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Articles

USALSA Report

U.S. Army Legal Services Agency
Trial Judiciary Note

Book Review

IN MEMORIAM

Corporal Coty James Phelps

16 June 1986 – 17 May 2007

A GREAT FRIEND TO ALL

Ask me why I'm here
Why would I do this?
So far from home
It's so hard to describe
Through words in a poem

Ask me why I'm here
It really doesn't bother me
Go ahead it's fine
Trust me I'm a Soldier
The choice was all mine

Ask me why I'm here
Even sometimes I wonder
Why I'm here in Iraq
Why we sit here awaiting
Some form of attack

Ask me why I'm here
Why should I bother?
We've lost so many brothers
But trust me my friends
There will be plenty of others

Ask me why I'm here
For some it is different
Often in the company of jokes
But the reason is simple
I am here for my folks

-- Poem composed by CPL Coty James Phelps in Iraq, February 2007

In the early afternoon of 17 May 2007, on a dusty stretch of road in South-Central Iraq between Forward Operating Base Kalsu and Forward Operating Base (FOB) Iskandariyah, Corporal (CPL) Coty James Phelps was killed while riding in a combat logistics patrol on his way to assist with a claims mission. His vehicle was struck by an explosively formed penetrator killing him and two other Soldiers in the vehicle. Corporal Phelps died doing his job—both as a Soldier and as a paralegal.

He died at age twenty; a month shy of his twenty-first birthday. A short existence in quantity of years, but a rich life measured in terms of quality and in impact upon those who knew and loved him. He brought tremendous joy and happiness to all those who came in contact with him. This memorial is a tribute to him from those whose lives he touched.

Coty James Phelps was born on 16 June 1986, in Lake Havasu City, Arizona. His family moved to Kingman, Arizona, in January 1993. In high school he was involved in many activities including football and softball.[1] He made the decision to serve his country by joining the Army Delayed Entry Program in February 2004 before graduating from Kingman High School North in May 2004.[2] He formally enlisted in the United States Army on 2 September 2004, in Phoenix, Arizona and graduated from Basic Combat Training and Advanced Individual Training (AIT) at Fort Jackson, South Carolina on 12 November 2004. He then went on to Basic Airborne Training at Fort Benning, Georgia.

During Basic Training and AIT, he first met up with Specialist (SPC) Adam Welch and SPC Aaron Stein—two paralegals who would be soon paired up with him in Alaska and in Iraq. Specialist Welch recalls his initial impression of then Private Phelps as a "fun-loving type of guy" who made friends easily.

Upon completion of Airborne School, he was assigned to the 4th Brigade Combat Team (Airborne), 25th Infantry Division at Fort Richardson, Alaska. On 11 May 2005, he signed into the unit, the second member of the newly forming 4-25 Brigade Operational Law Team (BOLT) to arrive on station. The Brigade would not officially activate until 14 July 2005, but Coty Phelps, whom everyone referred to as simply Phelps, was on the ground and assisting with building an office and a team from scratch.

Phelps immediately gained friends within the BOLT and the Brigade. He became known for his sense of humor, self-effacing attitude, and his enthusiastic love of life. He was everyone's friend in the Brigade largely because he so willingly brought all those he met into his life.

To truly gain an appreciation of Phelps, one had to see him with children. Major Rich DiMeglio, the 4-25 Brigade Judge Advocate, recalls:

> *Phelps was the one adult who at any office party or social, could be found running around and playing tag with all the young kids. Children absolutely adored him—and he was tremendous with them. All of the children in our office instantly gravitated towards him. He was the only adult I ever knew who could physically exhaust a group of young children. I'd often say to Phelps that I would love for him to baby-sit my seven-year-old son—but was fearful of what my house might look like when I returned. I always referred to him as a nine–year-old trapped inside a twenty-year-old body.*

Sergeant Joshua Kramer, a paralegal in the 4-25 BOLT, remembered an evening when he asked Phelps to baby-sit his two younger boys.

> *My wife Trish and I returned to our home later that evening to find Phelps on the floor sound asleep, with one of our boys cuddled up in his right arm sleeping, and our other son in his left arm, also sleeping.*

Chief Warrant Office Three Manny Molina from the U.S. Army Alaska Office of the Staff Judge Advocate, recalls a barbecue that he had at his home that Phelps attended:

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[1] *See* Terry Organ, *Family Mourns Fallen Soldier*, KINGMAN DAILY MINER, May 25, 2007, *available at* http://www.kingmandailyminer.com/main.asp?SectionID=13&subsectionID=18&articleID=12185.

[2] *See War Claims Third Local Son*, TODAY'S NEWS-HERALD, May 21, 2007, *available at* http://www.havasunews.com/articles/2007/05/22/news/news01.txt.

PVT Phelps was shy when I first met him. I took him to the back of my house for some BBQ. The back of my house had a pirate's castle, a Barbie house, and huge swing set. He asked me, "Chief, is it ok for me to play with the kids?" I told him yes. Without hesitation he took off! Coty was a kid at heart, my daughters were just in love with that boy. There was one point during the BBQ where he was piled on by at least ten kids from the neighborhood.

As the BOLT stood up, Phelps was assigned to be the sole paralegal for the 725th Brigade Support Battalion. With nearly 1000 assigned Paratroopers, it was the largest of the six battalions in the Brigade. Despite the enormous mission and workload, he immediately took ownership of his responsibilities and his tasks.

As the months passed, the 4-25 BOLT became a team, both at work and outside the office, as they trained for their pending combat deployment to Iraq. Physical conditioning was an important aspect of their preparation and team building and it was an area where Phelps consistently stood out. He was a great runner and consistently scored a perfect 300 on his Army Physical Fitness Test.

Phelps often took it upon himself to bring humor and levity to the daily garrison office routine. One day in the office at Fort Richardson, a First Sergeant and a senior noncommissioned (NCO) came into the BOLT office concerning a legal issue. Staff Sergeant Kimberly Dant, the BOLT NCO in charge, and Captain Cory Young, the BOLT Trial Counsel, got into a debate with them that was just about to crescendo when Phelps suddenly leapt to his feet and yelled: "You can't handle the truth!" That immediately placed the issue back into its proper perspective and effectively quelled the situation.

In early October 2006, the Paratroopers from 4-25 loaded onto aircraft and headed towards Iraq. Only a little over a year from the day the Spartan Brigade was officially stood up, Phelps and nine other Soldiers from the BOLT were off to a combat zone. During the prior year, Phelps and his teammates had all tirelessly trained in field exercises in the frozen Alaskan tundra in arctic weather and in the heat and humidity of a Joint Readiness Training Center rotation at Fort Polk, Louisiana in August. Phelps was excited about the deployment and ready to do his job in Iraq.

After spending nearly another month preparing in Kuwait, Phelps arrived at FOB Kalsu—a mid-sized FOB south of Baghdad in late October 2006. There, he immediately set to work with the other BOLT paralegals to establish an office. In addition to his assigned duty of handling actions for his battalion, he was eventually given the additional task as the claims specialist. His claims duties required him to assist with the intake and processing of all foreign claims—a duty that necessitated his travel to FOB Iskandariyah every two weeks to handle claims at that FOB. He loved his claims mission, the ability to get off FOB Kalsu, assist claimants, and visit with SPC Stein, who was stationed with his battalion at FOB Iskandariyah.

Captain Sarah Rykowski, who assumed the role of Claims Attorney and Trial Counsel for the BOLT upon her arrival into Iraq in April 2007, had the opportunity to work closely with Phelps on several claims missions. Once, she and Phelps were discussing a claim with two Iraqi women who alleged that the U.S. military was responsible for their husband's deaths.

I had to tell these two Iraqi women that we found no evidence the U.S. military was responsible for their husbands' deaths, and therefore could offer no compensation. "What do we do?" they asked. "We're widows." Everyone was near tears when Phelps took out his wallet and gave them each a $50 bill. I didn't expect that, and it warmed my heart. He was an amazing kid.

In April 2007, indirect fire attacks on FOB Kalsu became nearly a daily routine. The Soldiers became accustomed to spending time in bunkers waiting for the all-clear to sound. A unique culture developed from time spent with others in the bunkers. Captain Matt Dyson, who handled Detention Operations and Legal Assistance for the BOLT at that time, recalls:

Phelps was always great at impersonations. I remember one particular night when Phelps and I were in the office getting ready to call it a day. Phelps was impersonating Dane Cook, a favorite comedian of ours. He knew all the jokes and delivered them as if he had actually written them and performed them a hundred times. Sure enough, just before we were heading out of the office we heard three or four explosions. We made our way to the closest bunker to wait out the attack. While in the bunker Phelps told me that he needed to log more "bunker time." He explained that extended periods of time spent in a bunker was a prerequisite for promotion to sergeant. He made the comment in jest probably to calm my nerves. It worked!

Despite the daily challenges and the demanding work schedules, Phelps still found time to keep in touch with friends and family back in the States. Phelps loved his family dearly and would talk about them often. Phone conversations with his family were coveted in Iraq and every time he would successfully get through to his family he was very happy. In addition to his father Robbie and stepmother Regina, Phelps is survived by an older brother Ryan, a younger brother Robbie, and a younger sister Trisha. On the morning of 17 May 2007, before heading out on his convoy, Phelps was able to get through to his family on the phone and wish Robbie a happy birthday.

Corporal Phelps was a tremendous person, a great Soldier, and a wonderful paralegal. Phelps enjoyed being a paralegal, but he loved being a Soldier. Once, when asked on a questionnaire what his career aspiration was, he listed simply: "to raise a family and retire from the Army." His awards and decorations include the Bronze Star Medal, Purple Heart, National Defense Service Medal, Iraq Campaign Medal, Global War on Terrorism Service Medal, Army Service Ribbon, Overseas Service Ribbon, Combat Action Badge, Basic Marksmanship Qualification Badge, and the Parachutist Badge.

Sergeant Jennifer Brown, a paralegal from the 4-25 BOLT, offers a final reflection:

> *Phelps wasn't only a great Soldier, he was great young man. No matter how bad my day was going, Phelps was there to try to make me laugh and to tell me to just pray about it and leave it to the "Big Guy up there." It cracked me up when I'd walk in the office singing a song, and he would end up singing it all day. Especially when it was a "girly song" as he called it. I really miss him. I pray that I have another Soldier as hard working, witty, and compassionate as he was. Coty James Phelps will be greatly missed. I believe that right now he is in Heaven making all the angels laugh.*

The Threat Assessment Process (TAP): The Evolution of Escalation of Force

Lieutenant Colonel Randall Bagwell[1]

As a warrior, you might one day face the single most difficult task any person will ever have to face: to decide whether to use deadly force and take a life. If you chose to take a life when you should not, or if you fail to take a human life when you should, a world of hurt will come down on you.

This is not an impossible task; it is a hero's task, a warrior's task. It is immensely difficult, but if we did not have men and women willing to walk out the door and face that challenge every day, within a span of a generation our civilization would no longer exist.[2]

Somewhere in Iraq one such hero stands guard at a snap traffic control point (TCP).[3] As fellow members of his squad search vehicles, he scans the road for approaching threats. In the distance, through the dust and heat, he sees a car approaching. It doesn't appear to be slowing down.

The traditional role of escalation of force (EOF) is to help with the proportional application of force in self-defense situations.[4] The basic idea is simple—to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated.[5] It was envisioned to be used in times where there was no actual enemy.[6] Situations where angry civilians who might throw rocks and swing clubs at Soldiers could be calmed down and dispersed, hopefully, without having to resort to deadly force. In short, traditional EOF is a concept best suited for riot control, peacekeeping, and other types of military operations other than war (MOOTW).

How then did EOF find its way on to the counterinsurgency battlefields of Iraq and Afghanistan? In these conflicts, the issue has not been the excessive use of force against low-level threats, but rather the identification of who to use force against in the first place. Simply put, Soldiers were too often misidentifying threats and shooting the wrong people—people who posed no actual threat to them.[7] To address this problem, EOF has evolved into a new role and re-emerged on the counterinsurgency battlefield as a threat assessment tool.[8] In other words, in counterinsurgency EOF is not being used for its traditional purpose of limiting the amount of force used against an identified threat, but rather for the far more difficult task of threat identification. While EOF practices have been successful, EOF for threat assessment has also resulted in confusion as to its purpose and when the process is initiated. To eliminate this confusion, EOF must continue to evolve until it is a separate process whose purpose is to assist Soldiers in determining hostile act and hostile intent. A critical step in this transition is to rename this new threat assessment process to clearly distinguish it from traditional EOF. Threat Assessment Process—or TAP—is an easy to remember and appropriate name for this new threat assessment tool.

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[1] Judge Advocate, U.S. Army. Presently assigned as Chief, Operational Law, First Army, Fort Gillem, Ga. M.A., 2005, U.S. Naval War College; LL.M., 2000, The Judge Advocate General Sch.; J.D., 1990, University of Arkansas School of Law; B.A., 1987, Henderson State University. Previous operational law assignments include Chief, Operational Law, Multi-National Force–Iraq, 2006–2007; Instructor, International Law Division, U.S. Naval War College, 2005–2006; International Law Attorney, International and Operational Law, Office of the Judge Advocate General, 2003–2004; Staff Judge Advocate, Coalition Task Force 82, Afghanistan, 2003; Deputy Staff Judge Advocate, 82d Airborne Division, 2002; and Chief, Operational Law, V Corps, 1992–1994. Previous infantry assignments with the 39th Infantry Brigade, Arkansas National Guard include Company Executive Officer, 1989–1991 and Platoon Leader, 1987–1989. Member of the bars of the Supreme Court, Court of Appeals for the Armed Forces, State of Arkansas, and State of Texas. Contact Lieutenant Colonel (LTC) Bagwell at randall.bagwell@us.army.mil for comments or discussion on this article.

[2] LIEUTENANT COLONEL DAVE GROSSMAN & LOREN W. CHRISTENSEN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE 114 (2004).

[3] Snap TCPs are TCPs which are quickly erected and operate for a short duration of time. *See* Center for Army Lessons Learned (CALL) Escalation of Force (EOF) Conference Packet, Carr Center for Human Rights and PKSOI Workshop, at the John F. Kennedy School of Government, Harvard University, at 15 (26–27 Mar. 2007) [hereinafter CALL EOF Conference Packet].

[4] *See* CENTER FOR ARMY LESSONS LEARNED, PUB. 07-21, ESCALATION OF FORCE HANDBOOK 1 (July 2007) [hereinafter CALL EOF HANDBOOK].

[5] *Id.*

[6] *See* The Judge Advocate General's Legal Ctr. & Sch., Standard Training Package, *Standing Rules of Engagement (SROE)* (20 Nov. 2006) [hereinafter TJAGLCS SROE STP] ("EOF procedures do not apply to Declared Hostile Forces.").

[7] Greg Jaffe, *U.S. Curbs Iraqi Civilians Deaths in Checkpoint, Convoy Incidents*, WALL ST. J., 6 June 2006.

[8] Multi-National Corps–Iraq ROE card (Unclassified) (30 May 2007) [hereinafter MNC-I ROE card] ("2. Escalation of Force (EOF). If time and circumstances permit, use EOF to determine whether hostile act/intent exists.").

Traditional EOF

Prior to the Global War on Terror the thought process on rules of engagement (ROE) was simpler. The standing rules of engagement (SROE) anticipated two scenarios for the armed forces—a state of peace (applying force in self-defense) and a state of war (applying force against an identified declared hostile force).[9] Given the type of missions we expected to conduct in the 1990's, EOF was seen as a useful tool in self-defense situations where there was no declared hostile force or dedicated enemy.[10] The prime concern in those types of operations was to avoid escalating the situation.[11]

One of the most common examples used for traditional EOF is a crowd control situation during peacekeeping operations. The "textbook" traditional EOF scenario often involved a squad of Soldiers manning a checkpoint between two ethnic groups as part of a peacekeeping mission. In the scenario, a visibly angry, but apparently unarmed, crowd approaches the Soldiers shouting at them and throwing rocks. In this type of situation, the squad should use the least amount of force necessary to respond to this low, but possibility escalating, threat.

In a scenario like the one above, traditional EOF was most often applied using the five S's (Shout, Show, Shove, Shoot, Shoot) (Fig. 1).[12] Once the crowd demonstrated hostile intent or a committed hostile act, the squad would shout commands at the crowd to stop their actions and go home. If that failed to stop their threatening actions, the squad would then show their weapons and demonstrate their intent to use them. If that failed to pacify the crowd, the Soldiers would be authorized to shove the crowd back or use other non-lethal means. If this also failed to counter the threat, the Soldiers could then fire a warning shot. Finally, as a last resort having exhausted all other options, the squad could fire shots to eliminate specific threats within the crowd. Most of the ROE that contain the Shout, Show, Shove, Shoot, Shoot provisions also stated that if there was an immediate threat of serious injury or death, Soldiers could defend themselves or others without going through the progressive steps.[13]

Traditional EOF Process[14]

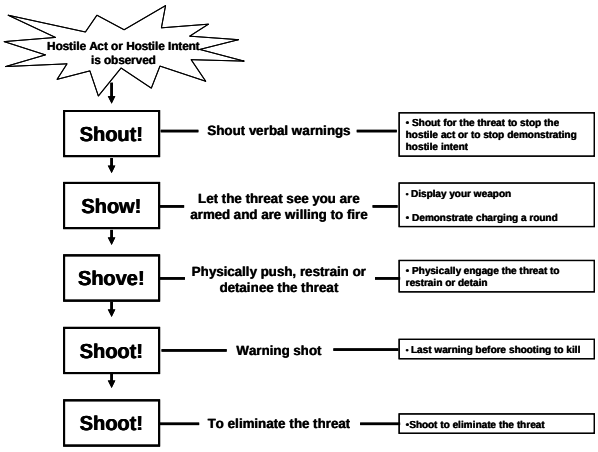

Fig. 1.

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[9] *See* JOINT CHIEFS STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES encl. A (13 June 2005) [hereinafter CJCSI 3121.01B]. The CJCSI 3121.01B actually allows ROE to be tailored for specific missions from restrictive self-defense based rules for peacetime and traditional peacekeeping operations, to the declaration of hostile forces during war. Though ROE can be tailored to fit between those two ends of the spectrum, ROE are still based on two paradigms: self-defense and declared hostile forces.

[10] TJAGLCS SROE STP, *supra* note 6, slide 23; *see also* Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, but Also* Trained, ARMY LAW., Sept./Oct. 2001, at 1; U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (14 June 2001) (this version superseded on 27 Feb. 2008).

[11] CJCSI 3121.01B, *supra* note 9, A-4.a.(1) ("When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions.").

[12] *See* ARCENT RUF card (unclassified) (7 July 2007) [hereinafter ARCENT RUF Card]. Used by U.S. Forces in Kuwait, it is an example of both the traditional EOF process and a mission where this type of EOF might be appropriate.

[13] TJAGLCS SROE STP, *supra* note 6, slide 24.

[14] *See* ARCENT RUF Card, *supra* note 12.

As the vehicle approaches, the Soldier at the snap TCP applies the rules of traditional EOF. Under these rules, he must wait until he has identified the driver of the vehicle as committing a hostile act or demonstrating hostile intent before he starts the EOF process. Traditional EOF offers no assistance in making the critical threshold decision—is the driver exhibiting hostile intent. It is only after the Soldier has determined the driver is a threat that the traditional EOF process can begin.

Traditional EOF Becomes Threat Assessment EOF in Counterinsurgency

Applying traditional EOF in Iraq and Afghanistan is problematic to say the least. The current conflicts in these countries are not peacekeeping operations. While we are not fighting high-intensity, conventional conflicts, we are fighting counterinsurgency campaigns against real and determined enemies. Make no mistake—counterinsurgency is war.[15] The issue in counterinsurgency is not that we lack a designated enemy—the issue is we cannot tell the enemy from the innocent civilian.[16] The enemy in counterinsurgency is cloaked in the invisibility of the innocent civilians around him. He wears no uniform, he has no distinguishing characteristics, and he looks like every other civilian a Soldier encounters. If he is identified, he is likely killed or captured. Unlike in peacekeeping operations, in counterinsurgency campaigns we seek to engage the enemy.[17] Escalation of force procedures that encourage the enemy to disperse only to fight another day are both counterproductive and unacceptable.

Equally unacceptable was the high rate of civilian casualties suffered in Operation Iraq Freedom during the spring and summer of 2005, with many of these casualties occurring at checkpoints and during convoy operations.[18] In an effort to reduce civilian casualties, traditional EOF procedures were implemented in the Iraq theater of operations with a new purpose—to serve as a tool for threat assessment.[19] The impact was immediate and substantial as the number of civilian casualties dropped dramatically.[20] Interestingly, this decrease did not occur because Soldiers were using less force on civilians who presented actual threats. Rather by using EOF procedures to assess potential threats, Soldiers realized that the majority of the civilians they encountered posed no threat.

Threat identification is one of the major complaints Soldiers in Iraq and Afghanistan have with the ROE.[21] While the ROE tell them who they can use force against, they do not identify what those people look like. Unfortunately, when insurgents deliberately disguise themselves as civilians, ROE can never describe how to identify them. Instead, the ROE tells Soldiers that they can identify threatening individuals based on their conduct. The current Multi-National Corps – Iraq ROE card states that Soldiers "may engage the following individuals based on their conduct: persons who are committing hostile acts [and] persons who are exhibiting hostile intent."[22] It also tells them that EOF is now used for threat identification, "use EOF to determine whether hostile act/intent exists."[23] However, the ROE makes clear that if a hostile act or hostile intent is obvious, Soldiers may immediately engage with force to stop the threat.[24]

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[15] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-28 (15 Dec. 2006) [hereinafter FM 3-24] ("Coin is an extremely complex form of warfare.").

[16] *Id.* at 1-28, 7-7, D-3.

[17] *Id.* at 1-23, 1-25, 7-6; *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS VI-5 (10 Sept. 2001) [hereinafter JOINT PUB. 3-0]. In peace *keeping* operations, U.S. Forces generally monitor and facilitate the implementation of a peace agreement with the consent of the parties. In peace *enforcement* operations, U.S. Forces may use force to compel compliance, restore peace and order, or forcibly separate parties. *Id.* at VI-6. However, neither peace keeping operations nor peace enforcement operations include the active seeking and destroying of enemy fighters. *Id*. at VI-5, VI-6.

[18] Nancy Montgomery, *U.S. Seeks to Reduce Civilian Deaths at Iraq Checkpoints*, STARS & STRIPES, Apr. 6, 2006; Thom Shanker, *New Guidelines are Reducing Iraqi Civilian Deaths, Military Says*, N.Y. TIMES, June 22, 2006; Jaffe, *supra* note 7.

[19] Telephone Interview with Lieutenant Colonel Michael L. Kramer, Chief of Operational Law, MNC–I, during 2005, in Newport, RI (Dec. 17, 2007). The MNC–I Operations section drafted and implemented new guidance on EOF in 2005. *Id.* Until this point in OIF, EOF had not been stressed, presumably due to the transition from high intensity conflict to counter-insurgency. *Id.*

[20] Shanker, *supra* note 18; Jaffe, *supra* note 7.

[21] *See, e.g.*, Joshua Partlow, *Waiting to Get Blown Up*, WASH. POST, July 27, 2006, at A1.

[22] MNC–I ROE card, *supra* note 8 ("1. You may engage the following individuals based on their conduct: persons who are committing hostile acts [and] persons who are exhibiting hostile intent."). Soldiers still have to be trained that not all individuals committing a hostile act or demonstrating hostile intent are the enemy. The reaction of the Soldier will depend on what type of threat the person poses.

[23] *Id.* ("2. Escalation of Force (EOF). If time and circumstances permit, use EOF to determine whether hostile act/intent exists.").

[24] *Id.* ("When a hostile act or hostile intent is obvious, you may immediately engage with force to stop the threat.").

In this role, EOF is not used for its traditional purpose of applying proportional force to deescalate or disperse an already identified threat, but instead is used as a method to assess potential threats. The goal in this new "threat assessment EOF" is to force the insurgent to self-identify while keeping innocent civilians from being mistaken for threats.[25] This approach works primarily because it uses non-force measures to put potential threats into situations where they must either comply with or disobey the Soldiers' commands.[26]

Despite its successes, threat assessment EOF has resulted in confusion, frustration, and anger on the part of some Soldiers.[27] The source of this confusion is the conflict between traditional EOF and threat assessment EOF concerning the purpose of EOF and initiation of the EOF process. Since the purpose of traditional EOF is the proportional application of force, it follows that traditional EOF is only initiated after a Soldier recognizes a hostile act or hostile intent. Threat assessment EOF has a different purpose—to assess suspicious individuals to determine if they have hostile intent. However, even though EOF is now being used for threat assessment, Soldiers are still being trained to wait to initiate the EOF process until they recognize a hostile act or hostile intent. Confusingly, at the same time, they are also being told to use EOF to determine if hostile act or hostile intent exists.[28]

Contributing to this confusion is the fact that no formal, universal definition of EOF exists within the Army doctrinal structure. The Army Center for Lessons Learned Publication 07-21, *Escalation of Force Handbook*, defines EOF as "sequential actions that begin with nonlethal force measures (visual signals to include flags, spotlights, lasers, and pyrotechnics) and may graduate to lethal measures (direct action) to include warning, disabling, or deadly shots to *defeat a threat* and protect the force."[29] In a recently posted training support package accessed through the U.S. Army's Judge Advocate General's Legal Center and School website, EOF is defined as the "use of lesser means of force when such use is likely to achieve the desired effects without endangering the Soldier or others."[30] Escalation of force is also defined in Army Field Manual 3-24 as "using lesser means of force when such use is likely to achieve the desired effects and Soldiers and Marines can do so without endangering themselves, others, or mission accomplishment."[31] In all of these definitions, the EOF process is triggered in response to a demonstrated hostile act or hostile intent and continues with force of ever increasing magnitude being applied.[32] None of the definitions account for the current use of the EOF process—to determine if a hostile act or hostile intent exists.

A conference packet assembled by the Center for Army Lessons Learned (CALL) after a March 2007 EOF workshop captures this confusion in one sentence: "However, if the driver refuses to obey *instructions and warnings*, but has not yet displayed *overt* hostile intent, Soldiers must *begin to consider* appropriate EOF measures."[33] This sentence would confuse most Soldiers. It begins by assuming the Soldiers have already initiated EOF, otherwise they would not have issued instructions and warnings, which are part of both the traditional and threat assessment EOF processes. It then continues by telling the Soldiers that if the warnings do not work they must "consider" initiating EOF. To further add to the confusion, it tells Soldiers that they should only do so if the driver has not yet displayed "overt" hostile intent. The document does not explain the difference between "ordinary" hostile intent and "overt" hostile intent, or explain how a Soldier is to know the difference.

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[25] CALL EOF Conference Packet, *supra* note 3, at 3, 7.

[26] *Id.*

[27] Gordon Dillow, *Dillow's Iraq; 'Rules' of War Limit Marines*, ORANGE COUNTY REG., Aug. 20, 2006; Jeffrey Barnett, *Frustration Likely Led to Marine Crisis in Haditha*, BIRMINGHAM NEWS, June 11, 2006; Bill Gertz, *Inside the Ring: Rules of Engagement*, WASH. TIMES, Feb. 16, 2007; James Lyons, *Untie Military Hands*, WASH. TIMES, Jan. 26, 2007.

[28] MNC–I ROE card, *supra* note 8.

[29] CALL EOF HANDBOOK, *supra* note 4, at 1 (emphasis added).

[30] TJAGLCS SROE STP, *supra* note 6, slide 22.

[31] FM 3-24, *supra* note 15, para. 1-142.

[32] *Id.* slide 24 ("[Y]ou may use the following escalation of force in response to hostile and/or the display of hostile intent.").

[33] CALL EOF HANDBOOK, *supra* note 4, at 3 (emphasis added).

The term "perceived" hostile intent, which has recently appeared in threat assessment EOF, adds yet another source of confusion.[34] It is used to overcome the fact that traditional EOF only begins once a hostile act or hostile intent has been identified. In attempting to create a lower threshold for initiating EOF, the users of the terms "perceived" and "overt" hostile intent have instead created further uncertainty for Soldiers who must now decide between perceived, overt, or ordinary hostile acts or hostile intent.

This conflict is evident in the threat assessment EOF diagram at Figure 2. In this diagram, Soldiers are told to initiate EOF when a hostile act or hostile intent is observed or perceived. They are then told to "Shout, Shock, and Show," none of which involve the actual use force. These non-force measures are intended to get the attention of, and to warn, possible threatening individuals to desist and depart. If "Show" fails to work Soldiers are then instructed to make a "split second observation and re-evaluate the threat."[35] In other words, at this point in the process, the Soldier must decide "for real" if the person is actually committing a hostile act or demonstrating hostile intent before the Soldier progresses to the next step, "Shoot."

Threat Assessment EOF Process[36]

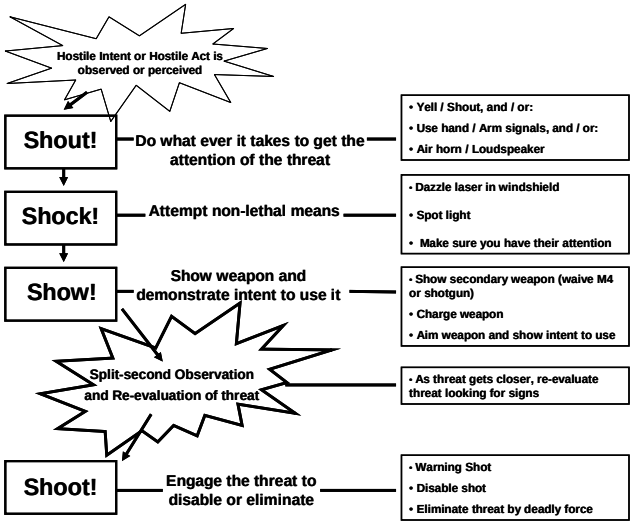

Fig. 2.

As long as we continue to struggle to identify faceless enemies, threat assessment EOF will be required. Traditional EOF will also be necessary for use in crowd control and peacekeeping operations. Much of the confusion between these two separate and distinct EOF processes could be avoided if these were known by two separate and distinct names. Threat assessment EOF is a new process with a new purpose and should be renamed to reflect its new role. "Threat Assessment Process" (TAP) is both a simple and appropriate name and it is also easy for Soldiers to remember—"when you see a potential threat, TAP it."

A separate name makes even more sense given that TAP is neither escalation nor force. It is not a progression of sequential force measures, rather it is a menu of tactics, techniques, and procedures (TTPs) that a Soldier can apply to a potential threat to determine if it is in fact an actual threat. These TTPs can be used in any number of combinations and sequences depending on the circumstances of the particular situation. Using the term "escalation" incorrectly gives Soldiers the impression that the measures must be used in a predetermined sequence and that there is a trigger that sends them from one measure to the next. This creates a potentially disastrous "try and fail before you can advance" mentality. Also, TAP is not force because TAP ends when the potential threat departs the area, is satisfactorily identified as non-threatening, or is

[34] CALL EOF Conference Packet, *supra* note 3, at 10, 32; *see also* Task Force Phoenix EOF Training Presentation (8 Oct. 2007) [hereinafter TF Phoenix OEF Training Presentation] (on file with author) (given to Soldiers upon their arrival at TF Phoenix in Afghanistan). Initiate EOF when hostile act or hostile intent is observed or perceived.

[35] TF Phoenix EOF Training Presentation, *supra* note 34.

[36] *See id.* Figure 2 is based on a diagram in a slide presentation used by TF Phoenix in Afghanistan to teach EOF.

identified as a threat. Waving a flag, shouting at someone, using signs, aiming lasers, or shining spotlights is not force. Under TAP, force is only used after TAP has ended by identifying an individual as a threat.

> As the vehicle approaches, the Soldier manning the snap TCP applies the rules of threat assessment EOF to help him determine if the approaching driver is a threat. He recalls from training that before he initiates any EOF measures he must first observe or perceive the driver committing a hostile act or demonstrating hostile intent. Unfortunately, it is left to the Soldier to figure out what is a "perceived" hostile act or hostile intent before he can start the EOF process.

Threat Assessment EOF Should Become TAP

A separate threat assessment procedure will eliminate confusion and allow Soldiers to accurately assess potential threats. This final step in the evolution of EOF procedures will not require major change as it builds upon the significant progress already made by the threat assessment EOF. Threat assessment EOF has proven to be successful because it accomplishes three things—it gets the attention of people who are potential threats; it communicates to these people what they need to do to avoid the use of force being used against them; and it provides time for Soldiers to make an informed threat decision. It accomplishes this while still maintaining standoff distance for identified threats to be safely engaged. The TAP adopts and builds on these three areas of success.

In Soldier training terms, TAP equals Attention, Communicate, and Decide. Remembering three things—attention, communicate, and decide—is easy enough for most Soldiers to do. Soldiers and trainers must keep this framework simple and not get lost in the specifics of how to complete the three parts. Available equipment, TTPs, and the overall situation will be constantly changing. As new equipment becomes available and situations and missions evolve, new TTPs can be specifically tailored. During generic The Army School System (TASS) training and unit home-station training, Soldiers can be taught that the three basic components are of primary concern, and that specific TTPs to implement those components are less significant as they will be constantly evolving.

Threat Assessment Process (TAP) [37]

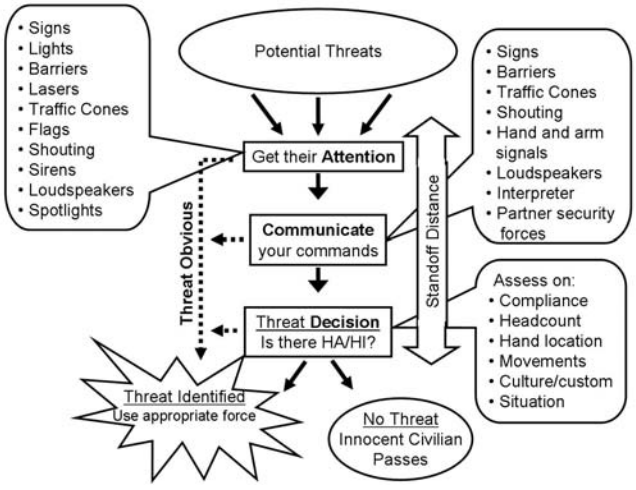

Fig. 3.

[37] This diagram is not intended to be a TAP Soldier card. It is intended only as an illustration of the TAP process.

Initiate TAP

As a foundational point, Soldiers must understand that a potential threat is different than an actual threat. A vehicle approaching a checkpoint is a potential threat, but not all vehicles approaching checkpoints are actual threats. The same is true for the people; most will be innocent civilians, but a few will be threats.[38] The distance between the potential threat and the Soldier is the deciding factor for initiating TAP. As long as the Soldier feels there is sufficient distance[39] between him and the potential threat, no further steps are taken aside from continued monitoring. Once the potential threat closes to a distance where it causes the Soldier to feel even the slightest suspicion, TAP can be initiated. A Soldier does not have to wait until he sees any type of hostile act or hostile intent—perceived, overt, or ordinary. Since the initiating act in TAP is only getting the potential threat's attention, the Soldiers or the civilians are never hurt by initiating the TAP process. The triggering event is one of the main distinctions between threat assessment EOF and TAP. Threat assessment EOF is triggered by the recognition of a hostile act or hostile intent.[40] TAP is triggered by the approach of a potential threat.

Get Their Attention

Once TAP has been triggered, the Soldier must get the attention of the potential threat. A Soldier may use both active and passive measures to get the potential threat's attention. Passive measures include things such as signs, cones, lights, and barriers. Active measures include shouting, sirens, lasers, loudspeakers, spotlights, flags, and displaying the intent to use weapons. There is no sequence that dictates how these measures are to be employed.[41] Specific measures and the order of employment are entirely dependent upon the circumstances of the particular situation. The critical point is that the Soldier take some action that gets the attention of the potential threat as the outcome of the threat decision will depend heavily on the Soldier knowing that the potential threat was aware of the Soldier and chose to ignore his warnings and instructions. A primary benefit of TAP is that it gets the attention of innocent, but inattentive, people.[42]

Communicate Your Commands

Now that the Soldier has the attention of the potential threat, he must effectively communicate what the person must do to avoid a potentially deadly force confrontation. The person's reaction to these commands will play a significant role in the Soldier's threat decision.[43] It is the failure of this critical step that has often resulted in innocent civilians being misidentified as threats.

When a person, either on foot or in a vehicle, approaches a U.S. checkpoint, the Soldiers manning that checkpoint have specific actions that they want an approaching person to take. They must be trained and equipped with the means to effectively communicate these specific actions to the person approaching. Some of the most effective methods of communication in checkpoint situations have been signs, lights, and barriers.[44] Used effectively these measures can help get the person's attention as well as inform them of what actions they are to take to avoid the use of force. Signs in their native language let people know what is expected of them; lights help them read the signs at night and draw attention to the checkpoint; and barriers channel them to proceed in a desired direction. These measures, along with hand and arm signals and simple native language voice commands, have proven to be effective means of communication in many situations.[45]

Communication becomes even more difficult in convoy situations. While many military vehicles have signs instructing other motorists to "stay back 100 meters,"[46] these signs have proven to be ineffective in some areas and unrealistic in high

[38] CALL EOF Conference Packet, *supra* note 3, at 2.

[39] "Sufficient" distance is determined by a host of factors, including friendly TTPs, enemy TTPs and the Soldier's "gut" feelings.

[40] TJAGLCS SROE STP, *supra*, note 6, slide 24.

[41] Unit specific TTPs may dictate a preferred sequence to employ certain measures at the unit level.

[42] CALL EOF Conference Packet, *supra* note 3, at 2.

[43] *Id.* at 5.

[44] *Id.*

[45] *Id.*

[46] Alex Kingsbury, Street Scenes in Baghdad: A Reporter's Notebook, U.S. NEWS & WORLD REP., Mar. 20, 2007, http://www.usnews.com/usnews/news/articles/070320/20greenzone.htm. The use of the "Stay back 100 meter" signs on MNF-I vehicles is so common that the phase is now sold on T-shirts and coffee mugs in the International Zone in Baghdad, Iraq and on the internet. *Id.*

traffic areas such as Baghdad. Additionally, these signs only address potential threats that approach from the rear of the convoy. They do not address vehicles that approach the convoy from the front or sides. Other measures currently used to communicate with approaching vehicles include hand and arm signals, loudspeakers, lasers, flags, and in some cases, warning shots.

Make the Threat Decision

The ultimate purpose for conducting TAP is the threat decision. The threat decision depends on the independent and sound judgment of the Soldier and is not based on completing rote steps in a process. The Attention and Communication steps, while important, merely provide information, which along with other information will be used to make the threat decision.[47] If a Soldier is unable to get the potential threat's attention or is unable to effectively communicate with the potential threat, the Soldier must make a threat decision. The inability to gain the potential threat's attention and communicate with him is not dispositive, but it provides the Soldier with important information to assist in making an informed threat decision.

An infinite number of factors shape the threat decision. It is impossible to list all the possible decision factors; however, several common factors have emerged from the current conflicts. If the potential threat understands the commands, lack of compliance with the Soldier's commands is a significant indicator of hostile intent.[48] Another good indicator has been the location of the potential threat's hands as most hostile actions are initiated by the hands.[49] The fact that a potential threat keeps his hands from a Soldier's view can be an indication of his hostile intent.[50] Maneuvering by a potential threat that seems to be designed to gain a tactical advantage is also an indictor of hostile intent.[51] In vehicle situations, head counting has proven a valuable indicator as almost all vehicle born suicide bombers travel alone.[52] Multiple people present in a vehicle, and especially children, is a good indicator that the vehicle is not a threat.

Many Soldiers have also reported what they can only categorize as strange or weird behavior on the part of potential threats. General nervousness, excessive sweating, and shifty eyes, can all be contributing factors in making a threat decision. While no factor standing alone can be dispositive of hostile intent, all factors contribute to the totality of the circumstances that go into the threat decision. Predeployment training based on current, theater specific scenarios is necessary to inform Soldiers of threat indicators they will likely encounter on their arrival in theater.[53]

The standard for determining whether a person constitutes a threat is objective.[54] Would a reasonable Soldier under similar circumstances believe the person was committing a hostile act or demonstrating hostile intent?[55] "Similar circumstances" takes into account, among other things, the training and experience of the Soldier as well as the often split-second and chaotic nature under which the threat decision is made. Additionally, this standard allows for a reasonable mistake on the part of the Solider. If the totality of the circumstances is such that a reasonable Soldier under similar circumstances would have also determined a threat existed, the Soldier is justified in using force, even if a post-incident examination determines the individual actually posed no threat. This position has been backed up by the words and actions of our most senior military leaders.[56]

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[47] This is not to diminish the significance attention and communication play in warning off innocent civilians. Attention and communication play a two part role of providing warning to civilians and providing information for the threat decision.

[48] CALL EOF Conference Packet, *supra* note 3, at 3; *see also* UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF AND OTHERS 138 (2005).

[49] PATRICK & HALL, *supra* note 48, at 139.

[50] Martins, *supra* note 10, at 8.

[51] PATRICK & HALL, *supra* note 51, at 139.

[52] Montgomery, *supra* note 18 ("Counting heads in a vehicle—few, if any suicide car bombers have contained more than one person in the vehicle—is just one of the things [Lieutenant General] Chiarelli [MNC-I Commander] wants soldiers to do").

[53] *Cf.* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 4.18c(4) (3 Aug. 2007).

[54] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(e) (2008) [hereinafter MCM].

[55] *Id.*

[56] *See* MULTI-NATIONAL FORCE–IRAQ, FRAGMENTARY ORDER 06-481, MOD 1, MNF-I ESCALATION OF FORCE POLICIES AND TTPS STRATEGIC DIRECTIVE (4 Mar. 2007) (Unclassified) ("No one may issue supplementary guidance that forecloses the judgment of an individual facing a split-second and

Four additional points shape TAP. First, TAP is a continuous process. Beginning when a potential threat approaches, TAP ends when the potential threat departs the area, is satisfactorily identified as non-threatening, or is identified as a threat. Until one of these three outcomes occurs, TAP remains an ongoing process.

Second, in many situations the three components of TAP will occur simultaneously. For example, when a Soldier shouts at an approaching person to halt, he may be simultaneously getting the persons attention, communicating a command, and making a threat decision based on the person's response. Whether these actions happen consecutively or simultaneously will depend on the situation and the speed in which the incident occurs. Training should stress that TAP is not a step-by-step process.

Third, since TAP is a tool for threat assessment, if a threat is obvious there is no need to use TAP. The threat may be obvious before starting TAP or may become obvious at some point in the process. Regardless, once a threat is identified, TAP stops and appropriate force may be used against the threat.

Lastly, for Soldiers to effectively employ TAP, the process must allow for sufficient standoff distance to safely engage individuals identified as actual threats. In TAP, distance equals time. Time to get a potential threat's attention; time to communicate to a potential threat what he must do to avoid force being used; time to continually assess the situation as attention and communication measures are applied; and time to engage an actual threat if necessary.[57] Most ROE issues can be eliminated before they arise if proper tactics are used. Proper tactics result in both distance and time.[58] Improperly applied tactics result in the potential threat getting too close to allow time for the threat assessment process work. When there is no time to evaluate and react, Soldiers often feel they have no option but to treat the person as a threat and engage.[59]

TAP Has Identified a Threat—How Much Force Can Be Used?

Judgment–Based-Force Application

The TAP ends when the potential threat departs the area, is satisfactorily identified as non-threatening, or is identified as a threat. The first two of these events require no force to be used, but if a threat is identified, proportionate force may be used. Fortunately, the outcome of the TAP threat decision produces more than just a determination of threat or no threat. It also simultaneously reveals the degree of threat the person presents. Any time a Soldier assesses a potential threat, he instinctively calculates the seriousness of the harm that threat could do. The result is a two part outcome to the threat decision—is there a threat and if so, to what degree. When a Soldier knows the degree of threat he is facing, he can then select an appropriate level of force to counter that threat allowing for judgment-based-force-application.

Judgment-based-force application is an alternative to traditional EOF as a method to proportionally apply force. While traditional EOF generally necessitates trying and failing with lesser means of force, judgment-based-force application allows Soldiers to immediately use a degree of force appropriate to defeat the degree of threat presented.[60] Traditional EOF ignores the fact that in many use-of-force situations a Soldier will only get one opportunity to use force. In many cases there will not be time to try, fail, and try again; and the price of failure is often severe. Judgment-based-force application is similar to traditional EOF in that Soldiers are provided with a variety of force options of greater and lesser magnitude. The difference is that rather than requiring a sequential progression through force options of increasing magnitude until they hit upon one that works, in judgment-based-force application Soldiers are allowed to immediately select one that is in their judgment

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independent decision whether to engage a threat. Your chain of command will stand with you"); *see also* Memorandum, Lieutenant General Raymond T. Odierno, Headquarters, Multi-National Corps–Iraq. Baghdad, Iraq, to All Members of the Multi-National Corps–Iraq, subject: Warrior's Edge (15 Feb. 2007) (Unclassified) ("The split-second decision on when and how to eliminate a threat is a matter of sound judgment left to individual troopers, leaders, and commanders.").

[57] CALL EOF Conference Packet, *supra* note 3, at 4; *see also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 92 (2007) ("Properly used, EOF measures allow Soldiers more time and better information with which to make use of force decisions.").

[58] CALL EOF Conference Packet, *supra* note 3, at 4 ("Lessons learned from OIF reveal that the more control measures and barrier equipment at a TCP, the more time a Soldier has to make an EOF decision. More time often results in enhanced situational awareness, which may lessen the requirement to escalate to higher levels of force.").

[59] *Id.* at 4, 15.

[60] While most traditional EOF procedures use terms such as "if possible," "if time and circumstances permit," or the phrase "if there was an immediate threat of serious injury or death, you may defend yourself or others without going through the progressive steps" when discussing how much force to use, the very name "Escalation of Force" implies a try, fail, and try again approach to force application.

appropriate to the threat presented. With judgment-based-force application, the Soldier selects from a pool of force options an amount of force he believes is appropriate to counter the threat present. Judgment-based-force application creates a significantly different mindset for Soldiers. This builds trust and confidence between the Soldiers and their leaders by recognizing that Soldiers have the common sense and combat experience to make sound judgment-based decisions.

To illustrate judgment-based-force application, consider a Soldier who is faced with the possibility of varying degrees threats represented in this example by a Phillips screw, a flathead screw, and a nail. He is given force options of a Phillips screwdriver, a flathead screwdriver, and a hammer. If during the TAP process the Soldier recognizes a Phillips screw, he should use his judgment to select the Phillips screwdriver as the most appropriate force option. Both the flathead screwdriver and the hammer will probably work, but both will cause more damage than he would like. If on the other hand the TAP reveals the threat as a flathead screw, judgment-based-force application allows the Soldier to use his judgment to immediately select the flathead screwdriver as the appropriate level of force without having to try and fail with the Phillips screwdriver. Judgment-based-force application also allows the soldier to know that based on the degree of threat presented by the flathead screw, a hammer is not appropriate.

What Is Appropriate Force?

The phrase "appropriate force" is significantly different than the phrase "minimum force" which often appears in ROE.[61] Minimum force implies there is a known, precise, and absolute amount of force necessary to counter a particular threat. It implies reward for erring on the side of using too little force and punishment for using even slightly too much force. Unfortunately, force is most often applied as a result of a split-second decision made amidst chaos and confusion—conditions far from precise and absolute. The phrase "appropriate force" captures the approximate nature inherent in all force application, while still incorporating the concept of proportionality. It further reinforces judgment-based-force application as the word "appropriate" inherently implies an exercise of judgment, while still providing for right and wrong limits.

The authority to exercise judgment always comes with accountability and responsibility. The decision on how much force is appropriate is no exception; however, the latitude to decide what degree of force is appropriate for a specific threat is very broad.[62] Ensuring that Soldiers understand this point is critical to maintaining their confidence in their leaders and in the ROE. Soldiers must know that their leaders understand there is no precise formula for applying force. Out of necessity, the decision of how much force to use is an educated guess often made in an instant with incomplete information and limited force options. Training, commander's intent, available intelligence, experience, ethics, and values all contribute to the information supporting this "educated guess."

Despite this latitude, Soldiers can be held accountable for using excessive force. A Soldier is allowed to use the amount of force that in his judgment,[63] is required to respond decisively to the degree of threat presented.[64] "Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required" to respond decisively and to dissuade further hostile acts or demonstrations of hostile intent.[65] The language "respond decisively" sets the outer limit on what amount of force is appropriate. It is clear from this language, that the range of what is "appropriate force" is very broad. This means that a Soldier's decision on the degree of force to use will not be judged on information learned after the incident indicating that less force could have sufficed, but will instead take into account the individual circumstances of that particular Soldier when the decision on what degree of force to use was made.

Despite such a broad continuum of allowable force, Soldiers must still exercise great discretion. Sound judgment involves knowing more than just the limits of the law. It requires consideration of all available factors. Soldiers must ask not only "are their actions legal", but also "are their actions the right thing to do?" Sound judgment is grounded in personal values, forged in training, and guided by commander's intent. Training in this area includes teaching that in

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[61] *See* MNC–I ROE card, *supra*, note 8. A fact not lost on the MNC–I ROE Card, which does not have the phrase "minimum force" on it.

[62] *See*, CJCSI 3121.01B, *supra* note 9, at A.4.a(3).

[63] MCM, *supra* note 54, R.C.M. 916(e)(1)(B). "The test for [believing that the force used was necessary] is entirely subjective." *Id.* R.C.M. 916(e) discussion.

[64] *See* CJCSI 3121.01B, *supra* note 9, at A.4.a(3).

[65] *Id.*

counterinsurgency, sometimes the appropriate amount of force might be no force at all.[66] Army Field Manual 3-24, *Counterinsurgency*, lists several paradoxes of counterinsurgency that Soldiers must understand.[67]

- Sometimes, the more you protect your force, the less secure you may be.
- Sometimes, the more force is used, the less effective it is.
- The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.
- Sometimes doing nothing is the best reaction.[68]

These statements are paradoxes because they contradict what many Soldiers believe to be common sense. That is the belief that if they see a threat, they should immediately shoot to eliminate it. Training in TAP and in the fundamentals of counterinsurgency can provide Soldiers with the tools necessary to assess the degree of threat against this backdrop. Counterinsurgency is a thinking Soldier's war requiring an understanding of tactical patience and restraint.[69] With sufficient training Soldiers can identify a threat, determine the degree of harm it presents, and select an appropriate amount of force to counter the threat while accounting for the complexities of counterinsurgency warfare. Currently in Iraq and Afghanistan, Soldiers are forced to make these types of decision hundreds of times everyday. The TAP and judgment-based-force application will empower them to make these decisions confidently and with greater accuracy and effectiveness.

> As the vehicle approaches, the Soldier manning the snap TCP applies the rules of TAP. Since the vehicle is approaching in such a manner to raise the suspicions of the Soldier, he immediate starts TAP by attempting to get the attention of the driver and communicating what the driver needs to do as he approaches the TCP. Knowing that he can start TAP at any point, without first having to determine the driver to be a threat, provides him information, time, and confidence to make an informed threat decision. If he decides the approaching vehicle is a threat, he can then use judgment-based-force application to select an appropriate amount of force to counter the threat. Depending on time and available equipment, he might select spike strips, disabling fire, or shooting to kill the driver. Fortunately in this case, the driver sees the Soldier, slows his vehicle, and complies with the commands of the Soldier. The Soldier determines that the driver is not a threat and no force is used.

Conclusion

Traditional EOF has evolved to provide a much needed tool for threat assessment. However, this new role of EOF is often confused and comingled with its traditional role as a guide to the application of proportional force against identified threats. Subsequently, this confusion has resulted in conflicting guidance to Soldiers in EOF training breeding frustration and distrust.[70] It starts when Soldiers are told that EOF begins when they witness hostile intent or hostile acts. To stay true to this requirement, Soldiers would have to believe that almost every civilian they encounter is demonstrating hostile intent before they as much as waive a flag, shine a laser, or shout a command. Experienced Soldiers know that it is unrealistic to wait until a person has committed a hostile act or demonstrated hostile intent before implementing non-force EOF measures. To protect both Soldiers and civilians the process must start much sooner. Attempting to correct this problem by using the term "perceived hostile act or intent" only adds to the confusion. If taught to correctly use TAP, Soldiers can understand and appreciate the new threat assessment tool they have been given.

Admittedly, the introduction of a new concept during existing conflicts will be challenging, but it has been done before and can successfully be done with TAP.[71] A relatively smooth transition is possible as we are not introducing a completely new concept, but rather clarifying and legitimizing a process Soldiers are already using. Soldiers are already using TAP; they have just been calling it EOF. The transition could begin with the senior commands in Iraq and Afghanistan embracing this new methodology. Once accepted, the training of deploying units on TAP and the issuing of revised Soldier ROE cards can

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[66] FM 3-24, *supra* note 15, at 1-27.

[67] *Id.* at 1-26.

[68] *Id.* at 1-26 to 1-28.

[69] *Id.* at 5-12; *see also* CALL EOF Conference Packet, *supra* note 3, at 3, 6.

[70] Based on multiple discussions by the author with Soldiers training for deployment to OIF and OEF.

[71] In the early phase of the OEF in Afghanistan, U.S. ROE required to identify targets as "Likely and Identifiable Threats" (LIT). That terminology has since changed to require targets to be "Positively Identified" (PID).

be accomplished as these units rotate into theater. Units with substantial time left in theater can be retrained on TAP. Units that will shortly rotate out of theater can continue to use the threat assessment EOF process they have used for most of their tour and receive TAP training after their deployment ends.

Commanders, Judge Advocates, and Soldiers must understand that this new process is not traditional proportional force EOF. We must review how we train Soldiers to ensure we are training the TAP of counterinsurgency, not the EOF of peacekeeping. We must accept that in the current conflicts, disproportional use of force against identified threats is not the primary issue. The number one issue currently facing Soldiers is threat identification. We must continue to seek new methods to get the attention of inattentive civilians and new ways to improve our ability to quickly and effectively communicate with potential threats. We must also ensure that Soldiers have the correct training and equipment to properly apply tactics in threat assessment situations and that they are equipped with a variety of force options.

Equally important, we must train Soldiers in judgment-based-force application. Soldiers must understand that they will not face prosecution for an honest judgment call. This will give them confidence that their leaders understand and support them in these tough decisions. Given confidence in leaders, counterinsurgency doctrine, and the current state of the conflicts, Soldiers can make informed, rational, and correct decisions to appropriately apply force against identified threats.

Once we accomplish these things, we will have taken great strides to improve Soldiers' ability to identify threats—thereby increasing force protection and reducing civilian casualties. Equally important, Soldiers can have confidence in their leaders and TAP. Confidence that the TAP is not a dangerous constraint, but instead a valuable tool to assess threats, protect the force, and spare innocent lives.

The Mixed-Case Dilemma in Federal Sector Employment Appeals

Why Merit Systems Protection Board (MSPB) Administrative Judges Should Be Permitted to Reach the Merits of Discrimination Claims in Mixed Constructive Removals Where Non-Frivolous Allegations Are Successfully Alleged Yet Jurisdiction Is Lacking

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Administrative Judge
Merit Systems Protection Board

Introduction

The appeals process in federal-sector employment cases has been criticized as inefficient and cumbersome.[1] The criticism has been particularly keen with respect to disciplinary actions where the employee is also claiming discrimination.[2] The duplication of efforts, costliness, and delays associated with the present system have led commentators to suggest that the system would be better served by consolidating the functions of various agencies such as the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor, and the MSPB into one administrative agency.[3]

This article poses more modest suggestions for improvement. This article examines the inefficacies present in the adjudication by the MSPB and the EEOC of a small fraction of appeals referred to as "mixed constructive removals." In addition, the article suggests reasons why the present procedure for adjudicating such cases should be reformed.

How Is a Case Adjudicated by the MSPB and the EEOC?

Although they are separate federal agencies with distinct missions, both the MSPB and the EEOC duplicate their efforts much more than necessary when adjudicating mixed constructive removal appeals. The MSPB is an independent federal agency created to ensure all federal government agencies follow federal merit systems principles.[4] The MSPB does this by adjudicating personnel actions of agency federal employees, and by conducting special reviews and studies of federal merit systems.[5]

The MSPB's appellate jurisdiction is relatively expansive.[6] However, the overwhelming majority of agency personnel actions appealed to the MSPB fall within a relatively small category of actions including, but not limited to: removals,[7] suspensions for more than fourteen days, reductions in grade, and reductions in pay.[8]

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[1] Because federal employees can either consecutively or simultaneously have claims which are based primarily on the same set of facts adjudicated by the Equal Employment Opportunity Commission, the U.S. Department of Labor, and the MSPB, employees and management may find themselves entangled in a burdensome and complicated process which may take years to resolve. *See* Martin J. Dickman & Patricia A. Marshall, *Examining the Inefficiencies of the Federal Workplace—Recommendations for Reform* 2 (Sept. 2001), *available at* http://www.rrb.gov/pdf/oig/REPORTS/ineffi.pdf; *see also Federal Employee Redress: A System in Need of Reform: Hearing Before the Subcomm. on Treasury, Postal Service, and General Government Comm. on Appropriateness of the H. Comm.*, 104th Cong. 1–4 (1996) [hereinafter *Federal Employee Redres*] (statement of Timothy P. Bowling, Associate Director, Federal Management and Workforce Issues, General Government Division), *available at* http://www.gao.gov/archive/1996/gg96110t.pdf.

[2] *See* discussion p. 22.

[3] *See* Dickman & Marshall, *supra* note 1; *see also Federal Employee Redress*, *supra* note 1.

[4] *See* 5 U.S.C. § 2301 (2000).

[5] *See* 5 C.F.R. § 1200.1 (2008).

[6] The Code of Federal Regulations lists more than twenty different actions over which the MSPB exercises its appellate jurisdiction. *See id.* § 1201.3(a), (b).

[7] A removal under 5 U.S.C. § 7512(1) is considered "an adverse action removal." A removal under 5 U.S.C. § 4303 is considered "a performance-based action removal."

[8] *See* 5 U.S.C.S. § 7512(1)–(4) (LexisNexis 2008).

The Equal Employment Opportunity Commission (EEOC) has jurisdiction over employment discrimination issues raised in the federal government's role as an employer.[9] In this regard, the EEOC has responsibility for enforcing all federal EEO laws and the duty to coordinate and lead the federal government's effort to eradicate workplace discrimination.[10] It accomplishes this mission by receiving, reviewing, and processing charges of employment discrimination, as well as by filing discrimination lawsuits.[11]

A "mixed-case appeal" is an appeal filed with the MSPB alleging that an agency action (appealable to it) was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.[12] A "mixed-case complaint," on the other hand, is a complaint of employment discrimination filed with a federal agency's EEO office based on race, color, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the MSPB.[13]

A constructive adverse action arises when an agency's conduct leaves an employee no alternative but to self-impose an adverse action such as to resign or retire involuntarily.[14] For example, although a resignation is ostensibly a voluntary separation from employment, it is possible that resignations may be coerced by actions of the employing agency.[15] In other words, a facially voluntary action by the employee may actually be involuntary.[16]

The MSPB has long held that actions such as forced resignations are tantamount to a removal and are, thus, "constructive" removals.[17] Since a removal action is within the jurisdiction of the MSPB, a forced resignation claim would be considered a constructive removal and within the jurisdiction of the MSPB.[18] In appealing a constructive adverse action to the MSPB, a claim of possible prohibited discrimination in connection with a claim of a possible adverse action is a mixed case.[19] Hence the term, mixed constructive removal.

How the Present State of the Law Contributes to the Inefficiencies Associated with Adjudicating Mixed Constructive Removals

In conventional mixed case appeals, i.e., those cases where a claim of prohibited discrimination is raised in connection with an action that is within the MSPB's jurisdiction,[20] there is no duplication of efforts between the MSPB and the EEOC with respect to the initial findings on the merits of the discrimination claim because only the MSPB administrative judge

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[9] *See* Exec. Order No. 12067, 3 C.F.R. 206 (July 5, 1978), *available at* http://www.eeoc.gov/abouteeoc/plan/par/2006/management_discussion.html.

[10] *See id.*

[11] The EEOC also has jurisdiction over employment discrimination issues for private employers, state and local agencies, employment services, and labor organizations. *See id.*

[12] *See* 29 C.F.R. § 1614.302(a)(2) (2007); *see also* 5 C.F.R. § 1201.151 (2008).

[13] *See* 29 C.F.R. § 1614.302(a)(1).

[14] *See* Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1324 (Fed. Cir. 2006).

[15] *See id.*

[16] *See id.*

[17] *See* Greenup v. Dep't of Agric., 106 M.S.P.R. 202, ¶ 4 (2007).

[18] The MSPB recently sought clarification from its reviewing Court, the U.S. Court of Appeals for the Federal Circuit, on the question whether, in a constructive adverse action, jurisdiction attached upon a finding that the underlying removal action was involuntary, or upon the aggrieved employee making a non-frivolous allegation of jurisdiction. *See* McMillan v. U.S. Postal Serv., 98 M.S.P.R. 334, 336 n.* (2005). Acknowledging the "divergent decisions" of the U.S. Court of Appeals for the Federal Circuit, the MSPB "has consistently acknowledged that we are constrained to follow *Cruz v. Department of the Navy*, 934 F.2d 1240, 1248 (Fed.Cir.1991) (en banc), which holds that the Board (MSPB) does not acquire jurisdiction over a constructive removal unless the appellant proves that his resignation or retirement was involuntary." *See McMillan*, 98 M.S.P.R. at 336 n.*. In *Garcia*, 437 F.3d at 1324, the court clarified that jurisdiction attaches in constructive adverse action appeals to the MSPB in accordance with its holding in *Cruz* and not in accordance with its holding in *Spruill v. M.S.P.B.*, 978 F.2d 679, 689 (Fed.Cir.1992), which held that jurisdiction attached when an aggrieved employee made non-frivolous allegations that he was constructively removed.

[19] *See Garcia*, 437 F.3d at 1324.

[20] The Board's authority to adjudicate claims of prohibited discrimination is limited to those cases where the underlying appeal may be brought directly to the Board. *See* Saunders v. M.S.P.B., 757 F.2d 1288, 1290 (Fed. Cir. 1985) (holding that 5 U.S.C. § 2302(b) is not an independent source of MSPB appellate jurisdiction). The MSPB is authorized to adjudicate a claim of discrimination of the sort listed in 5 U.S.C. § 2302(b)(1) where the claim is interposed as a defense to an appealable action. *See* 5 U.S.C. § 7701(c)(2)(B) (2000); *see also* Fair v. Dep't of the Navy, 66 M.S.P.R. 485, 488 (1995).

reviews the discrimination claim in a mixed case filed with the MSPB.[21] If an employee loses before the MSPB he may appeal his discrimination claim to the EEOC's Office of Federal Operations but they will only review the MSPB's discrimination finding for legal sufficiency.[22] The EEOC can either concur with the MSPB decision, or remand it back to the MSPB for additional evidence to the extent the EEOC considers it necessary to supplement the record.[23] No EEOC administrative judge will look at the case.[24]

In mixed constructive removal cases, however, the situation is different. The immediate question in such cases is whether the MSPB has jurisdiction over the claim. If the MSPB administrative judge finds that the decision to resign or retire is voluntary, it is outside the MSPB's jurisdiction and the appeal is dismissed for lack of jurisdiction.[25] By dismissing the appeal in this manner, the MSPB administrative judge is prohibited from making a finding on the merits of the discrimination issue even though he has already heard the evidence.[26] The aggrieved employee must now take his discrimination claim back to the EEOC as a non-mixed case complaint, where the EEOC will conduct a review of the same set of facts and issues as did the MSPB.[27] Herein lies the dilemma presented by mixed constructive removal cases and the host of potential problems associated with them.

For example, in an appeal before the MSPB where the appellant raises the claim that he was forced to resign his position based upon the discrimination he suffered at the hands of the agency, the MSPB would not have jurisdiction to adjudicate the employee's claim of prohibited discrimination without first establishing its jurisdiction over the forced resignation claim.[28] However, because the MSPB presumes the decision to resign is voluntary and, thus, outside its jurisdiction, the appellant is not entitled to a hearing on the jurisdictional issue before an MSPB administrative judge unless he first makes a "non-frivolous allegation" that his decision to resign was involuntary.[29] Such evidence must be sufficient to establish that the action was obtained through duress or coercion, or to show that a reasonable person would have been misled by the agency.[30] The touchstone of the "voluntariness" analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him of freedom of choice.[31]

In adjudicating the voluntariness issue, if the MSPB administrative judge finds there is evidence of discrimination, but that such evidence is not pervasive enough that a reasonable person would have felt compelled to resign or retire under the circumstances, then the MSPB administrative judge would have to dismiss the case for lack of jurisdiction finding the appellant's decision to resign or retire was voluntary.[32] Such a case would not constitute a constructive removal. In such a scenario, while the MSPB's administrative judge has heard evidence on the discrimination issue, the judge has not made a

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[21] In conventional mixed case appeals, duplication of efforts on review of the discrimination claim is not normally an issue because the aggrieved employee usually elects the forum in which to proceed. The EEOC Regulation 29 C.F.R. § 1614.302(b) provides that:

> An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 C.F.R. 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB *and who has either orally or in writing raised the issue of discrimination during the processing of the action* of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum.

29 C.F.R. § 1614.302(b) (2007) (emphasis added).

[22] *See* 29 C.F.R. § 1614.305(c).

[23] *See id.* § 1614.305 (c)(1), (d).

[24] Indeed, in cases where an aggrieved employee has first elected to file a mixed case appeal to the MSPB, EEOC regulations state that the agency may temporarily dismiss the mixed case complaint by tolling all statutory/regulatory time deadlines until the question of the MSPB's jurisdiction over the action has been resolved. *Id.* § 1614.302(c)(2)(ii).

[25] *See* Cruz v. Dep't of the Navy, 934 F.2d 1240, 1248 (Fed. Cir. 1991) (en banc).

[26] This has been the case since at least 1996 when, in *Markon v. Dep't of State*, 71 M.S.P.R. 574 (1996), the MSPB held that the appellant's allegations of discrimination and reprisal will only be addressed by it insofar as they relate to voluntariness, unless jurisdiction is established.

[27] *See* 29 C.F.R. § 1614.302(b).

[28] *See Cruz*, 934 F.2d at 1248.

[29] In making a non-frivolous allegation of fact, appellant need not prove that the alleged fact occurred. Rather, all appellant need do is allege facts which, if true, would establish that his decision to resign was involuntary. *See* Neice v. Dep't of Homeland Sec., 105 M.S.P.R. 211, ¶ 7 (2007).

[30] *See id.* (citing Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123–24 (Fed. Cir. 1996); Huyler v. Dep't of the Army, 101 M.S.P.R. 570, ¶ 5 (2006)).

[31] *See id.*

[32] *See* Markon v. Dep't of State, 71 M.S.P.R. 574, 578–80 (1996).

finding on the merits of the issue since the underlying action is outside the MSPB's jurisdiction. Likewise, once the MSPB administrative judge finds the alleged constructive removal is outside of the MSPB's jurisdiction, the case is no longer considered a mixed case.[33]

When an aggrieved party files a complaint and appeal in both forums and there is a regulatory determination that the party elected to proceed before the MSPB, the agency and the MSPB administrative judge may question the MSPB's jurisdiction over the matter. The agency must hold the mixed case complaint in abeyance and toll all time limitations. If the MSPB administrative judge dismisses the appeal for lack of jurisdiction, the agency *shall* recommence processing of this discrimination complaint as a non-mixed case complaint.[34] This process is automatic and does not require any additional action from the complainant. As such, the employee in this scenario would have an opportunity to have his discrimination complaint heard, potentially for a second time, either electing to receive an immediate final decision on the issue from the agency, or electing to have a hearing on the issue before an EEOC administrative judge.[35]

The current process opens the door to the substantial duplication of efforts between the MSPB and the EEOC, the potential (either real or perceived) for inconsistent judgments by these agencies and the layman's resulting perception of ineptness, and needless expenses by all parties, to name but a few. To eradicate these inefficiencies and misperceptions, upon finding the appellant in an MSPB appeal has made a non-frivolous allegation that his decision to resign or retire was involuntary, the MSPB administrative judge should be permitted to make a finding on the merits of the discrimination claim he would be adjudicating in connection with the constructive removal, even in the event that he ultimately finds the appellant's decision to resign/retire was voluntary. To do so would eliminate the previously cited problems and the many others as aptly illustrated in the recent case of *Davis v. Department of Homeland Security*.[36]

Why the Current Law Should Be Changed to Allow for the Expansion of MSPB's Jurisdiction in the Adjudication of Mixed Constructive Removal Cases

Davis illustrates the problems inherent in the present treatment by the MSPB and the EEOC of mixed constructive removal appeals. In *Davis*, the aggrieved employee, a Customs and Border Patrol Officer, claimed that she had no choice but to resign her position due to the intolerable working conditions caused by the sexual harassment to which she had been subjected.[37] In her appeal to the MSPB, Ms. Davis alleged that, shortly following her appointment to the position, her second-line supervisor began to sexually harass her by making "numerous sexual advances towards her, to include making obscene comments, and stalking her."[38] In addition, Ms. Davis claimed that, subsequent to this harassment, she was further subjected to a hostile work environment when her immediate supervisor, a female, lowered her mid-term performance ratings, denied her the opportunity to work on Sundays, and unlawfully inquired into the status of her EEO complaint, among other things.[39]

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[33] As explained in *Markon*, discrimination "'is not an independent source of [MSPB] jurisdiction.' Nor has the [MSPB] been granted jurisdiction over Title VII discrimination claims, 'per se.' Because the [MSPB] may initially consider only the issue of jurisdiction, this case is not a mixed one, under 5 U.S.C. § 7702, involving discrimination as an affirmative defense." *Id.* at 578 (citing Cruz v. Dep't of the Navy, 934 F.2d 1240, 1245 (Fed. Cir. 1991)).

[34] 29 C.F.R. § 1614.302(c)(2)(ii) (2007).

[35] Under 29 C.F.R. § 1614.302(b), an aggrieved party may initially file a mixed case complaint with an agency or an appeal on the same matter with the MSPB but not both. Whichever forum first receives a filing on the same matter is considered an election to proceed in that forum. *Id.* If the aggrieved party files a mixed case appeal with the MSPB instead of a mixed case complaint with the agency and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. If a person files a timely appeal with the MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision. *Id.*

[36] *See* Davis v. Dep't of Homeland Sec., MSPB Docket No. SF-0752-04-0760-I-1 (Feb. 22, 2005) (Initial Decision).

[37] *Id.* at 4. At the hearing, Ms. Davis testified that shortly after her second-line supervisor began harassing her, she confided in a peer of her supervisor about the harassment. *See id.* at 6. The supervisor's peer testified that when he spoke to the supervisor about Ms. Davis's concerns regarding his conduct, the supervisor responded by saying that "insofar as he was concerned, [Ms. Davis] was single and would be the mother of his children." *See id.* The supervisor's peer further testified that he believed the supervisor was stalking Ms. Davis because he observed him at Ms. Davis's "vehicle booth" on two occasions even though supervisors had no reason to go to the booth. *See id.* Moreover, the supervisor's peer testified that he raised the matter with the Deputy Port Director and told her that the supervisor was "at it again." *See id.*

[38] *See id.* at 5.

[39] *See id.*

The MSPB administrative judge found these claims constituted a non-frivolous allegation that Ms. Davis's decision to resign was involuntary, and he scheduled a jurisdictional hearing.[40] During the prehearing conference, the MSPB administrative judge advised the parties of the burden of proof regarding the jurisdictional issue.[41] In light of the appellant's hostile work environment claim,[42] the MSPB's administrative judge advised the parties that the ultimate question was "whether under all the circumstances working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to [resign]."[43]

At the hearing, the MSPB administrative judge heard evidence on the appellant's allegations of sexual harassment and hostile work environment.[44] Although the appellant chose not to testify at the MSPB proceeding, she presented evidence of discrimination, both in support of her discrimination claim as well as the underlying claim on the merits that her resignation was involuntary because of that discrimination.[45]

The MSPB administrative judge found that Ms. Davis failed to meet her burden of showing that working conditions were so difficult as to compel a reasonable person to resign.[46] With respect to the sexual harassment allegations, the judge noted that, while there was evidence indicating that Ms. Davis may have been subjected to inappropriate conduct of a sexual nature, the agency had taken immediate and appropriate measures to curtail such conduct.[47] The MSPB administrative judge discredited the testimony of appellant's witnesses with respect to her allegations that her first and second-line supervisors created a hostile work environment and caused her to contract tuberculosis by purposely assigning her cases involving aliens with tuberculosis and other communicable diseases such as HIV and AIDS.[48] The judge also concluded that Ms. Davis's claims of stress, anxiety, and unpleasant working conditions were not so intolerable as to compel a reasonable person to resign.[49]

In sum, the MSPB administrative judge found that Ms. Davis's decision to resign was voluntary and, thus, outside the MSPB's jurisdiction. Despite having heard evidence on Ms. Davis's claims of sexual harassment and retaliation for filing an EEO complaint and for making protected whistleblower disclosures, the MSPB administrative judge concluded that "[b]ecause I have found that the Board has no jurisdiction over this appeal, I cannot adjudicate the discrimination claims on the merits."[50] Accordingly, the MSPB administrative judge dismissed the appeal.[51]

At the conclusion of the initial MSPB proceedings, Ms. Davis filed a petition for review, which the MSPB received on 28 April 2005, asking the MSPB to reconsider its administrative judge's initial decision.[52] The evidentiary record on the petition for review closed on 23 May 2005.[53] On 17 June 2005, the EEOC issued its final decision of Ms. Davis' complaint concerning the same sexual harassment charges as were raised before the MSPB administrative judge.[54] After having heard substantially the same set of facts as those presented to the MSPB administrative judge, the EEOC administrative judge found that Ms. Davis's "supervisor's inappropriate conduct and the agency's complicity were so objectively offensive as to alter the conditions of complainant's (Ms. Davis') employment."[55] Thus, the EEOC determined that Ms. Davis's supervisor

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[40] *See supra* note 18.

[41] *See supra* note 19 and accompanying text.

[42] *Davis*, MSPB Docket No. SF-0752-04-0760-I-1, at 5; *see* Heining v. Gen. Servs. Admin., 68 M.S.P.R. 513, 520 (1995).

[43] *See Davis*, MSPB Docket No. SF-0752-04-0760-I-1, at 2–3, tab 29 (Order and Summary of Telephonic Prehearing Conference, Initial Appeal File).

[44] *Id.* at 6–9.

[45] *See id.* at 16.

[46] *See id.* at 12.

[47] *See id.* at 13.

[48] *See id.*

[49] *See id.* at 15.

[50] *See id.* at 18.

[51] *See id.*

[52] *See* Davis v. Dep't of Homeland Sec., MSPB Docket No. SF-0752-04-0760-I-1, slip op. at 1 (Sept. 21, 2005).

[53] *See id.* at 2.

[54] *See* Davis v. Dep't of Homeland Sec., No. 2006-3061, at 5 (Fed. Cir. May 30, 2007) (Nonprecedential Disposition).

[55] *See id.*

had sexually harassed her and the EEOC awarded her damages.[56] On 6 July 2005, Ms. Davis moved to have a transcript of the EEOC hearing and the EEOC's final decision finding that she had been sexually harassed admitted into the MSPB's record for consideration on petition for review.[57]

After fully considering the record, the MSPB affirmed by Final Order its administrative judge's initial decision, correctly finding that there was no new or previously unavailable evidence, and that the administrative judge made no error in law or regulation that affected the outcome of the initial decision.[58] Furthermore, the MSPB refused to consider the final decision of the EEOC. The MSPB, therefore, denied the petition for review, and the MSPB administrative judge's initial decision became the MSPB's final decision.[59]

Ms. Davis next appealed the MSPB's final decision to the Court of Appeals for the Federal Circuit.[60] After reviewing the MSPB's record in its entirety and concluding that the MSPB did not err in denying the admission of the EEOC hearing transcript, the court nonetheless remanded the case back to the MSPB.[61] The court held that, because the EEOC's decision finding sexual harassment was not complete until 17 June 2005, almost one month after the MSPB's evidentiary record closed, and because the sexual harassment issue was so central to the issue of whether the appellant's decision to resign was voluntary, the MSPB, "faced with this inconsistency (on the sexual harassment issue), should have considered the final decision of the EEOC."[62] Moreover, the court charged the MSPB with resolving any inconsistencies (reached by the respective agencies).[63]

In light of the current state of the law, the Federal Circuit's decision remanding the case back to the MSPB was incorrect, for it is clear that the MSPB correctly decided the case in accordance with current case law. Rather, the remand is more the result of the inefficiencies present in the current appeals system for Federal-sector employment cases. For instance, the court cited "inconsistencies" between the MSPB and EEOC decisions as justification for its remand. The decisions, however, are not necessarily inconsistent. While the MSPB administrative judge heard evidence on sexual harassment, the law does not presently allow him to make findings on that issue—and he did not. However, he could have easily done so, had the law so permitted, with a minimum of additional work.

The Federal Circuit remand in *Davis* makes no sense considering that the MSPB administrative judge had already heard substantially the same evidence as the EEOC administrative judge. It is true that the evidence before the agencies was not identical since, as previously noted, the appellant did not testify in the hearing before the MSPB but did testify in the EEOC proceeding. Also, certain other witnesses testified before the EEOC that did not before the MSPB. However, it makes no sense to give the employee a "second bite at the apple" when doing so could be avoided.

The Need for Change

The perception of inconsistent judgments is created between different forums when those forums reach different conclusions after having been presented with essentially the same set of facts. The present system promotes such a perception when, in actuality, no such inconsistencies may exist at all. Presently, an aggrieved employee who files an appeal to the MSPB has the right to have the MSPB decide any allegation of discrimination raised in an appeal of an agency action, without consideration of whether the allegation is based on facts to support a prima facie case of discrimination, or is non-frivolous.[64] This article proposes that Title 5 of the United States Code be amended to allow for MSPB administrative judges

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[56] *See id.* at 2.

[57] *See id.* at 6.

[58] *See Davis*, MSPB Docket No. SF-0752-04-0760-I-1, slip op. at 1.

[59] *See id.*

[60] *See Davis*, No. 2006-3061.

[61] *See id.* at 2.

[62] *See id.* at 11. This case is not eligible for referral to the Special Panel, as the MSPB administrative judge did not make a merits determination on the issue of discrimination. A case is eligible for referral to the Special Panel if, upon review of the MSPB's final decision on discrimination, the EEOC reaches a different result, and the MSPB reaffirms its decision on the issue upon the case being referred back to it by the EEOC. *See* 29 C.F.R. § 1614.306 (2007).

[63] *See Davis*, No. 2006-3061, at 11.

[64] 5 U.S.C. § 7702(a)(1) (2000). In a recent decision, however, the MSPB overruled its decision in *Currier v. U.S. Postal Serv.*, 79 M.S.P.R. 177, 182 (1998), and found that an administrative judge may strike an appellant's discrimination claim from consideration at an evidentiary hearing if the appellant

to decide allegations of discrimination made in connection with constructive removal actions where non-frivolous allegations of jurisdiction have been successfully made, even if the administrative judge ultimately finds that the decision to resign or retire was voluntary. If MSPB administrative judges had been granted the authority to decide the merits of discrimination claims in constructive removal cases, the perception of inconsistent judgments in *Davis* might have been eliminated.

In *Davis*, several factors accounted for the perception of inconsistent judgments. First, there was the fact that the appellant testified before the EEOC administrative judge but not before the MSPB administrative judge.[65] Likewise, certain witnesses who allegedly possessed firsthand knowledge of the events in question testified before the administrative judge in one proceeding but not before the administrative judge in the other proceeding. Tactical maneuvers such as these are significant and can substantially impact the outcome of a case as they did in *Davis*. Despite these various trial strategies, the fact remains that the present law constrains the administrative judge in the MSPB proceeding to consider the evidence of discrimination heard in connection with a constructive removal claim in an extremely limited fashion and for an extremely limited purpose while such is not the case for the EEOC administrative judge hearing essentially the same evidence. These factors, and others, increase the likelihood that different judges in different forums will arrive at different outcomes after hearing essentially the same evidence, thus, creating the perception of inconsistent judgments.

Implementing the proposal suggested in this article eliminates this scenario because the MSPB administrative judge would make findings on the merits of the discrimination claim made in connection with the constructive removal claim, assuming a nonfrivolous allegation was successfully alleged. In this context, the EEOC's role would be just as it is in mixed case appeals of actual removals—to review the MSPB's finding on the discrimination claim for legal sufficiency.[66]

In addition to eliminating the perception of inconsistent judgments, implementation of the reforms suggested in this article would also promote judicial economy. Since the proposed system allows the MSPB to conduct the hearing in a mixed constructive removal case and make initial findings on claims of prohibited discrimination, needless delays inherent in the present system would be eliminated. One proceeding would be conducted instead of potentially two. Thus, one prehearing conference would be held instead of potentially two, and one set of witness rulings would ensue instead of potentially two, etc.

This judicial economy would necessarily result in cost effectiveness. The aggrieved employee, who in most cases is already financially burdened by the loss of income resulting from his resignation or retirement, would only have to support the costs associated with attorney representation in one proceeding rather than potentially two. Likewise, the net costs to the government would be severely reduced since it would only have to finance one proceeding rather than potentially two regarding the same set of facts.

Finally, the inordinate delays inherent in the present system would be virtually eliminated in a newly reformed system in which MSPB administrative judges adjudicate the merits of discrimination claims in appropriate constructive removal cases. Elimination of these adjudicatory delays is in keeping with recent congressional attempts to implement systems which provide for more expeditious resolution of these appeals. For instance, similar to the Department of Defense's newly proposed personnel system entitled the "National Security Personnel System (NSPS)," the Department of Homeland Security's (DHS) equivalent newly proposed personnel system, "MaxHR," proposes several changes to DHS's existing personnel system. One such proposal calls for the reduction of the time limit for the MSPB's adjudication of a DHS appeal from the present regulatory requirement of 120 days to 90 days.[67]

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fails to make factual allegations to support an inference that the agency's action was a pretext for discrimination. *See* Redd v. U.S. Postal Serv., 101 M.S.P.R. 182, 185–88 (2006).

[65] *See Davis*, No. 2006-3061, at 10–11.

[66] The EEOC's authority to review the MSPB's decision on a claim of prohibited discrimination made in connection with a mixed case appeal is found at 5 U.S.C. § 7702(b). Upon petition of the aggrieved party, 5 U.S.C. § 7702(b)(1) enables the EEOC to review such claims "within 30 days after notice of the decision of the Board (MSPB)." 5 U.S.C. § 7702(b)(1). After receiving such a petition, the EEOC shall, within thirty days after the date of the petition, determine whether to consider the (MSPB) decision. *Id.* § 7702(b)(2). If the EEOC decides to consider the MSPB's decision, it shall, within sixty days of the date of the decision, consider the entire record of the MSPB proceedings and, on the basis of the MSPB's evidentiary record: (A) concur in the MSPB's decision; or (B) issue another decision which differs from that of the MSPB to the extent that, as a matter of law, it finds the MSPB decision interprets the law incorrectly or, the MSPB decision is not supported by the evidence in its record. *Id.* § 7702(b)(3).

[67] *See* 5 C.F.R. § 9701.706(k)(7) (2005). The U.S. Court of Appeals for the District of Columbia agreed with a federal district court judge's ruling striking down certain portions of MaxHR which proposed changes involving union rights, disciplinary procedures, and employee appeal rights protections. *See* Nat'l Treasury Employees Union v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006). In that opinion, the Court of Appeals reversed with prejudice, however, DHS' attempt to change the standard by which the MSPB would apply its mitigation authority in DHS cases under MaxHR, finding that issue "not yet ripe for review." *See id.* at 868. Similar legal challenges to DOD's NSPS were not initially met with such favorable results as these, however. For instance, the U.S. Court of Appeals for the District of Columbia reversed a District Court opinion which struck down as unfair those provisions of NSPS dealing with adverse actions, employee appeal rights and union rights, leaving the door open for DOD to fully implement its proposals. *See* Am. Fed'n of Gov't

Conclusion

Congress should amend the law to allow for the expansion of MSPB's jurisdiction so its administrative judges can make findings on the merits of discrimination claims made in connection with mixed constructive removal cases where the appellant has made a non-frivolous allegation of MSPB jurisdiction, even though the judge may ultimately find that the appellant's decision to resign or retire was voluntary.

Employees v. Gates (formerly AFGE v. Rumsfeld), 486 F.3d 1316 (D.C. Cir. 2007). Despite the Court of Appeals ruling, DOD has withheld implementation of these controversial provisions in response to congressional pressure and the threat of additional legal action (AFGE filed an appeal of the Court of Appeals decision to the U.S. Supreme Court on 7 Jan. 2008). Brittany Ballenstedt, *Union Files Supreme Court Appeal of NSPS Lawsuit*, GOV'T EXECUTIVE (Jan. 7, 2008), *available at* http://www.govexec.com/dailyfed/0108/010708b1.htm. On 29 January 2008, however, AFGE withdrew its appeal to the Supreme Court after President Bush signed a revised version of the National Defense Authorization Act of 2008 (the Act) into law. Brittany Ballenstedt, *Bush Signs Bill that Sends Unions Back to Bargaining Table at Defense*, GOV'T EXECUTIVE (Jan. 29, 2008), *available at* http://www.govexec.com/dailyfed/0108/012908b1.htm. In a revised version of the Act (fiscal year 2008 Defense Authorization Act), the DOD, in concession to the employee unions, removed all previous limitations and "restore[d] collective bargaining and [employee] appeal rights under the National Security Personnel System." *See id.* Thus, the full implementation of NSPS will have no affect on the proposals suggested in this article.

Clarifying the Article 138 Complaint Process

Major Robert W. Ayers[*]

Introduction

Article 138, Uniform Code of Military Justice (UCMJ), provides a Soldier with an avenue to complain about the decisions of his commanding officer. This complaint procedure is available to both active duty Soldiers and reserve component Soldiers when in a Title 10 duty status.[1] The language of Article 138 is as follows:

> Art. 138. Complaints of wrongs
>
> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Article 138 complaints are not often sought as a remedy for a perceived wrong.[2] As such, many junior Judge Advocates (JAs) are unaware of how to properly counsel a Soldier on submitting an Article 138 complaint or how to advise a commander on how to respond to one. In fact, the procedures for submitting and disposing of an Article 138 complaint are likely frustrating to many and may easily be confused with the more prevalent Article 139 request that seeks payment from a Soldier for his willful damage or theft of another's property.[3] This article is written to clarify Article 138 complaint procedure and provides an overview of its provisions to assist in disposing of these complaints in an efficient manner.

Request for Redress

Before filing an Article 138 complaint, a Soldier must submit an initial request for redress.[4] A request for redress gives the commanding officer the opportunity to respond to the Soldier's allegations and perhaps resolve issues at a much lower level.[5] Defense counsel or legal assistance attorneys can point Soldiers to an example request for redress in Army Regulation (AR) 27-10 and can assist in the preparation of requests for redress.[6] Requests for redress may be as short as a one-page memorandum but must "identify the commanding officer against whom it is made, the date and nature of the alleged wrong, and if possible, the specific redress desired."[7]

The Soldier's commanding officer has fifteen days in which to respond to a Soldier's request for redress.[8] If a commander will not be able to complete his response in fifteen days, he must provide the Soldier with an interim response containing the estimated date of when the final response will be completed.[9] This commander should seek the advice of his

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[1] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 20-2 (16 Nov. 2005) [hereinafter AR 27-10].

[2] This assertion is based on the author's professional experience as an Administrative Law Attorney, Fort Carson, Colorado, completing only four Article 138 complaints from 1 June 2003 to 15 June 2005.

[3] UCMJ art. 139 (2008).

[4] AR 27-10, *supra* note 1, para. 20-6a.

[5] *Id.* para. 20-3a. Department of Army policy is to resolve complaints at the lowest level of command. *Id.* Common sense also dictates that a Soldier should speak informally to his commanding officer or the commander's senior enlisted advisor before placing anything on paper.

[6] *Id*. fig.20-2.

[7] *Id*. para. 20-6a(2).

[8] *Id*. para. 20-6b.

[9] *Id*.

servicing JA as soon as he receives a request for redress. A JA may provide a recommendation regarding whether any relief should be granted, give advice on the possible need to initiate an investigation into a Soldier's allegation(s), or assist in drafting a response. During the request for redress stage, a JA should ensure a respondent-commander meets the above timelines so that a Soldier does not have further reason to complain. The JA should also collect any counseling or other documentation that may be needed for a subsequent Article 138 complaint.

Making a Complaint

A Soldier who requests redress and has been refused a remedy or did not receive a response within fifteen days may submit an Article 138 complaint.[10] As with the request for redress, AR 27-10 contains example Article 138 complaints that may be used by the Soldier and his counsel.[11] The complaint should be in writing and include all pertinent information such as the identity of the commanding officer being complained against, the dates a written request for redress was submitted and denied, a concise description of the wrong, and any remedy sought.[12] The Soldier has ninety days from the time of the perceived wrong to submit an Article 138 complaint.[13] The complaint should be submitted to the respondent-commander's immediate superior commissioned officer.[14] Therefore, if the respondent-commander is the Soldier's company commander, the Soldier should submit the Article 138 complaint to his battalion commander. This superior commissioned officer has the duty to forward the complaint to the general court-martial convening authority (GCMCA), which is normally the installation commanding general.[15] As with the request for redress, the superior commissioned officer should seek the aid of his servicing JA. The JA may assist the superior commander in drafting a memorandum to the GCMCA that provides additional information regarding the circumstances of the complaint and recommends any grants of redress within the GCMA's authority.[16] Judge Advocates at all levels should ensure that commanders do not restrict the submission of Article 138 complaints and should ensure that no retaliation measures are taken against the Soldiers who submit them.[17]

Installation Staff Judge Advocate's Office

Prior to the GCMCA taking action on an Article 138 complaint, the Administrative Law Division of the Installation Office of the Staff Judge Advocate reviews the file. Typically, each installation informally designates one administrative law attorney to prepare the memorandum of review and the final action by the GCMCA. This JA is responsible for ensuring each complaint is factually sufficient, is appropriate for Article 138 review, or is referred to alternate channels as appropriate.[18]

There is an important distinction between deficient complaints and complaints that are inappropriate for review under Article 138. A deficient complaint "does not substantially meet the requirements of Article 138" and therefore no decision by the GCMCA is required.[19] Examples of deficient complaints include those that were submitted prior to a request for redress, those that were filed outside the ninety-day window, or those that were essentially the same as an earlier complaint.[20] The GCMCA has discretion to waive the above deficiencies upon "good cause" and act upon the Article 138 complaint; however, some deficiencies may not be waived.[21] Examples of these include Article 138 complaints by a Soldier who was

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[10] *Id.* para. 20-7.

[11] *Id*. figs.20-3, 20-4.

[12] *Id*. para. 20-7a (identifying ten elements to an Article 138 complaint).

[13] *Id.* para. 20-7b (indicating that any period in which a request for redress was with the respondent-commander will not be included in the ninety-day time limit).

[14] *Id* para. 20-7b(1).

[15] *Id.* para. 20-9a.

[16] *Id*. para. 20-9b.

[17] *Id*. para. 20-3b.

[18] *See generally id.* para. 20-11.

[19] *Id.* para. 20-10a.

[20] *Id*. para. 20-10b(2).

[21] *Id*. para. 20-10b(3).

not on active duty or by a reserve component Soldier who was not in a Title 10 status when the complaint was submitted (lacks standing to complain), the wrong complained of was an act taken by someone other than the Soldier's commanding officer, or the complaint did not adequately identify the respondent-commander.[22] If a deficient complaint is not waived or cannot be waived, then the complaint will be returned to the Soldier with an explanation of the deficiency.[23]

On the other hand, complaints that are generally inappropriate for Article 138 review are those based upon adverse actions against a Soldier. These actions are inappropriate for review because Soldiers are already entitled to due process with "more specific channels and procedures to ensure the Soldier has an adequate opportunity to be heard."[24] Article 138 complaints provide Soldiers an avenue for redress when there is no other remedy available.

Matters that are inappropriate for Article 138 review include courts-martial, nonjudicial punishment, officer elimination actions, enlisted separation actions, findings of financial liability, and appeals of officer or enlisted evaluation reports.[25] The JA reviewing an Article 138 complaint must be careful, however, to ensure that a matter is truly inappropriate as an Article 138 submission. For example, an Article 138 complaint relating to the imposition of nonjudicial punishment is inappropriate for review but a complaint concerning the vacation of suspended nonjudicial punishment is reviewable because no other review or due process exists.[26] Further, if a Soldier requests that a relief for cause evaluation report be withdrawn or revised, the complaint is inappropriate for review under Article 138 because there are specific procedures available to Soldiers to appeal evaluation reports.[27] If a Soldier requests an additional remedy such as reinstatement, however, the complaint must be reviewed and action taken on the merits.

General Court-Martial Convening Authority Action

The GCMCA is required to make an examination into each Article 138 complaint.[28] He may examine the complaint personally or appoint an officer to conduct an AR 15-6 investigation.[29] Intervening commanders and the staff judge advocate (SJA) can provide information to the GCMCA. Therefore, depending on the complexity of the complaint, available information may preclude the necessity of an AR 15-6 investigation. The SJA will have to make a determination on whether to recommend an AR 15-6 investigation to the GCMCA when the complaint is initially received by the administrative law division. If an AR 15-6 investigation is initiated, the investigating officer may contact the complainant-Soldier for more information but he is not entitled to be a participant in the process.[30] When an investigating officer has been appointed, the SJA is ultimately responsible to ensure that the investigation is complete, that there is a sufficient basis for the findings and recommendations of the investigating officer, and that the GCMCA clearly indicates which of the findings and recommendations are approved.

The GCMCA must personally act on Article 138 complaints;[31] his authority may not be delegated to another officer such as the installation chief of staff. The SJA should ensure that all of the issues presented in the complaint are addressed by the GCMCA and that the GCMCA's actions comport with applicable law and regulations. The GCMCA's action includes notifying Soldiers when complaints are deficient, are inappropriate for review, or will be referred to a more appropriate

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[22] *Id.*

[23] *Id.* para. 20-10a.

[24] *Id.* para. 20-5a.

[25] *Id.* para. 20-5b.

[26] *Id.*

[27] *Id.*

[28] *Id.* para. 20-11a.

[29] *Id.*; *see* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).

[30] AR 27-10, *supra* note 1, para. 20-3d.

[31] *Id.* para. 20-11b.

official channel. An example referral is forwarding allegations of whistleblower reprisal to the inspector general.[32] Finally, the GCMCA will respond to complaints that are appropriate for review, whether by granting the requested relief or by providing reasons for his denial.[33]

If a remedy is denied, the GCMCA (with the aid of his SJA) should fully explain the factual basis for his denial even though the presumption is that commanding officers act appropriately.[34] Factors that a GCMCA must consider include whether: the commanding officer's perceived "wrong" violated law or regulation; was beyond his legitimate authority; was arbitrary, capricious, or an abuse of discretion; or was materially unfair.[35] A practice tip is to ensure that the GCMCA's response to the complainant-Soldier does more than merely recite any of these factors but adequately describes the basis for the denial of a remedy. The response must be more than mere conclusions without substance.

Withdrawal of a Complaint

After action by the GCMCA, the Article 138 complaint is forwarded to the Office of the Judge Advocate General (OTJAG) for review. In many cases the complaint may not have to be forwarded to OTJAG but may be resolved at the local installation level. For instance, commanding officers may provide some or all of the relief requested by Soldiers who submit requests for redress or Article 138 complaints; a Soldier may decide it is no longer necessary to file an Article 138 complaint after receiving his commander's response or action on a request for redress; or a Soldier may voluntarily choose to withdraw an Article 138 complaint that has already been submitted.[36] An Article 138 complaint that has not been forwarded to the GCMCA may be withdrawn based on a Soldier's verbal request.[37] If the GCMCA has already received the complaint, the Soldier must submit a written request to withdraw it.[38] Complaints that have been properly withdrawn are not forwarded to OTJAG.

Deficient complaints are also not forwarded to OTJAG but are returned to the Soldier.[39] The Soldier will be instructed as to why his complaint is deficient and ways to correct such deficiency.[40] Unlike withdrawn and deficient complaints, complaints that are inappropriate for review must still forwarded to OTJAG for final action.[41]

Office of the Judge Advocate General

The OTJAG, Administrative Law Division, receives the Article 138 complaint at the Headquarters Department of Army (HQDA) level. A JA in the Ethics, Legislation, and Freedom of Information Act (FOIA) Branch of the Administrative Law Division (HQDA Judge Advocate) will complete a further legal review of the complaint and may coordinate to clarify information with the installation point of contact. This is usually the JA who prepared the action for the GCMCA. This interaction usually pertains to questions that arise that were not fully answered by a reading of the action, and should not be viewed as a problem with the disposition of the Article 138 complaint. The circumstances are rare in which the action has to be returned for additional information or further investigation.[42]

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[32] U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 1-4a(9)(c) (1 Feb. 2007). The IG is responsible for processing DOD whistleblower reprisal cases that relate to Army activities. *Id.*

[33] AR 27-10, *supra* note 1, para. 20-11b.

[34] *Id.* para. 20-3e.

[35] *Id.* para. 20-4e.

[36] *Id.* para. 20-7c.

[37] *Id.*

[38] *Id.*

[39] *Id.* para. 20-10a.

[40] *Id.*

[41] *Id.* para. 20-5d.

[42] *Id.* para. 20-12a (noting that a file may be returned based upon a need for further information to conduct a sufficient review at HQDA).

The HQDA JA prepares a memorandum of review for final action by the Assistant Judge Advocate General for Military Law and Operations (AJAG (ML&O)). The current AJAG (ML&O) is Brigadier General Malinda Dunn, and she takes final action on Article 138 complaints on behalf of the Secretary of the Army. Once final action is taken, the complainant, the respondent commander, and the GCMCA are informed of the final disposition of the Article 138 complaint.[43]

Conclusion

Although Article 138 complaints are infrequently submitted, JAs should be prepared to efficiently process these actions when they arise. If such processing stalls, it frustrates the Soldier filing the complaint, it frustrates the command forwarding the complaint, and it frustrates the SJA office handling the complaint. A familiarization with the basic provisions of Article 138 complaints makes them a manageable action.

[43] *Id*. para. 20-12b.

Legal Assistance: The John Warner National Defense Authorization Act for Fiscal Year 2007 and Protecting Soldiers Against Predatory Lending

Captain Jason M. Gordon[*]

Introduction

Private Smith, a recent graduate of basic and advanced individual training, reports for duty at Fort Stewart. Family circumstances leave Private Smith behind on his bills and struggling to meet his financial obligations. Faced with the prospect of having his only family vehicle repossessed, he seeks a payday advance loan to make his car payment. Private Smith borrows $300 from a commercial, short-term lender. The fee for the loan is $60 ($20 per $100 borrowed), and the loan must be repaid within fifteen days. Private Smith, planning to repay the loan with his next paycheck, cannot repay the loan and is forced to renew the loan or extend the period for repayment. As customary, the lender allows up to four fifteen-day extensions for $60 each, for a total of $240 in fees. Private Smith repays the loan after sixty days along with $240 in fees at an astronomical 487% annual percentage rate. This payment drives Private Smith further into debt and his financial situation becomes dire.

Legal assistance attorneys must often counsel Soldiers, Families, and retirees who, like Private Smith, fall victim to predatory lending practices.[1] Thus, legal assistance attorneys must stay current on the different types of usurious lending schemes and the relevant consumer laws. In addition, legal assistance attorneys should be familiar with the Financial Readiness Program run through Army Community Services. Soldiers depend on legal assistance attorneys. This program provides financial counseling for Soldiers at all levels and can be a cornerstone for Soldiers to learn how to successfully manage their finances in the future. This article addresses short-term lending, the new law purporting to protect military members against predatory short-term loans, and how legal assistance attorneys can protect Soldiers against unlawful, predatory lending. Though this article focuses on Army regulations, these protections apply to servicemembers from all military branches.[2]

As of 1 October 2007, provisions of the John Warner National Defense Authorization Act (NDAA)[3] and subsequent Department of Defense (DOD)-issued regulations[4] establish new protections for Soldiers and their dependents from the many lending traps that target the military. Collectively known as the Military Lending Act, these laws and regulations specifically circumscribe the conduct of pay-day lenders, title loan companies, and providers of tax refund anticipation loans.[5] The Military Lending Act requires the lender to disclose certain terms to Soldiers and their dependents.[6] These disclosure requirements serve two purposes: (1) to ensure that the Soldier is aware that greater protections exist for Soldiers and their dependents, and (2) to ensure that the Soldier understands the terms and conditions of the loan before completing the transaction.[7] Additionally, the regulations specifically prohibit certain conduct by the lender.[8] Violations of these regulations may result in making the entire lending agreement void and creating a cause of action against the lender.[9]

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[1] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-1a (21 Feb. 1996) [hereinafter AR 27-3] ("The mission of the legal assistance program is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by . . . [m]eeting their needs for information on personal legal matters."). For ease of reading, this article uses the term "Soldier" to refer to all eligible legal assistance clients, including retirees and Family members.

[2] *Id.* para. 1-4 g(2)(m) ("Timely provide all eligible clients, regardless of military department, installation, or command affiliation, with the same legal assistance services routinely provided clients affiliated with their own installations or commands.").

[3] John Warner Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

[4] Limitations on Terms of Consumer Credit Extended to Service Members, 32 C.F.R. pt. 232 (2006). This article refers to both the statute and its implementing regulations as the Military Lending Act.

[5] *Id.* § 232.3(b)(1)(i)–(iii).

[6] *Id.* § 232.6 (Mandatory Loan Disclosures).

[7] *Id.* § 232.1(b).

[8] *Id.* § 232.8 (Limitations).

[9] *Id.* § 232.9(c).

Too often, Soldiers have little knowledge of the legal rights and protections afforded them because of their military status. Legal assistance attorneys have a duty to ensure that Soldiers are aware of their rights and protections and can find the correct avenue to enforce them.[10] The Military Lending Act adds to that duty.[11] Soldiers who seek legal advice often have some form of short-term debt.[12] Without the attorney's help, Soldiers will continue to fall victim to the unlawful practices of short-term lenders.

Short-Term Lenders Target Soldiers

Soldiers are traditionally a good target for predatory lenders.[13] Lenders offer short-term loans that are characteristically unreasonable and unduly oppressive to the borrower.[14] Various studies conclude that Soldiers are predisposed to financial difficulty.[15] Furthermore, characteristics of military pay and service entice lenders to target Soldiers.[16] These characteristics include the consistency of military pay, the Soldier's assignment to a permanent duty station, and the general military obligation of financial responsibility.[17]

Lenders can be fairly certain of the amount of military pay[18] as the DOD publicly announces Soldier salaries.[19] Furthermore, Soldiers draw their pay on a regular schedule, either bi-weekly or monthly.[20] The nature of military assignments also makes Soldiers attractive borrowers. Soldiers typically receive permanent change of station orders every two to four years. These moves are command-controlled and subject to military regulation.[21] A Soldier cannot relocate to avoid collection efforts.[22] Thus, lenders are secure in believing that the Soldier will be present for collection of any debt.[23] Lastly, the military requires Soldiers to maintain financial security and responsibility.[24] At the same time, Soldiers are reluctant to alert their command to their financial difficulties for fear of adverse administrative action or punishment under the Uniform Code of Military Justice.[25] Therefore, short-term financial loans continue to thrive in the military environment.[26]

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[10] AR 27-3, *supra* note 1, para. 3-7b ("[A]ttorneys providing legal assistance . . . may provide one or more of the following types of legal services: (b) *Legal counseling*. Legal counseling involves providing legal advice to a client.").

[11] *See generally* 32 C.F.R. pt. 232.

[12] AR 27-3, *supra* note 1, para. 3-6e(1) ("Legal assistance will be provided to debtors on disputes over lending agreements.").

[13] Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653, 676 (2005) ("Military service members tend to have demographic characteristics associated with personal indebtedness problems.").

[14] Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits?*, 12 FORDHAM J. CORP. & FIN. L. 203, 208 (2007) (citing Caroline Wilson, *Faces in the Fight Against Predatory Lending*, COMMUNITY BANKER, Oct. 1, 2001, at 23 ("[A] process, often starting with misleading sales tactics, that culminates in the origination of a loan to a borrower who is paying too much in fees, interest or insurance, may not fully understand or was not made aware of all the provisions of the contract, and may not have the financial capacity to repay the loan.")).

[15] Graves & Peterson, *supra* note 13, at 676.

[16] U.S. DEP'T OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 10 (9 Aug. 2006) [hereinafter DOD, REPORT ON PREDATORY LENDING], *available at* http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf.

[17] *Id.*

[18] *Id.*

[19] U.S. DEP'T OF DEFENSE, REG. 7000.14-R, 7A-7C DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATIONS (1999) [hereinafter FMRS].

[20] Defense Finance and Accounting Service: *Army: Military Pay*, *available at* http://www.dfas.mil/army2/militarypay/2008militarypaypaydays.html (last visited Apr. 11, 2008).

[21] U.S. DEP'T OF ARMY, REG. 614-6, PERMANENT CHANGE OF STATION POLICY (7 Oct. 1985).

[22] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 10.

[23] *Id.*

[24] U.S. DEP'T OF ARMY, REG. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL para. 1-5(a) (14 Mar. 1986) ("Soldiers are required to manage their personal affairs satisfactorily and pay their debts promptly.").

[25] Graves & Peterson, *supra* note 13, at 685 (citing Major Alan L. Cook, *The Armed Forces as a Model Employer in Child Support Enforcement: A Proposal to Improve Service of Process on Military Members*, 155 MIL. L. REV. 153, 169 (1998) ("The institutional demand that service members have their financial affairs in order is backed up with the very real threat of reprimand, loss of security clearances, bar to re-enlistment, denial of promotion, court martial, and dishonorable discharge.")).

[26] Dawn Goulet, *Protecting Our Protectors: The Defense Department's New Rules to Prevent Predatory Lending to Military Personnel*, 20 LOY. CONSUMER L. REV. 81, 82 (2007) (stating that "[a]ctive-duty military personnel are three times more likely than their civilian counterparts to take out payday loans").

What Methods Do Short-Term Lenders Employ

This article addresses three major types of short-term loans: the payday, or cash advance, loan; the automobile title loan; and the tax refund anticipation loan.[27]

Payday Loan

The DOD regulations define a "payday loan" as

> a closed-end credit with a term of 91 days or fewer in which the amount financed does not exceed $2,000 and the covered borrower: (1) receives funds from and incurs interest and/or is charged a fee by a creditor, and, at the same time as the funds are received, the borrower provides a check or other payment instrument to the creditor who agrees with the covered borrower not to deposit or present the check or payment instrument for more than one day, or; (2) receives funds from and incurs interest and/or is charged a fee by a creditor, and, at the same time as the funds are received, the borrower authorizes the creditor to initiate a debit or debits to the covered borrower's deposit account (by electronic fund transfer or remotely created check) after one or more days.[28]

In sum, a payday loan is a high-interest, short-term loan which is secured by a check drawn on the borrower's bank account.[29] The Soldier writes a predated check, drawn on his bank account which does not contain sufficient funds to cover the amount of the check at that time.[30] In exchange for the check, the lender loans the Soldier a certain percentage of the check amount.[31] The percentage of loan amount withheld by the lender, which is the cost of the loan, is included in the calculation to determine the applicable interest rate and fee charged by the lender.[32] The lender then holds the check until a later date, usually one to three weeks, when the Soldier purportedly has sufficient funds in his bank account to cover the amount of the check.[33] The profit for the lender is the amount of the check minus the amount loaned to the Soldier.[34] The interest and fees associated with the loan often exceed an annual percentage rate of 600%.[35]

Title Loan

The regulations define a vehicle title loan as "a closed-end credit with a term of 181 days or fewer that is secured by the title to a motor vehicle, which has been registered for use on public roads and is owned by a covered borrower, other than a purchase money transaction."[36] In other words, a title loan is a short-term loan whereby the lender makes a loan to the Soldier and effectively puts a lien on the Soldier's automobile. The Soldier, upon approval and receipt of the high-interest loan will surrender to the lender the title to his vehicle.[37] The automobile title will serve as security for the loan.[38] When the

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[27] 32 C.F.R. § 232.3(b)(1)(i)–(iii) (2006).

[28] *Id.* § 232.3(b)(1)(i)(A)–(B).

[29] JEAN ANN FOX, SAFE HARBOR FOR USURY: RECENT DEVELOPMENTS IN PAYDAY LENDING, CONSUMER FED'N AM. 1 (Sept. 1999), *available at* http://www.consumerfed.org/pdfs/safeharbor.pdf; Huckstep, *supra* note 14, at 206–07 (stating that "The check serves as the only form of security on the loan.").

[30] FOX, *supra* note 29, at 1; Huckstep, *supra* note 14, at 206–07 (explaining that "[t]he borrower writes a check for a set amount, gives the check to the payday lender").

[31] FOX, *supra* note 29, at 1.

[32] *Id.* at 1–2; Huckstep, *supra* note 14, at 206 ("The difference between the face value of the check and the amount of cash received represents the service charge on the loan").

[33] Huckstep, *supra* note 14, at 207 (referencing Charles A. Bruch, *Taking the Pay Out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CINN. L. REV. 1257, 1258 (20001) ("The payday lender agrees not to deposit the check for a short period of time (typically two weeks or until payday). On the due date, a borrower with sufficient funds can allow the lender to deposit the original check or pay the loan off with cash.").

[34] *Id.* (explaining that "[t]he difference between the face value of the check and the amount of cash received represents the service charge on the loan").

[35] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 10.

[36] 32 C.F.R. § 232.3(b)(1)(ii) (2006).

[37] AMANDA QUESTER & JEAN ANN FOX, CAR TITLE LENDING: DRIVING BORROWERS TO FINANCIAL RUIN, CONSUMER L. CTR. & CONSUMER FED'N OF AM. 4 (14 Apr. 2005), *available at* http://www.responsiblelending.org/pdfs/rr008-Car_Title_Lending-0405.pdf.

Soldier is unable to pay the loan, he is either forced to renew or rollover the loan for a higher interest rate or find some other source of funds to pay the loan.[39] In the event the Soldier fails to pay or refinance the loan, the lender will charge large penalties.[40] As legal holder of title, the lender will begin an action for repossession.[41] The Soldier and his family members are then often left without a means of transportation.

Tax Refund Anticipation Loan

The regulations define a tax refund anticipation loan as "a closed-end credit [transaction] in which the covered borrower expressly grants the creditor the right to receive all or part of the borrower's income tax refund or expressly agrees to repay the loan with the proceeds of the borrower's refund."[42] In other words, the tax refund anticipation loan is a loan against the expected income tax return of the Soldier.[43] The Soldier may not realize that the amount he receives from the tax preparer is not their actual tax return, but a loan based on the anticipated income tax return amount.[44] After preparing the Soldier's tax return, the lender will then have a 100% lien on the return.[45] The lender typically charges a standard fee for tax preparation, loan origination, and a loan service or administration fee.[46] All fees are generally deducted from the amount loaned to the Soldier.[47] Some of these fees are included in the calculation of the military annual percentage rate, discussed below, which typically ranges from 300% to 600%.[48] The lender may loan more money to the Soldier than the Soldier will receive as his income tax return.[49] The Soldier, oftentimes unwittingly, signs documents agreeing that any excess amount paid to the Soldier above the actual tax return amount will be a loan with unconscionable repayment terms.[50] As with other relevant short-term loans, the high cost of the loan over such a short period makes the Soldier subject to astronomical interest rates.[51]

Rollovers and Renewals

Soldiers who cannot repay a short-term loan at the end of the period stated in the loan agreement will normally have the opportunity to "roll over" the loan.[52] Rolling over a loan extends the period allowed for the Soldier to repay the loan.[53] In order to roll over the loan, the Soldier must pay additional fees associated with the rollover while the interest charge on the loan amount continues to accrue.[54] Another option offered to the Soldier is the prospect of "renewal."[55] A renewal is an

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[38] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 16.

[39] *Id.*

[40] QUESTER & FOX, *supra* note 37, at 4–5.

[41] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 16.

[42] 32 C.F.R. § 232.3(b)(1)(iii) (2006).

[43] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 16 ("Tax refund anticipation loans are expensive short-term loans secured by a taxpayer's expected tax refund that are often granted to the lowest earners, those receiving the Earned Income Tax Credit.").

[44] *Id.* at 20.

[45] Press Release, Ctr. for Responsible Lending and The Consumer Fed'n of Am., Down, But Not Gone: Quick Tax Refund Loans Continue to Gouge Taxpayers and Military (Feb. 5, 2007) [hereinafter Down, But Not Gone], *available at* http://www.consumerlaw.org/issues/refund_anticipations/content/2007RALRelease.pdf.

[46] *Id.* ("[I]n 2007, a consumer can expect to pay from $57 to $104 to $111 in order to get a RAL for a typical refund of about $2,500.").

[47] NAT'L CONSUMER LAW CTR. & CONSUMER FED'N OF AM., ANOTHER YEAR OF LOSSES: HIGH-PRICED REFUND ANTICIPATION LOANS CONTINUE TO TAKE A CHUNK OUT OF AMERICANS' TAX REFUNDS, CTR. FOR RESPONSIBLE LENDING & THE CONSUMER FED'N OF AM. 3 (Jan. 2006) [hereinafter ANOTHER YEAR OF LOSSES], *available at* http://www.consumerfed.org/pdfs/2006_RAL_report.pdf.

[48] DOD, REPORT ON PREDATORY LENDING *supra* note 16, at 16.

[49] Down, But Not Gone, *supra* note 45, at 4 ("A RAL must be repaid even if the taxpayer's refund is denied, is smaller than expected, or frozen (something that the National Taxpayer Advocate has noted happens to hundreds of thousands of taxpayers, particularly EITC recipients).").

[50] ANOTHER YEAR OF LOSSES, *supra* note 47, at 3.

[51] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 16.

[52] *Id.* at 47.

[53] Huckstep, *supra* note 14, at 207 (referencing Bruch, *supra* note 33, at 1258).

[54] *Id.* ("When a borrower does not have sufficient cash to repay a loan, one easy option is to rollover or renew the loan for another term by paying additional interest or extension fees.").

extension of additional credit.[56] In order to qualify for the extension, proceeds from the new, larger loan are used to pay off the original debt amount.[57] Essentially, the Soldier becomes obligated on a larger loan amount, often without receiving any additional funds.[58]

Too often the Soldier cannot repay the high-interest loan and goes into default.[59] In the case of payday loans, the lender cashes the check which is subsequently returned to the lender for insufficient funds.[60] In such a case, the Soldier remains indebted to the lender, who continues to assess interest, while the bank charges a fee for writing a check on insufficient funds.[61] In title loan transactions, the lender begins the process to repossess the Soldier's vehicle.[62] Regardless of the loan type, the lender may then bring a summary court action for repayment of the funds. Often the Soldier chooses to obtain a payday loan from a different lender in order to pay the original debt.[63] The Soldier then becomes stuck in a cycle of shifting high-interest debt.

Why Is the Army Concerned?

Military Readiness and Morale

The Army is concerned with the fiscal situation of Soldiers.[64] In order to maintain troop readiness, the Army has a vested interest in maintaining high troop morale.[65] Excessive debt has a detrimental effect on the quality of life and morale of the Soldier.[66] Indeed, the DOD further recognizes that predatory loans degrade troop morale and detract from readiness.[67] Individual troop readiness is extremely important considering the current operational tempo. A key goal of the legal assistance attorney is to support Soldiers and promote military readiness.[68] With regard to the Military Lending Act, the legal assistance attorney must provide information and assistance to Soldiers plagued with financial problems resulting from such

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[55] Huckstep, *supra* note 14, at 207–08 (citing Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* 1 (FDIC Center for Financial Research Working Paper, Paper No. 2005/09, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract id= 771624 ("Rollovers involve payment of only additional fees; the renewal requires repayment of the loan in full before a new loan is extended.").

[56] *Id.*

[57] *Id.*

[58] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 22.

[59] *Id.* ("[T]he borrower is placed at a disadvantage and penalized through high fees and interest and dire consequences if they default.").

[60] Huckstep, *supra* note 14, at 207 (referencing Bruch, *supra* note 33, at 1258) ("Another [lender tactic] is for the lender to deposit the borrower's original check, leaving the borrower to deal with the high cost of bouncing a check, while still owing the payday lender.")).

[61] *See, e.g.*, IDAHO CODE ANN. § 28-46-412(3) (2007) ("Lenders may further assess a fee of up to $ 20 for any check that bounces or is returned for insufficient funds.").

[62] QUESTER & FOX, *supra* note 37, at 4–5.

[63] Huckstep, *supra* note 14, at 207 (referencing Bruch, *supra* note 33, at 1258) ("The borrower could begin a vicious cycle: obtain a new loan from a different payday lender, and use the new funds to pay off the old debt.")).

[64] *See generally* U.S. DEP'T OF DEFENSE, DIR. 1344.9, INDEBTEDNESS OF MILITARY PERSONNEL (27 Oct. 1994).

[65] AR 27-3, *supra* note 1, para. 2-1b(2) ("Fostering the high morale of Soldiers and their families is an important aspect of readiness.").

[66] Goulet, *supra* note 26, at 82 (referencing DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 45) ("Predatory lending affects the quality of life and morale of service members, and has demonstrably undermined troop readiness.").

[67] *Id.* at 82 (citing DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 53) (The Department of Defense has stated that "predatory lending undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding an all volunteer fighting force.").

[68] AR 27-3, *supra* note 1, para. 2-1b(1)

> *Readiness*. Because Active Army and RC Soldiers and emergency-essential DOD civilian employees must be prepared for immediate mobilization and deployment, their personal legal affairs must be in order at all times. Although the goal is to prepare Soldiers and emergency-essential DOD civilian employees for such eventualities well in advance of their occurrence, future legal needs cannot always be anticipated or met even under the best of plans. Possessing the capability to deliver legal assistance on short notice to great numbers during a brief period of time is essential to readiness.".

Id.

illegal predatory lending.[69] Helping Soldiers escape these lending traps not only helps the individual Soldier, it serves to maintain troop morale and, ultimately, military readiness.[70]

Duty to Maintain Fiscal Responsibility

Army Regulation (AR) 600-15 places an affirmative duty on the Soldier to maintain personal financial responsibility.[71] This regulation has two principal goals: to aid creditors in dealing with uncooperative Soldiers, and to protect the Soldier's right to privacy.[72] This aids creditors by providing a method of collection against Soldiers who refuse to pay their legitimate debts.[73] The regulations state that the lender's claim will be "processed" by the Army.[74] "Processed" seems to indicate that the Army will help the creditor collect on the debt; however, there is no definition for the word "processed."[75] Understanding these provisions is very important, as the commander may ultimately advise the Soldier to see a legal assistance attorney for advice regarding the debt.[76]

The regulation explicitly delineates the procedures that creditors must follow.[77] The creditor must first attempt to collect the debt from the Soldier.[78] If the Soldier refuses or otherwise fails to pay the debt, the creditor must present the claim to the command.[79] The creditor must provide sufficient evidence to establish a valid claim.[80] Sufficient evidence should include a court order or the contract, signed by the Soldier, forming the basis of the indebtedness.[81] The creditor must also provide written evidence sufficient to show the creditor's attempt to collect the debt from the Soldier.[82] All evidence must conclusively show that the creditor has complied with all applicable state and federal law, as well as DOD standards of fairness, in establishing the indebtedness and collection efforts.[83] After presenting all affirmative evidence, the creditor may then contact the commander directly.[84] After reviewing the evidence, the commander will counsel the Soldier regarding the indebtedness and the duty of fiscal responsibility.[85] If the Soldier is unwilling to pay, the creditor can appeal to the Army Community and Family Support Center.[86]

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[69] *Id.* para. 3-6e(1) ("Legal assistance will be provided to debtors on disputes over lending agreements . . . .").

[70] *Id.* para. 2-1b(2) ("High morale is enhanced by providing [S]oldiers and their [F]amilies information, advice and assistance responsive to their personal legal needs and problems.").

[71] AR 600-15, *supra* note 24, para. 1-5a ("Soldiers are required to manage their personal affairs satisfactorily and pay their debts promptly.").

[72] Major James S. Tripp, *Army Regulation 600-15, Indebtedness of Military Personnel: Time for an Update*, ARMY LAW., Nov. 2005, at 1, 8 ("The current *AR 600-15*'s structure loosely reflects its two main goals: (1) the implementation of a procedure for a creditor to follow whereby he or she may receive Army assistance in collecting a debt from an uncooperative Soldier, and (2) protection of a Soldier's right to privacy.").

[73] AR 600-15, *supra* note 24, para. 1-4b (stating that the Commanding General, United States Army Community and Family Support Center (USACFSC) will "process debt claims received at USACFSC regarding Soldiers.").

[74] *Id.* para. 1-5c ("Creditors who follow chapter 4 will have their debt complaints processed.").

[75] Tripp, *supra* note 72, at 8 (citing AR 600-15, *supra* note 24, para. 1-4b ("'Processed'" is defined nowhere in the regulation, but the context certainly seems to imply that the Army will assist the creditor to receive payment.")).

[76] AR 600-15, *supra* note 24, para. 2-1c(8)(d) ("[I]nform the Soldier that counseling is available under the Legal Assistance Program (27-3).").

[77] *Id.* para. 4-1 (listing the conditions creditors must meet before getting help with processing).

[78] *Id.* para. 4-3d(2).

[79] *Id.* para. 2-2a.

[80] *Id.* para. 4-3a (providing a list of all documents necessary to establish a valid claim).

[81] Tripp, *supra* note 72, at 9 (citing U.S. DEP'T OF ARMY, REG. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL para. 4-3a(4) (31 Feb. 1970)) ("A Soldier does not respond, the creditor should then make available to the commander a series of documents, including either written permission from the Soldier for the creditor to contact the Army about the debt.").

[82] AR 600-15, *supra* note 24, para. 4-3a(5) (requiring "written evidence showing the creditor's efforts to get the money directly from the Soldier").

[83] *Id.* para. 4-3a(1) (requiring "evidence showing the creditor has complied with the DOD's Standards of Fairness and other applicable Federal and State regulations").

[84] Tripp, *supra* note 72, at 9 ("Once all the required information has been provided and the commander has determined that the creditor complied with the terms of AR 600-15, the creditor may then contact the Soldier's commander directly.").

[85] AR 600-15, *supra* note 24, para. 2-(c)(8) (commander's duty to counsel the Soldier regarding the debt).

[86] Tripp, *supra* note 72, at 9 ("If the debt is not disputed, but the command is unable or unwilling to persuade the Soldier to pay, the creditor may appeal to USACFSC.").

An inadvertent consequence of the commander's involvement is that Soldiers may feel pressured to pay illegitimate debts. The commander does not force the Soldier to pay the debt,[87] yet a Soldier may see the commander's involvement as a motivating factor to pay the debt.[88] The purpose of AR 600-15, paragraph 1-5(a), is defeated if the commander inadvertently counsels the Soldier on an illegitimate debt.[89] However, commanders may be unaware of the provisions of the Military Lending Act that make a seemingly legitimate debt void and unenforceable.[90] The legal assistance attorney, after becoming aware of the debt, should inform the commander that the short-term debt violates the Military Lending Act. Informing the commander, as well as the Soldier, may relieve the Soldier's worry that the commander will become involved in the collection of the predatory loan.

The Military Lending Act

The Military Lending Act covers consumer credit extended by "covered creditors" to "covered borrowers."[91] Specifically, it covers the previously discussed payday loans,[92] vehicle title loans,[93] and tax refund anticipation loans.[94] These three lending methods are the subject of the Act because they involve high interest rates, coupled with short payback terms.[95] It is imperative that legal assistance attorneys become familiar with these types of lending arrangements.

Which Lending Transactions Does the Act Not Cover?

The regulations do not cover certain transactions or credit arrangements entered into by Soldiers.[96] Lending arrangements excluded from the Act are: residential mortgages, refinance transactions, home equity loans or lines of credit, and reverse mortgages.[97] Further, the regulations do not cover any credit transaction to finance the purchase or lease of a motor vehicle when the credit is secured by the vehicle being purchased or leased.[98] This provision may create some confusion between a vehicle purchase loan and a title loan. The legal assistance attorney must be familiar with title liens as they relate to both vehicle purchase loans and title loans.

Also, the regulations do not cover any credit transaction to finance the purchase of personal property when the credit is secured by the property being purchased.[99] These finance agreements may be usurious and violate applicable state law, but there are no protections under the Military Lending Act. In addition, the regulations do not cover loans secured by funds in a qualified retirement account, as defined in the Internal Revenue Code.[100] Attorneys should watch for future clarification of the reasoning behind excluding loans secured by a qualified retirement account. Finally, any other credit transaction that is not consumer credit extended by a creditor is an exempt transaction, or is not otherwise subject to disclosure requirements for purposes of Regulation Z (Truth in Lending), is not regulated by the Military Lending Act.[101] Nonetheless, in order to adequately advise the client regarding his financial indebtedness, the legal assistance attorney should be familiar with every type of lending transaction.

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[87] AR 600-15, *supra* note 24, para. 1-5a.

[88] *Id.* para. 3-1 (Administrative and Punitive Actions).

[89] *Id.* para. 1-4b(3) ("objectives of this regulation are to protect the rights of the Soldier, his or her family members, and the interests of the Army").

[90] 32 C.F.R. § 232.9(c) (2006).

[91] *Id.* § 232.1(c).

[92] *Id.* § 232.3(b)(1)(i).

[93] *Id.* § 232.3(b)(1)(ii).

[94] *Id.* § 232.3(b)(1)(iii).

[95] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 4.

[96] 32 C.F.R. § 232.3(b)(2)(i)–(v).

[97] *Id.* § 232.3(b)(2)(i).

[98] *Id.* § 232.3(b)(2)(ii).

[99] *Id.* § 232.3(b)(2)(iii).

[100] *Id.* § 232.3(b)(2)(iv).

[101] *Id.* § 232.3(b)(2)(v) (referencing The Truth in Lending Act (Regulation Z), 12 C.F.R. pt. 226 (1995)).

To Whom Do the Regulations Apply?

The regulations only apply to certain "covered creditors."[102] Under the Military Lending Act, a covered "creditor" (lender) is defined as "a person who is engaged in the business of extending consumer credit with respect to a borrower covered by this Regulation."[103] All financial institutions—without exception—are subject to these regulations. These regulations include purchasers or assignees of the loan agreement.[104] An assignee may not engage in any transaction or take any action that would be prohibited for the original lender.[105]

The regulations offer protections to all "covered borrowers,"[106] defined as a "regular or reserve member of the Army, Navy, Marine Corps, Air Force, or Coast Guard, serving on active duty under a call or order that does not specify a period of thirty days or fewer, or such a member serving on 'Active Guard' and 'Reserve duty,'"[107] or "the member's spouse, the member's child, or an individual for whom the member provided more than one-half of the individual's support for 180 days immediately preceding an extension of consumer credit covered by this part."[108] For purposes of this article, "covered borrowers" will be referred to collectively as the Soldier. The legal assistance attorney must determine whether the client is indeed a "covered borrower" and thereby protected by the Act.[109] Notably, military retirees and non-activated Reserve Component Soldiers are not "covered borrowers." The attorney must then determine whether the lender qualifies as a "covered creditor."[110] If either condition is not met, the Military Lending Act will not regulate the conduct of the creditor or protect the borrower.[111]

The Military Annual Percentage Rate

What is the "Military Annual Percentage Rate" (MAPR) and how does the new code affect that rate?[112] "The MAPR is the cost of the consumer credit transaction expressed as an annual rate."[113] The MAPR includes most of the costs paid by the Soldier in order to receive the loan.[114] The cost of the loan includes the "interest, fees, credit service charges, [and] credit renewal charges."[115] The MAPR also includes certain mandatory costs paid to the lender, such as "credit insurance premiums including, charges for single premium credit insurance, fees for debt cancellation or debt suspension agreements,"[116] and "fees for credit-related ancillary products sold in connection with and either at or before consummation of the credit transaction."[117]

Certain items are not included in the calculation of the MAPR, such as "fees or charges imposed for actual unanticipated late payments, default, delinquency, or similar occurrence."[118] Fees charged for failure to pay a valid debt are not part of the cost of the original transaction, as they are contingent upon a breach of the agreement.[119] Further, the regulations do not

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[102] *Id.* § 232.3(e).

[103] *Id.*

[104] *Id.* § 232.4(a).

[105] *Id.* § 232.8(b).

[106] *Id.* § 232.3(c).

[107] 32 C.F.R. § 232.3(c)(1). For further definition of "Active Guard" and "Reserve duty," see 10 U.S.C.S. § 101(d)(6) (LexisNexis 2008).

[108] 32 C.F.R. § 232.3(c)(2).

[109] *Id.* § 232.3(c).

[110] *Id.* § 232.3(e).

[111] *Id* § 232.2.

[112] *Id.* § 232.3(h).

[113] *Id.*

[114] *Id.* § 232.3(h)(1).

[115] *Id.* § 232.3(h)(1)(i).

[116] *Id.* § 232.3(h)(1)(ii).

[117] *Id.* § 232.3(h)(1)(iii).

[118] *Id.* § 232.3(h)(2)(i).

[119] *Id.*

affect "taxes or fees prescribed by law that actually are or will be paid to public officials for determining the existence of, or for perfecting, releasing, or satisfying a security interest."[120] The Military Lending Act purports to protect Soldiers against predatory lenders.[121] It does not restrict the right of state or local governments to tax certain financial transactions.[122] The regulation does not control "any tax levied on security instruments or documents evidencing indebtedness if the payment of such taxes is a requirement for recording the instrument securing the evidence of indebtedness."[123] Again, state and local governments charge certain tax and recording fees. The Military Lending Act does not regulate such activity.

Not every fee charged by the lender is included in calculating the MAPR. The MAPR does not include "tax return preparation fees associated with a tax refund anticipation loan, whether or not the fees are deducted from the loan proceeds."[124] This is an important distinction. The lender may deduct the cost of his tax preparation service from the proceeds of the loan and the fee is not included in the MAPR.[125] Lenders will often provide rapid-refund loans at a legal interest rate, but charge an exorbitant preparation fee.[126] Even though the legal assistance office offers free tax preparation services to Soldiers,[127] they often opt to take these high-cost, high-interest loans in order to immediately receive funds from their income tax return. The Military Lending Act offers no protection to the Soldier against these fees, as the regulations control only fees that are included in the MAPR.[128] The legal assistance attorney must closely examine the credit transaction to determine whether the amount withheld from the rapid refund loan is a preparation fee or a loan origination fee.

What Are the MAPR Limits?

The regulations specifically limit the MAPR.[129] In calculating all fees, including renewal or refinance fees, and applicable interest rates, the total MAPR cannot exceed 36%.[130] Importantly, the maximum MAPR applies to any assignee of the creditor, as well as the creditor who originated the loan.[131] The Soldier must specifically agree to any legitimate MAPR as stated in the credit agreement or promissory note.[132] A lender cannot circumvent the regulations by issuing a loan and quickly transferring the debt to another assignee, who erroneously believes he is protected by the "good faith purchaser" rule.[133] Lastly, the MAPR cannot violate the Military Lending Act[134] or any other applicable state or federal law.[135]

Covered Borrower Identification Statement

The regulations impose certain disclosure requirements.[136] Specifically, each applicable credit agreement must contain a "Covered Borrower Identification Statement."[137] This provision also applies to consumer credit originated or extended

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[120] *Id.* § 232.3(h)(2)(ii).

[121] *Id.* § 232.1(b).

[122] *Id.* § 232.3(h)(2)(ii).

[123] *Id.* § 232.3(h)(2)(iii).

[124] *Id.* § 232.3(h)(2)(iv).

[125] *Id.*

[126] Down, But Not Gone, *supra* note 45, at 4.

[127] AR 27-3, *supra* note 1, para. 3-6i ("Legal assistance will be provided on real and personal property tax issues and on the preparation of Federal and State income tax returns.").

[128] 32 C.F.R. § 232.1(c)(1).

[129] *Id.* § 232.4.

[130] *Id.* § 232.4(b).

[131] *Id.* § 232.4(a).

[132] *Id.* § 232.4(a)(1).

[133] 15 U.S.C. § 1640(f) (2000).

[134] 32 C.F.R. § 232.4(a)(3).

[135] *Id.* § 232.4(a)(2).

[136] *Id.* § 232.6.

[137] *Id.* § 232.5(a)(1).

through the Internet.[138] The lender must present the written covered borrower identification statement to the applicant before entering into the transaction.[139] The applicant must sign the statement indicating that he is or is not a covered borrower.[140] If the Soldier signs the agreement, including the covered borrower identification statement, erroneously or falsely indicating that he is not a covered borrower, then the lender will not be subject to these regulations.[141]

This requirement does not apply to a transaction in which the Soldier rolls over, renews, repays, refinances, or consolidates the loan in a manner that does not exceed the allowable MAPR or violate other provisions of this Act.[142] These are very important provisions, as the Soldier can waive the protections of the Military Lending Act by falsely affirming that he is not a covered borrower.[143] The legal assistance attorney should remind the Soldier that "knowingly making a false statement on a credit application is a crime."[144] One caveat is that the creditor must not have determined the borrower to be a covered borrower by any other optional, identity verification procedure.[145] If the lender is aware that the client is a covered borrower the Soldier cannot waive his rights by any method, including falsifying the covered borrower identification statement.

Financial Disclosures: What and How?

The lender must make certain financial disclosures, "clearly and conspicuously," before entering into the contract with the covered borrower.[146] The agreement must clearly disclose the total dollar amount charged as a fee for the loan and the calculated MAPR.[147] Also, there must be a "clear description of the payment obligation of the covered borrower."[148] The standard for adequate disclosure is that the Soldier must be able to readily identify all charges, fees, and the MAPR.[149] The lender may use a detailed payment schedule to satisfy this requirement.[150] These requirements are in addition to any disclosures required by other laws, including the Truth in Lending Act.[151]

The regulations place certain requirements on the manner of disclosure.[152] The above-stated disclosures must be in writing "in a form the covered borrower can keep."[153] The lender may satisfy this requirement by providing a copy of the credit agreement to the Soldier.[154] The creditor must also provide the required disclosures orally before consummating the transaction.[155] This oral disclosure requirement applies to mail and Internet transactions as well.[156] The lender can satisfy this requirement by providing a toll-free telephone number where the Soldier can listen to the oral disclosures.[157] Disclosures

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[138] *Id.* § 232.6(b)(2).

[139] *Id.* § 232.5(a)(1).

[140] *Id.*

[141] *Id.*

[142] *Id.* § 232.5(d) ("Transaction which are exempt from the disclosure requirements are where the creditor rolls over, renews, repays, refinances, or consolidates consumer credit in accordance with § 232.8(a)(1) if § 232.5(a)(1) and § 232.5(a)(2) applied to the previous transaction.").

[143] *Id.* § 232.5(a).

[144] *Id.* § 232.5(a)(1).

[145] *Id.* § 232.5(a)(2).

[146] *Id.* § 232.6(a).

[147] *Id.* § 232.6(a)(1).

[148] *Id.* § 232.6(a)(3).

[149] *Id.* § 232.6(a).

[150] *Id.* § 232.6(a)(3).

[151] *Id.* § 232.6(a)(2) (referencing Regulation Z, 12 C.F.R. pt. 226).

[152] *Id.* § 232.6(b).

[153] *Id.* § 232.6(b)(1).

[154] *Id.*

[155] *Id.* § 232.6(b)(2).

[156] *Id.*

[157] *Id.* § 232.6(b)(2).

are required for refinancing or renewal of covered loans if the transaction is considered a new transaction that requires disclosures under the Truth in Lending Act.[158] It is important to query the Soldier regarding the oral disclosure—the Soldier will likely have the burden of proving that there was no oral disclosure.

Refinancing an Old Transaction

The regulations control the possible refinance terms of prior loan agreements.[159] A lender cannot roll over, renew, repay, refinance, or consolidate any of the subject loans to a covered borrower with new credit, unless the new transaction results in more favorable terms to the covered borrower.[160] More favorable terms are those that comply with the Military Lending Act and subsequent regulations. The more favorable terms provision does not apply if the initial extension of credit would have been permitted by this section. [161]

No Waiver of Legal Action

The Soldier cannot waive his right to legal recourse under this or any other law.[162] Specifically, the Soldier cannot waive his rights under the Servicemembers Civil Relief Act.[163] The most common form of waiver is an arbitration clause.[164] The regulations specifically state that a lender cannot require a Soldier to submit to arbitration.[165] No agreement to arbitrate a dispute involving the extension of consumer credit to a covered borrower will be enforceable against any covered borrower, or any person who was a covered borrower when the agreement was made.[166] Further, the lender cannot impose any other onerous legal notice provisions in the case of a dispute.[167] For example, lending agreements often require notice to the lender of any claim or dispute regarding the validity of the loan.[168] Per the regulations, a creditor may not demand unreasonable notice from the covered borrower as a condition of legal action.[169]

No Paycheck Lending

Under the new regulations, a lender may not use a check or other access to the Soldier's financial account, unless the loan agreement complies with all of the regulations under the Military Lending Act.[170] This provision requires close inspection, as it does not prohibit certain payment assurances or methods.[171] For example, the creditor may require an electronic fund transfer to repay a consumer credit transaction.[172] If the transaction complies with these regulations, the lender may require repayment of such a loan via electronic debit.[173] The lender may also require direct deposit of the

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[158] *Id.* § 232.6(c) (referencing 12 C.F.R. § 226.20(a), which states that "[a] refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer.").

[159] *Id.* § 232.6(c).

[160] *Id.* § 232.8(a)(1).

[161] *Id.*

[162] *Id.* § 232.8(a)(2).

[163] *Id.* § 232.10.

[164] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 7.

[165] 32 C.F.R. § 232.8(a)(3).

[166] *Id.*

[167] *Id.*

[168] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 7.

[169] 32 C.F.R. § 232.8(a)(4).

[170] *Id.* § 232.8(a)(5)

[171] *See generally id.* § 232.8.

[172] *Id.* § 232.8(a)(5)(i).

[173] *Id.*

borrower's salary in order to secure repayment of a legitimate loan.[174] This type of arrangement is most common where the short-term lender is financed by a bank where the Soldier maintains an account.[175] The lender may take a security interest in funds deposited in the Soldier's account if that account was established to deposit the loan proceeds.[176] Be aware that this provision does not affect a bank or other financial institution's right to offset the debt owed to that entity, granted by other statutes, regulations, or common law, against the account of the Soldier.[177] Finally, if the terms of the loan allow for payment in allotments, the lender may require that automatic payments be established in accordance with the allotment schedule.[178]

Early Payment or Pay-off Clauses

A creditor may not include provisions stating that the covered borrower is prohibited from prepaying the consumer credit or that the covered borrower is charged a penalty for prepaying all or part of the consumer credit.[179] These types of provisions result in usurious interest rates, as the Soldier is precluded from escaping the exorbitant interest and fees through early repayment of the loan.[180] The regulations generally prohibit any provisions that restrict the Soldier from finding his way out of the debt cycle created by these short-term, high-interest loans.

Act Preempts State Law

The regulations specifically state that they "preempt any State or Federal law to the extent such law, rule or regulation is inconsistent . . . . Any State law may provide greater protections than those described under 10 U.S.C. § 987 and this Regulation."[181] Furthermore, "[s]tate law is not allowed to treat covered borrowers differently than what is provided for under this Regulation."[182]

Legal Assistance Attorney: Serving the Soldier

Legal assistance attorneys advise Soldiers on their legal troubles.[183] Primarily, the attorney informs the Soldier of the law that governs or pertains to the Soldier's situation.[184] Depending on knowledge or expertise, the attorney will advise the Soldier of his rights or protections under the law.[185] The remaining part of this article explains the requirements of the Military Lending Act in a manner easily understood by attorney and client alike.

Legal assistance attorneys should first attempt to represent the Soldier's interest through negotiation and unofficial mediation with the lender/creditor.[186] The attorney may contact the lender to determine the circumstances of the loan agreement.[187] After carefully examining the facts, the attorney should inform the Soldier whether the terms of the lending agreement violate state or federal law. After determining that the lender has violated the law, the attorney will typically write a letter to the lender, giving him notice of his illegal conduct.[188] Depending on the Soldier's desires, the attorney may also

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[174] *Id.* § 232.8(a)(5)(ii).

[175] FOX, *supra* note 29, at 9.

[176] 32 C.F.R. § 232.8(a)(5)(iii).

[177] *Id.* § 232.3(b)(1)(i)(B).

[178] *Id.* § 232.8(a)(6).

[179] *Id.* § 232.8(a)(7).

[180] *See generally* FOX, *supra* note 29.

[181] 32 C.F.R. § 232.7(a).

[182] *Id.* § 232.7(b).

[183] AR 27-3, *supra* note 1, para. 3-3 (General).

[184] *Id.* para. 3-6h(1) ("Legal assistance will be provided on invoking whatever protections may be afforded under the [SCRA] on matters relating to the prosecution or defense of civil lawsuits based on alleged tortuous conduct.").

[185] *Id.* para. 3-5 (Scope).

[186] *Id.* App. B-4(d) (citing legal negotiation as one of the many types of legal services that may be provided to eligible clients).

[187] *Id.*

[188] *Id.* para. 3-7c (Legal correspondence).

call and negotiate with the lender on the client's behalf.[189] Before taking any of these steps, the attorney should be well-versed in the applicable law and relevant facts of the loan agreement. As the Military Lending Act is very specific regarding the lender's conduct, the attorney will gather most of his information from the loan agreement.

Generally speaking, a legal assistance attorney cannot represent a Soldier in court.[190] However, there are certain exceptions to this rule.[191] A legal assistance attorney may represent a Soldier in state or federal court if that attorney is a member of the state/federal bar where the violation took place, or if a special program exists allowing the lawyer to undertake such representation.[192] In any event, the attorney should always consult his supervisor and the Staff Judge Advocate before undertaking such representation.[193] The Staff Judge Advocate may determine that the circumstances warrant in-court representation by a legal assistance attorney.[194] For example, maintaining troop readiness is a command objective that could warrant in-court representation.[195] Nonetheless, in-court representation by a uniformed Judge Advocate is not the norm. Army regulations specifically provide for referral of a Soldier to a civilian attorney with experience in the subject matter and local jurisdiction.[196]

The legal assistance attorney is obliged to help the Soldier contact a civilian attorney.[197] The attorney should consult closely with the Soldier before external referral.[198] The Soldier needs to be aware of the costs and procedures that he will face in consulting a civilian attorney. Civilian consumer law attorneys typically charge high fees due to the difficult subject matter of such cases. Often, Soldiers cannot afford civilian attorneys.[199] The legal assistance attorney should try to help the client without sending him to a civilian attorney.[200] Furthermore, Army regulation states that once a Soldier retains a paid civilian attorney, the matter may no longer be within the realm of military legal services.[201] For these reasons, the attorney should do as much as possible to help the Soldier without or before referral. The civilian attorney representing the Soldier may contact the legal assistance attorney for factual information about the Soldier's situation or interpretation of the law as it affects Soldiers in general. The legal assistance attorney may assist the civilian attorney if authorized by the client and Army regulation.

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[189] *Id.* para. 3-7d (Legal negotiation).

[190] *Id.* para. 3-7g(1) ("[O]nly a supervising attorney can authorize in-court representation by an attorney providing legal assistance. Authorization may be on a case-by-case basis or for certain categories of cases . . . it may also be authorized to advance certain command objectives (for example, protecting service members from certain unfair business practices.").

[191] *Id.*

[192] *Id.* para. 3-7g(4)

> In-court representation may occur in any one or combination of the following methods: (a) *Bar membership.* The attorney providing legal assistance is qualified (through bar membership or otherwise) to represent clients in the particular Federal, State, or foreign jurisdiction (b) *State-approved program.* The attorney providing legal assistance from an Active Army legal office is authorized to represent clients pursuant to a written agreement with the State bar or pursuant to a motion granted by an appropriate court of the State concerned.

Id.

[193] *Id.* para. 3-7g(1).

[194] *Id.*

[195] *Id.*

[196] *Id.* para. 3-7h(1) ("Attorneys providing legal assistance may refer a client to an attorney in another military legal office, to a civilian lawyer, or to another office or agency whenever referral is in the best interest of the client or required by this regulation.").

[197] *Id.* para. 3-6h(1) ("Subject to the availability of expertise and resources, other legal assistance may be provided, but such assistance will be limited to counseling and assistance on retaining a civilian lawyer.").

[198] *Id.* para. 3-7g(3).

[199] *Id.* para. 3-7g(3)(e).

[200] *Id.* para. 3-7h(2) ("Clients should be assisted whenever possible without referral. Unnecessary referrals delay the delivery of legal assistance and cause inconvenience to clients.").

[201] *Id.* para. 3-5b ("A matter entirely within the legal assistance program may also cease to be within the legal assistance program if the client is paying a fee for professional legal services for help on that matter (for example, to a civilian lawyer to whom the client was referred).").

Conclusion

Legal assistance exists to benefit Soldiers.[202] The legal assistance attorney may be the first, and possibly only, line of defense against predatory lenders. To adequately serve the Soldier, the legal assistance attorney must be very familiar with the Military Lending Act and subsequent regulations. In the face of tighter federal regulation of predatory lending, it appears that lenders are modifying their lending agreements to extend for more than ninety days, thereby falling outside the Act's purview.[203] This is just one example of the many alternative lending arrangements that lenders will use in order to circumvent the Act.[204] As common law develops around the Military Lending Act, attorneys will have to independently research this topic in order to stay apprised of the changing nature of short-term, lending agreements. Soldiers depend on legal assistance attorneys. Therefore, attorneys must strive to maintain the knowledge and skills to serve and protect Soldiers and should become familiar with services offered by the Financial Readiness Program to refer and assist Soldiers in learning how to avoid future financial dilemmas.

[202] *Id.* para. 1-1 (Purpose).

[203] DOD, REPORT ON PREDATORY LENDING, *supra* note 16, at 22, 47; *see also* Consumer Affairs, *Pentagon's Predatory Lending Rules Faulted*, (14 June 2007), *available at* http://www.consumeraffairs.com/news04/2007/06/pentagon_predatory.html.

[204] FOX, *supra* note 29, at 1.

USALSA Report
United States Army Legal Services Agency

Trial Judiciary Notes

A View from the Bench

Preparing Your Client for Providency

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One of the most important areas of a defense counsel's guilty plea trial preparation, and definitely one of the most challenging aspects, is preparing the client for providency. Though grounded in statutory and case law, most of what a defense counsel learns about providence preparation will come from experience rather than through formal study. In that vein, this article will briefly address the legal requirements of an accused's guilty plea, and will then focus on practice pointers to help counsel ensure that his client is provident. The article will discuss use of the *Military Judges' Benchbook* (*Benchbook*)[1] in preparing for providence, traps for unwary counsel, and practical tips for assuring the client does not lose the benefit of his plea agreement. The article will conclude with a checklist for counsel's use in preparing a client for the court's guilty plea inquiry.

Legal Basis for Providence Inquiry

Since the groundbreaking 1969 case of *United States v. Care*,[2] military judges must inquire into and establish a factual basis for an accused's guilty plea:

> [T]he record of trial . . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge . . . has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[3]

Article 45, Uniform Code of Military Justice (UCMJ), presumes a military judge will verify the providence of an accused's guilty plea, though it does not specifically require such an inquiry:

> If an accused . . . after a plea of guilty sets up a matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.[4]

Unlike Article 45's presumption that the military judge will inquire into the providence of an accused's guilty plea, Rule for Courts-Martial (RCM) 910 explicitly requires such an inquiry and details particular issues that the judge must address.[5] Before accepting a guilty plea, the military judge must inform the accused of the nature of the offense pled to, the penalty range for that offense, the accused's right to counsel, the accused's right to confront and cross-examine witnesses, and the

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[1] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 July 2003) [hereinafter BENCHBOOK].

[2] 40 C.M.R. 247 (C.M.A. 1969).

[3] *Id.* at 253 (citations omitted). For an excellent summary of *Care*, its origins, and its progeny, see Major Deidra J. Fleming, *The Year in Voir Dire and Challenges, and Pleas and Pretrial Agreements*, ARMY LAW., June 2007, at 31, 35–36.

[4] UCMJ art. 45 (2008).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2005) [hereinafter MCM]. For similar requirements in civilian criminal practice, see FED. R. CRIM. P. 11(b).

accused's right against self-incrimination.[6] The judge must advise the accused that if he pleads guilty, there will not be a trial as to the offenses pled to, and that the accused waives his right to confront and cross-examine witnesses, as well as his right against self-incrimination.[7] Finally, the judge must tell the accused that if he pleads guilty, the judge will place him under oath and question him about the offenses to which he has pled guilty.[8]

Under RCM 910, not only must the military judge provide this advice to the accused, he also must insure that the accused understands it.[9] Likewise, the judge must ensure that the plea is voluntary; that is, free from threats or promises not contained in any plea agreement.[10] Just as importantly, the military judge must be satisfied that "there is a factual basis for the plea."[11] The judge should explain the elements of the offenses to the accused, and "the accused must admit every element of the offense(s)" pled to.[12] The judge should explain any potential defenses "raised by the accused's account of the offense," and elicit facts from the accused that negate those defenses.[13] If there is a plea agreement, the military judge must examine it (absent any sentence limitation)[14] and question the accused to ensure that he fully understands the agreement.[15]

The *Benchbook* Is Your Friend

As a defense counsel readying yourself and your client for the court's providence inquiry, the best tool for incorporating these legal standards into your trial preparation is the *Benchbook*.[16] The *Benchbook*'s table of contents and Chapter 2 script are good roadmaps for preparing the client for the court's inquiry.

When explaining the providence inquiry to the client, start by telling the client the name of the judge and explaining the client's forum rights.[17] Move next to the elements of the offenses to which the client is pleading guilty.[18] Review the elements with your client and discuss how the facts of the particular case meet those elements. Make sure the client can explain to the court how the facts satisfy each and every element of the offenses to which he is pleading. Remind the client that mere "yes" or "no" answers will not suffice.[19] Reassure the client that he "need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea."[20] Rather, he may "be able to adequately describe the

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[6] MCM, *supra* note 5, R.C.M. 910(c)(1)–(3).

[7] *Id.* R.C.M. 910(c)(4).

[8] *Id.* R.C.M. 910(c)(5). Further, the judge must advise the accused that the accused's answers may later be used against him in a prosecution for perjury or false statement. *Id.*

[9] *Id.* R.C.M. 910(c) ("[A]nd determine that the accused understands . . . .").

[10] *Id.* R.C.M. 910(d).

[11] *Id.* R.C.M. 910(e); *see also id.* R.C.M. 910(e) discussion ("A plea of guilty must be in accord with the truth.").

[12] *Id.* R.C.M. 910(e) discussion.

[13] *Id.*

[14] *Id.* R.C.M. 910(f)(3).

[15] *Id.* R.C.M. 910(f)(4). Not only must the accused understand the agreement, he also must agree to it. *Id.*

[16] In recognizing the *Benchbook*'s value, counsel may want to remember this ditty:

> This is my laptop
>
> Here is its port
>
> Access the Benchbook
>
> And use it in court

[17] BENCHBOOK, *supra* note 1, § 2-1-2; MCM, *supra* note 5, R.C.M. 903. Practically speaking, this also is a good time to explain to the accused any particular reputations that the detailed judge or court members may have. Additionally, remind the accused that the military judge will review the accused's rights to counsel at about this same point in the trial. BENCHBOOK, *supra* note 1, § 2-1-1.

[18] *See generally* BENCHBOOK, *supra* note 1, ch. 3; MCM, *supra* note 5, R.C.M. 910(e) discussion.

[19] United States v. Jordan, 57 M.J. 236, 239 (2002) (answering yes or no to conclusory statements by military judge insufficient in absence of admissions to support them) (citing United States v. Outhier, 45 M.J. 326, 331 (1996)); *accord* United States v. Frederick, 23 M.J. 561, 562–63 (A.C.M.R. 1986).

[20] MCM, *supra* note 5, R.C.M. 910(e) discussion; *see* United States v. Axelson, 65 M.J. 501, 510–11 (Army Ct. Crim. App. 2007) (citing United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977)).

offense based on witness statements or similar sources which [he] believes to be true."[21] For example, the client may remember that he smoked marijuana and recognize the validity of the lab report without necessarily having observed the lab's testing of his urine sample.[22]

Along with explaining the elements to the client and making sure he can match the facts to those elements, clarify with the client the various bases of his potential liability, if more than direct liability is at issue.[23] Next, review with the client any defenses that may exist under RCM 916.[24] Assist the client in preparing his explanation to the judge why those defenses do not apply in his case.[25] For both elements and potential defenses, make sure the client understands the applicable definitions and how those definitions fit the facts of his case. Review the appropriate definitions in Chapters 3 (offenses) and 5 (defenses) of the *Benchbook* with the client.[26] Finally, have the client especially prepared to explain how his conduct is service discrediting or prejudicial to good order and discipline if charged under Article 134.[27]

After explaining elements, defenses, and definitions, review the pretrial agreement with your client, paragraph-by-paragraph.[28] Though this usually is not difficult, reviewing the stipulation of fact with the accused is the source of many anxious moments for defense counsel. If the client notes factual inaccuracies, by all means bring them to the attention of the trial counsel and try to resolve them. On the other hand, if the client tells you that everything in the stipulation is true but that he objects to the government's inclusion or characterization of certain facts, remind him that the government holds great leverage because of its offered sentence cap. For instance, if the client wants the benefit of his pretrial agreement, the government can force him to stipulate to aggravation evidence if it is true.[29] Moreover, as part of the pretrial agreement, the government can force the accused to stipulate to uncharged misconduct that is true.[30]

After reviewing the pretrial agreement and stipulation of fact, review the maximum potential punishment with the client. Tell him that the trial counsel will announce the maximum punishment when queried by the judge, but that the pretrial agreement guarantees a lower punishment if the client is provident. Explain that the judge will not know the sentence terms of the pretrial agreement, even though he will review the rest of the agreement with the accused. When explaining the terms of the pretrial agreement, ensure that the accused understands particular rights that he is waiving, as applicable. For example, if appropriate, clarify for the accused his waiver of his right to a statutory waiting period between service of charges and trial,[31] his waiver of his right to conflict-free counsel,[32] his waiver of his right to an Article 32 hearing,[33] his waiver of his right to trial by members,[34] and his waiver of motions.[35]

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[21] MCM, *supra* note 5, R.C.M. 910(e) discussion.

[22] *But see* United States v. Wiles, 30 M.J. 1097, 1100–01 (N.M.C.M.R. 1989) (setting aside guilty plea where accused convinced by witness statements that he smoked marijuana, but had no memory of smoking it).

[23] BENCHBOOK, *supra* note 1, § 7-1, 7-2; MCM, *supra* note 5, pt. IV, ¶¶ 2, 5; *id.* at R.C.M. 307(c)(5).

[24] MCM, *supra* note 5, R.C.M. 916.

[25] Be especially careful to resolve fully any potential defenses in AWOL and drug cases, as the appellate courts are scrutinizing pleas in these areas. *See* United States v. Gaston, 62 M.J. 204, 207 (2006) (insufficient admission from accused that absence was terminated by apprehension rather than voluntary surrender); United States v. Gosselin, 62 M.J. 349, 352–53 (2006) (insufficient admission from accused that he assisted in introducing drugs onto air base).

[26] BENCHBOOK, *supra* note 1, chs. 3, 5.

[27] *See* United States v. Erickson, 61 M.J. 230, 232 (2005) (accused sufficiently testified regarding how his drug use could prejudice good order and discipline by rendering him unfit and unwilling to perform military duties); United States v. Jordan, 57 M.J. 236, 239 (2002) (conduct was not service discrediting where accused testified where owners of damaged property "appeared neither upset nor agitated").

[28] MCM, *supra* note 5, R.C.M. 910(f)(3), (4).

[29] United States v. Harrod, 20 M.J. 777, 779 (A.C.M.R. 1985); United States v. Sharper, 17 M.J. 803, 807 (A.C.M.R. 1984).

[30] United States v. Vargas, 29 M.J. 968, 970–71 (A.C.M.R. 1990).

[31] BENCHBOOK, *supra* note 1, § 2-7-1; MCM, *supra* note 5, R.C.M. 602; UCMJ art. 35 (2008).

[32] BENCHBOOK, *supra* note 1, § 2-7-3 (defense counsel representing multiple accused); UCMJ art. 27; *see* United States v. Smith, 36 M.J. 455, 457 (C.M.A. 1993).

[33] BENCHBOOK, *supra* note 1, § 2-7-8; MCM, *supra* note 5, R.C.M. 405(k); UCMJ art. 32.

[34] BENCHBOOK, *supra* note 1, § 2-7-9; MCM, *supra* note 5, R.C.M. 903; UCMJ art. 16.

[35] BENCHBOOK, *supra* note 1, § 2-7-10. Be careful, though, as there are some motions that an accused may not waive, even as part of a pretrial agreement. *See id.* at note 1; MCM, *supra* note 5, R.C.M. 705(c)(1)(B), R.C.M. 705(c)(2)(E); *see also* United States v. McLaughlin, 50 M.J. 217, 218–19 (1999) (holding that the accused may not waive his right to speedy trial as part of a pretrial agreement); United States v. Jennings, 22 M.J. 837, 838–39

Traps for the Unwary

Even when using the *Benchbook* as a roadmap for your guilty plea preparation, there remain a few traps for both you and your client that the *Benchbook* does not specifically address. First and foremost, remind the client that if he "busts"[36] providency, that doesn't mean that the court finds him not guilty. What it means instead is that the government will have to prove his guilt at a trial and, more importantly, he loses the benefit of his pretrial agreement if found guilty. Many accused do not initially understand this, but once they do, it provides a powerful incentive to get through providence.

Discuss with the client the consequences of raising a defense or a matter inconsistent with his plea. Whether the client raises the defense or inconsistency during providence or later during sentencing, the judge must resolve the defense or inconsistency.[37] Therefore, defense counsel must "scrub" both the accused's providence statements and the sentencing case to ensure that he raises no defenses or inconsistent matters that he cannot resolve consistent with his pleas.

Remind the client of any potential collateral consequences of his guilty conviction. For example, ensure that the client understands that he may have to participate in a Mandatory Supervised Release program,[38] and that he may need to comply with certain state criminal registration requirements, particularly if convicted of sex-related offenses.[39] Though not necessarily a bad thing for the client, it is important to remind him that any adjudged forfeitures will be at the rate of his new pay grade, if reduced in rank.[40] Finally, explain to the client his post-trial and appellate rights, remind him that the military judge will review these with him, and have him sign a post-trial and appellate rights form.[41]

Call Mama, Or What They Didn't Teach You in Law School

Even after thoroughly reviewing the *Benchbook* along with statutory and case law, there are some practice pointers that defense counsel should know that are not found in books. When reviewing the following practice pointers, counsel should first remember to be themselves. What works for certain counsel may not work for other counsel. Be willing to try new techniques, but more importantly, be willing to adopt those that work for you and jettison those that do not.

Before you even get to the stage of preparing the client for providency, work on building a strong rapport with the client. Though not always an easy task, it is essential that the client trusts your judgment as you begin discussing providence. Before you even reach this stage, spend time with the client, let him know what work you are doing on his case, listen to him and answer his questions.

Though it may not be difficult to convince the client to plead guilty in return for a sentence limitation, persuading him to admit guilt in open court and recount his misdeeds is an altogether different challenge. Counsel walk a fine line between urging the client to plead guilty because the pretrial agreement is in his best interests, and not coercing the client into pleading guilty when that's not what the client wants. Ultimately, of course, the decision to plead guilty is solely the client's. However, once he makes that decision, counsel can help the client see that decision through.

In preparing the client for his providence inquiry, remember the old adage, "train as you fight." In this instance, give the client a copy of the *Benchbook* script and review it with him. Like most Soldiers, the client will likely be familiar with "by-the-numbers" training, and will feel more comfortable in court if he recognizes the script from "training." When reviewing the script, role-play with the client. Practice asking him questions that the judge likely will pose during providence. When practicing, try to get the client to bust providence. Ask questions like, "You didn't really know it was marijuana, did you?"

(N.M.C.M.R. 1986) (holding that accused's attempt to "waive any pretrial motion I may be entitled to raise" as part of pretrial agreement is "null and void" as "contrary to public policy").

[36] To "bust" providence means that the accused is not able to establish a legal and factual predicate, to the satisfaction of the military judge, to support his plea of guilty.

[37] MCM, *supra* note 5, R.C.M. 910(e) discussion, 910(h)(2).

[38] United States v. Pena, 64 M.J. 259, 263–64, 267 (2007).

[39] United States v. Miller, 63 M.J. 452, 458–59 (2006).

[40] MCM, *supra* note 5, R.C.M. 1003(b)(2).

[41] BENCHBOOK, *supra* note 1, § 2-6-14; MCM, *supra* note 5, R.C.M. 1010.

or "When you left your unit, you really meant to come back, didn't you?" Remind the client that in asking these type of "nice guy" questions, the judge is not the client's friend. Explain that the judge has to ask such questions to protect the record, and that if the client's answers to these "nice guy" questions cause the judge to refuse to accept the guilty plea, the client then loses the benefit of his plea bargain.[42] Explain to the client that he must accept criminal responsibility for his acts, despite the judge's dangling the bait of potential defenses. Even better, make sure the client is able to articulate to the court why those potential defenses do not apply in his case.

"Train as you fight" also means practicing in the courtroom, if available. Though your office may serve as an adequate "simulation center," have the client "train" "on" the actual battlefield so as to be better prepared for trial. Practice the providence inquiry while in the courtroom. When in the courtroom, tell him which parties will be in court, and where they will be. Along with the judge, court reporter, trial counsel, and bailiff, remind him that an audience may be in the gallery, including victims and members of his unit. Mechanically, tell him he will have to stand at counsel table when placed under oath by trial counsel. Advise him to stand when the judge enters and departs the room.

The idea behind all these tips is to ensure that the accused is as familiar and comfortable as possible with the courtroom and guilty plea proceeding. The more familiar he is with the "battlefield," the more capable he will be of completing his "mission," in this case, completing providence.

Despite all this practice, however, the client still may be reluctant to admit guilt in open court. If that happens, enlist the help of your fellow defense counsel. Try the "good cop—bad cop" routine with one of you pressing the client hard to admit guilt, and the other gently explaining the consequences of losing the benefit of the pretrial agreement. Sometimes hearing the same advice from a different attorney with a different approach will do the trick. Consider making the "jail is not your happy place" speech; that is, explain the unpleasant conditions found in prison and remind the client of the maximum potential punishment that he faces without the protection of a sentence cap. With the right client, employ the "come to Jesus" or "be a man" talks; that is, remind the client of the importance of "making things right" by his victims, by his family, by his unit, and perhaps by his God.

If all else fails, call Mama. Yes, consider calling the client's mother and enlist her help in convincing the client to carry through on his guilty plea. Some of the toughest criminals from some of the roughest neighborhoods in the country cower before their mothers. If you can explain to Mama[43] the nature of the charges, the strength of the inculpatory evidence, and the severity of the sentence likely to be adjudged without a pretrial agreement, Mama may be able to convince her baby that you really do know what you are talking about when recommending a pretrial agreement.

When exercising any of these tactics, remember not to push the client too far. Ultimately, the client has the right to decide whether to plead guilty.[44] Remind the client that, even after all your practice for his plea, he has the absolute right to change his mind in the middle of the providence inquiry. In strong terms, however, remind him also of the consequences of busting providence.

Conclusion

In preparing a client for the providence inquiry, defense counsel must be familiar with the legal requirements for an accused's guilty plea. Additionally, counsel must be aware of traps for the unwary. Most importantly, counsel must learn through experience how best to assure a truly voluntarily plea that wins the client the benefit of his hard-earned pretrial agreement.

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[42] Though the military term is "pretrial agreement," do not shy away from using terms the accused may be more familiar with, such as "plea bargain."

[43] Don't limit your calls to your client's mother. If you sense that your client has a close relationship with his father, sibling, aunt, uncle, or close friend, enlist that person's help in convincing the client to do what truly is in his best interests.

[44] UCMJ art. 45 (2008); MCM, *supra* note 5, R.C.M.910(d).

Appendix

Suggested Checklist for Providence Preparation

Law

 Review who will be the judge and request for judge-alone trial.

 Review the elements of offenses and how the facts meet those elements. Mere "yes" or "no" answers are not enough.

 Explain theories of liability.

 Review potential defenses and why they do not apply.

 Review applicable definitions.

 Review the pretrial agreement.

 Review the stipulation of fact.

 Review and resolve inconsistencies between the stipulation and the client's testimony.

 Review maximum potential punishment and protection of the pretrial agreement.

 Review waiver of potential motions.

 Review waiver of members.

 Review waiver of Article 32 hearing.

 Review waiver of three or five day waiting period.

 Review waiver of conflict-free counsel.

 Review post-trial and appellate rights.

Traps

 Explain that if the plea is not accepted, the client goes to trial without a sentence limitation.

 Explain collateral consequences of conviction.

 Explain forfeitures at new rank.

 Do not forget post-trial and appellate rights form.

Practice Pointers

- [x] Give client a copy of *Benchbook* script.
- [x] Practice providence questions.
- [x] Explain the courtroom layout and the parties in courtroom.
- [x] Practice providence in the courtroom.
- [x] Enlist the help of fellow defense counsel.
- [x] Enlist the help of the client's family and friends.
- [x] Remind the client of the consequences of busting providence.
- [x] Remind the client that the decision to plead guilty is solely his.

Book Reviews

LINCOLN THE LAWYER[1]

REVIEWED BY MAJOR TONYA L. JANKUNIS[2]

Grease does not favor one cog over another; it is a third set of values, favoring smooth operation of the whole machine, both big and little parts. . . . The enemy is friction.[3]

Before Abraham Lincoln became known as "the railsplitting frontiersman," "the savior of the union," or "the Great Emancipator," he was "grease"—an "ordinary attorney" in New Salem, Illinois for twenty-five years.[4] Despite the myriad books written about Lincoln and the well known fact that he was an attorney before he became President, there is little discussion about his legal practice. Due to a lack of primary sources, many historians "gloss[ed] over" Lincoln's lawyer days.[5] At most, they dedicated a chapter or two focusing on the same "four or five cases out of thousands that he handled."[6] However, the completion of the Lincoln Legal Papers in 2000[7] enabled Lincoln historians to take a deeper look at his legal career.[8] Brian Dirck combs through the Lincoln Legal Papers to provide a unique perspective concentrating primarily on Lincoln's legal practice and its impact on him.

Sifting through thousands of "unearthed" cases, Dirck ponders how the law impacted Lincoln both personally and professionally.[9] Dirck examines not only countless cases from Lincoln's practice, but also the social, political, and economic changes in the United States from the 1830s into his presidency.[10] Viewed in the context of these changes, Dirck concludes Lincoln's legal practice taught him to be the "grease."[11] Lincoln became the gooey substance that facilitates change by being the lubricant that permits competing positions to coexist and ultimately transform together.

Dirck demystifies Lincoln. He pulls him out of the world of legends that history built and presents him as an ordinary man who practiced law. Lincoln spent 40% of his life as a practicing attorney, bringing him "into contact with a greater variety of people and circumstances than any other role he assumed."[12] Dirck reveals the cases and the man who handled them—a man "cramming paperwork into his hat as he heads out the front door in the morning."[13] But he also brings forth from Lincoln the skills that made him legendary and presents them to the Judge Advocate (JA) as practicable.

Dirck begins his study of Lincoln by speculating why Lincoln chose the legal profession given that he had no formal education, family ties, future employment, or backup alternatives should he fail.[14] Despite providing an excellent

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[1] BRIAN DIRCK, LINCOLN THE LAWYER (2007).

[2] U.S. Army. Written while assigned as a student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] DIRCK, *supra* note 1, at 160.

[4] *Id.* at xi, 142, 155.

[5] *Id.* at ix–xi (noting Lincoln scholar Mark Neely's comment in 1993 that based on the "lack of primary source material" that it would "not be safe to hazard many conclusions about Lincoln's life as a lawyer") (quoting MARK E. NEELY, JR., THE LAST BEST HOPE OF EARTH 34 (1993)).

[6] *Id.* at ix–xi; MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 5–6, 19 (2006).

[7] *See The Lincoln Legal Papers*, http://adh.sc.edu/mepinfo/Lincoln/lincbase.htm (last visited Apr. 8, 2008) (describing the Lincoln Legal Papers and providing a link to a "sample document image").

[8] DIRCK, *supra* note 1, at ix–xi (commenting that the project consisted of forty staff members who over a fourteen year period scoured over eighty courthouses, compiled sixty-one manuscript collections, and contacted nearly 14,000 libraries for primary source materials related to Lincoln's legal practice); STEINER, *supra* note 6.

[9] DIRCK, *supra* note 1, at x–xi.

[10] DIRCK, *supra* note 1. Dirck does a comparative analysis of Lincoln with other practicing attorneys in Lincoln's region and other states. Though interesting, the conclusions Dirck draws from the comparisons are speculative and at times distracting.

[11] *Id.* at 154–75.

[12] *Id.* at xi.

[13] *Id.* at 150.

[14] *Id.* at 13–15.

background on why and how most people came to be lawyers, Dirck assumes the reader has a strong knowledge of Lincoln's life or just discounts it as being unimportant in his analysis. He omits the background details concerning Lincoln's family, education, and childhood and expects you to believe his conclusion that it just kind of happened.[15] A discussion of Lincoln's law partners, cases, and circuit riding forms the core of the book.[16] Dirck meticulously reviews many of the run of the mill cases Lincoln encountered on a daily basis from divorce, slander, and creditor or debtor (which accounted for the majority of Lincoln's cases) to rape and murder.[17] With few exceptions, the presentation of the cases is mundane, redundant, and lacking significant legal perspective,[18] making these portions of the book somewhat tedious. Unless you are an avid Lincoln follower, this portion of the book could be skimmed and understood by reading only the introduction, the last two chapters, and the conclusion.[19] These segments of the book contain the crux of Dirck's theory applied to the relevant facts he distills from the cases. However, an examination of Lincoln's role in the cases leads to several significant observations.

The cases support Dirck's contention that people from all walks of life and all sides of the story entered Lincoln's office doors. Many of the cases were simple and routine matters that settled out of court. Not even Lincoln's political career "gave him quite the same panorama of humanity, in all its glory."[20]

The cases and Lincoln's lifestyle on the circuit also support Dirck's theory that Lincoln professionally distanced himself from people, to include his clients and partners. From Dirck's perspective, Lincoln never revealed himself to anyone nor interested himself in the secret corners of the human heart.[21] For Lincoln, the heart of the matter was the resolution of any given conflict at hand.[22] This meant bringing two competing interests to an acceptable compromise that still allowed the small town to function.[23] To achieve this resolution, Lincoln had to professionally distance himself from his clients and partners. Dirck goes so far as to attribute even Lincoln's renowned "magnanimity" "to his lawyerly sense of distance from other people's motives, and his appreciation—honed by decades of witnessing every imaginable form of strife in the Illinois' courtrooms—of reducing friction as much as possible."[24] Distance gave Lincoln the ability to transcend conflict and be the "grease" in cases that he handled and ultimately in America.[25]

Lincoln's practice of remaining detached or distant also extended to his personal life. Lincoln did not take things personally. Prior to becoming a lawyer, Lincoln was insolvent to the tune of about $1200.00 and as a result was sued on multiple occasions. It was not until 1847 or 1848 that he finally freed himself of his debts.[26] Through it all, Lincoln never took "the actions of his creditors personally."[27] His creditors were simply protecting their interests under the umbrella of impersonal law. Lincoln could have easily left the state or "pled inability to pay."[28] Instead, he maintained his integrity by remaining subject to the law's jurisdiction. Because of Lincoln's integrity, a former creditor asked Lincoln to represent him; Lincoln accepted, not having taken things personally.[29]

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[15] *Id*. at 15. *But see* FREDERICK TREVOR HILL, LINCOLN THE LAWYER (spec. ed., Legal Classics Library 1996) (discussing Lincoln's early years and concluding that Lincoln's personality and ambitions drove him to be a lawyer); BENJAMIN P. THOMAS, "LINCOLN'S HUMOR" AND OTHER ESSAYS (Michael Burlingame ed., 2002) (providing contrasting perspectives on Lincoln's legal calling).

[16] DIRCK, *supra* note 1, at 9–137.

[17] *Id*. Of Lincoln's 4000 cases, 2500 involved "some form of debt litigation." *Id*. at 59–60.

[18] In Dirck's defense, he states that "the point [of the book] is Abraham Lincoln, and what the law did both to and for him." *Id*. at x. "The book's center of gravity is not the law." *Id*. Rather, the law and legal history are "secondary concern[s]." *Id*.

[19] *Id*. at ix–8, 138–75. Dirck likely dedicates a significant portion of his work to the routine nature of the cases as a means of highlighting the humdrum legal life led by Lincoln. However, the presentation of the cases does little to invigorate the cases' subject matter. Therefore, for less than avid Lincoln followers, one could read select portions of the book without losing the substance of Dirck's theory on Lincoln, just the countless details.

[20] *Id*. at xi.

[21] *Id*. at 7, 31, 48–49, 52.

[22] *Id*. at 154–72 (describing Lincoln's role as "grease" in society).

[23] *Id*. at 154–66.

[24] *Id*. at 169.

[25] *Id*. at 7, 31, 48–49, 52, 154–66.

[26] *Id*. at 54–58.

[27] *Id*. at 56.

[28] *Id*.

[29] *Id*. at 54–56.

In discussing Lincoln's personal finances and using America's changing economic realities as a backdrop,[30] Dirck provides the reader a better understanding of why debt collection cases dominated Lincoln's law practice.[31] It is within the realm of debt collection cases that Dirck highlights Lincoln's emerging role as "grease." Lincoln represented both creditors and debtors. He honed his skills of negotiation and compromise settling most of his cases out of court.[32] By being able to transcend the strong feelings on both sides of any given debtor case, regardless of which side he represented, Lincoln learned the necessity of compromise for the community's long term well-being.[33]

In discussing Lincoln the President, Dirk ties together the many strands of Lincoln's legal practice to firmly root his argument that Lincoln's values and ultimately his success were born of his interactions with the common person forged during his law practice.[34] Whether reviewing the Second Confiscation Act,[35] courts-martial,[36] or even writing the Emancipation Proclamation,[37] his analysis brought a certain "[l]awyerly dryness."[38] Lincoln had a "lawyerlike concern for the rules and forms of policy making, even when those rules and forms prevented a more robust pursuit of grandiose ideals like racial equality, justice, or retribution toward the South's rebels."[39] He was "grease"—the grease between debtors and creditors, the grease between business partners who have gone separate ways, and the grease between warring factions.[40]

"As a lawyer, Lincoln was part of both [sides to a conflict] and neither at the same time."[41] "Although there were cases that aroused [Lincoln's] ire or compassion, far more often no one could tell what he thought about the plaintiff or defendant's character."[42] Lincoln's ability to remain "emotionally separated" from the legal controversies he daily encountered enabled him "to focus on the negotiations, the settlements, or other solutions that keep the machinery of the community intact and functioning smoothly."[43] It is at this point that we begin to see how Lincoln's legal practice affirmatively impacted him to become the "Great Emancipator," "savior of the union, "Honest Abe," and yet remain the "railsplitting frontiersman."[44] Only when the "grease" proved inadequate to effect compromise did Lincoln "transcend 'grease'" and bring his personal moral values to bear on the outcome.[45] Lincoln therefore "chose to embrace the machinery of emancipation and its attendant frictions, come what may."[46]

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[30] *Id*. at 54–75. The following chapter carries forward how economic expansion created debtor-creditor conflicts. As the economy expanded and men moved west, investors took more and more risks thus precipitating the need for someone to clean up their building blocks when they tumbled to the ground. *Id*. at 76–98. When their "pursuit of wealth" went too far and contracts and partnerships fell apart, and promissory notes piled to the sky, Lincoln settled the accounts. *Id*. at 78. Despite the messy nature of partnership dissolutions, Lincoln was able to "pick his way around all sorts of relationships while trying to successfully disentangle the partners in question." *Id*. at 79.

[31] *Id*. at 54–75.

[32] *Id*.

[33] *Id*. at 54–75, 154–72.

[34] *Id*. at 154–72 (generally describing how Lincoln's law practice and interactions with a variety of persons and businesses enabled him to become "grease" or "lubricant" as President).

[35] *Id*. at 152, 166–67.

[36] *Id*. at 166–67; *see also* THOMAS P. LOWERY, DON'T SHOOT THAT BOY! ABRAHAM LINCOLN AND MILITARY JUSTICE , at i, 3 (1999) (reviewing thousands of courts-marital records and finding that Lincoln "reviewed individual cases in a judicious manner, tempering the wrath of irate officers with wisdom acquired as a prairie lawyer").

[37] DIRCK, *supra* note 1, at 152, 169.

[38] *Id*. at 152. While Dirck attributes this position to other commentators on Lincoln, the following chapter makes apparent that Dirck himself subscribes to this position as a necessary component of Lincoln's role as "grease." *See id*. at 154–72.

[39] *Id*. at 152.

[40] *Id*. at 153–65.

[41] *Id*. at 160.

[42] *Id*. at 161.

[43] *Id*. at 163.

[44] *But see* STEINER, *supra* note 6, at 3 (arguing that Lincoln's strong sense of compromise or "grease" originates from his Whig politics and not his legal practice); THOMAS, *supra* note 15, at 77 (arguing that Lincoln's success was based on his ability to understand the common man based on the many roles he himself played in the community, from debtor, blacksmith, cobbler, postmaster, to lawyer).

[45] DIRCK, *supra* note 1, at 170–71.

[46] *Id*. at 170.

Regardless of how much we try to demystify Abraham Lincoln there will always be a part of us that refuses to see him as an "ordinary attorney."[47] We do not want to think of him as having an "overstuffed envelope" on his desk with the following written in his hand—"when you can't find it anywhere else look in this."[48] But the truth is that he was just a man, a man who his law partner described in the following manner: "the whole man, body and mind, worked slowly, as if it needed oiling."[49]

Lincoln the Lawyer serves as a primer for the JA. As lawyers, we hold a unique position, trusted individually by those who do not trust our larger profession. We serve as "guardians of the community['s] values."[50] Whether advising commanders on the legality of particular operations or the necessity of depriving a Soldier of his liberty through a trial by courts-martial, it is the JA's duty to be not only a legal tactician, but a counselor. The JA is the honest broker who guards our deepest values. So what lessons does *Lincoln the Lawyer* contain to make us better guardians?

First, the JA must always be honest. The legend of "Honest Abe" developed while Lincoln was a lawyer and followed him into the presidency.[51] Lincoln urged his fellow comrades to be honest and diligent.[52] As lawyers, JAs are talented story tellers, but the facts are the facts and the law is the law. There is a left and right legal limit to nearly every matter a JA handles. Communicate these limits to your clients, and if they are unacceptable, be creative in finding an honest alternative solution. Regardless of the personal cost to you, be "'honest' in the sense of being frank, unapologetic, and practical."[53] Of all the accusations made against Lincoln "by his political enemies over the years—people who accused him of everything from thievery to adultery—no one seems to have ever accused him of being an unethical attorney."[54]

Second, JAs must saw the wood in front of them. Regardless of the position a JA may find themselves in, the "details" of the law must not be neglected. A JA's ethical duties of diligence and competence must be carefully guarded. Success in law is in the attention to details and not the sheer eloquence of stage production or shooting from the hip.[55]

Third, JAs should strive to maintain a professional distance from their immediate clients, especially in a transformed Army. Our client is ultimately the Army. At the brigade combat team level, however, we closely bond with our immediate clients, the brigade commander and staff. While this bonding is necessary and desirable, JAs must be able to maintain their professional independence. Regardless of a commander's reaction to the legal advice provided, JAs must stay focused on the mission. "Lincoln always seemed able to maintain a high degree of emotional distance from his enemies, to readily overlook slights and insults, and to keep his mind focused on the task of victory without an excessive focus on his own pride and its possible wounding at the hands of others. . . ."[56] Loyalty to your commander is best measured by your insistence that your commander's actions comply with the law.

Lastly, a JA must be the "grease." The mission comes first. Lincoln masterfully handled the rift between his personal views, the abolitionists, and southern slave owners—he knew that he had to be flexible and work with all the parties within the confines of the Constitution to ultimately reach his end goal.[57] No where is the calling to be the "grease" more apparent than for our brigade JAs. Brigade JAs must learn to balance the desires of all parties involved to include those of the commander and the technical chain in today's transformed Army.

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[47] *See* STEINER, *supra* note 6, at 5, 7–8 (discussing how people are uncomfortable viewing Lincoln as an "ordinary attorney").

[48] DIRCK, *supra* note 1, at 38.

[49] *Id.* at 102.

[50] STEINER, *supra* note 6, at 3.

[51] *Id.* at 4.

[52] *Id.* at 2, 4, 164.

[53] *Id.* at 5.

[54] *Id.* at 146.

[55] *Id.* at 5.

[56] *Id.* at 168.

[57] *Id.* at 166.

In the end, Dirck's work represents yet another theory of the making of a man who became one of our greatest presidents.[58] The book's strength is its conception of Lincoln as the "grease" that enabled compromise between otherwise conflicting interests, whether as an attorney or as the President. Unfortunately, Dirck narrowly focuses on Lincoln's experiences as a lawyer as the source of Lincoln's compromise approach to life to the exclusion of other possible sources, such as Lincoln's Whig politics. But by no means is this a fatal flaw in the book. Overall, *Lincoln the Lawyer* is worthwhile reading, especially for Lincoln buffs.

[58] In this sense, it represents a varied retelling of a familiar tale of a man who "grew beyond his beginnings, but not far away from them." THOMAS, *supra* note 15, at 32.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. 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. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
ENLISTED COURSES		
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08
5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08

5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
BOLT	BOLT (030) BOLT (030)	4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (020)	22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
748A	Law of Naval Operations (020)	15 – 19 Sep 08
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (020)	1 – 2 May 08 (Naples)
03RF	Legalman Accession Course (030)	9 Jun – 22 Aug 08

846L	Senior Legalman Leadership Course (010)	18 – 22 Aug 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (020)	12 – 23 May 08 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (060) Legal Clerk Course (070)	7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (070) Senior Officer Course (080)	2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Legal Assistance Course 2 (Estate Planning) (Dayton, OH)	9 – 13 Jun 08
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Legal Assistance Course 3 (Family Law), Class 08-C (Montgomery, AL)	7 – 11 Jul 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Legal Assistance 4 (Family Law), Class 08-D (Dayton, OH)	21 – 25 Jul 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
APRI	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600

GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482

NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG Universiry. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

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 Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. 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 LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

1. The Judge Advocate General's School, U.S. Army (TJAGLCS) 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

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
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	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

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

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

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 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

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

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

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

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. 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.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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. t 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.

4. 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.

5. 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 Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.