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Articles

Notes from the Field

TJAGSA Practice Notes

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

Senior Editor, Captain Erik L. Christiansen
Technical Editor, Charles J. Strong

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United States Legal Services Agency

The Globalization of Justice: The Rome Statute of the International Criminal Court

Lieutenant Colonel Bruce D. Landrum, United States Marine Corps
Officer in Charge, Legal Services Support Section
2d Force Service Support Group
II Marine Expeditionary Force
Camp Lejeune, North Carolina

Introduction

Globalization has been called nothing more than the compression of time and space.[1] People, things, and information can now move around the globe so fast that the world is essentially becoming a smaller place. Because of this constant and rapid movement in all directions, the peoples of the world, like so many tectonic plates, are constantly bumping into one another and creating impacts on one another, intended or not. In this environment, with this ever-increasing interaction between states, governments, and their peoples, the Westphalian concepts of state sovereignty[2] are more frequently being put to the test. In the United Nations Security Council, the world community has created a coercive body, which has the power to tell sovereign states what to do, and the power to enforce those orders. While it cannot yet truly be called a "world government," the United Nations is certainly a step in that direction, or at least, as an organization, is moving in that direction. Because the free peoples of the world have accepted that their governments must be of laws and not of men, not of whims or caprices, but of set standards fairly applied, it stands to reason that the United Nations would at some point need legal institutions to help it as it takes steps toward being a part of a world government.

The International Court of Justice is one such legal institution, which is available to resolve disputes between states. The effectiveness of this institution has been called into question, however, because its jurisdiction is limited to cases in which all state parties consent, and because states have other means which they have preferred for settling international disputes.[3] The rule limiting jurisdiction to consenting state parties was a reflection of the customary international law concept, later embodied in the Vienna Convention on the Law of Treaties, that sovereign states can only be bound with their consent.[4] While states could agree to create a court with jurisdiction over them even in the absence of a case-by-case consent, they have not yet done so.

In the area of individual criminal jurisdiction, the international community has not been so reluctant to create courts with non-consensual jurisdiction. The ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda imposed jurisdiction over accused criminals, regardless of state consent, by the coercive power of the Security Council.[5] The new International Criminal Court concept, following in the footsteps of these tribunals, is yet a further move away from the traditional rules of international law, in that it purports to impose jurisdiction over some accused criminals from non-consenting states, even when those states are not parties to the treaty that created the Court.

The United States finds itself in an awkward position in this debate. As much as the Security Council may have set a precedent for coercive action without the consent of the sovereign states involved, it has always had to take that action with the consent of the United States and the other four permanent members of the Council, all of whom have the ability to exercise a veto.[6] Now, after the United States has spent much time and effort advocating the International Criminal Court concept and

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1. Dr. Louis Goodman, Lecture at the Inter-American Defense College (Feb. 20, 2002).

2. This refers to the Peace of Westphalia of 1648, which was one of the recognized origins of the multistate system, leading to the concept of sovereign nation-states. *See generally* INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 22 (4th ed. 1971). *See also* Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27-28 (2001) (describing the views of proponents of the International Criminal Court that state sovereignty should be subordinated to the greater good of the world community).

3. INIS L. CLAUDE, JR., STATES AND THE GLOBAL SYSTEM: POLITICS, LAW AND ORGANIZATION 160-72 (1988).

4. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 34-35, 8 I.L.M. 679 [hereinafter Vienna Convention].

5. *See The International Criminal Court*, U.N. Department of Public Information (June 1999) [hereinafter *The ICC*], *available at* http://www.un.org/News/facts/iccfact.htm; Philippe Kirsch, *Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court*, 46 MCGILL L.J. 1141, 1146 (2001). *See infra* text accompanying notes 35-36.

6. *Security Council: Background*, U.N. Department of Public Information (Jan. 30, 2001), *available at* http://www.un.org/Docs/scinfo.htm#BACKGROUND; *see also* CLAUDE, *supra* note 2, at 120-22.

helping to shape its structure and procedures, the United States has been out-maneuvered in the international negotiations. The result is an agreement on a Court that is independent of the Security Council to a large degree and purports to have its own coercive power which can be exercised even without the consent of the permanent members of the Council.[7]

While the United States certainly has been an advocate of the International Criminal Court concept as a useful tool to help maintain basic standards of human decency in this increasingly globalized world, surely it had also envisioned a Court which would operate within the control of the Security Council and subject to similar constraints on its powers as were the ad hoc tribunals. The danger of a Court so unchecked by Security Council control has led to a host of visions of worst-case scenarios of rogue prosecutors or judges applying unfair standards to innocent U.S. peacekeepers in an effort to make a political statement against the hegemonic super-power. While it is easy to say these dangers are insignificant, a good lawyer must always protect the interests of the client, and any lawyer who did not point out these dangers would be committing malpractice.

It can also be argued this is but a small issue, since the International Criminal Court will be dealing with individuals (as opposed to states) charged with a relatively narrow spectrum of crimes, and the chances of this impacting on U.S. national power are very slim. On the other hand, if this Court is allowed to come into being with U.S. consent and with the power to act coercively independent of the Security Council, it will surely be a crack in the dam, which though small initially, will grow ever-larger. This can only lead to pressure for more international institutions that operate in the same manner and, ultimately, may signal the beginning of the end for the supreme power of the Security Council and, in particular, of its permanent members.

This is a huge concern for the United States. For as much as the United States wants world order, it does not want to fall victim to a world order that might not be representative of its values. Any student of U.S. history cannot doubt that the United States would react this way. It was, after all, our ancestors' desire to throw off the tyranny of unrepresentative government that led to our Revolutionary War. Surely our current crop of lawmakers will not want to go down in history as the people who returned our country to a state of imposed domination from outside our borders. For this debate to progress, the international community needs to understand the United States' concerns. Through greater understanding, compromises may be reached which will allow the Court to carry out its proper function, but at the same time will allay the U.S. fears that its power will be abused for a more sinister purpose.

This article examines the history and mechanics of the International Criminal Court. Part I reviews the history of the International Criminal Court concept.[8] Part II relates the significant events that occurred during the development of the Rome Statute of the International Criminal Court.[9] Part III provides a somewhat detailed look at the mechanics of the proposed Court, to include the Court structure and the Court procedures.[10] Finally, Part IV addresses the remaining concerns with the Statute and how they might be addressed in such a way that the Court can become the instrument of international justice that the world community needs in this day and age.[11]

Part I: History of the International Criminal Court Concept

The concept of international crimes is not new. As early as the sixteenth century, piracy was recognized as an international crime with universal jurisdiction. By the end of the nineteenth century, slavery was also widely recognized as an international crime.[12] Over the years, a number of other types of crimes have been added to the body of international law by various treaties and conventions. But while internationally recognized crimes have existed for centuries, and the concept of some sort of international tribunal to sanction these crimes has been discussed for almost as long, the realistic possibility of creating a permanent international criminal court is relatively new.[13]

Historically, these international crimes were crimes of universal jurisdiction, which meant that any nation that found itself in possession of a perpetrator of such a crime would have jurisdiction to try the accused person in its own national courts.[14] Conceptually, the main potential weakness of this approach

7. In fact, the Court appears to have no real coercive power of its own, which blunts this concern to some degree. *See infra* note 113 and accompanying text.

8. *See infra* text accompanying notes 12-36.

9. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute]; *see infra* text accompanying notes 37-48.

10. *See infra* text accompanying notes 49-102.

11. *See infra* text accompanying notes 103-31.

12. Newton, *supra* note 2, at 30 & n.36.

13. *Id.* at 24.

14. *Id.* at 30 & n.37.

might lie in the inability of an accused person's national courts to try the case fairly and objectively. This could create at least a perception in the international community that war criminals were enjoying what might be called a "home field advantage," or even worse, immunity.[15]

This weakness manifested itself clearly in the aftermath of World War I. Although the Treaty of Versailles specified that an international court would try the German Kaiser, this never occurred.[16] The treaty also provided that Allied tribunals would try other suspected German war criminals, but ultimately the Germans could not agree to the list of people the Allies requested for extradition. The German government was concerned that to appear overly submissive would undermine its already weak political standing with the German people.[17]

In the end, as a compromise, a German court was allowed to try a reduced number of the war crimes suspects originally identified by the Allied states, and the results appeared to many to have been excessively lenient.[18] In what came to be known as the Leipzig Trials (1921-1922), only a token representation of twelve of the originally listed 896 suspects was ever tried.[19] Of these twelve cases, six resulted in outright acquittals, and of the remaining six, three received sentences of less than a year of confinement.[20] Spectators at the trials noted the hostility toward the proceedings on the part of the German press and the German public, which apparently applied pressure to the tribunal and may have influenced the results.[21]

In the aftermath of these events, the international community first entertained serious discussions on the creation of a permanent international criminal court. Although the concept did not immediately gain support, it was at least raised as a possibility within the League of Nations. The first proposal called for a "High Court of International Justice," apparently intended to be a court of universal jurisdiction over international crimes.[22] In 1934, the term "International Criminal Court" was coined in conjunction with a French proposal for the adoption of an anti-terrorism convention. The Convention for the Creation of an International Criminal Court was adopted and opened for signature in 1937, but never went any further since it lacked ratification support among the member states.[23]

With the apparent miscarriage of justice of the Leipzig Trials as background, the Allied powers in World War II determined to do things differently the next time around. In the Moscow Declaration of 1943, the Allies announced that any Germans suspected of war crimes would be tried "by the people and at the spot where the crime was committed."[24] For those crimes with no specific location, the Allies also indicated that there would also be a general (as opposed to local) tribunal of some sort to be agreed on later.[25] This was the beginning of the process that led to the creation of the International Military Tribunals at Nuremberg and Tokyo. While national courts of the Allied powers conducted war crimes trials as well, these international tribunals did establish a precedent for international cooperation in these matters, at least on an ad hoc basis. Even the Department of the Army *Field Manual on The Law of Land Warfare*, published in 1956, documented this precedent and recognized the jurisdiction of international tribunals over war crimes.[26]

Ever since the unprecedented atrocities of World War II, the international community has looked for ways to avoid a recurrence of those terrible events. One of the first strong statements made by the United Nations on the subject was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[27] This convention specifically recognized the potential for an international court to have jurisdiction over this sort of crime. Article I of the convention confirmed that

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15. *See Establishment of an International Criminal Court: Overview*, U.N. Preparatory Commission for the International Criminal Court (1999) [hereinafter *ICC Overview*], *available at* http://www.un.org/law/icc/general/overview.htm; 13 HUMAN RIGHTS WATCH NO. 4(G), INTERNATIONAL CRIMINAL COURT: MAKING THE INTERNATIONAL CRIMINAL COURT WORK (2001), *available at* http://www.hrw.org/campaigns/icc/icc-main.htm.

16. Kirsch, *supra* note 5, at 1143-44.

17. U.S. DEP'T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, vol. II, at 221 (Oct. 1962) [hereinafter DA PAM. 27-161-2].

18. *Id.* at 221-22; *see also* Kirsch, *supra* note 5, at 1144.

19. DA PAM. 27-161-2, *supra* note 17, at 221.

20. *Id.* at 221-22.

21. *Id.* at 222.

22. Kirsch, *supra* note 5, at 1144.

23. *Id.*; Newton, *supra* note 2, at 30 n.38.

24. DA PAM. 27-161-2, *supra* note 17, at 222.

25. *Id.*

26. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 180 (July 1956).

genocide, whether committed in time of peace or time of war, is indeed an international crime.[28] Article VI stated that this and related crimes could be prosecuted in competent national tribunals where the acts were committed or "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[29]

In the same resolution that adopted this convention, the General Assembly also requested that the International Law Commission study the idea of establishing such an international tribunal. When the Commission reported that creating an international court to try persons accused of genocide and other similarly serious crimes was, in its opinion, an idea worth pursuing, the General Assembly appointed a committee to prepare proposals. In 1951, the committee delivered a draft statute, which was later revised in 1953.[30] At that point, however, the process was frozen in time, as the uneasy standoff between the two major powers in the cold war made reaching agreement on any issue a challenge.[31]

No real movement on the issue of creating an International Criminal Court occurred until 1989, when Trinidad and Tobago requested the United Nations to study the idea of an International Criminal Court to deal with drug traffickers.[32] By this time, the cold war was over and the time seemed right for a new look at this concept. The General Assembly requested that the International Law Commission reopen the study of establishing an International Criminal Court and that the study include the issue of drug trafficking jurisdiction.[33] In 1992, the General Assembly granted a mandate to the Commission to prepare a new draft statute for an International Criminal Court.[34]

In the next two years, world events again provided cause for the United Nations to realize the need for some sort of international criminal tribunal, when it became apparent that serious breaches of international humanitarian law were being committed in the Former Yugoslavia and in Rwanda.[35] As the work on the newest draft of the International Criminal Court plans was just beginning, the Security Council resorted to the much more rapidly deployable option of ad hoc tribunals to deal with these violations. The International Criminal Tribunal for the Former Yugoslavia was established in 1993, and the similar tribunal for Rwanda came into being in 1994. Like the Nuremberg and Tokyo tribunals, these were ad hoc bodies, but their very creation demonstrated the international political will to deal with these serious problems with an international institution. Furthermore, the implementation of these tribunals provided useful empirical data to feed the development of a permanent model.[36] The need to create two such institutions within such a short time-span also highlighted the potential efficiencies that could be gained from a permanent standing institution which would not require constantly reinventing the same wheel.

Part II: Development of the Rome Statute of the International Criminal Court

Having received the 1992 mandate of the General Assembly to prepare a new draft statute for the International Criminal Court, the International Law Commission was almost immediately provided with the experiences of the ad hoc tribunals being created for the Former Yugoslavia in 1993 and for Rwanda in 1994. These real-world developments further brought the issue of international criminal justice to center stage and invigorated the Commission's labors. In 1994, the Commission provided an ambitious draft statute to the General Assembly, envisioning a court with jurisdiction over the crimes of genocide and aggression, war crimes, crimes against humanity, and treaty crimes (including drug trafficking, as requested by Trinidad and Tobago in 1989).[37]

Before proceeding to a full-scale international diplomatic conference, the General Assembly first convened the Ad Hoc Committee on the Establishment of an International Criminal Court, which met in 1995 to address major issues being raised

27. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; *ICC Overview, supra* note 15, at 1.

28. Genocide Convention, *supra* note 27, art. I.

29. *Id.* art. VI; *ICC Overview, supra* note 15, at 1; Kirsch, *supra* note 5, at 1145.

30. *ICC Overview, supra* note 15, at 1.

31. *See* Kirsch, *supra* note 5, at 1145.

32. *Id.*; *ICC Overview, supra* note 15, at 1.

33. *ICC Overview, supra* note 15, at 1.

34. Kirsch, *supra* note 5, at 1145-46.

35. *Id.* at 1146; *The ICC, supra* note 5, at 1.

36. Kirsch, *supra* note 5, at 1146.

37. *Id.*

in the draft and prepare the ground for further development of the concept. After receiving the work product of this committee, the General Assembly then moved to the next step by creating the Preparatory Committee on the Establishment of an International Criminal Court to develop the draft statute in more detail and "to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference."[38] The Preparatory Committee held six sessions between 1996 and 1998, with the final session in March and April of 1998, culminating with a completed draft text.[39] Thus was laid the groundwork for Rome.

At this point, the General Assembly was ready to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, which ran from 15 June to 17 July 1998.[40] This was the big event: the negotiation, refinement, and ultimate adoption of the completed convention. Considering the many different areas for potential disagreement between so many nations, the fact that so much agreement was reached is remarkable. Just trying to develop a set of legal procedures that would accommodate all the diverse legal systems in the world was a daunting task.[41]

The United States negotiating team had many concerns about the draft text going into the Rome negotiations.[42] After much productive negotiation, many of the concerns raised by the United States were addressed and the problems solved in the final version of the Statute.[43] Unfortunately, significant U.S. objections were not resolved,[44] time was running out on the Diplomatic Conference, and the majority view was that it was better to leave the conference with an approved Statute than to defer a decision in an attempt to achieve greater consensus.[45] Chairman Philippe Kirsch of Canada apparently overcame numerous obstacles and worked tirelessly to piece together the best and most widely acceptable product possible in the short time remaining. Ultimately, the overall quality of the document (despite some flaws[46]) and its strong acceptance by a vote of 120 to seven (with twenty-one abstentions) must be attributed to his efforts.[47]

To his credit, Chairman Kirsch has said he would have preferred to have attained a Statute that could have been approved by consensus. In his mind, however, the United States had already gained so many protections that the resulting Statute was being criticized by some for being too weak, and the United States (and some other states as well) seemed unwilling to compromise on the few remaining issues, which meant that consensus was impossible.[48] Thus concluded the Diplomatic Conference on 17 July 1998, with the final result being the Rome Statute of the International Criminal Court, the key provisions of which will now be examined in some detail.

Part III: Mechanics of the Proposed Court

A. Court Structure

The mechanics of the International Criminal Court envisioned by the Rome Statute are remarkably simple and apparently efficient in theory, at least on the macro level.[49] The Court is made up of two independent parts. The judiciary part of the Court consisting of the judges and their administrative support personnel falls under the Presidency, and the prosecutorial arm of the Court, which includes the investigators, falls under an independent Prosecutor.[50] All of this structure, in turn, falls under the supervision of the Assembly of States Parties.

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38. *ICC Overview*, *supra* note 15, at 1.

39. *Id.*; Kirsch, *supra* note 5, at 1147.

40. *ICC Overview*, *supra* note 15, at 1.

41. Kirsch, *supra* note 5, at 1147-48.

42. William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROB. 119, 121 (2001).

43. *Id.* at 124; Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, 64 LAW & CONTEMP. PROB. 3, 9-10 (2001).

44. *See infra* part IV.

45. Newton, *supra* note 2, at 22-24; Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 AM. U. INT'L L. REV. 35, n.18 & accompanying text (2001).

46. Lietzau, *supra* note 42, at 130-33.

47. *Id.* at 130; Kirsch, *supra* note 5, at 1148.

48. Kirsch, *supra* note 43, at 7.

49. *See infra* Appendix I for a diagram of the Court structure.

50. Rome Statute, *supra* note 9, pt. 4, arts. 34, 38, 42-43.

The Assembly of States Parties

Each State Party to the treaty will provide one representative to the Assembly, which will serve as the overall controlling body for the Court. This control will be exercised by way of a power to "[p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court."[51] The Assembly also maintains the power of the purse, as it will decide the budget for the Court.[52] As with many international organizations, the Assembly will have an executive agency, in this case called a Bureau. The Bureau will have a President, two Vice-Presidents, and eighteen members, all elected by the Assembly for three-year terms, and will meet at least once a year.[53] In addition to the Bureau, the Assembly may also establish other "subsidiary bodies" such as an independent oversight agency for the Court.[54]

The Presidency

The Court will have a total of eighteen judges, subject to a potential increase if needed on the vote of two-thirds of the Assembly of States Parties. These judges will vote among themselves to select the President and the First and Second Vice-Presidents, who, together, make up the Presidency.[55] The Presidency is responsible for the administration of the entire Court, except for the prosecutorial arm. This includes the Registry and the three Divisions of judges: Pre-Trial, Trial, and Appeals.

The eighteen judges are to be selected by a vote of the Assembly of States Parties from two lists of nominees, one containing candidates with a criminal law background and the other containing candidates with an international law background.[56] Each State Party may nominate one candidate for the election, who may appear on either list if qualified for both. The Statute also requires that the initial election select at least nine judges from the criminal law list and at least five from the international law list, and that future elections be organized to maintain the "equivalent proportion" of judges from the two lists. Only one serving judge is allowed from each state, and the term of office is generally nine years, subject to a phase-in period in which one-third of the judges will have terms expiring every three years. Judges may not be re-elected, except for those serving initial three-year phase-in period terms or those elected to fill a vacancy for a period of three years or less.[57]

The Chambers

Once judges are elected, they are to be subdivided into the three Divisions. The Appeals Division will be made up of the President and four other judges, while the Pre-Trial and Trial Divisions will be made up of at least six judges each. The qualifications of the judges will be a factor in assignment, with the requirement that the Pre-Trial and Trial Divisions be heavy in judges with criminal law experience. The functions of the Divisions will be executed by the Chambers, which are the working bodies of the Court. The Appeals Division will have but one Chamber, made up of all of the judges in the Division. The Pre-Trial and Trial Divisions may subdivide and operate in three-judge Chambers, and occasionally in the Pre-Trial Division, in one-judge Chambers. Based on the numbers of judges in each Division, both the Pre-Trial and Trial Divisions could have at least two Chambers each, operating simultaneously and independently on different cases.[58]

The Registry

The Registrar is to be elected by a majority vote of the judges of the Court for a five-year term, with the possibility of re-election once. The Registrar is the principal administrative officer of the Court, and runs the Registry, which is the organ responsible for the administration and servicing of the Court. The Registrar works for the President of the Court, and in addition to being responsible for a staff of administrative personnel, this officer is also tasked with establishing the Victims and Witnesses Unit. This Victims and Witnesses Unit will work with the Office of the Prosecutor to provide protection, counseling, and other support for victims, witnesses, and others who may be at risk due to the witnesses' testimony before the Court.[59]

51. *Id*. art. 112(2)(b).

52. *Id*. art. 112(2)(d).

53. *Id*. pt. 11, art. 112(3).

54. *Id*. art. 112(4).

55. *Id*. arts. 36, 38.

56. *Id*. art. 36(3).

57. *Id*. arts. 36-37.

58. *Id*. art. 39.

59. *Id*. arts. 43-44, 68.

The Office of the Prosecutor

As noted above, the Office of the Prosecutor operates independently from the rest of the Court. The Prosecutor is to be elected by a majority vote of the Assembly of States Parties for a nine-year term, without the possibility of re-election. The Prosecutor will then nominate candidates of different nationalities for one or more Deputy Prosecutor positions to be filled by a similar majority vote of the Assembly of States Parties for similar terms of office. These Deputy Prosecutors will then assist the Prosecutor and will have the authority to act in any capacity for the Prosecutor. The Prosecutor will also be responsible for an administrative staff, a team of investigators, and other issue advisors which he may appoint as a particular expertise is needed.[60]

B. Court Procedures[61]

Initiating an Investigation

There are three basic sources of information that can cause the Prosecutor to initiate an investigation under the Statute. The common element is that the Prosecutor receives information that a crime within the jurisdiction of the Court appears to have been committed. The jurisdiction of the Court is specifically limited to the crime of genocide, crimes against humanity, and war crimes, as defined in the Statute.[62] The allegation that such a crime has been committed may be referred by a State Party,[63] may be referred by the Security Council,[64] or may be received by the Prosecutor from any other source.[65] The Prosecutor, upon receiving this information, begins a preliminary examination to determine if there is a reasonable basis to investigate the allegation.[66]

If the Prosecutor determines that a reasonable basis to investigate exists, as one check on prosecutorial discretion, he must obtain authorization from the Pre-Trial Chamber before beginning an investigation. But before requesting that authorization, except in cases of Security Council referrals, the Prosecutor must first notify any states which would normally exercise jurisdiction over the crime alleged. The notified states have one month to respond, within which time any such state may request that the Prosecutor defer to the state's investigation.[67]

Upon receiving such a deferral request, the Prosecutor must defer to the state's investigation unless the Pre-Trial Chamber specifically authorizes the Prosecutor to proceed despite the deferral request.[68] This is part of the concept commonly referred to as "complementarity," which dictates that national courts should be the first choice for handling these cases.[69] Absent a deferral request, the Prosecutor submits the matter to the Pre-Trial Chamber for a decision on whether there is a reasonable basis to investigate the allegation and whether the alleged crime is within the jurisdiction of the Court. If the Pre-Trial Chamber finds in the affirmative on both issues, then it will authorize the Prosecutor to proceed with the investigation.[70]

If, on the other hand, the Prosecutor decides no reasonable basis to investigate exists, there are checks on this discretionary decision as well. The Prosecutor must notify the reporting or referring party that no investigation of the allegation will occur. A referring state or the Security Council may then request that the Pre-Trial Chamber review this decision. Upon review, the Pre-Trial Chamber may request that the Prosecutor reconsider his decision. If the Prosecutor did not base his decision on a lack of belief that the crime was committed or a lack of jurisdiction, but instead on a subjective determination that pursuing the matter would not serve the interests of justice, then the Pre-

60. *Id*. arts. 42, 44.

61. *See infra* Appendix II for flowcharts that may help illuminate this textual description.

62. Rome Statute, *supra* note 9, arts. 5-8. The crime of aggression is included as well, but the Court will have no jurisdiction over this crime until the Statute is amended with an agreed definition of the crime, which at last report was still being debated. *See Proceedings of the Preparatory Commission at Its Tenth Session (1-12 July 2002)*, U.N. Preparatory Commission for the International Criminal Court, 10th Sess., U.N. Doc. PCNICC/2002/L.4/Rev.1 (2002), *available at* http://www.un.org/law/icc/. Even if all parties agree on the definition of the crime of aggression, it now appears that they will be unable to amend the Statute until 1 July 2009, or seven years from the time the statute entered into force. *See* Rome Statute, *supra* note 9, arts. 5(2), 121, 123.

63. Rome Statute, *supra* note 9, arts. 13-14.

64. *Id*. art. 13; U.N. CHARTER, ch. VII.

65. Rome Statute, *supra* note 9, arts. 13, 15.

66. *Id*. art. 15.

67. *Id*. art. 18.

68. *Id*.

69. *See* Newton, *supra* note 2, at 24-28.

70. Rome Statute, *supra* note 9, art. 15(4).

Trial Chamber has the power to reverse the Prosecutor's decision.[71]

Investigation and Pre-Trial Procedures

Once the Pre-Trial Chamber authorizes an investigation, the Prosecutor may then pursue the full investigation of the allegation. During the investigation, the Prosecutor has a wide range of tools available to discover the facts of the matter, and the people being investigated or questioned have a wide range of rights specified in the Statute to ensure that they are treated fairly. Included are the rights against self-incrimination, coercion, duress, threats, and arbitrary arrest or detention. The person also has the right to be informed, before questioning, that he is suspected of a crime within the jurisdiction of the Court, and to be informed of his rights, including the right to counsel.[72]

At some point in the investigation process, the Prosecutor must examine what facts have been discovered and determine whether there is sufficient basis for a prosecution. If the determination is negative, then the Prosecutor must inform the Pre-Trial Chamber, and if the case was referred by a State Party or by the Security Council, he must also inform the referring party. At the request of one of these referring parties, the Pre-Trial Chamber may review this decision not to proceed and may request the Prosecutor to reconsider. As with the decision not to pursue an investigation, if the Prosecutor's decision not to prosecute is based on a subjective determination that the interests of justice would not be served by pursuing the matter, then the Pre-Trial Chamber again has the power to reverse the Prosecutor's decision.[73]

If, on the other hand, the Prosecutor determines that there is sufficient basis to prosecute the subject of the investigation, he must then determine whether or not arrest is necessary. If arrest appears to be necessary to ensure the accused person's presence at trial, or to prevent the accused from obstructing the investigation or continuing the criminal course of conduct of which he or she is accused, then the Prosecutor may request the Pre-Trial Chamber to issue an arrest warrant. If arrest does not appear necessary, the Prosecutor may request the Pre-Trial Chamber to issue a summons. In either case, the Pre-Trial Chamber will examine the request to decide its propriety. This analysis will include a determination as to whether there are reasonable grounds to believe the accused person committed a crime within the jurisdiction of the Court.[74]

If the Pre-Trial Chamber issues an arrest warrant, the Court may then request the State Party in whose territory the accused is located to arrest the person. The Court may request either a provisional arrest in urgent cases, with a promise that the proper request will follow, or an arrest and surrender with all the proper documentation provided at the outset.[75] Once arrested by the custodial state, the accused will be brought before the judicial authorities of that state to determine that the warrant does, in fact, apply to that person and that the arrest was properly conducted with respect for the rights of the accused. The custodial state authorities may grant interim release pending surrender to the Court, but may not contest the validity of the warrant itself.[76] In any case, the custodial state must surrender the accused to the Court when ordered to do so.[77]

If the Pre-Trial Chamber issues a summons, this document will specify the date the accused is to appear before the Court. The summons will be served on the accused, presumably using the procedures acceptable in the territory of the State Party where the accused is located.[78] In this case the accused person will be expected to present himself voluntarily on the date specified. Accordingly, this type of process should be reserved for suspects not considered flight risks.[79]

If the Pre-Trial Chamber refuses to issue the process requested (whether warrant or summons), then the Prosecutor must determine what course to take next. If at this point the Prosecutor decides not to proceed further, he can close the case, but must still inform the Pre-Trial Chamber and the referring party as indicated above. If, on the other hand, the Prosecutor decides to continue pursuing the case, he may either reopen the investigation to attempt to garner more facts to support the allegations, or, if the refusal to issue the process appears to have been based primarily on the Pre-Trial Chamber's belief that the Prosecutor requested the wrong process for the particular case,

71. *Id*. art. 53(3)(b).

72. *Id*. art. 55.

73. *Id*. art. 53(3)(b).

74. *Id*. arts. 58(1)(a), 58(7).

75. *Id*. arts. 91-92.

76. *Id*. art. 59(4).

77. *Id*. art. 59(7).

78. *Id*. arts. 58(7), 93(1)(d).

79. *Id*. art. 58(7).

the Prosecutor may simply submit a new request for the alternate process.[80]

Initial Proceedings, Trial, and Appeal Procedures

Whether brought before the Court by the process of warrant, arrest and surrender, or by summons and voluntary appearance, the accused will receive one more level of procedural protection before being tried on the charges alleged. At an initial appearance, the Pre-Trial Chamber will ensure that the accused has been informed of the charges and of his rights under the Statute, including the right to apply for interim release pending trial. Then, within a reasonable time after this initial appearance, the Pre-Trial Chamber will hold a hearing to "confirm" the charges.[81]

Essentially this would be what is commonly know in U.S. courts as a "preliminary hearing," and the procedures very much resemble the Uniform Code of Military Justice, Article 32,[82] Pretrial Investigation hearing used in the U.S. military. Rules of evidence are relaxed and witnesses need not testify in person, but the accused also has the opportunity to present evidence at this hearing. The Prosecutor's burden here is merely to "support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged,"[83] which closely resembles the "probable cause" standard applied in U.S. courts.

If the Pre-Trial Chamber finds that the Prosecutor has met this burden, it will confirm the supported charges and commit the accused to a Trial Chamber for trial. If the Pre-Trial Chamber is not convinced the Prosecutor has met the burden, it has two choices. First, it may adjourn the hearing to allow the Prosecutor to consider providing additional evidence or amending charges to better fit the evidence. Alternatively, it may simply decline to confirm the charges. In this case, the Prosecutor may either close the case and take no further action, or he may reopen the investigation to attempt to better support the charges before trying again.[84]

When any charges have been confirmed against an accused person, a Trial Chamber will then take over the case from the Pre-Trial Chamber. When the Trial Chamber assumes control of the case, it will hold pre-trial conferences with the parties as necessary to resolve as many administrative and procedural issues as possible in advance of trial. This will include issuing whatever discovery orders are necessary to allow the parties to properly prepare for trial. The Trial Chamber may also choose to refer certain preliminary issues back to the Pre-Trial Chamber for decision.[85] Likewise, the Trial Chamber may also refer certain trial issues to the Appeals Chamber for interlocutory decision.[86] Chief among the duties of the Trial Chamber throughout the process is to protect the rights of the accused, the witnesses, and the victims.[87]

The list of the rights of the accused at a trial of the International Criminal Court is impressive. At least on paper, the due process offered to the accused seems every bit as extensive as the protections afforded under the U.S. Constitution, with the most noteworthy exception being the absence of the right to a jury trial. The accused has the right to be present at the trial, unless unduly disruptive, in which case he will be required to observe from a remote location. The accused has a right to a public trial, subject to limitations when the Trial Chamber determines a need to protect a witness, victim, or sensitive information. Echoing U.S. procedures, the accused is also presumed innocent until guilt is proven "beyond reasonable doubt," and the burden of proving this is on the Prosecutor, and may never be shifted to the accused.[88]

The exhaustive list of trial rights also includes concepts U.S. lawyers would recognize as rights to a speedy trial, to counsel, to confront the witnesses, to compel the testimony of witnesses, to remain silent, and to be provided with any exculpatory evidence in the possession of the Prosecutor.[89] Many of the rules of evidence included in the Statute also closely resemble rules applied in U.S. courts.[90] While the list of rights and rules appears to be quite similar to what would be afforded in a U.S. criminal court, it remains to be seen how the International Criminal Court applies these concepts, since national case law

80. *See id.* art. 58.

81. *Id*. arts. 60-61.

82. UCMJ art. 32 (2000).

83. Rome Statute, *supra* note 9, art. 61(5).

84. *Id*. arts. 61(7)-(8).

85. *Id*. art. 64(4).

86. *Id*. art. 82(1)(d).

87. *Id*. art. 64(2).

88. *Id*. art. 66.

89. *Id*. art. 67.

precedents interpreting these rules are not necessarily binding on the Court.[91]

On the other side of the coin, the Statute also provides for a well-developed system to protect victims and witnesses, and to respect their rights to participate in the proceedings. Specifically, the Court is tasked with taking "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,"[92] but is also required to apply these measures so that they do not prejudice the right of the accused to a fair and impartial trial. This inherent friction guarantees that the Court, like other courts in similar judicial systems, will be continually exercising a balancing process to ensure the adequate protection of conflicting interests. The Prosecutor and the Victims and Witnesses Unit within the Registry of the Court are likewise tasked to assist the Court in the protection of these often-fragile and under-represented parties in the case.[93]

After receiving all the admissible evidence offered by the parties, the judges of the Trial Chamber enter secret deliberations to decide the guilt or innocence of the accused. They are limited to the charges as alleged and to the evidence of record in the case. The Statute prefers unanimity, but failing that, the majority decides the case. The Trial Chamber must issue a single written decision supported by the rationale for the findings and conclusions reached, and including both majority and minority views, if any. The decision or a summarized version of it is then delivered in open court.[94]

If a finding of guilt has been made, except in the case of a guilty plea by the accused, the Trial Chamber may, on its own initiative, or must, at the request of either party, hold a sentencing hearing.[95] In deciding an appropriate sentence, the Trial Chamber will consider any relevant evidence submitted during the trial, as well as any additional information submitted at the sentencing hearing, if one is held. The Trial Chamber will announce the sentence in public, in the presence of the accused, if possible. The maximum sentence is life imprisonment, but this is to be awarded only in extreme cases. Imprisonment for a term of years is limited to a maximum of thirty. The Court may also impose a fine or a forfeiture of assets derived from the crimes of which the accused has been convicted.[96] Furthermore, the Court may order reparations for harm caused to victims, which can include restitution, compensation, and rehabilitation.[97]

Once the Trial Chamber has completed its work, further action, if any, will likely be in the realm of the Appeals Chamber. One stunning difference between the International Criminal Court and U.S. Court procedures is the fact that the Prosecutor may appeal an acquittal. Under the Statute, either side is permitted to appeal the guilt or innocence decision of the Court, based on procedural error, factual error, or legal error. The accused may also appeal based on any other issue that calls into question the fairness or reliability of the proceedings. Either side may also appeal the sentence imposed on the ground that it is disproportionate to the crime committed.[98] If only the decision or the sentence is appealed, but the Appeals Chamber believes the other should be appealed as well, the Court may invite the appropriate party to submit the additional appeal.[99]

After considering the matters submitted, the Appeals Chamber may confirm, reverse, or amend the decision or the sentence, or it may modify the sentence if found to be disproportionate to the crime. Alternatively, the Court may order a new trial before a different Trial Chamber, if the extent of the error warrants this remedy. In gathering information to make this decision, the Appeals Chamber may call for evidence to answer particular factual questions, or may refer the case back to the original Trial Chamber to answer the questions. The Appeals Chamber decides the appeal by a majority vote and, in a similar fashion to the results of trial, the decision is announced in open court with its supporting rationale, including the majority and minority views, if any. In this case, however, a judge may, if he wishes, also deliver a separate opinion on a particular legal question.[100]

90. *See, e.g., id.* art. 69.

91. *Id*. art. 21.

92. *Id*. art. 68.

93. *Id*. arts. 43(6), 68(4)-(5).

94. *Id*. art. 74.

95. *Id*. art. 76.

96. *Id*. art. 77.

97. *Id*. art. 75.

98. *Id*. art. 81.

99. *Id*. arts. 81(2)(b)-(c).

100. *Id*. art. 83.

Even after the final decision on the appeal, the Appeals Chamber may again be called upon to review the conviction or the sentence at some future time, if important new evidence is discovered, if it is later discovered that a fraud was committed upon the Court, or if one of the participating judges committed a serious breach of duty in the case.[101] The Appeals Chamber has substantial leeway to take remedial action if it finds the claim to be meritorious. It may reconvene the original Trial Chamber or constitute a new one, or it may retain jurisdiction of the case within the Appeals Chamber to hear the evidence submitted and decide the matter. In the event that a conviction is later reversed on the basis of some miscarriage of justice, the Statute even provides an enforceable right to compensation for the unjustly convicted person.[102]

Part IV: Objections to the Rome Statute and Potential Solutions

Having now examined in some detail the extensive, multi-layered due process apparently provided by the Rome Statute, some might find it difficult to understand how anyone could refer to this proposed International Criminal Court as a "kangaroo court."[103] But as the framers of the U.S. Constitution well understood, a detailed set of rules alone cannot guarantee due process. The integrity of the system depends in large part on the integrity of the people charged with implementing and enforcing the rules. Despite anyone's best intentions to pick only the best people to run the system, the only real way to guarantee the integrity of those people and, in turn, the integrity of the system, is to establish a solid framework of checks and balances to ensure that no official is ever operating without independent oversight.

This concept of checks and balances, which was the real genius of the U.S. Constitution, is an area in which the Rome Statute is apparently lacking. One important example of this is Article 119 of the Statute, which provides that "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."[104] If the Court is the only check on itself, this is a recipe for disaster.

The best example of the lack of adequate checks in the Statute is in the role of the independent Prosecutor, and in particular, determining when the Prosecutor may overcome the Statute's general preference for handling these cases in national courts (the so-called "complementarity" principle).[105] A genuine concern exists that an independent and unchecked Prosecutor might manipulate the Court by pursuing politically motivated prosecutions. While it is true that several layers of procedures have been added to the Statute to create the appearance of checks on the system, most of these checks are within the Court itself. If the people in the roles assigned to be a check on the Prosecutor are from one of a group of "like-minded states" that is politically opposed to United States policies, these checks will not likely serve their intended purpose. The fear is that this structure will allow the smaller states to band together to impose their will on the United States, or as one commentator has put it, the "Lilliputians want a permanent system to strangle Gulliver."[106]

Of course, this view does reflect a certain degree of paranoia in the expectation that all of these appointees to the Court will elevate their countries' political agendas over their own notions of justice. But, the fact is that for many of these people, their own notions of justice have been formed in the crucible of their countries' politics and will likely be a reflection of their countries' political agendas. The United States cannot discount the impact of the cultural differences between the nations providing appointees to this Court. What may seem just to the United States may not seem just to others. This problem of political-cultural differences is especially troublesome because the law this Court is being created to enforce is in some ways highly subjective and open to a wide variety of interpretations. What may be destruction justified by "military necessity" in the eyes of some nations may be destruction carried out "unlawfully and wantonly" in the eyes of some others.[107]

The United States also objects to the fact that the Statute purports to assert jurisdiction over non-party nationals without the authority of the Security Council.[108] This would only occur with the consent of the state where the crime was committed or the state of the accused person.[109] In the latter case, the accused

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101. *Id.* art. 84.

102. *Id*. art. 85.

103. Senator Jesse Helms, *Helms Opposes Clinton's Signing of the ICC Treaty*, U.S. Dep't of State, Int'l Info. Programs (Dec. 31, 2000) [hereinafter Helms Testimony], *at* http://usinfo.state.gov/topical/pol/usandun/01010201.htm.

104. Rome Statute, *supra* note 9, art. 119(1).

105. *See supra* text accompanying notes 67-69.

106. *UN International Criminal Court*, The Conservative Caucus (June 30, 1998), *at* http://www.conservativeusa.org/UNcourt.htm.

107. *See* Rome Statute, *supra* note 9, art. 8(2)(a)(iv). The determination that incidental injury and collateral property damage are "clearly excessive in relation to the concrete and direct overall military advantage anticipated," *id.* art. 8(2)(b)(iv), is open to diverse interpretations. Likewise, what may be a lawful use of force to some may be "inhumane acts" to others. *See id.* art. 7(1)(k). These are but a few examples of the subjectivity of the law in this area.

108. Lietzau, *supra* note 42, at 128.

person's state could at least be said to be an ad hoc party to the treaty, but in the former case, a power is being granted to this Court that has previously been reserved exclusively to the Security Council.[110] While it is true that the Vienna Convention on the Law of Treaties prohibits a treaty from binding a non-consenting state,[111] this is a defeatist argument for the United States to make. It assumes that the United States will not be a party to the treaty.

This also makes it a somewhat circular argument. If a state objects to a treaty and therefore refuses to join the treaty because of a bad provision, fixing the provision should gain that country as a State Party. But if the state becomes a party, then the treatment of non-parties will not affect its status, so it is hard to see why that state would refuse to join the treaty only for that reason. Matters of principle are important, but the United States should not deceive itself into thinking the primary goal of a state is anything other than protecting its national interests.

This United States' objection merely highlights the greater issue in this debate, which is the proper role of the Security Council in the functioning of this Court. One of the checks on the discretion of the Prosecutor is the provision that allows the Security Council to defer investigation or prosecution of any case with a Chapter VII resolution.[112] Of course the "veto power" that usually protects the permanent members of the Security Council from collective actions that threaten that state, in this context, actually hurts the permanent members by making it that much harder to pass a deferment resolution. Since this is the only real check on the system that comes from outside the Court itself, all it would take is one of the permanent members aligning with the group of "like-minded states" for this check to be as ineffective as the others.

The United States should oppose the non-party jurisdiction provision because that is the purview of the Security Council, and this Court needs to have checks and balances on its actions that will actually work. The Security Council is that check, and this Court needs to be brought clearly within the control of the Security Council to prevent potential abuses. While it is true that Security Council control brings with it another potential for abuse (or impunity for a permanent member of the Council), this danger is no greater than it has always been. In fact this danger is no greater than it would be with the proposed independent Court because even as this Statute is drafted, the International Criminal Court has no teeth and little hope of backing up its orders without the approval of the Security Council.[113]

While there is apparently some general resentment about the power exercised by the permanent members of the Security Council,[114] it is important to remember that all these states consented to the Security Council's role when they joined the United Nations. This is, after all, a voluntary association. The Security Council's structure may be due for an update, but its role in international affairs, which has proven useful for many years, should not be diluted or abandoned in the interests of greater international "democracy." There is no legitimate reason to accept a "democratic" vote of nations. The only thing that can come of that is *less* fairness, as small sparsely populated nations gain the same voice and vote in the international community as the most populous, the most productive, and the most powerful.

Even if productivity and power are rejected as legitimate reasons for having a greater voice, anyone truly purporting to advance the cause of "democracy" must accept the fact that more populous nations should have a greater voice. This is the reason the United States republic model gives more populous states a greater voice in the House of Representatives, although all states are equally represented in the Senate. This type of arrangement was intended to address just this sort of paradox of the democratic republic. Of course, the United States probably should not pursue a completely population-based system of voting, as that would provide the wrong incentives to states that already have trouble supporting the populations they have.

As Professor Inis Claude has pointed out, the only reason the traditional international system allowed each state to have

109. Rome Statute, *supra* note 9, art. 12.

110. Some have argued that this is merely a delegation by the state where the crime occurred, which would normally have jurisdiction in its national courts over crimes committed within its territory. *See, e.g.*, Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept.-Oct. 2001, at 150. Others have argued that such a delegation of jurisdiction is unprecedented and violates basic principles of state sovereignty. *See, e.g.*, Lietzau, *supra* note 42, at 135.

111. Vienna Convention, *supra* note 4, arts. 34-35. The Genocide Convention even recognized states would have to consent to the jurisdiction of the international tribunal. Genocide Convention, *supra* note 27, art. VI. This point was conveniently omitted by the United Nations in a document using that treaty provision to support the concept of an International Criminal Court. *See ICC Overview*, *supra* note 15, at 1.

112. Rome Statute, *supra* note 9, art. 16. The United States has recently used this provision successfully to convince the Security Council to agree to a one-year deferment of any International Criminal Court action against United Nations peacekeepers from countries not accepting the Court. This concession would likely not have been gained, however, but for the pending renewal votes for ongoing peacekeeping missions which allowed the United States to leverage its veto power. *See Negroponte Calls Exemption for UN Peacekeepers "a First Step,"* U.S. Dep't of State, Int'l Info. Programs (July 12, 2002), *at* http://usinfo.state.gov/topical/pol/nato/02071207.htm; Serge Schmemann, *U.S. Peacekeepers Given Year's Immunity From New Court*, N.Y. TIMES, July 13, 2002, at A3.

113. *See, e.g.*, Rome Statute, *supra* note 9, arts. 87(7), 112(2)(f). This should not be read to mean the Court poses no danger to anyone. State Parties and other governments may still be quite willing to cooperate with the Court voluntarily in areas in which they do have their own enforcement powers.

114. Kirsch, *supra* note 5, at 1147; Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROB. 193, 213 (2001).

equal voice and vote was because any state could effectively veto the action taken by the group by refusing to consent. This dual principle of "equal vote"—"bound only by consent" resulted in the rule of unanimity. The reason we have gotten away from this rule is that it is very hard to get anything done if all decisions have to be unanimous.[115] Thus, the international community has evolved a split personality of sorts, creating some institutions with equal vote for all nations, but reserving the most critical issues for the Security Council, in which international democracy is not the rule. The inherent problem with this Court is that it threatens to cross over from the international democracy realm into the critical issues that are the purview of the Security Council.

The United States has voiced other objections to the Rome Statute as well, including concerns about how the crime of aggression is ultimately defined and some of the other definitions of offenses that seem to be susceptible to political manipulation. The "no reservations" clause has also drawn an objection.[116] But in the final analysis, the United States could live with most of these problems if the complementarity regime were strengthened in the Statute. This would allow the United States to preempt any International Criminal Court prosecution that did not seem legitimate simply by asserting jurisdiction over the case in its national investigative agencies or courts. As currently drafted, the independent Prosecutor could foil this preemption by simply deciding that the national authorities are either "unwilling or unable genuinely to carry out the investigation or prosecution."[117] Of course, the Court would have to concur with this decision, but in such a subjective area, this concurrence is virtually assured if the judges are of the "like-minded group" with the Prosecutor.

The United States could more easily accept the Statute, even with its remaining defects, if this complementarity regime is changed so that the state's decision is controlling over the Prosecutor's for any United Nations recognized state, absent a Security Council decision to override complementarity. This state preference could even be limited to States Parties to encourage ratification, but this would not solve the non-party national jurisdiction issue.[118] This small change would likely gain U.S. support, and the international community would still reap all the benefits of establishing a standing court, perhaps even more benefits, since this modified version of the Court would actually have the teeth of Security Council action to back it up.

Chairman Philippe Kirsch has written that the United States should be reasonable in its requests for accommodation at this point, since the Preparatory Commission cannot change the Statute.[119] He makes a valid point, since the Statute itself places severe limitations on amendments, including a seven-year waiting period before an amendment can even be proposed.[120] If, however, fair-minded states want to gain U.S. support for this important endeavor, some avenue to fix this problem should be found, even if it means abandoning this first attempt and adopting a new, but slightly modified version of the Statute. On the other hand, with the negative rhetoric and outright opposition being heard from the U.S. government,[121] these fair-minded states are getting little assurance that their daunting task, if accomplished, would even achieve the intended goal.

Within Congress, this opposition has resulted in significant legislation designed to prevent any U.S. cooperation with the International Criminal Court. Already, Congress has included sections in at least two annual appropriations acts prohibiting the use of any funds to support the International Criminal Court.[122] The President has recently signed into law even more sweeping anti-cooperation legislation as part of a Supplemental Appropriations Act.[123] Called the "American Servicemembers' Protection Act of 2002," [124] this legislation not only prohibits

115. *See* CLAUDE, *supra* note 2, at 118-20.

116. Lietzau, *supra* note 42, at 125.

117. Rome Statute, *supra* note 9, art. 17.

118. *See supra* text accompanying notes 108-10.

119. Kirsch, *supra* note 43, at 11.

120. Rome Statute, *supra* note 9, art. 121.

121. *See, e.g.*, Helms Testimony, *supra* note 103; *U.K. Ratifies International Criminal Court as Bush Backs U.S. Ban*, LIFESITE DAILY NEWS, Oct. 2, 2001 [hereinafter *U.K. Ratifies*], *available at* http://www.lifesite.net/ldn/2001/oct/011002.html; Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, PUB. PAPERS, Jan. 14, 2002 (statement of Jan. 10, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/print/20020110-8.html; Carol Giacomo, *Bush Presses for End to U.N. War Crimes Tribunals*, THE NEWS (Mexico), Feb. 27, 2002, at 8.

122. *See* Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8173, 115 Stat. 2230, 2289; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 630, 115 Stat. 748, 805 (2001).

123. *See* 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820.

124. Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (2002).

cooperation with the Court, but it also restricts U.S. participation in peacekeeping missions unless the President certifies that U.S. troops will not risk prosecution by the Court or that U.S. national interests justify accepting the risk of prosecution.[125] Furthermore, the legislation will, effective 1 July 2003, block U.S. military aid to certain countries[126] that are parties to the Court, unless the President waives this provision based either on U.S. national interests or on the other country's agreement to shield U.S. troops present in their territory from the actions of the Court.[127] Another provision authorizes the President to use "all means necessary and appropriate" to free covered persons being held by or on behalf of the Court.[128] Unless some change in the current direction of the Rome Statute occurs, this seems to be the type of position the United States will take regarding the Court.[129]

The United States will, of course, continue to advocate human rights and will continue to cooperate with enforcement mechanisms that it supports. But, if the international community chooses to implement this International Criminal Court regime in its current form, then the United States must curtail its international activities unless properly assured that its troops will be protected. The Statute does provide some protections that the United States can incorporate in its planning, most importantly, a provision that allows a receiving state to honor protections granted to sending state troops in a Status of Forces Agreement.[130] Unless the flaws in the Rome Statute are repaired, this type of protective provision should become a precondition to any future U.S. deployment of troops to the territory of a State Party to the International Criminal Court.[131]

Conclusion

On 11 April 2002, ten states added their ratifications to those of the fifty-six states which had already ratified the Rome Statute, and thereby became States Parties. This provided more than the required sixty ratifications to bring the Treaty into force on 1 July 2002, and initiated the process of bringing the International Criminal Court to life.[132] But even if the Court is brought into existence, without the full participation of the United States, the Court will never be able to realize its full potential as an instrument of justice and human decency. Unfortunately, the international community may be cutting off its nose to spite its face. Despite some differences with other nations on definitions and scope, the United States has always been a strong supporter of human rights and an opponent of tyrants who abuse their fellow human beings. Few, if any, nations would be a more useful ally for the International Criminal Court to have in helping to accomplish its mission. The sad truth is that the United States, whether justifiably or not, has become a power to be opposed for many of the smaller nations active in the international community today.

Whether comfortable with the label or not, the United States has been stuck with the title of "hegemonic world superpower," thanks in large part to the demise of the Soviet Union

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125. *Id.* §§ 2004-2006. The United States has already achieved some success in protecting its peacekeepers from the jurisdiction of the Court, and continues other efforts to enhance this protection. *See supra* note 112; *infra* note 131.

126. The Statute exempts NATO members, major non-NATO allies, and Taiwan from losing military assistance. American Servicemembers' Protection Act of 2002, § 2007(d).

127. *Id.* § 2007; *see also U.K. Ratifies*, *supra* note 121.

128. American Servicemembers' Protection Act of 2002, § 2008.

129. Other legislation addressing the issues raised by the International Criminal Court is still pending in Congress, including the American Servicemember and Citizen Protection Act of 2002, H.R. 4169, 107th Cong., 2d Sess. (2002), and the American Citizens' Protection and War Criminal Prosecution Act of 2001, S. 1296, 107th Cong., 1st Sess. (2001); H.R. 2699, 107th Cong., 1st Sess. (2001). The former adopts a stance more hostile to the International Criminal Court than the latter. *See* Jennifer Elsea, Congressional Research Service, The Library of Congress, U.S. Policy Regarding the International Criminal Court 11-15 (2002).

130. *See* Rome Statute, *supra* note 9, art. 98.

131. *See infra* Appendix III for a Status of Forces Agreement Model Provision that could be used to protect U.S. personnel. While critics argue that Article 98(2) was intended to apply only to pre-existing Status of Forces Agreements, the United States has already met with some success securing new "Article 98 Agreements." As of this writing (September 2002) the U.S. has reportedly signed agreements with Romania, Israel, East Timor, and Tajikistan and is actively pursuing others. *See Romania Agrees to Protect Americans from Surrender to ICC*, U.S. Dep't of State, Int'l Info. Programs, Washington File (Aug. 1, 2002), *at* http://usinfo.state.gov/topical/rights/law/02080202.htm; *U.S. Continues to Seek Article 98 Agreements on ICC*, U.S. Dep't of State, Int'l Info. Programs, Washington File (Aug. 14, 2002), *at* http://usinfo.state.gov/topical/rights/law/02081435.htm; Amnesty Int'l, International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes 5-20 (2002); Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y. Times, Aug. 10, 2002, at A1; Elizabeth Becker, *On World Court, U.S. Focus Shifts to Shielding Officials*, N.Y. Times, Sept. 7, 2002, at A4.

132. Edith M. Lederer, *World Crimes Tribunal to Debut*, AP, Apr. 12, 2002. As of this writing (September 2002) eighty-one states have become parties to the Rome Statute. *See Multilateral Treaties Deposited With the Secretary General: Rome Statute of the International Criminal Court*, U.N. Treaty Database (2002), *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp. On 1-12 July 2002, the Preparatory Commission held its tenth and final session, and on 3-10 September 2002, the Assembly of States Parties held its first session. Nominations for Judges and Prosecutor opened on 9 September 2002, with the election to be held at the first resumed session of the Assembly of States Parties scheduled for 3-7 February 2003. *Rome Statute of the International Criminal Court*, U.N. Office of Legal Affairs (2002), *available at* http://www.un.org/law/icc/index.html.

as a counter-balancing power. While the average U.S. citizen would probably view this role as one of world leadership, unfortunately many other nations' governments see only a bully. The U.S. can point to a strong record of foreign aid and assistance to other nations, but many of them see the aid as self-serving of U.S. interests instead of a freely given helping hand.

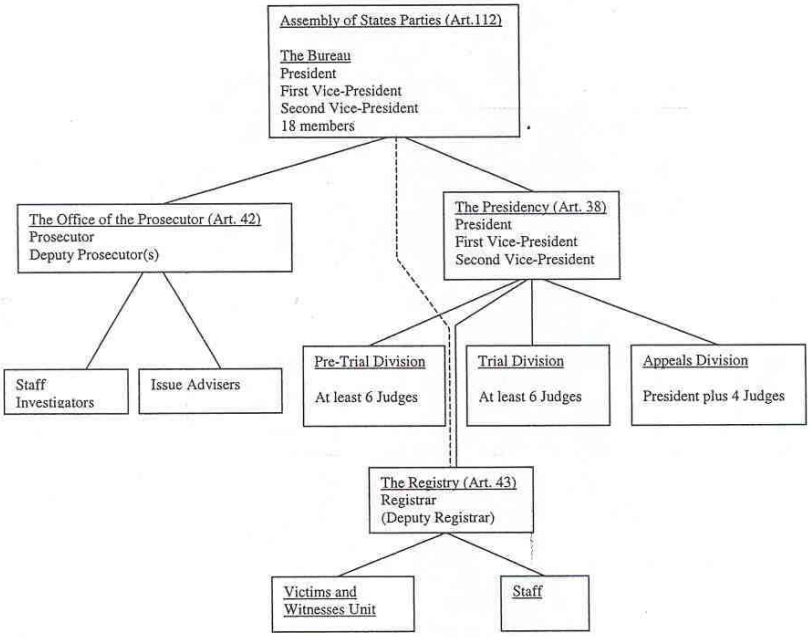
The bottom line is that the real truth is probably somewhere in between these two positions. The United States is truly a charitable country, but national interests do motivate most U.S. policies. The question then is whether it should be any other way. Governments exist to serve their people and their national interests. The international community is not a world government, but rather is a collection of competing national governments, each of which is supposed to be looking out for its national interests. The fact that the United States is as altruistic as it is stands as a tribute to the charity of its people. But it also serves a national interest in promoting free trade around the world. While a world government watching out for the whole world's interests does not yet exist, the increasing globalization of every aspect of people's lives is certainly driving in that direction. If nations can work out their differences and better understand each other's positions, this International Criminal Court could be a bold step in the direction of global institutions designed to promote global interests.

The reality is that as long as the world is made up of separate nations pursuing separate interests, the only likely areas of cooperative effort will be areas in which interests overlap. The objectives of the International Criminal Court should be one such area. The remaining differences are relatively small and can be harmonized with some relatively small (but maybe difficult to achieve) changes in the procedures of the Court. All the civilized nations of the world should be taking a stand for the stated purpose of this Court. To allow this whole effort to fail because of a desire to kick sand in the face of the hegemonic bully, while it might give some people temporary visceral pleasure, would not be worthy of the progress that has been made by the noble group who should rightly be called international statesmen.

It has been said that strong judicial institutions are the key to eliminating government corruption, which in turn will allow for better governance and economic and social development for the benefit of the human race. The scope of this proposed International Criminal Court is strictly limited to only the most serious crimes with the greatest international implications. The possibility remains, however, that if this experiment in international jurisprudence meets with some success, gaining the confidence of the international community, it may indeed serve as a useful model for a future institutional increase in the globalization of justice. With the ever-increasing pressure of economic and social globalization, a strong movement in that direction can certainly be expected.

Appendix I

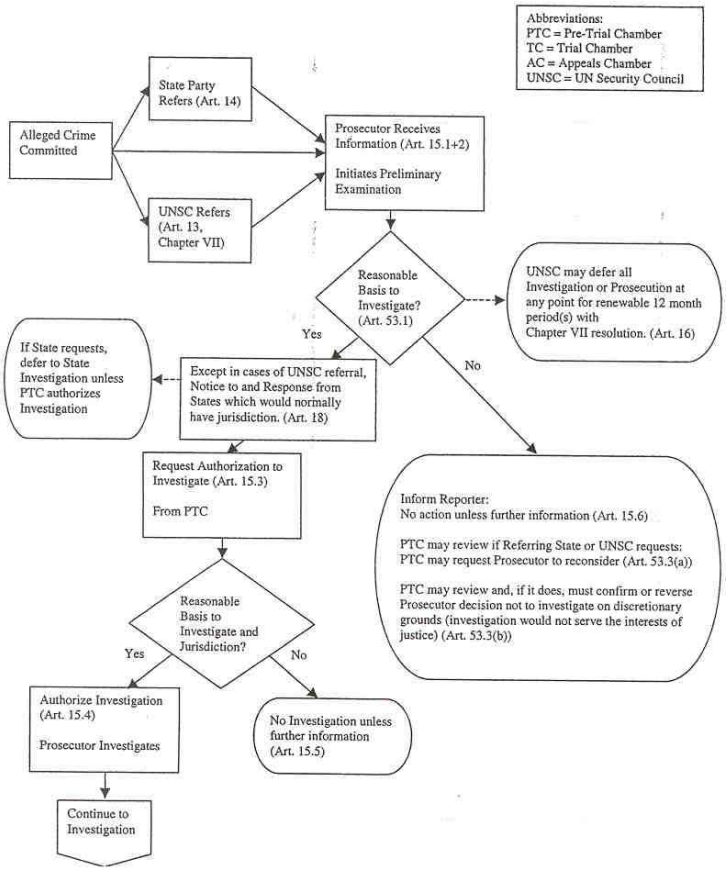
The International Criminal Court



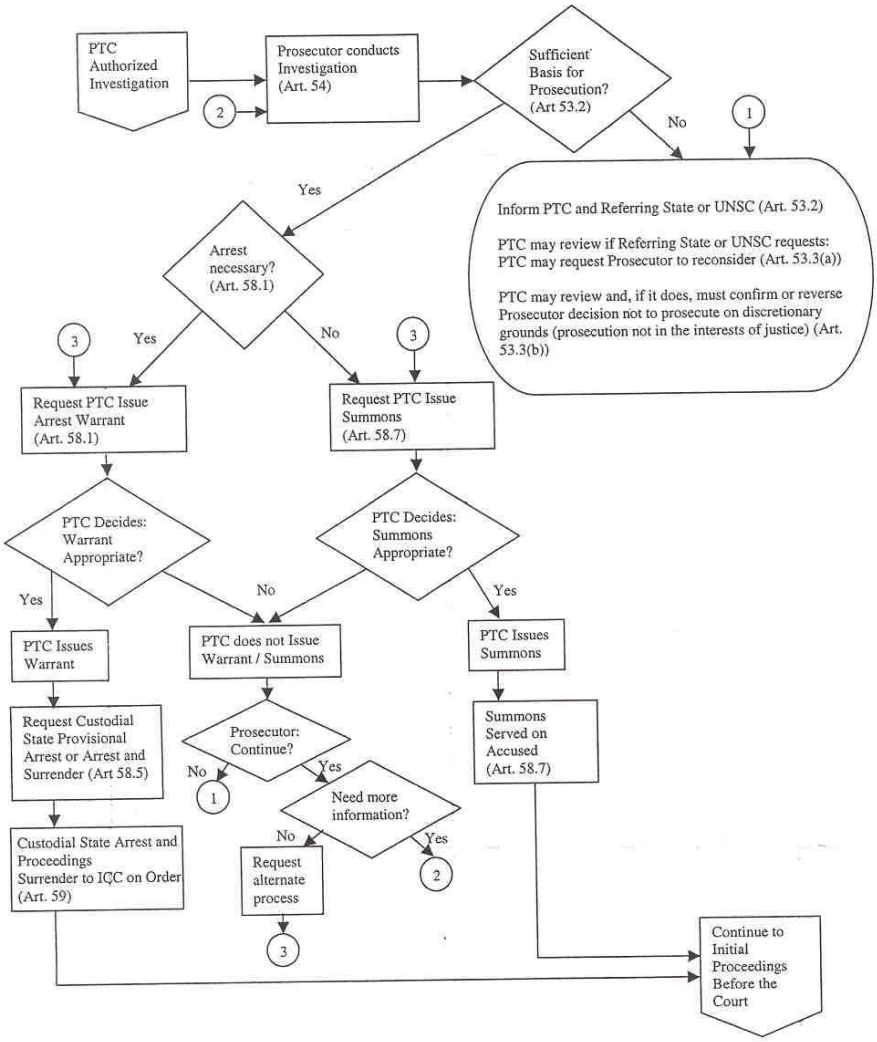
Appendix II

Flowcharts

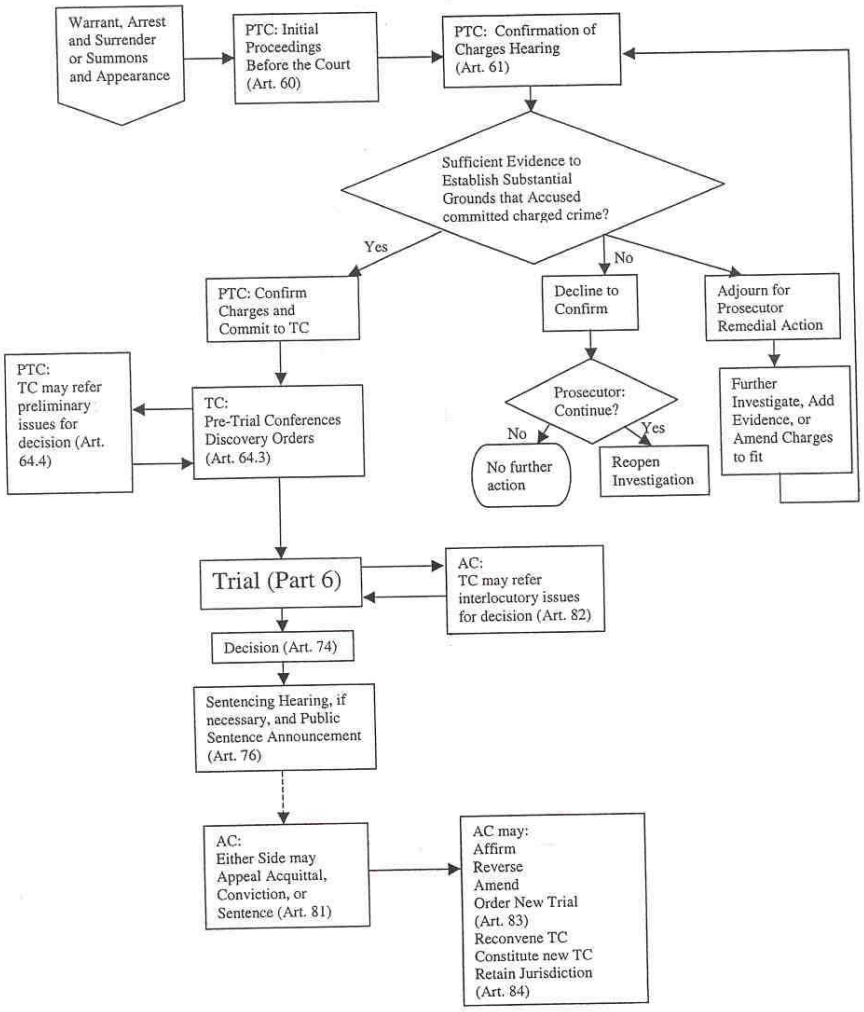
Initiating an Investigation



Investigation and Pretrial Procedures



Initial Proceedings, Trial, and Appeal



Appendix III

Status of Forces Agreement Model Provision[133]

United States as Sending State

(Note: This provision may be added as an amendment to Article VII of the NATO SOFA or to the appropriate section of any other pre-existing SOFA, or it may be used in the drafting of a new SOFA.)

The authorities of the receiving State shall have no authority over the members of a sending State force or civilian component or any of their dependents to arrest or hold any of them for or on behalf of the International Criminal Court without the consent of the sending State. Furthermore, in accordance with Article 98 of the Rome Statute of the International Criminal Court, the authorities of the receiving State will not honor any request by the International Criminal Court to arrest, hold or surrender any such person without the consent of the sending State.

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133. According to Amnesty International and the Coalition for the International Criminal Court (CICC), the following language has been used in Article 98 Agreements already signed between the United States and several other states. This may provide a useful example of the typical language being used in these agreements.

> A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,
>
> B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,
>
> C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,
>
> D. Bearing in mind Article 98 of the Rome Statute,
>
> E. Hereby agree as follows:
>
> 1. For purposes of this agreement, 'persons' are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
>
> 2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,
>
> (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or
> (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.
>
> 3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of *X*.
>
> 4. When the Government of *X* extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of *X* will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
>
> 5. This Agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

AMNESTY INT'L, *supra* note 131, at 19 n.48 (numbering and lettering added by the CICC).

Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations

Lieutenant Colonel (Ret.) Michael Davidson

Introduction

A natural tension exists between the procurement fraud and contracting communities. Fraud investigators and litigation attorneys want sufficient time to investigate allegations of fraud and are concerned that contracting officers will neglect to bring suspected fraud to their attention. Furthermore, investigating agents and attorneys assigned to pursue any potential civil or criminal action against a contractor will be wary of any contracting officer's efforts to address the fraud for fear that the case will in some way be compromised, if not legally, then at least in terms of jury appeal, the creation of potential defenses,[1] or evidentiary issues. In contrast, the agency contracting office usually wants to move the procurement forward, often sees misunderstandings and mistakes rather than fraud, and is culturally oriented toward working issues out with its "partners" in the private sector. Indeed, as noted in the applicable portion of the Federal Acquisition Regulation (FAR): "[t]he Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level."[2]

This article provides guidance on resolving a reoccurring issue raised during procurement fraud investigations: what authority does a contracting officer (CO) retain once fraud is suspected on a claim? Depending upon the specific stage of the investigation or litigation, the primary restrictions on the CO are contained in section 605(a) of the Contract Disputes Act (CDA), FAR section 33.210, the Department of Justice's (DOJ) statutory litigation authority (28 U.S.C. § 516), and agency policy directives and regulations.[3]

Limitations on the Contracting Officer's Authority

Once a claim is suspected of being fraudulent, a number of responsibilities and restrictions come into play. For ease of organization, this note addresses those rights and responsibilities through the various stages of litigation.

Prelitigation

General Overview of the Law

Federal regulations impose mandatory reporting requirements on a CO whenever a claim is suspected of being fraudulent. The FAR mandates that whenever "the contractor is unable to support any part of a claim and there is evidence that the inability is attributable to misrepresentation of fact or fraud on the part of the contractor, the CO *shall* refer the matter to the agency official responsible for investigating the fraud."[4] Similarly, when a Termination Contracting Officer (TCO) "suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures."[5] Further, individual agency regulations or policies may trigger reporting requirements. For example, by regulation the Army requires a "Procurement Fraud Flash Report" whenever (1) the procuring agency has referred the matter for investigation, or (2) "there is a reasonable suspicion of procurement fraud or irregularity."[6]

In addition to mandatory reporting requirements, the CO loses a significant degree of authority over a tainted claim. Federal Acquisition Regulation section 33.210(b) removes from

1. For example, it is a defense to the scienter element of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000), that relevant employees of the United States had knowledge of the alleged falsity at issue, at the time the false claim was submitted to the United States. United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

2. General Servs. Admin. et al., Federal Acquisition Reg. § 33.204 (June 1997) [hereinafter FAR]. Additionally, one purpose of the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000), was to "induce resolution of more contract disputes by negotiation prior to litigation." Contract Disputes Act of 1978, S. Rep. No. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

3. *See* 41 U.S.C. § 605(a); FAR, *supra* note 2, § 33.210; 28 U.S.C. § 516 (2000).

4. FAR, *supra* note 2, § 33.209 (emphasis added); *see* United States *ex rel.* Biddle v. Bd. of Trustees of Leland, 161 F.3d 533, 542 (9th Cir. 1998) (Navy ACO had a duty to detect and "refer possible fraud to the appropriate authorities"), *cert. denied*, 526 U.S. 1066 (1999) (citing FAR section 33.209 and the Navy Acquisition Procedures Supplement); UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) ("a contracting officer cannot find fraud, but must refer suspected cases of fraud to the Department of Justice for review pursuant to 41 U.S.C. § 605(a) (1994)"), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001).

5. FAR, *supra* note 2, § 49.106.

6. U.S. Dep't of Army, Reg. 27-40, Litigation para. 805 (19 Sept. 1994) [hereafter AR 27-40]; *see also* Army Federal Acquisition Reg. Supp. § 5109.406-3 (Oct. 2001) [hereinafter AFARS]. Of note, the FAR links the reporting requirement for suspected fraud involving "advance, partial or progress payments" to agency regulatory reporting requirements. FAR, *supra* note 2, § 32.006-3(b).

the CO's authority "[t]he settlement, compromise, payment or adjustment of any claim involving fraud."[7] Similarly, CDA section 605(a) prohibits the agency head from administratively resolving a claim involving fraud.[8] The same section of the CDA also removes from the CDA's contract dispute resolution process "a claim or dispute for penalties prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine."[9] Falling within that exclusionary language are section 604 claims[10] and False Claims Act disputes and claims,[11] both of which fall within the exclusive authority of the DOJ.

Although the FAR addresses the authority of the CO, and the last sentence of section 605(a) restricts the authority of the agency head, the two provisions are related. The CDA's prohibition on an agency head's administrative resolution of a claim involving fraud was added by Congress "to insure that cases involving fraud [were] not subject to the [contract dispute resolution] provisions of [§605(a)]."[12] Similarly, FAR section 33.210(b) was intended to interpret section 605(a) and further "admonishes the CO not 'to decide or settle . . . claims arising under or relating to a contract subject to the [CDA] . . . involving fraud.'"[13] Courts have relied upon section 605(a), as well as FAR section 33.210(b), when discussing the *contracting officer's* lack of authority to resolve fraudulent claims.[14] Section 605(a)'s fraud exclusion for agency heads necessarily encompasses subordinate COs.[15]

Court opinions in various areas of the law provide some guidance to help establish the parameters of a CO's authority.[16] Many of the restrictions seem obvious. Government employees have neither the authority to permit contractor violations of federal statutes or regulations,[17] nor to waive such violations once they have occurred.[18] Procurement officials should not make statements concerning a contractor's *lack* of potential criminal or civil liability,[19] but a CO may express "concern about the

7. FAR, *supra* note 2, § 33.210(b).

8. 41 U.S.C. § 605(a). Section 605(a) states, in relevant part, "This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." *Id. See* United States *ex rel.* Johnson v. Shell Oil Co., 34 F. Supp. 2d 429, 432 (E.D. Tex. 1998) ("Federal agencies are specifically prohibited by statute from adjudicating or compromising civil fraud claims.").

9. 41 U.S.C. § 605(a).

10. Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 545 (Fed. Cir. 1988) ("Section 604 . . . was never intended to be within the purview of the CO."); *see* Appeal of TDC Mgmt. Corp., Dkt. No. 1802, 1989 DOT BCA LEXIS 26, at *25 (Oct. 25, 1989) ("[A] contracting officer has no authority to issue a decision under the Act setting forth a government claim under § 604, a fraud claim . . .[;] the Contract Disputes Act in general and the second sentence of § 605(a) in particular do not apply in fraud determinations.") (citation omitted). In relevant part, 41 U.S.C. § 604 provides:

> If a contractor is unable to support any part of his claim and it is determined that such liability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.

41 U.S.C. § 604.

11. *Simko Constr., Inc.*, 852 F.2d at 547-48.

12. United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996) (citation omitted). *See also* United States v. EER Sys. Corp., 950 F. Supp. 130, 134 (D. Md. 1996) ("The last sentence of 605(a) expresses Congress' intent that all government contract disputes involving fraud were not to be affected by the CDA.").

13. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 549 n.11 (1999).

14. *See, e.g.*, UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) (citing 41 U.S.C. § 605(a)); Defense Logistics Agency—Request for Advance Decision, B-230095, 1988 U.S. Comp. Gen. LEXIS 275, at *4 (Mar. 16, 1988) ("Under the CDA, as reflected in the FAR, a contracting agency shall not settle, compromise, pay or otherwise adjust any claim involving fraud.") (citing 41 U.S.C. § 605(a)); *see also Medina Constr., Ltd.*, 43 Fed. Cl. at 550 (citing 41 U.S.C. § 605(a)); FAR, *supra* note 2, §§ 33.209-.210, 49.106); *Unified Indus.*, 929 F. Supp. at 950 (citing 41 U.S.C. § 605(a)).

15. United States v. United Techs. Corp., No. 5:92-CV-375 (EBB), 1996 U.S. Dist. LEXIS 17398 (D. Conn. Oct. 11, 1996) ("To begin with, the court rejects the distinction Sikorsky draws between the contracting officer and agency heads. The statute's restriction on the authority of agency heads should be read as encompassing their subordinates."); *see also Unified Indus.*, 929 F. Supp. at 950 ("[T]he contracting officer is not an independent third party arbiter, but an agent of the agency itself."); *cf.* S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5253 ("However, it is not the intent of this section to authorize Agency heads, contracting officers, or agency boards to settle or compromise claims independent of their legal or contractual merits . . . ."). *Contra* Appeal of Hardrives, IBCA-2319; 1991 IBCA LEXIS 19, at *17 (Feb. 6, 1991) ("Finally, an 'agency head' is not the same thing as a contracting officer, or a Board of Contract Appeals.").

16. In the context of general agency law, as applied to the United States, the sovereign is bound generally only by the authorized conduct of its agents acting within the scope of their actual authority. Fed. Crop. Insur. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); *see* California v. United States, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("an agent acting *ultra vires* cannot bind the federal government"); *see also* Starflight Boats v. United States, 48 Fed. Cl. 592, 598 (2001); American Anchor & Chain Corp. v. United States, 331 F.2d 860, 861-62 (Ct. Cl. 1964) (employee's apparent authority binds a contractor, but only actual authority of a government employee binds the United States). The actual authority of an employee of the United States is usually articulated, or restricted, by applicable federal statutes and regulations. *Fed. Crop Ins. Corp.*, 332 U.S. at 384; *see also Starflight Boats*, 48 Fed. Cl. at 598 (express actual authority must be found in the Constitution, statutes or regulations; actual authority may be implied "when such authority is an 'integral part of the duties assigned to a [g]overnment employee'"). For government contracting personnel, the FAR and its agency supplement are the primary sources for defining the limits of their authority.

possibility of fraud."[20] Clearly, making a determination whether fraud actually exists is beyond the CO's authority.[21]

In the False Claims Act (FCA)[22] context, at least one case has addressed the impact of unauthorized conduct of a CO on subsequent litigation. In *United States v. National Wholesalers*,[23] a defense contractor delivered falsely labeled and nonconforming generator regulators to the Army. After about two-thirds of the required regulators had been accepted and paid for, the CO discovered the nonconformance, issued a stop work order, and had the regulators tested. When the test results proved favorable to National Wholesalers, the CO issued a letter to the contractor advising it "that the counterfeit labeled product would be accepted as 'or equal.'"[24] The contractor furnished the remaining regulators and was paid for them.[25]

Subsequently, the U.S. Attorney's Office filed an FCA suit. The district court ruled in the defendant's favor, relying, in part, on the CO's authority to resolve contract disputes.[26] The U.S. Court of Appeals for the Ninth Circuit reversed and entered judgment for the United States.[27] First, the court noted that the time for measuring whether a claim was false is when the claim was submitted, and that every invoice the defense contractor submitted to the Army before the CO became aware of the fraud was false.[28]

Next, the court discussed the conduct of the Army CO. The court recognized the CO's authority to modify the contract to permit a regulator equal to that called for in the contract. Any retroactive modification that permitted acceptance of the initial delivery of nonconforming and falsely labeled regulators, however, was "void as against public policy."[29] With regard to the effect of the CO's unauthorized conduct on the FCA lawsuit, the court stated: "In such palming off as we have here we do not believe that the Congress ever intended that COs should have the power to vitiate the False Claims statute."[30]

Consistent with *National Wholesalers*, a CO is not authorized to directly or indirectly waive a false claim. Accordingly, a CO cannot permit a contractor to withdraw a claim suspected

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17. *See* United States *ex rel.* Mayman v. Martin Marietta Corp., 894 F. Supp. 218, 223 (D. Md. 1995) ("Even assuming that Martin Marietta did inform the Government of its precise actions, a government officer cannot authorize a contractor to violate federal regulations.") (False Claims Act case); Brown v. United States, 207 Ct. Cl. 768, 782-83 (1975) (agent of the government cannot authorize a contractor to violate contractual provisions or government regulations); United States v. Fox Lake State Bank, 225 F. Supp. 723, 724 (N.D. Ill. 1963) ("However, [a government] employee could not be said to be acting within the scope of his authority in telling that one can file a false claim 'with the understanding that the sanctions of Congressional legislation (False Claims Act) will not apply thereto.'"); *cf.* Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928) (field auditor had no authority to tell taxpayer that he was not obligated to observe the requirements of a statute or regulation).

18. United States v. Nat'l Wholesalers, 236 F.2d 944 (9th Cir. 1956); *see* JAMES B. HELMER, JR., ANN LUGBILL, & ROBERT C. NEFF. JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION § 3-19, at 121 (2d ed. 1999) ("Government contracting officers do not have the authority to waive statutory civil or criminal responsibility."); *cf.* United States v. Woodbury, 359 F.2d 370, 376 (9th Cir. 1966) ("doubtful" that agency or its officials possess the authority to compromise a false claim.).

19. *Cf.* Strauch v. United States, No. 78 C 375, 1979 U.S. Dist. LEXIS 10844 (N.D. Ill. July 23, 1979) (postal inspector, who allegedly made a statement concerning the liability of a party, acted beyond his authority as an inspector); Cooper Agency v. McLeod, 247 F. Supp. 57, 60 (E.D. S.C. 1965) (alleged concession of a revenue agent and chief auditor concerning taxpayer's liability were beyond the scope of their authority and was not binding on the United States). *But cf.* FED. R. EVID. 801(d)(2)(D); note 77 *infra* and accompanying text.

20. Appeals of Schleicher Community Corrections Ctr., Inc., Dkt. Nos. 3046, 3067, 1998 DOT BCA LEXIS 19, at *19 (Aug. 6, 1998) ("[T]here is nothing in the statute or applicable regulations prohibiting a contracting officer from expressing concern about the possibility of fraud.").

21. UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) ("Moreover, the contracting officer was without authority to determine fraud without referral to the Department of Justice."), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001); Int'l Potato Corp. v. United States, 142 Ct. Cl. 604, 607 (1958); United States v. U.S. Cartridge Co., 78 F. Supp. 81, 83-85 (D. Mo. 1948), *aff'd*, 198 F.2d 456 (8th Cir. 1952); Defense Logistics Agency—Request for Advance Decision, B-230095, 1988 U.S. Comp. Gen. LEXIS 275, at *3 (Mar. 16, 1988) (responsibility of determining the existence of bid collusion rests with DOJ).

22. 31 U.S.C. §§ 3729-3733 (2000).

23. 236 F.2d 944 (9th Cir. 1956).

24. *Id.* at 946. Originally, the solicitation called for a specified catalogue item, or equal, but if the offeror was going to use an equal item, it had to specifically inform the Army. *Id.* at 945-46. National Wholesalers elected not to offer an equal; "the contract required the bidder to furnish the proprietary . . . regulator and nothing else." *Id.* at 946.

25. *Id.* at 948.

26. *Id.* at 949-50.

27. *Id.* at 951.

28. *Id.* at 950.

29. *Id.*

30. *Id.*

of being partially fraudulent, and then permit the contractor to resubmit the claim after having deleted any questionable portions. In effect, such action would constitute an attempt by the CO to waive the fraudulent claim by circumventing the statutory and regulatory restrictions on the CO's authority.[31]

Additionally, if the CO cannot settle, compromise, pay, or adjust a claim involving fraud, he may not separate a claim into fraudulent and legitimate portions and then pay the undisputed portion.[32] One rationale for this limitation on the CO's authority is that such action "would defeat the intent and purpose of the Forfeiture Statute which is based on the sound principle that fraud destroys the validity of everything into which it enters and vitiates the most solemn contracts and documents, even judgments."[33] Further, a plain reading of the statutory and regulatory restrictions on the CO suggest that if the CO is without authority to resolve the *entire* claim, then the CO lacks authority to settle, pay, compromise, or adjust any *part* of it.[34]

Definitional Ambiguity

Less obvious is the CO's authority to take contractual action that affects, directly or indirectly, the claim suspected of being fraudulent and any related claims, before resolution of the fraud allegation. Much of the confusion derives from the lack of explanation of key terms, such as "claim involving fraud"[35] and "settle, compromise, pay or otherwise adjust."[36]

When Does the Claim Involve Fraud?

Neither the CDA nor the FAR explain the amount or type of evidence of fraud required to trigger section 605(a)'s agency head prohibition or FAR section 33.210(b)'s withdrawal of CO authority. Requiring that the claim be proven fraudulent to trigger section 605(a) and FAR section 33.210(b)'s prohibitions, however, would be nonsensical.[37] Were it otherwise, the CO could resolve the claim before an investigation was even initiated.

Dicta in several cases suggest that the fraudulent claim resolution preclusion is relatively low, being triggered by the mere suspicion of fraud.[38] Further, precedent exists positing that, at least during the pendency of an ongoing investigation by a federal law enforcement agency, a CO lacks authority to settle, compromise, pay, or adjust the claim.[39] Within the Army, the trigger for initiating such an investigation is a "determination that credible information exists that an offense has been committed."[40]

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31. Similarly, if evidence suggests that the contractor knowingly provided nonconforming goods, the CO should not unilaterally accept the defective goods and resolve the dispute by merely agreeing to an equitable adjustment in price. *But cf.* JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 882, 882 (3rd ed. 1995) (after acceptance, the CO retains the option of requiring an equitable reduction in price upon discovering nonconformities rather than have the defect corrected); *see* FAR, *supra* note 2, § 52.246-2(h)(2) ("Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction.").

32. *See* To The Secretary of the Army, B-154766, 1964 U.S. Comp. Gen. LEXIS 88, at *14 (Aug. 29, 1964); *cf.* Matter of: Fraudulent Travel Vouchers, B-245282, 1992 U.S. Comp. Gen. LEXIS 1173, at *10 (Apr. 8, 1992) ("When suspicion of fraud taints one item on a claim, the entire claim is tainted.").

33. *To The Secretary of the Army*, 1964 U.S. LEXIS 1173, at *14. The Forfeiture Statute, also known as the Special Plea in Fraud, is codified at 28 U.S.C. § 2514. Pursuant to this statute, which only applies when raised in the Court of Federal Claims, the contractor forfeits all claims arising out of a contract tainted by fraud. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 435 (1994), *aff'd without opinion*, 57 F.3d 1084 (Fed Cir. 1995); Crane Helicopter Serv., Inc. v. United States, 45 Fed. Cl. 410, 431 (1999).

34. The legislative history of the CDA, however, indicates that, at least for jurisdictional purposes involving section 604 claims, the agency boards and the Court of Federal Claims may adjudicate those portions of a claim severable from the tainted portion. S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254 ("other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency board or in the Court of Claims where the claim originated"). Any claim to be paid to the contractor remains subject to a set off to reflect an adverse FCA judgment against that contractor. *Id.*

35. *See, e.g.*, Appeal of Hardrives, Inc., IBCA-2319, 1991 IBCA LEXIS 19, at *17 (Feb. 6, 1991) ("Also, the phrase 'involving fraud' is nebulous.").

36. *See id.* (The last sentence of subsection 605(a) "is unclear. For example, the terms 'settle, compromise, pay, or otherwise adjust' do not include the word 'decide.'"); United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996) ("Arguably, some ambiguity infects this language.").

37. *See* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 550 (1999) ("It is concluded under the circumstances of this case . . . the CO was expressly prohibited from settling the claim because of the outstanding, unproven allegations of fraud.") (citing 41 U.S.C. § 605(a); 42 C.F.R. § 33.210); *cf.* UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 510 (1999) ("without authority to address suspected fraudulent claims, a contracting officer must turn to the [Department of Justice]").

38. *UMC Elec. Co.*, 45 Fed. Cl. at 509 ("suspected cases of fraud"); *Medina Constr., Ltd.*, 43 Fed. Cl. at 555 ("Pursuant to the FAR, the suspicion of fraud is considered to be of such a sensitive nature that CO's are specifically admonished not 'to decide or settle . . . claims arising under or relating to a contract subject to the [CDA] . . . involving fraud.'") (citing FAR, *supra* note 2, § 33.210(b)); *see To The Secretary of the Army*, 1964 U.S. LEXIS 1173 (agency authorized to refuse payment to contractor when there is a reasonable suspicion of fraud.); *see also* FAR, *supra* note 2, § 49.106 ("If the TCO *suspects* fraud . . . the TCO shall discontinue negotiations and report the facts under agency procedures."); *cf.* Matter of: Fraudulent Travel Vouchers, B-245282, 1992 U.S. Comp. Gen. LEXIS 1173, at *9-10 (Apr. 8, 1992) ("a certifying or disbursing officer has an affirmative duty to withhold payments on any doubtful claims, including those for which there is a *reasonable suspicion of fraud*") (emphasis added).

39. *Medina Constr., Ltd.*, 43 Fed. Cl. at 550; *see* Appeal of TRS Research, ASBCA No. 51712, 2000 ASBCA LEXIS 162, at *12 & n.2 (Oct. 24, 2000).

In *Medina Construction, Ltd. v. United States*, the Air Force suspected a contractor of submitting false invoices in support of progress payment requests on a hangar repair contract in the Azores Islands.[41] After the Air Force Office of Special Investigations (AFOSI) initially concluded that evidence supporting the fraud allegations was insufficient to terminate the contract for cause, the CO terminated for convenience.[42] The DOJ also declined to prosecute.[43] The contractor submitted its termination settlement proposal (TSP) to the CO, but ultimately elected to file suit against the United States in Portuguese courts seeking the TSP money.[44] The DOJ moved to dismiss and, in the alternative, pled fraud as an affirmative defense.[45]

Unaware of the Portuguese litigation, the CO issued a final decision denying the claim for additional payments because of the "apparently fraudulent invoices," determining that the claim was subject to forfeiture "under the Forfeiture Claims Act'"; and opining that the termination for convenience claim was otherwise unsupported.[46] The contractor then filed suit under the CDA in the Court of Federal Claims (COFC), the DOJ counterclaimed in fraud, and the contractor then moved to delay or dismiss the CDA litigation.[47]

The COFC discussed the legal effect of the CO's final decision. The COFC noted that the AFOSI investigation continued after the initial determination that available evidence did not support a termination for cause. Under such circumstances, the CO was precluded from negotiating a settlement of the TSP. Specifically, the court stated: "So long as the fraud investigation was continuing, the CO was statutorily precluded from carrying out any action which would cause the claim to be administratively settled, compromised, paid, or otherwise adjusted."[48] This prohibition remained in effect even though the DOJ had declined to prosecute the case and even though the allegations remained unproven.[49] Additionally, the court held that the CO's final decision was invalid because the CO based the denial predominately, if not entirely, on unproven allegations of fraud.[50]

What Is the Claim?

There is some confusion concerning what constitutes the "claim" when determining what actions the CO may take, or not take. Part of the confusion results from the differing definitions of a claim for purposes of the CDA and the FCA.

The CDA does not specifically define the term "claim."[51] Instead, FAR section 33.201 defines a claim for purposes of the CDA.[52] Significantly, a routine request for payment, such as a voucher, invoice or progress payment request, is not a claim when submitted.[53] Nonroutine requests for payment "which do not seek payment as a matter of right," such as cost proposals, are also not CDA claims.[54] Additionally, even a written demand for money, seeking as a matter of right a sum certain in excess of $100,000 is not a claim for CDA purposes if the demand is not certified.[55]

40. Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, Army Law., Aug. 1998, at 2 (citing U.S. Army Criminal Investigative Command, Reg. 195-1, Criminal Investigation Operation Procedures para. 7-11(o) (1 Oct. 1994) [hereinafter CID Reg. 195-1]).

41. *Medina Constr., Ltd.*, 43 Fed. Cl. at 542.

42. *Id.* The AFOSI continued to investigate the alleged fraud. *Id.*

43. *Id.* at 543.

44. *Id.* at 541.

45. *Id.* at 544.

46. *Id.*

47. *Id.* at 545. The DOJ counterclaimed under the Special Plea in Fraud, 28 U.S.C. § 2514 (2000); the anti-fraud provision of the CDA, 41 U.S.C. § 604 (2000); and the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). *Medina Constr., Ltd.*, 43 Fed. Cl. at 545. In its motion to dismiss, the contractor argued that the court lacked jurisdiction because the TSP was not a valid claim and, therefore, the CO's final decision was "improper and ineffectual." *Id.* The court held that the TSP had ripened into a valid CDA claim, but that the court lacked jurisdiction because the CO's final decision was invalid and there was no legitimate deemed denial of Medina's claim. *Id.* at 552.

48. *Medina Constr., Ltd.*, 43 Fed. Cl. at 550.

49. *Id.*

50. *Id.* at 556.

51. D.L. Braughler Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997); Kanag'iq Constr. Co. v. United States, 51 Fed. Cl. 38, 43 (2001); Weststar Eng'g, Inc., ASBCA No. 52484, 2002 ASBCA LEXIS 14, at *9 (Feb. 11, 2002).

52. Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1372 (Fed. Cir. 2000) ("The FAR definition merely elaborates that set forth in the CDA itself."); *see* Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995); *cf.* James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1542 (Fed. Cir. 1996) (relying on FAR definition of a claim); *Weststar Eng'g Inc.*, 2002 ASBCA LEXIS 14, at *9 (relying on FAR definition of a claim).

In contrast, the FCA uses a very broad definition of a claim.[56] Under the FCA, a claim is defined as:

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[57]

The falsity of the claim is measured at the time it is submitted.[58] False claims for FCA purposes have included vouchers,[59] invoices,[60] progress payment vouchers,[61] monthly progress and expenditure reports,[62] and checks falsely presented for payment.[63]

Some confusion is generated by the application of FAR section 33.201, which not only defines a claim for purposes of the CDA, but also for FAR subpart 33.2, which necessarily includes FAR sections 33.209 and 33.210. To illustrate the problem, assume that the contractor knowingly produces nonconforming goods and then submits an invoice for payment. Unaware of the defective nature of the goods, and concomitantly the falsity of the invoice, the United States accepts the goods and pays the invoice. Arguably, the invoice, which is not in dispute at the time of submission, constitutes a routine request for payment, and does not qualify as a claim for CDA purposes. Because the false invoice is not a claim as defined by FAR section 33.201, the CO, who subsequently learns of the defective nature of the goods and falsity of the invoice, may argue that he is not bound by the prohibition of FAR section 33.210(b) and elects to resolve the matter contractually. The absurd result in such a case is that the false invoice would constitute a claim for FCA purposes, which the CO could not resolve, but not a claim for CDA purposes, permitting CO resolution.

Such a literal reading of FAR section 33.201 would circumvent the intent behind section 604 and 605(a) of the CDA and FAR section 33.210(b). In effect, the CO would be settling, compromising, or otherwise adjusting a fraudulent claim, which could serve as the basis for a potential False Claims Act claim or counterclaim.[64] Unless a fraudulent claim is considered to be either nonroutine or in dispute for purposes of FAR

53. *See* FAR, *supra* note 2, §§ 33.201 ("A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim."), 52-233-1(c); *see also Reflectone*, 60 F.3d at 1577 ("Thus we hold that FAR 33.201 does not require that 'a written demand . . . seeking, as a matter of right, the payment of money in a sum certain' must already be in dispute when submitted to the CO to satisfy the definition of 'claim,' *except* where that demand or request is a 'voucher, invoice or other routine request for payment.'"). In *Reflectone*, the court also characterized progress payment requests as routine requests for payment. 60 F.3d at 1577. A routine request for payment may be converted into a CDA claim, however, "by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time." FAR, *supra* note 2, § 33.201.

54. *Reflectone*, 60 F.3d at 1577 n.7.

55. *D.L. Braughler Co.*, 127 F.3d at 1480 & n.5; *see Weststar Eng'g, Inc.*, 2002 ASBCA LEXIS 14, at *10, 15 (monetary claim must be certified); *see also* FAR, *supra* note 2, §§ 33.201, 52.233-1(c).

56. *See* United States v. Inc. Village of Island Park, 888 F. Supp. 419, 439 (E.D.N.Y. 1995). "The provisions of the False Claims Act are to be read broadly and 'reaches beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.'" *Id.* (citations omitted).

57. 31 U.S.C. § 3729 (2000).

58. United States v. Nat'l Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956); *see also* United States v. Southland Mgmt. Corp., No. 00-60267, 2002 U.S. App. LEXIS 6751, at *34 (6th Cir. Apr. 11, 2002).

59. United States v. Job Resources for the Disabled, No. 97 C 3904, 2000 U.S. Dist. LEXIS 6343, at *8 (May 5, 2000) (vouchers for wage reimbursement for people placed in an on-the-job training program conceded by defendants to be claims for FCA purposes).

60. United States v. Bornstein, 423 U.S. 303 (1975) (subcontractor caused prime to submit false invoices); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999) (invoices submitted for reimbursement claims for FCA purposes); BMY-Combat Sys. Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 124-25 (1997) (Department of Defense Form 250 used as an invoice); United States v. Advanced Tool Co., 902 F. Supp. 1011 (W.D. Mo. 1995) (government paid invoices for nonconforming tools); *aff'd without opinion*, 86 F.3d 1159 (8th Cir. 1986).

61. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994), *aff'd without opinion*, 57 F.3d 1084 (Fed. Cir. 1995); *cf.* United States v. Chilstead Bldg. Co., 18 F. Supp. 2d 210, 214 (N.D.N.Y. 1998) (FCA suit based on allegedly false "progress payment 'claims'").

62. United States v. TDC Mgmt. Corp., 24 F.3d 292, 294 (D.C. Cir. 1994) (TDC was reimbursed "monthly for documented expenditures").

63. United States v. Savaree, 19 F. Supp. 2d 58 (W.D.N.Y. 1997) (presentation of checks on the bank account of a deceased retiree, which contained electronically deposited federal annuity funds); *see* United States v. McLeod, 721 F.2d 282, 284 (9th Cir. 1983) ("the endorsement and deposit of a government check known to be issued by mistake is the presentation of a false claim under the Act").

64. *See, e.g.*, United States v. Nat'l Wholesalers, 236 F.2d 944 (9th Cir. 1956) (for purposes of the FCA, a CO lacked the authority to waive fraud as part of a contract modification).

section 33.201, then it would be nonsensical to apply this definition to the term "claim involving fraud." As a matter of law, a claim that is false when submitted—even if the government is unaware of the falsity at the time—should be treated as a claim for purposes of FAR section 33.210. Alternatively, FAR section 33.201 should be read to define a claim for purposes of the CDA, but not for claims falling outside the CDA's dispute resolution process, that is, claims involving fraud.

Finally, as a general rule, a CO is not precluded from taking action on other claims not involving fraud, which arise from the same contract as the claim alleged to be fraudulent.[65] In some cases, however, whenever it is discovered after award that a contract involves fraud, the entire contract will be considered tainted by fraud, depriving the CO of authority to resolve *any* claims under the contract. Contracts tainted by fraud at their inception are considered to be *void ab initio*.[66] In the FCA context, these cases, labeled by some courts as "fraud-in-the-inducement cases," arise "when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct."[67] *Every* claim submitted under such a contract may be considered false or fraudulent for FCA purposes,[68] contractually unenforceable, and falling outside the CO's resolution authority.

What Constitutes Settling, Compromising, or Otherwise Adjusting a Claim?

The intent behind FAR section 33.210(b) and the last sentence of section 605(a) was to remove all contractual disputes involving fraud from the contract disputes resolution procedures of the CDA.[69] In short, Congress did not want agencies, particularly their COs and boards of appeals, intruding into the DOJ's legal turf by deciding whether fraud existed, or by interfering with fraud investigations or subsequent fraud-related litigation by addressing allegations of fraud through some form of contractual mechanism. These terms must be interpreted in light of that intent rather than attempting to split semantical hairs.[70] Accordingly, the terms settle, pay, compromise, and adjust should be treated as being virtually synonymous with such terms as determine, dispose of, resolve, waive, or adjudicate.[71]

Although decided before the enactment of the CDA, the court's decision in *United States v. U.S. Cartridge Co.*[72] provides an illustration of an impermissible settlement of a claim involving fraud. At the conclusion of World War II, the United States terminated an ammunition contract and then resolved the contractor's termination claim. As part of that resolution, the CO and the contractor entered into a "supplemental contract" that stated the contractor had satisfactorily performed all of its work and contractual obligations and "expressly relieved and released [the contractor] from all accountability and responsibility therefor or in any way connected therewith."[73] Subse-

65. *See* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 553 (1999).

66. J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1200 (Fed. Cir. 1988); K & R Eng. Co. v. United States, 616 F.2d 469, 477 (Ct. Cl. 1980); Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 ASBCA LEXIS 20, at *18 (Jan. 30, 2001) (contract obtained through bribery "is void ab initio and cannot be ratified"); *see* Godfrey v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993).

67. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 (4th Cir. 1999); *see* United States *ex rel.* Schwelt v. Planning Research Corp., 59 F.3d 196, 199 (D.C. Cir. 1995). An example of a fraud-in-the-inducement case occurs when the contract was obtained through collusive bidding. *Harrison*, 176 F.3d at 787 (citing United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943)); *see* Medina, S.A., No. PCC-142, 2000 Eng. BCA LEXIS 8, at *21 (Jan. 11, 2000) (Contract modification obtained by bribing the CO "was tainted by wrongdoing at its inception. As such Mod 4 is void ab initio.").

68. *Harrison*, 176 F.3d at 787 (citing *Hess*, 317 U.S. at 543-44).

69. United States v. EER Sys. Corp., 950 F. Supp. 130, 134 (D. Md. 1996) ("The last sentence of § 605(a) expresses Congress' intent that all government contract disputes involving fraud were not to be affected by the CDA."); *see also* Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 544-45 (Fed. Cir. 1988); United States v. Unified Indus., Inc., 929 F. Supp. 947, 950 (E.D. Va. 1996); United States v. JT Constr. Co., 668 F. Supp. 592, 594 (W.D. Tex. 1987).

70. *See, e.g.*, Appeal of Hardrives, IBCA-2319, 1991 IBCA LEXIS 19, at *17 (Feb. 6, 1991) (The last sentence of 41 U.S.C. § 605(a) was "unclear. For example, the terms 'settle, compromise, pay, or otherwise adjust' do not include the word 'decide.'").

71. *See* UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999) ("Moreover, the contracting officer was without authority to *determine* fraud without referral to the Department of Justice.") (emphasis added); Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 549 n.11 (1999) ("not 'to *decide* or *settle*'") (emphasis added; citation omitted); United States v. United Techs. Corp., No. C-3-99-093, 2000 U.S. Dist. LEXIS 6219, at *9 (Mar. 20, 2000) ("[c]onsistent with the limitations expressed in section [605(a),] excluding issues of fraud against the United States from the authority of contracting agencies to *consider or resolve*") (emphasis added; citing legislative history of the CDA); TDC Mgmt. Corp., 1989 DOT BCA LEXIS 26, at *25 (Oct. 25, 1989) (CO's decision authority under the CDA does not apply to "fraud determinations"); 41 U.S.C.A. § 604 (West 2002), Historical and Statutory Case Notes ("consider or resolve"); Report of the Acquisition Law Advisory Panel to Congress, sect. 2.6.7.1, at 2-177 (Jan. 1993) (Section 605 "does not permit the contracting officer to *resolve* any claim involving fraud") (emphasis added); *cf.* United States v. U.S. Cartridge Co., 78 F. Supp. 81, 83-85 (D. Mo. 1948) ("a Contracting Officer has no authority to *determine* or settle liability"), 85 ("without authority in law to settle and *dispose of* the liability") (emphasis added).

72. 78 F. Supp. 81, 84 (D. Mo. 1948), *aff'd*, 198 F.2d 456 (8th Cir. 1952).

73. *Id.* at 82.

quently, the United States brought suit alleging that the contractor had submitted false claims before the contract termination associated with the production of defective ammunition.[74]

In defense, the contractor posited that the CO was authorized to resolve contractual disputes, including factual disputes, which he did in the contractor's favor. Additionally, the contractor argued that the CO had "compromised and finally settled" all matters raised in the government's complaint and had "released the defendant from all liability for any act mentioned in the complaint."[75] The court rejected these arguments, holding that the CO lacked authority to either "determine or settle liability."[76]

Some in the procurement fraud community have read the term "compromise" very broadly to inhibit COs or other agency procurement officials from taking any action that would create potential evidentiary issues, defenses, or otherwise undermine the successful litigation of a procurement fraud case. There is good reason for their concern. To illustrate, there is a danger that statements of government employees concerning the fraudulent claim may be admitted as admissions against the United States if the trial judge determines that the statements "concern a matter within the scope of the agency or employment made during the existence of the relationship."[77] Even though COs cannot waive fraud, if the CO or other relevant officials allow nonconforming goods or services to be provided, the contractor may acquire a defense to any subsequent FCA lawsuit.[78]

The term compromise, however, does not appear to extend that far, at least at the pre-complaint or pre-indictment stage.[79] The legislative history of the CDA indicates that Congress used the term "compromise" in two contexts: (1) that the CDA did not affect "the current procedures being used for 'compromising' claims as identified under 31 U.S.C. [§] 952"; and (2) the agency's prohibition on compromising claims currently contained in section 605(a).[80] The term compromise appears to be more synonymous with "resolve" or "settle" than with "jeopardize" or "undermine."[81] To some extent, the Department of Defense (DOD) has addressed the legitimate concerns of the procurement fraud community that the CO's actions will somehow undermine a fraud investigation or subsequent litigation by requiring advanced notice and coordination of remedies.[82]

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74. United States v. U.S. Cartridge Co., 198 F.2d 456, 458 (8th Cir. 1952).

75. *U.S. Cartridge Co.*, 78 F. Supp. at 83.

76. *Id.* at 83-85.

77. Federal Rule of Evidence (FRE) 801(d)(2)(D); *cf.* United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996) (FRE 801(d)(2)(D) applies to the federal government as a party opponent in a criminal case); United States v. Am. Tel. & Tel. Co., 498 F. Supp. 353, 356-58 (D.D.C. 1980) (FRE 801(d)(2)(D) applies to the United States as a party). *But cf.* Cooper Agency v. McLeod, 247 F. Supp. 57, 60 (E.D.S.C. 1965) (United States not bound by oral concession of agent acting outside scope of his authority).

78. Robin P. West, *Handling the False Claims Act Case*, 9 PRACTICAL LITIGATOR 45, 57 (Mar. 1998) ("Defendants have on a number of occasions successfully argued that a claim cannot be 'knowingly false' if the government acquiesced in allegedly false billings, using the rationale that if the government acquiesces, a defendant lacks the requisite knowledge that he is billing falsely. . . . Other cases reject this view . . . .").

79. Once litigation is actually pending, the DOJ's authority to control agency action that may affect the outcome of the case is much more extensive. Executive Bus. Media v. U.S. Dep't of Def., 3 F.3d 759, 762 n.1 (4th Cir. 1993) ("when the Attorney General represents an agency in litigation, it is the Attorney General, rather than the agency, who has the final authority to determine the litigation position of the United States") (citation omitted); *see also infra* notes 83-84 and accompanying text.

80. S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5253. 31 U.S.C. § 952 is now codified at 31 U.S.C. §§ 3701, 3711, 3717-3718. 31 U.S.C.A., tbl., at xxv (West 1983).

81. The CDA's legislative history indicates that the term was added to section 605(a) in response to concerns that within the proposed legislation "current procedures such as excluding fraud from the disputes process, the limitations now imposed on compromise, and the role of the Justice Department were not spelled out." S. REP. NO. 95-1118, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5239. Then existing law addressing the government's ability to compromise included Executive Order (EO) 6166, which confirmed the DOJ's authority over any case referred to it. United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283, 1287 (4th Cir. 1978) ("The Attorney General's authority to *compromise* or settle any case referred to the Department of Justice was expressly confirmed by § 5 of Executive Order No. 6166, June 10, 1933, 5 U.S.C. § 901.") (emphasis added); *see also* Halbach v. Markham, 106 F. Supp. 475, 480 (D. N.J. 1952) ("authority to compromise Government litigation"), *aff'd*, 207 F.2d 503, 504 (3d Cir. 1953) (Attorney General and Alien Property Custodian "were legally authorized to make the compromise settlement in question"); *accord* United States v. Sandstrom, 22 F. Supp. 190 (N.D. Okla. 1938). Executive Order 6166 states in relevant part:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to *compromise*, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

5 U.S.C.A. § 901 note, at 263 (West 1983) (emphasis added). The current language precluding settlement or compromise of claims involving fraud was added to clarify what is now section 605(a). S. REP. NO. 95-1118, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5242.

82. *See infra* notes 95-97 and accompanying text.

Litigation

It is axiomatic that, absent "explicit statutory language vesting independent litigation authority in another agency," once the United States, or one of its client agencies, is embroiled in litigation, the DOJ possesses exclusive authority to control the case.[83] Inherent in the DOJ's authority to control litigation is its authority to settle.[84] Furthermore, the DOJ's litigation authority "includes the power to determine all decisions concerning whether to defend an action, and, if so, in which manner to defend it."[85] Significantly, "if the Department of Justice is defending a CO's decision, the CO lacks jurisdiction to render a decision on the same claim."[86] Indeed, this legal maxim has been extended to preclude "the contracting officer from taking any action on a claim that is the subject of pending litigation."[87]

For purposes of triggering the DOJ's exclusive statutory authority over a case, "[l]itigation becomes pending upon the filing of a complaint with the court."[88] Some courts have noted that the DOJ's litigation authority does not extend to other matters not yet pending, even if related.[89] The legislative history of the CDA, however, suggests that for fraud claims, Congress intended that the DOJ control the matter from the point of agency referral. Specifically, the legislative history noted that "language was added to prohibit agency heads from 'settling [or] compromising . . .' claims independent of the legal or contractual merits of the claims after the claims *have been referred to the Attorney General* or litigation has commenced."[90]

If not as a matter of law, then certainly as a matter of policy, the DOJ's exclusive authority should extend before the point that it actually files a civil complaint or obtains a criminal indictment. The Justice Department should be able to control agency action affecting potential litigation at the point it becomes actively involved with a criminal or civil case.

From a policy perspective, sound reasons exist supporting expanded DOJ authority during periods of pre-filing investigation. Even though the specific claim involving fraud may affect only a single contract from an individual agency, the underlying fraud may permeate numerous contracts from several different agencies, both within and without the DOD. A centralized authority is necessary to determine if fraud exists; otherwise subsequent litigation may be handicapped by different agencies taking inconsistent positions on the same alleged misconduct. As the authors of one legal treatise observed: "Because these [Government] agencies are run by different people, one agency may conclude that fraud has occurred and that the Government was significantly damaged. Another agency, looking at essentially the same facts, but different contracts, may reach an opposite conclusion."[91]

As a centralized litigation authority, the DOJ can "coordinate the legal involvements of each 'client' agency with those of other 'client' agencies as well as with the broader legal interests of the United States overall."[92] Further, because criminal, civil, administrative, and contractual remedies may be pursued concurrently in a procurement fraud case, the potential exists for one remedy to interfere with another; such as when government officials prematurely seek or disclose evidence, or when they assert conflicting or inconsistent legal theories, factual positions, or damages calculations.[93] A coordinated govern-

83. Mehle v. Am. Mgmt. Sys., Inc., 172 F. Supp. 2d 203, 205 (D.D.C. 2001) ("Only explicit statutory language vesting independent litigation authority in another agency creates an exception to [28 U.S.C. § 516]."); Johnson Controls World Serv., Inc. v. United States, 43 Fed. Cl. 506, 510 (1999) ("Once a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation.") (citation omitted); *see also* Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 552 (1999); *accord* Exec. Order No. 6166, 5 U.S.C.A. § 901 note, at 263; United States *ex rel.* Johnson v. Shell Oil, 34 F. Supp. 2d 429, 432 (E.D. Tex. 1998) ("Further, according to Executive Order 6166 . . . the Department of Justice has exclusive authority over civil fraud claims.").

84. United Techs. Corp., ASBCA No. 46880, 95-2 BCA ¶ 27, at 698; *Settlement Authority of the United States in Oil Shale Cases*, 4B Op. O.L.C. 756 (1980).

85. Durable Metals Prods., Inc. v. United States, 21 Cl. Ct. 41, 45-46 (1990).

86. *Johnson Controls*, 43 Fed. Cl. at 510; *see also* Case, Inc. v. United States, 88 F.3d 1004, 1009 (Fed. Cir. 1996) ("The 'exclusive authority' given to the Department of Justice 'divests the contracting officer of his authority to issue a final decision on the claim.'") (citation omitted).

87. Volmar Constr., Inc. v. United States, 32 Fed. Cl. 746, 757 (1995); *see* Ervin & Assocs., Inc. v. United States, 44 Fed. Cl. 646, 654 (1999) ("divests the contracting officer of any authority to rule on the claim"); Medina Constr., Ltd., 43 Fed. Cl. 537, 552 (1999) ("divests the CO of authority to act in the matter").

88. *Ervin & Assocs.*, 44 Fed. Cl. at 654 (citing Sharmon Co. v. United States, 2 F.3d 1564, 1571 (Fed. Cir. 1993), *rev'd in part on other grounds*, Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

89. *Johnson Controls*, 43 Fed. Cl. at 511; Hughes Aircraft Co. v. United States, 534 F.2d 889, 901 (1976) ("In our view, it is limited to the conduct of pending litigation against the Government, and does not encompass exclusive control of other matters which, albeit related, are not yet so pending.").

90. S. REP. NO. 95-1118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5242 (emphasis added); *see id.* at 5253 ("It is not the intent of this section to change the current procedures for settlement of claims by the Justice Department once the claim has been turned over to that body or litigation has commenced in court."); *cf.* United States v. Sandstrom, 22 F. Supp. 190, 191 (N.D. Okla. 1938) ("[Executive Order] 6166 invests in the Attorney General the exclusive control of any case after it has been referred to his department.").

91. HELMER, LUGBILL & NEFF, *supra* note 18, at 261.

92. *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 54 (1982).

ment approach, with the DOJ as the authoritative head of the government's efforts, will serve to avoid these remedial conflicts.[94]

At present, the DOD requires only advanced coordination with the DOJ during the prelitigation stage of a procurement fraud case. *Department of Defense Directive 7050.5* states only that "advanced knowledge" of applicable contractual and administrative action be provided to DOJ legal counsel.[95] Current Army policy mandates not only prior coordination with the DOJ,[96] but also "cooperation" and "reasonable deference," at least with respect to criminal investigations.[97] In recent years, however, the Army practice appears to be one of deference to the DOJ's litigation-related desires during the pre-filing stage of procurement fraud cases. Similarly, once the DOJ accepts a procurement fraud case with a view towards prosecution, the Navy's practice has been to relinquish control of the investigation to the federal prosecutor.[98] Although committed to the simultaneous pursuit of criminal, civil, and administrative remedies, the Air Force has historically deferred to the DOJ on litigation-related matters, given priority to the pursuit of criminal proceedings, and coordinated administrative actions with the DOJ to avoid potential conflict.[99]

Significantly, even if the DOJ lacks statutory authority to control the conduct of potential litigation during the pre-filing stage, other statutory and regulatory restrictions on the CO's authority will force the same result, at least in part. An ongoing DOJ investigation of alleged fraud will trigger or continue the prohibition against a CO settling, compromising, paying, or adjusting the claim under investigation.[100] Further, as noted above, DOD regulations mandate advanced coordination with the DOJ before any contractual or administrative action is taken. Finally, because the penultimate sentence of section 605(a) removes FCA and section 604 claims and disputes from the CO's authority, only the DOJ can ultimately "'administer, settle, or determine' such claims or disputes.'"[101] Any CO resolution of a claim involving fraud that ultimately ripens into the basis for an FCA lawsuit or counterclaim, or a government counterclaim brought under the anti-fraud provision of the CDA (section 604), would be *ultra vires* and not binding on the United States.[102]

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93. Colonel Jerald D. Stubbs, *Fighting Fraud Illustrated: The Robins AFB Case*, 38 A.F. L. Rev. 141, 161, 164, 167 (1994).

94. *See id.* at 156-76 (advocating a coordinated team approach with priority given to pursuit of criminal remedies).

95. U.S. Dep't of Defense, Dir. 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities para. 4.3 (June 7, 1989).

> During an investigation and before prosecution or litigation, and when based in whole or in part on evidence developed during an investigation, ["appropriate civil, contractual, and administrative actions"] shall be taken with the advance knowledge of the responsible DoD criminal investigative organization and, when necessary, the appropriate legal counsel in the Department of Defense and the Department of Justice (DoJ).

Id.

96. *Army Regulation 27-40* states: "In cases which are pending review or action by DOJ, [procurement fraud advisors] *should* coordinate with the DOJ attorney handling the case prior to initiating any contractual or administrative remedy. In the case of ongoing criminal investigations, this coordination *will* be accomplished through the appropriate DOD criminal investigation organization." AR 27-40, *supra* note 6, para. 8-10(b) (emphasis added).

97. *Id.* para. 8-5(d) ("All personnel will cooperate to ensure that investigations and prosecutions of procurement fraud are completed in a timely and thorough manner.") ("When the conduct of criminal investigations and prosecutions conflict with the progress of procurements, reasonable deference will be given to criminal investigators and prosecutors whenever possible.").

98. *See* GAO/NSIAD-97-117, *Naval Criminal Investigative Service: Fraud Interview Policies Similar to Other Federal Law Enforcement Agencies* 7 (Apr. 1997).

> According to the Navy's General Counsel, once a case is accepted for prosecution in federal court, the Assistant U.S. Attorney assumes responsibility for the investigation and determines the need for further investigation, the witnesses who will be interviewed, and the timetable for referring the case to the grand jury for indictment.

Id.; *cf.* Weststar Eng'g, Inc., ASBCA No. 52484, 2002 ASBCA LEXIS 14 (Feb. 14, 2002) (after the U.S. Attorney's Office began a civil investigation, the Navy ceased negotiations of the contractor's Request for Equitable Adjustment, at the direction of DOJ).

99. *See* Stubbs, *supra* note 93, at 156-57, 164, 177; Steven A. Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, Rep. 4, 8-9 (Mar. 1999).

100. *See* UMC Elec. Co. v. United States, 45 Fed. Cl. 507, 509 (1999); Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 550 (1999); Appeal of TRS Research, 2000 ASBCA LEXIS 162, at *12 & n.2 (Oct. 24, 2000).

101. Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 548 (Fed. Cir. 1988) ("Section 605(a) does not limit the CO's authority only if another federal agency has exclusive authorization under a statute or regulation. Rather, the penultimate sentence of section 605(a) requires only that another federal agency (in this case the Department of Justice) have *specific* authority to 'administer, settle, or determine' such claims.").

102. *See, e.g.*, United States v. Nat'l Wholesalers, 236 F.2d 944, 950 (9th Cir. 1956) ("[W]e do not believe that the Congress ever intended that contracting officers should have the power to vitiate the False Claims statute.").

Post-Declination

A thorny area of the law concerns the authority of the CO to settle, compromise, pay, or adjust a claim found fraudulent by law enforcement officials,[103] but declined criminally and civilly by the DOJ.[104] This situation is not unusual and may arise in a number of different circumstances. The allegations of fraud may be supported by the evidence, but the attorney handling the case may believe that the requisite level of evidence does not exist to win at trial and/or may believe that the case, although supported by sufficient evidence, lacks jury appeal. Also, the fraudulent nature of the claim may have been discovered before disbursement of any government funds. Accordingly, the DOJ may determine that the minimal monetary liability or likely criminal sentence does not warrant the expenditure of its limited resources to pursue the case.[105]

The declination scenario casts COs into a gray area of the law. The determination by law enforcement agents that fraud exists triggers the loss of CO authority, but the ultimate resolution of the claim may be paralyzed by the DOJ's election not to pursue the case. Contracting officers in such a situation may perceive themselves as having to choose between potentially acting *ultra vires* to resolve the claim, or risk angering the parent agency or a subsequent reviewing tribunal by doing nothing.[106]

Unfortunately for the CO, the available law in this area indicates that a CO may not unilaterally resolve a claim found fraudulent by investigative agents, but declined by the DOJ. As discussed earlier, in *Medina*, the court determined that the CO was prohibited from resolving the contractual dispute while an ongoing AFOSI investigation was in process, even though the DOJ had declined to prosecute the case.[107] In that case, the fraud was unproven at the time of the initial DOJ declination.[108] It follows then that if a criminal investigative organization determines that a claim is fraudulent, the statutory and regulatory prohibition against resolving the claim remains, even though the DOJ has elected not to pursue the matter in court. In short, the mere fact that the DOJ has declined to pursue a claim involving fraud does not, by itself, lift the statutory and regulatory restrictions on the CO's authority to resolve the claim.

At least one good policy reason exists to support the retention of exclusive DOJ authority over the claim, even when the DOJ elects not to exercise its authority. The possibility remains that the contractual dispute, or a related dispute involving the same or different agency, may be raised at a later time in a different forum. The United States must preserve its ability to raise fraud as a defense or counterclaim in any such proceeding.

Further, it has been suggested that law enforcement officials within an agency may reconsider a finding of fraud in response to a DOJ declination. For example, Army Criminal Investigative Division (CID) could reevaluate the available evidence and change its characterization of the allegations from "founded" to "insufficient evidence," or a reviewing attorney may opine that the offense is unsubstantiated.[109] This course of action is fraught with peril. Agency officials may elect to determine that fraud does not exist for collateral reasons that are not dependent upon a determination that the claim is untainted by fraud. Additionally, the DOJ may be placed in an awkward litigation position if it subsequently raises fraud as a defense or counterclaim only to learn that the agency has determined that no such fraud exists.

The best course of action is for the CO to coordinate any contractual remedies with both the Army Procurement Fraud

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103. Army CID will make an investigative determination that an allegation of fraud is "founded" if it believes a criminal offense has been committed. Ham, *supra* note 40, at 1 n.7. Alternatively, Army CID may determine that the offense did not occur ("unfounded") or that insufficient evidence exists to make a determination. *Id.*

104. Presumably, once the relevant law enforcement agency has determined that the allegations of fraud are unfounded, the claim is no longer one involving fraud and the statutory and regulatory restrictions on the CO are lifted.

105. Under the False Claims Act, the United States may recover civil penalties and three times the amount of actual damages proven at trial. 31 U.S.C. § 3729(a) (2000); *In re* Schimmels, 85 F.3d 416, 419 n.1 (9th Cir. 1996); *see* United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty."). Absent actual damages, the United States may recover civil penalties between $5500 and $11,000 for each false claim or statement submitted to the United States. 28 C.F.R. § 85.3(9) (2000). In criminal procurement fraud cases, a significant sentencing consideration under the federal sentencing guidelines is the amount of loss. UNITED STATES SENTENCING COMMISSION, COMMISSION MANUAL sect. 2B1.1 (Nov. 2001). The Guidelines increase the offense level on a graduated scale for any loss exceeding $5000, up to a twenty-six level increase. *Id.* sect. 2B1.1(b). Before 1 November 2001, the amount of loss was calculated under section 2F1.1, which has now been consolidated with section 2B1.1. *See id.* sect. 2F1.1 [Deleted], Historical Note.

106. *Cf.* E.W. Eldridge, Inc., No. 5269-F, 1991 Eng. BCA LEXIS 19, at *14 (Aug. 30, 1991) ("The Board notes that the Government had initiated a fraud investigation of the Contractor in 1984 and the Respondent informed the Board in December, 1987, that no action would be taken as a result of the fraud investigation. This continued allegation of fraud as a supposed defense pursued by Respondent bewilders, angers actually, the Board, since the Government has failed to follow up its own investigation with any timely or official action.").

107. 43 Fed. Cl. 537, 543, 550 (1999).

108. *Id.* at 543.

109. An investigative determination of "insufficient evidence" means that CID is unable to determine if the offense occurred or is unable to establish probable cause that a specific entity committed the offense. Ham, *supra* note 40, at 1 n.7 (citing CID REG. 195-1, *supra* note 40, para. 7-25c(3)(a)-(b)). After the investigation is complete, the CID agent must coordinate with an attorney to determine if, based on probable cause, the offense is substantiated. *Id.* at 1.

Division (PFD) (or other applicable agency equivalent) and with a representative from the civil section of the DOJ or U.S. Attorney's Office that declined the case. Army PFD is charged with monitoring all significant Army fraud cases and coordinating applicable remedies,[110] and may be aware of actual or potential litigation involving the claim in another forum, in which fraud may be raised as a defense, counterclaim,[111] or as the basis for affirmative litigation. Having the DOJ approve the CO's proposed course of action should satisfy the requirements of the CDA and the FAR, and legitimize any CO's final decision.[112]

Permissible Contractual and Administrative Remedies

To the extent this area of the law enjoys some clarity, it is in the fact that a large number of contractual and administrative remedies are available to the CO in response to fraudulent claims during the investigative stage of a procurement fraud case. Beyond those limited actions that constitute settling, paying, compromising, or adjusting a claim, few legal constraints exist on the CO's authority. As a general rule of thumb, the CO may safely assume that most adverse actions taken against a contractor suspected of fraud will not run afoul of the statutory and regulatory restrictions on the CO's authority for claims involving fraud. Within this zone of contractual remedies include: (1) discontinuing settlement negotiations "related to the settlement of a terminated contract;"[113] (2) withholding payment of claims suspected of being fraudulent;[114] (3) denying the claim;[115] (4) terminating the contract for default;[116] and (5) determining the contractor nonresponsible.[117]

Indeed, the unsettling recent decision of the COFC in *Lion Raisins, Inc. v. United States*[118] has provided agencies with an incentive to make COs aware of the existence of fraud investigations and to encourage them to rely on such investigations for nonresponsibility determinations. In *Lion Raisins*, the COFC

110. AR 27-40, *supra* note 6, para. 8-2(c).

111. Additionally, albeit rarely used, the Army PFD may elect to pursue administrative action against the contractor under the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812 (2000). AR 27-40, *supra* note 6, para. 8-12.

112. "A contracting officer's final decision is invalid when the contracting officer lacked authority to issue it." Case, Inc. v. United States, 88 F.3d 1004, 1009 (Fed. Cir. 1996). Further, "an invalid final contracting officer's decision may not serve as the basis for a CDA action." *Id. See also* Ervin & Assocs., Inc. v. United States, 44 Fed. Cl. 646, 655 (1999). If the CO lacks authority to issue a final decision, "there can be no valid deemed denial of the claim so as to confer CDA jurisdiction under 41 U.S.C. [§] 605(c)(5)." *Case*, 88 F.3d at 1009. *See also Ervin & Assocs.*, 44 Fed. Cl. at 656.

113. *See* FAR, *supra* note 2, § 49.106 ("If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations . . . ."); *see also* Medina Constr., Ltd., 43 Fed. Cl. 537, 555 (1999); Rex Sys., Inc. v. Cohen, 224 F.3d 1367, 1372 (Fed. Cir. 2000). *But cf.* Gen. Constr. & Dev. Co., ASBCA 36138, 1988 ASBCA LEXIS 200 (May 17, 1988) (contracting officer's initial determination of costs actually incurred, contained within the CO's final decision and clarifying letter, was within the CO's jurisdiction despite alleged fraud and the language of FAR section 33.210(b)).

114. *See* To The Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).

> Furthermore, under the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, it is the plain duty of administrative, accounting and auditing officers of the Government to refuse approval and prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken.

Id. See also Defense Logistics Agency—Request for Advance Decision, Comp. Gen. B-230095, 88-1 CPD ¶ 273 (DLA may withhold payment until allegations of bid collusion are resolved); *cf.* Fraudulent Travel Claims, B-245282, 1992 U.S. Comp. Gen. LEXIS 1173, at *9-10 (Apr. 8, 1992) ("a certifying or disbursing officer has an affirmative duty to withhold payment of any doubtful claims, including those for which there is a reasonable suspicion of fraud") (citing *To The Secretary of the Army*, 44 Comp. Gen. at 110).

If the agency remedy coordinating official (RCO) finds that substantial evidence exists to believe that a contractor's payment request is based on fraud, he must recommend to the agency head, or delegated official, that the contractor's progress payments be reduced or suspended. 10 U.S.C.A. § 2307(I)(1) (West 1998 & Supp. 2001); *see* FAR, *supra* note 2, § 32.006-4(a). The agency head may take such action if he determines that substantial evidence of fraud in fact exists. 10 U.S.C.A. § 2307(I)(2); FAR, *supra* note 2, § 32.006-1(b), -4(c). Within the Army, this authority has been delegated to the Assistant Secretary of the Army (Acquisition, Logistics and Technology). AFARS, *supra* note 6, § 5132.006-1. The Army's RCO is the Chief, Procurement Fraud Division. *Id.* § 5132.006-2.

115. Appeal of Hardrives, Inc., IBCA-2319, 1991 IBCA LEXIS 19, at *16 (Feb. 6, 1991) ("such denials of a contractor's claims do not constitute settling, compromising, paying, or otherwise adjusting any claim involving fraud—to the contrary"); *cf.* Application Under the Equal Access to Justice Act Aislamientos y Construcciones Apache S.A., ASBCA No. 45437, 1997 ASBCA LEXIS 235, at *5-6 (Dec. 2, 1997) (although the investigation did not reveal fraud, discrepancies in the contractor's claim "were so pervasive as to justify the position of the Government in denying the claim in total").

116. Defrauding the United States on a contract constitutes "a material breach justifying a termination of the entire contract for default." Ricmar Eng'g, Inc., ASBCA Nos. 44260, 44673, 1997 ASBCA LEXIS 109, at *11 (June 23, 1997) ("A contractor which engages in fraud in its dealing with the government on a contract has committed a material breach justifying a termination of the entire contract for default . . . .") (citing Cosmos Eng'g, Inc., ASBCA No. 23529, 84-2 BCA ¶ 17, at 268); *see* Stubbs, *supra* note 93, at 159 (may cancel the contract); *see also* Joseph Morton Co. v. United States, 3 Cl. Ct. 120, 122 (1983), *aff'd*, 757 F.2d 1273, 1279 (Fed. Cir. 1985); Umpqua Excavating & Paving Co., AGBCA No. 84-185-1, 1990 AGBCA LEXIS 41, at *31 (Oct. 26, 1990); Michael C. Avino, ASBCA No. 31752, 89-3 BCA ¶ 22, at 156.

held that the U.S. Department of Agriculture (USDA) acted arbitrarily and capriciously when its Suspension Authority suspended a contractor after USDA COs had previously found the contractor responsible.[119]

The court's opinion is particularly unsettling for two reasons. First, the COFC appears to posit that an individual CO's responsibility decision binds an agency for purposes of determining whether a contractor is responsible in the suspension and debarment context.[120] Second, the court appears to extend the collective knowledge doctrine to the USDA by imputing the knowledge of an agency investigation to the COs.[121] Significantly, the court's opinion failed to indicate whether the COs, which found Lion Raisin a responsible contractor for five contracts following the initial agency investigation, were even aware of the investigation, its result, or the underlying basis for the allegations. Notwithstanding the CO's apparent ignorance of these facts, the court found that the *agency* had determined that the contractor was responsible, following the completion of an initial agency investigation, because these individual COs had made responsibility determinations.[122] If the COFC actually intended to reach the conclusions that its opinion suggests, then the mere existence of an investigation will require a non-responsibility determination,[123] and agencies will more readily publicize the existence of ongoing investigations to their COs.

Agencies may certainly take administrative action to suspend or debar the fraudulent contractor, or any of its employees, subject only to meeting the FAR's requirements for taking such action.[124] In addition to serving to protect the integrity of the procurement system, suspension or proposed debarment would be consistent with any future DOJ litigation position that the United States had been defrauded in some manner. Further, responsible contractors faced with the potential loss of future government business will be encouraged to identify miscreant employees, correct any systemic problems giving rise to the fraud, and cooperate with the government's investigation and subsequent litigation.[125] Because the suspension and debarment process requires notice to the contractor and the release of some information,[126] however, advanced coordination with the assigned DOJ attorney, if applicable, or some other authoritative body is critical.[127]

Remaining constraints are generally policy driven, such as the requirement for advanced notice and coordination of remedies so that contractual and administrative actions do not interfere with fraud investigations and subsequent litigation. Also,

117. FAR, *supra* note 2, § 9.104-1; *see also* Garten-und Landschaftsbau Gmbh Frank Mohr, B-237276-7, 1990 U.S. Comp. Gen. LEXIS 189 (Feb. 13, 1990) (protest denied; CO determined contractor had an unsatisfactory record of business integrity based on information obtained during Army CID and German investigations). Repeated nonresponsibility determinations, however, may constitute an impermissible de facto debarment or suspension. *Garten-und*, 1990 U.S. LEXIS 189, at *8; *cf.* TLT Constr. Corp. v. United States, 50 Fed. Cl. 212, 215 (2001) ("De facto debarment occurs when an agency bars a contractor from competing for government contracts for a period of time without following the applicable debarment procedures found in the Federal Acquisition Regulations.").

118. 51 Fed. Cl. 238 (2001).

119. *Id.* at 249.

120. *See id.* at 247, 248 n.7, 249. *But cf.* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1339 (Fed. Cir. 2001) ("The decision at issue [a responsibility determination] is not the decision of the agency or agency head, but the decision of the contracting officer—an individual within the agency.").

121. Pursuant to the collective knowledge doctrine, an entity is charged with all the knowledge of any of its employees who are acting within the scope of their employment. *See, e.g.*, United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987) (criminal case); United States v. U.S. Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (FCA case).

122. *Lion Raisins, Inc.*, 51 Fed. Cl. at 247.

123. The CO must make an "affirmative determination of responsibility." FAR, *supra* note 2, § 9.103(b). "In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall male a determination of nonresponsibility." *Id. But cf.* Computer Data Sys., Inc. v. Dep't of Energy, GSBCA No. 12824-P, 1994 GSBCA LEXIS 481, at *150 (July 15, 1994) (CO is not required to make nonresponsibility determination based on knowledge of an ongoing investigation; "[p]rotestor has cited no statute, regulation, or other authority which has been violated by the contracting officer in declining to rely on open investigations or a settlement").

124. *See, e.g.*, Russek & Burkhard Gmbh, Gebaudereinigung, B-244692.2, 1991 U.S. Comp. Gen. LEXIS 994 (Aug. 27, 1991) (protest denied; Army suspension upheld based on statements made by contractor to German police during ongoing investigation); *see generally* FAR, *supra* note 2, subpt. 9.4.

125. *See, e.g.*, Stubbs, *supra* note 93, at 146 (contractor suspended). "The Air Force made it plain to [the contractor] that ending the suspension depended in part, on the company's willingness to cooperate in the Government's investigation and to make restitution. Cooperation is a legitimate factor in debarment and suspension decisions." *Id.* at 160 (citing FAR, *supra* note 2, §§ 9.406-1(a)(4)-(5), 9.407-1(b)(2) (1992)).

126. FAR, *supra* note 2, §§ 9.406-3(c) ("[a] notice of proposed debarment shall be issued"), 9.407-3(c) ("[w]hen . . . suspended, they shall be immediately advised"); *see* Stubbs, *supra* note 93, at 164; *cf. Lion Raisins, Inc.*, 51 Fed. Ct. at 248 ("The court does not disagree with the proposition that '[t]here may be circumstances where substantial Government interests would be prejudiced even by disclosure of enough facts to show 'adequate evidence' for the suspension.'") (citation omitted); Horne Brothers Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972) ("There may be reasons why the Government should not be required to show any of its evidence to the contractor, particularly reasons of national security, or, more likely, the concern that such a proceeding may prejudice a prosecutorial action against the contractor.").

127. *See supra* notes 93-97 and accompanying text. The FAR contemplates coordination with the DOJ before a hearing for fact based suspensions. *See* FAR, *supra* note 2, § 9.407-3(b)(2).

CO action is restricted by various practical limitations, such as being able to meet the government's burden of proof if any action is challenged before the completion of the investigation or initiation of litigation. Accordingly, one particularly salient consideration for the agency is determining when, and under what circumstances, the agency or CO may employ these remedies.

Agency regulations provide little guidance on the issues of timing and proof. For example, *AR 27-40* lists twelve contractual and six administrative remedies to "be considered in response to *confirmed* fraudulent activity."[128] Unfortunately, *AR 27-40* does not explain when the fraudulent activity has been "confirmed" or by whom. One would think that the fraud has been confirmed following a judicial determination to that effect, but the follow-on regulatory provision encourages DOJ coordination for "cases which are pending review or action by DOJ" and "[i]n the case of an ongoing investigation."[129] When read in its entirety, the section suggests that fraud can be "confirmed" well short of a civil judgment or criminal conviction.

One particular contractual option that does not violate the statutory and regulatory restrictions on the CO, but which raises important timing and proof considerations, is revocation of acceptance. A CO may revoke acceptance based on latent defects, fraud, or gross mistakes amounting to fraud.[130] The decision to revoke acceptance implicates timing considerations during a procurement fraud investigation. First, the revocation must occur in a timely manner,[131] but it may be necessary to delay revocation so as not to alert the contractor prematurely or to obtain the requisite proof to support such action.[132] The nonconforming nature of the goods does not, by itself, constitute fraud or support revocation.[133] Delaying revocation for a reasonable period to determine if the parts are indeed nonconforming, or during the pendency of an investigation, should not prejudice the government's right to revoke acceptance.[134]

After the revocation, the United States enjoys a number of additional rights, including having the contractor replace or repair the defective goods.[135] Requiring the replacement of defective goods should only be accomplished after prior coordination with applicable law enforcement officials, the procurement fraud advisor, and/or the assigned DOJ attorney. The defective parts must be preserved as evidence of fraud.[136] Further, replacement or repair of nonconforming goods may inject an unnecessary quantum issue in the damages portion of any subsequent litigation.[137] Finally, depending upon the DOJ's litigation strategy, permitting replacement or repair may be inconsistent with, and undercut, the government's case with a jury.

Conclusion

The normally broad authority of a CO to resolve a contract dispute is severely curtailed for claims involving fraud. This loss of authority, which is grounded in both statutory and regu-

128. AR 27-40, *supra* note 6, para 8-10(a) (emphasis added). *Cf.* SECNAVINSTR. 5430.92A, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY encl. 1 (20 Aug. 1987) ("Examples of Civil, Contractual, and Administrative Remedies That Can Be Taken in Response to *Evidence* of Procurement Fraud.") (emphasis added).

129. AR 27-40, *supra* note 6, para. 8-10(b).

130. Chilstead Bldg. Co., ASBCA No. 49548, 2000 ASBCA LEXIS 163, at *21-22 (Aug. 30, 2000); *see also* FAR, *supra* note 2, §§ 52.246-2(k) ("Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract."), 246-7(f); *see id.* § 52.246-3(h)(1), -6(h)(1); *see generally* CIBINIC & NASH, *supra* note 31, at 872-76.

131. *Chilstead Bldg. Co.*, 2000 ASBCA LEXIS 163, at *23 ("Revocation of acceptance must be done within a reasonable time after the latent defect, gross mistake, or fraud is discovered, or could have been discovered with ordinary diligence."); Ordinance Parts & Eng. Co., ASBCA No. 40293, 90-3 BCA ¶ 23, at 141; *see* Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672, 674 (2000) (latent defect).

132. To sustain a revocation of acceptance based on fraud, the United States must prove, by a preponderance of the evidence, "(1) a misrepresentation of a material fact; (2) an intent to deceive; and (3) reliance on the misrepresentation by the government to its detriment." BMY-Combat Sys., Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 116 (1997); *see Chilstead Bldg. Co.*, 2000 ASBCA LEXIS 163, at *24-25 (similar criteria before the boards of contract appeals); CIBINIC & NASH, *supra* note 31, at 872. For gross mistake amounting to fraud, the elements are essentially the same, except that the United States is not required to prove intent to deceive or mislead. *BMY-Combat Sys. Div.*, 38 Fed. Cl. at 123; *Chilstead Bldg. Co.*, 2000 ASBCA LEXIS 163, at *25; CIBINIC & NASH, *supra* note 31, at 873.

133. CIBINIC & NASH, *supra* note 31, at 873 ("Performance of nonconforming work, in and of itself, does not constitute fraud and overcome final acceptance.") (citing Henry Angelo & Co., ASBCA No. 30502, 87-1 BCA ¶ 19, at 619).

134. Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672, 674-75, 677 (2000); *see* Umpqua Excavation & Paving Co., AGBCA No. 84-185-1, 1990 AGBCA LEXIS 41, at *30 (Oct. 26, 1990) (government did not forfeit right to revoke by waiting until corporate officer pled guilty).

135. CIBINIC & NASH, *supra* note 31, at 881 ("Normally, the Government seeks to have the contractor repair or replace the defective work at the contractor's expense.") (citations omitted); *see* FAR, *supra* note 2, § 52.246-2(l).

136. *Cf.* Stemaco Prods., Inc. ASBCA No. 45469, 1994 ASBCA LEXIS 221, at *13-15 (July 29, 1994) (noting that a criminal Assistant U.S Attorney had instructed the CO to retain defective life preservers as evidence; the board reasoned that normally the goods should be returned following a revocation of acceptance, but the failure to do so does not "automatically negate revocation as a matter of law"). *But cf.* CIBINIC & NASH, *supra* note 31, at 883 ("Upon proper revocation of acceptance, the Government also has the right to return the items to the contractor and demand the return of the purchase price . . . . The work must be returned to the contractor unless it is utterly worthless.") (citations omitted).

latory law, is triggered by the initiation of an investigation and probably as early as when the CO reasonably suspects, or should suspect, that the claim is fraudulent. Furthermore, once the claim becomes the subject of litigation for the DOJ, the CO loses even more authority.

The CO continues to retain authority to administer the contract, and resolve other claims arising from it, with the possible exception of contracts void at their inception. As a matter of policy and practice, however, COs must coordinate their contractual and administrative actions with applicable law enforcement agency and DOJ officials to avoid interfering with ongoing investigations and potential litigation. When responding to suspected procurement fraud, the United States is best served when the contracting and fraud communities coordinate and use the full range of remedies at the government's disposal.

137. Under federal contract law, the contractor is normally credited with any benefit received by the United States resulting from the use of the defective goods or work. CIBINIC & NASH, *supra* note 31, at 883. In some cases, the CO may elect to negotiate "an equitable reduction in price where the Government decides not to have the defect corrected." *Id.* at 882; *see also* FAR, *supra* note 2, § 52.246-2(h). By comparison, in an FCA case, the DOJ will take the position that the defendant is to be credited for any repair or replacement *after* the government's original damages are trebled. *See* United States v. Bornstein, 423 U.S. 303, 314 (1976); United States v. Thomas, 709 F.2d 968, 972 (5th Cir. 1983); United States v. Entin, 750 F. Supp. 512, 519 (S.D. Fla. 1990). As a prophylactic measure, the CO should consider including language that mirrors FAR section 33.210(b), clearly indicating that any replacement or repair does not settle, compromise, or adjust the disputes claim or resolve any fraud matters.

A Trial Counsel's Guide for Article 13 Motions: Making Your Best Case

Captain Jeffery D. Lippert
Senior Trial Counsel
XVIII Airborne Corps & Fort Bragg
Fort Bragg, North Carolina

Introduction

You are the trial counsel for an active-duty infantry brigade, about to try a drug distribution and aggravated assault case. The accused is pleading guilty. The pretrial agreement and stipulation of fact are ready. Your sentencing witnesses are present and prepared. You are ready to go. Then, near the end of the pretrial Rule for Court-Martial (RCM) 802[1] session, minutes before you are to go into court, the defense counsel announces that she intends to move for appropriate relief under Article 13, Uniform Code of Military Justice (UCMJ).[2]

She states that the accused's unit made him hobble across the company area, before trial, wearing hand-irons and shackles in front of his entire company. The company was practicing for a change of command ceremony. When the accused and his escort were about fifty meters to the left of the company formation, the commander ran up and quickly spoke to the first sergeant. The first sergeant then ordered the company to execute a left face and parade rest. He then stated to the company in a loud voice, "You all see that . . . that's what happens to drug dealers and scum in this company." The first sergeant then spat on the ground, ordered a right face, and continued the change of command rehearsal.

The defense counsel claims that the unit's actions violated Article 13, and that her client is entitled to substantial sentence credit. She intends to put the accused on the stand to testify about the incident, as well as other soldiers who witnessed the unit's actions. The military judge, with a distinctly unhappy expression on his face, turns to you and says, "Well, trial counsel, how do you intend to handle this?"

Article 13 motions are a regular procedure for defense counsel seeking sentence relief for real or perceived penalties imposed on their clients by the chain of command before trial.[3] This note reviews the standards for relief and waiver of Article 13 violations, and discusses how trial counsel and the chain of command can work together to present a persuasive defense against a claim of unlawful pretrial punishment.

Article 13 Standard

Motions for Relief

Article 13, UCMJ, prohibits the imposition of punishment or penalty on an accused before trial, as well as pretrial arrest or confinement conditions more rigorous than required to ensure the accused's presence at trial.[4] Motions for appropriate relief under Article 13 generally fall into two categories: (1) those in which the accused claims he was punished by conditions of confinement or arrest more rigorous than necessary;[5] and (2) those in which the accused claims that some other unit or chain of command action punished or penalized him before trial.[6] Courts routinely award administrative and judicial sentence credit as relief for violations of Article 13.[7]

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1. MANUAL FOR COURTS-MARTIAL, R.C.M. 802 (2000) [hereinafter MCM].

2. UCMJ art. 13 (2000).

3. *See, e.g.*, United States v. Fulton, 55 M.J. 88, 89 n.1 (2001) (accused was repeatedly required to refer to himself as "prisoner bitch" and "prisoner jackass," questioned about his sexual orientation, ordered to perform a strip tease routine in front of other guards and prisoners, and ordered to do other similar acts which constituted unlawful punishment); United States v. Stringer, 55 M.J. 92 (2001) (accused was read his rights by his commander in front of his unit, handcuffed in front of the unit, and subjected to ridicule by his drill sergeants).

4. UCMJ art. 13. Article 13 states:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Id.

5. *See, e.g.*, United States v. Quintero, 54 M.J. 562 (Army Ct. Crim. App. 2000) (appellant, a noncommissioned officer, claimed violation of Article 13 when confinement facility authorities required him to work on details with enlisted men while he was in pretrial confinement).

6. *See, e.g.*, United States v. Starr, 53 M.J. 380 (2000) (appellant claimed violation of Article 13 when assigned different duties than his normal occupational specialty and ordered him to surrender special headgear for extended period before trial).

Whether the court is dealing with a "more rigorous" or a "punishment-or-penalty" type Article 13 motion, the factors the court will consider in determining whether an accused has suffered pretrial punishment are similar. These factors, which are meant to assist the military judge, are:

> (1) What similarities, if any, in daily routine, work assignments, clothing attire, and other restraints and control conditions exist between sentenced persons and those awaiting disciplinary disposition;
>
> (2) What relevance to customary and traditional military command and control measures can be established by the government for such measures;
>
> (3) Are the requirements and procedures primarily related to command and control needs, or do they reflect a primary purpose of stigmatizing [the accused]; and
>
> (4) Was there an "intent to punish or stigmatize [the accused]."[8]

The lines between these factors are often blurred, and the weight given to each particular factor varies on a case-by-case basis. In some cases, the court may view seemingly innocuous, well-intentioned unit actions as pretrial punishment.[9] In other cases, however, the court may find that severe limitations on an accused's liberty are justified.[10] Because most accused soldiers do not spend time in pretrial confinement, trial counsel more frequently face punishment-or-penalty type Article 13 motions. Accordingly, after a brief discussion of waiver, this note focuses on responding to this type of motion.

Waiver and Article 13

Most motions or objections are considered waived if not raised in a timely manner at trial.[11] Unless affirmatively waived,[12] however, an accused may make a motion for relief based on a violation of Article 13 at any time, even on appeal.[13] Appellate courts may consider evidence not contained in the record of trial to determine whether an accused suffered pretrial punishment.[14] Therefore, even if the accused does not request relief, the trial court should address pretrial punishment of the accused, obtaining an affirmative waiver of Article 13 issues if the accused does not seek such relief.

Trial counsel have a role in this process. In guilty plea cases, trial counsel should ensure that the pretrial agreement contains a specific waiver of Article 13 issues. In other cases, trial counsel should remain alert and ensure that the military judge discusses a waiver of all Article 13 issues before the accused enters his plea[15] or at some other time during trial.[16]

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7. *See* United States v. Fulton, 55 M.J. 88, 89 (2001) (concurring with the lower service appellate court that a military judge has the power to dismiss charges because of illegal pretrial punishment); United States v. Stringer, 55 M.J. 92, 94 (2001) (discussing the broad powers of the military judge to grant administrative credit for illegal pretrial punishment, but declining to address whether the military judge had authority to order the convening authority to publish an article in the post newspaper regarding the propriety of the command's conduct). *See generally* Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, Army Law., Aug. 1999, at 1 (administrative credit is applied against the approved sentence to confinement; judicial credit is applied against the adjudged sentence, reducing the sentence at trial).

8. United States v. Smith, 53 M.J. 168, 172 (2000) (quoting Francis A. Gilligan & Fredric I. Lederer, Court-Martial Procedure § 4-90.00, at 136-37 (2d ed. 1999)). *See also Quintero*, 54 M.J. at 567 (applying the four factors announced in *Smith* and finding no basis for the accused's claim of unlawful pretrial punishment).

9. *See, e.g.*, United States v. Francis, 54 M.J. 636, 641 n.2 (Army Ct. Crim. App. 2000) (trial judge found a violation of Article 13 when a platoon leader told members of his platoon that the "accused had come up hot on a urinalysis, was going to get court-martialed and go to jail, and that they needed to stay away from him as any association would be bad for them").

10. *See, e.g.*, United States v. Sittingbear, 54 M.J. 737 (N-M. Ct. Crim. App. 2001) (court concluded that accused's placement in maximum custody with only limited time out of his cell for over six months before trial was not pretrial punishment because measures were related to legitimate government objectives).

11. *See* MCM, *supra* note 1, R.C.M. 905(e).

12. *See* United States v. Huffman, 40 M.J. 225, 227 (C.M.A. 1994).

13. *See* United States v. Scalarone, 54 M.J. 114, 117 (2000) (affirming Court of Criminal Appeals decision to grant eighty-seven days sentence credit to soldier whose conditions of pretrial confinement were more rigorous than necessary even though accused did not raise issue at trial; accused presented affidavits in support of his claim before the lower appellate court); *Huffman*, 40 M.J. 225.

14. *See, e.g.*, *Scalarone*, 54 M.J. at 115.

15. *See* U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 2-1-3 (1 Apr. 2001).

16. *See Scalarone*, 54 M.J. at 118 (Cox, J., concurring).

Responding to Article 13 Motions

Receiving the Motion

Article 13 motions should be made before pleas are entered. The defense carries the burden by a preponderance of the evidence.[17] Often, the only evidence the defense presents is the testimony of the accused. This testimony can be vague and unfocused, and may be unsupported by any documents or physical evidence. The defense may raise the motion before arraignment, but, for tactical reasons, may defer it until sentencing.[18] Sometimes, as in the introductory fact pattern to this note, the trial counsel is unaware that the accused intends to raise Article 13 issues until a few minutes before trial. Nonetheless, if the accused can articulate any kind of action that the military judge could consider as pretrial punishment, the trial counsel will need to respond.

Form of the Motion

The trial counsel should ask the military judge to make the defense put its Article 13 motion in writing.[19] Responding to a written motion is much easier than responding to one made orally. With a written motion, the defense must narrow the focus of their request. This enables trial counsel to respond more effectively to the allegations raised by the defense. More importantly, a written motion gives the military judge a better perspective on the merits of the motion.

Time to Respond

The trial counsel may need to ask the military judge for a continuance to discuss the motion with the chain of command and prepare a response.[20] The amount of time the military judge gives is usually proportional to the amount of notice the defense gave to the trial counsel. If the trial counsel first hears of the motion in court, the military judge may grant a generous continuance. If, however, the trial counsel knew or should have known that the defense would make an Article 13 motion, the military judge will probably not give the trial counsel much time to respond. Regardless, whatever the circumstances, the trial counsel must gather facts and prepare any necessary witnesses.[21]

Gathering Facts

Ideally, the defense has given the trial counsel a written motion outlining the facts and arguments offered in support of the motion. If not, the trial counsel should have notes on the defense's oral motion, including testimony and arguments from court.[22] Armed with this information, the trial counsel must immediately meet with the chain of command and anyone else involved, including relevant defense witnesses, to "get their side of the story." Trial counsel should check each "fact" for accuracy to find out what really happened and to develop a list of witnesses to testify on disputed issues. The trial counsel must gather the facts in light of the purpose behind each pretrial condition or measure placed on the accused. In particular, the trial counsel needs to focus on whether the unit action was a relevant customary control measure, or whether the action reflected an intent to stigmatize or otherwise punish the accused.[23] The trial counsel must also gather any relevant documents (for example, conditions on liberty orders, charge of quarters logs, witness notes, counseling statements, and hand-receipts) and review them.

Witness Preparation

Preparing the chain of command to testify for an Article 13 motion can be difficult. It is an uncomfortable situation for them; the defense has accused them of treating one of their own soldiers poorly. They often become defensive, and may be irritated at the accused and the witnesses who testified about the alleged poor treatment. They will probably feel rushed, and may be irritated at the trial counsel, too.

Despite these distractions, the trial counsel and the chain of command must focus on the two issues at hand: the military control function of their action, and the reasons why it was not intended to stigmatize or punish the accused.[24] Trial counsel must go over the facts with the witnesses. Leaders sometimes do things without thinking of the underlying purpose, if any.

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17. *See* MCM, *supra* note 1, R.C.M. 905(c)(1).

18. *See id.* R.C.M. 905(d).

19. *See id.* R.C.M. 905(a).

20. *See id.* R.C.M. 906(b)(1) discussion.

21. *Id*.

22. Trial counsel could also ask the court reporter for a transcript or tape recording of the Article 39(a) session in which the defense counsel and accused presented the motion.

23. United States v. Smith, 53 M.J. 168, 172 (2000).

24. *Id*.

"That's the way we always do it," or "That's our SOP" are common answers from company-level leaders. In most cases, however, when given an opportunity to review their actions, the chain of command can articulate a legitimate reason for every action they took involving an accused. Getting this information across clearly to the judge is simply a matter of good witness preparation before they take the stand.

Testimony

The trial counsel should ask the chain of command witnesses simple, non-leading questions, such as: What did you do? What order did you give? Why did you do that? The witness should be the focus of the questions. If the witness understands why he is testifying, these simple questions allow him to explain what happened in his own words. The witness will also be better prepared for cross-examination. The trial counsel should advise the witnesses to remain even-tempered and professional, and address all answers to the military judge. They should be calm and respectful to the court, counsel, and the accused. They should admit any mistakes they made, but be firm about their motives. Such a presentation will help legitimize the chain of command's actions in the military judge's mind.

Arguing the Motion

The trial counsel should make his argument short and concise, addressing the relevant issues and debunking the defense counsel's points. The trial counsel may not have time to script the argument for an Article 13 motion, but if he can, he should not merely read it to the judge. A checklist or outline may be a better tool to help the trial counsel cover the necessary points.

Conclusion

A judge reviewing this note's introductory fact pattern would have little trouble finding a violation of Article 13. A judge might find that having an accused walk from point A to point B in hand irons and shackles was a relevant military control measure; however, most judges would likely find that walking the accused past the entire company, and then maneuvering the unit for a better look at the accused in irons, reflect a clear intent to stigmatize the accused. Such actions are inappropriate and demonstrate a training deficiency on the part of the chain of command. An accused subjected to such treatment would almost certainly receive some sentence credit.[25]

Trial counsel should be relieved that Article 13 motions are not a part of every case. Dealing with these motions is time consuming and requires a significant amount of effort better spent preparing for the actual trial. Using some of the techniques described in this note can help trial counsel make their best case, minimizing wasted time and effort, the next time they face an Article 13 motion.

A Preference for Native-American Contractors

Mr. Paul D. Hancq
Office of the General Counsel
Department of the Army

Major Karen S. White, USAF
Staff Judge Advocate, 97th Air Mobility Wing
Altus Air Force Base, Oklahoma[26]

Introduction

Commercial activities studies, also known as competitive sourcing or "A-76"[27] competitions, can be expensive and can take years to complete. Furthermore, they can be disruptive to mission and morale. So one day, you are sitting in a meeting with some installation people, and somebody comes in and says a law allows us to skip all that, as long as we contract with a Native-American firm. Is it really that easy? What is this all about? The U.S. District Court for the District of Columbia has addressed this issue.[28]

Facts

In *American Federation of Government Employees v. United States*,[29] the controversy arose from source selections for civil engineering and maintenance work at both Kirtland Air Force Base in Albuquerque, New Mexico, and MacDill Air Force Base in Tampa, Florida. Pursuant to 10 U.S.C. § 2461 and *Office of Management and Budget Circular A-76, Performance*

25. Relief for pretrial punishment may also include dismissal of charges. *See, e.g.*, United States v. Fulton, 55 M.J. 88 (2001) (holding that the military judge has the authority to dismiss charges as a remedy for unlawful pretrial punishment).

26. Major White co-authored this note while assigned as Professor, Contract and Fiscal Law, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

27. Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities (Aug. 4, 1983, Revised 1999).

28. Am. Fed'n of Gov't Employees v. United States, 104 F. Supp. 2d 58 (D.D.C. 2000); *see also* Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4 (D.D.C. 2002).

29. 104 F. Supp. 2d at 58.

of Commercial Activities, the Air Force initiated cost studies to determine whether it would be cost-efficient to contract out the base maintenance work that Department of Defense (DOD) employees were performing at those two bases.[30]

The basic steps of the A-76 study were as follows: (1) develop a performance work statement; (2) develop a management study that shows the government's Most Efficient Organization (MEO); (3) develop an in-house (that is, using government employees) cost estimate; (4) solicit bids/offers from private contractors; (5) compare the in-house cost estimate to the selected private contractor's bid/offer; and (6) the administrative appeals process.[31]

Early in Kirtland's A-76 process, the Air Force decided to forego the normal A-76 process and instead award the civil-engineering contracts to private firms owned by Native Americans.[32] The authority for that action was Section 8014 of the Department of Defense Appropriations Act, 2000, which permitted conversion of a function, without cost comparison, from performance by DOD employees to performance by a contractor with at least fifty-one percent Native-American ownership.[33] After reviewing the capability statements from three Native-American owned firms, the Air Force selected Chugach Alaska Corporation.[34]

The plaintiff union and the individual-employee plaintiffs first sought to enjoin the defendants, the United States and the Secretary of the Air Force,[35] from using the Section 8014 preference for Native-American-owned firms. The court denied the plaintiffs' application for a preliminary injunction.[36]

The next phase of litigation involved cross-motions for summary judgment on the issue of the constitutionality of Section 8014(3).[37] The court granted the defendants' motion, denying the plaintiffs' motion.[38]

Discussion

On the preliminary issue of standing to sue, the court concluded that the individual-employee plaintiffs had standing to challenge the action at Kirtland. The court found that the operation of Section 8014(3) "deprived the plaintiffs of the opportunity to compete," and was "directly traceable to the governmental conduct at issue, i.e., the Air Force's award of that civil engineering contract to Chugach."[39] Furthermore, the alleged injury was "likely to be redressed by a favorable decision" of the court,[40] thereby satisfying all three prongs of the individual standing test.[41] The court also concluded the American Federation of Government Employees (AFGE) met the organizational standing requirements.[42]

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30. *Id.* at 60-61.

31. *Id.* at 61.

32. *Id.*

33. Pub. L. No. 106-79, § 8014, 113 Stat. 1212, 1234 (enacted Oct. 25, 1999) [hereinafter 2000 DOD Appropriations Act]. Section 8014 states:

> None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this Act, is performed by more than 10 Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: Provided, That this section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that: (1) is included on the procurement list established pursuant to section 2 of the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or (3) is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.

Id.

34. *Am. Fed'n of Gov't Employees*, 104 F. Supp. 2d at 62.

35. In addition to these two original defendants, Chugach Management Joint Venture and Chugach Management Services, Inc., intervened as defendants. *Id.* at 59.

36. *Id.* at 61. MacDill Air Force Base had also decided to use Section 8014(3) to convert civil engineering functions directly to Chugach Management Services (a subsidiary of Chugach Alaska Corporation), and the preliminary injunction request initially included these functions. The court found the named employees had no standing to challenge the actions at MacDill Air Force Base because they were not employees at MacDill, and dismissed the case as to MacDill. *Id.* at 66. Therefore, the court's holding only applied to the actions at Kirtland Air Force Base.

37. Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4 (D.D.C. 2002).

38. *Id.* at 7.

39. *Id.* at 14-15.

40. *Id.* at 15.

As with the preliminary injunction request, the plaintiffs asserted a violation of the equal protection component of the Fifth Amendment Due Process clause and argued the appropriate standard of review was strict scrutiny, as the Section 8014(3) preference was a racial classification. The defendants argued, and the court agreed, that rational basis was the appropriate standard because "Section 8014(3) encompasses a political, rather than race-based, classification."[43] The court further noted the constitutional power of the legislative arm to regulate commerce with Indian tribes, and highlighted the defendants' argument that Section 8014(3) furthers the government policies of Indian self-determination, the United States' trust responsibility to Native American tribes, and the promotion of Native American community self-sufficiency.[44] The court concluded that "no reasonable trier of fact could find that Section 8014(3) is not a reasonable method for fulfilling Congress' special responsibilities to Alaska Natives."[45] In fact, the court said, "[T]he preference is constitutional because it is a reasonable tool to further these enumerated goals."[46]

Congress continued the Section 8014 preference for Fiscal Year 2002.[47] Section 8014 is identical in Fiscal Years 2000 and 2002, except the 2002 version applies to Indian tribes, as defined in 25 U.S.C. § 450b(e), and Native-Hawaiian organizations, as defined in 15 U.S.C. § 637(a)(15), rather than "Native Americans."[48] Thus, the issue of the Section 8014 preference continues to present itself.

The facts of the AFGE case present an issue that the court did not address: the issue of competition. As a general rule, the DOD must procure its needs by the use of full and open competition to the maximum extent practicable.[49] Under certain circumstances, it is permissible to establish or maintain alternative sources by use of full and open competition after exclusion of sources.[50] In addition, there is authority for other than full and open competition.[51] Notably, Section 8014 does not provide any exceptions to the law and regulation on competition among the private-sector offerors.[52]

Section 8014 provides, essentially, that conversion to firms mostly owned by Native Americans (Fiscal Year 2000 version), or firms mostly owned by Indian tribes or Native-Hawaiian Organizations (Fiscal Year 2002 version), will be exempt from the application of two statutes. The first is the Section 8014 requirement to perform a most efficient and cost-effective organization analysis.[53] The second is 10 U.S.C. § 2461, which requires a cost comparison between the MEO (of government employees) and the selected private contractor.[54] In other

41. An individual must satisfy a three-prong test to establish standing. First, the individual must have suffered some injury in fact. *Id.* at 9 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). Second, the injury must be fairly traceable to the governmental conduct alleged. *Id*. at 10 (citing Warth v. Seldin, 422 U.S. 490, 504 (1975)). Finally, a favorable decision of the court must be likely to redress the alleged injury. *Id.* (citing *Lujan*, 503 U.S. at 561).

42. *Id*. Organizations must meet a separate three-part test.

> Standing exists where the organization's members (1) would have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to its purpose, and, finally, (3) neither the claims asserted nor the relief requested requires the participation of each of the organization's individual members.

Id. (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)).

43. *Id*. at 18. The court noted case precedent that "specifically considered Native Americans as a political classification," observing "that Indians [are] not . . . a discrete racial group, but, rather . . . [are] members of quasi-sovereign tribal entities." *Id.* at 19-20 (citing Morton v. Mancari, 417 U.S. 535 (1974)).

44. *Id*. at 18.

45. *Id.* at 24. The court earlier discussed the Treaty of Cession with Russia, which noted that "uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes." *Id.* at 21. The court further cited the Alaska Natives Claims Settlement Act, which recognizes as a goal fostering self-determination and financial independence among the Alaska Natives. *Id.* at 22 n.9.

46. *Id*. at 24.

47. *See* Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8014, 115 Stat. 2230 (enacted Jan. 10, 2002) [hereinafter 2002 DOD Appropriations Act].

48. *Compare id. with* 2000 DOD Defense Appropriations Act, *supra* note 33, § 8014. The 2000 DOD Defense Appropriations Act did not define the term "Native Americans" for the purpose of Section 8014. *See* 2000 DOD Defense Appropriations Act, *supra* note 33, § 8014.

49. Competition in Contracting Act, 10 U.S.C. § 2304(a)(1) (2000); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 6.1 (June 1997) [hereinafter FAR]. Under full and open competition, all responsible sources are permitted to compete for the procurement.

50. *See* 10 U.S.C. § 2304(b); FAR, *supra* note 49, subpt. 6.2; U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. subpt. 206.2 (Apr. 1, 1984) [hereinafter DFARS].

51. See 10 U.S.C. § 2304(c) (listing seven statutory exceptions that can justify other than full and open competition) *see also* FAR, *supra* note 49, subpt. 6.3; DFARS, *supra* note 50, subpt. 206.3.

52. 2002 Appropriations Act, *supra* note 47, § 8014.

words, Section 8014 exempts these conversions from the normal requirement to prove that the private contractor will be cheaper and more efficient than that government organization, but that is all it does. Section 8014 does nothing to the normal rule that competition is necessary when selecting one private contractor among many. It does not authorize sole-source contracting.[55]

The Path Ahead

Army organizations facing a conversion decision may choose to use the Section 8014 preference. They can convert one or more functions from performance by government employees to performance by a contractor that meets the Section 8014 criteria, without doing an MEO analysis, and without doing a cost comparison. That can be desirable, since it could save time and money, and may be less disruptive to the mission. Army installations considering use of the Section 8014 preference should, however, be aware of the pitfalls.

As previously noted, use of the Section 8014 preference does not avoid the need to comply with the law of competition. In full and open competition, though, all responsible sources are permitted to make offers, which could attract all kinds of firms, including those not at least fifty-one percent owned by Native-American Indian tribes, or Native-Hawaiian organizations. It is possible, perhaps even likely, that another kind of firm could or would win a full and open competition. So, is it possible to limit competition to Indian-owned or Native-Hawaiian-owned firms so we can use the Section 8014 preference confidently?

The answer is yes, by award to a contractor that qualifies under the "8(a) program."[56] This program allows the Small Business Administration (SBA) to assist some minority-owned firms, known as small disadvantaged businesses, by sending government work their way. To qualify as a disadvantaged business, the firm must be at least fifty-one percent owned and controlled by persons both socially and economically disadvantaged.[57] To qualify as socially disadvantaged, a person must be a member of a group that has been subjected to racial or ethnic prejudice or cultural bias.[58] There is a rebuttable presumption that American Indians and Native Hawaiians are socially disadvantaged.[59]

Generally, if an activity decides that an 8(a) contract is appropriate for a particular need, it contacts the SBA. The activity may choose the 8(a) firm, the SBA may offer one, or there may be a competition among eligible 8(a) firms. Thus, if the requiring activity arranges with the SBA to obtain an 8(a) firm with at least fifty-one percent ownership by members of Indian tribes or Native-Hawaiian organizations, the requiring activity can select that firm without violating the law of competition, since the activity can legally exclude sources other than the small disadvantaged business.[60] In addition, use of this well-established method of contracting will probably make the conversion less subject to potential constitutional challenge.

The Assistant Chief of Staff for Installation Management, Department of the Army, has specifically endorsed use of the Section 8014 preference with award to an 8(a) firm as a matter of policy.[61] Army leaders should, however, consider the practical drawbacks of using this policy.

One drawback is that it may not produce optimal results from a cost standpoint. One reason that the law prefers compe-

53. *Id.*

54. 10 U.S.C. § 2461.

55. For Section 8014 to be an exception to the requirement for full and open competition, it would need to exempt specifically direct conversions from 10 U.S.C. § 2304(j) (the Competition in Contracting Act requirement for full and open competition). *See* FAR, *supra* note 49, § 6.302-5(c).

56. This program is named after Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000).

57. 13 C.F.R. §§ 124.102-.109 (LEXIS 2002).

58. *Id.* § 124.103(a).

59. *Id.* § 124.103(b).

60. 10 U.S.C. § 2304(b)(2) (2000); FAR, *supra* note 49, § 6.204.

61. *See* Memorandum, DAIM-CS, subject: Army Interim Guidance on Conducting Commercial Activities Studies encl. 3 (6 Sept. 2000) (on file with author).

> [W]hen used in conjunction with the Small Business Administration (SBA) 8(a) Business Development Program, Section 8014 allows the Army to directly convert in-house activities, regardless of size, to performance by Indian Tribe Owned firms (as defined in 25 U.S.C [§] 450b(e)) and Native Hawaiian Organizations (as defined in 15 U.S.C. [§] 637(a)(15)) that participate in the 8(a) program . . . Effective 1 October 2000, commanders may convert in-house activities of any size to contract performance without a cost competition study if the contract is awarded to an eligible 8(a) firm with at least 51% Indian Tribe ownership or Native Hawaiian Organization at a fair market price, even if the conversion results in adverse employee actions.

Id.

tition is that competition tends to produce lower costs and higher quality goods or services. The Section 8014 preference eliminates competition between the MEO and the private contractor. Furthermore, depending on the method used to select the 8(a) firm to perform the function, there may be no competition in the selection of that contractor. The end result could be higher costs and prices over the long run, which may defeat the entire purpose of the competitive-sourcing process.

Other drawbacks to this approach is that it may be harmful to employee morale, and it may increase controversy. Government employees and their unions frequently complain (in litigation and to their senators and congressmen) that they are not being treated fairly in the competitive-sourcing process. Use of the Section 8014 preference deprives them of an opportunity to compete for the work as members of a governmental organization. Some may regard that as fundamentally unfair.

Conclusion

The Section 8014 preference has so far survived constitutional challenge from government-employee unions and individual government employees.[62] While there are some potential drawbacks, as noted above, a direct conversion using Section 8014(3) is a useful tool for Army leaders to use in appropriate circumstances. When combined with the 8(a) program, Section 8014 can provide a relatively fast and efficient way to contract out commercial activities in this era of budgetary constraints.

62. American Fed'n of Gov't Employees, 195 F. Supp. 2d 4 (D.D.C. 2002).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Environmental Law Note

Mitigation Measures in Analyses Under the National Environmental Policy Act (NEPA)

Military environmental law attorneys are often challenged by the complexities and nuances of compliance with the provisions of the NEPA of 1969.[1] The proper use and management of mitigation measures in NEPA analyses can be overlooked on occasion and are worthy of some discussion. This note highlights some of the issues military environmental law practitioners may face when analyzing mitigation measures in conjunction with their reviews of NEPA analyses performed by their commands. Particular emphasis is placed on the mitigation requirements found in the revised Army NEPA regulation.[2]

The NEPA requires federal agencies to prepare an environmental impact statement (EIS) for "major [f]ederal actions significantly affecting the quality of the human environment."[3] Federal agencies often prepare environmental assessments (EAs)[4] to determine whether an EIS is necessary for a particular federal action. The EA process concludes with either a finding that a major federal action significantly affects the quality of the human environment necessitating the production of an EIS, or a finding of no significant impact (FNSI).[5]

Environmental analyses performed by federal agencies under NEPA often include mitigation measures. The regulations of the Council on Environmental Quality (CEQ)[6] implementing NEPA generally define mitigation to include measures that avoid, minimize, reduce, rectify, or compensate for impacts to the physical environment resulting from federal actions.[7]

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1. 42 U.S.C. §§ 4321-4370 (2000).

2. 67 Fed. Reg. 15,290 (2002) (to be codified at 32 C.F.R pt. 651) (superceding U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988)).

3. 42 U.S.C. § 4332. This provision states that

> all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and any other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be eliminated, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

4. The Code of Federal Regulations (CFR) defines *environmental assessment* as follows:

> "Environmental Assessment":
>
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
>
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
> (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9 (LEXIS 2002).

5. The CFR defines *finding of no significant impact* as follows:

> "Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

Id. § 1508.9.

Federal agencies often use such measures in EAs to mitigate environmental impacts below the significance threshold, thus avoiding the requirement to produce an EIS (the mitigated FNSI).[8] The manner in which federal agencies use and manage mitigation commitments made in environmental analyses performed under NEPA is critical to overall compliance with NEPA, particularly in light of the use of mitigated FNSIs.

The Army NEPA regulation[9] covers the subject of mitigation in environmental analyses under NEPA in several places. The Army regulation defines mitigation measures substantially as the CEQ regulations define them.[10] Examples of mitigation measures cited by the Army regulation include maneuver restrictions for tracked vehicles;[11] aerial seeding to reduce erosion problems;[12] changing times or frequency of operations (for example, changing seasons of the year, days of the week, or times of day for various activities);[13] and reducing the effects of construction equipment around protected trees.[14]

The Army regulation states that "[w]hen the analysis proceeds to an EA or EIS, mitigation measures will be clearly assessed and those selected for implementation will be identi-

6. *Id*. §§ 1500-1508.

7. Mitigation is defined as follows:

> "Mitigation" includes:
>
> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

Id. § 1508.20.

8. Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981). Question 40 reads:

> Q. If an environmental assessment indicates that the environmental effects of a proposal are significant, but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?
>
> A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute, regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. [40 C.F.R. §§] 1508.8, 1508.27.
>
> If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping of EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.
>
> In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g. where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. [*Id*. §] 1501.4(e)(2).
>
> Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

46 Fed. Reg. 18,026.

9. 67 Fed. Reg. 15,290 (2002) (to be codified at 32 C.F.R pt. 651).

10. *See id*. at 15,305 (to be codified at 32 C.F.R. § 651.15(a)(1)-(5)).

11. *Id*. at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(c)(1)).

12. *Id*. (to be codified at 32 C.F.R. pt. 651, app. C(c)(2)).

13. *Id*. (to be codified at 32 C.F.R. pt. 651, app. C(c)(3)).

fied in the FNSI or the [Record of Decision]. The proponent must implement those identified mitigations, because they are commitments made as part of the Army decision."[15] The Army regulation further states that "[t]he mitigation shall become a line item in the proponent's budget or other funding document, if appropriate, or included in the legal document implementing the action (for example contracts, leases, or grants)."[16] Importantly, for a mitigated FNSI, the Army regulation states that any promised mitigation measures "become legally binding and must be accomplished as the project is implemented. If any of these identified mitigation measures do not occur, so that significant adverse environmental effects could reasonably be expected to result, the proponent must publish an NOI [Notice of Intent] and prepare an EIS."[17]

The Army regulation also provides guidance on determining what mitigation measures are practical in light of operational and funding constraints.[18] Regarding practicality, the regulation states, "The key point concerning both the manpower and cost constraints is that, unless money is actually budgeted and manpower assigned, the mitigation does not exist."[19]

Another important issue to consider is the monitoring and enforcement of mitigation measures mentioned in NEPA analyses. The CEQ regulations state that "[a] monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation."[20] The CEQ regulations further state that "[a]gencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases."[21] The Army regulation sets out those situations that constitute "important cases."[22] Included are those cases in which changed environmental conditions or activities other than those assumed in the EIS occur, resulting in predictions of adverse environmental impacts being too limited;[23] cases in which the outcome of mitigation is unknown as when new technology is employed;[24] cases in which major environmental controversy is associated with the selected alternative;[25] and cases in which failure of mitigation could result in serious harm to protected species, sites, or areas.[26]

The Army NEPA regulation defines monitoring as either enforcement monitoring[27] or effectiveness monitoring.[28] Enforcement monitoring is basically designed to ensure that mechanisms are built into contracts and agreements with those

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14. *Id*. (to be codified at 32 C.F.R. pt. 651, app. C(c)(4)).

15. *Id*. at 15,306 (to be codified at 32 C.F.R. § 651.15(b)).

16. *Id*.

17. *Id*. (to be codified at 32 C.F.R. § 651.15(c)).

18. *Id*. (to be codified at 32 C.F.R. § 651.15(d)). This section of the regulation states:

> A number of factors determine what is practical, including military mission, manpower restrictions, cost, institutional barriers, technical feasibility, and public acceptance. Practicality does not necessarily ensure resolution of conflicts among these items, rather it is the degree of conflict that determines practicality. Although mission conflicts are inevitable, they are not necessarily insurmountable; and the proponent should be cautious about declaring all mitigations impractical and carefully consider any manpower requirements.

Id.

19. *Id*.

20. 40 C.F.R § 1508.2(c) (LEXIS 2002).

21. *Id.* § 1503.

22. 67 Fed. Reg. 15,306 (2002) (to be codified at 32 C.F.R. § 651.15(h)); *id.* at 15,327 (to be codified at 32 C.F.R pt. 651, app. C(d)).

23. *Id*. at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(1)); *id*. at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)(1)).

24. *Id*. at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(2)); *id*. at 15,327 (to be codified at 32 C.F.R. pt., app. C(d)(2)).

25. *Id*. at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(3)); *id*. at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)(3)).

26. *Id*. at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(4)); *id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)(4)). The paragraph at Appendix C states that important cases include:

> (4) Failure of a mitigation measure, or other unforeseen circumstances, could result in serious harm to federal-or state-listed endangered or threatened species; important historic or archaeological sites that are either on, or meet eligibility requirements for nomination to the National Register of Historic Places; wilderness areas, wild and scenic rivers, or other public or private protected resources. Evaluation and determination of what constitutes serious harm must be made in coordination with the appropriate federal, state, or local agency responsible for each particular program.

Id.

entities that will actually perform the mitigation. An example of enforcement monitoring is a penalty clause written into a contract for the performance of mitigation measures.[29] This form of enforcement is important, considering that much of the Department of Defense's environmental work is actually performed by contract with private entities.

Effectiveness monitoring is a more challenging concept than enforcement monitoring in that it actually measures the effectiveness of particular mitigation measures over time. Effectiveness monitoring can be both qualitative and quantitative in nature.[30] It is important that the monitoring effort result in sufficient data and observations to make a meaningful analysis of the effectiveness of the mitigation.[31] Further guidance on effectiveness monitoring can be found at Appendix C of the Army NEPA regulation.[32]

One final issue for the environmental law practitioner to consider is the duration of the mitigation monitoring. The Army regulation states that if the mitigation is effective, monitoring should continue "as long as the mitigations are needed to address the impacts of the initial action."[33] Effective mitigation is the desired result and the easier case to deal with. Ineffective mitigation, however, presents a different and more difficult issue.

If mitigation is deemed ineffective, technical personnel must be consulted to resolve any inadequacies. Resolving inadequacies in cases involving mitigated FNSIs is particularly important, since the regulation states that "[i]f ineffective mitigations are identified which were required to reduce impact below significance levels . . . , the proponent may be required to publish an NOI and prepare an EIS."[34] This could present a very unpleasant situation for the proponent, particularly if the action has already been initiated and possibly completed. This potentiality highlights the importance of carefully considering mitigation plans as the action is developed throughout the NEPA process. Poor planning and a mere listing of potential mitigation actions will not serve the interests of the proponent of the action if mitigation is ineffective and such ineffectiveness is recognized through the monitoring process.

In addition to the requirements of the Army NEPA regulation, some recent court decisions provide further incentive to ensure that mitigation is well thought out and executed by federal agencies. Regarding mitigation under NEPA, the Supreme Court has ruled, in the context of an EIS, that CEQ regulations

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27. *Id*. (to be codified at 32 C.F.R. § 651.15(i)(1)).

28. *Id*. (to be codified at 32 C.F.R. § 651.15(i)(2)).

29. *Id*. (to be codified at 32 C.F.R. § 651.15(i)(1)).

30. *Id*. (to be codified at 32 C.F.R. § 651.15(i)(2)).

31. *Id*.

32. *Id*. at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(g)). This paragraph states:

> (g) Effectiveness Monitoring. Effectiveness monitoring is often difficult to establish. The first step is to determine what must be monitored, based on criteria discussed during the establishment of the system; for example, the legal requirements, protected resources, area of controversy, known effectiveness, or changed conditions. Initially, this can be a very broad statement, such as reduction of impacts on a particular stream by a combination of replanting, erosion control devices, and range regulations. The next step is finding the expertise necessary to establish the monitoring system. The expertise may be available on-post or may be obtained from an outside source. After a source of expertise is located, the program can be established using the following criteria:
>
> > (1) Any technical parameters used must be measurable; for example, the monitoring program must be quantitative and statistically sound.
> > (2) A baseline study must be completed before the monitoring begins in order to identify the actual state of the system prior to any disturbance.
> > (3) The monitoring system must have a control, so that it can isolate the effects of the mitigation procedures from effects originating outside the action.
> > (4) The system's parameters and means of measuring them must be replicable.
> > (5) Parameter results must be available in a timely manner so that the decision maker can take any necessary corrective action before the effects are irreversible.
> > (6) Not every mitigation has to be monitored separately. The effectiveness of several mitigation actions can be determined by one measurable parameter. For example, the turbidity measurement from a stream can include the combined effectiveness of mitigation actions such as reseeding, maneuver restrictions, and erosion control devices. However, if a method combines several parameters and a crucial change is noted, each mitigation measurement must be examined to determine the problem.

Id.

33. *Id*. at 15,307 (to be codified at 32 C.F.R. § 651.15(k)).

34. *Id*.

require a federal agency to discuss possible mitigation measures in the scoping process, in discussing alternatives, in discussing consequences of the proposed action, and in explaining its ultimate decision. The Court stated, however, that "[t]here is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."[35] In the context of an EA, mitigation measures may clearly be taken into account in assessing whether a significant impact exists,[36] and "it is clear that an agency may condition its decision not to prepare a full EIS on adoption of mitigation measures."[37]

In a case decided in 2001, the Court of Appeals for the Ninth Circuit stated that "[w]hile the Agency is not required to develop a complete mitigation plan detailing 'the precise nature of the mitigation measures,' the proposed mitigation measures must be 'developed to a reasonable degree.'"[38] "A '"perfunctory description,"'[39] or '"mere listing" of mitigation measures, without supporting analytical data,' is insufficient to support a finding of no significant impact."[40] The Tenth Circuit has stated that "[a]s a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement."[41] The cases above illustrate that courts have recently shown a heightened interest in examining mitigation issues in the context of EAs, particularly in cases resulting in mitigated FNSIs.

The CEQ regulations, the Army NEPA regulation, and recent case law all suggest that federal agencies closely analyze and plan for mitigation issues in preparing analyses under NEPA. The possibility of having to go back and prepare an EIS as a result of a poorly planned and executed mitigation plan documented in a mitigated FNSI should serve as a concrete incentive to get the mitigation right the first time. Hopefully, this note will serve to remind Army environmental law practitioners of the importance of mitigation measures under NEPA and serve as a reference tool for mitigation questions that may arise. Lieutenant Colonel Tozzi.

Criminal Law Note

Army Publishes Significant Revision to AR 27-10

Introduction

The Army recently published a comprehensive revision to *Army Regulation* (*AR*) *27-10*,[42] ushering in significant changes to the administration of military justice. These changes, effective 14 October 2002, warrant the immediate attention of staff judge advocates, trial practitioners, and legal noncommissioned officers (NCOs). The Criminal Law Department, Office of the Judge Advocate General (OTJAG), issued an information paper on 10 September 2002, which addresses the major revisions of the updated regulation.[43] The purpose of this note is to further highlight and disseminate these changes, which can be grouped into three subject areas: judicial, nonjudicial, and administrative matters.

Judicial

Among the updated regulation's many changes within the judicial arena, this note discusses five of the most significant revisions. These five changes affect special courts-martial, automatic reduction, sentencing, suspension of favorable actions, and national security crimes coordination, respectively.

Arguably, the most significant judicial change is that *AR-27-10* now authorizes special court-martial convening authorities (SPCMCA) to convene special courts-martial empowered to adjudge a bad-conduct discharge (BCD special).[44] Although not prevented by the Uniform Code of Military Justice

35. Robertson v. Methow Valley, 490 U.S. 332, 352 (1989).

36. *See, e.g.*, Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 733-34 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 903 (2002).

37. City of Auburn v. United States, 154 F.3d 1025, 1033 (9th Cir. 1998) (citing Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986); Steamboaters v. Fed. Energy Regulatory Comm'n, 759 F.2d 1382, 1394 (9th Cir. 1985)), *cert. denied*, 527 U.S. 1022 (1999).

38. *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 734 (quoting Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F. 3d 1105, 1121 (9th Cir. 2000)).

39. *Id*. (quoting Okanogan Highlands Alliance v. Williams, 226 F.3d 468, 473 (9th Cir. 2000) (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998))).

40. *Id*. (quoting *Okanogan Highlands*, 226 F.3d at 473 (quoting Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998))).

41. Davis v. Mineta, 2002 U.S. App LEXIS 12285 (10th Cir. June 20, 2002).

42. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10] (superceding *Army Regulation 27-10*, dated 24 June 1996, and the electronic media edition, dated 20 August 1999).

43. Information Paper, Major Michelle E. Crawford, Criminal Law Department, Office of The Judge Advocate General, subject: Upcoming Changes to *Army Regulation* (*AR*) *27-10*, *Military Justice* (10 Sept. 2002).

(UCMJ),[45] *AR 27-10* previously withheld SPCMCAs from convening such courts-martial.[46] The new *AR 27-10* no longer contains this restrictive provision.[47]

Consistent with the requirements of its predecessor, paragraph 5-27 of the new *AR 27-10* requires the detailing of a military judge, representation of the accused by qualified counsel, and the preparation of a verbatim record of trial before a special court-martial can adjudge a BCD.[48] Paragraph 5-27 also introduces one additional requirement. Before a special court-martial can adjudge a BCD, servicing staff judge advocates must prepare a pretrial advice for SPCMCAs under Rule for Courts-Martial (RCM) 406(b).[49]

The second major change reflected in the court-martial arena affects the automatic reduction of enlisted soldiers sentenced to confinement. Paragraph 5-28e now restricts automatic reduction to the lowest enlisted grade under Article 58a, UCMJ,[50] to cases with an approved sentence of a punitive discharge or "[c]onfinement in excess of 180 days . . . or in excess of 6 months."[51] For example, consider a staff sergeant convicted at a BCD Special of wrongful appropriation who receives an adjudged sentence of two months confinement and forfeiture of two-thirds pay per month for two months. Before the revision to *AR 27-10*, the staff sergeant would be reduced to grade E-1 automatically upon approval of the sentence, even though his adjudged sentence did not include a reduction in grade.[52] Now, the staff sergeant is no longer subjected to this administrative inconsistency.[53]

A third change to the regulation clarifies the admissibility of sentencing documents during the presentencing hearing at a court-martial. In 1994, the Army Court of Military Review, now the Army Court of Criminal Appeals, held in *United States v. Weatherspoon*[54] that for purposes of RCM 1001(b)(2), "personnel records" are those contained in "the Official Military Personnel File (OMPF), the Military Personnel Records Jacket (MPRJ) and the Career Management Individual File (CMIF)."[55] In 1996, the Court of Appeals for the Armed Forces stated in *United States v. Davis*[56] that the admissibility of personnel records includes "any records made or maintained in accordance with departmental regulation that reflect . . . the history of the accused."[57] Paragraph 5-28 of the new *AR 27-10* expressly implements the Secretarial authority of RCM 1001(b)(2) and clarifies the more expansive view of admissibility of personnel documents during sentencing.[58]

A fourth change to *AR 27-10* protects absent-minded trial counsel. Paragraph 5-15b now automatically suspends favorable personnel actions upon the preferral of charges. The suspension (or FLAG) remains in place until charges are dismissed or the convening authority takes initial action.[59]

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44. AR 27-10, *supra* note 42, para. 5-27.

45. UCMJ art. 23 (2000); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 404(d), 504(b)(2) (2000) [hereinafter MCM].

46. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-25b-c (20 Aug. 1999) [hereinafter 1999 AR 27-10].

47. *See* AR 27-10, *supra* note 42, para. 5-27.

48. *Compare id.* para. 5-27a, *with* 1999 AR 27-10, *supra* note 46, para. 5-25.

49. AR 27-10, *supra* note 42, para. 5-27b; *see also id*. para. 5-11 (requiring the detailing of court reporters to all special courts-martial).

50. UCMJ art. 58a(a) (providing for the automatic reduction to the lowest enlisted grade of a soldier above grade E-1 sentenced by a court-martial to a punitive discharge, any term of confinement, or any term of hard labor without confinement).

51. AR 27-10, *supra* note 42, para. 5-28e.

52. *See* UCMJ art. 58a(a).

53. AR 27-10, *supra* note 42, para. 5-28e.

54. 39 M.J. 762 (A.C.M.R. 1994).

55. *Id*. at 767.

56. 44 M.J. 13 (1996).

57. *Id*. at 20.

58. *See* AR 27-10, *supra* note 42, para. 5-28. Rule for Courts-Martial 1001(b)(2) states, "'Personnel records of the accused' includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused . . . ." MCM, *supra* note 45, R.C.M. 1001(b)(2).

59. *See* AR 27-10, *supra* note 42, para. 5-15. *See generally* U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (30 Oct. 1987) [hereinafter AR 600-8-2].

Finally, a fifth change requires staff judge advocates to coordinate with OTJAG before preferring charges in cases that may have national security implications.[60] These cases include sedition, "giving intelligence to the enemy," spying, espionage, "unauthorized acquisition of military technology [and] research and development information . . . on behalf of a foreign power, . . . [v]iolation of rules . . . concerning classified information, . . . [s]abotage . . . by or on behalf of a foreign power," subversion, treason, or domestic terrorism.[61]

Nonjudicial Punishment

The new *AR 27-10* incorporates three major changes in the administration of nonjudicial punishment. First, appellate authorities can change filing determinations to the benefit of the appealing soldier.[62] For example, if a battalion commander directs the filing of an Article 15 in the performance section of a soldier's OMPF, on appeal the brigade commander may direct filing of the Article 15 in the restricted section of the soldier's OMPF. Any change in filing determination must be noted in block nine of Department of the Army Form 2627.[63]

Second, *AR 27-10* now allows judge advocates to attend Article 15 hearings in a representative capacity; judge advocates may be present and render advice during the hearing phase to soldiers who have accepted nonjudicial punishment. The regulation provides that judge advocates giving such advice should do so during recesses in the hearing.[64] Representing and advising a soldier during the hearing is distinct from acting as a spokesman on a soldier's behalf. Judge advocates and civilian attorneys acting as spokesmen "do not serve in a representative capacity."[65]

Finally, *AR-27-10* now requires "[i]mposing commanders, *assisted by their legal clerks*," to track the execution of punishment imposed.[66] Additionally, "[t]he Chief Legal NCO . . . or delegee [must, at a minimum, annually inspect] the execution of Article 15 forfeitures and reductions."[67] To execute these tracking and inspection requirements properly, NCOs must pay meticulous attention to the proper flow of documents through the entire administrative system, including distribution, after Article 15s leave the imposing commander's desk. Therefore, to ensure compliance with these requirements, Chief Legal NCOs and, more importantly, Criminal Law NCOICs must develop and maintain good working relationships with their respective personnel and finance sections. Additionally, staff judge advocates and chiefs of military justice must recognize and supervise their legal NCOs' additional tracking requirements.

Administrative Matters

Among the significant administrative changes brought about by the new regulation include the addition of Chapter 24: Registration of Sexually Violent Military Offenders Who Are Not Confined.[68] This chapter implements 42 U.S.C. § 14071[69] and Department of Defense Instruction 1325.7[70] as the Army's "Military Sexual Offender Program."[71]

Chapter 24 contains a twofold requirement. First, "military officials [must] notify State officials upon release of soldiers [from confinement] or transfer of unconfined soldiers . . . convicted at special or general courts-martial of a qualifying offense."[72] For military sexual offenders in Army confinement facilities, corrections officials are responsible for ensuring registration requirements are met. Trial counsel, however, have

60. AR 27-10, *supra* note 42, para. 2-7 (requiring an unclassified executive summary via e-mail).

61. *Id*.

62. *See id*. para. 3-37b(1)(a).

63. *Id*.; *see also* U.S. Dep't of Army, Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984).

64. AR 27-10, *supra* note 42, para. 3-18g(1).

65. *Id*.

66. *Id*. para. 3-39 (emphasis added).

67. *Id*.

68. *Id*. ch. 24.

69. 42 U.S.C. § 14071 (2000) (Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program).

70. U.S. DEP'T OF DEF., INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 July 2001) [hereinafter DODI 1325.7].

71. AR 27-10, *supra* note 42, para. 24-1.

72. *Id*. *See generally id*. para. 24-2 (listing covered UCMJ offenses (quoting DODI 1325.7, *supra* note 70, encl. 27)).

responsibilities in "cases in which the sentence in a special or general court-martial involves a finding of guilty of a covered offense without adjudged confinement."[73] These responsibilities include providing notice to the offender by requiring the offender to complete a form[74] acknowledging his registration requirements and ensuring this form is filed with the allied papers of the record of trial.[75]

Second, soldiers convicted of a qualifying offense or are otherwise required "[must] register with the Provost Marshal and with State and local officials."[76] Paragraph 24-4b of *AR 27-10* mandates stringent registration requirements for soldiers with qualifying convictions. Notably, soldiers failing to meet these requirements are subject to punitive action.[77]

The new *AR 27-10* also changes the agency responsible for funding certain trial defense expenses. Before 14 October 2002, convening authorities funded trial defense counsel travel and related expenses to interview witnesses related to a court-martial.[78] Paragraph 6-5a(2) now shifts to the Commander, United States Army Legal Services Agency, the burden of funding defense counsel travel "to interview the accused or any witnesses, take depositions, and investigate the case."[79]

Finally, Chapter 21 of *AR 27-10* delineates active component support to reserve component commands. Paragraph 21-12 and the new Appendix E consolidate military justice support responsibilities.[80] Chiefs of military justice receiving a call from a contemporary in the reserve component need only reach for *AR 27-10* for guidance to confront initial issues. Stateside staff judge advocates and chiefs of military justice should familiarize themselves with the geographical support areas set out in Appendix E.

Conclusion

This note and the OTJAG Criminal Law information paper highlight some, but not all, of the revisions contained in the new *AR 27-10*. As this note illustrates, the judicial, nonjudicial, and administrative changes made effective on 14 October 2002 are significant, wide ranging, and require immediate attention. Consequently, judge advocates and legal NCOs should read through the new regulation to gain a better understanding of the changes and, more specifically, how the changes will impact the local practice of military justice. Lieutenant Colonel Garrett.

Administrative & Civil Law Note

Army Substance Abuse Program

Last year, the Army published a revision to *Army Regulation* (*AR*) *600-85*, effective 15 October 2001.[81] The most noticeable change was the name of the program, from the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP), to the Army Substance Abuse Program (ASAP). In addition, the Army made several other changes to the program. One of these changes requires unit commanders to process for administrative separation all soldiers identified as illegal drug users. This policy change caused some confusion, as it did not comport with the policy in the enlisted separations regulations.[82] The Department of the Army (DA) recently published a message clarifying that commanders will follow the policy outlined in the revised *AR 600-85*.[83]

The new regulation changes Army policy on when commanders must initiate separation actions for drug abuse. The old policy did not require commanders to initiate separation for

73. *Id*. para. 24-3.

74. U.S. Dep't of Army, Form 7439, Acknowledgment of Sex Registration Program (Sept. 2002), *available at* http://www.usapa.army.mil.

75. AR 27-10, *supra* note 42, para. 24-3. The record of trial form has been revised to reflect the implementation of the Military Sex Offender Program. *See* U.S. Dep't of Army, Form 4430, Record of Trial (Sept. 2002) (adding blocks 11 and 12 to annotate these requirements), *available at* http://www.usapa.army.mil.

76. AR 27-10, *supra* note 42, para. 24-4a.

77. *See id.* para. 24-4b.

78. 1999 AR 27-10, *supra* note 46, para. 6-5b.

79. AR 27-10, *supra* note 42, para. 6-5a(2).

80. *See id.* para. 21-12, app. E. Coordinating installation responsibilities outlining active component support, including military justice, were deleted from *Army Regulation 5-9*. *See* U.S. DEP'T OF ARMY, REG. 5-9, AREA SUPPORT RESPONSIBILITIES (16 Oct. 1998).

81. *See* U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (1 Oct. 2001) [hereinafter AR 600-85].

82. *See* U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL paras. 14-12c, d (1 Nov. 2000) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 12d (3 Dec. 2001) [hereinafter AR 135-178].

83. Message, R 161152Z SEP 02, U.S. Dep't of Army, DAPE-MPE, subject: Clarifying Enlisted Separation Policy for Illegal Drug Abuse [hereinafter Illegal Drug Abuse Separation Clarification Message].

first-time drug use if the soldier was in the grade of E-1 through E-4 and had less than three years of service.[84] Under the revised regulation, however, commanders no longer have this discretion. The new policy requires commanders to initiate and process to the separation authority separation actions for misconduct on all soldiers involved in illegal possession, use, sale, trafficking, or distribution of illegal drugs. As an exception, commanders are not required to initiate separation if charges have been referred to a court-martial empowered to adjudge a punitive discharge, or if drug use is discovered through self-referral.[85] The new policy mirrors other military service policies, generally requiring commanders to initiate separation of all service members who abuse drugs.[86]

Because of the confusion caused by the inconsistency between the revised *AR 600-85* and the enlisted separations regulations, commanders were advised to continue following the policy contained in the enlisted separations regulations until the proponents of these regulations agreed on a unified policy. The recent message was intended to clarify DA policy, specifically providing that commanders follow the guidance in the new *AR 600-85* requiring initiation of separation proceedings (but not mandatory discharge) on all first-time drug abusers. The message also provides that the proponent of the enlisted regulations will amend *AR 635-200* and *AR 135-178* to be consistent with the new policy in *AR 600-85*.[87]

In addition to the new policy on first-time drug users, the new regulation requires commanders to initiate separation actions for certain alcohol-related misconduct. Specifically, commanders must initiate and process to the separation authority an administrative separation action for misconduct if a soldier is involved in two serious incidents of alcohol related misconduct in a year, such as drunk on duty or operating a motor vehicle while intoxicated.[88] The old policy only required commanders to consider separating soldiers involved in serious alcohol-related misconduct.[89]

The new policy also contains several other changes of interest to judge advocates. For example, the first general officer in the chain of command or the installation commander must specifically authorize alcohol consumption during duty hours at the work place.[90] Also, all Active Component soldiers must be tested for drugs at a rate of one unannounced random sample per year.[91] Additionally, the regulation addresses several personnel actions during rehabilitation. Soldiers command referred to the ASAP and enrolled in the program must be flagged (effective when *AR 600-8-2*[92] is changed to reflect this

84. *See* U.S. DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM para. 1-11b(3) (26 Mar. 1999) (rescinded) [hereinafter AR 600-85 (rescinded)]; AR 635-200, *supra* note 82, paras. 14-12c, d; AR 135-178, *supra* note 82, para. 12.

85. AR 600-85, *supra* note 81, para. 1-35b.

86. *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 5.55.2 (10 Mar. 2000).

> 5.55.2.1. A member found to have abused drugs will be discharged unless the member meets all seven of the following criteria:
>
> [1] Drug abuse is a departure from the member's usual and customary behavior.
> [2] Drug abuse occurred as the result of drug experimentation (a drug experimenter is defined as one who has illegally or improperly used a drug for reasons of curiosity, peer pressure, or other similar reasons).
> [3] Drug abuse does not involve recurring incidents, other than drug experimentation as defined above.
> [4] The member does not desire to engage in or intend to engage in drug abuse in the future.
> [5] Drug abuse under all the circumstances is unlikely to recur.
> [6] Under the particular circumstances of the case, the member's continued presence in the Air Force is consistent with the interest of the Air Force in maintaining proper discipline, good order, leadership, and morale (Noncommissioned officers have special responsibilities by virtue of their status; fulfill an integral role in maintaining discipline; and, therefore, must exhibit high standards of personal integrity, loyalty, dedication, devotion to duty and leadership).
> [7] Drug abuse did not involve drug distribution . . . .

Id. *See also* U.S. DEP'T OF NAVY, SECNAVINST 5300.28C, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL para. 4.d (24 Mar. 1999) (providing that "[m]ilitary members determined to be using drugs, in violation of applicable provisions of the Uniform Code of Military Justice (UCMJ), Federal, State or local statutes, or who unlawfully engage in the trafficking of drugs or drug abuse paraphernalia, or who are diagnosed as drug dependent shall be disciplined as appropriate, and processed for administrative separation").

87. Illegal Drug Abuse Separation Clarification Message, *supra* note 83, para. 4.

88. AR 600-85, *supra* note 81, para. 1-34a.

89. AR 600-85 (rescinded), *supra* note 84, para. 1-11c.

90. AR 600-85, *supra* note 81, para. 2-8b; *see also* U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 7.14h (25 Oct. 1998) (generally prohibiting service of alcoholic beverages to soldiers on duty on Army installations and authorizing the first general officer in the chain of command, with the concurrence of the installation commander or designee, to grant exceptions to this policy).

91. AR 600-85, *supra* note 81, para. 8-2. To the maximum extent possible, U.S. Army Reserve (USAR) and Army National Guard (ARNG) soldier test rates must mirror this rate. *Id.*; *see also id.* para. 13-9c (providing that the USAR testing rate of one random sample per Selected Reserve member annually will mirror that of the Active Component testing rate as closely as operationally possible).

provision). Further, commanders, in consultation with the ASAP clinical staff, must determine the deployment availability of soldiers under the same standards used for other medical treatment; generally, only those actually undergoing inpatient detoxification are not deployable.[93]

Army National Guard (ARNG) and U.S. Army Reserve (USAR) judge advocates must also be familiar with the new ASAP policy, as the new policy contains specific requirements for each component. For instance, the new regulation requires commanders to process ARNG soldiers identified as illegal drug users for administrative separation within forty-five days of receiving a verified positive drug test; USAR soldiers must be processed for separation within thirty days.[94]

Judge Advocates must be familiar with the changes to the Army's ASAP policy contained in *AR 600-85*. In particular, those advising commanders must know when a commander is required to initiate separation of soldiers who are drug or alcohol abusers. Moreover, ARNG and USAR judge advocates and paralegals must be familiar with the new processing time requirements to assist commanders in meeting them. Lieutenant Colonel Stahl.

92. AR 600-8-2, *supra* note 59.

93. AR 600-85, *supra* note 81, para. 5-2. For example, soldiers are deployable even if they are enrolled in the ASAP and receiving outpatient services or participating in, or awaiting admittance to, an ASAP partial inpatient care program. *Id.*

94. *Id*. paras. 12-11a(2), 13-9a(3).

The Art of Trial Advocacy

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

Tactical Charging: Choosing Wisely the Terrain on Which You Want to Fight!

> *The contour of the land is an aid to an army; sizing up opponents to determine victory, assessing dangers and distances, is the proper course of action for military leaders. Those who do battle knowing these will win, those who do battle without knowing these will lose.*[1]

Introduction

From the government's standpoint, trial advocacy begins with the charging decision. Equating a court-martial to a battlefield, the art of advocacy is like the art of war. In war, commanders attempt to shape the battlefield to their advantage by electing to fight on terrain of their own choosing. In trial practice, the government possesses the initial advantage because trial counsel have the ability to shape the battlefield through the charging decision. Effective trial counsel recognize the tactical importance of selecting the most advantageous terrain through the charging process. They realize that trial advocacy does not begin with opening statements or even voir dire. Trial advocacy begins when counsel draft charges against an accused.

The art of tactical charging starts with listing all potential charges and then asking "why" each of the charges should end up on the charge sheet.[2] Tactical charging focuses on preferring only those charges that are consistent with the government's theory or provide a particular tactical advantage for the prosecution. Unfortunately, many trial counsel complete their charging analysis after determining "what" they can charge. Additionally, most guidance from chiefs of justice, military judges, and criminal law instructors focuses on the problems associated with overcharging, mischarging, or inartful drafting.[3] Yet, the real threat to effective advocacy involves "random" charging—failing to charge in a manner consistent with theory and tactics.

Certainly, "poorly drafted charges and specifications can damage or doom the government's case at the outset,"[4] and trial counsel should heed guidance regarding the mechanics of charging. However, this article's purpose is not to offer another primer on how to avoid embarrassment or prevent losing by following a set of charging guidelines.[5] Instead, this article focuses on how trial counsel can seize the high ground well before a case goes to trial.

Three areas are particularly relevant to a discussion of tactical charging. First, before preferring charges, trial counsel should always develop a clear theory of the case and charge consistent with the theory. Second, trial counsel should consider how the charges selected for preferral will enhance the government's presentation of evidence at trial and increase the potential for success. Third, trial counsel should refrain from alienating panel members or the military judge by overcharging in a manner that evokes "unwarranted sympathy for the accused"[6] and thereby allows the defense to shift the battle to terrain of their choosing.

Theory Development and the Charging Decision

The theory of a case is a logical and persuasive adaptation of the story to the legal issues in the case.[7] It communicates to the fact-finder "what really happened."[8] First, a successful theory must be logical. "It must be consistent with the credible evi-

1. Sun Tzu, The Art of War 145 (Thomas Cleary trans., Shambhala Publications 1988).

2. U.S. Dep't of Defense, Form 458, Charge Sheet (Aug. 1984) (copy found at Manual for Courts-Martial, United States app. 4, at A4-1 (2000) [hereinafter MCM]).

3. *See generally* Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, Army Law., Oct. 1994, at 15; Colonel Gary J. Holland, *Tips and Observations from the Trial Bench: The Sequel*, Army Law., Nov. 1995, at 3; Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, Army Law., Oct. 1997, at 4.

4. Morris, *supra* note 3, at 17.

5. *Id.* at 17-18 (providing an excellent set of guidelines and practical tips regarding the mechanics of drafting charges). Additional resources provide extensive guidance on the mechanics of charging. *See generally* MCM, *supra* note 2, R.C.M. 307(c) discussion; Francis A. Gilligan & Fredric I. Lederer, Court-Martial Procedure § 6 (2d ed. 1999); David A. Schlueter, Military Criminal Justice: Practice and Procedure § 6-1 (5th ed. 1999).

6. Morris, *supra* note 3, at 18.

7. Steven Lubet, Modern Trial Advocacy: Analysis and Practice 8 (National Institute for Trial Advocacy 2d ed. 1997).

8. Thomas A. Mauet, Fundamentals of Trial Techniques 380 (Little, Brown & Co. 3d ed. 1992).

dence and with the jury's perception of how life works."[9] The facts supporting an effective and persuasive theory will reinforce each other.[10] Second, a successful theory speaks to the legal aspects of the case. Trial counsel must direct the theory to prove every element of the charged offenses. Third, a good theory is simple and easy to believe. The theory should rely on undisputed evidence, and trial counsel should strive to eliminate all implausible or questionable aspects of the theory.[11]

Theory development often begins far too late in the trial process. In fact, most junior counsel start to consider their theory in the final stages of trial preparation when writing their opening statements or outlining their closing arguments. Trial counsel must develop a logical, comprehensive, and reasonable theory before drafting charges. The charges should then accurately reflect the theory and not contradict it in any way.

Because the government is not always privy to the complete story at the outset of a case, "it often makes sense to err on the side of over-charging and then to reassess the case after the Article 32 investigation is complete. Chiefs of military justice should be liberal in recommending that charges be dropped after the Article 32 and before referral."[12] Also, the government may need to charge cases in the alternative to present plausible explanations to the fact-finder. However, if trial counsel wish to present the strongest case possible on the most important charges, then they must never force themselves to prove charges that require inconsistent theories.

A common example of inattentive charging that causes the government to present inconsistent theories arises in the context of a barroom brawl. An intoxicated soldier picks up a beer bottle and smashes it over another soldier's head. In an effort to charge the soldier with all possible offenses, an overzealous trial counsel charges both intentional infliction of grievous bodily harm under Article 128, Uniform Code of Military Justice (UCMJ),[13] and drunk and disorderly under Article 134, UCMJ.[14]

To prove both offenses, the government must present inconsistent theories. To prove drunkenness, the government must show that the soldier was intoxicated sufficiently "to impair the rational and full exercise of [his] mental or physical faculties."[15] The aggravated assault offense requires "that the accused, at the time, had the specific intent to inflict grievous bodily harm."[16] Although voluntary intoxication is not a complete defense, it may be introduced to raise reasonable doubt on a specific intent element.[17] By proving drunkenness, the trial counsel undermines his effort to prove the specific intent element required for intentional infliction of grievous bodily harm. The fact-finder may convict the accused of a lesser-included offense under Article 128, but the absence of tactical charging will likely cost the government a conviction on the most serious offense.

By going forward on both the drunk and disorderly and intentional infliction of grievous bodily harm charges, the trial counsel loses the initiative. Instead of picking the terrain to fight on and making the defense respond to him, he allows the defense to seize the initiative by pointing to the inconsistent theories. The facts supporting a persuasive theory should not contradict each other. They should effectively communicate to the panel or military judge what actually occurred. Tactical

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9. *Id.* at 380.

10. LUBET, s*upra* note 7, at 8.

11. *Id.* at 11.

12. Morris, *supra* note 3, at 18.

13. UCMJ art. 128 (2000). The elements of intentional infliction of grievous bodily harm under Article 128, UCMJ, are as follows:

> [1] That the accused assaulted a certain person;
> [2] That grievous bodily harm was thereby inflicted upon such person;
> [3] That the grievous bodily harm was done with unlawful force or violence; and
> [4] That the accused, at the time, had the specific intent to inflict grievous bodily harm.

MCM, *supra* note 2, pt. IV, ¶ 54b(4)(b).

14. UCMJ art. 134. The elements of drunk and disorderly under Article 134, UCMJ are as follows:

> (1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and
> (2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, *supra* note 2, pt. IV, ¶ 73b.

15. MCM, *supra* note 2, pt. IV, ¶ 35c(6).

16. *Id.* pt. IV, ¶ 54b(4)(b)(iv).

17. *Id.* R.C.M. 916*l*(2).

charging requires clear theory development before preferral and ensuring that all charges flow from that theory in a logical manner.

Enhancing the Government's Presentation of Evidence

Another way that tactical charging enhances a trial counsel's ability to succeed involves advance consideration of how particular charges will affect the presentation of evidence at trial. When the government has an evidentiary advantage or possesses the ability to "force" the accused to testify to tell his side of the story, it needs to ensure that adding or deleting particular charges will not shift the initiative to the defense. Two common examples in which trial counsel often let the defense "off the hook" involve uncharged misconduct[18] and false official statements.[19]

The easiest way to avoid defense motions regarding suppression of uncharged misconduct under Military Rule of Evidence 404(b) is to charge the misconduct. Counsel must have credible evidence before charging the actions, and some "misconduct" may not rise to the level of a criminal offense. However, trial counsel often forfeit the advantage in cases by fighting evidence battles rather than exercising tactical charging. By clearly developing the theory of the case prior to preferral and working through an extensive proof analysis worksheet,[20] trial counsel will discover their best methods of proof. Those methods will translate into success if the defense cannot suppress helpful evidence. Adding relevant misconduct to the charge sheet that is consistent with and supports the government's theory will enhance a trial counsel's ability to advocate in the courtroom.

Another tactical mistake is charging a false official statement in cases where the alleged false statement provides the accused's version of events regarding a more serious offense on the charge sheet. A common scenario involves a male soldier accused of indecently assaulting[21] a female soldier in the barracks. When questioned by investigators or his commander, the accused tells his side of the story. As the investigation continues, the trial counsel becomes convinced that the soldier lied on the sworn statement made during the initial interview. The trial counsel then charges both the indecent assault and a false official statement.

To prove that the accused "made a certain official statement,"[22] the trial counsel must introduce the exculpatory statement. The accused then has a choice whether or not to testify because his version of the events is already in front of the fact-finder. Rather than seizing the tactical advantage by "forcing" the defense counsel to put the accused on the stand, the trial counsel allows the defense to fight the battle on terrain of his own choosing. By winning a small battle on a relatively inconsequential charge, the government relinquishes the initiative regarding the indecent assault offense.

Although trial counsel may at times need a false official statement charge to fully explain the theory behind a case, exploring how each specification on the charge sheet benefits the prosecution will assist in maintaining control of the government's initial courtroom advantage. Tactical charging allows the trial counsel to shape the battlefield in a way that enhances his presentation of the case.

Unreasonable Multiplication of Charges

Although trial counsel should consider and perhaps draft all possible offenses in a given scenario, the charges should "adequately reflect the accused's conduct without under-representing the seriousness of the conduct or, at the other extreme, appearing to unreasonably multiply charges."[23] An increased focus on avoiding unreasonable multiplication of charges has resulted in the wake of the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Quiroz*.[24] The

18. *Id.* MIL. R. EVID. 404(b).

19. UCMJ art. 107. The elements of false official statement under Article 107 are as follows:

(1) That the accused signed a certain official document or made a certain official statement;
(2) That the document or statement was false in certain particulars;
(3) That the accused knew it to be false at the time of signing it or making it; and
(4) That the false document or statement was made with the intent to deceive.

MCM, *supra* note 2, pt. IV, ¶ 31b. Trial counsel should note that by executive order in 2002, the President amended the 2000 edition of the *MCM* to remove paragraph 31c(6). Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,777 (Apr. 17, 2002). This change reflects the Court of Appeals for the Armed Forces' opinion in *United States v. Solis*, 46 M.J. 31 (1997). Therefore, false statements made by an accused during an investigation may be charged as false official statements under Article 107, UCMJ, as well as false swearing under Article 134, UCMJ.

20. A proof analysis worksheet requires the trial counsel to list the elements of each offense and state what evidence the counsel intends to offer at trial to prove each element.

21. UCMJ art. 134.

22. MCM, *supra* note 2, ¶ 31b(1).

23. Morris, *supra* note 3, at 18.

Double Jeopardy Clause of the Constitution and the unreasonable multiplication of charges doctrine place limitations on the charging decision. From an advocacy standpoint, however, the tactical reasons for limiting charges are far more practical. Unreasonably multiplying charges "risks (1) evoking unwarranted sympathy for the accused, (2) burdening the government with proving relatively minor charges, and (3) confusing or distracting a panel."[25]

Trial counsel must learn that overcharging rarely achieves better results for the government. Occasionally, intentional multiplicity serves a legitimate purpose;[26] however, piling on charges to make sure that "as much as possible sticks" runs the risk of shifting the initiative to the defense. Tactical charging always asks whether multiple charges for the same underlying misconduct actually gain any recognizable advantage for the government. Rather than allowing the defense to construct its own theory regarding prosecutorial overreaching, trial counsel should simplify the charge sheet by preferring only those charges that most accurately describe the misconduct and directly contribute to the theory of the case.

An all too common scenario illustrates how overcharging can shift the tactical advantage to the defense. Two soldiers decide to go to Mexico to buy about five grams of marijuana. They cross the border and one soldier buys the marijuana. After returning to post, the buyer divides the marijuana with his friend, and they use it together. The government charges the buyer with conspiracy to possess marijuana, conspiracy to distribute marijuana, conspiracy to introduce marijuana onto post, conspiracy to import marijuana into the customs territory of the United States, conspiracy to use marijuana, possession of marijuana, possession with the intent to distribute marijuana, introduction of marijuana, importation of marijuana, distribution of marijuana, use of marijuana, and violating various regulations.[27]

Aside from having to deal with losing a number of the charges if the defense elects to make a multiplicity and unreasonable multiplication of charges motion, the government has also lost the tactical advantage. The trial counsel has turned a simple five-gram charge sheet into one in which the maximum punishment for offenses on the charge sheet totals at least 115 years. The excessive charges would not warrant additional punishment. Yet, the trial counsel has opened the door to defense attacks aimed at evoking sympathy from the military judge and panel regarding overzealous prosecution. Furthermore, the lengthy charge sheet burdens the trial counsel with unnecessary proof challenges and runs the risk of distracting, boring, or confusing the panel. The government has lost the initiative and will have to advocate its position from terrain of the defense's choosing.

Conclusion

This article has only scratched the surface of potential tactical considerations for trial counsel when making the charging decision. Good trial counsel must survey the eventual courtroom battlefield and select where they want to focus the fight. Selecting charges tactically, consistent with an established theory of the case, will allow counsel to shape the courtroom battlefield. Choosing the best terrain on which to fight through the charging process is the first step toward effective advocacy and success in the courtroom. Major Velloney.

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24. 55 M.J. 334 (2001).

> The majority opined that the concept of multiplicity is founded on the Double Jeopardy Clause of the Constitution. Multiplicity focuses on the elements of criminal statutes themselves and congressional intent. The concept of unreasonable multiplication of charges only comes into play when charges do not already violate constitutional prohibitions against multiplicity. "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." The CAAF pointed specifically to the discussion accompanying Rule for Courts-Martial 307(c)(4) to support the proposition that unreasonable multiplication of charges exists in military practice separate and apart from the concept of multiplicity. The discussion states, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Major David D. Velloney, *Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions*, ARMY LAW., Apr. 2002, at 60 (quoting *Quiroz*, 55 M.J. at 337; MCM, *supra* note 2, R.C.M 307(c)(4) discussion).

25. Morris, *supra* note 3, at 18.

26. *Id.* at 19. "Intentional multiplicity has the benefit of avoiding squabbles over uncharged misconduct and the confusing, dense instructions over lesser included offenses." *Id*.

27. UCMJ arts. 81, 92, 112a (2000).

Environmental Law Division Notes

The Environmental Law Division (ELD), U.S. Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCnet, which readers can access online at http://www.jagcnet.army.mil.

"Excuse Me, Sir, Do You Have a Permit for That Bomb?"

Thou wast not born for death, immortal Bird![1]

The U.S. District Court for the District of Columbia sent a shock wave through military installations nationwide recently when it held that the Migratory Bird Treaty Act (MBTA)[2] prohibits federal agencies from conducting activities that may result in the indirect, unintentional death of migratory birds. In *Center for Biological Diversity v. Pirie*,[3] the court reviewed a request to declare the Navy's bombing of a small, uninhabited island in the western Pacific Ocean illegal, and to issue an injunction barring further training activities on the island until the Navy obtains a permit from the U.S. Fish and Wildlife Service (FWS). The court granted the request, and it ultimately issued an order preliminarily enjoining further training activities with the potential to wound or kill migratory birds.[4]

Since the early 1990s, two important questions about the MBTA's impact on federal agencies have been unresolved: (1) whether the MBTA applies to federal agencies;[5] and (2) if so, whether its prohibition on the unpermitted "take" of migratory birds[6] extends to indirect, unintentional killing resulting from otherwise lawful activities.[7] In *Humane Society v. Glickman*,[8] the Court of Appeals for the District of Columbia squarely resolved the first issue, establishing that federal agencies are subject to the MBTA's prohibition on "takes" and can be subject to suit under the Administrative Procedure Act (APA)[9] for MBTA violations.[10] The reach of *Glickman*, however, was unclear. *Glickman* concerned a federal agency's proposal to purposefully and intentionally kill migratory Canadian geese to control depredation. This was different from an agency proposing to conduct an otherwise lawful activity, such as a timber sale, that would result in the indirect or "unintentional take" of migratory birds. Indeed, the D.C. Circuit noted in *Glickman* that the issue of unintentional take remained unresolved.[11]

In *Pirie I*, the D.C. District Court resolved this issue by holding that the MBTA applies to federal agencies with regard to

1. John Keats, *Ode to a Nightingale*, *in* THE OXFORD BOOK OF ENGLISH VERSE (Arthur T. Quiller-Couch ed., 1919).

2. 16 U.S.C. §§ 701-712 (2000).

3. 191 F. Supp. 2d 161 (D.D.C. March 13, 2002) [hereinafter *Pirie I*].

4. *Id*. at 178.

5. *See* Major Jeanette Stone, *Migratory Bird Treaty Act May Now Apply to Federal Agencies*, ARMY LAW., Nov. 1999, at 40-41 (discussing the split in the circuits regarding applicability of the MBTA to federal agencies); *see also* Scott Belfit & Scott M. Farley, *Court Decisions on Migratory Bird Treaty Act Raise Questions*, U.S. Army Environmental Center, Office of Command Counsel (Spring 1998), *at* http://aec.army.mil/usaec/publicaffairs/update/spr98/mbta.htm.

6. *See* 16 U.S.C. § 703 (as implemented by 50 C.F.R. pt. 10, § 21.11 (2002)) (prohibiting the killing of migratory birds without a valid permit or compliance with an applicable regulation published by the FWS).

7. *Pirie I* cited authority that the MBTA had been applied equally to intentional and unintentional takes by private parties, but no such authority as applied to federal agencies. *Pirie I*, 191 F. Supp. 2d at 174 (citing United States v. Corrow, 119 F.3d 796 (D.D.C. 1997); United States v. Boyton, 63 F.3d 270, 273 (7th Cir. 1994); United States v. Smith, 29 F.3d 270 (7th Cir. 1994); United States v. Engler, 806 F.2d 425, 431 (3rd Cir. 1986)).

8. 217 F.3d 882 (D.C. Cir. 2000).

9. 5 U.S.C. §§ 501-559, 701-706 (2000).

10. *Glickman*, 217 F.3d at 888. In response to *Glickman*, the FWS reversed a 1997 policy and issued a Director's Order on 20 December 2000. The Director's Order stated, "[I]t is our position that the take of migratory birds by federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA." Jamie R. Clark, U.S. Fish and Wildlife Service, Director's Order (Dec. 20, 2000), *available at* http://policy.fws.gov/do131.html. *See also* Transmittal Letter from Jamie R. Clark, Director, U.S. Fish and Wildlife Service, to L. Peter Boice, Director of Conservation, Office of the Deputy Undersecretary of Defense for Environmental Security (Dec. 2000) ("[t]hrough issuance of the Director's Order we have notified all Service employees that, in light of [*Glickman*], the prohibitions of the MBTA apply to federal agencies").

11. *Glickman*, 217 F.3d at 888 (citing Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (8th Cir. 1991) (holding that Section 703 of the Endangered Species Act (ESA) did not prohibit "conduct, such as timber harvesting, that indirectly results in the death of migratory birds").

both intentional and unintentional takes.[12] *Pirie I* concerned Navy training activities on the remote, uninhabited island of Farallon de Medinilla in the western Pacific Ocean. The Center for Biological Diversity (CBD), an environmental group, brought the suit in Washington, D.C., seeking a declaratory judgment that the Navy had violated the APA and MBTA by conducting live-fire training activities without an MBTA permit.[13] The following facts were undisputed:

> (1) Farallon de Medinilla (FDM), a small island within the Commonwealth of the Northern Mariana Islands, serves as an important nesting and roosting site for a diverse group of migratory seabirds;
>
> (2) The United States has used FDM for live fire training exercises since 1971, and these exercises are critically important to maintaining the readiness of Navy and Marine forces;
>
> (3) Live fire training activities include air-to-surface gunnery with missiles, bombs and machine guns and the firing of 5-inch deck-mounted guns using high explosive point-detonating rounds; and
>
> (4) Live fire training activities on FDM kill migratory birds.[14]

The Navy, aware of the adverse environmental impacts on FDM, engaged in an aggressive environmental planning, review, and compliance effort. The Navy prepared an environmental impact statement (EIS) to consider the impact on migratory birds, consulted with the FWS under Section 7 of the Endangered Species Act[15] to assess the effects on the protected Micronesian megapode, and identified and implemented mitigation measures to avoid and minimize adverse impacts.[16] The Navy even applied to the FWS to obtain an MBTA "depredation permit." The FWS denied the permit application, stating that "there are no provisions for the service to issue permits authorizing UNINTENDED conduct on the part of a permittee."[17] The Navy could either cease live-fire activities or proceed without an MBTA permit. Given the importance of FDM to military readiness, the Navy continued training exercises.[18]

On 21 December 2001, the plaintiffs filed suit seeking a declaration that the Navy's activities violated the MBTA and the APA, as well as a permanent injunction barring the Navy's use of the island until it obtained a proper MBTA permit.[19] After finding that the plaintiff had standing,[20] the court addressed the most pressing issue—whether the MBTA prohibited the "unintentional take" of migratory birds. The court first reiterated *Glickman*'s holding that the MBTA's prohibition on the take of protected species applies to federal agencies.[21] The court also found that the Navy was killing migratory birds, that its activities would continue to do so, and that such activities "are unlawful unless they are somehow authorized by the regulations promulgated pursuant to the authority granted in the MBTA. Defendants can find no such authority . . . ."[22] Despite

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12. 191 F. Supp. 2d at 178.

13. *Id*. at 163.

14. *Id*. at 165-66. Starting in 1978, the Commonwealth of the Northern Mariana Islands granted the Navy a fifty-year lease for several of its islands, including FDM, for use as an aircraft and ship ordnance impact target area. *Id.* at 165. According to the Navy's brief, FDM contains the only U.S.-controlled live-fire range in the Western Pacific where sailors and Marines can engage in the kind of realistic, integrated training exercises critical to maintaining the Navy's readiness. *Id*. at 169.

15. 16 U.S.C. §§ 1531-1544 (2000).

16. *Pirie I*, 191 F. Supp. 2d at 168. The Navy attempted to limit training during nesting seasons, to relocate targets away from dense nesting populations of birds, and to chase birds away from target areas before conducting training activities. *Id*.

17. *Id*. at 167.

18. *Id*. at 168.

19. *Id*. at 170.

20. *Id*. at 171. The Navy argued that the plaintiff had not suffered a concrete injury in fact, an essential element of demonstrating the existence of a case or controversy under Article III of the Constitution. *Id*. (citing Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). The CBD represented Mr. Ralph Frew, a CBD member and avid bird watcher who regularly viewed birds that nested on FDM and migrated to other local islands. *Id.* at 171-72. While Mr. Frew could not visit FDM itself, the CBD argued that the Navy's take of birds on FDM impacted Mr. Frew's ability to view birds. *Id*. The court found that this diminished ability to view birds on adjacent islands was sufficient to establish a concrete and particularized injury in light of existing case law. *Id.* at 173 (citing Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) (holding that injury sufficient when "whale watching and studying of members . . . [is] adversely affected by continued whale harvesting by Japan"); Hill v. Norton, 275 F.3d 98 (D.C. Cir. 2001) (agreeing that plaintiff had standing to sue under MBTA when diminished presence of mute swans near her property reduced aesthetic enjoyment)).

21. *Pirie I*, 191 F. Supp. 2d at 173 (citing Humane Soc'y v. Glickman, 217 F.3d 882 (D.C. Cir. 2000)).

22. *Id*. at 172.

the Navy's effort to obtain a permit from the FWS, the court concluded that "[b]ecause they continue to kill these birds without complying with the statutory and regulatory provisions for a permit, [Navy personnel are] violating the MBTA."[23]

The court curtly dismissed the Navy's assertions that its killing of migratory birds was unintentional and therefore not prohibited.[24] It found the distinction between intentional and unintentional take immaterial. Citing a long line of cases, the court flatly concluded that the MBTA prohibits both intentional and unintentional take without regard to intent or knowledge.[25]

The only remaining issue was whether the Navy's MBTA violation was also a violation of the APA bar to agency action that is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."[26] The district court, again relying on *Glickman*, found that "the law of [the D.C.] Circuit is clear: a plaintiff may sue a federal agency under the APA for violations of the MBTA."[27] The court emphatically concluded: "Congress and the President together passed the MBTA and made [the Navy's] activity a crime, and together have given the citizens of this country the right to sue their federal government civilly when it violates the law. That is the beginning and end of this court's inquiry."[28]

Having found that the Navy had violated both the MBTA and APA, the court then considered CBD's request that it enjoin further training at FDM until the Navy received a take permit from the FWS. The court deferred its decision until the parties presented additional briefs and oral argument on thirteen specific questions set forth its initial memorandum opinion and order.[29] After the hearing on 1 May 2002, the court enjoined any training activities with the potential to kill or wound migratory birds and ordered the Navy to obtain a permit from the FWS before any future take of migratory birds.[30] The Navy, however, appealed to the D.C. Court of Appeals for a stay of the district court's injunction pending appeal. The higher court granted the stay and expedited the appeal.[31]

Pirie I and *Pirie II* could carry significant implications for the Army, depending on the outcome of the pending appeal. The Army conducts many activities that may result in the unintentional take of migratory birds. These activities range from military training exercises to land management actions (for example, timber harvesting and prescribed burns).

Present Army policy draws a sharp distinction between "intentional take" and "unintentional take" of migratory birds. For intentional takes, the current policy is to apply for an appropriate MBTA permit. For unintentional takes, however, the policy directs installations to consider and, if possible, minimize impacts to migratory birds through the National Environmental Policy Act and the Integrated Natural Resource Management Planning process.[32] By implication, it is not Army policy to apply for an MBTA permit when an unintentional take is anticipated. This Army guidance is now inconsistent with the current state of the law, as stated in *Pirie I*.

23. *Id*. at 176-77.

24. *Id.* at 177. The court was skeptical of the Navy's characterization of its take as unintentional, noting that "[t]his description is misleading. Defendants' own documents amply establish that defendants are knowingly engaged in activities that have the direct consequence of killing and harming migratory birds." *Id.* at 175. The court found it "baffling" that the Navy should suggest that it was not "knowingly" killing migratory birds in light of the wealth of information in the administrative record (for example, the 1996 EIS and MBTA permit application) demonstrating the Navy was "engaged in activities that have the direct consequence of killing and harming migratory birds." *Id.* at 174 n.7.

25. *Id.* at 174. The court explained that other "[c]ourts have consistently refused to read a scienter requirement into the MBTA." *Id.* (citing United States v. Corrow, 119 F.3d 796, 805 (10th Cir. 1997); United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995); United States v. Smith, 29 F.3d 270, 273 (7th Cir. 1994); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986); United States v. Manning, 787 F.2d 431, 435 n.4 (8th Cir. 1986); United States v. Catlett, 747 F.2d 1102, 1105 (6th Cir. 1984); United States v. Wood, 437 F.2d 91 (9th Cir. 1971)).

26. *Id*. at 175 (quoting the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000)).

27. *Id*. at 177 (citing Humane Society v. Glickman, 217 F.3d 882 (D.C. Cir. 2000)).

28. *Id.* The district court observed that in cases like this, in which the FWS has exercised its discretion not to enforce a statute, "[w]ithout plaintiff acting as a 'private attorney general,' no one would prevent these violations from occurring." *Id.*

29. *Id*. at 178.

30. Center for Biological Diversity v. Pirie, 201 F. Supp. 2d 113 (D.D.C. May 1, 2002) [hereinafter *Pirie II*]. In his opinion, Judge Sullivan struggled with the scope of the court's authority to issue equitable relief. The court first determined that, while equitable relief is not available under the MBTA, it is provided for in the APA. *Id.* at 119. The court considered the range of available remedies directly aimed at securing compliance with the statute being violated. *Id.* at 120 (citing Weinberger v. Romero Barcelo, 456 U.S. 305 (1982); United States v. Oakland Cannibis Buyers' Cooperative, 532 U.S. 483 (2001)). Because all Navy training on FDM could kill or injure birds, the court saw two options: (1) ordering the Navy to obtain a permit; and (2) enjoining all such training activities. The court decided that requiring the Navy to obtain a permit would not sufficiently assure compliance with the law, and concluded that an injunction was necessary. *Id*. In weighing the equities, the court refused to consider harm to the Navy associated with cessation of training at FDM. *Id*. at 122 ("[T]he court can not and will not read into the MBTA a [national security] exception that Congress has not included in the statute.").

31. Center for Biological Diversity v. England, 2002 U.S. App. LEXIS 11493 (D.C. Cir. June 5, 2002). Several members of Congress have since entered the suit on the Navy's side as amici curiae. Center for Biological Diversity v. England, 2002 U.S. App. LEXIS 16073 (D.C. Cir. Aug. 8, 2002).

Environmental law specialists should encourage installation staff (for example operational, environmental, forest management, and Integrated Training Area Management representatives) to apply to the FWS for "special purpose" permits, in accordance with 50 C.F.R. section 21.27, unless and until new legislation, regulatory relief, or judicial relief changes the current state of the law. Doing so will reduce the risk of litigation and help avoid disruption of mission-critical activities. Scott M. Farley.

Criminal Liability for Killing a Snake? How One Soldier Learned About Environmental Crimes the Hard Way

The average soldier probably does not realize that the Endangered Species Act (ESA)[33] provides for criminal sanctions,[34] that states have their own versions of the ESA, or that state and federal endangered species lists are maintained separately.[35] Recently, a soldier got a first-hand look at how criminal liability operates under New York's version of the ESA.[36] The soldier has since consented to the telling of his story so that others may learn from it.

Soldier *X* and several other soldiers were in the woods of New York, participating in a field training exercise (FTX). Suddenly, Soldier *X* realized that a rattlesnake was crawling past him, causing him and some of the other soldiers to jump to their feet. The alarmed snake then turned toward the soldiers, and it struck at Soldier *X*'s foot. Soldier *Y* threw Soldier *X* a shovel, which Soldier *X* used to kill the snake.

At the conclusion of the FTX, Soldier *X* reported the incident to his chain of command, which in turn reported the incident to the post environmental office. The environmental office determined that the snake was a timber rattlesnake, a threatened species under New York's ESA.[37]

A representative from the state's environmental office questioned Soldier *X* about the snake incident a few days after the FTX. The soldier explained what had happened without realizing that he was incriminating himself. The environmental officer then told Soldier *X* that he intended to cite him for an offense and impose a $75 fine. Soldier *X* protested that he had done nothing wrong. The officer suggested settling the matter for a $50 fine, but Soldier *X* still proclaimed his innocence. The officer left without actually issuing the citation, but his office later contacted the installation environmental law specialist (ELS). At that point, Soldier *X* saw a legal assistance attorney, and the parties worked out an agreement that permitted Soldier *X* to teach a class to his company in lieu of any citation or fine.

This story teaches some important lessons. First, states have their own listings of endangered and threatened species, separate from the listings under the federal ESA.[38] Killing a member of a threatened species can result in state criminal liability. Specifically, killing a timber rattlesnake in New York is a misdemeanor under state law.[39] Second, ELSs should learn which species on their installations are protected by state and federal ESAs. On installations with protected species, the legal and environmental offices should coordinate their efforts to resolve ESA issues. Environmental law specialists must assure that soldiers on their installations know of those ESA protections and the penalties for violating them. Third, ordinary notions of self-defense may not carry any weight with the state environmental regulator.

Finally, Soldier *X* and his chain of command resolved the situation favorably because both the soldier and the command notified the appropriate authorities promptly. Soldier *X*'s story illustrates the importance of understanding local regulations and prosecution guidelines. This allows the ELS to work proactively and serve the operational needs of the unit better.[40] The wise ELS should also review the installation Newcomer's Inbrief to ensure it adequately addresses relevant ESA issues.

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32. Memorandum, Colonel Richard Hoefert, Director, Environmental Programs, Headquarters, Department of the Army, subject: Army Policy Guidance on Migratory Birds (Aug. 17, 2001).

33. 16 U.S.C. §§ 1531-1543 (2000).

34. *Id.* § 1540(b).

35. *Id.* § 1531 (a)(5) (providing for states to enact their own conservation programs to protect species at risk).

36. N.Y. ENVTL. CONSERV. LAW § 11-0535 (Consol. 2002).

37. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.6(b)(5)(v) (2002); *see also* State v. Sour Mountain Realty, 714 N.Y.S.2d 78, 82 (App. Div. 2000) (discussing the status of the timber rattlesnake as a threatened species, as opposed to an endangered species, in New York).

38. *See, e.g.*, *Sour Mountain Realty*, 714 N.Y.S.2d at 82 (noting that the legislative history of the New York ESA states that it is intended to compliment the federal ESA).

39. N.Y. ENVTL. CONSERV. LAW §§ 11-0535, 71-0921(1)(f).

40. In a 1996 speech, New York's Attorney General cited two primary reasons for prosecuting environmental crimes—deterrence and the prevention of unfair competition. Dennis C. Vacco, Address at Fordham University Law School, Environmental Law Symposium (1996), *in* 7 FORDHAM ENVTL. L.J. 573 (1996). Soldier *X*'s story illustrates how environmental crimes have resulted in ideological tension between the emphasis on deterrence and the principle that punishment is unjustified in the absence of moral culpability. Enforcement agencies may argue for a diminished mens rea when the harm from an ESA violation is irremediable.

If environmental enforcement authorities attempt to question anyone at an installation for alleged environmental crimes, the ELS should report the facts to the Environmental Law Division. This reporting requirement is not new; it is already specified in *Army Regulation 200-1*.[41] Major Arnold.

Categorical Exclusions Under 32 CFR Part 651: A Guide to the Changes

Introduction

On 29 March 2002, the Office of the Deputy Assistant Secretary of the Army published Volume 32, Code of Federal Regulations (CFR), part 651, Environmental Analysis of Army Actions; Final Rule (hereinafter Final Rule), in the *Federal Register.* The Final Rule is a revision of policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA)[42] and Council on Environmental Quality regulations.[43] It supersedes the guidance found in *Army Regulation (AR) 200-2*.[44] The Army is currently revising *AR 200-2* based on the new Final Rule.[45]

The Final Rule's myriad changes to the Categorical Exclusions (CXs) are particularly important to environmental law practitioners. Previously found in *AR 200-2*, Appendix A, the CXs are now located in Appendix B of the Final Rule.[46] They have been reorganized according to the type of activity (for example, administration/operation, construction/demolition, and repair and maintenance), and the old alphanumeric system has been adjusted accordingly.[47] The new system may be disconcerting initially, but once one becomes familiar with it, it is easier to use than its alphanumeric predecessors.

CX Changes in the Final Rule

To help the reader pinpoint the changes in the regulation, this article discusses the revisions using the older, revised regulation's numbering system:

A-1. Personnel and administrative activities. Renumbered as Section II(b)(5). No change; the text is taken verbatim from the previous version.[48]

A-2. Law and order activities. Renumbered as Section II(b)(1), and with only minor changes. The word "routine" now qualifies "law and order activities," and the phrase "military policy" has finally been changed to the always-intended "military police."[49] With the addition of a slash mark, it now appears that military personnel other than military police can perform such law and order activities.[50] More substantively, the umbrella of this CX now includes civilian natural resources and environmental law officers. Finally, the phrase "excluding formulation and/or enforcement of hunting and fishing policies or regulations that differ substantively from those in effect on surrounding non-Army lands" has been stricken from this CX, but can now be found in Section II(d)(3) of the Final Rule, "Implementation of hunting and fishing policies consistent with state and local regulations."[51]

A-3. Recreation and welfare activities. Renumbered as Section II(b)(6), with few significant changes, except that "routinely conducted" now qualifies "recreation and welfare activities."[52]

A-4. Commissary and Post Exchange operations. Omitted from the Final Rule. Section II(b)(4), "Activities and opera-

41. *See* U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT para. 15-7(a) (21 Feb. 1997) ("Commanders will immediately forward criminal indictments or information against Army and civilian personnel for violations of environmental laws through command channels. Criminal actions involving Civil Works activities or personnel will be reported to the Director of Civil Works. Other criminal actions will be reported to the DEP [Department of Environmental Protection] or ELD [Environmental Law Division]."); *see also* U.S. DEP'T OF ARMY, PAM. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT para. 15-16 (Jan. 17, 2002).

42. 42 U.S.C. §§ 4321-4370 (2000).

43. 40 C.F.R. §§ 1500-1508 (2002).

44. U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1998) (superceded).

45. *See* 32 C.F.R. pt. 651 (2002) (discussing intent to change *AR 200-2* in the introductory section); *see also* 65 Fed. Reg. 54,347-92 (Sept. 7, 2000) (publishing draft rule for public comment).

46. 32 C.F.R. pt. 651, app. B.

47. *See id.*

48. *See id.* app. B, § II(b)(5).

49. *Id.* app. B, § II(b)(1).

50. *See id.*

51. *Id.* app. B, § II(b)(1), (d)(3).

52. *Id.* app. B, § II(b)(6).

tions to be conducted in existing non-historic structures," however, appears to cover such activities.[53]

A-5. Repair and maintenance of buildings. Renumbered as Section II(g)(1) for buildings, airfields, grounds, equipment, and other facilities. Section II(g)(2), in turn, covers roads, including trails and firebreaks. The language excluding hazardous or contaminated materials has been removed from this CX.[54] For guidance on such materials, see Section II(h), "Hazardous materials/hazardous waste management and operations."[55] The revision of this CX has also been expanded to specifically include the removal and disposal of asbestos-containing material and lead-based paint. Note, though, undertaking either requires a record of environmental exclusion (REC); any repair or maintenance conducted on a historic structure also requires a REC. Removal of dead, diseased, or damaged trees is also now covered under this CX. Finally, the list of repair and maintenance activities covered specifically indicates that it is not exhaustive.[56]

A-6. Procurement of goods and services. Renumbered as Section II(e)(1). With the addition of a parenthetical regarding "green" procurement, this CX has become more voluminous, but its content has not changed significantly.[57]

A-7. Construction. Construction activities are now found in Section II(c). The changes here are significant; for example, the previously vague "[c]onstruction that does not significantly alter land use" has been supplanted by highly specific guidance permitting construction of additions to existing structures seemingly without limitation, except as to the facility's use for solid, medical, or hazardous waste.[58] Even more significantly, new construction that does not involve the surface disturbance of more than five cumulative acres also is now categorically excluded under Section II(c)(1), provided that the facility's use does not involve solid, medical, or hazardous waste. Note, though, that this CX cannot be used if the proposed action would affect wetlands, sensitive habitat, or in other special circumstances. This CX requires a REC.[59]

A-8. Simulated exercises without troops. Renumbered as Section II(i)(1). It has been expanded to include not only simulated war games, but also on-post tactical and logistical exercises involving up to battalion-sized units, so long as no tracked vehicles are used. A REC is required, however, "to demonstrate coordination with installation range control and environmental office."[60]

A-9. Administrative and classroom training. Renumbered as Section II(i)(2), but otherwise unchanged.[61]

A-10. Storage of materials other than hazardous. Omitted from the Final Rule. Section II(b)(4), "Activities and operations to be conducted in existing non-historic structures," may cover such activities.[62] This CX requires a REC.[63]

A-11. Operations by established laboratories. Renumbered as Section II(h)(5). The language of this CX has been substantially revised, to include the addition of research and testing, and the omission of the qualifier "laboratories." The change makes this CX generally applicable to any research, testing, or operations conducted at an existing facility, provided that the facility is enclosed. Although the caveat regarding the necessity of compliance with federal, state, and local standards (a slight change from the previous reference to "laws and regulations") remains in place, the prohibition against using captured animals from the wild as research subjects has been removed. Finally, although this CX no longer specifically requires a REC, if a given operation within an existing facility "will substantially increase the extent of potential environmental impacts or is controversial," then an EA (and, potentially, an EIS) is required unless one already exists.[64]

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53. *See id.* app. B, § II(b)(4).

54. *Id.* app. B, § II(g).

55. *Id.* app. B, § II(h).

56. *Id.* app. B, § II(g).

57. *See id.* app. B, § II(e)(1).

58. *Id.* app. B, § II(c); *see also id.* app. B, § II(h).

59. *See id.* § 651.29.

60. *Id.* pt. 651, app. B, § II(i)(1).

61. *Id.* app. B, § II(i)(2).

62. *See id.* app. B, § II(b)(4).

63. *Id.*

64. *Id.* app. B, § II(h)(5).

A-12. Developmental and operational testing on a military reservation. Omitted from the Final Rule. To the extent that this CX had a purpose (limited, as it was, by the caveat, "provided that the training and maintenance activities have been adequately assessed . . . in other Army environmental documents"), an element of what it excluded—the testing of a commercially available item—may be found in Section II(e)(5), "Procurement, testing, use, and/or conversion of a commercially available product," or Section II(e)(7), "Modification and adaptation of commercially available items and products for military application."[65]

A-13. Routine movement of personnel/routine handling of non-hazardous and hazardous materials. Renumbered as found, in part, in Section II(h)(4). The preliminary "routine movement of personnel"—never further expounded upon after the semi-colon that followed it in the last version—has been omitted from the new section of the Final Rule, and the CX now focuses exclusively on the handling, transportation, and disposal of wastes, including asbestos, PCBs, lead-based paint, unexploded ordnance, and hazardous waste that otherwise complies with regulatory agency requirements. In a cross-reference to Section II(c)(1), "Construction of an addition to an existing structure/new construction if no more than 5.0 cumulative acres," Section II(h)(4) indicates that it is specifically not applicable to construction of new facilities.[66]

A-14. Reduction and realignment of civilian and/or military personnel). Renumbered as Section II(b)(12). A seemingly small but actually significant change was made to the language of this CX, in that "reduction and realignment of civilian and/or military personnel that fall below the thresholds for reportable actions as prescribed by statute *or AR 5-10*" has been revised to strike the italicized portion.[67] That regulatory reference created difficulties in the stationing of military units because it effectively limited the use of a REC to stationing decisions involving less than 200 military personnel or fifty civilian employees—a wholly arbitrary line inadvertently created by the last update of *Army Regulation* (*AR*) *5-10*, *Stationing*, in March 2001.[68]

The new CX also states that Section (b)(12) *cannot* be used for related activities such as construction, renovation, or demolition activities that would otherwise require an EA or EIS—but may be used for reorganizations and reassignments with no changes in force structure, unit redesignations, and routine administrative reorganizations and consolidations.[69] With the elimination of the problematic regulatory reference, the addition of more specific language, and a parenthetical reference to the statute governing Base Realignment and Closure, this CX is much clearer and more useful than its predecessor. The CX still requires a REC.[70]

A-15. Conversion of commercial activities. Renumbered as Section II(e)(3). The reference to Department of Defense Directive 4100.15[71] has been updated, and *AR 5-20*[72] is now the authority cited for the contracting of services. The CX is now somewhat more limited, though, by the addition of qualifying language indicating that only those actions that do not change the actions or the missions of the organization or alter the existing land-use patterns can be categorically excluded.[73]

A-16. Preparation of regulations, procedures, manuals, and other guidance. Renumbered as Section II(b)(3). The text is taken nearly verbatim from the old version, except for the addition of an explanatory parenthetical indicating that "environmentally evaluated" means "subject to previous NEPA review," and the correction of a typographical error ("an" to "and") from the prior regulation.[74]

A-17. Acquisition, installation, and operation of utility and communication systems. Renumbered as Section II(e)(2). The new CX contains little change from a textual perspective (for example, the addition of "mobile antennas," a few much-needed commas, and the disjunctive "or"), but the CX now requires a REC.[75]

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65. *See id.* app. B, § II(e)(5), (7).

66. *Id*. app. B, § II(h)(4).

67. *See id.* app. B, § II(b)(12).

68. U.S. DEP'T OF ARMY, REG. 5-10, STATIONING (1 Mar. 2001).

69. 32 C.F.R. pt. 651, app. B, § II(b)(12).

70. *Id*.

71. U.S. DEP'T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989).

72. U.S. DEP'T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct. 1997).

73. 32 C.F.R. pt. 651, app. B, § II(e)(3).

74. *Id*. app. B, § II(b)(3).

75. *See id*. app. B, § II(e)(2).

A-18. Activities that identify the state of the environment. This CX has been so thoroughly revised as to appear initially as having been removed. The essence of what it was meant to exclude, though, can partially be found in Section II(d)(4) of the Final Rule, which covers "studies, data collection, monitoring and information gathering that do not involve major surface disturbance."[76] After providing certain examples of its inclusiveness (specifically, topographic surveys, bird counts, wetland mapping, and other resource inventories), it adds the requirement of a REC to use it.[77]

Wild animals suffered another loss under the Final Rule, as the language prohibiting their capture was again omitted from the new CX. Section II(h)(3), "Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous wastes, contaminants, pollutants, or special hazards are present," could potentially be used in place of A-18. As with Section II(d)(4), however, reliance upon this CX requires a REC.[78]

A-19. Deployment of military units. Renumbered as Section II(b)(7). Some change; specifically, a clarification that this exclusion can be used only when the existing facilities will be used "for their intended purposes consistent with the scope and size of [the] existing mission."[79] More significantly, this CX no longer requires a REC.[80]

A-20. Grants of easements for existing rights-of-way. The dramatic alteration of "real estate activity" exclusions makes a side-by-side comparison impossible. Some of the exclusions have been subsumed by broader successors, while others have simply disappeared. At first, the Final Rule appears to omit A-20—except that easements generally have been incorporated into Section II(f)(1), "Grants or acquisitions of leases, licenses, easements, and permits." This CX corresponds somewhat to A-21, covering the use of real property and facilities where there is no significant change in land or facility use. Section II(f)(1) includes a non-exhaustive list of examples. This CX still requires a REC.[81]

A-21. Grants of leases, licenses, and permits. This exclusion correlates most closely to Section II(f)(1). Section II(f)(1) is broader, however, in that it covers more than the use of existing Army-controlled property for non-Army activities. Instead, its parameters extend to the leasing of civilian property, so long as no significant change in the land or facility use occurs. Further, Section II(f)(1) does not require that the land at issue be the subject of an existing and environmentally assessed land-use plan. Section II(f)(1) still requires a REC.[82]

A-22. Grants of consent agreements to use a Government-owned easement. The disposal of excess easement areas to the underlying fee owner can be found in Section II(f)(2); the granting of agreements to use an easement was subsumed under Section II(f)(1), as discussed above.[83] Section II(f)(2) also requires a REC.[84]

A-23. Grants of licenses for the operation of public utilities. Renumbered as Section II(f)(4). Although the title is completely reworded—it is now "Transfer of active installation utilities to a commercial or governmental utility provider"—conceptually, the CX is the same and its revision only clarifies its meaning.[85] This CX requires a REC.[86]

A-24. Transfer of real property within the Army or to another agency. Renumbered as Section II(f)(3), this CX changed significantly. The language regarding "leases, licenses, permits, and easements" of excess and surplus property has been replaced with the far more concise and meaningful "reporting of property as excess and surplus to the GSA for disposal."[87] This CX still requires a REC.[88]

A-25. Disposal of uncontaminated buildings and other improvements for removal off-site. Section II(f)(6) arguably

76. *Id.* app. B, § II(d)(4).

77. *Id.*

78. *See id.* app. B, § II(h)(3).

79. *Id.* app. B, § II(b)(7).

80. *See id.*

81. *See id.* app. B, § II(f)(1).

82. *See id.*

83. *See id.* app. B, § II(f)(1)-(2).

84. *See id.* app. B, § II(f)(2).

85. *See id.* app. B, § II(f)(1).

86. *Id.*

87. *See id.* app. B, § II(f)(3).

covers this exclusion, but the new exclusion is so much broader than the old one that the two are nearly unrelated.[89] The new CX covers the disposal of *all* real property, including facilities, so long as the reasonably foreseeable use will not change significantly. This CX requires a REC.[90]

A-26. Studies that involve no resources other than manpower. Omitted from the new rule. The new Section II(b)(8), "Preparation of administrative or personnel-related studies, reports, or investigations," appears to be the closest match, although this section does not specifically mention manpower.[91]

A-27. Study and test activities within the procurement program for commercial items. Renumbered as further broken down into three CXs: Section II(e)(5), "Procurement, testing, use, and/or conversion of a commercially available product;" Section II(e)(7), "Modification and adaptation of commercially available items and products for military application;" and Section II(e)(8), "Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry." Section II(e)(5), unlike A-27, has no REC requirement, but Sections II(e)(7) and (e)(8) require a REC.[92]

A-28. Development of table organization and equipment documents. Omitted from the Final Rule. The closest corresponding CX is now Section II(b)(3), "Preparation of regulations, procedures, manuals, and other guidance documents."[93]

A-29. Grants of leases, licenses, and permits to use DA property. This was subsumed by Section II(f)(1), "Grants or acquisitions of leases, licenses, easements, and permits for use of real property or facilities."[94] This CX requires a REC.[95]

New CXs

Many of the CXs in the Final Rule are completely new. The following is a brief listing of those CXs not mentioned above.

Section II(b), Administration/operation activities:

(b)(2). Emergency or disaster assistance provided to federal, state, or local entities (requires a REC);

(b)(9). Approval of asbestos or lead-based paint management plans (requires a REC);

(b)(10). Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities;

(b)(11). Ceremonies, funerals, and concerts;

(b)(13). Actions affecting Army property that fall under another federal agency's list of categorical exclusions (requires a REC); and

(b)(14). Relocation of personnel into existing federally-owned or commercially-leased space (requires a REC).

Section II(c), Construction and demolition:

(c)(2). Demolition of non-historic buildings, structures, and disposal of debris therefrom, including asbestos, PCBs, lead-based paint, and other special hazard items (requires a REC); and

(c)(3). Road or trail construction and repair.

Section II(d), Cultural and natural resource management activities:

(d)(1). Land regeneration activities using only native trees and vegetation, not including forestry operations (requires a REC);

(d)(2). Routine maintenance of streams and ditches or other rainwater conveyance structures (requires a REC); and

88. *See id*.

89. *See id.* app. B, § II(f)(6).

90. *Id*.

91. *See id.* app. B, § II(b)(8).

92. *See id.* app. B, § II(e)(5), (7)-(8).

93. *See id.* app. B, § II(b)(3).

94. *See id.* app. B, § II(f)(1).

95. *Id*.

(d)(5). Maintenance of archeological, historical, and endangered/threatened species avoidance markers, fencing, and signs.

Section II(e), Procurement and contract activities:

(e)(4). Modification, product improvement, or design change that does not change the original impact of the material, structure, or item on the environment (requires a REC); and

(e)(6). Acquisition or contracting for spares and spare parts.

Section II(f), Real estate activities:

(f)(5). Acquisition of real property where the land use will not change substantially, or where the land acquired will not exceed 40 acres, and where the use will be similar to Army activities on adjacent land (requires a REC).

Section II(g), Repair and maintenance activities:

(g)(3). Routine repair and maintenance of equipment and vehicles, other than depot or unique military equipment maintenance.

Section II(h), Hazardous materials/hazardous waste management and operations:

(h)(1). Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources (requires a REC);

(h)(2). Immediate responses in accordance with emergency response plans; and

(h)(6). Reutilization, marketing, distribution, donation, and resale of items, equipment, or materiel.

Section II(i), Training and testing:

(i)(3). Intermittent on-post training activities that involve no live fire or vehicles off established roads or trails.

Section II(j), Aircraft and airfield activities:

(j)(1). Infrequent, temporary increases in air operations up to 50% of the typical installation aircraft operation rate (requires a REC);

(j)(2). Flying activities in compliance with Federal Aviation Administration Regulations and normal flight patterns and elevations;

(j)(3). Installation, repair, or upgrade of airfield equipment; and

(j)(4). Army participation in established air shows.[96]

Screening Criteria

Although screening criteria are no longer found in the same appendix as the CXs, the use of any CX remains contingent upon meeting relevant screening criteria. Those criteria have been greatly expanded and are now found at 32 CFR section 651.29 (2002), "Determining when to use a CX (screening criteria)." The new criteria may be summarized as follows:

(1) The action has not been segmented;

(2) No exceptional circumstances exist (the regulation specifies fourteen such circumstances); and

(3) At least one CX encompasses the proposed action.[97]

In addition to the three criteria listed above, another layer of regulation protects "environmentally sensitive" resources.[98] These resources include listed, threatened, or endangered species, properties listed or eligible for listing on the National Register of Historic Places, wetlands, sole-source aquifers, coastal zones, cultural resources, and a dozen others, including the catch-all, "areas of critical environmental concern or other areas of high environmental sensitivity."[99] Where a proposed action would otherwise adversely affect "environmentally sensitive" resources, a CX still cannot be used unless the impact has been resolved through other environmental law processes.[100]

96. *Id.* app. B, § II(b)-(j).

97. *Id.* § 651.29.

98. *Id.*

99. *Id.*

100. *Id.*

The same general considerations found in the old *AR 200-2* have long been factors in the environmental assessment process. The expansion of the screening criteria, therefore, might appear at first glance to be merely semantic. In fact, the fourteen listed exceptional circumstances in the Final Rule constitute a significant addition to the screening criteria. Major Jeanette Stone.

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.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

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

2002

September 2002

9-13 September	173d Senior Officers Legal Orientation Course (5F-F1) (**CANCELLED**).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).
17 September - 10 October	159th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
23-27 September	2002 USAREUR Legal Assistance CLE (5F-F23E).

October 2002

7-11 October	2002 JAG Worldwide CLE (5F-JAG).
11 October - 19 December	159th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
21-25 October	56th Federal Labor Relations Course (5F-F22).
21 October - 1 November	5th Speech Recognition Training (512-27DC4).
21-25 October	2002 USAREUR Administrative Law CLE (5F-F24E).
23-25 October	1st Advanced Federal Labor Relations Course (5F-F21).
28 October - 1 November	2d Domestic Operational Law Course (5F-F45).
28 October - 1 November	64th Fiscal Law Course (5F-F12).

November 2002

12-22 November	6th Speech Recognition Training (512-27DC4).
18-21 November	26th Criminal Law New Developments Course (5F-F35).
18-22 November	174th Senior Officers Legal Orientation Course (5F-F1).

December 2002

2-6 December	2002 USAREUR Criminal Law CLE (5F-F35E).

2-13 December	7th Speech Recognition Training (512-27DC4).
3-6 December	2002 Government Contract & Fiscal Law Symposium (5F-F11).
9-13 December	6th Income Tax Law Course (5F-F28).

January 2003

5-17 January	2003 JAOAC (Phase II) (5F-F55).
6-10 January	2003 USAREUR Contract & Fiscal Law CLE (5F-F15E).
6-10 January	2003 USAREUR Income Tax Law CLE (5F-F28E).
7 January - 31 January	160th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
13-17 January	2003 PACOM Income Tax Law CLE (5F-F28P).
21-24 January	2003 Hawaii Income Tax Law CLE (5F-F28H).
22-24 January	9th RC General Officers Legal Orientation Course (5F-F3).
27-31 January	175th Senior Officers Legal Orientation Course (5F-F1).
27-29 January	2003 Hawaii Estate Planning Course.
27 January - 28 March	9th Court Reporter Course (512-27DC5).
31 January - 11 April	160th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2003

3-7 February	79th Law of War Course (5F-F42).
10-14 February	2003 Maxwell AFB Fiscal Law Course.
10-14 February	2002 USAREUR Operational Law CLE (5F-F47E).
24-28 February	65th Fiscal Law Course (5F-F12).
24 February - 7 March	39th Operational Law Course (5F-F47).

March 2003

3-7 March	66th Fiscal Law Course (5F-F12).
10-14 March	27th Administrative Law for Military Installations Course (5F-F24).
17-21 March	4th Advanced Contract Law Course (5F-F103).
17-28 March	19th Criminal Law Advocacy Course (5F-F34).
24-28 March	176th Senior Officers Legal Orientation Course (5F-F1).
31 March - 4 April	14th Law for Paralegal NCOs Course (512-27D/20/30).

April 2003

7-11 April	9th Fiscal Law Comptroller Accreditation Course (Korea).
14-17 April	2003 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April	1st Ethics Counselors Course (5F-F202).
21-25 April	14th Law for Paralegal NCOs Course (512-27D/20/30).
28 April - 9 May	150th Contract Attorneys Course (5F-F10).
28 April - 16 May	46th Military Judge Course (5F-F33).
28 April - 27 June	10th Court Reporter Course (512-27DC5).

May 2003

5-16 May	2003 PACOM Ethics Counselors Workshop (5F-F202-P).

June 2003

2-6 June	6th Intelligence Law Course (5F-F41).
2-6 June	177th Senior Officers Legal Orientation Course (5F-F1).

2-27 June	10th JA Warrant Officer Basic Course (7A-550A0).
3-27 June	161st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9-11 June	6th Team Leadership Seminar (5F-F52S).
9-13 June	10th Fiscal Law Comptroller Accreditation Course (Alaska) (5F-F14-A).
9-13 June	33d Staff Judge Advocate Course (5F-F52).
16-20 June	7th Chief Paralegal NCO Course (512-27D-CLNCO).
16-20 June	14th Senior Paralegal NCO Management Course (512-27D/40/50).
23-27 June	14th Legal Administrators Course (7A-550A1).
27 June - 5 September	161st Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2003

7 July - 1 August	4th JA Warrant Officer Advanced Course (7A0550A2).
14-18 July	80th Law of War Course (5F-F42).
21-25 July	34th Methods of Instruction Course (5F-F70).
28 July - 8 August	151st Contract Attorneys Course (5F-F10).

August 2003

4-8 August	21st Federal Litigation Course (5F-F29).
4 August - 3 October	11th Court Reporter Course (512-27DC5).
11-22 August	40th Operational Law Course (5F-F47).
11 August 03 - 22 May 04	52d Graduate Course (5-27-C22).
25-29 August	9th Military Justice Managers Course (5F-F31).

September 2003

8-12 September	178th Senior Officers Legal Orientation Course (5F-F1).
8-12 September	2003 USAREUR Administrative Law CLE (5F-F24E).
15-26 September	20th Criminal Law Advocacy Course (5F-F34).
15-26 September	52d Legal Assistance Course (5F-F23).
16 September - 9 October	162d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2003

6-10 October	2003 JAG Worldwide CLE (5F-JAG).
10 October - 18 December	162d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
20-24 October	57th Federal Labor Relations Course (5F-F22).
20-24 October	2003 USAREUR Legal Assistance CLE (5F-F23E).
22-24 October	2d Advanced Labor Relations Course (5F-F21).
26-27 October	8th Speech Recognition Training (512-27DC4).
27-31 October	3d Domestic Operational Law Course (5F-F45).
27-31 October	67th Fiscal Law Course (5F-F12).
27 October - 7 November	6th Speech Recognition Course (512-27DC4).

November 2003

12-15 November	27th Criminal Law New Developments Course (5F-F35).
17-21 November	3d Court Reporting Symposium (512-27DC6).

17-21 November	179th Senior Officers Legal Orientation Course (5F-F1).
17-21 November	2003 USAREUR Operational Law CLE (5F-F47E).

December 2003

1-5 December	2003 USAREUR Criminal Law CLE (5F-F35E).
2-5 December	2003 Government Contract & Fiscal Law Symposium (5F-F11).
8-12 December	7th Income Tax Law Course (5F-F28).

January 2004

4-16 January	2004 JAOAC (Phase II) (5F-F55).
5-9 January	2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).
5-9 January	2004 USAREUR Income Tax Law CLE (5F-F28E).
6-29 January	163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
12-16 January	2004 PACOM Income Tax Law CLE (5F-F28P).
20-23 January	2004 Hawaii Income Tax Law CLE (5F-F28H).
21-23 January	10th Reserve Component General Officers Legal Orientation Course (5F-F3).
26-30 January	9th Fiscal Law Comptroleer Accreditation Course (Hawaii) (5F-F14-H).
26-30 January	180th Senior Officers Legal Orientation Course (5F-F1).
26 January - 26 March	12th Court Reporter Course (512-27DC5).
30 January - 9 April 04	163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2004

2-6 February	81st Law of War Course (5F-F42).
9-13 February	2004 Maxwell AFB Fiscal Law Course.
23-27 February	68th Fiscal Law Course (5F-F12).
23 February - 5 March	41st Operational Law Course (5F-F47).

March 2004

1-5 March	69th Fiscal Law Course (5F-F12).
8-12 March	28th Administrative Law for Military Installations Course (5F-F24).
15-19 March	5th Contract Litigation Course (5F-F102).
15-26 March	21st Criminal Law Advocacy Course (5F-F34).
22-26 March	181st Senior Officers Legal Orientation Course (5F-F1).

April 2004

12-15 April	2004 Reserve Component Judge Advocate Workshop (5F-F56).
19-23 April	6th Ethics Counselors Course (5F-F202).
19-23 April	15th Law for Paralegal NCOs Course (512-27D/20/30).
26 April - 7 May	152d Contract Attorneys Course (5F-F10).
26 April - 14 May	47th Military Judge Course (5F-F33).
26 April - 25 June	13th Court Reporter Course (512-27DC5).

May 2004

10-14 May	53d Legal Assistance Course (5F-F23).
24-28 May	182d Senior Officers Legal Orientation Course (5F-F1).

June 2004

1-3 June	6th Procurement Fraud Course (5F-F101).

1-25 June	11th JA Warrant Office Basic Course (7A-550A0).
2-24 June	164th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
7-9 June	7th Team Leadership Seminar (5F-F52S).
7-11 June	34th Staff Judge Advocate Course (5F-F52).
12-16 June	82d Law of War Workshop (5F-F42).
14-18 June	8th Chief Paralegal NCO Course (512-27D-CLNCO).
14-18 June	15th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 June	15th Legal Administrators Course (7A-550A1).
25 June - 2 September	164th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2004

12 July - 6 August	5th JA Warrant Officer Advanced Course (7A-550A2).
19-23 July	35th Methods of Instruction Course (5F-F70).
27 July - 6 August	153d Contract Attorneys Course (5F-F10).

August 2004

2-6 August	22d Federal Litigation Course (5F-F29).
2 August - 1 October	14th Court Report Course (512-27DC5).
9-20 August	42d Operational Law Course (5F-F47).
9 August - 22 May 05	53d Graduate Course (5-27-C22).
23-27 August	10th Military Justice Managers Course (5F-F31).

September 2004

7-10 September	2004 USAREUR Administrative Law CLE (5F-F24E).
13-17 September	54th Legal Assistance Course (5F-F23).
13-24 September	22d Criminal Law Advocacy Course (5F-F34).

October 2004

4-8 October	2004 JAG Worldwide CLE (5F-JAG).

3. Civilian-Sponsored CLE Courses

6 September ICLE	U.S. Supreme Court Update Swissotel Atlanta, Georgia
27 September ICLE	Eight Steps to Effective Trial National Speakers Series Marriott Gwinnett Place Hotel Atlanta, Georgia

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

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
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

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 thirty-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.
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 responsiblity 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.mb-cle.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 submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 October 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel J T. Parker, telephone (800) 552-3978, ext. 357, or e-mail JT.Parker@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2002-2003 Academic Year)

DATE	TRNG SITE/HOST UNIT	GENERAL OFFICER AC/RC	SUBJECT	ACTION OFFICER
21-22 Sep 02	Topeka, KS KSNG		Administrative Law (Legal Assistance)	MAJ Frances Brunner Fbrunner@state.ks.us
21-22 Sep 02	Pittsburgh, PA 99th RSC		Criminal Law; Administrative Law	LTC Donald Taylor (724) 693-2152 Donald.Taylor2@usarc-emh2.army.mil
2-3 Nov 02	St. Paul, MN 214th LSO	BG Carey	Administrative Law (Legal Assistance); Criminal Law	MAJ Peter Grayson (651) 222-3784 graysonlaw@qwest.net
23-24 Nov 02	New York, NY 77th RSC	MG Marchand/ BG Arnold	Criminal Law; Fiscal Law; Administrative Law	COL Myron Berman (718) 352-5720
7-8 Dec 02	Charleston, SC 12th LSO	BG Carey/ BG Pietsch	Criminal Law; Contract Law	MSG Ruth Blackmon (803) 751-1223 ruth.blackmon2@se.usar.army.mil
13-15 Dec 02	New Orleans, LA 2d LSO/90th RSC	MG Romig/ BG Arnold	Operational Law; Criminal Law	LTC LeAnne Burch (870) 357-5351 LeAnne.Burch@mail.state.ar.us
11-12 Jan 03	Long Beach, CA 78th LSO	BG Black/ BG Pietsch	Contract Law; Administrative Law	MSG Rosie Rocha (714) 229-3700 rosie.rocha@usarc-emh2.army.mil
1-2 Feb 03	Columbus, OH 9th LSO	BG Black/ COL(P) Schneider	Administrative Law (Legal Assistance); Contract Law	1LT Keith Blosser (614) 554-4355 kblosser@columbus.rr.com
1-2 Feb 03	Seattle, WA 70th RSC/WAARNG	MG Marchand/ BG Arnold	International Law; Criminal Law	LTC John Felleisen (253) 798-7894 john.felleisen@usarmy.mil
15-16 Feb 03	Indianapolis, IN INARNG	BG Wright/ COL(P) Schneider	Contract Law; International Law	LTC George Thompson (317) 247-3491 george.Thompson@in.ngb.army.mil
21-23 Feb 03	Salt Lake City, UT 96th RSC/87th LSO	BG Black/ BG Pietsch	Contract Law; Administrative Law	LTC Lawrence A. Schmidt (801) 523-4322/4408 Lawrence.Schmidt@ut.ngb.army.mil
22-23 Feb 03	W. Palm Beach, FL 174th LSO/FLARNG	MG Marchand BG Arnold	Administrative Law; International Law	COL Paul Nicolletti (561) 659-5300 paul.nicoletti@se.usar.army.mil LTC Elizabeth Masters (904) 823-0132 Elizabeth.masters@fl.ngb.army.mil

1-2 Mar 03	San Francisco, CA 63rd RSC/75th LSO	BG Wright/ BG Arnold	Operational Law; Criminal Law	MAJ Tracey Schlabach (529) 439-4090 tschlabach@kpmg.com Ms. Diane Vasse (650) 603-8652 Diane.Vasey@usarc-emh2.army.mil
8-9 Mar 03	Washington, DC 10th LSO	BG Black BG Pietsch	Criminal Law; Administrative Law	CPT James Szymalak (703) 588-6759 james.szymalak@hqda.army.mil
22-23 Mar 03	West Point, NY	TBA	Eastern States Senior JAG Workshop	COL Randall Eng (718) 520-3482 reng@courts.state.ny.us
26-27 Apr 03	Boston, MA 94th RSC	MG Marchand/ BG Arnold	Administrative Law; Contract Law	SSG Neoma Rothrock (978) 796-2143 neoma.rothrock@us.army.mil
16-18 May 03	Kansas City, MO 89th RSC	BG Carey/ BG Pietsch	Criminal Law; International Law	MAJ Anna Swallow (316) 781-1759, est. 1228 anna.swallow@usarc-emh2.army.mil SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
17-18 May 03	Birmingham, AL 81st RSC	BG Wright/ BG Arnold	Criminal Law; International Law	CPT Joseph Copeland (205) 795-1980 joseph.copeland@se.usar.army.mil
	Charlottesville, VA OTJAG	All General Officers scheduled to attend	Spring Worldwide CLE	

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

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 148th Contract Attorneys Deskbook, JA 501, Vol. I, Apr/May 2001.

AD A392561 148th Contract Attorneys Contract Deskbook, JA 501, Vol. II, Apr/May 2001.

AD A38746 58th Fiscal Law Course Deskbook, JA 506-2002.

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 A400000 Tax Information Series, JA 269-2002.

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 A397153 Environmental Law Deskbook, JA 234-2002.

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 A399975 The Law of Federal Labor-Management Relations, JA 211-2001.

Legal Research and Communications

AD A394124 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 A400114 Operational Law Handbook, JA 422-2002.

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 headquar-

ters, 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 the JAGCNet:

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

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

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

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

(d) FLEP students;

(e) Affiliated (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 to:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

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

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

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

(d) 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.

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

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

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

5. 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	August 2001	The Law of Federal Labor-Management Relations, August 2001.
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 1996.
JA 231	August 2000	Reports of Survey and Line of Duty Determinations Guide, September 1992.
JA 234	August 2001	Environmental Law Deskbook, August 2001.
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 Worldwide Legal Assistance and Reserve Components Office Directory, November 1999.
JA 269	January 2002	Tax Information Series, January 2002.
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	March 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	January 2002	Operational Law Handbook 2002.
JA 501	August 2001	146th Contract Attorneys Course Deskbook, Vols. I & II, July/Aug. 2001.
JA 506	March 2001	62nd & 63rd Fiscal Law Course Deskbook, March 2002.

6. 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.

7. 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 before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

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: (434) 972-6394, facsimile: (434) 972-6386, or e-mail: lullnc@hqda.army.mil.

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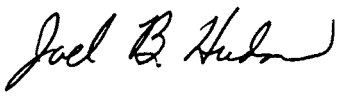

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
0229602

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