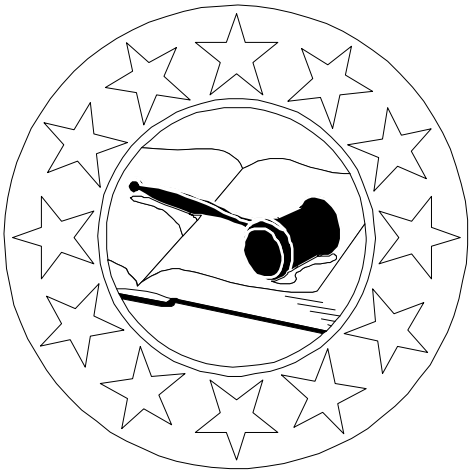

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Editor, Captain Todd S. Milliard
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Articles

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

USALSA Report
United States Legal Services Agency

How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force

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"[T]he willingness of our men and women in uniform to put their lives at risk is a national treasure. That treasure can never be taken for granted . . . ." [1]

Introduction

A United States military patrol proceeds as trained–alert, camouflaged, and unified. They know the rules of engagement. They follow the plan and cover the ground designated by the chain of command. When someone shoots at them, a member fires back in self-defense, killing a civilian with one well-aimed shot. Investigation confirms that he complied with the rules of engagement. Is he subject to further criminal jurisdiction?

Such was the case for Corporal Clemente Banuelos, United States Marine Corps. On May 20, 1997, he shot and killed Esequiel Hernandez, Jr., a civilian in Texas.[2] Corporal Banuelos and his team, assigned to Joint Task Force 6 (JTF-6), patrolled the U.S.-Mexico border in support of the U.S. Border Patrol's drug-interdiction efforts.[3] Primarily a surveillance team, Corporal Banuelos' four-man unit followed Mr. Hernandez, a suspected lookout for drug smugglers, while they waited for the arrival of the Border Patrol.[4] Mr. Hernandez shot twice at Corporal Banuelos' team. When he pointed his weapon again at one of Corporal Banuelos' team members, Corporal Banuelos fired back.[5] The unit operated as instructed; they followed the rules of engagement.[6] Nonetheless, they became the subjects of two grand jury criminal investigations by the state of Texas, a third grand jury investigation by the Department of Justice, and two military investigations by JTF-6 and the Marine

1. William J. Perry, *The Ethical Use of Force, in* 10 DEF. ISSUES 49 (Am. Forces Info. Service ed., 1995) *available at* http://www.defenselink.mil/speeches/1995/s19950418-perry.html.

2. S.C. Gwynne, *Border Skirmish*, TIME, Aug. 25, 1997, at 40, *cited in* John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 SW. J. OF L. & TRADE AM. 453, n.10 (1998); HAYS PARKS, REQUEST FOR EXPERT OPINION CONCERNING COMPLIANCE WITH RULES OF ENGAGEMENT 5-6 (Nov. 15, 1997). Colonel W.H. Parks, U.S. Marine Corps Reserve (retired), is Special Assistant to The Judge Advocate General of the Army for International and Operational Law. He provided the requested opinion, in "a personal capacity," to the military investigating officer conducting the Marine Corps investigation. *Id.* at 1-2.

3. Gwynne, *supra* note 2, *cited in* Flock, *supra* note 2, at n.7; Parks, *supra* note 2, at 2. Military support to civilian law enforcement is restricted by the Posse Comitatus Act (PCA), which prohibits the use of the military "as a posse comitatus or otherwise to execute the laws" unless expressly authorized by the Constitution or Congress. 18 U.S.C. § 1385 (1994); *see* United States v. Walden, 490 F.2d 372, 375 (4th Cir. 1974) (finding the PCA applicable to all armed services, including the Navy and Marine Corps). The PCA was enacted during the Reconstruction Period "to eliminate the direct active use of Federal troops by civil law authorities." United States v. Banks, 539 F.2d 14, 16 (9th Cir. 1976) (upholding military's authority to arrest and detain civilians for civil law violations committed on board military installations). The PCA codified a deeply rooted "traditional insistence on limitations on military operations in peacetime." *See also* Laird, Secretary of Defense v. Tatum, 408 U.S. 1, 15 (1971) (commenting on presidential authority to order federal troops to assist during civil disorders in Michigan after the assassination of Dr. Martin Luther King); Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985) (citing a long tradition, beginning with the Declaration of Independence, in limiting military involvement in military affairs). Posse comitatus is defined as the "body of men summoned by a sheriff or other peace officer to assist him in making an arrest." BALLENTINE'S LAW DICTIONARY 964 (3d ed. 1969). The clause "to execute the laws" makes unlawful "the direct active participation of federal military troops in law enforcement activities." United States v. Red Feather, 392 F. Supp. 916, 924 (D.S.D. 1975) (holding that evidence of active participation by military troops in law enforcement is admissible in defense of interfering with law enforcement officers during the Indian occupation of Wounded Knee, South Dakota). Congress implicitly authorized military support in drug interdiction by enacting the Military Cooperation with Civilian Law Enforcement Agencies Act. 10 U.S.C. §§ 371-381 (1994). Specifically, the "Secretary of Defense may . . . provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials." *Id.* § 371(a) (authorizing use of information collected during military operations). Furthermore, Department of Defense personnel may operate equipment for the "[d]etection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary." *Id.* § 374(b)(2)(B). A restriction remains on direct participation by military personnel in a "search, seizure, arrest, or other similar activity," such as investigation of crimes, interviewing witnesses, pursuit of escaped civilian prisoners, and search of an area for a suspect, unless authorized by law. *Id.* § 375; *Red Feather*, 392 F. Supp. at 925; *see also* United States v. Jaramillo, 380 F. Supp. 1375, 1381 (D. Neb. 1974) (upholding acquittal on charge of obstructing law enforcement officers at Wounded Knee on grounds that the prosecution failed to prove that the PCA was not violated by the military's contributions to the operation, thus raising a reasonable doubt as to whether the law enforcement officers were lawfully engaged in the performance of duties). *But see* United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1976) (holding that evidence of military activity at Wounded Knee was insufficient to overcome presumption that law enforcement officers acted in performance of duties). Military support to civilian law enforcement is not to adversely affect military preparedness. 10 U.S.C. § 376.

4. Gwynne, *supra* note 2, *cited in* Flock, *supra* note 2, at nn.9, 11; Parks, *supra* note 2, at 5.

Corps.[7] The investigations lasted for one year and three months.[8] Fortunately, for the marines involved, none of the investigations resulted in indictments.[9] However, the incident highlights a neglected point of law–that military members are generally subject to the criminal law and procedure of the state in which they operate.[10] Alarmingly, Corporal Banuelos' unit received no instruction on Texas law, even though it applied to their activity.

A serviceperson's right to protection from criminal liability for applying military rules should be as inherent as the right of self-defense. Unfortunately, criminal jurisdiction remains a neglected issue that directly impacts military individuals. Blindly instructing them to apply military rules, without considering local law, jeopardizes not only their personal freedom, but force protection and mission accomplishment as well. More importantly, the rules purport to authorize, in some cases, violation of governing law.

Legal review procedures should address the impact of international, foreign,[11] and domestic law. Trigger-pullers–every man and woman who puts the front-sight post on center mass–need to know when, and when not, to squeeze the trigger, without worrying about going to jail. The "fog of war" will create enough chaos without uncertainty about the rules. They should not be put in harm's way without training, confidence, and protection in the rules that permit them to send rounds down range. From the Khobar Towers[12] to Haiti[13] to the Balkans,[14] the rules

5. Gwynne, *supra* note 2, *cited in* Flock, *supra* note 2, at nn.12, 14; Parks, *supra* note 2, at 5-6.

6. Parks, *supra* note 2, at 8, 10 (agreeing with the JTF-6 investigating officer, that "[t]he Joint Chiefs of Staff . . . Standing Rules of Engagement . . . , which were in effect for this mission, were followed"); *see* Newsletter, Staff Judge Advocate to the Commandant of the Marine Corps, subject: JTF-6 Border Shooting Incident (July 1998), *available at* http://192.156.19.100/newsletter/NewsLetterArchive.htm [hereinafter SJA to CMC Newsletter] (stating that the Marine Corps investigation concluded that the Marines acted non-criminally, within the scope of duty, and in compliance with the rules of engagement and inherent right of self-defense).

7. *See* SJA to CMC Newsletter, *supra* note 6 (Sept. 1997) (stating that the Texas grand jury did not indict Corporal Banuelos for Mr. Hernandez' death, and that the other three team members testified under state and military immunity); *id.* (Apr. 1998) (stating that the Department of Justice closed its civil rights investigation with no indictments, finding insufficient evidence); *id.* (Aug. 1998) (stating that the Texas District Attorney concluded his second grand jury investigation with no bill).

8. Within three to four months of the incident, the first Texas grand jury ended with no bill, and JTF-6's investigation found that the Marines committed no criminal or civil rights violations. *See* SJA to CMC Newsletter, *supra* note 6 (Sept. & Nov. 1997). The Department of Justice's Civil Rights Division then joined the Marine Corps investigation. *Id.* (Nov. 1997). In February, 1998, the Department of Justice closed its federal grand jury investigation with no indictments, concluding the FBI's investigation. *Id.* (Apr. 1998). In June, 1998, the Marine Corps forwarded its investigation to the Secretary of Defense, after the investigating officer reviewed the federal grand jury evidence, released by court order. *Id.* (May & July, 1998). The Department of Justice also provided its federal grand jury evidence to the Texas District Attorney, who then opened his second grand jury investigation, finally concluding with no bill in August, 1998. *Id.* (May & Aug. 1998).

9. *See* SJA to CMC Newsletter, *supra* notes 6-8.

10. The Texas border shooting incident fueled an ongoing debate over the military's increased involvement in domestic and other non-combat operations. *See generally* W. Kent Davis, *Swords into Plowshares: The Dangerous Politicalization of the Military in the Post-Cold War Era*, 33 VAL. U.L. REV. 61 (1998) (stating that after the Cold War, the armed forces have assumed new tasks such as criminal law enforcement and international peacekeeping, which only marginally involve fighting and winning wars). *See also* David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619 (1997) (maintaining that the PCA was eroded by the drug war in the 1980s, and that PCA exceptions were used to procure military support for the Bureau of Alcohol, Tobacco and Firearm's raid on Branch Davidians in Waco, Texas, resulting in the deaths of four federal agents and seventy-six other men, women and children). One author argues that the type of support provided by Corporal Banuelos' unit violates the PCA. *See* Flock, *supra* note 2 (concluding that military border operations are surrogate law enforcement activities that violate the PCA and the Fourth Amendment, and advocating application of the exclusionary rule to exclude any evidence seized in such an operation). Another author advocates repealing the PCA and enacting a new statute that prevents military involvement in drug interdiction. Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 982 (1997). However, the courts have held that "military involvement, even when not expressly authorized by the Constitution or a statute, does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief." Bissonette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985) (finding that the military's aerial surveillance of Indian Reservation residents at Wounded Knee did not violate the PCA and was not unreasonable for Fourth Amendment purposes); *see also* United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1976) (concluding the PCA prohibits military use which is regulatory, proscriptive, or compulsory upon citizens).

11. Foreign law is the domestic "law of a state or country other than the forum." BALLENTINE'S LAW DICTIONARY 488 (3d ed. 1969).

12. *See* Downing Report to the Secretary of Defense of the Assessment of the Khobar Towers Bombing, Downing Assessment Task Force, The Pentagon (30 Aug. l996); General Accounting Office Report to Congress on Combating Terrorism: Status of DOD Efforts to Protect Its Force Overseas, Letter Report, GAO/NSIAD-97-207 (July 21, 1997).

13. *See* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, 34-45 (11 Dec. 1995). The lessons learned also discuss the problems inherent in operating without the benefit of a Status of Forces Agreement, and the importance of understanding the country's legal system. *See id.* at 50-53.

14. *See* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998, 56-74 (13 Nov. 1998). The lessons learned also cover aspects of international law and international agreements, emphasizing that judge advocates should know the "international legal basis for the mission and for the use of force," understand the host nation's legal culture, and expect "difficulties with information flow on international agreements." *Id.* at 76-79.

governing the application of force appear in lessons learned as an area for improvement. However, the jurisdictional issues associated with these rules appear forgotten. Assuming that personal freedom and diplomatic relations should continue after the application of force, this jurisdictional dilemma should be resolved.

This article first summarizes the unclassified Standing Rules of Engagement (Standing ROE)[15] and Rules for the Use of Deadly Force (Rules of Deadly Force)[16] that currently apply to military forces. Second, this article describes the international agreements that protect forces from foreign criminal process in some countries. Third, this article highlights international, foreign and domestic laws that subject U.S. forces to local jurisdiction, sampling four jurisdictions where the military rules could potentially violate criminal law. Finally, as a partial solution, this article advocates jurisdiction-specific standards that incorporate local law and U. S. policy concerning the application of force. Without limiting the inherent right of self-defense, jurisdiction-specific standards should modify the rules, appropriately excluding the authorization to go beyond self-defense when criminal liability is at stake. The solution is only partial because the United States cannot force sovereign nations to give up criminal jurisdiction, nor force domestic U.S. states to immunize military personnel. If the United States continues to send military personnel to such places, the risks will remain; however, they should be minimized as much as possible under the law.

This article will not address the issue of whether the individual right to use defensive force imposes an inherent duty to use force, like the obligation levied on commanders under the Standing ROE.[17] Furthermore, the issues raised herein exist neither in combat operations, nor in a chaotic society, where judicial infrastructure has collapsed and cannot be imposed on U.S. forces. On the contrary, these issues pertain to a broad scope of common military activity–such as transporting weapons along California highways between military bases for training, taking liberty in the United Arab Emirates (U.A.E.) during a deployment to the Middle East, or conducting a bilateral exercise in Thailand. In each of these peacetime environments, security is paramount; thus, rules governing the use of force apply. However, in each of these locations, the domestic law of the host jurisdiction–California, U.A.E., or Thailand–also applies. More importantly, the law may trump the U.S. rules and hold individuals criminally liable for their official actions.

The Standing Rules of Engagement

Rules of engagement are "[d]irectives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."[18] As military directives, the rules of engagement are not law.[19] Although they may be based in law, directives merely provide policy, authority, mission definition, and responsibility.[20] The Standing ROE,[21] issued by the Chairman, Joint Chiefs of Staff, provide "guidance on the application of force for mission accomplishment and the exercise of the inherent right and obligation of self-defense."[22] The Standing ROE used to apply "during *all* military operations and contingencies," without regard to location in or outside the United States.[23] However, as of 15 January 2000, the Standing ROE apply during "operations, contingencies, and terrorist attacks" *outside* the United States, and during attacks against the United States.[24]

The Standing ROE authorize the use of all "necessary means available and all appropriate actions" in self-defense.[25] They specify:

> (1) "Attempt to De-Escalate the Situation" if possible by providing the hostile force a warning and "opportunity to withdraw or cease threatening action;"
> (2) "Use Proportional Force[26]–Which May Include Nonlethal Weapons[27]–to Control the Situation;" and

15. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, ENCLOSURE (A) (15 Jan. 2000) [hereinafter CJCS INSTR. 3121.01A]. CJCS INSTR. 3121.01A canceled CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) [hereinafter CJCS INSTR. 3121.01]. CJCS INSTR. 3121.01A, para. 2.

16. U.S. DEP'T. OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (25 Feb. 1992) (administrative reissuance incorporates change 1, 10 Nov. 1997) [hereinafter DOD DIR. 5210.56].

17. *See* CJCS INSTR. 3121.01A, *supra* note 15, para. 6(b) & encl. A, para. 2(a). "These [Standing Rules of Engagement] do not limit a commander's inherent authority and *obligation* to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other US forces in the vicinity." *Id.* (emphasis added).

18. THE JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 390 (23 Mar. 1994; amended 24 Jan. 2000) [hereinafter JOINT PUB. 1-02].

19. *See* Office of the Secretary of Defense, Directives Section, *DOD Issuances, at* http://web7.whs.osd.mil/general.htm (last visited Mar. 25, 2000). A directive is "a broad policy document containing what is required by legislation, the President, or the Secretary of Defense to initiate, govern, or regulate actions or conduct by the DOD Components . . . ." *Id.*

20. *Id.*

21. CJCS INSTR. 3121.01A, *supra* note 15.

(3) "Attack to Disable or Destroy" when "the only prudent means" to stop a hostile act or intent.[28]

While these three measures appear conservative, the guidance further states "pursue and engage hostile forces that continue to commit hostile acts or exhibit hostile intent,"[29] an action that may go beyond restrictive views of self-defense.[30] Furthermore, the Standing ROE do not impose a duty to retreat in self-defense.[31] Instead, they contemplate escalating measures, beginning with a warning, if feasible, and culminating in an offensive pursuit.[32] They also confirm that "[t]he individual's inherent right of self-defense is an element of unit self-defense."[33]

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22. *Id*. at encl. A, para. 1(a). "ROE supplemental measures apply only to the use of force for mission accomplishment and do not limit a commander's use of force in self-defense." *Id.* at para. 6b. A sample unclassified pocket card, based on the Standing ROE in effect 1994-1999 states:

> STANDING ROE DO NOT CHANGE—MEMORIZE:
> A. Self-defense—Take all Necessary and Appropriate Action to defend yourself and other U.S. Forces against a Hostile Act or Hostile Intent.
> B. Hostile Act—Attack or force used against U.S. Forces, or force used directly to impede the mission or duties of U.S. Forces.
> C. Hostile Intent—The threat of imminent use of force. Example—a weapon pointed at U.S. Forces.
> D. Necessary and Appropriate Action.
> 1. Try to control without force. Warn if time permits.
> 2. Use force proportional in nature, duration and scope to counter the hostile act or hostile intent and ensure U.S. Forces' safety.
> 3. Attack to disable or destroy only if necessary to stop the hostile act or hostile intent. Stop your attack when the imminent threat stops.
> 4. You may pursue and engage an attacker after the hostile act or hostile intent if the threat is still imminent (not into a third country).
> E. Minimize Collateral Damage to civilians and civilian property consistent with mission accomplishment and force protection.
> SUPPLEMENTAL ROE ARE SUBJECT TO CHANGE:
> F. Forces Declared Hostile by higher military authority may be engaged without observing hostile act or hostile intent.

Id. The 15th Marine Expeditionary Unit (Special Operations Capable), I Marine Expeditionary Force, used this card, with scenarios and mission-specific supplemental ROE, for two deployments in 1997-98, which included Operations Southern Watch and Desert Thunder. The back of the card contained the Law of War principles, applicable during all operations as a matter of policy. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, para. 5 (1999).

23. *See* CJCS INSTR. 3121.01, *supra* note 15, at para. 3 (emphasis added). The former version made exceptions for forces not under control of a combatant commander, U.S. Coast Guard units, and forces supporting authorities in domestic civil disturbances or foreign or domestic disaster assistance missions. Those units were directed to follow use-of-force policy or ROE promulgated by the cognizant agency. *Id.* at encl. A, para. 1. Service personnel typically learn the ROE with scenarios and pocket cards as training tools.

24. CJCS INSTR. 3121.01A, *supra* note 15, at para. 3. "Peacetime operations conducted by US military within the territorial jurisdiction of the United States are governed by use-of-force rules contained in other directives or as determined on a case-by-case basis for specific missions . . . ." *Id*. at para. 3(a). For operations within the United States, the Standing ROE refers to the following directives for policy and guidance: U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCE (4 Feb. 1994); U.S. DEP'T OF ARMY, DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLAN, ANN. C (15 Feb. 1991) (Garden Plot); U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (15 Jan. 1993); U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986); DOD DIR. 5210.56, *supra* note 16; U.S. Dep't of Justice Memorandum, Uniform Department of Justice Deadly Force Policy (16 Oct. 1995); CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3121.02, RULES ON THE USE OF FORCE BY DOD PERSONNEL DURING MILITARY OPERATIONS PROVIDING SUPPORT TO LAW ENFORCEMENT AGENCIES CONDUCTING COUNTERDRUG OPERATIONS IN THE UNITED STATES (31 May 2000); and U.S. COAST GUARD, COMMANDANT INSTR. M16247 SERIES, USE-OF-FORCE POLICY, MARITIME LAW ENFORCEMENT MANUAL 4, GLOBAL COMMAND AND CONTROL SYSTEM (GCCS) *available at* http://204.36.191.2/cghq.html. CJCS INSTR. 3121.01A, *supra* at encl. I, para. 2 (additional classified reference).

25. CJCS INSTR. 3121.01A, *supra* note 15, at encl. A, para. 8a.

26. *Id*. at encl. A, para. 8a(2). When necessary, "the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property." *Id.*

27. *Id*. Nonlethal weapons "are explicitly designed and primarily employed to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment." *Id*. at glossary, GL-22. However, "[n]either the presence nor the potential effect of nonlethal weapons will obligate a commander to use them in a particular situation. In all cases, commanders retain the right for immediate use of lethal weapons, when appropriate, consistent with these rules of engagement and the right of self-defense." *Id.*

28. *Id*. at encl. A, para. 8.

29. *Id*. at encl. A, para. 8b.

30. The ROE Glossary on "self-defense" adds that "U.S. forces may employ such force in self-defense only so long as the hostile force continues to present an imminent threat." *Id.* at glossary, GL-26, 27. Thus, the right to pursue in self-defense exists under the ROE when the pursued hostile force still poses an imminent threat by continuing "to commit hostile acts or exhibit hostile intent." *Id.* at encl. A, para. 8b. However, the ROE even define "pursuit" as an "*offensive* [vice defensive] operation designed to catch or cut off a hostile force attempting to escape, with the aim of destroying it." *Id.* at glossary, GL-25 (emphasis added).

31. *See id.* at encl. A, para. 8.

32. *Id*. at encl. A, para. 8, glossary, GL-25 (defining "pursuit" as an "offensive operation," *see supra* text accompanying note 30).

The concept of self-defense in the Standing ROE incorporates the principles of "necessity"[34] and "proportionality"[35] and is grounded in international law.[36] The United Nations (U.N.) Charter recognized the inherent right of self-defense in a multilateral international agreement.[37] Even before the U.N. Charter entered into force, customary international law recognized the inherent right of self-defense. The right stems from a state's right of self-preservation.[38] "In the exercise of [self-defense], no independent State can be restricted by any foreign power."[39]

The United States maintains that customary international law and the U.N. Charter authorize anticipatory self-defense.[40] The United States position, though historically supportable, contradicts the restrictive views of some U.N. members.[41] The authorization to use force against "hostile intent" in the Standing ROE embraces the concept of anticipatory self-defense.[42] The Standing ROE defines "hostile intent" as:

> The threat of imminent use of force against the United States, U.S. forces, and in certain circumstances, U.S. nationals, their property, U.S. commercial assets, and/or other designated non-U.S. forces, foreign nationals and their property. Also, the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital [U.S. government] property . . . .[43]

The Standing ROE similarly define "hostile act" as not only an attack, but also "force used directly to *preclude or impede the mission and/or duties* of US forces . . . ."[44] Many countries do not share the aggressive American stance, woven into the fabric of the Standing ROE. Nonetheless, that stance is the one carried in the pockets of American troops everywhere. The risk this imposes upon military personnel is that they may use force

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33. *Id.* at glossary, GL-17. Unit self-defense is the "act of defending a particular U.S. force element, including individual personnel thereof, and other U.S. forces in the vicinity, against a hostile act or demonstrated hostile intent." *Id.* at encl. A, para. 5d. "A unit commander has the authority and obligation to use all necessary means available and to take all appropriate actions" in unit self-defense. *Id.* at encl. A, para. 7c.

34. *Id.* at encl. A, para. 5f(1). Necessity "[e]xists when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent." *Id.*

35. *Id.* at encl. A, para. 5f(2). The principle of proportionality mandates that "[f]orce used to counter a hostile act or demonstrated hostile intent must be reasonable in intensity, duration, and magnitude to the perceived or demonstrated threat based on all facts known to the commander at the time . . . ." *Id.*

36. International law develops from international agreements, custom, general principles of law, judicial decisions, and prominent scholarship. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102-103 (1986). "International law is law like other law . . . . States . . . consider themselves bound by it . . . . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts." *Id.* at ch. 1, introductory note; *see also* U.S. CONST. art. I, § 8 (referring to the "Law of Nations").

37. U.N. CHARTER art. 51. The United States joined the U.N. in 1945 when the U.N. Charter entered in force. The U.N. represents 188 countries. United Nations, *United Nations Member States*, *at* http://www.un.org/Overview/unmember.html (updated Mar. 10, 2000).

38. Henry Wheaton, *Elements of International Law, in* 19 THE CLASSICS OF INTERNATIONAL LAW 1, 75 (James Brown Scott, ed., Carnegie Endowment for Int'l Peace 1936) (1866).

39. *Id.* "[T]he exercise of these absolute sovereign rights can be controlled only by the equal correspondent rights of other States, or by special compacts freely entered into with others . . . ." *Id.*

40. The requirements for anticipatory self-defense originated in the classic *Caroline* case in 1837, when the Secretary of State agreed with the British Special Minister that force is authorized when the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *See* JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906) (quoting letter from Mr. Webster, United States Secretary of State to Lord Ashburton, the British Special Minister to Washington, D.C. (Aug. 6, 1842)), *cited in* Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 130 (Sept. 1999) (explaining that the British attacked the *Caroline*, a U.S. ship carrying supplies to Canada during the Canadian Rebellion, resulting in the agreement on self-defense); *but see* Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 326 (1999) (arguing that the *Caroline* doctrine has been applied "to circumstances to which it was not intended to apply").

41. *See* Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 127 (1998) (discussing the *Caroline* principles and stating that the U.S. Standing ROE "grant the right of unit self defense a particularly wide ambit . . . [which] is not justified under international law").

42. *See* CJCS INSTR. 3121.01A, *supra* note 15, at encl. A, paras. 5(h), 7(c).

43. *Id.* at encl. A, para. 5(h). The Standing ROE Glossary further defines "hostile intent:"

> When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. A determination that hostile intent exists and requires the use of proportional force in self-defense must be based on evidence that an attack is imminent. Evidence necessary to determine hostile intent will vary depending on the state of international or regional political tension, military preparations, intelligence and [indications] and [warning] information.

Id. at glossary, GL-15 (amplifying and assessing "hostile intent" further in classified text).

in self-defense in a country that views the inherent right of self-defense more restrictively than the United States. Consequently, foreign authorities may find the use of force excessive or criminal.

Rules for the Use of Deadly Force by Law Enforcement and Security Personnel

In the Khobar Towers bombing aftermath, robust force protection plans are mandatory,[45] requiring round-the-clock security during deployments. As a result, numerous deployed troops stand duty as security personnel in ports and camps, receiving ammunition and instruction on the Rules of Deadly Force in accordance with regional directives.[46] Like the Standing ROE, the Rules of Deadly Force exist in a military directive.[47] Thus, like the Standing ROE, the rules themselves are not law.[48] The rules establish policy and authorize military personnel "to carry firearms while engaged in law enforcement or security duties, protecting personnel, vital Government assets, or guarding prisoners."[49]

Under the Rules of Deadly Force, security and law enforcement personnel have authority to use deadly force, as a last resort, in circumstances that move beyond self-defense.[50] Specifically, they can use deadly force as follows:

> (1) In defense of self and others;
> (2) To prevent theft or sabotage of national security assets designated "vital" by appropriate authority;[51]
> (3) To prevent theft or sabotage of property inherently dangerous to others;[52]
> (4) To prevent serious offenses against persons;
> (5) To apprehend or arrest certain persons; and,
> (6) To prevent escape of certain prisoners.[53]

These rules, broader than the Standing ROE,[54] apply predominantly as a matter of force protection.[55] More importantly, they are triggered by the mere presence of U.S. forces, whether conducting operations, exercises, transit, or liberty. One author recently commented:

> As the United States military engages in operational missions at a record pace, the need for commanders to understand their force protection responsibilities has never been greater. Force protection responsibility for deployed personnel is one of the most confusing and contentious issues in every military operation. Because terrorism is a constant concern, commanders agonize over their force protection responsibilities and demand that the boundaries of their force protection authority be defined with laser-like preciseness.[56]

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44. *Id*. at encl. A, para. 5g, glossary, GL-14 (amplifying and providing examples of "hostile act" in classified text) (emphasis added).

45. *See* U.S. Dep't of Defense, Dir. 2000.12, DOD Antiterrorism/Force Protection (AT/FP) Program (13 Apr. 1999) [hereinafter DOD Dir. 2000.12]; U.S. European Command, Operations Order 98-01, Antiterrorism/Force Protection (21 Feb. 1998) [hereinafter EuCom Op. Ord. 98-01]; U.S. Pacific Command, Operations Order 5050-99, Antiterrorism/Force Protection (11 Jan. 1999) [hereinafter PaCom Op. Ord. 5050-99]; U.S. Central Command, Operations Order 97-01A, Force Protection (15 Apr. 1999) [hereinafter CentCom Op. Ord. 97-01A]; U.S. Southern Command, *Command Specific Information*, *at* http://www.southcom.mil/scnet/J337/info.htm (last visited Mar. 11, 2000) [hereinafter SouthCom Specific Information].

46. *See* DOD Dir. 2000.12, *supra* note 45; EuCom Op. Ord. 98-01, *supra* note 45; PaCom Op. Ord. 5050-99, *supra* note 45; CentCom Op. Ord. 97-01A, *supra* note 45; SouthCom Specific Information, *supra* note 45.

47. DOD Dir. 5210.56, *supra* note 16.

48. *See* Directives Section, *supra* note 19.

49. DOD Dir. 5210.56, *supra* note 16, at paras. 2.2, 4-6. The directive does not apply in certain cases, such as when ROE are in effect during military operations, in a wartime combat zone, in a hostile fire area, when under control of another federal agency carrying firearms in support of the mission, in a civil disturbance mission area, or during a training mission. *Id.* at para. 2.3.

50. *Id*. at encl. 2; *see also* CentCom Op. Ord. 97-01A, *supra* note 45; U.S. European Command, Policy Letter No. 98-03, subject: Policy for the Arming of Security Personnel (22 Feb. 1999).

51. For example, in the U.S. Naval Central Command area of responsibility, naval ships and aircraft are designated as vital national security assets. Message, 061230Z Nov 96, U.S. Naval Central Command, subject: Designation of National Security Assets Justifying Use of Deadly Force (6 Nov. 1996). Assets are designated "vital" only when their "loss, damage, or compromise would seriously jeopardize the fulfillment of a national defense mission. Examples include nuclear weapons; nuclear command, control, and communications facilities; and designated restricted areas containing strategic operational assets, sensitive codes, or special access programs." DOD Dir. 5210.56, *supra* note 16, at encl. 2, para. E2.1.2.2.

52. DOD Dir. 5210.56, *supra* note 16, at encl. 2, para. E2.1.2.3. This rule protects property such as "operable weapons or ammunition, that are inherently dangerous to others [and] in the hands of an unauthorized individual, present a substantial potential danger of death or serious bodily harm to others. Examples include high risk portable and lethal missiles, rockets, arms, ammunition, explosives, chemical agents, and special nuclear material." *Id*.

Part of the precision commanders must demand includes knowing the consequences of using force, particularly in a host nation that: (1) retains primary criminal jurisdiction; and, (2) may regard the U.S. application of force as criminal. If the authority to use deadly force is not grounded in law, then such use of force may impose criminal liability.

International Agreements on Criminal Jurisdiction

An international agreement between nations signifies their intention to be bound in international law to its provisions.[57] Military directives govern the negotiation of international agreements, including status of forces agreements (SOFAs), by Department of Defense personnel.[58] A SOFA "defines the legal position of a visiting military force deployed in the territory of

53. *Id.* at encl. 2, para. E2.1.2. A sample troop pocket card elaborates as follows:

> Use of Force Rules for Law Enforcement and Security Personnel
> These rules do not limit your inherent right to use all necessary means available and to take all appropriate action in self-defense of yourself, your unit, and other U.S. forces in the vicinity.
> Definition—Deadly force is force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm.
> Deadly force is justified only under conditions of extreme necessity and as a last resort when *all lesser means have failed or cannot reasonably be employed*. Then deadly force is justified when it reasonably appears necessary in the following circumstances:
> 1. In Self-defense and Defense of Others. To protect security or law enforcement (LE) personnel or others who are reasonably believed to be in imminent danger of death or serious bodily harm.
> 2. In Defense of Property Involving National Security. To prevent actual theft or sabotage of assets designated vital to national security, including U.S. Navy ships, U.S. Navy and U.S. Marine Corps aircraft in the NavCent AOR.
> 3. In Defense of Property Inherently Dangerous to Others. To prevent actual theft or sabotage of weapons, ammunition, explosives and property whose theft or destruction presents a substantial potential danger of death or serious bodily injury to others.
> 4. To Prevent Serious Offenses Against Persons. To prevent commission of a serious offense involving violence and threatening death or serious bodily injury to another, such as murder, armed robbery, or aggravated assault.
> 5. Apprehension or Arrest. To arrest, apprehend or prevent the escape of a person who, there is probable cause to believe, committed an offense described above.
> 6. Escapes. When deadly force has been specifically authorized to prevent escape of a prisoner who security/LE personnel have probable cause to believe poses a threat of serious bodily harm to security/LE personnel or others.
> 7. Lawful Order. When ordered to use deadly force by competent authority. Competent authority in the NavCent AOR is an E-5 or above who has knowledge of the relevant facts and circumstances which justify deadly force in accordance with the rules above. The person who is directed to use deadly force must have a clear description of the person against whom deadly force is authorized, and a general knowledge of the circumstances that warrant deadly force.
> When using force:
> A. Use only the minimum amount of force necessary, applying a continuum of force including verbal commands, contact control, compliance techniques, and defensive tactics if possible, before resorting to deadly force.
> B. Warning shots are prohibited for safety reasons.
> C. If you must fire, fire with due regard for the safety of innocent bystanders.
> D. If you must fire, fire with the intent of rendering the person incapable of continuing the activity or behavior which prompts you to fire.
> E. Holstered firearms should not be unholstered unless there is a reasonable expectation that deadly force may be necessary.
> The killing of an animal is justified for self-defense, or to protect others from serious injury.

The 15th Marine Expeditionary Unit (Special Operations Capable), I Marine Expeditionary Force, used these rules, supplemented with force protection scenarios, to train thousands of Marines who stood peacetime security duty in low to high threat countries in Southeast Asia, the Middle East and Africa during deployments in 1997-98. The card is based on DOD DIR. 5210.56, *see id.*, and applicable implementing guidance by subordinate commands. *See* U.S. CENTRAL COMMAND, REG. 190-3, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY USCENTCOM PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (26 Apr. 1993); U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5500.29B, USE OF DEADLY FORCE BY PERSONNEL IN CONJUNCTION WITH SECURITY DUTIES (28 Sept. 1992); U.S. MARINE CORPS, ORDER 5500.6F, ARMING OF SECURITY AND LAW ENFORCEMENT PERSONNEL AND THE USE OF FORCE (20 July 1995); Message, 211230Z Nov 96, U.S. Central Command, subject: Guidance on Use of Deadly Force in Law Enforcement or Security Operations (21 Nov. 1996); Memorandum, Commander, U.S. Naval Central Command, subject: Rules for Use of Deadly Force (22 Apr. 1997) (authorizing deadly force on lawful order).

54. *See* CJCS INSTR. 3121.01A, *supra* note 15. The Standing ROE authorize self-defense against a hostile act or demonstrated hostile intent directed at U.S. forces or other protected entities. *Id.* at encl. A, paras. 5(g)-(h), 7(c). Similarly, the Rules of Deadly Force authorize self-defense. DOD DIR. 5210.56, *supra* note 16, at encl. 2, E2.1.2.1. However, the Rules of Deadly Force also authorize deadly force to protect vital and inherently dangerous assets, to prevent violent crime against anyone, and to apprehend suspects or prevent escape of certain prisoners. *Id.* at encl. 2, E2.1.2.2-.6.

55. *See generally* DOD DIR. 2000.12, *supra* note 45; EUCOM OP. ORD. 98-01, *supra* note 45; PACOM OP. ORD. 5050-99, *supra* note 45; CENTCOM OP. ORD. 97-01A, *supra* note 45; SOUTHCOM Specific Information, *supra* note 45.

56. Major Thomas W. Murrey, Jr., U. S. Air Force, *Khobar Towers' Progeny: the Development of Force Protection*, ARMY LAW., Oct. 1999, at 1.

57. *See* U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS, encl. 2, para. E2.1.1 (11 June 1987) [hereinafter DOD DIR. 5530.3]; U.S. DEP'T OF DEFENSE, DIR 5525.1, STATUS OF FORCES POLICY AND INFORMATION (7 Aug. 1979) (with change 2 of 2 July 1997) [hereinafter DOD DIR. 5525.1]; *see also* Policy Letter, Dep't of Defense General Counsel, Policy Letter, subject: Interim Guidance on DOD Directive 5530.3 (International Agreements) (11 July 1996). "[C]ontingency or operations plans that contain commitments not covered by existing agreements may constitute international agreements if they are cosigned or agreed to by U.S. and foreign officials." CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 2300.01, INTERNATIONAL AGREEMENTS, para. 5 (15 Sept. 1994) (C1, 19 Aug. 1996) [hereinafter CJCS INSTR. 2300.01].

a friendly state."[59] A SOFA is the "middle ground" between "sovereign immunity" from local criminal process and "blanket abdication of jurisdiction" to host nation criminal courts.[60] While diplomats are accorded "sovereign immunity" under customary international law, extending that privilege to military forces is no longer the norm due to political sensitivities.[61] On the other hand, total jurisdictional surrender of U.S. forces would hinder the military mission.[62]

A SOFA generally refers to the visiting country as the "sending state," and the host nation as the "receiving state."[63] A SOFA routinely addresses, among other issues, which country has criminal jurisdiction over the visiting country's forces.[64] Criminal jurisdiction may also be covered in other binding international agreements, such as a defense cooperation agreement (DCA), an access agreement, an exchange of diplomatic notes, or a temporary agreement limited to the duration of a military exercise or operation.

Criminal jurisdiction provisions generally take one of three forms:

> 1. The sending state has exclusive jurisdiction over its members in all cases;
> 2. The sending and receiving states have exclusive jurisdiction over offenses which are unique to their own laws; and
> 3. The states share concurrent jurisdiction, with primary jurisdiction apportioned according to the offense and victim.[65]

Administrative and technical (A&T) staff of American embassies generally benefit from the first type of provision–exclusive criminal jurisdiction with the sending state.[66] SOFAs commonly use the second and third types of provisions. These generally grant primary jurisdiction to the sending state for *official acts*, and crimes in which the victim is a sending state member. The receiving state has primary jurisdiction over all other cases. Either state may waive primary jurisdiction. Accordingly, a SOFA protects U.S. forces from foreign criminal liability for official duties. Thus, if a guard uses force in accordance with the Standing ROE or Rules of Deadly Force, his or her actions will be scrutinized in an American forum.

Such status agreements that cover criminal jurisdiction bind the parties under international law.[67] In combat or in a stateless society, where the U.S. can exert its own jurisdiction, the absence of a SOFA poses little risk. Conversely, a favorable SOFA should be the goal in other instances when military personnel enter a foreign jurisdiction–for training, exercises, deployments, liberty, and military operations other than war. While a SOFA need not provide blanket protection from sovereign criminal law, it should embrace official acts. However, sovereign nations must consent to an international agreement; thus, this goal may never be met. Therefore, some risk to military personnel will remain in these jurisdictions.

The North Atlantic Treaty Organization SOFA provides an example of a favorable agreement on criminal jurisdiction.[68] Article VII[69] grants the United States primary jurisdiction over official duty and U.S.-victim cases. The host nation retains primary jurisdiction in all other cases.[70] Actions taken under the Standing ROE or Rules of Deadly Force constitute official duties. Consequently, an agreement under the NATO model protects military personnel from being held criminally responsible in a foreign system for following these military rules.

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58. DOD DIR. 5530.3, *supra* note 57; CJCS INSTR. 2300.01, *supra* note 57.

59. JOINT PUB 1-02, *supra* note 18, at 427.

60. William T. Warner, *Status of Forces Agreements, in* 4 ENCYCLOPEDIA OF U.S. FOREIGN RELATIONS 130 (Bruce W. Jentleson & Thomas G. Paterson eds. 1997).

61. *Id.* at 130-31.

62. *Id.*

63. *Id.* at 130.

64. *Id.*

65. *Id.* at 131 (listing two types of jurisdictional concepts contained in the NATO SOFA).

66. The Vienna Convention codified the privileges and immunities accorded diplomatic agents and missions that were already grounded in customary international law. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 22-45, 23 U.S.T. 3227, 500 U.N.T.S. 95-221 (entered into force on April 24, 1964; for the U.S. on December 13, 1972); s*ee generally* E. Denza, *Diplomatic Agents and Missions, Privileges and Immunities, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1040 (Rudolf Bernhardt, ed., 1992) (1986 & 1990 addendum) (discussing historical development of diplomatic privileges and immunities and application to different categories of persons associated with the diplomatic mission).

67. Some SOFAs, such as the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA], are treaties, enacted with the advice and consent of the Senate as the supreme law of the land. *See* U.S. CONST. art. II, § 2, art. VI, cl. 2.

68. NATO SOFA, *supra* note 67.

Sovereignty of Foreign and Domestic Jurisdictions

> *"Obey the king's command . . . [s]ince the king's word is supreme . . . . Whoever obeys his command will come to no harm . . . ."*[71]

In modern times, when on foreign and American soil, military personnel are generally subject to the law of the local jurisdiction.[72] Compliance with the Standing ROE and Rules of Deadly Force will not free an individual from the local criminal process. Unfortunately, neither the Standing ROE nor the Rules of Deadly Force address this issue prominently. Instead, they purport to authorize force without specifying its legal basis. The legal basis may change with each jurisdiction, whether foreign or American.

Foreign Jurisdictions

"The concept of domestic jurisdiction [of nations] signifies an area of internal State authority that is beyond the reach of international law."[73] International law, as codified in the U.N. Charter,[74] recognizes the general sovereignty of nations within their borders.[75] A sovereign state "governs itself independently of foreign powers."[76] Self-government includes the power to legislate.[77] Thus, in the absence of an international agreement governing criminal jurisdiction, U.S. military forces abroad are legally at the mercy of the host nation–including the sovereign's definition of crime, defenses thereto, pretrial detention, procedure, and punishment. While military vessels and embassies enjoy sovereign immunity,[78] if military personnel do not reach their ship or embassy before arrest, they can spend months or years in a foreign jail. Although the Foreign Claims Act[79] and diplomacy can assist in recovering a service member, they offer no guarantees. Consequently, to avoid jail, military personnel "must abide by the laws of the United States as well as the laws of the host nation. A force protection program must operate within the same restraints."[80]

Although the United States has international agreements that preserve criminal jurisdiction in many countries, risks remain in several nations where no such agreement exists.[81] To understand the risks involved with following the Standing ROE and Rules of Deadly Force in these nations, the military must con-

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69. *Id.*, art. VII. Pertinent provisions state:

> The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State. . . . In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply: (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offenses arising out of any act or omission in the performance of official duty. (b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction. (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

NATO SOFA art. VII, ¶¶ 2-3.

70. *Id.*

71. *Ecclesiastes* 8:2-5 (New International).

72. Exemption from local jurisdiction used to be implied when a sovereign permitted foreign military forces to pass through the sovereign's territory. Now, however, the "sovereign power of municipal legislation" extends to "the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same . . . ." Wheaton, *supra* note 38, at 118, 132.

73. Anthony D'Amato, *Domestic Jurisdiction, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1090 (Rudolf Bernhardt ed., 1992). The U.S. invoked the concept of domestic jurisdiction with the "Connally Reservation" to its acceptance of the International Court of Justice's (ICJ) compulsory jurisdiction, refusing to accept the ICJ's jurisdiction over matters within U.S. domestic jurisdiction. *Id.* at 1091.

74. "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 . . . ." U.N CHARTER art. 2, para. 7. The U.N. General Assembly also adopted a resolution which states, "No State, or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." U.N. GAOR, Supp. No. 28 at 121, U.N. Doc A/RES/2625 (XXV) (1970) (Friendly Relations Resolution). *But see* D'Amato, *supra* note 73, at 1093 (arguing that the Friendly Relations Resolution goes beyond Article 2 of the Charter, purporting to rule out actions such as humanitarian intervention and economic boycotts).

75. The international community may intervene in a domestic jurisdiction only in certain circumstances, i.e., when the nation is violating another international norm, such as human rights. U.N. Security Council measures are exempt from the Charter's restriction against intervening in matters of domestic jurisdiction. U.N CHARTER art. 2, para. 7, arts. 55-56 (human rights provisions).

76. Wheaton, *supra* note 38, at 44. A state acquires sovereignty upon its origin or independence. *Id.* at 28.

77. *Id.* at 110. "Every nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory." *Id.* at 111. The effect of foreign law on a sovereign depends on the sovereign's consent. *Id.*

sider their legal systems, particularly criminal law and procedure.[82] Based on a thorough examination of the legal system, the military can adjust the Standing ROE or Rules of Deadly Force in order to maximize jurisdiction. The following descriptions of the legal systems in Thailand and Yemen provide examples of the criminal process that military personnel may face in countries without jurisdiction agreements.

Thai Criminal Law and Procedure

American military personnel frequently visit the Kingdom of Thailand in the course of duty.[83] Amphibious Readiness Group ships with Marine Expeditionary Units enroute to the Middle East and Africa stop in Thailand and other Asian countries for liberty, supplies, and limited training. Additionally, the United States conducts a bilateral military exercise, "Cobra Gold," annually in Thailand. Despite the regular United States military presence in Thailand, the United States does not have a SOFA with Thailand that retains criminal jurisdiction for official acts of Department of Defense personnel.[84] Consequently, an American service person who takes action in compliance with the Standing ROE or Rules of Deadly Force could face charges in a Thai criminal court.[85]

The Thai legal system rests primarily on civil law with common law influences, favoring written codes over jurisprudence.[86] Thai people culturally lean toward settling disputes out of court,[87] a posture that dovetails conveniently with the U.S. policy to promptly settle meritorious claims under the For-

78. The sovereign immunity of embassies was long recognized as a matter of customary international law and codified in the Vienna Convention. The embassy is immune from the law enforcement of the host nation, including entry, search, requisition, and service of process. Inviolability of the premises includes the host nation's duty to protect against intrusion, damage, or disturbance of the peace. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 22, 23 U.S.T. 3227, 500 U.N.T.S. 95-221; *see generally* E. Denza, *Diplomatic Agents and Missions, Privileges and Immunities, in* 1 Encyclopedia of Public International Law 1040 (Rudolf Bernhardt ed., 1992) (1986) (discussing development and application of diplomatic privileges and immunities). The sovereign immunity of warships is also a matter of customary international law which the United States codified as a matter of domestic law, stating, "a foreign state shall be immune from the jurisdiction of the courts of the United States," with exceptions for state commercial activities. 28 U.S.C. §§ 1604-1605 (1994); *see generally* A.N. Yiannopoulos, *The Need for an Admiralty Sovereign Immunity Act*, Tul. L. Rev. (1983), *reprinted in* 10A Modern Legal Systems Cyclopedia 10A.180.5, 10A.180.6 (discussing the absolute immunity of foreign warships and restrictive immunity of commercial vessels). "Warship" is defined under international law as a state's naval ship, distinctively marked, under command of a naval officer and manned by a crew under naval discipline. Convention on the High Seas, Apr. 29, 1958, art. 8, para. 2, 13 U.S.T. 2312, 450 U.N.T.S. 510; *see also* Yiannopoulos, *supra*, at 10A.180.14-.15 (discussing the immunity of hospital and other state ships).

79. 10 U.S.C. § 2734 (1994) (authorizing prompt payment of meritorious claims by foreign inhabitants for personal injury, death, and property damage caused by noncombat activities of U.S. servicemembers, whether due to negligent or criminal conduct, in order to promote friendly foreign relations).

80. Murrey, *supra* note 56, at 11 (citing U.S. Dep't of Defense, Instr. 2000.14, DOD Combating Terrorism Program Procedures, para. D.1.C (15 June 1994)).

81. The General Counsel, Department of Defense, is designated as the central repository for international agreements negotiated by its personnel, except for intelligence and standardization agreements. DOD Dir. 5530.3, *supra* note 57, at para. 5.2. The Department of State publishes an annual list of recorded international agreements to which the United States is a party. *See* Treaty Affairs Staff, Dep't of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1999 (1999), *available at* http://www.acda.gov/state (listing bilateral SOFAs in part 1 by country under "Defense," multilateral agreements in part 2 by subject, and citing sources of full texts). The Center for Law and Military Operations (CLAMO), The Judge Advocate General's School, U.S. Army, maintains a database of SOFAs and similar international agreements, available to registered Department of Defense legal personnel, linked through the Army Judge Advocate General's Corps homepage *at* http://jagcnet.army.mil/.

82. The world's legal systems fall into six basic categories: civil law, common law, customary law, Muslim law, Talmudic law, and mixed law. A civil law system, inspired by Roman law, favors codified written law. A common law system, inspired by English law and used in the United States, generally favors case law. Customary law systems may be based on practical experience or intellectual spiritual or philosophical tradition. Muslim and Talmudic systems are religious autonomous systems. The Muslim system is based predominantly on the Koran. A mixed legal system combines two or more systems. Faculty of Law, Univ. of Ottawa, Can., *World Legal Systems, at* http://aix1.uottawa.ca/world-legal-systems/eng-monde.htm (last modified Sept. 3, 1998).

83. Thailand is located in the area of responsibility (AOR) of the U.S. Pacific Command, headquartered in Hawaii. The Pacific Command AOR includes Australia, Bangladesh, Bhutan, Brunei, Burma (Myanmar), Cambodia, China, Comoros, Cook Island, Fiji, New Caledonia/French Polynesia (France), India, Indonesia, Japan, Kiribati, Laos, Madagascar, Malaysia, Maldives, Republic of Marshall Islands, Mauritius, Federated States of Micronesia, Mongolia, Nauru, Nepal, New Zealand, Niue, North Korea, Republic of Palau, Papua New Guinea, Philippines, Russia, Samoa, Singapore, Solomon Islands, South Korea, Sri Lanka, Taiwan, Thailand, Tonga, Tuvalu, Vanuatu, and Vietnam. *United States Pacific Command Area of Responsibility, at* http://www.pacom.mil/about/aor.htm (last visited Mar. 17, 2000).

84. Marine security guards and certain other military personnel such as Defense Attache Officers, are attached to American embassies and the Department of State vice the Department of Defense. They are typically covered by the embassy's Administrative and Technical (A&T) Staff agreement. An A&T agreement generally maximizes U.S. criminal jurisdiction over embassy personnel for most, if not all, offenses in the host nation. *See* Vienna Convention on Diplomatic Relations, *supra* note 66.

85. The United States maintains diplomatic relations with Thailand through an American Ambassador in Bangkok and a Thai Ambassador in Washington, D.C. Thailand, like the United States, has a constitution and three branches of government–the executive, legislative, and judicial; however, Thailand is run by a constitutional monarchy. The hereditary king is chief of state. The head of government is the prime minister, designated by the House of Representatives (*Sapha Phuthaen Ratsadon*), whose members are nationally elected by popular vote to four-year terms. The legislative branch, a bicameral National Assembly (*Rathasapha*), is composed of the House and the Senate (*Wuthisapha*), whose members are appointed to six-year terms. The monarch appoints the judicial branch–judges of the Supreme Court (*San Dika*). Thailand does not accept compulsory jurisdiction by the International Court of Justice of the United Nations. CIA, *The World Factbook, available at* http://www.odci.gov/cia/publications/factbook/th.html (last modified Jan. 1, 1999).

eign Claims Act.[88] Notwithstanding culture, Thai law permits both the Public Prosecutor and the injured person (or family) to institute criminal proceedings.[89] Individuals can prosecute criminal offenses by bringing a private criminal suit.[90] Moreover, the Public Prosecutor's decision not to prosecute will not bar the victim from pursuing criminal punishment.[91] Thus, without a SOFA, a U.S. serviceperson can be subject to Thai criminal law and procedure due to the insistence of the state or the victim (or family).[92]

The Thai Penal Code largely governs the criminal law of Thailand.[93] Section four establishes *in personam*[94] jurisdiction over offenders, stating: "Whoever commits an offence within the Kingdom shall be punished according to the law."[95] Ignorance of the law does not excuse criminal liability, thus a serviceperson could not defend on the ground that he or she had not been briefed on the application of Thai law.[96] The offense of murder can be punished by death, life imprisonment, or imprisonment for fifteen to twenty years.[97] The principle of self-defense, codified in section 67 of the Penal Code, states:

> Any person shall not be punished for committing any offence on account of necessity . . . when such person acts in order to make himself or another person to escape from imminent danger which could not be avoided by any other means, and which he did not cause to exist through his own fault; provided that no more is done than is reasonably necessary under the circumstances.[98]

Thus, Thai law permits actions in self-defense and defense of others in imminent danger, restricted by the principles of neces-

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86. *See* Faculty of Law, Univ. of Ottawa, *supra* note 82 (defining and categorizing legal systems of the world); CIA, *supra* note 85*; see also* APIRAT PETCHSIRI, EASTERN IMPORTATION OF WESTERN CRIMINAL LAW: THAILAND AS A CASE STUDY 149 (1987) (stating that Southeast Asia legal culture mixes Western and Eastern concepts of social order, including Hindu, Confucian and Buddhist ideals). Religion in Thailand is about ninety-five percent Buddhist, four percent Muslim, and less than one percent Christian, Hindu, and other religions. CIA, *supra* note 85 (1991 estimate).

87. Thai people characteristically "avoid public insistence upon their 'legal' rights [and] public litigation of their disputes in court," as public anger reflects poorly on victims, who instead may seek informal remedies such as *kha tham sop* (funeral payment) or *kha siahai* (payment for lost property or income) from the wrongdoer. An informal remedy will not preclude later criminal prosecution but will be considered favorably by a Thai court. Contrarily, in American courts, prior payments can be unfavorably considered as an admission of wrongdoing. DAVID M. ENGEL, CODE AND CUSTOM IN A THAI PROVINCIAL COURT: THE INTERACTION OF FORMAL AND INFORMAL SYSTEMS OF JUSTICE 62-63, 131 (1978). In addition, local police, "involved by law in every criminal infraction that occurs within their jurisdiction," may mediate minor criminal offenses under Sections 37-39 of the Criminal Procedure Code of Thailand. *Id.* at 94; CRIMINAL PROCEDURE CODE [hereinafter CRIM. PROC. CODE] §§ 37-39 (Thail.), *translated in* THE CRIMINAL PROCEDURE CODE OF THAILAND (1981) (trans., ed. and publisher not provided in English). Such formal settlements must be approved by the prosecutor's office; however, they will preclude later criminal prosecution. ENGEL, *supra* note 87, at 94.

88. 10 U.S.C. § 2734. *See supra* note 79 and accompanying text.

89. CRIM. PROC. CODE §§ 5, 28; PETCHSIRI, *supra* note 86, at 163. The Criminal Procedure Code was promulgated provisionally in 1896, and permanently in 1935. ENGEL, *supra* note 87, at 125.

90. CRIM. PROC. CODE § 28; ENGEL, *supra* note 87, at 103-04. To go to court, a Thai plaintiff must characterize the suit as a private criminal suit (seeking state punishment for actions detrimental to society) or as a civil suit (seeking damages), or join the two suits (with the civil portion governed by the Civil Procedure Code). CRIM. PROC. CODE § 40; ENGEL, *supra* note 87, at 103-04. The private criminal suit has been permitted since the beginning of the modern Thai judicial system primarily "because the office of the public prosecutor would [have been] perceived as a new and somewhat suspicious institution in provincial Thailand . . ." *Id.* at 105.

91. CRIM. PROC. CODE § 34. Ordinarily, if both the victim and public prosecutor institute prosecution, the cases will be joined. *Id.* § 33.

92. There are two ways to trigger the Thai criminal process: (1) the public prosecutor screens the police officer's investigation or administrative official's inquiry and then decides to institute proceedings (vice issue a non-prosecution order); or (2) the injured person institutes a charge directly with the court, which judicially screens the case by conducting a special preliminary investigation. PETCHSIRI, *supra* note 86, at 163.

93. *Id.* at 162. The Penal Code is divided into three Books: Book I contains general principles of criminal law and punishment; Book II defines specific crimes and penalties, including offenses against the royal family and against individual life and body; and Book III contains penalties for petty offenses. PENAL CODE (Thail.), *translated in* THE THAI PENAL CODE (1985) (trans., edition and publisher not provided in English) [hereinafter PENAL CODE]; PETCHSIRI, *supra* note 86, at 162-63. The Penal Code was promulgated in 1908. ENGEL, *supra* note 87, at 125.

94. "*In personam*" jurisdiction is defined as "[j]urisdiction over the person of the defendant which can be acquired only by service of process upon the defendant in the state to which the court belongs or by his voluntary submission to jurisdiction." BALLENTINE'S LAW DICTIONARY 691 (3d ed. 1969).

95. PENAL CODE § 4. Courts have territorial jurisdiction. CRIM. PROC. CODE § 22.

96. PENAL CODE § 64. Ignorance can be considered to reduce punishment. *Id.*

97. *Id.* § 288. Related crimes that might occur while carrying out the ROE or Rules of Force include assaults and some petty offenses. Called "Offences Against Bodily Harm," assaults carry punishment of up to ten years imprisonment. *Id.* §§ 295-300. Relevant "Petty Offences" include carrying arms openly and publicly, without reasonable cause, or in a religious or entertainment gathering; unnecessarily firing a gun in a place with a conglomeration of people; and drawing or showing arms in the course of a fight. These petty offenses rate a small fine, forfeiture of the arms, and/or ten days imprisonment. *Id.* §§ 371, 376, 379.

98. *Id.* § 67.

sity and proportionality. If reasonable under the circumstances, self-defense constitutes a lawful defense and requires a finding of not guilty.[99] Even if a person acts excessively, beyond reason, "if such act occurs out of excitement, fright or fear, the Court may not inflict any punishment at all."[100]

Thai criminal procedure is governed by the Criminal Procedure Code.[101] A police officer, superior administrative official, or court may issue an arrest warrant.[102] The arresting official must notify the offender of the warrant's contents and produce the warrant, if requested.[103] In addition, a search warrant may be issued in order to find the person to be arrested.[104] Thus, unless on a U.S. vessel or embassy, where the United States has sovereign immunity,[105] a military unit could be subject to search in Thailand in order to locate an alleged offender.[106] More importantly, if the person to be arrested resists, "the arrester may use all means and precautions necessary to effect the arrest according to the circumstances of the situation."[107]

Once taken into custody, an offender may be questioned at any time by the inquiring official.[108] Certain safeguards apply, though not to the level of *Miranda*[109] or Uniform Code of Military Justice, Article 31[110] warnings with which U.S. military personnel are accustomed. In Thailand, the offender must be warned that his or her words may be used as evidence against him or her at trial.[111] Furthermore, "[d]eception, threats, or promises to the alleged offender in order to induce him to make any particular statement concerning the charge against him are forbidden." Offenders may be held in custody during the inquiry into the offense, with time limits specified by law according to the gravity of the offense.[112] For murder, the Court can issue a warrant of detention for up to eighty-four days if necessary to complete the inquiry.[113] The court may authorize further detention upon entry of a charge, during a preliminary examination, or during trial.[114]

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99. *Id.* § 68. The law also provides that a person shall "not be punished for an act done in accordance with the order of an official, even though such order is unlawful, if he has the duty or believes in good faith that he has the duty to comply with such order, unless he knows that such order is unlawful." *Id.* § 70. The Code does not define "official." If "official" includes U.S. officials, an accused American serviceperson, otherwise ignorant of Thai law, might claim in defense that he or she was following the order of officials given in the ROE or Rules of Deadly Force.

100. *Id.* § 69. If a person acts "in excess of what is reasonable under the circumstances or in excess of what is necessary" without the excuse of excitement, fright or fear, the court may impose punishment, though less than what the offense prescribes. *Id.* The court also has authority to put a person under restraint in a hospital if the court opines such person has a defective mind, mental disease or infirmity, and is not safe for the public. *Id.* § 48.

101. PETCHSIRI, *supra* note 86, at 163.

102. CRIM. PROC. CODE § 58; PETCHSIRI, *supra* note 86, at 164. The warrant may issue on motion of the court or official, or upon application by another person. If based on an application, the official or court must make an inquiry and find evidence of reasonable grounds to issue the warrant. Grounds may be derived from sworn testimony or any other circumstances. CRIM. PROC. CODE § 59. Grounds for an arrest warrant include: (1) the offender has no fixed place of residence; (2) the offense is punishable by a maximum of three years imprisonment or more; (3) the offender fails to appear or absconds; or (4) the offender fails to make bond. *Id.* § 66. Arrest without a warrant can be based on: (1) a flagrant offense; (2) an attempted or intended offense; (3) reasonable suspicion of an offense and intent to abscond; or (4) the request of another person who states a regular complaint has been filed. *Id.* §§ 78, 80.

103. *Id.* § 62.

104. *Id.* § 69(4).

105. *See supra* note 78 and accompanying text.

106. "A warrant of arrest may be executed throughout the Kingdom." CRIM. PROC. CODE § 77.

107. *Id.* § 83. The Code also authorizes private persons to make arrests for certain flagrant offenses, i.e., offenses causing death or bodily harm, or when an official requests assistance. *Id.* §§ 79, 82, 267 sched. Authorized private persons may also use all means necessary to effect the arrest. *Id.* § 83. Consequently, the arrester is authorized to give first aid to the arrested person, if necessary, before delivering him to the administrative or police official. *Id.* § 84.

108. *Id.* §§ 17-18.

109. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

110. UCMJ art. 31 (2000). Under U.S. military law, before being questioned, a military suspect must be advised of the right to remain silent, that any statement could be used against the suspect at trial, of the right to consult with a lawyer (appointed or retained) before questioning, of the right to have the lawyer present during questioning, and of the right to stop answering questions at any time. *Id.*

111. PETCHSIRI, *supra* note 86, at 163.

112. CRIM. PROC. CODE § 87; PETCHSIRI, *supra* note 86, at 163. Custody shall generally be no longer than necessary to take a statement, ascertain identity and residence, and conduct an inquiry. The initial maximum period of custody, forty-eight hours, may be extended by necessity up to seven days. Beyond seven days, if a person must be held in order to complete the inquiry, the Public Prosecutor or inquiry official must ask the court to issue a warrant of detention. For petty offenses, the court may grant one remand for up to seven days; thus, a petty offender could be held up to fourteen days. For more serious offenses that carry up to ten years imprisonment, custody shall not exceed forty-eight days. For offenses that carry a maximum punishment of ten years or more, custody shall not exceed eighty-four days. CRIM. PROC. CODE § 87. Offenders may also be released with or without bail. PETCHSIRI, *supra* note 86, at 163.

When charged by the Public Prosecutor, the accused has the following rights at the preliminary examination: to appear; to receive a copy of the charge and an explanation of it; to enter a plea; to make or refuse to make a statement; and to have the assistance of counsel.[115] The accused has no right to adduce evidence during a Public Prosecutor's preliminary examination.[116] When charged by a private prosecutor, the accused has no right to appear at the preliminary examination or to make a statement; however, the accused does have the right to counsel, to cross-examine witnesses, and to receive a copy of the charge.[117] If the prosecutor establishes a prima facie case,[118] the court accepts the charge and proceeds to trial.[119]

At trial, the accused ordinarily has a right to appear[120] in open court.[121] For serious offenses such as murder, which carry a maximum sentence of ten years or more, the accused also has a right to court-appointed counsel.[122] The presumption of innocence applies, and both sides present opening statements, evidence and argument.[123] Nonetheless, "the court may at any time conduct its own investigation" and take over witness examination.[124] There is no provision in the Thai Penal Code for trial by jury. At the trial's conclusion, the court dismisses the case and releases the accused, or convicts the accused and determines appropriate punishment.[125] To determine punishment, the court may consider prior informal settlements, which do not bar prosecution, as well as extenuating circumstances.[126]

In summary, Thailand justifies homicide in self-defense, including defense of others, but provides no justification in circumstances beyond self-defense. In addition, Thai criminal procedure provides no right to trial by jury, no right to appointed counsel except at trial for the most serious offenses, and no right to be present at a preliminary examination by a private prosecutor. Consequently, if military personnel apply the Rules of Deadly Force as written, they risk a serious conviction and punishment, even death, under the Thai legal system.

Yemeni Criminal Law and Procedure

The Republic of Yemen borders the Middle Eastern countries of Oman and Saudi Arabia.[127] Located on a strategic shipping lane between the Red Sea and the Gulf of Aden,[128] Yemen has been frequented by U.S. military ships and personnel on duty in the U.S. Central Command area of responsibility.[129] As in Thailand, military personnel are subject to local criminal

113. CRIM. PROC. CODE § 87; PENAL CODE § 288.

114. CRIM. PROC. CODE §§ 71, 88. Detention shall then continue until the court issues a warrant of release in appropriate cases or issues a warrant of imprisonment. *Id.* §§ 71-73.

115. *Id.* § 165.

116. *Id.*

117. *Id.* At a "private" prosecution, "the Court has the power to hold the preliminary examination in the absence of the accused . . ." *Id.* If not in attendance, the accused may conduct cross-examination through counsel. If allowed to attend, the accused may cross-examine witnesses with or without counsel. *Id.*

118. "Prima facie case" is defined as a "case supported by sufficient evidence to warrant submission to the jury or trier of the fact and the rendition of a verdict or finding in accord therewith." BALLENTINE'S LAW DICTIONARY 987 (3d ed. 1969).

119. CRIM. PROC. CODE § 167. If there is no prima facie case, the charge is dismissed. *Id.*

120. CRIM. PROC. CODE § 172. At the beginning of trial, the charge will be read and explained, and the accused will be asked whether or not he committed the offense and what will be his defense. The accused will also be allowed to make a statement. *Id.* After that, the court can proceed in the accused's absence if: (1) the maximum punishment does not exceed three years, 5000 baht, or both, when the accused has counsel and has been excused; (2) there are several accused and the prosecutor satisfies the court that certain evidence does not involve the absent accused; or (3) there are several accused and the court decides to take evidence against each accused in the others' absence. *Id.*

121. *Id.* The court may hold the trial within closed doors in the interest of public order, good morals, or national security. CRIM. PROC. CODE §§ 177-178.

122. *Id.* § 172; PENAL CODE § 288.

123. CRIM. PROC. CODE § 174; PETCHSIRI, *supra* note 86, at 164-165.

124. PETCHSIRI, *supra* note 86, at 164-165.

125. CRIM. PROC. CODE §§ 185-186. The court must read the judgment in open court within three days after trial, unless the re is reasonable ground for an extension. CRIM. PROC. CODE § 182. The judgment is effective immediately. § 188. If more than one judge sits on a case, decision shall be given to the majority of votes. If a majority cannot be reached on any point, that point shall be decided in favor of the accused. CRIM. PROC. CODE § 184. The accused also has a right to appeal on questions of fact and/or law in certain cases and to petition the King for pardon. CRIM. PROC. CODE §§ 193, 216, 259.

126. PENAL CODE § 78; ENGEL, *supra* note 87, at 131; PETCHSIRI, *supra* note 86, at 175. In criminal cases, if the defendant has already appropriately compensated the victim, the court may nonetheless have to render a verdict, but may treat the defendant as leniently as possible. ENGEL, *supra* note 87, at 131. Extenuating circumstances permit the court to reduce punishment by no more than one half. Such circumstances include lack of intelligence, distress, good conduct, repentance, efforts to minimize consequences, surrender, information given to the court for trial, or other similar circumstance. PENAL CODE § 78.

process because the United States does not have an international agreement with Yemen retaining criminal jurisdiction.[130]

Like Thailand, Yemen has a mixed legal system.[131] Islamic law dominates; however, customary law influences rural areas.[132] The three primary sources of Yemeni law are the Koran, Sacred Law (Shari'ah),[133] and the customary, non-written law of the urf. Nomadic Bedouins and rural peasants, the majority of Yemeni population, may reject Sacred Law, common in urban areas, if it conflicts with custom. Instead, Bedouins often invoke urf.[134]

> [U]rf is based on a mystical belief in the unity of the tribal blood, meaning that members of the group are jointly liable and the blood of one allows such a member to redeem the crime of another. A person guilty of murder is not alone in his crime; adult members of his family through the fifth generation are equally responsible.[135]

To settle disputes, Bedouins use *muhakkam* (arbitrators), who usually require the guilty party to indemnify the victim.[136] The arbitrator cannot award penalties.[137] On the contrary, "Yemenite Bedouins have neither prisons nor executioners."[138] Instead of meting out punishment, Bedouins and peasants observe the law of retaliation, offering sanctuary to members considered guilty of murder in order to deter a family's revenge.[139] Yemenite peasants similarly observe customary law–"[h]onor dictates that everyone should keep his pledged word and also protect guests, refugees, route companions, or women against aggression."[140] Consequently, the risks to U.S. military personnel under Yemeni customary law among Bedouins and in rural areas may be minimal. The customary redress of indemnification, vice punishment, would be authorized for payment under the U.S. Foreign Claims Act.[141] In con-

127. Yemen is one of the poorest Arab countries; however, oil production, restructuring and foreign debt relief have improved Yemen's economic condition over the last decade. Yemenis are predominantly Arab in ethnicity and Muslim (Sunni and Shi'a) in religion. There are also African-Arabs on the west coast, South Asians in the south, and Europeans in metropolitan areas, as well as Jewish, Christian, and Hindu religions. CIA, *The World Factbook*, *available at* http://www.odci.gov/cia/publications/factbook/ym.html (last visited Jan. 1, 1999).

128. *Id.*

129. The U.S. military maintains a presence in the Central Region to "preserve U.S. interests," including the "free flow of energy resources, access to regional states, freedom of navigation, and maintenance of regional stability." U.S. Central Command, *Central Command's Theater Strategy*, *at* http://www.centcom.mil/theater_strat/theater_strat.htm (last visited Mar. 24, 2000). The U.S. Central Command Area of Responsibility includes the countries of Afghanistan, Bahrain, Djibouti, Egypt, Eritrea, Ethiopia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Oman, Pakistan, Qatar, Saudi Arabia, Seychelles, Somalia, Sudan, Tajikistan, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen. United States Central Command, *Area of Responsibility*, *at* http://www.centcom.mil/aor_pages/aor_page.htm (visited Mar. 24, 2000).

130. Marine security guards and other military personnel at embassies, attached to the Department of State, are covered by an agreement conferred as a matter of international law under the doctrine of diplomatic immunity. *See* Vienna Convention on Diplomatic Relations, *supra* note 84 and accompanying text.

131. One source categorizes Yemen's legal system as a mix of Muslim, common and civil law. *See* Faculty of Law, Univ. of Ottawa, *supra* note 82 (defining world legal systems). *But see* CIA, *supra* note 127 (describing Yemen's legal system as "based on Islamic law, Turkish law, English common law, and local tribal customary law," not civil law). The United States maintains diplomatic relations with Yemen through an American ambassador in Sanaa, the nation's capitol, and a Yemeni ambassador in Washington, D.C. The Yemeni government is composed of a President as chief of state (elected by popular vote to five-year terms), an appointed Prime Minister as head of government, a unicameral House of Representatives (elected by popular vote to four-year terms), and a Supreme Court. Yemen has not accepted compulsory jurisdiction by the International Court of Justice of the United Nations. *Id.*

132. Janice Mack & Yorguy Hakim, *The Legal System of the Yemen Arab Republic (YAR)*, *in* 5A MODERN LEGAL SYSTEMS CYCLOPEDIA 5A.50, 5A.50.13 (Kenneth Robert Redden ed., 1990) (Sept. 1995).

133. Shari'ah, including Hadilt-sayings and Sunna-practices of the prophet. *Id.*

134. *Id.*

135. *Id.* (citing Joseph Chelhod, *La societe Yemenite et le droit*, L'HOMME 72 (Apr.-June 1975) (Paris). *See also* S.H. AMIN, LAW AND JUSTICE IN CONTEMPORARY YEMEN 58 (1987).

136. Mack & Hakim, *supra* note 132 at 5A.50.13-.14.

137. *Id.* at 5A.50.14.

138. *Id.* at 5A.50.13.

139. *Id.* at 5A.50.14 (citing Chelhod, *supra* note 135).

140. *Id.*

141. 10 U.S.C. § 2734. *See supra* note 79 and accompanying text.

trast, in urban areas, the established criminal process imposes greater risks of punishment.

The Yemeni Code of Criminal Procedure covers the entire criminal process, including offenses and penalties.[142] Arrest procedures parallel those in Thailand.[143] Following arrest, the criminal process unfolds in two stages. During the first stage, which includes inquiry, investigation, inquisition, prosecution, and custody, the accused has no right of defense.[144] Trial before a one-judge court comprises the second stage.[145] The presumption of innocence applies;[146] however, under Islamic law the accused has no right to trial by jury.[147] The accused has a right to counsel, which may be appointed only for serious offenses, or he may defend himself.[148] In rendering a decision, the judge may only consider evidence introduced in open court.[149] The defendant has a right to appeal the preliminary court's decision, usually within thirty days, to the appellate court.[150]

The precise penalties and defenses for violent crime in Yemen remain unclear under available sources;[151] however, it is clear that a criminal violation could expose U.S. military personnel to severe punishment. Violent crime would most likely be dealt with under Shari'ah or customary law, depending on the location.[152] "Blood money is payable either by the culprit or by his kin or tribe . . . . Whether or not blood money or retaliation is to be invoked, the action to be taken depends upon the tribal society, represented by the Sheikh's Council, which alone is able to pronounce and execute the death sentence."[153] Capital punishment is authorized by crucifixion, stoning, decapitation, and death by firing squad.[154] Other penalties include flogging and severing the right hand and leg.[155]

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142. CODE CRIM. PROC. (Yemen), *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21. "Available sources do not disclose that there is a [substantive] criminal code in the YAR." Mack & Hakim, *supra* note 132, at 5A.50.21. Although customary law may prevail in rural areas, the government issued the Code in 1979 to provide penal justice principles "for all citizens . . . regardless of religious and tribal affiliation . . . ." *Id.* at 5A.50.18. The Criminal Procedure Code consists of four books: Book I lays out individual rights and freedoms and pretrial proceedings such as fact-gathering, crime detection, inquiry and investigation, and custody; Book II governs the trial phase, including jurisdiction, insanity, witnesses, evidence, review costs, severity of sentence, and annulment of judgements; Book III covers appeals; and Book IV covers sentence execution and abatement. H.A. AL-HUBAISHI, LEGAL SYSTEM AND BASIC LAW IN YEMEN 82-83 (1988).

143. Arrests may be made with or without a warrant in appropriate cases. The arresting official may use reasonable force to enter property if there is a strong presumption the suspect is there; however, tradition prohibits entry if women are in the house. The official may use non-excessive force, if necessary, to overcome resistance by the arrested person or others. The suspect must be notified of the reason for arrest, and that he is entitled to see the warrant and contact a lawyer or other person. The arrested person must be treated as though innocent, and kept separate from convicts. Confessions may not be extracted by bodily or mental harm. The accused may be freed on bond. CODE CRIM. PROC. arts. 2, 99-100; Mack & Hakim, *supra* note 132 at 5A.50.19-.20; AMIN, *supra* note 134, at 60-62.

144. AL-HUBAISHI, *supra* note 142, at 83.

145. One-judge preliminary courts have jurisdiction in district capitals and counties. Mack & Hakim, *supra* note 132, at 5A.50.16. The Yemeni government originally established the judiciary and court structure with the Law of Judicial Authority No. 23 of February 21, 1976, subsequently replaced by No. 28 of September 20, 1979. *Id.* at 5A.50.14 (citing CHARLES S. RHYNES, LAW AND JUDICIAL SYSTEMS OF NATIONS 842-843 (1978); Tashri'at 167 (1980) (Yemen legislation in Arabic)). The Law established a High Court, Appellate Courts, Preliminary Courts, and Prosecuting Department. Mack & Hakim, *supra* note 132, at 5A.50.14-.16. Citizens and agencies may also complain directly to the Shari'ah Grievance Board. *Id.* at 5A.50.17-.18.

146. YEMEN CONST. art. 24 (1974), *noted in* Mack & Hakim, *supra* note 132, at 5A.50.18, *and* AL-HUBAISHI, *supra* note 142, at 42; CODE CRIM. PROC. art. 2, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.19-.20.

147. *Id.* 5A.50.19.

148. *Id.* at 5A.50.20; AMIN, *supra* note 135, at 62-63. He has a right "to present his defense and to be the last one to speak de jure on his own behalf." Mack & Hakim, *supra* note 132, at 5A.50.20-.21. The court must also provide an Arabic translator to a foreign accused, if necessary, to protect his right to know what is said at trial. CODE CRIM. PROC. art. 278, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.20. The accused also enjoys confidentiality with counsel. CODE CRIM. PROC. arts. 137, 156, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.20.

149. CODE CRIM. PROC. art. 303, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.19.

150. CODE CRIM. PROC. art. 247, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21; CIVIL AND COMMERCIAL PROCEDURE CODE art. 198 (Yemen), *noted in* Mack & Hakim, *supra* note 132, at 5A.50.17 (stating that Judicial Circular No. 13 of April 19, 1980, clarified ambiguities in the Code and specified appeal time limits). At the appellate court, three magistrates conduct proceedings and rule by majority vote. Mack & Hakim, *supra* note 132, at 5A.50.15.

151. AMIN, *supra* note 134, at 63; Mack & Hakim, *supra* note 132 at 50A.50.22; AL-HUBAISHI, *supra* note 142, at 111-112.

152. Mack & Hakim, *supra* note 132, at 50A.50.22.

153. *Id.* (citing Chelhod, *supra* note 135, at 82).

154. CODE CRIM. PROC. arts. 407-413, *noted in* Mack & Hakim, *supra* note 132, at 50A.50.21; AMIN, *supra* note 134, at 63. Sexual offenses carry severe penalties under Islamic law. The crimes of adultery, beastiality, homosexuality, and false accusation of unlawful intercourse are punishable by death. Mack & Hakim, *supra* note 132, at 50A.50.21. The Koran forbids alcohol consumption; public drunkenness is thus punishable by six months in jail and possible flogging. *Id.* Capital punishment and limb severance must be approved by the President, subject to pardon. CODE CRIM. PROC. arts. 339, 409, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21.

Obviously, military personnel should not be exposed to these potentially extreme consequences for violating the law of Yemen, or any other country. Nonetheless, the military rules purport to authorize force without examining foreign law, even in countries without SOFAs. As a result, military personnel are currently exposed to extreme penalties if they follow the military rules as written.

Domestic Jurisdictions of the United States

The risk of severe penalties such as crucifixion and limb severance[156] do not exist in American jurisdictions. Nonetheless, in domestic activities, the military must still operate with the utmost caution. As stated by the Eighth Circuit:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights.[157]

As stated earlier, the military rules are not law. Neither the Standing ROE nor Rules of Deadly Force fall under the Supremacy Clause to preempt state law on the application of force.[158] For example, while transporting equipment along state highways, is a sentry authorized to use deadly force to prevent someone from stealing inherently dangerous weapons or ammunition? The Rules of Deadly Force suggest he is so authorized;[159] however, state law does not recognize adherence to the military rules as a defense to homicide.

American jurisdictions each contain their own legislative and judicial laws on self-defense. Some impose a duty to retreat before resorting to deadly force, while others grant a right to stand ground. A sample of two service-populated jurisdictions, Texas and California law, shows critical distinctions between state law and the Defense Department's rules justifying force. In some cases, using force under a military rule would violate state law.

Texas Law of Self-Defense

In Texas, a "person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force."[160] Texas imposes a duty to retreat before resorting to deadly force, unless "a reasonable person in the actor's situation would not have retreated."[161] A person may then use deadly force "to the degree he reasonably believes the deadly force is immediately necessary: (A) to protect himself against the other's use or attempted use of unlawful deadly force; or (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery."[162]

The Texas duty to retreat could critically restrict military defensive action under both the Standing ROE and Rules of Deadly Force. "The [Texas] statute requires that the defendant retreat, if he can do so safely, before taking human life."[163] While the military rules permit only force deemed *necessary*, the military rules do *not* contemplate withdrawal.[164] Without specific training, most military personnel would not consider

155. CODE CRIM. PROC. arts. 415, 418, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21; AMIN, *supra* note 134, at 63.

156. CODE CRIM. PROC. arts. 407-413, 415, 418, *noted in* Mack & Hakim, *supra* note 132, at 5A.50.21.

157. Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985) (commenting on the threat to constitutional government inherent in military enforcement of civilian law arising during civil disorder at Wounded Knee, South Dakota, where plaintiffs claimed damages for unreasonable search, seizure and confinement). Interestingly, the Chief of Staff of the Army's 82d Airborne Division advised the Department of Justice to adopt more conservative Rules of Engagement against civilians during the occupation of Wounded Knee in 1973. Initially ordered to Wounded Knee to advise the Department of Defense whether federal troops should assist law enforcement, Colonel Volney Warner "counseled Department of Justice officials on the scene to substitute a shoot-to-wound policy for a then-existing shoot-to-kill policy, and suggested the use of other Rules of Engagement which were a part of a military contingency plan for civil disorders." U.S. Marshals and FBI agents adopted his advice. United States v. McArthur, 419 F. Supp. 186, 192, n.2 (D.N.D. 1976).

158. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

159. *See supra* note 52 and accompanying text.

160. TEX. PENAL CODE ANN. § 9.31(a) (Vernon 1999). "'Reasonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42). "Unlawful" includes "what would be criminal or tortious but for a defense not amounting to justification or privilege." *Id.* § 1.07(a)(48).

161. *Id.* § 9.32(a)(2). The duty to retreat does not apply in one's home against an intruder. *Id.* § 9.32(b). *See* Fielder v. State, 683 S.W.2d 565, 592 (Tex. Crim. App. 1985) (judging duty to retreat by an objective standard).

162. TEX. PENAL CODE ANN. § 9.32(a)(3).

163. *Fielder*, 683 S.W.2d at 592.

retreat–an action that runs counter to training and indoctrination to accomplish the mission. Nonetheless, in other ways, Texas law complements the Standing ROE, matching concepts of hostile act and intent with "use or attempted use of unlawful force," and incorporating principles of necessity and proportionality.[165] Texas law also parallels the military rule that authorizes deadly force to prevent violent offenses; however, Texas does *not* permit deadly force to prevent theft or sabotage of inherently dangerous property or vital assets.[166] Such deadly force would arguably violate Texas law.

California Law of Self-Defense

California generally authorizes defensive action when someone is in "imminent peril of death" or serious bodily harm.[167] California imposes no duty to retreat–persons have a right to stand their ground, unless they initiated the affray.[168] In addition, like the Standing ROE, California has a limited right to pursue in self-defense.[169] However, like Texas, California has no equivalent to the military rules that authorize deadly force to protect dangerous property or vital assets. Thus, when armed guards transport weapons along California highways, they have no right, under California law, to use deadly force to prevent theft of those weapons.

Specifically, California law justifies homicide for self-defense, defense of others, defense of habitation,[170] violent-felon apprehension,[171] riot suppression, and peacekeeping.[172] The law also justifies homicide by "public officers and those acting by their command" in the discharge of legal duty, to retake escaped felons or to arrest fleeing felons.[173] Judicial interpretation limits the Code's justifications for homicide.[174] Similar to the Standing ROE, California case law employs the principles of proportionality and necessity to limit the degree of force one may use in self-defense. Resistance must be propor-

164. *See* CJCS INSTR. 3121.01A, *supra* note 15, at encl. A, para. 8.

165. TEX. PENAL CODE ANN. § 9.31(a).

166. *Id.* § 9.32(a)(3).

167. People v. Keys, 145 P.2d 589, 596 (Cal. Ct. App. 1944).

168. *See* People v. Collins, 11 Cal. Rptr. 504, 513 (Cal. Ct. App. 1961). "A person who without fault on his part is exposed to sudden felonious attack need not retreat . . . . [H]e may stand his ground and . . . he may pursue his assailant until he has secured himself from danger . . . ." *Id.* The right to stand one's ground in self-defense developed from case law and does not appear in the Penal Code.

169. *See id.* at 513 (upholding the right to pursue a felonious assailant, if reasonably necessary, until one is secure from danger, *even though* safety may be gained more easily by flight or withdrawal). However, "[w]hen that danger has passed and when the attacker has withdrawn from combat, the defendant is not justified in pursuing him further and killing him, because the danger is not then imminent . . . ." *Keys*, 145 P.2d at 596.

170. *See* People v. Ceballos, 526 P.2d 241, 242-43, 246, 250 (Cal. 1974). The court limited the defense of habitation to burglaries which reasonably create a fear of death or serious bodily harm. The court upheld conviction for assault with a deadly weapon of a defendant who had set a trap gun in his garage, injuring the victim, an intended burglar, while the premises were vacant. *Id.*

171. The courts distinguish between violent and nonviolent felonies, prohibiting the use of deadly force against a fleeing nonviolent-felony suspect. *See* Kortum v. Alkire, 138 Cal. Rptr. 26, 30-31 (Cal. Ct. App. 1977). The court held that Section 197 of the Penal Code prohibits deadly force "against a fleeing felony suspect unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." *Id.*

172. CAL. PENAL CODE § 197 (Deering 1999). Section 197 justifies homicide in the following situations:

> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
> 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
> 3. When committed in the lawful defense of such person, or of a [household member], when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; . . . or,
> 4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any [violent] felony committed, or in lawfully suppressing an riot, or in lawfully keeping and preserving the peace.

Id. Justification under Section 197 will also shield the defendant from a civil suit for money damages for wrongful death. *See* Gilmore v. Superior Court, 281 Cal. Rptr. 343, 345-46 (Cal. Ct. App. 1991). "[T]here is no civil liability for a justifiable homicide . . . [which] is, in legal effect, a privileged act." *Id.* at 346.

173. CAL. PENAL CODE § 196. U.S. armed forces are not defined as "public" or "peace officers." *Id.* §§ 830.1-.2.

174. *See supra* notes 168-71 and accompanying text. The California Civil Code also states: "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a [relative or household member], or guest," but does not authorize deadly force solely for the protection of property. CAL. CIV. CODE § 50 (Deering 1999); *see also Ceballos*, 526 P.2d at 246 ("[T]here may be no privilege to use a deadly mechanical device to prevent burglary of a dwelling house in which no one is present.").

tional to the threat.[175] Force must be only that necessary to meet the danger,[176] and it must stop once the attacker is disabled.[177] For example, a California court refused to hold as a matter of law that deadly force was justified against an unarmed assailant. Although the defendant had the right to defend himself, he did not believe the assailant intended to use a weapon; thus, his force in self-defense went beyond what was necessary.[178]

Echoing the military rule on crime prevention, the California Supreme Court clearly limited the right to use deadly force in felony-resistance cases to violent offenses such as murder, mayhem, rape, robbery, and some burglaries.[179] Similarly, California courts[180] have incorporated the U.S. Supreme Court decision that using deadly force to apprehend felons requires a threat of death or serious injury.[181] Overall, California imposes an objective standard in self-defense–an actor must actually and reasonably believe in the need to defend.[182] To achieve "perfect self-defense," the fear must reasonably be of imminent death or great bodily harm, judged under the totality of the circumstances.[183]

Thus, unlike Texas, California imposes no duty to retreat before resorting to self-defense.[184] On the other hand, similar to Texas, California provides no equivalent to the military rules that authorize deadly force to protect dangerous property and vital assets. Consequently, without modifying the rules to comply with state law, military personnel may become criminal defendants in state court.

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175. *See* People v. Lopez, 23 Cal. Rptr. 532, 538 (Cal. Ct. App. 1962) (holding that "the degree of resistance" must appear not clearly disproportionate to the injury threatened).

176. *See* People v. Harris, 97 Cal. Rptr. 883, 885 (Cal. Ct. App. 1971) (holding that "use of excessive force destroys the justification," and justifying the use of only such force as is, or reasonably appears to be, necessary to resist the harm).

177. *See* People v. Lucas 324 P.2d 933, 936 (Cal. Ct. App. 1958) ("The danger which justifies homicide must be imminent . . . . [M]easures of self-defense cannot continue after the assailant is disabled . . . .").

178. *See* People v. Clark, 181 Cal. Rptr. 682, 687-88 (Cal. Ct. App. 1982).

179. *See Ceballos*, 526 P.2d at 256-46.

180. California cases have turned on the facts surrounding both the crime and the arrest. For example, one court exonerated a man who killed the fleeing nighttime burglar of his son's unoccupied residence. The court held that Section 197(4), *supra* note 172, applies at least to crimes that were felonies at common law, e.g., nighttime residential burglaries, but limited its interpretation to offenses that precede the U.S. Supreme Court's decision in *Tennessee v. Garner,* 471 U.S. 1 (1985)). *See* People v. Martin, 214 Cal. Rptr. 873, 881-82 (Cal. Ct. App. 1985) (affirming trial court that set aside manslaughter charge, finding defendant's gun use necessary to apprehend the victim-burglar under the circumstances, but stating that, "necessarily limits the scope of justification for homicide under section 197"). In contrast, the court denied the felony apprehension defense to a defendant who killed a burglar two days after the crime, stating the burglary of an unoccupied apartment did not threaten death or serious bodily harm. *See* People v. Quesada, 169 Cal. Rptr. 881, 883-85 (Cal. Ct. App. 1980); *see also* People v. Piorkowski, 115 Cal. Rptr. 830, 833-34 (Cal. Ct. App. 1974) (limiting the justification to use deadly force to make an arrest, under Section 197 of the Penal Code, to felonies which threaten death or great bodily harm).

181. In *Tennessee v. Garner,* 471 U.S. 1, the U.S. Supreme Court held:

> [A] Tennessee statute permitting police to use deadly force to prevent escape of all felony suspects whatever the circumstances, is constitutionally unreasonable. It noted that insofar as the statute authorizes use of such force against apparently unarmed, nondangerous suspects it violates the Fourth Amendment [of the U.S. Constitution on unreasonable searches and seizures]. The court held that deadly force may not be used unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the pursuing officer or others.

Martin, 214 Cal. Rptr at 882 (citing *Garner*, 471 U.S. at 2-4).

182. *See* People v. Humphrey, 921 P.2d 1, 6 (Cal. 1996). An honest but unreasonable belief, called "imperfect self-defense," nonetheless reduces murder to manslaughter, as the criminal intent of malice is deemed lacking. *Id.*

183. *See id.*; People v. Lucas, 324 P.2d 933, 936 (Cal. Ct. App. 1958) (fearing that danger will *become* imminent is insufficient); People v. Turner, 195 P.2d 809, 814 (Cal. Ct. App. 1948). "The circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." CAL. PENAL CODE § 198 (Deering 1999).

184. *Compare* People v. Collins, 11 Cal. Rptr. 504, 513 (Cal. Ct. App. 1961), *with* TEX. PENAL CODE ANN. § 9.32(a)(2) (Vernon 1999).

Jurisdiction-Specific Standards

To comply with local law, the Department of Defense should promulgate jurisdiction-specific modifications to the military rules. For example, if using deadly force to prevent theft of inherently dangerous property would violate foreign law and risk foreign criminal jurisdiction, then a modification to the Rules of Deadly Force should apply in that country. Alternatively, the Department of Defense should articulate the legal basis and policy for authorizing violations of state and foreign law. The on-scene commander should not be expected to determine U.S. foreign or domestic policy in this regard, nor make ad hoc adjustments to the governing rules after hasty interagency coordination. More importantly, in a foreign jurisdiction, the on-scene commander may not have authority to negotiate with local authorities. An "international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State."[185] Many international agreements are classified; the fact that some agreements even exist is classified. Moreover, these sensitive agreements are not ordinarily distributed to the units that are expected to interpret and apply them.[186]

Currently, standard legal review procedures are in place for operation plans.[187] However, these review procedures do not cover the breadth of military activity that occurs outside of an operation plan. Standard legal review procedures are also in place to maximize compliance with environmental law in foreign jurisdictions.[188] Similarly, standard legal review procedures should be in place to maximize compliance with local law on the use of force. Such procedures are not established within the Standing ROE or the Rules of Deadly Force.

The Standing ROE refer to "legal considerations" in the "Mission Analysis" task step of the ROE process, stating:

> Review higher headquarters planning documents for political, military, and legal considerations that affect ROE. Consider tactical or strategic limitations on the use of force imposed by . . . [i]nternational law, . . . U.S. domestic law and policy [and host nation] law and bilateral agreements with the United States.[189]

However, this passing reference to law incorrectly suggests that the law imposes "tactical or strategic" legal limitations; that the limitations, if any, will appear in higher planning documents; and that international, domestic, and host nation law are merely legal "considerations" instead of binding law that may trump the military rules. Similarly, the Rules of Deadly Force make only a passing reference to the law, stating, "consult as appropriate with the DOD [or Component] General Counsel . . . for *legal sufficiency* of use of deadly force implementing guidance."[190] Thus, neither the Standing ROE nor Rules of Deadly Force establish legal review procedures to ensure compliance with governing law.

To determine jurisdiction-specific standards that comply with law, this article proposes a five-step legal review process:

1. Determine the governing law in the jurisdiction.
2. Analyze the legal basis for use of force.
3. Compare the law to the applicable military rules.

185. DOD DIR. 5530.3, *supra* note 57, at para. 7.1 (citing the Case-Zablocki Act, 1 U.S.C. § 112b (1994)); *see* 22 C.F.R. pt. 181 (1985) (implementing the Case-Zablocki Act "on the reporting to Congress and the coordination with the Secretary of State of international agreements of the United States.").

186. *See* Murrey, *supra* note 56 (stating that a "classified agreement makes it difficult for the personnel deployed to or stationed in these countries to know the limitations of their force protection authority.").

187. *See* CHAIRMAN, JOINT CHIEFS OF STAFF MANUAL 3141.01A, PROCEDURES FOR THE REVIEW OF OPERATIONS PLANS, encl. A, 13, 32-34, 36, 94, 110 (15 Sept. 1998) (reviewing whether the plan complies with U.S. domestic, international and host nation law, and whether it resolves status of forces issues).

188. The environmental law compliance standards provide a useful analogy to jurisdiction-specific legal standards. By incorporating Department of Defense guidance, host nation standards, and international agreements, theater commanders have to issue country-specific requirements in environmental law to establish fundamental compliance. Specifically, in *Federal Compliance with Pollution Control Standards*, the President mandates compliance with host nation environmental standards at overseas installations. Exec. Order No. 12,088 (1978); *see also* U.S. DEP'T OF DEFENSE, DIR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) (implementing Executive Order 12,088). Under the Executive Order, Environmental Executive Agents (EEAs) have ultimate regulatory authority for military components in foreign countries. The EEA must issue, for each country assigned to it, substantive provisions in Final Governing Standards (FGS). The Order also requires the publication of a baseline guidance document. The Department of Defense thus published the Overseas Environmental Baseline Guidance Document (OEBGD), containing objective criteria and management practices. The OEBGD provides environmental compliance standards to combatant commands, establishing minimum environmental protection criteria for military installations worldwide. "In cases of conflicting requirements, the standard that is more protective of human health and the environment shall apply." Harry M. Hughes, *Environmental Law for Overseas DOD Installations*, *at* http://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENVLAW/INTERNATIONAL/primover.html (last visited Aug. 23, 1999).

189. CJCS INSTR. 3121.01A, *supra* note 15, at encl. L, para. 2b(1)(c). The ROE appendix on *Defense of U.S. Nationals and Their Property at Sea* also makes a passing reference to compliance with law, stating, "Defense of U.S. nationals and their property [at sea] will conform with US and international law." *Id.* at encl. B, app. A, para. 2b. However, even this reference fails to address the applicability of foreign domestic law in a host nation's territorial waters. *See id.* at encl. B, app. A. The ROE appendix on *Noncombatant Evacuation Operations* similarly states, "NEOs will be conducted in accordance with applicable US and international law," failing to address the applicability of foreign domestic law, especially in a permissive environment where the host nation government is still in control. *Id.* at encl. G, para. 2.

190. DOD DIR. 5210.56, *supra* note 16, at encl. 2, E2.1.1 (emphasis added).

4. Conduct a risk analysis.
5. Modify the rules to comply with law, or assume some risk.

Determine the Governing Law in the Jurisdiction

The first step in the analysis is to determine what law governs in a particular jurisdiction. In a foreign jurisdiction, the primary sources of law are foreign law–the domestic law of the host nation–and international law. If, however, judicial and police infrastructure in the host nation has collapsed, leaving no method to *impose* foreign law, then foreign law would not, in actuality, govern the jurisdiction. In such a case, international law and United States law would govern U.S. military forces. Next, in an American jurisdiction, the primary sources of law are the domestic law of the state or territory, and U.S. federal law. Finally, in any jurisdiction, U.S. military law applies to the actions of military forces.[191]

Analyze the Legal Basis for the Use of Force

The second step is to analyze the governing law on justifications for the use of force. The international law of the right to self-defense applies in a foreign jurisdiction. However, as noted earlier, the United States view of anticipatory self-defense under the U.N. Charter and customary international law, and the ROE's definitions of hostile act, hostile intent and the right to pursue, may go beyond the self-defense views held by some countries. Accordingly, the host nation's view of the international right of self-defense should be examined in order to determine whether differing views are of any consequence under the host nation's criminal law and procedure.

In a foreign jurisdiction, this step requires analyzing not only the host nation's substantive criminal law, but also the legal system and procedure.[192] A foreign legal system may be based on codes, cases, custom, religion, or a mixture of these elements. In addition, foreign criminal procedure may accord substantially fewer rights than American procedure, increasing the risk to personnel suspected of violating the law.

In American jurisdictions, due process under the Constitution will be standard; however, substantive distinctions on the duty to retreat must be analyzed, in addition to the justifications for the use of force in self-defense, defense of others, crime prevention, felony-arrest, and other situations. Furthermore, if the military is conducting an authorized activity in support of law enforcement, the analysis should determine whether military personnel would be considered "public" or "peace officers" under state law, with different justifications to use force that should be analyzed.[193]

In addition to the defenses of self-defense and defense of others, military criminal law allows defenses of "legal duty" and "obedience to orders" as justification for homicide and assault.[194] However, to meet the justification of "legal duty," the duty must be "legal" and "imposed by statute, regulation, or order."[195] Similarly, the defense of "obedience to orders" fails if the accused subjectively or objectively knew the orders were unlawful.[196] Consequently, if the Standing ROE or Rules of Deadly Force are not grounded in law, a serviceperson could be held liable under the Uniform Code of Military Justice for exceeding the law.[197]

191. *See* UCMJ art. 2 (2000).

192. Country law studies must already be maintained by "the designated commanding officer for such country, " with copies forwarded to the Judge Advocates General of the Military Services. DOD DIR. 5525.1, *supra* note 57, at paras. 4.4.1-.2. "This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the State courts of the United States." *Id.*

193. "Police officers are constitutionally subjected to many burdens and restrictions that private citizens are not." Kortum v. Alkire, 138 Cal. Rptr. 26, 30 (Cal. Ct. App. 1977) (citing Kelley v. Johnson, 425 U.S. 238 (1976)).

194. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(c)-(e) [hereinafter MCM]. Under military law, homicide and assault are justified in self-defense and defense of another based on a reasonable apprehension that death or grievous bodily harm is "about to be inflicted" wrongfully. *See id.* R.C.M. 916(e).

195. *Id.* R.C.M. 916(c), discussion. "A death, injury, or other act caused or done in the proper performance of a *legal* duty is justified and not unlawful . . . . The duty may be imposed by statute, regulation, or order." *Id.* (emphasis added).

196. *Id.* R.C.M. 916(d). "It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful." *Id.*

197. If a killing or assault under the ROE or Rules of Deadly Force is unlawful, and the defenses of self-defense, defense of others, legal duty, or obedience to orders do not apply, a military member could be found guilty of murder or assault. *See* UCMJ arts. 118(b), 128; MCM, *supra* note 194, R.C.M. 916(c)-(e). Under the UCMJ, the elements of murder with "[i]ntent to kill or inflict great bodily harm" are: "(a) That a certain named or described person is dead; (b) That the death resulted from the act or omission of the accused; (c) That the killing was unlawful; and (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person." UCMJ art. 118(b)(2). The elements of "[a]ssault consummated by a battery" are "(a) That the accused did bodily harm to a certain person; and (b) That the bodily harm was done with unlawful force or violence." *Id.* art. 128(b)(2). Murder with intent to kill or inflict great bodily harm carries "such punishment other than death as a court-martial may direct," including life imprisonment, a dishonorable discharge (for enlisted) or dismissal (for officers), and forfeiture of all pay and allowances. *Id.* art. 118(e). Assault carries a maximum punishment of dishonorable discharge, total forfeitures, and ten years confinement (for "[a]ssault in which grievous bodily harm is intentionally inflicted . . . with a loaded firearm"). *Id.* art. 128(e).

Compare the Law to the Applicable Military Rules

The third step is to compare the governing law to the applicable military rules–the Standing ROE and the Rules of Deadly Force. Rule by rule, and definition by definition, this step must find the common ground between the law and the military rules. More importantly, this crucial step must determine where the military rules would violate the law, subjecting military personnel to criminal liability. In a foreign jurisdiction, this step may include the difficult task of interpreting foreign terms that have no English synonym, or distinguishing the real-time differences between "immediate" and "imminent."

If military forces are operating under the Standing ROE, that is, in an overseas operation or contingency (or attack on the United States), then the ROE's concepts of hostile act, hostile intent, and actions in self-defense, such as the right to pursue, should be compared to: (1) the host nation's concept of actions authorized under the inherent right of self-defense under international law; and (2) the justifications for the use of force embodied in the host nation's criminal law and procedure. Even though the United States may not cater to a host nation's more restrictive view of self-defense, this detailed comparison will enable an accurate risk analysis in the next step.

If the Rules of Deadly Force apply, each of the six rules contained therein should be compared to the justifications authorizing the use of force under local law. In Thailand, Yemen, Texas and California, the two rules that authorize deadly force in defense of property (inherently dangerous property and vital assets)[198] commonly violate the law. On the other hand, the rules that authorize deadly force in defense of self and others and to prevent serious crime establish common ground from which to make adjustments, for example, to the duty to retreat. Those jurisdictions did not expose a trend in laws regarding the last two rules on arrest and escape. Thus, like the rest of the Rules of Deadly Force, they should be compared to the law of the jurisdiction.

Conduct a Risk Analysis

The fourth step in establishing jurisdiction-specific standards is to conduct a risk analysis in cases where the military rules would violate the law. Obviously, if the rules comply with the law, there is no risk of criminal liability in following the rules; thus, no risk analysis or modification of the rules is required–the analysis is complete. However, if step three discloses that the military rules, without modification, would violate the law, then the analysis continues with step four. In this step, the interests in following the military rules that violate law must be weighed against the risks of not following the law.

Besides promoting an aggressive right of self-defense, the military rules incorporate interests in matters of national security, as evidenced by the authorization to use deadly force to protect vital national security assets. In addition, the authorization to use deadly force to protect inherently dangerous property advances an interest in force protection–arguably an extension of the right of self-defense. Consequently, the importance of protecting such interests must be weighed carefully against the risks of not following the law.

The greatest peril in not conforming the military rules to the local law is faced by individual military personnel. Disregarding the law exposes them to criminal liability, prolonged incarceration, and severe penalties. In countries where the United States has an international agreement that preserves U.S. criminal jurisdiction, or in countries that historically waive their right to criminal jurisdiction, the risk to military personnel is minimal. Nonetheless, even in these countries, failing to follow the law can jeopardize diplomatic relations. In American jurisdictions, in addition to exposing military personnel to criminal liability, violating the law contradicts the principle that "[c]ivilian rule is basic to our system of government."[199] Consequently, in American jurisdictions, any interest in following military rules will rarely, if ever, outweigh the risk of not following domestic law.

Modify the Rules to Comply with the Law, or Assume Some Risk

The final step in the analysis is to modify the military rules, if necessary, to comply with the law.[200] This final step will ensure that military personnel will not go to jail for following the military rules governing the use of force. Alternatively, if the law will not be followed, then appropriate authority should articulate the underlying policy. Such a policy implies that U.S. interests outweigh the risks of not following the law; that the risks will be assumed; and that the risks, including criminal liability and punishment, will be passed on to military individuals.[201]

198. *See supra* notes 51-52 and accompanying text.

199. Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985).

200. Applying this five-step analysis to the jurisdictions of Thailand and California, appendices A and B provide examples of jurisdiction-specific standards. The appendices assume that the Rules of Deadly Force, vice ROE, apply, and that the governing law of the jurisdiction will be followed.

201. Such a policy decision would raise another issue not addressed here—whether military personnel would have a legal obligation to follow military rules that contradict the law. As stated in the introduction, this article does not explore the issue of whether the *individual right* to use force under military rules imposes an *individual obligation* to use force under the military rules.

Conclusion

Confident trigger-pulling and equally confident trigger-restraint should remain high priorities in maintaining a force in readiness. Consequently, there should be no doubt in the minds of military personnel about when they can, should, and must, pull the trigger. In today's diverse military operations other than war[202] and terrorist threat environment, confidence includes knowing they will *not* be incarcerated for appropriately applying the military rules on the use of force. American military personnel unselfishly lay down their lives in the line of duty. "This Nation owes them the best protection we can provide."[203] In doing the right thing–protecting the liberty of others–they should not risk losing their own liberty in a foreign or domestic jail.

Therefore, jurisdiction-specific standards on the use of force should comply with the law to the maximum extent practicable without forfeiting the inherent right of self-defense. In any area where the military conducts activity, the law of the local jurisdiction ordinarily applies.[204] The Standing ROE and Rules of Deadly Force merely establish policy; they do not supersede law. Nonetheless, they imperil the liberty of military personnel by authorizing force that does not comply with the law, exposing them to criminal liability and severe penalties. Consequently, legal review procedures should determine the legal basis for the use of force, compare the law to the military rules, and modify the rules accordingly. Alternatively, if the rules do not incorporate the law, then U.S. policy should articulate the fact that certain U.S. interests outweigh the risks of violating the law. More importantly, the Department of Defense should inform military personnel of the personal criminal liability risks imposed on them by a policy that does not follow the law.

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202. *See* CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3500.01A, JOINT TRAINING POLICY FOR THE ARMED FORCES OF THE UNITED STATES, para. 4 (1 Jul. 1997). "Although preparing US forces to fight and win wars remains the highest national military training priority, people and units must be prepared for [Military Operations Other Than War] . . . . Skills required for MOOTW missions . . . are different than those required for warfighting." *Id.*

203. Memorandum, General Wayne A. Downing, Director, Downing Assessment Task Force, The Pentagon, to Secretary of Defense, subject: Report of the Assessment of the Khobar Towers Bombing 1 (Aug. 30, 1996).

204. In some circumstances, the governing law may be disregarded with impunity, such as when the local infrastructure has collapsed and the government is unable to govern, the United States has entered the territory by force, or an international agreement grants criminal jurisdiction to the United States.

Appendix A

Standard Rules for the Use of Deadly Force by DOD Personnel Engaged in Law Enforcement and Security Duties in Thailand

The legal authority for the use of force in this jurisdiction is the inherent right of self-defense under Article 51 of the United Nations Charter, and Section 67 of the Thai Penal Code:

> Any person shall not be punished for committing any offence on account of necessity . . . when such person acts in order to make himself or another person to escape from imminent danger which could not be avoided by any other means, and which he did not cause to exist through his own fault; provided that no more is done than is reasonably necessary under the circumstances.

Based on the governing law, the Modified Rules for the Use of Deadly Force in this jurisdiction are as follows:

> These rules do not limit your inherent right to use all necessary means available and to take all appropriate action in self-defense of yourself, your unit, and other U.S. forces in the vicinity.
>
> Definition–Deadly force is force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm.

Deadly force is justified only under conditions of extreme necessity and as a last resort when *all lesser means have failed or cannot reasonably be employed*. Then deadly force is justified when it reasonably appears necessary in the following circumstances:

> 1. *In Self-defense and Defense of Others.* To protect security or law enforcement personnel or others who are reasonably believed to be in imminent danger of death or serious bodily harm.
> 2. *To Prevent Serious Offenses Against Persons*. To prevent commission of a serious offense involving violence and threatening death or serious bodily injury to another, such as murder, armed robbery, or aggravated assault.

When using force:

> A. Use only the minimum amount of force necessary, applying a continuum of force including verbal commands, contact control, compliance techniques, and defensive tactics if possible, before resorting to deadly force.
> B. Warning shots are prohibited for safety reasons.
> C. If you must fire, fire with due regard for the safety of innocent bystanders.
> D. If you must fire, fire with the intent of rendering the person incapable of continuing the activity or behavior which prompts you to fire.
> E. Holstered firearms should not be unholstered unless there is a reasonable expectation that deadly force may be necessary.

The killing of an animal is justified for self-defense, or to protect others from serious injury.

Appendix B

Standard Rules for the Use of Deadly Force By DOD Personnel Engaged in Law Enforcement and Security Duties in California

The legal authority for the use of force in this jurisdiction is the California Penal and Civil Codes and California Supreme Court case law.

I. Under Section 197 of the Penal Code, homicide is justified in the following situations:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
3. When committed in the lawful defense of such person, or of a [household member], when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; or,
4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any [violent] felony committed, or in lawfully suppressing an riot, or in lawfully keeping and preserving the peace.

II. Under Section 50 of the California Civil Code, "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a [relative or household member], or guest."

III. Under California Supreme Court case law, People v. Ceballos, 526 P.2d 241 (Cal. 1974):

1. Deadly force is not authorized solely for the protection of property.
2. Homicide in defense of habitation is justified only in the case of burglaries that reasonably create a fear of death or serious bodily harm.

Based on the governing law, the Modified Rules for the Use of Deadly Force in this jurisdiction are as follows:

These rules do not limit your inherent right to use all necessary means available and to take all appropriate action in self-defense of yourself, your unit, and other U.S. forces in the vicinity.

Definition–Deadly force is force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm.

Deadly force is justified only under conditions of extreme necessity and as a last resort when *all lesser means have failed or cannot reasonably be employed*. Then deadly force is justified when it reasonably appears necessary in the following circumstances:

1. *In Self-defense and Defense of Others*. To protect security or law enforcement personnel or others who are reasonably believed to be in imminent danger of death or serious bodily harm.
2. *To Prevent Serious Offenses Against Persons*. To prevent commission of a serious offense involving violence and threatening death or serious bodily injury to another, such as murder, armed robbery, or aggravated assault.
3. *Apprehension or Arrest*. To arrest, apprehend or prevent the escape of a person who, there is probable cause to believe, committed an offense described above.

When using force:

A. Use only the minimum amount of force necessary, applying a continuum of force including verbal commands, contact control, compliance techniques, and defensive tactics if possible, before resorting to deadly force.
B. Warning shots are prohibited for safety reasons.
C. If you must fire, fire with due regard for the safety of innocent bystanders.
D. If you must fire, fire with the intent of rendering the person incapable of continuing the activity or behavior which prompts you to fire.

E. Holstered firearms should not be unholstered unless there is a reasonable expectation that deadly force may be necessary.

The killing of an animal is justified for self-defense, or to protect others from serious injury.

Rule for Courts-Martial 305 Issues in Unauthorized Absence Cases Involving Civilian and Military Pretrial Confinement

Commander James P. Winthrop, U.S. Navy
Military Judge, Tidewater Judicial Circuit
Navy-Marine Corps Trial Judiciary
Norfolk, Virginia

Private Frist Class Demon Outlaw, United States Marine Corps (USMC), began a period of unauthorized absence on 20 August 1999, two weeks before his Camp Lejeune-based unit was to deploy for a six-month Mediterranean "float." On 29 May 2000, a Virginia state trooper arrested Outlaw for reckless driving in Tazewell County, Virginia. While running Outlaw's license plate through his computer system, the trooper discovered a warrant for his arrest issued by the Marine Corps. Marine Corps authorities were notified of his incarceration in Tazewell County. Outlaw remained in the county jail until 15 June, when he was convicted of reckless driving and sentenced to time served and a hefty fine. That same day, the Tazewell County deputy sheriff notified Marine Corps authorities that Outlaw's civilian proceedings were completed and sought advice on what to do with him. He was advised to keep Outlaw incarcerated until Marine escorts arrived. Those escorts arrived on 19 June, took Outlaw into custody, and returned him to Camp Lejeune on 20 June where he was placed into pretrial confinement in the base confinement facility on the orders of his commanding officer, in accordance with Rule for Courts-Martial (RCM) 305(d). On 23 June, the commanding officer wrote and forwarded his seventy-two hour memorandum recommending continued confinement. The seven-day reviewing officer held a hearing on 27 June and kept PFC Outlaw in pretrial confinement.

Violations of Article 85 and 86 of the Uniform Code of Military Justice (UCMJ) involving desertion and other extended absences, like the PFC Outlaw hypothetical, continue to be a staple of our military justice practice. Such absences are frequently terminated by apprehension on the part of civilian law enforcement authorities and involve various periods of pretrial confinement by civilian authorities. In such circumstances, both trial and defense counsel should be alert to potential issues stemming from the various requirements of RCM 305 for the review of that confinement. These requirements, particularly those in RCM 305(i)(1), are a fairly constant source of confusion at trial. These issues surface in courts-martial when the defense counsel files a motion for appropriate relief seeking administrative credit under RCM 305(k) for non-compliance with these review requirements.[1] This article briefly surveys[2] the confinement review requirements of RCM 305, and then examines some of the issues associated with these requirements and provides suggestions on how judge advocates should handle them.[3]

The first review that must be undertaken is the forty-eight hour review by a neutral and detached officer of the probable cause to continue pretrial confinement. This requirement is contained in RCM 305(i)(1), which was added in the 1998 Amendments to the *Manual for Courts-Martial*.[4] It incorporates the Supreme Court's *Gerstein v. Pugh*[5] and *County of Riverside v. McLaughlin*[6] Fourth Amendment probable cause review requirements that the Court of Appeals for the Armed Force (CAAF) made applicable to the armed forces in *United States v. Rexroat*.[7] The next review is the seventy-two hour

1. *See* United States v. McCants, 39 M.J. 91, 93 (C.M.A. 1994) (citing RCM 305(j) for the proposition that RCM 305(k) issues are raised in this manner). Defense counsel should be aware that "an accused who fails to affirmatively assert entitlement to RCM 305(k) . . . credit at trial waives the issue on appeal." United States v. Chapa, 53 M.J. 769, 772 (Army Ct. Crim. App. 2000).

2. *See* Michael J. Hargis, *Pretrial Restraint and Speedy Trial: Catch Up and Leap Ahead*, ARMY LAW., Apr. 1999, at 13 (discussing in-depth these review requirements).

3. This article does not discuss the issue of credit for civilian pretrial confinement under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Judge advocates should be aware, however, that, although the Court of Appeals for the Armed Forces has not ruled on this issue, two of the service courts have. United States v. Murray, 43 M.J. 507, 513-14 (A.F. Ct. Crim. App. 1995); United States v. Chaney, 53 M.J. 621, 622-24 (N-M. Ct. Crim. App. 2000). Both of those opinions cite federal sentence computation procedures, specifically 18 U.S.C. § 3585(b) (2000), which are applicable to courts-martial via U.S. DEP'T OF DEFENSE, DIR. 1325.4, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (28 Sept. 1999).

4. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305(i)(1) (2000) [hereinafter MCM]. The current MCM incorporates all executive orders (1984 MCM, changes 1-7, and the 1995, 1998 and 1999 amendments). *Id.* app. 25. The 1998 amendments are discussed in Criminal Law Division Note, *Explanation of the 1998 Amendments to the Manual for Courts-Martial*, ARMY LAW., Aug. 1998, at 38.

5. 420 U.S. 103 (1975).

6. 500 U.S. 44 (1991).

7. 38 M.J. 292 (C.M.A. 1993); *see* Hargis, *supra* note 2, at 13 (discussing briefly *Gerstein* and *County of Riverside*).

probable cause review by the commanding officer of the accused that is set forth in RCM 305(h)(2)(A). The commanding officer is required to conduct the review within seventy-two hours and to reduce that decision to a memorandum, which must be forwarded to the seven-day reviewing officer by the time of that officer's review.[8] This brings us to the seven-day probable cause review of RCM 305(i)(2).[9] This review is also one that is accomplished by a neutral and detached officer, although this officer is one appointed by service regulations.[10] Counsel should also be aware that if either the seven-day review[11] or the seventy-two hour review[12] is done within forty-eight hours of confinement, it may serve as the forty-eight hour review as long as, in the case of the seventy-two hour review, the commander qualifies as a "neutral and detached officer."

The threshold issue defense counsel face in these cases is determining when the clock starts for these review requirements. Rule for Courts-Martial 305(i)(1) states that the forty-eight hour review must occur within "48 hours of imposition of confinement under military control." That rule goes on to state that "[i]f the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion." In the context of a civilian apprehension, the question then becomes what is meant by the term "military control," that is, does it refer to the moment when the accused is actually placed in a military confinement facility or sometime earlier, such as the time when the accused is placed in civilian confinement or when the accused is actually picked up by military escorts. The language of RCM 305(i)(1), and even more explicitly the language of the analysis of RCM 305(i),[13] seem to indicate that it is the former, that is, placement in a military confinement facility. The Air Force Court of Criminal Appeals (Air Force Court) reached the same conclusion on this issue in *United States v. Scheffer.*[14] In *United States v. Stuart*,[15] an earlier Army Court of Military Review opinion, the court employed the standard set forth by the then Court of Military Appeals in *United States v. Ballesteros.*[16] In *Ballesteros*, the court held that the clock began when the accused was detained "with the notice and approval of military authorities."[17] In *United States v. Lamb*, a case decided after both of these opinions, CAAF reaffirmed its holding in *United States. v. Ballesteros*, stating that "the [RCM 305] must be followed if a military member is confined by civilian authorities for a military offense and with notice and approval of military authorities."[18] Thus, *Lamb* establishes that the clock may start

8. Nothing in RCM 305(h)(2)(C) requires that the commander actually prepare the memorandum within seventy-two hours. That rule, however, does mandate the forwarding of the memorandum to the seven-day reviewing officer prior to that officer's review. United States v. Shelton, 27 M.J. 540, 542 n.3 (A.C.M.R. 1988) (stating that the "only timeliness requirement attached to this [seventy-two hour] memorandum is that it must be available for the military magistrate's review, that is, by the seventh day of pretrial confinement"). Trial counsel should note, however, that having a seventy-two hour memorandum dated within seventy-two hours of confinement is the easiest way to establish the timeliness of that review. Failing that, counsel will have to introduce other evidence, such as the testimony (or stipulation of expected testimony) of the commander.

9. Note that in counting the seven days, both the initial date of confinement and the date of the review are included. MCM, *supra* note 4, R.C.M. 305(i)(2).

10. Of course, a military judge also has the ability to review pretrial confinement. MCM, *supra* note 4, R.C.M. 305(j).

11. Criminal Law Division Note, *supra* note 4, at 38.

12. MCM, *supra* note 4, R.C.M. 305(h)(2)(A).

13. *Id.* at A21-18 to A21-19. This RCM analysis section states that, in a case in which civilian authorities have apprehended a deserter and it takes several days to transfer the prisoner to a military confinement facility, the clock does not "begin to run until the prisoner's transfer to military authorities." *Id.* This section of the analysis, however, must be read with caution for two reasons. First, counsel should realize that it is discussing RCM 305(i) as it existed *before* the 1998 amendment; that is, it is only analyzing the seven-day review. Furthermore, although the analysis does acknowledge the contrasting view of the Court Military Appeals in *United States v. Ballesteros*, 29 M.J. 14 (C.M.A. 1989), it does not reflect the apparent ripening of the *Ballesteros* holding in *United States v. Lamb*, 47 M.J. 384 (1998).

14. 41 M.J. 683 (A.F. Ct. Crim. App. 1995). Scheffer was initially apprehended by civilian authorities for a civilian traffic offense. Air Force authorities requested that he be detained until he could be picked up. Military escorts picked him up two days later, and he was ordered into pretrial confinement three days later. The Air Force Court of Criminal Appeals held that the forty-eight hour clock did not start until the accused was actually ordered into pretrial confinement by a military commander. *Id.*

15. 36 M.J. 746 (A.C.M.R. 1993). Stuart was incarcerated by civilian authorities solely for desertion and was turned over to military authorities one day later. The court held that the forty-eight hour clock began the day Stuart was incarcerated by the civilians, not the following day when he was turned over. *Id. See* Amy M. Frisk, *New Developments in Pretrial Confinement*, ARMY LAW., Mar. 1996, at 26 (analyzing in detail *Scheffer* and *Stuart*).

16. 29 M.J. 14 (C.M.A. 1989). Ballesteros was arrested by civilian authorities solely on the military deserter warrant. He was incarcerated from the outset with the notice and approval of military authorities. The Court of Military Appeals held that the seven-day clock (this was a pre-*Rexroat* case) began the first day of incarceration by civilian authorities. *Id.*

17. *Id.* at 16.

18. *Lamb*, 47 M.J. 384, 385 (1998). Lamb, who was an unauthorized absentee, was initially arrested and confined by civilian authorities for driving with a suspended license. Navy authorities were notified of his arrest. Ten days later those charges were resolved and he was turned over to Navy authorities that same day. Although the defense sought to start the clock the day Lamb was arrested, CAAF held that the defense had not established that he was being confined solely for a military offense and ruled that the forty-eight hour clock began when he was turned over to the Navy escorts. *Id.*

earlier than indicated by the language of RCM 305(i) and its analysis. In doing so, however, CAAF clearly placed the burden on defense counsel to establish the point at which the accused is being held for military purposes. In *Lamb*, CAAF held that the defense "failed to show that [the accused] was confined [by civilian authorities] solely for a military offense."[19]

Defense counsel must thus examine the circumstances surrounding the accused's arrest by civilian authorities. The critical factor, of course, is whether the accused was picked up by civilian authorities *solely* on the basis of a deserter warrant. If that is the case, *Lamb* seems to indicate that the clock will start at the time of civilian confinement. On the other hand, if the accused is initially arrested and detained on a civilian charge and civilian authorities subsequently discover the accused is wanted by the military, *Lamb* indicates that defense counsel has the burden to prove, by a preponderance of the evidence, that at some time during his civilian incarceration he was being held solely for the military offense.[20] In this situation, CAAF also requires the defense to show that the accused was not given a *Gerstein* hearing while in civilian confinement.[21] Defense counsel should be able to meet their burden in such cases through various means such as a stipulation of fact, testimony of the accused, or documentary evidence, for example, civilian court documents or message traffic. In PFC Outlaw's case, defense counsel should attempt to prove that the clock started on 15 June, the day the civilian charges were disposed of, because as of that date he was confined solely for the unauthorized absence with the notice and approval of Marine Corps authorities.

Trial counsel may argue for a delay in the clock's start by claiming lack of military control or military exigencies. At least in a case where the accused was initially confined for a civilian offense, trial counsel could argue for a strict interpretation of the *Lamb* holding in order to delay the clock's start. Thus, the *Lamb* timing rule would only apply if the accused was arrested solely for a military offense, that is, no civilian offense was involved. Such an interpretation finds support in the holding of the Air Force Court in *Scheffer*, in the language of RCM 305(i)(1), and in the analysis of RCM 305(i). Additionally, trial counsel could cite as authority CAAF's language discussing the defense counsel's burden in the *Lamb* holding in which the court stated that "he [the accused] failed to show that he was confined *solely* for a military offense."[22] Finally, although this argument may appear to be a strained reading of *Lamb*, it is worth noting that Navy appellate government counsel recently made a similar argument in an unpublished decision in which the Navy Court of Criminal Appeals did not ultimately address this specific issue.[23]

Trial counsel could also make a "military exigency" argument in seeking to delay the start of the clock. *Rexroat* emphasized that the *Mclaughlin* forty-eight hour limit is only a presumption, which may be rebutted by evidence of a military exigency preventing a timely review.[24] In *Scheffer*, the Air Force Court believed that the time spent in retrieving the accused from civilian confinement and incarcerating him in a military facility constituted such military exigencies.[25] Trial counsel could thus make this claim in a case where military escorts must travel to a distant location and return as in the hypothetical. No cases subsequent to *Scheffer* have addressed the issue of military exigencies under *Rexroat.*

Finally, even if the trial counsel does not attempt one of these arguments, they still have the responsibility of holding defense counsel to their burden imposed by *Lamb. Lamb* was clear in placing the burden on the defense to establish that the accused was being held for a military offense with the notice and approval of military authorities, and that the civilian jurisdiction had not held a *Gerstein* hearing. Obviously, these are factual issues, but trial counsel should verify the defense's version of events with both civilian and military authorities.

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19. *Id.* at 385. The Court of Appeals for the Armed Forces also held that the defense had not shown noncompliance with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (the forty-eight hour hearing rule), stating that there was a presumption of compliance by civilian authorities absent evidence to the contrary.

20. *Id.*; *see* United States v. Gable, No. 9701533 (Army Ct. Crim. App. Aug. 10, 1999) (unpublished opinion) (holding that defense counsel had not met its burden under *Lamb* to show that the accused, who was arrested for civilian charges, was being held solely for a military offense). Gable was initially arrested solely on civilian traffic charges. Civilian authorities immediately notified the Army of the situation and the Army requested that they continue to detain Gable and that they drop the civilian charges. On the day charges were dropped, the accused was picked up by Army escorts and confined in an Army facility. The Army court held that the clock did not start until Gable was confined in the Army facility because defense counsel had not met its burden under *Lamb.* The court ruled that "[g]iven the circumstances of this case, appellant has failed to carry his burden to show that he was confined by civilian authorities solely for a military offense." *Id.*

21. *See supra* note 19.

22. *Lamb*, 47 M.J. at 385 (emphasis added).

23. United States v. Alaniz, No. 9901370 (N-M. Ct. Crim. App. 28 Apr. 2000) (unpublished opinion). Alaniz was made available to the Navy on 19 January 1999, but was not picked up and incarcerated in a Navy facility until 26 January 1999. The military judge held that the government's RCM 305 responsibilities began on 19 January 1999 and the Navy Court declined to disturb that determination as it considered it the "law of the case." It should be noted that the accused was apparently arrested solely for a military offense. Navy appellate government counsel's argument may thus reflect a view that the *Lamb* holding imposes an overly harsh timetable on the government.

24. United States v. Rexroat, 38 M.J. 292, 295-96 (C.M.A. 1993).

25. United States v. Scheffer, 41 M.J. 683, 693 (A.F. Ct. Crim. App. 1995).

Occasionally an issue may also arise regarding who may conduct the forty-eight hour review, that is, who qualifies as a "neutral and detached officer" for purposes of RCM 305(i)(1). This issue does not arise in the case of the other two reviews because the Rules for Courts-Martial are explicit in that regard.[26] Judicial debate about this issue swirled in the service courts after the Supreme Court opinion in *County of Riverside v. McLaughlin*, particularly regarding whether the accused's commanding officer could perform this function by virtue of ordering confinement.[27] The Court of Military Appeals resolved this issue in *Rexroat*, which in addition to holding that the forty-eight hour *County of Riverside v. Mclaughlin* requirement applied to the military, also held that the commanding officer's ordering of confinement under RCM 305(d) or his seventy-two hour determination pursuant to RCM 305(h)(2)(c) could satisfy the requirement as long as the commander was "neutral and detached."[28] Courts have also held that a command duty officer in the Navy and an Army staff judge advocate also would qualify, in most cases, as a neutral and detached officer for purposes of the forty-eight hour review.[29] In addition, of course, the review must be conducted within forty-eight hours of confinement.

In the typical civilian confinement scenario, it would be the rare case where the commanding officer could conduct this review in a timely manner. For example, in the PFC Outlaw hypothetical, the commanding officer did not order him into pretrial confinement until 20 June. Assuming the commanding officer was not involved in the command's law enforcement function, the act of ordering Outlaw into confinement satisfies the need for a determination of probable cause for confinement. With the clock starting on 15 June (assuming the defense counsel was successful in that regard), however, the order could not satisfy the timing portion of *Rexroat* because it was not accomplished by 17 June, that is, within forty-eight hours.

The next issue to resolve is how to ascertain the actual number of days of administrative credit that the accused should receive under RCM 305(k).[30] According to RCM 305(k), the credit is computed at a rate of one day for each day of non-compliance with RCM 305(h) and (i), specifically RCM 305(h)(2), (i)(1), and (i)(2).[31] The Army Court of Military Review addressed this issue in *United States v. Stuart*[32] in the context of a tardy magistrate hearing. In *Stuart* the court held that "[t]he credit is calculated from the day the magistrate[33] should have held the hearing until the day before the hearing was conducted."[34] This method of calculation, beginning the day the review should have been conducted and extending to the day before the review was actually completed, captures each day of noncompliance. The Navy Court of Criminal Appeals employed a similar method of counting in *United States v. Plowman*.[35] In our hypothetical, again assuming the defense counsel was successful in establishing 15 June as triggering the review clock, the first day of non-compliance was 17 June, the day the forty-eight hour review should have been conducted. The seventy-two hour review should have been completed on 18 June and the seven-day review on 22 June. Thus, the non-compliant period extended from 17 June to 26 June, the day before compliance occurred. Private First Class Outlaw would thus be entitled to ten days of RCM 305(k) credit.

Frequently these cases involve violations of all three provisions. The question then becomes whether the accused is entitled to multiple RCM 305(k) credit. Creative defense counsel could argue that their accused is entitled to what amounts to overlapping administrative credit. For example, PFC Outlaw's

26. The RCM 305(h)(2) review must be conducted by the accused's commander, while the RCM 305(i)(2) review must be conducted by a "neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned." MCM, *supra* note 4, R.C.M. 305(h)(2), 305(i)(2).

27. Both the then Army and Navy Courts of Military Review held that the commanding officer's initial determination, pursuant to RCM 305(d), was not sufficient to meet the *Riverside* requirements. United States v. Rexroat, 36 M.J. 708 (A.C.M.R. 1992); United States v. Holloway, 36 M.J. 1078 (N.M.C.M.R. 1993).

28. United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993).

29. United States v. Bell, 44 M.J. 677 (N-M. Ct. Crim. App. 1996) (holding that the command duty officer, who stands in the place of a ship's commanding officer during the latter's absence was not normally involved in law enforcement functions and could therefore be neutral and detached); United States v. McLeod, 39 M.J. 278 (C.M.A. 1994) (holding that the brigade commander and the staff judge advocate could conduct the forty-eight hour review because there was no evidence that they were involved in the command's law enforcement function).

30. This administrative credit is taken against the *adjudged* sentence according to RCM 305(k).

31. The credit also applies to violations of RCM 305(f), (j), and (l). For purposes of this article, however, only violations of RCM 305(h) and (i) are relevant. It is worth noting that RCM 305(k) does not expressly refer to RCM 305(l) as one of the provisions for which it serves as a remedy. Nonetheless, the Army Court of Criminal Appeals has held that RCM 305(k) affords a remedy in cases involving RCM 305(l) violations. United States v. Williams, 47 M.J. 621, 623 (Army Ct. Crim. App. 1997), *aff'd on other grounds*, 50 M.J. 436 (1999).

32. 36 M.J. 746 (A.C.M.R. 1993).

33. For purposes of clarity, the current MCM now employs the term "7-day reviewing officer," instead of previous terms such as magistrate or initial review officer. MCM, *supra* note 4, R.C.M. 305(i)(2).

34. *Stuart*, 36 M.J. at 748.

35. 53 M.J. 511, 514 n.12 (N-M. Ct. Crim. App. 2000).

defense counsel could argue for twelve days of RCM 305(k) credit. Counsel could arrive at that figure by counting four days for violation of RCM 305(i)(1) for the period 17 to 20 June; three days for violation of RCM 305(h)(2) for the period 20 to 22 June; and five days for violation of RCM 305(i)(2) for the period 22 to 26 June.

This issue has recently been decided by the Navy-Marine Corps Court of Criminal Appeals in *Plowman*.[36] In *Plowman*, the court was faced with a situation in which there were overlapping violations of all these provisions of RCM 305. The court held that the accused was not entitled to multiple days of RCM 305(k) credit, noting that "[n]oncompliance with separate requirements occurring simultaneously does not cause the accused to spend multiple days confined for each instance of noncompliance."[37] In fashioning this interpretation of RCM 305(k), the court believed that it adequately compensated the accused, while deterring commands from failing to comply with the requirements of RCM 305.[38] Obviously, this decision is only binding on courts in the naval service, and still leaves room for argument to the contrary by Army and Air Force defense counsel. Nonetheless, the Navy court holding is quite persuasive.

Although the stakes with respect to RCM 305 issues are relatively small in comparison to other issues in military courts-martial practice, several days of confinement credit can be significant to an accused. Furthermore, given the frequency with which these issues arise, judge advocates would also be professionally remiss in not taking the small amount of time necessary to master them.

36. *Id*.

37. *Id*.

38. *Id*.

Legal Assistance Notes

Debt Collection Assistance Officers: A New Tool for Legal Assistance Attorneys

On 27 June 2000, the Under Secretary of Defense announced a new program to assist service members with TRICARE claims collection problems.[1] TRICARE-related debt problems were identified as a primary concern for service members during the first Military Family Forum in June 2000. Ordinarily, a service member with an outstanding debt arising from a TRICARE claim is solely responsible for resolving the issue and dealing with the creditor, debt collector, or credit reporting agency.

This new program entitled the Debt Collection Assistance Officer Program provides for the establishment of Debt Collection Assistance Officers (DCAO) at medical treatment facilities and TRICARE lead agent offices.[2] Under the program, the DCAO will assume responsibility for researching the TRICARE claim involved and determining whether or not the basis for the underlying alleged debt is valid.[3] The DCAO will provide feedback directly to the service member and, if appropriate, provide written documentation necessary to assist the service member in addressing national credit reporting companies or debt collection agencies regarding unwarranted adverse credit information.

At first glance, it appears the DCAO will act as an advocate for the soldier and take the place of the legal assistance attorney when service members have TRICARE-related debt issues. The DCAO will contact the debt collection agency or credit reporting agency to explain that the service member's case is being reviewed and will request a temporary suspension on further collection action. However, the program explicitly states that the DCAO is not acting as an advocate regarding the debt collection action and is not a legal representative of the service member.[4] Additionally, these contacts are not sufficient to invoke the protections available under the Fair Debt Collection Practices Act (FDCPA) or the Fair Credit Reporting Act (FCRA).[5] A legal assistance attorney must still assist the soldier in invoking these protections if appropriate.

However, the legal assistance attorney can use the DCAO as a research tool when a client meets the threshold for help under this program. If a client receives a letter from a debt collection agency or has negative information on their credit report relating to a TRICARE claim, the legal assistance attorney, after advising the client on the applicable dispute procedures under the FDCPA or the FCRA, should refer the client to the DCAO for assistance in investigating the claim. If the client does not meet the DCAO assistance threshold, he should be referred to the local TRICARE Beneficiary Counseling and Assistance Coordinator for assistance.

Once the DCAO concludes the investigation, they will provide the results of the investigation to the service member along with a list of local resources available, a copy of the FDCPA, and a letter to the collection agency or credit bureau notifying them of the investigation findings. During the initial consultation, the client should authorize the DCAO to release the results of the investigation to the client's legal assistance attorney.

Since a significant number of clients consult with military legal assistance attorneys regarding TRICARE-related debt problems, establishing the DCAO to assist in cutting through the TRICARE red tape is a step in the right direction. Legal assistance attorneys should use these individuals as fact finders and investigators and should ensure that those clients who meet the criteria for assistance are referred to the DCAO. Attorneys must also advise clients on their rights under the FDCPA and FCRA and assist them in invoking those rights. Simply referring the client to the DCAO is not providing competent, diligent and complete legal advice. Major Kellogg.

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1. Memorandum, Office of the Under Secretary of Defense, Personnel and Readiness, to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Executive Director, Tricare Management Activity, subject: Debt Collection Assistance Officer Program to Assist Service Members with TRICARE Claims Collection Problems (27 June 2000), *available at* http://www.tricare.osd.mil/downloards/signed_memo.pdf.

2. Under Secretary of Defense, Personnel and Readiness, *Debt Collection Assistance Officer Directory, at* http://www.tricare.osd.mil/dcao/DCAO_Dir.doc (last modified Nov. 9, 2000).

3. Office of the Judge Advocate General, U.S. Army, Tricare Debt Collection Assistance Officer (DCAO) Training Guide (detailing the strategy for implementing this program and providing guidance on responsibilities and limitations of DCAO's), *available at* http://www.jagcnet.army.mil/LegalAssistance.

4. *Id.* at 37.

5. *See* Administrative and Civil L. Dep't, The Judge Advocate General's School, U.S. Army, JA 265, Consumer Law Guide, ch. 9 (2000) (providing more information about the FDCPA or FCRA), *available at* http://jagcnet.army.mil/LegalAssistance (JA 265, Consumer Law Deskbook (2000)).

"I Might Like You Better if We Slept Together,[6] but I Like My Alimony Even More"

Legal assistance attorneys (LAA) are becoming ever more involved in the marital dissolution process, be it with general divorce counseling, nonsupport issues, or preparing separation agreements. Although much emphasis is placed on securing a portion of the service members' military retirement pay for the former spouse in divorce proceedings, less attention is given to whether those payments are characterized as alimony, child support, or a property interest.

A recent case, *Ex parte Ward*,[7] highlights what can happen when, through either poor draftmanship, bad luck, or bad advice, a former spouse's portion of the service member's retired pay is characterized as alimony rather than property, and provides valuable food for thought to LAAs representing either side in these situations.

Charles Ray (the husband) and Mary Frances Ward (the wife) divorced in 1984.[8] As part of the divorce, the husband agreed to pay the wife the total amount of his military retirement pay.[9] The retirement paychecks were sent directly to the wife, and, under the terms of the agreement, were "considered as child support . . . and periodic alimony."[10] The agreement did not provide for any adjustments in amount paid to the wife after their child reached age nineteen.[11]

The wife continued receiving payments until December 1996. The husband then stopped the checks going directly to the wife and reduced the amount paid her to one-half of his military retirement pay.[12] Payments stopped altogether in February 1997.[13] Not surprisingly, the wife petitioned the court for a *rule nisi*,[14] and asked that the husband be found in contempt for not paying alimony and ordered to pay arrearages as well.[15] At the hearing, the husband argued that the wife's cohabitation with another man released him of his obligation to provide alimony under Alabama law.[16]

Despite significant evidence that the wife had been cohabitating with another man for twelve years,[17] the trial court found the husband in contempt and ordered him to pay arrearages.[18] The husband appealed, but the Court of Civil Appeals affirmed without opinion.[19] The Alabama Supreme Court granted the husband's petition for certiorari review,[20] and reversed and remanded the lower courts' ruling.

The Alabama statute at the heart of the husband's argument, ALA. CODE § 30-2-55 (1975), states:

> Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabitating with a member of the opposite sex. This provision shall be applicable to any person granted a decree of divorce either prior to April 28, 1978, or thereafter; provided, however,that no payments of alimony already received shall have to be reimbursed.

Looking at the lower court's ruling, the Alabama Supreme Court noted that the trial judge found the husband had not proven cohabitation.[21] Recognizing that "whether cohabitation exists is a factual determination for the trial judge in each case,"[22] the state supreme court stated that it could not substitute its judgment for the trial judge's unless the trial court's findings were "plainly and palpably wrong."[23]

In addition to reviewing the specific facts of the husband's case, the court also reviewed similar case law[24] providing indicia of cohabitation. The court stated that "[a] petitioner must prove some permanency of relationship, along with more than

6. ROMEO VOID, *Never Say Never, on* NEVER SAY NEVER (415 Records 1981).

7. *Ex parte* Charles Ray Ward (Re: Charles Ray Ward v. Mary Frances Ward), No. 1990727, 2000 Ala. LEXIS 393, at *1 (Supreme Court of Alabama, Sept. 15, 2000).

8. *Id.*

9. *Id.* At the time of divorce, the husband's monthly military retired pay was $783.63. *Id.*

10. *Id.*

11. *Id.* Age nineteen was the parties' agreed upon age of majority.

12. *Id.*

13. *Id.*

14. *Id.* at *2. A *rule nisi* is a rule that becomes imperative and final *unless* cause be shown against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced. BLACK'S LAW DICTIONARY 1331 (6th ed. 1990).

15. *Ward*, 2000 Ala. LEXIS 393, at *2.

16. *Id.*

occasional sexual activity, in order to establish cohabitation. Factors which suggest some 'permanency of relationship' include evidence that the former wife and alleged cohabitant occupied the same dwelling and shared household expenses."[25] These factors are important, because the Alabama legislature "intended to strike a balance between the occasional brief sojourn and the common-law marriage."[26] In this case, the fact that the wife testified that she had lived with a man in the same house for twelve years, that they shared expenses, and that they had a sexual relationship was more than enough to convince the supreme court that not only had the wife cohabitated with another,[27] but that the trial court had "plainly and palpably erred in finding no cohabitation because the evidence was supplied by the wife's own testimony and was uncontroverted."[28] The court also stated that the "trial court cannot ignore undisputed evidence."[29]

Although holding that the husband was not liable for any alimony once the wife began cohabitating, the state supreme court also held that, according to statute,[30] the husband was not entitled to a refund of monies already paid.

17. At the hearing, the husband's attorney questioned the wife about one of her relationships:

> [Attorney]: Now, what was the name of this gentleman you lived with over there? You lived with a gentleman in Austin, Texas, what was his name?
>
> [Wife]: I had a boyfriend named Domingo, but I didn't live with him.
>
> [Attorney]: He didn't live with you at all?
>
> [Wife]: Oh yeah, he stayed at my place and paid rent.
>
> [Attorney]: Okay. And you shared a house together?
>
> [Wife]: No, the house was mine. My cousin bought the house.
>
> [Attorney]: How long did he stay there for?
>
> [Wife]: Off and on about 12 years.
>
> [Attorney]: Twelve years. And did you have sexual relations with this man?
>
> [Wife]: Of course.

18. *Id.* at *3. The trial court determined the amount of arrearages to be $15,141.90.

19. *Id.* The Court of Civil Appeals affirmed without opinion, although there was a dissenting opinion. *Id.*

20. *Id.* The Alabama Supreme Court reversed the Court of Civil Appeals' judgment of affirmance, and remanded the cause to the Court of Civil Appeals to direct the trial court to enter an order consistent with the supreme court's opinion. *Id.*

21. *Id.* at *4. This was because the trial judge had ordered payment of arrearages for alimony, not child support, since it was only after the child reached majority that the husband reduced, and then stopped payments. *Id.*

22. *Id.* (citing Capper v. Capper, 451 So. 2d 359, 360 (Ala. Civ. App. 1984) (citing Tucker v. Tucker, 416 So. 2d 1053 (Ala. Civ. App. 1982))).

23. *Id.* (citing Ivey v. Ivey, 378 So. 2d 1151, 1153 (Ala. Civ. App. 1979) (citing Sutton v. Sutton, 55 Ala. App. 254, 314 So. 2d 707 (1975))).

24. *Id.* (citing *Capper*, 451 So. 2d at 359 (finding that the wife's longtime paramour had lived in her apartment for twenty-three days, kept his personal items there, and had shared her bed and engaged in sexual relations with her. The court found this evidence sufficient to support cohabitation). In *Ivey*, 378 So. 2d at 1151, the court found sufficient evidence of cohabitation where the wife admitted in interrogatories that she lived with a man.

25. *Id.* at *5, (citing Taylor v. Taylor, 550 So. 2d 996, 997 (Ala. Civ. App. 1989) (citing Hicks v. Hicks, 405 So. 2d 31 (Ala. Civ. App. 1981))).

26. *Id.* at *6.

27. *Id.*

28. *Id.*

29. *Id.* (citing Carufel v. Hub Trucking, Inc., 687 So. 2d 200 (Ala. Civ. App. 1996); State ex rel. Smith v. Smith, 631 So. 2d 252 (Ala. Civ. App. 1993); Easterly v. Beaulieu of America, Inc., 717 So. 2d 406 (Ala. Civ. App. 1998)).

30. ALA. CODE § 30-2-55 (1975).

This case should serve as a warning to LAAs counseling spouses who qualify for receipt of a portion of military retired pay. If the parties intend, or at least one party intends, to ensure that payments continue beyond remarriage, or cohabitation, that share of military retired pay must be classified by the court as property, and not as alimony or child support. The court is free to order those payments as well.[31] And naturally, those LAAs advising service members should negotiate to have any payment of retired pay categorized as alimony and not as a property interest. Failing that, LAAs advising those clients receiving a portion of military retired pay as alimony should, at a minimum, advise their clients of the ramifications attached with remarriage or cohabitation. Major Boehman.

Criminal Law Note

United States v. Collazo[32]: The Army Court of Criminal Appeals Puts Steel on the Target of Post-Trial Delay

Over the last several years, errors in the post-trial processing of records of trial have become more and more of a problem for the Army Court of Criminal Appeals (Army Court).[33] One particularly vexing aspect of this problem has been undue post-trial delay. The Army Court has seen a steady climb in the time it takes to get from sentencing an accused to convening authority action. Excessive delay in the post-trial processing of a record of trial can adversely impact an accused in several ways. Lengthy delay in the preparation of a record of trial can effectively deprive an accused of a genuine opportunity for clemency,[34] parole, and can affect job opportunities once the accused is released from confinement and placed on appellate leave. Additionally, lengthy post-trial delay deprives the accused of a speedy appellate review since the service courts cannot review a case until the convening authority has taken action.

As of 28 August 2000, the average Army post-trial processing time was 119 days for a general court-martial and 115 days for a special court-martial, as compared to ninety-three days and seventy-nine days respectively, five years ago.[35] More disturbing perhaps are the number of cases in the Army which have taken over six months to get from sentencing to action. Army-wide, there have been forty-five cases this year which have taken over six months to get from sentencing to action; sixteen of those forty-five cases have taken over a year.[36]

Both the Army Court and the Court of Appeals for the Armed Forces have admonished staff judge advocates in the field regarding this trend. The warning has been clear: staff judge advocates must correct the problem of undue post-trial delay or the courts will fix it for them.[37] After years of not seeing any improvement, the Army Court has apparently grown weary of shooting rounds across the bow of undue post-trial delay and has decided to put one on the deck. *United States v. Collazo* is that round. *Collazo* represents a significant break from precedent in handling undue post-trial delay and the establishment of a new method of addressing this issue.

To put *Collazo* in perspective, we must review how military appellate courts have previously dealt with the issue of undue post-trial delay. The logical place to begin this review is with *Dunlap v. Convening Authority.*[38] In *Dunlap*, the United States Court of Military Appeals (the forerunner of the Court of Appeals for the Armed Forces) changed significantly the way the courts would deal with delays in post-trial processing. Before *Dunlap*, the most relief an appellant could realistically hope to receive for post-trial delay was removal of the impediment to the completion of the post-trial process and an order directing that the record be completed and action taken.[39] After

31. The Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1972, 1076, 1086, 1408, 1447, 1448, 1450, and 1451, allow courts of competent jurisdiction to divide military retired pay once certain jurisdictional requirements are met. However, the USFSPA places no limitations or special requirements on a court's jurisdiction in awarding a portion of the retired pay for child support or alimony purposes.

32. 53 M.J. 721 (Army Ct. Crim. App. 2000).

33. *Id.* at n.4.

34. In cases where an accused receives a punitive discharge and confinement, failure to prepare the record of trial quickly may result in the accused being release from confinement before the convening authority takes action. At this point, the only clemency the convening authority can offer is to disapprove some of the findings or disapprove the punitive discharge. By not having the option of disapproving a portion of the accused's confinement, it becomes much less likely that the convening authority will grant any clemency.

35. The above statistics address those cases which are still outstanding as of 1 September 2000. Interview with Mr. Joseph A. Neurauter, Clerk of the Court for the United States Army Court of Criminal Appeals, in Arlington, Va. (Sept. 1, 2000).

36. According to statistics from the Office of the Clerk of Court, United States Army Court of Criminal Appeals, as of 29 August 2000, there were forty-five cases Army-wide that were over six months from sentence to action, and sixteen were over a year from sentence to action. *Id.*

37. *See* United States v. Bell, 46 M.J. 351, 354 (1997); United States v. Hudson, 46 M.J. 226, 228 (1997); United States v. Sherman, 52 M.J. 856 (Army Ct. Crim. App. 2000).

38. 48 C.M.R. 751 (C.M.A. 1974).

39. *See* Rhoades v. Haynes, 46 C.M.R. 189, 190 (C.M.A. 1973).

Dunlap, an appellant might get the ultimate relief, dismissal of all charges.[40]

Dunlap was decided in 1974, after a string of post-trial delay cases had come before the Court of Military Appeals.[41] In December 1972, the appellant in *Dunlap* pled guilty to some charges and was found guilty of others at a general court-martial. The appellant was sentenced to three years confinement at hard labor, total forfeitures, and a bad conduct discharge.[42] During the first staff judge advocate's post-trial review it was discovered that, despite the appellant's request for a panel composed of one-third enlisted members, the panel had fallen below one-third enlisted membership. The staff judge advocate recommended adjusting the findings to conform with the charges the appellant pled guilty to and holding a new sentencing hearing.[43] It was at this point that the post-trial process fell apart.

The appellant had been tried in Bamberg, Germany. After the court-martial, but before the staff judge advocate's post-trial recommendation, the appellant was transferred to Fort Leavenworth, Kansas. The convening authority agreed with his staff judge advocate, but felt incapable of ordering the necessary rehearing because the appellant had been transferred to Fort Leavenworth.[44] The convening authority from Bamberg therefore forwarded the record of trial to the Fort Leavenworth convening authority, and requested that he take jurisdiction over the case and order a rehearing. The Fort Leavenworth convening authority refused to take jurisdiction over the case, concluding that the original court-martial of the appellant was invalid for all purposes, and a rehearing for just the sentencing phase of trial would be inadequate.[45] Ultimately the convening authority in Germany agreed, and ordered a rehearing for findings and sentencing. The record was again returned to Fort Leavenworth, with a request that Fort Leavenworth conduct the rehearing. It was not until 20 November 1973 that new charges were referred against the appellant. In the meantime, the appellant filed a petition with the United States District Court of Kansas to have the charges dismissed for a violation of his right to a speedy trial.[46] The new trial was postponed pending the District Court's ruling on the appellant's petition. The District Court refused to rule on the petition, concluding that the appellant had not exhausted the remedies available to him through the military judicial system. On 25 February 1974, the Court of Military Appeals heard the appellant's case on the issue of whether he had been denied his right to a speedy trial.[47]

By the time the appellant's case in *Dunlap* made it to the Court of Military Appeals, a year and three months had passed since the appellant's court-martial. The frustration the Court of Military Appeals felt over the issue of undue post-trial delay is evident from its opinion. The court began its discussion by pointing out that delayed convening authority action had been a source of criticism by the court for years.[48] The court then discussed the unique role that the convening authority action occupies in the military justice system. According to the court, "[i]n significant ways . . . the function of the court-martial and those of the convening authority in the determination of guilt and in the imposition of sentence are so connected that they can be regarded as representing, for the purpose of speedy disposition of the charges, a single stage of the proceedings against the accused."[49] After this provocative comment, the court backed off and concluded it did not have to decide whether the requirement for the speedy disposition of charges applied to the convening authority action. Instead, the court reasoned that Congress, through various statutes, mandated that all stages of the military criminal justice system move as expeditiously as possible.[50] In order for the court to fulfill its obligation to "protect [Congress's] mandate for timely justice,"[51] it had to provide timeliness guidelines for the convening authority's action. The *Dunlap* court created a brightline rule when it stated:

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40. *Dunlap*, 48 C.M.R. at 754.

41. United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973); United States v. Timmons, 46 C.M.R. 226 (C.M.A. 1973); United States v. Wheeler, 45 C.M.R. 242 (C.M.A. 1972).

42. *Dunlap*, 48 C.M.R. at 751, 752.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 753.

49. *Id.*

50. *Id.* at 754.

51. *Id.*

> 30 days after the date of this opinion, a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial.[52]

The consequence of violating this new rule was dismissal of all charges against the appellant.

The military justice system labored under the *Dunlap* ninety-day presumed prejudice rule for five years, until *United States v. Banks*.[53] In a short opinion, the Court of Military Appeals concluded that the ninety-day presumed prejudice rule was too inflexible and had outlived its usefulness.[54] In particular, the court pointed to changes in military law that made the *Dunlap* rule unnecessary. Those changes included specifying the post-trial duties of trial defense counsel and the announcement of standards for the evaluation of deferment requests.[55] After *Banks,* an appellant could still receive relief for undue post-trial delay, but the appellant would now have to establish prejudice.[56]

After *Banks*, the military appellate courts became less inclined to grant relief for inordinate post-trial delay. There have been several cases where the appellate courts have granted relief for post-trial delay,[57] but as the *Dunlap* ninety-day rule has become more a thing of the past, courts have become less inclined to grant relief for this issue. In early cases after *Banks*, the Court of Military Appeals believed it "should be vigilant in finding prejudice whenever lengthy post-trial delay in review by a convening authority is involved."[58] Later cases showed a greater reluctance to find prejudice regardless of the length of delay. In *United States v. Hudson*,[59] it took the government eight hundred and thirty-nine days to get from the announcement of the accused's sentence to action. Despite allegations by the appellant that he lost job opportunities due to the delay, no relief was granted.[60] In *United States v. Bell*,[61] it took the Government 737 days to produce a sixty-nine page record of trial. The appellant alleged that he was prejudiced because he lost three days of confinement credit that he would have been given had his case made it to appellate review before he served his confinement. The Court of Appeals for the Armed Forces held: "The defense argument that three 3 days' confinement or less, even if unlawful, warrants setting aside a bad-conduct discharge is not well taken . . . . [S]uch harm, although unfortunate, does not render the appellant's punitive discharge inappropriate."[62]

In *Collazo,* the Army Court fashioned a new method of dealing with undue post-trial delay.[63] This new method provides incentive to the field to clean up post-trial delay without granting the extreme sanction of dismissal of charges. In *Collazo*, the accused was convicted of rape and carnal knowledge and sentenced to a dishonorable discharge, total forfeiture of all pay and allowances, reduction to E1, and confinement for eight years. On appeal, the appellant claimed that he had been prejudiced by the length of time it took the Government to process the record of trial to action. The appellant also pointed out other administrative errors in the processing of the record of trial that had adversely impacted the appellant. These administrative errors included failing to provide the accused or counsel with a complete authenticated record of trial until after action was taken, and failing to provide the appellant and his counsel with a copy of the convening authority's action in a timely manner.[64]

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52. *Id.*

53. 7 M.J. 92 (C.M.A. 1979).

54. *Id.* at 93.

55. *Id.*

56. *Id.* at 94.

57. *See* United States v. Bruton, 18 M.J. 156 (C.M.A. 1984); United States v. Shely, 16 M.J. 431 (C.M.A. 1983); United States v. Sutton, 15 M.J. 235 (C.M.A. 1983); United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982).

58. *Shely*, 16 M.J. at 431.

59. 46 M.J. 226 (1997).

60. *Id.* at 227.

61. 46 M.J. 351 (1997).

62. *Id.* at 354.

63. United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).

64. *Id.*

The appellant in *Collazo* was convicted on 25 September 1997, and the 519-page record of trial was not authenticated until 4 August 1998.[65] The staff judge advocate's post-trial recommendation was served on the defense counsel on 18 August 1998, and a defense request for delay in submitting Rule for Courts-Martial (RCM) 1105 matters was granted until 16 September 1998.[66] Although the government failed to serve the appellant or his defense counsel with a properly authenticated record of trial, appellant's counsel was provided an electronic version of the transcript to assist in the preparation of the RCM 1105 matters. The appellant's counsel submitted the RCM 1105 matters on 16 September 1998 and action was taken on 30 September 1998.[67] A complete authenticated record of trial was not served on the appellant's defense counsel until 7 October 1998.[68]

The Army Court's frustration with the unexplained post-trial delay in *Collazo* was reminiscent of the Court of Military Appeal's frustration in *Dunlap*, but the Army Court's solution was different. First, the court reminded readers, particularly staff judge advocates, that it was not so long ago that lengthy post-trial delays brought about the *Dunlap* ninety-day rule.[69] The Army Court addressed staff judge advocates directly in the opinion, stating, "[s]taff judge advocates can forestall a new judicial remedy by fixing untimely post-trial processing now."[70] Next, the court specifically found the appellant in *Collazo* suffered no actual prejudice due to the post-trial delay. Had the court found prejudice, under a *Dunlap*/*Banks* analysis, the court would have had to dismiss the charges. Finally, the court created a new remedy for inordinate post-trial delay.[71]

The new remedy could be called "fundamental fairness credit," although the Army Court did not name it so. After the court concluded the appellant suffered no actual prejudice, it went on to state "fundamental fairness dictates that the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible."[72] The test that the court applied was a "totality of the circumstances" test.[73] The court concluded that the government did not proceed with due diligence and, although the appellant was not prejudiced, he was entitled to some relief. The appellant had been sentenced to ninety-six months of confinement. The Army Court only approved ninety-two months of that sentence.[74]

For decades, military appellate courts have struggled with how to resolve the issue of undue post-trial delay. Besides undermining public confidence in the military justice system, delay in convening authority action can cause actual harm to the accused. In a fit of frustration over this issue, the Court of Military Appeals wrote the *Dunlap* opinion. In *Dunlap* the Court of Military Appeals took the radical step of treating post-trial delay in the same way as pretrial delay. Although this position helped reduce post-trial delay, it was extreme. The dissent in *Dunlap* pointed out that "[t]here is a marked dissimilarity between pretrial delay and delay in a convening authority's action and the harm that may result from each."[75] The dissent went on to comment that "whatever reason might exist to deplore post-trial delay generally . . . [I am] loathe to declare that valid trial proceedings are invalid solely because of delays in the criminal process after trial."[76] Even after *Banks* removed the ninety-day presumed prejudice rule, *Dunlap* was not completely dead. As noted in later decisions, if the court finds prejudice, the remedy created in *Dunlap* remains the mandatory result, that is, dismissal of the charges.

It seems clear that in *Collazo* the Army Court was wrestling with the ghost of *Dunlap*. Because *Banks* did not completely eradicate *Dunlap*, the Army Court was left with the options of finding prejudice and letting a rapist go free, or finding no prejudice and ratifying the sloppy administration of justice. The Army Court elected to create a new option. This new option

65. *Id*. at 724.

66. *Id*. at 725.

67. *Id*.

68. *Id*.

69. *Id*.

70. *Id*.

71. *Id*.

72. *Id*. at 727.

73. *Id*.

74. *Id*.

75. United States v. Dunlap, 48 C.M.R. 751, 756 (C.M.A. 1974).

76. *Id*. at 757.

used the court's broad authority under Article 66,[77] to provide relief to an appellant despite a lack of prejudice.

Three questions remain after the *Collazo* opinion. First, does the Army Court have the authority to grant the relief it provided in this case? Article 66[78] does grant the service courts authority that is unique to appellate courts, but the service courts are not courts of equity. In *United States v. Powell*,[79] the Court of Appeals for the Armed Forces described the authority of the service courts as bracketed by Article 59(a) and Article 66(c) when it stated: "Article 59(a) constrains their authority to reverse; Article 66(c) constrains their authority to affirm."[80] Article 59(a) states, "[a] finding or sentence of a court-martial may not be held incorrect on the grounds of an error of law unless the error materially prejudices the substantial rights of the accused."[81] Arguably, the Army Court acted beyond the scope of its authority by granting relief to an accused where no prejudice was found.

The second question is whether *Collazo* demonstrates the need for new guidance from the Court of Appeals for the Armed Forces to the service courts on resolving issues related to inordinate post-trial delay. Based on the present guidance, the service courts have two options when dealing with inordinate post-trial delay: they can find prejudice and dismiss all charges, or find no prejudice and do nothing. Given the Army Court's opinion in *Collazo*, it is clear that these two options are not enough. *Collazo* highlights the need for the Court of Appeals for the Armed Forces to put a stake through the heart of the *Dunlap* opinion by removing the requirement to dismiss all the charges if the service courts find prejudice.

The final question is how will *Collazo* be applied? In *Collazo* the court established a totality of the circumstances test to determine whether fundamental fairness had been violated. Although this test avoids the inflexibility of a *Dunlap* fixed-day rule, it is hard to know what will warrant relief. In *Collazo,* the Army Court relied on the following facts to find a violation of fundamental fairness: ten months to type a relatively short record; failure to give the defense an opportunity to review the record of trial before authentication; and failure to provide the appellant and defense counsel a full authenticated record of trial for the preparation of RCM 1105 matters.[82] It is unclear if relief would be warranted if the government had done everything correctly except for the ten-month delay in the preparation of the record of trial.

Despite the questions that remain after *United States v. Collazo,* some things are clear. Staff judge advocates and chiefs of justice need to take notice of this decision. *Collazo* represents a break from precedent and puts more pressure on criminal law sections and staff judge advocate offices to decrease post-trial processing time. Finally, based on recent memorandum opinions of the Army Court, it is clear that *Collazo* was the first of many rounds directed at the target of undue post-trial delay.[83] Major MacDonnell.

Estate Planning Note

Gifts Made Under a Durable Power of Attorney

The general power of attorney (POA) is an essential weapon in the arsenal of the legal assistance attorney. At its most basic level, the POA allows the agent or attorney-in-fact to carry on personal affairs during the absence of the principal. For this reason, many legal assistance clients drawn from our aging military retiree population request POAs as a tool to assist in managing financial affairs should they become incapacitated. Consequently, it is critical that legal assistance attorneys supporting the military retiree population specifically contemplate drafting POAs with an eye toward carrying out estate plans,[84] and ensuring the POA contains "durable" language that allows it to survive the incapacity or incompetency of the principal.

In addition to executing a power of attorney, one of the most basic estate planning techniques for reducing potential estate taxes is the annual gift tax exclusion ($10,000 per person, per year).[85] These two components of estate planning often overlap. When a principal is incapacitated, elderly, and financially

77. UCMJ art. 66(c) (2000).

78. *Id.*

79. 49 M.J. 460 (1998).

80. *Id*. at 464.

81. UCMJ art. 59(a) (2000).

82. United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000).

83. United States v. Benton, No. 9701402 (Army Ct. Crim. App. 10 Aug. 2000); United States v. Marlow, No. 9800727 (Army Ct. Crim. App. 31 Aug. 2000); United States v. Fussell, No. 9801022 (Army Ct. Crim App. 20 Oct. 2000).

84. For a thorough examination of the durable power of attorney, see, for example, Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney,* 75 Neb. L. Rev. 574 (1996*);* Major Michael N. Schmitt & Captain Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 Mil. L. Rev. 203 (1991); Captain Kent R. Meyer *Proactive Law: Continuing Powers of Attorney: A Military Use*, 112 Mil. L. Rev. 257 (1986); Major Mulliken, TJAGSA Practice Notes: *Legal Assistance Items, Powers of Attorney,* Army Law., July 1986, at 72.

stable, it may be prudent for an attorney-in-fact under a POA to make gifts of the principal's resources by taking advantage of the annual gift tax exclusion. Regrettably, many POAs neither expressly confer nor specifically withhold the power to make gifts. These POAs leave open the issue of whether the power to make gifts of property has been conferred by the principal. The absence of specific language granting authority to make gifts can be interpreted as an intentional choice by the principal. Many legal assistance attorneys are not aware that the Internal Revenue Service (IRS) *generally* holds the position that an attorney-in-fact who makes such a gift on behalf of a principal without specific gifting language in the POA is actually making a "revocable transfer" which is not entitled to the gift tax exclusion. The result is an inclusion in the decedent's estate of the unauthorized gifts.

The current military wills drafting software, Drafting Libraries (DL), not only drafts wills, but also ancillary documents. Before the purchase of the DL program by the Army, legal assistance practitioners used the Patriot Expert System (and its predecessors) for drafting wills and POAs. The Patriot Expert System general POA did not contain gifting language and the drafter did not have the option to include such language. The ancillary document feature of DL, however, contains tools for the drafting of general POAs. While the DL ancillary document feature is convenient and produces a general POA of broad applicability, the legal assistance practitioner who wishes to tailor a general POA to provide specific authority for gifting must answer numerous queries regarding gifting clauses to ensure the complete POA reflects the requirements of the client. Practitioners need to understand the importance of these options as they relate to their clients.

The Durable Power of Attorney (DPOA)

One of the most common estate planning tools in preparing for incapacity is the DPOA.[86] Different from a regular POA, which terminates on the incapacity of a principal, a DPOA continues during the incapacity of the principal until death.[87] When durable powers are included in a POA, the powers can survive incapacity, and can be relied upon for management of the principal's affairs. All states recognize durable powers of attorney.[88] Some states have a requirement for statutory language in the DPOA.[89] The DPOA can be prepared as either a "current DPOA" or a "springing DPOA."[90] A springing power makes the DPOA effective only when a specific event occurs, such as incapacity of the principal, and if it is authorized by state law.[91] A current DPOA is effective upon execution of the document. The DPOA is founded in statutory law with a basis in agency law. General DPOAs grant *almost* unlimited authority to the attorney-in-fact. Normally, any powers in the POA that are not expressly conferred will not be implied under the law of agency.[92] The agent does not own the property, and agency law customarily cautiously implies powers and exactingly construes express powers.[93] Therefore, DPOAs drafted by legal assistance attorneys survive the incapacity of the principal, but

85. I.R.C. § 2503(b) (LEXIS 2000).

86. The DPOA gained popularity in estate planning following the adoption of the Uniform Durable Power of Attorney Act in 1979. UNIF. DURABLE POWER OF ATTORNEY ACT (amended 1987), *reprinted in* MARTINDALE-HUBBELL UNIFORM AND MODEL ACTS §§ 1 –10 (2000).

87. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 396 (6th ed. 2000); *see* UNIF. PROBATE CODE § 5-501 (amended 1998) (When Power of Attorney Not Affected by Disability).

> Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

Id.

88. DUKEMINIER & JOHANSON, *supra* note 87, at 396; UNIFORM PROB. CODE §§ 5-501 to 5-505.

89. DUKEMINIER & JOHANSON, *supra* note 87, at 396. The DL Wills program prepares state specific POAs and will include the necessary statutory language.

90. See Appendix for state summary of DPOA statutes.

91. Normally, a springing POA states that it is validated by the written certification of at least one physician who opines that the principal meets the disability criteria. The agent does not currently hold a general power of appointment. A power that is exercisable only upon the occurrence of a future event(s) which did not occur before the agent's death, would not be taxable in the agent's estate as a general power of appointment. 26 C.F.R. § 20-2041-3(b) (LEXIS 2000). Consequently, if the attorney-in-fact dies before the principal's disability, there are no unfavorable estate tax consequences because the contingency did not occur before the agent's death. Peter J. Strauss & Russell N. Adler, *Using Powers of Attorney as Planning Tools*, N.Y. L. J., July 17, 2000, at 7.

if the power to gift is not expressly conferred by the DPOA, then generally the authority will not be implied.

The Gift Tax

The intent of this note is not an in-depth look at the gift tax. However, for purposes of this article, the most notable feature of the gift tax is the annual gift tax exclusion (currently $10,000 per donee).[94] Estate planners frequently advise financially secure clients to establish a strategy of making annual gifts in order to reduce the value of their potential gross estate and to reduce the amount of taxes due upon death. A donor can gift up to the annual exclusion amount to an unlimited number of recipients during any calendar year without the gifts being subject to gift taxation.[95] While the rationale for the annual exclusion is to preclude the requirement for record keeping for small gifts, the annual exclusion is an effective estate tax planning device because the annual exclusion gifts are not includible in the donor's gross estate and can reduce the gross estate. However, the donor should keep in mind that a gift is not complete until the donor parts with dominion and control so as to leave him with no power to change the disposition.[96] In order to qualify for the annual exclusion, the gift must be a transfer of a present interest in property rather than a future interest,[97] and the donor must complete the gift within the calendar year.[98] When an individual makes a gift that qualifies for the annual gift tax exclusion, there is no requirement for the filing of a gift tax return.

The Estate Tax

Again, the intent of this note is not to serve as an in-depth look at estate taxation, but it is important to review several important points relating to estate taxation. A decedent's gross estate includes the value of all property to the extent the decedent had an interest at the time of death.[99] Certain adjustments, which decrease the overall worth of an estate due to gifts made within three years of death, are included in the value of the gross estate.[100] Several years ago, all gifts made within three years of death were included in the donor's gross estate, unless it could be shown that the gifts were not made in contemplation of death.[101] Currently, the three-year rule only applies to any property interests transferred by gift within three years of death with a retained life estate;[102] transfers taking effect at death;[103] revocable transfers;[104] and proceeds of life insurance.[105]

Generally, lifetime transfers by a decedent over which he retains the power to revoke are included in the decedent's tax-

92. RESTATEMENT (SECOND) OF AGENCY § 34, cmt. h (1999).

> *Formal instruments*. Formal instruments which delineate the extent of authority, such as powers of attorney and contracts for the employment of important agents, either executed on printed forms or otherwise giving evidence of having been carefully drawn by skilled persons, can be assumed to spell out the intent of the principal accurately with a high degree of particularity. Such instruments are interpreted in light of general customs and the relations of the parties, but since such instruments are ordinarily very carefully drawn and scrutinized, the terms used are given a technical rather than a popular meaning, and it is assumed that the document represents the entire understanding of the parties. On the other hand, a hastily drawn memorandum can be expected to contain only the outlines, and to indicate only in a general way the extent of the authority. Hence the attendant circumstances can properly be used more freely to explain or to interpret it. It is because formal instruments are subjected to careful scrutiny that it is frequently said that they must be "strictly" construed. In fact, of course, they are construed so as to carry out the intent of the principal. There should be neither a "strict" nor a "liberal" interpretation, but a fair construction which carries out the intent as expressed. It is true that dangerous powers, such as the power to borrow money, will not be inferred unless it is reasonably clear that this was intended. It is also true, on the other hand, that ambiguities in an instrument will be resolved against the one who made it or caused it to be made, because he had the better opportunity to understand and explain his meaning. But this must be done only within the frame of the entire instrument. All-embracing expressions are discounted or discarded. Thus, phrases like "as sufficiently in all respects as we ourselves could do personally in the premises", "as the said agent shall deem most advantageous", "hereby ratifying and confirming whatever our agent shall do in the premises" are disregarded as meaningless verbiage. As to the introduction of parole evidence, see Section 48.

Id.

93. DUKEMINIER & JOHANSON, *supra* note 87, at 397.

94. I.R.C. § 2503(b) (LEXIS 2000).

95. *Id*.

96. 26 C.F.R. § 25.2511-2 (LEXIS 2000).

97. *See generally* Treas. Reg. § 25.2503-3 (2000).

98. Metzger v. Comm'r, 38 F.3d 118 (4th Cir. 1994).

99. *See generally* I.R.C. §§ 2031-2046.

100. *Id.* § 2035 (1997).

101. *Id.* (amended by Pub. L. 105-34, § 1310(a)) (applies to the estates of decedents dying after 5 August 1997).

102. I.R.C. § 2036 (LEXIS 2000).

able gross estate.[106] In other words, an individual cannot dodge the tax consequences of property transfers at death while remaining in a position during life to enjoy some or all of the fruits of ownership.[107] The gross estate includes the value of property interests transferred by a decedent (except to the extent that the transfer was made for full consideration) if the enjoyment of the property was subject to any power of the decedent to alter, amend, revoke, or terminate the transfer at the date of the death.[108]

What is the importance of these estate tax provisions when making gifts using a power of attorney? The IRS has used these provisions to contest gifts made by attorneys-in-fact by arguing that POAs that do not include specific gifting language result in the inclusion of gifts in the estate because the agents are acting without authority to gratuitously transfer the principals property, and consequently the gifts are actually "revocable transfers."[109]

Gifting and POAs[110]

Although a general POA would apparently include the ability to make gifts, the IRS has repeatedly challenged the authority of the attorney-in-fact to make gifts when gifting language is not included in the POA.[111] The general assumption is that the attorney-in-fact must act in the principal's best interest. Giving away the principal's assets is not ordinarily in the principal's best interests. Most states follow the common law rule that a general DPOA does not include a power to gift.[112] Normally, unless the POA includes a specific power to make gifts, the attorney-in-fact does not have the power to make gifts.

A dilemma occurs when an attorney-in-fact makes gifts on behalf of a principal who later dies, but the POA does not contain a specific power to make gifts. The IRS may assert that the gifts are includible in the gross estate of the decedent because the transfer was revocable.[113] The rationale for this assertion by the IRS is that if the principal regains capacity to act, the principal could recover the unauthorized gifts. Therefore, if the estate plan of the individual needs to include the ability to make gifts as a planning technique, it is critical to grant specific authority to make gifts in the DPOA.

If the attorney-in-fact does hold the power to make gifts, then any such gift is complete at the time it is made for the reason that the principal is bound by the acts of the attorney-in-fact.[114] On the other hand, if the attorney-in-fact is not authorized to make gifts under the POA, then the transfers are considered to be revocable by the principal despite that the principal may in reality not have the mental capacity to revoke the gift. A transfer that is revocable by a decedent due to an attorney-in-fact's lack of power, is includible in the decedent's estate for estate tax purposes.

While most courts have concurred with the IRS position, a few courts have interpreted broad grants of power to include the power to make gifts.[115] When a DPOA does not contain specific gifting language, state law governs an attorney-in-fact's authority to make gifts.[116] Currently, only two states provide statutory authority that specifically recognizes that a general grant of power includes an implied authority to make gifts.[117] Most states have not addressed the issue of an attorney-in-fact's power to make gifts when a DPOA does not contain specific

103. *Id.* § 2037.

104. *Id.* § 2038.

105. *Id.* § 2042.

106. *Id.* § 2036.

107. *Id.* §§ 2036-2038.

108. *Id.* § 2038.

109. *Id.*; Townsend v. United States, 889 F. Supp. 369 (D. Neb. 1995); Estate of Casey v. Comm'r, 948 F.2d 895 (4th Cir. 1991).

110. For an extensive review of this subject, see generally Valerie Finn-DeLuca, *The Federal Tax Problems Posed by Durable Powers of Attorney Which are Ambiguous as to the Agent's Authority to Make Gifts*, 22 N. Ky. L. Rev. 891 (1995).

111. *See generally Agents Under Powers: Can They Make Gifts?*, 19 Tax Mgmt. Est., Gifts & Tr. J. 89 (1994).

112. *See generally* Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 Prob. & Prop. 58 (May/June 2000).

113. I.R.C. § 2038.

114. S*ee generally* Finn-DeLuca, *supra* note 110.

115. *See, e.g.*, Estate of Bronston v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Gagliardi v. Comm'r, 89 T.C.M. 1207 (1987); Estate of Council v. Comm'r, 65 T.C. 594 (1975).

116. *See generally* Finn-DeLuca, *supra* note 110.

gifting language. In the majority of states that have not addressed this issue statutorily or judicially, the IRS takes the position that a DPOA which does not explicitly authorize the attorney-in-fact to effectuate gifts creates revocable transfers which are incomplete for gift tax purposes and subject to taxation as part of the estate.[118] Conversely, the Tax Court has inferred gift giving authority not specifically provided in a DPOA in only a few situations when the attorney-in-fact could demonstrate he was carrying out a long established pattern of gift giving by the principal.[119] Nevertheless, these cases are the exception rather than the norm and should not be relied upon in the majority of states.

Swanson[120] *and* Pruitt[121]

Two recent cases illustrate the importance of careful draftsmanship of general DPOAs and coordination of the POA with an estate plan. The lessons from these cases are valuable to practitioners who have drafted general POAs using the prior military drafting software (such as Patriot Expert Systems) and the new DL program.

In 1985, Sylvia Swanson was declared legally blind and a relative began to manage almost all of her assets and financial affairs. In 1990, the health of Mrs. Swanson quickly deteriorated. Mrs. Swanson executed a DPOA which purported to give her agent the legal authority to manage and dispose of her property and to conduct business on her behalf. The DPOA was

117. ALA. CODE § 26-1-2.1 (2000) (Attorney-in-fact; power to make gifts), states:

> (a) If any power of attorney or other writing either authorizes an attorney in fact or other agent to do, execute, or perform any act that the principal might or could do, or evidences the principal's intent to give the attorney in fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney in fact or agent shall have the power and authority to make gifts of any of the principal's property to any individuals, including the attorney in fact or agent, within the limits of the annual exclusion as provided by Section 2503(b) of Title 26 of the United States Code, and taking into account the availability of Section 2513 of Title 26 of the United States Code, as the same may from time to time be amended, or to organizations described in Sections 170(c) and 2522(a) of Title 26 of the United States Code, or corresponding future provisions of federal tax law, or both, as the attorney in fact or agent shall determine: (1) to be in the principal's best interest; (2) to be in the best interest of the principal's estate; or (3) that will reduce the estate tax payable on the principal's death; and is in accordance with the principal's personal history of making or joining in the making of lifetime gifts.
>
> (b) Subsection (a) shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to further authorize, expand, or limit the authority of any attorney in fact or other agent to make gifts of the principal's property.
>
> (c) This section is declaratory of Section 26-1-2 and shall not be construed to nullify any actions taken by any attorney in fact prior to May 6, 1994.

Id.

VA. CODE ANN. § 11-9.5 (2000) (Gifts under power of attorney), states:

> A. If any power of attorney or other writing (i) authorizes an attorney-in-fact or other agent to do, execute, or perform any act that the principal might or could do or (ii) evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to organizations described in §§ 170 (c) and 2522 (a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts.
>
> B. Subsection A shall not in any way impair the right or power of any principal, by express words in the power of attorney or other writing, to authorize, or limit the authority of, any attorney-in-fact or other agent to make gifts of the principal's property.
>
> C. After reasonable notice to the principal, an attorney-in-fact or other agent acting under a durable general power of attorney or other writing may petition the circuit court for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney or other writing. The court shall determine the amounts, recipients and proportions of any gifts of the principal's property after considering all relevant factors including, without limitation, (i) the size of the principal's estate, (ii) the principal's foreseeable obligations and maintenance needs, (iii) the principal's personal history of making, or joining in the making of, lifetime gifts**,** (iv) the principal's estate plan, and (v) the tax effects of the gifts.

Id.

118. *See, e.g.*, Estate of Casey v. Comm'r, 948 F.2d 895, 898 (4th Cir. 1991); Tech. Adv. Mem. 93-97-003 (Aug. 5, 1993); Tech. Adv. Mem. 92-31-003 (Apr. 9, 1992); Tech. Adv. Mem. 93-42-003 (June 30, 1993).

119. *See, e.g.*, Estate of Bronston v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Gagliardi v. Comm'r, 89 T.C.M. 1207 (1987); Estate of Council v. Comm'r, 65 T.C. 594 (1975).

120. 46 Fed. Cl. 388 (2000).

121. Estate of Pruitt v. Comm'r, 80 T.C.M. (CCH) 348 (2000).

very broad in the authority and discretion it purported to authorize the agent. However, the DPOA *did not* include specific gifting language or provisions. The DPOA gave the agent the "sole discretion" as to when he should invoke the powers conferred by the DPOA. The DPOA was properly executed and witnessed. A couple of months after the execution of the DPOA, the agent approached Mrs. Swanson with the idea of making $10,000 gifts to forty individuals for "minimizing the tax impact on her estate."[122] Mrs. Swanson approved thirty-eight gifts to potential gift recipients by nodding her head when the agent read each individual's name. The agent wrote, signed, and delivered thirty-eight checks made out to thirty-eight separate individuals for $10,000 each. Mrs. Swanson died the following week.[123]

Sometime after her death, the estate of Mrs. Swanson paid estate tax on the $380,000 of gifts, and filed a claim for refund for the tax on the gifts. The IRS denied the claim for the refund. The estate then brought an action in the United States Court of Federal Claims. The IRS asserted that all thirty-eight gifts made by the agent were beyond the power given to the agent under the DPOA and thus were void under state law. The IRS argued that Mrs. Swanson retained a power of revocation over the gifts and they were includible in her gross estate.[124] The Court of Federal Claims agreed with the IRS position.[125]

In *Swanson*, the decedent's DPOA did not give her attorney-in-fact authority to make gifts, and therefore the gifts were void under state law (California). Because the gifts were void, the decedent retained the right to revoke the gifts, and the gifts were includible in her estate.[126] Most states agree with the IRS position that when an attorney-in-fact or agent is acting without authority or beyond the scope of the expressed powers of the general POA, the gifts are actually revocable transfers.[127] The *Swanson* court reiterated that the legality of a gift made under a POA depends on state law.[128] The court pointed out that California law does not automatically give the attorney-in-fact the right to give away the principal's property.[129]

The estate unsuccessfully argued to the court that the POA gave the attorney-in-fact the right to make the gifts. However, the POA did not contain any specific gifting language. The estate argued that even if the attorney-in-fact did not have authority to make the gifts under the POA, the decedent ratified the gifts when she nodded as each prospective beneficiary's name was read to her. The court did not agree. The court relied upon state law that said that any additional authority given the attorney-in-fact must be done in writing.[130] According to California law, a transfer of assets by an attorney-in-fact without proper authority is void.[131] The *Swanson* court held that the decedent could have revoked the transfers by the attorney-in-fact before death, and the estate could have pursued the collection of the revoked gifts before death. The decedent retained the right to revoke the gifts and each of the thirty-eight gifts of $10,000 was included in the decedent's gross estate for estate tax purposes.[132]

In *Pruitt*,[133] the U.S. Tax Court had the opportunity to address a similar situation, but in a different state and with a slightly different twist on the facts. Beginning in the 1980's, the decedent engaged in lifetime estate planning techniques in order to lower her potential estate tax liability and increase her children's inheritance. From 1980 to 1992, the decedent consistently engaged in a pattern of making lifetime gifts to her children (and their spouses) and grandchildren in order to reduce the size of her estate. From 1987 to 1993, the decedent executed three different powers of attorney to the same agent or attorney-in-fact. None of the POAs contained specific gifting provisions or language. Beginning in 1993, the decedent's mental condition had deteriorated to the point where she lacked

122. *Swanson*, 46 Fed. Cl. at 390.

123. *Id.*

124. *See generally* I.R.C. § 2038(a)(1) (LEXIS 2000).

125. *Swanson*, 46 Fed. Cl. at 391.

126. *Id.* at 393 (applying I.R.C. § 2038(a)(2)).

127. The majority of courts have agreed with the IRS position, but some cases have interpreted broad grants of power to include the authority to make gifts. *See, e.g.*, Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L. J. 143 (1996).

128. *Swanson*, 46 Fed. Cl. at 391 (citing Morgan v. Comm'r, 309 U.S. 78 (1940); Mapes v. United States, (9th Cir. 1994)).

129. *Id.* (citing Huston v. Greene, 51 Cal. App. 4th 1721, 1726 (Cal. Ct. App. 1997); Randall v. Duff, 19 P. 532 (Cal. 1888), *adhered to on reh'g* 21 P. 610 (Cal. 1889); Bertelsen, 122 P.2d 130 (Cal. Dist. Ct. App. 1942)).

130. *Id.* (citing *Huston*, 51 Cal. App. 4th at 1727 (quoting CAL. CIV. CODE § 2310 (2000))).

131. *Id.* at 393.

132. *Id.* (citing I.R.C. § 2038(a)(2)).

133. Estate of Pruitt v. Comm'r, 80 T.C.M. (CCH) 348 (2000).

the mental capacity to discuss gifting with the attorney-in-fact. The agent used the DPOA to make gifts to family members and their spouses. The gifts made in 1993 and 1994 pursuant to the DPOA were not included in the calculation of the of the decedent's gross estate.[134]

The IRS asserted that the gifts made by the attorney-in-fact pursuant to the DPOA were not expressly authorized by the DPOA and were includible in the decedent's gross estate. However, unlike the *Swanson* case, the court held that the decedent did not have the right to revoke the gifts on her date of death and the gifts were not includible in her gross estate. Despite the lack of specific language in the DPOA regarding the authority to make gifts, the court looked beyond the DPOA to find that the decedent had a history or record in the case showing a clear intent on the part of the decedent to include the power to make gifts in the DPOA. The court held that the gifts made were authorized by the DPOA, despite the lack of specific language or a specific gifting provision.[135]

Lessons from Swanson & Pruitt

What lessons can be learned from *Swanson*? The case highlights the significance of advance estate planning and careful consideration. In the proper situation, legal assistance clients, particularly retirees, should be counseled to make annual exclusion gifts as early on as possible. The client should also be counseled regarding the importance of giving a DPOA that permits the making of gifts. In the event of the incapacitation of the client, the attorney-in-fact would be in a position to make annual exclusion gifts on behalf of the client and thereby save estate taxes. The ill-fated tax consequence of *Swanson* easily could have been avoided if the DPOA had been drafted to include specific authority for the attorney-in-fact to make gifts. Generally, an attorney-in-fact does not have implied authority to make gifts under a DPOA (depending on state law). The provisions in California regarding the POA are common in most other states. In some situations, making a number of gifts using the annual exclusion and a general DPOA is an effective way to reduce a client's gross estate. However, the legal assistance attorney must make sure that the gift giving is allowable under the instrument. When drafting the POA, the client and attorney should consider the potential need and usefulness of including gifting language in the POA. Likewise, legal assistance attorneys that advise clients regarding the ability to use a general DPOA need to look closely at the language of the document (if already in existence) to make sure the document has gifting language if that is the desire of the client.

Pruitt can be distinguished from *Swanson*. All parties in the *Pruitt* case agreed that the DPOA did not contain an express authorization for the attorney-in-fact to make gifts. However, the Tax Court applied the state law and examined not only the language of the POA, but the facts and circumstances surrounding the execution of the POA to ascertain whether the power to make gifts must be inferred to give effect to the decedent's intent. The *Pruitt* court held that its goal was to ascertain whether the decedent had the intent to confer gift-giving power upon the attorney-in-fact.[136] In *Pruitt*, the court rationalized that the power to make gifts was inferred from the language of the POA and the state law controlling did not contain a prohibition on inferring the power to make gifts. In addition, the state jurisdiction considered the principal's intention in interpreting the POA which was manifest in the principal's pattern of gifting prior to the initiation of gifting by the attorney-in-fact . The gifts made by the attorney-in-fact were consistent with the principal's prior gifting, and the gifts did not deplete the principal's assets to the principal's detriment. Finally, it was clear there had been no fraud or abuse by the agent.[137]

In light of *Swanson* and *Pruitt*, legal assistance practitioners should closely examine the intent of their clients regarding the ability of their agents to make lifetime gifts pursuant to general DPOAs. The result may be surprising for some practitioners that drafted POAs using the Patriot Expert System (and its predecessors). The DPOAs drafted using the Patriot Expert Systems did not contain any gifting language or provisions. Many legal assistance clients may be under the false impression that the general DPOA they currently have in their estate plan will allow their agent to make gifts. For practitioners drafting POAs using the DL program, the attorney will need to understand the importance of options available for the making of lifetime gifts and include the appropriate gifting language if the client desires the agent to have such powers.

Drafting Considerations

In drafting a POA, it is important to state specifically all the powers the principal intends to convey. When a client desires to confer the power to make gifts upon his agent, the POA should explicitly state that the attorney-in-fact has the power to make gifts for purpose of estate planning. Although a few cases were mentioned where courts looked to the pattern of past gifts by the principal to establish the authority to make gifts in the absence of specific language, a drafter should by no means rely on this versus including specific language in the POA.

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134. *Id.*

135. *Id.*

136. *Id.* (citing Estate of Bronston v. Comm'r, 56 T.C.M. (CCH) 550 (1988); Estate of Neff v. Comm'r, 73 T.C.M. (CCH) 2606 (1997)).

137. *Id.*

Many clients select an agent in a POA that is trusted implicitly and thus, the client is not concerned with the abuse of power. Is it advisable to provide the trusted agent with the unlimited ability to make gifts? From the standpoint of the principal, there may be no downside to giving unlimited ability to gift to a trusted agent. In the event the agent is not a potential beneficiary, there is no problem. However, most agents are family members and also potential beneficiaries. The dilemma is that under the Internal Revenue Code, the agent is considered to possess a general power of appointment.[138] If the attorney-in-fact predeceases the principal, the principal's entire estate will be included in the attorney-in-fact's gross estate. This sticky situation requires the client and the drafting attorney to develop a line of attack that allows the attorney-in-fact to make substantial gifts and yet avoids unfavorable gift and estate tax consequences to the agent.

There are several strategies for employing a restriction on an attorney-in-fact's gifting power.[139] It is common to limit the power to make gifts in a POA to a specific dollar limitation. For example, the limitation could state an amount not to exceed the annual gift tax exclusion (currently $10,000 per person, per year) or an amount not to exceed the principal's unused unified credit amount. The limitation reduces the agent's exposure upon death. In addition, some clients may want to identify a class of potential beneficiaries to some extent. The disadvantage of limiting a potential class is that the restriction may prevent the attorney-in-fact from taking complete advantage of the annual exclusion in order to avoid potential estate taxation. Another approach is to use the ascertainable standard exception to the general power of appointment rule.[140] An ascertainable standard includes amounts for health, education, maintenance, and support.[141] Finally, an annual limitation on gifting to the greater of $5000 or five percent ("5 and 5 power") of the aggregate value of the assets subject to the power also limits the negative tax exposure.[142] Upon the death of the agent, the tax liability arising under the POA would be limited to the "5 and 5" power if the assets have not already been withdrawn during that year. Limitations in the POA using the annual exclusion, the ascertainable standard, and "5 and 5" power formulas limit the agent's exposure for estate taxes upon his death and reduces the potential for abuse.

Conclusion

The foundation of military estate planning for disability or incompetency is the DPOA. The basic reason most individuals need a DPOA is to prevent the requirement for an unnecessary and burdensome guardianship. For legal assistance clients with potentially taxable estates, a properly drafted DPOA is an effective component of an estate plan that can significantly reduce taxation. Automation programs such as the DL program greatly enhance the estate planning arsenal of the legal assistance attorney. Despite the fact the DL program assists the attorney in drafting a general DPOA, the attorney still must be an effective document drafter and make the appropriate selections regarding the inclusion of clauses in the general DPOA. Military attorneys may encounter clients from all fifty states. It is not realistic for legal assistance attorneys to commit to memory the law of each state regarding DPOAs and gifting. However, the legal assistance attorney must understand the importance of including specific gifting language in the general DPOA for clients that are involved in a gifting program, or may need to engage in a gifting program prior to their death. Major Rousseau.[143]

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138. *See* I.R.C. § 2041 (2000). For more information on a general power of appointment, see Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, ARMY LAW., Nov. 1999, at 1, 13-14.

139. *See generally* Strauss & Adler, *supra* note 91, at 7.

140. I.R.C. § 2041(b)(1)(A); I.R.C. § 2514(C)(1) (LEXIS 2000).

141. *Id.*

142. The tax code allows a power limited to this method to avoid gift taxation when the power lapses each year. I.R.C. § 2514.

143. Major Vivian Shafer, 48th Graduate Course, assisted with the preparation of this article.

Appendix[144]

State	Statute Section	Comment	Durable	Springing/Contingent
Alabama	ALA. CODE § 26-1-2 (LEXIS 2000)		Yes	Yes
Alaska	ALASKA STAT. § 13.26.350 (LEXIS 2000)		Yes	Yes
Arizona	ARIZ. REV. STAT. § 14-5502 (LEXIS 2000)		Yes	Yes
Arkansas	ARK. STAT. ANN. § 28-62-201, § 28-62-202 (LEXIS 1999)		Yes	Yes
California	CAL. PROB. CODE § 4124, 4125, 4029, 4030 (LEXIS 2000)	Written declaration required asserting that contingency has occurred.	Yes	Yes
Colorado	COLO. REV. STAT. § 15-14-501, § 15-14-604 (LEXIS 1999)		Yes	Yes
Connecticut	CON. GEN. STAT. § 45a-562, § 1-56h (LEXIS 1999)	For Springing POA, the POA must require that a written affidavit be executed to verify that the contingency has occurred.	Yes	Yes
Delaware	12 DEL. CODE ANN. § 4901, 4902 (LEXIS 1999)		Yes	Yes
District of Columbia	DIST. COL. CODE § 21-2081, 2081 (LEXIS 1999)		Yes	Yes
Florida	FLA. STAT. § 709.08 LEXIS 1999)	Current statute has specific limitations on powers.	Yes	No
Georgia	GA. CODE ANN. § 10-6-6, 10-6-36 (LEXIS 1999)	POA does not terminate at incompetence unless expressly provided. Agent must execute written declaration that the contingency has occurred. POA valid until administrator appointed or judicial action to terminate.	Yes	Yes
Hawaii	HAW. REV. STAT. § 551d-1, 551d-2 (LEXIS 1999)		Yes	Yes
Idaho	IDAHO CODE § 15-5-501, 15-5-502 (LEXIS 1999)		Yes	Yes

144. Appendix furnished by the Office of The Judge Advocate General, Legal Assistance Policy Division.

Illinois	755 ILL. COM. STAT. ANN. § 45/2-4, 45/2-5, 45/2-6 (LEXIS 2000)		Yes	Yes
Indiana	IND. CODE ANN. § 30-5-10-3, 30-5-3-2, 30-5-4-2 (LEXIS 1999)		Yes	Yes
Iowa	IOWA CODE § 633.705 (LEXIS 1999)		Yes	Yes
Kansas	KAN. STAT. ANN. § 58-610, 58-611 (LEXIS 1999)		Yes	Yes
Kentucky	KEN. REV. STAT. § 386.093 (LEXIS 1998)		Yes	Yes
Louisiana	LA. CIV. CODE art. 3026; LA. REV. STAT. § 9:3861 - 9:3887 (LEXIS 2000)		Yes	[a]
Maine	ME. REV. STAT. § 5-501, 5-502, 5-508 (LEXIS 1999)	A financial durable POA must be notarized. There is required language for a durable financial POA.	Yes	Yes
Maryland	MD. EST. & TRUSTS CODE ANN. § 13-601 (LEXIS 1999)		Yes	[b]
Massachusetts	MASS. ANN. LAWS Ch. 201B § 1 Ch. 201B § 1 (LEXIS 2000)		Yes	Yes
Michigan	MICH. STAT. ANN. § 700.5501, 700.5502 (LEXIS 1999)		Yes	Yes
Minnesota	MINN. STAT. § 523.02, 523-07 (LEXIS 1999)	POA valid if valid pursuant to law of another state.	Yes	Yes
Mississippi	MISS. CODE ANN. § 87-3-105, 87-3-107 (LEXIS 2000)		Yes	Yes
Missouri	MO. REV. STAT. § 404.705 (LEXIS 1999)		Yes	[c]
Montana	MONT. CODE ANN. § 72-5-501, 72-31-222 (LEXIS 1999)		Yes	Yes
Nebraska	NEB. REV. STAT. ANN. § 30-2665, 49-1510, 1511, 1518, 1523, 1524 (LEXIS 2000)		Yes	Yes
Nevada	NEV. REV. STAT. ANN. § 111.460 (LEXIS 2000)		Yes	Yes
New Hampshire	N.H. REV. STAT. ANN. § 506:6 (LEXIS 1999)		Yes	[d]
New Jersey	N.J. REV. STAT. § 46:2B-8 (LEXIS 2000)		Yes	Yes

New Mexico	N.M. STAT. ANN. § 45-5-501, 45-5-502 (LEXIS 2000)		Yes	[e]
New York	N.Y. GEN. OBLIG. LAW § 5-1505, 5-1506 (LEXIS 2000)	POA must require that the agent declare in writing that the contingency has occurred.	Yes	Yes
North Carolina	N.C. GEN. STAT. § 32A-8, 32A-9 (LEXIS 1999)	Needs to be registered in the office of the register of deeds of the county in the state designated in the POA, or if none, designated office in county of legal residence of principal at time of registration, or if unsure of residence, in county in which principal owns property.	Yes	Yes
North Dakota	N.D. CENT. CODE § 30.1-30-01, 30.1-30-02 (LEXIS 2000)		Yes	Yes
Ohio	OHIO REV. CODE ANN. § 1337.09 (LEXIS 2000)		Yes	Yes
Oklahoma	OK. STAT. tit. 15 § 1004, 1072, 1073 (LEXIS 1999)		Yes	Yes
Oregon	OR. REV. STAT. § 127.005 (LEXIS 1997)		Yes	No
Pennsylvania	20 PA. CONS. STAT. § 5601.1, 5604 (LEXIS 1999)		Yes	Yes
Rhode Island	R.I. GEN. LAWS § 34-22-6.1, 23-4.10-11 (LEXIS 2000)		Yes	Yes
South Carolina	S.C. CODE ANN. § 62-5-501 (LEXIS 1999)		Yes	Yes
South Dakota	S.D. CODIFIED LAWS § 59-7-2.1 (LEXIS 2000)		Yes	No
Tennessee	TENN. CODE ANN. § 34-6-102, 34-6-103 (LEXIS 1999)		Yes	Yes
Texas	TEX. PROB. CODE § 482, 484 (LEXIS 2000)		Yes	Yes
Utah	UTAH CODE ANN. § 75-5-501 (LEXIS 1999)		Yes	Yes
Vermont	14 VT. STAT. ANN. § 3051 (LEXIS 2000)		Yes	Yes
Virginia	VA. CODE ANN. § 11-9.1, 11-9.4 (LEXIS 1999)		Yes	Yes
Washington	WASH. REV. CODE § 11.94.010 (LEXIS 2000)		Yes	Yes

West Virginia	W. VA. CODE ANN. § 39-4-1, 34-4-2 (LEXIS 2000)		Yes	Yes
Wisconsin	WIS. STAT. § 243.07 (LEXIS 1999)		Yes	Yes
Wyoming	WYO. STAT. ANN. § 3-5-101 (LEXIS 2000)		Yes	Yes

a. Louisiana statutes do not specifically address springing powers. However, LA. REV. STAT. § 3862 (LEXIS 2000), contains a sample military power of attorney that contains language that indicates the power of attorney is effective immediately unless otherwise directed.
b. Maryland changed its statute effective 1 January 2000. Previously, the law was clear that a power of attorney could become effective upon the disability of the principal. When the new statute was enacted, that language was deleted. The new statute provides that a power of attorney is durable unless otherwise provided by its terms.
c. The statute in Missouri does not clearly provide for a springing power of attorney, but the statute has a sample phrase that seems to contemplate a springing power of attorney.
d. There is no statute or case in New Hampshire on point as to whether a springing power of attorney is authorized.
e. New Mexico statutes doe not expressly provide for a springing power of attorney, but the statute has a sample phrase that contemplates a springing power of attorney. However, N.M. STAT. ANN. § 45-5-602 (LEXIS 2000), a statutory form of power of attorney, seems to allow for springing powers.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

Department of Defense (DOD) Services Sign N.J. Multisite Agreement

On 31 August 2000, the DOD services signed the New Jersey Multisite Agreement. The Multisite Agreement is intended to lay the framework for streamlining New Jersey cleanups that are conducted consistent with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] Parties to the Agreement include the New Jersey Department of Environmental Protection, the Army, Navy, Air Force, and U.S. Defense Logistics Agency. Particular emphasis is given to how parties will document and maintain land use controls at various sites. (Land use controls are restrictions in access or uses of property that are intended to protect human health and the environment.) The sites addressed by this agreement include cleanups at active installations, facilities slated for transfer in accordance with the Defense Base Closure and Realignment Act,[2] and formerly used defense sites. A similar agreement was already signed with the State of Pennsylvania.[3] Ms. Barfield.

Superfund Recycling Equity Act Applies to Pending Litigation Brought by the California DTSC

In 1999, Congress enacted the Superfund Recycling Equity Act (Act)[4] in order to remove impediments to recycling created as an unintended consequence of the liability provisions of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[5] As a matter of "liability clarification," the new provision exempts arrangers for recycling of certain materials from CERCLA liability for clean up costs. These materials include scrap paper, scrap glass, rubber (other than whole tires), scrap metal, and spent batteries. The law states that it will not affect "any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment." Regarding pending actions by parties other than the United States, the Act was silent.

The effect of the Act on such pending actions was recently addressed by a district court in California.[6] The court denied a partial summary judgment motion brought by the California Department of Toxic Substances Control (DTSC), who argued that that the Act does not apply to this action because it was pending at the time the amendments were enacted. The DTSC had brought suit against ten scrap metal dealers and the United States seeking response costs the DTSC incurred from a release of hazardous substances at the Mobile Smelting Site in Mojave, California. Two years later, the Superfund Recycling Equity Act was passed. The DTSC argued that since this case was pending at the time of passage, the Act should not apply.

The court identified and applied the two-part test of *Landgraf v. USI Film Products*:[7] "(1) Has Congress expressly prescribed the temporal reach of the statute?; and if not, (2) Does the statute have retroactive effect?"[8] Regarding the first test, the court first looked to the language of the Act to determine whether there was an express command or unambiguous directive regarding the temporal reach of the Act for parties other than the United States. The DTSC argued that there is no explicit statement that applies the Act's provisions to pending actions brought by a state agency before the date of enactment; therefore, it does not apply to this case. Some of the defendants argued that the specific exclusion of pending United States claims from the Act means that pending claims by all other parties are not excluded. Other defendants and some *amicus* parties argued that the court should first determine whether the language of the Act is plain and unambiguous. If the language

1. 42 U.S.C. § 9601 (2000).

2. *See generally* 10 U.S.C. § 2687.

3. Ms. Colleen Rathbun of the U.S. Army Environmental Center negotiated both the Pennsylvania and New Jersey Multisite Agreements on behalf of the Army.

4. 42 U.S.C. § 6001.

5. 42 U.S.C. § 9601.

6. California Department of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123 (E.D. Cal. 2000).

7. 511 U.S. 244 (1998).

8. *Id*. at 269-70.

is clear, the court's analysis stops. If the court finds no statutory language mandating retroactivity, then the court turns to the congressional intent of the statute. Here, the court reviewed all parts of the statute–its structure, verb tense, headings, purpose, express prospective language, proof standards, and its legislative history–in search of any express prescription. The court concluded that many aspects of the Act's structure and legislative history weigh heavily toward the argument that the Act should be read retrospectively.

The court, however, went on to assume, *arguendo*, that there was no conclusive language, and addressed the second test, the Act's retroactive effect. The court in *Landgraf* found that a statute would be improperly retroactive if "it would impair the rights a party possessed when [the party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[9] Retroactive application is consistently rejected when its application "result[s] in manifest injustice."[10] The DTSC claimed it was harmed because the amendment eliminated a cause of action that previously existed, but the court concluded that DTSC's rights were not impaired. The recyclers who can avoid liability under the new Act should be able to do so, and the Act does not impose any new duties against the DTSC. The DTSC will not incur more costs or suffer greater expense if some parties are exempt from liability under this Act. The DTSC did not assert that it engaged in conduct that it would not have otherwise engaged in had the law been enacted earlier. The court saw no vested expectation on behalf of the state that was defeated by the new Act. Overall, the application of the statute made no difference in the State's actions. Therefore, the Act is not improperly retroactive.

The court then identified a separate analytical approach to determine the retroactivity of the Act: whether a new statute clarifies or changes the existing law.[11] If the new statute clarifies the existing law then there is no retroactive effect because it is merely restating a current law. If the new statute had no retroactive effect, then it can be applied to the pending case. A significant factor that the court used to determine whether the amendment clarifies an existing law was whether, when the amendment was enacted, the conflict or ambiguity existed with respect to the interpretation of the relevant provision. If so, the amendment is a clarification, not a change of the existing law. After reviewing the arguments of the defendants and *amicus* parties, the court held that the legislative history supports the finding that the amendment is a clarification of recycler liability under CERCLA.[12] Therefore, the Act has no improper retroactive effect and the defendants can seek exemption from liability pursuant to the Act in the case.

In third-party sites, the Army is often named as a responsible party where it only sent recyclable materials to the site. This holding provides the Army the recycling exemption from liability under CERCLA section 107(a) for cases filed against the Army by a state agency or private party prior to when the Act was enacted. But this is just a beginning: to claim the exemption, the Army must still demonstrate by a preponderance of the evidence that the waste it allegedly generated, arranged, or transported to the site consisted solely of recyclable material. In addition, this is one district court's opinion in California; many other courts in other districts will have an opportunity to either follow or reject this ruling. Ms. Greco.

Yes, We Need No Permits

When the Army undertakes cleanups under the CERCLA,[13] it need not obtain permits for on-site response actions conducted under our CERCLA authority. In fact, the CERCLA contains a specific permit exclusion, which reads:

> No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section.[14]

The primary reasons that this exclusion was created are:

> (1) avoid delays in CERCLA response actions;
>
> (2) CERCLA and the National Contingency Plan (NCP)[15] provide detailed procedures that outline all steps of the cleanup action, while allowing for public involvement; and
>
> (3) CERCLA response actions follow the substantive provisions of law and regulation

9. *California Department of Toxic Substances Control*, 99 F. Supp. 2d at 1128 (quoting *Landgraf*, 511 U.S. at 280).

10. *Id.* at 1129 (quoting Two Rivers v. Lewis, 174 F.3d 987, 994 (9th Cir. 1999)).

11. *Id.*

12. *Id.* at 1152.

13. 42 U.S.C. § 9601 (2000).

14. *Id.* § 9621(e)(1).

15. *See generally* 40 C.F.R. pt. 300 (2000).

identified in the Record of Decision or comparable decision document.[16]

Thus, the environmental protection that might be provided by a permit is already met by complying with the requirements of the CERCLA, the NCP, and any applicable or relevant and appropriate requirements that are identified in the Record of Decision or other decision document. This process also allows the Army to proceed with cleanups in a straightforward manner and avoid needless delays.

The permit exclusion applies to on-site response actions. The NCP defines the term "on-site" to include the "real extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."[17] This concept can sometimes cause confusion at active installations that are undertaking the CERCLA cleanups. This is because an installation may have permits for hazardous waste management and air or water discharges. Although the terms of such permits would apply to the installation's operation in general, this does not mean that permits must be acquired to conduct specific CERCLA response actions. When the Army is operating under its authority to conduct a CERCLA cleanup on-site, the permit exemption applies. Ms. Barfield.

Court Ruling Heightens Import of Installations' Endangered Species Planning

Recently the federal district court for the Eastern District of California granted summary judgment to the National Wildlife Federation (NWF) in its lawsuit regarding the Natomas Basin Habitat Conservation Plan (HCP) in the Sacramento area,[18] finding violations of the Endangered Species Act (ESA)[19] and the National Environmental Policy Act (NEPA).[20] Because the Army (along with other DOD services) is now attempting to gain the same sorts of protections for its installations that the HCPs allow for non-federal lands, Army practitioners may wish to note the points of failure of this HCP. There are lessons in this case which are applicable to how the Army develops and implements its Integrated Natural Resource Management Plans (INRMPs) and Endangered Species Management Plans (ESMPs).[21]

The HCP in question encompasses approximately 53,000 acres of land straddling the northern boundary of the city of Sacramento, and was developed to protect the habitat of at least two federally listed species, the Giant Garter Snake and Swainson's Hawk. Of the total acreage, just over 11,000 acres fell within Sacramento's jurisdiction, with the remainder of the acreage falling into two counties. At the time of the lawsuit, neither of the counties had applied for an Incidental Take Permit (ITP) pursuant to the HCP.

The Natomas HCP set up a mitigation scheme whereby for each acre of land to be developed, one half an acre was to be acquired and set aside as a habitat reserve, with the assumption that much of the undeveloped land would remain either undeveloped or agricultural, the latter also providing good habitat value. Development fees were to be collected that would pay for both the acquisition and management of the reserve lands.

The HCP was developed in accordance with Section 10 of the ESA, which provides an exception from the prohibition on "take" found in Section 9 of the ESA.[22] The ITP granted to Sacramento was granted pursuant to Section 10's criteria:

"Upon submission of an HCP and an ITP application, [U.S. Fish and Wildlife Service (FWS)] shall issue the permit if it finds that:

> (1) The taking will be incidental;
> (2) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
> (3) The applicant will ensure that adequate funding for the plan will be provided;
> (4) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
> (5) Other measures required by [FWS] will be met."[23]

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16. For information on how cleanup standards are identified, see 40 C.F.R. §§ 300.400(g), which outlines the process for determining applicable or relevant and appropriate requirements governing cleanup actions.

17. 40 C.F.R. §§ 300.400(e)(1), 300.5.

18. National Wildlife Federation v. Babbitt, Civ. S-99-274 (E.D. Cal. Aug. 15, 2000).

19. 16 U.S.C. §§ 1531-1544 (2000).

20. 42 U.S.C. §§ 4321 (2000).

21. *See* Sikes Act Improvement Act of 1997, 16 U.S.C. § 670; *see also* U.S. Dep't of Army, Reg. 200-3, Natural Resources–Land, Forest and Wildlife Management, chs. 9, 11 (28 Feb. 1995).

22. Section 9 of the ESA prohibits "take" of any listed species. Take is defined very broadly, and includes "harm," 16 U.S.C. § 1538(a)(1), which includes any "significant habitat modification or degradation [which would impair] essential behavioral patterns . . . ." 50 C.F.R. § 17.3 (2000).

The district court held as arbitrary and capricious FWS's findings that Sacramento would to the maximum extent practicable minimize and mitigate the impacts of development,[24] and that Sacramento had ensured adequate funding for the plan.[25] Both holdings turned on the inadequacy and lack of economic analysis of the scheme whereby development fees would fund acquisition of reserve lands to mitigate habitat loss. Specifically, the court found it notable that the land inside the Sacramento city border would be rapidly developed,[26] but there were no assurances that the political entities outside Sacramento would submit ITP applications,[27] and no analysis of the how the scheme would work if the counties did not participate in the HCP.[28] The NWF also claimed, and the court agreed, that FWS should have prepared an environmental impact statement for the HCP, given its duration of fifty years, complexity, and certain controversy.[29]

For installation INRMPs and ESMPs, the lessons from this holding are clear: if FWS is to grant ITPs and defer critical habitat designations on Army installations pursuant to the installation's INRMP and ESMP, then clearly the Army will have to make an ironclad fiscal commitment to ensure funding, and to minimize and mitigate take. That said, however, it is clear that the Army is clearly committed to sustained funding for not only developing comprehensive, programmatic plans, but also for implementing those plans. MAJ Robinette.

Proposed Suspension of Historic Preservation Regulations Creates Compliance Confusion

With the specter of an unfavorable court ruling hanging over its head, the Advisory Council on Historic Preservation (Council) proposed to suspend 36 C.F.R. § 800,[30] its regulations governing review of federal agency actions with the potential to effect historic properties.[31] The regulations could be suspended as early as 30 October 2000 unless the Council receives comments expressing a compelling reason for not going forward. Once suspended, the procedures set forth in 36 C.F.R. § 800 will become non-binding guidance that federal agencies are encouraged to use to meet their responsibilities pursuant to section 106 of the National Historic Preservation Act (NHPA).[32] The Council anticipates republishing a new final rule by 17 November 2000. This target may be somewhat optimistic given the controversy surrounding publication of the current rules in 1999 and the willingness of certain stakeholders to resort to litigation for relief.

Promulgation of the current regulations has had a long and tortured history. Congress established the fundamental requirements of section 106 of the NHPA in 1966. Section 106 directed federal agencies to consider the effects of their actions on historic properties and provide the Council a reasonable opportunity to comment prior to making a final decision to proceed. Since 1986, federal agencies have complied with this mandate by following the detailed review procedures published by the Council in 36 C.F.R. § 800. Congress amended the NHPA in 1992, in large part, recognizing the need to provide for greater participation of federally recognized Indian tribes and Native Hawaiian Organizations (NHOs) in the review process.[33]

Realizing that the 1986 regulations were insufficient to address the amendments in 1992, the Council initiated the informal rule-making process pursuant to the Administrative Procedure Act (APA)[34] to amend and update 36 C.F.R. § 800. After almost five years and publication of two Notices of Proposed Rulemaking,[35] the Council completed a final rule,[36] cod-

23. 16 U.S.C. § 1539(a)(2)(B).

24. National Wildlife Federation v. Babbitt, Civ. S-99-274 (E.D. Cal. Aug. 15, 2000), at 42.

25. *Id.* at 47.

26. *Id.* at 41.

27. *Id.* at 44.

28. *Id.*

29. *Id.* at 42.

30. Protection of Historic Properties, 36 C.F.R. § 800 (2000).

31. The Notice of Proposed Suspension, which initiated a forty-five day public comment period, was published in the Federal Register at 65 Fed. Reg. 55,928 (Sept. 15, 2000).

32. *See* 16 U.S.C. § 470 (2000).

33. *See* 16 U.S.C. § 470a(d)(6)(A) (making clear that properties of traditional religious and cultural importance may be eligible for inclusion in the National Register); *see also* 16 U.S.C. § 470a(d)(6)(B) (directing federal agencies to consult with tribes and NHOs when carrying out Section 106 responsibilities with respect to properties of traditional religious and cultural importance).

34. 5 U.S.C. §§ 551-559 (2000).

ified at 36 C.F.R. § 800, which became effective on 17 June 1999–finally superceding the 1986 regulations. The 1999 regulations significantly altered the section 106 review process, delegating greater day-to-day responsibilities to State Historic Preservation Officers (SHPOs), redefining the Council's program and policy oversight roles, and establishing mandatory procedures for involvement of Tribal Historic Preservation Officers (THPOs), tribes and NHO's.[37]

Just as the Army and other federal agencies were coming to grips with the compliance challenges posed by the new regulations, the National Mining Association (NMA), filed suit in Federal District Court, alleging, among other things, that the Council's decision to promulgate the final rule violated the Appointments Clause of the United States Constitution by allowing representatives of the National Trust for Historic Preservation and National Conference of State Historic Preservation Officers to vote on the issue. Both representatives are members of the Council, but are not appointed by the President.

In response to the litigation, the Council voted to suspend 36 CFR § 800 to avoid an unfavorable ruling by the Court. It is presently in the process of republishing the regulations,[38] and anticipates completing a final rule by 17 November 2000. This means that there will be no binding section 106 regulations between 30 October 2000 and the date of final publication. To remedy this regulatory shortcoming, the Council has adopted 36 C.F.R. § 800 as "guidance" and encourages Federal agencies to comply with those procedures to avoid disruption in the compliance process while rule-making proceeds.

Whether the Council meets its 17 November 2000 deadline or not, Environmental Law Specialists should continue to advise their clients to comply with 36 C.F.R. § 800 until the Council publishes a final rule in the Federal Register. These procedures are consistent with those contained in *Army Regulation 200-4, Cultural Resources Management*, and will ensure that the Army continues to meet the fundamental requirements of section 106. Mr. Farley.

Assessing the Aftermath of Section 8149

The arrival of 1 October 2000 signals many things to many people, but to military attorneys who deal with environmental enforcement actions it holds the promise to the end of a year of frustration. The Defense Appropriations Act for Fiscal Year 2000[39] contained a rider, section 8149,[40] that upset the routine process of negotiating settlements in enforcement actions by requiring specific congressional approval of all settlements that would use fiscal year (FY) 2000 funding.[41] This meant that Army attorneys had to build into each settlement agreement provisions that would suspend payment of penalties or funding of supplemental environmental projects (SEPs) until Congress passed legislation approving the expenditure of funds. An additional dilemma was introduced when a survey of settlements from prior years turned up five installations that required FY 2000 funding to complete SEPs, some of which were already underway. This article surveys the impacts of what is now known simply as "section 8149" on enforcement actions against Army installations, and the status of legislation that may succeed it.

The main catalyst for section 8149 was EPA's proposal in August 1999 to issue a $16 million penalty to Fort Wainwright, Alaska. Over ninety-nine percent of the proposed fine was based on two types of "business" penalty assessment criteria[42] that have no relevance to federal agencies.[43] Although intended as the proverbial "shot across the bow" to the EPA, it was a message the EPA did not receive because the EPA has continued undeterred in its campaign to impose business penalties against federal facilities.[44] Section 8149 not only incurred a

35. These notices were published in the Federal Register at 59 Fed. Reg. 50,396 (Oct. 3, 1994) and 61 Fed. Reg. 48,580 (Sept. 13, 1996), respectively.

36. The final rule was published in the Federal Register at 64 Fed. Reg. 27,044-27,084 (May 18, 1999).

37. *See id.*

38. The Council published a Notice of Proposed Rule-making in the Federal Register. 65 Fed. Reg. 42,834 (July 11, 2000). The extended comment period closed 31 August 2000. The Council is presently reviewing comments in anticipation of publishing the final rule on 17 November 2000. *Id.*

39. Pub. L. No. 106-99, 113 Stat. 1235 (1999).

40. *Id.* § 8149. This section directs that none of the funds appropriated for FY 2000 "may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law." *Id.*

41. For background on the Defense Appropriations Act for FY 2000 and DOD and Army policy implementing it, see Major Robert Cotell: *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction*, ENVTL. L. DIV. BULL., Oct. 1999; *Section 8149 Update*, ENVTL. L. DIV. BULL., Nov. 1999.

42. First, the EPA proposed to recover $10.5 million for alleged "economic benefits" (i.e., net profits from alternative investments) received by the installation for non-compliance. Second, the EPA sought an additional nearly $5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that the EPA presumes the Army can sell or mortgage to raise money to pay for penalties.

43. For a discussion of Army and DOD objections to business penalties, see Lieutenant Colonel Richard A. Jaynes: *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL., Sept. 1999; *New Resource on Economic Benefit Available*, ENVTL. L. DIV. BULL., Aug. 2000.

reaction of indifference from the EPA, it was misunderstood and assailed by states and environmental activist groups. While DOD did not request and did not want the burdens imposed by section 8149, media coverage suggested otherwise and viewed section 8149 as an outrageous attempt by DOD's defenders on the Hill to protect DOD from its compliance responsibilities. Consequently, working under the constraints of section 8149 greatly impeded the process of reaching settlements and detracted from Army efforts to build positive relations with state regulators.

In its effort to implement section 8149, the Army submitted six enforcement action settlements for approval, five of which involved SEPs from earlier years. These became part of DOD's legislative package request that was initially submitted in March 2000, and it was supplemented with a few additional cases as time passed. The DOD's request was packaged as a rider intended to be attached to a piece of fast-moving legislation to obtain approval as quickly as possible. Instead, Congress included it as part of both the House and Senate versions of the FY 2001 Defense Authorization Bill. Initially, it was hoped that the Authorization Bill might be expedited under the schedule Congress planned for this election year. Unfortunately, two things happened to frustrate DOD's legislation packaged under section 8149 from achieving its original purpose. First, it was not passed in FY 2000. Second, and more importantly, DOD's legislative package was amended to only authorize the use of FY 2001 funds to pay for the fines and SEPs listed in the proposed legislation. These developments led to an instruction from the ELD in August 2000 for affected installations to spend any FY 2000 funds that had been fenced to meet the requirements of settlement agreements for other purposes before the end of the fiscal year.

The primary impact of section 8149, as it came to be implemented, was to frustrate the ability to spend FY 2000 funds for fines and SEPs after it became law. Although well intentioned as a means to curb the EPA's ill-conceived regulatory enforcement strategy against federal facilities, section 8149 cannot be said to have achieved its goal. Indeed, the overly broad swath it cut may have spelled doom to a subsequent and more surgical attempt to attack the EPA's business penalties strategy.[45]

Regarding the National Defense Authorization Act for 2001, section 342 of the Senate version was originally written to prohibit DOD Services from paying any environmental penalties that are "based on the application of economic benefit criteria or size-of-business criteria" unless Congress specifically approved payment.[46] Had section 342 been enacted as originally drafted, it would have contributed significantly to resolving the ongoing and contentious dispute with the EPA over the application of these "business" penalty criteria to federal facilities.

In reporting section 342, the Senate Armed Services Committee explained its rationale for drafting the business penalties provision. The Committee noted that these penalty criteria are designed for "market-based activities, not government functions subject to congressional appropriations."[47] After highlighting essential differences between the government and private sectors, the Committee concluded that applying these penalty criteria "would interfere with the management power of the Federal Executive Branch and upset the balance of power between the federal executive and legislative branches, exceeding the immediate objective of compliance."[48] These observations of the Committee are diametrically opposed to the position the EPA has been taking as the Army has been working to resolve the uniquely-large fine levied against Fort Wainwright, Alaska.

On 12 July 2000, the Senate agreed to Amendment 3815 to Senate Bill 2549 that removed any mention of business penalties in section 342. Senator Stevens proposed Amendment 3815[49] as a compromise that was reached with Senate opponents to section 342. In addition to removing the business penalties provision, the amendment curtailed the impacts of the section in other respects. The original version was a permanent requirement for Congress to approve any penalty that is $1.5 million or greater. Amendment 3815 restricts the application of section 342 to a three-year trial period and makes it applicable to federal regulators such as the EPA (i.e., there is no penalty threshold for state and local regulatory agencies). After Amendment 3815 was submitted, Senator Kerry made a speech explaining that he was opposed to any exemption of federal facilities from business penalties because they should be subject to the full range of penalties that apply to private industry.[50] Senator Kerry's remarks, in contrast to the Senate Armed Ser-

44. For example, the EPA dismissed any significance to section 8149 in a Memorandum from Steven A. Herman, Assistant EPA Administrator to Regional Administrators and Counsels, dated December 7, 1999, subject: Impact of Department of Defense FY 2000 Appropriations Act, Section 8149. Note also that section 8149 drew administration criticism both from the President, in his signing statement to the FY 2000 Appropriations Act, and from the Assistant to the President for National Security Affairs in a letter to Senator Frank R. Lautenberg, dated 10 March 2000.

45. The EPA's economic benefit policy for federal facilities is embodied primarily in its Memorandum from Steven Herman, EPA Assistant Administrator, to Regional Administrators and Counsels, dated September 30, 1999, subject: Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies.

46. S. 2549, 106th Cong. § 342 (2000).

47. S. REP. 106-292 (2000).

48. *Id.*

49. 146th Cong. Rec. S. 6538 (daily ed. July 12, 2000).

vices Committee's report on section 342, make it clear that there is no consensus in Congress on the issue of whether business penalties should apply to federal facilities. The legacy of section 8149 so heightens the political rhetoric on macro issues that it effectively obscures and precludes a close examination of the profound factual, legal, and policy deficiencies of the EPA's business penalties policy, a policy that amounts to rule-making without any notice and comment procedures.[51]

On 13 July 2000, the bill passed the Senate on a 97-3 vote as an amendment to its House counterpart. The National Defense Authorization Act for Fiscal Year 2001 was ultimately signed into law on 30 October 2000. In light of Amendment 3815, however, the Act is not expected to have much effect on the administrative litigation pending between the EPA and Fort Wainwright. The only possible impact may be that the amendment's $1.5 million threshold may serve as a negotiating cap to avoid the necessity of requesting the approval of Congress for settlements with the EPA regions.

The Army and DOD view business penalties as a floodgate for greatly increasing the size of fines against installations in most enforcement actions. In contrast, the EPA has made business penalties the centerpiece of its new federal facilities enforcement strategy. In practice, the EPA often asserts statutory maximum fines in its complaints, and then uses business penalties to develop an inflated negotiating position that drives all settlement discussions thereafter. The EPA's practice is particularly problematic because the EPA regions now often refuse to provide penalty calculations, thus making it difficult to determine whether business penalties have been used to inflate the settlement amount. This puts a greater burden on the installation to ensure that business penalties are removed from settlement discussions. These developments make it clear that Army installations must continue to oppose the EPA's "inflate and then stonewall" strategy for federal facilities. In individual cases, the ELD will work with installation environmental law specialists to ensure that settlements do not bear any "taint" from the EPA's business penalties campaign. LTC Jaynes.

50. *Id.*

51. See recent judicial disapproval of this sort of approach by EPA in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 2000 U.S. App. LEXIS 6826, (DC Cir., 2000).

CLE News

1. Resident Course Quotas

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

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

When requesting a reservation, you should know the following:

TJAGSA School Code—181

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

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

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

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

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

2. TJAGSA CLE Course Schedule

November 2000

13-17 November	24th Criminal Law New Developments Course (5F-F35).
27 November-1 December	54th Federal Labor Relations Course (5F-F22).

December 2000

4-8 December	2000 Government Contract Law Symposium (5F-F11).
4-8 December	2000 USAREUR Criminal Law Advocacy CLE (5F-F35E).
4-8 December-	2000 USAREUR Operational Law CLE (5F-F47E).
11-15 December	4th Tax Law for Attorneys Course (5F-F28).

2001

January 2001

2-5 January	2001 USAREUR Tax CLE (5F-F28E).
8-12 January	2001 PACOM Tax CLE (5F-F28P).
8-12 January	2001 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-27 February	4th Court Reporter Course (512-71DC5).
9 January-2 February	154th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
16-19 January	2001 Hawaii Tax CLE (5F-F28H).
17-19 January	7th RC General Officers Legal Orientation Course (5F-F3).
21 January-2 February	2001 JOAC (Phase II) (5F-F55).
29 January-2 February	164th Senior Officers Legal Orientation Course (5F-F1).

February 2001

2 February-6 April	154th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
5-9 February	75th Law of War Workshop (5F-F42).

12-16 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
26 February-2 March	59th Fiscal Law Course (5F-F12).
26 February-9 March	35th Operational Law Seminar (5F-F47).

March 2001

5-9 March	60th Fiscal Law Course (5F-F12).
19-30 March	15th Criminal Law Advocacy Course (5F-F34).
26-30 March	3d Advanced Contract Law Course (5F-F103).
26-30 March	165th Senior Officers Legal Orientation Course (5F-F1).

April 2001

2-6 April	25th Admin Law for Military Installations Course (5F-F24).
9-13 April	3d Basics for Ethics Counselors Workshop (5F-F202).
16-20 April	12th Law for Legal NCOs Course (512-71D/20/30).
23-26 April	2001 Reserve Component Judge Advocate Workshop (5F-F56).
30 April-11 May	146th Contract Attorneys Course (5F-F10).

May 2001

7 - 25 May	44th Military Judge Course (5F-F33).
14-18 May	48th Legal Assistance Course (5F-F23).

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Professional Recruiting Training Seminar
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).
18-22 June	12th Senior Legal NCO Management Course (512-71D/40/50).
18-29 June	6th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
25-27 June	Career Services Directors Conference.
29 June-7 September	155th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2001

8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-10 August	2d JA Warrant Officer Advanced Course (7A-550A2).
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).

20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

5-7 September	2d Court Reporting Symposium (512-71DC6).
5-7 September	2001 USAREUR Legal Assistance CLE (5F-F23E).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	55th Federal Labor Relations Course (5F-F22).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).

25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Contract Litigation Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).

9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

2 November ICLE	American Justice: Professionalism, Ethics and Malpractice Kennesaw State University Center Kennesaw, Georgia
5 December ICLE	Litigation Under 42 U.S.C § 1983 Sheraton Buckhead Hotel Atlanta, Georgia
21 December ICLE	Trial Practice Workshop Swissotel Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 July annually
New Mexico	prior to 1 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	30 June annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	End of two-year compliance period
Vermont	15 July annually
Virginia	30 June annually

Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt
** Military Must Declare Exemption

For addresses and detailed information, see the March 2000 issue of *The Army Lawyer.*

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

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2000***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any 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, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2000***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact LTC Karl Goetzke, (800) 552-3978, extension 352, or e-mail Karl.Goetzke@hqda.army.mil. LTC Goetzke.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRAINING SITE AND HOST UNIT	AC GO/RC GO	SUBJECT	ACTION OFFICER
11-12 Nov	Bloomington, MN 214th LSO (88th RSC)		Administrative Law; Contract Law	POC: Todd Corbo (612) 596-4753 todd.corbo@us.pwcglobal.com
18-19 Nov	Kings Point, NY 77th RSC/4th LSO		Criminal Law; Operational Law	POC: MAJ Terri O'Brien and CPT Sietz, 77th RSC ObrienT@usarc-emh2.army.mil POC: LTC Ralph M.C. Sabatino (718) 222-2301, 4th LSO
20-21 Nov	San Diego, CA 78th LSO		LSO Commander's Workshop	POC: COL Daniel Allemeier drallemeier@hrl.com
6-7 Jan	Long Beach, CA 63rd RSC, 78th LSO	MG Altenburg COL(P) Pietsch	Criminal Law; International Law	POC: CPT Paul McBride (714) 229-3700 Sandiegolaw@worldnet.att.net
2-4 Feb	El Paso, TX 90th RSC, 5025th GSU	BG Romig BG Walker	Civil/Military Operations; Administrative Law	POC: LTC(P) Harold Brown (210) 384-7320 harold.brown@usdoj.gov
2-4 Feb	Columbus, OH 9th LSO	MG Altenburg COl(P) Pietsch	Law of Land Warfare; International Law	POC: MAJ James Schaefer (513) 946-3038 jschaefe@prosecutor.hamilton-co.org ALT: CW2 Lesa Crites (614) 898-0872 lesa@gowebway.com
10-11 Feb	Seattle, WA 70th RSC, 6th MSO	MG Huffman COL(P) Arnold	Administrative and Civil Law; Contract Law	POC: CPT Tom Molloy (206) 553-4140 thomas.p.molloy@usdoj.gov
24-25 Feb	Indianapolis, IN INARNG	BG Barnes COL(P) Arnold	Administrative and Civil Law; Domestic Operations Law; International Law	POC: LTC George Thompson (317) 247-3491 ThompsonGC@in-arng.ngb.army.mil
2-4 Mar	Colorado Springs, CO 96th RSC, NORD/USSPACECOM		Space Law; International Law; Contract Law	POC: COL Alan Sommerfeld (719) 567-9159 alan.sommerfeld@jntf.osd.mil
10-11 Mar	San Franscisco, CA 63rd RSC, 75th LSO	MG Huffman COL(P) Pietsch	RC JAG Readiness (SRP, SSCRA, Operations Law	POC: MAJ Adrian Driscoll (415) 543-4800 adriscoll@ropers.com
10-11 Mar	Washington, DC (Fort Belvoir, VA) 10th LSO		Criminal Law; Administrative and Civil Law; Mobilization/Deployment Issues; Legal Aspects of Information Operations; Ethics	POC: MAJ Silas Deroma (202 305-0427 silas.deroma@usdoj.gov
24-25 Mar	Charleston, SC 12th LSO	BG Barnes BG Walker	Administrative and Civil Law; Domestic Operations; CLAMO; JRTC-Training; Ethics; one hour Professional Responsiblity	POC: COL Robert Johnson (704) 347-7800 ALT: COL David Brunjes (919) 267-2441
22-25 Apr	Charlottesville, VA OTJAG		RC Workshop	

28-29 Apr	Newport, RI 94th RSC	MG Huffman BG Walker	Fiscal Law; Administrative Law	POC: MAJ Jerry Hunter (978) 796-2143 Jerry.Hunter@usarc-emh2.army.mil ALT: NCOIC-SGT Neoma Rothrock (978) 796-2143
5-6 May	Gulf Shores, AL	BG Marchand COL (P) Pietsch	Administrative and Civil Law; Environmental Law; Contract Law	POC: MAJ John Gavin (205) 795-1512 1-877-749-9063, ext. 1512 (toll-free) John.Gavin@se.usar.army.mil
18-20 May	St. Louis, MO 89th RSC, 6025th GSU 8th MSO	BG Romig COL (P) Pietsch	Legal Assistance; Administrative and Civil Law	POC: LTC Bill Kumpe (314) 991-0412, ext. 1261

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

For a complete listing of the TJAGSA Materials Available Through DTIC, see the September 2000 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September 2000 issue of *The Army Lawyer.*

4. Articles

The following information may be useful to judge advocates:

Robert D. Gifford, *Stepping onto the Battlefield: A Military Justice Primer for the Oklahoma Attorney*, 71 OKLA. B.J. 2479 (2000).

Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of* Edwards v. Arizona, 53 OKLA. L. REV. 11 (2000).

Cory L. Wade, *A Thorny Side of Copyright Law: Book Reviews, Plagiarism, and the Doctrine of Fair Use*, 24 LINCOLN L. REV. (1997).

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at http://www.jagcnet.arm.mil/tagjsa. Click on directory for the listings.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-10*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to 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.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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