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Articles

Book Review

U.S. and Them:
Citizenship Issues in Department of Defense Civilian Employment Overseas

Mike Litak
Attorney Advisor
Office of the Judge Advocate, HQ, U.S. Army Europe & Seventh Army
Heidelberg, Germany

"These laws have been with us for centuries; how can you doubt them?"[1]

I. Introduction to United States Employment Systems

Hypothetically Speaking

Federal employment systems must evolve to remain relevant,[2] yet a virtually inevitable consequence of evolution is complexity. When the U.S. Secretary of Defense noted that, "We have complaints from managers that they have to manage over several different personnel systems,"[3] he had identified one such complexity. Indeed, over the past half-century, Department of Defense (DOD) personnel systems overseas have developed their own intricate challenges. These challenges often involve citizenship issues.

A significant part of the DOD civilian workforce is employed in Europe.[4] Within Europe, the majority is employed in Germany. Focusing on the U.S. Army in Germany, this article examines the sources, impact, and occasionally incongruous consequences of citizenship on DOD employment of civilians overseas. In doing so, this article makes periodic reference to the following hypothetical which illustrates some common, recurring issues that invariably vex even seasoned labor and employment law practitioners abroad:

Mr. G. S. Wannabe is a U.S. citizen who has been living in Germany for years with no affiliation to the U.S. forces stationed there. One day, he applies for a local, appropriated fund (APF) job with the U.S. Army. The Army civilian personnel advisory center rejects his application because he is ordinarily resident[5] and, in their words, cannot be paid in dollars. They also reject his later applications for APF positions under Euro-paid, local national (LN) conditions, so he files a national origin discrimination complaint against them. The Army eventually hires him into a nonappropriated fund (NAF) job under LN conditions. In this position, Mr. Wannabe meets a German citizen who also works for the Army, but as an APF (LN) employee. They marry and she acquires U.S. citizenship. At her citizenship party, Ms. Wannabe learns that the Classification Act[6] now forces her out of her job. She is terminated and tries to file a discrimination complaint, but the agency tells her she cannot. She then sues in German labor court, prevails, and the Army settles her case. Meanwhile, Mr. Wannabe faces a reduction in force (RIF). When he isn't placed into a vacant, APF (LN) job in his field, he tries to add a reprisal allegation to his pending discrimination complaint, but the agency informs him that he cannot file one. He, too, sues in German labor court, challenging the propriety of the separation procedures, and is reinstated even though he had qualified for no jobs at the time of his separation.

How can any of this happen? The Classification Act is cited routinely as the culprit in denying such employment, but does it really do any of this and, if so, how? To be certain, not all of the hypothetical's circumstances appear in a single case, and this

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[1] KAFKA (Paramount Pictures 1991). Bureaucratic deference to tradition facilitates stability but risks stagnation. Some laws and rules central to this text have originated over a half-century ago.

[2] *See* H.R 1836, 108th Cong. (2003). The Civil Service and National Security Personnel Improvement Act and National Security Personnel System Act, intended to replace the Classification Act System. *Id*. "Embracing change" in all areas has become somewhat of a Mantra throughout much of the Army.

[3] Tanya N. Ballard, *Rumsfeld: Defense Needs Personnel Reform to Manage Better*, GOVEXEC.com, June 4, 2003, *at* http://govexec.com/dailyfed/0603/060403t1.htm (quoting Secretary Rumsfeld in a hearing before the Senate Governmental Affairs Committee regarding reforms to the General Schedule system) (on file with author).

[4] In 1988, for example, before the reunification of Germany, the U.S. Army in Europe employed over 65,500 U.S. and foreign civilian employees. PUBLIC AFFAIRS OFFICE, HQ, U.S. ARMY EUROPE AND 7th ARMY, U.S. ARMY EUROPE & 7th ARMY—CONTINUITY, CHANGE, GROWTH 9 (1994). In 2005, prior to another anticipated major reduction, this number stands at just under 30,000. *See*, *e.g.*, U.S. Army, Europe, *Global Rebasing and Restructuring IPR #4* (powerpoint presentation, 9 December 2004) (on file with author) [hereinafter *Global Rebasing and Restructuring*].

[5] Ordinarily resident status is gained primarily through residence or employment in a nation hosting U.S. Forces but without status of forces affiliation. *See* discussion *infra* pt. III.

[6] 5 U.S.C. §§ 5101-5115, 5331-5338 (2000). *See also* 8 U.S.C. § 1430b(1)(B) (providing for U.S. citizenship without a continuous residence requirement in certain cases.). Many variations of acquired U.S. citizenship after LN appointment exist, typically involving marriage to Soldiers. The hypothetical example is theoretical.

article is by no means intended as a comprehensive discourse on all aspects of these scenarios, but effectively answering these basic questions can affect the outcome of recurring employment eligibility determinations, discrimination complaints, removals, and RIF actions. Before answering these questions, however, it would be helpful to refresh military practitioners' understanding of how the civil service and foreign national employment systems operate—particularly their limitations under statutory employment, classification, and pay systems.

What Makes a Civil Servant?

Federal employment law stretches back to the creation of the Departments of State, Treasury, and War in 1789.[7] The escalating complexity of Government functions, and the need for similar federal jobs to have standardized performance requirements and pay, led to a continuum of legislative changes. The Civil Service Reform Act of 1978 (CSRA),[8] inter alia, replaced an archaic Civil Service Commission with the Office of Personnel Management (OPM)[9] to oversee federal human resources. Congress, the President, and the OPM are the principal authorities behind today's civil service.

Metaphorically, perhaps, it should not take an "Act of Congress" to make a civil servant, but in reality, many statutes and rules affect civil service operations.. All aspiring civil servants must meet three initial requirements for eligibility.[10] A citizenship requirement is not among them, but it rapidly enters the maze of laws, treaties, agreements, executive orders, and regulations that restrict access to many federal jobs. Citizenship issues in federal employment are as much matters of fiscal law, as they are of international, administrative, immigration, or employment law. Congressional acts establish the basic systems of federal employment and govern the classification and pay of their respective employees.[11] Separate statutes are required to annually fund those systems.[12] Congress gave the President authority to regulate executive branch employees, and delegated broad rule-making power, subject to his direction, to the OPM,[13] which exercises its authority primarily in the Code of Federal Regulations (C.F.R.).[14] Among its duties, the OPM establishes government-wide classification standards placing civil service positions in classes and setting pay grades with fixed rates.[15]

How Federal Jobs Are Structured

The Federal Civil Service basically consists of three statutory employment systems or services that provide for the different types of positions it requires: the competitive service, the excepted service, and the senior executive service (SES).[16] These services are supported by statutory pay and classification systems for the types of duties performed in each position. Once classified, the positions are filled with employees under statutory and other hiring authorities (Table 1 provides a simplified overview of this structure).

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[7] U.S. Office of Personnel Management-Strategic Compensation Policy Center, *Evolution of White Collar Pay*, *at* http://www.opm.gov/strategicomp/HTML (last visited Jan. 12, 2005) [hereinafter OPM, *Evolution of White Collar Pay*].

[8] Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended at scattered sections of 5 U.S.C.).

[9] For more information about the OPM, visit their website at http://www.opm.gov/, which outlines the OPM's mission to build a high quality and diverse Federal workforce.

[10] *See*, *e.g.*, 5 U.S.C. § 2105(a) (listing the requirements that prospective employees must be appointed by one of several designated federal officials; engaged in a federal function; and be subject to the supervision of one of several designated federal officials).

[11] U.S. CONST. art. II, § 2. Resulting federal employment systems promote equal pay for substantially equal work, and comparability of federal pay with private sector rates. 5 U.S.C. §§ 5301, 5341.

[12] *See* Treasury and General Gov't Appropriations Act of 2002, Pub. L. No. 107-67 § 605, 115 Stat. 514.

[13] 5 U.S.C. § 5115. Congress, however, retains significant authority over the terms and conditions of federal employment. *See* 5 U.S.C. pt. III.

[14] *Id. See generally* 5 C.F.R. pts. 1- 1199 (2004).

[15] *See*, *e.g.*, 5 U.S.C. chs. 51, 53.

[16] *Id.* §§ 2102, 2102(a), 2103.

Civilian Employment System	Competitive Service	Excepted Service	Senior Executive ervice (SES)
Classification Systems	General Schedule (GS) Federal Wage System (FWS)	GS FWS	SES
Common Pay Systems/ Schedules	GS, Wage Grade (WG), Wage Leader (WL), Wage Supervisor (WS)	GS, WG, WL, WS	SES (pay band)
Common Appointment Authorities	COMPETITIVE: Career & Career Conditional	Schedules A, B, C	Limited Term SES Limited Emergency SES Career SES Non-career SES Scientific & Professional Term, Temporary
	NON-COMPETITIVE: Career & Career Conditional Career and Career Conditional (but authorized by statute or court order)	Time Limited, Veteran's Readjustment Act, etc.	

Table 1

*Dozens of different appointment authorities are used to hire civil servants.[17]

The major differences between the three services lie in their appointment processes and employment protections.[18] Over 80 percent of civil service employees are in competitive service positions.[19] This includes all positions with appointments subject to the examination, selection, and placement rules of Title 5 U.S.C. Chapter 33.[20] An employee's competitive status also can affect how positions are filled.[21] The excepted service aptly consists of positions excepted from the competitive service by statute, the President, or OPM,[22] including positions in the legislative, executive, and judicial branches for which competitive examination is not feasible. The excepted service has three appointment categories: Schedules A, B, and C.[23] Over 19 percent of civil service employees are in the excepted service. The remaining less than one half of one percent of them are in top-level, SES positions.[24]

Competitive and excepted service employees furnish both white- and blue-collar work.[25] The Classification Act of 1923[26] identified five position groups essential to the federal workforce (at the headquarters-level) and established pay scales for each.[27] Its successor, the Classification Act of 1949,[28] established the General Schedule (GS) system (essentially white-collar positions),

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[17] *See*, *e.g.*, U.S. OFFICE OF SECRETARY OF DEFENSE, MANAGER'S GUIDE TO APPOINTING AUTHORITIES (Oct. 2000) (on file with author).

[18] *See* U.S. Army Personnel Management and Information Support System, *The Federal Civil Service*, *available at* http://www.afpc.randolph.af.mil/permiss/civilian/c_641.htm (last visited Jan. 12, 2005).

[19] 2000 FEDERAL PERSONNEL GUIDE 18 (KEY COMMUNICATIONS GROUP, INC. 2000) [hereinafter 2000 FEDERAL PERSONNEL GUIDE]. *See also* ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 210, LAW OF FEDERAL EMPLOYMENT 2-1 (Sept. 2000).

[20] 5 U.S.C. § 2102(a)(1).

[21] U.S. Dep't of Defense Civilian Personnel Management Service, *Virtual Interactive Personnel—Competitive Service*, *at* http://www.cpms.osd.mil/vip/per_data/6411.htm (last updated Jan. 12, 1999) (observing that competitive service positions are in the excepted service while filled by some individuals appointed under excepted authorities).

[22] 5 C.F.R. § 213.101 (2004).

[23] *Id.* § 6.2 (providing that schedules A and B include non-confidential, non-policy determining jobs. Schedule C comprises confidential, or policy-determining jobs subject to political patronage.).

[24] 2000 FEDERAL PERSONNEL GUIDE, *supra* note 19, at 18.

[25] U.S. Army Personnel Management and Information Support System, *Pay Setting Information, Employee Benefits Information & Advice*, *at* http://cpol.army.mil/library/permiss/2413.html (last modified Jan. 27, 2005).

[26] Classification Act of 1923, Pub. L. No. 67-516, 42 Stat. 1488 (repealed 1949) (establishing the following groups: professional and scientific; sub-professional; clerical, administrative, and fiscal; custodial; and Bureau of Engraving, clerical-mechanical jobs).

[27] *See* OPM, *Evolution of White Collar Pay*, *supra* note 7.

[28] Classification Act of 1949, Pub. L. No. 81-429, 63 Stat. 954 (1949) (repealed 1966). *See infra* note 30.

which included the first three groups.[29] Its classification rules are found at Title 5 of the U.S. Code.[30] Indeed, Chapter 51 and subchapter III of Chapter 53 are commonly referred to as the Classification Act or GS system.[31] The present GS system's classification rules[32] apply to all federal civilian employees unless they are expressly excepted from its application.[33] Classification systems thus fix varying types of positions against uniform standards.[34] Each system's employees must have their pay set in accordance with that system's laws[35] and funded by statutory appropriations. Surveys of non-federal employers determine GS pay,[36] which is set in U.S. dollars.[37] These pay provisions also apply to GS employees stationed overseas.[38]

As federal work has diversified, new classification systems continued to evolve. The Federal Wage System (FWS), established in 1972, was designed to make federal blue-collar pay comparable to prevailing private sector rates for trade, craft and laboring employees in local wage areas.[39] Differences between the GS and FWS include occupational and geographic coverage, pay ranges,[40] and pay adjustment cycles.[41] Wage System employees also obtain competitive and excepted service appointments,[42] and are subject to separate rules.[43] The GS system, however, does not apply to them.[44] The type of work performed by GS and FWS employees is still sometimes very similar.[45] Thus, GS employees may seek reclassification of their positions as FWS, and vice versa,[46] with the OPM deciding any appeals.[47] The SES system was created by the CSRA of 1978, replacing over sixty

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[29] OPM, *Evolution of White Collar Pay*, *supra* note 7.

[30] *See* notes to 29 U.S.C. § 172 (2000) (noting that the Classification Act of 1949 was repealed by Pub. L. 89-554, Sept. 6, 1966, Sec. 8(a), 80 Stat. 632 and that "Section 5102 of Title 5 contains the applicability provisions of the 1949 Act . . .").

[31] U.S. Army Personnel Management and Information Support System, *Pay Systems, Employee Benefits Information & Advice* (last modified Feb. 2, 2001) ("(GS) system, sometimes called the Classification Act system, is . . . prescribed by Chapters 51 and 53, Title 5, U.S. Code. The positions . . . are classified in accordance with . . . Chapter 51.") (on file with author).

[32] U.S. Dep't of Defense Civilian Personnel Management Service, *Virtual Interactive Personnel--General Schedule Classification System*, *at* http://www.cpms.osd.mil/vip/per_data/31b.htm (last modified Nov. 30, 1998) (providing that the GS system comprises five work categories—professional, administrative, technical, clerical, and other—spanning twenty-two broad occupational groups.). The twenty-two groups are under a revision study. *See* U.S. ARMY COMBINED ARMS CENTER AND FORT LEAVENWORTH, THE ARMY TRAINING AND LEADER DEVELOPMENT REPORT PHASE IV (CIVILIAN STUDY) 11 (24 Feb. 2003).

[33] 5 U.S.C. § 5102(b) (2000).

[34] *See, e.g.*, CLASSIFICATION PROGRAMS DIVISION, U.S. OFFICE OF PERSONNEL MANAGEMENT, TS-107, THE CLASSIFIER'S HANDBOOK 5 (1991), *available at* http://www.opm.gov/fedclass/clashnbk.pdf (last visited Jan. 12, 2005) (noting that classification recognizes levels of position difficulty and responsibility).

[35] U.S. Army Personnel Management and Information Support System, *Pay Setting Information, Employee Benefits Information & Advice*, *at* http://cpol.army.mil/library/permiss/2413.html (last modified Jan. 27, 2005) (noting that when pay is set "the pay policies which apply to the pay system covering that position are used").

[36] *E.g.*, surveys of state and local government are used for comparison. The system spans pay grades GS-01 to GS-15, each with ten step levels attainable through time in grade, award, or superior qualifications appointment. *See generally* 5 U.S.C. §§ 5333, 5336.

[37] *Id.* § 5303.

[38] U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION vol. 8, ch. 7, para. 070101 (Feb. 2001) [hereinafter DOD REG. 7000.14-R].

[39] Government Employees Prevailing Rate Systems Act, Pub. L. No. 92-392, 86 Stat. 564 (1972) (codified at 5 U.S.C. §§ 5341-49). Federal Wage System employees are also known as wage grade or prevailing rate workers.

[40] The FWS has three classes of hourly rate employees: (1) WG (worker); (2) WL (leader), and (3) WS (supervisor). Each class includes multiple grade and step-levels. 5 C.F.R. § 532.203 (2004).

[41] U.S. Office of Personnel Management—Office of Compensation Administration, *Facts about the Federal Wage System*, *at* http://www.opm.gov/oca/wage/fwsfact.asp (last visited Jan. 12, 2005).

[42] *See generally* U.S. OFFICE OF PERSONNEL MANAGEMENT, THE GUIDE TO PROCESSING PERSONNEL ACTIONS ch. 4, *available at* http://www.opm.gov/feddata/gppa/Gppa04.pdf (last visited Jan. 12, 2005) (addressing, for example, completion of U.S. Office of Personnel Management, SF 50-B, Notification of Personnel Action blocks 8 and 34 (July 1991)).

[43] *See* 5 U.S.C. § 5342(b)(1) (2000).

[44] 5 U.S.C. § 5102(c)(7); 5 U.S.C. ch. 53, subch. IV.

[45] For example, in the guidance on GS 0856 Electronics Technicians, OPM observed that classifying close cases between FWS and GS positions "requires consideration of management requirements and intent . . . [and inter alia] time spent on trades and crafts functions as against Classification Act types of work." U.S. Office of Personnel Management—Office of Merit Systems Oversight & Effectiveness, *Digest of Significant Classification Decisions and Opinions, No. 05-04*, at 3 (Sept. 1984), *available at* http://www.opm.gov/classapp/digests/articles.asp#b (last updated August 2003).

[46] *See* 5 C.F.R. § 532.705 (2004).

[47] 5 U.S.C. § 5103.

separate executive personnel authorities. It emphasizes broad governmental perspective and executive skills in its members[48] and is classified distinctly, with its own pay system.[49]

Other Federal employment systems, schedules, and authorities outside the civil service have distinct classification and pay systems.[50] Pertinent to this discussion, as well, are NAF[51] and DOD foreign national employment systems. Funding sources affect the classification of these employees.[52] Indeed, NAF employees are excepted from the Classification Act system as "employees whose pay is not wholly from appropriated funds. . . ."[53] Their multi-grade pay systems[54] are, nevertheless, structured along GS and FWS lines.[55] Further excepted from the Classification Act system are "aliens or noncitizens of the United States who occupy positions outside the United States."[56] The legal authorities examined below govern the classification and pay of these non-citizens.

How They Are Funded

Federal pay for each employment category must derive from either APF or NAF sources, in strict compliance with the statutes and regulations for those funds. Federal APF employees (e.g., GS, FWS, and SES) are paid from Treasury funds—U.S. taxpayer dollars. Specific statutory authority must exist to lawfully expend these funds.[57] Thus, paying federal employees requires appropriate statutory pay systems, which, in turn, require annual statutory funding (e.g., Treasury and General Government Appropriations Acts). In contrast, NAF employees are paid with funds derived principally from their own sales and services.[58] These funds are not commingled with Treasury APF even if used for the same programs.[59]

The Army's civilian workforce structure is determined by a continuous assessment of its needs, annually justified to the DOD, the Office of Management and Budget, and Congress.[60] Before 1985, Congress set the number of APF civilians that DOD could employ at each fiscal year end.[61] Hastily firing and rehiring employees every year created obvious inefficiencies,[62] and Civilian Employment Level Plans emerged. Supervisors now estimate civilian pay requirements under an annual Planning,

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[48] U.S. Office of Personnel Management, *History of SES*, *at* http://www.opm.gov/ses/history.html (last visited January 11, 2005). The consolidation also included former GS grades 16 through 18.

[49] *See generally* 5 U.S.C. §§ 3132, 5108, 5381.

[50] *E.g.*, the Foreign Service Schedule (22 U.S.C. ch 52), Dep't of Medicine and Surgery, Veterans Administration (38 U.S.C. ch 73), Executive Schedule (5 U.S.C. ch 53), pay fixing authority for experts and consultants (5 U.S.C. § 3109), Postal Service Schedule, and others at 5 U.S.C. § 5102(c).

[51] *See* 5 U.S.C. § 2105(c). Non-appropriated fund employees work primarily in base exchanges, clubs, commissaries, and similar instrumentalities of the armed forces.

[52] *See id*.

[53] *Id.* § 5102(c)(14). In fact, NAF employees are not treated as federal employees for the purposes of most laws administered by OPM. *Id* § 2105(c).

[54] These include pay band, child care, NAF FWS, and other systems. *See* U.S. DEP'T OF ARMY, REG. 215-3, MORALE, WELFARE, AND RECREATION, NONAPPROPRIATED FUNDS PERSONNEL POLICY ch. 3 (26 Aug. 2002) [hereinafter AR 215-3]. *See also* U.S. DEP'T OF DEFENSE, MANUAL 1400.25-M, DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL MANUAL para. SC1405.1.2 (Dec. 1996) [hereinafter DOD MAN. 1400.25-M].

[55] Employees in NAF FWS positions, for example, may submit classification appeals to the OPM after agency final decision. AR 215-3, *supra* note 54, para. 3-38a.

[56] 5 U.S.C. § 5102(c)(11).

[57] The U.S. Constitution provides: "No Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law." U.S. CONST. art. I, § 9. An "appropriation" is simply "an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." DOD REG. 7000.14-R, *supra* note 38, vol. 2A, ch. 1, para. 010107B5. The "Purpose Statute" provides that "[a]ppropriations shall be applied only to the objects for which . . . made . . . ." 31 U.S.C. § 1301(a). It does not require that each expenditure be specified in an appropriations act, but only that each be reasonably necessary or material to the accomplishment of a specified or authorized function. *Id*. An unauthorized expenditure of Treasury funds can constitute a crime punishable by a fine or imprisonment or both. 31 U.S.C. §§ 1341, 1350.

[58] *See* U.S. DEP'T OF ARMY, REG. 215–1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 3-1c (25 Oct. 1998) [hereinafter AR 215–1].

[59] *Id*. para. 3-1a.

[60] The Army is a military department of DOD, an executive branch agency. 5 U.S.C. §§ 101, 102, 105.

[61] ARMY COMMAND, LEADERSHIP, AND MANAGEMENT: THEORY AND PRACTICE 20-3 (Charles S. Rousek ed., U.S. Army War College, 17th ed., 1992-93).

[62] *Id*. at 20-3, 20-4.

Programming and Budgeting System,[63] based on an analysis of projected work, with staffing based on an accepted workload requirements determination process.[64] Congress then decides how best to fund these staffing needs.[65]

How They Are Governed

Complexity aside, federal employment, classification, and pay systems have evolved to afford agency management great flexibility in accomplishing its varied missions. A hierarchy of rules from the Constitution to command publications provides a cumbersome, but critical, operational framework for federal employment. Agencies determine the nature of the work and the numbers and types of employees they require.[66] Generally, the management of any business enjoys wide latitude in making business decisions.[67] This latitude is often reflected in internal rules and regulations. Federal agency regulations are key to workforce administration, especially where superior legal authority is often vague.[68] The authority for federal agencies to promulgate regulations is statutory.[69]

II. Introduction to Local National Employment Systems

A Quick Word on Nationals

The Immigration and Nationality Act clearly defines non-citizen nationals at birth,[70] but tests for distinguishing them later in life vary depending on purpose. Nationals may include citizens and certain non-citizens.[71] An emerging consensus of circuit court decisions now focuses on application for citizenship, not merely residence, as a determinative factor.[72] Nationals also may be dual citizens.[73] For many employment purposes, the DOD characterizes nationals according to their citizenship. For instance, within the DOD, a "foreign national employee" is "[a] non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions."[74] Indeed, not all countries distinguish between citizens and nationals. In the German language, for example, being a "citizen" is typically synonymous with being a "national."[75] German employment law makes no distinction and, while English and French languages control the Status of Forces Agreement with Germany,[76] German is equally authoritative for implementing agreements.

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[63] *Id*. at 20-4.

[64] U.S. DEP'T OF ARMY, REG. 570–5, MANPOWER AND EQUIPMENT CONTROL, MANPOWER STAFFING STANDARDS SYSTEM para. 1-21 (30 June 1989).

[65] 5 U.S.C. § 3101 (2000).

[66] *Id.* § 301. *See also* 5 C.F.R. § 351.201(a)(1) (2004).

[67] *E.g*., "[A]n employer has the right to . . . assign work, to change an employee's duties, to refuse to assign a particular job, and to discharge---for good reason, bad reason, or no reason at all, absent intentional . . . discrimination." Walker v. AT&T Phone Ctr., Inc., 995 F.2d 846, 849-50 (8th Cir. 1993).

[68] *See* Collins v. Weinberger, 707 F.2d 1518, 1521-1522 (D.C. Cir. 1983).

[69] 5 U.S.C. §§ 301, 302. Electronically updated agency regulations change rapidly, but provide a chronological record that must be preserved to defend agency determinations under any particular version.

[70] 8 U.S.C. § 1408 (including, for example, persons born in an outlying U.S. possession on or after the date of formal acquisition of such possession, persons born outside the United States and its outlying possessions of parents both of whom are U.S. nationals, but not citizens, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person, and others as specified therein).

[71] A "U.S. national" is either "a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101a (22).

[72] *See* Shittu v. Elwood, 204 F. Supp. 2d 876, 879 (E.D. Penn. 2002).

[73] Gaudio v. Dulles, 110 F. Supp. 706, 708 (D. D.C. 1953) (observing that "double allegiance has been an issue of concern to the United States Congress . . . .").

[74] U.S. DEP'T OF DEFENSE, MANUAL 1416.8-M, DEPARTMENT OF DEFENSE MANUAL FOR FOREIGN NATIONAL COMPENSATION para. DL1.1.4 (Jan. 1990) [hereinafter DOD MAN. 1416.8-M].

[75] *See* CASSELL'S GERMAN-ENGLISH ENGLISH-GERMAN DICTIONARY 909, 1222 (McMillan Pub. Co., 8th ed. 1985); *see also* LANGENSCHEIDT'S NEW COLLEGE GERMAN DICTIONARY, GERMAN-ENGLISH 501 (Heinz Messinger ed., Langenscheidt KG, 1973); LANGENSCHEIDT'S NEW COLLEGE GERMAN DICTIONARY, ENGLISH-GERMAN 116, 416 (Heinz Messinger ed., Langenscheidt KG, 1978). The German language Status of Forces Agreement uses "*Staatsangehoerige(r),"* which translates identically as "national" and "citizen." Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (employing the term *Staatsangehoerige*, for example, art. 1 para. 1(b)) [hereinafter SOFA].

[76] SOFA, *supra* note 75, at execution para., after art XX.

Can Non-U.S. Citizens Be "Federal Employees?"

United States law on federal employment precludes government agencies from hiring certain non-citizens stateside;[77] however, the government grants some agencies exemptions and allows hiring of non-citizens overseas in specific instances.

Beginning in 1939, annual appropriations laws precluded using APF to pay non-U.S. citizen federal employees in the continental United States, unless they met one of several exceptions.[78] This preclusion is reflected in annual Treasury and General Government Appropriations Acts.[79] Certain agencies are exempted from the stateside preclusion, including the DOD,[80] as evinced in annual DOD Appropriations Acts.[81] The stateside preclusion does not prevent the hiring of non-U.S. citizens overseas. Indeed, statutory authority exists for such employment of foreign nationals.[82]

Nevertheless, other restrictions exist. Agencies may employ citizens and non-citizens overseas,[83] but only citizens may receive competitive service appointments. In fact, Executive Order (EO) 11935 specifically bans the employment of non-U.S. citizens or nationals in competitive service positions, worldwide.[84] The EO, reflected in the C.F.R.,[85] allows the OPM to specify exceptions[86] but their only exception is for "appointment in rare cases under [5 CF.R.] Sec. 316.601."[87] These positions do not confer competitive status[88] and aliens may fill them in the absence of qualified citizens.[89] In the end, their excepted service nature complies with the EO's ban.[90] The Classification Act extends to non-citizens hired stateside, so they may receive excepted appointments to GS positions within the United States.[91] Appointments under GS conditions, even in the excepted service, are not possible for non-U.S. citizens overseas.[92]

The EO ban does not distinguish GS from FWS competitive service positions. Although the Classification Act does not apply to the FWS,[93] its employees also face citizenship restrictions.[94] They, too, have competitive and excepted service status[95]

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[77] 8 U.S.C. § 1324(a) (2000) (stating that it is unlawful for a person or entity to employ an unauthorized alien). *See also* U.S. Office of Personnel Management, *Federal Employment of Non-Citizens, Detailed Policy Information with Citations, at* http://www.opm.gov/employ/html/Citizen.htm (last modified Oct. 25, 1999) [hereinafter *Employment of Non-Citizens*] (noting that "In 1996, Public Law 104-208 added a statement that 'the term 'entity' includes an entity in any branch of the Federal Government.'"). A citizenship requirement is not national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (unless there is evidence that it is a pretext to disguise a policy of discrimination or a policy with the purpose or effect of such discrimination). Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 95 (1973).

[78] *See Employment of Non-Citizens, supra* note 77.

[79] The Appropriations Act provides, in pertinent part, that "no part of any appropriation . . . shall be used to pay . . . any officer or employee of the Government . . . in the continental United States unless such person: (1) is a citizen . . . . [listing related categories]" Treasury and General Gov't Appropriations Act of 2002, Pub. L. No. 107-67 § 605, 115 Stat. 514, 545-6.

[80] 10 U.S.C. § 1584 (providing: "Laws prohibiting the employment of, or payment of pay or expenses to, a person who is not a citizen of the United States do not apply to personnel of the Department of Defense.") This basic authority allows, but does not set or fund, payment of DOD's LN workforce.

[81] Dept of Defense Appropriations Act of 2003, H.R. 5010, 108th Cong. (2003) (providing that FY "provisions of law prohibiting the payment . . . or employment of, any person not a citizen of the United States shall not apply to personnel of the Department of Defense . . . .").

[82] 22 U.S.C. § 3968(b) (providing that for overseas functions "any agency . . . may administer employment programs for its employees who are foreign nationals.").

[83] 5 C.F.R. § 8 (2004).

[84] Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 3, 1976), *as amended*.

[85] 5 C.F.R. § 7.3 (mandating: "No person shall be admitted to competitive examination [or] . . . shall be given any appointment in the competitive service unless . . . a citizen or national of the United States."). Overseas the Classification Act excepts non U.S. citizens from its coverage. 5 U.S.C. § 5102(c)(11).

[86] *Employment of Non-Citizens, supra* note 77 (noting that "OPM may, as an exception to this rule . . . authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.").

[87] 5 C.F.R. § 338.101.

[88] *Id.* § 316.601.

[89] *Id.* § 213.3102(bb).

[90] If agencies find no qualified citizens for a competitive service vacancy, and meet all the requirements of specific authorization, appropriations ban, and immigration rules, they may hire a non-citizen under a special Schedule A excepted appointment. The position then is withdrawn from the competitive service while filled by the non-citizen. *Employment of Non-Citizens, supra* note 77. The employee is ineligible for other federal jobs and may not be promoted or reassigned to competitive service positions, except again where no qualified citizens are available, under a Schedule A appointment. 5 C.F.R. § 316.601.

[91] 5 U.S.C. §§ 5102(b), 5102(c)(11) (2000).

[92] *Id.* § 5102(c)(11).

[93] *Id.* § 5102(c)(7).

and are subject to applicable rules. Further, by statute, the OPM must set schedules and rates for U.S. citizen, FWS employees outside the United States, but it has no such authority for non-U.S. citizens outside the United States.[96]

How Local Nationals Are Hired

As with other employment systems, the basic authority to hire and pay foreign nationals is statutory.[97] The Foreign Service Act of 1980[98] provides this authority and allows agencies to establish LN classification systems.[99] Section 408 of the Act provides basic pay setting authority for DOD's LN employees (whose salaries are funded by annual DOD Appropriations Acts).[100] The Secretary of State, though authorized by statute, has left the promulgation of foreign national compensation plans to the agencies.[101] The DOD has further delegated the authority to establish the terms of employment for foreign nationals to its military components, including the U.S. European Command.[102] Department of Defense guidance, however, still governs the development of these compensation programs.[103]

Just as non-U.S. citizens cannot be hired as GS employees overseas, their employment under the Foreign Service Act is seemingly restricted. The Foreign Service Act provides specific authority to employ U.S. citizens under APF (U.S.), Foreign Service schedules,[104] but provides the DOD no specific authority for U.S. citizens to be appointed or paid with APF as foreign nationals.[105]

While the DOD may appoint non-U.S. citizens, and by delegation, the Army may hire LNs overseas, they typically do so under treaties and agreements endorsed by the State Department with DOD or higher-level input[106] and agency regulations providing implementing guidance.[107] Thus, the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany[108] (the Supplementary Agreement) implements the North Atlantic Treaty Organization's Status of Forces Agreement

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[94] *Id.* § 5342(c) (providing: "Each prevailing rate employee employed within any of the several States or the District of Columbia shall be a United States citizen or a bona fide resident . . . unless the Secretary of Labor certifies that no United States citizen or bona fide resident . . . is available. . . .").

[95] *See supra* note 42 and accompanying text.

[96] 5 U.S.C. § 5343(a)(5). The DOD is OPM's lead agency for establishing these schedules for all agencies using FWS. 5 C.F.R. §§ 532.255, 532.257 (2004).

[97] 22 U.S.C. § 3968(b); 10 U.S.C. § 1584. *See supra* notes 81- 82 and accompanying text.

[98] 22 U.S.C. §§ 3901– 4226. The Foreign Service Act of 1980 is classified principally to 22 U.S.C. ch. 52.

[99] *Id.* § 3968(a)(1). Though this provision addresses State Dep't personnel, section 3968(b) expands this authority to other U.S. agencies operating overseas. *See id.* § 3968(b).

[100] DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.5.1. *See also* DOD REG. 7000.14-R, *supra* note 38, vol. 8, ch. 7, para. 070102A; DOD MAN. 1416.8-M, *supra* note 74, para. C1.2.1 (providing that under § 408, "The Secretary shall establish compensation (including position classification) plans for foreign national employees . . . ."). Foreign Service, U.S. citizen employees have classification/pay authority distinct from the Classification Act. *See* 5 U.S.C. § 5102(c)(2).

[101] 22 U.S.C. § 3968(c).

[102] U.S. DEP'T OF ARMY, REG. 690-300, EMPLOYMENT CH. 301 OVERSEAS EMPLOYMENT para. 3-4a (15 Oct. 1979), *available at* http://www.usapa.army.mil /cpol/ar690-300/chapter301/chapter301.html [hereinafter AR 690-300, CH. 301] (the *Federal Personnel Manual* was sunset in 1993 and DOD INSTR. 1400.10 was cancelled by DOD MAN. 1400.25-M, para. SC1231). *See also* U.S. DEP'T OF DEFENSE, DIR. 1400.6, DOD CIVILIAN EMPLOYEES IN OVERSEAS AREAS (15 Feb. 1980) (certified current 1 Dec. 2003). Combatant commands have authority "to establish salaries, wages, fringe benefits, related compensation items, and other terms of employment for foreign national employees . . . .". DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.5.2.

[103] *See* DOD MAN. 1400.25-M, *supra* note 54, para. SC1251.3.

[104] 22 U.S.C. § 3963.

[105] 5 U.S.C. § 5102(b). *See* 22 U.S.C. § 3941(a) ("Only citizens of the United States may be appointed to the Service, other than for service abroad . . . as a foreign national employee."). *See also* 22 U.S.C. 3903(6) (describing foreign national employees in the Foreign Service as "foreign nationals appointed under section 3942 of this title . . . .").

[106] DOD MAN. 1400.25-M, *supra* note 54, paras. SC 1231.3.1-1231.3.2. (explaining that "a treaty or other formal agreement . . . usually addresses the subject of employment of foreign nationals . . . ." and that the State Dep't, with DOD technical advice and guidance, negotiates basic arrangements with host governments).

[107] DOD REG. 7000.14-R, *supra* note 38, vol. 8, ch. 7, para. 070102B. *See generally* U.S. EUROPEAN COMMAND, DIR. 30-6, ADMINISTRATION OF CIVILIAN EMPLOYEES IN THE U.S. EUROPEAN COMMAND (USEUCOM) AREA OF RESPONSIBILITY (AOR) (6 July 1999); U.S. DEP'T OF DEFENSE, DIR. 5120.39, DEPARTMENT OF DEFENSE WAGE FIXING AUTHORITY APPROPRIATED FUND COMPENSATION (24 Apr. 1980).

(NATO SOFA).[109] Article IX of the SOFA mandates that local labor conditions shall be those of host nation law and Article 56 of the Supplementary Agreement specifically applies German labor law to LN employment by NATO forces stationed in Germany.[110] Local agency regulations reflect this law.[111]

How the Local National Workforce Is Structured

All U.S. forces components must use the same grade and step structure for LN employment systems within a country.[112] In Germany, the occupying powers originally employed resident workers "without any labor agreement and subject to merely discretionary application of German labor law … [T]he actual administration of these local employees was largely left to German public agencies."[113] Eventually all sending States,[114] except the Netherlands, employed local labor under a special Allied Collective Tariff Agreement.[115] The Federal Republic of Germany concluded this Agreement with the German trade unions for the Allies.[116] The resulting system implemented Article 56 of the Supplementary Agreement (and related provisions in its Protocol of Signature), founded in Article IX, paragraph 4, of the SOFA.[117] The Collective Tariff Agreement for the Employees of the Sending States Forces in the Federal Republic of Germany, of 16 December 1966 (CTA II), [118] governs wage and salary schedules and other employment conditions for most LN (APF and NAF) employees in Germany.[119]

United States citizen family members of U.S. Government employees abroad may be appointed against positions identified in manpower guidance as LN,[120] thus restricting jobs otherwise available to German citizens. [121] These family member appointments, however, are made under GS employment conditions.[122] This is consistent with the Classification Act's

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[108] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, August 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, as amended 24 U.S.T. 2355, T.I.A.S. No. 7759 (the Treaty of Paris, July 26, 1961, governs NATO Supreme Headquarters Allied Powers, Europe personnel and those at subordinate NATO headquarters) [hereinafter Supplementary Agreement].

[109] *See* SOFA, *supra* note 75.

[110] *Id.* art. IX, para. 4 (prescribing that local labor "conditions of employment and work . . . shall be those laid down by the legislation of the receiving State.). *See also* Supplementary Agreement, *supra* note 108, art. 56, para. 1(a) (prescribing further that "German labor law . . . as applicable to civilian employees working with the German Armed Forces . . . shall apply to employment of civilian labor with a force or a civilian component . . . .").

[111] *See, e.g.*, DOD MAN. 1400.25, *supra* note 54, para. SC 1231.4.5.1. This is not, however, considered German public service employment of the LN workforce. *See infra* notes 152, 155.

[112] DOD MAN. 1416.8-M, *supra* note 74, para. C2.1. Grade structures for GS and FWS serve as models, if compatible with prevailing host nation practices. *Id*. para. C2.2. If not, DOD components should consider "[p]revailing practices in the private non-U.S. Forces sector, and/or . . . the in-country government (public) sector." *Id*. para. C2.3.1. Note that the manual's pay fixing provisions only apply to direct hire systems though its total compensation comparability provisions apply in all cases. *Id*. at foreword.

[113] Memorandum, Special Assistant for NATO Legal Affairs, OSJA, HQ, U.S. Air Forces in Europe (unaddressed), subject: Indirect Hiring of U.S. Nationals Ordinarily Resident in the Federal Republic of Germany (FRG) (Aug. 2, 1977) [hereinafter HQ, USAFE, OSJA Memorandum, 2 Aug. 1977] (on file with author).

[114] SOFA, *supra* note 75, art. I, paras. 1(d), 1(e) (providing that a "sending State" is "the Contracting Party to which the force belongs." A "receiving State" is the "Party in the territory of which the force or civilian component is located . . . .").

[115] HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

[116] *Id*.

[117] *Id*. *See also infra* note 149.

[118] *See* U.S. ARMY EUROPE, PAM. 690-60, TARIFF AGREEMENTS THAT APPLY TO PERSONS EMPLOYED BY THE U.S. FORCES IN GERMANY (ENGLISH TRANSLATION) (1 Apr. 1996) [hereinafter USAREUR PAM. 690-60] (German version, U.S. ARMY IN EUROPE, PAM. 690-60-G/U.S. AIR FORCE EUROPE, PAM. 36-720-G**,** TARIFVERTRÄGE FÜR DIE ARBEITNEHMER BEI DEN US-STREITKRÄFTEN IN DEUTSCHLAND (8 Mar. 2004)).

[119] *Id*. art. 63 (including, for example, Salary Tariff C setting LN monthly pay rates based on a 38.5-hour workweek. Pay grades range from C-1 through 10, with 4 through 7 with intermediate "a" grades (*i.e.*, C-4a)).

[120] *See* 22 U.S.C. § 3951(a) (2000). *See generally* U.S. DEP'T OF DEFENSE, INSTR. 1400.23, EMPLOYMENT OF FAMILY MEMBERS OF ACTIVE DUTY MILITARY MEMBERS AND CIVILIAN EMPLOYEES STATIONED IN FOREIGN AREAS (12 May 1989) [hereinafter DOD INSTR. 1400.23] .

[121] Political tensions could arise if non-family member U.S. citizens filled these APF jobs. "[I]n many cases DoD personnel could not afford to have their families accompany them abroad . . . . [T]he State Department states 'that as a matter of practice . . . Germany willingly acquiesces in the United States Forces . . . employing its dependents for jobs designated under NATO SOFA for foreign national occupancy.[']" U.S. Dep't of Justice Opinion, 2 OLC (1978), *quoted in* Draft Memorandum, Chief, Labor and Employment Law Office, Office of the Judge Advocate General, U.S. Army, to General Counsel, U.S. Dep't of Defense, subject: Request for Opinion of the Attorney General (21 Mar. 1990) [hereinafter OTJAG Request for Attorney General Opinion, 1990] (indicating possible German Government non-acquiescence "if the U.S. attempted to place anyone other than dependents in them") (on file with author).

[122] Excepted Service; Consolidated Listing of Schedules A, B, and C, Notice, 67 Fed. Reg. 60,798 (Sept. 26, 2002) (codified at 5 C.F.R. § 213.3106(b)(6)) (providing Schedule A applicability for overseas DOD positions "when filled by dependents of military or civilian employees of the U.S. Government

applicability to U.S. citizens.[123] The OPM General Counsel has confirmed that "there is no exception in 5 U.S.C. 5102 that would permit payment of local national pay rates to U.S. citizens paid from appropriated funds."[124] Similarly, the Army defines LN employees as non-U.S. citizens.[125] (Hence Mr. Wannabe's application for APF (LN) employment was rejected properly.)

The Army also may place non-U.S. citizen family members[126] into positions customarily filled by foreign nationals overseas, absent host nation restrictions, but must employ them under LN conditions.[127] They are given Schedule A appointments, but are paid in accordance with LN schedules established pursuant to the Foreign Service Act. This complies with the EO ban on non-U.S. citizen competitive service appointments,[128] and with the exception of non-U.S. citizens from the GS system when outside the United States.[129] Agency regulations may further limit employment opportunities based on citizenship [130] (e.g., by granting LN hiring preferences in certain circumstances). [131] At Major Army Command (MACOM)-level, for example, the Headquarters, U.S. Army, Europe and 7th Army (USAREUR) promulgated both USAREUR and Army in Europe regulations (AER) [132] that include guidance on this area.[133]

III. Affects of Citizenship on DOD Employment Overseas

The SOFA and Its Two Categories

Thus far, citizenship matters in overseas employment seem straightforward, but to more fully understand the affects of citizenship on DOD employment overseas, practitioners must understand how the SOFA and DOD-utilized employment systems interact. Normally, when U.S. Forces are stationed abroad a treaty or SOFA is executed that provides for categories of civilian employment.[134] In 1983, the Court of Appeals for the D.C. Circuit observed that sending State civilian employees under the SOFA with Germany are either: (1) members of the civilian component, or (2) local labor (i.e., LN employees).[135]

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residing in the area . . . ."). *See also* 5 C.F.R. § 6.2 (2004); U.S. ARMY EUROPE, SUPP. 1 TO U.S. DEP'T OF ARMY, REG. 690-300.301, OVERSEAS EMPLOYMENT para. 7-2d (15 June 1999) [hereinafter USAREUR SUPP. TO AR 690-300.301].

[123] *See* discussion *supra* pt. II.

[124] Applicability of 5 U.S.C. § 5102 to Specific Positions and Employees in DOD, Op. General Council, Office of Personnel Management (28 Nov. 1986) (on file with author).

[125] AR 690-300, CH. 301, *supra* note 102, para. 1-1d(9) (defining an LN employee as "A non-U.S. citizen employee who is a national of the host country or is ordinarily resident there or is otherwise employed under the same conditions as host country employees.").

[126] Non-U.S. citizen family members are defined as "[f]amily members of any nationality, including permanent alien residents, who have not acquired U.S. citizenship." *Id*. para. 1-1d(11).

[127] DOD INSTR. 1400.23, *supra* note 120, para. 4-7. *See also* U.S. ARMY IN EUROPE, REG. 690-70, CIVILIAN PERSONNEL RECRUITMENT AND STAFFING FOR LOCAL NATIONAL EMPLOYEES IN GERMANY para. 7b (23 Apr. 2003) [hereinafter AER 690-70]; 5 C.F.R. 8.3 (2004) (providing that non U.S. citizens "may be recruited overseas and appointed to overseas positions without regard to the Civil Service Act").

[128] *See* discussion *supra* pt. II (regarding excepted service appointments for rare cases).

[129] AR 690-300, CH. 301, *supra* note 102, para. 7-4 ("[N]on-U.S. citizen family members (if permitted by treaty) will be under Schedule A … appointments under 5 CFR 213.3106(b)(6). [They] . . . are excluded by 5 USC 5102(c)(ll) from . . . pay and employment conditions accorded to U.S. citizen family members hired under the same appointment authority, unless . . . in summer/student . . . programs."). *See also* U.S. Office of Personnel Management, Basic Federal Personnel Manual ch. 301, para. 3-1 (Last OPM Update: Inst. 312, Jan. 31, 1984) (obsolete) (providing that non-citizen appointed outside the United States "may be recruited overseas and appointed to overseas positions without regard to competitive requirements in accordance with the authority provided in civil service rule VIII, section 8.3. These appointments are, in general, made in the same manner as Schedule A excepted appointments") (on file with author).

[130] Supplementary Agreement, *supra* note 108, art. 3, para. 4 (allowing for administrative implementation by the parties); *see also* Collins v. Weinberger, 707 F.2d 1518, 1522 (D.C. Cir. 1983) (observing, essentially, that MACOM regulations promulgated after bilateral negotiations and representing a compromise between two legal systems, while obviously not treaties, are accorded judicial deference if consistent and within the scope of the treaty).

[131] *See* U.S. DEP'T OF DEFENSE, INSTR. 1404.12, EMPLOYMENT OF SPOUSES OF ACTIVE DUTY MILITARY MEMBERS STATIONED WORLDWIDE para. 6.2.5 (12 Jan. 1989); DOD INSTR. 1400.23, *supra* note 120, para. 6.8. *See, e.g.*, AER 690-70, *supra* note 127, para. 7 (Regarding recruitment of LN applicants for APF and NAF positions "recruitment may be limited to LN employees and applicants when the commander determines that it is essential for mission effectiveness . . . .").

[132] U.S. Army Europe regulations, when updated, are published as U.S. Army in Europe, Regulations.

[133] *See, e.g.*, AER 690-70, *supra* note 127.

[134] *See* DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.3.

[135] No other categories of civilian employment are identified in the SOFA and Supplementary Agreement:

> These agreements distinguish three categories of employees of a "sending state" . . . First, there are military personnel. . . . Second, there is a "civilian component" consisting of civilian personnel accompanying and employed by the sending state's force who are

The civilian component is exempt from many host nation taxes and obligations, and receives other logistical privileges.[136] Its members are subject to sending State employment conditions[137] and its constituency is restricted. The SOFA with Germany essentially defines the civilian component as the following:

> [T]the civilian personnel accompanying [and]…who are in the employ of an armed service of [a]…Contracting Party, and who are not stateless persons, nor nationals of any State which is not a party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located.[138]

Thus, a sending State can employ those who cannot be members of the civilian component only as local labor—tautologically, the only other specifically authorized SOFA employment category not conferring civilian component status[139]—and local labor is subject to local employment law.[140]

Local labor conditions differ from the civilian component's in currency, pay, procedural protections, sick leave, social insurance, retirement, taxes, vacation, working hours and so on.[141] But what if the German Government was considered to be the employer of our LN workforce—could U.S. citizens who met local employment and immigration rules escape the Classification Act's restrictions and be employed in the U.S. Forces' APF (LN) workforce? This premise has surfaced in forums ranging from the U.S. Equal Employment Opportunity Commission (EEOC) to the German Supreme Labor Court.

Direct and Indirect Hire Systems

The DOD officially provides for two systems of foreign national employment overseas: direct and indirect hire systems.[142] The host nation is the legal employer of U.S. Forces foreign nationals in indirect hire systems, but grants daily operational control to the Forces.[143] These employees often are host nation civil servants working for the Forces. Their hiring rules, not merely their conditions of employment, are governed by host nation law. For direct hire systems, however, the U.S. Forces are the employer.[144] The Army defines both systems similarly to the DOD, noting that direct hire employees are paid directly in U.S. APF,[145] not through an indirect reimbursement agreement.[146] The system that is used depends upon social, political, and

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> neither "stateless persons nor nationals of any state which is not a party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the state in which the force is located." . . . [T]hird, there are local nationals . . . .

Collins, 707 F.2d at 1519.

[136] *See generally* SOFA, *supra* note 75; Supplementary Agreement, *supra* note 108. *See also* U.S. ARMY EUROPE, REG. 600-700, IDENTIFICATION CARDS AND INDIVIDUAL LOGISTIC SUPPORT (17 July 2002).

[137] SOFA, *supra* note 75, art. I, para. 1(b), art. IX, para. 4.

[138] *Id*. art. I, para. 1(b).

[139] *Id*. art. IX, para. 4.

[140] Supplementary Agreement, *supra* note 108, art. 56, para. 1(a).

[141] USAREUR PAM. 690-60, *supra* note 118.

[142] DOD MAN. 1400.25-M, *supra* note 54, para. SC 1231.4.2 (providing for "those where the employees are hired directly by the U.S. Forces as employees of the U.S. Government (direct hire); and those where the personnel are employees of the host government and are assigned to work with the U.S. Forces on a reimbursable [sic] cost or other financial basis (indirect hire)."). *But see* JAMES R. DIKEMAN, THE STRUCTURE OF OVERSEAS FOR DOD CIVIL SERVANTS IN EUROPE INCLUDING PAY AND ALLOWANCES para. I C (2005), *available at* http://www.usis.it/ussso/files/labor/outline2005.pdf (identifying U.S. Forces local national employment systems as follows: in Italy, a direct hire system exists; in the United Kingdom, both a direct and an indirect hire system exist; in Spain, an indirect hire system is used; in Greece, an indirect hire system is used but the Greek Ministry of Defense employs contracted employees rather than civil servants, however, U.S. Forces in Iceland employ "a unique system that has elements of both the direct hire and indirect hire system.") [hereinafter Dikeman].

[143] DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.4.2.2.

[144] *Id*. para. SC1231.4.2.1.

[145] AR 690-300, CH. 301, *supra* note 102, para. 1-1d(2) (defining "direct-hire" as "[a]n employee hired directly by the U.S. Government and paid directly for personal services from appropriated funds.").

[146] *Id*. para. 1-1d(7) (defining "indirect-hire" as "[a] non-U.S. citizen employee hired in a foreign area under the terms of an agreement between the host country and the United States.").

economic factors,[147] and indirect hire systems naturally increase host nation obligations (e.g., social service, pension, and placement expenses).[148]

Written indications of whether direct hire, indirect hire, or both systems apply in Germany are scant. Manpower documents occasionally refer to indirect hire employment in Germany. This possibly emanates from the origins of sending State employment there,[149] further complicated by the unique, occupational cost—LN salary situation of the enclave in Berlin.[150] This enclave no longer exists and it is well established, though not as well accepted,[151] that LN employees in Germany are not indirect hire employees. As early as 1957, the German Supreme Labor Court held that "the authorities of the forces are the employer," a fact reflected in the Supplementary Agreement.[152] The Supplementary Agreement allows U.S. Forces to determine the number of jobs they require and their classification, as well as control of employee engagement, placement, training, transfer, dismissal and

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[147] DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.4.2.1.1 to SC1231.4.2.1.4 (including the following factors: host nation objections; the number of potential employees and its affect on the local economy; whether treaty or agreements grant U.S. Forces authority to employ foreign nationals following local law and customs; and whether the host nation is able or willing to meet the obligations of an indirect hire system.

[148] Dutch Forces were able to use an indirect hire system in Germany, but not U.S. Forces, due to costs:

> German public employees were made available to the Netherlands forces in Germany upon Dutch reimbursement of their salaries. . . . [T]his workforce numbers 200. [They] . . . are not subject to the special CTA . . . but remained under the regular "Bundesangestellten-Tarifvertrag" . . . for white collar workers and the "Mantel Tarif Vertrag" . . . for blue collar workers. There would be no objection, of course, if the FRG would be willing to convert some 80,000 local employees of the U.S. Forces to public service employees. . . . Obviously . . . they are not going to do the same for such a tremendous number . . . ."

HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

[149] West Germany's status changed significantly after 1955:

> In 1955, West Germany's status as occupied territory was dissolved and membership in NATO was conferred upon the Federal Republic. Article 1 of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954 . . . also incorporated the Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952 . . . (effective May 5, 1955), and in Schedule 1 amended *inter alia*, its Article 8 to provide that the temporary status-of-forces arrangement would endure only "until the entry into force of new arrangements . . . based on" NATO SOFA, "supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic." The Senate ratified the Protocol…authorizing negotiation by the Executive Branch and its concurrence in the Supplementary Agreement . . . . [citations and footnotes omitted].

Holmes v. Laird, 459 F.2d 1211, 1214 n.15 (1972), *cert. denied*, 409 U.S. 869 (1972).

> [After] the Bonn Conventions and . . . attainment of sovereignty by the FRG on 5 May 1955, an organized system of employment and administration of local nationals and residents was established pursuant to Article 44 of the Forces Convention (FC). The German legal writers, Pretsch, Schalkhaeuser and Rechenberg, all officials of the Federal Ministry of Finance, in their commentary, November 1955, entitled . . . The Law applying to the Employees of the Armed Forces (Foreign Powers) . . . unequivocally hold that the forces are to be considered the employer . . . . Just as the occupying powers were the true employers before 5 May 1945, they retain this status thereafter although the FRG agreed in Article 44, FC, as a left-over from occupation times, to discharge certain employer's functions. In concluding the CTA, the FRG acted on behalf and as the agent of the sending States forces. As far as the likewise accepted duty to represent the forces before German Courts is concerned, it must be observed that this applies not only to labor disputes but also to lawsuits for or against the forces as recipients of goods, services and facilities . . . . This was done . . . since the sending States could not be sued in German courts due to their sovereign immunity.

HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

[150] The Berlin Tariff Agreement employees were neither direct nor true indirect hire employees, but rather:

> [A]ll employees hired under the provisions of the Berlin Tariff Agreement were paid directly by the German Government in deutsche marks . . . neither appropriated nor non-appropriated funds of the United States were utilized to pay their salaries or to reimburse the German government . . . employees hired as local nationals were not considered U.S. Government employees since the German government paid those salaries directly as a mandatory occupation cost recognized under principles of international law until October 3, 1990. On that date, the occupation of Berlin came to an end. Since October 3, 1990, the German government had continued to pay the salaries of the local national employees in fulfillment of its obligations undertaken pursuant to international agreements.

Ashburn v. West, 1994 EEOPUB LEXIS 1055 (Aug. 25, 1994).

[151] The number of Army LN direct hires has relatively recently been reported to total 8,411. U.S. Dep't of Army, The Army Training and Leader Development Panel Civilian Study and The Strategic Army Workforce, *Outbrief and Discussion* (Powerpoint presentation, 2003), *available at* http://www.odcsrm.hqusareur.army.mil/rmmp/CP26/ATLDP.ppt#1. Provided U.S. Army foreign national employment in Germany is properly viewed as a direct hire system, however, Germany alone has half as many direct hires, affecting pension, RIF, and other costs. *See, e.g.*, *Global Rebasing and Restructuring*, *supra* note 4.

[152] HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113, at 2 (citing BAGE 5, 130 (136-37). *See also* Supplementary Agreement, *supra* note 108, art. 56, para. 1(f) (providing: "Employment of civilian labor with a force or a civilian component shall not be deemed employment with the German Public Service."); U.S. ARMY EUROPE, REG. 690-60, EMPLOYMENT OF LOCAL NATIONAL PERSONNEL IN GERMANY para. 5 (29 Sept. 1987) [hereinafter USAREUR REG. 690-60].

resignation.[153] Agency regulations implement this authority.[154] German LN employees have no German civil service placement rights.[155] Moreover, for indirect hire systems, bilateral subsidiary agreements typically identify the legal employer (and even the employing agency[156]) of a local labor force.[157] Such agreements, identifying indirect hire host nation agencies, exist with the United Kingdom, Netherlands, and Greece, for example, but not with Germany.[158] Rather, the CTA II controls many LN employment matters in Germany, with a DOD system of APF (LN) payrolls that is characteristic of direct hire systems,[159] and DOD Appropriations Acts fund various "necessary and authorized" expenses[160] including the salaries of U.S. and LN employees.[161]

The Consequences of Acquiring U.S. Citizenship

It seems that even after decades of operation, a direct hire system can yield a confusing result when APF (LN) employees obtain U.S. citizenship. These APF employees, as U.S. citizens, ordinarily could become subject to the Classification Act and that Act does not permit classification and payment of U.S. citizens as LNs in APF positions.[162] Employees hired under other than LN conditions, however, are considered members of the civilian component.[163] Therein lies the catch. Former German citizens, especially those who have lived and worked in Germany for years, are now citizens of their new country, but are often ordinarily resident in the old country. Further, dual citizens are still considered to be German nationals.[164] Both are excluded from civilian component membership and thus cannot be converted to U.S. employment conditions.[165]

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[153] Supplementary Agreement, *supra* note 108, art. 56, paras. 6, 7a.

[154] *See, e.g.*, USAREUR REG. 690-60, *supra* note 152, para. 5a (providing: "LN employees . . . will be recruited, appointed, and serviced by civilian personnel offices . . . according to USAREUR Regulation 690-1.").

[155] The results of RIF actions and consequent compensation or "annulment contracts" with the U.S. Forces attest to this status. The U.S. Air Force, Europe, Headquarters Legal Office noted:

> [T]hat work for the forces shall not constitute employment in the German public service . . . is illustrated, e.g., by the lack of credit for service performed with the sending State's forces . . . by an individual who is later taken over into the German public service . . . The Federal Republic is so concerned that there should be no notion that the national or resident personnel working for the forces could be considered to be in the German public service that it bought off the pressure . . . by the German Trade Unions, by conclusion of the special "Tariff Agreement for the Social Security of the Employees of the Stationing Forces in the territory of the Federal Republic of Germany" of 31 August 1971 granting these workers separately in case of layoff or dismissal . . . benefits of a type . . . available to them only if they were in the public service.

HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113. *See generally* U.S. ARMY EUROPE, REG. 690-84, REDUCTION IN FORCE—LOCAL NATIONAL EMPLOYEES IN GERMANY ENGLISH TRANSLATION OF USAREUR-REGULATION 690-84(G) (5 May 2000).

[156] HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

[157] DOD MAN. 1400.25-M, *supra* note 54, para. SC 1231.4.3.1.2.

[158] HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113 (opining further that Sending States in Germany "have insisted on . . . sovereign prerogatives, such as irreversible dismissal of local employees on security grounds . . . which would lapse if the Federal Republic would be made the legal employer."). *See also* Dikeman, *supra* note 152, para I C (identifying, for example, systems used in Italy, Spain, and Iceland).

[159] *See* U.S. ARMY EUROPE, REG. 690-72/ U.S. AIR FORCES IN EUROPE, REG. 40-4, LOCAL NATIONAL PAYROLL PROCEDURES IN GERMANY sec. II (1 Sept 1994) [hereinafter USAREUR REG. 690-72].)

[160] *See* Department of Defense Appropriations Act, 2003**,** Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002) (explaining that Operation and Maintenance funds are available for expenses, not otherwise provided for, necessary for the operation of the Army).

[161] Subordinate overseas commands receive a Funding Authorization Document for salaries based on work years, with no distinction between U.S. and LN civilian employees. Payment is made in U.S. dollars from the DOD Finance and Accounting Service to the *Aufsuchts und Dienstleistung Direktion, Verteidigungslasten-Verwaltung*, which processes LN payrolls. United States APF are used. *See* USAREUR REG. 690-72, *supra* note 159, sec. IV (outlining NAF (LN) payroll procedures). The USAREUR Commander, as designated coordinator for LN personnel matters, and the German Federal Minister of Finance have agreed on pay procedures for LNs. *Id*. sec. I, para. 1. "[A]ppropriate agencies of the US Forces . . . furnish to the [now *Verteidigungs-lastenverwaltung* or Administration of Defense Costs (ADC)the necessary pay supporting documents, pay authorizations, and required funds. The ODC will compute, document, and disburse all monetary entitlements . . . ." USAREUR REG. 690-72, *supra* note 159, sec. I, para. 4. The role of the ADC is more ministerial. They deduct taxes, social insurance and other required charges. USAREUR REG. 690-72, *supra* note 159, sec. I, para. 4c.

[162] 5 U.S.C. § 5102(c)(11) (2000). *See also supra* note 124 and accompanying text. *See also supra* note 124 and accompanying text. *See, e.g.* U.S. OFFICE OF PERSONNEL MANAGEMENT, BASIC FEDERAL PERSONNEL MANUAL ch. 301, para. 3-2 (Last OPM Update: Inst. 312, Jan. 31, 1984) (obsolete) (providing: "Employees appointed under section 8.3 of rule VIII who acquire citizenship during their overseas service may continue to serve under excepted appointment in the position occupied when citizenship is acquired") (on file with author).

[163] SOFA, *supra* note 75, art. IX, para. 4 (regarding local labor, it provides that "Such civilian workers employed by a force or civilian component shall not be regarded for any purpose as being members of that force or civilian component.").

[164] Rich Wales, *Dual Citizenship FAQ: Dual Nationality and United States Law*, *at* http://www.richw.org/dualcit/#Overview (last revised Jan. 29, 2005) (noting that "Each country will usually consider the person as if he were a citizen of that country alone.") (on file with author). Also, a dual citizen is still a U.S. citizen and the Classification Act applies to U.S. citizens. *See* discussion *supra* pt. I. *Cf.* Kriegel v. Petri, 2000 U.S. Dist. LEXIS 14265, 2 (S.D. N.Y., 2000) (observing regarding a choice of forums, "Plaintiff, although the holder of dual citizenship, is an American citizen . . . ."). Loss of U.S. citizenship is

But, for indirect hire systems the host nation government is the employer.[166] Though the Classification Act normally would apply to a U.S. citizen in a position wholly funded with appropriated funds, it obviously does not apply to the employment systems of other nations.[167] Thus, new U.S. citizens who do not qualify for the civilian component may remain classified and paid as local labor under indirect hire systems.[168]

The fate of Title 22 authorized APF (LN) employees who acquire U.S. citizenship in direct hire systems but do not qualify for civilian component membership is, somewhat nebulous. The Army regulation addressing this situation, for Title 5 oriented non-citizen appointments under Rule VIII, mandates in its paragraph on direct hire systems, but mandates in its paragraph on indirect hire systems that, for LN employees who acquire U.S. citizenship, remaining under LN employment conditions is only possible where the host nation is the true legal employer.[169] The lack of clear authority for continued classification and payment of these U.S. citizens could be interpreted as requiring the cessation of such employment where the host nation is not the true legal employer (e.g., direct hire systems). New U.S. citizens in Germany's direct hire foreign national employment system, of course, could secure APF (U.S.) jobs in other NATO countries (assuming they qualify), although this could entail reappointment, relocation, loss of benefits, and family separation. They also remain eligible for NAF employment under LN conditions (NAF employees under other than LN conditions are in the civilian component). In other NATO countries this may not be an option.[170] If such placement options are not available, authority for their continued employment becomes vague. Once employees are hired under LN conditions, however, local employment law governs their employment including the propriety of its termination.[171]

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possible on acquisition of another. 8 U.S.C. § 1481(a) (listing expatriating acts). *But see* Vance v. Terrazas, 444 U.S. 252, 261 (1980) (noting that the act alone is not enough; an expatriating act, and an intent to relinquish citizenship, must both be proved by a preponderance of the evidence to establish loss of U.S. citizenship. *Id*. at 266-70. *See also* AR 690-300, CH. 301, *supra* note 102, para.1-1d.

[165] SOFA, *supra* note 75, art. I, para. 1(b). *See* USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 3-2a(4) (noting that "U.S. citizens who are also citizens of another country . . . other than Italy may apply for employment based only on their U.S. citizenship."). But, for dual citizens, "apply" does not automatically mean "qualify." *See supra* note 164.

[166] *See* discussion *supra* pt. II, *Direct and Indirect Hire Systems*.

[167] *Id. See also* 5 U.S.C. § 5102(c)(14).

[168] Memorandum, Deputy Asst. Secretary of Defense, Manpower, Reserve Affairs, & Logistics, to Asst. General Counsel, Manpower, Health and Public Affairs, subject: Local Employment of U.S. Citizens in Foreign Areas (25 May 1976) (on file with author) (noting: "In indirect hire countries, this apparent conflict poses no problem because employees in the category of local labor are not employees of the U.S. Government . . . . Thus they can be hired and paid under . . . conditions established for local national personnel.").

[169] Acquired U.S. citizenship situations were significant enough to merit specific address in an Army Regulation provision dealing with Rule VIII appointments:

> b. Direct hire employees. An employee appointed under civil service rule VIII, section 8.3 [non-U.S. citizen recruited overseas], {nay [sic] continue to be employed in the excepted service and in the position occupied when U.S. citizenship is acquired. If qualified as a member of the civilian component, the employee becomes subject to U.S. salary schedules and conditions of employment. In these cases, make a pay system change on the day immediately following the elate [sic] on which the employee provides proof of U. S. citizenship.
>
> c. Indirect hire employees. An indirect hire employee who is a national of, or ordinarily resilient [sic] in, the host country will normally hot [sic] qualify for membership in the civilian component when acquiring U.S. citizenship. The employee continues to be subject to host country labor law and may be retained on the rolls with no change in status, pay, or benefits. *Retention of the employee in this status is permissible only in those countries where the host country government is the true legal employer* . . . and when consistent with the . . . SOFA [emphasis added].

AR 690-300, CH. 301, *supra* note 102, para. 3-2. *See* 5 C.F.R. § 8.3 (2004) (allowing overseas appointment without regard to the Civil Service Act). Rule VIII § 8.3 was used as authority for Third Country Citizen employment in Germany. *See also supra* note 129 and accompanying text. *See infra* note 237 and accompanying text. It is not used as appointment authority for the foreign national workforce in Germany. They are hired pursuant to the Foreign Service Act. *See* discussion *supra* pt. II.

[170] Employment of U.S. citizens under NAF foreign national systems seems inconsistent with Foreign Service Act and DOD definitions of foreign nationals as "non-U.S. citizens." *See supra* notes 74, 105 and accompanying text. These are definitions, of course, not exclusionary provisions. It is the Classification Act that does not permit U.S. citizen employment under APF (LN) conditions. NAF systems, however, are not covered by the Classification Act, 5 U.S.C. § 5102(c)(14), and neither German law nor the NAF foreign national system in Germany preclude U.S. citizen employment in NAF (LN) positions. This result may differ in other NATO countries, thus, their laws and restrictions must be examined independently. *See, e.g.*, USAREUR REG. 690-60, *supra* note 152, para. 4e (noting: "LN employment of US citizens in GE, excluding Berlin, is limited to nonappropriated fund positions [the affect of SOFA, arts. I and IX]."). *See also infra* note 228 and accompanying text; note 230 and accompanying text.

[171] SOFA, *supra* note 75, art. IX, para.4 (providing: "The conditions of employment . . . and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State."). *See also* Supplementary Agreement, *supra* note 108, art. 56, para. 1(a) (providing: "German labor law . . . shall apply to employment of civilian labor with a force or a civilian component except as otherwise provided . . . ."). Local nationals may be removed by "ordinary" or "extraordinary" notice, for disciplinary infractions and unacceptable performance. U.S. ARMY EUROPE, REG. 690-64, LOCAL NATIONAL EMPLOYEE CONDUCT, DISCIPLINE, COMPLAINTS, GRIEVANCES, AND LABOR DISPUTES para. 11b (18 Sept. 1984) [hereinafter USAREUR REG. 690-64]. National security reasons are a separate basis. The requirements are specific. *Id*. para. 11).

German employment law does not view the acquisition of U.S. citizenship as a ground for disqualification, and terminations based on this factor could translate into costly settlements in their labor courts.[172]

A one-person RIF would be no better a solution than a termination for disqualification.[173] A host nation labor attorney can best assess prospects for the success of such an action before a German labor court, but LN RIF actions, in general, have a lackluster success record.[174] Even absent exacerbated "old European"[175] political tensions, the success of such an action is uncertain.[176] (Hence, should Ms. Wannabe be required to leave her job under these circumstances, she might achieve a handsome settlement in German labor court.)

Thus, the SOFA and the German Supplementary Agreement apply German labor law to employees hired under LN conditions. The SOFA, of course, is a multilateral treaty, ratified by the U.S. Senate and the President,[177] and a treaty, like a statute, is the supreme law of the land.[178] This presents a quandary. No specific authority exists to classify or pay U.S. citizens as APF foreign nationals, but no lawful authority exists by operation of German law to remove them on this basis. "It has been a maxim of statutory construction … [that] 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains….'"[179] This is especially so for general statutes applied extraterritorially.[180] But, the Classification Act is difficult to reconcile with the treaty in this regard. The authority to pay APF salary-based settlements seems similarly questionable, and while taking such actions to German courts could result in judgment fund solutions,[181] this, too, seems counterproductive.

What Can Be Done About It?

The issue then, is how to best enforce both statute and treaties. From an employer's standpoint, there is no public policy interest in discouraging U.S. citizenship applications or in losing these employees simply because they have acquired their

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[172] Improperly separated LN employees may retain employment or receive indemnity pay on appeal:

> If the [German] court decides that the notice is not justified and, therefore, does not terminate the employment contract, the employer must either continue the employment or request the court to cancel the employment contract and rule that the employer pay an indemnity . . . US Forces should . . . request that the court dissolve the employment relationship and establish … suitable indemnity pay if … termination is not justified. If the employee was given an extraordinary notice, only the employee can request dissolution of the employment relationship . . . .

USAREUR REG. 690-64, *supra* note 171, para. 35a.

[173] The German Law on the Protection from Termination of Employment or Kündigungsschutzgesetz, is the basis for MACOM, LN RIF policies. U.S. ARMY EUROPE, REG. 690-84, CIVILIAN PERSONNEL, REDUCTION IN FORCE-LOCAL NATIONAL EMPLOYEES IN GERMANY ENGLISH TRANSLATION OF USAREUR REGULATION 690-84 (G) para. 7 (20 Nov. 2003).

[174] For example, LN RIF actions in the Stuttgart area after the U.S. VII Corps' departure in the 1990s were widely problematic, resulting in costly settlements. This comment is based on the author's professional experiences as an Attorney-Advisor with the Office of the Judge Advocate, HQ, U.S. Army Europe & Seventh Army, and at various other U.S. Army legal offices in Germany from December, 1983 through present [hereinafter Professional Experiences].

[175] *See* BBC News World Ed., *Outrage at 'old Europe' remarks* (Jan. 23, 2003), *at* http://news.bbc.co.uk/2/hi/europe/2687403.stm (referencing Defense Secretary Rumsfeld's then poorly received remarks at a 22 Jan. 2003 press brief: "'You're thinking of Europe as Germany and France. I don't,' he said. 'I think that's old Europe.'").

[176] Again, both funding and work exist. The U.S. Forces would have continued the employment but for the employee's acquisition of U.S. citizenship. The OPM permits agencies with § 408 programs to include special RIF plans, but this is only to give effect to local laws and practices consistent with public interest. 5 C.F.R. § 351.201(d) (2004).

[177] *See* Aaskov v. Aldridge, 695 F. Supp. 595, 596 (D.C. Dist. 1984) ("NATO SOFA, a multilateral treaty . . . is designed 'to define the status of [forces of one party] while in the territory of another Party'"); Collins v. Weinberger, 707 F.2d 1518, 1522 n.25 (D.C. Cir. 1983) (explaining: "No one disputes that NATO/SOFA, as an Article II treaty, and the Supplementary Agreement, as an executive agreement, are both treaties within the meaning of Section 106," referring to Pub. L. 92-129, § 106, 85 Stat. 355 (Sept. 28, 1971) at note following 5 USC § 7201 (2000).).

[178] U.S. CONST. art. VI, cl. 2.

[179] Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804)). *See also* Rossi v. Brown, 467 F. Supp 960, 964 n.3 (1979) (quoting Restatement (Second) Foreign Relations Law of the United States § 145 (1965): "An act of Congress enacted after an international agreement . . . inconsistent with the agreement, supersedes it as domestic law . . . [i]f the purpose of Congress to supersede the agreement is clearly expressed.").

[180] *Rossi*, 456 U.S. at 32.

[181] 31 U.S.C. § 1304 (2000). *See also* DEP'T OF TREASURY, MANUAL I TFM 6-3100, TREASURY FINANCIAL MANUAL pt. 6, ch. 3100 (Sept. 28, 2000), *available at* http://www.fms.treas.gov/judgefund/regulations.html.

employer's citizenship. But where would authority be found to allow their conversion to APF (U.S.) employment conditions or to continue their APF (LN) employment in these recurring cases?[182]

One solution to this problem would entail amendment of the SOFA to allow or require LN employees who acquire U.S. citizenship to become members of the civilian component.[183] This presents several challenges. The continued LN employment of a new U.S. citizen is not a problem under German law, but a compelled conversion to employment under U.S. conditions might detrimentally impact upon long-term LN employment benefits such as German social security benefits. Further, all countries with similar SOFA provisions and direct hire systems could require a similar re-negotiation to allow for the employment of host nation nationals, or persons ordinarily resident in the host nation, in the civilian component of a sending State, under those circumstances. Such an effort is not only unrealistic, but might also could jeopardize existing sending State advantages on other issues. Seeking case-by-case waivers from the receiving State is another option, but it is irregular and uncertain. Moreover, German authorities likely have no policy interest in increasing the U.S. civilian component while, correspondingly, decreasing the number of persons who would otherwise pay German revenues. (In fact as discussed later in this article, they are beginning to believe that APF (U.S.) employment may be possible without SOFA privileges.).

In the end, a practice of removing LN employees from the rolls simply because they become U.S. citizens seems legally "absurd."[184] Far better solutions are locally under examination to identify and effect proper authority for classification and payment of these employees. The Classification Act does not specifically require the removal of U.S. citizens from APF positions under other systems in which they have been lawfully hired. Since the expenditure of taxpayer dollars is at issue, however, specific authority for their continued employment still must be identified.[185] This is not as easy as it might seem, and a multitude of interests must be balanced. Possible reappointment of these new "family members" under other authority requires consideration of any SOFA implications, the impact on various benefits and entitltements, liability, and other issues. The Foreign Service Act does not provide specific authority to pay U.S. Citizens in APF (LN) positions, [186] but it does provide authority to pay persons properly hired under local compensation plans.[187] The issue of authority to pay U.S. citizens as APF (LN) under these circumstances may not be resolved with finality absent authoritative clarification,[188] but analogous authority exists regarding various aspects of foreign national compensation plans. For example, the U.S. Comptroller General has held that the Foreign Service Act, at "22 U.S.C. 889 does not require compensation plans for aliens to be limited by the laws and regulations applicable to civil service employees."[189] If the proposed practice is based upon prevailing compensation practices for corresponding types of positions in the locality it may be adopted, in spite of civil service employment or fiscal law, but only to the extent it is "consistent with the public interest."[190]

If U.S. citizen, LN employees continue in their APF (LN) jobs in direct hire systems, however, this creates an appearance of inconsistency. Such an appearance already has generated confusion in several Army EEO complaint investigations, as exemplified by an investigating agency's comments:

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[182] Nearly 16,000 foreign nationals are presently employed by the Army alone, in the European theater. *See*, *e.g.*, *Global Rebasing and Restruturing*, *supra* note 4. In the two years, prior to August 2004, there have been at least six acquired citizenship situations in Germany and foreign law attorneys have noted more. Professional Experiences, *supra* note 174. Unreported citizenship acquisitions likely number even higher. Combined with other direct hire systems, the scenario is more extensive. Especially since the opening of borders within the European Union, the citizenship of LN employees in Germany varies—some are eager to acquire U.S. citizenship.

[183] Holmes v. Laird, 459 F.2d 1211, 1222 (1972), *cert. denied*, 409 U.S. 869 (1972) (stating that changes to the SOFA must be made through diplomacy rather than courts: "the corrective machinery specified in the treaty itself is nonjudicial [notes omitted].").

[184] *See* Environmental Defense Fund, Inc., v. EPA, 82 F.3d 451, 466 (D.C. Cir. 1996); State of Ohio v. EPA, 997 F.2d 1520, 1535 (D.C. Cir. 1993); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987) (holding that "the literal meaning of a statute need not be followed where the precise terms lead to absurd or futile results . . . .").

[185] *See supra* note 57 and accompanying text.

[186] *See supra* note 105 and accompanying text.

[187] 22 U.S.C. § 3968 (2000).

[188] For example, by OPM, Federal Courts, or through congressional action.

[189] To the Secretary of Navy, B 173210,1971 U.S. Comp. Gen. LEXIS 68, *1 (Aug. 24, 1971). The cited statute section has been replaced by 22 U.S.C. § 3968a(1).

[190] Decision of the Comptroller General, B-199054, 1980 U.S. Comp. Gen LEXIS 2110, *1-2 (Dec. 16, 1980). Though there are limits to how far the statute will allow for recognition of prevailing practices, it seems at least arguable that this authority could be used to allow for the continued compensation of lawfully hired LN employees who acquire U.S. citizenship. Prior to adopting a local employment practice it should be substantially followed by local employers, determined by the agency head to be consistent with public interest, and coordinated with other agencies in the area to ensure uniformity in application. Decision of the Comptroller General, B-145804, 1961 U.S. Comp. Gen LEXIS 2110, *7 (May 26, 1961).

> [Army Regulation] 690-300, Chapter 301.3-2c, permits a non-US citizen employee who acquires US citizenship, if a national or ordinarily resident in the country of employment to remain employed as a Local National under host nation employment conditions…. There is no known legal basis for discriminating in this fashion in favor of the ordinary resident who acquires American citizenship, as opposed to the American who becomes ordinarily resident simply by virtue of length of sojourn.[191]

The above-cited regulation provision, of course, specifically provides for continued APF (LN) employment in *indirect* hire systems.[192] It provides that direct hire, APF (LN) employment should extend only for one day after providing proof of acquiring U.S. citizenship. These LN employees must then convert to U.S. conditions—if they qualify for the civilian component.[193] The Army regulation's "day-after clause" promotes rapid conversion, rather than offering a loophole for delay. Of course, LN employees are not always of German nationality. To understand why others are excluded, military practitioners must examine the concept of "ordinarily resident" status.

What Is "Ordinarily Resident" Status?

Military lawyers have observed that the phrase "not ordinarily resident" is "by far the thorniest area in determining status under the SOFA."[194] The term "ordinary residence" has various definitions, most commonly in the context of jurisdiction or tax liability. Under the SOFA, personnel who are ordinarily resident in the receiving State, regardless of their citizenship, cannot be members of a civilian component of a sending State.[195] Neither the SOFA, nor the Supplementary Agreement, defines ordinary residence in a SOFA context, and the negotiating histories offer no clues to assist in the term's implementation.[196] The definition of ordinary residence, for purposes of U.S. Forces civilian employment in Germany, is found in MACOM publications:[197]

> A person with ordinarily resident status is a U.S. citizen to whom one of the following applies: (1) The person obtained a work permit during current residency in the host country (2) The person resided in the host country for the time shown below without status as a member of the U.S. Forces or civilian component as defined by the NATO Status of Forces Agreement: (a) In Germany: 1 year. . . .[198]

Historically, USAREUR derived the work permit rule and the one-year rule from legal commentaries.[199] The U.S. Air Forces in Europe and the U.S. Naval Forces, Europe, have similar basic rules.[200] "Ordinary residence," in the SOFA context, "is not

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[191] U.S. Army Civilian Appellate Review Agency, Europe, *Analysis of Issue of Employability of Ordinarily Resident Americans in Appropriated Fund Positions* 6, 7 (undated) (submitted in EEO Complaint of Chester J. Cole, received by agency, Oct. 7, 1987) (on file with author).

[192] AR 690-300, CH. 301, *supra* note 102, para. 3-2. *See supra* note 169 (quoting the provision).

[193] *Id*. *See also* discussion *supra* pt. II (supporting continued APF (LN) employment is possible *only* where the host government is the legal employer.).

[194] Captain David S. Gordon, *Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*,100 MIL. L. REV. 49, 80 (1983).

[195] SOFA, *supra* note 75, art. I, para. 1(b).

[196] Gordon, *supra* note 194, at 81.

[197] Because the SOFA does not define ordinarily resident status, and agencies are obliged to implement the SOFA, an agency's definition of that term, as consented to by the host nation, also enjoys deference from judicial and quasi-judicial U.S. forums. *See* Supplementary Agreement, *supra* note 108, art. 3, para. 4, (allowing for administrative implementation by the parties). *See also* Collins v. Weinberger, 707 F.2d 1518, 1521-1522 (D.C. Cir. 1983) (noting that MACOM regulations promulgated after bilateral negotiations and accommodations envisioned by the SOFA and Supplementary Agreement, and representing a compromise between two legal systems, while obviously not treaties, are accorded judicial deference if consistent and within the scope of the treaty); Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 184-85 (1982); Daneshpayeh v. Dep't of Air Force, 57 M.S.P.R. 672 (1993), *aff'd,* 17 F.3d 1444 (Fed. Cir. 1994). The Commander, U.S. European Command, gave the Commander, U.S. Army, Europe, responsibility for coordination of LN employment matters in Germany, Belgium, Luxembourg and the Netherlands. U.S. EUROPEAN COMMAND, DIR. 30-6, ADMINISTRATION OF CIVILIAN EMPLOYEES IN THE U.S. EUROPEAN COMMAND (USEUCOM) AREA OF RESPONSIBILITY (AOR) para. 9b(1) (6 July 1999).

[198] USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1a. *See also* U.S. ARMY EUROPE, REG. 600-700, IDENTIFICATION CARDS AND INDIVIDUAL LOGISTIC SUPPORT glossary, sec. II (17 July 2002). Examples of ordinary residents include U.S. citizen family members whose sponsors are reassigned but who remain in Germany or obtain work permits or both or former U.S. employees who likewise remain or obtain work permits or both. Other nations use different gauges. *See, e.g.*, TRI-SERVICE REGULATIONS FOR ITALY, U.S. ARMY EUROPE, REG. 550-32/U.S. NAVAL FORCES EUROPE, INSTR. 5840-2D/U.S. AIR FORCES IN EUROPE, INSTR. 36-101, REGULATIONS ON PERSONAL PROPERTY, RATIONED GOODS, MOTOR VEHICLES AND DRIVERS' LICENSES, CIVILIAN COMPONENT STATUS, AND ACCESS TO FACILITIES BY ITALIAN LABOR INSPECTORS (18 Apr. 2001).

[199] Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of "Ordinarily Resident" clause of SOFA (4 May 1998) (on file with author).

[200] Memorandum of Chief Nonappropriated Fund Division, Civilian Personnel Directorate, U.S. Army, Europe and 7th Army, to Chief International Law Division, Office of the Judge Advocate, Headquarters, U.S. Army, Europe and 7th Army, subject: Employability Determination (24 May 2000) (on file with author) (explaining:

equivalent to the legal concept of residence or domicile . . . in either common or civil law jurisdictions."[201] Indeed, "Prior to 1974, 'ordinarily resident' determinations were . . . based on the indicia of intent commonly found in American legal practice."[202] Consequently, the criteria for ordinarily resident status determinations have always been more of a factual than a legal issue, taking into account all the facts surrounding a person's presence in the receiving State, with particular emphasis on the place of recruitment.[203] The resulting latitude in agency discretion developed new dimensions after the Equal Employment Opportunity Act of 1972 extended the right to file civil actions on discrimination complaints to many Federal employees.[204] The USAREUR rule was implemented to avoid subjective and unfair ordinarily resident status determinations.[205] It was not intended to exclusively define ordinary residence, but to serve as guidance for initial applicant evaluations.[206] Commanders, however, still may request reviews of this status (when gained by residence, not by work permit) to determine an applicant's APF employability.[207] These discretionary reviews take into account individual circumstances (e.g., the nature of one's travel and its origins).[208] Further, under the USAREUR rule, ordinarily resident status gained in Germany can be lost under certain conditions upon leaving the country.[209]

German authorities have tacitly, though never formally, agreed to the USAREUR definition of ordinary residence.[210] Initially, the German government seems to have voiced no concern over these determinations.[211] At least from 1974, however, the German Ministry of Finance has expressed an interest (joined later by their Foreign Office and Ministry of Labor) in applying

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> The USAFE Supplement 1 to FPM chapter 301 [expired, but used as guidance, takes] . . . into account: whether the person has (1) purchased a residence or entered into a long term lease; (2) been employed on the local economy or obtained a work permit on the economy; (3) obtained a resident visa; (4) paid local taxes; or (5) been in Germany for over a year without AF affiliation.).

See also U.S. NAVAL FORCES, EUROPE, INSTR. 12301.3B, INELIGIBILITY OF 'ORDINARILY RESIDENT' INDIVIDUALS FOR U.S. CIVILIAN COMPONENT EMPLOYMENT IN NATO HOST NATIONS (2 Sept. 1998).

[201] *See* Gordon, *supra* note 194, at 81.

[202] *Id*. at 80.

[203] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 93 (1971).

[204] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-16 2000) (amending and adding various sections to Title VII).

[205] Memorandum, Chief of Staff, Headquarters, U.S. Army, Europe and 7th Army, to subordinate commanders, subject: "Ordinarily Resident" Determinations (14 Apr. 1983) [hereinafter Memorandum of USAERUR Chief of Staff, 14 April 1983] (on file with author). *See also* Gordon, *supra* note 194, at 81 (stating that the rule was adopted to avoid judgments "which could be construed as discriminatory or showing favoritism").

[206] Gordon, *supra* note 194, at 81 (citing 1st Indorsement, AEAJA-IA, subject: Concept of the "Ordinarily Resident" Provision (Paragraph 16, Article I, NATO SOFA) (2 Mar. 1981)).

[207] USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1d. The MACOM Civilian Personnel Directorate conducts the reviews. *Id*. For NAF employment, a separate regulation is used. U.S. ARMY IN EUROPE, REG. 215-3, MORALE, WELFARE, AND RECREATION, NONAPPROPRIATED-FUND PERSONNEL POLICY AND PROCEDURES (29 Jan. 2004) [hereinafter AER 215-3].

[208] Circumstances that might warrant flexibility include "cases where individuals have crossed the bridge into becoming 'ordinarily resident' between the dates of application, referral and selection for employment." Memorandum, USAERUR Chief of Staff, 14 April 1983, *supra* note 205. Also:

> Although presence in Germany without status for more than one year without substantial interruption, when combined with employment on the local economy would probably give rise to a finding of "ordinarily resident" in almost all instances, a one year or more presence as a student, without a local job, or a one year presence . . . traveling on business or vacation from a point of origin located outside the host country, or a one year presence without a local job combined with evidence that the applicant has tried repeatedly for civilian component jobs, could, in the absence of evidence to the contrary, form the basis for a finding that the applicant is not ordinarily resident in Germany.

Id. *See also* USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1c.

[209] Presently, continuous U.S. residence for a year or more is required, tying the concept in to other DOD employment policy considerations. *Id*. para. 5-1.1a. A former USAREUR REG. 690-333, allowed a "substantial period" of stateside residence to purge ordinarily resident status. Factors examined included, for example, German house sale or lease cancellation and creation of a new domicile, shipment of household goods, and any employment outside Germany. Information Paper, U.S. Army, Europe, Office of the Judge Advocate, subject: Ordinarily Resident General Information para. 7 (1996) (on file with author) (explaining the process envisioned in U.S. ARMY EUROPE, REG. 690-333, RECRUITMENT AND SELECTION FOR TEMPORARY AND TERM APPOINTMENT OUTSIDE THE REGISTER (version ca. 1991)).

[210] *See* Information Paper, U.S. Army, Europe, Office of the Judge Advocate, subject: Ordinarily Resident General Information paras. 2, 3 (1996) (on file with author) (contending that aware of the USAREUR rule: "The German government has, by abstention, given credence to the USAREUR definition of ordinarily resident . . . ." but noting "It could be an issue for discussion in any negotiations pertaining to the SOFA.").

[211] Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of "Ordinarily Resident" clause of SOFA (4 May 1998) (on file with author) (explaining that "[i]n the seventies and early eighties . . . sending State Forces could decide independently on their internal matters without much control by the German authorities.").

German law to define ordinary residence.[212] Thus, the receiving State's interest in controlling SOFA status clearly extends beyond its own nationals.[213] After all, the core issues of revenue and sovereignty would evoke the interest of any nation.

The German standard for ordinary residence is generally based on their legal requirement to obtain a residence permit after 90 days in the country.[214] While German employment law is silent on the term, the German General Revenue Code, for example, provides that ordinary residence can be acquired in a much shorter period than under the USAREUR rule.[215] This period is normally six months but, depending upon other factors, can be as brief as a single day, and does not exceed one year, in Germany.[216] An example of the factors considered in German ordinary residence determinations is evident in the distinct but analogous reviews of U.S. Forces' contractor employees seeking technical expert status under Article 73 of the Supplementary Agreement. If accorded technical expert status, they are "considered to be, and treated as, members of the civilian component."[217] Tightening control on SOFA status,[218] German authorities, through negotiations specifically limited to these non-Federal employees, have listed nine residence, income, employment, and social-related factors that when evaluated along with the "totality of circumstances," determine whether an applicant's main "focus of vital interests" has shifted from the United States to Germany.[219] If so, this type of applicant for SOFA status is considered to be ordinarily resident in Germany.

The German judiciary has not ignored U.S. Forces civilian employee SOFA status, either. In 1984, the German Supreme Labor Court held that while the sending States determined which persons accompanied their forces as civilian employees, the SOFA status of those employees was subject to review by the receiving State.[220] German authorities, nevertheless, continue to tacitly abide by the USAREUR standards in reviewing these SOFA status determinations.

Given the interests at stake, and the determination of the German government to exercise greater influence in defining ordinary residence, any formal, bilateral consistency on the definition of ordinary residence for federal employment purposes remains illusive. Within the European Union, it is likely that a common definition of ordinary residence eventually will emerge

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[212] *See, e.g.*, Letter from German Ministry of Finance, to Director of Civilian Personnel Division, HQ USAREUR and 7th Army 4 (Mar. 26, 1974) (raising no objection to the U.S. Forces hiring discharged soldiers who were not ordinarily resident under German law) (on file with author).

[213] *But see* LAZAREFF, *supra* note 203, 93. Lazareff argues that:

> the criterion of residence is not of particular interest to the Receiving State whose main problem is to make certain that its own nationals do not enjoy privileges granted to foreign members of the civilian component. Therefore . . . the Sending State is . . . responsible for determining who . . . belongs to the civilian component.

Id.

[214] Information Paper, U.S. Army, Europe, Office of the Judge Advocate, subject: Ordinarily Resident General Information para. 2 (1996) (on file with author).

[215] The German Revenue Code provides that one who stays at a place under conditions that indicate he is not there temporarily is ordinary resident after a continuous period of residence of more than six months; with any brief interruptions not considered. If the stay is only for a visit or similar private purpose and does not exceed one year, howeve, the above restriction does not apply. § 9 AO (1977), BGBl. I 800.

[216] The German Federal Ministry of Finance stated that "As a rule such intent is implied when a person's stay exceeds a certain period." Letter from German Ministry of Finance to Director of Civilian Personnel Division, HQ USAREUR and 7th Army (Mar. 26, 1974) (on file with author) (proceeding to analogize the standard to the German Revenue code standard of six months).

[217] Supplementary Agreement, *supra* note 108 art. 73. *See also id*. arts. 71, 72. Contractor employees are employees of private firms under private employment contracts, not under Federal personnel statutes or under the Foreign Service Act. They are not "employees" of the U.S. Forces. 5 U.S.C. § 2105 (2000). They do not always stand in such an integral relation to the U.S. Forces so as to warrant SOFA exemptions. *But see* Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 218 (1992) (indicating that an intertwined employee/employer relationship can inadvertently yield some employee rights in other respects.).

[218] This apparently resulted from a longstanding bilateral disagreement. *See* Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of "Ordinarily Resident" clause of SOFA (4 May 1998) (on file with author) (explaining "USAREUR continued to make unilateral determinations. . . . In a letter dated 19 July 1982, the FMOF [Federal Ministry of Finance] indicated that it had serious doubts whether the USAREUR position . . . for granting Article 73 status was in line with Article 73 . . . .").

[219] Exchange of Notes between the United States and Germany on Article 73 of the Supplementary Agreement to the NATO SOFA para. 2f (Mar. 27, 1998) *available at* http://www.per.hqusareur.army.mil/cpd/docper/exchange73.htm (last visited 23 June 2005) (including factors, such as the duration of the stay, and performance of work, in Germany while not affiliated with the Forces. The Exchange of Notes explains at para. 2c that one who remains in Germany without SOFA status "may within a period of 90 days . . . solely on the basis of the fact . . . become ordinarily resident.").

[220] BAGE 46, 107 (124-26) (examining whether employees of the American Express Internat'l Banking Corp. military banking facilities in Germany qualified for civilian component benefits and exemptions, irrespective of any sending State designation as members of the civilian component). In November 1985, the German Federal Social Court had ruled that SOFA status was subject to final review by German courts. Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of "Ordinarily Resident" clause of SOFA (4 May 1998) (noting that "As a result [of these decisions], USAREUR became more restrictive in granting exceptions to the 'ordinarily resident' rule and OJA gradually interpreted the internal rule more restrictively.") (on file with author).

and also will impact this situation. For the present time, however, the twelve-month standard is used to implement the treaty in this regard.

What Is It Not?

Soldiers, civilian employees, and their family members cannot become ordinarily resident by the length of their residence as long as they have SOFA status.[221] The German Supreme Labor Court has interpreted Article 7 of the Supplementary Agreement as precluding family members of a member of the force or civilian component from establishing ordinary residence under Article I of the SOFA and under German law.[222] They are not required to obtain a work permit under any circumstances, even for employment on the economy. Because of their SOFA status, both U.S. citizen and non-citizen family members are exempt from certain German labor requirements, such as residence and work permits,[223] but this does not mean they cannot or do not get these permits. Though not ordinarily resident under German law, they may be treated as such by agency regulations.[224]

SOFA Interaction with the Classification Act

This article will now summarize and apply previously discussed information to U.S. Forces hiring determinations in Germany. Ordinarily resident U.S. citizens are still U.S. citizens. In APF positions ordinarily resident U.S. citizens are subject to the Classification Act (or other specifically excepted U.S. systems) and cannot be hired as LN employees. If they are hired by the U.S. Forces under employment conditions other than those of LN employment they would be considered members of the civilian component, but the SOFA precludes this.[225] Self-funded NAF positions are not subject to the Classification Act,[226] and the Army may fill them under either U.S. or LN conditions.[227] Normally, U.S. citizens are hired into NAF (U.S.) positions, but no U.S.

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[221] The SOFA, makes no distinction between U.S. and non-U.S. citizens in this regard. SOFA, *supra* note 75, art. I, para. 1(b) Also, "In applying international agreements …concerning residence . . . insofar as they relate to . . . extension of residence permits or to gainful occupation, periods of time spent in the Federal territory by any person as a member . . . of a civilian component . . . shall be disregarded." Supplementary Agreement, *supra* note 108, art. 7.

[222] BAGE 35, 370 (374-77).

[223] AER 690-70, *supra* note 127, para. 5d(5) (exempting family members from "a work permit, residence permit, and . . . a police good conduct certificate. . . ."). Also, "[n]on-German citizens-with the exception of non-U.S.-citizen family members-must be in possession of a residence permit if employment is expected to last longer than 3 months." *Id*. tbl. 1. A prior regulation explained that nonresident employment rules

> are established in the German Federal Law on Foreigners, 28 April 1965 German Federal Law Gazette (Bundesgesetzblatt) Nr. 19, 8 May 1965, and the pertinent implementing directive (arbeitserlaubnisverordnung), published in the German Federal Gazette Nr. 17, 6 March 1971 . . . . (1) Foreigners who enter GE seeking employment must possess a residence permit in the form of a visa issued before their entrance . . . . This requirement does not apply to (a) Citizens of countries that are parties to the EC. (b) Dependents of members of the Sending States Forces and the civilian component . . . . (3) Foreigners must obtain a work permit from the local German Labor Office before employment. Exempt from this requrement (sic) are individuals listed in 1(a) and (b) above.

U.S. ARMY EUROPE, REG. 690-70, RECRUITMENT AND STAFFING OF LOCAL NATIONAL POSITIONS para. 13 (2 Feb. 1982) (superceded by AER 690-70). Further highlighting the political interests at stake:

> In 1971 USAREUR instituted a Dependent Hire Program. . . . These dependents received jobs traditionally reserved for local nationals. . . . But as German economic growth slowed, local nationals became increasingly concerned with their job security. Complaints were made to the German parliament, and complicated negotiations between the two governments ensued. . . . The FRG maintained that since USAREUR was hiring these dependents in the FRG to fill local labor requirements they were, like local nationals, subject to German law, including the German work permit requirement. USAREUR, on the other side, insisted that it had the right to hire U.S. citizens, whether in the U.S. or in the FRG, according to U.S. law and to designate anyone so hired as a member of the civilian component. The negotiations on this issue reached an impasse. The FRG, however, proved willing to drop its insistence that dependents were subject to German law in exchange for assurances that the job security of local nationals would not be jeopardized by the Dependent Hire Program.

Collins v. Weinberger, 707 F.2d 1518, 1519-20 (D.C. Cir. 1983) (footnotes omitted).

[224] Regulations should ensure those with SOFA status are not improperly considered as ordinary residents. An agency's failure to comply with its regulatory requirements can be harmful error that invalidates its actions. *See* 5 U.S.C. § 7701(c)(2)(A) (2000); 5 C.F.R. § 1201.56 (b)(1) (2004). *See, e.g.*, Vitarelli v. Seaton, 359 U.S. 535 (1959).

[225] 5 U.S.C. § 5102 (2000). *See also* AR 690-300, CH 301, *supra* note 102, para. 1-1d(9); USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 3-2a(1). Views that the SOFA trumps the Classification Act since the treaty came later are not persuasive. There is no incompatibility between them that cannot be read *pari materia*. Memorandum, Asst. General Counsel, Manpower, Health and Public Affairs, Dep't of Defense, to Deputy Asst. Sec. Def. (Civilian Personnel Policy), subject: Local Employment of U.S. Citizens in Foreign Areas (1 May 1978) (on file with author).

[226] *See supra* note 53 and accompanying discussion.

[227] *See* AER 215-3, *supra* note 207. *See also* USAREUR REG. 690-60, *supra* note 152. The former governs NAF (U.S.) employees and the latter governs NAF (LN) hires.

statute or regulation specifically precludes their hire under NAF (LN) conditions.[228] The Army may not hire ordinarily resident U.S. citizens as NAF (U.S.) employees, though, since only employment under local labor conditions is excluded from civilian component status under the SOFA.[229] Thus, the sending State cannot employ ordinarily resident U.S. citizens in anything but NAF (LN) positions, if locally permitted.[230] (Hence, Mr. and Ms. Wannabe may be hired into the NAF (LN) positions in the vignette.)

The Classification Act specifically excepts non-U.S. citizens overseas from APF positions under its pay systems,[231] but the Army may hire non-U.S. citizens into APF (LN) positions under Foreign Service Act Authority.[232] Further, no statutes or regulations block their employment in most NAF (U.S.) or (LN) positions. If a non-U.S. citizen is hired under U.S. conditions, however, he or she would, under the SOFA, be considered a member of the civilian component. If ordinarily resident, he or she would face the same obstacle as their citizen counterparts and, at least in Germany, could only be hired into NAF (LN) jobs.[233] (Hence, ordinarily resident U.S. citizens such as Mr. Wannabe are covered by the Classification Act precluding their APF (LN) employment, but they cannot be hired under U.S. conditions (APF or NAF) since their civilian component status is SOFA-precluded.)

The SOFA further restricts civilian component membership to U.S. and other NATO country nationals. Stateless persons, host nation citizens, and non-NATO country citizens cannot be members.[234] Thus, in Germany, citizens of NATO countries (other than the U.S. or Germany) who are not ordinarily resident in Germany, generally, may be eligible not only for APF (LN) and NAF (LN) positions, but also for certain NAF (U.S.) positions. The U.S. Forces' practice, and indeed the plain language of the agreement, support that this eligibility extends to citizens of countries that are new entrants into NATO, once entry is complete. Special employment categories for "third-state nationals" and "third-country citizens (TCC)" are no longer used in Germany.[235] The TCCs were non-U.S. citizens who also were not citizens or permanent residents of the host nation.[236] They were paid in APF or NAF dollars, and held required skills unobtainable from U.S. or local citizens, but were term employees with no competitive status. Their employment under non-local labor conditions made them members of the civilian component.[237] Classified primarily against GS and FWS standards, their pay rates were based on separate but corresponding standards.[238] Because of their civilian component status, the Army could hire TCCs only if they were NATO country citizens and not citizens of, or ordinarily resident in, the host nation.[239] The Army in Germany must now hire all NATO country (other than U.S.) citizens who are seeking APF jobs as LN conditions.[240]

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[228] *See supra* note 170. Nonappropriated fund employees are an integral part of the U.S. Forces under Part I. Para. 4, of the Protocol of Signature to the Supplementary Agreement. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature (Supplementary Agreement and Protocol), Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351. United States citizen, NAF (LN) employees have no civilian component status. Their LN conditions of employment place them outside the civilian component. SOFA, *supra* note 75, art. IX, para. 4. The employment conditions used depend upon cost, expected job tenure, workforce stability, and skills needed. While NAF (LN) conditions offer less flexibility (*e.g.*, longer lead-time for outplacements and separations), their contracts can ensure they are as flexible as U.S. employees. Employment of U.S. citizens as LN may be prohibited by host nations or by agency policy.

[229] SOFA, *supra* note 75, art. I, para. 1(b). *See also* AER 215-3, *supra* note 207, para. 4c.

[230] Collins v. Weinberger, 707 F.2d 1518, 1519 n.7 (D.C. Cir. 1983) ("It should be noted the category of local nationals may include United States citizens ordinarily resident in the FRG.").

[231] 5 U.S.C. § 5102c(11) (2000).

[232] *See* discussion *supra* pt. II.

[233] SOFA, *supra* note 75, arts. I, IX. *See also* AER 215-3, *supra* note 207, para. 4c.

[234] SOFA, *supra* note 75, art. I, para 1(b). *See* SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 93 (1971). The working group designated to draft the SOFA failed to adopt a French proposal that civilians must be nationals of a sending State to be in its civilian component.

[235] The command rescinded the governing regulation when the term appointment of the last TCC/TSN employee expired in 1990/91.

[236] AR 690-300, CH. 301, *supra* note 102, para. 1-1d(14).

[237] U.S. ARMY EUROPE, REG. 690-34/U.S. NAVAL FORCES EUROPE, INSTR. 12250.2, CIVILIAN PERSONNEL, ADMINISTRATION AND MANAGEMENT OF THIRD COUNTRY CITIZEN EMPLOYEES para. 1-3 (22 Mar. 1974) (cancelled) (on file with author). These employees were hired under Civil Service R. VIII. *Id.* para. 2-7.

[238] *Id*. paras. 2-7, 3-1 (providing, for example, that a GS-05 was equivalent in grade to a TCC-5).

[239] AR 690-300, CH. 301, *supra* note 102, para. 1-1d(1) (providing that the civilian component: "includes U.S. citizens and third-country citizens (TCC) (also referred to as third-state nationals (TSN)) . . . .").

[240] 5 U.S.C. § 5102(c)(11) (2000). *See also supra* note 112 (regarding uniformity of LN systems).

Citizenship restrictions exist for certain NAF positions, as well. The Army may not assign non-US citizens to NAF positions designated as sensitive,[241] and they must meet all immigration requirements to be eligible for any stateside NAF position.[242] Citizenship restrictions for NAF FWS mirror their APF counterparts,[243] but EO 11935 restrictions do not apply since these are not positions with competitive service status. Army NAF (LN) employees (including third country nationals) are employed in foreign areas in accordance with specific international agreements and treaties.[244] In the absence of a SOFA or other intermediate guidance, MACOM regulations again provide employment details.[245] While NAF (LN) positions are the only option for U.S. Forces employment of ordinarily resident U.S. citizens in Germany, hiring preferences can make even these positions difficult to obtain.[246]

What Happens When Ordinary Residents Are Hired by the U.S. Forces?

Simply because ordinary residents cannot lawfully be members of the civilian component does not mean they are never mistakenly hired into its APF positions. Agencies must terminate ordinary resident appointments made under U.S. employment conditions since the residents are not qualified for them. The U.S. Merit Systems Protection Board (MSPB) has sustained such terminations.

The 1987 case of *Meyers v. Dep't of Army*[247] highlighted that erroneously converted (LN to GS) ordinarily resident employees are probationary, as well, and thus have no MSPB appeal rights. In that case, Ms. Giovanna M. Meyers, an LN employee in Italy, became a naturalized U.S. citizen. Consequently, the agency reappointed her as a GS overseas limited employee but later terminated her appointment because she was ordinarily resident in Italy.[248] She appealed both her conversion to GS conditions and her termination to the MSPB. The administrative judge dismissed the case finding that the MSPB had no jurisdiction over the agency's actions or over non-preference eligible, excepted service employees.[249] In her petition for review, Miss Meyers argued that because she was now a U.S. citizen, the MSPB had jurisdiction. Finding this argument irrelevant, the MSPB confirmed that her excepted service, non-preference eligible status was non- jurisdictional.[250] But even non-probationary, ordinarily resident appointees fare no better. They may never acquire statutory employee status.

The mistaken appointment of a non-probationary, ordinarily resident U.S. citizen was at issue in the 1993 MSPB case of *Daneshpayeh v. Dep't of Air Force*.[251] The agency removed Mr. David H. Daneshpayeh from a GS-07, Assistant Operations Manager position in Turkey, on grounds that his appointment was illegal under the SOFA when the agency hired him nearly three years earlier.[252] The administrative judge found that he was not a Title 5 employee and dismissed the case for lack of jurisdiction.[253] Upon petition for review, however, the MSPB noted that an employee entitled to adverse action procedures did not lose them because of an illegal appointment unless it was made "in violation of an absolute statutory prohibition so that the appointee [was] not qualified for appointment in the civil service."[254] The MSPB reopened his case and closely examined his employment record vis-à-vis the agency's ordinarily resident definition, then noted that ordinary residents could not become

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[241] AR 215-3, *supra* note 54, para. 2-13m.

[242] *Id*. para. 2-13n.

[243] *Id.* (providing: "Each FWS employee within . . . the United States . . . must be a US citizen or a bona fide resident . . . ."). If the Labor Secretary certifies that none are available, non-citizens may be considered. *Id*.

[244] *Id*. para. 1-8.

[245] *See, e.g*., AER 215-3, *supra* note 207.

[246] *See, e.g*., AER 690-70, *supra* note 127.

[247] Meyers v. Dep't of Army, 35 M.S.P.R. 417, 1987 MSPB LEXIS 162 (1987).

[248] *Id*. at *2.

[249] *Id*.

[250] *See* the Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461 (1990) (modifying the definition of employee at 5 U.S.C. § 7511 so that now most excepted service employees have true adverse action appeal rights after two years).

[251] Daneshpayeh v. Dep't of Air Force, 57 M.S.P.R. 672 (MSPB 1993), *aff'd,* 17 F.3d 1444 (Fed. Cir. 1994).

[252] *Id.* at *1,*2.

[253] *Id*. at *2.

[254] *Id*. at *4, *5 (citing Travaglini v. Dep't. of Educ., 18 M.S.P.R. 127, 137 (MSPB 1983), *aff'd as modified*, 23 M.S.P.R. 417, 419-20 (MSPB 1984); Torres v. Dep't. of the Treasury, 47 M.S.P.R. 421, 422 (MSPB 1991)).

civilian component members under the statute-equivalent SOFA.[255] It further explained that because the treaty (the SOFA) did not define the term "ordinarily resident," the MSPB was required to "afford deference to the interpretation given that term by the agency as set forth in its rules."[256] The MSPB, consequently, concluded Mr. Daneshpayeh was not an employee under 5 U.S.C. Sections 2105 (a) or 7511(a)(1)(A), and that it lacked jurisdiction over his removal.[257] Thus, it is reasonable to assume that USAREUR's definition of "ordinarily resident" would receive similar deference. The MSPB's logic, extrapolated, also would cover other SOFA-excluded categories. But, what harm is there in retaining such improperly appointed employees?

The improper appointment of ordinarily resident U.S. citizens presents significant liability issues. The risks to erroneously hired employees exceed job loss. Arguably, they may be liable for their portion of host nation social insurance for their employment period and their agencies may remain principally liable for all social insurance contributions. In 1996, for example, the Army was compelled to settle a 1991 German Social Court case (AOK Frankfurt/Main v. FRG)[258] involving Dr. James Lewis, an ordinarily resident U.S. citizen, who had been appointed as a Department of Army, GS employee at the agency's Scientific Technology Center, Europe in Frankfurt/Main from 1985 until 1989. The German Social Insurance Agency (*Allgemeinen Ortskrankenkasse* or AOK) received social insurance contributions of around $40,000 in settlement, for the period of Dr. Lewis's employment.

> [T]he judge indicated … the Army [had] violated the stationing agreements by hiring Dr. Lewis as a civil servant under U.S. law. Not being a member of the civilian component Dr. Lewis, in the opinion of the court, [was] only an employee with a civilian component, and therefore subject to the German social security system.[259]

If AOK had pursued interest and penalties, the amount could have nearly doubled.[260] The court's view of a U.S. employment category "with a civilian component," but subject to German liabilities, represents a problematic trend that will be examined later in this article.

Thus, for U.S. civilian employment purposes in Germany, USAREUR has adopted a twelve-month standard for determining ordinarily resident status.[261] Superficially, it might appear that the agency has excluded these expatriate citizens from U.S. employment, but any German law on this point likely would not condone a longer period. The U.S. standard is twice the duration of the German tax law standard and their differences have never been reconciled. While strict application of the USAREUR rule can avoid host nation litigation such as in the *Lewis* case, the manner in which the rule is applied remains a fertile ground for disparate treatment claims.

Isn't This Discrimination?

While the SOFA excludes ordinarily resident U.S. citizens from some types of employment,[262] this is not prohibited discrimination. Title 5 of the U.S. Code states that: "Unless [permitted][263] by treaty, no person shall be discriminated against …

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[255] *Id*. at *5 (noting: "The NATO/SOFA, as an Article II treaty ratified by the United States Senate, has the force and effect of a statutory enactment. U.S. Const. art. VI, cl. 2; *Collins*, F.2d at 1525 n.25 . . . . "). Although the SOFA is an executive agreement, not a treaty in the constitutional sense (requiring the advice and consent of the Senate before becoming effective), under international law, such executive agreements are considered treaties and supersede prior inconsistent domestic law. Rossi v. Brown, 467 F. Supp. 960, 964 n.3 (D.D.C. 1979).

[256] *Daneshpayeh*, 57 M.S.P.R. at *7 (citing Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 184-85 (1982)).

[257] *Id*. at *19.

[258] *See* Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to International Labor Relations Division, Directorate of Civilian Personnel U.S. Army, Europe and 7th Army, subject: Lawsuit FRG v. AOK (Dr. Lewis) (9 Dec. 1996) (on file with author) (referring to SozG, (social insurance court) Frankfurt, F.R.G., file no. S/9Kr 2777/91 (unpubl.) (on file with Directorate of Civilian Personnel, U.S. Army, Europe and 7th Army). The basic claim totaled approximately DM 60,000 (at the 1996 official exchange rate of DM 1.5/1 USD)) . The case was eventually settled. E-mail from Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Director of Civilian Personnel, U.S. Army, Europe and 7th Army (11 Oct. 1996) (on file with author).

[259] E-mail from Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Director of Civilian Personnel, U.S. Army, Europe and 7th Army (11 Oct. 1996) (on file with author).

[260] Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to International Labor Relations Division, Directorate of Civilian Personnel U.S. Army, Europe and 7th Army, subject: Lawsuit FRG v. AOK (Dr. Lewis) (9 Dec. 1996) (on file with author).

[261] USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1.

[262] SOFA, *supra* note 75, art. I, para. 1(b).

[263] The statute uses "prohibited," but "the words 'unless permitted by' or 'unless provided by' would convey more precisely the meaning . . . ." Weinberger v. Rossi, 456 U.S. 25, 29 (1982) (quoting Rossi v. Brown, 642 F.2d 553 (1980).

in the employment of civilian personnel at any … installation operated by the [DOD] in any foreign country because such person is a citizen of the United States…."[264] Thus, the SOFA's employment proscription is treaty-permitted, even if it might be considered "discriminatory."[265] The manner in which its employment proscription is implemented, however, is a separate issue, and one that has been the subject of litigation.

The requirement for nondiscriminatory implementation of such proscriptions is clear. In the 1984, EEOC case of *Chambers v. Dep't of Air Force*,[266] a United Kingdom (UK) SOFA provision prohibited UK citizens from holding U.S. Forces positions in the United Kingdom.[267] The U.S. Air Force rejected Ms. Shirley F. Chambers's—a UK/U.S. dual citizen—application for a U.S. Air Force civilian position, explaining that she was ineligible unless she renounced her UK citizenship.[268] Ms. Chambers challenged the practice as national origin discrimination, but the agency rejected her EEO complaint reasoning that it did not control the matter—the United Kingdom considered her its citizen and the SOFA precluded her U.S. employment.[269] On appeal, the EEOC concluded that the agency's rejection of her complaint was an improper finding on the merits, as the agency's reasons were merely its non-discriminatory justification for rejecting her application.[270] The EEOC required the agency to produce a copy of the SOFA and related documents, and data on any similarly situated employees whom the agency allegedly hired without renounced UK citizenship. No further record on the case exists (perhaps indicating a settlement, withdrawal, or a further complaint cancellation), but if no evidence of disparate treatment could have been shown, the supplemented record should have established Ms. Chambers's disqualification from such employment and defeated even a prima facie case of discrimination. The confusion over SOFA citizenship restrictions, however, continued.

In a 1986 letter to the editor of the European Stars and Stripes newspaper, the director of the U.S. Army Civilian Appellate Review Agency (USACARA), [271] European Region—charged with investigating Army discrimination complaints—ventured that since the Classification Act does not apply to FWS employees it could not exclude

> "ordinarily resident" Americans from such blue collar positions when classified under a Local National pay system. Moreover, since Local National wage scales in Germany are fixed under a cooperative agreement between the United States and the FRG . . . it seems at least pursuable that the Classification Act does not, in and of itself, prohibit the employment of "ordinarily resident" Americans from any position (white collar or Wage Grade) classified and paid under the Local National pay system.[272]

Perhaps an APF, FWS (LN) system was pursuable, but with Congress, not the Army. Any job under LN conditions would escape the SOFA's civilian component proscriptions, but any APF (LN) job still would fall under the Foreign Service Act's authority. Investigators do not determine an agency's workforce requirements for its management, but had FWS work been required, the notion of APF (LN) employment of U.S citizens still lacked statutory authority. The burden of proof that this commentary suggested was equally unfounded. Once management asserted that no such employment system for U.S. citizens existed, proving that one existed and had been used discriminatorily became an aggrieved employee's burden.[273] The USACARA

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[264] *See* 5 U.S.C. § 7201 (2000) (citing Pub. L. No. 92-129, tit. I, sec. 106, 85 Stat. 355 (Sept. 28, 1971)).

[265] The term "treaty" is not limited to international agreements concluded by the President under Article II of the Constitution, but also includes executive agreements. *Rossi*, 456 U.S. at 31-32. This is especially true where a statute impacts on foreign policy. *Cf.* B. Altman & Co. v. United States, 224 U.S. 583 (1912).

[266] Chambers v. Dep't of Air Force, EEOC No. 01832403, 84 FEOR 20535 (Apr. 5, 1984).

[267] In the United Kingdom, this covered APF and NAF (LN) jobs (NATO countries other than Germany typically prevent U.S. citizens from being LN employees). Although the EEOC has jurisdiction over U.S. citizen (including dual citizen) applicants for Federal employment, once hired under host nation conditions the EEOC has no jurisdiction. *See* Ashburn v. West, 1994 EEOPUB LEXIS 1055 (Aug. 25, 1994).

[268] Chambers v. Dep't of Air Force, EEOC No. 01832403, 84 FEOR 20535 at Background para. (Apr. 5, 1984).

[269] *Id.*

[270] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that findings can result if agencies knowingly disregard their rules and employ others not in the complainant's protected class.).

[271] The USACARA examined Army EEO complaints and grievances until 1993, when the DOD Office of Complaint Investigations assumed this role. *See* U.S. DEP'T OF ARMY, REG 10-57, ORGANIZATION AND FUNCTIONS U.S. ARMY CIVILIAN APPELLATE REVIEW AGENCY (15 Sept. 1979) (cancelled, on file with author). *See also* U.S. DEP'T OF DEFENSE, MANAGEMENT REPORT DECISION NO. 974, CIVILIAN PERSONNEL ADMINISTRATION EFFICIENCIES 6 (15 Dec. 1992).

[272] Letter from R. H. Thornhill, Director, USACARA-Europe, to Editor, European Stars and Stripes newspaper (Feb. 26, 1986) (on file with author) [hereinafter Thornhill Letter of Feb. 1986].

[273] *McDonnell-Douglas Corp.*, 411 U.S. 792 (1973); Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); U.S.P.S. v. Aikens, 460 U.S. 711 (1983); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) (holding that the burden of proof remains with the plaintiff.).

support for, and solicitation of, ordinarily resident cases,[274] nevertheless, was not lost on complainants. A short time later, what seemed to be a perfect case for USACARA arose in *Cole v. Stone*.[275]

In 1987, Mr. Chester J. Cole, a U.S. citizen ordinarily resident in Germany, applied for a GS-201-5/7/9, Personnel Management Specialist, position in Frankfurt/Main. The Civilian Personnel Office rejected his application and explained that he could qualify only for LN vacancies (but failed to specify NAF (LN)).[276] He then reapplied to be hired for the same position, but as an LN employee. When the agency rejected that application, Mr. Cole filed a formal discrimination complaint based on his American national origin and included a letter, on USACARA stationary, entitled *Analysis of Issue of Employability of Ordinarily Resident Americans in Appropriated Fund Positions.*[277] Although the SOFA excluded all ordinary residents, not just Americans, the analysis attacked such employment denials[278] and concluded "the USAREUR policy and practice of prohibiting employment of ordinarily resident Americans in appropriated fund positions as Local Nationals … [was] illegal."[279] The Army rejected the complaint, based on its non-discretionary application of the SOFA and the Classification Act (and thereby skipped USACARA review).[280]

Mr. Cole appealed, but the EEOC sustained the agency's rejection. In his request to reopen the complaint, Mr. Cole argued that it was not the SOFA, but the agency's interpretation of it that denied Americans employment.[281] As in *Chambers v. Dep't of Air Force*, the EEOC required the agency to supplement the record, reasoning that the DOD must not discriminate in the following matter:

> in employment against United States citizens on military bases located overseas unless permitted by treaty.... [A]ppellant is alleging that he is an aggrieved applicant . . . denied a position . . . on the basis of his national origin . . . . This is all that is necessary for appellant to state a claim. . . .[282]

It further observed that the "NATO-SOFA and its supplementary agreement are not a blanket prohibition against the employment of U.S. nationals, but merely concern working conditions of employment."[283] The remaining concerns ostensibly included whether the agency had improperly categorized him, or had impaired his ability to apply for jobs open to similarly situated citizens, and whether the agency permitted any similarly situated ordinarily resident applicants to receive APF (U.S.) or (LN) jobs in the past.[284]

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[274] Thornhill Letter of Feb. 1986, *supra* note 272 (advocating that certain complainants "might well desire to seek a review of any decision categorizing them as 'ordinarily resident' based solely on a one-year presence in Germany. It might be that a proper . . . application of the 14 Apr 83 USAREUR letter … would lead to a different decision based on the total USAREUR policy.").

[275] Cole v. Stone,EEOC No. 05891042, 89 FEOR 21252 (Aug. 23, 1989).

[276] Letter from Chief, Recruitment & Placement Division, Frankfurt Military Cmty. Civilian Pers. Office, to Chester J. Cole, Applicant (May 13, 1987) (on file with author).

[277] Memorandum, U.S. Army Civilian Appellate Review Agency, Europe, subject: Analysis of Issue of Employability of Ordinarily Resident Americans in Appropriated Fund Positions (undated, rec'd. Oct. 7, 1987) (on file with author) (purporting to have been drafted in response to similar issues from Italy and Germany in two other agency EEO complaints).

[278] Frustration with the rule is detectable in the USACARA commentary:

> It is our view that the more cogent principle of reductio in absurdum, i.e., the law should not be read in such a fashion as to render it ridiculous, must also be considered. An interpretation of the US Code, in conjunction with the NATO/SOFA, which permits the US Forces to hire as a Local National a national from virtually any country on the face of the earth who is ordinarily resident, and which concomitantly prohibits employment of a similarly situated American, is preposterous on its face.

Id. at 6.

[279] *Id*. at 7.

[280] U.S. Dep't of Army, DA Form 5497-R, Disposition of Complaint of Discrimination (Dec. 1985) (filed 5 Oct. 1987; rec'd. 7 Oct. 87); U.S. Dep't of Army, DA Form 5495-R, Chronology of Individual EEO Complaint (Dec. 1985) (on file with author) (completed by complainant 26 Jan. 1988).

[281] Cole v. Stone, EEOC No. 05890142, 89 FEOR 21252, at Background para. (Aug. 23, 1989).

[282] *Id*. at Analysis and Findings.

[283] *Id*.

[284] The USACARA editorial warned that "authority to prescribe regulations does not imply the authority to [arbitrarily] waive regulations in certain cases and enforce them in others. . . . [R]egulations must contain sufficient guidelines, applicable to all individuals similarly situated, so that an affected individual may determine his or her rights thereunder." Thornhill Letter of Feb. 1986, *supra* note 272. *See also* 5 U.S.C. § 706 (2000) (providing that agency actions are subject to judicial review and will not be upheld if they are arbitrary, capricious, an abuse of discretion, or otherwise unlawful.).

The agency, relying on *Espinoza v. Farah Manufacturing Co., Inc.*,[285] had prepared to argue that the discrimination envisioned in *Weinberger v. Rossi* was not cognizable in a Title VII context.[286] While this reasoning certainly supported the rule's legitimacy, the agency likely would have been required to develop the record and to articulate legitimate, nondiscriminatory reasons regarding the application of its ordinarily resident rule in that case. Had Mr. Cole been unable to refute his ordinarily resident status or to demonstrate his disparate treatment from others similarly situated he, too, would have failed even to establish a prima facie case of discrimination. Mr. Cole, however, passed away and his family did not pursue the case.

More recently, in *Chung v. Rumsfeld,*[287] a 2003 case from South Korea, the EEOC rendered a decision in an ordinary resident's discrimination complaint, albeit without a hearing. As in *Chambers v. Dep't of Air Force* and *Cole v. Stone*, the EEOC exercised jurisdiction, but based on the record before it found that the complainant, Mr. Arthur K. Chung, was ordinarily resident under the applicable SOFA and, as such, did not establish a prima facie case of discrimination.[288] Mr. Chung failed to apply for positions for which he was qualified, and could not further demonstrate that the agency considered similarly situated employees not in his protected class for employment even though they, too, did not reside in the United States.[289] Finally, he was unable to establish that the agency's residence requirement was not neutral or had not been even-handedly applied.[290] Thus, where discretion exists, so, too, will EEOC jurisdiction. Nevertheless, where treaty-predicated rules are correctly and consistently applied, any resulting employment denials will not be found unlawfully discriminatory. (Hence, Mr. Wannabe may file his initial EEO complaint over his ordinarily resident disqualification, but he likely will lose.)

Ordinarily resident determinations are not vulnerable to attack solely on the basis of national origin discrimination, as the EEOC case of *Miller v. Dalton*[291] demonstrates, but that case also offers an alternative strategy for agencies. Mr. Reuben A. Miller, a U.S. citizen and legal resident of Spain, applied for a GS-188-05, Recreation Specialist job with the U.S. Navy in Spain.[292] Under the Agreement on Defense Cooperation between the United States and Spain, civilian component members could not be nationals of, or ordinarily resident in, Spain.[293] When he was not selected, he filed an informal EEO complaint of race, gender and age discrimination. The agency settled the complaint by agreeing, inter alia, to request that the Permanent Committee of the Office of Defense Cooperation, Spanish Section, grant him civilian component status.[294] The agency also agreed to place him in a *status quo ante*, GS-188-05 position, with back pay, contingent upon his status's approval, and to make every reasonable effort to attain the status determination through established channels.[295] When the U.S. Section of the Permanent Committee ultimately denied the status request, he alleged that the agency breached its agreement. On appeal, however, the EEOC held that the agency made reasonable efforts and satisfied the agreement.[296]

And what of U.S. citizens, who already work under LN conditions and seek to challenge an agency's employment related decisions? Quite simply, other than as applicants for Federal employment, their relief is limited to host nation forums.[297] United

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[285] Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 95 (1973). The agency argued:

> What Mr. Cole is really complaining about…is the Army's distinction between groups of U.S. citizens … In Espinoza v. Farah Manufacturing Co . . . . the Supreme Court held . . . "national origin" in the Civil rights Act . . . was not intended to embrace United States citizenship . . . . [further] (T)he EEOC improperly interpreted Weinberger v. Rossi . . . and misconstrued "discrimination" in that context as within its own purview . . . The purpose of this small section in the Amendments to the Military Selective Service Act of 1967 was "to correct a situation . . . where discrimination in favor of local nationals and against American dependents in employment has contributed to . . . hardship for families of American enlisted men . . . ." H.R. Conf. Rep. No. 92-433, p. 31 (1971).

OTJAG Request for Attorney General Opinion. 1990, *supra* note 121.

[286] Professional Experiences, *supra* note 174. In November, 1989, the author assumed responsibility over the Cole case, at the agency representative level, at HQ, V Corps, in Frankfurt/Main, FRG..

[287] Chung v. Rumsfeld, 2003 EEOPUB LEXIS 2237 (2003).

[288] *Id*. at *2.

[289] *Id*.

[290] *Id*.

[291] Miller v. Dalton, EEOC No. 01952955, 96 FEOR 10672 (Mar. 5, 1996), *reconsid. denied* 7 FEOR 30229 (Mar. 27, 1997).

[292] *Miller*, 96 FEOR 10672 at Background para.

[293] *Id*.

[294] *Id*.

[295] *Id*.

[296] *Id*. at Analysis and Findings para.

[297] Supplementary Agreement, *supra* note 108, art. 56, para. 1(a).

States anti-discrimination laws, of course, do not cover non-U.S. citizens overseas[298]—they have no access to the EEOC, the MSPB or the Federal Labor Relations Authority.[299] Similarly, once U.S. citizens are employed under LN conditions, host nation law alone governs their employment.

An example of this principle is the 1994, EEOC case of *Ashburn v. West*.[300] Since 1984, the Army employed Mr. Lloyd A. Ashburn, an ordinarily resident U.S. citizen in Berlin, as a criminal investigator/translator (LN). In 1990, Mr. Ashburn filed a formal EEO complaint after the agency removed him for refusing an order to pull guard duty.[301] The Army rejected the complaint and maintained that Mr. Ashburn's exclusive relief rested with the LN system. In his action before a German labor court, the court found that the agency violated the German Employment Protection Law, but that Mr. Ashburn was not entitled to reinstatement.[302] Although the Army reached a DM 12,500 settlement, Mr. Ashburn appealed his EEO complaint's rejection to the EEOC. After two remands, the agency cancelled the complaint citing lack of jurisdiction. Mr. Ashburn again appealed to the EEOC, which affirmed the agency's cancellation holding that, by treaty, his LN employment was governed by German, not U.S., law.[303] Though the agency emphasized that Berlin's occupational cost salary system clearly made Mr. Ashburn a German employee, the U.S. Army concluded that host nation employment law applies to all employment under LN conditions.[304] (Hence the Wannabe's may not file U.S. EEO complaints over terminations or placement rights while under LN employment conditions. They are excluded from U.S. EEO or MSPB channels.[305]) When sending State citizens secure foreign labor court reviews, however, the results from a U.S. law standpoint may seem more equitable than legal.

The "Third Category"

No truly landmark foreign court cases have affected U.S. Forces employment categories in Germany, but an increasing number of decisions touching on employment eligibility are, perhaps, setting the stage for change. The German court cases discussed below, are significant in this regard. As discussed, the D.C. Circuit court in *Collins v. Weinberger*, identified the civilian component and local labor (LNs) as the only two categories of sending State-hired civilian employees under the SOFA.[306] In examining the employment status of several of these personnel, however, the German Supreme Labor Court came up with a third category.

Mr. Robert J. Still, a U.S. citizen, was married to a German citizen and had worked on the economy as a photographer in Germany since 1978.[307] This made him ordinarily resident, yet in 1981, the U.S. Forces in Germany hired Mr. Still as a photography instructor under U.S. employment conditions. After initially extending Mr. Still's employment, the agency sent him a notice terminating his employment effective May of that year.[308] Seeking to avail himself of greater protections under German law, he filed a complaint with the State Labor Court for Baden-Wuerttemberg, essentially arguing that as an ordinary resident the agency could not hire him under U.S. conditions, and thus he had to be treated as if under LN conditions.[309] The state court dismissed his case for lack of jurisdiction, and he appealed. In its 1984 judgment, the German Supreme Labor Court entertained a relatively novel concept that one could be hired under U.S. conditions yet not be entitled to the privileges of the civilian

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[298] *See, e.g.*, 42 U.S.C. § 2000e - 2000e-17 (2000). The term "employee," at § 2000e def.(f), regarding U.S. employment in a foreign country, "includes an individual who is a citizen . . . ." Unlawful discriminatory refusals to refer or hire applicants are also prohibited. *Id*. § 2000e-2(a) and (b).

[299] *See* 29 C.F.R. § 1614.103d (2004) (providing, "[t]his part does not apply to: . . . Aliens employed in positions, or who apply for positions, located outside the limits of the United States."). Non-U.S. citizen employees outside the United States have no MSPB rights. 5 U.S.C. § 7511(b)(9), *referencing* 5 U.S.C. § 5102(c)(11). *See also* 5 U.S.C. § 7103(a)(2)(i) (denying them Federal Labor Relations Authority rights, as well).

[300] Ashburn v. West, 1994 EEOPUB LEXIS 1055 (Aug. 25, 1994).

[301] *Id*. at *2-4.

[302] *Id*. at *5.

[303] *Id*. at *11-12.

[304] *Id*. at *8-9. *See also* Supplementary Agreement, *supra* note 108 art. 56, para. 1(a).

[305] *See* U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS (9 Feb. 2004). The complaints process under the regulation, "does not apply to non-U.S. citizens employed by the Army outside of the United States," or U.S. citizens employed under local national conditions. *Id*. at Applicability para. .

[306] Collins v. Weinberger, 707 F.2d 1518, 1519 (D.C. Cir. 1983).

[307] BAG (unpubl.), Urteil, 30.11.1984 - 7 AZR 499/83 1, 2 (on file with author). Citations to this judgment are to a file copy of judgment.

[308] *Id*. at 3.

[309] *See id*. at 4.

component.[310] Irrespective of whether the agency properly hired Mr. Still, or whether he could have enjoyed civilian component status, however, Mr. Still had not been hired under local labor conditions and, thus, the court had no jurisdiction.[311]

A short time later in 1985, the German Supreme Labor Court examined the SOFA status of a family member employee of the British Royal Air Force in Germany (RAFG).[312] A unit of the RAFG employed "Mrs. M" in a British Forces service dependent position.[313] Under the agency's rules, dependents could be employed only when no qualified civil servants were available and their working conditions could be no better than for civil servants.[314] While they took no oath to the British Crown, they signed an obligatory declaration similar to civil servants.[315] The unit's works council[316] sought a judgment subjecting these employees to their procedures and argued that they were local labor, not governed by British employment law. The RAFG maintained that these employees were in its civilian component under an employment relationship that required no oath and were distinguishable from local labor since they were not subject to German social security law and were paid directly by the British State, not under the CTA II.[317]

The court recognized that a sending State alone decided whether to employ LNs under Article IX or other employees under Article I of the SOFA, and found that service dependents were not local labor over which it had jurisdiction.[318] But, again, the court did not recognize any critical distinction between membership in the civilian component and being a civilian employee accompanying the forces. Citing Article I, the court observed that not all civilian workers accompanying the forces were "members of the civilian component."[319] It explained, by example, that if in the United States a stateless person became a civilian employee of the U.S. Forces and later transferred to Germany, that person was employed as an accompanying civilian, but neither enjoyed the rights of the civilian component nor became a civilian employee under Article IX, subject to German employment law.[320] Without jurisdiction, it was unnecessary for the court to examine whether such an employee could be legally appointed under sending State law.[321]

In fact, employees who are not qualified for civilian component membership are disqualified from employment under U.S. conditions in Germany. While such mistaken appointments vis-à-vis the SOFA inevitably occur, they are subject to the consequences upheld in *Daneshpayeh v. Dep't of Air Force* and *Meyers v. Dep't of Army*. The concept of a "third category," nevertheless, has endured. In 2002, for example, another German Supreme Labor Court case involved a U.S. Army and Air Force Exchange Service employee at the Giessen Depot.[322] "Mr. M" was an ordinarily resident U.S. citizen who secured U.S. Forces employment in Germany in 1997, that required an "oath of American public service."[323] In early 1999, Mr. M was placed in a term limited LN position over the objection of the local works council. In March of that year, the agency again hired Mr. M under U.S. conditions as an Accounting Clerk and, in 2001, he became a delivery Service Manager.[324]

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[310] *Id*. at 8. *See also* BAGE 46, 107 (124-26) The decision was translated, in pertinent part, in Memorandum of Special Assistant to the Judge Advocate, U.S. Army, Europe and 7th Army, to Mr. Ramish, subject: Implications of the 19 June 1984 Supreme Labor Court Decision Concerning American Express International Banking Corporation Military Banking Facilities in Germany (10 Dec. 1984) (on file with author) (presaging such arguments, the German court held that sending States determined which persons accompanied the force as civilian employees, but: "The question [of] . . . rights, exemptions and benefits . . . under the agreements is to be answered directly from . . . the Agreements, and not from a 'grant' of . . . status as members of the civilian component. . . .").

[311] *See* BAG (unpub.), Urteil, 30.11.1984 - 7 AZR 499/83 at 4-11.

[312] BAGE 48, 81 (81-96).

[313] *Id*. at 82.

[314] *Id*.

[315] *Id*. at 82 (referencing RAFG Civilian Administration Instructions).

[316] Works councils are groups of elected LN employees who represent other LNs in agency employment matters. U.S. ARMY EUROPE, REG. 690-63, ELECTION OF WORKS COUNCILS AND OTHER BODIES OF EMPLOYEE REPRESENTATIVES—LOCAL NATIONAL EMPLOYEES IN GERMANY para. 5a(1) (21 Sept. 2001).

[317] BAGE 48, 81 (82-83). Lastly, the RAFG argued against plaintiff's standing because their Civilian Administrative Instructions never had been coordinated with the works council. *Id*. at 83.

[318] *Id*. at 84-89.

[319] *Id*. at 91.

[320] *Id*. at 91-92.

[321] *Id*. at 95-96.

[322] BAG, Urteil, 28.05.2002 – 1 ABR 35/01 (C.H. Beck AP Arbeitsrechtliche Praxis CD-ROM, Jan. 2005).

[323] *See id*. sec. A. Oaths were administered in NAF employment as well.

[324] *Id*.

The works council brought suit asserting its right of participation in his job placement.[325] Arguing that he was not a member of the civilian component, the works council sought to block his further employment until the participation process had been concluded.[326] The works council was correct that his employment under U.S. conditions did not alter his ordinarily resident status and that local labor (specifically NAF (LN)) employment was the only U.S. Forces employment an ordinarily resident citizen could occupy in Germany. This fact, however, as with Mr. Still, did not make him defacto local labor. Although Mr. M did not qualify for employment under U.S. conditions, the German court had no control over his appointment.[327] Clearly, Mr. M was ordinarily resident and thus precluded from membership in the civilian component by the SOFA. He was not, however, employed under LN conditions that would give the court jurisdiction.[328] The court observed that while the civilian component and local labor were mutually exclusive these were not the only options.[329] It distinguished the civilian component as standing in a close organizational relationship to the forces, while others hired under U.S. conditions (solely a sending State's prerogative) merely stood in a force-accompanying relationship.[330] Twenty-one years after the RAFG decision, the court still believed that employment under U.S. conditions did not resolve civilian component status.

As we have seen in the German Social Court case of AOK Frankfurt/Main v. FRG, the consequences of a "third category" can include pecuniary accountability for improper appointments.[331] Where host nation jurisdiction over employment conditions finally arises, the concept also can be troublesome in other ways. For example, a U.S. citizen, NAF (LN) employee (such as Mr. Wannabe) could file suit in a German court challenging a RIF action—arguing that he could have been placed into an appointment, apparently improper under U.S. law, which the court would only consider a "third category" employment. In 2002, this occurred in a state-level case.

Mr. James K. Infield, an ordinarily resident U.S. citizen was employed by the Army in Germany since 1984, and eventually became a NAF (LN), C5 employee, in data processing at Bad Kreuznach.[332] In the spring of 2001, base closures affected his position. He received an employment change notice in May of that year, but protested the agency's offer of continued employment in a C4 position (with retained pay) in maintenance, at the agency's Gruenstadt Depot.[333] Mr. Infield brought an action challenging this change in working conditions in the local labor court in Kaiserslautern that was decided in the agency's favor in July of 2001, and he promptly appealed to the Labor Court for the Rhineland-Palatinate region.[334] Mr. Infield sought to invalidate the change notice alleging, inter alia, that the agency offered an APF position in Wiesbaden to another employee with less protection (considering host nation social factors of age and employment longevity) that the agency should have offered to him, and that the position offered him was not properly comparable to his old job.[335] He further claimed that the agency failed to meet its burden of proof and had denied him hearing rights.[336] He identified a dental technician, budget specialist, and several other positions that he felt he was qualified for and that he believed had been open in his competitive area during his notice period.[337]

The agency responded that American fiscal laws governed the appellant,[338] and that under the Classification Act, he could not be hired into an APF (LN) position and appropriated funds could not be used to fund his employment in such a position.

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[325] *Id*.

[326] *Id*.

[327] *See id*. sec. B II.

[328] *See id*. secs. B II, B III.

[329] *Id*. sec. B II 2. The German text's legal principle for the case essentially reads that a U.S. citizen who is an ordinarily resident in Germany cannot become a member of the civilian component under art. I, para. 1b of the NATO SOFA simply through placement by the stationing force. But, this does not mean that he can only be employed as local civilian labor under art. IX , para. 4. *Id*. para. preceding sec. A.

[330] *Id*. sec. B II 2c..

[331] *See supra* note 258 and accompanying text.

[332] *See* LAG Rheinland-Pfalz, Urteil, 3 (Mar. 15, 2002) [hereinafter LAG Rheinland-Pfalz, 15 Mar. 2002] (on file with author). Citations to this Rhineland-Palatinate Labor Court of Appeals judgment are to a file copy of the judgment.

[333] *Id*.

[334] *See id*. at 5.

[335] *Id*.

[336] *Id*. at 4.

[337] *Id*. at 6.

[338] *Id*. at 4, 5. The agency argued that all its operations save one office had been closed; the Head Works Council had taken due part in this, and the local works council had duly participated in the change notice. Finally, placement efforts failed because ordinary residents were eligible only for NAF(LN) employment. *Id.* at 7-8.

Although he was not employed under U.S. conditions of employment, as a U.S. citizen, he was not excepted from the Classification Act's applicability as were non-citizens hired into such positions.[339] Thus, he could only be employed with a NAF unit,[340] and a NAF position in Gruenstadt was the only available qualifying position.[341] The German court, however, rejected that argument and noted that the appellant had broad vocational experience.[342] Moreover, it found that positions could not be distinguished as LN and as NAF[343]—the appellant was a U.S. citizen, employed as a normal civilian worker with the U.S. Forces.[344]

Something seems to have been misconstrued.[345] The court was correct that employees under LN conditions are subject to German employment law, irrespective of their NAF (LN) or APF (LN) status. Indeed, had a NAF (LN) position been eliminated, and a suitable APF (LN) vacancy existed, a non-U.S. citizen incumbent might have qualified for it. But, as previously discussed, the Classification Act precludes employment of U.S. citizens in APF (LN) positions, and no separate authority exists for such employment. Ordinarily resident, U.S. citizens in Germany may only be hired by the U.S. Forces into NAF (LN) positions since NAF positions are not covered by the Classification Act and since employment under LN conditions is the only other category of SOFA employment outside the civilian component—unless, of course, there is a "third category" allowing for positions under U.S. employment conditions but without civilian component status.

The German court again noted that it had no authority over how the sending State filled its employment needs, but instead capitalized on its authority over LN RIF actions. The court found that the agency failed to meet its burden of proof,[346] and reinstated Mr. Infield under his original contractual conditions.[347] Had the agency specified the application of U.S. rules (such as NAF placement restrictions) in NAF (LN) employment contracts the results might have been different.[348] The fact remains that his NAF position had been abolished and the agency had no position in which to place him, yet it could not terminate his employment. (Hence, whether Mr. Wannabe could prevail in his separation appeal depends upon how clearly the applicable U.S. rules are spelled out—both in court and in his employment contract.)

IV. Conclusion

Does a "Third Category" Exist?

Clearly, German tribunals increasingly display a belief that employees not qualifying for membership in the civilian component may be hired by a sending State as non-local labor, but without SOFA benefits. This concept has several flaws. It has no direct support in the SOFA, Supplementary Agreement, or implementing regulations. A SOFA serves to establish a legitimate U.S. Forces' presence in a foreign country..[349]

The SOFA does not define the civilian component as a status for especially close, force-affiliated employees. It does not distinguish between civilian component personnel who accompany a force into a receiving State and those hired in a receiving State and who accompany a force after qualifying for civilian component treatment. The SOFA, however, does identify

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[339] *Id*. at 7. The record cites to a non-existing provision of the Classification Act, 5 U.S.C. § 5102(b)7. The citation should be to § 5102(c) (11) (2000).

[340] *Id.* The concepts of funding authority and SOFA preclusions apparently had been blurred.

[341] *Id*.

[342] *Id*. at 6.

[343] A non-U.S. citizen LN employee may apply for either APF (LN) or NAF (LN) positions. From this standpoint LN conditions are similar regardless of a position's funding, but the appellant was a U.S. citizen.

[344] LAG Rheinland-Pfalz , 15 Mar. 2002, *supra* note 332, at 6.

[345] Outsourced host nation counsel represent the U.S. Forces in German labor courts. *See* USAREUR REG. 690-64, *supra* note 171, para. 28b (explaining that, in accordance with the Protocol of Signature implementing art. 56, para. 9 of the Supplementary Agreement, the Commander, USAREUR, "requested that GE agencies act in the name of the US Forces or of the civilian component in labor court proceedings arising in connection with the German Personnel Representation Law . . . . ").

[346] LAG Rheinland-Pfalz , 15 Mar. 2002, *supra* note 332, at 10.

[347] *Id*. at 10, 11.

[348] *Id*. at 10 (clarifying that NAF (LN) employee qualification for variously funded positions under U.S. law does not alter the applicability of SOFA-derived local labor employment conditions to these employees).

[349] *See, e.g.*, SOFA, *supra* note 75, art. I, para. 1.

categories of individuals who can never be in a civilian component.[350] The SOFA also specifically provides that sending States may employ personnel under local labor conditions, and that this is not regarded as civilian component employment.[351]

Personnel not qualifying for civilian component status may be employed by a sending State if they qualify for its positions in accordance with its laws, are lawfully present in the foreign country, and such employment is permitted by international agreement. While hiring determinations are beyond the jurisdiction of receiving State courts, it is not beyond their power to recognize sending State laws that preclude certain types of employment. The "third category," however, would represent a sending State's non-local labor workforce in a receiving State without SOFA status. There is no authority for such a U.S. employment presence abroad under international agreement.

The fact that the SOFA does not specifically preclude a "third category" does not necessarily mean one can exist with the tacit consent of the receiving State. A "third category" would supplement rather than implement the treaty, as there is no mention of this category in either the SOFA or the Supplementary Agreement.[352] Consequently, it would exceed the parameters of SOFA authority—certainly a cause for receiving State concern in other areas. The U.S. Forces in Germany neither have nor ostensibly need another category of employees who are not local labor but who do not enjoy civilian component status. To create one likely would require a statutory or SOFA amendment, not a unilateral receiving State judicial decision.[353]

A "third category" is also contrary to the interpretation, case law, and overall practice of the sending State whose authority alone determines the need for employees under appropriate employment conditions.[354] A treaty's restrictions on which persons may accompany and be employed by a sending State require the State's employment systems and laws to restrict its employment eligibility accordingly. Under U.S. law, factors disqualifying applicants from the civilian component under the SOFA are as significant as disqualifying factors under the Classification Act or other applicable statutes.[355] Thus, a foreign tribunal's decision that is tantamount to a conversion from NAF to APF employment, or from LN to U.S. conditions, seemingly infringes on the sending State's discretion.

This does not mean that U.S. Forces can never be liable for the improper hiring of ordinarily resident applicants, but the present focus, scope, and resolution of such liability seem to be more a political than a legal issue.[356] The situation's significance lies in its potential for liability and in the confusion that it generates, which can unpredictably affect U.S. employment actions. Moreover, should the "third category" not be resolved, agency liability for employment claims in foreign courts from those employees hitherto properly denied employment, including those now retired, could become an issue,[357] and disparate treatment claims remain a factor.

As OPM guidance confirms, there is no exception to the Classification Act that would permit payment of local national pay rates to U.S. citizens paid from appropriated funds.[358] Other appointment, classification, and payment authority must clearly be identified for such employment to transpire. Such authority should be specific. Mr. Infield's case, for example is distinguishable from retained U.S. citizen employment under LN conditions in acquired citizenship cases. Unlike the employees in those cases, Mr. Infield would have to have been placed into a new LN position funded under different, APF fiscal constraints. Yet, as we have seen, LN employees may move from APF to NAF positions under the foreign national employment system in Germany, and Mr. Infield was lawfully hired under this local compensation plan. Arguably, applying the same logic as could support retained APF (LN) employment in an acquired citizenship scenario, he could move from one position to another and from NAF (LN) to APF (LN) positions with equal legal dexterity. The recurrent issues are those of proper U.S. fiscal and classification authority. If these issues are resolved for acquired citizenship scenarios, the arguments against placement of NAF (LN) U.S. citizen employees into APF (LN) positions become more tenuous. While this presents a far more serious impact in terms of RIF and disparate

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[350] *Id*. art. I, para 1(b).

[351] *Id*. art. IX, para. 4.

[352] *See supra* note 130 and accompanying text. Implementation requires that terms be consistent *and* within the scope of the treaty.

[353] Holmes v. Laird, 459 F.2d 1211, 1222 (1972), *cert. denied*, 409 U.S. 869 (1972). Changes to the SOFA must be diplomatic rather than judicial. *See supra* note 186.

[354] *See, e.g.*, *supra* note 317 and accompanying text.

[355] *See, e.g.*, Daneshpayeh v. Dep't of Air Force, 57 M.S.P.R. 672 (1993), *aff'd,* 17 F.3d 1444 (Fed. Cir. 1994); Chung v. Rumsfeld, 2003 EEOPUB LEXIS 2237 (Apr. 30, 2003).

[356] The improper hiring of an ordinarily resident U.S. citizen under U.S. conditions does not imply that he could have been hired under LN conditions (paying social insurance and other taxes). Similarly, it does not imply that an LN employee should have been hired, or that the U.S. citizen would have been working on the economy instead.

[357] *See supra* note 258 and accompanying text.

[358] *See supra* note 124 and accompanying text.

treatment claims than the comparatively few acquired citizenship cases, one possible prospective solution could be to apply U.S. fiscal and classification constraints in the terms of all LN employment contracts. That presents its own German labor issues, and as mentioned, this article is by no means intended as a comprehensive discourse on all aspects of these scenarios.

Regardless of what might result from the proposed DOD personnel system revisions, it will be another APF system, subject to the same SOFA, fiscal, and citizenship restrictions. To be certain, it will develop its own complexities. But, it also will propagate the same ones discussed herein unless prompt agency action is consistently taken to correct or identify proper authority for questionable appointments.[359]

Answers at a Glance

Each facet of federal employment presents myriad variations, with diverse applications and consequences, governed by layers of statutes, treaties, agreements, executive orders, regulations, publications, and policies, spanning several legal disciplines—all of it constantly in flux. No discourse on any one facet is exhaustive, and to the extent simplicity in this area is achieved, the potential for error is exponential. Nonetheless, the matrix at Table 2 provides a quick-reference summary of the impact of citizenship on the major categories of DOD Federal employment in Germany discussed in this article.[360]

[359] *See* discussion *supra* pt. II.

[360] Cited authority therein is explanatory, not exhaustive. Consult text or cited authorities for greater detail.

Table 2

CITIZENSHIP & MAJOR CATEGORIES OF FEDERAL EMPLOYMENT WITH THE U.S. FORCES IN GERMANY

The term "NATO country," as used in this chart, also applies to new NATO countries upon completion of entry into NATO.

	APF (GS) US Employment Cond.	APF (FWS) US Employment Cond.	APF (LN) LN Employment Cond.	NAF (US) US Employment Cond.	NAF (LN)* LN Employment Cond.
US citizen (**not** ordinarily resident)	**YES** 5 USC § 5102(b); Art I, SOFA: eligible for civilian component	**YES** 5 USC § 5102(c)(7) excludes FWS; Art I, SOFA: eligible for civilian component	**NO** 5 USC § 5102(b)	**YES** 5 USC § 5102(c)(14) excludes NAF; Art I, SOFA: eligible for civilian component	**YES** No restrictions in statute, treaty/agreement
US citizen (ordinarily resident)	**NO** Art I, SOFA: Ordinarily residents cannot be in civilian component	**NO** Art I, SOFA: Ordinarily residents cannot be in civilian component	**NO** 5 USC § 5102(b)	**NO** Art I, SOFA: Ordinarily residents cannot be in civilian component	**YES** Arts I, IX, SOFA: Only LN conditions not considered in civilian component
Dual citizen (US/FRG; US/non-NATO country) **Dual citizen (US/anywhere)** (ordinarily resident)	**NO** Art I, SOFA: FRG/non-NATO nationals & ordinarily residents cannot be in civilian component	**NO** Art I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	**NO** 5 USC § 5102(b)	**NO** Art I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	**YES** Arts I, IX, SOFA: Only LN conditions not considered part of civilian component
Dual citizen (US/NATO country, not FRG) (**not** ordinarily resident)	**YES** 5 USC § 5102(b); Art I, SOFA: NATO country nationals may be in civilian component	**YES** 5 USC § 5102(c)(7) excludes FWS; Art I, SOFA: NATO country nationals may be in civilian component	**NO** 5 USC § 5102(b)	**YES*** 5 USC § 5102(c)(14) excludes NAF; Art I, SOFA: NATO country nationals may be in civilian component	**YES** No restrictions in statute, treaty/agreement
NATO country citizen (not US or FRG) (**not** ordinarily resident—formerly employable as APF (TCC) under US employment conditions)	**NO** 5 USC § 5102(c)(11) excludes non-citizens hired overseas	**NO** 5 USC § 5343(a)(5) only for U.S. citizens overseas	**YES** Foreign Service Act FN schedule applies to non-US citizens	**YES*** Art I, SOFA: NATO country nationals may be in civilian component	**YES** No restrictions in statute, treaty/agreement
NATO country citizen (not US) (ordinarily resident) **Non-NATO country citizen** (ordinarily resident or not) **Stateless persons** **German citizen**	**NO** 5 USC § 5102(c)(11) excludes non-citizens hired overseas; Art I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	**NO** 5 USC § 5343(a)(5) only for U.S. citizens overseas; Art I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	**YES** Assuming lawful status in country. Foreign Service Act FN schedule applies to non-US citizens; No restrictions in statute, treaty/agreement	**NO** Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	**YES** Arts I, IX, SOFA: Only LN conditions not considered part of civilian component
LN employee acquiring US citizenship & qualifying for civilian component (i.e., **not** ordinarily resident, **not** FRG dual citizen, **not** non-NATO country dual citizen)	**YES**** 5 USC § 5102(b); Art I, SOFA: eligible for civilian component	**YES**** 5 USC § 5102(c)(7) excludes FWS; Art I, SOFA: eligible for civilian component	**NO***** Generally subject to US conditions day after proof of citizenship.	**YES*** 5 USC § 5102(c)(14) excludes NAF; Art I, SOFA: eligible for civilian component	**YES** No restrictions in statute, treaty/agreement
LN employee acquiring US citizenship, but not qualifying for civilian component (i.e., ordinarily resident, FRG dual citizen)	**NO** 5 USC § 5102(b); Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	**NO** Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	**YES?***** Specific authority is not clear, but arguable support exists.	**NO** Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	**YES** Arts I, IX, SOFA: Only LN conditions not considered part of civilian component

* Permissible absent other legal constraints. Agency policy/preferences may restrict employment. In other NATO countries U.S. citizen, LN employment is typically precluded. U.S. citizenship requirements also exist for certain NAF positions.

** *See* discussion *supra* Part II, *Direct and Indirect Hire Systems*, (Germany is a direct hire system.).

***See generally* discussion *supra* Parts II, III (Applying Classification Act and agency regulation. In some NATO countries, agreements or restrictions may affect or preclude U.S. citizen employment under LN conditions.).

Suspension and Debarment of Soldiers: Can We Do It? Yes, We Can

Captain Scott N. Flesch[1]
Trial Attorney
Contract Appeals Division

Chief Warrant Officer Two (CW2) Sticky Fingers, an aviation maintenance officer, is the approving official for all government purchase card (IMPAC)[2] *transactions by his department at Fort Irvine, California.*[3] *Essentially, anything sought to be purchased or procured using the IMPAC goes through CW2 Fingers for review and approval. Due in part to the operational tempo at Fort Irvine, compliance and oversight of the IMPAC program are lacking. Sensing an opportunity for supplemental income, CW2 Fingers met individually with three cardholders whom he trusted. Chief Warrant Officer Two Fingers contrived a scheme for each cardholder to purchase electronic items for personal use from stores that accepted the IMPAC. Chief Warrant Officer Two Fingers collects the items (e.g., cell phones, PDAs, digital cameras) and auctions them over the Internet. In exchange for their assistance, CW2 Fingers kicks back fifty percent of the proceeds from the sale of the goods. Before submitting a certified consolidated bill for the purchases to the Defense Finance and Accounting Service, CW2 Fingers alters and/or creates receipts to reflect otherwise legitimate purchases and prevent detection. In the two years of this ongoing conspiracy, CW2 Fingers makes $356,000 for himself and his co-conspirators.*

After an investigation by Fort Irvine's Criminal Investigation Command (CID), the government prefers charges against CW2 Fingers to include: conspiracy, failure to obey an order, larceny, and bribery. Chief Warrant Officer Two Fingers has eighteen years of active duty service and plans to work for one of several commercial vendors he established a relationship with as an approval official when he retires.[4]

Introduction

Unfortunately, abuse of government purchase cards is not uncommon in the military.[5] In fact, starting in 2001, the level of suspected fraud detected in the Military Purchase Card Program drew congressional interest and resulted in General Accounting Office[6] (GAO)[7] as well as Department of Defense (DOD) Inspector General scrutiny.[8]

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[2] The acronym, IMPAC, refers to the International Merchant Purchase Authorization Card.

[3] In 1989, the General Services Administration awarded the first government-wide purchase card contract and the Department of Defense (DOD) entered the program. *See* U.S. DEP'T OF DEFENSE, REPORT NO. D-2002-075, CONTROLS OVER THE DOD PURCHASE CARD PROGRAM (Mar. 29, 2002), *available at* http://www.dodig.osd.mil/audit/reports/fy02/02075sum.htm [hereinafter DOD AUDIT REPORT]. On 13 October 1994, the President of the United States issued Executive Order 12,931 to increase the use of purchase cards for micro-purchases identified as transactions under $2,500. Exec. Order No. 12,931, 59 Fed. Reg. 52,387 (Oct. 13, 1994). The DOD Purchase Card Program Management Office manages the DOD Purchase Card Program. *See* Dep't of Defense Purchase Card Program Management Office, *at* http://purchasecard.saalt.army.mil/default.htm (last visited June 27, 2005); *see also* Army Purchase Card Program, *at* http://aca.saalt.army.mil/army/default.htm (last visited June 27, 2005).

[4] Chief Warrant Officer Two Sticky Fingers is a fictitious name and the offered hypothetical reflects a collection of facts taken from reported military justice cases.

[5] *See* United States v. Duff, 2004 CCA LEXIS 281 (N-M. Ct. Crim. App. 2004) (A Sailor with fourteen years of service over-purchased on IMPAC accounts for personal use); United States v. Albright, 58 M.J. 570 (2003) (An active duty supply specialist purchased a number of goods and services using the IMPAC); United States v. Palagar, 56 M.J. 294 (2002) (A CW2 battalion maintenance officer used the IMPAC to make $2,242 worth of unauthorized purchases for personal use. Appellant signed and submitted a false "Statement of Account" to his IMPAC Approving Official, and he supported this statement with phony receipts that he created on a computer. The phony receipts purported to document purchases that were never made); United States v. Durant, 55 M.J. 258 (2001) (A Soldier approached by senior enlisted supervisor and initiated a scheme: Soldier would make unauthorized purchases of personal items with his IMPAC card for both himself and his supervisor who in turn would approve the purchase of these items and authorize payment with government funds. Soldier made over ninety unauthorized purchases totaling more than $30,000 over two years); United States v. Hawkins, 2000 CCA LEXIS 266 (A.F. Ct. Crim. App. 2000) (unpublished) (An Air Force master sergeant fraudulently procured services and wrongfully used the IMPAC for personal use in his role as a superintendent of a fitness center and lodging facility at the Royal Air Force Base, Lakenheath, United Kingdom); United States v. Hurt, 1999 CCA LEXIS 161 (A.F. Ct. Crim. App. 1999) (unpublished) (An airman supply specialist used an IMPAC to order electronic goods for personal use.).

[6] The General Accounting Office changed its name to the Government Accountability Office in 2004. *See* The GAO Human Capital Reform Act, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814 (2004).

[7] GEN. ACCT. OFF., NO. GAO-04-156, *Purchase Cards: Steps Taken to Improve DOD Program Management, but Actions Needed to Address Misuse* (Dec. 2, 2003), *available at* http://www.gao.gov/new.items/d04156.pdf [hereinafter GAO-04-156]; GEN. ACCT. OFF., NO. GAO-01-995T, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (July 30, 2001), *available at* http://www.gao.gov/new.items/d01995t.pdf; GEN.

In December 2003, the GAO identified fifty-one cases of fraudulent or potentially fraudulent purchases by cardholders and one hundred-twenty cases where cardholders made improper and abusive or questionable purchases.[9] Government purchase card abuse and procurement fraud have been topics of concern throughout the Department of Defense as well as other federal agencies.[10]

In the last several years, there have been numerous news articles and stories highlighting fraud investigations of corporate America and potential suspension or debarment. Some of the companies subject to investigation were: Boeing,[11] Enron,[12] Arthur Anderson,[13] WorldCom,[14] CACI,[15] and Halliburton.[16] Acquisition related wrongdoing by Soldiers, however, is not thought of in the same or a similar context.[17] Historically, the military services have treated acquisition related misconduct through the military justice system without thought of administrative remedies outside personnel actions.[18] Of course, the higher the rank of the offender, the more newsworthy the story.[19]

Take the case of Colonel (COL) Richard J. Moran.[20] While Commander of the U.S. Army Contracting Command Korea, COL Moran orchestrated a scheme of kickbacks and bribes involving hundreds of thousands of dollars in exchange for his influence in the award of millions of dollars in contracts to Korean contractors.[21] Despite being sentenced to fifty-four months in federal prison after pleading guilty,[22] COL Moran continued to express his desire to work in the federal procurement system following his confinement because it was "what he knew."[23] The Army Suspension and Debarment Official (SDO) suspended COL Moran from future contracting throughout the executive branch of the U.S. government pursuant to the Federal Acquisition Regulation (FAR) on 14 March 2003.[24] On 27 July 2004, after pleading guilty in the U.S.

ACCT. OFF., NO. GAO-02-506T, *Purchase Cards, Continued Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Mar. 13, 2002), *available at* http://www.gao.gov/new.items/d02506t.pdf; GEN. ACCT. OFF., NO. GAO-02-844T, *Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse* (July 17, 2002), *available at* http://www.gao.gov/new.items/d02844t.pdf; GEN. ACCT. OFF., NO. GAO-03-154T, *Purchase Cards: Navy Vulnerable to Fraud and Abuse but Is Taking Action to Resolve Control Weaknesses* (Oct. 8, 2002), *available at* http://www.gao.gov/new.items/d03154t.pdf.

[8] DOD AUDIT REPORT, *supra* note 3.

[9] GAO-04-156, *supra* note 7, at 13.

[10] *Id*.; *see also* GEN. ACCT. OFF., NO. GAO-04-430, *Contract Management: Agencies Can Achieve Significant Savings in Purchase Card Buys* (Apr. 28, 2004), *available at* http://www.gao.gov/htext/d04430.html.

[11] Press Release, U.S. Air Force, AF Announces Boeing Inquiry Results (July 25, 2003), *available at* http://www.af.mil/news/story.asp?storyID=123005322.

[12] News Release, General Services Administration, GSA Suspends Enron and Arthur Andersen and Former Officials (Mar. 15, 2002), *available at* http://w3.gsa.gov/web/x/publicaffairs.nsf//dea168abbe828fe9852565c600519794/576435646c09ff9185256b7d004800b8?OpenDocument.

[13] *Id*.

[14] News Release, General Services Administration, Worldcom Agrees To Stringent Reporting Requirements (Jan. 7, 2004), *available at* http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=14648&noc=T; *see also* News Release, General Services Administration, GSA Proposes Debarment of MCI WorldCom (July 31, 2003), *available at* http://www.gsa.gov/Portal/gsa/ep/contentViewdo?contentType=GSA_BASIC&contentId=8947&noc=T.

[15] Ellen McCarthy, *CACI Faces New Probe Of Contract, Interrogators Hired Under Army IT Deal,* WASH. POST, May 28, 2004, at E1.

[16] News Release, Project on Government Oversight, Government Should Consider Suspending Halliburton Contracts (Aug. 18, 2004), *available at* http://www.pogo.org/p/contracts/ca-040801-haliburton.html.

[17] The term acquisition is broadly interpreted to include the purchase of, or contract for, goods or services using appropriated funds for use by the federal government. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 2.101 (Mar. 2005) [hereinafter FAR].

[18] Telephone Interview with Special Agent Thomas Barnes, U.S. Army Criminal Investigation Command, Major Procurement Fraud Unit, Laguna Niguel, Cal. (12 Jan. 2005) [hereinafter Barnes Interview].

[19] Press Release, DOJ, U.S. Army Colonel Pleads Guilty to Taking Bribes from South Korean Companies Seeking Military Contracts (Jan. 29, 2003), *available at* http://www.usdoj.gov/usao/cac/pr2003/011.html [hereinafter DOJ Press Release, Jan. 29, 2003]; *see also* Press Release, DOJ, U.S. Army Colonel, Four Others Indicted in Scheme to Collect Bribes from South Korean Companies Seeking to Obtain Large Military Contracts (July 3, 2002), *available at* http://www.usdoj.gov/usao/cac/pr2002/103.html..

[20] DOJ Press Release, Jan. 29, 2003, *supra* note 19.

[21] *Id.*

[22] Press Release, DOJ, U.S. Army Colonel Sentenced to Prison for Taking Bribes From South Korean Companies Seeking Military Contracts (June 9, 2003), *available at* http://www.fbi.gov/fieldnews/june/2la060903.htm. Trial tactics and various evidentiary issues contributed to the decision to have the Assistant U.S. Attorney for the Central District of California prosecute Colonel Moran. Barnes Interview, *supra* note 18.

[23] Barnes Interview, *supra* note 18.

[24] *Id*.; *see also* FAR, *supra* note 17, 9.407.

District Court for the Central District of California to conspiracy,[25] bribery,[26] and aiding and abetting,[27] the Army SDO debarred COL Moran for a period of twenty-five years.[28] At the time of the debarment, COL Moran was no longer on the military rolls.[29]

The military justice system is often the vehicle used to address fraud by active duty Soldiers in the procurement process. Similar to COL Moran, these Soldiers often wish to work within the acquisition system after their punishment because it is what they know. This article looks at the use of suspension and debarment as administrative remedies to protect the federal procurement system from active duty Soldiers who are "non-responsible"[30] by virtue of their misconduct in the procurement system.[31] Additionally, this article addresses the need to report such misconduct so as to trigger review by the relevant procurement fraud offices.[32]

Basis for Suspension and Debarment

Subpart 9.4 of the FAR governs the debarment, suspension, and ineligibility of "non-responsible" contractors under the federal acquisition system.[33] These administrative remedies are far-reaching and apply throughout every executive agency.[34] The procedures and regulations governing suspension and debarment of contractors are designed to protect the overall integrity of the government procurement process. Significantly, the government should not use suspension and debarment for *punishing* non-responsible contractors.[35]

Suspension—Immediate Protection

Suspension is the process by which the government "disqualif[ies] a contractor temporarily from Government contracting and Government-approved subcontracting."[36] Normally, suspensions will last until the "completion of investigation and any ensuing legal proceedings."[37] In order to suspend a contractor, there must be "adequate evidence" of:

> (1) Commission of fraud or a criminal offense in connection with—(i) Obtaining; (ii) Attempting to obtain; or (iii) Performing a public contract or subcontract;
> (2) Violation of Federal or State antitrust statutes relating to the submission of offers;

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[25] 18 U.S.C. § 371 (2000).

[26] *Id.* § 201.

[27] *Id.* § 2(a).

[28] Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs (search "Moran, Richard P."), *available at* http://www.epls.gov/epls/servlet/EPLSGetInputSearch/WIHMUFGOKJCYXSNEILXBWUYTNDUENIYF; *see also* FAR, *supra* note 17, at 9.404.

[29] Barnes Interview, *supra* note 18. By being removed from the military rolls, COL Moran forfeited his retirement. U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 5-15 (30 July 2004).

[30] The FAR provides that contractors are not considered responsible unless the contractor: (1) has adequate financial resources to perform; (2) is able to comply with required or proposed delivery dates and performance schedules; (3) has a satisfactory performance record; (4) has a satisfactory record of integrity and business ethics; (5) has the necessary organization, experience, controls, skills or ability to obtain such; (6) has the necessary production, construction, and technical support; and (7) is qualified and eligible to receive an award under law and regulation. FAR, *supra* note 17, at 9.104-1.

[31] This article focuses on those illegal actions by active duty Soldiers directly related to federal acquisitions. It does not address other illegal activity by Soldiers that prompt a similar review of their "responsibility." Further, it does not address administrative remedies against those civilians involved in procurement misconduct while employed by the U.S. government.

[32] This article does not address the restriction set in place by 10 U.S.C. § 2408. Pursuant to 10 U.S.C. § 2408, implemented by U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 203.570-2 (Dec. 2004) [hereinafter DFARS], a contractor or subcontractor shall not knowingly allow a person, convicted after 29 September 1988, of fraud or any other felony arising out of a contract with the DOD, to serve as an agent, or representative in solicitations and contracts exceeding the simplified acquisition threshold, except solicitations and contracts for commercial items, for a period of no less than five years.

[33] FAR, *supra* note 17, at 9.4.

[34] *Id.* at 9.401.

[35] Steven A. Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, REPORTER, AIR FORCE RECURRING PERIODICAL 51-1, vol. 26, No. 1, at 4 (Mar. 1999) (Mr. Shaw currently serves as the suspension and debarment official for the Department of the Air Force.); *see also* Frequency Elecs. v. United States Dep't of the Air Force, 1998 U.S. App. LEXIS 14888 (4th Cir. 1998).

[36] FAR, *supra* note 17, at 2.101; *see also* PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT, ABA, COMMITTEE ON DEBARMENT AND SUSPENSIONS 5 (3d ed. 2002) [hereinafter ABA GUIDE TO SUSPENSION & DEBARMENT].

[37] FAR, *supra* note 17, at 9.407-4.

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
(4) Violations of the Drug-Free Workplace Act of 1988 (citations omitted);
. . .
(5) . . . "Made in America" [label violations];
(6) Commission of an unfair trade practice; . . . or
(7) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.[38]

As a final catch-all, an SDO may suspend a contractor, upon adequate evidence, "for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."[39]

Adequate Evidence: Preferral versus Referral of Charges

The FAR 2.101 defines "adequate evidence" as information sufficient to support the reasonable belief that a particular act or omission has occurred.[40] An indictment, information, or other filing by a competent authority charging a criminal offense constitutes adequate evidence for suspension purposes.[41] An indictment, as defined in *Black's Law Dictionary*, is:

1. The formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.

. . .

The act or process of preparing or bringing forward such a formal written accusation.[42]

In contrast, an information is defined as:

A formal criminal charge made by a prosecutor without a grand-jury indictment.[43]

A civilian defendant in federal court has the right, unless waived, to be prosecuted by indictment when punishment may include death, hard labor, or confinement for more than one year.[44] Any other offense may be prosecuted by indictment or information.[45]

Active duty Soldiers accused of offenses arising under the UCMJ are prosecuted by courts-martial.[46] Soldiers may also be prosecuted in federal court by a U.S. attorney for offenses not charged under the UCMJ. In the court-martial setting, Soldiers may be tried before a general court-martial authorized to impose the sentence of death or confinement in excess of one year only after an independent pretrial investigation by an appointed investigating officer.[47]

In the military context, it is arguable whether a preferral of charges against a Soldier alone would constitute "adequate evidence."[48] When charges are preferred, the person preferring the charges must "[s]ign the charges and specifications under

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[38] *Id.* at 9.407-2(a).

[39] *Id*. at 9.407-2(c).

[40] *Id.* at 2.101.

[41] The FAR 9.407-2(b) states that an "[i]ndictment for any of the causes in paragraph (a) . . constitutes adequate evidence for suspension." *Id*. at 9.407-2(b). The FAR 9.403 further provides that "[a]n information or other filing by competent authority charging a criminal offense [shall be] given the same effect as an indictment." *Id.* at 9.403.

[42] BLACK'S LAW DICTIONARY 788 (8th ed. 2004); *see also* DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL tit. 9-12.000, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (last visited June 28, 2005).

[43] BLACK'S LAW DICTIONARY, *supra* note 42, at 795.

[44] *See* FED. R. CRIM. P. 7(a).

[45] *Id*.

[46] *See generally* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10]; *see also* Solorio v. United States, 483 U.S. 435 (1987).

[47] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2002) [hereinafter MCM]; *see also* UCMJ art. 32 (2002).

[48] MCM, *supra* note 47, R.C.M. 307.

oath before a commissioned officer"[49] and vouch that he "has personal knowledge of or has investigated the matters set forth in the charges and specifications . . . ."[50] The preferral is also accompanied by an affidavit[51] while an information does not require one.[52] Upon preferral, the Soldier's immediate commander must notify the Soldier "of the charges preferred against him," "the name of the person who preferred the charges and of any person who ordered the charges to be preferred."[53]

A preferral of charges may be made by "[a]ny person subject to the [UCMJ]."[54] In contrast, only a licensed attorney representing the government can file an information or draft an indictment.[55] A referral of charges, however, adds an indicia of reliability that a preferral alone cannot.[56]

A referral of charges is an order by a convening authority that the charges against the Soldier will be tried by court-martial.[57] Before referring charges to court-martial, "the convening authority [must] find [] or [be] advised by a judge advocate that there are reasonable grounds to believe that an offense triable by court-martial has been committed and that the accused committed it."[58] Convening authorities are generally senior grade officers with substantial training and experience.[59]

Clearly, an information or indictment provides greater indicia of reliability that a preferral standing alone cannot. A criminal information is drafted and filed by an attorney licensed to practice law and representing the United States. An indictment is drafted by an attorney and issued by a grand jury after reviewing the evidence. On the other hand, a preferral can be drafted and filed by any person subject to the UCMJ. Further, a preferral is not required to be reviewed by a judge advocate before notification of the allegations to the accused.

A referral, however, is more akin to an information or indictment. In order to refer a charge to a court-martial, a convening authority either seeks advice from a judge advocate or relies upon his military experience to weigh the evidence for reasonableness. Convening authorities, because of their extensive experience, would seem a more "competent authority" than just any soldier subject to the UCMJ. Further, the process of referring charges to a court-martial has an indicia of reliability that preferral does not. As a result, a SDO should recognize a convening authority as a "competent authority" and a referral as "adequate evidence" in support of a suspension action.

Debarment—Long Term Protection

Debarment is defined as the exclusion of a contractor from government contracting and government-approved subcontracting for a reasonable, specified period.[60] The FAR provides that "[g]enerally, debarment should not exceed 3 years."[61] Given the seriousness of a case, however, debarments may be longer.[62] In order to debar a contractor, the government must provide notice to and an opportunity to the contractor to rebut the underlying reasons for the proposed debarment.[63]

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[49] *Id.* R.C.M. 307(b)(1).

[50] *Id.* R.C.M. 307(b)(2).

[51] *Id.* R.C.M. 307(b); *see also* U.S. Dep't of Defense, DD Form 458, Charge Sheet (May 2000).

[52] FED. R. CRIM. P. 9(a).

[53] MCM, *supra* note 47, R.C.M. 308(a).

[54] *Id.* R.C.M. 307(a).

[55] FED. R. CRIM. P. 7(c)(1).

[56] *See generally* MCM, *supra* note 47, R.C.M. 601.

[57] *Id.* R.C.M. 601(a).

[58] *Id.* R.C.M. 601(d)(1).

[59] *See* UCMJ arts. 22, 23 (2002); *see also* MCM, *supra* note 47, R.C.M. 504(b). Only the President of the United States, the Secretary of Defense, and various commanding officers may convene general and special courts-martial.

[60] FAR, *supra* note 17, at 2.101, 9-406-4(a).

[61] *Id.* at 9.406-4(a)(1).

[62] *Id.* at 9.406-4(a).

[63] *Id.* at 9.406-3.

An SDO can debar a contractor for numerous reasons, some of which differ from his suspension authority.[64] Causes for debarment include:

> (1) a conviction of or civil judgment for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public contract or subcontract;
> (2) violation of anti-trust laws;
> (3) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
> (4) Made-In-America label violations;
> (5) commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.[65]

Further, an SDO can debar a contractor upon a showing of a preponderance of evidence that a contractor:

> (1) seriously violated the terms of a Government contract or subcontract by willfully failing to perform in accordance with the terms of one or more contracts or having a history of failing to perform or continued unsatisfactory performance;
> (2) Drug-Free Workplace violations;
> (3) commission of unfair trade practice;
> (4) immigration related violations; or
> (5) any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor subcontractor.[66]

Given the array of causes for debarment, many practitioners overlook the fact that Soldiers who engage in acquisition related misconduct are eligible for suspension or debarment. Each case, however, is fact driven and only relevant for Soldiers that can be considered "contractors" under the FAR.

Soldiers and Contractors: One and the Same?

It may seem surprising to equate "Soldiers" as "contractors" in this day and age of contractors accompanying the force on the battlefield.[67] The lines between contactors and Soldiers, however, are increasingly fading. The current suspension and debarment process is structured to address this phenomenon.

The FAR 9.403 broadly defines "contractor" for purposes of suspension and debarment as:

> any individual or other legal entity that—
>
> (1) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or
>
> (2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.[68]

This broad definition includes those that "may be expected to conduct business with the Government."[69] When applying this definition to CW2 Fingers' scenario, it is clear that subpart 9.4 of the FAR can easily be applied to active duty Soldiers both with acquisition experience and also who are likely to seek employment in the federal acquisition workforce or federal

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[64] *Id.* at 9.406-2 - 9.406-5.

[65] *Id*. at 9.406-2(a).

[66] *Id*. at 9.406-2(b), (c).

[67] Linda Robinson & Douglas Pasternak, *America's Secret Armies*: *A Swarm of Private Contractors Bedevils the U.S. Military,* U.S. NEWS & WORLD REP., Nov. 4, 2002, at 38.

[68] FAR, *supra* note 17, at 9-403.

[69] *Id.*

contracting. However, it is necessary to draw a clear "nexus" between a Soldier's likelihood to pursue federal contracting and the need to protect the military's acquisition system.

Arguably, there may be little reason to "suspend" an active duty Soldier for procurement related misconduct.[70] The preferral of charges alone limits a Soldier's actions.[71] Further, the simple issuance of a commander's order or a change in official duties can normally rectify a situation and protect the government from acquisition related misconduct while the Soldier remains on active duty. When the situation involves a Soldier nearing retirement, administrative separation,[72] excess leave, or a post-trial scenario, however, it would be prudent to consider the harm that Soldier may cause the military acquisition system in the future. For those Soldiers, debarment may be an effective preventative measure, and a nexus can be articulated. Colonel Moran's and CW2 Fingers' situations provide clear examples of a need to protect the government's acquisition system and a nexus to an expectation of conducting business with the government in the future.[73] Further, the length of any debarment must be tailored to protect the procurement system when it is likely a Soldier may enter the contractor workforce or attempt to contract with the government. [74]

Double "Punishment" or Double Protection?

> [N]either money penalties nor debarment have historically been viewed as punishment. We have long recognized that "revocation of a privilege voluntarily granted," such as a debarment, "is characteristically free of the punitive criminal element."[75]

The underlying premise of suspensions and debarments is to protect the federal government, not to punish individuals or companies.[76] In *Hudson v. United States*,[77] the Supreme Court ruled that debarment did not amount to criminal punishment and did not violate the double jeopardy clause of the Constitution.[78] Since many debarments are "conviction" driven, Soldiers convicted at courts-martial are clear candidates for administrative remedies.[79] On the other hand, the extensive record created through a military law enforcement investigation normally provides the administrative record necessary to support a suspension or debarment action. Depending on their completeness, however, records in the form of administrative personnel actions or investigation reports[80] alone may not produce an adequate administrative record for suspension or debarment.[81]

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[70] The authority and decision to suspend or debar an active duty Soldier lay solely with the discretion of a suspension and debarment official. There may be instances where a suspension and debarment official's interest in protecting the acquisition system may not be congruent with the interests or motivations of a Soldier's commander. As a result, there may be cases that require suspension despite the administration curtailments normally imposed by the preferral of charges.

[71] *See generally* AR 27-10, *supra* note 46, para. 5-15(b). Upon preferral of charges, "all favorable personnel actions, including discharge, promotion, and reenlistment" are automatically suspended. *Id*.

[72] *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (15 July 2004) [hereinafter AR 635-200]. Administrative separation for enlisted Soldiers, pursuant to *AR 635-200*, para. 10, is frequently used to administratively separate Soldiers pending charges in "Lieu of Discharge." *Id.* Doing so can avoid the courts-martial process and a conviction. *Id*. para. 10-1. It is important to keep in mind that nothing in the FAR prevents matters submitted by Soldiers in support of their separation request from being considered by the suspension and debarment official as evidence in a suspension or debarment action. Trial defense counsel must consider the materials submitted by their clients and any potential long term consequences on their clients.

[73] *See* FAR, *supra* note 17, at 9-403.

[74] The author does not suggest that Soldiers, based on their military status, incur longer suspension or debarments than civilian contractors. Suspension and debarment officials must consider the facts of each case, any punishment imposed, and the contractor's potential involvement in government contracting. The FAR cautions SDOs to limit debarments to three years, but it does not prevent a SDO from issuing debarments in excess of three years. FAR, *supra* note 17, at 9-406(a)(1).

[75] Hudson v. United States, 522 U.S. 93, 104 (1997) (citing Helvering v. Mitchell, 303 U.S. 391, 399 n.2 (1938)).

[76] Robert Kittel, *Not Just a Punishment: Debarment Can Be Tool to Improve Acquisition System*, FEDERALTIMES.COM (on file with author) (Mr. Kittel currently serves as the suspension and debarment official for the Department of the Army.).

[77] 522 U.S. 93 (1997).

[78] *See id.* at 105; *see also* ABA GUIDE TO SUSPENSION AND DEBARMENT, *supra* note 36, at 5 (citing FAR 2.101).

[79] FAR, *supra* note 17, at 2.101 (defining "conviction" as "a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere").

[80] *See* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

[81] The extent of the administrative record in support of suspensions or debarments can face scrutiny. *See, e.g.*, Lion Raisins, Inc. v. United States, 51 Fed. Cl. 238 (Ct. Cl. 2001); Shane Meat Co. v. United States Dep't of Defense, 800 F.2d 334, 337 (3d Cir. 1986); Robinson v. Cheney, 876 F.2d 152 (D.C. Cir. 1989); Sloan v. HUD, 231 F.3d 10 (D.C. Cir. 2000); Kirkpatrick v. White, 351 F. Supp. 2d 1261 (N.D. Ala. 2004); Silverman v. United States Dep't of Defense, 817 F. Supp. 846 (S.D. Cal. 1993).

The Missing Link: A Lack of Reporting

Courts-martial and investigations involving Soldiers engaged in acquisition-related misconduct often go unreported to procurement fraud officials despite DOD policy to coordinate remedies.[82] In the Army, a system exists for criminal investigators and commands to report acquisition misconduct to a procurement fraud advisor (PFA) and irregularities (PFI) coordinator at major Army commands and a procurement fraud advisor at local installations.[83] Despite the availability of PFI coordinators and PFAs, these personnel are infrequently utilized.

The U.S. Army Criminal Investigation Command has overall responsibility to notify, in writing, installation PFAs as well as the Army's Procurement Fraud Branch (PFB)[84] within thirty days of initiation of a significant investigation of fraud or corruption related to Army procurement.[85] Once received, PFI coordinators and PFAs must forward reports of procurement fraud to the PFB in the form of "Procurement Flash Reports."[86]

Despite this reporting scheme and the number of courts-martial cases related to acquisition fraud, the Army has initiated relatively few suspension or debarment actions because such cases have gone unreported.[87] Another reason for the underreporting is that investigators, PFAs, and PFI coordinators may not have realized that misconduct by Soldiers may be appropriate for suspension and debarment.[88] Army investigators, PFAs, and PFI coordinators must recognize that Soldiers can be viewed as "contractors" under the FAR and be suspended or debarred as appropriate. Finally, staff judge advocates and their chiefs of military justice should be more sensitive to the reporting requirements imposed when Soldiers commit acquisition fraud. The increased use of suspensions and debarments of active duty Soldiers, in appropriate cases, not only will serve to protect the military's acquisition system but will also act as a significant deterrent.

Summary

Many people do not realize that, under the FAR, Soldiers who commit acquisition related misconduct may constitute "contractors" and fall within the purview of the Army's suspension and debarment process. The serious abuses and corruption committed by COL Moran, and demonstrated in the hypothetical CW2 Fingers scenario, are clear cases where suspension and debarment is appropriate. Other instances of procurement misconduct or abuse of the IMPAC program by service personnel may not merit suspension or debarment. Use of these potent administrative actions depends on the underlying facts.

The key for Army practitioners is to recognize that suspensions and debarments are important administrative measures for addressing procurement misconduct by military personnel—and ones that may properly augment criminal prosecution, separation actions, or other administrative measures. It is everyone's duty to protect the overall integrity of the government procurement process and to ensure that Soldiers receive safe, reliable goods and services.

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[82] Department of Defense policy requires the coordinated use of criminal, civil, administrative, and contractual remedies in suspected cases involving procurement fraud. *See* U.S. DEP'T OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989) [hereinafter DOD DIR. 7050.5]; U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION para. 1-4n (19 Sept. 1994) [hereinafter AR 27-40].

[83] AR 27-40, *supra* note 82, para. 8-2; *see also* DOD DIR. 7050.5, *supra* note 82.

[84] AR 27-40, *supra* note 82, para. 8-2(c) (establishing "the Procurement Fraud Division (PFD), U.S. Army Legal Services Agency, as the single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement"). Effective July 2003, the Procurement Fraud Division was redesignated as the Procurement Fraud Branch of the U.S. Army Contract Appeals Division, U.S. Army Legal Services Agency. A change to the regulation is currently being staffed.

[85] *Id*. para. 8-4(f). Of note, DOD DIR. 7050.5, *supra* note 82, para. 3-2, identifies any case involving gratuities or bribery as "significant."

[86] AR 27-40, *supra* note 82, paras. 8-5(b), (c).

[87] Interview with Christine McCommas, Branch Chief, Procurement Fraud Branch, U.S. Army Contract Appeals Division, U.S. Army Legal Services Agency, Arlington, Va. (Jan. 14, 2005).

[88] Telephonic Interview with Mr. Curtis L. Greenway, Legal Advisor, 701st Military Police Group, U.S. Army Criminal Investigation Command, Fort Belvoir, Va. (Jan. 14, 2005).

Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole

Major Glenn R. Schmitt[1]
U.S. Army Reserve

Introduction

For years, the problem of American civilians committing crimes while accompanying the Armed Forces abroad plagued the U.S. government. In 2000, Congress passed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) to fix a problem that had gone unsolved for more than forty years. The MEJA extended American federal law to govern criminal acts committed by military dependents and military contractors accompanying the Armed Forces overseas.[2] But little did the drafters of the bill know at the time—the bill contained a gaping loophole that would become all too evident less than four years later.

The Military Extraterritorial Jurisdiction Act of 2000

America's federal criminal jurisdiction generally ends at the nation's borders. When Americans commit crimes abroad, it is the nations in which the crime occurs that determine whether to prosecute the crime. However, when a host nation declines to prosecute, or when there is no functioning government in the place where the act is committed, crimes can go unpunished.

This jurisdictional problem was particularly vexing to the military, which sends its civilian employees and contractors around the world and also allows family members of many service members stationed abroad to accompany them.[3] The military's experience had been that when contractors or dependents committed crimes abroad, the host nation often declined to prosecute the crimes, even if the crimes were serious.[4] This was especially true if the crime was committed only against another American or American property. In areas where there was no functioning local government for periods of time, such as the Balkans, there was no government to even consider bringing such a prosecution.

To address this problem, Congress passed MEJA, which President Bill Clinton signed into law in November of 2000.[5] The law created a new federal crime, punishable in federal court, for acts committed outside the United States that would have been a felony under federal law had those acts been committed on federal land in the United States.[6]

The new criminal provision applies only to two groups of people: those "employed by or accompanying the Armed Forces outside of the United States," and those who are members of the armed forces.[7] The key to the jurisdiction of this

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[1] The author previously served as the Chief Counsel of the Subcommittee on Crime of the Committee on the Judiciary of the U.S. House of Representatives and was one of the drafters of the House version of the Military Extraterritorial Jurisdiction Act of 2000, H.R. 3380, 106th Cong. (2000). That bill eventually was enacted into law as S. 768, 108th Cong. (2003).

[2] *See* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001) (providing a detailed history of the problems that led to the creation of the Act, and the deliberations of Congress during the consideration of the bill in the House and Senate).

[3] *See, e.g.*, Richard Roesler, *Civilians in Military World Often Elude Prosecution*, STARS & STRIPES, Apr. 10, 2000, at 3. In his report, Roesler noted incidents of rape, arson, drug trafficking, assaults, and burglaries that went unpunished when the host nation declined to prosecute. *Id*. *See also* H.R. REP. NO. 106-778, pt.1 (2000).

[4] A vivid example of this problem is illustrated by the decision in *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000). In *Gatlin*, the government charged a civilian defendant with sexually abusing his teenaged step-child, the daughter of his Soldier-wife, while living in military housing in Germany. *Gatlin*, 216 F.3d at 209-10. However, the allegations did not come to light until the defendant, his wife, and step-daughter returned to the United States where the step-daughter revealed that she was pregnant with his child. *Id.* at 210. The defendant moved to dismiss the indictment for lack of jurisdiction. *Id.* The district court ruled that it had jurisdiction to try the defendant, finding that the American military housing area in Germany where the acts occurred was within the "special maritime and territorial jurisdiction of the United States," as defined in § 7 of Title 18, United States Code. *Id.* The Court of Appeals reversed, holding that it was clear from the legislative history that Congress intended § 7(3) to apply exclusively to the territorial United States, and therefore the overseas military housing area was not within the special maritime and territorial jurisdiction and the district court lacked jurisdiction to try the civilian defendant. *Id.* The result in that case helped to prompt Congress to pass MEJA. *See* Schmitt, *supra* note 2, at 102.

[5] The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. ch. 212, §§ 3261-67 (2000)).

[6] 18 U.S.C. § 3261. *See generally* Schmitt, *supra* note 2, at 113-17.

[7] While the main concern of the drafters of the bill was accountability for criminal acts by civilians, they drafted the bill to apply also to acts by service members. *See* Schmitt, *supra* note 2, at 114-15. Prior to the enactment of the MEJA, the military was powerless to prosecute properly-discharged service members for criminal acts they committed outside of the United States but which were not discovered before they were discharged, as they may not be

statute is the definition of the first phrase. The act defines the phrase persons "employed by . . . the Armed Forces," to mean a Department of Defense (DOD) civilian employee, including a nonappropriated fund instrumentality employee, a DOD contractor or subcontractor of any level, or an employee of such contractor or subcontractor. Persons "accompanying the Armed Forces outside the United States" is defined to mean those people who are dependents of and reside with military members, DOD civilian employees or NAF employees, or DOD contractors and subcontractors or their employees outside the United States. In both cases, the definitions use the term "DoD contractors and subcontractors." Consequently, persons or organizations under contract to other parts of the U.S. government were not covered by this Act.[8]

Abu Ghraib

This seemingly reasonable distinction would take on a great deal of consequence in 2004 when reports began to appear in the news media that American military personnel had abused Iraqi prisoners at Abu Ghraib, a prison in Iraq in which Coalition Forces held Iraqi detainees and which had been notorious under the Saddam Hussein regime.[9] As the story began to unfold, the media reported that civilian contractors working to support the American military also may have been involved in these abuses.[10] In early May of 2004, then-U.S. Attorney General John Ashcroft announced that the Department of Justice was considering using MEJA to prosecute these persons.[11] Eventually, however, the media reported that some of these contractors worked under contract for the Central Intelligence Agency (CIA) and other contractors, although directly working to support the military operations in Iraq, were employed under a contract with the Department of the Interior.[12] As press attention began to turn to MEJA, it became clear that the law would not apply to acts by these persons because of the act's limitation to only DOD employees and contractors. As a result, these people could not be prosecuted in American courts for their crimes.[13]

While two bills were introduced before the House Representativies to address this problem no action was taken, perhaps because members of the minority party had sponsored them.[14] Of course, the bills could not have provided a basis for

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recalled to active duty. *See id.* at Toth v. Quarles, 350 U.S. 11 (1955). *See also* Schmitt, *supra* note 2, at 61-72. The MEJA cured this jurisdictional limitation of the Uniform Code of Military Justice. In doing so it also gave the government another means to prosecute persons who commit a crime while in federal service as a member of a reserve component but who then return to civilian life and are no longer subject to the UCMJ. H.R. REP. NO. 106-778, at 12 n.23. *See also* Schmitt, *supra* note 2, at n.293 and accompanying text. Although the act technically applies to all active duty service members, it makes clear that the military retains exclusive jurisdiction to prosecute active duty service members under the UCMJ, unless the service member is charged as a codefendant of one or more civilians. *See* 18 U.S.C. § 3261(d); H.R. REP. NO. 106-778, at 12 n.23.

[8] The act has been used only sparingly. In 2002, a defendant prosecuted in federal court in Washington state pleaded guilty to a violation of the act. The first use of the extradition procedures under the act did not occur until 2003. *See* Jessica Iñigo, *In First Use of Jurisdiction Act, USAF Spouse to Be Tried in Husband's Death*, STARS & STRIPES (European ed.), June 5, 2003. The conviction in that case, the first in a contested case under the act, did not occur until late 2004. *See* Associated Press, *Military Base Death Called Manslaughter*, SAN DIEGO UNION-TRIBUNE, Oct. 16, 2004, *available at* www.signonsandiego.com/uniontrib/20041016/news_1n16region.html; NBC4.TV News, *Woman Convicted in Husband's Death on Military Base; Jury Convicts Woman on Voluntary Manslaughter Charge*, *at* www.nbc4.tv/news/3825936/detail.html (last modified Oct. 15, 2004); Barbara Miller, *Wife Convicted of Manslaughter*, PATRIOT-NEWS (Pa.), Oct. 16, 2004 (on file with author). The defendant was not sentenced until February 2005. *Woman Gets 8 Years for Stabbing Air Force Husband to Death*, NORTH COUNTY TIMES (Cal.), Feb. 16, 2005, *available at* www.nctimes.com/articles/2005/02/17/military/21_23_232_16_05.txt). In neither case were the jurisdictional aspects of the law challenged.

[9] The Coalition Provisional Authority announced in March, 2004 that it had concluded, but would not yet release publicly, an investigation into allegations that American military personnel abused detainees at the prison. Transcript, Coalition Provisional Authority Briefing, Mar. 20, 2004, *available at* http://www.iraqcoalition.org/transcripts/20040320_Mar20_KimmittSenor.html (statement of Brigadier General Mark Kimmitt, U.S. Army, Deputy Director for Coalition Operations). However, it was not until *CBS News* broadcast photos of the abuse and *The New Yorker* magazine published an in-depth piece on the story did the news media begin to report extensively on the allegations. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib, American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, *available at* http://www.newyorker.com/fact/content?040510fa_fact; Associated Press, *U.S. Soldiers Face Investigation of POW Abuse*, COLUMBIA DAILY TRIBUNE (Mo.), Apr. 30, 2004, *available at* www.showmenews.com/2004/Apr/20040430News017.asp); David Folkenflik, *Iraq Prison Story Tough to Hold Off on, CBS Says*, BALTIMORE SUN, May 5, 2004, *available at* http://www.baltimoresun.com/news/nationworld/bal-to.media05may05,0,296863.column?coll=bal-nationworld-headlines; Phillip Kennicott, *A Wretched New Picture of America*, WASH. POST, May 5, 2004, at C01; Christian Davenport, *New Prison Images Emerge, Graphic Photos May Be More Evidence of Abuse*, WASH. POST, May 6, 2004, at A01; Charles Babington & Helen Dewar, *Lawmakers Demand Answers on Abuses in Military-Run Jails*, WASH. POST, May 6, 2004, at A12; The New York Times Editorial Board, *A System of Abuse*, WASH. POST, May 5, 2004 at A28.

[10] Renae Merle, *Prison-Abuse Reports Adds to Titan's Trouble, Lockheed Plan to Buy Firm Already Stalled*, WASH. POST, May 7, 2004, at E03; Ariana Eunjung & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A01.

[11] Dan Eggen & Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors for Prison Abuse*, WASH. POST, May 7, 2004, at A18.

[12] Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18.

[13] Scott Shane, *Some US Prison Contractors May Avoid Charges; Interior Department Hired Abu Ghraib Interrogators; Loophole Tangles Prosecution; Army Chain of Command Blurred in Civilian Abuses*, BALTIMORE SUN, May 24, 2004, at 1A; Ellen McCarthy & Renae Merle, *Contractors and the Law; Prison Abuse Cases Renew Debate*, WASH. POST, Aug. 27, 2004, at E01.

[14] The Contractor Accountability Act, H.R. 4387, 108th Cong. (2004) (introduced by Rep. Martin Meehan (D – Mass.) on 18 May 2004); The MEJA Clarification Act, H.R. 4390, 108th Cong. (2004) (introduced by Rep. David Price (D – N.C.) on 19 May 2004).

prosecuting the acts that had already come to light,[15] but they would have applied to any future crimes committed by contractors or other government employees.[16] Although Congress did not act on the two introduced bills,[17] both houses of Congress held numerous hearings into the problems at the Abu Ghraib prison.[18] Also, the Senate included a provision similar to that contained in the House bills in the Senate version of the FY 2005 DOD authorization act.[19]

Finally, as the 2004 legislative session came to a close, conferees from the House and Senate met to work out the differences between the House and Senate versions of the DOD authorization bills. At this conference, the Senate's MEJA provision was left in the conference report on the bill[20] and enacted into law.[21] President George W. Bush signed the bill, with the MEJA amendments, into law on 28 October 2004.

The Legislative Fix

In section 1088 of the Fiscal Year 2005 DOD Authorization Act Congress amended MEJA to extend its jurisdictional coverage to employees and contractors of other federal agencies.[22] The 2005 DOD Authorization Act also amended MEJA to apply to employees and contractors of "any provisional authority."[23] In each case, however, the act limits this coverage

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[15] *See* U.S. CONST. art. I, sec. 9, cl. 3 (prohibiting Congress from passing any "ex post facto Law.").

[16] After the Abu Ghraib abuses gained widespread attention, there were reports of similar abuses at other prison facilities operated by the U.S. military. Tom Bowman & Julie Hirschfeld Davis, *Army Reveals Wider Abuse Investigation; At Least 20 Cases in Iraq, Afghanistan Scrutinized; Prisoner Death Ruled Homicide; Members of Congress Question Top Army Brass*, BALTIMORE SUN, May 5, 2004, *available at* www.baltimoresun.com/news/printededition/bal-te.congress05may05,0,6989726.story; R. Jeffrey Smith, *General Cites Problems at U.S. Jails in Afghanistan*, WASH. POST, Dec. 3, 2004, at A01.

[17] *See generally* Thomas, Legislative Information on the Internet, *at* http://thomas.loc.gov (providing a summary and status of bills introduced to Congress) (last visited Apr. 7, 2005).

[18] *See, e.g.*, H.R. REP. NO. 108-807, Report of the Activities of the Committee on Armed Services for the One Hundred Eighth Congress (2005). In it, the Committee states that it held

> three public hearings specifically on detainee treatment and three hearings on operations in Iraq, during which detainee issues were discussed at length, . . . four member briefings, fourteen staff briefings, and hosted several opportunities for members to review photographic evidence and specific reports by the International Committee of the Red Cross. Additionally, several members and staff made separate trips to review detainee operations at Guantanamo Bay, Cuba. The committee also sought and received over 15,000 pages of classified internal documents from the Department of Defense, provided every member of the committee with an opportunity to review the classified material, and reported out two bills concerning detainee matters.

Id. at 39. The Senate Armed Services Committee also held hearings on the issue and hosted briefings for its members and staff, however a report of its activities during the 108th Congress has yet to be filed. *But see, e.g.*, *Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST, May 7, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A8575-2004May7.html (printing a transcript of a hearing before the Committee on Armed Services of the United States Senate); Helen Dewar & Spencer S. Hsu, *Warner Bucks GOP Right on Probe of Prison Abuse*, WASH. POST, May 28, 2004 at A01; Josh White, *Top Army Officers Are Cleared in Abuse Cases*, WASH. POST, Apr. 23, 2005 at A01. Some persons debated whether these hearings had any effect. *See, e.g.*, Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21; The New York Times Editorial Board, *No Accountability on Abu Ghraib***,** N.Y. TIMES, Sept. 10, 2004, *available at* http://www.cfba.info/iraq/nyt_torture_accountability_2.html.

[19] National Defense Authorization Act for Fiscal Year 2005, S. 2400, 108th Cong. § 1081 (2004). Not included in the bill when it was originally introduced, Senator Jeff Sessions of Alabama offered it as an amendment when the Senate debated the bill on the floor. *See* 150 CONG. REC. S6535 (2004).

[20] The Conference Report is the vehicle that enacts the compromise bill

[21] National Defense Authorization Act for Fiscal Year 2005, H.R. 4200, 108th Cong. (2004) (enacted, Pub. L. No. 108-375, 118 Stat. 1811).

[22] The text of section 3267(1)(A) of title 18, as amended by the bill now defines "employed by the Armed Forces outside the United States" as:

> (A) employed as--
> (i) a civilian employee of--
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
> (ii) a contractor (including a subcontractor at any tier) of--
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or
> (iii) an employee of a contractor (or subcontractor at any tier) of--
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
> (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

18 U.S.C. § 3267(1)(A) (LEXIS 2005).

[23] *Id.*

only "to the extent such employment relates to supporting the mission of the Department of Defense."[24] Unfortunately, the lack of precision in each of these new terms may cause the courts problems in applying this portion of the act in the future.[25]

Most problematic, Congress failed to define the phrase "supporting the mission of the Department of Defense" supplied in the bill, leaving unanswered the question of just how broadly the terms "supporting" and "mission" are to be interpreted. In light of world events ongoing when Congress drafted this language, "mission" would seem to mean, at the least, the wartime or occupational activities of the military. This conclusion is born out by the limited discussion of this new language on the Senate floor by the bill's sponsors who focused solely on the military's activities in Iraq,[26] and principally on the physical abuses at Abu Ghraib.[27] But given that, the question arises: does the word "mission" mean all DOD activities, including its regular day-to-day administrative operations, or does "mission" only include identifiable missions—and perhaps only those that are so well-defined as to be given a specific name, such as "Operation Iraqi Freedom?"

Similarly, the question exists of whether any amount of support provided falls within the meaning of the term "supporting" in the bill. That is, is there some threshold level of support that must be provided to the military before MEJA, as amended, will apply to the criminal acts of the persons providing that support? For example, are all CIA agents covered by the bill if some or all of the intelligence that they gather is eventually shared with the Defense Department? Certainly, the DOD uses that intelligence in carrying out its mission, but is the CIA "supporting" the DOD's mission in that circumstance or its own mission?

There is no formal legislative history to be consulted on this provision, but given the floor debate, in which only federal government contractors were discussed, it is unlikely that the drafters intended to bring CIA agents within the scope of this bill.[28] The amendment language, however, applies to both employees and contractors, and so CIA employees do fall within the scope of the amendment. As another example, if contractors working on a State Department mission also provide incidental support (*e.g.*, food, shelter, housekeeping services) to military personnel providing security, training, or logistical support, do they then fall under the jurisdiction of the act? As the bill is drafted, it would seem that they would.

It would have been helpful had Congress used more specific terminology in the amendment. At the very least, the Senate should have provided examples in a legislative history on this portion of its version of the DOD Authorization Act as to the types of support it intended would fall within or outside this new provision. Without such guidance from the legislative branch, it will be left to the courts to parse the meaning of these phrases. A reasonable interpretation of this

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[24] *Id*.

[25] There were no hearings on this portion of the mammoth authorization bill, and only a passing reference to this provision in the conference report on the compromise between the differing House and Senate authorization bills. The conference report contains only the following language about MEJA amendment:

> The Senate amendment contained a provision (sec. 1081) that would amend the definitional section of the Military Extraterritorial Jurisdiction Act of 2000, section 3267 of title 18, United States Code (Public Law 106-523), to expand jurisdiction over civilian employees and contractor personnel of the United States to include personnel not employed by or contracting with the Department of Defense whose employment relates to supporting the mission of the Department of Defense overseas. The House bill contained no similar provision. The House recedes.

H. R. REP. NO. 108-767, National Defense Authorization Act for Fiscal Year 2005 (2004).

[26] Senator Jeff Sessions stated

> This act will deal with what our previous act dealt with—those who were directly related to the Department of Defense, either contractors or civilian employees. But the abuses in Abu Ghraib involved private contractors who may not have in every instance been directly associated with the Department of Defense, and as such, perhaps those people—or some of them at least—might not be prosecutable under this statute. So it highlighted our need to clarify and expand the coverage of the act.

150 CONG. REC. S6863 (daily ed. June 16, 2004) (statement of Sen. Sessions).

[27] While first discussing Abu Ghraib, Senator Sessions also made a passing reference to using this provision to prosecute contractor fraud against the United States. As he summarized at the end of his remarks,

> This amendment clarifies existing precedent and leaves no doubt whether wrongdoers can be brought to justice. This includes physical acts against personnel by contractors. It also includes frauds that could be committed against the Department of Defense such as overcharging. Fraudulent activities of any kind could be prosecuted under this act.

Id.

[28] The only floor statement on this point was made by Sen. Sessions, "This amendment would give the Justice Department authority to prosecute civilian contractors employed not only by the Department of Defense but by any Federal agency that is supporting the American military mission overseas." *Id*.

phrase, in light of the floor debate and the world events that prompted this amendment, would be to apply this new part of MEJA only when a person's activities have, *as their principal purpose*, the intent to assist the mission of the DOD.

Another, and possibly more vexing, problem with MEJA, as amended, is that it now applies to employees of "any provisional authority" and to contractors and their employees of "any provisional authority."[29] Given the focus of the drafters of this provision on the Abu Ghraib abuses, it seems certain that they had the Coalition Provisional Authority (CPA) in Iraq in mind when using this language.[30] But making this new term a part of MEJA calls into question the legal status of a provisional authority. The Government's view of just what the CPA was is muddled. The U.S. Congress, in an act to supply funding to the CPA, referred to it alternately as a U.S. Government entity and a creation of the U.N.[31] Similarly, the former general counsel of the CPA has described it as both an organization of the U.S. government and an international entity.[32] However, the Office of Management and Budget and other agencies of the Executive Branch have stated that the U.N. created the CPA.[33] And the U.S. Army Legal Services Agency has gone so far as to assert that the CPA is not a Federal agency, instead referring to it as "multi-national coalition"[34] Despite these references to the U.N.'s role, a close reading of the United Nations Security Council resolutions to which these agencies point as having created the CPA does not lend much support for that position. In those resolutions, the Security Council speaks about the CPA as if it already existed and does not use any language which might be interpreted as creating it.[35]

Even in early 2005, after sovereignty had been "restored" to Iraq, and the CPA no longer existed and had turned its the role over to the U.S Mission in Iraq,[36] the official position of the Executive Branch on what the CPA had been remained uncertain. In a lawsuit brought by whistle-blowers under the False Claim Act[37] against an American company that had

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[29] *See supra* note 24.

[30] *See supra* note 28.

[31] *See* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 117 Stat. 1209 (2004). That act provides that

> funds appropriated under this heading shall be approportioned only to the Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government . . . . *Id*. at 117 Stat. 1225. But in another part of that same act it appropriates money to the CPA "For necessary expenses of the Coalition Provisional Authority in Iraq, established pursuant to United Nations Security Council resolutions including Resolution 1483, ...

Id. 117 Stat. at 1226. It would seem strange that an entity of the United States Government could have been created by the United Nations and not by Congress. Finally, at section 2208 of that act, Congress defines the term "Coalition Provisional Authority" "to include any successor United States government entity with the same or substantially the same authorities and responsibilities as the Coalition Provisional Authority in Iraq." *Id*. 117 Stat. at 1231. In section 3001, Congress creates the Office of Inspector General of the CPA. *Id*. 117 Stat. at 1234. If the CPA was not part of the U.S. Government, how could Congress have created new offices within it?

[32] E-mail from E. Scott Castle, Esq., Deputy General Counsel (Fiscal), Office of DOD General Counsel, to author (15 Dec. 2004) (on file with author) ("The CPA had a dual status, and was simultaneously a U.S. Government entity . . . and a discrete entity under international law . . . . The CPA administered the occupation on behalf of the occupying powers (US and UK)"); E-mail from E. Scott Castle, Esq. to author (7 June 2005) (on file with author) ("'international entity'" . . . and 'organization of the U.S. Government' . . . more correctly describes our position."). Mr. Castle served as General Counsel of the Coalition Provisional Authority.

[33] *See* U.S. Office of Management and Budget, *Budget of the United States Government—FY 2005*, app., at 958-959 (2004) ("For necessary expenses of the Coalition Provisional Authority in Iraq, established pursuant to United Nations Security Council resolutions including Resolution 1483, ...). The Pentagon Renovation Office also took this position. *See* L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*, CONG. RESEARCH SERVICE 9 (June 6, 2005), *available at* http://www.fas.org/sgp/crs/mideast/RL32370.pdf#search='halchin%20june%206' (citing Pentagon Renovation Office, solicitation W914NS-04_R-0001, Jan. 6, 2004, p.2.).

[34] *See* Halchin, *supra* note 33, at 10 (citing a letter from a USALSA representative to the U.S. General Accounting Office in October 2003 in which USALSA asserted that the GAO did not have jurisdiction over a bid protest filed by a company to a contract issued by the CPA because the CPA was not a federal agency).

[35] In that resolution, the Security Council only "calls upon" the authority to do certain things. S.C. Res. 1438, 57th Sess., 4624th mtg., U.N. Doc. S/Res/1438 (2002). *But see* S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/Res/1511 (2003) (seeming to state something different by noting that the "specific responsibilities, authorities, and obligations under international law" of the United States and the United Kingdom as occupying powers under a unified command, defined as the Coalition Provisional Authority, were "set forth" in United Nations Security Counsel Resolution 1483 and were to end when an "internationally recognized, representative government of the people of Iraq . . . assumes the responsibilities of the Authority . . . .").

[36] *See* Embassy of the United States: Iraq-Baghdad, *Negroponte Pledges "True Partnership" with Iraq Government: Says U.S. committed to helping government achieve "lasting stability*," June 3, 2004, *at* http://iraq.usembassy.gov/iraq/amb_20040603.html (statement by Ambassador John D. Negroponte, U.S. Representative to the United Nations, on the Situation in Iraq). *See generally* Embassy of the United States: Iraq-Baghdad, Negroponte Sworn In as Ambassador to Iraq: Powell, Negroponte speak hopefully of Iraq's future, June 23, 2003, *at* http://iraq.usembassy.gov/iraq/amb_20040623.html (remarks of Secretary of State Colin L. Powell at the Swearing-In of John D. Negroponte, U.S. Ambassador to Iraq).

[37] 31 U.S.C. §§ 3729-33 (2000). In general, the act provides for a civil penalty to the United States if a person knowingly presents a false or fraudulent claim for payment to the U.S. Government, conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, or has possession, custody, or control of property or money to be used by the Government and conceals the property or delivers less property than the amount for which the person payment. *Id.* § 3729. The act allows private citizens to bring action for violation of the law in the name of the Federal government. *Id.* § 3730.

received millions in dollars from the CPA, the issue arose as to whether the act applied to funds paid by the CPA under contracts it had entered into.[38] As the case progressed, the judge specifically ordered the lawyers for the Federal government to state the government's position on whether the CPA was a U.S. Government entity.[39] In its brief to the court answering that question,[40] the government took the position, apparently for the first time, that "the CPA was created by the Commander of the Coalition Forces in Iraq, General Tommy Franks."[41] The Government's lawyers went on to explain that "General Franks established the CPA under the laws of war to perform civil government functions in liberated Iraq during the brief occupation."[42] Perhaps to explain the role of the UN in all of this, they noted that the "establishment of the CPA by the Coalition was formally recognized by" the United Nations in Security Council Resolution 1483.[43]

Thus, these conflicting views of the CPA's status makes interpreting MEJA amendment even more troublesome, and creates a risk that courts may conclude that it is unconstitutional. If the CPA, and any similar authorities created in the future, is deemed to be an agency of the U.S. government, it is unnecessary to include the term "any provisional authority" in the bill. After all, the term "any other Federal agency" as used in MEJA amendment is broad enough to cover the authority's employees and contractors. Conversely, if the CPA or some later authority is, instead, an interim government of the nation in which it is operating or an international entity, then including the employees and contractors of that organization within the reach of MEJA raises an important constitutional question: on what basis is the U.S. government seeking to regulate the employees and contractors of another country's government or of an international entity?

As the legislative history of MEJA makes clear, its principal constitutional basis is Congress' power to regulate the Armed Forces.[44] When MEJA applies to DOD employees, contractors, or even the dependents of service members who live abroad solely because their loved ones are stationed there, Congress is clearly acting to regulate the conduct of the Armed Forces.[45] Regulating the conduct of employees of and contractors to another government's agencies or an international agency does not fall into this category.

The other constitutional provision commonly used to justify federal criminal law, the Commerce Clause,[46] is an even more tenuous basis upon which to base a statute that regulates the conduct of another government's nationals or those employed by or under contract to an international organization. Given that the conduct MEJA regulates occurs outside the United States, it would seem quite a stretch to argue that it substantially affects interstate commerce in the United States or with foreign Nations.[47] By making this new provision so broad as to apply to almost everyone in an area where the military is involved in contingent operations, Congress might have made the amendment unconstitutionally overbroad. If so, then Congress' imprecise drafting might threaten the enforceability of the new language or even the statue as a whole.

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[38] *See* Griff Witte, *Lawmakers Told About Contract Abuse in Iraq*, WASH. POST, Feb. 15, 2005, at A03.

[39] See Griff Witte, *Justice Dept. Weighs Status of Interim Authority in Iraq Case*, WASH. POST, Feb. 18, 2005, at E01.

[40] Apparently, the Government did not have a position at the beginning of the case. *See id.* at E1. The reporter noted that the Justice Department had yet to file a brief outlining the government's position as to the status of the CPA. *Id.*

[41] *See* Halchin, *supra* note 33, at 12-13 (citing Supplemental Brief of the United States 6-7, United States *ex re.* DRC, Inc. and Robert Isakson v. Custer Battles, LLC et al., Case No. CV-04-199a)(E.D. Va. 2004)).

[42] *Id.*

[43] *Id.*

[44] *See* H.R. REP. NO. 106-778, pt.1, at 14 (2000) (citing as authority for the bill art. I, sec. 8, cls. 10, 14, 16, and 18 of the Constitution.). The sponsors of the Senate version of the bill adopted the House Report as the authoritative statement on the act. *See* 146 CONG. REC. S11181, S11183 (daily ed. Oct. 26, 2000) (statement of Sen. Sessions, commenting that the House report "reflects the intentions of the Senate," and statement of Sen. Leahy, "I agree with Senator Sessions with respect to the report.").

[45] While MEJA applies to the criminal conduct of third country nationals who are contractors or subcontractors of the DOD, this aspect of the law is still designed to control the conduct of persons who would not be in a country but for the activities of the U.S. military there. *See* Schmitt, *supra* note 2, at 131-32. This provision exempts from the reach of MEJA persons who are nationals of or ordinarily resident in the country where the crime is believed to have been committed. *See* 18 U.S.C. § 3267(1)(c).

[46] U.S. CONST. art. I, sec. 8, cl. 3. Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

[47] *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995). In *Lopez*, the Court struck down a federal criminal statute making it illegal to possess a firearm within 1,000 feet of a school. The Court held that Congress's power to regulate interstate commerce did not authorize it to regulate gun possession near schools, because "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. Given this, perhaps only the "Necessary and Proper Clause" of the Constitution (U.S. Const., art. I, sec. 8) is left as support for this part of the MEJA amendment.

Conclusion

MEJA was a significant development in American criminal law, and closed a gap in the law that existed for over forty years. But, as recent events have proven, loopholes exist even in bills that seemed comprehensive when they were drafted. Congress acted promptly to close the loophole in MEJA once the events surrounding the Abu Ghraib prison abuse were brought to light. However, the imprecise language it used in doing so, coupled with a lack any real legislative history to explain this language, may confuse the courts as to the meaning of these new provisions.

Given that the statute has been used only a few times since it was enacted, Congress' decision to add provisions to MEJA that might prove difficult to enforce could undermine the entire statute. In retrospect, it would have been better had Congress had spent a little more time publicly debating and then drafting the solution to the problem of non-DOD contractors committing crimes abroad, and included interpretive information in a congressional report to explain it, before enacting the solution into law.

Book Review

IN HARM'S WAY: THE SINKING OF THE USS *INDIANAPOLIS* AND THE EXTRAORDINARY STORY OF ITS SURVIVORS[1]

REVIEWED BY MAJOR ERIC R. CARPENTER[2]

On July 30, 1945, just days before the end of World War II, a Japanese submarine sank the USS *Indianapolis*, directly killing 300 of the ship's 1200-man crew.[3] Nine-hundred men entered the water alive.[4] Unbelievably, the U.S. Navy did not even realize that one of its ships was missing until four days later, and by the end of the belated rescue effort, only 317 men had survived.[5] The Navy blamed the ship's captain, Captain Charles McVay, III, for both the sinking and the delayed rescue, making him the only captain in the history of the U.S. Navy to be court-martialed for losing his ship to an act of war.[6] Twenty-three years later, still receiving hate mail from relatives of casualties and before his name would be cleared, he killed himself.[7]

Doug Stanton tells the story of this disastrous voyage and the Navy's subsequent treatment of McVay in *In Harm's Way: The Sinking of the USS* Indianapolis *and the Extraordinary Story of Its Survivors*. Stanton had been working as a contributing editor for *Esquire* and *Outside* magazines[8] and became interested in the Indianapolis after learning that the survivors planned to reunite.[9] Having no military background, Stanton intended to write only a short article on the disaster;[10] instead, he became captivated by the survivors' accounts of bravery and survival: "For almost five days, they struggled against unbelievably harsh conditions, fighting off sharks, hypothermia, physical and mental exhaustion, and finally, hallucinatory dementia. And yet more than 300 of them managed to survive. The question I wanted to ask was, *How*?"[11] The survivors wanted to clear McVay's name and lift the stigma that resulted from his conviction; Stanton took up their cause.[12] Finally, Stanton wanted to pin the blame for the disaster on the Navy, where he felt it belonged: "[T]he [N]avy put them in harm's way, hundreds of men died violently, and then the government refused to acknowledge its culpability."[13]

The article became a book, and Stanton published *In Harm's Way* in 2001 to the universal praise of critics and history buffs.[14] Shortly after publication, the Navy exonerated McVay, announcing that he was not culpable for the sinking or the loss of life caused by the delayed rescue.[15] But this leads to the question: why review an already thoroughly reviewed and acclaimed book, four years after publication? Why now, considering that one of Stanton's primary goals for writing *In Harm's Way* has been reached?

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[1] DOUG STANTON, IN HARM'S WAY: THE SINKING OF THE USS INDIANAPOLIS AND THE EXTRAORDINARY STORY OF ITS SURVIVORS (St. Martin's Paperbacks, 2002) (2001).

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] *See* STANTON, *supra* note 1, at 7.

[4] *See id.*

[5] *See id.*

[6] *See id.* at 8.

[7] *See id.* at 4, 6.

[8] *See id.* at inside back cover.

[9] *See id.* at 309.

[10] *See id.*

[11] *Id.* at 310.

[12] *See id.* at 8, 266, 270.

[13] *Id.* at 311.

[14] *See* http://www.ussindianapolisinharmsway.com/bookreviews.htm (last visited May 11, 2005) (providing a long list of positive reviews from, among others, Tom Brokaw and Stephen Ambrose).

[15] *See* STANTON, *supra* note 1, at 269.

Because America is again at war, and *In Harm's Way* offers contemporary lessons to military officers and judge advocates. Stanton's account captures the irregular, sometimes startling, and sometimes reaffirming ways that people respond when they reach the edge of life. Small-unit leaders who pick up *In Harm's Way* will learn how people behave while they are under enormous stress.[16] *In Harm's Way* also contains important lessons on risk management, showing what can happen when senior leaders personally manage the risks attached to potentially catastrophic missions, and how to assign responsibility and blame when risk becomes reality. Finally, *In Harm's Way* contains a simple lesson for judge advocates: a legally defensible position is not always a just position. While Stanton does not explicitly make all of these points (indeed, the reader will learn some of these lessons by spotting the shortfalls in some of Stanton's arguments), military officers and judge advocates will profit from them, while being rewarded with a riveting account of survival.

I. Why Some Men Survived

Stanton documents some uncomfortable facts: many sailors acted in apparently shameful and cowardly ways after just a short time in the water. On the second day, some sailors started to kill themselves:

> Those still lucid enough looked on in disbelief as their former shipmates calmly untied their life vests, took a single stroke forward, and sank without a word. Others suddenly turned from the group and started swimming, waiting for a shark to hit, and then looked up in terrified satisfaction when it did. Others simply fell face-forward and refused to rise. A boy would swim over to his buddy, lift his head by the hair from the water, and begin screaming for him to come to his senses. Often, he refused, and continued to quietly drown himself.[17]

Even more disturbing, on the third day, the sailors started to attack and kill each other.[18]

By applying modern medical knowledge, Stanton explains how the sailors deteriorated to a state of dementia so quickly. The men suffered from plasma shift, the inhalation of salt spray which caused their lungs to fill slowly with fluid, ultimately lowering the oxygen content in their bloodstreams.[19] They had hypothermia, losing an average of one degree of body temperature for every hour of exposure at nighttime.[20] Hypothermia depresses the central nervous system, allowing apathy and amnesia to set in.[21] Some sailors, with their judgment clouded and hallucinations underway, started drinking salt water, causing their cells to shrink, expand, and explode, disrupting their neuro-electical activity.[22] All of these factors, combined with shock associated with wounds suffered in the submarine attack and the constant shark attacks, acted on the sailors' central nervous systems, causing them to behave in such shocking ways.

Stanton offers plenty of examples of men acting heroically in the water, and their personal courage should inspire small-unit leaders.[23] But unfortunately, Stanton does not answer the question he set out for himself: why did some of the 900 men who entered the water survive, and some not? He makes some offhand remarks that each survivor, at some point, made a decision to live, and those with families seemed to avoid drinking salt water.[24] But he never draws any overarching conclusions on the root of human nature, and this conclusion would have been valuable to small unit-leaders.

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[16] *In Harm's Way* fits into the "survivor's story genre. *See also* NATHANIEL PHILBRICK, IN THE HEART OF THE SEA: THE TRAGEDY OF THE WHALESHIP ESSEX (2000) (describing the true story of the survivors of a New England whaling ship attacked by a whale in the Pacific); JOE SIMPSON, TOUCHING THE VOID: THE TRUE STORY OF ONE MAN'S MIRACULOUS SURVIVAL (1989) (telling the story of the victim of a serious mountain climbing accident, who survived against all odds).

[17] STANTON, *supra* note 1, at 167-68.

[18] *See id.* at 177 (describing how one sailor "saw boys with knives blindly stabbing at buddies who were still tied to them," and how a different sailor "gouged out another's eyes with his fingers").

[19] *See id.* at 151.

[20] *See id.* at 163.

[21] *See id.*

[22] *See id.* at 172.

[23] *Id.* at 135-36, 144-45 (describing how a Marine captain and a chaplain organized the survivors and distributed safety gear); *id.* at 181 (describing a Navy ensign's efforts to keep his noncommissioned officer alive); *id.* at 235 (describing sailors jumping off of rescue ships into shark-infested water to pull survivors to safety).

[24] *Id.* at 172.

II. Risk Management

Stanton successfully argues that the Navy leadership was partly responsible[25] for the ship's sinking because the Navy failed to mitigate the risk that an enemy submarine would sink the ship.[26] First, the Navy did not provide the ship with a needed security measure—a destroyer escort. The Indianapolis was a heavy cruiser, whose mission was to shell enemy positions on land and to provide air defense coverage for her flotilla.[27] Her design traded armor for speed; as a result, she required destroyer escorts for security against submarines.[28] Recognizing the need for security, McVay requested a destroyer escort for his voyage from Guam to Leyte.[29] The Navy denied his request, telling him that a destroyer was not necessary or available: the area where McVay was traveling was considered a backwater (or rear area) of the fight, and the destroyers were needed farther north.[30] Yet, if the Navy had mitigated the risk of submarine attack by providing an escort, the ship might not have sunk: after spotting an enemy ship, the Japanese submarine's captain was concerned that the ship might be a destroyer.[31] The Navy's senior leaders assumed this risk, not McVay.

Next, the Navy assumed risk when it withheld highly classified intelligence from its captains. Before leaving for Leyte, McVay asked for all of the intelligence available for his route.[32] He received a report that did not contain any recent, credible information about submarine activity in the area.[33] Importantly, the intelligence report did not contain a critical piece of information known to the Navy, a Japanese submarine group was operating on the Indianapolis's assigned route.[34]

The Navy sometimes withheld intelligence from its captains because intelligence officers used a top-secret code-breaking program to obtain their information.[35] Following the Battle of Midway, U.S. newspapers reported that American forces knew all of the Japanese positions.[36] The Japanese figured out that the United States had a machine that could crack their codes, so they changed them all.[37] Once the Americans developed a new code breaker, the Americans decided to keep its existence a closely-held secret, even if it meant not sinking Japanese ships when the Americans knew where they were—or, as was the case with McVay, disclosing to captains that submarines were in their area of operations.[38] Again, had the Navy mitigated this risk of submarine attack by providing this intelligence, the ship might not have been sunk. The submarine that sank the *Indianapolis* was from this enemy submarine group.[39] Had McVay known this intelligence, he may have taken different measures to protect himself, to include taking a defensive measure that the Navy later court-martialed him for not taking. The Navy's senior leaders assumed this risk, not McVay.

Turning to the delayed rescue, Stanton argues that the Navy leadership was partly responsible for that, too. The Navy assumed risk when it ordered its ships to travel alone, a risk that McVay well understood: "Whenever I was traveling alone, I always had the feeling, 'Suppose we go down and we can't get a message off? What will happen then?'"[40] This risk became

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[25] The obvious direct cause of the sinking was the Japanese submarine commander who sunk the Indianapolis in an act of war. *Id.* at 295. Stanton is really looking at the proximate causes of the disaster and who bears responsibility for them.

[26] *Id.* at 70.

[27] *See id.* at 25.

[28] *See id.* at 25, 70.

[29] *See id.* at 70.

[30] *See id.*

[31] *See id.* at 94.

[32] *See id.* at 70-71.

[33] *See id.* at 72.

[34] *See id.*

[35] *See id.* at 72-73.

[36] *See id.* at 73.

[37] *See id.*

[38] *See id.*

[39] *See id.* at 75.

[40] *Id.* at 59.

a reality when the ship's main radio shack was destroyed by the torpedo attack.[41] Sailors were able to get send a primitive, nonstandard distress signal from a back-up radio shack by quickly and ingeniously using whatever undamaged equipment remained.[42]

The Navy took steps to mitigate the risk that a ship might sink before it could get out a distress signal—it established a tracking system that, if properly executed, would alert the Navy to overdue ships. The tracking system failed, though, when leaders and lower-ranking sailors failed to do their jobs. Stanton effectively lays out this chain of errors, angrily contrasting the personal courage of sailors in the water who risked death to save others, while officers and sailors in the rear failed to exercise basic competence from the comfort and safety of their offices.

The first error occurred at Tinian, where McVay was to report to Vice Admiral Jesse Oldendorf and then to his subordinate, Rear Admiral Lynde McCormick.[43] McCormick's staff, however, improperly decoded the reporting order, thought it was for another command, and so stopped deciphering it.[44] Consequently, McCormick had no reason to watch for the ship.[45] Two days later, McCormick received the message when it was sent out again (and this time correctly decoded), but he was confused:

> In the first place, he was uncertain as to why the *Indianapolis* was reporting to him. Further, because she was the flagship of the Fifth Fleet, he assumed she would be diverted north to replace another cruiser, the USS *Portland*, that had recently been taken out of service. McCormick doubted that the *Indy* would ever make landfall at Leyte. Her arrival, from his point of view, was a nonissue.[46]

His boss, Oldendorf, received the first message, but that message did not contain the ship's report date.[47] Oldendorf never received the second message, which did contain the report date.[48]

> [Because of this,] Oldendorf knew that Captain McVay would be reporting to him, but he didn't know *when* to expect him. The effect of this double error in communication was simple: the two people whom McVay was to report did not possess enough information to determine if he was late. As he sailed to Leyte, Captain McVay was, essentially, a man headed nowhere.[49]

Neither of these senior officers did anything to clear up the issue.

The system errors and personal failures continued. A sailor on the island of Tacloban heard the non-standard distress message and passed it to the senior ranking officer on his base, who promptly dismissed the report.[50] Just a few days later, when that same sailor noticed that the *Indianapolis* had not arrived in her berth he remained silent because he thought no one would listen to him.[51] The distress message also made it to Leyte, where the officer on duty dispatched two ships to the reported site.[52] Unbelievably, Commodore Norman Gillette, the acting commander of the Philippine Sea Frontier, hearing that the ships had been dispatched without his authority, recalled them, and took no further action.[53]

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[41] *See id.* at 101.

[42] *See id.* at 123-25. These sailors put their lives at risk to send out the signal, staying with the ship until she had listed completely on her side. *See id.* at 124-25.

[43] *See id.* at 76-77.

[44] *See id.* at 64-65.

[45] *See id.* at 65.

[46] *Id.* at 77.

[47] *See id.* at 77-78.

[48] *See id.* at 77.

[49] *Id.* at 78.

[50] *See id.* at 125-26.

[51] *See id.* at 126.

[52] *See id.*

[53] *See id.* at 126-27.

Soon, problems with the tracking system arose. Six months earlier, in order to reduce shipping dispatches and increase security, Admiral Ernest King directed that the arrival of combatant ships would not be reported, but his directive contained ambiguity: "What was implied—but not intended—was that the *non-arrival* of combatants would also remain unreported."[54] Facing somewhat unclear guidance, tracking officers made faulty assumptions, which built errors into the system that would ultimately cause the system to fail. The first morning after the sinking, an operations officer at Leyte moved the ship's marker into the "arrived" column on the routing board: "He assumed her voyage had been uneventful; at least he had heard nothing to the contrary. Combatant vessels were always assumed to have arrived at their destinations, unless contradictory news was announced."[55] At nearly the same time, the dispatching headquarters in Guam assumed that the ship had arrived and removed a similar marker from the plotting board in that office.[56] In Tacloban, a tracking officer noted that the ship had not arrived, but did not call anyone to inquire—he simply marked her as overdue.[57] To work, the tracking system required an outside stimulus—a distress call or a positive report of non-arrival—and so the ship's absence fell through the cracks.

Here, military officers and judge advocates can pull a contemporary lesson: when senior leaders personally manage the risk associated with potentially catastrophic events, they can create an environment where small system or personal failures can lead to catastrophic results. Such senior leaders need to ensure that they issue clear instructions, that they build redundancies into mitigation systems, and that they establish clear communication channels between the redundant systems. Leaders then need to designate someone to supervise the system. If the Navy leadership had followed these steps with the *Indianapolis*, the Navy would have certainly noticed the ship's absence.

But while Stanton assigns responsibility to the Navy, he goes too far when he suggests that the Navy was culpable or blameworthy for these risk management decisions.[58] The Navy's senior leaders made a rational risk decision when they denied the destroyer escort. The Navy operated with limited resources and had to send them where they were needed most. Further, the Navy did establish a tracking system designed to mitigate that risk of traveling alone; unfortunately, that system had errors which surfaced when officers and sailors failed to do their jobs. The Navy also reasonably calculated the risk in withholding the intelligence. This code breaker could potentially prevent the loss of scores of American ships and lives in a major battle. The loss of one or two ships elsewhere would be a reasonable cost for that advantage. Contrary to Stanton's argument, the lesson is that when leaders make rational risk-based decisions, those leaders are *responsible* for making those risk management decisions, but they are not *culpable* for reasonable decisions simply because those risks materialize.

III. Clearing McVay's Name

Stanton drives home the lesson that when risks become reality, senior leaders should accept responsibility for their risk decisions and not scapegoat the junior leader who happens to be on watch when lightning strikes. Instead of accepting responsibility for their risk decisions, the Navy's senior leadership took the low road and decided to scapegoat McVay. The Navy charged McVay with hazarding his ship by not performing a defensive maneuver (called zigzagging), and with failing to order abandon ship in a timely manner (the Navy believed that if he had given the order earlier, the crew would have had more time to gather and distribute survival gear).[59] The court-martial convicted him of the first charge, but acquitted him of the second.[60]

Why the Navy prosecuted McVay is still up for debate and Stanton does not try to answer that question.[61] As late as 1996, the Navy's legal position was that "Captain McVay's court-martial was legally sound; no injustice has been done, and

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[54] *Id.* at 166.

[55] *Id.* at 165.

[56] *See id.*

[57] *See id.* at 165-66.

[58] *See id.* at 73-74, 311.

[59] *See id.* at 248, 250.

[60] *See id.* at 253. Stanton notes the facts that lead to the acquittal on the second charge. McVay ordered abandon ship just eight minutes after the attack, following the best battle damage assessment that he could make. *See id.* at 98-104. The ship sank just four minutes later. *See id.* at 104, 130. Stanton also argues that the Navy had improper motives for preferring this charge. *Id.* at 250

[61] *See id.* at 265; Commander William J. Toti, *The Sinking of the* Indy *& Responsibility of Command*, PROCEEDINGS, Oct. 1999, at 35-36 (describing the controversy over the charging decision). Stanton hints that the government wanted to dodge public bewilderment about why this disaster happened so close to the end of the war. STANTON, *supra* note 1, at 246-47.

remedial action is not warranted."[62] Nearly all of *In Harm's Way* attacks the point that "no injustice has been done," but unfortunately, Stanton only spends a few pages attacking the Navy's conclusion that the court-martial itself was legally correct.[63]

In 1999, Rear Admiral John D. Hutson, the Judge Advocate General for the Navy, testified before a Senate committee that "the finding of guilty was supported by fact and law."[64] Stanton argues that that McVay's failure to zigzag did not contribute to the sinking. The Japanese submarine's commander testified that zigzagging would not have prevented him from sinking the ship, and an American submarine commander testified that zigzagging had negligible value.[65] Therefore, McVay should not have been convicted. Hutson argued the contrary (and correct) position. Hazarding a ship, like dereliction of duty, is an unusual charge: the charge only requires *simple* negligence; and, that negligence need not cause actual harm.[66] Although McVay's failure to zigzag had no causal connection to the disaster, McVay could still be found guilty of hazarding his ship.[67] Turning to the negligence element, Stanton persuasively argues that McVay acted reasonably and admirably throughout the ordeal.[68] Some facts indicated that McVay did act reasonably: the actual movement order that said that McVay had the authority to not zigzag at night during poor visibility,[69] and on the night of the attack, visibility was poor. But Hutson correctly points out that the *court-martial* could have found that McVay negligently hazarded his ship. Just hours before the attack, McVay received a report that said that the day before, a merchant ship had spotted a periscope in his area.[70] The court-martial could have found him negligent on that fact alone,[71] so the Navy could not overturn the conviction on a factual basis.[72]

Hutson continued that "the proceedings were fair and [McVay was] provided full due process of law."[73] This time, Hutson was wrong. Stanton points out several ways that the trial was not fair: one of the members who sat on the preliminary board of inquiry had a conflict of interest;[74] McVay was given an inexperienced lawyer;[75] he was given only a few days to prepare for trial;[76] and the Navy withheld material evidence from McVay because it was highly classified.[77] Hutson provides some counter arguments (McVay was given counsel, allowed to confront witnesses, and had the opportunity

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[62] STANTON, *supra* not 1, at at 265 (quoting Commander R.D. Scott, a Naval judge advocate who reviewed McVay's case); *see also* Toti, *supra* note 61, at 36.

[63] *See* STANTON, *supra* note 1, at 249-254, 265-67. Judge advocates interested in the details of McVay's court-martial would be better off reading *All the Drowned Sailors*, RAYMOND B. LECH, ALL THE DROWNED SAILORS app. A-L (1982) (containing, among other documents, verbatim transcripts of the Japanese submarine commander, copies of the message traffic between the commands, and briefs and legal opinions associated with McVay's court-martial); *Fatal Voyage*, DAN KURZMAN, FATAL VOYAGE: THE SINKING OF THE USS INDIANAPOLIS (1990); and the report of the 1999 congressional hearing, *The Sinking of the U.S.S. Indianapolis and the Subsequent Court Martial of Rear Adm. Charles B. McVay III, USN: Before the Sen. Arm. Ser. Comm.*, 106th Cong. 70 (1999) [hereinafter Senate Committee Hearing]. In addition to providing more information on the court-martial, both *Fatal Voyage* and *All the Drowned Sailors* expose the risks that the Navy took and the blunders made by Navy personnel while providing compelling narrations of the sailors' time in the water.

[64] STANTON, *supra* note 1, at 72.

[65] *See id.* at 253.

[66] Senate Committee Hearing, *supra* note 63, at 72-74. *Compare* UCMJ art. 92(a)(3) (2000), *with* UCMJ art. 110 (2000).

[67] Senate Committee Hearing, *supra* note 63, at 72-74.

[68] STANTON, *supra* note 1, at 8, 270-73.

[69] *See id.* at 81.

[70] *See id.* at 80; Senate Committee Hearing, *supra* note 64, at 72.

[71] Commander William Toti argues: "[McVay] failed to take 'all necessary measures' to protect his ship. And in our system of responsibility of command, it does not matter whether that action would have been effective—he should have tried." Toti, *supra* note 61, at 37.

[72] Senate Committee Hearing, *supra* note 63, at 74.

[73] *Id.* at 71.

[74] *See* STANTON, *supra* note 1, at 245 (noting that panel member Vice Admiral George Murray's command gave McVay the incomplete intelligence report).

[75] *See id.* at 250.

[76] *See id.* at 249.

[77] *See id.* at 252.

to present evidence);[78] but the call is close enough that Hutson could have gone the other way if his client, the Navy, had wanted to clear McVay. Stanton should have made that point clear.

Considering that the emotional drive of his book is to clear McVay's name, Stanton should have pointed out the elephant in the room: why had the Navy stood by an unjust conviction for fifty years? Why was the Navy's top lawyer arguing before Congress—an audience looking to correct injustice—that McVay's conviction should stand? Did the Secretary of the Navy ever ask the President to unconditionally pardon McVay? Why did Hutson dismiss this option?[79] The lesson for judge advocates is that "a decision can be legally correct and still be unjust."[80] Hutson should have told the Senate committee as much. Judge advocates must spot when "legally correct" does not equal "just," and tell the client—and Congress, when asked—how to make things right.

In Harm's Way deserves a fresh look. Stanton's gripping narrative captures the unbelievable suffering and sacrifice that the Greatest Generation made to preserve America's freedom, and for those unfamiliar with the Indianapolis story, *In Harm's Way* will be incredibly rewarding. While *In Harm's Way* has some flaws, military officers or judge advocates can still pull the essential lessons from the book without much effort. These lessons on human behavior, risk management, and professional courage find new relevance in today's conflicts, where small unit leaders find themselves in stressful combat situations where their decisions can have strategic implications and their knowledge of human behavior must be deep; where the risks associated with potentially catastrophic events are managed by our most senior leaders; and where judge advocates and other government lawyers often find themselves arguing the legally defensible position, rather than the morally correct position.

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[78] Senate Committee Hearing, *supra* note 63, at 71.

[79] At the time, Hutson erroneously argued that full or unconditional presidential pardons do not overturn convictions. *Id.* at 74. *But see Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866):

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and it blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.

[80] STANTON, *supra* note 1, at 265 (quoting Toti, *supra* note 61, at 38).

1. Resident Course Quotas

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

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 non-unit reservists, through the U.S. 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, dial 1, extension 3304.

When requesting a reservation, please have the following information:
TJAGSA Code—181
Course Name—155th Contract Attorneys Course 5F-F10
Course Number—155th Contract Attorneys Course 5F-F10
Class Number—155th Contract Attorneys Course 5F-F10

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

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

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

Course Title	Dates	ATTRS No.
GENERAL		
54th Graduate Course	15 August 05—25 May 06	5-27-C22
167th Basic Course	31 May—23 June 05 (Phase I—Ft. Lee)	5-27-C20
	24 June—1 September 05 (Phase II—TJAGSA)	5-27-C20
168th Basic Course	13 September—6 October 05 (Phase I—Ft. Lee)	5-27-C20
	7 October—15 December 05 (Phase II—TJAGSA)	5-27-C20
169th Basic Course	3—26 January 06 (Phase I—Ft. Lee)	5-27-C20
	27 January—7 April 06 (Phase II—TJAGSA)	5-27-C20
170th Basic Course	30 May—22 June (Phase I—Ft. Lee)	5-27-C20
	23 June—31 August (Phase II—TJAGSA)	5-27-C20
171st Basic Course	12 September 06—TBD (Phase I—Ft. Lee)	5-27-C20
10th Speech Recognition Training	17—28 October 05	512-71DC4

18th Court Reporter Course	1 August—5 October 05	512-27DC5
19th Court Reporter Course	31 January—24 March 06	512-27DC5
20th Court Reporter Course	24 April—23 June 06	512-27DC5
21st Court Reporter Course	31 July—6 October 06	512-27DC5
6th Court Reporting Symposium	31 October—4 November 05	512-27DC6
188th Senior Officers Legal Orientation Course	12—16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14—18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January—3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27—31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12—16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11—15 September 06	5F-F1
12th RC General Officers Legal Orientation Course	25—27 January 06	5F-F3
36th Staff Judge Advocate Course	5—9 June 06	5F-F52
9th Staff Judge Advocate Team Leadership Course	5—7 June 06	5F-F52S
2006 JAOAC (Phase II)	8—20 January 06	5F-F55
37th Methods of Instruction Course	30 May—2 June 06	5F-F70
2005 JAG Annual CLE Workshop	3—7 October 05	5F-JAG
16th Legal Administrators Course	20—24 June 05	7A-270A1
17th Legal Administrators Course	19—23 June 06	7A-270A1
3d Paralegal SGM Training Symposium	6—10 December 2005	512-27D-50
17th Law for Paralegal NCOs Course	27—31 March 06	512-27D/20/30
5th 27D BNCOC	23 July—19 August 05	
6th 27D BNCOC	10 September—9 October 05	
3d 27D ANCOC	24 July—16 August 05	
4th 27D ANCOC	17 September—9 October 05	
12th JA Warrant Officer Basic Course	31 May—24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May—23 June 06	7A-270A0
JA Professional Recruiting Seminar	12—15 July 05	JARC-181
JA Professional Recruiting Seminar	11—14 July 06	JARC-181
6th JA Warrant Officer Advanced Course	11 July—5 August 05	7A-270A2
7th JA Warrant Officer Advanced Course	10 July—4 August 06	7A-270A2

ADMINISTRATIVE AND CIVIL LAW

4th Advanced Federal Labor Relations Course	19—21 October 05	5F-F21
59th Federal Labor Relations Course	17—21 October 05	5F-F22
57th Legal Assistance Course (Estate Planning focus)	31 October—4 November 05	5F-F23
58th Legal Assistance Course (Family Law focus)	15—19 May 06	5F-F23

2005 USAREUR Legal Assistance CLE	17—21 October 05	5F-F23E
30th Admin Law for Military Installations Course	13—17 March 06	5F-F24
2005 USAREUR Administrative Law CLE	12—16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11—14 September 06	5F-F24E
2005 Maxwell AFB Income Tax Course	12—16 December 05	5F-F28
2005 USAREUR Income Tax CLE	5—9 December 05	5F-F28E
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2005 USAREUR Claims Course	28 November—2 December 05	5F-F26E
2006 PACOM Income Tax CLE	9—13 June 2006	5F-F28P
23d Federal Litigation Course	1—5 August 05	5F-F29
24th Federal Litigation Course	31 July—4 August 06	5F-F29
4th Ethics Counselors Course	17—21 April 06	5F-F202
CONTRACT AND FISCAL LAW		
7th Advanced Contract Attorneys Course	20—24 March 06	5F-F103
155th Contract Attorneys Course	25 July—5 August 05	5F-F10
156th Contract Attorneys Course	24 July—4 August 06	5F-F10
7th Contract Litigation Course	20—24 March 06	5F-F102
2005 Government Contract & Fiscal Law Symposium	6—9 December 05	5F-F11
73d Fiscal Law Course	24—28 October 05	5F-F12
74th Fiscal Law Course	24—28 April 06	5F-F12
75th Fiscal Law Course	1—5 May 06	5F-F12
2d Operational Contracting Course	27 February—3 March 06	5F-F13
12th Comptrollers Accreditation Course (Hawaii)	26—30 January 04	5F-F14
13th Comptrollers Accreditation Course (Fort Monmouth)	14—17 June 04	5F-F14
7th Procurement Fraud Course	31 May —2 June 06	5F-F101
2006 USAREUR Contract & Fiscal Law CLE	28—31 March 06	5F-F15E
2006 Maxwell AFB Fiscal Law Course	6—9 February 06	
CRIMINAL LAW		
11th Military Justice Managers Course	22—26 August 05	5F-F31
12th Military Justice Managers Course	21—25 August 06	5F-F31
49th Military Judge Course	24 April—12 May 06	5F-F33
24th Criminal Law Advocacy Course	12—23 September 05	5F-F34
25th Criminal Law Advocacy Course	13—17 March 06	5F-F34

26th Criminal Law Advocacy Course	11—15 September 06	5F-F34
29th Criminal Law New Developments Course	14—17 November 05	5F-F35
2006 USAREUR Criminal Law CLE	9—13 January 06	5F-F35E
INTERNATIONAL AND OPERATIONAL LAW		
5th Domestic Operational Law Course	24—28 October 05	5F-F45
84th Law of War Course	11—15 July 05	5F-F42
85th Law of War Course	30 January—3 February 06	5F-F42
86th Law of War Course	10—14 July 06	5F-F42
44th Operational Law Course	8—19 August 05	5F-F47
45th Operational Law Course	27 February—10 March 06	5F-F47
46th Operational Law Course	7—18 August 06	5F-F47
2004 USAREUR Operational Law Course	29 November—2 December 05	5F-F47E

3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2005 issue of *The Army* Lawyer.

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

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2005***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 ("2006 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

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

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period

Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually

Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

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

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

5 – 6 Nov. 05	Topeka, KS Washburn School of Law	Civil Law Legal Assistance Operational Law Criminal Law	MAJ Fran Brunner (785) 274-1027 Fran.brunner@ks.ngb.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, 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 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 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 DTIC 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 A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

AD A384333	Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

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

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, JA 274 (2002).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 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 (2002).

AD A347157 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 (1997).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (1998).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (1999).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

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 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2003).

* Indicates new publication or revised edition.

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel

assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

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

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

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

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the March 2005 issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

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

6. The Army Law Library Service

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

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

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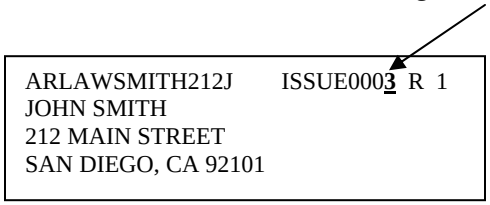

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