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Articles

Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program

Captain David O. Anglin

Opportunity often creates a thief or an abuser of a government program.[1]

I. Introduction

Sergeant (SGT) Andrews has been a government purchase cardholder for two years. Recently tasked with organizing a unit function, he decided to use the card for a number of questionable purchases, including food and alcohol. His rationale in making the purchases was, "I don't remember exactly what you can or can't buy with the card, but I'm doing it for the unit. I'll just accomplish the mission first and ask forgiveness later if I have to."

Specialist (SPC) Benton had been a government purchase cardholder for only six months when she ran into personal financial problems and began using her card to buy a number of items that she then sold or pawned. Among the items SPC Benton pawned were a laptop computer and a personal digital assistant (PDA), both of which should have been placed on the unit property book. Over the next few months, she began purchasing not only work-related items, but merchandise with no military use at all, such as expensive clothing and jewelry. Specialist Benton stopped recording her purchases in her log as required, and worse yet, her approving official (AO) continued approving her purchases each month without reviewing the account statements.

Sergeant First Class (SFC) Calhoun works in a recruiting battalion, and has held a government purchase card (GPC) for over a year. His brother owns an office supply store near post. One year after obtaining the card, SFC Calhoun concocted a scheme with his brother to defraud the government. He used his card to make a number of fictitious purchases, and his brother created a series of phony invoices to cover the nonexistent transactions. The two men divided the proceeds of their nefarious enterprise after the government paid the charges. Seven months into the scheme, SFC Calhoun's supervisor, who was also his AO, confronted him about the suspicious activity, demanding that he produce the thousands of dollars worth of office equipment that he had supposedly purchased, but which had never been seen by anyone in the recruiting station. Though his scheme was exposed, SFC Calhoun was undaunted; he revealed what he had been doing and offered his supervisor, "some of the action" provided he not disclose the misconduct. The supervisor agreed, and continued approving the fraudulent purchases. Losses to the government now exceed $100,000.

While these stories are fictitious, each is an example of misconduct that has occurred within the Department of Defense's (DOD) GPC program. Like many government programs, the GPC program was conceived with the best intentions, but it spawned a variety of unforeseen opportunities for misconduct. While the DOD will continue the program, in large part because the savings outweigh the losses,[2] the need for stronger program controls, more effective responses to misconduct, and better preventive measures against future misconduct have been the subject of intensive study.

This article begins with an overview of the GPC program, including its origin, its training requirements, and its management structure. Next, GPC misconduct will be divided into three categories: misuse, abuse, and complex fraud. The research will then focus on government responses to GPC misconduct, particularly the complexities of military prosecutions. The article then briefly addresses defenses and preventive measures, including a proposed panel instructionto simplify prosecution under the Uniform Code of Military Justice (UCMJ).

II. Origin of the Government Purchase Card Program

The DOD's GPC program is a component of the government-wide commercial purchase card program, implemented to streamline government procurements by providing a convenient and efficient means of making small purchases with minimal administrative requirements.[3] By eliminating the paperwork requirements of the purchase order, the GPC saves the government about twenty dollars per transaction, and saved the DOD an estimated $900 million between 1994 and 2003.[4] The GPC is now the required method of purchasing goods under the micro-purchase limit[5] and is the mandatory means of payment for services obtained from the Defense Automated Printing Service (DAPS).[6] Although the term "IMPAC" has, in many quarters, become synonymous with the GPC program, it

1. United States v. Girardin, No. 98-0391, 1998 CAAF LEXIS 1587 (1998) (Sullivan, J., concurring) (commenting on the appellant's misuse of a government-issued credit card).

2. *See* U.S. GEN. ACCT. OFF. REP. NO. GAO-04-156, *Purchase Cards: Steps Taken to Improve DOD Program Management, but Actions Needed to Address Misuse* (Dec. 2003) [hereinafter GAO-04-156].

3. *See* U.S. GEN. ACCT. OFF. REP. NO. GAO-04-87G, *Audit Guide: Auditing and Investigating the Internal Control of Government Purchase Card Programs* (Nov. 2003) [hereinafter GAO-04-87G].

is an acronym for the International Merchant Purchase Authorization Card, a registered trademark of US Bank, which provided VISA credit card services to the Army, Air Force, and Defense Agencies until 1998.[7] In the future, IMPAC may recede from the military lexicon. In November 1998, the General Services Administration's (GSA) SmartPay program replaced the IMPAC as the federal government's charge card program.[8] In fiscal year (FY) 2002, the DOD reported that an estimated 207,000 cardholders used purchase cards to make about eleven million transactions, at a cost of nearly seven billion dollars. In December 2003, the GSA reported that the DOD used purchase cards for nearly eleven million transactions, valued at about $6.8 billion, representing forty-five percent of the federal government's FY 2002 purchase card activity.[9]

III. Structure of the Government Purchase Card Program

A. Key Personnel and Their Responsibilities

All DOD personnel may be cardholders;[10] eligibility is not restricted by rank. The DOD GPC program has a six-level supervisory hierarchy, organized as follows: (1) the DOD; (2) the military service; (3) the major command; (4) the installation/organization coordinator; (5) the billing (approving) official; and (6) the cardholder.[11] Of the program's six tiers, levels four through six are most relevant to legal practitioners in the field.

The installation or organization coordinator is the fourth level supervisor, whose primary responsibilities include implementing and administering the program at the local level. This official trains, monitors, and audits GPC use at the installation level, and serves as the liaison between the major command, the bank, the Defense Finance and Accounting Service (DFAS), and installation organizations.[12]

The approving or billing official's primary responsibilities include approval or disapproval of all purchases after reconciliation by the cardholder, ensuring fund accountability, property accountability, certification of invoices, and surveillance of all cardholders within that AO's account.[13] The AO is usually the cardholder's supervisor or in the cardholder's chain of command, but if not, must have the capability to influence the cardholder's performance rating.[14] Unless exempted from the role by the Under Secretary of Defense for Contracting, the AO must also be the billing certifying officer for all account holders within his or her purview.[15] Thus, the AO must certify that all transactions made by the cardholder are legal, and within administrative and fiscal guidelines.[16] In July 2001, the DOD mandated a ratio of no more than seven cardholders to a billing official as the program standard,[17] although the total number of transactions must be considered when determining an acceptable cardholder to billing-official ratio.[18] The Deputy Assistant

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4. Tanya N. Ballard, *Defense Beefs Up Purchase Card Oversight*, Gov. Executive Mag., Daily Briefing, Jan. 2003, *available at* http://govexec.com/dailyfed/0103/010303t1.htm.

5. *See* U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 213.270 (July 31, 2000) [hereinafter DFARS].

6. *See* General Servs. Admin. et al., Federal Acquisition Reg. 5113.270 (Feb. 2002) [hereinafter FAR].

7. U.S. Dep't of Defense, Purchase Card Concept of Operations (Mar. 31, 2003), *available at* http://purchasecard.saalt.army.mil/Concept%20of%20Operations%20R1%20March%2003.pdf [hereinafter Purchase Card Concept of Operations] (noting that Citibank provides credit card services to the Navy and Marine Corps); *see also* DOD Charge Card Task Force Final Report 2-1 (June 27, 2002), *available at* http://www.dod.mil/comptroller/Charge_Card_TF_ Final.pdf [hereinafter Task Force Final Report].

8. *See* U.S. General Servs. Admin., Government Charge Cards Overview, *available at* http://www.gsa.g ov/Portal/gsa/ep/contentView.do?contID=8930&contentType=GSA_OVERVIEW (last visited Feb. 8, 2004) [hereinafter U.S. General Servs. Admin.] (explaining the SmartPay program issues the purchase card through five different banks: (1) Bank of America; (2) Bank One; (3) Citibank; (4) Mellon Bank; and (5) US Bank).

9. *Id.*

10. *See* U.S. Dep't of Army, Government Purchase Card Standing Operating Procedure (July 31, 2002), *available at* http://purchasecard.saalt.army.mil/Concept%20of%Operations%20R1 %20March%2003.pdf [hereinafter Army SOP].

11. *Id.* at 3-4.

12. *Id.*

13. *Id.*

14. *Id.*

15. Purchase Card Concept of Operations, *supra* note 7, at 5.

16. *Id.*

17. Army SOP, *supra* note 10, at 5.

Secretary for Procurement of the applicable defense agency must approve requests that exceed the seven-to-one ratio.[19]

The cardholder is primarily responsible for safeguarding the card, making only authorized purchases, maintaining a purchase log of all transactions (by using purchase receipts and invoices), and reconciling the log with the AO's records.[20] At a minimum, the purchase card log must contain: the date of purchase; the vendor name; the transaction's dollar amount; a description of items or services ordered; and an indication of whether or not they were received.[21]

B. Training Requirements

The Defense Federal Acquisition Regulation mandates standardized training for all purchase card users.[22] To fulfill this need, a self-paced, DODGPC Tutorial is available on the Defense Acquisition University (DAU) Website.[23] Designed primarily for prospective cardholders and AOs, the ten-part training program has a series of exams throughout the course and a final exam on which the user must achieve seventy percent or better to receive a certificate of completion. The program has an estimated completion time of four hours.[24]

The DAU training program includes a section titled, "Unauthorized Use of the GPC," which details the general prohibitions against the following: (1) split purchases and split requirements;[25] (2) purchases for other than official purposes; and (3) purchases for travel-related expenses. The section also includes advisories for requirements needing special approval, such as food purchases and short-term room rentals. The lesson also provides several examples of purchase card fraud. The comprehensive training outlines the dispute process, lists the persons to whom GPC misconduct should be reported, and details the order in which they should be contacted.[26]

In addition to the DAU, the GSA has a training course on its website. Training on the GSA site, however, is divided into two courses, one for cardholders and one for agency or organization program coordinators. The GSA site's cardholder training is geared for forty-five minutes, and includes its own exit quiz.[27]

In addition to online sources, local installations may offer their own GPC training programs. Judge advocates serving as trial counsel or defense counsel should consider attending such training, or at a minimum, should obtain the training materials, which could be extremely valuable at trial, particularly when the government alleges dereliction of duty.[28]

C. Fiscal Controls

1. Authorized Purchases

Cardholders may make purchases in person, by telephone, or online,[29] provided their purchases are authorized. Cardholders are thus subject to DOD mandates, their individual service regulations, and any applicable internal office policies. The general rule of all GPC transactions, however, is that cardholders may only make purchases to fulfill legitimate governmental needs.[30]

18. *Id.*

19. Memorandum, Assistant Secretary of Army, Acquisition Logistices and Technology Army Contracting Agency, to Assistant Secretary of the Army (Acquisition, Logistics and Technology), Assistant Secretary of the Navy (Research, Development and Acquisition), Assistant Secretary of the Air Force (Acquisition), Directors, Defense Agencies, subject: Cardholder to Approving Official Span of Control (17 Dec. 2002) (on file with author).

20. ARMY SOP, *supra* note 10, at 4.

21. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 12.

22. DFARS, *supra*, note 5, at 213.301.

23. Defense Acquisition University, *available at* http://clc.dau.mil/kc/no_login/portal.asp [hereinafter DAU Training Site] (last visited Feb. 8, 2004).

24. *Id.*

25. FAR *supra* note 6, at 13.301(c); *see also* note 38, *infra.*

26. DAU Training Site, *supra* note 23.

27. U.S. GENERAL SERVS. ADMIN., *supra* note 8.

28. *See generally* United States v. Shavrnoch, 49 M.J. 334 (1998) (holding that non-punitive regulations or rules may establish standards for which an accused may be prosecuted for dereliction); *see also* U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 3-16-4 (15 Sept. 2002) [hereinafter BENCHBOOK].

29. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 21. Before seeking items from commercial vendors, cardholders must review mandatory supply sources such as National Industries for the Blind (NIB). *Id.*

30. DAU Training Site, *supra* note 23.

Among transactions that require pre-purchase approval from an official other than the cardholder are the following: (1) printing or reproduction services other than DAPS;[31] (2) hazardous materials; (3) advertising; (4) items purchased with representational funds; (5) items for personal convenience (including appliances and clothing); (6) food and bottled water; (7) professionally printed business cards; and (8) trophies, plaques and mementos[32]. The procurement rules governing such transactions are complex, and the purchases often require legal opinions from judge advocates.

2. Unauthorized Purchases

The Army's GPC Standard Operating Procedure (SOP) identifies the most common types of purchases or transactions that are strictly prohibited.[33] Among the overarching categories of prohibited transactions are the following: (1) cash advances and wire transfers; (2) vehicle lease agreements; (3) motor vehicle repair; (4) long-term lease of land or buildings; (5) gasoline and other fuel purchases; (6) purchases of major telecommunication systems; (7) construction services over $2000; (8) securities purchases of any kind; (9) transactions with political organizations; (10) payment of court costs, fines, bail or bond; (11) gambling; (12) transactions with dating and escort services; (13) tax payments; and (14) and payment of alimony or child support judgments.[34]

In addition to the restrictions on certain types of transactions, regulations prohibit GPC purchases from certain classes of merchants, whose businesses are identified by a government coding system. Among the prohibited merchant categories are: jewelry stores; antique dealerships; pawn shops; wire transfer and money order dealers; gambling establishments; financial institutions; dating and escort services; courts; and political organizations.[35]

Finally, GPC fiscal controls include individual and monthly purchase limits. The basic rule is that all purchases are subject to the availability of funds and in no circumstances should a cardholder make purchases that are not funded or authorized.[36] An unauthorized or unfunded purchase may violate the Anti-Deficiency Act and could result in adverse administrative or disciplinary action.[37] Even when funds are available, however, two significant restrictions remain—those against split purchases and split requirements. Cardholders may not split the purchase of items exceeding the micro-purchase limit of $2,500 by making two or more purchases that fall under the purchase limit.[38] A classic example of a split purchase is a computer CPU purchase of $1,800, and a separate purchase of its $900 monitor, made separately to circumvent the micro-purchase limit.

Splitting requirements is use of the purchase card to avoid formal contracting procedures mandated by the nature of the purchase(s). Cardholders, for example, cannot split the requirements of a large contract, such as a need for an office computer network worth $150,000 dollars, into multiple purchases with the GPC.[39]

3. The GPC Dispute Process

Like other credit cards, the GPC may be lost, stolen, or the subject of billing errors. Cardholders may be victims of identity theft, or have their card numbers compromised. A GPC billing dispute process is available to address such problems whenever they occur. If a cardholder finds transactions for which she is not responsible on the statement of account, she should submit a dispute form to the card-issuing bank within sixty days of the statement.[40] Failure to submit the dispute form and the accompanying affidavit could result in liability to the government.[41] The dispute process becomes relevant in disci-

31. FAR, *supra* note 6, at 8.802.

32. Memorandum, Office of the Assistant Secretary of the Army Acquisition, Logistics and Technology, to See Distribution, subject: Army Standing Operating Procedure for the Government Purchase Card Program (1 July 2002); *see generally* CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 52D GRADUATE COURSE FISCAL LAW DESKBOOK ch. 2, para. VII.A-D, at 19-24 (Spring 2004) [hereinafter FISCAL LAW DESKBOOK]. The general prohibition on food purchases with appropriated funds is subject to limited exceptions. A unit may purchase bottled water if an outside water-testing agency issues a written report stating the available drinking water is non-potable. *See id.*

33. ARMY SOP, s*upra* note 10, at 19-20.

34. *Id*.

35. *Id*.

36. PURCHASE CARD CONCEPT OF OPERATIONS, *supra* note 7, at 21.

37. 31 U.S.C. § 1341 (2000). The Antideficiency Act's enforcement provision states, in pertinent part, "[a]n officer or employee of the United States Government . . . knowingly violating section[s] 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." *Id*. § 1350.

38. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 5, para. 0210 (July 2000) [hereinafter DFMR].

39. FAR, *supra* note 6, at 13.202(a).

40. DAU Training Website, *supra* note 23.

plinary actions when cardholders accused of misconduct deny making the purchase(s) giving rise to the charges against them. A cardholder's assertion that she never made certain purchases invariably raises the question of whether she disputed them when they arrived on the account statement. Whether the cardholder followed through with the dispute process could also have implications for offenses such as dereliction of duty.

If a cardholder reports his card stolen, the bank closes the account and issues a new card. While reporting the card stolen invalidates all further purchases, it does not relieve the government of its responsibility for any transactions made by the cardholder before reporting it stolen.[42] Cardholders who report their cards stolen may also be required to sign an affidavit confirming their report.[43]

Perhaps most significant is what the agency cannot dispute. If the cardholder makes a transaction within the single purchase limit, and not from a vendor with a blocked merchant category code, the issuing bank that paid the charges has fulfilled its contractual obligation and the government is bound to reimburse it. Thus, even when a purchase is frivolous, the government must usually pay the charges. This contractual obligation makes the government the victim, rather than the merchant or the bank, in most GPC misconduct cases, and is an important aspect of criminal prosecution and civil recovery. If a transaction is unauthorized, the agency should return the merchandise, or should seek reimbursement from the cardholder, the AO (if applicable), or both.[44]

D. The GPC Purchase Process

To understand misconduct involving the GPC, one must first understand the fiscal implications inherent in each stage of the purchase process. Unlike the Government Travel Card, which provides the cardholder a line of credit, the GPC expends government funds for required goods and services. Only when there is misconduct must, a cardholder or AO reimburse the government.[45]

Purchases with the GPC are funded through advance reservation of funds, in the form of either bulk commitments or bulk obligations.[46] In other words, a resource manager (or equivalent person) sets individual and office purchase limits for the organization and reserves (commits) a certain amount of funds in advance of purchases.[47] Thus, certifying officials do not individually approve (certify) the expenditure of funds in advance of each purchase. The following is a summary of a purchase card transaction. First, after identifying a need and selecting a vendor or contractor, the cardholder presents the GPC as the means of payment; second, the vendor or contractor provides the goods or services on the credit of the United States. The government's obligation to pay the invoice is, however, revocable; i.e., the obligation is subject to revocation if the purchase exceeds authorized limits or is with a prohibited vendor.[48] Third, the AO certifies the purchase as an authorized expenditure and forwards it to the disbursing office; and fourth, the disbursing office pays the debt. Understanding the fiscal process is crucial to a successful prosecution or defense, as both the offense and the victim may vary depending on what the cardholder purchases and whether the government pays the charges.

IV. Characterizing Misconduct

Following earlier reports from government investigations which failed to find systemic problems in the GPC program,[49] investigations by the U.S. General Accounting Office (GAO) found numerous abuses, ranging from mere negligence to outright fraud.[50] The GAO reported that misconduct involving the GPC had been carried out through every means from splitting

41. *Id.*

42. *Id.*

43. *Id.*

44. Purchase Card Concept of Operations, *supra* note 7, at 30.

45. *Id.*

46. *See id.* at D, pp. 61-68; U.S. Dep't of Defense Policies for Advance Reservation of Funds, Account Treatment and Billing Statement Processing for Micro-Purchase Transactions Using the Government Purchase Card (Mar. 22, 2002).

47. Purchase Card Concept of Operations, *supra* note 7, at D, pp. 61-68.

48. *Id*. at 14.

49. *See* Memorandum, Assistant Secretary of Army for Acquisition Logistics and Technology, to Inspector General, Dep't of Defense Director, Defense Finance and Accounting Service Director, Defense Manpower Data Center, subject: Operation Mongoose Fraud Detection Program (5 Oct. 2001) (on file with author). In June 1994, the Under Secretary of Defense (Comptroller) joined with the Defense Finance and Accounting Service, and the Defense Manpower Data Center to create a fraud detection and control program dubbed "Operation Mongoose." *See id.*

50. *See generally* U.S. Dep't of Defense, Inspector Gen. Audit Rep. D-2002-075, *Controls Over the DOD Purchase Card Program* (Mar. 29, 2002), *available at* https://www.us.army.mil/portal/portal_home.jhtml (discussing among other reports, GAO Rep. 02-32, GAO Rep. 02-506T).

purchases, to altering purchase receipts and records, to conspiracies between cardholders and AOs (or others).[51] For example, a 2001 GAO audit of the purchase card program of two U.S. Navy units revealed the following: forty-six of sixty-five major items such as laptop computers purchased with the GPC never appeared on property books at the inspected units; cardholders repeatedly used the GPC to buy personal items from jewelry to pizza; and screening of potential cardholders was so lax that any employee with supervisory approval was able to obtain a card.[52] A second review of the units, conducted one year later, revealed many of the same weaknesses.[53]

The reports of program weaknesses and cardholder misconduct prompted the DOD to initiate further studies to identify the basis for the problems in the GPC program. In March 2002, the Under Secretary of Defense (Comptroller) established a task force to investigate the DOD's charge card programs, find their weaknesses, and recommend ways to strengthen the programs; it was given sixty days to return its findings. The task force's final report, released in June 2002, identified the following weaknesses in the program: excessive numbers of cardholders in the program; inadequate training; too many cardholders within the AOs' span of control; and inadequate component regulations.[54]

The Department of the Army's SOP, released on 31 July 2002, cited many of the same weaknesses uncovered by the DOD Charge Card Task Force. The weaknesses manifested themselves in numerous forms of misconduct including: split purchases; unauthorized purchases; payment for items not received; cardholders returning items to merchants for store credit vouchers rather than having credit issued to the card; certifying invoices without proper review; excessive purchases with one vendor; lack of accountability for nonexpendable or sensitive items; cardholders or billing officials allowing persons other than the named cardholder to use the card; and purchase approvals by persons other than the authorized AO.[55]

Although the DOD and the GAO publications often use terms like abuse and fraud interchangeably, distinctive categories that mirror the disciplinary responses are a beneficial tool for the legal practitioner. Although the categories are not mutually exclusive and contain some artificial distinctions, they aid commanders in determining the most appropriate administrative or disciplinary responses by placing misconduct on a continuum. For the purposes of this article, improper conduct involving the GPC card is divided into three non-exclusive categories: misuse; abuse; and complex fraud.

A. Misuse

Misuse is the failure to use the GPC properly, but not for personal gain. Misuse includes misconduct from simple negligence, such as unknowingly buying unauthorized items, to knowingly making unauthorized purchases, all ostensibly to benefit the service. Misuse also includes purchases of authorized items at excessive costs, such as personnel buying expensive Bose clock radios for office use when less expensive brands are readily available.[56]

In our introductory example, SGT Andrews' conduct—purchasing items without obtaining the required special authorization—constituted misuse. His purchases, while in violation of fiscal rules, were not for personal gain.

B. Abuse

Abuse is use of the purchase card, or disposition of property purchased with the card that falls short of complex fraud but it is conducted for personal gain. Abuse encompasses making unauthorized cash advances, purchasing items solely for personal purposes, and selling or pawning items purchased with the GPC. Although fraud is inherent in the recordation process whenever the cardholder certifies that improper purchases are for governmental purposes, the fraud is not complex—proper review by the AO would detect it. Likewise, a properly implemented property accountability system would detect items purchased, but not recorded in the unit property book.

In contrast to SGT Andrews, who acted on behalf of the unit, SPC Benton used her GPC for her own benefit. Her sale of office equipment (the laptop and PDA) and purchase of purely personal items (clothing and jewelry), illustrate two types of cardholder abuse—wrongful disposition of military property and unauthorized purchases—both facilitated by a lack of accountability on the part of program officials.

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51. *Id.*

52. *See* GAO Rep. 02-32, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* 2-3 (Nov. 2001), *available at* http://www.gao.gov/new.items/d0232t.pdf.

53. *See generally* GAO Rep. 02-506T, *Purchase Cards: Continued Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Mar. 2002), *available at* http://www.gao.gov/new.items/d02506t.pdf.

54. DOD Charge Card Task Force Final Report 2-6, 27 June 2002, *available at* http://www.fmo.navy.mil/doc/purchase_card/DOD_Charge-Card_Task_Force_Final.report_06_27_02.pdf.

55. Army SOP, *supra* note 10, at 9-10.

56. GAO-04-156, *supra* note 2, at 7.

C. Complex Fraud

Complex fraud is misconduct motivated by personal gain, but carried out through acts of deception designed to defeat accountability controls. Complex fraud includes acts such as altering purchase records or signing receipts for nonexistent purchases. Also included in complex fraud are kickbacks from the vendor to the cardholder (including conflicts of interest), and any schemes involving both the cardholder and the AO.

Of the three cardholders from our initial example, SFC Calhoun's conduct is most egregious and is a case of complex fraud. SFC Calhoun's misconduct, like that of SPC Benton, included fraud, but extended far beyond representing improper purchases as legitimate. His scheme not only involved conflicts of interests, but also included a series of false statements designed to steal thousands in government funds. Sergeant First Class Calhoun's complex enterprise defeated the approval process and audit system, and violated several federal laws. His fraudulent purchase scheme was similar to that in *United States v. Brown*,[57] in which the defendant, a retired Army warrant officer and owner of a military surplus store in Fayetteville, North Carolina, formed a cabal with Soldiers stationed at nearby Fort Bragg. Brown created phony invoices and charged the government for purchases that were never made, and in return, gave cash kickbacks to the Soldiers who had allowed him to use their GPCs. Brown was convicted of larceny of government funds, conspiracy to commit larceny, false statements, and wire fraud.[58]

United States v. Durant[59] was a case involving collusion between the cardholder and the AO. Durant, an Army sergeant, was approached by his AO and supervisor, Staff Sergeant (SSG) Cochrane, who devised a scheme whereby Durant would make unauthorized purchases of personal items for both men with his IMPAC purchase card. Staff Sergeant Cochrane would then approve the purchases and authorize payment with government funds. Over the next two years, Durant made over ninety unauthorized purchases totaling more than $30,000 for himself, SSG Cochrane, and others. Durant progressively increased the amounts of purchases that he illegally made with his purchase card, knowing that SSG Cochrane would approve the purchases and cover for him. Both men were eventually prosecuted, with Durant pleading guilty to two specifications of larceny, while Cochrane pleaded guilty to conspiracy and eight specifications of larceny.[60]

V. Prosecuting Government Purchase Card Misconduct

The government has a variety of potential responses to misconduct involving the GPC. In its December 2003 report to Congress, however, the GAO reported that the military had not taken strong disciplinary action against cardholders who misused the GPC, largely because many purchases, though ill-advised, did not "directly violate existing service policies."[61] The GAO reported that the services punished the most egregious complex fraud schemes with courts-martial (and removal for civilian employees), but often took little or no disciplinary action in response to misuse or abuse.[62] While selecting the most appropriate response is the commander's prerogative, they will need the counsel of judge advocates, who must advise them of the gravamen of the offense(s) and provide the cost-benefit analysis of administrative versus punitive action.

Citing our earlier examples, SGT Andrews' well-intended but ill-conceived purchases might likely result in counseling or retraining, reprimand, reimbursement, or some combination of these measures. In contrast, one would expect a more severe command response to SPC Benton, who specifically intended to steal military property and wrongfully committed government funds to make her personal purchases. The government might opt for nonjudicial punishment or adverse administrative actions, along with reimbursement, but court-martial charges are also a possibility. Sergeant First Class Calhoun's conduct, however, would almost certainly warrant court-martial charges.

In courts-martial, misconduct involving the GPC poses complex legal issues in both guilty pleas and contested cases. Is merchandise purchased with the GPC government property even if the government never requested it, authorized it, or possessed it? What about the proceeds of items bought with the card but then sold? What charge(s) apply if the cardholder makes an improper purchase, but the AO refuses to certify it, and the funds are never disbursed? To prosecute successfully, the trial counsel must understand the major theories of criminal liability in several factual permutations and must conduct a careful, fact-intensive analysis. Likewise, the defense counsel

57. United States v. Brown, No. 98-4592, 1999 U.S. App. LEXIS 11333 (4th Cir. June 3, 1999).

58. *Id*. The U.S. Attorney's Office and the defense disagreed over the amount of the government's loss, the defense arguing for the presentence investigation figure of over $85,000, but the government estimating it at over $200,000. Brown stated he had made only thirteen fraudulent transactions while the government alleged hundreds. *Id*.

59. United States v. Durant, 55 M.J. 258 (2001).

60. *Id*. The only issue on appeal was the sentence disparity between SGT Durant, and his co-actor, SSG Cochran. The court offered no explanation for the disparity, other than noting that SGT Durant and SSG Cochrane were referred to trial by different convening authorities and tried at different locations. *Id*.

61. GAO-04-156, *supra* note 2, at executive summary.

62. *Id*. at 13-15.

must also master the theories of criminal liability to properly defend their clients.

A. General Principles of Prosecution under the UCMJ

Although the UCMJ does not specifically address GPC misconduct, the broad provisions of Article 121, UCMJ, proscribes various forms of theft, including obtaining property by false pretenses and embezzlement.[63] Choosing the most appropriate charge, however, is a tactical decision, often dictated by intricate factual nuances. For example, while the GPC is a means of paying authorized contracts, it has also been used to secure unauthorized services, such as personal automobile rentals.[64] While such purchases are impermissible, only monies[65] and tangible items may be the subject of an Article 121 offense.[66] Theft of services does not violate Article 121, but rather Article 134.[67]

Like the substantive offense itself, in GPC cases, the victim may vary. While the comments in Article 121 state that obtaining property though wrongful use of credit cards "usually [constitutes] a larceny of those goods from the merchant offering them,"[68] the fiscal rules of GPC transactions may result in a different victim. Depending on the circumstances, improper GPC use may constitute theft of government funds, theft of merchant's property, or theft of government property under Article 108, UCMJ.[69] When the cardholder obtains services, but the government does not pay the charges, a prosecution under Article 134 may result. To successfully try their cases, counsel must navigate the intricacies of proof by matching the cardholder's actions with the fiscal constraints inherent in purchase card transactions.

United States v Russell[70] is, perhaps, the seminal case on GPC misconduct, addressing the nature of property purchased with the card. In *Russell*, the appellant, an airman basic, pleaded guilty to dereliction of duty, false official statement, wrongful disposition of military property and eight specifications of larceny of military property for his abuse of the GPC. Russell, a GPC holder, used his GPC to buy numerous household items that the Air Force never requested. The court remarked, "Some of the items he would take to his workplace; others he would take directly from the civilian source to his quarters, never intending them to be turned over to the Government."[71] The Court of Appeals for the Armed Forces (CAAF) addressed one issue on appeal: the sufficiency of Russell's guilty pleas to the wrongful disposition of military property and larceny of military property when the government never requested, authorized, used, or possessed any of the items that Russell bought with his GPC.[72]

The court, citing the military purpose of the items (which could have been used in the Air Force's refrigerator systems), and Russell's admissions during the providence inquiry, concluded that the property in question was military property, even though the government never ordered or possessed it.[73] While the court settled the question by determining the property's potential use, it fell short of a definitive ruling on the applicable charges when property had no military use. Moreover, the *Russell* court left undecided issues such as when theft of merchant property or theft of military funds is the more applicable charge. Instead, the courts' analysis on these issues spans twenty years, from *United States v. Christy,*[74] a case before the Navy-Marine Court of Criminal Appeals (NMCCA), to *United States v. Albright,*[75] the Army Court of Criminal Appeals (ACCA).

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63. *See* UCMJ art. 121 (2002). "Not unlike the law of many state jurisdictions, Article 121, UCMJ, 10 U.S.C. § 921, proscribes larceny in its various forms, incorporating false pretense and embezzlement. The UCMJ eliminates their technical distinctions and provides for a simplified pleading form to cover the different theories of theft." United States v Christy, 18 M.J. 688 (N.M.C.M.R. 1984); *see also Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm*., 81st Cong., 1st Sess. 815, 1232 (1949).

64. United States v. Green, 44 M.J. 631 (C.G. Ct. Crim. App. 1996).

65. "In sum, the ambit of Article 121 is limited to 'money, personal property, or articles of value of any kind.'" United States v. Antonelli, 35 M.J. 122, 126 (C.M.A. 1992). Public funds are the revenue or money of a governmental body or securities of the national government or a state government. BLACK'S LAW DICTIONARY 682 (7th ed. 1999). To the extent that such revenue, money, or securities are tangible "articles of value," the theft of public funds may constitute larceny. *See* UCMJ art. 121.

66. *See* United States v. Albright, 58 M.J. 570, 572 (2003) (quoting United States v. Mervine, 26 M.J. 482, 483 (C.M.A. 1988)). *But see* United States v. Sanchez, 54 M.J. 874, 878 (Army Ct. Crim. App. 2001) (processing fees charged by banks in connection with ATM fraud was not proper subject of larceny under Article 121).

67. *See* UCMJ art. 134; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 78 (2002) [hereinafter MCM].

68. *Id*. pt. IV, ¶ 46(c)(1)(h)(vi).

69. *See* UCMJ art. 108.

70. United States v Russell, 50 M.J. 99 (1999).

71. *Id*. at 100.

72. *Id*.

73. *Id*.

In *United States v. Christy*, the NMCCA conducted a comprehensive analysis of Article 121, *vis-a-vis* GPC misconduct. In *Christy*, the accused improperly used his government credit card for his personal benefit and obtained gasoline from a number of gas stations. The court ruled that Christy, who made the purchases under false pretenses, induced the service stations to part with their property for an unauthorized commitment, a transaction they would not have entered into absent the cardholder's deception. Thus, larceny of the merchants' gasoline occurred immediately, even though the government later paid the bill. The court further found that by obligating the government, Christy created a possessory interest in the gasoline for the United States that was superior to his own.[76] The court's analysis was as follows:

> When the appellant [Christy] consumed the gasoline for his personal benefit, larceny of the purchased gasoline was complete. In these circumstances, it matters little whether the appellant's conduct is viewed as a wrongful taking or embezzlement; it is larceny. Appellant's stated intention to pay to the Government the cash equivalent of the gasoline did not reduce the offense from larceny to wrongful appropriation.[77]

The *Christy* court's basic analysis is sound. One does not nullify one's theft of an item belonging to the government, a computer, for example, by later offering to repay the item's value.[78] Cash, however, is fungible, and the UCMJ recognizes a defense to larceny when the accused takes money, but intends to return an equivalent amount.[79] Moreover, reimbursement (at least of the bank) is an inherent aspect of credit card transactions, ostensibly making claims of intended reimbursement more viable. Although it did not explicitly state its rationale, the *Christy* court likely rejected wrongful appropriation as a viable theory of criminal liability because reimbursement is not an ordinary feature of purchase card transactions. In larceny cases in which the accused seeks a safe haven in the lesser-included offense of wrongful appropriation, government counsel should rebut the assertion by pointing out that reimbursement by cardholders is a government-initiated process, conducted in response to misconduct, not at the cardholder's whim. The absence of a regular reimbursement process may be used as circumstantial evidence of the cardholder's intent when making the transaction.

Although *Christy* is twenty-years old as of this writing, the court's detailed analysis is still relevant; the ACCA cited it as recently as 2003.[80] Portions of the *Christy* court's analysis—supporting larceny from the merchant service stations—do not survive the fiscal law considerations inherent in the current GPC purchase process. Citing the accused's false representations to the merchants, *Christy* posited that had the service station operators known the purchases were unauthorized, they would not have transferred the gasoline. The court thus concluded that upon purchase, the accused stole the merchants' gasoline; it was inconsequential that they did not suffer actual pecuniary loss.[81] The court, therefore, presumed that the government would not pay for unauthorized commitments, an analysis inapplicable to today's GPC purchase process. The government's contractual obligation to remunerate the bank, even for unauthorized GPC transactions, means the merchant is almost always paid (barring one of the earlier mentioned prohibitions). Thus, in most GPC cases, unless the cardholder cancels the transactions, theft of a merchant's property is usually eliminated as a viable theory of criminal liability. To apply the correct analysis and find the proper charge(s), counsel must ascertain whether the purchase was for a documented government need, and must carefully track both the purchase and the property, often in several possible permutations.

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74. United States v. Christy, 18 M.J. 688 (N.M.C.M.R. 1984).

75. United States v. Albright, 58 M.J. 570 (2003).

76. *Christy*, 18 M.J. at 690; *see also* United States v. Jett, 14 M.J. 941 (A.C.M.R. 1982); United States v. Leslie, 13 M.J. 170 (C.M.A. 1982); United States v. Ragins, 11 M.J. 42, 47 (C.M.A. 1981).

77. *Christy*, 18 M.J. at 690.

78. MCM, *supra* note 67, pt. IV, ¶ 46c(1)(f)(iii)(B).

79. *Id.*

80. *Albright*, 58 M.J. at 572-73.

81. *Christy*, 18 M.J. at 690; *see also* United States v. Rubenstein, 22 C.M.R. 313 (C.M.A. 1957); United States v. Turiano, 13 C.M.R. 753 (A.F.B.R. 1953).

B. Prosecution under Various Provisions of the UCMJ

1. Larceny in Several Factual Permutations

a. Cardholder Keeps Goods; Government Makes Payment

In *Russell*, the CAAF established that items purchased with the GPC are military property, even if they were never approved for purchase and never in the government's possession.[82] Thus, it would appear that theft of military property is the appropriate charge whenever the cardholder purchases items with the GPC, the government pays for the items, and the cardholder then keeps them. It is noteworthy, however, that *Russell* was a guilty plea in which the accused conceded that the items he purchased became military property. Questions over ownership persisted nevertheless, with some of the appellate judges determining the items were military property using evidence other than Russell's admissions.[83] Indeed, the *MCM* and the *Military Judge's Benchbook* (*Benchbook*) appear at odds when defining military property. The *MCM* defines military property as: "[A]ll property, real or personal, owned, held, or used by one of the Armed Forces of the United States."[84] The definition of military property found in the *Benchbook*, however, is even more restrictive, requiring that the property have, "either a uniquely military nature or [be] used by an armed force in furtherance of its mission."[85] As has been demonstrated, GPC misconduct may involve property with no legitimate military purpose.

Thus, charges of theft or wrongful appropriation of military property are appropriate whenever the cardholder keeps goods purchased with the GPC. The government, however, may also charge theft of public funds. How to charge depends upon a subtle but important distinction. Theft of military funds implies wrongfulness in the purchase itself, which is not necessarily the case when the cardholder buys items to fulfill a documented government need. Thus, the government is better served by charging theft of military funds only when the items purchased (jewelry, for example) are for purely personal use. Prosecutors should charge theft of military property when the property was intended to fulfill governmental needs, but was not surrendered to the unit.

From our initial examples, SPC Benton should be charged with wrongful disposition of military property (assuming the purchases were to fulfill legitimate needs) for pawning the laptop computer and PDA. Her purchases of clothing and jewelry, however, are better charged under a separate specification as theft of government funds.

Prosecutors alleging larceny must remember their responsibility of proving payment actually occurred. Likewise, defense counsel must remember that theft of government funds does not take place until the payment occurs—purchase receipts alone are insufficient proof that the funds were actually disbursed.[86] Although a subsequent government payment does not negate the wrongfulness of the original transaction,[87] for obvious reasons, a prosecutor would be well advised not to charge theft of the vendor's goods or services when the merchant has been paid.

Questions concerning property ownership invariably arise at trial, and counsel must prepare for them. For example, in a guilty plea case involving theft, wrongful appropriation, or wrongful disposition of military property, trial counsel must ensure that the accused admits that the item(s) in question are, in fact, military property because public funds covered the purchase(s). In a providence inquiry, both trial and defense counsel should expect a question from the military judge along the lines of, "Whose property did you think it was?" In response, the accused must articulate why he or she believes that the property is, in fact, military property. Simply agreeing to legal definitions is not sufficient to ensure a provident plea.[88] Thus, a response of, "Although I was purchasing the item for my personal benefit, I knew it rightfully belonged to the government because the government was going to pay for it," would likely survive the providence inquiry, while a response of, "I thought the property was mine," might well result in a broken pretrial agreement or an appellate issue.

b. Cardholder Keeps Goods; Payment Not Made

In contrast to theft of government funds, theft of military property does not require actual payment; payment need only be pending. In an improper GPC transaction in which the government has not paid the charges, whether disbursal *was to occur* determines whether the government or the merchant is

82. United States v Russell, 50 M.J. 99 (1999).

83. *Id*. at 101.

84. *See* MCM, *supra* note 67, pt. IV, ¶ 32(c)(1).

85. *See* BENCHBOOK, *supra* note 28, para. 3-46-1.

86. *See* United States v. Franchino, 48 M.J. 875 (C.G. Ct. Crim. App. 1998).

87. United States v. Albright, 58 M.J. 570, 573 (2003).

88. *Russell*, 50 M.J. at 99 (quoting United States v. Outhier, 45 M.J. 326 (1996)).

the victim. When the agency is obligated to pay, but simply has yet to do so, the government, by virtue of its obligation, obtains a right of possession superior to that of the cardholder.[89] The cardholder who wrongfully takes such merchandise may thus be convicted of theft of military property.

When no payment is pending, a different analysis applies. When the cardholder receives the goods or services, but the funds are *never* disbursed due to discovery and subsequent disapproval of the merchant's category, the government incurs no obligation and the merchant is the victim. An example of such a situation is when the cardholder uses the GPC to purchase Internet-based entertainment services. If the AO spots the unauthorized transaction, disallows it, and the disbursing officer subsequently refuses payment, the merchant is the victim, and if the cardholder is charged, it should be under Article 134, UCMJ, for theft of services.[90]

c. Cardholder Sells Goods; Government Makes Payment

A cardholder who disposes of property purchased with the GPC violates Article 108, UCMJ, just like any other offender who disposes of military property.[91] Proper purchase recordation and efficient property accountability procedures are essential to substantiating such allegations. One who keeps profits associated with a sale or wrongful disposition is guilty of wrongfully withholding government funds.[92]

*d. Cardholder Sells Goods; Payment Not Mad*e

When payment has not occurred (but is pending), and the cardholder purchases merchandise with the GPC, sells it, and pockets the proceeds, the offense is neither *theft* of government funds, nor wrongfully *obtaining* government funds, but rather wrongfully *withholding* government funds.[93] Such was the case in *United States v Albright*, when the accused, an Army supply specialist, purchased numerous items with the GPC, including five laptop computers and seven pagers, most of which she then sold. Although the trial judge accepted Albright's plea to wrongfully obtaining public funds in violation of Article 121, UCMJ, there was no evidence that any government funds were actually disbursed.[94] Relying on the *Christy* court's analysis, the ACCA stated that Albright might have been convicted of theft of government funds had the monies actually been disbursed, but without such proof, such a charge was inapplicable.[95] Albright's guilty pleas to larceny of public funds, which the government charged as a wrongful "taking" of government funds, were, therefore, inaccurate. Instead, the court reasoned, Albright wrongfully withheld military property by keeping her purchases, in which the government held a superior possessory interest. She converted the government's property into cash by selling the merchandise, and should have surrendered the proceeds to the government.[96] By keeping the money, Albright wrongfully *withheld*, rather than *obtained* government funds.[97] Despite the variance, the court upheld Albright's plea, but chastised both the trial counsel and the trial judge for failing to grasp the proper theory of liability.[98]

2. Dereliction of Duty

Prosecution for dereliction of duty requires proof that the accused knew or should have known of his duty and that his actions inconsistent with the duty were either willful, the result of neglect, or the product of culpable inefficiency.[99] Regulations establishing the duty need not be punitive.[100] Dereliction, therefore, may be either *failure to act* in accordance with established procedures, such as failure to maintain a proper purchase log, or *affirmative acts* of misconduct, such as circumventing the guidelines by making split purchases. In either case, the model specification is sufficient, but when the government

89. United States v Christy, 18 M.J. 688, 690 (1984).

90. UCMJ art. 134 (2002).

91. *Id*. art. 108.

92. *Albright*, 58 M.J. at 573.

93. *Id*.

94. UCMJ art. 121.

95. *Albright*, 58 M.J. at 573.

96. *Id*.

97. *Id*.

98. *Id.* at n.3.

99. MCM, *supra* note 67, pt. IV, ¶ 16c(3).

100. *See* United States v. Shavrnoch, 49 M.J. 334 (1998); *supra* note 28 and accompanying text.

alleges affirmative acts of dereliction, the drafter should, for clarity, follow the standard language in the model specification with the details of the accused's conduct.

At trial, proof of training and guidance given to the cardholder or the AO is critical. Standardized, mandatory training provides the prosecution a starting point, but the prosecutor must produce copies of the accused's training certificates. Government counsel should also obtain any local training records, and should use training materials (including printouts of training slides or other training materials) at trial. Likewise, defense counsel should watch for incomplete training records at any level.

3. Conduct Unbecoming

While officer misconduct involving the GPC may be prosecuted under Article 133, UCMJ,[101] an impermissible multiplication of charges could become an issue. The accused in *United States v. Palagar*,[102] an Army Chief warrant officer and battalion maintenance officer, was charged with conduct unbecoming an officer for making false charges, and larceny for essentially the same acts—obtaining funds by making false charges against the GPC. The military judge denied a defense motion to dismiss the larceny and obstructing justice charges as multiplicious with the charge of conduct unbecoming an officer. Before the military judge announced the sentence, however, he informed the parties that he considered, "The clear overlap and relation between the misconduct which [made] up the subject matter of all of the offenses as a matter of extenuation."[103] The CAAF ruled, however, that where the accused's unauthorized purchases comprised the factual basis for both larceny and conduct unbecoming an officer, the charges were multiplicious.[104] Prosecutors should, therefore, be judicious in charging under Article 133, UCMJ,[105] using it to prosecute collateral misconduct surrounding the purchases, such as the use of government computers to carry out credit card scams.

4. False Statements

False statements are inherent in improper GPC purchases, as the cardholder and AO must ultimately certify every purchase as fulfilling governmental needs. A cardholder or AO who knowingly signs a bogus certification, presents fictitious or altered receipts, or makes a false official representation may be subject to court-martial charges. Once again, *Palagar*,[106] provides guidance. Palagar used his government-issued IMPAC card to make $2,242 worth of unauthorized purchases for his personal use. He signed and submitted a false "Statement of Account" to his IMPAC AO, which he supported with phony receipts that he created on a computer. The phony receipts purported to document purchases that Palagar never made. Palagar also altered some receipts by writing over the unauthorized items or by folding and photocopying the receipts to conceal his purchases of unauthorized items, and he submitted the altered receipts to an officer appointed to investigate his suspected misuse of the IMPAC card. He was subsequently convicted of submitting a false official record and of obstructing justice (by submitting an altered receipt to an investigating officer). The *Palagar* case illustrates the need for supervisory officials to reconcile cardholder statements against their own separate account statements, preferably in an unalterable, read-only computerized format received directly from the bank.

5. Conflict of Interests

Portions of the Joint Ethics Regulation (JER) are punitive and may be charged under Article 92, UCMJ, Violation of a Lawful General Regulation.[107] The punitive provisions apply to enlisted personnel as well as officers, as the accused found in *United States v. Hawkins*.[108] Hawkins, an Air Force master sergeant and IMPAC cardholder, was the superintendent of a post gym at an overseas airbase. He was convicted of, among other offenses, violating the JER, for conflicts of interest in awarding base contracts. Hawkins stipulated that sometime during August 1995, his wife and brother-in-law decided to create a corporation in the United Kingdom called Eagle Alarm and Electronics Limited (Eagle). Hawkins admitted that his wife had a direct financial interest in Eagle (she was the secretary of the company), and further admitted that she spent the Hawkins' money to set up the business. It was he, however, who filled out the documentation that enabled Eagle to become an incorporated company in the United Kingdom.[109]

While Hawkins was superintendent of the post gym, the Air

101. UCMJ art. 133 (2002); *see supra* note 28.

102. United States v. Palagar, 56 M.J. 294 (2002).

103. *Id.* at 297.

104. *Id.*

105. UCMJ art. 133.

106. *Palagar*, 56 M.J. at 294.

107. *See generally* U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, THE JOINT ETHICS REGULATION [hereinafter JER] (1993); *see* UCMJ art. 92.

108. United States v. Hawkins, No. 33087, 2000 CCA LEXIS 266 (A.F. Ct. Crim. App. Nov. 6, 2000) (unpublished).

Force identified a need for an improved security system for the facility. During 1995 and 1996, Hawkins manipulated the bid system to send contracts to Eagle. He also stipulated that on three occasions, he used his IMPAC card to make purchases directly from Eagle in his official capacity, either as the superintendent of the gym or as the noncommissioned-officer-in-charge of billeting. After two of these purchases, Hawkins or his wife withdrew cash from an Eagle bank account and deposited it into their personal bank account. Hawkins stipulated that his certification (i.e., that his purchases from Eagle were made in good faith) was false. Hawkins' conduct was eventually uncovered and he was charged under Article 92, UCMJ, for violating two provisions of the JER.[110]

Though the facts were overwhelming and led to a guilty plea, Hawkins challenged his conviction on appeal, claiming that his pleas to Article 92 were improvident because the ethical rules did not apply to noncommissioned officers and because he never indicated to the military judge that his spouse was a compensated employee or had a financial interest in Eagle. The court found all of Hawkins' arguments unpersuasive and affirmed both the findings and the sentence.[111]

C. Fact-Based Defenses and Government Responses

Despite the potential complexity of GPC prosecutions, defenses may be relatively simple. Cardholders accused of misconduct involving the GPC may claim one of eight, non-mutually exclusive defenses: (1) they did not make the transaction(s); (2) their purchase(s) were within program guidelines and therefore permissible; (3) they were unaware of program rules; (4) they mistakenly used the wrong credit card; (5) their purchases, although proper, were simply followed by dilatory recordation or turn-in; (6) they knew the purchase(s) were improper, but intended to reimburse the government the money; (7) they cancelled the transactions; or (8) the government never paid the charges.

1. Cardholder Denies Making the Purchases

Determining the maker of a GPC transaction is a question of fact, which, in the fast-paced world of credit purchases, is increasingly complex. In-store transactions should, of course, yield purchase receipts with signatures, and perhaps eyewitness identification, but the GPC may also be used for on-line buying and telephone orders, making the purchaser's identity more difficult to determine. While cardholders have a duty not to surrender their cards to third persons,[112] they must surrender their account number in every lawful transaction, making identity theft a possibility. Identifying the cardholder as the purchaser becomes even more difficult if the program's discipline is lax. Thus, in investigations, admissions by the cardholder are at a premium, and statements to the AO, investigators, or other supervisory personnel, are a crucial source of information. Government counsel should ensure that investigators obtain detailed admissions from persons suspected of misconduct with the GPC. To the extent practicable, investigators should conduct a line-by-line review of purchase receipts with persons suspected of misconduct, obtaining admissions or explanations for specific charges. In the absence of such proof, the defense may challenge the authenticity of any purchase.[113]

Government counsel must search for indicators of misconduct outside of the accused's purchases. They should closely scrutinize the cardholder's account reconciliation for relevant evidence. A lengthy period of fraudulent charges with no challenge from the cardholder indicates only one of two possibilities: nonfeasance or malfeasance. The longer the unauthorized purchases continue, the more likely that malfeasance is the cause. Government counsel and investigators should also gather the accused's personal credit transactions, including purchases made before the cardholder obtained the GPC, to identify any similarities in buying patterns. A series of charges to the same or similar vendors may provide strong circumstantial evidence of identity and absence of mistake, grounds for admission under Military Rule of Evidence 404(b).[114]

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109. *Id.*

110. JER, *supra*, note 107, ch. 2, sec. 2635.502, para. 5-301.

111. *Hawkins*, No. 33087, 2000 CCA LEXIS, at *6.

112. *See* ARMY SOP, *supra* note 10, at 4.

113. While questions from the AO may be as simple as, "Did you make these charges," the battle is nevertheless joined: do *Miranda* rights and Article 31 rights apply to such inquiries? When an investigator initiates questioning, it is, of course, potentially for use in legal proceedings against the accused. Yet, when the AO—who is likely the cardholder's immediate supervisor—makes the query, the primary purchase is to maintain proper records. Government counsel should remind AOs that the questions are a regular function of business; i.e., the reconciliation of accounts. Should defense counsel win the race to the witness he or she might get the supervisor to state that the questions were asked primarily to gather evidence, thus requiring a rights warning or proper waiver. When the AO testifies to the cardholder's admissions, counsel should know whether the official spoke to investigators beforehand or asked any questions at their behest.

114. MCM, *supra* note 67, MIL. R. EVID. 404(b).

2. Cardholder Claims Compliance with or Ignorance of Program Rules

When the government alleges violations of fiscal guidelines, the trial counsel should expect a challenge from the defense, either on whether the rules were actually violated or on the accused's knowledge of them. The trial counsel should call a witness or witnesses to testify to the rules governing the program, and a finance expert to prove that the funds were actually disbursed. The agency or organization coordinator, for whom monitoring the GPC program is a primary rather than additional duty, is generally a better choice than the AO for testimony about program rules. Therefore, the trial counsel should call the agency or organization coordinator, or a higher official in the GPC supervisory structure, whenever the government needs testimony concerning program rules.

3. Cardholder Planned to Reimburse the Government

When cardholders assert that they intended to repay the government for their GPC purchases, they place SOPs (and their knowledge thereof) at issue. In such cases, the absence of a regular reimbursement procedure supports the prosecution, who can use it as circumstantial evidence of intent to defraud the government. If, however, the accused takes the stand at trial, prosecutors would be well advised to avoid posing the ultimate question. If asked how he intended to repay the government without having a regular process to do so, the accused might well respond, "I thought DFAS might just deduct it from my pay." Such a response is, of course, a calculated risk for the defense, but might garner sympathy if the members are unfamiliar with the rules on recovery. At any rate, the government's finance expert should explain that the reimbursement process is a government-initiated process, imposed as a response to improper use of the card, and not at the cardholder's request.

4. Cardholder Simply Delayed Surrendering the Property

Prosecutors should also consider charging dereliction of duty whenever the accused ultimately surrenders the property and claims to have simply failed to maintain proper records. The dereliction charge is not superfluous; in difficult cases, such as those in which the property has a military purpose, dereliction may be the only offense of which the accused is convicted. The purchase logs are also essential in proving more serious misconduct, and are the key to detecting inconsistencies between lawful purchases and extraneous charges. Charging dereliction of duty may also eliminate uncharged misconduct issues.

5. Cardholder Mistakenly Used the Wrong Card

Although the GPC is prominently marked for official use only, at least one accused has claimed to have mistakenly used it for his personal purchases, actually intending, he asserted, to have used his personal credit card.[115] While such a defense might seem spurious, government counsel should be prepared for it. Trial counsel should have an enlarged version of the purchase card available in every contested GPC case to rebut any such assertion from the accused. Government counsel should also include the credit card number on the charge sheet.

As larceny, fraud, and false statements are all specific intent offenses, the defense need only show an honest mistake to obviate criminal intent.[116] In anticipation of such a defense, government counsel should subpoena the accused's personal credit card records. While credit card transactions that are the subject of criminal charges will, of course, be absent from the accused's personal credit card statements, confronting her with their absence leaves her in a double bind. She must then explain the conspicuous absence, or at least her lack of any reaction to the unexpected windfall. Her situation becomes even worse if she paid other monthly charges on her personal account. Faced with the absence of the purchases in her personal credit card account records, the accused is left with the highly implausible explanation that she not only failed to keep track of her GPC statements, but her own as well.

6. Cardholder Cancelled the Purchase

One can easily envision the scenario in which a cardholder, knowing that investigators are close at his heels, reveals items he purchased but previously withheld, with the explanation, "I just hadn't gotten around to recording the transactions." When the purchases are of impermissible items, this defense is counterintuitive and likely falls flat at trial. One would not expect the cardholder to record, for example, the unauthorized purchase of a diamond ring. But when the items purchased could be used to fulfill legitimate needs, the equation becomes more complicated. In such cases, memoranda, requisitions, or other business records documenting official needs (or the lack of such documents) are valuable evidence. As a preventive law measure, trial counsel should advise commanders to require a memorandum for record from cardholders or AOs *before* major GPC purchases, documenting the unit's need (with major purchases specified at whatever dollar amount the command chooses).

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115. *See* United States v. Primeau, 55 M.J. 572 (C.G. Ct. Crim. App. 2001), in which the appellant, a Coast Guard warrant officer, claimed ineffective assistance of counsel after his trial defense counsel failed to call military character witnesses to support a mistake of fact defense. The court was apparently unconvinced remarking, "The evidence of this record convinces us beyond a reasonable doubt that there was no mistake of fact when this experienced warrant officer wrongfully used a Government American Express card to withdraw money from automatic teller machines for unauthorized personal purposes." *Id.* at 573.

116. *See generally* United States v. Bankston, 57 M.J 756 (Army Ct. Crim. App. 2002).

7. Cardholder Asserts the Government Never Paid for the Purchases

There are, of course, cases in which an accused may assert the absence of payment, either because the government simply did not provide proof, or because the cardholder cancelled the transactions before payment. Such cases may, nevertheless, yield convictions for attempted larceny. When the accused has fraudulently obtained a GPC, the courts have gone so far as to accept a guilty plea to attempted larceny of bank funds even though there was no evidence of a specific transaction.[117] The accused may also cancel the transactions and claim the defense of abandonment. When the accused offers such a defense, counsel should determine whether the accused cancelled the transactions of his own accord or in response to potential detection by law enforcement.[118]

VI. Administrative Responses

A. Military Administrative Actions

For military personnel, administrative actions range from no action, to remedial training, to reprimands or admonitions, to relief for cause, to administrative separations.[119] As with all adverse personnel actions, commanders are encouraged to consider all factors involved.[120]

B. Civilian Employee Discipline

As part of the National Defense Authorization Act of 2003, Congress required that agencies establish procedures and issue regulations to address improper use of GPCs by DOD civilian employees.[121] While suspension of employment without pay and termination of employment are authorized measures, agencies must consider the applicable factors listed in *Douglas v. Veteran's Administration*, in every disciplinary case.[122] Thus, the command should always consider the gravity of the offense, the purpose of the expenditure, the employee's time in service, and the employee's service record.[123]

Supervisors imposing disciplinary action against civilian employees should be ready to follow through on any proposed sanctions. If they fail to act decisively, supervisors risk undermining management's authority. Such was the case in *Tackett v. Air Force*, when the Merit Systems Protection Board (MSPB) reversed a removal action after the agency failed to follow its own improvement plan. Tackett, the subject employee, had made numerous unauthorized purchases with the GPC, prompting the agency to issue a written performance improvement plan that made further improper GPC use immediate grounds for termination. Tackett continued making improper charges with the card despite the written warning, but his supervisor responded only with verbal counseling. The agency later made Tackett's GPC misconduct a partial basis for a removal action, which prompted his appeal to the MSPB. The MSPB reversed the removal, essentially ruling that since the government did not find the conduct serious enough to carry through on its ultimatum, neither did the board.[124]

C. Civil Recovery

The Debt Collection Act[125] provides the authority for collecting debts resulting from improper expenditure of government funds, even when the offender has permanently changed station, retired, or left government service. Certifying officers are subject to pecuniary liability for the fund payments that they approve.[126] This tool for financial recovery can also serve as a deterrent against negligence by AOs.

The *DOD Financial Management Regulation*, volume 5, chapters 28-32 outline debt collection and recovery. Chapter twenty-eight, the general provision on indebtedness, provides an overview on debt collection and recovery tools for debts owed by both uniformed service members and DOD civilian employees. It states:

117. United States v. Smith, 50 M.J. 380 (1999).

118. *See generally* BENCHBOOK, *supra* note 28, para. 5-15.

119. U.S. DEP'T OF ARMY, REG. 600-200, ARMY COMMAND POLICY para. 4-7a (13 May 2002).

120. *Id.*

121. *See* Department of Defense Appropriations Act for Fiscal Year 2003, Pub. L. No. 107-248, § 8149 (c), (d), 116 Stat. 1519; Bob Stump National Defense Authorization Act of 2003, Pub. L. No. 107-314, 116 Stat. 2458.

122. *See* Memorandum for Distribution, Under Secretary of Defense, subject: Government Charge Card Disciplinary Guide for Civilian Employees, app. 3 (21 Apr. 2003); Douglas v. Veteran's Administration, 5 M.S.P.B. 313 (1981).

123. *Douglas*, 5 M.S.P.B. at 313.

124. Tackett v Air Force, 76 M.S.P.B. 649 (1997).

125. 31 U.S.C. § 3701-11 (LEXIS 2004); *id.* § 3701.

126. *Id.* § 3528.

> [D]ebts owed by current or retired members of the military to the DoD or to other federal agencies that can be collected through salary offset shall be collected as provided in Volume 7A, Chapter 50, and Volume 7B, Chapter 28, respectively. Debts owed by current or retired civilian employees to the DoD or to other federal agencies that can be collected through salary or retired pay offset shall be collected as provided in Volume 8, Chapter 8. Debts determined to be owed to the United States that must be collected administratively other than through offset shall be collected under the authority of 31 U.S.C. 3716; and the "Federal Claims Collection Standards," Title 31, Code of Federal Regulations, Parts 900-904, applying the procedures of Volume 5, Chapters 28 through 32.[127]

Measures to enforce debt collection may include: Federal salary offset (including retirement pay); offsets against tax refunds; and litigation. There are provisions for compromise, suspension, and termination of debt collection activity, but such remedies are not available in cases of fraud (as defined by the agency).[128]

VII. Preventing Misconduct

A. Existing Preventive Measures

In response to the numerous reports of misconduct with the GPC, the DOD issued a number of directives aimed at increasing controls over cardholders and reducing misconduct. In March 2002, the Comptroller established a Government Charge Card Task Force to identify problems within the program and to make recommendations to reduce the incidence of inappropriate use. The task force issued its report in June 2002, and suggested twenty-five measures to reduce misconduct with the GPC. Among the task force's suggestions were the following: online statement review for purchase card officials (to defeat alteration of paper copies); improved training; tougher enforcement of the span of control; and more positive control of individuals who depart an installation or activity.[129] Other improvements, like improved screening of potential cardholders, have already been implemented.[130] The government is now required to screen potential cardholders and identify bad credit risks, much like civilian credit card agencies.[131]

In November 2003, the GAO released an audit guide for investigating misconduct with the GPC and improving internal controls within the program. While the guide was not intended for use in criminal investigations,[132] it nevertheless contains several measures that may be so used. One such tool is data mining: a computer-assisted method of detecting irregularities in credit card buying patterns, by which financial institutions, persons in the program's supervisory hierarchy, or criminal investigators can set parameters that will electronically flag accounts with suspicious activity.[133] The value of data mining as a diagnostic measure cannot be understated—it provides the user with an instantaneous snapshot of a cardholder's purchase activity and provides a constant review over numerous accounts. When combined with other preventive measures, data mining can be an effective means of policing the GPC program, without the need for outside audits. If, for example, the command adopts the aforementioned practice of requiring memoranda to record major purchases at a specific dollar amount (e.g., $1000) and forwards this information to the installation or MACOM coordinator responsible for reviewing the purchase records, the coordinator can set parameters accordingly and provide the commander with a list of all purchases at or above the amount specified. The commander can then inspect unit records for the memoranda, take corrective action when the documents are missing, and initiate a criminal investigation when warranted.

It is crucial, however, that persons other than the cardholder be notified when data mining identifies a possible discrepancy. In one case from the field, the issuing bank noted several transactions of questionable authenticity and called to confirm their validity. Unfortunately, the call went to the cardholder, the very person committing the purchase card abuse. The cardholder, of course, simply confirmed the transactions. The abuse continued until detected through an unrelated audit.[134] Since the

127. *See* DFMR, *supra* note 38, vol. 5, para. 2801(B).

128. *Id.* para. 280103.

129. U.S.Dep't Defense Charge Card Task Force Final Report, apps. A, B, 27 June 2002, *available at* http://www.fmo.navy.mil/docs/DOD_Charge_Card_Final_Report_27_June_2002.doc.

130. *Id.*

131. *Id.*

132. *See* GAO-04-87G, *supra* note 3, at 6.

133. *Id.*

134. Interview with Lieutenant Commander Russell J. MacFarlane (U.S. Navy), Student 52d Graduate Course, Judge Advocate General's Legal Center and School, Charlottesville, Va. (Nov. 13, 2003).

potential for misconduct is greatest when the cardholder and the AO work in concert to defraud the government,[135] and since GPC misconduct almost invariably involves either deception of AOs, complicity of AOs, or negligence of AOs, it would be prudent that any programs aimed at detecting abuses involve commanders, who are ultimately responsible for funds and military property within their purview, and who are charged with maintaining unit discipline.

In addition to screening, DOD regulations require reporting of possible Anti-Deficiency Act violations. One who suspects a violation has ten working days to report the violation to his chain of command, which must then appoint an investigating officer.[136] If the investigating officer suspects criminal misconduct he or she must suspend the investigation and obtain a legal opinion on whether to consult criminal investigators.[137]

The DAU website advises any person who suspects fraud in a GPC account to immediately contact the card-issuing bank, the agency program coordinator, the DOD Fraud Hotline (1-800-424-9098), and the local procurement fraud advisor. Persons suspecting impropiety should also contact their organization's Criminal Investigation Command.

Among the misconduct identified in the GPC program were DOD employees creating or participating in the ownership of outside businesses for the purpose of committing fraud or abuse of the purchase card.[138] Yet, there is no specific guidance on how to guard against conflicts of interest, other than the training guidance offered at the various websites. As a preventive measure, units might employ conflict of interest disclosure forms for cardholders. The disclosure form can include a pledge to inform the supervisor of any potential conflicts of interest that arise in the future. One further possibility is a simple written declaration from the cardholder, documenting or disclosing personal interest in any businesses with which the cardholder is likely to do business.

B. Does the Military Need a UCMJ Article Addressing GPC Misconduct?

The *MCM* contains no nominate offense for misconduct with the GPC, and the current definition of military property extends to "all property, real or personal, owned, held, or used by one of the Armed Forces of the United States."[139] The definition of military property found in the *Benchbook* is even more restrictive, requiring that the property have "either a uniquely military nature or [be] used by an armed force in furtherance of its mission."[140] As has been demonstrated, however, GPC misconduct may involve property with no legitimate military purpose. Moreover, a window of time exists between the transaction and payment, during which the government has only its superior interest in the property as its basis of ownership. This raises the question: does the military need a new UCMJ article to address GPC misconduct?

Military law enforcement officers who have inherent federal authority do not need a new code article to give them greater authority to investigate. If needed at all, a new UCMJ article addressing GPC misconduct would assist prosecutors by closing the evidentiary window, thereby simplifying the exigencies of proof. In its dicta, the *Christy* court discussed the absence of a specific UCMJ article addressing government credit card misconduct, but did not resolve whether a new article was needed.[141] Subsequent cases have shown areas of ambiguity in GPC cases that a new definition of military property might cure.

In GPC cases, the area of greatest area of ambiguity is often in characterizing the loss; i.e., determining whether the accused has stolen military funds or property, and if so, when the offense was consummated. Unlike other larceny and wrongful disposition offenses in which the taking of existing property out of the military's possession constitutes the *actus reus*, in a wrongful GPC purchase, *the unauthorized transaction* is the misconduct which converts the merchant's property to military property—the taking is only incidental. A charge of *withholding* military property raises questions concerning remoteness in time from the moment of purchase, to the time when the property should have been surrendered. When cardholders purchase items such as jewelry, which has no military purpose and would likely never be voluntarily surrendered, it is easier to fix the moment of purchase as the time of the offense. Even so, the funds might not yet be disbursed, complicating the situation further. The fact-finder may well be forced to rely on legal definitions as the basis of criminal liability. The analysis in GPC cases can be complex, however, with both trial counsel and the trial judge

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135. *See, e.g.*, United States v Durant, 55 M.J. 258 (2001).

136. *See* DFMR, *supra* note 38, vol. 14; ch. 3, para. 030101; *see also* FISCAL LAW DESKBOOK, *supra* note 32, ch. 6, at 17 (stating the MACOM usually appoints or approves the investigating officer).

137. *See* DFMR, *supra*, note 38, vol. 14, ch. 5, para. 050301(E); *see also* FISCAL LAW DESKBOOK, *supra* note 32, ch. 6, at 17.

138. ARMY SOP, *supra* note 10, at 9.

139. *See* MCM, *supra* note 67, pt. IV, ¶ 32(c)(1).

140. *See* BENCHBOOK, *supra* note 28, para. 3-46-1.

141. United States v. Christy, 18 M.J. 688, 691 (N.M.C.M.R. 1984).

missing the correct theory. It is noteworthy, for example, that both *Russell* and *Albright* were guilty pleas, both of which left delicate appellate issues for the Army Court and the CAAF. To accomplish its objective in *Russell*, the CAAF had the benefit of the accused's admission that the property could be used by the military. The judges, nevertheless, based their respective opinions on different grounds.[142] Similarly, in *Albright*, the accused admitted that the property became military property upon her purchases,[143] but the court nevertheless wrestled to define her misconduct. In a contested case before members, defense counsel might capitalize on the ambiguities, perhaps with greater success. Property comprising the subject of Article 108 or 121 offenses might have no legitimate military use, might never have been in the government's possession, or might not have been paid for, providing the defense counsel an opportunity to raise doubts. In such instances, the prosecutor must fill the gaps by showing how the government's contractual obligation vests the Army with the superior right of possession.[144] The case might very well hinge on the instructions given by the military judge. A definition clarifying the nature of property purchased with the GPC could eliminate much of the ambiguity commonly found in such cases. Thus, in contested cases involving GPC misconduct, the trial counsel should request that the military judge provide the following definition of military property: Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States, *including all property purchased through the obligation of military funds, regardless of whether the property serves a military purpose, or whether the funds are actually disbursed.*[145]

VIII. Conclusion

Accounting for roughly forty-five percent of the federal government's 2002 FY purchase card activity,[146] the DODGPC Program will likely continue to be a cornerstone of military contracting and procurement. The services, therefore, will continue to confront misuse, abuse, and complex fraud within the program. Prosecutors, commanders, administrators, and investigators must take a multifaceted approach involving screening, training, and preventive law. When preventive measures fail, counsel must master the intricacies of GPC cases to advise their commanders and clients, and to prosecute or defend cases effectively.

142. United States v. Russell, United States v. Russell, 50 M.J. 99 (1999).

143. United States v. Albright, 58 M.J. 570, 573 (2003).

144. The term "military property" was not defined in the 1995 *MCM*, which was in effect during Russell's offenses. *Russell*, 50 M.J. at 101 (Gierke, J., concurring). The current benchbook instruction advises the accused commits theft when he wrongfully takes property to which another party has a superior right of possession. *See* BENCHBOOK, *supra* note 28, para. 3-46-1.

145. Note that this is the author's proposed definition. *See generally Russell*, 50 M.J. at 101; BENCHBOOK, *supra*, note 28.

146. GAO-04-156, *supra* note 2, at 4.

Legal Assistance Issues for Retirees: A Counseling Primer on Old Age, Disability, and Death Issues

Colonel (USAR) Gene S. Silverblatt[1] & Lieutenant Colonel (Ret.) Linda K. Webster[2]

You are a newly assigned legal assistance attorney, fresh from the basic course. Your parents are still of working age, and your grandparents are just beginning to draw Social Security benefits. Old age, disability, and death have so far eluded your immediate concerns. Lieutenant Colonel (Retired) X *comes to see you at the legal assistance office for help. His questions center around what he has to do to have legal authority over his wife to put her in a nursing home. She has grown so forgetful that she almost burned down their house last week after leaving food cooking on the stove. Lieutenant Colonel* X *also wants to know about paying for a nursing home. He has heard that he must either pay for it himself or go on Medicaid to have Medicaid pay the bill. This is all new to you, although* Army Regulation (AR) 27-3 *states that the Army will provide legal assistance for many of these issues. What will you tell Lieutenant Colonel* X*?*

I. Introduction

Legal assistance attorneys are often the least experienced attorneys in a staff judge advocate's (SJA) office. They routinely face complex issues, however, in advising clients on topics including consumer law, income and estate taxes, family law, real estate law, bankruptcy, and estate planning.[3] As the life expectancy of Americans increases along with the myriad legal issues facing older Americans, it is essential that legal assistance attorneys become familiar with common concerns for these clients.[4] This area of law is generally referred to as elder law, in recognition of some of the particularized issues clients face as they age.[5] This article provides an overview of elder law as it applies to the practice in legal assistance. Section II describes preparing for and meeting with clients, to include ethical considerations. Section III describes planning for disability, such as powers of attorney, advance medical directives, guardianships, and Medicaid. Section IV describes planning for death, including wills, trusts, and probate. Section V summarizes the major learning points from this article and suggests elder law resources for legal assistance attorneys.

II. Meeting with the Client

A. Office Arrangements

Usually, someone other than the SJA or the chief of legal assistance determines the location of the legal assistance office.[6] As a practical matter, however, these individuals must ensure that the legal assistance office is accessible to their clients. Not all legal assistance clients are active duty Soldiers who have few, if any, physical limitations.[7] Practitioners must be sensitive to the limitations of older clients and ensure that the physical accommodations of the office provide for them. For example, how hard is it to get to the legal assistance office? How far away must clients park? Is the office on the upper floor of a multi-story building? If so, are there elevators that are easily accessible to clients? In any building, are there ramps or other methods of access for those using walkers, wheelchairs or scooters?[8] Are the offices and hallways well-lit and marked with signs?

Young attorneys may wonder why the answers to these questions matter. Accessibility to the legal assistance office is important because older clients must be reasonably able to get to the office or they cannot seek assistance. With the security practices in place at many military installations,[9] clients often

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3. *See generally* U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program ch. 3, sec. III (21 Feb. 1996) [hereinafter AR 27-3].

4. *See* U.S. Census Bureau, Population Division, Populations Projection Project, *National Population Projections* (last modified Aug. 2, 2002), *at* http://www.census.gov/population/www/projections/natsum-T3.html. Demographic studies indicate that in the United States, senior citizens (those over age sixty-five) are increasing to the point to which that segment of the population will reach some fifty million individuals, or twenty percent of the total population in the next few years. *Id.*

5. *See generally* Virginia Morris, How to Care for Aging Parents (1996).

6. AR 27-3, *supra* note 3, para. 1-4f.

7. *See id.* para. 2-5 (identifying individuals eligible to receive legal assistance).

8. *But see* Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 (2000) (noting that the ADA does not apply to the federal government).

must park some distance away from legal assistance offices. Not all impaired clients qualify for handicapped parking permits, so it may be reasonable to request that offices reserve certain parking places for legal assistance clients. For example, one SJA directed office personnel to leave the parking spaces closest to the office open for clients.[10] In buildings that house multiple offices, the SJA may request that certain parking spaces be reserved for legal assistance clients. During the initial screening of clients, the legal assistance office staff should ask whether the client has a special need, such as limited mobility, and arrange for special request parking on an as-needed basis.

The interior of the office is also critical.[11] Is there enough room in the waiting area for someone in a wheelchair to sit comfortably without being jostled or bumped as others walk by? Is the play area for children off to one side in the waiting room so that older clients can sit away from the noise? Is the seating area user-friendly for someone who has difficulty moving? Are reading materials and handouts available in larger print for ease of reading? Are there easily accessible restroom facilities nearby? Is a water fountain readily available?

The chief of legal assistance should examine the layout of the waiting area. Does the seating consist of individual chairs or couches without firm cushions and secure armrests, making it difficult or even painful for elder clients to sit and rise? Does the furniture consist of used furniture from other sections? Is there a place for a wheel chair? Loose carpet and uneven surfaces can be hazardous to those who are frail. Further, older clients often need quick access to restrooms. Because they may take medications, they also need easy access to water fountains or water coolers. Once the client is inside the waiting area, how difficult is it for someone using a walker or a wheelchair to move from there to the attorney's office? Do bookcases or rugs obstruct any passages?

Even individual attorneys who cannot influence the quality of the furniture or the layout of the office can do much to improve the effectiveness of the meeting itself. First, attorneys should minimize auditory distractions, such as frantic screensavers, that can make concentration difficult for older clients. The furniture in the attorney's office should be arranged so that less-than-agile clients can easily enter the office and still be able to close the door for privacy.[12] They can instruct the staff not to disturb them during meetings since such disruptions can interrupt the older client's train of thought. While it may not be necessary to speak loudly, attorneys should speak clearly and pay close attention to their diction. They should avoid blocking their mouths with their hands; seniors may be embarrassed to admit that they do not hear well, but may pay close attention to the attorney's mouth movements to assist their comprehension. Attorneys should not be surprised if clients repeatedly ask them to repeat themselves. Ultimately, attorneys should be certain that clients hear every part of the attorneys' advice, not just the last part.[13]

Some may react that these concerns are overly specialized for such a small group of clients. These concerns, however, reflect an attitude of caring for clients and making them welcome in the military community rather than raising so many barriers that the clients give up and go away. It may be helpful to remember that this class of clients has served their country for many, many years and that they likely feel a very special closeness to those continuing to serve today.

B. Handouts and Materials for Review

Legal assistance attorneys should consider providing clients with written materials, either before or after counseling sessions.[14] The importance of written materials becomes apparent when one considers that visiting a legal assistance office may be an unfamiliar, stressful experience for many older clients. Many clients, particularly elderly clients, are already under stress arising from the circumstances that brought them to a legal assistance office. They may never have met with an attorney or dealt with legal issues before visiting the office. "Legalese" may seem foreign to them. Some clients are not even certain whether legal assistance attorneys are licensed attorneys. This may be a particular concern for older clients; many of them remember the days when line officers prosecuted

9. *See* U.S. Army, The 2003 Posture Statement: Force Protection & Anti-terrorism, *available at* http://www.army.mil/aps/2003/realizing/readiness/force.html (last visited Aug. 26, 2004) ("In the war on terrorism, the area of operations extends from Afghanistan to the East Coast and across the United States. Naturally, Force Protection and Antiterrorism measures have increased across Army installations in the Continental United States (CONUS) and overseas.").

10. Oral Office Policy, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas (1981-1985).

11. *See generally* U.S. Dep't of Army, Office of The Judge Advocate General, Legal Assistance Policy Division, *Instructions for the Application Form for the FY03 Army Chief of Staff Annual Award for Excellence in Legal Assistance, Legal Assistance Office Facilities*, at 2 (1 Oct. 2003), *available at* https://www.jagcnet.army.mil/JAGCNET/JAGCNet.nsf/JAGCNet2?OpenFrameSet&Login [hereinafter FY03 Chief of Staff Award Application] (assessing legal assistance office facilities in its application).

12. *See* AR 27-3, *supra* note 3, para. 4-8 ("Those providing legal assistance will carefully guard

> the attorney-client relationship and protect the confidentiality of all privileged communications with their clients."); *see also* U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers para. 1.6 (1 May 1992) [hereinafter AR 27-26] ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.").

13. AR 27-3, *supra* note 3, para. 4-7 (explaining ethical standards).

and defended criminal cases.[15] They may also be concerned about losing their independence, experiencing prolonged sickness, losing their mental faculties, or facing their own mortality. As a result, they may suffer lapses in memory or concentration and the ability to process complex information independently of any organic or physiological impairment.[16]

Pamphlets or fact sheets with commonly asked questions and answers are an easy way to provide clients with valuable information on individual topics. When provided to clients before counseling sessions, such documents may help clients prepare and organize for sessions more effectively. Checklists of items for clients to bring to interviews, sorted by topic, are also useful. After a client counseling session, a pamphlet or fact sheet may be an important reminder, as well as a summary of information discussed during the meeting. For example, clients may hear the terms "testate" and "intestate" for the first time when they talk to their lawyers. A pamphlet covering the basic concepts of probate procedure will insure that a client understands the substance of a thirty-minute counseling session and has something to review to refresh his memory. Materials should use examples to illustrate how procedures work. They should include a disclaimer that the pamphlet alone is not a substitute for personal legal advice nor is it intended to create an attorney-client relationship. If there is enough space in the waiting area, use two racks for handouts, one for documents in regular-sized print and the other with documents in larger print.

There are many additional benefits for legal assistance offices with a good collection of preventive law materials. Legal assistance officers may use handouts at preventive law classes they teach to Soldiers, commanders, staff sections, family members, and family support groups. Many SJA offices have web pages on their installation internet sites, typically with separate legal assistance sections.[17] Clients can download, read, or print these materials before or after they visit legal assistance attorneys.

C. Before the Client Walks in the Door

Before the client comes to the legal assistance office for an appointment, support staff personnel should do a preliminary screening to make sure the appointment is necessary, the client understands the time and place of the appointment, and the client brings the appropriate documents to the appointment.[18] Again, checklists may be particularly useful. As a routine matter, the person making appointments should inquire whether the client has any special needs or requirements, such as limited mobility, special parking requirements, or visual or auditory impairments. Those who schedule the appointments should note any such factors in the appointment book so that office personnel are prepared on the client's appointment day.

The person who makes the appointment should confirm the time and date, and ensure the client knows how to find the office. With an elder law client, this may mean repeating the information to the client and asking for an affirmative reply. If the client makes the appointment in person, the staff should give the client an appointment card or note showing the time and date of the appointment and the name of the attorney.

Once the staff member determines the legal issue for the appointment, he should discuss what documents, if any, the client should bring. The staff should have checklists for various topics, listing the documents clients should bring for the attorney's review. For example, if the client requests advice about probating his wife's estate, the checklist should include the wife's will, if there is one; the wife's death certificate; a copy of the marriage certificate; a preliminary list of the wife's assets and debts; a copy of the deed for any real estate the wife owned in whole or in part; and copies of the titles to any vehicles the wife owned in whole or in part. Although it is very unlikely that the legal assistance attorney will appear in court to represent the client in the probate proceeding,[19] he must still review the documents to advise the client on the types of probate issues applicable to the deceased's estate.[20]

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14. FY03 Chief of Staff Award Application, *supra* note 11, at 15. Commenting on the need for written material, the Legal Assistance Policy Division states that

> [p]reventive law is an integral part of a successful Legal Assistance operation. An educated client may have the information to avoid a legal problem altogether, or when obtaining legal assistance will be better prepared and have the information necessary to more readily obtain effective advice. At a minimum, a successful legal assistance office should insure that each legal assistance attorney publish one preventive law article/item per quarter.

Id.

15. *U.S. Army Trial Defense Service Begins One Year Test*, Army Law., June 1978, at 10 (explaining the Army established a separate defense structure on 15 May 1978; before the 1969 UCMJ, defense counsel were generally not attorneys).

16. *See* Karl E. Miller, *Depression & Cognitive Functioning in the Elderly*, Am. Acad. of Fam. Physicians (2001), *available at* http://www.aafp.org/afp/20010615/tips/11.html.

17. U.S. Dep't of Army, The Judge Advocate General's Corps, JAGCNET, *Links, SJA Offices, at* https://www.jagcnet.army.mil/JAGCNetIntranet (last visited Nov. 3, 2003) [hereinafter SJA Links] (containing hyper-links to the Web sites of SJA Offices).

18. *See* Administrative & Civil Law Dep't, The Judge Advocate's Legal Center & School, U.S. Army, 51st Legal Assistance Course Desk Book, Main Volume, Legal Assistance Office Management, ch. B, *available at* http://www.jagcnet.army.mil/TJAGLCS (last visited Nov. 3, 2003) [hereinafter Legal Assistance Deskbook].

D. Using Worksheets

Most legal assistance offices have worksheets available for clients. Some worksheets seem simple to attorneys but may confuse clients who are not familiar with the worksheets' terms. Often the attorney relies on the information in the worksheet to draft legal documents for the client. This raises concerns about the accuracy of the information. The client must understand what he is completing and put the right information in the right place. Attorneys who have concerns of this nature should carefully consider whether they should give their clients worksheets before their appointments.[21]

The answer to many legal questions is, "It depends." For legal assistance clients, it usually depends on what document the attorney generates with the worksheet as well as the client's level of knowledge. For example, many legal assistance offices offer walk-in preparation of powers of attorney. Usually, clients complete worksheets in the waiting room. When they finish, they give the worksheet to a staff member who may also be busy answering the telephone, checking-in clients with appointments, and performing other administrative duties. The staff member then prepares the document, asks the client to review it, and shows the client where to sign it. The process seldom includes an explanation. Handouts may be most useful for powers of attorney; the office could include one extra step by asking the client to read a handout before completing the worksheet. This handout should describe the advantages and disadvantages of a power of attorney, along with any attendant responsibilities for the attorney in fact. For example, in Texas, the legislature, in 2001, added a section to the Durable Power of Attorney Act that provides that the attorney in fact is a fiduciary and has a duty to inform and account for actions taken pursuant to a power of attorney.[22] The principal—the client—should understand his right to demand an accounting under this section. A well-written handout and a reasonably conversant legal assistance staff member usually suffice to make these rights clear to the client.[23]

The results are different for other commonly prepared documents. For example, *Army Regulation 27-3* states that legal assistance "*will be provided* on wills, testamentary trusts for the benefit of minors, guardianships, and the designation of beneficiaries under life insurance policies (including the Servicemen's Group Life Insurance (SGLI)). Legal assistance *will* also be provided in preparing advanced medical directives and anatomical gift designations."[24]

The will preparation process demonstrates what often happens when legal assistance offices ask clients to complete worksheets. Asking a client to complete a will worksheet several days before an appointment may not ensure that the client will complete the worksheet properly. A well-written handout can complement a well-written worksheet, enabling the client to provide enough information to complete most of the worksheet and allowing the attorney to elicit the remainder of the necessary information during the interview. Many offices require clients to pick up worksheets before the appointment to prevent multiple visits during the document preparation stage of obtaining a will. Other offices require clients to attend will briefings before their actual appointments.[25] Whatever process the office uses, the worksheet must be clear and have as many

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19. *See* AR 27-3, *supra* note 3, para. 3-7g. The following provision illustrates that such in-court representation is unlikely:

> *d) Civil proceedings.* Except for cases described in paragraphs 3–6*a* (regarding appointment as a guardian ad litem in an adoption case), and 3–6*b*(3) (regarding assistance to certain PNOK) *e*(2), (regarding assistance under USERRA and comparable state statutes), and in AR 608–18, paragraph 1–6*j*(13) (regarding in-court representation of abused children), in-court representation is limited to service members who are eligible for legal assistance pursuant to paragraphs 2–5*a*(1), (2), or (3); and (2) for whom hiring civilian lawyers would entail substantial financial hardship to themselves or their families.

Id. Note that retirees are eligible to receive legal assistance under paragraph 2-5a(4). *Id.* para. 2-5a(4).

20. *See id.*; *see generally* Administrative & Civil Law Dep't, The Judge Advocate's Legal Center & School, U.S. Army, 51st Legal Assistance Course Desk Book, Estate Planning Volume, Probate and Probate Avoidance, ch. C, *available at* http://www.jagcnet.army.mil/TJAGLCS (last visited Nov. 3, 2003).

21. *See* Legal Assistance Deskbook, *supra* note 18, ch. B, at B-10 (Estate & Client Analysis, The Estate Planning Interview). The Judge Advocate General's Legal Center & School recently addressed the issue of whether to fill out the questionnaire before the meeting as follows:

> Whether the client before should fill it in during or after the meeting with the estate planner depends on the estate owner and his relationship with the estate planner. If there's an established relationship, advance preparation of the questionnaire by the client will save time and make the meeting easier and more fruitful. The questionnaire should not touch on sensitive personal relationships and attitudes requiring special handling.

Id.

22. Tex. Prob. Code Ann. § 489B (West 2003).

23. AR 27-3, *supra* note 3, para. 3-7e(2) (providing specific guidance about drafting general powers of attorney, stating that clients requesting general powers of attorney with someone other than a trusted spouse or relative as the agent "should be cautioned as to the serious legal problems that may arise from its misuse"). Legal assistance officers should also include a similar warning in any worksheets or handouts they distribute that relate to powers of attorney. *See id.*

24. *Id.* para. 3-6b (emphasis added).

explanations as possible. Will worksheets vary from office to office; some versions are ten pages or longer.[26] A long and cumbersome worksheet can intimidate clients. It may even be offensive if it asks for too much personal information, such as types of assets and liabilities, and their associated monetary values. Older clients may not be accustomed to divulging this information and may not understand why someone in the legal assistance office needs it. They may also take offense if asked about the names, addresses, and ages of children, and the identities of their natural or adoptive parents. The worksheet should contain a brief explanation of the importance of these details. Like all clients, they are more likely to accept such questions if they understand why the answers are important.

Finally, clients may not understand common terms such as "executor," "guardian," "trustee," "per stirpes," and "per capita." The attorney must be certain that either he or his staff explains these terms clearly and correctly.[27]

E. Information Gathering

When the client arrives at the legal assistance office for an appointment, the legal assistance attorney must be prepared to elicit the necessary information to prepare the required documents and to provide responsible and competent counseling. This can be difficult when the legal assistance attorney was not yet born when the client served on active duty. This age disparity may even cause a client to distrust the attorney's competence to solve his problem.

To help establish rapport, the legal assistance attorney should maintain a professional-looking office.[28] This does not preclude the display of family pictures or personal items; anything tasteful and appropriate for clients of all ages is acceptable. Clients expect to see diplomas, professional certificates, and military memorabilia. The attorney should also have an orderly desk that is free of clutter, loose papers, and confidential matters.

In addition to a professional office appearance, the attorney should minimize interruptions during client meetings. He should listen carefully to the client's responses and ask the client to repeat them if necessary. Older clients who have no previous experience with the legal system may save their questions until the attorney finishes his initial comments; only then will the attorney learn the specifics of why the client is in his office. Similarly, some clients may save important issues for the end of the interview. Attorneys must remember to ask if the client has any other questions before proceeding. At the end of the interview, the attorney must state clearly what he will do for the client and how long he expects it to take. As always, attorneys should resist the temptation to promise results or unrealistic deadlines; this only sharpens a client's displeasure if the attorney cannot meet those expectations.

Older clients often come to lawyers with problems that have short "suspenses," such as the preparation of wills or advance medical directives. This may be because the client or his spouse has medical problems that may require surgery or treatments affecting his mental status. After much procrastination, the client may have finally decided to put his legal affairs in order, perhaps after seeing the problems that resulted when a friend or relative died intestate. The legal assistance staff should understand the perspective of older clients when scheduling their appointments.[29] Although minor surgery a week later may not normally constitute an emergency, it may for an older client for whom surgery is a greater risk.

F. Ethical Considerations in Elder Law

Legal assistance attorneys must be particularly mindful of several ethical rules when dealing with retirees. They must be sensitive to issues of confidentiality, conflicts of interest, undue influence, and mental capacity.[30] These issues may seem obvious in the abstract, but they often are difficult to apply in the real world.

The threshold question is: "Who is the client?" Sometimes the client will be the elder retiree; at other times, it will be his adult child. The client often seeks legal advice on behalf of someone else. To make matters more complex, an elder who is clearly the client may bring his adult child or other family member to the appointment. An inexperienced attorney might insist on seeing the retiree alone to preserve attorney-client confidentiality, but the client may view this as a problem. The client may want the family member to be present as his partner in any

25. *See* SJA Links, *supra* note 17 (reviewing the Web sites for the various SJA offices gives examples of the offices' estate planning practices).

26. *See, e.g.*, Fort Leavenworth Office of the Staff Judge Advocate, *Legal Assistance Will Worksheet*, *available at* http://leav-www.army.mil/osja/LA/wills.doc (last visited Nov. 3, 2003) (containing a twenty-page client questionaire).

27. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. B, apps. A-D (ESTATE & CLIENT ANALYSIS, THE ESTATE PLANNING INTERVIEW) (containing four sample estate planning questionnaires that indicate the importance of explaining all legalese to clients).

28. AR 27-3, *supra* note 3, para. 4-1a(3) ("Attorneys providing legal assistance will exhibit the highest professionalism at all times. This professionalism will be reflected in . . . . [t]he appearance of furniture, equipment, offices and other work areas, and reception and waiting rooms.").

29. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. M (A PRACTICE GUIDE TO ESTATE PLANNING FOR RETIREES).

30. *See* AR 27-3, *supra* note 3, paras. 4-7 through 4-9 (explaining ethical standards, attorney-client privilege, and conflicts of interest); *see generally* LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL ch. 2 (West Group 2d ed. 1999).

devised plan to serve as his support as well as his memory. The client, of course, can waive the right to confidential communication, but the potential issue of a conflict of interest remains.[31] A client's family member may have a motivation that is quite different from that of the client, and the motivation may be difficult to detect. A family member who asks too many questions about Medicaid and nursing home costs may be revealing a desire to preserve his own lifestyle and potential inheritance. One remedy to the joint-meeting problem is to conclude the meeting with a private session with the retiree-client to confirm his wishes. If the client wishes to mention anything else outside the family member's presence, the attorney should offer to call him later.

Another ethical concern is that of the competence of the client. The legal assistance attorney rarely has any evidence to corroborate the retiree's rendition of his estate holdings or family relationships, or the potential for undue influence or worse. The attorney must be vigilant for hints that the retiree cannot fully remember, comprehend, or adequately assess his situation. In appropriate cases, the legal assistance attorney may want to ask the client's permission to speak with the client's family members or physician. Although this may seem like a difficult question, the attorney can soften it by simply stating the importance of gathering all the details or preventing a will contest later. In fact, it is entirely appropriate for an attorney to ask a client about the chances that someone will contest the will, or about factors that increase the likelihood for a contest, such as blended families, remarriages, and disinherited heirs.[32]

The entire legal assistance team must assess the competence of the client during the entire process—particularly during the execution of any documents. If the attorney is confident in the client's competence but concerned about a potential challenge to the process, the office staff should not satisfy itself with the perfunctory grabbing of bystanders as witnesses who do no more than sign as they are told. Likewise, simply listing a witness's address as "Fort Swampy, North Carolina" will not be of much benefit should a will contest arise that requires more than the self-proving affidavit. If witnesses to the will are legal assistance office personnel, it may be helpful to use the office address, including the street name and building number, on the address line. This provides a logical starting point for attempts to locate these witnesses, if needed in the future. For the same reason, active duty witnesses should use their home of record addresses.

The attorney must also carefully observe the client and ensure that he understands why he is at the office and that he has the mental capacity to provide the information needed for competent counseling. In a will counseling session, for example, the attorney should ensure that the client understands the potential problems with co-executors, or of leaving too much authority to a young child. The legal assistance attorney should also be alert to the reaction of any person accompanying the client who attempts to limit that person's access to the client. If the legal assistance attorney or staff members believe that the relative or friend reacts inappropriately, it could be the sign of undue influence or even elder abuse.

Undue influence is subtler, and therefore more difficult to detect. The first sign for which an attorney should look is another individual helping the client, including the following: a son, daughter, or family friend provided the client with transportation to the appointment; the same relative or friend wants to sit in on the interview; or the client wants the relative or friend to be there to explain things to him. The legal assistance attorney providing the counseling must be aware of attempts by others—well-meaning or not—to influence a client to make a decision or take some action. The attorney must be clear as to whom he is advising and where the client's true interests lie.[33] Attorneys should be wary of comments such as, "My daughter told me I should put her in the will as the executrix," or "My son is the only one who loves me so I do not want the other children to get anything." The attorney should inquire about the family relationships, let the client talk, and listen carefully for clues about the client's mental capacity and the soundness of the reasons for the client's choices. He may discover that the hypothetical daughter is a reasonable choice as the executrix because she is the only relative living in the same state as the client and because state law requires the executrix to be a state resident. The attorney should listen for choices or explanations that do not fit the client's other comments. The attorney must clearly explain the client's options so the client is not confused by what others have told him he must do.

Issues of elder abuse and neglect are closely related to that of the client's competence.[34] It is imperative that the legal assis-

31. *See* AR 27-3, *supra* note 3, para. 4-9c.

32. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. M (A PRACTICE GUIDE TO ESTATE PLANNING FOR RETIREES).

33. AR 27-3, *supra* note 3, para. 4-9d states the following:

> In the following estate planning cases, attorneys providing legal assistance should consider and resolve any conflicts of interest prior to undertaking legal representation:
>
> (1) Joint requests by spouses for the preparation of wills or other estate planning documents, particularly if either spouse has a child from a prior relationship.
> (2) Requests (or apparent requests) for legal assistance on behalf of a third party (for example, a younger person accompanying an elderly client who requests a will or power of attorney on behalf of the client).

Id.

tance attorney has the telephone numbers of the local commission on aging and adult protective services. The staff at these offices and others like them can provide free literature, training, and support. Likewise, the National Association of Elder Law attorneys has on-line and printed references, and most importantly, a list of knowledgeable attorneys the legal assistance office may use as referral sources.[35] In some cases, the attorney may have a duty to report suspected neglect or abuse.[36]

Finally, the attorney is responsible for his own competence and the competence of his legal team. Fundamental to being professionally responsible is the ability to know one's limits. An attorney who feels unable to solve the specialized legal problems of retirees competently should feel no shame in admitting it. Young lawyers should not be afraid to ask questions of experienced attorneys and judges that specialize in elder law.[37]

III. Planning for Disability and Incapacity

A. Powers of Attorney

Powers of attorney can cover a wide variety of topics ranging from filing claims, cashing checks, and selling cars, to the broadest authority that a general power of attorney can grant.[38] Most retirees seeking powers of attorney do so as part of long-range planning. Explaining the concepts of springing and durable powers of attorney are very important parts of the process in counseling clients on their use.[39]

A springing power of attorney becomes effective upon the occurrence of a specific event, usually the principal's incompetency, incapacity, or disability.[40] A durable power of attorney remains in effect until the principal's death, its expiration, or its revocation by the principal.[41] For many older clients, selecting at least one of these features of a power of attorney is a necessary part of estate planning to anticipate a decline in mental capabilities with age or illness. The client must also understand the definitions of incompetency, incapacity, or disability so that

34. The National Elder Abuse Incidence Study (NEAIS), conducted in 1996 and published in 1998, with funding from the U.S. Administration on Aging and Administration on Children and Families, documents the extent of elder abuse in our society. Some of the general findings from the NEAIS indicate the following:

> The best national estimate is that a total of 449,924 elderly persons, aged sixty and over, experienced abuse or neglect in domestic settings in 1996.
> Female elders are abused at a higher rate than males, after accounting for their larger proportion in the aging population.
> Our oldest elders (eighty years and over) are abused and neglected at two to three times their proportion of the elderly population.
> In almost ninety percent of the elder abuse and neglect incidents with a known perpetrator, the perpetrator is a family member, and two-thirds of the perpetrators are adult children or spouses.

National Center on Elder Abuse, *The National Elder Abuse Incidence Study Final Report* (1998) *available at* http://www.aoa.gov/abuse/report/default.htm; *see also* Bonnie Brandl & Loree Cook-Daniels, *Domestic Abuse in Later Life* (Aug. 2002), *available at* http://www.elderabusecenter.org/pdf/research/statistics.pdf.

35. *See* National Academy of Elder Law Attorneys (NAELA), *Home, at* www.NAELA.com (last visited July 30, 2004). The NAELA describes itself as follows:

> The National Academy of Elder Law Attorneys, Inc. is a non-profit association that assists lawyers, bar organizations and others who work with older clients and their families. Established in 1987, the Academy provides a resource of information, education, networking and assistance to those who must deal with the many specialized issues involved with legal services to the elderly and disabled. The mission of the National Academy of Elder Law Attorneys is to establish NAELA members as the premier providers of legal advocacy, guidance, and services to enhance the lives of people as they age.

Id.

36. *See, e.g.*, TEX. HUM. RES. CODE ANN. § 48.001 (2002); MO. REV. STAT. § 565.188 (2002); FLA. STAT. ch. 415 (2003); KAN. STAT. ANN. § 39-1402 (2003); *see also* MODEL RULES OF PROFESSIONAL CONDUCT R.1.14 and cmt. (2003); AR 27-26, *supra* note 12.

37. AR 27-3, *supra* note 3, para. 4-2 (explaining that legal assistance attorneys should maintain contacts with the civilian bar). This paragraph states the following:

> Attorneys providing legal assistance should establish and maintain liaison with national, State, and local bar organizations. Membership in professional organizations, especially local branches involved in providing legal services pertinent to the military community, and attendance at professional meetings and seminars is encouraged.

Id.

See U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 4-11 (25 Oct. 1998) (governing the use of nonappropriated funds to purchase such memberships). "Upon receipt of necessary approvals, attorneys assigned to Active Army legal offices may attend meetings of private professional organizations at government expense." U.S. DEP'T OF ARMY, REG. 1-211, ATTENDANCE OF MILITARY AND CIVILIAN PERSONNEL AT PRIVATE ORGANIZATION MEETINGS (1 Dec. 1983).

38. *See* U.S. DEP'T OF DEFENSE, DIR. 1350.4, LEGAL ASSISTANCE MATTERS para. 3.4 (28 Apr. 2001) [hereinafter DOD DIR. 1350.4] (defining a military power of attorney as "a written instrument, prepared in accordance with this Directive, whereby one person, as principal, appoints another as his/her agent and confers authority to perform certain specified acts, kinds of acts or full authority to act on behalf of the principal"); The Office of The Judge Advocate General, *From Counsel: Power of Attorney*, Mar. 2002, *available at* https://www.jagcnet.army.mil/JAGCNetIntranet (explaining the types of powers of attorney and its uses).

39. *See* AR 27-3, *supra* note 3, para. 3-7; LEGAL ASSISTANCE DESKBOOK, *supra* note 18, at M-2 (A PRACTICE GUIDE TO ESTATE PLANNING FOR RETIREES).

he will know how these conditions affect his agent's ability to use the power of attorney. Many powers of attorney define these terms in the document itself while others rely on the state's statutory definition. In any event, the client must clearly understand the applicable standard and whether it provides for any aspects of physical limitations or disabilities. For example, if, under state law, the determination of incapacity requires certification by a physician, the client who has given his agent a durable general power of attorney may prefer to use a different definition within the power of attorney—one which does not require his agent to seek a physician's opinion. On the other hand, a client who has selected a springing power of attorney may want his agent to have a physician's certification of incapacity before the agent takes any action using the power of attorney.

Selecting the powers to be given to the agent is another important choice to discuss with the client. Keeping in mind that the older client is often planning for the day when his mental abilities are limited, the general power of attorney is often an appropriate choice. As with any power of attorney, the client must select someone he trusts as the agent. Even with a general power of attorney, however, the attorney must advise the client of any restrictions under state law. For example, some statutes may provide special instructions on general powers of attorney that permit gifting[42] or changing insurance policy beneficiaries. Attorneys must also advise clients about health care powers of attorney, which usually have specific requirements under state statutes.[43]

Once the client has selected the allowable powers, the agent, and whether the power of attorney is to be durable or springing (or both), the legal assistance staff member assisting him then must address the question of the expiration date of the power of attorney. Many legal assistance offices have policies that provide that the document itself must state an expiration date. Often, the time limit is three years or less.[44] Such a policy is often based on concerns that third parties may not accept older powers of attorney, and that an expiration date will prevent an agent from taking actions at remote times in the future when the principal did not envision the agent's further use of the document. Another reason for a limited time period is so that the document expires by its own terms if the agent refuses to acknowledge the principal's revocation of it. With older clients, however, the very reason for considering a power of attorney is often to allow for the agent's future use in the event of incapacity. That incapacity may occur in several months, or it may occur in five years. The better practice with an older client is to draft the power of attorney without including an expiration date, so that the client is prepared for whatever events may occur. Attorneys should advise clients who use this option to name at least the primary agent and one successor agent in the event the primary agent predeceases the client or cannot serve. Attorneys should also advise clients to update their powers of attorney as needed (*e.g.*, when a named agent dies or when family circumstances change). Although the topic may be difficult to address, the attorney should also explain how an agent could abuse the authority given in the power of attorney, and that as the principal, the client must remain alert to questionable actions or decisions by an agent to protect himself from liability.[45]

Assuming that the client does receive a power of attorney with no expiration date, he must be told how to revoke the power of attorney as well. The document itself may include such procedure; state statutes usually provide for them as well. The attorney must advise the client of any particular limitations or provisions in the state statute so he may address those with the staff member assisting him.[46] For example, some state statutes provide that the revocation of a durable power of attorney is not effective as to a third party relying on it until the third party receives actual notice of the revocation.[47] Therefore, the power of attorney may need to contain language stating what constitutes notice of the revocation (for example, filing a revocation in the county clerk's office for the principal's county of residence).

B. Medical Directives

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40. AARP, *Understanding Power of Attorney, available at* http://www.aarp.org/estate_planning/Articles/a2002-08-12-EstatePlanningPowerofAttorney.html (last visited Nov. 3, 2003) (defining durable and springing powers of attorney).

41. *Id.*

42. *See* Nandita Kohli Verma, *Gifts by Proxy: Drafting Powers of Attorney to Avoid Unwanted Tax Results*, PROB. & PROP., Sept./Oct. 2001, at 23-25 (discussing the possible tax results of having a power of attorney with gifting powers included).

43. *See infra* § III.B.

44. *See, e.g.*, U.S. Dep't of Army, Office of The Judge Advocate General, Legal Assistance Policy Division, *Estate Planning, Power of Attorney, available at* http://www.jagcnet.army.mil/Legal (last visited Nov. 3, 2003) ("A POA should be given for only a limited time period (such as six months during a deployment). A third party is more likely to accept a POA with a recent date than one which is many months or years old.").

45. *See* AR 27-3, *supra* note 3, para. 3-7e ("A client who requests a general power of attorney for use by other than a trusted spouse or relative should be cautioned as to the serious legal problems that may arise from its misuse.").

46. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. P, app. B (ESTATE PLANNING FOR THE TERMINALLY ILL CLIENT & ANCILLARY ESTATE PLANNING DOCUMENTS).

47. *See, e.g.*, TEX. PROB. CODE § 488 (West 2003).

Many older clients overlook the medical aspects of their estate planning, or make them a lower priority than the protection of their property assets. The continuing advances in medical technology—and the price tag that goes along with each advance—mean that older clients must understand their options regarding medical directives.[48]

A living will, or directive to physicians, is a direction by the client to terminate life support under certain conditions when the client (now the patient) is unable to express his wishes or rationally participate in medical decision-making.[49] In *Cruzan v. Missouri Department of Health*,[50] the U.S. Supreme Court ruled that a state may apply a clear and convincing evidence standard in proceedings in which a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. The Court declined to substitute the judgment of close family members for that of the patient and found that the patient must have declared his desire to be taken off life support in some fashion before he became incapacitated.[51] After *Cruzan*, many state legislatures examined the issue of patient consent and substituted judgment.[52] Currently, all states and the District of Columbia have some type of statute addressing a person's choice regarding health care decisions. Each state provides its own set of conditions under which a living will becomes effective. The applicable statute defines the conditions under which life-sustaining treatment shall be withdrawn, such as "terminal," "irreversible condition," and "persistent vegetative state."[53]

As an alternative to a living will drawn up according to state law, a legal assistance attorney may provide the client with an advance medical directive drafted pursuant to federal law. Section 1044c of Title 10 of the U.S. Code provides that an advance medical directive is any written declaration that "sets forth directions regarding the provision, withdrawal, or withholding of life-prolonging procedures, including hydration and sustenance, for the declarant whenever the declarant has a terminal physical condition or is in a persistent vegetative state."[54]

The selection of the federal or the state living will is primarily affected by the client's domicile and travel habits. Most states have statutes providing for the enforcement of advance directives from other jurisdictions.[55] Nevertheless, a client who travels frequently may want to have a federal living will that he carries with him during his journeys. Federal law, however, does not make an advance medical directive enforceable in a state that does not otherwise recognize and enforce advance medical directives under its own laws.[56] A client should still have a state-specific living will for his state of domicile—one that will be easily recognized by the health care providers most likely to treat him. For the client who is retired, the domicile state is the state where he lives.[57] For the client who is still on active duty, the attorney should discuss the advisability of having a living will for the state where the client is currently stationed, in addition to a federal living will and a state-specific living will for his state of domicile.

Another type of medical directive is a health care power of attorney, also known as a medical power of attorney, health care proxy, or appointment of health care agent.[58] Just as a living will is the client's declaration of when not to use life-sustaining procedures, the health care power of attorney is a document in

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48. *See generally Symposium: Thoughts on Advance Medical Directives*, 37 REAL PROP. PROB. & TRUST J. 537-75 (2002).

49. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, at T-2 through T-4 (ADVANCE HEALTHCARE DIRECTIVES).

50. 497 U.S. 261 (1990).

51. *Id.* at 284.

52. *See generally* Rebecca C. Morgan & Charles P. Sabatino, *Advance Planning and Drafting for Health Care Decisions*, PROB. & PROP., July/Aug. 2001, at 35-39.

53. *See generally id.*

54. 10 U.S.C. § 1044c(b) (2000).

55. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 166.005 (West 2003); FLA. STAT. ch. 765, § 765.112 (2003).

56. 10 U.S.C. § 1044c(d); *see also* FROLIK & KAPLAN, *supra* note 30; Aimee R. Fagan, *An Analysis of the Convention on the International Protection of Adults*, 10 ELDER L.J. 329 (2002). Regarding the elderly who are incapacitated while traveling outside the country:

> The Draft Hague Convention on the International Protection of Adults was released in 1996, with the intent of protecting the dignity of elderly persons traveling abroad by determining which state—that of their permanent residence, or that in which they were currently located—exercised jurisdiction over them in the case of illness or insufficiency . . . . While praising its goals, [the author] asserts that numerous exceptions within the Convention—allowing for local laws to govern the medical treatment of elderly patients, regardless of the patients' wishes—undermine the purpose of advance directives and render them meaningless.

Id.

57. *See* BLACK'S LAW DICTIONARY 501 (7th ed. 1999).

58. *See generally* ABA Comm. on Legal Problems of the Elderly, *Health Care Powers of Attorney* (1990).

which the client appoints someone he trusts, his agent, to make decisions about his medical care if he cannot make the decisions himself. Usually, the agent can exercise his power at any time the client is unable to act on his own behalf. The power is not limited to when a client is in a terminal condition.

Under federal law, an advance medical directive also includes any written declaration that "authorizes another person to make health care decisions for the declarant, under circumstances stated in the declaration, whenever the declarant is incapable of making informed health care decisions."[59] The same choices as described above for living wills also apply to health care powers of attorney.

Some clients may wonder whether they need both a living will and a health care power of attorney. The answer depends on the client's circumstances. Some clients may have religious, personal, or other beliefs that affect their decisions about obtaining living wills. Other clients prefer to wait until they are in the required condition, that is, in poor health, before executing living wills, because they feel they will be in a better position to evaluate what quality of life means. Also, some clients will not have someone who can serve effectively as the health care agent. This could be because of the proposed agent's personal circumstances, or because the proposed agent does not agree with the choices the client has made about the withdrawal of life-sustaining procedures. It is the experience of the authors that attorneys should discuss living wills and health care powers of attorney with their clients to discover their clients' wishes before attempting to draft such documents.[60] Unfortunately, living wills are

> proferred to and signed by clients routinely, with little discussion and inadequate reflection on the possible consequences. Given the import of the document, clients should expect the same standard of care with regard to advice concerning living wills that they receive with regard to avoidance of death taxes and preservation of assets.[61]

C. Out-of-Hospital Medical Instructions

Legal assistance attorneys must know the laws of the state where they are stationed regarding medical instructions for patients who are not in hospital inpatient settings or in physicians' offices. Many living wills do not apply outside these settings. No client should be in the unfortunate situation in which he thinks he has clearly expressed his wishes regarding the withdrawal of life-sustaining procedures, only to find out during the ambulance ride to the hospital or in the emergency room that his living will is not effective in that setting. A review of a particular statute helps to explain this further. In Texas, the Health and Safety Code specifically provides for "Out-of-Hospital Do-Not-Resuscitate Orders."[62] Section 166.081 includes the following definitions:

> (6) "Out-of-hospital DNR Order:
>
> (A) means a legally binding out-of-hospital do-not-resuscitate order, in the form specified by the board under Section 166.083, prepared and signed by the attending physician of a person, that documents the instructions of a person or the person's legally authorized representative and directs health care professionals acting in an out-of-hospital setting not to initiate or continue the following life-sustaining treatment:
>
> (i) cardiopulmonary resuscitation;
> (ii) advanced airway management;
> (iii) artificial ventilation;
> (iv) defibrillation;
> (v) transcutaneous cardiac pacing; and
> (vi) other life-sustaining treatment specified by the board under Section 166.101(a); and
>
> (B) does not include authorization to withhold medical interventions or therapies considered necessary to provide comfort care or to alleviate pain or to provide water or nutrition.
>
> (7) "Out-of-hospital setting" means a location in which health care professional are called for assistance, including long-term care facilities, inpatient hospice facilities, private homes, hospital outpatient or emergency departments, physicians' offices, and vehicles during transport.[63]

The Texas Department of Health (Department) has made a standard form available for the Out-of-Hospital Do-Not-Resuscitate Order, which can be obtained from the Department via mail or via the State of Texas Web site.[64] The legal assistance attorney must review the statutes of the state where his military installation is located to determine if that state has provisions

59. 10 U.S.C. § 1044c(b)(2).

60. *See supra* notes 1–2.

61. Clifton B. Kruse, Jr., *A Call for New Perspectives for Living Wills*, 37 REAL PROP. PROB. & TRUST J. 551, 545-52 (2002).

62. TEX. HEALTH & SAFETY CODE § 166.081.

63. *Id.*

for out-of-hospital orders to ensure he is providing his client with the complete picture of medical directives.[65]

D. Guardianships

A guardianship or conservatorship may become necessary for long-term care.[66] This is a court-supervised administration of the ward's person or property. This will usually allow the guardian to handle the financial affairs of the ward and make nursing home decisions.[67] Because of the need for local expertise and court appearances, legal assistance attorneys usually will not appear in state courts on behalf of clients in guardianship cases. Legal assistance, however, is often the first stop for a client seeking guardianship information. Because this process is based on state law, it is necessary to review the actual steps the local jurisdiction requires before advising the client. This process is cumbersome and expensive—it is akin to a formal or dependent administration in probate—but it is designed to afford maximum safety to the incapacitated person's (the ward's) estate. Typically, statutes require insurance-type bonds, court approval of investments and expenditures, and annual accountings.[68]

Older adults do not need guardians simply by reason of age or minor mental or physical impairments, provided they can still manage their personal and financial affairs. In the authors' experiences,[69] a typical court will not appoint a guardian merely because the family believes the ward is making foolish or risky decisions; it will do so, however, if a physical or mental condition impairs the proposed ward's decision-making capacity or ability to avoid harm to himself or others. The court determines exactly what kind of incapacitation exists and what benefit the proposed ward would receive from a guardianship. The court may conclude that a person is incapacitated, but only to the extent that he needs help to handle his finances; it may find that he can otherwise take care of himself. In such an instance, the court may decide that this person needs a guardian of the estate only. On the other hand, if the person has no estate or his property can be managed without the requirements for a guardianship, but he is physically unable to do certain things, the court may decide that only a guardianship of the person is necessary.

When assisting an older client, the attorney should look for alternatives to guardianships. If possible, an attorney can prepare and execute revocable management trusts and durable powers of attorney. If the ward is no longer competent, state law (particularly in community property states) may still allow for continuing management powers by the competent spouse, often without the necessity of court appointment, bond, or annual accountings.[70]

Mental health commitments are generally short-term solutions, usually for situations requiring emergency detention to stabilize and evaluate patients' situations. Attorneys should become familiar with the process as well as facilities in their local areas. Often, a military hospital will not be equipped to handle this type of case, and it will be necessary to use a civilian hospital.

E. Long-Term Care Considerations

An increasing area of concern for older clients is who will take care of them when they need assistance in the future as well as how to pay for that assistance. These questions seem to overwhelm not only the older clients, but also younger clients with aging parents.[71] Unfortunately, much of their information might have come from sales representatives who have vested interests in the clients' decisions. If possible, a legal assistance attorney should help his clients assess their long-term financial situations, cash flow, and the odds that they will need nursing home care.

Long-term care is generally defined as health care to help someone who has a disabling or chronic illness and who cannot care for himself.[72] The exact type of care and the length of the care depend on the person's condition. There are several types of long-term care arrangements. Some are based in the patient's home or on an outpatient basis using services available in the community. Other arrangements may be coordinated

64. Texas Dep't of Health, *Standard Out-of-Hospital-Do-Not-Resuscitate Order, available at* www.tdh.state.tx.us/hcqs/ems/dnr.pdf (last visited July 30, 2004). To obtain the form by mail, write to the Texas Medical Association, ATTN: DNR Form, 401 West 15th Street, Austin, Texas 78701-1680. *Id.*

65. *See* U.S. DEP'T OF ARMY, REG. 40-3, MEDICAL, DENTAL, AND VETERINARY CARE ch. 2, § II (12 Nov. 2002). Legal assistance attorneys should be aware of the differences between advance medical directives and "do not resuscitate" orders. *Id.*

66. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, at E-21 (INTRODUCTION TO THE USE OF TRUSTS IN ESTATE PLANNING) (describing use of trust in event of incapacitation of grantor).

67. *See, e.g.*, TEX. PROB. CODE §§ 601-905 (West 2003); S.C. CODE ANN. § 62-5-101 (Law. Co-op 2002).

68. *See, e.g.*, TEX. PROB. CODE §§ 699, 741; S.C. CODE ANN. §§ 62-5-312, 62-5-411.

69. *See supra* notes 1–2.

70. *See, e.g.*, TEX. PROB. CODE § 883.

71. *See generally* Nkiru Asika Oluwasanmi, *Parental Guidance*, SMART MONEY, Dec. 2002, at 112-17.

with a nursing home or other type of living facility. This type of care does not take place in a hospital and is not intended to cure the patient.[73]

A common standard medical and insurance professionals use to determine whether someone requires long-term care is the ability to perform "activities of daily living" (ADLs).[74] If the person can perform most or all of the ADLs without prompting or assistance, long-term care is not usually required. The ADLs are based on the essential functions of dressing, eating, ambulating, bodily functions, and hygiene. Some other recognized ADLs are related to managing one's money and doing housework. The inability to perform an ADL can be based solely on physical or health limitations, solely on mental incapacity to perform the ADL, or a combination of both.[75]

The cost of long-term care varies widely, depending on the geographic location of the patient, the level of care, and the facilities and caretakers involved. According to an article in a military-related publication from two years ago, the national average cost of a year in a nursing home was $50,000.[76] Some people rely on their personal funds or contributions from other family members. This can be financially draining, especially if the need for care goes on for an extended period. Another choice is for the government to pay. Medicare, however, covers very little of the long-term expenses most people incur.[77] The Department of Veterans Affairs (VA) provides extensive long-term care services at larger VA hospitals, but the programs are not fully funded, and the services are not universally available.[78]

The remaining option is to purchase long-term care insurance. Such policies may cover any or all of nursing home stays, home health care, adult day care, assisted living facility care, and respite care. The cost of such insurance depends on the age of insured at the time of the purchase of the policy, the insured's health condition, the amount of the maximum daily benefit, the elimination period, and the maximum benefit period. The maximum daily benefit is the amount the policy will pay each day. If expenses exceed the amount the insured selected, he must pay the difference. The elimination period is the amount of time that must pass after the patient begins receiving long-term care services before the policy begins to pay for them. Periods of up to one hundred days are common. The maximum benefit period is the length of time the insurer will pay benefits; longer periods correspond to higher premiums.[79]

In addition to these factors influencing the cost of the insurance, the prospective insured should consider issues of services or care covered. First, what triggers the payment of the benefits under the policy? Generally, payment is tied to an individual's ability to perform ADLs, but who determines what is sufficient impairment? Must the insurance company's medical staff certify disability, or can the patient's own physician provide the certification? Second, the patient or attorney should carefully review the policy for forfeiture provisions. If the patient cannot afford to pay the premium at some time in the future, he may be able to convert the policy into term life insurance, borrow against the policy, or keep the policy with reduced benefits. Third, the policy should have protection against inflation, such as an automatic increase in the maximum daily benefit each year.

Most policies available for long-term care insurance are offered through private companies. The Office of Personnel Management, however, now offers military and other government employees and retirees such insurance through the Federal Long-term Care Insurance Program. The program became available in 2002 and is intended to cover a variety of health care options, such as custodial nursing home care, assisted-living facilities, and home health care.[80]

F. Medicaid and Nursing Homes

Some older clients may have misconceptions about Medicaid and nursing care. For instance, they may believe that the government will pay for their nursing care if they transfer their

72. *See generally* The Administration on Aging, Center for Communication and Consumer Services, *at* http://www.aoa.gov/about/about.asp (last visited July 30, 2004); Health Insurance Ass'n of America, *A Guide to Long-Term Healthcare*, *at* http://membership.hiaa.org/pdfs.2002LTCGuide.pdf (last visited Nov. 3, 2004) [hereinafter HIAA Guide].

73. HIAA Guide, *supra* note 72.

74. Center for Disease Control (CDC), *National Center for Health Statistics (NCHS)*, *at* http://www.cdc.gov/maso/pdf/nchsfs.pdf (last visited July 30, 2004).

75. *Id.*

76. Gary Turbak, *Securing Your Health: A Primer on Long-term Care Coverage*, VFW, Feb. 2002, at 30-32.

77. *See Centers for Medicare & Medicaid Services*, 2003 GUIDE TO HEALTH INSURANCE FOR PEOPLE WITH MEDICARE, Mar. 2003. Medicare will pay for up to 100 days of care in a skilled nursing facility after the patient has been hospitalized for at least three days. It covers the first twenty days entirely. The patient pays a daily coinsurance after the twentieth day until day 100. After day 100, Medicare covers none of the costs. Medicare does not pay for custodial care. *Id.*

78. Turbak, *supra* note 76, at 32.

79. *See generally* HIAA Guide, *supra* note 72.

80. *See generally* Karen Kopp DuTeil, *Making a Decisions About Long-term Care Insurance*, RETIRED OFFICER MAG., June 2002, at 67-72.

property into their children's names. Clients may seek legal assistance hoping to confirm these beliefs. While some of these strategies previously worked, effective 10 August 1993, Congress amended the Medicaid laws to materially change the eligibility rules and close such loopholes.[81] It is important for legal assistance attorneys to know the basics of Medicaid rules and eligibility.

Medicaid[82] is a combined federal and state program that provides benefits to assist in the payment of long-term care expenses. Federal law sets forth certain criteria for eligibility for those benefits that are binding upon all state medical assistance programs that receive federal reimbursements. State programs, however, may impose additional eligibility requirements to the extent permitted by federal law or administrative waivers the federal government grants to the states. Thus, state-specific facts and figures are essential because of the degree to which they vary, making it difficult to be overly specific.

A patient establishes eligibility for nursing home Medicaid benefits by meeting every part of a series of tests which can be summarized as follows: (1) the applicant must have a medical necessity for nursing home care (not further discussed herein, but see 42 U.S.C.S. § 1382c(a)(3)(A) (2003); 20 C.F.R. § 416.905 (2003)); (2) the applicant must have less than the maximum amount of countable resources, without having made any disqualifying transfers; and (3) the applicant must have no more than the maximum amount of allowable income in his name.[83]

1. Countable Resources

The applicant's state Medicaid agency can provide legal assistance offices with a current list of qualifying assets to determine whether a client exceeds the maximum amount of assets or "resources."[84] In 2004, the maximum amount of resources that federal law allows an institutionalized individual to have is $2000.[85] State law establishes exclusions from countable resources and then sets values for these exclusions. Typical exclusions from countable resources include: the entire value of one's principal residence and its attached land; the current market value of one's household goods and personal effects up to a set limit; the market value of an automobile, up to a set limit (the total value of a car is excluded under some states' laws if it is needed for employment or medical treatment, or if it is specially modified for use of a handicapped person); property of a trade, or business and non-business property essential for the individual's self-support; resources of a blind or disabled person needed to fulfill an approved plan for achieving self-support; life insurance policies up to a set value; payments from another federal benefit program that requires exclusion of such payments (for example, food stamps); cash or in-kind replacement to repair or replace a lost, damaged, or stolen resource, provided that the applicant spends the cash for such purpose within nine months; the entire value of burial spaces for an individual and immediate family, a prepaid irrevocable burial contract regardless of the value, and a burial expense fund, up to a set value; and non-business property essential for self-support, if it produces a net annual income of at least six percent, up to a certain value (but note that the resulting income counts toward the income cap).[86]

2. Disqualifying Transfers

Clients can spend down until they reach the appropriate level of resources for Medicaid qualification. Merely transferring title of an asset, however, into someone else's name, while retaining all benefits from the asset, such as its use or its income, will not be sufficient to take the asset out of its available status. Assets transferred to a revocable trust and which are still considered as owned by the transferor fall into this category.[87] Further, clients who are considering making gifts (or property "sold" at less than fair market value) to children or others in order to make themselves eligible under this resource requirement must be aware that such actions can actually backfire and disqualify an otherwise eligible person from Medicaid benefits by subjecting the transferor to a period of temporary ineligibility for Medicaid benefits.[88] The period of ineligibility is determined by a formula in which the state calculates how long the transferor could have paid for his nursing home care

81. 42 U.S.C.S. § 1396p(d)(4) (2003). The Omnibus Budget Reconciliation Act of 1993 (commonly referred to as OBRA '93) closed many of the loopholes previously used by persons to transfer their assets into trusts and retain many of its benefits yet qualify for Medicaid. *Id.*

82. Social Security Act, tit. XIX, 42 U.S.C. § 1396 (2000). Although referred to as Medicaid by the public, the statutes and regulations used the phrase "Medical Assistance Program." *Id.*

83. *See generally* 42 C.F.R. ch. IV, subch. C (2003); Colonel Richard Kwieciak, *Medicaid Planning*, ARMY LAW., Aug. 1997, app. A (providing an excellent overview of Medicaid qualifying strategies).

84. 20 C.F.R. §§ 416.1201 – 1266 (2003) (Resources and Exclusions).

85. *Id.* § 416.1205 (Limitation on Resources).

86. *Id.* §§ 416.1201 – 1266 (Resources and Exclusions).

87. 42 U.S.C. § 1396p(d) (2000).

88. *See* 20 C.F.R. § 415.1246. These transfers without fair consideration include outright gifts as well as transfers to irrevocable trusts. *Id.*

with the transferred assets if they had not been transferred. For example, if one transfers $300,000 in assets without fair consideration, and the average cost of nursing home care in the state where the transferor resides is $3000 per month, the period of ineligibility would be 100 months because he could have paid for 100 months of nursing home care with the $300,000 if it had not been transferred. While there is no limit on this period of disqualification, the "look-back period" is three years in the case of outright gifts and five years for certain other transfers, including transfers to an irrevocable trust.[89] The legal assistance attorney should also inform the client that assets being transferred by a Medicaid applicant's spouse within the look-back period also results in a disqualification period for the applicant, just as if the applicant had transferred the assets.

There are, however, a few long-term care planning opportunities still available to get the person qualified for resources:

Special needs trusts. If a disabled person has assets of his own that he is mentally or physically able to manage, it is possible to establish a trust to manage his assets. The corpus of the trust is exempt from the regular available assets rules, as long as the trustee is directed to reimburse the state, at the beneficiary's death, for government medical benefits received during the beneficiary's lifetime (to the extent the trust is able to do so). Funds for special needs not covered by Medicaid can be paid out of the trust.[90]

A carefully structured gift program. There is a monthly gifting limit under each state's Medicaid program. By instituting a monthly plan in which an individual gifts assets equivalent to that amount twice the authorized gift limit, he can eventually deplete the estate in a spend down until he reaches the countable resource minimum. Because the penalty period for a transfer of assets runs contemporaneously with the gift period, when the month for one ends, so does the other.[91]

Certain annuities. It is possible to use non-exempt resources to purchase an annuity in the name of the community spouse. Before making the Medicaid application, the community spouse could irrevocably elect an annuity (periodic income) payout; no cash-value lump sum would be available as a resource. Any annuity income payable in the name of the Medicaid applicant could raise his income above the permitted level. It is the understanding of the authors that such annuity arrangements are closely examined by state Medicaid agencies to determine if the annuity purchase was really an improper attempt to transfer resources.[92]

In addition, the institutionalized spouse may establish a *protected resource amount* (PRA) that allows him to transfer assets to the spouse living at home (to the extent her resources are less than his). Public Law No. 100-360 provides for the protection of resources for the community spouse when the other spouse is institutionalized.[93] The PRA is the portion of the total resources reserved for the community spouse and is deducted from the couple's combined resources in determining eligibility. This amount is one-half of all combined resources subject to a minimum and maximum amount as determined by a formula calculated at the time of initial institutionalization, which will not change thereafter. For 2004, the PRA limit is capped at $92,760.00 and subject to a minimum amount of $18,552.00.[94]

Public Law No. 100-360 also provides for the protection of income for the community spouse when the other spouse is institutionalized.[95] A spousal income maintenance allowance is authorized to be deducted from the couple's combined monthly income and is paid to the community spouse if that spouse's income is less than the allowance amount. It is calculated by subtracting the dependent's income from 150% of the monthly federal poverty level for a family of two, and then dividing by three.[96] For 2004, the maximum monthly spousal allowance is $2,319, with a minimum of $1,515.[97] This monthly maintenance allowance protects the institutionalized spouse and his

89. 42 U.S.C. §§ 1396p(c), 1396r-5; 20 C.F.R. § 416.1240. Also, if one makes a disqualifying transfer while the disqualification period for another transfer is still running, the new disqualification period does not begin until the previous one ends. *Id.*

90. 42 U.S.C. § 1396 (d)(4).

91. If an individual donee, however, receives more than $11,000 in a calendar year, he will have to file a gift tax return because the value of the transferred assets exceeds the current annual gift tax exclusion. 26 U.S.C. § 2503(b) (Taxable Gifts).

92. *See supra* notes 1–2.

93. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 748-64.

94. Announcement by U.S. Centers for Medicare and Medicaid Services, Office of the Actuary, Oct. 30, 2003, as reported in NAELA eBulletin (Nov. 4, 2003). NAELA eBulletin is a weekly newsletter by Tim Takacs, CELA; Robert Fleming, CELA; and Professor Rebecca C. Morgan published by the National Academy of Elder Law Attorneys via email to subscribers and on the Web *at* http://www.naela.org/applications/ebulletins/. It is a highly recommended source for elder law practitioners.

95. 102 Stat. at 748-64.

96. U.S. Center for Medicare & Medicaid Services, Office of the Actuary (Oct. 30, 2003).

97. *Id.*

family from having to use some of his income to pay for his institutional care. This spousal allowance, however, has nothing to do with whether the client exceeds the income cap referenced heretofore and can be payable from the Qualified Income Trust.

Income requirements. Problems may still exist even if a person spends down to reach the minimum resource amount. He may still fail to qualify if he receives too much income from such non-discretionary sources as military retirement, civil service retirement, or Social Security.[98] States vary considerably on the maximum amount of income one may receive in one's name, based on the options the particular state has elected.[99] For those who otherwise would qualify, one method for reducing income to the institutionalized person is for him to transfer that income stream to another person whenever possible. Examples of transferable income include rental income, interest, and dividends. Social Security and military retirement income are not transferable. Another solution is to place excess income in a qualified income trust (QIT), sometimes called a Miller Trust. All income that is routed through this type of trust does not count for income qualification.[100] However a QIT has the requirement to reimburse the state for its Medicaid payments from the residue of the trust after the Medicaid recipient's death. The QITs make sense if the likely government benefits to be received during a lifetime exceed the amount likely to remain in the trust at the time of the client's death had the institutionalized person had to pay for nursing home care out of his private funds.

IV. Planning for Death

A. Wills[101]

As discussed previously, legal assistance attorneys interviewing older clients must be sensitive to the issues of lack of testamentary capacity and the presence of undue influence, particularly when another person asks to sit in on the interview to help explain what the client really means. Attorneys must also be sensitive to statements regarding special bequests or gifts. An attorney should never laugh or make light of an older client's desires, such as the desire to take care of a beloved pet. Many older clients have family pets that they want cared for after they die; this does not mean that the client lacks testamentary capacity. Part of the attorney's discussions with a client about such plans will include the options for future care, such as through gifts or by establishing a trust.[102]

The attorney should learn what assets the client has, either through questions, the use of a worksheet, or both. The client must understand the importance of the accuracy of the information in providing competent advice on estate taxes and general probate procedures. The client must also understand what assets are probate assets and affected by the provisions in the will. Many older clients may have pension plans or other investments that usually do not pass according to a will. If the client has non-probate or nontestamentary[103] assets, the attorney should explain the importance of current beneficiary designations. Some clients are concerned about their debts and what assets will be used to pay those debts. After explaining to the client what the provisions of the will are regarding debt payment, the attorney should discuss the option of converting a non-probate asset into a probate asset for the purpose of paying all or part of the debts. For example, many clients are worried about taking care of funeral expenses but do not want to buy prepaid burial plans. The attorney should consider discussing the option of designating the estate as the beneficiary of a life insurance policy with the estate's interest being roughly equivalent to the cost of a funeral in the local area. In most jurisdictions, however, this would require opening some type of probate so that the life insurance company will issue the check to the estate.[104]

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98. 42 U.S.C. § 1382a(a)(2) (2000); 20 C.F.R. § 416.1120 (2003) (explaining that "income" includes the following: annuities, pensions, alimony, support, dividends, life insurance proceeds, prizes, gifts, and inheritances). Significant exemptions include most federal payments such as food stamps, one-third of child support payments, and certain VA payments (although VA retirements benefits are countable). *See* 42 U.S.C. § 1382a(b); 20 C.F.R. § 416.1124.

99. States can be generally classified into three categories for income determination: (1) "SSI states" that cover everyone who qualifies for the Supplemental Security Income (SSI) program; (2) "Section 209(b) states" that adopt more restrictive requirements than simple SSI determination; and (3) those states that broaden the qualification to cover "medically needy persons." Goldfarb Abrant Stutzman & Kutzkin LLP, *Medicaid Frequently Asked Questions*, *at* www.seniorlaw.com/medicaid-faq.htm (last visited July 30, 2004).

100. 42 U.S.C. § 13969(d)(4).

101. *See* DOD DIR. 1350.4, *supra* note 38 (explaining that it is DOD policy that the "[m]ilitary Departments, within the limits of available resources and expertise, shall inform and educate persons eligible for legal assistance on estate planning generally, and the advisability of preparing a will or military testamentary instrument"); *see also* U.S. Dep't of Army, Office of The Judge Advocate General, Legal Assistance Policy Division, *Estate Planning Tool Kit for Military & Family Members* (May 2002), *at* www.jagcnet.army.mil/legal.

102. *See generally* Gerry W. Beyer, *Estate Planning for Pets*, PROB. & PROP., July/Aug. 2001, at 7-12.

103. "Non-probate" and "nontestamentary" are terms that generally refer to assets that are not required to be distributed through a probate procedure. Examples of common non-probate assets are life insurance policy proceeds, Individual-Retirement Account (IRA) proceeds, and pay-on-death or survivorship accounts. *See, e.g.*, TEX. PROB. CODE ANN. § 436 (West 2003); MO. REV. STAT § 461.001 (2002).

104. *See generally* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. C (PROBATE AND PROBATE AVOIDANCE).

The attorney must explain the procedural requirements for a will along with the substantive requirements. He must explain what a self-proving affidavit is and why it is such an important document.[105] The client and the witnesses must answer any questions aloud. Any handwritten information, for example, dates and signatures, must be legible. Before the attorney gives the signed will to the client and releases the witnesses, the attorney must review the will one last time to ensure all initials, dates, and signatures are where they should be and that the will pages are numbered correctly and in proper order.[106] The attorney should remind the client not to write on the will after signing it and provide the client with instructions on safekeeping of the will.[107]

B. Inter Vivos Trusts

Many clients and their families may have been bombarded with literature and sales pitches for living trusts, family limited partnerships, and other probate-avoiding techniques. These estate-planning tools, while perfectly legitimate, are often marketed to those without the ability to properly evaluate their need or price. Often, the information is predicated on nightmare probate scenarios and percentage probate fees. Attorneys can greatly assist their clients by sorting truth from hyperbole. Inter vivos trusts, often referred to as living trusts (and sometimes more aptly called revocable stand-by management trusts), typically allow the trust maker (settlor) to continue management of his property until he no longer wishes to or is able to do so.[108] These trusts can be very effective at avoiding or minimizing the need for guardianships or probate and have some important advantages over simple ownership as joint tenants with rights of survivorship. Although legal assistance offices usually do not draft these documents, eligible clients often ask legal assistance attorneys to review trusts they have obtained, especially trusts obtained at seminars whose drafters have since left the area. In preparing, reviewing, or discussing such trusts, look for the following critical elements: (1) detailed provisions concerning incapacity, disability, or incompetency, especially with non-judicial determinations; (2) gifts to beneficiaries, especially to take advantage of estate and gift tax exclusions; and (3) proper transfer of all appropriate assets, consistent with an understanding of the potential disadvantages of transferring such items as vehicles (high liability) and homesteads (which may cause the loss of state protection or federal tax benefits).[109]

C. Probate

Because of negative publicity, especially by those selling living trusts, clients often come to the legal assistance office with much hostility toward the word "probate." They often fail to see the need to authenticate in probate what they know to be a valid will, or to update the title on property before the statute of limitations runs on filing any expedited form of probate. Probate is simply the legal process that insures the legitimate and orderly transfer of property at death.[110] This involves the proving of someone's passing; a determination of whether a document is a valid will or, in its absence, who are the lawful heirs; and the updating of transferable title while protecting the rights of legitimate creditors. Even an attorney who practices no probate law needs some basic familiarity with local state laws to discuss these matters with clients.

One of the main reasons probate is necessary is to update the title to property so that it will eventually be saleable. Title, or written documentation of ownership, is often required with real estate, vehicles, investments, and bank accounts. In some instances, this may occur without probate by the mere presentation of a death certificate or affidavit of heirship. In most cases, however, property will require some form of probate administration to verify rightful ownership[111] and to update title to them after legitimate creditors' claims are satisfied.

A legal assistance attorney may assist the client in many ways without actually drafting the probate documents;[112] if the client understands the need for probate and what information he needs to have ready for his probate attorney, his experience with the probate attorney will be less stressful and more effective. Because some simple documents, such as small estate affidavits, may not require court hearings, a legal assistance attorney might consider drafting them in appropriate cases.

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105. States may recognize a military testamentary instrument and a self-proving military testamentary instrument. 10 U.S.C. § 1044d (2000). The format for the military testamentary instrument self-proving affidavit is set by DOD directive. DOD DIR. 1350.4, *supra* note 38, encl. 2. If the legal assistance attorney is using this format instead of the format for the self-proving affidavit for the client's state of domicile, he should explain his reasons for doing so to the client.

106. *See* AR 27-3, *supra* note 3, para. 3-6b(2).

107. *See* LEGAL ASSISTANCE DESKBOOK, *supra* note 18, ch. B (ESTATE & CLIENT ANALYSIS: THE ESTATE PLANNING INTERVIEW).

108. *Id.* ch. E (INTRODUCTION TO THE USE OF TRUSTS IN ESTATE PLANNING).

109. *See id.*

110. *See id.* ch. C (PROBATE & PROBATE AVOIDANCE).

111. This is possible either through presentation of the will or through an heirship determination of the next of kin under the state's intestate succession rules.

112. Because of the length of administration, the need for court appearances, and state-specific rules, it is not usually advisable to encourage clients to do most probates *pro se*, even with the assistance of a legal assistance attorney.

The office should also try to negotiate non-percentage probate fees with local counsel.

V. Conclusion

Elder law represents an emerging field that brings together many areas of law, psychology, and resources in an integrated and holistic manner. While this can be intimidating to the new attorney, it is a chance to help those who have served our country for many years. Legal assistance attorneys must realize that older clients often need additional care and concern. The older client may have health problems that significantly affect his mobility and even his competency. Even a forty-year-old retiree in excellent physical and mental health may have concerns about caring for his aging parents; his own estate plan for his family's future requires a legal assistance attorney to be familiar with various aspects of elder law. Drafting a power of attorney for a nineteen-year-old private first class deploying to the National Training Center and drafting one for a fifty-five-year-old retiree may seem to have little difference. As should be apparent now, however, an attorney must understand each client's individual concerns. Legal assistance attorneys should be aware of the long-term needs of older clients and be prepared to advise them competently on estate planning issues, including durable powers of attorney, wills, and medical directives, as well as counseling on guardianships, long-term care, Medicaid, and probate.

Legal assistance attorneys seeking assistance in elder law have a variety of resources available to them. Some have been listed in this article. They include: members of the local bar; the American Bar Association and its various commissions, committees, and sections; national elder law associations; and state and local agencies specializing in elder law issues. An internet search for the term "elder law" will reveal further sources of information. It is imperative for legal assistance offices to make this emerging subject matter a high priority for training and education.

Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism

James P. Terry

I. Introduction

This article argues for acceptance of a legal structure capable of addressing widespread international human rights violations and genocide, when a potential veto of a permanent member of the United Nations (U.N.) threatens to frustrate U.N. Security Council Chapter VII authorization.[1] This article focuses on the specific context of Kosovo where the right of individual or collective self-defense under Article 51 of the U.N. Charter[2] by possible contributor nations did not exist. While some international legal scholars have argued that humanitarian intervention in such circumstances should be limited under international law to redressing abuses to one's own nationals or those of an ally on foreign territory, recent history in Kosovo dictates that a more flexible regime is required. When a force carefully defines the parameters of their intervention—as in Kosovo—and the force limits its intervention to redressing widespread human rights abuses, the intervention supports the principles of the U.N. Charter addressing human dignity.[3] Furthermore, an action done in this manner does not significantly abridge the territorial integrity and political independence of the target state.

Respect for national sovereignty and the commitment to nonintervention have long been at the heart of the international legal structure.[4] The norm of state sovereignty, however, has never been absolute. Sovereignty has always been subject to certain constraints, whether embodied in other norms of international relations or formalized in international law.[5] A challenge to the traditional concept of sovereignty arises when a sovereign state fails to perform such basic functions as providing political stability, equitable distribution of resources, or social welfare. When that failure results in the direct violation of the civil liberties and human rights of a major segment of a state's own population, compromising its health and well-being and generating a humanitarian crisis, the state's body politic is generally responsible to hold the state accountable. When the ethnic majority joins the government in promoting the humanitarian crisis within the community represented by the ethnic minority, as in Kosovo in 1998,[6] the international community arguably has a corresponding responsibility to help the victims and prevent their genocide. Otherwise, the 1947 Genocide Convention has no meaning.[7]

Professor Louis Henkin succinctly clarified the responsibility of states to address international human rights abuses, stating,

> The international system, having identified contemporary human values, has adopted and declared them to be fundamental law. But in a radical derogation from the axiom of "sovereignty," that law is not based on consent; at least it does not honor or accept dissent, and it binds particular states regardless of their objection.[8]

The debate over sovereignty centers on the principle of nonintervention—the duty to refrain from uninvited involvement in a state's internal affairs.[9] Nonintervention has been a standard

1. See U.N. CHARTER art. 27(3) (requiring an affirmative vote of all permanent members and at least nine members of the U.N. Security Council on decisions under Chapter VII).

2. *Id.* art. 51.

3. *Id.* preamble. "[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ." *Id.*

4. *See* Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 2 (1995) (explaining that references to principles of humanitarian intervention originated as early as 1579). After the First World War, the allied powers sought to protect national sovereignty in the Covenant of the League of Nations. *See* LEAGUE OF NATIONS COVENANT art. 10. Following the Second World War, the principles of national sovereignty and nonintervention were incorporated into Article 2 of the U.N. Charter. U.N. CHARTER art. 2.

5. *See* Richard Lillich, *Forcible Self Help Under International Law, in* 62 READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 135 (Richard Lillich & John N. Moore, eds., 1980).

6. *See* James Terry, *Response to Ethnic Violence: The Kosovo Model*, BROWN J. WORLD AFF. 233, 235-238 (1999).

7. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277.

8. Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 37 (1995/1996).

9. *See* U.N. CHARTER art. 2(7). The U.N Charter binds nations from intervening "in matters which are essentially within the domestic jurisdiction of any state . . . ." *Id.*

corollary to the traditional norm of sovereignty. As stated in the U.N. Charter, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[10] Once a government fails to fulfill the basic purposes of its independence, which include providing safety and fundamental human rights to all of its population, that government undermines the principles that guarantee that state's immunity from intervention.[11]

This article first examines the legal framework related to humanitarian intervention as it has developed under customary international law and U.N. Charter precedents. Next, the article reviews the potential or actual legal impact the North Atlantic Treaty Organisation (NATO) intervention in Kosovo may have had on that body of law. The article suggests that the NATO action fulfilled the principles of the U.N. Charter, and that Soviet and Chinese opposition would have frustrated those principles if they were allowed to preclude actions other nations deemed necessary to restore peace and security in Kosovo. Finally, the article examines whether criticism of NATO actions in Kosovo is misguided. Such criticism fails to understand that the U.N. Charter regime was designed to be effective, and interpretations of its provisions that make it effective support, rather than destroy, its moral authority.

II. Legal Concepts for Humanitarian Intervention

Traditionally, humanitarian intervention refers to a forcible intervention designed to stem a large-scale human rights crisis.[12] The late Professor Richard Lillich of the University of Virginia observed that a group of states, not a single state, has ~~traditionally exercised humanitarian~~ intervention in the protection of nationals.[13] He further stated that the justification for pre-U.N. Charter humanitarian intervention was that although it obviously was an interference with the sovereignty of the state concerned, it was a permissible one.[14] "Sovereignty was not absolute and when a state did reach this threshold of shocking the conscience of mankind, intervention was legal."[15]

A component of humanitarian intervention is that nations execute interventions without the target government's consent.[16] Nations usually direct this form of intervention against incumbent regimes, although non-state actors might be the target when the state is weak or unstable.[17] It is important that nations only target humanitarian abuses; addressing other political objectives or interests may take an intervention out of the humanitarian category.[18] Therefore, if the U.N. approves humanitarian intervention, the objective for the use of force must be to address a human rights crisis, and more specifically, the abuses that made intervention necessary.[19] Finally, the rule of proportionality applies to humanitarian intervention, as it would in every case of the use of force.[20] Thus, the level of force exerted must be consistent with the magnitude of the specific crisis and the amount of force must not exceed the amount of force necessary to curtail the abuse.[21] Professor Ved Nanda explains that demanding adherence to the proportional use of force in such operations eliminates the "pretext problem," which arises when overwhelming force is used to address a situation that quite obviously does not warrant the level of force committed.[22]

Many legal experts, however, believe enforcement of the U.N. Charter supplanted the lawful use of humanitarian intervention under customary international law.[23] Their rationale is that the U.N. Charter provides the exclusive authority for the use of force in circumstances under Chapter VII, including humanitarian intervention.[24] The contrary view,[25] however,

10. *Id.* art. 2, para. 4.

11. *See id.* art. 2, para. 1 (explaining "the Organization is based on the principle of the sovereign equality of all of its Members").

12. Lillich, *supra* note 5 at 134; *see also* Ruth Gordon, *Humanitarian Intervention by the United Nations*, 31 TEX. INT'L L.J. 43, 44 (1996).

13. Lillich, *supra* note 5, at 135.

14. *Id.* at 134.

15. *Id*.

16. ANTHONY AREND & ROBERT BECK, INTERNATIONAL LAW AND THE USE OF FORCE 113 (1993) (noting that governments are usually more capable than other parties of violating human rights on the scale necessary to justify humanitarian intervention).

17. *Id*.

18. Ved Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti-Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT'L L. & POL'Y 305, 331 (1992).

19. *Id.*

20. *Id.* at 311.

21. *Id*. at 332.

22. *Id*. at 311.

argues that humanitarian intervention remains permissible under customary international law in certain circumstances and only after diplomatic and other peaceful techniques are exhausted and the U.N. Security Council is unable to take effective action (e.g., due to a veto of a permanent member of the U.N.).[26]

Legal scholars advocating the post-U.N. Charter vitality of the doctrine of humanitarian intervention have urged that a significant credibility gap exists between a strict noninterventionist policy and fulfillment of the principles of the U.N. Charter.[27] Examining the U.N. Charter as a whole, they claim, shows that the U.N. Charter's two main purposes are the maintaining peace and security and protecting human rights.[28] Article 2(4), U.N. Charter provision relevant to both these purposes, prohibits "the threat or use of force against the territorial integrity or political independence of any state, *or in any other manner inconsistent with the Purposes of the United Nations*."[29] Humanitarian intervention by a collective of states or a regional organization (e.g., NATO), acting independently but consistent with the U.N. Charter's purposes, may actually further one of the U.N.'s major objectives. Thus, legal scholars advocating the post-U.N. Charter vitality of the doctrine of humanitarian intervention insist that humanitarian intervention would not run afoul of Article 2(4) provided they do not affect the "territorial integrity" or "political independence" of the state against which they are directed.[30] When the U.N. Security Council is unable to act because of a potential veto, humanitarian intervention by a group of concerned states, as in Kosovo, thus becomes critical to upholding the U.N. Charter principles.

This argument is even more attractive legally when reviewing the actual substance of the U.N. Charter. While the U.N. Charter is admittedly best known for the articles which create a minimum world order system,[31] as represented by Article 2(4) (prohibition on the use of force), Article 51 (exception for self-defense), and Articles 39-51 (Chapter VII) (addressing Security Council responsibilities), there is certainly an equal emphasis in the U.N. Charter on the protection of human rights.[32] The Preamble of the U.N. Charter focuses on the rights of individuals vice the rights of nations, when it states the following purpose of the U.N. Charter:

> [T]o save succeeding generations from the scourge of war, which twice in our lifetime have brought unto sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
>
> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom . . . .[33]

Article 1(3) of the U.N. Charter reinforces the preamble by stating that the organization's principle purpose is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex,

23. *See, e.g.*, Ian Brownlie, *Humanitarian Intervention, in* LAW AND CIVIL WAR IN THE MODERN WORLD 3, 217 (John N. Moore ed., 1974), *reprinted in* NATIONAL SECURITY LAW 151-52 (John N. Moore ed., 1990).

24. *Id.*

25. Professors John Norton Moore and the late Richard Lillich of the University of Virginia; Professors Michael Reisman and the late Myres McDougal of Yale University; Professor Ved Nanda of the University of Denver, and Professor Christopher Green of Great Britain, to name a few, support the contrary view. *See generally* Daphne Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 48 (2003); Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323, 333-34 (2000); Lillich, *supra* note 5.

26. Lillich, *supra* note 5, at 136.

27. *See* Yoshiko Inoue, *United Nations' Peace-keeping Role in the Post-Cold War Era: The Conflict in Bosnia-Herzegovina*, 16 LOY. L.A. INT'L & COMP. L.J. 245 (1993).

28. Brownlie, *supra* note 23, at 148-49.

29. U.N. CHARTER art. 2(4) (emphasis added).

30. *Id*; *see also* Brownlie, *supra* note 23, at 147 ("A number of American scholars, however, support the right of humanitarian intervention if carefully limited.")

31. *See* U.N. CHARTER pmbl. (stating the determination "to unite our strength to maintain international peace and security"); *id.* art. 1, para. 1 (stating the purpose of the organization is "[t]o maintain international peace and security, and to that end: to take effective collective measures"); see *generally* Major James Francis Gravelle, *Contemporary International Legal Issues—The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5, 57-58 (1985).

32. U.N. CHARTER art. 2(4), 39-51.

33. *Id.* pmbl.

language or religion . . . ."[34] Articles 55-60 of the U.N. Charter directly address international economic and social cooperation.[35] Article 55, for example, emphasizes the need to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[36] The fifty-four member U.N. Economic and Social Council, established in Article 61 and addressed in Articles 61-72, provides the means to address the humanitarian objectives set forth in Articles 55-60 and to make recommendations to the U.N. General Assembly or to the U.N. Security Council for action.[37]

Under the U.N. Charter framework, the U.N. Security Council authorizes measures involving the use of force.[38] Article 27(3) of the U.N. Charter, however, requires all permanent party members to support the U.N. Security Council on such measures.[39] When not all of the permanent party members agree on the use of force, they can easily frustrate the U.N. Security Council in exercising its decisional authority. This described the situation in March 1999, when despite the support of twelve of the fifteen U.N. Security Council members, the Chinese and Russian delegates refused to support a draft U.N. Security Council resolution authorizing NATO-led forces to intervene in the Kosovo crisis.[40]

It was precisely this concern, long before the Kosovo crisis, that led to a debate of the criteria that would satisfy the need to address instances of widespread human rights abuses, while preserving U.N. Charter principles. In 1974, Professor Lillich anguished over the U.N. Security Council's inability to function in matters requiring the unanimous approval of the permanent members for Chapter VII "all necessary means" operations.[41] Professor Lillich argued that, "the most important task confronting international lawyers is to clarify the various criteria by which the legitimacy of a State's use of forcible self-help in human rights situations can be judged."[42] Lillich suggested that consideration of five criteria by a state, collective of states, or regional organization before taking humanitarian action in a foreign state, would still uphold the U.N. Charter principles, despite the lack of U.N. Security Council approval.[43] Professor Lillich's five proposed criteria are as follows: (1) the immediacy of the violation of human rights; (2) the extent of the violation of human rights; (3) the existence of an invitation by appropriate authority; (4) the degree of coercive measures employed; and (5) the relative disinterestedness of the state or states invoking the coercive measures.[44]

Professor Ved Nanda of the University of Denver offers similar criteria in arguing for the continued vitality of the humani-

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34. *Id*. art. 1(3).

35. *Id*. art. 55-60.

36. *Id*. art. 55.

37. *Id*. art. 61-72.

> 1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.
> 2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
> 3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
> 4. It may call, in accordance with the rules prescribed by the United Nations,international conferences on matters falling within its competence.

Id. art. 62.

38. *Id.* art. 39-51 (explaining how the U.N. Security Council determines the existence of any threat to the peace, breach of the peace, or act of aggression and decides what measures, including the use of armed force, will be taken to maintain or restore international peace and security).

39. *Id*. art. 27(3).

40. *See* Louis Henkin, *Editorial Comments, Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 4, ¶ 3 (1999).

41. Richard Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plan for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 3, 229 (John N. Moore ed., 1974), *reprinted in* NAT'L SECURITY L. 152-53 (John N. Moore ed., 1990).

42. *Id*.

43. *Id*. at 153.

44. *Id*. Lillich stated:

> Since humanitarian interventions by states, far from being inconsistent with Charter purposes, actually may further one of the world organization's major objectives in many situations, such interventions run afoul of Article 2(4) only if they are thought to affect the "territorial integrity or "political independence" of the state against which they are directed . . . .

Id.

tarian intervention doctrine: (1) a specific limited purpose; (2) an invasion by the recognized government; (3) a limited duration of the mission; (4) a limited use of coercive measures; and (5) a lack of any other recourse.[45]

By far, the most definitive and principled approach has been offered by Professor John Norton Moore of the University of Virginia who is a former Legal Advisor to the Department of State. He suggested in 1974 that intervention for the protection of human rights is permissible under customary international law if the following standards are met: (1) an immediate threat of genocide or other widespread arbitrary deprivation of human life in violation of international law; (2) an exhaustion of diplomatic and other peaceful techniques for protecting the threatened rights to the extent possible and consistent with protection of the threatened rights; (3) the unavailability of effective action by an international agency or the UN; (4) a proportional use of force which does not threaten greater destruction of values than the human rights at stake and which does not exceed the minimum force necessary to protect the threatened rights; (5) the minimal effect on authority structures necessary to protect the threatened rights; (6) the minimal interference with self-determination necessary to protect the threatened rights; (7) a prompt disengagement, consistent with the purpose of the action; and (8) immediate full reporting to the security Council and compliance with Security Council applicable regional directives.[46]

Professor Moore suggested these standards reflect the judgment that intervention for the protection of fundamental human rights should be permitted under customary international law if carefully circumscribed. He explained his position as follows:

> Although it is recognized that legitimizing such intervention entails substantial risks, not permitting necessary action for the prevention of genocide or other major abuse of human rights seems to present a greater risk. Opponents of any such standard should at least endeavor to weigh the risks of permitting such intervention as carefully delimited by the suggested standard against the risk of insulating genocidal acts and other fundamental abuse of human rights from effective response.[47]

Each proposal still protects equally significant U.N. Charter values. There are, however, three critical points with respect to the three proposed sets of criteria. First, a humanitarian intervention involving the use of force by a regional organization (such as NATO) is permissible in response to threats of genocide or other widespread arbitrary deprivation of human life in violation of international law if diplomatic and other peaceful means are not available. Next, the U.N. must be unable to take effective action. Finally, the territorial integrity and political independence of the target state must be only temporarily affected.

The three proposed criteria, designed to preserve territorial integrity and political independence during humanitarian intervention, must nevertheless be balanced with the States' right regarding domestic jurisdiction, as set forth in Article 2(7) of the U.N. Charter. Article 2(7) provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . ., but this principle shall not prejudice the application of enforcement measures under Chapter VII."[48] This provision does not mesh comfortably with the requirements in Articles 55 and 56 of the U.N. Charter to cooperate with the U.N. in promoting respect for human rights (nor with the explicit duties of states set forth in human rights treaties).[49]

The fall of the former Soviet Union, however, marked a defining moment in the way many states viewed the proper exercise of domestic jurisdiction. For example, in 1983, when its own declaration of martial law was under severe international criticism, Poland insisted that U.N. organs could not consider human rights questions in a particular state unless there existed a gross, massive, and flagrant violation of human rights and fundamental freedoms, which established a consistent pattern and which endangered international peace and security.[50] By 1991, however, Poland endorsed the following conclusion of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE):

> The participating states emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They

45. Nanda, *supra* note 18, at 311.

46. John N. Moore, *Toward an Applied Theory for the Regulation of Intervention*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 3, 24-25 (John N. Moore ed., 1974), *reprinted in* NATIONAL SECURITY LAW 140, 141-42 (John N. Moore ed., 1990).

47. *Id.* at 142.

48. U.N. CHARTER art. 2(7).

49. *Id*. arts. 55, 56.

50. UN DOC. E/CN.4/1983/SR.40/Add.1. (1983) (on file with author).

> categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the State concerned.[51]

Today, nations rarely raise the issue of domestic jurisdiction in other than a perfunctory manner in U.N. forums or other international discourse.[52]

III. Humanitarian Intervention in Context

The most significant post-U.N. Charter example of humanitarian intervention absent U.N. Security Council approval, other than Kosovo, occurred in the Republic of the Congo in 1964.[53] The Stanleyville[54] intervention was unlike the 1965 intervention in the Dominican Republic by U.S. Marines, which was ordered by President Johnson solely to save American lives (although third country nationals were ultimately rescued as well).[55] The leaders of three states (Belgium, the United States, and Great Britain) ordered the intervention into the Congo to protect not only their own nationals, but also the nationals of third states and the Congo. As Professor Lillich explained, "the Congo airdrop was a classic occasion of humanitarian intervention, and the Dominican Republic, at least initially, was a classic case of forcible self-help."[56]

The Congo crisis in 1964 presented nearly parallel legal issues to those NATO faced in 1999. In early November 1964, the Democratic Republic of the Congo undertook offensive actions against rebel factions, which had received Communist especially Chinese backing.[57] The rebel government— the Popular Revolutionary Government—was threatened by the offensive along the Uganda border and toward the rebel capital of Stanleyville. The self-proclaimed President of the Popular Revolutionary Government, Christophe Gbenye, announced that he had taken 60 Americans and 800 Belgians as hostages.[58] The rebels also broadcast threats against the lives of the hostages if the Congolese Army continued their advance on Stanleyville. On 16 November, the rebels announced that Dr. Paul E. Carlson, an American medical missionary on duty in the Congo, would be executed as a spy.[59] There is no doubt this constituted a violation not only of the U.N. Charter, but also of the Geneva Conventions. No one took issue that the situation presented these violations, but the U.N. Security Council could not agree on a course of action.[60] The Organization of African Unity was thereafter ceded authority to deal with the situation.[61] It failed miserably.[62] The United States, seeing no alternative—much as it had in the later Kosovo crisis—cooperated with other concerned states (Great Britain and Belgium) in mounting an airdrop of paratroopers without U.N. Security Council authority into Stanleyville.[63] The forces involved in the humanitarian intervention landed at Stanleyville and rescued the hostages.[64]

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51. 30 Int'l Legal. Mat. 1670, 1672 (1991) (on file with author).

52. *See* Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 1 (1982).

53. *See* Major Ronald M. Riggs, *The Grenada Intervention: A Legal Analysis*, 109 Mil. L. Rev. 1, 18 (1985).

54. Kisangani, formerly Stanleyville, is a city in north-central Democratic Republic of the Congo. *See* Columbia Encyclopedia, Sixth ed., 2001 *at* http://www.bartleby.com/65/ki/Kisangan.html (last visited Aug. 5, 2004).

55. *See* Max Hilaire, International Law and the United States Military Intervention in the Western Hemisphere 60-65 (The Hague; Boston: Kluwer Law International, 1997) (outlining President Johnson's rationale for the intervention as protecting American citizens and also preventing the establishment of another communist government). *But see* Riggs, *supra*, note 53, at 18 (explaining that the humanitarian intervention in the Congo was commenced by the United States after the rebel government announced that foreigners in Stanleyville, including sixty-three Americans—a minority—would not be permitted to leave).

56. Lillich, *supra* note 5, at 137.

57. Lieutenant Colonel William H. Glasgow, *Operations Dragon Rouge and Dragon Noire*, *at* http://unx1.shsu.edu/~his_ncp/Dragon.html (last visited July 29, 2004) (outlining Operations Dragon Rouge and Dragon Noire, the military operations for the hostage rescue in the Congo).

58. *Id.*

59. *Id.*

60. Lillich, *supra* note 5, at 135. Lillich relates:

> There was no doubt that this constituted a violation not only of the UN Charter, but also of the Geneva Conventions. No one really took issue with that at all. But the United Nations got bogged down in debate upon it. They finally decided to let the Organization of African Unity do something: they tried and were very, very unsuccessful..

Id.

61. *Id.*

62. *Id.* "Why should Gizenga, on his last legs, give up these hostages? He made the maximum propaganda use of them. There were broadcasts indicating they would skin these people alive and do all kinds of other horrendous things unless peace was made on his terms." *Id*.

It is interesting to note that while there was much political criticism of the allied intervention, led by the Russian Ambassador to the U.N., there has been little scholarly legal criticism alleging a violation of Article 2(4) of the Charter in the Stanleyville operation.[65] Not one legal commentator has found the use of limited force—represented in the collective effort of Britain, Belgium, and the United States—to have impaired the long-term territorial integrity or political independence of the Congolese state. One can in fact argue that the resolution of the hostage crisis enhanced the stability of the Congolese.[66]

A similar judgment can be reached in the case of Kosovo. The province of Kosovo in the former Yugoslavia contains a mix of about 1.8 million Albanians (who are predominantly Muslims) and two hundred thousand Serbs (who are Eastern Orthodox Christians).[67] Kosovo is a province to which Serbs have strong emotional ties, since many regard it as the cradle of their nation. Kosovo enjoyed political autonomy until 1989 when the Serb-dominated Government of the Federal Republic of Yugoslavia (FRY**)** terminated Kosovo's autonomy. The Kosovo Liberation Army (KLA), a group seeking to expel Serbian authorities and establish an independent state of Kosovo, sporadically attacked Serbian police and civilians in Kosovo during 1997-1998.[68] In response, FRY police and Serbian forces, beginning in late February 1998, violently cracked down on the KLA, as well as on ethnic Albanians.[69] The U.N. responded to the extreme violence with three Security Council Resolutions 1160, 1199, and 1203.[70] When fighting continued after these resolutions, NATO leadership threatened airstrikes,[71] which led to negotiations between U.S. Envoy Richard Holbrooke and the FRY leadership, including President Milosevic. President Milosevic concluded an agreement with Mr. Holbrooke that outlined FRY compliance with Resolution 1199.[72] On 15 October 1998, NATO and the FRY signed an agreement supporting FRY's compliance with Resolution 1199[73] and on 16 October 1998, the Organization for Security and Cooperation in Europe (OSCE) signed an agreement with the FRY governing the terms of OSCE deployment to Kosovo.[74] These efforts culminated in peace negotiations in March 1999 at Rambouillet, France. The Kosovar Albanian delegation signed the agreement, but the Serbian delegation failed to reach agreement on the peace settlement.[75] The Serbs once again escalated the violence against ethnic Albanians in Kosovo.[76] NATO forces commenced airstrikes in FRY (Operation Allied Force) as part of a humanitarian intervention to force the Serb forces from Kosovo and end the violence against the ethnic Albanian citizens of this province.[77]

63. *See* Glasgow, *supra* note 57.

64. Lillich, *supra* note 5, at 136.

65. *See* H.L. Weisberg, *The Congo Crisis in 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261 (1972) (discussion).

66. *See* Lillich, *supra* note 5, at 136.

67. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 161, 167 (1999).

68. *Id.* at 168.

69. *Id.*

70. S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3836th mtg., U.N. Doc. S/RES/1160 (1998) (determining that the situation in Kosovo constituted a threat to international peace and security and condemning the excessive use of force by Serbian police forces and all acts of terrorism by the KLA); S.C. Res. 1199, U.N. SCOR, 53rd Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998) (demanding that, "all parties, groups and individuals immediately cease hostilities and maintain a cease-fire in Kosovo"); S.C. Res. 1203, U.N. SCOR, 53rd Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998) (endorsing the October 1998 cease-fire agreement and further condemning all acts of violence and terrorism).

71. *See generally* North Atlantic Treaty Organisation, *NATO's Role in Relation to the Conflict in Kosovo*, *at* http://www.nato.int/kosovo/history.htm (last visited July 30, 2004) [hereinafter NATO] (providing background information on the Kosovo conflict and an overview of NATO's goals and methods).

72. *Id.*

73. Murphy, *supra* note 67, at 169. The 15 October 1998 Agreement between the FRY and NATO, established an Air Verification Mission for NATO forces to enforce the requirements of S.C. Res. 1160 and 1199. *Id.*

74. *Id.* at 169-70. The 16 October 1998 Agreement between the OSCE and FRY established the terms for monitoring by the OSCE observers of relief groups assisting Albanian Kosovar refugees. *Id.* at 169. The OSCE is a fifty-five member body, which serves as an instrument for early warning, conflict prevention, and crisis management in Europe. Both the U.S. and Russia are members. There is no military arm of this organization. *See generally* Organization for Security and Co-operation in Europe, *at* http://www.osce.org/ (last visited July 30, 2004).

75. NATO, *supra* note 71.

76. *Id.*

The NATO determination to intervene in Kosovo, without U.N. Security Council authority, came after the Russian and Chinese Permanent Representatives advised the U.N. Security Council in early March 1999 that their governments would not support a draft resolution that would authorize the use of force to stop Serb attacks in Kosovo.[78] This occurred after neither Russia nor China impeded passage of earlier Security Council Resolutions 1160, 1199, and 1203. These three Security Council Resolutions under Chapter VII of the UN Charter called on both Serb and KLA forces to end the fighting, withdraw, cooperate with investigators and prosecutors from the War Crimes Tribunal at the Hague, and support OSCE missions.[79] Operation Allied Force continued until 9 June 1999.[80] In its first eight days, the U.N. High Commissioner for Refugees (UNHCR) reported that Serbian forces forcibly expelled some 220,000 persons from Kosovo to neighboring states, principally Albania.[81] The OSCE Verification Mission in Kosovo estimated that over ninety percent of the Kosovo Albanian population—some 1.45 million people—had been displaced by the conflict when it ended.[82]

Although the U.N. Security Council never authorized the intensive bombing campaign, it endorsed the political settlement and resolution of conflict that NATO action achieved, and agreed to deploy an extensive "international security presence" along with a parallel "international civil presence."[83] The U.N. Security Council detailed considerable responsibilities for each of these missions in their 10 June 1999 Resolution, 1244.[84]

IV. Legal Rationale for the Intervention in Kosovo

Immediately following the start of bombing on 24 March 1999, NATO representatives of the five member states on the U.N. Security Council claimed, "NATO's actions were necessary to avoid a 'humanitarian catastrophe.'"[85] The German Foreign Minister, Klaus Kinkel, earlier argued, "Under these unusual circumstances of the current crisis situation in Kosovo, as it is described in Resolution 1199 of the U.N. Security Council, the threat of and if need be the use of force by NATO is justified."[86] Foreign Office Minister Anthony Lloyd stated the British position on the use of force in Kosovo in January 1999, before the House of Commons Select Committee on Foreign Affairs. In response to a question concerning whether there was a legal right for NATO to intervene in the humanitarian crisis in Kosovo to save lives absent Security Council authorization, Minister Lloyd stated, "Within those terms yes. International law certainly gives the legal basis in the way that I have described . . . [w]e believe[] . . . that the humanitarian crisis was such as to warrant that intervention.[87]

Professor Christopher Greenwood, who represented Great Britain before the International Court of Justice defending NATO's action in the Case Concerning the Legality of the Use of Force in Kosovo, further explained Britain's legal position when he stated:

> [T]here is a right of humanitarian intervention when a government—or the factions in a civil war—create a human tragedy of such magnitude that it creates a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so. It is from

77. The NATO executed Operation Allied Force on 24 March 1999. *See* Press Release, United Nations Security Council SC/6657, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo (Mar. 24, 1999) (on file with author) [hereinafter Security Council Press Release SC/6657].

> NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo, United Nations Security Council, Press Release SC/6657, 24 March 1999, *available at* http://www.un.org/News/Press/docs/1999/19990324.sc6657.html.

78. *See* Terry, *supra* note 6, at 233.

79. S.C. Res. 1160, *supra* note 70; S.C. Res. 1199, *supra* note 70, S.C. Res. 1203, *supra* note 70; *see also* James Terry, *The Importance of Kosovo to NATO*, 1999 A.B.A Nat'l Security L. Rep. 1, 2, 4.

80. *See* W. Gary Sharp, Sr., *A Short History of the Kosovo Crisis*, A.B.A Nat'l Security L. Rep. 3, 6 (1999).

81. *See* Stephen Dycus, A. Berney, W.C. Banks, & P. Raven-Hanssen, *U.S. and NATO Intervention in Kosovo: Operation Allied Force*, *in* Nat'l Security L. 410 (3d ed. 2002).

82. OSCE Online, *Kosovo/Kosova: As Seen, As Told, Volume 1, at* http://www.osce.org/documents/mik/1999/11/1620_en.pdf (last visited July 30, 2004).

83. *See* S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

84. *Id.* S.C. Res. 1244 also sets forth President Milosevic's 9 June 1999 agreement to comply with NATO's schedule for a Serb withdrawal from Kosovo. *Id.*

85. *See generally* Security Council Press Release SC/6657, *supra* note 77.

86. Deutscher Bundestag: Plenarprotokoll 13/248 vom 16.10.1998, 21329 (on file with author).

87. House of Commons Minutes of Evidence taken before Foreign Affairs Committee, 26 Jan. 1999, at 35 (on file with author).

> this state practice that the right of humanitarian intervention on which NATO now relies has emerged. Those who contest that right are forced to conclude that even though international law outlaws what the Yugoslav Government is doing . . . if the Security Council cannot act, the rest of the world has to stand aside. That is not what international law requires at the end of the century.[88]

Professor Antonio Cassese, in defending the Kosovo humanitarian intervention from an ethical, but not legal perspective, has nevertheless stated that under certain strict conditions, "resort[ing] to armed force may gradually become [legally] justified even absent any authorization by the Security Council."[89] The criteria Cassese would require for legal justification are as follows:

> (i) gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;
>
> (ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that these authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;
>
> (iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power . . .,
>
> (iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted . . .,
>
> (v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of the Member states of the UN;
>
> (vi) armed force is exclusively used for [the] limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed force.[90]

It is significant to note that the Kosovo crisis precisely satisfies each of the factors required by Cassese to provide legal justification for humanitarian intervention outside U.N. Charter parameters. It is also striking how similar and parallel in content Cassese's six criteria for humanitarian intervention are to the eight criteria proposed by Professor Moore twenty-five years earlier.[91]

If the British justification for resorting to force under the doctrine of humanitarian intervention per Professor Greenwood was the clearest and most compelling, the United States' legal rationale was the least centered, and most confusing. In fact, the official government statements of legal justification for United States participation never mentioned the doctrine of humanitarian intervention. The United States, however,

88. Christopher Greenwood, *Yes, But Is It Legal?*, OBSERVER, 28 Mar. 1999, at 2.

89. Antonio Cassese, *Ex Iniuria Ius Oritur: Is International Legitimization of Forcible Humanitarian Countermeasures Taking Shape in The World Community?* 10 EUR. J. INT'L L. 23, 25 (1999). Antonio Cassese is a Professor of International Law at the University of Florence, and former President of the International Criminal Tribunal for the Former Yugoslavia. *Id*.

90. *Id*. at 25-26.

91. *Compare id. with* Moore, *supra* note 46.

addressed a number of factors—some legal, some policy-driven—that justified NATO action.[92]

On 29 March 1999, after five days of NATO bombing, then-U.S. President Bill Clinton offered the following rationale for U.S. participation: "Make no mistake, if we and our allies do not have the will to act, there will be more massacres. In dealing with aggressors, . . . hesitation is a license to kill. But action and resolve can stop armies and save lives."[93]

Before the U.N. General Assembly, President Clinton stated:

> By acting as we did, we helped to vindicate the principles and purposes of the U.N. Charter, to give the U.N. the opportunity it now has to play the central role in shaping Kosovo's future. In the real world, principles often collide, and tough choices must be made. The outcome in Kosovo is helpful.[94]

As international legal scholar and writer Gary Sharp has accurately summarized, the former President's justifications focused

> on "moral imperative[s]" and the political interests of America and NATO, and his War Powers Report did not refer to any international legal authority for the airstrikes against Serbia-Montenegro. The White House argued, however, that the NATO bombing campaign was backed internationally by Security Council Resolutions 1199 and 1203 because they affirmed "that the deterioration of the situation in Kosovo constitutes a threat to the peace and security of the region."
>
> Specifically, the United States contended that Resolution 1199 authorized the use of force by United Nations members' to compel compliance with its terms because it is a Chapter VII resolution, even though the resolution does not explicitly authorize the use of force. The United States also contended that Resolution 1203 was to protect personnel monitoring the cease-fire, even though the monitors had been withdrawn before the NATO airstrikes began.[95]

The justifications of a number of U.N. contributors, including the United States, reflect an uneasy recognition that the U.N. Charter system inadequately addresses certain humanitarian crises that may come before the U.N., if unanimity among the five Permanent Members of the U.N. Security Council continues to be a requirement. Among NATO participants, only the United Kingdom, Belgium, and Germany have directly addressed this matter, finding authorization of the U.N. Security Council was not necessary in Kosovo since the action was supportive, rather than contrary, to the values represented in Article 2(4),[96] thereby obviating a need for the Security Council to consider the matter. The United States, unfortunately, fashioned a rather contrived and disingenuous approach to justification for intervention by claiming the U.N. Security Council provided the necessary authorization by implication in its earlier resolutions on Kosovo.[97]

V. Kosovo's Implications for Future Charter Application

Kosovo requires that we reexamine the law of humanitarian intervention as it relates to U.N. Charter values on the one hand, and required U.N. Charter procedures on the other. Kosovo is especially appropriate for consideration since it presumably met all the requirements for humanitarian intervention under pre-U.N. Charter law. The horrendous crimes against humanity, mass expulsions, and war crimes were widely recognized and little disputed as breaches of customary international law. The purpose of humanitarian intervention in Kosovo was only to redress the threat to international peace and security and end the abuses resulting from the Serb forces' mass violations, not to disturb FRY's territorial integrity or political independence. Equally important, the intervention was collective in nature, based on NATO's decision—a responsible body acting to carry out the will of the world community—a community unable to act through a U.N. Security Council resolution under Chapter VII of the U.N. Charter.

Professor Louis Henkin suggests the likely result of the Kosovo humanitarian intervention, unless the unanimity requirement is removed from U.N. Security Council decisions on humanitarian intervention, is a precedent where states or collec-

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92. *See* Murphy, *supra* note 67, at 628, 629-31; *see generally* Jules Lobel, *American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 33 (2000).

93. *The President's News Conference*, 35 WKLY. COMP. PRES. DOC. 471, at 25-26 (1999).

94. President William J. Clinton, Statement of President Clinton before UNGA (Sept. 21, 1999), *quoted in* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 661-62 (2d ed., 2000).

95. W. GARY SHARP, SR., JUS PACIARII: EMERGENT LEGAL PARADIGMS FOR U.N. PEACE OPERATIONS 313-14 (1999) (citations omitted).

96. U.N. CHARTER art. 2(4).

97. Unfortunately, neither U.N. S.C. Res. 1199 nor 1203 provided specific authority to intervene. *See* S.C. Res. 1199, *supra* note 70, S.C. Res. 1203, *supra* note 70.

tives of states, confident that the U.N. Security Council will acquiesce in their decision to intervene, will act instead of seeking authorization in advance and challenge the U.N. Security Council to terminate the action.[98]

Professor Henkin argues that this procedure may be what Kosovo already achieved.[99] He suggests that "[f]or Kosovo, Council ratification after the fact in Resolution 1244—formal ratification by an affirmative vote of the Council—effectively ratified what earlier might have constituted unilateral action questionable as a matter of law."[100] The actions of the North Atlantic Council, the principal policy and decision-making institution of NATO, and the subsequent action of the U.N. Security Council in adopting U.N. Security Council Resolution 1244, clearly reflect a step toward changing the law. While it is unlikely there will be a formal change in the U.N. Charter, NATO actions in Kosovo support an interpretation of international law in which regional organizations can authorize humanitarian intervention, absent U.N. Security Council authorization, provided their actions are consistent with the purposes of the U.N. When these organizations carefully apply the strictures suggested by Professor Moore to ensure they neither impact the territorial integrity nor the political independence of the target state, they will successfully avoid implicating Article 2(4) of the U.N. Charter.

In Kosovo, NATO's use of military force to prevent the continuation of massive human rights abuses supported state practice, which has established the lawfulness of humanitarian intervention, as Moore, Lillich, Nanda, Reismann, McDougal, and Greenwood carefully circumscribed. International law requires the community of nations first consider all means short of force to address threats to international peace and security. When diplomacy fails after the international community finds egregious human rights violations, states cannot be confined by pre-U.N. Charter references to principles of non-intervention and sovereign immunity or to the U.N. Charter requirement for U.N. Security Council approval, especially when the lack of approval is contrary to the values for which the U.N. Charter stands. Therefore, it is important for the principle of humanitarian intervention under customary international law to be recognized as a legal action separate from the confines of the U.N. provided such action is strictly circumscribed.

98. Louis Henkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT'L L. 824, 827 (1999).

99. *Id.*

100. *Id.*

Center for Law and Military Operations (CLAMO) Note from the Field

The Judge Advocate General's Legal Center & School

Dual Boltage: A Sneak Preview of the Unit of Action

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Introduction

Every U.S. service member who has lived in Europe or deployed overseas knows how critically important it can be to have dual voltage appliances. Many Soldiers have experienced the sinking feeling of plugging in a prized possession only to see wisps of smoke emanate from the outlet and smell a burned-out motor. In much the same way, individual attorneys working in a deployed brigade operational law team (BOLT) have frequently found themselves inadequate and maladapted, which can lead to smoked, burned-out attorneys of little use to their commanders or the Army. The leadership of the Judge Advocate General's Corps has recognized this problem and has begun staffing units of action (UA) with two judge advocates (JA). Recently, albeit inadvertently, the 1st Armored Division (1AD) served as a test case for the dual JA concept during its extended deployment to Iraq.

Discussion

1AD Application of the Existing Doctrine

Field Manual (FM) 27-100 provides for a brigade JA, who is normally that brigade's trial counsel while in garrison, to serve as the BOLT chief.[2] The paralegal specialists assigned to the brigade support that JA. Current doctrine requires the staff judge advocate to task-organize assets based on the following major factors considered during mission analysis: "mission, enemy, terrain and weather, troops and support available, time available, civil considerations" (METT-TC).[3] Yet, because JA assets are limited, *FM 27-100* contemplates a single attorney being assigned to each brigade.[4] Moreover, *FM 27-100* states that a brigade JA may be required to support more than one brigade or additional organizations.[5] The JA is expected to contribute to several, if not all, of the battlefield operating systems while identifying and resolving legal issues across all legal functional areas and core legal disciplines.[6] In addition, deployed JAs frequently find themselves fulfilling unanticipated, non-traditional missions.[7] Accomplishing those myriad functions in an exercise or combat training center rotation is burdensome. Meeting that challenge as a JA for a brigade combat team (BCT) engaged in urban combat, however, is a Herculean task.

The size and composition of a "standard" brigade continues to—and will continue to— evolve. An example is the Second Armored Cavalry Regiment (2ACR), attached to the 1AD for Operation Iraqi Freedom (OIF). The 2ACR's mission was to eliminate opposition, maintain peace, and rebuild infrastructure in the northeastern neighborhoods of Baghdad, to include Sadr City, a cramped and impoverished sector of Baghdad.[8] For at least a portion of the deployment, the 2ACR had authority under the Uniform Code of Military Justice (UCMJ)[9] over six battalion-sized units comprised of as many as forty-six company-sized units with 4,400 Soldiers in theater.[10] Some of those units, both reserve and active-duty, were not attached to 2ACR

1. The author wishes to thank the following attorneys who concurrently served in Baghdad BOLTs for their insights: Captain (CPT) Nate Jacobs (DISCOM), CPT Jeff Miller (3BCT), CPT Pat Parson (2ACR), CPT Dan Sennott (1BCT), and CPT Jay Urgese (2BCT). Additionally, the 82d Airborne Division Operation Iraqi Freedom After Action Report, published on the CLAMO database, was a helpful confirmation of these conclusions. *See* Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army, 82d Airborne Division Operation Iraqi Freedom After Action Report (Apr. 2003).

2. U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations para. 5-21 (1 Mar. 2000) [hereinafter FM 27-100].

3. U.S. Dep't of Army, Field Manual 3-0, Operations para. 5-2 (14 June 2001) [hereinafter FM 3-0].

4. *See* FM 27-100, *supra* note 2, para. 5-21.

5. *Id.*

6. *Id.* para. 5-22. The Army's battlefield operating systems include: intelligence, maneuver, fire support, air defense, mobility/countermobility/survivability, combat service support, and command and control. FM 3-0, *supra* note 3, para. 5-64.

7. This assertion is based on the author's recent professional experiences in Iraq, May 2003 through March 2004 [hereinafter Professional Experiences].

8. *Id.*

9. UCMJ (2002).

10. Professional Experiences, *supra* note 7.

until they arrived in theater; thus, they lacked habitual legal support relationships. The 2ACR was spread out over five forward operating bases (FOBs) throughout an area of operations with a local population numbering approximately three million people.[11] The mission for other 1AD units was equally challenging. The ground-owning maneuver units in 1AD averaged over 3,500 troops and were responsible for countless citizens.[12] Yet existing Army doctrine called for only one attorney to address millions of potential claimants, detainees, or investigation subjects and thousands of Soldiers requiring operational law training, UCMJ administration, and legal assistance.[13]

To address this anticipated need, the 1AD Office of the Staff Judge Advocate (OSJA) deployed with enough JAs to supply each organic maneuver BCT with two JAs—the 1AD OSJA deployed with not only the attorneys on the tables of organization and equipment but also more than a dozen attorneys on the tables of distribution and allowance.[14] This was only possible because reservists called to active duty supported the rear detachment and communities. In hindsight, it would have been impossible to effectively support each BCT with only one JA and provide the comprehensive legal support required by the mission.[15] The reasons are as varied as the missions each BOLT routinely performed, missions that JAs in future operations will almost certainly be required to execute.

OIF: The Dual Attorney Concept in Action

As with most contemporary operations and training exercises, the OIF mission continued twenty-four hours a day, seven days a week. Unlike most recent deployments, however, that pace continued for deployed Soldiers more than a year. Providing twenty-four hour coverage for a thirty-day exercise is manageable; doing the same for six months on a deployment is difficult; continuing at that pace for 365 days and beyond is mentally and physically impossible without adequate support. While six-month personnel rotation plans are an appealing practical solution at first glance, the unpredictability and variety of contemporary operations necessitates deployment with a robust legal support package. Such a package will readily outstrip the ability of most offices to support six-month rotations.

Operation Iraqi Freedom is rife with examples of unforeseen missions that demanded enhanced legal support. Supporting those missions without the "luxury" of being two-deep in BOLTs would have been unrealistic. For example, the Corps Holding Facility at Camp Cropper on Baghdad International Airport required a magistrate's cell to review the flood of detainee case files that accumulated daily to determine whether continued confinement was warranted.[16] That mission required one full-time JA routinely assisted by other JAs on an almost daily basis. Another mission required a JA, in the grade of major, to support the Ministry of Justice at the Coalition Provisional Authority Headquarters.[17] Fulfilling those requirements demanded the full complement of JAs in our stable to be able to continue providing effective legal support across the task force.

The complexity of the contemporary battle space quickly surpasses one JA's capacity to provide full-spectrum legal operations at the BCT. Brigade combat teams conducted simultaneous humanitarian, peace, and combat operations. Judge advocates were accordingly expected to confront the unique legal challenges associated with each type of operation. Additionally, more traditional missions required JAs to spend extended time away from their BCT headquarters. The 1AD 1st BCT trial counsel found himself traveling back to the United States with the BCT commander to brief a family regarding the circumstances surrounding the death of their son. The 2d BCT trial counsel traveled with the BCT Forward Tactical Command Post to Karbala for an operation outside the division sector. In both instances, these JAs were away from their BCT headquarters for over a week.[18] Even during daily operations, with battalion FOBs scattered throughout the BCT's area of responsibility (AOR), consultation with two battalion commanders could take the trial counsel away from the BCT headquarters for an entire day. It was essential that another JA was available to sustain the remaining units throughout the AOR. The JA that remained at the BCT headquarters was able to advise other commanders, pay Iraqi claimants, assist investigating officers, and process legal assistance clients during such absences. The volume of work in these disciplines across the Task Force was staggering. In the first nine months of the deployment, 1AD processed almost 4,000

11. *Id*.

12. This figure was based on the average of the troop strengths reported by those units on daily status reports, calculated by the author in January 2004, Baghdad, Iraq.

13. *See* FM 27-100, *supra* note 2, para. 5-21.

14. Professional Experiences, *supra* note 7.

15. Interviews with 1AD Attorneys in three unclassified multi-discipline AARs, in Baghdad, Iraq (Sept. 2003, Dec. 2003, and Mar. 2004) (voicing collective opinions) [hereinafter Interviews with 1AD Attorneys].

16. Series of Personal Interviews with CPT R. Matthew Newell, Holding Facility Magistrate, in Baghdad, Iraq (June 2003).

17. Series of Personal Interviews with MAJ Tideman Penland, CPA Ministry of Justice Attorney-Advisor, in Baghdad, Iraq (Aug. 2003 to Mar. 2004).

18. Personal Interviews with CPT Dan Sennott, 1st BCT Trial Counsel, and CPT Joseph Urgese, 2d BCT Trial Counsel, immediately following these events, in Baghdad, Iraq (specific dates withheld for privacy and security reasons).

claims, paying almost $700,000, saw almost 9,500 legal assistance clients, and reviewed close to 300 *Army Regulation (AR) 15-6*[19] investigations.[20] Many of these actions were processed at the Division Main (DMAIN), but whenever possible, the actions were completed at the brigade level.

The challenge of moving safely from BCT FOBs to DMAIN demanded that brigade trial counsel travel to the DMAIN and remain overnight, often for several nights, during trial terms. Likewise, BCT commanders did not have the resources necessary to transport Soldiers across the city to DMAIN for routine legal advice; nor was it safe to do so. Nonetheless, the (timeless) challenge of conflicts of interest for a trial counsel providing legal assistance to individual Soldiers remained, and intensified over the course of a yearlong, or more, deployment. An organic administrative law JA within the unit solves all of these problems. Additionally, without a second JA in the BOLT, an *AR 15-6* investigation will normally have to be sent to the DMAIN for a legal review, since it is common practice and preferable, to have an impartial attorney review the investigation for legal sufficiency and not the one who advised the investigating officer (IO). In cases in which there will be no court-martial action taken, however, the administrative law attorney can advise the IO, and the trial counsel can conduct the legal review, or vice versa. Accordingly, each BOLT operated as a semi-autonomous OSJA. Most commonly, the trial counsel performed all military justice duties and also handled traditional operational law issues. The administrative law attorney provided legal assistance and claims advice and processing in addition to handling administrative law actions.[21]

Operation Iraqi Freedom introduced other unique challenges to the personnel tasked with providing legal support to a task-organized division. Each BCT established and administered its own holding facility which held detainees for up to seventy-two hours pending their transfer to the corps holding facility at Abu Ghraib prison or the division interrogation facility.[22] It was incumbent upon the BCT legal team at the inception of this operation to enforce division standards for detention, to review interrogation procedures, and to ensure evidence preservation. Trial counsel ensured the treatment of detainees and the construction of the holding facilities comported with international law. Also, U.S. Soldiers found themselves training and working along side Iraqi security guards (the Facilities Protection Service or FPS), the Iraqi Police Service (IPS), and the newly formed Iraqi National Guard (Iraqi Civil Defense Corps or ICDC). The ICDC, in particular, were attached to BCTs in battalion-sized elements and worked for, and received orders from, the BCT commander. Because ICDC Soldiers were not subject to the UCMJ, it became necessary for JAs to develop ICDC rules of conduct and advise U.S. commanders on the enforcement of discipline within their ranks. Other non-traditional missions included reviewing humanitarian projects funded with captured former regime funds, and attending, addressing, and advising neighborhood and district advisory council meetings.[23] Since those missions were not fully contemplated in the pre-deployment phase, planning the framework for execution occurred in theater, almost simultaneous to the actual execution. Accordingly, those missions were very time-intensive.

Conclusion

As this note has attempted to establish, the decision to place a second JA position in the new UA is both justified and plausible. The justifications include size of the jurisdiction served (both U.S. military and local national, and both in area and population), additional taskings acquired in theater both external and internal to the brigade, extended travel out of the sector, and conflicts of interest. Two JAs can split duties to provide the full spectrum of legal services or serve in exigent circumstances as the sole JA when the other is called away. With the very real possibility of additional and lengthening deployments on the horizon, it is imperative that brigade-sized units be adequately staffed with JAs and paralegals. Providing two JAs to the UA is a necessary, tenable, and welcome step in that direction.

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19. *See* U.S. Dep't. of Army, Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (30 Sept. 1996).

20. Compiled by the author based on reporting provided by the BOLTs and the OSJA Branch Chiefs on a weekly basis to DMAIN SJA, Baghdad, Iraq (May 2003 through Jan. 2004) (on file with author).

21. Interviews with 1AD Attorneys, *supra* note 15.

22. Professional Experiences, *supra* note 7.

23. Interviews with 1AD Attorneys, *supra* note 15.

CLE News

1. Resident Course Quotas

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

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Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorneys Course 5F-F10

Class Number—155th Contract Attorneys Course 5F-F10

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

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

2. TJAGSA CLE Course Schedule (August 2004 - September 2006)

Course Title	Dates	ATTRS No.
	GENERAL	
53d Graduate Course	16 August 04 – 25 May 05	5-27-C22
54th Graduate Course	15 August 05 – 25 May 06	5-27-C22
164th Basic Course	1 – 24 June 04 (Phase I – Ft. Lee)	5-27-C20
	25 June – 3 September 04 (Phase II – TJAGSA)	5-27-C20
165th Basic Course	14 September – 7 October 04 (Phase I – Ft. Lee)	5-27-C20
	8 October – 16 December 04 (Phase II – TJAGSA)	5-27-C20
166th Basic Course	4 – 27 January 05 (Phase I – Ft. Lee)	5-27-C20
	28 January – 8 April 05 (Phase II – TJAGSA)	5-27-C20
167th Basic Course	31 May – 23 June 05 (Phase I – Ft. Lee)	5-27-C20
	24 June – 1 September 05 (Phase II – TJAGSA)	5-27-C20
168th Basic Course	13 September – 6 October 05 (Phase I – Ft. Lee)	5-27-C20
	7 October – 15 December 05 (Phase II – TJAGSA)	5-27-C20
169th Basic Course	3 – 26 January (Phase I – Ft. Lee)	5-27-C20
	27 January – 7 April 06 (Phase II – TJAGSA)	5-27-C20
170th Basic Course	30 May – 22 June (Phase I – Ft. Lee)	5-27-C20
	23 June – 31 August (Phase II – TJAGSA)	5-27-C20
171st Basic Course	12 September 06 – TBD (Phase I – Ft. Lee)	5-27-C20
9th Speech Recognition Training	18 – 29 October 04	512-71DC4
10th Speech Recognition Training	17 – 28 October 05	512-71DC4
15th Court Reporter Course	2 August – 1 October 04	512-27DC5
16th Court Reporter Course	24 January – 25 March 05	512-27DC5

17th Court Reporter Course	25 April – 24 June 05	512-27DC5
18th Court Reporter Course	1 August – 5 October 05	512-27DC5
19th Court Reporter Course	31 January – 24 March 06	512-27DC5
20th Court Reporter Course	24 April – 23 June 06	512-27DC5
21st Court Reporter Course	31 July – 6 October 06	512-27DC5
5th Court Reporting Symposium	1 – 5 November 04	512-27DC6
6th Court Reporting Symposium	31 October – 4 November 05	512-27DC6
183d Senior Officers Legal Orientation Course	13 –17 September 04	5F-F1
184th Senior Officers Legal Orientation Course	15 – 19 November 04	5F-F1
185th Senior Officers Legal Orientation Course	24 –28 January 05	5F-F1
186th Senior Officers Legal Orientation Course	28 March – 1 April 05	5F-F1
187th Senior Officers Legal Orientation Course	13 – 17 June 05	5F-F1
188th Senior Officers Legal Orientation Course	12 – 16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14 – 18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January – 3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27 – 31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12 – 16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11 – 15 September 06	5F-F1
11th RC General Officers Legal Orientation Course	19 – 21 January 05	5F-F3
12th RC General Officers Legal Orientation Course	25 – 27 January 06	5F-F3
35th Staff Judge Advocate Course	6 – 10 June 05	5F-F52
36th Staff Judge Advocate Course	5 – 9 June 06	5F-F52
8th Staff Judge Advocate Team Leadership Course	6 – 8 June 05	5F-F52-S
9th Staff Judge Advocate Team Leadership Course	5 – 7 June 04	5F-F52-S
2005 JAOAC (Phase II)	2 – 14 January 05	5F-F55
2006 JAOAC (Phase II)	8 – 20 January 06	5F-F55
36th Methods of Instruction Course	31 May – 3 June 05	5F-F70
37th Methods of Instruction Course	30 May – 2 June 06	5F-F70
2004 JAG Annual CLE Workshop	4 – 8 October 04	5F-JAG
2005 JAG Annual CLE Workshop	3 – 7 October 05	5F-JAG
16th Legal Administrators Course	20 – 24 June 05	7A-550A1
17th Legal Administrators Course	19 – 23 June 06	7A-550A1
16th Law for Paralegal NCOs Course	28 March – 1 April 05	512-27D/20/30
17th Law for Paralegal NCOs Course	27 – 31 March 06	512-27D/20/30
16th Senior Paralegal NCO Management Course	13 – 17 June 05	512-27D/40/50
9th Chief Paralegal NCO Course	13 – 17 June 05	512-27D- CLNCO
1st 27D BNCOC	12 – 29 October 04	
2d 27D BNCOC	3 – 21 January 05	
3d 27D BNCOC	7 – 25 March 05	
4th 27D BNCOC	16 May – 3 June 05	
5th 27D BNCOC	1 – 19 August 05	
1st 27D ANCOC	25 October – 10 November 04	
2d 27D ANCOC	10 – 28 January 05	
3d 27D ANCOC	25 April – 13 May 05	

4th 27D ANCOC	18 July – 5 August 05	
12th JA Warrant Officer Basic Course	31 May – 24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May – 23 June 06	7A-270A0
JA Professional Recruiting Seminar	12 – 15 July 05	JARC-181
JA Professional Recruiting Seminar	11 – 14 July 06	JARC-181
6th JA Warrant Officer Advanced Course	11 July – 5 August 05	7A-270A2

ADMINISTRATIVE AND CIVIL LAW

3d Advanced Federal Labor Relations Course	20 – 22 October 04	5F-F21
4th Advanced Federal Labor Relations Course	19 – 21 October 05	5F-F21
58th Federal Labor Relations Course	18 – 22 October 04	5F-F22
59th Federal Labor Relations Course	17 – 21 October 05	5F-F22
55th Legal Assistance Course	1 – 5 November 04	5F-F23
56th Legal Assistance Course	16 – 20 May 05	5F-F23
57th Legal Assistance Course	31 October – 4 November 05	5F-F23
58th Legal Assistance Course	15 – 19 May 06	5F-F23
2004 USAREUR Legal Assistance CLE	18 – 22 October 04	5F-F23E
2005 USAREUR Legal Assistance CLE	17 – 21 October 05	5F-F23E
29th Admin Law for Military Installations Course	14 – 18 March 05	5F-F24
30th Admin Law for Military Installations Course	13 – 17 March 06	5F-F24
2004 USAREUR Administrative Law CLE	13 – 17 September 04	5F-F24E
2005 USAREUR Administrative Law CLE	12 – 16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11 – 14 September 06	5F-F24E
2004 Income Tax Course	13 – 17 December 04	5F-F28
2005 Maxwell AFB Income Tax Course	12 – 16 December 05	5F-F28
2004 USAREUR Income Tax CLE	6 – 10 December 04	5F-F28E
2005 USAREUR Income Tax CLE	5 – 9 December 05	5F-F28E
2005 Hawaii Income Tax CLE	10 – 14 January 05	5F-F28H
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2004 USAREUR Claims Course	29 November – 3 December 04	5F-F26E
2005 USAREUR Claims Course	28 November – 2 December 05	5F-F26E
2005 PACOM Income Tax CLE	3 – 7 January 05	5F-F28P
2006 PACOM Income Tax CLE	9 – 13 June 2006	5F-F28P
22d Federal Litigation Course	2 – 6 August 04	5F-F29
23d Federal Litigation Course	1 – 5 August 05	5F-F29
24th Federal Litigation Course	31 July – 4 August 06	5F-F29

3d Ethics Counselors Course	18 – 22 April 05	5F-F202
4th Ethics Counselors Course	17 – 21 April 06	5F-F202

CONTRACT AND FISCAL LAW

7th Advanced Contract Attorneys Course	20 – 24 March 06	5F-F103
153d Contract Attorneys Course	26 July – 6 August 04	5F-F10
154th Contract Attorneys Course	Not conducted	
155th Contract Attorneys Course	25 July – 5 August 05	5F-F10
156th Contract Attorneys Course	24 July – 4 August 06	5F-F10
5th Contract Litigation Course	21 – 25 March 05	5F-F102
7th Contract Litigation Course	20 – 24 March 06	5F-F102
2004 Government Contract & Fiscal Law Symposium	7 – 10 December 04	5F-F11
2005 Government Contract & Fiscal Law Symposium	6 – 9 December 05	5F-F11
70th Fiscal Law Course	25 – 29 October 04	5F-F12
71st Fiscal Law Course	25 – 29 April 05	5F-F12
72d Fiscal Law Course	2 – 6 May 05	5F-F12
73d Fiscal Law Course	24 – 28 October 05	5F-F12
74th Fiscal Law Course	24 – 28 April 06	5F-F12
75th Fiscal Law Course	1 – 5 May 06	5F-F12
1st Operational Contracting Course	28 February – 4 March 2005	5F-F13
2d Operational Contracting Course	27 February – 3 March 06	5F-F13
11th Comptrollers Accreditation Course (Fort Bragg)	20 – 24 October 03	5F-F14
12th Comptrollers Accreditation Course (Hawaii)	26 – 30 January 04	5F-F14
13th Comptrollers Accreditation Course (Ft. Monmouth)	14 – 17 June 04	5F-F14
7th Procurement Fraud Course	31 May – 2 June 04	5F-F101
2005 USAREUR Contract & Fiscal Law CLE	29 March – 1 April 05	5F-F15E
2006 USAREUR Contract & Fiscal Law CLE	28 – 31 March 06	5F-F15E
2005 Maxwell AFB Fiscal Law Course	7 – 10 February 05	
2006 Maxwell AFB Fiscal Law Course	6 – 9 February 06	

CRIMINAL LAW

10th Military Justice Managers Course	23 – 27 August 04	5F-F31
11th Military Justice Managers Course	22 – 26 August 05	5F-F31
12th Military Justice Managers Course	21 – 25 August 06	5F-F31
48th Military Judge Course	25 April – 13 May 05	5F-F33
49th Military Judge Course	24 April – 12 May 06	5F-F33
22d Criminal Law Advocacy Course	13 – 24 September 04	5F-F34
23d Criminal Law Advocacy Course	14 – 25 March 05	5F-F34
24th Criminal Law Advocacy Course	12 – 23 September 05	5F-F34
25th Criminal Law Advocacy Course	13 – 17 March 06	5F-F34
26th Criminal Law Advocacy Course	11 – 15 September 06	5F-F34
28th Criminal Law New Developments Course	15 – 19 November 04	5F-F35

29th Criminal Law New Developments Course	14 – 17 November 05	5F-F35
2005 USAREUR Criminal Law CLE	3 – 7 January 05	5F-F35E
2006 USAREUR Criminal Law CLE	9 – 13 January 06	5F-F35E

INTERNATIONAL AND OPERATIONAL LAW

4d Domestic Operational Law Course	25 – 29 October 04	5F-F45
5th Domestic Operational Law Course	24 – 28 October 05	5F-F45
83d Law of War Course	31 January – 04 February 05	5F-F42
84th Law of War Course	11 – 15 July 05	5F-F42
85th Law of War Course	30 January – 3 February 06	5F-F42
86th Law of War Course	10 – 14 July 06	5F-F42
42d Operational Law Course	9 – 20 August 04	5F-F47
43d Operational Law Course	28 February – 11 March 05	5F-F47
44th Operational Law Course	8 – 19 August 05	5F-F47
45th Operational Law Course	27 February – 10 March 06	5F-F47
46th Operational Law Course	7 – 18 August 06	5F-F47
2004 USAREUR Operational Law Course	30 November – 3 December 04	5F-F47E
2005 USAREUR Operational Law Course	29 November – 2 December 05	5F-F47E

3. Civilian-Sponsored CLE Courses

For further information, see the March 2004 issue of *The Army Lawyer*.

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

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2004***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2005 ("2005 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2005 JAOAC will be held in January 2005, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2004). If the student receives notice of the need to re-do any examination or exercise after 1 October 2004, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2004 will not be cleared to attend the 2005 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month triennially
Georgia	31 January annually

Idaho	31 December, admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program, hours must be completed in compliance period July 1 to June 30
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	31 October annually
Washington	31 January triennially
West Virginia	31 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2003 issue of *The Army Lawyer.*

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005)

DATE	TRNG SITE/HOST UNIT	SUBJECT	ACTION OFFICER
13 - 14 Nov 04	St. Paul, MN 214th LSO	Administrative and Civil Law, Contract Law	LTC Peter Gayson (651) 222-3784 graysonlaw@qwest.net
19 - 20 Nov 04	New York City, NY 77th RRC	Administrative and Civil Law, International and Operational Law	LTC Isolina Esposito (718) 352-5106
4 - 5 Dec 04	Charleston, SC 12th/174th LSO	Criminal Law, Administrative and Civil Law	COL Daniel Shearouse (803) 734-1080 Dshearouse@scjd.state.sc.us
8 - 9 Jan 05	Long Beach, CA 63d RRC	Criminal Law, Contract Law	MSG Rosie Rocha (78th LSO)
29 - 30 Jan 05	Seattle, WA 70th RRC	Criminal Law, International and Operational Law	MAJ Brad Bales (206) 296-9486 (253) 223-8193 (cell) brad.bales@metrokc.gov
4 - 6 Feb 05	San Antonio, TX 90th RRC	Contract Law, Administrtative and Civil Law	MAJ Charmaine E. Betty-Singleton (501) 771-8962 (work) (501) 771-8977 (office) charmaine.bettysingleton@us.army.mil
26 - 27 Feb 05	Denver, CO 87th LSO	Criminal Law, International and Operational Law	MAJ Howie Reitz 96th RRC (Asst. SJA) (801) 656-3690 (801) 656-3692 (facsimile) howard.reitz@usarc-emh2.army.mil
5 - 6 Mar 05	Washington, DC 10th LSO	Contract Law, Administrative and Civil Law	LTC Philip Luci, Jr. (703) 482-5041 pluci@cox.net
11 - 13 Mar 05	Columbus, OH 9th LSO	Criminal Law, International and Operational Law	1LT Matthew Lampke (614) 644-8392 MLampke@ag.state.oh.us
26 - 27 Mar 05	Fort McCoy, WI WIARNG	Criminal Law, Contract Law	LTC Terence Mcardle (608) 242-3077 terence.mcardle@wi.ngb.army.mil
16 - 17 Apr 05	Ayer, MA 94th RRC	International and Operational Law, Administrative and Civil Law	SFC Daryl Jent (978) 784-3933 darly.jent@us.army.mil
23 - 24 Apr 05	Indianapolis, IN INARNG	Contract Law, Administrative and Civil Law	COL George Thompson (317) 247-3491 george.thompson@in.ngb.army.mil
30 Apr - 1 May 05	Memphis, TN 81st RRC	Contract Law, Administrative and Civil Law	CPT Kenneth Biskner (205) 795-1511 kenneth.biskner@us.army.mil
14 - 15 May 05	Rosemont, IL 91st LSO	Administrative and Civil Law, International and Operational Law	CPT Douglas Lee (630) 954-3123 douglas.lee@nationalcity.com
20 - 23 May 05	Kansas City, KS 89th RRC	Criminal Law, Administrative and Civil Law, Claims	MAJ Anna Swallow (800) 892-7266, ext. 1228 (316) 681-1759, ext. 1228 lynette.boyle@us.army.mil

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

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2004 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the March 2004 issue of *The Army Lawyer*.

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2004 issue of *The Army Lawyer*.

6. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accesible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, United States Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie Evans@hqda.army.mil.

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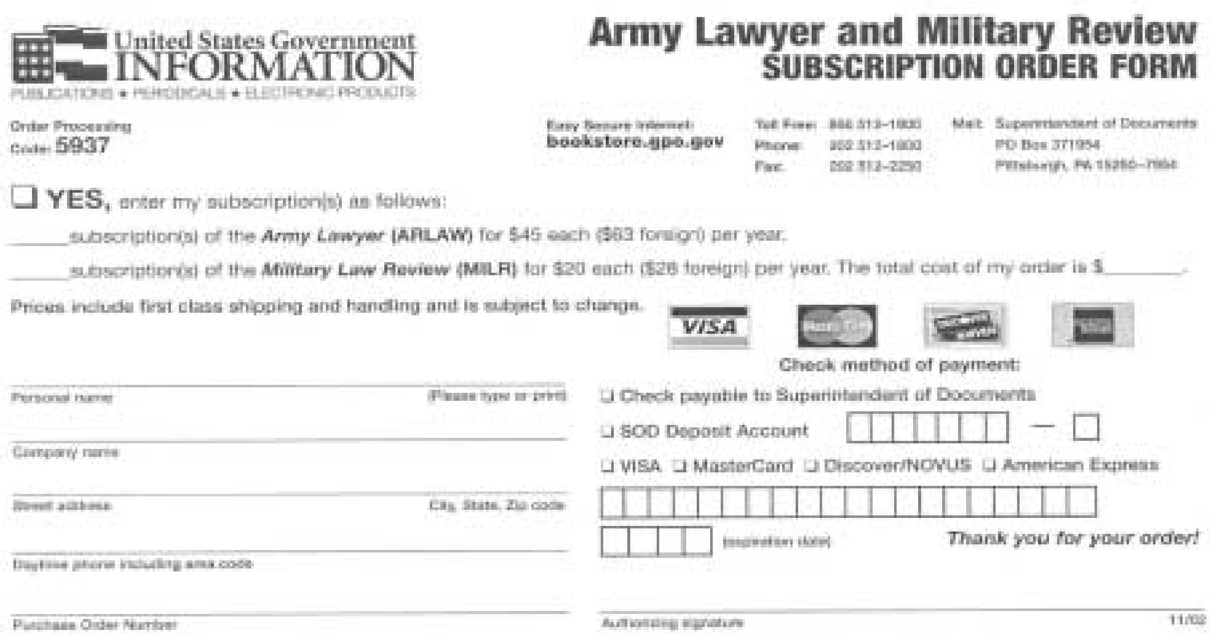
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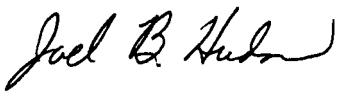

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