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TJAGLCS FEATURES

CLE NEWS

CURRENT MATERIALS OF INTEREST

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Lore of the Corps

From West Point and Armored Cavalry Officer to Harvard Law and The Judge Advocate General: The Life and Career of Wilton B. Persons (1923 - 2015)

Fred L. Borch
Regimental Historian & Archivist

While serving as an Armored Cavalry officer in Austria in the late 1940s, then Lieutenant Wilton B. Persons, Jr., "decided that there must be something more interesting than being in an orderly room of a cavalry troop."[1] Since he "liked doing" the special courts-martial that were then the sole responsibility of line officers in the Army, and since the Army was advertising that it would send a small group of officers to law school---all expenses paid---Persons applied to Harvard, Yale, and the University of Virginia. He ended up going to Harvard's law school and, when he graduated in 1953, began what would be a remarkable and rewarding career as an Army lawyer. When Major General Persons retired as The Judge Advocate General in 1979, he had accomplished a great deal in the Corps, and left a lasting legacy for the Army lawyers who followed him.

Born in Tacoma, Washington, on December 2, 1923 (his father was stationed at Fort Lewis), Wilton "Will" Burton Persons, Jr., spent his childhood in Kansas before attending a preparatory school in Montgomery, Alabama. In 1941, when seventeen-year old Persons had enough credits to begin college, he enrolled at Alabama Polytechnic Institute.[2] He wanted to fly airplanes and applied for aviation cadet training, but his poor eyesight prevented him from flying. In the meantime, Persons also applied several times for an appointment to the U.S. Military Academy, and ultimately gained admission to West Point in July 1943.[3]

Wilton Persons, Alabama Polytechnic, 1941.

When he graduated in 1946, Second Lieutenant Persons chose Armor as his branch. His first assignment was with the 24th Constabulary Squadron in occupied Austria. He spent eighteen months in Austria and then moved to Germany, where he joined the newly formed 6th Armored Cavalry Regiment in Landshut, Bavaria.

Cadet Wilton Persons, USMA,1946.

Persons liked the Army---and he still had a service obligation from his time at West Point---but he thought he should look for another line of work because he "was sort of in a dead end job."[4] As he remembered it:

> After the war, the Army started putting out circulars and announcements [offering] to send officers to different graduate schools---engineering, law, foreign languages. I was in the Armored Cavalry and I decided that there must be something more interesting than being in an orderly room in a cavalry troop. I'd done a lot of courts-martial as a line officer; we did trials on the weekends and in the evenings because that was the only time we had to do them. We were working during the day. I like the law and I enjoyed the court work, so I decided to apply to law school. I also applied to go to Engineering school and Journalism school.

[1] Interview with Major General (ret) Wilton B. Persons (May 8, 2013) [hereinafter May Interview].

[2] In 1960, Alabama Polytechnic Institute was granted university status by the Alabama state legislature, and renamed Auburn University.

[3] Michael E. Smith, *Major General Wilton Burton Persons, Jr. United States Army (Retired) The Judge Advocate General of the Army 1975-1979*, 153 MIL. L. REV. 177, 181 (1996). This excellent biographical sketch of Persons relies primarily on two oral histories done in 1985.

[4] Interview with Major General (ret) Wilton B. Persons (June 5, 2012) [hereinafter June Interview].

I went to Frankfurt and took the LSAT in 1949. I was then selected to go to Harvard Law School just before the Korean War started.[5]

Lieutenant Wilton Persons, Austria, 1946

Lieutenant Wilton Persons, U.S. Army Europe & 7th Army, Heidelberg, Germany, 1949.

Persons began his studies in 1950 and graduated from Harvard in 1953. He "worked 18 hours a day for the first year in law school and finished in the top ten percent."[6] During his summers, he worked at a civilian law firm in Boston. This was normal for the time; the JAG Corps' Career Management Office[7] encouraged officers attending law school at Army expense to "apply for a legal related job" during their summer breaks.[8]

Captain Persons began his judge advocate career in The Judge Advocate General's Office, or "JAGO" as it was then called. He worked first in the Military Affairs Division and later in the Administrative Law Division. Probably the highlight of this Pentagon tour was his time as the assistant defense counsel in *United States v. Dickenson.* Persons' work on this high profile case of a Korean war "turncoat" was his first introduction to the new Uniform Code of Military Justice that had replaced the Articles of War under which he had practiced law as a line officer.[9]

After four years in the Pentagon, Persons was selected to attend Command and General Staff College. He was promoted to major (MAJ) shortly before graduating in June 1958 and then travelled to Germany, where he joined the 8th Infantry Division. He worked first as a defense counsel, and then served as a claims attorney and administrative law attorney before becoming the Deputy Staff judge Advocate for the division.

Major Wilton Persons, 8th Infantry Division, German, 1961.

[5] May Interview, *supra* note 1.

[6] June Interview, *supra* note 4. *See also*, Smith, *supra* note 3, at 184.

[7] Today's Personnel, Plans and Training Office, Office of The Judge Advocate General.

[8] May Interview, *supra* note 1.

[9] For more on Dickenson, and Persons role in the case, see Fred L. Borch, *The Trial of a Korean War "Turncoat": The Court-Martial of Corporal Edward S. Dicksenson*, ARMY LAW. (January 2013). *See also United States v. Dickenson*, 20 C.M.R. 154, 6 U.S.C.M.A. 438 (1955).

When MAJ Persons left in July 1961, he was on his way to Charlottesville and was a very unhappy officer. This was because he had requested that his next assignment be at an Army installation like Fort Huachuca or Fort Bliss, where Persons hoped to do procurement law. But Major General Charles "Ted" Decker, the new Judge Advocate General, informed Persons in a letter that he would instead "take over as chief of the Procurement Law Division at the JAG School."[10]

Persons was distressed. He simply had no interest in a job at The Judge Advocate General's School (TJAGSA). Perhaps this is understandable since he had not attended either the Basic Course or the Advanced Course and consequently had little or no appreciation of what TJAGSA was all about.[11] As Persons remembered, he was so upset that:

> I contemplated jumping out the window---it was not economically feasible for me to resign at that point, and I could not very well, at least it never occurred to me, to write back to General Decker and tell him that he got it all wrong. . . So we gritted our teeth and went off to Charlottesville.[12]

When MAJ Persons arrived at TJAGSA, however, he was given a completely different job: School Secretary. He was in this position, similar to today's TJAGLCS Executive Officer, for a year when he moved to be an instructor in the Military Justice Division. After a year teaching evidence, now Lieutenant Colonel (LTC) Persons (he had been promoted in January 1963) became TJAGSA's top criminal law instructor as Chief, Military Justice Division.[13]

While at TJAGSA, LTC Persons developed some firm opinions about the institution's place in the Corps—some of which were at odds with the views of the Corps' leadership. General Decker, for example, was attempting to get authority for TJAGSA to award an LL.M. Persons, however, was not really convinced that this was necessary. In his view, the school's role "was to turn out people who could immediately function in the Army" and this meant that TJAGSA was a "service school first and a graduate school second."[14]

He also formed some definite opinions about administration in the schoolhouse. Persons disliked faculty meetings because they were a waste of time. As for student evaluations, only those from the Advanced Course (today's Graduate Course) were valuable. Faculty evaluations from basic course students were of little consequence. As Persons put it: "[T]o take seriously what they thought should be in the curriculum and who should teach it seemed to me to be pretty silly." When asked by Colonel John F. T. Murray, then serving as TJAGSA Commandant, what should be done with evaluations from the Basic Class, LTC Persons replied: "Throw them in the waste basket. Don't even read them."[15]

While Persons believed that his time at TJAGSA was professionally rewarding, he "was becoming bored with teaching" by the end of this tour of duty. But obviously his record was good, as he was selected to attend the Army War College with only 18 months in grade as a lieutenant colonel.[16]

After graduating from the course at Carlisle Barracks, LTC Persons returned to Washington, D.C., for an assignment as Chief, General Law Branch. He subsequently served as Assistant Chief and then Chief, Military Affairs Division. During this tour in the Pentagon, LTC Persons was the legal advisor to the Army's Civil Disturbance Liaison Committee. Racial unrest in the late 1960s had resulted in the Army's involvement "in the civil disturbance business in a big way,"[17] and Persons was heavily involved in advising on the drafting of model proclamations, operations plans, and rules of engagement. Additionally, when the White House decided that soldiers should be deployed to the location of a riot or other civil disturbance, a judge advocate went with these soldiers. On more than a few occasions, these Army lawyers "reached back" to LTC Persons for advice and counsel.[18]

In July 1969, now Colonel Persons (he had been promoted in November 1967) assumed duties as the Staff Judge Advocate (SJA), U.S. Army, Vietnam (USARV). The Military Justice Act of 1968, which had created the new position of military judge and, as a practical matter, also took line officers out of special courts-martial, had just become effective. Implementing these two major changes to courts-martial practice was a significant challenge, as commanders were not at all happy with the new reality that a military judge was now in charge of proceedings at special courts, much less that judge advocates were now serving as trial counsel and defense counsel at these courts. Colonel Persons, however, was successful in convincing commanders in Vietnam that lawyers were not "taking over

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[10] Smith, *supra* note 3, at 189.

[11] Persons did not attend any course at TJAGSA until the summer of 1969, when he was a full colonel and student in the 'SJA course' prior to deploying to Vietnam. *Id*. at 195, fn 133.

[12] *Id*.

[13] *Id*., 190-191. Department of the Army (DA) Form 2-1, Wilton B. Persons, para. 12, Appointments.

[14] Smith, *supra* note 3, at 191. For more on the efforts to obtain authority for TJAGSA to award an LL.M, see Fred L. Borch, *Masters of Laws in Military Law: The Story Behind the LL.M. Awarded by The Judge Advocate General's School*, ARMY LAW. (August 2010), 1.

[15] *Id*. at 190.

[16] *Id*. at 191.

[17] *Id*. at 192.

[18] *Id*. at 193.

the system" and that commanders "still made the key decisions" in the system.[19] During this same tour of duty, COL Persons also wrestled with the high profile court-martial of Army Special Forces personnel charged with the murder of suspected Vietnamese double agent. This case generated intense media interest and took most of Persons time during the first three months of his year in Saigon.[20]

Colonel Wilton Persons, Staff Judge Advocate, U.S. Army Vietnam, 1969.

After his year in Vietnam, COL Persons reported for duty as the SJA, U.S. Army Pacific. During his ten months in Hawaii, he thought seriously about retiring from active duty. Persons had twenty-five years of active service and realized that if he retired, he was still young enough for a second career in a law firm. But retirement became a non-issue when Persons was selected for brigadier general and was sent to Heidelberg as the Judge Advocate, U.S. Army Europe and Seventh Army.

After arriving in Germany, Persons made history as the first judge advocate to be frocked to a higher rank. General (GEN) Michael S. Davison, the USAREUR commander, believed that Persons would be more successful in his dealings with the German authorities if he were wearing stars, and received permission from the Pentagon to frock him. As a result, Persons pinned a single star on his collar in September 1971. His official promotion to brigadier general occurred six months later, in February 1972.[21]

Brigadier General Persons' tour of duty in USAREUR was a tough one. There were many complicated legal issues that arose during his four-year tenure. These included: improving race relations between black and white soldiers (by establishing equal opportunity staff officers in each unit); creating a Military Magistrate Program (giving a judge advocate magistrate the responsibility to review every case of pre-trial confinement); and replacing command-line court-martial jurisdiction with so-called area jurisdiction (which made better sense given that some units were widely dispersed in Germany).[22]

But the most serious challenge involved the command's aggressive crackdown on illegal drug use among soldiers, especially in the barracks. A drug abuse prevention plan was published in USAREUR *Circular 600-85*, and it included provisions "permitting the dissemination of drug information to nonmilitary government agencies" and prohibiting "the display on barracks walls of posters and other items" condoning illegal drug use. When a group of soldiers assigned to USAREUR filed a class action suit in Washington, D.C., challenging this drug abuse prevention plan, both GEN Davison and BG Persons were surprised when U.S. District Court Judge Gerhard A. Gesell certified the class as "representing all soldiers in the European Command with ranks of E-1 through E-5." They were shocked, however, when Gesell held that "the existing USAREUR drug plan [was] so interlaced with constitutional difficulties that *Circular 600-85* must be withdrawn and cancelled, along with all earlier related orders and instructions."[23] It should come as no surprise that the European edition of the *Stars and Stripes* newspaper trumpeted that Judge Gesell had stopped the "Drug War in Its Tracks."[24]

Fortunately for GEN Davison and BG Persons, Judge Gesell stayed his order pending the Army's appeal of his ruling. But Gesell required USAREUR to keep very detailed records of any and all soldiers disciplined for drug offenses while the appeal was pending, and this requirement, "along with other litigation support efforts, required an enormous amount of effort and many overtime hours."[25] Ultimately, the Court of Appeals for the D.C. Circuit, in an unanimous decision, reversed Judge Gesell. But this did not occur until September 1975, some 28 months after the plaintiffs had filed their complaint.[26]

In 1975, BG Persons was selected to succeed Major General George S. Prugh as the next Judge Advocate General. For the next four years, until he retired from active

[19] *Id*. at 197.

[20] For more on the Green Beret murder case, see JEFF STEIN, A MURDER IN WARTIME (1992).

[21] Smith, *supra* note 3, at 205, fn 207; DA Form 2 & 2-1, *supra* note 13.

[22] Smith, *supra* note 3, at 210-217.

[23] *Committee for G.I. Rights v. Calloway*, 370 F. Supp. 934 (D.D.C. 1974).

[24] Smith, *supra* note 3, at 209.

[25] *Id*.

[26] *Committee for G.I. Rights v. Calloway*, 518 F. 2d 446 (D.C. Cir. 1975).

duty in 1979, Major General Persons was the top uniformed lawyer in the Army. He wrestled with a number of legal issues, including the so-called "West Point Cheating Scandal" and attempts to unionize the armed forces. The former involved collusion on a take-home electrical engineering exam. Of a reported 117 cadets suspected of having cheated on the test, 50 were later discharged. The event resulted in a reexamination of the Cadet Honor Code and reforms to the Military Academy's adjudication process. The latter involved efforts by two federal employee unions to give soldiers safeguards "against oppressive and unlawful actions by their commanders."[27] Ultimately, this attempt to unionize the Army was resolved when Congress enacted legislation prohibiting uniformed personnel from joining organized labor.

Major General Wilton Person, The Judge Advocate General of the Army, 1975.

Major General Person's most important action as TJAG—and certainly his longest lasting contribution—was his decision to create a separate and independent Trial Defense Service (TDS). Persons had long been concerned that the existing system—whereby SJAs supervised both trial and defense counsel and rated their performance—led inexorably to a perception of unfairness. Others in the Corps had voiced similar concerns over the years. The end result was that, in March 1977, TJAG Persons directed then COL Wayne E. Alley "to assign and take the actions necessary to establish a separate [trial] defense organization."[28] Ultimately, the details of the framework for the new defense organization fell to COL Robert B. Clark. Clark interviewed commanders in preparing the proposed trial defense service and Major General Persons was pleased with the end product.

The Army Chief of Staff, General Bernard W. Rogers, however, was not convinced that a separate TDS was a good idea. On the contrary, Rogers apparently believed "that defense counsel were already out of control and that under a separate system they would become even more out of control."[29] The solution was to suggest to General Rogers that, rather than creating a "full-fledged" Trial Defense Service, the Army conduct "a test program first." General Rogers approved the test program and, in November 1980, after a two year Army-wide test, "TDS was given permanent organizational status."[30] Major General Persons had retired the year before, but the creation of TDS remains a lasting legacy of his tenure as TJAG.

In retirement, Persons settled in Savannah, Georgia, and "enjoyed a long, wonderful retirement" with his wife Christine. He danced, drank Maker's Mark bourbon, and amassed an "impressive hat and necktie" collection.[31]

Will Persons was proud that he never again worked for money but instead was able to do volunteer work in a variety of organizations. These included: the Skidaway Island Division, Southside Fire Department (where he served as assistant chief and ultimately as board president); Skidaway Island Yacht Club (where he served as commodore); Savannah Symphony (where he served as president); and U.S. Fish and Wildlife Service (where he served as a volunteer guide and wildlife interpreter).[32]

Major General Persons once said in an interview: "My father never thought I would amount to much. . ."[33] In an oral history, Persons mused in retrospect that this might have been his father's way of motivating his son—by telling young Will Persons that he was not "strong enough or smart enough."[34] Regardless of why the senior Persons had this opinion, history proves that he could not have been more wrong about his son. When Persons died at the age of 91 on

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[27] Smith, *supra* note 3, at 230.

[28] *Id*. at 237. For more on Wayne E. Alley, see George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley (U.S. Army 1952-1954, 1959-1981),* 208 MIL. L. REV. 213-306 (Summer 2011).

[29] *Id*. at 238.

[30] *Id*.

[31] *Wilton Persons (1923-2015)*, SAVANNAH (GA.) MORNING NEWS, Apr. 7, 2015.

[32] *Id*.

[33] May Interview, *supra* note 1.

[34] Smith, *supra* note 3, at 181-182.

April 3, 2015, he had lived a rich life filled with personal and professional accomplishments.[35]

Major General (ret) Persons and Major General (ret) William K. Suter, at the Retired Association of Judge Advocates gathering at TJAGLCS, June 2011.

[35] Major General Persons is survived by his wife of 69 years, Christine (nee Smith); his children Charlotte Persons, Alice Persons, and Wilton B. Persons III; grandsons David and Stephen Blomeyer, and many nieces and nephews.

Lore of the Corps

Addendum to "It's a Family Affair": A History of Fathers, Daughters and Sons, Brothers, and Grandfathers and Grandsons in the Corps

Fred L. Borch
Regimental Historian & Archivist

In October 2014, *The Army Lawyer* contained a Lore of the Corps called *"It's a Family Affair": A History of Fathers, Daughters and Sons, Brothers, Grandfathers and Grandsons in the Corps*. This addendum adds more details about family relationships in our Corps that were omitted in the original article.

Father and son. Captain (CPT) Samuel J. Smith Sr. and Colonel (COL) Samuel J. Smith, Jr. In 1961, the senior Smith was an Infantry first lieutenant in the 3d Armored Division in Germany. He was passionate about baseball and was the coach of the Combat Command C "Cougars" and the assistant coach of the 3d Armored Division "Spearheads" baseball teams. In the early 1960s, baseball (and other sports) played by Army teams both in the United States and overseas were a major morale and recreational outlet for thousands of soldiers. First Lieutenant Smith (1LT) was proud of his time as a coach for the 3d Armored team, especially as the division commander, Major General Creighton Abrams,[1] was an avid baseball fan and took a personal interest in young Sam Smith. But 1LT Smith wanted to go to law school and, when the Army announced a new Excess Leave Program[2] for officers who wanted to be uniformed lawyers, Smith applied and was accepted. He was one of the first individuals to participate in the Excess Leave Program, and he exchanged his crossed rifles for the crossed sword-and-quill insignia when he started law school at Washington and Lee in September 1961. When Smith later resigned his commission and left active duty, he was a captain in the Corps.

Then First Lieutenant Samuel J. Smith, Jr. (center), Coach, Combat Command C Cougars Baseball Team, 3d Armored Division, Germany, 1959.

His son, COL Sam Smith, was commissioned through the Reserve Officer Training Corps (ROTC) program at James Madison University in 1984, and received his Juris Doctor (J.D.) from George Washington University in 1988. He entered the Corps that same year and has served in a variety of positions, including Staff Judge Advocate, U.S. Army Training and Doctrine Command. Today, he is a professor at National Defense University.[3]

Brothers. Captain Robert L. Davenport, Jr., and CPT Darius K. A. Davenport. Both Robert and Darius graduated from Norfolk State University and were commissioned through the ROTC program. Both then received their J.D. degrees from the University of Wisconsin in Madison. Robert Davenport then served an active duty tour in the Army General Counsel Office (as part of the honors program). He left that office in 2006, having transitioned to a civilian attorney position. Today, he is the District Counsel for the Norfolk District Army Corps of Engineers.

Darius Davenport graduated from the 158th Judge Advocate Basic Course in 2002 and subsequently served at XVIII Airborne Corps and at TRADOC until leaving active

[1] General Creighton W. Abrams (1914-1974) was one of the most well-known officers of his generation. A distinguished combat commander in World War II (General George S. Patton considered Abrams to be his best tank commander), Abrams finished his career as Army Chief of Staff (1972-1974). His untimely death from cancer while still on active duty cut short a life of devoted service to our Army and our nation. For an excellent biography of Abrams, see LEWIS SORLEY, THUNDERBOLT (1992).

[2] Prior to the establishment of a Funded Legal Education Program in the 1974, active duty officers "were authorized to go into an extended leave status without pay and attend a civilian law school of their choice, but at their personal expense." More than a few judge advocates who came into the Corps in the 1960s did so through the Excess Leave Program; in 1965, for example, there were 144 officers in the program. JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 238 (1975).

[3] Email from COL Samuel J. Smith, Jr. (Feb. 15, 2015, 11:23 AM)(on file with author).

duty in 2006. Today, he is in private practice in Norfolk and also works as the Director, Career and Alumni Services, Regent University Law School.[4]

Since the older Davenport never wore the crossed quill-and-sword insignia, one might argue that the Davenports do not qualify for inclusion in this "It's a Family Affair" addendum. Your Regimental Historian, however, believes that their service deserves mention.

Captain Robert L. Davenport (left) and Captain Darius K.A. Davenport (right), with their sister, Staff Sergeant Grooms Joy Davenport Grooms, 2004. Staff Sergeant Grooms served in Operation Desert Storm and in Operation Iraqi Freedom before retiring from the Army Reserve.

Uncle and nephew. Lieutenant Colonel (LTC) Kevin Flanagan and CPT James M. Flanagan. Kevin Flanagan graduated from the U.S. Military Academy in 1971 and was accepted into the Excess Leave Program two years later. After the creation of the Funded Legal Education Program (FLEP) in 1974, then CPT Flanagan was in the first group of officers accepted into the FLEP for the last two years of law school. After obtaining his J.D. from the University of Oklahoma and graduating from the 81st Judge Advocate Officer Basic Course in 1976, Flanagan served in a variety of assignments and locations, including: 3rd Infantry Division, Schweinfurt, Germany; Litigation Division, Office of The Judge Advocate General (OTJAG); and Procurement Fraud Division, OTJAG. After retiring in 1991, LTC Flanagan continued to serve as a civilian attorney and was appointed to the Senior Executive Service in 1999 as the Deputy General Counsel (Inspector General), Department of Defense. He served as General Counsel, Defense Threat Reduction Agency from 2004 to 2014, when he retired.

His nephew, CPT James M. Flanagan, graduated from the University of Georgia in 2005 and Catholic University's law school in 2008. He then accepted a direct commission as a first lieutenant in the Corps and, after completing the 178th Judge Advocate Officer Basic Course in 2009, was assigned to 10th Mountain Division, Fort Drum, New York.[5]

Your Regimental Historian welcomes additional information about judge advocate family connections in the Corps---past and future.

More historical information can be found at
The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

[4] Email from Robert L. Davenport, Jr., (Mar. 27, 2015, 5:32 PM)(on file with author).

[5] THE JUDGE ADVOCATE GENERAL'S SCHOOL, 178TH JUDGE ADVOCATE OFFICER BASIC COURSE, 2009; Email form James M. Flanagan (Feb. 17, 2015, 12:05 PM)(on file with author).

Contract and Fiscal Law Note

The Current Scope of 10 U.S.C. § 2410a

"There is no exception to the rule that every rule has an exception."[1]

I. Introduction

Title 10, United States Code, section 2410a (2410a) provides commanders with a great deal of flexibility with regard to funding severable service contracts that cross fiscal years.[1] Congress first provided the authority in 1985,[2] and since then, the Government Accountability Office (GAO) has issued three opinions regarding the scope of 2410a, including one in January 2015.[3] The purpose of this article is to provide the current limits of 2410a through analysis of the GAO opinions.

II. Background

Congress enjoys the power of the purse[4] and exerts its control over federal spending in three primary ways: limiting the purpose, limiting the period of availability, and limiting the amount of each appropriation.[5] Therefore, analysis of purpose, time, and amount is typically the starting point for fiscal law practitioners. The time principle[6] requires federal agencies to obligate funds only for legitimate—or bona fide—needs that arise within an appropriated fund's period of availability as established by Congress.[7] To determine when the bona fide need arises, one must look to what is being procured.[8] As a general rule, severable service contracts address a recurring or continuing need, and the bona fide need arises at the time the services are provided.[9] Therefore, a severable services contract that crosses fiscal years and is funded with the initial year's appropriation violates the bona fide needs rule because the agency is using the initial year's appropriation to fund a future year need.[10] However, 2410a provides the Departments of Defense and Homeland Security with an exception to the general rule. It states:

> The [agencies] may enter into a contract for [severable services, maintenance, and leases] for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year. . . .

Therefore, based upon this statutory exception, the military departments may use current funds to pay for a severable services contract that extends into the next fiscal year so long as the contract does not exceed twelve months. The application of 2410a is typically straight forward, however, there are unusual circumstances in some cases that warrant further analysis. The GAO has opined in three such cases.

III. Applying the Exception

The GAO first addressed the application of 2410a in a 1996 opinion regarding an Air Force vehicle maintenance contract.[11] In 1990, the Air Force entered into a one-year contract with four one-year options.[12] The first year of the contract was from October 1, 1991, until September 30, 1992.[13] During the third option year, the Air Force decided to restructure some of its support contracts so they did not

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[1] James Thurber, *available at* http://www.brainyquote.com/quotes/quotes/j/jamesthurb383659.html.

[1] 10 U.S.C. § 2410a (2015).

[2] Department of Defense Appropriations Act, 1986, Pub. L. 99-190 § 8005, 99 Stat. 1185 (Dec. 19, 1985).

[3] Matter of: U.S. Army Europe—Obligation of Funds for an Interagency Acquisition, B-323940 (Comp. Gen. Jan. 7, 2015), *available at* http://www.gao.gov/assets/670/667868.pdf [hereinafter Matter of USAREUR].

[4] U.S. CONST. art I, § 9, cl. 7; U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, vol I, ch. 1, at 1-3 to -7 (3d ed. 2004).

[5] CONT. & FISCAL L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CENTER & SCH., U.S. ARMY, FISCAL LAW DESKBOOK, at 1-6 (2014) [hereinafter FISCAL LAW DESKBOOK].

[6] 31 U.S.C. § 1502 (2015).

[7] *Id*.; FISCAL LAW DESKBOOK, *supra* note 6, at 1-6.

[8] FISCAL LAW DESKBOOK, *supra* note 6, at 3-8 to -10 (When the bona fide need arises depends upon what is being acquired. For supply contracts, the bona fide need arises when the items or goods are actually required, that is, when the item will be used or consumed. For severable services, the bona fide need arises when the services are actually rendered. For non-severable service contracts, construction contracts, and training contracts, the bona fide need generally arises at contract execution even though the period of performance may extend into future fiscal years.) The scope of this paper is limited to severable service contracts.

[9] U.S. GOV'T ACCOUNTABILITY OFFICE, B-317636, SEVERABLE SERVICE CONTRACTS 3 (2009), *available at* http://www.gao.gov/assets/390/385620.pdf.

[10] *Id*.

[11] Matter of: Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274 (Comp. Gen. May 22, 1996), *available at* http://www.gao.gov/products/476343#e-report.

[12] *Id*. at 2.

[13] *Id*.

all conclude at the end of the fiscal year.[14] Therefore, the Air Force modified the third option year of the vehicle maintenance contract to end one month early, on August 31, instead of September 30, and changed the fourth option year to run from September 1, 1994, until August 31, 1995.[15] To complicate matters, the Air Force only had enough funds from fiscal year 1994 appropriations to fund the first four months of the newly-structured option year.[16] In light of 2410a's one-year limitation, a certifying official was concerned that the Air Force was exceeding its authority by paying for fifteen months of performance—eleven in option year three and four in option year four—all with fiscal year 1994 funds.[17]

The GAO opined that the statute's one-year limitation applies to contracts, not payments.[18] While 2410a limits a contract period to one year, it does not limit an agency's authority to make more than one year's worth of payments for severable services.[19] The GAO states, "The fact that fiscal year funds may be used to make payments for more than 12 months of services is a consequence of the law that . . . has 'no legal significance.'"[20]

In 2009, the GAO provided its opinion to Congress on a novel issue with regard to 2410a: in light of the statute's one year limitation, may an agency use multiple-year or no-year funds to secure severable services contract for periods of performance exceeding one year?[21] The GAO analyzed the statute, its legislative history, and its implementing provisions in the Federal Acquisition Regulation.[22] The GAO concluded that the language in 2410a ". . . clearly indicates that the [statute] cover[s] contracts funded by annual funds," and was not intended to limit an agency using multiple-year or no-year funds from entering into severable service contracts lasting more than one year.[23]

The most recent question answered by GAO is whether 2410a authority applies to interagency acquisitions.[24] In early September 2011, United States Army Europe (USAREUR) contracted, via an interagency acquisition, with the Government Services Agency (GSA) for GSA to provide a series of training classes to USAREUR from 12 September 2011 until 16 December 2011.[25] The GAO opined that USAREUR could rely upon 2410a and use fiscal year 2011 funds to pay for the training.[26]

In arriving at its conclusion, GAO noted that it had previously held "that a series of training courses are continuing and recurring in nature and are severable, representing a bona fide need of the time period in which each individual training course is delivered."[27] It noted that 2410a provides the military with a mechanism to fund a severable services contract in one fiscal year even if the contract crosses into the next fiscal year.[28] The GAO concluded that interagency acquisitions are akin to contractual transactions, and 2410a is sufficiently broad to cover certain types of them.[29]

Importantly, GAO notes that 2410a would not provide authority to cross fiscal years in an interagency acquisition entered into under the authority of the Economy Act.[30] The Economy Act requires an ordering agency using one-year funds to deobligate the funds at the end of the fiscal year to the extent the performing agency has not performed.[31] This requirement is unique to the Economy Act and "does not apply to transactions governed by statutory authority such as the GSA Acquisition Services Fund, which has no such deobligational requirement."[32] Therefore, practitioners must look to the statutory authority upon which an interagency acquisition was entered to determine 2410a's applicability.

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[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 3. The certifying official was also concerned about a possible violation of the Anti-Deficiency Act (ADA), but GAO concluded that the Air Force had not violated the ADA. *Id*. at 3, 6-7.

[18] *Id*. at 4.

[19] *Id*. at 4-5.

[20] *Id*. at 5.

[21] U.S. GOV'T ACCOUNTABILITY OFFICE, B-317636, SEVERABLE SERVICE CONTRACTS 1 (2009), *available at* http://www.gao.gov/assets/390/385620.pdf.

[22] *Id*. at 4-6.

[23] *Id*. at 4.

[24] Matter of USAREUR, *supra* note 4.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 3.

[28] *Id*.

[29] *Id*. at 3-4 ("In our view, given the contractual nature of interagency agreements, an agency should not be disadvantaged when acquiring goods or services from another agency as compared to acquiring goods or services from a private vendor.").

[30] *Id*. at 4 n.3 (citing the Economy Act at 31 U.S.C. § 1501(a)(1)).

[31] Matter of USAREUR at 4 n.3 (citing the Economy Act at 31 U.S.C. § 1535(d)(additional citations omitted)).

[32] Matter of USAREUR at 4 n.3.

IV. Conclusion

The statutory exception to the bona fide needs rule contained in 2410a has remained relatively unchanged in the last thirty years. Very few legal opinions discuss its application, but the ones that do provide practitioners with a clear picture of its current limits. Now that it may be used for interagency acquisitions outside of the Economy Act, commanders have even more flexibility with regard to severable service contracts.

—Major John H. Montgomery

Requests for Official Information and Government Witnesses

*Major Steve Watkins and Major Jennifer McKeel**

I. Background

The Department of the Army (DA) receives a significant number of requests for official information[1] and the appearance of personnel as witnesses for use in litigation, commonly referred to as *Touhy* requests.[2] For the Army, *Touhy* requests are governed by 5 U.S.C. § 301, 32 Code of Federal Regulations (C.F.R.) § 97 (codifying Department of Defense Directive (DoDD) 5405.2), and 32 C.F.R. § 516 Subpart G (codifying Army Regulation (AR) 27-40 Chapter 7), as well as the Supreme Court's decision in *Touhy*.[3] This article is meant to provide judge advocates and Department of the Army (DA) civilian attorneys with an overview of the *Touhy* framework; it is not designed to be all-inclusive as to every possible legal issue that could arise when confronted with a *Touhy* request. Rather, this article describes the most common requests received and provides guidance on how best to respond. The first part focuses on requests for official information in the form of documentary or other tangible information. Part two addresses those requests for testimony from DA or military personnel as it relates to official information. Finally, this paper addresses subpoenas and how best to respond.

II. Requests for Information

Touhy requests can and should be acted upon by the servicing Staff Judge Advocate (SJA) or Command Counsel of the appropriate office, command, or activity with control over the official information being requested.[4] Requests for official information, whether in the form of documents or testimony, must be submitted in writing and must set forth, "the nature and relevance of the official information sought."[5] The request must also be submitted at least 14 days before the desired date of production.[6] An initial response should be provided to the requester acknowledging receipt by the correct office and giving an approximate date of completion, if additional time is required.

Not surprisingly, many *Touhy* requests are submitted to the incorrect office or command. When this happens, every effort should be made by the receiving office to determine the correct location for processing. The requester should be notified in writing of the correct point of contact, and a positive handoff with the proper office should be conducted. All too often, the Litigation Division of the United States Army Legal Services Agency (USALSA) becomes involved in *Touhy* matters because the requester was needlessly sent from one office to the next without receiving a response to the original request. In these situations, requesters become so frustrated that they will file an action with the court. This could take the form of requesting the judge in the case at bar issue a subpoena for the information, or a separate action against the government under the Administrative Procedures Act (APA). A discussion of this distinction occurs *infra*. In turn, the Army is forced to expend significant time and resources on a request that could have been easily answered in the first place.

The Army's position on *Touhy* requests when it does not have an interest in litigation is clear: "DA policy is to make official information reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure."[7] When the Army is not a party, but has an interest in litigation, it maintains a policy of strict impartiality and equal access to official information and fact witnesses, but not as to expert or opinion witnesses.[8]

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* Currently assigned as Senior Litigation Attorney and Litigation Attorney, respectively, Litigation Division, United States Army Legal Services Agency. The authors wish to acknowledge the indispensable assistance of Lieutenant Colonel Patrick Gary, Majors Sam Kim and Tom Hong, and Mr. (COL-Ret) Mackey Ives in the preparation of this paper.

[1] Official information is defined as, "All information of any kind, however stored, that is in the custody and control of the Department of Defense (DoD), relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces." 32 C.F.R. § 516, Appendix F.

[2] *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (limiting a private litigant's access to government information and witnesses for use in private litigation) [hereinafter *Touhy*]. Though somewhat similar, these requests are distinct from Freedom of Information Act requests, which are governed by a different statutory and regulatory scheme and not discussed within this paper.

[3] *Id.* The Supreme Court held that 5 U.S.C. § 22 (now 5 U.S.C. § 301) was constitutional and that Executive Agencies' regulations (to include DoD and subordinate military departments) controlling access to their information and personnel were therefore a proper exercise of executive authority.

[4] *See, e.g.*, 32 C.F.R. §§.516.41(b), 516.42(a), 516.47(c), and 516.48(a). Such individuals are referred to in the C.F.R. as the "deciding official," which is the term that will used in this article to refer to the local SJA, Command Counsel, or Senior Legal Advisor authorized to respond to the *Touhy* request. Two sample *Touhy* request approvals are attached: one for documents at Appendix B and one for witness testimony at Appendix C.

[5] 32 C.F.R. § 516.41(d).

[6] 32 C.F.R. § 516.41(d).

[7] 32 C.F.R. §516.44(a).

[8] 32 C.F.R. § 516, Appendix F. In addition to litigation in which the United States is a named party, litigation in which the United States has an interest includes: litigation in which the United States is likely to be named a party; a suit against DA personnel and arising out of the individual's performance of official duties; a suit concerning an Army contract, subcontract, or purchase order under the terms of which the United States may be required to reimburse the contractor for recoveries, fees, or costs of the litigation; a suit involving administrative proceedings before Federal, state, municipal, or foreign tribunals or regulatory bodies that may have a financial impact upon the Army; a suit affecting Army operations or which

Therefore, the Army should always take reasonable efforts to approve proper *Touhy* requests and to make official information available for use by parties to third-party litigation.[9]

When evaluating the merits of a *Touhy* request, keep in mind the releasability factors set forth in 32 C.F.R. § 516.44.[10] In general, if the requester has complied with the regulation, if the requested information is neither classified nor privileged, and if the release would not itself violate law or regulation (to include protections afforded under the Privacy Act[11]), then it should be released.[12] The statute which enables the promulgation of *Touhy* regulations specifically disclaims an independent basis for withholding information[13] Therefore, any decision to withhold official information must cite to specific statutory or authority *apart from* the *Touhy* framework. [14]

Frequently, overly broad requests are made by attorneys in order to capture any or every type of document that could possibly be relevant to their case. These requests are done without giving much thought as to the time and effort it will take the Army to search for and produce the requested information. Requests that ask for "all" documents or "all" emails without giving narrowly tailored specifics would create an unfathomable amount of effort to search and process the information for release. Before outright denying these requests, the Litigation Division recommends making contact with the requester in order to narrow the scope of the request. If that cannot be done, then it should be denied as being overly broad and unduly burdensome. Another strategy is to provide only those documents that are known to be responsive and deny any further processing of the request as being overly broad and unduly burdensome. This may result in the requester being satisfied with the response and forgoing a motion to compel any additional search efforts. If a requester is unwilling to narrow the scope of the request or files a motion to compel against the Army in State or Federal court, you should contact Litigation Division for further guidance.

Another common reason for denying a request is when a requester seeks to obtain official information from Criminal Investigation Division (CID), and fulfilling the request would interfere with or compromise an ongoing investigation. In these situations, a denial is appropriate, but it is not permanent. Once the investigation is complete, and barring any other reasons for denying release, the requested information should be provided. Finally, the fact that information is embarrassing to an agency or individual is not a proper basis for denying its release.

III. Request for Appearance of Witnesses

Requests for testimony from specifically identified present or former DA personnel in third-party litigation require a *Touhy* request when the testimony sought involves official information, the witness is to testify as an expert, or the absence of the witness from duty will seriously interfere with the accomplishment of the military mission.[15] Keep in mind, however, that the *Touhy* process merely authorizes testimony. The Army generally cannot compel a Soldier or DA personnel to testify in a third-party action. However, once the requester has a *Touhy* approval in hand, there is no longer a barrier to issuing a subpoena to the individual whose testimony is requested as it relates to the approved testimony. Any individual who does not wish to testify despite the presence of a valid subpoena should be advised to seek the advice of an attorney concerning the consequences, if any, of refusal. Any individual not

might require, limit, or interfere with official action; a suit in which the United States has a financial interest in the plaintiff's recovery; or foreign litigation in which the United States is bound by treaty or agreement to ensure attendance by military personnel or civilian employees. *Id.*

[9] It should be noted that this article, as well as the laws, regulations, and cases cited herein, are only applicable to requests related to third-party litigation. That is, cases between two or more private litigants where the government is not a party. If the government is a party to the case, the Federal Rules of Civil Procedure (F.R.C.P.) governing discovery generally apply.

[10] The failure to comply with such regulation(s) may form the basis of withholding information, but only until the requester complies with the regulation. There is no prescribed format for making a *Touhy* request. A typical request received by the Litigation Division and other agencies is attached at Appendix A.

[11] Information protected by the Privacy Act of 1974, 5 U.S.C. § 552a, cannot be provided unless the statutory restrictions imposed by the act are overcome. The simplest means by which a requester can overcome the statutory restrictions is to provide a written release authorization signed by the individual to whom the information pertains. If the requester is unable to obtain authorization, then a court ordered release signed by a judge of a court of competent jurisdiction must be provided. A state court generally lacks authority to order disclosure of a nonparty federal agency's records, including those subject to the Privacy Act. *See, e.g., Bosaw v. NTEU*, 887 F.Supp. 1081, 1210-17 (S.D. Ind. 1995). The order must direct the person to whom the records pertain to release the specific records or instruct that copies of the records be delivered to the clerk of court. The order must also indicate that the court has determined the materiality of the records and the non-availability of a claim of privilege. A Privacy Act-compliant protective order must also be in place prior to release of any protected records.

[12] 32 C.F.R. § 516.45. Note that there is a typographical error in this section. The reference to "§ 536.44" should read "§ 516.44." A helpful flow chart of the evaluation process covering the most common situations is included at Appendix D.

[13] 5 U.S.C. § 301. The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public. *Id.*

[14] All references to DoD Directive (DoDD) 5405.2 or Army Regulation (AR) 27-40, will instead cite to the corresponding Code of Federal Regulations (C.F.R.) section. This the practice of the Litigation Division when corresponding with civilian attorneys, as they are far more likely to be familiar with, and have independent access to, the C.F.R. as opposed to the DoDD or AR 27-40.

[15] 32 C.F.R. § 516.47(a).

authorized to consult with Army counsel should consult with private counsel, at no expense to the government.[16]

When the information being requested involves official information, "the matter will be referred to the SJA or legal advisor serving the organization of the individual whose testimony is requested."[17] If, on the other hand, the *Touhy* request is for expert testimony, the deciding official is authorized to deny the request, which decision may be appealed to Litigation Division.[18] There is an exception which allows for Army Medical Department (AMEDD) personnel to testify in third-party litigation about official information without having to obtain approval from Litigation Division.[19] Department of the Army personnel can never furnish expert or opinion testimony for a party whose interests are adverse to the interests of the United States or in a case in which the United States has an interest.[20] However, if the deciding official believes the requester has shown "exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States," the request for expert testimony may be forwarded to Litigation Division for approval.[21]

To protect the Army's interest, an Army judge advocate or DA civilian attorney should be present during all interviews, depositions, or trial testimony to serve as the Army's legal representative.[22] The approval letter signed by the deciding official should specifically explain the legal representative's role, the scope of the official information that may be provided by the witness and any caveats to the release of such information. See Appendix C for a sample witness approval letter.

If, during the interview or deposition, a question exceeds the request's authorization (e.g., calls for the disclosure of classified information) the Army's legal representative will advise the witness not to answer. If questioning continues to require answers beyond the scope of the approval, the legal representative will terminate the interview or deposition to avoid unauthorized disclosure of information.[23] In the case of in-court testimony, the Army's legal representative must advise the judge, in advance, of the applicable policy and regulations precluding witnesses from disclosing certain official information. Every effort should be made, however, to provide releasable information and continue the interview or testimony.

IV. Subpoenas

Attorneys unfamiliar with the *Touhy* process will typically subpoena the required information and/or witness(es) without first complying with the applicable regulations. Although the processing of a subpoena will depend on several factors, a few general guidelines apply to any subpoena received by your office. Most importantly, never ignore a subpoena.[24]

A subpoena for release of official information, or for the testimony of a government witness, in private litigation, should be promptly referred to the deciding official. Also, if a subpoena or request is received in a case in which the United States has an interest, the SJA should coordinate with the General Litigation Branch at Litigation Division prior to action, unless the case has previously been delegated.[25] Occasionally, the subpoena will contain a short suspense date that does not allow for studied evaluation or even consultation with Litigation Division or the local United States Attorney's Office. In those instances, the deciding official should follow the procedures as outlined in 32 C.F.R. § 516.41(f).[26]

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[16] 32 C.F.R. § 516.47(d).

[17] 32 C.F.R. § 516.48(a).

[18] 32 C.F.R. § 516.49(a). A sample denial letter for expert witness testimony can be found at Appendix E.

[19] 32 C.F.R. § 516.49(c).

> Members of the Army medical department or other qualified specialists may testify in private litigation with the following limitations:
>
> (1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions taken in the regular course of their duties.
>
> (2) They limit their testimony to factual matters such as the following: their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment.
>
> (3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

Id.

[20] 32 C.F.R. §§ 516.49(b) and 516.52.

[21] 32 C.F.R. § 516.49(b).

[22] 32 C.F.R. § 516.48(b).

[23] 32 C.F.R. § 516.48(b). A script should be read prior to the giving of any testimony, whether in deposition, interview, or trial, which sets forth the legal advisor's role and the scope of the witness' authorized testimony. A sample script can be found at Appendix F.

[24] *See* 32 C.F.R. § 516.41.

[25] 32 C.F.R. § 516.41(e).

[26] (1) Furnish the court or tribunal a copy of this regulation (32 C.F.R. part 516, subpart G) and applicable case law (*See United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)); (2) Inform the court or tribunal that the requesting individual has not complied with this Chapter, as set out in 32 C.F.R. §§ 97 and 516, or that the subpoena or order is being reviewed; (3) Seek to stay the subpoena or order pending the requestor's compliance with this Chapter or a final determination by Litigation Division; and, (4) If the court or other tribunal declines to quash or stay the subpoena or order,

A. Subpoenas From a State Court

Absent unique or unusual circumstances, state courts lack jurisdiction to compel nonparty federal officials to testify or produce documents, or to enforce subpoenas seeking the same.[27] This is grounded not only in the fact that the presence of a subpoena indicates an inherent failure to comply with applicable regulations, but also a failure to take into consideration the concept of sovereign immunity.[28] These subpoenas arise most often from domestic relations or family court actions, although a significant minority derive from state criminal prosecutions.[29]

It is important to bifurcate your analysis when receiving a subpoena from a state court. Although the court does not have jurisdiction over the official information that the subpoenaed individual possesses, and thus cannot compel disclosure, the state court may have jurisdiction over the person and thus can compel their appearance. In such cases, if the subpoena is not quashed or withdrawn, the individual should appear as directed, but respectfully decline to answer any questions or produce any documents that relate to official information until the issue is resolved by either Litigation Division or the U.S. Attorney's Office.[30]

B. Subpoenas From a Federal Court

Though beyond the scope of this article, practitioners should be aware that there is a circuit split on whether Federal court subpoenas may issue at all against Federal entities in third-party litigation and, if so, how they are enforced. Some circuits hold that the sole method of obtaining Federal witnesses or information is via the *Touhy* process, and that the only recourse for an adverse response is the Administrative Procedures Act.[31] Other circuits are more accepting of enforcement via the Federal Rules of Civil Procedure (FRCP) 45.[32] The following information is general in nature and before responding to a subpoena, attorneys should educate themselves on the state of the law within their jurisdiction.

Federal court subpoenas require the consideration of *Touhy*-related issues in conjunction with FRCP 45. Under FRCP 45, if a subpoena is for documents, the subpoenaed party must submit any objections (usually by letter to the subpoenaing attorney, depending on local rules) within fourteen days of service or by the return date, if sooner. The burden is then on the subpoenaing party to decide whether to negotiate further or move to compel.[33] If a subpoena is for a deposition, the onus is on the subpoenaed party to file any motion to quash or for a protective order in a "timely" manner.[34] "Timely" is usually interpreted to mean fourteen days from service or before the return date, absent circumstances justifying a delay. Therefore, it is especially important that Federal court subpoenas be acted upon in a timely manner. Both the local U.S. Attorney's Office and Litigation Division should be notified immediately upon receipt of a Federal court subpoena. Unless specifically and unmistakably directed otherwise by the U.S. Attorney's Office or Litigation Division, the recipient should comply with such a subpoena.

C. General Guidance Regarding Subpoenas

Filing a motion to quash a subpoena or taking formal action of any type in response to a subpoena can sometimes be avoided by simply making contact with the requester. The most effective method of avoiding a protracted struggle over an improper subpoena is simply to pick up the phone, contact the issuing attorney, and explain the rules. If that is not possible, a letter, such as the one found at Appendix H, can be sent. Such informal resolution, if possible, is always the preferred method and will often result in the party complying with the *Touhy* regulations and withdrawing the subpoena. If such resolution is not possible, further strategy in any particular case should be discussed with Litigation Division or the United States Attorney's Office in advance. If the requester does move to compel the requested testimony, then the U.S. Attorney's Office will defend the Army consistent with *Touhy* doctrine and principles of sovereign immunity.

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inform Litigation Division immediately so a decision can be made whether to challenge the subpoena or order. If Litigation Division decides not to challenge the subpoena or order, the affected personnel will comply with the subpoena or order. If Litigation Division decides to challenge the subpoena or order, it will direct the affected personnel to respectfully decline to comply with the subpoena or order. (*See Touhy*).

[27] *See, e.g., Sharon Lease Oil Co. v. FERC*, 691 F. Supp. 381 (D.D.C. 1988); *Puerto Rico v. United States*, 490 F.3d 50, 61 (1st Cir. P.R. 2007), *cert. denied*, 552 U.S. 1295 (2008).

[28] *Comsat Corporation v. National Science Foundation*, 190 F.3d 269, 277 (4th Cir. 1999).

[29] A sample response to a subpoena or request for information in a state court family law matter is attached at Appendix G. The publication, *Working With the Military as an Employer*, referenced in this appendix can be found at http://www.acf.hhs.gov/sites/default/files/ocse/military_quick_guide.pdf

[30] 32 C.F.R. § 516.41(f).

[31] "We disagree with the Ninth Circuit's approach and think that the only identifiable waiver of sovereign immunity that would permit a court to require a response to a subpoena in an action in which the government is not a party is found in the APA." *United States EPA v. GE*, 197 F.3d 592, 598 (2d Cir. N.Y. 1999).

[32] "The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause. Such limitations do not apply when a federal court exercises its subpoena power against federal officials…For the foregoing reasons, we believe that federal district courts, in reviewing subpoena requests under the federal rules of discovery, can adequately protect both an individual's right to 'every man's evidence' as well as the government's interest in not being used as a 'speakers bureau' for private litigants." *Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. Alaska 1994).

[33] *See* FED. R. CIV. P. 45(c)(1)(B).

[34] *See* FED. R. CIV. P. 45(c)(3), 26(c).

V. Privilege Review

Prior to the release of any official information, the deciding official must review the documents for privileged information. Most commonly the Privacy Act, the Procurement Integrity Act, the Health Insurance Portability and Accountability Act, Army Safety Investigations, and Inspector General records are subject to laws and regulations that preclude their release. In such cases, the deciding official's release determination must be in compliance with the applicable law and/or regulation.

VI. Conclusion

While DA policy is to make official information reasonably available for use in third-party litigation, the disclosure of such must be made in accordance with the applicable *Touhy* regulations. Further, present or former DA personnel may disclose official information only if they obtain written approval from the appropriate deciding official. Subpoenas can present certain unique and time-sensitive issues that must be addressed immediately upon receipt. When in receipt of a request for official information, ensure that it complies with 32 C.F.R. § 516 Subpart G and AR 27-40, chapter 7, and respond accordingly. While most requests can be resolved at the local level, deciding officials should never hesitate to contact the Litigation Division for assistance with those requests that cannot be resolved at their level.

Appendix A

[redacted]

Sample Touhy Request

[redacted]
Tel 650.[redacted]
Fax 650.[redacted]
[redacted]

October 30, 2013

VIA EMAIL AND U.S. MAIL

[redacted]
Acting Assistant Chief Counsel/Division Counsel
Department of the Army
South Pacific Division, U.S. Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103-1399
Email: [redacted]@usace.army.mil

Re: [redacted]
v. [redacted]
Superior Court of Muscogee County, Georgia, No. [redacted]:
[redacted]

Dear [redacted]:

Thank you for your letter of October 18, 2013 outlining the requirements for requesting the deposition of [redacted] in the above-referenced litigation.

Pursuant to 32 C.F.R. § 97.6(c) and § 516(d), we request that [redacted] appear for a deposition on Wednesday, November 27, 2013 at 10:00 a.m. at Walnut Creek Marriott, 2355 N. Main St., Walnut Creek, California, 94596, [redacted].

The nature of the proceeding is a Fifth Amended Complaint filed by Plaintiffs [redacted] against [redacted] In 2003, [redacted], [redacted] and the Army entered into operating agreements to create privatized Army residential communities at Fort Belvoir, Virginia. In 2005, the same parties entered into operating agreements to create privatized Army residential communities at Fort Benning, Georgia (collectively, the "Projects"). The Fifth Amended Complaint alleges that [redacted] engaged in fraud and other misconduct resulting in the termination of [redacted]'s 50-year property management agreements at both Projects.

[redacted] served as the senior career person within the Army Secretariat responsible for the Army's worldwide installations and housing structure. Prior to his appointment

ALBANY
AMSTERDAM
ATLANTA
AUSTIN
BOSTON
CHICAGO
DALLAS
DELAWARE
DENVER
FORT LAUDERDALE
HOUSTON
LAS VEGAS
LONDON*
LOS ANGELES
MIAMI
MILAN**
NEW JERSEY
NEW YORK
ORANGE COUNTY
ORLANDO
PALM BEACH COUNTY
PHILADELPHIA
PHOENIX
ROME**
SACRAMENTO
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
TALLAHASSEE
TAMPA
TYSONS CORNER
WASHINGTON, D.C.
[redacted]

as the DASA(I&H), [redacted] was a member of the USACE team and concurrently served as the [redacted] of the South Pacific Division Regional Integration Team at Headquarters. [redacted]'s testimony is relevant to the lawsuit because he worked with the RCI partners in overseeing operations at the military housing communities and he has personal knowledge related to the operations and management of the Projects. Additionally, [redacted] communicated directly with upper management at both [redacted] and [redacted] regarding issues at the Projects. We want to inquire of [redacted] about the issues in the Fifth Amended Complaint and the performance and management of both Projects.

We understand that, as a government employee, testimony from [redacted] is subject to the limitations of 32 CFR § 97.6(e). We wish to assure you that we seek only factual testimony from him.

Thank you for your communications and assistance to date. Please let me know if you need any additional information.

Very truly yours,

[redacted]

[redacted]

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
LITIGATION DIVISION
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060

March 28, 2015

SUBJECT: *Plaintiff(s) v. Defendant(s)*, Civil Action File No.: 14CV1234, Superior Court of Muscogee County, State of Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

This letter responds to your letter of March 28, 2015, a request for official information made pursuant to Army Regulation (AR) 27-40, Chapter 7 (as codified 32 C.F.R. §516 et seq.). This letter specifically relates to your request for copies of the Aviation Unit Maintenance (AVUM) and Aviation Intermediate Maintenance (AVIM) estimated Repair Appraisal for the accident helicopter, and the flight plan for the accident helicopter for August 18, 2014, DD Form 175, for use in the above-referenced case. Subject to the following conditions, your request for these documents is approved.

Pursuant to 32 C.F.R. §§516.43-45, the documents you requested have been determined to be releasable, subject to certain caveats. Information falling into the following general areas has therefore been redacted:

- Any information that is classified, privileged, or otherwise protected from public disclosure. U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION Chapter 7 (19 September 1994) (hereinafter "AR 27-40"); 32 C.F.R. §516.41, 44.

- Any information the disclosure of which would violate the Privacy Act, absent a written release authorization signed by the individual to whom the information pertains or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a.

- Any information the disclosure of which would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly

confidential commercial or financial information, or otherwise be inappropriate under the circumstances. U.S. DEP'T OF DEF., DIR. 5405.2, RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DOD PERSONNEL AS WITNESSES para. 6.2.6 (23 July 1985); AR 27-40, Appendix C. *See, e.g.*, *Am. Mgmt. Servs., LLC v. Dep't of the Army*, 703 F.3d 724, 729 (4th Cir. 2013) *cert. denied*, 12-1233, 2013 WL 1499158 (U.S. Oct. 7, 2013).

- Information which is protected by the deliberative process privilege; which relates to the process by which policies are formulated; and/or is or was at the time predecisional in nature. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (stating that "[t]he cases uniformly rest the [deliberative process] privilege on the policy of protecting the 'decision making processes of government agencies'" (quoting *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972))); *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. The requested documents are enclosed, with Bates Stamp Army_20150220_0001 thru Army_20150220_0047. According to our records, this release comprises the totality of responsive documents in the possession of the Army, and your *Touhy* request is now closed. If you should have any questions, please feel free to contact me at (703) 693-xxxx or xxx.xxx.mil@mail.mil.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney

Enclosure

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
LITIGATION DIVISION
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060

March 28, 2015

SUBJECT: Plaintiff(s) v. Defendant(s), Civil Action File No.: 14CV1234, Superior Court of Muscogee County, State of Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

This letter responds to your letter of March 28, 2015, a request for official information made pursuant to Army Regulation (AR) 27-40, Chapter 7 (as codified 32 C.F.R. §516 et seq.). This letter specifically relates to your request for the depositions of Mr. John Smith and Mr. Bill Jones for use in the above-referenced case. Subject to the following conditions, your request is approved.

Pursuant to 32 C.F.R. §516.48, these individuals may provide official information during a deposition. Based on your request, they may release official information regarding their personal knowledge in the following general areas, subject to the caveats which follow:

> Mr. Smith: The operation and management of the Projects and his communications with upper management of both Plaintiff and Defendant regarding construction problems and delays at the Projects.
>
> Mr. Jones: The Community Development Management Plans at the Projects, the performance of the property and asset manager at the Projects, and residential and operational issues at the Projects.

Caveats and Reservations: Deponents are prohibited from offering testimony which falls into the following general, non-exhaustive, areas:

- Any information that is classified, privileged, or otherwise protected from public disclosure. U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION Chapter 7 (19 September 1994) (hereinafter "AR 27-40"); 32 C.F.R. § 516.41, 44.

- Any information the disclosure of which would violate the Privacy Act, absent a written release authorization signed by the individual to whom the information pertains or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a.

- Any information the disclosure of which would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances. U.S. DEP'T OF DEF., DIR. 5405.2, RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DOD PERSONNEL AS WITNESSES para. 6.2.6 (23 July 1985); AR 27-40, Appendix C. See, e.g., Am. Mgmt. Servs., LLC v. Dep't of the Army, 703 F.3d 724, 729 (4th Cir. 2013) cert. denied, 12-1233, 2013 WL 1499158 (U.S. Oct. 7, 2013).

- Information which is protected by the deliberative process privilege; which relates to the process by which policies are formulated; and/or is or was at the time predecisional in nature. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that "[t]he cases uniformly rest the [deliberative process] privilege on the policy of protecting the 'decision making processes of government agencies'" (quoting Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972))); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deponents may only provide factual information related to their involvement in the events that gave rise to the present litigation. They may not be qualified as expert witnesses or be asked for personal opinions relating to official information. See AR 27-40, para. 7-10; 32 C.F.R. §516.49(a).

The following conditions apply to this authorization. First, an Army-designated attorney must be present during the deposition. AR 27-40, para. 7-9; 32 C.F.R. §516.48. Second, the witnesses' participation must be at no expense to the United States. AR 27-40, para. 7-16; 32 C.F.R. §516.55; the Army must be provided a copy of the deposition transcript, also at no expense to the United States (electronic copies are acceptable). Finally, this approval is limited to the requested deposition and subject areas and does not extend to any other forum or format. If the testimony of any of the individuals is later requested for trial, a new Touhy request must be submitted.

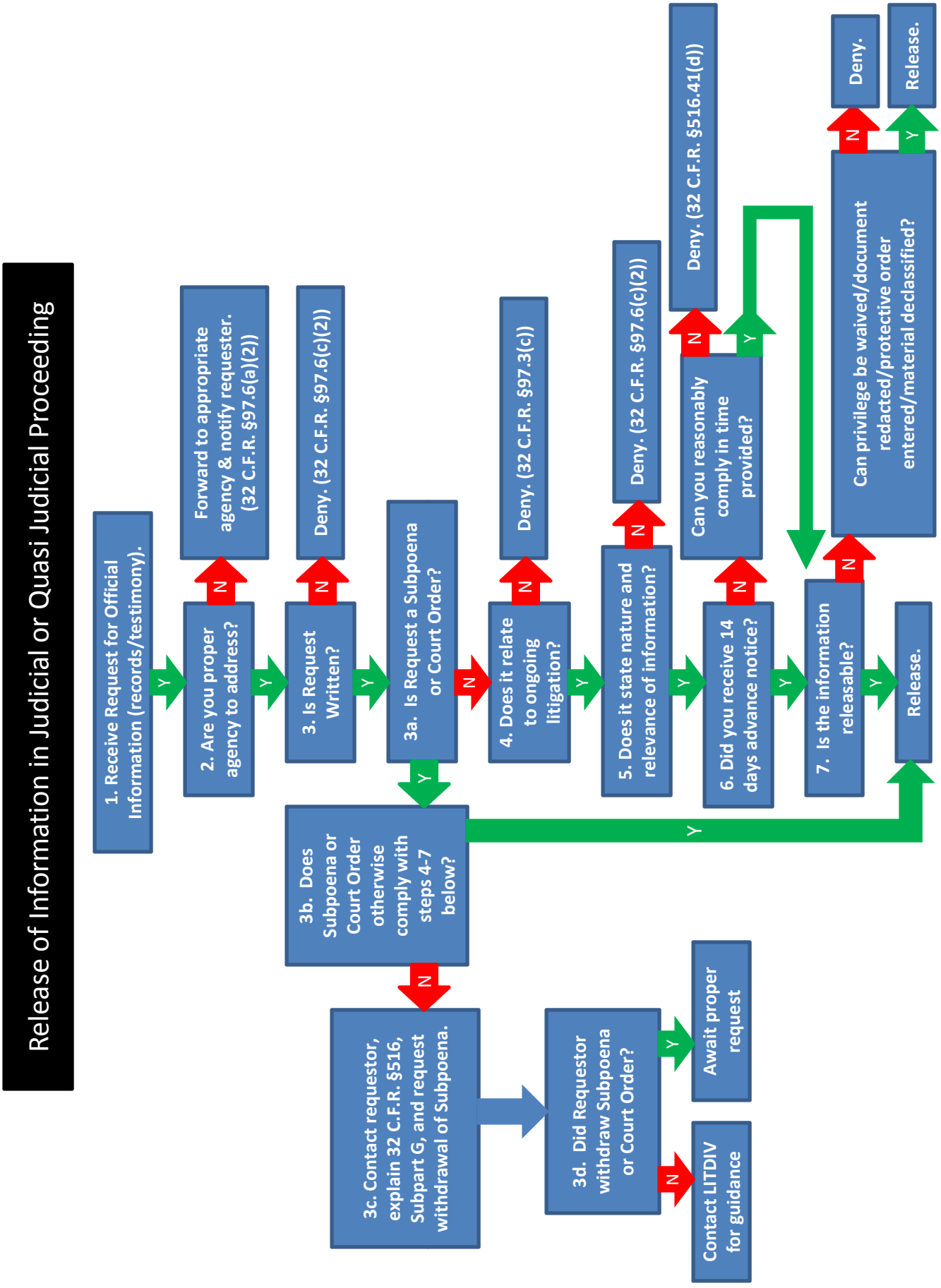
The decision whether to testify in private litigation is within the discretion of the prospective witnesses. The United States cannot compel an official to participate in private litigation. 32 CFR §516.47(d). This authorization is also subject to the approval of the witness' supervisor to be absent during the period involved. If the witness' absence on the requested time

and/or date would seriously interfere with the accomplishment of a military mission, the deposition would need to be rescheduled. 32 CFR §516.47(a)(3). Advance scheduling is therefore important for all parties concerned.

We look forward to working with you to find mutually acceptable dates for the testimony of these individuals. Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. Our office will continue to keep your Touhy request open until the completion of the requested depositions. In the interim, if you should have any questions, please feel free to contact me at (703) 693-xxxx or xxxx.mil@mail.mil.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney


Release of Information in Judicial or Quasi Judicial Proceeding
1. Receive Request for Official Information (records/testimony).
2. Are you proper agency to address?
Forward to appropriate agency & notify requester. (32 C.F.R. §97.6(a)(2))
3. Is Request Written?
Deny. (32 C.F.R. §97.6(c)(2))
3a. Is Request a Subpoena or Court Order?
3b. Does Subpoena or Court Order otherwise comply with steps 4-7 below?
3c. Contact requestor, explain 32 C.F.R. §516, Subpart G, and request withdrawal of Subpoena.
3d. Did Requestor withdraw Subpoena or Court Order?
Await proper request
Contact LITDIV for guidance
4. Does it relate to ongoing litigation?
Deny. (32 C.F.R. §97.3(c))
5. Does it state nature and relevance of information?
Deny. (32 C.F.R. §97.6(c)(2))
6. Did you receive 14 days advance notice?
Can you reasonably comply in time provided?
Deny. (32 C.F.R. §516.41(d))
7. Is the information releasable?
Can privilege be waived/document redacted/protective order entered/material declassified?
Deny.
Release.
Release.
Y
N

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
LITIGATION DIVISION
9275 GUSTON ROAD
FORT BELVOIR, VIRGINIA 22060

REPLY TO ATTENTION OF:

April 28, 2015

General Litigation Branch

John Q. Attorney
100 Anywhere
Suite 701
New York City, NY 20001

Dear Mr. Chapman:

This responds to your request for _____ to appear as an expert witness in private litigation:_____. For the following reasons, the request is denied.

Army Regulation 27-40 forbids Army personnel from providing expert testimony in private litigation, with our without compensation, except under the most extraordinary circumstances. See 32 C.F.R. § 97.6(e), 516.49. Several reasons support the exercise of strict control over such witness appearances.

The Army policy is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have a significant interest. When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary.

The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. If Army personnel testify as expert witnesses in private litigation, their official duties are invariably disrupted, often at the expense of the Army's mission and the Federal taxpayer.

Finally, the Army is concerned about the potential for conflict of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust and confidence in the integrity of our Government.

This case does not present the extraordinary circumstances necessary to justify the requested witness' expert testimony. You have demonstrated no exceptional need or unique circumstances that would warrant (his or her) appearance. The expert testimony desired can be secured from non-Army sources. Consequently, we are unable to grant you an exception to the Army's policy. In accordance with 32 CFR §516.49, you may appeal this determination to the

United States Army Litigation Division. The appeal authority is:

Chief, Army Litigation
U.S. Army Legal Services Agency
Litigation Division
9275 Gunston Rd., Suite 3000
Fort Belvoir, VA 22060

If you have any questions, please call _____ at XXX-XXX-XXXX.

Sincerely,

Signature Block

Touhy Script (Deposition, Interview, Trial)

Good morning, I'm [your name], with the [organization]. I am present here today representing the United States Army as required by 32 C.F.R. § 516.48. My representation of [deponent name] is limited to matters related to the release of official Army information and to [his/her] role as [officer/employee] of the United States Army. In accordance with Army Regulation 27-40, Chapter 7 and 32 C.F.R. § 516.48, [deponent name] is authorized to disclose official information related to [insert scope of authorization as contained in approval letter]. [Insert approving official / Office] has authorized [deponent name] to provide this information in the matter of [Insert Case Caption]. The letter authorizing this disclosure is dated [date] and signed by [authorizing official]. I request that this document be admitted as an exhibit to this deposition.

[Deponent name] is specifically prohibited from disclosing certain information. [He/She] may not provide classified or privileged information or provide information that is otherwise protected from public disclosure, such as Privacy Act protected information, without appropriate additional authorization. [He/She] may not provide opinion testimony (such as hypothetical questions) or expert testimony without additional justification and approval required by 32 C.F.R. §516.49. In accordance with 32 C.F.R. § 516.48, I am required to instruct the deponent not to answer questions which call for official information outside the scope of this authorization or seek information which is otherwise prohibited from disclosure.

{Use this paragraph when the expected testimony covers both official and non-official information.

Official information is defined by 32 C.F.R. Part 516, Appendix F as "All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces."}

{Use this paragraph when the deponent has been authorized to provide expert testimony.

In accordance with Army Regulation 27-40, Chapter 7 and 32 C.F.R. § 516.49, [deponent name] is authorized to provide expert testimony related to [insert scope of approved expert testimony contained in approval letter]. While both parties may question the deponent on this field of expertise, the deponent is not authorized to provide expert testimony on other subjects.}

{Use this paragraph when the deponent is an AMEDD member and has been authorized to provide expert testimony.

In accordance with Army Regulation 27-40, Chapter 7 and 32 C.F.R. § 516.49 (c), [deponent name] is authorized to provide testimony related to the treatment of [insert patient name]. Both parties may question the deponent on this patient, limited to the scope of the [patient

confidentiality waiver / court order] and the previously mentioned approval letter from [authorizing official]. [Deponent's] testimony must be limited to [his / her] treatment of the patient, investigations [he / she] has made, laboratory tests [he/she] has conducted, or other actions taken in the regular course of their duties. Deponent must limit [his / her] testimony to factual matters such as the following: observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment. [His / her] testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.}

Read this paragraph in cases in which the Army is NOT a party and DOES NOT have an interest in the case:

It is DoD policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. Army policy is one of strict impartiality in private litigation in which the Army is not a named party or does not have a significant interest as that term is defined in 32 C.F.R. § 516, Appendix F. Therefore, my role during this deposition is solely to protect the Army's interest and, as such, my intervention will be limited to that end. The parties are responsible for advancing their respective positions and objections as it relates to matters outside the Army's interest.

Read this paragraph in cases in which the Army is NOT a party but DOES have an interest in the case:

It is DoD policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. In private litigation in which the United States is not a party, but does have a significant interest as that term is defined in 32 C.F.R. § 516, Appendix F, Army policy is one of strict impartiality in regards to access to information and fact witnesses; that is, all parties shall have equal access to official information and fact witnesses. Therefore, my role during this deposition is solely to protect the Army's interest and, as such, my intervention will be limited to that end. The parties are responsible for advancing their respective positions and objections as it relates to matters outside the Army's interest.

Thank you.

Appendix G

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
LITIGATION DIVISION
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060

April 28, 2015

SUBJECT: [Request / Subpoena] for Finance, Medical, and Personnel Records of Specialist (SPC) Walter X. Snuffy pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), in the family law matter of Ms. Betty Snuffy, State of California

Dolores M. Jones, Esq.
Dewey, Cheatem, & Howe, PLLC
610 South Main Street
San Jose, CA 95113

Dear Ms. Jones:

This letter responds to your [Subpoena / request] of March 30, 2015 for the personnel, medical, and finance records of SPC Walter Snuffy. As outlined in detail below, your request is denied because [the subpoena does not comply with federal laws or regulations regarding the release of the information sought and] this office is not the custodian of any of the records you seek .

Finance records for Army personnel are maintained by the Defense Finance and Accounting Service (DFAS) and requests must be sent directly to that office. I have enclosed a publication entitled, "Working With The Military As An Employer" which contains contact information for DFAS, as well as other information you might find helpful.

Personnel records are generally maintained at the unit level. You should direct your request for those records to:

[Change the below information to the servicing OSJA of the Soldier's command. For National Guard Soldiers, this should be the office of the State Adjutant General. Determining the correct POC for Reserve Soldiers may be more challenging.]
Office of the Staff Judge Advocate
10th Mountain Division (Light Infantry)
Att'n.: Administrative Law Division
141 Lewis Avenue
Fort Drum NY 13602-5100

Delete the above paragraph and use this one for individuals who are retired or otherwise no longer serving. Personnel records for retired /discharged individuals should be requested from:

National Personnel Records Center
Military Personnel Records
1 Archives Drive
St. Louis, MO 63138
Phone: 314-801-0800
Fax: 314-801-9195

We recommend contacting the NPRC to determine requirements prior to submitting a request.

As for medical records, we recommend you contact the Department of Veterans Affairs (VA), Records Management Center, in St. Louis, MO, or call their toll free number at 1-800-827-1000 to identify the current location of specific health records and to find out how to obtain releasable documents or information.

[Remove this paragraph if the original request was not in the form of a subpoena.]The presence of a subpoena in this case does not affect the requirements contained in 32 C.F.R.§97.6(c) and Part 516, Subpart G. In accordance with *Touhy*, the Secretary of the Army may withhold release authority for official Army information from his subordinates—as he has done in the above-referenced regulations. Based upon these regulations, an Army employee, if ordered by the court to testify or produce documents not properly requested and approved for release, must respectfully decline. It is well settled that courts cannot compel a federal agency employee to testify or produce documents in violation of agency regulations. *See*, *Touhy*, 340 U.S. at 467-70; *Boron Oil Co.*, 873 F.2d at 69-70; and *United States Steel Corp. v. Mattingly*, 663 F.2d 68 (10th Cir. 1980).

[Remove this paragraph if the original request was not in the form of a subpoena.]Furthermore, in this instance, refusal to comply with the specified subpoena for the production of records is also grounded on "sovereign immunity," [and not merely housekeeping regulations], *Comsat Corporation v. National Science Foundation*, 190 F.3d 269, 277 (4th Cir. 1999). The Administrative Procedures Act (APA) provides the "sole avenue for review." *Id.*, at 274, citing *Smith v. Cromer*, 159 F.3d 875, 881 (4th Cir. 1998).

You should be aware that much of the information you seek may be protected by the Privacy Act and/or the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Any records so protected may only be disclosed with a written release authorization signed by the individual to whom the information pertains, or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a; 45 C.F.R. § 164.512(e). A subpoena or other legal process signed by an attorney or clerk of court for records or information protected by the Privacy Act does not authorize the release of the protected information. *See*, *e.g.*, *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985); 5 U.S.C. §552a(b)(11) and 32 C.F.R. §516.46(b)(1).

The order must direct release of the specific record(s) or instruct that copies of the record(s) be delivered to the clerk of court. The order must also indicate that the court has

determined the materiality of the records and the non-availability of a claim of privilege. Typically, a Privacy Act-compliant protective order must also be in place prior to release of any protected records. Note that a state court generally lacks authority to order disclosure of a nonparty federal agency's records. *See, e.g., Bosaw v. NTEU*, 887 F.Supp. 1199, 1217 (S.D. Ind. 1995).

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. If you should have any questions, please feel free to contact me at (703) 693-xxxx or xxxxxxxxx@mail.mil.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney

Enclosure

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
LITIGATION DIVISION
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060

February 18, 2015

SUBJECT: *Plaintiff(s) v. Defendant(s)*, Civil Action File No.: 14CV1234, Superior Court of Muscogee County, State of Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

*****If the subpoena seeks information/documents rather than the testimony of an individual(s), adjust the language accordingly. The citations to cases and regs are the same regardless.***** I coordinate general litigation issues for the U.S. Army. I am writing because we have learned that you have issued a subpoena to John Smith, an Army employee, in reference to the above captioned litigation, for a deposition to take place on November 25, 2014. As outlined in detail below, your request is denied because the subpoena does not comply with federal laws or regulations regarding the release of the information sought.

Under 32 C.F.R. §§ 97 and 516, the Army must authorize the production of official documents or testimony in private litigation. In this case, the Army cannot authorize Mr. Smith to appear unless his appearance is requested in writing and in accordance with Department of Defense Directive 5405.2; 32 C.F.R. § 97.6; Army Regulation 27-40, Chapter 7; and 32 C.F.R. § 516, Subpart G. The request must include, *inter alia*, the nature and relevance of the official information sought. 32 C.F.R. § 516.41(d). It is important for this request to be as specific as possible. We cannot act on your request until we receive the required information, and, absent a proper request and approval of that request by the designated Army official, no official information may be released. 32 C.F.R. 516.41(d); s*ee, e.g., United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989); *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen*, 554 F.2d 398 (l0th Cir. 1977) cert. denied, 434 U.S. 836, 98 S.Ct. 124, 54 L.Ed.2d 97 (1977).

The presence of a subpoena in this case does not affect the requirements contained in 32 C.F.R.§ 97.6(c) and Part 516, Subpart G. In accordance with *Touhy*, the Secretary of the

Army may withhold release authority for official Army information from his subordinates—as he has done in the above-referenced regulations. Based upon these regulations, an Army employee, if ordered by the court to testify or produce documents not properly requested and approved for release, must respectfully decline. It is well settled that courts cannot compel a federal agency employee to testify or produce documents in violation of agency regulations. *See, Touhy,* 340 U.S. at 467-70; *Boron Oil Co.*, 873 F.2d at 69-70; and *United States Steel Corp. v. Mattingly*, 663 F.2d 68 (10th Cir. 1980).

*****REMOVE IF NOT APPLICABLE.*****You should be aware that much of the information you seek may be protected by the Privacy Act. Any records so protected may only be disclosed with a written release authorization signed by the individual to whom the information pertains, or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a. A subpoena or other legal process signed by an attorney or clerk of court for records or information protected by the Privacy Act does not authorize the release of the protected information. See, e.g., Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985); 5 U.S.C. § 552a(b)(11) and 32 C.F.R. §516.46(b)(1).

The order must direct release of the specific record(s) or instruct that copies of the record(s) be delivered to the clerk of court. The order must also indicate that the court has determined the materiality of the records and the non-availability of a claim of privilege. Typically, a Privacy Act-compliant protective order must also be in place prior to release of any protected records.******* *****REMOVE IF THE UNDERLYING CASE IS FEDERAL RATHER THAN STATE.*****Note that a state court generally lacks authority to order disclosure of a nonparty federal agency's records. See, e.g., Bosaw v. NTEU, 887 F.Supp. 1199, 1217 (S.D. Ind. 1995).*******

*****REMOVE THIS PARAGRAPH IF THE UNDERLYING CASE IS FEDERAL RATHER THAN STATE.*****Furthermore, in this instance, refusal to comply with the specified subpoena for the production of records is also grounded on "sovereign immunity," [and not merely housekeeping regulations], *Comsat Corporation v. National Science Foundation*, 190 F.3d 269, 277 (4th Cir. 1999). The Administrative Procedures Act (APA) provides the "sole avenue for review." *Id.*, at 274, citing *Smith v. Cromer*, 159 F.3d 875, 881 (4th Cir. 1998).*******

***** In the case of documents, remove this paragraph concerning "opinion/expert testimony" entirely.***** Finally, if Mr. Smith appears as a witness, he may only give factual testimony. He may not testify as an opinion or expert witness. This limitation is based on Department of Defense and Army policy that generally prohibits Government employees from appearing as expert witnesses in private litigation. *See* 32 CFR §§ 97.6(e). ***

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. We look forward to hearing from you so that we may timely process your request. I can be reached at (703) 693-xxxx or xxxx.mil@mail.mil if you have any questions.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney

cc:
United States Attorney for _____ District of _____

Where There's a Will, There's a Way: Command Authority over Juvenile Misconduct on Areas of Exclusive Federal Jurisdiction, and the Utilization of Juvenile Review Boards

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We have a powerful potential in our youth, and we must have the courage to change old ideas and practices so that we may direct their power toward good ends.[1]

I. Introduction

A thirteen year-old girl shoplifts a magazine and a pair of headphones from the Post Exchange (PX) at Fort Wahoo. The girl is a dependent who lives on-post with her mother and two younger siblings: her father is currently deployed. Fort Wahoo is an exclusive federal jurisdiction installation, and the local U.S. Attorney's Office does not support prosecuting juveniles in federal court because of federal law limitations on juvenile prosecutions and insufficient time and resources. The Fort Wahoo Garrison Commander is upset because this is the fourth juvenile shoplifting incident at the PX this month and he wants to take action to address on-post juvenile misconduct, but feels like his hands are tied. What would you advise the Garrison Commander to do?

In 2011, nearly 1.5 million juveniles[2] were arrested in the United States, with "about 1 in 13 arrests for murder and 1 in 5 arrests for robbery, burglary, and larceny-theft."[3] While statistical data shows a decline in juvenile arrests during the last decade,[4] the reality remains that juveniles engage in criminal misconduct across the United States, and military installations are no exception. Commanders are responsible for the maintenance of good order and discipline on military installations,[5] including juvenile misconduct. However, commanders at installations with exclusive federal jurisdiction face unique challenges.

The Federal Juvenile Delinquency Act[6] severely limits the authority to bring juvenile offenses before federal courts, resulting in infrequent court adjudication of on-post juvenile offenses. In the absence of federal court adjudication, commanders at exclusive federal jurisdiction installations are limited in their ability to handle on-post juvenile misconduct. In response, commanders at such installations are resorting to administrative alternatives, including juvenile review boards, to address juvenile misconduct.

Juvenile review boards[7] (JRBs) are non-adversarial administrative boards established to adjudicate cases of juvenile misconduct occurring on military installations, and are an effective administrative alternative for commanders to maintain control over on-post misconduct. Juvenile review boards promote command involvement in community safety and rehabilitation of juveniles on military installations, and can be used in coordination with state juvenile authorities, thereby reinforcing command involvement and responses to juvenile misconduct.[8]

This article discusses the utility of JRBs as an administrative alternative to the challenges of exercising command authority over juveniles in areas of exclusive federal jurisdiction.[9] Part II will address the specific challenges of exercising command authority over juvenile misconduct on installations with exclusive federal jurisdiction. Part III will examine JRB procedures, and current challenges based on data from select Army

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[1] Mary McLeod Bethune, *My Last Will and Testament*, *available at* http://www.marybethuneacademy.org/My%20Last%20Will%20and%20Testament.pdf.

[2] A juvenile is a person under eighteen years of age, the age "at which one should be treated as an adult by the criminal justice system . . . ." BLACK'S LAW DICTIONARY 945 (9th ed. 2009).

[3] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE ARRESTS 2011 5 (2013), *available at* http://www.ojjdp.gov/pubs/244476.pdf (last visited May 6, 2015).

[4] *Id*. at 4.

[5] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-5b (6 Nov. 2014).

[6] Federal Juvenile Delinquency Act, 18 U.S.C. § 5031-5042 (2012) (establishing procedures for the treatment and prosecution of juveniles under federal jurisdiction who violate federal law).

[7] While this article refers to installation juvenile review boards and procedures in general, the boards exist under various titles across U.S. Army installations: namely, Juvenile Review Boards, Juvenile Disciplinary Control Boards, Juvenile Delinquency Programs, or Youth Intervention Programs.

[8] *See* discussion *infra* Part IV.B.

[9] This article does not address juvenile misconduct in areas of concurrent, partial, or proprietary jurisdiction, or outside the continental United States.

installations across the continental United States.[10] Lastly, Part IV will provide recommendations for improvement of JRBs and other courses of action to address juvenile misconduct on installations with exclusive federal jurisdiction.

II. The Challenges of Command Authority over Juveniles in Federal Jurisdiction

A. Understanding Exclusive Federal Jurisdiction

Jurisdiction is "[a] government's general power to exercise authority over all persons and things within its territory,"[11] and legislative jurisdiction refers to the authority to make, execute, and enforce the law over a particular area of land.[12] There are several types of legislative jurisdiction found on military installations, including exclusive federal jurisdiction,[13] which can include all land within an installation, often called a federal enclave,[14] or be limited to a specific area within a mixed jurisdiction installation.[15] Although this article focuses on addressing juvenile misconduct on installations with exclusive federal jurisdiction, it is important, as a threshold matter, for judge advocates to know and understand which type of legislative jurisdiction exists and, therefore, which body of law applies on an installation.[16]

Exclusive federal jurisdiction is founded in the U.S. Constitution and exists on many military installations. Specifically, the Constitution grants Congress the power

> to *exercise exclusive Legislation* in all Cases whatsoever, . . . as may, by Cession of particular states, and the Acceptance of Congress, become the seat of Government of the United States, *and to exercise like Authority over all Places purchased* by the Consent of the Legislature of the State in which the Same shall be, for the Erection of forts, Magazines, Arsenals, dock-yards, and other needful Buildings.[17]

Pursuant to its Constitutional authority, the federal government may exercise legislative jurisdiction on a military installation when it acquires such jurisdiction by state consent to federal purchase of land, or by state cession of land to the federal government.[18] The federal government may also reserve exclusive legislative jurisdiction upon admission of a state into the Union.[19] Because the federal government can acquire property by various methods, legal advisors must be aware of the type of legislative jurisdiction accompanying each specific tract of land on an installation.[20]

Regardless of how acquired, where there is exclusive federal jurisdiction, the federal government has exclusive authority to enact, execute, and enforce laws to the exclusion of the state.[21] Congress may permit a state to exercise limited authority in areas of exclusive federal jurisdiction by granting such authority in a federal statute;[22] otherwise, a state may not interfere with federal functions on military installations.[23]

In the context of juvenile misconduct, the federal government recognizes a general policy of abstention from the prosecution of juveniles in federal court.[24] Federal

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[10] The author conducted a survey of U.S. Army installations across the continental United States to gather research data on current command practices in addressing juvenile misconduct. The survey questionnaire and consolidated research data from responsive installations are captured in Appendices A-C.

[11] BLACK'S LAW DICTIONARY, *supra* note 2, at 927.

[12] U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 3a (21 Feb. 1974) [hereinafter AR 405-20]. Legislative jurisdiction is separate from subject matter jurisdiction, "which is dependent, not on [land] area, but upon subject matter and purpose, and which must be predicated upon some specific grant in the Constitution." *Id*.

[13] *Id*. at 1, para. 3 (defining and discussing the four types of legislative jurisdiction).

[14] BLACK'S LAW DICTIONARY, *supra* note 2, at 606.

[15] For example, Fort Hood, Texas, and Fort Stewart, Georgia, are military installations made up of exclusive federal jurisdiction, while Fort Bragg, North Carolina, and Joint Base Lewis-McChord, Washington, are mixed jurisdiction installations, made up of areas of exclusive federal jurisdiction and concurrent jurisdiction. *See, e.g.*, *infra* Appendix B (capturing installation data and responses to the author's survey in Appendix A).

[16] As a practical tip, judge advocates should review and maintain copies of all relevant documents concerning an installation's jurisdiction, including any purchase, acquisition, or retrocession documents.

[17] U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

[18] *See* Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 117 (1997) (discussing the historical background and methods of acquiring federal legislative jurisdiction, and providing recommendations to address challenges with exclusive federal legislative jurisdiction on military installations).

[19] U.S. ATTORNEY GEN., REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. II, at 43 (U.S. Government Printing Office 1957), citing Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885).

[20] Castlen & Block, *supra* note 18, at 118.

[21] AR 405-20, *supra* note 12, at 1, para. 3b. The exception to the Federal government's exclusive authority in exclusive federal jurisdiction is the State's authority to serve civil or criminal process. *Id*.

[22] *Id*. at 1, para. 3a.

[23] U.S. CONST. art. IV, cl. 2; *see also* Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525, 539 (1885) (holding that forts or buildings erected for federal government use on land within the limits of a state "will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use from the purposes designed").

[24] "The continuing basic premise of federal juvenile law is that juvenile matters, even those arising under federal law, should be handled by state authorities whenever possible." CHARLES DOYLE, CONG. RESEARCH SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATES MATTERS 3

abstention permits a state to assume authority over juvenile offenses in exclusive federal jurisdiction, with limited exceptions.[25] However, state assumption of jurisdiction over juveniles is within the discretion of the state, and outside the command's control.[26] Absent state assumption, installations with exclusive federal jurisdiction must resort to administrative command options, or persuade the U.S. Attorney General to adjudicate juvenile misconduct in federal court under the Federal Juvenile Delinquency Act.

B. The Federal Juvenile Delinquency Act

Congress passed the Federal Juvenile Delinquency Act "to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[27] The Act provides a non-criminal procedure for the treatment of juveniles under federal jurisdiction who violate federal law,[28] and a criminal procedure for prosecuting juveniles as adults. Specifically, juveniles[29] cannot be adjudicated as delinquents or criminally prosecuted in federal court unless the Attorney General certifies to the appropriate U.S. District Court that:

> (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction, over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony . . . [or enumerated drug offense], and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.[30]

Without proper certification to the appropriate District Court, the juvenile "shall be surrendered to the appropriate legal authorities of the state."[31]

On exclusive federal jurisdiction installations, state court refusal to assume jurisdiction satisfies the first prong as a basis for certification, but still requires appropriate coordination and authorization by the Attorney General or an authorized designee.[32] Installations with felony prosecution programs can utilize attorneys and judge advocates assigned as Special Assistant U.S. Attorneys (SAUSA) to request prosecution of juvenile offenses in U.S. District Court.[33] The SAUSA must coordinate through the supervising U.S. Attorney's Office, for authorization and certification in the proper U.S. District Court. However, supervising federal attorneys often disapprove SAUSA requests for prosecution of juvenile cases in U.S District Court due to lack of sufficient interest and resources, and the insignificance of juvenile offenses in relation to other crimes.[34] Thus, in the absence of state assumption or federal exercise of jurisdiction over on-post juvenile offenses, commanders must rely on administrative options within their command authority to address juvenile misconduct.

C. Limitations of Command Authority and Administrative Options

Commanders have inherent authority to promote health, safety, morale, and welfare, and to maintain good order and

juveniles into state and local treatment programs is clearly intended in the legislative history of 18 U.S.C.A. § 5032.").

[25] *See* discussion *infra* Part II.B.

[26] *See generally*, Appendix A *infra* (the author's survey revealed one of the challenges with handling juvenile misconduct on installations with exclusive federal jurisdiction is state court reluctance to assume jurisdiction over juvenile offenses). *But see* Attorney General of Georgia, Unofficial Opinion 2012-2 (June 14, 2012), *available at* http://law.ga.gov/opinion/2012-2-0 (last visited May 6, 2015) (concluding that the Federal Juvenile Delinquency Act provides authority for Columbia County, Georgia, to assume jurisdiction over matters of juvenile delinquency occurring on Fort Gordon military installation, an exclusive federal legislative jurisdiction, except where the federal government exercises jurisdiction under 18 U.S.C. § 5032).

[27] United States v. Male Juvenile E.L.C., 396 F.3d 458 (1st Cir. 2005) (quoting United States v. Female Juvenile A.F.S., 377 F.3d 27, 32 (1st Cir. 2004) (citations omitted)).

[28] Jean M. Radler, Annotation, *Treatment, under Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042), of Juvenile Alleged to Have Violated Law of United States*, 137 A.L.R. FED. 481 (1997).

[29] The Federal Juvenile Delinquency Act defines a juvenile as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter . . . for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday." 18 U.S.C. § 5031 (2012).

[30] 18 U.S.C. § 5032 (2012) (emphasis added). Under the plain language of the statute, certification only needs to satisfy one of the three prongs. As a matter of practice, each category should be addressed in the request for certification.

[31] Major Richard L. Palmatier, Jr., *Criminal Offenses by Juveniles on the Federal Installation: A Primer on 18 U.S.C. § 5032*, ARMY LAW. Jan. 1994, at 3, citing 18 U.S.C. § 5032 (2012).

[32] The Attorney General delegated authority over juvenile criminal proceedings to the Deputy Assistant Attorney General and the Assistant Attorney General (Criminal Division), with further delegation permissible. *See* United States v. Dennison, 652 F. Supp. 211, 213 (D.N.M. 1986); *see also* 28 C.F.R. § 0.57 (1992).

[33] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-3 (3 Oct. 2011).

[34] *See generally*, *infra* Appendices A-B (revealing several of the exclusive federal installations reported little to no court adjudication over on-post juvenile offenses, citing the local Assistant U.S. Attorney's lack of interest and resources in prosecuting juveniles).

discipline on their installations.[35] Generally, commanders can exercise their inherent authority to pursue criminal and administrative actions against personnel who commit misconduct. However, commanders have limited authority to pursue court adjudication of juveniles in areas of exclusive federal jurisdiction.[36] Without state or federal court adjudication, commanders rely on administrative actions to address on-post juvenile misconduct, including suspension or revocation of installation privileges and exclusion from the installation.

Installation communities are made up of military and civilian personnel, including service members, Family members, retirees, and visitors. While many of these personnel are eligible for Commissary, PX, and Morale, Welfare, and Recreation (MWR) privileges, such privileges are not absolute. Commanders have the authority to suspend or revoke installation privileges for abuse or misconduct,[37] and may exercise such authority in response to juvenile misconduct. Suspension of installation privileges allows the command to directly respond to on-post misconduct,[38] but requires ongoing coordination and cooperation between multiple agencies for imposition and enforcement of the suspension.[39] A juvenile review board can serve as a command mechanism with an established battle drill to consistently coordinate efforts between appropriate agencies and resources when revocation of privileges has been recommended.

In addition to suspension or revocation of installation privileges, commanders have broad proprietary authority to exclude individuals, including juveniles, from installations and areas within their command.[40] Commanders also have statutory authority to exclude and criminalize unlawful entry or trespassing on the installation,[41] and can exercise such authority to bar unruly juveniles from the installation. Although barring juveniles from the installation may be an effective response to on-post juvenile misconduct by non-family members,[42] it can be an extreme hardship for juvenile Family members where the parents or military sponsors work, reside, or rely on the installation for school, medical, religious, and other essential services.

Despite best efforts, installations with exclusive federal jurisdiction continue to encounter difficulties with state and federal court adjudication and prosecution, suspension of privileges, and bars from the installation. As an alternative, many installations with exclusive federal jurisdiction are utilizing JRBs to address on-post juvenile misconduct.[43]

III. Juvenile Review Boards: An Effective Response to Juvenile Misconduct

Juvenile review boards are a viable and effective option for commanders to address on-post juvenile misconduct. Commanders[44] generally establish JRBs by local, written regulation, and develop the boards as a non-adversarial method to assess reports of on-post juvenile misconduct,[45] the impact of misconduct on installation and community safety, and the extent to which installation resources are capable of addressing and preventing further misconduct. They provide an opportunity for the juvenile and the juvenile's military sponsors to appear and respond to allegations of misconduct. Juvenile review boards also make recommendations as to disposition, but final disposition authority rests with the board president, often the

[35] While there is no general statutory command authority, the inherent authority for commanders to regulate the morale, safety, health, and good order and discipline of their installations is derived from case law. *See* Greer v. Spock, 424 U.S. 828 (1976) ("There is nothing in the constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.") .

[36] *See* discussion *supra* Part II.A-B.

[37] *See* U.S. DEP'T OF ARMY, REG. 215-8, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATIONS para. 7-6b (5 Oct. 2012) ("Garrison/ installation commanders will take appropriate action to include revoking or suspending exchange privileges."); *see also* U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 7-4b (24 Sept. 2010) ("Patronage privileges will be suspended, terminated, or denied if the garrison commander (or designee) determines it to be in the best interest of an MWR program, the garrison/installation, or the Army.").

[38] The author's survey revealed the most common on-post juvenile offenses are larceny (e.g., shoplifting), and assault and battery. *See* Appendix A.

[39] For example, if a juvenile shoplifts at a PX, enforcement of a suspension of the juvenile's PX privileges will likely require coordination between the command, installation law enforcement, Army and Air Force Exchange Service (AAFES) and its security or loss prevention personnel, the juvenile, and the juvenile's military sponsor(s).

[40] Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 893 (1961) (acknowledging the "historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command").

[41] *See* 18 U.S.C. § 1382 (2012) (prohibiting entry onto a military installation "for any purpose prohibited by law or lawful regulation;" or re-entering a military installation "after having been removed therefrom or ordered not to reenter by any officer or person in command thereof"). *Id.*

[42] In cases of on-post juvenile misconduct by non-family members (non-dependents), a Garrison Commander can release the juvenile to the military sponsor with a letter barring the juvenile's presence on the installation and notice that re-entry or trespass onto the installation is criminally punishable under 18 U.S.C. § 1382.

[43] The responses to the author's survey revealed thirteen of the seventeen installations with areas of exclusive federal jurisdiction use a juvenile review board or similar procedure to address on-post juvenile misconduct. *See, e.g.*, *infra* Appendix C.

[44] The authority to establish JRBs often rests with garrison commanders, who can detail representatives from various installation directorates and support offices to serve as board members or to provide support services.

[45] Local JRB regulations direct how to file a report of juvenile misconduct, and often allow anyone with credible information to file a report with a designated person or agency, like the Provost Marshal's Office.

garrison commander.[46] Through JRBs, local commands, juveniles, and military sponsors can work together to address on-post misconduct and "avoid the need to resort to the juvenile justice system."[47]

A. Achieving Command Interests in Maintaining Good Order and Discipline

While juvenile review boards may vary in title, size, and composition,[48] they commonly operate under the responsibility of the garrison commander,[49] and act independently from state or federal juvenile courts and agencies. This independent administrative authority enables commanders to achieve disciplinary interests by actively engaging board members, juveniles, and military sponsors in the assessment and disposition of juvenile misconduct, rather than relying on state or federal authorities to make assessments and take action that may not consider the installation's interests in good order and discipline.

Independent authority also allows commanders to decide membership of the JRB. In deciding whom to appoint to a JRB, commanders often appoint representatives from directorates with consistent involvement in responding to on-post juvenile misconduct: namely, the Directorate of Emergency Services (DES) and Office of the Staff Judge Advocate (OSJA). A DES representative can provide the board with reports of misconduct, evidence, and community safety assessments, while a judge advocate from the installation OSJA can advise and assist the board in ensuring compliance with board procedures and applicable laws and regulations.[50] Unlike state or federal courts, criminal rules of evidence do not apply to juvenile review boards, allowing the boards to consider all available evidence when assessing each report of juvenile misconduct.[51]

Independent command authority allows for freedom and flexibility in handling juvenile misconduct through juvenile review boards. However, JRBs are not limited to achieving command interests in discipline and safety. Commanders can also utilize juvenile review boards to support the rehabilitative needs of the juveniles on the installation.

B. Promoting Public Interest in Rehabilitating Wayward Juveniles

Through effective utilization of JRBs, commanders can promote the public interest in rehabilitating wayward juveniles for the benefit of the juvenile, the command, and the installation community. "The public recognizes a collective responsibility to intervene in the lives of delinquent and at-risk youths . . . ."[52] While maintaining good order and discipline is of primary importance to commanders, supporting the rehabilitation of juveniles engaged in on-post misconduct is also of great significance.

From frequent relocations to overseas deployments, military communities face unique challenges that affect their youth physically, mentally, and emotionally.[53] For some juveniles, the complexities of a military lifestyle, coupled with "youthful exuberance and a penchant for experimentation,"[54] can spur acts of defiance disguised as misconduct. With the support of the installation community,[55] commanders can utilize JRBs to positively

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[46] *See, e.g.*, III CORPS AND FORT HOOD, REG. 210-1 YOUTH INTERVENTION PROGRAM (YIP) AND YOUTH REVIEW BOARD (YRB) para. 2b (29 July 2008), *available at* http://www.hood.army.mil/dhr/asd/ publications3.htm (identifying the Fort Hood Garrison Commander as the approval authority for all actions, recommendations, and decisions of the YRB); *see also* U.S. ARMY GARRISON, FORT STEWART, REG. 15-7 JUVENILE DISCIPLINARY CONTROL BOARD para. 4c (12 Apr. 2010) (identifying the Garrison Commander, Hunter Army Airfield, as President of the Juvenile Disciplinary Control Board for Fort Stewart and Hunter Army Airfield, Georgia).

[47] ABA COMM. ON YOUTH AT RISK, THE CHALLENGES TO YOUTH IN MILITARY FAMILIES 8 (2007).

[48] For example, the Garrison Commander at Fort Benning appoints a single Juvenile Misconduct Action Authority (JMAA) to hear cases of juvenile misconduct referred by an Installation Hearing Officer. *See* U.S. ARMY MANEUVER CENTER OF EXCELLENCE, REG. 210-5 GARRISON REGULATION para. 7-1 (22 Feb. 2012). In contrast, Fort Campbell has a nine member Juvenile review board to hear cases of juvenile misconduct referred by the Garrison Commander, Juvenile Probation Officer, or Provost Marshal. *See* U.S. ARMY FORT CAMPBELL INSTALLATION, REG. 190-3 JUVENILE OFFENDER PROGRAM para. 3, 4h (1 Oct. 2013).

[49] *See supra* text accompanying note 46.

[50] For example, judge advocates can help ensure JRBs protect private information in accordance with the Privacy Act and the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule. *See generally*, Privacy Act of 1974, Pub. L. No. 93-579, § 552a, 88 Stat. 1896 (2015) (recognizing individual privacy as a fundamental right, and regulating the collection, maintenance, use, and dissemination of personal information by federal executive branch agencies); *see also* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264, 110 Stat. 1936 (2015) (protecting, as a matter of privacy, individually identifiable health information).

[51] Although juvenile review boards may consider all available evidence, care must be taken to ensure the privacy of each juvenile, along with any individuals involved in the process, is adequately protected and any associated documents and evidence are properly safeguarded.

[52] Melissa M. Moon, Francis T. Cullen, & John Paul Wright, *It Takes a Village: Public Willingness to Help Wayward Youths*, YOUTH VIOLENCE AND JUVENILE JUSTICE, Jan. 2003, at 32.

[53] *See* ABA COMM. ON YOUTH AT RISK, *supra* note 47, at 3 (summarizing the contents of roundtable discussions on youth in military families, and recognizing the unique challenges present in the military lifestyle).

[54] ABA Comm. on Youth at Risk, *The Challenges to Youth in Military Families*, at 3 (June 2007).

[55] Research confirms that communities are supportive of government programs that provide early intervention with juvenile delinquency and help treat troubled youth. *See* Alex R. Piquero, Francis T. Cullen, James D. Unnever, Nicole L. Piquero, & Jill A. Gordon, *Never Too Late: Public Optimism About Juvenile Rehabilitation*, PUNISHMENT & SOCIETY, Apr. 2010, at 187, 198; *see also* Melissa M. Moon, Jody L. Sundt, Francis T. Cullen, & John Paul Wright, *Is Child Saving Dead? Public Support for Juvenile Rehabilitation*, CRIME & DELINQUENCY, Jan. 2000, at 38 (studying Tennessee residents to confirm public support for rehabilitation of juvenile

promote intervention and rehabilitation of wayward juveniles.

Juvenile review boards can assist juveniles and their military sponsors in understanding how misconduct affects community health, safety, morale, and welfare on an installation. As juveniles appear before JRBs, board members can engage in open discussion about the juvenile's misconduct, and specifically address how the misconduct impacted any victims, the command, and the installation. Juvenile review boards can also help educate juveniles and the community on preventing juvenile misconduct by imposing community-focused outcomes tailored to the underlying juvenile misconduct.[56]

Research suggests that child abuse, maltreatment, and other family-related factors negatively affect child development and increase the risk of juvenile misconduct.[57] Garrison commanders can utilize JRBs to synchronize and direct the efforts of installation agencies and programs focused on child and family development, including Army Community Service,[58] Child, Youth, and School Services,[59] Family Advocacy,[60] and Morale, Welfare, and Recreation.[61] In addition to installation programs, JRBs can also collaborate with available off-post resources, such as counseling services, mentorship programs, and youth camps,[62] to assess the needs of juveniles and to develop diverse and appropriate options for commanders to address juvenile misconduct. By integrating a variety of resources dedicated to youth and family support, JRBs can help identify contributing factors to juvenile misconduct, and recommend disposition options tailored to the misconduct and the rehabilitative needs of juveniles.

C. Current Challenges Across the Field

Although many installations with juvenile review boards support the use of JRBs to address on-post juvenile misconduct,[63] several exclusive federal jurisdiction installations are experiencing challenges with the use of JRBs. These challenges include a lack of guidance or understanding of board procedures, poor participation and cooperation by a juvenile's parents or military sponsors in the juvenile review board process, and delays in convening juvenile review boards.[64] In the absence of corrective measures, these issues will likely continue to impact the use and effectiveness of JRBs in achieving command interests of good order and discipline and rehabilitation of juveniles on military installations.

In the establishment and execution of JRBs, commanders remain responsible for providing clear intent and purpose. However, a lack of clear guidance and understanding of the JRB process is one of the issues facing installations with exclusive federal jurisdiction.[65] Commanders and JRB members at some installations perceive JRBs as the only option to handle juvenile misconduct, and as having little to no enforcement authority for uncooperative juveniles.[66] Additionally, juveniles and their military sponsors are often uncertain of the non-punitive nature of JRBs, and unaware of commanders' authority to administratively handle misconduct on installations, including the authority to bar individuals from post.[67] Without a clear and concise purpose and

offenders, but also recognizing public sentiment for punishment of juvenile offenders).

[56] For example, the JRB can require a juvenile who places graffiti on government property to repaint the property, thus tailoring the outcome to the misconduct while still focusing on the community.

[57] Alida V. Merlo & Peter J. Benekos, *Defining Juvenile Justice in the 21st Century*, YOUTH VIOLENCE AND JUVENILE JUSTICE, July 2003, at 276, 282, citing Richard Wiebush, Raelene Freitag, & Christopher Baird, *Preventing Delinquency Through Improved Child Protective Services*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, July 2001, *available at* https://www.ncjrs.gov/html/ojjdp/jjbul2001_7_1/contents.html (last visited May 6, 2015).

[58] *See* U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE para. 1-6 (13 Mar. 2013) (highlighting the Army Community Service mission is to "[f]acilitate the commander's ability to provide comprehensive, standardized, coordinated, and responsive services that support Soldiers, Department of the Army civilians, and Families regardless of geographical location").

[59] *See* U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 8-15 (24 Sept. 2010) [hereinafter AR 215-1] (discussing Child, Youth, and School Services, including Youth Services which "offer a range of positive activities for middle school youth and teens that promote healthy development and ease transition to adulthood").

[60] *See* U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 1-6 (30 Oct. 2007) (RAR 13 Sept. 2011) (recognizing Family Advocacy Program objectives are "to prevent spouse and child abuse, . . . and to treat all family members affected by or involved in abuse").

[61] *See* AR 215-1, *supra* note 59, at 2, para. 1-10 (noting the Morale, Welfare, and Recreation Program "[f]osters community pride, Soldier morale, and Family wellness" and "[e]ases the impact of unique aspects of military life, such as frequent relocations and deployment").

[62] Many national and local support groups offer counseling, mentorship, and services for military youth and families. *See, e.g.*, MILITARY ONESOURCE, https://www.militaryonesource.mil (last visited May 7, 2015) (offering information and counseling services to military families on various topics); *see also Military Mentoring*, BIG BROTHERS BIG SISTERS OF AMERICA, http://www.bbbs.org (follow "Our Programs"; then follow "Whom We Serve"; then follow "Mentoring Military Children") (last visited May 7, 2015).

[63] The author's survey revealed thirteen of the thirteen installations with exclusive federal jurisdiction and a current JRB recommend use of a JRB or similar procedure to address on-post juvenile misconduct. *See, e.g.*, *infra* Appendix C.

[64] *See, e.g.*, Appendix C *infra*.

[65] *Id.*

[66] *Id*.

[67] In response to the author's survey, several installations noted that some parents and military sponsors are unaware of the administrative nature of JRBs and elect not to participate in board proceedings due to

commander's intent, members of the JRB and installation community are less likely to understand the board's utility, capability, and significance in addressing juvenile misconduct.

Families are a critical component to understanding and addressing juvenile misconduct,[68] and essential to the effectiveness of JRBs. The juvenile's family or community are often most aware of the specific issues affecting the juvenile, and can positively influence their behavior, intervention, and rehabilitation.[69] Yet, several installations encounter challenges with active sponsor involvement in JRBs, including failure to appear before the board, and lack of cooperation in determining and completing an appropriate disposition.[70]

Another challenge facing juvenile review boards is the delay between the date of the misconduct and the date of adjudication.[71] At several installations, JRBs meet infrequently, resulting in substantial delays in adjudication. In some cases, the delay from the date of the offense and the board meetings are so extensive that the juvenile and Family are no longer at the installation, resulting in no command action for the misconduct.[72]

In spite of current challenges, JRBs remain an effective course of action for commanders to address on-post juvenile misconduct on areas of exclusive federal jurisdiction. There is room for improvement, and judge advocates can help commanders, like the Fort Wahoo Garrison Commander, improve command responses to juvenile misconduct by drafting local JRB regulations with clear and concise guidance, and unambiguous provisions for mandatory parent or sponsor involvement and timely adjudication of JRBs.

misperceptions of JRBs as a punitive process with potential long-term effects for juveniles. *Id.*

[68] Antoinette Davis, Angela Irvine, & Jason Ziedenberg, *Engaging Juvenile Justice System-Involved Families*, NATIONAL COUNCIL ON CRIME & DELINQUENCY, July 2003, at 2, *available at* http://nccdglobal.org/sites/default/files/publication_pdf/engaging-justice-involved-families.pdf. (encouraging the engagement of families in the treatment and rehabilitation of youthful offenders).

[69] *Id.* at 3.

[70] Several installations reported that parent or sponsor participation in juvenile review boards is not mandatory under the local policy or regulation, while others reported that enforcement of mandatory sponsor participation is challenging due to the harsh nature of enforcement mechanisms (e.g., barring the juvenile from post) and the parent or sponsor's unfamiliarity with the juvenile review board as an administrative, rather than punitive, process. *See, e.g.*, Appendix C *infra*.

[71] *Id.*

[72] This is as noted in installation responses to question 9b of the author's survey at Appendix A.

IV. Where There's a Will, There's a Way

Although many installations with exclusive federal jurisdiction use JRBs to address on-post juvenile misconduct, several installations report either not having a JRB, or experiencing challenges with JRB procedures that interfere with command interests in good order and discipline and the public interest in rehabilitating juveniles.[73] Judge advocates can assist commanders in achieving those interests by drafting local JRB regulations that implement measures to improve JRB procedures. In addition to drafting clear regulations, judge advocates can further support command interests by advising commanders on state court assumption of jurisdiction over juvenile matters on the installation, or, where appropriate, retrocession of unnecessary exclusive federal jurisdiction to the states.

A. Recommendations for Improvement of Juvenile Review Boards

1. Draft Local Regulations with Clear Intent and Procedural Guidance

First, local regulations concerning JRBs should be in writing, easily accessible,[74] and include a commander's intent that is "easy to remember and clearly understood . . . ."[75] The commander's intent should plainly state the JRB's purpose: a non-criminal, administrative procedure to address on-post juvenile misconduct without referring juveniles to juvenile or criminal court. It should also directly address the commander's desired end state: maintaining good order and discipline and community safety, while promoting the positive rehabilitation of juveniles engaging in misconduct on the installation.

Juvenile review board regulations should also contain clear procedural guidance, including which level of command will convene boards,[76] board membership,[77] how often boards will convene,[78] how juvenile misconduct is reported to the board, how notification is made to juveniles and military sponsors, how misconduct with be assessed,

[73] *See, e.g.*, Appendix C *infra*.

[74] Local JRB regulations should be readily available to the installation community, and included among internet resources for installation publications. *See, e.g.*, III CORPS AND FORT HOOD, REG. 210-1 YOUTH INTERVENTION PROGRAM (YIP) AND YOUTH REVIEW BOARD (YRB) para. 2b (29 July 2008), *available at* http://www.hood.army.mil/dhr/asd/publications3.htm (publishing the local JRB regulation on the Fort Hood publications website).

[75] U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 5-0, THE OPERATIONS PROCESS para. 1-19 (May 2012).

[76] *See supra* text accompanying note 46.

[77] *See infra* text accompanying note 80.

[78] *See* discussion *infra* Part IV.A.3.

how disposition recommendations will be made, who the final disposition authority is, and what appeals process consists of.[79] Specifically, JRB procedures should direct which installation resources will provide representatives as members of the juvenile review board, and whether the board will convene regularly or as needed.[80] If not already part of the process, JRB procedures should require written notification to juveniles and their military sponsors of a report of misconduct, and direct appearance before the board.[81] The local JRB regulation should direct the board to consider all available evidence concerning the misconduct, including matters presented by the juvenile and sponsor, and to assess the seriousness of the misconduct, the impact of the misconduct on the installation, and the juvenile's rehabilitative potential. Upon completion of the assessment, the board should provide disposition recommendations to the garrison commander for final disposition as the board president, with a higher level commander as the appellate authority.[82]

Additionally, local JRB regulations should provide guidance concerning disposition recommendations to ensure they are tailored to the underlying misconduct and the juvenile's developmental needs, but also diverse and beneficial to the juvenile and the installation community. Options for disposition can include community service, letters of apology, victim restitution, curfew, restriction from a specific area on post, supervision, mentorship,[83] counseling for the juvenile and the juvenile's sponsor, suspension or revocation of installation privileges, and other administrative actions as appropriate.[84]

With a clear, concise commander's intent and procedural guidance, juvenile review board members, juveniles, and military sponsors can better understand and appreciate the significance of juvenile review boards and more effectively adjudicate on-post misconduct.

2. Mandate Military Sponsor Involvement

"[F]amilies are vital to understanding and interrupting patterns of delinquent and criminal behavior,"[85] and should be involved in juvenile review boards to assist commanders in addressing juvenile misconduct. Commanders can improve family involvement in juvenile review boards by requiring juvenile and military sponsor appearance before the board. A juvenile's appearance before the JRB allows the board to determine whether the juvenile understands and accepts responsibility for misconduct, and the extent to which disposition options may further the command's interests in good order and discipline and rehabilitation.

In the written notification to the juvenile and sponsor, the commander should mandate appearance before the board, and clearly state that failure of the juvenile and his or her military sponsor to appear and cooperate in JRB proceedings may result in command action to bar the juvenile from the installation.[86] The notification should also emphasize the importance of the installation community working together with the Family to address the juvenile's misconduct and development, the opportunity for the juvenile to proceed with the juvenile review board in lieu of court adjudication, and the contact information to the supporting legal assistance office for independent legal advice if eligible.[87] This information can not only help juveniles and their sponsors understand the purpose of JRBs, but can also reaffirm the command's support of the military community and its juveniles.

3. Convene Boards in a Timely and Efficient Manner

"In a setting in which any erosion of time available for rehabilitation may be viewed as a limitation of rehabilitative

[79] *See generally* Major Dan Estaville & Major Brett Lamborn, *Handling Juvenile Misconduct on Post*, U.S. ARMY JAG CORPS (Feb. 24, 2014), https://jagu.army.mil (last visited May 6, 2015) (follow "JAGU Resources Streaming Media"; then follow "Admin & Civil Law"; then follow "Advanced Topics in Ad Law") (providing an overview of juvenile review boards and recommendations for procedures).

[80] *See id.* (discussing which installation agencies can offer helpful expertise to juvenile review boards, such as the Department of Emergency Services and Social Services, and whether to appoint agency representatives as standing or ad hoc board members).

[81] The notification should succinctly state the purpose of the juvenile review board in promoting good order and discipline and rehabilitating juveniles on the installation, and provide a date, time, and location for the board hearing, with acknowledgment signed by the juvenile and the sponsor, and returned within a specific timeframe. *Id.*; *see also infra* Part IV.A.2.

[82] *See* Estaville & Lamborn, *supra* note 79 (highlighting that the garrison commander often serves as the JRB president, and the commanding general or higher level commander serves as the JRB appellate authority).

[83] Installation programs like Better Opportunities for Single Soldiers (BOSS) promote mentorship of troubled youth, and can serve as positive resources for juveniles. AR 215-1, *supra* note 59, at 47, para. 8-11d(3)(a).

[84] Some juvenile review boards require juveniles to visit a local juvenile detention facility as part of a "scared straight" effort to encourage corrective behavior. *See, e.g.*, U.S. ARMY GARRISON, FORT STEWART, REG. 15-7 JUVENILE DISCIPLINARY CONTROL BOARD Appendix D, para. n (12 Apr. 2010).

[85] Joseph P. Ryan & Huilan Yong, *Family Contact and Recidivism: A Longitudinal Study of Adjudicated Delinquents in Residential Care*, SOCIAL WORK RESEARCH, Mar. 2005, at 31, 38.

[86] The notification should also state that unlawful re-entry onto the installation after bar or removal may result in criminal prosecution under 18 U.S.C. § 1382.

[87] Judge advocates serving as JRB advisors should request support from supervising attorneys to provide legal assistance to eligible clients appearing before JRBs. *See* U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6g(1) (21 Feb. 1996) (RAR 13 Sept. 2011) (discussing legal assistance services for eligible clients on military administrative matters).

potential, the expansion of case processing time becomes a cause of concern."[88] To address concerns with untimely juvenile review boards, judge advocates can help commanders develop ways to reduce total processing times, including convening JRBs on a regular basis and removing any quorum requirements.

While installations with little to no juvenile misconduct can convene juvenile review boards on an ad hoc basis, installations with frequent incidents of juvenile misconduct should convene JRBs at least once every two months, if not more often, to avoid creating a backlog of cases and efficiently move cases along for disposition and rehabilitation. Frequent JRB meetings can also help improve board efficiency by increasing board member interaction and providing more opportunities for members to understand the process and develop an internal battle rhythm in assessing juvenile misconduct and providing disposition recommendations.

While the specific facts and circumstances of each incident of misconduct are important in assessing misconduct and providing recommendations, commanders should direct JRBs to proceed efficiently and not delay boards on the basis of open or pending investigations where the pending matters are immaterial to the board's purpose.[89] Commanders should direct a board member to conduct an initial review of evidence to ensure sufficient facts are available to proceed, rather than delay board proceedings until investigations are formally closed.[90] Additionally, commanders should examine the number of board members necessary for a quorum,[91] if any, since quorum requirements can further delay boards from proceeding in a timely manner.[92]

Judge advocates can help commanders tackle current challenges and improve the effectiveness of juvenile review boards by drafting regulations with clear intent and procedural guidance, mandatory parent and sponsor participation in JRB proceedings, and timely processing. Still, commanders may be in search of procedures to complement JRBs, and judge advocates should be prepared to provide advice on supplemental efforts to address on-post juvenile misconduct.

B. Additional Efforts: State Court Assumption and Federal Retrocession of Jurisdiction

In addition to utilizing juvenile review boards to address juvenile misconduct on areas of exclusive federal jurisdiction, commanders can request state court assumption of jurisdiction, or, where appropriate, pursue federal retrocession of exclusive federal legislative jurisdiction over juveniles.[93] In furtherance of federal policy towards juveniles,[94] installations with exclusive federal jurisdiction can request state assumption of jurisdiction to provide assistance with on-post juvenile offenses. Under this approach, state assumption and assistance complement a commander's authority over juvenile misconduct by allowing commanders to handle on-post misconduct through JRBs, with the option of referral to state authorities for adjudication.[95] Juvenile review boards can still serve as the primary mechanism for the command to adjudicate juvenile misconduct, and if a juvenile and military sponsor refuse or fail to comply with the board, or if the board determines the nature of the misconduct warrants state adjudication or prosecution, the board can refer the juvenile to the state authorities. This joint approach serves the command interest in maintaining good order and discipline, promotes rehabilitation of juveniles, and acts as an enforcement mechanism for juvenile review boards, while working together with state and local resources.

Commanders at installations with limited personnel, training, and resources to address juvenile misconduct can also pursue retrocession of unnecessary exclusive federal legislative jurisdiction over juveniles to the state.[96] Under this approach, the installation commander initiates and submits a request for retrocession of exclusive federal jurisdiction, through the Corps of Engineers, to the Secretary

[88] Anne Rankin Mahoney, *Time and Process in Juvenile Court*, JUST. SYS. J. 39 (1985).

[89] For example, JRBs should proceed in the absence of a closed investigation if the investigation is merely pending a final clerical or administrative review, or correction of minor typographical errors.

[90] A DES representative may be the best person to make an initial assessment of evidence based on access to information on criminal investigations. If the misconduct is based on information from an administrative investigation, an OSJA representative may be the best person to make the initial assessment.

[91] A quorum is the minimum number of board members who must be present for a juvenile review board to convene. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 1370 (defining quorum in general).

[92] *See* Estaville & Lamborn, *supra* note 79 (recommending removal of quorum requirements to allow juvenile review boards to make forward progress).

[93] Army policy is to "retrocede unnecessary Federal legislative jurisdiction to the State concerned." AR 405-20, *supra* note 12, at 2, para. 5.

[94] *See supra* text accompanying note 24.

[95] Attorney General of Georgia, *supra* note 26 (Fort Gordon, Georgia, entered into a Memorandum of Agreement with the Columbia County Juvenile Court for assumption of jurisdiction over matters of juvenile delinquency, which the Attorney General for the State of Georgia found permissible under the Federal Juvenile Delinquency Act.

[96] *See* 10 U.S.C. § 2683 (2012) (authorizing the "Secretary concerned" to relinquish "to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession."); *see also* Castlen & Block, *supra* note 18, at 127 (recommending retrocession to address challenges with juvenile prosecutions, among other issues, at installations with exclusive federal legislative jurisdictions).

of the Army for approval.[97] If retrocession is approved, the state assumes concurrent or a lesser degree of jurisdiction over the retroceded land.[98] While rarely pursued,[99] several installations have effectively retroceded jurisdiction over juvenile offenses to the state, thereby allowing the state to exercise concurrent jurisdiction over on-post juvenile misconduct.[100]

V. Conclusion

Despite the challenges of handling juvenile misconduct on areas of exclusive federal jurisdiction, the Fort Wahoo Garrison Commander's hands are not tied. As the legal advisor, you should advise the Garrison Commander on the administrative options available to exercise command authority over on-post juvenile misconduct, especially the utilization of juvenile review boards. A juvenile review board allows the Garrison Commander to exercise his command authority independently from state or federal courts and agencies, and directly engage with juveniles and their military sponsors to maintain good order and discipline in the Fort Wahoo community. A juvenile review board also enables the command to work together with youth and family resources to promote public interests in rehabilitating wayward juveniles.

You can help the Fort Wahoo Garrison Commander execute an effective juvenile review board by drafting a local JRB regulation with clear intent and procedural guidance, mandatory parent and military sponsor participation, and timely and efficient processing. Additionally, you should advise the Garrison Commander to consider requesting state court assumption of jurisdiction over on-post juvenile offenses, or retrocession of unnecessary exclusive federal legislative jurisdiction to the states, if necessary, to address on-post juvenile misconduct. Whether operating wholly under command authority or together with state authorities, commanders at installations with exclusive federal jurisdiction like Fort Wahoo should implement and continue to make improvements to juvenile review boards.

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[97] AR 405-20, *supra* note 12, at 3, para. 8; *see also* Castlen & Block, *supra* note 18, at 135 (providing guidance on retrocession procedures).

[98] *See* Castlen & Block, *supra* note 18, at 138.

[99] *See id.* at 139 (recognizing "affirmative efforts to retrocede jurisdiction are slow to develop").

[100] *See, e.g.*, Letter from the Honorable Gary Locke, Governor, State of Washington, to the Deputy Assistant Secretary (Installation and Housing), Department of the Army (6 Sept. 2000) (on file with the Office of the Staff Judge Advocate, Joint Base Lewis-McChord, Washington) (accepting the retrocession of exclusive federal legislative jurisdiction and establishment of concurrent juvenile legislative jurisdiction over Fort Lewis Military Reservation, Washington).

Appendix A: Survey Questionnaire[101]

1. Installation: _____.

2. Type of jurisdiction (*e.g.*, exclusive federal, concurrent, proprietary, or mixed): _____.

3. Approximate number of on-post juvenile misconduct incidents reported in Fiscal Year 2014 (FY14): _____.

4. Types of juvenile misconduct/offenses reported: _____
_____.

5. Approximate number of juvenile cases initiated for prosecution in Federal Court in FY14: _____.

6. Approximate number of juvenile cases referred to a State court or agency in FY14: _____.

7. Please describe problems or challenges experienced in prosecuting on-post juvenile misconduct: _____
_____.

8. Approximate number of administrative actions initiated in FY14 for on-post juvenile misconduct (*e.g.*, letters of concern, termination of on-post housing, termination of post privileges, bars from post): _____.

9. Does the installation use juvenile review boards or an administrative board process to address on-post juvenile misconduct? Yes / No (If yes, please answer 9a and 9b).

9a. Would you recommend use of juvenile review boards? Why/Why not? _____
_____.

9b. Lessons learned or suggestions for improvement in using juvenile review boards: _____
_____.

10. Please include copies of any installation regulations, policies, or procedures used in handling on-post juvenile misconduct.

[101] This survey questionnaire is modeled after a past survey of juvenile delinquency on select major Army installations in the United States. *See* Lieutenant Colonel William K. Suter, *Juvenile Delinquency on Military Installations*, ARMY LAW., July 1975, at 3, Appendix A.

Juvenile Misconduct on Select Army Installations in Fiscal Year 2014 (FY14)[102]

Installation	Type of Jurisdiction	Reports of On-Post Juvenile Misconduct	Juvenile Cases Referred to Federal Court	Juvenile Cases Referred to State Court	Juvenile Cases Handled by Administrative Action	Currently Use a Juvenile Review Board
Ft Benning	Exclusive Federal	49	0	0	48	Yes
Ft Bliss	Exclusive & Concurrent	Unknown	0	0	Unknown	No
Ft Bragg	Exclusive & Concurrent	Unknown	2	Unknown	46	Yes
Ft Campbell	Exclusive Federal	Unknown	0	Unknown	Unknown	Yes
Ft Gordon	Exclusive Federal	25	0	16	10	No
Ft Hood	Exclusive Federal	60	0	4	10	Yes
Ft Huachuca	Exclusive Federal	5	0	0	0	Yes
Ft Irwin	Concurrent	11	0	5	3	Yes
Ft Knox	Exclusive & Concurrent	30	0	2	4	Yes
Ft Leavenworth	Exclusive Federal	30	0	0	30	Yes
Ft Lee	Exclusive & Concurrent	Unknown	0	0	1	Yes
J B Lewis-McChord	Exclusive & Concurrent	Unknown	0	Unknown	24	No
Ft Meade	Exclusive & Concurrent	39	10	28	0	Yes
Redstone Arsenal	Exclusive Federal	2	0	0	1	No
Ft Riley	Exclusive Federal	75	0	6	8	Yes
Ft Rucker	Exclusive & Concurrent	24	5	2	8	Yes
Ft Stewart & HAAF	Exclusive Federal	42	0	0	39	Yes
White Sands	Exclusive & Proprietary	0	0	0	0	Yes

[102] All figures are approximate.

Appendix C: Synopsis of Juvenile Misconduct on Exclusive Federal Jurisdiction

Juvenile Misconduct on Select Installations with Exclusive Federal Jurisdiction, FY14[103]

Installation	**Type of Jurisdiction**	**Reports of On-Post Juvenile Misconduct**	**Currently Use / Recommend Use of a Juvenile Review Board**	**Lessons Learned for Improvements to Juvenile Review Boards**
Ft Benning	Exclusive Federal	49	Yes / Yes	Difficult to administer process; need parent cooperation
Ft Bliss	Exclusive & Concurrent	Unknown	No / Yes	No means to handle on-post juvenile misconduct; local regulation is pending
Ft Bragg	Exclusive & Concurrent	Unknown	Yes / Yes	Need parent cooperation; clearly state the board's purpose in the notification letter
Ft Campbell	Exclusive Federal	Unknown	Yes / Yes	Hold boards regularly for continuity upon board member departure
Ft Gordon	Exclusive Federal	25	No / Yes	State court assumption of jurisdiction over juveniles; adjudicate juveniles in state court
Ft Hood	Exclusive Federal	60	Yes / Yes	Hold boards regularly for continuity; work closely with law enforcement
Ft Huachuca	Exclusive Federal	5	Yes / Yes	Too high of a quorum (five) to hold boards; lack of uniform guidance
Ft Knox	Exclusive & Concurrent	30	Yes / Yes	Retrocession of jurisdiction over juveniles; more involvement of senior leaders
Ft Leavenworth	Exclusive Federal	30	Yes / Yes	Involve parents, but focus on the juvenile and the misconduct, not on parenting skills
Ft Lee	Exclusive & Concurrent	Unknown	Yes / Yes	Hold boards regularly to avoid delays and maintain continuity and momentum
J B Lewis-McChord	Exclusive & Concurrent	Unknown	No / No response	Retrocession of jurisdiction over juveniles to the State
Ft Meade	Exclusive & Concurrent	39	Yes / Yes	Involve parents, and conduct boards in timely manner from the date of misconduct
Redstone Arsenal	Exclusive Federal	2	No / Yes	Juvenile misconduct is rare; use ad hoc boards as needed; local regulation pending
Ft Riley	Exclusive Federal	75	Yes / Yes	Need options to remove or detain violent juveniles, or refer to treatment facilities
Ft Rucker	Exclusive & Concurrent	24	Yes / Yes	Community-oriented dispositions; follow-up with juveniles to ensure progress
Ft Stewart & HAAF	Exclusive Federal	42	Yes / Yes	Detail board members who can provide valuable input and assistance with juveniles
White Sands	Exclusive & Proprietary	0	Yes / Yes	Conduct boards in a timely manner from the date of the misconduct

[103] All figures are approximate.

The Client's Chosen Child: Adoption Laws, Regulations, and Processes for the Legal Assistance Attorney

Major Laura A. O'Donnell[*]

"There are times when the adoption process is exhausting and painful and makes you want to scream. But, I am told, so does childbirth."[1]

I. Introduction

You are a legal assistance attorney and preparing to meet your first client of the day. Staff Sergeant (SSG) Johnny Langley and his wife are excited to see you. When they come in to your office, they tell you about their plans to expand their family and they want information on adoption.[2] You are happy to help, but you know very little about this area and are afraid if they see your hesitation, it will dampen their spirits. While they are filling out a client card, you conduct a quick Google search, but there is a large amount of information out there. What do you do? Do you send them away and tell them to get a civilian attorney practicing in that area of the law?

Adoption[3] is a complicated area of family law that requires specialized knowledge to inform and prepare a client for expanding his family. Army Regulation (AR) 27-3, The Army Legal Assistance Program, clarifies that legal assistance attorneys may provide advice on adoption "based on the availability of expertise and resources."[4] State law[5] and intercountry agreements govern adoption, which can be confusing for your clients to navigate. However, knowing the basics about adoption and the specific impact on Soldiers looking into the process gives you, the legal assistance attorney, a starting point to impart useful information to your client.

The first part of this article explores the many types of adoptions: stepparent, independent (private), agency, foster care (welfare), and intercountry and the classification of open and closed adoptions. The second part lays out an overview of the process associated with an adoption, to include such elements as home studies and financial considerations. This overview also examines legal topics including residency requirements, the Interstate Compact on the Placement of Children (ICPC), parental rights, and citizenship. Finally, this article explores selected topics specific to servicemembers considering adoption, such as leave and healthcare. Additionally, the appendices present a synopsis of state-by-state adoption laws, as well as further information about differences in intercountry adoptions. Thus, the starting point for the client meeting described above is to explain the different types of adoption to SSG Langley and his wife or to ascertain if they have already begun the process, and further assist from there.

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[1] SCOTT SIMON, BABY, WE WERE MEANT FOR EACH OTHER: IN PRAISE OF ADOPTION 4 (Random House 2010). Scott Simon is a writer, reporter and host of Weekend Edition Saturday on National Public Radio. *Baby, We Were Meant for Each Other* is about his family's experience in the adoption process. Scott Simon—Biography, NPR, http://www.npr.org /people/ 3874941/scott-simon (last visited Jan. 28, 2015).

[2] Adoption is "[t]he creation of a parent-child relationship by judicial order between two parties who usually are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child. . . . Adoption creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges, and responsibilities that attach to that relationship, though there may be agreed exceptions." BLACK'S LAW DICTIONARY 55 (9th ed. 2009).

[3] Army Legal Assistance Offices world-wide assisted approximately 1,855 clients with adoption issues in Fiscal Year 2014. E-mail from John Meixell, Chief, Legal Assistance Policy Division, Office of the Staff Judge Advocate, U.S. Army, to author (Feb. 26, 2015, 14:45 EST) (on file with author) [hereinafter E-mail from John Meixell to author].

[4] U.S. DEP'T OF ARMY, REG. 27-3, THE LEGAL ASSISTANCE PROGRAM para 3-6(a) (21 Feb. 1996) [hereinafter AR 27-3]. "Legal assistance in adoption and other family law cases may be provided based on the availability of expertise and resources. Legal assistance in adoption cases may include appointment by a court as a guardian ad litem and assistance on placement." *Id*. Since adoption is state-specific and a nuanced subset of family law, this might be a good area for civilian legal assistance attorneys to learn and become the subject matter expert in. Civilian legal assistance attorneys provide needed consistency in a Legal Assistance Office to become experts in state regulations to better inform clients and mentor new military legal assistance attorneys.

[5] "Federal legislation sets the framework for adoption in the United States; States then pass laws to comply with Federal standards." Child Welfare Information Gateway, *Adoption Options*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2 (Jul. 2010), https://www. childwelfare.gov/pubs/ f_adoptoption.pdf.

II. Types of Adoption[6]

Staff Sergeant Langley and his wife must first—if they have not already—determine what kind of adoption they are interested in pursuing. There are a variety of types, to include stepparent, independent (private), agency, foster care (welfare), intercountry, open and closed. Once SSG Langley and his wife know what type of adoption is right for their family, you can better advise them on the next steps they should take.

A. Stepparent Adoption

When you first look at SSG Langley's client card and see he has questions about adoption, you might assume it is about stepparent adoption. This is the most common type of adoption clients seek information about.[7] This type of adoption occurs when a birth parent of a child remarries and the new spouse adopts that child.[8] One of the issues arising frequently in this type of adoption is the noncustodial birth parent's refusal to consent to the adoption.[9] Although there may be consent issues with this type of adoption, once those are resolved, it is generally a more simplified and expedient process than traditional adoptions.[10] Another element to advise your clients on when it comes to stepparent adoptions is that when the noncustodial parent consents to the stepparent adoption and the adoption is final, he or she "gives up all rights and responsibilities, including child support."[11] In the context of military clients, if the parent relinquishing parental rights is a servicemember, then when the adoption is finalized, the child is no longer entitled to military benefits associated with being a dependent of that parent. Once your meeting with SSG Langley begins, you learn that he and his wife are not looking at a stepparent adoption situation.

B. Independent (Private) Adoption[12]

In independent adoptions, parental rights transfer directly from birth parents to adoptive parents.[13] When a client uses the term "private" adoption, you should clarify what he actually means. Many times, when clients say private adoptions, they are actually referring to agency adoptions. Private adoptions occur directly between birth parents and adoptive parents without agency involvement.[14] The adoptive parents do not work through an agency, but instead find a birth mother and make the connection on their own.[15] This occurs through various means governed by state statute,[16] such as newspaper ads or even online websites that allow potential birth mothers to examine profiles of adoptive parents.[17]

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[6] Although not addressed in this article, another option for some couples is surrogacy. Surrogacy is "the process of carrying and delivering a child for another person." BLACK'S LAW DICTIONARY *supra* note 2, at 1584. There are two types of surrogacy: gestational and traditional. *Id*. Laws governing surrogacy are state-specific and heavily rooted in contract law; "American jurisdictions are split on the interpretation and enforceability of these contracts." *Id*. at 1583. You should refer clients seeking assistance with surrogacy to civilian counsel with expertise in this area. *See* Major Tricia Birdsell, *A Few Minutes of Your Time Can Save Your Client's Dime: Obtaining Pro Bono Assistance for Legal Assistance Clients,* THE ARMY LAWYER (forthcoming June 2015)

[7] Child Welfare Information Gateway, *Stepparent Adoption*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 1 (May 2013), https://www.childwelfare.gov/pubs/f_step.pdf. Although the Army does not maintain a statistical breakdown of types of adoptions for which it provides assistance, the assumption is that stepparent adoptions are the most prevalent because of the cost and the fact that some legal assistance offices offer pro se services for stepparent adoptions. *See* E-mail from John Meixell to author, *supra* note 3.

[8] ARNOLD H. RUTKIN, FAMILY LAW AND PRACTICE, Ch. 64, § 64.04 (Matthew Bender 2014) (*available at* LexisNexis). Some states have requirements regarding how soon after marriage the adoption can occur, e.g., a year or longer. *See Stepparent Adoption*, *supra* note 7, at 2.

[9] *Stepparent Adoption*, *supra* note 7, at 2 (consent of noncustodial parent required unless abandonment is determined).

[10] *Id*. However, if the child concerned in a stepparent adoption is older, the child's consent may be required as well. *Id*. In the majority of states that require consent of the child, the age range is ten to fourteen. *Id*.

[11] *Id*. at 1.

[12] RUTKIN, *supra* note 8, at n.7 (independent adoptions allowed in all states except Colorado, Connecticut, Delaware, and Massachusetts).

[13] *Id*. at § 64.04.

[14] BLACK'S LAW DICTIONARY *supra* note 2, at 56.

[15] *Adoption Options*, *supra* note 5, at 5.

[16] Child Welfare Information Gateway, *Use of Advertising and Facilitators in Adoptive Placement*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2 (Apr. 2012), https://www.childwelfare.gov/pubPDFs/advertising.pdf. For more information on the use of advertising, see Appendix E (available online). Appendices A to D of this article appear in the printed version, but the full appendices (A to J) appear in the online version of the article, available at https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER .NSF/TALDisplay?. The appendices include: Appendix A, Who May Adopt by State; Appendix B, Adoption Jurisdiction by State; Appendix C, State Statutes Regarding Parental Consent; Appendix D, State Statutes on Postadoption Agreements; Appendix E, State Statutes on Advertising and Use of Facilitators; Appendix F, Differences in Hague versus Non-Hague International Processes; Appendix G, Countries Party to the Hague Convention on Adoption; Appendix H, Convention-Authorized Agencies; Appendix I, Department of Defense Form 2675, Reimbursement Request; and Appendix J, Cost of Adopting by Type.

[17] Mark T. McDermott, *Independent Adoption*, BUILDING YOUR FAMILY: THE FERTILITY AND ADOPTION GUIDE, http://buildingyourfamily.com/adoption/domestic-adoption/independent-adoption/ (last visited May 12, 2015). There are websites that specifically assist in setting up profile pages for birth parents to search through. Adoption.com offers this service; prospective parents can post videos, have family members leave comments and endorse them, blog, and post pictures. *Frequently Asked Questions, Adopting, Parenting Profiles*, ADOPTION.COM, http://adoption.com/profiles/faq (last visited May 12, 2015). This service charges a setup fee of $99 and then costs a minimum of $199 a month for three months, but prospective parents can pay more for additional features such as placement on social media sites and prominence on the search page. *Id*.

So, if SSG Langley told you that he and his wife were placing an ad in the paper to find a birth mother who wanted to give her baby up for adoption, that would be an independent or private adoption.[18] Because private adoption takes place directly between adoptive and birth parents, parental rights transfer directly to the adoptive parents.[19] One reason prospective adoptive parents (like SSG Langley and his wife) might prefer this method is that it may prevent the long wait sometimes associated with adoption through an agency.[20] Additionally, birth parents prefer the sense of openness they get with selecting the adoptive parents.[21] However, there are some disadvantages. For example, since adoptive parents are not required to use an attorney or agency during the adoption process, some states place additional restrictions on independent adoptions, which are complicated to navigate.[22] Another drawback is that states regulate this process more[23] and it is less systematic than a private agency adoption.[24] If SSG Langley wants to pursue independent adoption, you should advise him to consider seeking the assistance of an adoption attorney, since the rules governing independent adoptions vary by state.[25] If SSG Langley has reservations about independent adoptions, talk to him and his wife about using an agency in the process.

C. Private Agency Adoption

Because SSG Langley and his wife are unsure about an independent adoption, they ask that you give them more information on using an agency. Some adoptive parents choose to use the resources of a private adoption agency, of which there are two types: licensed and unlicensed.[26] An unlicensed agency, also referred to as a facilitator, serves as a middleman who simply links the adoptive parents with the birth parents for a fee.[27] States usually do not regulate unlicensed agencies and facilitators, which means less protection for the adoptive parents and "little recourse if the plan does not work out as they hoped."[28] Some states do not allow unlicensed agencies or facilitators to enable adoptions.[29] Also, unlicensed agencies tend to cost the same as licensed agencies.[30] In an agency adoption, generally, the parental rights transfer from birth parents to the agency and then to the adoptive parents.[31]

Therefore, a licensed agency is the preferred route for many adoptive parents. Licensed agencies are state-regulated and required to follow state-specific guidelines, making the process more predictable and reliable for all parties involved.[32] Additionally, fees associated with an agency adoption are all-inclusive, which means the legal fees and various expenses are included, resulting in the

[18] The use of advertising to locate a child is restricted in some states. Staff Sergeant (SSG) Langley and his wife would not be authorized to take out this ad in Alabama or Kentucky, but would be authorized to place it in a paper in Connecticut. *Use of Advertising and Facilitators in Adoptive Placements*, *supra* note 16. For a tally of state-specific limitations like these, see Appendix E (available online).

[19] McDermott, *supra* note 17.

[20] *Id*.

[21] *Id*.

[22] *Independent Adoptions: The Advantages and Disadvantages of Skipping the Agency when you Adopt a Child*, NOLO, LAW FOR ALL, http://www.nolo.com/legal-encyclopedia/independent-adoptions-29696.html (last visited May 12, 2015) [hereinafter *Independent Adoptions*].

[23] *Id*.

[24] When adopting from a licensed agency, which is discussed in the following subsection, certain rules and regulations exist to meet licensing requirements. *Agency vs. Independent Adoption*, PARENTS, http://www.parents.com/parenting/adoption/facts/agency-vs-independent-adoption/ (last visited May 12, 2015) (article reprinted from the editors of "American Baby"). Additionally, if using an attorney, the licensed agency makes assurances that the attorney is following the necessary regulations to maintain American Bar Association accreditation. *Id*. However, if a family pursues a private adoption without those resources, the risk is higher and less recourse exists in the event the adoption does not go as planned. *Id*. One area of little recourse is expenses provided to the birth parents prior to finalization of the adoption; they may not be recoverable if the birth parents revoke consent or change their minds. JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE, Ch.1, § 1.05 (Matthew Bender 2014) (*available at* LexisNexis). Generally, the only time monetary damages can be recovered is in the event of fraud on the part of a birth parent or facilitator. *Id*. See Appendix C for consent revocation by state.

[25] McDermott, *supra* note 17. "The role of the adoption attorney varies by state. In most cases, your lawyer will handle all the legal documents, negotiate payments to the birthmother, and represent you at the adoption court hearing." *Id*.; s*ee also*, *Independent Adoptions supra* note 22.

[26] *Adoption Options*, *supra* note 5, at 4, 6. A starting point to find an agency or other state resources is the National Foster Care and Adoption Directory Search, which allows you to search by state and type of resources you or your client are looking for. *National Foster Care and Adoption Directory*, CHILD WELFARE INFO. GATEWAY, U.S DEP'T OF HEATH AND HUMAN SERVICES, https://www.childwelfare.gov/nfcad/ (last visited May 15, 2015).

[27] *Adoption Options*, *supra* note 5, at 6. "Facilitators may or may not be regulated in their State and may have varying degrees of expertise in adoption practice." *Id*.

[28] *Id*.

[29] *Id.* (states prohibiting the use are Delaware and Kansas). See Appendix E (available online) for more information about what states allow the use of facilitators and restrictions related to the use.

[30] Child Welfare Information Gateway, *Costs of Adopting*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2 (Feb. 2011), http://www.childwelfare.gov/pubPDFs/s_costs.pdf. See Appendix J (available online) for cost ranges of each type.

[31] RUTKIN, *supra* note 8. Some agencies allow birth mothers more input into the process, and some agencies allow birth mothers to direct the placement of the child with a certain family. In that situation, the agency oversees placement of the child. *Id*.

[32] *Adoption Options*, *supra* note 5, at 4.

adopting parents knowing the total cost upfront and being able to plan for it.[33] Based on the affiliation of the agency, there may be limitations as to who can apply for adoption through a prospective agency.[34] In addition to possible limitations placed on the process by various agencies, another downside to using an agency is the lengthy wait times frequently associated with these types of adoptions.[35] If SSG Langley and his wife are concerned about a potentially long wait time in using an adoption agency, you can direct the conversation to foster care adoption, where the process is usually quicker.

D. Foster Care (Welfare) Adoption

You might explain to SSG Langley that a foster care adoption describes the adoption process that occurs when children are adopted from the foster care system after they are taken from the birth home because of abuse or neglect (among other reasons).[36] At the time of adoption, these children "are in the custody of their State or county's Department of Child and Family Services."[37] In 2012, approximately 50,000 children were adopted from the welfare system out of the 102,000 waiting for adoption.[38] Obviously, there is no shortage of children in the foster care system waiting to be adopted. However, children adopted via foster care adoptions stayed in foster care for approximately thirty months, on average.[39] The reason this statistic is important to a legal assistance attorney (and thus their clients) is that foster care adoptions usually involve older children, not infants.[40]

Foster care adoptions are an especially viable path if your clients are interested in adopting a child with special needs. One consideration when using the term "special needs" is that its definition is broad in the adoption world.[41] Special needs can refer to anything from disabilities to age, ethnicity, or "any condition that makes it more difficult to find an adoptive family."[42] In all states, assistance is available when adopting a special needs child.[43] Generally, children older than age five are considered a special needs adoption.[44] If SSG Langley and his wife adopt an older child from the welfare system, this would be considered a special needs adoption, which is different from the medical definition of special needs since it may not have anything to do with a mental, emotional, or physical handicap.[45]

The first step in starting a foster care adoption is to contact the state's Department of Child Services. Most states hold meetings offering information on the state-specific procedures.[46] Advise them to pay special attention to the rules on moving the child from the state and the timelines, especially if your client expects orders for a permanent change of station in the near future. Your clients should start the required home study (more formally known as an investigation), discussed in further detail in section III of this article.

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[33] *Costs of Adopting*, *supra* note 30, at 4-5.

[34] *Adoption Options*, *supra* note 5, at 4-5.

[35] *Id*. at 4.

[36] *Id*. at 3.

[37] *Adopting Children from Foster Care*, CHILD WELFARE INFO. GATEWAY, U.S DEP'T OF HEATH AND HUMAN SERVICES ADMIN. FOR CHILDREN AND FAMILIES, https://www.childwelfare.gov/topics/adoption/adoptive/choices/ foster-care/ (last visited May 12, 2015).

[38] U.S DEP'T OF HEATH AND HUMAN SERVICES ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2009-2012 REPORT TO CONGRESS 22 (Nov. 6, 2014).

[39] *Id*. at 23 (tbl. IV-4, measure C2.2).

[40] *Id*. at 13 (tbl. III-2). The median percentage of children under the age of 1 in foster care is 5.9%. The majority of children in foster care are older than age 8. *Id*.

[41] Child Welfare Information Gateway, *Special Needs Adoption: What Does It Mean?*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2 (Jul. 2010), https://www.childwelfare.gov/pubs/factsheets/specialneeds/specialneeds.pdf.

[42] *Id*. In intercountry adoptions, the term special needs refers more commonly to a child with physical or mental disabilities. *Id*.

[43] RUTKIN, *supra* note 8. Families adopting special needs children from foster care may be eligible for federal subsidies under Title IV-E for the Social Security Act and state subsidies, which are often called non-Title IV-E. *Adoption Subsidy in the Unites States*, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, http://www.nacac.org/adoption subsidy /us.html (last visited May 12, 2015). Title IV-E assistance attaches two additional requirements to special needs adoptions to receive federal assistance: the child cannot be returned to his birth parents and the child could not have been adopted without the financial assistance. *Special Needs Adoption: What Does It Mean?*, *supra* note 41, at 2. "In the U.S. today, almost 90 percent of children and youth adopted from foster care receive adoption subsidy (or adoption assistance) to help their families meet their special needs." *Adoption Subsidy in the United States, supra* note 43. For example, if SSG Langley were adopting a two-year-old child from the foster care system in Illinois, then that child would be considered a special needs child under the Illinois definition. *Illinois State Subsidy Profile*, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, http://www.nacac.org/adoptionsubsidy/stateprofiles/ illinois.html (last visited May 15, 2015). One of the criteria in the "special needs" category in Illinois is that the child is one year of age or older. *Id.* As a result, the family could receive as much as $384 a month (adjusts based on age) and a nonrecurring payment of up to $1,500. *Id.* Additionally, the child is eligible for Medicaid. *Id.* There are also other benefits available, like tuition assistance and child care. *Id.*

[44] RUTKIN, *supra* note 8.

[45] BLACK'S LAW DICTIONARY *supra* note 2, at 272.

[46] *How to Adopt*, HEART GALLERY OF AMERICA INC., http://www.heartgalleryofamerica.org/Adoption/About_Adoption.html#steps (last visited May 12, 2015).

E. Intercountry Adoption

Families who adopt from a country other than the United States go through the procedure of an intercountry adoption.[47] Intercountry adoption entails several legally complicated processes, and the fact that a Soldier is stationed in another country can create additional requirements. Adoptive parents must abide by the state laws in which they reside, along with the requirements of the country where the child is located and the federal requirements for bringing the child back into the United States.[48] Another important aspect that clients looking into this type of adoption must research is whether the country they are adopting from is a party to the Hague Adoption Convention.[49] If the country of the prospective adoption is a party to the Hague Adoption Convention, then the Hague process of both the United States and other country must be followed.[50]

When starting the international adoption process, adoptive parents should, in general, find an adoption agency. If your client elects to seek the assistance of an agency for an adoption from a country that is a party to the Hague Adoption Convention, then it is imperative that the adoptive parents find an accredited adoption agency.[51] Military personnel "on assignment abroad [must] be [a] 'habitual resident'[52] in the United States for the purpose of completing an intercountry adoption in accordance with U.S. law and regulation."[53] Additionally, SSG Langley and his wife must to be aware that once they have completed the adoption, they still need to obtain a visa for the child prior to bringing the child back to the United States.[54]

F. Closed vs. Open Adoption

Closed adoptions are increasingly rare in domestic adoption, but prospective parents should know about the concept.[55] "Closed adoption refers to an adoption process where there is no interaction of any kind between birthmothers and prospective adoptive families."[56] In a closed adoption, the court usually seals the records and the birth parents and adoptive parents do not have any contact after the adoption is finalized.[57] This is an attractive option when the adoptive parents do not want their child to have contact with the birth parent for a variety of reasons, such as continued contact might be harmful to the child.[58] The more common trend in

[47] Office of Children's Issues, *Intercountry Adoption from A to Z,* U.S. DEP'T STATE, 7, http://travel.state.gov/content/dam/aa/pdfs/Intercountry_Adoption_From_A_Z.pdf (currently, the countries that U.S. adoptive families adopt from the most are China, Colombia, Ethiopia, Guatemala, Haiti, India, Kazakhstan, Liberia, Philippines, Russia, South Korea, Taiwan, Ukraine, and Vietnam). To see the specific process of a certain country, visit the U.S. Department of State's website. *Country Information*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/content/adoptionsabroad/en/country-information.html (last visited May 15, 2015).

[48] *What is Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/content/adoptionsabroad/en/adoption-process/what-is-intercountry-adoption.html (last updated June 4, 2013). Some countries will not finalize the adoption, but instead grant guardianship; then, the prospective parent brings the child back to the United States and finalizes the adoption in the state of residence. *Intercountry Adoption from A to Z, supra* note 47, at 17. Additionally, the servicemember must determine if there is a Status of Forces Agreement (SOFA) with the host nation and ascertain any restrictions on relocating the adopted child. Child Welfare Information Gateway, *Military Families Considering Adoption*, U.S DEP'T OF HEATH AND HUMAN SERVICES 3 (Dec. 2010), https://www.childwelfare.gov/pubPDFs/f_militia.pdf.

[49] *Intercountry Adoption from A to Z, supra* note 47, at 11-12. The Hague Adoption Convention is an agreement signed by more than seventy-five countries (the United States signed it in 1994 and became a party in 2008) to provide more protections and transparency to intercountry adoptions. *Id*. An example of an additional requirement for adopting from a country that is a party to the Hague Adoption Convention is that the prospective parents "must participate in at least ten hours of pre-adoption training before traveling overseas to complete an adoption." *Id*. See Appendix G (available online) for a list of countries party to the Hague Convention.

[50] *Adoption Process*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/content/adoptionsabroad/en/adoption-process.html (last visited May 12, 2015). See Appendix F (available online) for a chart on the different processes of Hague and non-Hague countries.

[51] *Intercountry Adoption from A to Z, supra* note 47, at 7. See Appendix H (available online) for a list of accredited agencies.

[52] The term habitual residence lacks a definition, which causes confusion and leaves room for varying court interpretation. Jeff Atkinson, *The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Child*, 63 OKLA. L. REV. 647, 647-49 (2011); *see also*, BLACK'S LAW DICTIONARY *supra* note 2, at 1423.

[53] *U.S. Citizens Adopting Abroad*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/content/adoptionsabroad/en/adoption-process/who-can-adopt/us-citizens-adopting-abroad.html (last visited May 12, 2015).

[54] *Intercountry Adoption from A to Z, supra* note 47, at 21. The status of whether the country is a Hague country or not plays into this part of the process, too. If the country is a party to the convention, then the child must meet the definition of a "convention adoptee" and a form I-800 must be filled out and approved before the child can be brought back to the United States. *Id*. at 22. If the country is not a party to the convention, then a form I-600 needs to be completed and approved to verify the child meets the definition of an orphan under the Immigration and Nationality Act. *Id*. at 21.

[55] *Open vs. Closed Adoption*, FINDLAW, http://family.findlaw.com/adoption/open-vs-closed-adoption.html (last visited May 12, 2015). "Closed adoptions are rare in the United States, but remain common in international adoptions. . . ." *Id*.

[56] *Closed Adoption Advantages*, AMERICAN PREGNANCY ASSOCIATION, http://americanpregnancy.org/adoption/closed-adoption-advantages/ (last visited May 12, 2015).

[57] *Open vs. Closed Adoption*, *supra* note 55.

[58] The trend is just now changing from more closed adoptions to more open adoptions. "The trend [in the past] reflected common attitudes that children and birth mothers should be protected from the stigma of

domestic adoption is an open adoption.[59] This is where the adoptive parents know who the birth parents are and have likely met one or both of them.[60] In an open adoption, it is possible for a relationship between child and birth parent(s) to continue after the transfer of rights: the birth parent(s) stays in touch with the child and adoptive parents.[61] Sometimes, this contact and its frequency is outlined in a postadoption agreement, incorporated into the adoption decree and enforceable by the court.[62]

III. The Next Steps

Once your clients have settled on the type of adoption they want to pursue, they must start the process. One of the first steps is understanding the procedures and some of the key laws that govern it, such as the Interstate Compact on the Placement of Children (ICPC).

A. Interstate Compact on the Placement of Children

The ICPC is "the main legal mechanism outlining the mandatory legal process that must be followed before a child can be placed from one state to another for purposes of foster care and adoption."[63] "The [ICPC] is comprised of individual state laws, not federal legislation."[64] The tricky part is that "[e]very state has developed its own requirements, procedures and interpretations of the law."[65] What this means for your clients is they should be aware that they are a party to an interstate adoption. Because of this fact, they and their team of experts, which may include the adoption agency and/or an adoption attorney, will have to ensure "compliance with the [ICPC] and the applicable laws of the state where the child is to be placed."[66] In simple terms, tell your clients it means there is additional paperwork and court filings for an interstate adoption.[67] This may be another reason your clients should hire an attorney to assist if they are considering an independent adoption.

In cases of agency adoption, the agency handles these procedures. Another point for your client to consider during interstate adoptions is that the process of obtaining court approval to take the child across state lines can vary from seven to twenty-one days.[68] This is a matter your clients should factor in to planning if they want to stay with the child until approval is given as this could result in the need for additional leave. Two exceptions to the ICPC are stepchildren adoptions and familial adoptions; in those cases, the ICPC does not apply.[69] Compliance with the ICPC is of utmost importance because failure to comply could result in termination of the adoption.[70]

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illegitimacy." Child Welfare Information Gateway, *Openness in Adoption: Building Relationships Between Adoptive and Birth Families*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2 (Jan. 2013), https://www.childwelfare.gov/ pubPDFs/f_openadopt.pdf. As a result, the "sense of secrecy" left adopted children with unanswered feelings of loss and without access to information about their medical histories or genetics. *Id*. However, the openness prevalent now in many adoptions allows adopted children access to that information. *Id*.

[59] "In today's adoptions, Bethany experiences over 90% of infant adoptions within the U.S. having some form of openness." *Learn more About Domestic Adoptions*, BETHANY CHRISTIAN SERVICES, http://www.bethany.org/martinsburg/faq-domestic-adoption (last visited May 12, 2015).

[60] *Open vs. Closed Adoption*, *supra* note 55.

[61] *Id*.

[62] Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 2 (Jun. 2014), https://www.childwelfare.gov/ pubPDFs/cooperative.pdf. "Postadoption contact occurred more in private adoption (68 percent) as compared with adoption from foster care (39 percent) and international adoption (6 percent)." *Openness in Adoption: Building Relationships Between Adoptive and Birth Families*, *supra* note 58, at 3 (citing Sharon Vandivere and Karin Malm, *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (2009), http://aspe.hhs.gov/hsp/09/NSAP/chartbook/ index.pdf). See Appendix D for a list of states that allow postadoption agreements.

[63] The Am. Pub. Human Services Ass'n, *Interstate Compact on the Placement of Children: A Pathways Policy Brief* (Apr. 25, 2013), http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/Home%20page/ICPC-Policy-Brief.pdf.

[64] RUTKIN, *supra* note 8, at § 64.21. The Interstate Compact on the Placement of Children (ICPC) has been enacted by all fifty states and the District of Columbia and the Virgin Islands. *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*. This is important for military clients because of the potential for a permanent change of station before completing the adoption. A servicemember has options if this happens before the adoption is final: he could ask to extend at his current assignment; he could ask the court to allow the non-military adoptive parent to remain in the state to finalize the adoption; or he can work with his adoption professionals to ensure the ICPC compliance and both the receiving and sending state approve the adoption. McKenzie Consulting, Inc., *Where My Family Is: That's Home!*, ADOPTUSKIDS 69, http://www.adoptuskids.org /_assets/files/nrcrrfap/ resources/wherever-my-family-is-thats-home.pdf. Once the adoption is final, the servicemember can move with the child without issues. *Military Families Considering Adoption*, *supra* note 48, at 4.

[68] RUTKIN, *supra* note 8, at § 64.21.

[69] *Id*.

[70] *Id*.

> The Supreme Court of Montana in *In re Adoption of T.M.M.*, found that the prospective adoptive parents' failure to comply with the terms and procedures of the ICPC constituted full and sufficient grounds for the revocation of the parents' consent when the adoptive parents stated they brought the child across state lines for adoption. A number of courts have taken the position that ICPC compliance is required before a petition for adoption may proceed.

To help alleviate the inevitable stress associated with the complicated legalese of various state statutes, it might be helpful to give your clients an overview of what the ICPC requires.[71] The forms filed in the child's state contain the basic administrative information of the adoption, such as the names of the birth parents, the individuals who will be financially responsible for the child, and the type of placement.[72] Additionally, "[a]ll states require that there be a home study conducted of the prospective adoptive parents."[73] One of the benefits to the ICPC is that a majority of states collect the "medical history and social summary of the birth parents," along with the "medical information about the child's birth or the child's medical and social history."[74] One of the reasons for the delay caused by the ICPC is most states require proof of the relinquishment of parental rights.[75] Some states have mandatory waiting periods before parental rights can terminate, which can further prolong the process.[76]

B. Parental Rights

An adoption to be deemed final, all states require consent be given by the birth parents or "a statute or court waives the necessity for it."[77] Consent of the birth parent(s) can "be executed in writing and witnessed as specified by statute or given orally before a court or an individual designated by the court."[78] Your clients should understand that parental consent does not necessarily terminate parental rights; most jurisdictions terminate parental rights and support obligations upon the adoption decree becoming final.[79] This means parental rights "remain in a state of legal limbo" from the time parental consent is given until the final adoption decree.[80] Further, some states require birth parents be notified of each step in the process as parental rights do not terminate until the final adoption decree is entered, whereas other states statutorily waive notice, which means that the birth parents are not informed throughout the process.[81] Since state law varies, it is beneficial for your clients to simply include a waiver of notice as part of the consent to adopt.[82]

It is also important to know, when dealing with parental consent, who must give consent.[83] In most circumstances, it is clear who the birth mother is, and she has the "legal right to consent."[84] The birth father's right to consent is more complicated. In cases where the child is born in wedlock, and the husband is the father of the child, then the father has the right to consent.[85] In some states, even if the husband is not the father, consent may be required.[86] Situations where birth parents are not married vary even more, depending on the state. Many states require the birth father to demonstrate he is willing to participate in the childrearing in order to have the right to consent.[87] "The mere existence of a biological link does not merit equivalent constitutional protections under the Due Process Clause."[88]

In some cases, birth parents transfer their rights to the adoption agency or even to Child Welfare Services, thus requiring agency/department consent.[89] Consent from an agency is generally handled two ways. The first is for the agency to give consent to the adoptive parents, as if it

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Id. (citing *In re Adoption of T. M. M*., 186 Mont. 460 (Mont. 1980)).

[71] *Id*. The basic principle of the ICPC is that it requires the "receiving" state to approve the process prior to the child arriving in the state. *Id*.

[72] *Id*.

[73] *Id*.; *see* also infra Part III.C (discussing home studies in further detail).

[74] *Id*. States not requiring the medical history of parents are Montana and Wyoming, and states not requiring the medical history of the child and record of the child's birth are Arizona, Montana, Nevada, and Vermont. *Id*. at n.33–34. In addition to information such as medical history, all states require compliance with the Indian Child Welfare Act (ICWA). *Id*. The ICWA is a federal law governing adoption and foster care of American Indian and Native Alaskan Children. *Id*. § 64.22.

[75] *Id*. § 64.21.

[76] *Id*. See Appendix C for more information on waiting periods.

[77] *Id*. § 64.10. The court may waive the necessity for consent in situations of abandonment, child abuse, failure to communicate, incarceration, mental illness, neglect, non-support, rape and incest, unfitness, or when it is in the best interest of the child. *Id*. § 64.11.

[78] *Id*. § 64.12. This document is one of the most important documents in the adoption process. *Id*. Issues with the consent documents or deviations from the statue can result in a challenge by the birth parents and possibly termination of the adoption proceedings. *Id*. *See* Bozeman v. Williams, 248 Ga. 606, 285 S.E.2d 9, 1981 Ga. LEXIS 1099 (Ga. 1981) (adoption found invalid because no strict compliance with Georgia statute).

[79] *See* RUTKIN, *supra* note 8, at § 64.10

[80] *Id*.

[81] *Id*. *See* D.C. Code § 16-306(b) (2014) (party who formally gives consent to the adoption waives notice).

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*. (citing Lehr v. Robertson, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983)).

[89] *Id*.

were actually the birth parents consenting.[90] The second way is the agency/department holds consent until immediately before the final adoption decree, and it transfers with the decree.[91]

C. You Want to Adopt? You're Going to Be Investigated

An investigation into the adoptive family is one of the first steps in starting the adoption process.[92] Almost all individuals seeking adoption must conduct this step, with the exception of stepparent adoptions in some states.[93] Generally, the investigation is referred to as a home study, but that only encompasses one element of the investigative process. The investigation is often a three-step process, but varies depending on state requirements.[94]

> First, there is a pre-placement evaluation on the suitability of the prospective adoptive parents. Second, there is a report and recommendation to the court, evaluating the placement and describing the adoptive parents, the child and birth parents. Third, there may be a report based upon post-placement supervision, often after entry of an interlocutory order, which reports on the child's adjustment to the adoptive family.[95]

This is one area your client will not be able to look to state statutes for guidance, but instead should examine state regulations to determine the requirements on the "content and form of home studies and court reports."[96] Home studies are required in intercountry adoptions, too.[97] Clients, or their attorneys, must determine if the country is a party to the Hague Convention and, if so, must follow the rules and requirements of the Hague Convention for the home study.[98] The result of unclear statutory guidance is that prospective parents rely heavily on the individual conducting the investigation to accomplish the study in compliance with the law.

1. Pre-placement Evaluation

The investigative process starts with a pre-placement evaluation; this is the home study.[99] The pre-placement evaluation is generally required, but not in all states.[100] The Child Welfare League of America[101] has six criteria it uses during the pre-placement evaluation to assist in the determining the suitability for adoption.[102] Those six criteria are "total personality functioning, emotional maturity, quality of spousal relationship, capacity to parent children in need of family membership, attitudes towards childlessness, and readiness to adopt and the reasons for adoption."[103] Each state evaluates the criteria differently, depending on the requirements of the specific

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[90] *Id*.

[91] *Id*. When consent is withheld, this may be done until completion of the post-placement evaluation. *Id*.; *see also infra* Part III.

[92] The individual or entity that conducts the investigation and prepares the reports varies from state to state. *Id*. § 64.13. The investigation is generally done by the agency in an agency adoption; in cases of private adoptions, it can be done by an independent social worker, licensed child-placing agency, or court investigator, depending on the state. *Id*. In most cases, the prospective parents select who conducts the investigation. *Id*. It is important that they select an evaluator who has "a similar basic philosophical approach" and is "reputable with the courts, the ICPC office and the adoption community in general." *Id*.

[93] *Id*. Servicemembers living overseas who want to adopt must still have a home study "completed and approved by a social worker licensed in the United States to do adoption home studies." *Military Families Considering Adoption, supra* note 48, at 3. Additionally, if a servicemember has a home study done in one state and then moves to another state, the servicemember must check the requirements of the new state to see if the home study has to be redone or approved by that state to receive approval for an adoption. *Id.* at 4.

[94] RUTKIN, *supra* note 8, § 64.10.

[95] *Id*.

[96] *Id*. State statutes usually determine who should do the home study and set forth an overview of what it should contain, but the bulk of the information is in state regulations (not in the actual statute). *Id*.

[97] Child Welfare Information Gateway, *The Adoption Home Study Process*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES 4 (Jul. 2010), http://www.childwelfare.gov/pubs/f_homstu.cfm. For intercountry adoptions, "[s]ome countries accept an authenticated U.S. home study of the prospective adoptive parents; other countries require adoptive parents to travel and be evaluated in-country." *Intercountry Adoption from A to Z, supra* note 47, at 15. Some countries place additional requirements on families adopting from their country. For example, in May 2007, China added an additional criterion that in order to adopt from there, prospective parents had to have body mass index of less than 40. David Katz, *China Restrictions Adoption Policies*, ABCNEWS (Dec. 21, 2006), *available at* https://www.childwelfare.gov/pubPDFs/f_openadopt.pdf.

[98] *See The Adoption Home Study Process, supra* note 97, at 4.

[99] RUTKIN *supra* note 8, at § 64.15. When dealing with agency adoptions, there are oftentimes two additional elements prior to the home study: an information meeting to see if the agency is a fit for the family and training to assist the family in understanding challenges they may face in adoption. *The Adoption Home Study Process*, *supra* note 97, at 2.

[100] *See* RUTKIN *supra* note 8, at § 64.13. The exceptions in some states are in cases of some intra-state private adoptions, step-parent adoptions, and some relative adoptions. *Id*. However, in intra-state private adoptions, a majority of states require a post-placement evaluation. *Id*.

[101] "[Child Welfare League of America] leads and engages its network of public and private agencies and partners to advance policies, best practices and collaborative strategies that result in better outcomes for children, youth and families that are vulnerable." *Who We Are and What We Do, Our Mission*, CHILD WELFARE LEAGUE OF AMERICA, http://www.cwla.org/about-us/ (last visited May 12, 2015).

[102] RUTKIN, *supra* note 99 (citing CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICES § 5.5 (rev. ed. 1978)). These criteria are only used as guidelines and are therefore not binding.

[103] *Id*.

state.[104] The methods of evaluation include letters of recommendation, interviews with the prospective parents, criminal history, income or employment verification, and home visits.[105] Once the Child Welfare League of America compiles all the information, it prepares a written report containing a recommendation as to the suitability of the applicant for placement.[106]

2. Court Report

The investigative process continues with a court report.[107] The court report occurs after placement, usually within ninety days.[108] These "reports typically consist of analysis of the adoptive family, birth parents, and child, and then a recommendation as to the adoption."[109] It is a compilation of all the information that has already been collected so that the parties can present everything to the court.[110] Again, as with the pre-placement evaluation, after all this information is gathered, this report is prepared and contains a recommendation to the court as to adoption.[111]

3. Post-placement Evaluation

Finally, a post-placement evaluation is completed.[112] This is not required in all states or countries; in states or countries that do require it, a negative recommendation in the report is rare.[113] The post-placement evaluation is simply a follow-up to ensure the child is adjusting to her new environment and that the parents are settling into their roles as parents.[114] The reason it is important your clients understand the investigative process is, first, they know what to expect as it may feel invasive at times and, second, it takes time to get this accomplished, adding to the timeline to finalize an adoption.[115]

D. How Much Does It Cost to Adopt?

The projected cost of raising a child, to the age of 18, born in 2013 is $245,340—before college tuition.[116] For clients seeking to start or expand their family through adoption, the costs can begin to accumulate before the child is even born. The financial costs associated with adoption can range from nothing to more than $40,000, depending on several factors, which may include what type of adoption the client is seeking, whether the client is adopting a special needs child, and if the adoption crosses state lines.[117] The financial aspect is something your clients must prepare themselves for. Pointing out to clients they must plan accordingly so the process does not push them into an undesirable financial situation is part of a legal assistance attorney's job. Additionally, they should be aware of grant and stipend opportunities available to defer some of the costs, discussed further in subsection F below.[118]

If your client chooses to adopt from foster care or a public agency, the cost may range from zero to $2,500.[119] There are some lesser fees associated with public agency adoptions, but, in most instances, the state provides subsidies to cover expenses or waives fees.[120] However, once a family decides on a private adoption, international adoption, or agency adoption, the costs increase. The reason for the increase is the inclusion of the home

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[104] *Id*.

[105] *Id*. Other sources of information the social worker may collect are income statements, health statements, and autobiographical statements. *The Adoption Home Study Process*, *supra* note 97, at 4.

[106] *See* RUTKIN, *supra* note 8, at § 64.13. The recommendation could be favorable, to include that the family only adopt from a certain category, or an unfavorable recommendation. *Id*. During this stage, the social worker generally assists the potential parents in remedying any issues that arise. *Id*. However, some obstacles are harder to overcome. Those issues are child abuse, periods of incarceration, drug and alcohol abuse, and certain physical and mental health issues. *Id*. In addition to the recommendation, the report contains information on family background, education, employment, relationships, daily life, parenting, neighborhood, religion or belief system, and feelings and readiness for adoption. *See The Adoption Home Study Process*, *supra* note 97, at 2.

[107] *See* RUTKIN, *supra* note 8, at § 64.13.

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] *Id*. The possible recommendations at this point in the process are that the adoption proceed, more investigation occur, or the adoption be denied. *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *The Adoption Home Study Process*, *supra* note 97, at 7. The home study process can take approximately three to six months and may vary based on the responsiveness of the adoptive parents. *Id*.

[116] News Release No. 0179.14, U.S. Dep't of Agriculture, Parents Projected to Spend $245,340 to Raise a Child Born in 2013, according to USDA Report (Aug. 18, 2014) (on file with author).

[117] *Costs of Adopting, supra* note 30, at 2. See Appendix J (available online) for a range of costs for various types of adoption.

[118] Bethany Christian Services, *Adoption Loans, Grants & Scholarship Resources*, http://www.bethany.org/assets/guides/Adoption-Financial-Resources.pdf; *see also*, *Affording Adoption*, ADOPTION COVENANT, http://www.adoptioncovenant.org/affording-adoption.php (last visited May 12, 2015) (providing examples of resources available to individuals seeking financial assistance).

[119] *Costs of Adopting*, *supra* note 30, at 2.

[120] *Id.*

study,[121] legal fees, foreign fees, and agency fees, among other costs.[122] Nevertheless, there are ways to reduce these fees and the overall cost of adoption.

E. Easing the Financial Burden

Tax credits can assist in decreasing the financial burden of an adoption. In 2014, the maximum federal tax credit for a qualifying adoption was $13,190.[123] Your clients should consult with tax professionals about state tax credits. For example, Indiana recently enacted a credit for tax year 2015 that allows families who finalized a qualifying adoption in that tax year to receive a credit of 10 percent of the federal credit or $1,000, whichever is less.[124]

Additionally, the military offers a stipend to active duty members who adopt. The military offers "up to $2,000 per adoptive child, but no more than $5,000 per calendar year."[125] When advising your clients, ensure they are aware that this stipend is only available for adoptions accomplished through "a qualified adoption agency or other source authorized to place children for adoption under State or local law."[126] Additionally, the stipend is only paid when the adoption is finalized, which means to receive this stipend, the servicemember must remain on active duty until the adoption is complete.[127]

Outside of the military, many institutions offer loan, grant, and scholarship opportunities.[128] An example is the nonprofit organization Help Us Adopt, which issues grants to individuals trying to adopt and needing assistance with the expenses.[129] Help Us Adopt has paid more than $900,000 in grants since its creation in 2007.[130] Although it may be time and work-intensive to seek out financial assistance, other avenues exist for loans and grants to defray adoption costs. Your clients should know that those opportunities are available so they can ask the right questions of experts involved in the adoption process.[131]

F. Citizenship

At the conclusion of an intercountry adoption, your happy clients—new parents—may return to your office to ask questions about obtaining citizenship for their new child. You should review the Child Citizenship Act of 2000.[132] The Child Citizenship Act was designed to make it easier for foreign-born children (including adopted children) who meet the requirements to obtain citizenship automatically.[133] Under the Child Citizenship Act, children adopted abroad can automatically acquire U.S. citizenship if the following circumstances exist: "At least one parent of the child is a U.S. citizen; the child is under the age of 18; the child is admitted to the United States as an immigrant for lawful permanent residence; and the adoption is final."[134] This means your clients no longer have to submit a separate application for the child to be naturalized; a child will receive citizenship automatically upon meeting the requirements.[135]

One of the exceptions to the Child Citizenship Act is when a child is born outside the United States and is

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[121] The home study fee even varies depending on the type of adoption. For welfare adoptions, the cost may be waived altogether or be as little as $300 to $500, which many times is reimbursed. *The Adoption Home Study Process*, *supra* note 97, at 7. In situations of an agency adoption, the cost can range from $1,000 to $3,000 and may include other fees. *Id*.

[122] *Costs of Adopting*, *supra* note 30, at 4.

[123] *Topic 607 – Adoption Credit and Adoption Assistance Programs*, I.R.S. (2014), http://www.irs.gov/taxtopics/tc607.html (last visited May 12, 2015). Individuals can claim reimbursement for certain expenses for a qualifying adoption up to a maximum of $13,190 in tax year 2014. *Id*. (explaining tax credit does not apply to stepparent adoptions).

[124] H.B. 1222, 2014 Gen. Assemb., Reg. Sess. (Ind. 2014).

[125] U.S. DEP'T DEF., INSTR. 1341.9, DOD ADOPTION REIMBURSEMENT PROGRAM, para. 4.1 (3 Nov. 2007) (C1 23 Apr. 2009). If an adopting couple is dual-military, then only one servicemember can receive the stipend. *Id*.

[126] *Id*. para. 4.2. (noting stepparent adoptions do not qualify for this stipend).

[127] *Id*. para. 4.1. In order to apply for the reimbursement, the Soldier must fill out and submit Department of Defense (DD) Form 2675, Reimbursement Request for Adoption Expense, within one year of finalizing the adoption, to the nearest personnel and finance office. *Id*. See Appendix I (available online) for a copy of DD Form 2675.

[128] *Supra* note 118.

[129] Becky and Kipp Fawcett, *Learn More About Us*, HELPUSADOPT.ORG, http://www.helpusadopt.org /about_us.html (last visited May 12, 2015).

[130] *Id*.

[131] *Adoption Loans, Grants & Scholarship Resources*, *supra* note 118. Examples of assistance are the Gift of Adoption Fund, which offers grants up to $7,500 for domestic and international adoptions, and A Child Waits Foundation, offering grants up to $5,000 and low-interest loans up to $10,000 for international adoptions. *Id*.

[132] The Child Citizenship Act of 2000, P. L. No. 106-395, 11 Stat. 1631 (2000).

[133] U.S. DEP'T OF JUSTICE, FACT SHEET: THE CHILD CITIZENSHIP ACT OF 2000 (1 Dec. 2000).

[134] *Intercountry Adoption from A to Z, supra* note 47, at 31.

[135] *Id*. A copy of N-600, Application for Citizenship can be found at http://www.uscis.gov/sites/default/files/ files/form/n-600.pdf. Although the requirements are simplified, that does not alleviate the costs associated with the forms. Filing a N-600 costs U.S. citizens $550 per adopted child. Form N-600 Instructions, DEP'T OF HOMELAND SECURITY 7 (rev. 2/3/15), http://www.uscis.gov/sites/default/files/ files/form/n-600instr.pdf.

living outside the United States.[136] In that case, the parents must apply for naturalization and the child must be in the United States for that process to take place.[137] However, there is an exception for military members stationed overseas.[138] A servicemember who completed an intercountry adoption and who is living overseas must still apply for naturalization for the child, but the process can take place while overseas.[139] This is beneficial to your clients, and a simplified step for a servicemember assigned overseas.

IV. Military-Specific Issues

A. Leave

When your clients plan for the adoption process, they should think about the time they will need to be away from work during the process and after they have adopted the child.[140] Soldiers adopting are not authorized leave under the Family Medical Leave Act.[141] However, under Public Law 109-163, a servicemember is allowed twenty-one days of adoption leave to take care of the new child.[142] If the adopting parents are dual-military, only one parent may take the twenty-one days.[143] This leave can be taken in conjunction with ordinary leave.[144] Advise your clients that most daycares will not take a baby under six weeks old.[145] If your clients have opted for an international adoption, remember to go through the proper channels for a travel clearance for the country they are adopting from.[146]

B. Healthcare

Some private adoption agreements with the birth mother, depending on what the specific state allows, require adopting parents to pay for housing and healthcare relating to maternity expenses of the birth mother.[147] However, Tricare does not cover these costs, which can be substantial.[148] This becomes an out-of-pocket expense for the adopting parent. Once the child is born and is registered in the Defense Enrollment Eligibility System (DEERS), Tricare does cover medical expenses.[149] The child can only be enrolled in DEERS with "a record of adoption or a letter of placement of the child into the home by a recognized placement/adoption agency or the court before the final adoption."[150] Additionally, "[c]hildren are automatically covered as TRICARE Prime or [TRICARE Prime Remote for Active Duty Family Members (TPRADFM)] beneficiaries for 60 days after birth as long as one family member is enrolled in TRICARE Prime, [TRICARE Prime Remote] or TPRADFM."[151] Therefore, the adopting parents should find a point of contact at TRICARE before the baby arrives and ensure they take appropriate, timely actions once the baby is born. In the case of a non-adopted stepchild, the stepchild need not be adopted for Tricare eligibility.[152] The servicemember simply proves he is "married to the stepchild's parent" at the time he adds the child to DEERS and that the spouse is the custodial parent.[153]

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[136] U.S. DEP'T OF JUSTICE, FACT SHEET: THE CHILD CITIZENSHIP ACT OF 2000 (1 Dec. 2000).

[137] *Id*.

[138] Child Citizenship Act of 2000 – Sections 320 and 322 of the Immigration and Nationality Act, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/child-citizenship-act.html (last visited May 12, 2015).

[139] *Id*.

[140] Your clients should pay particular attention to this in intercountry adoptions and the travel requirements associated with the country they want to adopt from. Some countries require an extended stay or a period of residence prior to completion of the adoption. *Intercountry Adoption from A to Z, supra* note 47, at 15.

[141] Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993). The Family Medical Leave Act allows eligible employees from covered employers to take 12 weeks of unpaid leave for the birth of a child or the adoption of a child; additionally, the employee's position is protected. *Id*.

[142] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §592, 119 Stat. 3280 (2006).

[143] *Id*.

[144] *Id*.

[145] *Child Development Centers*, NATIONAL MILITARY FAMILY ASSOCIATION, http://www.militaryfamily.org/get-info/military-kids/child-care/child-development-centers.html (last visited Jan. 21, 2015). The Child Development Center, which runs more than 800 child care facilities for military and Department of Defense children, does not take children until they are at least 6 weeks old. *Id*.

[146] U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES, ch. 8 (15 Feb. 2006).

[147] Child Welfare Information Gateway, *Regulation of Private Domestic Adoption Expenses*, U.S DEP'T OF HEALTH AND HUMAN SERVICES 3 (Mar. 2013), https://www.childwelfare.gov/pubPDFs/expenses.pdf.

[148] *Adopting a Child*, TRICARE, http://www.tricare.mil/LifeEvents/Baby/Adopting.aspx (last visited May 12, 2015).

[149] *Id*.

[150] *Children*, TRICARE, http://www.tricare.mil/Plans/Eligibility/Children.aspx (last visited May 12, 2015).

[151] TRICARE, *Maternity Care*, 2 (Feb. 2014), www.tricare.mil/~/media/Files/TRICARE/.../Maternity_FS.pdf.

[152] *Adopting a Child*, *supra* note 148.

[153] *Id.*

V. Conclusion

Adoption is a complicated area of family law that requires specialized knowledge to inform and prepare clients expanding their family. You can assist SSG Langley and his wife with certain parts of the adoption proceedings[154] and give them the tools, knowledge, and advice to start planning the path they want to take. This is an area of practice that is specifically authorized under AR 27-3.[155] The requirement is simply to be knowledgeable in the area; [156] this article gives you that knowledge.[157] Clients like SSG Langley and his wife will walk away from their client consultation more informed about adoption laws and armed with the resources to gain more information. You will have made a difference in their lives and in the lives of the children they adopt.

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[154] AR 27-3, *supra* note 4.

[155] *Id*.

[156] *Id*.

[157] *Id*.

Appendix A. Who May Adopt by State[1]

State	Statute Reference (see statute for additional details on adoption requirements)	Any Adult (see statue for definition of adult and residency requirements)	Husband and Wife Jointly (not including cases of stepparent adoptions)	Stepparent (age and residency requirements do not apply to stepparent adoption in many states)	Unmarried Adult	Married Adult with Consent of Spouse	Married Adult Without Consent of Spouse (unable to ascertain consent: absence, incompetence, unavailable, etc.; see statute for definition of unavailable)	Married, Legally Separated	Other Requirements/Additional Information
Alabama	Ala. Code § 26-10A-5	X	X						
Alaska	Ann. Stat. § 25.23.020		X		X	X	X	X	
American Samoa	Ann. Code § 45.0411	X							21 years or older or with court approval
Arizona	Rev. Stat. § 8-103	X	X						Requires residency; all things being equal, preference given to married man and woman
Arkansas	Ann. Code § 9-9-204		X		X	X	X	X	
California	Family Code §§ 8600; 8601; 9326	X	X	X					Adult must be at least 10 years older than the child being adopted; exceptions made for stepparent and familial adoptions
Colorado	Rev. Stat. §§ 19-5-202; 14-1-101	X	X					X	Adult must be 21 years or older or have court approval
Connecticut	Gen. Stat. §§ 45a-726a; 45a-732; 45a-734	X	Must						Sexual orientation of the adopter may be considered and placement not required when adopter is homosexual or bisexual
Delaware	Ann. Code Tit. 13, §§ 903; 951		X		X			X	Must be 21 years of age or older and a resident of the state
District of Columbia	Ann. Code § 16-302	X	Must	X					
Florida	Ann. Stat. § 63.042		X	X	X		X		Prohibition on homosexuals adopting deemed unconstitutional by the Florida Court of Appeals in September 2010

[1] Child Welfare Information Gateway, *Who May Adopt, Be Adopted, or Place a Child for Adoption*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Jan. 2012), https://www.childwelfare.gov/pubPDFs/parties.pdf. The information in this appendix is not a substitute for the complete statute. The statutes contain important additional information, to include other requirements and exceptions not noted here. Further, states continually change and update statutes, so ensure you review the current language of the state statutes and applicable regulations.

State	Statute Reference (see statute for additional details on adoption requirements)	Any Adult (see statue for definition of adult and residency requirements)	Husband and Wife Jointly (not including cases of stepparent adoptions)	Stepparent (age and residency requirements do not apply to stepparent adoption in many states)	Unmarried Adult	Married Adult with Consent of Spouse	Married Adult Without Consent of Spouse (unable to ascertain consent: absence, incompetence, unavailable, etc.; see statute for definition of unavailable)	Married, Legally Separated	Other Requirements/Additional Information
Georgia	Ann. Code § 19-8-3	X	Must	X					In all adoptions: must be at least 25 years of age or married and living with spouse; at least 10 years older than child; state residency at least 6 months; and financially, physically, and mentally able to permanently care for child
Guam	Ann. Code Tit. 19, § 4203		X	X	X			X	Must be legal residents of Guam
Hawaii	Rev. Stat. § 578-1		X	X	X				
Idaho	Ann. Code §§ 16-1501; 16-1502; 16-1503	X		X		X			Adopter must be at least 15 years older than the child or at least 25 years in age, with the exception of stepparent adoptions
Illinois	Cons. Stat. Ch. 750, § 50/2	X	Must						Legally disabled individuals not authorized to adopt; residency requirement of 6 months or members of the armed forces domiciled in the state for 90 days; residency requirements do not apply in relative adoptions
Indiana	Ann. Code §§ 31-19-2-1; 31-19-2-2; 31-19-2-3; 31-19-2-4	X	Must	X					Must be a resident of the state unless adopting a hard-to-place child
Iowa	Ann. Stat. § 600.4		X	X	X		X	X	
Kansas	Ann. Stat. § 59-2113	X	X						
Kentucky	Rev. Stat. § 199.470	X	Must	X					Must be 18 years of age or older and a resident of the state or have resided in the state for at least 12 months
Louisiana	Ch. Code Art. 1198, 1221		X		X				Single individual must be 18 years or older
Maine	Ann. Stat. Tit. 18-A, § 9-301		X		X				

State	Statute Reference (see statute for additional details on adoption requirements)	Any Adult (see statue for definition of adult and residency requirements)	Husband and Wife Jointly (not including cases of stepparent adoptions)	Stepparent (age and residency requirements do not apply to stepparent adoption in many states)	Unmarried Adult	Married Adult with Consent of Spouse	Married Adult Without Consent of Spouse (unable to ascertain consent: absence, incompetence, unavailable, etc.; see statute for definition of unavailable)	Married, Legally Separated	Other Requirements/Additional Information
Maryland	Family Law §§ 5-331; 5-3A-29; 5-3B-13	X	Shall	X			X	X	
Massachusetts	Ann. Laws Ch. 210 § 1	X	X	X					
Michigan	Comp. Laws § 710.24	X	X						
Minnesota	Ann. Stat. § 259.22	X							Residency requirement of 1 year (waiveable if familial or close relationship with the child exists)
Mississippi	Ann. Code § 93-17-3	X	X		X				Adoption by same-sex couples prohibited; state residency of 6 months required
Missouri	Ann. Stat. § 453.010	X	X						If married and spouse does not join, court may require joinder and, if not complied with, the action may be dismissed
Montana	Ann. Code § 42-1-106		X	X	X		X	X	If unmarried or married and filing without consent of spouse, then individual must be 18 or older
Nebraska	Rev. Stat. § 43-101	X	Must	X					
Nevada	Rev. Stat. Ann. §§ 127.020; 127.030; 127.190	X	Must						Adult person must be at least 10 years older than adopted minor
New Hampshire	Rev. Stat. § 170-B:4		X	X	X		X	X	
New Jersey	Ann. Stat. §§ 9:3-39.1; 9:3-43	X	X	X				X	Must be at least 18 years of age and 10 years older than child
New Mexico	Ann. Stat. § 32A-5-11	X		X			X	X	Must be a resident of the state, unless the child is less than 6 months of age and in the care of a state agency

State	Statute Reference (see statute for additional details on adoption requirements)	Any Adult (see statue for definition of adult and residency requirements)	Husband and Wife Jointly (not including cases of stepparent adoptions)	Stepparent (age and residency requirements do not apply to stepparent adoption in many states)	Unmarried Adult	Married Adult with Consent of Spouse	Married Adult Without Consent of Spouse (unable to ascertain consent: absence, incompetence, unavailable, etc.; see statute for definition of unavailable)	Married, Legally Separated	Other Requirements/Additional Information
New York	Dom. Rel. Law § 110		X	X	X			X	Two unmarried adult intimate partners may adopt; in addition to legal separation, individual living apart from his or her spouse for a period of more than 3 years is allowed to adopt
North Carolina	Gen. Stat. § 48-1-103	X							
North Dakota	Cent. Code § 14-15-03		X	X	X		X	X	
Northern Mariana Islands	Commonwealth Code Tit. 8, § 1403	X	X	X	X				Must be at least 10 years older than the child
Ohio	Rev. Code § 3107.02		X	X	X		X	X	
Oklahoma	Ann. Stat. Tit. 10, § 7503-1.1		X	X	X			X	Age requirement of 21 years old
Oregon	Rev. Stat § 109.309	X							At least one party to adoption must have at least 6 months of residency prior to petition
Pennsylvania	Cons. Stat. Tit. 23, § 2312	X							
Puerto Rico	Ann. Law Tit. 31, § 531; 532	X	X	X					Residency requirement of 6 months, be at least 18 years of age, have the legal capacity to act and be at least 14 years older than the child; in stepparent adoptions, adopting spouse must be married to the other spouse for 2 years or be at least 14 years older than the child
Rhode Island	Gen. Laws § 15-7-4	X	Must						Residency requirements apply unless child is in custody of a child placing agency

State	Statute Reference (see statute for additional details on adoption requirements)	Any Adult (see statue for definition of adult and residency requirements)	Husband and Wife Jointly (not including cases of stepparent adoptions)	Stepparent (age and residency requirements do not apply to stepparent adoption in many states)	Unmarried Adult	Married Adult with Consent of Spouse	Married Adult Without Consent of Spouse (unable to ascertain consent: absence, incompetence, unavailable, etc.; see statute for definition of unavailable)	Married, Legally Separated	Other Requirements/Additional Information
South Carolina	Ann. Code § 63-9-60	X							Residency requirements apply unless child is special needs, child is being placed with a relative, at least one of the adoptive parents is a member of the military, unusual or exceptional circumstances and dictate it is in the best interest of the child to place outside of state, or child has been in foster care for more than 6 months and there is no resident prospective parent
South Dakota	Ann. Laws §§ 25-6-2; 25-6-3	X				X		X	Adult must be at least 10 years older than the child
Tennessee	Ann. Code §§ 36-1-115; 36-1-107	X	Must						Adult must be at least 18 years of age and been a resident for 6 consecutive months; if in the military stationed outside of Tennessee, residency requirement is waived if the individual lived in the state 6 consecutive months immediately prior to entering military; exception for relative adoption
Texas	Fam. Code § 162.001	X							
Utah	Ann. Code §§ 78B-6-117; 78B-6-114; 78B-6-118		X	X	X	X		X	Individuals living together but not married cannot adopt; individual adopting must be as least 10 years older than the child (if married, only one person must be 10 years older)
Vermont	Ann. Code Tit. 15A, § 1-102	X		X					
Virgin Islands	Ann. Code Tit. 16, § 141	X	Shall						Must be a resident

State	Statute Reference (see statute for additional details on adoption requirements)	Any Adult (see statue for definition of adult and residency requirements)	Husband and Wife Jointly (not including cases of stepparent adoptions)	Stepparent (age and residency requirements do not apply to stepparent adoption in many states)	Unmarried Adult	Married Adult with Consent of Spouse	Married Adult Without Consent of Spouse (unable to ascertain consent: absence, incompetence, unavailable, etc.; see statute for definition of unavailable)	Married, Legally Separated	Other Requirements/Additional Information
Virginia	Ann. Code §§ 63.2-1201; 63.2-1201.1	X	X	X					Adopter must be a resident of the state; foster parent can adopt without residency if child is already in their care through a child placement agency; exception to the residence requirement are parties to a surrogacy contract
Washington	Rev. Code § 26.33.140	X							Age requirement of 18 or older
West Virginia	Ann. Code § 48-22-201		X		X	X			
Wisconsin	Ann. Stat. §§ 48.82; 882.01		X	X	X				Residency required
Wyoming	Ann. Stat. § 1-22-103	X							Residency in the state for at least 60 days is required

Appendix B. Adoption Jurisdiction by State[2]

State	Jurisdiction Statute Reference	Circuit Court	District Court	Superior Court	Probate Court	Family Court	Juvenile Court	Other Court	Additional Information
Alabama	Ala. Code § 26-10A-3				X				
Alaska	Alaska Stat. § 25.23.030			X					
American Samoa	Ann. Code §§ 45.0103(8); 45.0115		Uncontested					Trial Division of the high court for contested adoptions	
Arizona	Rev. Stat. § 8-102.01			X					
Arkansas	Ann. Code §§ 9-9-202(2); 9-9-205				X				For out-of-state adoption, jurisdiction transfers to circuit court
California	Fam. Code § 200; Welf. & Inst. Code § 366.3			X					
Colorado	Rev. Stat. § 19-1-104(1)						X		
Connecticut	Ann. Stat. § 45a-727				X				
Delaware	Ann. Code Tit. 13, § 902					X			Family court still retains jurisdiction even if petitioner moves into another jurisdiction
District of Columbia	Ann. Code § 16-301			X					
Florida	Ann. Stat. § 63.102(1)	X							Circuit court retains jurisdiction until final judgment
Georgia	Ann. Code § 19-8-2(a)			X			X		Specific county dictates whether it is the superior court or the juvenile court
Guam	Ann. Code Tit. 19, §§ 5102; 5103			Family Division					
Hawaii	Rev. Stat. § 578-1					X			In the relevant circuit
Idaho	Ann. Code § 16-1506		X						If the petition is the result of a child protective case, then the court with original jurisdiction of the child protective case has jurisdiction over the adoption unless relinquished
Illinois	Comp. Stat. Ch. 750 § 50/4	X							
Indiana	Ann. Stat. §§ 31-19-1-2; 31-19-2-1				X				If the county does not have a probate court, then the court that hears probate matters will hear the petition for adoption
Iowa	Ann. Stat. § 600.3						X	Any county court	
Kansas	Ann. Stat. § 38-2203		X						
Kentucky	Ann. Stat. § 199.470	X							

[2] Child Welfare Information Gateway, *Court Jurisdiction and Venue for Adoption Petitions*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Jan. 2012), https://www.childwelfare.gov/pubPDFs/jurisdiction.pdf. The information in this appendix is not a substitute for the complete statute. The statutes contain important additional information, to include other requirements and exceptions not noted here. Further, states continually change and update statutes, so ensure you review the current language of the state statutes and applicable regulations.

State	Jurisdiction Statute Reference	Circuit Court	District Court	Superior Court	Probate Court	Family Court	Juvenile Court	Other Court	Additional Information
Louisiana	Children's Code Art. 1180						X		
Maine	Rev. Stat. Tit. 18-A, § 9-103				X				
Maryland	Fam. Law § 1-201							Equity Court	Unless the juvenile court already has jurisdiction over the child and the child has been deemed in need of assistance
Massachusetts	Ann. Laws Ch. 210, § 1				X				District or juvenile court may exercise jurisdiction if pending proceeding is already before that court
Michigan	Comp. Laws § 710.22	Family division							If adoption proceeding starts in another state, that state retains jurisdiction
Minnesota	Ann. Stat. § 259.23, subd. 1						X		
Mississippi	Ann. Code § 93-17-3				X				
Missouri	Ann. Stat. § 453.010	Juvenile division							
Montana	Ann. Code § 42-1-104		X						
Nebraska	Rev. Stat. § 43-102							Country Court	If juvenile court already has jurisdiction over the child, then the juvenile court will have concurrent jurisdiction with the county court
Nevada	Rev. Stat. § 127.010		X						Exception when jurisdiction of the child falls under an Indian Tribe pursuant to Child Welfare Act
New Hampshire	Rev. Stat. § 170-B:15(I)				X				
New Jersey	Ann. Stat. § 9:3-42			X					
New Mexico	Ann. Stat. §§ 32A-1-4; 32A-1-9		Children Court Division						Petition will be transferred to the Indian child's tribe on petition from the child's parent, guardian, or tribe; but will be barred if there is an objection by the parent of the child or the tribe
New York	Fam. Ct. § 641					X			
North Carolina	Gen. Stat. § 48-2-100			X					It jurisdiction is already being exercised by the court of another state, then that court will retain jurisdiction
North Dakota	Cent. Code § 14-15-01		X						
Northern Mariana Islands	Commonwealth Code Tit. 8, § 1101							Commonwealth Trial Court	

State	Jurisdiction Statute Reference	Circuit Court	District Court	Superior Court	Probate Court	Family Court	Juvenile Court	Other Court	Additional Information
Ohio	Rev. Code § 3107.01				X				Uniform Child Custody Jurisdiction and Enforcement Act shall govern
Oklahoma	Rev. Stat. Tit. 10, § 7502-1.1		X						A party to the adoption (petitioner, child, or consenting parent, but not an adoption agency) must be a resident of the state (see statute for additional information on residency and jurisdiction)
Oregon	Rev. Stat. § 109.309(1)-(3)	X							
Pennsylvania	Cons. Stat. Tit. 23, § 2301							Court of Common Pleas	
Puerto Rico	Ann. Laws Tit. 32, § 2699b							Family part of the court of first instance	
Rhode Island	Gen. Laws § 15-7-4					X			Residency is required, but jurisdiction is retained if the petitioner leaves the state after the filing; additionally, petition can be filed if nonresidents but the child is in the custody of the state
South Carolina	Ann. Code § 63-9-40					X			
South Dakota	Ann. Stat. § 25-6-6	X							
Tennessee	Ann. Code § 36-1-102(16)	X						Chancery Court	
Texas	Fam. Code. § 101.008		X				X	Any court already having jurisdiction over the parent-child relationship	
Utah	Ann. Code §§ 78B-6-105; 78A-6-103		X				X (If original jurisdiction on the termination of parental rights)		

State	Jurisdiction Statute Reference	Circuit Court	District Court	Superior Court	Probate Court	Family Court	Juvenile Court	Other Court	Additional Information
Vermont	Ann. Stat. Tit. 15A, § 3-101			Probate Division					In accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, no court of this state will assume jurisdiction if a petition has already been filed in another state
Virgin Islands	Ann. Code Tit. 4, § 76			X					
Virginia	Ann. Code § 63.2-1201	X							
Washington	Rev. Code § 26.33.030			X					
West Virginia	Ann. Code § 48-22-201	X							
Wisconsin	Ann. Stat. § 48.83							County Court	
Wyoming	Ann. Stat. § 1-22-104		X						Jurisdiction can be transferred to juvenile court if the court has had prior and continuous jurisdiction in the case

State	State Statutes Regarding Consent	Child Consent/Age	When Consent May Be Executed	Revocation of Consent Allowed (Prior to Entry of Final Decree)
Alabama	Ala. Code §§ 26-10A-7; 26-10A-8; 26-10A-9; 26-10A-10; 26-10A-11; 26-10A-12; 26-10A-13; 26-10-14	Yes - age 14 (waived if lacks mental capacity)	Consent by the mother may be given prior to birth but must be reaffirmed after birth; alleged birth father can execute consent any time before or after birth	Consent was obtained by fraud, duress or coercion; finding that withdraw is in the best interest of the child (petition must be filed within 14 days)
Alaska	Alaska Stat. §§ 25.23.040; 25.23.050; 25.23.060; 25.23.070	Yes - age 10 (the court may dispense with consent if it is in the best interest of the child)	Any time after birth	Consent can be withdrawn up to 10 days after given, but then irrevocable unless it can be shown that revocation is the best interest of the child
American Samoa	Ann. Code §§ 45.0401; 45.0412(a); 45.0412(b); 45.0414(a); 45.0431	Yes - age 12		Consent can be withdrawn for 2 years after given, but then irrevocable
Arizona	Rev. Stat. § 8-106(A), (B), (C), (D), (G), and (J)	Yes - age 12	Waiting period of 72 hours (3 days) after birth	Consent was obtained by fraud, duress or coercion
Arkansas	Ann. Code §§ 9-9-206; 9-9-207; 9-9-208	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Any time after birth	Consent can be withdrawn for 10 days after given, but then irrevocable
California	Fam. Code §§ 8602; 8603; 8604; 8605; 8606; 8606.5; 8606.6; 8700; 8801.3; 8814; 8814.5	Yes - age 12	Any time after birth for agency placements and after the mother has been discharged from the hospital in direct placement adoptions (if an Indian Child, then there is a 10-day waiting period)	Consent can be withdrawn up to 30 days after given for direct placement, but then irrevocable; consent can be withdrawn up to 2 years after given for an Indian Child, but then is irrevocable unless evidence of fraud or duress; if the placement is not made with a specific family within 30 days
Colorado	Rev. Stat. §§ 19-3-604; 19-5-103; 19-5-104; 19-5-104(7)(a); 19-5-203; 19-5-207	Yes - age 12	Any time after birth	Consent was obtained by fraud, duress or coercion (must be filed within 90 days)
Connecticut	Gen. Stat. §§ 45a-724; 45a-715; 45a-715(d); 45a-717(g); 45a-715(e)-(f); 45a-717(f); 45a-719	Yes - age 12	Waiting period of 48 hours after birth	If there is a finding that withdrawal is in the best interest of the child
Delaware	Ann. Code Tit. 13, §§ 907; 908; 909; 1106(c)	Yes - age 14 (the court may dispense with consent if it is in the best interest of the child)	Any time after birth; alleged birth father can execute consent any time before or after birth	Consent can be withdrawn up to 60 days after given, but then irrevocable
District of Columbia	Ann. Code §§ 16-304; 16-304(a); 4-1406(f); 4-1406(e)-(d)	Yes - age 14	Waiting period of 72 hours (3 days) after birth	Consent can be withdrawn up to 10 days after given, but then irrevocable
Florida	Ann. Stat. §§ 63.062; 63.064; 63.082	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 48 hours after birth	Consent was obtained by fraud, duress, or coercion
Georgia	Ann. Code §§ 19-8-4; 19-8-5; 19-8-9(b); 19-8-10;	Yes - age 14	Any time after birth	Consent can be withdrawn up to 10 days after given, but then irrevocable
Guam	Ann. Code Tit. 19, §§ 4206; 4207; 4208	Yes - age 12		If there is a finding that withdrawal is in the best interest of the child
Hawaii	Rev. Stat. §§ 578-2; 571-61	Yes - age 10 (the court may dispense with consent if it is in the best interest of the child)	Consent by the mother may be given prior to birth but must be reaffirmed after birth; alleged birth father can execute consent any time before or after birth	If there is a finding that withdrawal is in the best interest of the child
Idaho	Ann. Stat. §§ 16-1504; 16-1506; 16-1515	Yes - age 12 (waived if lacks mental capacity)		Consent may not be revoked unless an appeal of termination of parental rights proceeding is pending
Illinois	Cons. Stat. Ch. 750, §§ 50/8; 50/9; 50/10; 50/11; 50/12	Yes - age 14 (waived if lacks mental capacity)	Waiting period of 72 hours (3 days) after birth; alleged birth father can execute consent any time	Consent was obtained by fraud, duress, or coercion (the claim must be filed within 12 months)

[3] Child Welfare Information Gateway, *Consent to Adoption*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Apr. 2013), https://www.childwelfare.gov/pubPDFs/consent.pdf. The information in this appendix is not a substitute for the complete statute. The statutes contain important additional information, to include other requirements and exceptions not noted here. Further, states continually change and update statutes, so ensure you review the current language of the state statutes. See the specific state statutes and applicable regulations for definitions and explanation regarding who can or must give consent.

State	State Statutes Regarding Consent	Child Consent/Age	When Consent May Be Executed	Revocation of Consent Allowed (Prior to Entry of Final Decree)
			before or after birth	
Indiana	Ann. Code §§ 31-19-9-1; 31-19-9-8 to 31-19-9-10; 31-19-9-8 to 31-19-9-10; 31-19-10-3; 31-19-10-4	Yes - age 14	Any time after birth; alleged birth father can execute consent any time before or after birth	If there is a finding that withdrawal is in the best interest of the child (petition must be filed within 30 days)
Iowa	Ann. Stat. §§ 600.7; 600A.4; 600A.8	Yes - age 14	Waiting period of 72 hours (3 days) after birth	Consent can be withdrawn up to 96 hours after given, but then is irrevocable unless evidence of fraud or duress
Kansas	Ann. Stat. §§ 59-2114; 59-2115; 59-2116; 59-2129; 59-2136(d), (h)	Yes - age 14 (waived if lacks mental capacity) (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 12 hours after birth	Consent was obtained by fraud, duress, or coercion
Kentucky	Rev. Stat. §§ 199.500; 199.502; 625.040	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 72 hours (3 days) after birth	Consent can be withdrawn up to 20 days after given, but then irrevocable
Louisiana	Ch. Code Art. 1113; 1120; 1122; 1123; 1130; 1147; 1193; 1195; 1245	Not addressed	Waiting period of 72 hours (3 days) after birth for agency adoptions and 5 days for private adoptions; alleged birth father can execute consent any time before or after birth	Consent was obtained by fraud, duress, or coercion
Maine	Rev. Stat. Tit. 18-A, §§ 9-202; 9-302	Yes - age 14	Any time after birth	Consent can be withdrawn up to 3 days after given, but then is irrevocable unless evidence of fraud or duress; if the adoption is not finalized within 18 months
Maryland	Fam. Law §§ 5-3B-21(2); 5-3B-22; 5-338; 5-339; 5-351	Yes - age 10	Any time after birth	Consent can be withdrawn up to 30 days after given, but then irrevocable
Massachusetts	Ann. Laws Ch. 210, §§ 2; 3	Yes - age 12	Waiting period is until the fourth day after birth	Consent irrevocable on execution
Michigan	Comp. Laws §§ 710.29; 710.31; 710.37; 710.43; 710.44; 710.51(6)	Yes - age 14	Any time after birth	
Minnesota	Ann. Stat. § 259.24	Yes - age 14	Waiting period of 72 hours (3 days) after birth	Consent can be withdrawn up to 10 days after given, but then is irrevocable unless evidence of fraud or duress
Mississippi	Ann. Code § 93-17-5; 93-17-7; 93-17-15	Yes - age 14	Waiting period of 72 hours (3 days) after birth	Consent can be withdrawn up to 6 months after given, but then irrevocable
Missouri	Rev. Stat. §§ 453.030; 453.040	Yes - age 14 (waived if lacks mental capacity)	Waiting period of 48 hours after birth	Consent can be withdrawn until confirmed by the court, but then irrevocable
Montana	Ann. Code §§ 42-2-301; 42-2-302; 42-2-303; 42-2-405; 42-2-408; 42-2-410	Yes - age 12 (waived if lacks mental capacity)	Waiting period of 72 hours (3 days) after birth	If the birth parents and adoptive parents mutually agree to withdraw
Nebraska	Rev. Stat. §§ 43-104; 43-105; 43-106	Yes - age 14	Waiting period of 48 hours after birth	
Nevada	Rev. Stat. §§ 127.020; 127.040; 127.043; 127.053; 127.057; 127.070; 127.080; 127.090	Yes - age 14	Waiting period of 72 hours (3 days) after birth; alleged birth father can execute consent any time before or after birth	If no petition for adoption is filed within 2 years
New Hampshire	Rev. Stat. §§ 170-B:3; 170-B:5; 170-B:7; 170-B:8; 170-B:9; 170-B:10; 170-B:12	Yes - age 14 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 72 hours (3 days) after birth	Consent was obtained by fraud, duress, or coercion; if there is a finding that withdrawal is in the best interest of the child

State	State Statutes Regarding Consent	Child Consent/Age	When Consent May Be Executed	Revocation of Consent Allowed (Prior to Entry of Final Decree)
New Jersey	Ann. Stat. §§ 9:3-41; 9:3-45; 9:3-46; 9:3-49;	Yes - age 10 (waived if lacks mental capacity)	Waiting period of 72 hours (3 days) after birth; alleged birth father can execute consent any time before or after birth	Consent was obtained by fraud, duress, or coercion
New Mexico	Ann. Stat. §§ 32A-5-17; 32A-5-18; 32A-5-19; 32A-5-21; 32A-5-23	Yes - age 14 (waived if lacks mental capacity)	Waiting period of 48 hours after birth	Consent was obtained by fraud, duress, or coercion
New York	Dom. Rel. Law §§ 111; 113; 115-b; Soc. Serv. Law. § 384	Yes - age 14 (the court may dispense with consent if it is in the best interest of the child)		Extrajudicial consent can be withdrawn up to 45 days after given, but then irrevocable unless it can be shown that revocation is the best interest of the child; judicial consent is irrevocable
North Carolina	Gen. Stat. §§ 48-3-601; 48-3-602; 48-3-603; 48-3-604; 48-3-605; 48-3-606; 48-3-607; 48-3- 608; 48-3-609	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Any time after birth; alleged birth father can execute consent any time before or after birth	Consent was obtained by fraud, duress, or coercion; consent can be withdrawn up to 7 days after given, but then is irrevocable unless evidence of fraud or duress; if the birth parents and adoptive parents mutually agree to withdraw
North Dakota	Cent. Code §§ 14-15-05; 14-15-06; 14-15-07; 14-15-08	Yes - age 10	Any time after birth	If there is a finding that withdrawal is in the best interest of the child
Northern Mariana Islands	Commonwealth Code Tit. 8, §§ 1404; 1405(a); 1406(a); 1407	Yes - age 10	Any time after birth	If there is a finding that withdrawal is in the best interest of the child
Ohio	Rev. Code §§ 3107.06; 3107.07; 3107.08; 3107.081	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 72 hours (3 days) after birth	If there is a finding that withdrawal is in the best interest of the child
Oklahoma	Ann. Stat. Tit. 10, §§ 7503-2.1; 7503-2.2; 7503-2.3; 7503-2.4; 7503-2.6; 7503-2.7; 7505-4.2	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Any time after birth; alleged birth father can execute consent any time before or after birth	Consent was obtained by fraud, duress, or coercion (the claims must be filed within 3 months); extrajudicial consent can be withdrawn up to 15 days after given, but then irrevocable; consent can be withdrawn up to 30 days after given, but then is irrevocable unless evidence of fraud or duress; if the birth parents and adoptive parents mutually agree to withdraw; if the adoption petition is not filed within 9 months
Oregon	Ann. Stat. §§ 109.312; 109.314; 109.316; 109.322; 109.324; 109.326; 109.328; 109.346; 418.270	Yes - age 14		Consent was obtained by fraud, duress, or coercion
Pennsylvania	Cons. Stat. Ch. 23, §§ 2501-2504; 2511; 2711; 2713; 2714	Yes - age 12	Waiting period of 72 hours (3 days) after birth; alleged birth father can execute consent any time before or after birth	Consent can be withdrawn up to 30 days after given, but then is irrevocable unless evidence of fraud or duress
Puerto Rico	Ann. Laws Tit. 31, § 535; Tit. 32, § 2699b; 2699q	Yes - age 10		Consent was obtained by fraud, duress, or coercion
Rhode Island	Gen. Laws §§ 15-7-5; 15-7-6; 15-7-7; 15-7-10; 15-7-21.1	Yes - age 14	Waiting period of 15 days after birth	Consent can be withdrawn up to 180 days after given, but then irrevocable unless it can be shown that revocation is the best interest of the child
South Carolina	Ann. Code §§ 63-9-310; 63-9-320; 63-9-330; 63-9-340; 63-9-350	Yes - age 14 (waived if lacks mental capacity) (the court may dispense with consent if it is in the best interest of the child)	Any time after birth	Consent was obtained by fraud, duress, or coercion; if there is a finding that withdrawal is in the best interest of the child
South Dakota	Codified Laws §§ 25-5A-16; 25-6-4; 25-6-5; 25-6-12; 25-6-21	Yes - age 12	Within for 5 days after birth	Consent was obtained by fraud, duress, or coercion (the claim must be filed within 2 years)
Tennessee	Ann. Code §§ 36-1-110; 36-1-111; 36-1-1112; 36-1-117	Yes - age 14 (waived if lacks mental capacity)	Waiting period of 72 hours (3 days) after birth	Consent can be withdrawn up to 10 days after given, but then is irrevocable unless evidence of fraud or duress

State	State Statutes Regarding Consent	Child Consent/Age	When Consent May Be Executed	Revocation of Consent Allowed (Prior to Entry of Final Decree)
Texas	Fam. Code §§ 161.001 through 161.007; 161.103; 161.1035; 161.106; 162.010; 162.011	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 48 hours after birth; alleged birth father can execute consent any time before or after birth	Consent can be withdrawn up to 10 days after given, but then is irrevocable unless evidence of fraud or duress
Utah	Ann. Code §§ 78B-6-111; 78B-6-120; 78B-6-121; 78B-6-123; 78B-6-124; 78B-6-125; 78B-6-126	Yes - age 12 (waived if lacks mental capacity)	Waiting period of 24 hours after birth; alleged birth father can execute consent any time before or after birth	Consent irrevocable on execution
Vermont	Ann. Stat. Tit. 15A, §§ 2-401; 2-402; 2-404; 2-405; 2-407; 2-408; 2-409	Yes - age 14 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 36 hours after birth	Consent can be withdrawn up to 21 days after given, but then is irrevocable unless evidence of fraud or duress; if the birth parents and adoptive parents mutually agree to withdraw (request must be made within 21 days)
Virgin Islands	Ann. Code Tit. 16, §§ 142(a); 142(b); 144	Yes - age 14		No provisions for revocation
Virginia	Ann. Code §§ 63.2-1202; 63.2-1204; 63.2-1223; 63.2-1233; 63.2-1234; 63.2-1241	Yes - age 14 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 72 hours (3 days) after birth; alleged birth father can execute consent any time before or after birth	Consent was obtained by fraud, duress, or coercion; consent can be withdrawn up to 7 days in a direct placement if the child is at least 10 days old and 7 days in an agency placement, but then irrevocable; consent can be withdrawn up to 15 days after given, but then is irrevocable unless evidence of fraud or duress; if the birth parents and adoptive parents mutually agree to withdraw (request must be made within 15 days)
Washington	Rev. Code §§ 26.33.080; 26.33.120; 26.33.160; 26.33.170	Yes - age 14	Waiting period of 48 hours after birth (if the child is an Indian child then there is a 10-day waiting period)	Consent was obtained by fraud, duress, or coercion (the claim must be filed within 1 year, or 2 years for an Indian Child)
West Virginia	Ann. Code §§ 48-22-301; 48-22-302; 48-22-303; 48-22-304; 48-22-305; 49-3-1	Yes - age 12 (the court may dispense with consent if it is in the best interest of the child)	Waiting period of 72 hours (3 days) after birth	Consent was obtained by fraud, duress, or coercion (the claim must be filed within 6 months); if the birth parents and adoptive parents mutually agree to withdraw
Wisconsin	Ann. Stat. §§ 48.028; 48.415; 48.41; 48.42; 48.46(2); 48.837	Yes - age 12	Any time after birth	Consent was obtained by fraud, duress, or coercion
Wyoming	Ann. Stat. §§ 1-22-109; 1-22-110	Yes - age 14	Any time after birth	Consent was obtained by fraud, duress, or coercion

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Alabama	Ann. Code § 26-10A-30	Visitation of natural grandparents in relative adoption	Natural grandparents and the relative (and spouse) who adopted the child	Yes, if in the best interest of the child		
Alaska	Alaska Stat. §§ 25.23.130(c); 47.10.089(d); 25.23.180(k), (l); 47.10.089(f)&(g); 25.23.180(l); 47.10.089(g)&(j)	Future contact (communication and visitation) may be retained, but it must be in writing and described with specificity	Adopted child and the child's natural parents or other natural relative of the adopted child	Court shall incorporate retained privileges (if in writing and with specificity) in the termination order and recommend they be in the adoption decree	May seek enforcement, but may not seek termination of the relinquishment because the privileges are being withheld	Yes, if by clear and convincing evidence it is in the best interest of the child
American Samoa	None found					
Arizona	Rev. Stat. Ann. § 8-116.01	Communication between child and birth parents; agreement must contain a clause that communication will be terminated if not in best interest of child and must contain a clause specifying continued jurisdiction of the court to enforce and modify; failure to comply with the contract is not grounds for termination of adoption	Adoptive parents, birth parent concerned and the division of agency with whom the child is in the custody of.	Court determines if it is in the best interest of child (taking the child's wishes into consideration if 12 years or older); court where decree of adoption was entered retains jurisdiction over the matter; good faith attempt of mediation required before court will hear any issues	Must be in writing and approved by the court; failure to comply is not grounds for termination of the adoption	Modification can be made if in the best interests of the child
Arkansas	None found					
California	Fam. Code § 8616.5; Welf. & Inst. Code § 366.29	Limited to provisions about visitation, future contact, and information sharing; agreement will contain (in bold print), that adoption will not be set aside for failure to comply with the agreement, will not serve as a basis for affecting child custody, and no action will be taken by the court unless petitioner has attempted mediation in good faith	Adoptive parent(s), birth relatives, the child (and, if governed by the Indian Child Welfare Act, then the child's Indian Tribe); child will be a party to the agreement and if child is 12 or older, then he or she must consent in writing to the agreement and any modification	Court may grant postadoption privileges in accordance with an agreement.	Jurisdiction falls under court that issued the petition of adoption; court may not set aside adoption because of a failure to comply with terms in the agreement (but see statute for exceptions); enforcement must be in best interest of child	If all parents agree to termination or modification or the court finds it is in the best interest of the child, there has been a substantial change to circumstances that warrant it, or after participation or good faith participation in mediation
Colorado	None Found					
Connecticut	Gen. Stat. §§ 45a-715(h); 45a-715(i); 45a-715(j); 45a-715(k); 45a-715(m); 45a-715(n)	May include communication, future visits, and maintenance of medical history; agreement must include that adoption is irrevocable and that birth parent(s) may seek enforcement of agreement; no presumption of contact in absence of an agreement	Birth parent(s) and adoptive parents; only applicable to the birth parent(s) who is a party to the agreement	Must approve postadoption agreement and determine if it is in best interest of child	Enforceable but must contain a provision stating that adoption is irrevocable and that the agreement may be enforced	Court will not act unless there is a good faith attempt or participation in meditation; modifications or termination possible when in best interest of child

[4] Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Jun. 2014), https://www.childwelfare.gov/pubPDFs/cooperative.pdf. The information in this appendix is not a substitute for the complete statute. The statutes contain important additional information, to include other requirements and exceptions not noted here. Further, states continually change and update statutes, so ensure you review the current language of the state statutes and applicable regulations.

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Delaware	Ann. Code Tit. 13, § 929	Exchange of identifying information may take place up to the finalization of the adoption	Written consent for the exchange of information must be obtained by adoptive parents, birth parents, and child (if aged 14 or older); department or licensed agency may prevent this if it deems it is not in best interest of child			
District of Columbia	Ann. Code § 4-361	Written postadoption contract agreement for contact; children aged 14 or older must consent in writing to contact	Adoptive parent(s), birth parent or other birth relative	Family Court of the Superior Court must enforce if in best interest of child; if child was the subject of a child abuse or neglect case, court will review postadoption agreement prior to finalizing adoption to determine best interest of child	Failure to comply will not be grounds to set aside the adoption	Court may modify agreement if it finds it is in best interest of child; parties must attempt to participate or participate in good faith in meditation before bringing the matter to the court; adoptive parents select mediator
Florida	Ann. Stat. § 63.0427	Court may consider appropriateness of communication, to include visits, written correspondence, or telephone calls	Child has the right to have contact with his or her siblings and (with agreement of adoptive parents) shall have the right to have contact with birth parents or biological relatives	Court determines if contact is in best interest of child based on several factors (see statute) and determines nature/frequency of contact; this will be part of final adoption decree, but failure to comply will not terminate adoption; also, this will not affect the adoptive parents' ability to move outside state with child		Adoptive parents may petition for termination or modification at any time when they deem it in the best interest of the child; court can order it if it deems the same; contact cannot be increased without consent of adoptive parents
Georgia	Ann. Code § 19-8-27	May include visitation, contact, sharing of information about the child or birth relatives; must contain (in 14-point bold font) that adoption cannot be set aside for failure to comply or changing of the agreement; adoption or orders of child custody will not be affected by disagreement between the parties or litigation regarding agreement	Child who is 14 or older, adoptive parent(s), birth parent(s), and birth relative (see statute for further explanation of birth relatives)	Court that issued final adoption decree maintains jurisdiction for purposes of agreement; parties may specifically waive enforcement, or modification and may terminate agreement	If in writing and signed by all parties to the agreement	Modification or termination possible if all parties have voluntarily signed the modified postadoption agreement; court may terminate or modify if it finds (preponderance of evidence) it is in best interest of child; mediation may be required before court will hear issue
Guam	None found					
Hawaii	None found					
Idaho	None found					

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Illinois	None found					
Indiana	Ann. Code §§ 31-19-16-1; 31-19-16-2; 31-19-16-3; 31-19-16-4; 31-19-16-6; 31-19-16-9; 31-19-16.5-1; 31-19-16.5-2; 31-19-16.5-4; 31-19-16.5-5	Privileges may not include visitation; agreement must contain provisions where: (1) birth parents acknowledge adoption is irrevocable even if adoptive parents do not abide by the terms of the postadoption agreement and (2) acknowledgement by adoptive parents that birth parents may seek enforcement of postadoption agreement	Court grants postadoption privileges to birth parents who consented to the adoption or voluntarily gave up parental rights; court may order adoptive parents to provide specific postadoption contact with a sibling if child is older 2 (if court deems it in best interest of child and adoptive parents consent); postadoption contact for child under the age of 2 need not be court-approved	Court may grant if it deems it in best interest of child, child is at least 2, and court finds an emotional attachment, the adoptive parents consent, the child is at least 12 years of age and consents, or based on the recommendation of persons listed in the statute	Court hears petitions to compel compliance; court may appoint attorney ad litem if child's interests differ from those of adoptive parents	Adoptive parents or both parents may file petition for termination or modification and court can do so if in best interest of child; to determine best interest of child, court appoints guardian ad litem or court-appointed special advocate
Iowa	None found					
Kansas	None found					
Kentucky	None found					
Louisiana	Children's Code Arts. 1264; 1269.2; 1269.3; 1269.4; 1269.5; 1269.6; 1269.8	Must be in writing and signed by adopting parents and any adult granted contact; agreement may provide for exchange of information, communication, or direct visitation; court may refer parties to mediation in drafting agreement and may also appoint independent counsel to represent best interest of child (see statute for provisions that must be declared in agreement)	In agency adoptions (the department is the custodian of the child), court may approve an agreement if the person the child will have contact with had a relationship with the child previously and loss of the relationship will cause substantial harm to the child or contact will otherwise be in the best interest of the child	Agreement must be filed within 10 days after petition is filed (good cause must be shown if filed later than 10 days); if either side objects, then court may hold a hearing prior to approving agreement; court will incorporate the agreement if it is in best interest of child; if court rejects agreement, it will provide specific findings of fact to support the decision	Only if filed with the court and approved; failure to comply with agreement is not terms for termination of adoption	Court that had jurisdiction after final decree of adoption maintains jurisdiction and hears motions of termination or modification; parties will be referred to mediation prior to hearing the motion; any modification or termination will only be ordered when in best interest of child
Maine	None found					
Maryland	Fam. Law §§ 5-308; 5-525.2	Authorized while child is a minor	Adoptive parent may enter into a written agreement with a birth parent or former parent; a sibling may petition the court for reasonable sibling visitation rights	Court refers parties to meditation if a dispute arises (see statue for more information on enforcement of sibling visitation)	Yes, unless not in best interest of child	If modification is justified because of exceptional circumstances and court finds that modification to be in best interest of child

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Massachusetts	Gen. Laws Ann. Ch. 210, §§ 6C; 6D	Postadoption agreement on communication may be entered into prior to entry of an adoption decree (see statute for provisions agreement must include); agreement must be in writing and signed before a notary public; if child is above age 12 his or her written consent is required and if child is in custody of Department of Children and Families or licensed child care agency, then that entity will provide written approval of agreement)	Birth parents and adoptive parents	Court approves an agreement if it is entered voluntarily and knowingly and is in best interest of child	Yes, as long as it is in writing, approved by the court prior to entry of the adoption decree, and incorporated in the adoption decree; agreement will cease to be enforceable when child turns 18	Court may modify agreement if there has been a material and substantial change in circumstances and court finds it in best interest of child
Michigan	None found					
Minnesota	Ann. Stat. § 259.58	Authorized regarding communication, contact, or visitation	Adoptive parents, birth parents, birth relatives that the child lived with prior to adoption, or any other birth relatives if child is being adopted by a relative upon the death of his or her birth parent or foster parents	Order may be sought from the court at any time prior to the decree of adoption; court will only approve the order if it is in writing and the necessary parties consent	Only if agreement is in writing and entered in accordance with the statute; failure to comply with the terms of the agreement is not grounds for termination of the adoption	Order will only be modified if court finds it in best interest of child, parties have agreed to it, and modification is result of exceptional circumstances that have resulted since the initial order
Mississippi	None found					
Missouri	Ann. Stat. § 453.080(4)	Prior to completion of adoption, exchange of information is authorized at discretion of the parties; after adoption has been finalized, contact is at discretion of adoptive parents	Parties to the adoption	Court will not have jurisdiction to deny continuing contract or exchange of information		
Montana	Ann. Code § 42-5-301	Written agreement completed after relinquishment and consent to adopt is authorized and independent of the adoption proceedings	Placing parent and the prospective adoptive parents	Agreement is valid if it is after relinquishment and consent, but failure to comply with terms does not set aside adoption decree	Agreement will not be enforced if it is detrimental to the child, undermines the adoptive parents' authority, or compliance is unduly burdensome	

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Nebraska	Rev. Stat. §§ 43-155; 43-156; 43-157; 43-158; 43-159; 43-160; 43-162; 43-163; 43-165	Department of Health and Human Services determines if exchange of information is in best interest of child; if so, it is a 2-year, renewable obligation, voluntarily agreed to and signed by adoptive parents, birth parents, and the department	Birth parents, adoptive parents, and the department	Court appoints guardian ad litem to represent best interest of child prior to approving 2-year agreement; agreement may only be approved if in best interest of child (see statute for factors to be considered in determining if exchange of information is in best interest of child)	Yes, as long as it was approved by the court	Modifications may be made by parties with consent of all parties if it is determined that original terms of agreement are no longer in best interest of child; court may modify agreement if in best interest of child, modification is agreed to by adoptive and birth parents, and exceptional circumstances have arisen since original agreement
Nevada	Rev. Stat. §§ 127.187; 127.188; 127.1875; 127.1885; 127.1895	Agreement must be in writing, signed by parties, and incorporated into order of decree of adoption	Child, adoptive parents and birth parents	Court that incorporates agreement into adoption decree retains jurisdiction	Yes, but any motion to enforce must be filed with court within 120 days of breach	Only adoptive parents may petition court for modification or termination of agreement; request to modify or terminate is granted if court finds it in best interest of child and both parties agree to termination or modification
New Hampshire	Rev. Stat. § 170-B:14	Agreement is enforceable if made knowingly and voluntarily; if child is in custody of Department of Health and Human Service, agreement must be voluntary and mediated (see statute for additional provisions that must be contained in agreement); agreement must be signed by a notary public	Department, adoptive parents, and birth parents may all take part in court-approved meditation to reach a mediated agreement; if child is 14 or older, then agreement must contain child's written consent	Court approves agreement if it determines that agreement is in best interest of child and agreement was made knowingly and voluntarily (see statute for list of factors court considers in determining best interest of child)	Unless department is a party, agreement will not be enforceable; agreements where department is a party are enforceable; enforcement will not affect validity of adoption decree	Modification or termination can be sought from court with original jurisdiction; before filing with court, moving party must show he or she participated or attempted to participate in mediation in good faith; court may modify or terminate agreement if material and substantial change in circumstances and it is in best interest of child
New Jersey	None found					

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
New Mexico	Ann. Stat. § 32A-5-35	Agreements are authorized and are presumed to be in the best interest of the child without evidence to the contrary; agreement may include such contact as exchange of information or visitation	Adopted parents and birth parents; if involving contact with a sibling, then the sibling's parent, or legal guardian must consent	Court may appoint guardian ad litem, especially in cases involving visitation; if child is 14 or older, court may appoint attorney for child and child's wishes will be taken into consideration when determining child's best interest	Court that entered adoption decree retains jurisdiction	Only if the moving party shows that they has been a change of circumstances and that the agreement is no longer in the child's best interest.
New York	Soc. Serv. Law § 383-c(2)(b); Dom. Rel. Law § 112-b Soc. Serv. Law § 383-c(2)(b); Dom. Rel. Law § 112-b; Fam. Crt. Act § 1055-a	Agreements are authorized and contain terms and conditions for communication and contact	Parties to the adoption	Court in which surrender document is presented determines whether agreement is in best interest of child and approve if it is; if agreement is not approved, court will give birth parents opportunity to withdraw from surrender before approving surrender instrument	Agreement can be enforced as soon as it is approved, even before adoption is finalized; to be enforceable, agreement must be in writing and incorporated into written court order and is in best interest of child	
North Carolina	Gen. Stat. § 48-3-610	Agreement may be entered, but may not be a condition to consent; failure to comply with agreement does not invalidate consent	The person giving consent and the adopting parents		No	
North Dakota	None found					
Northern Mariana Islands	None found					
Ohio	Rev. Code §§ 3107.62; 3107.63; 3107.65	Authorized, but with limitations; agreement not allowed for such things as shared authority over child, deny adoptive parents access to social or medical histories, provide that agreement to an open adoption be binding or enforceable (see statute for complete list of prohibited provisions)	Birth parents and adoptive parents	Probate court will not deny final decree of adoption just because it contains a provision that adoption remain open; exception to this is if court determines an open adoption is not in best interest of child	Open adoption agreement is nonbinding and nonenforceable	Agreement is voluntary and any person may withdraw at any time

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Oklahoma	Ann. Stat. Tit. 10, § 7505-1.5	Agreement may be entered between adoptive parents and birth relative, which includes birth parent (if child lived with birth relative before being adopted) before or after adoption proceedings	Adoptive parent and the birth relative	Court will only enter proposed agreement if approved in writing by adoptive parents and birth relative, and agreement is in best interest of child	Agreement is only enforceable if it is contained in a written court order in accordance with the statute; failure to comply with terms of agreement will not necessarily result in setting aside adoption decree	Agreement may be modified based on a petition of a party, but court must determine that both parties agree to modification and that exceptional circumstances have arisen justifying the modification
Oregon	Rev. Stat. § 109.305	Authorized and must be approved by court	Adoptive parent and birth relative	Written agreement must be approved by court and agreement must be incorporated by reference into adoption judgment	Agreement may be enforced, but before court can enter an order it must be demonstrated that the moving party attempted or participated in good faith in mediation	Agreement may be modified by court if it finds it in best interest of child, mediation was sought prior to seeking modification, modification is agreed to by original parties to agreement, and exceptional circumstances have arisen since original agreement that give rise to need for modification
Pennsylvania	Cons. Stat. Tit. 23, §§ 2731; 2733; 2734; 2735; 2736; 2737; 2738; 2739	Authorized if it is in best interest of child, is appropriate based on role of individuals in child's life, recognizes parties' desires and interests for ongoing contact or communication, and is approved by the court	Adoptive parents and birth relative; if agreement involves contact with a sibling with whom the parents do not have parental rights, then the sibling will have an attorney ad litem representing his or her interests; if child is 12 years or older, then child must consent to agreement	Agreement will be filed with court that finalized adoption; court will approve agreement if it finds agreement was made knowingly and voluntarily and is in best interest of child (see statute for list of factors court considers in determining best interest of child)	Yes, as long as it is court-approved on or before date of adoption decree; to issue an order to enforce, court must find that moving party is in substantial compliance with terms and that it is in best interest of child; failure to comply with terms of agreement will not be grounds to set aside adoption decree	Only adoptive parent or child 12 or older may seek modification of agreement; to modify, court must find by clear and convincing evidence it is in best interest of child
Puerto Rico	None found					

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Rhode Island	Gen. Laws § 15-7-14.1	Agreements are authorized and must contain an acknowledgement by birth parents that adoption is irrevocable even if terms of agreement are not complied with and acknowledgment by adoptive parents that birth parents may seek to enforce agreement	Adoptive parents and birth parents	Court may grant birth parents postadoption privileges of visitation, contact or exchange of information; these privileges may be granted if court determines it is in best interest of child, court finds a significant emotional attachment between child and birth parent, there is a jointly negotiated and executed postadoption privileges agreement filed with and approved by court, any department, attorney ad litem, or licensed child placing agency recommending approval of agreement and consent of child if child is 12 or older	Yes, but failure to comply with terms does not revoke decree of adoption	Either party can seek modification and court can modify or terminate at any time before or after adoption if deemed best interest of child
South Carolina	Ann. Code § 63-9-760(D)	Authorized before entry of decree, but does not affect validity of final adoption decree	Adoptive parents and birth parents	Court has no involvement	No	
South Dakota	Codified Laws § 25-6-17	Not allowed except in cases of natural party being granted privileges by adopting stepparent or in cases of voluntary consent and there is a preadoption agreement	Adoptive parents and birth parents in situation of voluntary consent and there is a preadoption agreement; and in stepparent adoptions, parties to the adoption	Courts do not have jurisdiction over these agreements	Not addressed. However, postadoption visitation is an extreme remedy and may only be exercised by adoptive parents when deemed in best interest of child	
Tennessee	Ann. Code § 36-1-121(f)	Nothing prohibits open adoptions but no conditions can be placed on adoption by adopting parent	Sole discretion of adopting parents	Court has no involvement other than to ensure nothing prohibits open adoptions; visitation and contact is in sole discretion of adopting parents	No	

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Texas	Fam. Code §§ 161.2061; 161.2062	Order of termination may allow for exchange of information, written communication, or limited contact	Biological parents and Department of Protective and Regulatory Services	Court may allow limited post-termination contact if in best interest of child	May be enforced if moving party shows mediation was attempted in good faith prior to filing	No
Utah	Ann. Code § 78B-6-146	Agreement is authorized but it must describe specifics of any visits, degree of supervision during a visit, what information will be provided, if any, ground on which adoptive parents may decline to permit visits or provide information, and that the state presumes adoptive parents' judgment is in best interest of child in any action to enforce, modify, or terminate; agreement cannot limit adopting parents' ability to move outside state	Adoptive parents and birth parents or birth relatives; birth parents are not required to be a party if contact is sought with a birth relative	Court with jurisdiction over adoption decree retains jurisdiction over agreement; failure to comply with agreement is not grounds to set aside adoption	Yes, if court-approved, signed by all parties, and approved by child if 12 years or older (see statute on how a party overcomes presumption that actions of adopting parents are in best interest of child)	Only with consent of adoptive parents
Vermont	Ann. Stat. Tit. 15A, §§ 1-109; 4-112	Stepparent adoptions only; written agreements for visitation or communication authorized	Stepparent adoptions only; person, petitioner, petitioner's spouse, child (if 14 or older), and, if placed by an agency, then the agency	Stepparent adoptions only; court may enter order if deemed in best interest of child; (see statute for factors court considers in determining best interest of child)	Only in stepparent adoptions if enforcement is in best interest of child; failure to comply is not grounds to set aside adoption	Stepparent adoptions only; modification can only take place if court determines it is in best interest of child, parties to order request modification, and exceptional circumstances since issuing the original order justify modification
Virgin Islands	None found					
Virginia	Ann. Code §§ 16.1-283.1; 63.2-1220.2; 63.2-1220.3; 63.2-1220.4	Agreements are authorized and must contain acknowledgement by birth parents that adoption is irrevocable even if terms of agreement are not complied with and acknowledgment by adoptive parents that birth parents may seek to enforce; documents are referred to as written postadoption contact and communication agreement	Adoptive parents and birth parents	Court considers agreement at permanency planning hearing and, if all requirements are met, court incorporates them into order; court determines if it is in best interest of child, whether the parties consented, and that agency authorized to consent to adoption and/or attorney ad litem recommends approving agreement	Enforceable if approved by circuit court and incorporated into final order of adoption; court appoints attorney ad litem before hearing a motion to compel compliance	Any party may move for modification and court may grant modification if it in child's best interest; moving party must establish change in circumstances that makes the current agreement no longer in child's best interest

State	Postadoption Agreement State Statutes	What May Be Included in Postadoption Agreements	Who May be a Party to the Agreement	Court Oversight of the Agreement	Legally Enforceable	May be Terminated or Modified
Washington	Rev. Code §§ 26.33.295; 26.33.420; 26.33.430	Authorized	Adoptive parents and birth parents	Court only approves agreement if it is in writing and approved by parties (to include representatives of department of licensed child-placing agency if child is in their custody); agreement will not be approved by court unless it is in best interest of child	Enforceable if it is written and in accordance with statute requirements; prevailing party in enforcement action may be awarded attorney fees in a reasonable amount (fixed by court)	Agreement may be modified by court if court finds it in best interest of child, modification is agreed to by original parties to agreement, and exceptional circumstances have arisen since the agreed upon order
West Virginia	Ann. Code § 48-22-704			No decree of order will be vacated or set aside based on allegations of failure to comply with agreement for visitation or communication with adopted child	Court may hear a petition for enforcement and determine if enforcement is in best interest of child	
Wisconsin	Ann. Stat. § 48.925(1)-(4)		Stepparent and relative adoptions only; relative may petition for visitation if that relative has maintained a parent-child-like relationship within 2 years prior to filing	Court will determine if it is in the best interest of child; adoptive parents' relationship with child will not be undermined and petitioner will not act in a manner contrary to parenting decisions of adoptive parent; court will take child's desires into consideration when possible; restrictions on petitioners who have certain convictions (see statute for more information)	Order for visitation is enforceable and anyone who interferes will be held in contempt (only remedial sanctions will be imposed)	
Wyoming	None found					

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 TJAGLCS 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 servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

d. The ATRRS 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 ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS 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 ATRRS 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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

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
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 Law School
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

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968

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

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade judge advocates (JA). It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please go to JAG University at https://jagu.army.mil. At the home page, find JAOAC registration information at the "Enrollment" tab.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have completed and passed all non-writing Phase I modules by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline. Students must have submitted all Phase I writing exercises for grading by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline.

d. Phase II includes a mandatory Army Physical Fitness Test (APFT) and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact LTC Andrew McKee at (434) 971-3357 or andrew.m.mckee2.mil@mail.mil.

5. Mandatory Continuing Legal Education

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

b. 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.

c. 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.

d. Regardless of how course attendance is documented, it is the personal responsibility of JAs 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 JAs 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.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primarily mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the "Public" side of JAGCNet by using the following link: http://www.jagcnet.army.mil. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the "Legal Center and School" link across the top of the page. The page will drop down.

(2) If you want to view the "Army Lawyer" or "Military Law Review," click on those links as desired.

(3) If you want to view other publications, click on the "Publications" link below the "School" title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the "Law Library" that will provide access to additional resources.

c. If you have access to the "Private" side of JAGCNet, you can get to the TJAGLCS publications by using the following link: http://www.jagcnet2.army.mil. Be advised that to access the "Private" side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the "TJAGLCS" link across the top of the page and click on it. The page will drop down.

(2) Find the "Publications" link under the "School" title and click on it.

(3) There are several other resource links there as well. You can find links the "Army Lawyer," the "Military Law Review," and the "Law Library."

d. Access to the "Private" side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

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

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

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

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: https://www.jagcnet.army.mil/Register.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

g. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. Contact information for TJAGLCS faculty and staff is available through the JAGCNet webpage at https://www.jagcnet2.army.mil. Under the "TJAGLCS" tab are areas dedicated to the School and the Center which include department and faculty contact information.

b. TJAGLCS resident short courses utilize JAG University in a "blended" learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop or tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO username and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short course operations and JAGU course access are provided in separate correspondence from a Course Manager.

c. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 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 TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Distributed Learning and JAG University (JAGU)

a. *JAGU:* The JAGC's primary Distributed Learning vehicle is JAG University (JAGU), which hosts the Blackboard online learning management system used by a majority of higher education institutions. Find JAGU at https://jagu.army.mil.

b. *Professional Military Education:* JAGU hosts professional military education (PME) courses that serve as prerequisites for mandatory resident courses. Featured PME courses include the Judge Advocate Officer Advanced Course (JAOAC) Phase 1, the Pre-Advanced Leaders Course and Pre-Senior Leaders Course, the Judge Advocate Tactical Staff Officer's Course (JATSOC) and the Legal Administrator Pre-Appointment Course.

c. *Blended Courses:* TJAGLCS is an industry innovator in the 'blended' learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop, iPad, tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO user name and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short-course operations and JAGU course access are provided in separate correspondence from a Course Manager.

d. *On-demand self-enrollment courses and training materials:* Self enrollment courses can be found under the 'Enrollment' tab at the top of the JAGU home page by selecting course catalog. Popular topics include the Comptrollers Fiscal Law Course, Criminal Law Skills Course, Estate Planning, Law of the Sea, and more. Other training materials include 19 Standard Training Packages for judge advocates training Soldiers, the Commander's Legal Handbook, and specialty sites such as the SHARP (Sexual Harassment/Assault Response and Prevention) site and the Paralegal Proficiency Training and Resources site.

e. *Streaming media:* Recorded lectures from faculty and visiting guests can be found under the JAGU Resources tab at the top of the JAGU home page. Video topics include Investigations Nuts and Bolts, Advanced Contracting, Professional Responsibility, Chair Lectures and more.

f. *Naval Justice School Online (NJS Online):* JAGU is also the home of the Naval Justice School Online Legal Education Program. Find it by going to the JAGU home page and selecting the 'NJS Online' tab. NJS Online features 'LAWgos,' which are "shot in the arm" self-paced chunks of targeted learning in various topics. NJS Online also features

multi-week courses taught over a number of weeks with facilitated instruction. Most courses are open enrollment for servicemembers across the DOD.

g. *Contact information:* For more information about Distributed Learning/JAGU, contact the JAGU help desk at https://jagu.army.mil (go to the help desk tab on the home page), or call (434) 971-3157.

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

PERIODICALS

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