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Articles

TJAGSA Practice Note

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

Deadly Force Is Authorized, but Also *Trained*

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Introduction

In the January issue of *Naval Institute Proceedings*, Colonel Hays Parks, U.S. Marine Corps Reserve (Retired), warns that restrictive and unsuitable rules of engagement (ROE)[2] today handicap and endanger U.S. forces, especially ground troops on peace-support missions. Identifying the problem as one of ignorance on the part of individual Marines, sailors, and soldiers, including service judge advocates, over when deadly force is authorized, Parks sounds an alarm that America's young men and women in uniform "need to know when they may resort to deadly force to protect their lives."[3]

Parks' Argument

Parks second-guesses assorted real-life decisions in which ground troops have refrained from opening fire, suggesting these decisions were caused by foolish ROE. In one of these examples, he derides the official commendation of a young U.S. Army sergeant whose platoon held its fire even as he and his soldiers were being struck by Bosnian Serbs bearing rocks and clubs. This situation, Parks urges, placed the soldiers in a situation where they were "legally entitled to use deadly force."[4] In another example, he cites unspecified "Kosovo beatings" to illustrate risks faced by peace-support forces. Parks maintains that these and other instances of restraint are "representative rather than isolated incidents," and he cautions that "operating under bad ROEs invites mission failure, usually with fatal consequences to men and women who deserve better."[5]

Parks' extended argument is sweeping in scope and damning in tone. He condemns the current Joint Chiefs of Staff Standing Rules of Engagement (SROE)[6]—a document that has evolved from maritime origins and contains tolerably clear guidance for commanding officers on the open seas. Parks maintains the SROE is a poor vehicle for commanders to inform individuals in port or on the ground when they may use deadly force to protect themselves and others. The lack of commanders' "tools" in the SROE on the matter of individual self defense, he claims, combined with a propensity for micromanagement on the part of senior administration officials naïve to the bad things that can happen when force is used, has resulted in peace-support ROE that place servicemen and women at undue risk.[7]

Parks further argues that military lawyers writing ROE for field commands compound the problem. They misapply international law, he says, cut and paste ROE from bogus sources, fail to read U.S. court decisions relating to use of deadly force by domestic law enforcement agents, and ignore basic truths about wound ballistics and close-quarters marksmanship under stress. Parks holds military commanders ultimately responsible, however, because they delegate ROE drafting and training to lawyers, because they hide behind ROE to avoid making tough decisions, because they rarely have the spine to stand up to civilian leaders when restrictive rules are being imposed, or because they fail to provide soldiers, sailors, and Marines sufficient firearms training to be effective in a gunfight or other violent confrontation.[8]

At various points during this argument, Parks suggests curative measures. The most important of these appears to be the military's adoption—with input from Navy Special Warfare

1. I thank the following people for their assistance in preparing this article: Captain Larry Gwaltney, Lieutenant Colonel Mike Ellerbe, Major Paul Wilson, Staff Sergeant Rod Celestaine, Lieutenant Colonel Bill Hudson, Colonel Dan Wright, Lieutenant Colonel Kevin Govern, Lieutenant Colonel Jeff Lau, Captain Mike Roberts, Captain Koby Langley, Major Kevin Hendricks, Colonel Dan Bolger, Colonel John Scroggins, Lieutenant Colonel Renn Gade, Lieutenant Colonel Ted Westhusing, Brigadier General Dave Petraeus, Major General John Ryneska, and Major General John Altenburg. I alone am responsible for any errors.

2. Rules of engagement are defined as "Directives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (19 Mar. 1998).

3. W. Hays Parks, *Deadly Force* Is *Authorized*, U.S. NAVAL INST. PROC., Jan. 2001, at 32-37, *available at* http://www.usni.org/Proceedings/Articles01/PROparks1.html.

4. *Id.* at 33.

5. *Id.*

6. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE].

7. Parks, *supra* note 3, at 33-34.

and Army and Marine Corps infantry representatives—of a uniform deadly force policy and training system similar to that used by the Federal Bureau of Investigation (FBI). Colonel Parks contends that every young American on point for the nation should know how to defend himself when attacked.[9]

Parks' aims are undoubtedly noble, and his track record is that of someone who has wrestled with the predicaments faced by individual soldiers, sailors, and Marines for much of his professional life. Certainly, his recommendation for meaningful involvement by ground force commanders in top-level policy on use of force also has considerable merit.

Respectfully, Sir, That's Not Quite Right

Still, there is much to disagree with in Parks' argument, at least as presented in *Proceedings*. He overstates several premises and incompletely recounts important facts. More significant, he mistakes the problem—subtly but critically—at its core.

Individual soldiers, sailors, and Marines facing bad actors or nasty crowds get no help from legal formulas for when deadly force is authorized. The document used by the FBI and offered by Parks as a model states that "the necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail" and that use of deadly force "must be objectively reasonable under all the circumstances known to the officer at the time."[10] To know these verbal incantations is to know nothing particularly helpful in a jam.

Far more important to a soldier in a firefight are those trained reactions that enable the soldier to deal with the bad actor appropriately and before the bad actor can do him harm. Far more important to a soldier facing a nasty crowd are those trained actions that produce a conditioned response and enable the unit to accomplish its task and purpose while protecting the force. The successful missions performed by thousands of brave and dedicated young Americans in the Balkans are the strongest evidence available that leaders have gone well beyond merely authorizing deadly force: They have ensured that soldiers and units are well-trained and equipped for the situations they face.

Ready and Willing to Fire, if Necessary

On the morning of 7 March 2001, U.S. Army soldiers moved by foot into the village of Mijak, near the border between Kosovo and the Former Yugoslav Republic of Macedonia (FYROM), with the mission of conducting a search for weapons and armed ethnic Albanian guerrillas that had been reported in the town.[11] They secured the town and began entering buildings in their search. At about 9 a.m., an armed man walked toward soldiers at an observation point. The soldiers detained him. Minutes later, five armed men departed one of the buildings under observation. The men maneuvered toward the soldier's position, took up firing positions, and oriented weapons toward the soldiers. The soldiers fired their weapons, wounding two of the men. One of the men was shot in the abdomen and in the leg. Unknown individuals dragged the other wounded man into a nearby building, and his condition remains unknown. No U.S. soldiers were injured. There was no second-guessing of the soldiers' decision to shoot their armed adversaries.[12]

The Mijak incident was typical of the operation. Between June 1999 and May 2000, the month when Parks was defending the honor of American military men and women in Sandhurst against ninja turtle jokes delivered by British officers,[13] American soldiers and Marines in Kosovo were executing tens of thousands of squad-sized missions, some of them deadly violent.[14] In contrast to the suggestion by Parks that U.S. forces in the Balkans are trigger shy and cowering within their shells, these data support a different picture—one of seriousness and strength.[15]

The soldiers who accomplished their mission at Mijak did so because they and their unit were well trained for that scenario, beginning in basic training and continuing through mission predeployment. In basic rifle marksmanship, trained first upon initial entry, periodically thereafter, and again in the weeks immediately prior to heading to Kosovo, the soldiers fired hundreds of rounds from prone and foxhole positions at popup silhouette

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8. *Id.* at 35-37.

9. *Id.* at 36-37.

10. U.S. Dep't. of Justice, Office of Investigative Agency Policies, Policy Statement: Use of Deadly Force para. III (Oct. 16, 1995) [hereinafter DOJ Deadly Force Policy] (Commentary on the Use of Deadly Force in Non-Custodial Situations). The deadly force policy adopted by the Department of Justice resulted from leadership by the FBI to establish uniformity. *See* U.S. Dep't of Justice, Federal Bureau of Investigation, Ensuring Public Safety and National Security Under the Rule of Law: A Report to the American People on the Work of the FBI 1993-1998, 75 (1999). The Department of Treasury adopted a policy closely resembling that of the Department of Justice the very next day. *See* U.S. Dep't of Treasury, Treasury Order 105-12, Policy on the Use of Force (Oct. 17, 1995) [hereinafter Treasury Order 105-12].

11. Memorandum for Record, CPT Koby Langley, U.S. Army, subject: Summary of TF 1-325 Airborne Infantry Regiment Direct Fire Engagement with Ethnic Albanian Armed Group (9 Mar. 2001) (on file with author) (providing details about the Mijak incident).

12. *Id.*

targets between fifty and 300 meters away.[16] This training prepared soldiers for success in their Kosovo mission.

Close-Quarters Training: Hard But Effective

Because the infantry unit was likely to be given cordon-search, checkpoint, and similar missions in built-up areas of Kosovo, their soldiers also received many hours of close-quarters combat training before deployment. This involved repetitive and stressful training of close-quarters techniques on several Fort Bragg ranges. The soldiers mastered methods of movement, firing stances, weapon positioning, and reflexive shooting.[17]

These discriminating techniques were devised with appreciation for precisely the physiological responses and wound ballistics Colonel Parks discovered at the FBI Academy.[18] Army doctrine properly touts these techniques as the most effective way to accomplish Military Operations Other Than War (MOOTW) missions that have turned violent. Such missions are accomplished "while minimizing friendly losses, avoiding unnecessary noncombatant casualties, and conserving ammunition and demolitions for subsequent operations."[19]

Although the soldiers at Mijak never needed it, they received training in reflexive shooting, and specifically the "aimed quick kill" technique, which requires the most practice.[20] It involves a departure of point of aim from "center of mass," taught in basic training, to the center of the cranium.[21] Parks notes that a

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13. Parks, *supra* note 3, at 34. Parks relates:

> At the American-British-Canadian-Australian Army meeting at Sandhurst in May 2000, the United States was berated constantly for its "ninja turtle" (heavily armed and armored, cowering within its shell) approach to peace-support operations by senior British officers, who suggested that U.S. forces were ineffective as a result of leadership timidity. It might be an unfair characterization of U.S. field commanders, who are constrained by administration-driven ROEs, but the British charges have foundation.

Id.

14. About fifty incidents involved the firing of shots in the vicinity of U.S. forces. Although many of these consisted of Kosovar-on-Kosovar violence, in no fewer than twenty incidents, U.S. ground troops were attacked or threatened with deadly attack and responded by firing a variety of arms, including M16s, MK19s, and M203s. The troops fired at least 450 rounds during these incidents, and probably many more. Interestingly, not all U.S. rounds fired were shots to kill: more than twenty were warning shots, which enjoyed varying degrees of effectiveness in dispersing crowds, and more than ten were illumination rounds. Also, during an April 1999 civil disturbance in Sevce, military police fired ninety-two nonlethal M203 rounds and released two canisters of CS gas to disperse a large crowd. In all, four U.S. soldiers and Marines received minor injuries. Three assailants were killed, four were seriously wounded, and dozens were detained in these engagements. Memorandum, Commanding General, 1st Infantry Division, to Chief of Staff, Army, subject: Authorization for Wear of Shoulder Sleeve Insignia-Former Wartime Service (SSI-FWS) for Soldiers Assigned to Selected Task Force Falcon Units (25 Sept. 2000) (on file with author) (including spreadsheet describing these incidents in Kosovo).

15. Journalist Frank Viviano provided a more insightful alternative to the "ninja turtle" description.

> A visitor is immediately impressed with the conduct of the GIs in Bosnia. With their discipline, seriousness of purpose—and literal sobriety. Unlike their counterparts from Britain, France, Russia and other allied nations, American soldiers are not allowed to drink alcoholic beverages in Bosnia, not even on U.S. bases . . . . There are no American soldiers looking for girls in Tuzla or what's left of Brcko. No drunken GIs [are] looking for fights.

Frank Viviano, *GIs Try to Keep Bosnia's Uneasy Peace: U.S. Soldiers Know "Something" Could Happen Any Time*, San Francisco Chronicle, Nov. 3, 1997, at A1.

16. Telephone Interview with MAJ Willard Burleson, Operations Officer, 1st Battalion, 325th Airborne Infantry Regiment (Mar. 28, 2001) [hereinafter Burleson Interview] (conducted while MAJ Burleson was deployed to Vitina, Kosovo). *See generally* U.S. Dep't of Army, Field Manual 23-9, M16A1 and M16A2 Rifle Marksmanship (3 July 1989) (basic marksmanship requires aiming at center of mass and mastery of sighting, breathing, and adjusting windage or elevation).

17. Burleson Interview, *supra* note 16. *See generally* U.S. Dep't of Army, Field Manual 90-10-1, An Infantryman's Guide To Combat In Built-Up Areas app. K (3 Oct. 1995) [hereinafter FM 90-10-1] (describing the training techniques referred to in this section of the article).

18. Parks, *supra* note 3, at 36-37. In addition to its close-quarters combat ranges on many installations, the Army's training facilities include state-of-the art MOUT (military operations on urban terrain) towns at Fort Knox, Kentucky, Fort Polk, Louisiana, and Fort Benning, Georgia. Also, thirteen Fire Arms Training Simulators (FATS) of the type described favorably by Parks are coming on line in U.S. Army, Europe's 7th Army Training Center. Press Release, John Morelli, *Firearms Training Systems, Inc. Announces Contract Award to Support U.S. Army Deployed Forces* (Sept. 29, 2000). At Fort Bragg, North Carolina, two Engagement Skills Trainers (EST) were installed on 1 May 2001. An additional thirteen trainers, consisting of ten lanes each will be installed in coming months. The EST is a next-generation simulation system that replicates individual and collective marksmanship environments. E-mail from Michael Lynch, Fort Bragg Readiness Business Center, to author (Apr. 16, 2001) (on file with author).

19. FM 90-10-1, *supra* note 17, app. K-1.

20. Burleson Interview, *supra* note 16.

21. FM 90-10-1, *supra* note 17, app. K-1.

shot so placed is more likely to achieve rapid incapacitation.[22] Such a shot also avoids the protective vests that may be worn by adversaries. Early in the unit's preparation, infantry rifle squads also conducted collective live fire training on the most fundamental of battle drills—React to Contact. This drill forms the nucleus of the rifle squad's collective skill set.[23]

IRT, STX and Mission Rehearsal

Effective training with issued weapons was part of a comprehensive predeployment training program designed specifically to ensure that soldiers could handle situations like Mijak.[24] Individual readiness training (IRT) and situational training exercises (STX) featuring uncooperative role players confronted soldiers and squads with a variety of dangerous situations, including snipers, landmines, crowd disturbances, criminal acts by Kosovars, and speeding vehicles and armed persons at checkpoints. Immediately before deployment, the unit underwent an intensive Mission Rehearsal Exercise (MRE)—a heavily resourced event that culminates in individual and collective training designed to test soldiers, teams, and leaders in a stressful, Kosovo-like environment.[25]

The most recent MRE, held at the Army's Joint Readiness Training Center in Louisiana, replicated the towns, movement routes, base camps, and border areas of the Multinational Brigade (East) area, that part of the Kosovo province secured by U.S. forces. In addition to reinforcing all of the individual and team tasks already trained, the MRE gave soldiers and leaders firsthand experience with interpreters speaking the Balkan languages, with civil authorities, with nongovernmental officials and private international organizations, with officers from the Polish and Greek battalions serving alongside U.S. forces in Kosovo, and with the specific demographics, economic, and security characteristics of individual neighborhoods.

At the MRE, soldiers and leaders practiced not only fire and movement against ethnic Albanian armed guerrillas, but also effective use of an interpreter and negotiation based on principle. They learned not only how to call for air or artillery support, but also how to coordinate operations with international police forces in the area. The price tag: An estimated 11 million dollars. It was not cheap, to be sure, yet few who have experienced an MRE—and seen how well it prepares soldiers and units to accomplish a difficult mission and come home safely—doubt that it is money well spent.[26]

The Standing ROE: Find Another Punching Bag

Some of Parks' criticism of the SROE is overdone and obscures the true nature of the challenge commanders face in providing clear guidance to ground troops on self defense. True, the SROE acknowledges U.S. commitments under the United Nations (U.N.) Charter—and indeed all of its international agreements[27]—because any responsible national security policy document must do so. Reasonable people, however, can disagree with Park's statement that, "Nothing in the history of the Charter suggests that it was intended to apply to the actions of individual service personnel . . . ."[28] The Charter expressly incorporates previously assumed international obligations,[29] among them treaties and customary law dealing with war crimes. As a matter of international law, an individual defendant can plead self-defense to a criminal charge, just as a defendant in an excessive use of force prosecution can plead self-defense under U.S. domestic law.[30] Thus, Parks' statement is questionable. Also, regardless of personal self-defense guarantees under international law, the SROE is replete with caveats that make clear that no international obligation may be interpreted to infringe upon individual self-defense.[31]

Army judge advocates expressly invoked one of these SROE caveats in late 1999. This was necessary after NATO attorneys at higher headquarters responded to a hypothetical but very possible encounter with a "Mad Mortarman" in Kosovo.[32] Their response—that U.S. forces could not fire upon the fleeing

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22. Parks, *supra* note 3, at 37.

23. Burleson Interview, *supra* note 16.

24. *Id.* The commander refined his mission essential task list (METL) to account for the tasks, threats, terrain, and environmental factors extant and expected in Kosovo. He and the senior noncommissioned officers in the unit ensured that training on individual tasks supported the collective tasks on the METL. The commander understood conditions on the ground in the theater of operations, because he and other unit leaders had conducted a leaders' reconnaissance, poured over after-action reports provided by previous units in Kosovo, and maintained communication with leaders still in Kosovo throughout the training process. *Id.* This predeployment training process followed Army training doctrine. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 25-100, TRAINING THE FORCE (15 Nov. 1988).

25. Interview with MAJ Mark Gerges, XVIII Airborne Corps Assistant Operations Officer for KFOR and SFOR Missions, at Fort Polk, La. (Mar. 28, 2001).

26. The training provided at the MRE includes skills extolled by James Fyfe, an expert on training appropriate use of force, in *Zuchel v. City and County of Denver*, 997 F.2d. 730, 739 (10th Cir. 1993).

27. SROE, *supra* note 6, encl. A, para. 1c(3).

28. Parks, *supra* note 3, at 35.

29. U.N. CHARTER, pmbl, art. 1, sec. 1.

mortarman—infringed upon the right of self-defense as captured in the SROE caveat, which states:

> US forces assigned to the operational control (OPCON) or tactical control (TACON) of a multinational force will follow the ROE of the multinational force for mission accomplishment if authorized by the NCA. US forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.[33]

This hypothetical involves an individual who is discovered at the precise grid coordinate where a Q36 radar acquired a mortar round being fired moments earlier. The individual's actions—running away from KFOR soldiers toward a nearby vehicle, carrying a mortar base plate—suggest complicity in a pattern of mortar attacks over the preceding weeks on various targets from nearby points. Some of those targets were close to KFOR bases, and the attacks claimed Kosovar lives, though no KFOR soldiers were injured.[34]

Army judge advocates in Kosovo correctly argued that, even though the immediate attack had ended, the individual's failure to obey commands to halt, along with his continuing ability and opportunity to fire again, constitute "hostile intent" sufficient to engage him with deadly force. In addition to informing higher NATO headquarters that U.S. forces would not be bound by the restrictive response of NATO attorneys (that is, suggesting U.S. forces could not fire upon the fleeing mortarman), the Army lawyers quoted the SROE and offered analogous examples from U.S. case law relating to fleeing felons.[35]

It is difficult to understand Parks' frustration with the self-defense principles stated in the SROE. The SROE separates self-defense into two major elements—necessity and proportionality. Necessity exists "when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent."[36] A proportionate response is one whose nature, duration, and scope do 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."[37] When one gets past Parks' apparent suspicion of the SROE as a maritime rather than a ground-force product, one strains to figure out his objection to these SROE self-defense principles.

Admittedly, the term "hostile intent" requires elaboration and further definition through concrete examples of intent indicators, and determining proportionality is a lawyerly balancing act type that irritates laymen. Yet these are not problems unique to the SROE's formulation of individual self-defense. The FBI policy preferred by Parks also includes a version of "necessity" that is incomprehensible without reference to specific examples. Also, American law enforcement officers comply with an unlabeled doctrine of proportionality, because necessity only arises "when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail."[38]

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30. *See, e.g.*, UNITED NATIONS WAR CRIMES COMMISSION, XIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 149-51 (1949).

> The finding of the Court [to acquit Erich Weiss and Wilhem Mundo, tried on 9-10 November 1945 by U.S. military commission for the alleged unlawful killing of an American prisoner] is evidence that self-defence which, according to general principles of penal law is an exonerating circumstance in the field of common penal law offenses when properly established, is also relevant, on similar grounds, in the sphere of war crimes.

Id. See also R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT'L L. 82, 91 (1938).

> Even Webster, in his letter of April 24, 1841, the source of the formulation of the classic definition of self-defense, says: "It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both."

Id.

31. *See, e.g.*, SROE, *supra* note 6, encl A, paras. 2a, 3a, 5e.

32. Interview with CPT Larry Gwaltney, Deputy Legal Advisor (Dec. 1999-June 2000), Task Force Falcon, at Fort Polk, La. (Mar. 28, 2001) [hereinafter Gwaltney Interview].

33. SROE, *supra* note 6, encl A, para. 1c.

34. Gwaltney Interview, *supra* note 32.

35. *Id.*

36. SROE, *supra* note 6, encl. A, para. 5f(1).

37. *Id.* encl. A, para. 8a(2).

38. DOJ DEADLY FORCE POLICY, *supra* note 10, para. III (Commentary on the Use of Deadly Force in Non-Custodial Situations).

Perhaps, as Parks urges, the SROE should contain the FBI policy's reminder that "the reasonableness of a decision to use deadly force must be viewed from the perspective of the man on the scene—who may often be forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving—and without the advantage of 20/20 hindsight."[39] This valuable standard forecloses most second-guessing. Still, it is difficult to imagine a single scenario in which the self-defense standard under domestic federal law differs from the self-defense standard under the SROE.[40] This notion, that by following the SROE we are sacrificing soldiers' inalienable rights on the altar of international cooperation, simply does not persuade.

Making a Federal Case Out of Force Continuums

Parks finds appealing the federal cases and policies relating to law enforcement use of deadly force. Yet law enforcement tasks, organization, weapons, and operations are different from military ones, and domestic legal fights over police use of deadly force are raised in contexts governed by distinct constitutional and statutory provisions. The military is properly wary of borrowing too much from a law enforcement model.[41]

Parks' concern about what he calls "the level of force continuum" is understandable, but his broadside against military judge advocates is unfair.[42] He states that lawyer-inspired ROE "require" gradualism, yet consider these typical cautions against gradualism excluded from Parks' analysis:

> (1) *If possible*, apply a graduated escalation of force.
>
> (2) Measure your force, *if time and circumstances permit.*
>
> (3) *Omit lower level . . . measures* if the threat quickly grows deadly.

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39. This language is drawn almost verbatim from *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

40. Though interesting as a matter of comparative legal studies, the differences in self-defense formulations between jurisdictions noted by Lieutenant Colonel W.A. Stafford, USMC, are academic distinctions on which no actual criminal convictions have turned. *See* Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE and the Rules of Deadly Force*, ARMY LAW., Nov. 2000, at 1. The case of Corporal Banuelos, who shot and killed a civilian in Texas on 20 May 1997, is of central interest to both Colonel Parks and Lieutenant Colonel Stafford. Though grand jury investigations by Texas and the U.S. Department of Justice occurred, and though Texas law was interpreted to apply, no indictments resulted. *Id.* at 1-2. Parks' own intervention surely helped bring about this good outcome. By its own terms, the SROE does not apply in domestic operations. SROE, *supra* note 6, encl. A, para. 3a. I certainly agree with Parks to the extent he is arguing that basic self-defense rules should be applied wherever a soldier is, and that soldiers and Marines should not have to learn different formulations in Texas, California, and Thailand.

41. Wariness of that model in the domestic context stems also from the traditional—and statutory—exclusion of the military from law enforcement duties in the United States. *See* 18 U.S.C. §1385 (2000).

42. Historically, ground force operations orders and soldier cards have indeed included something described in Army doctrine as "scale of force/challenging procedure." By the author's estimate, this rubric is one of ten functional categories of rules that have fit technically, if sometimes uncomfortably, within the official definition of "rules of engagement." *See* Mark Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 30-33 (1994). The ten functional categories follow no rigorous format, and variations have been almost as numerous as missions and units. Yet with all of their risks and perceived advantages to commanders and staffs, they fit within the technical definition of ROE and have been issued as such in various military orders and plans since the 1960s. The ten functional categories are:

Type I:	Hostility Criteria
Type II:	Scale of Force/Challenging Procedure
Type III:	Protection of Property and Foreign Nationals
Type IV:	Weapons Control Status/Alert Conditions
Type V:	Arming Orders
Type VI:	Approval to Use Weapons Systems
Type VII:	Eyes on Target
Type VIII:	Territorial or Geographic Restraints
Type IX:	Restrictions on Manpower
Type X:	Restrictions on Point Targets and Means of Warfare

These are not mere academic distinctions. Recognition that military headquarters tend to transmit ROE in these different ways is helpful in identifying the risks and benefits of including a specific type in an operations order while at the same time referring to it as a "*rule* of engagement." In addition to taking aim at Type II, Parks also, properly, blasts Type V in his discussion of the 1986 Ranger Regiment example and in his speculation about whether the crew of the *U.S.S. Cole* was subjected to restrictions on carrying loaded firearms. Recognition that not all types need to be known by every soldier also recommends the packaging of the basic SROE self defense principles of necessity and proportionality, along with Types I, II, and III, into a memorable form to permit vignette training. It was this idea of packaging for a training purpose that led to the development of the RAMP training aid. *See id.* at 86-90.

In his third example, Parks excerpts a continuum of force that merely suggests techniques for the "M" element when confronting an unarmed and unfriendly crowd ("Measure the amount of force that you use, if time and circumstances permit"). He misleadingly makes no reference to the baseline principle. He also swaps two very different notions of the word "rule"—that is "requirement" versus "technique"—when he says that ROE "require" soldiers to proceed sequentially along a force continuum. Parks, *supra* note 3, at 36.

(4) *Risks*: Initiative may suffer if soldiers feel the need to progress sequentially through the measures on the scale.[43]

Note also that deadly force is nowhere characterized in the ROE training aids as a "last resort." It is easy to concur with Parks, however, that "last resort" language should be expunged from the ROE vocabulary because it can too easily be interpreted to mean that a shot must be last in a chronological sequence of measures.[44] But here, Parks has misfired.

Parks wrongly accuses fellow lawyers of imposing "an obligation to exhaust all other means before resorting to deadly force, even when deadly force is warranted."[45] Moreover, he seems to forget that law enforcement officers daily use techniques along a force continuum.[46]

The force continuum is also firmly embedded within the time-tested techniques for dealing with extraordinary, large-scale civil disturbances. In addition to verbal warnings, shoves, holds, and pepper spray, such techniques include use of riot sticks and shields, as well as extreme-force options involving volley fire of nonlethal projectiles, and deadly force.[47] Mentioning options such as use of pepper spray or firing nonlethal projectiles in the text of a training aid can create a healthy stimulus for leaders to obtain, issue, and train soldiers on such nonlethal weapons, because soldiers who face crowd confrontations will inevitably ask the sensible question, "Sir, when are we going to be issued pepper spray and sponge grenades?"

Parks' aversion to the level of force continuum is still more curious in light of the Justice Department's own requirement

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43. *See* Center for Army Lessons Learned, *ROE Training*, CALL NEWSLETTER 96-6 (1996) (Appendix B, Performance Measure 5); Martins, *supra* note 42, at 111.

44. "Last resort" language appears in several military references. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES paras. 3-1a, 3-2f (12 Mar. 1993) [hereinafter AR 190-14]; U.S. DEP'T OF DEFENSE, INSTR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES para. B (25 Feb. 1992) [hereinafter DODI 5210.56]. Note that the provisions of the Army regulation do not apply to DA personnel engaged in military operations and subject to rules of engagement. AR 190-14, *supra*, para. 1-5e.

45. Parks, *supra* note 3, at 36.

46. It is well established that police use of force typically occurs at the lower end of the force spectrum and involves grabbing, pushing, or shoving. In one study of 7,512 adult custody arrests, for example, roughly 80% of arrests in which police resorted to force involved weaponless tactics. Grabbing was used about half the time. Only about 2.1% of all arrests involved use of weapons by police. When weapons were used, chemical agents, such as pepper spray, were resorted to most frequently. Firearms were used least often (.2% of cases). U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA vii (1999). *See also* Samuel D. Faulkner & Larry P. Danaher, *Controlling Subjects: Realistic Training v. Magic Bullets*, L. ENFORCEMENT BULL., Feb. 1997, *available at* http://www.fbi.gov/publications/leb/1997/feb974.htm.

> No device or physical maneuver guarantees 100 percent success when confronting subjects. Therefore, training should provide officers with various methods to address combative subjects and surprise assaults. It then should prepare officers to be flexible in their responses to confrontations.

Id.

47. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 19-15, CIVIL DISTURBANCES (15 Nov. 1985) [hereinafter FM 19-15]; *Ken Hubbs, Riot Response: An Innovative Approach*, L. ENFORCEMENT BULL., Jan. 1997, *available at* http://www.fbi.gov/publications/leb/1997/jan972.htm. It is significant that the continuum of civil disturbance measures is to be applied only after a unit has undergone careful task organization (such as squad arrangement, skirmish line formation, leader positioning, riot control agent dispersers, selected firer of nonlethal force projectiles, and special reaction teams), threat analysis, mission planning, and specialized, stressful, repetitive training involving all equipment and well-rehearsed role players. FM 19-15, *supra*. Soldiers who have dealt with civil disturbances attest that, far from handicapping them or obligating them to exhaust every avenue in checklist fashion, these many options give them greater ability to accomplish the larger mission and come away uninjured. *See, e.g.*, Specialist Gary C. Goodman, *Civil Disturbance Training*, FALCON FLIER, Aug. 15, 2000, at 1. Data collected by Tom McEwen of the Department of Justice support this conclusion that nonlethal weapons are effective tools.

> One way of organizing data collection and analysis falls under the category of a force continuum, which envisions a range of options available to police officers from verbalization techniques to deadly force. In the middle of that range lies the variety of less-than-lethal weapons now available to police. Tom McEwen and Frank Leahy . . . discuss several types of less-than-lethal weapons under four general categories:
>
> - Impact weapons (for instance, batons and flashlights)
> - Chemical weapons (for example, pepper spray)
> - Electrical weapons (for instance, electronic stun guns)
> - Other less-than-lethal weapons (such as stunning devices and projectile launchers)
>
> In their survey of police departments and sheriffs' agencies, McEwen and Leahy found that 93% reported at least one type of impact weapon available, 71% had chemical weapons, and 16% had electrical weapons. With regard to the incidence of use of less-than-lethal technologies, an article in the Law Enforcement News reported that use of pepper spray--a cayenne pepper-based chemical spray--by New York City police officers has increased dramatically with use of the spray in 603 arrests during the first 10 months of 1995, compared to 217 uses for the same period in 1994. By comparison, nightsticks were employed 188 times during the same 10 months of 1995, and 158 times in 1994. The proliferation of these less-than-lethal technologies, especially chemical agents such as pepper spray, expands the data collection effort on use of force.

TOM MCEWEN, NATIONAL DATA COLLECTION ON POLICE USE OF FORCE 21-23 (1996) (internal citations omitted).

that a verbal warning be given, if feasible, and in view of its statement that "if other force than deadly force reasonably appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary."[48]

Warning Shots: Don't Overuse, but Don't Ban

Parks' claim that "Justice Department Guidelines [and] U.S. Law . . . [prohibit] warning shots"[49] is not strictly correct. The Justice Department's guidelines expressly permit warning shots in the prison context "if reasonably necessary to deter or prevent the subject from escaping from a secure facility" or "if reasonably necessary to deter or prevent the subject's use of deadly force or force likely to cause grievous bodily harm."[50] Moreover, a ban on warning shots, such as that imposed by the Justice Department outside the prison context, is not necessarily appropriate for soldiers in a MOOTW.

Soldiers and leaders on the ground, without the benefit of other nonlethal means, may suddenly encounter unarmed but unfriendly civilians. Prohibiting warning shots under such circumstances would deny soldiers a useful, nonlethal option to maintain control and accomplish the mission.[51] In the official commentary to its deadly force policy, the Department of Justice acknowledges the importance of a force continuum:

> The Department of Justice recognizes and respects the integrity and paramount value of all human life. Consistent with that primary value, but beyond the scope of the principles articulated here, is the Department's full commitment to take all reasonable steps to prevent the need to use deadly force, as reflected in Departmental training and procedures.[52]

The fact is that Parks' preferred method, articulated in the Department of Justice deadly force guidelines and its implementing documents, contains a force continuum. These sources incorporate, albeit in a wordy and confusing formula, the very proportionality principle that Parks mocks.

Parks further claims that, under military ROE, Indiana Jones would be required to risk death by closing with his sword-wielding assailant in *Raiders of the Lost Ark*. This assertion is simply false. Under the "RAMP" training device outlined in U.S. Army doctrine,[53] Indy's decision to shoot the threat is an excellent example of "A-Anticipate Attack." Indy—like the Army soldiers who fired at their prospective attackers in Mijak—had seen hostile intent that required immediate application of deadly force.

An FBI agent's training at the Academy in Quantico on a similar scenario might have emphasized the difference between "imminent"[54] and "instantaneous" harm to help the agent understand the concept of "objective reasonableness."[55] A soldier's training, however, causes him to look at the subject's hands, activity, and weapon to judge whether he is under attack.[56] Military training on the use of force specifically stresses that, before killing an attacker, a soldier need neither take the first shot nor surrender an advantage provided by the standoff range of his weapon.[57] Measuring force, captured under the "M" in "RAMP," simply does not apply,[58] and it is through repetitive training, rather than talk, that soldiers become conditioned to shoot instead of measuring force in this scenario.

The "Shoot to Wound" Fallacy: A Straw Man

Parks' criticism of "shoot to wound," "shoot to disable," or "injure with fire," though understandable, is aimed at a straw man. Consider his comment that, "Requirements to 'shoot to

48. DOJ DEADLY FORCE POLICY, *supra* note 10, para. II (Policy Statement: Use of Deadly Force).

49. Parks, *supra* note 3, at 36.

50. DOJ DEADLY FORCE POLICY, *supra* note 10, para. IV, attachment B.

51. Interview with Lieutenant Colonel Michael Ellerbe, Commander, 3d Battalion, 504th Infantry Regiment (Sep. 1999-Mar. 2000), at Fort Polk, La. (Mar. 28, 2001). Though they are not always effective and though users of warning shots must always consider their twin risks of endangering bystanders and encouraging gradualism, they have been a useful option for soldiers in the Balkans on more than twenty occasions. *See supra* note 14.

52. DOJ DEADLY FORCE POLICY, *supra* note 10, para. III.

53. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 8-15 (1 Mar. 2000).

54. *See* DOJ DEADLY FORCE POLICY, *supra* note 10, para. III (Commentary Regarding the Use of Deadly Force in Non-Custodial Situations).

> As used in this policy, 'imminent' has a broader meaning than 'immediate' or 'instantaneous.' The concept of 'imminent' should be understood to be elastic, that is, involving a period of time dependent on the circumstances, rather than the fixed point of time implicit in the concept of 'immediate' or 'instantaneous.

Id.

55. *Id.* ("Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time.").

wound' . . . indicate a serious lack of knowledge of the law, close-quarter marksmanship under stress against a hostile moving target, wound ballistics, and the impracticality of round counting in a gunfight."[59] This comment is misdirected for several reasons.

> (1) The word "requirement" appears nowhere in any of the ROE training aids cited by Parks, and training vignettes do not suggest a soldier should fire lethal munitions other than to kill;[60]
>
> (2) Fire by a covered soldier aiming an M203 grenade launcher loaded with nonlethal munitions, even as other soldiers remain armed and ready with M16A2s, can be helpful in dispersing a crowd and maintaining control;[61]
>
> (3) Army close-quarters marksmanship trainers are fully aware that rapid incapacitation of the threat can generally be expected only with high velocity shots to the head, and shot placement for "reflexive shooting" is trained accordingly;[62]
>
> (4) Much military training is dynamic and specifically designed to inculcate effective responses under the stress of a deadly force encounter, when visual narrowing, auditory exclusion, decreased fine motor skills, and other symptoms are to be expected;[63]
>
> (5) Parks is fixated on a particular scenario—involving elements of "close quarter," "hostile moving target," and "gun"—while useful decision models in training materials need to be geared for a range of scenarios;[64] and
>
> (6) Several military sources, which are outdated but nonetheless still in effect, continue to direct or imply attempts at disabling, if feasible, to lower-level commands.[65]

While federal law enforcement training with firearms discourages shooting to wound, the body of federal law endorsed

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56. *See, e.g.*, DANIEL P. BOLGER, THE BATTLE FOR HUNGER HILL: THE 1ST BATTALION, 327TH INFANTRY REGIMENT AT THE JOINT READINESS TRAINING CENTER 94-100 (1997).

> Did R mean you must eat the first hostile shot? Not at all, said A, because it stood for "Anticipate attack." Here [the RAMP training aid] urged soldiers to use the same target evaluation skills schooled since induction training. Shooters should check the size, activity, location, uniform, time available, and equipment, with special scrutiny of the potential target's hands. Policemen know this method very well. Just because a guy holds an AK-47 does not necessarily make him a badnik. It all depends on what he's doing with the item. Here is discipline distilled to its essence—to shoot or not to shoot, with each individual rifleman calling his shot.

Id. at 99.

57. "Anticipate attack" is consistent with the SROE's restatement of the legal principle of necessity, and while this American notion of "anticipatory self defense" occasionally comes under international criticism for being too robust, the better reasoned view is that it is fully compliant with domestic as well as international law. *See generally* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE (1988).

58. *See* Bolger, *supra* note 56, at 100. "These suggestions, ranging from a shout to a shot, applied only when trying to control civilians or a crowd that had not yet turned ugly. If the jokers fired or got ready to fire, then R and A applied." *Id.*

59. Parks, *supra* note 3, at 36.

60. *See supra* notes 42-43 and accompanying text.

61. Issue of nonlethal munitions in the Army is generally limited to military police, though other soldiers may be equipped and trained to use them in certain situations. *See generally* Captain Michael Kirschner, Staff Sergeant Chris Callan, and Staff Sergeant Ray Zumwalt, Task Force Falcon Mobile Training Team, Non-Lethal Munition Training PowerPoint Presentation (Feb. 2000) (Camp Bondsteel, Kosovo). When soldiers do not have such munitions, commanders have readily adapted the VEWPRIK memory aid, Martins, *supra* note 42, at 120, to eliminate wounding shots from these nonlethal weapons. *See, e.g.*, Bolger, *supra* note 56, at 99 (making the "I" in VEWPRIK "Injure with Bayonet"); Captain Keith Puls, U.S. Army, After Action Report, 10th Mountain Division Operations in Bosnia 1999-2000 (2000) (changing "VEWPRIK" to "VENS" in the "RAMP Acronyms" section) (on file with the Center for Law and Military Operations).

62. FM 90-10-1, *supra* note 17, app. K-20 to K-21.

63. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 14-2 (14 June 1993).

> Loneliness and fear on the battlefield increase the fog of war. They can be overcome by effective training, unit cohesion, and a sense of leadership so imbued in the members of a unit that each soldier, in turn, is prepared to step forward and give direction toward mission accomplishment.

Id. See also B.K. SIDDLE, SHARPENING THE WARRIOR'S EDGE: THE PSYCHOLOGY AND SCIENCE OF TRAINING 121 (1995); DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995); George T. Williams, *Reluctance to Use Deadly Force*, L. ENFORCEMENT BULL., Oct. 99, at 1 ("Taking their cue from the military, law enforcement agencies have developed training methods to ensure that their officers will employ deadly force when the need arises."); *cf.* UREY W. PATRICK, FBI ACADEMY FIREARMS TRAINING UNIT, HANDGUN WOUNDING FACTORS AND EFFECTIVENESS 16 (1989).

by Parks induces no clear and eternal damnation of such shooting. Parks' statement, "Justice Department Guidelines [and] U.S. Law . . . [forbids] shoot to wound" is not strictly accurate, as federal law enforcement deadly force policy does not actually forbid shooting to disable. Instead, it states: "Attempts to shoot to wound or to injure are unrealistic and, because of high miss rates and poor stopping effectiveness, can prove dangerous for the officer and others. Therefore, shooting merely to disable is strongly discouraged."[66] While not forbidden, the wariness of the federal law enforcement community about shooting to disable provides insight into how policy interacts with training and litigation. It also exposes subtle differences between police officers and soldiers.

This was brought into focus recently after a member of the Secret Service Emergency Response Team (ERT) shot a man who brandished a .38 caliber revolver while walking along the south fence line of the White House. Though the shot struck the man in the right knee, the agent's point of aim was center mass.[67] Still, uninformed media speculation that a federal agent may have intentionally aimed to disable suggests that such a policy would damage the credibility of the law enforcement community.[68]

Whenever an especially well-trained agent—in the rare circumstances where he enjoys the luxuries of time, cover, concealment, standoff range, a good firing position, a suitable firearm, and a controlled heart rate—shoots a limb or even the handgun out of a suspect's hands, howls are understandably heard in police academies. Such a feat is risky, and a pattern of increased shooting to disable could someday cause judges to raise the bar for every agent accused of excessive force in a 42 U.S.C. §1983 complaint.[69]

In addition, Parks' assertion that military lawyers have ignored the post-shooting litigation record is incorrect.[70] Borrowing good ideas and techniques from domestic law enforcement cases is nothing new.[71] The leading Supreme Court cases of *Graham v. Connor*[72] and *Tennessee v. Garner*,[73] and their progeny, make good professional reading for military law-

64. *See* Dean T. Olson, *Deadly Force Decision-Making*, L. ENFORCEMENT BULL., Feb. 1998, at 1.

> The implication of the *Zuchel* decision is that traditional instruction—consisting of periodic firearms qualifications on the gun range, the use of classroom shoot/don't shoot scenarios, and other closed motor skills training strategies—does not adequately prepare law enforcement officers to make effective deadly force decisions. To meet the higher standard imposed by the *Zuchel* decision, deadly force training also must develop decision-making skills that enable officers to avoid confrontations when possible and to minimize the escalation of force when practical. Dynamic training meets this standard.

Id. at 5 (citations omitted).

65. *See* DODI 5210.56, *supra* note 44, para. E2.1.6.2.

> When a firearm is discharged, it will be fired with the intent of rendering the person(s) at whom it is discharged incapable of continuing the activity or course of behavior prompting the individual to shoot.

Id. See AR 190-14, *supra* note 44, para. 3-2g(3) (containing the same language). Similar language is used in the SROE:

> An attack to disable or destroy a hostile force is authorized when such action is the only prudent means by which a hostile act or demonstration of hostile intent can be prevented or terminated.

SROE, *supra* note 6, encl. A, para. 8a(3). Finally, a 1991 source advises, "When firing is necessary, if possible, shoot to wound, not to kill." U.S. DEP'T OF ARMY, DEPARTMENT OF DEFENSE CIVIL DISTURBANCE PLAN (GARDEN PLOT) C-8-A-1 (15 Feb. 1991).

66. DOJ DEADLY FORCE POLICY, *supra* note 10, para. IV (Commentary Regarding the Use of Deadly Force in Non-Custodial Situations). Treasury Department guidance contains the same language pertaining to shooting to disable. TREASURY ORDER 105-12, *supra* note 10.

67. Telephone Interview with Official from Federal Law Enforcement Training Center, Glynco, Ga. (Mar. 26, 2000) (the official preferred to remain anonymous).

68. *See, e.g.*, Jane Prendergast, *Cops Not Trained To Wing Armed Suspects Such As Pickett*, CINCINNATI ENQUIRER, Feb. 9, 2001, at A10.

69. John C. Hall discusses raising the standard of reasonableness.

> Noting that most of the major law enforcement agencies had apparently already adopted more stringent policy standards than the common law fleeing felon rule, the Court reasoned that a constitutional standard that does the same thing was not likely to have any significant detrimental impact on law enforcement interests. The Court observed: "We would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement."

John C. Hall, *Liability Implications of Departmental Policy Violations*, L. ENFORCEMENT BULL., Apr. 1997 (citing Tennessee v. Garner, 471 U.S. 1, 19 (1985)). Firearms training divisions at law enforcement academies well know that there are a few showoffs in every class who occasionally shoot to disable in training and who must be indoctrinated with the need to follow the deadly force guidance in the agency's policy statement. If they depart from that statement and their risky shot goes awry, they will be defending themselves in court alone, and their chances of obtaining summary judgment under a qualified immunity defense will be severely damaged. Hence, they are drilled: never shoot to wound; shoot to eliminate the threat; aim center mass; fire at the torso, if visible; or, if the torso is not visible, fire at the center of mass of what the subject exposes. Telephone Interview with Official from Federal Law Enforcement Training Center, Glynco, Ga. (March 27, 2000) (the firearms training expert preferred to remain anonymous).

yers.[74] Specific military examples from Beirut, Madden Dam, Brcko, or Mijak, though, are more useful for training soldiers. This is because police objectives, organization, weapons, and operations are significantly different even from military counterparts in a peace-support mission. Also, domestic litigation is raised in distinct constitutional and statutory contexts related to liability and immunity, so the value of the litigation record is limited.

While discussion of domestic excessive force prosecutions or civil liability cases involving deadly force may help prepare police agents for hostile cross-examination on the witness stand, is this precisely the approach commanders should use for training young soldiers? For one thing, although the Supreme Court has indeed developed a doctrine of "reasonableness" that sensibly refrains from second-guessing officers staring down the barrel of a gun, not all federal case results tend to quiet the fears of those who are enforcing the law and keeping the peace.[75] Accordingly, when the onion of domestic litigation extolled by Parks is peeled back, it does not yield the claimed benefits.[76]

Commanders Do Lead

Commanders and judge advocates with experience in developing the right balance of initiative and restraint in soldiers heading to Kosovo and Bosnia learn that soldiers ask typical questions about ROE. In addition to, "When can I shoot?," soldiers ask:

> (1) Can you give me some real examples of when soldiers shot and when they did not?
>
> (2) What happened to those soldiers?
> (3) What are some ideas on other things I can do if my buddies and I are not immediately threatened?
> (4) Will we get any other equipment if controlling crowds becomes a problem?
> (5) Will the chain of command back me if I am trying to do the right thing and I shoot? What if I don't shoot?

Soldiers get answers to these questions and achieve the balance between initiative and restraint through briefbacks, STXs involving hostile role players, and open, frank discussions with leaders built upon a foundation of trust and values. Soldiers are expected to be aggressive and always try to do the right thing. They have to understand that, in spite of best efforts, mistakes will occur. Leaders underwrite honest mistakes and tell soldiers that such mistakes help the entire task force improve at performing difficult missions. Because these leaders' expressions of support are consistent with their all-important supportive actions after a shooting or violent encounter, trust is further reinforced, thus mitigating the extremes of inaction and over aggression. This fully prepares soldiers not only to defend

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70. Parks, *supra* note 3, at 35 n.5 (citing, as the only exception, Captain David G. Bolgiano, *Firearms Training System: A Proposal for Future Rules of Engagement Training*, ARMY LAW., Dec. 1995, at 79). Two years before the article Parks cites as the single exception, the author was advised by at least nine hard thinkers on use of force in the Army and the Marine Corps to probe that very litigation record while a student in the Army's Judge Advocate Graduate Course. These were then Brigadier General Walt Huffman, Colonels John Altenburg, Frederick Lorenz, Pete Lescynzski, Hays Parks, and Lieutenant Colonels Dave Petraeus and Dan Bolger, and Majors Marc Warren and Mac Warner, along with law enforcement experts Jim Fyfe and Sergeant Sean Hayes. Later, the author received instruction from Special Agent John C. Hall at the FBI Academy in Quantico, underwent orientation training on Firearms Training System (FATS) scenarios in the Spring of 1996, and benefited from the insights of former policemen David Bolgiano, whose article on the subject is complimented by Parks. Since that time, several judge advocates have drawn from federal case law for persuasive (if not strictly binding) authority on ROE questions. *See supra* notes 32-34 and accompanying text (discussing judge advocates efforts to address the "Mad Mortarman" question).

71. *See, e.g.*, Martins, *supra* note 42, at 101 & n.329.

72. 490 U.S. 386 (1989).

73. 471 U.S. 1 (1985).

74. Those cases, when combined with practical knowledge of police policies, training, and procedures gained from law enforcement officers, do in fact furnish helpful lessons about when deadly force is authorized. *See, e.g.*, John C. Hall, *Deadly Force: A Question of Necessity*, L. ENFORCEMENT BULL., Feb. 1995.

75. Consider that in one recent five-year period, the Civil Rights Division of the Department of Justice filed charges against 246 law enforcement officers. During that same period, the Division culled through 45,000 citizen complaints and reviewed about 12,500 FBI investigations. The matters deemed by the Division to be most significant were presented to 142 federal grand juries around the country, and formal charges were filed that generated ninety-one indictments and forty-five criminal informations. The results of these charges: 107 guilty pleas, sixty-two jury trials, fifty-two convictions, and ten acquittals, yielding a conviction rate of 73.4%. Now, close study of these cases frequently reveals intentional wrongdoing by a tiny fraction of officers who set out do harm in flagrant violation of law and policy. Still, these are not reassuring statistics to America's law enforcement officers. *See* James P. Turner, *Civil Rights: Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991 (1999).

76. The law enforcement community is not immune from surprise opinions issued by courts whose reasoning does not exactly track that of the law enforcement academy legal counsel. *See, e.g.*, Hall, *supra* note 69. The author attempts to reconcile the court's reasoning in *Bradford v. City of Los Angeles* with the standard of "reasonableness" articulated in leading cases. The court in *Bradford* concluded it would let a jury decide whether an officer had been reasonable in using deadly force (in this case a vehicle) to eliminate a threat. The jury found that under the circumstances it was not reasonable because other alternatives (such as driving in front of the subject) existed. *Id.*

themselves and accomplish unit missions, but also to serve as representatives of American strength and fairness—eternal themes of national foreign policy.[77]

Command Backing

Parks suggests that commanders are more inclined to court-martial a soldier after a shooting incident than to stand up against restrictive ROE before an operation. The facts do not support this assertion.[78] Only two reported appellate cases involve charges founded in violations of the rules of engagement. Both of these cases—*United States v. McMonagle*[79] and *United States v. Finsel*[80]—arose in Panama, following Operation Just Cause.

Restrictive ROE played no part in the prosecution of either McMonegle or Finsel. These two soldiers were subject to prosecution because, on the night in question, they were drinking alcohol in violation of a no-drinking order, having sex with a woman in a local brothel despite an order prohibiting intimate contact with Panamanians, staging an elaborate mock firefight to cover up Sergeant Finsel's loss of a 9 mm pistol, and finally killing an innocent bystander who fell victim to a wild shot.[81] What the court termed "ROE" violations here—specifically violations of the commanding general's order relating to weapons safety—were incidental to other serious wrongs.

Commanders go to great lengths to avoid second-guessing soldiers' good faith use of deadly force in situations where ROE violations are rumored or informally alleged. Parks' inability to cite examples of criminal convictions for ROE violations is telling. Isolated instances in which post-shooting investigations have occurred, perhaps with the side-effect of chilling other soldiers' initiative,[82] should serve as lessons to all that, when possible, a review of the circumstances should be undertaken as an after-action review rather than as an investigation.

Meanwhile, commanders aggressively challenge ROE issued by higher headquarters. The 1986 Honduras example cited by Parks, in which the 75th Ranger Regiment Commander insisted upon authority for live and chambered rounds, is representative rather than unusual. The Dayton process, which involved close involvement by senior military commanders and resulted in a "robust" Military Annex to the General Framework Agreement for Peace, is another example in which political and diplomatic considerations were not permitted to dilute the soldiers' employment of force.[83] A final example is the

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77. Parks applauds the rules for use of force by ground forces in Vietnam and asserts that ROE for U.S. forces on peace-support operations today place greater constraint on individual soldiers than existed during that conflict. Parks, *supra* note 3, at 35, 37. Any comparison between wartime and peacetime rules is like comparing apples and oranges, however, because during war, enemy soldiers can be shot on sight. Rules in a MOOTW are for this fundamental reason more constraining. Also, Parks' implied assertion that the Vietnam rules "served us well" would not go unchallenged in some quarters. *See, e.g.*, ANDREW F. KREPENEVICH, JR., THE ARMY AND VIETNAM 199 (1986).

78. Regarding an incident in Bosnia that occurred in the Spring of 1999, Parks writes:

> In Bosnia, Special Forces personnel were threatened by a heavily armed mob. The senior soldier present directed his men to run to avoid the confrontation. As they began to run, the senior soldier was struck in the back by a club. Realizing that were he or any of his men to fall, they would be beaten and possibly killed, he drew his pistol and shot his assailant. Although his action clearly was in self-defense, authorities weighed his court-martial for violating ROEs before ordering him out of the area of operations.

Parks, *supra* note 3, at 33. This account is strongly denied by individuals who were close to the situation. *See, e.g.,* E-Mail from Colonel Michael Kerschner, Commander of the Combined Joint Special Operations Task Force (at the time of this incident), to multiple addressees, subject: Comment on Deadly Force Is Authorized by Colonel W. Hays Parks (Jan. 19, 2001).

> The only feedback the soldier in question ever received from his chain of command was--he had done exactly the right thing . . . . The NCO was moved out of country, not for disciplinary reasons, but for his own protection. His team experienced frequent and prolonged contact with the civilian populace of the region and I did not want him to become a target for Serb retaliation.

Id.

79. 34 M.J. 825 (A.C.M.R. 1992).

80. 33 M.J. 739 (A.C.M.R. 1991).

81. *McMonagle*, 34 M.J. at 856-57, 865; *Finsel*, 33 M.J. at 740, 747.

82. *See* Martin, *supra* note 42, at 64-67 (discussing the *Mowris* and *Conde* cases).

83. *See, e.g.*, Walter B. Slocombe, Undersecretary of Defense for Policy, Prepared Statement Before the House International Relations Committee (Mar. 12, 1998).

> First, the force will be fully able to protect itself. Although the follow-on force will be smaller, it will be sufficient, as judged by our military commanders, in numbers and in equipment to achieve its mission and to protect itself in safety. It will continue NATO's robust ROEs. As has been true throughout, force protection is our highest priority.

Id.

planning and orders-writing process that preceded operations in Kosovo, when U.S. Army commanders refused to rest until they received interpretations of NATO ROE consistent with self-defense and mission success.[84]

The Real Story in Brcko

Events in Brcko, Bosnia, in late August 1997, reveal that commanders are stepping up and leading as their soldiers face tough decisions. Those events, among the ones summarized all-too-briefly by Parks at the start of his article, provide a helpful context for discerning the true role of authority to use deadly force in a military operation. That role is often quite limited.[85]

Around 2 a.m. on 28 August 1997, sirens went off in the town of Brcko. Serb radio had announced that backers of a moderate, elected Serb official were going to attempt to assume control over the local police station. The siren served as a signal for an orchestrated demonstration to begin. A U.S. company-sized task force, providing presence in the town during the anticipated change in civil power, was deployed into a perimeter and at several intersections. Within an hour, a large Serb crowd—about 400-strong—had gathered near the police station, armed with stones and clubs, and many Serbs were throwing stones, bricks, and flower pots at the American soldiers from rooftops. The company commander reported the growing disturbance in the town and began moving the task force to a reinforced position at the nearby Brcko bridge, remaining in frequent contact with his battalion and division headquarters, which would soon have the town under close aerial observation.[86]

Two dismounted squads of soldiers, overwatched by a Bradley Fighting Vehicle with their platoon sergeant in the turret, were starting their movement from an intersection when a crowd member climbed up on the Bradley and struck the platoon sergeant with a two-by-four. The assailant then slipped down into the crowd. The company continued its orderly movement to the bridge, the protection of which was a continuing mission. There, soldiers and the bridge were well protected by earthen barriers, concertina wire, and more Bradleys.[87]

By late morning, the situation escalated. The crowd had grown to several thousand, many of whom were bused to the demonstration by organizers loyal to Bosnian Serb leader Karadzic. A few in the crowd had Molotov cocktails and CS[88] canisters; women with babies and elderly people were being pushed toward the front of the crowd.[89]

The American company in Brcko was part of the Stabilization Force that was implementing the 1994 General Framework Agreement for Peace negotiated at Dayton. Control over the town was so contentious that it could not be decided within the Framework agreement; rather, it was deferred for decision through an arbitration process that both of the former warring factions were still attempting to influence in August 1997. The Serb Republic realistically felt that it could not exist without control of Brcko because the razor-thin Posavina Corridor on which Brcko rests is the sole land link between the two halves of the Serb state.[90]

The Muslim-Croat Federation, meanwhile, felt it would be fatally weakened by the loss of the corridor. Such a loss would isolate Sarajevo from the rest of Europe and weaken the defenses of Tuzla, Bosnia's only major industrial city. Also, to give control to the Serbs would seemingly condone one of the war's clearest examples of "ethnic cleansing." On 28 August 1997, Brcko's population of 34,000 was 98% Serb. Just before the war, in 1992, the population had been 40% Muslim, 30% Serb and 30% Croat or "other."[91]

The company commander maintained excellent command and control throughout the day. The angry crowd was kept at bay with a variety of measures, which included the conspicuous locking and loading of weapons, butt-strokes to individuals who came too close, small arms warning shots, CS grenades and canisters, and eventually a burst of fire from an M240C, 7.62 mm, coaxially mounted machine gun, over the heads of the demonstrators and into a nearby building.[92]

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84. The commanding generals of Task Force Falcon (Brigadier General Bantz Craddock), 1st Infantry Division (Major General Dave Grange), V Corps (Lieutenant General John Hendrix), and United States Army Europe (General Montgomery Meigs), and their judge advocates, were personally and closely involved in the process of obtaining clarifications from NATO relating to use of force rules.

85. Telephone Interview with Major Kevin Hendricks, Former Company Commander, C Company, 2d Battalion, 2d Infantry Regiment (Mar. 28, 2001) [hereinafter Hendricks Interview]; Telephone Interview with Lieutenant Colonel Jeff Lau, Former Executive Officer, 1st Battalion, 77th Armor Regiment (Mar. 26, 2001). The facts in this account of the August 1997 Brcko incident are drawn from these two telephone interviews.

86. Hendricks Interview, *supra* note 85.

87. *Id.*

88. Ortho-chlorobenzylidene malononitrile or "tear gas."

89. Hendricks Interview, *supra* note 85.

90. *Id.*

91. *Id.*

The discipline and resolve of the U.S. forces to remain on the bridge eventually caused the crowd leaders to call an end to the disturbance. Many of the soldiers sustained wounds from rocks and tussles with the crowd, and five injuries—including the platoon sergeant hit with the two-by-four—required medical treatment. One soldier, whose eye was injured, eventually left the Army with a 10% disability; but he has since re-enlisted and is stationed at Fort Bragg.

Although some in the international media portrayed the events as a victory for Serb nationalists because the platoon on the bridge did not kill any of the demonstrators, informed observers are convinced that Serbs would have achieved their objectives by inciting the soldiers to open fire on them. Presumably, Parks believes U.S. soldiers should have fired on the crowd the moment they had legal authority to do so. This would have been the instant when rock throwers, Molotov cocktail hurlers, and club wielders gave the soldiers a reasonable belief that they were in imminent danger of serious physical injury. Setting aside the difficult question of which targets the soldiers should have shot if the threats were submerged in a crowd of unarmed persons, most could agree that legal authority to fire was present at various points throughout the long day—during which the crowd disturbances ebbed and flowed—and that excessive use of force allegations might have run a short course in a post-shooting process under domestic federal policy and law.

Part of the trouble with Parks' analysis is that soldiers were not holding fire because they feared a lack of legal authority, something they certainly also had under ROE disseminated and trained by the unit. They held fire rather because shooting would not have eliminated the threat, would have helped the Serbs achieve their destabilizing aims, would have precluded other techniques, and would have risked spinning the situation in Brcko out of control.[93] The decorations the platoon sergeant and several other men received that day were well-deserved, like any other commendation given to a soldier for placing himself at risk to accomplish a greater good.

The greater good in this case was significant: In addition to bringing an end to the disturbance without the loss of a single soldier or civilian life, the fragile stability in the Balkans began to take hold. With the 2000 election in Belgrade of a regime committed to democratic reforms, the discipline, resolve, and situational awareness of our soldiers and leaders in Brcko and elsewhere in the Balkans paid enormous dividends for U.S. national security interests.

Another troubling part of Parks' analysis is the extent to which he takes the individual "right" to fire, an idea that competes with Parks' exhortation that "commanders must lead." Soldiers in a platoon, more so than a policeman responding to a call with his partner in a patrol car, take action within a chain of command. The prerogative of individual decision-making occurs only as the soldier's actions—say, while on sentry duty or during clearing operations in urban terrain—require him to operate independently. Soldiers are required to follow orders. The need for any operation against a determined and ingenious adversary to be coordinated and strongly led is one of the deepest military truths and is captured in the principle "unity of command." Does Parks honestly believe that each soldier has the unqualified and personal right to fire at will in a Brcko Bridge scenario, even when every soldier continues to enjoy clear communication with a sergeant or officer-in-charge on the scene who are in a better position to gauge the risk of fratricide?[94] One cannot tell by reading Parks' *Deadly Force Is Authorized*. The distinction in the SROE between ROE for self-defense and ROE for "mission accomplishment"[95] at least acknowledges that unit goals and individual self-interest are not identical.

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92. *Id.*

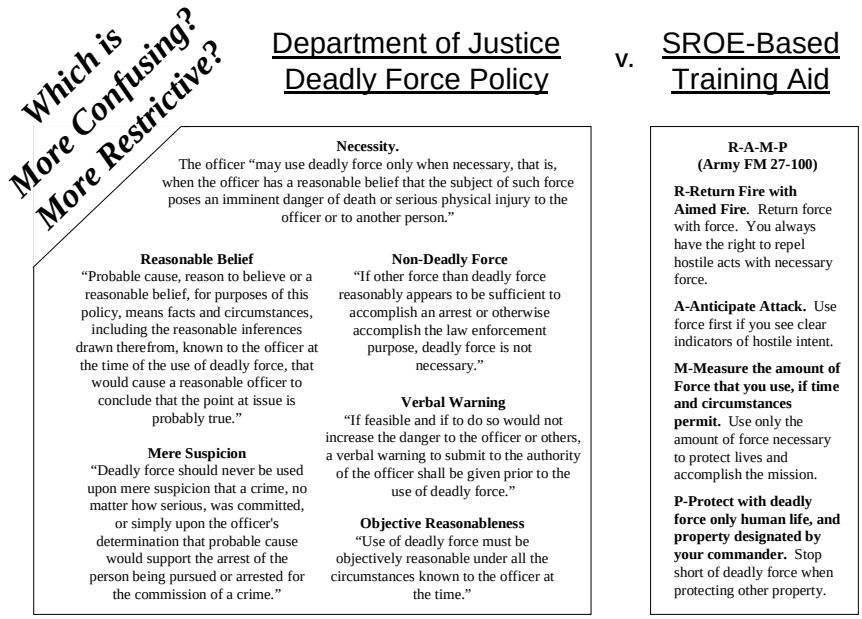
93. United States soldiers who dealt successfully with civil disturbances in Strpce and Mitrovica, Kosovo, in early 2000 concur that holding fire is not the result of ignorance about where the legal line of authority to use deadly force lies. Interview with Lieutenant Colonel Mike Ellerbe, Former Commander, 3d Battalion, 504th Parachute Infantry Regiment, at Fort Polk, La. (Mar. 26, 2001).

94. Consider *Parker v. Levy*, 417 U.S. 733 (1974):

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955). In *In re Grimley*, 137, U.S. 147, 153 (1890), the Court observed: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "the military constitutes a specialized community governed by a separate discipline from that of the civilian," Orloff v. Willoughby, 345 U.S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion.

Id. at 743-44.

95. SROE, *supra* note 6, paras. 1a, 6b, 6c, 7; *id.* encl. A, paras. 1a, 1c(1), 3b; *id.* encl. K, para. 3.



We're All Hicks' Now

Parks criticizes commanders for ignoring Hicks' law. Yet while they may not know it by name, military commanders actually employ training techniques for use of force that are fully built upon the insight of Hicks' law and related concepts of information processing. Cognitive psychology models describe three sequential stages for neural information processing related to movement output: (1) stimulus identification; (2) response selection; and (3) response programming.[96] All three stages require time. Hick's law, which relates to the second stage, states that response selection time increases as the number of alternatives increases.[97]

Research shows that response selection time decreases as alternatives are ordered within schemas. Further, all three information-processing stages can be shortened through repetitive practice in a progressively more distracting environment, as well as through improved overall physical conditioning and other influences.[98] Repetitive practice is the hallmark of the Army's "performance-oriented training" system, and effective leaders of all services incorporate these same insights into drills for improving time and quality of performance on a multitude of tasks.

A federal law enforcement agent, who is required by policy to consider nonlethal force and to issue a verbal warning if feasible, faces no fewer alternatives than a similarly armed and situated soldier. Operant conditioning quickens both the agent's and the soldier's response time in firing at identified threats. In a close-quarters firefight, there are only two options: Shoot or don't shoot. Repetition during firearms training must ensure that defensive movements become natural and decisive. At this deadly moment, a training aid's list of continuum of force options or a vague policy reference to nonlethal force must not hamper the response of the threatened soldier or agent. Again, training rather than legal drafting is the key.[99]

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96. R.A. SCHMIDT, MOTOR CONTROL AND LEARNING: A BEHAVIORAL EMPHASIS ch. 4 (1988).

97. *Id.*

98. *See* C.K. Hertzog, M.V. Williams & D.A. Walsh, *The Effect of Practice on Age Differences in Central Perceptual Processing*, 31 J. GERONTOLOGY 428, 428-33 (1976); W.W. Spirduso & P. Clifford, *Replication of Age and Physical Activity Effects on Reaction and Movement Time*, 33 J. GERONTOLOGY 26, 26-30 (1978); David E. Rumelhart, *Schemata: The Building Blocks of Cognition*, in THEORETICAL MODELS AND PROCESSES OF READING 33-58 (Harry Singer & Robert B. Ruddell eds., 3d ed. 1980).

99. Described in terms of the RAMP decision model, a soldier needs a strong foundation of repetitive training in the "A-Anticipate Attack" before all else, and when a threat appears, his or her judgment must have been trained such that the response is instantaneous. This is one of the potential risks associated with RAMP, in that like any other collection of words, it is a poor substitute for the actual training that can develop the good, rapid judgments and muscle memory crucial to effective defense of self and others. To the extent that it is regarded as more than a training aid, it is unhelpful and even counterproductive.

Conclusion

Rules of engagement are not handicapping and endangering ground troops on peace-support missions. United States troops are well organized, equipped, supported, armed, led, and—most significantly—trained. That training, though at times similar to the training of domestic law enforcement agents, is appropriately geared to military rather than police functions. High-level policy statements as well as training materials regarding self-defense and the authority to use deadly force must also recognize the distinction between soldiers and cops.

All is certainly not perfect with the current materials used to convey guidance to units and soldiers on the use of force. Operations orders, soldier cards, and even specific vignettes continue to incorporate a variety of terms and verbal formulas addressing individual self-defense. Force continuums lacking precautions against gradualism and "last resort" language describing deadly force contain troubling boilerplate language. Vignettes also often lack grounding in real situations that have been faced by soldiers situated similarly to the training audience.

Commanders and staffs have wrestled, unsuccessfully to date, to find a standard way of disseminating ground force ROE not related to individual self-defense (such as geographic restrictions, weapons approval authorities, and alert conditions). The lack of consistent language and format, however, has impeded adoption of a uniform training approach at service schools and initial entry bases.[100]

Commanders reassure soldiers with uneven success that actions taken in tense, uncertain, and rapidly evolving circumstances will not be second-guessed with 20/20 hindsight. Most commanders, though, do an excellent job at this important leadership task. The ability of units and soldiers to transition immediately from low threat to high threat and wartime scenarios remains an elusive and essential goal. Not all units perform enough marksmanship and close-quarters combat training. The term "ROE" itself is applied to so many varied types of directives that greater precision in the military vocabulary is needed.

Yet improvement upon these and other aspects of the current system is frustrated rather than advanced by sensationalism. Because he ignites easy biases against other services, against peace support operations, against political and international constraints, and against lawyers, Hays Parks obscures the training imperatives that provide clues to a better way. Deadly force is indeed authorized, but a burning focus on legal authorization rather than training creates more heat than light.

100. I recognize the difficulties in standardizing the dissemination of these higher order rules. For a variety of reasons, I now believe that the "ROECONs" system that I recommended in 1994 is not the answer. *See* Martins, *supra* note 42, at 83 n.280, 92-94, app. D. Still, the basic idea of that system—to standardize ROE dissemination in unit Standing Operating Procedures (SOPs)—has merit and would benefit from further effort at Corps and Division staffs throughout the Army.

Legal and Practical Aspects of Debriefings: Adding Value to the Procurement Process

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Introduction

Debriefings of unsuccessful offerors can be a key stage of many competitive negotiated procurements under Federal Acquisition Regulation (FAR) Part 15.[2] In a debriefing, which can occur before or after contract award, agency representatives inform the offeror, commonly face to face, of the proposal's weaknesses and deficiencies. The procuring agency in a post-award debriefing will further disclose limited information relating to the awardee's proposal, such as the awardee's overall evaluated cost or price, and the rationale for the source selection. The debriefed offeror either before or after award is entitled to receive certain other information, such as whether the agency followed the applicable source selection procedures. Debriefings are closely regulated by statute[3] and the FAR,[4] which identify appropriate topics for further discussion in this article.

Properly conducted, debriefings can greatly aid offerors, who can obtain insights for improving their proposals in future procurements. A skillfully performed debriefing also can ward off a potential protest by an unsuccessful offeror to the agency, the General Accounting Office (GAO), or the United States Court of Federal Claims whereby the agency allays the debriefed offeror's concerns about possible prejudicial error in the evaluation or selection decision.

Poorly conducted, debriefings can decrease an offeror's confidence in the agency's evaluation practices, and can discourage that offeror from pursuing future business with that agency, thereby decreasing competition. A confusing or poorly executed debriefing also can spark a protest when the offeror was not otherwise so inclined. Most protests consume extensive agency resources in defending the procurement before the protest decision maker.[5]

Award protests further impact the agency's mission. In this regard, timely protests to the GAO, the usual forum of choice, automatically invoke a stay of the agency's performance of a contract, unless the procuring activity obtains the approval of the agency head for an override of the automatic stay.[6] In the Department of the Army, that official is the Secretary of the Army, who closely scrutinizes—and does not always grant—such requests.[7] The ordinary GAO stay period is 100 calendar days, which can be extended when the protester files timely, supplemental protest grounds.[8] Therefore, agency procurement officials have every incentive to provide disappointed offerors with a well-conceived and executed debriefing so that both offerors and agencies can obtain the maximum benefit from these sessions.

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1. An earlier version of this article appeared in Steven Feldman, *Effective Debriefings from a Government Perspective*, CONTRACT MGMT., Jan. 2001, at 51.

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION 33.104(c)(1) (June 1997) [hereinafter FAR].

3. 10 U.S.C. § 2305(b) (2000); 41 U.S.C. § 253b (2000).

4. FAR, *supra* note 2, Subpart 15.5.

5. The case law reflects many instances where a debriefing appeared to prompt, in whole or part, an unsuccessful offer to protest the agency's evaluation or selection decision. *See, e.g.*, AWD Techs., Inc., Comp. Gen. Dec. B-250081.2, 93-1 CPD ¶ 83; CACI Field Servs., Inc., Comp. Gen. Dec. B-234945, 89-2 CPD ¶ 97; Sechan Elecs., Inc., Comp. Gen. Dec. B-233943, 89-1 CPD ¶ 337; Raven Servs. Corp., Comp. Gen. Dec. B-231639, 88-2 CPD ¶ 173; Gov't Computer Sales, GSBCA 9981-P, 89-2 BCA ¶ 21779.

6. 31 U.S.C. § 3553(d)(4) (2000). A contracting officer must immediately suspend performance of a contract when the agency receives notice of a protest from the GAO within ten days after a contract award, or within five days after a debriefing date offered to the protester for a "required" debriefing under FAR 15.505 or 15.506, whichever is later. *See* FAR, *supra* note 2, at 33.104(c)(1) (summarizing statutory rules). For a discussion of "required debriefings," see section on Debriefings—Purpose and Procedures, *infra.* These rules on invoking the mandatory stay differ slightly from the rules for timely award protests. *See infra* section "Relationship to GAO Timeliness Regulations.

7. *See* FAR, *supra* note 2, at 2.101; U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 202.101 (Dec. 1, 1984) [hereinafter AFARS] (defining "agency head"). The head of the agency may authorize contract performance upon a written finding (and notification to GAO) that, notwithstanding the protest, contract performance will be in the best interests of the United States, or that urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for the GAO's decision. *See* 31 U.S.C. § 3555(d)(3)(C); FAR, *supra* note 2, at 33.104(c)(2), (3).

8. 31 U.S.C. § 3554(a); FAR, *supra* note 2, at 33.104(f) (explaining GAO's obligations).

This article seeks to aid government representatives in performing quality debriefings, and to help agency personnel avoid common pitfalls. It first examines the essentials of competitive negotiated procurement, which are a substantive focus of many debriefings. It then explains the procurement regulations on debriefings, along with GAO decisions construing this process. Next the article discusses in depth the relationship between debriefings and the GAO's rules on timely bid protests. Lastly, the article offers practical suggestions for ensuring successful debriefings from a government perspective.

Essentials of Competitive Negotiation

In sealed bidding under FAR Part 14, the award must be made strictly on the solicitation's price and price-related factors to the lowest, responsive, and responsible bidder.[9] In competitive negotiations under FAR Part 15, the responsible offeror with the lowest-priced, technically acceptable offer is not necessarily entitled to an award, unless the Request for Proposals (RFP) states otherwise.[10] Usually, the focus of a competitive negotiated procurement is an assessment of both cost and price and the relative merits of the offerors' technical proposals under the announced evaluation factors. Thus, an RFP may include evaluation factors based on traditional responsibility factors—such as experience**,** technical excellence, or past performance—that would be impermissible for sealed bidding.[11]

In negotiated procurements, FAR 15.303 makes the source selection authority (SSA), typically the contracting officer, responsible for selection decisions. Further, FAR 15.303(b)(4) states that the SSA must ensure that proposals are evaluated based solely on the factors and subfactors in the solicitation. Federal Acquisition Regulation 15.303(b)(6) requires the agency to select the source or sources whose proposal is the "best value" to the government, a term that has two variants under FAR 15.101. First, the agency can select the lowest price, technically acceptable offer under FAR 15.101-2(b), provided that the RFP announced this award process. Second, the agency under FAR 15.101-1(c) can compare the price and non-price qualifications of the proposals. Thus, the agency may determine to award to a higher priced, but technically superior proposal, or to award to a lower priced, but less technically qualified proposal, depending on which proposal the agency deems to be the most advantageous offer to the government. The GAO and the other protest adjudicators will approve these trade-offs so long as they are reasonable and consistent with the announced evaluation factors.[12]

In the author's experience, the two most frequently recurring legal issues in debriefings are whether the agency followed the announced evaluation factors and whether the agency adequately justified its trade-off decision.

Debriefings—Purpose and Procedures

Debriefings are a creature of both statute and regulation. For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, 10 U.S.C. § 2305(b) spells out the process in great detail. For other covered executive agencies, 41 U.S.C. § 253b provides parallel guidance. Subpart 15.5 of the FAR implements these statutes for FAR-covered procuring activities.

The purpose of a debriefing is two-fold: to inform the offeror of its significant weaknesses and deficiencies, and to provide essential information in a post-award debriefing on the rationale for the source selection decision.[13] The procuring activity has substantial discretion on the mode of debriefing—it may occur orally, in writing, or by any other method acceptable to the contracting officer.[14] The contracting officer should

9. 10 U.S.C. § 2305(b)(3) (2000); 41 U.S.C. § 253b(c) (2000); Communications Network, Comp. Gen. Dec. B-215902, 84-2 CPD ¶ 609, at 2.

10. Ingersoll-Rand Co., Comp. Gen. Dec. B-232739, 89-1 CPD ¶ 124; Raven Servs. Corp., Comp. Gen. Dec. B-231639, 88-2 CPD ¶ 173; Sal Esparaza, Inc., Comp. Gen. Dec. B-231097, 88-2 CPD ¶ 168.

11. *See* FAR, *supra* note 2, at 15.304(c)(2) (addressing permissible quality evaluation factors in negotiated procurements). The only proper award factors in sealed bidding are price and price-related factors. *See id.* § 6.401(a)); Eaglefire, Inc., Comp. Gen. Dec. B-257951, 94-2 CPD ¶ 214, at 7 (analyzing 10 U.S.C. § 2304(a)(2); KIME Plus, Inc., Comp. Gen. Dec. B-231906, 88-2 CPD ¶ 237, at 2; Variable Staffing Sys., Comp. Gen. Dec. B-224105, 86-2 CPD ¶ 705, at 2.

12. *See* Valenzuela Eng'g, Inc., Comp. Gen. Dec. B-283889, 2000 CPD ¶ 1, and cases cited therein; Widnall v. B3H Corp., 75 F.3d 1577 (Fed. Cir. 1996).

13. *See* 10 U.S.C. §§ 2305(b)(5)(B), (6)(C); 41 U.S.C. §§ 253b(e)(2), (f)(3); FAR, *supra* note 2, at 15.505(e) (pre-award debriefing), 15.506(d) (post-award debriefing). The GAO has said: "The primary function of a debriefing is not to defend or justify selection decisions, but to provide unsuccessful offerors with information that would assist them in improving their future proposals." AWD Tech., Inc., Comp. Gen. Dec. B-250081.2, 93-1 CPD ¶ 83, at 6 n.2. This GAO observation, made in 1993, applies equally to the current version of the debriefing rules, which Congress changed in 1994. *See* Pub. L. No. 103-355, secs. 1014, 1064 (amending 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b). Subpart 15.5 of the FAR was last revised in 1997. FEDERAL ACQUISITION CIRCULAR 97-2, 62 Fed. Reg. 51224 (Sept. 30, 1997).

Clearly, the purpose of a debriefing is not to provide the offeror with the opportunity to correct the deficiencies that led to its elimination from the competition. OMV Medical, Inc., Comp. Gen. Dec. B-281388, 99-1 CPD ¶ 53; Security Defense Systems Corp., Comp. Gen. Dec. B-237826, 90-1 CPD ¶ 231. The debriefing rules in FAR Subpart 15.5 apply to procurements using competitive proposals, FAR, *supra* note 2, at 6.102(b), and to acquisitions using a combination of competitive procedures, *id.* at 6.102(c). For simplified acquisition procedures, the unsuccessful vendor is entitled only to receive a brief explanation for the basis of the award decision. *See id.* at 13.106-3(d), 15.503(b)(2); *see also id* at 2.101 (setting usual threshold at $100,000 for this class of procurements). The rules on post-award debriefing of offerors, *id.* at 15.506, and protest after award, *id.* at 15.507, with reasonable modifications, should be followed for sole source procurements, architect engineer procurements, and competitive selection of basic and applied research submissions. *See id.* at 15.502.

normally chair the debriefing, and evaluators shall provide support.[15]

Pre-Award Debriefing

Offerors that the agency excluded from the competitive range or otherwise removed from the competition before the award may request a pre-award debriefing by making a written request to the contracting officer within three days of receipt of the notice of exclusion from the competition.[16] The offeror may request that the debriefing be postponed until after award, but if so delayed, the debriefing shall include all information normally provided in a post-award debriefing.[17] Absent a timely request, the offeror has no entitlement to receive a pre- or post-award debriefing.[18]

The agency must make every effort to provide a pre-award debriefing as soon as practicable.[19]

> [T]he honest exchange of information in a preaward debriefing may well obviate the need for, or discourage, a bid protest; competitive range evaluation results for excluded offerors are always "fresher" in the pre-award than in the post-award time frame . . . [S]ince a protest could result in disruption to correct a procurement deficiency, it generally would be better to correct the problem at an earlier time whenever possible.[20]

The agency may decline a timely request for a pre-award debriefing if, for compelling reasons, the government's best interests dictate a postponement; however, the agency must document the reasons for the delay.[21]

Post-Award Debriefings

If the offeror makes a written request for a debriefing within three days after receiving notification of an award decision, the offeror under FAR 15.506(a)(1) shall be debriefed and furnished the basis for the selection decision and contract award. To the maximum practicable extent, the debriefing should occur within five days after the receipt of the written request.[22] An offeror that was notified of its exclusion from the competitive range, but that fails to submit a timely request, is not entitled to a debriefing.[23] The agency may accommodate untimely requests for a debriefing.[24]

Information Disclosure

With some variations, the rules for disclosure of information are similar for pre- and post-award debriefings. For pre-award debriefings, the debriefing "shall" include the following information:

> (1) The agency's evaluation of significant elements in the offeror's proposal;
>
> (2) A summary of the rationale for the elimination of the offeror from the competition; and
>
> (3) Reasonable responses to relevant questions about whether source selection proce-

14. FAR, *supra* note 2, at 15.505(c) (pre-award debriefing), 15.506(b) (post-award debriefing).

15. *Id*. at 15.505(d) (pre-award debriefing), 15.506(c) (post-award debriefing).

16. 10 U.S.C. § 2305(b)(6)(A); 41 U.S.C. § 253b(f)(1); FAR, *supra* note 2, at 15.505(a). "Days" under FAR Subpart 15.5 has the same meaning as under FAR 33.101. *See* FAR, *supra* note 2, at 15.501. Thus, in counting days, the first day encompassing the event is excluded, but the last day for counting is included, except where the last day is a non-business day, in which case the total includes the next business day. The GAO uses the same approach for counting "days" in bid protests. *See* 4 C.F.R. § 21.0(e) (2000). *See also* Int'l Res. Group, Comp. Gen. Dec. B-28663, 2001 CPD ¶ 35 (interpreting "three day" rule of FAR 15.505(a)(1).

17. FAR, *supra* note 2, at 15.505(a)(2).

18. *Id*. at 15.505(a)(3).

19. 10 U.S.C. § 2305(b)(6)(A); 41 U.S.C. § 253b(f)(1).

20. Global Eng'g & Constr., Joint Venture, Comp. Gen. Dec. B-27599.3, 97-1 CPD ¶ 77.

21. 10 U.S.C. § 2305(b)(6)(a); 41 U.S.C. § 2536b(f)(1); FAR 15.505(b).

22. *Id*. at 15.506(a)(2). Although no cases address the issue, it would appear that an electronic mail message should qualify, because a document can be "signed" when sent via electronic mail. *See id*. at 2.101 (defining "signature").

23. *Id*. at 15.506(a)(3).

24. *Id*. at 15.506(a)(4)(i). Notwithstanding this permissive rule, agencies characteristically accommodate untimely debriefing requests. FAR 15.506(a)(4)(i) *analyzed in* Beneco Enters., Inc., Comp. Gen. Dec. B-283154, 2000 CPD ¶ 69.

dures in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.[25]

A pre-award debriefing "shall not" disclose:

(1) The number of offerors;

(2) The identity of other offerors;

(3) The content of other offerors' proposals;

(4) The ranking of other offerors;

(5) The evaluation of other offerors; or

(6) Any other information prohibited from disclosure by FAR 15.506(e).[26]

Regarding prohibited information, FAR 15.506(e) precludes point-by-point comparisons with other offerors' proposals and disclosure of trade secrets, confidential commercial or financial information, or the names of persons providing past performance references about an offeror.[27]

At a minimum, the post-award debriefing information shall include:

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal;

(2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and "past performance information"[28] on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for the award;

(5) The make and model of the item to be delivered by the successful offeror in a commercial item procurement; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.[29]

The restrictions in FAR 15.506(e) for pre-award debriefings, summarized above, have equal force in post-award debriefings. In addition, the agency must make a record of both pre-award debriefings[30] and post-award debriefings.[31]

Relationship to GAO Timeliness Regulations

To account for the revised FAR debriefing rules, GAO has changed its protest timeliness regulations.[32] Ordinarily, when making a challenge other than one to the terms of a solicitation, a protester under 4 C.F.R. § 21.2(a)(2) must file its complaint with GAO not later than ten days after the basis of protest is known, or should have been known, whichever is earlier. When the offeror obtains a required debriefing, a qualification exists. In this situation—when a protest is known or should have been known, either before or as a result of the debriefing—the initial protest may be filed only within ten days *after* the date the debriefing occurs. The policy for the revised rule is to encourage early and meaningful debriefings and to preclude "strategic" or "defensive" protests, such as protests filed before the offeror has actual knowledge that a basis for protest exists or in anticipation of improper actions by the agency.[33]

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25. 10 U.S.C. § 2305(b)(6)(C) (2000); 41 U.S.C. § 253b(f)(3) (2000); FAR, *supra* note 2, at 15.505(e).

26. 10 U.S.C. § 2305(b)(6)(D); 41 U.S.C. § 253b(f)(4); FAR, *supra* note 2, at 15.505(f).

27. FAR, *supra* note 2, at 15.506(e) (stating the debriefing may not reveal information that is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), and the implementing regulation, FAR 24.202). *See also* 10 U.S.C. § 2305(b)(5)(C), 41 U.S.C. § 253b(e)(3).

28. *See* FAR, *supra* note 2, at 42.1501.

29. 10 U.S.C. § 2305(b)(5)(B); 41 U.S.C. § 253b(e)(2); FAR, *supra* note 2, at 15.506(d).

30. FAR, *supra* note 2, at 15.505(g).

31. *Id.* at 15.506(f).

32. 4 C.F.R. § 21.2 (2000).

33. *See* Minotaur Eng'g, Comp. Gen. Dec. B-276843, 97-1 CPD ¶ 194; Real Estate Ctr., Comp. Gen. Dec. B-274081, 96-2 CPD ¶ 74 (explaining revised regulation).

The GAO has strictly enforced the revised protest timeliness regulation. The rule forbidding pre-"required debriefing" protests applies even if the protester knew the basis of the complaint before the debriefing. Thus, in *Real Estate Center*, the agency rejected the protester's offer on 7 August 1996, and the protester timely invoked its right to a "required" debriefing.[34] Although the agency had not yet responded to the request, the protester filed its challenge to the award with GAO on 9 August 1996. Since the protester filed its complaint before the required debriefing, the GAO dismissed the protest under 4 C.F.R. § 21.2(a)(2).[35]

The revised GAO timeliness rules pertain only to "required" debriefings. If the protester challenging an award fails to make a timely, written request for a debriefing per FAR 15.506, but obtains a debriefing anyway, then the usual timeliness rules under 4 C.F.R. § 21.2(a)(2) will control.[36] Thus, in such circumstances, no preclusive filing rule pertains to protest grounds that are known or should have been known before the debriefing.

Delayed pre-award debriefings could also affect the timeliness of any protest filed subsequent to the debriefing.[37] This rule for potential protesters was nicely illustrated in *United International Investigative Services, Inc*.[38] In this GAO decision, the agency informed the protester on 8 June 2000 that its proposal was excluded from the competitive range. The next day, the protester sought a pre-award debriefing pursuant to FAR 15.505, but also requested that the debriefing be delayed until after award. On 13 September 2000, the agency made the award to another offeror. The agency provided the protester a written debriefing on 19 September 2000, and the protester filed a GAO protest on 22 September 2000, challenging its exclusion from the competitive range.[39]

The agency argued that the GAO should dismiss the protest as untimely because the protester had failed to pursue diligently the grounds for complaint. The protester countered that its complaint was timely under 4 C.F.R. § 21.2(a)(2), because it was filed on 22 September 2000, which was fewer than the ten days required under the regulation. The GAO agreed with the agency and dismissed the protest under 4 C.F.R. § 21.2(a)(2), reasoning:

> (1) The protester did not actually request a pre-award debriefing, but merely requested that its debriefing be delayed until after award. Therefore, the written debriefing the agency provided on September 19, 2000, was not a "required" debriefing under the applicable statute, 41 U.S.C. § 2453b(f) [and, inferentially, FAR 15.506(a)(1)]; and
>
> (2) Since the debriefing was not "required" under the statute, the rules of 4 C.F.R. § 21.2(a)(2) applied, i.e., the protest was required to be filed within 10 days after the basis of the protest was known, or should have been known, whichever was earlier. Since the protester waited more than three months until it protested in September, 2000, the protester was guilty of failing to pursue the protest grounds diligently, which required GAO's invocation of 4 C.F.R. § 21.2(a)(2) to dismiss the complaint.[40]

Debriefings and Agency Corrective Action

During a one-year period after a contract award, when a protest causes the agency to take corrective action on the procurement—that is, to issue either a new solicitation or a new request for revised proposals on the award—the agency has certain disclosure obligations. Under FAR 15.507(c), the agency shall make available to all prospective offerors (for a new solicitation) and for all competitive range offerors (for any final proposal revisions) the following information: (1) materials contained in any debriefing conducted on the original award about the successful offeror's proposal, and (2) other nonproprietary information that would have been provided to the original offerors.[41]

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34. Comp. Gen. Dec. B-274081, 96-2 CPD ¶ 74.

35. *Id.*

36. *See* Trifax Corp., Comp. Gen. Dec. B-279561, 98-2 CPD ¶ 24, at 5; Minotaur Eng'g, Comp. Gen. Dec. B-276843, 97-1 CPD ¶ 194, at 4 n.2. *See also* Empire State Med. Scientific & Educ. Found., Inc., Comp. Gen. Dec. B-238012.2, 90-1 CPD ¶ 261; Beneco Enters., Inc., Comp. Gen. Dec. B-283154, 2000 CPD ¶ 69.

37. FAR, *supra* note 2, at 15.505(a)(2). In a similar vein, FAR 15.506(a)(4)(ii) states that for post-award debriefings, "Government accommodation of a request for a delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadline for filing protests." *Id.* at 15.506(a)(4)(ii). These rules regarding pre-award and post-award required debriefings are inapplicable when the agency, and not the offeror, delays setting the required debriefing.

38. Comp. Gen. Dec. B-286327, 2000 CPD ¶ 173.

39. *Id.*

40. *Id.*

The United States Court of Federal Claims has held that this regulation does not authorize the agency's disclosing information under the above standard when the agency elected to make no award on the procurement, or decided to reopen negotiations after making an initial award.[42] Furthermore, even where the agency fails to satisfy FAR 15.507(c), such an omission is not grounds for protest absent proof of competitive prejudice—that is, evidence that, but for the agency's action, the protester would have had a substantial chance of receiving the award.[43]

Frequently, the agency takes corrective action on an award decision after an unsuccessful offeror submits a protest based on information learned from the debriefing. The awardee usually finds this process disconcerting because the agency in a post-award debriefing will commonly reveal to a competitor the awardee's overall and unit prices, which are required disclosures under FAR 15.506(d)(2). Under what circumstances may the awardee challenge the corrective action based on such debriefing disclosures? The GAO has held that reasonable corrective action on an award decision will be valid, notwithstanding that the unsuccessful offerors had debriefings under FAR Subpart 15.5. The reason is that no unfair competitive advantage results where an agency discharges its debriefing obligations and later events require reopening of the procurement.[44] Similarly, the GAO has rejected protesters' arguments that the public disclosure of the awardee's prices at a debriefing creates an improper price revelation or other unfair negotiation practice.[45] The GAO holds that the importance of correcting an improper award through further negotiations outweighs any harmful effect on the integrity of the competitive procurement system resulting from an otherwise proper disclosure of the awardee's prices.[46]

Legal Challenges to Debriefings

Disappointed offerors are almost uniformly unsuccessful in challenging the quality or conduct of the debriefing, as opposed to the underlying evaluation and source selection. In case law principles that remain valid with the current version of the debriefing statutes and regulations, the Comptroller General has ruled:

> (1) The agency's best interests decision to decline a pre-award debriefing is not a cognizable protest issue;[47]
>
> (2) The scheduling of a debriefing is a procedural issue, and not independent grounds for protest;[48]
>
> (3) The agency's alleged failure to provide an adequate debriefing is a procedural matter that has no affect on an otherwise valid award;[49]
>
> (4) No requirement exists for the agency to answer questions to the offeror's satisfaction;[50]
>
> (5) Any agency miscommunications or misinformation at a debriefing are procedural matters that have no affect on the validity of an actual evaluation and award decisionmaking;[51]
>
> (6) An offeror has no grounds for overturning an award when the agency fails to respond to

41. FAR, *supra* note 2, at 15.507(c).

42. DGS Contract Serv., Inc. v. United States, 43 Fed. Cl. 227, 237 (1999); Fore Sys. Fed., Inc. v. United States, 40 Fed. Cl. 490, 491 (1998).

43. Norvar Health Services—Protest and Reconsideration, Comp. Gen. Dec. B-286253.2, 2000 CPD ¶ 204. The same result should hold in the Federal Circuit, which has a similar standard on competitive prejudice. *See infra* note 59.

44. *Norvar*, 2000 CPD ¶ 204 at 4-5. Agencies have broad discretion in a negotiated procurement to take corrective action when the agency determines that such action is needed to ensure fair and impartial competition. Rockville Mailing Servs., Inc., Comp. Gen. Dec. B-270161.2, 96-1 CPD ¶ 184, at 4; DGS Contract Serv., 43 Fed. Cl. at 238. No requirement exists for the agency to be certain that a protest will be sustained before it takes corrective action, provided the agency has a reasonable basis for its decision. Main Bldg. Maint., Inc., Comp. Gen. Dec. B-279191.3, 98-2 CPD ¶ 47, at 3.

45. *Norvar*, 2000 CPD ¶ 205; Computing Devices Int'l, Comp. Gen. Dec. B-258554.3, 94-2 CPD ¶ 162.

46. *See* cases cited *supra* notes 44-45; *see also* Navcom Def. Elecs., Inc., Comp. Gen. Dec. B-276163.3, 97-2 CPD ¶ 126; Park Sys. Maint., Inc., Comp. Gen. Dec. B-252453.4, 93-2 CPD ¶ 265; Anderson-Hickey Co., Comp. Gen. Dec. B-250045.3, 93-2 CPD 15; Telesec Library Services—Reconsideration, Comp. Gen. Dec. B-245844.3, 92-2 CPD ¶ 103.

To alleviate any unfairness resulting from such disclosures, however, the agency may release the prices of all competitors as an appropriate remedial action where one competitor obtained the "awardee's" prices in a debriefing and the agency properly opened negotiations. *See DGS Contract Service*, 43 Fed. Cl. at 237-38 (citing GAO decisions and noting that such disclosures do not violate the Procurement Integrity Act, 41 U.S.C. § 423).

47. Global Eng'g & Constr., Joint Venture, Comp. Gen. Dec. B-275999.3, 97-1 CPD ¶ 77. Based on *Global Engineering*, the FAR guidance on pre-award debriefings has little compulsory force for procuring agencies. *See also* Ralph C. Nash & John Cibinic, *Pre-Award Debriefings: Get Them Over Quickly*, NASH & CIBINIC REP., Apr. 1998, at 59 (criticizing *Global Engineering*) ("[T]he Comptroller's refusal to review such actions appears to permit the agency to arbitrarily deny a pre-award debriefing, thus thwarting congressional policy.").

a request for a debriefing,[52] totally denies the firm a debriefing,[53] or intentionally postpones a debriefing;[54] and

(7) The agency commits no protestable error when it excludes an offeror representatives from attending a face to face session.[55]

Practical Considerations

Quality debriefings are hard to accomplish. The principal debriefers are typically engineers or other technical personnel, and not always well-versed in the statutes and regulations governing evaluation of competitive proposals. Debriefings require quick agency responses in pressure-filled situations, and once the agency makes a verbal slip-up, the damage might not be reversible. If the agency has reviewed many proposals and receives requests from numerous unsuccessful offerors, the challenge only increases.

As stated above, perhaps the most frequently recurring legal issue in a debriefing is whether the agency followed the RFP's announced evaluation factors. By adhering to some key practical strategies, as described below, the procuring activity will likely provide the offeror with solid assurance that the agency properly evaluated the proposal.

Be Prepared

The first prerequisite for a successful debriefing is sound preparation by the debriefers. These persons should have a thorough understanding of the solicitation, the evaluation record, and the proposal of the awardee and the offeror being debriefed. Nothing more undermines the confidence of an offeror being debriefed more than when agency representatives are unprepared or, even worse, make mistakes in discussing the deficiencies and weaknesses of the proposal. Preferably, the debriefers should have a session before the debriefing to plan the approach and to assign duties and responsibilities. The agency also should bring the solicitation, the evaluation record, and the full proposal to the debriefing so that proper research can be done on the spot to answer all valid questions properly. Another helpful technique is to ask the offeror beforehand if it has specific concerns that it wants addressed during the debriefing.

Opening the Debriefing

Before a telephonic or in-person debriefing, the debriefers should ensure that each offeror representative identifies himself or herself and his or her duty for the offeror. If possible, the agency should obtain this information before the debriefing so that the agency can ensure that the right mix of people represents the procuring activity. Agency representatives should provide a similar introduction of its personnel.

If the offeror is accompanied by an attorney, a strong possibility exists that the offeror is considering a protest against the award. Therefore, the debriefing should not continue until the agency is similarly represented by counsel. In fact, since agency counsel are integral members of the acquisition team, as recognized by Army Federal Acquisition Regulation Supplement 1.602-2(c)(i),[56] counsel should be present in any event, depending on availability. If the agency is conducting a telephonic debriefing, the agency should request that the offeror not make a tape recording unless the government consents to this procedure.

48. Canadian Commercial Corp., Comp. Gen. Dec. B-222515, 86-2 CPD ¶ 73.

49. *See* Senior Communications Servs., Comp. Gen. Dec. B-233173, 89-1 CPD ¶ 37; *cf.* United Int'l Investigative Servs., Inc. v. United States, 42 Fed. Cl. 73, 79 n.7 (1998) (implying that a violation of the rules on debriefing could be grounds for protest where it created a substantial likelihood of competitive prejudice regarding the award).

50. *See* Trellclean USA, Inc. Comp. Gen Dec. B-213227.2, 84-1 CPD ¶ 661 (predating current FAR Subpart 15.5, but still good law). Indeed, it appears that denying the firm any chance to pose questions is not protestable before the GAO. *See* Acquest. Dev. LLC, Comp. Gen. Dec. B-287439, 2001 CPD ¶ 101 (rejecting protest that firm did not have an opportunity to ask questions regarding a written debriefing).

51. *See* CACI Field Servs., Inc., Comp. Gen. Dec. B-234945, 89-2 CPD ¶ 97, at 3 n.1 (citing BDM Mgmt. Servs. Co., Comp. Gen. Dec. B-228287, 88-1 CPD ¶ 93). Professors Nash and Cibinic have suggested that "if the improper information received at the debriefing was the cause of the protest, the protester should obtain the costs of filing and pursuing the protest until the correct information was obtained." *See* Ralph C. Nash & John Cibinic, *Debriefing: Tell It Like It Is*, NASH & CIBINIC REP., July 1990, at 102. No cases were found addressing this theory.

52. Emerson Elec. Co., Comp. Gen. Dec. B-213382, 84-1 CPD ¶ 233.

53. Piezo Crystal Co., Comp. Gen. Dec. B-236160, 89-2 CPD ¶ 477.

54. Reliability Sciences, Inc., Comp. Gen. Dec. B-212582, 84-1 CPD ¶ 493.

55. Wilderness Mountain Catering, Comp. Gen. Dec. B-280767.2, 99-1 CPD ¶ 4 (protester's counsel).

56. *See* AFARS, *supra* note 7, at 1.602-2(c)(i) ("Legal counsel participates as a member of the contracting officer's team throughout the acquisition process, from acquisition planning through completion and close out of contracts.").

Disclose the Ground Rules

Before the agency and the debriefed firm discuss the offeror's proposal, agency debriefers should inform the offeror of the regulatory ground rules for debriefings. Debriefed offerors commonly push the agency to go beyond the FAR requirements for debriefings, especially regarding comparisons between the proposals of the offeror and the awardee. Providing the debriefed offeror the ground rules up-front can prevent wasting time declining to answer questions about the awardee's proposal or the awardee's evaluation.

Provide a Handout

Give the offeror a handout summarizing the weaknesses and deficiencies in the offer. Be clear whether the proposal point is a "weakness," "significant weakness," or "deficiency," as defined in FAR 15.301.[57] This handout will save time and focus the parties' attention on the pertinent issues. The paper will also become part of the record if a dispute arises in a protest about what the agency communicated during the debriefing.

Disclose the Offeror's Full Evaluation

Nothing in FAR 15.505 or 15.506 precludes the agency from disclosing the offeror's full evaluation, including its ratings. The offeror has invested substantial resources in submitting the offer and attending the debriefing; therefore, the meeting should be meaningful and productive. Regarding the offeror's own evaluation, the only information that needs to be protected is the names of past performance references.[58] In fact, the offeror might be more interested in knowing or confirming the strengths or advantages that the agency found in the proposal, in addition to the weaknesses. The sole qualification to the above advice is that stray references in one offeror's evaluation to another offeror's proposal must be excised.

Be Specific

Focus on the particular aspects of the proposal in communicating strengths, weaknesses or deficiencies, as opposed to generalities. Thus, instead of saying that an offeror was "weak on management," say that "the offeror had excessive layers of management control that would likely lead to inefficiency and delay in executing the project."

Avoid Surprises

If the agency held pre-award discussions during the acquisition, the debriefers should comment on the same deficiencies and weaknesses with the offeror that were disclosed during discussions. Under FAR 15.306(d)(3), the agency is required to discuss with all competitive-range offerors, before any award, the significant weaknesses, deficiencies, and other aspects of the proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. If the agency raises new concerns in the debriefing, the offeror could file a protest, arguing that the agency violated its duty to provide meaningful discussions. Such a protest on the lack of proper discussions could succeed if the omission caused competitive prejudice, that is, a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving an award.[59]

In a related issue, the agency should ensure that in discussing the evaluation process, the agency does not give the impression the contracting officer deviated from the announced evaluation criteria, either by overlooking the solicitation's stated factors or by referencing new considerations. As stated above, law and regulation require agencies to evaluate proposals in compliance with the announced evaluation factors, the same as the GAO and the other protest decision makers.[60] If the agency's contemporaneous evaluation was legally sufficient, however, any misstatements at the debriefing are procedural

57. A "deficiency" is a material failure of a proposal to meet a government requirement or a combination of significant weaknesses that increase the risk of unsuccessful contract performance to an unacceptable level. A "weakness" is a flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" is a flaw in the proposal that appreciably increases the risk of unsuccessful contract performance. FAR, *supra* note 2, at 15.301.

58. *Id.* at 15.506(e)(4).

59. *See* Metro Machine Corp., Comp. Gen. Dec. B-281872, 99-1 CPD ¶ 101, at 9. The GAO's prejudice standard in *Metro Machine* relied in part upon the United States Court of Appeals for the Federal Circuit's decision in *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996). In *Statistica*, the court considered a protest case on appeal from the General Services Board Administration, Board of Contract Appeals under the since-repealed Brooks Act, 40 U.S.C. § 759. In articulating its standard for competitive prejudice in a protest after award, the *Statistica* court ruled that, but for the alleged error, there must be a substantial chance that the protester would have received the award. *Statistica*, 102 F.3d at 1581-82. The GAO sees no substantive difference between its "reasonable possibility" standard and the Federal Circuit's "substantial chance" approach. *See* Anthem Alliance for Health, Inc., Comp. Gen. Dec. B-278189.3, 98-2 CPD ¶ 66, at 6 n.9 (analyzing Federal Circuit precedent).

Other GAO decisions relied on the Federal Circuit's competitive prejudice standard in various contexts. *See, e.g.*, Bristol-Myers Squibb Co., Comp. Gen. Dec. B-281681.12, 2000 CPD ¶ 23; SBC Federal Sys., Comp. Gen. Dec. B-283693, 283693.2, 2000 CPD ¶ 5; McHugh/Calumet, Joint Venture, Comp. Gen. Dec. B-276472, 97-1 CPD ¶ 226.

60. *See* 10 U.S.C. § 2305(b)(1) (2000); 41 U.S.C. § 253b(a)(2000); FAR, *supra* note 2, at 15.303(b)(4), 15.304(a); Consol. Eng'g Servs., Inc., Comp. Gen. Dec. B-279565.2, 99-1 CPD ¶ 75, at 2; Latecoere Int'l, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1350 (11th Cir. 1994); ITT Fed. Servs. Corp. v. United States, 45 Fed. Cl. 174, 194 (1999). The GAO also applies the same competitive prejudice test described in note 59, *supra*, concerning alleged misevaluation of proposals. *See, e.g.*, Nat'l Toxicology Labs., Inc., Comp. Gen. Dec. B-281074.2, 99-1 CPD ¶ 5, at 6 n.4.

matters that should have no affect on the validity of the actual evaluation and selection decision.[61]

Speak with One Voice

Agency representatives should not undermine or contradict one another during the debriefing. Disunity among the government representatives impairs teamwork, lowers confidence by debriefed offerors, and could make a protest more likely. If a government speaker makes a misstatement, another government representative should pass a note to the speaker. If necessary, a recess may be taken so that the government team can discuss the point in more depth.

Be Vigilant Against Improper Disclosures

Debriefed offerors often display inordinate curiousity about the content of their competitors' proposals. Resist these efforts! The agency may not disclose, directly or indirectly, the content of any other proposal in a pre-award debriefing.[62] The only information that bears upon the content of the awardee's proposal that the agency must disclose in a post-award debriefing is the successful offeror's prices and overall rating,[63] and the summary of the rationale for the award.[64]

Commonly, debriefed offerors ask for the government price estimate and a copy of the schedule from the contract containing the awardee's prices. Are these disclosures proper? In a pre-award debriefing, while the procurement is on-going, release of the government estimate would clearly be inappropriate because it would harm the agency's ability to negotiate fair and reasonable prices.[65] These concerns are absent with a post-award debriefing, and the release is proper unless the same government estimate will be used for another procurement where similar concerns exist.[66] Regarding the contract, release of the unit prices in awarded contracts is proper under DOD guidance.[67] The only exception is where the contract schedule reveals the awardee's profit, general and administrative expense rate, or other commercially sensitive information. These items should be redacted from the document.[68]

Be Honest and Point Out the Positives

Offerors who fail to obtain an award after making a substantial investment of their bid and proposal dollars must make a business decision on whether to compete for future contracts from the particular agency. Some unsuccessful offerors will have no real chance of getting business from the agency, but other offerors will be on the edge of future success. Agencies should give a debriefed offeror a frank and specific assessment of its capabilities—the vendor will appreciate sincerity and candor. Also, where an offeror has strengths, agencies should point these out because an offeror needs to know about its strengths as well as its weaknesses.

Solicit the Offeror's Views

Debriefings are intended to be a dialogue. Many agencies frequently forego the opportunity to solicit the offeror's frank assessment of the agency's own acquisition process. Often, the offeror can provide the agency with many constructive suggestions on how to improve future procurements. Since the debriefed offeror frequently will have its senior personnel in attendance, the agency has a perfect opportunity to obtain helpful, knowledgeable input from the offeror.

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61. *See supra* note 51 and accompanying text.

62. FAR, *supra* note 2, at 15.505(f)(3).

63. *Id.* at 15.506(d)(2).

64. *Id.* at 15.506(d)(4).

65. *See id.* at 36.203(c) (government estimate for construction projects); *see also* Gov't Land Bank v. Gen. Servs. Admin., 671 F.2d 613 (1st Cir. 1982); Morrison-Knudsen v. Dep't of the Army, 595 F. Supp. 352 (D.D.C. 1984), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985); Hack v. Dep't of Energy, 538 F. Supp. 1098 (D.D.C. 1982). The government estimate also could be protected from disclosure before award as source selection information under the procurement integrity rules of FAR 3.104.

66. Unless a continued need exists for confidentiality, the need for the privilege diminishes after award. *Cf.* Federal Open Market Committee, 443 U.S. 340, 360 (1979) (an Exemption Five case under FOIA, 5 U.S.C. § 552(b)(5)) (holding the rationale for protecting confidential government commercial information expires upon contract award).

67. *See* Memorandum, Office of the Assistant Secretary of Defense, subject: Release of Unit Prices in Awarded Contracts (Feb. 6, 1998). *But see* McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999) (arguably following a stricter view in cases under the FOIA).

68. *See* Pacific Architects & Eng'rs. v. U.S. Dep't of State, 906 F.3d 1345, 1347 (9th Cir. 1990); Acumenics Research & Tech. v. Dep't of Justice, 843 F.2d 800, 807-08 (4th Cir. 1988); Environmental Technology, Inc. v. EPA., 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (a "reverse" FOIA cases). In providing notice of award to unsuccessful offerors, the agency may not reveal an offeror's cost breakdowns, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information to any other offeror. FAR, *supra* note 2, at 15.503(b)(1)(v).

Conclusion

Debriefings in negotiated acquisitions are an effective tool in giving meaningful information to unsuccessful offerors. This article summarized the applicable regulatory and case law principles governing debriefings, and also identified some practical pointers in assisting government personnel to avoid common pitfalls. Poorly handled, debriefings can create controversy and needless protests, both to the detriment of the procurement system and the agency's mission.

TJAGSA Practice Note

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

Contract & Fiscal Law Note

Procurement Disabilities Initiative Takes Effect

Introduction

> The Internet brings a world of information into a computer screen, which has enriched the lives of many with disabilities. Yet, technology creates challenges of its own. Researchers here at the Department of Defense and at other agencies throughout the federal government and in the private sector are developing solutions to these problems.[1]

With these words at the Department of Defense (DOD) Computer/Electronic Accommodations Program Technology Evaluation Center (CAPTEC),[2] President Bush highlighted the 25 June 2001 effective date for federal compliance with a new procurement disabilities initiative. Section 508 of the Rehabilitation Act of 1973[3] requires all federal agencies to ensure that disabled employees and disabled members of the public have access to electronic and information technology (EIT) that is comparable to access available to people without disabilities.[4] As of 25 June, government contracts awarded for EIT must contain technology that is accessible to disabled federal employees and disabled members of the public.[5] Section 508 imposes a significant new requirement on DOD procurement officials to consider handicapped access when soliciting and awarding EIT contracts. This note explains the new accessibility rule, examines its key definitions, analyzes its exceptions, and discusses its applicability to military procurements. This note concludes with a brief discussion of the judge advocate's role in implementing Section 508 within the DOD community.

The Rule

Section 508 required the Architectural and Transportation Compliance Board (Access Board)[6] to develop EIT access standards for federal agencies[7]. The Access Board published these access standards on 21 December 2000.[8] The standards address software applications and operating systems, web-based intranet and Internet information and applications, telecommunications products, video and multimedia products, self-contained (closed) products,[9] and desktop and portable computers.[10] The Federal Acquisition Regulatory Council implemented these access standards by amending the Federal Acquisition Regulation (FAR)[11] on 25 April 2001.[12] Both the Access Board standards and the FAR amendments require agencies, when

1. Press Release, U.S. Department of Defense, President Bush Highlights Disabilities Initiative (June 19, 2001), *available at* http://www.defenselink.mil/news/Jun2001/b06192001_bt27-01.htm.

2. DOD's Computer/Electronic Accommodations Program (CAP) assists disabled government employees in gaining access to information and technology. Created in 1990, CAP serves approximately 20,000 employees in DOD and thirty-eight other federal agencies. More information on CAP is available at http://www.tricare.osd.mil/cap. *Id.*

3. Rehabilitation Act of 1973 § (codified as amended by the Workforce Investment Act of 1998 29 U.S.C.S. § 794d (LEXIS 2001).

4. *Id.*

5. Electronic and Information Technology Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 10, 11, 12, 39).

6. The Rehabilitation Act of 1973, as amended by the Workforce Investment Act of 1998, 29 U.S.C.S. § 794d (LEXIS 2001), established the Access Board as an independent federal agency whose primary mission is to promote accessibility for people with disabilities. The Access Board consists of twenty-five members. The President appoints thirteen members from the general public, a majority of which must be disabled. The remaining twelve are heads of the following agencies (or their designees): Health and Human Services, Education, Transportation, Housing and Urban Development, Labor, Interior, Defense, Justice, Veterans Affairs, Commerce, the General Services Administration, and the Postal Service. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500, n.2 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194).

7. Rehabilitation Act of 1973, as amended by the Workforce Investment Act of 1998, 29 U.S.C.S. § 794d (LEXIS 2001).

8. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194). The standards are available at http://www.access-board.gov/ufas/ufas-html/ufas.htm.

9. Self-contained (closed) products are products "that generally have embedded software and are commonly designed in such a fashion that a user cannot easily attach or install assistive technology. These products include . . . information kiosks and information transaction machines, copiers, printers, calculators, fax machines, and other similar types of products." Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,524 (to be codified at 36 C.F.R. pt. 1194).

10. *Id.* at 80,524-80,526 (to be codified at 36 C.F.R. pt. 1194).

11. General Servs. Admin. et al., Federal Acquisition Regulation (June 1997) [hereinafter FAR].

developing, procuring, maintaining, or using EIT, to ensure that the EIT

> allows Federal employees with disabilities to have access to and use of information and data that is comparable to the access to and use of information and data by other Federal employees. Section 508 also requires that individuals with disabilities, who are members of the public seeking information or services from a Federal department or agency, have access to and use of information and data that is comparable to that provided to the public without disabilities.[13]

The rule is two-pronged. It focuses on disabled government employees and disabled members of the general public. Unlike the Americans With Disabilities Act, Section 508 does not focus on reasonable accommodation of *individuals* with disabilities.[14] Rather, Section 508 demands a *systemic* approach to creating access to EIT for disabled individuals. The DOD procurement officials must keep this systemic approach in mind when acquiring EIT.

Key Definitions

The Access Board standards contain definitions of twelve terms.[15] An "agency" is "[a]ny Federal department or agency . . ."[16] Therefore, the standards clearly apply to the DOD. The term "information technology" means:

> Any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term information technology includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.[17]

The FAR amendments only contain one definition of "EIT."

> [It] has the same meaning as "information technology" except EIT also includes any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term EIT, includes, but is not limited to, telecommunication products (such as telephones), information kiosks and transaction machines, worldwide websites, multimedia, and office equipment (such as copiers and fax machines).[18]

The Access Board standards and the FAR amendments therefore apply to a broad range of EIT acquisitions.

Exceptions

Although broadly worded, Section 508 contains some significant exceptions. The most significant exception for DOD procurement officials is the "national security system" exception. Section 508 does not apply to EIT procurements for national security systems, as that term is defined in the Clinger-Cohen Act of 1996.[19] "National security system" means:

> Any telecommunications or information system operated by the United States Government, the function, operation, or use of which-
>
> (1) involves intelligence activities;
>
> (2) involves cryptologic activities related to national security;

12. Electronic and Information Technology Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 10, 11, 12, and 39).

13. *Id*.; Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,500 (to be codified at 36 C.F.R. pt. 1194).

14. The Americans with Disabilities Act, 42 U.S.C.S. § 12101 (LEXIS 2001); *see also* U.S. DEP'T OF ARMY, REG. 600-7, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF THE ARMY (15 Nov. 1983).

15. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,524 (to be codified at 36 C.F.R. pt. 1194). Those twelve terms are: "agency," "alternate formats," "alternate methods," "assistive technology," "electronic and information technology," information technology," "operable controls," "product," "self contained, closed products," "telecommunications," "TTY," and "undue burden." *Id*.

16. *Id*.

17. *Id*.

18. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,896 (to be codified at 48 C.F.R. pt. 2.101).

19. *Id*. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(b)); Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,500, n.1 (to be codified at 36 C.F.R. pt. 1194) (citing the Clinger-Cohen Act of 1996, 40 U.S.C.S. § 1452(a) (LEXIS 2001)).

(3) involves command and control of military forces;

(4) involves equipment that is an integral part of a weapon or weapons system; or

(5) . . . is critical to the direct fulfillment of military or intelligence missions.[20]

At first glance, this definition appears to be a large loophole for the DOD. One imagines almost any EIT system being "critical to the direct fulfillment of military or intelligence missions." The statute, however, somewhat narrows this broad definition in the next section: "Subsection (a)(5) of this section does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications)."[21] Procurement officials, therefore, cannot avoid the spirit of Section 508's requirements when acquiring routine administrative and business EIT by simply invoking the "military missions" language of subsection (a)(5).[22]

Related to the "national security system" exception is the "service personnel" exception.[23] When civilian contractors or government personnel service an EIT system "in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment,"[24] Section 508's accessibility standards do not apply to those systems.[25]

Micro-purchases[26] are also exempt from Section 508's requirements until 1 January 2003.[27] This exception is especially useful for government employees because most micro-purchases are for commercial off-the-shelf items that may not yet comply with the accessibility standards.[28] Despite this exception, contracting officers are nonetheless "strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable . . . ."[29] Moreover, this exception does not exempt all purchases under $2500. The exception only apples to one-time purchases under $2500, not to purchases less than $2500 but part of a larger package costing more than $2500.[30]

Section 508 also does not apply to EIT "acquired by a contractor incidental to a contract."[31] In other words, Section 508 applies only to federal agencies, not to contractors who do business with those agencies.[32]

Finally, the exception most prone to subjective interpretation is the "undue burden" exception.[33] Agencies need not comply with Section 508 if doing so would "impose an undue burden

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20. The Clinger-Cohen Act of 1996, 40 U.S.C.S. § 1452(a).

21. *Id*. § 1452(b).

22. On the other hand, perhaps the savvy procurement official will note that § 1452(b) of the statute only refers to the "direct fulfillment of military or intelligence missions" exception of § 1452(a)(5). That still leaves the "command and control of military forces" exception of § 1452(a)(3). Might telephones in the command suite fall under this exception, even though disabled civilians might work there and disabled members of the public might phone there? Although the "command and control" exception can be interpreted very broadly, commands should carefully consider whether to invoke this exception unless in a purely military environment.

23. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(d)).

24. *Id*.

25. This exception applies only to those portions of the system serviced by maintenance personnel, not the entire system. This "back office" exception "applies only to EIT which is located in physical spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment. If any services other than maintenance, repair, or occasional monitoring are performed at the data center, then the back office exception doesn't apply." General Services Administration, *Acquisition of Electronic and Information Technology Under Section 508 of the Rehabilitation Act: Frequently Asked Questions*, G.5.i, *at* http://www.section508.gov/docs/508QandA.html (last visited Oct. 19, 2001). Moreover, "[w]here "back office" equipment is connected to a computer network that may distribute information located on that equipment to other locations, the information delivered to other locations is not subject to the "back office" exception." *Id*. at G.5.ii.

26. Micro-purchases are acquisitions of "supplies or services (except construction), the aggregate amount of which does not exceed $2,500, except that in the case of construction, the limit is $2,000." FAR, *supra* note 11, at 2.101.

27. *Id*. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(a)).

28. *FAC 97-27 Amends FAR On Acquisition of Accessible Technology*, GOV'T CONTRACTOR, May 2, 2001, at ¶ 183.

29. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(a)).

30. *Id*. at 20,895 (Apr. 25, 2001). For example, a "software package that costs $1,800 is not a micro-purchase if it is part of a $3,000 purchase . . . ." *Id*.

31. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(c)).

32. While contractors do not have to make their internal IT systems Section 508 compliant, they will have to sell compliant equipment to the government. The FAR Council estimates that Section 508 will impact approximately 17,500 contractors who sell EIT to the government. *Id*. at 20,896.

33. *Id*. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(e)).

on the agency."[34] "Undue burden" means "a significant difficulty or expense."[35] Unfortunately, neither the Access Board standards nor the FAR amendments provide significant guidance in defining "significant difficulty or expense." Both merely require the agency to consider "the difficulty or expense of compliance" and "[a]gency resources available to its program or component for which the supply or service is being acquired."[36] If the agency invokes this exception, the "requiring official must document in writing the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the contract file."[37] Despite this documentation requirement, this exception is ripe for litigation. For example, an agency may buy a product that is not compliant because buying a compliant product would be too difficult or expensive. A losing bidder[38] that sells a compliant product may protest the award to its competitor, arguing that buying its compliant product would be neither difficult nor expensive. These protests are then going to boil down to what constitutes "difficult" and "expensive."

Applicability to Military Procurements

For most procurement actions, Section 508 applies to all contracts awarded on or after 25 June 2001.[39] Note that the rules apply to contracts *awarded*, rather than *solicited*, on or after 25 June. For indefinite-quantity contracts, the rules apply to delivery orders or task orders issued on or after 25 June 2001.[40]

The rules do not apply to:

(1) Taking delivery for items ordered prior to [June 25];

(2) Within-scope modifications of contracts awarded before [June 25];

(3) Exercising unilateral options for contracts awarded before [June 25]; or

(4) Multiyear contracts awarded before [June 25].[41]

Section 508 affects many within the DOD community. Contracting officers and the entire acquisition team must be familiar with the new requirements as well as the exceptions. The rules place an affirmative duty on requiring officials to identify which accessibility standards apply to a procurement, perform market research to determine the availability of compliant products, analyze exceptions to the accessibility standards, and to finally draft appropriate specifications.[42] Resource managers must also understand the rules and their exceptions because of the budget implications of acquiring accessible EIT. Because the rules concern information technology, the Directorates of Information Management must also learn the applicability of the new requirements. Labor counselors should also become familiar with Section 508 because of the impact on the rights of civilian government employees.[43] Commanders, of course, should also learn the basics of the new rules, their exceptions, and how they apply within their commands.

Section 508 will touch many aspects of government acquisition. When updating public Web sites, webmasters must comply with the accessibility standards.[44] What about Armed Forces Radio and Television?[45] Because their target audience is civilian family members as well as active duty service members, its broadcasting will likely fall under Section 508. Installation telephone systems will also likely be subject to Section 508's requirement as long as civilian employees and members of the public use them. In short, unless an EIT system exists in a purely military environment (field radios and telephones, for instance), DOD acquisition planners must incorporate Section 508's accessibility requirements into their procurements.

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34. *Id*.

35. *Id*. at at 20,897 (to be codified at 48 C.F.R. pt. 39.202).

36. *Id*. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(e)(1)); Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,524 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194.4).

37. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,897 (to be codified at 48 C.F.R. pt. 39.204(e)(2)(i)). Neither the FAR nor the new rules define "requiring official." From context, the term seems to refer to the person in the agency who establishes the need for the particular good or service that is being ordered.

38. Along with bid protests, the statute also permits disabled individuals to file complaints against agencies for alleged noncompliant purchases of EIT after June 21, 2001. 29 U.S.C.S. § 794d(f) (LEXIS 2001).

39. Electronic and Information Technology Accessibility, 66 Fed. Reg. at 20,894.

40. *Id*.

41. *Id*.

42. *Id*. at 20,898 (to be codified at 48 C.F.R. pt. 1.)

43. Telephone Interviews with Cassandra Johnson, Assistant Deputy General Counsel, Office of the General Counsel, Department of the Army (July 17-18, 2001).

The Role of the Judge Advocate

Judge advocates must play a key role in incorporating Section 508 into acquisition planning. With a broad client base, military attorneys must act as a clearing-house for information regarding the accessibility rules and their exceptions. Whether counseling a contracting officer on a proposed telephone acquisition, or advising a commander on the procurement of a target-acquisition system, judge advocates must be proactive in reminding their clients of the accessibility requirements. They must also be prepared to find an exception to those same requirements if available and in their client's best interests.

After the accessibility standards and the FAR amendments themselves, the single most useful tool in helping judge advocates (and others, for that matter) implement Section 508 is a multi-agency Web site hosted by the General Services Administration. Individuals may find much information, including answers to Section 508's "Frequently Asked Questions."[46] Practitioners may also find two other Web sites useful.[47] Regardless of where they obtain their information, judge advocates must constantly communicate with others in the EIT and procurement fields to share knowledge as new Section 508 issues develop.

Conclusion

As of 25 June 2001, Section 508 requires government contracts awarded for EIT to contain technology that is accessible to disabled federal employees and disabled members of the public. The new rules mean that DOD procurement officials must consider handicapped access when drafting EIT solicitations and awarding EIT contracts. Though broadly worded, the EIT requirements also contain several exceptions. Generally speaking, they do not apply to EIT acquisitions to be used in purely military environments. Nonetheless, the accessibility standards touch nearly all aspects of the DOD acquisition process. The standards also touch all players in DOD procurement operations. Judge advocates must play a key role in implementing the new accessibility standards. When advising their wide variety of acquisition clients, military attorneys must act as a clearing-house of Section 508 information. They must be proactive in reminding their clients of the accessibility requirements. They must also be prepared to find an exception to those same requirements if available and in their client's best interests. It appears that many of Section 508's ramifications will develop through implementing regulations and through reported case law. Judge advocates must take the lead in understanding these developments and in helping to implement them. Major Siemietkowski.

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44. This should not mean, however, that webmasters must turn off Web sites that are not currently compliant. Rather, webmasters must ensure that all future Web site updates comply with the accessibility standards.

> We do not encourage agencies to get rid of Web sites that would otherwise be used because they are not compliant. But agencies do need to provide good contact information so that people with disabilities have a way to find that information and agencies have a responsibility to quickly provide this information in an alternative format.

Mary Lou Mobley, Trial Attorney, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, *quoted in* GovExec.com, *Industry Still Raising Questions About IT Accessibility* (May 10, 2001), *at* http://www.govexec.com/dailyfed/0501/051001t2.htm.

45. Johnson interviews, *supra* note 43.

46. *See* General Services Administration, *Federal IT Accessibility Initiative*, *at* http://www.section508.gov/faq.html (last visited Oct. 19, 2001); *see also Government Responds to FAQs As FAR § 508 Accessibility Rule "Goes Live"*, GOV'T CONTRACTOR, June 27, 2001, at ¶ 253.

47. James J. McCullough et al., *The New Section 508 Accessibility Rules: Threshold Compliance Issues for Both Federal Agencies and Contractors*, 75 FED. CONTRACTS REP. 536 (2001), *available at* http://www.ffhsj.com/govtcon/ffgalert/fcrmay2001.pdf; National Council on Disability, The Accessible Future, Report Submitted to the President (June 21, 2001), *available at* http://www.ncd.gov/newsroom/publications/accessiblefuture.html.

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-OPB, 1 Reserve Way, 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

2001

September 2001

10-14 September	2d Court Reporting Symposium (512-27DC6).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	1st Closed Mask Training (512-27DC3).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-11 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG). **(This course will be rescheduled).**
1 October-6 December	6th Court Reporter Course (512-27DC5).
9-26 October-	2nd JA Warrant Officer Advanced Course (7A-550A2).
12 October-20 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
15-26 October	3rd Voice Recognition Training (512-27DC4).
22-26 October	55th Federal Labor Relations Course (5F-F22).
22-26 October	2001 USAREUR Legal Assistance CLE (5F-F23E).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

5-8 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E). (**This course is tentatively rescheduled for February 2002).**

December 2001

3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-12 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
10-14 December	4th Fiscal Law Comptroller Accreditation Course—Hawaii (**Tentative**) (5F-F14).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
6-18 January	2002 JAOAC (Phase II) (5F-F55).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7-18 January	4th Voice Recognition Training (512-27DC4).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
14-18 January	2002 USAREUR Tax CLE (5F-F28E).
23-25 January	8th RC General Officers Legal Orientation Course (5F-F3).
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	2nd Closed Mask Training (512-27DC3).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2002 Maxwell AFB Fiscal Law Course (**Tentative**) (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).
25 February-26 April	7th Court Reporter Course (512-27DC5).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).
18-22 March	4th Contract Litigation Course (5F-F103).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

15-18 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
22-26 April	4th Basics for Ethics Counselors Workshop (5F-F202).
22-26 April	13th Law for Legal NCOs Course (512-27D/20/30).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-7 June	5th Intelligence Law Workshop (5F-F41).

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Legal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-27DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

28 September ICLE	Selecting and Influencing Your Jury Sheraton Colony Square Hotel Atlanta, Georgia
15-19 October	Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education 1613 15th Street, Suite C Tuscaloosa, AL 35404 (205) 391-9055
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Michigan Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	Local Official	CLE Requirements
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years of which four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thrity-six months thereafter) Group 2 (Last Name H-M) 1 Feb 007-31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 99-31 Jan 02 and every thirty-six months thereafter)
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http://www.courts.state.co.us/cle/cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/rules.htm	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.

Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/newflabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January
Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076 No web site available	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.kscle.org	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/rule_xxx.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.
Maine	Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: 31 July
Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/mobarcle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.

Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana-bar.org/	-Fifteen hours per year. -Reporting date: 1 March
Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org/	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.
New Hampphire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.
New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http://www.courts.state.ny.us	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.
Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec

Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http://www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http://www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111-3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not practicing in state. -Reporting date: 31 January.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/courts/	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 30 June.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, including six hours ethics. -Reporting date: 31 January.
West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http://www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.
Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 http://www.wyomingbar.org	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 January.

* Military exempt (exemption must be declared with state)
**Must declare exemption.

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 2001***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2002 ("2002 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 2001***. 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 2002 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2002 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 2002 JAOAC.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

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
8-9 Sep 01	Park City, UT		Western States Senior JAG Workshop	COL Mike Christensen (801) 523-4408 mchristensen@co.slc.ut.us
22-23 Sep 01	Pittsburgh, PA 99th RSC		Criminal Law; Adminstrative Law	LTC Donald Taylor (724) 693-2152 Donald.Taylor@usarc-emh2.army.mil
26-28 Oct 01	West Point, NY		Eastern States Senior JAG Workshop	COL Randall Eng
17-18 Nov 01	New York, NY 77th RSC		Administrative Law (Claims, Legal Assistance); International and Operational Law	MAJ Isolina Esposito (718) 352-5654
18-20 Nov 01	Alexandria, VA		LSO Commanders/RSC SJAs Workshop	
8-9 Dec 01	Charleston, SC 12th LSO/SCARNG		Criminal Law (Administrative Separation Boards); Operational Law; Law of War; Ethics Tape	MAJ John Carroll (803) 751-1223 john.carroll@se.usar.army.mil
5-6 Jan 02	Long Beach, CA 63rd RSC		Operational Law; Operations other than War; Administrative Law (Legal Assistance)	CPT Paul McBride (760) 634-3829 ncsdlaw@pacbell.net
2-3 Feb 02	Seattle, WA 70th RSC/WAARNG		Administrative Law (Legal Assistance); Criminal Law	LTC Greg Fehlings (206) 553-2315 Gregory.e.fehlings@usdoj.gov
23-24 Feb 02	West Palm Beach, FL 174th LSO/FLARNG		Criminal Law (Administrative Separation Boards); Operational/Deployment Law; Ethics Tape	LTC John Copelan (305) 779-4022 john.copelan@se.usar.army.mil
8-10 Feb 02	Columbus, OH 9th LSO		Operational Law; Law of War; Administrative Law	SSG Lamont Gilliam (614) 693-9500
16-17 Feb 02	Indianapolis, IN INARNG		Criminal Law; Administrative Law	LTC George Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
2-3 Mar 02	Denver, CO 96th RSC/87th LSO		Administrative Law (Legal Assistance/Claims)); Criminal Law	LTC Vince Felletter (970) 244-1677 vfellett@co.mesa.co.us
9-10 Mar 02	Washington, DC 10th LSO		Operational Law; Contract Law	CPT James Szymalak (703) 588-6750 James.Szymalak@hqda.army.mil
9-10 Mar 02	San Mateo, CA 63rd RSC/75th LSO		International Law (Information Law); Contract Law; Ethics Tape	MAJ Adrian Driscoll (415) 274-6329 adriscoll@ropers.com
16-17 Mar 02	Chicago, IL 91st LSO		Administrative Law (Claims)	MAJ Richard Murphy (309) 782-8422 DSN 793-8422 murphysr@osc.army.mil

12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC		Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
15-18 Apr 02	Charlottesville, VA OTJAG		Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO		Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov
27-28 Apr 02	Newport, RI 94th RSC		Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil
4-5 May 02	Gulf Shores, AL 81st RSC/ALARNG		Criminal Law (Administrative Separation Boards); Administrative Law (Legal Assistance); Ethics Tape	MAJ Carrie Chaplin (205) 795-1516 carrie.chaplin@se.usar.army.mil

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

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at (703) 767-9052, (DSN) 427-9052 or www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The Defense Technical Information Center also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A392560 146th Contract Attorneys Deskbook, JA 501, Vol. I, Apr/May 2001.

AD A3925610 146th Contract Attorneys Contract Deskbook, JA 501, Vol. II, Apr/May 2001.

*AD A38746 58th Fiscal Law Course Deskbook, JA 506-2001.

Legal Assistance

AD A384333 Soldiers' and Sailors' Civil Relief Act Guide, JA 260-2000.

AD A326002 Wills Guide, JA 262-1997.

AD A346757 Family Law Guide, JA 263-1998.

AD A384376 Consumer Law Guide, JA 265-2000.

AD A372624 Uniformed Services Worldwide Legal Assistance & Reserve Component Directory, JA 267-1999.

AD A374147 Tax Information Series, JA 269-2000.

AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I, 1998.

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AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II, 1998.

AD A329216 Legal Assistance Office Administration Guide, JA 271-1997.

AD A276984 Deployment Guide, JA 272-1994.

AD A360704 Uniformed Services Former Spouses' Protection Act Guide, JA 274-1999.

AD A392496 Tax Assistance Program Management Guide, JA 275-2001.

Administrative and Civil Law

AD A380147 Defensive Federal Litigation, JA 200-2000.

AD A327379 Military Personnel Law, JA 215-1997.

AD A255346 Reports of Survey and Line of Duty Determinations, JA 231-1992.

AD A347157 Environmental Law Deskbook, JA 234-1998.

AD A377491 Government Information Practices, JA 235-2000.

AD A377563 Federal Tort Claims Act, JA 241-2000.

AD A332865 AR 15-6 Investigations, JA 281-1998.

Labor Law

AD A350510 Law of Federal Employment, JA 210-2000.

AD A387749 The Law of Federal Labor-Management Relations, JA 211-2000.

Legal Research and Communications

**AD A332958 Military Citation, Seventh Edition, JAGS-ADL-P, 2001.

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA 301-1995.

AD A303842 Trial Counsel and Defense Counsel Handbook, JA 310-1995.

AD A302445 Nonjudicial Punishment, JA 330-1995.

AD A302674 Crimes and Defenses Deskbook, JA 337-1994.

AD A274413 United States Attorney Prosecutions, JA 338-1993.

International and Operational Law

*AD A377522 Operational Law Handbook, JA 422-2000.

Reserve Affairs

AD A345797 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-1998.

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8.

* Indicates new publication or revised edition.

** Indicates that a revised edition of this publication has been mailed to DTIC.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC*. Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on

their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), or the World Wide Web (WWW).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

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

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

b. Access to theJAGCNet:

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

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

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

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

(d) FLEP students;

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

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

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

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

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

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

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

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

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

(f) Once granted access to JAGCNet, follow step (b), above.

5. Articles

The following information may be useful to judge advocates:

Michael Lacey, *Self-Defense or Self-Denial: The Proliferation of Weapons of Mass Destruction*, 10 IND. INT'L & COMP. L. REV. 293 (2000).

Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in* Prosecutor v. Kunarac, Kovac, & Vukovic *on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (Spring, 2001).

6. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The following is a current list of TJAGSA publications available in various file formats for downloading from the LAAWS XXI JAGCNet at www.jagcnet.army.mil. These publication are available also on the LAAWS XXI CD-ROM set in PDF, only.

FILE NAME	UPLOADED	DESCRIPTION
JA 200	August 2000	Defensive Federal Litigation, January 2000.
JA 210	October 2000	Law of Federal Employment, September 2000.

JA 211	October 2000	The Law of Federal Labor-Management Relations, September 2000.
JA 215	August 2000	Military Personnel Law, June 1997.
JA 221	August 2000	Law of Military Installations Deskbook, September 1996.
JA 230	August 2000	Morale, Welfare, Recreation Operations, January 1998.
JA 231	August 2000	Reports of Survey and Line of Duty Determinations Guide, September 1992.
JA 234	September 2000	Environmental Law Deskbook, May 1998.
JA 235	May 2000	Government Information Practices, March 2000.
JA 241	October 2000	Federal Tort Claims Act, May 2000.
JA 250	September 2000	Readings in Hospital Law, May 1998.
JA 260	August 2000	Soldiers' and Sailors' Civil Relief Act Guide, July 2000.
JA 263	August 2000	Family Law Guide, May 1998.
JA 265	October 2000	Consumer Law Guides, September 2000.
JA 267	May 2000	Uniformed Services Worlwide Legal Assistance and Reserve Components Office Directory, November 1999.
JA 269	December 2000	Tax Information Series, December 2000.
JA 270	August 2000	The Uniformed Services Employment and Reemployment Rights Act Guide, June 1998.
JA 271	August 2000	Legal Assistance Office Administration Guide, August 1997.
JA 275	July 2001	Tax Assistance Program Management Guide, June 2001.
JA 280	May 2001	Administrative & Civil Law Basic Course Deskbook, (Vols. I & II), March 2001.
JA 281	August 2000	AR 15-6 Investigations, December 1998.
JA 301	May 2000	Unauthorized Absences, August 1995.
JA 330	October 2000	Nonjudicial Punishment Programmed Text, August 1995.
JA 337	May 2000	Crimes and Defenses Deskbook, July 1994.
JA 422	August 2000	Operational Law Handbook 2001, May 2000.
JA 501	May 2001	146th Contract Attorneys Course Deskbook, Vols. I & II, Apr./May 2001.
JA 506	March 2001	60th Fiscal Law Course Deskbook, March 2001.

7. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), 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.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

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.

8. The Army Law Library Service

Per *Army Regulation 27-1*, 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 DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

9. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2001. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

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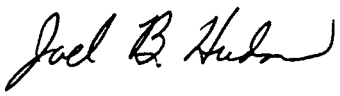

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