SOLO DESKBOOK

The Judge Advocate General's School

United States Army

Charlottesville, Virginia

FY 2004

SENIOR OFFICER LEGAL ORIENTATION DESKBOOK

TABLE OF CONTENTS

CRIMINAL LAW SUBJECTS

CORE SUBJECTS:

CHAPTER 1	MISCONDUCT: OPTIONS & DUTIES OF THE COMMANDER
CHAPTER 2	ADVERSE ADMINISTRATIVE ACTIONS
CHAPTER 3	OFFICER SEPARATIONS
CHAPTER 4	ENLISTED SEPARATIONS
CHAPTER 5	NONJUDICIAL PUNISHMENT
CHAPTER 6	INTRODUCTION TO JUDICIAL ACTIONS
CHAPTER 7	UNLAWFUL COMMAND INFLUENCE
CHAPTER 8	SEARCH & SEIZURE
CHAPTER 9	SELF-INCRIMINATION, CONFESSIONS, & IMMUNITY
CHAPTER 10	IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION
CHAPTER 11	CHILD/SPOUSE ABUSE & THE LAUTENBURG AMENDMENT
CHAPTER 12	THE AMHERST PROBLEM & EVERYDAY PROBLEMS IN ADMINISTRATIVE LAW

ELECTIVE SUBJECTS:

CHAPTER 13	SENTENCING & MILITARY CORRECTIONS
CHAPTER 14	SELECTED PROBLEMS IN THE PROTECTION OF THE MILITARY INSTALLATION

ADMINISTRATIVE & CIVIL LAW SUBJECTS

CORE SUBJECTS:

CHAPTER 15	INTRODUCTION TO ADMINISTRATIVE & CIVIL LAW
CHAPTER 16	HANDLING SEXUAL HARASSMENT COMPLAINTS
CHAPTER 17	ADMINISTRATIVE INVESTIGATIONS
CHAPTER 18	ENVIRONMENTAL LAW
CHAPTER 19	JUDICIAL REVIEW OF MILITARY ACTIVITIES, LEGAL REPRESENTATION, & OFFICIAL IMMUNITY
CHAPTER 20	STANDARDS OF CONDUCT

ELECTIVE SUBJECTS:

CHAPTER 21	MWR & NONAPPROPRIATED FUND INSTRUMENTALITIES
CHAPTER 22	COMMAND AUTHORITY and the REGULATION OF SPEECH, POLITICS, & RELIGION
CHAPTER 23	GOVERNMENT INFORMATION PRACTICES
CHAPTER 24	ENVIRONMENTAL LAW ELECTIVE
CHAPTER 25	EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 26	LAW OF FEDERAL EMPLOYMENT
CHAPTER 27	FEDERAL LABOR-MANAGEMENT RELATIONS
CHAPTER 28	EMERGENCY-ESSENTIAL CIVILIANS ACCOMPANYING THE FORCE/CIVILIANS ON THE BATTLEFIELD
CHAPTER 29	RC LEGAL ISSUES FOR AC COMMANDERS
CHAPTER 30	SOLDIER SUPPORT TO FAMILY MEMBERS
CHAPTER 31	CONSUMER LAW FOR LEADERS
CHAPTER 32	SURVIVOR BENEFITS
CHAPTER 33	MEDICAL/LEGAL ISSUES
CHAPTER 34	FOREIGN & DEPLOYMENT CLAIMS
CHAPTER 35	REPORTS OF SURVEY

CONTRACT & FISCAL LAW SUBJECTS

CORE SUBJECTS:

CHAPTER 36 FISCAL LAW FOR COMMANDERS

ELECTIVE SUBJECTS:

CHAPTER 37 COMPETITIVE SOURCING AND PRIVATIZATION
CHAPTER 38 FUNDING U.S. MILITARY OPERATIONS

INTERNATIONAL & OPERATIONAL LAW SUBJECTS

CORE SUBJECTS:

CHAPTER 39 OPERATIONAL LAW OVERVIEW
CHAPTER 40 MEANS & METHODS OF WARFARE

ELECTIVE SUBJECTS:

CHAPTER 41 RULES OF ENGAGEMENT
CHAPTER 42 DOMESTIC SUPPORT OPERATIONS
CHAPTER 43 POST-CONFLICT GOVERNANCE

CENTER FOR LAW & MILITARY OPERATIONS

CHAPTER 44 JAGC DOCTRINE - FM 27-100

CHAPTER 1

MISCONDUCT: OPTIONS AND DUTIES OF THE COMMANDER

PART I - COMMANDER'S OPTIONS

Introduction

At every level of command a number of options are available to a commander who is confronted by a military justice problem. This part concerns the various measures for dealing with an accused prior to trial as well as an examination of the various forums and administrative measures which a commander may use.

A. Pretrial Restraint

1. In General. Pretrial restraint is an actively developing area of the law. Also, some locations have other specific rules or procedures. Consult your local judge advocate. What if a soldier in your unit has committed an offense under the Uniform Code of Military Justice? What do you do with him or her pending court-martial? The short answer is "[a]n accused pending charges should ordinarily continue the performance of normal duties within his or her organization while awaiting trial." AR 27-10, para. 5-14. Specific circumstances, such as the need to ensure the soldier's presence at trial, to prevent criminal misconduct such as intimidation of witnesses, injury to others, or threatening the safety of the community or the effectiveness, morale, or discipline of the command, may move a commander to place a soldier under pretrial restraint. UCMJ art. 10; R.C.M. 305(h)(2)(B). As the soldier is presumed innocent until convicted, the restraint may not be punishment and must be the least restrictive restraint adequate to meet the circumstances which require the restraint. UCMJ art. 13; R.C.M. 305(h)(2)(B)(iv).

2. Types of Pretrial Restraint. There are four types of pretrial restraint. From least severe to most severe they are:

a. Conditions on liberty. Conditions on liberty are defined as "orders directing a person to do or refrain from doing specified acts." R.C.M. 304(a)(1). Conditions on liberty would include orders to a soldier not to go to the location of an offense or not to approach a victim of an offense or witnesses. Conditions may be imposed separately or with other forms of restraint. Imposing conditions on liberty does not trigger the 120-day speedy trial rule.

b. Restriction. Formally called "restriction in lieu of arrest," restriction is "the restraint of a person by oral or written orders directing the person to remain within specified limits." R.C.M. 304(a)(2). A soldier under restriction normally performs his or her usual duties. Common terms of restriction are, "to your place of duty, company (or battalion) area, dining facility, and chapel." Restriction triggers the 120-day speedy trial rule. (If "tantamount" to confinement, it may trigger more stringent rules; see Part II, paragraph F).

c. Arrest. "Arrest" is defined as orders "directing the person to remain within specified limits." R.C.M. 304(a)(3). The limits of arrest are generally tighter than those of restriction and a person in arrest does not perform "full military duties," such as commanding, bearing arms, or serving guard, but may "do ordinary cleaning or policing, [or] routine training and duties." R.C.M. 304(a)(3). The distinction between "arrest" and "restriction" is largely a matter of degree and is important as arrest triggers more stringent speedy trial requirements. The term of "arrest" as a form of pretrial restraint is distinguishable from the common civilian meaning, which is to take into custody. In military usage "apprehension" is the equivalent of "arrest" in civilian terminology. Arrest triggers the 120-day speedy trial rule and may trigger more stringent rules (see Part II, paragraph F).

d. Pretrial Confinement. Pretrial confinement is the physical restraint of a soldier pending trial. It also triggers the 120-day speedy trial rule and may trigger more stringent rules. (see Part II, paragraph F).

3. Administrative restraint. Administrative restraint is not the same as pretrial restraint. Limitations placed on a soldier for operational, medical, or other military purposes, independent of military justice are not pretrial restraint. "Administrative restraint" placed on a soldier pending trial, however, will be scrutinized to ensure it serves purposes wholly independent of military justice.

4. Authority to Order Pretrial Restraint. Generally, any commissioned officer may order the pretrial restraint of an enlisted soldier. Only the commander may order pretrial confinement of officers within his command. Authority may also be withheld by a superior commander, which frequently occurs pursuant to local regulations. The commander must review the decision to order to pretrial confinement within 72 hours. Consultation with your legal advisor is always appropriate prior to imposing pretrial restraint.

5. Pretrial Confinement.

a. In General. As pretrial confinement is the most stringent pretrial restraint, specific procedures must be followed in putting a soldier in pretrial confinement. "In any case of pretrial confinement, the SJA concerned, or that officer's designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27-10, para. 5-14. Upon confinement, the soldier must be informed of the nature of the offenses for which held, the right to remain silent and that any statement made may be used against him, the right to civilian counsel at no expense to the United States and to assignment of military counsel, and the procedures by which the confinement will be reviewed. R.C.M. 305(e). A soldier charged only with an offense normally tried by a summary court-martial will not ordinarily be put in pretrial confinement. When no court-martial charges are pending, a person pending administrative separation will not be placed in pretrial confinement.

b. Requisites For Pretrial Confinement. Pretrial confinement of a soldier is illegal unless:

[T]he commander has probable cause (reasonable grounds) to believe that

(i) An offense triable by a court-martial has been committed;

(ii) The person to be confined committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The person to be confined will not appear at a trial, pretrial hearing, or investigation, or

(b) The person to be confined will engage in serious criminal misconduct; **AND**

(iv) Less severe forms of restraint are inadequate.

In Europe and some other places, the power of subordinate commanders to order pretrial confinement is withheld by the General Court-Martial Convening Authority and delegated to the SJA. The rationale for this delegation is that a military magistrate (usually a military judge) must review the pretrial confinement within 7 days of imposition to ensure it is legal. If illegal, the soldier will be released.

"'Serious criminal misconduct' includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." R.C.M. 305(h)(2)(B).

The soldier who is an "irritant" and a "pain in the neck" in the unit may not be confined on that basis, but the soldier who is a "quitter," who disobeys orders and refuses to perform duties, is an "infection" in the unit and may properly be confined. R.C.M. 305(h) analysis. **Less severe forms of restraint must be considered first.**

c. Commander's Memorandum. When the commander (or the SJA, depending on local procedures) determines that the requisites for pretrial confinement are met, the commander must document the determination in a memorandum. Trial counsel should assist in the drafting or editing of this important document, to which the reviewing magistrate gives great weight. The "Checklist for Pretrial Confinement," DA Form 5112-R, satisfies the memorandum requirement. AR 27-10, para. 9-5b(2).

d. Prompt Determination of Probable Cause. Within 48 hours after a soldier enters pretrial confinement, a neutral and detached probable cause review of a warrantless apprehension must occur. A commander who is not an accuser or otherwise involved in the case or by an official designated to approve a commander's pretrial confinement decision may conduct the review. Local procedures will normally prescribe how the 48-hour review will be conducted.

e. Review of Pretrial Confinement by the Military Magistrate (the "neutral and detached officer" of R.C.M. 305(i)(2)). Within 7 days after a soldier enters pretrial confinement, a military magistrate who will approve continued confinement or order the release of the soldier will review the confinement. If a soldier is ordered released from pretrial

confinement, he may not be confined again before completion of trial except upon discovery of new evidence or misconduct which justifies confinement either alone or together with all other available information.

6. Sentence Credit for Pretrial Restraint. A commander should consider that, if convicted and sentenced, a soldier will receive day for day credit on the sentence for pretrial confinement and for restriction or arrest which is "tantamount" to confinement. Restriction or arrest is "tantamount" or equivalent to confinement when the limits and conditions of restriction, taken together, show circumstances amounting to physical restraint. When a soldier is restricted to a relatively small area (such as to a floor of a barracks), has sign-in requirements each hour, is escorted from place to place, and does not perform normal duties, the restriction is likely tantamount to confinement.

In addition to the day for day sentence credit, a soldier will receive additional credit for pretrial restraint, which violates R.C.M. 305 or Article 13, UCMJ. R.C.M. 305 is violated when pretrial confinement or restriction tantamount to confinement is served as a result of an abuse of discretion or in violation of the procedural requirements of R.C.M. 305. Procedural requirements include providing military counsel to a confinee upon request, a commander's properly applying the standard for restraint and documenting the decision in a memorandum. R.C.M. 305(j)(2) and (k). Further, imposing restriction tantamount to confinement may result in the soldier receiving day-for-day credit for the restriction tantamount to confinement, plus an additional day for day credit for failing to follow the procedural rules for confinement.

A soldier will also receive credit for pretrial restraint, which violates Article 13, UCMJ, which prohibits punishment prior to trial. When the conditions of pretrial restraint do not serve a legitimate, nonpunitive purpose, the restraint will be found to be punishment. Specifically prohibited is wear of a special uniform, punitive labor, duty hours, or training. R.C.M. 304(f). Other forms of improperly singling soldiers out, *e.g.*, mass apprehensions, may also violate Art. 13.

7. Conclusion. A soldier pending charges should ordinarily continue performing normal duties in the unit while awaiting trial. If specific circumstances require pretrial restraint, the commander has ample tools available to meet the circumstances. If a soldier is put in pretrial confinement or under restriction tantamount to confinement, he or she will receive day for day credit on their sentence. If restraint is imposed in violation of certain procedural rules, or as punishment, the soldier will receive additional credit toward the sentence.

B. Nonjudicial Punishment Under Article l5, UCMJ (see separate outline).

C. Preferring Charges

Any person subject to the Uniform Code of Military Justice may prefer charges; commonly, however, the unit commander prefers charges. A person subject to the Uniform Code of Military Justice "cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility." Thus, a superior commander may not order a subordinate to prefer charges in a particular case. If a superior authority directs that charges be preferred, that superior authority becomes the accuser and, as explained later, is barred from

convening a court-martial to try the charges. When a superior authority has only an official interest in a case, he or she ordinarily will transmit the available information about the case to an officer of the command "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of any charges which appear to you to be sustained by the expected evidence."

D. Summary Court-Martial

1. Function. The summary court-martial is the lowest level trial court in the military legal system. A summary court-martial is designed for disposition of minor offenses under simple procedures. It is composed of one commissioned officer. The law specifies no particular grade for a summary court officer, and the powers are the same regardless of the individual's grade. Ordinarily, the summary court officer is a senior captain or a field grade officer.

A battalion commander normally convenes a summary court-martial. It may also be convened by anyone having the authority to convene a special or general court-martial. The summary court officer is detailed by personal direction of the convening authority.

A summary court-martial may try only enlisted soldiers for any non-capital offense punishable under the Uniform Code of Military Justice; that is, for any offense for which the punishment is something less than death. The summary court-martial, however, should be limited to relatively minor military offenses and often is used after an accused has been offered and refused nonjudicial punishment for the offense.

A summary court-martial may not try an accused over his or her objection. Prior to trial, an accused should indicate on the summary court form in writing an acceptance of disciplinary action under summary court-martial. If the accused objects to trial by summary court-martial, the summary court officer will note the objection and return the charge sheet to the convening authority for disposition. If the accused consents to trial by summary court-martial, the summary court officer will proceed with the trial.

The punishment powers of the summary court-martial are outlined in the chart on page 1-22. A summary court-martial may only confine enlisted soldiers who are serving in the grade of E-4 or below.

In a trial by summary court-martial, an accused is not entitled to be represented by military counsel but he does have the right to consult military counsel before the proceeding.. If the accused desires to be represented by a civilian attorney at no expense to the Government, the summary court officer should allow such counsel to be present.

2. Mechanics of Referral. Charges are referred to summary court-martial by the convening authority. This is accomplished by completing Section V (Referral; Service of Charges) on page 2 of the charge sheet (DD Form 458). Completion of Section V is particularly important if charges are returned to the summary court-martial convening authority by a superior command with instructions to handle the matter at the lowest level. Even if the case was referred to a higher court and subsequently withdrawn, the summary court-martial convening authority must actually refer the case to a summary court-martial by completing Section V.

3. Summary Court-Martial Procedure. Trial by summary court-martial is conducted according to the procedure outlined in R.C.M. 1301-1306 of the Manual for Courts-Martial. This has been incorporated into DA Pam 27-7, which also provides a script that should be used if an accused pleads guilty, to ensure that the accused understands the meaning and effect of the plea. The Military Rules of Evidence and the standard of proof of beyond a reasonable doubt do apply to summary courts-martial.

4. Review. At the conclusion of a trial by summary court-martial, the record of trial is forwarded to the convening authority for review. Following this initial review and action by the convening authority, the summary court-martial record is forwarded to the staff judge advocate at the supervisory general court-martial jurisdiction, usually division or installation level, for a further review.

E. Special Court-Martial (Non-BCD)

1. Functions. The special court-martial is the intermediate court in our system. A brigade commander normally convenes it. It has more sentencing power than the summary court-martial, but less than the general court-martial. Unlike the Article 15 and summary court-martial, an accused may not turn down a special or higher court-martial.

The punishment powers of the non-BCD special court-martial are outlined on page 1-22. A special court-martial may not confine an officer.

The membership of a non-BCD special court-martial may take any one of three different forms. It may consist of (l) at least three members; (2) at least three members and a military judge; or (3) solely of a military judge if the accused so requests. Special courts-martial are not currently tried without military judges. In some instances the military judge may deny an accused's request for trial by military judge alone, but special courts-martial are tried by military judge alone in the vast majority of cases when requested. If an enlisted accused requests that the court have enlisted membership, at least one-third of the court members must be enlisted soldiers.

The U.S. Army Trial Judiciary details the military judge of a special court-martial. AR 27-l0, chapter 8, covers the detailing of military judges and their administrative and logistical support.

Trial and defense counsel are detailed for each special court-martial. The trial counsel need not be a lawyer (though in practice virtually always is); however, the accused has a right to representation by counsel who is a lawyer and certified by The Judge Advocate General. As a matter of practice, both counsel are lawyers. The administrative task of making counsel available is generally handled through the offices of the responsible staff judge advocate and senior defense counsel.

A special court-martial may try anyone subject to the Uniform Code of Military Justice for any non-capital offense made punishable by the Uniform Code of Military Justice; that is, for any offense for which the maximum punishment is less than death. Special rules apply to referral of capital offenses to a special court-martial. R.C.M. 201(f)

Charges are referred for trial by a special court-martial by completing the referral portion of Section V on page 2 of the charge sheet, as in the summary court-martial described above.

2. Procedure for the Special Court-Martial. Ordinarily, a military judge presides over the special court-martial. In the rare event a judge is unavailable, the senior officer member present presides as president.

F. "BCD" Special Court-Martial

1. Distinctive Features of a "BCD" Special Court-Martial. The "BCD" special court-martial is the same as the special court-martial outlined above except that this court-martial has the power to impose a bad-conduct discharge as punishment. There are certain requirements, which must be met before such punishment may be imposed.

For a special court-martial to have the authority to impose a BCD, a qualified defense counsel and a military judge must be detailed (unless a military judge could not be detailed because of physical conditions or military exigencies), and a verbatim record must be made. In practice, all Army special courts-martial will have a military judge detailed to them. The SJA will prepare a pretrial advice IAW R.C.M. 406(b). AR 27-10, para. 5-27b.

2. "BCD" Special as an Option. The BCD special court-martial option provides a forum for cases in which a convening authority deems a punitive discharge warranted but does not feel that the charges are serious enough to deserve more than one year in confinement. Where the discharge is warranted and the case is referred to a special rather than general court, the effort that would have been expended by the Article 32 investigation process described below is saved.

G. General Court-Martial

l. Function. The general court-martial is the highest-level trial court in the military legal system and must be convened by a general court-martial convening authority after receiving the formal pretrial advice of the staff judge advocate. This court-martial tries military personnel for the most serious types of crimes.

The punishment powers of the court are limited only by the maximum punishments for each offense found in Part IV of the Manual for Courts-Martial. A general court-martial is the only court that can sentence an officer to confinement or a punitive discharge.

The general court-martial may take either of two forms. It may consist of a military judge and not less than five members, or solely of a military judge, if the accused so requests. The accused may elect trial by judge alone in all cases except those, which are referred to trial as capital cases. In all cases a military judge must be detailed to the court. An enlisted soldier is also entitled to at least one-third enlisted membership upon request.

Trial and defense counsel are detailed for each general court-martial. Both the detailed trial counsel and defense counsel at a general court-martial must be lawyers certified by The Judge Advocate General.

2. Article 32 Investigation. No charge may be referred to a general court-martial until a thorough and impartial investigation has been made in accordance with Article 32, UCMJ or the accused waives the investigation. The officer appointed to conduct this investigation should be a field grade officer or an officer with legal training and experience. Many commanders appoint line officers in all cases except the most complex in order to educate young officers in the procedures of our military justice system. The purposes of the investigation are to inquire into the truth of the matters set forth in the charge sheet, to determine the correctness of the form of the charges, and to secure information upon which to determine the proper disposition of the case. The Article 32 investigating officer performs a judicial function and must obtain legal advice from a source not involved in prosecution or defense functions.

The investigation will be conducted with the accused present and represented by a defense counsel. After the investigation, a report of investigation will be made to the officer directing the investigation. The recommendations of the Article 32 investigating officer are advisory only. The Article 32 investigation is discussed more fully in Part II of this chapter.

H. Dismissing Charges

Charges should be dismissed whenever the preliminary investigation reveals that the charges are trivial or unfounded. They should also be dismissed when no further action is deemed warranted; for example, if administrative separation is more appropriate, the charges should be dismissed. Dismissal of charges is within command discretion and if such dismissal is later deemed inappropriate, the charges may be restored.

I. Discharge In Lieu of Court-Martial (Chapter 10)

1. General. Administrative separations are important tools for dealing with minor offenses. Most separations are accomplished before charges are ever preferred against a soldier. One separation, the Chapter 10, is especially designed to operate after charges are preferred, but before action by the convening authority.

2. Discharge in Lieu of Court-Martial. AR 635-200, chapter 10, provides that an individual who is charged with an offense or offenses punishable by a bad-conduct discharge or dishonorable discharge may submit a request for discharge in lieu of trial by court-martial. The general court-martial convening authority is the approval and disapproval authority for these requests. A single exception allows delegation of approval authority to the special court-martial convening authority in limited cases.

The request is initiated by the accused and is forwarded through channels, with intermediate commanders recommending approval or disapproval. If approval is recommended, the type of discharge also is recommended. A discharge under other than honorable conditions normally is issued, but either an honorable or general discharge is also authorized. Several items ordinarily accompany the form; the individual's unit commander is responsible for aiding the accused in obtaining this information. For example, the request should include a copy of the court-martial charge sheet (DD Form 458), a medical report, all reports of investigation, a statement as to the accused's mental responsibility (often a psychiatric evaluation), and the recommendations of subordinate commanders.

This administrative option must not be used indiscriminately. In the words of the regulation:

> Commanders . . . must be selective in approving of requests for discharges in lieu of trial by courts-martial. The discharge authority should not be used when the nature, gravity and circumstances surrounding an offense require a punitive discharge and confinement. Nor should it be used when the facts do not establish a serious offense, even though the punishment, under the Uniform Code of Military Justice, may include a bad-conduct or dishonorable discharge. Consideration should be given to the soldier's potential for rehabilitation and his or her entire record should be reviewed before taking action. . . . Use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation from the Service and the member has no rehabilitation potential. (AR 635-200, para. 10-4)

J. Pretrial Agreements with the Accused

l. Definition. Negotiated pleas are an integral part of the military justice system. A negotiated plea is an agreement between the accused and the convening authority to the effect that the accused will plead guilty in exchange for some favorable action by the convening authority--generally a promise to limit an approved sentence.

2. Advantages. A commander may question why to agree to anything if the chances are good that the Government will prevail. One obvious advantage is that a plea of guilty results in saving time and personnel involved in processing charges. Also, there are specific considerations in some trials, such as the fact that a distant witness will not have to appear at trial. Thus, economy results from such an agreement. The chance for reversible error in a guilty plea case is considerably less than it is in a contested case.

3. The Rights of the Accused. An accused's guilty pleas must be entirely voluntary. Because of the possibility of abuse, it is essential that the accused's rights are fully protected when entering into a pretrial agreement. The agreement is written so that the court and the reviewing authorities know exactly what was agreed upon. In addition, because the agreement involves the rights and prerogatives of both the accused and the convening authority, both individuals must personally sign the agreement.

4. Illegal Actions. An accused may not be forced to plead guilty to any specification. For example, it is illegal for a convening authority to prefer a number of multiplicious charges and then drop some of them in exchange for a plea of guilty. Only the convening authority can enter into a pretrial agreement with the accused. Subordinate commanders must avoid "promises" or "deals" that could be construed to bind the convening authority in some sort of pretrial agreement.

5. Permissible Agreements. In exchange for a plea of guilty by the accused, the convening authority will often agree to (a) reduce the offense charged to a lesser included offense; (b) withdraw certain specifications; or (c) agree to approve only a particular sentence. If the convening authority agrees to approve a particular sentence, such as confinement for two

months, the accused gets the advantage of the agreed-upon sentence or the sentence of the court, whichever is less. Thus, if the court imposes a sentence of three months, the accused is confined for only two months because of the agreement. If, on the other hand, the court imposes a sentence of only one month, the accused is confined for one month because he gets the advantage of whichever sentence is less.

6. Criticism. Critics generally object to plea bargaining for two reasons: (1) it forces innocent people to plead guilty to offenses they did not commit; and (2) serious criminals get off with light sentences. In the military, a service member must admit under oath in open court every element of the offense before the military judge will accept his guilty plea. This process is called the providence inquiry. To prevent agreeing to a light sentence for a serious criminal, convening authorities should approve only those sentence limitations that are just and appropriate under the circumstances. Your legal advisor will assist you in making this determination.

PART II - COMMANDER'S DUTIES

Introduction

Upon receiving a charge sheet with its allied papers, a commander must examine the file and determine a proper course of action. If the commander decides to refer a case to trial, the commander must perform the duties described below.

A. Ensure There Is a Case

l. Ensure That Charges Allege Offenses. One of a commander's most irritating experiences is to send charges to trial only to have the military judge dismiss the case for failure to state an offense. The result is that the soldier who is a disciplinary problem will return to the unit. The responsibility for properly alleging an offense rests at the company level. Your trial counsel must check all specifications prior to preferral.

If all elements of the offense are not implied or specifically alleged in the specification, the specification is deficient and subject to dismissal by the military judge. Even if the military judge does not dismiss the specification, findings of guilty to specifications that do not allege an offense will be reversed on appeal. Failure to allege an offense is not remedied by a plea of guilty or proof of guilt beyond a reasonable doubt, nor is it waived by a failure to object. Careful examination of the specification before trial prevents this error and permits corrective action.

Part IV of the Manual for Courts-Martial contains a description of the various offenses under the Uniform Code of Military Justice. Each description also includes a discussion of the proof required for a conviction. The elements of the offense are those facts that the Government must prove beyond a reasonable doubt.

The practice of charging several separate offenses from what is basically a single transaction is called multiplicious charging and is prohibited. For example, if a soldier enters a billet at night and steals three items from someone's locker, charge the soldier with one larceny of three items, not three separate larcenies. Multiplicity is a difficult area of the law and the trial counsel should review all charges prior to preferral to prevent multiplicious charging.

Also avoid duplicity, that is, alleging more than one offense in a single specification. If a soldier assaults Jones at l500 and at l530 assaults Smith, he has committed two separate offenses and should be charged with two different specifications of assault. Again, if there is doubt as to what to charge, consult your trial counsel.

2. Ensure Thorough Investigation. Trial results are based upon evidence admitted at trial. Without enough evidence, there is no conviction. Too often a case will seem to fit together immediately based upon the circumstantial evidence of the moment or the commander's close proximity to the situation. It is natural to suspect that a soldier who has been a disciplinary problem is the one who committed a particular offense. It is even more inviting to assume that this soldier can be convicted of that offense. In fact, there must be admissible evidence to support each of the allegations in the specification.

At trial each element of an offense must be established by competent evidence beyond a reasonable doubt. Many proof problems concern witnesses. A witness who is not available or not credible is of little use. A convening authority should inquire of the S-l or legal specialist as to the nature and whereabouts of the witnesses. It is also important to ensure that key witnesses do not PCS or ETS prior to trial. Immediately notify the trial counsel of witnesses who may be unavailable for trial because of separation from the unit so they may legally preserve the evidence for example via deposition. The law requires the presence of material witnesses when requested by an accused, so potential defense witnesses should also be identified and their evidence preserved. If a material defense witness was properly requested but not produced at trial, the case is subject to abatement or dismissal.

Although an investigation must be thorough, it is not necessary for a commander to await the results of a CID laboratory analysis before forwarding the charge sheet. If a soldier has been found in possession of marijuana and the company commander desires to charge the soldier with a violation of Article l12a, UCMJ, the commander should process the charge sheet and send it forward even though the lab analysis is not completed. The notion that one must await the lab analysis is common in the Army and superior commanders should make their subordinates aware that there is no such requirement. Of course, the lab analysis frequently is required for proof of the offense at trial, but this is not a reason to delay processing the charge sheet.

Command emphasis is required for expeditious and accurate processing of charges. Military Police and CID Reports of Investigation, if available, should be forwarded with the charges. If these investigative reports are not completed when the company commander is ready to forward the charges, forward the charges with a statement saying that the reports will follow when they are available. Initial and interim reports, as well as the underlying witness statements, should accompany the charge sheet. Under no circumstances should a commander delay the forwarding of charges until completion of the final MP or CID Report.

B. Disposition of Charges

l. Referral to Trial. Where trial by court-martial is warranted because of the accused's prior record, the seriousness of the offense, and the needs of justice and discipline, the convening authority may dispose of the charge by referring it for trial by court-martial. The referral of a case to trial is accomplished by an appropriate endorsement on page 2 of the charge sheet, authenticated by the signature of an adjutant under the command line of the convening authority.

The determination to refer a case to trial is not governed by any hard and fast rules. Each accused's case must be separately studied, and disposition made on an individual basis. The application of policies requiring that the cases of all persons committing certain offenses be referred for trial to a particular type of court is forbidden. The determination to refer a case to trial must be based on probable cause that an offense was committed and the accused did it. The convening authority must personally make the decision to refer a case to trial; delegation of this decision-making authority is not allowed.

2. Considerations Affecting the Decision. In deciding what options are appropriate for disposition of alleged misconduct, a commander must consider several factors. The Manual

for Courts-Martial mandates referral to the lowest court-martial, which can adjudge an appropriate punishment.

In determining which court is the lowest court-martial, which can adjudge an appropriate punishment, consult the Maximum Punishments Chart in Appendix 12 of the Manual for Courts-Martial. It lists the maximum punishments for each offense. A quick look at this table will indicate that a violation of Article 121, UCMJ, larceny, is more serious than a three-day AWOL. The amount of punishment is one factor that the convening authority should consider.

It is also necessary to understand the jurisdictional limitation of the court to which a case is referred. For example, a case that warrants referral to a court that can confine an officer should not be referred to a special court-martial, which cannot confine an officer. Court-martial jurisdictional punishment limitations are set out on page 1-22.

The commander must carefully analyze the nature of the offense and must treat the offense in a manner that ensures that the policies described above are implemented; a summary court-martial is not appropriate for a serious civilian-type offense, nor is a BCD special court-martial normally appropriate for a minor military-type offense. Balancing discipline and justice, there should be consistency in military justice matters.

A commander should analyze the offense to determine if an individual victim is involved, as in an assault, or if the crime has no individual victim, such as AWOL. Also, a commander should look to see what injury or threat, if any, was inflicted upon the victim. An assault that results from an argument in the NCO Club in which the victim initiated the argument is perhaps not as serious as an assault where the victim was minding his or her own business and was assaulted for no reason at all. Whether a commander administers equal and effective justice to the unit depends in large measure upon how well the commander comes to a reasoned decision based on proper analysis. A commander who sends a simple military disorder to a general court-martial because the accused is a chronic troublemaker but disposes of a serious aggravated assault by special court-martial creates an impression that military justice is not fairly administered.

In deciding upon an action or a recommendation, a commander should take into account the character and prior service of the accused. A number of the soldiers who commit offenses are very young and on their own for the first time. Many still have a good deal of maturing to do. Thus, in some cases, a 30-year-old who becomes involved in the black market on his third tour to Korea should be dealt with more severely than an l8-year-old who had never left home before being assigned to Korea. In other cases, an older soldier with a long record of good service may merit a less severe disposition.

In addition to the soldier's age, a commander should look into the accused's military and civilian history. If a commander pursues a policy of giving everyone the "max," that commander's military justice system will have no flexibility. Soldiers who have never been in trouble before may become a permanent problem to the command if they do not feel that they were dealt with fairly by the system. Thus, it generally is unwise to impose the "max" under Article l5, UCMJ, upon a soldier who has committed his first offense by failing to report to a formation. The offender's prior military and civilian record is, of course, only one of a number of factors that the commander must consider.

An offender's mental state is also a matter to consider. This may include mental disease, intoxication, or merely low intelligence. A commander, upon examining a file, may discover that a chronic AWOL offender has a GT score of 80 and, upon interviewing the individual, may find that the soldier just does not understand the responsibilities to the unit. If there is reason to believe that an individual is not mentally responsible, a sanity board should be convened under the provisions of R.C.M. 706 of the Manual for Courts-Martial.

A number of environmental factors may have influenced the actions of an accused. Before referring a case to trial, the convening authority should inquire into any problems the soldier has. Perhaps the accused stole a small amount of money because of family financial problems. While a "personal history" is often included with the allied papers, it is sometimes incomplete and inaccurate. The convening authority should carefully review the personal history and make an additional inquiry into the soldier's background if warranted.

The convening authority should consider any rehabilitation the soldier demonstrates. In the case of a chronic offender with no hope of rehabilitation, it may be appropriate to refer the case to a court-martial that can adjudge a punitive discharge. If the soldier has performed well since the commission of the offense and seems to have rehabilitation potential, a referral to special court-martial might be appropriate.

In addition to considering the nature of the offense and the background of the offender, a commander should consider a number of command factors in disposing of a case. The recommendations of subordinates should be given due weight. The subordinates are closest to the situation and most likely know the facts. Generally, commanders rely greatly upon recommendations of their subordinates. As with everything else in military justice, however, such reliance should be tempered by caution. In addition to being closer to the facts, subordinates are also plagued by having troublemakers in their units. A court-martial may just be an easy way to get rid of an unwanted soldier.

Consider the previous disposition of similar offenses within the same command. The administration of justice should be even-handed. If one soldier is given an Article 15 for an offense and another soldier is given a special court-martial for the same offense under the same circumstances, soldiers may perceive the justice system within a command as unfair.

A commander should determine whether or not an offense is a product of ineptness or unsuitability. If this is the case, perhaps an administrative separation is the proper course of action. Consider also whether the individual can continue to perform in the Army or whether separation is appropriate. If a separation is appropriate, the next inquiry is whether a punitive or administrative separation is warranted.

Another consideration is what impact, if any, the offense under consideration has had on unit morale. A commander may be confronted with an 18-year-old accused of low intelligence who has written several bad checks at the very time that the bad check rate of the command is higher than it has ever been. A commander should consider all of the factors involved and avoid the temptation to jump immediately to the discipline and morale of the unit as the primary reason for a decision to court-martial the accused.

3. Alternative Dispositions. Upon receipt of a charge sheet and allied papers, a battalion or brigade commander has three basic choices in disposing of the charges:

a. The commander may return the charges to the subordinate commander for whatever action the subordinate deems appropriate. This action would follow in a situation where the battalion or brigade commander did not feel the offense was as serious as did the subordinate commander. Remember that the higher commander cannot direct the lower commander to take a particular action, *e.g.*, give an Article 15.

b. The battalion or brigade commander may dispose of the charges at his own level. A commander who pursues this course should review the options outlined in this chapter and select the one most appropriate for disposition of the charges.

c. The commander may feel that his or her power is inadequate to handle the case. If so, the commander must forward the case to a superior authority whose judicial powers are greater. For example, if a special court-martial convening authority believes that a punitive discharge is warranted, he can convene a "BCD" special or forward to the general court-martial convening authority and recommend trial by general court-martial.

C. Article 32 Investigating Officer

l. Before Referral to General Court-Martial. An Article 32 investigation, or defense waiver thereof, is required before any charge may be referred to a general court-martial. Any convening authority may appoint an Article 32 investigating officer, but in practice it is the special court-martial convening authority who normally performs this duty.

2. Functions and Duties. The investigating officer's functions are: (l) to make a thorough and impartial investigation into the truth of the matters; (2) to consider the correctness and the form of the charges; and (3) to recommend a proper disposition of the charges in the interest of justice and discipline.

The duties of an Article 32 investigating officer should take precedence over other military duties. Officers detailed to perform these duties must be familiar with the contents of DA Pam 27-l7, Article 32, UCMJ, and R.C.M. 405, Manual for Courts-Martial. In preparing for and conducting the investigation, the investigating officer must bear in mind that he or she is performing a judicial function. The investigating officer must be impartial in appearance and in actuality.

3. Legal Advice. The Article 32 investigating officer should seek legal advice from an impartial judge advocate, who is assigned by the staff judge advocate to perform this function. This judge advocate officer should be consulted prior to the investigation and whenever advice is needed thereafter. The investigating officer must not rely upon the trial or defense counsel for legal advice. The investigating officer must make his own conclusions and recommendations.

The accused may be represented at the Article 32 investigation by (1) a detailed military lawyer, (2) a military lawyer of the accused's own selection if that counsel is reasonably available, or (3) a civilian lawyer provided by the accused at no expense to the Government.

Counsel may also be detailed to represent the Government at the Article 32 investigation. Such counsel represents a party to the investigation just as the defense counsel and should not be relied upon by the investigating officer for legal advice. Remember, the investigating officer should obtain legal advice from a judge advocate that does not represent either party.

4. Procedure. Generally, a legal specialist summarizes the testimony of the witnesses given at the investigation. In certain instances an accused may be entitled to the presence of live witnesses in lieu of sworn statements in the file. The investigating officer should have the services of a clerk to summarize the substance of what the witnesses say. A verbatim record is not required. In certain cases, however, the officer appointing the Article 32 investigating officer may desire to have the entire proceedings tape-recorded or reported verbatim by a court reporter. Where the proceedings are taped, great care should be taken to safeguard the tapes until after the accused's trial. In addition to hearing witnesses, the investigating officer will examine any documentary evidence in the case.

The Article 32 investigating officer considers the evidence from both sides and makes recommendations based upon that evidence. The conclusions and recommendations of the Article 32 investigating officer along with a report of investigation and attached exhibits are submitted on DD Form 457 to the officer who directed the investigation. This officer is free to accept or reject the recommendations; they are advisory only.

D. Appointment of Court Members

1. Basic Policies. Some commanders regard court-martial duty as an unnecessary burden. They may seek to avoid this important duty or select members whose absence will least disrupt unit operations. Such members are normally those least useful to the command. A commander can make no greater mistake than to disregard the primary policy for selection of members, that is, those with the best qualifications. Appoint as court members those who are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. Note that rank is not a permissible qualification. The convening authority makes this selection personally. As a general rule, a convening authority will avoid the appearance of "packing" the court-martial if he or she selects court members with a wide variety of ranks, ages, and job positions.

Certain individuals may not serve as court members. For example, an accuser (one who prefers charges), an investigating officer, or one who has acted as counsel for either side in the case. In addition, AR 27-10, chap. 7 prohibits chaplains and inspectors general from serving as court members, and generally precludes the selection of officers in medical fields.

2. Other Considerations. Attempt to appoint officers from another unit who are unfamiliar with the accused and the offense. The accused is entitled to an impartial court. To avoid the appearance of evil, officers who deal closely with disciplinary matters within the command, such as military police, should not normally be selected as court members. For these same reasons it is unwise for a summary court-martial convening authority to appoint his or her executive officer as the summary court officer. Arrangements should be made to appoint an impartial officer from another battalion. Upon request, an enlisted accused is entitled to have at

least one-third of the membership of the court composed of enlisted soldiers, from a different company-sized unit.

The selection of court members by convening authorities is the focus of much criticism by civilians, and every effort should be made to avoid any charge of unlawful command influence in the selection of court members (see Chapter 3).

E. Pretrial Requests of the Convening Authority

1. Severance. A request for severance may arise where two or more accused are being tried together. In such a case, one accused may ask to be tried separately by requesting a severance.

An accused may seek a pretrial severance for several reasons. For example, the evidence against one co-accused may be more prejudicial. An accused may also want a separate trial in a case where the defense desires to use the testimony of the co-accused. In such a case the accused does not want the defense witnesses being judged by the same court hearing his or her case. If one accused is also charged with an unrelated offense, the co-accused may desire a separate trial.

The convening authority should carefully consider the reasons set forth by the accused for a severance and grant the request on a showing of good cause.

2. Change of Venue. A request for a change of venue is a request to move the location of the trial. Once a case is before a military judge, the judge decides such requests. Initially, however, the convening authority selects the trial site. The reasons an accused might make such a request include an allegation that the accused cannot get a fair trial at the present location of the trial due to local publicity. The burden rests with the accused to convince the convening authority that local prejudice exists, but a convening authority should seek the advice of a judge advocate before making a determination.

3. Amendment of the Specification. Occasionally a case will work its way through the entire pretrial process and still contain a defective specification. In this event the trial counsel may request to amend the specification to correct the defect. If trial counsel recommends dismissal or amendment of a specification due to insufficient evidence, the convening authority should normally accede to this request. If the specification will mislead the accused or fail to protect against a second trial for the same offense, the request to amend should be granted.

4. Immunity. Witnesses whose testimony may incriminate themselves have a right to refuse to testify; a grant of immunity, however, can overcome this right. Once immunity is properly granted, it is possible to order a witness to testify. Only the general court-martial convening authority has the power to grant immunity, although there are circumstances where the Department of Justice must approve such a grant.

5. Psychiatric Examination. In some cases it is desirable to have the accused examined by a psychiatrist to determine if he or she was mentally responsible at the time of the act or at time of trial. The law does not permit the conviction of one who was not mentally

responsible at the time of the act or at time of trial. If there is any question as to the mental status of the accused at the time of the commission of the offense or at the time of trial, the convening authority should arrange for a psychiatric examination of the accused.

Either counsel or some other appropriate party may bring the question of an accused's mental status to the attention of the convening authority, *e.g.*, the Article 32 investigating officer. The board is composed of physicians and conducts an inquiry into the mental condition of the accused. At least one member of the board should be a psychiatrist. Any request for such a board should be coordinated with the judge advocate serving the command.

F. Speedy Trial

1. In General. After an offense occurs, effective law enforcement and discipline require that a timely inquiry be made into the incident by the company commander while the facts are fresh and any appropriate charges be brought and expeditiously resolved. Delay in investigation and disposition of offenses undercuts morale and discipline. Also, an accused soldier has a right to a speedy trial. If the government violates an accused's right to a speedy trial, the charges may be dismissed.

2. Speedy Trial Rules. There are several rules that define an accused's right to a speedy trial. Under R.C.M. 707 all accused soldiers must be brought to trial within 120 days after the earlier of imposition of restraint, preferral of charges, or entry on active duty under R.C.M. 204. Prior to referral of the charges, the convening authority may grant delays requested in advance by either the government or defense. Prior to granting a delay, the opposing party must be given an opportunity to respond. The convening authority should reduce to writing any decision to grant a delay, the supporting reasons, and the applicable dates. Any period of an approved delay may be excluded from the 120-day period.

Although R.C.M. 707 prescribes a 120-day rule, Article 10, UCMJ, has a more stringent rule if an accused is in pretrial confinement, arrest, or restriction tantamount to confinement. The government has no grace period. From the first day of confinement or arrest, it must exercise reasonable diligence in bringing the charges to trial.

3. Avoiding Speedy Trial Problems. As a general rule, the commander should seek to have cases resolved within 90 days of the day of an incident, and even more quickly if circumstances permit. Immediately upon learning of an incident, the company commander should begin the preliminary inquiry called for by R.C.M. 303. As appropriate, law enforcement assistance should be requested. Early coordination should be made with the unit's supporting judge advocate. If pretrial restraint is necessary, the commander should coordinate with the judge advocate prior to imposing pretrial confinement or as soon as practicable after imposing arrest or restriction. Any witnesses needed for trial must be identified and put on hold. Case files should be handcarried. Necessary charges should be forwarded without waiting for final MP or CID reports. Timely action from incident to final disposition will best serve law enforcement, discipline, and the right to a speedy trial.

CHAPTER 1

MISCONDUCT: OPTIONS AND DUTIES OF THE COMMANDER

TEACHING OUTLINE

I. INTRODUCTION.

II. TRENDS.

III. PROCESS AND OPTIONS.

A. Act of misconduct occurs.

B. Investigate.

1. Preliminary (informal) investigation. R.C.M. 303 (aka "Commander's Inquiry").

   "Upon receipt of information that a member of the command is accused or suspected of committing an offense . . . triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."

2. AR-15-6 Investigation alternative.

3. Distinguish from Article 32, UCMJ; R.C.M. 405.

   "[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule." R.C.M. 405(a).

   a) May be directed by any court-martial convening authority, but usually directed by Special Court-Martial Convening Authority.

b) Accused and defense counsel entitled to be present. Trial counsel may attend.

c) Commander's call:

(1) Investigating Officer (company or field grade, JAG or line).

(2) Delays

(3) Witness Requests

(4) Open or closed?

4. **BOTTOM LINE.** Get the facts expeditiously . Company commander can do some investigations; okay to do 15-6 investigation if not sure a criminal offense has been committed.

C. Consider command alternatives. **Who** decides **what**, and **when,** and **why?** ***See*** R.C.M. 306(b) factors.

1. No action/dismissal.

2. Nonpunitive/adverse administrative action.

a) Flag.

b) Letter of reprimand (local/OMPF).

c) Bar to Reenlistment (impose/appeal/lift).

d) Relief for cause.

e) Administrative separation (which chapter, type of discharge, notification or board).

3. Nonjudicial punishment (summarized, company-grade, field-grade, suspend punishment, filing determination, appellate action).

4. Judicial action. Summary, Special, BCD Special, General Court-Martial

5. RCM 306(b) Factors:

a) character and service of accused

b) nature of offense,

c) effect on unit good order and discipline,

d) appropriateness of punishment allowed,

e) motive of accuser/victim,

f) reluctance of victim to testify

g) cooperation of accused

h) treatment of similar offenses

i) admissibility of evidence

j) other issues

D. Pretrial Restraint. R.C.M. 304.

1. Types of pretrial restraint. R.C.M. 304(a).

a) Conditions on liberty (versus corrective training).

b) Restriction (versus pulling pass privileges).

c) Arrest.

d) Pretrial confinement.

e) **BOTTOM LINE.** Restriction starts 120-day speedy trial clock. Pretrial confinement, arrest or restriction tantamount to confinement start a more stringent clock.

2. Only grounds for pretrial confinement: accused likely to flee or to commit additional serious criminal misconduct.

3. Who may order pretrial restraint? R.C.M. 304(b).

a) Of officers - commander to whose authority they are subject. May not be delegated.

b) Of enlisted soldiers - any commissioned officer. May be delegated to NCO.

c) Magistrate and Judicial Review.

4. Credit for Pretrial Restraint.

a) Accused in pretrial confinement receives day for day credit against sentence to confinement.

b) Accused also receives day-for-day credit against sentence to confinement for restriction "tantamount to confinement," *e.g.*, sign in every hour, escort to leave room, etc.

E. Speedy Trial Discussion.

1. "120-Day Rule." R.C.M. 707.

a) The accused shall be brought to trial within 120 days after the earlier of:

(1) preferral of charges, or

(2) the imposition of restriction, arrest or pretrial confinement.

(Note: Conditions on liberty do not start 120-day clock)

(3) Entry on active duty under R.C.M. 204 (Reservists).

b) Defense delays are excludable.

c) Request and approval of delays must be in writing and approved by convening authority (pre-referral) or the military judge (post-referral).

d) Remedy - dismissal of charges.

2. Pretrial confinement, arrest, or restriction tantamount to confinement require government to bring charges to trial in a reasonably diligent manner. Can have a speedy trial violation in less than 120 days. Remedy is dismissal.

3. Fewer rules for administrative action. Standards are due process, fundamental fairness, and reasonableness.

F. Trial Options:

1. Request for Discharge in Lieu of Court-Martial. Chapter 10, AR 635-200.

a) Requirements.

(1) Offense must carry a punitive discharge as a possible punishment or,

(2) Combination of charges would permit a BCD under R.C.M. 1003(d) <u>and</u> case is referred to a court authorized to adjudge a punitive discharge.

b) Only a GCM convening authority may approve or disapprove.

c) Type of discharge - usually Under Other than Honorable Conditions.

d) When to recommend/accept?: Some examples: Unlikely court will give much of a sentence; saves child victims from testifying; precludes massive outlay of resources; unit preparing to deploy, if no negative effect on command disciplinary climate.

2. Pretrial Agreements. R.C.M. 705.

a) Made between accused and convening authority.

b) When to accept? Some examples: good sentence; saves resources; speeds process, reluctant witnesses.

c) Increasing flexibility regarding possible terms of agreement: e.g. reduction, confinement or forfeitures, rehabilitation, restitution, deferral, unlawful command influence.

d) Counter-offers permitted.

G. Court and Board Member Selection. R.C.M. 502, 503.

1. Court Members.

a) Convening authority shall detail as members those who are "best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d), UCMJ.

b) Rank is an impermissible consideration.

c) Considering race and gender are permissible if motivation is legal (proper).

2. Administrative Board Members.

Different rules: minority member, MOS member, reserve member.

3. Other officer selections:

a) Summary Court Officer.

b) Article 32b Investigating Officer.

c) AR 15-6 Investigating Officer.

4. Other Military Justice Personnel:

a) Trial Counsel - detailed by SJA.

b) Defense Counsel - detailed by Senior Defense Counsel.

c) Military Judge - detailed by Trial Judiciary.

H. Post-Trial/Board Action on Findings and Sentence. R.C.M. 1107.

1. Appellate authority for many adverse administrative actions.

2. Administrative Board discretionary powers.

3. Article 15 appellate authority.

4. Article 32b discretionary review and recommendation.

5. Post-trial authority: (consult JA first).

a) Convening authority must take action on the sentence; action on the findings is discretionary. Personal to convening authority.

b) Clemency:

Findings - convening authority may set aside finding of guilty or change to lesser-included offense.

Sentence - convening authority may disapprove sentence in whole or part. Cannot increase sentence.

Submissions by defense: must review.

Do not consider adverse matters outside record unless defense is notified.

c) Post-trial confinement begins on date it is adjudged. Convening authority or, if authority is delegated, trial counsel orders soldier into post-trial confinement.

d) Forfeitures. Automatic maximum forfeitures if more than six months confinement or any confinement and discharges.

(1) Start 14 days after sentence or CA's action.

(2) CA may waive forfeitures for additional six months for accused with dependents and order money be paid directly to them.

e) Excess leave.

f) Post-trial sessions—fix trial mistakes prior to initial action.

IV. FINAL THOUGHTS.

A. Commander owned and operated system.

B. Dual goals: Justice and Discipline.

C. Quasi-judicial role.

D. Each case individually considered in the context of a consistent disciplinary philosophy.

COURTS-MARTIAL IN THE ARMY

	Summary	Regular Special (SPCM)	Bad-Conduct Discharge (BCD) SPCM	General
Convening Authority	Battalion Cdr	Brigade Cdr	Bde Cdr (SPMCA) or Division/Corps/Major (GCM CA)	Div/Corps/ Installation Cdr***
Composition	One Commissioned Officer	Military Judge alone* , or MJ and minimum of 3 court members	Military Judge alone* or MJ and minimum of 3 court members	Military Judge or MJ and minimum of 5 court members
Counsel	None detailed. Accused may consult with military lawyer prior to trial. May hire civilian lawyer.	Trial Counsel (lawyer)** Defense Counsel (lawyer). Accused may request individual military legal counsel or hire civilian lawyer.	Same as SPCM	Same as SPCM (trial counsel must be a lawyer)
Accused's Options	May refuse SCM.	May request enlisted personnel on court (minimum of 1/3 must be enlisted); may request trial by MJ alone.	Same as SPCM	Same as SPCM
Jurisdiction	Only enlisted personnel Noncampital offenses	All personnel Noncapital offenses	All personnel Noncapital offenses	All personnel All offenses
"Reporter"	Legal Specialist	Legal Specialist	Court Reporter	Court Reporter
Record of Trial	Abbreviated	Summarized	Verbatim	Verbatim

*There are provisions for convening a regular special court-martial without a military judge. A military judge must be detailed to a BCD SPCM unless prohibited by physical conditions or military exigencies. In practice, military judges are detailed to all special courts-martial. SJA must give pretrial advice for BCD Special.

**The trial counsel in a special court-martial need not be a lawyer. In practice a lawyer always represents the government.

***A formal investigation under Art. 32, UCMJ and a written pretrial advice by the SJA are prerequisites for referral to a GCM.

MAXIMUM PUNISHMENT CHART

Type	Confinement	Forfeitures	Reduction[1]	Punitive Discharge
Summary	1 Month[2]	2/3 pay per month for 1 month	E5 and above - one grade E4 and below - lowest Enlisted grade	None
Special	1 year[3]	2/3 pay per month for 1 year	Lowest Enlisted Grade	None
BCD Special	1 year	2/3 pay per month for 1 year	Lowest Enlisted Grade	BCD[4] (enlisted)
General[5]	See Part IV, MCM, 1984 and Maximum Punishment Chart, Appendix 12, MCM	Total forfeitures of pay and allowances	Lowest Enlisted Grade	BCD (enlisted DD enlisted, warrant officer) Dismissal (officer)

[1]Only enlisted soldiers may be reduced by courts-martial.

[2]A Summary Court-Martial may impose confinement and hard labor without confinement only on soldiers in the grade of E-4 and below.

[3]A Special Court-Martial may impose confinement only on enlisted soldiers.

[4]In order to impose a BCD, A Special Court-Martial must:

(1) Be convened by a General Court-Martial Convening Authority.
(2) Have a military judge detailed (Unless a military judge cannot be detailed because of physical conditions or military exigencies).
(3) Have a defense counsel within the meaning of Article 27(b), U.C.M.J., detailed.
(4) Have a verbatim record of trial prepared.
(5) SJA must provide pretrial advice

[5]A General Court-Martial may impose the death penalty when authorized by Part IV, MCM, 1984, and the conditions in R.C.M. 1004 are met.

CHAPTER 2

SENIOR OFFICERS LEGAL ORIENTATION

ADVERSE ADMINISTRATIVE ACTIONS

I. CONSOLIDATED LIST OF REFERENCES....2

II. INTRODUCTION....2

III. DUE PROCESS OF LAW - THE STARTING POINT....3

IV. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS)....4

V. EXTRA TRAINING....6

VI. REVOCATION OF PASS PRIVILEGES....7

VII. COUNSELING WITH A VIEW TOWARDS SEPARATION....7

VIII. REHABILITATIVE TRANSFER....10

IX. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION....12

X. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT....15

XI. THE QUALITATIVE MANAGEMENT PROGRAM (OR "QMP")....19

XII. THE ARMY WEIGHT CONTROL PROGRAM....22

XIII. DRUNK OR DRUGGED DRIVING SANCTIONS....25

XIV. REMOVAL FROM PROMOTION LIST....30

XV. REDUCTION FOR CIVIL CONVICTION OR INEFFICIENCY....35

SUMMARY TABLE....39

Outline of Instruction

I. CONSOLIDATED LIST OF REFERENCES.

A. AR 190-5, Motor Vehicle Traffic Supervision.

B. AR 350-15, The Army Physical Fitness Program.

C. AR 380-67, Personnel Security Program.

D. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS).

E. AR 600-8-10, Leaves and Passes.

F. AR 600-8-19, Enlisted Promotions and Reductions.

G. AR 600-9, The Army Weight Control Program.

H. AR 600-20, Army Command Policy and Procedures.

I. AR 600-37, Unfavorable Information.

J. AR 601-280, Total Army Retention Program, w/ IO3 (November 1993).

K. AR 635-200, Personnel Separations - Enlisted Personnel.

II. INTRODUCTION.

Commanders have a spectrum of administrative military personnel actions which they can use to motivate, improve, and rehabilitate soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit's mission.

If soldiers fail to respond to motivation and rehabilitation, other administrative tools are available which commanders can use to take appropriate remedial or adverse action, or to separate soldiers from the Army.

This outline reviews the twelve administrative actions short of administrative separation that you can expect to see most often. Each section lists the appropriate references. The chart at Appendix A lists these actions in a tabular form. Enlisted separations are addressed in the next chapter.

This outline should be supplemented by reference to the applicable regulation, to appropriate local regulations and policies, and any guidance from senior commanders.

III. DUE PROCESS OF LAW - THE STARTING POINT.

A. The Constitution.

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.

2. When challenged in court on alleged denial of constitutional due process (fifth amendment), military position is "there is no constitutional life, liberty, or property interest affected by our administrative actions."

B. Our Regulations.

1. Must follow procedures in regulations -they are more than "guidelines." Although federal district courts are very hesitant to second guess armed forces on substance of decisions, they will grant relief if we fail to follow our own regulations.

2. "Minimum" due process: notice of allegations and an opportunity to be heard.

IV. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).

A. Reference. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS), 30 Oct 87. I01, Apr 94.

B. Purpose.

1. A suspension of favorable personnel actions (or "flag") is an administrative hold placed on a soldier which precludes the processing of nearly all favorable personnel actions (e.g., promotion, awards, school attendance, payment of reenlistment bonuses, etc.) while the soldier's chain of command conducts an investigation, determines whether or what adverse action to take against the soldier, and completes the adverse action.

2. A flag itself is not an adverse action, because it can be removed as easily as it can be initiated. But since it prevents virtually all favorable action on/for a soldier, it can have a very adverse effect on the soldier's career.

C. Types. There are two types of flags, "transferable" and "nontransferable" actions. The impact of the action will vary depending upon the flag's basis and type.

a. Regular ("non-transferable") flags prevent appointment, reappointment, reenlistment, extension, entry on active duty or active duty for training, reassignment, promotion or reevaluation for promotion, awards and decorations, attendance at civil or military schools, unqualified resignation or discharge, retirement, advance or excess leave, payment of enlistment or selective reenlistment bonus, assumption of command, family member travel to an overseas command and command sponsorship of family members overseas when sponsor is overseas.

b. APFT (Army Physical Fitness Test) failure ("transferable") flags prevent promotion, reenlistment, and extension.

c. Weight control ("transferable") flags prevent attendance at schools, promotions, assumption of command, awards and decorations, and reenlistment or extension.

D. Procedure.

1. Any commander (or general officer staff head) directs the flag.

2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits SIDPERS transaction. Properly administered, a flag has two (previously three) components:

a. A SIDPERS (Standard Installation/Division Personnel System) transaction that codes a soldier's records in the Army's automated personnel database and prevents favorable personnel transactions.

b. [Marking and physically segregating the soldier's Military Personnel Records Jacket (MPRJ) at the military personnel records center, to alert personnel clerks that the soldier was flagged, thus preventing manual favorable personnel transactions at the personnel service company. The elimination of the MPRJ removed this safeguard and put more emphasis on unit-level management of personnel actions.]

c. Battalion S1 (or equivalent) unit management of the flagging system, to keep unit leadership and unit personnel clerks aware of the flag, and lift it when appropriate.

3. Unit notifies soldier.

4. Unit or battalion manages SIDPERS C95 report, which lists all flagged soldiers.

5. Lift flag when appropriate.

E. Approval Authority. Any commander or general officer staff head.

F. Appeal. None.

G. Records. DA Form 268 maintained only so long as soldier is flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

V. EXTRA TRAINING.

A. Reference. AR 600-20, para 4-6b.

B. Purpose. An effective, nonpunitive corrective measure.

C. Procedure. No formal procedure.

1. Any leader may order a soldier to train to overcome a deficiency.

a. Must be directly related to the deficiency.

b. Must be aimed at improving the soldier's performance.

2. Not punishment; must stop when deficiency is overcome.

D. Approval Authority. Any commander. An “inherent power of command.” May be delegated.

E. Appeal. No specific procedure.

F. Records. None; *however*. . .

1. "Deficiencies *satisfactorily corrected* by means of training and instruction will be not noted in the official records of the soldier concerned." AR 600-20, para 4-6b(2) (emphasis added).

2. If the problem merits it, consider documenting with a counseling with a view towards separation. Destroy the counseling if, after a reasonable period, the problem truly is cured; otherwise, proceed to separation.

VI. REVOCATION OF PASS PRIVILEGES.

A. Reference. AR 600-8-10, Chapter 5, Section XIV.

B. Purpose. Commanders should grant passes (defined as short, nonchargeable, authorized absences from post or place of duty during normal off-duty hours) to those soldiers whose performance of duty and conduct merits approval. If a soldier's performance of duty and conduct do not merit approval, do not approve a pass.

C. Procedure. No formal procedure. Regular passes usually do not require a DA Form 31 (although one may be used). If a soldier's pass privileges are revoked, the soldier's immediate commander or his or her representative should inform the soldier in writing. If DA Form 31 is used for regular passes, indicate disapproval on the form.

D. Approval Authority. Any commander.

E. Appeal. No special procedures.

F. Records. None required. Consider documenting with a counseling ststement.

VII. COUNSELING WITH A VIEW TOWARDS SEPARATION.

A. Reference. AR 635-200, para 1-16.

B. Purpose. An administrative prerequisite to many administrative separations, counseling with a view towards separation serves as a "final warning" to a soldier to improve performance or face discharge. It also is an attempt by the Army to protect its investment in the soldier's recruiting and training costs. *Compare with* general counseling (AR 600-20, para 2-1e) (basic leadership tool used to assist soldiers in professional growth; not necessarily adverse).

C. Procedure.

1. ***May*** be used at any time. As a prerequisite to processing a soldier for discharge under the following provisions of AR 635-200, the command **must** complete at least one recorded counseling:

   a. Chapter 5, Involuntary Separation Due to Parenthood;

   b. Chapter 5, Personality Disorder;

   c. Chapter 11, Entry Level Performance and Conduct;

   d. Chapter 13, Unsatisfactory Performance; or

   e. Chapter 14, Minor Disciplinary Infractions or Pattern of Misconduct.

2. The officer or NCO counseling the soldier will advise the soldier of:

   a. The reason for counseling;

   b. The fact that separation may be initiated if behavior continues;

   c. The type of discharge that could result from possible separation; and

   d. The effect of each type of discharge.

D. The command must give the soldier a reasonable opportunity to overcome the deficiencies.

E. Approval Authority. None. Counseling may be conducted by "a responsible person." AR 635-200, para 1-18b.

F. Appeal. None.

G. Records.

1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.

2. DA Form 4856 (General Counseling Form) normally should be used for this purpose.

3. Filed in unit personnel files - not in MPRJ or OMPF (Official Military Personnel File). No permanent, long-term record, unless incorporated into separation action. Maintain until soldier departs unit; destroy one year later IAW MARKS.

4. Commander's Notebook. Beware of Freedom of Information Act access. Generally, no right to access under FOIA if:

   a. Prepared voluntarily; and

   b. Used only as a memory aid by preparer.

5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself. Solution: have legal clerk/legal center prepare DA Form 4856 to accompany each Art 15.

VIII. REHABILITATIVE TRANSFER.

A. Reference. AR 635-200, para 1-16.

B. Purpose. A soldier must be recycled or reassigned to a new unit at least once before separation action can be initiated under AR 635-200:

1. Involuntary separation due to parenthood, para 5-8.

2. Personality disorder, para 5-13.

3. Entry level performance and conduct, chap 11.

4. Unsatisfactory performance, chap 13.

5. Minor disciplinary infractions or a pattern of misconduct, para 14-12a and 14-12b.

C. Procedure.

1. Period required.

a. Soldiers in replacement stream: recycle between training companies where feasible; if not, between training platoons.

b. Soldiers in regular units: reassign between battalion-size units at least once, with a minimum of three months in each unit, where possible. PCS possible only for SPC/CPL & below, w/ less than 2 years TIS, & no family members.

2. Very limited. The company-level commander requests the transfer, and the request is processed through command channels to the approval authority. No due process rights for the soldier.

3. A soldier usually cannot be reassigned to a different installation on a rehabilitative transfer. *See* AR 635-200, para 1-16c(3).

D. Approval Authority.

1. Not specified in AR 635-200, para 1-16. Logically, first commander with authority over the gaining and losing unit.

2. May waive requirement for rehabilitative transfer.

a. Routine, common practice in many units. ("The exception that swallows the rule.")

b. *Waiver now extremely limited in Chapter 11 and Chapter 13 cases*. *See* DA Messages cited above. **Represents significant change from common past practice for many units.**

c. Document why you are doing it. Make sure there is something in the file to *support* your *conclusion* that transfer would:

(1) "Create serious disciplinary problems or a hazard to the military mission or to the soldier, or

(2) "Be inappropriate because the soldier is resisting rehabilitation attempts, or

(3) "Rehabilitation would not be in the best interest of the Army as it would not produce a quality soldier."

E. Appeal. No specific provisions.

F. Records. No specific provisions. In practice, losing unit should document reasons for rehabilitation with counseling with a view towards separation, and maintain those records for one year after soldier's departure (*i.e.*, transfer to gaining unit if needed to support a separation action).

IX. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.

A. Reference. AR 600-37. (See also AR 25-400-2, The Army Records Information Management System (ARIMS)) 18 Mar 2003.

B. Purpose.

1. Documents misconduct or poor performance in official files.

2. Leadership tool.

3. Be wary of information originating *solely* from intelligence and personnel security files: this information requires special handling (*See*, e.g., AR 600-37, para 4-6; AR 380-67, Chapter 8).

C. The terms defined.

1. "Reprimand. To reprove severely; to censure formally, especially with authority. . . . . A public and formal censure or severe reproof, administered to a person in fault by his superior officer or by a body or organization to which he belongs." Black's Law Dictionary 1170 (5th ed. 1979).

2. "Censure. . . . . An official reprimand or condemnation." *Id*. at 203.

3. "Admonish. To caution or advise. To counsel against wrong practices, or to warn against danger of an offense." *Id*. at 45.

4. What's the practical difference? Don't use *censure*; it's ambiguous. Use *reprimand* instead if you wish to reprove someone for something they have done. Use *admonish* if the person's wrongdoing is not clear, but you wish to make a record of warning the person to avoid or desist from certain behavior. The procedures outlined in AR 600-37 apply to the filing of all three actions.

D. Procedure.

1. Drafting and initiating the letter.

a. For enlisted soldiers. Initiated by the person's immediate commander, any higher commander in the chain of command, a supervisor, school commandant, general officer, or GCMCA.

b. For officers. As above, less "supervisor," plus any rating official.

2. Contents. (*See* Figure 3, *infra* at p. O-15.)

a. Reason for reprimand.

b. The statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15. AR 27-10, para 3-3.

c. If the reprimand is intended for filing in the OMPF, either the reprimand or the document referring the reprimand should indicate where the drafter desires to file the reprimand.

3. Notice and rebuttal by the soldier. AR 600-37, paras 3-2 and 3-6.

4. No right to counsel, but local legal assistance and Trial Defense Services will often try to see soldiers, time permitting.

E. Appeal.

1. Local filing. No formal appeal process.

COMPANY A
16TH SIGNAL BATTALION, 29TH SIGNAL GROUP
FORT ARLINGTON, VIRGINIA 11111

ABCD-EF-B 6 June 2002

MEMORANDUM FOR PV2 Kathleen B. Nash, Company A, 16th Signal Battalion, 29th Signal Group, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 22, 24, 26, and 31 May 2002, you were absent without authority from your appointed place of duty. You failed to report to the unit supply room at Company A, 16th Signal Battalion, 29th Signal Group, at the appointed time, 0800, to begin your duties on those dates. Further you were formally counseled on a number of prior occasions and orally admonished for similar offenses. You are hereby reprimanded for your conduct on 22, 24, 26, and 31 May.

2. You are expected to be at your appointed place of duty at the appointed time unless excused by proper authority. Your persistent tardiness will not be tolerated in this unit.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your unit personnel file. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider your response.

HARD CHARGER
Captain, SC
Commanding

Figure 3

2. OMPF filing. Appealed to DA Suitability Evaluation Board (DASEB). Normally, consideration of these appeals is restricted to SSG and above.

   a. Grounds for removal: document is untrue or unjust.

   b. Grounds for transfer from P-fiche to R-fiche: document is untrue or unjust; or reprimand has served its intended purpose. If basis is that reprimand has served its intended purpose, soldier must wait at least one year since imposition of the reprimand and have received at least one OER or NCOER.

F. Records. Memorandum maintained in local unit files until 12 months after a soldier's departure, or permanently on the OMPF.

X. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT.

A. Reference. AR 601-280, Chapter 8 (29 Sep 95).

B. Purpose.

1. Only soldiers of high moral character, personal competence, and demonstrated adaptability to the requirement of the professional soldier's moral code will be reenlisted in the Active Army. Soldiers who cannot, or do not, measure up to such standards . . . will be barred from further service . . . AR 601-280, para 8-2a.

2. A potentially rehabilitative tool: puts pressure on soldier to shape up; sets up soldiers who fail to do so for separation.

3. Discretionary grounds for bar to reenlistment. AR 601-280, para 8-4d, lists 28 reasons, including but not limited to tardiness, loss of clothing or equipment, substandard personal appearance or hygiene, indebtedness, nonjudicial punishment, traffic violations, inability to follow orders, apathy, cannot adapt to military life, failure to manage personal affairs, behavior which brings discredit upon the unit or Army, failure to pass APFT or weapons qualification, and noncompetitive for promotion.

4. Mandatory grounds for bar to reenlistment. AR 601-280, para 8-4c.

   a. Single soldier and in-service couples with dependent family members when soldier has been counseled IAW AR 600-20, Chapter 5, and does not have an approved family member care plan on file w/in 2 months.

   b. Single soldiers and in-service couples with dependent family members w/ instructions of overseas assignment, if unable to provide the name of a guardian who will care for their family members in CONUS in the event of evacuation from overseas.

   c. Weight control failures.

5. Commander's option: bar from reenlistment, or proceed directly to separation action.

   a. Soldiers who fail two consecutive APFTs (or commander may proceed with separation immediately).

   b. Soldiers who are removed for cause from an NCOES course (or commander may proceed with separation immediately).

C. Procedure. AR 601-280, para 8-5.

1. Initiating the bar.

a. Any commander in soldier's chain of command may initiate.

b. Bars are usually not appropriate during a soldier's first 90 days or last 30 days in a unit. If circumstances warrant, soldier may be barred, but the certificate should explain the timing.

c. Use DA Form 4126-R.

2. Notice and rebuttal by the soldier.

a. If soldier requests, allow seven days for comment.

b. Rebuttal attached to DA Form, 4126-R.

c. No right to counsel. TDS or legal assistance will generally try to see soldier.

3. Initiating commander attaches soldier's rebuttal (if any) and forwards through chain of command to approval authority. Personal action by each commander or acting commander required. Any commander may disapprove.

4. Restrictions.

a. May not approve bar after soldier separates from active duty.

b. May not enter bar in soldier's records after soldier separates from active duty.

c. May not retain soldier involuntarily past ETS in order to approve bar.

5. Company level commander informs/"counsels" soldier if bar approved using back side of DA Form 4126-R, Bar Certificate.

6. Periodic review by the unit commander.

   a. At least once every 3 months after date of approval, and 30 days before the soldier's PCS or ETS.

   b. [After first review, must advise soldier of option of voluntary separation under AR 635-200, para 16-5. This provision has been suspended indefinitely by DA.]

   c. Must lift bar or initiate separation (AR 635-200, Chapter 13, for underlying grounds) after second review.

7. [Option of requesting voluntary separation. AR 635-200, para 16-5, and AR 601-280, para 8-5f. *This provision of the regulation has been suspended indefinitely by DA*.]

   a. [Approval is at discretion of first LTC-level commander.]

   b. [A soldier separated under these provisions will receive an honorable discharge, but no separation pay.]

D. Approval Authority. Depends upon soldier's active Federal service (AFS) on date of bar initiation (note change from previous practice, when AFS at ETS controlled).

1. Less than ten years AFS on date bar was initiated: LTC commander or SPCMCA.

2. Ten years or more AFS on date bar was initiated: general officer in command or GCMCA .

3. Commander who initiates bar cannot approve bar.

4. If bar initiated above company level, approval authority must be GCMCA, GO in command, or HQDA.

E. Appeal.

1. Soldier has seven days to submit appeal.

2. If otherwise qualified, soldier will not be involuntarily separated while appeal is pending.

3. Appellate authority. Depends upon soldier's AFS on date of bar initiation and approval authority.

a. Less than 10 years AFS on date bar was initiated: general officer in command or GCMCA .

b. 10 years or more AFS on date bar was initiated, or bar approved by GCMCA/GO in command: HQDA.

c. Bar approved by PERSCOM: no appeal.

F. Records. DA Form 4126-R (still) filed permanently in MPRJ. Approved bar annotated on soldier's DA Form 2-1.

XI. THE QUALITATIVE MANAGEMENT PROGRAM (OR "QMP") BAR TO REENLISTMENT.

A. **New Authority**: **AR 635-200, Ch. 19**. Old Authority: AR 601-280, Chapter 10. (Proponency and guidance for QMP has moved to AR 635-200.)

B. Purpose. Eliminate unproductive and nonprogressive soldiers. Not intended to be rehabilitative; in reality a fast track to separation.

C. Procedure.

1. Files of all soldiers Staff Sergeant (E-6) or higher in grade (with at least 8 years TIS) reviewed annually by DA promotion boards. Boards select soldiers for QMP.

2. Notification packet mailed from DA to installation or overseas command, who forwards packet to first LTC (or higher) commander in soldier's chain of command. Commander must serve packet on soldier within two days. Packet contains:

   a. Instruction letter to commander;

   b. Instruction letter to soldier;

   c. Document(s) which triggered bar; and

   d. Soldier's statement of option.

3. Using DA Form 4941-R, a soldier has seven days from date of receipt to elect one of seven options:

   a. Appeal;

   b. Do nothing and face separation;

   c. Request immediate voluntary discharge under AR 635-200 and forfeit any chance to receive separation pay;

   d. Retire, if retirement eligible;

   e. Request retirement from Active Duty with a concurrent transfer to the Reserve Components;

   f. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS; or,

g. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS, with a request for concurrent transfer to the Reserve Components.

D. Approval Authority. DA. Action has already been approved when it is received in the field. Soldier's action is just a statement of option, and perhaps an appeal.

E. Appeal.

1. Grounds.

a. Material error in file. "An error is considered reasonable when there is a reasonable chance that had the error not existed, the soldier might not have been selected for the QMP."

b. Improved duty performance.

2. Must be submitted to chain of command w/in 45 days of date of memorandum.

3. Must arrive at USAEREC w/in *60 days* of date received by soldier, or appeal decision will automatically be converted to Option 2, which results in the soldiers separation.

4. Considerations on appeal. Appeals, particularly those submitted on the basis of improved duty performance, without <u>strong</u>, <u>personal</u> chain of command support are <u>rarely successful</u>. [Remember, the board which selected the soldier for DA QMP bar had the soldier's subsequent NCOERs and AERs before them.]

F. Records. Maintained by DA as part of OMPF.

XII. THE ARMY WEIGHT CONTROL PROGRAM.

A. References.

1. AR 600-9, The Army Weight Control Program, 1 Sep 86 (as published in All Ranks Personnel Update 15, 1 Oct 90). I01, 4 Mar 94 (exp 4 Mar 96). New version of AR 600-9 pending. Expected publication was Summer 1995; with the recent issuance of DODI 1308.3, Physical Fitness and Body Fat Procedures, Nov 5, 2002, DA may release additional guidance in early 2004.

2. AR 635-200, Personnel Separations – Enlisted Personnel, 1 Nov 2000.

B. Purpose. To ensure that all soldiers:

1. Are able to meet the physical demands of their duties under combat conditions; and

2. Present a trim military appearance at all times.

C. Procedure.

1. Commanders and supervisors will monitor soldiers to ensure that they maintain proper weight. At minimum, soldiers will be weighed when they take the APFT or at least every 6 months. Commander may direct weight check if soldier presents an unmilitary appearance.

2. All soldiers scheduled to attend professional military schooling will be screened before departure. If the soldier exceeds the screening table weight, he will not be allowed to depart unless his commander determines that he meets body fat composition standards. Soldiers arriving overweight at any DA select school or those who PCS to a professional military school will be processed for disenrollment.

3. Soldiers exceeding the screening table weight will be tested for body fat using the "tape" test.

4. Commanders will flag overweight personnel IAW AR 600-8-2. Flagged personnel are:

   a. Are nonpromotable;

   b. Will not be assigned to command positions;

   c. Will not be authorized to attend professional military schooling; and

   d. Will not be allowed to reenlistment or extend unless:

      (1) The GCMCA approves an extension of a soldier who either has a temporary medical condition that precludes weight loss or is pregnant and otherwise qualified for reenlistment; or,

      (2) The GCMCA approves an extension of a soldier who has completed a minimum of 18 years active federal service. [Application for retirement will be submitted at the time the extension is approved.]

5. Flagged personnel will be enrolled in the Army Weight Control Program (AWCP).

   a. The loss of 3-8 pounds per month is deemed to be satisfactory progress in the AWCP. Overweight soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to reenlistment or will have separation proceedings initiated against them. Commander must notify the soldier in writing that separation is being considered and consider the soldier's response. If the soldier's response is not satisfactory,

initiate separation UP AR 635-200, Chapter 18. Results in an honorable discharge.

b. Overweight soldiers who are reenrolled in the AWCP within 24 months of successfully complete an enrollment in the AWCP will be processed for separation. Recent regulatory change doubled the post-AWCP jeopardy period from 12 months.

c. The AWCP no longer provides a "grace period" for second-time enrollees. Soldiers were formerly afforded 90 days to achieve standard when reenrolled in the AWCP after more than 12 months but less than 36 months of successfully completion of the AWCP.

D. Approval Authority.

1. Authority to place a soldier in the weight control program: company-level commander.

2. Separation authority for active-component enlisted soldiers.

a. LTC-level commander if soldier has less than six years active and reserve service (notification procedure used).

b. SPCMCA if soldier has six or more years service (administrative board procedure used).

E. Appeal. No specific procedure.

F. Records.

1. Upon removal from weight control program, records will be maintained in unit (Bn S1/PAC) files for 36 months or until the soldier's PCS.

2. Upon transfer from one unit to another, the losing commander will forward a memorandum to the gaining commander indicating the status of the soldier's participation in a weight control program, and forward any records.

3. When soldier successfully completes AWCP, completion date will be entered in SIDPERS and the soldier's name and completion date will continue to print out on the unit's C95 (FLAG) roster for 36 months.

XIII. DRUNK OR DRUGGED DRIVING SANCTIONS.

A. References.

1. AR 190-5.

2. AR 600-85.

B. Purpose. Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army's Alcohol and Substance Abuse Program (ASAP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not.

C. Procedures.

1. Withdrawal of driving privileges. AR 190-5, para 2-5.

a. **Suspension** is immediate pending resolution of drunk driving charges brought in the following circumstances:

(1) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs;

(2) Operating a motor vehicle with a blood alcohol content (BAC) of 0.10% by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the installation;

(3) Operating a motor vehicle with a BAC of at least 0.05% by volume but less than 0.10% blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated, if the jurisdiction imposes a suspension solely on the basis of the BAC; or,

(4) On an arrest report or other official documentation of the circumstances of an apprehension for intoxicated driving.

b. **Limited hearing**. AR 190-5, para 2-6. Following the suspension of driving privileges, the subject has ten days in which to request a hearing. If requested, the hearing must be conducted by the installation commander or designated hearing officer within ten days. The hearing officer must issue a decision within ten duty days of the hearing. Issues addressed:

(1) Did the law enforcement official have reasonable grounds to believe person was DWI or in actual physical control of motor vehicle while under the influence of alcohol or other drugs?

(2) Was the apprehension or citation lawful?

(3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?

(4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine? Did the person fail to complete the test? Do the results of a completed test indicate a BAC of .10% or higher the presence of other drugs?

(5) Was the testing method used valid and reliable? Were the results accurately evaluated?

c. **Revocation** for period of one year. AR 190-5, para 2-5.

(1) Lawfully apprehended for DWI and refused to submit to or to complete a test to measure the alcohol content in the blood, or detect the presence of any other drug.

(2) Conviction, NJP, or military or civilian administrative action resulted in suspension or revocation of a driver's license for DWI.

(3) Compute from date of original suspension, exclusive of periods when full driving privileges restored pending resolution of charges.

d. **Restricted privileges**. AR 190-5, para 2-11. Specifically tailored to permit the subject to drive under restricted conditions (e.g., for medical emergencies; to and from work site; duty driving).

(1) May be requested at any time.

(2) GCMCA acts on all DWI/DUI requests for restricted privileges.

2. Referral to ASAP. AR 190-5, para 2-9.

a. Mandatory (within 10 days).

b. Enrollment is discretionary.

3. General Officer Memorandum of Reprimand (GOMOR). (*See* Figure 5, *infra* p. O-29).

Department of the Army
52d Infantry Division (Mechanized) and Fort Arlington
Fort Arlington, Virginia 11111-1111

ABCD-EF-G 15 June 2002

MEMORANDUM FOR 1LT Gideon Pillow, Company A, 2d Battalion, 11th Infantry, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 1 March 2002 you were apprehended at approximately 2200 while driving your privately owned vehicle on Fort Arlington. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 June 2002, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court. I reprimand you for your conduct.

2. Your conduct on 1 March 2002 demonstrates a serious disregard for your own safety and that of others. It raises grave doubts as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence that the President of the United States has reposed in you as a commissioned officer. I charge you to conduct yourself in a manner that is worthy of an officer in the United States Army.

3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.

4. I intend to file this written reprimand in your Official Military Personnel File. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response, if any, should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider any response you may make.

RICHARD J. HALFTRACK
Major General, USA
Commanding

Figure 5

a. Mandatory. Must be issued to active duty Army commissioned and warrant officers and NCOs, including corporals.

b. General Officer will sign.

c. Based upon:

(1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation;

(2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs;

(3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.10% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws, irrespective of other charges; or,

(4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully requested chemical tests reflect the presence of illegal drugs.

d. Filing is IAW AR 600-37. The General Officer may:

(1) Decide to not file the GOMOR;

(2) Decide to file the GOMOR in the soldier's Unit Personnel File.

(3) Decide to file the GOMOR in the soldier's OMPF.

4. Consider other administrative actions. AR 190-5, para 2-7c.

a. Administrative reduction UP AR 600-200.

b. Bar to reenlistment UP AR 601-280.

c. Administrative discharge per AR 635-200. AR 600-85, para 1-11c, directs the command to consider separation in DWI cases.

XIV. REMOVAL FROM PROMOTION LIST.

A. Reference. AR 600-8-19, para 3-28 (Local Promotion List) and para 4-18 (Centralized Promotion List).

B. Purpose. To take administrative action against those soldiers who have been selected for promotion, but whose conduct or duty performance no longer merits promotion. Recall that soldiers may be selected for promotion some months before they are actually promoted. Such soldiers are said to be "on the list." (The informal practice has evolved of writing such "promotable" soldiers' ranks with "(P)" after the rank designation, such as "SGT(P) Chen" or "LTC(P) Vasquez.") [For the Army policy on use of "(P)" designation, *see* AR 25-50, para 7-5*c*(2).]

C. Procedure.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). (Unit commander promotes without referral to promotion board.) Unit commander may decide not to promote.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). (Local board considers soldiers for promotion to SGT and SSG. Field grade commander of unit authorized LTC commander approves the list.)

a. The command will provide soldiers with a written explanation for the proposed removal. However, under certain circumstances, including those listed in AR 600-8-19, para 3-28b, immediate removal from the promotion list is required. Though not all inclusive, no further due process is required in the following circumstances:

(1) Failure to Qualify for MOS-required Security Clearance;

(2) Local Bar to Reenlistment (if appeals exhausted);

(3) Reduction in Grade;

(4) Weight Control Failure;

(5) Release from Active Duty; and,

(6) Dropped From Rolls.

b. A removal board will be convened if immediate removal is not justified under AR 600-8-19, para 31b.

(1) AR 15-6 procedures do not apply.

(2) Recorder will give at least 15 days written notice to soldier.

(3) Soldier may be present and recorder will arrange for the presence of requested witnesses, if reasonably available.

(4) Recorder will provide statements of witnesses who cannot attend the board.

(5) Soldier may:

(a) Appear personally or decline to appear;

(b) Challenge members for cause;

(c) Question witnesses; and,

(d) Remain silent, make a sworn or unsworn statement, and/or submit to examination by the board.

(6) The board will:

(a) Fully and impartially evaluate the case;

(b) Make a recommendation; and

(c) Prepare a written report for submission to the approval authority.

(7) The promotion authority will approve or disapprove the board's recommendation and notify the soldier of his decision.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). (Soldiers selected for promotion by DA-level board.)

a. Commanders may recommend removal from a DA list. Removal may be based on substandard duty performance or

misconduct. "Removal based on minor or isolated incident(s) of conduct may be unfair to the soldier." (IO1, Apr 94)

b. The commander must submit a recommendation for removal if the soldier is nonpromotable due to being overweight and:

(1) Soldier fails to make satisfactory progress after six months; or

(2) After 12 months in a weight control program the soldier still exceeds body fat standards.

c. Removal without referral to the soldier (AR 600-8-17, para 4-18a(1)). Commanders will notify Cdr, PERSCOM, by message for immediate removal of any soldier who has been:

(1) Reduced;

(2) Discharged;

(3) Dropped from the rolls;

(4) Approved for retirement (I01, Apr 94);

(5) Barred from reenlistment due to signing a declination of continued service statement, AWOL, local bar, or court-martial during current enlistment (I01, Apr 94);

(6) Or who otherwise falls within the factual situations listed in AR 600-8-19, para 4-18(a)(1).

d. Other cases. If the reason for removal is not listed in AR 600-8-19, para 4-18a(1), the recommendation for removal must be referred to the soldier and the soldier must be given 15 days to submit matters in rebuttal. A soldier who declines to submit rebuttal must do so in writing.

(1) Upon initiation, the commander must impose a flag.

(2) Forward recommendation and soldier's rebuttal through GCMCA. May be disapproved at any level.

(3) DA makes final decision.

D. Approval Authority.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4): unit commander.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6): field grade commander of unit authorized LTC commander.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9): DA.

E. Appeal. No specific procedure.

F. Records.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). No records required. If reasons warrant, consider documenting with a counseling with a view towards separation.

2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). DA Form 4187, Removal Board Report, and DA Form 3355 filed in battalion functional files for two years.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). Maintained at DA.

XV. ADMINISTRATIVE REDUCTION FOR CIVIL CONVICTION OR INEFFICIENCY.

A. Reference. AR 600-8-19, Chapter 7.

B. Purpose.

1. Civil conviction. A soldier convicted by a civil court (domestic or foreign) or adjudged a juvenile offender by a civil court (domestic or foreign) will be reduced or considered for reduction. AR 600-8-19, para 7-4.

2. Inefficiency. Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include an act or conduct that clearly shows that the soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. Commanders may consider misconduct, including conviction by a civil court, as bearing on efficiency. A soldier may be reduced under this authority for long-standing unpaid personal debts that he or she has not made a reasonable effort to pay. AR 600-8-19, para 7-6.

3. Authority to Reduce.

4. PV2, PFC, and SPC/CPL - Company, troop, battery, and separate detachment commanders.

5. SGT and SSG - Field grade commander of any organization authorized a LTC or higher grade commander.

6. SFC, MSG/1SG, and SGM/CSM - Commanders of organizations authorized a COL or higher grade commander.

C. Procedure.

1. Civil Court Conviction (domestic or foreign, or adjudication as a juvenile offender). AR 600-8-19, Table 7-2. (*See* Chart, *infra* at pp. 2-39 through 2-40.

   a. Soldier will be reduced to PVT, E-1, if sentence includes death or confinement for one year or more (not suspended). Board action not required.

   b. The command will consider reducing the soldier (one or more grades) if sentenced to confinement for more than 30 days but less than one year (not suspended) or confinement for one year or more (suspended). Board action required for SGT or above.

   c. The command may consider reduction for all other offenses. Board action required for SGT or above.

2. Inefficiency. AR 600-8-19, para 6-4.

   a. Soldier cannot perform duties and responsibilities of the grade and MOS. Inefficiency includes long standing unpaid debts that the soldier has not made a reasonable effort to pay.

   b. Command must document inefficiency. Should establish a pattern of inefficiency rather than identify a specific incident. A single act of misconduct is <u>not</u> a sufficient basis for reduction for inefficiency.

c. Soldier must have been in unit at least 90 days.

d. Command may reduce soldier only one grade.

3. Soldier gets notice and opportunity to respond.

a. SPC/CPL and below - no board.

b. SGT and above - reduction board is usually required (exceptions noted above). Board appearance may be declined in writing, which will be considered acceptance of the reduction board's action.

4. Reduction Boards. AR 600-8-19, para 6-6.

a. Must have both officers and enlisted members.

b. At least three voting members.

c. Members impartial.

d. Recorder without vote appointed.

e. Board has officer or enlisted soldier or both of same sex as soldier being considered for reduction.

f. For inefficiency cases only, one board member will be familiar with soldier's MOS or field of specialization.

g. If soldier is minority and requests minority member on board, generally must provide minority member.

D. Appeal.

1. SSG and below - next higher authority.

2. SFC and above - next higher authority who is a general officer.

E. Records. Filed in OMPF.

ARMY ADVERSE ADMINISTRATIVE ACTIONS

	SUSPENSION OF FAVORABLE PERSONNEL ACTION	EXTRA TRAINING	REVOCATION OF PASS PRIVILEGES	COUNSELING WITH A VIEW TOWARDS SEPARATION	REHABILITATIVE TRANSFER
Grounds for Action	Other adverse action contemplated or investigation pending	Soldier deficient in any aspect of duty or conduct	Soldier deficient in any aspect of duty or conduct	Cdr contemplates separation for parenthood (5-8), personality disorder (5-13), entry level perf (ch 11), unsat perf (ch 13), or misconduct (ch 14)	
Ultimate Result	Many favorable personnel actions barred temporarily	Soldier corrects the problem	Soldier not permitted to leave post or place of duty during normal off-duty hours	Soldier on notice that continued poor performance may lead to separation, and consequences	Soldier gets a fresh start in a new unit
Regulation	AR 600-8-2 (30 Oct 87)	AR 600-20, para 4-6b (30 Mar 88)	AR 600-8-10, para 5-28 (1 Jul 94)	AR 635-200, para 1-18 (17 Sep 90)	
Who Initiates	Commander or GO staff head	Any leader	Any leader	"Any responsible person"	Commander
Board hearing	No	No	No	No	No
Entitled to Counsel	No (but see AR 27-3, para 3-6g(4)(i))	No	No	No	No
SJA Review	No	No	No	No	No
Approval Authority	Cdr or GO staff head	"[I]nherent power of command."	Unit Commander	None	Commander w/ auth over losing and gaining unit
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

ARMY ADVERSE ADMINISTRATIVE ACTIONS

	ADMINISTRATIVE REPRIMAND	LOCAL (OR FIELD) BAR TO REENLISTMENT	DA OR QMP BAR TO REENLISTMENT	DRUNK DRIVING SANCTIONS
Grounds for Action	Misconduct or unsatisfactory performance	Untrainable, unsuitable, PT failure, NCOES RFC, weight control failure; [no family care plan or no guardian, if applic.]	Moral or ethical problems; declining performance; no potential for continued service	Refusal to test; BAC > .10% (or between .05% and .10% depending on local law); or any official report of DWI
Ultimate Result	Written reprimand may be filed in soldier's permanent records	Soldier can't reenlist, and may face separation action in six months	Soldier will be separated in 90 days, unless appeal successful	Privilege to drive on post or in overseas command suspended or revoked
Regulation	AR 600-37, chap 3 (19 Dec 86)	AR 601-280, chap 8 (29 Sep 95)	AR 635-200, ch. 19 (1 Jan. 01)	AR 190-5, chap 2
Who Initiates	Cdr, supervisor (enl) or rater (off), school cmdt, GO or GCMCA	Any commander	SSG & +: all records reviewed automatically by HQDA promo. boards	Installation commander or designee not assigned to law enf duties
Board hearing	No	No	Record review; see above	W/in 10 days, on request
Entitled to Counsel	No (but see AR 27-3, para 3-6g(4)(j))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(w))
SJA Review	No	No	No	No
Approval Authority	OMPF: GO or GCMCA	<10 yrs svc: LTC cdr; 10-18, >20: GO or GCMCA; 18-20: DA	HQDA promotion selection board	Installation commander
Appeal Authority	OMPF: DASEB	<10 yrs svc: GO or GCMCA; all others: DA	Commander, US Army Enlisted Records Center	GCMCA may grant restricted privileges

ARMY ADVERSE ADMINISTRATIVE ACTIONS

	REMOVAL FROM SGT OR SSG PROMOTION LIST	REMOVAL FROM SFC, MSG, OR SGM PROM LIST	REMOVAL FROM OFFICER PROMOTION LIST	REDUCTION FOR INEFFICIENCY (ENLISTED)	REDUCTION FOR CIVL CONVICTION (ENLISTED)
Grounds for Action	Poor duty perf, Art. 15 punishment; pending OTH discharge; 16 other grounds	Substandard duty performance; 10 other grounds	Referred OER or AER, Art. 15, OMPF reprimand; AWCP failure; derogatory info	Unable to perform duties & responsibilities required of rank and MOS	Any civilian conviction. Mandatory if confined for 1 yr or more (unsuspended)
Ultimate Result	Soldier is removed from promotion standing list			Soldier is reduced one rank	Soldier is reduced one or more ranks
Regulation	AR 600-8-19, chap 3 (1 Nov 91)	AR 600-8-19, chap 4 (1 Nov 91)	10 U.S.C. § 629(a); AR 600-8-29 (30 Nov 94)	AR 600-8-19, chap 6 (1 Nov 91)	
Who Initiates	Any commander	Any commander	Any commander	Any commander	Any commander
Board hearing	Yes (not full AR 15-6 board)	No	DA Promotion Review Board considers paper case	Yes, if soldier is SGT or above, unless reduction is for unsuspended sentence of confinement for one year or more	
Entitled to Counsel	No	No	No	Yes (provided by Trial Defense Service)	
SJA Review	No	No	No	No	No
Approval Authority	LTC-level commander	DA Standby Advisory Board	The Secretary of the Army	PV2-CPL: company level commander SGT-SSG: field grade commander SFC-CSM: COL or higher commander	
Appeal Authority	No formal appeal	No formal appeal	No formal appeal	Next higher cdr for SSG & below First GO for SFC & above	

(This page intentionally left blank.)

CHAPTER 3

SENIOR OFFICERS LEGAL ORIENTATION

OFFICER SEPARATIONS

I. REFERENCES. 2

II. OVERVIEW OF PURPOSE, KEY CONCEPTS, AND TERMS. 2

III. OFFICER TRANSFERS AND DISCHARGES. 4

IV. VOLUNTARY RELEASE FROM ACTIVE DUTY (REFRAD). 4

V. INVOLUNTARY RELEASE FROM ACTIVE DUTY (REFRAD). 6

VI. RESIGNATIONS. 10

VII. INVOLUNTARY DISCHARGES / ELIMINATIONS. 12

A. BASES FOR ELIMINATION OR DISCHARGE: 12
B. PROCEDURAL ISSUES (10 U.S.C. § 1185): 14

VIII. MISCELLANEOUS SEPARATIONS. 19

IX. RETIREMENT. 20

X. FINANCIAL CONSIDERATIONS. 23

XI. OTHER CONSIDERATIONS. 26

XII. COMMANDER'S RESPONSIBILITIES. 29

XIII. CONCLUSION. 31

OUTLINE OF INSTRUCTION

I. REFERENCES.

A. Title 10, United States Code.

B. DOD Instruction 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay.

C. DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers.

D. DOD Instruction 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers.

E. AR 15-80, Army Grade Determination Review Board.

F. AR 600-8-24, Officer Transfers and Discharges.

G. AR 600-8-29, Officer Promotions.

II. OVERVIEW OF PURPOSE, KEY CONCEPTS, AND TERMS.

A. Purposes for Officer Transfers and Discharges.

1. Provide a way to terminate service prior to the terms of the original contract.

2. Provide authority to transfer officers from one component to another.

3. Provide authority to discharge officers from all military obligations.

4. Support the service's personnel life-cycle function of transition.

B. Privilege of Service. "An individual is *permitted* to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the United States have placed in his or her patriotism, valor, fidelity, and competence." DODD 1332.20, para 4.1 (emphasis added).

C. Active Duty List vs. Reserve Active Duty List.

1. A single list for the Army, Air Force, Navy or the Marine Corps that contains the names of all officers (other than those outlined in 10 U.S.C. § 641) who are serving on active duty.

2. A single list which contains the names of all officers (including commissioned warrant officers) who are in an active status in a Reserve Component and are not on the Active Duty List.

D. Probationary vs. Nonprobationary Commissioned Officers. Commissioned officers on the Active Duty List who have less than five years of active commissioned service and Reserve commissioned officers who have less than five years of commissioned service.

E. Separation. Broadly defined to include any actions designed to result in a commissioned officer's discharge, retirement, or resignation. Does not include actions designed to result in a Release From Active Duty, which affects a transfer between service components.

F. Regular Officer v. Other Than Regular Army (OTRA).

G. Show-Cause Authority. Specifically determined by the Secretary of the Military Service concerned. Includes:

1. The Secretary of the Department or officers (not below the grade of major general or rear admiral (upper half)) designated by the Secretary to determine, based upon a record review, that an officer should show cause for retention.

2. Commanders or reserve personnel centers, commanders exercising general court-martial authority and all general or flag officers in command who have a judge advocate or legal advisor available.

III. OFFICER TRANSFERS AND DISCHARGES.

AR 600-8-24 divides officer transfers and discharges into six areas:

A. Voluntary Release From Active Duty (REFRAD) - Chapter 2, paras 2-5 through 2-20. Applies to OTRA officers only. A REFRAD is the transfer of an OTRA officer from Active Duty status rather than discharge.

B. Involuntary REFRAD - Chapter 2, paras 2-21 through 2-42. Applies to OTRA officers only.

C. Resignations - Chapter 3.

D. Eliminations - Chapter 4.

E. Miscellaneous Types of Separations - Chapter 5.

F. Retirements - Chapter 6.

IV. VOLUNTARY RELEASE FROM ACTIVE DUTY (REFRAD).

A. REFRADs are service specific separation actions designed to terminate a reserve component officer's active duty obligation or agreement, which do not generally terminate the officer's status or commission. A REFRAD is commonly viewed as a transfer of a reserve component commissioned officer from the active component back to the reserve component. (See 10 U.S.C. §§ 12311-12313.)

B. Examples of Voluntary REFRAD include: Expiration of obligated service; hardship; pregnancy; separation to attend college; conscientious objection; and separation to accept public office.

1. Personal Reasons. OTRA officers may submit applications no earlier than 12 months and no later than 6 months prior to the desired release date. UP AR 600-8-24, paras 2-5 and 2-6, the officer must:

   a. Complete at least one year of current AD commitment;

   b. Complete current prescribed tour if stationed OCONUS;

   c. Complete Active Duty Service Obligation (ADSO) unless granted an exception to policy.

2. Hardship. Exists when in circumstances not involving death or disability of a member of the soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship. UP AR 600-8-24, paras 2-9 and 2-10, the officer must clearly establish:

   (1) The hardship is permanent and did not exist prior to entry on Active Duty; or

   (2) If the hardship existed prior to entry on Active Duty, the condition has since intensified and can only be alleviated by separating from Active Duty; and,

   (3) Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.

3. Pregnancy. A commander with Separation Approval Authority (SAA) may release a RC officer who requests REFRAD because of pregnancy. UP AR 600-8-24, paras 2-13 and 2-14:

   a. The officer's immediate commander will counsel the officer to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued Active Duty or separation.

b. Officers commissioned through funded programs will not be released until completion of their Active Duty Service Obligation (ADSO). When extenuating circumstances exist, officers may request a hardship separation.

c. If before the REFRAD is accomplished a medical officer determines that the pregnancy has terminated for any reason, the authority for separation no longer exists.

4. School. An officer who is serving the initial tour of Active Duty and who is not mission essential may request REFRAD to attend a recognized institution of higher learning. UP AR 600-8-24, paras 2-15 and 2-16:

a. Officers commissioned through funded programs will not be released until completion of their service obligations.

b. Officer's school reporting date must be in the last three months of the officer's remaining active service.

C. Approval Authority varies with type of REFRAD. GOSCA may generally approve voluntary REFRADs but has not authority to disapprove a voluntary request. Recommendations are forwarded to HQDA for action.

V. INVOLUNTARY RELEASE FROM ACTIVE DUTY (REFRAD).

Involuntary REFRADs may be divided into two groups: actions based upon the soldier's status and actions based upon the soldier's conduct.

A. Status based involuntary REFRADs include: REFRAD for declining integration into the Regular Army; REFRAD for reaching maximum age or service; and REFRAD based upon nonselection for VI or AGR continuation or promotion.

B. Conduct based involuntary REFRADs include: board directed actions for poor performance or misconduct; REFRAD fir civil conviction; and REFRAD for OBC failure.

1. Declination of RA Integration. An OTRA officer who was selected for but declined RA integration will be released from Active Duty. UP AR 600-8-24, paras 2-21 and 2-22:

   a. Applies to officers who entered Active Duty after enactment of the Defense Officer Personnel Management Act (DOPMA); i.e., on or after 15 September 1981.

   b. Officers will be released only after all service obligations have been fulfilled.

   c. Otherwise, release is effective not later than 90 days after the officer signs the declination statement.

2. Maximum Age or Service. (*See* AR 600-8-24, paras 2-23 through 2-26.)

   a. Age. An officer will be released from AD (unless he or she requests voluntary retirement) on the last day of the month in which he or she attains the following maximum age:

      (1) For major general or brigadier general promotable – 62.

      (2) For any other commissioned officer – 60. (If the officer is within 2 years of active federal service retirement eligibility, he or she may be retained on Active Duty until eligible for retirement.)

      (3) For warrant officers without commission – 62.

      (4) For reserve commissioned warrants – 60.

      (5) For certain medical officers – 68. (However, the service may not retain the officer to this age without consent).

   b. Service. Generally, Reserve commissioned officers will be released from Active Duty after completing 20 years of active Federal service. There are several exceptions:

(1) Staff College Level School or Senior Service College members will be retained on Active Duty until completing 2 years of Active Duty following graduation.

(2) Officers named by command selection boards will be retained on Active Duty up to 90 calendar days after completing assignment to the designated command position.

(3) Lieutenant Colonels may be retained until 28 years service.

(4) Colonels may be retained until they have 5 years in grade or reach 30 years service, whichever is later.

(5) Brigadier Generals may be retained until they have 5 years in grade or reach 30 years service, whichever is later

(6) Major Generals may be retained until they have 5 years in grade or reach 35 years service, whichever is later

3. Nonselect for Voluntary Indefinite (VI) or Active Guard or Reserve (AGR) Continuation. (*See* AR 600-8-24, paras 2-27 and 2-28.) RC officers nonselected for VI status will be released not later than the date established by the Secretary or on completion of his or her ADSO, whichever is earlier.

4. REFRAD by the Department of the Army Active Duty Board (DAADB). (*See* AR 600-8-24, paras 2-31 and 2-32.)

a. IAW 10 U.S.C. § 14902, Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any Reserve officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.

b. The DAADB is the Army's tool for ensuring that only RC officers who consistently maintain high standards of efficiency, morality, performance, and professionalism are permitted to serve on AD.

(1) Referral of a case to the DAADB may initiated locally or at department headquarters level.

(2) Bases for REFRAD similar to bases for administrative elimination: substandard performance, misconduct, moral or professional dereliction, and national security reasons.

(3) These cases involve minimal due process. The officer is notified and given an opportunity to respond/rebut. The board reviews the record and officer's response/rebuttal and then recommends either retention or release.

(4) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.

c. Civil Conviction. An officer found convicted of a criminal offense or who enters a plea of no contest to a criminal offense in any federal or state court may be released from AD.

(1) UP AR 600-8-24, paras 2-33 and 2-34, the command may immediately REFRAD an officer when the offense:

(a) Is one punishable by a maximum penalty of death or confinement for more than 1 year under the UCMJ. When the offense is not listed or is not closely related to an offense listed in the UCMJ, the maximum punishment authorized by the United States Code or the District of Columbia Code, whichever is less, applies.

(b) Involves moral turpitude, regardless of the sentence received or maximum punishment permissible under any code.

(2) These cases involve minimal due process. The officer's case is not referred to a board; the officer is only notified and allowed an opportunity to respond.

5. Officer Basic Course (OBC) Failure. RC officers with less than three years commissioned service will be released from AD and discharged from his or her Reserve commission when the officer fails to meet service school standards.

a. UP AR 600-8-24, paras 2-37 and 2-38, release and discharge may be based upon:

(1) Misconduct;

(2) Moral or professional dereliction;

(3) Academic or leadership deficiencies; or,

(4) Resignation from the course.

b. Enhanced due process is warranted since action can involve more than a loss of AD status. Officers are entitled to a faculty board because they may also lose their commission. However, officers may waive the board and accept the decision of the approval authority with respect to their release/discharge.

C. The SAA for involuntary REFRAD actions is generally reserved to the PERSCOM or HQDA level. In any involuntary REFRAD case, reviewing JAs must consult AR 600-8-24.

VI. RESIGNATIONS.

A. Unqualified.

1. Any officer on AD for more than 90 calendar days may tender an unqualified resignation, unless:

a. Action is pending that could result in Resignation for the Good of the Service;

b. The officer is under a suspension of favorable action;

c. The officer is pending investigation;

d. The officer is under charges; or

e. Any other unfavorable or derogatory action is pending.

2. Normally, resignations will not be accepted unless, on the requested date of separation, the officer has completed his or her applicable ADSO.

3. Once submitted, a resignation may be withdrawn with HQDA approval.

B. Failure to Meet Medical Standards at Appointment. A probationary officer who did not meet medical fitness standards when accepted for appointment may submit a resignation UP AR 600-8-24, paras 3-9 and 3-10.

C. Pregnancy. (*See* AR 600-8-24, paras 3-11 and 3-12.)

1. Counseling required. Purpose is to provide information concerning rights, entitlements, and responsibilities with respect to continued AD or separation.

2. Normally, the Army will not grant a tendered resignation for pregnancy until the officer has completed her initial ADSO or any service obligation incurred from the funded program, if any, under which she was commissioned. However, when extenuating circumstances exist, the Army may grant an exception to policy if the officer accepts an indefinite appointment in the Reserves in order to complete the ADSO.

D. Good of the Service (In Lieu of General Court-Martial).

1. Officers who resign for the good of the service normally receive an Under Other Than Honorable Conditions characterization of service. Regardless of the characterization of service received, an officer who resigns for the good of the service in lieu of general court-martial is barred (with minor exceptions) from receiving Veteran's Affairs benefits.

2. In Lieu of General Court-Martial. (*See* AR 600-8-24, paras 3-13 and 3-14.)

a. An officer may submit a resignation for the good of the service in lieu of general court-martial when:

(1) Court-martial charges have been preferred against the officer with a view toward trial by general court-martial, or

(2) The officer is under a suspended sentence of dismissal.

b. Tender of the resignation does not preclude or suspend court-martial proceedings. However, the convening authority may not take action on findings and sentence until DA acts on the resignation request.

E. Good of the Service (Homosexual Conduct). (*See* AR 600-8-24, paras 3-15 and 3-16.)

1. Officers can tender resignations for the good of the service due to homosexual conduct prior to the preferral of general court-martial charges or the initiation of administrative elimination proceedings.

2. The submission of a resignation for the good of the service does not preclude or suspend command initiated disciplinary actions.

VII. INVOLUNTARY DISCHARGES / ELIMINATIONS.

A. Bases for Elimination or Discharge:

1. Substandard Performance (10 U.S.C. § 1181(a) and DOD Directive 1332.30. Examples:

   a. Failure to keep pace with contemporaries.

   b. Apathy, defective attitudes.

   c. Failure of a course at a service school for academic reasons.

   d. PT or weight failure.

2. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security (10 U.S.C. § 1181(b) and DOD Directive 1332.30. Examples:

   a. Serious or recurring wrongdoing, punishable by military or civilian authorities.

   b. Intentional or discreditable mismanagement of personal affairs.

   c. Intentional neglect or failure to perform assigned duties or complete required training.

   d. Drug dependent or misconduct involving drugs.

   e. Loss of professional qualifications.

   f. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

3. Homosexual Conduct (10 U.S.C. § 654 and DOD Directive 1332.30) is grounds for separation from the military services. Homosexual conduct includes: Homosexual acts; homosexual statements; or homosexual marriage.

4. Derogatory Information. UP AR 600-8-24, para 4-2c, the Army's receipt of or filing of unfavorable information relating to an officer may result in the initiation of an elimination action.

a. Required record review is triggered by:

(1) Punishment under Article 15, UCMJ;

(2) Conviction by court-martial;

(3) Denial of security clearance;

(4) Relief for cause OER;

(5) OMPF-filed administrative reprimand; or,

(6) Failure of a course at a service school.

b. In considering whether to terminate his or her appointment, the Army must review the officer's overall record.

5. Multiple Bases. Officers may be considered for separation for one or more reasons, however, separate findings are required for each.

B. Procedural Issues (10 U.S.C. § 1185):

1. Initiated by Military Department or an SCA. After reviewing "all information presented about the case," the Show Cause Authority (SCA or GOSCA) shall either close a case in which an officer should not be required to show cause for retention or "report the matter for referral to a Board of Inquiry."

a. Grounds for separation may be combined.

b. There are several limits on show cause actions. (10 U.S.C. § 1161.)

(1) In substandard performance cases:

(a) If an officer showing cause for poor duty performance is retained, she cannot again be required to show cause for the same reasons within a one year period; and,

(b) The officer is entitled to honorable discharge if the **sole** reason for elimination is substandard performance.

(2) In homosexual conduct and misconduct cases in which the officer is retained, the officer may again be required to show cause for retention; however, the second show cause action may not be based solely upon the conduct of the previous board unless the findings and recommendation of the Board are determined to have been the result of fraud or collusion.

2. Notification by SCA.

a. The initiating authority must provide the officer with "show cause" notice that identifies the reason(s) for elimination.

(1) Bases for elimination may be combined.

(2) If combined, separate findings are required for each separation basis identified.

b. Notice to show cause must also outline the officer's option to:

(1) Submit a resignation in Lieu of Elimination;

(2) Request Discharge from the RA IAW 10 U.S.C. § 1186;

(3) Submit a request for Retirement in Lieu of Elimination, if eligible, IAW 10 U.S.C. § 1186.

c. Without regard to the officer's probationary or nonprobationary status, he or she is entitled to submit a written response or rebuttal to the headquarters that initiated the show cause action. At any point of the process, the decision to retain the officer stops the show cause action.

3. Officer is provided an opportunity to provide a rebuttal to SCA initiating action.

4. The characterization of service for officers facing show cause actions may be Honorable, General, or Under Other Than Honorable Conditions.

   a. The characterization is normally based on a pattern of behavior and duty performance rather than an isolated incident.

   b. If the **sole** reason for elimination is substandard performance, the officer is entitled to an Honorable discharge.

5. Decision to retain at any point stops action.

6. Probationary officers are generally afforded less due process.

   a. Probationary officer not entitled to board unless OTH discharge is recommended. *See*, Air Force Instruction 36-3206, Administrative Discharge Procedures for Commissioned Officers (*Deleting previous requirement for* Probationary Officer Discharge Board).

   b. If officer loses probationary status during processing, must process as nonprobationary.

7. Nonprobationary officers must be afforded an opportunity to show cause for retention. (10 U.S.C. § 14904.)

   a. The officer is first provided with both formal notice to show cause and an opportunity to submit rebuttal matters to the initiating authority. The decision to retain the officer stops the show cause action.

b. The officer is referred to a Board of Inquiry (BOI). If the BOI recommends the officer's retention, the action is terminated. In all other cases, the case is referred to HQDA.

c. HQDA next appoints a Board of Review (BOR) to review the BOI proceedings. If the BOR recommends the officer's retention, the action is terminated. In all other cases, the case is referred to the Secretary of the Army.

d. The Secretary of the Army takes action in the officer's case.

8. Referral to Board of Inquiry (BOI) - full due process. (10 U.S.C. §§ 1182 and 14903.)

a. Composition. (10 U.S.C. § 14906; DODD 1332.40, para E4.1 and E4.2.)

(1) Previously limited to officers in the grade of O-6. Recent statutory changes permit the military departments to use officers in the grade of O-5 for two of the three membership positions. (See, 10 U.S.C. § 14906 (2001); 29 June 2002 revision of AR 600-8-24.)

(2) A reserve component member must serve on any board composed to review a reserve component officer. Additionally, if the respondent is an OTRA officer, a reserve component member must serve on the board. Importantly, when the officer is a female, minority, or member of a special branch, the board membership will, upon the officer's request, include a female, minority, or special branch member.)

b. Function. The BOI "shall give a fair and impartial hearing to a respondent. . . The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken." (DODD 1332.40, para E3.3.3.)

c. Respondents afforded substantial due process. At the Board of Inquiry, the officer:

(1) Will be provided with a military counsel and may hire civilian representation:

(2) Will have a reasonable time to prepare his case, but in no case will he or she have less than 30 days;

(3) Will be permitted to be present at all stages of the proceedings, and have full access to all of the records, except when the Secretary determines that national security requires the protection of classified documents;

(4) May challenge any member of the Board for cause;

(5) May present documents from his record of service, letters, depositions, sworn or unsworn statements, affidavits, evidence, and may require the production of witnesses deemed to be reasonably available;

(6) May cross examine any witness brought before the board; and,

(7) May elect to testify or may remain silent. If the officer testifies, he or she may be required to submit to examination by the board as to any matter concerning the testimony, but not in contravention of the UCMJ, Article 31. (*See* AR 600-8-24, para 4-11.)

d. Determinations.

(1) If a BOI determines that the respondent's retention is warranted, the case is closed.

(2) If a BOI determines that the respondent's retention is not warranted, the case is "reported" to a Board of Inquiry.

9. Board of Review (10 U.S.C. § 1183) - limited due process. The BOR shall review the record of the BOI. If the respondent established that is warranted, the case is closed. If the documentation establishes that retention is not warranted, the BOR recommends separation action and the appropriate characterization for the respondent's discharge certificate.

10. Action by Service Secretary (10 U.S.C. §1184). The Secretary has two choices: retention or separation. The Secretary's decision is final.

11. Processing an Option Elected by Officer.

    a. Resignation in Lieu of Elimination (Regulatory).

    b. Request for Discharge (RA) (10 U.S.C. § 1186).

    c. Retirement in Lieu of Elimination (10 U.S.C. § 1186).

VIII. MISCELLANEOUS SEPARATIONS.

A. AR 600-8-24, Chapter 5, prescribes disposition and procedures for miscellaneous types of separations whereby an officer may be dismissed, released, separated and discharged from AD. These include:

1. Lack of jurisdiction – or cases in which the officer obtains a court writ ordering release from Active Duty;

2. Chaplain's loss of professional qualifications - if the command did not initiate elimination action under Chapter 4, para 4-2b;

3. Officers twice nonselected for promotion by an HQDA centralized board - unless selectively continued (SELCON), the officer has more than 18 years of service, or is retirement eligible;

4. Second Lieutenant and Warrant Officer (WO1) nonselected for field promotion;

5. Conviction by foreign tribunal – in cases when sentence includes confinement of greater than 6 months;

6. Dropped From the Rolls (DFR) – AD or retired when confined, absent without leave (AWOL), or loses retired pay; and,

7. Dismissed by General Court-Martial - after appellate review is complete.

B. Procedures. The steps necessary to separate officers vary with the type of separation. In all Chapter 5 cases, the command must follow the regulatory separation steps outlined in the regulation.

IX. RETIREMENT.

1. Voluntary Retirements.

a. Voluntary Retirement (VR) – General Court-Martial Convening Authority (GCMCA) approval. The Army is the only service to include voluntary retirements in its officer separation regulation. This area, however, is primarily governed by statute.

(1) Temporary Early Retirement Authority (TERA). TERA is limited to physical disability cases. This drawdown program was authorized in the FY 2002 National Defense Authorization Act, however, Congress did not fund the program, which expired on 31 December 2002.

(2) Voluntary Early Retirement. (*See* 106 Stat 2315.) Another temporary drawdown program, that expired on 31 December 2002, which authorized retired pay for selected soldiers with between 15-20 years of service.

(a) Service Secretary determines who is eligible.

(b) Retired pay reduced 1% for each year less than 20.

b. VR in Lieu of Mandatory - i.e., pending REFRAD, elimination, or nonselection.

c. Retirement in lieu of elimination, in cases involving misconduct or moral or professional dereliction, **requires** referral to Army Grade Determination Board.

d. Retirement in Lieu of PCS - at least 19 years, 6 months time in service; must submit within 30 days of notice of PCS.

2. Involuntary Retirements.

a. Mandatory Retirement - maximum age or service.

b. Selective Early Retirement - based on selection by SERB.

(1) 10 U.S.C. § 638 provides authority for the Secretary of the Army to convene boards to select officers for retirement before their mandatory retirement date. (*See* AR 600-8-24, para 6-30.) Board may select no more than 30% of the officers in the following categories:

(a) COL with four (4) years TIG;

(b) LTC twice nonselected for promotion to COL; and,

(c) Drawdown officers below COL who are not promotable and retirement eligible or within two (2) years of eligibility.

(2) 10 U.S.C. § 638a modifies SERB eligibility rules during an authorized drawdown. In a drawdown, the categories include:

(a) COL with two (2) years TIG;

(b) LTC **once** nonselected for promotion to COL; and

(c) Drawdown officers below COL who are not promotable and retirement eligible or within two (2) years of eligibility.

B. Retired Grade (10 U.S.C. § 1370).

1. Minimum Time in Grade Requirements (Voluntary Retirements).

a. Six months for MAJ and below.

b. Three years for LTC through major general (MG). The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

c. Under previous drawdown authority, the Secretary of the Army could reduce the TIG requirement to 2 years for LTC and COL.

2. Secretary of the Army makes satisfactory grade determination.

3. Special Appointment to Grades O-9 and O-10.

C. Retired Pay (10 U.S.C. § 1401-1412).

1. Member before 8 September 1980. ("Multiplier" x number of years x high month's pay.)

2. Member after 7 September 1980. ("Multiplier" x number of years x average monthly base pay for member's high three years.)

3. Determining the retired pay "multiplier." (10 U.S.C. § 1409)

a. Member before 1 August 1986 – "multiplier" equals 2 ½ percent per year.

b. Member after 31 July 1986 – "multiplier" equals 2½ percent per year minus 1 percent for each year of service less than 30. For a twenty-year retirement, officer will receive 40%. **NOTE**: As a result of the FY 2000 Defense Authorization Act, members who entered the service after July 31, 1986, will be given a choice of retirement plans at their 15th year of service. There are two options:

(1) Take the pre-1986 retirement system (High-Three Year Average System) or

(2) Elect the post-1986 retirement system (Military Retirement Reform Act (MRRA) of 1986, commonly referred to as REDUX) and take a $30,000 career retention bonus.

X. FINANCIAL CONSIDERATIONS.

A. Separation Pay for Involuntary Separations (DOD Instruction 1332.29, para C).

1. Basic eligibility requirements: Six years active duty; honorable service; involuntary separation; and a written agreement to serve in Ready Reserve for at least 3 years.

2. Full Separation Pay.

a. Officers who are involuntarily separated for the following reasons may receive full separation pay.

(1) Fully qualified but denied continuation on AD.

(2) Fully qualified but being separated under reduction in force (RIF).

b. Computation.

(1) $30,000 ceiling eliminated.

(2) Formula: 10% of annual base pay times the number of years service.

(3) Example. CPT with 8 years service. (.10 x (12 x $3,703.00 (monthly base pay))) x 8 (years in service) = $35,548.80

3. Half Separation Pay. Officers who are involuntarily separated for cause **may** receive half separation pay.

a. Homosexuality.

b. Drug or alcohol abuse rehabilitation failure.

c. For the convenience of the government.

d. Security.

4. Officers involuntarily separated due to substandard performance or misconduct do not receive separation pay.

B. Special Separation Benefit (SSB) (10 U.S.C. § 1174a) and Voluntary Separation Incentive (VSI) (10 U.S.C. § 1175).

1. Special Separation Benefit (SSB) and Voluntary Separation Incentive (VSI). [**NOTE:** The DOD's temporary drawdown program was not renewed by the National Defense Appropriations Act for FY 2002 and therefore terminated on 31 December 2002. These programs may be resurrected, subject to the availability of future appropriations and the need to reduce Army size.]

a. Special Separation Benefit (SSB). (*See* 10 U.S.C. § 1174a.)

(1) Provided for a one-time lump sum payment.

(2) Formula: 15% of annual base pay times the number of years service.

(3) Example: CPT X has eight (8) years of service. CPT X's pre-tax payment would be (.15 x (12 x $4,273.50 (last month base pay)) x 8 (years in service) or $61,538.40.

b. Voluntary Separation Incentive (VSI). (*See* 10 U.S.C. § 1175.)

(1) Provided for annual payments for twice the number of years of active duty.

(2) Formula: 2.5% of annual base pay times the number of years service paid annually for twice the number of years in service.

(3) Example: CPT Y has eight (8) years of service. During the next 16 years, he will receive $164,102.40 paid at an annual pre-tax rate of $10,256.40. Each of the 16 installments would be (.025 x (12 x $4,273.50 (last month's base pay))) x 8 (years in service) or $10,256.40.

c. Eligibility Rules for SSB and VSI. To collect benefits, an officer must:

(1) Be a RA or RC officer on the ADL;

(2) Have between six (6) and 20 years of service;

(3) Have five years of continuous AD or full time Guard duty immediately preceding the date of separation;

(4) Not be eligible for retired pay;

(5) Execute an agreement to serve in the Reserves; and,

(6) Meet other requirements established by the Secretary.

d. Other Limitations on SSB and VSI.

(1) Acceptance of DOD civilian position within 180 days results in loss of SSB or VSI.

(2) Disability/retired pay set-off. SSB/VSI recipients were permitted to later convert to the early retirement program. Retirement pay would then have been set-off by amounts received under SSB/VSI. (*See* 10 U.S.C. § 1174 (h).)

(3) Subject to the availability of appropriations.

C. Recoupment (10 U.S.C. § 2005).

1. Policy. Individuals who participate in certain advanced education programs and fail to complete their educational requirements or military service obligations are subject to recoupment.

2. Procedures.

a. Defense Finance and Accounting Service (DFAS) procedure initiated by the officer's local commander.

b. Recoupment must be accomplished prior to separation.

XI. OTHER CONSIDERATIONS.

A. Selective Continuation on Active Duty (SELCON). (*See* 10 U.S.C. § 637.)

1. Applies to RA **and** OTRA officers. The Secretary may (based on the needs of the service for specific skills) convene selective continuation boards to retain twice nonselected officers who wish to remain on active duty. CPTs may be retained until 20 years time in service (TIS); MAJs until 24 years TIS, unless thereafter promoted AZ.

2. NDAA for FY 2002, section 505(d), extended SELCON to OTRA officers.

a. MAJs with less than 14 years TIS are not required to be SELCONed until 20 years. SELCON increments of three years.

b. MAJs with more than 14 years TIS will normally be SELCONed until 20 years. Officers who refuse to accept SELCON through retirement eligibility are not authorized to receive Separation Pay.

c. Non-SELCONed officers will be separated within seven months.

B. Involuntary Separation of Officers with Access to Sensitive Programs. AR 600-8-24, para 1-18.

1. Coordination with supporting security officials required. Separation will not occur unless the security official concurs with the action.

2. Applies to officers in the following categories:

a. Knowledge of sensitive compartmented information (SCI).

b. Nuclear Weapon Personnel Reliability Program assignment.

c. Knowledge of Single Integrated Operational Plan—Extremely Sensitive Information (SIOP-ESI).

d. Special Access Program (SAP) knowledge.

e. Presidential Support assignment.

C. Separation in a Foreign Country. AR 600-8-24, para 1-28.

1. Normally, officers are not separated in OCONUS (Outside the Continental United States) commands. They are returned to the United States and processed for final separation at CONUS-based separation/transfer points.

2. Exceptions.

a. Officer requests separation in a foreign country and the government concerned consents.

(1) The officer must obtain all necessary documents for his or her lawful presence in the foreign country prior to separation.

(2) The officer's major command (MACOM) may disapprove the request for overseas separation.

b. Officers confined in a foreign penal institution pursuant to the sentence of a foreign court.

(1) DA must approve separation during confinement.

(2) Foreign authorities must take final action on the case before separation.

(3) The foreign government concerned must consent to the officer's separation in its territory.

D. Referral for Physical Disability Evaluation. AR 600-8-24, para 1-23.

1. Triggered when it is determined that an officer being processed for REFRAD, separation, retirement, or elimination has a medical impairment that does not meet medical retention standards.

2. Officers under investigation for an offense chargeable under the Uniform Code of Military Justice (UCMJ) that could result in dismissal or punitive discharge may not be referred for or continue disability processing unless –

a. The investigation ends without charges.

b. The commander exercising court-martial jurisdiction dismisses charges.

c. The commander exercising court-martial jurisdiction refers the charge(s) for trial to a court-martial that cannot adjudge a dismissal or punitive discharge.

3. Officers pending certain involuntary REFRADs or involuntary elimination under chapter 4, AR 600-8-24, or who request resignation for the good of the service or separation, resignation or retirement in lieu of elimination, will be processed under both AR 600-8-24 and the medical/physical evaluation board system.

a. If the physical disability evaluation results in a finding of physical fitness, the Army Physical Disability Agency will approve the findings for the Secretary of the Army and forward them for processing with the AR 600-8-24 action.

b. If the physical disability evaluation results in a finding of physical unfitness, both actions will be forwarded to the Secretary of the Army for determination of appropriate disposition.

4. When an officer is processed for separation or retirement for reasons other than those indicated above, physical disability processing takes precedence.

XII. COMMANDER'S RESPONSIBILITIES.

A. Ensuring proper documentation.

B. Ensure counseling requirements of AR 600-8-24, para 1-12, properly completed in all REFRAD cases.

1. Required for commissioned officers with less than 10 years active federal commissioned service.

2. Triggered when such officers submit a request for voluntary REFRAD or an unqualified resignation.

3. Counseling is by the first colonel in the officer's chain of command or supervision. Chaplains, judge advocates, and medical officers will be counseled by a senior officer of their branch in the chain of technical supervision or as specifically designated by their branch.

4. Counseling must include the following:

a. Advice concerning the opportunities available in the military.

b. A discussion of the officer's previously achieved investment in the Army.

c. A determination as to whether the officer has satisfied all applicable service obligations.

d. A determination that the officer is not under investigation or charges, awaiting the results of trial, or being considered for administrative elimination.

e. A determination that the officer is not AWOL, in the confinement of civil authorities, suffering from a severe mental disease or defect, or in default in respect to public property or public funds.

f. Advice encouraging a RA officer to accept an appointment in the U.S. Army Reserve. RC officers will be encouraged to retain their commissioned status in the U.S. Army Reserve.

g. The addresses of agencies that can provide the officer with information about U.S. Army Reserve career opportunities. See Table 1-1.

C. Take the Proper Action. In determining what action to take when faced with officer misconduct or poor performance, the commander should decide:

1. Should the officer be retained on active duty?

2. Should the officer be eligible for reappointment or recall to active duty at some later time?

3. Should the officer lose his or her commission?

XIII. CONCLUSION.

THIS PAGE INTENTIONALLY BLANK

CHAPTER 4

ENLISTED SEPARATIONS

TABLE OF CONTENTS

I. REFERENCES. 1

II. INTRODUCTION. 1

III. AUTHORITY TO ORDER SEPARATIONS.. 2

IV. CHARACTERIZATION OF SERVICE OR TYPE OF DISCHARGE. 4

V. PROCEDURAL CATEGORIES AND ADMINISTRATIVE CONSIDERATIONS. 6

- **A. Overview. 6**
- **B. Soldier initiated (i.e., voluntary). 7**
- **C. Notification cases. 7**
- **D. Board hearing cases. 10**
- **E. Administrative double jeopardy 13**
- **F. Separation pay. 13**

VI. COMMAND-INITIATED (INVOLUNTARY) SEPARATIONS. 15

- **A. Convenience of the Government, Chap 5 15**
- **B. Defective Enlistments, Reenlistments, and Extensions, Chap 7. 17**
- **C. Alcohol or Other Drug Abuse Rehabilitation Failure, Chap 9. 19**
- **D. Entry Level Performance and Conduct, Chap 11 19**
- **E. Unsatisfactory Performance, Chap 13. 20**
- **F. Misconduct, Chap 14 21**
- **G. Discharge for Homosexual Conduct, Chap 15 24**
- **H. Failure to Meet Body Fat Standards, Chap 18. 31**
- **I. Qualitative Management Program, Chapter 19 32**

VII. SOLDIER-INITIATED (VOLUNTARY) SEPARATIONS. 32

A. Expiration of Service Obligation, Chap 4. 32

B. Dependency or Hardship, Chap 6. 32

C. Separation of Enlisted Women -- Pregnancy, Chap 8. 33

D. Discharge in Lieu of Trial by Court-Martial, Chap 10. 33

E. Retirement for Length of Service, Chap 12 34

F. Selected Changes in Service Obligation, Chap 16 35

VIII. CONCLUSION. 35

CHAPTER 4

ENLISTED SEPARATIONS

I. REFERENCES.

A. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS).

B. AR 600-9, The Army Weight Control Program.

C. AR 600-85, Alcohol and Drug Abuse Prevention and Control Program.

D. AR 601-280, Total Army Retention Program.

E. AR 635-200, Personnel Separations - Enlisted Personnel (1 Nov 2000).

II. INTRODUCTION.

Enlisted administrative separations is the area of military personnel law that governs how enlisted soldiers leave the Army. Strictly speaking, the topic covers both favorable (i.e., retirement or Honorable Discharge at expiration of term of service (ETS)) and unfavorable separations. This outline focuses on those involuntary and voluntary separations that senior leaders will most likely encounter.

It is useful to analyze enlisted separations along four dimensions. These axes frequently determine how fast, or indeed whether, a separation can be accomplished.

- Who has authority to order (i.e., direct or approve) the separation?
- How will the separation be characterized (i.e., what type of discharge will the soldier receive)? What will be the impact on the soldier's future?
- What procedural steps are required to separate the soldier?
- On what substantive basis (or "chapter") will the separation be processed? Is the separation voluntary or involuntary?

MAJ Chris Fredrikson
FY 2004 Senior Officers Legal Orrientation Course
FY 2004

III. **AUTHORITY TO ORDER SEPARATIONS.** AR 635-200, para 1-19 [hereinafter, citations without reference to a regulation will be to AR 635-200].

A. **Secretary of the Army**. Virtually unlimited authority.

B. **GCMCA** (General Court-Martial Convening Authority). All chapters, except Secretary of the Army plenary authority cases (para 5-3), reduction in force, strength limitations, or budgetary constraints (para 16-7); QMP (chap 19); voluntary separations of soldiers serving indefinite enlistments (para 4-4); conviction by a foreign court (paras 1-41a and d, para 14-9a); and early release from AD of RC personnel serving AGR tours under Title 10 (para 15-5).

C. **General officer** (GO) **in command with a legal advisor**. Most chapters, *except* secretarial authority cases (para 5-3), lack of jurisdiction (5-9), discharge in lieu of court-martial (Chap 10).

D. **SPCMCA** (Special Court-Martial Convening Authority).

1. Chap 5, Convenience of the Government (less 5-9, Lack of Jurisdiction).
2. Chap 6, Dependency or Hardship.
3. Chap 7, Defective Enlistments, Reenlistments, and Extensions (except OTH).
4. Chap 8, Pregnancy.
5. Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure.
6. Chap 10, Discharge in Lieu of Court-Martial (if delegated, at a post with a PCF, for AWOLs; may approve before trial, but may not disapprove)
7. Chap 11, Entry Level Performance and Conduct.
8. Chap 12, Retirement
9. Chap 13, Unsatisfactory Performance.
10. Chap 14, Misconduct (only with a General Discharge; Honorable or OTH goes to GCMCA or GO in command).
11. Chap 15, Homosexual Conduct (unless OTH Discharge warranted).

12. Chap 16, Selected Changes in Service Obligations.

13. Chap 18, Failure to Meet Body Fat Standards (notification cases only).

E. **LTC-level commander with a legal advisor** (includes MAJ(P) assigned to LTC position; does not include MAJ or MAJ(P) Acting Commander). Only the following:

1. Chap 8, Pregnancy (voluntary discharge).

2. Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure (notification cases only).

3. Chap 11, Entry Level Performance and Conduct.

4. Chap 13, Unsatisfactory Performance (notification cases only).

5. Chap 16, Selected Changes in Service Obligations (voluntary).

6. Chap 18, Failure to Meet Body Fat Standards (notification cases only).

F. Only HQDA may involuntarily discharge a soldier with 18 or more years of active Federal service.

G. The separation authority's three questions.

1. Sufficient evidence?

a) Burden on the government, not the soldier (or "respondent").

b) **Preponderance** (50% +), ***not*** higher criminal standard of proof beyond a reasonable doubt.

2. Retain or separate?

3. Characterization of service?

IV. CHARACTERIZATION OF SERVICE OR TYPE OF DISCHARGE.

Characterization of service will be based on the quality of the soldier's service, including the reason for separation . . . subject to the limitation under the various reasons for separation. The quality of service will be determined according to standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in the UCMJ, directives and regulations issued by the Army, and the time-honored customs and traditions of military service.

AR 635-200, para 3-5a.

A. Overview.

1. Honorable.

2. General (under honorable conditions).

3. Under Other Than Honorable Conditions.

4. Entry Level status (uncharacterized).

5. Order of release from the custody and control of the Army by reason of void enlistment or induction.

6. [Dropped from the rolls.]

7. [Punitive discharge (Dishonorable or Bad Conduct discharges). Only as a result of approved court-martial sentence.]

B. **Honorable** discharge.

1. "[A]ppropriate when the quality of the soldier's service generally has met the standards of acceptable conduct and performance of duty for Army personnel…." AR 635-200, para 3-7a(1).

2. Look to the pattern of behavior, not isolated incidents.

3. Soldier receives DD Form 256A, Honorable Discharge Certificate.

4. Usually required if Government first introduces limited use information from the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) during discharge proceedings.

C. **General** discharge (under honorable conditions).

1. "[I]ssued to a soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge." AR 635-200, para 3-7b(1).

2. Only permitted if the reasons for separation (chapter) specifically authorizes it. Never permitted for ETS.

3. Soldier receives DD Form 257A, General Discharge Certificate.

4. Impact on benefits.

   a) No civil service retirement credit for time spent on active duty.

   b) No education benefits. Money paid in to Montgomery GI Bill is forfeited.

   c) Many states will not pay unemployment compensation.

   d) "I understand that I may expect to encounter substantial prejudice in civilian life."

5. No automatic upgrading of discharges. Upgrading requires application to the Army Board for Correction of Military Records (ABCMR) or the Army Discharge Review Board (ADRB), and the ultimate success rate is very low.

D. Under Other Than Honorable (**OTH**) Conditions.

1. Authorized under certain chapters for a pattern of behavior, or one or more acts or omissions, "that constitutes a significant departure from the conduct expected of soldiers of the Army." AR 635-200, para 3-7c(1) & (2).

2. Board hearing required, unless waived by the soldier or the separation is voluntary (i.e., Chap 10).

3. No discharge certificate issued (but soldier still receives DD Form 214 with characterization of service annotated).

4. "I . . . understand . . . I may be ineligible for many or all benefits as a veteran under both Federal and State laws and . . . I may expect to encounter substantial prejudice in civilian life."

5. When approved by separation authority, automatically reduces an enlisted soldier to Private, E-1, by operation of law.

6. No automatic upgrading of discharges. Upgrading requires application to the ABCMR or the ADRB. Chances of success are very low.

E. **Entry Level** status (uncharacterized).

1. For "unsatisfactory performance and/or conduct while in entry-level status" (first 180 days of creditable service, or first 180 days of creditable service after a break in service of over 90 days).

2. Counseling and rehabilitation essential before separation.

3. No characterization of service.

4. Not a *per se* bar to veteran's benefits, but has the effect of disqualifying the soldier for most federal benefits, since most require service of over 180 days to qualify.

F. Release from custody and control of the Army (para 3-9).

1. Usually no characterization of service, since the person never acquired military status. Exception for constructive enlistment.

2. Very rare; used only for void enlistments.

3. Since no "service," no veteran's benefits.

V. PROCEDURAL CATEGORIES AND ADMINISTRATIVE CONSIDERATIONS.

A. Overview.

1. Soldier initiated (i.e., voluntary).

2. Notification cases.

3. Board hearing cases.

B. Soldier initiated (i.e., voluntary).

1. Procedure.

a) Soldier initiates action by memorandum or DA Form 4187 with supporting documentation.

b) Forwarded through command channels to approval authority.

c) Limited procedural rights for the soldier.

2. Applicable separation chapters.

a) Chap 6, Dependency or Hardship.

b) Chap 8, Enlisted Women--Pregnancy.

c) Chap 10, In Lieu of Trial by Court-Martial.

d) Most of Chap 16, Selected Changes in Service Obligations (includes VSI and SSB).

C. **Notification cases**.

1. Procedure. Paras 2-2 and 2-3.

a) Counseling and rehabilitative transfer requirements apply to many separations.

(1) Counseling always ***required*** under (para 1-16):

(a) Involuntary separation due to parenthood, para 5-8.

(b) Personality disorder, para 5-13.

(c) Physical or mental condition, para 5-17.

(d) Entry Level Performance and Conduct, Chap 11.

(e) Unsatisfactory Performance, Chap 13.

(f) Minor disciplinary infractions or a pattern of misconduct, para 14-12a or b.

(g) Overweight, Chap 18.

(2) Rehabilitative transfer generally *required* for separations under (1)(d) (e) & (f) above.

(a) Trainees recycled between companies or platoons at least once.

(b) Others recycled between battalion-sized units or larger at least once, with at least 3 months at each unit.

(c) PCS only for “meritorious cases” where soldier is a “distinct asset” to the Army.

(d) Waiver authorized if transfer would serve no useful purpose or would not produce a quality soldier. Examples:

(i) Two consecutive APFT failures.

(ii) Pregnancy while in entry-level status.

(iii) Highly disruptive or suicidal.

(iv) Resistance to rehabilitative efforts.

(v) Small installation or remote location.

(vi) Transfer detrimental to soldier or Army. (i.e. indebtedness, ASAP or mental health counseling)

b) Commander notifies soldier in writing that soldier's separation is recommended. Soldier must sign acknowledgment of receipt.

(1) Cite specific allegations and provisions of regulation that authorize separation.

(2) Least favorable characterization of service soldier could receive.

(3) Right to consult with counsel.

(4) Right to submit statements.

(5) Right to obtain copies of all matters going to separation authority.

(6) Right to a hearing if soldier has six years or more of combined active and reserve service on date separation is initiated.

c) Soldier may consult with counsel; submit matters within seven duty days (or request extension).

d) Action forwarded through command channels to separation authority for final action.

e) Legal review.

(1) No *requirement* for legal review unless ADAPCP limited use evidence (typically, Chap 9; will include some Chap 13 or 14 separations) involved.

(2) As a practical matter, most SJA offices try to do a legal review twice: first, before packet is presented to soldier; second, before final action goes to the separation authority.

2. Notification procedure alone may be used when:

a) Soldier has less than six years of combined active and reserve service on date separation is initiated.

b) Command does not seek to impose an OTH discharge.

c) Regulation permits for:

(1) Some provision of Chap 5, Convenience of the Government.

(2) Chap 7, Defective Enlistments/Reenlistments and Extensions.

(3) Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure.

(4) Chap 11, Entry Level Performance and Conduct.

(5) Chap 13, Unsatisfactory Performance.

(6) Chap 14, Misconduct, but only when service should be characterized as General.

(7) Chap 18, Failure to Meet Body Fat Standards.

D. **Board hearing cases**.

1. Procedure. Paras 2-4 through 2-12.

a) Soldier entitled to all rights listed under Notification Procedure, *supra*. Added rights:

(1) Counsel for representation (no right to counsel of choice).

(2) Right to a board hearing.

(3) Right to submit a conditional waiver.

(4) Fifteen-day notice before the hearing.

(5) Challenge board members for cause.

(6) Request witnesses.

(7) Submit matters to the board.

(8) Question witnesses.

(9) Choose whether of not to submit to examination by the board.

(10) Argue to the board.

b) Board hearing.

(1) Composition. Para 2-7. Three or more voting members, SFC or above, all senior to the respondant. Majority commissioned or warrant officers. One must be MAJ or above. If soldier is female or member of a minority group and so requests, a board member must be female or a member of a minority group.

(2) Formal rules of evidence (i.e., Military Rules of Evidence (MRE), contained in the Manual for Courts-Martial (MCM)) do not apply. See para 2-11.

(a) See AR 15-6.

(b) Standard for admission of evidence: relevant and competent.

(c) Limited privileges preserved.

(d) Coerced statements excluded.

(e) Bad faith unlawful searches by military members excluded.

(f) Polygraph evidence admitted only by agreement of the parties.

(3) Government represented by a “Recorder.”

(4) Legal advisor. Not required by para 2-7a. If appointed, rules finally on all matters of evidence and challenges except to himself or herself.

(5) President rules on all matters of procedure and all matters of evidence if no legal advisor appointed. May be overruled by a majority of the board.

(6) Voting members meet in closed session and return findings and recommendations. Be sure board answers the required questions; use a findings worksheet as you would in a court-martial.

c) Final action. Para 2-6.

(1) Legal review required "by a qualified officer fully cognizant of applicable regulations and policies to determine whether the action meets the requirements of [AR 635-200]." Para 2-6a.

(a) No *requirement* for reviewing officer to be a JA unless:

(i) OTH recommended.

(ii) Soldier identified specific legal issues for consideration by separation authority.

(iii) Limited use evidence was introduced.

(b) As a practical matter, most SJA offices try to do a legal review twice: first, before packet is presented to soldier; second, before final action goes to the separation authority.

(2) Separation authority's action may be no less favorable than the board's recommendations, para 2-6d, unless separation authority submits a request for separation under para 5-3 to HQDA (TAPC-PDT-SS) for action by the Secretary of the Army, para 2-6e.

(3) Separation authority may suspend execution of an approved separation (except for fraudulent entry or homosexual conduct) for up to six months. Para 1-18. Upon satisfactory completion of the probation period (or earlier) separation authority will cancel execution of

the approved separation. If there is further misconduct, may be basis for new separation action, disciplinary action, or vacation of the suspension.

2. Required.

a) Any case where command seeks to impose an OTH.

b) Any case when soldier has six years or more of combined active and reserve service on date separation action is initiated.

c) Any separation under Chap 15, Homosexual Conduct.

E. **Administrative double jeopardy** (para 1-17). Soldiers will not be processed for administrative discharge under Chaps 11, 13, 14, 15 , or AR 604-10 (Military Personnel Security Program) for conduct that has been the subject of:

1. A prior judicial proceeding resulting in acquittal, or a finding of not guilty only by reason of lack of mental responsibility;

2. A prior board action resulting in an approved finding that the evidence did not sustain the factual allegation concerning the conduct; or

3. A prior separation action if the separation authority ordered retention.

4. Exceptions.

a) Conduct or performance after the prior proceeding.

b) Fraud or collusion not known at time of prior proceeding.

c) New evidence not known at time of prior proceeding despite due diligence.

F. **Separation pay**. DoD Instr. 1332.29.

1. General prerequisites.

a) More than six but less than twenty years service immediately before discharge.

b) Agrees to enter Ready Reserve for three years.

c) Involuntary discharge or denial of reenlistment.

2. Full separation pay.

a) Honorable discharge required.

b) Fully qualified for retention, but denied reenlistment because of RIF, retention control point, or denial of promotion.

c) (monthly base pay at discharge) x 12 x (yrs active duty) x 10%.

3. Half separation pay.

a) Honorable or general discharge.

b) Not fully qualified for retention and being involuntarily separated because of ETS, selected changes in service obligation (i.e., QMP), convenience of the government, homosexual conduct, alcohol or drug abuse rehabilitation failure, or security.

c) One half of the formula in para F.2.c. above.

4. No separation pay.

a) Any soldier who *requests* discharge (i.e., Chap 6 (Dependency or Hardship), Chap 8 (Pregnancy), Chap 10 (In Lieu of Trial by Court-Martial), or para 16-5 (voluntary discharge of soldier denied reenlistment)).

b) Any separation during first term of enlistment.

c) Any separation under Chap 13 (Unsatisfactory Performance), Chap 14 (Misconduct), dropped from the roles, or court-martial sentence.

d) Any OTH discharge.

VI. COMMAND-INITIATED (INVOLUNTARY) SEPARATIONS.

A. **Convenience of the Government**, Chap 5.

1. Secretarial Plenary Authority (Chap 5, Section II).

a) Requires DA approval.

b) Honorable, general, or entry level (uncharacterized) discharge.

c) Ordinarily used when no other provision applies (i.e. HIV infection, refusal to submit to medical care, religious practices cannot be accommodated, or separation authority wants to take action more adverse to soldier than that recommended by an administrative discharge board).

d) Standard: Early separation in the best interest of the Army or of the soldier.

e) No requirement for administrative board hearing, regardless of soldier's time in service.

2. Involuntary Separation Due to Parenthood, para 5-8.

a) Basis. "Parental obligations interfere with fulfillment of military responsibilities [such as] repeated absenteeism, late for work, inability to participate in field training exercises or perform special duties such as CQ and Staff Duty NCO, and nonavailability for worldwide assignment or deployment according to the needs of the Army." Para 5-8a.

b) Counseling with a view towards separation required.

c) Honorable, general, or entry level (uncharacterized) discharge.

d) Separation authority: SPCMCA.

e) See AR 600-20, Army Command Policy, para 5-5 (13 May 02), for requirements for single soldiers and soldiers married to service members to prepare family care plans.

3. Personality Disorder, para 5-13.

   a) Deeply-ingrained maladaptive pattern of behavior of long duration that interferes with assignment or duty performance.

   b) Psychiatrist or doctoral-level clinical psychologist must make diagnosis.

   c) Counseling and opportunity to overcome deficiency required.

   d) Honorable or entry-level discharge required under most circumstances. General discharge available only for soldier who has GCM conviction, or more than one SPCM conviction, in current enlistment.

4. Other Designated Physical or Mental Conditions, para 5-17.

   a) Conditions that potentially interfere with assignment to or performance of duty, but not amounting to disability and excluding conditions appropriate for separation under paras 5-11 or 5-13.

   b) Psychiatrist or doctoral-level clinical psychologist must make diagnosis.

   c) Counseling and opportunity to overcome deficiency required.

   d) Honorable discharge or entry-level appropriate under most circumstances. General discharge available with notice procedures, but normally not appropriate.

5. Other bases within Chap 5: surviving sons and daughters, aliens not lawfully admitted to the United States, lack of jurisdiction, soldiers who did not meet procurement medical standards, failure to qualify for flight training, concealment of arrest record, early separation to further education.

6. Para 5-15, failure to meet Army body fat composition or weight control standards, has been superseded by Chap 18, Failure to Meet Body Fat Standards.

B. **Defective Enlistments, Reenlistments, and Extensions**, Chap 7.

1. Fraudulent entry.

a) Procurement of enlistment, reenlistment, or period of active service through deliberate misrepresentation, omission, or concealment of information which, if known and considered by the Army at the time of enlistment or reenlistment, might have resulted in rejection.

b) Separation authority must apply three tests.

(1) Is information disqualifying?

(2) Is the apparently disqualifying information true?

(3) Did the soldier deliberately misrepresent or withhold it?

c) Examples of fraudulent entry include concealment of prior service, true citizenship status, conviction by civil court, record as a juvenile offender, medical defects, absence without leave or desertion from a prior service, pre-service homosexual conduct, or other disqualification, or misrepresentation of intent with regard to legal custody of children.

d) Honorable, general, under other than honorable conditions, or entry level separation.

2. Minority.

a) Release from custody and control of the Army if soldier enlisted under 17 and has not yet attained that age.

b) Discharge for minority is upon application of parents if soldier is under 18 and enlisted without written consent of parents.

3. Erroneous enlistments or reenlistments.

a) Enlistment is erroneous if:

(1) it would not have occurred had the relevant facts been known by the government or had appropriate directives been followed; and

(2) it was not the result of fraudulent conduct on the part of the soldier; and

(3) the defect is unchanged in material respects.

b) Soldier may be retained in service if retention is in the best interests of the Service and the disqualification may be waived.

c) Honorable, ELS, or release from custody and control.

4. Defective or unfulfilled enlistment or reenlistment.

a) Defective enlistment agreement. Soldier was eligible for enlistment but did not meet prerequisites for option for which enlisted. This situation exists in the following circumstances:

(1) A material misrepresentation by recruiting personnel, upon which the soldier reasonably relied and thereby was induced to enlist for the option, or

(2) An administrative oversight or error on part of recruiting personnel in failing to detect that the soldier did not meet all requirements for enlistment commitment, and

(3) Soldier did not knowingly take part in creation of the defective enlistment.

b) Unfulfilled enlistment commitment. Soldier received a written enlistment commitment for which the soldier was qualified, but which cannot be fulfilled by the Army, and soldier did not knowingly take part in creation of the unfulfilled commitment.

c) Honorable discharge or entry level separation.

C. **Alcohol or Other Drug Abuse Rehabilitation Failure**, Chap 9.

1. Basis. Soldier is enrolled in ADAPCP and commander determines:

   a) That soldier lacks potential for future service and further rehabilitation efforts are not practicable; or

   b) Long term rehabilitation is necessary and the soldier is transferred to a civilian medical facility for rehabilitation.

2. Mandatory initiation when a soldier is declared an alcohol or other drug abuse rehabilitation failure. AR 635-200, para 9-2, and AR 600-85, para 5-5.

3. Notification procedure.

4. Separation authority. LTC-level commander (but SPCMCA for board cases).

5. Honorable, general, or entry level separation. But honorable discharge required in any case in which the government initially introduces limited use evidence as defined by AR 600-85.

D. **Entry Level Performance and Conduct**, Chap 11.

1. Basis. Unsatisfactory performance or minor disciplinary infractions evidenced by inability, lack of reasonable effort, failure to adapt to military environment, or pregnancy which precludes full participation in training required to earn MOS (Military Occupational Specialty).

2. Soldier must be in an entry level status:

   a) First 180 days of creditable continuous active duty; or

   b) First 180 days of creditable continuous active duty following break in active service of more than 92 days.

   c) Separation action must be initiated prior to the end of the 180th day.

3. Prior counseling and rehabilitative efforts are essential.

4. Rehabilitative transfer required. May be waived by separation authority *under extremely limited circumstances*. Para 1-16d.

5. Notification procedure.

6. Description of separation.

   a) Soldiers who have completed Initial Entry Training or have been awarded a Military Occupation Specialty will be transferred to the Individual Ready Reserve unless the soldier has no potential for useful service under full mobilization.

   b) All other soldiers separated under Chap 11 will receive an entry level separation with no characterization of service.

7. Separation authority. LTC-level commander for non-board cases. SPCMCA for board cases.

E. **Unsatisfactory Performance**, Chap 13.

1. For soldiers beyond entry level status.

2. Prior counseling with a view toward separation required.

3. Rehabilitative transfer required. May be waived by separation authority *under extremely limited circumstances*. Para 1-16d.

4. Mandatory grounds. Para 13-2. Unless the commander chooses to impose a bar, separation must be initiated for soldiers who:

   a) Without medical reason fails two successive APFTs (*see also* AR 350-41).

   b) Are eliminated for cause from an NCOES course.

5. Notification procedure.

6. Description of separation.

   a) Characterization: Honorable or General.

b) Soldiers who have completed IET or have been awarded a MOS will not necessarily be separated.

(1) If the characterization is Honorable, the soldier is transferred to the IRR.

(2) If the characterization is General, the soldier will be transferred to the IRR unless the soldier clearly has no potential for useful service under conditions of full mobilization (separation authority's decision).

7. Separation authority. LTC-level commander for non-board cases. SPCMCA for board cases.

F. **Misconduct**, Chap 14.

1. Overview. Chap 14 includes four separate grounds for separation:

a) Conviction by a civil court.

b) Pattern of minor military disciplinary infractions. .

c) Pattern of misconduct (military or civilian).

d) Commission of a serious offense.

2. Separation authority.

a) GCMCA or general officer in command with a JA or legal advisor for cases initiated under administrative board procedures (OTH possible).

b) SPCMCA:

(1) Discharge under OTH not warranted and notification procedures used. *This exception is used frequently*. An honorable discharge may be ordered only when the GCMCA has so authorized in the case.

(2) An administrative separation board recommends an entry level separation or general discharge.

(3) An administrative separation board recommends an honorable discharge and GCMCA has authorized the exercise of separation authority in the case.

3. Conviction by a civil court. Para 14-5.

a) May be considered for discharge when initially convicted by civil authorities, if:

(1) A punitive discharge would be authorized for the same or closely related offense under the UCMJ, or

(2) The sentence by the civil authorities includes confinement for 6 months or more, without regard to suspension or probation.

b) If separation action is initiated by the immediate commander, the case will be processed through the chain of command to the separation authority.

c) Execution of discharge is withheld until soldier indicates in writing that he won't appeal the civilian conviction, until time for appeal expires, or until soldier's term of service expires, whichever is earlier.

d) Retention should be considered only in exceptionally meritorious cases when clearly in the best interest of the Army.

4. Minor (military) disciplinary infractions. Para 14-12a.

a) A pattern of misconduct consisting solely of minor military disciplinary infractions.

b) Prior counseling with a view toward separation required.

c) Rehabilitative transfer or waiver required.

5. Pattern of Misconduct. Para 14-12b.

a) Discreditable involvement with civil or military authorities.

b) Conduct prejudicial to good order and discipline.

c) Prior counseling with a view toward separation required.

d) Rehabilitative transfer or waiver required.

6. **Commission of a serious offense**. Para 14-12c.

a) Specific circumstances of the offense (military or civilian) warrant separation, and a punitive discharge would be authorized for the same or closely related offense under the MCM.

b) AWOL or desertion.

c) Abuse of illegal drugs.

(1) Handled under the above provisions if not handled by either a court-martial authorized to impose a punitive discharge or by separation UP AR 635-200, Chap 9, Alcohol or Other Drug Abuse Rehabilitation Failure.

(2) Criteria. AR 635-200, para 14-12c.

(a) All soldiers identified as illegal drug abusers , with the exception of self-referrals to ASAP, will be processed for separation. See ALARACT Message, DAPE-MPE, Subject: Clarification of Enlisted Separation Policy for Misconduct-Abuse of Illegal Drugs, 161152Z SEP 02

(b) Note that the message and AR 600-85 requires initiation of separation proceedings, but does not mandate discharge. The separation action will be initiated and processed through the chain of command to the separation authority, who will exercise discretion, on a case-by-case basis, in directing retention or discharge of the soldier.

(c) All medically-diagnosed drug dependent soldiers *will* be processed for separation after detox.

(d) Any soldier involved with illicit trafficking, distributing, or selling *will* be processed for separation unless the case is referred to a court-martial empowered to adjudge a punitive discharge. AR 600-85, para 1-35b.

7. Procedure.

a) Administrative board procedure - if OTH warranted.

b) Notification procedure - if OTH is not warranted.

8. Description of separation. Honorable, general, OTH, or entry level separation.

G. **Discharge for Homosexual Conduct**, Chap 15.

1. Grounds for Separation. National Defense Authorization Act FY 94 (10 U.S.C. § 654) (Effective 30 Nov 93). Codifies homosexual exclusion policy. Requires separation of a soldier who:

a) "... has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts,"

b) "... has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding ... that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," or

c) "... has married or attempted to marry a person known to be of the same biological sex."

2. Definitions. Several definitions are key to understanding the new legislation and its implementation. Some of the definitions are found in the statute; others are provided in the implementing DoD guidance.

a) Homosexual means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

b) Homosexual conduct means a homosexual act, a statement by the soldier that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

c) Homosexual act means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purposes of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in such bodily contact.

d) Homosexual statement means language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (See ref f). Includes statement "I have a homosexual orientation.".

e) Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

3. Accessions.

a) Don't ask. Applicants will not be asked to reveal their sexual orientation or whether they have engaged in homosexual conduct.

b) All applicants will be informed of the separation policy for homosexual conduct.

c) If applicant volunteers homosexual orientation, or if recruiter comes across independent evidence of homosexual acts, applicant will be rejected.

4. Investigations.

a) Only a commander in the chain of command of a suspected homosexual can authorize an investigation or inquiry.

b) Investigations may be initiated only when there is "credible information that there is a basis for discharge."

c) "Credible Information ..."

(1) Exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

(2) Does <u>not</u> exist, for example, when "the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct."

d) Informal fact-finding inquiries and administrative separation procedures are the preferred way of addressing homosexual conduct.

e) Neither CID nor MPI will conduct investigations solely to determine the sexual orientation of an individual.

f) If the misconduct is purely private, consensual, adult misconduct, the CID may investigate only if the information is either referred to them by the unit commander, or the local CID unit receives approval to investigate from the commander or deputy commander, USACIDC.

g) If case involves only statements (e.g., "I am gay"), or only private, consensual, adult sexual misconduct, scope of investigation should be limited to "the factual circumstances directly relevant to the specific allegations."

h) When interviewing soldiers suspected of homosexual conduct:

(1) The military policy on homosexual conduct should be explained to the soldier before questioning. The interviewer will not ask questions if the soldier indicates a reluctance to talk.

(2) Soldiers will be advised of Art 31 rights if suspected of UCMJ violation.

(3) "Statement" case. May inquire into whether soldier has engaged in, attempted to engage in, or intends to engage in homosexual acts or marriages. May ask soldier why he or she made statement; what he or she means by it.

(4) "Acts" case. Discuss only the alleged conduct. May seek specific details to test credibility, to corroborate statement, to assess criminality of acts, to determine whether aggravating circumstances are present, to obtain information to counter a possible rebuttal by soldier, and to determine possible basis for recoupment by government.

(5) Soldiers shall not be asked to reveal sexual orientation.

5. Separations.

a) Administrative board procedure used in all enlisted cases.

b) Soldiers will be separated if there is an approved finding of homosexual conduct. Exceptions:

(1) **Rebuttable presumption for cases based solely on admissions**. Admission of being a homosexual or having a homosexual orientation creates a rebuttable presumption of propensity or intent to engage in homosexual acts. Burden of proof shifts to soldier. In determining whether a soldier has successfully rebutted the presumption, some or all of the following may be considered (this is not an exclusive list):

(a) Whether the member has engaged in homosexual acts.

(b) The member's credibility.

(c) Testimony from others about the members past conduct, character, and credibility.

(d) The nature and circumstances of the member's statements.

(e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.

(2) **Homosexual act committed by a heterosexual**. A soldier may be retained after commission of a homosexual act if and only if the following findings are made. The soldier bears the burden of proving *all* the following items to the board's satisfaction:

(a) Such conduct is a departure from the soldier's usual and customary behavior.

(b) Such conduct is unlikely to recur.

(c) Such conduct was not accomplished by use of force, coercion, or intimidation.

(d) Under the particular circumstances of the case, soldier's continued presence is consistent with

the interests of the Service in proper discipline, good order, and morale.

(e) The soldier does not have a propensity or intent to engage in homosexual acts.

(3) Homosexual conduct for purposes of avoiding or terminating military service. If the commander or board believes that the individual is not a homosexual but is merely trying to avoid military service, the soldier does not have to be discharged.

c) Characterization of service.

(1) Honorable, general, or entry level separation.

(2) Under Other Than Honorable (OTH) conditions. Authorized if, during a current term of service, the soldier attempted, solicited, or committed a homosexual act:

(a) By use of force, coercion, or intimidation.

(b) With a person under 16 years of age.

(c) With a subordinate in circumstances that violate customary military superior-subordinate relationships.

(d) Openly in public view.

(e) For compensation.

(f) Aboard a military vessel or aircraft.

(g) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

d) Separation Authorities. Enlisted separation authorities are:

(1) GCMCA (when command seeks OTH).

(2) SPCMCA (when command does not seek OTH).

6. Reporting Requirement.

a) All Army legal offices (including reserve component) are required to *report* pending homosexual discharge cases to OTJAG Administrative Law Division.

b) Initial report made on initiation of separation action; subsequent report made following ultimate disposition.

c) Report by fax (fax (703) 693-2518; voice (703) 614-4586).

d) Separation authority remains with local commanders.

7. Recoupment.

a) 10 U.S.C. § 2005 & 37 U.S.C. § 308, as amended by NDAA FY 94.

b) Soldiers (and cadets) receiving "advanced education assistance" must enter into written agreements providing for pro rata reimbursement of such educational assistance if the soldier, "voluntarily or because of misconduct," fails to complete the agreed upon period of service. The same standard applies to pro rata recoupment of enlisted bonuses when the enlisted soldier is separated prior to the end of the agreed service obligation.

c) Separation for homosexual conduct requires recoupment only if the conduct:

(1) Was punishable under the UCMJ.

(2) Would authorize an OTH discharge.

(3) Was committed for the purpose of seeking separation.

d) Soldiers being processed for separation due to homosexual conduct that requires recoupment should be informed of the possibility of recoupment in the notification of separation.

e) In cases where recoupment might be appropriate, separation boards should make specific findings on the issue of recoupment. If the board is waived, the separation authority must make specific findings.

f) Coordinate all potential recoupment cases with HQDA (DAPE-MP).

H. **Failure to Meet Body Fat Standards**, Chap 18.

1. Soldier must first be given a reasonable opportunity to comply with and meet weight reduction goals.

2. Soldier must not have a medical condition that precludes them from participating in the Army body fat reduction program.

3. Initiation of separation or bar to reenlistment mandatory for soldiers who do not make satisfactory progress and still exceed the body fat standards for any two consecutive months, or after a period of 6 months in the Army body fat reduction program.

4. Initiation of separation required for soldiers who fail to maintain body fat composition standards during the 24-month period following removal from the program.

5. Sole basis for separation is failure to meet weight control standards under the provisions of AR 600-9. Will not be used to separate a soldier who meets the criteria for separation under other provisions of AR 635-200.

6. Notification procedure.

7. Honorable discharge or entry level separation.

8. Separation authority is LTC level commander; SPCMCA, if there is a board.

I. Qualitative Management Program, Chapter 19.

1. NCOs whose performance, conduct, and/or potential for advancement do not meet Army standards.

2. HQDA boards screen RA NCOs (SSG-CSM/SGM) and USAR AGR NCOs (SGT-CSM/SGM).

3. Soldier notified and given opportunity to appeal.

4. Approval authority is DCSPER.

5. Honorable discharge.

VII. SOLDIER-INITIATED (VOLUNTARY) SEPARATIONS.

A. Expiration of Service Obligation, Chap 4.

1. Rarely any JAG involvement.

2. Honorable or entry level discharge.

3. Beware of inadvertent ETS discharge of soldier for whom the command is contemplating adverse action. See paras 1-21 through 1-28.

B. **Dependency or Hardship**, Chap 6.

1. Bases.

a) Dependency. Death or disability of a member of a soldier's (or spouse's) immediate family causes an immediate family member to rely upon the soldier for principal care of support.

b) Hardship. Separation from the Army will materially affect the care or support of the family by alleviating undue and genuine hardship.

2. Voluntary request by soldier.

3. Separation authority: SPCMCA.

4. Honorable, General, or Entry Level (uncharacterized) discharge possible. General requires notification procedure.

C. **Separation of Enlisted Women -- Pregnancy**, Chap 8.

1. Bases.

a) Normal Pregnancy. An enlisted woman is pregnant and has been counseled IAW para 8-9, AR 635-200.

b) Abnormal Pregnancy. An enlisted soldier carries a pregnancy for 16 weeks or more, but then has an abortion, miscarriage, or an immature or premature delivery before separation.

2. Voluntary; soldier must request separation.

3. Request must generally be approved.

4. Soldier may request a specific separation date, but separation authority, in consultation with treating physician, sets the date. Date may be no later than thirty days before expected delivery date.

5. Soldier will not be separated overseas except at her home of record. (Soldiers assigned overseas are processed through stateside separation facility).

6. Prohibited when separation has been initiated under a different chapter of AR 635-200.

7. If soldier is under investigation, charges, or serving court-martial sentence, Chap 8 request may be approved with consent of GCMCA.

8. Separation authority: LTC-level commander.

9. Honorable or Entry Level (uncharacterized). General, if notification procedures listing specific factors warranting characterization used.

D. **Discharge in Lieu of Trial by Court-Martial**, Chap 10.

1. Chap 10 previously titled “Discharge for the Good of the Service.”

2. Two independent bases.

   a) Preferral of charges, the punishment for which, under the UCMJ, includes a punitive discharge, OR

   b) Referral of charges to a court-martial authorized to adjudge a punitive discharge where the enhanced punishment provisions of RCM 1003(d), MCM, are relied upon.

3. Voluntary request by soldier.

4. Consulting counsel advises soldier concerning elements of offense, burden of proof, possible defenses, possible punishments, requirement of voluntariness, type of discharge, withdrawal rights, loss of VA benefits, and prejudice in civilian life because of discharge.

5. Disciplinary proceedings are neither suspended nor abated by submission.

6. Statements submitted by the accused in connection with the request for discharge are not admissible against the accused at courts-martial, except as provided for in Military Rule of Evidence 410.

7. Withdrawal permitted only with consent of the GCMCA unless trial results in acquittal or sentence does not include a punitive discharge.

8. Separation authority.

   a) GCMCA.

   b) SPCMCA where authority has been delegated to act in certain cases (para 10-7) (*rare*: commander of Personnel Confinement Facility, only charge is AWOL, prior to trial, specific delegation of authority). Cannot disapprove.

9. Most requests approved with Other Than Honorable discharge. Although the regulation provides for Honorable, General, or entry level (uncharacterized) separations.

E. **Retirement** for Length of Service, Chap 12. Usually not considered an "administrative discharge" at all.

F. Selected Changes in Service Obligation, Chap 16. Chap 16 contains ten grounds for discharge.

1. Order to active duty as a commissioned or warrant officer.

2. Discharge for acceptance into a program leading to a commission or warrant officer appointment.

3. Discharge for the purpose of immediate enlistment or re-enlistment.

4. Non-retention on AD. (only USAR AGR soldiers who have a local bar to reenlistment may request voluntary separation, not RA soldiers)

5. Overseas returnees.

6. Early separation due to disqualification for duty in MOS.

7. Early separation due to reduction in force, strength limitations, or budgetary constraints.

8. Separation of soldiers of medical holding detachments/companies.

9. Separation of personnel assigned to installations or units scheduled for inactivation or permanent change of station.

10. Holiday early transition program.

VIII. CONCLUSION.

CHAPTER 5

SENIOR OFFICERS LEGAL ORIENTATION

NONJUDICIAL PUNISHMENT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESOURCES 1

III. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT 1

IV. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT? 2

V. OFFENSE 3

VI. TYPES OF ARTICLE 15 3

VII. NOTICE REQUIREMENTS 4

VIII. HEARING 6

IX. PUNISHMENTS 6

X. ARTICLE 15 FILING 7

XI. APPEALS 8

XII. PUBLICIZING ARTICLE 15S 10

XIII. ADMINISTRATIVE CONSEQUENCES OF ARTICLE 15 10

XIV. JUDGE ADVOCATE'S ROLE 12

XV. CONCLUSION 12

XVI. ARTICLE 15 NARRATIVE 13

THIS PAGE INTENTIONALLY LEFT BLANK

CHAPTER 5

NONJUDICIAL PUNISHMENT

I. INTRODUCTION

II. RESOURCES

A. UCMJ art. 15 (2002).

B. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2002) [hereinafter MCM].

C. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE chs. 3, 4, 21 (6 Sep. 2002) [hereinafter AR 27-10].

III. AUTHORITY TO IMPOSE NONJUDICIAL PUNISHMENT

A. Who may impose? AR 27-10, para. 3-7.

1. Commanders.

2. Joint Commanders. *See* AR 27-10, para. 3-7*b*.

B. Can Article 15 authority be delegated? AR 27-10, para. 3-7*c*.

1. Article 15 authority may *not* be delegated.

2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to a deputy or assistant commander or to chief of staff (if general officer or frocked to general officer rank). Delegation must be written.

MAJ Robert Best
FY 2004 Senior Officers Legal Orientation Course
FY 2004

C. Can Article 15 Authority Be Limited? *Yes*.

1. Permissible limitations.

a) Superior commander may ***totally*** withhold.

b) Superior commander may ***partially*** withhold (e.g., over categories of personnel, offenses, or individual cases). No requirement that limitations be written but probably a good idea (e.g., write a memorandum or publish in post regulation).

2. Impermissible limitations.

a) Superior commander cannot direct a subordinate commander to impose an Article 15.

b) Superior commander cannot issue regulations, orders, or guides that either directly or indirectly suggest to subordinate commanders that --

(1) Certain categories of offenders or offenses are to be disposed of under Article 15.

(2) Predetermined kinds or amounts of punishment are to be imposed for certain categories of offenders or offenses.

IV. WHO CAN RECEIVE NONJUDICIAL PUNISHMENT?

A. Military Personnel of a Commander's Command. AR 27-10, para. 3-8.

1. Assigned.

2. Affiliated, attached, or detailed.

3. The “Beans and Bullets” Rule. AR 27-10, para. 3-8*a*(3)(b).

B. Personnel of Other Armed Forces (services).

V. OFFENSE

A. When is an Article 15 Appropriate? AR 27-10, para. 3-9.

1. ***Minor*** offenses.

2. Correct, educate, and reform offenders.

3. Preserve a soldier's record of service from unnecessary stigma.

4. Further military efficiency.

B. Can a soldier be court-martialed for an offense that has been the subject of NJP?

1. Yes, if it is a serious offense. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). *See also* R.C.M. 907(b)(2)(D)(iv) and AR 27-10, para. 3-10.

2. Para. 1e, Part V, MCM states that ordinarily a "minor offense" is one that does not authorize the imposition of a dishonorable discharge or confinement in excess of one year if tried at a general court-martial. That same paragraph, however, makes clear that determining what is a minor offense versus a major offense is within the discretion of the imposing commander, considering a number of factors including circumstances of the offense; age, rank, duty assignment, record and experience of the offender; and maximum sentence if tried by general court-martial. *See United States v. Gammons*, 51 M.J. 169 (1999); *Turner v. Dep't of Navy*, 325 F.3d 310 (D.C. Cir. 2003). The maximum punishment authorized for an offense is not controlling. *United States v. Pate*, 54 M.J. 501, 506 (Army Ct. Crim. App. 2000).

C. Once Article 15 imposed, cannot impose another Article 15 for same offense or substantially same misconduct. AR 27-10, para. 3-10.

VI. TYPES OF ARTICLE 15

A. Summarized Article 15. AR 27-10, para. 3-16.

1. Appropriate where soldier is enlisted *and* punishment should not exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

2. Recorded on DA Form 2627-1 (AR 27-10, p. 23).

B. Formal Article 15. AR 27-10, para. 3-17.

1. Appropriate if soldier is an officer, **OR**

2. Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

3. Recorded on DA Form 2627 (AR 27-10, p. 24).

VII. NOTICE REQUIREMENTS

A. Soldier must be notified of the following (AR 27-10, paras. 3-16*b* and 3-18):

1. Commander's intention to dispose of the matter under Article 15.

2. Offense suspected of.

3. Maximum punishment that the commander could impose under Article 15.

4. Soldier's rights under Article 15.

a) Formal

(1) A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.

(2) Consult with counsel (usually 48 hours).

(3) Right to remain silent.

(4) Demand trial by court-martial (unless attached to or embarked on a vessel).

(5) Request an open hearing.

(6) Request a spokesperson.

(7) Examine available evidence.

(8) Present evidence and call witnesses.

(9) Appeal.

b) Summarized

(1) Reasonable decision period (normally 24 hours).

(2) Demand trial by court-martial.

(3) Remain silent.

(4) Hearing.

(5) Present matters in defense, extenuation, and mitigation.

(6) Confront witnesses.

(7) Appeal.

B. Delegating the notice responsibility. AR 27-10, para. 3-18*a*.

1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified).

2. Good way to involve first sergeant or command sergeant major.

C. How to give notice. Follow AR 27-10, app. B.

VIII. HEARING

A. In the commander's presence.

B. "Open" v. "closed" hearing.

C. Witnesses.

D. Spokesperson.

E. Defense counsel's role.

F. Rules of evidence.

1. Commander is not bound by the formal rules of evidence, except for the rules pertaining to privileges.

2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

3. But beware that if turned down, Military Rules of Evidence will apply at a court-martial.

G. Decision on guilt.

H. Proof beyond a reasonable doubt required. AR 27-10, para. 3-18l.

IX. PUNISHMENTS

A. Maximum punishment. AR 27-10, para. 3-19, tbl. 3-1. Based on rank of imposing commander – field grade v. company grade and rank of soldier receiving punishment.

B. Four types of punishment.

1. Reduction in grade.

a) In general, commander who can promote to a certain grade can also reduce from that grade.

b) Officers and enlisted soldiers above the grade of E-6 cannot be reduced at an Article 15.

2. Loss of liberty punishments.

a) Correctional custody.

b) Extra duty.

c) Restriction.

3. Forfeiture of pay.

a) Forfeitures are based on grade to which reduced, whether or not reduction is suspended.

b) Forfeitures may be applied against a soldier's retired pay. AR 27-10, para. 3-19*b*(7)(b).

4. Admonition and reprimand.

C. Combination of punishments.

X. ARTICLE 15 FILING

A. Summarized Article 15. AR 27-10, para. 3-16*f*.

1. DA Form 2627-1 filed locally.

2. Destroyed two years after imposition or upon transfer from the unit.

B. Formal Article 15. AR 27-10, para. 3-37.

1. Specialist/Corporal (E-4) and below.

a) Original DA Form 2627 filed locally in unit nonjudicial punishment or unit personnel files.

b) Destroyed two years after imposition or upon transfer to another general court-martial convening authority.

2. All other soldiers.

a) Performance fiche or restricted fiche of OMPF.

b) Imposing commander's filing decision is subject to review by superior authority.

c) Records directed for filing in restricted fiche will be redirected to the performance fiche if the soldier already has an Article 15, received while he was a sergeant (E-5) or above, filed in his restricted fiche.

d) Superior commander cannot withhold subordinate commander's filing determination authority.

XI. APPEALS

A. Soldier only has one right to appeal under Article 15. AR 27-10, para. 3-29.

B. Time limits to appeal.

1. Reasonable time.

2. After five calendar days, appeal presumed untimely and may be rejected.

C. Who acts on an appeal?

1. Next superior commander. Should act on appeal within five calendar days or three calendar days for summarized proceedings.

2. Any superior commander, senior to the appellate authority, may act on an appeal.

3. Successor in command or imposing commander can take action on appeal.

D. Procedure for submitting appeal.

1. Submission of matters optional.

2. Submitted through imposing commander.

E. Action by appellate authority.

1. May conduct independent inquiry.

2. Must refer certain appeals to the SJA office for a legal review *before* taking appellate action. UCMJ art. 15(e); DA Form 2627, note 9 (on reverse of form).

3. May refer an Article 15 for legal review in any case, regardless of punishment imposed.

4. May take appellate action even if soldier does not appeal.

5. Options. AR 27-10, paras. 3-23 through 3-33.

a) Approve punishment.

b) Suspend. Suspension automatically includes a condition that the soldiers not violate any punitive article of the UCMJ. AR 27-10, para. 3-24. Consider vacation if subsequent misconduct or violation of a condition imposed by the commander.

c) Mitigate.

d) Remit.

e) Set Aside. "Clear injustice."

F. Petition to the Department of the Army Suitability Evaluation Board (DASEB). AR 27-10, para. 3-43.

1. Sergeants (E-5) and above may petition to have DA Form 2627 transferred from the performance to the restricted fiche.

2. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.

3. Petition normally not considered until at least one year after imposition of punishment.

XII. PUBLICIZING ARTICLE 15S

A. Permissible, but must delete social security number of the soldier and relevant privacy information. Avoid inconsistent or arbitrary policy. Special considerations for sergeants and above. AR 27-10, para. 3-22.

XIII. ADMINISTRATIVE CONSEQUENCES OF ARTICLE 15

A. Formal Article 15 (DA Form 2627).

1. Admissible at trial by court-martial during presentencing but record must be from "personnel records." R.C.M. 1001(b)(2). If trial is for

the same offense the subject of earlier nonjudicial punishment, Art. 15(f) allows an accused soldier to offer evidence that a disciplinary punishment has been imposed. In that case, the court-martial shall consider the prior punishment, if offered by the accused, in determining an appropriate punishment. *United States v. Gammons*, 51 M.J. 169 (1999).

2. Possible objections to the admissibility of records of nonjudicial punishment include:

a) Record of nonjudicial punishment is incomplete. *E.g., United States v. Rimmer*, 39 M.J. 1083 (A.C.M.R. 1994) (holding that record inadmissible because the form had no indication whether soldier appealed). *See also, United States v. Godden*, 44 M.J. 716 (A.F. Ct. Crim. App. 1996) (holding that administrative errors on record did not affect any procedural due process rights of appellant and record admissible).

b) Record not maintained in accordance with regulation. *E.g., United States v. Weatherspoon*, 39 M.J. 762 (A.C.M.R. 1994) (finding that record maintained in Investigative Records Repository was not a personnel record maintained in accordance with regulation because regulation specifically stated that records of courts-martial or nonjudicial punishment would not be maintained under its authority); *United States v. Davis*, 44 M.J. 13 (1996) (holding that records from Discipline and Adjustment Board Report admissible).

c) Record does not indicate that the accused had the opportunity to consult with counsel <u>and</u> the accused waived his/her right to demand trial by court-martial. *U.S. v. Booker*, 5 M.J. 238 (C.M.A. 1978); *U.S. v. Kelley*, 45 M.J. 259 (1996).

d) Record does not have discernible signatures. *United States. v. Dyke*, 16 M.J. 426 (C.M.A. 1983).

e) Appeal incomplete. *United States v. Yarbough*, 33 M.J. 122 (C.M.A. 1991).

f) Record is for an offense subject to the current court-martial. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (declaring

that record of prior nonjudicial punishment has no relevance to current court-martial). *But see, United States v. Dire*, 46 M.J. 804 (C.G. Ct. Crim. App. 1997) (averring that prior nonjudicial punishment could be relevant to show accused's recidivism; deciding case, however, on defense waiver).

3. May be considered in administrative proceedings.

B. Summarized Article 15 (DA Form 2627-1).

1. Not admissible at trial by court-martial. AR 27-10, para. 5-26.

2. May be considered in administrative proceedings.

XIV. JUDGE ADVOCATE'S ROLE

A. Commander's Advisor.

B. Defense Counsel.

XV. CONCLUSION

ARTICLE 15 NARRATIVE

Introduction

One of the most valuable disciplinary tools available to the commander is the authority to impose nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice (UCMJ). In the case of United States v. Booker, 5 M.J. 238 (C.M.A. 1977), the Court of Military Appeals recognized the role of nonjudicial punishment in the military:

> We wholeheartedly express our firm belief that those exercising the command function need the disciplinary action provided for under Article 15 . . . to meet and complete their military mission.

The provisions of Article 15 are also discussed in Part V of the Manual for Courts-Martial (MCM) and Chapter 3, Army Regulation (AR) 27-10. These three sources are the primary authorities on nonjudicial punishment.

A. Applicable Policies

A commanding officer is encouraged to use nonpunitive measures to the maximum extent possible in furthering the efficiency of the command without resorting to the imposition of nonjudicial punishment. Resort to nonjudicial punishment is proper only in cases in which administrative measures are considered inadequate or inappropriate. Nonjudicial punishment may be imposed in appropriate cases to –

- Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;

- Preserve an offender's military record from unnecessary stigma by a court-martial conviction; and

- Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial (AR 27-10, para. 3-2).

Before imposing punishment under Article 15 the commander should consider all options. In reviewing these options, the commander should be aware of the ultimate impact of his action upon the soldier's record and upon the discipline of the command. He should also consider the number of man-hours required to effect his decision. When an offense has occurred, one or more of the following options may be available to the commander:

1. No action.

2. Nonpunitive action.

   a. Administrative reprimand/admonition (AR 600-37).

b. Administrative reduction in grade for inefficiency (AR 600-8-19).

c. Extra training (AR 600-20, para. 4-4*b*).

d. Administrative separation (AR 635-200).

3. Nonjudicial punishment.

4. Court-martial.

REFERENCE: MCM, Part V, paras. 1c, d; AR 27-10, paras. 3-2, 3-3.

B. Imposition Authority

1. Who May Give an Article 15?

The general rule is that any "commander" is authorized to impose punishment under Article 15. The term "commander," when speaking of Article 15 authority, refers to a "commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command" (AR 27-10, para. 3-7). Whether a unit constitutes a "command" sometimes raises questions. AR 27-10 indicates that "commands" include companies, troops, batteries, numbered units and detachments, missions, Army elements of unified commands and joint task forces, service schools, and area commands. This list is not exhaustive.

The commander's discretion to impose an Article 15 is personal and must not be hampered by any superior's "guidelines" or "policies" (AR 27-10, para. 3-4*b*). Although a superior commander may not tell a subordinate when to impose an Article 15 or how much punishment should be assessed, the superior commander may:

a. Totally withhold the subordinate's imposition authority, or

b. Partially limit imposition authority regarding (1) a particular category of offenses (e.g., all larcenies), (2) a certain category of personnel (e.g., all officers), or (3) a particular case (e.g., a fight involving soldiers at a local bar).

Because the authority to impose an Article 15 is an attribute of command, a commander may not, as a general rule, delegate that authority to a subordinate. The exception to that rule is that an officer authorized to exercise general court-martial jurisdiction and any commanding general may delegate Article 15 powers to a commissioned officer actually acting as a deputy or assistant commander. A general court-martial convening authority or a commanding general may also delegate the authority to the chief of staff, provided the chief of staff is a general officer. These delegations must be in writing and may be exercised only when the delegate is senior in rank to the person being punished (AR 27-10, para. 3-7*c*). A commander's delegation of the authority does not prevent that commander from personally acting in any case. An appeal from

punishment imposed under a delegation of power will be acted upon by the authority next superior to the officer who delegated the authority.

2. Who May Receive an Article 15?

A commander may impose nonjudicial punishment upon military members of the command. Individuals are considered to be members of the command if they are assigned to the command or affiliated with the command under conditions, either expressed or implied, which indicate that the commander of the unit is to exercise administrative or disciplinary authority over them. If there is any question as to whether an individual is within the command, written or oral orders that effect the individual's status should be examined. If the orders indicate that the soldier is attached for administration of military justice, or simply attached for administration, the individual normally will be considered to be a member of the command for purposes of Article 15. Otherwise, consider where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors (AR 27-10, para. 3-8*a*).

A soldier could be a member (for the purposes of Article 15) of several commands. For example, PFC Frank Jones, who is a member of Company A at Fort Sticks, goes on TDY to Fort Acres where he is temporarily assigned to Company B. Theoretically, he could be a member of both Company A and Company B for purposes of nonjudicial punishment. In such cases, coordination between commanders is appropriate.

An Article 15 may not be imposed upon an individual once military status as a member of the command has terminated. For example, once Jones returns to his parent unit (Company A), he is no longer amenable to punishment by the commander of Company B. The commander of Company B may forward reports of offenses to Company A's commander for possible Article 15 punishment (AR 27-10, para. 3-8*b*).

3. When is an Article 15 Appropriate?

The general rule is that an Article 15 should be offered only for minor offenses. A rule of thumb found in the MCM indicates that an offense is minor if the maximum authorized punishment for the offense does not include a dishonorable discharge or confinement for more than one year (MCM, Part V, para. 1*e*). That, of course, is only a guideline. The standard for determining whether the offense is minor is flexible and requires examination of the surrounding circumstances. For example, possession of cocaine is normally considered a "major" offense, but the circumstances of the possession may dictate that it is a minor offense for the purposes of an Article 15.

Occasionally, an Article 15 is given for a major offense. If this occurs, a higher level commander may still refer the case to a court-martial if he deems the Article 15 inappropriate for the magnitude of the offense. The soldier must be given full credit for the Article 15 punishment that was imposed. This type of situation should occur only rarely. A commander should not proceed with an Article 15 if he or she is planning to court-martial the soldier for the same offense later.

REFERENCE: MCM, Part V, para. 2; AR 27-10, paras. 3-7, 3-8, 3-9.

C. Procedures in Formal Proceedings

1. Notice.

The commander who is considering the imposition of an Article 15 must give written and oral notice to the soldier (MCM, Part V, para. 4*a*; AR 27-10, para. 3-18*a*). AR 27-10 allows the notice to be given by an officer or noncommissioned officer designated by the imposing commander. The noncommissioned officer must be a SFC or above and must be senior to the individual being notified. The officer or NCO who conducts the notice portion of the proceeding does not sign in Item 2; the imposing commander must always sign the Article 15. The vehicle for providing the written notice is DA Form 2627. A boilerplate notice/advice can be found at Appendix B of AR 27-10. Normally, the commander presents the form to the individual and orally explains the various options and rights that are available. These options and rights include the following:

a. Article 31 rights.

b. Right to demand trial.

c. Right to consult with counsel.

d. Right to request an open hearing.

e. Right to request a spokesperson.

f. Right to call witnesses.

g. Right to appeal.

2. Rights and Rules.

The soldier is not entitled to know the type or amount of punishment that the soldier will receive if nonjudicial punishment ultimately is imposed. The soldier will be informed of the maximum punishment which may be given under Article 15, and, upon the soldier's request, the maximum punishment that could be adjudged by a court-martial upon conviction for the offense(s) (AR 27-10, para. 3-18*f*(2)). In addition, the soldier should be advised that the commander is not limited to the Article 15 charges if trial is demanded. This should not be a threat to add additional charges if trial is demanded, but may reflect that a commander selected one or two primary offenses to be dealt with by Article 15 and could list all offenses for a court-martial.

a. Article 31, UCMJ, rights warnings. The soldier should initially be advised that: (1) he or she is suspected of having committed an offense; (2) he or she has the right to remain silent; and (3) anything said may be used against him or her in the Article 15 proceeding or in a court-

martial. AR 27-10, para. 3-18*b*.

b. Right to demand trial. Unless the individual is attached to or embarked in a vessel, he or she may demand trial by court-martial in lieu of an Article 15. If the soldier does not demand a court-martial, then the commander may proceed under Article 15. If the soldier demands trial by court-martial, the Article 15 proceedings must stop. The commander must then decide whether to prefer court-martial charges. As a practical matter, a commander considering punishment under Article 15 should ensure, before proceeding, that a "good case" exists against the individual; otherwise, the commander could find himself in the unenviable position of not being able to prefer charges in the case of an Article 15 turn-down because of the strong likelihood of acquittal or even dismissal. An Article 15 generally should not be offered unless the commander is satisfied that the case can be won at trial. AR 27-10, para. 3-18*d*.

c. Right to consult with counsel. The soldier must be informed of the right to consult with counsel before making any further decisions regarding the Article 15. For purposes of nonjudicial punishment, "counsel" means (1) a judge advocate, (2) a Department of the Army civilian attorney, or (3) an officer who is a member of the bar of a federal court or of the highest court of a state. Included within this right is notice of the location of qualified counsel and a reasonable time (suggested to be 48 hours) to consult with the counsel. AR 27-10, para. 3-18*c* and *f*.

d. Open hearing. The soldier may request that the proceedings be open to the public. In all cases the imposing commander decides if the hearing is open or closed. Whether the proceeding is open or not, it is still informal and nonadversarial. The individual has the right to have this proceeding in the presence of the commander who intends to impose the punishment unless such an "appearance is prevented by the unavailability of the commander or by extraordinary circumstances." In those circumstances, the commander will appoint a commissioned officer to hear the soldier's case and make a written summary and recommendations. The commander then makes his decision based on the written summary and recommendations (AR 27-10, para. 3-18*g*(1)).

e. Spokesperson. The soldier may wish to have a spokesperson present during the proceedings. The spokesperson need not be a lawyer, and no travel costs or other unusual costs may be incurred at Government expense for the spokesperson's presence. The role of spokesperson must be voluntary; he or she may not be ordered to participate. Neither the spokesperson nor the soldier has a right to question or cross-examine any witnesses who may appear unless the commander agrees. The spokesperson or the soldier may, however, propose lines of questioning or relevant areas to pursue. AR 27-10, para. 3-18*h*.

f. Witnesses. Should the soldier request witnesses, the commander decides whether they are available. If the witnesses are located at the installation or nearby, they are considered available if their attendance would not unnecessarily delay the proceedings. No witness fees or transportation fees are authorized. AR 27-10, para. 3-18*i*.

g. Right to appeal. The soldier should be advised of the right to appeal the punishment. AR 27-10, para. 3-18*m*.

3. Consultation with counsel.

The commander will provide a reasonable opportunity (normally 48 hours) for the soldier to consult with counsel and decide whether to demand court-martial. If at the end of the designated time (including extensions) the soldier has not demanded trial by court-martial, the commander may impose punishment. The commander may also impose the Article 15 if the individual refuses to complete or sign Block 3 of the DA Form 2627 after having been given a reasonable time to do so. The individual should be told during the initial notification that punishment can be imposed if he or she fails to make a timely demand for trial or refuses to sign. If punishment is imposed under these conditions, the DA Form 2627 will reflect that fact at item 4 (see AR 27-10, para. 3-18*f*(4)).

4. Hearing.

After consulting with counsel, the soldier returns to the commander and completes DA Form 2627 indicating what options are to be exercised (demand trial, open hearing, etc.). If the soldier elects to proceed under Article 15, a hearing takes place at which the commander determines the guilt or innocence of the soldier. During the hearing the commander hears and considers all the evidence for and against the soldier, and if the soldier is found guilty, evidence of extenuating and/or mitigating factors. See Appendix B, AR 27-10 for further guidance in conducting the hearing.

The commander is not bound by the formal rules of evidence, except those pertaining to privileges, and may consider any matter, including unsworn statements, he or she reasonably believes to be relevant to the offense. The standard for guilt at the Article 15 proceeding is proof beyond a reasonable doubt.

REFERENCE: MCM, Part V, para. 4; AR 27-10, paras. 3-17, 3-18.

D. Article 15 Punishments

A field grade officer has substantially more punishment power than a company grade officer. See the punishment chart at Table 3-1, AR 27-10. If a company grade officer does not believe that his or her punishment authority is sufficient, the case may be forwarded to the first field grade officer in the chain of command. The company grade officer may recommend that the field grade officer exercise Article 15 power in the case; however, AR 27-10 prohibits a specific recommendation as to the nature or extent of the punishments that should be imposed. (AR 27-10, para. 3-5).

There are four general types of Article 15 punishments: censure, loss of liberty, deprivation of pay, and reduction in grade.

1. Censure.

There are two types of censure: admonition and reprimand. For enlisted personnel, admonitions and reprimands may be oral or written. For officers, they must be written. The admonition is a warning that if the particular conduct is repeated, adverse action will follow. The reprimand is a means of condemning past conduct. The censure should specifically indicate that it is being imposed as punishment under Article 15 (AR 27-10, para. 3-3*b*).

2. Loss of Liberty.

There are five types of punishment involving loss of liberty that can be imposed under Article 15:

a. Correctional Custody may be imposed upon enlisted soldiers in the grade of E-3 or below. Correctional custody may only be imposed if a correctional custody facility is available for use.

b. Arrest in Quarters is reserved for commissioned officers or warrant officers. While in this status the individual may not exercise command. If a superior commander, knowing of the arrest status, assigns command duties to the officer, the arrest terminates. AR 27-10, para. 3-19*b*(4).

c. Extra Duty may be performed at any time and for any length of time within the duration of the punishment. Normal extra duties might include fatigue details, but no duty may be imposed as extra duty which constitutes cruel or unusual punishment, or a punishment not sanctioned by service customs, is normally intended as an honor (e.g., guard of honor), requires the soldier to perform in a ridiculous or unnecessarily degrading manner, constitutes a safety or health hazard to the offender, or would demean the soldier's position as a NCO or specialist.

d. Restriction means that the individual must remain within specified limits (e.g., company area). The limits may be changed later as long as the new limits are not more restrictive than the original limits. Unless otherwise specified, the individual continues to perform military duties.

e. Confinement on diminished rations may be imposed only upon enlisted personnel in the grade of E-3 or below who are attached to or embarked on a vessel (MCM, Part V, para. 5*c*(5) and AR 27-10, para. 3-19*b*(2)).

3. Deprivation of Pay.

Forfeiture of pay is a permanent loss of basic pay, sea pay, and foreign duty pay. If the imposed punishment includes a reduction, the forfeiture is based on the lower pay grade. Forfeitures can be applied against a soldier's retirement pay.

An imposed punishment of forfeiture of pay should be indicated in dollar amounts as follows (AR 27-10, para. 3-19*b*(9)):

When the forfeiture is to be applied for not more than 1 month:

"Forfeiture of $_____,"

When the forfeiture is to be applied for more than 1 month:

"Forfeiture of $_____ per month for 2 months."

4. Reduction in Grade.

A reduction in grade is the most severe form of nonjudicial punishment. It affects not only the amount of pay the individual will receive but often results in loss of privileges and responsibilities.

The following rules relate to this form of punishment:

a. A reduction may be imposed only by a commander who has general authority to promote to the grade that the soldier currently holds. AR 600-8-19 provides:

The commanders below may promote, subject to authority and responsibility by higher commanders, as follows:

Grades	Promotion Authority
E-4 and below	Company grade commanders, (para. 1-9).
E-5 and E-6	Field grade commanders of any unit authorized a commander in the grade of lieutenant colonel (O-5) or higher, (para. 3-1).
E-7, E-8 and E-9	Headquarters, Department of the Army, (para. 4-1).

AR 600-8-19, para. 7-3, prohibits the reduction for misconduct of personnel in grades E-7 through E-9 under Article 15.

b. An individual in grade E-5 or E-6 or above may be reduced only one grade at a time in peacetime (MCM, Part V, para. 5*b*(2)(B)(iv)).

c. The new date of rank is the date the reduction is imposed. If the commander suspends the reduction, the date of rank for the grade held before imposition remains the same (AR 27-10, para. 3-19*b*(6)(b)).

5. Combinations of Punishments.

Normally, no two or more punishments involving deprivation of liberty may be combined to run either consecutively or concurrently. Restriction and extra duties may be combined, however, in any manner to run for a length of time not exceeding the maximum period for extra duties (45 days for field grade punishment, 14 days for company grade punishment).

6. Effective Date of Punishments.

A punishment is "imposed" on the date the commander signs the DA Form 2627 (Items 4-6, DA Form 2627, or Items 2-3, DA Form 2627-1). All punishments, if unsuspended, take effect the date they are imposed unless the commander, or a superior authority, prescribes otherwise.

If, when punishment is imposed, the soldier indicates a desire to appeal the punishment, the command has five calendar days (three days for summarized proceedings) excluding the date of submission, to decide the appeal. If the appeal is not decided in this five-day period, punishments involving loss of liberty (correctional custody, extra duty, restriction, etc.) will be interrupted at the soldier's request pending decision on the appeal (AR 27-10, para. 3-21).

REFERENCE: MCM, Part V, para. 5; AR 27-10, paras. 3-19 through 3-22.

E. Appeals

As noted earlier, one of the rights available to an individual being punished under Article 15 is the right to appeal. The recognized grounds for appeal are:

- Based on the evidence, the soldier was not guilty.

- Punishment was disproportionate to the offense.

The appeal is started with a notation on the DA Form 2627 in Item 7, when the soldier indicates a desire to appeal the punishment. Only one appeal is permissible in Article 15 proceedings. The appellate authority may reject an appeal not made within a reasonable period of time. Normally, an appeal submitted within 5 days after imposition of the punishment is considered timely. The commander may extend that time for good cause. (AR 27-10, para. 3-29). If, at the time of imposition of punishment, the soldier indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even if it is made within the 5-day period (AR 27-10, para. 3-29). The decision to file the Article 15 in the performance or restricted fiche (Item 5, DA Form 2627) is subject to appeal (AR 27-10, para. 3-37*b*(a)).

Who acts on the appeal? The soldier's appeal is routed through the commander who imposed the punishment. This commander may reconsider and take mitigating action. If the commander

so acts, the individual should be informed and asked whether, in view of the commander's clemency action, he or she wants to withdraw the appeal. Unless the appeal is voluntarily withdrawn, it is forwarded to the appellate authority, who is the authority "next superior" to the commander who imposed the punishment. For example, an appeal from an Article 15 imposed by a company commander would be sent to the soldier's battalion commander (AR 27-10, para. 3-30).

If the individual is transferred before the appeal is started, the appeal would be sent to the "new" appellate authority (i.e., the new battalion commander if we extend the example given above).

You will also recall that when we discussed the delegation of authority to impose an Article 15, we noted that in limited cases the authority could be delegated. The same holds true here. A "superior authority" who is a commander exercising general court-martial jurisdiction or is a general officer in command may delegate appellate powers to a commissioned officer of the command who is actually serving as a deputy or assistant commander. Such a commander may also delegate Article 15 appellate authority to a chief of staff who is a general officer.

1. Review by Judge Advocate.

Before an appellate authority may act, a judge advocate must review the case (Item 8, DA Form 2627; Note 9, back of DA Form 2627) if the punishment includes any of the following:

a. Arrest in quarters for more than seven (7) days;

b. Correctional custody for more than seven (7) days;

c. Forfeiture of more than seven (7) days' pay;

d. Reduction of one or more pay grades from the fourth or a higher pay grade;

e. Extra duties for more than 14 days;

f. Restriction for more than 14 days.

2. Options.

The appellate authority has a number of available options in deciding what action to take on an Article 15. The punishment may be approved as it stands (assuming that it is valid), but it may not be increased in either quality or quantity. The remaining options are actions that are viewed as lessening the imposed punishment.

a. Suspension. The purpose of suspending the punishment (or portions thereof) is to provide a probationary period for the soldier. If the soldier commits further misconduct amounting to an offense under the UCMJ, or violates a written condition of suspension during the period of suspension, the suspension may be "vacated" and the punishment executed. If the

punishment is not vacated before the end of the period of suspension, however, the punishment will be automatically canceled. Note that misconduct that causes a suspension to be vacated may also be the subject of a new Article 15.

Several special rules on suspension should be noted (MCM, Part V, para. 6a):

(1) An executed punishment of reduction or forfeiture may be suspended only within a period of four months after the date of imposition.

(2) Suspension of a punishment may not be for a period longer than six months from the date of suspension.

(3) Expiration of enlistment or term of service automatically terminates the suspension.

(4) Although a formal hearing is not required to vacate a suspension, the soldier should, unless impracticable, be given an opportunity to appear before the commander and present matters in defense, extenuation, or mitigation, if the punishment in question is one of those which would require judge advocate review (see preceding section).

b. Mitigation. Mitigation is a reduction of the quantity or quality of the punishment while the general nature of the punishment remains the same (AR 27-10, para. 3-26).

Example: Restriction for 14 days is reduced to restriction for seven days, or extra duties for 14 days is reduced to restriction for 14 days.

Example: Reduction in grade is converted to forfeiture of pay or to an intermediate grade. Note: This is an exception to the rule that requires the general nature of the punishment to remain the same. Furthermore, in this instance care should be exercised to ensure that the mitigated punishment of forfeiture of pay, added to any other forfeitures which might have been originally imposed, does not exceed the maximum amount of loss of pay which could have been originally imposed.

c. Remission. This action cancels any unserved portion of the punishment. Remission does not cancel the Article 15 itself, only that portion of the punishment that has not been served. Note that an unsuspended reduction in grade is executed immediately and therefore, can never be remitted. A discharge automatically remits the unserved portion of the punishment.

d. Setting Aside. If the punishment results in a clear injustice, the punishment or any portion thereof may be set aside and the soldier's rights and property restored. The punishment set aside may be executed or unexecuted (AR 27-10, para. 3-28). Set aside actions should normally be taken within four months of the imposition of the punishment (MCM, Part V, para. 6d), but such actions may be taken even after four months where there are unusual circumstances.

Although mitigating actions are normally taken on "appeal," the commander who imposed the punishment could take these steps even in the absence of an appeal, formal or otherwise. In

addition, a "successor in command" to the commander who imposed the punishment may also take action on the punishment. Furthermore, any "superior authority" may take these actions. For example, Jones appeals her Article 15 (imposed by her company commander) to her battalion commander, who in turn approves the punishment. The brigade commander may learn of the situation and suspend a portion of the punishment even though Jones has no right of appeal to the brigade commander (AR 27-10, para. 3-35).

REFERENCE: MCM, Part V, paras. 6, 7; AR 27-10, paras. 3-23 through 3-35.

F. Summarized Procedures

A commander may utilize summarized proceedings when dealing with the misconduct of an enlisted member of the command. The punishment imposed may not exceed 14 days restriction, 14 days extra duty, an oral reprimand or admonition, or any combination of these sanctions. The imposing commander or a designated subordinate (officer or noncommissioned officer in the grade of E-7 or above) will inform the soldier of the following:

1. The intent to proceed under Article 15, UCMJ.

2. The intent to use summarized proceedings.

3. The maximum punishment under summarized proceedings.

4. The right to remain silent.

5. The offenses allegedly committed and the articles of the UCMJ violated.

6. The right to demand trial.

7. The right to confront witnesses, examine adverse evidence, and submit matters in defense, extenuation and mitigation.

8. The right to appeal.

The soldier will be given a reasonable time (normally 24 hours) to decide whether to demand trial or to gather matters in defense, extenuation, and mitigation. There is no right to consult with legally qualified counsel. A spokesperson will not accompany the soldier at the proceedings. The soldier will be given a reasonable time (normally five days) to appeal. If an appeal is taken, punishment may be served pending a decision on appeal. Appeals should be promptly decided. If not decided within three calendar days, and if the soldier so requests, further performance of any punishment involving deprivation of liberty (extra duty and restriction) will be delayed pending decision on the appeal. The summarized proceedings will be legibly recorded on DA Form 2627-1. The form may be handwritten.

G. Filing

For soldiers in pay grade E-4 and below, all formal Article 15s (DA Form 2627) are filed locally in unit nonjudicial punishment files. They remain there for two years or until transfer to another general court-martial convening authority for a non-medical reason, whichever occurs first. For all other soldiers, records of formal Article 15s are filed in the Official Military Personnel File (OMPF). The imposing commander decides whether the Article 15 will be filed in the performance fiche or the restricted fiche of the OMPF. If, however, a soldier has an Article 15 in his or her restricted fiche, received while the soldier was a sergeant (E-5) or above, then any subsequent Article 15 will be filed in the soldier's performance fiche, regardless of the imposing commander's filing designation. Career managers and selection boards routinely use the performance fiche, and a filing on this fiche will likely have an adverse impact on the soldier's career. Access to the restricted fiche is typically more limited.

Summarized Article 15s (DA Form 2627-1) are maintained locally. They remain there for two years or until transfer from the unit. Summarized Article 15s may not be used in subsequent court-martial proceedings, but they may be used in adverse administrative actions.

REFERENCE: AR 27-10, paras. 3-36 through 3-40.

H. Supplemental Action

Even after action has been taken on an appeal and/or after DA Form 2627 has been properly filed, a commander can still take supplemental action on the Article 15. Such action may include mitigation, remission, suspension, set aside, or vacation, so long as it is taken within the time limits prescribed for each action. The supplemental action is recorded on DA Form 2627-2.

REFERENCE: AR 27-10, para. 3-38.

I. Publicizing of Article 15s

Article 15 punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted on the unit bulletin board, once the soldier's social security number and any other privacy information is deleted. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other soldiers. An inconsistent or arbitrary policy should be avoided regarding the announcement of punishment, to preclude the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of soldiers in the grade of E-5 or above, the following should be considered:

1. The nature of the offense.

2. The individual's military record and duty position.

3. The deterrent effect.

4. The impact on unit morale or mission.

5. The impact on the victim.

6. The impact on the leadership effectiveness of the individual concerned.

REFERENCE: AR 27-10, para. 3-22.

J. Administrative Consequences

Records of nonjudicial punishment may result in serious consequences not directly associated with the punishment imposed. Under some circumstances, the Article 15 must be reported to the National Criminal Information Center (NCIC). This is generally true only for serious offenses. The NCIC can be accessed by certain governmental agencies nationwide and could adversely impact the soldier's ability to obtain certain civilian jobs. In addition, a formal Article 15 is generally admissible at trial if the soldier is subsequently court-martialed. On the other hand, summarized Article 15s are not admissible at courts-martial. Any type of Article 15 can be considered in Army administrative proceedings or actions such as administrative separation boards and bars to reenlistment. An Article 15 is not, however, an automatic bar to reenlistment.

REFERENCE: AR 27-10, paras. 3-44 and 5-28*a*(4); AR 601-280, para. 8-4*d*(7); AR 635-200.

CHAPTER 6

SENIOR OFFICER LEGAL ORIENTATION

INTRODUCTION TO JUDICIAL ACTIONS

Introduction

In a perfect world the law would be fixed and eternal, but in reality, the law is man-made, fallible, and dynamic. Today's commander must be aware of the system and strive to apply it fairly and intelligently. This book will assist you in understanding the Uniform Code of Military Justice and the Manual for Courts-Martial, and in performing your duties as an integral actor in the military justice system.

It is not the purpose of this book to make you an expert in military justice. Rather, it is to expose commanders to the major requirements of military justice. This book is not intended to replace the basic sources to which it refers, or to do your thinking. It is only an aid, to be applied with sound discretion and mature judgment. There is a recurring theme throughout this guide; that is, the commander must seek the advice and assistance of the staff judge advocate. The "SJA" is your expert and adviser on military law; don't wait until your problem is out of control before seeking the staff judge advocate's counsel and advice.

A. Sources

1. The Constitution. The basic source for the separate system of criminal law in the military is the Constitution of the United States. Article I, section 8, of that document provides that Congress shall have the power to "make Rules for the Government and Regulation of the land and naval Forces."

2. The UCMJ. In l950, Congress used its constitutional powers to enact the Uniform Code of Military Justice (UCMJ), which was substantially revised by the Military Justice Acts of l968 and 1983. This statute provides a separate system of military criminal law for the armed services, much the same as the State of California or the State of Maryland have separate systems of criminal justice to meet their societal needs.

3. The Manual for Courts-Martial. Like most other statutes, the Uniform Code of Military Justice requires a detailed set of rules to supplement and explain its various provisions. Article 36 of the UCMJ authorizes the President to make rules prescribing the procedures to be followed before military tribunals, including the rules of evidence. In addition, Article 56 empowers the President to establish the levels of punishment for most offenses. These rules are issued in the form of an Executive Order by the President and are found in the Manual for Courts-Martial, (1995 ed). Therefore, the Manual has the force and effect of law, and compliance is mandatory.

4. Army Regulations. In addition to the Manual, AR 27-10, Military Justice (6 September 2002), fine-tunes the everyday administration of military justice for the Army. This regulation announces additional rules and procedures that must be followed. Furthermore, supplemental military justice regulations have been issued by many local commands. Commanders must also consult and comply with these regulations.

5. Court Decisions. While the Manual and Army regulations supplement and explain the UCMJ, the various courts involved with military criminal law interpret all of these sources of law. The Supreme Court of the United States and lower federal courts hear cases involving military criminal law. These cases are usually limited to (l) appeals based upon lack of jurisdiction and (2) appeals based upon a denial of some constitutional right. The United States Court of Appeals for the Armed Forces is the highest appellate court within the military judicial structure. This court is composed of five civilian judges appointed by the President. In addition, there is the United States Army Court of Criminal Appeals, an intermediate appellate court of review consisting of military appellate judges. The decisions of these courts interpreting statutes and regulations have the force of law and are binding upon commanders.

6. The Staff Judge Advocate. You can readily see from the above discussion that the sources of military criminal law are varied. To solve most military justice problems, you must refer to one or all of these sources. This is what the staff judge advocate is trained to do. The SJA is your legal adviser. Just as corporations consult with their general counsel before making legal and business decisions, commanders should contact their SJA for advice in dealing with disciplinary problems.

B. Background and Development

1. Background. The UCMJ had its beginnings early in our history. Rules for the government of our Army have been in force since the time of the American Revolution, initially in the form of the Articles of War. The Second Continental Congress adopted the first Articles of War on 30 June 1775, just three days before George Washington took command of the Continental Army. These Articles were patterned after the British Army Articles, which were derived from earlier European articles traceable to the Middle Ages. Our system of military justice is the product of centuries of experience in many countries. Our present UCMJ is not, however, an outmoded historical relic. On the contrary, while retaining the substance of what has proven sound, Congress has periodically reconsidered and revised the military justice system to reflect new knowledge, experiences, and law.

2. The Uniform Code of Military Justice, l950. The UCMJ was a significant revision in the military criminal law system. It combined the laws formerly governing the Army, Navy, and Air Force into one uniform code for all armed forces of the United States.

3. The Military Justice Act of 1968. A major revision of the Code and the Manual occurred with the Military Justice Act of 1968. The revised Code and Manual incorporated changes in the law since 1951 and substantially modified the military justice system.

The 1968 Act, among other things, instituted the position of military judge and gave soldiers the right to a qualified lawyer at a special court-martial in all but the rarest of

circumstances. Article 27(c) provides an accused with representation by a qualified lawyer except where a lawyer cannot be obtained due to physical conditions or military exigencies. AR 27-10, Military Justice, paragraph 5-5a, goes even further by mandating that in all special courts-martial the accused must be afforded the opportunity to be represented by qualified counsel. Remember, this right to counsel is in addition to the accused's right to hire a civilian lawyer.

The 1968 Act, as implemented by AR 27-10, para. 8-1c(1), also provides that a military judge will be detailed to special courts-martial unless precluded by physical conditions or military exigencies. It also gives an accused the right to request trial by a military judge alone in all cases except those that are referred to trial as capital cases. If the accused elects trial by judge alone, the military judge determines the guilt or innocence of the accused and, if there is a finding of guilty, the sentence.

4. The Military Justice Act of 1983 substantially revised the UCMJ. The Act relieved commanders of the administrative burden connected with personally excusing court-members before trial, eliminated requirements that commanders make certain legal determinations, and alleviated many redundancies in the system. The most significant revisions in the Act provide for direct review of Appeals for the Armed Forces decisions by the United States Supreme Court and authorized Government appeal of certain rulings by military judges at the trial level. This major revision was incorporated into the 1984 Manual for Courts-Martial.

The Military Justice Amendments of 1986, further refined the military justice system. The most significant change involved the expansion of court-martial jurisdiction to reach reserve component soldiers who commit offenses while in an Inactive Duty Training (IDT) status. In addition, the Act authorized, in limited circumstances, reserve component soldiers to be involuntarily called to active duty for the purpose of trial by court-martial, investigation under Article 32, UCMJ, or nonjudicial punishment.

After 1986, several national defense authorization acts made many minor changes to the UCMJ. For example, the Defense Authorization Act for Fiscal Year 1993 amended both the rape and drunk driving articles.

5. Changes to the Manual for Courts-Martial.

In 1980, the Joint Service Committee on Military Justice rewrote the Manual for Courts-Martial that took effect on 1 August 1984, replacing the Manual for Courts-Martial, 1969 (Rev. ed.).

6. The Trend. The trend in military justice legislation and court decisions is to increase the efficiency of our criminal justice system while balancing and protecting the rights of the accused. In light of these developments and continued public scrutiny of military justice matters, commanders must have a thorough knowledge of the system, and seek the advice of the staff judge advocate on all but routine matters.

C. Why a Separate System of Military Justice?

One of the unique features of our military society is its separate system of criminal justice. Most justice problems involving military personnel are resolved within this separate military justice system and only infrequently reach civilian criminal courts. Why do we have a separate justice system?

The succinct answer is: mission and location. The mission of the military is to defend the United States. No other institution has this mission. Because of this, many crimes in the military--AWOL, disobedience, disrespect--have no counterpart in civilian law. Our military justice system must function in wartime as well as in peacetime. This raises not only substantive, but also geographical problems for our state or federal civilian systems. Would a state or federal court be available in every part of the world where the United States might go to war? The answer is clearly no. Further most state and federal laws are not extraterritorial, that is, they do not reach to foreign lands. Accordingly, we have our own military justice system that reinforces the military mission and goes wherever we go.

It is inevitable in a democratic society such as ours that the military justice system is compared with the civilian court system. While there are differences, in almost every instance, a military accused receives rights and protections equal to or superior to those enjoyed by civilian defendants. Commanders, however, must continue to administer military justice with utmost fairness and efficiency. By doing so, the trust and confidence bestowed upon commanders by the American people and the Congress will be preserved.

D. Jurisdiction of Courts-Martial

1. Active Duty Jurisdiction. On June 25, 1987, the Supreme Court decided the case of Solorio v. United States. This case dramatically changed the rules concerning court-martial jurisdiction. The Court held that jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces, and not on whether the offense is service-connected. The case overruled the "service-connection test" established by the Court in O'Callahan v. Parker, a 1969 decision. Now jurisdiction will be established by simply showing that the accused is a member of the armed forces.

Now it is possible for both the military and civilian authorities may have jurisdiction over a soldier and his offense, *e.g.*, an offense committed off post. This will require SJA coordination with the local civilian prosecutor. Between the two, they will decide who can best prosecute the offender.

Civilians, including family members, are not subject to courts-martial jurisdiction. If they commit offenses on post, they may be tried in the local state, federal, or host nation court. Commanders should consult with their SJA when issues arise involving misconduct by civilians.

2. Jurisdiction over Reservists. In 1986, Congress amended Articles 2 and 3 of the UCMJ to extend jurisdiction over reservists during all types of training; in short, if the reservist is training, he or she is subject to military jurisdiction for crimes committed during the training period. The most significant change allows the military to exercise authority over reservists who commit crimes while performing weekend drill in IDT status.

Recognizing that IDT periods are brief, usually lasting only one weekend, the amendments to Article 3 allow reservists to return home at the end of IDT drill without divesting the military of jurisdiction. As a result, nonjudicial punishment may be handled during successive drill periods. Specifically, while punishment can be imposed during one drill period, it can be served during successive drill periods. Additionally, under the new Article 2(d), the government can order to involuntary active duty those reservists who violate the UCMJ during a training period. Reservists can be involuntarily ordered to active duty for Article 32 investigations, courts-martial, and nonjudicial punishment.

Active duty convening authorities should be familiar with reserve jurisdiction because all general and special courts-martial will be tried at the active duty post which supports the reserve component unit (includes National Guard units when federalized). Additionally, only the active duty general court-martial convening authority can authorize an involuntary recall to active duty of a reservist for the purpose of an Article 32 investigation, court-martial, or nonjudicial punishment. Army Regulation 5-9, appendix B-1, contains a list of active duty posts and the areas they support they provide reserve legal support.

3. Jurisdiction and Convening Authority.

A general court-martial convening authority may, pursuant to AR 27-10, para 5-2a(2), establish contingency plans which, when ordered executed, designate provisional units whose commanders may convene special courts-martial. A deploying general court-martial convening authority may, for example, establish a rear detachment whose commander has special court-martial convening authority.

A superior convening authority may withhold the authority of a subordinate convening authority to dispose of individual cases, types of cases, classes of offenders, or generally. A general court-martial convening authority establishing area court-martial jurisdiction is an example of a superior convening authority withholding authority from subordinate convening authorities. Establishing area court-martial jurisdiction usually results in more expeditious processing of military justice actions.

E. The Commander's Role in Military Justice

l. The Increasing Burden. Anyone who has compared the size and weight of the 1951 Manual for Courts-Martial with the 1969 or 1984 editions knows that military criminal law has greatly expanded in the past decades. The law of search and seizure, self-incrimination, lineups, and many other areas has burgeoned. In all contexts, the legal decisions commanders must make are increasingly technical. To help resolve these problems, the Judge Advocate General's Corps conducts training for commanders, provides military lawyers to commanders at all levels, and in many instances relieves commanders of administrative burdens associated with those increasing responsibilities.

2. The Commander and the Defense Function. The military defense counsel is frequently the lightning rod for criticism and hostility directed at the legal protections of the accused. Defense counsel occasionally succeed in getting cases dismissed because of excessive government delay, in having evidence excluded because of illegal searches or interrogations, and

in winning acquittals or lenient sentences for the accused. In response, some have suggested, in a variety of phrases, that the military defense counsel ought to "ease off," ought to do less than can be done in order to ensure that "justice" is accomplished. ANYTHING LESS THAN FULL AND ZEALOUS REPRESENTATION WITHIN THE LIMITS OF THE LAW IS INSUFFICIENT UNDER ETHICAL AND CONSTITUTIONAL STANDARDS. The defense counsel who does not fully and vigorously represent a client is professionally derelict. Those who fear that defense counsel are unfettered in their efforts for the accused should be aware that counsel practice under strict cannons of professional conduct; these are found in the UCMJ itself, the Manual for Courts-Martial, the Rules of Professional Conduct for Lawyers (AR 27-26), and ethical standards established by the American Bar Association. These rules are vigorously enforced. The Judge Advocate General's Professional Responsibility Advisory Committee investigates allegations of counsel misconduct and recommends disciplinary action to The Judge Advocate General.

Before the 1968 legislation which injected military lawyers into special courts-martial, officers from all branches prosecuted and defended cases in that forum. That experience created an understanding for both the prosecution and defense role. Without this experience, commanders now participate only in the law enforcement or court member functions. Some tend to be intolerant of the defense function. Many commands alleviate this problem by providing young Army leaders a more balanced picture of the prosecution and defense function through temporary assignment to local JAG offices and other educational programs. These include requiring lieutenants to attend the court-martial of a member of the battalion and officer professional development classes taught by judge advocates.

On a practical level, commanders should recognize that defense counsel are fellow officers who provide an important service to the command. They should acknowledge the importance of this service by following these simple rules: (1) allow the defense counsel easy access to you and your soldiers to discuss a case or locate a witness; (2) provide soldiers with a copy of the Article 15 specification(s) and supporting documents so the defense counsel can provide thorough and proper advice on whether to accept the Article 15 proceeding; and (3) avoid derogatory comments. Instead teach your officers and NCOs the importance of the defense functions.

3. The Commander's Prosecutorial Discretion. One of the commander's greatest powers in the administration of military justice is the exercise of prosecutorial discretion--to decide whether a case will be resolved administratively or referred to trial, and what the charges will be. The Manual for Courts-Martial mandates two rules in this area. First, cases should be resolved in a timely manner at the lowest possible level consistent with the seriousness of the offense and the record of the offender.

Secondly, a commander should refer a case to a court-martial only when there are reasonable grounds to believe a crime was committed and the accused did it. Although further advice can be sought from your SJA, the commander must ultimately decide how to dispose of alleged misconduct.

Any decision should be made with an understanding of the array of alternatives. Military justice procedures are not always the best way to dispose of disciplinary problems;

courts-martial and Article 15's are sometimes slow, cumbersome, and blunt instruments, unsuited to the incident, the accused, or the commander's purpose. Short of military justice remedies, a variety of administrative alternatives exist:

a. Counseling.

b. Written or oral reprimands and admonitions.

c. Withdrawal of pass privileges.

d. Withdrawal or limitation of other privileges--commissary, PX, check-cashing, on-post driving, etc.

e. Extra training.

f. Alcohol and drug rehabilitation programs.

g. EER and OER.

h. MOS reclassification.

i. Reduction for inefficiency.

j. Administrative separation.

k. Bar to reenlistment.

l. Compassionate reassignment.

m. Transfer.

And the list goes on. The rapid development of these alternatives to court-martial has highlighted the past decade of military law, and with almost all of these remedies, the power to take final action has been passed down to field commanders. In the case of any minor incident, the commander exercising prosecutorial discretion should first decide that none of the varied administrative remedies is sufficient before considering punitive options.

The decision to refer offenses to trial by court-martial is difficult. Occasionally the decision is made for the wrong reasons. When an apparently serious offense occurs, there is great pressure on a commander to "do something." Congressional inquiries and expressions of interest in the incident from higher command tempt some to refer cases to trial to settle the matter. "Let the court decide whether or not the accused is guilty." A CASE SHOULD NEVER BE REFERRED TO TRIAL UNLESS THE CONVENING AUTHORITY IS PERSONALLY SATISFIED THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE AND SHOULD BE PUNISHED. The perceptive commander will find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, interests of justice, or other considerations, the accused should not be punished. Similarly, commanders must not refuse to use the military justice system in order to

create a rosy statistical picture of morale and discipline; serious crime is an unfortunate but inevitable facet of human conduct and should be prosecuted.

The military justice system requires commanders to exercise Solomon-like judgment--and, if necessary, to stand alone for the right as they see it. At all times the staff judge advocate or legal advisor is available to advise, but the final decision rests with commanders.

In any case of public interest, a commander's decision will be examined and reexamined. Because of restrictions on pretrial publicity and the danger of influencing subordinates, witnesses, or panel members, commanders are often unable to defend decisions in public. Do not permit possible public reaction to deter you from making a decision you believe is correct. Think long and hard in making these decisions, and ensure that the decision to refer a case to trial on particular charges can withstand the kind of close scrutiny it may receive. This does not mean that you should hesitate to take necessary disciplinary action or tolerate an atmosphere of permissiveness. Rather, your actions must be proportionate to the misconduct you seek to sanction.

CHAPTER 6

SENIOR OFFICER LEGAL ORIENTATION

INTRODUCTION TO JUDICIAL ACTIONS

Teaching Outline

At least since the harsh days of Gustavus Adolphus, governments have striven to strike a perceived balance of fairness in substantive and procedural law as applied to members of the military force, a balance which primarily takes into account the vital mission of the force itself. Often this balance is described in a specialized criminal code.

General William C. Westmoreland
Major General George S. Prugh
Harvard Journal of Law and Public Policy 1 (1980)

I. NEW DEVELOPMENTS IN CRIMINAL LAW

Recent changes:

1. SPCMCA may convene BCD Special

2. Max punishment for Special Court-Martial raised to 1 year

3. Life without possibility of parole

4. May change Art 15 filing determination

II. MILITARY JUSTICE SYSTEM—LEGAL BASIS.

A. Constitution of the United States.

Article I, section 8, clause 14. "The Congress shall have Power . . . to make rules for the Government and Regulation of the land and naval Forces."

B. Uniform Code of Military Justice.

1. Congress exercised its power in 1950 to provide one statute to govern all the Armed Forces.

2. Provides President with authority to decide pretrial, trial, and post-trial procedures (Article 36) and maximum punishments (Article 56).

C. Manual for Courts-Martial.

1. Executive Order of the President; implements Congress' grant of authority to decide procedures and maximum punishments.

2. Organized into five parts plus appendices.

I. Preamble

II. Rules for Courts-Martial (R.C.M.)

III. Military Rules of Evidence (M.R.E.)

IV. Punitive Articles

a. Text of Article from UCMJ
b. Elements of the offense
c. Explanation
d. Lesser included offenses
e. Maximum punishment
f. Sample specification

V. Nonjudicial Punishment Procedure

VI. Appendices (currently 25)

a. Constitution
b. U.C.M.J.
c. Appendices of forms, Trial Guides, Analysis

D. DoD Instructions.

E. Service Regulations.

1. AR 27-10 prescribes the policies and procedures pertaining to the administration of military justice within the Army and implements the Manual for Courts-Martial, United States.

2. AR 635-200 describes policies and procedures for administrative separations. There are several additional regulations covering specific types of adverse administrative action. *See* outline for Adverse Administrative Actions.

F. Court Decisions.

III. THE MILITARY COURT SYSTEM.

A. Trial Courts (see charts - pp. 1-29 & 1-30).

1. Summary Court-Martial.

2. Special Court-Martial.

3. BCD Special Court-Martial.

4. General Court-Martial.

B. Appellate Courts.

1. Army Court of Criminal Appeals (formerly Army Court of Military Review).

Appellate military judges (COLs and LTCs) review cases in which sentence includes death, punitive discharge (Dismissal, DD, BCD) or confinement for one year or more.

2. United States Court of Appeals for the Armed Forces (CAAF) (formerly Court of Military Appeals).

Five civilian judges review cases in which death penalty is adjudged, The Judge Advocate General certifies for review, or the court grants accused's petition for review.

3. United States Supreme Court.

Accused or government may appeal cases decided by the CAAF to the Supreme Court.

IV. THE MILITARY JUSTICE SYSTEM—PERSONNEL.

A. Major Players:

1. Commander.

2. Staff Judge Advocate.

3. Trial Counsel.

4. Defense Counsel.

5. Military Judge.

6. Court Members.

7. Legal Specialist/Court Reporter.

B. Other Players:

1. Victims, witnesses (VWAP liaison)

2. IG

3. FACMT

4. Congress

5. Press

V. JURISDICTION.

A. Court.

1. Court must be properly convened.

2. Area court-martial jurisdiction.

3. Proper designation of court-martial convening authority.

B. Person.

Accused must be subject to court-martial jurisdiction, *i.e.*, a member of the Armed Forces.

C. Offense.

1. The offense must be subject to court-martial jurisdiction.

2. Court-martial jurisdiction depends on the accused's status as a member of the Armed Forces.

D. Reserve Jurisdiction.

1. UCMJ jurisdiction continues over Reservists after a period of active duty for any offenses committed during the active duty.

2. Reservists may be involuntarily recalled to active duty for court-martial, Article 32 investigations, and nonjudicial punishment.

VI. CONCLUSION.

CHAPTER 7

SENIOR OFFICER LEGAL ORIENTATION

UNLAWFUL COMMAND INFLUENCE

I. INTRODUCTION. 1

II. REFERENCES: 1

III. KEYS TO UNDERSTANDING UNLAWFUL COMMAND INFLUENCE. 1

IV. WHAT'S AT STAKE? 1

V. CURRENT ISSUES. 2

VI. CRITICAL AUDIENCES. 4

VII. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER. 5

VIII. CONVENING AUTHORITY AS ACCUSER. 6

IX. CONVENING AUTHORITY MUST NOT EXHIBIT AN INFLEXIBLE ATTITUDE PRE OR POST-TRIAL 7

X. COURT MEMBER SELECTION. 7

XI. NO OUTSIDE PRESSURE ON MEMBERS. 8

XII. WITNESS INTIMIDATION. 10

XIII. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE. 11

XIV. INDEPENDENT DISCRETION OF MILITARY JUDGE. 11

XV. NON-COMMANDER COMMAND INFLUENCE. 12

XVI. RAISE ISSUE IMMEDIATELY. 13

XVII. CONCLUSION. 14

THIS PAGE INTENTIONALLY LEFT BLANK

UNLAWFUL COMMAND INFLUENCE

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES:

1. Manual for Courts-Martial, United States, 1984 (2002 ed.) [hereinafter MCM).

2. Uniform Code of Military Justice [hereinafter UCMJ], arts. 1, 25, 37, 98, 134 paragraph 96a.

III. KEYS TO UNDERSTANDING UNLAWFUL COMMAND INFLUENCE.

1. Commander as a quasi-judicial authority.

2. Complete control under one person.

3. Responsibility for unit discipline v. purity of system.

4. Actual **and** apparent unlawful command influence. Looks can kill.

5. Not just a commander's problem (*e.g.*, staff members, NCOs, JAGs).

6. Different way of doing business.

IV. WHAT'S AT STAKE?

1. Dismissal of charges.

2. Right to fair trial.

3. Morale and Discipline.

4. Self-preservation.

5. Our system of military justice as we know it.

V. CURRENT ISSUES.

A. Congressional Interest.

B. Deployments – Split ops/rear detachment.

C. Over-management.

D. Vision Statements/Transition Briefings.

E. E-mail trail.

F. Slang/Lingo.

G. High-Profile Cases.

1. The battle versus the war.

a) Press wants to hear it from “the commander” or “the Pentagon.”

b) Increasing desire within the military to tell the “military’s story.”

c) More talk = more potential UCI issues.

d) Do we keep quiet and win the battle of UCI, but lose the war over the military's public image?

2. UCI and the associated administrative (e.g. safety, collateral) investigation.

a) Commander often exerts greater control over scope and clarity of these types of investigations. Perhaps greater sense of responsibility and ownership. But …

b) May spill over into court-martial decision.

c) More battles and wars.

(1) Avoid the battle of UCI by completely cutting off commo between commanders.

(2) Is it at the expense of losing the war of ensuring a complete and thorough investigation?

d) Does approval of investigator's findings and recommendations constitute pre-judgment of guilt?

3. Preventive Measures.

a) 32b Investigating Officer: Consider a neutral Judge Advocate or Military Judge in lieu of a line officer to reduce the threat of UCI.

b) Consider having a more senior level commander prefer charges.

c) Command Communications.

(1) Completely prohibit any discussion between superior and subordinate commands?

(2) Have JAG present for any discussions between commanders.

d) Article 6, UCMJ. Congress authorized legal tech channel commo. Safest (?) commo channel between different levels of command

e) Refresher UCI and military justice training.

(1) Do it ASAP, before the press comes looking.

(2) To all levels of command and to all members of the High Profile Battlestaff.

f) Deliberately open up our process to the public and the Defense.

(1) We have nothing to hide.

(2) But everyone must know and understand their roles and responsibilities.

VI. CRITICAL AUDIENCES.

1. Subordinate Commanders.

2. Court members.

3. Potential Witnesses.

4. Media?

5. Congress?

VII. INDEPENDENT DISCRETION VESTED IN EACH COMMANDER.

Each judicial authority, at every level, is vested with independent discretion, **by law**, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander.

A. **Lawful Command Actions.** The commander MAY:

1. Personally dispose of a case if within commander's authority or any subordinate commander's authority. R.C.M. 306(c).

2. Send a case back to a lower-level commander for that subordinate's independent action. R.C.M. 403(b); 404(b), 407(a)(2). Superior <u>may not</u> make a recommendation as to disposition. R.C.M. 401(c)(2)(B).

3. Send a case to a superior commander with a recommendation for disposition. R.C.M. 401(c)(2)(A).

4. Withdraw subordinate authority on individual cases, types of cases, or generally. R.C.M. 306(a).

5. Escalate a lower disposition. R.C.M. 601(f). It is permissible for superior commander to prefer charge for a major offense even though accused already received Art. 15 for the offense.

B. Recurring mistakes:

1. Advice before the offense (Policy Letters).

   Example: Policy of GCM for soldiers with two prior convictions constitutes unlawful interference with subordinate's independent discretion. *United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956)

   Example: Policy of predetermined forfeitures and reductions based on DUI, injuries, blood alcohol level and rank. *United States v. Martinez,* 42 M.J. 327, 331-334 (1995).

2. Advice after the offense.

a) Improper for battalion commander to return request for Article 15 to company commander with comment, "Returned for consideration for action under Special Court-Martial with Bad Conduct Discharge." *United States v. Rivera,* 45 C.M.R. 582 (A.C.M.R. 1972).

b) But it was not improper in another case for the superior who learned of additional misconduct by the accused, to tell a subordinate commander, "You may want to reconsider the Article 15 and consider setting it aside based on additional charges." Court, relying on fully developed record at trial, agreed with trial judge that subordinate "exercised his own independent discretion when he preferred charges." *United States v. Wallace*, 39 M.J. 284 (C.M.A. 1994). *But see United States v. Gerlich,* 45 M.J. 309 (1996).

VIII. CONVENING AUTHORITY AS ACCUSER.

Accuser is "person who signs and swears charges, any person who directs the charges nominally be signed and sworn to by another and any person who has an interest other than an official interest in the prosecution of the accused."

A. Test is whether under the circumstances "a <u>reasonable person</u> would impute to [the convening authority] a personal feeling or interest in the outcome. *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952). *See also United States v. Shelton*, 26 M.J. 787 (A.F.C.M.R. 1988).

B. Convening authority that possesses more than an official interest must forward the charges to a superior competent authority for disposition. UCMJ, art. 22(b), 23(b) (GCM and SPCM respectively); *United States v. Gordon*, 2 C.M.R. 161, 166 (C.M.A. 1952)(GCMCA was victim of burglary); *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992)(accused attempted to blackmail GCMCA).

C. Exceptions:

1. Violations of general regulations.

2. Article 15s.

3. Summary Courts-Martial.

IX. CONVENING AUTHORITY MUST NOT EXHIBIT AN INFLEXIBLE ATTITUDE PRE OR POST-TRIAL

A. Pre-trial. As a judicial authority, the convening must consider each case **individually** on its own merits.

B. Post-trial. The convening authority **may** approve or disapprove findings, and suspend or reduce sentences. As a judicial appellate authority, the convening authority has a duty to impartially review military justice actions. An inflexible attitude towards clemency necessitates a loss of command/judicial authority.

C. Accused is entitled "as a matter of right to a careful and individualized review of his sentence at the convening authority level. It is the accused's first and perhaps best opportunity to have his punishment ameliorated and to obtain the probationary suspension of his punitive discharge." *United States v. Howard*, 48 C.M.R. 939, 944 (C.M.A. 1974).

X. COURT MEMBER SELECTION.

A. Article 25 Criteria. The **convening authority** chooses court members based on criteria of Article 25, UCMJ: age, education, training, experience, length of service and judicial temperament.

B. Staff Assistance.

Commander must beware of subordinate nominations not in accordance with Article 25. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991)(improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of "harsh discipline").

C. Replacement of panel also requires that the convening authority use only Article 25 criteria. Even then, the convening authority must avoid using improper motives or creating the appearance of impropriety.

1. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ("the history of [art. 25(d)(2)] makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated" to select members with intent to achieve harsh sentences.).

2. *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991) (improper for CG to replace panel because of "results that fell outside the broad range of being rational").

D. Deliberate exclusion of unit personnel. Convening authority's motive is critical.

United States v. Simpson, 55 M.J.674 (Army Ct. Crim. App. 2001). Convening authority systemically excluded members from accused's unit. Based on his knowledge of scope of investigation into sexual misconduct among trainees and cadre AND the difficulty in finding court members from the unit not tainted by exposure to the investigation. Army court calls this good judgment not error.

XI. NO OUTSIDE PRESSURE ON MEMBERS.

A. Education: AR 27-10, para. 5-10*c*. "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . ." *See also* UCMJ, art. 37(a) and R.C.M. 104 concerning permissible education.

B. In the deliberation room.

1. Comments by SJA in staff meeting held shortly before trial, that previous court-members had "under-reacted" and "shirked leadership responsibilities," and comment from CG that he had sent a letter to that officer's gaining command offering his opinion that his career had "peaked," unlawfully tainted the court members in attendance. *United States v. Youngblood*, 47 M.J. 338 (1997).

2. Commander, during staff meeting, indicated his dissatisfaction with the results of courts-martial. Four officers attending the meeting sat on court-martial panel that day. SJA made full disclosure, resulting in

extensive voir dire of four officers; one of four officers was excused on peremptory challenge. Additional allegation was that president, one of the four officers at the meeting, improperly exerted superiority in rank during the sentence deliberations. *United States v. Reynolds*, 40 M.J. 198, 200 (1994).

3. Improper for senior ranking court members to use rank to influence vote within the deliberation room, *e.g.*, to coerce a subordinate to vote in a particular manner. . Discussion, Mil. R. Evid. 606; *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985) (allegation that senior officer cut off discussion by junior members, remanded to determine if senior officer used rank to "enhance" an argument).

C. Mentoring.

1. The "black letter" rule is expressed in United States v. Rogers, CM 442663 (A.C.M.R. 29 March 1983) (unpub.): "While a commander may not preclude subordinate commanders from exercising their independent judgment, he may express his opinion and provide guidance to them. The fine line between lawful command guidance and unlawful command control is determined by **whether the subordinate commander**, though he may give consideration to the policies and wishes of his superior, **fully understands and believes that he has a realistic choice to accept or reject them."**

2. *United States v. Stoneman*, 57 M.J. 35 (2002). Bde Cdr sent email to subordinate commanders "declaring war on all leaders not leading by example." Email also stated the following: "No more platoon sergeants getting DUIs, no more NCOs raping female soldiers, no more E7s coming up 'hot' for coke, no more stolen equipment, no more approved personnel actions for leaders with less than 260 on the APFT, …., -- all of this is BULLSHIT, and I'm going to CRUSH leaders who fail to lead by example, both on and off duty." At a subsequent leaders' training session, Cdr reiterated his concerns. After consulting with SJA, Cdr issued a second email to clarify the comments in the first. Cdr stated that he was expressing his concerns about misconduct, but emphasized that he was not suggesting courses of action to subordinates, and that each case should be handled individually and appropriately in light of all circumstances. He specifically addressed duties as a court-martial panel member and witness. At trial, defense counsel initially sought to stay proceedings until a new panel could be selected. After denial of this request, defense counsel challenged all panel members from the brigade based on implied bias. After

extensive voir dire, MJ denied the challenge based on the members' statements that they thought the comments were intemperate and that they would not be swayed by anything said by the SPCMCA. **HELD: CAAF sent case back** for rehearing to determine if the facts constituted UCI and whether the proceedings were tainted.

3. How to do it right.

a) Discuss generic thought process for deciding how to respond to misconduct (hint: use R.C.M. 306(b) factors).

b) Reinforce independent discretion of subordinate commanders.

c) JA must be present. Consider team approach.

d) Timing is critical.

XII. WITNESS INTIMIDATION.

A. Direct attempts to influence witnesses.

1. Example: Battalion commander characterized TDS as "enemy," TC was "friend," discouraged testimony for accused. Retraction ineffective. Findings and sentence set aside. *United States v. Gleason*, 43 M.J. 69 (1995).

2. Example: The chain of command briefed members of the command before trial on the "bad character" of the accused. During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told "that they had embarrassed" the unit. Court found unlawful command influence necessitated setting aside findings of guilt and the sentence. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987).

B. Indirect or unintended influence. The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, <u>despite</u> good intentions.

1. Example: CG addressed groups over several months on the inconsistency of recommending discharge level courts and then having leaders testify that the accused was a "good soldier" who should be retained. The message received by many was "don't testify for convicted soldiers." Accordingly, these comments unlawfully pressured court-martial members and witnesses. *See United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986).

2. Command policies versus military justice policies: Example: When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused, the hesitancy of potential witnesses to testify in a similar case was evidence of unlawful command influence. *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991); *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991).

XIII. PRETRIAL PUNISHMENT MAY RAISE UNLAWFUL COMMAND INFLUENCE.

A. Mass Apprehension. Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence (attempt to induce severe punishment) and unlawful punishment. *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987).

B. Pretrial Humiliation. Comments made by unit commander in front of potential witnesses that accused was a thief did not constitute unlawful command influence; no showing that any witnesses were persuaded or intimidate from testifying. It did, however, violate Art. 13. *United States v. Stamper*, 39 M.J. 1097 (A.C.M.R. 1994).

XIV. INDEPENDENT DISCRETION OF MILITARY JUDGE.

A. Prohibition: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case." UCMJ, art. 37(a).

B. Efficiency Ratings: "[N]either the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or

efficiency of the military judge so detailed, which relates to his performance of duty as a military judge." UCMJ, art. 26c.

C. Questioning the military judge's authority.

1. *United States v. Tilghman* 44 M.J. 493 (1996). Unlawful command interference when commander placed accused into pretrial confinement in violation of trial judge's ruling. Remedy: 18 months credit ordered against accused's sentence.

2. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries that question or seek justification for a judge's decision are prohibited.

XV. NON-COMMANDER COMMAND INFLUENCE.

A. **Staff.** *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991)(improper for Division Deputy AG to develop list consisting solely of nominees who were supporters of "harsh discipline"). Chief of Staff and G-3 who ignored SJA advice. *United States v. Rivers*, 49 M.J. 434 (1998).

B. **NCOs**. *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). During trial, the 1SG "ranted and raved" outside the courtroom about NCOs condoning drug use. After trial, NCOs who testified for the accused were told that they had "embarrassed" the unit. Court found UCI necessitated setting aside findings and sentence.

C. **SJA**. Comments by SJA in staff meeting held shortly before trial, that previous court-members had "underreacted" and "shirked leadership responsibilities unlawfully tainted the court members in attendance. *United States v. Youngblood*, 47 M.J. 338 (1997).

D. **Trial counsel** who advise company, battalion, and brigade level commanders may be unwitting conduits of UCI.

XVI. RAISE ISSUE IMMEDIATELY; REMEDIAL ACTIONS ARE POSSIBLE.

A. Before trial.

4. Investigate to determine scope of impact.

5. Brief witnesses of duty to testify. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988). In response to 1SG's criticism that those who testify on behalf of drug offenders contravenes Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

6. Rescission or clarification letters and pronouncements. *United States v. Rivers*, 49 M.J. 434 (1998).

7. Transfer offending actors.

8. Reprimand or relieve offending officer/NCO. *United States v. Rivers*, 49 M.J. 434 (1998).

9. Dismiss and re-prefer charges.

10. Consider a pre-trial agreement that waives the issue in return for favorable sentence cap. *United States v. Weasler*, 43 M.J. 15 (1995).

B. At trial (judge-directed).

11. Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. GCMCA disqualified from taking action in case. *United States v. Giarratano*, 22 M.J. 388, 399 (C.M.A. 1986).

12. *United States v. Clemons*, 35 M.J. 770, 773 (A.C.M.R. 1992):

a) No government aggravation witnesses.

b) Government not allowed to attack accused's credibility by opinion or reputation testimony.

c) Defense given wide latitude with witnesses.

d) Accused allowed to testify about what he *thought* witnesses might have said on merits or E&M.

C. Post-trial.

R.C.M. 1102: Any time before authentication of the record of trial or action the military judge or convening authority respectively may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence.

13. New recommendation and action ordered. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974).

14. *DuBay* hearing ordered. *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988).

15. Findings and sentence overturned.

D. Remedial action may not work. Extremely important to litigate (at the trial court level) the adequacy of remedial actions.

XVII. CONCLUSION.

THE 10 COMMANDMENTS
OF
UNLAWFUL COMMAND INFLUENCE

COMMANDMENT 1: **THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.**

COMMANDMENT 2: **THE COMMANDER, IF ACCUSER, MAY NOT REFER THE CASE.**

COMMANDMENT 3: **THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT OR CLEMENCY.**

COMMANDMENT 4: **THE COMMANDER MAY NEITHER SELECT NOR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.**

COMMANDMENT 5: **NO OUTSIDE PRESSURES MAY BE PLACED ON THE COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.**

COMMANDMENT 6: **WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.**

COMMANDMENT 7: **THE COURT DECIDES PUNISHMENT. AN ACCUSED MAY NOT BE PUNISHED BEFORE TRIAL.**

COMMANDMENT 8: **COMMANDERS MAY NOT QUESTION, CHALLENGE, OR OTHERWISE ATTEMPT TO INFLUENCE THE MILITARY JUDGE.**

COMMANDMENT 9: **STATEMENTS AND ACTIONS OF STAFF AND SUBORDINATE COMMANDERS AND NCOs MAY CONSTITUTE UNLAWFUL COMMAND INFLUENCE.**

COMMANDMENT 10: **IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.**

BLANK PAGE

CHAPTER 8

SEARCH AND SEIZURE

Introduction

The fourth amendment protects individuals from "unreasonable" searches and seizures, and requires that searches and seizures be based upon probable cause and a warrant.

The fourth amendment applies to soldiers - they do not waive their fourth amendment rights when they join the Army. However, the fourth amendment applies to soldiers differently than it does to civilians. This is because a soldier's privacy rights are balanced against not only law enforcement needs but also against military necessity and national security. Consequently, a search may be considered reasonable in a military setting, but would not be so in the civilian world.

An example of how the fourth amendment applies to soldiers differently than it does to civilians is search authorizations. A civilian search "warrant" must be in writing, under oath, and issued by a civilian magistrate. A military search "authorization," on the other hand, need not be in writing, need not be under oath, and may be issued by a commander. Despite these technical distinctions, the terms "search warrant" and "search authorization" basically mean the same thing and are often used interchangeably.

Another example of how the fourth amendment applies to soldiers differently than to civilians is urinalysis testing. Most civilians presently are not subject to random urinalysis testing for illegal drug use. Soldiers, however, must give urine samples during routine health and welfare inspections. This greater intrusion into a soldier's privacy is justified because of the detrimental impact that illegal drug use has on military operations and national security.

Searches and seizures need not always be based on probable cause and a search warrant or authorization. There are several situations where the fourth amendment does not apply, such as searches of government property or seizures of items in plain view. There are also situations where the fourth amendment applies but no probable cause or warrant is required. For example administrative inspections, such as health and welfare inspections, urinalysis inspections, gate inspections, and inventories, need not be based on probable cause or a warrant.

The search and seizure rules are complex and constantly changing because of court interpretations. Therefore, the best advice is to contact your legal adviser whenever a search and seizure issue comes up. Your legal adviser can assist you with proposed courses of action, and recommend alternatives which will decrease the likelihood that evidence may be found inadmissible at a court-martial.

Major Ernest Harper
FY2004 Senior Officers Legal Orientation Course

A. Warrants and Probable Cause.

1. Probable Cause.

a. Probable Cause Defined. There is probable cause to search when there are reasonable grounds to believe that items connected with criminal activity are located in the place or on the person to be searched.

b. Evaluating Probable Cause. A commander may determine that probable cause exists based on his or her personal observations, or information from others. The commander's task is to determine from the totality of the circumstances whether it is reasonable to conclude that evidence of a crime is in the place to be searched. In determining whether probable cause exists, the following method for evaluating the information should be used.

(1) Factual Basis. The commander should be satisfied that the information was obtained in a reliable manner. The informant should have actually seen, or heard the information being reported. This may be satisfied in any of the following ways:

(a) Personal observation. The trustworthiness of information can be established if the informant personally observed the criminal activities. In drug cases, you should also inquire why the informant believes that what he or she saw was drugs. You should determine whether the informant had a class on drug identification, furnished reliable information in the past, or had substantial experience with drugs.

(b) Admission of the suspect. An informant's information is considered reliable if based on statements he or she heard the suspect or an accomplice make.

(c) Self-verifying detail. The factual basis of an anonymous tip may be established if the tip is so detailed that the information must have been obtained as a result of a personal observation.

(2) Believability. The commander should also be satisfied as to the credibility of the person furnishing the information. This may be established by one or more of the following:

(a) Demeanor. When the information is personally given to the commander, the commander can judge the informant's believability at that time. In many cases the individual may be a member of the commander's unit and the commander is in the best position to judge the credibility of the person. Even when the person is not a member of the commander's unit, the commander can personally question the individual and determine the consistency of statements made by the individual.

(b) Past reliability. This is one of the easiest methods for establishing believability: knowledge that the informant has proven reliable in the past. A commander should examine the underlying circumstances of past reliability, such as a record that the informant has furnished correct information in the past.

(c) Corroboration. Corroboration means that other facts back up the information provided. Corroboration and the demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability.

(d) Declaration against interest. The person furnishing the information may provide information that is against that person's penal interest. For example, when a person knowingly admits to an offense and has not been promised any benefit, he or she may be prosecuted for that offense. This lends a great degree of reliability to the information furnished.

(e) Good citizen informants. Often, the informant's background renders him or her credible. For instance, a victim or a bystander with no reason to lie may be considered reliable. In addition, law enforcement officers and good soldiers are generally considered reliable sources of information.

2. Search Warrants and Authorizations.

a. Commander's Authorization. A commander may authorize searches of his or her soldiers and equipment, or areas he or she controls, when there is probable cause to believe that items connected with criminal activity are located in the place or on the person to be searched. When time permits, the commander should consult a legal adviser first. A commander may not delegate the authority to authorize searches to others in the unit. The power to authorize a search, however, may devolve to an acting commander if the commander is absent.

b. Magistrate's and Judge's Authorization. Ordinarily, when there is a magistrate (designated JAG officer) or a judge on the installation, law enforcement or unit personnel should get the magistrate's or judge's authorization to search. Using a magistrate to authorize a search may be preferable to requesting authorization from a commander for several reasons. First, commanders may be involved in an investigation related to a search and their neutrality could become an issue. Second, the magistrate may authorize searches anywhere on an installation; therefore, issues of scope of authority are avoided. Third, if a search authorization is contested at trial, the commander need not appear to testify.

c. Procedures for Obtaining an Authorization to Search. AR 27-10, Military Justice (6 September 2002), sets out the procedures for obtaining an authorization to search. Written or oral statements (including those obtained by telephone or radio), sworn or unsworn, should be presented to the commander, magistrate, or military judge. The authorizing official will then decide whether probable cause to search exists, based upon the statements and will issue either a written or an oral authorization to search. Written statements and authorizations are preferred to avoid problems later if the search is challenged at trial. When granting authority to search, the authorizing official must specify the place to be searched and the things to be seized. Sample forms for obtaining an authorization to search are in the back of AR 27-10.

d. Scope of an Authorized Search. Once authorization to search has been

obtained, the person conducting the search must carefully comply with the limitations imposed by the authorization. Only those locations which are described in the authorization may be searched and the search may be conducted only in areas where it is likely that the object of the search will be found. For example, if an investigator has authority to search the quarters of a suspect, the investigator may not search a car parked on the road outside. Likewise, if an authorization states that an investigator is looking for a 25-inch television, the investigator may not look into areas unlikely to contain a TV, such as a medicine cabinet or file cabinet.

e. Detention Pending Execution of Search Authorizations. An authorization to search for contraband implicitly carries the limited authority to detain occupants of a home, apartment, or barracks room while the search is conducted. Police may also detain occupants leaving the premises at the time police arrive to execute the search authorization.

3. Commander Must Be Neutral and Detached.

a. A commander, much like a judge, must remain objective when deciding whether there is sufficient information to justify a search authorization. When a commander is actively involved in a criminal investigation, he or she is disqualified from acting as the authorizing official.

b. A commander is not neutral and detached if he or she initiated or orchestrated the investigation or conducted the search personally. On the other hand, knowledge of an on-going investigation within the unit, disdain for certain kinds of crime, and personal information or knowledge about a suspect's character do not disqualify a commander from granting a search authorization.

c. If a commander is unsure whether a court will view his or her involvement in a particular case as disqualifying, the commander should play it safe by sending the person seeking the authorization to the military magistrate or to the next higher commander who has no involvement with the case.

B. Exceptions to the Fourth Amendment.

1. Nongovernmental Searches. The fourth amendment only protects soldiers against searches by U.S. government officials. It does not cover searches by private persons or foreign officials.

a. Private Searches. The fourth amendment does not prohibit searches by private persons (roommates or family members), unless the private search was directed by a commander or police investigator. Be careful when working with unit informants. Telling them to "keep your eyes open" is permissible; telling them to bring you evidence may violate the fourth amendment and render the evidence inadmissible.

b. Foreign Searches. The fourth amendment applies only to the U.S. Government. Searches by German or Korean police need not comply with the fourth

amendment unless the foreign search is directed, conducted, or participated in by U.S. agents. Foreign police may freely exchange criminal information with the military police.

2. No Reasonable Expectation of Privacy. The fourth amendment does not apply unless the suspect has a reasonable expectation of privacy in the area searched.

a. Government Property. A soldier has no reasonable expectation of privacy in most government property, including military vehicles, tents, common tool kits, and office desks. No authorization is required to search these places. But the fourth amendment does cover items issued for personal use, such as wall lockers, foot lockers, and field gear. These items may be examined only during inspections and authorized searches.

b. Abandoned Property. There is generally no expectation of privacy in abandoned property, such as a car abandoned on a public road, on-post quarters after a person has checked out, items thrown from a window or to the ground, garbage containers placed on a street curb, or a building destroyed by fire. Therefore, no authorization or probable cause is required to search or seize these items.

c. Open View. What a person knowingly exposes to the public is not subject to fourth amendment protection. For example, a tattoo, a gold tooth, or the exterior of a car parked on a public street are not protected by the fourth amendment.

d. Sensory Aids. So long as a person is lawfully present in an area, he or she may properly use low-technology devices that enhance the senses. For example, flashlights may be used to look inside cars and dogs may sniff autos, luggage, or field gear. On the other hand, a thermal imaging device may not be used to observe activity inside a private home. In addition, special rules exist for the use of wiretaps and electronic "bugs." See your trial counsel if you feel electronic surveillance is necessary.

3. Exigent Circumstances. In emergencies, where the delay necessary to get a warrant would result in the removal, destruction, or concealment of evidence, a warrant is not required. However, probable cause is still required in these situations. For example, a staff duty officer walking through a barracks who smells marijuana coming from a soldier's room may enter the room and "freeze" the situation. If he apprehends the soldier for using marijuana, he may conduct a search of the soldier incident to apprehension and may also seize any items in plain view. He should then seek authorization before he searches the rest of the room.

4. Automobile Exception. If there is probable cause to search an automobile, a warrant or authorization is generally not required. For example, if a staff duty officer has probable cause to believe that drugs are located in a soldier's car, he may search the car without obtaining a warrant or search authorization. This exception exists because such evidence may be easily lost if the automobile is driven away before a warrant or authorization is obtained. The entire automobile may be searched, to include the trunk.

5. Consent Searches. A soldier may consent to a search. However, the consent must be voluntary and not coerced by the influence of rank or position. When requesting

consent you should advise the soldier that he or she has the right not to consent. If the soldier does consent, he or she can withdraw the consent at any time. In this case, the search must stop immediately. A soldier may consent to a partial search (for example, everything but the wall locker). Article 31 rights and written consent are recommended but not required. Do not "threaten" a soldier that the search will be conducted even if he or she refuses to give consent.

6. Search Incident to Apprehension. Any person who has been properly apprehended may be searched in order to ensure the safety of the apprehending person and others, and to prevent destruction of evidence. Only the person's clothing and body and any areas within the person's reach may be searched. When a person is apprehended in an automobile, the entire passenger compartment may be searched. This includes the glove box, console, back seat and under the seats, but does not include the trunk.

7. Inspections.

a. General. Inspections are a function of command. The commander has the inherent right to inspect the barracks to ensure the command is properly equipped, maintained, and ready, and that personnel are present and fit for duty. A commander conducting an inspection may find items that could aid in a criminal prosecution. These items may be seized and used as evidence for an Article 15 or court-martial.

(1) Primary purpose test. An inspection must have a primary administrative purpose. For example, inspections to ensure security, readiness, cleanliness, order, and discipline are permissible. Inspections may include an examination to locate and confiscate unlawful weapons and other contraband, since confiscation of contraband is a means of ensuring security, readiness, and order. An inspection whose primary purpose is to obtain evidence for an Article 15 or court-martial is not permissible, and any evidence discovered will be inadmissible. An inspection may have a dual purpose (both administrative and criminal) so long as the primary purpose is administrative.

(2) Scope. The scope of an inspection must reflect its purpose. If the purpose is broad (general security, readiness, fitness for duty) then the intrusion may be broad (unroll sleeping bags, check inside pockets, unlock containers). If the purpose of the inspection is narrow (for example, only to check helmet accountability), then one cannot inspect beyond that purpose.

(3) Subterfuge rule. An inspection may not be used as a subterfuge for a search. This normally takes place when a commander "feels" an individual has contraband in his possession or living area but lacks sufficient information to amount to probable cause, and uses an "inspection" to search that person for the contraband. Evidence discovered during an improper inspection usually is not admissible for court-martial or Article 15 purposes. If (1) an inspection immediately follows a report of a specific offense and was not previously scheduled, or (2) specific persons are targeted, or (3) persons are subjected to substantially different intrusions, then the government must show by clear and convincing evidence that the primary purpose of the examination was administrative, and that the inspection was not a ruse for an illegal criminal search. The commander's testimony is crucial to this issue.

b. Health and Welfare Inspections. The most common type of inspection is an commander's inspection of the unit to protect the health and welfare of the unit's soldiers.

1) The primary purpose of such an inspection must be administrative. Commanders should ensure that the scope of the inspection is consistent with the purpose and that everyone is treated alike. For example, if one soldier's wall locker is inspected with "extra care" during a health and welfare inspection, the inspection will likely be found to be an unlawful subterfuge for a criminal search.

(2) Drug Dogs. A commander conducting a health and welfare inspection may use a drug detector dog to enhance the senses of individuals conducting the inspection. Drug detector dogs may be used to inspect barracks, automobiles, and other areas, but as a matter of DA policy, will not be used to inspect persons. Drug dogs may not sniff individual soldiers or formations. When a request is made for a handler and dog to go to a particular unit, the commander requesting the team should ask the provost marshal about the reliability of the dog and handler. Before the dog is used, the handler should demonstrate the reliability of the dog. The test for reliability consists of certification from an approved training course, the training and utilization alert record, and performance demonstrated to the commander.

c. Lost Weapons Lock-downs. The commander has the right to conduct an inspection for weapons or ammunition after a unit has been firing or has found a weapon missing. The commander or designated representatives may inspect all persons who were on the range and others who were in a position to steal the weapon, and their barracks and private automobiles.

d. Gate Inspections. A gate inspection is another form of an administrative inspection. An installation commander may authorize gate inspections to check drivers' licenses and vehicle registrations, deter drug traffic, reduce DWI incidents, prevent terrorist attacks, deter larcenies, or any other legitimate administrative purposes. Inspections may include all vehicles, or only those designated by the commander, such as every tenth vehicle.

(1) Written guidance. The installation commander must issue written instructions defining the purpose (e.g. security, drugs, or and DWIs), times, locations, and methods for gate inspections. It is important to limit the discretion of the gate guards conducting the inspection. Some discretion to consider traffic patterns is permissible so long as it is provided by the written guidance.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure from the installation. A warning sign or visitor's pass are common ways to give notice.

(3) Drug dogs. Metal detectors, drug dogs, and other technological aids may be used during gate inspections.

(4) Civilian employees. Civilian employees may be entitled to overtime pay when their working conditions are affected by gate inspection delays. Check the local collective bargaining agreement to gauge this impact.

(5) Entry inspections. Civilians entering the installation may only be inspected with their consent. If they refuse to consent, they should be denied access to the installation. Soldiers may be ordered to comply with an inspection, and may be inspected over their objection, using reasonable force, if necessary.

(6) Exit inspections. Civilians exiting the installation may be inspected over their objection, using reasonable force if necessary. Civilians who refuse to comply with an exit inspection should be informed of possible administrative sanctions (loss of post driving privileges, bar letter). Immediately notify the installation commander if this happens. If contraband is found, detain the civilians and notify the local civilian police. The standard for exit inspections for soldiers is the same as for entry inspections; they may be ordered to submit to an inspection and reasonable force may be used if necessary.

e. Inventories.

(1) General. A commander is required to conduct an inventory of a soldier's property when the soldier is AWOL, admitted to the hospital, or on emergency leave. See AR 700-84, Issue and Sale of Personal Clothing (28 February 1994). The commander or a designated representative should also inventory the property of an individual who has been placed in military or civilian confinement. See AR 190-47, The U.S. Army Correctional System (15 August 1996). If the person conducting the inventory discovers items that would aid in a criminal prosecution, those items may be seized and used as evidence.

(2) Automobiles. Under some circumstances, automobiles may also be inventoried. When a person is arrested for DWI or for some other offense which requires transportation to the MP station, the person's vehicle may be secured. If the vehicle is impounded, it may be inventoried. If a person is arrested for DWI just as he pulls into his quarters' parking lot, there is no reason to impound the vehicle. But if the person is arrested on an outer road of the post where there is a possibility of vandalism, the vehicle may be impounded and inventoried.

C. Apprehensions

1. Contacts and Stops and Apprehensions.

a. Contacts. Officers, NCOs, and MPs may initiate "contact" with persons in any place they are lawfully situated. Generally, such contacts are not "apprehensions" subject to the fourth amendment. Most contacts do not result from suspicion of criminal activity. Examples of lawful contacts include questioning witnesses to crimes and warning pedestrians that they are entering a dangerous neighborhood. These types of contacts are entirely reasonable, permissible, and within the normal activities of law enforcement personnel and commanders. They are not detentions in any sense.

b. Stops. An officer, NCO, or MP who reasonably suspects that a person has committed, is committing, or is about to commit a crime has the obligation to stop that person. Both pedestrians and occupants of vehicles may be stopped. If the person is a suspect and is to be questioned, Article 31 warnings should be read. The stop must be based on more than a hunch. The official making the stop should be able to state specific facts to support the decision to stop an individual.

c. Apprehensions. Arrests in the military are called apprehensions. Any officer, noncommissioned officer, or military policeman may apprehend individuals when there is probable cause to apprehend. Generally, a person is apprehended when he or she is not free to leave. The person making the apprehension should identify himself or herself and tell the suspect he or she is under apprehension. The suspect should also be told the reason for the apprehension and read his or her Article 31 rights, preferably from a rights warning card, as soon as practicable. If the suspect resists apprehension he or she may be prosecuted for resisting apprehension or disobeying an order. Civilians may be detained until military or civilian police arrive.

2. Probable Cause to Apprehend. A person may be apprehended only if there is probable cause that the person has committed a crime. Probable cause to apprehend is a common sense appraisal based on all of the facts and circumstances present. An example of probable cause to apprehend is when you or some other reliable person has seen an individual commit a violation of the UCMJ, such as using marijuana, assaulting someone, breaking another's property, or being drunk and disorderly.

3. Arrest Warrants. Generally, if there is probable cause, no authorization to apprehend (arrest warrant) is required in the military. There is one important exception, however; that is when you apprehend someone in a "private dwelling," such as on-post family quarters, the BOQ or BEQ, or any off-post quarters. If the person to be apprehended is in a "private dwelling," the apprehending officer must obtain authorization to make the apprehension from a military magistrate or the commander with authority over the private dwelling (usually the installation commander). Barracks and field encampments are not considered private dwellings; therefore, no special authorization is needed to apprehend someone there. Also, to apprehend a person at off-post quarters requires coordination with civilian authorities and may require a search warrant from a civilian judge.

D. Urine Tests

1. Use of Test Results.

a. There are four kinds of urine tests: inspections, probable cause tests, consent tests, and fitness-for-duty tests. Results from inspection, probable cause, and consent urine tests may be used for Article 15, court-martial and administrative separation purposes. The results of a fitness-for-duty test may not be used as a basis for an Article 15 or court-martial. In addition, a positive fitness-for-duty test result may not be used in an administrative separation action unless the soldier receives an honorable discharge. See AR 635-200, Personnel Separations, Enlisted Personnel (1 November 2000).

b. Command-direct. Be wary of the term “command-directed" urinalysis. Any urine test ordered by the commander (inspection, probable cause, fitness-for-duty) is "command-directed." The ability to use the test results for UCMJ or separation purposes depends on the type of test (inspection, probable cause, consent), not on whether or not it is labeled "command-directed." A fitness-for duty test is normally "command-directed," but a positive result may not be used for UCMJ purposes.

2. Urinalysis inspections.

a. Unit integrity. A unit urinalysis test is merely another form of inspection. All of the soldiers in a unit may be tested or soldiers may be "randomly" selected, usually based on the final digit of their social security number, for testing. Alternatively, a portion of the unit (platoon, section, squad) may be tested.

b. Unit Alcohol and Drug NCO. When the government loses a urinalysis case it is rarely due to laboratory errors. Army urine testing laboratories are now widely regarded as the models for comparison and employ the most stringent scientific testing equipment and techniques. When the government loses a urine case or decides not to prosecute one, it is primarily due to problems at the unit level, usually with the chain of custody. Many of these problems stem from the Unit Alcohol and Drug NCO. If a commander takes a soldier who cannot perform adequately as a squad leader and makes that soldier the Unit Alcohol and Drug NCO, it is likely that there will be problems.

3. Probable cause urine tests. Probable cause urine tests follow the same rules as other probable cause searches. If, under the totality of the facts and circumstances, a commander has a reasonable belief that a soldier has used drugs, then he may order the soldier to provide a urine sample. The results of that test are admissible. Common examples of probable cause urine tests are (1) when drugs are discovered on a soldier's person, car, wall locker or field gear; and (2) when a soldier has been observed using drugs.

4. Consent urine tests.

a. Consent must be voluntary. A consent urine test is a form of consent search. No probable cause or authorization is required, but the commander must be able to show that the soldier voluntarily consented to provide a urine sample and was not coerced by the rank or position of the person requesting the sample. When a commander asks a soldier to provide a urine sample, he may advise the soldier of his Article 31 rights and ask the soldier to sign a consent form. If the soldier has no questions, then the consent will normally be viewed as voluntary.

b. What to do if the soldier asks questions. If a soldier asks the commander, "What are my options?" a new problem arises. In response to the "what are my options" question, the commander should explain the differences between a consent urine test and one ordered by the commander. The results of a consent urine test may be the basis for an Article 15, court-martial or administrative elimination. The results of a fitness-for-duty urine test may not. If the soldier understands these differences and nevertheless consents, the consent will probably be viewed as voluntary.

c. Consent as a back-up. If a commander has probable cause to order a urine test, he may still request a consent sample as a precautionary alternative. If the soldier asks "what are my options" the commander should explain that the results of a consent urine test are admissible and, if the soldier refuses to consent, the commander may order a urine test. However, the commander should also tell the soldier that if the commander orders the test, the results may not be admissible if it is later determined that the commander did not have probable cause. In this case, the test results may not be used for Article 15 or court-martial purposes and may only be used in an administrative separation if the soldier receives an honorable discharge.

5. Fitness-for-duty urine tests.

a. Results inadmissible. AR 600-85, Army Substance Abuse Program (1 October 2001) provides that a commander may order a urine test to determine the "fitness-for-duty" of any soldier when the commander observes, suspects, or otherwise becomes aware that the soldier may be affected by illegal drug use. The results of such a fitness-for-duty test are inadmissible for Article 15 or court-martial purposes. They are inadmissible because AR 600-85 balances the needs of the military with the individual privacy rights of the soldier and will not allow test results based on mere suspicion to be used for punishment. A commander can order a soldier to provide a urine sample based solely on mere suspicion; but because this is not based upon probable cause, an inspection, or consent, the results may only be used to refer the soldier for rehabilitative treatment or separate him from the service with an honorable discharge. When a commander orders a soldier to provide a urine sample, the commander should understand the admissibility of the urine test so there is no confusion when the test result returns.

b. Suspicion is less than probable cause. Reasonable suspicion sufficient to order a fitness for duty test must be based upon facts which a commander can articulate. However, it need not amount to probable cause.

6. Confirmatory testing. One of the most difficult cases that a commander must handle is when a senior NCO, particularly one who is a "good soldier," tests positive for drug use. The soldier may deny drug use and challenge the validity of the testing procedures at the unit and the lab, often focusing on minor irregularities that do not invalidate the results. A commander has a few options to resolve these dilemmas.

a. Polygraphs. Offer the soldier the opportunity to take a polygraph. A soldier may not be required to take a polygraph, but if he consents to take one, the local CID polygrapher can be invaluable in distinguishing those who did not use drugs from those who only swear that the urine test was wrong. Few of these "wronged" soldiers will be willing to take a polygraph, and many of those who do will admit to the drug use after failing the polygraph test.

b. Blood and DNA testing. When a soldier alleges that his or her urine sample was switched with someone else's, the sample can be tested to ensure that the blood type of the positive sample is the same as the soldier's blood type. This method does not eliminate any possibility of error, but it may help determine whether the positive urine sample

was, in fact, the soldier's sample. DNA found in the urine can also be compared with the soldier's DNA to confirm that the positive sample was submitted by the soldier. Unless there is evidence that the soldier's urine sample was switched, the government is not required to perform blood or DNA testing.

c. Hair testing. If a soldier denies ever using drugs, his or her hair may be tested to confirm this allegation. Since traces of drugs are deposited in a drug user's hair as the hair grows, a hair sample will provide a history of an individual's drug use. Although hair analysis may be unable to detect a single use of drugs, it will be able to detect chronic use. The government is generally not required to pay for hair testing.

CHAPTER 8

SEARCH AND SEIZURE

TEACHING OUTLINE

I. THE FOURTH AMENDMENT

A. Requirements.

1. Searches must be reasonable.

2. Searches must be based on:

a) Probable cause.

b) Warrant or authorization.

B. Applicability.

1. Fourth amendment applies to soldiers.

2. Fourth amendment provides soldiers less protection than civilians

C. Exclusionary rule: items seized in violation of fourth amendment may not be used in court-martial.

II. WARRANTS AND PROBABLE CAUSE.

A. Search warrants in military are called search authorizations.

1. Search warrants must be in writing, under oath, and issued by a civilian magistrate.

2. Search authorizations may be oral, need not be under oath, and may be authorized by a military commander.

B. Warrants/authorizations must be based on probable cause. See Appendix A.

1. What is where and when?

2. How do you know?

3. Why should I believe you?

C. Who can authorize search.

1. Any commander of the place to be searched ("king-of-the-turf") may authorize search.

2. Preferable to use the military judge or magistrate: avoids problems and eliminates chance that commander may have to testify.

D. Commander must be neutral and detached.

1. Cannot be "investigator" and "judge" in same case.

2. Examples.

a) Commander is not neutral and detached when he or she:

(1) Orchestrates the investigation.

(2) Conducts the search.

b) Commander may be neutral and detached even though he or she:

(1) Is present at the search.

(2) Has personal knowledge of the suspect's reputation.

(3) Makes public comments about crime in his or her command.

(4) Is aware of an on-going investigation.

3. Alternatives:

a) Next higher commander.

b) Military magistrate.

III. EXCEPTIONS TO FOURTH AMENDMENT.

A. Private searches (by roommate, friend, etc.).

B. Foreign searches.

C. Government property (unless issued for personal use).

D. Items in open view.

E. Exigent circumstances.

F. Consent.

G. Inspections.

1. Primary purpose of inspection must be administrative.

a) Administrative inspection.

(1) Primary purpose is administrative (ensure readiness, eliminate drugs from unit, etc.).

(2) Focus on unit problem.

(3) Must be reasonable (treat all the same).

b) Criminal search.

(1) Primary purpose is to gather evidence of crime.

(2) Usually follows specific crime (rape, larceny, drugs).

(3) Focus on specific person.

(4) Must be based on probable cause and warrant.

2. The subterfuge rule. An inspection is presumed to be an improper criminal search if it:

a) Immediately follows report of a specific offense; or

b) Targets specific soldiers;, or

c) Subjects soldiers to substantially different intrusions.

3. Health and welfare inspections.

a) Articulate primary purpose:

(1) If primary purpose is administrative (ensure readiness, eliminate crime from unit), inspection is proper

(2) If primary purpose is to obtain evidence for an Article 15 or court-martial, inspection is improper.

(3) Inspection may have dual purpose so long as primary purpose is administrative.

b) Inspect everyone alike; do not target specific soldiers.

4. Lost weapon lock-downs.

a) Keeping all of the unit members in the unit area to continue to search for a lost weapon is a legitimate military purpose. It makes transfer of the missing item less likely and protects the community.

b) Mass punishment is not a proper purpose, although it is often perceived as a side-effect of a lock-down due to the inconveniences to soldiers and families.

5. Gate inspections.

a) Prepare written instructions for guards.

b) Post notice at gate.

c) Technological aids (mirrors, drug dogs) may be used.

d) Consider manpower and morale. Civilian employees delayed at gate may be entitled to overtime.

6. Inventories. Evidence obtained during proper inventory may be used against soldier.

IV. URINE TESTS.

A. Four Kinds of Urine Tests.

1. Inspection

2. Probable Cause

3. Consent

4. Fitness for Duty

a) Cannot be used for disciplinary actions

B. Drugs tested.

1. Marijuana.

2. Cocaine.

3. Amphetamines, Opiates, Barbiturates, PCP.

4. Some drugs are tested on a rotating basis or upon request (e.g. steriods).

C. Tests used.

1. Initial test: immunoassay test.

2. Confirmation test: gas chromatography/mass spectrometry test.

D. When you question the test results (for example, if a "super soldier" tests positive) you may consider:

1. Polygraph test.

2. Blood or DNA tests.

3. Hair test. Limitations.

E. Defenses.

1. Passive inhalation (marijuana).

2. Spiked food or drink (marijuana and cocaine).

APPENDIX A

COMMANDER'S GUIDE

TO ARTICULATE PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a reasonable belief, based on facts, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

a. What is where and when? Get the facts!

(1) Be specific: how much, size, color, etc.

(2) Is it still there (or is information stale)?

(a) If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

(b) If the witness saw large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

b. How do you know? Which of these apply:

(1) "I saw it there." Such personal observation is extremely reliable.

(2) "He [the suspect] told me." Such an admission is reliable.

(3) "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

(4) "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

c. Why should I believe you? Which of these apply:

(1) Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

(2) Witness has given reliable information before; he has a good track record (CID may have records).

(3) Witness has no reason to lie.

(4) Witness has truthful demeanor.

(5) Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

(6) Other information corroborates or verifies details.

(7) Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

4. Make a written note of the reasons why you authorized the search in case authorization becomes an issue later.

5. Talk to your legal advisor!

Appendix B: Cut-Off Levels

Cut-off Levels. DOD and urine testing laboratories have established "cut-off" levels. Samples that give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening and the confirming test.

3. Cut-off levels for screening tests (IA).

Drug	ng/ml
Marijuana (THC)	50
Cocaine (BZE)	150
Amphetamines	500
Barbiturates	200
Opiates	2000
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.5

4. Cut-off levels for GC/MS test:

Drug	ng/ml
Marijuana (THC)	15
Cocaine (BZE)	100
Amphetamine/methamphetamine	500
Barbiturates	200
Opiates	
Morphine	4000
Codeine	2000
6-MAM (heroin)	10
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.2

Appendix C: Detection Times

.

Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: US Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

Drug	Approximate Retention Time
Marijuana (THC)(Half-life 36 hrs)	
Acute dosage (1-2 joints)	2-3 days
Eaten Marijuana	1-5 days
Moderate smoker 4 times per week):	5 days
Heavy smoker (daily):	10 days
Chronic smoker: (may be 20 days or longer)	14-18 days
Cocaine (BZE)(Half-life 4 hrs)	2-4 days
Amphetamines	1-2 days
Barbiturates	
Short acting (e.g. secobarbital):	1 day
Long acting (e.g. phenobarbital):	2-3 weeks
Opiates	2 days
Phencyclidine (PCP):	14 days
Chronic user:	up to 30
Lysergic Acid Diethylamide(LSD)	8-30 hrs-

CHAPTER 9

SELF-INCRIMINATION, CONFESSIONS, AND IMMUNITY

Introduction

The Fifth Amendment protects a person from self-incrimination. To enforce this right enjoyed by all Americans, the Supreme Court decided in 1966 that before the police could talk to a suspect who was in custody, they had to advise him of his right to remain silent and that he could have a lawyer present during questioning. This was the case of Miranda v. Arizona.

A commander may ask - why do I need to know about rights warnings? There are a variety of situations where a commander may be required by law to warn an individual about their privilege against self-incrimination. In our military justice system, the commander plays a key law enforcement role. They frequently conduct investigations and regularly interview people as part of their investigation. In fact, Rule of Court-Martial 303 requires the commander to make a preliminary inquiry when a member of the command is accused or suspected of an offense triable by court-martial. Additionally, during the nonjudicial punishment process, the commander is required by AR 27-10 personally to determine whether the soldier committed an offense. Commanders also can appoint or be appointed to either formal or informal boards or investigations under AR 15-6. Finally, situations triggering a warning requirement may arise in the course of daily events, outside a structured investigatory proceeding.

In order to properly conduct an investigation or a nonjudicial punishment proceeding, the commander must talk to the persons involved in the incident. Those persons can be classified as witnesses or suspects. Witnesses are persons who have information about the incident, but did not do anything criminally wrong. You are not required to read rights warnings to witnesses before questioning them. Suspects are those persons you reasonably believe (or should believe) committed a criminal offense. A soldier may initially be a witness, but during the interview may reveal information that makes you suspect the soldier of involvement in a crime. At that point, the soldier should be treated as a suspect. The soldier-suspect has the same privilege against self-incrimination and right to counsel that other citizens have. You must, therefore, read rights warnings before questioning a soldier suspected of committing an offense. The suspect may waive the rights and choose to make a statement or may invoke his or her rights. If a soldier invokes his or her rights, the questioning must immediately stop. At that point, the commander should consult with their trial counsel to determine how best to proceed.

LTC David H. Robertson
FY 2004 Senior Officers Legal Orientation Course
FY 2004

If the suspect talks to you, it may be a statement, an admission, or a confession. A statement is a report of facts or opinions. An admission is a self-incriminating statement falling short of an acknowledgment of guilt. A confession is an acknowledgment of guilt. Mil. R. Evid. 304(c). If proper rights warnings have been given, admissions and confessions are admissible at trial against an accused and frequently will constitute the key evidence in the case. One further rule governs confessions - before being admitted, there must be independent evidence which corroborates the essential facts of the confession. Mil. R. Evid. 304(g). This protects the system from people who admit to crimes for publicity, because of mental imbalance, or because of improper police conduct.

A. Sources of the Rights

A soldier's privilege against self-incrimination and right to counsel come from four sources:

1. The Fifth Amendment.

   "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

2. Uniform Code of Military Justice.

   a. Article 31(a), UCMJ.

      "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

   b. Article 31(b).

      "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him . . ."

3. The Sixth Amendment.

   "In all criminal prosecutions, the accused shall . . . enjoy the right to have the Assistance of Counsel for his defense."

4. Army Regulations.

   a. AR 15-6 - Investigations

      (1) No military witness or respondent will be compelled to incriminate himself (see Article 31, UCMJ).

      (2) No witness or respondent not subject to the UCMJ will be deprived of his rights under the Fifth Amendment.

b. AR 27-10 - Nonjudicial Punishment.

The imposing commander will ensure that the soldier is notified of his right to remain silent and his right to consult with counsel.

c. AR 635-200 - Enlisted Personnel Separations.

Article 31, UCMJ will apply to board procedures.

d. This list of regulations is not exhaustive; other regulations also impose a rights warning requirement. Always review regulations governing a specific type of investigation or proceeding to decide if rights warnings are required.

B. Due Process Voluntariness

Any confession used as evidence must be voluntary. This is a fundamental requirement of the due process clause to the Constitution. Additionally, Article 31(d), UCMJ, prohibits the use of any statement obtained through the use of "coercion, unlawful influence, or unlawful inducement." These protections are separate from the protections of rights warnings.

The courts have condemned such practices as beating the suspect, depriving the suspect of food, water, or sleep, threatening the suspect, removing the suspect's clothing, and interrogating the suspect for extremely long periods without a rest or break. Confessions obtained through the use of such tactics are not admissible because they are not voluntary.

C. Scope of the Rights

As originally adopted, Article 31, UCMJ, and the Fifth Amendment to the Constitution applied only to criminal proceedings or where there is a risk of criminal prosecution. Army regulations, however, extend these protections to nonjudicial and administrative proceedings. When conducting an administrative investigation you should always check the governing regulations for provisions that require rights warnings.

Not all evidence provided by a soldier is protected by Article 31, UCMJ, or the Constitution. In order to be protected, the evidence must be both incriminating and "testimonial or communicative." Mil. R. Evid. 301(a). Clearly, oral and written statements fit the definition and are protected by the privileges. So are a soldier's actions that have a commonly understood meaning, such as nodding his or her head in response to a question.

Other evidence is not protected, even though it is gathered from a suspect, because it does not require the suspect to "communicate" or "testify" against himself or herself. Physical characteristics such as fingerprints, scars, tatoos, footprints, or trying on clothing are not protected. This evidence may be incriminating, but its value is in its physical characteristics, not in what the suspect tells you about it. The fingerprint of the suspect may have evidentiary value that is separate and apart from anything the subject may choose to say about the crime. If clothing found at a burglary scene fits the suspect, that may incriminate the suspect, but he or she is not required to say

anything about the burglary. Likewise, body fluids such as blood or urine can incriminate a suspect, but the collection process does not require the suspect to testify or communicate information. Instead, the physical characteristics of the blood and urine are the important element. The same is true for voice and handwriting samples, even though they require the suspect's cooperation. The investigator compares the physical aspects of the suspect's handwriting or voice prints to the physical aspects of the handwriting or voice of the person who committed the crime. The investigator is using the way the words were spoken, not what was spoken, and those physical characteristics are not protected. Finally, identification is not protected even though the soldier provides the information. This is because a person's identity is neutral information that does not tend to prove a crime. Accordingly, the commander can generally require a soldier to identify himself and produce his identification card, even though no rights warnings are given.

D. The Rights Warning Decision

You now know where rights warnings come from and what kind of evidence is protected, but how do you decide if you must actually read the rights warnings? The answer is: whenever you intend to conduct official questioning of a suspect or accused, you must read rights warning. Let's discuss each element in order.

1. Official.

Article 31 was enacted to protect soldiers from the subtle pressures to respond to questioning by a superior. Soldiers are trained to respond to orders. That training may cause them to respond to a superior's questioning because of rank, duty, or similar relationships, even though the response is incriminating. The warning makes it clear that the soldier is not required to respond.

The first part of the rule, then, is that rights warnings are required when the questioner is acting in an official capacity. Law enforcement personnel and commanders are almost always seen as acting in an official capacity. In contrast, when a soldier brags about criminal conduct in response to a friend's question, those statements may be used against the soldier because the friend is not acting in an "official" capacity and is not required to read rights warnings to the soldier. The soldier's act of bragging indicates that he or she did not feel pressured or coerced into talking about the crime, so the rationale underlying the rights warning requirement does not apply.

There is one exception to the official questioning rule. Undercover agents are not required to read rights warnings even though they are military police acting in an official capacity. Such a requirement would pose an obvious threat to the safety of undercover agents. More importantly, however, since the suspect does not realize he is dealing with a police officer or government agent, there are neither subtle nor coercive pressures that would justify rights warnings. There are, however, limitations on the use of undercover agents. Once a suspect has had charges preferred against him, the suspect is entitled to consult with counsel, to be given rights warnings again, and to have counsel present at any subsequent interrogation. A commander (or the police) cannot circumvent this rule by sending an undercover agent to question the suspect; the commander cannot use the undercover agent to do what the commander cannot do on his own.

2. Questioning.

Questioning is a broad term and includes any formal or informal words or actions that are designed to elicit (or reasonably likely to result in) an incriminating response. Mil. R. Evid. 305. If, in your official capacity, you are trying to get the soldier to tell you something that you can use against him or her, you are questioning the soldier. It is questioning, for example, if you bring a soldier suspected of stealing a rifle into your office and attempt to get a response by showing the soldier the recently recovered stolen weapon.

It is not questioning when a soldier volunteers information or spontaneously gives information without any "words or actions reasonably likely to elicit an incriminating response" from the commander. If you simply listen to the soldier, there is no requirement to stop the soldier and advise him or her of their rights. If you want to question the soldier after the volunteered information, then you must give rights warnings.

3. Suspect or accused.

You do not have to advise all soldiers of their rights before questioning them. Witnesses, who are not suspected or accused of offenses, need not be advised of any privilege against self-incrimination, even though you are conducting official questioning. A soldier is a suspect when you believe, or have enough information such that you reasonably should believe that the soldier committed an offense. The questioner cannot avoid rights warnings by simply saying that he did not suspect the soldier being questioned. A soldier is the "accused" after court-martial charges have been preferred against him.

4. Summary.

When you officially question a suspect or accused, you must read the rights warnings prior to the questioning. If you must re-interview the suspect, you should complete another rights advisement before beginning your questioning and, if necessary, ensure defense counsel is present.

E. Rights Warnings

Rights warnings should be read verbatim from DA Form 3881, Rights Warning Procedure/Waiver Certificate (Appendix A, page 8-13) or GTA 19-6-5, How To Inform Suspect/Accused Persons of Their Rights (Rights Warning Card) (Appendix B, page 8-15).

F. Voluntary Waiver of Rights

After reading the rights warnings to the suspect, ask these questions:

1. Do you understand your rights? (Yes)

2. Do you want a lawyer? (No)

3. Are you willing to make a statement? (Yes)

If the answers in the parentheses are given, the suspect has waived his or her rights and you may proceed with your interview. If the suspect doesn't understand his or her rights, explain them

further; if he or she wants to remain silent or see an attorney, stop the interview, make a note of the request, and call your trial counsel. Be sure to specifically note whether the suspect wants to remain silent, have an attorney, or both. Different rules apply to each request.

In order to use a suspect's statement in a later court-martial, the trial counsel must prove that the suspect voluntarily waived his or her rights. If you obtained the statement, you may be called to testify about the rights warnings you gave and the suspect's waiver of those rights. This may be a long time after you actually took the statement, so it's important that you make a record of what occurred. If possible, use the DA Form 3881 because it provides not only a written record of the rights warning, but also the suspect's signature which indicates the suspect waived his or her rights. If you use GTA 19-6-6 (rights warning card), you may wish to write the date and time of the rights advisement on the card and have the suspect place his initials by each of the rights warnings. A written memo can be prepared later. Although these steps are not required, they will assist you when testifying under oath about what happened during the rights warning process.

One final note: it is not permissible to use trickery to obtain a suspect's waiver of rights, e.g., telling a suspect his accomplice confessed, but laid the blame completely on him; or telling a suspect his fingerprints were found at the crime scene when none was found. If the suspect is tricked or mislead into waiving his or her rights, the waiver will be considered involuntary and the admission or confession will be ruled inadmissible at trial. The courts have allowed law enforcement agents to use some trickery in obtaining a confession, but only after the suspect freely and voluntarily agreed to talk. This is an area fraught with danger and should be avoided by commanders.

G. Presence of Counsel

Depending on the circumstances, defense counsel must be present before questioning a soldier about misconduct. If, for example, charges have been preferred against a soldier, defense counsel must be present before questioning the soldier about the charged offenses. If, however, the questioning focuses on uncharged misconduct, defense counsel may not have to be present. Even if no charges are preferred, if the soldier in a previous custodial interrogation requests to consult with a lawyer, under certain situations, a defense counsel must be present before conducting a subsequent interrogation. As illustrated, this area can be very complicated; therefore, contact your trial counsel before questioning a soldier who faces preferred charges or has asked for a lawyer.

H. Remedy: Exclusion

If a questioner violates the requirements of the voluntariness doctrine, warnings, waiver, or notice to counsel, any statement obtained from a suspect which might have been used against the suspect at trial is excluded from evidence. Also, any evidence derived from the statement must be excluded. This may not, however, be the end of the government's case. If the trial counsel can prove the case with evidence that is independent of the inadmissible statement, the prosecution may go forward.

I. Immunity

When a soldier refuses to testify because of the privilege against self-incrimination, the soldier can be compelled to testify by immunizing the soldier from the incriminating results of his testimony. Immunity is the government's promise that the soldier's testimony will not be used against the soldier. Because the grant of immunity removes the criminal consequences of talking, the soldier must talk with authorities.

Rule of Court-Martial 704 sets out the procedures for granting immunity and specifies that only the General Court-Martial Convening Authority may grant immunity. There are two types of immunity:

1. Transactional immunity - the witness cannot be prosecuted at all for the criminal transaction that he or she testifies about. This is seldom used.

2. Testimonial immunity - the witness's testimony and derivative evidence cannot be used against him or her. Prosecution is possible if the government can show that all evidence is from an independent source, but this is very difficult for the government to do.

A soldier with a grant of immunity is not free from all subsequent prosecution. If the soldier lies or refuses to talk with government authorities, the soldier may be prosecuted for perjury, false swearing, making a false official statement, or failure to comply with an order to testify.

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is ODCSOPS

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY: Title 10, United States Code, Section 3012(g)
PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your Social Security Number is voluntary.

1. LOCATION	2. DATE	3. TIME	4. FILE NO.
5. NAME *(Last, First, MI)*	8. ORGANIZATION OR ADDRESS		
6. SSN	7. GRADE/STATUS		

PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

Section A. Rights

The investigator whose name appears below told me that he/she is with the United States Army _____ _____ and wanted to question me about the following offense(s) of which I am suspected/accused: _____

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any question or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. *(For personnel subject othe UCMJ* I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

   - or -

   (For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.
4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

5. COMMENTS *(Continue on reverse side)*

Section B. Waiver

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES *(If available)*	3. SIGNATURE OF INTERVIEWEE
1a. NAME *(Type or Print)*	
b. ORGANIZATION OR ADDRESS AND PHONE	4. SIGNATURE OF INVESTIGATOR
2a. NAME *(Type or Print)*	5. TYPED NAME OF INVESTIGATOR
b. ORGANIZATION OR ADDRESS AND PHONE	6. ORGANIZATION OF INVESTIGATOR

Section C. Non-waiver

1. I do not want to give up my rights
   ☐ I want a lawyer ☐ I do not want to be questioned or say anything
2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT *(DA FORM 2823)* SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

DA FORM 3881, NOV 89 EDITION OF NOV 84 IS OBSOLETE USAPPC V1.00

PART II - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:
   a. Your official position.
   b. Nature of offense(s).
   c. The fact that he/she is a suspect/accused.
2. RIGHTS - Advise the suspect/accused of his/her rights as follows:
   "Before I ask you any questions, you must understand your rights."
   a. "You do not have to answer my questions or say anything."
   b. "Anything you say or do can be used as evidence against you in a criminal trial."
   c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

   - or -

   (For civilians not subject to the UCMJ) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."
   d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Have you ever requested a lawyer after being read your rights?"
(If the suspect/accused says "yes," find out when and where. If the request was recent *(i.e., fewer than 30 days ago)*, obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?" *(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)*

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

1. If the supsect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.
2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")

COMMENTS *(Continued)*

REVERSE OF DA FORM 3881 USAPPC V2.00

Appendix B

HOW TO INFORM SUSPECT/ACCUSED PERSONS OF THEIR RIGHTS

Use this card only when DA Form 3881, Rights Warning Procedure/Waiver Certificate, cannot be used. Complete DA Form 3881 as soon as possible.

VERBAL RIGHTS WARNING

Inform the person of your official position, the nature of the offense(s), and the fact that he/she is a suspect/accused. Then read him/her the following--do not paraphrase, read verbatim.

"BEFORE I ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS."

1. YOU DO NOT HAVE TO ANSWER MY QUESTIONS OR SAY ANYTHING."
2. ANYTHING YOU SAY OR DO CAN BE USED AS EVIDENCE AGAINST YOU IN A CRIMINAL TRIAL."
3. (For personnel subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. "THIS LAWYER CAN BE A CIVILIAN YOU ARRANGE FOR AT NO EXPENSE TO THE GOVERNMENT OR A MILITARY LAWYER DETAILED FOR YOU AT NO EXPENSE TO YOU, OR BOTH."

   (For civilians not subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. "THIS LAWYER CAN BE ONE YOU ARRANGE FOR AT YOUR OWN EXPENSE, OR IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING BEGINS."
4. IF YOU ARE NOW WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION, WITH OR WITHOUT A LAWYER PRESENT, YOU HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME, OR SPEAK PRIVATELY WITH A LAWYER BEFORE ANSWERING FURTHER, EVEN IF YOU SIGN A WAIVER CERTIFICATE."

Make certain the suspect/accused fully understands his/her rights, then say:

"DO YOU WANT A LAWYER AT THIS TIME?"

"AT THIS TIME, ARE YOU WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION AND MAKE A STATEMENT WITHOUT TALKING TO A LAWYER AND WITHOUT HAVING A LAWYER PRESENT WITH YOU?"

(See DA Form 3881 for more detailed instructions.)
Department of the Army Criminal Investigation Command
Supersedes GTA 19-6-7, July 1988

GTA 19-6-6, June 1991

8-15

BLANK PAGE

Chapter 10

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION

Table of Contents

I. REFERENCES..... 1

II. INTRODUCTION..... 2

III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS..... 2

IV. FRATERNIZATION AND RELATED OFFENSES. 8

V. SELECT CASE LAW. 11

VI. CONCLUSION 11

VII. APPENDCIES 11

This Page Intentionally Left Blank

Chapter 10

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION

Outline of Instruction

I. REFERENCES.

A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (13 May 2002)[hereinafter AR 600-20], implementing Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999)[hereinafter DA Message].

2. Manual for Courts-Martial, United States [hereinafter MCM].

3. Former Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (7 Dec 1993).

4. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (21 Feb 2001) (available from www.odcsper.army.mil).

B. Navy, Marine Corps, and Air Force References.

1. U.S. Navy Regulations, 1990, Article 1165 - Fraternization Prohibited (as amended 25 Jan 1993).

2. OPNAVINST 5370.2B, Navy Fraternization Policy (27 May 1999).

LTC David H. Robertson
FY 2004 Senior Officers Legal Orientation Course
FY 2004

3. Marine Corps Manual 1100.4 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3).

4. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (1 May 1999).

II. INTRODUCTION.

A. Three Separate Concepts.

1. Improper Superior – Subordinate Relationships.

2. Fraternization.

3. Sexual Harassment.

B. A Spectrum of Misconduct.

III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS.

A. History:

1. Task Force found disparate treatment between Services.

2. New policy announced by Secretary Cohen on 29 Jul 98 (Appendix 1).

3. Not effective immediately; gave Services 30 days to provide draft new policies to DoD. Essence of guidance now included within AR 600-20, paras 4-14 through 4-16.

4. Does NOT cover all senior / subordinate relationships.

5. Directs Service Secretaries to prohibit by policy:

a) Personal relationships, such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service; and

b) Personal relationships between recruiter and recruit, as well as between permanent party personnel and trainees.

B. **<u>The Old Army Policy</u>**. Previous AR 600-20 (30 Mar 88), para 4-14. Two Part Analysis:

1. Part One: "Army policy does not hold dating or most other relationships between soldiers [of different ranks] as improper, barring the adverse effects listed in AR 600-20." Old DA Pam 600-35, Para. 1-5(e). Therefore, Army policy did <u>not</u> prohibit dating (even between officers and enlisted soldiers), *per se*.

2. Part Two:

a) "Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." Old AR 600-20, paragraph 4-14.

b) "Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers of different rank --

(1) Cause actual or perceived partiality or unfairness.

(2) Involve the improper use of rank or position for personal gain.

(3) Create an actual or clearly predictable adverse impact on discipline, authority or morale." Old AR 600-20, para 4-14a.

C. Applicability of the Current Army Policy.

1. "Officer" includes commissioned and warrant officers.

2. Applies to relationships between soldiers, and between soldiers and members of other services.

3. Is gender-neutral.

4. Old AR 600-20 was not a punitive regulation. The new provisions of AR 600-20 are punitive. (Para 4-16: Paragraphs 4-14b. 4-14c and 4-15 are punitive. Violations could be punished as violations of Article 92, UCMJ).

5. All soldiers bear responsibility for maintaining appropriate relationships between military members. The senior military member is usually in the best position to terminate or limit relationships that may be in violation of this paragraph, but all soldiers involved may be held accountable for relationships in violation of this paragraph.

D. **The Current Army Policy**. Changes to AR 600-20, paras 4-14, 4-15 and 4-16.

1. Now a **THREE** Part Analysis:

a) Part 1: Is this a "strictly prohibited" category?

b) Part 2: If not, are there any adverse effects?

c) Part 3: If not "strictly prohibited" and there are no adverse effects, then the relationship is not prohibited.

2. Certain types of personal relationships between **officers and enlisted** personnel are prohibited. (PARA 4-14c.) Prohibited relationships include:

a) Ongoing business relationships (including borrowing or lending money, commercial solicitations and any other on-going financial or business relationships), **except**:

(1) Landlord / tenant; and

(2) One time transactions (such as car or home sales).

(3) All ongoing business relationships existing on the effective date of this prohibition, that were otherwise in compliance with the former policy, will not be prohibited until 1 Mar 00 ("grace period").

(4) This prohibition does not apply to USAR / ARNG soldiers when the ongoing business relationship is due to the soldiers' civilian occupation or employment.

b) Personal relationships, such as dating, shared living accommodations (other than as directed by operational requirements), and intimate or sexual relationships.

(1) This prohibition does not affect marriages.

(2) Otherwise prohibited relationships (dating, shared living accommodations [other than directed by operational requirements] and intimate or sexual relationships), outside of marriage that predate the effective date of this policy until 1 Mar 2000.

(3) Relationships otherwise in compliance with this policy **will not** become prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). While not expressed in the policy, this provision is NOT intended to allow continued officer / enlisted dating after the close of the grandfather period.

(4) RC/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on AD or Full Time National Guard Duty (FTNGD) other than AT.

(5) AD/RC exclusion when the personal relationship is primarily due to civilian association, unless on AD or FTNGD other than AT.

c) Gambling. NO EXCEPTIONS.

3. Other Prohibited Relationships Regardless of Rank. (Para 4-15):

a) **Trainee / Soldier**. Any relationship between IET trainees and permanent party soldiers (not defined) not required by the training mission will be prohibited. This prohibition would apply regardless of the unit of assignment of either the permanent party soldier or the trainee.

b) **Recruit / Recruiter**. Any relationship between a permanent party soldier assigned or attached to USAREC, and potential prospects, applicants, members of the Delayed Entry Program or members of the Delayed Training Program, not required by the recruiting mission, will be prohibited. The prohibition would apply regardless of the unit of assignment or attachment of the parties involved.

4. The following relationships between servicemembers of **different ranks** are prohibited. (PARA 4-14b.):

(1) Relationships that compromise or appear to compromise the integrity of supervisory authority or the chain of command;

(2) Relationships that cause actual or perceived partiality or unfairness;

(3) Relationships that involve or appear to involve the improper use or rank or position for personal gain;

(4) Relationships that are, or are perceived to be, exploitative or coercive in nature; and

(5) Relationships that cause an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

NOTE: Subparagraphs (1) and (4) are new additions to the three adverse effects looked for under the old policy's analysis.

5. These prohibitions are not intended to preclude normal team-building associations between soldiers, which occur in the context of activities such as community organizations, religious activities, family gatherings, unit social functions or athletic teams or events.

E. Commander's Analysis: How does the commander determine what's improper?

1. JAs must cultivate the idea that commanders should consult with OSJA.

2. Use common sense. “The leader must be counted on to use good judgment, experience, and discretion. . . ."

3. Keep an open mind. Don’t prejudge every male/female relationship. Relationships between males of different rank or between females of different rank can be as inappropriate as male/female relations. "[J]udge the results of the relationships and not the relationships themselves." DA Pam 600-35.

4. Additional scrutiny should be given to relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of the propriety of a particular relationship." DA Pam 600-35. These relationships are most likely to generate adverse effects.

5. Be wary that **appearances of impropriety** can be as damaging to morale and discipline as actual wrongdoing.

F. Command Response.

1. The commander has a wide range of responses available to him and should use the one that will achieve a result that is "warranted, appropriate, and fair." Counseling the soldiers concerned is usually the most appropriate initial action, particularly when only the potential for an appearance of actual preference or partiality, or an appearance without any adverse impact on morale, discipline or authority exists.

2. Adverse Administrative Actions: Order to terminate, relief, re-assign, bar to re-enlistment, reprimand, adverse OER/NCOER, administrative separation.

3. Criminal Sanctions: Fraternization, disobey lawful order, conduct unbecoming, adultery.

G. Commander's Role.

1. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. AR 600-20, para. 4-14(f).

2. Don't be gun-shy. Mentoring, coaching, and teaching of soldiers by their seniors should not be inhibited by gender prejudices. Old AR 600-20, para. 4-14 (e)(1).

3. Training. DA Pam 600-35.

IV. FRATERNIZATION AND RELATED OFFENSES.

A. General.

1. Fraternization is easier to describe than define.

2. There is no stereotypical case. Examples include sexual relations, drinking, and gambling buddies.

B. Fraternization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 83b.

2. Elements: the accused

a) Was a commissioned or warrant officer;

b) Fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c) Knew the person(s) to be (an) enlisted member(s); and

d) Such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

3. "Hard to define it, but I know it when I see it."

4. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

5. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 83e.

6. Custom.

   a) The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.

   b) Customs vary from service to service, and may change over time.

   c) Custom of the service must be proven through the testimony of a knowledgeable witness. *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).

7. Factors to Consider in Deciding How to Dispose of an Offense.

   a) Nature of the military relationship;

   b) Nature of the association;

   c) Number of witnesses;

   d) Likely effect on witnesses.

C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.

1. Elements. MCM, pt. IV, ¶ 16b(1).

   a) There was in effect a certain lawful general order or regulation;

   b) The accused had a duty to obey it; and

c) The accused violated or failed to obey the order or regulation.

2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 16e(1).

3. Applications.

a) Applicable to officers and enlisted.

b) Most effective when used to charge violations of local punitive general regulations (for example, regulations prohibiting improper relationships between trainees and drill sergeants).

4. **Remember:** AR 600-20 re: improper relationships is NOW a punitive regulation.

D. Conduct Unbecoming an Officer. UCMJ art. 133.

1. Elements.

a) Accused did or omitted to do certain acts; and

b) That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

2. Only commissioned officers and commissioned warrant officers may be charged under article 133. Maximum punishment: dismissal, total forfeitures and confinement for a period not in excess of that authorized for the most analogous offense for which punishment is prescribed in the Manual, e.g., two years for fraternization.

E. Sexual Harassment.

1. Charged under Article 93 as Cruelty and Maltreatment.

2. Other offenses may be possible given the facts and circumstances of the case such as extortion, bribery, adultery, indecent acts or assault, communicating a threat, conduct unbecoming, conduct prejudicial to good order/discipline.

V. SELECT CASE LAW.

A. *United States v. Sanchez*, 50 M.J. 506 (A.F.Ct.Crim.App. 1998). Accused cannot be convicted of both conduct unbecoming (Art. 133) and fraternization (Art. 134) when the misconduct alleged in the specifications is identical; fraternization gets dismissed. Those fraternization allegations not alleged in conduct unbecoming specifications remain. Court cites *United States v. Harwood*, 46 M.J. 26, 28 (1997) in support.

B. *United States v. Hawes*, 51 M.J. 258 (CAAF, 1999). CAAF affirmed Air Force Court's decision to set aside fraternization conviction and to reassess the appellant's sentence without ordering a rehearing. CAAF agreed that the fraternization offense was "relatively trivial" when compared to other misconduct.

C. *United States v. Mann*, 50 M.J. 689 (A.F.Ct.Crim.App. 1999). Sexual relationship is not a prerequisite for fraternization. Evidence was legally and factually sufficient to support conviction for fraternization. No interference with accused's access to witnesses where order prohibiting accused from contact with his fraternization partner did not prohibit accused's counsel from such contact. A.F. court finds no unlawful command influence or unlawfulness with the order.

D. *United States v. Rogers*, 54 M.J. 244 (CAAF 2000). Evidence legally sufficient to sustain Art. 133 conviction for the offense of conduct unbecoming an officer by engaging in an unprofessional relationship with a subordinate officer in appellant's chain of command. AF Court holds there is no need to prove breach of custom or violation of punitive regulation.

VI. CONCLUSION

VII. APPENDCIES

APPENDIX 1

THE SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1000

29 JUL 1998

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR OF ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Good Order and Discipline

Last July, I directed the Under Secretary of Defense for Personnel and Readiness to lead a Task Force of senior representatives from the Services, the Office of the Secretary of Defense, the Office of the Joint Chiefs of Staff and the DoD Inspector General to determine whether current policies and practices for maintaining good order and discipline in the all volunteer force are fair and effective. This Task Force obtained the views of field commanders, senior enlisted personnel, members of the reserve components, Service chaplains, the Chair of the Defense Advisory Committee on Women in the Services and other interested parties on the content, enforcement, general understanding and perception of our policies.

The information gathered by the Task Force indicated that breaches of good order and discipline in our Services are not widespread. The information further revealed, however, that the Services defined, regulated and responded to relationships between service members differently. Such differences in treatment are antithetical to good order and discipline, and are corrosive to morale, particularly so as we move towards an increasingly joint environment.

In order to support our national objectives, the military Services task organize, deploy and fight predominantly as a unified force. In today's military environment, we owe it to our forces to eliminate as many differences in disciplinary standards as possible and to adopt uniform, clear and readily understandable policies.

Accordingly, the Service Secretaries will, by policy, prohibit personal relationships such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and

borrowing between officer and enlisted regardless of their Service. This change will not affect existing marriages.

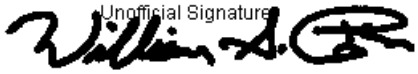
A more uniform policy is also needed in military recruiting and initial entry training environments. Interaction with recruiters and trainers offers the first examples of professional conduct expected of a military member and creates lasting impressions in new recruits. Similarly, military training and education are the means by which the values of military service are transferred. Because these relationships are so important, the Services shall prohibit personal relationships between recruiter and recruit, as well as between instructors and permanent party personnel with initial entry trainees.

In setting forth rules prohibiting unprofessional relationships, I want to make clear that professional interaction between officers and enlisted members is encouraged.

The best way to curtail inappropriate or unprofessional relationships is, of course, to prevent them through proper training and leadership by example. Should inappropriate relationships occur, commanders must carefully consider all facts and circumstances in reaching a disposition that is warranted, appropriate and fair. The failure to adhere to standards supportive of good order and discipline can often be satisfactorily addressed and corrected by appropriate administrative measures.

For any policy to be effective, it must be clear and understandable. I am directing each Service to prepare training materials explaining the Service's policies and regulations pertaining to good order and discipline, specifically addressing how the policies are applied and written in language that is understandable to all.

Each Service will provide me its draft implementing plans within 30 days and training materials within 60 days.



William S. Cohen

APPENDIX 2

Subject: R U 020804Z REVISED POLICY ON RELATIONSHIPS BETWEEN SOLDIERS OF
>
> RTTUZYUW RUEADWD3952 0612228-UUUU--RUERCOL.
> ZNR UUUUU ZYW ZOC ZEO T ALL US ARMY REPS ANS ACTIVITIES
> R 020804Z MAR 99
> FM DA WASHINGTON DC//DAPE-HR-L//
> TO ALARACT
> INFO RUEADWD/DA WASHINGTON DC//DAPE-HR-L//
> BT
> UNCLAS ALARACT 014/99
> SECTION 01 OF 02
> SUBJECT: REVISED POLICY ON RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS
> 1. REFERENCE AR 600-20, PARAGRAPHS 4-14, 4-15, AND 4-16.
> 2. ARMY POLICY REGARDING RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS HAS BEEN REVISED. THIS MESSAGE CONSTITUTES A PERMANENT CHANGE TO AR 600-20, TO TAKE EFFECT IMMEDIATELY. THIS TEXT WILL BE INCORPORATED INTO THE NEXT PRINTED REVISION OF THIS REGULATION.
> 3. AR 600-20, PARAGRAPH 4-14. RELATIONSHIPS BETWEEN MILITARY MEMBERS OF DIFFERENT RANK.
> A. THE TERM "OFFICER," AS USED IN THIS PARAGRAPH, INCLUDES BOTH COMMISSIONED AND WARRANT OFFICERS UNLESS OTHERWISE STATED. THE PROVISIONS OF THIS PARAGRAPH APPLY TO BOTH RELATIONSHIPS BETWEEN ARMY PERSONNEL AND BETWEEN ARMY PERSONNEL AND PERSONNEL OF OTHER MILITARY SERVICES. THIS POLICY IS EFFECTIVE IMMEDIATELY, EXCEPT WHERE NOTED

> PAGE 02 RUEADWD3952 UNCLAS
> BELOW, AND APPLIES TO DIFFERENT-GENDER RELATIONSHIPS AND SAME-GENDER RELATIONSHIPS.
> B. RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANK ARE PROHIBITED IF THEY:
> (1) COMPROMISE, OR APPEAR TO COMPROMISE, THE
> INTEGRITY OF SUPERVISORY AUTHORITY OR THE CHAIN OF COMMAND.
> (2) CAUSE ACTUAL OR PERCEIVED PARTIALITY OR UNFAIRNESS.
> (3) INVOLVE, OR APPEAR TO INVOLVE, THE IMPROPER USE OF RANK OR POSITION FOR PERSONAL GAIN.
> (4) ARE, OR ARE PERCEIVED TO BE, EXPLOITATIVE OR COERCIVE IN NATURE.
> (5) CREATE AN ACTUAL OR CLEARLY PREDICTABLE ADVERSE IMPACT ON DISCIPLINE, AUTHORITY, MORALE, OR THE ABILITY OF THE COMMAND TO ACCOMPLISH ITS MISSION.
> C. CERTAIN TYPES OF PERSONAL RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED PERSONNEL ARE PROHIBITED. PROHIBITED RELATIONSHIPS INCLUDE:
> (1) ON-GOING BUSINESS RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED PERSONNEL. THIS PROHIBITION DOES NOT APPLY TO LANDLORD/TENANT RELATIONSHIPS OR TO ONE-TIME TRANSACTIONS SUCH AS THE

> PAGE 03 RUEADWD3952 UNCLAS
> SALE OF AN AUTOMOBILE OR HOUSE, BUT DOES APPLY TO BORROWING OR LENDING MONEY, COMMERCIAL SOLICITATION, AND ANY OTHER TYPE OF ON-GOING FINANCIAL OR BUSINESS RELATIONSHIP. BUSINESS RELATIONSHIPS WHICH EXIST AT THE TIME THIS POLICY BECOMES EFFECTIVE, AND THAT WERE
> AUTHORIZED UNDER PREVIOUSLY EXISTING RULES AND REGULATIONS, ARE EXEMPT UNTIL MARCH 1, 2000. IN THE CASE OF ARMY NATIONAL GUARD OR UNITED STATES ARMY RESERVE PERSONNEL, THIS PROHIBITION DOES NOT APPLY TO RELATIONSHIPS THAT EXIST DUE TO THEIR CIVILIAN OCCUPATION OR EMPLOYMENT.
> (2) DATING, SHARED LIVING ACCOMMODATIONS OTHER THAN THOSE DIRECTED BY OPERATIONAL REQUIREMENTS, AND INTIMATE OR SEXUAL RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED PERSONNEL. THIS PROHIBITION DOES NOT APPLY TO:
> (A) MARRIAGES THAT PREDATE THE EFFECTIVE DATE OF THIS POLICY OR ARE ENTERED INTO PRIOR TO MARCH 1, 2000.
> (B) UNTIL MARCH 1, 2000, RELATIONSHIPS (DATING, SHARED
> LIVING ACCOMMODATIONS, AND INTIMATE OR SEXUAL RELATIONSHIPS) OUTSIDE
> OF MARRIAGE THAT PREDATE THE EFFECTIVE DATE OF THIS POLICY.
> (C) SITUATIONS IN WHICH A RELATIONSHIP WHICH COMPLIES WITH
> THIS POLICY WOULD MOVE INTO NON-COMPLIANCE DUE TO A CHANGE IN STATUS

> PAGE 04 RUEADWD3952 UNCLAS
> OF ONE OF THE MEMBERS (FOR INSTANCE, A CASE WHERE TWO ENLISTED MEMBERS ARE MARRIED AND ONE IS SUBSEQUENTLY COMMISSIONED OR SELECTED AS A WARRANT OFFICER).
> (D) PERSONAL RELATIONSHIPS OUTSIDE OF MARRIAGE BETWEEN MEMBERS OF THE NATIONAL GUARD OR ARMY RESERVE, WHEN THE RELATIONSHIP PRIMARILY EXISTS DUE TO CIVILIAN ACQUAINTANCESHIPS, UNLESS THE INDIVIDUALS ARE ON ACTIVE DUTY (OTHER THAN ANNUAL TRAINING) OR FULL-TIME NATIONAL GUARD DUTY (OTHER THAN ANNUAL TRAINING).
> (E) PERSONAL RELATIONSHIPS OUTSIDE OF MARRIAGE BETWEEN MEMBERS OF THE REGULAR ARMY AND MEMBERS OF THE NATIONAL GUARD OR ARMY RESERVE WHEN THE RELATIONSHIPS PRIMARILY EXISTS DUE TO CIVILIAN ASSOCIATION AND THE RESERVE COMPONENT MEMBER IS NOT ON ACTIVE DUTY (OTHER THAN ANNUAL TRAINING) OR FULL-TIME NATIONAL GUARD DUTY (OTHER THAN ANNUAL TRAINING).
> (F) SOLDIERS AND LEADERS SHARE RESPONSIBILITY,> HOWEVER, FOR ENSURING THAT THESE RELATIONSHIPS DO NOT INTERFERE WITH GOOD ORDER AND DISCIPLINE. COMMANDERS WILL ENSURE THAT PERSONAL RELATIONSHIPS WHICH EXIST BETWEEN SOLDIERS OF DIFFERENT RANKS EMANATING FROM THEIR CIVILIAN CAREERS WILL NOT INFLUENCE TRAINING,
> READINESS, OR PERSONNEL ACTIONS.
>

> PAGE 05 RUEADWD3952 UNCLAS
> (3) GAMBLING BETWEEN OFFICERS AND ENLISTED PERSONNEL.
> D. THESE PROHIBITIONS ARE NOT INTENDED TO PRECLUDE NORMAL TEAM BUILDING ASSOCIATIONS WHICH OCCUR IN THE CONTEXT OF ACTIVITIES SUCH AS COMMUNITY ORGANIZATIONS, RELIGIOUS ACTIVITIES, FAMILY GATHERINGS, UNIT-BASED SOCIAL FUNCTIONS, OR ATHLETIC TEAMS OR EVENTS.
> E. ALL MILITARY PERSONNEL SHARE THE RESPONSIBILITY FOR MAINTAINING PROFESSIONAL RELATIONSHIPS. HOWEVER, IN ANY RELATIONSHIP BETWEEN SOLDIERS OF DIFFERENT GRADE OR RANK THE SENIOR MEMBER IS GENERALLY IN THE BEST POSITION TO TERMINATE OR LIMIT THE EXTENT OF THE RELATIONSHIP. NEVERTHELESS, ALL MEMBERS MAY BE HELD ACCOUNTABLE
> FOR RELATIONSHIPS THAT VIOLATE THIS POLICY.
> F. COMMANDERS SHOULD SEEK TO PREVENT INAPPROPRIATE OR UNPROFESSIONAL RELATIONSHIPS THROUGH PROPER TRAINING AND LEADERSHIP BY EXAMPLE. SHOULD INAPPROPRIATE RELATIONSHIPS OCCUR, COMMANDERS HAVE AVAILABLE A WIDE RANGE OF RESPONSES. THESE RESPONSES MAY INCLUDE COUNSELING, REPRIMAND, ORDER TO CEASE, REASSIGNMENT, OR ADVERSE ACTION. POTENTIAL ADVERSE ACTION MAY INCLUDE OFFICIAL REPRIMAND, ADVERSE EVALUATION REPORT(S), NONJUDICIAL PUNISHMENT, SEPARATION, BAR TO REENLISTMENT, PROMOTION DENIAL, DEMOTION, AND
>

> PAGE 06 RUEADWD3952 UNCLAS
> COURTS MARTIAL. COMMANDERS MUST CAREFULLY CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES IN REACHING A DISPOSITION THAT IS WARRANTED, APPROPRIATE, AND FAIR.
> 4-15. OTHER PROHIBITED RELATIONSHIPS
> A. TRAINEE AND SOLDIER RELATIONSHIPS. ANY RELATIONSHIP BETWEEN PERMANENT PARTY PERSONNEL AND IET TRAINEES NOT REQUIRED BY THE TRAINING MISSION IS PROHIBITED. THIS PROHIBITION APPLIES TO PERMANENT PARTY PERSONNEL WITHOUT REGARD TO THE INSTALLATION OF ASSIGNMENT OF THE PERMANENT PARTY MEMBER OR THE TRAINEE.
> B. RECRUITER AND RECRUIT RELATIONSHIPS. ANY RELATIONSHIP BETWEEN PERMANENT PARTY PERSONNEL ASSIGNED OR ATTACHED TO THE UNITED STATES ARMY RECRUITING COMMAND AND POTENTIAL PROSPECTS, APPLICANTS, MEMBERS OF THE DELAYED ENTRY PROGRAM (DEP), OR MEMBERS OF THE DELAYED TRAINING PROGRAM (DTP) NOT REQUIRED BY THE RECRUITING MISSION IS PROHIBITED. THIS PROHIBITION APPLIES TO UNITED STATES ARMY RECRUITING COMMAND PERSONNEL WITHOUT REGARD TO THE UNIT OF ASSIGNMENT OF THE PERMANENT PARTY MEMBER AND THE POTENTIAL PROSPECTS, APPLICANTS, DEP MEMBERS, OR DTP MEMBERS.
> 4-16. FRATERNIZATION. VIOLATIONS OF PARAGRAPH 4-14B, 4-14C, AND 4-15 MAY BE PUNISHED UNDER ARTICLE 92, UCMJ, AS A VIOLATION OF A LAWFUL GENERAL REGULATION.
> 4. DA PAM 600-35 IS BEING REVISED TO REFLECT THIS CHANGE.
> ADDITIONAL TRAINING MATERIALS PERTAINING TO THIS CHANGE WILL BE ISSUED SEPARATELY.
> 5. POC FOR THIS ACTION IS MAJOR LINDSEY ARNOLD, DAPE-HR-L, DSN 227-6864, COM (703)697-6864, E-MAIL ARNOLLE@HQDA.ARMY.MIL.
> BT

CHAPTER 11

CHILD/SPOUSE ABUSE AND THE LAUTENBURG AMENDMENT

I. INTRODUCTION..... 1

II. ARMY POLICY..... 1

III. INVESTIGATION AND COMMANDER'S OPTIONS..... 6

IV. THE COURT-MARTIAL PROCESS..... 9

V. LAUTENBURG AMENDMENT 10

VI. CONCLUSION. 16

CHAPTER 11

CHILD/SPOUSE ABUSE AND THE LAUTENBURG AMENDMENT

I. INTRODUCTION

A. The problem-

1. A battering husband kills four women a day. One woman is battered every 15 seconds.

2. Link between child abuse and spouse abuse. The American Academy of Pediatrics estimates that between 30-59% of mothers of children reported for abuse are themselves battered.

3. The Clerk of Court, United States Army Court of Criminal Appeals, estimates the percentage of the general-courts martial containing at least one specification of child abuse has risen from 4.7% in 1988 to 14.4% in 1995 - fell to 9.3% in 1996. Rose to 10.5% in 1997. For the 5-year period from FY 98-FY03, 5.53% of all GCM convictions included at least one specification of domestic abuse.

B. Why a separate class? Unique Issues.

1. Family members.

2. Rank of Perpetrator.

3. Duty Performance.

4. Role of Medical Personnel.

5. Interface with Civilian Agencies.

II. ARMY POLICY

A. AR 608-18, *The Army Family Advocacy Program.* It is DA policy to:

1. Prevent spouse and child abuse.

2. Protect victims of abuse.

3. Ensure personnel who intervene are trained.

4. Identify abuse early and provide treatment for those affected.

5. Balance treatment concerns with your authority as a commander to take disciplinary or administrative action.

B. Responsibilities.

1. At DA level, the ACSIM has responsibility for the Family Advocacy Program.

2. The Commander, U.S. Army Community and Family Support Center develops policy and programs.

3. Unit Commanders:

a) Attend spouse and child abuse commander education programs designed for unit commanders.

b) Schedule time for soldiers to attend troop awareness briefings.

c) Report and investigate suspected abuse.

d) Attend Case Review Committee (CRC) presentations when unit soldiers involved.

e) Encourage soldiers to participate in Family Advocacy Programs.

f) Consider CRC recommendations before taking administrative or disciplinary action.

4. The Family Advocacy Program Manager (FAPM):

a) Works for Army Community Services (ACS).

b) Runs Family Advocacy Program for the installation.

c) Acts as liaison between military and civilian agencies.

d) Serves as member of FAC.

5. The Family Advocacy Committee (FAC):

a) is the multidisciplinary team that advises installation commander on FAP policy and procedure.

b) is chaired by the garrison or base support battalion commander or designee.

c) is composed of:

(1) Pediatrician or other MD.

(2) Community Health Nurse (ad hoc).

(3) DENTAC representative.

(4) Provost Marshall representative.

(5) CID representative.

(6) SJA representative.

(7) ADAPCP clinical director.

(8) Child Development Services representative.

(9) Schools representative.

(10) Installation Chaplain or representative.

(11) Command Sergeant Major.

(12) Child Protective Service representative.

d) Meets at least quarterly.

e) Identifies trends requiring a command or community response, coordinates civilian and military resources, facilitates an integrated community approach to the prevention of child and spouse abuse, develops community, command and troop education prevention programs, publicizes how to report abuse, addresses administrative details.

6. Case Review Committee (CRC):

a) Is a multidisciplinary team falling under medical treatment facility (MTF).

b) chaired by the Chief, Social Work Services.

c) tracks and evaluates cases of reported abuse.

(1) cases are either substantiated or unsubstantiated.

(2) the standard is fairly low: a preponderance of the evidence.

(3) a majority of members must vote to substantiate.

d) meets monthly; each case is reviewed at least quarterly.

e) determines whether civilian courts should intervene.

f) determines whether to recommend removal of children from home.

g) recommends corrective measures.

h) briefs the commander on status of case.

i) recommendations, such as treatment, foster care, etc., do not preclude criminal or adverse administrative action against a soldier.

C. Reporting Requirements.

1. Report Point of Contact (RPOC). Para. 3-6.

a) Designated by installation commander as a central POC.

b) Normally the MTF emergency room or MP Desk.

c) Manned 24 hours.

2. Who must report suspected abuse?

a) All soldiers, civilian employees and members of military community **should be encouraged** to report.

b) Law enforcement, medical, social work and school personnel **will** report.

c) Commanders **should** report.

3. When a family member reports abuse, the commander will be notified within 24 hours.

D. Removal of Children From Home.

1. Medical Protective Custody. If the child is properly at the MTF, child may be taken into medical protective custody as follows:

a) Obtain parental consent, if possible.

b) If consent is not given, ask whether the child suffers from abuse or neglect by a parent to the extent that immediate removal from the home is necessary to avoid imminent danger to the child's life or health.

c) The treating physician makes the initial determination.

d) Approved by MTF commander.

e) Unit commander will be notified.

2. Children cannot be removed from a home, school or child care facility unless a bona fide medical emergency exists. Coordination with civilian authorities may be appropriate.

3. Foster Care.

a) Generally, need parental consent or order from state or foreign court with jurisdiction.

(1) U.S. - seek court order even if parental consent is given.

(2) Foreign Country - Coordinate with host nation authorities.

b) Emergency situations. May be authorized if abuse is substantiated and child at risk of death or physical injury.

E. Records of Reported Abuse: Chapter 5.

1. are filed with the Army Central Registry, Fort Sam Houston.

2. must be substantiated spouse and child abuse.

a) The standard used by the Case Review Committee – a preponderance of the evidence available indicates abuse occurred.

b) Distinguish the standard used by CID in titling decisions: credible information exists that a crime was committed and this person did it.

3. a commander's access governed by FOIA and Privacy Act.

III. INVESTIGATION AND COMMANDER'S OPTIONS

A. Law enforcement officials will take the lead.

1. Military police: any offense punishable by one year or less.

2. CID: all other offenses.

3. CID will handle almost all offenses involving child sexual abuse, often in conjunction with civilian law enforcement agencies.

B. Self-incrimination.

1. Interrogation of suspect.

a) Preference for law enforcement.

b) If a commander questions the soldier, read Article 31/Miranda rights. See rights Warning Card (GTA 19-6-6).

c) Social Workers or Medical Personnel. Once a soldier is identified as suspect, questioning should stop and law enforcement notified.

d) Therapist-patient privilege in the military? Unclear in light of recent case law. The Joint Service Committee on Military Justice has recommended the President approve a privilege prohibiting the government and defense from using statements made by service members and civilians to psychiatrists, psychotherapists and licensed social workers. However, while there may eventually be a rule prohibiting use of these communications in a court-martial, unresolved is whether health care providers can still be compelled to disclose to the chain of command communications made by soldiers to insure the health and welfare of other soldiers in the command..

2. Immunity. Can only be granted by the GCMCA.

C. Commander's options.

1. Actions under UCMJ.

a) Court-Martial.

b) Nonjudicial Punishment.

2. Adverse Administrative Actions.

a) Counseling, Reprimand.

b) Bar to Reenlistment.

c) Administrative Separation.

3. Ancillary actions.

a) Termination of quarters/move soldier into the barracks.

b) Early return of dependents if overseas.

c) Curtailment of soldier's tour.

d) Bar to the installation.

e) Refer soldier to Community Mental Health.

4. Considerations.

a) Must consider recommendation of the CRC.

b) This is only one of many factors. Also consider the need to maintain discipline, victim's needs, and the interests of justice.

c) Effect on victims. Will terminating quarters result in their unavailability for testimony?

(1) Subpoena power does not exist outside U.S.

(2) Foreign nationals may not be compelled to testify in U.S. courts. SOFA may require host nation to issue subpoena.

d) Statute of Limitations. Normally 5 years. Article 43, UCMJ.

5. Dealing with family members.

a) Chain of Command concern v. disciplinary role.

b) Emotional issue.

c) Don't discuss legal rules (use of statements, etc.)

d) Concerns with finances, disruption of family, may lead to recanting or altering of testimony.

e) Victim - Witness Assistance. AR 27-10, chapter 18.

(1) Victims and witnesses are to be treated with dignity and courtesy.

(2) Victims should be kept informed of court proceedings and consulted about pretrial agreement negotiations and decisions not to prefer charges.

(3) Staff Judge Advocate is responsible for the installation Victim - Witness Program.

IV. THE COURT-MARTIAL PROCESS

A. Typical Charges.

1. Rape and Carnal Knowledge (Article 120) (viability of mistake of fact defense in carnal knowledge cases).

2. Sodomy (Article 125).

3. Indecent Acts or liberties with a Child (Article 134).

4. Indecent Exposure (Article 134).

5. Indecent Language (Article 134).

B. Article 32, UCMJ Investigation.

1. Careful selection of investigating officer. Pick officer you could least afford to lose.

2. Witnesses.

a) No subpoena power over civilians.

b) Investigating officer decides if witness is reasonably available. R.C.M. 405(g)(2). If travel is required, IO coordinates with OSJA. Travel funded by GCMCA.

c) Authorizing delays.

C. Production of Witnesses at Trial.

1. The SJA office is responsible for securing witnesses for both the prosecution and defense.

2. Subpoena Power. A court-martial has the power to subpoena civilian witnesses (military witnesses are not subpoenaed, they are ordered to court).

a) Extends only to territorial limits of U.S. No U.S. subpoena power exists overseas.

(1) Court-martial overseas: SOFA may address host nation subpoena.

(2) Court-martial in U.S. but civilian witness outside U.S.: cannot be compelled to testify.

b) Witness who fails to respond to a subpoena may be punished in federal district court under Article 47, UCMJ. Subject to confinement and/or fine. As a practical matter, not often used.

V. LAUTENBURG AMENDMENT

A. References.

1. Gun Control Act of 1968, 18 U.S.C. § 921-928 (Supp. 1997).

2. The "Lautenburg Amendment" to the Brady Handgun Violence Prevention Act, P.L. 104-208, Title VI, section 658, 110 Stat. 3009.371; codified at 18 U.S.C. § 922(d)(9), § 922(g)(9); § 925(a)(1); (effective 30 Sept. 1996).

3. Department of Defense Implementation:

a) Memorandum, Assistant Secretary of Defense, Force Management Policy, Subject: Interim DoD Policy on Domestic Violence Amendment to the Gun Control Act (22 Oct 1997).

b) Message, 151100Z Jan 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim

Implementation of Lautenburg Amendment (15 Jan. 1998). Copy at Appendix 1.

c) Message, 311108Z Oct 97, Headquarters, Dep't of Army, DAJA-LA, subject: Interim Guidance on Lautenburg Amendment Issues (31 Oct. 1997).

d) Message, 211105Z May 99, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Solders Affected by the Lautenburg Amendment. Copy at Appendix 2.

e) Memorandum, Under Secretary of Defense for Personnel and Readiness, Subject: Department of Defense Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for Military Personnel (27 Nov. 2002). Copy at Appendix 3.

4. JAGNet site for Lautenberg Amendment database: http://www.jagnet.army.mil/jagnet/lautenasgm.nsf/?Open

B. Basic Provisions.

1. 18 U.S.C. § 922(d) prohibits the transfer of "any firearm or ammunition to any person whom you know or have reasonable cause to believe . . . has been convicted in any court of a misdemeanor crime of domestic violence."

2. 18 U.S.C. § 922(g) prohibits "any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to receive any firearm or ammunition which has been shipped in interstate or foreign commerce."

3. Violations of either prohibition are punishable by 10 years confinement, $250, 000 fine, or both. 18 U.S.C. § 924(a)(2).

4. 18 U.S.C. § 925 formerly exempted "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof." This "federal exemption" has been eliminated for individuals "convicted in any court of a misdemeanor crime of domestic violence."

C. Elements of a "Misdemeanor Crime of Domestic Violence," 18 U.S.C. § 921(a)(33).

1. The person was convicted of a crime classified as a misdemeanor in the jurisdiction where the conviction was entered.

2. The offense had as an element the use or attempted use of physical force, or threatened use of a deadly weapon.

3. The offender was at the time of the offense:

a) A current or former spouse, parent or guardian of the victim;

(1) A person with whom the victim shared a child in common;

(2) A person who was cohabiting with or has cohabited with the victim as a spouse, parent or guardian of the victim;

(3) A person who was similarly situated to a spouse, parent, or guardian of victim.

4. The convicted offender was represented by counsel, or knowingly and intelligently waived the right to counsel.

5. If entitled to have the case tried by jury, the case was actually tried by a jury or the person knowingly and intelligently waived the right to have the case tried by a jury.

6. The conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense or had civil rights restored, unless the pardon, expungement, or restoration of civil rights provides that the offender may not ship, transport, possess, or receive firearms.

D. Dep't of Defense and Dep't of Army Response.

1. Interpretation.

a) Conviction of a misdemeanor crime of domestic violence does not include a summary court-martial conviction or nonjudicial punishment under Article 15.

b) The law does not apply to crew served weapons or major weapons systems (tanks, missiles, aircraft, etc.).

c) The law applies to all other Army issue and privately owned firearms and ammunition.

d) The Army policy applies worldwide (including hostile fire areas).

e) Pursuant to the 27 November 2002 DoD Policy Memorandum, felony crimes of domestic violence are now considered qualifying convictions for Lautenberg Amendment purposes.

2. Commander Responsibilities Under January 1998 Interim Guidance.

a) Notify all soldiers that it is unlawful to possess firearms and ammunition if they have a conviction of a misdemeanor crime of domestic violence.

b) Conduct local file checks to identify soldiers who may have disqualifying convictions.

c) Establish procedures to ensure compliance, to include withdrawing privately owned weapons from unit arms rooms. Such procedures should permit soldiers to sell or transfer personal firearms to authorized individuals.

d) Soldiers who have or may have a qualifying conviction should be referred to a legal assistance attorney.

e) Reassign to duties that do not require possession of firearms or ammunition.

f) May initiate adverse administrative action against soldiers solely on the basis of inability to possess a weapon only if the conviction was entered after 30 September 1996 and the soldier has been given a reasonable amount of time to obtain a pardon or other relief.

g) May initiate adverse action on the basis of the underlying misconduct or for civil conviction regardless of when the misconduct or conviction occurred.

3. Commander Responsibilities Under May 1999 Message

a) Soldiers with disqualifying conviction or *reasonable cause to believe* have a disqualifying conviction are non-deployable or assignable for:

(1) Mission requiring Firearms (No Curtailment)

(2) Overseas assignments (No Curtailment)

(3) TOE/MTOE Units (New Soldiers Only)

(4) Service Schools

(5) Limited Leadership

b) Enlisted Retention

(1) Extension for one year only (does not apply to bared soldiers).

(2) No reenlistment.

(3) Accept voluntary separation under Chapter 5-3.

c) Reporting:

(1) USR Code (other) beginning 15 July.

(2) Central reporting, wait.

d) National Guard and Reserves report Semi-annually starting 1 Aug. 1999.

4. Military Department Policies Under November 2002 DoD Policy Memorandum:

a) Each Department shall implement a periodic training program to inform personnel of the Lautenberg Amendment and DoD policy related thereto.

(1) Training shall inform personnel of their affirmative and continuing obligation to inform commanders or supervisors of qualifying convictions.

(2) DoD components will also post notices about the Amendment and DoD policy in all facilities in which Government firearms or ammunition are stored.

b) Departments may require personnel to certify whether they have qualifying convictions.

(1) If so, Departments shall use DD Form 2760 for such certifications.

(2) If not, DD Form 2760 shall made available for personnel who self-report.

(3) Departments will issue regulations governing the filing, maintenance and retrieval of DD Form 2760.

c) Departments may promulgate separation regulations specifically pertaining to members who have qualifying convictions.

d) NOTE: As of 25 September 2003, neither DoD nor DA have provided instructions or regulations implementing the provisions of the 27 November 2002 DoD policy memorandum.

5. Legal Assistance.

a) Personnel who believe they may have a disqualifying conviction will be referred to legal assistance. Legal assistance attorneys will explain the law and potential criminal and administrative consequences of a disqualifying conviction.

b) LA attorneys will assist soldiers, to the extent possible, in obtaining pardons, expungement of records, proof of deferred adjudication, or restoration of civil rights, which would render Lautenburg inapplicable to the client.

c) The scope of legal assistance involving civilian criminal matters is limited by AR 27-3, &3-6j, and clients may need referral to civilian defense counsel.

d) Clients needing advice on criminal law or administrative separation matters should be referred to TDS, IAW AR 27-3, &3-6g(5) & 3-8a(1).

E. Current Issues.

1. Litigation. *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998) *reh'g granted*, 159 F.3d 1362, *reversed*, 173 F.3d. 898 (D.C. Cir. 1999). On 28 August 1998 the court held that 18 U.S.C. ə925 violates the Equal Protection Clause, because there is no rational basis for prohibiting possession of firearms by officers with misdemeanor domestic violence convictions, while permitting possession by officers with domestic violence felony convictions. On 16 April 1999 the court reversed itself and held that the amendment does not violate the Equal Protection Clause.

F. The Current Policy Debate.

1. Rescind overseas applicability (absent definitive judicial ruling).

2. Provide guidance on foreign convictions.

3. Require certification only for personnel with unsupervised access to weapons and ammunition.

4. Ensure consistent application for military, civilian and contract personnel.

5. Oppose creation of non-weapons-bearing MOSs.

VI. CONCLUSION.

SUBJECT: HQDA GUIDANCE ON DEPLOYMENT ELIGIBILITY,. ASSIGNMENT, AND REPORTING OF SOLDIERS AFFECTED BY THE LAUTENBERG AMENDMENT

A. REFERENCE HQDA MESSAGE 151100Z JAN 98, SUBJECT: HQDA MESSAGE ON INTERIM IMPLEMENTATION OF THE LAUTENBERG AMENDMENT.

1. THE LAUTENBERG AMENDMENT BECAME LAW 30 SEP 1996. THIS AMENDMENT
MADE IT A FELONY FOR ANY PERSON WHO HAS BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE TO SHIP, TRANSPORT, POSSESS OR RECEIVE FIREARMS OR AMMUNITION. THE TRANSFER, ISSUANCE OR SALE OF
FIREARMS TO A PERSON WITH SUCH A CONVICTION IS ALSO A FELONY.

2. THIS MESSAGE SUPPLEMENTS AND DOES NOT SUPERSEDE HQDA MESSAGE IN
REFERENCE A ABOVE. COMMANDERS WILL FOLLOW THE GUIDANCE CONTAINED
IN THAT MESSAGE FOR SOLDIERS ALREADY DEPLOYED. COMMANDERS WILL DETAIL THOSE WHOM THEY KNOW OR HAVE REASONABLE CAUSE TO BELIEVE
HAVE A CONVICTION FOR A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE TO
DUTIES THAT DO NOT REQUIRE THE BEARING OF WEAPONS OR AMMUNITION UNTIL THEY CAN DETERMINE WHETHER A QUALIFYING CONVICTION EXISTS.

A. DEPLOYMENT GUIDANCE: EFFECTIVE IMMEDIATELY, ALL SOLDIERS KNOWN TO HAVE, OR SOLDIERS WHOM COMMANDERS HAVE REASONABLE CAUSE TO BELIEVE HAVE, A CONVICTION OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE ARE NON-DEPLOYABLE FOR MISSIONS THAT REQUIRE POSSESSION OF FIREARMS OR AMMUNITION.

B. ASSIGNMENT POLICY

(1) SOLDIERS AFFECTED BY THE LAUTENBERG AMENDMENT ARE NOT ELIGIBLE FOR OVERSEAS ASSIGNMENT. ALL ACTIVE ARMY SOLDIERS, INCLUDING RESERVE SOLDIERS ON EXTENDED ACTIVE DUTY, WITH QUALIFYING CONVICTIONS (I.E., CONVICTIONS OF MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE) OR THOSE ACTIVE ARMY SOLDIERS WHOM COMMANDERS HAVE REASONABLE CAUSE TO BELIEVE HAVE QUALIFYING CONVICTIONS ON HQDA-ISSUED OCONUS ASSIGNMENT INSTRUCTIONS WILL BE REPORTED IMMEDIATELY BY FAX TO CDR PERSCOM (TAPC-EPC-O) FOR ENLISTED AND (TAPC-OPD-M) FOR OFFICERS FOR TOP OF THE SYSTEM DELETION. THE FAX NUMBER FOR ENLISTED SOLDIERS IS DSN 221-6636,

COMMERCIAL (703) 325-6636 AND FAX NUMBER DSN 221-7254, COMMERCIAL (703)325-7254 FOR OFFICERS. SOLDIERS WHO HAVE ALREADY EXERCISED ANY PORTION OF THEIR PCS ENTITLEMENTS WILL COMPLY WITH THEIR OVERSEAS ASSIGNMENT.

(2) OCONUS BASED ACTIVE ARMY AND ACTIVE GUARD RESERVE (AGR) SOLDIERS AFFECTED BY THE LAUTENBERG AMENDMENT WILL COMPLETE THEIR PRESCRIBED TOURS. ALL OCONUS-BASED ACTIVE ARMY SOLDIERS, (INCLUDING RESERVE SOLDIERS ON EXTENDED ACTIVE DUTY) AND AGR SOLDIERS WITH HQDA-ISSUED ASSIGNMENT INSTRUCTIONS WILL CONTINUE TO COMPLY WITH THEIR ASSIGNMENT INSTRUCTIONS. SOLDIERS WILL NOT BE CURTAILED FROM THEIR OCONUS COMMANDS; THEY WILL DEPART ON THEIR ESTABUSHED DEROS. COMMANDERS MAY SUBMIT REQUESTS TO EXTEND SOLDIERS ON A CASE BY CASE BASIS. FOR PURPOSES OF THIS MESSAGE, OCONUS DOES NOT INCLUDE ALASKA, HAWAII, AND PUERTO RICO.

(3) COMMANDERS WILL ENSURE NEWLY ARRIVED OR ASSIGNED ACTIVE ARMY AND RESERVE COMPONENT SOLDIERS WITH QUALIFYING CONVICTIONS (I.E., CONVICTIONS OF MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE) OR THOSE SOLDIERS WHOM COMMANDERS HAVE REASONABLE CAUSE TO BELIEVE HAVE QUALIFYING CONVICTIONS ARE NOT ASSIGNED/ ATTACHED TO ANY TABLE OF ORGANIZATION EQUIPMENT (TOE) OR MODIFIED TABLE OF ORGANIZATION EQUIPMENT (MTOE) UNITS. COMMANDERS MAY REASSIGN/REAYITACH CURRENTLY ASSIGNED/ATTACHED AFFECTED ACTIVE ARMY AND RESERVE COMPONENT SOLDIERS TO TABLE OF DISTRIBUTION AND ALLOWANCES (TDA) UNITS IF AVAILABLE ON THEIR INSTALLATIONS TO POSITIONS THAT DENY THEM ACCESS TO WEAPONS AND AMMUNITION. COMMANDERS WILL ALSO DENY THOSE SOLDIERS APPOINTMENT TO LEADERSHIP, SUPERVISORY OR PROPERTY ACCOUNTABILITY POSITIONS THAT BY NATURE OF THEIR EXECUTION OF MILITARY AUTHORITY/RESPONSIBILITY WOULD GIVE THEM ACCESS TO ARMS OR AMMUNITION.

(4) SOLDIERS WITH QUALIFYING CONVICTIONS (I.E., CONVICTIONS OF MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE) OR THOSE SOLDIERS WHOM COMMANDERS HAVE REASONABLE CAUSE TO BELIEVE HAVE QUALIFYING CONVICTIONS ARE NOT AUTHORIZED TO ATTEND ANY SERVICE SCHOOL WHERE INSTRUCTION WITH INDIVIDUAL WEAPONS OR AMMUNITION IS PART OF THE CURRICULUM. COMMANDERS WILL COUNSEL SOLDIERS THAT THE INABILITY TO COMPLETE SERVICE SCHOOLS MAY IMPACT ON FUTURE PROMOTION AND AFFECT THEIR CAREER LENGTH.

C. ENLISTED RETENTION: SOLDIERS KNOWN TO HAVE, OR THOSE

SOLDIERS WHOM COMMANDERS HAVE REASONABLE CAUSE TO BELIEVE HAVE, A CONVICTION OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE MAY EXTEND IF OTHERWISE QUALIFIED; HOWEVER, THEY ARE LIMITED TO A ONE YEAR EXTENSION. THESE SOLDIERS MAY NOT REENLIST AND ARE INELIGIBLE FOR THE INDEFINITE REENLISTMENT PROGRAM. THIS PARAGRAPH DOES NOT AUTHORIZE THE EXTENSION OF SOLDIERS BARRED FROM REENLISTMENT BASED ON AN INABILITY TO POSSESS A FIREARM OR AMMUNITION DUE TO CONVICTION OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE BASED ON AN ACT OF DOMESTIC VIOLENCE OCCURRING AFTER 30 SEP 1996 WHERE THE SOLDIER HAS BEEN GIVEN A REASONABLE TIME TO SEEK EXPUNCTION OF THE CONVICTION OR PARDON. AFFECTED SOLDIERS WHO HAVE REENLISTED FOR OPTIONS THAT REQUIRE A CONUS-BASED PCS WILL PROCEED TO THEIR NEW DUTY ASSIGNMENT. AFFECTED OCONUS SOLDIERS MAY RECEIVE NEW ASSIGNMENT INSTRUCTIONS FROM PERSCOM. AFFECTED SOLDIERS WHO HAVE REENLISTED FOR RETRAINING IN AN MOS WHERE INSTRUCTION INCLUDES WEAPONS OR AMMUNITION TRAINING WILL BE DELETED FROM ASSIGNMENT INSTRUCTIONS. ENLISTED SOLDIERS IMPACTED BY THIS CHANGE MAY SUBMIT A DA FORM 4187 THROUGH CHANNELS TO VOLUNTARILY SEPARATE UNDER THE PROVISIONS OF AR 635-200 PARAGRAPH 5-3 SECRETARIAL AUTHORITY. THIS RETENTION POLICY IS SUBJECT TO THE “SANCTUARY PROVISIONS” OF 10 U.S.C. 1176 (SOLDIERS WITHIN TWO YEARS OF RETIREMENT ELIGIBILITY).

D. OFFICER RETENTION: THE SAME STANDARDS OF EFFICIENCY AND CONDUCT ARE APPLICABLE TO OFFICERS REGARDLESS OF COMPONENT. OFFICERS MAY REQUEST RELEASE FROM ACTIVE DUTY OR SUBMIT UNQUALIFIED RESIGNATION UNDER AR 600-8-24, CHAPTERS 2 (SECTION II) OR 3 (SECTION II), RESPECTIVELY.

3. REPORTING REQUIREMENTS:

A. PERSCOM WILL PROVIDE ADDITIONAL GUIDANCE UNDER SEPARATE COVER ON RECURRING REPORTING FOR THE ACTIVE COMPONENT.

B. SEMI-ANNUALLY. THE ARMY NATIONAL GUARD DIRECTORATE (NG-ARZ-HRP) AND HEADQUARTERS OCAR (DAAR-PE) WILL SUBMIT E-MAIL REPORTS OF THE NUMBER OF SOLDIERS CONVICTED OF MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE AND NUMBER OF SOLDIERS WHO THEY HAVE REASON TO BELIEVE HAVE SUCH CONVICTIONS BEGINNING 1 AUG 1999, TO HQDA ODCSPER AT: DAPE-MPE@HQDA.ARMY.MIL.

C. UNIT STATUS REPORTING. COMMANDERS WILL ADD SOLDIERS IDENTIFIED AS NON DEPLOYABLE UNDER THIS POLICY TO USR REPORTING EFFECTIVE 15 JUL 1999. PERSONNEL IDENTIFIED WILL BE ADDED TO NON

DEPLOYABLE TOTAL UNDER THE CODE (OTHER) IAW AR 220-1, CHAPTER 4, PARAGRAPH 10, SUB PARAGRAPH E (PSPER NON-DEPLOYABLE REPORT). AN AMENDMENT TO TABLE D-1, AR 220-1, DATED 1 SEP 1997 WILL FOLLOW IN A SUBSEQUENT HQDA MESSAGE. DAMO-ODR POC: MAJ STEWART SMITH, DSN 227-9636.

4. NO ACTION OTHER THAN THAT SPECIFIED IN THIS MESSAGE IS REQUIRED PENDING FURTHER GUIDANCE FROM HQDA. POINTS OF CONTACT FOR HQDA ARE
MAJ CARR AT DSN 225-2457, COMMERCIAL (703) 695-2457 OR EMAIL (CARRDA@HQDA.ARMY.MIL) OR COL REDMANN AT DSN 227-7054, COMMERCIAL
(703) 697-7054 OR EMAIL (REDMAJL@HQDA.ARMY.MIL).

R 151100Z JAN 98

FM DA WASHINGTON DC//DAPE-MPE//

TO ALARACT

UNCLAS

SUBJECT: HQDA MESSAGE ON INTERIM IMPLEMENTATION OF LAUTENBERG
AMENDMENT

1. THIS MESSAGE PROVIDES HQDA INTERIM POLICY GUIDANCE FOR IMPLEMENTNG THE LAUTENBERG AMENDMENT TO THE GUN CONTROL ACT OF 1968.

2. THE LAUTENBERG AMENDMENT BECAME LAW 30 SEPTEMBER 1996. THIS AMENDMENT MAKES IT A FELONY FOR ANY PERSON WHO HAS BEEN CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE TO SHIP, TRANSPORT, POSSESS OR RECEIVE FIREARMS OR AMMUNITION. CONVICTION OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE DOES NOT INCLUDE A SUMMARY COURT-MARTIAL CONVICTION OR IMPOSITION OF NONJUDICIAL PUNISHMENT (ARTICLE 15. UCMJ), OR DERERRED PROSECUTIONS (OR SIMILAR ALTERNATIVE DISPOSITIONS) IN A CIVILIAN COURT. TRANSFER OR SALE OF FIREARMS TO A PERSON WITH SUCH A CONVICTION IS ALSO A FELONY UNDER THE LAW.

3. THE FOLLOWING POLICY APPLIES TO ALL SOLDIERS THROUGHOUT THE WORLD INCLUDING HOSTILE FIRE AREAS AND APPLIES TO ALL ARMY ISSUE AND PRIVATELY OWNED FIREARMS AND AMMUNITION. IT DOES NOT APPLY TO MAJOR WEAPONS SYSTEMS OR CREW SERVED WEAPONS (TANKS, MISSILES, AIRCRAFT, ETC.). GUIDANCE FOR CIVILIAN EMPLOYEES WILL BE ISSUED SEPARATELY.

4. COMMANDERS MUST IMPLEMENT THE PROVISIONS IN THIS MESSAGE IMMEDIATELY. COMMANDERS WILL NOTIFY ALL SOLDIERS THAT IT IS UNLAWFUL TO POSSESS FIREARMS AND AMMUNITION IF THEY HAVE A CONVICTION OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE. COMMANDERS WILL CONDUCT LOCAL UNIT FILES CHECKS AND WILL REPORT THRU COMMAND CHANNELS TO HQDA (DAPE-MPE) SOLDIERS KNOWN TO HAVE QUALIFYING CONVICTIONS AND SOLDIERS REASONABLY BELIEVED TO HAVE SUCH CONVICTIONS. UPON RECEIPT OF THIS MESSAGE, MACOMS WILL NOTIFY HQDA (DAPE-MPE, MAJ DILLARD AT DSN 227-2403 (EMAIL DILLANL@HQDA.ARMY.MIL)) OF THEIR POC. HQDA WILL SEND REPORTING FORMAT AND MATRICES VIA EMAIL TO EACH MACOM POC FOR COMPILING DATA FOR FORWARDING TO HQDA. EACH MACOM

WILL FORWARD INITIAL DOMESTIC VIOLENCE CONVICTION INFORMATION ON ACTIVE DUTY SOLDIERS TO THIS HEADQUARTERS NO LATER THAN 27 FEBRUARY 1998. SOLDIERS WHO HAVE OR MAY HAVE A QUALIFYING CONVICTION SHOULD BE REFERRED TO A LEGAL ASSISTANCE ATTORNEY. FURTHER IMPLEMENTATION GUIDANCE WILL FOLLOW IN SUBSEQUENT MESSAGES.

5. COMMANDERS WILL DETAIL SOLDIERS WHO THEY HAVE REASON TO BELIEVE HAVE A CONVICTION FOR MISDEMEANOR CRIME OF DOMESTIC VIOLENCE TO DUTIES THAT DO NOT REQUIRE THE BEARING OF WEAPONS OR AMMUNITION. COMMANDERS MAY REASSIGN SOLDIERS TO LOCAL TDA UNITS WHERE APPROPRIATE. NO ADVERSE ACTION MAY BE TAKEN AGAINST SOLDIERS SOLELY ON THE BASIS OF AN INABILITY TO POSSESS A FIREARM OR AMMUNITION DUE TO CONVICTION OF A MISCEMEANOR CRIME OF DOMESTIC VIOLENCE IF THE ACT OF DOMESTIC VIOLENCE THAT LED TO THE CONVICTION OCCURRED ON OR BEFORE 30 SEPTEMBER 1996. COMMANDERS MAY INITIATE ADVERSE ACTION, INCLUDING BARS TO REENLISTMENT OR PROCESSING FOR ELIMINATION UNDER APPLICABLE REGULATIONS, AGAINST SOLDIERS BECAUSE OF AN INABILITY TO POSSESS A FIREARM OR AMMUNITION DUE TO CONVICTION OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE IF THE ACT OF DOMESTIC VIOLENCE, THAT LED TO THE CONVICTION OCCURRED AFTER 30 SEPTEMBER 1996, AND AFTER PROVIDING SUCH SOLDIERS A REASONABLE TIME TO SEEK EXPUNCTION OF THE CONVICTION OR PARDON. THIS POLICY CONCERNING ADVERSE ACTION IS NOT MEANT TO RESTRICT A COMMANDERS AUTHORITY TO INITIATE SEPARATION OF A SOLDIER BASED ON THE CONDUCT THAT LED TO THE QUALIFYING CONVICTION. OR FOR CIVIL CONVICTION UP AR 635-200. PARAGRAPH 14-5, REGARDLESS OF WHEN THE MISCONDUCT OR CONVICTION OCCURRED. LEGAL ASSISTANCE ATTORNEYS MAY ASSIST SOLDIERS IN SEEKING EXPUNCTION OR PARDON OF CONVICTIONS.

6. A PERSON HAS A CONVICTION OF A “MISDEMEANOR CRIME OF DOMESTIC VIOLENCE” IF: THE PERSON WAS CONVICTED OF A MISDEMEANOR CRIME, AND; THE OFFENSE HAD AS AN ELEMENT THE USE OR ATTEMPTED USE OF PHYSICAL FORCE, OR THREATENED USE OF A DEADLY WEAPON, AND; THE CONVICTED OFFENDER WAS AT THE TIME OF THE OFFENSE: A CURRENT OR FORMER SPOUSE, PARENT, OR GUARDIAN OF THE VICTIM OR: A PERSON WITH WHOM THE VICTIM SHARED A CHILD IN COMMON, OR; A PERSON WHO WAS COHABITING WITH OR HAS COHABITED WITH THE VICTIM AS A SPOUSE, PARENT OR GUARDIAN, OR; A PERSON WHO WAS SIMILARLY SITUATED TO A SPOUSE, PARENT, OR GUARDIAN OF THE VICTIM, AND; THE CONVICTED OFFENDER WAS REPRESENTED BY COUNSEL, OR KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO COUNSEL, AND; IF ENTITLED TO HAVE THE CASE TRIED BY A JURY, THE CASE WAS ACTUALLY TRIED BY A JURY OR THE PERSON KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO HAVE THE CASE TRIED BY A JURY,

AND; THE CONVICTION HAS NOT BEEN EXPUNGED OR SET ASIDE, OR THE CONVICTED OFFENDER HAS NOT BEEN PARDONED FOR THE OFFENSE OR HAD CIVIL RIGHTS RESTORED, UNLESS THE PARDON, EXPUNCT1ON, OR RESTORATION OF CIVIL RIGHTS PROVIDES THAT THE PERSON MAY NOT SHIP, TRANSPORT, POSSESS OR RECEIVE FIREARMS.

7. COMMANDERS MUST ESTABLISH PROCEDURES TO ENSURE COMPLIANCE WITH THE LAW TO INCLUDE WITHDRAWING PRIVATELY OWNED WEAPONS FROM ARMS ROOMS. THESE PROCEDURES SHOULD PERMIT, HOWEVER. FOR SUCH SOLDIERS TO SELL OR TRANSFER THEIR PERSONAL FIREARMS TO AUTHORIZED INDIVIDUALS. COMMANDERS SHOULD ADVISE SOLDIERS WISHING TO SELL OR TRANSFER FIREARMS STORED IN ARMS ROOMS TO SEEK ASSISTANCE FROM A LEGAL ASSISTANCE ATTORNEY AT THE LOCAL OFFICE OF THE STAFF JUDGE ADVOCATE. LEGAL ASSISTANCE ATTORNEY CAN ASSIST SOLDIERS IN PREPARING BILLS OF SALE AND POWERS OF ATTORNEY.

8. NO ACTION OTHER THAN WHAT IS SPECIFIED IN THIS MESSAGE IS REQUIRED TO BE TAKEN PENDING ISSUANCE OF FURTHER HQDA GUIDANCE.

9. POINT OF CONTACT FOR HQDA IS MAJ DILLARD AT DSN 227-2403 (EMAIL DILLANL@HQDA.ARMY.MIL) OR COL BRADY AT DSN 227-7O54 (EMAIL BRADYTM@HQDA.ARMY.MIL).

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

NOV 27

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DEFENSE FIELD ACTIVITIES

SUBJECT: Department of Defense (DoD) Policy for Implementation of Domestic Violence Misdemeanor Amendment to the Gun Control Act for Military Personnel

This directive-type memorandum establishes DoD policy for implementing the domestic violence amendment to the Gun Control Act of 1968 (18 U.S.C. §§ 922(d)(9) and (g)(9)) for military personnel. It supersedes the memorandum of October 22, 1997, on this subject that provided interim DoD policy. DoD Components shall take all reasonable and necessary steps to implement this policy with regard to military personnel. For the purposes of this policy, the DoD Components include the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the DoD Field Activities, and all other organizational entities of the Department of Defense.

The domestic violence amendment makes it a felony for any person to sell or otherwise dispose of firearms or ammunition to any person whom he or she knows or has reasonable cause to believe has been convicted of a "misdemeanor crime of domestic violence" (18 U.S.C. § 922(d)(9)). The amendment also prohibits anyone who has been convicted of a misdemeanor crime of domestic violence from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any firearm or ammunition; or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce (18 U.S.C. § 922(g)(9)). (See attachment for definition of terms used in this memorandum.)

The law applies to misdemeanor crimes of domestic violence only. For purposes of this memorandum, however, a "qualifying conviction" also includes a conviction for a "crime of

domestic violence" tried by general or special court-martial which otherwise meets the definition of a misdemeanor crime of domestic violence. Further, as a matter of DoD policy, a conviction for an offense meeting the definition of a "felony crime of domestic violence" adjudged on or after the date of this memorandum shall be considered a qualifying conviction for purposes of this memorandum. The term "qualifying conviction" does not include summary court-martial convictions, imposition of nonjudicial punishment (Article 15, UCMJ), or deferred prosecutions or similar alternative dispositions in civilian courts.

Each Military Department shall implement a program to periodically inform its military personnel of the domestic violence amendment to the Gun Control Act, its consequences, and this policy. Information provided shall include notice that personnel have an affirmative, continuing obligation to inform commanders or supervisors if they have, or later obtain, a qualifying conviction and that the revised DD Form 2760 (attached), which states that any statements made on the form will not be used in a prosecution for violating the Gun Control Act, is available. All DoD components shall post notices about the domestic violence amendment and DoD implementing policy in all facilities in which Government firearms or ammunition are stored, issued, disposed of, and transported.

If in implementing this policy a Military Department chooses to require that all or some of its military personnel certify whether or not they have a qualifying conviction, the DD Form 2760 shall be used for such certifications. Even if certification is not required, DD Form 2760 shall be made available for those personnel who come forward to report a qualifying conviction in compliance with their obligation to do so. The use of this form and the protections it affords have been approved in accordance with Section E of the 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (see DoD Directive 5525.7). Each Military Department shall issue regulations governing how completed forms are to be filed and maintained to ensure they are retrievable if needed.

The Military Departments' procedures to discover whether an applicant for military service has a qualifying conviction for a crime of domestic violence shall continue in effect. Individuals with such convictions shall not be granted a waiver for entrance into military service.

In the case of all members found to have a qualifying conviction, appropriate authority will immediately retrieve all Government-issued firearms and ammunition, suspend the member's authority to possess government issued firearms or ammunition, and advise them to dispose of their privately owned firearms and ammunitions lawfully. These actions shall also be taken if there is reasonable cause to believe a military member has a qualifying conviction.

Consistent with applicable law and regulations, the Military Departments may promulgate regulations governing permanent adverse personnel actions, including discharge, that may be taken with respect to service members who have a qualifying conviction. Separation of military personnel shall comply with existing statutory military retirement sanctuaries (See 10 U.S.C. § 1176(a)(regular and reserve members); 10 U.S.C. § 637(a)(5)(regular officers); 10 U.S.C. § 580(a)(4)(C)(regular warrant officers); 10 U.S.C. § 12646(e)(1)(reserve commissioned officers); 10 U.S.C. § 12686 (reserves on active duty). A service member in any of these

sanctuaries who has a "qualifying conviction" and would otherwise be separated under Military Department regulations shall be given meaningful duties that do not entail access to firearms or ammunition until they are retired upon first attaining eligibility.

DoD Components may afford military personnel who have qualifying convictions a reasonable time to obtain an expungement or pardon of the qualifying conviction. If time is granted to a service member for this purpose, however, DoD Components shall retrieve all Government-owned or issued firearms and ammunition and suspend the service member's authority to possess firearms and ammunition until an expungement or pardon is obtained.

Military Departments shall issue policies and procedures to ensure compliance with the domestic violence amendment to the Gun Control Act with respect to privately owned firearms under Government control or permitted in Government quarters. Policies and procedures shall also be issued governing the transfer of firearms and ammunition to individuals in morale, welfare, and recreation activities and other Government-sponsored or sanctioned activities.

If a completed security clearance investigation reveals that a military member has a qualifying conviction, the investigation shall be referred to the requesting DoD component for action consistent with this policy.

The actions required by this memorandum apply outside United States territory as a matter of policy. The Department has not construed the amendment to apply to major military weapon systems or "crew served" military weapons and ammunition (tanks, missiles, aircraft, etc.).

The Military Departments are requested to forward copies of their implementing instructions or regulations not later than 120 days from the date of this memorandum.

This memorandum is effective immediately. A DoD Directive or Instruction incorporating the substance of this memorandum will be issued within 120 days.

David S. C. Chu

Attachments:
As stated

CHAPTER 12

THE AMHERST PROBLEM AND

EVERYDAY PROBLEMS IN ADMINISTRATIVE LAW

THE AMHERST PROBLEM

1. <u>General Facts</u>:

You recently took over command of the 3d Brigade, 52d Infantry Division. On 6 July 20XX, you are informed of a rape allegation in your unit. You learn that PFC Elizabeth Tucker, HHC, 301st FSB, has claimed that SGT Alvin Amherst, B Company, 1-14 Inf, sexually assaulted her on Friday night after a Fourth of July party. You also learn that the commander, B Company, 1-14 Inf, CPT Atkinson, had the MPs bring SGT Amherst to his office, where he asked SGT Amherst "What happened between you and Tucker?" or words to that effect. SGT Amherst blurted out something like "I didn't mean to hurt her! I thought she wanted me! I just got upset when she said no!" The commander then read SGT Amherst his rights under Article 31, UCMJ, and the sergeant was taken to CID. When SGT Amherst arrived at CID, the agents read him his rights under *Miranda v. Arizona* and Article 31, UCMJ. SGT Amherst then gave the enclosed statement to an investigator (p. 8-9). Statements were also obtained from other witnesses, and are included in the investigation presented to you (and in this chapter of the deskbook).

SGT Alvin Amherst's formal education consists of completion of high school and the usual military education. He lived most of his childhood with his divorced mother, who relies on him today for most of her support. SGT Amherst scored 90 on his GT entry test and Captain Atkinson states that his conduct and efficiency ratings have been excellent. Similar ratings were received from previous commanders during SGT Amherst's 36 months service on his current four-year enlistment. He has no combat experience but has completed airborne training and qualified as an expert rifleman. He has no prior military or civilian criminal record. His record reflects no evidence of mental instability. He is married with one child, but he and his wife have been separated for six months, contemplating divorce.

On 10 July, you attend a community club function on post. There you chance to have a conversation with the command sergeant major of 1-14 Inf. You tell the sergeant major that SGT Amherst should probably be sent to a general court-martial for rape. You learn later that the CSM relayed this information to the B Company commander.

You are meeting with your trial counsel to discuss the case, including the questions listed below. As the commander, you may, of course, raise additional issues.

Question 1. What is the state of the evidence against SGT Amherst? Can his statement that "I didn't mean to hurt her! I thought she wanted me! I just got upset when she said 'no'!" be used against him at trial?

Question 2. Does your discussion with the CSM, 1-14 Inf, and his communication of your desires to the B Company commander raise any issues?

Question 3. Assume the company commander prefers charges, and he and the battalion commander recommend a GCM. When the court-martial packet comes to your desk, what disposition do you recommend? What are your options? Discuss your disposition of the pending charges in this case and the reasons why you have elected that disposition.

Question 4. After the case is referred to a GCM, SGT Amherst submits a request for a discharge in lieu of court-martial pursuant to Chapter 10, AR 635-200. The request is forwarded through the chain of command for endorsement. Do you support it? Why or why not? Discuss the relevant considerations and your disposition of SGT Amherst's request for discharge for the good of the service UP Chapter l0, AR 635-200.

Question 5. After the CG denies SGT Amherst's request for a Chapter 10, the defense submits a pretrial agreement, in which he offers:

To plead Not Guilty to rape and burglary, but Guilty to fraternization and adultery. In return, he asks the convening authority to limit his confinement to eight months. The convening authority could approve any other part of the sentence adjudged by the court. The defense requests an opportunity to see you personally to discuss the pretrial agreement. PFC Tucker and her family would also like to meet with you to discuss the case.

a. The GCMCA is not required to get the chain of command's recommendation on pretrial agreements, but wants your recommendation. What would it be? What factors do you consider?

b. Do you grant the defense counsel's request for an office call? If so, any conditions?

c. Do you meet with the alleged victim and her family? Should you consider the alleged victim's views when formulating your recommendation as to disposition?

Investigator's Summary

SA SWEENY: On the weekend of 4 July PFC Tucker claimed she was raped by SGT Alvin Amherst. SGT Amherst essentially confessed to the crime to his company commander.

Medical personnel have stated that the rape kit was taken too long after the alleged incident to yield any results. Serology testing has failed to detect the presence of semen in the alleged victim or on any of her bedclothes. No blood alcohol evidence exists due to the passage of time between the incident and the report. Medical personnel report seeing some faint bruising around the victim's legs and chest, but cannot pinpoint when the injuries would have occurred except to say "within one week of the exam."

No further evidence is anticipated at this time. Since sufficient evidence exists to support a reasonable belief that SGT Amherst committed the offense of rape, the case file will be closed.

Sworn Statement
PFC Elizabeth Tucker
6 July 0930

On Friday, 4 Jul 20XX, I went downtown to watch the fireworks with some of my friends. We got back to the dorm around 2200. I went to a party. SGT Michael King was having a party in his room, so I went up to see who was there. People were drinking and dancing. I had some drinks, my usual amount, 3 rum and cokes. I also saw my best friend, PFC Tracy Smith. I went to her room to see her. When I was walking back to the party alone I saw SGT Amherst. He asked me if I was going back to the party and I said yes. He put his arm around me, but I told him my boyfriend wouldn't like that. My boyfriend is SPC Johnny Bravo, currently deployed to Kosovo.

SGT Amherst came up to me again at the party, and put his arm around me and asked me to dance. I thought that was weird, since I'd just been working for him, plus I've got a boyfriend. I didn't want to dance, but I decided to, just to be polite and have a good time. We danced to a couple of songs, then a slow dance. After that I talked with some guys, and SGT Amherst wouldn't take his arm from around my shoulders. I had to work the next day, so I left the party around 0100 and went to my room. On the way SGT Amherst asked me if I wanted to party in his room, and I told him no, I was tired. I didn't see anyone in the hallway when I got to my room.

I was asleep when SGT Amherst came into my room. I heard a noise, and I woke up, and I sat up and saw him. I asked him what was he doing there, but he didn't say anything. He got on the bed with me, and said, "Let's party now. I know you want me." I told him no, but he got angry and said "Now!" he put his hand on my mouth and got on top of me, and he was touching me. I tried to get away, and I think I kicked him, but he was choking me with his hand on my mouth. He pulled his gym shorts down and used his knee to get between my legs. He stayed on top of me, and he was holding my right arm and hand down. I hit him with my left hand and tried to push him off, but he was too big. I hit him in the face. When he was done he said, "that was so good baby" in a sarcastic kind of voice. Then he said he was sorry, he got carried away, and told me I'd better not tell anyone. After he was gone I was crying and I didn't know what to do. I stayed in my room, took a shower and got dressed. Then I took my bed sheets and nightshirt and put them in the washer in the laundry room. I went to Tracy's room and told her what happened. She wanted me to call the MPs but I didn't want Johnny to find out.

When Johnny called me that Saturday night I tried to act normal, but he could tell something was wrong, so I told him what had happened. He was real angry, just like I knew he would be, but then he calmed down and asked me if I was OK, and if I had reported it to the MPs. I told him I was afraid and he said he'd call the MPs if I didn't.

Today, 6 July, I wasn't feeling well, so I went to the hospital. I told one of the RNs, 1LT Lesley Hill, what had happened because I thought she could help me, and then I went to the OB/GYN clinic and 1LT Hill told a tech there what happened. They did a physical examination at the hospital. I still had some bruises above my knees that you could see. The bruises were about the size of a half-dollar. I think I had a couple on each leg, and one or two above my breasts. I'm sure they all came from SGT Amherst.

I did not encourage SGT Amherst in any way that night. I did not want to have sex with him. I tried to fight him off, but he was too big. I told him "No" several times.

I have had other boyfriends besides SPC Bravo. I might have said something to him after dancing with SGT Amherst like “Hi sweetie," but I didn't mean anything by it. I do not have any other boyfriends now. Johnny and I are dating exclusively, meaning we agreed we would not see anyone else. I trust Johnny and I'm sure he trusts me.

I did not tell SGT Amherst to take his arm away from my shoulders after we danced. I don't know why I didn't tell him, but I didn't like it.

My barracks room must have been unlocked when SGT Amherst came in. Normally I lock my room when I go to sleep, but sometimes I forget. I must have forgotten that night.

I was not wearing panties when I got into bed that night. Sometimes I wear them and sometimes I don't, especially in the summer.

Sworn Statement
CPT Oscar Atkinson
6 July 1500

On the morning of 6 July, I got a call from the MPs. They told me that PFC Tucker, 301st FSB, had made a complaint of rape against SGT Amherst. He is in my unit. The MPs told me that they would need to talk to SGT Amherst. I told them to come over and get him. I also told them to bring him by my office before they took him down to CID.

When Amherst came into my office I may have asked him something like "So what happened between you and Tucker?" I was not trying to interrogate him. I was just making casual conversation. He said something like he hadn't meant anything by it and that she had wanted him, I guess in a sexual sense. He also said he got angry when she said "no."

Sworn Statement
SSG Jimmy LaRue, MP
6 July 1100

On 6 July we were told of a rape complaint against SGT Amherst. We were directed to apprehend him. We notified his CO that we were coming over to get Amherst because he was accused of raping PFC Tucker. He told us to get Amherst then bring him over before we went to CID. When we got to Amherst, we told him he was being apprehended for the rape of PFC Tucker. We didn't read him his rights because we didn't want to talk to him. We then took him to the CO's office as instructed. We went in to the office, and Amherst was standing at attention and CPT Atkinson said something like "Why did you rape Tucker?" Something like that. I'm not sure now. Amherst said he never meant to hurt her, he just got angry when she said "no." Then we left and went to CID. At CID, Amherst made a statement reflecting the aforementioned facts.

Sworn Statement
SPC Johnny Bravo
6 July 1030 (telephonic)

During the 4th of July weekend my girlfriend, PFC Tucker; told me she'd been raped by SGT Amherst. At first, I felt hurt, frustrated, and betrayed. I must say at first I didn't believe her, because she's fooled around on me in the past; you know, she's had sex with other guys while she's supposed to be dating only me. And then she'd lie about it, and I'd catch her in the lie. So I was skeptical. But she kept crying really hard and she told me she had bruises and that Tracy, her friend, had seen them too. I guess I believed her. So I told her she had to call the MPs. She didn't want to. She said she was too embarrassed, and she felt bad about destroying all the evidence (she said she took a shower after the rape, and that she washed the sheets the next day). I told her I wouldn't believe her unless she called the MPs. Maybe that's why she finally called them.

Sworn Statement
SGT Alvin Amherst
6 July 2330

My name is SGT Alvin Amherst. I am assigned to 1st Battalion, 14th Infantry, and 52d Infantry Division. I have been stationed here for approximately two years. I am married but my wife and I are separated.

I have known PFC Beth Tucker for approximately 18 months. We have worked together on a couple of occasions. In the time that I've been tasked out to work at the Installation Management Office, she has been sent over to work occasionally. I've supervised her maybe three times on details: police call, PMCS on some recreational vehicles, etc. In fact, she had worked with me on Friday the Fourth. She was part of a crew setting up bleachers for the parade. We were never what you would call good friends but I liked her a lot.

Over the past year or so, I've heard some of the guys talking about PFC Tucker. The scuttlebutt and rumors pretty much has it that she's pretty loose and likes to party. What I mean is that she has a reputation for being sexually promiscuous. I've also heard that she really enjoys rough sex. However, before the Fourth of July, I never knew this for sure, and quite frankly, never really paid that much attention to any of it.

Around 10:00 on the evening of the Fourth, I decided to go across the parking lot and see what was going on at SGT King's party. I walked up to the second floor, and when I got to SGT King's room, I noticed there were about 15 people there. I either knew or recognized almost everyone at the party. About this time, PFC Tucker came in. She was wearing a pair of black spandex shorts and a loose-fitting T-shirt. I noticed that she was real friendly with several of the guys at the party; I saw her greet some of the guys with a hug and a kiss.

PFC Tucker waved at me to come over to her and I did. We talked a while and she told me she was upset with her boyfriend, who is deployed, because he found time to call his roommate and co-workers more than he did her. I suggested that we dance, that it would help take her mind off her problems. We danced a couple of fast songs; although the music was fairly loud, we carried on a little conversation during our dances. She was still obviously upset with her boyfriend. At this point, a slow song came on, and she threw her arms around me and brought her body very close to mine. She told me that she thought she'd made a big mistake being totally faithful to her boyfriend. Something about him not knowing what a good thing he had. She then told me, "I'm not going to let that bastard take advantage of me." As she rubbed my shoulders, she whispered in my ear, "How about we go to my room and have our own private party?" I could hardly believe my ears; I told her, "That works for me." The song ended and she said, "give me 30 minutes, then meet me in my room downstairs, number 134. I'll leave the door unlocked." She went around the party saying goodbye to friends. At this time, I asked PFC Tucker, in the presence of her friends, as we had agreed, whether she wanted to go party with me somewhere else. She said, "No, I've got a boyfriend." She left the room and went down the hall, towards the end of the building.

I left the party and went to the day room, where I watched TV for about 30 minutes. Then I went down the hall to PFC Tucker's room. There was no one else in the hall at the time.

I knocked real soft and said “Hey it’s me.” I tried the door and it was unlocked. I opened the door and peeked in; she was lying on the bed. She said to come on in. I locked the door when I went in. There was a lamp on, but it was very low. I went over to the bed and sat down. She pulled up her gown, and I began kissing her and touching her breasts. After a few minutes, I took off my shorts and underwear and got on top of her. She began to moan loudly, and I put my hand over her mouth so no one would hear her. She seemed to get even more excited, and was moving around even harder, hitting at me. She even hit me in the face a couple of times. (I figure this was the rough sex part that I’d heard about it). I really had to struggle with her, and I was worried that someone might hear us. Just at the point I was about to climax, she shouted “No!” and tried to push me off her, but I pushed her back down hard on the bed. I figure she got angry because I was not wearing a condom. I apologized for that later. We just lay there together for a few minutes, catching our breath. I told her it was good, and I apologized again. PFC Tucker seemed very concerned. For the first time, she told me that she still loved her boyfriend, that this was a one-time deal, and that I was not to “tell a soul.” I got dressed and left.

On Sunday, the MPs rousted me in my room and told me I was “busted” for “raping Tucker.” They took me to CPT Atkinson who demanded that I explain everything. By this time I was really scared that they’d never believe me about the rough sex thing, so I just blurted out something about her wanting to have sex and how I got upset when she said “no.” Only I think she said “no” because she was upset that I wasn’t wearing a condom.

BLANK PAGE

EVERYDAY PROBLEMS IN ADMINISTRATIVE ACTIONS AND REMEDIES

We will discuss the following series of hypothetical problems. The seminar will examine these problems from both a legal standpoint (what options are available to the commander?) and a practical standpoint (what options are best?).

At the conclusion of the problems, the moderator will distribute a "green sheet" or "school solution." The solution does not purport to be the only correct solution; instead, it outlines the commander's legal options. The "best" solution usually is influenced by factors which we can't reproduce (but which we'll discuss) in class: command climate, mission requirements, unit concerns, etc.

BLANK PAGE

DISCUSSION PROBLEM ONE

You are the 250th MP Brigade Commander. Last Friday afternoon, CPT Greenwood, one of your subordinate company commanders, came to see you during your open-door hours and related the following: CPT Greenwood's battalion commander recently relieved him from command, issued a written reprimand, which he filed locally, and made adverse comments on his OER. The battalion commander based these actions on CPT Greenwood's alleged dereliction of duty in failing to properly supervise his subordinates during a party that CPT Greenwood hosted at his home. During the party, several of his soldiers got drunk, and one soldier, SGT Doe, was arrested for DUI while driving home from the party.

CPT Greenwood requests that you redress these wrongs against him under Article 138, UCMJ, and AR 27-10, chap 20. What do you do?

DISCUSSION PROBLEM TWO

After your staff call, CPT Tom Smith (your battalion S-4) informs you that he has an issue he needs to discuss with you. He tells you that one of his soldiers in the S-4 shop, SPC Julie Barnett, just reported that SSG Joe Taylor was harassing her. SSG Taylor is a stellar NCO who works down the hallway in the S-3 shop. According to SPC Barnett, SSG Taylor has been doing things that make her feel uncomfortable. For example, she says SSG Taylor grills her every Monday morning about what she did over the weekend. He asks her if she went out on any dates and if so, who did she go out with and what did they do. He told her several times that she is an "attractive young lady" and once told her that if she ever needed a date to keep him in mind. Last week he sent her an email that said "Saw you coming in with your civies on this morning, Jules. Too bad we don't have a competition for Best-Looking Soldier of the Quarter!" SPC Barnett says she has been ignoring SSG Taylor and his remarks, but lately he seems to be going out of his way to run into her and talk to her at work, in the dining facility, at the gym, etc. She says she is sick of him, wants him to leave her alone, and wants to be treated professionally like the other soldiers.

Is SPC Barnett required to tell SSG Taylor that his behavior must stop?

What should CPT Smith do?

Assume that after SPC Barnett talks with her company commander and the unit Equal Opportunity Representative, she elects to try to have the problem resolved <u>informally</u> by her company commander (she does not want to file a formal complaint against SSG Taylor at this time). **What, if any, timelines and reporting requirements apply?**

Assume SPC Barnett elects to file a formal EO complaint against SSG Taylor. **What timelines and reporting requirements apply?**

What if the last incident SPC Barnett complains of occurred over 60 days ago? Is she too late to file a formal complaint?

If SPC Barnett's company commander (not SSG Taylor) was doing these things and making her feel uncomfortable, where would SPC Barnett go to get the problem resolved?

What if SPC Barnett's alleged harasser was not SSG Taylor, but Mr. Taylor, a civilian in the battalion headquarters? Could she file a complaint against Mr. Taylor with the installation Equal Employment Opportunity (EEO) officer?

Now assume that the person reporting the allegations to CPT Smith is not SPC Julie Barnett, but Ms. Julie Barnett, a civilian secretary in the battalion headquarters. **What complaint processes might be available to Ms. Barnett?**

Assume Ms. Barnett elects to file her complaint using the 10 U.S.C. § 1561 procedures. **What timelines and reporting requirements will apply?**

Assume Ms. Barnett elects to file her complaint with the EEO office. **What should the battalion commander do?**

CHAPTER 13

SENTENCING AND MILITARY CORRECTIONS

Introduction

Commanders are the cornerstone of the military justice system. When deciding whether to court-martial a soldier in their unit, commanders must remember that courts-martial serve two complementary purposes: enforcing unit discipline and administering justice.

What expectations should commanders have regarding court-martial sentences? The discussion that follows covers various aspects of sentencing. Commanders should consider these matters when determining what action to take on pending charges.

A. Purposes of Punishment

An organization comprised of well-disciplined soldiers will carry out its mission and function efficiently. Although good leadership is the best method of achieving discipline, deterrence of crime and protection of the military community are closely associated with discipline. A few undisciplined soldiers in an organization can cause disciplinary problems to spread and impair a unit's efficiency.

An essential ingredient of good leadership is fair treatment of subordinates by superiors. A soldier who is treated fairly will learn to respect the Army's disciplinary procedures. A sentence which is either too light or too severe can undercut discipline and result in disrespect for the law; whereas, fair sentences tend to foster good discipline and thereby protect the interests of the military community.

There are five recognized theories of punishment:

1. Retribution. Retribution has long been high on the list of reasons for punishment. Under this theory, the purpose of punishment is to make the offender pay for a crime by pain and suffering and to express the community's outrage and disappointment. The amount and type of punishment are based upon the offense(s). Retribution is based upon retaliation and vengeance.

Punishment based upon retribution is not the dominant objective of modern criminal law. Today we believe that punishment should fit the offender and not merely the crime.

2. Deterrence. A second purpose of punishment is deterrence. Deterrence has two objectives: to provide the offender with a sentence that deters him or her from committing future crimes (specific deterrence); and to dissuade others who might engage in similar criminal conduct (general deterrence). Deterrence is effective in punishing an individual only when he or she knows in advance that breaking the law will be followed by certain and swift punishment. Thus,

commanders may consider publishing court-martial findings and sentences throughout the command.

3. Rehabilitation. A recurrent theme of modern military penology is rehabilitation of the offender. The great majority of offenders come out of prison some day, and their sentences should be formulated to promote rehabilitation. Rehabilitation contemplates individualized treatment permitting the offender to return as a useful and productive member of society, whether military or civilian.

Under this theory, emphasis is placed on the offender as an individual, and the sentence is a means by which he or she can be compelled to receive individualized treatment which will help make him or her a useful and responsible member of society. The field of rehabilitation is controversial and in ferment, but rehabilitation remains a core principle of the military justice system.

4. Protection of Society. The protection of society theory combines aspects of retribution, deterrence, and rehabilitation, but has its roots in one of the fundamental purposes of confinement: keeping dangerous or predatory offenders from victims and potential future victims. The fact that confinement is warranted for protection of society does not answer the next question: how long? That involves balancing all five sentencing theories.

5. Good Order and Discipline. The last judicially recognized purpose of punishment ties the others together. Good order and discipline means ensuring that the military community is safe, that a sense of justice exists in which criminal conduct is punished and good behavior is rewarded, and in which misbehaving soldiers are rehabilitated simultaneous with their punishment. Courts-martial entrust panel members to assess the impact of the crime on good order and discipline and to consider how good order and discipline can be buttressed by a fair and just sentence.

B. Functions of the Commander

1. Disposition of Cases. Congress has given disciplinary powers to certain members of the armed forces as a public trust. These powers must be exercised in the name of the United States in a manner befitting this trust.

A commander must be aware of the severity of punishments which may be adjudged by the various forums in order to make an intelligent disposition of or recommendation regarding the case.

The initial punishing authority is required by law to exercise absolute and unfettered individual judgment. One should not be concerned with possible future actions of higher authority on the punishment; rather the punishing authority should adjudge an appropriate punishment based on the circumstances of the case.

2. Review. As a convening authority, the commander refers charges to the lowest court that has the power to adjudge an appropriate sentence. As the reviewing authority, the

commander approves the sentence or part of the sentence found to be correct in law and fact and determined to be appropriate.

REFERENCE: R.C.M. 1107.

C. Duties as a Court Member

1. In General. Court members deliberate and vote after the military judge instructs them on sentence. Only the members are present during deliberations and voting. Panel members may not use seniority in rank to control the independence of junior members in the exercise of their judgment.

2. Deliberations. Deliberations include a full and free discussion of the sentence to be imposed in the case. Members may normally take their notes with them during deliberations and will also be allowed to examine any exhibits which have been admitted and any written instructions. If requested, the military judge may allow the court to be reopened to allow the members to have portions of the record played back or to have more evidence introduced.

3. Proposal of Sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member collects the proposed sentences and submits them to the president.

4. Voting. Each member votes for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused. The president places the sentence proposals in voting order beginning with the least severe. The vote is by secret written ballot beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under the circumstances. A two-thirds vote is required to adopt a sentence; however, a three-quarters vote is required for sentences that include more than 10 years of confinement, and a unanimous vote is required to impose the death penalty.

REFERENCE: R.C.M. 1006.

D. Matters to Consider

Anyone who attempts to judge another's conduct should be aware of what is involved. Court members must make an impartial diagnosis of the problem and must understand the remedies available within the military. In most civilian jurisdictions, the judge--not the jury--imposes sentence on a convicted offender. A thorough investigation of the offender's record, termed the "presentence report," is prepared to assist the judge in assessing a proper sentence. In the military, either the judge or the court members arrive at an appropriate sentence; there is no presentence report. Court-martial procedure authorizes both the prosecution and defense to present, after findings, certain material which will assist the court in determining the kind and amount of punishment.

1. Aggravation. Regardless of the plea, after findings of guilty, the trial counsel may present evidence directly related to or resulting from the offense(s) for which an accused is to be sentenced so that the aggravating circumstances are understood by the sentencing body.

In addition to matters in aggravation, the trial counsel may present evidence of admissible prior convictions and matters from the personnel records of the accused that reflect past conduct or performance, including, but not limited to, any Article 15s or Letters of Reprimand which are properly maintained in the accused's personnel records. Finally, the trial counsel may call witnesses to express opinions about the accused's past duty performance and potential for rehabilitation as a member of society. The trial counsel may not inquire into the specific bases of witnesses' opinions on duty performance and potential for rehabilitation unless the witness has been cross-examined on this issue by the defense.

REFERENCE: R.C.M. 1001(a), (b).

2. Extenuation. Matters in extenuation of an offense serve to explain the circumstances surrounding the commission of the offense, including the reasons that motivated the accused. For example, an accused convicted of a 5-day AWOL may explain the absence by relating a chain of events involving the death of a close relative, which at the time seemed to justify the unauthorized absence.

While this does not excuse the absence, it may help explain why this accused acted, and such an explanation could motivate a court to be lenient.

3. Mitigation. Matters in mitigation of an offense serve to bring to the court's attention evidence of the accused's prior good conduct, background, character of service, responsibilities, and other reasons that indicate leniency may be appropriate.

The military judge will allow the defense counsel latitude at this stage of the proceedings. For example, a properly authenticated letter from the accused's high school principal detailing the accused's good background could be considered as a matter in mitigation.

Also, examples of specific acts of bravery or prior good conduct may be presented. Proof may include prior conduct and efficiency ratings of the accused or witnesses who testify as to the accused's prior good conduct. The accused may also bring awards and decorations to the attention of the court. The accused may make a sworn or unsworn statement to the court. If the accused elects to make a sworn statement, the prosecution may cross-examine. If the accused makes an unsworn statement, the trial counsel may not cross-examine the accused about the statement but can rebut any factual inaccuracies with contradictory evidence. The accused may also elect to have counsel make an unsworn statement on his or her behalf even if the accused testifies.

REFERENCE: R.C.M. 1001(c).

E. Punishment Limitations and Effective Dates

1. General. The various types of punishment available to the sentencing authority are limited in two ways: (a) the sentence may not exceed the jurisdiction of the court-martial as to punishment; and (b) the sentence may not exceed the limitations on punishment for the convicted offense(s) defined in Part IV of the Manual for Courts-Martial.

2. Reprimand. Any court-martial may impose a reprimand as a lawful punishment. If a reprimand is imposed, the members do not determine the wording of the reprimand. Rather, the convening authority issues the reprimand as a part of the action.

3. Forfeiture of Pay. Effective 1 April 1996, the law regarding forfeitures of pay at courts-martial changed. According to Article 58b, UCMJ**,** maximum forfeitures authorized for that level court-martial take effect if the court-martial adjudges either of two triggering sentences. The triggers for automatic maximum forfeitures are sentences which include: a) more than six months confinement; or, b) a punitive discharge (bad conduct discharge, dishonorable discharge, or dismissal) and ANY confinement. The maximum forfeiture pursuant to Article 58b, UCMJ, at a general court-martial is total forfeiture of all pay and allowances; and at a special court-martial the maximum forfeiture is two-thirds of the soldier's base pay.

The law also gives the Convening Authority the option to waive forfeitures effected by operation of law for a period not to exceed six months, and to pay that money to the dependents of the accused soldier.

A second amendment to the UCMJ enacted in 1996 determines the effective dates of forfeitures or reduction in grade adjudged by courts-martial. Pursuant to new Article 57(b), UCMJ, any forfeitures or reduction from a court-martial take effect on the *earlier* of: a) 14 days after sentencing; **or**, b) the date on which the Convening Authority approves the sentence. Again, the law provides a means of temporarily easing the financial burden on the accused or dependents. The Convening Authority may, upon application of the accused, defer the reduction and the forfeitures from the 14 day point until approval of the sentence. The Convening Authority may rescind such deferral at any time, and without any due process requirements for the accused.

4. Fine. All courts-martial have the authority to adjudge fines. While a forfeiture deprives the accused of pay as it accrues, a fine is a judgment making the accused immediately liable to the United States for the total amount of money specified. General courts-martial have the power to adjudge fines in addition to forfeitures. Special and summary courts-martial have authority to impose fines as well as forfeitures so long as the combined amount is no greater than the jurisdictional limit of the court (i.e., two-thirds pay per month). Fines are effective on action by the convening authority.

5. Reduction in Grade. General and special courts-martial may reduce enlisted soldiers to the lowest or any intermediate enlisted grade. A reduction carries both the loss of military status and corresponding reduction of military pay. Any enlisted soldier who receives a sentence that includes either a punitive discharge (i.e., bad-conduct or dishonorable discharge) or confinement greater than 180 days/6 months, whether suspended or not, will be reduced to

private E-1 by operation of law (Article 58a, UCMJ and Army Reg. 27-10, Legal Services: Military Justice, Para. 5-28e(2) (6 September 2002)). A commissioned or warrant officer, or a cadet or midshipman may not be reduced in grade by any court-martial, except that, in time of war or national emergency, the Secretary concerned may commute a sentence of dismissal to reduction to any enlisted grade. Pursuant to Article 57(a), UCMJ, an adjudged reduction is effective 14 days after sentence is adjudged, or on the date of action by the Convening Authority, whichever is *earlier*. Automatic reduction (by operation of law) is effective upon convening authority action. **Thus, it is wrong for a commander or first sergeant to remove the stripes of a soldier sentenced to reduction immediately after a court-martial**.

6. Restriction. Restriction is a moral restraint requiring that an individual remain within a specific geographic area. For example, a sentence could include restriction to the company area. Regardless of the level of the court-martial, restriction may not exceed 60 days. In order to aid in the enforcement of this punishment, a person undergoing restriction may be required to report to a specified individual at a specified time. **Restriction is effective upon convening authority action**.

7. Hard Labor Without Confinement. A sentence to hard labor without confinement envisions an individual performing hard labor during available time in addition to regular military duties. Normally, the immediate commanding officer of the accused will determine the nature and amount of the duties that will constitute the hard labor. Hard labor without confinement may be adjudged only for enlisted soldiers. Hard labor without confinement may not exceed three months for a general or special court-martial and 45 days for a summary court-martial. A summary court-martial is without authority to impose hard labor without confinement upon enlisted soldiers in the grade of E-5 and above. **Hard Labor Without Confinement is effective upon convening authority action**.

8. Confinement. Only a general court-martial may impose confinement upon a commissioned officer or a warrant officer. A special court-martial may adjudge confinement for twelve months. A summary court-martial may confine an enlisted soldier below the grade of E-5 for one month. Confinement is effective immediately after the court-martial.

9. Bad-Conduct Discharge (BCD). Only enlisted soldiers may receive bad-conduct discharges. Bad-conduct discharges may only be adjudged by a general court-martial or by a special court-martial where a military judge was detailed, the accused was represented by counsel qualified under Article 27(b), UCMJ, a verbatim record of trial was prepared, and the servicing staff judge advocate prepared a pretrial advice in the Rule for Courts-Martial 406(b) format. The bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad conduct rather than dishonorable conduct. A bad-conduct discharge is effective only after appellate review is completed.

10. Dishonorable Discharge (DD). A dishonorable discharge may be adjudged only by general courts-martial and may be imposed upon appointed warrant officers and enlisted soldiers. The Manual for Courts-Martial provides that a dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized by the civilian legal system as felonies, or offenses of a

military nature requiring severe punishment. A dishonorable discharge is effective only after appellate review is completed.

11. Dismissal. A dismissal may only be adjudged by a general court-martial and only upon commissioned officers and commissioned warrant officers. It is the equivalent of a punitive discharge (BCD, DD). Dismissal may be adjudged for any violation of any article of the UCMJ (*i.e*., not only those for which a BCD or DD is authorized). A dismissal is effective after appellate review is completed.

12. Death. The death penalty may be adjudged only if an accused is unanimously convicted of certain offenses (for example, premeditated murder or espionage) at a court-martial specifically empowered to adjudge the death penalty. A death sentence may not be adjudged unless all the court members find, beyond a reasonable doubt, that one or more aggravating factors exist. An example of an aggravating factor for premeditated murder is that the victim was a commissioned, warrant, or noncommissioned officer in the execution of the victim's office. If one or more aggravating factors are found beyond a reasonable doubt, a sentence of death may be adjudged only upon the unanimous vote of all the members that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. A sentence of death includes a dishonorable discharge or dismissal and confinement as a necessary incident of a sentence of death but not a part of it. A sentence of death may not be suspended. The death penalty is effective only after appellate review is completed and after it is ordered executed by the President.

REFERENCE: R.C.M. 1003.

F. Additional Punishments (Recidivist Provisions)

R.C.M. 1003(d) of the Manual for Courts-Martial sets forth a number of circumstances which authorize increased punishment beyond that authorized by the maximum punishment listed in Part IV.

1. Three or More Convictions During the Past Year. If an accused has three or more previous convictions during the year prior to the commission of any offense for which he or she is convicted, the court may adjudge a dishonorable discharge, total forfeitures, and confinement for one year notwithstanding the lesser punishments authorized for the offense.

2. Two or More Convictions During the Past Three Years. If an accused has two or more previous convictions during the three years prior to the commission of any offense for which he or she is convicted, the court may adjudge a bad-conduct discharge, total forfeitures, and confinement for three months notwithstanding the lesser punishments authorized for the offense.

3. Offenses - Six Months. Finally, if an accused is found guilty of two or more offenses, none of which authorizes a bad-conduct discharge but the combined authorized confinement exceeds six months, the court-martial may also impose a bad-conduct discharge.

These rules are important to you as a commander and as a convening authority seeking to dispose of a case. For example, if you are a convening authority confronted with an accused that has committed two offenses for which no punitive discharge is authorized, your immediate reaction may be frustration because of your inability to seek a punitive discharge at a court-martial. Upon further reflection, however, the accused could be punitively discharged if prosecuted at a special or general court-martial because of the commission of two or more offenses which combined authorize confinement in excess of 6 months.

REFERENCE: R.C.M. 1003(d).

G. Powers of the Convening Authority with Regard to Sentence

1. Review. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. There is no requirement that the convening authority approve the sentence adjudged by the court. The convening authority may not, however, increase the sentence imposed by the court.

2. Alternatives. The convening authority may decide upon one of three courses of action when reviewing the sentence imposed by the court-martial. The convening authority may approve the sentence without change, approve a less severe sentence, or disapprove the entire sentence.

3. Legal Sentence. Many factors are involved in a commander's exercise of his discretion as the convening authority to approve a sentence which he or she feels is appropriate. The convening authority has a duty to approve only so much of a sentence as is legal. For example, if a summary court-martial sentences an accused to confinement for three months, the convening authority can only approve so much of the sentence as amounts to confinement for one month (the maximum sentence to confinement a summary court-martial can legally impose).

4. Suspension. The convening authority may take mitigating action by suspending all or part of a sentence. Suspension creates a probationary period for the accused. The period of suspension and the conditions upon which the suspension is granted are within the discretion of the convening authority. The suspension period may not be unreasonably long. (See also Army Reg. 27-10, Legal Services: Military Justice, Para. 5-34 (6 September 2002), that defines "reasonable periods" of suspensions.) Suspending sentences is a rehabilitative tool that may be appropriate in certain circumstances. R.C.M. 1108 governs the suspension process and commanders should consult with their staff judge advocates before ordering any suspension.

Should the offender commit another offense while serving a suspended sentence, the suspension may be vacated. If the case involves a bad-conduct discharge or a general court-martial sentence, a hearing must be held before the suspension can be vacated. The staff judge advocate should be consulted in such cases as there are important procedural requirements.

5. Reduction in Sentence. In addition to having the ability to suspend punishments, the convening authority may remit or commute the sentence in whole or in part. Reductions in sentence are always considered on a case-by-case basis. Examples of when a reduction in sentence may be appropriate are when a family requires support and substantial forfeitures have

been adjudged, or when a co-accused has been sentenced to a significantly less severe sentence and the interests of justice would be served by the reduction.

6. Deferment of Confinement. If the accused has been sentenced to a term of confinement, he or she may petition the convening authority, in writing, to defer the service of confinement. The accused has the burden of showing that the interests of the accused and the community in release outweigh the community's interests in immediate and continued confinement. Among the factors that the convening authority can consider are the nature of the offenses, the effect of the crime on the victim, the command's need for the accused, and the effect of deferment on good order and discipline in the command. The commander's decision must be in writing and must state the basis for denial. Denial of a request for deferment is subject to judicial review only for an abuse of discretion. If deferment is granted, the commander can include appropriate restrictions or conditions on the accused during the period of deferment. For example, the accused may be ordered not to enter a certain service club, housing area, or geographic area. These conditions must not be a substitute form of punishment. After deferment is granted, the convening authority may rescind the deferment, but the accused is entitled to notice and an opportunity to be heard.

7. Excess Leave. If an approved sentence includes an unsuspended dismissal or punitive discharge, the general court-martial convening authority may direct the soldier to take excess leave involuntarily to await discharge. Confinement included as part of the approved sentence must have been served, deferred, or suspended prior to the beginning of leave. A soldier does not accrue pay or allowances while on excess leave awaiting discharge.

REFERENCE: R.C.M. 1101(c); 1107; 1108; Army Reg. 600-8-10, Leaves and Passes: Personal Absences, Para. 5-19 thru 5-22 (31 July 2003).

H. Problem Areas

1. Inconsistent Sentences. Commanders should be aware of two problem areas with respect to inconsistent sentences. Occasionally, a court-martial may adjudge a sentence that includes confinement for greater than 180 days/6 months and an intermediate reduction of an enlisted service member (e.g., from E-5 to E-3). As explained, under Article 58a, UCMJ, and AR 27-10, Para. 5-28e(2), this soldier would be automatically reduced by operation of law to the lowest enlisted grade, E-1. The question in such a situation is what the court intended: a one-grade reduction or confinement regardless of the included reduction?

Another problem of a similar nature involves a sentence to a suspended bad-conduct discharge. Only the convening authority can suspend a sentence, not the court. The question is, would the court have awarded a bad-conduct discharge if they had known that the suspension would have no effect? In either event, the staff judge advocate should be consulted.

2. Improper Forfeitures. The wording of the sentence is critical in adjudging or approving forfeitures. A sentence which reads "forfeiture of $40 for six months" amounts to a total forfeiture of $40. On the other hand, a sentence which reads "forfeiture of $40 pay per month for six months" amounts to a forfeiture of a total of $240. Unless total forfeitures (i.e., forfeiture of ALL pay and allowances) are adjudged, partial forfeiture of pay (and/or allowances)

must be adjudged in whole dollar amounts per month for a specific number of months. This applies even if the sentence to confinement is adjudged in a term of years.

I. Confinement Facilities

1. United States Disciplinary Barracks (USDB). The USDB is located at Fort Leavenworth, Kansas. The general rule is that the USDB confines enlisted long-term prisoners (defined as more than one year remaining on a sentence after convening authority action and initial clemency consideration). In practice, Army prisoners with sentences in excess of seven years (and all officers) are transferred to the USDB. Additionally, the USDB confines long-term prisoners from other services, as well as all officer prisoners (regardless of length of sentence).

The mission of the USDB is two-fold: (a) to confine prisoners who are legally sentenced to confinement under the provisions of the UCMJ in a safe, secure environment; and (b) to provide the correctional treatment, training, care, and supervision necessary to return inmates to civilian life as useful, productive citizens with improved attitudes and motivation. Military discipline and courtesy are maintained within the USDB. Discipline and Adjustment Boards, convened by the Commandant of the USDB, review alleged violations of institutional rules and make recommendations to the Commandant for corrective action. The rules, programs, and activities of the USDB are discussed in USDB Regulation 600-1.

Shortly after arrival at the USDB, every inmate is evaluated by the staff of the Directorate of Mental Health. Specialized treatment is provided for many categories of inmates, such as child sex offenders and alcohol or drug abusers. The inmates also receive vocational training to prepare them for civilian employment.

2. Regional Confinement Facilities (RCF). Multi-service Regional Confinement Facilities are located throughout CONUS. The Army currently operates facilities at Fort Lewis, Washington; Fort Sill, Oklahoma; and Fort Knox, Kentucky. The Army also operates OCONUS facilities in Germany and Korea. Regional facilities operated by the Navy, Air Force, and Marines are also available for confinement of Army enlisted prisoners. The general rule is that Army enlisted prisoners with sentences that include confinement up to and including seven years are confined at the nearest Regional Confinement Facility.

Inmates who engage in misconduct are subject to Disciplinary and Adjustment Boards, punishment under the UCMJ, or possible transfer to the USDB. All prisoners assigned to the Regional Confinement Facilities receive individual evaluation, counseling, and treatment by social workers.

3. Installation Detention Facility (IDF). The 13 stateside IDFs have been replaced with the Regional Confinement Facilities. Two OCONUS IDFs remain at Mannheim, Germany, and Camp Humphreys, Korea. These OCONUS facilities are used for pretrial confinement and for post-trial confinement pending transfer to one of the CONUS RCFs.

CHAPTER 13

SENTENCING AND CORRECTIONS

TEACHING OUTLINE

I. INTRODUCTION.

II. PURPOSES OF PUNISHMENT.

A. Retribution.

B. Deterrence.

C. Protection of society/protection of the victim.

D. Rehabilitation.

E. Good order and discipline.

III. COURT-MARTIAL PUNISHMENTS.

A. No punishment.

B. Reprimand.

C. Forfeiture of pay and allowances.

D. Fine.

E. Reduction in pay grade.

F. Restriction to specified limits.

G. Hard labor without confinement.

H. Confinement.

I. Punitive separations.

1. Bad conduct discharge.

2. Dishonorable discharge.

3. Dismissal.

J. Death.

IV. PRESENTENCING PROCEDURE.

A. Government performance and aggravation evidence.

B. Defense extenuation and mitigation.

C. Argument by counsel.

V. SENTENCING PROCEDURES.

A. Full and free discussion.

B. Sentences proposed.

C. Ranking of sentences.

D. Voting.

1. Secret written ballot.

2. Start with least severe.

3. The required concurrence.

a) Normally - 2/3.

b) 10 yrs. or more of confinement - 3/4.

c) Death - unanimous.

E. The sentence worksheet.

VI. CONVENING AUTHORITY'S POST-TRIAL RESPONSIBILITIES.

A. Initial action.

1. Command prerogative.

2. Must consider result of trial, SJA's recommendation, and any matters submitted by the accused.

3. May consider record of trial, accused's personnel records, and other appropriate matters.

4. May correct legal errors.

5. May act on the findings.

6. Must explicitly act on sentence.

B. Promulgating Order.

VII. CONFINEMENT.

A. Old System.

B. Consolidated DOD Confinement System.

1. Regional Confinement Facilities (RCFs).

2. United States Disciplinary Barracks, Fort Leavenworth, Kansas - All officers and long-term prisoners.

3. Three Army RCFs: Forts Knox, Lewis, and Sill.

4. Long-term prisoners.

5. Short-term prisoners.

C. Clemency and parole.

1. Clemency.

2. Parole.

3. Good time.

VIII. COLLATERAL CONSEQUENCES.

A. Housing.

B. Medical benefits.

C. Educational benefits.

D. Veterans Administration benefits.

E. Retirement benefits.

IX. CONCLUSION.

APPENDIX A

GENERAL COURT-MARTIAL SENTENCE WORKSHEET

After the Court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any filling in or crossing out within the punishments selected.

_____, this court-martial sentences you:

1. To no punishment.

Reprimand

2. To be reprimanded.

Forfeitures, Etc.

3. To forfeit $_____ pay per month for _____ month(s).

4. To forfeit all pay and allowances.

5. To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ (days/months/years) if the fine is not paid).

Reduction of Enlisted Personnel

6. To be reduced to _____.

Restriction

7. To be restricted to the limits of _____ for _____ (days/months).

Hard Labor

8. To perform hard labor without confinement for _____ (days/months).

Confinement

9. To be confined for _____ (days/months/years) (the length of your natural life with eligibility for parole) (the length of your natural life without eligibility for parole).

(cont. on back)

Punitive Discharge

10. To be discharged from the service with a bad-conduct discharge (enlisted personnel only).

11. To be dishonorably discharged from the service (enlisted personnel and noncommissioned warrant officers only).

12. To be dismissed from the service (commissioned officers, commissioned warrant officers, cadets, and midshipmen only).

ALCS-ADC 1 September 2003

Information Memorandum

SUBJECT: Prisoner Transfer Criteria and Sentence Statistics

1. The following guidelines control the transfer of post-trial confinees:

< or = 7 Yrs	Ft Knox RCF, Ft Lewis RCF, Ft Sill RCF, as well as
> 7 Yrs and all officers	United States Disciplinary Barracks at Ft Leavenworth
All females > 30 days	Miramar Consolidated Brig (U.S. Navy)

2. Overseas short-term facilities are: Coleman Barracks at Mannheim, Germany; and Camp Humphreys, Korea. Prisoners will be transferred at the earliest opportunity to a CONUS facility.

3. Sentence statistics (at USDB, for all prisoners): (data as of Oct 02).

DEMOGRAPHICS

Death Sentence	6
Life Sentence w/o Parole	5
Life Sentence	46
Officers	25
Inmates	**436**

Current as of : October-02

United States Disciplinary Barracks

POPULATION BY SERVICE

USA	222
USAF	85
USMC	73
USN	55
USCG	1
Total	**436**

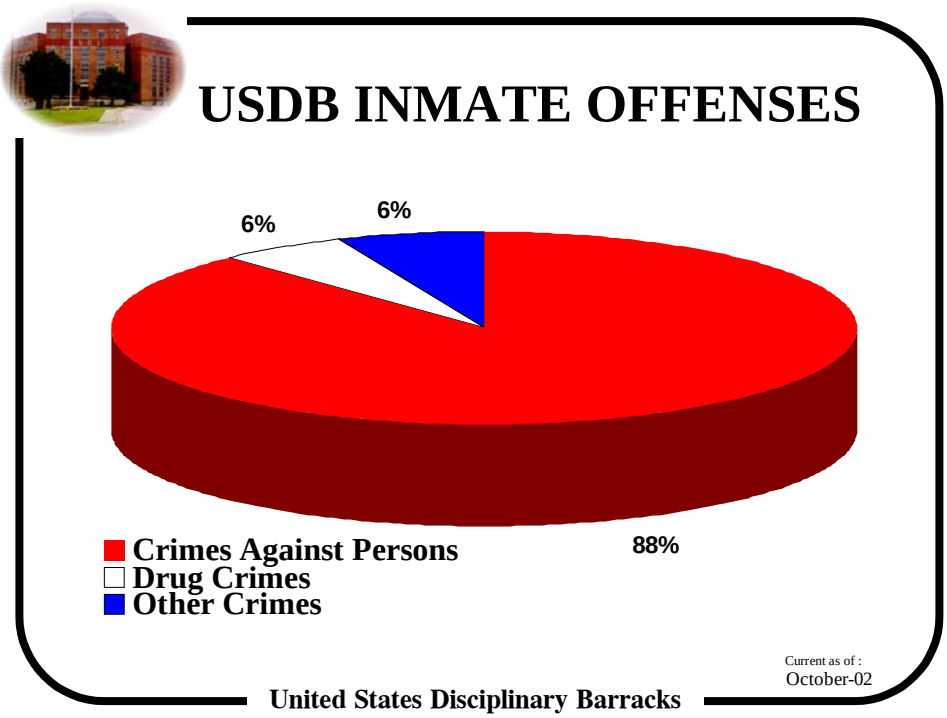
Current as of :
October-02

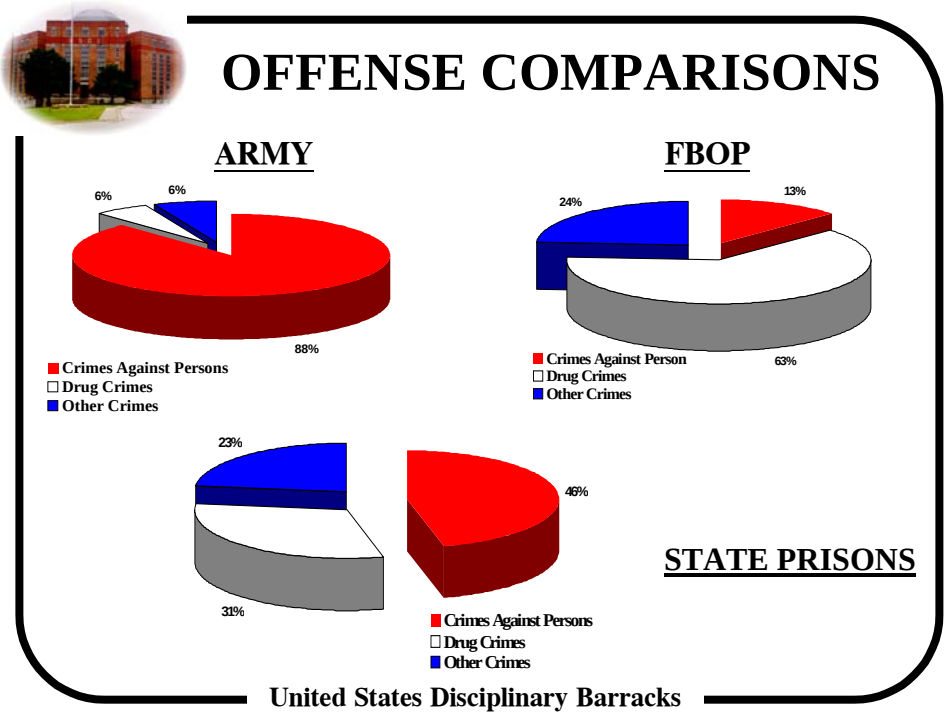
United States Disciplinary Barracks

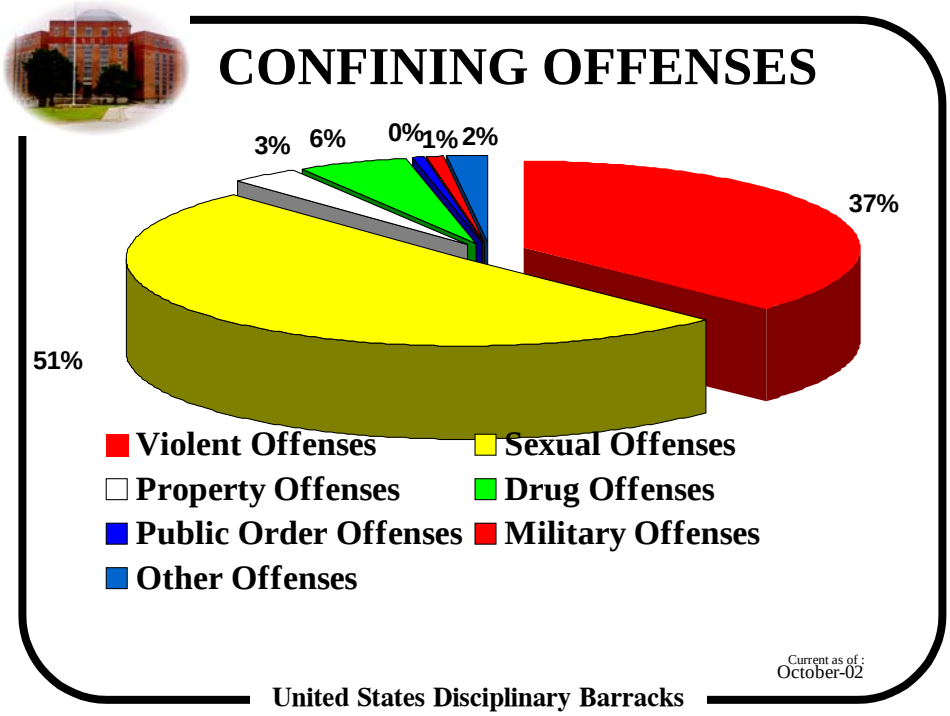
INMATE DEMOGRAPHIC TRENDS

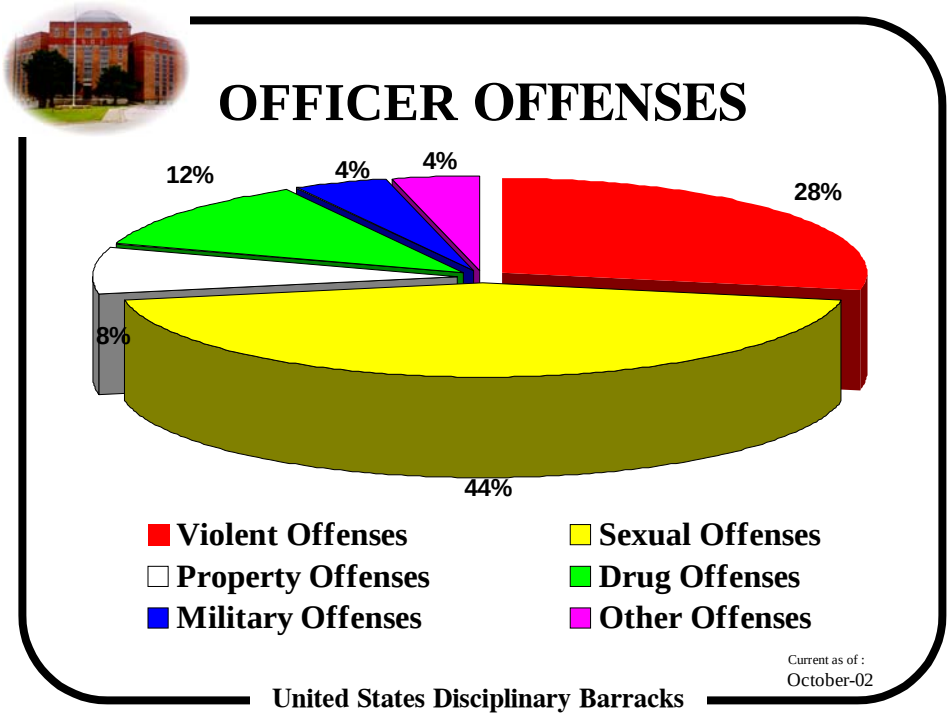
	1984	1994	Current
Average Age	26.6	31.3	34.1
Average Sentence	9.0	12.4	18.8
Against Persons	62%	77%	88%
Sex Crimes	52%	64%	51%
Drugs	25%	11%	6%

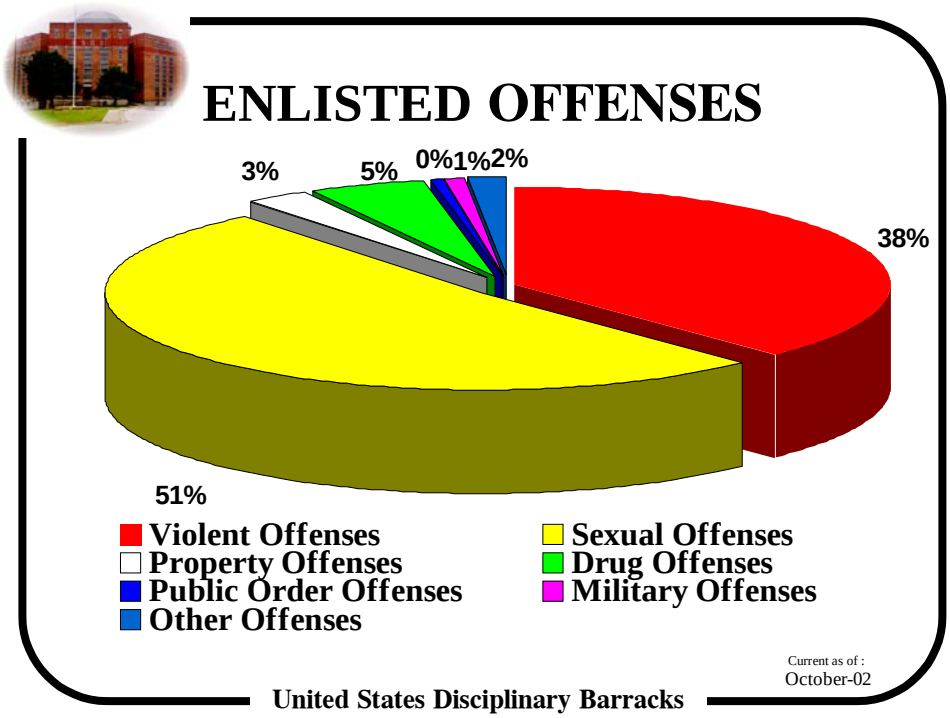
United States Disciplinary Barracks

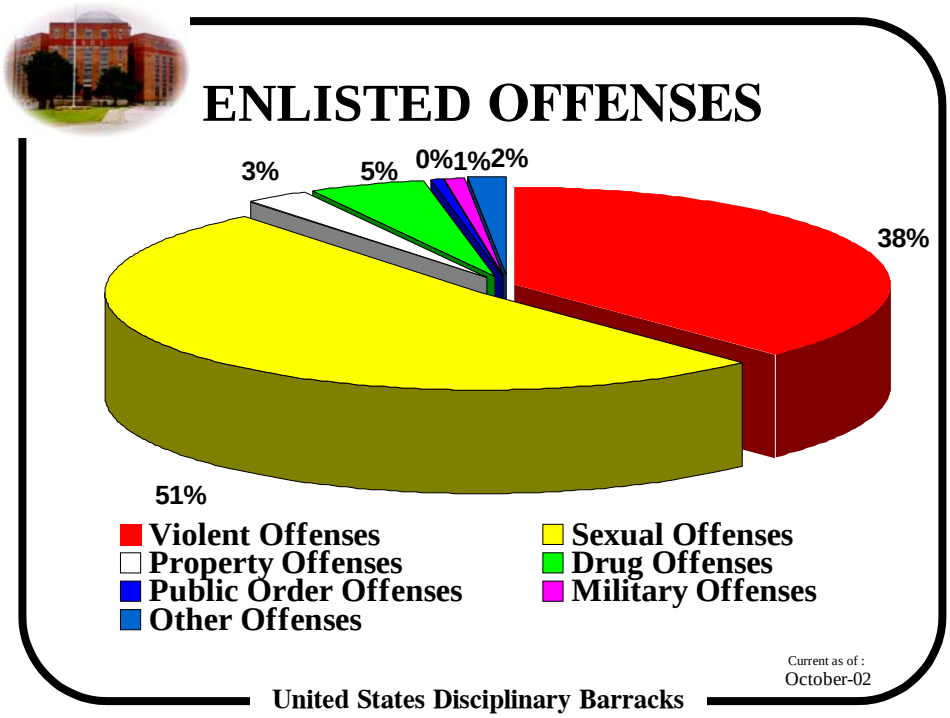

USDB INMATE OFFENSES
6%
6%
88%
Crimes Against Persons
Drug Crimes
Other Crimes
Current as of :
October-02
United States Disciplinary Barracks


OFFENSE COMPARISONS
ARMY
6%
6%
88%
Crimes Against Persons
Drug Crimes
Other Crimes
FBOP
24%
13%
63%
Crimes Against Person
Drug Crimes
Other Crimes
23%
46%
31%
STATE PRISONS
Crimes Against Persons
Drug Crimes
Other Crimes
United States Disciplinary Barracks


CONFINING OFFENSES
3%
6%
0%
1%
2%
37%
51%
Violent Offenses
Sexual Offenses
Property Offenses
Drug Offenses
Public Order Offenses
Military Offenses
Other Offenses
Current as of :
October-02
United States Disciplinary Barracks


OFFICER OFFENSES
12%
4%
4%
28%
8%
44%
Violent Offenses
Sexual Offenses
Property Offenses
Drug Offenses
Military Offenses
Other Offenses
Current as of :
October-02
United States Disciplinary Barracks


ENLISTED OFFENSES
3%
5%
0%
1%
2%
38%
51%
Violent Offenses
Sexual Offenses
Property Offenses
Drug Offenses
Public Order Offenses
Military Offenses
Other Offenses
Current as of :
October-02
United States Disciplinary Barracks


ENLISTED OFFENSES
3%
5%
0%
1%
2%
38%
51%
Violent Offenses
Sexual Offenses
Property Offenses
Drug Offenses
Public Order Offenses
Military Offenses
Other Offenses
Current as of :
October-02
United States Disciplinary Barracks

CHAPTER 14

SELECTED PROBLEMS IN THE PROTECTION OF THE MILITARY INSTALLATION

I. INTRODUCTION. 1

A. Physical security is the commander's responsibility. 1

B. Installation commanders must develop, establish, and maintain policies and procedures, tailored to local conditions, to protect the installation, including: 1

II. THE THREE MOST IMPORTANT QUESTIONS. 1

A. What routine level of control do I have over the access to, and egress from, my installation? 1

B. What kind of federal prosecution program, if any, does my installation currently have in place? 4

C. What is my installation doing about juvenile crime? 5

III. CONCLUSION. 6

THIS PAGE INTENTIONALLY LEFT BLANK

CHAPTER 14

PROTECTION OF THE MILITARY INSTALLATION

I. INTRODUCTION.

A. Physical security is the commander's responsibility.

B. Installation commanders must develop, establish, and maintain policies and procedures, tailored to local conditions, to protect the installation, including:

1. determining the **routine degree of control** over access to, and egress from, the installation;

2. **removal of, or denial of access to, persons** who threaten order, security, and discipline on the installation;

3. **designate restricted areas**, if appropriate.

Dep't of Army, Reg. 190-16, Military Police: Physical Security para. 12 (31 May 1991).

II. THE THREE MOST IMPORTANT QUESTIONS.

A. What routine level of control do I have over the access to, and egress from, my installation?

1. Installations generally fall into one of three categories, informally referred to as either "open," "closed," or "mixed" posts; the category to which your installation belongs will determine the ease with which you can apply the following statutes.

2. Trespass Offenses. 18 U.S.C. sec. 1382.

a) **Entry for an Unlawful Purpose**.

(1) Statutory Text.

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, **for any purpose prohibited by law or lawful regulation** . . . [s]hall be fined under this title or imprisoned not more than six months, or both.

(2) **"For any purpose prohibited by law or lawful regulation"** may include, but is not limited to, the entry itself; however, knowledge by the defendant that the entry was prohibited must be established at trial.

(a) Constructive notice.

May be established by publication of facility access regulation in Federal Register. United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978), cert. denied, 439 U.S. 967 (1978).

(b) Actual Notice.

(i) Multiple signs, fence around facility, and nature of defense at trial showed actual notice. United States v. Cottier, 759 F.2d 760 (9th Cir. 1985).

(ii) Conduct of defendant upon entry to fenced, guarded facility showed actual notice. United States v. Hall, 742 F.2d 1153 (9th Cir. 1984).

(iii)Earlier lawsuits and requests for access to facility and prior statements showed actual notice. United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978), cert. denied, 439 U.S. 967 (1978).

(iv)One sign, five security guards, and a fence around facility. United States v. Floyd, 477 F.2d 217 (10th Cir. 1973), cert. denied, 414 U.S. 1044 (1973).

(v) But cf. United States v. Parrilla Bonilla, 648 F.2d 1373 (1st Cir. 1981) (holding evidence not sufficient to establish actual notice).

b) **Unlawful Reentry**.

(1) Statutory Text.

Whoever **reenters or is found within any such reservation**, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof - [s]hall be fined under this title or imprisoned not more than six months, or both.

(2) Reentry or Discovery.

(a) Must be **knowing**. United States v. Vasarajs, 908 F.2d 443 (9th Cir. 1980) (holding signs on access road to be sufficient to establish notice of entry).

(b) **Motives** for reentry are generally **irrelevant**. United States v. Albertini, 472 U.S. 695 (1985).

(3) After Removal or Bar.

Trespassers or other individuals who have engaged in misconduct on post are generally given formal written notice, i.e., a bar letter, that they are not to reenter the installation without the written permission of the commander.

(4) By any officer or person in command or charge thereof.

(a) The installation commander must authorize the bar letter. United States v. Levalley, 957 F.2d 1309 (6th Cir. 1992), cert. denied, 113 S. Ct. 460 (1992).

(b) Individuals excluded have no due process rights, but the commander cannot exercise authority to "bar" in an arbitrary or capricious manner. Serrano Medina v. United States, 709 F.2d 104 (1st Cir. 1983); Tokar v.

Hearne, 699 F.2d 753 (5th Cir. 1983), cert. denied, 464 U.S. 844 (1983).

(c) Installation commanders can issue "tailored" bar letters when statutory privileges are involved. Berry v. Bean, 796 F.2d 713 (4th Cir. 1986).

c) **Military, naval, or Coast Guard property** is expansively defined in the caselaw, and may include, by example, areas adjacent to an installation designated as a "security zone" by federal regulation, United States v. Allen, 924 F.2d 29 (2d Cir. 1991), or the driveway leading to the entrance gate at a post. United States v. McCoy, 866 F.2d 826 (6th Cir. 1989).

B. What kind of federal prosecution program, if any, does my installation currently have in place?

1. An individual, military or civilian, who violates federal law within the territorial limitations of the United States can be prosecuted for the offense in federal district court. Dep't of Army, Reg. 27-10, Legal Services: Military Justice, para. 23-1b (6 September 2002) [hereinafter AR 27-10].

2. While prosecutions in federal district court are the responsibility of the U.S. Department of Justice, most military installations have had appointed one or more Judge Advocates or civilian attorneys as **Special Assistant U.S. Attorneys** (SAUSA) to prosecute crimes in which the military has an interest. AR 27-10, para. 23-4; 28 U.S.C. sec. 543.

3. Military SAUSA will be subject to the primary **supervision** of the **local U.S. Attorney's office**, and will perform their duties in accordance with the Memorandum of Understanding (MOU) between the U.S. Attorney and the SJA or legal advisor. AR 27-10, para. 23-4c. An example of a typical MOU can be found at Figure 23-3, AR 27-10.

4. SAUSA is **not a police function**, so is not violative of Posse Comitatus Act, 18 U.S.C. ∋1835; 18 U.S.C. ∋806(d). See, e.g., United States v. Allred, 867 F. 2d 856 (5th Cir. 1989) (finding no limit on whom the Attorney General may appoint, or what that person may do).

5. Misdemeanors and the U.S. District Court.

a) Any individual, military or civilian, who commits a misdemeanor or infraction on a military installation can be prosecuted before a Magistrate Judge. AR 27-10, para. 23-5a.

b) AR 190-29 requires each installation to establish procedures on how and when to refer soldiers for trial by the magistrate judge.

c) It is generally expected that the magistrate system will be used whenever feasible, particularly for minor offenses of a civil nature, e.g., traffic violations.

d) If there is no magistrate judge appointed to hear cases at your installation, the command can request the U.S. Attorney to petition the U.S. District Court to appoint one.

e) The **installation** generally pays for witnesses that appear in proceedings before the magistrate judge.

f) Trial before a magistrate judge is **voluntary**; a defendant may demand trial before a judge in federal district court.

6. Felony Prosecutions in U.S. District Court.

a) An increasing number of installations have been granted the authority by the Justice Department to prosecute felony offenses committed by civilians on military installations in federal district court.

b) Approval of such a program is usually made dependant upon the SJA committing an attorney for up to two years to the U.S. Attorney's Office; inter-office negotiation is sometimes required.

c) **Authorization** to conduct such a program must be obtained from the **Office of the Judge Advocate General**.

d) **Witness expenses** in felony prosecutions are often funded out of **DA-level accounts**.

C. What is my installation doing about juvenile crime?

1. The **federal policy** toward juvenile misconduct is **abstention**.

2. Juveniles may, nevertheless, be tried before the magistrate judge for petty offenses committed on the installation; however, the magistrate judge may not impose any period of confinement upon a juvenile.

3. Juveniles who commit class A misdemeanors or felonies on the installation may only be tried in federal district court if one of three conditions is met:

a) State **cannot, or will not, assume jurisdiction** over the juvenile;

b) State programs are **inadequate**; or

c) The charged offense is a **felony or certain drug offenses**, and there is **substantial federal interest** in the case.

4. Unless at least one of these conditions met, then the juvenile **must** be surrendered to state authorities.

5. Time is of the essence when handling juveniles.

a) **Apprehension**.

When a juvenile is taken into custody, they "shall be taken before a magistrate forthwith." 18 U.S.C. sec. 5033.

b) **Trial**.

Juveniles in pre-trial detention generally must be brought to trial within 30 days of the commencement of detention. 18 U.S.C. sec. 5036.

III. CONCLUSION.

CHAPTER 15

INTRODUCTION TO ADMINISTRATIVE & CIVIL LAW

I. PURPOSE.

The purpose of this text and your Administrative and Civil Law instruction is to provide you with an appreciation for the legal environment in which the Army operates and the need for close liaison between commanders and judge advocates in all areas of Army activities.

II. WHERE TO GET HELP IN THESE AREAS

III. ADMINISTRATIVE LAW.

A. Defined: "Body of law created by administrative agencies in the form of rules regulations, orders, and decisions." Black's Law Dictionary

B. Administrative law is the "internal" law of the agency. We (and agencies over us) make these rules for ourselves. The Administrative Procedures Act requires us to follow our rules once we establish them.

C. Administrative law is as broad as the mission of the Army and covers virtually every area of Army operations.

IV. CIVIL LAW.

A. Defined: "Laws concerned with civil or private rights and remedies, as contrasted with criminal laws." Black's Law Dictionary

B. There are two aspects of the civil law – agency impact and personal impact on soldiers.

1. Agency Impact. Many Civil Laws impact the operation of the agency. For example, environmental laws have had a profound impact on the conduct of military training and operations.

2. Personal Impact. Many laws also impact soldiers individually, and the Army has undertaken to assist soldiers with these issues in order to preserve readiness. The impacts of these laws are implemented in two programs in the Army:

a) LEGAL ASSISTANCE: "Legal advice, counseling, and other help provided to eligible clients on their personal legal affairs." AR 27-3.

b) CLAIMS: "A demand for payment of a specified sum of money in writing and signed by the claimant or a properly designated representative." AR 27-20

V. AREAS OF COVERAGE. Within the very broad coverage of Administrative and Civil Law, the JAGC focuses on areas most likely to concern commanders. These areas are listed below.

A. Law of Military Installations

1. Administrative Law

a) Command Authority
b) Private Orgs/MWR
c) Administrative Review of Investigations (15-6, Line of Duty, etc.)

2. Civil Law

d) Federal State Relations
e) FOIA/Privacy Act
f) Environmental Law
g) Defensive Federal Litigation

B. Military Personnel Law

1. Administrative Law

a) Adverse Administrative Actions (Reprimands, Chapters, etc.)
b) Administrative Remedies (Article 138 Complaints, etc.)
c) HIV/AIDs Policy

d) Substance Abuse Programs

2. Civil Law

a) Federal Labor Relations
b) Law of Federal Employment
c) Equal Opportunity

C. Legal Assistance – Mostly Civil Law except number 5.

1. Family Law (Marital Separations, Custody, etc.)
2. Estate Planning
3. Consumer Protection
4. Taxation
5. Response to Administrative Actions (Reports of Survey, Reprimands, etc.)

D. Claims

1. Personnel Claims (PCS Claims)
2. Foreign and Deployment Claims
3. Federal Tort Claims
4. Affirmative Claims (Recovering money owed to the Army)

CHAPTER 16

SENIOR OFFICERS LEGAL ORIENTATION

HANDLING SEXUAL HARASSMENT COMPLAINTS

I. INTRODUCTION. 2
II. DEFINING SEXUAL HARASSMENT..... 2
III. EO COMPLAINT PROCESSING. 8
IV. EO STAFFING. 11
V. EEO COMPLAINT PROCESS. 13
VI. INVESTIGATION PROCESS FOR COMPLAINTS OF SEXUAL HARASSMENT UNDER 10 USC § 1561. 17
VII. SANCTIONS FOR SEXUAL HARASSERS. 19
VIII. LIABILITY. 20
IX. CONCLUSION. 23

OUTLINE OF INSTRUCTION

I. INTRODUCTION.

II. DEFINING SEXUAL HARASSMENT.

A. DoD Definition. DoD Dir 1350.2 (Aug. 18, 1995).

1. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

   a. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or

   b. Submission to, or rejection of, such conduct by a person is used as a basis for career or employment decisions affecting that person; or

   c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive environment.

2. Such conduct, to be actionable as "abusive work environment" harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

3. "Workplace" is an expansive term for military members and may include conduct on or off duty, 24 hours a day.

4. Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay or job of another soldier or civilian employee is engaging in sexual harassment.

5. Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.

(AR 600-20, para 7-4 adopts this definition with minor differences.)

B. Title VII (of the Civil Rights Act of 1964) definition.

1. Title VII is implemented in the federal government through the Code of Federal Regulations (CFR). 29 CFR § 1604.11 contains the following definition of sexual harassment:

a. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Sexual harassment in violation of Title VII is also defined by the courts, as discussed below in paragraph D.

C. 10 USC § 1561 Definition:

1. Conduct (constituting a form of sex discrimination) that:

   a. Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:

      (1) Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career;

      (2) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

      (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and

      (4) Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive.

2. Any use or condonation by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.

3. Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.

D. Types of Sexual Harassment

1. Old Terms: Traditionally, federal courts categorized sexual harassment claims as Quid Pro Quo or Hostile Work Environment:

a. "Quid Pro Quo." A request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.

b. "Hostile Work Environment." Deliberate or repeated verbal comments, gestures, or physical contact of a sexual nature that create an offensive or hostile workplace.

2. New Terms: The Supreme Court appears to reject the traditional model in two decisions handed down in 1998. In Ellerth, the Supreme Court discussed whether the "quid pro quo" and "hostile environment" terms had outlived their usefulness. "The terms quid pro quo and hostile work environment are helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2264 (1998).

a. "Tangible Employment Action" harassment. Sexual harassment that results in a negative tangible employment action (usually involves actions such as a demotion, removal, downgrade, bad appraisal, etc). This type of harassment almost invariably involves harassment by the supervisor.

(1) The action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2268 (1998).

(2) A tangible employment action would not include a "bruised ego," a demotion without change in pay, benefits, duties, or prestige, or a reassignment to a more inconvenient job. Id. at 2268.

(3) Sexual advances must be "unwelcome." 29 C.F.R. §1604.11(a).

b. Hostile Environment harassment. Sexual harassment that is so objectively offensive as to alter the conditions of employment even though the victim suffers no tangible employment action.

(1) The conduct must be "severe or pervasive." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Single act versus pattern of conduct: the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.

(2) Do not measure the conduct in isolation. Look at all the circumstances, such as frequency of the discriminatory conduct, its severity, whether it is physically threatening or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

(3) "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher v. Boca Raton, 524 U.S. 775, 788 (1998).

(4) The conduct must be unwelcome. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

(5) Complainant's Participation.

(a) Employee's hostile work environment claim was rejected because of her active and often enthusiastic participation in sexual shenanigans. Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991).

(b) But employees do not forfeit their rights to be free of a sexually offensive workplace merely because they participate to some degree in sexual horseplay, especially when they engage in such behavior defensively. *See* Carr v. Allison Gas Turbine Div., 32 F.3d 1007 (7th Cir. 1994)(Employee's use of vulgar language is not fatal to her claim because she otherwise made clear that she did not welcome the sexually-directed actions of others).

(6) Does not require the loss of job benefits or opportunities. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

(7) Psychological and emotional work environment as a condition of employment. A violation can be shown either by evidence that the misconduct interfered with an employee's work or that the environment could "reasonably be perceived and is perceived as hostile or abusive." Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

(8) "Reasonable person" and "reasonable victim" test. Objective/subjective elements. Harris v. Forklift Systems Inc., 114 S.Ct. 367 (1993); Rabidue v Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986). A "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Farragher v. Boca Raton, 524 U.S. 775 (1998).

(9) Need not necessarily be directed at complainant. Evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment. Hall v. Gus Construction Co., Inc., 842 F.2d 1010 (8th Cir. 1988); Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988).

(10) The harassing official need not be of the opposite sex as the complainant. EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989), Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998).

E. Agency Liability for Sexual Harassment. Discussed in Section VIII, below.

III. EO COMPLAINT PROCESSING.

A. AR 600-20, Appendix E.

B. Applies to soldiers, DA civilian employees, and family members (but DA civilian employees will generally use more specific means; *see* Section V below (EEO)).

C. Informal Complaint. AR 600-20, Appendix E-1 (a).

1. Any complaint that the soldier, employee, or family member does not wish to file in writing.

2. Not subject to time suspense or reporting.

3. Attempted resolution at the lowest possible level.

D. Formal Complaint. AR 600-20, Appendix E-1 (b).

1. Filed by submitting a sworn statement on DA Form 7279-R.

a. Basis of complaint.

b. Dates, parties, witnesses.

c. Requested remedy.

2. Timely submission required (w/in 60 calendar days of the incident). Processed through chain of command or alternative agency.

   a. Reporting complaint to chain of command "strongly encouraged."

   b. "Alternative agencies" when complainant perceives chain of command as the problem:

      (1) Higher echelons of chain of command.

      (2) EO advisor.

      (3) Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279-R not used. Confidentiality policy.

      (4) Chaplain.

      (5) Provost Marshall, Criminal Investigation Command.

      (6) Medical agencies.

      (7) Staff Judge Advocate.

      (8) Housing referral office.

3. The EO complaint process, in itself, provides no promises of confidentiality. Note, however, that other regulations may provide confidentiality to complainants (e.g., Inspector General, Staff Judge Advocate legal assistance).

4. Actions by “alternative agencies.” Appendix E-2.

   a. Talk with the complainant; gather as much information as possible; tell complainant what role (if any) that agency will have in resolving the complaint.

   b. Annotate DA Form 7279-R.

   c. If resolution is beyond agency’s charter, refer complainant to appropriate agency or commander, with complainant’s consent.

   d. Most “alternative agencies” do not have an independent investigatory charter. Exceptions: Inspector General; higher commanders in the chain of command.

5. Investigation. *Commander* will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15-6. AR 600-20, Appendix E-4 (b).

   a. Referral to battalion/brigade *commander* for appointment of investigating officer under AR 15-6.

   b. Fourteen days (3 weekend drill periods) to complete the investigation. Possible extension of 30 days (2 weekend drill periods).

6. Feedback. Written feedback within 14 days (3 weekend drill periods) after acknowledgment of complaint.

   a. Summary of investigative results.

   b. Remedial actions taken.

   c. Copy provided to complainant.

7. Appeal by complainant in writing to the next higher commander, up to GCMCA.

a. Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.

b. Options outside the EO system.

8. Follow up. Thirty to forty-five days after final decision on the complaint, Equal Opportunity Advisor conducts an assessment on **all** EO complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal. Not recorded on DA Form 7279-R.

9. File maintained for two years.

E. Complaints against promotable colonels, active or retired GOs, IGs, members of the SES or Executive Schedule employees forwarded to Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 "by rapid but confidential means within 5 calendar days of receipt." AR 600-20, Appendix E-2d.

IV. EO STAFFING.

A. AR 600-20.

1. Commander. Commanders at all levels are the EO Officers for their commands. AR 600-20, para. 6-2g.

2. Equal Opportunity Advisor (EOA).

a. Role. EOA's are "agents for cultural change" and the eyes and ears for the commander. The are responsible for understanding and articulating EO policy; assisting the commander with the Consideration of Others Program; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; assessing command climate; developing affirmative action plans; EO training; complaint processing.

b. EOA's may conduct inquiries in accordance with the commander's guidance.

c. Brigade-level or equivalent and higher commands. Primary, full-time duty. Has direct access to commander. Commander must be EO Advisor's rater or senior rater.

d. Density.

(1) Brigade-level and higher units; installations to 10,000 soldiers; base support battalions: SFC (E-7) or higher.

(2) Installations over 10,000 soldiers, and area support groups: MSG (E-8) and SFC.

(3) MACOM: LTC/MAJ, SGM, & MSG.

3. Equal Opportunity Representative.

a. Role. Assists commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations.

b. Assigned to battalion and company size organizations. Not a full time duty. SSG or SFC is typical, but can be SSG – 1LT.

V. EEO COMPLAINT PROCESS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. References. 29 C.F.R. Part 1614; AR 690-600 (currently under revision).

2. Complaint process.

a. Informal stage: Employee contacts EEO Counselor.

(1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a).

(a) Commencement of 45-day period.

(i) Personnel action--effective date of action.

(ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.

(2) Counselor actions. 29 C.F.R. § 1614.105.

(a) Initial interview.

(i) Advise complainant.

(ii) Gather facts from complainant.

(iii) Identify primary agency witness(es) .

(b) Counselor inquiry, including interview with primary agency witnesses.

(c) Final interview.

(i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the agency has a precomplaint dispute resolution program and the employee agrees to participate in it. 29 C.F.R. § 1614.105(d)-(f).

(ii) Notice of right to file formal complaint.

(d) Final report.

(e) Identity of complainant. EEO Counselor does not reveal without complainant's consent. 29 C.F.R. § 1614.105g.

b. Formal stage.

(1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b).

(a) Timing--within 15 days of final interview with EEO Counselor.

(b) After acceptance, the agency may dismiss the complaint:

(i) If complainant files suit in federal court.

(ii) If complainant fails to prosecute or the issue is moot.

(iii) If complainant did not meet time limits.

(iv) If complaint has already been raised using the grievance procedure or in appeal to the Merit Systems Protection Board.

(v) If complainant is found to be misusing the EEO process.

(c) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(e) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).

(d) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).

(i) Request a final agency decision from the agency head based on the record.

(ii) Request a hearing and decision from administrative judge from EEOC.

(iii) File suit in federal District Court if no final agency decision has yet issued and 180 days has elapsed since filing complaint.

(2) EEOC hearing. 29 C.F.R. § 1614.109.

(a) Hearing procedures.

(i) Evidence. 29 C.F.R. § 1614.109(f). Documentary and testimonial.

(ii) Witnesses. Direct evidence, not unduly repetitious, under oath.

(iii) Alternatives to testimony. Written statements (sworn), video teleconference, phone testimony.

(b) Record of hearing. 29 C.F.R. § 1614.109(h). Agency pays for verbatim transcripts.

(c) Decisions. 29 C.F.R. § 1614.109(i). The administrative judge (AJ) must issue a decision on the complaint within 180 days of the request for hearing.

c. Final orders. The agency must issue a final order within 40 days after receiving the administrative judge's decision and hearing file. The order must state whether or not the agency will fully implement the decision. If the order states that the agency will not, the agency must file an appeal with the EEOC at the same time as it issues its final order (within 40 days of receiving judge’s decision). 29 C.F.R. § 1614.110, § 1614.401.

d. Complainant’s Appeal to EEOC. An appeal of the final agency order must be filed with the EEOC within 30 days. 29 C.F.R. § 1614.401, § 1614.402.

e. Remedial actions.

(1) Nondiscriminatory placement.

(2) Back pay.

(3) Compensatory damages up to $300,000.

(4) Fees and costs.

f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.

(1) Representation. Complainants have the right to be accompanied, represented, and advised by a representative of their choice at any stage of the EEO complaint process.

(2) Official time. Complainants get reasonable amount of official time to prepare and attend. Witnesses are in duty status when testifying (as required by administrative judge). If Complainant's representative is Federal employee (i.e., union rep), the representative gets reasonable amount of official time to prepare, but if representation conflicts with work duties, representative may be disqualified. 29 C.F.R. § 1614.605(c). The agency does not have to change work schedules or incur overtime wages for Complainant's or the representative's preparation time.

VI. 10 USC § 1561 INVESTIGATION PROCESS FOR COMPLAINTS OF SEXUAL HARASSMENT.

A. Action when military member alleges sexual harassment:

[See directive-type memorandum from Assistant Secretary of Defense for Force Management, SUBJECT: DoD Interim Policy for Implementation of 10 U.S.C. 1561, Sexual Harassment Investigations and Reports, dated February 25, 1998.]

1. The DoD policies and procedures governing investigating and reporting sexual harassment complaints shall be used. Therefore, the provisions of AR 600-20 (EO Complaint Process), detailed above, will apply.

B. Action when DoD civilian alleges sexual harassment:

[See directive-type memorandum from Assistant Secretary of Defense for Force Management, SUBJECT: Interim Policy for DoD Implementation of 10 U.S.C. 1561: Sexual Harassment Investigations and Reports for Civilian Employees of the Military Services, dated February 9, 1999.]

1. Establish a separate POC on the installation to handle 10 USC §1561 complaints. That person should be separate from the EEO Officer to avoid any perceived conflict-of-interest issues.

2. The 1561 POC shall, within 48 hours after initial contact by an aggrieved person, submit in writing as detailed a description as possible of the allegation to the appropriate commanding officer or military officer-in-charge.

3. Within 72 hours of receipt of written notification from a 1561 POC, a commanding officer, or officer-in-charge shall

   a. Forward the complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial;

   b. Commence, or cause the commencement of, an investigation of the complaint; and

   c. Advise the complainant of the commencement of the investigation.

C. Duration of investigation.--To the extent practicable, a commanding officer shall ensure that the investigation of the complaint is completed not later than 14 days after the date on which the investigation is commenced.

1. If it is not practical to complete the investigation in 14 days, the commanding officer shall submit a report on the progress made in completing the investigation to the General Court-Martial Convening Authority within 20 days of the start of the investigation and every 14 days thereafter until it is completed.

D. Report on investigation.--To the extent practicable, a commanding officer receiving such a complaint shall--

1. Determine if the allegations have been substantiated within 3 days of receipt of the investigation report;
2. Notify the aggrieved person in writing within 6 days of receipt of the investigation findings of the investigation findings, the decision made on substantiation of the allegations and the decision on corrective action taken or proposed;
3. Submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the General Court-Martial Convening Authority (within 20 days from the start of the investigation, if practicable).

E. If the aggrieved civilian employee raises the complaint with the EEO Office rather than with the 1561 POC, the EEO Counselor should determine if the civilian employee is *directly* supervised by a military commanding officer of military officer-in-charge.

1. If not, the EEO Counselor will continue with the EEO procedures of 29 C.F.R. §1614 (discussed above).

2. If so, the EEO Counselor will advise the civilian employee of the 1561 POC and inform the civilian employee that he or she must contact the 1561 POC in order to file a complaint under those provisions. The EEO Counselor shall then continue processing the complaint under the EEO procedures of 29 C.F.R. §1614 (discussed above).

VII. SANCTIONS FOR SEXUAL HARASSERS.

A. Military members.

1. Administrative action.

2. Action under the Uniform Code of Military Justice (UCMJ).

B. Civilian employees.

1. May be subjected to administrative discipline in accordance with the Army Table of Penalties (AR 690-700, chap 751, Table 1-1).

2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984).

VIII. LIABILITY.

A. Agency Liability. The Army may be liable for sexual harassment by its military or civilian employees.

1. Sexual Harassment by Supervisor.

a. Tangible Employment Action Case. If the harassment is by the employee's supervisor and results in a tangible employment action, the agency is strictly, or automatically, liable under Title VII. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

b. Hostile Environment Case. If the harassment is by the employee's supervisor, does *not* result in a tangible employment action, but is so offensive as to alter the employee's conditions of employment, the agency is liable under Title VII *unless*:

(1) The agency shows it exercised reasonable care to prevent or correct promptly any sexually harassing behavior, and

(2) The agency shows the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the agency or to avoid harm otherwise. Ellerth, 118 S.Ct. at 2270.

Note: This 2-prong test is an affirmative defense subject to proof by a preponderance of evidence.

2. Sexual Harassment by Non-Supervisor (Co-Worker). If the harassment is by the employee's co-worker, the agency is only liable if the agency knew or should have known of the harassing conduct and failed to take prompt and effective corrective action.

3. A published procedure for handling sexual harassment complaints, disseminated to the workforce, and suitable to the employment circumstances may be sufficient to show that the agency exercised reasonable care to prevent and promptly correct sexually harassing behavior. Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

4. The Civil Rights Act of 1991 permits federal civilian employees who prove intentional discrimination to recover up to $300,000 in compensatory damages for future pecuniary losses, emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life.

B. Personal liability. Agency officials may be sued in their individual (personal) capacities and held personally liable for sexual harassment.

1. Agency officials, including members of the Armed Forces, who are sued for common law torts are entitled to immunity under the Westfall Act so long as the alleged tort was committed *within the scope of their employment.* Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. § 2671, 2674, 2679). However, sexual harassment is not within the scope of employment.

a. Wood v. United States, 995 F.2d 1122 (1st Cir. 1993) (Army officer sued in individual capacity for common law torts arising from claims of sexual harassment was not acting within scope of employment and therefore was not entitled to immunity under Federal Employees Liability Reform and Tort Compensation Act). Accord McHugh v. University of Vermont, 758 F. Supp. 945 (D. Vt. 1991), aff'd, 966 F.2d 67 (2d Cir. 1992). Turner v. United States, 595 F. Supp. 708 (W.D. La. 1984) (National Guard recruiter found to be acting outside the scope of his employment in conducting complete physical examinations of female applicants).

2. The statutory immunity provided by the Westfall Act requires that Department of Justice certify that the actions of the agency official were within the course and scope of employment. This certification can be challenged in court.

a. Mackey v. Milam, 154 F.3d 648 (6th Cir. 1998) (Certification by United States Attorney under Westfall Act that federal employee was acting within scope of his employment does not conclusively establish as correct the substitution of United States as defendant in place of the employee, but provides prima facie evidence that the employee was acting within scope of his employment. Under the Westfall Act, whether a federal employee was acting within the scope of his employment is a question of law made in accordance with the law of the state where the conduct occurred.)

3. *Feres* doctrine bars common-law tort suits by service members against superiors in personal capacity for actions that arise incident to military service. *See generally* Feres v. United States, 340 U.S. 135 (1950).

4. *Bivens* claims for constitutional torts not generally actionable by service members, because courts consistently find that special factors (e.g., military discipline) counsel hesitation or that Congress intended another remedy (e.g., UCMJ) to be exclusive. *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and Chappell v. Wallace, 462 U.S. 296 (1983). The constitutional claim must arise "incident to service." Id.

IX. CONCLUSION.

"Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982).

CHAPTER 17

ADMINISTRATIVE INVESTIGATIONS

SENIOR OFFICER LEGAL ORIENTATION COURSE

I. REFERENCES.

A. 10 U.S.C. § 1034 [Military Whistleblower Act].

B. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note) [Family Presentation Requirements in Fatality Cases].

C. DoDD 7050.6, Military Whistleblower Protection, 23 June 2000.

D. DODI 6055.7, Accident Investigation, Reporting, and Record Keeping, 3 October 2000.

E. AR 15-6, Procedure For Investigating Officers and Boards of Officers, 11 May 1988 (w/ change 1, 30 Sep 96).

F. AR 20-1, Inspector General Activities and Procedures, 29 March 2002.

G. AR 385-40, Accident Reporting and Records, 1 December 1994.

H. AR 600-20, Army Command Policy, 13 May 2002.

I. AR 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin, 2 January 2003.

II. INTRODUCTION.

A. A senior commander should be familiar with several types of military investigations.

B. This outline will discuss the following investigations:

1. Rule for Courts-Martial (R.C.M.) 303 Inquiries.

2. AR 15-6 Investigations.

3. Inspector General Investigations.

4. Military Whistleblower Investigations.

5. Accident Investigations.

6. Family Presentations.

7. Evaluation Reports.

8. Article 138 Complaints.

C. Aside from the brief discussion of R.C.M. 303 inquiries, this outline does not discuss criminal investigations.

III. R.C.M. 303 PRELIMINARY INQUIRY.

A. If a commander receives information that a member of his or her command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander is required to make or cause to be made a preliminary inquiry into the charges or suspected offenses.

B. Not the same as an Article 32 (UCMJ) investigation.

C. The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should normally seek the assistance of MPI/CID.

D. The commander should gather all reasonably available evidence on:

1. Guilt or innocence;

2. Aggravation; and

3. Extenuation and Mitigation.

E. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general courts-martial [R.C.M. 504(c)(1)]. Therefore, any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and prefer charges, if necessary.

IV. AR 15-6 INVESTIGATIONS.

AR 15-6, Procedure For Investigating Officers And Boards Of Officers (11 May 88, w/ch1, 30 Sep 96**).**

A. FUNCTION. To ascertain facts, make recommendations, and report them to the appointing authority.

B. APPLICABILITY. AR 15-6 establishes procedures for investigations and boards of officers not specifically authorized by any other regulation. It may also be made applicable to investigations or boards that are authorized by another regulation, by specific provision of that regulation (e.g., enlisted administrative separation board procedures under AR 635-200).

C. TYPES OF AR 15-6 PROCEDURES: FORMAL OR INFORMAL.

1. Formal (Chapter 5, AR 15-6).

a) Requires a board hearing and provides extensive due process rights for named respondents. Also requires a president with voting members, recorder, notice to respondent with right to counsel, challenges for cause, and entitlement to be present at all open sessions, put on evidence, cross-examine witnesses, and make argument.

b) Example: An enlisted administrative separation board conducted under AR 635-200 is a formal AR 15-6.

2. Informal (Chapter 4, AR 15-6).

a) May be used to investigate individual conduct. Para 1-6: "The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual." Para 1-4b(2): <u>Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual</u>, formal procedures are not mandatory unless required by other regulations or by higher authority.

b) Great flexibility.

(1) Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. No respondents are designated and no one is entitled to the rights of a respondent.

(2) An informal investigating officer (IO) may use whatever method he or she finds most efficient and effective for acquiring information. The IO may obtain witness testimony by personal interview, correspondence, telephone inquiry, or other informal means. Proceedings are not open to public; there is no right to counsel unless required by Art 31(b), UCMJ; and witnesses have no right to cross-examine.

c) Selection of Procedure. In deciding whether to use informal or formal procedures, the appointing authority should consider:

(1) Purpose of the inquiry;

(2) Seriousness of the subject matter;

(3) Complexity of issues involved;

(4) Need for documentation; and

(5) Desirability of providing a comprehensive hearing for persons whose conduct or performance of duty is being investigated.

D. APPOINTING AN INFORMAL 15-6.

1. Authority. A commander at any level or a principal staff officer or supervisor in the grade of major or above. Change 1 authorizes GS-14 agency head or division chief to appoint either formal or informal. An appointing authority can ratify the appointment of an IO. In other words, the decision of an official who lacks the authority to appoint an AR 15-6 IO can be ratified by an official with the authority to appoint an IO.

2. Method. May be oral or written appointment. A written memorandum of appointment is preferred and an oral appointment should be confirmed in writing. Appointment should specify purpose and scope of investigation and nature of findings and recommendations required. The command's Judge Advocate, and other appropriate staff, should assist in drafting the appointment memorandum.

3. Choosing the Investigating Officer.

a) Commissioned/Warrant Officer/GS-13, senior to soldier whose conduct is under investigation; **best qualified** by reason of education, training, experience, length of service and temperament.

b) The IO **must consult with OSJA for legal guidance before beginning an informal investigation**. IO should continue to consult with OSJA during the entire investigation process, including the development of findings and recommendations.

E. SPECIAL CASES.

1. Only a GCMCA can appoint an AR 15-6 investigation if:

a) Property damage of $1M or more;

b) Loss or destruction of Army aircraft or missile; or

c) Injury or illness likely to result in death or permanent total disability.

2. Investigation into fratricide/friendly fire incident must be forwarded after action by the appointing authority to next higher Army HQs for review.

F. CONDUCTING THE INVESTIGATION.

1. Appointment Memorandum. The appointment memorandum should contain sufficient information to enable the IO to begin developing an investigative plan.

a) It should direct the IO to immediately set a briefing with the advising judge advocate to understand the rules and legal concerns of AR 15-6 investigations and to develop an investigation plan.

b) It should clearly set forth the purpose of the investigation and the suspense for completing the investigation.

c) It should outline the specific facts that the IO needs to find based on the allegations (e.g., determine whether CPT Smith fraternized with PFC Jones) and require the IO to provide recommendations.

G. FINDINGS AND RECOMMENDATIONS.

1. Findings.

a) Clear concise statement of fact readily deduced from evidence in the record, including negative findings. The findings should not exceed the scope of the appointment. The findings should refer to the evidence gathered in the investigation such as Statement of LTC __, or Photograph 1 at TAB C.

b) Standard is preponderance of evidence: more likely than not; greater weight of evidence than supports a contrary conclusion. Weight not determined by the number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, other indications of credibility.

c) The IO should work with his or her legal advisor to develop the findings based on the facts as found during the investigation and the commander's appointment memorandum.

2. Recommendations. The recommendations must be consistent with the findings. They can be negative, e.g., no further action taken. They must be supported by the record of investigation.

H. ACTION BY APPOINTING AUTHORITY.

1. Options.

a) Approve as is.

b) Disapprove, and/or return for additional investigation. May consider all relevant information, even information not considered by IO. The command may take action less favorable than that recommended.

c) Substitute Findings and Recommendations. Unless otherwise provided by another directive, appointing authority is not bound by findings or recommendations of the IO, but may substitute his or her own findings and recommendations.

2. Legal review before action by appointing authority. Legal reviews are required:

a) In serious or complex cases, such as where the incident being investigated resulted in death or serious bodily injury; or

b) Where findings and recommendations may result in adverse administrative action or will be relied upon by higher HQs.

I. USING INFORMAL AR 15-6 REPORTS OF INVESTIGATION TO SUPPORT ADVERSE ADMINISTRATIVE ACTION

1. A commander may not take adverse administrative action based on an informal AR 15-6 investigation until:

a) **Notice** is given to the subject of the investigation of the allegations. The subject is given a copy of the investigation subject to any redactions required.

b) The subject is given a **reasonable opportunity to rebut** the allegations.

c) The **Commander must consider the subject's rebuttal** to the investigation, if submitted in a timely manner, **before taking any adverse action**.

2. These safeguards may already exist if the adverse administrative action process itself provides them. However, when there are no such safeguards, following this process provides important practical and legal benefits. The federal courts have routinely upheld adverse administrative actions based on an AR 15-6 investigation against military members as long as the subject received notice, a chance to rebut the allegations, and command consideration of the rebuttal prior to the adverse action taking place.

J. RELEASE OF AR 15-6 INVESTIGATIVE REPORTS AND MATERIALS.

AR 15-6 documents hold no special, automatic status under either the Privacy Act or the Freedom of Information Act. The individual parts of a report of investigation must be analyzed under both laws to determine suitability for release. No part of a report should be released (unless specifically authorized by law or regulation) without the approval of the appointing authority.

V. INSPECTOR GENERAL INVESTIGATIONS. AR 20-1, Inspector General Activities and Procedures, 29 Mar 02.

A. TWO TYPES OF IG INVESTIGATIVE MECHANISMS.

1. Investigative inquiries. Informal fact-finding process to gather information needed to resolve allegations or issues when investigative techniques are appropriate but circumstances do not merit an IG investigation. Inquiries conducted into "improprieties." If inquiry develops evidence to substantiate misconduct, inquiry ends---matter may be referred to CID, or commander may appoint AR 15-6 investigation, or, in rare instances, it may become an IG investigation. Only substantiated inquiries need to have a written legal review.

2. Investigations. Fact-finding examination by detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Normally addresses allegations of wrongdoing by an individual. IG must obtain written directive by appointing authority. Written legal review required. Verbal notification required of the commander/supervisor of nature of allegations against the subject/suspect, and verbal notification of the results to commander/supervisor. Should <u>not</u> contain recommendations for adverse action against suspect/subject.

3. IGs should not normally investigate when substantiation of allegations are likely to establish criminal misconduct or likely to result in adverse action against individual.

B. Benefits. Trained, thorough investigators; keeps matter in-house, at least to start with; useful when there is no skilled, sufficiently senior AR 15-6 IO available. Disadvantages: restrictions on releasing reports of investigation; cannot use evidence for adverse action without TIG authorization; may be necessary to duplicate IG work with AR 15-6 to obtain usable evidence.

C. Release of IG Records.

1. IG records are available within DA for those having need for the record "in the official performance of their duties." AR 20-1, para. 3-6.

2. IG investigations and inquiries may be reviewed by HQDA command and promotion boards.

3. Records of unsubstantiated IG complaints will normally be retained for three years after the case is closed (longer in some circumstances in cases against senior officials).

D. Special reporting and investigating requirements.

1. Allegations against field grade officers and senior NCOs. IGs must report to TIG any Inspector General Action Request (IGAR) containing an allegation against a MSG, SGM, and CSM, or any officer in the grade of MAJ through COL within 2 working days after receipt, if the allegation resulted in the initiation of an IG investigation or investigative inquiry or a command-directed action such as an AR 15-6 investigation, commander's inquiry, or referral to USACIDC.

a) AR 600-8-29, Officer Promotions, establishes a requirement for a review of IG records in conjunction with senior officer promotion boards. Paragraph 1-15 provides for post-board screening of officers selected for promotion to colonel. A board reviews any adverse information in files, including DAIG files, and the derogatory information may be presented to a promotion review board to reevaluate the recommendation for promotion.

b) Other IG records reviews are conducted at the direction of senior Army leaders. DAIG Assistance Division is the proponent for post selection board review of IG records for other than General Officers and members of the SES. The intent of these requirements is to ensure the selection of the best leaders and commanders, to consider information not available to the original board, and to protect the rights of individuals.

2. Allegations against GO, BG selectee, SES or equivalent.

a) All must be reported to DAIG. Investigation by DAIG or (rarely) DODIG.

b) All allegations, whether eventually substantiated or unsubstantiated, are maintained in database, for use during background checks.

c) A General Officer may receive a Memorandum of Reprimand based upon a DAIG Investigation (ROI). The reprimand must be authorized by the SA, US of A, CSA, VCSA, or TIG. AR 20-1, para. 3-3.

3. Adverse comments: If unfavorable information is obtained which may result in an adverse comment in the ROI and the individual is not informed of unfavorable information during investigation, the IG must advise the individual of the substance of the investigation before it is completed and provide an opportunity to comment on unfavorable information.

VI. MILITARY WHISTLEBLOWER PROTECTION ACT. Title 10, U.S. Code, sec. 1034; DoDD 7050.6, Military Whistleblower Protection, 23 Jun 00; AR 20-1, Inspector General Activities and Procedures, 29 Mar 02; and AR 600-20, Army Command Policy, 13 May 02).

A. No person may:

1. Restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

2. Take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a protected communication (described in subparagraph B, below), made to a member of Congress, an IG, a member of a DoD audit, inspection, investigation, or law enforcement organization, an Equal Opportunity Office, or to the service member's chain of command or supervisor.

B. A "protected communication" is a communication in which a soldier complains of, or discloses information that the soldier reasonably believes constitutes evidence of, any of the following:

1. A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination; or

2. Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety.

C. Authority to Investigate and Act on Complaints of Reprisal.

1. TIG has limited the authority to MACOM and higher level IGs to investigate allegations of individuals taking or threatening to take unfavorable personnel actions or withholding or threatening to withhold favorable personnel action as reprisal against a member of the Armed Forces for making or preparing a protected communications. (AR 20-1, paragraph 8-9c(1))

2. If a soldier makes a reprisal allegation, the IG must contact DAIG Assistance Division within 2 days. Based on the coordination with DAIG, the DAIG will formally advise IG, DoD of the complaint.

3. The IG, DoD is the final approval authority for cases involving allegations of whistleblower reprisal.

VII. ACCIDENT INVESTIGATIONS. AR 385-40, Accident Reporting and Records, 1 Nov 94.

A. SAFETY INVESTIGATIONS. There are two types of safety investigation reports: limited use reports and general use reports.

1. Limited Use Safety Accident Investigation Reports. These are close-hold, internal communications of DA whose SOLE purpose is prevention of subsequent DA accidents.

a) They are required for all flight and fratricide/friendly fire accidents. They also may be used for accidents involving other complex weapon systems, equipment, or military-unique items, and military unique equipment/operations/exercises when the determination of causal factors is vital to the national defense with approval of Cdr, USASC.

b) These reports cannot be used as evidence or to obtain evidence for disciplinary action, in determining the misconduct or line-of-duty status of any person, before any evaluation board, or to determine liability in administrative claims for or against the government.

c) Witnesses may be given the option of making their statement under a promise of confidentiality if they are unwilling to make a complete statement without such a promise and the investigation board believes it is necessary to obtain a statement from a witness.

2. General Use Safety Accident Investigation Reports. These reports are prepared to record data concerning all recordable DA accidents not covered by the limited use safety accident investigations. These reports are intended for accident prevention purposes also and cannot be used for administrative or disciplinary actions. In these cases, promises of confidentiality cannot be made that information will be treated as exempt from mandatory disclosure in response to a request under the FOIA.

B. COLLATERAL ACCIDENT INVESTIGATION. AR 385-40, para. 1-8.

1. This type of investigation is prepared:

a) For all Class A accidents (Army accident in which the resulting total cost of property damage is $1 M or more; an Army aircraft or missile is destroyed, missing, or abandoned; or an injury and/or occupational illness results in a fatality or permanent total disability);

b) As directed by the SJA under the claims regulation;

c) On accidents where there is a potential claim or litigation for or against the government or government contractor; or

d) On accidents with a high degree of public interest or anticipated disciplinary or adverse administrative action.

2. These investigations are used to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative action. Such investigations often parallel the safety investigation.

a) Investigators must work with their legal advisor on obtaining facts, e.g., names of witnesses (but not witness statements), and physical evidence from the safety investigation team.

b) Only factual information may be made available to the collateral investigation; Safety Board experts are prohibited from giving their opinions of what caused the accident to collateral investigators

c) No requirement to follow AR 15-6 procedures, but a good idea.

3. It is <u>improper</u> to use statements and expert opinions developed through the safety investigation in the collateral investigation.

VIII. FAMILY PRESENTATIONS IN FATAL TRAINING/OPERATIONAL ACCIDENTS.

A. Congressional Requirement. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note).

1. Requires the Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to family members.

2. Within a reasonable period of time after the family members are notified of the death, but not more than 30 days after the date of notification, the Secretary must:

a) In any case under investigation, inform the family members of the names of the agencies conducting the investigation and of the existence of any reports by such agencies that have been or will be issued; and

b) Furnish, if the family members desire, a copy of any completed investigative report to the extent such reports may be furnished consistent with the Privacy Act and the Freedom of Information Act.

B. ARMY IMPLIMENTATION. ar 600-34, Fatal Training/Operational Accident Presentations to the Next of Kin, 2 January 2003.

1. Key definitions.

a) *Fatal training accidents* include those accidents associated with non-combat military exercises or training activities that are designed to develop a soldier's physical ability or to maintain or increase individual/collective combat and/or peacekeeping skills.

b) *Fatal operational accidents* are those deaths associated with active duty military exercises or activities occurring in a designated war zone or toward designated missions related to current war operations or Military Operations Other Than War, contributing directly or indirectly to the death.

c) *Primary Next of Kin.* The legal next of kin. That person of any age most closely related to the individual according to the line of succession. Seniority, as determined by age, will control when the persons are of equal relationship.

d) *Family member*.

(1) Spouse.

(2) Unmarried child of a sponsor, including an adopted child, step child, foster child, ward, who either: (1) has not passed his/her 21st birthday; (2) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is (or was at the time of the member's or former member's death) in fact dependent on the sponsor for over one-half of his/her support; (3) has not passed his/her 23rd birthday, is enrolled in a full-time course of study in an institution of higher learning and is in fact dependent on the sponsor for over one-half of his/her support.

(3) A parent or parent-in-law of a sponsor who is in fact dependent on the sponsor for one-half of his/her support and residing in the sponsor's household.

2. Presentations are required for:

a) All fatal training/operational accidents investigated under AR 15-6, AR 385-40, and AR 600-34.

b) Special interest cases or cases in which there is probable high public interest, as determined by TAG;

c) All suspected cases of Friendly Fire; and

d) In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

(1) *Hostile deaths* are defined as a death caused by terrorist activity or "in action."

(2) *In action* characterizes death as having been the direct result of hostile action, sustained in combat or related thereto, or sustained going to or returning from a combat mission provided that the occurrence was directly related to hostile action.

3. Updates to PNOK. If the appointing/approval authority grants an extension of the 30-day requirement to complete the collateral investigation, the approval authority is responsible for the release of status information from the investigation to the PNOK.

a) The approving authority's legal office must review each update to ensure that it contains no admission of liability, waiver of any defense, offer of compensation or any statement that might jeopardize the Army's litigation posture.

b) The update is then given to the Casualty and Memorial Affairs Operation Center (CMAOC) who will instruct the Casualty Affairs Officer (CAO) on its delivery to the PNOK.

4. Preparing the presentation to the PNOK.

a) Once the investigation is complete, TAG contacts the collateral investigation appointing/approval authority to coordinate appointment of the briefer who is “most often the deceased soldier’s colonel or brigade level commander.”

b) Within 24-hours of completion of the investigation, the CAO must inform the PNOK that the Army is prepared to discuss the results of the investigation with the family. Presentations are offered to adult PNOK (18 years of age or older); for PNOK under 18, the adult custodian must decide the PNOK’s ability to receive a face-to-face briefing.

(1) In single-family presentation cases, the CMAOC coordinates the written statement of offer (SOO) to provide a presentation through the CAO for delivery to the PNOK.

(2) Accident presentations requiring the offer of multiple family presentations will be official offered via a formal letter of offer (LOO) mailed to the PNOK within 24 hours following the collateral investigation report.

(a) The CAO then follows up with the PNOK to arrange for the presentation date and forward the preferred dates (primary and secondary) to the CMAOC.

(b) The CMOAC must develop a proposed presentation schedule for all PNOK, accommodating family preferences to every extent possible.

(3) The SOO/LOO must:

(a) Inform the PNOK that the collateral investigation is complete.

(b) Provide a timeframe for the presentation (usually between 21-25 days from the date the collateral investigation was approved). The goal for multiple briefings is to schedule them within a 3-day window.

(c) Identify the briefer, and provide the name of the CAO with instructions for accepting or declining and scheduling the presentation.

c) Briefing Team.

(1) At a minimum, the briefing team must consist of the briefer, the family's CAO, and a chaplain from the mishap unit.

(2) The briefer must consider including the SJA or legal advisor or PAO representative when it is apparent that a family has invited, or may invite, the local media or a family legal representative will attend the presentation.

(a) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the family's intent to invite media or legal representation.

(b) NOTE: The Army is prohibited from putting conditions or limitations upon those whom the family wishes to invite to the presentation.

(3) The briefer must also consider including an interpreter if the PNOK or other attending family members do not understand English.

d) Duties and responsibilities prior to the briefing.

(1) The briefer must prepare and conduct training sessions and rehearsals for the presentation team.

(2) The briefer must obtain a summarized copy of the autopsy report and provide it to the briefer for delivery to the PNOK at the time of the presentation.

(a) If the PNOK does not which to receive an autopsy report, it won't be left with the PNOK.

(b) Otherwise, the briefer must explain that the autopsy does not contain graphics but is very detailed and is provided in a sealed envelope. The briefer must also recommend that when they are ready to review the report, they do so in the presence of a medical person able to explain the terminology.

(c) There is no intent for the autopsy report to be opened or discussed during the presentation.

(3) The CAO must provide a written summary of the current health and well being of the family, describing their emotional, mental, and physical health; the family's relationship with friends and other significant support groups; the current living arrangements; and any outstanding issues the family has with benefits and entitlements.

(4) The CAO must conduct a reconnaissance of the area where the presentation will be conducted and recommend a hotel in the vicinity for the presentation team.

(a) The CAO must also make hotel and transportation arrangements for the briefing team.

(b) Family members are generally responsible for arranging their own transportation to the briefing location. The policy prohibits the briefing team from traveling with the PNOK family members in a privately owned vehicle.

5. Conducting the Family Presentation.

a) The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following.

(1) An explanation of the unit's mission which highlights the soldier's significant contributions to the mission and the Army;

(2) An accurate account of the facts and circumstances leading up to the accident, the sequence of events that caused the accident, and a very clear explanation of primary and contributing factors causing the accident as determined by the collateral investigation.

(3) Actions taken at the unit level to correct any deficiencies.

b) The most favored choice for the presentation is the PNOK's home.

c) Style of presentation.

(1) Dialogue with no notes but with maps and diagrams of training areas. This works best for a briefer who is intimately familiar with the accident and investigation.

(2) Bullet briefing charts. These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

(3) Simple notes and an executive summary. Written materials must be reviewed and approved by the SJA and copies should be left with the PNOK if requested.

d) If a family presentation must proceed with a legal representative present, but without Army legal advice, the briefer must inform the PNOK that the presentation is strictly intended to provide information to the family. If the attorney has a list of questions for the family to ask, the briefer must offer to take the questions back to the servicing SJA to obtain complete answers. The SJA may then follow up directly with the PNOK.

6. Completion of Family Presentation. Within two weeks of the presentation, the briefer must submit an AAR through the appointing authority and MACOM to the TAG.

7. SJA Requirements.

a) The OSJA is required to review the presentation to ensure that it contains no admission of liability, waiver of any defense, offer of compensation, or any other statement that might jeopardize the Army's litigation posture. This may include review of briefing charts, notes, and executive summaries.

b) The SJA or legal advisor must provide a non-redacted copy of the collateral investigation report to CMAOC.

c) The regulation is not intended to provide the PNOK with information not otherwise releasable under the Privacy Act or the Freedom of Information Act.

(1) The SJA must redact the collateral investigation report and prepare the required number of copies. At a minimum, the briefer, each team member, and each PNOK will be given a redacted copy.

(2) The SJA also must prepare a letter to accompany the redacted version of the report delivered to the family and will explaining, in general terms, the reasons for the redactions.

8. Release of the Collateral Investigation. The collateral investigation will be released in the following order:

a) PNOK and other family members designated by the PNOK;

b) Members of Congress, upon request; and

c) Members of the public and media.

IX. EVALUATION REPORTS. AR 623-105, Officer Evaluation Reporting System, paragraph 6-3 (1 Apr 98); AR 623-205, Noncommissioned Officer Evaluation Reporting System, paragraph 6-3 (15 May 02).

A. A commander is required to look into an OER/NCOER given by a subordinate or member of a subordinate command when it comes to the commander's attention that the report may be illegal, unjust, or otherwise violate regulation. The commander's inquiry is confined to matters relating to the clarity of the report, its facts, compliance with regulation, and conduct of rated soldier and members of rating chain.

B. The inquiry is by the commander in the chain of command above the designated rating officials involved in the allegations. NCOER: commander (major or above). May appoint an officer senior to designated rating officials involved in allegations to make inquiry.

1. As formal or informal as commander thinks appropriate to include telephone and personal discussions. Not an AR 15-6 investigation generally.

2. Primary purpose is to provide a greater degree of command involvement in preventing injustices and errors before they become a matter of permanent record. May also occur after report is accepted at DA but not intended to substitute for appeal.

C. A commander does not have the authority to direct that the evaluation be changed and may not use command influence to alter the rating officials evaluations. The commander may, however, provide results of a commander's inquiry to the rating chain.

X. ARTICLE 138 COMPLAINTS. Art. 138, UCMJ; AR 27-10, Military Justice, chapter 20 (6 Sep 02)**.**

1. A complaint submitted by a soldier for any discretionary act or omission by a commanding officer, under color of Federal military authority, that adversely affects the complainant personally, and that is:

a) A violation of law or regulation;

b) Beyond the legitimate authority of that commanding officer;

c) Arbitrary, capricious, or an abuse of discretion; or

d) Materially unfair.

2. Before submitting a complaint under Article 138, a soldier must make a written request for redress of the wrong to the commanding officer the soldier believes has wronged him or her. The commanding officer must respond, in writing, within 15 days; if not possible, the commander must provide an interim response indicating the estimated date of a final response.

3. A soldier must submit an Article 138 complaint to the soldier's immediate superior commissioned officer within 90 days of the date of complainant's discovery of the alleged wrong, excluding any period during which the request for redress was in the hands of the respondent.

4. The commanding officer must forward the complaint to the general court-martial convening authority (GCMCA). If the complaint is appropriate for redress under Article 138, the GCMCA must examine into the complaint. The examination may be delegated and, if so, the investigation will be conducted under AR 15-6. Generally, an action is inappropriate subject for resolution under Article 138 procedures when:

a) Review is provided by the UCMJ or the action is otherwise reviewable by a court;

b) It is taken pursuant to the recommendation of a board authorized by Army regulation to which the complainant was afforded substantial rights of a respondent; or

c) Army regulations specifically authorize an administrative appeal.

5. Once completed, the GCMCA must forward the complaint to HQDA (TAJAG), who will review the complaint on behalf of the SA.

XI. CONCLUSION.

CHAPTER 18

ENVIRONMENTAL LAW

Outline of Instruction

"The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission"

--Vision

I. INTRODUCTION.

II. FOUR PILLARS OF THE ENVIRONMENTAL PROGRAM (ARMY STRATEGY).

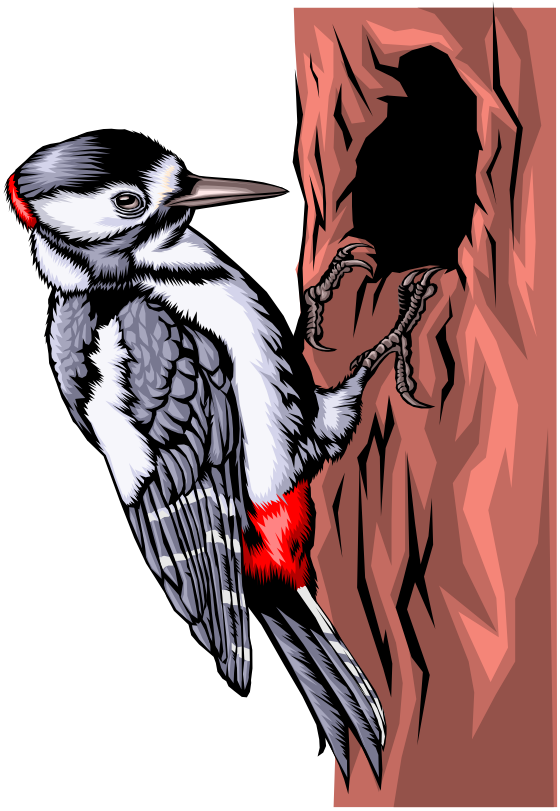
A. Compliance.

1. Ensure current operations comply with all laws.

2. Priority on building environmental staff.

3. Ensure adequate funding and budgeting.

4. Build relations with regulators and public.



MAJ JAMES H. ROBINETTE, II

a. Partners in compliance.

b. Resolve violations quickly.

5. Explore innovative technologies; share with others.

B. Restoration.

1. Clean up contaminated sites.

2. Protect human health and the environment.

3. Prioritize sites and resources.

4. Move dirt—not paper.

C. Prevention.

1. Minimize contamination and pollution.

2. Analyze life cycle costs of weapons systems.

3. Systematically eliminate hazardous materials use (unless we really need it).

4. Instill pollution prevention ethic.

D. Conservation.

1. Conserve, protect, and enhance environmental, natural, and cultural resources for future generations.

2. Instill conservation stewardship ethic.

3. Balance mission with land and natural resources.

III. ENVIRONMENTAL LAW—BASIC PRINCIPLES.

A. Sovereign immunity has largely been eliminated. Stateside federal facilities are now largely treated like any other part of the regulated community.

B. States have authority over federal activities.

C. Strict liability is the guiding principle.

D. No automatic national defense exemptions. Exemptions are available, but they usually require a Presidential or Secretary of Defense finding of necessity, and are rarely invoked.

E. Traditional legal defenses have been abolished.

F. No direct application of U.S. laws to overseas operations. DoD has, however, decided to apply many U.S. standards via **DoD Instruction 4715.5**, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).

1. Applies to all DoD components including the Unified Combatant Commands.

2. Explicitly does not apply to:

   a. the operations of U.S. military vessels or aircraft.

   b. off-installation operational and training deployments.

   c. determination or conduct of remedial or cleanup actions necessary to correct environmental problems arising from past DoD activities.

3. DoD establishes an overseas "baseline" document. The baseline will consist of standards applicable to similar operations conducted in the U.S. and all U.S. environmental laws with extraterritorial effect.

4. Once developed, the baseline will be compared with existing host nation law to develop country-specific environmental standards (i.e., Final Governing Standards (FGS)). After consultation with the U.S. Diplomatic Mission in the host country, the "Executive Agent" will determine whether to apply baseline standards or host nation standards. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS.

5. Disposal of hazardous wastes in the host country will be limited to instances where:

   a. disposal complies with either the baseline guidance or FGS and is in accordance with any applicable international agreements; or,

   b. disposal complies with either the baseline guidance or FGS and host nation authorities have concurred with disposal in their country.

6. Waivers from applicable standards can be obtained from the Environmental Executive Agent where "compliance with the standards at particular installations or facilities would seriously impair their actions, adversely affect relations with the host nation or would require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or . . . realignment . . .." Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.

IV. ARMY POLICY.

A. References.

1. Army Regulation 200-1, Environmental Protection and Enhancement, 21 February 1997 (an overview of environmental protection programs).

2. Army NEPA Regulation, 32 CFR Part 651, March 29, 2002, replaces Army Regulation 200-2, Environmental Impacts of Army Actions, 23 December 1988 (implementation of the National Environmental Policy Act (NEPA)).

3. Army Regulation 200-3, Natural Resources - Land, Forest and Wildlife Management, 28 February 1995 (sets forth policy and guidance for the management and maintenance of all lands under Army control).

4. Army Regulation 200-4, Cultural Resources Management, 1 October 1998 (sets forth policy and guidance for the management of cultural resources located on lands under Army control).

5. Army Regulation 420-47, Solid and Hazardous Waste Management, 1 December 1984.

B. Environmental Compliance.

1. The installation commander:

a. must ensure compliance with federal, state, and local environmental laws and regulations.

b. must cooperate with federal, state, and local officials in addressing environmental problems.

c. must allow civilian authorities access to the installation to monitor compliance.

2. Key installation personnel.

a. Environmental Coordinator: usually a GS employee in the DPW shop.

b. JAG: the Environmental Law Specialist (ELS) should be consulted before undertaking any major activities in order to allow him or her an opportunity to spot environmental issues in advance.

c. PAO: should be aware of and actively involved in the planning process for all environmentally sensitive activities.

V. AREAS OF ENVIRONMENTAL CONCERN.

A. Environmental Impacts of Federal Actions.

1. Reference. National Environmental Policy Act (NEPA), 42 U.S.C.§§ 4321-4370d.

2. Enforcement authority: the EPA to some extent, but mostly citizen groups and federal courts.

3. Approach: mandatory decision-making procedure, frequently involving public participation.

4. Concerns addressed.

   a. Efficient use of natural and cultural resources.

   b. Protection of endangered plant and animal species.

   c. Protection of historic, scientific, and cultural resources.

   d. Consideration of unquantifiable environmental values.

5. Typical NEPA issues.

   a. Failure to consider environmental impacts prior to undertaking major federal actions.

   b. Failure to consider alternatives to major actions impacting the environment.

   c. Inadequate compliance with NEPA's procedural requirements.

B. Air.

1. Reference. Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q.

2. Enforcement authority: state and local governments, usually by permits to operate pollution facilities.

3. Types of pollution controlled.

   a. Fossil fuel combustion by-products.

   b. Chemicals in smokestack gases.

   c. Hazardous substances (e.g, asbestos dust).

   d. Haze, particles, and smoke.

   e. Chemicals that emit volatile organic compounds (VOCs).

4. Sources of pollution.

   a. Vehicles.

   b. Heating plants.

   c. Industrial operations.

   d. Building demolition and renovation.

   e. Surface coating operations.

   f. Smoke-generating equipment.

   g. Fueling operations.

5. Typical air issues.

a. Solvent degreasers releasing VOCs.

b. CFC/Halons. Lack of proper recovery systems/trained personnel to service refrigerant systems containing CFC/Halons.

c. Asbestos releases during building demolition or renovation operations.

C. Surface Water.

1. Reference. Federal Water Pollution Control Act (Clean Water Act [CWA]) 33 U.S.C. §§ 1251-1387.

2. Enforcement authority: mostly state government, with some federal involvement, through mandatory permits for all effluent discharges.

3. Types of pollution controlled.

a. Discharges into surface waters.

b. Waste products.

(1) Chemicals.

(2) Heat.

c. Stormwater discharges.

4. Sources of pollution.

a. Sewage treatment plants.

b. Waste streams from industrial operations.

c. Accidental spills.

d. Runoff from parking lots.

e. Portable bath and laundry equipment.

5. Typical water issues.

a. Improper discharges into sewer systems.

b. Cleaning vehicles at other than designated washracks.

c. Absence of Spill Prevention Control and Countermeasure (SPCC) Plan.

d. Runoff from parking areas, field training sites.

D. Hazardous Waste.

1. Reference. Resource Conservation and Recovery Act, (RCRA), 42 U.S.C. §§ 6901-6992k.

2. Enforcement authority: federal, state, and local governments, through registration of waste-generating operations and permit requirements.

3. Types of pollution controlled: over 700 chemical compounds, plus waste streams from specified industrial processes.

a. Solvents.

b. Paint.

c. Batteries.

d. Waste streams with chemical components.

e. Used POL.

4. Sources of pollution.

a. Industrial production.

b. Vehicle maintenance operations.

c. Equipment operations.

d. Building maintenance.

5. Control scheme.

a. Regulate generators.

(1) Register with the EPA.

(2) Encourage reduction of waste volume.

(3) Maintain records of hazardous waste produced.

(4) Label all hazardous waste.

(5) Transport and dispose of waste properly.

(6) Remove hazardous waste from the premises within 90 days of generation.

(7) Report irregularities in transportation or disposal.

b. Regulate transporters.

(1) Register with the EPA.

(2) Mandatory safety equipment.

(3) Deliver only to authorized facilities.

(4) Maintain records.

(5) Report and clean up spills.

c. Regulate treatment, storage, and disposal facilities.

(1) Obtain a permit from the EPA or the state.

(2) Comply with strict technological requirements.

(3) Maintain records.

(4) Pay for clean-up costs if materials are <u>ever</u> released into the environment.

d. Typical RCRA related problems to look for at installations.

(1) Failure to label drums that contain hazardous waste.

(2) Failure to include the accumulation start date on drum labels.

(3) Failure to remove the drums within 90 days.

(4) Failure to update training records for hazardous waste personnel.

(5) Failure to update RCRA permits when mission changes add a new hazardous waste stream.

(6) Failure to develop an adequate contingency response plan to deal with releases of hazardous waste.

(7) Failure to maintain proper contingency response equipment at hazardous waste storage areas.

(8) Failure to maintain up-to-date emergency notification rosters for releases of hazardous waste.

e. Abandoned waste site clean-up.

(1) Identify abandoned sites that threaten to release hazardous substances into the environment.

(2) Identify generators who contributed waste to these sites.

(3) Bill the generators for the cleanup costs on a pro rata basis.

E. Protection of Wildlife.

1. Reference. Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544.

2. Enforcement authority: the EPA, US Fish & Wildlife Service, but mostly citizen groups and federal courts.

3. Approach: mandatory protection of "endangered and threatened" species and their critical habitat.

4. Typical ESA issues.

a. Taking of species through construction or training activities.

b. Destruction of critical habitat through construction or training activities.

c. Failure to take adequate measures to conserve endangered species.

F. Historic and Cultural Resources.

1. References.

a. National Historic Preservation Act (NHPA), 16 U.S.C. § 470.

b. Archeological and Historic Preservation Act (AHPA) of 1974, 16 U.S.C. §§ 469-469c-2.

c. Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa-mm.

d. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013.

e. American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996.

2. Enforcement authority: Native American Indians, citizen groups, and federal courts.

3. Approach: mandatory consultation and protection requirements under NHPA and AHPA regarding actions that will adversely affect historic properties; affirmative duties under ARPA to protect archeological artifacts; affirmative duties under NAGPRA to protect and return burial objects and human remains to Native Americans; and consideration and accommodation of Native American Indian religious beliefs under AIRFA.

4. Typical issues.

a. Failure to identify historic properties located on federal lands.

b. Failure to coordinate with State Historic Preservation Officers and/or the Advisory Council on Historic Preservation regarding the adverse or potentially adverse impact of federal actions on historic properties located on federal lands.

c. Failure to protect archeological artifacts located on federal lands.

d. Failure to protect Native American artifacts, burial objects, or remains, or make good faith efforts to return Native American remains to tribal members or lineal descendants.

e. Failure to reasonably accommodate Native American Indian religious practices.

VI. THE CONSEQUENCES OF NONCOMPLIANCE.

A. Injunctions.

1. They can delay, and even prevent, mission accomplishment.

2. Citizen suit provisions—anyone can sue the Army for environmental violations.

B. Monetary Costs.

1. Cleanup costs are expensive—Approximately $1.6 billion budgeted for DOD during FY03, of which the Army received approximately $396 million for the remediation of active sites and $212 million for formerly used defense sites (FUDS).

2. The command may be required to pay fines and forfeitures to state agencies.

a. Passage of the Federal Facilities Act has dramatically increased the number of fines and penalties paid to the states.

b. Fines and penalties generally must be paid from OMA.

C. Personal Liability.

1. The Department of Justice is actively pursuing enforcement of environmental laws through criminal prosecution.

2. Basis for supervisory responsibility.

a. Knowledge of the violation.

(1) Actual knowledge, or

(2) "Constructive knowledge": <u>should</u> have known but failed or refused to find out.

b. Authority and <u>responsibility</u> to take corrective action. Note how this matches Army doctrine on an installation commander's role in the environmental arena.

3. Issues.

a. Who represents the federal official?

(1) Federal prosecution: the official must provide his or her own legal defense at his or her own expense.

(2) State prosecution: representation by Department of Justice is possible, depending on the facts of the case.

b. Is there any attorney client privilege with your JAG on environmental matters? (Note, however, that the initial communication between a service member and a legal assistance or trial defense service attorney is privileged; but further representation is not available).

(1) As to federal prosecutions: NO!

(2) As to state prosecutions: maybe.

c. Is there any official immunity?

(1) Federal prosecution: no.

(2) State prosecution: maybe, if:

(a) acting in good faith compliance with federal law; and,

(b) state law unduly interferes with federal function.

D. Public Relations.

1. People care about pollution.

2. An opportunity as well as a challenge. Good compliance and public relations programs can enhance the command's image.

3. Failure to gain public confidence may result in denial of access to needed resources, and ultimately decreased training flexibility and readiness.

VII. PRACTICAL APPLICATIONS FOR COMMANDERS.

A. Determine your command's state of environmental compliance. Initial questions to ask.

1. Has the command:

a. been named as a defendant in a lawsuit based on environmental problems?

b. received any administrative compliance orders?

c. received any notices of violation (NOVs)?

2. What is the nature of the relationship between installation personnel and state and federal environmental regulators?

3. When were the installation's hazardous waste generating and handling operations last comprehensively reviewed for compliance and possible waste reduction efforts?

4. How active has the PAO been in managing the installation's public image on environmental matters?

B. Exercise effective environmental management techniques.

1. Promote the Environmental Quality Control Committee (EQCC).

a. Formation at every installation (except satellites) is required by AR 200-1, para. 15-11.

b. Purpose of the EQCC is to advise the installation commander on environmental priorities, policies, strategies, and programs.

c. EQCC should normally meet **monthly**.

d. Membership on the EQCC is **mandatory** for all major staff sections, directorates, and tenant activities.

e. The installation commander, or his designated representative, **must** chair the EQCC. It is important that any delegate also be given authority to assign coordination responsibilities to resolve problems that are identified.

2. Identify environmental problem areas through use of internal and external audits. Require subordinates to fully support implementation of the **Environmental Performance Assessment System (EPAS)**.

a. This program is more than just an inspection. In addition to finding problems, the audit team will help formulate solutions.

b. There is a direct correlation between the effectiveness of the audit and the cooperation of the installation personnel involved.

3. Insist on a vigorous environmental training program for installation personnel.

a. Require technical and legal personnel to develop user-friendly rules tailored to your mission and installation that make compliance reasonably understandable.

b. Use available training resources.

c. The **Army Logistics Management College (ALMC)** currently offers eight courses in general environmental compliance and hazardous waste management. These courses are taught in the resident, onsite, correspondence, accredited off-campus instructor, learning center, and satellite education program modes. **Call DSN 687-2323/4774 or (804) 734-2323/4774 for more information**.

4. Promote efforts to reduce waste generation.

- Ask the simple question: "Is there something else that we can use which will not become a RCRA regulated hazardous waste?"

5. Build bridges. Consider giving a briefing concerning your installation's environmental program to state and federal environmental regulators responsible for overseeing installation compliance. Don't be in the position where you are meeting them for the first time when discussing a NOV!

6. Budget for Environmental Cleanup and Compliance.

a. Funding for environmental compliance and cleanup comes primarily from three sources:

(1) Defense Environmental Restoration Account (DERA).

(2) Operations and Maintenance (Army).

(3) Military Construction Account.

b. Budgeting for major environmental compliance projects is accomplished pursuant to the A-106 process (Environmental Program Requirements Report (EPR), formerly the Environmental Pollution Prevention, Control, and Abatement at DoD Facilities Report (RCS 1383)). AR 200-1, para. 13-5.

c. Commanders must insure that they identify **all** pollution control projects and programs needed to achieve and maintain environmental compliance for the next five years. Items identified (to include training) are divided into three categories:

(1) Category I is for "must fund" requirements. Included within Category I are items necessary to resolve NOVs; items necessary to meet promulgated standards whose implementation deadline has already passed or will pass in a current budget cycle; and items needed to support a signed compliance agreement.

(2) Category II is for items necessary to meet established standards whose compliance date falls in a future budget cycle.

(3) Category III is for items needed to demonstrate leadership or which will require replacement in the future because of physical or technological obsolescence.

VIII. CONCLUSION.

APPENDIX

RESOURCE CONSERVATION AND RECOVERY ACT

WASTE ACCUMULATION RULES

SATELLITE ACCUMULATION POINT	ACCUMULATION POINT
1. At or near point of generation.	1. Centrally located.
2. Single chemical.	2. Multiple chemicals.
3. Less than 55 gallons.	3. Any amount.
4. Indefinite storage time.	4. 90 days storage.
5. Accumulation start date is day it reaches 55 gallons. (90 days starts to run)	
6. 3 days to move to accumulation point after it reaches 55 gallons.	

CHAPTER 19

SENIOR OFFICERS LEGAL ORIENTATION COURSE

JUDICIAL REVIEW OF MILITARY ACTIVITIES, LEGAL REPRESENTATION, AND OFFICIAL IMMUNITY

I. INTRODUCTION.....1
II. REPRESENTATION OF THE UNITED STATES.....1
III. TYPES OF SUITS FILED.....2
IV. SUITS AGAINST INDIVIDUALLY NAMED OFFICERS. 3
V. IMMUNITIES AND JUDICIAL BARS FROM LIABILITY. 4
VI. CONCLUSION.....5

Outline of Instruction

I. INTRODUCTION.

A. Military decision, programs, and policies are subject to challenge and judicial review in the federal courts.

B. Military decision-makers can be named as defendants in such challenges.

C. The unique character of the military influences the scope of review. The concept of judicial deference:

> "We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters." Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

D. Judicial deference today.

II. REPRESENTATION OF THE UNITED STATES AND ITS EXECUTIVE AGENCY, THE DEPARTMENT OF THE ARMY.

A. Venues

1. Supreme Court.

2. Courts of Appeals.

3. District Courts.

4. Court of Federal Claims.

5. State courts of general jurisdiction.

B. Representation of the interests of the United States. 28 U.S.C. §§ 516, 517, 518, and 519.

1. The Department of Justice.

2. Army Litigation Operations

a. The Army Litigation Division.

b. The Army Contract Appeals Division.

c. The Army Environmental Law Division.

d. The Army Regulatory Law and Intellectual Property Division.

3. Organization, caseloads, and practice.

III. TYPES OF SUITS FILED AGAINST THE ARMY AND ARMY OFFICIALS.

A. Subject-matter of litigation (illustrative, not exclusive):

1. Enlistments, inductions, activations.

2. Discharges.

3. Transfers and assignments.

4. Promotions.

5. Personnel policies.

6. Military programs.

7. Civilian personnel actions.

8. Installations management decisions.

9. Environmental compliance and remediation.

10. Bankruptcy (as a creditor).

11. Personal injury, death, or property damage caused by the negligence of Federal employees.

12. Civil challenges to courts-martial convictions (habeas actions, corrections of military records).

13. Contract disputes.

14. Freedom of Information and Privacy Act.

15. Federal and state administrative regulatory activities.

B. Types of relief sought.

1. Damages (money).

2. Injunction/mandamus.

3. Declaratory judgment.

4. Habeas corpus.

IV. SUITS AGAINST INDIVIDUALLY NAMED OFFICERS.

A. The significance of being individually named.

1. Official capacity.

2. Individual (personal) capacity.

B. Where is the suit filed.

1. Federal court.

2. State court.

C. Representation.

1. What is it?

2. Who provides.

a. Role of the Department of Justice (DOJ).

b. Role of the installation Staff Judge Advocate.

(1) Request the local U.S. Attorney to provide temporary representation when "time for response is limited." Army Reg. 27-40, Legal Services: Litigation, para. 3-2a(2) [hereinafter AR 27-40].

(2) Referring the request for representation to Litigation Division, OTJAG. AR 27-40, para. 3-2a(3).

D. DOJ Representation Criteria 28 C.F.R. § 15.3 & § 50.15.

1. Current or former employee of the federal government.

2. Acting within the course and scope of employment.

3. Not in connection with a federal criminal proceeding or agency disciplinary matter.

4. Best interests of the United States.

E. Who Is Liable for an Adverse Judgment?

1. Judgments against individual federal employees and the United States are paid by the United States.

2. Judgments against individual federal employees are the responsibility of the employee.

V. IMMUNITIES AND JUDICIAL BARS FROM LIABILITY.

A. Statutory immunities for **common law torts**.

1. Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679) (The Westfall Act). Federal employees, including members of the Armed Forces, who are sued for state law torts committed within the scope of their employment. *United States v. Smith*, 499 U.S. 160 (1991).

   a. Certification.

   b. Motion to substitute.

   c. Reviewability. *Guiterrez de Martinez v. Lamango*, 515 U.S. 417 (1995).

2. Military medical or dental personnel performing medical, dental, or other health-related functions within the scope of their employment. 10 U.S.C. § 1089 (The Gonzalez Act).

3. Lawyers or members of legal staffs rendering legal advice within the scope of their employment. 10 U.S.C. § 1054.

B. Judicial bar from personal liability for **common law torts**:

1. Suit filed by soldier against another soldier.

2. When claim arises "incident to service" -- no personal liability. *Feres v. United States*, 340 U.S. 135 (1950).

C. Judicial bar from personal liability for **constitutional torts**.

1. Constitutional torts are different, and the protection from liability is more limited.

   a. General rule: You get only a "qualified immunity" from suit. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

(1) Test for qualified immunity: Did the individual defendant's actions violate a clearly established constitutional right of which a reasonable person would have known? If no, immunity kicks in and suit cannot maintain against the defendant.

b. Exceptions: You are absolutely immune when:

(1) Suit filed by soldier against another soldier.

(a) When constitutional claim arises "incident to service" -- no personal liability. *Chappell v. Wallace*, 462 U.S. 296 (1983) (The *Feres* rationale applied to constitutional torts).

(2) Your actions were quasi-judicial or quasi-prosecutorial in character. *Butz v. Economou*, 438 U.S. 486 (1978).

(3) The suit is filed by a Federal civilian employee on a claim that is covered by the Civil Service System. *Bush v. Lucas*, 462 U.S. 367 (1983).

VI. CONCLUSION.

CHAPTER 20

STANDARDS OF CONDUCT

I. REFERENCES.

A. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.

B. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635 (Office of Government Ethics Rules).

C. DOD 5500.7-R, JOINT ETHICS REGULATION (JER), 30 Aug 93. Change 4, effective 6 August 1998.

II. BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER EXECUTIVE ORDER 12674 (also reproduced on the last page of this outline).

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

MAJ Kurt Takushi
FY 2004 Senior Officers Legal Orientation Course
FY 2004

III. JOINT ETHICS REGULATION (JER).

A. Overview. A single, comprehensive regulation covering more than traditional standards of conduct.

B. Applies OGE rules to DoD. Specifically applies many of the OGE rules to enlisted members. Rules printed in ***bold italics*** are general orders--they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, UCMJ.

C. Rescinds Army-specific Standards of Conduct rules once found in AR 600-50, Standards of Conduct. Now all services use the same rules.

D. Key definitions under the JER

1. DOD Employee (JER 1-211). The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:

a. Any DOD civilian officer or employee (including special Government employees) of any DOD Component (including any nonappropriated fund activity).

b. Any active duty Regular or Reserve military officer, including warrant officers.

c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.

d. Any Reserve or National Guard member on active duty under orders issued pursuant to title 10, United States Code.

e. Any Reserve or National Guard member while performing official duties or functions under the authority of either title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]

2. Designated Agency Ethics Official (DAEO) (JER 1-209): A DOD employee who is responsible for the implementation and administration of the component's ethics program.

3. Ethics Counselor (EC) (JER 1-214): A DOD employee appointed in writing to generally assist in implementing and administering the command's or organization's ethics program and to provide ethics advice to DOD employees in accordance with the JER.

a. Communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications.

b. ECs advise and assist on issues, such as:

(1) acceptance of gifts and gratuities;

(2) business visitors (e.g., product demonstrations and capabilities briefings);

(3) ethics training;

(4) participation in or dealings with private and professional associations, such as AUSA;

(5) review of public (SF 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests;

(6) post-Government employment restrictions; and

(7) use of Government resources and time.

c. EC's advice *generally* precludes disciplinary action against an employee who follows EC's advice (5 C.F.R. § 2635.107(b)).

4. Agency Designee (JER 1-202): The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervision of the DOD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

IV. USE OF GOVERNMENT RESOURCES.

A. Official Use. Punitive provision, restricting use of communication systems (telephones, facsimile machines, electronic mail, internet systems, etc.) for official uses only - with exceptions. (JER 2-301). Official use may include deployed employee's use to enhance MWR. This requires theater commander approval.

B. Permits Agency Designee to authorize personal (non-official) use, only IF:

1. there is no adverse effect on duty performance;

2. the duration and frequency are reasonable (if possible while off duty - during breaks or after normal work hours);

3. a legitimate public interest is served (keeping employees at their desks; education/familiarization with communication systems; enhancing professional skills; job search in response to downsizing);

4. use does not reflect adversely on DOD (no pornography, chain letters, advertising, soliciting, or selling (unless on authorized bulletin boards), etc.);

5. use does not overburden Government communication systems; and

6. use creates no significant additional cost to DOD (no long distance charges to the Government).

C. Monitoring Use. Employees' use serves as consent to monitoring of any type of use, including incidental and personal uses, whether authorized or not.

D. Other Use. Agency Designees may permit employees limited use of items, such as typewriters, calculators, libraries, and other similar resources and facilities, if:

1. use does not reflect adversely on duty performance;

2. use is of reasonable duration and made during personal time;

3. use serves a legitimate public interest (supports local charities or community volunteers, enhances professional skills, or job search relative to downsizing, etc.);

4. use does not reflect adversely on DOD; and

5. use creates no significant additional DOD cost.

E. Employee Support. Employees (such as secretaries, clerks, and military aids) may not be used to support the unofficial activity of another DOD employee in support of non-Federal entities. (JER 3-305).

F. Cellular Phones. UP of AR 25-1, Army Information Management, paragraph *6-3.aa.(1) Portable, mobile, and cellular telephones.* These types of telephones will not be used in lieu of established 'wired' telecommunications networks. These devices are to be used for official business only.

V. GIFTS FROM OUTSIDE SOURCES (JER, CHAPTER 2).

A. Basic Punitive Prohibition on Gifts From Outside Sources. A soldier shall not, directly or indirectly, solicit or accept a gift:

1. from a prohibited source (e.g., someone who has an interest in the performance of official Army missions); or

2. because of the employee's official position.

B. Practical Approach. Three questions:

1. Is the item actually a gift? The term "gift" includes almost anything of monetary value, but not these (*exemptions*):

   a. Coffee, donuts, and similar modest items of food and refreshments when offered other than as part of a meal;

   b. Greeting cards and most plaques, certificates, and trophies;

   c. Rewards and prizes in contests open to the public;

   d. Commercial discounts available to the general public or to all Government or military personnel;

   e. Commercial loans, and pensions and similar benefits;

   f. Anything paid for by the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute; and

   g. Anything for which the employee pays market value.

2. If the item is a gift, does an exception apply? Common ***exceptions*** when an employee may accept:

   a. unsolicited gifts with a market value of $20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a year does not exceed $50;

   b. gifts based on an outside relationship, such as a family relationship or personal friendship;

c. discounts and similar benefits offered to groups in which membership is not related to Government employment (or "Government discounts" where the same offer is broadly available to the public through similar groups), and certain benefits offered by professional associations or by persons who are not prohibited sources;

d. legitimate awards that are part of a regular and established program of recognition for meritorious public service;

e. gifts resulting from the outside business activities of employees and their spouses;

f. free attendance (not travel or lodging) paid by the sponsor of a widely-attended gathering, speaking engagement, or other event if the agency determines an interest in the event (attend in personal capacity) [Rule amended: 61 Fed. Reg. 42965 (20 Aug 96) allows payment by other than the sponsor if >100 people attend and the cost is <$250; also allows spouse or other guest to attend];

g. food, refreshments, and entertainment at certain social events extended by persons who are not prohibited sources, where no one is charged a fee to attend the event;

h. unsolicited gifts of free attendance for DOD employees (and spouses) at events sponsored by state or local governments or non-profit, tax exempt civic organizations, where the agency has determined its community relations interests in the event (JER 2-202a); and

i. certain educational scholarships or grants for DOD employees and dependents (JER 2-202b).

3. Would using the exception undermine Government integrity? Even if a gift is covered by one of the exceptions, do not accept it if it will undermine Government integrity.

a. Cannot use official position to solicit a gift or force someone to give a gift.

b. Any gift is illegal if it is in exchange for an official action.

c. Some gifts may be prohibited by other statutes (such as procurement integrity contract laws).

d. Finally, gifts may not be accepted so frequently that anyone would question whether influence is being bought. For example, a Federal building manager cannot accept a free sandwich every week from a lunch counter operating in the building.

C. Handling Improper Gifts (5 C.F.R. § 2635.205). When an employee cannot accept a gift:

1. First and foremost, if possible, refuse the offer of an improper gift. Diplomatically explain that Federal employees may not accept certain gifts.

2. The employee should pay the donor its market value; or

3. If the gift is a tangible item, the employee may instead return the gift.

4. Subject to approval, perishable items may be donated to a charity, shared within the office, or destroyed.

VI. FOREIGN GIFTS. (U.S. CONST. ART. I, §9, CL. 8; 5 U.S.C.A. §7342, AND JER §2-300.)

A. Gifts from foreign governments.

1. Can accept a "gift of minimal value" (i.e., one having a retail value in the United States not in excess of $285 at the time of acceptance. "Minimal value," based on the Consumer Price Index.)

2. Gifts valued above "minimal value" can only be accepted on behalf of the U.S. Report to and deposit these with Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA, 22332-0474 for disposal, official use, or forwarding to the General Services Administration.

3. Aggregate the value of gifts from different officials during the same presentation.

4. Gifts from spouses of foreign officials are deemed gifts from the foreign official.

5. Gifts to employees' spouses are deemed gifts to the employee.

6. Gifts received at separate presentations are separate gifts - their values are not aggregated (even if from the same official and on the same day).

7. When more than one gift is given at a single presentation, the employee may retain only those with an aggregate of less than "minimum value." The remainder (valued over "minimal value") may not be kept by the employee.

B. Gifts to deployed personnel. Apply general gift analysis, unless gift is from a foreign government, then apply those rules.

VII. GIFTS BETWEEN EMPLOYEES (JER CHAPTER 2)

A. General Punitive Rules. An employee shall not:

1. give a gift or solicit a contribution for a gift for an official superior (i.e., supervisor or those in supervisory chain); or

2. accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

B. Exceptions.

1. Gifts may be given on an occasional basis, including traditional gift-giving occasions, such as birthdays and holidays.

   a. This includes minor contributions of food which will be consumed at the office, meals at someone's home (of a type and value customarily provided to personal friends), and customary gifts, such as a bottle of wine brought when invited to another's home.

   b. This also includes infrequent gifts having a value of less than $10 on appropriate occasions, such as Christmas or birthdays. Such gifts may not become "routine."

2. A subordinate may give or donate toward a gift to a superior on special infrequent occasions, such as, marriage PCS, or retirement.

   a. Gifts on special infrequent occasions that do not terminate the superior subordinate relationship are limited to $300 in value per gift per donating group (JER 2-203).

      (1) Donating group is comprised of all contributors to that group gift.

      (2) If one contributor contributes to two donating groups, then value of gifts from groups with a common contributor is aggregated as if from a single donating group--$300 limit applies to total value (JER 2-203a(2)).

b. Special infrequent occasion gifts that terminate the superior, subordinate relationship (retirement, resignation, transfer) may exceed $300 per donating group if they are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same. (Changed on 2 January 1997.)

c. An employee cannot solicit more than $10 from another employee for a group gift to the contributing employee's superior (JER 2-203b).

d. Solicitations for gifts to a superior must be completely voluntary. Solicited individual may decline to contribute.

e. To avoid improper pressure, the collection should be handled by someone junior in the organization.

GIFTS SUMMARIZED

Methodology	Gifts from Outside Sources	Gifts Between Employees
Prohibited (***Punitive***)	Yes if from prohibited source, or given because of off. psn § 2635.202	Yes if from subordinate or solicited for superior § 2635.302
A gift?	Nongifts - exemptions (§ 2635.203): 1. nonmeal food/refreshments 2. cards, plaques 3. bank loans 4. paid for by Government 5. paid market value	
Exceptions?	§ 2635.204 <u>Examples:</u> 1. $20/50 rule 2. personal relationship 3. discounts/benefits 4. awards/degrees 5. outside bus. relations 6. widely attended event 7. social invitations 8. local Govt/civil events 9. scholarships/grants	§ 2635.304 <u>Two categories:</u> 1. occasional basis ($10 or less; food refreshments; hospitality; leave transfers) 2. special infrequent occasions (gift appropriate to occasion - max $300 (unless event terminates superior/subordinate relationship) from single donating group; $10 max on solicitation per person)
Limitations	§ 2635.202(c) 1. no bribes 2. no gift solicitations 3. reasonable person test 4. no statutory violations	§ 2635.302(c) 1. no coercion 2. common member in donating groups

Citations to 5 CFR § 2635 reprinted in the Joint Ethics Regulation, chapter 2. Provisions on accepting or soliciting gifts are punitive. Violations may result in UCMJ actions.

VIII. OFFICIAL TRAVEL.

A. Air Travel.

1. First class. On official business, use coach, unless:

   a. No other reasonably available accommodations exist.

   b. Travel by an employee whose physical condition necessitates first-class travel.

   c. Exceptional security circumstances.

2. Report all *purchased* first-class travel to GSA within 60 days of the end of each fiscal year.

3. Premium class (other than first class, such as business class) may be used, **if**:

   a. Regularly scheduled flights along the required route only provide premium-class seats.

   b. No space is available in coach, and travel is urgent and cannot be postponed.

   c. Travel involves an employee with a disability substantiated in writing by competent medical authority. An attendant may accompany him in premium class, if necessary.

   d. Security purposes or exceptional circumstances exist.

   e. Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.

   f. Overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.

g. Travel costs are paid by a non-Federal source. Payments from a non-Federal source may not be used for first-class travel, only coach or premium-class.

h. Travel which is in excess of 14 hours and begins/ends in a foreign country is now only authorized premium upgrade in limited circumstances.

B. Payment for ***Official*** Travel Expenses From Non-Federal Sources (31 U.S.C. § 1353; JER 4-101; JFTR, Chapter 7, Part W, §§ U7900-7908; JTR, Chapter 4, Part Q, §§ C4900-4908; HQDA Letter 55-96-1, Subject: Acceptance of Payments From a Non-Federal Source for Official Travel Expenses (30 October 1996); 41 C.F.R. Part 304).

1. Gift requiring approval of normal travel approving official.

2. Unsolicited gift may be accepted under 31 U.S.C. § 1353. Consultation with Ethics Counselor required. Payment may be accepted for travel, subsistence, and related expenses.

3. Deciding official must determine acceptance does not appear to jeopardize integrity of agency. Standard: reasonable person with knowledge of relevant facts. Deciding official considers (31 C.F.R. Part 304):

a. Source of offer/payment;

b. Purpose of meeting or similar function;

c. Identity of other expected participants;

d. Nature and sensitivity of any matter pending at agency affecting the offeror;

e. Significance of traveler's role in any offeror's pending matter; and

f. Monetary value and character of travel benefits offered.

4. After travel, traveler reports acceptance if over $250 through the approval authority and the local Ethics Counselor to DAJA-SC.

5. Payments from a non-Federal source may not be used for first-class travel, only coach or premium class less than first class (JFTR, §§ U7902D, U3125 (7/1/94), JTR; §§ C4902.4, C2205).

IX. INCIDENTAL TRAVEL BENEFITS (JER, CHAPTER 4, SECTION 2; JFTR §§ U3125 AND U2010; JTR § C2205; AND SECARMY TRAVEL POLICY (MARCH 2003)).

A. Federal Government Property. Anything that a DOD employee receives as a result of official travel belongs to the Federal Government unless it falls under a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2).

1. Frequent Traveler Benefits (JER 4-201).

a. Frequent flyer mileage credits earned on official travel now belong to the individual.

b. Only exception to the above recent change are miles received as the result of an “involuntary bump” (see below).

2. Awards and prizes (merchandise) from travel services on official travel belong to the Federal Government.

B. Personal Property. Benefits that can't be used for official purposes may be accepted if a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2) applies.

1. On-the-spot upgrades (JER 4-202). May be accepted if they meet the gift exceptions.

a. May accept if generally available to the public, all Federal employees, or all military members.

b. Do not accept if offered because of traveler's rank or official position.

c. Upgrades while traveling in uniform--OK to accept an offer, unless it is given because of your official position. However, Army employees may not travel in premium or higher class in uniform.

2. Cash or credit rebates from personal credit cards used on official travel are not the property of the Federal Government and may be accepted (Comp. Gen. Decision B-236219, Matter: Use of Discover Charge Cards, May 4, 1990).

3. Getting "bumped" on official travel.

a. Benefits, such as free tickets, as a result of being *involuntarily* bumped from an overbooked flight on official travel belong to the Government (traveler remains on Government time).

b. Benefits as a result of *voluntarily* relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler is on his own time and may not give up the seat if it would interfere with mission accomplishment.

X. TRANSPORTATION. (See DOD 4500.36-R; SecArmy Memo, Policy For Travel By DA Officials (March 2003); and AR 58-1, January 2000.)

A. Home-to-Work Transportation.

1. Generally not available.

a. Designated position exception:

(1) Field work (i.e., duty requires employee to travel to various other duty sites from primary duty location, e.g., recruiter).

(2) Intelligence, counterintelligence, protective services, or criminal law enforcement duties.

b. Statutory exception: special determinations based on clear and present danger, emergency, or compelling operational considerations. (SECARMY approval 15-calendar day periods, 90-calendar day extensions possible.)

2. SECARMY approval (DCSLOG responsibility).

B. Spouse Transportation.

1. General rule: spouses do not accompany soldiers-sponsor on official business at Government expense. Exceptions:

a. Invitational travel orders for "unquestionable official participation" requirement. Spouse must actually participate or presence is deemed in national interest because of diplomatic or public relations. Transportation only (no per diem).

b. "Non-interference" travel (Unofficial, reimbursable). MILAIR must already be scheduled for an official purpose; use must not require a larger aircraft; official travelers not displaced; negligible additional costs to the government; government is reimbursed at full commercial coach-class fare rate or equivalent.

2. Unaccompanied Spouse Travel. Authorized when spouse is a subject matter expert under JTR; also authorized if spouse attending service-endorsed training course or briefing and will provide subsequent volunteer service incident to such training; may also attend conferences pertaining to Army Family Programs or Quality of Life (QOL) issues under limited conditions. (March 2003 SecArmy Memo.)

3. Nontactical vehicles. Space available with sponsor when vehicle used to transport Army personnel to an official function and the transportation of the spouse does not result in additional expense.

XI. JER CHANGES NOT COVERED ABOVE.

1. Financial Disclosure Reporting

a. Threshold Filing Increase. JER 7-300b increases the presumptive threshold for required OGE 450 filing to $2,500 per purchase and $20,000 per year. This conforms the JER to the definition of "micro purchases" in the Federal Acquisition Streamlining Act.

b. Forms. OGE Form 450 in; SF 450 out. OGE Optional Form 450A, Confidential Certificate of No New Interests, authorized, but must use DoD version and attach copy of last OGE 450.

c. SF 278 Filers. Note: Goes to DA through the Ethics Counsel, who prepares DA Form 4971-R (Nov 94, reproducible form in AR 27-1). Late Reports: $200 penalty paid by the filer unless waived by OGE.

(1) **New Entrant Report.** File within 30 days of appointment (actual promotion). **For RC personnel**. Old Rule was DoD imposed--file within 30 days of promotion to BG. New Rule comports w/ OGE rule--file in the first year the officer conducts 61 or more days in federal service (Title 10). Report due 30 days after the 61st day.

(2) **Annual Report.** Due by 15 May of each year for the previous calendar year. File only if the officer conducted 61 or more days in a Title 10 status.

(3) **Termination Reports.** Due not sooner than 15 days before but not later than 30 days after termination from a covered position. (Per OGE/DOD SOCO, this 15 days prior to termination rule will be eliminated and changed in the next JER revision). Not required of RC GO's serving not more than 60 days on active duty in a calendar year in which the officer is transferred to the retired reserve. Watch out for terminal leave.

Practice Tip: Many NG GO's probably will not have to file a 278 because they are most often in a Title 32 status. Title 10 status is most common for mobilization and overseas deployments. Many "Assistant to TAGs" get 61 or more days of federal service.

Practice Tip: If RC GO does not have to file an SF 278 because of less than 61 days of active federal service, the officer probably still has to file an OGE Form 450.

2. Annual Ethics Training. (JER 11-302)

a. Annual ethics training may currently be presented in person by a Qualified Individual or by telecommunications, computer-based methods, or by recorded means prepared by a qualified Individual. As of 1 January 2004, computer based methods will no longer be acceptable; further, annual ethics training will be required for ALL Army personnel, not just OGE 450 and SF 278 Filers.

b. If the DAEO determines, SGEs and RC personnel serving on AD less than 30 consecutive days may be trained by "other means."

3. 18 U.S.C. §208 Regulations (Conflict of Interest) 5 C.F.R. Part 2640.101 (JER 5-200). Supersedes TAB D of JER.

XII. CONCLUSION.

PERSONAL OUTSIDE ACTIVITIES SUPPLEMENT

A. Personal and Financial Conflicts of Interest

1. An employee may not personally and substantially participate in an official capacity in a matter in which he (or certain others) has a financial interest if participation will have a direct and predictable affect on that interest.

2. An employee also may not personally and substantially participate in a matter if it involves a person or entity with whom the employee has a special relationship--called a "covered relationship." This includes a nonfinancial, yet personal, conflict of interest.

3. Personal Financial Interests imputed to you (i.e. you generally may not participate in matters involving these entities):

   a. The interests of a company or business you work at, own as a partner, or serve as an officer (imputed for one year); or a company you own stock in (unless worth less than $5,000).

   b. The interests of your spouse and children.

   c. The interests of "members of your household" or those with whom you have a "close, personal relationship."

   d. The interests of an organization you serve as an officer or director (imputed for one year)

e. The interests of an organization you "actively participate" in; includes serving as an officer or committee chair or otherwise directing the organization's activities (may include aggressive endorsement). Active participation means more than mere membership.

4. Appearance Problem-Consideration of appearances of a conflict of interest by an employee.

a. A conflict of interest also occurs where a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter--the mere appearance of a conflict invokes the rules.

b. Employee may still act on the matter when agency designee issues a written authorization after considering the matter. Obtain Ethics Counsel opinion.

5. Job-Hunting. Prohibitions against working on a matter involving a company with which you are seeking employment.

6. Example. Employee who moonlights as a salesperson at XYZ Computer Store may not be involved personally and substantially in the procurement of computers for the office from XYZ Computers.

7. Example. President of the local AUSA chapter (or unit sub-chapter) may not, in an official capacity, approve a request for use of DoD space by the Association.

B. Private Businesses (JER para. 2-205).

1. **Punitive provision**: DoD employees may not solicit or make any solicited sales to personnel who are junior in rank, grade, or position to them

2. May also not solicit or make solicited sales to the family members of the junior employee.

3. Applies on and off duty.

4. Exception: As long as there is no coercion or intimidation, it is okay to:

a. Make sales off-duty from an off-post retail establishment.

b. Sell or lease your own personal property or real estate.

C. Employment Prohibitions.

1. During Your Federal Service.

a. May not engage in any outside employment if it conflicts with your federal duties.

b. Commands may require pre-approval for outside employment. Filers of financial disclosure forms must obtain prior approval.

c. General Officers may not sit as an officer or director of an outside organization for compensation.

d. May not receive improper supplementation of your federal salary for performing your official duties (18 USC § 209).

2. After Your Federal Service.

a. May not "switch sides" and work for a contractor on the same matter you handled as a DoD employee.

b. DoD personnel involved working with contractors have special rules under the Federal Acquisition Regulation. Contract personnel should consult their Ethics Counselor for post-employment issues.

D. Honoraria and Teaching, Speaking, and Writing.

1. Statutory ban on Honoraria--that is, compensation for a lecture, speech, or writing-- was "effectively eviscerated" by the U.S. Supreme Court. (See JER 3-307c.)

2. Prohibitions remain, however, on "Teaching, Speaking, and Writing."

a. May not receive compensation for teaching, speaking, and writing related to your official duties, i.e., cannot re-package your federal work and profit from it.

b. Does not preclude teaching, speaking, and writing in an inherent area of your expertise based on your education or experience even though it may deal generally with a subject within your official responsibility/

c. May receive compensation for teaching courses at certain educational institutions even if the subject is related to your official duties. Seek ethics counselor advice.

d. May not use your rank or official position to promote your teaching, speaking, and writing. May include it in a title or bio and, if the subject deals with an ongoing agency program or policy, must include a disclaimer.

E. Political Activities (JER 6-300; DoD Directive 1344.10; AR 600-20, para 5-3 and Appendices B & C).

1. Soldiers may not engage in partisan political politics.

2. May not use your position to solicit votes or contributions.

3. Registering to vote, voting, expressing an opinion, making monetary contributions are generally okay.

F. Gambling (JER 2-302). Punitive Provision.

1. Gambling is prohibited on federally-owned or leased property or anywhere while on duty.

2. Rule allows private wagers in housing areas if based upon a personal relationship if IAW local laws. But: UCMJ may prohibit if a violation of punitive provisions regarding gambling with a subordinate.

PRINCIPLES OF ETHICAL CONDUCT

1. Public Service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.

CHAPTER 21

MWR AND NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs)

I. REFERENCES.

A. DODI 1015.10, Subject: Programs for Military Morale, Welfare, and Recreation (3 November 1995, Change 1, 31 Oct 96).

B. Army: AR 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (25 October 1998) (Draft AR 215-1 currently in circulation for comment).

C. Navy: SECNAV Instruction 1700.12, Subject: Operation of Morale, Welfare and Recreation Activities (18 September 1997).

D. Air Force: AFI 34-262, Subject: Air Force Community Service Programs and use Eligibility (27 June 2002).

E. USMC: MCO 1700.27A, Marine Corps Community Services Policy Manual, (November 1999).

F. AR 60-10/AFR 147-7, Army and Air Force Exchange Service General Policies (17 June 1988); AR 60-20/AFR 147-14, Army and Air Force Exchange Service Operating Policies (15 December 1992).

II. INTRODUCTION.

Service MWR Headquarters:

Army Community and Family Support Center (CFSC) (http://www.armymwr.com/)

Navy Morale, Welfare, and Recreation Division (http://www.mwr.navy.mil/)

Air Force Services Agency (http://www-p.afsv.af.mil/default.htm

MAJ Kurt Takushi
FY 2004 Senior Officers Legal Orientation Course
FY 2004

Marine Corps Community Services (MCCS) (http://www.usmc-mccs.org/)

III. NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIs)--OPERATIONS AND FUNDING.

A. Definition: A DoD organizational entity which performs an essential government function. It provides morale, welfare, and recreational programs for military personnel and civilians. As a fiscal entity, it maintains custody and control over nonappropriated funds. It is not incorporated under the laws of any state and enjoys the legal status of an instrumentality of the United States.

B. First U.S. Military NAFI - 1775.

C. Objectives of the MWR Program. DODI 1015.10, para. 4.1; see also AR 215-1, paras. 1-7 through 1-9, and MCO 1700.27A, para 1101.

1. Maintain a high level of esprit de corps.

2. Maintain physical and mental well-being.

3. Encourage the constructive use of time.

4. Aid in recruitment and retention.

5. Assist in the adjustment to military life.

6. Provide a community support environment.

7. Create a self-sustaining military community.

8. Reinforce unit cohesion.

9. Increase combat readiness.

10. Not listed but ever-present objective, MAKE MONEY.

D. Congressional Interest in NAFIs.

1. Initially, reaction to business and private concerns over PX, BX, and MWR activities.

2. Two congressional committees—the primary committee is the MWR Panel of the Readiness Subcommittee of the House Armed Services Committee.

a. Broad interests—construction, financing, and services.

b. NAFIs should operate like a business.

E. Command Responsibilities for NAFI Operations. AR 215-1, ch. 2.

1. Secretary of the Army has overall responsibility. AR 215-1, para. 2-1.

2. Assistant Chief of Staff for Installation Management (ACSIM) is proponent and focal point for all MWRs and NAFIs. AR 215-1, para 2-1c. The Chief Naval Officer (CNO) and Commander of the Marine Corps perform coordination and information functions for MWR activities in the navy and Marine Corps, respectively. SECNAVINST 1700.12, para 4c.

3. U.S. Army Community and Family Support Center (USACFSC). AR 215-1, para. 2-5.

a. Recommends to the ACSIM Army policy.

b. Reviews the MWR program and establishes business strategies. Provides management and technical assistance.

c. Reviews and approves request for establishment of all Army NAFIs.

d. Develops financial management practices for the management of MWR and NAF resources.

e. Administers Armed Forces Recreation Centers (AFRCs) and the Army Recreation Machine Program (ARMP), NAF Major Construction program, and NAF employee benefit programs.

f. Provides administrative support to the MWR Board of Directors BOD. Commander from USAREUR, USFK, FORSCOM, TRADOC, AMC, AUAPAC, and the Sergeant Major of the Army, make u the voting members of the BOD. The BOD is responsible to the Secretary of the Army for approving major management strategies, plans, and programs pertaining to Army MWR, and to provide oversight of APF and NAF. The USMC MCCS BOD, chartered by the Commandant, performs similar functions. MCO 1700.27A, para 1102.

4. Major Army Commands (MACOMs). AR 215-1, para. 2-3.

a. Provide oversight and ensure APF and NAF funds are properly used.

b. Allocate APF based upon installation needs and the five-year plan priorities.

c. Conduct MACOM-level MWR events.

5. Installation Commanders. Operate MWR programs, the IMWRF, and local NAFIs. AR 215-1, para. 2-4.

F. Funding of NAFIs.

1. APF support for MWR personnel, operations, supplies, and other expenses. See DODI 1015.10, encl. 6; AR 215-1, ch. 4 & App D; AFI 34-162, para 2.3; MCO 1700.27A, paras 1300, 1303, & 1304.

2. Nonappropriated funds--those generated by NAFI activities.

3. Construction funding. AR 215-1, ch. 10 (Sec. II) and App. E.

a. Army Morale, Welfare, and Recreation Fund (AMWRF) for NAF construction. AR 215-1, para. 10-8.

(1) Funded by AAFES revenues, monthly capital reinvestment assessment of all NAFI income, and interest. DODI 1015.10, para. 4.8; AR 215-1, para. 11-8.

(2) Pays most of major construction costs.

(3) Installation funds design cost (includes furniture, fixtures, and equipment), opening costs, all environmental costs, and project validation costs (market analysis). AR 215-1, para. 10-8.

b. The Marine Corps' "Central Construction Fund" is funded by an assessment of revenue generating activities. The rate of assessment is determined by the MCCS BOD. MCO 1700.27A, para 1312.

c. Market analysis required. AR 215-1, para. 10-2.

d. Public-Private Ventures. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare, and Recreation (MWR) Category C Revenue-Generating Activities (June 17, 1998); AR 215-1, para. 10-12; MCO 1700.27A, para 2005.

(1) In order to meet MWR requirements, installations may identify morale enhancing activities that are unavailable through normal funding sources and that may be met by the private sector. The Army leases the land for a facility, and the contractor builds the activity and operates it, with the IMWRF receiving a percentage of profits.

(2) CFSC is the sole Army agency authorized to negotiate PPV projects.

(3) Request requires approval/coordination with CFSC and an extensive local survey prior to approval by OASA (M&RA).

4. Organization of NAFIs. See DODI 1015.10, para. D3 and encl. 4; AR 215-1, para. 4-1; AFI 34-262, para 2.2.2; MCO 1700.27A, para 1302 & 1303.

a. Category A: Mission-Sustaining Activities. DODI 1015.10, Encl 7; AR 215-1, paras. 4-1a, 11-4a(1).

(1) Essential to sustaining readiness and have little or no capacity to generate NAF income.

(2) Supported with APF--up to 100%; DoD minimum is 85%.

(3) NAF funding only allowed for:

(a) Specific expenses for which APFs are not authorized, or

(b) When use is not otherwise prohibited and it is certified in writing that APF is not available.

(4) Category A activities are:

- Armed Forces Professional Entertainment Program Overseas.
- Gymnasium/Physical Fitness/Aquatic Training.
- Libraries.
- Parks and Picnic Areas.
- Recreation Centers/Rooms.
- Shipboard/Isolated/Deployed/Free Admission Motion Pictures.
- Sports/Athletics (Self-Directed, Unit Level, Intramural).
- Unit Level Programs and Activities.

b. Category B: Community Support Activities.

(1) Satisfies the basic needs of soldiers and their families. Makes installations temporary home towns. Different than Category A because of their ability to generate some income. AR 215-1, para. 4-1b.

(2) Requires substantial APF support. DoD standard is at least 65% APF. DODI 1015.10, Encl 7; AR 215-1, para 11-4a(2); MCO 1700.27A, para. 1303.4.

(3) Category B activities are:

- Arts and Crafts Skill Development.
- Bowling Centers (less than 13 lanes).
- Automotive Crafts Skill Development.
- Child Care and Youth Programs.
- Entertainment (Music and Theater).
- Information, Ticketing, and Registration Services.
- Outdoor Recreation.
- Recreational Swimming Pools.
- Sports Programs (above the intramural level).
- Stars and Stripes.

c. Category C: Revenue-Generating Activities. DODI 1015.10, Encl. 7; AR 215-1, para. 4-1c, 11-4a(3), appendix D.

(1) Has less impact on readiness and provides recreational opportunities.

(2) Has ability to generate income to cover <u>most</u> operating expenses. Only indirect APF support.

(3) At remote sites (<u>see</u> AR 215-1, table 4-1, for listings), Category C programs may receive APF on the same basis as Category B. AR 215-1, para. 4-4.

(4) Examples include:

- Aero Clubs (note: While the services all have authority for Aero Clubs (e.g., see AR 215-1, App. M), the Air Force currently operates the only truly active program. See AFI 34-217, Air Force Aero Club Program (1 February 1997)..
- Amusement Machine Locations and Centers.
- Armed Services Exchange and Related Activities. (See AR 60-20 for AAFES policy)
- Armed Forces Recreation Centers.
- Audio/Photo and Retail Sales (Overseas).
- Bingo.
- Bowling Centers (over 12 lanes).
- Food, Beverage, and Entertainment Operations.
- Golf Courses.
- Military Clubs.
- Others.

d. Supplemental Missions. AR 215-1, paras. 4-7 and 4-8. Not formally part of the Army MWR Program.

(1) Established to support a mission activity of the Army.

(2) Income and funding maintained at a level to “break even.”

(3) Examples include:

- Army Community Services.
- Veterinary Services.
- Supplemental Field Ration Dining Facility Funds.
- NAF Billeting.
- Fisher House Funds.
- Military Historical Museums.
- Vehicle Registration Fund.
- Disciplinary Barracks Funds.

e. Army: New special category; Temporary Guest Facilities, Cabins, Cottages, Cabanas, Recreational Guest Houses. Receipts remain in a revolving account to be used for these facilities only.

5. Installation Morale, Welfare, and Recreation Fund (IMWRF), the "One Fund." AR 215-1, para. 4-6. Referred to in the Marine Corps as the "Single NAFI," the legal and NAF fiscal entity of MCCS activities. Operated similarly to the current Army "One Fund." MCO 1700.27A, para. 1306.

a. Goals.

(1) Designed to make NAFIs operate in a more businesslike fashion.

(2) Designed to help NAFIs better meet the needs of the military community.

b. Operation of IMWRF.

(1) Central control under the installation commander.

(2) Fund manager for IMWRF will be the Director for Community Activities (DCA). AR 215-1, para. 11-2b.

(a) Responsible for overall fiscal operation.

(b) Responsible for establishing sound management functions.

(3) NAFI councils are required (except for DA or MACOM administered NAFIs). Councils will be governing (directing and supervising the fund manager) or non-governing (advisory only). AR 215-1, paras. 5-8 - 5-10.

(a) Members will be full-time DoD civilians and active duty military. AR 215-1, para. 5-9.

(b) Made up of fund manager (nonvoting) and at least four other (voting) members. AR 215-1, para. 5-9.

c. DoD MWR Utilization, Support, and Accountability (AR 215-1, para. 4-3). Implements DoD policy found in Ass't Sec Def (Force Management Policy) Memo, 23 July 1997, DoD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DoD MWR USA) Practice.

(1) Designed to foster efficiency in the use of appropriated and nonappropriated funds.

(2) Applies only to MWR activities listed in AR 215-1, figure 4-1.

(3) Allows the use of NAF contracting and personnel procedures to meet an APF MWR need. APF must then reimburse the IMWRF for the expenses.

(4) Must have a Memorandum of Agreement in place.

(5) Not available for installations participating in the Uniform Resource Demonstration Funding Project (White Sands and Fort Campbell).

d. Unit Funds. Each service has specific policies.

(1) Army. AR 215-1, para 5-11c, clarifies proper expenditures of unit funds, including "unit activity" funds established by MACOMs.

(a) Funds must be used for the collective benefit of all unit members for off-duty recreational purposes authorized by AR 215-1.

(b) All members must have the opportunity to participate.

(c) Activities must relate to the morale, welfare, and recreation needs of the unit members. Family members and guests may attend at the discretion of unit members.

(2) Navy.

(3) Air Force.

6. Solicited and unsolicited Commercial Sponsorship. DODI 1015.10, encl. 9; AR 215-1, para. 7-47. Allowed for MWR activities, Army Family Team Building, and Army Family Action Plan only.

a. Advertising, publicity, or other promotional consideration must be commensurate with the level of sponsorship offered.

b. Solicitation must be competitive and sponsorship award must be based upon the best value received and the appropriateness of the sponsor. No favored treatment allowed for sponsors and no penalties for nonsponsors.

c. All agreements must receive legal review (personnel involved in APF contracting may not be directly or indirectly involved in the solicitation).

d. All public recognition of sponsors must have disclaimers, i.e., "sponsorship does not imply endorsement."

e. Contents of all proposed public recognition must be reviewed to ensure compliance with DoD Directives.

f. May not solicit alcohol or tobacco manufacturers, but may accept unsolicited offers.

g. Sponsorship agreement must be in writing and for one year or less (extensions OK, but period covered by original agreement and renewals may not exceed five years). Also must include certification that no sponsorship costs will be charged to the Federal Government.

h. Open house programs are public affairs office events (not MWR). PAO must approve MWR events during open houses.

i. Professional development (SOC) training required for MWR employees authorized to work with the Commercial Sponsorship Program.

7. Gifts. NAFIs can accept conditional or unconditional gifts from individuals or private organizations. AR 215-1, para. 7-39. For gifts to the government see AR 1-100. For Marine Corps see MCO 1700.27A, figure 2.3.

a. Acceptance of the gift must be in the Army's best interest.

b. Gifts may not be requested, and donors receive no preferential treatment.

c. Fund managers may accept gifts of up to $5,000 when delegated authority by local commander.

d. Local commanders may accept gifts of up to $25,000.

e. MACOM commander may accept gifts up to $50,000 in value.

f. CFSC may accept gifts valued up to $200,000.

g. Secretary of the Army may accept gifts valued over $200,000.

G. Patronage. AR 215-1, Table 6-1,; AFI 43-162, Table A2.1; MCO 1700.27A, paras. 1200 & 1201.

1. MWR programs are established primarily for active duty personnel. Uniformed members of the Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration on active duty have equal access. DODI 1015.10, para E3.2.1.

2. Equal access for reservists for Category C activities. AR 215-1, para. 6-2a (implementing 10 U.S.C. § 1065).

a. Gives Ready and Selected Reserve members same priority as active duty members for Category C activities.

b. Gives Gray area retirees (retired reservists under 60) same priority as regular Army retirees for Category C activities.

c. Changes not applicable to Category A and B activities.

d. Family members have same priority as their sponsor.

3. State and local government use. AR 215-1, para. 6-2h(3).

a. May use Category A or B activities when the facilities have excess capacity; use is mutually beneficial to the installation and local activity; and when the use is at no additional cost to the Army unless the local/state agency subsidizes additional costs.

b. Must establish a Memorandum of Understanding.

4. Routine use of MWR activities by members of on-post private organizations is prohibited unless the member otherwise qualifies. AR 215-1, para. 6-2i.

5. Allows ASA (M&RA) to approve a waiver to allow the general public to patronize Category C activities when the facility is under-utilized and the local community agrees (except for bingo).

6. New DODI 1015.10 provides Coast Guard civilian employees access to military MWR facilities and programs commensurate with access provided to DOD civilian employees.

7. Suspension, termination or denial of patronage privileges is under the control of the installation commander.

H. Prohibited Uses of NAFIs. AR 215-1, para. 4-12; AFI 34-162, para 2.4.2.

1. Use must withstand public scrutiny test.

2. Financial support to private organizations.

3. Charitable contributions or assistance in collection of charitable donations.

4. Non-MWR events, such as change of command, retirement ceremonies, funerals, or other personal-type events for selected individuals.

5. Items authorized to be funded with APFs.

a. Under some circumstances, NAFs may be used for MWR activities if APFs are not available.

b. Requires written authorization that authorized APFs cannot satisfy the requirements.

c. Consider fiscal limitations set out in Congressional appropriations and authorizations.

6. Food and beverages, except as specifically authorized in regulation.

7. Spending must be connected to command morale and welfare.

I. APF Contracting with NAF Activities (Overturning the Mattress Decision, 58 Comp. Gen. 94, Nov. 21, 1978). 10 U.S.C. § 2482a authorizes a NAFI to enter into an agreement with a Federal agency or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the MWR system.

1. Authorizes APF activities to contract w/ a NAFI, noncompetitively, for purchases up to $2,500 using micropurchase procedures (rotating sources) with the IMPAC card.

2. Authorizes APF activities to contract w/ a NAFI for purchases exceeding $2,500 when justified as a sole-source contract using APF procedures.

3. Must be for goods or services "integral to the ongoing functions performed by the NAFI in support of the NAFI mission."

4. Overseas, APF activities may contract with the PX for purchases up to $50,000 (implements 10 U.S.C. § 2424).

IV. LIABILITY OF NAFIs.

A. NAFIs as Federal Instrumentalities (Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942)). AR 215-1, para. 3-1.

B. Tax Liability. AR 215-1, ch. 3, sec. III and para. 3-1b(2).

1. Federal. Alcohol wholesale & retail taxes. AR 215-1, paras. 3-10 and 3-12.

2. State and local. AR 215-1, paras. 3-13 and 3-14.

a. Waiver of immunity. 4 U.S.C. § 104.

b. Legal versus economic incidence of tax. AR 215-1, para. 3-13a.

C. Tort Liability. AR 215-1, para. 3-1.

1. Suits by NAFI employees. Exclusive remedy is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

2. Suits by third parties. Federal Torts Claims Act. AR 215-1, Ch. 14.

D. Contract Liability. AR 215-4.

1. NAFIs have sovereign immunity from suit, but administrative remedies exist. Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953).

2. Waiver of sovereign immunity for suit against the Exchange Service. Tucker Act, 28 U.S.C. § 1346.

E. Concessionaires status. They are private businesses and not instrumentalities of the United States. They are not entitled to any of the privileges and immunities of the Federal Government. AR 215-1, para. 3-2.

V. NAFI EMPLOYEES.

A. References.

1. DoD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities (Dec. 1988); DoD 1401.1-M-1, Job Grading System Manual for Nonappropriated Fund Instrumentalities (Oct. 1981).

2. DODI 1015.10, para. D12.

3. AR 215-3, (26 August 2002).

4. AFI 34-162, para 2.3.4. and AFI 65-106, Chapter 4.

B. Generally, NAFI employees are civilians. AR 215-3, para. 1-5.

C. Military.

1. Commander approval required.

2. Enlisted soldiers may be employed if off duty and if no interference with duty. AR 215-3, para. 2-20a.

3. Officers may provide off-duty service pursuant to a personal services contract. AR 215-3, para. 2-20b.

D. NAFI employment must comply with the applicable federal labor laws, but NAFI employees do not fall under OPM or the Federal Employment Compensation Act. 5 USC § 2105.

VI. CLUBS. AR 215-1, para. 8-17b.

A. Financial Status. Clubs must operate without a loss, or MACOM Commander must explain to MWR BOD why club should not close.

B. Army Theme Restaurants.

C. Membership.

1. Voluntary membership. AR 215-1, para. 8-17b(3); AR 600-20, para. 4-11.

a. Can't require reasons for ending or declining club membership.

b. Can't engage in any practice that involves or implies coercion, influence, or reprisal in the conduct of membership campaigns.

(1) No repeated orientations, meetings, or similar counseling of persons who have chosen not to join.

(2) No use of membership statistics in support of supervisory influence.

c. Encouraging membership.

(1) Sponsoring membership drives.

(2) Giving information to potential members, i.e., when they in-process.

(3) Structuring and running club activities based on the desires and support of patrons.

(4) Letter from commander encouraging club membership—must not use improper pressure.

2. Nonmember use of the club. AR 215-1, para. 8-17b(7).

a. Personnel in a transient or TDY status for less than 30 days. AR 215-1, para. 8-17b(7)(a)2.

b. To attend special functions. AR 215-1, para. 8-17b(7).

c. Bona fide guest of a member. AR 215-1, para. 8-17b(7)(a)1.

d. Others.

e. Nonmembers may be charged a different price than members.

VII. UNAUTHORIZED/RESTRICTED ACTIVITIES. DODI 1015.10, para. 4.10; AR 215-1, para. 8-35; AFI 34-262, para 1.8; MCO 1700.27A, paras. 1402, 1405, and 2104.2.

A. Lotteries or sale of lottery tickets.

B. Pull-tab bingo.

C. Sale of chit books related to the sale of alcohol.

D. Topless or nude dancing. AR 215-1, para. 8-12.

E. Awarding alcohol as a prize. AR 215-1, para. 7-14(e).

F. Pornography Sales.

1. Military Honor and Decency Act of 1996 (10 U.S.C. § 2489a), implemented by DoDI 4105.7, Sale or Rental of Sexually Explicit Material on DoD Property (June 29, 1998). Prohibits sale or rental of sexually explicit material on "property under the jurisdiction of DoD" (DoD resale activities).

   a. Includes DeCA, AAFES, NEX, MCX, and U.S. Navy Ships Stores.

   b. Does not include entities that are not instrumentalities of the U.S.

   c. Other MWR activities covered? Not by the letter of the law.

   d. Covers audio and video recordings and periodicals with visual depictions produced in any medium.

2. Suit brought to enjoin enforcement by DoD.

   a. General Media Communications, Inc. v. Cohen, 952 F. Supp. 1072 (20 February 1997, U.S. District Court, Southern District of New York). Court ruled the statute unconstitutional and issued permanent injunction prohibiting DoD from implementing the Act.

   b. GMC v. Cohen, 131 F.3d 273 (21 November 1997, U.S. Court of Appeals, 2d Circuit). Court overturned the lower court's holding, finding the Act constitutional and within Congress' authority.

c. GMC v. Cohen, 118 S. Ct. 2367 (June 26, 1998). Supreme Court denied certiorari.

3. Updated status.

a. Act is implemented within DoD.

b. DoD Resale Activities Board of Review -- reviewed hundreds of periodicals -- most were found violative.

c. In PMG Int'l Division v. Rumsfeld, 303 F.3d 1163, (9th Cir.), the Court upheld the Act as Constitutional.

G. Gambling is generally prohibited. See DoD Directive 5500.7-R, Joint Ethics Regulation § 2-302.

1. Monte Carlo or Las Vegas Events. DODI 1015.10, para. 4.11; AR 215-1, para. 8-9.

a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

b. Must use chits or play money. Can use winnings to buy resale items, food, beverages. Can't pay club dues, nor exchange for cash.

c. MWR--four per year (overseas may be more); PO--one per year.

d. CONUS use of slot machines or roulette wheels is prohibited.

e. Can't advertise via U.S. Postal Service.

2. "Gray Area Gambling Devices." Defined at AR 215-1, para 8-35g. Implements 15 U.S.C. § 1171.

a. Gambling Device vs. Amusement Machine.

b. Game of Chance vs. Game of Skill.

3. Bingo. DODI 1015.10, para. 4.11.1.2; AR 215-1, para. 8-7.

a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

b. On exclusive jurisdiction areas, the NAFI need not pay state or local fees or taxes, or obtain a bingo permit. Concurrent jurisdiction: state may regulate and charge for permits. AR 215-1, para. 3-13d.

c. Can't advertise via U.S. Postal Service.

d. Participation limited to authorized patrons and bona fide guests. Effective 4 January 1999 may not open bingo to general civilian populace, and contractor-operated bingo is prohibited. (Memo from ASA (M&RA) to Cdr, USACFSC, subject: Bingo Activities in Army Morale, Welfare, and Recreation (MWR) Programs--Action Memorandum, dated Nov. 5, 1998.)

4. Raffles. DODI 1015.10, para. D11a (3); AR 215-1, para. 8-19.

a. Lotteries are prohibited.

b. Raffles may be conducted to raise funds for MWR activities.

(1) Raffle proposal must receive a legal review;

(2) The Installation Commander must give his written approval of the raffle in advance;

(3) The raffle tickets must specify the maximum number of tickets that may be sold; and

(4) The IMWRF's total annual prizes may not exceed a retail value of $20,000. $15,000 is maximum retail value for any one prize. (MACOM may grant exception.)

(5) Raffles must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.

(6) Can't advertise raffles via U.S. Postal Service.

VIII. MWR ACTIVITIES AND ALCOHOL. DODI 1015.10, Encl. 12; AR 215-1, Ch. 7, Sec. II.

A. Age Restrictions on Sale of Alcohol. AR 215-1, para. 7-7.

1. At locations outside U.S., 18 years is minimum age for the purchase of alcohol products in the overseas Military Retail System. Look at treaties and local situation for higher minimum age. AR 215-1, para. 7-7b.

2. In U.S., no one under 21 will be employed to dispense, sell, or handle alcohol unless permitted by the state. AR 215-1, para. 7-7a.

B. In U.S., drinking age will be the same as the state where the installation is located. Exceptions to drinking age restrictions possible.

1. At remote installations where POVs are not available, all alcoholic beverages may be sold. AR 215-1, para. 7-7c(1).

2. If installation is located within 50 miles or 1-hour driving time from a state or international border with a lower drinking age. Sole consideration is the motor vehicle safety of the community. AR 215-1, para. 7-7c(2).

3. Special occasions under controlled conditions in order to foster camaraderie and friendship in a military environment. Must be approved by a general officer. AR 215-1, para. 7-7c(3).

4. Exceptions only apply to soldiers. AR 215-1, para. 7-7e.

5. State law does not affect “nonalcoholic” drinks (containing less than one-half of one percent alcohol), even if the state classifies them as alcoholic. AR 215-1, para. 7-7d.

C. Off Post. No activity may provide alcohol for off-post catered functions. Outside U.S., MACOMs will determine. AR 215-1, para. 7-10c.

D. Purchase of Alcohol. AR 215-1, para. 7-12.

1. In U.S., distilled spirits may be purchased from any source. Malt beverage and wine must be purchased in state. Exception: In Alaska and Hawaii, all alcohol purchases must be made within the state. AR 215-1, para. 7-12b.

2. Outside U.S., MACOMs decide policy consistent with treaties and agreements. AR 215-1, para. 7-12a.

3. As instrumentalities of the United States, NAFs are exempt from state and local taxes. AR 215-1, paras. 3-1b(2) and 3-13. But they must pay federal wholesaler or retailer taxes. AR 215-1, para. 3-10.

IX. CONCLUSION.

CHAPTER 22: COMMAND AUTHORITY

I. SOURCES OF COMMAND AUTHORITY:

A. Constitution:

1. Article 1, Section 8: "The Congress shall have power to ... provide for the common defense and general welfare of the United States…declare war ... raise and support Armies ... provide and maintain a Navy…make rules for the Government and regulation of the land and naval forces ...."

2. Article II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States."

B. Statutes:

1. Some grant authority, e.g., 10 U.S.C. §§ 1071-1104, "under regulations to be prescribed by the Secretary of Defense," active duty military entitled to medical and dental care in any facility of the uniformed services.

2. Others limit authority, e.g., 18 U.S.C. §1385, Posse Comitatus Act, "Whoever…willfully uses any part of the Army or the Air Force as a posse comitatus…shall be fined or imprisoned…"

C. Regulations:

1. DoD Directives, DoD Instructions (http://www.dtic.mil/whs/directives/) lay out DoD requirements. Services spell out specific service requirements in respective service regulation.

2. Service Regulations:

a. Army, Army Regulations (AR), e.g. AR 600-20 (13 May 2002);

b. Navy, Navy Regulations, SECNAVINST, OPNAVINST;

c. Marines, Marine Corps Orders (MCO), Marine Corps Directives;

d. Air Force, Air Force Instructions (AFI).

3. Local regulations, policies, directives.

a. Promulgated at the local installation level. Often serve as gap fillers when higher directives, orders, or regulations are inadequate or have been rescinded.

b. Heavy lifters in the areas of installation protection. UP DoDD 5200.8, Security of DoD Installations and Resources, 25 April 1991, paragraph 5.1, "Military commanders shall issue the necessary regulations for the protection and security or property or places under their command…"

D. Inherent Authority.

1. The Constitution, statutes, and regulations defining the authority of a commander do not address every contingency faced by a commander in the lawful execution of their duties. Commanders have inherent authority to act in order to avert dangers to morale, welfare, or discipline.

2. Inherent authority recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)(power of a commander over an installation is "necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand"). See also Greer v. Spock, 424 U.S. 828 (1976)(commander has the "historically unquestioned power" summarily to exclude civilians from the area of his command, "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").

3. Limitations. There must be some nexus between the authority sought and the effect on morale, welfare, or discipline. Political considerations, news media, and public relations may also serve as limiting factors.

II. DELEGATION OF COMMAND AUTHORITY:

A. Many duties may be delegated to a lower level commander. "Any duties of an installation commander may be delegated except those which are imposed upon installation commander by law, such as those mentioned in the Uniform Code of Military Justice, appropriation acts, other statutory provisions and regulations, or other directives that specifically prohibit delegation." AR 210-10, para 2-5. (Now rescinded); AFI 51-604, Appointment to & Assumption of Command; Navy Reg. Art. 0802.

B. Other duties may not be delegated, such as selection of panel members or conferring field grade Article 15 authority to a company grade officer.

III. USE OF COMMAND AUTHORITY TO REGULATE:

A. Speech.

1. Nature of forum:

a. Public Forum: Traditionally used for free speech activities, such as public streets and sidewalks. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Capitol Square Review & Advisory Board v. Pinette, 115 S. Ct. 2440 (1995)(state owned plaza surrounding Statehouse in Columbus, Ohio). Test is whether principal purpose is free exchange of ideas, evidenced by longstanding historical practice of permitting speech. But see U.S. v. Kokinda, 497 U.S. 720 (1990)(sidewalk used solely as a passage for postal patrons not a public sidewalk); Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992)(airport terminals not public forum).

b. "Created" Public Forum: aka "limited" or "designated." Government property set aside for free speech activities. E.g., Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)(school district opened school facilities for use after school hours by community groups for wide variety of social, civic, and recreational purposes); Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995)(university's Student Activities Fund, funded by mandatory student fees, paid for, inter alia, student group publications on student news, information, opinion, entertainment, or academic communications). Intent & extent of use granted is key.

c. Nonpublic Forum. Public property which is not by tradition or designation a forum for public communication may be reserved for its intended purpose so long as "regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)(selective access to school mailboxes did not transform property into public forum). See also Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985). Public access, such as at open house, is not sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8th Cir. 1982). Contra, U.S. v. Albertini, 710 F.2d 1410 (9th Cir. 1983), rev. on other grounds, 472 U.S. 675 (1985).

2. Content-based restriction:

a. Public Forum. Legitimate restrictions on time, place, and manner may be imposed. Courts will view any restrictions based upon content under a strict scrutiny (necessary to serve a compelling state interest and narrowly drawn to achieve that end) standard.

b. "Created" Public Forum: Same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, supra (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional). Accord Lamb's Chapel v. Center Moriches Union Free School District, supra (prohibiting after hours access to school property to groups with religious viewpoints).

c. Nonpublic Forum: Reasonable for forum. Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977)(ban on inmate solicitation to join prison inmate "labor union" and group meetings rationally related to reasonable objectives of prison administration).

3. Unprotected Speech including Dangerous Speech:

a. Fighting Words, i.e., those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971)(simply wearing jacket bearing words "F*** the Draft" may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" upheld conviction for calling another "damned racketeer" and "a damned Fascist").

b. Pornography. Roth v. U.S., 354 U.S. 476 (1957)(1st Amendment does not protect obscenity, i.e., material which deals with sex in a manner appealing to prurient interest).

c. Dangerous Speech:

(1) Civilian Standard: Whether words used under circumstances are such as to create a clear and present danger, Schenck v. U.S., 249 U.S. 47 (1919); clear and present danger means directed to inciting or producing imminent lawless action and likely to do so. Brandenburg v. Ohio, 395 U.S. 444 (1969)(mere abstract teaching of propriety or necessity to resort to force and violence not the same as preparing group for and steeling it to violent action).

(2) Military Standard: Speech which undermines the effectiveness of response to command is constitutionally unprotected. Parker v. Levy, 417 U.S. 733, 758 (1974)(different character of the military community and mission requires different application of 1st Amendment protections; "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it"). Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977)(affirmed Vietnam era court-martial conviction of seaman for publishing newsletter for active duty military urging desertion to Canada; 1st Amendment test in military is that words "tended to interfere with responsiveness to command or to present a clear danger to military, loyalty, discipline, or morale").

4. Prior Restraint. DoDD 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (1 Oct 96); AR 600-20, Army Command Policy; AFI 51-903, Dissident & Protest Activities (1 Feb 98); MCO 5370.4B, Dissident & Protest Activities (26 Jun 97); OPNAVINST 1620.1B, Guidelines for Handling Dissent & Protest Activities Among Members of the Armed Forces (14 Sep 99).

a. Approval in advance to determine whether publication presents clear danger to loyalty, discipline, or morale of military personnel or if distribution would materially interfere with mission is authorized. Prior approval requirement upheld in Greer v. Spock, supra (unsuccessful challenge to regulation prohibiting distribution of political literature on post); Brown v. Glines, 444 U.S. 348 (1980)(unsuccessful challenge to regulation requiring airmen to obtain prior approval from installation commander prior to distributing literature on installation).

b. Limitations: Cannot prohibit materials properly distributed through PX or library. These materials are governed by separate statute or regulation.

B. Solicitation.

1. Charitable. DoDD 5035.1, Combined Federal Campaign (CFC), Fund-Raising Within the Department of Defense (7 May 99); AR 600-29, Fund-Raising within the Department of the Army; SECNAVINST 5340.2C, Fundraising & Solicitation of Personnel, Military and Civilian, in the Navy Department (18 Aug 78). On-duty solicitation authorized only for Combined Federal Campaign and military relief & aid agencies. (See JER 3-210) Limited off-duty local fund raising may be authorized, e.g., for MWR activities, on-post private organizations, and other limited fund-raising to assist the unfortunate such as veteran organization "poppies" and collection boxes for food or goods.

2. Commercial. DoDD 1344.7, Personal Commercial Solicitation on DoD Installations (13 Feb 86, w/Ch 1-2: May 1991); AR 210-7, Commercial Solicitation on Army Installations; SECNAVINST 1740.2D, Solicitation & Conduct of Personal Commercial Affairs (27 Apr 87).

a. No right to solicit; must be authorized. Army permits in writing and valid for up to one year. (Navy/MC by local reg). Door-to-door solicitation prohibited. By appointment only; limited to family quarters or other designated areas.

b. Highly regulated to maintain discipline, protect property, and safeguard personnel. List of forbidden practices includes mass solicitation and retirees using IDs to get on post to solicit. Additional requirements for life insurance/securities. Violators can lose solicitation privileges; receive due process in form of notice and opportunity to be heard. Nature varies with service, e.g., Army has "show cause" hearing; Navy/MC informal.

C. Political Activities: Ch. 6, DoDD 5500-7.R, Joint Ethics Regulation; DoDD 1344.10, Political Activities by Members of the Armed Forces on Active Duty (15 Jun 90, Reissued 17 Feb 02 w/changes 1-2); AR 600-20; MCO 5370.7B, Political Activities (8 Mar 93); AFI 51-902, Political Activities by Members of the USAF (1 Jan 96).

1. Soldiers, Sailors, Airmen, & Marines: Traditional concept is that military members do not engage in partisan political activity. Examples: Voting and expressing personal opinion on candidates and issues authorized, as are contributions to a political party. Prohibitions include: no public demonstrations (partisan and nonpartisan) while on duty, in uniform (Locks v. Laird, 300 F. Supp. 915 (D. Colo. 1969)), or in a foreign country (Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir 1977)); no distribution of partisan political literature; no participation in partisan political management, campaigns, or convention.

2. Civilians: Hatch Act, 5 U.S.C. §§ 7324-27. No political activity on duty, in office space, while wearing uniform or indicia of government position, or using government vehicle. Political activity means partisan, i.e., representing a party. Less restrictive than DoD is for military. Call 1-800-85-HATCH (854-2824) for advisory opinions.

3. Recurring issue: bumper stickers & signs:

a. Small bumper sticker on private vehicle is authorized; large sign or poster is not.

b. Bumper stickers disrespectful to President can be banned. Ethredge v. Hail, 56 F.3d 1324 (11th Cir. 1995)(order barring civilian from displaying on his truck stickers embarrassing or disparaging to the President not violative of 1st Amendment).

c. Lawn signs in government housing areas. Local policy usually controls. Appropriate limitations authorized.

D. Religion.

1. Constitutional test. Lemon v. Kurtzman, 403 U.S. 602 (1977)(three part test: proposed government action must have a secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and not involve excessive government entanglement with religion).

a. Applied:

(1) Religious displays. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986)(city nativity scene in front of city hall unconstitutional); Jewish War Veterans v. United States, 695 F. Supp. 3 (D.D.C. 1988)(65-foot cross in front of HQ on military installation unconstitutional).

(2) Holiday displays. Lynch v. Donnelly, 465 U.S. 668 (1984)(secular holiday display which included nativity scene not unconstitutional).

(3) Invocations. Lee v. Weisman, 505 U.S. 577 (1992)("nonsectarian" prayer at middle and high school graduation ceremonies impermissible establishment of religion).

(4) Day care. Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995)(Army regulations prohibiting Family Child Care providers from having any religious practices during their daycare program unconstitutional; relationship between Army and provider is solely one of regulator and regulatee and does not create an unconstitutional entanglement).

b. Exceptions:

(1) Army Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

(2) Opening legislative sessions with invocation constitutional. Marsh v. Chambers, 463 U.S. 783 (1983).

2. Statutes.

a. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (Government shall not substantially burden exercise of religion, even from a rule of general applicability, except in furtherance of a compelling governmental interest and through the least restrictive means) Compelling governmental interest test applies to the military, but intent is for courts to grant authorities significant deference in effectuating military interest in maintaining good order, discipline, and security. 1993 U.S. Code Cong. & Admin News 1892. RFRA ruled unconstitutional in Boerne v. Flores, 521 U.S. 507 (1997).

b. 10 U.S.C. § 774, legislatively overruling Goldman v. Weinberger, 475 U.S. 503 (1986)(granting great deference to professional judgment of military authorities on matters of military interest and holding that 1st Amendment did not prohibit AF regulation preventing wearing of yarmulke while on duty and in uniform). Statute provides for wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty.

3. Regulation & Policy. DoDD 1300.l7, Accommodation of Religious Practices Within the Military Services (3 Feb 88, w/ch.1: 17 Oct 88); AR 600-20; SECNAVINST 1730.8A, Accommodation of Religious Practices (13 Dec 97).

a. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline. Commanders are responsible for initial determination of appropriate accommodation, but service member can have denial reviewed. Each service establishes procedures for such review. Army (HQDA Committee for Review of Accommodation of Religious Practices in U.S. Army); Navy/Marine (for wear & appearance denial) CNO/CMC)

b. Specific practices:

(1) Worship: Worship services, holy days, and Sabbath observances should be accommodated, except when precluded by military necessity.

(2) Diet: Military Departments should include religious belief as one factor for consideration when granting separate rations, and permit commanders to authorize individuals to provide their own supplemental food rations in a field or "at sea" environment to accommodate their religious beliefs.

(3) Wear and appearance: Religious items or articles not visible or otherwise apparent may be worn with the uniform, provided they shall not interfere with the performance of the member's military duties. Members may wear visible items of religious apparel while in uniform, except under circumstances in which an item is not neat and conservative or its wearing shall interfere with the performance of the members military duties. Hair and grooming practices required or observed by religious groups are not included within the meaning of religious apparel. Jewelry bearing religious inscriptions or indicating religious affiliation is subject to existing Service uniform regulations just as jewelry that is not of a religious nature.

(4) Medical practices: Army, no accommodation in life threatening situations; otherwise, medical board will consider request.

E. Extremist Organizations.

1. See DoDD 1325.6; AR 600-220; AFI 51-903; MCO 5370.4B (26 Jun 97); OPNAVINST 1620.1B (14 Sep 99) (prohibiting active participation in organizations which espouse supremacist causes, attempt to create illegal discrimination, advocate the use of force or violence, or otherwise engage in efforts to deprive others of their civil rights).

2. Army: AR 600-20 http://www.usapa.army.mil/pdffiles/r600_20.pdf.

a. Participation in extremist organizations or activities is incompatible with military service.

b. Extremism includes advocating racial, gender or ethnic hatred, or intolerance.

c. Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline/mission accomplishment; attending meetings under certain circumstances, e.g., in violation of commander's order.

d. Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, or morale within the command.

F. Appearance.

1. Each service promulgates its own uniform and appearance regulation.

a. The military uniform is an inappropriate forum for individual expression.

b. Personal appearance standards are established by the respective services. Additional standards may be imposed in unique circumstances, such as a deployed environment.

2. Army: AR 670-1 standards.

IV. AUTHORITY OFF THE INSTALLATION:

THE ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB). JOINT REG: AR 190-24/ OPNAVIST 1620.2A/ MCO 1620.2C/ AFI 31-213.

A. Takes action on reports of negative conditions; coordinates with civil authorities; makes recommendations to commander on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.

B. May recommend off-limits area, i.e., any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the off-limits period.

1. Due process provided in form of notice and opportunity to be heard.

2. Loss to business from order is not a "taking" for which damages accrue. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946).

3. Violation of off-limits is UCMJ offense.

CHAPTER 23

SENIOR OFFICERS LEGAL ORIENTATION

GOVERNMENT INFORMATION PRACTICES

Outline of Instruction

I. THE FREEDOM OF INFORMATION ACT (FOIA).

A. References.

1. Freedom of Information Act, 5 U.S.C. § 552, as amended.

2. Department of Defense Directive No. 5400.7, DOD Freedom of Information Act Program (29 September 1997).

3. Department of Defense Regulation No. 5400.7-R, DOD Freedom of Information Act Program (4 September 1998) (includes 1996 amendments to the Freedom of Information Act).

4. Army Regulation No. 25-55, The Department of the Army Freedom of Information Act Program (14 April 1997) (does not include 1996 amendments to the Freedom of Information Act).

5. Web Site Resources: Army FOIA/Privacy Website - http://www.rmd.belvoir.army.mil/FOIAMain.htm

B. Introduction.

C. Overview of FOIA.

1. Disclosure is the rule, not the exception.

2. The status and purpose of requester are generally irrelevant in determining whether records must be released.

3. Nine exemptions (seven of which apply to the DoD) and three exclusions permit withholding of records from the public.

4. Remedial provisions: access rights are enforceable in court.

D. Scope of FOIA. Applies to all "agency records."

1. "Records" include almost anything capable of being reproduced -- books, papers, computer data, photographs, etc.

2. Private notes vs. agency records. Private notes not subject to FOIA or Privacy Act if:

a. Prepared voluntarily;

b. Used only by the preparer (as a memory aide).

E. Disclosure of agency records.

1. Publication.

2. Reading room materials -- in paper and electronic format.

3. Release upon request.

F. Rule of segregability.

1. Portions of documents that are releasable must be segregated from portions that may be withheld.

2. Must estimate the volume of information denied.

G. How does the Army process FOIA requests?

1. The request must be proper.

a. It must request and reasonably describe a record.

b. It must be in writing (which includes conventional, paper requests, e-mail messages, and facsimile transmissions), express a willingness to pay or request a waiver of fees, and be directed to the proper custodian.

2. Acting on a proper request.

a. Custodian may usually grant the request.

b. Custodian cannot deny the request--it must be forwarded to the Initial Denial Authority (usually a higher-up in the technical chain).

c. Statutory time limit, 20 working days to communicate decision to the requester.

H. Exemptions. Exemptions permit, but do not require withholding.

1. Exemption 1 – Classified records.

2. Exemption 2 – Internal personnel rules and practices.

3. Exemption 3 – Other federal withholding statutes.

4. Exemption 4 – Trade secrets and commercial or financial information.

5. Exemption 5 – Certain agency memoranda and internal agency communications.

6. Exemption 6 – Personal privacy protection.

7. Exemption 7 – Records or information compiled for law enforcement purposes.

I. Exclusions.

1. Protect ongoing investigations unknown to subject.

2. Protect informants.

J. Penalties for improper withholding.

II. THE PRIVACY ACT.

A. References.

1. The Privacy Act of 1974, 5 U.S.C. § 552a, as amended.

2. Dep't of Defense Directive No. 5400.11, Department of Defense Privacy Program (13 December 1999).

3. Dep't of Defense Regulation No. 5400.11-R, Privacy Program (31 August 1983).

4. Army Regulation No. 340-21, The Army Privacy Program (5 July 1985).

5. Dep't of Army Pamphlet 25-51, The Army Privacy Program -- System Notices and Exemption Rules (21 September 1988).

6. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1 (18 April 1992).

7. Websites: www.rmd.belvoir.army.mil/foiamain.htm (does not contain Army systems notices – for Army systems notices use www.defenselink.mil/privacy and follow hyperlinks). Defense Privacy Office Web Page--to research current Privacy Act System of Records Notices and other Privacy Act guidance and information--http://www.defenselink.mil/privacyT.

B. Introduction.

C. Overview of the PA.

1. Public notice of systems of records.

2. Establish fair information practices.

3. Presumes subject access and the opportunity to amend factual matters in his own records.

4. Presumes no access to non-subjects (third parties) of records within a system of records.

D. Scope of the PA. Applies to "systems of records."

--A "system of records" is a group of records under the control of an agency from which information about an individual is retrieved by the name of the individual or by some other identifying particular.

E. Collection and maintenance of personal information.

1. Establish sound information practices.

a. Only collect information relevant and necessary to accomplish an agency purpose as defined by statute or Executive Order.

b. Collect directly from the subject unless:

(1) verifying information provided by the subject, or

(2) only a third party can provide the information.

c. A prohibition on the collection of information regarding the exercise of First Amendment rights unless:

(1) consent by the subject;

(2) collection is required by statute; or

(3) a valid law enforcement purpose exists.

d. Privacy Act advisement.

F. Access and amendment rights.

1. Requirements.

a. Access -- Tell subject we have the record. Allow subject to inspect and copy.

b. Amendment - Correct factual errors.

2. Ten exemptions from access and amendment (allow the agency to deny the subject access to and amendment of his own record).

a. General exemptions (2) - focus on agency maintaining the records.

b. Specific exemptions (6) - focus on the type of record.

c. Information compiled in anticipation of civil litigation (1).

3. Processing access and amendment requests.

a. Custodian may grant the request.

b. Custodian cannot deny the request--it must be forwarded to the Access and Amendment Refusal Authority (similar to the FOIA Initial Denial Authority (also a higher-up in the technical chain)).

G. General rule of nondisclosure to third parties--Unless the subject of the record consents or an exception applies (12 exceptions permit agencies to disclose information from records without the prior consent of the subject).

1. Disclosure within the agency (for the Army, the "agency" includes all of the DOD) on a need to know basis (Exception 1).

2. Disclosure required by FOIA (Exception 2). Use a balancing test to determine whether there is a “clearly unwarranted invasion of personal privacy.” Strike a balance.

3. Routine use (Exception 3). There are both general and specific routine uses.

4. Law enforcement use (Exception 7).

5. Court order (Exception 11). Must be signed by a judge, not a clerk or attorney.

H. Remedies.

1. Criminal provisions. Intentionally and willfully disclosing information from a Privacy Act protected record can result in criminal prosecution.

2. Civil remedies. Wrongful releases of information from Privacy Act protected files may subject the Army to lawsuit and monetary damages.

III. CONCLUSION

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

October 15, 2001

MEMORANDUM

TO: Principal FOIA Administrative and Legal Contacts at All Federal Agencies

FROM: Richard L. Huff
Daniel J. Metcalfe
Co-Directors
Office of Information and Privacy

SUBJECT: New Attorney General Memorandum on the FOIA

Enclosed is a new policy memorandum on the Freedom of Information Act that was issued by Attorney General John Ashcroft this past Friday evening, October 12, 2001.

As you can see, Attorney General Ashcroft's FOIA Memorandum establishes a new "sound legal basis" standard governing the defense of Freedom of Information Act lawsuits by the Department of Justice. It also recognizes the continued agency practice of making discretionary disclosures of exempt information under the Act, subject to statutory prohibitions and careful agency consideration of all institutional, commercial, and personal interests involved.

This new statement of FOIA policy supersedes the FOIA policy statement that was issued by the Department of Justice in October 1993, and it is effective immediately. The presidential statement on the FOIA that was issued in 1993 remains in effect.

Please ensure that this new FOIA policy memorandum is distributed widely within your agency as expeditiously as possible. Additionally, we will be distributing and discussing it at a FOIA Officers Conference to be held on Thursday, October 18, at the Commerce Department's Main Auditorium, at 10:00 a.m. It also is being made available through *FOIA Post* on the Department of Justice's FOIA Web site as of today.

Do not hesitate to contact OIP, through its FOIA Counselor service, at (202) 514-3642, with any question about this FOIA policy memorandum or any other aspect of FOIA administration.

Enclosure

APPENDIX A -1

NOT USED

Office of the Attorney General
Washington, D. C. 20530

October 12, 2001

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: John Ashcroft
Attorney General

SUBJECT: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

APPENDIX A-2

NOT USED

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

18 OCT 2001

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THEDEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTOR OF THE DOD FIELD ACTIVITIES

SUBJECT: Operations Security Throughout the Department of Defense

On 14 September the President declared a national emergency by reason of terrorist attacks and the continuing and immediate threat of further attacks on the United States. As this Department assists wide-ranging efforts to defeat international terrorism,. it is clear that US military and civilian service lives, DOD operational capabilities, facilities and resources, and the security of information critical to the national security will remain at risk for an indefinite period.

It is therefore vital that Defense Department employees, as well'as persons in other organizations that support DOD, exercise *great* caution in discussing information related to DOD work, regardless of their duties. Do not conduct *any* work-related conversations in common areas, public places, while commuting, or over unsecured electronic circuits. Classified information may be discussed *only* in authorized spaces and with persons having a specific need to know and the proper security clearance. Unclassified information may likewise require protection because it can often be compiled to reveal sensitive conclusions. Much of the information we use to conduct DOD's operations must be withheld from public release because of its sensitivity. If in doubt, do not release or discuss official information except with other DoD personnel.

All major components in this Department to include the Office of the Secretary of Defense, the Military Departments, the Joint Staff, the Combatant Commands, the Defense Agencies, the DOD Field Activities and all other organizational entities within the DOD will review the Operations Security (OPSEC) Program, described in DOD Directive 5205.2, and ensure that their policies, procedures and personnel are in compliance. We must ensure that we deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department.

Paul Wolfowitz

APPENDIX B

NOT USED

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 203014950

ADMINISTRATION & MANAGEMENT

November 9, 2001

Ref: OI-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the'analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise

APPENDIX C

security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.

- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a narne may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.

D. 0. Cooke
Director

Attachment:
As stated

DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 NOV 2001

01-CORR-111

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: DoD Guidance on Attorney General Freedom of Information Act (FOIA) Memorandum

On October 12, 2001, the Attorney General (AG) issued a memorandum for all heads of federal departments and agencies concerning the FOIA. On October 15, the U.S. Department of Justice (DOJ) Office of Information and Privacy (OIP) distributed the AG memorandum and stated that the new policy supersedes the previous FOIA policy statement issued by DOJ in October 1993. Copies of the AG and OIP memorandums are attached. On October 18, 2001, a FOIA officers conference was hosted by OIP in Washington D.C. to discuss the AG memorandum and other FOIA issues. The conference focused on interpretation of the AG memorandum and discussion on the possible use of the (b)(2) High (high 2) exemption in withholding information potentially of use to terrorists.

- Effective immediately, DoD components will adopt the **Sound Legal Basis** standard as reflected by the AG memorandum. The "foreseeable harm" standard is superseded. Changes to DoD 5400.7-R, "DoD Freedom of Information Act Program," will be forthcoming. Components will present a rationale for denial that DOJ will be able to defend if the denial is litigated. Components are advised to consult their respective FOIA policy and/or legal offices, or this Directorate as appropriate, to determine if a proper basis for denials of information exists.

- DoD components will apply the low 2 exemption as applicable. Be advised that the low 2 threshold applies **only** to internal matters of a relatively trivial nature. Components are encouraged to consult the DOJ "Freedom of Information Act Guide & Privacy Act Overview" for an in depth discussion on the legal history of the use of the low 2 exemption.

- Discretionary disclosures are no longer encouraged.

- DoD components may consider application of the high 2 exemption to deny information that may be of use to terrorist organizations, but must be prepared to present a **Sound Legal Basis** in support of their determinations.

H. J. McIntyre
Director

Attachments:
As stated

APPENDIX D

NOT USED

DEPARTMENT OF THE ARMY
U.S. ARMY RECORDS MANAGEMENT & DECLASSIFICATIONS AGENCY
6000 6TH STREET STOP 5603
FORT BELVIOR, VA 22060-5603

REPLY TO ATTENTION OF:

TAPC-PDD-FP 11 February 2002

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Release of Information Concerning Chemical, Biological, Radiological, and Nuclear Weapons of Mass Destruction.

1. Due to recent events the FOIA/PA Office is providing this interim guidance pertaining to all requests concerning release of information associated with chemical, biological, radiological, and nuclear weapons of mass destruction.

2. If you are the office of record and receive such a request, please provide the individual with an interim letter acknowledging receipt and informing them that the action is being processed. If you are not the office of record, please refer the request to the appropriate activity or to this office, and advise the individual and this office of your action. Quite simply we want to be kept informed of the number and nature of the requests being received and the disposition thereof.

3. When processing the request, if a decision is made that certain documents are releasable under the FOIA, please forward the initial request and the documents identified as releasable to this office for further review prior to releasing the information. If all requested documents are being withheld under a FOIA exemption, please provide the requester with a response denying the information, citing the proper exemption, providing appeal rights, and forward a copy of your response to this office.

4. We are not telling you not to release any requested documentation dealing with this topical material. We are saying that it should not be released without our review. If you have any questions, please call Ms. Rose Marie Christensen at 703-806-5698.

JOHN W. MATTHEWS
Director, Records Management
and Declassification Agency

DISTRIBUTION:
THE SECRETARY OF THE ARMY (SASA)
THE CHIEF OF STAFF, ARMY (DACS-ZA)
UNDER SECRETARY OF THE ARMY (SAUS)
VICE CHIEF OF STAFF, ARMY (DACS-ZB)
(CONT)

APPENDIX E

Printed on Recycled Paper

DISTRIBUTION: (CONT)
ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS) (SACW)
ASSISTANT SECRETARY OF THE ARMY (FINANCIAL MANAGEMENT AND COMPTROLLER) (SAFM-ZA)
ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS, LOGISTICS, AND ENVIRONMENT) (SAIE)
ASSISTANT SECRETARY OF THE ARMY (MANPOWER AND RESERVE AFFAIRS) (SAMR-ZA)
ASSISTANT SECRETARY OF THE ARMY (ACQUISITION, LOGISTICS, AND TECHNOLOGY) (SAAL-ZA)
GENERAL COUNSEL (SAGC)
ADMINISTRATIVE ASSISTANT TO THE SECRETARY OF THE ARMY DIRECTOR, ARMY STAFF (SAAA)
DIRECTOR OF INFORMATION SYSTEMS FOR COMMAND, CONTROL, COMMUNICATIONS, AND COMPUTERS (SAIS-ZA)
THE INSPECTOR GENERAL (SAIG-ZA)
THE AUDITOR GENERAL (SAAG-ZA)
THE DEPUTY UNDER SECRETARY OF THE ARMY (INTERNATIONAL AFFAIRS) (SAUS-AI-ZA)
THE DEPUTY UNDER SECRETARY OF THE ARMY (OPERATIONS RESEARCH) (SAUS-OR)
CHIEF, LEGISLATIVE LIAISON (SALL)
CHIEF, PUBLIC AFFAIRS (SAPA-ZA)
DIRECTOR, SMALL AND DISADVANTAGED BUSINESS UTILIZATION (SADBU)
CHAIRMAN, ARMY RESERVE FORCES POLICY COMMITTEE (SAMR-RF)
DEPUTY CHIEF OF STAFF FOR INTELLIGENCE (DAMI-ZA)
DEPUTY CHIEF OF STAFF FOR LOGISTICS (DALO-ZA)
DEPUTY CHIEF OF STAFF FOR OPERATIONS AND PLANS (DAMO-ZA)
DEPUTY CHIEF OF STAFF FOR PERSONNEL (DAPE-ZA)
CHIEF OF ENGINEERS (DAEN-ZA)
THE SURGEON GENERAL (DASG-ZA)
CHIEF, NATIONAL GUARD BUREAU (NAGB-ZA)
CHIEF, ARMY RESERVE (DAAR-ZA)
THE JUDGE ADVOCATE GENERAL (DAJA-ZA)
CHIEF OF CHAPLAINS (DACH-ZA)
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT (DAIM-ZA (CONT)

DISTRIBUTION: (CONT)
COMMANDING GENERAL:
US ARMY EUROPE AND SEVENTH ARMY (AEACG)

COMMANDER:
US ARMY MATERIEL COMMAND (AMCCG)
US ARMY FORCES COMMAND (AFCG)
US ARMY TRAINING AND DOCTRINE COMMAND (ATCG)
US ARMY SPECIAL OPERATIONS COMMAND (AOCG)
US ARMY CORPS OF ENGINEERS (CECG)
US ARMY MEDICAL COMMAND (DASG)
US ARMY PACIFIC (APCG)
EIGHTH U.S. ARMY (EACG)
MILITARY TRAFFIC MANAGEMENT COMMAND (MTCG)
US ARMY MILITARY DISTRICT OF WASHINGTON (ANCG)
US ARMY SOUTH (ASCG)
US ARMY INTELLIGENCE AND SECURITY COMMAND (IACG)
US ARMY CRIMINAL INVESTIGATION COMMAND (CICG)

CF:
THE ADJUTANT GENERAL, (TAPC-PD)
OFFICE OF THE COMMANDING GENERAL, U.S. TOTAL ARMY PERSONNEL COMMAND, (TAPC-ZA)
OFFICE OF THE DEPUTY CHIEF OF STAFF, G1, (DAPE-ZA)

NOT USED

ASSISTANT SECRETARY OF DEFENSE
6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

December 28, 2001

COMMAND, CONTROL, COMMUNICATIONS, AND INTELLIGENCE

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Removal of Personally Identifying Information of DoD Personnel from Unclassified Web Sites

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy (www.defenselink.mil/webmasters), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and

APPENDIX F

Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail Linda.Brown@osd.mil. Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.

John P Stenbit

John P. Stenbit

Attachment
As stated

DEPARTMENT OF THE ARMY
U.S. ARMY RECORDS MANAGEMENT & DECLASSIFICATIONS AGENCY
6000 6TH STREET STOP 5603
FORT BELVIOR, VA 22060-5603

REPLY TO ATTENTION OF:

TAPC-PDD-D

22 May 2002

MEMORANDUM FOR SEE DISTRUBTUION

SUBJECT: Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security

1 References:

a. Records Management and Declassification Agency (RMDA) memorandum dtd 11 April 2002, SAB (enclosures w/d) (Enclosure 1).

b. SECDEF message to ALDODACT, 151629Z May 02 (Enclosure 2), that directs military departments to provide OSD the status of their reviews and progress on implementation by 31 May 2002. The Army's Security Policy Office, Deputy Chief of Staff for Intelligence, G2, is responsible for reporting the Army's overall progress to date, and included in the Army's report will be the status of your command's review of unclassified but potentially sensitive documents recently removed from the Defense Technology Information Center (DTIC) web site because of concern they could potentially contain information that could assist in the development and use of weapons of mass destruction. While some organizations have been actively involved in completing their reviews, others appear to be virtually ignoring the White House and National Security Council request for expeditious action. In some instances, the command's designated action officer has not been definitively reported, or will not accept responsibility for this action.

2. Although we have not yet received a firm suspense date from the G2 for reporting your progress in support of the SECDEF message, in order to allow time for compiling the data and staffing the action, it can be assumed that our suspense will be several days prior to the DOD suspense of 31 May 2002. Therefore, pending a firm suspense, please review your progress to date and expedite your reviews as much as possible. It is certainly not our intent to embarrass any particular command; however, we must accurately report those Army organizations that have or have not put forth a good faith effort to respond to the White House/SECDEF request. Additionally, in support of the SECDEF message, the Directorate for Freedom of Information and Security Review (DFOISR) is publishing guidance for the handling of Freedom Of Information Act (FOIA) and Mandatory Review (MDR) requests. The Army FOIA Office will forward a copy of this guidance with implementing instructions directly to Command FOIA offices.

APPENDIX G

Printed on Recycled Paper

TAPC-PDD-D
SUBJECT: Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security

3. As always, we at RMDA stand willing to assist to the greatest extent possible. My point of contact remains Mr. Steven A. Raho, Army Declassification Activity. Mr. Raho may be reached at (703) 465-2553/2555, or email steven.raho@adf.hoffman.army.mil. Please verify the name, phone number, and email address of your point of contact for this action upon receipt of this memorandum to Mr. Raho. The DTIC point of contact remains Mr. Chris Cupp, (703) 767-8242 or email ccupp@dtic.mil.

2 Encls

JOHN W. MATTHEWS
Director, Records Management and
Declassification Agency

DISTRIBUTION:
DEPUTY CHIEF OF STAFF FOR OPERATIONS AND PLANS
DEPUTY CHIEF OF STAFF FOR PROGRAMS
DEPUTY CHIEF OF STAFF FOR INTELLIGENCE

COMMANDER:
US ARMY CENTER FOR ARMY ANALYSIS
US ARMY MATERIEL COMMAND
US ARMY FORCES COMMAND
US ARMY TRAINING AND DOCTRINE COMMAND
US ARMY CORPS OF ENGINEERS
US ARMY MEDICAL COMMAND
US ARMY INTELLIGENCE AND SECURITY COMMAND
US ARMY SPACE AND MISSILE DEFENSE COMMAND
US ARMY TEST AND EVALUATION COMMAND
US ARMY CENTER OF MILITARY HISTORY
US TOTAL ARMY PERSONNEL COMMAND

CF:
THE ADJUTANT GENERAL, (TAPC-PD)
OFFICE OF THE DEPUTY CHIEF OF STAFF, G1, (DAPE-ZA)

DEPARTMENT OF THE ARMY
U.S. ARMY RECORDS MANAGEMENT & DECLASSIFICATIONS AGENCY
6000 6TH STREET STOP 5603
FORT BELVIOR, VA 22060-5603

REPLY TO
ATTENTION OF:

TAPC-PDD-FP

28 JUN 2002

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Release of Information Concerning Chemical, Biological, Radiological, and Nuclear (CBRN) Weapons of Mass Destruction (WMD) and Critical Infrastructure Information (CIF)

1 References:

a. Records Management and Declassification Agency (RMDA) memorandum dtd 11 February 2002, SAB (enclosures w/d) (Enclosure 1).

b. Records Management and Declassification Agency (RMDA) memorandum dtd 22 May 2002, Subject: Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Enclosure 2).

2. This memorandum supplements and expands upon the memorandums referenced above.

3. The events of 911 have instilled added significance to the manner in which the Department of the Army reviews/releases certain documentation. The special records so identified pertain to mainly chemical, biological, radiological and nuclear weapons of mass destruction and critical infrastructure information. The rules and regulations pertaining to their releasibility under the Freedom of Information Act or the criteria for Declassification Actions have not changed. The overall responsibility for administering both programs remains with the Army Records Management Declassification Agency (RMDA), which is a part of the Office of the Adjutant General.

4. Addressees are reminded that all requests pertaining to this type document submitted under FOIA, or when processing mandatory declassification reviews submitted under Executive Order 12958, require special handling. In those instances where an office receives a request for such documentation within their custody and which they think should be granted, that office will forward: (a) the incoming request; (b) the documents in question; (c) a recommendation with respect to the incoming request; (d) supportive memorandum, if appropriate; and, (e) the name and address of the Initial Denial Authority responsible for the release of the material requested, to Department of Army Freedom of information and Privacy Acts Office, 7798 Cissna Road, Springfield, VA 22153-3166. Denial authority for such requests remains unchanged at the present level.

APPENDIX H

Printed on Recycled Paper

TAPC-PDD-FP
SUBJECT: Release of Information Concerning Chemical, Biological, Radiological, and Nuclear (CBRN) Weapons of Mass Destruction (WMD) and Critical Infrastructure Information (CIF)

5. No exceptions and no waivers. If in doubt as to whether it should be released or declassified, refer the material to us for review. My point of contact in this matter is Ms. Rose Marie Christensen, (703) 806-5698

Enclosures

JOHN W. MATTHEWS
Director, U.S. Army Records Management
and Declassification Agency

DISTRIBUTION

DEPUTY CHIEF OF STAFF FOR OPERATIONS AND PLANS
DEPUTY CHIEF OF STAFF FOR PROGRAMS
DEPUTY CHIEF OF STAFF FOR INTELLIGENCE

COMMANDER:
US ARMY CENTER FOR ARMY ANALYSIS
US ARMY MATERIEL COMMAND
US ARMY FORCES COMMAND
US ARMY TRAINING AND DOCTRINE COMMAND
US ARMY CORPS OF ENGINEERS
US ARMY MEDICAL COMMAND
US ARMY INTELLIGENCE AND SECURITY COMMAND
US ARMY SPACE AND MISSILE DEFENSE COMMAND
US ARMY TEST AND EVALUATION COMMAND
US ARMY CENTER OF MILITARY HISTORY
US TOTAL ARMY PERSONNEL COMMAND

CF:
THE ADJUTANT GENERAL, (TAPC-PD)
OFFICE OF THE DEPUTY CHIEF OF STAFF, G1, (DAPE-ZA)

CHAPTER 24

SOLO ENVIRONMENTAL LAW ELECTIVE

I. SECRETS OF A SUCCESSFUL ENVIRONMENTAL PROGRAM

A. U.S. Army Material Command Video

1. Leadership and Management Lessons

a. Working-Level Environmental Quality Control Committee

b. Employee Environmental Training

c. Vigilant Self Auditing

2. Despite Complex Problems, Progress Made over *Time*

B. Focus on Hazardous Materials and Hazardous Waste Management

1. Prevalent at both Unit and Installation Levels

2. Easy to Spot Violations

3. Individual Responsibility and Exposure (Case Illustrations)

4. Statistically, the Source of Most Army Violations

a. 124 out of 228 Fines Assessed to Date against Army Installations Involve Resource Conservation and Recovery Act (RCRA) Violations (FY 93 through 3rd Qtr FY 01)

MAJ James H. Robinette, II

b. Most Fines are Imposed by States or Localities (181)

5. Pharmacy Concept and the Hazardous Substance Management System

C. Underground Storage Tank (UST) Issues

1. Firm Deadline for UST Compliance was 22 December 1998

2. Point Paper addresses issues

3. EPA's recently released enforcement strategy

a. Appears to "target" federal facilities

b. Should be no surprise to your commands

II. MUNITIONS AND RANGE RULES

A. Munitions Rule

1. Military Munitions are not solid waste when used for intended purpose

2. Not a waste in the tube, in flight or on range after firing

3. Not a waste for on-range destruction during clearance activities

4. Covers active and inactive ranges

5. Becomes waste when transported off range for disposal, recovered and then disposed of by burial or landfilling (on or off range), lands off-range and is not promptly rendered safe and/or retrieved

6. If not a solid waste, then not a hazardous waste

7. Munitions managed IAW DOD and DOT regulations are conditionally exempt from RCRA

8. Action on munitions at closed, transferred and transferring ranges postponed while DOD prepares Range Rule

9. Munitions Rule upheld by Court of Appeals for D.C. Circuit 30 Jun 98

10. States must adopt to be effective (AL, AK, AZ, GA, HI, ID, IA, NV, OR, PR, MS, OK), process ongoing

B. Range Rule

1. Proposed Rule published 26 Sep 97, 62 Fed. Reg. 50830

2. Voluminous comments by regulatory agencies and public

3. Major issues are CERCLA basis and risk model (see article)

4. Range Rule withdrawn by DoD Nov 00, but expect to see as DoD guidance (DoDI/DoDD).

5. More challenging to get regulator acceptance

C. Activist Efforts

1. Challenged Munitions Rule

2. Will certainly challenge any interpretation of the range rule by regulators as obviating Army compliance with other hazardous substance or waste requirements.

3. Will continually use litigation/lobbying to increase regulatory control over ranges

III. ENDANGERED SPECIES ACT

A. Continues to be the area most able to affect operations

B. Recent activities

1. Impacts related to water usage form a basis for challenge to ongoing operations

2. Focus on large range and training areas, land withdrawals

3. Willingness of FWS to look at measures beyond the fenceline as mitigation

4. Less deference by regulators towards military mission

5. Decentralized USFWS structure highlights local issues over national issues

C. Trends

1. Very contentious issue in Congress

2. Strong lobbying for reform by industry and private interests

3. Substantial support for maintaining current strong statute, supported by activist groups

4. Unlikely any major revisions will pass

IV. LEAD BASED PAINT ISSUES

V. ENVIRONMENTAL LAW OVERSEAS AND IN MILITARY OPERATIONS

A. References

1. Primary.

a. DOD Instruction 4715.8, Environmental Remediation for DoD Activities Overseas, 2 Feb. 1998.

b. DOD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DOD Directive 6050.16, DOD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).

c. Department of Defense Overseas Environmental Baseline Guidance Document, Oct 92 (pending revision).

d. Country-Specific Standards.

(1) Final Governing Standards for Belgium, Mar 96.

(2) Final Governing Standards for Germany, Mar 96; Supplementary Agreement to NATO SOFA—effective 29 March 1998 (see below).

(3) Final Governing Standards for the Netherlands, Mar 96.

2. Secondary.

a. Executive Order, 12114, Environmental Effects Abroad of Major Federal Actions, 4 Jan 79.

b. Executive Order 12088, Federal Compliance with Pollution Standards, 13 Oct 78.

c. DOD Directive 4715.1, Environmental Security, 24 Feb 96.

d. DOD Instruction 4715.4, Pollution Prevention, 18 Jun 96.

e. DOD Directive 5530.3, International Agreements, 11 Jun 87.

f. DOD Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, 31 Mar 79.

g. AR 200-2, Environmental Effects of Army Actions, 23 Dec 88 (chapter 8 and appendices G and H deal with environmental effects of major Army actions abroad).

B. Background and general policies.

1. Background.

a. DOD is committed to the protection of human health and the environment at DOD installations in foreign countries.

b. Most U.S. environmental laws do not apply extraterritorially.

c. The FY 91 National Defense Authorization Act mandated that DOD develop environmental compliance standards for installations located abroad.

(1) Overseas Environmental Baseline Guidance Document (OEBGD).

(2) Final Governing Standards (FGS)

2. General Policies.

a. Hazardous Wastes. DOD Components will not dispose of hazardous wastes (as defined under either United States law or host nation standards) overseas without concurrence of the nation where the disposal takes place.

(1) Hazardous waste disposal in foreign countries must comply with either the OEBGD or FGS, as appropriate.

(2) Disposal must also be accomplished in accordance with any applicable international agreements.

(3) Absent an international agreement that grants disposal authority, appropriate authorities of the nation where the disposal takes place must explicitly or implicitly concur with the disposal.

b. Pollution Prevention. Prevention is the preferred means for attaining environmental compliance, where economically advantageous and consistent with mission requirements.

c. Cooperation. DOD Components will use cooperative solutions for environmental facilities or services, where economically advantageous and consistent with mission requirements.

d. Commercially Proven Solutions. DOD Components should use commercially proven solutions, where possible, to achieve, maintain, and monitor compliance.

e. Environmental Assessments. DOD Components shall establish and conduct a program for regular assessment of environmental compliance at installations overseas.

C. Overseas Environmental Baseline Guidance Document (OEBGD).

1. Prepared by the DOD Overseas Environmental Task Force.

2. Designed to achieve the broad policy mandate of protecting human health and the environment by establishing objective criteria and management practices for environmental compliance at overseas installations.

   a. Reflects consideration of current, generally accepted environmental standards applicable to similar DOD installations, facilities, and actions in the United States.

   b. Contains extracts of all pertinent U.S. environmental laws and regulations.

   c. Incorporates requirements of U.S. law that have extraterritorial application to DOD.

   d. Includes DOD guidance for overseas commanders.

3. Used in developing country-specific FGS. Contains procedures for use in establishing FGS for a particular geographic area and provides standards for environmental compliance where no FGS have been established.

4. Review and Updating.

   a. The OEBGD is supposed to be reviewed as needed, but at least biennially to ensure it reflects consideration of current standards.

   b. The Air Force (Center for Environmental Excellence) is in charge of the OEBGD review process and chairs a multidisciplinary committee consisting of, at a minimum, representatives of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Defense Logistics Agency. Field comments are solicited during the review process.

   c. The 1992 OEBGD revised 15 March 2000

D. Applicability of OEBGD

1. The OEBGD applies to all DOD installations located outside the United States, its territories, and possessions.

2. The OEBGD does not apply to:

   a. Operations of U.S. military vessels and aircraft. (Except support functions for such vessels and aircraft; e.g., management or disposal of off-loaded waste or material.)

   b. Off-installation operational and training deployments.

   c. Facilities and activities covered under the Naval Nuclear Propulsion Program.

   d. Restoration/remediation projects.

3. Unless inconsistent with applicable host nation law, base rights and/or Status of Forces Agreements, or other international agreements or practices established pursuant to such agreements, the OEBGD shall be applied by DOD Components stationed in foreign countries when:

   a. Host nation environmental standards do not exist;

   b. Host nation environmental standards are not applicable; or

   c. Host nation environmental standards provide less protection to human health and the natural environment than the baseline guidance.

E. Contents of OEBGD

1. Air Emissions - Chapter 2.

2. Drinking Water - Chapter 3.

3. Wastewater - Chapter 4.

4. Hazardous Materials - Chapter 5.

5. Hazardous Waste - Chapter 6.

6. Solid Waste - Chapter 7.

7. Medical Waste Management - Chapter 8.

8. Petroleum, Oil, and Lubricants - Chapter 9.

9. Noise - Chapter 10.

10. Pesticides - Chapter 11.

11. Historic and Cultural Resources - Chapter 12.

12. Endangered Species and Natural Resources - Chapter 13.

13. Polychlorinated Biphenyls - Chapter 14.

14. Asbestos - Chapter 15.

15. Radon - Chapter 16.

16. Lead Based Paint - Chapter 17.

17. Spill Prevention and Response Planning - Chapter 18.

18. Underground Storage Tanks - Chapter 19.

19. Appendix A - Characteristics of Hazardous Wastes and Lists of Hazardous Wastes and Hazardous Materials.

VI. FINAL GOVERNING STANDARDS (FGS).

A. Defined.

A comprehensive set of country-specific substantive provisions, typically technical limitations on effluent, discharges, etc., or a specific management practice with which DOD installations in the host nation concerned must comply.

B. FGS reconcile the requirements of applicable international agreements, applicable host-nation environmental standards, and the OEBGD.

C. Procedure for Establishing FGS.

1. The Deputy Under Secretary of Defense for Environmental Security (DUSD(ES)) designates a DOD Component as the DOD Environmental Executive Agent for environmental matters in foreign countries where DOD installations are located and where the DUSD(ES) determines that the level of DOD presence justifies establishment of FGS (see attached list). Current designations include:

a. CINCUSAREUR - Germany, Belgium, and the Netherlands.

b. CINCUSAFE - United Kingdom and Turkey.

c. CINUSNAVEUR - Italy, Spain, and Greece.

2. The DOD Executive Agent then identifies applicable host nation environmental standards. In identifying these standards, the Executive Agent must:

a. Identify published host nation law and applicable international agreements for the protection of human health and the environment within the host nation. Note that local laws are not included unless they implement national laws that delegate authority to, or recognize the authority of, the local governments in the environmental arena.

b. Determine the extent to which the host nation environmental standards are adequately defined and generally in effect and enforced against host nation and private sector activities.

3. Next, the Executive Agent will determine the FGS. Essentially, this is accomplished by comparing the OEBGD with applicable host nation environmental standards identified as described above.

a. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS. If a specific international agreement with the host nation establishes a standard applicable to U.S. installations, however, the Executive Agent will use that standard to establish the FGS.

b. The OEBGD will not be used to establish FGS if it is inconsistent with applicable host nation law or standards established under applicable international agreements, and such laws or standards provide more protection to human health and the environment.

c. If an individual standard is best analyzed as part of a comprehensive regulatory scheme, the Executive Agent should compare the overall regulatory scheme in the OEBGD with the corresponding scheme under host nation law or applicable international agreements. Ordinarily, the more protective scheme will then be used to establish the FGS.

d. If a particular issue is not addressed in the OEBGD but is regulated by host nation law or international agreement, the Executive Agent will consider the standards established by such law or agreement in developing the FGS. Until the Executive Agent establishes the FGS, the provisions of host nation law or the applicable international agreement apply.

e. The Executive Agent must coordinate the FGS with other DOD Components operating in the country, the Unified Combatant Commander, and the U.S. Diplomatic Mission.

f. Once established, the Executive Agent is supposed to revalidate and update the FGS "on a periodic basis," but at least every two years.

D. Compliance and Waivers.

1. DOD Components operating in a country for which FGS have been established must comply with the FGS for that country. If operating in a country for which no FGS have been established, such Components must comply with applicable international agreements, applicable host nation laws, and the OEBGD. In case of inconsistency, the most stringent standard applies.

2. Waivers.

a. DOD Components may request a waiver of FGS (or other applicable standards if not FGS have been established) only if:

(1) Compliance with the standards at particular installations or facilities would seriously impair their actions;

(2) Adversely affect relations with the host nation; or

(3) Require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or a realignment that would remove the requirement.

b. Waivers will not be granted if noncompliance would result in violation of any U.S. environmental law with extraterritorial application or constitute a breach of any applicable international agreement.

c. The Executive Agent approves or disapproves waiver requests. Pending action by the Executive Agent, Unified Combatant Commanders may authorize temporary emergency waivers in limited cases (i.e., the waiver is essential to the accomplishment of an operational mission directed by the National Command Authority).

E. Goals and Impact of New Supplementary Agreement with Germany

1. FRG's Goal: Greater German Control over Foreign Forces in Germany by Applying German Law

2. USAREUR Goals:

a. No degradation of training or readiness

b. No degradation of quality of life

c. No increased costs to government or personnel

3. ***Upshot is Uncertainty: FRG Will Force Maximum Compliance with German Law, especially***

a. Environmental (NATO SOFA Claims Procedures May Apply [75/25 Cost Split]; Pay Hazardous Substance Contamination Costs If We Did It, As Soon As Funds Are Available)

b. Permit requirements (construction; operate landfills; operate firing ranges; obtain water rights; transport hazardous cargo; store hazardous material; vehicle disposal (junk car) issues; perform activities with potentially dangerous effects on people or the environment)—if permit is denied, "consult" and find alternative.

c. Traffic and Transportation (expanded Hazardous Cargo Drivers Training [from 19 to 40 hours]; Hazardous Cargo Advisor Requirements [full implementation by 1 Jan, 2000]; operating waivers procedure/Bundeswehr Issues).

VII. OVERSEAS COMPLIANCE ASSESSMENTS.

A. DOD Instruction 4715.5 requires the heads of DOD Components to establish and implement an environmental compliance assessment program for overseas installations.

B. The overseas compliance assessment program must include both internal and external audits.

1. Internal assessments must be conducted annually, except in years when external audits are conducted.

2. External assessments will be conducted once every three years or when directed by the Unified Combatant Commander.

C. The protocol manuals used for assessment of installations located in the United States are not used overseas. Compliance is measured against standards established in the OEBGD, FGS , or applicable host nation laws or international agreements.

VIII. OVERSEAS "NEPA."

A. Executive Order, 12114 creates "NEPA-like" rules for certain overseas operations; i.e., major actions that have significant effects on the environment. "Major actions" are those activities that:

1. Involve substantial expenditures of time, money, and resources;

2. Affect the environment on a large geographic scale or have substantial or concentrated environmental effects on a more limited area; or

3. Are significantly different from other actions previously analyzed with respect to the environment.

B. Analysis and Documentation.

1. Generally, the Order requires analysis and documentation whenever a "major action" significantly affects the environment of any of the following:

a. The global commons;

b. A foreign nation not involved in or participating with the United States in the action;

c. A foreign nation which, during the action, receives a product that is prohibited or strictly regulated in the U.S. because of its toxic or radioactive nature (e.g., asbestos, vinyl chloride, PCBs); or

d. Any area with natural or ecological resources of global importance.

2. The type of analysis and documentation required will differ depending on which of the four "environments" set forth at paragraph VI.B.1 above are affected.

a. Global commons - Environmental Impact Statement (EIS).

b. Foreign nations and areas with natural or ecological resources of global importance - Environmental Study (ES) or Environmental Review (ER).

C. Exemptions.

1. No environmental analysis or documentation is required if one or more of the following exemptions apply:

a. Actions that DOD determines do not do significant harm to the environment outside the U.S..

b. Actions taken by the President.

c. Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict.

d. Actions taken by or pursuant to the direction of the President or a cabinet official when the national security or national interest is involved.

e. The activities of certain intelligence components utilized by the Secretary of Defense.

f. The decisions and actions of certain DOD organizations with respect to arms transfers to foreign nations.

g. Votes and other actions in international conferences and organizations.

h. Disaster and emergency relief actions.

i. Actions involving export licenses, export permits, or export approvals, other than those relating to nuclear activities.

j. Actions relating to nuclear activities, except those involving production, utilization, or waste management facilities.

k. **Any additional exemptions established by the Secretary of Defense.**

2. DOD is also authorized to establish categorical exclusions. If an action is covered by a categorical exclusion, no environmental analysis or documentation is required.

IX. CONTINGENCY OPERATIONS AND ENVIRONMENTAL CONSIDERATIONS.

A. Host Nation Law.

1. Immunity.

a. Granted by agreement.

b. Combat - Foreign troops enter a nation by force (Law of the Flag).

c. U.N.-sanctioned security enforcement mission.

2. Noncombat, human rights missions?

B. Environmental Protection Treaties.

1. 1925 Geneva Gas Protocols.

2. 1993 Chemical Weapons Convention.

3. Environmental Modification Convention

C. Traditional Law of War.

1. Hague Regulations.

2. Geneva Convention IV.

3. 1977 Protocols Additional to the Geneva Conventions.

CHAPTER 25

SENIOR OFFICER LEGAL ORIENTATION

EQUAL EMPLOYMENT OPPORTUNITY

I. INTRODUCTION.....1
II. EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT.....1
III. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.....2
IV. THEORIES OF DISCRIMINATION AND METHODS OF PROOF. 3
V. THE EEO COMPLAINT PROCESS.....6
VI. CONCLUSION.....11

OUTLINE OF INSTRUCTION

I. INTRODUCTION.

II. EQUAL EMPLOYMENT OPPORTUNITY (EEO) IN THE FEDERAL GOVERNMENT.

A. Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e - 2000e-17, prohibits:

1. Basis: discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action; retaliation or reprisal for having engaged in protected activity.

2. Persons covered: applicants for employment, employees, and former employees.

3. Issues: fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect person.

B. Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits:

1. Basis: discrimination on basis of age 40 and over; retaliation or reprisal for having engaged in protected activity.

2. Persons covered: applicants for employment, employees, and former employees.

3. Issues: fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages.

C. Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 790-794, and modified by the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213:

1. Basis: discrimination on the basis of handicapping condition (disability); failure to reasonably accommodate qualified handicapped.

2. Persons covered: applicants for employment, employees, and former employees.

3. Issue: test applicant to screen out handicapped; fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages, or be denied "reasonable accommodation" if accommodation does not impose undue hardship on agency.

D. The Equal Pay Act (29 U.S.C. § 206(d)) requires equal pay for equal work.

E. The Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.).

1. Under Section 102 of the Act, compensatory damages, but not punitive damages, of up to $300,000 may be recovered from the federal government.

2. Also, under Section 102 of the Act, where plaintiff seeks compensatory damages, either party may demand trial by jury and the court shall not inform the jury of the damage limitations.

III. EQUAL EMPLOYMENT OPPORTUNITY AGENCIES

A. Equal Employment Opportunity Commission (EEOC).

B. Merit Systems Protection Board (MSPB).

C. Department of Defense Civilian Personnel Management Service (CPMS), Office of Complaint Investigations (OCI).

D. Army Equal Employment Opportunity & Civil Rights Office (EEOCRO).

IV. THEORIES OF DISCRIMINATION AND METHODS OF PROOF.

A. Disparate treatment.

1. Definition: "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."

2. Proof of discriminatory motive essential.

3. Harassment/hostile work environment.

4. Burden of proof in cases involving circumstantial evidence of discrimination. The shifting burdens.

a. Plaintiff's prima facie case.

(1) Member of protected class.

(2) Employment action taken.

(3) Complainant treated differently than similarly situated member of another class.

b. Defendant's burden of going forward.

(1) Articulate legitimate non-discriminatory reason for the employment action.

(2) Bona fide occupational qualification.

c. Plaintiff's rebuttal.

(1) Discriminatory reason for action is more likely.

(2) Employer's explanation unworthy of belief (pretext).

d. Ultimate burden of proof remains with plaintiff.

B. Retaliation and reprisal.

1. Elements.

a. Individual engaged in protected activity. 42 U.S.C. § 2000e-3.

(1) Opposition clause.

(2) Participation clause.

b. Adverse employment action taken against the employee.

c. Causal connection between protected activity and personnel action. An inference that a causal connection exists will arise where the individual shows that employer was aware of the protected activity and the adverse action follows the protected activity closely in time.

2. Employer defenses.

a. Legitimate, non-retaliatory reasons for action.

b. Decision to take action made before protected activity.

c. Lack of knowledge of prior protected activity.

d. Prolonged period of time between protected activity and adverse action.

C. "Mixed Motive" discrimination cases. Both proper and improper motives involved in personnel action. Once the employee proves discrimination contributed to action, the employer must prove by clear and convincing evidence that it would have taken the same employment action absent the prohibited discrimination.

D. Reasonable accommodation (for disability).

1. Plaintiff's prima facie case: Demonstrate that plaintiff is "qualified disabled person." 29 C.F.R. § 1614.203.

   a. Disabled person - has or is treated as having a physical or mental impairment that substantially limits one or more major life activity.

   b. Can perform essential functions of position, with/without reasonable accommodation.

   c. Performance will not endanger health or safety of subject employee or others.

2. Defenses.

   a. Plaintiff not "qualified" handicapped.

   b. The accommodation would impose an undue hardship on agency's operation.

   c. Agency is not obligated to try every possible accommodation regardless of its likelihood of success.

3. Miscellaneous handicap issues.

   a. Alcoholism and drug dependence as disabling conditions.

   b. Accommodating the alcoholic or drug addict. No more "Last chance agreements". *Kimble v. Navy*, 70 M.S.P.R. 617 (1996).

   c. Reassignment as reasonable accommodation. Reassignment is an accommodation of *last resort*.

(1) New Rule Broadens Reassignment Job Search: The EEOC amended it regulations (May 2002) to align the federal sector reassignment rule with the Americans With Disabilities Act (ADA) standard. New rule: reassignment is to funded vacant position in same department. Department = Army. Reassignment job searches must now be Army-wide.

V. THE EEO COMPLAINT PROCESS.

A. Administrative Complaint Procedures--Nonmixed Cases.

1. References. 29 C.F.R. Part 1614; AR 690-600 (currently under revision).

2. Complaint process.

a. Informal stage: Employee contacts EEO Counselor.

(1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a).

(a) Commencement of 45-day period.

(i) Personnel action--effective date of action.

(ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.

(2) Counselor actions. 29 C.F.R. § 1614.105.

(a) Initial interview.

(i) Advise complainant.

(ii) Gather facts from complainant.

(iii) Identify agency witnesses, if any.

(b) Counselor inquiry, including interview with witnesses.

(c) Final interview.

(i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the agency has a precomplaint dispute resolution program and the employee agrees to participate in it. 29 C.F.R. § 1614.105(d)-(f).

(ii) Notice of right to file formal complaint.

(d) Final report.

(e) Identity of complainant. EEO Counselor does not reveal without complainant's consent. 29 C.F.R. § 1614.105(g).

b. Formal stage.

(1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b).

(a) Timing--within 15 days of final interview with EEO Counselor.

(b) After acceptance, the agency may dismiss the complaint for a variety of reasons, to include:

(i) Complainant files suit in federal court.

(ii) Complainant fails to prosecute or the issue is moot.

(iii) Complainant did not meet time limits.

(iv) Complaint has already been raised using the grievance procedure or in appeal to the Merit Systems Protection Board.

(v) Complainant is found to be abusing the EEO process.

(c) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(e) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).

(d) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).

(i) Request a final agency decision from the agency head based on the record.

(ii) Request a hearing and decision from administrative judge from EEOC.

(iii) File suit in federal District Court if no final agency decision has yet issued and 180 days has elapsed since filing complaint.

(2) EEOC hearing. 29 C.F.R. § 1614.109.

(a) Hearing procedures.

(i) Evidence. 29 C.F.R. § 1614.109(f). Documentary and testimonial.

(ii) Witnesses. Direct evidence, not unduly repetitious, under oath.

(iii) Alternatives to testimony. Written statements (sworn), video teleconference, phone testimony.

(b) Record of hearing. 29 C.F.R. § 1614.109(h). Agency pays for verbatim transcripts.

(c) Decisions. 29 C.F.R. § 1614.109(i). The administrative judge (AJ) must issue a decision on the complaint within 180 days of the request for hearing.

c. Final orders. The agency must issue a final order within 40 days after receiving the administrative judge's decision and hearing file. The order must state whether or not the agency will fully implement the decision. If the order states that the agency will not, the agency must file an appeal with the EEOC at the same time as it issues its final order (within 40 days of receiving judge's decision). 29 C.F.R. § 1614.110, § 1614.401.

d. Complainant's Appeal to EEOC. An appeal of the final agency order must be filed with the EEOC within 30 days. 29 C.F.R. § 1614.401, § 1614.402.

e. Remedial actions.

(1) Nondiscriminatory placement.

(2) Back pay.

(3) Compensatory damages up to $300,000.

(4) Fees and costs.

f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.

(1) Representation. Complainants have the right to be accompanied, represented, and advised by a representative of their choice at any stage of the EEO complaint process.

(2) Official time. Complainants get reasonable amount of official time to prepare and attend. Witnesses are in duty status when testifying (as required by administrative judge). If Complainant's representative is Federal employee (i.e., union rep), the representative gets reasonable amount of official time to prepare, but if representation conflicts with work duties, representative may be disqualified. 29 C.F.R. § 1614.605(c). The agency does not have to change work schedules or incur overtime wages for Complainant's or the representative's preparation time.

B. Civil Action in U.S. District Court.

1. Employees may obtain judicial review of final administrative decisions by filing suit in Federal district court within 90 days of receipt of the final agency or EEOC decision.

NOTE: The Civil Rights Act of 1991 permits Federal employees who prove intentional discrimination (*i.e.*, disparate treatment) to recover up to $300,000 in compensatory damages for future pecuniary losses, emotional

pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life. This is in addition to the "make whole" remedies already available (*e.g.,* back pay). The Civil Rights Act of 1991 also authorizes Federal employees to demand a jury trial in district court.

2. Judicial Review of Claims of Discrimination Involving Personnel Actions Not Appealable to MSPB ("Pure" Discrimination Claims).

   a. Actions reviewable: Suit is limited to claims of discrimination raised administratively and claims like or reasonably related to claims raised administratively.

   b. Proper defendant - The head of the agency (*e.g.,* Secretary of the Army) is the only proper defendant.

   c. Scope of Review - Trial de novo on claims raised administratively.

   d. Standard of Review - Plaintiff must prove discrimination by a preponderance of the evidence.

VI. CONCLUSION.

CHAPTER 26

SENIOR OFFICER LEGAL ORIENTATION

LAW OF FEDERAL EMPLOYMENT

I. INTRODUCTION.....1
II. REFERENCES.....1
III. THE ROLE AND FUNCTIONS OF CIVIL SERVICE AGENCIES.....1
IV. INSTALLATION LEVEL PLAYERS.....1
V. FEDERAL CIVILIAN EMPLOYMENT.....2
VI. APPEAL & GRIEVANCE RIGHTS.....3
VII. EMPLOYEE PERFORMANCE.....3
VIII. CIVILIAN EMPLOYEE MISCONDUCT.....5
IX. RESERVE TECHNICIANS.....7
X. CONCLUSION.....8

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

A. Statutes: Title 5, United States Code, section 1101 *et seq*.

B. Office of Personnel Management (OPM) Regulations: Title 5, Code of Federal Regulations (CFR).

C. Army Regulations: Civilian Personnel Regulations and AR 690-xxx series.

III. THE ROLE AND FUNCTIONS OF CIVIL SERVICE AGENCIES.

A. Office of Personnel Management (OPM). 5 U.S.C. §§ 1101-1105.

B. Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 1201-1209.

C. Office of Special Counsel (OSC). 5 U.S.C. §§ 1211-1219.

IV. INSTALLATION LEVEL PLAYERS.

A. The Role of the Military Lawyer--The Labor Counselor Program.

B. The Civilian Personnel Office.

1. Traditional organization had four divisions: Position and Pay Management Division (PPM); Recruitment and Placement Division (R&P); Management-Employee Relations Division (MER); and Training and Development Division (T&D).

2. Army CPO Regionalization: New w

a. CPOCs.

b. CPACs.

V. FEDERAL CIVILIAN EMPLOYMENT.

A. Employees--Classified by Type of Appointment:

1. Competitive Service.

2. Excepted Service.

3. Senior Executive Service.

B. Employees--Classified by Tenure Status.

1. Requirement for probationary period. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.801-315.806.

2. Tenure upon appointment: career-conditional. 5 C.F.R. § 315.301.

3. Probationary period for excepted service positions. 5 U.S.C. § 7511(a)(1)(C).

4. Probationary period for military technicians. *Hintz v. Dep't. of Army*, 21 F.3d 407 (Fed. Cir. 1994).

5. Probationary period for new supervisors. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.901-315.908; AR 690-300, ch. 315, subch. 9.

C. Classification of Positions by Method of Payment. 5 U.S.C. Chapters 51-59.

1. General schedule employees. 5 U.S.C. Chapters 51 and 53. GS-1 - GS-15.

2. Prevailing rate employees (wage board). 5 U.S.C. §§ 5341-5349. WG-1 - WG-15.

3. Senior Executive Service (SES) employees. 5 U.S.C. §§ 5381-5385. ES-1 - ES-6.

4. Executive Schedule. Levels I - V.

5. Nonappropriated fund employees (AR 215-3): Those employees who are not paid from funds appropriated by Congress.

6. Other personnel.

VI. APPEAL AND GRIEVANCE RIGHTS DEPEND ON:

A. Type of action,

B. Collective bargaining agreement, and

C. Employee status.

VII. EMPLOYEE PERFORMANCE.

A. Performance Appraisal System -- Total Army Performance Evaluation System (TAPES). AR 690-400, Ch. 4302.

B. Actions for Unacceptable Performance (Performance-Based Actions).

1. Counseling.

2. Reassignment.

3. Reduction in grade.

4. Removal.

C. Proof Requirements.

1. Performance appraisal system approved by OPM.

2. Employee given written notice of performance standards. Standards themselves are subject to review and challenge.

3. Employee given notice of performance deficiencies.

   a. Written notice.

   b. Note oral notice on SF 7-B; prepare MFR on discussion.

4. Employee given reasonable time to improve.

   a. Opportunity to improve must be meaningful.

   b. Employee improvement during "performance improvement period" (PIP). 5 C.F.R. § 432.105. Employee must maintain acceptable performance for 1 year from beginning of PIP or no new PIP is required.

5. Employee's performance remains unsatisfactory.

   a. Employee Evaluation Report.

   b. Examples of employee's work product.

   c. SF 7-B with supplemental MFRs reflecting assistance to employee during PIP.

   d. Supervisor's explanation.

6. Followed proper procedures. Harmless error rule.

VIII. CIVILIAN EMPLOYEE MISCONDUCT.

A. Types of Actions and Procedural Requirements.

1. Informal actions. AR 690-700, Ch. 751.1-3b.

a. Oral admonitions/warnings.

b. Use of Employee Record Card, SF 7-B.

2. Formal actions.

a. Written reprimands. AR 690-700, Ch. 751.3-2.

(1) Procedure.

(2) Retained 1-3 years.

b. Suspensions for 14 days or less.

(1) Procedure.

(2) Nature and length of suspension.

c. "True" adverse actions.

(1) Types of actions.

(a) Suspensions for more than 14 days.

(b) Furloughs.

(c) Reductions in grade.

(d) Removals.

(2) Procedures.

(a) 30 days advance written notice.

(b) Representation.

(c) Oral and Written replies.

(d) Written decision.

B. Proof Requirements.

1. Employee committed the act of misconduct (by preponderance of the evidence).

2. Nexus/Connection between the misconduct and the efficiency of the service.

3. Appropriateness of penalty choice.

a. General MSPB Rule: Relevant “Douglas” factors which include:

(1) nature and seriousness of offense;

(2) employee's job;

(3) employee's past disciplinary record;

(4) employee's past work record;

(5) effect of offense on employee's ability to perform job;

(6) consistency with penalties to other employees for similar offenses;

(7) impact on agency's reputation;

(8) clarity of notice to employee that conduct proscribed;

(9) potential for employee's rehabilitation; and

(10) adequacy of alternative sanctions to deter misconduct by this employee and others.

4. Followed proper procedures.

5. Standard of proof - preponderance of the evidence.

6. Deference to the agency in penalty selection; abuse of discretion standard.

7. When not all agency charges are sustained, the Board will apply a "reasonable penalty" standard to make the penalty selection and then direct the agency to implement the penalty selected by the Board.

IX. NATIONAL GUARD AND MILITARY RESERVE TECHNICIANS.

A. National Guard Technicians Act of 1968. 32 U.S.C. § 709.

1. Must maintain guard membership.

2. The Act reserves to the Adjutant General of the state involved specific authority over technicians. Separation from civilian employment allowed based on:

a. Loss of guard membership or specific grade required;

b. Loss of security clearance;

c. For cause by the Adjutant General; and

d. Reductions in Force.

B. Reserve Technicians. 5 U.S.C. § 3329; 10 U.S.C.§ 10216; AR 140-315; and AFRESR 40-2.

1. Originally created by an agreement between the military service and Civil Service Commission in 1957. *See also AFGE v. Hoffman*, 543 F.2d 930 (D.C. Cir. 1976).

2. Employees enjoy the same rights as other civil service employees, except as provided by implementing regulations.

3. Common issues in reserve technician employment:

a. Loss of reserve status due to circumstances within employee's control. (Active reserve membership is a term and condition of employment.) Examples: Non-promotion which leads to loss of active reserve membership, *Buriani v. Dep't. of Air Force*, 777 F.2d 674 (Fed. Cir. 1985); Misconduct, *Jeffries v. Dep't. of Air Force*, 999 F.2d 529 (Fed. Cir. 1993); and Transfer to Individual Ready Reserve following a failure to report for annual training, *Zimmerman v. Dept. of Army*, 755 F.2d 156 (Fed. Cir. 1985).

b. 10 U.S.C. § 10216: Requires (unless exempted out by law) all military technicians hired after 1 December 1995 to maintain military membership in the Selected Reserve unit by which they are employed as a military technician (so as to be a "dual-status" technician). Prohibits the use of appropriated funds to compensate any military technician hired after 10 February 1996 who is no longer a member of the Selected Reserve.

c. 10 U.S.C. § 10217: Defines "non-dual status military technician" as a DoD civilian employee serving in a military technician position who was hired as a military technician before 18 November 1997 and as of 18 November 1997 is not a member of the Selected Reserve or after such date ceases to be a member of the Selected Reserve. Sets a cap on the number of non-dual status technicians in each component as of 30 September 1998. Requires DoD to submit a plan to ensure that by the end of FY 2007 all military technician positions are occupied only by military technicians (dual status).

X. CONCLUSION.

CHAPTER 27

SENIOR OFFICERS LEGAL ORIENTATION

FEDERAL LABOR-MANAGEMENT RELATIONS

Outline Of Instruction

I. INTRODUCTION.

A. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101 - 7135.

The Congress finds that [union participation]-
safeguards the public interest,
contributes to the effective conduct of public business, and
facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment. . . Therefore, labor organizations and collective bargaining in the civil service are in the public interest. [5 U.S.C. § 7101].

B. Civilian Work Force and Unions (As of January 2001).

1. Exclusive Recognition by Agencies.

Federal Employees Represented Government Wide:	1,043,479
Decrease From 1999:	6,944
Percentage Of All Federal Employees:	61%
Percentage Represented in 1997	60%

2. Percentage of Employees Organized, by Agency.

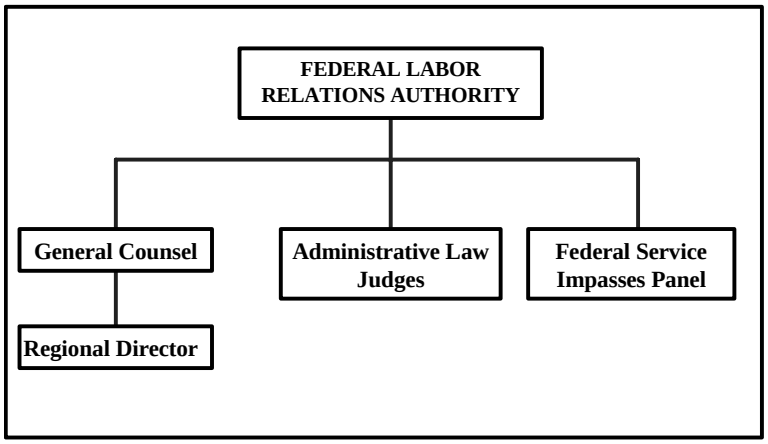
AGENCY	PERCENTAGE REPRESENTED
Air Force	71%
Army	58%
Navy	61%

3. Exclusive Recognition by Major Unions.

UNION	EMPLOYEES REPRESENTED
AFGE	582,753
NTEU	139,302
NFFE	68,535
NAGE	45,533
ACT	22,173
IFPTE	21,885

AFGE - AMERICAN FEDERATION OF GOV'T EMPLOYEES
NTEU - NATIONAL TREASURY EMPLOYEES UNION
NFFE - NATIONAL FEDERATION OF FED. EMPLOYEES
NAGE - NATIONAL ASSOCIATION OF GOV'T EMPLOYEES
ACT - ASSOCIATION OF CIVILIAN TECHNICIANS
IFPTE – INTERNATIONAL FEDERAL OF PROF. AND TECH ENGINEERS

II. PROGRAM ADMINISTRATION. Who are the players?



A. Federal Labor Relations Authority (FLRA) [5 U.S.C. § 7105].

1. Overall program administration.

2. Important functions.

a. Resolves issues of negotiability.

b. Renders final decisions in Unfair Labor Practice (ULP) cases.

c. Reviews arbitration awards.

B. General Counsel [5 U.S.C. § 7104(f)].

1. Prosecutes unfair labor practices.

2. Supervises Regional Offices.

C. Regional Directors.

1. Seven locations.

a. Boston. (Includes Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Eastern Pennsylvania, Rhode Island, and Vermont.)

b. Washington, D.C. (Includes the District of Columbia, Maryland, and Virginia.)

c. Atlanta. (Includes Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and the Virgin Islands.)

d. Chicago. (Includes Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Eastern Missouri, Ohio, Western Pennsylvania, West Virginia, and Europe.)

e. Dallas. (Includes Arkansas, Louisiana, Oklahoma, Texas, and Panama.)

f. Denver. (Includes Alaska, Arizona, Colorado, Idaho, Kansas, Western Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.)

g. San Francisco. (Includes California, Hawaii, Oregon, Washington, and Asia.)

2. Determine appropriate bargaining units.

3. Investigate ULPs.

4. Supervise elections.

D. Administrative Law Judges.

- Hear ULP complaints.

III. TERMINOLOGY.

A. Agencies of the Federal Sector. This includes any Executive branch agency, the Library of Congress, and the Government Printing Office. It excludes most agencies with law enforcement and national security missions. Agencies which are specifically excluded include:

1. The General Accounting Office;

2. The Federal Bureau Of Investigation;

3. The Central Intelligence Agency;

4. The National Security Agency;

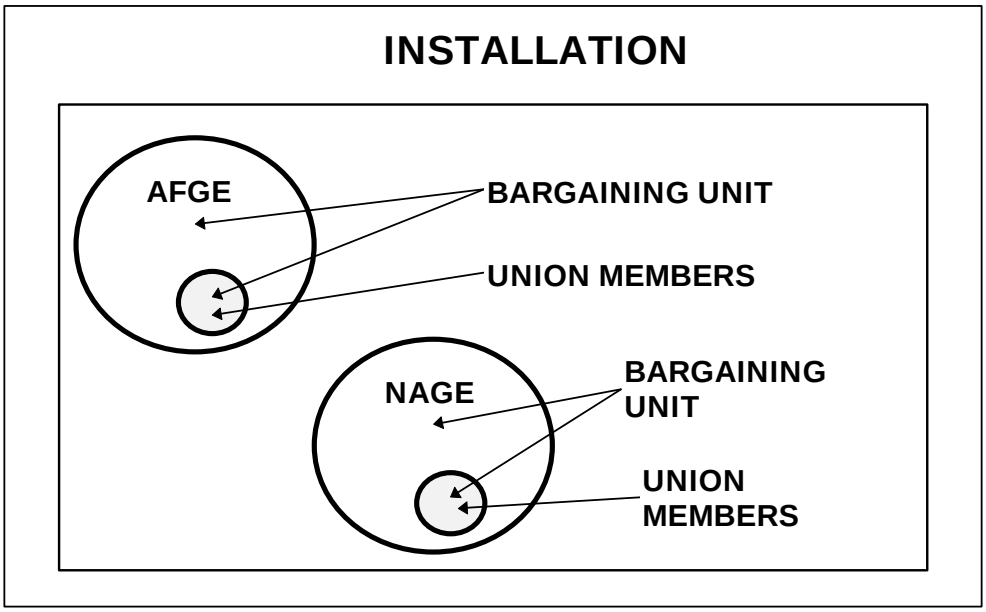
5. The Tennessee Valley Authority;

6. The Federal Labor Relations Authority; and

7. The Federal Service Impasses Panel.

B. Employee. Civilian personnel who work for the federal government. Excludes aliens or non-U.S. citizens who occupy a position outside the U.S.; members of the uniformed services; supervisors and management officials; confidential employees; foreign service employees; and employees who engage in strikes.

C. Bargaining Unit. Employees with a similar community of interest which is appropriate for representation.



Bargaining Units

1. Factors to consider include:

   a. Community of interest. Are the characteristics of the group of employees common enough to allow for proper representation by one union?

   b. Effective dealings with the agency. Will there be authority at the level of organization to make decisions for the group?

   c. Efficiency of agency operations. Is the unit size and make-up appropriate to allow for necessary interactions without duplication of effort and excessive disruption of the mission?

D. Exclusive Representative. The union that has been elected and certified to represent the employees in a specific bargaining unit.

F. Collective Bargaining Agreement. The contract negotiated between management and the exclusive representative.

G. Unfair Labor Practice. A violation of the labor statute by an individual, agency, or union.

H. Grievance. A violation of the collective bargaining agreement by any individual, agency, or union.

IV. GRIEVANCE/ARBITRATION.

A. Every collective bargaining agreement must have a grievance procedure in which the last step is binding arbitration. A typical four-step negotiated grievance procedure might be:

1. Report the grievance to the first line supervisor.

   a. Oral complaint.

   b. Decision within 48 hours.

2. If resolution is unsatisfactory, raise the grievance with the second line supervisor.

   a. Written complaint submitted within 72 hours of first line supervisor's denial.

   b. Decision within 5 days.

3. If resolution is unsatisfactory, elevate the grievance to the Civilian Personnel Officer or Deputy Post Commander.

   a. Written complaint submitted within 7 days of second line supervisor's denial.

   b. Decision within 10 days.

4. If there is still no resolution, the parties will go to binding arbitration.

   a. May be invoked by management or the union. May not be invoked by an employee.

b. Union has the right to be present during grievance/arbitration hearings.

V. UNFAIR LABOR PRACTICES.

A. Both Agencies and Unions are prohibited from committing Unfair Labor Practices (ULPs).

1. Management ULPs. 5 U.S.C. § 7116(a).

a. Interference with Basic Employee Rights.

b. Discrimination to Encourage or Discourage Union Membership.

c. Improper Assistance to a Labor Organization.

a. Retaliation Against an Employee for Filing a Complaint or Giving Information.

b. Refusal to Negotiate in Good Faith.

c. Bypassing the Union.

d. Refusal to Cooperate at Impasse.

e. Enforcement of Rules in Conflict with CBA.

f. Otherwise Fail or Refuse to Comply with Provisions of the Statute.

2. Union ULPs. 5 U.S.C. §7116(b).

a. Interference with Basic Employee Rights.

b. Cause the Agency to Discriminate Against an Employee.

c. Coerce a Union Member as Punishment, Reprisal, or for the Purpose of Impeding the Member's Work Performance.

d. Discriminate in Union Membership Based Upon Race, Color, Creed, National Origin, Sex, Age, Civil Service Status, Political Affiliation, Marital Status, or Handicapping Condition.

e. Refusal to Negotiate in Good Faith.

f. Failure to Cooperate at Impasse.

g. Call or Participate in a Strike or Work Slow Down, or Condone Such Activity.

(1) Picketing by Federal Employees (5 U.S.C. § 7116(b)(8)).

(a) Generally. Informational picketing that does not interfere with the agency's operations is not an unfair labor practice. SSA, New York, 22 FLRA 63 (1986) (may picket if it does not interfere with agency mission).

(b) DA Policy. Picketing interferes with Army operations. DA Msg., Clarification of DA Policy on Informational Picketing, 24 Feb. 1979. *But see* Fort Ben Harrison and AFGE, 40 FLRA 558 (1991) (commander admitted that there was no interference with mission when employees picketed in park on installation).

h. Otherwise Fail or Refuse to Comply with Provisions of the Statute.

3. ULP Remedies.

a. Cease and desist order.

b. Status quo ante (SQA).

c. Retroactive Bargaining Order.

VI. UNION ORGANIZING. HOW DOES THE UNION GET ON YOUR INSTALLATION?

A. Non-employee Union Organizer's Access to Employees.

1. No absolute right to solicit on the installation.

2. Must be able to communicate by other reasonable means. Reasonable means include: mailings, TV and radio ads, billboards, information booths at shopping centers or commuter stations, and/or employee organizer(s).

B. Employee Solicitation of Union Support on the Installation.

1. Employees may organize on the installation.

2. Organization must be during non-work times in non-work areas.

3. No disruption of work is allowed.

C. Elections.

1. Regional Director Conducts or Supervises the Election. [5 C.F.R. § 2422.23].

a. Notice of election is posted. [5 C.F.R. § 2422.23(b)].

b. Observers are appointed. [5 C.F.R. § 2422.23(h)].

c. Challenged Ballots Are Impounded. [5 C.F.R. § 2422.24].

2. Labor organization needs the vote of a majority of eligible employees who vote to win. [5 U.S.C. § 7111(a)].

D. Management Neutrality.

1. Management may not aid or hinder the organization effort.

2. Management may act or speak to:

a. Publicize elections and encourage employees to vote.

b. Inform employees about Government policies concerning labor relations.

c. Correct the record.

VII. UNION REPRESENTATIONAL RIGHTS. The union's right to be present.

A. Formal Discussions.

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices, or other general conditions of employment. . . . [5 U.S.C. § 7114(a)(2)(A)].

1. The Rule: Management must give the exclusive representative advance notice and an opportunity to attend.

B. Investigatory Examinations. [5 U.S.C. § 7114(a)(2)(B)].

1. When an agency representative conducts an interview of a bargaining unit employee during an investigation, and the employee reasonably believes discipline may result, the employee may request a union representative (this is often referred to as the employee exercising their *Weingarten* rights).

2. Management Options.

a. Terminate interview.

b. Allow union representative to attend.

c. Advise the employee that he may choose to make a statement without the union representative or end the interview. This must be done in a noncoercive manner.

VIII. COLLECTIVE BARGAINING. WHEN AND WHAT MUST MANAGEMENT NEGOTIATE?

A. When to Bargain.

1. Contract: Management must negotiate with a new bargaining unit or upon expiration of existing contract.

2. Mid-Contract: Management must continue to negotiate, when appropriate, throughout the life of the contract.

a. Topics addressed in collective bargaining agreement.

(1) Either party may refuse to bargain.

(1) Resolve disputes through arbitration.

b. Topics not addressed in collective bargaining agreement.

(1) Must negotiate if initiated by management.

(2) *New Rule*: Must also negotiate union-initiated midterm proposals that are not covered by the collective bargaining agreement. U.S. Department of the Interior and National Federation of Federal Employees, 56 FLRA No. 6 (2000).

B. Conditions of Employment Are Negotiable. [5 U.S.C. § 7102(2)].

1. Definition. "*Personnel policies, practices, and matters, . . . , affecting working conditions. . . .*" [5 U.S.C. § 7103(a)(14)].

   a. Examples include wages and benefits not set by statute, amount charged for food, removal of vending machines from break areas, newspaper subscriptions, location of water coolers, and relocation to a windowless office.

   b. Proposals dealing with civilian aspects of a National Guard technician's duties are negotiable. Proposals dealing with military aspects of the duties are not negotiable. AFGE Local 2077 and Michigan Air National Guard, 43 FLRA 344 (1991) (Proposals concerning military weight control program are not negotiable); NFFE Local 1655 and Illinois National Guard, 43 FLRA 1257 (1992) (Uniform allowances are negotiable when technicians are required to wear the uniform while performing civilian duties).

2. Distinguish negotiation from agreement.

C. Topics Precluded from Negotiation by Statute [5 U.S.C. § 7117(a)].

1. Proposals That Conflict With Federal Law Are Not Negotiable.

   a. Statutes passed within the term of the CBA which conflict with the CBA will take effect immediately upon passage.

2. Proposals Which Conflict With Government-Wide Regulations Are Not Negotiable.

   a. Government-wide regulations are those which apply to the federal civilian work force as a whole and are binding upon the federal agencies and officials to which they apply

   b. Regulations passed within the term of the CBA which conflict with the CBA will not take effect until the CBA expires.

3. Proposals Conflicting With Agency[1] Regulations for Which There is a "Compelling Need" are not Negotiable. A compelling need exists when:

   a. The regulation is essential to mission accomplishment; or

   b. The regulation is necessary to maintain merit principles; or

   c. The regulation implements a mandate to the agency under law or outside authority.

4. Management Rights Are Not Negotiable [5 U.S.C. § 7106(a)].

   a. Mission, budget, organization, number of employees and internal security.

   b. Hire, assign, direct, lay-off, retain, suspend, remove, reduce in grade or pay, and take other disciplinary action.

   c. Assign work, and make contracting-out determinations.

   d. Fill positions by promotions and appointments.

   e. Take emergency actions.

5. Permissive Topics [5 U.S.C. § 7106(b)(1)].

   a. Staffing Patterns. (Numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty).

   b. Technology, Methods and Means of Performing Work.

   c. The Rule:

[1] We must negotiate over proposals concerning conditions of employment that conflict with local or MACOM regulations.

(1) Management can choose whether or not to negotiate over proposals concerning these topics.

(2) Once agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b), the rules governing permissive topics will control and the proposal may not be declared non-negotiable.

d. Impact of Executive Order 12,871 (October 1, 1993).

(1) Language.

SEC. 2. IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of title 5 United States Code shall: . . .

> *(d) Negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . .*

SEC. 3. NO ADMINISTRATIVE OR JUDICIAL REVIEW. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

(2) Both the federal courts and the FLRA have rejected the allegation that the Executive Order affects an election to bargain under § 7106(b)(1) that is enforceable as an unfair labor practice. *See, e.g.,* NAGE v. FLRA, 179 F.3d 946 (D.C. Cir. 1999); AFGE v. FLRA, 204 F.3d 1272 (9th Cir. 2000); Dep't of Commerce Patent and Trademark Office and Patent Office Professional Association, 54 FLRA 360 (1998).

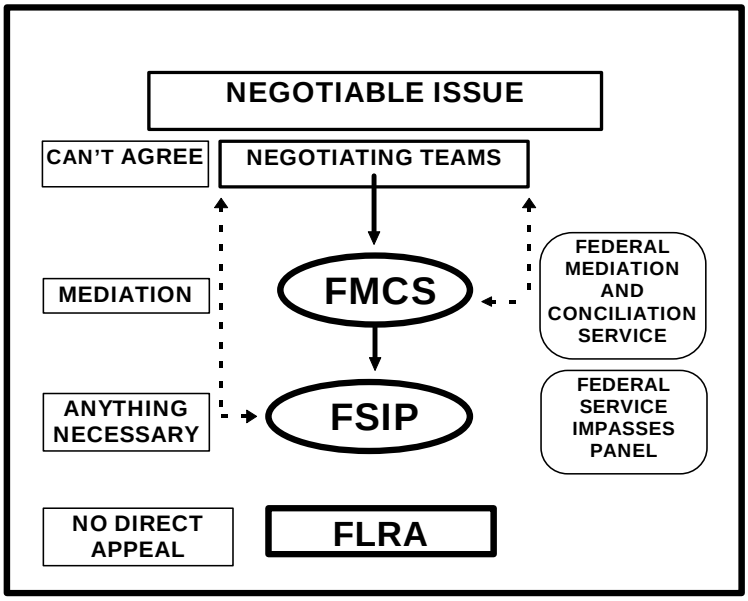
e. **Executive Order 12,781 Revoked.** On 17 February 2001, President Bush issued Executive Order 13,203, which revoked Executive Order 12,871. The Office of Personnel Management (OPM) guidance states that Executive Order 13,203 abolished both the requirement to form labor-management partnerships and the previous mandate to bargain on matters covered by 5 U.S.C. §7106(b)(1).

6. Impact and Implementation (I & I) Bargaining [5 U.S.C § 7106(b)(2)]. If a decision or proposal concerns a management right and consequently is non-negotiable, the agency may still be required to negotiate:

a. To determine the procedures management will use in the exercise of management rights (Implementation).

b. To lessen the impact on employees adversely affected by the exercise of management rights (Impact).

IX. IMPASSE RESOLUTION. WHAT DO YOU DO WHEN YOU CAN'T AGREE?



Impasse Resolution Process

A. Definition of Impasse. The point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement.

B. The Federal Mediation and Conciliation Service.

1. Offers mediation assistance during negotiations impasse.

2. Limited powers to recommend actions for resolution.

C. The Federal Service Impasses Panel [5 U.S.C. § 7119].

1. An agency of the FLRA whose function is to provide assistance in resolving negotiation impasses. If voluntary arrangements, including use of the FMCS or another third-party mediator, fail to resolve the impasse

a. Either party may request the services of the FSIP; or

b. The parties may use another form of binding arbitration if approved by the FSIP.

2. Can impose a solution. This solution is binding upon the parties.

3. The federal sector alternative to the private sector strike.

X. SUCCESSORSHIP AND ACCRETION.

A. The Authority discussed a framework to determine how accretion and successorship apply when an agency reorganizes. AFGE and Navy Fleet and Industrial Supply Center, 52 FLRA 950 (1997).

1. The first step is to determine if the employees are in a new appropriate bargaining unit.

2. If the employees are in a new appropriate bargaining unit, apply the successorship analysis.

3. If the employees are not in a new appropriate bargaining unit, apply the accretion analysis.

B. Successorship following reorganization. Naval Facilities Engineering Service Center, Port Hueneme, California and National Association of Government Employees, 50 FLRA 363 (1995). The gaining entity is a successor, and the union retains its status as the exclusive representative of the employees who are transferred, when:

1. An entire recognized unit, or portion thereof, is transferred.

2. The transferred employees are:

   a. in an appropriate bargaining unit after the transfer, and

   b. constitute a majority of such employees in such unit.

3. The gaining entity has substantially the same organizational mission as the losing entity.

4. The employees are performing substantially the same duties.

5. No election is necessary to determine representation.

C. Accretion applies when the transferred employees:

1. Are not in an appropriate bargaining unit.

2. Are functionally and administratively integrated into existing units.

3. Are appropriate to add to the bargaining unit.

D. Restructuring existing units.

1. Chain of command reorganization. Navy Base Norfolk, Virginia and NAGE, Local R4-1, 56 FLRA No. 47 (2000).

   a. A change in an agency's chain of command does not, by itself, render an existing unit inappropriate. Rather, the FLRA will evaluate how such a change has affected each of the three criteria for appropriate units, as applied to the existing unit and any proposed, new units.

b. If an agency reorganizes and there are competing claims of successorship, the FLRA will first evaluate the proposed bargaining units that will most fully preserve the status quo in terms of bargaining unit structure and the relationship of employees to their chosen exclusive representative. If it finds the existing unit continues to be appropriate, the FLRA will not address any petitions that attempt to establish different unit structures.

2. An agreement between unions that would change the structure of existing bargaining units by removing employees from a unit represented by one union to a unit represented by the other is not valid because it interferes with the fundamental right of employees to determine their exclusive representation, and thwarted the Authority's representation process. NAGE/SEIU, Local 5000, and SEIU and Dep't of Veterans Affairs, Washington, D.C., 52 FLRA 1068 (1997).

XI. THE COMMANDER'S ROLE.

A. Commander's Team.

1. Civilian Personnel Officer. This has become a limited resource due to the regionalization of CPO.

2. Labor Counselor.

a. Aids in making policies and procedures for the administration of labor/management relations.

a. Participates in contacts with the exclusive representative.

b. Represents management (command) in third-party proceedings.

c. Renders legal advice to the management team when it is negotiating a collective bargaining agreement (CBA).

d. Renders legal advice on the interpretation and application of the CBA.

B. Awareness.

C. Leadership.

XII. CONCLUSION.

CHAPTER 28

SENIOR OFFICER LEGAL ORIENTATION

CIVILIANS ON THE BATTLEFIELD

I. REFERENCES 2
II. INTRODUCTION 3
III. DESIGNATING EMERGENCY ESSENTIAL POSITIONS 3
IV. DEPLOYMENT PREPARATIONS 7
V. COMMAND & CONTROL DURING DEPLOYMENTS 10
VI. PAY & ALLOWANCES DURING DEPLOYMENTS 11
VII. CONTRACTOR EMPLOYEES 15
VIII. CONTRACTOR ISSUES DURING DEPLOYMENTS 20
IX. MILITARY EXTRATERRITORIAL JURISDICTION ACT 23
X. CONCLUSION. 27

OUTLINE OF INSTRUCTION

I. REFERENCES

A. DODD 1404.10, Emergency-Essential (E-E) DOD U.S. Citizen Civilian Employees, April 10, 1992

B. DODD 1400.31, DOD Civilian Work Force Contingency and Emergency Planning and Execution, April 28, 1995

C. DODI 1400.32, DOD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures, April 28, 1995

D. AR 690-11, Mobilization Planning and Management, 14 September 1990

E. DA Pam 690-47, DA Civilian Employee Deployment Guide, 1 November 1995

F. Civilian Personnel Management Guide for Management Officials During Contingencies and Emergencies, March 2003, available at http://www.cpms.osd.mil/civ_prep/ManagementGuide.pdf

G. DA Pam 715-16, Contractor Deployment Guide, 27 February 1998

H. AR 715-9, Contractors Accompanying the Force, 29 October 1999

I. FM 100-21 (also numbered FM 3-100.21), Contractors on the Battlefield, 3 January 2003

J. Contingency Contracting and Contractor on the Battlefield Policy, Guidance, Doctrine, and Other Relevant Information: http://www.amc.army.mil/amc/rda/rda-ac/ck/ck-prime.htm

II. INTRODUCTION

A. "It is DOD policy that the DOD civilian workforce shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies." DoDI 1400.32, para 4 (April 24, 1995)

III. DESIGNATING EMERGENCY ESSENTIAL POSITIONS

A. Identify E-E Positions

1. Include civilian positions overseas or in the United States that would be transferred overseas in a crisis situation.

a. The specific crisis situation duties and responsibilities and physical requirements of each E-E position must be identified and documented to ensure that E-E employees know what is expected of them.

b. Documentation can be:

(1) Annotation of E-E duties in existing peacetime position descriptions;

(2) Brief statements of crisis situation duties attached to position descriptions if materially different than peacetime duties;

(3) Separate E-E position descriptions.

c. Record E-E Position Designation. A statement shall be included in the position description of each E-E identified position.

(1) Example: "This position is emergency-essential (E-E). In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the E-E duties until relieved by proper authority. The incumbent or the designated alternate may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated "key," which requires the incumbent, or designated alternate, to be screened from military recall status."

2. Ensure that civilian positions are designated "E-E" only when civilians are required for direct support to combat operations, or to combat systems support functions that must be continued and that could not otherwise be immediately met by using deployed military possessing the skills in the number and in the functions expected to be needed to meet combat operations or systems support requirements in a crisis situation.

3. Ensure that employees are identified to perform the duties of E-E positions, including the identification of alternates to cover vacant E-E positions or those in which the incumbents are unable to perform the duties or have not signed the E-E position agreement.

4. Issue E-E employees, or employees occupying positions determined to be E-E, the DD Form 489, "Geneva Convention Identity Card for Civilians Who Accompany the Armed Forces," or DD Form 1934, "Geneva Convention Identity Card for Medical and Religious Personnel Who Serve In or Accompany the Armed Forces," as appropriate.

5. Advise applicants for E-E positions that individuals selected to fill these positions are required to sign written agreements (DD Form 2365), "DoD Civilian Employee Overseas Emergency-Essential Position Agreement."

a. The agreements document that incumbents of E-E positions accept certain conditions of employment arising out of crisis situations wherein they shall be sent on temporary duty, shall relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not in E-E positions.

b. All individuals selected for E-E positions must be exempted from recall to the military Reserves or recall to active duty for retired military.

6. Encourage incumbents of positions that become E-E to sign DD Form 2365 as soon as reasonably practicable and consistent with the needs of the military mission.

a. Those employees who decline to sign the agreement should be detailed or reassigned to non-E-E positions as soon as reasonably practicable given the exigencies of the military situation. If that is not possible, no further tour extension should be approved.

7. Attempt to fill E-E positions with employees who volunteer to occupy such positions and sign the E-E agreement or direct the involuntary assignment of civilian employees to E-E positions as may be necessary to meet the exigencies of the circumstances and when unforeseen contingencies prevent prior identification of those positions as being "E-E."

8. If an employee declines to sign the agreement, but possesses special skills and expertise, which in management's view renders it necessary to send that employee on the assignment without signing the agreement, the employee may be directed on involuntary temporary duty to the location where the employee's skills are required. EE employees may be separated from employment for failure to remain in an EE position or to relocate on temporary duty or permanent change of station to an EE position. All civilian employees deploying to combat operations/crisis situations are considered EE regardless of volunteer status or the signing of the EE position agreement.

9. Notification of Anthrax Immunization Requirements. Title 10, U.S. Code, as amended by § 751 of the National Defense Authorization Act for FY 2001, requires SECDEF to prescribe regulations to ensure E-E civilians required to participate in the anthrax vaccine program are notified of the requirement and of the consequences of a decision not to participate.

a. Written notice is required. E-E civilians must sign acknowledging receipt of notification. A copy of the acknowledgement must be filed with the signed DD Form 2365 (E-E Position Agreement).

b. Notice of anthrax immunization requirements must be included in all vacancy announcements for E-E positions.

c. See Memorandum dated June 25, 2001, Assistant SECDEF for Force Management, SUBJECT: Notifying Emergency-Essential Employees Regarding Anthrax Immunization Requirements-- contains sample notification and vacancy announcement statement as follows:

(1) "This is to notify you that your position has been designated as emergency essential. You may be required, as a condition of employment, to take the series of anthrax vaccine immunizations to include annual boosters. This may also include other immunizations that may in the future be required for this position, or for a position you may fill as an emergency essential alternate. Failure to take the immunizations may lead to your removal from this position or separation from Federal service.

Acknowledgement: This is to acknowledge that I have read and fully understand the potential impact of the above statement" {employee signature and date}.

IV. DEPLOYMENT PREPARATIONS

A. E-E employees shall be provided protective equipment, work related training, law of war training, and training in the Uniform Code of Military Justice, commensurate with the anticipated threat and theater policy.

1. Protective Equipment Training Requirements

   a. Civilian employees should be issued, and trained in the use of the same protective gear as is issued to military personnel in theater, to include lens inserts, if required.

2. Training for civilian employees on their responsibilities; e.g. standards of conduct, as well as coping skills if they become Prisoners Of War.

3. Civilian employees shall receive the same immunizations as given to military personnel in theater.

4. Civilian employees shall be provided appropriate cultural awareness training for the theater if such training is being provided to military personnel.

5. Civilian employees shall be issued passports, visas, and country clearances.

6. Civilian employees shall be issued any required security clearances expeditiously.

7. Civilian employees will fill out DD Form 93,"Record of Emergency Data." Components will establish procedures to store and access civilian DD 93s that are the same as or parallel to those for military personnel.

   a. Components will set up procedures for civilian casualty notification and assistance that parallel those for military personnel.

8. Provisions shall be made for medical care of civilian employees in a theater of operations.

a. They shall be HIV-tested before deployment, if the country of deployment requires it.

(1) DA policy (DA DCSPER/ OTJAG decision) is that in those isolated situations when a requirement exists for mandatory HIV screening, and the test is positive, a civilian can be deployed in support of a contingency operation as long as the host country is notified and the individual is able to perform assigned duties.

b. All DOD-sponsored non-military personnel PCS or TDY outside the United States and its Territories shall have panarex or DNA samples taken for identification purposes.

(1) Dental x-rays may be substituted when the ability to take panarex or DNA samples is not available.

c. Civilians may also be issued" dog tags" for identification purposes.

(1) Components shall establish procedures to store and access such identification data that are the same as or parallel to those for military personnel.

d. Civilians shall receive medical and dental examinations and, if warranted, psychological evaluations to ensure fitness for duty in the theater of operations to support the military mission.

(1) During a contingency or emergency, civilian employees returning to the United States and its Territories from a theater of operations shall receive cost-free military physical examinations within 30 days if the medical community decides it is warranted, or required for military personnel.

e. Civilians shall carry with them a minimum of a 90-day supply of any medication they require.

f. Civilians with dependents who are in or deploying to a theater of operations are encouraged to make Family Care Plans.

(1) As a condition of employment, single parents or families where both parents are emergency-essential civilians are required to prepare a family care plan. This plan will be equivalent to that required of the military located in the same geographical area. AR 690-11, para. 1-4k(11)(c).

g. Civilians killed in a theater of operations shall be processed by Graves Registration personnel with procedures parallel to those for the military personnel.

(1) An escort officer for the remains of civilians killed is authorized; and a flag shall be purchased for the casket at Government expense.

h. Legal assistance relating to matters of deployment is available to Army civilians, notified of deployment, as well as their families. Legal assistance will be available for the period of deployment and is limited to matters related to deployment as determined by the on-site supervising attorney.

(1) Civilians deploying to or in a theater of operations shall be furnished the opportunity and assistance with making wills and any necessary powers of attorney.

B. Weapons Certification and Training

1. Under certain conditions Army civilians may be issued military firearms for their personal self-defense, subject to military regulations regarding training in proper use and safe handling of firearms. Acceptance of a military firearm is voluntary by the emergency-essential civilian. DA PAM 690-47 (para. 1-12).

a. Authority to carry military firearms is contingent upon the approval and guidance of the supported Combatant Commander. The Army Component Commander must make the decision early in the operation as to whether or not civilians may be armed.

b. Only government issued military firearms/ammunition are authorized. Familiarization training will be conducted IAW FM 23-35.

C. Clothing and Equipment Issue

1. Organization Clothing and Individual Equipment (OCIE) will be issued to emergency-essential personnel and other civilians who may be deployed in support of military operations.

a. Kevlar Helmets, load bearing equipment, and chemical defensive equipment will be worn in a tactical environment in accordance with supported unit procedures.

b. Maintenance and accountability of EE clothing and equipment is the responsibility of the employee to whom the items were issued.

c. Items of personal clothing and personal care are the responsibility of the individual. Civilian employees should bring work clothing required by their particular job.

V. COMMAND AND CONTROL DURING DEPLOYMENTS

A. During a crisis situation or deployment, civilian employees are under the direct command and control of the on-site supervisory chain. Therefore, the on-site supervisory chain will perform the normal supervisory functions; for example, those related to performance evaluations, task assignments and instructions, and initiating and effecting recognition and disciplinary actions.

1. During contingencies and emergencies, when normal administrative procedures may not be feasible and the Defense Civilian Personnel Data System (DCPDS) may not be accessible, managers must ensure that personnel actions are appropriately documented and recorded, either in handwritten format or in recoverable electronic format. Personnel actions will be processed electronically in DCPDS once normal operations are restored. DODD 3020.26, Continuity of Operations Policy and Planning; Modern DCPDS Contingency Management Manual, March 26, 2001.

B. The on-site commander may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. These restrictions need only be considered reasonable in the circumstance of the deployment to be enforceable.

VI. PAY AND ALLOWANCES DURING DEPLOYMENTS

A. Civilian employees receive the same pay and allowances to which they were entitled prior to deploying, and to which they would become entitled thereafter (i.e., within grade increases).

1. There is no tax exclusion for civilian employees similar to the combat tax exclusion for military members.

B. Tour of Duty. 5 U.S.C. § 6101; 5 C.F.R. § 610.121; 5 U.S.C. § 6131. The administrative workweek constitutes the regularly scheduled hours for which a deployed employee must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay.

1. The authority for establishing and changing the tours of duty for civilian employees is delegated to the in-theater commander or his representative. The duration of the duty is dependent upon the particular operation and will be established by the in-theater commander.

C. Overtime. GS employees whose basic rates of pay do not exceed that of a GS-10 step 1, will be paid at a rate of one and one-half times their basic hourly pay rate for each hour of work authorized and approved over the normal 8 hour day or 40 hour week. Employees whose rate exceeds that of a GS-10, step 1, will be paid at the rate of one and one-half times the basic hourly rate of a GS-10, step 1.

1. If overtime is not approved in advance, the employee's travel orders should have this statement in the remarks column: "Overtime authorized at TDY site as required by the Field Commander. Time and attendance reports should be sent to (name and address)." The field commander should then submit to the employee's home installation a DA Form 5172-R, or local authorization form (with a copy of the travel orders), documenting the actual premium hours worked by each employee for each day of the pay period as soon as possible after the premium hours are worked.

2. Premium Pay Limitations. Normally, the aggregate rate of pay (including base and premium pay) for any pay period is limited to the greater of the biweekly rate of pay for GS-15, Step 10 or Level V of the Executive Schedule. 5 U.S.C. § 5547. This biweekly limitation does not apply to work performed in connection with an emergency that involves a direct threat to life or property or work that is critical to the agency's mission. General Schedule employees may receive premium pay as long as the annual total (basic plus premium pay) does not exceed the greater of the annual rate for GS-15, step 10 or Level V of the Executive Schedule. By administrative extension, this emergency authority to apply the annual limitation also applies to NAF payband employees. Within DOD, the authority to determine the existence of an emergency has been delegated to officials who exercise personnel appointing authority (normally the head of an installation or activity). DOD 1400.25-M, SC 550, § 551.501(d). Wage Grade employees are not subject to the premium pay limitations described above.

D. On Call Employees. During crisis situations, the nature of the work may make it necessary to have employees "on-call" because of emergencies or administrative requirements that might occur outside the established work hours.

1. On-site commanders may designate employees to be available for such a call during off-duty times. Designation of employees for this purpose will follow these guidelines:

a. There should be a definite possibility that the services of the designated employee might be required;

b. On-call duties required of the employees will be brought to the attention of all employees concerned;

c. If more than one employee could be used for on-call service, the designation should be made on a rotating basis;

2. The designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (i.e., overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.

E. Leave Accumulation. Any annual leave in excess of the maximum permissible carry over is automatically forfeited at the end of the leave year. 5 U.S.C. § 6304. Annual leave forfeited during a combat or crisis situation, which has been determined by appropriate authority to constitute an exigency of the public business, may be restored for future use. 5 U.S.C. § 6304(d)(1)(B). The employee must file for leave carry over.

F. Foreign Post Differential. 5 U.S.C. § 5925. Employees assigned to work in foreign areas where the environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive are eligible for Foreign Post Differential (FPD) after being stationed in the area in excess of 41 days.

1. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate not to exceed 25% of the basic pay.

a. The Department of State determines areas entitled to receive FPD and the FPD rate for the area. The Department of State also determines the length of time the rate is in effect. Different areas in the same country can have different rates.

G. Danger Pay. 5 U.S.C. § 5928. Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State, because of civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area, will receive a danger pay allowance (DPA).

1. The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, or 25 percent as determined by the Secretary of State. This allowance is in addition to any foreign post differential prescribed for the area but in lieu of any special incentive differential authorized the post prior to its designation as a danger pay area.

   a. The foreign post differential may be reduced by any part attributable to political violence. The combined danger pay and post differential must be at least 5 percent above the previous combined post differential and special incentive differential at the post, if any, in effect at the post prior to its designation as a danger pay area.

2. The DPA commences for employees already in the area on the date of the area's designation for danger. For employees later assigned or detailed to the area, DPA commences upon arrival in the area. For employees returning to the post after a temporary absence it commences on the date of return.

3. DPA will terminate with the close of business on the date the Secretary of State removes the danger pay designation for the area or on the day the employee leaves the post for any reason for an area not designated for the DPA.

   a. The DPA paid to Federal civilian employees should not be confused with the Imminent Danger Pay (IDP) paid to the military. The IDP is triggered by different circumstances and is not controlled by the Secretary of State.

H. Hostile Fire Pay. 5 U.S.C. § 5949. Allows payment of $150 per month, but not payable to employees already receiving danger pay allowance.

I. Life Insurance. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death.

1. The Office of Personnel Management (OPM) has confirmed that civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying military firearms for personal protection are not "in actual combat."

VII. CONTRACTOR EMPLOYEES

A. "In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence, covering, clothing, and moving of any Army. " Robert Morris, Superintendent of Finance, 1781.

B. Command and Control. The command and control of contractor employees is significantly different than that of DA civilians.

1. For contractor employees command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command. The Contracting Officer is the designated liaison for implementing contractor performance requirements.

2. While the government does not directly command and control contractor employees, key performance requirements should be reflected in the contract. For example, Combatant Commander directives, orders and essential standard operating procedures can be incorporated into the government contract. If those requirements should change, the contract can be modified by the contracting officer to satisfy the commander's new requirements.

a. Contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Commander. All instructions and guidance will be issued based upon the need to ensure mission accomplishment, personal safety, and unit cohesion. If the instructions and orders of the Combatant Commander are violated, the Combatant Commander may limit access to facilities and/or revoke any special status that a contractor employee has as an individual accompanying the force.

b. The contracting officer may also direct that the contractor remove from the theater of operations any contractor employee whose conduct endangers persons or property or whose continued employment is inconsistent with the interest of military security.

C. Legal Assistance. Contractor employees in the U.S. preparing to deploy abroad, or already deployed overseas, to perform work pursuant to any contract or subcontract with DA, generally will not be eligible to receive legal assistance from military or DA civilian lawyers.

1. Contractor employees should satisfy all legal requirements that they deem necessary, such as a last will and testament, guardianship arrangements for children and estate planning, with privately retained attorneys before deployment. Payment of legal fees is a private matter between the contractor employee and the lawyer retained. The Army has no involvement.

2. Exceptions:

a. If contractor employees are accompanying the Armed Forces of the United States outside the United States, they may receive certain legal assistance from Army lawyers when DA or DOD is contractually obligated to provide this assistance as part of their logistical support.

(1) The specific terms of the contract under which contractor employees are deploying must be reviewed to verify if DA is obligated to provide legal service.

3. Where DA is under contractual obligation to provide legal assistance, the following rules apply:

a. If the legal assistance is to be provided overseas, it must be in accordance with applicable international agreements or approved by the host nation government in some way.

b. Legal assistance is limited to ministerial service (for example notarial services), legal counseling (to include the review and discussion of legal correspondence and documents), and legal document preparation (limited to powers of attorney and advanced medical directives) and help on retaining civilian lawyers.

c. NOTE: Contract employee status is irrelevant if the person is an authorized recipient of legal assistance services, e.g. Retiree or family member otherwise authorized legal assistance services.

D. Identification Cards. Contractor employees will receive the following three distinct forms of identification:

1. DD Form 1173 (Uniformed Services Identification and Privilege Card). This card is required for access to facilities and use of privileges afforded to military, government civilians and/or military dependents.

2. DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). This card identifies one's status as a contractor employee accompanying the U.S. Armed Forces. This card must be carried at all times when in the theater of operations. Pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War, article 4(4), if captured, contractors accompanying the force are entitled to prisoner of war status.

3. Personal identification tags. The identification tags will include the following information: full name, social security number, blood type and religious preference. These tags should be worn at all times when in the theater of operations.

4. In addition, other identification cards, badges, etc., may be issued depending upon the basis for the operation. For example, when U.S. forces participate in United Nations (U.N.) or multinational peace-keeping operations, contractor employees may be required to carry items of identification that verify their relationship to the U.N. or multinational force.

5. If their employer processes contractor employees for deployment, it is the responsibility of the employer to ensure its employees receive required identification prior to deployment.

E. Organizational Clothing and Equipment.

1. Contractors may be issued some protective Organizational Clothing and Individual Equipment (OCIE) according to the theater to which deployed, but they will not be issued Battle Dress Uniforms (BDUs) or Desert Camouflage Uniforms (DCUs), boots, etc. without a Department of the Army waiver. Requests for exception will be submitted to the Office of the Deputy Chief of Staff, G-4 (DALO-PLS), 500 Army Pentagon, Washington, D.C., 20310-0500 for consideration. The contractor is encouraged to require a uniform appearance among their employees, but the use of current U.S. Armed Forces uniforms is prohibited. These policies are in place for their protection, to distinguish them from combatants. (From revised AR 715-9, publication *pending*).

2. The decision of contractor personnel to wear any issued OCIE is voluntary, however, the Combatant Commander, subordinate JFC and/or ARFOR Commander may require contractor employees to *be prepared* to wear Chemical, Biological, and Radiological Element (CBRE) and High-Yield Explosive defensive equipment. Other examples of equipment the government may provide are communications equipment, firefighting equipment, and medical and chemical detection equipment.

3. The contract must specify that the contractor is responsible for storage, maintenance, accountability, and checking and performing routine inspection, of Government furnished property and procedures. The contract must also specify contractor responsibilities for training and must specify the procedures for accountability of Government furnished property.

4. Contractor employees will be responsible for maintaining all issued items and must return them to the issuer upon redeployment. In the event that issued clothing and/or equipment is lost or damaged due to negligence, a report of survey will be initiated IAW AR 735-5, Chapters 13 and 14. According to the findings of the Survey Officer, the government may require reimbursement from the contractor.

F. Medical Screening. As part of the predeployment process, Individual Deployment Sites (IDS) or CONUS Replacement Centers (CRC) medical and dental personnel verify that all requirements for deployment are met. Screening will include HIV testing, pre- and post-deployment evaluations, dental screenings, and TB skin test. A military physician will determine if the contract employee is qualified for deployment to the AO and will consider factors such as age, medical condition, job description, medications, and requirement for follow-up care. FM 100-21, para. 3-39.

G. Force Protection. Pursuant to FM 00-21, Paragraph 6-4, "Protecting contractors and their employees on the battlefield is the commander's responsibility. When contractors perform in potentially hostile or hazardous areas, the supported military forces must assure the protection of their operations and employees. The responsibility for assuring that contractors receive adequate force protection starts with the combatant commander, extends downward, and includes the contractor."

1. Weapons and Training. Pursuant to FM 100-21, paragraph 6-29, "The general policy of the Army is that contractor employees will not be armed." However, Individual Deployment Sites (IDS) or CONUS Replacement Centers (CRC) may issue sidearms to contractor employees for their personal self-defense. The issuance of such weapons must be authorized by the Combatant Commander and must comply with military regulations regarding firearms training and safe handling. Weapons familiarization is provided to contractor employees as part of the IDS/CRC deployment processing.

a. The acceptance of self-defense weapons by a contractor employee is voluntary and should be in accordance with the gaining theater and the contractor's company policy regarding possession and/or use of weapons.

(1) Pursuant to FM 100-21, paragraph 6-29, "Contractor employees may only be issued military specification sidearms, loaded with military specification ammunition."

(2) Contractor employees will not possess privately owned weapons.

VIII. CONTRACTOR ISSUES DURING DEPLOYMENTS

A. Vehicle and Equipment Operation. Deployed contractor employees may be required or asked to operate U.S. military, government owned or leased equipment such as generators and vehicles. Contractor personnel may also be required to obtain a local license for the country they are being deployed to, i.e. German driver's license.

1. While operating a military owned or leased vehicle, a contractor employee is subject to the local laws and regulations of the country, area, city, and/or camp in which he/she is deployed. Traffic accidents or violations usually will be handled in accordance with the local laws, the Status of Forces Agreement, and/or Combatant Commander guidance.

2. If a contractor employee does not enjoy special status under the Status of Forces Agreement, then he/she may be subject to criminal and/or civil liabilities. Therefore, the employee or contractor may be held liable for damages resulting from negligent or unsafe operation of government, military vehicles and equipment.

B. Living under field conditions. Generally, a contractor employee's living conditions, privileges, and limitations will be equivalent to those of the units supported unless the contract with the Government specifically mandates or prohibits certain living conditions.

C. Medical and Dental care. Military and/or host nation emergency medical and dental care will be available to contractors should the need arise, at a level commensurate with that afforded government employees and military personnel.

1. Deployed contractor personnel generally do not receive routine medical and dental care at military medical treatment facilities unless this support is specifically included in the contract with the government. In the absence of such agreements, contractors should make provisions for their employees' medical and dental care.

2. The Army medical department may provide pharmaceutical support to deploying employees of system and external support contractors. See FM 100-21, para. 5-35 – 5-37. Contractor employees are required to bring a 90-day supply of personal medications in the AO.

D. MWR Support. Contractor employees working within the theater of operations may be eligible to use some or all MWR facilities and activities subject to the installation or Combatant Commander's discretion and the terms of the contract.

1. U.S. citizen contractor employees may be eligible for use of Army and Air Force Exchange Service (AAFES) facilities for health and comfort items. Use of these facilities will be based on the installation or Combatant Commander's discretion, the terms of the contract with the government, and the terms of the applicable Status of Forces Agreement.

E. Status of Forces Agreements (SOFAs). Contractor employee's status will depend upon the specific provisions of the SOFA, if any, that are applicable between the U.S. and the country of deployment at the time of deployment.

1. Contractor employees may or may not be subject to criminal and/or civil jurisdiction of the host country to which they are deploying.

2. The North Atlantic Treaty Organization (NATO) SOFA is generally accepted as the model for bilateral and multilateral SOFAs between the U.S. Government and host nations around the world. The NATO SOFA covers three general classes of sending state personnel:

a. Members of the "force," i.e., members of the armed forces of the sending state;

b. Members of the "civilian component, " i.e., civilian employees of the sending state;

c. "Dependents," i.e., the spouse or child of a member of the force or civilian component that is dependent upon them for support.

d. Under the generally accepted view of the NATO SOFA, contractor employees are not considered members of the civilian component. Accordingly, special technical arrangements or international agreements generally must be concluded to afford contractor employees the rights and privileges associated with SOFA status.

F. Discipline of Contractor Employees. Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command.

1. The process for removal of contractor employees from the theater of operations is dependent upon the policies issued by the Combatant Commander and the extent to which those policies are incorporated in the terms of the contract, and are exercised through the contracting officer.

2. Commanders can indirectly influence the discipline of contractor personnel through revocation or suspension of clearances, restriction from installations or facilities, or revocation of exchange privileges.

3. Criminal activity. Contractor employees are not subject to military law under the UCMJ when accompanying U.S. forces, except during a declared war. When a contractor is involved in criminal activity, international agreements and the host nation's laws take precedence. In the absence of host nation involvement, the commander may be able to use the Military Extraterritorial Jurisdiction Act to deal with felonies (see below).

G. Tours of Duty and "On-Call" Requirements. A contractor employee's Tour of Duty is established by the employer and the terms and conditions of the contract between the employer and the government.

1. On-call requirements, if any, will be included as special terms and conditions of an employer's contract with the Government.

H. Mortuary Affairs. Contractors who are in direct support of military operations and who die in the line of duty are eligible to receive mortuary affairs support on a reimbursable basis. The nature and extent of that support is governed by OPLANs/OPORDs and contractual documents. FM 100-21, para. 5-46. If a contractor employee who is a U.S. citizen dies or is missing, next of kin notification is made by the military. In some cases, the military may affect notification through the employing contractor. When the contractor employee is a citizen of the host nation or a third-country national, the employer is responsible for next of kin notification. FM 100-21, para. 5-47.

IX. MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000 18 U.S.C. §3261

A. Background. Since the 1950s, the military has been prohibited from prosecuting by courts-martial civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many Federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation, particularly those involving another U.S. person as a victim or U.S. property. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. The result is jurisdictional gaps where crimes go unpunished.

B. Solution. The Military Extraterritorial Jurisdiction Act (MEJA) closes the jurisdictional gaps by extending Federal criminal jurisdiction to civilians overseas and former military members.

C. What Is Covered.

1. 1. Conduct that is a crime under U.S. law in special maritime and territorial jurisdiction.

2. 2. Felony-level offenses, i.e., offenses punishable by imprisonment for more than 1 year.

3. 3. Conduct committed outside the United States.

D. Who Is Covered.

1. Civilians while "Employed by the Armed Forces." This includes:

a. Those present or residing outside the U.S. in connection with such employment who are (a) civilian employees of the DoD, (b) DoD contractors (including subcontractors at any tier), or (c) employees of a DoD contractor (including subcontractors at any tier.

b. But NOT a national or ordinarily resident in the host nation.

2. Civilians "Accompanying the Armed Forces." This includes:

a. Those who are residing outside the U.S. and are dependents of:

(1) Any of the above civilian employees/contractors.

(2) Any member of the Armed Forces.

b. But NOT a national or ordinarily resident in the host nation.

3. Former military members who commit such crimes while a member of the Armed Forces overseas, but who cease to be subject to UCMJ court-martial jurisdiction (e.g., discharged from the service) and have not previously been court-martialed for such offenses.

E. Limitations.

1. Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the U.S., has prosecuted or is prosecuting the person, the U.S. will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.

2. Military Member as Co-Actor/Conspirator. Military members subject to the UCMJ will not be prosecuted under this Act, unless the member ceases to be subject to the UCMJ, or the indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ (i.e., this Act provides a limited exception to exclusive military UCMJ jurisdiction).

3. Juveniles. Juveniles are subject to the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042). Juvenile delinquency is an adjudication of status, not a crime. In limited cases, juveniles over 13 may be tried as an adult.

a. Federal courts cannot proceed against juveniles without Attorney General certification to the U.S. District Court that:

(1) State courts do not have jurisdiction (e.g. overseas offense).

(2) Offense is a crime of violence or violates the Controlled Substances Act, AND

(3) There is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction.

F. Removal to the U.S. and Initial Proceedings.

1. SECDEF is authorized to designate any DoD law enforcement person to make a probable cause arrest of persons for such U.S. felonies and promptly deliver these persons to the custody of U.S. civilian law enforcement for removal to the U.S. for judicial proceedings.

2. Limitations on Removal. The person arrested shall not be removed to another foreign country, other than where the offense was committed, or to the U.S., except when ordered by a Federal magistrate judge for:

   a. Presence in the U.S. at a detention hearing;

   b. Pretrial detention;

   c. Preliminary examination, when person is entitled to one and does not waive it; or

   d. When otherwise ordered by the Federal magistrate judge.

3. Overseas Transfer. When SECDEF determines that military necessity requires waiver of limitations on removal, then person may be removed to the nearest U.S. military installation outside the U.S. adequate to detain the person and facilitate the initial appearance required by the Act.

G. Initial Proceedings.

1. Federal magistrate judge will conduct initial appearance proceeding, which may be carried out by telephone or other voice communication means, including counsel representation.

2. Federal magistrate judge will also determine probable cause that crime was committed and person committed it, and conditions of release if government counsel does not make a motion seeking pretrial detention.

3. Federal magistrate judge will also conduct any detention hearing required under federal law, which at the request of the person may be carried out overseas by telephonic means, including any counsel representing the person.

4. The Federal magistrate judge may appoint military counsel for limited purpose of overseas initial appearance proceedings.

5. SECDEF, after consultation with the Secretary of State and Attorney General, shall prescribe regulations governing apprehension, detention, delivery, and removal of persons to the U.S.

6. These regulations are not to take effect before a report containing such regulation, to be uniform throughout the DoD, is submitted to the Senate and House Judiciary Committees.

X. CONCLUSION.

CHAPTER 29

RC LEGAL ISSUES FOR AC COMMANDERS

SENIOR OFFICER LEGAL ORIENTATION COURSE

I. REFERENCES.

A. AR 15-6, Procedures for Investigating Officers and Boards of Officers (30 Sep 96).

B. AR 27-10, Military Justice (6 Sep 02).

C. AR 135-18, The Active Guard Reserve (AGR) Program (19 Jun 96).

D. AR 135-91, Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures (26 Sep 00).

E. AR 135-175, Separation of Officers (28 Feb 87).

F. AR 135-178, Enlisted Separations (3 Dec 01).

G. AR 140-1, Army Reserve: Mission, Organization, and Training (1 Sep 94).

H. AR 140-10, Assignments, Attachments, Details, and Transfers (1 Sep 94).

I. AR 140-111, U.S. Army Reserve Reenlistment Program (28 Jun 02).

J. AR 350-21, Instructions in Benefits of an Honorable Discharge (4 Mar 85).

K. AR 600-8-24, Officer Transfers and Discharges (29 Jun 02).

L. AR 600-20, Army Command Policy (13 May 02).

M. AR 623-105, Officer Evaluation Reporting System (1 Apr 98).

N. AR 623-205, Noncommissioned Officer Evaluation Reporting System (15 May 02).

O. AR 630-10, Absence Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings (31 Aug 01).

P. AR 635-200, Enlisted Personnel (1 Nov 00).

Q. DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers, (14 Mar 97).

R. DOD Instruction 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers, (16 Sep 97).

S. Masterton, Urinalysis Administrative Elimination Boards in Reserve Components, The Army Lawyer, April 1995 at 3.

II. INTRODUCTION.

A. PURPOSES. This outline has two purposes:

1. To acquaint the Active Army commander with the reserve component environment and some of its key terminology. An understanding of this basic, foundational material assists greatly when commanders face more complicated legal and other issues from the RC.

2. To highlight some of the significant legal and regulatory provisions applicable to soldiers of the Army Reserve (USAR) and Army National Guard (ARNG) (the Reserve Components).

III. THE RESERVE COMPONENTS IN GENERAL.

A. THE BASIC ENVIRONMENT.

1. The Army Reserve.

a) The USAR consists of units (primarily combat support and combat service support) known as Troop Program Units (TPU).

b) Other soldiers, not assigned to units, are assigned to the Individual Ready Reserve (IRR).

c) Reserve soldiers and units normally serve under FORSCOM with the units reporting through the U.S. Army Reserve Command (USARC).

d) Some reserve units serve as part of the U.S. Army Civil Affairs and Psychological Operations Command (USACAPOC).

2. The Army National Guard.

a) Each state and territory has a National Guard made up of a variety of combat, combat support, and combat service support units.

b) While each state or territory has a headquarters, the units may, for mobilization purposes, have an association with other states' National Guard units or units from the Active Army.

c) Under normal circumstances, the units of the ARNG report to their respective governors.

d) In addition to their service to the state, ARNG soldiers and units hold a dual status as reserve soldiers in the United States Army. Thus, they may serve at times in a Federal status and at other times in a state status under the governor's command.

(1) ARNG soldiers often serve in a state status when performing disaster relief and civil disturbance missions. In this capacity they are brought to duty under their state. They are commanded by state authorities and they are funded with state money.

(2) Unless serving in a Federal status, ARNG soldiers do not come under the Uniform Code of Military Justice (UCMJ) for disciplinary purposes. National Guard units and soldiers have recently been "federalized;" that is, brought to Federal active duty under the provisions of Title 10 of the United States Code. For example, they have been ordered to active duty under a Presidential Selected Reserve Call-up (PSRC) or under the partial mobilization authority.

(3) Typically, the ARNG trains in a so-called "Title 32 status." That is, they are on duty under the provisions of Title 32 of the United States Code. In this hybrid

capacity they are under the command and control of their state authorities, but the training money comes from the Federal government. Despite the fact that they are on duty pursuant to a portion of the U.S. Code, there is no jurisdiction under the UCMJ.

B. ARMY RESERVE ORGANIZATION.

1. Office of the Chief, Army Reserve (OCAR).

a) DA Staff element.

b) Chief, Army Reserve = LTG.

c) Manages USAR policy, programs, priorities, and resources.

2. U.S. Army Reserve Command (USARC).

a) Ft. McPherson, GA.

b) Commands, controls, and supports USAR forces.

c) Oversees the organization and training of USAR forces.

3. Army Reserve Personnel Command (AR-PERSCOM).

a) St. Louis, MO.

b) Supports the assignment of USAR soldiers and their records management.

c) Provides some veterans' services as well as retirement and transition assistance.

d) Should be combined with PERSCOM in the near future to form Human Resources Command.

4. Regional Readiness Commands (RRCs).

a) Formerly known as Regional Support Commands (RSCs).

b) Twelve commands geographically aligned with the Federal Emergency Management Agency (FEMA) regions. The number of these commands may change depending on the outcome of the Army's current transformation. Continued alignment with FEMA is doubtful.

c) Serve as command and control for USAR units located in regions, less units assigned to divisions and USACAPOC.

d) Provide installation-like support to downtrace units.

e) Commanded by a major general.

5. Institutional Training (IT) Divisions.

a) Seven divisions.

b) Provide soldiers capable of conducting basic training and other types of individual training. Work to augment TRADOC upon mobilization.

6. Training Support (TS) Divisions.

a) Five divisions.

b) Plan, conduct, and evaluate USAR and ARNG training exercises (e.g., Battle Command Staff Training and Combat Support Simulation Exercises).

7. Other General Officer Commands.

a) Several, larger commands report to the USARC during peacetime, but exercise, plan, and mobilize under a variety of Active Army chains-of-command.

b) Examples.

(1) 332nd Medical Brigade, Nashville, TN.

(2) 377th Theater Support Command, New Orleans, LA.

(3) 416th Engineer Command, Darien, IL.

C. NATIONAL GUARD ORGANIZATION.

1. National Guard Bureau.

   a) DA and Department of Air Force joint bureau.

   b) Director of the Army National Guard = LTG.

   c) DOES NOT command and control National Guard units.

   d) Serves to assist units with meeting Federal training, organizational, and operational standards.

2. State and Territorial Headquarters.

   a) All 50 States.

   b) Commonwealth of Puerto Rico, the territories of Guam and the Virgin Islands, and the District of Columbia.

   c) Led by a major general (The Adjutant General ("TAG")).

3. Divisions.

   a) Seven Infantry Divisions.

   b) One Armored Division.

   c) Headquartered in one state with units in several states.

   d) Example: 38th Infantry Division, Indianapolis, IN. Units from Indiana, Illinois, Michigan, and Ohio national guards.

4. Enhanced Separate Brigades.

   a) Fifteen.

   b) Example: 45th Separate Infantry Brigade, Oklahoma City, OK. Serves as one of three maneuver brigades under the 7th Infantry Division (Light), a command with an Active Army commander.

c) Two Special Forces Groups.

d) 19th SF Group, Utah.

e) 20th SF Group, Alabama.

D. ADDITIONAL TERMINOLOGY.

1. No military organization could function without a plethora of terms and acronyms. The USAR and ARNG are no different. Along with the terms already discussed, the following list hopefully serves to help one better understand the reserve components.

2. Basic terminology.

a) AT: Annual Training:

(1) Usually a two-week period of training performed as a unit pursuant to Federal orders. Some headquarters units are allowed to have their members perform duty in fragmented periods, rather than in the traditional two-week increments.

(2) Now somewhat archaic, but also referred to as "summer camp."

(3) A type of active duty.

(4) Statutorily limited to 30 days per year.

b) ADT: Active Duty Training:

(1) Like AT it is a type of active duty.

(2) IADT: Initial Active Duty Training: Basic Training and Advanced Individual Training. Same training as performed by Active Army counterparts, but may be split into two periods. (Example: College student enlists with this option. Attends basic training during summer break and AIT during the next year's summer break.)

(3) ADT-S: Active Duty Training, Schools: Funds coded into these accounts are used to send soldiers to MOS-producing schools and other professional development courses.

c) ADSW: Active Duty for Special Work: Tours of varying length in support of USAR and ARNG missions.

d) TTAD: Temporary Tours of Active Duty:

(1) Used to support Active Army needs.

(2) CO-TTADs: Contingency Temporary Tours of Active Duty: Used for OCONUS missions.

e) Drill:

(1) Weekend training, usually conducted one time per month. (See "IDT.")

(2) Drills are normally broken down into four-hour blocks, called Unit Training Assemblies (UTAs) with four UTAs constituting a drill weekend and with two or more consecutive drill periods constituting a Multiple Unit Training Assembly (MUTA).

f) IDT: Inactive Duty Training: Normally the weekend drill, but other types exist.

(1) ADAs: Additional Drill Assemblies:

(a) RMAs: Readiness Management Assemblies. Additional periods of funded service allowing soldiers to do those things necessary to prepare the unit for a drill. For example, soldiers scheduled to present instruction to their unit may use an RMA, if available, to prepare for the instruction.

(b) ATAs: Additional Training Assemblies: Used to conduct training when training beyond that conducted at regularly scheduled drills is necessary.

(c) AFTP: Additional Flight Training Periods.

g) AGR: Active Guard Reserve:

(1) USAR soldiers who serve on active duty with the USAR, in a Title 10 status.

(2) ARNG soldiers who serve on active duty with the ARNG, but in a Title 32 status.

h) IMA: Individual Mobilization Augmentee: USAR soldiers who do not perform regularly scheduled drills. AT is spent with Active Army units.

E. THE BASIC ANNUAL CYCLE.

1. Normally, USAR and ARNG soldiers perform duty for one weekend each month. They also participate in a two-week annual training period.

2. In recent years it has been possible for units and individuals to perform additional periods of annual training. In other words, it is possible for USAR and ARNG units to adapt to missions and training opportunities beyond those found within the framework of their historic training cycle.

3. A member of a TPU is required, by statute, to attend 48 drills each year. By regulation, the Army provides that a drill can be as short as four hours. Hence, a drilling USAR or ARNG soldier can serve four drill periods on a drill weekend in each of the twelve months in order to accumulate the required number of drills.

4. Retirement.

a) USAR and ARNG soldiers may draw retired pay, depending on their election, at either age 60 or age 65.

b) To be eligible, they must accumulate twenty years of qualifying service.

c) A qualifying year is based on the accumulation of fifty retirement points in any year.

(1) One retirement point is awarded for each day of annual training or each day of other active duty performed.

(2) One retirement point is awarded for each drill period performed.

(3) A soldier assigned to a TPU ordinarily receives a minimum of 62 retirement points each year (14 days AT plus 48 drill periods).

IV. MILITARY JUSTICE AND THE RESERVE COMPONENTS.

A. Jurisdiction.

1. As noted, ARNG soldiers must be on orders, in a Federal, Title 10 status in order for there to be jurisdiction under the UCMJ.

a) Ordinarily, ARNG soldiers are not in a Title 10 status during weekend drills. Instead, they perform duty in a Title 32 status.

b) The states and territories have codified versions of the UCMJ and may discipline their soldiers pursuant to those provisions for offenses committed while in a Title 32 status.

2. In other words, a soldier must be on Federal active duty at the time a crime is committed in order for there to be jurisdiction.

3. The same is true for USAR soldiers. USAR soldiers always perform duty in some form of Title 10 status.

B. Bottom Line.

1. Many offenses, involving USAR and ARNG soldiers, such as minor drug offenses, cannot be sanctioned under the UCMJ. This is because it is impossible to determine when the crime was committed. At other times, it is possible to determine when a crime was committed, but if the soldier was not “in status,” then there can be no jurisdiction.

2. This result is true for both courts-martial and nonjudicial (Article 15) punishment.

3. **Title 10 status is not an element for processing under the Army's regulatory (administrative) provisions.** In other words, adverse action may be used regardless of the soldier's status at the time of the offense.

a) Bar to reenlistment.

b) Administrative memorandum of reprimand.

c) Adverse elimination.

V. ARMY REGULATORY LAW AND THE RESERVE COMPONENTS.

A. Many of the Army's regulations are applicable to soldiers regardless of whether service is with the Active Army, the Army Reserve or the Army National Guard. For example, one regulation controls officer performance evaluations regardless of assignment. See AR 623-105.

B. In other instance, differences exist and process changes are necessary.

1. For example, different regulations are necessary because the reserve components perform duty during limited periods of time.

2. Differing contractual obligations, and the like, also necessitate a broader regulatory scheme.

C. Although processes are sometimes different, the Army standard remains the same regardless of component. (Compare, Chapter 14, AR 635-200, governing Active Army enlisted separation for misconduct with Chapter 12, AR 135-178 which governs ARNG and USAR enlisted separations for misconduct.)

D. The remainder of this outline considers adverse actions as applicable to the ARNG and USAR. Those adverse actions with little variation throughout the Army, such as those involving memoranda of reprimand, are not discussed.

VI. ENLISTED ADVERSE SEPARATION ACTIONS.

A. COUNSELING AND REHABILITATIVE TRANSFERS BEFORE INITIATION OF SEPARATION ACTION.

1. Counseling is required at least once before initiation of some separation actions. AR 135-178, para 2-4.

2. Rehabilitative transfer within commuting distance for a minimum of 2 months is required, but the separation authority may waive transfer. AR 135-178, para. 2-4c & d.

B. COMMAND-INITIATED SEPARATION ACTIONS.

1. Notification Procedures. (AR 135-178, Chapter 3, Section II). Generally, the immediate commander initiates the process by giving written notice. The notice must contain:

a) Specific allegations on which the proposed action is based.

b) Cite the specific provision in the regulation authorizing separation.

c) Advise the soldier that the separation could result in discharge, transfer to the IRR or being dropped from the roles.

d) State the least favorable characterization of service or a description of separation he or she could receive.

e) The soldier must be advised of the following rights:

(1) To consult with consulting counsel, or to consult with civilian counsel at no expense to the government.

(2) To submit statements.

(3) To obtain copies of documents that will be sent to the separation authority.

(4) To present the case to an administrative board, if he or she has 6 or more years of total Regular and Reserve service or if being considered for a discharge under other than honorable conditions.

(5) To waive these rights in writing.

(6) If an intermediate commander makes a recommendation based upon additional information outside the proposed action he must give written notice to the soldier and afford him/her an opportunity to rebut the additional information. Military counsel will be made available to prepare rebuttal.

f) The soldier will be given 30 days to respond to the notice. Failure to respond to the notice within 30 days constitutes a waiver.

g) The soldier has the right to submit a conditional waiver.

2. Administrative Board Proceedings.

a) Notice must contain the same information as notification procedure (basis for separation; authority for initiation of the action; characterization of discharge). The additional notice provisions concerning the intermediate commander are also required.

b) All the rights provided in notification procedures.

c) Soldier has a right to representation before the board by military counsel, or by civilian counsel at soldier's expense and no expense to the Government.

C. SEPARATION AUTHORITY.

a) Who are separation authorities?

b) For ARNG soldiers: State adjutant generals have been delegated this authority by the Secretary of the Army, except for soldiers with 18-20 qualifying years of service, whereby the Chief, National Guard Bureau, is the approval authority.

c) For USAR soldiers:

(1) Commander AR-PERSCOM: IRR and IMA soldiers.

(2) Area commanders: soldiers attached or assigned to troop program units of the Selected Reserve.

d) Delegation by Area Commanders is authorized under AR 135-178, para 1-10b(2) to the following commanders:

(1) RRC and GOCOM commanders with SJA available for soldiers subordinate to RRC or GOCOM.

(2) First GO in the chain with SJA available when no RRC or GOCOM subordinate to Area Command.

(3) No further delegation is authorized.

(4) USARC Commander is the area commander for TPU members except for special operations units (USACAPOC) and overseas units.

2. Separation Authority action upon receipt of recommended separation packet when a board is not required.

a) Determine whether sufficient basis exists to support the separation. Standard of review is a preponderance of the evidence.

b) If there isn't sufficient basis, disapprove the recommendation and return the case to the originating command with reasons for the disapproval.

c) If there is sufficient factual basis for separation, the separation authority must determine whether separation is warranted by applying the criteria in Chapter 2, AR 135-178.

d) Separation Authority may:

(1) Direct retention.

(2) Direct separation.

(3) Suspend separation.

3. Separation Authority's Action on recommended separation packet requiring an administrative board.

a) If the basis to support separation is not sufficient, return the action to originating command with reasons for disapproval.

b) If there is sufficient factual basis for separation determine whether separation is warranted. If separation is warranted the separation authority must convene a separation board.

D. ACTIONS OF SEPARATION AUTHORITY BEFORE BOARD HEARING.

1. Separation authority must appoint a board of at least three commissioned, warrant or noncommissioned officers. AR 135-178, para 3-17.

a) At least one member must be a Major or above.

b) A majority of the board must be commissioned or warrant officers.

c) Noncommissioned officers may not serve on a board when an other than honorable (OTH) discharge could result.

d) Qualifications of board members.

(1) Experienced soldier of mature judgment.

(2) Impartial and fully cognizant of the regulations and policies related to separation actions.

e) Female or minority representation on the board is not required, but the regulation does express that they will be given an opportunity to serve.

f) Standing board appointment orders are encouraged.

2. Appearance of Respondent's Witnesses. AR 135-178, para 3-17.

a) If the appearance will require TDY or invitational travel orders, the request must be in writing and:

(1) Give a synopsis of the testimony.

(2) Explanation of relevance of the testimony.

(3) Explanation why written testimony is not sufficient.

(4) Convening authority makes the determination.

b) Witnesses not requiring expenditure of funds.

(1) Request must be in writing, and

(2) Specify the type of information the witness will provide.

(3) The board is to secure the attendance of the witness if, reasonably available and the testimony will materially add to the case.

E. SEPARATION AUTHORITY'S ACTION. AR 135-178, para 3-18.

1. Options when board recommends separation.

a) Direct separation for any reason set forth in the notification and established by the evidence.

b) Disapprove the recommendation and direct retention when grounds for separation are not documented in the file.

c) Suspend the execution of the discharge for a period not to exceed 12 months.

2. Options when board recommends retention.

a) Approve recommendation and direct retention, or

b) Request Secretary of the Army to discharge soldier for the convenience of the government. (Rarely invoked and should be used only under extraordinary circumstances.)

3. Separation authority cannot direct discharge if a board recommends retention or discharge of a soldier with a less favorable characterization than recommended by the board.

4. Options when error or defects in board action.

a) If approving authority determines the errors to be harmless, take final action.

b) If errors are substantial (failure to make required findings and recommendations; action which materially prejudiced a substantial right of the respondent; or there was fraud or collusion in obtaining the findings of the board) and if there is a proper objection from respondent's counsel, the separation authority may:

(1) Direct retention.

(2) Return case to board to make findings and recommendations required by the regulation.

(3) Set aside the proceeding and direct a new board.

F. LIMITATION OF SEPARATION ACTIONS. AR 135-178, para 2-3.

1. No soldier will be considered for separation, if the conduct was subject to a judicial proceeding resulting in an acquittal or "similar action." See Cooney v. Dalton, 877 F. Supp. 508 (D. Hawaii 1995).

2. No soldier will be considered for separation if the conduct was subject to a prior administrative separation board in which the board determined the evidence did not sustain the factual allegation.

3. If the conduct was the subject of a separation action resulting in the separation authority directing retention.

4. If Government introduces limited use information (soldier-supplied voluntary information of drug use for purposes of rehabilitation), then soldier must be given an honorable discharge in misconduct proceedings, except when the action is under Chapter 8 (drug rehab failure).

5. Unlawful command influence in the administrative separation process may result in voiding separation action as a violation of minimal due process. AR 15-6, para. 5-7. May also be a criminal violation. See UCMJ, Article 134, Manual for Courts-Martial, para. 96a (wrongful interference with adverse administrative proceeding).

G. JUDGE ADVOCATE INVOLVEMENT IN THE SEPARATION PROCESS.

1. Consulting Counsel and Counsel for Representation. Provides advice and assistance to respondents. Must perform functions in a fully independent manner. See AR 27-26, Rule 5-7.

2. Legal Review.

   a) No pre-board legal review is required at any stage. However, it is strongly recommended that prior to referral of an action to a separation board that a judge advocate review the action to ensure the adequacy of the notice and that there is sufficient factual basis to warrant separation, and so inform the appointing authority in writing.

   b) Post-hearing legal review by a judge advocate only required in those cases in which the board has recommended an OTH or where the respondent identifies specific legal issue for consideration by the separation authority. AR 135-178, para 3-18.

3. Legal Advisor. Appointment of a legal advisor to the board is optional. However, it is recommended that whenever possible a legal advisor will be appointed. Use of Reserve military judges is encouraged; however, they must understand that evidentiary rules are relaxed, and they should not require counsel to submit written briefs on evidentiary questions or dismiss the board members when hearing argument on evidentiary matters.

4. Recorder. A nonvoting recorder may be appointed. The recorder does not have to be a judge advocate, but it is strongly recommended that the recorder be a judge advocate.

5. Several alternate recorders and legal advisors and additional voting board members should be listed on standing board orders. In cases of time conflict or when members are disqualified, the commanding general appointing authority's staff judge advocate can excuse one and substitute another before the first session of the board, IAW AR 15-6, para 5-2a.

H. REASONS FOR SEPARATION ACTION.

1. Unsatisfactory Performance AR 135-178, Chapter 9.

   a) If in the judgment of the commander

(1) The soldier will not develop sufficiently; or

(2) Soldier's retention would have an adverse impact on discipline, good order and morale; or

(3) Soldier would be disruptive; or

(4) Potential for advancement or leadership is unlikely.

(5) Second consecutive APFT failure or elimination for cause from NCOES.

b) Generally, notification procedures are used in Chapter 9 actions. No board required unless soldier has more than 6 years of service.

c) Soldier will receive Honorable Discharge or General Discharge under honorable conditions.

d) Counseling and rehabilitation efforts required. See para. 2-4, AR 135-178.

2. Misconduct. AR 135-178, Chapter 12.

a) Minor disciplinary infractions. Relates to conduct in a military environment.

(1) Counseling and rehabilitative efforts required before separation action may be initiated.

(2) May utilize notification procedures.

b) Pattern of misconduct.

(1) Counseling and rehabilitative efforts required before separation action may be initiated.

(2) Conduct may have occurred in the military or civilian communities.

(3) Involves conduct that does not carry with it a punitive discharge.

(4) Must be more than one incident.

c) Conviction by Civilian Court.

(1) Soldier is convicted by civil authorities and;

(2) A punitive discharge would be authorized for the same or similar offense under the UCMJ or the civil sentence includes confinement for 6 months or more.

(3) Conviction does not have to be final. If the conviction has been appealed or the soldier indicates an intention to appeal and the period for appeal has not expired, the execution of the separation will be held in abeyance until the appeal is finalized.

d) Commission of a Serious Offense.

(1) Commission of military or civilian offense if a punitive discharge is authorized for the same or similar offense under the UCMJ.

(2) Abuse of illegal drugs constitutes serious misconduct.

(a) Separation action must be initiated and the soldier processed for discharge.

(b) Administrative board notification should be used.

(3) Soldier does not have to have been in a Title 10 status at the time of the activity that gave rise to the separation action.

3. Homosexuality. AR 135-178, Chapter 10.

a) Note: All Army legal offices (including reserve component) are required to report pending homosexual discharge cases to OTJAG Administrative Law Division.

4. Expiration of service obligation. AR 135-178, Chapter 11.

5. Other reasons. AR 135-178, Chapter 15.

a) Medically unfit for retention.

b) Noncitizens who are members of the ARNG or USAR.

c) Ministers of religion and divinity students.

d) Attainment of maximum allowable age.

6. Unsatisfactory Participation. AR 135-178, Chapter 13.

a) Soldier is determined to be an unsatisfactory participant under provisions of AR 135-91, Chapter 4:

(1) Nine or more unexcused UTAs/year.

(2) Fails to attend or complete Annual Training.

(3) Soldier verbally or in writing refused to comply with orders or correspondence or a second notice sent by certified mail was refused, unclaimed, or otherwise undeliverable.

b) Administrative board procedures apply, unless an OTH is not warranted or the SM has less than six years total military service.

c) All limitations on separations, rights associated with board actions, appointment of counsel apply.

7. Weight Control Failure. AR 135-178, Chapter 7.

a) Applies only to USAR soldiers who have not completed Initial Entry Training (IET) and have not been awarded an MOS.

b) Most USAR soldiers will be transferred to the IRR under the provisions of AR 140-10, or are boarded IAW AR 600-9.

VII. OFFICER ADVERSE SEPARATION ACTIONS.

A. COMMAND-INITIATED ACTIONS.

1. Who may recommend separation action against an officer? AR 135-175, para 2-16.

   a) A commander with respect to an officer in his/her command.

   b) A proper agency of HQDA.

   c) A duly constituted selection board.

2. Notice Requirements of Separation Action. AR 135-175, paras 2-17 and 2-19.

B. REASONS REQUIRING INVOLUNTARY SEPARATION.

1. Substandard Performance of Duty. AR 135-175, para 2-11. An Honorable Discharge Certificate will be furnished.

2. Moral or Professional Dereliction. AR 135-175, para 2-12. An OTH Discharge is authorized.

C. BOARD PROCEEDINGS.

1. Appointing authority must appoint a board of at least three commissioned officers. AR 135-175, para 2-25.

   a) Equal or higher in grade and senior in rank, at a minimum grade of O-6.

   b) One member will be a Regular Army officer or a reserve officer on active duty.

   c) One member of the board must be of the same sex/branch as the respondent, unlike enlisted elimination boards, if reasonably available.

   d) If possible, minority member if the officer respondent is a minority officer. Respondent has 15 days from board notice to request.

e) The appointing authority may appoint a judge advocate as legal advisor.

f) A commissioned or warrant officer will be named as recorder. Generally, a judge advocate officer should act as recorder.

g) Commands should use standing boards for the same reasons mentioned for enlisted elimination boards. Consider use of IRR/IMA officers to sit on boards.

2. Notice of Proceeding. Recorder will notify respondent of the time and place of the hearing at least 10 days prior to date of the board.

3. Conduct of the hearing.

a) The recorder is responsible for presenting the government's case. [Recorder has an obligation to do more than just present the drug lab litigation packet and the soldier's 201 file. Live witness testimony and prehearing preparation is essential to success.]

b) If a legal advisor is not assigned, the President makes all rulings on procedure and evidence. When legal advisors are lawyers, they should not act as judges--relaxed rules of evidence, no briefs or written decisions required. The President of the board is still in charge.

c) Formal rules of evidence do not apply to separation boards. AR 15-6 is to be consulted in determining the procedures and rules to be applied as to evidence.

d) The standard of proof for the government is a preponderance of the evidence, not "substantial evidence."

e) The board must make a finding on each allegation stated in the notification memorandum. If they find the allegation is supported by the evidence they must make a finding as to whether the conduct warrants separation. AR 135-175, para 2-34.

f) The board must make a recommendation of retention or separation and the characterization of the discharge.

4. Record of the Proceeding. No verbatim record is required. Only the findings and recommendations must be verbatim. The proceedings must be summarized as fairly and accurately as possible. Officer boards require that there be a statement that the findings and recommendations were determined by secret written ballot in closed session. AR 135-175, para 2-35.

D. LIMITATION OF SEPARATIONS. AR 135-175, para 2-5.

1. No officer will be considered for separation if the conduct was subject to a judicial proceeding resulting in an acquittal on the merits.

2. No officer will be considered for separation if the conduct was subject to a prior administrative separation board resulting in a final determination that the member should be retained.

VIII. RECURRING PROBLEMS IN ENLISTED AND OFFICER SEPARATION CASES.

A. Inadequate notice to the soldier.

1. Failure to state the factual basis for the separation action. Notice should tell the soldier the act or acts that were relied upon for the separation.

2. Failure to state the type of discharge.

3. Notification not signed by the commander.

B. Improper signature in the consulting counsel portion of the notification form.

1. Commanders have signed as consulting counsel. If an individual refuses to consult with counsel the commander is to annotate the form indicating that the soldier declined to consult with counsel. He or she is not to sign as consulting counsel.

2. Other staff officers have signed as consulting counsel.

IX. AGR SOLDIERS.

A. Must receive counseling/rehabilitative transfer (or waiver), if being processed for involuntary separation IAW AR 600-8-24 (officers) and AR 635-200

(enlisted). The DA Form 4856, General Counseling Form, must meet the rights advisement requirements listed in the Active Army regulations, not AR 135-178 or AR 135-175.

B. AGR officers may also be involuntarily released from active duty (REFRAD) through a DA Active Duty Board (DAADB).

1. Secretary of the Army is the approval authority for DAADB boards and the Secretary's decision is final. No AGR soldier will be processed before a DAADB board if they have between 18-20 years of Active Federal Service, without the written approval of the Secretary.

2. The bases for DAADB action are basically the same as those under AR 135-175. A case may be initiated by any commanding officer, the Chief, Army Reserve, Commander, AR-PERSCOM, or Chief, National Guard Bureau.

3. The USAR AGR officer is notified of the DAADB referral by the Commander, AR-PERSCOM Full Time Support Management Directorate (FTSMD), and given 30 days from receipt of notice to respond in writing. There are no personal appearances before the board.

4. If the board recommends separation and the recommendation is concurred with by the Secretary of the Army, the officer will be released from active duty no earlier than 5 calendar days and no later than 14 calendar days from notification by FTSMD when misconduct, moral or professional dereliction is found. Separation solely because of substandard performance will result in release from active duty not less than 30 days from notification by FTSMD. Officers released under DAADB board REFRAD procedures for misconduct or substandard performance receive no separation pay.

5. Enlisted USAR AGR soldiers may be removed from active duty by administrative separation board UP AR 635-200.

C. Commanders and their judge advocates must coordinate closely with FTSMD. Officer and Enlisted Special Action sections when attempting adverse administrative action against a USAR AGR soldier. All USAR AGR personnel records are stored centrally at FTSMD. Coordination is critical for filing adverse actions (e.g., memoranda of reprimand) and to insure soldiers are properly flagged.

X. OTHER ADVERSE PERSONNEL ACTIONS.

A. INVOLUNTARY TRANSFER TO THE IRR. AR 140-10.

1. Unsatisfactory participation. Soldiers who receive nine unexcused absences in one year may be transferred to the IRR.

2. Exception: soldiers who have not completed initial entry training or are within 3 months of ETS will not be transferred to the IRR. Paragraph 4-15.

B. DROPPED FROM THE ROLLS. AR 135-178, Chapter 15.

1. Unauthorized absence from AD or ADT covered by AR 630-10.

2. Felony conviction by civilian criminal court. Must be finally sentenced to confinement in a Federal or state penitentiary or correctional institution. Appeal rights must have run (time limit)/appeal finally denied, or proof soldier waived his appellate rights.

3. This action is not a discharge.

4. Approval authority is the area commander [USARC] for USAR TPU soldiers (non-SOF), State Adjutants General for ARNG soldiers, and Commander, AR-PERSCOM for IRR/IMA USAR soldiers.

C. BARS TO REENLISTMENT. AR 140-111, Chapter 1, Section VII.

1. A bar to reenlistment is not a punitive action. It is designed to put the soldier on notice that he or she:

a) Is not a candidate for reenlistment, and

b) May be separated if the circumstances that gave rise to the bar are not overcome.

2. When may a bar be initiated?

a) Bars normally are not imposed when:

(1) A soldier has been assigned to the unit for less than 90 days, or

(2) During the last 90 days (30 days for AGRs) before the soldier is discharged, transferred from the command or released from active duty.

b) Rules related to retirement eligibility. A bar may be initiated against a soldier with at least 18 but less than 20 years qualifying years; however, if the chain of command does intend to permit the soldier to extend his/her enlistment to retirement eligibility, approval of the bar is the Chief, Army Reserve.

3. Who may initiate a bar?

a) Any commander in the soldier's chain of command.

b) Any commissioned officer in the soldier's chain of command on a headquarters staff, agency or activity for soldiers he/she has supervisory responsibility.

c) The chief of an enlisted management division under AR-PERSCOM.

4. What are the categories of soldiers that should be considered for a bar?

a) Untrainable soldiers. Individuals who lack the ability, aptitudes or motivation to qualify for an MOS.

b) Unsuitable soldiers.

(1) Single soldiers/in-service couples with dependents who fail to have family care plan in place.

(2) Persons who exhibit interests or habits detrimental to the maintenance of good order and discipline.

(3) Paragraph 1-30c, AR 140-111 contains a laundry list of conditions that are considered adequate basis for initiation of bar.

5. Who may approve a bar?

a) Soldier with less than 10 years of service at ETS: first commander in rank of LTC or SPCMCA.

b) Soldiers with 10 to 18 years; those with more than 20 years of qualifying service; those with 18 to 20 years when action has to taken to extend him or her to qualify for retirement: first general officer or the GCMCA.

c) Soldiers with 18 to 20 years, when not extended to achieve retirement eligibility: Chief, Army Reserve.

6. What are procedural rights of soldier?

a) Notice must be provided by officer initiating the bar.

b) If not on AGR tour, soldier has 30 days to respond. If on an AGR tour the soldier will have 7 days.

c) May be voluntarily REFRAD or discharged.

d) Appeal the bar.

7. When must the bar be reviewed?

a) At least 6 months after approval and each 6 months thereafter.

b) days before the soldier's scheduled departure from the unit, REFRAD or discharge from USAR.

8. Who must act on appeals?

a) Soldiers with less than 10 years the first general officer or GCMCA.

b) Soldiers with more than 10 years – Chief, Army Reserve.

c) If the Chief, Army Reserve approved the bar no appeal is authorized.

D. USAR AGR Qualitative Management Program (QMP). AR 635-200, Chapter 19.

1. Enhance the quality of the AGR enlisted force by screening out the nonproductive soldiers.

2. Unlike its predecessor, the current QMP results in the elimination of active duty (Active Army and AGR) NCOs. It no longer serves merely as a bar to reenlistment.

3. The first LTC (or above) in the effected AGR soldier's chain of command is sent the memorandum and supporting documents, and is required to personally counsel the soldier, using a DA Form 4856 (General Counseling Statement), and the LTC must have the soldier fill out a Statement of Options (DA Form 4941-R). The supervisor must explain the impact of the QMP bar to reenlistment, discharge options, and appellate rights.

4. The soldier or the commander may appeal the QMP to Commander, AR-PERSCOM, on the grounds that the soldier has overcome the deficiencies listed as the basis for the bar action, and/or material error in the soldier's records that were reviewed by the selection board. An appeal stays the discharge process, until the appeal has been finalized or the soldier elects discharge.

   a) Appeal period for soldier is 90 days from date of receipt of the Statement of Options.

   b) Appeal from commander must reach AR-PERSCOM 120 days from notification to the soldier.

5. Soldiers who do not appeal will be involuntarily discharged.

6. Soldiers who unsuccessfully appeal the QMP decision will be discharged within 90-days from receipt of pre-discharge counseling.

XI. CONCLUSION.

CHAPTER 30

SOLDIER SUPPORT TO FAMILY MEMBERS

Table of Contents

I. INTRODUCTION 2

II. REFERENCES. 2

III. MILITARY POLICY REGARDING FAMILY SUPPORT. 2

IV. PATERNITY. 12

V. CHILD CUSTODY AND PARENTAL KIDNAPPING. 13

VI. CONCLUSION 15

VI. JANUARY 2003 BAH Table II and Differential 16

MAJ Evan M. Stone
evan.stone@hqda.army.mil
FY 2004 Senior Officers Legal Orientation Course

CHAPTER 30

SOLDIER SUPPORT TO FAMILY MEMBERS

Outline of Instruction

I. INTRODUCTION:

"I was married by a judge. I should have asked for a jury."

— Groucho Marx

II. REFERENCES.

Army Regulation 608-99, Family Support, Child Custody, and Paternity (1 Nov. 1994).

III. MILITARY POLICY REGARDING FAMILY SUPPORT.

A. DOD Policy: Service members will not use military service to evade family support obligations.

B. Support Enforcement in the Army: Army Regulation 608-99.

1. Purposes of AR 608-99.

a. Implement DOD policy on family support.

b. Define the amount of a soldier's family support obligation.

c. Create a mechanism to ensure soldiers meet their support obligations.

d. Define Army policy regarding paternity allegations.

e. Define Army policy regarding child custody matters.

2. Command interest. The purpose of interim support is to provide some family support while the parties seek an agreement or settlement by a court.

3. Whom must the soldier support?

a. Soldiers must support "family members." See glossary of AR 608-99.

(1) Current spouse.

(2) Minor children (unmarried, under 18 and not in the Armed Forces) born into the soldier's marriage or adopted by the soldier.

(3) Children born out of wedlock to:

(a) A female who is a soldier; or

(b) A male soldier **if** a court order establishing paternity exists **and** it requires him to provide support.

(4) Any other person the soldier may be required by law to support. Eg.

(a) Stepchildren. Not included as family members unless required by state law.

(b) Parents. Not included as family members unless required by state law. .

b. **Note**: Family member under AR 608-99 may differ from the definition of dependent for other entitlements such as health care, BAH, and commissary/PX benefits.

4. How Much Support?

a. A soldier must comply with any applicable court order.

b. Absent court ordered support, a soldier must comply with any written agreement regarding support (e.g. a separation agreement).

c. Absent a court order written agreement, or effective oral agreement, then a soldier must pay the interim support required under AR 608-99, para. 2-6.

d. Interim Support Requirements are based on BAH II-WITH, and BAH II -DIFF rates for a soldier's rank. As of 1 January 1998, soldiers receive Basic Allowance For Housing (BAH). BAH is a combination of the BAQ rate authorized and VHA for the locale. THE ARMY SUPPORT OBLIGATION DID NOT CHANGE . The BAH II Table, July 2001 reflects that portion of the BAH reflecting the old BAQ (See attached table).

5. Interim Support Requirement. AR 608-99, para. 2-6.

a. An Army-created guideline for support in the absence of an agreement between the parties or a court order.

b. Not intended to permanently define the support obligation--emphasis is on the word *interim*.

6. Rules for a Single Family:

a. All family members **living in government quarters:** BAH II DIFF.

(1) **Example 1**: CPT Leaving moved out of his on-post quarters after deciding to divorce his civilian wife. They do not have children. Mrs. Leaving obtained permission to live in the quarters for an additional six months without charge. What is CPT Leaving's interim support requirement if any?

Answer 1: *If there are no court orders or written agreements CPT Leaving will owe the BAH II or the BAH II DIFF depending on where his family members reside. Since Mrs. Leaving is his only family member and she will reside on-post, CPT Leaving will owe the BAH II DIFF for a CPT: $132.60*

b. All family members **living off-post:** BAH-II-WITH

(1) **Example 2**: MAJ Major moved out of her off-post rental house after deciding to divorce her civilian husband, Mr. Major. They have three children who all remained with Mr. Major in the rental house. What is MAJ Major's interim support requirement?

Answer 2: *If there are no court orders or written agreements, MAJ Major will owe the BAH II WITH or BAH II DIFF depending on where the family members reside. Since Mr. Major and the kids all reside in the rental house, MAJ Major will owe the BAH II WITH: $960.90*

c. Family members residing in **different locations:** PRO-RATA share to those not in government quarters and BAH II DIFF for members residing in government quarters.

(1) **Example 3**: CPT Moneymaker and her husband have four children and live on-post in government quarters. Mr. Moneymaker moves out to an apartment after the couple decides to separate with a view toward divorce. What is CPT Moneymaker's interim support requirement, if any?

Answer 3: *If there are no court orders or written agreements, CPT Money Maker owes a PRO RATA SHARE of her BAH II WITH to each family member not in government quarters and BAH II DIFF to the aggregate group of family members residing in the quarters. Thus, since she resides in the quarters with her four children, she only owes Mr. Moneymaker 1/5 or 20% of her BAH II WITH: $795.00 x .20 = $159.00*

7. Rules for Military Couple:

a. Neither spouse owes support to the other if they do not have children.

(1) **Example 4**: SFC Culpepper and SSG Culpepper were assigned to two separate duty locations. The Army sent SFC Culpepper language training in California and SSG Culpepper to Korea for a year. What are the respective support requirements if they do not have children?

Answer 4: None. Service members do not have to support each other when separated if they do not have children.

b. If a military couple has children, and the children are all living with one spouse, the non-custodial spouse owes BAH II DIFF.

(1) **Hypothetical 5**: What if the Culpepper's have two children and the kids will both reside with SFC Culpepper in California? Does SSG Culpepper owe support?

Answer 5*: If the couple is separated for whatever reason, the non-custodial military spouse owes the BAH II DIFF to the custodial military spouse. Thus, SSG Culpepper owes $218.70 to SFC Culpepper.*

c. If at lease one child resides with each spouse, neither spouse owes support to the other.

(1) **Hypothetical 6**: What if one child goes to Korea with SSG Culpepper and the other child goes to California with SFC Culpepper?

Answer 6: *When military spouses are separated and at least one child resides with each spouse, neither owes support regardless of the proportion of children. Here, neither Culpepper would owe support to the other.*

8. Rules for Multiple Families:

a. A soldier might have family members from different relationships and living at varying locations. A soldier in a multiple family situation must provide a pro-rata share of the BAH II WITH to all family members not in government quarters. Those family members in government quarters receive BAH II DIFF as a group.

(1) **Hypothetical 7**: SSG Thomas (E-6) has two children by a previous relationship with no court ordered support. He just separated from his current family of a wife and one child who reside off post. What is SSG Thomas' support requirement?

Answer 7: *Since there are no court orders or written agreements, the first step is to count total family members. Here SSG Thomas has four family members: two kids from a prior relationship, his current spouse, and his child with his current spouse. Each family member therefore is entitled to 1/4 or 25% of his BAH II WITH: $645.90 x .25 = $161.475 per family member. This means that two children from the prior marriage receive $161.475 x 2= $322.95. His spouse and their child receive the other $322.95 for a total outlay of his entire BAH II WITH of $645.90*

b. Remember that the location of family members determines how much interim support the service member owes.

(1) **Hypothetical 8**: Same facts as #7, but suppose his two children from his prior relationship live with their mother and step-father, SSG Newguy, in government quarters. What is SSG Thomas' support requirement?

Answer 8: *There are still no court orders or written agreements. SSG Thomas still has four family members each entitled to something. The current spouse and child still represent two of four family members and since they live off post, they are each entitled to 25% of the BAH II WITH just as explained in Analysis 7. However, since his children from the prior relationship are residing in government quarters, collectively they are entitled only to an amount equal to the BAH II DIFF. Thus, SSG Thomas still owes $322.95 to his current spouse, but only $218.70 to his prior children for a total outlay of $541.65.*

c. A service member must still comply with any valid existing court orders.

(1) **Hypothetical 9**: Same as #8, but now you learn that SSG has a valid court order requiring him to pay $150 per month per child for each of the two children of the previous relationship. What is SSG Thomas' support requirement?

Answer 9*: AR 608-99 requires SSG Thomas to honor the court ordered support of $300 for his children of his prior relationship. The "interim" support requirements do not apply to this family. He still must provide interim support to the current spouse and child absent a court order for them. Since SSG Thomas's current spouse and child still represent two of his four "family members" he will continue to owe $322.95 to the current spouse and child, but he will owe $300 to the children of the previous marriage by court order for a total outlay of $622.95.*

d. A service member must comply with all court orders, not just ones pertaining to child support.

(1) **Hypothetical 10**: Same facts as #9 except you just found a clause in the court order requiring SSG Thomas to $100 per month in support to the children's mother.

Answer 10: *Since AR 608-99 requires a service member to comply with all valid court orders, SSG Thomas will additionally owe $100 per month in support on top of the $300 in child support for a total of $400 to that family. He still owes the $322.95 to his current spouse and child for a grand total of $722.95.*

9. Payment In Kind. AR 608-99, paras. 2-7d and e.

a. Allowed only in cases of interim support unless the court order or written agreement allows for payment in kind.

b. Limited to payment of non-government housing expenses for a dwelling in which the supported family members reside.

c. Rent—Only if the service member has an obligation under the lease.

d. Real property taxes and property insurance, mortgages

e. DOES NOT include utilities, cable T.V.

f. Soldier must make up any shortfall between payment in kind and actual support obligation.

g. Other support in kind such as car payments, insurance and credit card obligations requires written consent of the supported family members.

10. The Commander's Role.

a. Respond to inquiries

b. Establish compliance procedures

(1) Commander can counsel the soldier and impose punishment for a failure to provide support.

(2) Commander cannot take money away from soldier and give it to the family.

c. Monitor compliance

d. Train subordinate commanders

e. Setting the amount of the support obligation.

(1) **Company commanders** *cannot* excuse failure to comply with the minimum requirements created by the regulation.

(2) **Battalion commanders** *may* release a soldier from the regulatory support requirements of AR 608-99 in the following circumstances:

(a) *Order has been issued by a court without jurisdiction.* Release from the requirement to support in accordance with the terms of a court order is only appropriate when jurisdiction is clearly lacking and the soldier has continuously provided support in accordance with a written agreement or the interim requirements of AR 608-99.

(b) *A court order does not contain a financial support provision.* Release under this authority is limited and should be discussed with the servicing SJA office.

(c) *The income of the spouse exceeds the military pay of the soldier.* This is a defense to spousal support, not child support, and only applies in the absence of a court order or written separation agreement.

(d) *The soldier has been the victim of a substantiated case of physical abuse.* Only appropriate when the abuse is documented by a court or a Family Advocacy Case Management Team (FACMT) and did not involve a mutual affray or abuse of the spouse by the soldier. This exception authorizes release from regulatory requirements to support a spouse, not children.

(e) *The supported family member is in jail.* This exception applies to any penal institution, regardless of the reason for incarceration.

(f) *The supported child is in the custody of another who is not the lawful custodian.* This limited exception applies only when the soldier is the lawful custodian and is diligently pursuing physical custody.

f. Credit for support in kind is limited, and an allegation of marital infidelity or desertion is *not* a defense.

g. Ensure the troops know their obligations.

11. <u>Counsel the soldier about a nonsupport complaint</u>.

a. If possible, send the soldier to a Legal Assistance office.

b. Provide a rights advisement.

(1) AR 608-99 is **punitive**, and failure to provide required support is a violation of Article 92, UCMJ.

(2) The soldier should also be given an opportunity to complete DA Form 5459-R, Authority to Release Information From Army Records on Nonsupport/Child Custody/Paternity Inquiries. This form is included in the regulation.

(3) Question the soldier about the situation.

(4) Respond to the complaint within 14 days.

c. Final step: determine whether disciplinary action is appropriate.

(1) Sanctions are a means of "encouraging" support and deterring nonsupport.

(2) Possible actions include:

(a) Counseling;

(b) Letter of reprimand;

(c) Bar to reenlistment;

(d) Administrative separation; and/or

(e) Punishment under the UCMJ (failure to obey a lawful general regulation--AR 608-99).

(3) Additionally, if the soldier has been drawing "BAH-WITH" and not supporting the family, the finance officer will terminate BAH and recoup past BAH during periods of non-support.

12. Soldiers seeking child support from ex-spouses.

a. Soldiers can use the "IV-D" program in the state in which they are assigned.

b. Under the IV-D program, for a minimal fee (not exceeding $25.00), the state will pursue the soldier's support claim, even if the non-supporting ex-spouse is located in a different state.

IV. PATERNITY.

A. The Army's Role.

1. Civilian Matter. The command will not adjudicate paternity, but will answer the mail.

2. Counsel Soldier. The main obligation of the command is to counsel the service member and respond to the inquiry.

B. The Commander's Role.

1. Advise the soldier of the allegation.

2. Give him an opportunity to consult with a legal assistance attorney.

3. Give him an opportunity to admit or deny paternity.

4. Answer the claimant based on the soldier's response and his decision regarding release of information.

5. If the soldier admits paternity, the chain of command should help him start an allotment, apply for BAH, and obtain an ID card for the child.

V. CHILD CUSTODY AND PARENTAL KIDNAPPING.

A. Army Policy.

1. Soldiers must comply with child custody orders.

2. Regulatory violations. A soldier who is aware that another person is the lawful custodian of an unmarried child under the age of fourteen will not:

a. Abduct, take, entice, or carry the child away from the lawful custodian;

b. Withhold, detain, or conceal the child from the lawful custodian.

3. Commander's Actions.

a. Advise the soldier of legal rights.

(1) AR 608-99 is punitive, so Article 31 rights apply.

(2) Soldier also should be asked for consent to release information on DA Form 5459-R.

b. Question the soldier.

c. Consult with an administrative law attorney as necessary to clarify the legal posture of the case.

d. Respond to the claimant with appropriate information.

e. Take appropriate disciplinary action. The full range of administrative and punitive actions can be taken against a soldier who violates a custody order.

B. DOD Policy. AR 608-99, ch. 4.

1. Special rule for soldiers and family members who are:

a. Stationed overseas, and

b. The subject of:

(1) A judicial contempt citation, order to (show cause, or a felony charge.

(2) Arising from a family support, child custody, child visitation or paternity case.

2. Upon receiving notice of the legal action, the command attempts to get the matter resolved without the soldier or the family member having to return to the U.S.

3. If this is not possible, and if the requesting civilian court or agency agrees to provide intra-U.S. transportation, then the Army must return the soldier to the nearest U.S. port of entry, at government expense.

4. If the subject of the request is a family member, or involves a soldier but does not involve child custody, the company commander will forward the matter with recommendations to the GCMCA.

5. The GCMCA, in coordination with the SJA, will consider a range of possible solutions including, but not limited to, withdrawal of command sponsorship, adverse action and tour curtailment.

VI. NOTES

JANUARY 2003 BAH TABLE II AND DIFFERENTIAL

GRADE	BAH II WITH	BAH II DIFF
0-7 To 0-10	$1256.40	$249.90
06	$1131.00	$207.00
05	$1090.20	$200.10
04	$960.90	$132.90
03	$795.00	$132.60
02	$678.60	$156.60
01	$607.20	$169.50
03E	$854.40	$139.50
02E	$771.00	$166.50
01E	$712.50	$195.00
W5	$927.90	$83.10
W4	$850.50	$102.30
W3	$779.70	$154.50
W2	$716.70	$163.20
W1	$619.80	$157.80
E9	$816.30	$208.80
E8	$752.70	$195.30
E7	$698.70	$226.50
E6	$645.90	$218.70
E5	$580.80	$186.00
E4	$504.60	$161.10
E3	$469.80	$131.70
E2	$447.60	$176.70
E1	$447.60	$208.80

CHAPTER 31

SENIOR OFFICER LEGAL ORIENTATION

CONSUMER LAW FOR LEADERS

I. PLACING AREAS "OFF-LIMITS" 1
a. *References* *1*
b. *Off-Limits Establishments and Areas* *1*
c. *Procedure – The Armed Forces Disciplinary Control Board* *2*
FEDERAL TRADE COMMISSION RULES **6**
II. COOLING OFF PERIOD FOR DOOR-TO-DOOR SALES (16 C.F.R. PART 429) 6
a. *How Does This Rule Help Soldiers?* *6*
b. *How Does the Rule Work?* *6*
c. *How Does the Soldier Rescind the Transaction?* *8*
III. TELEMARKETING RULE (16 C.F.R. PART 310). 9
a. *How Does This Help Soldiers?* *9*
b. *How Does the Rule Work?* *9*
c. *What Should A Leader Do?* *13*
SELECTED STATUTORY PROTECTIONS **14**
IV. TRUTH IN LENDING ACT (TILA). 14
a. *How Does This Help Soldiers?* *14*
b. *How Does the Rule Work?* *14*
c. *Scope.* *14*
V. FAIR CREDIT BILLING ACT (FCBA) & ELECTRONIC FUND TRANSFER ACT (EFTA) 27
a. *How Do These Acts Help Soldiers?* *27*
b. *Procedure,* *27*
c. *Limits the liability.* *27*
d. *How Do these Acts Work?* *27*
e. *What Should A Leader Do?* *29*
VI. FAIR DEBT COLLECTION PRACTICES ACT 30
a. *Purpose.* *30*
b. *Military Regulations* *30*
c. *Overview of the debt collection process.* 30
d. *Hows Does the Act Work?* 30
VII. PROCESSING REQUESTS FOR DEBT COLLECTION ASSISTANCE BY THE MILITARY. 35
a. *References.* *35*
b. *A Process for Analysis.* *35*
c. *Bankruptcy.* *40*
d. *What should a leader do?* *40*
VIII. FAIR CREDIT REPORTING ACT (FCRA) 42
a. *How Does the Act Help Soldiers?* *42*
b. *Introductory note* *42*
c. *How Does the act work?* *42*
d. *What should A leader do?* *47*

INTRODUCTION

The following outline is a brief overview of several key consumer protection rules and laws. They have been selected because they address situations which soldiers are likely to experience. It is important to note that this outline **does NOT contain a complete discussion of all aspects of the cited rules and laws! For complete advice, soldiers must see a legal assistance attorney**. The outline is designed to provide leaders with an understanding of the situations addressed by the rules and laws so that they can do two things. First, recognize when a soldier needs to go to legal assistance, whether the soldier knows it yet or not. Second, decide how critical it is for the soldier to get to the Legal Assistance Office (LAO) quickly.

Each section is broken down into similar subsections. The first subsection is an explanation of how the rule/law helps soldiers. The middle subsections give some critical details about the rule/law. At the end, is a subsection explaining what a leader should do if they learn a soldier is experiencing the particular consumer problem addressed by the rule/law. Again, this is NOT a complete treatment of these rules. If you need further information, contact your servicing LAO.

I. PLACING AREAS "OFF-LIMITS"

a. References

1. AR 190-24, Armed Forces Disciplinary Control Boards and Off-installation Liaison and Operations (30 June 1993).

2. AR 600-20, Army Command Policy

b. Off-Limits Establishments and Areas

1. Purposes.

a) Maintain good discipline, health, morals, safety, and welfare of service members.

b) Prevent service members from being exposed to or victimized by crime-conducive conditions.

2. Effect of Off-limits Designation

a) Service members are prohibited from entering establishments or areas declared off-limits according to AR 190-24.

b) Violations subject the service member to discipline under appropriate regulations or the UCMJ.

c) Family members should be made aware of the off-limits areas.

c. Procedure – The Armed Forces Disciplinary Control Board

1. The Role of Commanders

a) Establishment of off-limits areas is a function of command.

b) Commanders retain substantial discretion to declare establishments or areas temporarily off-limits for their commands. These areas are given first priority for review at the AFDCB.

c) Prior to initiating AFDCB action, installation commanders will attempt to correct adverse conditions or situations through the assistance of civic leaders or officials.

2. The Armed Forces Disciplinary Control Board (AFDCB)

a) Composition

(1) Established at the installation base or station level.

(2) Structured according to the needs of the command, but consider reps from the following functional areas:

(a) Law Enforcement

(b) Legal Counsel

(c) Medical, Health, and Environmental Protections

(d) Public Affairs

(e) Equal Opportunity

(f) Fire and Safety

(g) Chaplain

(h) Alcohol and Drug Abuse

(i) Personnel an Community Activities

(j) Consumer Affairs

(3) Commanders designate a board president and voting members in the written agreement establishing the board. At most installations, the president is the Provost Marshal.

b) Function

(1) Advise and make recommendations to commanders concerning eliminating conditions which adversely affect the health, safety, morals, welfare, morale, and discipline of the Armed Forces.

(2) Meet as designated by the forming commander. Most meet at some predesignated interval (quarterly, monthly).

(3) The Board makes recommendations as to the following conditions:

(a) Disorders and Lack of Discipline

(b) Prostitution

(c) Sexually Transmitted Disease

(d) Liquor Violations

(e) Racial and other discriminatory practices

(f) Alcohol and Drug Abuse

(g) Criminal or illegal activities involving cults or hate groups

(h) Illicit Gambling

(i) Areas Susceptible to terrorist activities

(j) Unfair commercial or consumer activities

(k) Other undesirable conditions that may adversely affect members of the military or their families.

(4) The Board coordinates with local and civil authorities regarding these conditions.

c) Procedure

(1) The Board receives and considers reports of the conditions cited above.

(2) The board may investigate or visit an establishment, but if they do so, the President must submit a report of the findings and recommendations from the visit at the next meeting.

(3) DUE PROCESS: When the board concludes that conditions adverse to Armed Forces personnel exist, they must do the following before placing the establishment off-limits:

(a) Notify the individual responsible (owner or manager) for the conditions of the problem. This notification letter must be sent by certified mail.

(b) The proprietor should be afforded an opportunity to appear before the board.

(c) Conduct further investigation to determine whether improvements have been made.

(4) Make a recommendation to the sponsoring commander. The commander will approve or disapprove and notify the president.

(5) The president will notify the proprietor of the outcome.

(6) Commanders will publish a list of off-limits establishments

d) Limitations.

(1) Commanders may not post signs on private property (saying “off-limits.”)

(2) OCONUS procedures must be consistent with the SOFA for that country.

(3) Off-limits should only be imposed where there is substantive information supporting the action. The board must not act arbitrarily.

e) Removal.

(1) The proprietor may petition for removal at any time. Removal action must be taken by the AFDCB.

(2) A change in ownership, management, or name does NOT in and of itself revoke the off-limits order.

(3) Additionally, the Board should inspect off-limits establishments at least quarterly to ensure that continued limitations are justified.

(4) Once the board is convinced that adequate corrective measures have been taken, they should forward a recommendation for removal to the commander.

FEDERAL TRADE COMMISSION RULES

II. COOLING OFF PERIOD FOR DOOR-TO-DOOR SALES (16 C.F.R. PART 429)

a. How Does This Rule Help Soldiers?

1. Rule grants unilateral right to rescind consumer purchase contracts for three business days following a door-to-door sale.

2. Rule contains disclosure requirements and notice requirements.

3. Leaders may be able to get a soldier to the Legal Assistance Office in time to use the rule for protection against unwise purchases/contracts.

b. How Does the Rule Work? You must have a "door-to-door" sale as defined by the rule. If you do, the consumer may cancel within 3 business days for any reason or no reason.

1. Door-to-door Sale: Sale, lease, or rental of **consumer goods** and services with a total purchase price of $25.00 or more personally solicited by the seller at a **place other than the permanent place of business of the seller**.

a) Consumer goods are those purchased primarily for personal, family, or household purposes.

b) Other than the Permanent Place of Business of the Seller. 1995 Amendments added an annotation to the definition that includes the following examples of places that fit within the definition:

(1) Buyer's residence;

(2) Facilities rented on a temporary or short-term basis including hotel or motel rooms, convention centers, fairgrounds, restaurants;

(3) Sales at the buyer's workplace;

(4) Sales in dormitory lounges. This would include barracks.

2. Business day: Any day except Sundays and Federal Holidays. Current Federal Holidays are New Year's Day, Martin Luther King, Jr.'s Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving and Christmas.

3. Business activities specifically EXCLUDED from the rule. These are NOT "door-to-door" sales!

a) Pre-arranged visits after initial contact at a seller's regular place of business. (For example, carpet salesman who comes to measure your home after you visit the carpet store.)

b) Contracts in which the cooling-off period of the Truth-in-lending act applies. (primarily home equity loans).

c) Buyer-initiated contacts for a bona-fide emergency need. (For example, you call the furnace repairman in the winter and sign the service order when he gets to your house.) However, the consumer must waive the cooling-off period in writing!

d) Solicitations by mail or telephone. (See the Telemarketing Rule below).

e) Buyer initiated visit for repairs of personal property. (For example, you call a computer repairman to come to your home and you sign the service order only when he arrives.)

f) Sale (or rental) of Real Property, Insurance, or Securities. (These are governed by other regulations.)

g) Automobile tent sales (where dealer has permanent place of business elsewhere).

h) Craft Fairs.

4. Waiver is not allowed. (Exception - emergency needs).

c. How Does the Soldier Rescind the Transaction?

1. Consumer must mail or deliver written notice to seller before midnight of he third business day following the transaction.

2. Use cancellation form provided by the seller, or,

3. Use any written form, to include a telegram, that communicates the desire to rescind to the seller.

d. What Should A Leader Do?

1. If a soldier indicates that he has participated in a “door-to-door” sale, MAKE time for him to go have the transaction reviewed at the LAO immediately.

2. Have the soldier bring ALL documentation he may have.

3. **Time is of the essence**. Once three business days have passed, the rule does not help the soldier at all!

III. **TELEMARKETING RULE** (16 C.F.R. Part 310)**.**

a. How Does This Help Soldiers?

1. The Rule implements the Telemarketing & Consumer Fraud and Abuse Protection Act which was enacted to "offer consumers necessary protection from telemarketing deception and abuse."

2. The Rule prohibits certain telemarketing practices and prescribes certain disclosures.

3. Leaders should be familiar with the Rule so that they know when to refer soldiers to the Legal Assistance Office to seek protection from deceptive and abusive telemarketing activities.

b. How Does the Rule Work? The Rule makes certain telemarketing practices an Unfair or Deceptive Act or Practice (UDAP) subject to enforcement by private lawsuit, state action, or federal action.

1. **Telemarketing** under the Rule is any plan, program or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones AND which involves more than one interstate telephone call.

2. Specifically excluded are:

a) Most Catalog Sales. (Like Lands End where the solicitation is a written catalog and the sales are made only after the consumer initiates a call to the sellers sales center.)

b) Sale of pay-per-call services (Regulated under other rules.)

c) Sale of franchises (Regulated under other rules.)

d) Calls where the sale is not complete until after a face-to-face presentation by the seller.

e) Most Calls initiated by consumer:

(1) Without any solicitation on the part of the seller;

(2) In response to an advertisement through any media.

(3) In response to a direct mail solicitation that makes proper disclosures.

f) Calls between a telemarketer and any business (except for the sale of nondurable office or cleaning supplies).

3. TELEMARKETER means any person who, in connection with telemarketing, initiates or receives telephone calls to or from the customer, whether or not the telemarketer is an employee of the seller of the product.

c. Prohibitions of the Rule.

1. Deceptive Telemarketing Acts or Practices (16 C.F.R. § 310.3).

a) Failure to disclose:

(1) Total costs of transaction

(2) All material restrictions, limitations, and conditions of transaction.

(3) Any policy of not making refunds.

(4) All material terms and conditions of any refund, cancellation, or repurchase policy that IS mentioned in the call.

(5) In a prize promotion, the odds of receiving a prize and all material conditions or costs to receive or redeem the prize.

b) Misrepresenting, directly or by implication:

(1) Total costs of transaction

(2) Any material restrictions, limitations, and conditions of transaction.

(3) Any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services.

(4) Any material terms and conditions of any refund, cancellation, or repurchase policy

(5) Any material aspect of a prize promotion.

(6) Any material aspect of an investment opportunity.

(7) Seller's affiliation with any government or third party organization.

c) Obtaining or submitting for payment a form of negotiable paper without the person's express verifiable authorization. Authorization is verifiable if it is:

(1) Express and in writing.

(2) Express and made orally and is tape recorded

(3) Written confirmation of the transaction has been sent to the customer PRIOR TO submission for payment and the confirmation includes all disclosures required under the Rule.

d) Making a false or misleading statement to induce any person to pay for goods or services.

2. Abusive Telemarketing Acts or Practices.

a) Threats, intimidation, profane, or obscene language.

b) Requesting or receiving payment for goods and services to fix credit reports UNLESS:

(1) The time frame in which the seller is supposed to have provided all goods and services has passed AND

(2) The seller provides the person with documentation of success in the form of a credit report having been issued more than 6 months after the results were achieved.

c) Requesting or receiving payment for goods and services represented to return money or other value from a previous telemarketing transaction until 7 business days after the money or other item is returned to the consumer.

d) A PATTERN OF PHONE CALLS that is:

(1) causing the phone to ring repeatedly and continuously with intent to annoy, abuse, or harass any person at the called number OR

(2) Initiating a call with a person who has previously stated that he or she does not wish to receive calls made by or on behalf of the seller whose goods or services are being offered.

e) Calls made earlier than 8:00 a.m. or later than 9:00 p.m. at the called person's location UNLESS the person consents to calls outside that time frame.

f) Failure to make the following oral disclosures:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods and services;

(3) The nature of the goods and services; AND

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered.

c. What Should A Leader Do?

1. If a soldier has experienced the problems outlined above, have him make a routine Legal Assistance Appointment.

2. The soldier should write out his exact recollection of the conversation with the telemarketer immediately. This will prevent him from forgetting critical details prior to the appointment.

3. Get the soldier to the LAO at the appointed time.

SELECTED STATUTORY PROTECTIONS

IV. TRUTH IN LENDING ACT (TILA).

a. How Does This Help Soldiers?

1. TILA requires "meaningful disclosure of credit terms" to allow for comparison shopping of credit terms. Additionally TILA is designed to protect consumers against inaccurate and unfair credit billing and credit card practices.

2. TILA is to be liberally construed in favor of consumers, with creditors who fail to comply with TILA in any respect becoming liable to the consumer regardless of the nature of the violation or creditors' intent.

b. How Does the Rule Work? The Rule requires certain disclosures regarding the terms of credit extension by businesses that extend credit when certain conditions are met.

c. Scope.

1. TILA **applies to**:

a) Each individual or business that offers or extends credit when 4 conditions are met:

(1) Credit offered or extended to consumers,

(2) Done "regularly" - extends credit more than 25 times (or more than 5 times for transactions secured by dwelling) per year,

(3) Subject to a finance charge or is payable by written agreement in more than 4 installments, and

(4) Primarily for personal, family, or household purposes.

b) If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge, is not payable by agreement in more than 4 installments, or if the credit card is used for business purposes.

c) Also, certain requirements apply to persons who are not creditors but who provide applications for home equity plans to consumers.

2. TILA is inapplicable to:

a) Creditors who extend credit primarily for business, commercial, agricultural, or organizational purposes or other purposes that are otherwise regulated, such as securities brokers.

b) Student Loan Programs.

c) Credit transactions, over $25,000.00, except those involving a security interest in real property, or in personal property used or expected to be used as the principal dwelling of the consumer.

b. Material Disclosures Required.

1. Required disclosures must be made clearly and conspicuously, in meaningful sequence, in writing, and in a form the consumer may keep.

2. FRB promulgates model disclosure forms, but where they would be misleading, lenders should provide tailored notice consistent with TILA.

3. States also regulate credit disclosure:

a) CHECK CASHING COMPANIES

(1) *Virginia v Allstate Express Check Cashing, Inc.*, No. HC-44-1; *Virginia v Foremost Group, Inc.*,No. HC-1234-1; *Virginia v Ameracheck Corp.*, No. HC-1232-1 (Cir. Ct., Richmond Sep. 1993) - Check-cashing companies violated Virginia Consumer Finance Act by making short-term advances to customers who write personal checks in return for substantially smaller amounts of on-the-spot cash in transactions amounting to short term loans with annual percentage rates sometimes higher than 2,000%. (Cases cited in BNA Antitrust & Trade Reg. Daily (Oct. 7, 1993).

(2) *Turner v. E-Z Check Cashing*, 35 F. Supp. 2d 1042 (M.D. Tenn. 1999) for a description of the mechanics of a check advancement loan; *White v. Check Holders, Inc*., 1999 Ky. LEXIS 68 (Ky. 1999)(holding check advancement transactions are loans for purposes of state usury laws); *Smith v. The Cash Store*, 1999 U.S. Dist. LEXIS 9040 (N.D. Ill. 1999)(applying TILA to check advancement loans).

b) TAX REFUND ANTICIPATION LOANS

(1) *North Carolina Ass'n of Electronic Tax Filers v Graham*, 429 S.E.2d 544 (N.C. 1993) (North Carolina's Refund Anticipation Loan Act (N.C. Gen. Stat. §§ 53-245-254) which imposes registration and disclosure requirements on and otherwise regulates tax refund anticipation loans does not violate U.S. Constitution and was not preempted by federal tax and banking laws. State law ensured residents were fully informed as to difference between refund anticipation loan and simple electronic filing of returns and as to potentially high cost of refund loan.

(2) Texas Attorney General settled deceptive trade practices lawsuit with H&R Block, Inc. forcing tax return company to advertise its "Rapid Refund" program is actually a loan program charging customers up to 150% in annual interest. Filed as UDAP suit. [Case reported in National Association of Attorneys General Consumer Protection Report (Sep. 1993)]

(3) Cades v. H. & R Block, Inc., 43 F.3d 869 (4th Cir. 1994), cert. Denied, 515 U.W. 1103 (1995); Zawikowski v. Beneficial National Bank, 1999 WL 35304 (N.D. Ill. 1999)(applying TILA to refund anticipation loan); Affatato v. Beneficial Corp., 1998 WL 472404 (E.D.N.Y. 1998)(discussing timing of refund anticipation loan disclosures); Basile v. H & R Black, Inc., 897 F. Supp. 194 (E.D. Pa. 1995).

(4) But see Cullen v. Bragg, 350 S.E.2d 798 (Ga. App. Ct. 1986)(holding TILA inapplicable to refund anticipation transactions because the consumer had no obligation to repay.

c.) PAWN TRANSACTIONS/AUTO PAWN

(1) Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261 (9th Cir. 1993)(decision discusses extensively factors considered, including, e.g., fact that 75% of customers "repurchased" the goods; parties' intent; title to property did not pass until end of repurchase option period, which could be extended for a fee, which court held analogous to charging interest; "sales" prices related to amount customer needed, rather than fair market value of goods).

(2) Pendleton v. American Title Brokers, Inc., 754 F. Supp. 860 (S.D. Ala. 1991)(where the ad read, "Pawn your title, keep your car;" the borrower signed a "pawn ticket/loan" contract, repayable with interest in weekly installments and executed a leaseback of the automobile, to run concurrently with the loan repayment, for a weekly rental amount equal to 10% of the loan; also included a provision granting the creditor the right of repossession in the event of default. This was a credit transaction, therefore TILA applied and since the proper disclosures were not made, TILA was violated). Good example of a disguised Credit Sale.

c. Closed-end Credit Transactions:

1. Definition: "other than open-end credit" - Credit is advanced for a specific time period and, the amount financed, finance charge, and schedule of payments are "agreed upon" by the creditor and the consumer. (See 12 C.F.R. § 226.2(a)(10)).

2. Closed End Disclosures:

   a) Identity of the creditor,

   b) Amount financed,

   c) Itemization of amount financed,

   d) Annual percentage rate, including applicable variable-rate disclosures,

   e) Finance charge,

   f) Total of payments,

   g) Payment schedule,

   h) Prepayment/late payment penalties, and,

   i) If applicable to the transaction:

      (1) Total sales cost,

      (2) Demand feature,

      (3) Security interest,

      (4) Insurance,

(5) Required deposit, and

(6) Reference to contract.

d. Violations of TILA.

1. Creditors are liable for violation of the disclosure requirements, regardless of whether the consumer was harmed by the nondisclosure, **UNLESS**:

a.) The creditor corrects the error within 60 days of discovery and prior to written suit or written notice from the consumer, or,

b.) The error is the result of bona fide error. The creditor bears the burden of proving by a preponderance of the evidence that:

(1) The violation was unintentional.

(2) The error occurred notwithstanding compliance with procedures reasonably adapted to avoid such error (error of legal judgment with respect to creditor's TILA obligations not a bona fide error).

2. Civil remedies for failure to comply with TILA requirements:

a.) Action in any U.S. district court or in any other competent court within one year from the date on which the violation occurred. This limitation does not apply when TILA violations are asserted as a defense, set-off, or counterclaim, except as otherwise provided by state law.

b.) Private remedies - applicable to violations of provisions regarding credit transactions, credit billing, and consumer leases.

(1) Actual damages in all cases.

(2) Attorneys' fees and court costs for successful enforcement and rescission actions.

(3) Statutory damages.

(a) Individual actions - double the correctly calculated finance charge. For closed end transactions secured by real property – not less than $200 or more than $ 2,000.

(b) Class actions - an amount allowed by the court with no required minimum recovery per class member to a maximum of $500,000 or 1% of the creditor's net worth, whichever is less.

(c) Can be imposed on creditors who fail to comply with specified TILA disclosure requirements, with the right of rescission, with the provisions concerning credit cards, or with the fair credit billing requirements.

3. Enforcement by administrative agencies.

a.) Who:

(1) Banks - Federal Reserve Board, the Federal Deposit Insurance Corporation, and other agencies.

(2) Others not subject to the authority of any specific enforcement agency - Federal Trade Commission.

(3) Nine separate agencies currently have enforcement responsibilities.

b.) What - Enforcement agencies can do:

(1) Issue cease and desist orders or hold hearings pursuant to which creditors are required to:

(a) Adjust debtors' accounts (15 U.S.C. § 1607(e)(4)(A), (B)) to ensure that the debtor is not required to pay a finance charge in excess of the finance charge actually disclosed or,

(b) the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(2) If the FTC determines in a cease and desist proceeding against a particular individual or firm that a given practice is "unfair or deceptive," it may proceed against any other individual or firm for knowingly engaging in the forbidden practice, even if that entity was not involved in the previous proceeding.

c) Criminal penalties - Willful and knowing violations of TILA permit imposition of a fine of $5,000, imprisonment for up to 1 year, or both.

d) Rescind the contract (see below).

e. Truth In Lending Act Rescission Rights. 3-Day Cooling Off Period (15 U.S.C. § 1635; 12 C.F.R. § 226.15).

1. General - **In addition to remedies described above**, consumers who enter into certain home equity loans may also have rescission rights as described below.

a) Under TILA, a consumer may rescind a consumer credit transaction involving a “non-purchase money” security interest in the consumer's **principal dwelling:**

(1) **Within 3 business days** (excludes Sunday and most Federal holidays) if all TILA disclosure requirements are met, or

(2) During an extended statutory period for TILA disclosure violations:

(a) Failure to give adequate **notice** of right to rescind, clearly and conspicuously in a form the consumer may keep.

(b) Failure to give adequate TILA credit term **disclosures**.

b) Rescission **voids the security interest** in the principal dwelling.

c) Consumer must have ownership interest in dwelling that is encumbered by creditor's security interest. Consumer need not be a signatory to the credit agreement.

d) TILA rescission rights do not apply to business credit transactions, even if secured by consumer's principal dwelling.

2. Scope of Rescission Rights (WHAT).

a.) Applies to loan involving a <u>non-purchase money security interest</u> in consumer's principal residence (i.e., home equity loans/lines of credit/home improvement loans, etc.).

b.) A consumer can have only <u>one</u> principal dwelling at a time. A vacation or other second home is not a principal dwelling. A transaction secured by a second home cannot be rescinded even if the consumer plans to reside there in the future.

3. Time to Exercise Right to Rescind (WHEN).

a.) Right to rescind until midnight of third business day following the later of:

(1) Consummation of transaction,

(a) In the case of closed-end credit, when the credit agreement is signed.

(b) In the case of open-end credit, the occurrence giving rise to the right to rescind:

(i) Opening the plan,

(ii) Each credit extension above previously established credit limit,

(iii) Increasing the credit limit,

(iv) Adding to an existing account a security interest in the consumer's principal dwelling, and

(v) Increasing the dollar amount of the security interest taken in the dwelling to secure the plan.

(2) Delivery of the required rescission right notice, or

(3) Delivery of all material disclosures.

b.) Extended right to rescind.

(1) Continuing right to rescind if required disclosures not made or made incorrectly, but...

(2) Statutory cut-off of extended right to rescind at 3 years after consummation.

(3) Will be cut off earlier by transfer of all of the consumer's interest in the property (including involuntary transfer such as foreclosure), or sale of the property.

(4) Violations Giving Rise to An Extended 3-Year Right to Rescind.

(a) Failure to give proper rescission notice.

(b) Creditors are required to deliver two copies of the right to rescind to each consumer entitled to rescind.

(c) Notice must disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling,

(ii) The consumer's right to rescind,

(iii) How to exercise the right to rescind, with a form for that purpose, setting forth the creditor's business address,

(iv) The effects of rescission, and

(v) The date the rescission period expires.

4. Waiver of the Right to Rescind.

a.) Consumers may modify or waive the right to rescind the credit transaction if extension of credit is needed to meet a bona fide personal financial emergency before end of rescission period. Waiver must be knowing and voluntary.

b.) Consumer must provide creditor with dated written statement describing emergency,

(1) Specifically modifying or waiving right, and

(2) Signed by all consumers entitled to rescind.

2. Delay of Performance.

a) Unless the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party,

(1) Disburse advances to the consumer or others,

(2) Begin performing services for the consumer, or

(3) Deliver materials to the consumer.

b) During the delay period, a creditor may:

(1) Prepare cash advance check (or loan check in the case of open-end credit),

(2) Perfect the security interest and/or

(3) Accrue finance charges,

(4) In the case of open-end credit, prepare to discount or assign the contract to a third party.

c) Delay beyond rescission period.

(1) Creditor must wait until he/she is reasonably satisfied consumer has not rescinded.

(2) May do this by:

(a) Waiting reasonable time after expiration of period to allow for mail delivery, or

(b) Obtaining written statement from all eligible consumers that right not exercised.

3. Mechanics of Rescission Process.

a) Consumer sends or delivers written notice to creditor.

b) When consumer rescinds, the security interest becomes void and consumer is not liable for any amount, including finance charges.

(1) Within 20 calendar days after receiving notice of rescission, creditor must:

(a) Return any property or money given to anyone in connection with the transaction,

(b) Take whatever steps necessary to reflect termination of the security interest.

(2) When creditor meets its obligations, consumer must tender the money or property to creditor, or if tender not practicable, it's reasonable value.

(3) If creditor fails to take possession of tendered money or property within 20 days, consumer may keep it without further obligation.

c) Court may modify procedures.

(1) Court has power to exercise equitable discretion and condition rescission of a loan upon the return of the loan proceeds.

(2) *See* Family Financial Services v. Spencer, 677 A.2d 479(Conn. App. 1996)(creditor's failure to honor the rescission nullified the security interest, barring foreclosure, and the consumer was not required to tender back the proceeds).

(3) *See* Reynolds v. D & N Bank, 792 F. Supp. 1035 (E.D. Mich. 1992). Consumer canceled home improvement contract 14 months after signed; 4 TILA violations; creditor failed to respond (did not return money or cancel security interest); consumer sued to enforce rescission, obtain damages, and **keep value of property purchased rather than tender it to creditor**. Court gave creditor 20 days to comply with its obligations, which creditor then failed to do. Court, in unreported opinion, then granted consumer's request. Creditor blew second chance! (See NCLC Reports, Vol. 11, March/April 1993).

V. FAIR CREDIT BILLING ACT (FCBA) & ELECTRONIC FUND TRANSFER ACT (EFTA)

a. How Do These Acts Help Soldiers?

b. They establish procedures for complaining about billing errors and require creditors to respond to such complaints,

1. Either by correcting the error or,

2. By explaining any rejection of the billing error complaint.

c. They limit the liability of consumers for unauthorized transactions.

d. How Do these Acts Work? These two acts are closely related and provide similar protections to different types of transactions. The following table compares the two acts and lays out their protections side-by-side. The key point in these areas is that, in many situations where soldiers might take credit cards or ATM cards from each other, you can help the victim as well as punish the perpetrator.

	Fair Credit Billing Act	Electronic Fund Transfer Act
Applicability	Open-end consumer credit transactions (i.e., credit cards, store charge accounts).	Fund Transfers directly from accounts using an electronic device (i.e., ATM machines, debit cards, etc.)

	Fair Credit Billing Act	Electronic Fund Transfer Act
Billing Errors	Bills for transactions that never occurred. Transactions by unauthorized people. Bills for erroneous amounts. Bills for goods/services that were not delivered or were not accepted. Failure to credit account properly. Computation errors. Bills sent to incorrect addresses, provided that the creditor received notice of the change of address at least 20 days before the end of the billing cycle for which the statement was sent out.	An unauthorized electronic fund transfer, An incorrect electronic fund transfer to or from consumer's account, Omission from a periodic statement of an electronic fund transfer to or from consumer's account that should have been included, Computational or bookkeeping error made by financial institution relating to an electronic transfer, Consumer's receipt of an incorrect amount of money from an electronic terminal, An electronic fund transfer not identified in accordance with regulations, or, A consumer's request for any documentation required to be given by the financial institution, or additional clarification concerning an electronic transfer. Does not include routine inquiry about the balance of account.
Billing Error Resolution	Notify IN WRITING w/I 60 days of transmittal of periodic statement. Consumer may withhold payment. Paying may waive some claims & defenses. Card Issuer must do reasonable investigation and resolve complaint within 2 billing cycles (no more than 90 days.)	Notify ORALLY or in writing w/I 60 days. Access Device Issuer must resolve complaint within 10 (20) days or 45 (90) days if they provisionally recredit.
Unauthorized Use	No actual, implied, or apparent authority	No **actual** authority

	Fair Credit Billing Act	Electronic Fund Transfer Act
Liability for Unauthorized Use	$50 maximum	Three-Tiered Liability Notice w/i 2 Business Days: $50 2 Bus. Days<Notice<60 days from transmittal of statement: $500 Notice>60 days - Unlimited
Other Provisions	Claims & Defenses IF: K entered W/I 100 miles or same state as billing address K >$50	

e. What Should A Leader Do?

1. Ensure that soldiers are aware that they have certain rights and protections under law in dealing with their credit card companies.

2. Invite a Legal Assistance Attorney (LAA) to speak at a professional development class about this subject.

3. If a soldier has a problem with billing errors or unauthorized charges, the soldier should be allowed to seek legal assistance immediately.

4. **Time is of the essence!** The sooner the soldier properly notifies the credit card issuer, the greater the protection he has against such things as unauthorized transfers. Additionally, the proper assertion of claims and defenses can keep the soldier from having to pay the disputed bill.

VI. FAIR DEBT COLLECTION PRACTICES ACT

a. The Act circumscribes the conduct of debt collection agencies to protect consumers from abusive practices.

b. Military regulations prescribe the proper involvement of commander's in the process of debt collection.

c. OVERVIEW OF THE DEBT COLLECTION PROCESS.

1. Creditors (those to whom the debt is owed) start collection efforts with series of form letters, graduate to phone calls or personal visits, then to repossession or referral to collection agency or lawyer for suit.

a) Initial contacts usually friendly "reminder" letters.

b) Followed by letters requesting consumer phone to discuss problem and suggesting nonpayment is serious.

(1) Phone calls may serve legitimate purpose of determining why payments are late and resolving misunderstandings and disputes.

(2) Calls may be used illegally to harass consumer in attempts to collect debt from distressed consumer.

c) When payments 30 to 60 days late, creditor generally threatens to repossess collateral or foreclose on a mortgage.

2. At any stage of process, creditor may write off debt, either because debt obviously not collectible or because creditor has internal rule that obligations unpaid for certain period of time will be charged off for tax purposes.

3. Creditor may turn account over to lawyer or debt collector (one in the business of collecting debts for others).

a) Lawyer may simply send or furnish creditor with dunning letter or series of letters for flat fee or pursuant to retainer. Lawyer may also be retained to initiate legal action, usually contingency fee, retaining portion of amount collected (i.e., 30-50%).

b) Collection Agency may be retained for flat fee or retainer, many times a 50% contingency.

(1) Seldom do collection agencies bother to get all documents related to debt from creditor -rather; they get name, address of consumer, and amount of debt.

(2) Must comply with federal Fair Debt Collection Practices Act.

d. How Does the Act Work? The Act applies almost exclusively to debt collectors. The key to the Act is understanding who it defines as “debt collectors” and how the conduct of these people is limited.

1. Key Definitions.

a) A "debt collector" is a person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects debts owed to others.

(1) Includes a party based in U.S. who collects debts owed by consumers residing outside U.S. Residence of consumer is irrelevant.

(2) Attorneys may meet the definition of "debt collector."

(3) Not included in the definition are, among others (there are 6 categories of excepted persons):

(4) Officers or employees of a creditor collecting debts for that creditor.

(5) Any officer or employee of the U.S. or any state to the extent that collecting or attempting to collect is in performance of his/her duty. Thus, a collection by AAFES is NOT covered either because they are the creditor or they are an employee of the U.S.

b) **A "creditor" is a person or organization to whom or to which a debt is owed.** Generally, creditors are not included within the definition of "debt collector" when collecting its own debts using its own name.

(States may have statutes which limit conduct of creditors as well as debt collectors)

c) A **"debt"** is any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily used for personal, family, or household purposes, whether or not the obligation has been reduced to judgment (i.e., overdue obligations on bills, dishonored checks used to pay for goods or services intended for personal, family, or household purposes, student loans).

2. Requirements imposed by the FDCPA:

a) Requires validation of debts (a debt collector must notify the debtor of the nature of the debt, the identity of the creditor, and must cease collection efforts until verification of the debt is completed if the consumer chooses to verify the debt).

b) Requires that a debt collector's letter disclose that any information provided by recipient will be used to collect debts.

c) Provides a means by which a consumer can stop the attempts of a debt collector to communicate with the consumer.

3. Protections Under the Act.

a) Restricts contacts by debt collectors with third parties.

b) Debt collectors may contact third parties seeking debt collection assistance only if:

(1) The debtor has given prior consent directly to the debt collector, or

(2) The debt collector has obtained a court order permitting such contact, or

(3) Contact is reasonably necessary to effectuate a post-judgment judicial remedy.

c) Debt collectors may contact third parties to acquire information about consumer's location, but must

(1) Identify self, state he/she is trying to confirm or correct location information about consumer, and only if expressly asked, identify his/her employer,

(2) Refrain from referring to the debt,

(3) Usually make only a single contact with each third party,

(4) Not communicate by postcard,

(5) Not indicate the collection nature of his/her business purpose in any written communication, and

(6) Limit communications to the consumer's attorney, where collector knows of the attorney, unless the attorney fails to respond.

d) They may contact a consumer reporting agency if otherwise permitted by law.

4. Without prior consent of the consumer given directly to the debt collector or a court order, a debt collector may not communicate with a consumer (this includes consumer's spouse, parent if consumer is a minor, guardian, executor, or administrator):

a) At unusual or inconvenient times or places (8:00 A.M. - 9:00 P.M. at consumer's location is presumed convenient).

b) If the debt collector knows the consumer is represented by an attorney and knows or can readily ascertain the attorney's name and address.

c) At the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

d) After the consumer notifies the debt collector in writing that the consumer refuses to pay the debt or that the consumer wishes the debt collector to cease further communication with the consumer, except that the debt collector may notify the consumer that the debt collector intends to invoke a specific remedy.

5. A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with a debt.

6. A debt collector may not use any false, deceptive, or misleading representations in connection with the collection of any debt.

7. A debt collector may not use unfair or unconscionable means to collect any debt.

VII. PROCESSING REQUESTS FOR DEBT COLLECTION ASSISTANCE BY THE MILITARY.

a. References.

1. 32 C.F.R. Part 113, Indebtedness of Military Personnel (1999).

2. DOD Directive 1344.9.

3. AR 600-15, Indebtedness of Military Personnel (14 March 1986). Soon to be amended to include regulations implementing Garnishment of military wages.

b. A Process for Analysis. Consult you servicing judge advocate for assistance with the execution of this process.

1. STEP 1: Should this person even be calling me?

a) Requests from Debt Collectors. Remember that debt collectors are limited in contacting third parties. (See Above.) As a general rule, we do not assist debt collectors, only creditors.

b) Requests from Creditors.

(1) A "creditor" is a person or organization to whom or to which a debt is owed.

(2) Creditors <u>are</u> entitled to contact third parties for assistance <u>unless</u> state law precludes such contact. DOD installations in those states will follow state law because it does not infringe upon significant military interests.

c) Credit Unions and Banks:

(1) Those serving DOD must conform to Standards of Fairness. (*See* AR 600-15, App. B)

(2) Commanders will answer all check complaints.

(3) No mention that they are exempt from state law prohibiting third party contact.

2. STEP 2: Consult with Your Servicing Judge Advocate and Review DOD/Army Policy and Regulations.

a) Department of Defense Directive 1344.9.

(1) DOD Definitions.

(a) **Just Financial Obligations.** A legal debt acknowledged by the military member in which **there is no reasonable dispute as to the facts or the law**; or one reduced to judgment which conforms to the SSCRA, if applicable.

(b) **A Proper and Timely Manner.** A manner which under the circumstances does not reflect discredit on the military service.

(c) **Debt Collector.** Same as FDCPA.

(2) General Policies.

(a) Members are expected to pay just financial obligations in proper and timely manner.

(b) Services have no legal authority, except in the case of court ordered alimony or child support, to require members to pay a private debt or to divert any part of their pay for its satisfaction.

(c) Enforcement of private obligations of a military member is a matter for civil authorities.

(3) Processing debt complaints will not be extended to those:

(a) Who have not made a bona fide effort to collect the debt directly from the military member;

(b) Whose claims are patently false and misleading;

(c) Whose claims are obviously exorbitant.

b) Army policy reflects that of DOD and adds some other specifics.

(1) We will assist creditors only. We will NOT assist debt collectors.

(2) To receive assistance, creditors must provide commanders with the following information (AR 600-15, para. 4-3).

(a) Certificate of Compliance with ONE of the following:

(i) DOD Standards of Fairness

(ii) The Truth in Lending Act (TILA)

(iii) State Regulations

(iv) Creditors not subject to the TILA (such as public utility companies) may submit a certificate that certifies that they charged no interest, finance charge, or other fee that violates the laws of the state where the service they provided was requested.

(b) A true copy of the signed contract.

(c) The general and specific disclosures given to the soldier.

(d) A copy of a judgment or written permission from the soldier allowing employer contact **if state law requires it**. (Contact your servicing SJA office for advice on this.)

(e) Proof of efforts by the creditor to collect directly from the soldier.

(3) Foreign owned companies must submit with their requests for assistance:

(a) Copy of terms of the debt (English translation), and

(b) Certification it has subscribed to DOD Standards of Fairness.

3. STEP 3: Provide/Deny Assistance IAW Policy

a) Advise creditors who have not met requirements what the requirements are and that the commander will provide no assistance until those requirements are met. (Form letters to do this are included in AR 600-15).

b) For creditors who HAVE met requirements, Commanders shall:

(1) Review facts surrounding transaction forming basis of complaint, to include:

(a) Member's legal rights and obligations,

(b) Member's defenses or counterclaims.

(2) **Advise member** that:

(a) Just financial obligations are expected to be paid in proper and timely manner, and

(b) Financial and legal counseling services are available.

(3) Notify claimant that soldier told of complaint, summarizing soldier's intentions if soldier gave permission to release that information.

(4) Assistance should be provided within 45 days (for the contiguous 48 states) or 60 days (all other locations). AR 600-15, para. 4-3e.

c) Commanders will not:

(1) Arbitrate disputed debts, or

(2) Admit or deny the validity of the claim.

(3) Try to judge or settle disputed claims or admit or deny validity. If soldier denies debt, notify creditor that disputed debts must be handled by civil authorities.

(4) Commanders' responses will not indicate whether any action has been taken against a member as a result of the complaint.

d) Commanders May Deny Assistance to Creditors.

(1) When the claimant, having been notified of the DOD requirements, refuses or repeatedly fails to comply;

(2) When the claimant, regardless of the merits of the claim, clearly shows an attempt to unreasonably use the processing privilege.

4. STEP 4: Take Disciplinary Action Where Appropriate.

a) Commanders may take administrative or disciplinary action against members who fail to meet their just financial obligations in a proper and timely manner.

b) Commanders should see the guidance in AR 600-15, Chapter 3 and consult with their servicing judge advocate before proceeding with disciplinary action.

c) Commanders may consider:

(1) Placing Adverse Information into the Soldier's Records (AR 600-37),

(2) Denying reenlistment (AR 601-280),

(3) Administrative separation (AR 635-100 (officer) or 635-200 (enlisted)),

(4) Punitive action under UCMJ, articles 92,123,133, or 134.

c. Bankruptcy. Care must be taken not to infringe on the rights of soldiers under bankruptcy law.

d. What should a leader do?

1) Ensure that soldiers are aware that they have certain rights and protections under law in dealing with debt collectors. However, they must also understand that the military expects them to honor their just financial obligations.

2) Invite a Legal Assistance Attorney (LAA) to speak at a professional development class about this subject.

3) If a soldier has a problem with a debt collector, they should be allowed to seek legal assistance as soon as possible.

4) If you are contacted by a person seeking assistance with a debt, do NOT begin giving information immediately. Ask them for a request in writing that conforms to appropriate regulations. Then follow the analysis above in coordination with your servicing judge advocate.

VIII. FAIR CREDIT REPORTING ACT (FCRA)

a. How Does the Act Help Soldiers?

1. A good credit rating is essential to purchasing many necessities such as homes and cars. The Act helps to ensure that the information that affects this rating is accurate and relevant.

2. The Act protects consumers from improper release of credit information by defining the circumstances under which credit information may be released.

3. The Act also establishes procedures for resolving errors in credit reports.

b. Introductory note: The Omnibus Appropriations Act referenced above contained, among other consumer protection legislation, the Consumer Credit Reporting Act of 1996 which made changes to the Fair Credit Reporting Act. In general, the changes took effect on **September 30, 1997**.

c. How Does the act work?

1. The Fair Credit Reporting Act applies to **Credit Reporting Agencies (CRAs) and Users of Credit Reports (Users)**. It **does not** apply to those furnishing information from their own dealings with the consumer; i.e., creditors.

2. Credit Reporting Agencies (CRAs) are those "who for monetary fees, dues, or on a cooperative nonprofit basis, <u>regularly engage in</u> ... the practice of assembling or evaluating consumer credit information on consumers **for the purpose of furnishing consumer reports to third parties,** and [who use] any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." (e.g., TRW, Trans Union Credit Corporation).

3. **NOTE:** Creditors that report information about their own experiences with consumers are not credit reporting agencies, nor are they issuing a "consumer report." **BUT**, if the creditor reports any information other than that obtained in its own dealings with consumer, then it may meet the definition of "consumer reporting agency."

4. Users are those receiving the "consumer report" information and applying it to a consumer.

5. Consumer Credit Reports are any written, oral or other communications of information collected by a CRA bearing on the consumer's credit worthiness, credit standing, or, general reputation, personal characteristics, or mode of living, which is used or expected to be used in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or other purposes authorized by the Act.

6. Permissible Purposes For Releasing Reports.

   a) CRAs may furnish consumer reports only:

      (1) In response to a **court order or subpoena** issued in connection with proceedings before **federal grand jury**, or

      (2) With the **consent of the consumer** to whom the report relates, or

      (3) To a person who the CRA "has reason to believe":

         (a) Intends to use the report in connection with a credit transaction involving the consumer,

         (b) Intends to use the report for employment purposes, or

         (c) Intends to use the report in connection with the consumer's insurance, or

         (d) Intends to use the report in connection with the consumer's eligibility for a license or other benefit conferred by the government, or

(4) Otherwise has a legitimate business need for the information--

(i) The legitimate business need must be in connection with a business transaction that is initiated by the consumer; or

(ii) To review an account to determine whether the consumer continues to meet the terms of the account.

7. REPORTS CONTAINING MEDICAL INFORMATION: A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction or a direct marketing transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report.

8. ADVERSE ACTION: If the user takes adverse action in a credit, insurance, or employment situation, based on a credit report, then the user must:

a) Provide oral, written, or electronic notice of the adverse action to the consumer; AND

b) Provide--

(1) The name, address, and telephone number of the CRA that furnished the report to the person; AND

(2) A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; AND

(3) Notice of the consumer's right--

(a) To obtain a FREE copy of a consumer report from the CRA, including notice that the request must be made with 60 days; AND

(b) To dispute the accuracy or completeness of any information in the consumer report.

c) Special Rule for Adverse Action in EMPLOYMENT Situations. **Before taking any adverse action** based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(1) A copy of the report; AND

(2) A description in writing of the rights of the consumer under the FCRA.

9. Obsolete Information.

a) Unless otherwise specified, the following information is considered "obsolete" and cannot be included in a CRA's consumer report (Note: this is adverse information; favorable information that is old may be included in the report):

(1) Bankruptcy adjudications more than 10 years old.

(2) Other categories for 7 years. Included are:

(3) Paid tax liens,

(4) Accounts placed for collection or charged to profit and loss,

(5) Records of criminal **arrest**, indictment, or conviction which, from the date of disposition, release, or parole, antedate the consumer report by more than 7 years,

(6) Suits and judgments which, from date of entry, antedate the consumer report by more than 7 years or until the governing statute of limitations has expired, whichever is the longer period,

(7) Any other adverse item of information which antedates the consumer report by more than 7 years.

10. Inclusion of "adverse" obsolete information. "Obsolete" information **CAN** be included in the consumer report IF the report is intended for use involving (15 U.S.C. § 1681c):

a) The consumer's participation in a credit transaction of $150,000 or more. (e.g. home mortgage!)

b) Issuance of life insurance coverage on the consumer of $150,000 or more.

c) Employment of the consumer at an annual salary of $75,000 or more.

11. CONSUMER'S RIGHTS.

a) **Upon request**, the consumer can obtain (15 U.S.C. § 1681g):

(1) All information in the CRA's files with the exception of risk score formulas.

(2) The identities of those who have received the report:

(3) Within the past 2 years for employment purposes.

(4) Within the past 6 months for other purposes.

(5) A fee may be charged for producing the report. (Except when adverse action has been taken by a user. Then, the report must be provided free of charge.)

(a) The reasonable fee cannot exceed $8. (Which amount will be adjusted by the FTC each January 1 for inflation based upon the CPI).

(b) The fee shall be disclosed to the consumer prior to issuing the information.

b) If the consumer disputes the completeness or accuracy of the report, the CRA must investigate (within a reasonable time) and record the current status of the disputed information **unless the CRA has reason to believe that the dispute is frivolous or irrelevant**. 15 U.S.C. § 1681i.

(1) If the investigation does not resolve the dispute,

(2) The consumer may file a statement of not more than 100 words, and

(3) In future reports, the CRA must note that the entry is disputed by the consumer and provide the consumer's statement.

(4) If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, the CRA must delete the information.

c) Following either correction of the report or receipt of a consumer's statement in rebuttal, the CRA must furnish a copy of the annotated report (and consumer's statement, where appropriate) to "any person specifically designated by the consumer" who has received the report:

(1) Within the past 2 years for employment purposes.

(2) Within the past 6 months for other purposes.

d. What should A leader do?

1. Ensure that soldiers are aware that they have certain rights and protections under law regarding their credit rating.

2. Invite a Legal Assistance Attorney (LAA) to speak at a professional development class about this subject.

3. If a soldier has a problem with their credit report, the soldier should be allowed to seek legal assistance as soon as possible. Resolving errors in these reports is difficult and requires substantial time and effort. The sooner the attorney can begin assisting the soldier in the matter, the less impact the error will have on the soldier's life.

CHAPTER 32
SURVIVOR BENEFITS

Table of Contents

I. REFERENCES.....2

II. THE RELEVANCE OF SURVIVOR BENEFITS. 3

III. DEPENDENCY AND INDEMNITY COMPENSATION (DIC). 5

IV. SURVIVOR BENEFIT PLAN (SBP).....10

V. GOVERNMENT INSURANCE PROGRAMS.....22

VI. DEPENDENTS EDUCATIONAL ASSISTANCE (DEA).....30

VII. SOCIAL SECURITY BENEFITS.....32

VIII.OTHER PAYMENTS AND BENEFITS TO SURVIVORS OF DECEASED MEMBERS.....34

IX. TERMINAL CONDITION: IS MEDICAL RETIREMENT APPROPRIATE? 40

X. CONCLUSION. 42

APPENDICES

APPENDIX A – SBP FOR RESERVISTS.....43
APPENDIX B - BENEFICIARY CHECKLIST.....47
APPENDIX C - VGLI RATES 49
APPENDIX D - RECOMMENDED SGLI LANGUAGE 51
APPENDIX E - EXAMPLE OF ACTIVE DUTY DEATH VS. RETIREE DEATH.....53
APPENDIX F - RETIREMENT IN IMMINENT DEATH CASE 55
APPENDIX G – ACCELERATED DEATH BENEFIT – SGLI 61
APPENDIX H – MILITARY FUNERAL HONORS 63
APPENDIX I – DOD AND ARMY GUIDANCE TO P.L. 107-107.....71
APPENDIX J - SURVIVOR BENEFITS HYPOTHETICALS & EXAMPLES……..83

SURVIVOR BENEFITS

OUTLINE OF INSTRUCTION

I. REFERENCES.

A. Army Reg. 37-104-1, Payment of Retired Pay to Members and Former Members of the Army (15 Sep 1990).

B. Army Reg. 600-8-1, Army Casualty Operations/Assistance/Insurance (24 Oct 1994) (Supersedes old AR 608-2 (SGLI) and DA Pam 608-33 (Casualty Assistance Handbook).

C. Army Reg. 930-4, Army Emergency Relief (30 Sep 1994).

D. DA Pamphlet 360-526, The Transition to Civilian Life (Rev. 1992).

E. SBP Made Easy (published by The Retired Officers Association, 201 North Washington St., Alexandria, VA 22314-2529).

F. DA Pamphlet 608-4, A Guide for the Survivors of Deceased Army Members (23 Feb 1989).

G. Veterans Benefits Manual (Vols. I and II, 1991), The National Legal Services Project, 2001 S Street NW, Suite 610, Attn: Publication Sales, Washington, DC 20009.

H. Reserve Retirement Benefits (1992), The Retired Officers Association.

I. AFBA Financial Planning Guide, Armed Forces Benefit Association, 909 N. Washington Street, Alexandria, VA 22314-1556.

J. Army and Air Force Mutual Aid Association, Fort Myer, Arlington, VA 22211-5002.

K. Army Reserve Personnel Center, 9700 Page Blvd., St. Louis, MO 63132-5200.

II. THE RELEVANCE OF SURVIVOR BENEFITS.

A. What Are Survivor Benefits?

B. Situations Requiring an Understanding of Survivor Benefits.

1. Lifetime planning.

a. Insurance needs.

b. The Survivor Benefit Plan.

2. Deathbed planning.

3. Casualty assistance.

C. References.

1. Publications.

2. The Army and Air Force Mutual Aid Association is available to assist by producing a benefits comparison tailored to the soldier's circumstances.

3. Websites (DFAS, VA, Private Organizations, etc.).

SURVIVOR BENEFITS

Monthly Payments	Lump Sum Payments	Other Benefits
DIC	SGLI	BURIAL REIMBURSEMENTS
SBP	DEATH GRATUITY	RELOCATION
SOCIAL SECURITY	SOC. SEC.	MEDICAL CARE
DEA	UNPAID PAY/ALLOWANCES	PX/COMMISSARY
		EMERGENCY $

III. **DEPENDENCY AND INDEMNITY COMPENSATION (DIC)** 38 U.S.C. §§ 1301-1322; 38 C.F.R. PART 3; INCLUDES COLAS THROUGH 1 DEC 02**.**

A. Conditions for Payment.

1. Active Component.

a. Death on active duty, by service-connected injury or disease, and not due to member's willful misconduct. If death occurs on active duty, a presumption arises that death was service-connected.

b. Death after active duty from service-connected causes, not due to member's willful misconduct.

c. Death after active duty not due to service-connected causes and not due to member's willful misconduct if decedent held a total service-connected disability rating.

2. Reserve Component.

a. "Active Duty" includes AD, ADT, and IDT. However, if death occurs in connection with IDT, only IDT deaths due to injury (not illness) are covered; and

b. Periods of travel to and from AD, ADT, and qualifying IDT are included, but only if travel accomplished by most direct means.

3. "Service connection." See paragraph A.1. above.

4. Death or injury cannot be due to member's "willful misconduct."

a. Willful misconduct involves deliberate or intentional wrongdoing with knowledge of or wanton disregard of consequences.

b. Requires proximate cause to injury, disease, or death to prohibit payments.

5. The Department of Veterans Affairs makes the ultimate determinations on service-connection and "willful misconduct" for purposes of DIC. Appeal is to the Court of Veterans Appeals.

B. Beneficiaries.

1. DIC to widow(er).

a. Spouses must have continuously cohabited since date of marriage.

b. Any separation not due to fault of surviving spouse; temporary separations disregarded (38 C.F.R. §§ 3.52 and 3.53).

c. Fraudulent marriages. Generally, for soldiers that separate from active duty, subsequently marry, and then die under circumstances described in paragraphs A.1.b. and A.1.c. above, the marriage must:

(1) have begun within 15 years after separation from active duty;

(2) have existed for at least one year; or

(3) produced a child (38 C.F.R. § 3.54(c)).

d. Before 01 October 1998, DIC was paid for life unless remarriage occurred.

(1) A widow(er) lost entitlement to DIC upon remarriage regardless of age.

(2) DIC would not be reinstated if second marriage were terminated through divorce or through death of second spouse.

e. As of 01 October 1998, the eligibility of certain remarried surviving spouses can be reinstated for DIC upon termination of that marriage. 38 U.S.C. § 1311.

(1) The remarriage of the surviving spouse shall not bar DIC if the remarriage is terminated by death, divorce, or annulment unless it is determined the divorce or annulment was secured through fraud or collusion.

(2) If the surviving spouse ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person DIC as the surviving spouse shall not apply.

(3) The first month of eligibility for DIC will be the later of the month after the month the termination of such remarriage or the month of the cessation living with another person and holding himself or herself out openly to the public as that person's spouse.

(4) No payment may be made for any month before October 1998.

f. For deaths occurring before 1 January 1993, monthly spousal payment depends on the rank of deceased at death (Note the below numbers are adjusted for inflation annually):

2003 Amounts
(Current rates can be found at: www.vba.va.gov)

E9 - $1,165*	W4 - $1,134	010- $2,168**
E9 - 1,080	W3 - 1,072	010- 2,021
E8 - 1,035	W2 - 1,042	09 - 1,843
E7 - 980	W1 - 1,001	08 - 1,722
E6 - 948		07 - 1,570
E5 - "		06 - 1,453
E4 - "		05 - 1,289
E3 - "		04 - 1,171
E2 - "		03 - 1,107
E1 - "		02 - 1,035
		01 - 1,001

* Veteran who served as Sergeant Major of the Army or Marine Corps, Senior Enlisted Advisor of the Navy, Chief Master Sergeant of the Air Force, or Master Chief Petty Office of the Coast Guard.

** Veteran who served as Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army or Air Force, Chief of Naval Operations, or Commandant of the Marine Corps.

g. For deaths occurring on or after 1 January 1993, the Veterans' Benefits Act of 1992 mandates a flat monthly payment, for 2002 the amount is $948.

2. DIC to children.

a. Children are broadly defined: Legitimate, adopted, stepchildren in household, or illegitimate if acknowledged or judicially decreed (38 C.F.R. § 3.57).

b. Must be unmarried and under age 18, or under age 23 if in school.

c. Amounts payable (children in the custody of a surviving eligible spouse).

(1) Under age 18 - $237 per child (Veterans' Benefits Act of 1992).

(2) Age 18 to under age 23 (in school) - $201 per child unless child is receiving Chapter 35 benefits (Dependent's Educational Benefits).

(3) Disabled child - $402 per child.

(4) These are the amounts payable to all children when there is a surviving spouse entitled to DIC. Payment to “all” children of the deceased veteran will be at these amounts. This includes children in the custody of former spouses or children born out of wedlock. (BVA 00-09216)

d. Amounts payable (if no surviving eligible spouse). DIC is calculated on the basis of the total number of eligible children.

(1) One child - $402.00.

(2) Two children - $578.00.

(3) Three children - $752.00.

(4) Each additional child adds $145.00.

(5) For each disabled child over the age of 18 add $237.

3. DIC to parents (38 U.S.C. § 1315).

a. Must have been dependent on deceased.

b. Parent(s) must be below income ceiling.

c. Amounts paid based on number of parents surviving.

C. Tax Consequences.

1. Not includable in decedent's gross estate.

2. Not taxable income to the recipient.

D. Application.

1. Apply to VA within 12 months to receive full payment from date of death (VA Form 21-534, Application for DIC).

2. If application is received by VA more than 12 months after death, payments are retroactive to date of application only (38 C.F.R. § 3.400).

IV. SURVIVOR BENEFIT PLAN (SBP) (10 U.S.C. §§ 1447-1460B).

A. Eligibility to Participate.

a. Active duty members who die in the line of duty while on active duty. (NDAA for FY 2002).

b. Active duty retired.

c. Retired with 30% or more disability.

d. Reservists eligible to retire (includes Army National Guard). (See Pub. L. No. 95-397, 1 Oct. 1978, extended coverage (RC-SBP) to Reserve soldiers completing 20 years, but not yet 60 years of age).

B. Eligible Beneficiaries for SBP and RC-SBP. 10 U.S.C. § 1448

1. Widow(er). .

a. Defined. A spouse who survives a military retiree where the marriage either:

(1) was in effect when soldier became eligible to receive retirement pay,

(2) was in effect for at least one year immediately before retiree's death, or

(3) produced issue.

b. Remarriage before age 55 terminates the SBP annuity. Annuity may be reinstated if widow(er)'s second spouse dies or there is a divorce.

2. Former spouses.

3. Widow(er) and children. Full payment made to widow(er) as long as eligible; then full payment made to remaining eligible children as a group. Child eligibility:

a. Child under age 18 and unmarried.

b. Unmarried and under 22 if a full-time student.

c. Incapacitated before 18 or 22 - paid for life.

4. Children only. Usually elected when there is no eligible spouse.

5. Natural person with an insurable interest.

a. Any person with a financial interest in survival of the soldier.

b. This option may not be elected by eligible participants who are married or have children.

C. Annuity Amount.

1. If soldier elects to participate in SBP, soldier then selects a "base" amount. The base amount can be anything from $300 to the full amount of soldier's retired pay. The soldier also selects a beneficiary (discussed later), which in most cases will be the spouse. The soldier then has a premium deducted from each retirement check, and if the soldier dies before the spouse (or other eligible beneficiary), the beneficiary will begin receiving the monthly SBP payments.

2. If deceased became retirement eligible after 1 October 1985, the widow(er) receives an annuity calculated under a two-tiered system.

a. Payments 55% of base.

b. Payments reduced to 35% when widow(er) reaches 62, unless supplemental coverage also is chosen.

c. <u>Example</u>: Base Amount = $2,000.

55% x $2,000 = $1,100 before age 62.

35% x $2,000 = $ 700 age 62 & older.

3. If deceased was eligible to retire before 2 October 1985, SBP payments to a widow(er) will also be reduced. Widow(er) may elect to have the reduction calculated under either the new two-tier system or under the old "social security offset."

4. Supplemental SBP (SSBP).

a. A retiree may elect to pay an additional premium to raise annuity payments above 35% of the base amount when widow(er) reaches age 62. Under SSBP, payments may be made at 40%, 45%, 50%, or 55% of base amount.

b. The additional cost is determined in accordance with actuarial principles.

5. Payment to all other beneficiaries (nonspouses) is at 55% of base for as long as they maintain eligibility.

D. Active Component Cost for SBP Coverage.

1. Determine desired base.

a. Minimum = $300.00.

b. Maximum = full retired pay.

c. Any amount in between.

2. Determine type of coverage.

a. Widow(er)-only coverage.

(1) Formulas:

(a) 2.5% of first $572, plus 10% of selected base over $572 (OLD Formula); or

(b) Flat 6.5% rate of full base amount (NEW Formula).

(2) Example: Base Amount = $2,000.00.

(a) Old Formula:

2 1/2% of $572 = $ 14.30
10% of $1,428 = $ 142.80
monthly cost = $ 157.10

(b) New Formula:

$2,000 x 6.5% = $130.00

(3) The formula producing the least amount of cost will be used. In the example, the new formula produces the least cost. As a rule of thumb, if the base amount exceeds $1,225 then the new formula is used; if the base amount is less than $1,226, the old formula is used.

(4) For those entering the service on or after March 1, 1990, only the new formula (flat 6.5% of base) will be used.

b. Widow(er) plus children coverage.

(1) Cost of widow-only coverage, plus

(2) Actuarial amount that accounts for the difference in age between the retiree and the spouse and the age of youngest child.

c. Children-only coverage. Cost is based upon actuarial tables comparing the ages of the retiree and the youngest child. If married at time of election, spouse must approve in writing.

d. Former spouse coverage. Cost and annuities for former spouse elections made before 1 Mar 1986, are computed by the same formula used to compute costs and annuities for insurable interest coverage. For former spouse elections effected on or after 1 Mar 1986, costs and annuities are computed by the same formula used to compute costs and annuities for spouse coverage (10 U.S.C. § 1450(a)).

e. Natural person with insurable interest (10 U.S.C. § 1448(b)(1)).

(1) By statute, this can only be elected if retiree has no spouse or dependent children (*Cf.* Comp. Gen. B-179465, 1974 WL 7682, which allowed this coverage for a child).

(2) Cost is 10% of base amount plus 5% of base amount for each five years beneficiary is younger than retiree (to a maximum of 40% of base amount).

3. Withholding stops if the beneficiary dies or otherwise loses eligibility. Must notify finance office.

E. Election.

1. Soldiers who are on active duty and have completed 20 years of active federal service are automatically enrolled in SBP without any affirmative election. Enrollment is at the full base amount of retired pay calculated as if the soldier had been retired on the day of death. Both widow(er) and children are covered (10 U.S.C. § 1448(d)). Retirees, however, must make an election to participate in SBP.

2. Active Component: Retired soldiers must elect type and amount of coverage within 30 days of retirement.

3. Reserve Component: Retirement eligible reservists have 90 days to elect, with the period running from receipt of their letter of notification of eligibility for retired pay at age 60 ("20-year letter").

4. An election of no coverage, less than full coverage for a widow(er), or children-only coverage requires written spousal concurrence.

5. If a soldier is married at the time of retirement, the election made is generally irrevocable. However:

   a. Can withdraw from the SBP between second and third anniversary from date of enrollment with concurrence of spouse and/or notification to former spouse. 10 U.S.C. § 1448a.

   b. An eligible participant need not continue premium payments if beneficiaries are no longer eligible.

   c. An eligible participant who has spousal coverage and loses spouse to death or divorce may withdraw after remarrying. Finance must be notified of intent to withdraw, however, before second marriage produces issue or reaches its first anniversary.

   d. An eligible participant who becomes permanently and totally disabled may withdraw.

6. An unmarried soldier who retires and later marries and/or acquires dependent children may opt into the plan at that time.

F. Reserve Component Cost for SBP (see Appendix A).

G. Spousal SBP Reduction Due to DIC Offset.

1. Any SBP or RC-SBP annuity to which surviving spouse is entitled will be reduced by amount of spousal DIC entitlement. The offset is mitigated, however, by a pro rata, lump sum return of SBP premiums paid (10 U.S.C. § 1450(e)).

2. Any SBP or RC-SBP annuity payable to other beneficiaries is not reduced, even if that beneficiary is also eligible for DIC.

H. SBP Tax Consequences (Federal).

1. Amounts withheld (premium payments) are not reportable as income for tax purposes (I.R.C. § 122).

2. Payments to beneficiaries are taxable as ordinary income.

3. The present value of the SBP annuity could be subject to federal estate tax in the retiree's estate.

I. Paid up coverage under SBP. (P.L. 106-65, October 5, 1999).

1. 30 years of SBP premiums paid.

2. Over 70 years of age.

3. Effective date: 01 October 2008.

J. SBP Tax Consequences (state).

K. Advantages of SBP (in comparison with commercial life insurance). There are basically three commercial insurance alternatives to SBP: annuities, term life insurance, and universal/whole life insurance. For various reasons, commercial insurers do not pitch annuities as replacements for SBP. Rather, they recommend term, whole life, or some combination of the two. Upon the retiree's death, the surviving spouse is supposed to collect the lump sum insurance proceeds, invest them, and draw a monthly check from the investment (see reference in para I.G. for computer program comparing term life to SBP). This paragraph contains a list of factors that might favor SBP in such an analysis.

1. Government subsidized; no administrative costs or commissions.

a. Premium costs for children coverage and small amounts of widow(er) coverage are particularly low. A fantastic bargain if child is incapacitated - child paid for life.

b. SSBP and natural persons with insurable interests not so subsidized.

2. SBP premiums are not taxable income to the retiree.

3. SBP payments to beneficiary increase with cost of living adjustments to retired pay. A significant factor if significant inflation returns anytime in the next 40+ years.

4. Guaranteed insurability.

5. Commercial insurer more likely to go out of business than the government.

6. Value of SBP increases when factors exist which increase the probability retiree will not outlive spouse. Some factors include:

   a. Retiree is older than spouse;

   b. Retiree has poorer health or a less healthy lifestyle than spouse (i.e., smoker); and

   c. Retiree is male (vs. female).

L. Disadvantages of SBP in comparison with commercial life insurance.

1. SBP is subject to change by Congress.

2. Reduction in spousal SBP (e.g., 55% to 35%) at age 62 (but SSBP is available).

3. Factors exist that increase likelihood retiree will outlive spouse (e.g., retiree is female; younger than spouse; or spouse has a less healthy lifestyle).

4. Limited revocation period. You can only withdraw from the program between the second and third anniversary from the date of your enrollment. For example, if you retired and enrolled on 1 January 1998, you will only be able to withdraw from SBP during the period from 1 January 2000 to 31 December 2000. (Note that you will also stop making payments should you no longer have a covered beneficiary – i.e., divorce, death of spouse, etc.).

M. Survivor Benefit Plan Annuities For Members Who Die While On Active Duty And In The Line Of Duty After 10 September 2001.

1. Created by Section 642 of the National Defense Authorization Act for Fiscal Year 2002. (Pub.L. 107-107, December 28, 2001).

   a. Makes the Survivor Benefit Plan available to service members with less than 20 years time in service, who die in the line of duty while in active duty without the benefit of being retired from active service.

   b. The new law applies to all service members who die on active duty, not just to those who die with less than 20 years of active service.

   c. This law only affects the SBP eligibility determination or annuity calculation in cases determined to be in the line of duty.

      (1) For cases determined to be not in the line of duty, SBP eligibility and annuity calculations remain in effect under the rules that existed prior to the effective date of the new law. That is, if the service member was not retirement eligible at the time of death, then SBP is inapplicable.

      (2) If the service member was retirement eligible at the time of death, an SBP annuity will be paid to a qualified survivor, but will not be computed on the basis of a nominal total disability retirement. Rather, the SBP base amount will be computed on the retirement for service rules that would have applied if the service member had retired at time of death.

2. Beneficiaries: The statute controls the beneficiary of the SBP annuity, not the elections of the service member. The law requires that the Secretary concerned <u>shall</u> pay an annuity to:

   a. Surviving spouse.

   b. Dependent child.

(1) If there is no surviving spouse, or

(2) If the member's surviving spouse subsequently dies.

c. Mandatory former spouse annuity. If an eligible member is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan or has made an election under subsection (b) to provide an annuity to a former spouse, the Secretary:

(1) May not pay an annuity to either the current surviving spouse or, if none, child(ren) of the member.

(2) The annuity shall be paid to that former spouse as if the member had been a participant in the Plan and had made an election under subsection (b) to provide an annuity to the former spouse, or in accordance with that election, as the case may be, if the Secretary receives a written request from the former spouse concerned that the election be deemed to have been made in the same manner as provided in 10 U.S.C. § 1450(f)(3).

d. Amount:

(1) The new law, governing death on active duty, changes the calculation of assumed retirement pay to presume that everyone receives 75% of their base pay or the average of the high three years (or whichever retirement system the service member is under) regardless of years in service.

(2) The SBP annuity is calculated at 55% of that figure.

(3) For spouse, this amount is:

(a) Subject to DIC offset.

(i) DIC is advantageous to the spouse because it is a tax-free benefit.

(ii) However, many surviving spouses will only see that their SBP annuity is reduced and will not view that as beneficial. For many the amount of DIC equals or surpasses any benefit from SBP, so the new rules will result in no additional payment to the family members.

(b) Reduced to 35% at age 62.

3. The new law does not change or do away with the service's imminent death procedures.

a. Imminent death retirement is still in place and when the situation arises where it can be implemented it is the preferred choice.

b. The imminent death procedure actually retires the service member and allows for an election to by-pass the spouse and select child coverage for the SBP annuity. This may have some be financial advantage since only spousal DIC offsets the SBP annuity.

c. The imminent death procedure actually retires the service member and allows the service member to elect the Supplemental Survivor Benefit Plan (SSBP).

d. A single service member, who does not take under the current plan, may be able elect to provide SBP to someone with an insurable interest if they are retired under the imminent death procedure.

e. Service members retired under the imminent death procedures are entitled to Supplemental SBP (SSBP) and the Veteran's Administration (VA) insurance of $20,000.

4. Legal Assistance Pointers.

a. Legal assistance attorneys must first recognize that imminent death retirement procedures, where available, are preferable to dying on active duty and using the new law.

b. Do not advise all surviving family members of service members who die on active duty that the new law will result in an increase in benefits due to the SBP annuity. For many surviving family members, the actual dollar amount will not change, either because the service member was already over 30 years of service and therefore eligible for 75% of their average pay or high three, or because the DIC offset will be equal to or greater than the SBP annuity.

V. GOVERNMENT INSURANCE PROGRAMS.

A. Servicemen's Group Life Insurance (SGLI); 38 U.S.C. §§ 1965-1976; 38 C.F.R. Part 9; Veterans' Benefits Act of 1992, § 201. Office of SGLI (OSGLI), phone number: 1-800-419-1473.

1. Group term life insurance for members of the armed forces, purchased by the government from private insurers, and partially subsidized by the government.

2. Active Component.

a. Active duty soldiers are automatically insured for $250,000 unless they opt out in writing.

b. Soldier can elect lower coverage or no coverage by completing VA Form 29-8286.

c. Insurability is guaranteed when first given the opportunity to elect SGLI. Thereafter, soldiers who desire to increase coverage may be subject to insurability determinations.

d. Provides protection on active duty and for 120 days following separation. No premiums are required during this additional 120-day period.

e. Soldiers may lose entitlement to SGLI based on:

(1) Their duty status at time of death (e.g., if death occurs during extended AWOL or while serving term of confinement); or

(2) Other miscellaneous factors (e.g., following refusal to serve due to conscientious objector status or following conviction of certain serious crimes). See AR 608-2, paras. 2-5 and 2-7.

f. Cause of death, however, is irrelevant to SGLI coverage.

g. Soldiers may convert to Veterans Group Life Insurance (VGLI) within 120 days of separation. No person may carry a combined amount of SGLI and VGLI in excess of $250,000 at any one time.

h. Amount is included in decedent's estate for purposes of federal estate tax, but generally exempt from the claims of creditors and other taxes, including federal income tax.

i. No loan, cash, paid-up, or extended insurance value.

3. Reserve Component.

a. Certain reservists are eligible for full-time coverage.

(1) Unit soldiers of the ARNG and USAR and –

(a) Unit soldier in pay status.

(b) Delayed entry soldiers.

(2) IRR or IMA soldiers attached for training in a non-pay status to units that are scheduled for at least 12 periods of IDT annually.

(3) Reservists who have completed 20 years of creditable service, but have not begun receiving retired pay.

b. Part-time coverage is also available during periods of AT and ADT.

4. Eligible beneficiaries.

a. Any person designated by the soldier on appropriate VA form (Active Component: VA Form 29-8286). SGLI Act gives service member absolute right to choose beneficiary.

b. If no designation, or "By Law" designation, then proceeds paid according to SGLI statute:

(1) All to spouse, but if none, then

(2) All to surviving children in equal shares (and descendants of deceased children, by representation), but if none, then

(3) All to parents (equally divided), but if none, then

(4) All to executor of soldier's estate, but if none, then

(5) Next of kin under state law.

c. Importance of proper designation.

(1) Avoid "By-Law" designation. "By Law" designations are no longer authorized within the Army. Message, Total Army Personnel Command, TAPC-PEC, subject: Servicemen's Group Life Insurance (SGLI) Program Change (021131Z Mar 93).

(2) But ensure soldier keeps designation current!

(3) Consider trustee (living or testamentary) or custodian under Uniform Gifts (Transfers) to Minors Act (UGMA/UTMA) as designated beneficiary for minor children. Such designation may avoid delay and expense in the payment of proceeds.

5. Settlement options.

a. Accelerated Death Benefits under SGLI/VGLI for servicemembers in terminal condition (within nine months of death). See Appendix H.

b. Soldier may elect lump sum or 36 monthly installments. (On Form SGLV 8286).

c. If no election, beneficiary may elect type of settlement.

d. Alliance Account & financial services.

6. Apply for benefits by submitting VA Form 29-8283, Claim for Death Benefits, to OSGLI, 212 Washington Street, Newark, N.J. 07102-2999.

B. Veterans Group Life Insurance (VGLI) (38 U.S.C. §§ 1977-1979).

1. Renewable group term life insurance available after soldier leaves active duty. VGLI is five-year renewable term insurance.

2. Up to $250,000 in coverage available.

3. Active Component soldiers should apply for VGLI within 120 days of leaving the service.

4. Reservists are also eligible when:

a. Being released from AD, ADSW, or ADT under call or order specifying not less than 31 days; and

b. Members of the IRR and ING.

5. VGLI rates (see Appendix C).

6. Certain reservists may also be eligible.

C. Servicemembers' Group Life Insurance Family Coverage: The Veteran's Opportunity Act of 2001, enacted 5 June 2001, amended Title 38 United States Code, Sections 1965-1970, extending SGLI coverage to insurable dependents.

1. Eligibility: All insurable dependents of active duty and Ready Reserve members covered by SGLI are automatically covered beginning 1 November 2001.

a. Insurable dependents include a spouse and all unmarried dependent children under the age of 18, and those over 18 but younger than 23 who attend an accredited school.

b. The definition of "child" includes legitimate children, adopted children, illegitimate children of female members, illegitimate children of male members if acknowledged in writing by the military member or judicially recognized, and stepchildren living in the home of the military member.

2. Spousal Coverage:

a. A spouse is automatically eligible for $100,000 of coverage (or to the same level as the military member's SGLI coverage if less than $100,000).

b. A military member elects not to cover the spouse at all or to reduce the $100,000 coverage in increments of $10,000 on form SGLV 8286A (Family Coverage Election). The military member pays a premium (by automatic military pay deduction) for spousal coverage.

c. The premiums for spousal coverage are:

Spouse's age:	Monthly rate per $10,000	Monthly cost for $100,000 coverage
Under 35	$.90	$9.00
35-44	$1.30	$13.00
45-49	$2.00	$20.00
50-54	$3.20	$32.00
55 & older	$5.50	$55.00

d. A spousal policy terminates 120 days after:

(1) The military member elects, in writing, to terminate spouse coverage.

(2) The military member's SGLI coverage terminates.

(3) The military member dies.

(4) The military member and spouse divorce.

(5) The spouse can convert the spousal SGLI policy into a commercial policy within 120 days of termination. The Office of Servicemember's Group Life Insurance (OSGLI) will provide a list of participating commercial companies upon request. The spouse cannot convert the SGLI to Veteran's Group Life Insurance (VGLI).

e. The military member is the beneficiary of the spousal SGLI policy.

f. The spouse has no incidents of ownership over the policy.

g. The spouse cannot change the beneficiary, name the beneficiary or contingent beneficiary, nor revoke the policy.

h. If a spouse dies and before OSGLI pays the proceeds to the military member the military member also dies, then the spousal SGLI proceeds are paid in accordance with the military member's SGLI policy beneficiary designation.

i. If a military member elects not to cover the spouse and later wants to provide spousal coverage, the member must complete for SGLV 8285A (Request for Family Coverage).

3. Child Coverage.

a. Every dependent child of the military member is automatically covered by a $10,000 policy.

b. There is no premium charged for a child's policy.

c. The military member cannot decline nor reduce the child policy.

d. Coverage for a child terminates 120 days after:

(1) The military member's SGLI coverage terminates.

(2) The military member separates from service.

(3) The military member dies.

(4) The child no longer qualifies for dependent status.

e. A child policy cannot be converted to a commercial policy at anytime.

f. The military member is the beneficiary of the child's policy.

g. If the child dies and before OSGLI can pay the proceeds to the military member the military member also dies, the child's policy proceeds are paid in accordance with the military member's SGLI policy beneficiary designation.

h. A child of a dual military couple is only covered by one policy. In the event of the child's death, the proceeds of the child's policy are paid to the military member eligible for SGLI coverage the longest. If a dual military couple divorces, the proceeds of a deceased child's policy are paid to the member with custody of the child.

VI. DEPENDENTS EDUCATIONAL ASSISTANCE (DEA) (38 U.S.C. §§ 3500-3566; 38 C.F.R. PART 21).

A. Death of member must be under same circumstances that qualify dependents for receipt of DIC. Additionally, dependents of a totally disabled, but living, veteran may qualify.

B. School must be approved for Department of Veterans Affairs (DVA) benefits (see 38 U.S.C. § 3523 and § 3672; 38 C.F.R. § 21.7120).

1. Each state establishes an agency that certifies educational programs according to standards established by the DVA.

2. Generally, the DVA will not allow approval of courses that are primarily a vocational or recreational in nature. The statute and regulation contain a list of specific courses which are either prohibited or discouraged.

C. Eligible Recipients.

1. Surviving spouses.

a. Period of eligibility for a spouse extends to 10 years from the date of the veteran's death; extension is possible.

b. Will not be reduced by DIC payments.

c. Remarriage permanently terminates DEA payments.

2. Children.

a. Eligibility for child ends at age 26 (unless extended under certain conditions such as the child serving on active duty with the Armed Forces).

b. Children must elect between DEA and DIC. Election of educational benefits is irrevocable and DIC may not be received once educational benefits begin. (Can receive DIC until age 23 and educational benefits to age 26)

c. Marriage does not bar payments.

D. Amounts Available (38 U.S.C. § 3532, current through P.L. 108-3, approved 1/13/03).

1. Institutional Training: The DVA will pay the eligible recipient $680 per month if the schooling is full time. Lesser amounts are available for three-quarter-time schooling ($511), half-time ($340). Less than half-time and quarter-time are based on tuition and fees for the course, not to exceed $340 and $170 respectively.

2. Farm Cooperative Training: The DVA will pay the eligible recipient $549 per month if the schooling is full time. Lesser amounts are available for three-quarter-time schooling ($412); half-time ($275).

3. Correspondence Courses: Entitlement charged at a rate of one month for each $680 paid.

4. Apprentice and On-The-Job Training: First six months - $495; second six months - $370; third six months - $246; remainders of the program - $124.

5. Payments made for a maximum of 45 school months (or to the equivalent thereof in part-time training).

E. State Programs.

VII. SOCIAL SECURITY BENEFITS.

A. General Types of Benefits.

B. Eligibility. For an individual (or his/her survivors) to qualify for social security benefits, the individual will have to be either fully insured or currently insured, or both, depending on the benefit (but see para. C.2.d. below).

1. An individual is fully insured upon receipt of 40 quarters of social security work credits. If an individual dies before age 62, he/she may be considered as "fully insured" with less than 40 credits. The actual number of credits needed depends on age at time of death.

2. An individual is currently insured if the individual has at least six quarterly work credits in the past 13 quarters.

3. Generally, one social security work credit is awarded for each $600 of wages upon which FICA taxes are paid. A maximum of four credits can be earned in a year (hence, "quarterly credits").

C. Available Benefits for Survivors.

1. Lump sum death benefit of $255 (deceased must have been either fully or currently insured at time of death).

2. Monthly survivor benefit payments.

a. Children under age 18 (deceased fully or currently insured).

b. Widow(er) with children under 16 (deceased fully or currently insured).

c. Widower age 60 and over (deceased must have been fully insured at time of death).

d. If the death was service-connected, but the soldier was not either fully or currently insured, the VA will make up any of these social security payments for which the soldier's survivors do not qualify (38 U.S.C. § 1312(a)).

e. Amount of monthly benefits depends on work history of insured and family situation. Generally, the more social security (FICA) taxes paid by the insured, the greater the benefits available to the survivors. When calculating the amount of FICA taxes paid by an active duty soldier, most soldiers will qualify for an additional $1,200 annual credit above the actual amount of FICA taxes paid.

3. Social Security benefits may be reduced if surviving spouse has earned income.

4. Apply for benefits by submitting SS Form DA-C24 (Application for Survivor Benefits), which can be obtained from the Social Security Administration, to the Social Security Office in your area.

5. More specific information on social security entitlements can be obtained by calling 1-800-772-1213.

VIII. OTHER PAYMENTS AND BENEFITS TO SURVIVORS OF DECEASED MEMBERS.

A. Death Gratuity (10 U.S.C. § 1475).

1. Conditions of payment.

a. Soldier died on active duty, or

b. 120 days after release if death resulted from disease or injury incurred while on active duty.

2. Amount.

a. Lump sum payment of $6,000 made by the local finance office.

b. The lump sum payment amount does not depend on the rank or years of service of the deceased. (National Defense Authorization Act for FY 1993).

3. Beneficiaries.

a. By law, to surviving spouse.

b. If no surviving spouse, to children equally without regard to age or marital status.

c. If no spouse or children, by designation among parents, brothers, and sisters. DD Form 93.

d. If no spouse or children and no designation - then to parents (if any survive), otherwise to brothers and sisters. If there are no parents, brothers, or sisters, the death gratuity is not payable (to the estate or otherwise).

4. Tax consequences (I.R.C. § 101(b)(1)).

a. If payment is for death occurring on or before 20 August 1996, a total of $5,000 is excluded from the gross income of the recipients. Remaining $1,000 is included in gross income. If gratuity is divided between more than one recipient, tax liability is split pro rata.

b. If payment is made for a death occurring after 20 August 1996, $3,000 is excluded from gross income and $3,000 is taxable. (Pub. L. No. 104-188, 110 Stat. 1755; and I.R.C. § 134).

(1) Reduced exclusion is based on the repeal of I.R.C. § 101(b) on 20 Aug 1996. This section excluded $5,000 of death gratuity from income.

(2) Upon the repeal of I.R.C. § 101(b), the excludable portion of the death gratuity reverted to the excludable amount that existed in 1986, when tax free military benefits were consolidated in I.R.C. § 134 which was $3,000. (See Conference Report to I.R.C. § 134 incorporating 10 U.S.C. §§ 1475-1480 and the 1991 Amendments to 10 U.S.C. § 1478).

5. Apply by submitting DD Form 397, Claim Certification and Voucher for Death Gratuity Payments, to local finance office.

B. Unpaid Pay and Allowances. 37 U.S.C. § 501; Chap. 5, para. 40511, DOD Military Pay and Allowances Manual.

1. Amount.

a. All pay due soldier at death, including allowances.

b. Accrued leave, which can even exceed 60 days.

2. Beneficiaries.

a. Designated by soldier.

b. If no designation, to spouse, children, parents, or the estate (in that order).

C. Burial Benefits (10 U.S.C. § 1482; 38 U.S.C. §§ 2301-08 & 2402; 38 C.F.R. § 3.1600).

1. Burial in a national cemetery.

a. The following individuals are eligible for burial in a national cemetery:

(1) All active duty personnel;

(2) Veterans who served a minimum period of time on active duty (generally, 2 years) and were discharged with an other than dishonorable characterization; and

(3) Reservists who die on active duty, or die as a result of service-connected injuries, or die after completing 20 good years toward retirement. See Pub. L. No. 103-240.

b. Burial in a national cemetery is on a space available basis. Eligibility creates the rights to:

(1) A headstone (monetary reimbursement no longer available), and

(2) A graveliner (if actually buried in a national cemetery).

2. Additional assistance with burials.

a. All active duty soldiers. The next of kin are eligible for the following support:

(1) Interment Allowances: (10 USC 1481 & 1482; DoDD 1344.8, Interment Allowance for Deceased Active Duty Personnel, September 25, 1978; Assistant Secretary of Defense Memorandum, Subject: Revised Interment Allowances Under DoD Directive 1344.8, December 13, 2000, attachment 1).

(a) If service arranges preparation and casket:

(i) $4,325 if consigned to funeral home and burial in civilian cemetery;

(ii) $3,000 if consigned to funeral home and burial in govt cemetery;

(iii) $600 if remains are consigned directly for burial in a govt cemetery.

(b) If family arranges preparation and casket:

(i) $6,900 for burial in civilian cemetery;

(ii) $5,550 for burial in govt cemetery.

(2) Reimbursement for next of kin travel to the burial site. 37 USC 411f).

b. Certain veterans. The next of kin are entitled to:

(1) A burial allowance not to exceed $1,500 if death is service-connected.

(2) An allowance not to exceed $300 for preparation and transportation of remains and other funeral and burial expenses if death is not service-connected, but veteran was eligible for VA pension or compensation (i.e., the veteran was rated partially or totally disabled). An additional $150 plot or internment allowance is available to these next of kin if burial is in a private cemetery.

3. Military funeral honors have become a statutory benefit to all veterans effective 01 Jan 2000 pursuant to the National Defense Authorization Act of 2000. See Appendix I.

D. Other Military Benefits (see DA Pam 608-4).

1. Travel of dependents and shipment of household goods and personal effects. 37 U.S.C. § 406(f).

2. Temporary continuation of allowance for dependents of members dying on active duty to continue to occupy family housing for 180 without charge. If dependents not in family housing basic allowance for housing at the rate that is payable for members of the same grade and dependency status as the deceased member for the area where the dependents are residing for 180 days. If in family housing and vacate before 180 days, then the dependents can receive basic allowance for housing for the remainder of the 180 days. 37 U.S.C. § 403.

3. Emergency financial assistance (Army Emergency Relief and/or American Red Cross).

4. Continued service benefits and privileges for dependents of soldier dying on active duty.

a. Commissary.

b. Post Exchange.

c. Medical care.

d. Legal assistance.

e. VA Death Pension (38 U.S.C. § 5112(b)(4); 38 C.F.R. § 3.660(d); and DA Pam 360-526, p. 16). This benefit is designed for surviving spouses and children of wartime veterans (i.e., those who served at least 90 days during designated war periods) whose survivors have limited income. Service during Desert Storm qualifies. Property holdings and date of marriage to the veteran also affect eligibility. Death need not be service-connected.

IX. TERMINAL CONDITION: IS MEDICAL RETIREMENT APPROPRIATE?

A. The decision to retire a soldier facing imminent death is still relevant, notwithstanding Section 642 of the National Defense Authorization Act for Fiscal Year 2002, which makes the Survivor Benefit Plan available to service members with less than 20 years time in service, who die in the line of duty while in active duty without the benefit of being retired from active service. See the discussion of this new act earlier in the outline.

B. Factors favoring retirement.

1. Choice of Beneficiaries.

a. NDAA FY 2002 (10 U.S.C. § 1448) – Mandates beneficiaries:

(1) Surviving spouse.

(2) Dependent child.

(a) If there is no surviving spouse, or

(b) If the member's surviving spouse subsequently dies.

(3) Mandatory former spouse annuity. The annuity <u>shall</u> be paid to that former spouse as if the member had been a participant in the Plan and had made an election under subsection to provide an annuity to the former spouse.

b. Retirement provides choice of beneficiaries.

(1) Child only SBP. (Possible with spousal consent.)

(2) Natural Person with an insurable interest. (If no spouse or child(ren).)

(3) Either choice:

(a) Creates higher premium payment. However, number of actual projected premium payments should be minimal.

(b) Neither are subject to DIC offset.

2. Supplemental SBP available. Increases basic SBP after age 62 reduction

3. Availability of Service Disabled Veteran's Life Insurance (38 U.S.C. § 1922; 38 C.F.R. § 8.116).

a. $20,000 of life insurance available to disabled retirees who are otherwise uninsurable.

b. Must be applied for by retiree within one year of retirement.

c. If retiree is mentally competent at any time between injury and death, the retiree must sign the insurance application (VA Form 29-4364). If serviceman is mentally incompetent for the entire period prior to death, the insurance may be applied for retroactively after the death of the retiree.

C. Factors favoring continued active duty.

1. Is family at risk for extensive medical costs?

a. How long might soldier continue to live?

b. If retired, when will soldier be removed from military medical care?

c. If retired, will care be available in a VA facility?

2. Eligibility for the Death Gratuity expires if death occurs more than 120 days after retirement.

3. Some commercial life insurance policies issued by companies which deal with the military provide for automatic termination or reduction of coverage upon retirement. Does the soldier have such a policy?

4. Survivors may have to pick up some additional burial expenses if soldier is retired vice remaining on active duty.

D. Summary Comparison on Selected Benefits in imminent death processing (See Information Paper at Appendix G)

Benefit	Death on Active Duty	Death in Retired Status
Serviceman's Group Life Insurance (SGLI)	**YES**	**Yes**. Coverage retained for up to one year or until less than totally disabled.
Death gratuity	**YES**	**Yes**, if death occurs within 120 days from service-connected disability.
DVA Dependency and Indemnity Compensation (DIC)	**YES**	**YES**
Survivor Benefit Plan (SBP) Offset by DIC, but may be more than DIC.	**Yes** without regard to years of service. *Election options restricted by law.*	**Yes** without regard to years of service. *Several election options, to include insurable interest for single soldier*.
Supplemental SBP Increases basic SBP after age 62 reduction.	**NO**	**YES** (Only for spouse or spouse/child elections.)
Eligibility for DVA Service Disabled Veterans Life Insurance (SDVI)	**NO**	**YES**

X. CONCLUSION.

APPENDIX A

SBP FOR RESERVISTS

FORMULAS FOR RESERVISTS

A. Under Option A, where the member first elects to participate at age 60, the active duty method of calculating costs and benefits applies. If the reservist dies prior to reaching age 60, he is not covered by SBP.

B. Under Option B, coverage is in effect immediately, but the beneficiary does not receive the SBP annuity until the date the service member would have reached age 60.

C. Under Option C, coverage is in effect immediately. The beneficiary begins receiving SPB benefits immediately upon the reservist's death.

D. Cost of electing any coverage before age 60 (Options B and C) is shared by the retiree (through increased premiums) and the beneficiary (through decreased benefits). The cost is based on a complicated calculation involving:

1. The option elected;

2. Retiree's age at election;

3. Difference in age of retiree and beneficiary at election; and

4. Actuarial tables.

E. Under all three options, no SBP premiums are actually paid until the reservist reaches age 60 and begins to draw retirement pay.

COST OF RETIREE SBP

Option A:

No payments are due until the retiree reach s age 60. At this point the premium is calculated as described earlier in this outline.

Option B:

Annuity begins on what would have been your 60th birthday if you die before that age. If you die after age 60, the annuity begins on the day after your death.

Your Age at Election	Base Amount Elected	Annuity Payable	Cost Per Month
45	**$1000**	**$534.22)**	**$85.80**
50	**$1000**	**$536.75**	**$81.20**
55	**$1000**	**$541.95**	**$72.40**

NOTE: Assumes a starting base (threshold) of $572

Option C:

Annuity begins on the day after your die, regardless of your age at death.

Your Age at Election	Base Amount Elected	Annuity Payable	Cost Per Month
45	**$1000**	**$525.91**	**$100.90**
50	**$1000**	**$531.36**	**$92.88**
55	**$1000**	**$539.44**	**$78.18**

NOTE: Assumes a starting base (threshold) of $572.

RESERVE PART OF RCSBP RATES

METHOD: **TWO-TIER**

TYPE: **DEFERRED TO MEMBER'S AGE 60 ("OPTION B")**

OPTION: **SPOUSE ONLY OR SPOUSE/CHILD**

Age at Year of Election	Years Beneficiary Younger Than Member			Years Beneficiary Older Than Member		
	10-14	**05-09**	**00-04**	**01-04**	**05-09**	**10-14**
59.5	.0022	.0022	.0020	.0017	.0017	.0016
59	.0044	.0043	.0039	.0034	.0033	.0032
58	.0083	.0082	.0075	.0065	.0063	.0061
57	.0118	.0117	.0107	.0094	.0091	.0088
56	.0148	.0148	.0136	.0119	.0115	.0112
55	.0175	.0175	.0162	.0142	.0138	.0134
54	.0198	.0199	.0185	.0163	.0158	.0153
53	.0218	.0220	.0205	.0181	.0176	.0171
52	.0235	.0238	.0223	.0198	.0192	.0186
51	.0250	.0254	.0239	.0212	.0206	.0200
50	.0262	.0268	.0253	.0225	.0219	.0213
49	.0273	.0279	.0265	.0236	.0230	.0224
48	.0282	.0289	.0275	.0246	.0240	.0233
47	.0290	.0298	.0284	.0255	.0249	.0242
46	.0296	.0305	.0292	.0262	.0256	.0249
45	.0302	.0311	.0298	.0269	.0263	.0256
44	.0306	.0317	.0304	.0274	.0269	.0262

RESERVE PART OF RCSBP RATES

METHOD: **TWO-TIER**

TYPE: **IMMEDIATE AT MEMBER'S DEATH ("OPTION C")**

OPTION: **SPOUSE ONLY OR SPOUSE/CHILD**

Age at Year of Election	Years Beneficiary Younger Than Member			Years Beneficiary Older Than Member		
	10-14	**05-09**	**00-04**	**01-04**	**05-09**	**10-14**
59.5	.0022	.0022	.0020	.0017	.0017	.0016
59	.0049	.0048	.0043	.0038	.0037	.0036
58	.0094	.0093	.0085	.0076	.0072	.0071
57	.0136	.0135	.0126	.0113	.0106	.0104
56	.0174	.0175	.0164	.0148	.0138	.0137
55	.0209	.0212	.0201	.0183	.0169	.0168
54	.0242	.0246	.0235	.0216	.0198	.0198
53	.0271	.0277	.0267	.0247	.0227	.0226
52	.0297	.0306	.0297	.0276	.0254	.0252
51	.0321	.0332	.0324	.0304	.0280	.0277
50	.0343	.0355	.0349	.0329	.0305	.0300
49	.0362	.0376	.0372	.0353	.0329	.0323
48	.0379	.0395	.0393	.0375	.0351	.0344
47	.0395	.0413	.0412	.0395	.0371	.0364
46	.0408	.0428	.0428	.0413	.0390	.0383
45	.0420	.0441	.0444	.0429	.0408	.0400
44	.0430	.0453	.0457	.0444	.0424	.0417

APPENDIX B
BENEFICIARY CHECKLIST

The following steps should be taken by the survivor of a deceased soldier or veteran. See also DA Pam 608-4.

1. Contact all insurance companies. They will require:

    a. Policy Numbers, and/or;
    b. Full name of the decedent.

2. Request approximately 10 certified copies of the Death Certificate.

3. Contact the Department of Veterans Affairs for burial payment. They will require:

    a. Full name of the deceased.
    b. Social Security Number and Branch of Service.

4. Contact the Department of Veterans Affairs for possible benefits for next of kin if soldier died while on active military duty. They will require:

    a. Certified copy of the Death Certificate.
    b. Copy of Marriage Certificate.
    c. Copies of the Birth Certificates of all dependent children.

5. If soldier retired from military service after September 21, 1972, contact respective branch of service for Survivors Benefit Plan (SBP). They will require:

    a. Full name of the deceased.
    b. Social Security Number.

6. Contact soldier's respective branch of service for Retired Serviceman's Family Protection Plan (RSFPP). They will require:

    a. Full name of the deceased.
    b. Social Security Number.

7. Contact nearest Social Security Office. They will require:

   a. Certified copy of Death Certificate.
   b. Social Security Number of deceased.
   c. Social Security Numbers for spouse and dependent children.
   d. Birth Certificates for spouse and dependent children.
   e. Approximate earnings of deceased in the year of his death and present employer's name.

8. Contact veteran's present employer for possible insurance.

9. Contact your veteran's present employer for funds possibly due from Credit Union participation.

10. Contact Bank for possible mortgage insurance.

11. Notify all creditors of death; there may be Credit Life Insurance on installment loans.

12. Contact any fraternal organization to which the deceased may have belonged for possible life insurance.

13. Contact Civil Service if deceased was employed for more than 18 months in Civil Service.

14. Search for a Will. It may explain how the deceased wanted to disburse the funds and to determine if there are trust funds in existence.

15. Look for check stubs or any canceled checks for payments to an insurance company. Check for securities, real estate, and a safe deposit box.

16. Check for past enrollment in the Veteran's Education Assistance Program and/or payroll purchase plan for Savings Bonds.

17. If death occurred on a common carrier, survivors may be able to collect damages from the carrier (for fault or negligence) and/or insurance proceeds from the relevant travel agent/credit card issuer (no fault or negligence required).

18. If death occurred due to combat, there may be federal tax breaks, both on income tax (I.R.C. § 1692) and estate tax (I.R.C. § 2201).

19. Contact the DVA for information on possible state benefits, including bonuses, educational assistance, employment preferences, and tax exemptions.

APPENDIX C

VGLI RATES* (Extract)

Coverage Amount	Age 40-44		Age 45-49		Age 50-54	
	Monthly	Annual	Monthly	Annual	Monthly	Annual
$250,000	$55.00	$627.00	$80.00	$912.00	$130.00	$1,482.00
$200,000	$44.00	$501.60	$64.00	$739.60	$104.00	$1,185.60
$100,000	$22.00	$250.80	$32.00	$364.80	$ 52.00	$ 592.80
$ 10,000	$ 2.20	$ 25.08	$ 3.20	$ 36.48	$ 5.20	$ 59.28

For more complete information see the charts at the following web address:

http://www.insurance.va.gov/sglivgli/VGLI%20rates.htm

* Your age should be either your age on your 121st day after separation or your age on the date of application, whichever is later. Premium schedule is subject to change.

NOTE: If you pay annually, you can take advantage of a one-month discount, which is reflected in the annual premium shown above.

APPENDIX D - RECOMMENDED SGLI LANGUAGE

SGLI intended for minors may be designated by the soldier for placement in a trust; for placement in a custodianship under the Uniform Gifts or Uniform Transfers to Minors Act; or for outright gift (in which case a court must appoint a guardian or conservator to receive and maintain the proceeds). The following language is recommended for trust/custodianship SGLI beneficiary designations on the SGLV-8286 (Servicemen's Group Life Insurance Election and Certificate) (**see AR 600-8-1, figures 11-12 to 11-14**):

* Testamentary Trust for Children:[1] "**My trustee to fund a trust established for the benefit of my children[2] under my will**."

* Living Trust for Children:[3] "**(Name of trustee), my trustee, pursuant to a trust agreement dated (date).**"

* Custodianship under the Uniform Gifts or Uniform Transfers to Minors Act:[4] "**(Name of custodian), as custodian for each of my children,[5] pursuant to the UGMA/UTMA of the state of (name of state), (with distribution to each minor when that minor reaches age (desired age)).**"

---

[1] The soldier's will must contain a trust.

[2] The definition of "children" in the SGLI statute excludes stepchildren and certain illegitimate children. If any such children are intended beneficiaries, they should probably be included by name in the SGLI designation. For example, "... for the benefit of my children, including my stepchild, Mary Lamb, ..."

[3] The soldier must create a living trust prior to completing the SGLI form. A copy of the trust agreement should be provided to the SGLI office.

[4] Life insurance custodianships are recognized in every state. A separate custodianship will be established for each child. Either the soldier, the children, the custodian, or OSGLI should have some connection with the state named by the soldier. The age of distribution to the child in most jurisdictions is 18, although in CO, CT, IN, IA, MA, and TN the age of distribution is 21. In CA and NV (and only in these jurisdictions), the soldier may designate any age between 18 and 25 as the age of distribution.

[5] See discussion, supra, note 2.

APPENDIX E

EXAMPLE OF DEATH ON ACTIVE DUTY VS. RETIREE DEATH
(Death after 10 September 2001)

HYPOTHETICAL CASE - DEATH ON AD
0-4 with spouse and 2 children (7 and 11 years old)
(0-4 had 15 years TIS)

Monthly Payments		Lump Sum Payments	
SBP----------	**$1,268***		
DIC (Spouse) ---	**$ 948**	**SGLI ----------**	**$250,000**
DIC (Child) -----	**$ 237**	**Death Gratuity -**	**$ 6,000**
DIC (Child) -----	**$ 237**	**Pay/Allowances -**	**$ 3,000**
Social Security -	**$1,950**	**Social Security --**	**$ 255**
TOTAL	**$4,640**	**TOTAL**	**$259,255**

* The NDAA of FY 02 presumes 100% disability and calculates retired pay at 75% of final base or high three, whichever is applicable. For this example we assume the Major's retirement is calculated based on final base pay and that the Major died in 2003.

HYPOTHETICAL CASE - RETIREE DEATH
0-4 with spouse and 2 children (7 and 11 years old)
(0-4 had 15 years TIS)

Monthly Payments		Lump Sum Payments	
SBP----------	**$1,268***	**SGLI ----------**	**$250,000**
DIC (Spouse) ---	**$ 948**	**Death Gratuity -**	**$ 6,000**
DIC (Child) -----	**$ 237**	**Pay/Allowances -**	**$ 3,000**
DIC (Child) -----	**$ 237**	**SDVI ----------**	**$ 20,000**
Social Security -	**$1,950**	**Social Security --**	**$ 255**
TOTAL	**$4,640**	**TOTAL**	**$279,255**

* Physical disability retirement, presumed the Major is retired as 100% disabled. For this example we assume the Major's retirement is calculated based on final base pay and that the Major died in 2003.

EXAMPLE OF DEATH ON ACTIVE DUTY VS. RETIREE DEATH

HYPOTHETICAL CASE - DEATH ON AD
0-5 with spouse and 2 children (13 and 17 years old)
(0-5 had 22 years TIS)

Monthly Payments		Lump Sum Payments	
SBP ----------	$1,741		
DIC (Spouse) ---	$ 948	SGLI ----------	$250,000
DIC (Child) -----	$ 237	Death Gratuity -	$ 6,000
DIC (Child) -----	$ 237	Pay/Allowances -	$ 3,000
Social Security--	$2,150	Social Security --	$ 255
TOTAL	$5,313	TOTAL	$259,255

* The NDAA of FY 02 presumes 100% disability and calculates retired pay at 75% of final base or high three, whichever is applicable. For this example we assume the Lieutenant Colonel's retirement is calculated based on final base pay and that the Lieutenant Colonel died in 2003.

HYPOTHETICAL CASE - RETIREE DEATH
0-5 with spouse and 2 children (13 and 17 years old)
(0-5 had 22 years TIS)

Monthly Payments		Lump Sum Payments	
SBP ----------	$1,741	SGLI ----------	$250,000
DIC (Spouse) ---	$ 948	Death Gratuity -	$ 6,000
DIC (Child) -----	$ 237	Pay/Allowances -	$ 3,000
DIC (Child) -----	$ 237	SDVI ----------	$ 20,000
Social Security--	$2,150	Social Security --	$ 255
TOTAL	$5,313	TOTAL	$279,255

* Physical disability retirement, presumed the Lieutenant Colonel is retired as 100% disabled. For this example we assume the Lieutenant's retirement is calculated based on final base pay and that the Lieutenant Colonel died in 2003.

APPENDIX F
INFORMATION PAPER

TAPD-OEA 10 Feb 2000

SUBJECT: Imminent Death Processing

1. Purpose. To provide an overview of expeditious processing of imminent death cases and the benefits that result when a soldier pending death is expeditiously retired for physical disability.

2. Facts.

a. Expeditious processing of imminent death cases consists of procedures for completing physical disability evaluation and retirement on a 24-hour basis.

b. Imminent death procedures are applied to the cases of Active and Reserve Component soldiers when the Medical Treatment Facility (MTF) determines that the soldier is expected to die within 72 hours from a medical condition incurred or aggravated in the line of duty.

c. No regulatory and statutory requirements are omitted or accomplished after the fact of death. For example, if a line of duty determination is required, retirement is not executed until the required level of determination (informal or formal) per AR 600-8-1, chapter 39 (1986), is approved and confirms an in-line-of-duty finding. Retirement must be executed before death as defined by the laws of the state where the soldier is assigned, or if soldier is outside of the Continental United States, as defined under military medical standards.

d. To protect the interests of the soldier and the government should the soldier recover or improve, the soldier is placed on the Temporary Disability Retired List.

e. The MTF Physical Evaluation Board Liaison officer (PEBLO) and the Installation Retirement Services Officer (RSO) have joint responsibility to counsel the soldier and the soldier's next of kin.

(1) The PEBLO is responsible for counseling the soldier and the soldier's next of kin on the disability evaluation process, the soldier's rights in the process, the Physical Evaluation Board findings, estimated disability compensation, and potential Department of Veterans Affairs (DVA) benefits and programs.

(2) The RSO is responsible for counseling the soldier and the soldier's next of kin on retirement and survivor benefits, to include the Survivor Benefit Plan (SBP), and DVA and Social Security entitlements. The RSO must:

(a) Complete the DD Form 2656 (Data for Payment of Retired Personnel), which indicates the family's desired SBP election; and

(b) Coordinate with HQDA, Army Retirement Services--the Secretary of the Army designee to make SBP elections on behalf of death imminent soldiers.

(3) The Army and Air Force Mutual Aid Association is available to assist the PEBLO or RSO by producing a benefits comparison tailored to the soldier's circumstances. The Association will telefax or email the comparison to the PEBLO and RSO without regard to whether the soldier is a member of the Association. The questionnaire at enclosure 1 must be provided to the Association. The printout is generally available only during the Association's office hours: 0830 to 1630, Eastern Standard Time. The objective of the Association is to be of service to the soldier and his family by providing the maximum information available on benefits. However, as a private institution not under contract to Department of Defense, the Association cannot assume liability for the choices made.

f. Due to the variables that affect benefits, primarily under SBP, this information paper cannot provide an exact monetary comparison of benefits between death on active duty and death in retired status. These variables include: The age of the spouse; whether there are children; the ages of the children and whether any are handicapped; whether a wife is pregnant at time of the soldier's death; specifics of any divorce settlement regarding former spouse entitlement to SBP; effect of remarriage on benefit entitlement; and, whether a single soldier has a relative that would qualify as an insurable interest beneficiary.

g. In most cases when death is imminent, retirement for physical disability provides greater benefits than if death occurs on active duty due to the benefits described below. A summary matrix is attached.

(1) <u>Entitlement to the same active duty death benefits</u>.

(a) Soldiers retired under imminent death procedures are totally disabled soldiers. Totally disabled soldiers retain coverage under Servicemen's Group Life Insurance (SGLI) up to one year or until the disability ceases to be total in degree, whichever occurs first, with no premium cost during this period.

(b) The death gratuity is payable to certain survivors if the death occurs within 120 days following retirement and is related to service connected causes as determined by the DVA.

(2) Eligibility for DIC and SBP.

(a) Eligible survivors of soldiers who die on active duty are entitled to DVA Dependency and Indemnity Compensation (DIC). They are not entitled to SBP unless the soldier had at least 20 years of federal service. In that case the law directs a "spouse only" election for a married soldier or a "child(ren) only" election for an unmarried soldier with child(ren). No other options are available.

(b) Survivors of retired soldiers who die of a service-connected disability may be entitled to DIC. The DVA should be consulted to ensure eligibility based on the DVA's marriage requirements and in-line-of-duty considerations.

(c) Soldiers pending disability retirement are eligible to elect SBP and have several election options: Spouse only, children only, spouse and children, former spouse only, former spouse and children; insurable interest; and, no election.

(d) There is a dollar for dollar offset between DIC and SBP for SBP elections of spouse only or spouse and child. However, depending on the retired pay entitlement, SBP may exceed the DIC amount, in which case monies would be payable from both VA and DoD. DIC has no offsetting impact on a child's SBP receipt. Thus, the flexibility of options available to the soldier pending retirement allows for weighing long term versus short term benefits in light of the number of dependents and their ages.

(e) A single soldier with no children or one dependent child has the election option of "natural person with an insurable interest." An annuity can be provided to any relative more closely related to the soldier than a cousin or a close business associate with proof of being financially affected by the soldier's death. This option is not available to single soldiers who die on active duty eligible for retirement.

(f) When a soldier pending retirement is mentally incompetent to make an SBP election, the Secretary of the Army makes the appropriate election on behalf of the soldier. This authority has been delegated to Chief, Army Retirement Services, Office of the Deputy Chief of Staff for Personnel. The RSO coordinates the action.

(3) Eligibility for Supplemental SBP (SSBP). SSBP is the supplemental plan which increases basic SBP's after-age-62 annuity amount. SSBP is not part of the active-duty death survivor package, even when the member has more than 20 years active federal service. It can only be elected at retirement. It is not connected to DIC; it is payable at age 62 to a qualified surviving spouse in addition to any DIC amounts received.

(4) Possibility of Greater retired pay and greater SBP/SSBP annuity. Retired pay is computed using a multiplier equating to years of service or the disability rating—both limited to 75%. The disability rating for imminent death retirement is 100%. Thus, even a soldier who was eligible to retire for length of service would benefit from death imminent retirement processing because of the higher multiplier used to calculate retired pay as well as the SBP election flexibility afforded by retirement.

(5) Eligibility for Service Disabled Veterans Life Insurance (RH) (SDVI). This is a $10,000 policy for disabled veterans. A soldier must be retired in order to apply for it.

(a) Totally disabled veterans, may apply for waiver of premiums for the basic policy. After six months, totally disabled veterans may apply for an additional policy of up to $20,000.

(b) If the veteran is mentally competent, but physically incapable of signing the application, a statement to that effect can be submitted by his doctor or nurse. The statement must confirm that the veteran was totally aware of what was happening and why he couldn't sign. If he is mentally incompetent, only a court appointed guardian can sign the application.

(c) If the mentally incompetent soldier dies before a guardian is appointed, the soldier's beneficiary may apply for gratuitous SDVI ("ARH"). This is a lump sum payment, the approval of which rests with the DVA.

h. There are two considerations which may result in retirement posing a hardship.

(1) Civilian life insurance: Does the soldier have a civilian policy that provides greater benefits if death occurs on active duty? Usually these are policies offered by military oriented associations. The amount of such a policy should be carefully weighed against the overall entitlement package afforded by retirement.

(2) Hospitalization in a civilian facility: If the soldier is in a civilian facility when retired, the spouse becomes responsible for those medical costs not covered under the soldier's TRICARE plan. While this is a factor to consider, a death imminent soldier who survives but needs additional hospital level care may be transferred to a VA hospital, where TRICARE is not an issue. The installation Health Benefits Advisor (HBA) should be consulted on this matter.

Frances A. Dennis(202) 782-3064
USPDA Policy Officer
Dennis E. Brower(202)782-3002
USPDA Legal Advisor
(DSN 662)

AAFMAA PEBLO/CAO QUESTIONNAIRE
(No Cover Sheet Required – Page 1 of 1)

AAFMAA
Ft. Myer, VA 22211
FAX # (703) 875-0070

CAO/PEBLO Requesting:_____
Address: _____
_____
Phone: _____
FAX: _____

XI. SERVICE MEMBER DATA

1. NAME: _____ 2. DATE OF BIRTH: MO _____ DAY _____ YR _____

3. PRESENT RANK/GRADE: _____ 4. DATE OF DEATH: MO _____ DAY_____ YR _____

5. SSAN: _____ - _____ - _____

6. PAY ENTRY BASE DATE (PEBD): MO_____ DAY _____ YEAR _____

7. BASIC ACTIVE SERVICE DATE (BASD): MO _____ DAY _____ YEAR _____

8. PRESENT MARITAL STATUS: SINGLE _____ MARRIED _____

9. DATE OF PRESENT MARRIAGE: MO _____ DAY _____ YEAR _____

XII. FAMILY DATA

10. CURRENT SPOUSE NAME: _____

11. SPOUSE DOB: MO _____ DAY _____ YEAR _____

12. CHILDREN:
#1_____ DOB: MO _____DAY _____YR _____

#2_____ DOB: MO _____DAY _____YR _____

#3_____ DOB: MO _____ DAY _____ YR _____

#4_____ DOB: MO _____ DAY _____ YR _____

#5_____ DOB: MO _____ DAY _____ YR _____

#6_____ DOB: MO _____ DAY _____ YR _____
Please complete ALL date fields. Dates are more important than names if names are not readily available.
FOR AAFMA USE: PROCESS DATE: _____ INITIALS: _____

APPENDIX G

INFORMATION PAPER

DAJA-LA
25 March 1999

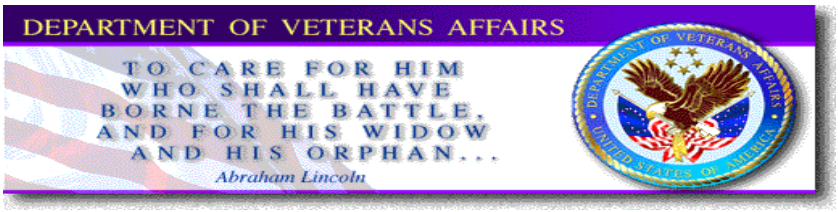
SUBJECT: Accelerated Death Benefit - SGLI

1. PURPOSE: To provide information on obtaining an accelerated death benefit for terminally ill SGLI policy holders.

2. FACTS.

a. The President signed in to law on Veterans Day (November 11) as part of the Veterans Programs Enhancement Act. Implementation date was February 9, 1999. Interim final rule under review.

b. The Department of Veterans Affairs will issue rules soon. Watch VA's web site for more details: http://www.va.gov.



c. Holders of Servicemen's Group Life Insurance (SGLI) or Veterans Group Life Insurance (VGLI) who have been diagnosed as terminally ill may receive up to half the face value of their SGLI/VGLI policy as a lump sum - $5,000 increments up to 50 percent available.

d. To qualify for the accelerated benefit, the policyholder must be diagnosed as having a life expectancy of less than 9 months. The member's subsequent SGLI/VGLI premiums will be reduced to reflect the remaining face value of the policy. The election may not be made more than once, and it will be irrevocable.

e. Not taxable - under the new law, the accelerated death benefit payment "shall not be considered income or resources for purposes of determining eligibility for or the amount of benefits under any Federal or federally-assisted program or for any other purpose."

f. Send proof of policy coverage & medical diagnosis to

Office of Servicemen's Group Life Insurance (OSGLI)
213 Washington Street
Newark, NJ 07102-2999
1-800-419-1473

COL Hancock/703-588-6708

APPENDIX H

P 170639Z DEC 99
FM CDRPERSCOM ALEXANDRIA VA //TAPC-PED-A//

MILPER MESSAGE NR 00-67
SUBJECT: **MILITARY FUNERAL HONORS**

1. THIS MILPER MESSAGE WILL EXPIRE NO LATER THAN JAN 2002.

2. MILITARY FUNERAL HONORS HAVE BECOME A STATUTORY BENEFIT TO ALL VETERANS EFFECTIVE 1 JANUARY 2000 WITH THE SIGNING OF THE NATIONAL DEFENSE AUTHORIZATION ACT 2000. CASUALTY AREA COMMANDS (CACS) MUST ENSURE THEY ESTABLISH MILITARY FUNERAL HONORS TEAMS TO MEET A SIGNIFICANT INCREASE IN REQUESTS ANTICIPATED FROM FAMILIES FOR FUNERAL HONORS. CACS HAVE THE ULTIMATE RESPONSIBILITY FOR PROVIDING MILITARY FUNERAL HONORS. CACS ARE RESPONSIBLE TO ENSURE PROPER DECORUM FOR MILITARY FUNERAL HONORS INCLUDING APPROPRIATELY TRAINED PERSONNEL AND PROPER EQUIPMENT, STANDARDIZED HONORS PROCEDURES, AND QUALITY CONTROL OF MILITARY FUNERAL HONORS TEAMS CONSISTENT WITH DEPARTMENT OF THE ARMY STANDARDS.

3. OSD HAS DEFINED "VETERANS" (FOR ELIGIBILITY FOR MILITARY FUNERAL HONORS)AS ANY PERSON WHO:

A. SERVED IN THE ACTIVE MILITARY, NAVAL, OR AIR SERVICE (AS DEFINED IN 38 U.S.C. 101(24)) AND WHO WAS DISCHARGED OR RELEASED THEREFROM UNDER CONDITIONS OTHER THAN DISHONORABLE; OR B. WAS A MEMBER OR FORMER MEMBER OF THE SELECTED RESERVE DESCRIBED IN 38 U.S.C. 2301(F)

(1) COMPLETED AT LEAST ONE ENLISTMENT AS A MEMBER OF THE SELECTED RESERVE OR, IN THE CASE OF AN OFFICER, COMPLETED THE INITIAL OBLIGATED SERVICE AS A MEMBER OF THE SELECTED RESERVE; OR
(2) WAS DISCHARGED BEFORE COMPLETION OF THE PERSON'S INITIAL ENLISTMENT AS A MEMBER OF THE SELECTED RESERVE OR, IN THE CASE OF AN OFFICER, PERIOD OF INITIAL OBLIGATED SERVICE AS A MEMBER OF THE SELECTED RESERVE, FOR A DISABILITY INCURRED OR AGGRAVATED IN LINE OF DUTY; OR

(3) DIED WHILE A MEMBER OF THE SELECTED RESERVE.

C. MILITARY BURIAL HONORS MAY NOT BE FURNISHED IN THE CASE OF A PERSON WHOSE LAST DISCHARGE FROM THE SELECTED RESERVE WAS UNDER DISHONORABLE CONDITIONS.

D. IN ACCORDANCE WITH 10 U.S.C. 985, MILITARY BURIAL HONORS MAY NOT BE FURNISHED FOR ANY INDIVIDUAL CONVICTED OF A CAPITAL OFFENSE UNDER FEDERAL OR STATE LAW FOR WHICH THE PERSON WAS SENTENCED TO DEATH OR LIFE WITHOUT PAROLE.

E. MILITARY FUNERAL HONORS FOR VETERANS WHO SERVED IN THE ARMY AIR CORPS OR THE ARMY AIR FORCE WILL BE PROVIDED BY THE U.S.AIR FORCE, UNLESS THE VETERAN'S FAMILY SPECIFICALLY ASKS FOR AN ARMY BURIAL HONORS TEAM.

F. PROOF OF ELIGIBILITY FOR MILITARY BURIAL HONORS CEREMONIAL FOLDING AND PRESENTATION OF THE INTERMENT FLAG AND PLAYING SHOULD BE REQUESTED FROM THE NEXT-OF-KIN.

4. AS OF 1 JANUARY 2000, A TWO-SERVICE MEMBER TEAM TO PERFORM THE OF TAPS IS THE MINIMUM REQUIREMENT FOR ALL VETERAN FUNERALS UPON RECEIPT OF A REQUEST FROM A FAMILY MEMBER OR HIS/HER REPRESENTATIVE. THIS MAY BE A REQUEST FROM A FUNERAL DIRECTOR OR VETERAN SERVICE ORGANIZATION (VSO). ONE OF THE MEMBERS OF THE TEAM MUST BE A MEMBER OF THE DECEASED VETERAN'S SERVICE. THE CHIEF OF STAFF, ARMY IS CURRENTLY REVIEWING THIS POLICY. HE MAY WITHIN THE NEXT SEVERAL MONTHS ENLARGE THE ARMY REQUIREMENT TO PROVIDE A BIGGER DETAIL AND TO EXPAND THE HONORS RENDERED. IN THE MEANTIME, FOR ANY REQUESTED VETERANS' FUNERAL, CACS MUST ENSURE A MINIMUM OF TWO SOLDIERS.

5. PROCEDURES: THE FOLLOWING PROCEDURES WILL BE IMPLEMENTED TO ENSURE COMPLIANCE WITH THE MILITARY FUNERAL HONORS PORTION OF NDAA 2000 (AN ABBREVIATED CHECKLIST IS PROVIDED AT PARAGRAPH 9). PREPARATION FOR FUNERAL HONORS BEGINS WITH THE REQUEST FOR ARMY ASSISTANCE USING THE DOD HOTLINE AS FOLLOWS:

A. REQUESTS FOR MILITARY FUNERAL HONORS WILL BE INITIATED BY THE NEXT-OF-KIN, OR HIS/HER AUTHORIZED REPRESENTATIVE (IN MOST CASES THE FUNERAL DIRECTOR), TO THIS 24 HOUR SYSTEM AT 1-877-MIL-HONR (1-877-645-4667). THE REQUESTOR WILL BE ASKED BY AUTOMATIC DEVICE THE BRANCH OF SERVICE OF THE DECEASED VETERAN AND THE STATE AND COUNTY THAT THE INTERMENT WILL BE MADE. THE REQUESTOR WILL THEN BE AUTOMATICALLY TRANSFERRED TO THE APPRORIATE CAC FOR SERVICE. DOD HAS DIRECTED THAT ALL REQUESTS FOR MILITARY FUNERAL HONORS MUST BE ANSWERED BY THE CAC WITHIN 12 HOURS FROM WHEN THE REQUEST IS MADE, NOT FROM WHEN THE REQUEST IS RECEIVED. AN ALTERNATIVE IS TO CONTACT A CAC DIRECTLY.

B. ONCE THE ARMY CAC IS ALERTED, IT MUST ARRANGE FOR THE DETAIL TO ARRIVE AT THE INTERMENT SITE AT THE APPROPRIATE TIME IN ORDER TO PROVIDE GRAVESIDE HONORS BY THE PLAYING OF TAPS AND THE FLAG FOLDING AND PRESENTATION TO THE APPROPRIATE FAMILY MEMBER. THE LEADER OF THE DETAIL HAS A NUMBER OF RESPONSIBILITIES. THESE INCLUDE CONTACTING THE FUNERAL DIRECTOR TO CONFIRM THE DATE, TIME AND LOCATION OF THE INTERMENT SERVICE. THE LEADER WILL ENSURE THAT THE FUNERAL DIRECTOR HAS OBTAINED A FLAG AND WILL BRING A BACKUP FLAG TO THE CEREMONY "JUST IN CASE" IT IS NEEDED. THE LEADER WILL CONFIRM AND COORDINATE PARTICIPATION OF THE SECOND MEMBER OF THE DETAIL. ONCE EVERYTHING IS COORDINATED, THE FINAL PREINTERMENT ACTIVITY IS TO TRAIN AND REHEARSE THE DETAIL. A MANDATORY TRAINING ITEM IS TO CAREFULLY WATCH A COPY OF THE VIDEO DEMONSTRATION TAPE PROVIDED BY DOD TO EACH INSTALLATION. ON THE DAY OF THE INTERMENT CEREMONY, THE DETAIL LEADER WILL CONFIRM ARRANGEMENTS WITH THE FUNERAL DIRECTOR. HE/SHE WILL WORK OUT NECESSARY CUES AT THE INTERMENT SITE WITH THE FUNERAL DIRECTOR.

C. THE RENDITION OF TAPS MAY BE BY A BUGLER OR BY DEVICE. THE CAC WILL CONDUCT AN ACTIVE SEARCH FOR A BUGLER. BUGLER SUPPORT MAY BE FROM AN ARMY BAND (ACTIVE OR RESERVE COMPONENT), CONTRACTED, OR VOLUNTARY. IF A BUGLER IS NOT AVAILABLE, THE CAC WILL USE THE HIGH QUALITY RECORDING PROVIDED BY OSD ON COMPACT DISK OF THE U.S. ARMY BAND BUGLER. MANY NATIONAL AND PRIVATE CEMETERIES HAVE SOUND SYSTEMS THAT PLAY TAPS AT THE INTERMENT SITE. HOWEVER, CACS CANNOT ASSUME AVAILIBILITY OF SUCH AND MUST POSSESS A SUFFICIENT NUMBER OF HIGH QUALITY PORTABLE CD PLAYERS TO PROVIDE THEIR OWN SOUND SYSTEM AT FUNERALS. RECOMMENDED IS A "BOOM BOX" SYSTEM THAT IS EASILY HEARD BY ALL ATTENDEES AT THE INTERMENT CEREMONY. BEFORE DEPARTING FOR A FUNERAL, THE DETAIL LEADER MUST ASCERTAIN IF A SOUND SYSTEM IS AVAILABLE OR IF THE CAC MUST PROVIDE A SOUND SYSTEM TO THE HONORS DETAIL.

D. THE DETAIL WILL ARRIVE AT THE INTERMENT SITE EARLY AND CONDUCT A RECONNAISSANCE AND REHEARSAL. PART OF THE REHEARSAL SHOULD BE THE SELECTION OF A LOCATION OUT OF SIGHT OF THE MOURNERS FOR THE BUGLER OR CD PLAYER THAT WILL SOUND TAPS. THE DETAIL LEADER WILL SET UP AND TEST THE CD PLAYER, ENSURING THE UNIT AND ITS REMOTE CONTROL ARE WORKING PROPERLY. ONCE EVERYTHING IS PREPARED, THE DETAIL LEADER WILL POSITION THE DETAIL IN THEIR DESIGNATED PLACE PRIOR TO THE ARRIVAL OF THE FUNERAL CORTEGE. THE DETAIL LEADER WILL POSITION HIMSELF NEAR THE RECORDING DEVICE; THE OTHER MEMBER(S) WILL BE POSITIONED NEAR THE FOOT OF THE GRAVE. THE LEADER WILL BRING THE TEAM TO "ATTENTION" AND "PRESENT ARMS" AS THE REMAINS ARE CARRIED TO THE GRAVESITE BY CIVILIAN PALLBEARERS. HE WILL COMMAND "ORDER ARMS" WHEN THE REMAINS HAVE BEEN PLACED ON THE LOWERING DEVICE. AT THE CONCLUSION OF THE COMMITTAL SERVICE, THE DETAIL LEADER WILL SOUND "TAPS" ELECTRONICALLY OR DIRECT THE BUGLER TO SOUND "TAPS". INSTALLATIONS MUST ENSURE THAT TRAINING FOR DETAILS INCLUDES INSTRUCTION ON ENSURING THE RECORDING DEVICE IS POSITIONED OUT OF SIGHT FROM THE FAMILY AND PLAYED IN A DIGNIFIED MANNER AS SHOWN IN THE TRAINING VIDEO FROM DOD. ALTHOUGH THE CD SHOULD BE OUT OF SIGHT, ACTIVATING THE "PLAY" BUTTON SHOULD BE PERFORMED WITH PRECISION AND DISTINCTION BY BENDING OVER, ACTIVATING THE RECORDER AND THEN STEPPING BACK ONE STEP BACK AND ASSUMING THE POSITION OF "ATTENTION". EACH DETAIL MEMBER WILL "PRESENT ARMS" DURING "TAPS" AND "ORDER ARMS" AT ITS COMPLETION. AT THE CONCLUSION OF "TAPS", THE DETAIL LEADER MUST ENSURE THE RECORDING DEVICE IS TURNED OFF; AND THEN PROCEED IN A DIGNIFIED AND MILITARY MANNER TO THE HEAD OF THE CASKET.

E. FOR FLAG FOLDING, UPON CONCLUSION OF "TAPS", THE REPRESENTATIVE AND HIS ASSISTANT WILL MOVE CLOSER TO THE CASKET. ONCE THE FLAG IS SECURED AND RAISED, THE DETAIL WILL TAKE THREE SIDE STEPS AWAY FROM THE MOURNERS. AFTER COMPLETING THE THREE SIDE STEP MOVEMENT, THEY WILL FOLD THE FLAG. WHEN THE FLAG IS PROPERLY FOLDED, THE DETAIL ASSISTANT WILL HAND THE FLAG TO THE DETAIL LEADER AND POST TO A POSITION NEXT TO THE SIDE OR REAR OF THE FAMILY. THE DETAIL LEADER WILL PRESENT THE FLAG TO THE NEXT OF KIN. THE FLAG WILL NOT BE PRESENTED UNTIL THE ASSISTANT DEPARTS. THE LEADER WILL THEN PRESENT THE FLAG TO THE NEXT OF KIN USING THE FOLLOWING WORDING:

"THIS FLAG IS PRESENTED ON BEHALF OF A GRATEFUL NATION AND THE UNITED STATES ARMY AS A TOKEN OF APPRECIATION FOR YOUR LOVED ONE'S HONORABLE AND FAITHFUL SERVICE." AFTER PRESENTING THE FLAG, THE DETAIL LEADER WILL OFFER CONDOLENCES.

F. THERE ARE TWO TYPES OF REMAINS; CASKETED AND CREMATED. EACH HAS ITS OWN SEQUENCE OF EVENTS FOR THE GRAVESIDE SERVICE. THE SEQUENCE DESCRIBED ABOVE IS FOR CASKETED REMAINS. PROCEDURES FOR CREMATED REMAINS ARE DIFFERENT ONLY IN THAT THE FLAG IS CARRIED BEHIND THE URN AND PLACED ON A DISPLAY DEVICE NEXT TO THE URN. AFTER "TAPS" IS SOUNDED, THE FLAG IS UNFOLDED, SECURED AND REFOLDED APPROXIMATELY THREE SIDE STEPS FROM THE MOURNERS. IT IS THEN PRESENTED TO THE NEXT OF KIN IN THE SAME MANNER AS FOR CASKETED REMAINS DESCRIBED ABOVE. THE DETAIL LEADER WILL THEN OFFER CONDOLENCES.

G. THE RESERVE COMPONENTS (RC) ALONG WITH THE ACTIVE ARMY WILL BE REQUIRED TO PARTICIPATE IN THIS SENSITIVE MISSION. THE ARMY NATIONAL GUARD (ARNG) AND U.S. ARMY RESERVE (USAR) WILL HAVE A SINGLE POINT OF CONTACT (POC) IN EACH ARNG STATE AREA COMMAND (STARC) OR USAR REGIONAL SUPPORT COMMAND (RSC) TO WHICH A REQUEST FOR ASSISTANCE CAN BE MADE. WHEN THE ACTIVE ARMY IS UNABLE TO SUPPORT THE REQUEST OR IT IS MORE PRUDENT FOR THE RC UNIT TO PROVIDE HONORS, THE CAC WILL CONTACT THE RC POC AT EITHER THE STARC OR RSC FOR MILITARY FUNERAL HONORS SUPPORT. IF THE RC POC HAS NOT RESPONDED TO THE REQUEST FOR SUPPORT WITHIN TWO HOURS, THE CAC SHOULD AGAIN CONTACT THE RC POC. WHEN THE RC IS UNABLE TO SUPPORT THE REQUEST FOR ASSISTANCE, THE CAC WILL BE RESPONSIBLE FOR PROVIDING THE HONORS. CACS WILL BE PROVIDED A LIST OF RC POCS BY THE CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM. CACS SHOULD ESTABLISH MEMORANDUMS OF AGREEMENT WITH RC POCS, AND OTHER MILITARY ORGANIZATIONS WITHIN THEIR AREA OF RESPONSIBILITY SPELLING OUT REQUIREMENTS AND RESPONSIBILITIES.

H. VETERAN SERVICE ORGANIZATIONS HAVE INDICATED A WILLINGNESS TO CONTINUE TO ASSIST THE ARMY IN SUPPORTING MILITARY FUNERAL HONORS. CACS WILL MAINTAIN LIAISON WITH THESE ORGANIZATIONS WITHIN THEIR AREA OF RESPONSIBILITY AND ENSURE THAT HONORS PROCEDURES ARE REHEARSED WITH VSO MEMBERS TO ENSURE A PROFESSIONAL CEREMONY IS CONDUCTED.

6. DOD/HQDA ASSISTANCE: IN ORDER TO FACILITATE PERFORMANCE OF THE PROVISIONS OF NDAA 2000, DOD AND HQDA ARE PROVIDING THE FOLLOWING ELEMENTS OF ASSISTANCE:

A. A TOLL FREE TELEPHONE ACCESS SYSTEM HAS BEEN ESTABLISHED. THIS LINE WAS ACTIVATED ON 17 DECEMBER 1999 AND WILL BE OPERATIONAL ON 1 JANUARY 2000.

B. A WEBSITE HAS BEEN ESTABLISHED FOR ACCESS BY FUNERAL DIRECTORS, ACTIVE AND RETIRED SOLDIERS, VETERANS, AND FAMILIES FOR THE PURPOSE OF ASSISTING THEM IN OBTAINING INFORMATION PERTAINING TO FUNERAL HONORS AND A REGISTRY OF THOSE GROUPS AUTHORIZED TO PROVIDE HONORS. THIS INCLUDES THE DOD MILITARY FUNERAL HONORS INFORMATION WEBSITE AT HTTP://WWW.MILITARYFUNERALHONOR.OSD.MIL. THE WEBSITE CONTAINS INFORMATION ON WHAT CONSTITUTES MILITARY FUNERAL HONORS, ELIGIBILITY FOR MILITARY FUNERAL HONORS, FLAG AND HEADSTONE INFORMATION, AND FREQUENTLY ASKED QUESTIONS. THE WEBSITE WILL BE FULLY OPERATIONAL ON 1 JANUARY 2000.

C. INFORMATIONAL KITS WILL BE DISTRIBUTED TO ALL FUNERAL HOMES TO INFORM AND UPDATE THEM ON MILITARY FUNERAL HONORS PROCEDURES. THESE KITS WILL BE DISTRIBUTED FROM DOD PRIOR TO 1 JANUARY 2000. THE KITS WILL CONTAIN A BROCHURE RELATING TO MILITARY FUNERAL HONORS, A DIRECTORY OF FUNERAL HONORS POCS, FLAG FOLDING PROTOCOL, FREQUENTLY ASKED QUESTIONS REGARDING DEATH BENEFITS, AND A COPY OF THE PORTION OF THE LAW RELATING TO FUNERAL HONORS.

D. THE MILITARY DISTRICT OF WASHINGTON WILL ALSO PRODUCE A VIDEO TRAINING TAPE TO INSTRUCT TEAM MEMBERS ON THE PROPER CUSTOMS AND COURTESIES FOR MILITARY FUNERAL HONORS INCLUDING HOW TO PROPERLY FOLD THE FLAG. THESE TRAINING TAPES WILL BE DISTRIBUTED BY DOD TO ALL ACTIVE AND RESERVE COMPONENT UNITS. LOCAL REPRODUCTION IS AUTHORIZED AND ENCOURAGED, PROVIDED THE QUALITY IS NOT DEGRADED. THE MDW WILL ALSO PROVIDE ON SITE TRAINING UPON REQUEST AND AT CAC EXPENSE. REQUESTS SHOULD BE COORDINATED THROUGH THE CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM.

E. DOD WILL DISTRIBUTE CDS OF A RECORDING OF TAPS PRODUCED BY THE UNITED STATES ARMY BAND TO ALL CACS AND ACTIVE AND RESERVE COMPONENT UNITS FOR USE IF A BUGLER IS NOT AVAILABLE. LOCAL REPRODUCTION IS AUTHORIZED AND ENCOURAGED.

7. ARBITRARY GEOGRAPHIC LIMITS OF SUPPORT WITHIN CACS ARE ELIMINATED. CACS ARE TO PROVIDE APPROPRIATE MILITARY FUNERAL HONOR SUPPORT TO ALL VETERANS WITHIN THEIR COMPLETE GEOGRAPHIC AREA OF RESPONSIBILITY.

8. CACS MUST STILL ENTER MILITARY FUNERAL SUPPORT DATA INTO THE DOD WEBSITE. CACS HAVE BEEN PROVIDED THE UNIT IDENTIFICATION CODES (UICS) FOR THE WEBSITE. THIS IS A CRITICAL TASK AS THE INFORMATION EXTRACTED BY DOD FROM THE WEBSITE WILL BE USED TO DETERMINE FUTURE FUNDING AUTHORIZATIONS. IN ADDITION, CAC'S WILL SUBMIT A MONTHLY REPORT TO CASUALTY AND MEMORIAL AFFAIRS OPERATIONS CENTER, PERSCOM THAT INCLUDES THE NUMBER OF FUNERAL DETAILS PROVIDED BY "ACTIVE", "RETIREE", AND "VETERAN"; AND THE NUMBER OF SOLDIERS SENT ON EACH MISSION. THIS REPORT WILL BE DUE THE LAST WORKING DAY OF THE MONTH. DATA FROM THIS REPORT WILL BE USED TO BRIEF THE CSA AND WILL HELP DETERMINE FUTURE RESOURCING.

9. REQUEST THE FOLLOWING CHECKLIST PROCEDURES BE INCORPORATED INTO EACH INSTALLATION MILITARY FUNERAL HONORS SOP.

A. BEGIN COORDINATION WITH THE FUNERAL HONORS REQUESTOR ASAP; HOWEVER THE REQUEST MUST BE ANSWERED WITHIN 12 HOURS AFTER THE REQUEST IS MADE.

B. DETERMINE IF THE REQUIREMENT CAN BE FULFILLED USING TRAINED CAC PERSONNEL.

C. IF NOT, REQUEST ASSISTANCE FROM EITHER THE RSC OR STARC POC OR OTHER MILITARY ORGANIZATION IN YOUR AOR. THE RC SHOULD BE CONTACTED ON A ROTATING BASIS.

D. IF SUPPORT CAN NOT BE PROVIDED BY THE RC, REQUEST ASSISTANCE FROM A SISTER SERVICE. IF ASSISTANCE IS NOT FORTHCOMING, THE CAC IS STILL RESPONSIBLE FOR PROVIDING THE MILITARY FUNERAL HONORS.

E. IF REQUIREMENT CANNOT BE ACCOMODATED, COORDINATE WITH FUNERAL DIRECTOR TO HAVE THE INTERMENT HELD AT A DIFFERENT DATE AND/OR AT A DIFFERENT TIME WHEN THE REQUEST CAN BE ACCOMODATED.

F. CONFIRM ARRANGEMENTS WITH THE REQUESTOR.

G. ENSURE THE FUNERAL DETAIL IS PROPERLY TRAINED AND EQUIPPED WITH THE PROPER UNIFORM PRIOR TO DISPATCH.

H. ENSURE SUCCESSFUL EXECUTION OF THE BURIAL HONORS DETAIL AT GRAVESITE.

I. UPON COMPLETION OF THE MISSION, ENTER DATA INTO THE DOD WEBSITE AND SUBMIT THE MONTHLY REPORT TO PERSCOM.

10. FULL MILITARY FUNERAL HONORS FOR ACTIVE DUTY SOLDIERS AND MEDAL OF HONOR RECIPIENTS CONTINUE TO CONSIST OF A TEAM OF AT LEAST NINE SOLDIERS. THIS TEAM CONSISTS OF AN OIC OR NCOIC, BUGLER, CHAPLAIN, AND A SIX-SOLDIER PALLBEARER/ FIRING PARTY. THIS NINE-SOLDIER TEAM IS THE ARMY STANDARD FOR FULL MILITARY FUNERAL HONORS. LIKEWISE, CURRENT ARMY POLICY FOR MILITARY FUNERAL HONORS RENDERED TO RETIREES UPON REQUEST CONTINUES TO BE FULL MILITARY FUNERAL HONORS WHEN RESOURCES ARE AVAILABLE. IF FULL MILITARY FUNERAL HONORS ARE NOT POSSIBLE FOR A RETIREE, THE REQUIREMENT TO FURNISH A TWO-SERVICE MEMBER TEAM TO FOLD AND PRESENT THE INTERMENT FLAG AND TO RENDER TAPS REMAINS IN EFFECT. ONE OF THE MEMBERS OF THE TEAM MUST BE A MEMBER OF THE DECEASED RETIREE'S SERVICE.

11. THE POC FOR THIS ACTION AT PERSCOM IS LTC STEWARD OR MR. ELLIS AT DSN 221-5314/5304.

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, DC 20301-4000

1 May 02

FORCE MANAGEMENT POLICY

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY (HUMAN RESOURCES)
PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE NAVY (PERSONNEL PROGRAMS)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (FORCE MANAGEMENT AND PERSONNEL)
DIRECTOR, DEFENSE FINANCE AND ACCOUNTING SERVICE

SUBJECT: Survivor Benefit Plan (SBP) Annuities when Member Dies on Active Duty

This memorandum provides uniform guidance to the Services and the Defense Finance and Accounting Service (DFAS) for implementing section 642, National Defense Authorization Act for Fiscal Year 2002 (NDAA 2002), Public Law 107-107, December 28, 2001. This section of law provides new benefits under the Uniformed Services Survivor Benefit Plan (SBP). The new benefits are effective for deaths of members that occur on or after September 10, 2001. New benefits are provided in the case of most members not yet retirement eligible. Increased benefit amounts are provided in most cases of members eligible for retired pay. No new benefits are provided when the death of a member is determined to be not in Line-of-Duty.

Policies, procedures, and responsibilities for the new provisions of law are attached. These include the criteria for a qualified death, the determination of qualified beneficiaries, the computation of benefits, and guidelines for Line-of-Duty determinations necessary to support the award of benefits. Since these provisions apply retroactively, Services should identify qualified recipients and DFAS should initiate annuity payments as quickly as possible.

Separate guidance is being staffed to govern the practice of imminent death retirements. Deaths on active duty do not result in any Insurable Interest or Supplemental SBP benefits. All SBP elections remain available to all members who are retired, whether for length of service or for disability.

John A. Van Alstyne
Lieutenant General, U. S. Army
Deputy Assistant Secretary
(Military Personnel Policy)

Attachment: As stated
cc: See distribution list

Distribution List:

Deputy Chief of Staff for personnel, U.S. Army
Deputy Chief of Naval Operations (Manpower and Personnel), U.S. Navy
Deputy Chief of Staff for Personnel, U.S. Air Force
Deputy Chief of Staff Manpower and Reserve Affairs, U.S. Marine Corps
Assistant Commandant for Human Resources, U.S. Coast Guard
Director, Division of Commissioned Personnel, U/S. Public Health Service
Director, National Oceanic and Atmospheric Administration Corps Operations-NC
DoD Chief Actuary
Deputy General Counsel (Fiscal)

Implementing Policies, Procedures, and Responsibilities
Section 642, P.L. 107-107, December 28, 2001

General

Section 642, Public Law 107-107, December 28, 2001, provides expanded benefits under the Uniformed Services Survivor Benefit Plan (SBP) for the qualified survivors of eligible members who die in the Line-of-Duty while serving on active duty. These benefits are effective for a death on or after September 10, 2001. Active duty is that duty defined by 10 U.S.C. 101(d)(1). This includes reserve members on active duty for annual training duty, whether or not their orders specify a period of more than 30 days. Reserve members serving periods of inactive duty training are not included.

This document provides uniform guidance as to when a death qualifies survivors for benefits, which survivor or survivors are entitled to an annuity, and how annuities will be computed. It also establishes general guidelines for Line-of-Duty determinations and prescribes implementing responsibilities and procedures.

Qualified Deaths

A qualified death under the provisions of Section 1448(d), title 10, United States Code [10 U.S.C. 1448(d)], as amended by P.L. 107-107, is a death of a member on active duty who:

(1) Died in the Line-of-Duty, or
(2) Died not in the Line-of-Duty, but was retirement eligible as described by 10 U.S.C. 1448(d)(1)(A).

Benefits for those described in (2) are unchanged by the amendments of P.L. 107-107.

Guidance is provided below concerning the determination of whether the member's death was in the Line-of-Duty.

The death of a member is not a qualified death if the member was not on active duty, or was on active duty but whose death is determined to be not in the Line-of-Duty and the member was not eligible to retire as described in 10 U.S.C. 1448(d)(1)(A). The survivors of members whose death is not qualified are not entitled to SBP benefits under the provisions of 10 U.S.C. 1448(d), but may be entitled to other benefits under existing laws and regulations.

Qualified Annuitants

The amendments of P.L. 107-107 did not change the law with respect to who may receive an SBP annuity based on a qualified death (as described above). The only changes were in the criteria for a qualified death and the method of calculating the annuity.

In general, an annuity is payable to a surviving spouse unless an annuity is payable to a former spouse under the provisions of 10 U.S.C. 1448(d)(3). A former spouse annuity takes precedence over any other SBP annuity payable because of the service of the deceased member.

Under the provisions of 10 U.S.C. 1448(d)(2), a member's children qualify to receive an annuity under these provisions only when a former spouse annuity does not apply and either there is no surviving spouse or the surviving spouse later dies. A member's children are not qualified annuitants when a surviving spouse loses entitlement to an annuity as a result of a remarriage before age 55.

No other persons are qualified to receive benefits under these provisions. No benefits will be paid under these provisions to a person with an insurable interest as described in 10 U.S.C. 1448(b)(1).

Annuity Amounts

The annuity payable for a qualified death (as described above) under the provisions of 10 U.S.C. 1448(d) will be computed with the SBP base amount equal to the amount of retired pay that would have been paid to the member had that member been retired on the date of death as follows:

(1) For a qualified death in the Line-of-Duty, the SBP base amount is equal to the retired pay as if the member were retired with total (100%) disability under 10 U.S.C. 1201 (which is equal to 75% of the appropriate retired pay base as described below). The annuity is then normally either 55 or 35 percent of the SBP base amount, following the provisions of 10 U.S.C. 1451(c).

(2) For a qualified death not in the Line-of-Duty and the member is retirement eligible under 10 U.S.C. 1448(d)(1)(A), the SBP base amount is equal to the retired pay as if the member were retired for length of service under the applicable section of law for the respective service of the deceased member (which is 2.5% multiplied by the qualifying creditable years of service multiplied by the appropriate retired pay base as described below). The annuity is then normally either 55 or 35 percent of the SBP base amount, following the provisions of 10 U.S.C. 1451(c).

Retired Pay Base: The retired pay base applicable to a qualified death will be calculated as described under 10 U.S.C. 1406 or 1407 as appropriate to the deceased

member's Date of Initial Entry on Military Service (DIEMS). Further, such annuity calculations shall be made without regard to any reduction in the multiplier that would apply to a member under 10 U.S.C. 1409(b)(2) who elected to receive a bonus under the provisions of 37 U.S.C. 322. Cost-of-living adjustments (COLAs), however, shall be applied in the same percentage that would have applied to the member's retired pay (had the member not died). Therefore, for members who elected the bonus under 37 U.S.C. 322, the COLA applied to the SBP annuity will be reduced pursuant to 10 U.S.C. 1401a(b)(3).

No supplemental SBP (SSBP) benefits will be paid under these provisions to a surviving spouse of a member who dies while serving on active duty. Any SBP annuity paid under these provisions to a surviving spouse shall be reduced by the amount of dependency and indemnity compensation to which the surviving spouse is entitled under 38 U.S.C. 1311(a). Any such reduction shall be effective on the date of the commencement of the period of payment of such compensation.

Line-of-Duty Determinations

For purposes of determining eligibility for SBP benefits under 10 U.S.C. 1448(d), a service member's death will generally be considered to have occurred in Line of Duty unless: (1) the death occurred while the member was not serving on active duty, (2) the death was the result of the member's own intentional misconduct or willful negligence, or (3) the death occurred during a period of unauthorized absence.

For purposes of this section, the military services will make a written finding as to whether a member's death on or after September 10, 2001 was in the Line-of-Duty while the member was serving on active duty. The written finding must describe the circumstances under which the member died, and it must also address whether the death was caused by the member's own intentional misconduct or willful negligence and whether the death occurred during a period of unauthorized absence.

With the exception of the requirements contained in this memorandum and other current DoD guidance governing Line of Duty determinations and investigations, each military service should continue to apply its own existing regulatory guidance and procedures. A copy of all Line-of-Duty determinations will be retained by the military services for the period required by agency regulations but not less than three years, and will be subject to a DoD Joint Service review to be conducted approximately one year after implementation of this law. The DoD Joint Service review will assess uniformity and consistency among the military services with respect to this provision of law.

Responsibilities

The military services must review the death of each member who died on active duty on or after September 10, 2001, to ascertain whether the death was in the Line-of-Duty and

whether there are any qualified survivors entitled to SBP payments. The military services will inform the Defense Finance and Accounting Service (DFAS) of their Line-of-Duty determinations. The determination may be recorded in the remarks section of the DD Form 1300, Report of Casualty; Block 10 of the DD Form 261, Report of Investigation Line of Duty and Misconduct Status; or on any other form authorized under individual Service regulations. However, all Line of Duty (LOD) determinations must be supported by a written finding which describes the circumstances of death that support that LOD determination, as outlined in the guidance above. DFAS does not require a copy of the written finding, only an official communication from the Service to indicate the Service's determination that the death is in the Line-of-Duty -- Yes or No.

DFAS shall establish and pay SBP annuities to qualified survivors for qualified deaths as prescribed above.

The Office of the Under Secretary of Defense (Personnel and Readiness) in conjunction with the military services will convene a DoD Joint Service review board to review Line-of-Duty findings for consistency and uniformity among the military services after approximately one year of experience with the statute. This review board will make recommendations as appropriate to ensure consistency and uniformity.

DAPE-RSO 11 Jun 2002

MEMORANDUM FOR ARMY RETIREMENT SERVICES OFFICERS

SUBJECT: Supplemental Guidance for Army Use -- Survivor Benefit Plan (SBP) Annuities when Member Dies on Active Duty

1. The information that follows amplifies portions of DOD's implementing guidance, dated 1 May 2002, subject as above (see Encl 1). Recommend you read the DOD guidance first; then digest this Army guidance. While P.L. 107-107 was *effective* on 28 Dec 2001, Section 642 is *retroactive* to **10 Sep 2001**, and applies to all active duty deaths since that date.

2. Topics are presented in the same order in both documents: General, Qualified Deaths, Qualified Annuitants, Annuity Amounts, Line of Duty (LOD) Determinations, and Responsibilities.

a. **General**. The key phrase is *expanded benefit* (in Line 1). What has *expanded* is the pool of eligible soldiers who receive a benefit. Prior to passage of Sect. 642, P.L. 107-107, only soldiers who died on active duty *after* becoming retirement-eligible provided an SBP annuity to *qualified* survivors. Now, ALL soldiers who die on active duty share that entitlement. LOD findings are a factor, and are explained separately.

b. **Qualified Deaths**.

(1) ALL deaths on active duty are *qualifying deaths* **unless***:* the member was not retirement-eligible **and** death was determined to be LOD-NO. If the soldier who dies on active duty IS retirement-eligible, it is a qualifying death regardless of LOD findings. However, SBP amounts are impacted. See *Table 2.*

(2) Reserve Component (RC) Soldiers**.** The same provisions apply to RC soldiers who die while serving ON ACTIVE DUTY. If they die while in an "**IN**active Duty for Training (IDT)" status, they do not qualify. "Retirement-eligible" RC soldiers are those who have received their Letter of Notification of Eligibility for Retired Pay at Age 60 *(i.e., "20-year letter").*

- Table 1 -
(LOD and SBP)

Years of Qualifying Service	**Line of Duty-- Yes or No?**	**SBP Payable? (To Eligible Beneficiaries)**
Less than 20	LOD-Yes	Yes
Less than 20	LOD-No	**No**
More than 20	LOD - Yes	Yes
More than 20	LOD - No	Yes

c. **Qualified Annuitants**.

(1) Relation to Death Imminent Retirement Processing. Do not confuse WHO is eligible for SBP under **this** law with what occurs as a result of "death imminent retirement" processing. Soldiers who die on active duty are not retired. We do not make an SBP election on their behalf. Instead, the law DIRECTS who is eligible and in what amount. Certain SBP election options that exist under death imminent retirement scenarios do not exist under this law (e.g., insurable interest for a parent; Supplemental SBP; and child only coverage when there is a spouse). The Army is considering their position now on continuing death imminent processing. You will be informed of the final policy. DOD will consider the Services' positions and make a recommendation to Congress on this topic in July 2002. As of this date, the Army continues expeditious retirements.

(2) Title 10, U.S. Code. This law (Chap. 73) identifies WHO is a qualified SBP annuitant under death-on-active-duty circumstances, just as it did prior to this law change for active duty deaths *of retirement-eligible soldiers.*

(3) The ONLY qualified SBP beneficiaries are:

- Spouse
- Children (if no spouse or former spouse)
- Former Spouse (if court order/written agreement exists)

(4) Child Eligibility. Unlike normal SBP, a child, when part of "spouse/FS and child" coverage, can ONLY receive SBP if the parent ***dies*** -- **not** if the parent becomes ineligible due to remarriage before age 55 -- even though the child remains eligible. And, of course, if there is no spouse or FS, "child only" coverage is established by law.

(5) Former Spouse Coverage.

(a) It is important that the soldier's records are closely examined for evidence of court-ordered former spouse SBP coverage. Typically, such an order would exist with "senior" soldiers - those who on date of divorce/agreement, the court considered well-vested in a military career.

(b) If such an order/agreement is uncovered, the former spouse must receive the annuity (if eligible). Under a former spouse election, only the soldier's children from his/her union with the former spouse are qualified.

(c) Why is it important to exert effort in uncovering an existing former spouse order? There are two main reasons: 1) it complies with the court's intent; and 2) it saves potential duplicate payments by the government. If the government incorrectly pays a surviving spouse, and an eligible former spouse later applies, the government likely first, would opt *not* to collect back the incorrectly paid spouse annuity; and second, would be obligated to pay the former spouse retroactively -- resulting in a double payment.

(d) The former spouse eligibility provision is not new. This has always been the case with active duty deaths of retirement-eligible members. We simply reemphasize it.

d. **Annuity Amounts**.

(1) The SBP annuity is 55% (or 35% if over age 62) of the soldier's retired pay "entitlement," as if the soldier had been retired for total disability (i.e., using a 75% multiplier). The exception is the case of a retirement-eligible soldier who dies under LOD-No conditions, in which case the multiplier is derived from actual years/months of service. (See sample below.)

(2) LOD determinations affect the annuity as follows:

- Retirement-Eligible; LOD-Yes: Final Pay (or high-36) X 75%; Retired Pay "entitlement" X 55% (or 35%) = SBP Annuity.
- Retirement-Eligible; LOD-No: Final Pay (or high-36) X multiplier based on years/months of service (e.g., 20 years = 50%); Retired Pay "entitlement" X 55% (or 35%) = SBP Annuity.
- NOT Retirement-Eligible; LOD-Yes: Final Pay (or high-36) X 75%; Retired Pay "entitlement" X 55% (or 35%) = SBP Annuity
- NOT Retirement-Eligible; LOD-No: No SBP Annuity Payable!

- Table 2 -
(LOD-Related Examples)

LOD (Y/N)	Grade	Yrs/Mos Svc	DIEMS Date	Final Pay/ High-36	Multiplier	Ret Pay Entit	SBP Amount	DIC Amount	SBP Left After DIC Offset
Y	E3	2/0	1 May 00	$1000	.75	$750	$412	$935	$0
N	E3	2/0	1 May 00	$1000	N/A	N/A	N/A	$935*	N/A
Y	E8	22/0	1 May 80	$3573	.75	$2679	$1473	$935	$538
N	E8	22/0	1 May 80	$3573	**.55**	$1965	$1080	$935*	$145

(3) Career Status Bonus (CSB) Receipt Implications. If a soldier received the CSB, the normal reductions to the multiplier that would have been applied to the soldier's retired pay, are not applied to the annuitant. However, reduced cost-of-living adjustments (COLAs) for spouses of soldiers who received the CSB are applied to the annuity just as they would have to retired pay.

(4) Supplemental SBP (SSBP). SSBP is not payable in any active-duty death situation.

(5) Dependency & Indemnity Compensation (DIC). The VA's DIC offsets SBP annuities dollar-for-dollar to spouses. Both SBP and DIC to children are fully payable.

e. **Line-of-Duty (LOD) Determinations**.

(1) DOD has given the Services some leeway by allowing them to develop their own processes to meet Congress's direction regarding LOD. These requirements must be met by the Services:

- Describe circumstances under which the member died.
- Address whether the death was caused by the member's own intentional or willful negligence.
- Address whether the death occurred during a period of unauthorized absence.

(2) Army will apply its own regulatory guidance and procedures. A Joint Service Review Board will audit the Services within one year for uniformity and consistency.

*** LOD-No may or may not result in a denial of DIC by the VA.**

f. **Responsibilities**.

(1) DA Casualty & Memorial Affairs Operations Center:

- Will render LOD findings in which the circumstances are clearly in line of duty. In cases where the circumstances are questionable, the deceased soldier's commander will be required to conduct a LOD investigation.
- Will coordinate with DA Officer Retirement/Separations Section and EREC, Indianapolis, IN, in preparing statements of service.
- Will provide the statement of service and the record of determination to DFAS-Cleveland Center (DFAS-CL); DFAS-CL POC: Army Liaison.
- Will ascertain whether there are survivors for SBP.
- DA Casualty POC: Mr. Homer Henderson, 703-325-6047; DSN 221-6047; Homer.Henderson@hoffman.army.mil.

(2) Commanders:

- Will conduct LOD investigations on death cases, as required.

(3) DFAS-Cleveland Center (DFAS-CL):

- Will establish pay accounts and provide account data to appropriate DFAS personnel.
  -- Note: Responsibility for establishing and maintaining both retiree *and* annuitant accounts is scheduled to consolidate at the Cleveland pay center. Proposed transfer dates from the Denver center to Cleveland are: New Accounts, NLT 30 Jul 02; All Accounts, NLT 30 Aug 02. These dates are subject to change.
- Will suspense annuity applications received from families if prior to account establishment, and process them at the first opportunity.

(4) Retirement Services Officers (RSO):

- Will estimate pay entitlement and SBP annuity amounts for the Casualty Assistance Officer (CAO) and/or survivors.
- Will provide personnel information as requested by DA Casualty and/or DFAS.
- Will counsel CAOs and families residing in their area of responsibility on SBP and associated government benefits.

3. HQDA POC is Avis Allen, CML (703)325-2695; DSN 221-2695; email Avis.Allen@hoffman.army.mil.

// signed //

Encls

JOHN W. RADKE
Chief, Army Retirement Services

APPENDIX J

Survivor Benefits Hypothetical – Death on Active Duty in the Line of Duty.

Staff Sergeant - 10 years time in service, a spouse, and two children ages 3 & 5

```
FAMILY INFORMATION RECORD AS OF  1APR2003
  SSG SAMPLE ONLY                PHONE HOME:  ?            WORK:  ?
  MILITARY STATUS: ACTIVE                MILITARY SVC: ARMY
  CURRENT PROMOTION DATE :  1NOV2002     PREVIOUS PROMOTION DATE:  1JUN1997
  DATE INIT ENTRY MIL SVC:  1FEB1993     PAY ENTRY BASIC DATE:  1MAR1993
  BASIC ACT SVC DATE:  1MAR1993

  EMAIL ADDR:  ?
  FAX NUMBER:  ?

  ----------------------------------FAMILY DATA--------------------------------
           NAME           BIRTHDATE BIRTH/MARRIAGE     SSN        REMARKS
                                     RECORDS AT AAFMAA IN VAULT
  MEMBER: SAMPLE           15JAN1974        NO        121-11-1111
  SPOUSE: JANE              9FEB1972        NO             ?
    DATE MARRIED:  1APR1975                 NO
   CHILD: JOHN            14FEB1998         NO             ?
   CHILD: SUSAN           12MAR2000         NO             ?
==========================================================================================


*  549           SSG SAMPLE ONLY                                      1Apr2003
Based on data you have provided, your assumed active duty death
(Service-Connected) would provide these benefits to the family:
                                   Family Benefits            Monthly Annual
Reason for Change                 SS  +   VA  +   SBP    =      Total   Total
Member's death   Apr-2003       $1917 + $1422 +    $0    =     $3,339  40,068
John is 18       Feb-2016        1578 +  1185 +     0    =      2,763  33,156
Susan is 16      Mar-2016         789 +  1185 +     0    =      1,974  23,688
Susan is 18      Mar-2018           0 +   948 +     0    =        948  11,376
Jane is 62       Feb-2034         838 +   948 +     0    =      1,786  21,432
Funds available to designated beneficiaries:
                    Social Security Death Benefit     $255
                    Death Gratuity                   $6,000
                    SGLI                           $250,000
                    Commercial Life Insurance          ?
                                                 ----------
                        Total                      $256,255
While SS, VA, and SBP are adjusted for inflation by law, the amounts above
are in today's dollars. Projections above are estimates.
Government agencies will provide exact amounts.
SBP amount is zero because DIC (VA) entitlement is greater than SBP.


                Department of Veterans Affairs (VA)
                Dependent Education Assistance (DEA)

  Recipients           From     Age     Until    Age

 Jane                1-Apr-2003  31   1-Apr-2013  41  45mos X $670 =  $30,150

 John               14-Feb-2016  18  14-Feb-2024  26  45mos X $670 =  $30,150
 Susan              12-Mar-2018  18  12-Mar-2026  26  45mos X $670 =  $30,150
                                                                     -------
Current full time student rate is $ 670 per month as of Jan 2002      $90,450
Maximum number of school months is 45 (undergraduate or graduate)
Spouse must be unmarried - Children may be married
DEA not paid if attending a federally funded academy or while on active duty
```

Prepared By And Provided Courtesy Of The
Armed Forces Services Corporation
Mr. Brad Snyder, CLU
President & CEO
http://www.AFSC-USA.com

Survivor Benefits Hypothetical – Death on Active Duty in the Line of Duty

Sergeant First Class with 15 years time in service, a spouse, and two children ages 7 & 9

```
*  549          FAMILY INFORMATION RECORD AS OF  1APR2003          PAGE   1
 SFC SAMPLE ONLY                 PHONE HOME:  ?            WORK:  ?
 MILITARY STATUS: ACTIVE                MILITARY SVC: ARMY
 CURRENT PROMOTION DATE :  1MAR2002     PREVIOUS PROMOTION DATE:     ?
 DATE INIT ENTRY MIL SVC:  1FEB1988     PAY ENTRY BASIC DATE:  1MAR1988
 BASIC ACT SVC DATE:  1MAR1988

 EMAIL ADDR:  ?
 FAX NUMBER:  ?

 ----------------------------------FAMILY DATA---------------------------------
           NAME           BIRTHDATE BIRTH/MARRIAGE     SSN        REMARKS
                                     RECORDS AT AAFMAA IN VAULT
 MEMBER: SAMPLE           15JAN1970        NO        121-11-1111
 SPOUSE: JANE              9FEB1972        NO             ?
   DATE MARRIED:  1APR1992                  NO
  CHILD: SUSAN           12MAR1994         NO             ?
  CHILD: JOHN            14FEB1996         NO             ?
==================================================================================
```

Based on data you have provided, your assumed active duty death (Service-Connected) would provide these benefits to the family:

Reason for Change		Family Benefits SS	+	VA	+	SBP	=	Monthly Total	Annual Total
Member's death	Apr-2003	$2070	+	$1422	+	$55	=	$3,547	42,564
John is 16	Feb-2012	1663	+	1422	+	55	=	3,140	37,680
Susan is 18	Mar-2012	832	+	1185	+	55	=	2,072	24,864
John is 18	Feb-2014	0	+	948	+	55	=	1,003	12,036
Jane is 62	Feb-2034	883	+	948	+	0	=	1,831	21,972

Funds available to designated beneficiaries:

Social Security Death Benefit	$255
Death Gratuity	$6,000
SGLI	$250,000
Commercial Life Insurance	?
Total	$256,255

While SS, VA, and SBP are adjusted for inflation by law, the amounts above are in today's dollars. Projections above are estimates.
Government agencies will provide exact amounts.
SBP reduced because of the integration with spouse's VA DIC entitlement.

Department of Veterans Affairs (VA)
Dependent Education Assistance (DEA)

Recipients	From	Age	Until	Age		
Jane	1-Apr-2003	31	1-Apr-2013	41	45mos X $670 =	$30,150
Susan	12-Mar-2012	18	12-Mar-2020	26	45mos X $670 =	$30,150
John	14-Feb-2014	18	14-Feb-2022	26	45mos X $670 =	$30,150

Current full time student rate is $ 670 per month as of Jan 2002						$90,450

Maximum number of school months is 45 (undergraduate or graduate)
Spouse must be unmarried - Children may be married
DEA not paid if attending a federally funded academy or while on active duty

Prepared By And Provided Courtesy Of The
Armed Forces Services Corporation
Mr. Brad Snyder, CLU
President & CEO
http://www.AFSC-USA.com

Survivor Benefits Hypothetical – Death on Active Duty in the Line of Duty

Captain with 10 years time in service, a spouse, and two children ages 3 & 5

```
*  3            CPT SAMPLE H ONLY                                20Mar2003
      Based on data you have provided, your assumed active duty death
      (Service-Connected) would provide these benefits to the family:
                                          Family Benefits            Monthly Annual
      Reason for Change                    SS  +   VA  +   SBP    =      Total   Total
      Member's death   Mar-2003         $2703 + $1422 +  $602    =     $4,727  56,724
      James is 18      Jan-2016          2316 +  1185 +   602    =      4,103  49,236
      Susan is 16      Jan-2017          1158 +  1185 +   602    =      2,945  35,340
      Susan is 18      Jan-2019             0 +   948 +   602    =      1,550  18,600
      Mary is 62       Jan-2036          1230 +   948 +    38    =      2,216  26,592
      Funds available to designated beneficiaries:

                     Social Security Death Benefit     $255
                       Death Gratuity                  $6,000
                       SGLI                          $250,000
                                                     ----------
                            Total                    $256,255

      While SS, VA, and SBP are adjusted for inflation by law, the amounts above
      are in today's dollars. Projections above are estimates.
      Government agencies will provide exact amounts.
      SBP reduced because of the integration with spouse's VA DIC entitlement.
      SBP reduced at spouse's age 62 because of integration with social security.


              Department of Veterans Affairs (VA)
                      Dependent Education Assistance (DEA)

        Recipients           From     Age     Until    Age

       Mary               20-Mar-2003  29  20-Mar-2013  39  45mos X $670 =  $30,150

       James               3-Jan-2016  18   3-Jan-2024  26  45mos X $670 =  $30,150
       Susan               4-Jan-2019  18   4-Jan-2027  26  45mos X $670 =  $30,150
                                                                            -------
      Current full time student rate is $ 670 per month as of Jan 2002      $90,450
      Maximum number of school months is 45 (undergraduate or graduate)
      Spouse must be unmarried - Children may be married
      DEA not paid if attending a federally funded academy or while on active duty
```


Prepared By And Provided Courtesy Of The
Armed Forces Services Corporation
Mr. Brad Snyder, CLU
President & CEO
http://www.AFSC-USA.com

Survivor Benefits Hypothetical – Death on Active Duty in the Line of Duty

Lieutenant Colonel with 22 years time in service, a spouse, and two children ages 14 & 16

```
*  5         TML LTC SAMPLE F ONLY                                    20Mar2003
Based on data you have provided, your assumed active duty death
(Service-Connected) would provide these benefits to the family:
                                     Family Benefits            Monthly Annual
Reason for Change                  SS  +   VA  +   SBP    =      Total   Total
Member's death   Mar-2003       $3018 + $1422 + $1394    =     $5,834  70,008
John is 18       Feb-2005        2588 +  1185 +  1394    =      5,167  62,004
Jan is 16        Feb-2005        1294 +  1185 +  1394    =      3,873  46,476
Jan is 18        Feb-2007           0 +   948 +  1394    =      2,342  28,104
Susan is 62      Jan-2025        1374 +   948 +   542    =      2,864  34,368
Funds available to designated beneficiaries:
                    Social Security Death Benefit     $255
                    Death Gratuity                  $6,000

SGLI                          $250,000
                                                 ----------
                       Total                     $256,255
While SS, VA, and SBP are adjusted for inflation by law, the amounts above
are in today's dollars. Projections above are estimates.
Government agencies will provide exact amounts.
SBP reduced because of the integration with spouse's VA DIC entitlement.
SBP reduced at spouse's age 62 because of integration with social security.


                Department of Veterans Affairs (VA)
                Dependent Education Assistance (DEA)

  Recipients           From     Age     Until    Age

 Susan              20-Mar-2003  40  20-Mar-2013  50  45mos X $670 =  $30,150

 John                1-Feb-2005  18   1-Feb-2013  26  45mos X $670 =  $30,150
 Jan                10-Feb-2007  18  10-Feb-2015  26  45mos X $670 =  $30,150
                                                                     -------
Current full time student rate is $ 670 per month as of Jan 2002      $90,450
Maximum number of school months is 45 (undergraduate or graduate)
Spouse must be unmarried - Children may be married
DEA not paid if attending a federally funded academy or while on active duty
```

Prepared By And Provided Courtesy Of The
Armed Forces Services Corporation
Mr. Brad Snyder, CLU
President & CEO
http://www.AFSC-USA.com

CHAPTER 33

SENIOR OFFICERS LEGAL ORIENTATION

MEDICAL/LEGAL ISSUES

Outline of Instruction

I. Introduction.

II. The Physical Disability Evaluation System

A. References.

1. DoD Dir 1332.18, Separation or Retirement for Physical Disability (4 November 1996).

2. AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (1 September 1990).

3. AR 40-501, Standards of Medical Fitness (28 March 2002).

B. General.

1. Purpose.

a) Personnel management.

(1) Effective and fit military.

(2) Quality retention.

b) Provide full and fair hearing.

(1) To determine soldier's physical fitness for continued military service.

(2) Determine the level and type of compensation the soldier is due.

(3) Take action to separate or retire the soldier when his or her career is interrupted due to physical disability.

2. Proponent. The proponent for the U.S. Army Physical Disability Evaluation System is the U.S. Army Physical Disability Agency (USAPDA), FGS-WRAMC, Washington DC 20307-5001.

a) Commanded by The Adjutant General of the Army, a brigadier general billet.

b) The Deputy Commander, USAPDA, runs day-to-day operations. Normally a line Colonel.

c) POC for physical disability evaluation policy and procedures is DSN 295-7326 or commercial (301) 295-7326.

d) Maintains a file copy of individual case processing for five years and a computer database of disability processing back to fiscal year 1981.

C. Structure.

1. **Standard for fitness.** A soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the soldier's office, grade, rank, or rating.

2. **Entering the Physical Disability Evaluation System.**

a) **Referred by a Medical Evaluation Board (MEBD).** When a soldier has received maximum benefit of medical treatment for a condition that may render a soldier unfit for further military service, the medical treatment facility (MTF) conducts a MEBD to determine whether the soldier meets the medical retention standards of AR 40-501, chap 3. If the soldier does not meet medical retention standards, he or she is referred to a Physical Evaluation Board (PEB) to determine physical fitness under the policies and procedures of AR 635-40.

b) **Referred by the MOS Medical Retention Board (MMRB).** The MMRB is an administrative screening. It is convened by the soldier's command to evaluate the ability of soldiers with permanent 3 or 4 medical profiles to physically perform their primary military occupational specialty (MOS) in a worldwide field environment. Referral to a MEBD/PEB is one of four actions the MMRB Convening Authority (MMRBCA) may direct. If it directs referral to a MEBD/PEB, the conduct of the PEB is mandatory, whether or not the soldier meets medical retention standards.

c) **Referred as the result of a fitness for duty medical examination.** When a commander believes a soldier is unable to

perform MOS-related duties due to a medical condition, the commander may refer the soldier to the MTF for evaluation. If evaluation results in a MEBD, and it determines that the soldier does not meet medical retention standards, the soldier is referred to a PEB.

d) **Referred as a result of HQDA action.** The Commander, PERSCOM, upon recommendation of The Surgeon General, may refer a soldier to the responsible MTF for medical evaluation as described in para 3, above. PERSCOM also directs referral to a PEB when it disapproves the MMRB recommendation to reclassify a soldier.

3. **PEBLO counseling.** When a soldier is referred for a MEBD/PEB, the Physical Evaluation Board Liaison Officer (PEBLO) assigned to the MTF counsels the soldier on MEBD/PEB findings and the related rights and benefits. If the MTF determines that the soldier is not mentally competent, the PEBLO counsels the designated next-of-kin.

4. **Presumption of fitness.** Notwithstanding the standard of fitness given above, when a soldier applies for length of service retirement, is within nine months of mandatory retirement, or has been approved for certain separation actions, or is referred for physical disability evaluation, the soldier enters the disability system under the presumption that he or she is physically fit. This is known as the Presumption of Fitness Rule.

a) The soldier is presumed fit because he or she has continued to perform military duty up to the point of separation for reasons other than physical disability.

b) The presumption originated in 1973 as a result of congressional dissatisfaction over general officers retiring for physical disability when they were eligible for length of service retirement. It was incorporated into the DoD directive governing military disability evaluation and applies to all soldiers.

c) The philosophy behind the rule is that military disability compensation is for career interruption, not compensation for service-incurred conditions. The latter falls under the purview of the Department of Veterans Affairs.

5. **Overcoming the presumption of fitness.** Application of the Presumption of Fitness Rule does not mandate a finding of fit. The presumption is overcome if the preponderance of evidence establishes either of the circumstances described below, per DoD Dir 1332.18.

a) The soldier, because of disability, was physically unable to perform adequately the duties of office, grade, rank, or rating.

This circumstance is aimed at long-term conditions. Efficiency reports or other performance-related evidence must show the soldier was not reasonably performing the duties of his or her office, rank, grade, or rating. Essentially, the burden of proof is on the soldier to establish unfitness. Ability to perform duties in the future is not an issue under these circumstances.

b) Acute, grave illness or injury, or other deterioration of the soldier's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the soldier unfit for further duty. Future duty ***is*** a factor in this circumstance.

6. **Rating the disability.** Once the PEB has determined the soldier to be unfit, it is required by law to determine the physical disability rating using the Veterans Schedule for Rating Disabilities.

7. **Physical disability disposition.** Retirement of separation with severance pay is based on the criteria in 10 U.S.C. chap 61.

a) Per 10 U.S.C. chap 61, three factors determine disability disposition:

(1) The rating percentage.

(2) The stability of the disabling condition.

(3) Total active years of federal service.

b) For service-incurred or -aggravated conditions not involving misconduct, the dispositions are described below.

(1) **Permanent disability retirement** occurs if the condition is permanent and stable and rated at a minimum of 30 percent, or if the soldier has 20 years or more of active federal service.

(2) **Temporary disability retirement** occurs if the soldier is entitled to permanent disability retirement except that the disability is not stable for rating purposes. However, stability does not include latent impairment – what happens in the future. If placed on the TDRL, the soldier is required to undergo a periodic medical reexamination within 18 months followed by PEB evaluation. The soldier may be retained on the TDRL or until final determination is made. While the law provides for a maximum tenure on the TDRL of five years, there is no entitlement be retained on the TDRL fall all five years if one's condition improves.

(3) **Continued on active duty (COAD).**

8. **Military disability compensation is based on disposition, rank, and years of service.**

a) For permanent disability retirement or placement on the TDRL, compensation is based on the higher of two computations:

(1) Disability rating times retired pay base; or the years of service percentage computation (2.5 x years of service) times retired pay base. Examples: SFC, 16 years service, 50% disabled, receives $459.60 per month. CPT, 6 years service, 75% disabled, receives $365.34 per month.

(2) Soldiers on the TDRL receive no less than 50 percent on their retired pay base. Retired pay base depends upon when the soldier entered the service. For soldiers on active duty prior to 8 September 1980, it is the basic pay of the highest rank held.

b) Disability severance pay equals two months base pay for every year of service not to exceed 12 years. This is the same for all disability ratings less than 30 percent. Examples: MAJ, ten years service, 20% disabled, receives a one-time, lump-sum payment of $74,424. SGT, five years service, 30% disabled, receives a one-time, lump-sum payment of $14,622.

D. Procedure.

1. **PEB.** The PEB, composed of a field grade president and personnel management officer and medical member, initially conduct an informal adjudication. This is a records review of the MEBD and applicable personnel documents without the soldier present. The informal decision is forwarded to the PEBLO for counseling of the soldier.

a) If the soldier concurs with the findings, the case is forwarded tot he Physical Disability Branch (PDB), a part of the U.S. Army Physical Disability Agency (USAPDA), to accomplish disposition.

b) If the soldier disagrees with the findings, the soldier has the right to submit a rebuttal for reconsideration and the right to elect a formal hearing. At the time of election for a formal hearing, the soldier may also elect to appear or not appear and to be represented by the regularly appointed military counsel or to have counsel of his choice at no expense to the government. He may also request essential witnesses to testify in his behalf.

c) If the soldier agrees with the findings of the formal hearing, the case if forwarded to PDB for disposition. If the soldier does not agree and submits a statement of rebuttal, the case is forwarded to USAPDA for review.

2. If USAPDA confirms the PEB findings, the case is forwarded to PDB for disposition. If USAPDA modifies the PEB findings, the revised findings are forwarded to the solder for election. If the soldier nonconcurs and provides a statement of rebuttal, the case will be forwarded to the U.S. Army Physical Disability Appeal Board for final decision if the rebuttal does not result in a reversal of the modification.

3. While both the Army and the Department of Veterans Affairs (DVA) use the VASRD, not all the general policy provisions of the VASRD apply to the Army. Consequently, disability ratings may vary between the two agencies. The Army rates only conditions determined to by physically unfitting, compensating for loss of a career. The DVA may rate any service-connected impairment, thus compensating for loss of civilian employability. Another difference is the term of the rating. The Army's ratings are permanent upon final disposition. The DVA ratings may fluctuate with time, depending upon the progression of the condition. Further, the Army's disability compensation is affected by years of service and basic pay while DVA compensation is a flat amount based upon the percentage rating received.

E. Calculating Disability Rating, or "20 + 20 = 36".

1. Combined Ratings Table.

a) When a soldier has more than one compensable disability, the percentages are combined rather than added (except when a "Note" in the VASRD indicates otherwise).

b) This results from the consideration of the individual's efficiency, as affected by the most disabling condition first, then by the less disabling conditions in the order of their severity.

c) A person having a 60 percent disability is considered to have a remaining efficiency of 40 percent. If he has a second disability rated at 20 percent, then he is considered to have lost 20 percent *of that remaining 40 percent*, thus reducing his remaining efficiency to 32 percent. Hence, a 60 percent disability combined with a 20 percent disability results in a combined rating of 68 percent.

2. Bilateral factor.

a) When a partial disability results from injury or disease of both arms, or both legs, or of paired skeletal muscles, or pelvic or

shoulder girdle injuries resulting in extremity impairment, the ratings for the disabilities of the right and left sides will be combined as usual, and 10 percent of this value (called the Bilateral Factor) will be added (not combined) before proceeding with further combinations, or converting to degree of disability.

b) The Bilateral Factor will be applied to such bilateral disabilities before other combinations are carried out, and the rating for such disabilities, including the Bilateral Factor as above, will be treated as one disability for the purpose of arranging in order of severity and for all further combinations.

F. Conclusion.

III. DOD HIV/AIDS POLICY

A. References.

1. DoD Directive 6485.1, Human Immunodeficiency Virus-1 (HIV-1), 19 March 1991.

2. Army Regulation 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (1 June 1996).

3. Air Force Instruction 48-135, Human Immunodeficiency Virus Program (1 August 2000).

4. SECNAV Instruction 5300.30C, Management Of Human Immunodeficiency Virus-1 (Hiv-1) Infection In The Navy And Marine Corps (14 March 90); 12792.4, Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome in the Department of the Navy Civilian Workforce (12 January 1989).

5. Centers for Disease Control and Prevention. HIV/AIDS Surveillance Report, 1997; Vol. 9, No.1. (Copies of the HIV/AIDS Surveillance Report are available free from the CDC National AIDS Clearinghouse, P.O. Box 6003, Rockville, MD 20849-6003; telephone 1-800-458-5231 or 1-301-519-0023.)

B. The Disease.

1. In General.

2. Disease Progression.

3. Detection.

4. Transmission.

5. Classifications. DODD 6485.1, E2.2; AR 600-110, para. 2-1b. See also Appendix A, this outline.

C. DOD and Service Policies.

1. Accession Testing. HIV positive personnel are not eligible for enlistment or appointment in the military, both Active and Reserve Component. DODD 6485.1, para. 4.1; AR 600-110, para. 1-14a.

a) HIV screening for enlisted applicants is conducted at Military Entrance Processing Stations (MEPS). DODD 6485.1, para. 4.2; AR 600-110, para. 3-3b.

b) Officer applicants are screened during pre-contracting, pre-scholarship, or pre-appointment physical examinations. DODD 6485.1, E5; AR 600-110, para. 3-3h.

(1) U.S. Military Academy cadets, midshipmen and persons attending the Uniformed Services University of Health Sciences are separated and discharged with an honorable discharge if HIV positivity is the sole basis for discharge. The Superintendent may delay separation until the end of the current academic year or allow graduation in final year. DODD 6485.1, para. E5.1.3; AR 600-110, para. 3-3h(1).

(2) ROTC cadets are disenrolled at the end of the academic term in which the HIV infection is confirmed. No recoupment action is initiated. DODD 6485.1, para. E5.1.2; AR 600-110, para. 3-3h(2).

(3) OCS candidates who are in their initial entry training are disenrolled from the program and discharged with an honorable or entry level separation, as appropriate. DODD 6485.1, para. E5.1.1; AR 600-110, para. 3-3h(3).

(4) OCS candidates who have completed entry level training are disenrolled, reassigned in their original enlisted specialty and administered in accordance with Service regulations for enlisted personnel. DODD 6485.1, para. E5.1.1 AR 600-110, para. 3-3h(3).

(5) No waiver for HIV infection is authorized.

(6) All personnel disenrolled from officer programs who are separated shall be given preventive medicine counseling and advised to seek civilian treatment.

c) Prior service personnel required to meet accession medical fitness standards must have a negative HIV test no more than 6 months before enlistment in the Selected Reserves. Active duty soldiers transferring to or enlisting in the Selected Reserves without a break in service must have a negative HIV test within the preceding 24 months. AR 600-110, para. 3-3g.

2. Disease Surveillance.

a) DOD Policy (DODD 6485.1, para. E6.2) requires periodic testing with the following priority for military personnel:

(1) Deployed or deploying to high HIV risk area,

(2) Permanent assignment overseas,

(3) Temporary deployment overseas,

(4) Specific categories (medical personnel, drug and alcohol rehab, prenatal patients) per service regulation, and,

(5) All remaining personnel per service regulation.

b) Army. Active duty and Reserve Component soldiers are periodically screened for evidence of HIV infection.

(1) All active duty soldiers are tested routinely at least biennially. AR 600-110, paras. 2-2h and 2-7. Testing is keyed to birth month screening. AR 600-110, para. 2-7b.

(2) Active duty and Reserve Component soldiers who PCS to overseas (defined as outside the 50 states, Puerto Rico, and

the District of Columbia) must have a negative HIV test within the 6 months prior to their portcall. AR 600-110, paras. 2-2k and 2-7e.

(3) Active duty soldiers who are scheduled for overseas TDY or deployment that will not exceed 179 days must have a negative HIV test within the 24 months prior to the departure date. AR 600-110, para. 2-2k(1).

(4) Active duty personnel scheduled for overseas TDY or deployment exceeding 179 days must have a negative HIV test within the 6 months prior to departure date. AR 600-110, para. 2-2k(2).

(5) Reserve Component soldiers are tested every 5 years. Reserve Component soldiers may also receive testing during their periodic physicals. AR 600-110, paras. 2-2i and 2-8.

(6) Reserve Component personnel scheduled for overseas duty: Less than 30 days - 24 months prior to departure date. Greater than 30 days - 6 months prior to their reporting date. AR 600-110, para. 2-2k(3).

c) Family members and other health care beneficiaries are not required to have an HIV test. However, DA policy is to routinely inform patients that physicians will order any necessary clinically indicated tests, to include HIV, unless the patient specifically declines such tests. DODD 6485.1, para. E6.2.5. Generally, HIV testing is "clinically indicated" under the circumstances listed below:

(1) All blood donors;

(2) All patients with suspicious illnesses;

(3) All persons admitted to Army hospitals unless tested during the proceeding twelve months;

(4) All persons seen at sexually transmitted disease clinics;

(5) Certain blood recipients;

(6) Sexual partners of HIV-infected individuals;

(7) All pregnant women at the time of their initial prenatal evaluation and at time of delivery, if the mother is identified as being at high risk;

(8) All persons enrolled in alcohol and drug rehabilitation programs (Tracks II or III);

(9) Adults undergoing physical examinations;

(10) All persons presenting at emergency rooms with evidence of trauma, such as shootings, stabbings, IV drug use, and rape;

(11) All persons with acute or chronic hepatitis B infection; and

(12) All persons who are dead on arrival or who die in emergency rooms.

d) DOD Civilians.

(1) Civilian employees and applicants for employment may not be mandatorily tested for HIV except to comply with valid host nation laws. DODD 6485.1, para. 6.10.

(2) HIV-positive civilian employees are treated no differently than other employees. They are permitted to work as long as their performance is acceptable and they do not pose a significant safety or health threat to themselves or others. They are considered handicapped employees within the meaning of the Rehabilitation Act of 1973 and are entitled to a reasonable accommodation if otherwise qualified. AR 600-110, paras. 1-14k, l, and m.

3. Health Education. DODD 6485.1, para. E6.3.

a) Upon identification, military health authorities will counsel the individual and others at risk regarding:

(1) Significance of a positive antibody test;

(2) Mode of transmission of the virus;

(3) Appropriate precautions, personal hygiene, and measures required to minimize transmission;

(4) Need to advise any past and future sexual partners of their infection;

(5) That they are ineligible to donate blood, organs, or semen;

(6) To always use condoms (except with a spouse who is fully informed of the soldier's condition).

(7) Counseling is recorded on DA Form 5669-R. Commanders will receive a copy of this form. AR 600-110, para. 2-14d.

(8) Soldiers who violate the preventative medicine counseling are subject to administrative separation. AR 600-110, paras. 4-12e and 4-13c.

b) The medical assessment of each exposure to or case of HIV infection includes an epidemiological assessment (EPI) of the potential transmission of HIV to other persons. AR 600-110, para. 7-3.

c) Commander's Counseling. AR 600-110, para. 2-14.

(1) Commanders formally counsel soldiers who test positive for the HIV antibody immediately after the post-diagnosis preventive medicine counseling. Commander counseling includes:

(a) A direct order to verbally advise all sexual partners of their infection prior to engaging in intimate sexual behavior or other behavior involving a significant risk of HIV transmission (such as behavior that would result in the exchange of blood or seminal fluid between persons);

(b) A direct order to use condoms when engaging in sexual relations (including, but not limited to, sexual intercourse, oral-genital, or anal-genital contact) with persons other than their spouse or with their spouse unless the spouse freely and knowingly consents to such relations after being informed of the soldier's infection (See also AR 600-110, para. 2-13b(9);

(c) A direct order not to donate blood, sperm, tissues, or other organs; and

(d) A direct order to inform all health care workers of their infection when seeking medical or dental treatment.

(2) Commanders record counseling on DA Form 4856 (General Counseling Form) (see Appendix B, this outline). AR 600-110 includes a reproducible sample form.

(3) Commanders maintain the counseling form in unit personnel files. Upon reassignment, commanders forward the form in a sealed envelope to the gaining commander. AR 600-110, paras. 2-14d and 2-17.

4. Retention.

a) Repeal of 10 Feb 96 statute mandating immediate discharge of HIV-positive service members. Repeal of amendments to 10 U.S.C. § 1177 effective 24 Apr 96.

b) Current Policy.

(1) Active duty personnel with evidence of HIV infection are referred for medical evaluation board to evaluate and document their fitness for continued service regardless of clinical staging. DODD 6485.1, para. 4.3 and E2.4.2

(2) HIV positive service members are managed in the same manner as personnel with other progressive illnesses.

(3) Soldiers meeting medical retention standards may reenlist, if otherwise eligible. AR 600-110, para. 4-5a.

(4) Personnel showing no evidence of clinical illness (generally associated with WR-1 or WR-2 stages) or other indications of immunologic or neurologic impairment related to HIV infection are not separated solely on the basis of HIV positivity. DODD 6485.1, para. 4.3; AR 600-110, para. 1-14d.

(5) Reserve Component soldiers with serologic evidence of HIV infection have 120 days to complete a medical evaluation to determine their fitness for continued reserve service. Reservists found medically fit are permitted to serve in the Selected Reserves in a nondeployable billet, if available. AR 600-110, para. 5-17.

5. Assignment Limitations - Current Policy.

a) HIV-positive service members are not deployed overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia). DODD 6485.1, para. 6.16; AR 600-110, paras. 1-14e and 4-2a.

b) Soldiers confirmed HIV positive while stationed overseas are reassigned to the United States as soon as possible, regardless of PCS rules. AR 600-110, para. 4-7.

c) HIV-positive soldiers are NOT assigned to:

(1) Any TOE or MTOE unit. AR 600-110, para. 4-2b. Installation commanders may reassign any HIV-infected soldier from such units to TDA units on their installation, provided the soldier has completed a normal tour. AR 600-110, para. 4-2b; or

(2) USAREC, Cadet Command, or ARNG Full Time Recruiting Force if the soldier's medical condition requires frequent follow up and the unit is not near an Army MTF capable of providing such treatment. Commanders must report these soldiers to PERSCOM for assignment instructions. AR 600-110, para. 4-2b(3).

(3) Military education programs resulting in additional service obligation. AR 600-110, para. 4-2b(2). This limitation does not apply to military schools required for career progression, such as an advanced course or CGSC. See also AR 600-110, para. 4-4.

d) Assignment preclusion from units, programs, organizations, or schools other than those listed in the regulation require HQDA (DAPE-HR) approval. AR 600-110, para. 4-2c.

e) Commanders may not change the assignment of an HIV-infected soldier unless required by this regulation or the soldier's medical condition. AR 600-110, para. 4-2d.

f) Commanders may not group HIV-infected soldiers into the same unit, duty area, or living area unless no other unrestricted units, positions, or accommodations are available. AR 600-110, para. 4-2d.

g) Commissioned officers in DOD sponsored professional education programs are disenrolled from the program at the end of the academic term in which the HIV infection is confirmed. Any additional service obligation incurred by participation in the program is waived. Financial assistance received is not subject to recoupment. AR 600-110, para. 4-2b(2).

h) Family members who are confirmed as HIV positive may accompany their sponsor overseas. The sponsor may request deletion from the overseas assignment based on compassionate reasons or may request an "all others" tour. If the initial diagnosis of a family member occurs while overseas, the sponsor may apply for a compassionate reassignment to the United States. Mandatory PCS of the sponsor will not occur based solely on the HIV positivity of the family member. AR 600-110, para. 4-3 and 6-12.

i) Comply with host nation requirements of HIV screening for DOD civilians. DODD 6485.1, para. 4.10

6. Separation.

a) "Individuals with serological evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of …HIV-1 infection." DODD 6485.1, para.4.3

b) Regular and Reserve Component service members who are determined to be unfit for further duty due to progressive clinical illness or immunological deficiency due to HIV infection are processed for separation or retirement. DODD 6485.1, para. 4.5.

(1) Regular Army and Reserve Component commissioned and warrant probationary officers, who are confirmed HIV positive within 180 days of their original appointment or who report for initial entry training in an AD status (other than ADT) and are confirmed HIV positive within 180 days of reporting to AD, are processed for discharge under the provisions of AR 635-100, Chapter 5, section IX (Elimination of Probationary Officers). AR 600-110, para. 4-12d.

(2) Enlisted soldiers, confirmed HIV positive within 180 days of initial entry on AD, are separated for the convenience of the government for failure to meet procurement medical fitness standards under the provisions of AR 635-200, paragraph 5-11. See AR 600-110, para. 4-13b.

(3) HIV-positive military personnel who fail to comply with lawfully ordered preventive medicine procedures, including the commander's "safer sex" order, are subject to appropriate administrative and disciplinary actions, including separation. AR 600-110, paras. 4-12e, 4-13c, and 2-14c.

(4) HIV-positive military personnel may request separation from the service for the convenience of the government. AR 600-110, paras. 4-12a, b, and 4-13a, b.

7. Limited Use Policy.

a) DOD policy (DODD 6485.1, para. E3) prohibits the use of HIV testing information and information obtained during the EPI as an independent basis for adverse administrative or disciplinary action, except for:

(1) Accession separations;

(2) Voluntary separations;

(3) Armed Service Blood Look Back activities;

(4) Rebuttal or Impeachment purposes consistent with law or regulation;

(5) For administrative or disciplinary actions resulting from disobeying preventative medicine order; and

(6) As an element of proof or aggravation in administrative or criminal action.

b) **Adverse personnel actions** include: court-martial; nonjudicial punishment; line of duty determination; involuntary separation action (other than for medical reasons); administrative or punitive reduction in grade; denial of promotion; a bar to reenlistment; as the basis for an unfavorable entry in a personnel record; as a basis to characterize service or to assign a separation program designator; or in any other action considered an adverse personnel

action (e.g., OER or NCO-ER). DODD 6485.1, para. E3.2.1; AR 600-110, para. 7-3b.

c) The limited use policy does not apply to:

(1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) is first introduced by the soldier.

(2) Disciplinary or other action based on independently derived evidence.

(3) **Nonadverse personnel actions** include such as reassignment; disqualification (temporary or permanent) from a personnel reliability program; denial, suspension, or revocation of a security clearance; suspension or termination of access to classified information; and removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness such as explosive ordnance disposal (a medical evaluation board must determine whether removal from flight status or a similar position is necessary). DODD 6485.1, para. E3.2.3; AR 600-110, para. 4-6.

(4) Any evidence or information derived from sources independent of the epidemiological assessment. AR 600-110, para. 7-4d.

8. Release of Information.

a) HIV data on a soldier is covered by the Privacy Act (5 U.S.C. § 552a).

b) Release is on an internal agency "need to know basis." 5 U.S.C. 552a(b)(1).

c) The service regulations stress the need for extra precautions in protecting HIV records. See, e.g., AR 600-110, paras. 1-12g, 1-13f, 1-14n, and 1-14o(3).

(1) All soldiers are individually and privately notified of all positive HIV test results in a face-to-face interview with a designated physician. AR 600-110, para. 2-12.

(2) Unit commanders will accompany HIV-positive soldiers to the initial notification by medical personnel. Unit commanders will not remain for the EPI. AR 600-110, para. 1-13d.

(3) MEDDAC/MEDCEN will notify commander if HIV-positive soldier requires change in profile status.

d) IAW AR 600-110, para. 2-12f, information concerning an individual's HIV positivity is only released outside DOD in the following circumstances:

(1) Military health care beneficiaries who are determined "at risk" (e.g., spouse of an HIV-positive soldier; See also AR 600-110, para. 6-9) are contacted directly by medical authorities and advised to seek medical evaluation;

(2) Individuals who are not military health care beneficiaries, who are determined "at risk" (e.g., sexual partner of an unmarried HIV-positive soldier), are contacted through the local public health authorities, unless disclosure to the civilian health authorities is itself prohibited by the jurisdiction.

(3) Release of information to local (including host nation) health authorities, concerning the identity of HIV-positive individuals, is done in accordance with the reporting requirements of the local jurisdiction.

e) Spouses of Reserve Component HIV-positive soldiers are notified and offered an opportunity for voluntary HIV testing and counseling. AR 600-110, para. 6-9b.

IV. General Medical Legal Issues Related to Medical Treatment Facilities.

A. Off Duty Employment.

1. References. DOD Directive No. 6025.7, Off-Duty Employment By DOD Health Care Providers (Oct. 21, 1985); Army Reg. 40-1, Medical Services: Composition, Mission, and Functions of the Army Medical Department, para. 1-8 (1 July 1983) (I03, 4 September 1992).

2. Policy.

   a) Military health care providers are available to provide patient care services at all times.

   b) Commissioned and warrant officers of the AMEDD on active duty and full-time civil service or equivalent personnel (40 hours per week) will not engage in off-duty employment without the written approval of the commanding officer.

   c) Interim change 3 to AR 40-1 at para. 1-8b(1) provides that "[o]fficer trainees (in graduate training programs) are prohibited from moonlighting." That includes interns, residents, and fellowship participants.

   d) The regulation is more restrictive for individuals who are paid for giving advice or services to civilian practitioners on the diagnosis or treatment of patients not eligible for DOD medical care. Permission for employment of this nature is limited to those officers who are certified by an American Specialty Board or who are recognized by TSG as having achieved an equivalent level of professional ability. See interim change 3 to AR 40-1, para. 1-8e.

3. Limitations.

   a) Military Duties Take Priority. Military health care providers must advise off-duty employer that military duties take priority and may require the officer to leave civilian employment without notice and/or fail to report at the scheduled time.

   b) No Compensation for Care to DOD beneficiaries. DOD health care provider may not accept compensation, either directly or indirectly, for care rendered to DOD beneficiary.

c) The "16/6/2 Rule." Off-duty employment cannot exceed 16 hours per week; health care provider must have 6 hours rest between off-duty employment and military duties; location of off-duty job cannot exceed 2 hours driving time from place of military duty. Hours and distance limitations do not apply to off-duty employment performed while on leave.

d) Yearly Off-Duty Status Reports. MTF commander must request yearly statement from all DOD health care providers regarding their off-duty employment status. Negative replies are required.

e) Moonlighters Responsible to File Off-Duty Documents. Military health care providers must file application for off-duty employment and supporting documents at the MTF; individuals must notify commander of any changes in their off-duty job prior to the inception of the changes.

f) Moonlighter Responsible for Off-Duty Licensures. AMEDD personnel engaging in civilian employment are responsible for complying with state licensing requirements and with state and federal drug regulations.

g) No Solo Practice. No Physician can engage in solo practice or assume responsibility for a patient on a continuing basis.

h) Civilian Employers Must Acknowledge Limitations in Writing. The employer must acknowledge conditions of employment in writing, accept compensation and availability limitations imposed upon the military officer, and agree not to seek reimbursement from TRICARE/CHAMPUS or from the patient for services provided to a DOD beneficiary by military health care personnel. AR 40-1, (I03), para. 1-8b(5).

B. Dual Compensation Act. 5 U.S.C. § 5536.

1. The Dual Compensation Act prohibits soldiers and DOD civilians from accepting additional Federal pay for performance of “any other service or duty, unless specifically authorized by law.”

2. Applies when other service or duty is in some way connected with the official duty performed or is determined to be incompatible with federal service.

a) An Army physician, moonlighting at a civilian hospital, cannot accept compensation, directly or indirectly, from TRICARE/CHAMPUS, because the physician has a preexisting duty to render care to any TRICARE/ CHAMPUS eligible patient.

b) If already employed by federal government, you cannot perform services for the same or different federal agency while retaining the original federal government position.

3. Medicare and Medicaid Compensation. Military personnel engaged in off-duty employment may accept Medicare or Medicaid compensation for the treatment of non-DOD patients. See AR 40-1, para. 1-2 (IO3, 4 Sep 92).

C. Expert Witness Testimony.

1. Testifying as an Expert Witness. See AR 27-40, chapter 7.

a) General rule is that DA personnel cannot provide opinion or expert testimony except for the U.S.

b) Prohibition applies to former DA personnel when the testimony concerns official information.

c) DA maintains strict impartiality in private litigation.

2. Individuals seeking expert testimony or the disclosure of official information must submit, at least 14 days before the desired date of production, a specific written request setting forth the nature and relevance of the testimony/information sought. Promptly transmit this request to your SJA.

3. Exception for AMEDD personnel: members of the Army medical department or other qualified specialists may testify in private litigation when testimony concerns “patients they have treated, laboratory tests they have conducted, or other action they have taken in the course of their military duties,” and testimony is “limited to factual matters.” Testimony will not extend to "expert or opinion testimony, to hypothetical questions, or to a prognosis." Members of the AMEDD will only provide expert testimony in cases of “exceptional need or unique circumstances.” Such testimony requires HQDA special written authorization. AR 27-40, para. 7-10.

4. Witness Fees. All fees tendered to present DA personnel as an expert or opinion witness, to the extent they exceed actual travel, meals, and lodging expenses of the witness, will be remitted to the United States.

D. Lawsuits Involving Alleged Malpractice by Health Care Providers in Overseas Areas. United States v. Smith, 111 S. Ct. 1180 (1991); Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994).

1. The Supreme Court ruled that the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act") immunizes Government employees from suit even when an FTCA exception (incidents occurring overseas) precludes recovery against the Government. 28 U.S.C. § 2679.

2. The Supreme Court determined language within 28 U.S.C. § 2679(d) confirms that the FTCA is the exclusive mode of recovery.

3. The Court recognized that substitution of the Government would sometimes foreclose a tort plaintiff's recovery. 28 U.S.C. § 2679(d) specifically states that suits proceeding under the FTCA are subject to the "limitations and exceptions" applicable to FTCA actions.

4. Another, older statute also applies to military medical personnel. The Gonzales Act (10 U.S.C. § 1089) functions solely to protect military medical personnel from malpractice liability and does not create rights in favor of malpractice plaintiffs. The Gonzales Act is effectively subsumed by the Westfall Act for purposes of certification, substitution, and immunity.

E. Medical Care Recovery Claims.

1. 10 U.S.C. § 1095 (as amended by Pub. L. No. 101-510, enacted 5 Nov 90; Pub. L. No. 103-160, enacted 30 Nov 93; Pub. L. No. 103-337, enacted 5 Oct 94; and Pub. L. No. 104-106, enacted 10 Feb 96).

2. Expands ability of U.S. to collect from "third party payers" the reasonable costs of "health care services" furnished to dependents and retirees.

3. Allows collections from insurers (no fault and liability--applies to active duty, family members, and retirees in an MTF after 5 November 1990) and from private health insurance and Medicare supplemental insurers (non active-duty beneficiaries).

a) Installation Claims Office is responsible for asserting claims against automobile insurers.

b) Medical Facility is responsible for asserting claims against private health benefits insurers and from Medicare supplemental insurers.

4. Allows recovery for "health care services" and not just for "inpatient hospital care."

5. The statute does not allow recovery under workmen's compensation, from non-automobile liability insurers, or from TRICARE/CHAMPUS.

6. If the care was provided in or purchased by a MTF on or after 30 Nov 93, all money recovered under 10 U.S.C. § 1095, or any other legal theory, is deposited directly into the MTF's OMA account.

7. Money recovered under the following is still deposited into the General treasury for:

   a) Care provided in an MTF <u>before</u> 5 Nov 90 (for collections under 10 U.S.C. § 1095 and the Medical Care Recovery Act).

   b) Care provided in an MTF <u>before</u> 30 Nov 93 (for collections under all other theories of liability, i.e., state workers' compensation, nonautomobile liability insurance, homeowner's/renter's insurance, etc.).

   c) Care provided in a civilian hospital.

8. The MTF's annual appropriation is <u>not</u> offset by the amounts recovered under this program. 10 U.S.C. § 1095(g)(1).

9. Impact of DOD TRICARE is yet to be determined.

F. National Practitioner Data Bank. AR 40-68, Para. 4-13 (Io1 26 Jun 91).

1. Established by Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152.

2. Effective 1 September 1990 (55 Fed. Reg. 31,239 (1990)). Criteria and Procedures in 54 Fed. Reg. 42,722 (1989) (codified at 45 C.F.R. Part 60 (1990)).

3. Dep't of Health & Human Services is charged with developing and maintaining a data base on:

   a) Malpractice claims resulting in the payment of money in settlement or judgment.

      Note: DOD policy is that health care providers will not be identified unless peer review determines the standard of care was not met.

   b) Information on actions that affect the clinical privileges of physicians.

4. Statute requires reporting of claims from civilian sector; MOU between DOD and HHS covers reporting of military information.

5. Malpractice Payments. AR 40-68, para. 4-13b (IO1).

a) Upon notification by the local MCJA that a monetary award has been granted to a claimant, the MTF/DTF will report the peer review findings and submit DD Form 2526 (Case Abstract for Malpractice Awards) to HQDA (SGPS-PSQ) within 7 days of notification of payment award.

b) If peer review has not been completed at the time of notification of payment, it will be conducted and reported within 21 days.

c) If peer review determines that the standard of care:

(1) Was met, then no HCP will be reported on DD Form 2526.

(2) Was not met, and the review identifies a licensed HCP as not meeting the standard of care, then the HCP will be reported on DD Form 2526.

(3) Was not met, and the review identifies a nonlicensed (not required to be licensed; such as intern, resident) HCP as not meeting the standard of care, then the HCP will be reported on DD Form 2526, but only if peer review shows flagrant or willful deviations from the standard of care.

(4) Was not met, and the review determines that the attribution is the result of a system or management problem, then no HCP will be reported on DD Form 2526.

(5) Local review is followed by review at the Consultation Case Review Branch of The Surgeon General's Office. Cases of substantial disagreement are reviewed by a Special Review Committee.

d) If peer review determines substandard care by one or more practitioners, a separate report is submitted for each practitioner involved.

e) Ancillary personnel in professions or occupations that are not licensed are not reported to the NPDB, but should be reported on DD Form 2526 as the responsible individual.

6. Other Reportable Events--Professional Review Actions.

a) Adverse privileging actions of longer than 30 days will be reported after appellate review, commander decision if no appeal, or separation, whichever comes first. AR 40-68, para. 4-13d (IO1, 26 JUN 91).

b) Unprofessional Conduct.

(1) HCPs, whether licensed or under grace period or waivers, and house staff who are convicted, plead guilty, plead nolo contendere, receive a discharge in lieu of court-martial, a discharge in lieu of criminal investigation, or a less than honorable discharge for unprofessional conduct will be reported within 3 working days of charges or date of discharge, whichever comes first. AR 40-68, para. 4-13d(3) (IO1).

(2) AR 40-68, para. 4-9k(5), includes the following in its definition of unprofessional conduct:

(a) Fraud or misrepresentation in application for clinical privileges;

(b) Commission of a serious misdemeanor or felony;

(c) Being impaired on duty through misuse of alcohol or drugs; and

(d) Fraud under dual compensation laws.

7. Reporting Responsibility. The Surgeon General is the reporting authority to the NPDB.

G. Pharmaceutical Company and Outside Agency Gifts.

1. Basic Prohibition of Gifts from Outside Sources. 5 C.F.R. Part 2635, Part B. An employee shall not solicit or accept a gift from a prohibited source.

a) A prohibited source is defined as any person (including any organization more than half of whose members are persons who are):

(1) Seeking official action by the employee's agency;

(2) Doing or seeking to do business with the employee's agency;

(3) Regulated by the employee's agency; or

(4) Substantially affected by the performance of the employee's official duties.

b) Definition of a Gift. The term "gift" includes almost anything of monetary value.

(1) Employee may accept unsolicited gifts with market value of $20 or less per occasion, totaling no more than $50 in a calendar year from any one source (this exception does not permit cash gifts or investment interests);

(2) Employee may accept gift if authorized by specific statute/supplemental agency regulation.

(3) The "No Pizza and Coke Rule." Contractors, vendors, manufacturing representatives, and others seeking business with the AMEDD may visit MEDCOM activities if they agree not to bring in or provide food or beverages at the MEDCOM facility. HSC Memo, 11 Feb 93, SUBJECT: "Gifts and the New Standards of Ethical Conduct."

2. Acceptance of Gifts by the Government--Statutory Implementation.

a) "The Secretary [of the Army] may accept ... any gift ... made on the condition that it be used for the benefit ... of a ... hospital . ..." 10 U.S.C. § 2601.

b) "The Secretary of Defense may accept [any gift] for use by the Department of Defense." 10 U.S.C. § 2608 (1990).

3. Acceptance of Gifts by the Government--Regulatory Implementation.

a) Unconditional gifts. Commanders may accept "unconditional gifts" valued at less than $1,000.00. The regulation does not specify what level of commander may accept the gift. AR 1-100.

(1) If the donor specifies that the gift be used in a certain place, manner, or for a certain purpose, but the condition is for normal use, the gift is to be considered unconditional. AR 1-100, para. 3b(1)(b).

(2) There is no Secretary of the Army delegation of authority to accept conditional gifts. Must staff all gifts of money or equipment to Army hospitals through command channels to the Secretary of the Army for acceptance. DAJA-AL 91/3245 (7 Jan 92).

b) Conditional gifts require Secretary of the Army approval. See AR 1-100.

c) MEDCOM will not accept a gift unless prior approval is obtained from Administrative Services Division (ASD), Office of the Deputy Chief of Staff for Information Management, HQ, Health Service Command. HSC Supp. 1 to AR 1-100, para. 5f. Must

submit written evidence of coordination with the servicing SJA and procurement officer. HSC Supp. 1 to AR 1-100, para. 5g. ASD will approve/disapprove or forward to the Secretary of the Army for final decision.

4. Clinical Investigation Program. AR 40-38.

a) May use investigational drugs, devices, biologics, vaccines, or placebos in approved clinical investigation (CI) programs. AR 40-38, para. 3-6(a)(8).

b) Drugs, placebos, biologics, and medical devices not commercially available, and equipment loaned for an approved CI program are not considered gifts and are accepted by MTF or DTF commanders. AR 40-38, para. 3-6b(3)(g).

c) A gift is tendered to a CI program must be made in accordance with AR 1-100. Must provide a receipt and an accounting for every gift. AR 40-38, para. 3-6b(3)(g). The receipt will specify the nature of the gift, its monetary value, requests of the donor, conditions of acceptance, and include a statement that the study is subject to delay or termination if required in the interest of the military mission. AR 40-38, para. 3-6b(8).

5. "School Solution."

a) Do not let physicians dispense "medication samples" that are not on the MTF formulary.

b) Ensure gift acceptance IAW AR 1-100.

H. AMEDD Personnel and AIDS/VIV.

1. Current Policy on Removing Health Care Providers From Patient Care: Must make an individual, case-by-case determination that removal from patient care is required. May not enact blanket policy of removal of all cases or of certain categories of cases. The sole basis for limiting the duties of a soldier infected with HIV is that it is necessary to protect the health and safety of service members. DOD Dir. 6485.1, para. E.18, 19 Mar 91

<u>EXCEPTION</u>: AR 600-110, para. 2-13b(15), states that "HIV infected health care providers with an exudative or weeping dermatitis will be removed from patient care positions until the condition improves."

2. Assignment Limitations.

a) HIV-infected soldiers not deployed or assigned overseas. Soldiers confirmed HIV positive while overseas are reassigned to the U.S. AR 600-110, para. 4-2a.

b) In the U.S. (including Alaska, Hawaii, Puerto Rico), HIV-infected soldiers are not assigned to MTOE/TOE units. Commanders may reassign any HIV-infected soldier from a MTOE/TOE unit after completion of a normal tour of duty. AR 600-110, para. 4-2b(1).

c) HIV-infected soldiers are not assigned to military sponsored educational programs, regardless of length, which would result in an additional service obligation. This includes advanced military or civilian schooling, professional residency, and fellowships. This restriction does not apply to military schools required for career progression in a soldier's MOS, branch, or functional area (i.e., CGSC). AR 600-110, para. 4-2b(2).

3. Limited Use Policy. Under existing Army regulations, information obtained from the soldier is subject to the following protections

No adverse action is authorized solely on a positive HIV test or on information derived from an EPI assessment and HIV confirmatory laboratory tests results

4. Duty to warn. 1988 DCSPER message requires preventive medicine physician performing initial notification and health care provider conducting the EPI to explain the limited use policy. DCSPER holds this as current policy, yet requirement not reflected in regulation.

I. Mental Health Evaluations of Members of the Armed Forces

1. DoD Directive. DoD Dir. 6490.1, "Mental Health Evaluations Of Members Of The Armed Forces," 1 October 1997.

2. Referral of Service members for mental health evaluations.

a) Command referrals.

b) Protections of the rights of service members against improper referrals for mental health evaluations. (Military Whistleblowing – Boxer amendments).

3. New duty to take precautions against threatened injury.

a) Service member communicates to health care provider an explicit threat to kill or seriously injure an identifiable person, or to destroy property under circumstances likely to lead to serious bodily injury

or death, and the service member has the apparent intent and ability to carry out the threat.

b) The responsible health care provider shall make a good faith effort to take precautions against the threatened injury. Such precautions may include, but are not limited to:

(1) Notifying the service member's commanding officer;

(2) Notifying military and/or civilian law enforcement authorities where the threatened injury most likely may occur;

(3) Notifying a potential victim; or

(4) Clinical treatments

c) The provider shall then inform the service member, and document in the medical record, that these precautions have been taken.

V. CONCLUSION.

APPENDIX A

GENERAL COUNSELING FORM

For use of this form, see AR 635-200; the proponent agency is MILPERCEN

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, 10 USC 3012 (G).
PRINCIPAL PURPOSE: To record counseling data pertaining to service members.
ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.
DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

PART I - BASIC DATA

1. NAME		3. GRADE	4. SEX
Doe, John Q.	123-45-6789	E4	Male

5. UNIT	*FOR TRAINING UNITS ONLY*	
	6. WEEK OF TRAINING	7. TRAINING SCORES
HHC, 1st Training Brigade		HIGH ____ MED ____ LOW ____

PART II - OBSERVATIONS

8. DATE AND CIRCUMSTANCES

The purpose of this command counseling is to inform you of DA and command policy regarding your responsibilities as a result of testing positive for the Human Immunodeficiency Virus (HIV) antibody. This counseling supplements and complements the preventive medicine counseling you received on 20 FEB 01.

9. DATE AND SUMMARY OF COUNSELING

I have been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. You were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. While I have great concern for your situation and needs, in my capacity as a commander, I must also be concerned with, and ensure the health, welfare, and morale of the other soldiers in my command. Therefore, I am imposing the following restrictions:

a. You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.

b. You will not donate blood, sperm, tissues, or other organs since this virus can be transmitted via blood and body fluids.

c. You will notify all health care workers of your diagnosed condition if you seek medical or dental treatment, or accident requires treatment. If you do not understand any element of this order, you will address all questions to me. Failure on your part to adhere to your preventive medicine counseling or the counseling I have just given you will subject you to administrative separation and/or punishment under the UCMJ, as I see fit.

DISPOSITION INSTRUCTIONS
This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement

This Page Intentionally Blank

CHAPTER 34

SENIOR OFFICERS LEGAL ORIENTATION

FOREIGN AND DEPLOYMENT CLAIMS

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

A. Foreign Claims Act, 10 U.S.C. § 2734.

B. International Agreement Claims Act, 10 U.S.C. §§ 2734a & b.

C. Federal Tort Claims Act, 28 U.S.C. §§ 2671-80.

D. Personnel Claims Act, 31 U.S.C. § 3721.

E. Military Claims Act, 10 U.S.C. § 2733.

F. AR 27-20, Claims, Chapters 7 & 10 (31 December 1997).

G. DA Pam 27-162, Claims, Chapters 7 & 10 (1 April 1998).

H. Disaster Claims Handbook (November 1998).

I. JA 422, Operational Law Handbook, Chapters 9 (2002).

J. JAGMAN, Chapter VIII.

K. JAGINST 5890.1, Enclosure 2.

L. AFI 51-501, Tort Claims, Chapter 4 (1 May 1996).

M. DoD Directive 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996).

N. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (NATO SOFA) (Article VIII).

O. Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature, 3 August 1959, 14 U.S.T. 631, T.I.A.S. No. 5351, 481 U.N.T.S. 262 (Supplementary Agreement or SA) (Article 41).

III. CLAIMS LAWS APPLICABLE IN MILITARY OPERATIONS.

A. Federal Tort Claims Act (FTCA). 28 U.S.C. §§ 1346(b), 2402, 2671-80; 28 C.F.R. Part 14; AR 27-20, chapter 4; JAGINST 5890.1, Encl (1); AFI 51-501, chapter 2.

1. The Federal Tort Claims Act provides a limited waiver of sovereign immunity to compensate eligible claimants for damage to property, personal injury, or death based upon the negligent or wrongful acts or omissions of servicemembers or federal civilian employees acting within the scope of employment.

2. Overseas Exception.

   a. The United States has not waived its immunity from suit for claims arising in a "foreign country."

   b. A "foreign country" is any land area outside the control of the United States. Smith v. United States, 507 U.S. 197 (1993) (Antarctica); Meredith v. United States, 330 F.2d 9 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964) (grounds of American embassy abroad); Miller v. United States, 73 F.3d 878 (9th Cir. 1995) (military hospital in Japan); Callas v. United States, 253 F.2d 838 (2d Cir. 1958) *cert. denied*, 357 U.S. 936 (1958) (U.N. trusteeship); Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996); Kinsley v. United States, 817 F. Supp. 680 (S.D. Ohio, 1993); Pignataro v. United States, 172 F. Supp. 151 (E.D.N.Y. 1959) (air space over foreign countries).

   c. The overseas exception does not bar torts occurring on the high seas or in aircraft flying over the high seas. Maritime statutes will usually govern resolution of the claim in these situations. 46 U.S.C. §§ 741-752 (Admiralty Act); 46 U.S.C. §§ 781-790 (Public Vessels Act).

   d. Exception to the exception. In re Paris Air Crash, 399 F. Supp. 732 (C.D. Calif. 1975) (where negligence occurs in the United States but the effect occurs in a foreign country, the claim is not barred).

3. Disaster Relief Operations Involving Debris Removal. (Stafford Act, 42 U.S.C. §§ 5121 et. seq.).

   a. By administrative agreement, states assume responsibility for processing claims in the aftermath of "major disasters" under 42 U.S.C. § 5173.

b. States indemnify the United States as a condition to receiving federal assistance. 42 U.S.C. § 5173(b).

c. Applies to debris removal only, but other claims may be barred by the FTCA's discretionary function exception.

B. Personnel Claims Act (PCA). 31 U.S.C. § 3721; AR 27-20, chapter 11; JAGINST 5890.1, Encl (5); AFI 51-502.

1. Limited protection to service members and certain civilian employees for loss or damage to tangible personal property that occurs incident to service.

2. Applies worldwide.

3. PCA claims that arise in deployments include loss of equipment and personal items during transportation, certain losses while in garrison quarters, losses suffered in an emergency evacuation, losses due to terrorism directed against the United States, and the loss of clothing and articles being worn while performing military duties.

4. Maintain positive morale.

5. Claims offices should make maximum use of small claims procedures when appropriate. AR 27-20, paras 2-17 and 11-10b; DA Pam 27-162, paras 2-17 and 2-42.

a. The small claims procedure applies to claims that do not require extensive investigation and can be settled for less than $1000.

b. Evidentiary requirements are relaxed, with greater emphasis placed on using catalog prices, telephone calls to confirm prices, and agreed cost of repairs and loss of value procedures. Remember, however, that estimates are required for repairs over $100.00.

c. Where local finance procedures permit, small claims should be approved on the spot, and the claimant allowed to hand-carry the voucher for immediate cash payment.

C. Military Claims Act (MCA). 10 U.S.C. § 2733; AR 27-20, chapter 3; JAGINST 5890.1, Encl (2); AFI 51-501, chapter 3.

1. A claim for personal injury, death, or damage to or loss of property is payable when:

a. Caused by a negligent or wrongful act or omission of military personnel or DA civilians acting within the scope of employment; or

b. Incident to the noncombat activities of the Department of the Army.

2. Applies worldwide.

a. CONUS tort claims must first be considered under the FTCA.

b. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA).

c. Most common applications of the MCA.

(1) Medical malpractice on family members overseas.

(2) Property damage claims by service members not payable under the PCA or FTCA.

3. Not a waiver of sovereign immunity.

4. Applicable law.

a. General principles of law applicable in a majority of American jurisdictions.

b. Contributory negligence. Apply the law of the place of the occurrence, including the law of foreign countries when the claim arises in a foreign country.

D. Foreign Claims Act (FCA). 10 U.S.C. § 2734; AR 27-20, chapter 10; JAGMAN, chapter VIII; AFI 51-501, chapter 4.

1. History.

a. Act of 18 April 1918.

b. WWII changes.

c. The Foreign Claims Act comes of age.

2. Purpose.

a. "To promote and to maintain friendly relations through the prompt settlement of meritorious claims." 10 U.S.C. § 2734(a).

b. Claim must be "meritorious." Undue emphasis should not be placed on the promotion and maintenance of friendly relations alone. Claims that are not meritorious will be denied even though payment might promote friendly relations.

3. Scope.

a. Applies only overseas. Claim must arise outside the U.S., its territories, Commonwealths, or possessions.

b. Includes places under the jurisdiction of the United States in a foreign country.

c. Maritime claims.

(1) Incidents occurring within the territorial waters of the United States do not give rise to FCA claims.

(2) Chapter 8, AR 27-20 governs maritime claims. Claims cognizable under this chapter will not be processed under the FCA without the express authorization of the Commander, U.S. Army Claims Service.

4. Proper claimants.

a. Governments of foreign countries and political subdivisions thereof.

b. "Inhabitants" of foreign countries.

(1) Citizenship or legal domicile not necessary.

(2) Mere presence insufficient.

(3) Can include U.S. citizens residing overseas.

c. Corporations.

5. Improper claimants.

a. Enemy or "unfriendly" nationals.

b. Insurers and subrogees.

c. U.S. military personnel, Federal civilian employees, and their family members residing overseas primarily because of their own or their sponsor's duty or employment status.

d. Other residents of the United States; i.e, visitors, tourists, and persons employed overseas.

6. Claims payable.

a. Noncombat activities. This includes personal injury, death, personal property damage, and damage to real property that occurs connection with training, field exercises, or maneuvers or other activities which are distinctly military in nature.

b. Negligent or wrongful acts of U.S. military personnel or civilian employees.

(1) If the civilian employee is a U.S. citizen or foreign national recruited or transferred from a country other than the one in which he or she is employed and where the incident occurred, the negligent or wrongful act need not be within scope of employment.

(2) If the civilian employee is a foreign national recruited in the country in which he or she is employed and where the incident occurred, claim is payable only if the negligent or wrongful act was within scope of employment. Exception for vehicle claims. AR 27-20, para 10-3.

(3) Distinction relates back to the purpose of the FCA. Maintaining friendly relations with foreign countries and their inhabitants is not furthered by accepting responsibility for the off-duty torts of employees who are in a foreign country through no act of the United States.

7. Claims excluded. AR 27-20, para 10-4.

a. Claims under status of forces or other international agreements.

b. "Enemy action" - direct and indirect combat activities. United States v. Marks, 187 F.2d 724 (9th Cir. 1951), *cert. denied*, 342 U.S. 823 (1951).

(1) Includes preparation for, movement to, and return from combat.

(2) Aircraft en route exception.

c. Contracts and domestic obligations.

d. Real estate claims founded upon contract. *See* AR 405-15.

e. Not in best interests of U.S. or contrary to public policy, general principles of equity, or the basic intent of FCA.

8. Procedures.

a. Presentation of Claim.

(1) "Normally" in writing to U.S. or authorized official.

(2) Within two years of accrual.

(3) Must state:

(a) The time, place, and nature of the incident.

(b) The nature and extent of damage, loss, or injury.

(c) The amount of compensation claimed.

b. Claims Settlement - Foreign Claims Commissions (FCC).

(1) FCA claims are settled and paid by FCCs.

(2) Appointment authority. AR 27-20, para 10-6.

(a) Senior Judge Advocate of a command having a command claims service. May be delegated to commander or chief of the command claims service.

(b) Commander, U.S. Army Claims Service.

(3) Composition. AR 27-20, para 10-7.

(a) One-member FCC. May be a commissioned officer or claims attorney.

(b) Three-member FCC. At least two members must be JAs or claims attorneys.

(4) Investigation.

(a) Normally, the FCC is responsible for the investigation of all claims referred to it.

(b) Can request assistance from units.

(c) AR 27-20, Chapter 2 and local procedures apply.

(5) Applicable law. The law and custom of the country where the incident occurred, including laws and customs pertaining to contributory or comparative negligence and joint tortfeasors.

(6) Payments.

(a) Made in the currency of the country in which the incident occurred or where the claimant resided at the time of the incident.

(b) Punitive damages, interest, court costs, bail, costs of filing a claim, and similar fees are not allowed.

(c) Deduct amounts paid by tortfeasor, other third parties, and insurance companies.

(d) Advance payments up to $10,000 permitted in limited circumstances.

(e) Generally, payments are final and not subject to appeal.

(7) Approval authorities. AR 27-20, para 10-9.

(a) One member FCC.

(i) If JA or claims attorney, may pay up to $15,000 regardless of amount claimed. May also disapprove any claim presented in an amount not over $15,000.

(ii) Other one-member FCCs may pay claims presented in an amount not exceeding $2,500. No denial authority.

(b) Three member FCC.

(i) May disapprove claims presented in any amount.

(ii) May pay claims filed in any amount which, after adjudication, are deemed to be meritorious in an amount not exceeding $50,000.

(c) TJAG, TAJAG, and the Commander, U.S. Army Claims Service.

(i) May disapprove any claim.

(ii) May approve any claim where the amount awarded does not exceed $100,000.

(d) Secretary of the Army, Assistant Secretary of the Army, or designee approves all payments in excess of $100,000.

IV. CLAIMS UNDER STATUS OF FORCES (SOFA) AND OTHER INTERNATIONAL AGREEMENTS

A. 10 U.S.C. § 2734a.

B. Required Provisions.

1. Is there an agreement?

2. Does it contain claims provisions?

3. Does it provide for cost sharing?

C. Preferred Provisions.

1. Do claims provisions mandate host country adjudication?

2. Is the agreement reciprocal?

D. NATO SOFA Model. Article VIII.

1. Provides for host nation adjudication.

2. NATO SOFA is reciprocal. Guidance on processing claims arising out of the acts or omissions of members of a NATO military force or civilian component present in the United States is found in AR 27-20, chapter 7, section II.

3. Claims between Contracting Parties. Art. VIII, paras 1-4.

a. Claims for damage to military property.

(1) Wholly waived

(2) The military property damaged or the military personnel causing the damage must have some relationship with the operation of the Treaty.

(3) NATO connection presumed when military property belonging to a NATO sending state is located within the territory of a NATO receiving state.

b. Claims for damage to nonmilitary property.

(1) Limited waiver for damage to property owned by a Contracting Party but which is not used by that Party's armed services.

(2) Personnel causing the damage must have some relationship with the operation of the Treaty.

(3) Waiver only applies if damage is less than $1,400; liability for greater damages is split in accordance with SOFA formula.

c. Claims for injury to or death of a service member.

(1) Wholly waived.

(2) Injury or death must occur while service member is performing official duties, but such duties need not have any connection with the operation of NATO.

(3) Waiver does not extend to civilian employees.

(4) Waiver extends only to claims between Contracting Parties. It does not affect third party claims under Article VIII.

4. Third Party Scope Claims. Art. VIII, para 5.

a. Proper claimants include persons and entities that are not Contracting Parties or members of the force or civilian component.

(1) Includes tourists and business travelers from the United States.

(2) Also includes inhabitants of foreign countries.

(3) May include family members of sending state forces.

b. Claim is payable if damage, injury, or death results from an act or omission done by a member of the force or civilian component in the performance of official duties or under circumstances that would make the force otherwise "legally responsible" under the law of the receiving state.

(1) Sending state makes the scope of employment determination.

(2) Normally, the sending state's determination is final. Rare disputes are settled by arbitration.

c. Claims are filed with receiving state authorities. The receiving state must designate offices where claims may be presented. Example: In Germany, claims are filed with the Defense Cost Office, a subsidiary of the Ministry of Finance.

d. Time limits for filing third party scope claims are often substantially less than the two years allowed under the FCA or MCA. Example: The DCO in Germany requires that a claim be filed within 90 days of the date it accrues.

e. Upon receipt of a claim, the receiving state investigates. The sending state cooperates in the investigation, providing information about the involvement of its forces and issuing a scope of employment certification.

f. Receiving states adjudicate the claim under their domestic law. If deemed meritorious, the receiving state makes the award and pays the claimant.

g. The receiving state reports all payments to the sending state, proposes distribution of the costs incurred, and requests reimbursement. Normally costs are split as follows: 75% sending state; 25% receiving state.

5. Nonscope Claims. Art. VIII, paras 6-7.

a. Often referred to as *ex gratia* (out of grace) payments. Do not confuse with solatia payments discussed later in the outline.

b. Nonscope claims arise in two situations.

(1) Tortious off-duty conduct by members of the force or civilian component.

(2) Unauthorized use of sending state vehicles.

c. Receiving states accept, investigate, process, and evaluate nonscope claims.

d. After assessing the claim's merits (including the measure of damages, if any), the receiving state forwards the claim with a recommendation to the sending state.

e. The sending state then reviews the claim and the receiving state's recommendation to determine if an *ex gratia* payment will be offered.

(1) In the case of the United States as sending state, nonscope claims are adjudicated by FCCs appointed pursuant to the FCA.

(2) In adjudicating the claim, the sending state is not bound by the advice and recommendation of the receiving state.

(3) If payment is approved, the sending state bears the entire cost.

V. SINGLE-SERVICE RESPONSIBILITY.

A. Department of Defense Directive 5515.8 (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996), and other memos referenced in Appendix A assign to each service exclusive responsibility for settling foreign claims in certain countries.

B. Army - Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, El Salvador, Estonia, Germany, Grenada, Haiti, Honduras, Hungary, Korea, Latvia, Lithuania, Marshall Islands, Moldova, Montenegro, Netherlands, Poland, Romania, Rwanda, Serbia, Slovakia, Slovenia, Switzerland, Ukraine, Receiving Office in U.S. for NATO SOFA.

C. Navy - Bahrain, Greece, Iceland, Israel, Italy, Portugal, Spain, United Arab Emirates.

D. Air Force - Australia, Azores, Canada, Cyprus, Denmark, Egypt, France, Greece, India, Iraq, Japan, Luxembourg, Morocco, Nepal, Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Tunisia, Turkey, United Kingdom, CENTCOM, USSOC.

E. Interim single-service claims responsibility. Unified and Specified Commanders may assign interim responsibility in countries where such assignment has not been made under the DoD directive. They must seek immediate confirmation and approval of such assignments from the DoD General Counsel.

VI. SOLATIA. AR 27-20, PARAS 10-17 AND 13-13.

A. Definition. Payment (not necessarily in money) to a victim or a victim's family as an expression of sympathy or condolence. Common in certain parts of the Far East and Southwest Asia.

B. Local custom determines when solatia applies and customary amount for specific case.

C. Not an admission of liability.

D. Paid from command operating funds, not Claims Expenditure Allowance.

VII. CONCLUSION.

APPENDIX A

SINGLE SERVICE CLAIMS PROCESSING ASSIGNMENTS

Updated February 2001

ASIA

Country	Assignment	Authority
Japan	Air Force	DoD Directive 5515.8, 9 June 1990
South Korea	Army	DoD Directive 5515.8, 9 June 1990
Vietnam (War era)	Navy	DoD Directive 5515.8, 9 June 1990

PACIFIC

Country	Assignment	Authority
Australia	Air Force	DoD Directive 5515.8, 9 June 1990
Azores	Air Force	DoD Directive 5515.8, 9 June 1990
Marshall Islands	Army	DoD Directive 5515.8, 9 June 1990

EUROPE/LEVANT

Country	Assignment	Authority
Albania	Army	Approval, John H. McNeill, 17 April 1996
Austria	Army	DoD Directive 5515.8, 9 June 1990
Azores	Air Force	DoD Directive 5518.8, 9 June 1990
Belarus	Army	Approval, John H. McNeill, 17 April 1996
Bahrain	Navy	DoD Directive 5515.8, 9 June 1990
Belgium	Army	DoD Directive 5515.8, 9 June 1990
Bosnia-Herzegovina	Army	Memo, David A. Koplow, 7 July 1999
Bulgaria	Army	Approval, John H. McNeill, 17 April 1996
Canada	Air Force	DoD Directive 5518.8, 9 June 1990
Croatia	Army	Memo, David A. Koplow, 7 July 1999
Cyprus	Air Force	DoD Directive 5515.8, 9 June 1990

Czech Republic	Army	Approval, John H. McNeill, 17 April 1996
Denmark	Air Force	DoD Directive 5515.8, 9 June 1990
Estonia	Army	Approval, John H. McNeill, 17 April 1996
Egypt	Air Force	DoD Directive 5515.8, 9 June 1990
France	Air Force	Memo, William H. Dalton, 25 November 1996
Germany	Army	DoD Directive 5515.8, 9 June 1990
Greece	Navy	Memo, John H. McNeill, 01 September 1994
Hungary	Army	Approval, John H. McNeill, 17 April 1996
Iceland	Navy	DoD Directive 5518.8, 9 June 1990
India	Air Force	DoD Directive 5515.8, 9 June 1990
Iraq	Air Force	Approved, Terrence O'Donnell, 14 June 1991
Israel	Navy	DoD Directive 5515.8, 9 June 1990
Italy	Navy	DoD Directive 5515.8, 9 June 1990
Latvia	Army	Approval, John H. McNeill, 17 April 1996
Lithuania	Army	Approval, John H. McNeill, 17 April 1996
Luxembourg	Air Force	DoD Directive 5515.8, 9 June 1990
Macedonia	Army	Memo, David A. Koplow, 7 July 1999
Moldova	Army	Approval, John H. McNeill, 17 April 1996
Montenegro	Army	Memo, David A. Koplow, 7 July 1999
Morocco	Air Force	DoD Directive 5515.8, 9 June 1990
Nepal	Air Force	DoD Directive 5515.8, 9 June 1990
Netherlands	Army	Memo, John H. McNeill, 01 September 1994
Norway	Air Force	DoD Directive 5515.8, 9 June 1990
Oman	Air Force	DoD Directive 5515.8, 9 June 1990
Pakistan	Air Force	DoD Directive 5515.8, 9 June 1990
Poland	Army	Approval, John H. McNeill, 17 April 1996
Portugal	Navy	DoD Directive 5515.8, 9 June 1990
Romania	Army	Approval, John H. McNeill, 17 April 1996
Rwanda Refugee Crisis Area (except Kenya)	Army	Memo, John H. McNeill, 01 September 1994
Saudi Arabia	Air Force	DoD Directive 5515.8, 9 June 1990
Serbia	Army	Memo, David A. Koplow, 7 July 1999
Slovak Republic	Army	Approval, John H. McNeill, 17 April 1996
Slovenia	Army	Approval, John H. McNeill, 17 April 1996
Spain	Navy	Memo, John H. McNeill, 01 September 1994
Switzerland	Army	DoD Directive 5515.8, 9 June 1990
Turkey	Air Force	DoD Directive 5515.8, 9 June 1990
Ukraine	Army	Approval, John H. McNeill, 17 April 1996
United Arab Emirates	Navy	Approved, John H. McNeill, 6 June 1996
United Kingdom	Air Force	DoD Directive 5515.8, 9 June 1990
Yugoslavia, Fed. Rep.	Army	Approval, David A. Koplow, 7 July 1999
CENTCOM Ops.	Air Force	DoD Directive 5515.8, 9 June 1990

AFRICA

Country	Assignment	Authority
Morocco	Air Force	DoD Directive 5515.8, 9 June 1990
Rwanda	Army	Memo, John H. McNeill, 1 September 1994
Tunisia	Air Force	Memo, John H. McNeill, 17 April 1996

AMERICAS

Country	Assignment	Authority
US- NATO/ Singapore SOFAs	Army	DoD Directive 5515.8, 9 June 1990
Canada	Air Force	DoD Directive 5515.8, 9 June 1990
El Salvador	Army	DoD Directive 5515.8, 9 June 1990
Grenada	Army	DoD Directive 5515.8, 9 June 1990
Haiti	Amry	Memo, John H. McNeill, 22 September 1994
Honduras	Army	DoD Directive 5515.8, 9 June 1990

THIS PAGE LEFT BLANK.

CHAPTER 35

THE REPORT OF SURVEY SYSTEM

SENIOR OFFICER LEGAL ORIENTATION COURSE

I. REFERENCES.

A. AR 735-5, Policies and Procedures for Property Accountability, 10 June 2002.

B. AR 600-4, Remission of Indebtedness for Enlisted Members, 1 Dec. 83.

C. AR 15-185, Army Board for the Correction of Military Records, 29 Feb 00.

D. AR 25-50, Preparing and Managing Correspondence, 5 Mar. 01.

E. AR 15-6, Procedures for Investigating Officers and Boards of Officers, 30 Sep. 96

F. DA Pam 735-5, Survey Officer's Guide, 1 Mar. 1997.

G. DA Pam 710-5, Unit Commander's Supply Handbook, 15 April 1987.

H. www.usapa.army.mil (Official Army regulation and pamphlet website).

II. INTRODUCTION.

A. Applicability. AR 735-5 applies to all elements of the U.S. Army and to all U.S. Army property. While processing time and authority levels differ, the general substantive provisions apply equally to:

1. Active Component.

2. U.S. Army Reserve and National Guard.

3. Department of the Army (DA) Civilians.

B. Purposes. AR 735-5, para. 13-1.

1. Document circumstances of loss, damage or destruction of Government property.

2. Serve as a voucher for adjusting property books.

3. Document a charge of or relief of financial liability.

C. The report of survey or any other method used to enforce property accountability is not intended as corrective action or punishment. However, commanders are not precluded from using administrative or disciplinary measures if appropriate. AR 735-5, para. 12-1.

III. ALTERNATIVES TO REPORTS OF SURVEY.

A. Statement of Charges/Cash Collection Voucher when liability is admitted and the charge does not exceed one month's base pay. (These two functions have been combined in the new DD Form 362 which rescinds the independent DD Form 1131, Cash Collection Voucher.)

B. Cash sales of hand tools and organizational clothing and individual equipment.

C. Unit level commanders may adjust losses of durable hand tools up to $100 per incident, if no negligence or misconduct is involved.

D. Abandonment order may be used in combat, large- scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

E. Recovery of property unlawfully held by civilians is authorized — show proof it is U.S. property and do not breach the peace.

F. AR 15-6 investigations and other collateral investigations can be used in conjunction with the DA Form 4687 as a substitute for report of survey investigations.

G. If the **approving authority** determines that no negligence was involved in the damage to the property no report of survey is required. The approving authority assumes all responsibility for computation of charges and notification to the respondent.

IV. THE REPORT OF SURVEY SYSTEM (AR 735-5 CHPS. 13 AND 14).

A. Initiating the Report of Survey.

1. The Active Army will initiate and present reports of survey to the appointing or approving authority not later than **15 calendar days.** U.S. Army Reserve will initiate and present reports of survey to the appointing or approving authority not later than **75 calendar days** after the date of discovering the discrepancy. Army National Guard will initiate and present reports of survey to the appointing or approving authority not later than **45 calendar days** after date of discovering the discrepancy Active Army requirement of **15 calendar days.** 735-5, para. 13-7.

2. The goal? A thorough investigation.

3. A unit **must** initiate a report of survey when:

a. An individual refuses to admit liability and negligence or misconduct is suspected.

b. A higher authority or other DA regulation directs a report of survey.

c. A sensitive item is lost or destroyed.

d. Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

e. The amount of loss or damage exceeds an individual's monthly base pay, **even** if liability is admitted.

f. The damage to government quarters or furnishings exceeds one month's base pay.

g. The loss involves certain bulk petroleum products.

4. Certain losses require an AR 15-6 investigation as the underlying investigative mechanism. A ROS DA Form 4697 will be completed as the adjustment document, but the appointing or approving authority will not conduct a separate Report of Survey investigation. These types of losses include:

a. Sensitive items.

b. Items enumerated in AR 190-11, app. E.

B. Total processing time. Total processing time is computed by subtracting the approval date from the initiation date minus time used to notify respondent of rights. Under normal circumstances these time constraints are as follows:

1. The U.S. Army Reserve component: 240 days (8 months).

2. The Army NG: 150 days (5 months).

3. The Active Army Component: 75 days (2 1/2 months).

C. Approval/Appointing Authority. AR 735-5, para. 13-16.

1. The approving authority is an Army officer, or DA civilian employee authorized to appoint a survey officer and to approve reports of survey "by authority of the Secretary of the Army." The approving authority does not have to be a court-martial convening authority.

   a. U.S. Army Active and Reserve Components. The minimum grade for an approval authority is LTC (O-5) or above, DA civilian in a supervisory position in the grade of GS-14 or above.

   b. Army National Guard. The minimum grade for an approval authority is a federally recognized COL (O-6) commander.

2. The appointing authority is an officer or civilian employee designated by the approving authority with responsibility for appointing report of survey investigating officers.

3. Generally, a lieutenant colonel (05) commander is both appointing and approval authority.

4. Retained Approval authority. When a Colonel (O-6)/ GS 15 or above retains approval authority, he or she may designate a Lieutenant Colonel (05) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority.

5. Regardless of who initiates the report of survey, it is processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5. AR 735-5, para. 13-4.

D. Survey Officer Qualifications. AR 735-5, para. 13-26.

1. The survey officer will be senior to the person subject to possible financial liability, "except when impractical due to military exigencies."

2. The survey officer can be an Army commissioned officer; warrant officer; or enlisted soldier in the rank of Sergeant First Class (E-7), or higher; a civilian employee GS-07 or above; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint commands or activities, any DOD commissioned or warrant officer or non-commissioned officer E-7 or above assigned to the activity or command can be the survey officer.

3. Consult AR 600-8-14, table 8-6 for the grade equivalency between military personnel and civilians employees.

4. The Survey officer's primary duty is the investigation.

   a. The U.S. Army Reserve Component: **60 Calendar days** to complete investigation.

   b. The Army National Guard: **60 Calendar** days to complete investigation

   c. The Active Army Component: **30 Calendar** days to complete investigation.

5. The surveying officer **should** get a briefing from a judge advocate.

V. VALUING THE LOSS.

A. Types of Loss.

1. Loss. There are two types of losses which can result in financial liability:

   a. Actual loss. Physical loss, damage or destruction of the property.

   b. Loss of accountability. Due to loss circumstances, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

2. The **actual value** at the time of the loss is the **preferred method** of valuing the loss. AR 735-5, App. B, para. B-2a.

   a. Determine the item's condition item at the time of the loss or damage.

   b. Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.

3. Depreciation.

   a. **Least** preferred method of determining the loss to the government. AR 735-5, App. B, para. B-8.

   b. Compute charges according to AR 735-5, App. B, para B-2b.

4. Limits on financial liability. AR 735-5, para. 13-39.

   a. **General rule:** An individual will not be charged more than one month's base pay.

      (1) Charge is based upon the soldier's base pay **at the time of the loss**.

      (2) For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

      (3) For civilian employees it is 1/12 of their annual salary.

   b. **Exceptions** to the general rule. There are times when personnel are liable for the **full amount of the loss**. AR 735-5, para. 13-39a.

(1) Any soldier is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.

(2) Any person is liable for the full loss of public funds.

(3) Accountable officers will be liable for the full amount of the loss.

(4) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of **gross negligence or willful misconduct** of the responsible individual, his guests, dependents, or pets.

5. Collective Financial Liability: Two or more persons may be held liable for the same loss.

(1) There is no comparative negligence.

(2) Financial loss is apportioned according to AR 735-5, Table 12-4.

(3) DO NOT use Table 12-4 if one of the collective liability respondents is not federally employed AR 735-5, para. 13-39d.

(a) Take the total number of respondents divide the total amount of the loss. This is the amount each respondent is liable for — subject to a one month's base pay cap for soldiers and civilian employees.

B. Involuntary Withholding of Current Pay.

1. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

2. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Chapter 15.

3. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).

4. No involuntary withholding for the loss of MFO property.

VI. IMPOSING LIABILITY.

A. Responsibility For Property AR 735-5, paras. 2-8 & 13-28, and figure 2-1.

1. Command Responsibility.

a. The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.

b. Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at <u>any</u> level.

2. Supervisory Responsibility.

a. The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and not contingent upon signed receipts or responsibility statements.

b. If supervisory responsibility is involved, also consider the following factors.

(1) The nature and complexity of the activity and how it affected the ability to maintain close supervision.

(2) The adequacy of supervisory measures used to monitor the activity of subordinates.

(3) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

3. Direct Responsibility.

a. The obligation to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.

b. Direct responsibility is closely related to custodial responsibility (discussed below).

4. Custodial Responsibility.

a. An individual's obligation regarding property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure property custody and safekeeping of the property.

b. Who has custodial responsibility? A supply sergeant, supply custodian, supply clerk, or warehouse person who is rated by and answerable directly to the accountable officer or the individual having direct responsibility for the property.

c. Responsibilities include:

(1) Ensuring the security of all property stored within the supply room and storage annexes belonging to the supply room or SSA is adequate.

(2) Observing subordinates to ensure they properly care for and safeguard property.

(3) Enforcing security, safety and accounting requirements.

(4) If unable to enforce any of these, reporting the problems to their immediate supervisor.

5. Personal Responsibility.

a. An individual's obligation to properly use, care, and keep safe government property in their possession, with or without a receipt.

B. Negligence. AR 735-5, para. 13-28 b and App. C, para. C-10).

1. Simple negligence—the failure to act as a reasonably prudent person would have acted under similar circumstances.

a. Remember, a reasonably prudent person is an average person, not a perfect person. Also consider:

(1) What could be expected of the person considering their age, experience, and special qualifications?

(2) The type of responsibility involved.

(3) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.

b. Examples of simple negligence.

(1) Failure to do required maintenance checks.

(2) Leaving weapon leaning against a tree while attending to other duties.

(3) Driving too fast for road or weather conditions.

(4) Failing to maintain proper hand receipts.

2. Gross negligence—an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

a. Reckless, deliberate, or wanton -

(1) These elements can be express or implied.

(2) Does not include thoughtlessness, inadvertence, or errors in judgment.

b. Foreseeable consequences.

(1) Does not require actual knowledge of actual results.

(2) Does not need to foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

c. Examples of gross negligence.

(1) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.

(2) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.

3. Willful misconduct—any intentional or unlawful act.

a. Willfulness can be express or implied.

b. Includes violations of law and regulations such as theft and misappropriation of government property.

c. A violation of law or regulation is not negligence *per se.*

d. Examples of willful misconduct

e. A violation of law or regulation is not negligence *per se.*

(1) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and as a result, the tent burns to the ground.

(2) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

C. Proximate cause—the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominant cause, from which the injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred.

1. The damage arises out of the original act of negligence or misconduct.

2. A continual flow or occurrence of events from the negligent act or misconduct.

3. Use common sense.

4. Examples of proximate cause.

a. Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.

b. Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

5. Independent intervening cause—an act which interrupts the original flow of events or consequences of the original negligence. It may include an act of G-d, criminal misconduct, or negligence.

VII. RIGHTS OF THE RESPONDENT (AR 735-5, PARA. 13-40).

A. General Information.

1. When a survey officer recommends financial liability against an individual, that individual is called the Respondent.

2. The report of survey form (DA Form 4697) contains a rights notice.

B. Respondents' Rights. AR 735-5, paras. 13-32 and 13-33. (Survey Officer)

1. The survey officer will notify the respondent by memorandum of the proposed recommendation of financial responsibility. The survey office will notify the respondent of the following:

a. The right to inspect and copy the report of investigation.

b. The right to obtain legal advice.

c. The right to submit a statement and other evidence in rebuttal to the recommendation

d. Time limits for submitting rebuttal evidence are as follows. AR 735-5, para. 13-33).

(1) *7 calendar days*—when survey and investigation are hand delivered to the respondent.

(2) *15 calendar days*—when respondent is unavailable but in the same country and the survey and investigation are mailed.

(3) *30 calendar days*—when respondent is unavailable and in a different country and the survey and investigation are mailed.

C. Respondents' Rights. AR 735-5, para. 13-40. (Approval Authority).

1. Involuntary withholding of current pay. If the approval authority approves the assessment of financial liability, the money can be involuntarily withheld from the respondent's pay.

a. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

b. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Chapter 15.

c. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).

d. No involuntary withholding for the loss of MFO property.

e. Time limits for submitting rebuttal evidence are as follows. AR 735-5, para. 13-33).

2. The approval authority must notify the respondent of that collection efforts will commence in *30 days* (**NOTE: ARNG affords 60 days**). In the memorandum the approval authority must also notify the respondent of the following rights.

a. The right to inspect and copy the file.

b. The right to legal advice.

c. The right to request reconsideration based on legal error.

d. The right to a hearing before finance (for DOD civilians only).

e. The right to request remission of indebtedness. AR 600-4

(1) Enlisted soldiers only.

(2) Only to avoid extreme hardship.

(3) Only unpaid portions can be remitted. Suspend collection action long enough for the soldier to submit his request for remission of the debt.

(4) Must request reconsideration before submitting request for remission of indebtedness.

f. The right to request extension of collection time.

g. The right to petition Army Board for the Correction of Military Records (ABCMR). AR 15-185

h. Civilian employees may avail themselves of the grievance/arbitration procedures.

VIII. JUDGE ADVOCATE REVIEW BEFORE APPROVING AUTHORITY ACTION.

A. Before the approving authority approves a recommendation of liability, a judge advocate **WILL** review the survey for legal sufficiency of the evidence and propriety of the findings and recommendations. AR 735-5, para. 13-36.

B. The approving authority is not bound by the survey officer's, or judge advocate's recommendations.

IX. RELIEF FROM REPORTS OF SURVEY.

A. Appeals. AR 735-5, paras. 13-42, 13-48 and 13-49).

1. **Appeal authority** is the next higher commander above the approving authority (normally the brigade commander).

2. Two step process:

   a. Submit request for reconsideration to approval authority.

   b. If the approving authority, after legal review and notice to respondent continues to approve financial liability, the approval authority must forward the survey to the appeal authority within **15 calendar days**.

3. If the approving authority denies reconsideration the following actions are required before forwarding to the appeal authority:

   a. Prepare a memorandum giving the basis for denying the requested relief.

   b. The approving authority must personally sign the denial.

4. <u>The appeal authority must get an independent legal review</u> before acting on the appeal.

5. Action by the appeal authority is final.

B. Reopening Reports of Survey. AR 735-5, para. 13-46.

1. Not an appeal.

2. Authority to reopen rests with the approval authority.

3. May occur:

a. as part of an appeal of the assessment of financial liability.

b. when a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.

c. when a subordinate headquarters recommends reopening based upon new evidence.

d. when the property is recovered.

e. When the approving authority becomes aware that an injustice has occurred.

X. JUDGE ADVOCATE ROLES.

A. Advisor to the Survey Officer.

1. Briefing

2. Guidance on the investigation, findings and recommendations.

B. Legal review and advice to the Approving Authority. AR 735-5, para. 13-36.

1. Before approving authority takes action, a judge advocate must review the survey and investigation for legal sufficiency.

2. The approving authority is not bound by the survey officer's or the judge advocate's recommendations.

C. Legal review and advice to the Appeal Authority. AR 735-5, para. 13-49b.

1. Before appeal authority takes action on an appeal, a judge advocate must review it.

2. Judge advocate must be different than the one who reviewed the survey and investigation for the approval authority.

D. Attorney for Respondent. AR 27-3, para. 3-6 g(4)(b).

1. Legal Assistance office required assist on rebuttal to report of survey.

2. Civilians not otherwise entitled to legal assistance receive assistance for report of survey purposes.

XI. CONCLUSION.

CHAPTER 36

FISCAL LAW FOR COMMANDERS

I. INTRODUCTION. **1**

II. AVAILABILITY AS TO PURPOSE. **2**

III. TYPICAL QUESTIONABLE EXPENSES. **3**

A. Clothing. 3

B. Food. 3

C. Bottled Water. 7

D. Workplace Food Storage and Preparation Equipment 7

E. Entertainment. 8

F. Decorations. 8

G. Business Cards. 9

H. Telephones. 9

I. Fines and Penalties. 11

J. Licenses and Certificates. 11

K. Awards (Including Unit or Regimental Coins) 12

L. Use of Office Equipment. 14

IV. MILITARY CONSTRUCTION. **15**

V. INVESTMENT/EXPENSE THRESHOLD. **22**

VI. USE OF OFFICIAL REPRESENTATION FUNDS. **24**

VII. AVAILABILITY AS TO TIME. **26**

VIII. AVAILABILITY AS TO AMOUNT. **28**

IX. THE ANTIDEFICIENCY ACT. **29**

X. LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342. ..... **30**

XI. VOLUNTARY CREDITOR RULE. **32**

XII. PASSENGER CARRIER USE. ……**34**

XIII. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS. **34**

XIV. CONCLUSION. **37**

FISCAL LAW FOR COMMANDERS

I. INTRODUCTION.

A. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. In implementing these express constitutional powers, Congress limits strictly the obligation and expenditure of public funds by the executive branch. Congress regulates virtually all executive branch programs and activities through the appropriations process.

1. Congress has enacted fiscal controls, which, if violated, subject the offender to serious adverse personnel actions and criminal penalties.

2. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.

B. What are the Major Fiscal Limitations?

1. An agency may obligate and expend appropriations only for a proper purpose;

2. An agency may obligate only within the time limits applicable to the appropriation (e.g. O&M funds are available for obligation for one fiscal year); and

3. An agency may not obligate more than the amount appropriated by the Congress.

C. Philosophy of Fiscal Law. The Supreme Court's Fiscal Philosophy: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. MacCollom, 426 U.S. 317 (1976).

II. AVAILABILITY AS TO PURPOSE.

A. What is the "Proper Purpose" Rule? The "Purpose Statute" provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).

B. The Purpose Statute does not require Congress to specify the purpose of every expenditure in an appropriations act, although it does specify the purpose of many expenditures. The DoD has reasonable discretion to determine how to accomplish the purpose of an appropriation. Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).

C. Determining the Purpose of a Specific Appropriation—Where Do You Look?

1. Appropriations Acts. The DoD has nearly one hundred separate appropriations available to it for different purposes.

2. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, Reserve, etc.), and purpose (Procurement, Research and Development, etc.). The major DoD appropriations provided in the annual Appropriations Act are:

a) Operation & Maintenance (O&M)—used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

b) Personnel—used for pay and allowances, permanent change of station travel, etc.;

c) Research, Development, Test and Evaluation (RDT&E)—used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and

d) Procurement—used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."

3. The DoD also receives smaller appropriations for other specific purposes (e.g., Humanitarian Assistance, Chemical Agents and Munitions Destruction, etc.).

4. Congress appropriates funds for military construction separately.

5. By regulation, the DoD has assigned most types of expenditures to a specific appropriation. See DFAS-IN Manual 37-100-XXXX, The Army Management Structure (July XXXX). The manual is reissued every FY. XXXX= appropriate FY.

D. Fund Cites.

III. TYPICAL QUESTIONABLE EXPENSES.

A. Clothing. Clothing is generally a personal expense. IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized). But see 5 U.S.C. § 7903 (authorizes purchase of special clothing, for government benefit, which protects against hazards); White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (tuxedo rental or purchase for employees authorized); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (safety shoes authorized).

B. Food.

1. General Rule. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency's mission performance. As a result, food is generally considered a personal expense. See Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II), B-247563, Dec. 11, 1996 (unpub.) (concluding that appropriated funds were not available for employee breakfasts or meetings); Pension Benefit Guaranty Corp.—Provision of Food to Employees, B-270199, Aug. 5, 1996 (unpub.) (concluding that appropriated funds were not available to provide food and drink during organizational effectiveness sessions); Department of the Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (concluding that the provision of coffee and doughnuts was an unauthorized entertainment expense).

2. Exceptions.

a) All inclusive facility / food fee. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is all right for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999 (unpub.).

b) "Light Refreshments." Regulatory-based "Light Refreshments" Exception. Through 27 January 2003, federal agencies commonly paid for "light refreshments" at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), ch. 2, para. U2550; Joint Travel Regulation (JTR), ch. 4, para. C4950. The JFTR as well as the JTR may be found at: http://www.dtic.mil/perdiem/trvlregs.html. That exception was recently overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003 (unpub.).

c) Formal Meetings and Conferences. Under 5 U.S.C. § 4110, the government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.

(1) This exception does **not apply to purely internal business meetings or conferences sponsored by government agencies**. See Pension Benefit Guar. Corp.—Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996); Meals for Attendees at Internal Gov't Meetings, B-230576, 68 Comp. Gen. 604 (1989).

(2) This exception also does **not apply to military members (it applies only to civilian employees).** But see JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.

d) Training. Under 5 U.S.C. § 4109 (applicable to civilian employees) and 10 U.S.C. § 4301 and 10 U.S.C. § 9301 (applicable to service members), the government may provide meals if necessary to achieve the objectives of a training program. See Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).

(1) The GAO and other auditors will not merely defer to an agency's characterization of a meeting as "training." Instead, they will closely scrutinize the event to ensure it was a valid training activity and that the food was actually necessary to achieve the objectives of that training. See Corps of Eng'rs—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (determining that quarterly managers meetings of the Corps did not constitute "training"); See also Pension Benefit Guar. Corp.—Provision of Food to Employees, *supra*. (determining that food was not needed for employee to obtain the full benefit of training).

(2) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. See Army — Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also AFI 65-601, vol. 1, para. 4.26.1.2.

e) Award Ceremonies. Under 5 U.S.C. §§ 4503-4504 (civilian incentive awards) and 10 U.S.C. § 1124 (military cash awards), federal agencies may "incur necessary expenses" including purchasing food to honor an individual that is given an award made on the basis of one or more of the above statutory authorities.

(1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending $20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124] which expressly permit agency to "incur necessary expense for the honorary recognition. . ..").

(2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1June 2000). See also AFI 65-601, vol. 1, para. 4.31.

(3) **NOTE**: 10 U.S.C. § 1125 governs the Secretary of Defense's (SECDEF) authority to award medals, trophies, badges, etc. to service members. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124. Therefore, food may not be purchased with appropriated funds and served at an awards ceremony conducted solely under the authority of 10 U.S.C. § 1125.

f) Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. See discussion *infra* Part **Error! Reference source not found.** of this chapter for an overview.

C. Bottled Water. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.

1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. See United States Agency for Int'l Dev.—Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

2. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120203 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.45 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, even in the context of a deployment / contingency).

D. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots). Buying food storage and/or preparation equipment generally does not materially contribute to an agency's mission performance. As a result, these items are generally considered to be a personal expense. Under a "necessary expense" analysis, the GAO has sanctioned the use of appropriated funds to buy food storage and preparation equipment when the purchase is "reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees."

1. This scenario generally arises when there are no commercial eating facilities proximately available. See e.g., Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (determining that commercial facilities were not proximately available when the nearest one was a 15-minute commute away from the federal workplace). See also Letter to Mr. Jerome D. Fallon, B-180272, 1974 U.S. Comp. Gen. LEXIS 1820 (July 23, 1974) (approving purchase of sink and wall cabinet); Letter to Mr. R.J. Schullery, B-173149, 1971 U.S. Comp. Gen. LEXIS 2302 (Aug. 10, 1971) (approving purchase of utensils).

2. Another possible scenario in which food storage and/or preparation equipment may be purchased is where an employee is forced to work extended hours during which there is no open and proximately located restaurant available. See Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining

commercial facilities were unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

E. Entertainment. Entertaining people generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display,
B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment).

1. Statutory-based Exceptions. Congress does occasionally provide permanent or one-time authority to entertain. See Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice); Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv.—Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training).

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See discussion *infra* Part **Error! Reference source not found.** of this chapter for an overview. See also To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

F. Decorations. Under a "necessary expense" analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest

expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining Christmas cards were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2. NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)

G. Business Cards. Business Cards. Under a "necessary expense" analysis, the GAO has recently sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper "necessary expense").

1. This case "overturned" a long history of Comptroller General's decisions holding that business cards were a personal expense because they did not materially contribute to an agency's mission accomplishment. See, e.g., Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

2. More Restrictive Agency Level Regulations. The military departments have implemented policies that generally only permit recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. See AR 25-30, The Army Publishing and Printing Program, para. 11-11 (21 June 1999); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); AFI 65-601, vol. 1, para. 4.36; Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999); but see Department of Defense memorandum, dated 15 July 1999 and Department of the Army memorandum, dated 2 August 1999 (indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer).

H. Telephones. Even though telephones might ordinarily be considered a "necessary expense," appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to

great abuse. See 31 U.S.C. § 1348. See also Centers for Disease Control and Prevention—Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director's residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2) and (c). See also Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. See 10 U.S.C. § 1588(f).

2. Exception for data transmission lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Communications Comm'n—Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

3. Cell Phones. The above prohibition only applies to phones installed in a personal residence and therefore does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate B-287524, Oct. 22, 2001 (unpub.) (indicating that the agency may not, however, pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data).

4. Exception for teleworking. In 1996, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. See Pub. L. No. 104-52, § 620. Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: http://www.opm.gov/wrkfam/telecomm/telecomm.htm. The Air Force also has some additional guidance found in AFI 65-601, vol I, para 4.24.6.

I. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds.

1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).

2. Note: Agencies may also pay fines imposed on the agency itself if Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

J. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. See A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable). See also AFI 65-601, vol. 1, para. 4.47.

1. Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Decision, B-257895, Oct. 28, 1994 (unpub.) (drivers' licenses for scientists and engineers to perform

security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

2. Potential Legislative Exception. Section 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 (2001), adds 5 U.S.C. §5757 permitting agencies to reimburse the following expenses that their **competitive service employees** incur:

a) professional accreditation;

b) state-imposed professional licenses;

c) professional certification; and

d) the costs of any examinations required to obtain such credentials.

NOTE: To date, there has been no regulatory implementation of this statutory authorization.

K. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase "mementos" or personal gifts. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992)(requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

1. Awards For Service Members. Congress has provided specific statutory authority for SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

a) The Army has implemented this statute in AR 600-8-22, Military Awards (25 Feb. 1995). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).

b) Chapter 11 of the regulation allows the presentation of other nontraditional awards for "excellence in accomplishments and competitions which clearly contribute to the increased

effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition."

c) These awards must "be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness." See AR 600-8-22, para. 11-2.

d) Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other "similar devices." The MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded, however. See AR 600-8-22, para. 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual "Peacekeeper Challenge").

e) Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders' coins, see Major Kathryn R. Sommercamp, *Commanders' Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6.

f) The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28, Awards and Decorations Programs, (1 Aug. 1997); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). See also AFI 65-601, vol. 1, para. 4.29; OpJAGAF 1999/23, 1 Apr. 1999.

2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503, permitting

a) Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993). For Air Force civilians, the

award must also be made in accordance with AF Pam 36-2861, Civilian Recognition Guide (1June 2000).

b) Non-Cash Awards. The statute technically states that the "head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of" one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments. In such circumstances, the award is not the food just an incidental expense incurred to honor the awardee.

c) Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors. See discussion *infra* Part **Error! Reference source not found.** of this chapter for an overview. In addition, commanders may use nonappropriated funds to purchase awards for intramural and athletic competitions. See AR 215-1.

L. Use of Office Equipment. Use of Office Equip. in Support of Reserves and Nat'l Guard, B-277678, Jan. 4, 1999 (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum may be found at: http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserves.htm. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (providing a good overview of this authority).

IV. MILITARY CONSTRUCTION.

A. Congressional oversight of the Military Construction Program is extensive and pervasive.

B. Dollar Thresholds and Funding Sources (in the absence of separate statutory authority)

1. Operations and Maintenance: 10 U.S.C. § 2805©; Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 2805, 115 Stat. 2230 (2001). See also AR 415-15, para. 1-6c(1); AR 420-10, para. 4-1c.

a) General Prohibition on the Use of O&M Funds. 41 U.S.C. § 12. Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 12 prohibits a federal agency from entering into a public contract to build, repair, or improve a public building that binds the government to pay a sum that exceeds the amount Congress specifically appropriated for that purpose.

b) The Secretary of a military department may use O&M funds to finance Unspecified Minor Military Construction projects costing less than:

(1) $1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

(2) $750,000 if the project is intended for any other purpose.

C. "Unspecified" Minor Military Construction (UMMC) Projects. 10 U.S.C. § 2805(a).

1. Authorized Use. 10 U.S.C. § 2805(a). See AR 415-15, para. 1-6b(1) and App. B. The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law.

a) An UMMC project is defined as a military construction project with an approved cost of $1.5 million or less.

b) However, an UMMC project may have an approved cost up to $3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

2. Requirements for Use. 10 U.S.C. § 2805(b)(2); Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 2805, 115 Stat. 2230 (2001).

a) Before beginning an UMMC project with an approved cost greater than $750,000, the Secretary concerned must approve the project.

b) In addition, the Secretary concerned must: 1) Notify the appropriate committees of Congress; and 2) Wait 21 days.

D. "Specified" Military Construction Projects. 10 U.S.C. § 2802. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects authorized by law.

1. Source of Funding. See, e.g., Military Construction Appropriations Act, 2003, Pub. L. No. 107-249, 116 Stat. 1578 (2002); H.R. CONF. REP. NO. 107-731 (2002). Congress provides annual funding and approval for "specified" military construction projects in the Military Construction Appropriations Act.

a) Congress funds the entire military construction program with lump sum appropriations. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.

b) The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by project.

2. Authorized Use.

a) Congress normally "specifies" military construction projects expected to exceed $1.5 million.

b) A military department may not carry out military construction projects expected to exceed $1.5 million without specific Congressional authorization and approval.

E. Project scope is critical. A "military construction project" includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L; AR 415-15, para. 2-3a; AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1c; see also The Honorable Michael B. Donley, B-234326, Dec. 24, 1991 (unpub.) (concluding that the Air Force improperly split a project involving 12 related trailers into 12 separate projects).

F. Project "Splitting" is Improper. An agency may not treat "clearly interrelated" construction activities as separate projects. The Honorable Michael B. Donley, supra; The Honorable Bill Alexander, House of Representatives,
B-213137, Jan. 30, 1986 (unpub).

G. Combat and Contingency Related O&M Funded Construction.

1. On 22 February 2000, the Army Deputy General Counsel (Ethics and Fiscal) issued a policy memorandum stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures "are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations." See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). To qualify for the Combat and Contingency Exception, a project must:

a) be clearly intended to meet a temporary operational requirement;

b) intend for use such to facilitate combat or contingency operations; and

c) not be used for the purpose of satisfying requirements of a permanent nature at the conclusion of combat or contingency operations (i.e., follow-on operations, future exercises).

2. On 27 February 2003, the Under Secretary of Defense (Comptroller), issued a policy memorandum clarifying DOD's position on the use of O&M funds for construction in support of contingency missions. See Memorandum, DOD Deputy General Counsel (Fiscal), Subject: Availability of Operation and Maintenance Appropriations for

Construction, (February 27, 2003). The memorandum authorizes the use of O&M funds for such construction where:

a) the construction is necessary to meet an urgent military operational requirement of a temporary nature;

b) the construction will not be carried out with respect to a military installation as defined under 10 U.S.C. 2801; and,

c) the United States has no intention to use the construction after the operational requirement has been satisfied.

3. On 16 April 2003 the President signed the Emergency Wartime Supplemental Appropriation for FY 2003. See Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003).

a) Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to $150 million of funds appropriated in the supplemental appropriation for carrying out military construction projects not otherwise authorized by law. Such funds would then be available to DOD pursuant to the Secretary's authority to carry out contingency construction under 10 U.S.C. § 2804.

b) Section 1901 clarified the definition of "military installation" to exclude projects that would previously have been permitted under the Under Secretary's 27 February 2003 memorandum. "Military Installation" includes not only buildings, structures & real property improvements under US operational control, but also, any building, structure or real property improvement to be used by the Armed Forces, regardless of whether such use is anticipated to be temporary or of longer duration (emphasis added).

c) The conference report accompanying the supplemental appropriation rejected the policy articulated in the Under Secretary's 27 February 2003 memorandum, and insisted the Secretary of Defense use his authority pursuant to 10 U.S.C. § 2804 to carry out contingency related construction in the future.

H. Contingency Construction Projects. 10 U.S.C. § 2804. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(6); AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20F, para. 6.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.

2. Requirements for Use.

a) Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be inconsistent with:

(1) National security; or

(2) National interest.

b) In addition, the SECDEF must:

(1) Notify the appropriate committees of Congress;

(a) (2) Wait 21 days.

3. Source of Funding. The SECDEF must use funds specifically appropriated for contingency construction to finance these projects.

4. Limitations.

a) Legislative History. H.R. Rep. No. 97-612 (1982).

(1) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.

(2) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.

b) DOD Limitations.

(1) DOD Dir. 4270.36, para. 3.4, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.

(2) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.F.4, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

c) Army Limitations. AR 415-15, para. 1-6b(6).

(1) The Army generally reserves this authority for projects that support multi-service requirements.

(2) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.

I. Other Military Construction Authorities.

1. Emergency Construction Projects. 10 U.S.C. § 2803. See DoD Dir. 4270.36; AR 415-15, paras. 1-6b(2) and 5-19, app. C; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

2. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DoD Dir. 4270.36; AR 415-15, para. 1-6b(7) and app. D, para. D-2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

3. Environmental Response Actions. 10 U.S.C. § 2810. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

4. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DoD Dir. 4270.36; AR 415-15, para. 1-6b(3) and app. D, para. D-1; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

J. Maintenance and Repair Projects.

1. Maintenance and repair projects are not construction. See AR 420-10, Glossary, sec. II. Therefore, maintenance and repair projects are not subject to the $750,000 O&M limitation on construction. See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for "an entire single-purpose facility or one or more functional areas of a multipurpose facility"). But see 10 U.S.C. § 2811 (requiring secretarial approval if the estimated cost of the project exceeds $5 million and congressional notification if the estimated cost of the project exceeds $10 million).

2. Maintenance. AR 420-10, Glossary, sec. II, defines maintenance as the "work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose." It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.

3. Repair.

a) Statutory Definition. 10 U.S.C. § 2811(e). A "repair project" is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

b) "New" DoD Definition. DoD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. See Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/ Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DoD Repair Memorandum]. The term "repair" means to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

c) Army Definition. See AR 415-15, para. 2-3b; AR 420-10, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 107; see also Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of "Repair" (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term "repair" means to restore of a facility or a facility component to

such a condition that the Army may use it effectively for its designated functional purpose.

(1) The DA Repair Memorandum states that: "The new definition is more liberal and expands [the Army's] ability to provide adequate facilities for [its] soldiers and civilians;" however, the DA Repair Memorandum also states that: "A facility must exist and be in a failed or failing condition in order to be considered for a repair project." Cf. DA Pam 420-11, para. 1-7e (stating that "[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated").

V. INVESTMENT/EXPENSE THRESHOLD.

1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See DOD FMR, vol. 2A, ch. 1, para. 010201. Common examples of expenses include:

   a) Labor of civilian, military, or contractor personnel;

   b) Rental charges for equipment and facilities;

   c) Food, clothing, and fuel;

   d) Maintenance, repair, overhaul, and rework of equipment; and

   e) Utilities.

2. Investments are "costs to acquire capital assets" or which have costs that will benefit both current and future periods and generally have a long life span. DOD FMR, vol. 2A, ch. 1, para. 010201.D.2. Investments are normally financed with procurement appropriations.

3. Exception Permitting Purchase of Investments With O&M Funds. In each year's Defense Appropriation Act, Congress has permitted DOD to utilize its Operation and Maintenance appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., The Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8040 (Oct. 23, 2002) (establishing that threshold at

$100,000); See also DOD FMR, vol. 2A, ch. 1, para. 010201.D.1 (implementing that threshold).

4. Expanded Threshold. In Division M, § 106 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7 (Feb. 20, 2003), Congress raised the investment/expense threshold to $250,000. For DOD purchases made after 20 February 2003 one should utilize this expanded threshold to determine the proper source of funding. All DOD purchase made prior to 20 February 2003 should utilize the old ($100,000) threshold to determine the proper source of funding. See also DFAS-IN Manual 37-100-03, Appendix A, Expense/Investment Criteria (implementing the expanded threshold for Army purchases).

5. Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

   a) Agencies must consider the "system" concept when evaluating the procurement of items. The determination of what constitutes a "system" must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.

   b) A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

   c) Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate "system" for funding purposes, only if the primary function of the end item is to operate independently.

   d) Do not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

Example: An agency is acquiring 200 stand-alone computers and software at $2,000 each. The computers are being purchased primarily to operate as independent workstations. The agency should use O&M funds for this acquisition. If one of the primary reasons for purchasing the computers is so that their users could tie into a network and communicate with one another via email, the computers should be purchased with Procurement funds.

VI. USE OF OFFICIAL REPRESENTATION FUNDS.

A. Representation funds are appropriations made available to the executive branch that may be expended without many of the normal controls. Throughout our history, Congress has provided representation funds for the use of the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Congress and DoD regulate representation funds tightly because of their limited availability and the potential for abuse.

B. Controls.

1. 10 U.S.C. § 127.

2. DOD Directive 7250.13, Official Representation Funds (10 Sep. 2002)

3. AR 37-47, Representation Funds of the Secretary of the Army (31 May 1996).

C. Official Representational Funds (.0012).

1. These funds are available to extend official courtesies to dignitaries, officials, and foreign governments. DOD Directive 7250.13, para. 3.1; AR 37-47, para. 2-1; AFI 65-603, para. 1; SECNAVINST 7042.7J, para. 6. The commander may use the official representation funds to throw a reception or host a dinner for the distinguished visitor. In addition, the commander may use the official representation funds to purchase, gifts, mementos, or tokens for authorized guests.

a) Non DOD Distinguished Visitors. The gift may cost no more than $285.00. See DOD Directive 7250.13, para. E.2.4.1.8 (which cross references 22 U.S.C. § 2694 which in turn cross references 5 U.S.C. § 7342; the amount established in the latter statute is revised by GSA once every three years to take inflation into account and at 67 Fed. Reg. 56,495 was most recently raised to $285) See also AR 37-47, para. 2-9a(1); AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).

b) If the guest is from within DOD and is one of the specified individuals listed in Enclosure 1 to DOD Directive 7250.13, then the command may present him or her with a gift valued at no more than $40.00. See Department of Defense memorandum, dated 23 December 2002, subject: Official Representation Funds.

2. Representation funds are an element of the emergency and extraordinary expense funds appropriated for the use of the Secretary of the Army in the annual appropriations act. Not all agencies receive representation funds, and agencies may not use other appropriations for representation purposes. See HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989).

3. Congress provides representation funds as a separate item in the Operation and Maintenance appropriation. Obligation in excess of the limitation is a violation of 31 U.S.C. § 1341, the Antideficency Act.

4. Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the Secretary of the Army or his designee. AR 37-47, para. 3-1d.

5. Obligation of representation funds requires legal review. AR 37-47, para. 3-1f(2).

6. Prohibitions. AR 37-47, para. 2-10.

   a) Expenses solely for entertainment of, or gifts to, DoD personnel, except for the select senior DoD personnel listed in AR 37-47, para. 2-4.

   b) Retirements and change of command ceremonies, absent DA approval. AR 37-47, para. 2-4g; United States Army School of the Americas—Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished).

   c) Classified projects and intelligence projects.

   d) Membership fees and dues.

   e) Personal expenses (e.g., holiday cards, calling cards, clothing, birthday gifts, etc.).

   f) Gifts or flowers that an authorized guest wishes to present to another person.

   g) Personal items purchased by an authorized guest.

   h) Guest telephone bills.

i) Any cost associated with the event that is eligible for nonappropriated funds, except expenses of authorized guests.

j) Repair, maintenance, and renovation of DoD facilities.

7. The Secretary of the Army routinely considers exceptions to AR 37-47.

8. Miscellaneous Contingency Funds (.0014).

a) DA uses miscellaneous contingency funds for expenses for which Congress has not otherwise provided.

b) Examples.

(1) To reward search teams at the Gander air crash.

(2) To mitigate the impact following the Army's erroneous failure to withhold tax from soldiers' pay.

9. CINC Initiative Funds. This element of the O&M, Defense-Wide Appropriation is governed by 10 U.S.C. § 166a, which authorizes the Chairman of the Joint Chiefs of Staff to expend funds for specified purposes, including augmentation of other appropriations.

VII. AVAILABILITY AS TO TIME.

A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552. An appropriation is available for obligation for a definite period of time. An agency must obligate an appropriation during its period of availability, or the authority to obligate expires.

B. The "Bona Fide Needs" Rule. 31 U.S.C. § 1502(a).

1. Agencies may obligate appropriated funds only for properly incurred expenses of the period of availability of the appropriation. That is, the requirement must represent bona fide needs of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995); Magnavox—Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); DFAS-IN 37-1, para. 080302.

2. Supply Contracts.

a) General Rule. Supplies are the bona fide need of the fiscal year in which the agency needs or consumes them. Thus, supplies with which the agency needs to operate during a given fiscal year are generally the bona fide need of that fiscal year. See Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965).

b) Exceptions. The Comptroller General has held that supplies ordered in one fiscal year for use in a subsequent fiscal year are the bona fide need of the year of purchase if one of two exceptions applies.

(1) The Stock-Level (Inventory) Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year.

(2) The Lead-Time Exception. If the agency cannot obtain supplies on the open market when it needs them because the time required to order, produce, and deliver the supplies requires the agency to purchase them in a prior fiscal year, the supplies are considered the bona fide need of the year of purchase.

3. Service Contracts.

a) General Rule. Services are generally the bona fide need of the fiscal year in which they are performed.

b) Exceptions.

(1) Severable Service Contracts. A military department or DoD agency may use current year funds to award a severable service contract for a period not to exceed 12 months at any time during the fiscal year. 10 U.S.C. § 2410a. See 41 U.S.C. § 235l (providing similar authority for non-DoD agencies); 10 U.S.C. § 2410a(b) (providing similar authority for the Coast Guard); see also Funding of Maintenance Contract Extending Beyond Fiscal Year, B-207433, May 22, 1996, 96-1 CPD ¶ 247.

(2) Non-Severable Service Contracts. An agency may use current year funds to award a non-severable service contract (i.e., a contract that seeks a single or unified outcome, product, or report), even if contract performance crosses fiscal year. See DFAS-IN 37-1, tbl. 8-1; DFAS-DE 7000-4, para. 4c(2); see also Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (concluding that work on an environmental impact statement properly crossed fiscal years).

VIII. AVAILABILITY AS TO AMOUNT.

A. Administrative Subdivision of Funds. 31 U.S.C. § 1514(a) requires agencies to control the subdivision of appropriations.

1. The Office of Management and Budget apportions funds over their period of availability to agencies for obligation. See 31 U.S.C. § 1512.

2. Agencies subdivide these funds among their subordinate activities.

3. In the Army, the Operating Agency/Major Command (MACOM) generally is the lowest command level at which the formal administrative subdivisions of funds required by 31 U.S.C. § 1514 are maintained for O&M appropriations. Below the MACOM level, O&M subdivisions generally are informal targets or allowances.

B. Agencies promulgate regulations to control the use of funds. See DoD 7000.14-R, vol. 14, app. A; DFAS-IN Reg. 37-1; Air Force Procedures for Administrative Control of Appropriations Procedures.

IX. THE ANTIDEFICIENCY ACT.

A. Prohibitions. The Act prohibits any government officer or employee from:

1. making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A);

2. making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds, or amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). 31 U.S.C. § 1517(a)(2);

3. incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); or

4. accepting voluntary services unless otherwise authorized by law. 31 U.S.C. § 1342.

B. Reporting and Investigating Violations. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, § 145.2; DOD FMR, vol. 14, chs. 4-7; DFAS-IN 37-1, ch. 4, para. 040204.

1. General. A violation of the Antideficiency Act is a serious matter. Violators are subject to appropriate administrative discipline, including suspension of duty without pay or removal from office. 31 U.S.C. § 1349(a). Knowing and willful violators are subject to a $5,000 fine and imprisonment for two years. 31 U.S.C. § 1350.

2. Reporting Suspected Violations. An individual learning of or detecting a potential ADA violation must report within 10 working days the possible violation to their chain of command. DOD FMR, vol. 14, ch. 3, para. 030101. In the Army, individuals inform the Director of Resource Management (DRM) at the service activity of any potential violations and the DRM shall immediately notify the commander of the allowance/allotment involved. DOD FMR, vol. 14, ch. 3, para. 030102.

3. Investigations.

a) The first step is a preliminary review to gather basic facts and determine whether an Antideficiency Act violation has apparently occurred. DOD FMR, vol. 14, ch. 3, para. A. Completion of the review is usually required within 90 days. DOD FMR, vol. 14, ch. 3, para. 030201. For Army activities,

the preliminary review must be completed within 90 days after discovery of the potential violation. DFAS-IN 37-1, ch. 4, para. 040204.

b) If the preliminary review determines that a violation occurred, a formal investigation must be initiated within 15 business days of the approval of the preliminary review report. DOD FMR, vol. 14, ch. 3, para. 030204. The purpose of the formal investigation is to determine the relevant facts and circumstances of the potential violation – if a violation has occurred, what caused the violation what are appropriate corrective actions and lessons learned, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401. Typically, the MACOM commander approves/appoints an investigating officer (IO), who must be adequately trained and qualified to serve as an IO or as an investigative team member. DOD FMR, vol. 14, ch. 4, para. 040401; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 4.3. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months after the formal investigation began. DOD FMR, vol. 14, ch. 6, paras. 050201 and 603. Status reports on the investigation are due monthly to the OUSD (Comptroller) office. DOD FMR, vol. 14, ch. 6, para. 603.

c) If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD FMR, vol. 14, ch. 5, para. 050301(E).

X. LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342.

A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

1. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).

2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). But see T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.

B. Examples of Voluntary Services Authorized by Law

1. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).

2. 5 U.S.C. § 3111 (student intern programs).

3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

4. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).

5. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

6. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).

C. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

D. Gratuitous Services Distinguished.

1. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B-44829,

24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

2. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev.—Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program—State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). But see Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

XI. VOLUNTARY CREDITOR RULE.

A. Definition. A voluntary creditor is one who uses personal funds to pay a perceived valid obligation of the government.

B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, July 21, 1999 (unpub.) (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, Aug. 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, Dec. 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for

Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine); see also DFAS-IN 37-1, ch. 9, para. 092037; cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, July 22, 1991 (unpub.). Claims are recoverable if:

1. The claimant shows a public necessity;

2. The underlying expenditure is authorized;

3. The claim is for goods or services; and

4. The expenditure is not for a personal use item.

XII. PASSENGER CARRIER USE. 31 U.S.C. § 1344; 41 C.F.R. SUBPARTS 101-6.4 AND 101-38.3.

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program,
B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not violations of the Antideficiency Act, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.

a) The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity.
31 U.S.C. § 1344(b)(8).

b) The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).

2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, Dec. 8, 1983 (unpub.).

C. Penalties.

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a $10,000 fine).

XIII. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.

2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

a) Article I, Section 9, Clause 7 of the United States Constitution.

No money shall be drawn from the treasury except in consequence of appropriations made by law.

b) 31 U.S.C. § 1301(a) (Purpose Statute).

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

c) 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute).

Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.

3. Types of Augmentation.

a) Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs.—Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

b) Augmenting an appropriation by retaining government funds received from another source.

(1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at 10 U.S.C. § 2646 – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant

Funds, B-246502, 71 Comp. Gen. 387 (1992); But see Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).

(2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).

B. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

1. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order." See also 41 U.S.C. § 23 (providing similar intra-DOD project order authority.

2. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.

3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).

4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv.—Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv.—Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).

5. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.

6. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation's operation and maintenance account. See Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

8. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.

9. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.

11. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.

XIV. CONCLUSION.

CHAPTER 37

COMPETITIVE SOURCING AND PRIVATIZATION

I. Competitive Sourcing. 1

A. Origins and Development. 1

B. Past Legislative Roadblocks. 1

C. DOD and Competitive Sourcing. 2

D. Program Criticism. 3

E. Recent Development. 3

II. Agency Activity Inventory. 5

A. Key Terms 5

B. Inventory Requirement 5

III. "Old" Circular A-76 8

A. Resources. 8

B. Key Players/Terms. 9

C. Competition Procedures. 10

D. Seeking/Evaluating Offers in Cost Comparisons. 10

E. Choosing the Winner. 12

F. Post-Award Review. 12

G. Final Decision and Implementation. 18

IV. Circular A-76 (Revised) 20

A. Key Players/Terms. 20

B. Competition Procedures. 21

C. Post Competition Accountability. 25

V. Civilian Personnel Issues. 26

A. Employee Consultation 26

B. Right-of-First-Refusal of Employment. 26

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws. 26

VI. Housing Privatization 30

A. Generally 30

B. Authority 29

C. Implementation. 31

D. Issues and Concerns. 32

VII. Utilities Privatization. 33

A. Authority 33

B. Implementation. 33

C. Issues and Concerns. 35

VIII. Conclusion 35

Attachment 1 - "Old" Circular A-76 Process 37

Attachment 2 - Streamlined Competition Process 39

Attachment 3 - Standard Competition Process 41

CHAPTER 37

COMPETITIVE SOURCING AND PRIVATIZATION

I. COMPETITIVE SOURCING.[1]

A. Origins and Development.

1. 1955: The Bureau of the Budget (predecessor of the Office of Management and Budget (OMB)) issued a series of bulletins establishing the federal policy to obtain goods and services from the private sector. See Federal Office of Management and Budget Circular A-76, Performance of Commercial Activities, ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter Circular A-76 (1999)].

2. 1966: The OMB first issued Circular A-76, which restated the federal policy and the principle that "[i]n the process of governing, the Government should not compete with its citizens." The OMB revised the Circular in 1967, 1979, 1983, and again in 1999. See Circular A-76 (1999), ¶ 4.a.

3. 1996: The OMB issued a Revised Supplemental Handbook setting forth procedures for determining whether commercial activities should be performed under contract by a commercial source or in house using government employees. In June 1999, OMB updated the Revised Supplemental Handbook. See Circular A-76 (1999), ¶ 1.[2]

B. Past Legislative Roadblocks.

1. The National Defense Authorization Act for Fiscal Year (FY) 1989 allowed installation commanders to decide whether to study commercial activities for outsourcing. Pub. L. No. 101-189, § 11319a)(1), 103 Stat. 1352, 1560 (1989). Codified at 10 U.S.C.

---

[1] While referred to in the past as "contracting out" or "outsourcing," the current, and preferred term-of-art, is "competitive sourcing."

[2] The Circular A-76 (1999), Revised Supplemental Handbook, and associated updates issued through OMB Transmittal Memoranda are available at http://www.whitehouse.gov/omb/circulars/index.html.

§ 2468, this law expired on 30 September 1995. Most commanders opted not to conduct such studies due to costs in terms of money, employee morale, and workforce control.

2. The Department of Defense (DOD) Appropriations Act for FY 1991 prohibited funding Circular A-76 studies. See Pub. L. No. 101-511, § 8087, 104 Stat. 1856, 1896.[3]

3. The National Defense Authorization Acts for FY 1993 and FY 1994 prohibited DOD from entering into contracts stemming from cost comparison studies under Circular A-76. See Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992) and Pub. L. No. 103-160, § 313, 107 Stat. 1547, 1618 (1993).

C. DOD and Competitive Sourcing.

1. 1993: National Performance Review (NPR). Part of Vice President Gore's "reinventing government" initiative, the NPR stated public agencies should compete "for their customers . . . with the private sector." AL GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).

2. 1997: Quadrennial Defense Review (QDR). Addressing the issue of maintaining combat readiness, the QDR urged outsourcing defense support functions in order to focus on essential tasks while also lowering costs. WILLIAMS S. COHEN, REPORT ON THE QUADRENNIAL DEFENSE REVIEW 6 (May 1997).

3. 1997: Defense Reform Initiative (DRI). Expanding upon the QDR, the DRI recommended outsourcing more in-house functions and established outsourcing goals for DOD. WILLIAM S. COHEN, DEFENSE REFORM INITIATIVE REPORT (Nov. 1997).

[3] While not a "roadblock," a recurring limitation in recent DOD Appropriations Acts prohibits the use of funds on Circular A-76 studies if the DOD component has exceeded twenty-four months to perform a single function study, or thirty months to perform a multi-function study. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8022 (2003). The thirty-month limitation represents a change this year, as previously Congress provided forty-eight months for multi-function studies. See e.g., Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8022, 116 Stat. 1519, 1541 (2002). In the

4. Between Fiscal Year (FY) 1997 and FY 2001, DOD had completed approximately 780 sourcing decisions involving more than 46,000 government positions (approximately 34,000 civilian positions and 12,000 military provisions). See GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002) *available at* www.gao.gov.

D. Program Criticism.

1. In response to increasing criticism of the Circular A-76 process by both the public and private sectors, Congress, in Section 832 of the National Defense Authorization Act for FY 2001, tasked the Comptroller General to convene a panel of experts to study the Circular A-76 policies and procedures and to make appropriate recommendations as to possible changes. Pub. L. No. 106-398, 114 Stat. 1654, 1654A-220 (Oct. 30, 2000).

2. On 30 April 2002, the Commercial Activities Panel (CAP) released its final report, identifying weaknesses, as well as strengths, in the Circular A-76 procedures and making recommended changes. GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002), *available at* www.gao.gov.

3. Proposed Revision to Circular A-76. Based in part on the recommendations made by the CAP, on 19 November 2002, OMB published proposed changes to Circular A-76 and sought comments. See Office of Management and Budget; Performance of Commercial Activities, 67 Fed. Reg. 69,769 (Nov. 19, 2002). Over 700 individuals/organizations/agencies submitted comments to OMB regarding the proposed changes.[4]

E. Recent Development.

1. Following the receipt and consideration of the numerous comments received in response to the Proposed Revision, the OMB issued the "new" Circular A-76, effective 29 May 2003, superseding and rescinding the prior Circular A-76, the Revised Supplemental Handbook, OMB Circular A-76 Transmittal Memoranda Nos. 1-25, and Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, *Inherently Governmental*

[4] The Proposed Revision to OMB Circular A-76 and the public comments received in response during the thirty-day notice period are available at http://www.whitehouse.gov/omb/circulars/index.html.

Functions, Sept. 23, 1992. See Federal Office of Management and Budget Circular A-76 (Revised), Performance of Commercial Activities, ¶ 2 (May 23, 2003) [hereinafter Circular A-76 (Revised)].[5]

2. In general, the Circular A-76 (Revised) aims to:

   a. provide new guidance for developing inventories of commercial and inherently governmental functions;

   b. strengthen application of public-private competition;

   c. incorporate "FAR-like" provisions; and

   d. increase accountability.[6]

3. Applicability. The Circular A-76 (Revised) applies to all inventories required and streamlined and standard competitions initiated after the "effective date" (i.e., 29 May 2003). Circular A-76 (Revised) ¶ 6.

   a. Direct conversions initiated but not completed by the effective date must be converted to the streamlined or standard competitions under Revised Circular A-76. Circular A-76 (Revised) ¶ 7.a.

   b. Initiated cost comparisons for which solicitations have not been issued prior to the effective date must also be converted to standard competitions under the Circular A-76 (Revised), or, at the agency's discretion, converted to streamlined competitions under the new rules. Circular A-76 (Revised) ¶ 7.b.

---

[5] For additional discussion of the procedures and changes implemented by the Circular A-76 (Revised), see discussion infra at Part IV. The full text of Circular A-76 (2003) is available on-line at http://www.whitehouse.gov/omb/circulars/index.html.

[6] See Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003). The Federal Register notice provides a good overview of the changes made by the issuance of the Circular A-76 (Revised), as well as OMB's reasoning for some of the changes.

c. The rules in effect prior to issuance of the Revised Circular A-76 shall apply to all cost comparisons for which solicitations have already been issued, unless agencies elect to convert to the new procedures. Circular A-76 (Revised) ¶ 7.c.

II. AGENCY ACTIVITY INVENTORY.

A. Key Terms. The heart and soul of competitive sourcing rests on whether a governmental activity/function is categorized as commercial or inherently governmental in nature.

1. Commercial Activity. A recurring service that could be performed by the private sector. Circular A-76 (Revised), Attachment A, ¶ B.2.

2. Inherently Governmental Activities. An activity so intimately related to the public interest as to mandate performance by government personnel. Such "activities require the exercise of substantial discretion in applying government authority and/or making decisions for the government."[7] Circular A-76 (Revised), Attachment A, ¶ B.1.a. Inherently governmental activities fall into two broad categories:

a. The exercise of sovereign government authority.

b. The establishment of procedures and processes related to the oversight of monetary transactions or entitlements.

B. Inventory Requirement. Federal executive agencies are required to prepare annual inventories categorizing all activities performed by government personnel as either commercial or inherently governmental. The requirement is based on statute and the Circular A-76 (Revised).

1. Statutory Requirement - Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)).

a. Codifies the definition of "inherently governmental" activity.

[7] Cf. Federal Activities Inventory Reform Act (FAIR Act) of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified at 31 U.S.C. § 501 (note)), which states the term "inherently governmental function" includes activities that merely require the "exercise of discretion."

b. Requires each executive agency to submit to OMB an annual list (by 30 June) of non-inherently governmental (commercial) activities. After mutual consultation, both OMB and the agency must make the list of commercial activities public. The agency must also forward the list to Congress.

c. Provides "interested parties" the chance to challenge the list within 30 days after its publication. The "interested party" list includes a broad range of potential challengers to include the private sector, representatives of business/professional groups that include private sector sources, government employees, and the head of any labor organization referred to in 5 U.S.C. § 7103(a)(4).

2. Circular A-76 (Revised) Inventory Requirements.

a. Requires agencies to submit to OMB by 30 June each year an inventory of commercial activities, an inventory of inherently governmental activities, as well as an inventory summary report. Circular A-76 (Revised), Attachment A, ¶ A.2.

b. After OMB review and consultation, agencies will make both the inventory of commercial activities and the inventory of inherently governmental functions available to Congress and the public unless the information is classified or protected for national security reasons. Circular A-76 (Revised), Attachment A, ¶ A.4.

c. Categorization of Activities.

(1) The agency competitive sourcing official (CSO)[8] must justify in writing any designation of an activity as inherently governmental. The justification will be provided to OMB and to the public, upon request. Circular A-76 (Revised), Attachment A, ¶ B.1.

[8] The CSO is an assistant secretary or equivalent level official within an agency responsible for implementing the policies and procedures of the circular. Circular A-76 (Revised) ¶ 4.f. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003).

(2) Agencies must use one of six reason codes to identify the reason for government performance of a commercial activity.[9] When using reason code A, the CSO must provide sufficient written justification, which will be made available to OMB and the public, upon request. Circular A-76 (Revised), Attachment A, ¶ C.2.

d. Challenge Process.

(1) The head of the agency must designate an inventory challenge authority and an inventory appeal authority.

(a) Inventory Challenge Authorities. Must be "agency officials at the same level as, or a higher level than, the individual who prepared the inventory." Circular A-76 (Revised), Attachment A, ¶ D.1.a.

(b) Inventory Appeal Authorities. Must be "agency officials who are independent and at a higher level in the agency than inventory challenge authorities." Circular A-76 (Revised), Attachment A, ¶ D.1.b.

(2) Inventory challenges are limited to "classification of an activity as inherently governmental or commercial" or to the "application of reason codes." Circular A-76 (Revised), Attachment A, ¶ D.2.[10]

---

[9] The six reason codes include the following:

> Reason code A – "commercial activity is not appropriate for private sector performance";
> Reason code B – "commercial activity is suitable for a streamlined or standard competition";
> Reason code C – "commercial activity is subject of an in-progress streamlined or standard competition";
> Reason code D – "commercial activity is performed by government personnel as the result of a streamlined or standard competition . . . within the past five years;
> Reason code E – "commercial activity is pending an agency approved restructuring decision (e.g., base closure, realignment).
> Reason code F – "commercial activity is performed by government personnel due to a statutory prohibition against private sector performance."

Circular A-76 (Revised), Attachment A, ¶ C.1, Figure A2.

[10] Originally the Circular A-76 (Revised) stated interested parties could only challenge "reclassifications" of activities. The OMB issued a technical correction, however, revising Attachment A, paragraph D.2 by deleting the word "reclassification" and inserting "classification." Office of Mgmt. & Budget, Technical Correction to Office of

III. "OLD" CIRCULAR A-76.

A. Resources.

1. OMB Guidance. Circular A-76 (1999), Revised Supplemental Handbook, OMB Transmittal Memoranda 1-25.

2. DOD Guidance.[11]

a. U.S. Dep't of Defense, Dir. 4100.15, Commercial Activities Program (10 Mar. 1989).

b. U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures (9 Sept. 1985 through Change 3 dated 6 Oct. 1995).

c. U.S. Dep't of Defense, Department of Defense Strategic and Competitive Sourcing Programs Interim Guidance (Apr. 3, 2000).

3. Military Department Guidance.

a. U.S. Dep't of Army, Reg. 5-20, Commercial Activities Program (1 Oct. 1997).

b. U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide (31 Jul. 1998).

c. U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program (19 Jul. 2001).

Management and Budget Circular No. A-76, "Performance of Commercial Activities," 68 Fed. Reg. 48,961, 48,962 (Aug. 15, 2003).

[11] The DOD Directive, Instruction, Interim Guidance, as well as the applicable regulations, instructions, and guidance of the various Armed Services are available at DOD's SHARE A-76 website located at http://emissary.acq.osd.mil/inst/share.nsf.

d. U.S. Dep't of Navy, Instr. 4860.7C, Navy Commercial Activities Program (7 June 1999).

e. Marine Corps Order 4860.3D W/CH 1, Commercial Activities Program (14 Jan 92).

B. Key Players/Terms.

1. Congress. The DOD must notify Congress "before commencing to analyze" a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).[12]

2. Performance Work Statement (PWS). The PWS defines the agency's needs, the performance standards and measures, and the timeframe for performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ C.

3. Quality Assurance Surveillance Plan (QASP). The QASP outlines how federal employees will inspect either the in-house or the contractor performance. Revised Supplemental Handbook, Part I, Chapter 3, ¶ D.

4. Cost Comparison Study Team. A group of functional experts in the agency who prepare plans and develop the agency's cost estimate. The team is responsible for developing:

a. The Management Plan, which defines the overall structure for the MEO. This organizational structure serves as the government's proposed work force for cost comparison purposes. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.1.

b. The Most Efficient Organization, which describes the way the government will perform the commercial activity and at what cost. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.2.

5. MEO Certification Official. An individual, organizationally independent of the function under study or at least two levels above the most senior official included in the MEO, who certifies the Management Plan as

[12] As this is a statutory requirement it still applies to DOD under the Circular A-76 (Revised) procedures.

reflecting the government's MEO. Revised Supplemental Handbook, Part I, Chapter 3, ¶ E.3.

6. Independent Review Officer (IRO). The PWS, Management Plan, QASP, cost estimates, and supporting documentation are forwarded to the agency IRO. The IRO certifies compliance with applicable procedures and ensures the data establishes the MEO can perform the requirements of the PWS and that all costs are justified. Revised Supplemental Handbook, Part I, Chapter 3, ¶ I.

7. Administrative Appeal Authority (AAA). An individual, independent of the activity under review or at least two organization levels above the MEO certification official, responsible for the administrative appeal process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.3.

C. Competition Procedures.

1. Direct Conversions. Activities with 10 or fewer full time equivalent employees (FTEs) may be converted without a cost comparison study. Revised Supplemental Handbook, Part I, Chapter 1, ¶ C.6.

2. Streamlined Cost Comparisons. Activities with 65 or fewer full time equivalent employees may use the simplified cost comparison procedures, if it will serve the equity and fairness purposes of the Circular A-76. Revised Supplemental Handbook, Part II, Chapter 5. [13]

3. Cost Comparisons. If direct conversion or streamlined cost comparison procedures are inapplicable, the agency must conduct a full cost comparison study. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ A.1.

D. Seeking/Evaluating Offers in Cost Comparisons.

[13] A recurring provision in the Defense Appropriations Act prohibits the DOD from converting to contractor performance any function involving more than 10 employees until a "most efficient and cost effective organization analysis is completed . . . ." Congress has granted the DOD a waiver to this analysis requirement, if directly converting performance of those functions to: 1) a Javits-Wagner-O'Day (JWOD) Act firm that employs blind or severely handicapped employees; or 2) a firm that is under fifty-one percent ownership of an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

1. Procurement Method. The Revised Supplemental Handbook permits all competitive methods provided under the FAR (e.g., sealed bidding, negotiated procurements). Revised Supplement Handbook, Part I, Chapter 3, ¶ H.1.

2. Solicitation/Evaluation. The agency issues a solicitation based on the PWS to seek bids/offers from the private sector. FAR 7.304(c).

   a. For sealed bid procurements, the contracting officer opens all bids and the government's in-house cost estimate and enters the apparent low bid on the Cost Comparison Form. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.1; FAR 7.306(a).

   b. For negotiated procurements, the Source Selection Authority (SSA) evaluates and selects the private sector offeror that represents the "most advantageous proposal" in accordance with the solicitation's stated evaluation criteria. The cost of this proposal is compared against the government's in-house cost estimate. See generally Revised Supplemental Handbook, Part I, Chapter 3, ¶ J.3; FAR 7.306(b).

3. "Cost/Technical Trade-Offs" in Negotiated Procurements. Negotiated procurements contemplating a "cost/technical trade-off' evaluation involve an additional step. See Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.

   a. Source Selection Authority. After the SSA reviews the private sector offers and identifies the offer that represents the "best value" to the government, the contracting officer submits to the SSA the government's management plan (not the cost estimate) to ensure that it meets the same level of performance and performance quality as the private offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶¶ H.3.c-d; see also, NWT, Inc.; PharmChem Laboratories, Inc., B-280988; B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158.

b. Independent Review Officer. Once the government makes any and all the changes necessary to meet the performance standards set by the SSA, the government submits a revised cost estimate to the IRO. This review assures that the government's in-house cost estimate is based upon the same scope of work and performance levels as the "best value" private sector offer. Revised Supplemental Handbook, Part I, Chapter 3, ¶ H.3.e.

E. Choosing the Winner.

1. The private offeror "wins" if its proposal costs beat the in-house cost estimate by a minimum cost differential of:

a. 10 percent of personnel costs, or

b. $10 million over the performance period, whichever is less.

The minimum differential ensures that the government will not convert for marginal cost savings. Revised Supplemental Handbook, Part II, Chapter 4, ¶ A.1.

2. Otherwise, the MEO "wins" and the agency continues performance of the commercial activity in-house, using the staffing proposed by the MEO.

F. Post-Award Review.

1. Administrative Appeals Process. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K; DODI 4100.33, ¶ 5.7; DOD Interim Guidance, Attach. 5; FAR 7.307.

a. Circular A-76 (1999) requires agencies to develop an internal administrative appeal process for challenges to cost comparison decisions.

(1) Generally, the agency must receive the appeal within 20 calendar days of announcement of tentative decision, which may be extended for complex studies. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.1.b. See FAR 52.207-2 (providing for a public review period of 15-

30 working days, depending upon the complexity of the matter).

(2) The appeal must be based on noncompliance with the requirements and procedures of Circular A-76 or specific line items on the Cost Comparison Form.

b. All "interested parties" need to review the tentative cost-comparison decision and all supporting documentation and immediately identify and bring to the attention of the Administrative Appeals Board any potential errors that, if corrected, would provide for a more accurate determination. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). "Interested parties" in this context includes affected federal employees/unions and the apparent winner of the tentative decision. Id. See also Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.2.

c. Decision on Appeal. The agency should provide for a decision within 30 days after the Administrative Appeal Authority receives the appeal. Revised Supplemental Handbook, Part I, Chapter 3, ¶ K.8.

2. Protests to the General Accounting Office (GAO). The GAO's normal bid protest procedures apply to competitive sourcing protests.

a. Standing.

(1) Only an "interested party" as defined by the Competition in Contracting Act (CICA) may file a protest with the GAO: "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551 (2). See American Overseas Marine Corp.; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (holding protester not in line for award, so protest dismissed).

(2) Affected federal employees/unions do not have standing to challenge Circular A-76 decisions at GAO, because affected employees/unions are not "actual or prospective bidders" and thus not "interested parties" under CICA. American Fed'n of Gov't Employees, B-282904.2, 2000 U.S. Comp. Gen. LEXIS ¶ 83 (June 7, 2000); American Fed'n of Gov't Employees, B-223323, 86-1 CPD ¶ 572; American Fed'n of Gov't Employees, B-219590, B-219590.3, 86-1 CPD ¶ 436.[14]

b. Timing.

(1) The protester must exhaust the agency appeal process. See Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000). See also BAE Sys., B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86 (stating GAO adopted as policy, for the sake of comity and efficiency, the requirement for protestors to exhaust the available appeal process); Omni Corp., B-2281082, Dec. 22, 1998, 98-2 CPD ¶ 159 (dismissing as premature a protest filed with the GAO when protester challenged cost study before post-award debriefing at the end of the agency appeal process).

(2) The protester must file the protest with GAO within 10 working days of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3); See Space Age Eng'g, Inc., B-230148, February 19, 1988, 88-1 CPD ¶ 173 (continuing to pursue protest with agency does not toll 10 day limit).

c. Standard of Review.

(1) When reviewing cost comparison decisions, the GAO applies the following standard of review:

(a) whether the agency conducted the cost comparison reasonably;

[14] Shortly after OMB issued the Circular A-76 (Revised), GAO published a notice in the Federal Register requesting comments on whether the GAO should accept jurisdiction over bid protests submitted by the Agency Tender Official and/or an "agent" for affected employees. General Accounting Office; Administrative Practices and Procedures; Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35.411 (June 13, 2003). The GAO has not yet issued an opinion or additional guidance on this matter.

(b) whether the agency complied with applicable procedures; and

(c) if the agency failed to follow procedures, whether the failure could have materially affected the outcome of the cost comparison. See Trajen, Inc. B-284310.2, Mar. 28, 2000, 2000 U.S. Comp. Gen. LEXIS 44.

(2) Within reason, agencies will be accorded discretion in their cost comparison studies. See, e.g., RTS Travel Serv., B-283055, Sept. 23, 1999 (finding the agency properly adjusted the contractor's price for contract administration costs); Gemini Industries, Inc., B-281323, Jan. 25, 1999, 99-1 CPD ¶ 22 (finding the agency acted properly when it evaluated proposals against the estimate of proposed staffing); Symvionics, Inc., B-281199.2, Mar. 4, 1999, 99-1 CPD ¶ 48 (finding the agency conducted a fair cost comparison despite not sealing the Management Plan and MEO).

3. Federal Court Challenges.

a. Jurisdiction. The Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320 (codified at 28 U.S.C. § 1491(b)(1)), provides the U.S. Court of Federal Claims (COFC) jurisdiction to hear pre-award and post-award bid protests.

b. Standing.

(1) Only an "interested party" under the ADRA has standing to challenge procurement decisions. The Court of Appeals for the Federal Circuit (CAFC) established that "interested party" should be limited to those parties covered by CICA. American Fed'n of Gov't Employees, et al v. United States, 258 F.3d 1294 (2001). Adopting the same CICA standard used by GAO, this case definitively answered the question of which standard to use in determining whether federal employees have standing in the Court of Federal Claims.

(2) Historically, employees and labor unions have had little success in federal court challenging the decision to outsource commercial activities.

(a) AFGE, AFL-CIO, Local 1482 v. United States, 46 Fed. Cl. 586 (2000) (holding federal employees/union lacked standing as they were not within the zone of interests protected by the statutes they alleged were violated). Cf. AFGE, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999) (holding federal employees/unions at Rock Island Arsenal did not have standing under 10 U.S.C. § 2462 to challenge the Army's decision to award two contracts to private contractors, but had standing under the Arsenal Act (10 U.S.C. § 2542)).

(b) AFGE v. Clinton, 180 F.3d 727 (6th Cir. 1999) (holding federal employees/union lacked standing to protest agency's decision to directly convert positions to contractor performance, as their injury was not concrete and particularized).

(c) NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989) (holding displaced federal workers/unions do not have standing to challenge the A-76 cost comparison process); cf. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991) (holding the government's decision to privatize an activity was subject to review under the Administrative Procedure Act (APA), but remanding the case to determine whether displaced federal employees and their union had standing to maintain the action).

(d) Grievances. Circular A-76 is a government-wide regulation and the agency is not required to bargain over appropriate arrangements. Department of Treasury, IRS v. Federal Labor Relations Authority, 996 F.2d 1246, 1252 (D.C. Cir. 1993). See also Department of Treasury, IRS v. Federal Labor Relations Authority, 110 S.Ct. 1623 (1990); AFGE Local 1345 and Department of the Army, Fort Carson, 48 FLRA 168 (holding that proposal requiring an additional cost study to consider cost savings achievable by alternate methods such as furloughs and attrition was not negotiable).

4. Problem Areas/Issues.

a. Ensuring the government Management Plan/MEO can meet the PWS requirements. See e.g., BAE Systems, B-287189, May 14, 2001, 2001 CPD ¶ 86 (finding the IRO failed to properly carry out his responsibility to ensure the MEO met the minimum PWS requirements and that it was properly adjusted to meet those performance levels).

b. Ensuring the accuracy and fairness for the costs of in-house and contractor performance. See e.g., Del-Jen Inc., B-287273.2, Jan. 23, 2002, 2002 CPD ¶ 27 (determining the agency understated the administration costs of in-house performance and overstated the administration of contractor performance.

c. Ensuring a "level playing field" in "cost/technical trade-off" negotiated procurements. See e.g., DynCorp Tech. Services, LLC, B-284833.3, July 17, 2001, 2001 CPD ¶ 112 (sustaining protest where the agency identified an "accelerated performance schedule" as a strength in the selected privates sector proposal but did not require the MEO to equal this performance level).

d. Avoiding Organizational Conflicts of Interest (OCI). An OCI arises when, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. FAR Subpart 9.5.

(1) Historically, OCI rules were applied to contractors; however, in 1999 the GAO found that government employees involved in Circular A-76 cost comparison study had an OCI that tainted the evaluation process, rendering it defective. See DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19 (finding an OCI where 14 of 16 agency evaluators held positions that were the subject of the study).

(2) In 2000, OMB amended the Revised Supplemental Handbook and implemented new rules prohibiting employees whose positions are subject to a cost comparison study from participating as evaluators in the study. Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (8 Sept 2000).

(3) In December 2001, the GAO found an OCI where an agency employee and private consultant wrote and edited both the PWS and the in-house Management Plan. The Jones/Hill Joint Venture, B-286194.4, B-286194.5; B-286184.6, Dec. 5, 2001, 2001 CPD ¶ 194. Upon reconsideration, the GAO modified its recommended corrective action for addressing the OCI issue in the Jones/Hill decision, stating its recommendation only applied prospectively. Department of the Navy – Reconsideration, B-286194.7, May 29, 2002.

G. Final Decision and Implementation.

1. After all appeals/protests have been resolved, the decision summary is sent to the Secretary of Defense (SECDEF) for approval and notice is forwarded to Congress. See 10 U.S.C. § 2461(a). The FY 2003 National Defense Authorization Act amends 10 U.S.C. § 2461 to require the SECDEF to notify Congress of the outcome of a competitive sourcing study, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.[15]

[15] Bob Stump National Defense Authorization Act for FY 2003, Pub. L. No. 107-314, § 331, 116 Stat. 2458, 2512 (2002). Again, as this is a statutory requirement it still applies to the DOD under the Circular A-76 (Revised) procedures.

2. If the private sector offer wins, the contracting officer awards the contract. If the MEO wins the cost study, the solicitation is cancelled and the MEO implemented in accordance with the Management Plan.

3. Contractor Implementation.

a. Reviews. Contracted commercial activities are monitored to ensure that performance is satisfactory and cost effective.

b. If the contractor defaults during the first year:

(1) The contracting officer will award the work to the next lowest offeror that participated in the cost comparison study, if feasible.

(2) If it is not feasible to award to the next lowest offeror, the contracting officer "will immediately resolicit to conduct a revised and updated cost comparison." Revised Supplemental Handbook, Part I, Chapter 3, para. L.7.

(3) If the contractor defaults after the first year, the contracting officer should seek interim contract support. If interim support is not feasible, in-house performance may be authorized by the commander on a temporary/emergency basis. See AFI 38-203, para. 19.7.

4. MEO Implementation.

a. When performance is retained in-house, a post-MEO performance review will be conducted at the end of the first full year of performance. If the MEO has not been implemented or the MEO fails to perform, the contracting officer will award to the next lowest offeror if feasible, or immediately resolicit to conduct a new cost competition study. Revised Supplemental Handbook, Part I, Chapter 3, para. L.1, 7.

b. The organization, position structure, and staffing of the implemented MEO will not normally be altered within the first year, although adjustments may be made for formal mission or scope of work changes. Revised Supplemental Handbook, Part I, Chapter 3, para. L.2.

c. Agencies must review at least 20 percent of the functions retained in-house as the result of a cost comparison decision. Revised Supplemental Handbook, Part I, Chapter 3, para. L.3.

IV. CIRCULAR A-76 (REVISED).

A. Key Players/Terms.

1. Agency Tender. The agency management plan submitted in response to and in accordance with the requirements in a solicitation. The agency tender includes an MEO, agency cost estimate, MEO quality control and phase-in plans, and any subcontracts. Circular A-76 (Revised), Attachment D.

2. Agency Tender Official (ATO). An inherently governmental official with decision-making authority who is responsible for developing, certifying, and representing the agency tender. The ATO also designates members of the MEO team and is considered a "directly interested party" for contest purposes. The ATO must be independent of the contracting officer, SSA/SSEB, and the PWS team. Circular A-76 (Revised), Attachment B, ¶ A.8.a.

3. Contracting Officer (CO). An inherently governmental official who is a member of the PWS team and is responsible for issuing the solicitation and the source selection methodology. The CO must be independent of the ATO, MEO team, and the human resource advisor (HRA). Circular A-76 (Revised), Attachment B, ¶ a.8.b and Attachment D.

4. PWS Team Leader. An inherently governmental official, independent of the ATO, HRO, and MEO team, who develops the PWS and QASP, determines government-furnished property, and assists the CO in developing the solicitation. Circular A-76 (Revised), Attachment B, ¶ a.8.c.

5. Human Resource Advisor (HRA). An inherently governmental official and human resource expert. The HRA must be independent of the CO, SSA, PWS team, and SSEB. As a member of the MEO team, the HRA assists the ATO and MEO team in developing the agency tender. The HRA is also responsible for employee and labor-relations requirements. Circular A-76 (Revised), Attachment B, ¶ a.8.d.

6. Source Selection Authority (SSA). An inherently governmental official appointed IAW FAR 15.303. The SSA must be independent of the ATO, HRA, and MEO team.

B. Competition Procedures.

1. Previously, agencies could "directly convert" to contractor performance functions performed by 10 or fewer full-time equivalents (FTEs). The Revised Circular A-76 eliminates the use of "direct conversions." Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,136 (May 29, 2003).[16]

2. Streamlined Competitions. The new "streamlined competition" process must be used for activities performed by 65 or fewer FTEs "and/or any number of military personnel," unless the agency elects to use the standard competition. Circular A-76 (Revised), Attachment B, ¶¶ A.5.b and C. The streamlined competition process includes:

a. Determining the Cost of Agency Performance. An agency may determine the agency cost estimate on the incumbent activity; "however, an agency is encouraged to develop a more efficient organization, which may be an MEO." Circular A-76 (Revised), Attachment B, ¶ C.1.a.[17]

---

[16] While the Circular A-76 (Revised) eliminates "direct conversions" recall that Congress permits the DOD to directly convert performance of functions to: 1) a Javits-Wagner-O'Day (JWOD) Act firms that employ blind or severely handicapped employees; or 2) firms that are under fifty-one percent ownership of an American Indian tribe or Native Hawaiian organization. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003). Additionally, this year Congress stated that if the DOD directly converts functions pursuant to the authority under § 8014, the DOD must receive credit for any OMB established competition goals. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

[17] Though civilian agencies may determine the estimated cost of in-house performance without creating an MEO, the DOD's ability to do so is limited. Recall that the DOD generally must complete a "most efficient and cost effective organization analysis" prior to converting any function that involves more than 10 employees. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

b. Determining the Cost of Private Sector/Public Reimbursable Performance. An agency may use documented market research or solicit proposals IAW the FAR, to include using simplified acquisition tools. Circular A-76 (Revised), Attachment B, ¶ C.1.b; Office of Management and Budget; Performance of Commercial Activities, 68 Fed. Reg. 32,134; 32,137 (May 29, 2003).

c. Establishing Cost Estimate Firewalls. The individual(s) preparing the in-house cost estimate and the individual(s) soliciting private sector/public reimbursable cost estimates must be different and may not share information. Circular A-76 (Revised), Attachment B, ¶ C.1.d.

d. Implementing the Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation" with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ C.3.a.

3. Standard Competitions. The new "standard competition" procedures must be used for commercial activities performed by more than 65 FTEs. Circular A-76 (Revised), Attachment B, ¶ A.5.

a. Solicitation. When issuing a solicitation, the agency must comply with the FAR and clearly identify all the evaluation factors.

(1) The solicitation must state the agency tender is not required to include certain information such as a subcontracting plan goals, licensing or other certifications, or past performance information (unless the agency tender is based on an MEO implemented IAW the circular). Circular A-76 (Revised), Attachment B, ¶ D.3.a(4).

(2) The solicitation closing date will be the same for private sector offers and agency tenders. Circular A-76 (Revised), Attachment B, ¶ D.3.a(5). If the ATO anticipates the agency tender will be submitted late, the ATO must notify the CO. The CO must then consult with the CSO to determine if amending the closing date is in the best interest of the government. Circular A-76 (Revised), Attachment B, ¶ D.4.a(2).

b. Source Selection.

(1) In addition to sealed bidding and negotiated procurements based on a lowest priced technically acceptable source selections IAW the FAR, the Circular A-76 (Revised) also permits:

(a) Phased Evaluation Source Selections.

(i) Phase One - only technical factors are considered and all prospective providers (private sector, public reimbursable sources, and the agency tender) may propose alternative performance standards. If the SSA accepts an alternate performance standard, the solicitation is amended and revised proposals are requested. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.

(ii) Phase Two – the SSA makes the performance decision after a price/cost realism analyses on all offers/tenders determined technically acceptable. Circular A-76 (Revised), Attachment B, ¶ D.5.b.2.

(b) Cost-Technical Tradeoff Source Selections. May only be used in a standard competitions for (1) information technology activities, (2) commercial activities performed by the private sector, (3) new requirements, and (4) segregable expansions. Circular A-76 (Revised), Attachment B, ¶ D.5.b.3.

(2) The agency tender is evaluated concurrently with the private sector proposals and may be excluded from a standard competition if materially deficient. Circular A-76 (Revised), Attachment B, ¶ D.5.c.1.

(a) If the CO conducts exchanges with the private sector offerors and the ATO, such exchanges must be IAW FAR 15.306, except that exchanges with the ATO must be in writing and the CO must

maintain records of all such correspondence. Circular A-76 (Revised), Attachment B, ¶ D.5.c.2.

(b) If an ATO is unable to correct a material deficiency, "the CSO may advise the SSA to exclude the agency tender from the standard competition." Circular A-76 (Revised), Attachment B, ¶ D.5.c.3.

(3) All standard competitions will include the cost conversion differential (i.e., 10% of personnel costs or $10 million, whichever is less). Circular A-76 (Revised), Attachment B, ¶ D.5.c.4.[18]

c. Implementing a Performance Decision. For private sector performance decisions, the CO awards a contract IAW the FAR. For agency performance decisions, the CO executes a "letter of obligation" with an agency official responsible for the commercial activity. Circular A-76 (Revised), Attachment B, ¶ D.6.f.

d. Contests.

(1) A "directly interested party" (i.e., the agency tender official, a single individual appointed by a majority of directly affected employees, a private sector offeror, or the certifying official of a public reimbursable tender) may contest certain actions in a standard competition. Circular A-76 (Revised), Attachment B, ¶ F.1.

(2) All such challenges will now be governed by the agency appeal procedures found at FAR 33.103. Circular A-76 (Revised), Attachment B, ¶ F.1.

(3) No party may contest any aspect of a streamlined competition. Circular A-76 (Revised), Attachment B, ¶ F.2.

[18] Although the "10% or $10 million" conversion differential does not apply in streamlined competitions for civilian agencies, Congress requires the DOD to apply the differential in all competitions involving 10 or more civilian employees. See Department of Defense Appropriations Act for FY 2004, H.R. 2658, 108th Cong., § 8014 (2003).

4. Timeframes.

a. Streamlined Competitions. Must be completed within 90 calendar days from "public announcement" to "performance decision," unless the agency CSO grants an extension not to exceed 45 days. Circular A-76 (Revised), Attachment B, ¶ C.2.

b. Standard Competitions. Must not exceed 12 months from "public announcement" to "performance decision," unless the CSO grants a time limit waiver not to exceed 6 months. Circular A-76 (Revised), Attachment B, ¶ D.1.

c. Preliminary Planning. Because time frames for completing competitions have been reduced, preliminary planning takes on increased importance. The new rules state that prior to public announcement (start date)[19] of a streamlined or standard competition, the agency must complete several preliminary planning steps to include: scoping the activities and FTEs to be competed, grouping business activities, assessing the availability of workload data, determining the incumbent activities baseline costs, establishing schedules, and appointing the various competition officials. Circular A-76 (Revised), Attachment B, ¶ A.

C. Post Competition Accountability.

1. Monitoring. After implementing a performance decision, the agency must monitor performance IAW with the performance periods stated in the solicitation. The CO will make option year exercise determinations IAW FAR 17.207. Circular A-76 (Revised), Attachment B, ¶¶ E.4 and 5.

2. Terminations for Failure to Perform. The CO must follow the cure notice and show cause notification procedures consistent with FAR Part 49 prior to issuing a notice of termination. Circular A-76 (Revised), Attachment B, ¶ E.6.

[19] Recall that the DOD has a statutory requirement to notify Congress "before commencing to analyze" a commercial activity for possible change to performance by the private sector if more than 50 civilian employees perform the function. 10 U.S.C. § 2461(b).

V. CIVILIAN PERSONNEL ISSUES.

A. Employee Consultation. By statute, the DOD must consult with affected employees. In the case of affected employees represented by a union, consultation with union representatives satisfies this requirement. 10 U.S.C. § 2467(b).

B. Right-of-First-Refusal of Employment.

1. The CO must include the Right-of-First-Refusal of Employment clause in the solicitation. See Circular A-76 (Revised), Attachment B, ¶ D.6.f.1.b; Revised Supplemental Handbook, Part I, Chapter 3, ¶ G.4; and FAR 7.305.

2. The clause, at FAR 52.207-3, requires:

a. The contractor to give the government employees, who have been or will be adversely affected or separated due to the resulting contract award, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-government employment conflict of interest standards.

b. Within 10 days after contract award, the contracting officer must provide the contractor a list of government employees who have been or will be adversely affected or separated as a result of contract award.

c. Within 120 days after contract performance begins, the contractor must report to the contracting officer the names of displaced employees who are hired within 90 days after contract performance begins.

C. Right-of-First-Refusal and the Financial Conflict of Interest Laws.

1. Employees will participate in preparing the PWS and the MEO. Certain conflict of interest statutes may impact their participation, as well as, when and if they may exercise their Right-of-First Refusal.

2. Procurement Integrity Act, 41 U.S.C. § 423; FAR 3.104.

a. Disclosing or Obtaining Procurement Information (41 U.S.C. §§ 423(a)-(b)). These provisions apply to all federal employees, regardless of their role during a Circular A-76 competition.

b. Reporting Employment Contacts (41 U.S.C. § 423(c)).

(1) FAR 3.104-1(iv) generally excludes from the scope of "personally and substantially" the following employee duties during an OMB Cir. A-76 study:

(a) Management studies;

(b) Preparation of in-house cost-estimates;

(c) Preparation of the MEO; or

(d) Furnishing data or technical support others use to develop performance standards, statements of work, or specifications.

(2) PWS role. Consider the employee's role. If strictly limited to furnishing data or technical support to others developing the PWS, then they are not "personally and substantially" participating. See FAR 3.104-1(iv). If the PWS role exceeds that of data and technical support, then the restriction would apply.

c. Post-Employment Restrictions (41 U.S.C. § 423 (d)). Bans certain employees for one year from accepting compensation.

(1) Applies to contracts exceeding $10 million, and

(a) Employees in any of these positions:

(i) Procuring contracting officer;

(ii) Administrative Contracting Officer;

(iii) Source Selection Authority;

(iv) Source Selection Evaluation Board member;

(v) Chief of Financial or Technical team;

(vi) Program Manager; or

(vii) Deputy Program Manager.

(b) Employees making these decisions:

(i) Award contract or subcontract exceeding $10 million;

(ii) Award modification of contract or subcontract exceeding $10 million;

(iii) Award task or delivery order exceeding $10 million;

(iv) Establish overhead rates on contract exceeding $10 million;

(v) Approve contract payments exceeding $10 million; or

(vi) Pay or settle a contract claim exceeding $10 million.

(2) No exception exists to the one-year ban for offers of employment pursuant to the Right-of-First-Refusal. Thus, employees performing any of the listed duties or making the listed decisions on a cost comparison resulting in a contract exceeding $10 million are barred for one year after performing such duties from accepting compensation/employment opportunities from the contractor via the Right-of-First-Refusal.

3. Financial Conflicts of Interest, 18 U.S.C. § 208. Prohibits officers and civilian employees from participating personally and substantially in a "particular matter" affecting the officer or employee's personal or imputed financial interests.

a. Cost comparisons conducted under OMB Cir. A-76 are "particular matters" under 18 U.S.C. § 208.

b. Whether 18 U.S.C. § 208 applies to officers and civilian employees preparing a PWS or MEO depends on whether the participation will have a "direct and predictable" effect on their financial interests. This determination is very fact specific.

4. Representational Ban, 18 U.S.C. § 207. Prohibits individuals who personally and substantially participated in, or were responsible for, a particular matter involving specific parties while employed by the government from switching sides and representing any party back to the government on the same matter. The restrictions in 18 U.S.C. § 207 do not prohibit employment; they only prohibit communications and appearances with the "intent to influence."

a. The ban may be lifetime, for two years, or for one year, depending on the employee's involvement in the matter.

b. Whether 18 U.S.C. § 207 applies to employees preparing a PWS or MEO depends on whether the cost comparison has progressed to the point where it involves "specific parties."

c. Even if 18 U.S.C. § 207 does apply to these employees, it would not operate as a bar to the Right-of-First-Refusal. The statute only prohibits representational activity; it does not bar behind-the-scenes advice.

VI. HOUSING PRIVATIZATION.

A. Generally. Privatization involves the process of changing a federal government entity or enterprise to private or other non-federal control and ownership. Unlike competitive sourcing, privatization involves a transfer of ownership and not just a transfer of performance.

B. Authority. 10 U.S.C. §§ 2871-85 provides temporary authority for military housing privatization. This legislation expires in 2012.[20]

1. This authority applies to family housing units on or near military installations within the United States and military unaccompanied housing units on or near installations within the United States.

2. Service Secretaries may use any authority or combination of authorities to provide for acquisition or construction by private persons. Authorities include:

a. Direct loans and loan guarantees to private entities.

b. Build/lease authority.

c. Equity and creditor investments in private entities undertaking projects for the acquisition or construction of housing units (up to a specified percentage of capital cost). Such investments require a collateral agreement to ensure that a suitable preference will be given to military members.

d. Rental guarantees.

e. Differential lease payments.

f. Conveyance or lease of existing properties and facilities to private entities.

[20] Originally granted in 1996, this authority was extended by the FY 2002 National Defense Authorization Act. Pub. L. No. 107-107, § 2805, 115 Stat. 1012 (2001).

3. Establishment of Department of Defense housing funds.

a. The Department of Defense Family Housing Improvement Fund.

b. The Department of Defense Military Unaccompanied Housing Improvement Fund.

C. Implementation.

1. The service conveys ownership of existing housing units, and leases the land upon which the units reside for up to 50 years.

2. The consideration received for the sale is the contractual agreement to renovate, manage, and maintain existing family housing units, as well as construct, manage, and maintain new units.

3. The contractual agreement may include provisions regarding:

a. The amount of rent the contractor may charge military occupants (rent control).

b. The manner in which soldiers will make payment (allotment).

c. Rental deposits.

d. Loan guarantees to the contractor in the event of a base closure or realignment.

e. Whether soldiers are required to live there.

f. The circumstances under which the contractor may lease units to nonmilitary occupants.

D. Issues and Concerns.[21]

1. Making the transition positive for occupants; including keeping residents informed during the process.

2. Loss of control over family housing.

3. The affect of long-term agreements.

a. Future of installation as a potential candidate for housing privatization.

(1) DOD must determine if base a candidate for closure.

(2) If not, then DOD must predict its future mission, military population, future housing availability and prices in the local community, and housing needs.

b. Potential for poor performance or nonperformance by contractors.

(1) Concerns about whether contractors will perform repairs, maintenance, and improvements in accordance with agreements. Despite safeguards in agreements, enforcing the agreements might be difficult, time-consuming, and costly.

(2) Potential for a decline in the value of property towards the end of the lease might equal decline in service and thus quality of life for military member.

[21] *See* General Accounting Office, Military Housing: Management Improvements Needed As Privatization Pace Quickens, Report No. GAO-02-624 (June 2002); General Accounting Office, Military Housing: Continued Concerns in Implementing the Privatization Initiative, NSIAD-00-71 (March 30, 2000); General Accounting Office, Military Housing: Privatization Off to a Slow Start and Continued Management Attention Needed, Report No. GAO/NSIAD-98-178 (July 17, 1998).

4. Effect on federal employees.

a. The privatization of housing will result in the elimination of those government employee positions that support family housing.

b. Privatization is not subject to Circular A-76.

5. Prospect of civilians living on base.

a. Civilians allowed to rent units not rented by military families.

b. This prospect raises some issues, such as security concerns and law enforcement roles.

VII. UTILITIES PRIVATIZATION.

A. Authority. 10 U.S.C. § 2688 (originally enacted as part of the FY 1998 National Defense Authorization Act) permits the service secretaries to convey all or part of a utility system to a municipal, private, regional, district, or cooperative utility company. This permanent legislation supplements several specific land conveyances involving utilities authorized in previous National Defense Authorization Acts.

B. Implementation.

1. In 1998, DOD set a goal of privatizing all utility systems (water, wastewater, electric, and natural gas) by 30 September 2003, except those needed for unique mission/security reasons or when privatization is uneconomical. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Defense Reform Initiative Directive (DRID) #49—Privatizing Utility Systems (23 Dec. 1998).

2. In October 2002, DOD revised its goal and replaced DRID #49 with updated guidance. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. The Revised Guidance Memo establishes 30 September 2005 as the date by which "Defense Components shall

complete a privatization evaluation of each system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law." In addition to revising the milestones for utilities privatization, the Revised Guidance Memo addresses:

a. updated guidance concerning the issuance of solicitations and the source selection considerations in utilities privatization;

b. DOD's position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the Government's utility systems;

c. new instruction on conducting the economic analysis, including a class deviation from the cost principle at FAR 31.205-20 authorized by DOD for "utilities privatization contracts under which previously Government-owned utility systems are conveyed by a Military Department or Defense Agency to a contractor;" and

d. the authority granted the Service Secretaries to include "reversionary clauses" in transaction documents to provide for ownership to revert to the Government in the event of default or abandonment by the contractor.

3. Requests for exemption from utility systems privatization, based on unique mission or safety reasons or where privatization is determined to be uneconomical, must be approved by the Service Secretary.

4. Agencies must use competitive procedures to sell (privatize) utility systems and to contract for receipt of utility services. 10 U.S.C.§ 2688(b). DOD may enter into 50-year contracts for utility service when conveyance of the utility system is included. 10 U.S.C. § 2688(c)(3).

5. Any consideration received for the conveyance of the utility system may be accepted as a lump sum payment, or a reduction in charges for future utility services. If the consideration is taken as a lump sum, then payment shall be credited at the election of the Secretary concerned for utility services, energy savings projects, or utility system improvements. If the consideration is taken as a credit against future utility services, then the time period for reduction in charges for services shall not be longer than the base contract period. 10 U.S.C. § 2688(c).

6. Installations may, with Secretary approval, transfer land with a utility system privatization. 10 U.S.C. § 2688(i)(2); U.S. Dep't of Army, Privatization of Army Utility Systems—Update 1 Brochure (March 2000). In some instances (environmental reasons) installations may want to transfer the land under wastewater treatment plants.

7. Installations must notify Congress of any utility system privatization. The notice must include an analysis demonstrating that the long-term economic benefit of privatization exceeds the long-term economic cost, and that the conveyance will reduce the long-term costs to the DOD concerned for utility services provided by the subject utility system. The installation must also wait 21 days after providing such congressional notice. 10 U.S.C. § 2688(e).

C. Issues and Concerns.

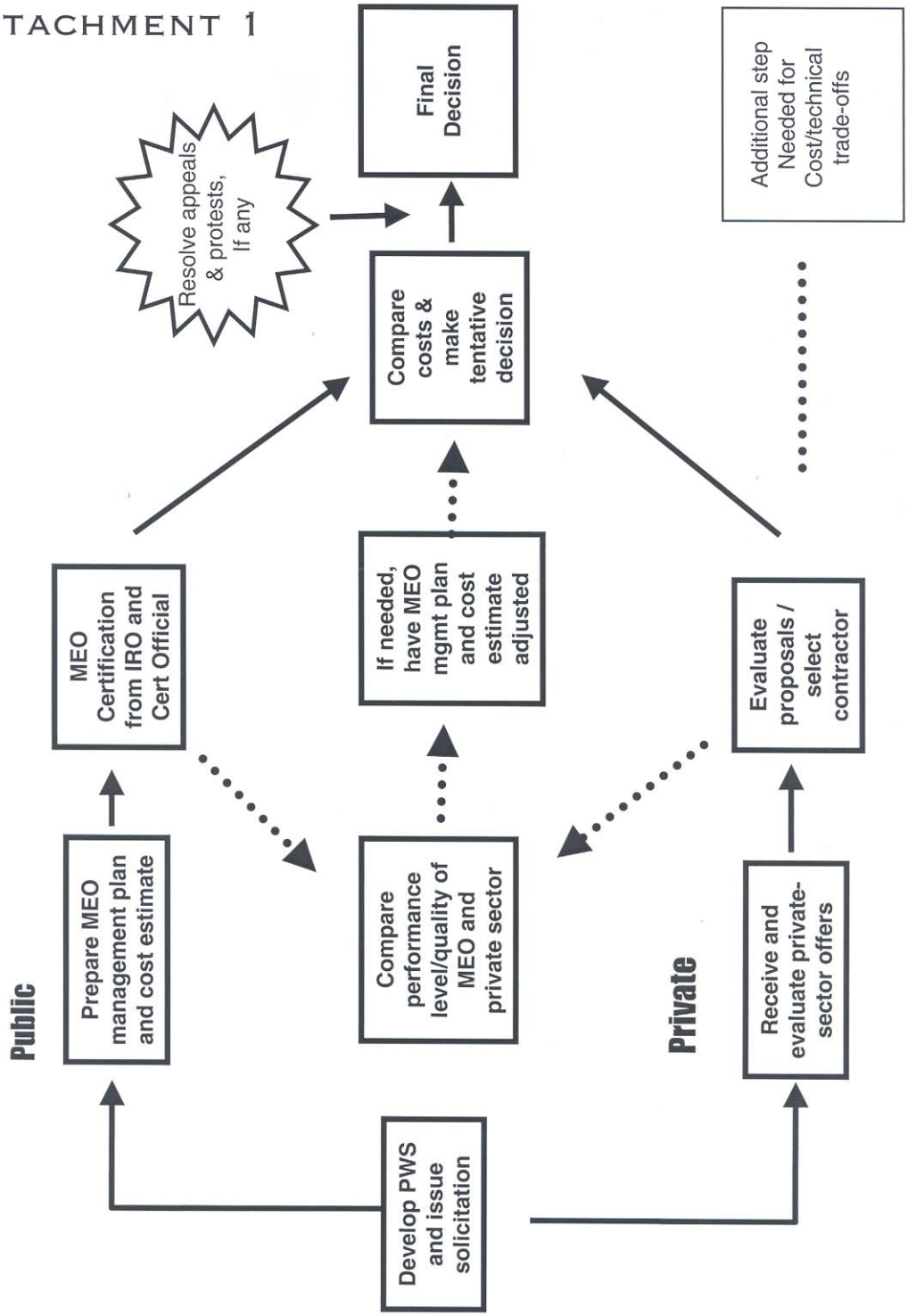
1. Effect of State Law and Regulation. State utility laws and regulations, the application of which would result in sole-source contracting with the company holding the local utility franchise at each installation, do not apply in federal utility privatization cases. See Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125 (holding 10 U.S.C. § 2688 does not contain an express and unequivocal waiver of federal sovereign immunity); see also Baltimore Gas & Electric v. United States, US District Court, District of Maryland, No AMD 00-2599 Mar. 12, 2001 (following the earlier GAO decision and finding no requirement for the Army to use sole-source procedures for the conveyance of utilities distribution systems and procurement of utilities distribution services). The DOD General Counsel has issued an opinion that reached the same conclusion. Dep't. of Def. General Counsel, The Role of State Laws and Regulations in Utility Privatization (Feb. 24, 2000).

2. Utility Bundling. An agency may employ restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. Bundled utility contracts, which not only achieve significant cost savings, but also ensure the actual privatization of all utility systems, are proper. Virginia Electric and Power Company; Baltimore Gas & Electric, B-285209, B-285209.2 (Aug. 2, 2000) 2000 U.S. Comp. Gen. LEXIS 125.

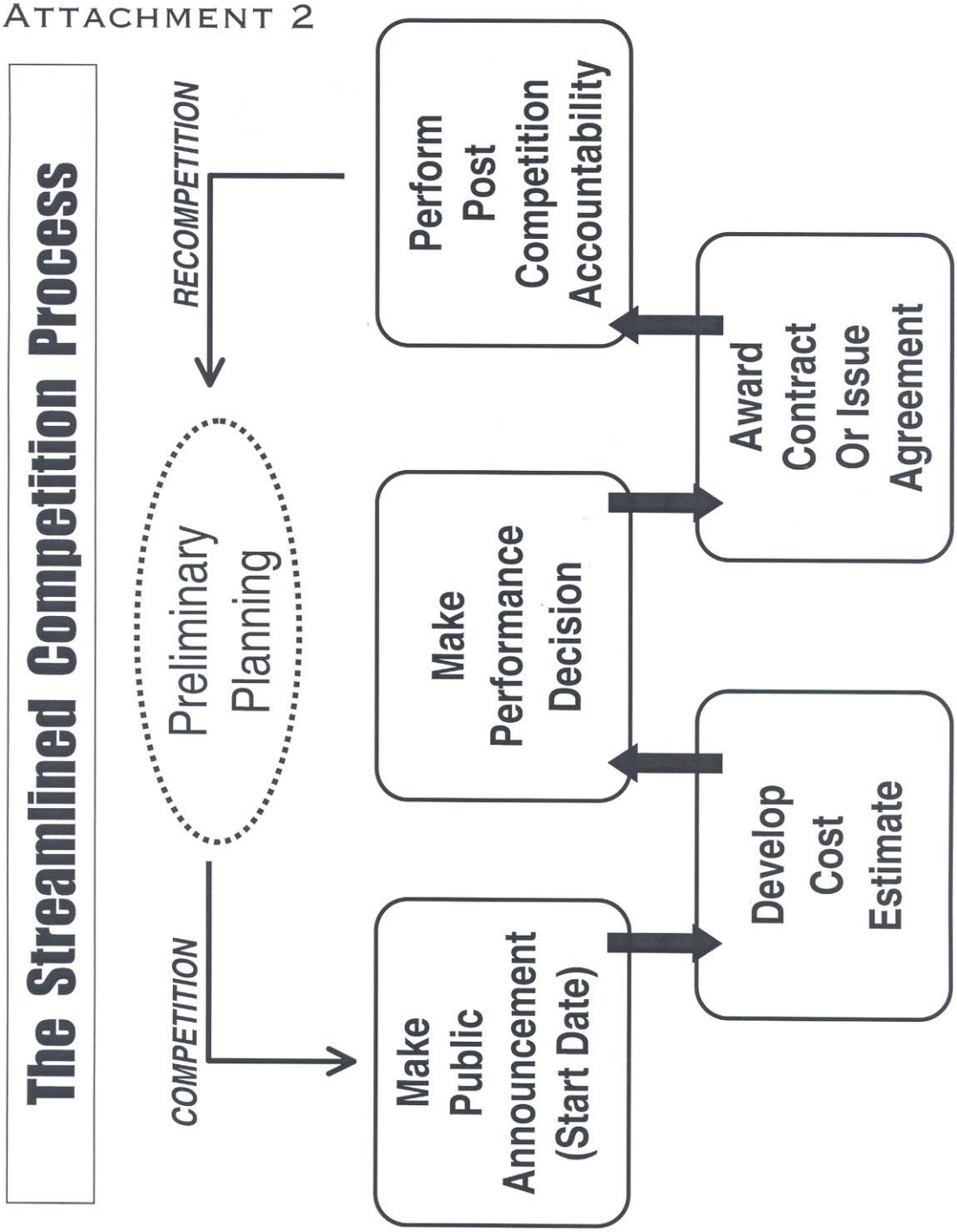
3. Reversionary Clauses. The contractual agreement must protect the government's interests in the event of a default termination. The use of reversionary clauses, which revoke the conveyance of the utility system, are an option. Revised Guidance Memo, supra.

VIII. CONCLUSION.

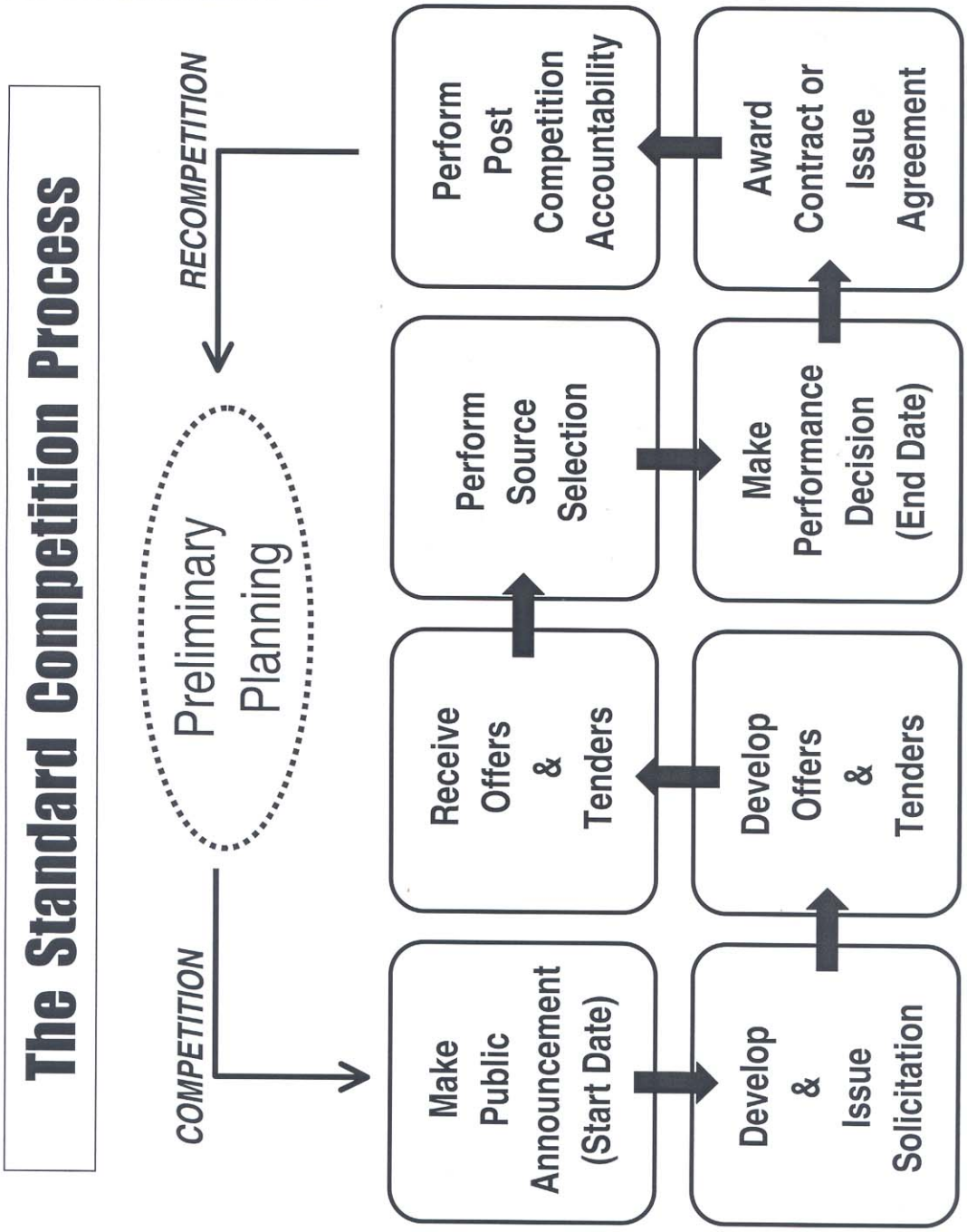
ATTACHMENT 1



ATTACHMENT 2



ATTACHMENT 3



CHAPTER 38

FUNDING U.S. MILITARY OPERATIONS

I. INTRODUCTION 1

II. CONSTITUTIONAL PREDICATE 1

A. President's Power. 1

B. Congress' Power. 1

III. THE NEED FOR EXPRESS LEGAL AUTHORITY 2

A. General. 2

B. "Article II Operations": Inherent Authority?. 2

IV. SUPPORTING MULTILATERAL PEACE & HUMANITARIAN OPERATIONS 2

A. Policy. Presidential Decision Directive (PDD) 25 (May 3, 1994). 2

B. Authorities. 3

V. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS 8

A. Appropriations 8

B. Humanitarian & Civic Assistance (HCA) - 10 U.S.C. § 401 8

C. Transportation of Humanitarian Relief Supplies for NGOs – 10 U.S.C. § 402. 11

D. Foreign Disaster Assistance - 10 U.S.C. § 404. 11

E. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2557. 12

F. Humanitarian Assistance - 10 U.S.C. § 2561. 13

VI. CONTACTS AND EXERCISES WITH FOREIGN MILITARIES 13

A. Bilateral & Multilateral Conferences, Seminars, & Meetings 13

B. Bilateral & Multilateral Exercise Programs 16

C. Regional Cooperation Programs 17

D. Military-to-Military Contact Program - 10 U.S.C. § 168 17

E. International Military Education & Training (IMET) - FAA §§ 541-545 (22 U.S.C. §§ 2347-2347d) 18

VII. SPECIAL AUTHORITIES 18

A. CinC Initiative Funds (CIF) - 10 U.S.C. § 166a 18

B. Emergency & Extraordinary (E&E) Expenses - 10 U.S.C. § 127 19

C. Contingency Operations Funding Authority. 10 U.S.C. § 127a 20

D. Combating Terrorism Readiness Initiative Funds 10 U.S.C. § 166b 20

VIII. SECTION 8066 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY 2003, PUB. L. NO. 107-248, § 8066 (2002) 22

A. General 22

B. Notice Requirement 22

C. Congress' Intent 22

D. President's Interpretation 23

E. Scope. 23

F. Compliance 24

IX. DOMESTIC OPERATIONS 25

A. Stafford Disaster Relief & Emergency Assistance Act of 1974, 42 U.S.C. §§ 5121-5204c. 25

B. DoD Directive 3025.1 25

X. CONCLUSION 26

FUNDING U.S. MILITARY OPERATIONS

I. INTRODUCTION.

II. CONSTITUTIONAL PREDICATE.

A. President's Power.

1. "The President shall be the Commander in Chief of the Army and Navy of the United States . . . . " U.S. Const. Art. II, § 2, cl. 1.

2. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . . " U.S. Const. Art. II, § 2, cl. 2.

3. "[H]e shall receive Ambassadors and other public Ministers . . . . " U.S. Const. Art. II, § 3.

B. Congress' Power.

1. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ." U.S. Const. Art. I, § 9, cl. 7.

2. "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. Art. IV, § 3, cl 2.

"An effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all. Through the authorization and appropriation process, Congress sets the terms of commerce; it provides military forces and intelligence capabilities; and it establishes the conditions for development assistance, security support programs and U.S. participation in

international organizations. . . . Hardly any important executive branch decision is taken without consideration of the reaction in Congress."

Trimble, The President's Foreign Affairs Power, 83 AM. J. INT'L. LAW 750 (1989)

III. THE NEED FOR EXPRESS LEGAL AUTHORITY.

A. General.

"The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."
United States v. MacCollom, 426 U.S. 317 (1976).

B. "Article II Operations": Inherent Authority? *See, e.g.*, R. Rosen, Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1 (1998) and W. Banks & P. Raven-Hansen, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 166 (1994).

Traditional vs. Non-Traditional Missions

IV. SUPPORTING MULTILATERAL PEACE & HUMANITARIAN OPERATIONS.

A. Policy. Presidential Decision Directive (PDD) 25 (May 3, 1994).

1. *General.* PDD 25 addresses the following areas:

a. Choosing which operations to support.

b. Defining U.S. policy regarding command and control. *See also* H.R. 1530, § 1301, 104th Cong., 1st Sess. (1995); 31 Pres. Doc. 2234 (Dec. 28, 1995) (Presidential veto of Defense Authorization Bill prevented additional Congressional restrictions on C2 policy in UN operations.)

c. Reducing U.S. costs for UN peace operations.

d. Reforming/improving UN management of peace operations.

e. Improving U.S. management and funding of peace operations.

f. Creating better cooperation between the Executive & Legislative branches.

2. Funding Provisions.

a. *Reimbursement.* U.S. will generally seek either direct reimbursement for provision of goods and services or credit against UN assessment. In rare circumstances, U.S. may contribute goods, services, and funds on a voluntary basis. *But see*, paragraph B.1.b., *infra.*

b. *Oversight & Management.*

(1) Department of State has responsibility for oversight and management of Chapter VI peace operations in which U.S. combat units are not participating.

(2) Department of Defense has responsibility for oversight and management of Chapter VI operations in which U.S. forces are participating and for all Chapter VII operations.

c. *UN Assessments.* No DoD funds may be expended, directly or indirectly, to make a financial contribution to the UN for the cost of a UN peacekeeping activity or for payment of U.S. arrearages to the UN.
10 U.S.C. § 405.

B. Authorities.

1. UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.

a. *Scope.* Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of the armed forces under Chapter VII of the UN Charter --

(1) Details of Personnel. Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.

(2) Supplies, Services, & Equipment. Furnishing of facilities, services, or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.

b. *Reimbursement.* Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. **This requirement to receive reimbursement is not limited to assistance provided under the UNPA, but applies to any authority under which assistance may be provided to an assessed peacekeeping operation.**

c. *Delegation of Authority.* The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206, ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

2. Drawdowns.

a. *Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1)* - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to $100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).

b. *FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2)* - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to $200,000,000 from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance, antiterrorism, and non-proliferation assistance. (The Security Assistance Act of 2000 increased the amount from $150M to $200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than $75M may come from DoD resources; not more than $75M may be provided for counternarcotics; and not more than $15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996); FY 2001 Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).

c. *FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2)* - Authorizes the President to direct the drawdown of up to $25,000,000 in any fiscal year of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.

3. Details of Personnel.

a. *FAA § 627, 22 U.S.C. § 2387.* When the President determines it furthers the FAA's purposes, statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

b. *FAA § 628, 22 U.S.C. § 2388.* When the President determines it furthers the FAA's purposes, statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

c. *22 U.S.C. § 1451.* Authorizes the Director, USIA, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.

d. *10 U.S.C. § 712.* Authorizes President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or -- during a war or a declared national emergency -- in any other country. Details may be on a reimbursable or nonreimbursable basis.

4. *Excess Defense Articles (EDA).* Defense articles no longer needed by the U.S. may be made available on a grant basis.

a. *FAA § 516, 22 U.S.C. § 2321j.* Authorizes both lethal and nonlethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO and non-NATO Southern-flank allies, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into §516 and repeal of §§ 518- 520); Security Assistance Act of 1999, Pub. L. 106-113,
§ 1211(b) (1999)(extending legislation four years).

b. *Amount* - An aggregate ceiling of $350M per year. Cost is determined using the depreciated value of the article.

c. *Transportation:* No-cost space available transportation is authorized for countries receiving less than $10M FMF or IMET in any FY if a determination is made that it is in the national interest of the United States to do so.

5. Reimbursable Support.

a. *FAA § 607, 22 U.S.C. § 2357* - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.

b. *FAA § 632, 22 U.S.C. 2392* - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.

c. *Economy Act, 31 U.S.C. § 1535* - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (*e.g.,* Department of State).

d. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA) §§ 21-22, 22 U.S.C. 2761-62* - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.

e. *Leases - AECA §§ 61-62, 22 U.S.C. § 2796-2796a* - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.

f. *Acquisition & Cross-Servicing Agreements (ACSA) - 10 U.S.C. §§ 2341-2350* - DoD authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the AECA. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.

V. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS.

A. Appropriations. $58.4M in FY 2003 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under §§401 [only for humanitarian demining], 402, 404, 2557, and 2561 of Title 10 (increase of approx. $9M from FY 2002).

B. Humanitarian & Civic Assistance (HCA) - 10 U.S.C. § 401 See also DOD Dir. 2205.2, 6 Oct. 1994; DOD Instr. 2205.3, 27 Jan. 1995.

1. Need for Express Authority.

a. *41 U.S.C. § 12:* "No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury *appropriated for the specific purpose.*

b. *63 Comp. Gen. 422 (1984):* "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)."

2. *Scope of Authority.* Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote -

a. the security interests of the U.S. and the country where the activities will be carried out; and

b. the specific operational readiness skills of the servicemembers who will participate in the activities.

3. Limits.

a. May not duplicate other forms of U.S. economic assistance.

b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

c. SecState must specifically approve assistance.

d. Must be paid out of funds appropriated for HCA.

e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces.

f. Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g. transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. DoD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations" 6 October 1994, para. D.9.

4. *Definition.* HCA means --

a. medical, dental, veterinary care in rural or underserved areas;

b. construction of rudimentary surface transportation systems;

c. well drilling and construction of rudimentary sanitation facilities;

d. rudimentary construction and repair of public facilities; and

e. detection and clearance of landmines, including education, training, and technical assistance.

5. *De minimis* HCA. 10 U.S.C. § 401(c)(4) and DOD Dir. 2205.2, para. E1.1.1.

a. Provides authority for commanders to react to HCA "targets of opportunity" during the course of a military operation. Such activities must be modest in scope and involve only "minimal expenditures for incidental costs."

b. All costs incurred in executing a *De minimis* HCA action are funded from the unit's O&M account.

c. Rule of Thumb: A few soldiers, a few dollars, for a few hours. CINC's may have promulgated specific guidance regarding the level of effort/funding that falls under the definition of *De Minimis* HCA in their AORs.

d. *Examples:*

(1) A unit's doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purposes of providing mass inoculations to the local populace.

(2) The opening of an access road through the trees and underbrush for several hundred yards, but not the asphalting of a roadway.

e. *Appropriations. De minimis* HCA is funded from the unit's O&M account.

6. *Exercise-Related Construction (ERC) distinguished.*
10 U.S.C. § 2805(a)(2).

"[F]unds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program*."

S. Rep. 355, 102d Cong., 2d Sess. 10 (1992) (emphasis added).

7. *Appropriations* Specifically fenced O&M for HCA. Demining, however, uses OHDACA. De minimis HCA is funded from the unit's O&M account.

C. Transportation of Humanitarian Relief Supplies for NGOs – 10 U.S.C. § 402.

1. *Scope of Authority.* SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

2. *Preconditions.* Before transporting supplies, SecDef must determine --

a. the transportation of the supplies is consistent with U.S. foreign policy;

b. the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

c. a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;

d. the supplies will, in fact, be used for humanitarian purposes; and

e. adequate arrangements have been made for the distribution of the supplies in the destination country.

3. *Limits.* Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

D. Foreign Disaster Assistance - 10 U.S.C. § 404.

1. Scope of Authority.

a. *General.* President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

b. *Delegation of Authority*. President delegated to SecDef authority to provide disaster relief with SecState's concurrence and in emergencies when insufficient time to seek SecState concurrence (provided SecDef seeks SecState concurrence as soon as practicable thereafter). Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).

2. *Types of Assistance.* Transportation, supplies, services, and equipment.

3. *Notice to Congress.* Within 48 hours of commencing relief activities, President must transmit a report to Congress.

4. *Appropriations.* Funded from the OHDACA appropriation.

E. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2557.

1. *Scope of Authority.* SecDef may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under statute transferred to DoS, which is responsible for the distribution of the supplies.

2. *Limits.* Statute does not constitute authority to conduct any activity that, if carried out as a DoD intelligence activity, would require notice to the intelligence committees under 50 U.S.C. §§ 413 et seq.

3. *Definition.* "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death.

F. Humanitarian Assistance - 10 U.S.C. § 2561.

1. Scope.

a. *General.* To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and **other humanitarian purposes worldwide**.

b. *Availability of Funds.* To the extent provided in the appropriations acts, funds appropriated for humanitarian assistance remain available until expended.

2. *Reports.* Statute contains detailed annual reporting requirements.

3. *Appropriations.* Funded from the OHDACA appropriation.

4. *§2561/401 Distinguished*. If it fits 401 in each and every particular, it's 401 HCA. If not (but humanitarian purpose) it's 2561 HA.

VI. CONTACTS AND EXERCISES WITH FOREIGN MILITARIES.

A. Bilateral & Multilateral Conferences, Seminars, & Meetings.

1. The Need for Express Authority.

a. 31 U.S.C. § 1345: "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting."

b. 62 Comp. Gen. 531 (1983): "[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word 'specifically' Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated." *See also* B-251921 (April 14, 1993); 55 Comp. Gen. 750 (1976).

2. Authorities.

a. *U.S. Civilian Employees & Military Personnel. See, e.g.,* 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412.

b. *Individuals Performing Direct Services for the Government.* GAO, I Principals of Federal Appropriations Law 4-40 to 4-42 (2d ed. 1991); *see also* B-242880 (March 27, 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

c. *Latin American Cooperation (LATAM COOP) - 10 U.S.C. § 1050.* Authorizes the service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

d. *Bilateral or Regional Cooperation Programs - 10 U.S.C. § 1051.*

(1) Scope.

(a) *Travel Expenses.* SecDef may pay travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with attendance at bilateral or regional conferences, seminars, or similar meetings if SecDef deems attendance in U.S. national security interest.

(b) *Other Expenses.* SecDef may pay such other expenses in connection with the conference, seminar, or meeting as he considers in the national interest.

(c) *Additional Funding Authority.* The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. *See* DoD Authorization Act for FY 97, Pub. L. 104-201 §1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.

(d) *Asia-Pacific Center for Security Studies*. SecDef may waive reimbursement of the cost of conferences, seminars, courses of instruction, or similar educational activities of APC for foreign military officers and civilian officials if in US national security interest. *See* § 8081 of the DoD Appropriations Act for FY 2002, Pub. L. 107-117 (2001). *See* § 1306 of the FY 95 NDAA for similar authority to waive costs for participation of personnel from PfP and EAPC countries in activities of the George C. Marshall European Center for Security Studies.

(2) *Limits*. Payments under section 1051 are limited to travel within the combatant commander's AOR in which the developing country is located or in connection with travel to Canada or Mexico, but when the combatant command headquarters is in the U.S., expenses may be paid for travel to the U.S.

B. Bilateral & Multilateral Exercise Programs.

1. *Developing Countries Combined Exercise Program (DCCEP)* - 10 U.S.C. § 2010.

a. *Scope.* After consulting with SecState, SecDef may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if --

(1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SecDef determines the participation of the participating country is necessary to achieve the "fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . ."

b. *Definition.* "Incremental expenses" are reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

2. Special Operations Force (SOF) Training - 10 U.S.C. § 2011.

a. *Scope.* CINCSOCOM and the commander of any other combatant command may pay any of the following expenses relating to the training of SOF of the combatant command --

(1) Expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country.

(2) Expenses of deploying SOF for the training.

(3) The incremental expenses incurred by the friendly foreign country incurred as the result of the training.

b. Definitions**.**

(1) SOF. Includes civil affairs and psychological operations forces.

(2) Incremental Expenses. The reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

C. Regional Cooperation Programs.

1. *Partnership for Peace (PFP) - DoD Authorization Act for FY 1995, Pub. L. No. 103-337, § 1307, 108 Stat. 2893 (1994)* (*See also* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994); S. Rep. No. 321, 103d Cong., 2d Sess. 42 (1994).) $30 million appropriated in FY 1995 to Joint Staff to "use existing authorities to the greatest extent possible" to provide assistance to and cooperate with PFP countries. $40 million in FY 96 and again in FY97. $44 million appropriated in FY 1998, but to OSD, not Joint Staff.

2. *Cooperative Threat Reduction (CTR) with States of Former Soviet Union (FSU) ("Nunn-Lugar") - DoD Authorization Act for FY 2002, Pub. L. No. 107-107 §§ 1301-1309 (2001).* (*See also* DoD Authorization Act for FY 1997, Pub. L. No. 104-201, 110 Stat. 2731(1996) (50 U.S.C. § 2362 note) (specifies activities that make up the CTR program). $400 million of "no-year" money provided for FY 1994 and FY 1995 for various programs to dismantle FSU's arsenal of weapons of mass destruction. $300 million appropriated in FY 1996. $327.9M appropriated in FY 97. $440.4M for FY 1999, $460.5M for FY 2000, $443.4M for FY 2001, and $403M for FY 2002; all "three-year" money. §§ 1303-1309 of the DoD Authorization Act for FY 2002 retains various limitations including reporting requirements and prohibitions against the use of the funds.

D. Military-to-Military Contact Program - 10 U.S.C. § 168. Authorizes SecDef to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

E. International Military Education & Training (IMET) - FAA §§ 541-545 (22 U.S.C. §§ 2347-2347d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

VII. SPECIAL AUTHORITIES.

A. CinC Initiative Funds (CIF) - 10 U.S.C. § 166a. *See* DoD Appropriations Act for FY 2003, Pub. L. 107-248 (2002) ($25M for CIF in FY 2003 in Defense-wide O&M); Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01A, "CINC Initiatives Fund," 30 January 1999.

1. *Scope.* CJCS may provide to Unified Commanders (including NORAD) sums appropriated for the following activities --

a. Force training.

b. Contingencies.

c. Selected operations.

d. Command and control.

e. Joint exercises (including the participating expenses of foreign countries).

f. Humanitarian and Civil Assistance.

g. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).

h. Personnel expenses of defense personnel for bilateral or regional cooperation programs.

i. Force protection.

2. *Priorities.* CJCS should give priority consideration to requests for funds that would (1) enhance warfighting capability, readiness, and sustainability of forces assigned to the commander requesting the funds; (2) be used for activities in a Combatant Commander's AOR that would reduce threats to, or enhance, U.S. national security.

3. *Relationship to Other Funding.* Any amount provided as CinC initiatives funds for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."

4. *Limits.* 10 U.S.C. § 166a(e) Of funds made available --

   a. No more than $7 million may be used to buy end items with a cost greater than $15,000;

   b. No more than $1 million may be used to pay the expenses of foreign countries participating in joint exercises;

   c. No more than $2 million may be used for education and training to military and related civilian personnel of foreign countries; and

   d. No funds may be used for any activity for which Congress has denied authorization.

B. Emergency & Extraordinary (E&E) Expenses - 10 U.S.C. § 127.

1. *General.* Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated).

2. *Congressional Notification.* DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of $1 million and five days advance notice for expenditures or obligations between $500,000 and $1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

3. *Appropriations.* $10.8M for Army; $8M for Navy and Marine Corps; $8M for Air Force; and $34.5M for SecDef. DoD Appropriations Act for FY 2003, Pub. L. No. 107-248 (2002).

C. Contingency Operations Funding Authority. 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003, 110 Stat. 415 (1996))

1. *Applicability.* Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed $50 million, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of $100 million. Does *not* apply to operations with incremental costs not expected to exceed $10 million.

2. *Consequences.*

a. *Waiver of Working Capital Fund (WCF) Reimbursement.* Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if an activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)

b. *Transfer Authority.* Authorizes SecDef to transfer up to $200 million in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.

3. Congressional Notification & GAO Compliance Reviews. Statute contains provisions for both.

4. Overseas Contingency Operations Transfer Fund. DoD Appropriations Act for FY 2003, Pub. L. No. 107-248 (2002). Appropriates $5M of "no-year" funds "for expenses directly relating to Overseas Contingency Operations by United States military forces." These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds. See DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency operations (Feb. 2001).

D. Combating Terrorism Readiness Initiative Funds. 10 USC § 166b; CJCSI 5261.01B, July 1, 2001.

a. Section 1512 of the FY 2002 National Defense Authorization Act amends Title 10 to add a new Section 166b. Section 166b codifies the longstanding practice of making funds available for high-priority unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.

b. Funds may be used for the following activities:

(1) Procurement and Maintenance of physical security equipment;

(2) Improvement of physical security sites;

(3) Under extraordinary circumstances, funds may be used for physical security management planning, procurement and support of security forces ands security technicians, security reviews and investigations and vulnerability assessments, and any other activity related to physical security.

c. Priority should be given to emergency or emergent unforeseen high-priority requirements for combating terrorism.

VIII. SECTION 8066 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY 2003, PUB. L. NO. 107-248, § 8066 (2002).

A. General**.** Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation.

B. Notice Requirement. The notice required includes:

1. A description of the articles or services to be transferred;

2. The value of the equipment, supplies, or services; and

3. With respect to a proposed transfer of supplies and equipment, a statement of

   a. whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and

   b. whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.

C. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126), which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about *the diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).

D. President's Interpretation. In "acquiescing" in Appropriations Act, President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

E. Scope.

1. *Included Activities.* Section 8066 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include --

a. *Acquisition & cross-servicing agreements* during peace and humanitarian assistance operations (10 U.S.C. §§ 2341-2350).

b. *Drawdowns* for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).

c. *Humanitarian & Civic Assistance* (HCA) (10 U.S.C. §§ 166a(b)(6), 401).

d. H*umanitarian Assistance* to the extent the assistance is provided to another nation or an international organization (10 U.S.C. § 2561).

e. *Excess nonlethal supplies* for humanitarian relief (10 U.S.C. § 2557).

f. *Reimbursable support* to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent that the transfer results in DoD transferring articles or services to another nation or international organization (31 U.S.C. § 1535; FAA § 632).

g. Landmine clearance activities (FY 1995 DoD Authorization Act, Pub. L. 103-337, §1413 (1994)).

2. *Excluded Activities.* Section 8066 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include --

a. *Exercises* in which the DoD pays the incremental expenses of participating developing countries -- including Partnership for Peace (PFP) exercises (10 U.S.C. § 2010).

b. *SOF training* (10 U.S.C. § 2011).

c. *Bilateral/regional conferences* and seminars unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1051).

d. *LATAM Coop* unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1050).

e. *Military-to-military contacts* (10 U.S.C. § 168).

f. *EDA authorities* (FAA §§ 516), which already have congressional notice requirements equal to or in excess of 15 days.

g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (*e.g.*, coalition operations in time of war).

F. Compliance. DoD complies with section 8066 by --

1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or

2. Transferring supplies and services in such operations without congressional notification when --

a. Providing disaster relief;

b. Providing support *without* using funds appropriated to DoD (*e.g.*, "advance-of-funds" basis); or

c. Providing support under an FMS case.

IX. DOMESTIC OPERATIONS.

A. Stafford Disaster Relief & Emergency Assistance Act of 1974, 42 U.S.C. §§ 5121-5204c.

1. Federal Emergency Management Agency (FEMA) has lead. Executive Order 12673, 54 Fed. Reg. 12573 (March 23, 1989).

2. State Governor must request assistance to trigger Act.

3. 42 U.S.C. § 5191.

4. DoD *may* receive reimbursement for assistance provided. 42 U.S.C. §§ 5147-5192(a)(1).

5. DoD may give emergency aid to preserve life and property. 42 U.S.C. § 5170b(c).

B. DoD Directive 3025.1.

1. Currently, Secretary of the Army is SecDef's executive agent for managing and executing DoD's response. *Id.* ¶ D.3.a.

2. The Secretary of Defense must approve the deployment and employment of any combatant command forces. DoD Directive 3025.15, February 1997.

3. The Secretary of the Army, acting through the Directorate of Military Support (DOMS), manages responses. *Id.* ¶ E.7.b.

4. USJFCOM and PACOM are the "DoD Planning Agents." *Id.* ¶ D.3.c.(3).

5. Responsibilities are currently under review and modification.

X. CONCLUSION.

Materials
for

CHAPTER 39

OPERATIONAL LAW OVERVIEW

Chapter 40

Senior Officer Legal Orientation

THE LAW OF WAR
METHODS AND MEANS OF WARFARE

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. I Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, T.I.A.S. 3362 [hereinafter G.I].
4. II Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, T.I.A.S. 3363 [hereinafter G.II].
5. III Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, T.I.A.S. 3364 [hereinafter G. III].
6. IV Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, T.I.A.S. 3365 [hereinafter G. IV].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of Defense Directive 5000.1, The Defense Acquisition System (12 May 2003) [hereinafter DODD 5000.1].

Major Derek Grimes, USAF
FY 2004 Senior Officers Legal Orientation Course

FY 2004

I. **LEGAL FRAMEWORK FOR TARGETING DECISIONS.** The law of targeting is largely the product of treaties and customary international law. The primary sources are as follows:

A. The Law of the Hague (ref. (1) and (2)). Regulates "methods and means" of warfare -- such as prohibitions against using poison and orders to refuse "quarter" to humanitarian concerns such as warning the civilian population before a bombardment.

B. Geneva Conventions of 1949 (ref. (3) - (6)). Protects "victims" of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.

C. 1977 Geneva Protocols (ref. (7)). The US has not ratified these treaties. Portions, however, do reflect state practice and obligations -- the key ingredient to customary international law.

1. Motivated by International Committee of the Red Cross' belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WWII.

2. New or expanded areas of definition and protection contained in Protocols include provisions for:

a. Medical aircraft. Extends further protection to medical aircraft flying over areas controlled by friendly forces and in contact zones. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exist. GP I, supra, article 25, 26 (both considered customary international law by US).

b. Wounded and sick. Civilians are included in definition of wounded and sick (who because of trauma, disease, . . . are in need of medical assistance and care and who refrain from any act of hostility). GP I, supra, article 8.

c. Prisoners of war. Expands definition of prisoners of war to include "combatants." Combatants include those that don't distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement. GP I, supra, article 44 (portions of this article considered customary international law by US).

d. Protection of natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against long-term, widespread, and severe damage. GP I, supra, article 55 (US specifically objects to this article).

e. Protection of works and installations containing dangerous forces. Facilities containing forces that might be harmful to the civilian population (nuclear plants, dams) are subject to enhanced targeting rules. GP I, supra, article 56 (US specifically objects to this article).

f. Journalists. Given protection as "civilians" provided they take no action adversely affecting their status as civilians. GP I, supra, article 79 (considered customary international law by US).

g. Expanded protections of the civilian population from "indiscriminate" attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated. GP I, supra, article 51 (except for para. 6, considered customary international law by US).

h. Legal review of new weapons now required. GP I, supra, article 36.

i. US views these GP I articles as customary international law: 5(appointment of protecting powers);10(equal protection of wounded, sick, and shipwrecked);11(guidelines for medical procedures); 12-34(medical units, aircraft, ships, missing and dead persons);35(1)(2)(limiting methods and means of warfare);37(perfidy prohibitions);38(prohibition against improper use of protected emblems); 44(combatants and prisoners of war (portions)); 45(prisoner of war presumption for those who participate in the hostilities); 51(protection of the civilian population, except para 6 -- reprisals);52(general protection of civilian objects);54(protection of objects indispensable to the survival of the civilian population);57-60(precautions in attack, nondefended localities, and demilitarized zones);62(civil defense protection);63(civil defense in occupied territories);70(relief actions);73-89(treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GPI).

j. The US specifically objects to articles 1(4)(GPI applicability to certain types of armed conflicts);35(3)(environmental limitations on means and methods of warfare);39(2)(use of enemy flags and insignia while engaging in attacks);47(non-protection of mercenaries);55(protection of the natural environment) and 56(protection of works and installations containing dangerous forces). *See* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l & Pol'y 419, 420 (1987).

D. Treaties that limit specific aspects of warfare are another source of targeting guidance.

1. Gas (ref. (8) and (9)). Prohibits use in war of asphyxiating, poisonous, or other gases . . . . Chemical Weapons Convention (CWC), supra, article I(1), prohibits production, stockpiling, and use (even in retaliation). The U.S. ratified the CWC on 25 April 1997.

2. Cultural Property (ref. (10)). Prohibits targeting cultural property, and sets forth conditions where cultural property may be used by a defender or attacked. 1954 Hague Cultural Property Convention, supra, article 4.

3. Biological Weapons (ref (11)). Biological weapons are prohibited by the 1925 Geneva Protocol supra. However, their use in retaliation as well as prohibitions on production, manufacture, and stockpiling are prohibited by the 1972 Biological Weapons Convention, supra.

4. Conventional Weapons (ref. (12)). Protocol I - nondetectable fragments; Protocol II - mines, booby traps and other devices; Protocol III - incendiaries; and Protocol IV- laser weapons are the subject of the 1980 Conventional Weapons Treaty, supra. The U.S. has ratified the treaty by ratifying Protocols I and II. The Senate is currently reviewing Protocols III and IV and amendments to Protocol II for its advice and consent to ratification.

E. Implementing targeting guidance for US Armed Forces is found in respective service regulations (FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps).

II. GENERAL TARGETING PRINCIPLES.

A. Military Necessity - That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible (FM 27-10, supra, para. 3).

1. "Not forbidden." Targeting of enemy personnel and property permitted unless otherwise prohibited by international law. This check on the application of military force, i.e., international law, is the distinction cited by Dr. Lieber in 1863. This differed from the 19th Century European view as stated below by Germany's Bismarck:

> Humanitarian claims such as the protection of men and goods can only be taken into consideration insofar as the nature of war permit." See Dep't of the Army, International Law, Dep't of the Army Pamphlet 27-161-2, 12 (1962) [hereinafter DA Pam. 27-161-2].

2. Indispensable (relevant).

3. Military Necessity has been argued as a defense to law of war violations and has generally been rejected as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. Approach -- look to whether international law allows targeting of a person or property. Examples:

   a. Protected Persons: Law generally prohibits the intentional targeting of protected persons under any circumstances. WWII Germans, under concept called "Kreigsraison," argued that sometimes dire military circumstances allowed them to violate international law -- i.e., kill prisoners at Malmedy because they had no provisions for them and their retention would have jeopardized their attack. (Rejected as a valid defense.)

b. Protected Places: Law typically allows destruction of civilian property if military circumstances require such destruction (FM 27-10, supra, para. 56 and 58). The circumstances requiring destruction of protected property are those of "urgent military necessity" appearing to the deciding commander at the time of the decision. See IX Nuremberg Military Tribunals, Trials of War Criminals Before the Nuremberg Military Tribunals, 1113 (1950). Charges that General Lothar Rendulic unlawfully destroyed civilian property via a "scorched earth" policy were dismissed by the Tribunal because "the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made." Id. Current norms for protection (and destruction) of civilian property:

(1) GC. IV, supra, art. 53. [Don't destroy real or personal property of civilians] "except where such destruction is rendered absolutely necessary by military operations.

(2) Hague Regulations, supra, art. 23. "[F]orbidden . . . to destroy or seize the enemy's property . . . unless demanded by the necessities of war."

B. Unnecessary Suffering - It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering (Hague Regulations, supra, art. 23e). This concept also extends to unnecessary destruction of property.

1. Can't use arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass).

2. Can't use otherwise lawful arms in a manner that causes unnecessary suffering (e.g., 2000 pound bomb instead of precision guided munition against a military objective where civilians are nearby).

C. Proportionality. A balancing test.

1. The loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained (FM 27-10, supra, para 41, ch. 1).

2. GP I, supra, art. 57(2)(b) requires planners to cancel an attack where incidental damage to civilians or civilian objects would be excessive to "the concrete and direct military advantage anticipated." This provision considered customary international law by US.

3. Judging commanders. It may be a grave breach of Protocol I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably*.

   a. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated (FM 27-10, para. 41).

   b. In judging a commanders actions one must look at the situation as the commander saw it in light of all circumstances. *See* A.P.V. Rogers, *Law on the Battlefield* 66 (1996). But based on case law and modern applications, the test is not entirely subjective -- "reasonableness" seems to have an objectivity element as well. In this regard, two questions seem relevant. Did the commander reasonably gather information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also factor into the analysis.

c. Example: Al Firdus Bunker. During the Persian Gulf War, targeters identified this bunker as a military objective. Barbed wire surrounding the complex, it was camouflaged, and armed sentries guarded its entrance and exit points. Unknown to coalition planners, however, was that Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in numerous civilian casualties. Was there a violation of the law of war? No. Based on information reasonably gathered by coalition planners, the commander made a reasonable assessment that the target was a military objective and that incidental damage would not outweigh the military advantage gained. Although the attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained -- had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).

III. DETERMINATION OF LAWFUL TARGETS.

Military Objectives (FM 27-10, supra, para. 40, and GP I, supra, art. 52). Combatants, defended places, and those objects which by their nature, location, purpose or use make an effective contribution to military action.

A. Combatants: Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless "out of combat" (discussed later).

1. Lawful combatants: Receive protections of Geneva Conventions (specifically, the GC I, II, and III).

2. Unlawful combatants: May be treated as criminals under the domestic law of the captor. An unlawful combatant can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.

B. Defended Places (FM 27-10, supra, paras. 39 & 40, Change 1). As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:

1. a fort or fortified place;

2. a place occupied by a combatant force or through which a force is passing; and

3. a city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions See also, GP I, supra, art. 51(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments which treat "as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village. . . ." Id.

C. Objects--if their nature, use, location, or purpose makes an effective contribution to military action FM 27-10, supra, para. 40, GP I, supra, art. 52(2).

1. The destruction, capture or neutralization must offer a definite military advantage. There must be a nexus between the object and a "definite" advantage toward military operations.

2. Examples: munitions factory, bridges, railroads.

IV. TARGETING PROHIBITIONS.

A. Prohibition against attacking civilians or civilian property (FM 27-10, supra, para. 246, GP I, supra, art. 51(2).

1. General Rule: civilians and civilian property may not be the subject or sole object of a military attack.

a. Civilians are persons who are not members of the enemy's armed forces; and

b. who do not take part in the hostilities (GP I, supra, art. 50 and 51).

2. Incidental Damage: Unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. For example, GP I, supra, art. 51(5) describes indiscriminate attacks as those causing "incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated." Id. Caution, however, the law of proportionality still applies.

3. Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.) (GP I, supra, art. 52(3)). Resolve doubtful cases by not targeting.

B. Prohibition against attacking undefended places. The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited. HR, supra, art. 25. An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:

1. all combatants and mobile military equipment are removed;

2. no hostile use made of fixed military installations or establishments;

3. no acts of hostilities shall be committed by the authorities or by the population; and

4. no activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed. FM 27-10, supra, art. 39b, ch. 1.

C. Prohibition against attacking enemy personnel who are "out of combat."

1. Prisoners of War. (G. III, supra, art. 4)

a. Surrender may be made by any means that communicates the intent to give up. No clear cut rule as to what constitutes a surrender. However, most agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.

b. Onus on person or force surrendering to communicate intent to surrender.

c. Captors must respect (not attack) and protect (care for) those who surrender--no reprisals.

2. Wounded and Sick (G. I, supra, art. 12). Those soldiers who have fallen by reason of sickness or wounds and who ceases to fight.

3. Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (G. II, supra, art. 12, NWP 1-14M supra, para. 11.6).

   a. Shipwrecked. Includes downed passengers/crews on aircraft, ships in peril, castaways.

   b. Includes protection for civilians.

4. Parachutists (FM 27-10, supra, para. 30).

   a. Paratroopers are presumed to be on a military mission and therefore may be targeted.

   b. Parachutists who are crewmen of a disabled aircraft are presumed to be out of combat and may not be targeted unless it's apparent they are engaged on a hostile mission.

   c. Parachutists, according to art. 42, GP I, "shall be given the opportunity to surrender before being made the object of attack."

5. Medical Personnel. Considered out of combat if they don't abuse their status. Accidental killing or wounding of such personnel due to their proximity to military objectives "gives no just cause for complaint" (para. 225, FM 27-10). Medical personnel include:

   a. Permanent medical personnel of the armed forces (art. 24, G. I).

      (1) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and orderlies who give direct care to the wounded and sick.

      (2) Administrative staffs of medical units (drivers, generator operators, cooks, etc.).

      (3) Chaplains.

   b. Auxiliary Medical Personnel of the Armed Forces. (art. 25, G. I requires that they have received "special training" and be carrying out their medical duties when they come in contact with the enemy.

c. Personnel of National Red Cross Societies and other Recognized Relief Societies (art. 26, G. I).

d. Personnel of Societies of Neutral Countries (art. 27, G. I)

D. Prohibition against attacking "Protected Places" (ref. para. 45, FM 27-10). Buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.

1. Misuse will subject them to attack.

2. Enemy has duty to indicate presence of such buildings with visible and distinctive signs.

3. Protection of Hospitals (ref. paras. 257 and 258, FM 27-10).

a. Warning requirement before attacking a hospital that is committing "acts harmful to the enemy."

b. Reasonable time to comply.

4. Richmond Hills (Grenada) example. When <u>receiving</u> fire from a hospital, there is no duty to warn before returning fire in self-defense.

E. Prohibition against attacking cultural property. The 1954 Cultural Property Convention (ref. 10 - p. 9 - 51) elaborates, but does not expand, the protections accorded cultural property found in other treaties (summarized in FM 27-10. The Convention has not been ratified by the US (treaty is currently under review with a view toward ratification with minor understandings). See also art. 53, GP I, for similar prohibitions.

F. Prohibition against attacking "works and installations containing dangerous forces." (ref. art. 56, GP I and art. 15, GP II). THIS RULE IS NOT US LAW BUT MUST BE CONSIDERED BECAUSE OF THE PERVASIVE INTERNATIONAL ACCEPTANCE OF GP I AND II.

1. Dams, dikes, and nuclear electrical generating stations shall not be attacked -- even if they are military objectives!

a. Military objectives that are nearby these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations).

b. May attack works and installations containing dangerous forces only if they provide significant and direct support to military operations and attack is the only feasible way to terminate the support.

c. Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may not be attacked unless they are used for purposes other than protecting the installation.

G. Designated Emblems of Protection (ref. para. 238, FM 27-10). Objects and personnel displaying emblems are presumptively protected under Conventions:

1. Medical and Religious Protection Emblems.

a. Red Cross.

b. Red Crescent.

c. Lion and Sun.

d. Red Star of David: Not mentioned in the 1949 Geneva Convention but must be protected.

2. Cultural Property Emblems.

a. 1954 Cultural Property Convention (art. 16 and 17). "A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle."

b. Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). "[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

3. Works and Installations Containing Dangerous Forces (Annex I, art. 16, GP I). Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius.

H. The Warning Requirement (FM 27-10, supra, para. 43,; see art. 26, HR IV). General requirement to warn before a bombardment.

1. Only applies if civilians are present.

2. Exception: if it is an assault (any surprise attack or an attack where surprise is a key element).

3. GP I, supra, art. 57(2)(c), however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the US).

V. SPECIAL PROBLEMS.

A. Stratagems and Ruses (FM 27-10, supra, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith).

1. Examples of stratagems:

a. Surprise.

b. Ambushes.

c. Psychological operations.

(1) Leaflet programs.

* Gulf War - US PSYOPS leafletting program. Delivered by aircraft and artillery, US PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance;

inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender." Adolph, PSYOP: The Gulf War Force Multiplier, Army Magazine 16 (December 1992).

2. Examples of Ruses.

a. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

* World War I - Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider Kormoran passed itself off as a Dutch merchant when approached by the Australian cruiser Sydney. Once close enough to open fire she hoisted German colors and fired, sinking Sydney with all hands. See C. John Colombos, The International Law of the Sea 454-55 (1962).

* World War II - Britain: British Q-ship program during WWII. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant mariners. When spotted by a surfaced U-boat, the disguised merchant would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks. LCDR Mary T. Hall, False Colors and Dummy Ships: The Use of Ruse in Naval Warfare, Nav. War. Coll. Rev., Summer 1989, at 60.

* World War II - United States: The US Q-ship program was a disaster. Samuel Eliot Morison says it consumed much time and many lives (1/4 of sailors who volunteered for it). Like the British program, the US used heavily armed merchants disguised as peaceful merchantmen. Morrison says WWII U-boats were too smart and fast to be taken in. But in early 1942, the situation was so dire in the Atlantic that Admiral King (CNO and COMINCH - CINC US Fleet) organized a Q-ship program as a result of pressure from President Roosevelt. In March 1942 three US Q-ships sailed from New England ports. USS Atik was sunk by a U-boat off Chesapeake Bay four days out, losing all hands. USS Foam had the same fate in May 1942. Two others never made a U-boat contact. Ultimately, all were converted to other uses. Samuel Eliot Morison, The Two Ocean War 132 (1963).

b. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit, etc. FM 27-10, para. 51. Some examples follow:

* World War II - Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies,

through the use of false radio transmissions and false references in bona fide messages, created a fictitious First US Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful. John Keegan, The Second World War, 373-79 (1989).

* Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti bootheel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the bootheel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, Crusade, 331-33 (1993).

3. Use of enemy uniforms, colors, and equipment.

a. Uniforms: Combatants may wear enemy uniforms but cannot fight in them. Note, however, the downside: military personnel not wearing their uniform lose their PW status if captured and risk being treated as spies (paras 12.5.3, NWP 1-14M; 8-6, AFP 110-31; 74, FM 27-10).

* World War II - Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150th SS Panzer Brigade. Several of his men were captured in US uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. None, however, were convicted of a war crime. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war. DA Pam 27-161-2 at 54.

* For listing of examples of the use of enemy uniforms see W. Hays Parks, Air War and the Law of War, 32 A.F. L. Rev. 1, 77-78 (1990).

* For an argument against any use of the enemy's uniform see Valentine Jobst III, Is the Wearing of the Enemy's Uniform a Violation of the Laws of War? 35 Am. J. Int'l L. 435 (1941).

* Protocol I, article 39, prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The US obviously does not consider this article reflective of customary law.

b. Colors: The US position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the US interprets the "improper use" of a national flag (art 23(f), Hague Regulations) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (para. 54, FM 27-10; para. 12.5, NWP 1-14M). Note the Protocol I position on this issue in the preceding paragraph. Interestingly, even this article contains an exception for the time-honored naval tradition of displaying false colors until prior to an actual engagement.

c. Equipment: must remove all enemy insignia in order to fight with it.

(1) However, GP I, supra, art 39(2) prohibits virtually all use of these enemy items - but US does not concur (see para 12.5.3, NWP 1-14M). This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on (GP I, supra, art 39(3); para 12.5.1, NWP 1-14M).

(2) Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR IV, supra, art. 53).

(a) Captured medical facilities and supplies of the armed forces. (FM 27-10, supra, para. 234).

(i) Fixed facilities. May be used by captors, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present.

(ii) Mobile facilities. Captors may keep material from mobile medical facilities, provided it is reserved for care of the wounded and sick.

B. Treachery and Perfidy are prohibited under the law of war (ref. FM 27-10, supra, para. 50). Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).

1. According to GP I, supra, art 37(1) (US considers customary law), the **killing, wounding, or capture via** "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts]."

2. Condemnation of perfidy is an ancient precept of the LOW - derives from principle of chivalry. Remains a cardinal principle because it degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace. Michael Bothe, et. al., New Rules for Victims of Armed Conflicts 202 (1982); FM 27-10, para. 50.

3. Art. 37(1) does not prohibit perfidy per se, only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. Bothe, supra, at 203. Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. Id. at 204-05. Note, however, that the US view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. Para. 50, FM 27-10.

4. Examples:

a. Feigning incapacitation by wounds/sickness. Art 37(1)(b) GPI. Whiteman says HR 23b also prohibits this, e.g. if shamming wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 Digest of International Law 390 (1968); NWP 1-14M, para. 12.7.

b. Feigning surrender or the intent to negotiate under a flag of truce. Art 37(1)(a), GPI.

(1) Some examples follow:

* Falklands War - British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group was attempting to surrender, but not the other group. The Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. This incident emphasizes awareness of the fact that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward. See Major Robert D.

Higginbotham, Case Studies in the Law of Land Warfare II: The Campaign in the Falklands, Mil. Rev., Oct. 1984, at 49.

* Gulf War - Coalition: Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward when action began was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed turret is not a recognized symbol of surrender per se. "Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only on a clear indication of hostile intent, or some hostile act." Dep't of Defense, Final Report to Congress: Conduct of the Persian Gulf War 621 (1992).

* On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street. Id.

* On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed. Id.

(2) Note that in order to be a violation of art. 37 the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of art. 38 of Protocol I, which the US also considers reflective of customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, The Modern Law of Land Warfare, 320-21 (1959). Art. 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

c. Feigning civilian, noncombatant status. Art 37(1)(c). "Attacking enemy forces while posing as a civilian puts all civilians at hazard." NWP 1-14M, para. 12.7.

d. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. Art 37(1)(d).

(1) As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drive up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French Peacekeepers without firing a shot. Joel Brand, French Units Attack Serbs in Sarajevo, Wash. Post, May 28, 1995, at A1.

(2) 2) As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GPI. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition which has only arisen on one occasion: the Korean War. Michael Bothe, et. al., New Rules for Victims of Armed Conflicts 206 (1982).

e. Certain uses of booby-traps prohibited by the 1980 Conventional Weapons Convention would otherwise be perfidious. Under this convention, it is prohibited to booby trap:

(1) dead bodies;

(2) sick and wounded;

(3) burial sites and graves;

(4) medical facilities, supplies, or transportation; and

(5) historic monuments, works of art which constitute the cultural heritage of a people.

f. Misuse of Red Cross, Red crescent, cultural property symbol (see also HR, art 23f)

(1) Designed to reinforce/reaffirm HR 23f.

(2) GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, US aircraft took fire from the Richmond Hills Hospital, and consequently engaged it; Congo 1961 - UN Indian forces alleged Kantanganese were transporting troops in medical vehicles. This allegation was never substantiated. DA Pam 27-161-2, p. 53, n. 61.

(3) Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. Bothe, supra, at 209.

g. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.

C. Assassination, hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" (para. 31, FM 27-10, and E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, Army Law. Dec. 1989, at 4.

D. Espionage (para. 75 FM 27-10, art. 46, GP I). Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage.

1. Espionage is not a law of war violation.

2. No protection, however, under Geneva Conventions for acts of espionage.

3. Tried under the laws of the capturing nation. Art. 106, UCMJ.

4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.

E. Reprisals (ref. para. 497, FM 27-10). An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.

1. Reprisals are authorized if the following requirements are met:

   a. it's timely;

   b. it's responsive to enemy's act;

   c. must first attempt a lesser form of redress; and

   d. must be proportional.

2. Prisoners of war and persons "in your control" can't be objects of reprisals.

3. US policy is that a reprisal may be ordered only at the highest levels.

VI. RULES OF ENGAGEMENT.

A. Rules of Engagement Defined: Directives issued by competent superior authority which delineate the circumstances and limitations under which US forces will initiate and/or continue engagement with other forces.

   1. ROE are drafted **in part** based upon the LOW. Drafted considering LOW, political policy, public opinion. and military operational constraints. ROE are usually more restrictive than what the LOW would allow.

   2. Targeting rules are often incorporated within ROE for a given operation.

B. JCS Standing ROE (CJS Instruction 3121.01 dtd 1 Oct 94): Predetermined guidance as to course of action in specific situations. "Inherent Right of Self-Defense "for both **individual and the unit** is the foundation of document.

VII. DETERMINATION OF LAWFUL WEAPONS.

A. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. DODD. 5000.1, AR 27-53, and SECNAVINST 5711.8A.

B. **The test:** Is the suffering occasioned by the use of the weapon needless, superfluous, or grossly disproportionate to the advantage gained by its use?

C. Weapons may be illegal:

1. Per se. Those weapons calculated to cause unnecessary suffering. Example: glass bullets.

2. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available.

3. By agreement or prohibited by specific treaties. Example: some of the booby trap prohibitions in Protocol II of the 1980 Conventional Weapons Treaty.

VIII. PARTICULAR WEAPONS AND WEAPONS SYSTEMS.

A. Small Arms.

1. Projectiles. Must not be exploding or expanding projectiles. Prohibited by late 19th century treaties (of which US was never a party). US practice, however, accedes to this prohibition being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).

2. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international and the treaties mentioned above. There are situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).

3. High Velocity Small Caliber Arms.

a. Early controversy about M-16 causing unnecessary suffering.

b. "Matchking" ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.

4. .50 Caliber machine guns, sniper rifles, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

B. Incendiaries (para. 36, FM 27-10). Weapons which employ fire. Examples: Napalm, flamethrowers, tracer rounds, and white phosphorous.

1. Napalm and Flamethrowers: Designed for use against armored vehicles, bunkers, and built-up emplacements.

2. White phosphorous: Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent.

3. None of these are illegal per se or illegal by treaty. The only US policy guidance is found in para. 36, FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering." See also para 6-7, AFP 110-31.

4. Protocol III of the 1980 Conventional Weapons Convention prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. HAS NOT BEEN RATIFIED BY THE US. The US is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

C. Poison (para. 37, FM 27-10). Has been outlawed for thousands of years.

1. Considered a treacherous means of warfare.

2. Problem -- once unleashed it is hard to control.

3. The 1925 Geneva Protocol (para. 38, FM 27-10). Applies to all **international** armed conflicts.

4. Prohibits use of Lethal, Incapacitating, and Biological Agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."

5. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.

   a. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. US views riot control agents as having a "transient" effect -- and thus are NOT incapacitating agents. Therefore, their use in war is not prohibited by the treaty. There are, however, policy limitations which are discussed below.

   b. U.S. reserves right to use lethal or incapacitating gases if the other side uses them first.

   c. Presidential approval required for use.

6. Riot Control Agents and Herbicides.

   a. US has an understanding to the Treaty that these are not prohibited.

   b. US policy restricts their use.

7. US RCA Policy is found in Executive Order 11850. Applies to use of Riot Control Agents and Herbicides; requires Presidential approval before first use in an armed conflict.

   a. Herbicides: renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)

   b. Riot Control Agents: renounces first use in armed conflicts except in defensive military modes to save lives such as:

(1) controlling riots;

(2) dispersing civilians where the enemy uses them to mask or screen an attack;

(3) rescue missions for downed pilots, escaping PWs, etc.; and

(4) for police actions in our rear areas.

N**CA approval required.**

8. Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: Is considered a Riot Control Agent.

9. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by US on 25 April 1997.

a. The CWC went into force on 29 April 1997 (for those States who ratified the treaty). The CWC prohibits use, development, acquisition, transfer, and stockpiling of chemical weapons (SIGNIFICANT DEPARTURE FROM 1925 GENEVA PROTOCOL).

b. Second use not allowed (SIGNIFICANT DEPARTURE FROM 1925 GENEVA PROTOCOL).

c. RCA controversy. Convention prohibits RCA use as "method of warfare."

(1) Initial DoD interpretation. EO 11850 remains valid. *See* CJCS Instruction 3110.07, Nuclear, Biological, and Chemical Defense; Riot Control Agents, and Non Lethal Weapons (3 July 1995).

(2) DoS interpretation. EO 11850 portions pertaining to rescue of downed airman and human shield dispersement uses are methods of warfare since the actions include combatants (and therefore can't be used). Rationale of CWC is that any chemical equipment on the battlefield, even if claimed only for RCA use, could be used as a subterfuge for chemical warfare or trigger chemical warfare response.

(3) President's interpretation. In June 1994, the President agreed with DoS interpretation and submitted this to Senate. In part due to controversy over this interpretation, the treaty was withdrawn from consideration by the Senate for its advice and consent during September 1996.

(4) Present status. **EO 11850 remains in effect .** It appears that as a condition for its consent to ratification, the Senate reached an agreement with the President that EO11850 guidance on the use of RCAs would remain in effect. *See* Condition 26 of the Senate's resolution of 24 April 1997, giving its advice and consent to ratification of the CWC; and the President's certification of 25 April 1997, in response to the resolution.

10. Biological weapons.

a. The 1925 Geneva Protocol prohibits bacteriological methods of warfare.

b. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons.

c. US renounced <u>all</u> use of biological and toxin weapons.

D. Fragmentation Weapons (FM 27-10, <u>supra</u>, para 34).

1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).

2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

E. Booby Traps and Land Mines: Lawful if properly used.

1. Primary legal concern: indiscriminate use which endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of "civilian concentration."

a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.

b. Non-remotely delivered mines, booby traps, and other devices. Can't be used in towns or cities or other places where concentrations of civilians are present, unless:

(1) they are placed in the vicinity of a military objective under the control of an adverse party; or

(2) measures are emplaced to protect civilians from their effects (posting of signs etc.).

2. Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects (Id. art. 6).

3. The Senate is currently reviewing amendments to Protocol II for its advice and consent on ratification. The amendments extend Protocol II application to internal conflicts. Antipersonnel landmines used outside marked, fenced, and monitored mine fields must have a self destruct capability with a self-deactivation back up. The amendments will also ban non-detectable landmines (metallic content required).

4. US policy on anti-personnel land mines: US forces may no longer employ "dumb" (those that don't self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy:

a. Use of "dumb" mines in demilitarized zone between North and South Korea; and

b. Use of "dumb" mines for training purposes.

F. Lasers. US Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by US). The Senate is reviewing the protocol for its advice and consent for ratification.

G. Nuclear Weapons (FM 27-10, supra, para. 35). Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defense, in which the very survival of the state would be at stake. 35 I.L.M. 809 (1996)

IX. SUMMARY AND CONCLUSIONS.

Materials
for

CHAPTER 41

RULES OF ENGAGEMENT

Chapter 42

Senior Officer Legal Orientation

DOMESTIC SUPPORT OPERATIONS

REFERENCES

1. 18 U.S.C. § 1385, Posse Comitatus Act.
2. 10 U.S.C. §§ 371-382, Chapter 18, Military Support For Civilian Law Enforcement Agencies.
3. 10 U.S.C. §§ 331-334, Chapter 15, Insurrections
4. 32 U.S.C. § 112, Drug Interdiction and Counter-Drug Activities
5. 42 U.S.C. § 5121, et seq., as amended, Stafford Act
6. 50 U.S.C. § 2311, Response to Threats of Terrorist Use of Weapons of Mass Destruction
7. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, as amended, Additional Support for Counter-Drug Activities
8. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
9. National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85, Section 1033, Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia
10. DoDD 3025.15, *Military Assistance to Civil Authorities*, 18 February 1997
11. DoDD. 3025.1, *Military Support to Civil Authorities*, 15 January 1993.
12. DoD 3025.1M, *Manual for Civil Emergencies*, June 1994.
13. DoDD. 3025.12, *Military Assistance for Civil Disturbances*, 4 February 1994.
14. DoDD. 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials* 15 January 1986, through Change 1, 20 December 1989.
15. DoDD 5525.10, *Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions*, 17 September 1990
16. NGR 500-1/ ANGI 10-8101, *Military Support to Civil Authorities*, February 1996
17. NGB 500-2/ ANGI 10-801, *National Guard Counterdrug Support*, 31 March 2000
18. CJCS Instruction 3710.01, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel*, 28 May 1993 (under revision).
19. AR 500-51, *Support to Civilian Law Enforcement*, 1 August 1983.
20. AR 700-131, *Loan and Lease of Army Material*, 1 September 1996
21. SECNAVINST 5820.7B, *Cooperation With Civilian Law Enforcement Officials*, 28 March 1988
22. OPNAVINST 3440.1C, *Navy Civil Emergency Management Program*, 10 March 1995
23. AFI 10-801, *Air Force Assistance to Civilian Law Enforcement Agencies*, 15 April 1994.
24. AFI 10-802, *Military Support to Civil Authorities*, 23 February 1994
25. AFI 31-202, *Military Working Dog Program*, 1 August 1999
26. DoD Civil Disturbance Plan GARDEN PLOT
27. FM 100-19, Domestic Support Operations, July 1993.
28. Office of the Defense Coordinator for Drug Enforcement Policy and Support Policy of 26 Jan 95, *Priorities, Policies, and Procedures for Department of Defense Counterdrug Support to Domestic Drug Law Enforcement Agencies*.
29. National Security Strategy for Homeland Security, Office of Homeland Security, July 2002.
30. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).

Major Derek Grimes, USAF
FY 2004 Senior Officers Legal Orientation Course
FY 2004

I. OBJECTIVES

A. Become familiar with DoD's role overall in domestic operations.

B. Become familiar with the Posse Comitatus Act.

C. Become familiar with DoD's role in disasters and emergencies.

D. Become familiar with DoD's role in civil disturbances.

E. Become familiar with DoD's role in providing support to law enforcement.

F. Become familiar with DoD's role in counterdrug support.

II. HOMELAND SECURITY

A. Since September 11, 2001, the role of the military in domestic operations has changed drastically. Prior to September 11th, military involvement in domestic operations was almost exclusively in the area of civil support operations. Post-September 11th, the military's role has expanded to cover "homeland defense" and/or "homeland security" missions, somewhat undefined terms.

1. The most recent Quadrennial Defense Review Report (September 30, 2001) "restores the defense of the United States as the Department's primary mission." How this national security mission interacts with the traditional framework for the civil support mission is unclear.

2. "Homeland security (HLS)" is defined in The National Strategy for Homeland Security (July 2002) as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." Clearly the focus is on acts of terrorism and responses thereto. The document does not break the mission of "homeland security" down further. However, the Vice Chairman of the Joint Chiefs of Staff testified to Congress that the DoD "homeland security" mission breaks down into two functions: homeland defense and civil support.

a. "Homeland defense (HLD)" is not defined in the National Strategy for Homeland Security. However it is generally considered to consist of war-fighting missions led by the Department of Defense. Examples include combat air patrols and maritime defense operations.

b. "Civil support (CS)" is not defined in the National Strategy for Homeland Security. However it is generally considered to consist of missions where the DoD provides assistance or support to other lead federal or state agencies. Examples include disaster response, counterdrug support, and support to civilian law enforcement.

3. The challenge in today's environment is determining which type of mission the military is being asked to perform. The type of mission, HLD or CS, dictates the applicable legal structure, to include: rules of engagement/ rules for use of force, applicability of statutory restrictions such as the Posse Comitatus Act, chain of command and authority levels, and funding sources.

B. Homeland Security Act of 2002

1. This Act establishes the Department of Homeland Security in the executive branch of the United States government and defines its primary missions and responsibilities. The primary missions of the department include preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism at home, and minimizing the damage and assisting in the recovery from any attacks that may occur. The Department's primary responsibilities correspond to the five major functions established by the bill within the Department: information analysis and infrastructure protection; chemical, biological, radiological, nuclear, and related countermeasures; border and transportation security; emergency preparedness and response; and coordination with other parts of the federal government, with state and local governments, and with the private sector. These primary missions and responsibilities are not exhaustive, and the Department will continue to carry out other functions of the agencies it will absorb.

2. Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense (25 March 2003). Appoints an Assistant Secretary of Defense for Homeland Defense (ASD(HD))whose principal duty is the overall supervision of the HLD activities of the DoD. The ASD(HD) serves as the DoD Domestic Crisis Manager. Secretary of the Army is therefore no longer the DoD executive agent under DoDD 3025.1, 3025.15, and 10 USC 2564. The functions and resources of the Office of the Director of Military Support (DOMS) are transferred to CJCS with policy oversight by ASD(HD).

III. POSSE COMITATUS ACT

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1385.

A. History.

1. posse comitatus *po.si komitei.tAs, -tius* , [med. (Anglo) L., force of the county: see prec. and county.] 'The force of the county'; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or 'raise' to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff. Oxford English Dictionary Online.

2. In the United States the military was used extensively as a posse comitatus to enforce various laws as diverse as the Fugitive Slave Law and the Reconstruction eras laws. Throughout time, the authority level necessary for local law enforcement to call on the military as a posse comitatus devolved down to the lowest level.

3. For several reasons (the Army's increasingly vocal objection to "commandeering of its troops," Southerners' complaints that the Northern-based federal military was unfairly enforcing laws against them, and compromises made as a result of the most recent presidential election), Congress sought to terminate the prevalent use of federal soldiers in civilian law enforcement roles.

4. Congress therefore passed the PCA in 1878 as a rider to an Army appropriations act, limiting the circumstances under which the Army could be used as a posse comitatus to "execute the laws."

B. To Whom the PCA Applies.

1. Active duty personnel in the Army and Air Force.

a. Most courts interpreting the Posse Comitatus Act have refused to extend its terms to the Navy and Marine Corps. (United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986); United States v. Mendoza-Cecelia, 736 F.2d. 1467 (11th Cir. 1992); United States v. Acosta-Cartegena, 128 F. Supp 2d. 69 (D.P.R. 2000)).

b. In 10 U.S.C. § 375, Congress directed SECDEF to promulgate regulations forbidding direct participation "by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." SECDEF has done so in DoDD 5525.5. Therefore, the proscription has been extended by regulation to the Navy and Marine Corps. (See DoDD 5525.5, para. B(1), and enclosure 4, para C.). SECDEF and SECNAV may grant exceptions on a case-by-case basis. DoDD 5525.5, Encl. 4, para. C., SECNAVINST 5820.7b, para. 9c.

2. Reservists on active duty, active duty for training, or inactive duty for training.

3. National Guard personnel in Federal service (Title 10 status).

4. Civilian employees of DoD when under the direct command and control of a military officer. (DoDD 5525.5, encl. 4; AR 500-51, para. 3-2; SECNAVINST 5820.7B, para. 9b(3)).

C. The Whom the PCA does NOT Apply:

1. A member of a military service when off duty and acting in a private capacity. [A member is not acting in a private capacity when assistance to law enforcement officials is rendered under the direction or control of DoD authorities]. (DoDD 5525.5, Encl. 4; AR 500-51 para. 3.2; SECNAVINST 5820.7B, para. 9b(4); AFI 10-801).

2. A member of the National Guard when not in Federal Service.

3. A member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training.

4. Members of the Coast Guard (14 U.S.C. § 2). Jackson v. Alaska, 572 P.2d 87 (Alaska 1977).

5. Members who are not a "part of the Army or Air Force." In a 1971 Department of Justice opinion, then-Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation to act as US Marshals. He determined that this was not a violation of the PCA as: (1) a statute (49 USC 1657) expressly authorized the detailing of military members to DoT; (2) under the statute the assigned members were not charged against statutory limits on grade or end strength; and (3) the members were not subject to direct or indirect command of their military department of any officer thereof. He determined, therefore, that they were DoT employees for the duration of the detail. Therefore they were not "part of the Army or Air Force."

D. To What the PCA Applies.

1. When determining what actions are covered by the PCA, i.e., what constitutes "execut[ing] the law" under the statute, you must consider **both** directive and case law, as they are not identical. In fact, case law prohibits a much broader range of activities as "execut[ing] the law." Some of these issues have been addressed in various service Judge Advocate General opinions, but some instances simply will require you to apply the court tests described.

2. By directive and regulation.

a. Prohibits direct law enforcement assistance, including:

(1) Interdiction of a vehicle, vessel, aircraft, or other similar activity;

(2) A search or seizure;

(3) An arrest, apprehension, stop and frisk, or similar activity; and

(4) Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DoDD 5525.5, Encl. 4, para. A.3.

3. By case law.

a. Analytical framework. There are three separate tests courts apply to determine whether the use of military personnel has violated the PCA. See United States v. Kahn, 35 F.3d 426 (9th Cir. 1994); United States v. Hitchcock, 103 F.Supp 2d. 1226 (D. Haw. 1999).

(1) FIRST TEST: whether the action of the military personnel was "active" or "passive." United States v. Red Feather, 392 F. Supp. 916, at 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, at 892 (D.D.C. 1988); United States v. Rasheed, 802 F.Supp. 312 (D. Haw. 1992).

(2) SECOND TEST: whether use of the armed forces pervaded the activities of civilian law enforcement officials. United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) *cert. den*. 459 U.S. 1170 (1983); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990);.

(3) THIRD TEST: whether the military personnel subjected citizens to the exercise of military power which was:

(a) Regulatory (a power regulatory in nature is one which controls or directs);

(b) Proscriptive (a power proscriptive in nature is one that prohibits or condemns); or

(c) Compulsory (a power compulsory in nature is one that exerts some coercive force). United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977). United States v. Yunis, 681 F. Supp. 891, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).

4. Military Purpose Activities. The PCA does NOT apply to actions furthering a military or foreign affairs function of the Untied States. This is sometimes known as the "Military Purpose Doctrine." The primary purpose must be to further a military interest. The civilians may receive an incidental benefit. DoDD 5525.5, Encl. 4, para. A.2.a. Such military purposes include:

(1) Investigations and other actions related to enforcement of the UCMJ. United States v. Thompson, 33 M.J. 218 (CMA 1991), *cert. denied*. 502 U.S. 1074 (1992).

(2) Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding.

(3) Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility. Harker v. State, 663 P.2d 932 (Alaska 1983); Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988); Eggleston v. Department of Revenue, 895 P.2d 1169 (Colo. App 1995). Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution. Applewhite v. United States, 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994).

(4) Protection of classified military information or equipment.

(5) Protection of DoD personnel, DoD equipment, and official guests of the DoD. United States v. Chon, 210 F.3d 990 (9th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (NCIS investigation of civilians undertaken for independent purpose of recovering military equipment was permissible).

(6) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

E. Where the PCA Applies. (Extraterritorial Effect of the PCA)

1. A 1989 DOJ Office of Legal Counsel opinion concluded that the Posse Comitatus Act does not have extraterritorial application. Memorandum, Off. Legal Counsel for General Brent Scowcroft, 3 Nov. 1989. This opinion also states the restrictions of 10 U.S.C. §§ 371 - 381, specifically 10 U.S.C. § 375, were also not intended to have extraterritorial effect. Id. at 21.

2. Some courts have also adopted the view that the Posse Comitatus Act imposes no restriction on use of U.S. armed forces abroad, noting that Congress intended to preclude military intervention in domestic affairs. United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); United States v. Marcos, No. SSSS 87 Cr. 598, 1990 U.S. Dist. LEXIS 2049 (S.D.N.Y. Feb. 28, 1990). (Note: both Chandler and D'Aquino involved law enforcement in an area of military occupation.) But see, United States v. Kahn, 35 F.3d 426, 431 n. 6 (9th Cir. 1994) (In a case involving the applicability of the PCA to Navy activities in support of maritime interdiction of a drug-smuggling ship, the government maintained the PCA had no extraterritorial effect. While the court stated that issue had not been definitively resolved, it did state that 10 U.S.C. §§ 371-381 did "impose limits on the use of American armed forces abroad.")

3. Note, however, that DoD policy, as contained in DoDD 5525.5, which incorporates restrictions of 10 U.S.C. § 375, applies to all U.S. forces wherever they may be. Two weeks after the promulgation of the Barr memo, Secretary Cheney amended the Directive to read that, in the case of compelling and extraordinary circumstances, SECDEF may consider exceptions to the prohibition against direct military assistance with regard to military actions outside the territorial jurisdiction of the U.S.

F. What is the effect of violating the PCA.

1. Criminal Sanctions. 2 years imprisonment, fine, or both.

2. Note that to date, no direct action has been brought for violation of the PCA. The issue of the PCA has arisen instead as a "collateral" issue, whether as a defense to a charge by a criminal defendant, see Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); United States v. Red Feather, 392 F. Supp. 916 (W.D.S.D. 1975); or in support of an argument for exclusion of evidence. Perhaps the question of more interest to the military member is what effect violation of the PCA would have on a state criminal case brought against a military member. For example, if a military member shot and killed a US civilian in the course of a HLS mission, if the state charged the member with murder and determined that the military member was "execut[ing] the law" (i.e. searching or seizing an individual) in violation of the PCA, would he therefore be acting outside the scope of his authority and lose protection from state prosecution.

3. Inability to Convict Offenders:

a. Exclusionary rule. In general, courts have not applied the exclusionary rule to cases in which the PCA was violated, using the following rationales:

(1) The PCA is itself a criminal statute, so there is no need to use the deterrent of the exclusionary rule. However, since there have been no prosecutions under the PCA, its deterrent effect is questionable. State v. Pattioay, 896 P.2d 911 (Hawaii 1995); Colorado v. Tyler, 854 P.2d 1366 (Colo. Ct. App. 1993), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994); Taylor v. State, 645 P.2d 522 (Okla. 1982).

(2) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant. United States v. Walden, 490 F.2d 372 (4th Cir. 1974), *cert. denied* 416 U.S. 983 (1974).

(3) Violations of the PCA are neither widespread nor repeated, so the remedy of the exclusionary rule is not needed. Court will apply the exclusionary rule when the need to deter future violations is demonstrated. United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied* 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); United States v. Thompson, 30 M.J. 570 (A.F.C.M.R. 1990).

b. Failure to prove an element of offense. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element. United States v. Banks, 383 F. Supp. 368 (1974).

4. Dismissal of charges. Not likely to be considered an appropriate remedy. United States v. Rasheed, 802 F. Supp 312 (D. Hawaii 1992); United States v. Hitchcock, 103 F. Supp 2d. 1226 (D. Haw. 1999).

5. Civil Liability.

a. PCA violation as a private cause of action: No. PCA is a criminal statute; Congress did not intend to create a private cause of action. Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 511 (2nd Cir. 1994) *citing* Lamont v. Haig, 539 F. Supp. 552 (W.D.S.D. 1982).

b. PCA violation as a constitutional tort ("Bivens suit"): An evolving area. Applewhite v. United States Air Force, 995 F.2d. 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994)(finding PCA not violated, and conduct of military personnel did not otherwise violate 4th or 5th Amendment rights); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988)(finding a private right of action under the 4th Amendment).

c. Federal Tort Claims Act: Military personnel acting in violation of the PCA may not be found to be acting "within the scope of their employment," and therefore may be subject to individual personal liability. Wrynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961).

IV. CIVIL SUPPORT

A. Note that the memo referenced above, "Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense" directs the Assistant Secretary of Defense for Homeland Defense to "update and streamline" DoDD 3025.15, DoDD 3025.1, DoDD 3025.12, and "other related issuances." There is no specific deadline for these changes noted. **Therefore before relying on the below information, you MUST check to ensure you have the most current version of the directive you are using.**

B. DoD will cooperate with civil authorities, but the relationship is generally one of support—the civilian authorities retain primary responsibility.

C. DoDD 3025.15

1. Governs all DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, U.S. possessions and territories.

2. Provides criteria against which all requests for support shall be evaluated. The directive addresses them to approval authorities, but commanders at all levels should use them in providing a recommendation up the chain of command.

   a. Legality - compliance with the law.

   b. Lethality - potential use of lethal force by or against DoD forces.

   c. Risk - safety of DoD forces.

   d. Cost - who pays, impact on DoD budget.

   e. Appropriateness - whether the requested mission is in the interest of DoD to conduct.

   f. Readiness - impact on DoD's ability to perform its primary mission.

3. Approval Authority. The directive changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable.

a. SECDEF is the approval authority for:

(1) Civil Disturbances.

(2) Responses to acts of terrorism.

(3) Support that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.

4. When Combatant Command assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff. CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command.

5. Immediate response authority in the local commander is not affected.

V. DISASTER & EMERGENCY RELIEF

A. References.

1. Law: Disaster Relief Statutes (Stafford Act), 42 U.S.C. §§ 5121, et seq.

2. DoD.

a. DoDD 3025.1, DoD 3025.1-M.

b. NGR 500-1/ANGI 10-8101.

3. Services.

a. AR 500-60.

b. OPNAVINST 3440.1C.

c. AFI 10-802.

B. Stafford Act. Provides four means by which the federal government may become involved in the relief effort:

1. President may declare the area a major disaster (42 U.S.C. § 5170).

a. Follows a natural catastrophe.

b. Requires a request for the declaration from the governor.

c. State must have executed its own emergency plan and require supplemental help.

2. President may declare the area an emergency (42 U.S.C. § 5191).

a. Same criteria as for a major disaster, except also requires that governor define the type and amount of federal aid required. Total federal assistance may not exceed $5 million.

b. Operationally, no significant distinction between an emergency and a major disaster.

3. President may send in DoD assets on an emergency basis to "preserve life and property." 42 U.S.C. § 5170b(c).

a. Done before any Presidential declaration, but still requires a governor's request.

b. Lasts only 10 days.

c. Used to clear debris and wreckage and to temporarily restore essential public facilities and services—very limited authority.

4. President may send in federal assets where an emergency occurs in an area over which the federal government exercises primary responsibility by virtue of the Constitution or federal statute. 42 U.S.C. § 5191(b).

   a. Does not require a governor's request, although the statute directs consultation with the governor, if practicable.

   b. Results in a Presidential declaration of an emergency.

   c. President Clinton exercised this authority on April 19, 1995 in the case of the bombing of the Murrah Federal Building in Oklahoma City, OK.

C. The Federal Response.

1. The Federal Emergency Management Agency (FEMA) directs and coordinates the federal response on behalf of the President.

2. FEMA has prepared the *Federal Response Plan*, which defines 12 Emergency Support Functions (ESF's) for which certain federal agencies have either a primary or supporting role. DoD (Corps of Engineers) is the primary agency for ESF #3, Public Works and Engineering. DoD is a supporting agency for all others.

3. FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene.

4. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is generally drawn from the CONUSA headquarters. The DCO will be the FCO's single point of contact for DoD support.

5. The FCO issues Mission Assignments, defining the task and maximum reimbursement amount, to the federal agencies. Federal agencies, which exceed the reimbursement amount, or execute tasks not within the Mission Assignment, may not be reimbursed.

D. The DoD Response.

1. The Secretary of the Army is no longer the DoD Executive Agent for disaster relief operations. The duties and authorities associated with that assignment has been delegated to the new Assistant Secretary of Defense for Homeland Defense.

2. USNORTHCOM (CONUS, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plan and for the execution of those plans.

E. Immediate Response Authority.

1. Authorizes local military commanders to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters.

2. Types of support authorized include:

a. Rescue, evacuation, and emergency treatment of casualties.

b. Emergency restoration of essential public services.

c. Emergency removal of debris and explosive ordnance.

d. Recovery and disposal of the dead.

3. This type of support is provided on a reimbursable basis, but assistance should <u>not</u> be denied because the requester is unable or unwilling to commit to reimbursement.

4. NOTE: This is a very limited authority, which should only be invoked, in bona fide emergencies. Contemporaneous coordination with higher headquarters should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities.

F. Disaster Support Involving Law Enforcement Activities.

1. The Stafford Act is **not** an exception to the Posse Comitatus Act. Therefore, any support that involves direct involvement in the enforcement of the civil law must undergo the PCA analysis discussed below. Typical areas of concern include:

   a. Directing traffic.

   b. Guarding supply depots.

   c. Patrolling.

2. National Guard personnel, acting in their Title 32 (State) status should be the force of choice in these areas.

3. Law enforcement duties that involve military functions may be permissible (i.e., guarding a military supply depot).

VI. CIVIL DISTURBANCES

A. References.

1. Constitution: Article 4, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

2. Law: Insurrections, 10 U.S.C. §§ 331-335.

3. DoD.

   a. DoDD 3025.12.

   b. DoD Civil Disturbance Plan GARDEN PLOT.

B. The maintenance of law and order is primarily vested in state and local officials. Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The probable order of employment of forces in response to a certain situation will be:

1. Local and state police.

2. National Guard in their state status.

3. Federal civil law enforcement officials.

4. Federal military troops (to include National Guard called to active federal service).

C. The insurrection statutes permit the President to use the armed forces in the following circumstances:

1. An insurrection within a State. The legislature or governor must request assistance from the President. § 331.

2. A rebellion making it impracticable to enforce the laws of the United States (i.e., federal law) by the ordinary course of judicial proceedings. § 332.

3. Any insurrection or domestic violence which:

a. opposes or obstructs federal law; or

b. hinders the execution of State law so that the people are deprived of their Constitutional rights, <u>and</u> the State is unable or unwilling to protect those rights. § 333.

D. The Federal response.

1. The Attorney General coordinates all federal government activities relating to civil disturbances.

2. If the President decides to respond to the situation, he must first issue a proclamation to the insurgents, prepared by the Attorney General, directing them to disperse within a limited time. § 334. At the end of that time period, the President may issue an execute order directing the use of armed forces.

3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

E. The DoD Response.

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.15).

2. Although the civilian authorities have the primary responsibility for response to civil disturbances, military forces shall remain under military command and control at all times.

3. GARDEN PLOT is the standing Operation Plan for response to civil disturbance. It is a comprehensive plan. Detailed Use of Force Policy / ROE is found in Appendix 1 and Appendix 8 to Annex C.

F. Emergency Employment of Military Forces.

1. Military forces shall not be used for civil disturbances unless specifically directed by the President (pursuant to 10 U.S.C. §§ 331-334), <u>except</u> in the following circumstances:

a. To prevent the loss of life or wanton destruction of property or to restore governmental functioning, in cases of civil disturbances, if the duly constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization.

b. When duly constituted state or local authorities are unable or decline to provide adequate protection for Federal property or functions.

2. Note that this is limited authority.

G. Other Considerations. Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much a possible. Our role is to support the civilian authorities, not replace them.

VII. SUPPORT TO CIVILIAN LAW ENFORCEMENT

A. Although the following activities can be considered law enforcement type activities, they do not violate the PCA as they do not involve use of military personnel to provide direct assistance. In addition, many of them are statutorily directed, and therefore could be considered an "exception" to the PCA.

B. Loan of Equipment and Facilities.

1. References.

a. Law: 10 U.S.C. § 372, § 374.

b. DoD.

(1) DoDD 5525.5, Enclosure 3.

(2) NGB 500-1/ANGI 10-8101.

c. Services.

(1) AR 500-51, Chapter 2, Section 2.

(2) SECNAVINST 5820.7B, para. 8.

(3) AFI 10-801, Attachment 4.

2. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to Federal, State, or local law enforcement officials for law enforcement purposes.

3. There must be no adverse impact on national security or military preparedness.

4. Approval authority.

a. SECDEF. Any requests for potentially lethal support, including loans of:

(1) Arms.

(2) Combat and tactical vehicles, vessels, or aircraft.

(3) Ammunition.

b. Army:

(1) HQDA (DALO-SMS). Non-lethal equipment in excess of 60 days. Installation Commander can approve all other equipment requests if loan/lease is for 60 days or less.

(2) HQDA (DAMO-ODS). Requests for use of installation or research facilities. AR 500-51, para. 2-5.

c. Navy & Marines: Assistant SECNAV (Manpower and Reserve Affairs) for non-lethal equipment for more than 60 days. All other requests may be approved as specified in SECNAVINST 5820.7B, para. 9e(3).

d. Air Force: Ass't SECAF for Manpower, Reserve Affairs, Installations, and Environment for all nondrug related requests. See AFI 10-801, Attachment 4.

e. National Guard: Loan of weapons, combat/tactical vehicles, vessels and aircraft require approval of the service secretary or their designee. Requests for loan/lease of NG equipment which require HQDA or HQAF approval will be reviewed by NGB. NGB 500-1/ANGI 10-8101, para. 3-1.

5. In addition to loan/lease authority, The National Defense Authorization Act of 1997 added a new section to Title 10. Section 2576a, "Excess Personal Property; Sale or Donation for law enforcement activities," permits DoD to provide excess personal property suitable for use in counter-drug and counter-terrorism activities to federal and state agencies.

a. This includes authority to furnish small arms and ammunition.

b. The Defense Logistic Agency manages this program as of 1 October 1995. Memorandum of the Secretary of Defense for the Under Secretary of Defense for Acquisition and Technology, 26 June 1995.

c. The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, Los Angeles) actually provide this excess property.

C. Expert Advice and Training.

1. References.

a. Law.

(1) 10 U.S.C. §§ 373, 375, 377.

(2) 50 U.S.C. §§ 2312, 2315.

b. DoD: DoDD 5525.5, Enclosure 4.

c. Services.

(1) AR 500-51, Chapter 3.

(2) SECNAVINST 5820.7B, para. 9.a.(4) and (5).

(3) AFI 10-801.

2. Military personnel may be used to train civilian law enforcement personnel in the use of equipment that we provide. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations.

   a. Note that the Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training US forces may provide. The policy is based on prudential concerns that advanced training could be misapplied or misused by CLEAs, resulting in death or injury to non-hostile persons. The memo permits basic military training such as basic marksmanship, patrolling, medical/combat lifesaver, mission planning, and survival skills. It prohibits what it terms "advance military training," which is defined as "high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists." Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training.

   b. A single general exception exists to provide this advanced training at the US Army Military Police School. In addition, Commander, USSOCOM may approve this training, on an exceptional basis, by special operations forces personnel.

3. Military personnel may also be called upon to provide expert advice to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited.

   a. A specific example of this type of support is military working dog team support to civilian law enforcement. The dogs have been analogized to equipment and its handler provides expert advice. See DoDD 5525.10, Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions, 17 Sept. 1990; Military Working Dog Program, AFI 31-202.

b. Weapons of Mass Destruction. Congress has directed that DoD provide certain expert advice to federal, state, and local agencies with regard to weapons of mass destruction (WMD). This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

(1) 50 U.S.C. § 2312: Training in emergency response to the use or threat of use of WMD.

(2) 50 U.S.C. § 2315: Program of testing and improving the response of civil agencies to biological and chemical emergencies. (Department of Energy runs the program for responses to nuclear emergencies.)

4. Approval Authority.

a. SECDEF.

(1) Training or expert advice to law enforcement in which there is a potential for confrontation between the trained law enforcement and specifically identified civilian individuals or groups.

(2) Assignments of 50 or more DoD personnel or a period of assignment of more than 30 days. The Assistance Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority for any other assignment.

b. Army. DOMS is the approval authority. AR 500-51, para. 3-1d.

c. Navy & Marines. The Secretary of the Navy is the approval authority. SECNAVINST 5820.7B, para. 9.e.

5. Funding. Support provided under these authorities are reimbursable, unless:

a. The support is provided in the normal course of training or operations; or

b. The support results in a substantially equivalent training value.

D. Sharing Information.

a. References.

(1) Law: 10 U.S.C. § 371

(2) DoD: DoDD 5525.5, Enclosure 2.

(3) Services.

(a) AR 500-51, Chapter 2, Section 1.

(b) SECNAVINST 5820.7B, para. 7.

(c) AFI 10-801, Chapter 4.

b. Any information collected in normal course of military operations may be provided to appropriate civilian law enforcement agencies.

c. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials shall be taken into account in planning and execution of military training and operations. 10 U.S.C. § 371(b).

VIII. COUNTERDRUG SUPPORT

A. References.

1. Law.

a. 10 U.S.C. § 124.

b. 32 U.S.C. § 112.

c. Section 1004, FY91 NDAA

d. Section 1031, FY97 NDAA

e. Section 1033, FY98 NDAA

f. Public Law 107-107, Section 1021 (extends support for counter-drug activities through 2006.)

2. DoD.

a. DEP&S Policy of 26 Jan 95.

b. CJCSI 3710.01.

c. NGB 500-2/ANGI 10-801.

B. General.

1. Counterdrug support operations have become an important activity within DoD. All DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)).

2. What separates counterdrug support from most other areas of support is that it is non-reimbursable. For FY03, Congress appropriated nearly $850 million for DoD counterdrug support. DEP&S channels that money to the providers of counterdrug support.

C. Detection and Monitoring.

1. 10 U.S.C. § 124 made DoD the lead federal agency for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States. D&M is therefore a DoD mission.

a. Although a mission, D&M is to be carried out in support of federal, state, and local law enforcement authorities.

b. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican border).

c. Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities.

2. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily USN vessels), and land-based radar (to include Remote Other The Horizon Radar (ROTHR)) sites.

D. National Guard.

1. 32 U.S.C. § 112 provides federal funding for National Guard counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.

2. The State must prepare a drug interdiction and counter-drug activities plan. DEP&S reviews each State's implementation plan and disburses funds.

E. Additional Support to Counterdrug Agencies.

1. General. Congress has given DoD additional authorities to support federal, state, local, and foreign which have counterdrug responsibilities. These are in addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above). Congress has not chosen to codify these, however, so it is necessary to refer to the public laws instead. Many of these are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.

2. Section 1004.

a. Section 1004 is the primary authority used for counterdrug operations. The statute permits broad support to the following law enforcement agencies which have counterdrug responsibilities:

(1) Federal, State, and Local.

(2) Foreign, when requested by a federal counterdrug agency. (Typically the DEA or member of the State Department Country Team that has counterdrug responsibilities within the country.)

b. Types of support:

(1) Maintenance and repair of equipment.

(2) Transportation of personnel (U.S. & foreign), equipment, and supplies CONUS/OCONUS.

(3) Establishment of bases of operations CONUS/OCONUS.

(4) Training of law enforcement personnel, to include associated support and training expenses.

(5) Detection and monitoring of air, sea, surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.

(6) Construction of roads, fences, and lighting along U.S. border.

(7) Linguist and intelligence analyst services.

(8) Aerial and ground reconnaissance.

(9) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

c. These authorities are <u>not</u> exceptions to the Posse Comitatus Act. Any support provided must comply with the restrictions of the PCA. Additional, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

d. Approval Authorities: CJCSI 3710.01.

(1) Non-Operational Support.

(a) That which does not involve the active participation of DoD personnel, to include the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDD 5525.5 and implementing Service regulations, discussed above.

(2) Operational Support.

(a) The Secretary of Defense is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.

(b) SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation, but no lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission. See CJCSI 3710.01. Example: For certain missions along the southwest border, the delegation runs from SECDEF to NORTHCOM to Joint Task Force SIX (JTF-6). (**Note:** as of now, current studies are considering whether to stand down JTF-6 as a standing task force.)

e. Requests for DoD support must meet the following criteria:

(1) Support requested has clear counterdrug connection,

(2) Support request must originate with federal, state or local agency having counterdrug responsibilities,

(3) Request must be for support DoD authorized to provide,

(4) Support must clearly assist with counterdrug activities of agency,

(5) Support is consistent with DoD support of the National Drug Control Strategy,

(a) DEP&S Priorities for the provision of support:

(i) Multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA)

(ii) Individual agencies in a HIDTA

(iii) Multi-jurisdictional, multi-agency task forces not in a HIDTA.

(iv) Individual agencies not in a HIDTA

(6) All approved CD operational support must have military training value.

3. Other Statutes.

a. Section 1206, FY 90 NDAA. Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas.

b. Section 1031, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation, and photo equipment.

c. Section 1033, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. The additional support is similar that provided to Mexico under Section 1031, but also includes boats suitable for riverine operations.

IX. MISCELLANEOUS SUPPORT

A. Sensitive support: DoDDS-5210.36

B. Law Enforcement Detachments

1. Law: 10 U.S.C. § 379.

2. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as Law Enforcement Detachments (LEDET's).

3. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a "constructive" Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, the law enforcement duties should be left to the Coast Guard personnel. Military members should offer necessary support.

C. Emergencies Involving Chemical or Biological Weapons

1. Law: 10 U.S.C. § 382.

2. In response to an emergency involving biological or chemical weapons of mass destruction, which is beyond the capabilities of the civil authorities to handle, the Attorney General may request DoD assistance directly.

3. The assistance provided includes monitoring, containing, disabling, and disposing of the weapon.

4. Regulations, required by the statute, implementing the authority, have not yet been promulgated.

D. Weapons of Mass Destruction

1. Defense Against Weapons of Mass Destruction Act (Nunn-Lugar-Domenici Act); Public Law 104-201.

2. Federal funding is provided to DoD to develop and maintain domestic terrorism rapid response teams to aid federal, state, and local officials and responders.

3. There are currently 37 response teams, composed of full time Army and Air National Guard members. These teams are federally resourced, trained, evaluated, and operating under federal doctrine. They perform their missions, however, primarily under the command and control of state governors. If the teams are federalized, they fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

E. Miscellaneous Exceptions. DoDD 5525.5, Encl. 4, para. A.2.e. contains a list of statutes, which contain express authorization for the use of military forces to enforce the civil law. Among them are:

1. Protection of the President, Vice President, and other dignitaries.

2. Assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials

Materials
for

CHAPTER 43

POST-CONFLICT GOVERNANCE

Materials

for

CHAPTER 44

JAGC DOCTRINE
FM 27-100