the sole military superpower in the world. Yet, recent history suggests that the United States need for military alliances and friendly relations with other countries has not diminished. As the United States pursues and establishes new military relations with countries that previously were impossible, exchange of military personnel will increase. Some of these exchanges may involve stationing American troops in foreign countries, as well as foreign military personnel coming to America for education and training. The United States will seek negotiation of new SOFAs to cover the American force (and members) in these countries.

The foreign governments likely will propose or insist on reciprocity during SOFA negotiations. Their desire for reciprocity might be based on genuinely felt practical concerns as discussed above, such as ensuring, in their view, fair criminal proceedings for their personnel in the United States. The strongest reasons for demanding reciprocity, however, may be based on legal/political reasons, especially the desire to be recognized and treated by the United States as a sovereign nation legally equal both to the United States and to NATO allies. What might be the benefits and costs to the United States of continuing its policy of nonreciprocal SOFAs?

Benefits to the United States from Continuation of Nonreciprocal SOFA Policy

Metaphorically speaking, nonreciprocal SOFAs allow the United States "to have its cake and eat it too." We start from the premise that a state would prefer to maintain the maximum degree of flexibility concerning the exercise of its different types of jurisdictions. This does not mean a state will necessarily want to exercise its jurisdiction in each case, but it does mean that a state, given a no-cost choice, always will want to the option to do so.

Because a SOFA necessarily requires the receiving state to yield some territorial jurisdiction to the sending state, the receiving state loses some of its power to exercise jurisdiction. By agreeing only to nonreciprocal SOFAs, the United States enjoys the benefit of avoiding a certain degree of another state's jurisdiction and even exercising its own criminal jurisdiction in the other state, while not having to specifically commit itself to yield any of its jurisdiction within American territory. The United States obviously benefits from having the SOFA protection for its force and troops, while not being legally required to reciprocate by international agreement.

Costs to the United States from Continuation of Nonreciprocal SOFA Policy

The costs to the United States are difficult to quantify, but are likely to get higher the longer the current policy persists. Four basic disadvantages exist.

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[76] *See infra* discussion concerning the passive personality principle of jurisdiction. States always have been interested in protecting their citizens from unfair punishment by other sovereigns.

1. More Difficult to Establish Desirable Military Relationship

The United States policy of nonreciprocal SOFAs could result in delays or denial of request for SOFAs for American troops. In a foreign country with a democratic representative form of government, the executive branch might not have the political power to convince the legislative branch to go along with a nonreciprocal United States SOFA. Even in countries with nondemocratic forms of government, political advisors who favor a SOFA for the United States may have to overcome the influence of those who oppose the SOFA. Thus, while the military leaders of a country may favor a nonreciprocal SOFA for the United States as a price to pay for greater ties to the United States military, the country's ministries of foreign affairs, justice, immigration, revenue, and customs may all oppose the nonreciprocal SOFA because they have to give up power.

In all situations, elements will arise within a foreign government, whatever its structure or type, which oppose a nonreciprocal SOFA with the United States and which have sufficient political power to delay or derail the negotiations. Evidence that this is a real concern of the United States government can be found in the justification for a Senate bill,[77] proposed in 1989 but not enacted, which would have granted the President authority to confer SOFA rights on a foreign state equivalent to the rights granted by that state to the United States.

The Senate Committee on Foreign Relations report[78] provided the following brief justification for why this legislation should be approved:

> Section 1208 . . . provide[s] the requisite basis to permit the United States to accord foreign military personnel in the United States rights that are reciprocal to those given to U.S. military personnel serving overseas. Such authority would *facilitate* . . . our ability to conclude base rights agreements. One factor complicating those efforts is the fact that the United States does not accord the same rights to the limited number of foreign military personnel located in the United States that we seek for the much larger contingent of U.S. military personnel present overseas.[79]

In the extreme case, American refusal to negotiate a reciprocal SOFA could lead to the foreign state demanding full reciprocity or no SOFA at all. Sensitive situations could arise when the United States has a stronger interest in sending troops to a foreign country than the foreign country has in receiving them, and the United States might have to send troops without any SOFA protection.

2. May Force the United States to Accept Lower Levels of SOFA Benefits for American Troops

In less extreme situations, if the United States refuses to agree to a reciprocal SOFA, but instead offers benefits already permitted by current United States laws as a "counterpart" agreement, the foreign government may respond that it is willing to grant the United States troops the more limited benefits of the United States proposed counterpart agreement. In other words, the foreign government would tell the United States to raise the level of benefits and protection for its troops to what the United States wants for American troops, or accept the lower levels for both sides.

3. Discourages Sense of Equal Responsibility

The United States wants allies and friends to carry more of the military load of helping to defuse the increasingly violent post-Cold War era environment. United States leadership of multinational and United Nations military involvement in recent conflicts in the Persian Gulf, Cambodia, Somalia, and the former Yugoslavia, provides a clear manifestation of the United States policy of sharing military responsibilities with other countries. The United States cannot afford to be the "Lone Ranger" of the world, but a consensus builder and partner. All countries should bear their fair share of military responsibility. Thus, it is inconsistent and counterproductive for the United States to insist on greater equality in military responsibility, yet hang on to the unequal policy of nonreciprocal SOFAs.

4. Perceptions of Unfairness and Arrogance Undermine Purpose of Establishing and Maintaining Military Relationship

It is a fundamental principle that American allies must perceive a SOFA as fair, or else the SOFA defeats the purpose of establishing and fostering a military relationship. The United States insistence on nonreciprocal SOFAs generates a perception that the United States does not play fair. Foreign governments and citizens may feel that Americans think that they are superior to them; they demand a SOFA in their country, but will not give them equal treatment for their troops in the United States.

Non-NATO American allies, and potential new military partners, may perceive the United States agreement to reci-

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[77] S. 1347, 101st Cong., 1st Sess. (1989).

[78] S. REP. No. 80, 101st Cong., 1st Sess. 58 (1989).

[79] *Id.* (emphasis added).

procity only under NATO as a bias in favor of western-European, "civilized" people and governments, and a bias against mostly "third world" nonwhite, Asia, Arab, African, or Hispanic people and governments.

The United States Should Adopt a New Policy Favoring Reciprocal SOFAs

How does one measure these benefits and costs against each other? It all depends on what view one holds concerning the nature of a SOFA. Most agree that "one of the main objectives of SOFAs is to resolve, by means of structured cooperation between sending and receiving States, conflicts of . . . jurisdiction that might otherwise arise."[80] The real disagreement occurs with regard to the nature of a SOFA. If one believes that a SOFA is only a technical instrument created to resolve a practical problem, which generates no political repercussions, the practical arguments are more persuasive.

The United States points out that number of foreign troops in the United States is small, and consists of more senior, individual students who are less likely to get into trouble with the civil authorities, as compared to younger troops of an operational force. Therefore, from a practical point of view, the United States believes that SOFA protections are not needed to fairly and adequately resolve the sending state's interests in problem situations. Indeed, experience has shown that the United States has informally, without need of a SOFA, satisfactorily resolved criminal jurisdiction and other matters involving foreign military personnel.[81] In effect, the existence of a SOFA would not materially affect the outcome of most problems that have arisen or are likely to arise.

If one takes the opposing view, as have many American allies, that a SOFA's nature is as much legal, political, and symbolic as practical, then the legal/political arguments are more persuasive. American allies maintain that a SOFA's practical purpose cannot be divorced from its legal/political and symbolic nature.

Foreign governments see this issue as primarily a matter of principle and symbolism. To them, equal sovereign states should treat each other with mutual respect, even if the United States is the most militarily powerful nation on earth. Fairness and equality among nations as well as among individuals is a cornerstone of American heritage.

Evaluating benefits and costs of reciprocal SOFAs is an inherently subjective exercise, the outcome of which depends on what point of view—practical versus legal/political—toward which one might be predisposed. Nevertheless, this article concludes that the time has come for American foreign policy concerning SOFAs to mature to the next level by favoring reciprocity. Such a change ultimately will better serve the interests of the United States.

The benefits of the current nonreciprocity policy are small. Under the United States own argument, the practical impact of having reciprocal SOFAs is insignificant, so why not just do it? Domestic American political interest in the reciprocal SOFAs issue is far less keen than in other countries. How important is maintaining the legal option to exercise jurisdiction if, practically, it does not matter much?

On the other hand, the negative costs of maintaining the current policy of nonreciprocity are high and likely to get higher. The times and the world are changing. A new policy of SOFA reciprocity would contribute toward the enhancement of the world's perception of the United States as a fair and equitable nation. This perception would in turn facilitate negotiation and conclusion of new SOFAs that provide current levels of protection for United States troops. The new SOFAs also would encourage foreign governments to take more of a lead in international military responsibility and strengthen the bonds of friendship and cooperation between the United States and other countries, which after all, is the ultimate purpose of establishing military-to-military relationships.

Two recent developments suggest that the United States may be ready to adopt a new policy of reciprocity. First, the executive branch has begun the practice of suggesting counterpart agreements as a measure of compromise to nations demanding full reciprocal SOFAs. The counterpart agreement offers the foreign state SOFA rights in the United States similar to those demanded by the United States for its troops, but consistent with existing federal and state laws. There is one glaring difference: on the very important issue of criminal jurisdiction, the counterpart agreement retains primary jurisdiction with federal and state judicial officials in all cases, including *inter se* and official duty cases. The only requirement is that the United States will give sympathetic consideration to a request by the other country for the United States to waive its jurisdiction.

Because criminal jurisdiction is the most politically sensitive issue, foreign governments generally view the counterpart agreement as a half-way measure. From the American viewpoint, however, it reflects a new sensitivity and awareness of the legal and political concerns of foreign governments on this topic.

The second development by the United States government is the introduction of the Senate bill containing the provision

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[80] WOODLIFFE, *supra* note 10, at 170.

[81] This, despite that most criminal law is administered by the states, and that the United States federal government needs the cooperation of state and local authorities to resolve these problems. Telephone Interview with Colonel Richard J. Erickson, United States Air Force, Assistant Director FMRA, (May 24, 1993) [hereinafter Erickson Telephone Interview].

that would have given the President the power to grant reciprocal SOFA rights. As discussed above, the Senate Committee on Foreign Relations approved the SOFA provision, although the full bill ultimately was not enacted. Nevertheless, the bill demonstrates that political sentiment in Washington, D.C., may be shifting in favor of adopting a new policy. That the provision has not been reintroduced is more likely due to the political bureaucracy being overtaken by more pressing demands than to a deliberate decision not to reintroduce the provision.

Implementation of New Policy Favoring Reciprocal SOFAs

If one accepts the proposition that it is in the United States best interests to adopt a new policy of reciprocal SOFAs and that the political will exists in Washington, D.C., to make it happen, what can be done to focus the attention of the policy makers on the problem and on a solution? What are the options for implementing a new policy favoring reciprocal SOFAs? Should the President (1) follow the conventional option of obtaining approval of SOFAs on a case-by-case basis through treaty procedures or separate legislation; (2) select the executive agreement option and rely on his constitutional authority to negotiate and conclude agreements; or (3) seek legislation that would authorize him to grant reciprocal SOFA rights? This article recommends that the President and Congress choose option (3), the compromise option, that legislatively delegates general authority to the President to negotiate and conclude executive agreement reciprocal SOFAs. This recommendation is reached by comparing the three options against certain evaluation criteria.

Evaluation Criteria

The options listed above must be evaluated on their ability to meet three criteria: (1) avoid domestic legal and political controversy; (2) operate efficiently; and (3) provide the President maximum discretion. The first criteria was selected because the option will require political cooperation between the Congress and the President to become a reality. The less controversy, the higher the changes of the option coming into effect. The second criteria was chosen because this article assumes an increase in requests from foreign governments for reciprocal SOFAs, thus the implementing procedure must operate efficiently to accommodate the anticipated additional volume of work. The third criteria was arrived at by concluding that the executive branch is better suited to negotiate the details of numerous SOFA agreements with foreign governments than the legislative branch.

Avoid Domestic Legal and Political Controversy

The implementation procedure should avoid the kind of controversy created when political and legal leaders believe certain presidential action exceeds his constitutional authority, or unjustifiably ignores the authority of Congress and/or state governments in certain matters. To avoid such controversy, the President must choose a procedure that a majority of federal and state political and legal leaders believe falls within the parameters of the United States Constitution.

The exact boundaries of the President's constitutional power to make and carry out foreign policy are not sharply defined. "In domestic affairs, the constitutional provision for the sharing of power and responsibility is reasonably clear. 'In foreign affairs, [the Constitution] was often cryptic, ambiguous and incomplete.'"[82] Presidential foreign affairs actions near the murky edges of the Constitution are more likely to generate domestic controversy, while actions closer to a better defined center of constitutional jurisprudence will not. How does the President avoid the less desirable murky edges when the edges are so hard to see?

Because the Constitution lacks clear delineation of authority and responsibility in foreign affairs matters, to avoid legal and political controversy, the President must rely more on political solutions, rather than constitutional legal arguments as justification for his actions. To accomplish the mission the President and the Congress must

> interact in a mutually reinforcing and complementary manner. . . . This interaction depends not simply upon the attempt by each branch to define and assert its own powers and responsibilities, but also upon the recognition by each that the others have a job to do. This is as true for foreign relations as it is for domestic affairs. In either case, the Executive should affirmatively bring the legislature into the decision-making process.[83]

Avoidance of domestic legal and political controversy over foreign affairs matters is important to United States national interests. "Foreign policy problems are truly national problems and do indeed require 'one voice.'"[84] Severe domestic controversy over a presidential foreign policy course of action, such as implementation of reciprocal SOFAs, splinters the "one voice" into a weaker, fragmented squabble, making it more difficult for American leaders to promote national interests.

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[82] ELLIOT L. RICHARDSON, *Checks and Balances in Foreign Affairs, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 25, 27 (Louis Henkin et al. eds., 1990).

[83] *Id.* at 28.

[84] PHILLIP R. TRIMBLE, *The President's Foreign Affairs Power, in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 39, 41 (Louis Henkin et al. eds., 1990).

Operate Efficiently

The method of implementation should be as efficient as possible. The procedure should operate effectively with the least amount of personnel, time, and money as possible to accomplish the objective.

Two credible assumptions about future United States foreign relations magnify the need for efficiency: (1) the United States will seek new military relations—including SOFAs—with nations with which it previously had no military relations or SOFAs, and (2) with a new United States policy of reciprocity, non-NATO allies under existing nonreciprocal SOFAs will seek renegotiation. The realization of these assumptions would result in a huge increase in SOFA negotiations for the United States. A heavier load of SOFA negotiations will require a very efficient procedure.

Provide President with Maximum Discretion

Finally, the procedure should provide the President with maximum discretion. Unlike the legislature, in the foreign affairs field, the executive branch "can act quickly and has expertise and secret information unavailable to Congress."[85] Additionally, "[d]iplomacy requires a long-term perspective, while Congress tends to be influenced by short-term interests. Congress often concentrates on narrow or immediate issues, dealing with broad problems as if a single factor should be of determinative significance."[86]

So long as the procedure contains some mechanism for informing Congress of what the President is doing so that Congress can feel assured that the President is not exceeding his authority, the nation benefits from letting the President take the initiative on foreign policy matters, including reciprocal SOFA negotiations.

With legal and political certainty, efficiency and presidential discretion as the measuring rods, we turn to three possible options for implementing a new policy of reciprocity.

Conventional Option: Case-by-Case Legislative Approval

The conventional option consists of two possible procedures for implementing reciprocal SOFAs, both of which involve the legislature on a case-by-case basis: the treaty procedure and the congressional-executive procedure.

Article II, Section 2 of the United States Constitution expressly gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[87]

On the other hand, "[t]he Constitution does not expressly confer authority to make international agreements other than treaties, but executive agreements, . . . have been common from . . . early [American] history."[88] Today, it is undisputed that

> the Congressional-Executive agreement is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress instead of two-thirds of the Senate only. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws as well as inconsistent provisions in . . . acts of Congress.[89]

Treaties and congressional-executive agreement procedures are so well established in American jurisprudence that this option scores very well in the first criteria of avoiding domestic legal and political controversy.

The conventional option is extremely inefficient compared to the sole executive agreement option and the compromise options discussed below. The treaty procedure usually requires a long time to implement, often taking years to complete. This procedure requires the submission of the proposed treaty to the Senate twice, first for advice, and then, after further negotiations, for consent.

The congressional-executive agreement procedure might be a little more efficient than the treaty process because the proposed agreement can be submitted to both houses of Congress simultaneously. This potential efficiency advantage over the treaty procedure, however, would be lost if either one of the *two* congressional houses resists the reciprocal SOFA. Thus, the President would have to spend more resources to win over more legislators.

While the conventional option permits the executive branch to negotiate a reciprocal SOFA, control over the detailed content of the agreement rests with the legislative branch. Using the treaty procedure, a minority of Senators (one-third plus

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[85] *Id.* at 42.

[86] *Id.*

[87] U.S. CONST. art. II, § 2.

[88] LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173 (1972).

[89] *Id.* at 175. *See also* RESTATEMENT, *supra* note 2, § 303(2), "The President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution." Over time, the executive agreement procedure has been far more popular than the treaty procedure for defining the international relationships of the United States.

one), can dictate the content of the agreement. Under the congressional-executive legislative procedure, the majority of either house of Congress can control the content of the agreement. The President must stay within the bounds of what he thinks will be not only politically acceptable to, but can commend affirmative support of, two thirds of the Senate or the majority of each house of Congress, and would be foolish to go beyond those bounds, lest the agreement be rejected. This option therefore, is more restrictive of the President's discretion as compared to the alternative options.[90]

In sum, the conventional option would be legally and politically less controversial. It suffers from the disadvantage of being very inefficient and relatively restrictive of the President's flexibility and discretion.

Sole Executive Agreement Option

The second option contemplates negotiation and conclusion of reciprocal SOFAs by the President under his sole constitutional authority.

The sole executive agreement option provides the President the most efficiency and discretion when negotiating international agreements. Because the agreements are negotiated and *concluded* under the President's sole authority, the additional expense of personnel, time, and effort necessary to shepard a treaty through the Senate or a congressional-executive agreement legislation through the Congress becomes unnecessary.

Because the agreement is not subject to direct Senate or congressional approval, the President enjoys greater discretion and is less restricted by the political influences that affect the conventional option. This is not to say that the President has unlimited discretion in negotiating sole executive agreements, just that Congress has less control over the detailed content of the agreement.

The real problem with using the sole executive agreement option as a vehicle for implementing reciprocal SOFAs is that they almost certainly would generate serious legal and political controversy. Sole executive agreements currently used for nonreciprocal SOFAs (that is, agreements defining the status of American troops in a foreign country) and counterpart SOFAs, (that is, agreements defining status of foreign troops in the United States), are legally and politically conservative and uncontroversial. The President's negotiators proceed from the premise that while the President has independent power to make SOFAs, sole executive agreements might not legally override preexisting federal and state laws.[91] With this postulate in mind, they draft executive only agreements for nonreciprocal SOFAs and counterpart SOFAs consistent with existing federal and state law thus avoiding controversy.

To implement a new policy of reciprocal SOFAs through executive only agreements is an entirely different matter. To provide adequate protection to the United States and its troops overseas, reciprocal SOFAs must contain NATO-like jurisdiction sharing formula provisions. Such jurisdiction sharing provisions would directly infringe on the jurisdiction of the federal and state governments. The President, independent of Congress, would be making international agreements intended to supersede existing federal and state criminal, civil, and tax laws as well as federal customs and immigration laws.

Why would such unilateral action by the President result in serious controversy? The unsettled nature of this area of the Constitution is worth exploring in more detail to gain a better appreciation for the severity of the legal controversy that would be generated by this action.

Two basic and related, yet unresolved questions at the heart of this debate exist. First, what is the *scope* of the President's power to *make* international agreements on his own authority, and second, what is the *status* of those agreements in the domestic law of the United States. Opinions on these questions form a wide arching spectrum.

"No one has doubted that the President has the power to make some 'sole' executive agreements."[92] The question remains, what is the scope of that power? The Restatement (Revised), section 303(4) states that "[t]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."[93] Status of forces agreements are related to the President's independent powers as Commander in Chief of the Armed Forces. Neither the Senate nor Congress has raised objections to the use of executive only agreements by the President to implement numerous nonreciprocal SOFAs and at least one counterpart SOFA. Thus, through practice, the United States legislature has conceded this subject area to the President as an area where he can make executive only agreements.

What makes the reciprocal SOFA different from the nonreciprocal SOFA or the counterpart SOFA is the former's

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[90] On the positive side, this option has the added benefit of having received congressional approval, thus making any potential need for appropriations to carry out the agreement more likely to be granted. Status of forces agreements do not usually require specific funding to implement, however, so this positive point is largely theoretical.

[91] Stone Telephone Interview, *supra*, note 1.

[92] HENKIN, *supra* note 88, at 177.

[93] RESTATEMENT, *supra* note 2, § 303(4).

intended impact on domestic federal and state law. Just what is the status of a sole executive reciprocal SOFA in United States domestic law?

Some may believe that the President can make executive agreements concerning SOFAs, but such agreements are like treaties only in their international obligation. "Congress, then, is presumably obligated to implement them, . . . they are never self-executing and cannot be effective as domestic law unless implemented by Congress."[94] Another writer concurred that while a President may have limited power to conclude sole executive agreements, "a treaty, if self-executing, can supersede a prior inconsistent statute, [but] it is very doubtful whether an executive agreement, in the absence of appropriate legislation, will be given similar effect."[95]

At the other end of the spectrum, some argue that in 1937 the Supreme Court soundly rejected such a restrictive view of the President's authority to make sole executive agreements in *United States v. Belmont.*[96] In *Belmont,* the Supreme Court upheld the supremacy of an executive only agreement over existing state law, stating

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several States.[97]

Belmont did not specifically address the question of an executive agreement's supremacy over existing federal law, only state law. Nevertheless, the implication of *Belmont* was to equate certain sole executive agreements with treaties for purposes of domestic law. As the legal equivalent of treaties, a sole executive agreement would supersede a prior inconsistent federal law.

Since *Belmont,* American presidents have made hundreds of executive only agreements that have been given effect in United States domestic law, federal and state, without express Senate or congressional approval. "At least some executive agreements, then, can be self-executing and have some status as law of the land."[98] Even under this view, "a self-executing executive agreement would surely lose its effect as domestic law in the face of a subsequent act of Congress."[99] Theoretically, therefore, the President and the Congress could engage in an endless circle of trumping each other's desires by being the last to take action on a particular matter. In reality, however, political forces have mitigated the theoretical constitutional confrontations over the President's power to make domestically binding executive agreements.

> The President has to get along with the Congress and with the Senate in particular, and he will not lightly risk antagonizing it by disregarding what it believes are its constitutional prerogatives. . . . Often the President will be careful to use the treaty form [or for purposes of this paper, options 1 or 3] so as not to risk subsequent challenge to the authority of the agreement, especially if it is to have effect as domestic law and its validity might be questioned in the courts.[100]

In an attempt to maintain some control over the President's ill-defined powers to make executive only agreements, "Congress has had before it numerous bills to limit or regulate sole executive agreements."[101] In 1972 Congress passed the Case Act[102] which requires the President to report to Congress executive only agreements within sixty days after their conclusion.

Whether one believes that the Constitution grants the President more or less authority to conclude international agreements having domestic effect

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[94] HENKIN, *supra* note 88, at 184.

[95] Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation,* 17 J. AIR L. & COM. 436 (1950).

[96] 301 U.S. 324 (1937).

[97] *Id.* at 331.

[98] HENKIN, *supra* note 88, at 185.

[99] *Id.* at 186.

[100] *Id.* at 183.

[101] HENKIN ET AL., *supra* note 5, at 222.

[102] 1 U.S.C. § 112b (1972).

> Constitutional issues and controversies have swirled about executive agreements concluded by the President wholly on his own authority. Without the consent of the Senate, the approval of Congress, or the support of a treaty, Presidents. . . have made many thousands of agreements, of different degrees of formality and importance, on matters running the gamut of American foreign relations. Periodically, Senators (in particular) have objected to some agreements, . . . but the power to make them remains as vast and its constitutional foundations and limits as *uncertain* as ever.[103]

For the purposes of selecting the most appropriate course of action, it is not necessary to conclusively decide whether the President has constitutional authority to make such sole executive reciprocal SOFAs or not. One need only scratch the surface to discover that any attempt by the President to independently override domestic federal and state jurisdictional laws through reciprocal SOFAs would probably result in serious legal and political controversy.

In sum, the sole executive agreement option would provide a procedure that is very efficient, and gives the President maximum discretion. The constitutionality of this option, however, is less than settled. Thus, on the avoidance of legal and political controversy criteria, this option scores very low.

Compromise Option: General Delegation of Authority by Congress

The third option calls for legislation granting the President preexisting authority to confer SOFA rights on a foreign state equivalent to the rights granted by that state to the United States. This preexisting authority would not be tied to particular negotiations, but would be a blanket authority ready to use by the President when needed. This option tries to blend the legal certainty of the conventional option with the higher degree of efficiency and discretion for the President of the sole executive agreement option.

This option is not a new idea. In 1989 the Senate considered a bill[104] that contained a provision entitled "Reciprocal Treatment for Foreign Military Personnel." That provision would have granted the President authority to confer SOFA rights to a foreign state equivalent to the rights granted by that state to the United States. The Senate Committee on Foreign Relations recommended approval of the bill containing the provision for reciprocal SOFA authority for the President. Congress, for reasons unrelated to the reciprocal SOFA provision, failed to approve the bill, however, thus the reciprocal SOFA authority provision contained in the bill did not become law.[105]

This option scores well in all three criteria. First, this option would be legally and politically uncontroversial. The reciprocal SOFA agreement would rest on preexisting legislative authorization. The cooperation between the executive and legislature on this matter serves to make the end product less controversial. Congress approved similar types of preexisting legislative authorization for the North American Free Trade Agreement and the General Agreement on Trade and Tariff negotiations.

The compromise option would be efficient because it leaves the actual negotiation and conclusion procedures within the executive branch. The President need not obtain additional or subsequent approval from the legislative branch. Negotiations would be spared the resource consuming process of obtaining Senate consent as required for treaties or congressional approval to get case-by-case legislative approval. The Case Act requires that all agreements concluded under this authority be reported to Congress[106] to ensure that Congress will be kept informed of what the executive branch is doing in the international agreements arena.

Finally, the compromise option provides the President with maximum discretion during the negotiations. The President is authorized to match what the foreign government is willing to offer, but not required to offer a specific SOFA formula. This discretion would allow the President to tailor the reciprocal SOFA agreement in a way that best suits the United States in relation to the specific country. While it may be advantageous to follow a uniform formula for SOFAs, variations may be desirable from country to country. Better to have some discretion to maneuver than to be locked into a rigid formula.

A less desirable variation of the compromise option (but one that is still preferable to the conventional option or the sole executive agreement option) is to enact legislation that grants visiting forces a predetermined set of SOFA rights on entry into the United States. In other words, rather than granting the President broad discretion to match offers of SOFA rights as he sees fit, the legislation would automatically provide any foreign military personnel invited to the United States by the President with specific SOFA benefits.

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[103] HENKIN, *supra* note 88, at 177 (emphasis added).

[104] S. 1347, 101st Cong., 1st Sess. (1989).

[105] Erickson Telephone Interview, *supra* note 81.

[106] *See supra* note 102.

This variation of the compromise option trades off discretion of the President for greater efficiency. With this type of legislation, future SOFA negotiations would have a set standard to accept or reject. The President may insist that American troops be granted the same rights as those already set forth in the legislation for the benefit of foreign troops. The negotiation process would be extremely simple: all or nothing. This variance also treats all countries uniformly, thus enhancing the image of the even handedness of the United States. On the negative side, however, such a compromise variance option would be the most restrictive of presidential discretion because the exact terms of the SOFA are set in the legislation.

In the end, the "pure" compromise option, where the President has maximum discretion to match SOFA offers, scores the best against the criteria used in this analysis. The variant of this option, where legislation spells out a predetermined SOFA formula, scores second best, because what it loses in presidential discretion is somewhat offset by gains in the efficiency area. The conventional option of using treaty or legislation procedures on a case-by-case basis is too inefficient and deprives the President of sufficient discretion. The sole executive agreement option scores high on efficiency and discretion, but would lead to serious domestic legal and political controversy.

Conclusion

When it comes to SOFAs, the United States[107] traditionally has been able to have its cake and eat it too. Concerning American troops overseas, the United States government consistently has insisted on retaining as much jurisdiction as possible, but with regard to foreign troops on American soil, the government has given up less jurisdiction than it usually gets for American troops overseas. The United States justifies this inequality by relying on differences in the quantity of the troops involved and in the nature of the missions. In the final analysis, however, the United States superpower position during the Cold War has allowed it to successfully sustain a policy of SOFA nonreciprocity. Times, however, have changed.

> It has been about four years since the Cold War ended. We are at a historical crossroads as momentous as the period immediately after the Second World War. [T]o say that this is a period of enormous change for the world, our Nation, and our Armed Forces is an understatement of the first order. This is a new world.[108]

New times call for new policies. The changes in the world's geopolitical structure have tipped the scales to make it more profitable for the United States to adopt a new policy favoring reciprocal SOFAs. "In the future, our Nation will have to rely even more heavily on alliances, coalitions, and the international organizations we helped create."[109] This increased interaction with allies and international organizations will benefit from a reciprocal SOFA policy.

Having concluded that the United States should adopt a new policy favoring reciprocal SOFAs, a compromise option apparently would work best to implement it. The compromise option affords the President efficiency and discretion, while avoiding domestic legal and political controversy.

If the United States seeks new and expanded alliances based on equal burden sharing during the post-Cold War era, America must be willing to treat its partners as equals. A reciprocal SOFA policy would be an important component of a larger policy of equality. The failed 1989 Senate bill provision which would have granted the President authority to conclude reciprocal SOFAs offered the best mechanism for achieving a rational reciprocal SOFA methodology. It is time to revisit the issue by pressing Congress to reintroduce and adopt the reciprocal SOFA provision.

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[107] The United States is not the only country that has pursued such a seemingly unequitable policy; Great Britain also has maintained a one-sided SOFA policy.

[108] The Honorable John W. Shannon, Acting Secretary of the Army & General Gordon R. Sullivan, U.S. Army Chief of Staff, STRATEGIC FORCE—DECISIVE VICTORY: A STATEMENT ON THE POSTURE OF THE UNITED STATES ARMY FISCAL YEAR 1994, Mar. 1993, at iii.

[109] *Id.* at iv. *See* Jeffrey F. Addicott, *The United States of America: Champion of the Rule of Law or the New World Order?*, 6 FLA. J. INT'L L. 63 (1990).

Legal Assistance as Champion for the Soldier-Consumer

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We are not weak if we make a proper use of those means which the God of Nature has placed in our power. . . . The battle, sir, is not to the strong alone; it is to the vigilant, the active, the brave.

- Patrick Henry (1775)

Introduction

The military pay of soldiers is now subject to involuntary allotment for *any* judgment indebtedness, including commercial debts.[1] With this change in the law, there never has been a better time to emphasize installation consumer affairs programs. The spectre of involuntary allotment for commercial indebtedness has upset the "balance" soldiers previously enjoyed with creditors.[2] Legal assistance attorneys and their staff judge advocates (SJA) must work to restore this balance and lead the effort in protecting soldiers from the consumer pitfalls that lie ahead. Legal assistance attorneys and SJAs also must ensure that commanders are aware of these pitfalls and of how to use their authority and influence to protect soldiers under their command from predatory practices by local businesses.

Civilian communities and their businesses have long benefited from the revenues generated by the presence of nearby military installations. Because these communities often rely on these installations for their continued economic well being, a mutually beneficial relationship exists between military installations and adjoining civilian communities. Most businesses recognize the benefit of commerce with the soldier-consumer and are motivated to treat the soldier fairly. Unfortunately, pawn shops, pseudo-financial and lending institutions, tenement tyrants, contract enforcement scams, and other enterprises invariably trap the unwary soldier. Moreover, these unscrupulous businesses have vastly expanded their stranglehold on the consumer in the past decade,[3] and soldiers have not gone unharmed. The spectre of involuntary allotment against soldiers' pay is a valid concern.

Soldiers—often naive and uniquely vulnerable—routinely fall prey to the questionable practices of unscrupulous businesses. Such businesses often border on illegality, justifying their practices by referring to local custom and behaving as if their chosen ignorance of the law provides carte blanche for consumer abuse. Many of these businesses also tout the often misquoted "payment-of-debts-by-military-members requirement" while ignoring the option that military members have in disputing debts not yet reduced to judgment.[4] Even worse are those "businesses"—which are not businesses at all, but simply "scams"—designed to charge the soldier much for little or nothing. Legal assistance attorneys, who are mandated to aid soldiers against unscrupulous businesses,[5] remain the soldiers' last bulwark against consumer abuse.

As advocates for soldiers and their families, legal assistance attorneys have a unique opportunity to be both altruistic and patriotic in helping those who have been taken advantage of by the unscrupulous. This role undoubtedly will continue to grow with the involuntary allotment for commercial debt.[6] Legal assistance attorneys must realize that they are fully

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[1] Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993). Until now, service members' pay has been subject to attachment (garnishment and involuntary allotment) only for the court-ordered payment of spousal and child support. Section 9, paragraph (k) of the statute now provides, however, that the military services must promulgate regulations for the involuntary allotment of soldiers' pay *for debts of any kind.* These regulations must be promulgated within 180 days from the statute's October 6, 1993 enactment date. The statute allows consideration of the Soldiers' and Sailors' Civil Relief Act and whether the soldier was absent from the judicial proceedings leading to judgment due to military exigencies. As of October 1, 1993, a Department of Defense Task Force began discussions on how to word the implementing regulations and what additional protections and considerations, if any, are needed. *See* Bryant Baynes, *Involuntary Allotment of Military Pay for Creditor Judgments,* THE LAMPLIGHTER, Spring 1994, vol. 5, no. 1, at 1.

[2] *See* Gerald E. Wuetcher, *The Garnishment Equalization Act of 1992: Leveling the Playing Field or Upsetting a Delicate Balance?,* ARMY LAW., Nov. 1992, at 3. For an excellent article discussing the evolution, interplay, and impact of federal and state garnishment laws, *see Garnishment and the Poor in Louisiana,* 33 LOY. L. REV. 79-112 (1987). Additionally, for a state-by-state overview of garnishment laws, *see* 1 Consumer Cred. Guide (CCH), para. 660.

[3] *See Dark Days for Consumer Agencies,* CONSUMER REP., May 1993, at 312-14 [hereinafter *Dark Days*].

[4] *See* DEP'T OF ARMY, REG. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL, para. 1-5 (14 Mar. 1986) [hereinafter AR 600-15]. Note that the military is not a debt collector and may not be used as such. *Id.* para. 1-5e.

[5] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6c, d, e (30 Sept. 1992) [hereinafter AR 27-3].

[6] Current involuntary allotment procedures for court-ordered spousal and child support—located in the *Department of Defense Pay and Entitlements Manual (DODPM),* part 60331-60338—allow soldiers an opportunity to provide "proof of error" (that is, amount ordered is not owed; judgment has been amended, superseded, or set aside). Soldiers have the opportunity to consult with legal assistance attorneys for help on these matters. These basic roles no doubt will be repeated—and perhaps expanded—in the involuntary allotment procedures for all debts.

capable to do battle against consumer abuse. The Army Legal Assistance Program has emerged from Operation Desert Storm with renewed importance and a new sense of prominence.[7] Legal assistance is recognized as a vital part of the total force concept. Equipped with a new and expanded regulation,[8] legal assistance attorneys stand ready to fight for the military consumer. As federal, state, and local resources in the consumer law arena continue to be cut,[9] the Judge Advocate General's Corps (JAGC) leadership becomes all the more important. This article is designed to generate debate and provide suggestions for establishing a unified approach for zealous advocacy in the battle against abuse aimed at the soldier-consumer.

If the military is to protect its own, it must take positive steps. Legal assistance attorneys no longer merely can refer a consumer complaint to the Federal Trade Commission or a state or local consumer protection office and expect a remedy. This passive piecemeal approach is ineffective because budgets at all levels of government are too tight and political forces too uncertain to cater to individual complaints.[10] Businesses that exploit the military are aware of this and have canned responses: "You're the only Army lawyer who has ever criticized my business, so, sue me." Thereafter, the legal assistance attorney, unable to either rebut the businessman's assertion or pursue court action, often has to pass the case on to an attorney in private practice.[11]

In such situations, legal assistance attorneys often feel unable to protect their clients. Although many circumstances contribute to this feeling of helplessness, it is tragic when the inability to act is the result of ignorance. Operation Desert Shield/Storm presented a number of consumer law issues. Paramount, however, was the importance of preventive law. Although the "client crunch" is ever present, legal assistance attorneys must make time to formulate uniform consumer affairs program management approaches, obtain or develop easy to use, comprehensive consumer resources, and establish a working consumer affairs network. These are the keys to an effective Army-wide consumer affairs program.

This article presents the author's consumer affairs experiences as chief of legal assistance at Fort Stewart, Georgia, in "five steps." Because some of the approaches are designed for a large legal assistance office, they may not work for everyone. The article is intended, however, to provide suggestions and generate debate on how legal assistance attorneys—and the commanders they serve—can protect soldiers from consumer fraud and abuse.

Five Steps to an Effective Consumer Affairs Program

Step 1: Appoint a Legal Assistance Attorney as the Installation Consumer Affairs Specialist (CAS) and Begin Program Organization

A chief of legal assistance should begin an installation consumer affairs program by seeking to have a legal assistance attorney appointed to organize and manage the program.[12] The Installation Commander—or perhaps the SJA—should appoint this attorney (the consumer affairs specialist, or CAS), which would give the position greater command emphasis and visibility. This also will provide other installation offices with a point of contact at the legal assistance office who will serve as the leader or trainer for the installation consumer affairs program. Moreover, a legal assistance attorney formally designated as a CAS is more likely to do the job well. After consulting with the appropriate installation offices, the SJA and the chief, legal assistance, only need to define the parameters of the CAS's job.

Consumer Affairs Resources

The first mission for the CAS is to obtain and organize the needed resources and do some self-education. This is not as

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[7] Office of The Judge Advocate General, United States Army, Desert Storm Assessment Team Report (22 Apr. 1992) identified 659 problem issues Army-wide arising out of Desert Storm [hereinafter DSAT Report]. Of these problem issues, 133 were legal assistance issues, driving home the importance legal assistance has to Army morale and readiness. *See* Alfred F. Arquilla, *The Army Legal Assistance Program,* ARMY LAW., May 1993, at 3-46, 3 n.6.

[8] AR 27-3, *supra* note 5.

[9] *See Dark Days, supra* note 3, at 312-14. The article demonstrates that the current economic downturn has severely hurt the effectiveness of consumer agencies at all levels of government. In the meantime, however, it is "springtime for scam artists who prey on people in financial distress." *Id.* at 312. *See also As Consumer Agencies Cut Back, It's Buyer Beware,* WASH. POST, July 4, 1993, at B5, col. 1.

[10] *Dark Days, supra* note 3, at 314.

[11] *But see* AR 27-3, *supra,* note 5, para. 3-7g, which now authorizes Army legal assistance attorneys, in both the active and Reserve components, to initiate and defend actions in court on behalf of legal assistance clients, under certain circumstances.

[12] This does not mean that the legal assistance attorney appointed as the CAS is the only one who sees consumer affairs matters. The best approach is to designate a legal assistance attorney to serve as the installation expert in each particular legal assistance area and have all attorneys see clients without regard to the nature of their legal problems. Each expert should, in turn, keep all other attorneys in the office informed and up to date. In addition to appointing a CAS, the chief of legal assistance at Fort Stewart, Georgia, designated an expert in each of the following areas: taxation/estate planning; domestic relations; soldier readiness processing; and military administrative matters. Each attorney was tasked to develop and keep up to date an "encyclopedia" of materials on recurrent problems in each area. Each expert periodically informed the other attorneys of new developments in their designated field of expertise, which proved to be an extremely efficient use of manpower.

hard as it may sound because many consumer resources are free or inexpensive and are available from installation and other government sources.[13] Additionally, several excellent nonprofit private organizations provide a wealth of consumer law information for minimal cost.[14] "Hornbooks" on state consumer or landlord and tenant law also are worthy investments. The "triage" nature of legal assistance necessitates that legal assistance attorneys have access to as much useful information as possible in an easy to use compact format. The CAS should search for resources that reduce research to one volume of easy to understand information. When such resources do not exist, the CAS should develop them for future use by all.[15] Disorganized and inadequate resources waste attorney time and produce ineffective results for clients. Legal assistance attorneys must acquaint themselves with these consumer resources and laws to discuss client consumer problems intelligently with other attorneys, federal and state agencies, and installation offices.

Consumer Law Points of Contact

Some consumer problems that legal assistance attorneys face may spark federal or state interest. Federal or state consumer protection agencies cannot, however, handle many consumer complaints submitted by legal assistance attorneys. Fortunately, these agencies are only the "tip of the iceberg" where consumer points of contact are concerned.[16]

Federal and state consumer protection agencies are available to provide valuable training, support, and assistance. Nevertheless, commensurate with cuts in government spending, federal and state consumer protection laws have taken a turn toward privately enforced remedies.[17] Consequently, powerful nonprofit agencies[18] and innovative civilian consumer lawyers[19] have emerged to fill the void. Legal assistance attorneys must adapt to this change and learn to use the available resources. Joining professional, social, and charitable organizations is one way for legal assistance attorneys to meet local business people and understand local practices. Negotiating with business people and attorneys usually is easier when an attorney has met them socially.

Finally, an under used source of assistance is the extensive and diverse "law firm" that is the JAGC. Legal assistance attorneys, perhaps because of the demanding environment immediately surrounding them, often lose sight of the vast

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[13] For an excellent primer on consumer law, *see* Kathleen Keest, *Consumer Law for the New Legal Services Practitioner,* THE LAMPLIGHTER, Summer 1990, vol. 2, no. 1, at 1; Federal Trade Commission, BEST SELLERS—FACTS FOR CONSUMERS AND BUSINESS, March 1993, a pamphlet containing a wealth of handouts and information on a variety of consumer laws and topics, most of which are free. To obtain a copy, contact the Federal Trade Commission, Bureau of Consumer Protection, Office of Consumer and Business Education, Washington, D.C. 20580, or call (202) 326-3650. Another valuable source of information is the *Consumer's Resource Handbook,* published yearly by the United States Office of Consumer Affairs. The handbook provides information on how to file consumer complaints, and has addresses and phone numbers to all federal, state, and local consumer agencies as well as to all major corporate consumer contacts. Single copies are available free by writing to Handbook, Consumer Information Center, Pueblo, Colorado 81009. The *Consumer Information Catalog* is a catalog of free and low-cost federal publications of consumer interest. Copies may be obtained by writing to Consumer Information Center, P.O. Box 100, Pueblo, Colorado 81002. Finally, no consumer law library would be complete without The Judge Advocate General's School's (TJAGSA) *Consumer Law Guide:* ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-265, CONSUMER LAW GUIDE (Sept. 1993) [hereinafter JA-265].

[14] The National Consumer Law Center, Inc. (NCLC) is a nonprofit legal organization that represents the interests of low income consumers. The NCLC publishes an excellent consumer law newsletter 24 times a year, which TJAGSA sends to most legal assistance offices. The NCLC's *Consumer Credit and Sales Legal Practice Series,* published yearly and covering all areas of consumer law in all 50 states, is a consumer practitioner's resource without equal. For subscription orders or more information write Publications, National Consumer Law Center, Inc., 11 Beacon Street, Boston, Massachusetts 02108, or call (617) 523-8010. Additionally, a subscription to the "noncommercialized" *Consumer Reports* is recommended. Write Consumer Reports, P.O. Box 53029, Boulder, Colorado 80322-3029, or call (800) 766-9988.

[15] *See* Mark Sullivan, *Preventive Law by Handout,* ARMY LAW., May 1984, at 29; ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 276, LEGAL ASSISTANCE PREVENTIVE LAW SERIES (Dec. 1992) (contains numerous reproducible handouts).

[16] Many federal and state consumer protection agencies are primarily geared to providing technical advice, training, and assistance. Nonetheless, a legal assistance attorney always should attempt to get these agencies involved in major consumer disputes involving soldiers and their families. The agencies even may provide opinion letters to the legal assistance attorney or send letters to the subject business or landlord that can be used as "official" government policy statements to bolster either Armed Forces Disciplinary Control Board (AFDCB) action or private litigation.

[17] *See Eight Laws You Can Enforce,* FACTS FOR CONSUMERS (Fed. Trade Comm. paper), March 12, 1979. An FTC representative came to the Fort Stewart in late 1991 to provide some requested help to legal assistance attorneys on countering contract enforcement scams. This FTC paper was the primary focus of instruction. For ordering information, *see supra* note 13.

[18] *See supra* note 14.

[19] Civilian consumer attorneys have had a banner year in 1993. Some "must reads" for legal assistance attorneys include: *Consumer Lawyers Innovate—New Breed of Suits Bring Results, Big Fees,* NAT'L L.J., Jan. 18, 1993, at 1, col 3; *When Rubin Sues, Defendant's Settle & New Ralph Naders,* A.B.A. J., Jan. 1993, at 28-29. Moreover, along with this increased aggressiveness on the consumer side, a new breed of suits, called "SLAPP Suits," has emerged as a response from the business and insurance interests. "SLAPP" stands for "strategic lawsuits against public participation." Such suits mainly have targeted the American Civil Liberties Union and other public interest attorneys to "weaken [their] resolve." Legal assistance attorneys should be aware that these tactics exist when representing military consumers. For more information, *see SLAPP Suits Continue in High Gear,* NAT'L L.J., May 18, 1992, at 3, col. 1; *California Court Stops SLAPP-Like Suit,* NAT'L L.J., Apr. 19, 1993, at 3, col. 1. These recent stories depict the continuing battle between consumer advocates and "tort reform" advocates. To get a view of powerful players at both ends of the spectrum on "tort reform" the following resources are recommended: L. DRIVON & B. SCHMIDT, THE CIVIL WAR ON CONSUMER RIGHTS 191 (Conari Press 1990); *Schwartz on Torts,* NAT'L L.J., July 12, 1993, at 1, col. 1.

network of attorneys throughout the Army, Navy, Air Force, and Marines, both active and Reserve, facing similar problems on a daily basis. Legal assistance attorneys should telephone their counterparts at other installations,[20] or Reserve judge advocates,[21] to see if they have dealt with or heard of a current consumer law problem.

Pooling resources often is the most effective way to address a problem with interstate complications. Moreover, worldwide legal assistance communication is possible with chiefs of legal assistance who, each morning, check the latest developments on the Legal Automation Army-Wide System (LAAWS) Bulletin Board,[22] and then take the time to add their legal assistance office's own consumer law experiences, insights, and queries.

Step 2: Develop a Memorandum of Understanding Between, and Training Programs for, Installation Offices That Have a Role in the Installation Consumer Affairs Program

Part of the CAS's mission in identifying consumer resources is understanding which installation offices have a role in the installation consumer affairs program, defining those roles, and helping those offices work together in implementing an effective installation consumer affairs program. This program must have unity of mind and purpose. The unifying purpose of a consumer affairs program is to promote good "morale and welfare" by ensuring the financial well being of soldiers and their families. Many installation offices are responsible for this financial well being, and they should be allowed to do their job. In this regard, the CAS should be a coordinator or facilitator of manpower and expertise, as opposed to an expert in every arena.

First and foremost, the CAS and the chief, legal assistance, never should forget for whom and with whom they work; they must keep the SJA and the chief, administrative law informed of important consumer program developments. The SJA ultimately is responsible for the legal assistance services in commands or installations where assigned.[23] Better for the SJA or chief, administrative law, to hear of a consumer dispute or problem in the consumer affairs program first through the chief, legal assistance, than from the Commanding General or the inspector general (IG) after a complaint from another installation office, targeted business, or landlord. Moreover, obtaining initial understanding, guidance, and support from the SJA and chief, administrative law, is wise because their support usually is necessary for success. Once SJA support is obtained, the chief, legal assistance, and the CAS can begin formulating the memorandum of understanding (MOU) between all the installation offices having a role in the installation consumer affairs program.

Consumer Affairs Committee Membership and Functions

Perhaps the best way to designate these installation offices in the MOU is as a "consumer affairs committee." Minimum membership on such an installation committee should include representatives from Army Community Service (ACS), the Housing Referral Office (HRO), the Equal Opportunity Adviser (EOA), the IG, the Public Affairs Office (PAO), the Provost Marshal's Office (PMO), and legal assistance.[24] The next task in the MOU would be to define each office's role in the consumer affairs program.

Army Community Service has primary responsibility for financial counseling, debt liquidation assistance, consumer and money management education, and consumer complaint resolution assistance.[25] Many new legal assistance attorneys,

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[20] *See* OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE ARMY, JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (1993-1994). Published annually, this reference contains the names, work addresses, and work telephone numbers of all active Army judge advocates.

[21] The Legal Assistance Division, OTJAG, publishes *The JAGC Reserve Officer Legal Assistance Directory.* Published annually, this reference contains the name, civilian occupation, address, telephone, FAX number, and legal areas of practice of each attorney listed. Additionally, *AR 27-3,* coupled with the downsizing of the active Army and Reserves, provides a strong incentive and an easier way for many Reserve judge advocates to earn retirement points by doing legal assistance work authorized by the Chief, Legal Assistance Division, Office of The Judge Advocate General. For detailed procedures, *see* AR 27-3, *supra* note 5, para. 2-2b; Arquilla, *supra* note 7, at 23 n.177.

[22] Instructions on how to use the LAAWS Bulletin Board System are contained in DEP'T OF ARMY, PAMPHLET 27-50-254, THE ARMY LAWYER, 57-61 (Jan. 1994). Check future issues of *The Army Lawyer* for updates.

[23] *See* AR 27-3, *supra* note 5, para. 1-4g. Additionally, *AR 27-3* allows legal assistance attorneys licensed in the jurisdiction in which the installation is located to go into court with SJA approval under certain circumstances (such as, "protecting soldiers from unfair business practices"). *Id.* para. 3-7g(1). Therefore, especially in cases when litigation appears likely, early SJA involvement is crucial.

[24] Commanders, SJAs, and legal assistance attorneys should resist the inclination to include civilian agencies—such as, the local Chamber of Commerce, Better Business Bureau, or District Attorney—as members of the consumer affairs committee. Including members who are not fulltime officers and employees of the federal government may subject meetings of the committee to the Federal Advisory Committee Act, 5 U.S.C.A. § 552b, which may require such meetings to be open to the public. *See* Association of American Physicians and Surgeons, Inc. v. Clinton, 61 U.S.L.W. 2561 (D.C. Cir. Mar. 10, 1993).

[25] DEP'T OF ARMY, REG. 608-1, PERSONAL AFFAIRS: ARMY COMMUNITY SERVICE PROGRAM, ch. 9 (27 Apr. 1988) [hereinafter AR 608-1]. Many localities have private credit counseling clinics sponsored by local businesses and social service agencies to help debtors liquidate debts for free or at nominal cost. The best known is the creditor-funded Consumer Credit Counseling Service (CCCS). For a directory of CCCS member clinics write to The Foundation for Consumer Credit, 1819 H Street N.W., Washington, D.C. 20006, or call 1-800-388-CCCS. Such services will remain cost effective for creditors and debtors alike—even with the advent of involuntary allotments for creditor judgments—because debtors still have the ultimate remedy: bankruptcy protection. For a bankruptcy overview, *see* Warner, *Bankruptcy, Effective Relief for the Soldier in Financial Distress,* ARMY LAW., June 1985, at 21-31.

in assisting clients with debt problems, work out payment plans for soldiers and investigate and respond to consumer complaints. In some cases this is necessary, but legal assistance attorneys should not allow this to become a routine practice. Someone coming to the legal assistance office for assistance in these matters should first seek assistance through ACS.[26] Army Community Service always can refer consumer complaints that present difficult legal problems or evidence a pattern of illegal practices to the legal assistance office. Such referrals are preferred because the files usually arrive at the legal assistance office factually developed and ready for *legal* assistance.

The installation HRO is another installation office, like ACS, with whom the CAS should coordinate consumer affairs initiatives. The HRO inspects and approves potential tenant accommodations in the community, provides information on available housing, assures nondiscrimination, and investigates and attempts informal resolution of landlord/tenant complaints.[27] The HRO has knowledge of the accepted rental practices in the area, and generally can recognize patterns of abusive landlord practices. Thus, legal assistance attorneys should allow the HRO to do its job and accept referrals from the HRO that show either egregious conduct or patterns of abuse. This also may be an area to structure an effective mediation program.[28] Additionally, although a legal assistance attorney may not give legal advice from the command perspective, he or she may advocate the legal position of the tenant/soldier, either individually or in the aggregate. Again, this approach frees up legal assistance attorneys for the legal advice that is their expertise, and leaves the fact-finding investigation to others more suited to the task.

The CAS also should strive to include the installation EOA as an integral part of the consumer affairs program because the Army's Equal Opportunity policy applies both on and off post to soldiers' working, living, and recreational environments.[29] The installation EOA serves as the installation commander's adviser on the Army's equal opportunity program.[30] The Army policy is to provide equal opportunity and treatment for soldiers and their families without regard to race, color, religion, gender, or national origin, and to provide an environment free of discrimination and sexual harassment.[31] Equal opportunity is an area of consumer affairs with strong command emphasis. Detailed regulatory procedures for "off-limits" actions against off-post activities exist.[32]

Coordinating with the installation IG and being familiar with IG operations is advisable because so much of what is done by an aggressive consumer advocate probably will be met with complaints and animosity from the local community.[33] The IG undoubtedly will be asked to inquire into such complaints, usually sent directly to the Commanding General. Furthermore, the installation IG is tasked with inquiring and reporting to the Commanding General on the state of morale and readiness within the unit[34]—including any complaints, usually sent directly to the Commanding

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[26] For example, legal assistance attorneys from the Fort Stewart legal assistance office developed and taught classes to ACS personnel and volunteers on how to deal with debt collectors and problem businesses when performing budget counseling for soldiers and how to initially handle consumer complaints. As a result, ACS was better prepared to handle such problems and made fewer unnecessary referrals to the legal assistance office.

[27] DEP'T OF ARMY, REG. 210-51, ARMY HOUSING REFERRAL SERVICE PROGRAM, para. 4-12 (1 July 1983) [hereinafter AR 210-51].

[28] For an example of such a mediation program, *see* 24TH INFANTRY DIV. & FS REG. 600-61, RENTAL AND UTILITY CLEARING HOUSE PROCEDURES, para. 4-4. Although AR 27-3, *supra* note 5, para. 3-7j allows legal assistance attorneys to perform mediation services with the Installation Commander's authorization, consumer disputes may pose unwanted difficulties. Legal assistance attorneys often will have recurrent contact (new client or dispute) with many of the businesses dealt with in mediation. Therefore, an impartial mediator, perhaps from the administrative law section, would be more appropriate and more likely to be respected by the business interests who submit to mediation in efforts to defray the costs of litigation. In any event, if the mediator is an attorney he or she must understand and follow the ethical restrictions set forth in DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 2.2. (1 May 1992) [hereinafter AR 27-26].

[29] DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 6-3a [hereinafter AR 600-20]. It is a crime in the United States to discriminate against persons wearing an armed forces uniform in a "public place of entertainment or amusement." 18 U.S.C.A. § 244 (1988). Additionally, such conduct also may constitute a "criminal insult" under German law. *See In the Criminal Proceedings v. Shuhmann for Insult*, 2 RGSt 140/82 (VGH Bayern, Mar. 7, 1983).

[30] AR 600-20, *supra* note 29, para. 6-6d.

[31] *Id.* para. 6-3a.

[32] *Id.* para. 6-7.

[33] Local businesses and landlords sometimes are confused about legal assistance offices and the SJA offices of which they are part; they often do not understand that legal assistance attorneys must be zealous advocates for their soldier-client. Even after explanation by the SJA, IG, and others, the same businesses or landlords may continue to complain that a legal assistance attorney is "overzealous" or "partial", not realizing that such labels are less indicative of misconduct, and perhaps more suggestive that a legal assistance attorney is actually doing a good job.

[34] DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, para. 1-5f (15 Dec. 1989) [hereinafter AR 20-1].

General.[35] Nonetheless, legal assistance attorneys need not fear such complaints. When the IG finds that the complained of actions benefit the morale and welfare of installation soldiers, the legal assistance attorney's actions will be that much stronger in the eyes of the Command.

Liaison with the PAO is important because the PAO is responsible for the command information program and community relations. The PAO will publish the legal assistance attorneys' preventive law articles and disseminate much of the information that legal assistance attorneys and the consumer affairs committee consider important for the military consumer.[36] Accordingly, the chief, legal assistance, or the CAS must keep the PAO informed of potential problems with the local community because the PAO often has the difficult task of explaining to the local community why a legal assistance attorney is being allowed to pursue an individual soldier's interests against them.

Finally, keeping the PMO informed of potential developments in the local community on "unfair commercial or consumer practices" is wise,[37] because the Provost Marshal normally serves as President to the area Armed Forces Disciplinary Control Board[38] and also enforces the "off-limits" sanction.

Consumer Affairs Committee Procedures and Interaction

Most consumer affairs committee meetings should address either patterns of consumer abuse seen by member agencies, or provide suggestions on how to foster better communication between member agencies and streamline the installation consumer affairs program. Growing pains are inevitable, and all good organizations have them. The best organizations overcome them.

Part of these growing pains will flow from efforts to agree on the best means for recording and resolving consumer complaints. This effort requires patience. Experience is the only teacher that can keep an installation consumer affairs program from "tilting at windmills." In time, members will be able to differentiate between valid consumer complaints and efforts to escape just debts.[39] Consumer affairs committee members allowed to do their job will come to feel confident in their judgment. As a result, consumer disputes can be resolved without unnecessary referrals to the legal assistance office.

Refer soldiers first to ACS to make a general consumer complaint. The HRO is the most appropriate place for initial landlord/tenant complaints. Army Community Service and the HRO have established regulatory procedures for performing and recording these functions.[40] Legal assistance attorneys should impress on personnel at these offices, however, that if they need legal advice on behalf of soldiers and their families, they should call the legal assistance office and speak to either the CAS or the chief, legal assistance. Moreover, legal assistance attorneys should emphasize that they are willing to accept referrals on patterns of consumer abuse or difficult legal problems. However, the consumer affairs committee should not be a body that decides what to pursue and what not to pursue. Rather, the purpose of the committee is to foster dialogue and the exchange of information on the best way to handle consumer problems facing the military community. The committee brings together all local consumer agencies so that everyone understands what the others do and how each job impacts the others on the committee. No one should feel prohibited, however, from pursuing independent action because of consumer affairs committee membership.

Local Civilian Agencies

While local civilian agencies and offices should not serve as members of the installation consumer affairs committee,[41] seek their opinions on contemplated consumer affairs committee actions. Moreover, requesting opinions fosters an under-

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[35] The IG's task is to inquire into and report on the discipline of the Army. *See id.* para. 1-5a. For the legal assistance attorney, this should translate into an inquiry on whether Army regulations are being followed (such as, *AR 27-3* for a legal assistance attorney). The IG is aware that a legal assistance attorney's job—even if done correctly—may tend to irritate persons both on and off the installation. Accordingly, IGs—and the Commanding Generals that they report to—rarely are fooled by complaints from those unscrupulous businesses targeted by legal assistance attorneys. For example, *see* GENERAL H. NORMAN SCHWARZKOPF, IT DOESN'T TAKE A HERO, 260-61 (Bantam Books 1992) (where General Schwarzkopf laments about the "scams" he saw during his days as Commanding General for the 24th Infantry Division and how some in the local community immediately surrounding Fort Stewart, Georgia, thought that the installation existed only to make them rich).

[36] DEP'T OF ARMY, REG. 360-81, COMMAND INFORMATION PROGRAM (21 Jan. 1986) [hereinafter AR 360-81]; DEP'T OF ARMY, REG. 360-61, COMMUNITY RELATIONS (15 Jan. 1987) [hereinafter AR 360-61].

[37] DEP'T OF ARMY, REG. 190-24, ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION LIAISON AND OPERATIONS, para. 2-5b(11) (30 June 1993) [hereinafter AR 190-24].

[38] *Army Regulation 190-24* is a military police regulation. Therefore, although *AR 190-24* paragraph 2-3c allows the sponsoring commander to designate anyone on his staff as AFDCB President, the PMO is the usual, and most expedient, choice.

[39] Soldiers in financial distress often will look for any means to either delay or forego paying a debt. Army Community Service should be the first agency to see soldiers with consumer complaints because, if they have no legal remedy, they already are in the appropriate place for budget counseling. Ultimately, ACS may refer some of these soldiers to the legal assistance office for advice on either consumer law remedies or bankruptcy. Nevertheless, first attempting informal resolution through ACS usually is the best procedure.

[40] For ACS procedures, *see* AR 608-1, *supra* note 25, para. 9-4. For HRO procedures, *see* AR 210-51, *supra* note 27, para. 4-12.

[41] *See supra* note 17.

standing and trust with community groups that goes a long way to both rebutting claims of arbitrariness and resolving problems. Because legal assistance attorneys perform their jobs for an average of one year before moving to another job, they must work quickly at building relationships in the local community if they expect to succeed. This is best accomplished by finding agencies with a purpose common to the consumer affairs committee. Examples of local agencies include the Better Business Bureau,[42] housing (health and welfare) inspectors,[43] tax and business licensing office,[44] the district attorney,[45] chamber of commerce,[46] and legal aid societies.[47]

Training

Another essential job for the CAS and the chief, legal assistance, is training legal assistance office personnel on how the installation consumer affairs program works. A common complaint that many legal assistance attorneys make is that half of their clients do not have "legal" problems.[48] Ironically, legal assistance attorneys have no one but themselves to blame for perpetuating this sad state of affairs.

Those who schedule legal assistance client appointments usually are following the directions provided by legal assistance attorneys. Unfortunately, lack of clear direction often results in a misuse of legal assistance resources because many on the installation improperly refer people to the legal assistance office for help not requiring legal skills. Moreover, many people simply come to legal assistance when they have a problem, regardless of whether their problem is actually a "legal" one. Ensuring that legal assistance office support personnel know where to send someone who incorrectly comes to the legal assistance office for help is as important as providing legal assistance.[49]

Everyone who steps in the legal assistance office is a potential client, especially in the area of consumer affairs. Accordingly, legal assistance office support personnel must know the consumer affairs network, where to properly send people for initial assistance, and what kind of coordination to make with the office or agency referred to. Not only will the person assisted appreciate the referral and coordination, it also shows the other consumer affairs committee member agencies that legal assistance attorneys are serious about making the instal-

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[42] Better business bureaus operate locally as a storehouse for consumer complaints. They can provide background information on area businesses and whether particular businesses have been the subject of prior complaints. Furthermore, if they receive enough complaints about a particular business, they may refer the matter to state or federal consumer protection offices for action.

[43] Many local governments have housing or health and welfare officials who inspect the adequacy of area housing. Many installation hospitals have environmental science officers who perform health and welfare inspections on and off the installation. Used in conjunction with the HRO, these offices can assist in resolving tenant complaints on substandard housing conditions.

[44] Generally, local tax and business licensing offices grant business licenses and, under certain conditions, also can take them away. *See e.g.*, VA. CODE ANN. § 58.1, ch. 37 (Michie 1991).

[45] Some business practices also are regulated by state and local criminal codes. The crime of usury is the most common example, but a host of other crimes exist (such as, fraud and larceny through wrongful withholding). The notorious General Development Corporation (GDC) "Florida swampland" scheme provides a case in point. In United States v. Brown, No. 90-0176, (S.D. Fla. 1992), the GDC corporate executive defendants were criminally convicted of fraud for "concealing" a price disparity from customers, even though comparative price levels were easily discoverable in the market. Specifically, the defendants were convicted for concealing that their prices for new homes were as much as 50 percent or more above their competitors' prices. Bolstering the prosecutor's argument in *Brown* were facts that revealed that GDC had an elaborate scheme designed to show their properties to buyers unfamiliar with the area, to target unsophisticated customers, and to keep their customers isolated until they made a sale. *See* Rita H. Jensen, *A Firm Blessing: Attorneys from Cravath Found a Developer's Plan Lawful. A Jury Disagreed,* NAT'L L.J., Aug. 24, 1992, at 1; John C. Coffee, Jr., *If Silence Equals Fraud, the Rules Shift,* NAT'L L.J., Oct. 5, 1992, at 18. Of concern is that these practices are the same approaches used by many contract enforcement schemes (such as, photo processing, encyclopedias, and magazines) familiar to legal assistance attorneys. *See* ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, CONTRACT ENFORCEMENT/PHOTO PROCESSING SCAMS (1993) [hereinafter TJAGSA's CONTRACT ENFORCEMENT SCAMS].

[46] Chambers of commerce normally consist of local businesses that all subscribe to written codes of business ethics or "charters." Chamber of commerce personnel sometimes act as mediators, which provides one more way of informally resolving consumer disputes.

[47] Legal aid societies, such as the National Consumer Law Center, represent low-income consumers; some soldiers may qualify for such assistance. Additionally, "pro bono projects" exist. For example, *The National Law Journal* published an extensive "Directory of Law Firm Pro Bono Activities." NAT'L L.J., Sept. 13, 1993, at 25. Such projects may provide another source of representation for low-income soldiers.

[48] Legal assistance office support personnel who understand how the installation consumer affairs program works will be less likely to set appointments with an attorney without first asking potential clients if they have been to the appropriate agencies for initial assistance (such as, ACS, the HRO, the IG, the EO). This same advice applies to other areas as well. For example, soldiers often come to the legal assistance office for assistance on cancellation of indebtedness to the Army. This is, however, a battalion S-1 function that should be handled through the unit personnel action clerk (PAC). *See* DEP'T OF ARMY, REG. 600-8-103, PERSONNEL-GENERAL: BATTALION S1, para. 1-13d (16 Sept. 1991) [hereinafter AR 600-8-103]. Additionally, soldiers who come to the legal assistance office to complain that conduct by their chain of command or others does not comply with Army regulation should first be referred to the IG for assistance. The IG's job is to investigate such matters. Simply stated, allow ACS, the HRO, the IG, and the Battalion S-1 to perform the initial investigation and fact-finding work. Reserve legal assistance office resources for "legal" opinions on behalf of clients *after* all the facts have been uncovered.

[49] One common complaint heard from those seeking help from government offices is that they are often told "I can't help you" from the person sitting behind the desk, and nothing else is said. No one deserves such improper treatment. The correct response is "No one in this office can help you. Let me refer you to the appropriate office, and I will call now to set up an appointment for you or inform them that you are coming."

lation consumer affairs program work and respectful of the job others have to do.

When those in legal assistance understand their role in the consumer affairs program, providing training to personnel in other installation offices whose duties involve consumer affairs is time well spent. Such education unifies the offices involved and provides a common direction and approach to problems presented.[50] Soldiers will become accustomed to hearing the same answer no matter where on the installation they go for help which should reduce duplication of installation efforts and assist all installation offices in providing the best service possible.

Step 3: Develop a Consumer Affairs Preventive Law Program Geared Towards Educating Soldiers and Business

Once consumer resources are gathered, consumer points of contact identified, and training completed, the next priority is to disseminate consumer information to the public and ensure compliance.

Educating Soldiers

A good consumer affairs preventive law program should start close to home. Thus, the first step is to put information papers in the legal assistance office waiting area.[51] Providing clients with information designed to prevent future problems will translate their time spent waiting into something positive.

An effective consumer affairs preventive law program includes publishing articles in the installation newspaper. The best approach is for the chief, legal assistance, to impose the requirement on the legal assistance attorneys, assigning a different attorney every week to write an article on a current topic of interest. These articles then can be published in a weekly column coordinated with the PAO.[52] Soon, a bank of articles will be created that can be rerun or updated as the law changes. Putting the writer-attorney's byline on the article has the added advantage of recognizing that attorney as the expert in that area. An article can be used further by turning it into an office information paper or handout, building the office's institutional knowledge—no need to "reinvent the wheel"—and serving to reduce the number of appointments attorneys see on recurrent matters.[53]

Establishing recognizable "experts" no doubt will result in requests from commanders for classes. Going out to units to teach classes in consumer law is the most important element of this section. A legal assistance attorney should keep such classes organized, to the point, and suitable for the audience.[54] Otherwise, the legal assistance attorney's presentation will be boring and ineffective. These classes also provide a unique opportunity: attorneys can ask what "rip-offs" soldiers are currently experiencing, and they will get answers. Soldiers in familiar surroundings at their unit are more likely to reveal common problems than when in an attorney's office. Legal assistance attorneys also should use this opportunity to speak personally to the commander and make recommendations about how to identify patterns of consumer abuse.

One final reason to conduct such an aggressive preventive law campaign is that Army regulation requires it.[55] However, a good program does not stop with educating soldiers. Educating the general business public about consumer law, legal assistance, and the Army will go far in reducing future difficulties.

Understanding, Educating, and Negotiating with Business

Understanding the opponent is an important step in obtaining a favorable result for the client, and is essential for success

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[50] Providing classes and information papers to ACS and HRO personnel is important. *See supra* note 26, discussing one option for ACS. Another good preventive law approach for the HRO is for the legal assistance office to provide a landlord/tenant law information handout that provides general answers and guidance on recurrent problems.

[51] *See supra* note 15.

[52] For example, the Fort Stewart, Georgia, SJA office calls its column "Ask the Judge," which is geared to topics of current interest. The focus in the early part of the calendar year is on taxes and financial planning. During late spring and early summer—when soldiers typically are arriving and departing—the topic is landlord/tenant law. In the latter part of the year, the issues include advice on credit and scams that arise during the Christmas holiday shopping period. *But see* Eveland, *Professional Responsibility Opinion 93-1*, ARMY LAW., June 1993, at 55 (addressing plagiarism and copyright violations by a legal assistance attorney).

[53] Legal assistance office support personnel can use such information papers to "screen" many clients, making the legal assistance office run more efficiently. Ethically speaking, however, the following warning should be put on all handouts: "THIS PAPER IS INTENDED FOR GENERAL INFORMATION ONLY. IF ADDITIONAL INFORMATION IS NEEDED, CONTACT THE LEGAL ASSISTANCE OFFICE TO REQUEST AN APPOINTMENT WITH AN ATTORNEY."

[54] Classes to older higher ranking soldiers necessarily will differ from those taught to younger lower ranking soldiers. For example, older soldiers are more likely to need a class on estate and financial planning. An excellent class in this area can be assembled from THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. AIR FORCE, PREVENTIVE LAW PROGRAM (attorneys ed. 1992). For current estate planning briefing slides for high ranking officers, contact Department of the Air Force, United States Air Force Academy at Colorado, Personal Estate Planning Team. For young soldiers, the FTC has two "Facts for Consumers" papers that provide a good starting place: *Making Smart Choices, Protecting Your Money* (October 1991) and *Consumer Quiz* (March 1986). Add some information on state landlord/tenant law and what services legal assistance provides, and you have a class. For ordering information on the FTC papers, *see supra* note 13.

[55] AR 27-3, *supra* note 5, para. 3-3.

in a consumer affairs context. A legal assistance attorney's primary goal for the client is usually to get as favorable a settlement as possible. Few military clients have either the time or the resources to initiate court proceedings, while many businesses do. A good way for the legal assistance attorney to offset this disadvantage is to learn how businesses operate in the local area and who represents local business interests.

Most business people want to do what is right. Nevertheless, legal assistance attorneys should prepare themselves for occasional staunch opposition from a business and its representatives if the attorney begins quoting or attempting to enforce laws whose existence are unknown or have been forgotten or ignored by the local community, and whose impact are unprofitable. Custom often governs local business conduct. Accordingly, a legal assistance attorney sometimes can assist in educating local businesses or communities on the current state of law and public policy. In this context, a legal assistance attorney must be a diplomat. Tactful explanation of what a business can do to comply with the law garners more respect than merely pointing out a perceived legal violation with no explanation.

Most business people want to please their customers, and they appreciate the chance to "clean their own house." Business people around military installations know how destructive the "rumor network" can be to their business. They usually appreciate a respectful attorney who listens, understands their position, and then seeks compromise in an effort to better serve their military customers.[56] Moreover, before making controversial opinions known, a legal assistance attorney should have spoken to an attorney in private practice—preferably one who specializes in the area concerned and whose legal opinion is well respected in the community, as back-up—especially when the outcome could affect a large group of individuals. The likelihood that businesses will challenge the attorney is reduced if they learn that the adverse opinion a legal assistance attorney has of their practices is supported by respected local counsel.

Not all businesses are concerned with the goodwill of the community; some exist solely to defraud the soldier. Some pawn shops, pseudo-financial institutions, and contract enforcement scams using trickery and deceit to sell little or nothing at exorbitant prices fall into this category. A legal assistance attorney's appeal to their empathy for the military consumer is often fruitless. Negotiations with businesses such as this usually require, at least initially, a hard-line approach. One hard-line tactic for a chief, legal assistance, to use is the "good cop, bad cop" routine.

The consumer affairs committee or the CAS identifies a business that is causing trouble. The chief, legal assistance, should discuss the matter with other legal assistance attorneys and then formulate a rough acceptable compromise to the consumer dispute. Then, the chief should assign the various cases arising out of the problem business to several attorneys. The legal assistance attorneys assigned will then simultaneously and aggressively pursue the business, using every resource at their disposal,[57] seizing on legal violations, and demanding the most advantageous settlements possible for their respective clients.

Eventually, a business representative will request to speak to the legal assistance attorneys' supervisor. At that point, the chief, legal assistance, can step in to suggest a satisfactory compromise. The business operator will be so glad to hear a "reasonable voice" that he or she often will agree immediately to the settlement that the chief originally formulated.

Unsuccessful discussions with a business may result in referral to its attorney.[58] Legal assistance attorneys should seek to establish a rapport with corporate and business attor-

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[56] Business people do not always know that their current business practices may not be the best course, either for them or the consumer. Two cases from Fort Stewart illustrate this point. In the first, a local used car salesman was not following the FTC's used car rule; he had no buyer's guide in the windows of the cars that he sold. Lack of a buyer's guide had led to widespread customer confusion over the terms of the salesman's car warranty. Thus, the consumer affairs committee voted to send the salesman a letter, penned by the CAS, explaining what was wrong with his practices and explaining how he could fix it. A copy of the FTC's "Facts for Consumers" paper titled *Buying a Used Car* (May 1985) was enclosed. In response, the salesman wrote back to the CAS agreeing to the consumer affairs committee's proposal, and stating that "[t]he professional and reasonable tone of your letter . . . is of note and is sincerely appreciated by an old sea dog such as myself" (the salesman was a retired Navy warrant officer). In the second case, a local auto mechanic was not doing written estimates up front, only oral estimates. This had led to numerous consumer disputes over "unfair" prices for work performed by the mechanic. To protect both area soldiers and the mechanic, the chief, legal assistance, commissioned the CAS to write an article for the installation newspaper's "Ask the Judge" column concerning car repairs. The article basically advised each soldier to get up front written estimates before allowing car mechanics to work on their cars. A week after the article was published, the chief, legal assistance, and the CAS visited the car mechanic (a retired Army warrant officer) in his shop. He had posted the article on his bulletin board, and was following it to the letter. He thanked the chief and the CAS, and that solved the problem.

[57] One worthwhile tactic is to refer every letter sent to the business on behalf of a consumer to every conceivable federal, state, and local consumer protection office as a consumer complaint. *See supra* note 13, the *Consumer's Resource Handbook,* for possibilities. Legal assistance attorneys should save up a few complaints and then send them in a group which will get more attention. The result often will be that the consumer protection offices will contact the target business. Inquiries from government offices will require the target business to expend time and effort in responding. This multiple pressure may force the business into an agreeable compromise without further attorney action. Furthermore, legal assistance attorneys should contact attorneys at other military installations to see if they are having similar problems and, if so, get them involved. When appropriate, the chief, legal assistance, should direct the CAS to ensure that the consumer affairs committee members know of the problem business, initially coordinate with counsel in private practice, and prepare the packet for referral to the AFDCB.

[58] AR 27-26, *supra* note 28, Rule 4.2, prohibits a legal assistance attorney from contacting an opposing party whom the attorney knows is represented by an attorney, unless express consent is obtained from the opposing party's attorney to do so.

neys and be respectful and correct when speaking to them. Corporate and business attorneys often can either make a case extremely easy or extremely difficult. Despite popular opinion, most attorneys are professional enough to respect a correct interpretation of the law and advise their client accordingly, thus concluding the matter. Of course, it seldom will be this easy. That is why a wise legal assistance attorney will have a lawyer in private practice or Reserve judge advocate in his or her private capacity as backup if court action becomes necessary. If such backup cannot be obtained—especially in matters affecting large numbers of individuals—a reassessment of the use of precious legal assistance resources for such a case may be prudent.

Step 4: Formulate Procedures for Handling Cases in Court That Focus on the Big Picture

Most legal assistance offices are so overburdened with routine business that—even when needed—pursuing cases in court[59] seems a remote possibility. When formulating procedures for handling cases in court, an SJA and a chief, legal assistance, must consider that legal assistance attorneys have a huge clientele and comparatively little time. The key, then, is to establish a purpose behind litigation procedures that serves broader goals. Legal assistance office procedures should not emphasize pursuing litigation in cases that affect only a few individuals. Again, cases will arise where an attorney feels compelled—consistent with the requirement to zealously advocate a client's position—to make exceptions. Legal assistance attorneys should not, however, severely limit themselves by making individual court representation routine. Legal assistance resources are better spent referring such "one-bite" cases to civilian counsel or to Reserve judge advocates and developing ways to minimize the cost for those cases referred.[60] Otherwise, a legal assistance office will spend ninety percent of its time on matters that affect only a few clients. Legal assistance cannot afford such a limiting approach if it expects to preserve itself in the future; it must search for the most efficient use of resources possible.

Litigation procedures that have as their goal the protection of installation soldiers collectively, rather than individually, are well-suited for consumer law. Consumer law, unlike many other areas of legal assistance, finds true expression and effectiveness when protecting a class of persons (the soldier).

Using available resources involves assembling litigation procedures that are directed at building consumer class actions,[61] and finding civilian lawyers or Reserve judge advocates in the area who have the desire, resources, and expertise to pursue these actions.[62] Violations of consumer law are not hard to prove; for the most part, the laws are unambiguous. The biggest obstacle is that, for a single individual complainant with little money, court action is prohibitively expensive. Moreover, most businesses and debt collectors know this. Thus, absent the class suit, unfavorable settlements are the norm for the poor and uninformed consumer.

Army Regulation 27-3 limits a legal assistance attorneys' representation in contingent fee tort cases.[63] However, nothing in *AR 27-3* should prohibit legal assistance attorneys—as part of an installation consumer affairs program—from investigating, organizing, and packaging a case with the intention of developing an attractive contingent fee consumer class action for an attorney in private practice where one *potentially*—but not currently—exists; then referring it to appropriate counsel in private practice. To operate otherwise would severely restrict soldiers' rights to organize and protect

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[59] AR 27-3, *supra* note 5, paras. 3-6 to 3-8.

[60] *See* DEP'T OF ARMY, PAMPHLET 600-45, ARMY COMMUNITIES OF EXCELLENCE, app. B (Aug. 1991). Legal assistance offices continually struggle against fulfilling two sometimes competing Army Community of Excellence standards: having a locally licensed attorney to fully assist clients while keeping appointment waiting times down to five days or less. The Fort Stewart legal office, for example, avoids in-court representation in domestic relations matters, finding that such representation matters effectively would eclipse all other legal assistance services. Instead, the Fort Stewart legal office prepares all paperwork short of court (such as, settlement/separation agreements in divorces, pro se petitions) and then negotiates reduced-fee representation for the client with a civilian attorney or Reserve judge advocate if needed.

[61] The NCLC's *Consumer Credit Series* dedicates an entire volume to consumer class actions. *See* NATIONAL CONSUMER LAW CENTER, INC., CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES, CONSUMER CLASS ACTIONS (2d ed. 1990). For ordering information, *see supra* note 14. Apparently, many civilian counsel are focusing on consumer class actions because it is the best way to make "big money" in consumer law. Legal assistance attorneys have the opportunity to turn this trend into something that benefits their military clients.

[62] Class actions are difficult, expensive, and beyond the scope of legal assistance. Accordingly, the firm in private practice chosen will need to understand that they must bankroll the action and lead it. This, like anything else, will require extensive negotiation, documentation, and organization on the part of legal assistance attorneys and the SJA. The key is attorney's fees. Normally, the rule on attorney fee awards—absent statute or enforceable contract—is that each party pays his or her own attorney's fees. Substantial case law exists, however, to support the position that a successful party may be awarded attorney's fees if his or her opponent has acted in bad faith or if a substantial benefit has been conferred on a class of persons. The latter judicial rule, called the "common fund" or "common benefit" exception is especially important to class action litigation; it means that if a party preserves or recovers a fund for his or her benefit and the benefit of others, he or she is entitled to recovery of his or her costs, including attorney's fees from the fund or directly from the other parties enjoying the benefit. *See* National Council of Community Mental Health Centers, Inc. v. Matthews, 546 F.2d 1003, 1008-09 (U.S. App. D.C. 1976), *cert. denied*, 431 U.S. 954 (1977). Note, however, that such a fee arrangement must be structured in the pleadings in class litigation in such a way as to inform the court and class members that an additional fee will be sought by the attorney representing the class if the class action is successful on the merits.

[63] *See* AR 27-3, *supra* note 5, paras. 3-6h(1); 3-8b(2).

themselves against off-installation consumer abuses. Legal assistance attorneys *can* provide a valuable conduit for protecting such consumer rights. Moreover, continued representation, perhaps as cocounsel, may be authorized "in order to protect the interests of a client," if requested by the client and approved by both the counsel in private practice and the SJA.[64]

Another option for groups of consumers with a common injury is to form an unincorporated association to sue.[65] This avoids the difficulty of certifying a class action, is a way for several consumers to raise enough money to hire an attorney on an other-than-contingent fee basis, and provides a way to bankroll an action on behalf of the association. For example, a legal assistance attorney may work with a civilian attorney to draft the by-laws of the unincorporated association which would allow those suffering a common consumer injury to join on paying a small sum of money (such as fifty dollars). The nonprofit, nonbusiness purpose of such an unincorporated association is to "hire an attorney to sue on behalf of the association and obtain compensation for consumer injuries common to the membership." The by-laws should specify the common consumer injury and provide the method for the election of officers.

Additionally, although private consumer remedies are becoming increasingly important, legal assistance attorneys should keep federal, state, and local consumer protection agencies informed at all stages of large consumer lawsuits. Government interest will increase commensurately with the number of consumers joining a particular action, perhaps even to the point where government lawyers decide to either pursue the action themselves or pursue an independent action.

The motto for the military consumer must be: "United we stand; divided we fall." For example, the Fair Debt Collection Practices Act,[66] (FDCPA) makes a variety of common debt collection practices illegal—such as, threatening criminal arrest or prosecution, making false statements—but has a statutory damage cap of $1000.[67] However, the FDCPA also allows the successful plaintiff to shift all attorney's fees to the defendant[68] and no cap on this provision exists. This is all the encouragement that a competent civilian counsel needs. Moreover, if a legal assistance attorney builds a case for a class of plaintiffs that has the possibility of a punitive damages award on top of this,[69] the legal assistance attorney has built a contingent fee case on a granite foundation.

Protecting soldiers collectively does not mean that legal assistance attorneys should always avoid individual cases. One effective tactic is to send legal assistance attorneys into small claims courts[70] with clients who are proceeding against businesses that the consumer affairs committee has identified as problem businesses. The chief, legal assistance, already

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[64] *See id.* para. 3-7h(6)(b)3; 3-7g(1).

[65] United States citizens have a constitutional right to organize to protect a common interest and make it easier to use the courts. *See* NAACP v. Button, 372 U.S. 415 (1963) (ruling that a state's valid interest in regulating the profession of law could not justify interference with the constitutionally protected activities of the NAACP in financing litigation aimed at ending racial segregation in the public schools). In *Button*, Virginia saw the NAACP's activities as "soliciting" legal business. The Court held, however, that the NAACP's activity in counseling minority group members in Virginia about their rights and referring them to a particular attorney or group of attorneys for assistance was protected by the First Amendment to the United States Constitution. Nonetheless, legal assistance attorneys should review state law to determine the rules for forming an unincorporated association, and then the applicable code of civil procedure to determine how such organizations may pursue, or be pursued in, litigation.

[66] 15 U.S.C.A. § 1692-1692o (1992).

[67] A split in opinion currently exists between the two federal circuit courts that have specifically addressed the limit of statutory damages available under the FDCPA. In Harper v. Better Business Services, 961 F.2d. 1561 (4th Cir. 1992), the Fourth Circuit ruled that statutory damages are limited to $1000 *per case* filed. In Wright v. Finance Service of Norwalk Inc., No. 91-4156, (6th Cir. June 17, 1993), the Sixth Circuit ruled that a plaintiff in a suit under the FDCPA may recover up to $1000 *for each violation.* Consumers and their advocates undoubtedly would prefer the Sixth Circuit's approach, but how the Supreme Court will rule if it hears an FDCPA case on this issue remains to be seen.

[68] Under 15 U.S.C.A. § 1692k(a)(3), the only limitation is that the fee be "reasonable." Thus, when the debt collector resists suit, making the plaintiff's attorney work harder, fee awards of $5000 or more are common. *See* Yelvington v. Buckner, Clearinghouse No. 36,581 (N.D. Ga. 1984) (fees in excess of the damages recovered is consistent with the FDCPA's purpose of encouraging private enforcement); *see also supra* note 19, *When Rubin Sues, Defendant's Settle* (practical discussion of fee negotiations pursuant to the FDCPA).

[69] The prospect of a successful class action probably is enough to encourage civilian counsel to take on a consumer case. Punitive damages generally are thought to be inappropriate, however, in the class setting. *See* Ratner v. Chemical Bank of New York, 54 F.R.D. 412 (S.D.N.Y. 1972). Nonetheless, the United States Supreme Court has placed few limits of late on punitive damages. *See Justices Fail to Illuminate on Punitive Damages,* NAT'L L.J., July 5, 1993, at 5, col. 1 (discussing TXO Production Corp. v. Alliance Resources Corp., No. 92-479 (S. Ct. 1993), which rejected a static "formula" for figuring punitive damages and upheld, against due process challenge, a $10 million punitive damages award that was 500 times the compensatory damages awarded in the case); *Punitives at Issue, Yet Again,* NAT'L L.J., Mar. 29, 1992, at 1, col. 1 (discussing Pacific Mutual Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991) upholding, against due process challenge, the procedure used by Alabama courts to set punitive damages (Alabama thought by some to be the "punitive damages capital of the world."). Pleading for punitives should be exercised when the defendant's conduct is serious or aggravated, and where actual malice, willful misconduct, or recklessness can be shown. *See* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 204 (1973). For example, one company that the Fort Stewart legal office dealt with was bold enough to have a "military debt collection specialist." Their tactic was to call the soldier-debtor, represent themselves as "JAG officers," and tell the soldier that they would "call the Commanding General and have them thrown in jail if payment was not received immediately." After negotiating with the president of the company, these contracts were cancelled.

[70] These courts have monetary limits on their jurisdiction (such as claims less than $5000 in Georgia) and operate more like informal arbitration (because the judges are not always attorneys). Because the judges often are elected officials, however, military personnel may be at a disadvantage if suing a local business person. Nonetheless, these courts may be excellent forums for prosecuting out-of-state scams, assuming jurisdiction can be obtained under the state's "long-arm" statute or otherwise.

should have communicated with a lawyer in private practice—such as, a Reserve judge advocate in his or her private capacity, other lawyers in private practice—willing to take on the individual cases as a class action.

Once a few judgments are obtained, or favorable court records established, "certifying" a class action will become easier.[71] Legal assistance attorneys have neither the authority nor resources, and most are without the expertise, to pursue a class action. Therefore, the role of a legal assistance attorney, with the SJA's consent,[72] could be that of cocounsel or perhaps administrative support. The lawyer in private practice should serve as lead counsel and "bank-roll" the effort.[73] Assuming the legal assistance attorney has developed a solid case—that is, attorney's fees and punitives—several good lawyers in private practice should be willing to take the risk.

Some legal assistance attorneys may feel this approach too limiting on their court representation programs because they feel that it will reduce their opportunity to go to court as lead counsel. These legal assistance attorneys should consider, however, the vast experience to be gained by involvement in a consumer class action or in a suit on behalf of an unincorporated association as the investigator or otherwise, and the potential for helping vast numbers of soldiers with a single effort.

Step 5: Use the Armed Forces Disciplinary Control Board Creatively

Another underused "class" weapon in the legal assistance attorney's arsenal is the AFDCB. The AFDCB is perhaps the most powerful tool legal assistance attorneys have against "unfair commercial or consumer practices."[74] Those responsible for writing the regulations implementing the legislation to allow involuntary allotments of soldiers' pay for creditor judgments should consider some of the important protections against such business practices based on AFDCB action. Such protections should minimally include: (1) revoking debt processing and involuntary allotment privileges for any business or debt collector which, based on AFDCB findings or other appropriate authority, is found to have abused the debt processing privilege or committed unfair consumer or commercial practices against soldiers, and (2) revoking debt processing and involuntary allotment privileges for any business declared "off limits" by appropriate command authority.[75]

When the AFDCB finds the practices of a business to be detrimental to the morale and welfare of area soldiers, commanders—on AFDCB recommendation—may appropriately limit a business's rights against, and dealings with, soldiers. Commanders, SJAs, and legal assistance attorneys must be careful, however, to follow AFDCB procedures precisely when targeting a particular business for such adverse action. Neither legal assistance attorneys, nor anyone else in the Department of the Army, may "officially" say that a particular business is carrying on unfair consumer or commercial practices *until* the AFDCB's "sponsoring commander" makes a formal determination that such unfair practice is occurring.[76] One exception to this prohibition is that a legal assistance attorney and others always may restate the precise content of court filings and judgments against the business or adverse findings and consumer warnings issued by federal, state, and local consumer protection offices. Unfortunately, many legal

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[71] Federal Rule of Civil Procedure 23, requires the following prerequisites for a class to be certified: commonality, typicality, representativeness, and predominance of questions of law or fact and superiority of the class action to other methods for adjudicating the controversy. For an in-depth discussion, *see supra* note 61 *Consumer Class Actions,* sec. 9.4. For a case exploring the technical requirements of obtaining class certification *see* Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986) (written by Judge Ruth B. Ginsburg).

[72] AR 27-3, *supra* note 5, para. 3-7g; 3-7h(6)(b)3.

[73] Nothing in *AR 27-3,* or anywhere else, authorizes legal assistance attorneys to advance court costs to clients. Therefore, either the clients will have to form an association to pay for them, or the civilian counsel or Reserve judge advocate in private practice must bank-roll the costs of the action. However, the plaintiffs still are liable for the costs if they lose. Another option when the named plaintiff cannot afford to repay the costs is to involve a legal services attorney as lead counsel. Not only may legal services attorneys advance costs, but they also may assume ultimate responsibility for them if no recovery in the litigation occurs. *See* Brame v. Ray Bills Finance Corp., 85 F.R.D. 568 (N.D.N.Y. 1979); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT AND THE CODE OF JUDICIAL CONDUCT, Rule 1.8(e) (1983); *American Bar Association Committee on Ethics and Professional Responsibility, Informal Opinion 1361* (1976).

[74] AR 190-24, *supra* note 37, para. 2-4b(11).

[75] Current procedures authorizing the suspension or revocation of a private business's debt processing privileges are found in Dep't of Defense, Directive 1344.9, Indebtedness Of Military Personnel (1979) [hereinafter DOD Dir. 1344.9]. The implementing Army regulation is AR 600-15, *supra* note 4; *see also* 32 C.F.R. pt. 43a (1979)). Moreover, the AFDCBs are equipped with substantial investigative authority for the protection of soldiers, even on a national scale. *See* DEP'T OF ARMY, REG. 210-7, INSTALLATIONS: COMMERCIAL SOLICITATION ON ARMY INSTALLATIONS, para. 4-9 (15 Apr. 1982); DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICES: ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 2-17a, d (15 Mar.1992). These regulations and procedures—and the case law cited therein—provide ample authority for commanders to protect soldiers from involuntary allotments sought by unscrupulous businesses through use of the "off-limits" sanction. As of February 11, 1994, discussions in the Pentagon among representatives from the Office of the Secretary of Defense (Personnel & Readiness), the DOD General Counsel's Office, Legal Counsel for the Chairman, Joint Chiefs of Staff, Defense Finance and Accounting Service (DFAS), and the Legal Assistance Divisions for the military services [referred to as "The Involuntary Allotment Task Force"], yielded a draft revision to DOD Dir. 1344.9 that incorporated these recommendations and provided for a number of other soldier-consumer protections as well. Although the DOD General Counsel has yet to rule on several "legal" issues, including the scope of command authority against involuntary allotments, commanders and legal assistance attorneys will play important roles in assisting soldiers with involuntary allotment requests from creditors.

[76] Only a "sponsoring commander," on approving formal AFDCB findings in accordance with *AR 190-24,* can "officially" state that a particular business or landlord is engaging in unfair consumer or commercial practices. *See* AR 190-24, *supra* note 37, para. 2-6, app. B. However, a legal assistance attorney may publish a general article (without identifying the names of the businesses involved) that explains a particular "current scam to avoid."

assistance attorneys are reluctant to use the AFDCB because they wrongly believe that the only remedy available through its use is the "off-limits" sanction.[77] However, the remedies available through the AFDCB are limited only by the creativity and persuasive ability of the legal assistance attorney arguing the soldier-consumer's cause before it.

If aware of its broad grant of powers and not afraid to use them, an AFDCB will be a valuable tool in protecting the "morale and welfare"[78] of the soldier in the consumer law context. An AFDCB can coordinate with appropriate civil authorities on problems and adverse conditions within the Board's jurisdiction,[79] and can make recommendations to commanders in its jurisdiction about off-installation procedures to prevent or control undesirable conditions.[80] Moreover, a commander who provides procedural due process[81] to the suspect business in accordance with AFDCB regulations has little to fear in the way of judicial interference. The commander's exercise of discretion is accorded great deference in any judicial review.[82] The exclusive remedy available to a business or individual alleged to be aggrieved by the decisions of a commander acting pursuant to AFDCB regulations is to resort to a United States federal district court seeking an injunction under the Administrative Procedure Act (APA).[83] Judicial review will be of the administrative record and the standard of review under the APA is a deferential one.[84] The reviewing court should not overturn the commander's decision unless it finds it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[85]

Furthermore, although the most extreme, the "off-limits" sanction is not the only action a commander can take. An AFDCB can recommend, and a commander can take, any measure short of "off limits," if satisfied that a particular business is detrimental to the morale and welfare of area soldiers, and assuming due process has been provided to that business without improvement. Examples include the following:

> (1) Advising area soldiers of the practices of a particular business and why those practices are harmful to the morale and welfare of area soldiers.[86]
>
> (2) Taking a particular landlord off the housing referral list because of health and sanitation complaints or a pattern of unfair business practices.[87]

The AFDCB could be seen as a kind of "quasi-class action forum," where legal assistance attorneys will find its most appropriate and effective use. Single complaint cases normally should not be brought before the AFDCB unless extremely egregious conduct is evidenced. This should not be interpreted that an attorney's zealous advocacy of a client should be stifled in some cases. Legal assistance attorneys must understand that zealousness means little or nothing unless pursuing an effective approach.

Effectiveness sometimes requires an attorney to have the patience and foresight to build a file against a particular business, and then take a package of documented complaints that demonstrates a "pattern" of unfair and deceptive business practices before the AFDCB. Otherwise, the legal assistance

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[77] *Id.* para. 2-6.

[78] *Id.* para. 2-1a.

[79] *Id.* para. 2-4d.

[80] *Id.* para. 2-4e.

[81] The AFDCB must send the business a notice to cure, and then provide the business a reasonable time to either comply or give reason to the AFDCB why they need not comply. *Id.* app. B.

[82] *See* Metlin v. Palastra, 729 F.2d 353 (5th Cir. 1984); Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946); Harper v. Jones, 195 F.2d 705 (10th Cir. 1952).

[83] 5 U.S.C.A. §§ 702, 703 (1993). The Federal Question statute, 28 U.S.C.A. § 1331 (1993), establishes jurisdiction for such a suit. The APA serves as the waiver of sovereign immunity for equitable relief. Monetary damages are not available.

[84] *See* Johnson v. Reed, 609 F.2d 784 (5th Cir. 1980), where the court ruled that in determining whether to review internal military affairs, the court should first determine whether the plaintiff has exhausted all administrative remedies and has alleged that the military violated the Constitution, a statute, or its own regulations; and second, the court must balance the sufficiency of the complainant's allegations against the policies contravening review. The factors to be balanced are the source and weight of the plaintiff's challenge, injury to plaintiff if review were denied, amount of interference with military matters if relief were granted, and the degree to which military experience and discretion are involved.

[85] 5 U.S.C.A § 706 (1993). This is simply a statutory embodiment of procedural due process.

[86] This is almost tantamount to "off limits." However, this approach works better with contract enforcement scams, which use door-to-door salespeople. Because of their interstate character, often no local "establishment" to place "off limits" exists.

[87] Specific authority for this approach is located in AR 210-51, *supra* note 27, para. 4-12b. This is the passive approach and simply revokes favorable treatment, analogous to the United States revoking a foreign country's "most favored nation trading status." Moreover, this probably is all the action required for problem landlords located on the outskirts of town in a slow rental market.

attorney may lose credibility before the AFDCB, and so may the clients' cause. Legal assistance attorneys should be ready to show that they have used every resource at their disposal without success, short of litigation, and that placing a particular business or landlord "off-limits" will help more than hurt area soldiers.[88] Legal assistance attorneys must be clear, concise, and correct in their legal arguments.[89]

If used in this way, the AFDCB can be an effective consumer class tool, and the time and expense necessary for courtroom class actions usually can be avoided. Moreover, many civilian businesses cannot begin to comprehend what AFDCB action means, much less how to successfully defeat it. Therefore, using the AFDCB provides a legal assistance attorney the opportunity to fight for the soldier on "military turf" and provides an opportunity for favorable settlement.

Lastly, viewing the AFDCB as a quasi-class action forum requires that only one person coordinate and command the presentation of cases before the AFDCB. The chief, legal assistance, on the installation is the best choice for this task because he or she is most likely to be able to advise concerning action on individual cases with a view toward the big picture. Also, this sets up a hierarchy within legal assistance that attorneys can use to their advantage when negotiating settlements with particular businesses.

Legal assistance attorneys, when dealing with individual cases, often deal exclusively with a business's lower echelon employees. Bringing in, as a last resort, the chief, legal assistance (and the chief's subsequent referral to the AFDCB resulting in a notice to cure) is an effective negotiating tactic that almost always requires a business's higher echelons to get involved. At that point, the chief, legal assistance, can act as a kind of "quasi-prosecutor," whose actions are governed by the character and quantity of soldier complaints against the particular business and the effect that those complaints have on the high-ranking members of the AFDCB to whom the chief must satisfactorily report. This impression will be galvanized if the AFDCB's notice to cure encourages the target business to contact the chief, legal assistance, to reach an "agreeable compromise that protects the morale and welfare of the soldier."

As discussed under "Step 3," the chief, legal assistance, should have formulated a reasonable settlement well in advance of referral to the AFDCB, and need only guide the business toward it "so the matter can be settled and AFDCB consent obtained to withdraw the action." In so doing, the business may be compelled to reach a reasonable and fair solution, avoiding expensive, time-consuming litigation.[90]

Conclusion

This article is intended to provide a starting point for debate and the development and growth of the consumer affairs program at the installation level, targeting an eventual Army-wide program. If readers balk at this approach, perhaps they will take consumer law in new and better directions and publish their results for everyone's benefit. The substance of this article is not as important as its emphasis on preserving the rights of the soldier-consumer.

The free market economy assumes that business interests constantly will push the envelope of liberty for their own self interest,[91] and that this push is beneficial. However, businesses only should be protected so far as it may be necessary to promote the consumer's interests.[92] Moreover, when this consumer is a soldier, heightened protection is warranted.[93]

With the advent of involuntary allotments for creditor judgments, the time is now to implement positive preventive law policies in legal assistance offices. Working together, commanders, SJAs, and legal assistance attorneys can build an effective Army-wide consumer law program.

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[88] For example, an attorney presenting a case to the AFDCB should know how many open rentals exist in the surrounding community. This information is available from the HRO, and is important because an AFDCB is much less likely to recommend a landlord with 60 rental units be placed "off limits" if only 45 rentals remain in the area market.

[89] "Legal counsel" serves on the AFDCB. AR 190-24, *supra* note 37, para. 2-2a(2) (most often the chief of administrative law in the SJA office, because that office most likely will provide an impartial opinion to the AFDCB). Legal assistance attorneys should furnish the materials presented and their arguments accordingly.

[90] For an example of an AFDCB successfully used in this way, *see* TJAGSA's CONTRACT ENFORCEMENT SCAMS, *supra* note 45.

[91] Every individual necessarily labors to render the annual revenue of the society as great as he can. He generally indeed neither intends to promote the public interest, nor knows how much he is promoting it. . . . He intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.

1 ADAM SMITH, WEALTH OF NATIONS ch. 3 (1776).

[92] "Consumption is the sole end and purpose of production; and the interests of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer." *Id.* (vol. II, bk. IV, ch. 8). For a contemporary exposition of this same philosophy, *see* Woodruff, *Smart Selling—How Companies Are Winning Over Today's Tougher Consumer,* BUS. WEEK, Aug. 3, 1992, at 46-50. One delightful quote from the article is "We forgot [businesses] exist to serve customers."

[93] This was recognized with the enactment and 1990 revision of The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. §§ 501-591 (1990).

Analysis of Change 6 to the 1984 *Manual for Courts-Martial*

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Introduction

On 23 December 1993, President Clinton signed Executive Order No. 12,888, authorizing the sixth change to the *Manual for Courts-Martial, United States (Manual),* 1984.[1] These changes reflect the exercise of the President's statutory authority[2] to prescribe pretrial, trial, and posttrial procedures,[3] and to set limits on the maximum punishment that may be adjudged for violations of the Uniform Code of Military Justice (UCMJ).[4] As with earlier changes to the *Manual,* Change 6 is intended to "improve the efficiency and effectiveness of the Military Justice System,"[5] and to "ensure that the Manual fulfills its fundamental purpose as a comprehensive body of law governing military justice procedures and as a guide for lawyers and nonlawyers in the operation and application of such law."[6]

Change 6 is the product of a comprehensive and extensive amendment process.[7] The Joint Service Committee on Military Justice (JSC) initially approved it on 15 May 1990 as part of its 1990 Annual Review of the *Manual.* Change 6 was published in the *Federal Register* for public comment on 29 June 1990 and the public comment period ended on 12 September 1990.[8] Comments were reviewed by the JSC's working group and the JSC adopted recommendations for amendments at its 14 November 1990 meeting. The revised proposals were staffed with the DOD General Counsel, who then forwarded the proposals to the Office of Management and Budget for executive coordination.

The amendments in Change 6 can be grouped into six major categories: professional supervision of judges; pretrial confinement procedures; courts-martial procedures generally; simplification of courts-martial; Military Rules of Evidence (MRE); and punishments and definitions of crime.

Professional Supervision of Judges

Change 6 has substantially modified Rule for Courts-Martial (R.C.M.) 109, relating to the professional supervision of military judges and counsel.[9] Rule for Courts-Martial 109(a) formally charges TJAGS with the responsibility for the professional supervision and discipline of military trial and appellate judges, as well as judge advocates and other lawyers who

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[1] MANUAL FOR COURTS-MARTIAL, United States (1984) (C6, 21 Jan. 1994) [hereinafter MCM]. The executive order was published at 58 Fed. Reg. 69,153 (1993) and will hereinafter be referred to as Change 6. A copy of Change 6 has been provided to all Army legal offices by Department of the Army message and the Legal Automated Army-Wide System bulletin board. Change 6 became effective 21 January 1994.

[2] Although the President's authority to prescribe the *Manual* is generally discussed in terms of statutory authority delegated by Congress (*see infra* notes 3-4), the President also has relied on his constitutional authority as Commander in Chief. Exec. Order No. 12,473, *as amended by* Exec. Order No. 12,484; *see generally* United States v. Ezell, 6 M.J. 307 (C.M.A. 1979) (discussing President's authority as Commander in Chief).

[3] UCMJ art. 36 (1988). The United States Court of Military Appeals (COMA) has long recognized the President's authority to prescribe court-martial procedures pursuant to UCMJ Article 36. *E.g.*, United States v. Curtis, 32 M.J. 252, 261 (C.M.A. 1991) (capital sentencing procedures); United States v. Kelson, 3 M.J. 139 (C.M.A. 1977) (timing of motions). Conversely, the COMA, quite properly, has not considered itself bound by language in the *Manual* addressing substantive criminal law, as these matters fall within the purview of Congress and the courts, not the President. *See, e.g.,* United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (resisting apprehension does not encompass fleeing from apprehension, despite language in the *Manual* to the contrary); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (President could not change substantive military law by language in the *Manual* designed to eliminate the defense of partial mental responsibility).

[4] UCMJ art. 56 (1988) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."); *see* United States v. Scranton, 30 M.J. 322, 325-26 (C.M.A. 1990).

[5] *See* Mason & Gilligan, *Analysis of Change 5 to Manual for Courts-Martial,* ARMY LAW., Oct 1991, at 68.

[6] Dep't of Defense Directive No. 5500.17, Review of Manual for Courts-Martial, para. C (Jan. 23, 1985) [hereinafter DOD Dir. 5500.17]. For a detailed discussion of the purposes and authoritative status of the *Manual,* see Milhizer, *United States v. Clear: Good Idea, Bad Law,* ARMY LAW., June 1992, at 7.

[7] For a detailed discussion of how the *Manual* is amended, *see* Milhizer, *Amending the Manual for Courts-Martial,* ARMY LAW., Apr. 1992, at 78; Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation,* 130 MIL. L. REV. 5 (1990); Garrett, *Reflections on Contemporary Sources of Military Law,* ARMY LAW., Feb. 1987, at 38.

[8] 55 Fed. Reg. 26,740 (1990).

[9] The prior version of R.C.M. 109, through Change 5, was not as explicit in recognizing the primacy of The Judges Advocates Generals' (TJAGS) responsibility for these matters. Indeed, the amended analysis to R.C.M. 109(a) explains that the "amendment [to the rule] is not intended to limit the authority of a Judge Advocate General in any way." MCM, *supra* note 1, R.C.M. 109(a) analysis, app. 21 (C6, 21 Jan. 1994). *See generally* UCMJ arts. 2, 26, 66 (1988).

practice in military tribunals.[10] Consistent with this enhanced responsibility, subsection (a) provides that TJAGS may proscribe rules of professional conduct that impose sanctions, such as indefinite suspension from practice in courts-martial or before the courts of military review. Likewise, TJAGS may, on good cause shown, modify or revoke a suspension.

Subsection (a) also describes the due process requirements for imposing sanctions. As with the previous rule, the subject of a proposed disciplinary action must be provided the minimal due process rights of notice and an opportunity to be heard. However, a formal hearing is not required. Similarly, subsection (b) provides that a TJAG need only provide minimal due process prior to suspending a person who previously has been suspended by another TJAG or disbarred by the COMA.

Subsection (c) is new and concerns the rules and procedures for the investigation and disposition of charges, allegations, and information pertaining to the fitness of military trial and appellate military judges. These rules and procedures are promulgated pursuant to UCMJ article 6(a).[11]

Subsection (c)(2) limits the application of R.C.M. 109(c) to allegations of "judicial misconduct or unfitness." The subsection provides that judicial misconduct "includes any act or omission that may serve to demonstrate unfitness for further duty as a judge, including, but not limited to violations of applicable ethical standards."[12] The Discussion explains that the term "unfitness" should be construed broadly to include matters relating to incompetence, impartiality, and misconduct; erroneous decisions, however, are not subject to investigation under this rule.[13]

Subsection (c)(3) provides that complaints about a judge will be forwarded to the appropriate TJAG or his or her designee.[14] The Discussion expresses a preference for sworn complaints,[15] and explains that complaints may originate from virtually any source, including media reports.

Subsection (c)(4) provides that the designated individual will screen all complaints. An initial inquiry is required only in those circumstances when the complaint, if true, would constitute judicial misconduct or unfitness. The concerned TJAG must be notified before an initial inquiry is conducted. The Judge Advocate General may temporarily suspend the subject of the complaint pending the outcome of the investigation.[16]

Subsection (c)(5) concerns the postscreening, initial inquiry of complaints. An initial inquiry is required to determine if a complaint is substantiated. Under the rule, a complaint is sub-

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[10] Rules of professional conduct prescribed by TJAGS must be consistent with R.C.M. 109 and the *Manual.* Under R.C.M. 109(a), TJAGS may impose suspensions only as to the courts of their services. MCM, *supra* note 1, R.C.M. 109(a) (C6, 21 Jan. 1994). Army judge advocates must be familiar with *Army Regulation 27-26, Rules of Professional Conduct for Lawyers* (1 May 1992).

[11] UCMJ article 6(a) provides the following:

> (a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position. To the extent practicable, the procedures shall be uniform for all armed forces.
>
> (b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committees on Armed Services of the Senate and the House of Representatives.

Article 6(a) was enacted by the Defense Authorization Act for Fiscal Year 1990. "Military Appellate Procedures," tit. XIII, sec. 1303, National Defense Authorization Act for Fiscal Year 1990, Pub. L. No. 101-189, 103 Stat. 1352 (1989). The analysis to R.C.M. 109(c) explains that the "legislative history reveals Congressional intent that, to the extent consistent with the [UCMJ], the procedures to investigate and dispose of allegations concerning judges in the military should emulate those procedures found in the civilian sector." MCM, *supra* note 1, R.C.M. 109(c) analysis, app. 21 (C6, 21 Jan. 1994) (citing H.R. REP. NO. 331, 101st Cong., 1st Sess. 656 (1989) [hereinafter CONF. REP. NO. 331]). The Analysis explains further that the "procedures established by subsection (c) are largely patterned after the pertinent sections of the *ABA Model Standards Relating to Judicial Discipline and Disability Retirement* (1978) [hereinafter *ABA Model Standards*] and the procedures dealing with the investigation of complaints against federal judges in 28 U.S.C. sec. 372 (1984)." MCM, *supra* note 1, R.C.M. 109(c) analysis, app. 21 (C6, 21 Jan. 1994). Consistent with the intent of subsection (a), however, the Analysis to subsection (c) reiterates that TJAGS have overall responsibility for the certification, assignment, professional supervision, and discipline of military trial and appellate military judges. *Id., see also* UCMJ arts. 2, 26, 66 (1988).

[12] MCM, *supra* note 1, R.C.M. 109(c)(2) (C6, 21 Jan. 1994).

[13] The Discussion explains that challenges to erroneous decisions are "more appropriately left to the appellate process." *Id.* discussion. This is especially necessary to preserve the independence and integrity of the judiciary. See the recent opinion of the United States Supreme Court in Weiss v. United States, decided 19 January 1994 (No. 92-1482, 62 U.S.L.W. 4047 (U.S. Jan. 18, 1994)). In *Weiss,* by unanimous vote, the Court rejected the petitioner's argument that military judges, under the Constitution, must have tenure and fixed terms of office, finding adequate safeguards under the UCMJ and the *Manual.* The Analysis to subsection (c)(2) indicates that the amendment to the subsection is based on the committee report accompanying the Fiscal Year 1990 Defense Authorization Act, *see supra* note 11, CONF. REP. NO. 331, at 658, and is designed to increase public confidence in, and contribute to, the integrity of the military justice system.

[14] MCM, *supra* note 1, R.C.M. 109(c)(3) (C6, 21 Jan. 1994). The Discussion recommends that such designees should have judicial experience. For example, the chief trial judge of a service may be designated to receive complaints about trial judges of that service. *Id.* discussion.

[15] *Id. Cf.* United States v. Stuckey, 10 M.J. 347, 364-65 (C.M.A. 1981) (although probable cause for a search authorization need not be based on sworn testimony, information provided under oath is typically more credible and entitled to greater weight).

[16] The Discussion accompanying subsection (c)(4) emphasizes the need to treat complaints with confidentiality. The Discussion explains that confidentiality both protects the subject and the judiciary generally when the complaint is not substantiated, as well as encourages the reporting and investigating of founded complaints. MCM, *supra* note 1, R.C.M. 109 (c)(4) discussion (C6, 21 Jan. 1994). *See generally* ABA MODEL STANDARD 7.10. Complaints alleging criminality should be referred to appropriate law enforcement and investigative agencies. *See* MCM, *supra* note 1, app. 3.

stantiated if it is more likely than not that the subject judge engaged in judicial misconduct or is otherwise unfit.

The rule instructs that the person designated to conduct the initial inquiry should, if practicable, be senior to the subject of the complaint. The rule also expresses a preference that trial judges be investigated by another trial judge or someone with prior experience as a trial judge. Similarly, appellate judges, if practicable, should be investigated by someone having prior experience as an appellate judge.[17] During the initial inquiry, the subject will, at a minimum, be entitled to notice and an opportunity to be heard.

If the initial inquiry determines that the complaint is unsubstantiated, it will be dismissed as unfounded. If the complaint is substantiated, however, minor professional disciplinary action may be taken against the subject by the designee.[18] The TJAG concerned will be notified prior to the imposition of minor disciplinary action or the dismissal of a complaint as unfounded. Alternatively, the findings and recommendations can be forwarded to TJAG for appropriate action.

Subsection (c)(6) pertains to action by TJAG. On receiving the findings and recommendations of the initial inquiry, TJAG may dismiss the complaint, appoint an ethics commission to consider the complaint,[19] refer the matter to another investigative agency, or take appropriate disciplinary action.[20] The decision by TJAG is final and not subject to appeal.

Prior to taking professional disciplinary action—other than minor disciplinary action—the concerned TJAG must find, by clear and convincing evidence, that the subject judge engaged in judicial misconduct or is otherwise unfit for continued judicial service. The subject judge must be given notice and an opportunity to be heard by TJAG before final action is taken.

Finally, subsection (c)(8) authorizes the Secretary of Defense and the service secretaries to establish additional procedures consistent with UCMJ Article 6(a) and R.C.M. 109.

These changes to R.C.M. 109 are significant for several reasons. First, R.C.M. 109 recognizes TJAGS as exercising primary responsibility for the professional supervision and discipline of military trial and appellate military judges. Second, the change fulfills Congress's intent, as reflected in UCMJ Article 6(a). Third, the military's procedures for investigating complaints on judicial ethics will more closely emulate the procedures used in the civilian sector. Fourth, and perhaps most importantly, the changes enhance the integrity of, and the public's confidence in, the military justice system.

Pretrial Confinement Procedures

Change 6 amends three subsections to R.C.M. 305 pertaining to pretrial confinement. Subsection (f) was amended to provide that counsel must be furnished to a service member in pretrial confinement within seventy-two hours of the service member's request for counsel. The request for counsel must be communicated to military authorities to trigger the seventy-two-hour time requirement. The previous version of the rule did not specify any time limit.

The Analysis to subsection (f) explains that a specific time limit for compliance with a request for counsel was established because a service member may obtain credit for violations of R.C.M. 305.[21] Accordingly, the amendment to subsection (f) should facilitate the calculation of such credit.

Moreover, the amendment to subsection (f) strikes an appropriate balance between safeguarding the rights of confined service members and protecting legitimate government interests. The latter concern arises when, for example, a service member confined in a civilian facility asks for counsel but that request is not communicated to military authorities. In such a circumstance, sentencing credit should not necessarily be awarded. Rather, as the Analysis explains, the drafters envision that a failure to notify military authorities in a timely manner of a request for counsel should be tested for preju-

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[17] The Discussion advises that, to avoid the type of conflicts prohibited in Article 66(g), appellate military judges should not be investigated by other appellate judges of the same military court of review. MCM, *supra* note 1, R.C.M. 109(c)(5) discussion. Accordingly, the Discussion recommends that a former appellate military judge should be designated to conduct an investigation of these subjects. The investigating judge could also come from another service. *Id.*

[18] The rule defines "minor professional disciplinary action" as "counselling, or issuance of an oral or written admonition or reprimand." *Id.* R.C.M. 109(c)(5)(D) (C6, 21 Jan. 1994).

[19] Subsection (c)(7) pertains to ethics commissions. It provides that the commission shall consist of at least three members. If the subject is a trial judge, the rule instructs that the commission should include one or more military trial judges or individuals with experience as a military trial judge. Likewise, if the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Finally, subsection (c)(7) provides that members of the commission should, if practicable, be senior to the subject of the complaint. The duties of the commission will be determined by the appointing TJAG. *Id.* R.C.M. 109(c)(7) (C6, 21 Jan. 1994).

[20] As the Discussion explains, "The discretionary reassignment of military trial or appellate military judges to meet the needs of the service is not professional disciplinary action." *Id.* R.C.M. 109(c)(6)(b) discussion (C6, 21 Jan. 1994).

[21] *See id.* R.C.M. 305(k); United States v. Chapman, 26 M.J. 515 (A.C.M.R. 1988), *pet. denied*, 27 M.J. 404 (C.M.A. 1989). Rule for Courts-Martial 305 may require further amendment as a result of the COMA's decision in United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993). *Rexroat* held that an initial probable cause review of pretrial confinement must be conducted within 48 hours as required by County of Riverside v. McLaughlin, 111 S. Ct. 1611 (1991). In *Rexroat* the COMA also held that any neutral and detached official may conduct this probable cause review. The JSC is considering several proposed changes to R.C.M. 305; change 6, however, is not per se inconsistent with *Rexroat.*

dice.[22] The Analysis also notes, however, that procedures should be established for communicating such requests to military authorities in a timely fashion.

Subsection (h)(2)(A) was amended to clarify that a prisoner's commander is required to conduct a timely review of the circumstances of a prisoner's pretrial confinement in two distinct situations. First, when the commander orders a prisoner into pretrial confinement, the commander must review that decision within seventy-two hours and decide whether the confinement will continue. Second, when some other authority orders a prisoner into pretrial confinement, a commander has seventy-two hours on receipt of a report that the prisoner has been confined to decide whether the confinement will continue.[23]

Subsection (i)(1) was amended to limit the requirement for review of pretrial confinement by a military judge or magistrate to those situations where the prisoner was confined "under military control."[24] Pursuant to amended subsection (i)(1), this review must take place within seven days of the imposition of such confinement. Subsection (i)(1) cautions, however, that "[i]f the prisoner was apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion."[25]

Finally, subsection (i)(1) was amended to clarify the method for calculating the total number of days of pretrial confinement. The subsection instructs that the initial date of confinement and the date of the review shall each count as one day.

Court-Martial Procedures Generally

Change 6 contains four amendments to court-martial procedures. Rule for Courts-Martial 405(i) and MRE 1101(d) were amended so that MRE 412, commonly referred to as the "rape shield law,"[26] applies to pretrial investigations conducted pursuant to UCMJ Article 32.[27] The Analysis to MRE 412 reflects that this amendment is consistent with Congress's intent to "protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial."[28]

Rule for Courts-Martial 701(g)(3)(C) was amended to authorize the exclusion of witnesses, including defense witnesses, for a willful violation of discovery rules.[29] The corresponding Discussion cautions that the use of this sanction to exclude defense witnesses is limited to situations where the violation was "willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony."[30] The Discussion further instructs that defense witnesses may be excluded, even in these circumstances, only if alternative sanctions would be inadequate for minimizing prejudice to the government. The Discussion concludes that

> Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process, (2) the interest in the fair and efficient administration of military justice, and (3) the potential prejudice to the truth-determining function of the trial process.[31]

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[22] *See* UCMJ art. 59 (1988). Prejudice could be found whenever an accused is held for any length of time without bail for the benefit of the military, regardless of who is responsible for failing to communicate the request for counsel.

[23] MCM, *supra* note 1, R.C.M. 305(h)(2)(A) analysis, app. 21 (C6, 21 Jan. 1994).

[24] *Id.* R.C.M. 305(i)(1) analysis, app. 21 (C6, 21 Jan. 1994).

[25] *Id.* The Analysis to R.C.M. 305(i)(1) illustrates the intended effect of the amendment to this subsection with the following example:

> [I]f the prisoner was apprehended and is being held by civilian authorities as a military deserter in another state from where the prisoner's unit is located and it takes three days to transfer the prisoner to an appropriate confinement facility, the seven day period under this rule would not begin to run until the date of the prisoner's transfer to military authorities. Any unreasonable period of time that it may take to bring a prisoner under military control should be tested for prejudice under Article 59, U.C.M.J., and should not be considered as invoking the credit provisions of subsection (k) of this rule absent evidence of bad faith by military authorities in utilizing civilian custody. *But see* United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989). However, any time spent in civilian custody at the request of military authorities would be subject to pretrial confinement credit mandated by United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

Id.

[26] Despite the reference to "rape," MRE 412 applies to all nonconsensual sex offenses. *See generally* United States v. Vega, 27 M.J. 744 (A.C.M.R. 1988) (rape shield rule also applies to offenses such as carnal knowledge, even though lack of consent is not an element of that crime).

[27] Case law already had applied the "rape shield law" to presentencing. *See* United States v. Fox, 24 M.J. 110 (C.M.A. 1987).

[28] MCM, *supra* note 1, MIL. R. EVID. 412 analysis, app. 22 (C6, 21 Jan. 1994) (referring to Federal Rule of Evidence 412 (citing Criminal Justice Subcommittee of the House Judiciary Committee Report, 94th Cong., 2d Sess., July 1976)).

[29] MCM, *supra* note 1, R.C.M. 701(g)(3)(C) (C6, 21 Jan. 1994). The Analysis to R.C.M. 701(g)(3)(C) explains that the amendment was based on Taylor v. Illinois, 484 U.S. 400 (1988) *id.* analysis; *see also* Chappee v. Commonwealth of Massachusetts, 659 F. Supp. 1220 (Mass. Dist. Ct. 1988).

[30] MCM, *supra* note 1, R.C.M. 701(g)(3) discussion.

[31] *Id.*

Rule for Courts-Martial 704(e) was amended to require that the military judge consider the government's interest in not granting immunity before ruling on a defense request for immunity. The corresponding Analysis reflects that the amendment makes military procedures for granting immunity for defense witnesses consistent with the majority federal rule in civilian courts[32] and conforms the rule to military case law.[33] The Analysis reiterates that a military judge is not empowered to immunize a witness; the judge only may abate the proceedings for the affected offenses unless the convening authority grants immunity.[34]

Rule for Courts-Martial 920(b) was amended to permit the military judge to give instructions on findings before argument, after argument, or both. The amendment conforms military procedures to the current federal civilian practice.[35] As the Analysis explains, this change facilitates the use of the judge's instructions by the parties during argument.[36] The corresponding Discussion emphasizes, however, that the timing of instructions is a matter solely within the discretion of the military judge.

Simplification of Courts-Martial

Three amendments contained in Change 6 help simplify the courts-martial process. Rule for Courts-Martial 910(a)(1) was amended to remove the need for pleading guilty to a lesser-included offense by exceptions and substitutions.[37] The rule now permits a plea of "not guilty to an offense as charged, but guilty of a named lesser included offense." The corresponding Discussion advises that when such a plea is entered, "the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit."[38]

A related amendment to R.C.M. 918(a)(1) allows findings of guilty to be entered to a named lesser included offense. Thus, the necessity for making findings by exceptions and substitutions likewise has been eliminated. This rule applies both to contested and guilty plea cases.

As the Analysis of the amendment to R.C.M. 918(a)(1) reflects, these changes help conform military pleadings practice to that used in trials before federal district courts.[39] The Analysis also explains, however, that the "practice of using exceptions and substitutions is retained for those cases in which the military judge or court members must conform the findings to the evidence actually presented."[40]

Rule for Courts-Martial 1103(g)(1)(A) was amended to eliminate the requirement to make four copies of verbatim records of trial for courts-martial not subject to review by a court of military review. The rule now requires that only *one* copy of the original need be made. The corresponding Analysis explains that "[t]hese cases are reviewed in the Office of the Judge Advocate General under Article 69 [UCMJ] and four copies are ordinarily not necessary."[41]

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[32] *Id.* R.C.M. 704(e) analysis, app. 21 (C6, 21 Jan. 1994) (citing United States v. Burns, 684 F.2d 1066 (2d Cir. 1982), *cert. denied,* 459 U.S. 1174 (1983); United States v. Shandell, 800 F.2d 322 (2d Cir. 1986); United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied,* 449 U.S. 1077 (1981); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982), *cert. denied,* 459 U.S. 825 (1982); United States v. Pennell, 737 F.2d 521 (5th Cir. 1984); United States v. Taylor, 728 F.2d 930 (7th Cir. 1984); United States v. Brutzman, 731 F.2d 1449 (9th Cir. 1984); McGee v. Crist, 739 F.2d 505 (10th Cir. 1984); United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986)). The Analysis explains that

> The majority rule recognizes that an accused has no Sixth Amendment right to immunized testimony of defense witnesses and, absent prosecutorial misconduct which is intended to disrupt the judicial fact-finding process, an accused is not denied Fifth Amendment due process by the Government's failure to immunize a witness. If the military judge finds that the witness is a target for prosecution, there can be no claim of government overreaching or discrimination.

MCM, *supra* note 1, R.C.M. 704(e) analysis, app. 21 (C6, 21 Jan. 1994).

[33] MCM, *supra* note 1, R.C.M. 704(e) analysis, app. 21 (C6, 21 Jan. 1994) (citing United States v. Smith, 17 M.J. 994, 996 (A.C.M.R.), *pet. denied,* 19 M.J. 71 (C.M.A. 1984); United States v. O'Bryan, 16 M.J. 775 (A.F.C.M.R. 1983), *pet. denied,* 18 M.J. 16 (C.M.A. 1984)).

[34] *See* MCM, *supra* note 1, R.C.M. 704(e) analysis, app. 21 (C6, 21 Jan. 1994).

[35] *See id.* R.C.M. 920(b) analysis, app. 21 (citing 1987 amendments to FED. R. CRIM. P. 30).

[36] MCM, *supra* note 1, R.C.M. 920(b) analysis, app. 21 (citing United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979); United States v. Pendry, 29 M.J. 694 (A.C.M.R. 1989)).

[37] MCM, *supra* note 1, R.C.M. 910(e)(1) analysis, app. 21 (C6, 21 Jan. 1994).

[38] *Id.* R.C.M. 910(e)(1) discussion (C6, 21 Jan. 1994). "Of course, a plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged." *Id.*

[39] *Id.* R.C.M. 918(a)(1) analysis, app. 21 (C6, 21 Jan. 1994) (citing FED. R. CRIM. P. 31(c); E. DEVITT & C. BLACKMAN, FEDERAL JURY PRACTICE AND INSTRUCTIONS sec. 18.07 (1977)).

[40] MCM, *supra* note 1, R.C.M. 918(a)(1) analysis, app. 21 (C6, 21 Jan. 1994). The Analysis to R.C.M. 918(a)(1) illustrates this situation with the example of "a larceny case in which the finding is that the accused stole several of the items alleged in the specification but not others." *Id.*

[41] *Id.* R.C.M. 1103(g)(1)(A) analysis, app. 21 (C6, 21 Jan. 1994).

Military Rules of Evidence

Change 6 contains three important changes to the Military Rules of Evidence. Military Rule of Evidence 311(e)(2) was amended to recognize an additional exception to the exclusionary rule pertaining to statements given by a suspect. The added language provides

> Notwithstanding other provisions of this Rule, an apprehension made in a dwelling in a manner that violates R.C.M. 302(d)(2) &(e) does not preclude the admission into evidence of a statement of an individual apprehended provided (1) that the apprehension was based on probable cause, (2) that the statement was made subsequent to the apprehension at a location outside the dwelling, and (3) that the statement was otherwise in compliance with these rules.[42]

The corresponding Analysis explains that the amendment incorporates the recent Supreme Court holding in *New York v. Harris*.[43] As the Analysis to amended MRE 311(e)(7) explains, "The purpose behind the exclusion of derivative evidence found during the course of an unlawful apprehension in a dwelling is to protect the physical integrity of the dwelling [and is] not to protect suspects from subsequent lawful police interrogation."[44] The rule recognizes, however, that a later statement made outside the home would be inadmissible if the apprehension was not predicated on probable cause.

Several significant changes to MRE 505 relate to the procedures for dealing with classified information. Subsection (a) was amended to clarify that the procedures pertaining to classified materials apply to all stages of the trial. In this regard, the Analysis expressly instructs that this rule, like other rules pertaining to privileges found in Section V, is not relaxed during presentencing.[45]

Military Rule of Evidence 505(g)(1)(D) was amended to require the cooperation of all persons requiring security clearances, including defense counsel, in investigations necessary to obtain such clearances. The amendment recognizes that the military judge has authority to require such cooperation from those involved in both the preparation and the conduct of the trial.[46]

Military Rule of Evidence 505(h)(3) was amended to require greater specificity in describing classified material which is expected to be introduced at trial. The rule provides that the description must be "more than a mere general statement of the areas about which evidence may be introduced," and requires the accused to "state, with particularity, which items of classified information he reasonably expects will be revealed by his defense."[47] Again, the amendment helps conform military practice to its federal civilian counterpart.[48]

Military Rule of Evidence 505(i)(3) was amended to clarify that the pertinent classified information and the government's affidavit—the prerequisites for an in camera proceeding—are to be submitted to the military judge only.[49] The rule expects that the military judge will examine the information and the affidavit without disclosing their contents when deciding whether to hold an in camera proceeding.

Military Rule of Evidence 505(i)(4)(B) was amended to include a standard for admitting classified information at presentencing. The rule now provides that "[i]n presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available."[50]

Military Rule of Evidence 505(j)(5) was amended to provide that the military judge's authority to exclude the public during the presentation of classified information is not dependent on the source of the information. The rule previously

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[42] *Id.* MIL. R. EVID. 311(e)(2) (C6, 21 Jan. 1994).

[43] 110 S. Ct. 1640 (1990). In *Harris,* the police had probable cause to believe that the defendant had murdered his girlfriend. They made a warrantless arrest of the defendant at his home for this offense. The defendant gave incriminating statements at his home and later at the police station. The Supreme Court held that although the defendant's statements at his home must be suppressed because the arrest violated the Fourth Amendment, his subsequent statement at the station house was nonetheless admissible. In explaining its rationale, the Court emphasized that the defendant's illegal arrest was based on probable cause and his statement was not the "fruit" of the illegality.

[44] MCM, *supra* note 1, MIL. R. EVID. 311(e)(7) analysis, app. 22 (C6, 23 Dec.1993).

[45] *Id.* MIL. R. EVID. 505(a) analysis, app. 22 (C6, 21 Jan. 1994). *See generally id.* R.C.M. 1101(c).

[46] MCM, *supra* note 1, MIL. R. EVID. 505(g)(1)(D) analysis, app. 22 (C6, 21 Jan. 1994); *see generally* United States v. Pruner, 33 M.J. 272 (C.M.A. 1991) (approves of requirement that defense counsel comply with streamlined procedures for obtaining a security clearance in a court-martial involving classified information).

[47] MCM, *supra* note 1, MIL. R. EVID. 505(h)(3) (C6, 21 Jan. 1994).

[48] *See* United States v. Collins, 720 F.2d 1195 (11th Cir. 1983) (cited in the Analysis, Change 6, to MRE 505(h)).

[49] MCM, *supra* note 1, MIL. R. EVID. 505(i)(3) (C6, 21 Jan. 1994).

[50] *Id.* MIL. R. EVID. 505(i)(4)(B) (C6, 21 Jan. 1994).

suggested that the judge's authority was limited only to circumstances where the disclosure was the result of testimony.[51]

Finally, MRE 609(a), relating to impeachment by evidence of a conviction of a crime, was amended in two respects.[52] First, the amendment eliminates the previous requirement that evidence of a conviction used for impeachment be elicited during the cross-examination of the witness. Second, the amendment specifies that the special balancing test found in subsection (a)(1)—the so-called preponderance or "50/50" balancing test—applies only when the accused's conviction for offenses not involving *crimen falsi* are at issue. Otherwise, the general balancing test found in MRE 403[53] is used in determining the legal relevance of witnesses' convictions for such offenses.[54] Evidence of convictions involving *crimen falsi* always are admissible for impeachment purposes, regardless of whether they pertain to the accused or a witness.

The amendment to MRE 609(a) is based on a similar 1990 amendment to Federal Rule of Evidence 609(a). Minor changes to the federal rule were made to adapt the amendment to military practice.

Punishment and Definitions of Crimes

Change 6 contains several amendments to Part IV of the *Manual* pertaining to punishment and definitions of crimes. Paragraph 37, relating to drug offenses,[55] has been amended in three respects. First, a new subparagraph c(10), defining wrongful use of a controlled substance, has been added. This subparagraph provides that

> "Use" means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.[56]

The Analysis to this subparagraph reflects that the definition of use[57] and the validity of the permissive inference of knowledge[58] is based on recent decisional authority.

Second, a new subparagraph 37c(11), pertaining to deliberate ignorance, also has been added. It provides that "[a]n accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as one who has actual knowledge."[59] The Analysis reflects that this addition incorporates case authority, which holds that "when an accused deliberately avoids knowing the truth concerning a crucial fact (that is, presence or identity) and a high probability that the crucial fact exists, the accused is held accountable to the same extent as one who has actual knowledge."[60]

Third, subparagraph 37e has been amended to include an additional aggravating factor for drug offenses. Pursuant to

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[51] *Id.* MIL. R. EVID. 505(j)(5) (C6, 21 Jan. 1994). *See id.* analysis (citing United States v. Hershey, 20 M.J. 433 (C.M.A.), *cert. denied*, 474 U.S. 1062 (1985), for a discussion of the factors to be considered by the trial judge in determining whether to close the proceedings).

[52] MCM, *supra* note 1, MIL. R. EVID. 609(a) (C6, 21 Jan. 1994). Military Rule of Evidence 609(a) was amended as follows (additions are italicized):

> For the purpose of attacking the credibility of a witness, *(1)* evidence that *a* witness *other than the accused* has been convicted of a crime shall be admitted, *subject to Mil. R. Evid. 403,* if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and *evidence that an accused has been convicted of such a crime shall be admitted if* the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; *and* (2) *evidence that any witness has been convicted of a crime shall be admitted if it* involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

[53] *See id.* MIL. R. EVID. 403, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[54] *See id.* MIL. R. EVID. 609(a) analysis, app. 22 (C6, 21 Jan. 1994) (citing Green v. Bock Laundry Co., 109 S. Ct. 1981 (1989)).

[55] *Id.* pt. IV, ¶ 37 ("Article 112a—Wrongful use, possession, etc., of controlled substances").

[56] *Id.* pt. IV, ¶ 37c(10) (C6, 21 Jan. 1994).

[57] *Id.* pt. IV, ¶ 37c analysis, app. 21 (21 Jan. 1994) (citing United States v. Mance, 26 M.J. 244 (C.M.A. 1988); *see generally* TJAGSA Practice Note, *Defining "Knowing" Use of a Controlled Substance,* ARMY LAW., Mar. 1991, at 46.

[58] MCM, *supra* note 1, pt. IV, ¶ 37c analysis, app. 21 (citing United States v. Ford, 23 M.J. 231 (C.M.A. 1987); United States v. Harper, 22 M.J. 157 (C.M.A. 1986)).

[59] MCM, *supra* note 1, pt. IV, ¶ 37c(11) (C6, 21 Jan. 1994).

[60] *Id.* analysis.

this change, a service member convicted of a drug offense while "in a confinement facility used by or under the control of the armed forces" will be exposed to an additional five years confinement.[61] The government must plead and prove this aggravating factor beyond a reasonable doubt in order for the accused to face the enhanced punishment.[62]

Subparagraph 43d of Part IV was amended to delete attempted murder, voluntary manslaughter, and various types of assault requiring specific intent as being lesser included offenses of murder by an inherently dangerous act to another. The change recognizes that because "depraved heart" murder does not require a specific intent to kill, offenses requiring such an intent cannot logically be included therein.[63] The change conforms the *Manual* to military decisional authority.

Subparagraph 45d of Part IV was amended to include carnal knowledge as a lesser included offense of rape. The corresponding Analysis explains that this change conforms the *Manual* to case authority, inasmuch as "[c]arnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not attained the age of 16 years."[64]

Lastly, a new paragraph 96a was added, proscribing wrongful interference with an adverse administrative proceeding. Subparagraph c defines "adverse administrative proceeding" to include "any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification."[65]

The offense reaches the wrongful influencing, intimidation, impeding of, or interference with a witness, investigator, or other person acting on an administrative action. It also encompasses interfering with, or delaying the communication of, information relating to an administrative proceeding by bribery, intimidation, misrepresentation, force, or threat of force. Also included within the scope of the offense is the wrongful destruction or concealment of information relevant to administrative proceedings.[66]

The maximum punishment for wrongful interference with an administrative proceeding is a dishonorable discharge, total forfeitures, and confinement for five years.[67] No lesser-included offenses are enumerated.[68]

This offense is based on a federal statute and is necessary "given the increased number of administrative actions initiated in each service."[69] The newly recognized crime is roughly analogous to the enumerated article 134 obstruction of justice offense, except that it reaches conduct related to administrative rather than criminal proceedings.[70]

Conclusion

The *Manual* is an evolving resource. Changes 7 and 8 (fiscal years 1991 and 1992 annual reviews) are presently being staffed by the Department of Defense General Counsel and the President's Office of Management and Budget. Additionally, the JSC is working on Change 9. Change 6 and recent legislative (UCMJ) changes have been incorporated into the *Manual* scheduled for publication in 1994. The reprinted *Manual* will be a single, soft-bound volume and will be republished annually or as changes are required. The JSC reviewed and edited the first composition draft in February 1994.

As always, all interested persons are encouraged to submit comments or proposals on the UCMJ and the *Manual* to the Criminal Law Division, OTJAG, for possible referral to the JSC. The process of reviewing and amending the *Manual* is important; since 1984 a great many individuals have contributed to this work. Despite the unusual delays associated with Change 6, the current process has served the military legal community extremely well. Your shared ideas may have great value.

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[61] *Id.* pt. IV, ¶ 37e (C6, 21 Jan. 1994).

[62] *See generally* United States v. Lingenfelter, 30 M.J. 302 (C.M.A. 1990) (discusses pleading and proving so-called "aggravating elements").

[63] MCM, *supra* note 1, pt. IV, ¶ 43d (C6, 21 Jan. 1994) (Article 118(3) "intent to kill or inflict great bodily harm"). Effective October 23, 1992, Article 118(3) was amended to describe acts inherently dangerous to "another." 10 U.S.C. § 918(3), Pub. L. No. 102-484, § 1066(b), 106 Stat. 2506. *See generally* Milhizer, *Murder Without Intent: Depraved-Heart Murder Under Military Law,* 133 MIL. L. REV. 205, 207-12 (1991).

[64] MCM, *supra* note 1, pt. IV, ¶ 45d analysis, app. 21 (C6, 21 Jan. 1994).

[65] *Id.* pt IV, ¶ 96a (C6, 23 Dec. 1994).

[66] *Id.* pt. IV, ¶ 96a, c (C6, 21 Jan. 1994).

[67] *Id.* pt. IV, ¶ 96a, e (C6, 21 Jan. 1994).

[68] *Id.* pt. IV, ¶ 96a, d (C6, 21 Jan. 1994).

[69] *Id.* pt. IV, ¶ 96a analysis, app. 21 (C6, 21 Jan. 1994) (citing 18 U.S.C. § 1505).

[70] *Id.* (citing *id.*, ¶ 96, obstruction of justice).

United States v. Duncan: The United States Court of Military Appeals Frowns on "Retroactive" Pretrial Delays

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Introduction

In *United States v. Duncan*,[1] the United States Court of Military Appeals (COMA) recently upheld the dismissal of charges based on a violation of the speedy trial provisions of Rule for Courts-Martial (R.C.M.) 707.[2] In so doing, the COMA appears to have answered a question left hanging by the text of R.C.M. 707(c)[3]: whether a military judge may grant an after-the-fact request for a pretrial delay. The COMA's answer was no.

The Case of *United States v. Duncan*

Lieutenant Colonel Dale Duncan was assigned to a classified operation in the early 1980s. The mission involved the establishment of a civilian business as a "cover." While the operation was ongoing, another soldier assigned to the mission reported possible misappropriation of government funds by Duncan and others. The report led to criminal investigations by both Army authorities and federal law enforcement agents. Duncan eventually was prosecuted for several federal offenses in United States District Court. Duncan also was tried and convicted by general court-martial on related charges.[4]

In his military appeal, Duncan raised a number of issues related to the dual prosecution scheme. One of these issues was the affect of a lengthy pretrial delay on his right to a speedy trial. The delay stemmed from requests from the Department of Justice (DOJ) that Duncan's court-martial be postponed until completion of the separate federal prosecution.[5]

Duncan apparently was not informed of the requests at the time the government received them.[6] At trial Duncan contested the delay via a speedy trial motion. The judge made extensive findings attributing assorted delays to both sides.[7] The judge, nevertheless, ruled against Duncan after finding good cause for the DOJ and government delay.[8]

Duncan renewed his speedy trial claim before the Army Court of Military Review (ACMR). He argued that a delay of 303 days with respect to the original charges, and 176 days for the additional charges, violated the 120 day mandate of R.C.M. 707.[9] The ACMR agreed and dismissed the affected charges.[10]

The government appealed the dismissal, asserting that the delay facilitating the federal prosecution was a delay for good cause[11] and thus excludable from speedy trial accountability.[12]

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[1] 38 M.J. 476 (C.M.A. 1993).

[2] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 707 (C5, 15 Nov. 1991) [hereinafter MCM].

[3] *Id.* R.C.M. 707(c) (C5, 15 Nov. 1991).

[4] *Duncan*, 38 M.J. at 477.

[5] United States v. Duncan, 34 M.J. 1232, 1242-45 (A.C.M.R. 1992).

[6] *Duncan*, 38 M.J. at 479. The COMA observed that the government did not establish when, or if, the convening authority reviewed the requests. The opinion of the Army Court of Military Review contains a statement from one of the trial counsel that the convening authority acted on the requests. *Duncan*, 34 M.J. at 1238.

[7] *Duncan*, 34 M.J. at 1232, 1236 n.14.

[8] *Id.* at 1237.

[9] *Id.* at 1245.

[10] *Id.*

[11] When Duncan was tried, R.C.M. 707(c)(8) allowed the exclusion of "Any . . . period of delay for good cause, including unusual operational requirements and military exigencies." This provision subsequently was renumbered as R.C.M. 707(c)(9). MCM, *supra* note 2, R.C.M. 707 (C3, 1 June 1987). The current version is R.C.M. 707(c) (C5, 15 Nov. 1991).

[12] United States v. Duncan, 38 M.J. 476, 479 (C.M.A. 1993).

Senior Judge Everett,[13] joined by Chief Judge Sullivan and Judge Wiss, expressed "many doubts about this proposition" as it related to Duncan's case.[14] The COMA acknowledged, however, that circumstances often may warrant delay while related matters are pending in a separate court.[15]

The COMA, nevertheless, placed an important condition on such "related proceeding delays," holding that "absent extraordinary circumstances . . . a delay for this reason is exclud[a]ble on grounds of 'good cause' only when the accused is informed at the time of the purported reason and given some opportunity to contest the decision."[16]

The COMA based its holding, in part, on *United States v. Lattany*,[17] a federal case interpreting the Speedy Trial Act.[18] *Lattany* involved an "ends of justice" delay.[19] Such delays are excludable from the federal seventy-day speedy trial clock if the trial court "sets forth, in the record . . . its reasons for finding that the [delay is warranted]."[20] Although the trial court in *Lattany* granted a defense delay, it did not enter specific findings supporting the delay until after the delay took place. The Court of Appeals found that the delay was excludable in spite of the delayed findings[21]

Although the government cited *Lattany* in support of its position before the COMA,[22] Judge Everett ultimately interpreted the case in Duncan's favor. Judge Everett noted that the *Lattany* court said that "a district court cannot provide an after-the-fact justification for unauthorized delays by granting an ends-of-justice continuance *nunc pro tunc*."[23] What *Lattany* meant to the COMA was that "a court must rule, with notice to the defense, that a delay is necessary; but the judge, if he decides that a delay . . . is justified, may specify at a later time the circumstances that constitute the justification."[24]

As to Duncan, the COMA noted that the government did not afford him an opportunity to respond to the delay when it was proposed. Had the government done so, the COMA said, Duncan could have contested the existence of "good cause." The parties also would have had an opportunity to create an appropriate record on the issue for later appellate use. Because of this failure, and the extended delays in question, the COMA upheld dismissal of the charges.[25]

Although it might be tempting to regard *Duncan* as limited to its rather unique dual prosecution scenario, the discerning practitioner can recognize broader implications. Specifically, the case should shape counsel's approach to all pretrial delays. The only sound practice is to seek prospective approval of all delays, with notice to one's opponent and an opportunity for the opponent to be heard. A brief review of the history of the law governing delays is necessary to appreciate this point.

Historical Analysis

Rule for Courts-Martial 707(c) contains the black letter law on pretrial delays 707(c).[26] Prior to Change 5 to the *Manual for Courts-Martial (Manual)*,[27] the rule included a series of

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[13] Although former Chief Judge Everett has retired from the court, he did sit in this case, apparently in the place of Judge Crawford, who did not participate. *Id.* at 480.

[14] *Id.* at 479.

[15] *Id.* at 480.

[16] *Id.*

[17] 982 F.2d 866 (3d Cir. 1992).

[18] 18 U.S.C. §§ 3161-3174 (1988).

[19] *Id.* § 3161(h)(8) allows a judge to grant delays "on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."

[20] *Id.*

[21] *Lattany*, 982 F.2d at 879.

[22] United States v. Duncan, 38 M.J. 476, 480 (C.M.A. 1993). Not evident from the opinion is how *Lattany* supported the government's position.

[23] *Id.* at 480 (citing *Lattany*, 982 F.2d at 877).

[24] *Duncan*, 38 M.J. at 480.

[25] *Id.*

[26] MCM, *supra* note 2, R.C.M. 707(c) (C5, 15 Nov. 1991).

[27] Exec. Order No. 12,767, 56 Fed. Reg. 30284 (1991).

"pigeon holes."[28] These pigeon holes were categorical exclusions of time from the 120-day speedy trial clock. Examples were the time required to examine the mental capacity of an accused[29] and the "other period of delay for good cause"[30] provision at issue in *Duncan.*

In practice, the categorical approach led to much postdelay litigation with parties striving to prove who put which pigeon into what hole. The COMA, apparently tiring of these contests, eventually extended an invitation to the services to quiet the frenzy in the pigeon loft. A series of cases from the last two decades records the COMA's efforts to impose a more ordered approach on pretrial delay methodology.

As early as 1976, in *United States v. Schilf,*[31] a case decided prior to the adoption of the R.C.M., the court expressed its preferred practice as follows:

> We believe that many of the problems involved in attributing pretrial delays will be ameliorated if all such requests for delay, together with the reasons therefor, were acted upon by the convening authority prior to referral of charges to a court-martial, or by the trial judge after such referral, rather than for them to be the subject of negotiation and agreement between opposing counsel. This procedural requirement will establish as a matter of record who requested what delay and for what reason.[32]

The COMA revisited the issue nine years later in *United States v. Burris.*[33] In *Burris*, the defense counsel submitted an ambiguous docketing notice to the trial judge's clerk.[34] The issue became whether the notice constituted a defense requested delay and thus tolled the speedy trial clock. The relevant rule at the time was R.C.M. 707(c)(3),[35] which excluded delays "granted at the request or with the consent of the defense." Although the COMA ultimately held in favor of the defense, it indicated that the outcome could have been different if the parties had followed the rule suggested in *Schilf* and built an appropriate record by affirmatively addressing the issue of delay[36]

United States v. Carlisle[37] demonstrated how the COMA's frustration grew in the face of continued disregard of its invitations to reform the approach to delays. The "old" R.C.M. 707(c)(3)[38] was once more in issue, this time due to an implicit defense request for a delay during the Article 32[39] investigation. Judge Cox authored the lead opinion and in unusually harsh terms wrote:

> [I]t appears that some [practitioners] regard R.C.M. 707 as though it were a numbers game—where days are just added and subtracted, a day or two here or there, quibbling about this or that, blaming trial or defense counsel, deciding later if the rule has been honored or broken. Implementing speedy trial rules in such a cavalier manner was never intended and is improper; it simply will not be tolerated. . . . In our judgement, each day that an accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority or the military judge, in writing or on the record.[40]

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[28] *See* MCM, *supra* note 2, R.C.M. 707(c), *changed by* R.C.M. 707(c) (C5, 15 Nov. 1991).

[29] *Id.* R.C.M. 707(c)(1)(A), *changed by* R.C.M. 707(c) (C5, 15 Nov. 1991).

[30] *Id.* R.C.M. 707(c)(9) (C3, 1 June 1987) (current version is R.C.M. 707(c) (C5, 15 Nov. 1991)).

[31] 1 M.J. 251 (C.M.A. 1976).

[32] *Id.* at 253.

[33] 21 M.J. 140 (C.M.A. 1985).

[34] *Id.* at 144.

[35] MCM, *supra* note 2, R.C.M. 707(c)(3), *changed by* R.C.M. 707(c) (C5, 15 Nov. 1991).

[36] *Burris*, 21 M.J. at 145.

[37] 25 M.J. 426 (C.M.A. 1988).

[38] MCM, *supra* note 2, R.C.M. 707(c)(3), *changed by* R.C.M. 707(c) (C5, 15 Nov. 1991).

[39] UCMJ art. 32 (1988).

[40] *Carlisle*, 25 M.J. at 426.

The COMA moderated its tone in *United States v. Maresca*,[41] because the government appeared to get the message. In *Maresca*, the trial counsel made a formal motion for a thirteen-day pretrial delay because two government witnesses would not be available during that period. The military judge granted the motion based on R.C.M. 707(c)(5).[42] At the time, this rule allowed government delays in order to continue good faith efforts to secure evidence not currently available. Maresca contested the judge's ruling on appeal. The COMA, after again reiterating the rule advocated in *Schilf*, said:

> Although we have urged that this prospective practice be followed, the services have not chosen to adopt this simple procedural rule. . . . Instead, R.C.M. 707 catalogs a set of principles to be applied after-the-fact to determine accountability for various events. Further, the rule has either been amended or changes have been proposed to respond to almost every ruling made by a court which seemed to go against the Government.[43]

The COMA further noted, however, that even in the absence of a general rule, the trial counsel had made a timely, prospective request for a delay. The defense had been given an opportunity to respond in an adversarial setting. The judge had made findings after the hearing and granted the delay. The COMA found that the record supported the trial judge's decision. Maresca received no relief.[44]

In *United States v. Longhoffer*,[45] the COMA rendered one of its last comprehensive expositions of R.C.M. 707 prior to Change 5. Although the decision actually breathed new vitality into many of the provisions of the rule,[46] the COMA also suggested that its simpler approach still had appeal. While addressing the issue of requests for delays by either side, the COMA explained:

> The primary purpose for written requests for delay or for motions on the record of the Article 32 investigation or Article 39(a) . . . . sessions is to memorialize and litigate questions of delay contemporaneous with the event and to avoid the salvage operation required of military judges and appellate courts faced with trying to allocate periods of delay long after the event occurred.[47]

Schilf, Burris, Carlisle, Maresca, and *Longhoffer* reveal the COMA's unmistakable preference for an exclusively prospective approach to granting and attributing pretrial delays. The COMA's long crusade for simplification finally bore fruit with Change 5 to the *Manual.*

Change 5 to the *Manual for Courts-Martial*

Change 5 virtually rewrote R.C.M. 707. The drafters based their changes to R.C.M. 707(c) in large measure on the cases just reviewed.[48] The changes represented an express adoption of the position advocated by the COMA since *Schilf.* The drafters eliminated the several pigeon hole categories of the old rule. They substituted a general rule of delays based on good cause. Rule for Courts-Martial 707(c)[49] now simply excludes pretrial delays approved by either the convening authority[50] (prior to referral) or the military judge (after referral) from the 120 day clock of R.C.M. 707(a).[51]

Although the drafters deleted the categorical exclusions from the text of the rule, they live on in another guise. Most can now be found in the discussion to R.C.M. 707[52]—listed as examples of good cause which may warrant a delay.

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[41] 28 M.J. 328 (C.M.A. 1989).

[42] MCM, *supra*, note 2, R.C.M. 707(c)(5), *changed by* R.C.M. 707(c) (C5, 15 Nov. 1991).

[43] *Maresca*, 28 M.J. at 333 (citations omitted).

[44] *Id.*

[45] 29 M.J. 22 (C.M.A. 1989). Ironically, Colonel Longhoffer was another officer implicated in the same misconduct as Lieutenant Colonel Duncan.

[46] For instance, the COMA indicated that the former R.C.M. 707(c)(9) would relieve the government from accountability for delays stemming from "good cause, including unusual operational requirements and military exigencies" even where the government did not prospectively request or litigate the delay. *Id.* at 22. This was an interesting concession given Judge Cox's blunt admonition in *Carlisle.*

[47] *Id.* at 28.

[48] MCM, *supra* note 2, R.C.M. 707(c) analysis, app. 21 (C5, 15 Nov. 1991).

[49] *Id.* R.C.M. 707(c) (C5, 15 Nov. 1991).

[50] The discussion to R.C.M. 707(c)(1) states that a convening authority may delegate authority to grant delays to an Article 32 investigating officer. *Id.* R.C.M. 707(c)(1) discussion (C5, 15 Nov. 1991).

[51] *Id.* R.C.M. 707(a) (C5, 15 Nov. 1991).

[52] *Id.* R.C.M. 707(c)(1) discussion (C5, 15 Nov. 1991).

The text of the "new" R.C.M. 707(c) did not expressly prohibit a convening authority or military judge from granting "retroactive" delays. When considered in their historical context, however, the significance of the changes to R.C.M. 707(c) was to mandate a *prospective* approach to all pretrial delays. The idea was to have the parties[53] demonstrate good cause, or lack thereof, based on contemporaneous evidence,[54] before a competent authority could authorize (and attribute) a continuance.

Conclusion

The COMA did not base its decision in *United States v. Duncan*[55] on the current version of R.C.M. 707. The case is perfectly consistent, however, with the historical bases for the current rule. The case is a solid indication to all practitioners that the days of ex post facto attribution of pretrial delays are past.

Duncan should leave no doubt as to how to approach pretrial delays. If counsel recognize good cause for delay, counsel should take immediate steps to request a delay from either the convening authority or the military judge, depending on the stage of the case. Counsel should give notice to the opposing side and allow a response. The parties then should litigate the matter by resort to contemporary evidence related to the delay. After receiving input from both sides, the judge (or convening authority) must decide whether a delay is warranted. The judge may, if he or she chooses, postpone memorializing the bases of the decision. Reason suggests, however, that contemporaneous findings would be a better practice.

Duncan stands for the proposition that judges may not grant after-the-fact requests for delay. Counsel should, therefore, not request such delays. After *Duncan*, practitioners will do well to seek prospective approval of all future delays.[56]

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[53] *Id.* R.C.M. 707(c) (C5, 15 Nov. 1991). The discussion to this provision indicates that delays should not be granted ex parte.

[54] *Id.* The discussion suggests that delays "should be based on the facts and circumstances then and there existing."

[55] 38 M.J. 476 (C.M.A. 1993).

[56] At least one exception to this general rule exists. In United States v. Powell, 38 M.J. 153 (C.M.A. 1993), the COMA held that R.C.M. 707 time does not run when an accused is beyond government control due to his own misconduct. Under such conditions it is physically impossible to try an accused. No advance delay is necessary to toll the speedy trial clock. Indeed, it would be ludicrous to require the government to request a delay to accommodate an accused's intention to absent himself. *Powell*, to a degree, has revived the categorical exclusion available under the former R.C.M. 707(c)(6): "Any period of delay resulting from the absence or unavailability of the accused." The ACMR reached a similar result in United States v. Youngberg, 38 M.J. 635 (A.C.M.R. 1993). Foreign authorities held Youngberg in custody pending their decision of whether to prosecute him for murder. The ACMR held that the R.C.M. 707 clock did not begin to run until the host nation released jurisdiction to military authorities.

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin (Bulletin)*, designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 1, number 6) is reproduced below:

Clean Air Act (CAA)

Federal Air Toxic Permit Program

Under Title V of the CAA, each state must establish an Environmental Protection Agency (EPA) approved Title V operating permit program.[1] The EPA is expected to approve

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[1] 40 C.F.R. pt. 70 (1993).

most state programs in late 1994 and 1995. As a result, virtually all Army installations will have to obtain a Title V operating permit. Additionally, on EPA approval of a state's Title V program, the Federal Air Toxic Permit Program takes effect in that state. The latter program will require a separate permit for the construction of new, or modification to, major sources of hazardous air pollutants (HAP).[2] The EPA is expected to propose a rule implementing the CAA § 112(g) requirements this spring. Thus, in addition to the burdensome CAA Title V operating permit requirements, the CAA § 112(g) permit program will impose major new requirements on many Army activities, warranting advance planning and analysis. Although no federal permit requirement for constructing or modifying major HAP sources currently exists, various state programs do exist. Because of the very low threshold for "major sources" of HAPs (the "*potential to emit*" ten tons per year (TPY) of one HAP or twenty-five TPY of any combination of HAPs), many Army activities will be "major sources," as defined in CAA § 112(a)(1).[3] Section 112(b) of the CAA lists 189 HAPs, that is, asbestos, chlorine, benzene, toluene, and mercury compounds.[4] Sources of HAPs on an installation include landfills, motorpools, fuel storage areas, and gasoline stations.

Under the § 112(g) program, the construction or modification of a major HAP source must meet the "maximum achievable control technology" (MACT) emission limitations. For new HAP sources, this will mean meeting the emission limitations achieved in practice by the best controlled similar source in the nation.[5] Existing sources must meet the average emission limitations achieved by the best performing twelve percent of existing sources or, if only thirty or less sources are within the source category, the best performing five sources. If the EPA has not promulgated MACT standards applicable to the source, the MACT standard must be determined on a case-by-case basis. In practice, in the absence of an EPA promulgated MACT, installations will have to develop and propose the MACT standard for state review and approval.

Many Army installations will meet the definition of a "major source" of HAPs under CAA § 112(a)(1). Consequently, modifications (physical changes and changes in methods of operations) on an installation that increase the "*actual emissions*" of any hazardous air pollutant by more than a "de minimis amount" (to be defined by the EPA or the states) will require a federal permit and must meet the applicable MACT standard. Developing, if necessary, and implementing MACT standards will increase the cost of many Army activities. Moreover, once issued, the terms of a CAA § 112(g) permit must be incorporated into the installation's Title V operating permit. Until the Title V permit is amended, the activity cannot begin operation. Consequently, because of the anticipated procedural difficulties in amending Title V permits, installation activities could be delayed.

Conformity Determinations

Effective 31 January 1994, federal agencies must make conformity determinations, in accordance with the EPA's conformity rule,[6] for federal actions in nonattainment and maintenance areas (nonattainment areas that have reached attainment) for National Ambient Air Quality Standards (NAAQS).[7]

The Secretary of the Army has delegated the authority to sign conformity determinations to the Deputy Assistant Secretary for Environment, Safety, and Occupational Health. Conformity determinations for Army actions should be prepared separate from the National Environmental Policy Act documentation and forwarded to Headquarters, Department of the Army, (HQDA) for review and approval. If an installation determines that a conformity determination is not required under 40 C.F.R. part 93, that decision, along with the supporting rationale, should be fully documented. Headquarters, Department of the Army, is planning to issue more detailed guidance in the near future. Major Teller.

Environmental Legal Opinions

Recently a privileged legal opinion from an installation to the ELD was leaked to the press. Although leaks do occur, the opinion was not stamped or otherwise identified as privileged attorney-client advice or work product. The opinion included an analysis of environmental legal issues and liabilities that should not have been shared outside the federal government.

Frank analysis, dialogue, and field input in environmental litigation and policy decisions are a must. The field should ensure that all privileged memoranda, documents, and letters are stamped or identified as privileged. Examples of documents that need to be identified as privileged include litigation

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[2] 42 U.S.C. §§ 7401-7671 (1990).

[3] *Id.* § 7412(a)(1).

[4] *Id.* § 7412(b).

[5] *Id.* § 7412(d).

[6] 58 Fed. Reg. 63,214 (1993) (amending 40 C.F.R. pt. 93).

[7] *See* Environmental Law Div. Note, *The EPA's New Conformity Rule,* ARMY LAW., Mar. 1994, at 37 for an overview of the EPA's new conformity rule. The rule exempts certain actions from the conformity determination requirement.

settlement recommendations, documents generated or obtained in support of settlement negotiations, and legal analysis that supports significant Army policy decisions. Lieutenant Colonel Graham.

Water Rights

Documentation Requirements

Installations must aggressively assert and protect the posts' water rights. Adequate records are essential for this purpose. The post water law specialist should determine whether the post stores or, at least, has access to the following water rights documents:

(1) Court decrees, state water permits, or certificates for the water source;

(2) For reserved rights, the documents which created the reservation, such as executive orders, land acquisition documents, public land orders, and statutes;

(3) History of the water source's uses, to include the amounts, times, and places of use;

(4) Proof of diversions amounts, water production, well pump tests, meter readings, or calculations of the size of water bodies, such as lakes and reservoirs;

(5) Proof of dates of the application of water to particular uses (priority date information), such as plans, drawings, photographs, maps, even newspaper reports;

(6) Historical documents, records, and reports concerning the above items; and

(7) Any other information the specialist deems useful or necessary to adequately maintain and protect water rights.

The installation real property manager already may have much of the above information or may be able to obtain it from the servicing United States Army Corps of Engineers Real Estate Office. The ELD and the MACOM Environmental Law specialists are available to assist. Lieutenant Colonel Graham.

EPA Right-to-Know

The EPA has released draft guidance on implementing Executive Order 12,856 on Community Right-to-Know. The guidance is being distributed by HQDA through MACOM Environmental Law specialists. Mr. Nixon.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Notes

Proper Bid Verifications Shield Government from Contractor Mistake-in-Bid Claims

In its recent *Rex Systems, Inc.*[1] decision, the Armed Services Board of Contract Appeals (ASBCA) considered a contractor's claim for reformation of an Army contract based on a mistake in the contractor's price for circuit cards. The contractor sought reformation after discovering the mistake, alleging that the government failed to conduct a proper bid verification because it did not disclose the wide discrepancy between the contractor's price and the price of the next low offeror in the negotiated procurement. The ASBCA denied the claim, finding that, under the circumstances, the government had put the contractor on adequate notice of the suspected mistake, and that by verifying its offered price, the contractor had assumed the risk of a mistake in its offer. The

[1] ASBCA No. 45297, 93-3 BCA ¶ 26,155.

decision highlights the importance of conducting an adequate bid verification when a bid or offer suggests the possibility of a mistake. The decision also illustrates the difference between what constitutes an adequate bid verification in a sealed bidding procurement versus a negotiated acquisition.[2]

For a contractor to obtain relief based on a mistake in its bid discovered after the award of a contract, the mistake must have been a mutual one between the parties, or the mistake—if made unilaterally by the contractor—must have been so apparent in the contractor's offer as to charge the government with notice of a possible mistake.[3] If a contractor submits a mistaken bid, and the government is *not* put on constructive notice by the bid of a possible mistake, then government acceptance of the offer results in a valid contract, and the contractor is not entitled to relief for the mistake.[4] Likewise, an offeror's confirmation of its price after a proper government bid verification binds the offeror to the contract price.[5]

A significant price disparity between an offeror's price and other offerors' prices, or between an offeror's price and the government estimate, generally is sufficient to put the government on notice of a possible mistake.[6] If the government is on constructive notice of a possible mistake, the contracting officer must immediately request that the offeror verify its bid.[7]

The sealed bidding procedures prescribed in the *Federal Acquisition Regulations* provide for slightly different information to be conveyed to a possibly mistaken bidder than the negotiations procedures. In sealed bidding, if the contracting officers suspect an error in price, they should tell the bidders that the government suspects a mistake, and that "its bid is so much lower than the other bids or the Government estimate as to indicate a possibility of error . . . ."[8] When using negotiations procedures, the contracting officer must advise the offeror of the suspected mistake by "pointing out the suspected mistake or otherwise identifying the area of the proposal where the suspected mistake is . . . ."[9] The difference in the language of the two provisions stems from the inherent differences in the two procedures: in sealed bidding, all bids are revealed at the same time, so bidders should not be prejudiced from disclosure of their prices during a bid verification; whereas, in negotiations, contracting officers are prohibited from revealing an offeror's prices to a competitor.

Although the *Federal Acquisition Regulation* uses different language to describe the information that a contracting officer must disclose to a possibly mistaken bidder in conjunction with a bid verification in a negotiated procurement than in sealed bidding, in practice, the courts and boards historically have applied a similar test for a bid verification's adequacy. A proper bid verification, as a bare minimum, must advise an offeror that the government suspects a mistake.[10] Beyond the bare minimum, bid verifications must be as informative as possible concerning the factors indicating to a contracting officer that an offeror may have made a mistake in its bid.[11]

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[2]The term "bid verification" in the context of a negotiated procurement actually is a misnomer, because offerors in negotiated procurements submit price or cost proposals rather than sealed bids. However, the boards of appeals routinely refer to prices offered in negotiated procurements as "bids" as well. *See id.* Therefore, this note uses the term "bid verification" to refer to an agency's verification of an offered price in a negotiated acquisition as well as in sealed bidding.

[3]GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.406-4 (1 Apr. 1984) [hereinafter FAR]. Mistakes in a contractor's proposal that are not discovered until after the award of a negotiated contract are treated the same as mistakes in sealed bidding. *Id.* 15.1005. The relief available to a contractor in instances of bilateral mistakes, or in cases of unilateral mistakes obvious enough to put the government on constructive notice of a possible error, may include rescission of the contract or reformation of the contract price. *Id.* 14.406-4(b). A contractor must demonstrate the existence of a mistake by clear and convincing evidence to obtain relief from its mistake. *Id.* 14.406-4(c).

[4]Kitco, Inc., ASBCA No. 45347, 93-3 BCA ¶ 26,153; Mid-South Metals, Inc., ASBCA No. 44241, 93-2 BCA ¶ 25,675.

[5]Robert S. Davies, ASBCA No. 27334, 83-2 BCA ¶ 16,556 (a proper government bid verification provides an offeror the last clear chance to correct an erroneous bid; by verifying, a contractor assumes the risk of any error and is bound by the contract price).

[6]*Id.* (price 20% lower than government estimate and 42% below second low offer put government on notice of possible mistake); Samuel R. Clarke d/b/a Clark Enters., ASBCA No. 24306, 82-1 BCA ¶ 15,627 (government not only was on constructive notice of a mistake when the low bid was just 19% of the government estimate, but the attempted award at this price was unfair and overreaching on the part of the government); *cf.* Seiferth Contractors, Inc./Bricks, Inc., A Joint Venture, ASBCA No. 45424, 93-3 BCA ¶ 26,239 (bid that is 9.5% and 10.7% lower than the next two lower bids does *not* indicate an apparent mistake); P.J. Valves, Inc., ASBCA No. 91-3 BCA ¶ 24,251 (13% differential between low and next-low bids is *not* evidence of mistake).

[7]FAR 14.406-3(g); FAR 15.607(c)(1).

[8]*Id.* 14.406-3(g)(1)(i).

[9]*Id.* 15.607(c)(1).

[10]United States v. Metro Novelty Mfg. Co., 125 F. Supp. 713 (S.D.N.Y. 1954).

[11]United States v. Hamilton Enters., Inc. 711 F.2d 1038 (Fed. Cir. 1983); Klinger Constructors, Inc., ASBCA No. 41006, 91-3 BCA ¶ 24,218 (adequacy of a bid verification turns on the reasonableness of the contracting officer's disclosure); Manistique Tool & Mfg. Co., ASBCA No. 29164, 84-3 BCA ¶ 17,599 (contracting officer, as a minimum, must advise the offeror that the government suspects a mistake and describe the basis for his or her suspicions).

In its *Liebherr Crane Corp.*[12] decision, the ASBCA found unpersuasive a government argument that a bid verification in a negotiated procurement may reveal less to the low offeror about the suspected mistake than under sealed bidding procedures. The ASBCA concluded that the circumstances of a negotiated procurement do *not* prohibit

> advice to an offeror of the possibility of the existence of a mistake, together with the disclosure of the [disparity from the] Government estimate, and certainly no prejudice to the interests of other offerors could result from such limited disclosures. Even though a procurement by negotiations was involved, good faith dealing required this minimum disclosure.[13]

When conducting bid verifications in either type of procurement, contracting officers typically adhere to this guidance by advising offerors that their bids are possibly mistaken and explaining the bases for their suspicions.

In the procurement which resulted in the *Rex Systems, Inc.* appeal, however, the contracting officer merely advised the offeror (Rex Systems) that its prices might be in error, and requested Rex Systems to recheck its figures.[14] The contracting officer told Rex Systems to reply within the week,[15] if it intended to "confirm" its offer, and to provide written confirmation using specified language stating that the offeror had checked for mistakes, and found its offer to be correct as submitted.[16]

Rex Systems followed its standard company procedures in response to the contracting officer's notice; it reviewed its mathematical calculations and then confirmed its unit prices. Therefore, the government awarded Rex Systems a contract at its offered price. Several months later, Rex Systems notified the contracting officer that it had obtained an erroneous quotation from a subcontractor, and that it sought reformation of its contract through an increase in its unit prices by the amount of the subcontractor's error. The contracting officer issued a final decision denying the reformation request, and Rex Systems appealed. The contractor argued on appeal that "the contracting officer was obligated to inform appellant of information indicating the potential mistake, such as the large discrepancy between appellant's bid and the bids of all other bidders. The contracting officer failed to do this, thereby failing to give appellant the required notice."[17]

The government acknowledged on appeal that it had not informed Rex Systems in conjunction with its bid verification of the significant difference between its unit prices and those of the next low offeror.[18] Despite the government's failure to disclose the price differential, however, the ASBCA denied the appeal. The board did so on three grounds: first, under the circumstances of the case, notice of the differential between Rex Systems's prices and the prices of the next low offeror would not have helped identify the source of the mistake;[19] second, no specific regulatory requirement exists mandating disclosure of price differentials when verifying prices in negotiated procurements;[20] and third, negotiations procedures prohibit disclosure to an offeror of information from competitors' proposals.[21]

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[12] ASBCA No. 24707, 85-3 BCA ¶ 18,353, *aff'd* 810 F.2d 1153 (Fed. Cir. 1987).

[13] *Id.* at 92,068.

[14] ASBCA No. 45297, 93-3 BCA ¶ 26,155, 130,023.

[15] The board did not discuss the time allowed for the offeror to verify its prices, apparently concluding that the allotted time was adequate. Failure to provide an offeror with sufficient time in which to verify its prices may preclude the government from enforcing a contract awarded at the mistaken price, however, even if the contractor confirms it. *See* Bremen Enters., GSBCA No. 5733, 80-2 BCA ¶ 14,755.

[16] 93-3 BCA ¶ 26,155 at 130,023. The "confirmation" language required of the offeror, if it verified its bid as initially submitted, stated:

> I have reviewed the engineering data furnished . . . and found that it is complete and legible and I fully understand the engineering requirements of the proposed purchase and comply therewith. At the request of the Contracting Officer, I have carefully reviewed all the elements of my offered price for a possible mistake and hereby confirm that the unit price of $979.00 . . . is correct as submitted.

Id.

[17] *Id.* at 130,025.

[18] *Id.* Rex Systems's unit price for the circuit cards in question was $979.00. *Id.* at 130,024. The second low offeror's price was $1479.00, or about 50% higher. The government had not prepared an independent estimate of the circuit cards' unit prices for this procurement, and therefore had no other basis for determining the reasonableness of the lowest offered price. *Id.* at 130,023.

[19] *Id.* at 130,025.

[20] *See supra* notes 8, 9 and accompanying text.

[21] *See* FAR 15.610(c)(4).

The board did not explicitly distinguish its prior *Liebherr Crane Corp.*[22] decision in denying the *Rex Systems, Inc.* appeal. Nevertheless, the two appeals involved distinguishable facts, which evidently warranted different results. Significantly, in the *Liebherr Crane* procurement, the contracting officer requested the offeror to confirm its price, but did not signal clearly that he suspected a mistake.[23] Additionally, in *Liebherr Crane Corp.* the government had an independent estimate,[24] to which the contracting officer could have referred in explaining the reason why he suspected a mistake, without revealing information about competitors' prices. Consequently, the ASBCA concluded in *Rex Systems, Inc.* that the contracting officer had provided the contractor all information known at the time of the verification in compliance with applicable regulations, and that the bid verification was adequate.[25]

Although the ASBCA denied the appeal in *Rex Systems, Inc.*, overreliance on the decision may be risky. Counsel should advise contracting officers conducting bid verifications due to suspected mistakes in prices offered in negotiated procurements to ensure that they disclose the bases for their suspicions to the extent reasonably practicable, to avoid the results in *Liebherr Crane Corp.* To minimize the risk of a successful appeal of a decision denying a reformation request, contracting officers should follow the procedures below when verifying bids in negotiated procurements:

1. Advise an offeror with an apparent mistake in its bid that the government suspects a mistake;

2. Explain to the offeror why the government suspects a mistake (such as, the price is substantially below the government estimate, or below the general range of prices that the government believes would be reasonable for the instant requirement);

3. Provide the offeror a reasonable time in which to verify its prices; and,

4. Obtain the offeror's price verification in writing.

Following the above procedures will not take significantly more effort than asking an offeror simply to confirm its prices, and it will avoid contractor arguments for reformation like those raised in *Rex Systems, Inc.* The government's verification procedure in reviewing Rex Systems's offer omitted the second step above, but fortunately, under the circumstances of that procurement, the government's bid verification proved marginally adequate to avoid the contractor's reformation claim. Consistent use of *all* steps in the above bid verification procedure, however, will avoid the outcome in *Liebherr Crane Corp.*, when the facts of a future negotiated procurement may not be as readily distinguishable. Major DeMoss.

Bid Back in the Hands of Bidder After Bid Opening May Be Considered

The General Accounting Office (GAO) recently has been providing the government procurement community additional guidance in the area of government mishandling.[26]

In *PLAN-Industriefahrzeug GmbH & Co. KG*,[27] the Army issued an invitation for bids (IFB) DAJA37-93-B-0039 for a heavy duty yard tractor with a bid opening date of July 19, 1993. The Army received one responsive bid at bid opening. On July 22, PLAN-Industriefahrzeug GmbH & Co. KG (PLAN) notified the contracting office that the German Postal Service had returned its bid on the IFB. The contracting officer investigated and discovered that PLAN had mailed its bid on July 9 by registered mail through the German Postal Service. On July 12, the German Postal Service attempted delivery of PLAN's bid, however, the mail clerk was not available. The postal employee left a "notice-of-arrival" slip with the Contracting Support Division indicating that the Postal Service had attempted delivery on that date and requesting that the package be picked up within seven days. Although the contracting office had established procedures to process the receipt of German registered mail, the mail clerk never received the notice slip. As a result, the Army never obtained the bid.

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[22] ASBCA No. 24707, 85-3 BCA ¶ 18,353, *aff'd* 810 F.2d 1153 (Fed. Cir. 1987).

[23] *Id.* at 92,066. In *Rex Systems*, the contracting officer did state explicitly during its bid verification that the government suspected an error in the offeror's prices. *See supra* notes 14, 15 and accompanying text.

[24] *Id.* at 92,066.

[25] ASBCA No. 45297, 93-3 BCA ¶ 26,155, 130,025. Interestingly, the ASBCA did not mention in the *Rex Systems, Inc.*, decision another risk inherent in not telling an offeror why the government suspects a mistake. The board noted in *Liebherr Crane Corp.* that a vague verification request which does not clearly inform an offeror of the basis for the government's inquiry may be interpreted as a request for further bargaining, that is, an effort by the government to obtain a further price reduction. 85-3 BCA ¶ 18,353, at 92,067. This may be true when the government deals with small businesses, which may not be aware of the significance of a verification request, or of an offeror's right to take a reasonable amount of time to verify thoroughly its offered price. *See* Singleton Contracting Co., ASBCA No. 26862, 82-2 BCA ¶ 15,994 (a contractor's skill and competence as a bidder are significant facts to consider in resolving a mistake in bid situation).

[26] *See* Contract Law Note, *The GAO Rejects Strict Interpretation of Government Mishandling Exception*, ARMY LAW., Dec. 1993, at 43.

[27] B-254517, Dec. 23, 1993, 73 Comp. Gen. ____, 93-2 CPD 338.

On July 22, the German Postal Service returned the undelivered bid to PLAN. Stamped on the back of the envelope were the following two official mail stamps of the German Postal Service (translations from German):

"Delivery not possible during normal business hours. Left notice of arrival slip." (12.07.93)

"Not picked up. Holding period expired." (20 July 1993)

In a letter dated July 22, 1993, PLAN asked the contracting officer to accept its bid as timely received or, alternatively, to accept its bid as a late bid. PLAN maintained that the bid package had not been opened or tampered with since it received the bid package back from the German Postal Service and that its bid would have been the low bid received. The contracting officer denied PLAN's request. Although the *Federal Acquisition Regulation*[28] sets out three exceptions[29] to the so-called "Late Bid" Rule,[30] only the government mishandling exception applied because the contracting office is located at an overseas installation. Although the contracting officer acknowledged that the bid was not received prior to bid opening because the agency failed to adhere to established procedures,[31] the contracting officer determined that the need to preserve the integrity of the competitive bidding process required rejection of the bid.[32] The contracting officer did advise PLAN, however, not to open or tamper with its bid package.[33]

PLAN protested. The only issue before the GAO was whether the protester's bid could be opened and considered for award after government mishandling and return. Although the GAO noted that "[a]n important concern in matters such as this is the preservation of the integrity of the competitive bidding system," it found that this goal is not compromised "by consideration of a returned bid resubmitted after bid opening where it can be established through an examination that the sealed bid envelope has not been opened."[34] The GAO recommended that the protester be permitted to resubmit its bid, and that "the Army have suitable experts analyze the envelope to determine whether or not the envelope has been opened or tampered with."[35] Should the experts find that the envelope is authentic and has not been opened or tampered with, the contracting officer should consider the protester's bid for award.

Although existing case law excludes the contracting officer from the definition of a "suitable expert,"[36] *PLAN-Industriefahrzeug GmbH & Co. KG* clearly authorizes the contracting officer to seek out "suitable experts" to determine whether an envelope has been tampered with or opened, without first going to the GAO. After obtaining expert advice, a contracting officer should act without fear of a sustained protest. Contracting officers and their legal advisors confronted with this type of situation should refer the analysis to the United States Postal Crime Lab at (703) 406-7100), their servicing investigative agency—such as, the Criminal Investigation Division (CID), the Office of Special Investigations, the Naval Investigative Service—or state agencies. In attempting to resolve the issue, contracting officers seeking such analysis from the United States Postal Crime Lab should expect to await a determination for up to three months. Substantial time may be saved by referring the envelope to the United States Army CID, which is capable of analyzing the envelope to determine whether it has been opened or tampered with within

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[28] FAR 14.304-1.

[29] The three exceptions are: the "Five Day Rule" at FAR 14.304-1(a)(1); the "Two Day Rule" at FAR 14.304-1(a)(3); and the "Government Mishandling" Rule at FAR 14.304-1(a)(2). Both FAR 14.304-1(a)(1) and (a)(3) require bids to be sent through the United States or Canadian Postal Services to a contracting office in the United States or Canada. The GAO created a fourth exception, the "Paramount Cause" Rule, but it applies only to hand-carried bids.

[30] FAR 14.304-1 provides that bids received in the office designated in the invitation for bids after the exact time set for bid opening are late and generally shall not be considered.

[31] When government mishandling occurs in the process of receipt, the GAO has permitted the consideration of the otherwise late bid if the bid is out of the bidder's hands. Select Inc., B-245820.2, Jan. 31, 1992, 92-1 CPD ¶ 22 (bid first in custody of United Parcel Service, then with agency); Watson Agency, B-241072, Dec. 19, 1990, 90-2 CPD ¶ 506 (bids locked in agency safe); *I&E Constr. Co., Inc.*, B-186766, Aug. 9, 1976, 76-2 CPD ¶ 139 (telegraphic bid modification in custody of Western Union).

[32] In Leggett & Platt, Inc., B-246733, Mar. 27, 1992, 92-1 CPD ¶ 314 at 4, the GAO held that "to allow consideration of bids that could have been altered while out of the government's control would be inconsistent with the integrity of the competitive process."

[33] In limited situations, the GAO has held that, where a bid was improperly returned to the bidder unopened, it could be considered for award on the basis of proof that the late bid should have been timely delivered and that the envelope had not been opened. Veterans Administration—Request for Advance Decision, B-212800, Oct. 25, 1983, 83-2 CPD ¶ 498; Metalsco, Inc., B-187882, Mar. 9, 1977, 77-1 CPD ¶ 175. In those cases the GAO acted as a conduit to the United States Postal Service Crime Laboratory, which could perform the necessary tests.

[34] PLAN-Industriefahrzeug GmbH & CO. KG, B-254517, Dec. 23, 1993, 73 Comp. Gen. ____, 93-2 CPD ¶ 338 (citations omitted).

[35] *Id.*

[36] In Metalsco, Inc., B-187882, Mar. 9, 1977, 77-1 CPD ¶ 175, the GAO stated that the contracting officer is not competent to determine whether an envelope has been opened and resealed.

several weeks. To save time and money, contracting officers should verify expected delays with the various experts. Finally, the GAO guidance in this case should be disseminated to all procurement personnel. Major Cameron and Ms. Wilke, United States Army Contracting Command, Europe.

International and Operational Law Notes

Intelligence Law

President's Foreign Intelligence Advisory Board

President Clinton signed Executive Order 12,863,[37] on September 13, 1993, which reconstituted the President's Foreign Intelligence Advisory Board (PFIAB). The new executive order revoked Executive Orders 12,334 and 12,537, disestablishing the Intelligence Oversight Board (IOB), and rolling its duties and responsibilities into the PFIAB. The IOB will be a standing committee within the PFIAB, consisting of four members from the PFIAB itself. The IOB's oversight duties will be the same, but will report to the President through the Chairman of the PFIAB, who also serves as the Chairman of the IOB.

The PFIAB will consist of no more than sixteen United States citizens who do not work for the federal government. The mission of the PFIAB will be, in accordance with section 1.2, to "assess the quality, quantity, and adequacy of intelligence collection, of analysis and estimates, and of counterintelligence and other intelligence activities."[38]

Additionally, the PFIAB "shall have the authority to review continually the performance of all agencies of the Federal Government that are engaged in the collection, evaluation, or production of intelligence or the execution of intelligence policy. The PFIAB shall be further authorized to assess the adequacy of management, personnel and organization in the intelligence agencies."[39]

In accordance with section 2.2, the IOB, as a committee, will continue its important role of reporting, investigating, and forwarding information on possible intelligence activities that may be unlawful or "contrary to Executive order or Presidential directive."[40]

Intelligence and Security

Look for the Clinton Administration to revise Executive Order 12,356, which deals with the security classification system. The basic theme will be one of more openness in light of the end of the Cold War. Lieutenant Colonel Crane.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer;* send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Divorce Jurisdiction

Durational Residency Requirements

A recent Maryland case, *Wamsley v. Wamsley,*[41] demonstrates that durational residency requirements may not stand in the way of divorce jurisdiction, at least in a service member's state of domicile.

Wamsley involved a Navy member who left Maryland at age seventeen to join the Navy. Over the next eleven years, the Navy member married, had two children, and although he moved several times, never returned to live in Maryland. In 1992, while stationed in Virginia, he separated from his wife and filed a complaint for divorce in Maryland alleging fault grounds. Under Maryland law, if fault grounds occurring outside the state are alleged as a basis for the divorce, one party to the action must have "resided" in the state for one year preceding the filing. Finding that neither of the parties had resided in the state for the requisite period, the trial court dismissed the complaint.

In a case of first impression in Maryland, the Maryland Court of Appeals first determined that the terms residence and domicile have the same meaning unless a contrary intent is shown. The court then reversed the lower court's reliance on a presumption that domicile is where you live. The court specifically noted that where someone lives may be a strong indication of intent, but held that "[i]n the case of a service member who is frequently moved from state to state, the location of his or her residence is not nearly so important a factor in determining intent as is his or her choice of voting registra-

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[37] Exec. Order No. 12,863, 58 Fed. Reg. 48,441 (1993).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Md. Ct. App. No. 78, 20 FLR 1162 (1993).

tion, state income taxes, vehicle registration, etc."[42] Sufficient facts in the trial court's record to demonstrate that the Navy member's claim of domicile in Maryland were found to exist.[43]

In dispensing with a distinction between domicile and residence, the court in *Wamsley* effectively eliminates what may have been seen as a physical presence requirement existing in addition to domicile. Fortunately, many states, by legislation or case law, have deemed a military person's residence to continue if that member's absence is because of military duty. Do not assume, however, the existence or nonexistence of such legislation or case law.

Jurisdiction for divorce actions and other family law issues is a continuing issue of interest for legal assistance practitioners. The varying perspectives on jurisdiction taken by the states suggest that reference to a suitable source on a case-by-case basis is necessary. Readily available references include TJAGSA's *JA 263, Family Law Guide*[44] and the *Martindale-Hubbell Law Digests for the United States.* Major Block.

Legal Assistance Note

A Judge Advocate Is a Judge Advocate, Right?

Despite the efforts of the Judge Advocate General's Corps to emphasize the diversity of our clientele, nonlawyers often fail to understand or misinterpret the role of the judge advocate as an advocate in many routine legal actions, often in the legal assistance area. This is particularly likely when legal assistance attorneys assist soldiers with reports of survey, line of duty investigations, evaluation report challenges, and other military administrative matters.

The diversity of clients that judge advocates can be called on to represent presents one of the interesting dichotomies of practicing law in the Army. Judge advocates are in the Army, are paid by the agency, and, in most situations, represent the Army. For example, in administrative law assignments, judge advocates represent the agency through its commanders; in many litigation and claims positions, judge advocates may directly represent the agency as a whole or even the United States directly. In legal assistance and defense assignments, however, a judge advocate's client is not the agency or the United States, but the individual soldier. The rules of professional conduct require judge advocates to competently represent the interests of all of our clients, and the potential for this to aggravate agency members—particularly when we represent the individual soldier—has resulted in the development of specific guidance for rating judge advocates.[45]

In the process of representing clients, legal assistance attorneys frequently will engage in discussion of cases with investigating officers, witnesses, and even commanders who will fail to appreciate the significance of the attorney's role as an advocate for the individual client. For example, a legal assistance attorney may, in good faith, present an interpretation of *Army Regulation 608-99*[46] that is in favor of the client's interests. Review of the same provision by a judge advocate designated to advise the command from the administrative law or military justice section may lead to a different interpretation. The existence of a difference in opinion hardly seems problematic to the judge advocate, who understands the different interests of the attorneys involved, but to the layman, a difference raises not only the question of which perspective is correct, but which lawyer to rely on. Similar confusion might result when an administrative law attorney is asked for an opinion regarding an individual soldier's action, or when individuals are interviewed by counsel for the government, as opposed to the defense.

Problems and misunderstandings regarding the varied roles of judge advocates in routine legal matters can be resolved with affirmative efforts to educate not just commanders and their staffs, but all potential clients, regarding legal operations. Just as important, however, is that Army lawyers appreciate their duties under Rule 4.3 of the Army *Rules of Professional Conduct* to "not state or imply that the lawyer is disinterested."[47] This same rule *requires* lawyers to make reasonable efforts to correct misunderstandings if they know, *or should know,* that the lawyer's role has been misunderstood.

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[42] *Id.* at 1163.

[43] From 1981, when he left the state to join the Navy, until he filed for divorce, Richard Wamsley's ties to Maryland were as follows:

(1) he listed his mother's address in Maryland as his home of record;
(2) the Navy withheld Maryland state income tax and he filed returns in Maryland each year;
(3) he maintained voting registration in Maryland;
(4) he registered three vehicles owned in Maryland; and
(5) he always intended to retain Maryland as his permanent residence.

[44] ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 263, FAMILY LAW GUIDE (June 1993). This publication can be downloaded from the Legal Automated Army-Wide System (LAAWS) Bulletin Board System.

[45] DEP'T OF ARMY, REG. 623-105, PERSONNEL EVALUATION REPORTS: OFFICER EVALUATION REPORTING SYSTEM, app. H, Special Consideration for Rating JAGC Officers (31 Mar. 1992).

[46] DEP'T OF ARMY, REG. 608-99, PERSONAL AFFAIRS: FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (22 May 1987).

[47] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT, Rule 4.3, Dealing with Unrepresented Persons (1 May 1992).

Service as a judge advocate presents a unique opportunity to lead, defend, and even challenge the business of the agency through a variety of clients that judge advocates serve. Despite confusion that may be created by the performance of so many different functions, the reputation of the Judge Advocate General's Corps (JAGC) suggests that present and past judge advocates have successfully responded to this challenge inherent in the work. As judge advocates continue to expand their areas of practice, they will be challenged even further to clarify their roles for the individuals and activities that they serve. A continued reputation of distinction for the JAGC demands this, and the rules of professional conduct require it. Major Block.

Estate Planning

New York Wills

The New York state statute on execution of wills requires that the will be signed and attested "at the end."[48] Construing this statute as invalidating any dispositive language following the first appearance of the testator's signature in the will is possible. The LAAWS Minuteman will program, however, requires the testator and witnesses to authenticate each page of the will by placing either their signatures or their initials on every page. Although the Minuteman program cautions the drafter of a New York will to select only the option for *initialing* on each page, concerns about the New York execution statute may remain. For example, what if the testator claims domicile in a state other than New York, signs every page of the will, and on death is determined to actually have been domiciled in New York? If a New York domiciliary initials each page of a Minuteman will, might the New York statute be interpreted as including initials within the definition of signature, thus leading to invalidation of all or part of the will?[49]

Fortunately, a survey of the case law interpreting the New York execution statute allays these concerns. Any Minuteman will that is properly signed and attested at the end of the will should satisfy the New York execution statute, *regardless* of how often the testator's signature (or initials) appear in the body of the will.

Several reported cases invalidate either the whole will, or the part of the will after the testator's signature, where the testator's signature appeared prior to the end of the will. Most of these cases have a common trait: the testator signed one time somewhere in the middle of the will, and did not sign at the physical end of the will.[50] A few cases, however, invalidated portions of documents that had a testator's signature at both the end of the document and somewhere in the middle.[51] In the latter cases, the testators originally signed at the end of the wills and had them properly attested. These testators then returned to their will, added new dispositive provisions at the end of the wills, signed at the end of the new provisions, but failed to have their new signatures attested. The courts in these latter cases refused to accept the additional provisions added after the original attestations. In reaching their conclusions, the courts focused not on the multiple testator signatures but, rather, on the lack of an attestation clause at the end of the additional provisions.

These cases and others explain that the primary intent of the New York execution statute requiring both the testator's sig-

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[48] N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a). Section 3-2.1(a) states, in relevant part:

> Except for nuncupative and holographic wills authorized by 3-2.2, every will must be in writing, and executed and attested in the following manner:
>
> (1) It shall be signed at the end thereof by the testator . . . subject to the following:
>
> (A) The presence of any matter following the testator's signature, appearing on the will at the time of its execution, shall not invalidate such matter preceding the signature as appeared on the will at the time of its execution, except that such matter preceding the signature shall not be given effect, in the discretion of the surrogate, if it is so incomplete as not to be readily comprehensible without the aid of matter which follows the signature, or if to give effect to such matter preceding the signature would subvert the testator's general plan for the disposition and administration of his estate.
>
> (B) No effect shall be given to any matter, other than the attestation clause, which follows the signature of the testator, or any matter preceding such signature which was added subsequently to the execution of the will.

[49] The statute does not describe the variety of writing which shall be placed by the testator at the end of the will, nor the manner in which the act shall be performed, wherefore it appears obvious that any visible indication of adoption, placed on the instrument by the testator, is a sufficient compliance with this phase of the statutory requirements for due execution if the particular testator intends it as a demonstration of his acceptance of the document and this is so whether such indication is a cross mark or any other sign or symbol which he may chance to have selected.

In re Arcowsky's Will, 11 N.Y.S.2d 853, 854 (Surrogate's Court, Kings County, 1939) (citations omitted).

[50] Will of Mergenthaler, 474 N.Y.S.2d 253 (Surrogate's Court, Nassau County, 1984) (misstapling puts testator's signature on third of four pages; fourth page held invalid); Estate of Zaharis, 91 A.D.2d. 737 (N.Y. App. Div. 1982) (will written on both sides of a 3-by-5 card but signed by testator only in margin of front side while attested on reverse; will held invalid); In re Klee's Estate, 153 N.Y.S.2d 346 (Surrogate's Court, Kings County, 1956) (will signed by testator only in the introductory clause held invalid).

[51] In re Frickey's Will, 96 N.Y.S.2d 825, 830 (Surrogate's Court, Monroe County, 1950); In re Begun's Will, 123 N.Y.S.2d 782 (Surrogate's Court, Kings County, 1953); In re Robinson's Will, 103 N.Y.S.2d 967, 972 (Surrogate's Court, Orange County, 1951).

nature and attestation "at the end" is to ensure that fraudulent additions to the will are not added to the end of the will sometime after the will is executed.[52] Of course, a Minuteman will signed (or initialed) on every page, signed at the end, and attested at the end, is structured to prevent both fraudulent additions at the end of the will and fraudulent insertions in the body of the will.[53]

Attorneys using the Minuteman program need not be overly concerned that they might inadvertently draft a New York will that will later be held partially or totally invalid due to multiple testator "signatures."[54] Major Peterson.

[52] *See* In re Estate of Young, 233 N.Y.S.2d 922, 924 (Surrogate's Court, New York County, 1962) ("The purpose of the statutory requirement that the testator sign at the end of the will is to prevent fraudulent additions to a will after its execution. Where there is obviously no chance that a fraud has been perpetrated it has been the tendency of the courts to have a less rigid approach.)" (citations omitted); In re Robinson's Will, 103 N.Y.S.2d 967, 969 (Surrogate's Court, Orange County, 1951).

[53] New York cases exist where the technicalities of the execution statute were not followed but the will was admitted to probate anyway. For example, in In re Hildreth's Will, 36 N.Y.S.2d 938 (Surrogate's Court, Westchester County, 1942), the testimonium and attestation clauses were placed in the body of the will and the will was not signed by anyone at the physical end. The court admitted the will to probate because the form of the will and the testimony of the witnesses made it clear that the document presented for probate was the original, and that the material after the testator's signature was there at the time of execution and had not been altered in any way.

[54] Attorneys probably should not go out of their way to have every page of the will signed in full by the testator. No reason exists to provide a "test case" before a new Surrogate judge in an obscure New York jurisdiction!

Claims Report

United States Army Claims Service

Tort Claims Note

Erroneous Supplemental Payments of Tort Claims

With the limited exception of advance payments under 10 U.S.C. § 2736, the Military Claims Act, and the Foreign Claims Act, the General Accounting Office enforces as a cardinal rule that a tort claimant may be paid only once. Making a supplemental payment on a tort claim under chapters 3, 4, 5, 6, 7, 8, or 10 of *Army Regulation 27-20*[1] *(AR 27-20)* is unauthorized. The settlement authority (SA) may make only one payment and that payment may not exceed the amount claimed on the *Standard Form 95 (SF 95)* unless the claimant amends the *SF 95* before final action—that is, payment. The language of the Federal Tort Claims Act, 28 U.S.C. § 2672, states as follows:

> The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.[2]

Similarly, *SF 95* states as follows: "I certify that the amount claimed covers only damages caused by the accident above and agree to accept said amount in full satisfaction and final settlement of this claim." Paragraph 2-25, *AR 27-20,* reflects the foregoing by stating: "Acceptance of an award by the claimant, except for advance payment, constitutes for the United States, military personnel, or civilian employee whose act or omission gave rise to the claim, a release from all liability to the claimant, based on the act or omission."[3]

[1] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (28 Feb. 1990) [hereinafter AR 27-20].

[2] 28 U.S.C. § 2672 (1988).

[3] AR 27-20, *supra* note 1, para. 2-25.

Erroneous payments frequently occur in claims involving loss of vehicle use—such as, rental car payments—or hidden vehicle damage. To avoid such erroneous payments, the SA should anticipate when such damages might arise and wait to make payment until the full amount is known.

Occasionally, erroneous supplemental payments occur in situations when one incident causes both property damage and personal injury to one claimant, but the claimant files separate claims for each. All damages to a single claimant arising from a single incident should be included in one claim and paid as one claim. Splitting the property damage and personal injuries into two separate claims and paying one before the other will result in an erroneous supplemental payment. When a claimant has suffered both property damage and personal injury, but has filed a claim for only one category of damages, the SA will obtain a settlement agreement before making payment. The SA will follow this practice even when paying the full amount of the claim. The SA also must inform the claimant that the settlement agreement bars any future claim for personal injury or death and will place a written record of that notice in the claim file.

The reconsideration provisions of *AR 27-20*[4] do not apply when a claimant knows in advance that the amount being paid on a claim may be inadequate. If the property is covered by insurance and the claimant is unwilling to wait until all damages for repairs are ascertained, the claimant must claim under the insurance policy for repairs and then the insurer can file a subrogated claim against the government for the repair costs. Mr. Rouse.

Personnel Claims Note

When Are Items Considered a Collection or Objects of Art?

When should you use the category "collections" in place of the category "objects of art," items number 48 and 101 from the *Allowance List-Depreciation Guide*[5] *(Guide)*? The situation typically arises when a field claims office adjudicates a claim for loss or damage to a number of objects of art—such as, Hummel figurines—using the "objects of art" category from the *Guide*. The amount adjudicated exceeds the maximum allowable—$750 per item or $2000 per claim—and the claimant in a request for reconsideration argues that the "collection" category—maximum allowable $4000 per claim—should have been used because the claimant has a large number of Hummel figurines which the claimant considers to be a collection. How do you respond?

To assist you in answering that question, the following guidance is provided. Items that fit into a "collection" are items that traditionally are considered as a collection, such as stamps or coins. Additionally, items manufactured or created to be interrelated—that is, the loss of or damage to one decreases the value of the total collection and the value of the individual item—may be considered a collection. For example, a series of sequentially numbered plates, or items designed to represent a historical period may represent a collection of items manufactured or created to be interrelated.

The decision to apply either category will be fact determinative based on the evidence that a claimant presents to substantiate use of "collection" instead of "objects of art." The quantity of an item by itself is insufficient to place the items into the "collection" category; a "bunch" of items does not a collection make. Lieutenant Colonel Kennerly.

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[4] *Id. supra* note 1, para. 4-18.

[5] UNITED STATES ARMY CLAIMS SERVICE, OFFICE OF THE JUDGE ADVOCATE GENERAL, ALLOWANCE LIST-DEPRECIATION GUIDE (15 Aug. 1990).

Professional Responsibility Notes

Department of the Army Standards of Conduct Office

Ethical Awareness

The following case summaries describe the application of the Army's *Rules of Professional Conduct for Lawyers*[1] *(Army Rules)* to actual professional responsibility cases. To stress education and protect privacy, neither the identities of the offices nor the names of the individuals involved are published. Lieutenant Colonel Fegley.

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[1] Dep't of Army, Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers (1 May 1992) [hereinafter AR 27-26].

Case Summary

ABA Standards for Criminal Justice:
The Prosecution Function
Standard 3-5.8 (Argument to the Jury)

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence . . . by making predictions of the consequences of the jury's verdict.[2]

AR 27-10: Military Justice

The ABA Standards for Criminal Justice apply to counsel.[3]

AR 27-1: Judge Advocate Legal Services

Information or allegations indicating a possible violation of the Army Rules of Professional Conduct for Lawyers . . . or other applicable ethical standards will be referred to a preliminary screening official.[4]

Captain *X* had served as a trial counsel for ten months. Prior to that, she had performed legal assistance duties for about eighteen months. At a court-martial based on urinalysis test results, the accused raised an innocent ingestion defense—that is, food or drink that the accused had consumed must have been spiked with marijuana. In her closing argument on findings, Captain *X* commented on the innocent ingestion defense as follows:

> What you've heard today is the brownie defense. It's a classic. It's been around as long as the Army has been conducting urinalysis. Now if you buy it here today, you're going to hear it a million times again back in your units. . . .

There was no defense objection nor were curative instructions requested or given by the military judge at trial. Both the Army Court of Military Review[5] and the United States Court of Military Appeals[6] (COMA) found that objections to the argument had been waived under Rule for Court-Martial 919(c),[7] and that the argument was not plain error. A unanimous COMA specifically found, however, that ABA Standard 3-5.8(d), "(t)he prosecution should refrain from argument which would divert the jury . . . by making predictions of the consequences of the jury's verdict,"[8] had been violated.

During the preliminary screening inquiry, Captain *X* reported that she was unaware of the allegation of impropriety or of the specific ABA Standard involved until she read the COMA decision. Based on a review of her closing argument notes, she concluded that the relevant comments were an in-trial, last minute addition to her argument. She agreed that the ABA Standard was violated, but stated that her violation was unintentional and that she would not knowingly violate the standard.

It was determined that Captain *X*'s comment did violate Standard 3-5.8(d), but that Captain *X* did not violate any other ABA Standard or ethical rule. The violation was deemed to be minor, as evidenced by the defense counsel's waiver, the military judge's lack of a curative instruction, and the unanimous finding of no plain error by the COMA. It also was concluded that Captain *X*'s violation was unintentional and the result of inexperience.

No further action was deemed necessary inasmuch as the attorney already had been counseled by the preliminary screening official regarding the need for review of and familiarization with all applicable ethical rules and rules regarding argument.

Case Summary[9]

Army Rule 1.6(a)
(Confidentiality of Information)

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .

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[2] ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION Standard 3-5.8(d) (2d ed. 1986) [hereinafter THE PROSECUTION FUNCTION].

[3] DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-8 (22 Dec. 1989) (IO2, 2 Sept. 1993) (*Army Regulation 27-10*, Change 9, (Military Justice), has been changed to a complete revision and is currently at the United States Army Printing and Publication Command for editing).

[4] DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 7-7a(1) (15 Sept. 1989) (*Army Regulation 27-1* is under revision and is currently at the Administrative Office, Office of The Judge Advocate General).

[5] United States v. Causey, ACMR 9003030 (A.C.M.R. 25 Feb. 1992).

[6] United States v. Causey, 37 M.J. 308 (C.M.A. 1993).

[7] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 919(c) (1984).

[8] THE PROSECUTION FUNCTION, *supra* note 2. On February 3, 1992, after the date of the trial in question, the ABA approved revisions to *The Prosecution Function*. Standard 3-5.8(d) now reads "(t)he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."

[9] For purposes of this summary, the factual scenario has been modified as necessary to protect the privacy of persons involved in the actual case.

Army Rule 5.1(c)(2)
(Responsibilities of Senior
Counsel and Supervisory Lawyers)

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if . . . the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

First Lieutenant *A* counseled a legal assistance client, the wife of a retired officer, regarding a possible marital separation. Mr. *B*, a civilian employee who works in the office, but not assigned to the legal assistance section, observed the client while she was sitting in Lieutenant *A*'s office. Coincidentally, Mr. *B*'s wife, Mrs. *B*, was the other party to a real estate sales contract dispute with Lieutenant *A*'s client. Mr. *B* went to the NCOIC of the legal assistance section, Staff Sergeant *D*, and told her that Lieutenant *A*'s client and his wife were in a real estate sales contract dispute. Staff Sergeant *D* immediately advised the chief of the legal assistance section, Major *E*.

Shortly after the client left the office, Mr. *B* approached Lieutenant *A* and told him that the client was a party to the contract dispute with his wife. Mr. *B* also told Lieutenant *A* that he had not known that the other party to the contract dispute was the spouse of a retired officer until that day. Mr. *B* asked Lieutenant *A* if the client had come to get advice about the contract dispute. Lieutenant *A* told him that the client was there for a domestic relations consult and that Mr. *B*'s wife's name had not come up. Lieutenant *A* then told Mr. *B* that "this information . . . might create a conflict for me and the entire office."

Lieutenant *A* and Mr. *B* then proceeded immediately to Major *E*'s office, walked in, and shut the door. Lieutenant *A* explained that a possible conflict of interest had just arisen regarding his last legal assistance client. Major *E* acknowledged that he was generally aware of the situation and asked Lieutenant *A* about the basis of the conflict. With Mr. *B* still in the room, Lieutenant *A* related several details of his conversation with his client. Lieutenant *A* said that his client had come in about obtaining a separation. In general terms, Lieutenant *A* also discussed information pertinent to the contemplated separation which he believed might result in a conflict of interest, including his client's financial situation and real estate holdings. At this time, Major *E* halted the conversation and asked Mr. *B* to leave the room. Lieutenant *A* admitted that he was uncomfortable with Mr. *B* being present and was unsure what he needed to tell Major *E*. He assumed that Major *E* would dismiss Mr. *B* if he determined that it was inappropriate for him to be there.

Both Major *E* and Lieutenant *A* committed violations of the *Army Rules* which are neither minor nor technical. Lieutenant *A* violated Army Rule 1.6. He discussed information relating to representation of a client directly with a third party (who had interests potentially adverse to his client) and again subsequently with his supervisor in the presence of that party. In doing so Lieutenant *A* violated one of the most important, basic, and widely understood rules of legal ethics. His reason for discussing the matter with his supervisor was to bring a potential conflict of interest to his supervisor's attention, yet in addressing the conflict of interest issue, he committed a more serious breach of ethics. He professes to have been uncomfortable discussing confidential information in front of a third party, yet failed to act on his concern and instead relied on his supervisor to tell him if he was doing anything wrong. Regardless of the trust he placed in his supervisor, it ultimately was his responsibility to protect his client's confidentiality, and he failed.[10]

Major *E* acknowledges that, thirty minutes before Lieutenant *A* came to his office with Mr. *B* (to discuss the possible conflict of interest), a legal NCO alerted him that Lieutenant *A* had seen a client who was the other party to a contract dispute with Mr. *B*'s wife. When Lieutenant *A* and Mr. *B* came to his office to speak with him just thirty minutes later, he should reasonably have been sensitive to the possibility that they were there to discuss the situation concerning the party to the dispute with Mr. *B*'s wife (that is, Lieutenant *A*'s client). Instead, Major *E* maintained that he "did not know the topic of the discussion at that time." As soon as Lieutenant *A* began to discuss his "client's" situation, Major *E* should have terminated the conversation and determined whether further discussion might lead to a breach of client confidences. Instead, Major *E* allowed Lieutenant *A* to discuss his client's situation in front of the third party (to the surprise of even Lieutenant *A*), in violation of Army Rule 1.6. Under provisions of Army Rule 5.1, having reasonable notice that Lieutenant *A* was about to discuss his client's situation in front of a third party, Major *E* should have stopped him from doing so.

Finally, it appears that Mr. *B*, who did not work in the legal assistance section, may have learned from client files that his wife's opponent in her real estate contract dispute was the spouse of a retired officer. If so, this relaxed control of office records arguably resulted in another violation of client confidentiality. Who, if anyone, is responsible for this breach is unclear.[11]

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[10] *Compare* Army Rule 1.6 *with* Army Rule 5.2, Responsibilities of a Subordinate Lawyer, which provides, in part:

> (b) A subordinate lawyer does not violate these Rules of Professional Conduct if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

In the matter of the summarized case, the propriety of disclosing confidential information in the presence of a third party was not deemed to be reasonably arguable. Accordingly, the subordinate lawyer was not protected by the supervisor's actions.

[11] *See also* Professional Responsibility Opinion 92-6, as digested in ARMY LAW., July 1993, at 49 (concluding that use of the *Legal Assistance Interview Record, DA Form 2465,* for personal purposes adversely affects public confidence in the integrity of the legal assistance program, and, therefore, violates established standards of conduct); Memorandum by Major General John L. Fugh, The Judge Advocate General, Subject: Supervision of Nonlawyer Assistants (4 June 1993), ARMY LAW., July 1993, at 3 (discussing, in part, the responsibility of supervisory lawyers to take reasonable measures to preserve client confidences when nonlawyer assistants are employed).

Notes from the Field

Effective Trial Advocacy Training for CLE Credit at Virtually No Cost

A great resource for training judge advocates in a host of legal specialties are the courses offered through the United States Department of Justice (DOJ) Legal Education Institute. This note describes how 1st Armored Division and United States Army, Europe (USAREUR) judge advocates benefited from one of these courses.

This past fall, the 1st Armored Division Office of the Staff Judge Advocate in Bad Kreuznach, Germany, successfully conducted two Continuing Legal Education (CLE) training sessions on criminal trial advocacy in cooperation with the United States DOJ Legal Education Institute. The CLE training consisted of a formal presentation over three full days of trial advocacy videotapes produced by Herbert J. Stern from his "Trying Cases to Win" lecture series. Mr. Stern is a former federal judge and a noted litigator and trial advocacy expert.

"The Trying Cases to Win" videotapes focused on ways to hone such fundamental advocacy skills as how to analyze a case, preparing a theory to win, structuring opening statements and closing arguments, effective use of voir dire, laying foundations for the introduction of exhibits, and direct and cross examination techniques. To emphasize his views on trial advocacy, Mr. Stern uses logic, wit, and practical examples throughout the tapes. He also enlists the aid of practicing trial attorneys to demonstrate effective and noneffective advocacy techniques.

We invited judge advocate trial and defense counsel from throughout USAREUR to participate in the training and over thirty counsel attended each of the two sessions. As an added bonus, attorneys attending the training may be able to receive CLE credit, because these United States DOJ training courses are approved by every state that gives credit for viewing video tapes.

Another benefit of the videotape course is that it is cost free, requiring only a VCR, a television monitor, and a room to show the videos. The DOJ Legal Education Institute pays the shipment costs to and from the location where the tapes will be shown.

The DOJ Legal Education Institute's quarterly publication describes the procedures for requesting a formal videotape showing. The quarterly publication also contains a listing of all videotapes available through the Legal Education Institute, as well as the upcoming "live" courses offered by the Institute throughout the United States. Most JAG offices receive a quarterly publication titled "Legal Education Institute Course Schedule." If you do not receive this publication you can get your office on the mailing list by writing to the Legal Education Institute, 601D Street N.W., Room 10332, Washington, D.C. 20091-0178, or by calling (202) 208-7574.

Other JAG offices in the continental United States and overseas should consider taking advantage of the formal videotape training sessions that the DOJ Legal Education Institute offers. Short of being a participant in a trial advocacy workshop, no better way to learn trial techniques exists than watching seasoned veterans demonstrate the skills that they have learned through experience. The Stern tape series successfully provides this form of training and allows participants to earn CLE credits at virtually no cost. Such an opportunity should not be wasted, especially by overseas JAG offices, where trial advocacy training is limited. Major Bill Condron and Major Dave Mayfield.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1994

6-10 June: 124th Senior Officers' Legal Orientation Course (5F-F1).

13-17 June: 24th Staff Judge Advocate Course (5F-F52).

20 June-1 July: JAOAC (Phase II) (5F-F55).

20 June-1 July: JATT Team Training (5F-F57).

6-8 July: Professional Recruiting Training Seminar.

11-15 July: 5th Legal Administrators' Course (7A-550A1).

13-15 July: 25th Methods of Instruction Course (5F-F70).

18-29 July: 133d Contract Attorneys' Course (5F-F10).

18 July-23 September: 134th Basic Course (5-27-C20).

1-5 August: 57th Law of War Workshop (5F-F42).

1 August 1994-12 May 1995: 43d Graduate Course (5-27-C22).

8-12 August: 18th Criminal Law New Developments Course (5F-F35).

15-19 August: 12th Federal Litigation Course (5F-F29).

15-19 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

22-26 August: 125th Senior Officers' Legal Orientation Course (5F-F1).

29 August-2 September: 19th Operational Law Seminar (5F-F47).

7-9 September: USAREUR Legal Assistance CLE (5F-F23E).

12-16 September: USAREUR Administrative Law CLE (5F-F24E).

12-16 September: 11th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

August 1994

1-2, GWU: Defective Pricing: Hazards and Defenses, Washington, D.C.

3-4, GWU: Subcontract Law in Federal Procurement, Washington, D.C.

8-12, ESI: Operating Practices in Contract Administration, Denver, CO.

8-12, ESI: Managing Projects in Organizations, Washington, D.C.

10-11, GWU: Procurement Law Research Workshop, Washington, D.C.

16-19, ESI: Contract Pricing, Denver, CO.

16-19, GWU: Source Selection Workshop, Seattle, WA.

16-19, ESI: ADP/Telecommunications (FIP) Contracting, Washington, D.C.

18-19, ESI: Electronic Commerce, Washington, D.C.

22-26, GWU: Cost-Reimbursement Contracting, San Diego, CA.

23-26, ESI: Contracting for Services, Washington, D.C.

23-26, ESI: Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

30 August-2 September, ESI: International Contracting, San Diego, CA.

31 August-2 September, ESI: Managing Information Systems Projects, Washington, D.C.

29 August-2 September, GWU: Government Contract Law, Anchorage, AK.

29 August-1 September, ESI: Negotiation Strategies and Techniques, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1994 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia31	January annually
Idaho	Admission date triennially

Jurisdiction	Reporting Month
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1994 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

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

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organiza-

tions to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/ JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A266351 Office Administration Guide/JA 271(93) (230 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A270397 Consumer Law Guide/JA 265(93) (634 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

*AD A276984 Deployment Guide/JA-272(94) (452 pgs).

*AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A269515 Federal Tort Claims Act/JA 241(93) (167 pgs).

*AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A268410 Defensive Federal Litigation/JA-200(93) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A269036 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A273376 The Law of Federal Employment/JA-210(93) (262 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International Law

AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) Units organized under a PAC. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) Units not organized under a PAC. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) Staff sections of FOAs, MACOMs, installations, and combat divisions. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in *(b)* above.

(2) ARNG units that are company size to State adjutants general. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) USAR units that are company size and above and staff sections from division level and above. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) ROTC elements. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of *DA Pam. 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed fulltime by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and the pending RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
1990_YIR.ZIP	January 1991	This is the 1990 Year in Review article in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
505-1.ZIP	March 1993	Contract Attorneys' Deskbook, Volume 1, 129th Contract Attorneys' Course, March 1993.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys' Course Deskbook.

FILE NAME	UPLOADED	DESCRIPTION
93CLASS.ASC	July 1992	FY93 TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY93 TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY93 TJAGSA Course Schedule, ASCII.
93CRS.EN	July 1992	FY93 TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.TXT	June 1993	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA.FSO 201. ZIP October 1992 Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB. JA200A.ZIPAugust 1993Defensive Federal Litigation—Part A, June 1993. JA200B. ZIPAugust 1993Defensive Federal Litigation—Part B, June 1993.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	November 1993	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA235.ZIP	August 1993	Government Information Practices.
NA241.ZIP	August 1993	Federal Tort Claims Act.
JA260.ZIP	September 1993	Soldiers' & Sailors' Civil Relief Act. Updated September 1993.
JA261.ZIP	March 1993	Legal Assistance Real Property Guide.
JA262.ZIP	June 1993	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide. Updated 31 August 1993.
JA265A.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part A, September 1993.
JA265B.ZIP	September 1993	Legal Assistance Consumer Law Guide—Part B, September 1993
JA267.ZIP	January 1993	Legal Assistance Office Directory.
JA268.ZIP	January 1993	Legal Assistance Notarial Guide.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	June 1993	Legal Assistance Office Administration Guide.
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	January 1993	Preventive Law Series.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	March 1992	Senior Officer's Legal Orientation.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.

FILE NAME	UPLOADED	DESCRIPTION
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993 version.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993 version.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993 version.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993 version.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993 version.
JA501-1.ZIP	June 1993	Volume 1, TJAGSA Contract Law Deskbook, May 1993.
JA501-2.ZIP	June 1993	Volume 2, TJAGSA Contract Law Deskbook, May 1993.
JA506.ZIP	November 1993	TJAGSA Fiscal Law Deskbook, May 1993.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509.ZIP	October 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, and Remedies Course held in September 1992.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
V1YIR91.ZIP	January 1992	Volume 1 of TJAGSA's Annual Year in Review for CY 1991 as presented at the January 1992 Contract Law Symposium.
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's annual review of contract and fiscal law for CY 1991.
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's annual review of contract and fiscal law for CY 1991.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International Law, or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

4. 1994 Contract Law Video Teleconferences (VTC)

March VTC Topic (to be determined)

23 Mar, 1400-1600: FORSCOM installations, HSC, AMCCOM, ATCOM, TACOM, White Sands Missile Range, Picatinny Arsenal

24 Mar, 1530-1730: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

April VTC Topic: Procurement Management Reviews (SARDA)

19 Apr, 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

22 Apr, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

May VTC Topic (to be determined)

16 May, 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

17 May, 1500-1700: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

June VTC Topic (to be determined)

15 Jun, 1400-1600: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

17 Jun, 1330-1530: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

July VTC Topic (to be determined)

18 Jul, 1530-1730: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

19 Jul, 1530-1730: TRADOC installations, ISC, DESCOM, ARL, MICOM

October VTC Topic (to be determined)

5 Oct, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Oct, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

November VTC Topic (to be determined)

8 Nov, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

9 Nov, 1300-1500: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

December VTC Topic (to be determined)

5 Dec, 1400-1600: TRADOC installations, ISC, CECOM, DESCOM, ARL, MICOM, TACOM

7 Dec, 1300-1500: FORSCOM installations, HSC, AMCCOM, ATCOM, TECOM, White Sands Missile Range, Picatinny Arsenal

NOTE: Mr. Moreau, Contract Law Division, OTJAG, is the VTC coordinator. If you have any questions on the VTCs or scheduling, contact Mr. Moreau at commercial: (703) 695-6209 or DSN: 225-6209. Topics for 1994 VTCs will appear in future issues of *The Army Lawyer.*

5. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties:

Helen Fein, *Discriminating Genocide From War Crimes: Vietnam and Afghanistan Reexamined,* 22 DENV. J. INT'L L. & POL'Y 29 (1993).

Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct,* 27 CREIGHTON L. REV. 381 (1994).

Matthew Lippman, *Vietnam: A Twenty Year Retrospective,* 11 DICK. J. INT'L L. 325 (1993).

Duane A. Daiker, Note, *Florida's Motor Vehicle Warranty Enforcement Act: Lemon-Aid for the Consumer,* 45 FLA. L. REV. 253 (1993).

Note, *DNA Fingerprinting: The Virginia Approach,* 35 WM. & MARY L. REV. 767 (1994).

Kurt B. Chadwell, Comment, *Automotive Passive Restraint Claims Post-*Cipollone: *An End to the Federal Preemption Defense,* 46 BAYLOR L. REV. 141 (1994).

Case Comment, *Florida Impact Doctrine: No Longer an Obstacle to Recovery of Emotional Damages in Wrongful Birth,* 45 FLA. L. REV. 349 (1993).

Comment, *Halcion Made Me Do It: New Liability and a New Defense—Fear and Loathing in the Halcion Paper Chase,* 62 U. CIN. L. REV. 603 (1993).

6. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

7. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials 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 available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Office of the Staff Judge Advocate, HQS, Military Traffic Management, Command Western Area, Attn: Tim Dorman, Oakland Army Base, CA 94626-5000, DSN: 859-3212, commercial (510) 466-3212, has the following material:

- ALR Annotated, vols. 1-175
- Permanent ALR Digest, vols. 1-12
- ALR Word Index to Annotations, vols. 1-4
- ALR Quick Index, vols. 1-175
- ALR 2d Word Index to Annotations, covering vols. 1-75, 76-100
- ALR 2d vols. 1-100
- ALR 2d Later Case Service, supplementing vols. 1-100
- ALR 2d Digest, vols. 1-7
- ALR 2d Quick Index
- ALR Second Edition Quick Index for ALR 2d & 3d
- ALR Quick Index for ALR 3d & 4th
- ALR 3d, vols. 1-77, 79-100 (missing vol. 78)
- ALR 4th, vols. 1-64, 89-90 (missing vols. 65-88, 91-100)
- ALR Blue Book of Supplementary Decisions, vol. 4 (1959-67), vol. 5 (1968-75), vol. 6 (1976-83)
- ALR 5th, vols. 1-6
- ALR 4th, Electronic Search Queries
- American Jurisprudence, 2d vols. 1-5, 7-21, 22-57B, 59-70, 71-83, Table of Statutes cited, General A-Z, 1993 ed. (missing vols. 6, 21A, 58, 70A; duplicates of vols. 31A and 61)
- AMJUR Legal Forms 2d, vols. 2, 3-7, 8, 9-20, General Index A-Z, Federal Tax vols. 1 & 2 (missing vols. 1, 2A, 7A, 8A)
- CCH Board of Contract Appeals Decisions, vol. 93-2
- Pacific Digest: vols. 1-46, beginning with 101 P.2d; vols. 1-60 beginning with 367 P 2d; supplements for 1981, 1982, 1983, 1984 pocket parts
- Shepard's Pacific Reporter Citations, bound supplements 1987-1990 and 1990-92

- Federal Labor Relations Reporter:

  1990 Decisions vol. 1;
  7/91-3/93 Arbitration vol. 2;
  Index, Statutes, Highlights vol. 1;
  1989-90 Decisions vol. 1;
  1989-90 Arbitrations vol. 2

- Federal Labor Relations Reporter (bound vols.)

  1979-84 Decisions
  1981-82 Decisions (vol. 1)
  1983-84 Decisions (vol. 1)
  1983-84 Arbitrations (vol. 2)
  1985-86 Decisions (vol. 1)
  1985-86 Arbitrations (vol. 2)
  1987 Decisions (vol. 1)
  1987-88 Arbitrations (vol. 2)
  1988 Decisions (vol. 1)

- American Jurisprudence 2d vols. 81 (Witnesses) and 31A (Expert and Opinion Evidence to Extradition) 1 copy
- U.S. Supreme Court Digest - vols. 12 (Replevin to Stare Decisis) and 12A (States, Territories to Syndicates) 1 copy
- U.S. Supreme Court Reports - vol. 111, L.Ed.2d, 1 copy

Post Judge Advocate, Tooele Army Depot, Attn: Allison Gambel, Tooele, Utah 84074-5000, DSN: 790-2536, commercial (801) 833-2536, has the following material:

- Army Federal Acquisition Register
- Federal Law Review Report
- Arizona Revised Statutes
- Arizona Digest Annotated
- Arizona Rules of Court
- New Mexico Statutes
- New Mexico Statutes Annotated
- Page on Wills
- West Pacific Digest
- CCH Employment Practice Decisions
- ALR Federal 3d
- Jones Legal Forms
- EPA General Counsel Opinions
- Environmental Rights & Remedies
- Moore's Manual Forms

*U.S. Government Printing Office: 1994 — 300-675/00002

By Order of the Secretary of the Army:

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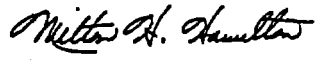

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