THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-343
June 2001

Articles

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Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $29 each ($36.25 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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Issues may be cited as ARMY LAW. [date], at [page number].

Articles

The *Qui Tam* Relator: A Modern Day Goldilocks Searching for the Just Right Circuit

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Introduction

Overview

Once upon a time there was a beautiful young accountant named Goldilocks who worked for the Department of Defense (DoD). One day during the course of her number crunching, Goldilocks discovered that Evil Stepmother Construction Inc., a government contractor, overcharged the DoD for services on a routine basis. Goldilocks told her supervisor many times about her discovery. However, Mr. Supervisor was very busy and never did anything about Goldilocks' discovery. "Just finish your number crunching Goldilocks," said Mr. Supervisor. "I need that information for the annual report for the happy townsfolk." So Goldilocks faithfully calculated her data and the townspeople received their annual report. Time went by and Goldilocks worried still about the money that Evil Stepmother took from the DoD. "I must do something," she said. So Goldilocks became a *qui tam* relator.[1] Later, as Goldilocks sat in the way-too-hard courthouse chair, a judge growled, "Somebody's been crunching numbers for a public report!" Another judge, who was sitting in a very soft chair muttered, "But it does not look like she derived her *qui tam* suit from the report." The first judge snarled, "Somebody is not the original source of her information and that somebody is sitting right here!" Goldilocks was so unnerved by the judge that she jumped out of the chair and ran out of the courtroom, never to be seen again.

The story you just read is not a fairytale. The plight of the modern day *qui tam* relator resembles the travails poor Goldilocks encountered in her search for that just-right-bowl of porridge and comfortable bed.[2] Depending on what circuit court the hapless relator finds herself in she is just as likely to end up with a mouthful of scalding porridge as she is of maintaining her *qui tam* action under the False Claims Act (FCA).[3] Unlike Goldilocks' story the culprit for the *qui tam* relator is not a bunch of lackadaisical bears. The relator's culprit is the inconsistent meaning various circuit courts apply to the current statutory language. Specifically, the circuit courts disagree about the correct statutory interpretation of what a "public disclosure" is, and when an action is "based upon" a public disclosure.

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1. *Qui tam* suits are statutorily authorized actions that allow private citizens to file suit for the government. These actions allow for recovery of monies paid by the government because of fraud. The *qui tam* plaintiff is also referred to as a "relator." *See* Susan F. Fentin, Note, *The False Claims Act—Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. 3730(e)(4)*, 17 W. NEW ENG. L. REV. 255, 257 (1995).

2. Robert Southey, *Goldilocks and the Three Bears*, *in* A TREASURY OF BEDTIME STORIES 9-11 (1981).

3. 31 U.S.C. §§ 3729-3730 (2000). Section 3729 permits the government to recover civil penalties and treble damages from persons who knowingly present, or cause a false claim to be made against the government. Actions covered by 31 U.S.C. § 3729(a) include those taken by any person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an Armed Forces of the United States a false or fraudulent claim for payment or approval;
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
> (4) has possession, custody, or control of public property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
> (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
> (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces who lawfully may not sell or pledge the property; or
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

Id. § 3729(a).

Why the Differing Interpretations Are a Matter of Concern

The FCA is an important statutory tool that allows the government to recover money obtained from it by fraudulent means. The Act not only gives the government a statutory means of recovery, it also empowers private citizens to bring suits on behalf of the government.[4] Since the most recent changes to the FCA in 1986, *qui tam* suits have recovered more than $2.5 billion in fines and damages.[5] In addition, since the 1986 Amendments went into effect, the number of *qui tam* suits filed increased more than forty fold.[6] The amended *qui tam* provisions appear to be very successful not only as a method to recover government funds, but also as a means to deter fraud.[7] Despite the success of the *qui tam* provisions, there are concerns that the Act is not living up to its full potential. The principal sponsors of the 1986 Amendments, Representative Berman and Senator Grassley, voiced their concern before Congress that some circuit courts interpret too restrictively what constitutes a public disclosure and who could be an original source.[8] There is indeed inconsistency among the circuits interpreting the most recent amendments to the Act. Some circuits adopt what is best described as a too hard, restrictive Daddy Bear approach, the result of which excludes many would-be relators. Other circuits are viewed as too soft Mother Bears that interpret the Act less restrictively which allows a larger category of relators to file suit.

At first glance, the differing judicial interpretations may not appear alarming. However, unsuspecting relators should beware because their story may not have a happy-ever-after ending. The relator facing a too hard, restrictive circuit court could be chased out of the courthouse as an improper *qui tam* plaintiff.[9] Unless the relator qualifies as an original source of the publicly disclosed information upon which his suit is based, 31 U.S.C. § 3730(e)(4)(A) will deprive the court of jurisdiction to hear the suit.[10] The question becomes how does the *qui tam* plaintiff's circuit court interpret § 3730(e)(4)(A). This article discusses the approaches used by the various circuit courts to interpret key provisions of the Act. Specifically, it addresses which circuit court correctly interprets the FCA. To accomplish this goal, the first section provides a brief historical overview of *qui tam* suits and the FCA to include the 1943 Amendments to the Act. The remainder of the section focuses on the 1986 Amendments and their legislative history. The next section

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4. *Id.* § 3730(b)(1). Section 3730(b)(1) provides that:

> [A] person may bring a civil action for violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

Id.

5. *See* 145 CONG. REC. E1540 (daily ed. Jul. 14, 1999) (statement of Rep. Berman) (discussing concern about misapplication of the 1986 Amendments to the FCA), *available at* http://thomas.loc.gov/cgi-bin/query/D?r106:50:./temp/~r106pOPMqA::.

6. *Id.*

7. *Id.* In his remarks before Congress, Representative Berman cited statistics provided by former Chief Economist for the U.S. Senate Committee on Budget, William L. Stringer. Mr. Stringer estimated that in the first ten years the amount of fraud deterred by the 1986 Amendments was between $35 and $75 billion. He also estimated an additional savings of $105 to $210 billion over the next ten years. *Id.*

8. *Id.*

9. After entering the Bears' cottage, Goldilocks took it upon herself to sample their food and test out their furniture. Exhausted by her activities, she fell asleep in Baby Bear's bed. It was there that the Bear family discovered her. Awakening, the Bears so startled Goldilocks that she jumped out of bed and ran out of the cottage, never to be seen by the Bears again. Southey, *supra* note 2, at 11.

10. Section 3730(e) sets forth the jurisdictional aspect of *qui tam* suits. Section 3730(e) provides that:

> (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
> (2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
> (B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).
> (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.
> (4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e) (2000).

addresses how the various circuit courts interpret the "based upon," and "public disclosure" language of the statute. The last section analyzes the current confusion among the circuits and discusses which interpretation fulfills the legislative intent of the FCA.

Background

Qui Tam's English Roots and Lincoln's Law

The concept of *qui tam* suits is not a modern one.[11] Although usually thought of as a response to contractor profiteering during the American Civil War, *qui tam* suits originated in English common law prior to the signing of the Magna Carta.[12] The term *qui tam* is derived from the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequtior.*" The literal translation is he "[w]ho serves on behalf of the King as well as for himself."[13] The early *qui tam* provisions had their share of problems. Because the focus of these actions was on rewarding the informer for successful prosecution rather than on compensating the injured plaintiff, many informers took advantage of the system.[14] The colonial American courts adopted English common law to include the common law notion that an individual could recover monies for himself as well as the sovereign.[15]

For many years, *qui tam* suits held little significance in the world of government contractor fraud. In fact, *qui tam* suits were virtually nonexistent during much of the nineteenth century.[16] *Qui tam* suits experienced a revival during the turmoil surrounding the Civil War. Throughout the course of the Civil War, stories abounded of unscrupulous businessmen whose only concern was to make as much profit as possible with no thought of the safety of the soldiers on the field.[17] In response, Congress enacted the FCA to combat government contractor fraud and to encourage private citizens to disclose their knowledge of such nefarious acts. The FCA attempted to induce private citizens to participate as relators by use of a hefty monetary lure. The first enactment of the FCA included a *qui tam* provision that allowed successful relators to keep half of the damages recovered, plus costs.[18] However, even with such a generous enticement few individuals instigated *qui tam* suits.[19]

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11. *See* Francis E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U.L. REV. 935, 938 (1993). Despite its ancient heritage, the *qui tam* action is not immune from attack. On 22 May 2000, the United States Supreme Court issued its opinion on the question of whether *qui tam* actions are constitutional. Vermont Agency of Natural Resources v. U.S. *ex rel*. Stevens, 529 U.S. 765 (2000). Specifically the question before the Court was whether a relator lacks "standing" as required by Article III of the Constitution. On 29 November 1999, the U.S. Supreme Court heard oral arguments concerning the constitutionality of *qui tam* suits. The matter initially involved a Second Circuit case, *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998), in which the relator, Jonathan Stevens, brought a *qui tam* suit against the Vermont Agency of Natural Resources. Stevens, an agency employee, asserted that the state of Vermont fraudulently billed the government for hours not worked by state employees. The issue initially before the Court was whether the definition of "persons" who could be sued under the FCA included states. In an unexpected move on 19 November 1999, Justice Scalia issued a sua sponte order moving the matter beyond the issues originally presented. Specifically he requested arguments regarding the constitutionality of a *qui tam* relator to bring suit under Article III when the government elected not to intervene. Charles Tiefer, *Order in Qui Tam Case May Foretell a Scalia Surprise*, LEGAL TIMES, Nov. 29, 1999, *available at* LEXIS, News Library file. In the Supreme Court's analysis of the *qui tam* issue, it first determined whether the relator had standing under Article III of the Constitution to maintain a suit. The Court noted that a plaintiff must meet three requirements to establish standing pursuant to Article III. It held that:

> First, he must demonstrate 'injury in fact' a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.' Second, he must establish causation-- a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant . . . And third, he must demonstrate redressability--a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

Stevens, 529 U.S. at 768. The Court stated that the fact that a successful relator was entitled to a concrete bounty was insufficient to confer standing. It did believe however, "that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id*. The Court held that the False Claims Act could be regarded as effecting a partial assignment of the government's claim for damages, thereby conferring Article III standing to *qui tam* relators. *Id.*

12. *See* Purcell, *supra* note 11, at 938. The English based version of the *qui tam* suit arose initially under common law and evolved into a statutory form. The statute allowed two types of potential plaintiffs to obtain damages, in addition to the fines recoverable by Parliament. These plaintiffs were the wronged party and the informer. *Id*. at 938, 939.

13. *Id*. at 939.

14. *Id*. Parliament tried a wide range of methods to staunch the number of manipulative claims and to improve public support of *qui tam* actions. Initially Parliament banned outright *qui tam* suits brought by informers. This ban was ultimately lessened to strict statutes of limitations, limited venues, and penalizing individuals who abused the system. *Id*.

15. *Id*. at 940. Colonial American government incorporated numerous *qui tam* provisions into its statutes. Such *qui tam* actions included matters dealing with copyright infringement, import duties, and liquor duties. *Id.*

16. *Id.* Ms. Purcell attributes the lack of *qui tam* suits during this time period to the fact that state and federal agencies were more efficient at rooting out fraud. This, coupled with statutory restrictions, caused a significant decrease in the number of *qui tam* suits. *Id*.

17. Fentin, *supra* note 1, at 257. Businessmen who contracted with the Union Army performed such egregious acts as substituting lesser-valued products, such as sand for sugar, or non-functioning firearms, than what was actually contracted for. *Id*. (citing JOHN T. BOSE, CIVIL FALSE CLAIMS AND *Qui Tam* ACTIONS 1-3 (1993)).

The Hess *Decision and the 1943 Amendments to the FCA*

The original enactment of the FCA failed to live up to its drafters' expectations. Despite the potential windfall the FCA offered a successful *qui tam* relator, the number of such privately instigated suits was few.[20] The minimal use of this cause of action may be why Congress gave little attention to *qui tam* suits until government spending grew. As the number of government contracts increased dramatically during the 1940s, so did concern about the possibility of contractor fraud.[21] Unfortunately, dishonest contractors were not the only individuals who saw a chance to make money. Opportunists also came in the form of *qui tam* relators. The original 1863 FCA *qui tam* provisions did not restrict the sources from which a relator could obtain his information. This allowed would-be relators to use public documents as the basis of their successful suits. This type of suit became known as a "parasitic suit." Ultimately, outrage concerning parasitic suits following the Supreme Court's decision in *United States ex rel. Marcus v. Hess*[22]caused Congress to amend the FCA for the first time in its 120-year history.

Marcus involved the allegation that electrical contractors in the Pittsburgh area engaged in a collective bidding scheme involving certain Public Works Administration projects. A grand jury indicted Hess and his collaborators for defrauding the government. They entered pleas of nolo contendre and the court fined them $54,000. Relying heavily on information from the grand jury indictment, Marcus filed a *qui tam* action pursuant to the FCA.[23] Both the contractors and the government challenged Marcus' status as a *qui tam* relator. They averred that the sole basis of the relator's suit was the previous indictment. Therefore, they argued, since Marcus contributed nothing to investigating the underlying fraud he should not be allowed to profit from the work of others.[24] The Court rejected this argument. It held that even if Marcus did not uncover the contractors' wrongdoing he contributed significantly to the litigation, thus fulfilling at least a portion of the Act's intent. Specifically, the Court noted that the relator's suit netted the government $150,000 at great personal risk in the form of the monetary expenses he incurred.[25] Nonetheless, the Court described Marcus as a parasitic relator due to the fact that he relied on the work of others to use as the basis for his *qui tam* suit.[26] However, the Court determined that neither the plain language of the statute, nor its legislative history precluded recovery by a relator such as Marcus.

The *Marcus* decision roused Congress to action. Congress perceived that *Marcus*-like parasitic suits enriched do-little relators who benefited from the work of others, yet contributed nothing in return. One committee proposed eliminating *qui tam* suits altogether. However, *qui tam* proponents who realized its value in fighting fraud sought to preserve these actions.[27] The final draft amended the *qui tam* section from allowing "any person" to bring a suit, as the 1863 provisions allowed, to barring a relator suit based on evidence or information already in the

18. Act of March 2, 1863, ch. 67, 12 Stat. 696 (amended by 31 U.S.C. § 3730 (1986)). Section 6 of the original FCA provided:

> That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Id. § 6. The FCA's congressional sponsor, Senator Howard, indicated that the Act's underlying basis was "the old fashion idea of holding out a temptation . . . setting up a rogue to catch a rogue." CONG. GLOBE, 37th Cong. 3d Sess. 956 (1863).

19. *See* Purcell, *supra* note 11, at 941.

20. *Id.*

21. *See* Fentin, *supra* note 1, at 258. The amount of profiteering and the number of government contracts is elastic. As one increases so does the other, therefore as the number of government contracts increases so does the number of potential *qui tam* suits. *Id*.

22. 317 U.S. 537 (1943).

23. *Id*. at 539.

24. *Id*. at 545.

25. *Id*. Remarking upon the argument that Marcus did not uncover the fraud, the court stated that "[e]ven if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed." *Id.* The Court's inference is that one of the purposes of the FCA, even prior to 1943, was to encourage private citizens to pursue judicial action in the face of fraud. The *Hess* court noted that "[the] recovery was obtained at the risk of a considerable loss to the petitioner since § 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of litigation." *Id.* at 545-46.

26. *Id*. at 546. Pursuant to the FCA's 1863 statutory language "any person" could make a qui tam suit. During committee debates concerning that original language the bill's sponsor stated that he envisioned that even a district attorney could act as an informer. *Id.* In response to the government's argument in *Marcus* that such an outcome violated public policy against unjust enrichment, the Court simply noted that Congress drafted the statute being complained about. The inference is that if the problem was statutory, it was Congress' responsibility to correct it. *Id.*

government's possession.[28] Congress believed that the new *qui tam* provision struck a balance between preventing parasitic suits such as in *Marcus*, while leaving the door open for honest relators.[29] Unfortunately, the 1943 Amendments to the FCA would become an impediment to the honest relators they sought to protect.

The 1986 Berman-Grassley Amendments

The drafters of the 1943 Amendments to the FCA believed that the changes they made had tightened the *qui tam* provision to prevent parasitic relators from successfully filing suit. They believed, however, that even with the changes, the provision was still flexible enough to reward honest relators. Their belief was incorrect. Approximately forty years later, the outcome in *United States ex rel. Wisconsin Department of Health & Social Services v. Dean*[30] prompted Congress to reexamine who should qualify as a proper relator. In *Dean*, the State of Wisconsin, acting as a relator, filed a *qui tam* suit alleging Medicaid fraud by Dean. Prior to filing its FCA claim, the state submitted its report of Medicaid fraud to the Department of Health and Human Services pursuant to federal statute.[31] The court dismissed the case holding that Wisconsin was not a proper relator because the federal government already possessed the information upon which the state based its suit.[32]

On 1 August 1985, Senator Grassley introduced his proposed amendments to the FCA.[33] This was partially in response to *Dean*, as well as the perception that the Act was stale and needed a jump-start. During committee hearings, legislators learned that a 1981 General Accounting Office Report estimated that contract fraud against the government would result in a loss of "between $150 and $200 million over the next two years."[34] The Department of Justice (DOJ) reported that as much as ten percent of the federal budget would be drained by contractor fraud.[35] Committee members believed that one reason contract fraud was so pervasive was because the contractors were not afraid of getting caught. They also believed that restrictive judicial decisions undermined the statute's effectiveness.[36] The proposed amendments reflected Congress's belief that "to combat fraud it was fundamental to obtain the cooperation of individuals who were either close observers or otherwise involved in fraudulent activity."[37] Congress determined that the lack of insider cooperation stemmed from a fear of job-related reprisal, as well as a sense that nothing would be done even if reported.[38] In addition to employee concerns, Congress heard from government officials that the government alone

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27. *See* Fentin, *supra* note 1, at 258. During the course of committee hearings the United States Attorney General, Francis Biddle, asked Congress to remove the provision for *qui tam* suits in its entirety. Despite the willingness of the House of Representatives to do so, the Senate expressed reservations. *Id*.

28. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608 (codified as amended at 31 U.S.C. § 232 (1976)). The provision reads: "The court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based on information in the possession of the United States, or any agency, officer or employee thereof at the time such suit was brought." *Id*.

29. *See* Fentin, *supra* note 1, at 260. During committee hearings for the 1943 Amendments, Senator Van Nuys, Chairman of the Senate Judiciary Committee, indicated that the changes to the *qui tam* provisions would not bar an action by an honest informer. *Id*. at 260-61 (citing S. REP. NO. 345, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277 (quoting 89 CONG. REC. 7609 (1943))). This belief was seconded by Representative Kefauver who opined that for "the average good American citizen . . . [who] has the information and he gives it to the Government, and the Government does not proceed in due course, provision is made here where he can get some compensation." *Id*. at 260-61 n.36 (citing S. REP. NO. 345, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277 (quoting 89 CONG. REC. 10846 (1943))). Unfortunately, Representative Kefauver and Senator Van Nuys were overly optimistic, in that they mistakenly relied on an earlier draft of the Amendment that was not adopted in the final draft. Specifically, one Senate version included language that read, "In other words, if the Attorney General will not prosecute the suit within 6 months, any citizen should have the right to prosecute it if a fraud has been committed, regardless of the source of the information." *See* Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 244 (1995) (quoting 89 CONG. REC. 7573 (1943) (statement of Sen. Revercomb)). However, the six-months language was subsequently omitted. *Id.* at 248.

30. 729 F.2d 1100 (7th Cir. 1984).

31. 42 U.S.C. §§ 1396-1396(p) (2000). As a condition to receiving Title XIX Social Security funding, the receiving state must report any fraud and abuse information to the Health Care Financing Administration of the Department of Health and Human Services. *Id*.

32. *Dean*, 729 F.2d at 1101. The holding in *Dean* ended with an honest relator finding himself barred from the courthouse contrary to the drafters' intent.

33. S. REP. NO. 99-345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5268.

34. *Id*. (quoting Hearings on White Collar Crime, Before the Senate Comm. on the Judiciary, 99th Cong. 2d Sess. (1985)).

35. *Id*. (quoting Hearings on the Dept's of State, Justice, and Commerce, Before the Subcomm. on the Dept's of State, Justice, and Commerce, the Judiciary and Related Agencies of the House Comm. on Appropriations, 96th Cong. 2d Sess. (1980)). During the early 1980s defense industry giants, such as General Electric, General Dynamics, and Rockwell, were among those found guilty of defrauding the government. In addition, of the one hundred largest contractors, forty-five were under investigation. Department of Defense contractors were not the only ones who were wrongfully lining their pockets. The Department of Health and Human Services tripled its fraud prosecution over a two-year period. *See* Frederick M. Morgan, Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the False Claims Act*, 24 OHIO N.U. L. REV. 163, 166 n.13 (1998).

36. S. REP. NO. 99-345, at 4, 7.

could not fight contractor fraud. The Department of Defense Inspector General, Joseph Sherick, testified that the government's resources paled in comparison with the legal resources available to contractors.[39] Therefore, in order to strengthen the government's ability to recoup money lost to fraud, Congress sought to encourage private individuals to assist in the fight against fraud. To accomplish its goal, Congress promulgated numerous amendments to the FCA to include §§ 3730(e)(4)(A) and (B). These sections provide that:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.[40]

Congress believed that the newly drafted amendment would lower the jurisdictional bar first created by the 1943 Amendments to the FCA and allow more *qui tam* relators to file suit. In addition, Congress hoped the new statutory language would prevent unduly restrictive judicial decisions of who qualified as a *qui tam* relator. Specifically, it was Congress's intent to avoid another *Wisconsin v. Dean* situation where an honest relator found himself statutorily barred despite the fact he had sought out and found fraud. Unfortunately, the 1986 Amendments failed to live up to the drafters' vision.[41] The problem is that different circuits interpret key terms of the test very differently thereby creating divergent outcomes. Because of the different interpretations, a *qui tam* plaintiff could find himself stopped in his tracks in one circuit court, however he could successfully file suit in another circuit. The key terms at issue are "based upon" and "public disclosure."

The Two-Prong Analysis Pursuant to 31 U.S.C. § 3170 (e)(4)(A) & (B): Prong I—The "Based Upon" and "Public Disclosure" Elements

When Congress drafted section 3730(e)(4) of the 1986 Amendments to the FCA, it essentially created a new jurisdictional bar. This jurisdictional bar is a two-prong test and each prong has its own subsets, or elements. Prong I encompasses the "public disclosure" issue. When confronted with a *qui tam* suit, the first element of the first prong asks if there was a public disclosure. If there was a public disclosure then the court considers the second element. The second element asks if the suit was based upon the public disclosure. If the answer to both elements is "yes," the test moves on to the second prong.[42] This article addresses the first prong of the jurisdictional bar. The initial analysis focuses on the first element term "public disclosure" then considers the second element criteria of "based upon."

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37. *Id*. at 4. During the course of committee hearings woeful whistleblowers such as Robert Wityczak testified of their experiences with government contractor fraud. Mr. Wityczak, a triple amputee veteran, told hearing members of how he felt stymied at his supervisors' lack of interest when he told them of his findings of fraud. He believed that he was subsequently excluded from office meetings and assigned demeaning taskings in the hopes that he would quit. *Id*.

38. *Id*. at 5 (quoting REPORT OF THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD (MSPB), BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT (1984)). The MSPB's report found that among employees who failed to report fraud, fifty-three percent cited the "belief that nothing would be done to correct the activity even if reported." Thirty-seven percent cited fear of reprisal making it the second most cited reason. *Id*.

39. *Id*. at 8 (quoting Hearings on Defense Procurement Law Enforcement, Before the Subcomm. on Defense Admin, Practice and Procedure, of the Senate Comm. on the Judiciary, 99th Cong. 1st Sess. (1985) (testimony of Joseph Scherick)). During the course of the hearing it was stated that "[f]ederal auditors, investigators, and attorneys are forced to make 'screening' decisions based on resource factors . . . . Allegations that could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient." *Id*.

40. 31 U.S.C. § 3730 (2000).

41. *See* 145 CONG. REC. E1540 (daily ed. Jul. 14, 1999) (statement of Rep. Berman) (discussing concern about misapplication of the 1986 Amendments to the FCA), *available at* http://thomas.loc.gov/cgi-bin/query/D?r106:50:./temp/~r106pOPMqA::. In his remarks to Congress, Congressman Berman stated that he and Senator Grassley were very worried that some courts misconstrued the meaning of 31 U.S.C. § 3730(e)(4). Specifically they worried that the courts were too narrowly interpreting the public disclosure bar. *Id.*

42. 31 U.S.C. § 3730(e)(4)(A). Prong II consists of three subsets, or elements. Two of the elements determine if the *qui tam* relator was the original source of the publicly disclosed information he based his suit upon. The first element asks if the relator had direct knowledge of the information. The second element asks if he had independent knowledge of the information. The last element requires that the *qui tam* relator voluntarily disclose his information to the government. *Id*. § 3730(e)(4)(B).

Prong I: The Public Disclosure Element–Public Disclosure and Discovery

When facing the FCA's jurisdictional bar, the first hurdle the *qui tam* relator must clear is whether the suit involved a public disclosure. Section 3730(e)(4)(A) clearly states that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] *Accounting Office report, hearing, audit, or investigation, or from the news media,* unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[43]

The difficulty facing a would-be relator is that the circuit courts do not agree on what is, or is not a "public disclosure." In their zeal to prevent undeserving relators from obtaining a windfall, the majority of circuit courts define "public disclosure" broadly. The practical effect of this broad definition is that it raises the jurisdictional bar for the relator. Faced with this higher bar, our relator may feel like Goldilocks did as she attempted to peer over the high brim of Daddy Bear's bowl. The prospects of obtaining his goal may appear quite daunting.

The Majority View

The Third Circuit follows the majority of circuits in defining broadly what constitutes public disclosure. This broad interpretation raises the jurisdictional bar and ultimately limits the pool of potential *qui tam* relators. An example of the Third Circuit's definition of public disclosure is found in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co*.[44] In *Stinson*, the issue before the Third Circuit was whether information obtained via discovery in a previous civil action was "publicly disclosed" information within the meaning of the statute.[45] The relator argued on appeal that its suit was not jurisdictionally barred because information obtained during discovery in a civil matter was not publicly disclosed as intended by the statute. Specifically, Stinson argued that the statute's use of the term "civil action" was not supposed to be so broadly construed to include a "civil proceeding" or "civil litigation."[46] The appellate court rejected Stinson's argument. The Third Circuit noted that the language of the statute referred to both civil and criminal hearings in the same manner. It was concerned that if it accepted Stinson's argument that the statute did not intend that a civil hearing included a civil proceeding or a civil litigation, then it could be argued that a criminal hearing would not include an indictment proceeding. Such an approach would permit a *United States ex rel. Marcus v. Hess*-type outcome in which information obtained from a criminal indictment could serve as the basis of a successful *qui tam* suit. The Third Circuit held that to avoid such a situation, the reading of subsection 3730(e)(4)(A) must be broad enough to cover a wide range of legal proceedings.[47] The court reasoned that Congress wrote the statute broadly to prevent suits based on matters susceptible to public access. It further reasoned that it did not matter whether the public ever tried to access the information. Therefore, the *Stinson* court held that information capable of being accessed by the public was publicly disclosed even if it is never accessed.[48] The court based its holding on Federal Rule of Civil Procedure 5(d) that requires filing of discovery material in the absence of a protective order issued by the court thereby making such information potentially accessible by others. The court was not swayed by the fact that the applicable local rules did not require the filing of discovery.[49] The court opined that no one would expect Congress to analyze all the local rules. Therefore, it was unwilling to limit its understanding of what constituted a public disclosure simply because the

43. *Id*. § 3730(e)(4)(A) (emphasis added).

44. 944 F.2d 1149 (3rd Cir. 1991). The relator (a law firm) acted previously as legal counsel on the part of a Mr. Leonard against Provident Life and Accident Insurance. *Id*. at 1151. During the course of representing Mr. Leonard, the relator began to suspect that Provident shifted illegally its primary liability of claims from itself to Medicare, thereby violating the Tax Equity and Fiscal Responsibility Act of 1982. *Id*. Subsequently, Provident filed suit in state court seeking a declaratory judgment that its claims procedures were legitimate. *Id*. It was during this state proceeding that Stinson obtained the two memoranda, via discovery, that are the subject matter of the appeal. These memorandums contained information about other insurance companies' claims processing procedure to include Prudential's. *Id.*

45. *Id*. at 1152. The lower level court dismissed the action after determining that the relator was not an "original source" of the information supporting the suit. The lower court found that the underlying information came exclusively from the Provident memorandum; therefore, the source was neither directly, nor independently gained from a public disclosure. *Id.* (citing United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 736 F. Supp. 614, 622 (D.N.J. 1990)).

46. *Id*. This was one of three theories asserted by the relator that its suit was not jurisdictionally barred. The relator also argued that the jurisdictional bar was to apply only when the government made the public disclosure. *Id.* In the alternative Stinson argued that even if discovery was tantamount to a public disclosure, it also contributed to that information by other means. *Id.*

47. *Id*. at 1153, 1155.

48. *Id*. at 1155. *But see id*. at 1162 (Scirica, J., dissenting). In the dissent, Judge Scirica rejected the majority's holding that information potentially accessible by the public was publicly disclosed. He stated, "I would find that public disclosure did not occur until . . . actually disclosed to the public." *Id*. He noted, "This suit is barred under the majority opinion even though it could have proceeded under the restrictive pre-1943 law that Congress intended to liberalize." *Id.*

49. *Id*. at 1157.

state rules differed. The majority reasoned that the FCA was a federal statute and as such the Federal Rules of Civil Procedure controlled.[50]

The Minority View

Although the majority of circuit courts consider information obtained during discovery to be publicly disclosed information pursuant to § 3730(e)(4)(A), this is not a unanimous position. In *United States v. Bank of Farmington*,[51] the Seventh Circuit held that information obtained during discovery was not publicly disclosed information. The Seventh Circuit expressly rejected the finding in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.* that public disclosure pursuant to the FCA included information that was potentially discoverable. The *Bank of Farmington* court held that the plain meaning of the term was information that was in the full view of the public. It did not mean information obscured from the public's sight unless otherwise ferreted out. The *Bank of Farmington* court reasoned that discovery proceedings were not conducted in public. Therefore, information obtained during the discovery process was not in the public's view. The court concluded saying that if information was publicly disclosed because the public might someday access it convoluted the plain meaning of the statute.[52] Despite the fact that the *Bank of Farmington* court rejected the notion that information disclosed in discovery was publicly disclosed information; it nonetheless found that the basis of Mrs. Mathews' *qui tam* suit was publicly disclosed. It also found that Mrs. Mathews was not the original source of that information and that her suit was barred by the FCA.[53]

Prong I: The "Based Upon" Element—A Derived From or Supported by Test?

Once a public disclosure is found pursuant to 31 U.S.C. § 3730(e)(4)(A), a second question must be asked. That question is whether or not the *qui tam* suit is "based upon" the public disclosure. This particular element is the most contentious among the circuit courts. There are essentially two schools of thought about what is meant by "based upon," with yet another circuit claiming to have a third approach.

"Based Upon:" The Majority's Restrictive Approach to the "Supported By" Definition

Unfortunately for the would-be relator, the majority of circuit courts interpret "based upon" very restrictively. This approach raises the bar making it harder for the *qui tam* relator to remain in court. The landmark case setting forth the majority's definition of "based upon" is the Tenth Circuit's holding in *United States ex rel. The Precision Co. v. Koch Industries, Inc*.[54] In *Precision*, the appellant-relator, Koch, argued that the FCA

50. *Id*. at 1159.

51. 166 F.3d 853, 859 (7th Cir. 1999). In 1993, Eunice Mathews acted as a guarantor of her son's farm loans with the Bank of Farmington. The bank subsequently obtained a Farmer's Home Administration (FmHA) guaranty on the same loans but failed to disclose to the FmHA that Mrs. Mathews was also a guarantor. Mrs. Mathews' son defaulted on the loans. The bank filed a claim with the FmHA to recover its losses and was paid by the FmHA. *Id*. at 856. The bank brought suit against Mrs. Mathews in state court to enforce her guaranty of the same loan. During the course of discovery, Mrs. Mathews' attorney discovered the FmHA guaranty and the fact that the bank had not disclosed his client's guaranty of the loan as required by law. *Id*. at 857. When confronted for the first time with the question of discovery and public disclosure pursuant to the FCA, the lower court relied on the Third Circuit's holding in *Stinson*. *Id.*

52. *Id*. at 859 (citing OXFORD ENGLISH DICTIONARY 12 (2d ed. 780) (1989)). It should be noted that in both *Bank of Farmington* and *Stinson*, the local court rules did not require that discovery be filed with the court. *Stinson*, 944 F.2d at 1157; *Bank of Farmington*, 166 F.3d at 857.

53. *Bank of Farmington*, 166 F.3d at 861. The court noted that Mrs. Mathews' attorney subpoenaed Mr. Victor Rhea, an FmHA employee who worked with the bank on guaranty matters, during the course of the civil litigation. Mr. Rhea in turn contacted the Bank of Farmington to find out what was going on. It was then that one of the bank's loan officers told Mr. Rhea for the first time about Mrs. Mathews' guaranty of her son's loans. The FmHA and the bank began negotiations concerning the FmHA's previous payments on said loans. *Id*. at 857. The court held that the communication between the loan officer and Mr. Rhea was a public disclosure because Mr. Rhea was a "competent public official" whose duties included oversight of loans and claims. *Id*. at 861.

The debate over what is public disclosure is not limited to discovery. *See, e.g.*, United States *ex rel.* Jones v. Horizon Healthcare Corp., No.94-CV-71573-DT, 1997 U.S. Dist. LEXIS 12108 (6th Cir. 1997). Jones worked for Horizon as a patient care services consultant. Her responsibilities included reviewing Medicare claims. Jones alleged that she informed Horizon higher-ups of fraudulent claims she discovered but nothing was done. Horizon eventually moved its claims processing department to another state. Jones was fired for poor work performance. *Id.* Jones filed her whistleblower retaliatory discharge suit in federal court in 1993. She subsequently filed her *qui tam* action in 1994. The court dismissed Jones' *qui tam* suit as jurisdictionally barred pursuant to § 3730(e)(4)(A). The court held that because Jones publicly disclosed the basis of her *qui tam* suit in her wrongful discharge suit she was no longer the original source of that information. *Id.*

The Eleventh Circuit has reached the same conclusion involving a similar scenario as *Jones*. Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235 (11th Cir. 1999). In *Ragsdale v. Rubbermaid, Inc.*, there was a flip-flop of the *Jones* facts. In *Ragsdale* the relator first filed his *qui tam* suit alleging that his former employer, Rubbermaid, misbilled the government. The *qui tam* suit was settled. Ragsdale then filed a suit pursuant to § 3730(h) asserting that his employer retaliated against him for whistleblowing. *Id*. at 1237. The court determined that the doctrine of res judicata barred the whistleblower suit. *Id*. at 1240. The *Ragsdale* court used a "transactional approach" finding that both claims were "based upon the same factual predicate and contain the same cause of action for res judicata purposes. *Id*. at 1237.

54. 971 F.2d 548 (10th Cir. 1992). Precision filed a qui tam suit alleging Koch Pipeline defrauded the government by "deliberate and systematic mismeasurment of crude and ground gas produced on Federal and Indian lands." *Id*. at 550. The lower court found that Precision's suit was barred for lack of jurisdiction because the "complaint was based, at least in part, upon publicly disclosed information . . . (of which) Precision was not the original source." *Id*. at 551.

only barred *qui tam* suits based solely on publicly disclosed information. The Tenth Circuit rejected that argument. The *Precision* court found the FCA's language to be plain and unambiguous. It held that it was common knowledge that the plain meaning of "based upon" was "supported by."[55] The court refused to read the word "solely" into the statute since Congress did not draft the statute to include it. The Tenth Circuit reasoned that if it read the word solely into the statute it would unlawfully expand federal jurisdiction by permitting relators to bypass the original source prong of the statute.[56] The *Precision* court attempted to bolster its decision by rationalizing that its definition not only fulfilled the statute's intent, but it served judicial economy by limiting the amount of evidence courts would otherwise have to consider.[57]

The Minority's "Derived From" Definition

The circuit courts differ greatly in implementing the relator provisions of the FCA. However, no term is more divergent than the "based upon" language of section 3730(e)(4)(A). The Fourth Circuit adopts the minority "derived from" test to determine if an action is "based upon a public disclosure." The impact of the "derived from" standard is that it allows a greater number of *qui tam* plaintiffs to clear the jurisdictional hurdle. This approach leaves the majority of circuit courts viewing the minority much like Mother Bear's chair in our fairytale. They assert that this too soft definition of "based upon" swallows-up the FCA's intent much like an overstuffed chair swallows-up the person sitting in it. This has caused at least one court to criticize the Fourth Circuit as rendering the public disclosure bar largely superfluous.[58] The case setting forth the Fourth Circuit's renegade position is *United States ex rel. Siller v. Becton Dickinson & Co*.[59] Becton Dickinson (BD), a medical supply company, terminated its distributorship agreement with Scientific Supply Inc. (SSI) in 1987. Scientific Supply Inc. filed suit in Texas state court alleging that BD wrongfully terminated the agreement because it feared that if SSI successfully sold BD products to the government, it would reveal that BD overcharged the government in its direct sales.[60] The parties settled the suit by confidential settlement. Siller filed his *qui tam* action in January of 1991. The United States District Court for the District of Maryland, granted BD's motion to dismiss the suit because it was "based upon" a public disclosure, thus barred in accordance with 31 U.S.C. § 3730(e)(4)(A).[61] Siller asserted that although his *qui tam* suit bore substantial similarities to the prior SSI-BD litigation, he did not base his suit upon information obtained from that previous civil matter. Siller argued that unless a relator derived his knowledge of fraud from the public disclosure, the *qui tam* action was not based upon that disclosure.[62] In opposition to Siller's argument, BD asserted that the statute required dismissal if the allegations in the suit mirrored information in a previous public disclosure.[63] The respondent argued that it was irrelevant under the statute from what particular source the relator obtained his information. In reaching its opinion, the *Siller* court believed that it

55. *Id*. The *Precision* court apparently understood the definition to be so commonly understood that it did not need to cite any reference for its definition. *Id*.

56. *Id*. at 552. The court stated that it had to balance its responsibility to use the "plain language of the statute" with its responsibility to "resolve [doubts] against federal jurisdiction." *Id*. Therefore, by defining "based upon" as "supported by" it limited the number of *qui tam* relators that would make it to the second prong of the test, thereby reducing the number of potential federal suits. *Id*.

57. *Id*. at 552, 553. The court noted that the *qui tam* provision had two "basic goals: (1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud." *Id*. at 552. It opined, "[T]he threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis . . . . If a suit was barred only if it was based on the public disclosure then there would be no need to entertain the second prong." *Id.* In addition, the court held that to require a court to slough through all the evidence to quantify the basis of the plaintiff's suit was adverse to its time, thus not judicially economical. *Id*. at 553.

58. United States *ex rel*. Mistick PBT v. Hous. Auth. of the City of Pittsburgh, 186 F.3d. 386 (3rd Cir. 1999). The Fourth Circuit is decidedly a soft, cuddly Mother Bear type circuit when compared to the other circuits. The remainder of the circuits follow the majority "supported by" standard. Prior to the Fourth Circuit's maverick stance the unanimous approach of all the circuits was that a *qui tam* action was based upon a public disclosure if the allegations in a *qui tam* suit were substantially similar to a public disclosure. They considered how the relator acquired the information as irrelevant. *See* Robert L. Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 PUB. CONT. L.J. 477, 491 (1995).

59. 21 F.3d 1339, 1348 (4th Cir. 1994). The case involved the *qui tam* suit of David Siller, an employee of his brother's medical supply distributorship, SSI. SSI's inventory included BD's merchandise. *Id*. at 1440.

60. *Id*. at 1341. Pursuant to the terms of the settlement, Ruben Siller, the president of SSI, would not disclose the existence or terms of his settlement with BD. Theoretically this would preclude anyone else of learning about BD's supposedly fraudulent activity. The settlement was not binding to David Siller. *Id*.

61. *Id*. Siller asserted that he did not read SSI's state court complaint until BD filed the motion to dismiss his *qui tam* action. He asserted that he conducted his own investigation into BD's overcharging after his discovery of the practice during his employment with SSI. *Id*. at 1340. Dismissal of Siller's *qui tam* suit was a win-win situation for BD. In addition to dismissing Siller's *qui tam* suit the lower court also dismissed the government as a party plaintiff pursuant to 31 U.S.C. § 3730(b)(2)-(b)(4). *Id*. Section 3730(b)(2) requires the relator to provide a copy of the complaint and material evidence to the government. The complaint is filed in camera and remains under seal for at least sixty days. The government may elect to intervene and proceed within sixty days after it receives both the complaint and the evidence. *Id*. Section 3730(b)(4) states, "Before the expiration of the 60-day period or any extension . . . the government shall (A) proceed . . . [and] notify the court that it declines to take over the action . . . ." 31 U.S.C. § 3730(b)(4) (2000). In *Siller* the government took over twenty-one months to decide to intervene. *Siller*, 21 F.3d at 1341. The lower court determined that because the government had not complied with the statutory procedures it could not intervene. *Id*.

62. *Siller*, 21 F.3d at 1347.

struck a balance between Congress's intent to promote privatization of the statute via civilian suits, with its desire to prevent parasitic *qui tam* actions. The court concurred with Siller that the only fair reading of the statute was that "based upon" meant "derived from."[64] In addition, the court held that a suit was not parasitic if it only contained allegations that were similar, even identical, to publicly disclosed information. It reasoned that a parasitic suit derives its cause of action solely from a public disclosure.[65]

The *Siller* court specifically rejected the reasoning used by two of majority's circuit courts that had interpreted the term "based upon." Specifically, it found the Second Circuit's interpretation of the term flawed. The Second Circuit espoused its interpretation of the term "based upon" in *United States ex rel Doe v. John Doe Corp.*[66] The *Siller* court found that the *Doe* court erred in defining "based upon," because the case law it relied upon did not support its holding. Specifically, the case *Doe* cited never addressed the question of what "based upon" meant. Therefore, the *Siller* court believed the Second Circuit's reading of the term was incorrect.[67] The *Siller* court also rejected the logic used by the majority Tenth Circuit to define "based upon." In *United States ex rel. The Precision Co. v. Koch Industries, Inc.*,[68] the Tenth Circuit defined "based upon" as meaning "supported by." The *Siller* court held that the Tenth Circuit "baldly asserts that as a 'manner of common usage, the phrase based upon is properly understood to mean supported by' . . . . We are unfamiliar with any usage, let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.'"[69] Since the Tenth Circuit's definition lacked any credible basis, the *Siller* court rejected that interpretation.

Somewhere in the Middle–Betwixt the "Derived From" and "Supported By" Definitions

The Third Circuit adopts a definition it calls the middle ground between the overly soft, minority approach of the Fourth Circuit, and the restrictive approach followed by the majority of circuits. The Third Circuit interprets "based upon" as meaning that a suit is based upon a public disclosure if the public disclosure has the essential elements of the *qui tam* suit.[70] Although the Third Circuit believes its definition makes it the "just right circuit," in reality its approach closely resembles the majority's definition.

United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh[71] is the Third Circuit's middle ground approach between the minority's "derived from" standard and

63. *Id*.

64. *Id*. at 1348. The court held that the phrase "based upon" was "susceptible of a straight forward textual exegesis . . . to 'base upon' means to 'use as a basis for.'" *Id*. (referencing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180 (1986)). Restricting the "based upon" language to "a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based" was common sense to the court. *Id*. at 1348.

65. *Id*.

66. 960 F.2d 318 (2nd Cir.1992). Specifically the Siller's court cited *Doe* as standing for the Second Circuit's proposition that a relator did not have to derive his information from a public disclosure for his suit to be based upon that public disclosure. *Siller*, 21 F.3rd at 1348 (citing *Doe*, 960 F.2d at 324). The court opined that the *Doe* court misapplied the holding in *United States ex rel.Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990), when it arrived at its meaning of the phrase "based upon." *Id*.

67. *Siller*, 21 F.3d at 1349. The Siller court held that "the LILC Court itself never addressed the particular question of when a *qui tam* action is 'based upon' a public disclosure . . . there was no dispute the suit was based upon publicly disclosed allegations or transactions; the only issue was whether the relator was the 'original source.'" *Id*. (citing *Long Island Lighting*, 912 F.2d at 16 (2nd Cir. 1990)).

68. 971 F.2d 548, 552 (10th Cir. 1992).

69. *Siller*, 21 F.3d at 1349 (citing *Precision*, 971 F.2d at 552). The Fourth Circuit has a strong supporter in Robert L. Vogel, a staunch defender of the rights of *qui tam* plaintiffs. He is currently in a solo private practice in Washington, D.C., where he specializes in *qui tam* suits. He has been involved in approximately twenty such suits most notably *Siller*, where he was the relator's counsel. Mr. Vogel has written several articles about the 1986 *qui tam* provisions to include, *The Public Disclosure Bar Against Qui Tam Suits*, *supra* note 58. Prior to entering into private practice in 1990, Mr. Vogel was a trial attorney in the commercial fraud section of the DOJ's Civil Litigation Branch from 1987-1990. He received his J.D. from Stanford in 1985. Robert Vogel, biography at http://www.fraudbusters.com (last visited Feb. 11, 1999). It is Mr. Vogel's opinion that only the minority approach satisfies Congress' desire to make *qui tam* suits more attractive for the average citizen to pursue.

In support of his thesis, Mr. Vogel points to *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), in which the Supreme Court interpreted the phrase "based upon" as it appeared in another statute. Vogel, *supra* note 58, at 499. The *Nelson* case involved a statute that provided for federal jurisdiction against a foreign state in any case 'in which the action is based upon a commercial activity carried on in the United States by a foreign state.'" *Id*. Because of the lack of legislative history, the Supreme Court elected to use the dictionary definition of "based upon" which was information that served as the basis or foundation of a claim. *Id.* Mr. Vogel asserts that the minority's common sense definition of the phrase "based upon" mirrors the logic used by the Supreme Court to interpret the same language, albeitly in a different statute. Therefore, the minority definition is the correct definition. *Id.*

70. *See supra* note 4 and accompanying text.

71. 186 F.3d. 386 (3rd Cir. 1999).

the majority's "supported by" standard. In *Mistick*, the Third Circuit easily cleared the public disclosure hurdle. It then tackled the issue of when a suit is "based upon" publicly disclosed information. The *Mistick* court noted the diverseness of the minority and majority's definitions. It concurred with the Fourth Circuit's minority opinion that the common meaning of the phrase "based upon" did not include "supported by." However, despite agreeing with the minority definition, the *Mistick* court agreed with the majority approach that to give the phrase such a meaning would render the second prong of the statute superfluous.[72] In an effort to resolve its dilemma, the court held that the statute was poorly written and the language ambiguous.[73] The court reasoned that in light of the ambiguous language of the statute it was best to follow the majority definition so as not to render the remainder of the section superfluous. Therefore, the Third Circuit held that a suit was "based upon" on a public disclosure, if a public disclosure laid out the same allegations contained in a *qui tam* suit.[74] Although the Third Circuit describes its interpretation of section 3730(e)(4)(A) as more lenient than the majority definition, that distinction is unclear. The majority's "supported by" definition of "based upon" bars any suit in which the allegations in the suit mirror a public disclosure.[75] The Third Circuit interprets "based upon" as meaning that the pertinent facts of a *qui tam* suit are also contained in a public disclosure. It is difficult to distinguish between the majority's definition and the Third Circuit's "contains the same elements" test. The two approaches appear to be the same.

Mistick is not a Third Circuit aberration, but represents the circuit's standard interpretation of the FCA's jurisdictional bar. Recently, however, in *United States ex rel. Waris v. Staff Builders, Inc*.[76] the Third Circuit took the *Mistick* definition of "based upon" and added a twist. Waris, the owner of a home health care business, sold his business to a subsidiary of Staff Builders. Pursuant to the purchase agreement between the two, Staff Builders retained Waris as a consultant.[77] The relationship soured quickly after Waris refused to alter an invoice he gave to Staff Builders for services rendered. Staff Builders wanted the bill changed so they could submit it to Medicaid for reimbursement. Waris filed a *qui tam* suit alleging that Staff Builders subsequently fabricated a memorandum to collect Medicaid funds reimbursing them for Waris' services. He used his invoice as evidence of the alleged fraud.[78] After the lower court dismissed his *qui tam* suit, Waris amended his complaint to incorporate new information, to include a Department of Health and Human Services Inspector General (IG) audit of Staff Builders for fiscal year 1994.[79] Concluding that the IG audit was a public disclosure, the Third Circuit turned its attention to whether the *qui tam* suit was "based upon" the audit.[80] The *Waris* court acknowledged the fact that the relator filed his *qui tam* action two years before the IG published its audit. The Third Circuit, however, using the *Mistick* definition of "based upon" found itself forced to bar the suit.[81] It opined that timing was irrelevant, as long as the public disclosure contained the essential elements of the *qui tam* suit.[82]

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72. *Id*. at 386-387.

73. *Id*. at 387. The *Mistick* court described itself as "confronted with a clash between two textual arguments concerning the meaning . . . of the phrase 'based upon' . . . ." *Id*. The court noted that the statute did "not reflect careful drafting or a precise use of language." *Id*. at 388. As evidence of Congress' poor drafting of the statute the court marked several errors to include referring to the "General Account Office as the Government Account Office." *Id*. Having concluded the statute was poorly drafted, the court held, "[Due to] this lack of precision we are hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A)." Therefore, the court deemed the section to be ambiguous. *Id*. It is interesting to note that the Third Circuit relies on the logic used by the majority, as announced in *United States ex rel. The Precision Co. v. Koch Industries, Inc*., in its holding that the statute's language was ambiguous. In *Precision*, the Tenth Circuit arrived at its definition of the statute after concluding that the FCA's language was unambiguous. 971 F. 2d 548, 551 (10th Cir. 1992).

74. *Mistick*, 186 F.3d at 388. In the dissent, Chief Judge Becker rejected the majority's dismissal of the plain meaning of "based upon." *Id*. at 398 (Becker, J., dissenting). He stated, "[W]hether or not Congress was sloppy in its choice of certain words, there is nothing ambiguous about the phrase 'based upon.'" *Id.* at 397-98.

75. *Precision*, 971 F.2d at 552.

76. United States *ex rel*. Waris v. Staff Builders, Inc., No. 96-1969, 1999 U.S. Dist. LEXIS 15247 (E.D. Pa. Oct. 4, 1999).

77. *Id*. Pursuant to their business agreement Waris would provide a minimum of 1000 hours of consulting services annually for two years. Staff Builders in turn would pay him $105,000 annually. *Id*. at *2.

78. *Id*. In January of 1994, Waris performed a market study at Staff Builder's request. The invoice submitted by Waris to Staff Builders was returned with the comment that "it could not be used." Waris refused Staff Builder's request to reword the invoice. After that Staff Builders rarely utilized his services. However, he received monies totaling $210,000 over the course of the contract. *Id*. at *3. Waris' evidence of fraud by Staff Builders consisted of the January invoice. *Id*. at *4.

79. *Id*. at *6. The lower court dismissed the suit "for failure to plead allegations of fraud with sufficient particularity." *Id*.

80. *Id*. at *9. The court espoused a four question test to determine if Waris passed Prong I of the statute. The analysis was as follows: "1). Are there any 'public disclosures' at work in this claim; 2). If so, do they disclose 'allegations' of fraud or fraudulent 'transactions'; 3) If so, is the plaintiff's claim 'based upon' these 'allegations or transactions'; and, 4) Is the plaintiff an 'original source' of these 'allegations or transactions.'" *Id*. at *9. The court identified quickly the IG audit as "a paradigmatic example of an 'administrative audit' . . . thus barred by § 3730 (e)(4)(A) [as a public disclosure]." *Id.* at *11.

81. *Id*. at *18. The definition of "based upon" set forth in *Mistick* is, whether "the disclosure sets out . . . all the essential elements of the *qui tam* action's claims." *Id.*

The False Claim Act's *Qui Tam* Provisions—Is There a Just Right Circuit, or Is it Just a Fairy Tale?

The majority and minority of circuits have clearly different views on how high or low to place the FCA's jurisdictional bar. Regardless of the difference in their interpretations of "based upon," and "public disclosure," they both believe that their approach satisfies the intent behind the 1986 Amendments to the FCA. The majority and minority agree that the purpose underlying the amendments was two-fold: to encourage private individuals to file suit against contractors defrauding the government, and to supplement the government's limited resources.[83] Since they both agree on the legislative intent behind the FCA, it is difficult to understand why they read the statute so differently. The question that arises is which of the two views is correct, or is the stage set for a new, just right circuit's interpretation to emerge? There is no need for a new interpretation. Considering the statute's language and the underlying congressional intent, it is clear that the minority approach is the correct one.

To understand why the minority interprets correctly the FCA's 1986 Amendments, the reader must understand what was amended. Congress's obvious concern was the limits placed upon who could be a *qui tam* relator pursuant to the FCA as amended in 1943. Congress amended the FCA in 1943 in a knee-jerk reaction to *United States ex rel. Marcus v. Hess*.[84] It abhorred the idea that someone, who did little, if anything, should reap a large and undeserved reward.[85] Therefore, to prevent a parasitic relator such as Marcus from becoming unjustly enriched, Congress raised the jurisdictional bar by prohibiting suits based on information already in the government's possession.[86] This raising of the bar resulted in a dramatic decrease in the number of *qui tam* suits filed.[87] This was partially due to the fact that the FCA's 1943 Amendments barred non-parasitic relators if they provided the government their information prior to filing their suit.[88] In 1986, Congress sought to revitalize the FCA by lowering the jurisdictional bar, thereby potentially increasing the number of *qui tam* suits.[89] The second problem that the 1986 Congress attempted to solve was not so obvious. It was the insidious nature of contractor fraud. Congress believed that contractor fraud was so far-flung and engrained in some industrial circles that government resources alone could not investigate or prosecute it effectively.[90] To solve this dilemma, Congress sought to include private citizens in ferreting out and prosecuting fraud. By lowering the jurisdictional

82. *Id*. at *18-19. The twist that *Waris* added was the timing of the disclosure. According to the Third Circuit's opinion when the matter was disclosed is irrelevant in the event the *qui tam* suit and the public disclosure contained the same essential elements. Therefore, whether the public disclosure was a year before, or a year after filing of the suit the result would be the same. The suit is jurisdictionally barred. *Id.* at *19.

83. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943). *See* Salcido, *supra* note 29, at 257. Mr. Salcido notes the following:

> From its inception in 1863, the *qui tam* provisions have been designed to further generally these ends:
>
> - To provide a sufficient incentive to spur private individuals knowledgeable about fraud to disclose that information to the Government;
> - To stem governmental complacency or override instances where agencies have been co-opted by those they are created to police;
> - To serve as a political check against governmental corruption; and
> - To supplement scarce federal resources.

Id.

84. *See* Salcido, *supra* note 29, at 242. Mr. Salcido provides an excellent analysis of the FCA and how the Act, specifically the jurisdictional bar, reflected the drafters' view of government and fraud at their respective times. He notes that when Congress enacted the FCA in 1863, the Act did not have a jurisdictional bar. At that time there were no federal investigative agencies to root out fraud, therefore the FCA's *qui tam* provision was vital to supplementing the government's virtually nonexistent law enforcement resources. Therefore, to encourage private citizens to participate the Act provided them a generous compensation. *Id.* at 258. When Congress amended the Act in 1943, it essentially eliminated the jurisdictional bar. Mr. Salcido opines that what prompted this change was a feeling of confidence in the government's ability to enforce the law. *Id.* Lastly, when Congress undertook to amend the FCA in 1986, in did so in the face of large government spending coupled with seemingly pervasive contractor fraud. Because of Congress' concern that the government was unable to detect fraud, or enforce its laws, it sought to lower the jurisdictional bar and once again encourage private suits. *Id.*

85. *See* Purcell, *supra* note 11, at 939. That has been a longstanding weakness with the *qui tam* provisions. To assuage the public's outcry against manipulation of the English common law *qui tam* statutes, Parliament banned such suits. That solution proved unacceptable and Parliament reinstituted *qui tam* suits with some limitations. *Id*.

86. Salcido, *supra* note 29, at 247. Mr. Salcido asserts that the drafters of the 1943 Amendments rejected the FCA's original *qui tam* provision because they believed that the government had the ability and integrity to fight fraud. By raising the bar it was assuming that if the government had the information it would pursue the matter accordingly. *Id.*

87. *See* Morgan & Popham, *supra* note 35, at 170. The authors describe the 1943 Amendments to the FCA as contributing to an anti-*qui tam* bias that almost ended this type of suit. *Id.*

88. *See* Salcido, *supra* note 29, at 248.

89. *Id*.

90. *Id*.

bar, Congress enabled *qui tam* plaintiffs easy access to the courtroom.

The minority's interpretation of the term "public disclosure" fulfills the intent of the 1986 Amendments to the FCA. As evidenced in *United States v. Bank of Farmington*,[91] the minority does not interpret the phrase "public disclosure" as broadly as the majority of circuits do. The majority's view of "public disclosure" includes information actually disclosed to the public, as well as information potentially accessible by the public.[92] By giving public disclosure such an expansive definition, the majority has not lowered the FCA's jurisdictional bar, but has raised it. As noted by Judge Scirica, the lone dissenter in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, the majority's interpretation of public disclosure was more restrictive than the pre-1943 statutory language.[93]

Judge Scirica is not alone in criticizing the majority's definition of what is a public disclosure. Robert Vogel shares Judge Scirica's opinion. Specifically, both individuals focus on the Senate's proposed six-month rule as evidence that the minority view is correct.[94] The original House amendments proposed to bar *qui tam* suits if based solely on publicly disclosed information.[95] A subsequent senate bill proposed barring *qui tam* suits based on government disclosed information, or information disseminated by the news media, unless the government failed to proceed within six months of obtaining the information.[96] Both Scirica and Vogel assert that the six-month rule reflects Congress's concern that government resources alone were insufficient to seek out and prosecute fraud. By permitting a potential *qui tam* relator to proceed with a suit even when the government had the information, Congress ensured that information about fraud was not overlooked or buried in a vast government morass. In the event the government knew about the fraud, but lacked the funding or manpower to prosecute the wrongdoer, the proposed language allowed the government to supplement its resources. Admittedly, this approach would permit some parasitic relators to file suit successfully. The six-month interim, however, would prevent would-be relators from rushing to the courthouse before the government had an opportunity to act. After the DOJ voiced its concern that the proposed language could possibly thwart government investigations, the Senate Judiciary Committee proposed a version that precluded the filing of a *qui tam* suit within six months of certain specified disclosures.[97] After further negotiations, the legislature dropped the six months language incorporating in its stead the statute's current language.[98]

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91. United States v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999). In *Bank of Farmington*, the Seventh Circuit held that information obtained during civil discovery was not public disclosed information pursuant to 31 U.S.C § 3730(e)(4)(A).

92. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1163-1167 (3rd Cir. 1991).

93. *Id.* at 1162.

94. Vogel, *supra* note 58, at 509-510. *See also Stinson*, 944 F.2d at 1163-1167.

95. H.R. 4827, 99th Cong. (1986). *See* Vogel, *supra* note 58, at 507 (citing H.R. REP. 660, at 23 (1986)).

96. *Stinson*, 944 F.2d at 1164 (citing S. 1562, 99th Cong., 1st Sess., § 2, at 3 (1985)). The proposed language read:

> Unless the Government proceeds with the action within 60 days after being notified, the court shall dismiss the action brought by the person if the court finds that-
>
> (A) the action is based on specific evidence or specific information *the Government* disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding;
> (B) or the action is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media.

Id. at 1164 (emphasis added). The provision goes on to read, "[I]f the government has not initiated a civil action within *six months* after becoming aware of such evidence or information, or within such additional time as the court allows upon a showing of good cause, the court shall not dismiss the action brought by the person." *Id.* (emphasis added).

97. *Id*. at 1165. The proposed language read:

> In no event may a person bring an action under this section based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or within *six months* of the disclosure of specific information relating to such allegations or transaction in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media.

Id. (emphasis added).

98. *See* 132 CONG. REC. 28,576 (1986); *see also* Vogel, *supra* note 58, at 508. Mr. Vogel asserts that Congress' failure to adopt the six-month rule manifests its dissatisfaction with the 1943 Amendments' jurisdictional bar. He notes that in lieu of the six-month language the 1986 Congress incorporated the public disclosure language into the statute. As long as the relator was the original source of the publicly disclosed information she could file suit successfully. This includes public information that the government already has in its possession. Mr. Vogel argues that this is contrary to the strict prohibition the 1943 Amendments placed on information already in the government's possession. *Id.*

The language in the original House proposal is identical to how the minority interprets "based upon" as it relates to a public disclosure. The original amendment proposed barring suits based solely on publicly disclosed information. The minority's "derived from" definition of "based upon" reaches the same result. If a *qui tam* suit is derived from a public disclosure it is based solely on that public disclosure. Not only does the minority approach mirror the language in the original proposed 1986 amendment, it clearly meets Congress' intent as expressed in the proposed six-month language. The six-month rule would have permitted suits based on information the government possessed if it took no action on that information after six-months. This would have lowered the jurisdictional bar. The minority's narrow view of what is a public disclosure pursuant to section 3730(e)(4)(A) also lowers the jurisdictional bar from the high position established by the 1943 Amendments. This is what the 1986 Congress intended. The fact that the legislature failed to include the six-month language does not indicate that Congress no longer wanted private citizens to supplement the government's limited investigative and enforcement resources. The exact opposite was true. Congress manifested this intent by allowing private persons to remain as *qui tam* plaintiffs in suits after the government elected to intervene.[99]

In addition to considering the proposed six-month rule, a review of Congress's actions after the 1986 Amendments went into effect also supports the assertion that the minority's definition of "public disclosure" is correct. In 1992, Congress attempted to resolve the conflicting judicial interpretations that were cropping up already by drafting an amendment that clarified the 31 U.S.C. § 3730(e)(4) bar. The proposed language limited the jurisdictional bar to suits in which all of the allegations came from matters listed specifically in the statute.[100] If this amendment had passed it would have directly conflicted with the majority's broad view of a public disclosure. The majority definition not only exceeds the matters specifically listed in the statute, in addition it includes information that is potentially discoverable. The amendment died during subsequent negotiations. Despite the defeat of the 1992 proposal, Congress attempted again in 1993 to clarify the FCA's *qui tam* jurisdictional bar. At that time Senator Grassley proposed an amendment that completely did away with section 3730(e)(4).[101] During the course of joint committee hearings, Senator Grassley and Congressman Berman both stated that a key point of the clarification was that only suits based upon information contained in matters specifically listed should be jurisdictionally barred. They believed that this would preclude truly parasitic suits and still encourage private citizens to join in the fight against contractor fraud. This proposed amendment also failed to pass.[102]

Regardless of the approach used, whether it is Vogel and Scirica's argument regarding the proposed six-month rule, or the subsequent failed amendments, the conclusion is the same. The minority approach is the correct one. The result of narrowly defining public disclosure is that it limits the number of instances the second element in Prong I, the "based upon" element, is considered. The natural result of this is that it allows more potential *qui tam* relators to file suit. The minority's definition of "based upon" also produces the same result.

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99. *See id.* at 509-10.

100. *See* Fentin, *supra* note 1, at 267 (referencing H.R. Res. 4563, 102d Cong. 13 (1992)). The 1986 Amendment to § 3730(e)(4)(A) read as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or *administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media,* unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2000) (emphasis added). *See* Fentin, *supra* note 1, at 262. The proposed amendment would have provided additional direction pertaining to the second element of Prong I. The proposed language included the following:

> (4)(A) No court shall have jurisdiction over an action brought under subsection (b) in which all of the material facts and allegations are obtained from a news media report or reports, or a disclosure to the general public of a document or documents-
> (i) created by the Federal Government;
> (ii) filed in a lawsuit to which the Federal Government is a party; or
> (iii) relating to an open and active investigation by the Federal Government; unless the person bringing the action is an original source of such facts and allegations.

H.R. 4563, 102d Cong. § 3 (1992). *See* Fentin, *supra* note 1, at 265 n.74 (citing H.R. REP. NO. 102-837, at 12 (1992)).

101. Fentin, *supra* note 1, at 266. In lieu of § 3730(e)(4), Senator Grassley proposed to beef up § 3730(b) to read:

> (6)(A) No later than 60 days after the date of service under paragraph (2), the Government may move to dismiss from the action the *qui tam* relator if, (i) all the necessary and specific material allegations contained in such action were derived from an open and active fraud investigation by the Government; or (ii) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States . . . .

S. 841, 103d Cong. § 2 (1993).

102. Fentin, *supra* note 1, at 271.

The majority of circuit courts define "based upon" as "supported by." Using the majority's approach a relator who discovers independently evidence of fraud cannot successfully bring suit if another source has publicly disclosed the information. When the relator discovered the fraud compared to when the other source publicly disclosed the information does not matter. The fact that the government is not prosecuting the matter would be irrelevant. The result is dismissal of the relator's suit and the fraud goes potentially unprosecuted. Such an outcome is clearly contrary to spirit of the FCA. One of the issues the 1986 Amendments hoped to address was the lack of government resources to prosecute fraud. A means to correct the problem was the privatization of the statute's enforcement mechanism. This would allow regular citizens to pursue possible fraud when lack of manning or finances prevented the government from doing so. The majority's broad definition of "based upon" clearly flies in the face of that intent.

The minority's interpretation of "based upon" as meaning "derived from" is the correct interpretation. The majority shunned this approach fearing that such a reading would allow undeserving plaintiffs to profit. Congress clearly shared that concern when drafting the amendments. Specifically, Congress provided a fee schedule for *qui tam* relators. The schedule provides that if a suit is based substantially on publicly disclosed information and the relator is not the original source of the information, the court has discretion over the amount of the award. It caps the amount such a relator could recover to ten percent of the proceeds.[103] This statutory provision is in keeping with the 1986 Congress's desire to lower the *qui tam* jurisdictional bar and allow more relator suits. However, it is important to consider that by incorporating a monetary cap Congress acknowledged that having a lower bar could result in instances were a parasitic relator could successfully file suit. The ten percent cap decreases how much a parasitic relator is unjustly enriched.

The majority's use of the "supported by" standard ignores the fact that Congress clearly envisioned instances where a relator was not the primary source of the information. In contrast, the minority's "derived from" definition acknowledges that in some instances information may come from two independent sources, one publicly disclosed, the other not. Rather than preclude the honest relator from filing suit, the minority takes that practical approach acknowledged by Congress that a lower jurisdictional bar there may result in the successful filing of a parasitic suit. The majority argues that it has to use such restrictive language or it will render the second prong superfluous. The majority completely ignores the fact that it is rendering § 3730(d)(1) superfluous.

In June 1999, Congressman Berman addressed the bittersweet consequences of the 1986 Amendments. He noted proudly that revitalizing the FCA had resulted in the recovery of a significant amount of money. He opined that the Amendments' greatest success, however, was not the amount of money recovered, but in the amount of fraud deterred.[104] Despite the success of the FCA's 1986 Amendments, Congressman Berman expressed his and Senator Grassley's concern that some of the circuit courts misinterpreted section 3730(e)(4)(A), and this was causing confusion among the circuits. They feared that this confusion would have a chilling effect on would-be *qui tam* relators. What is disappointing about Congressman Berman's statements is his proposed solution. He stated that it was his opinion that the DOJ, as the primary enforcer of the statute, should take a more assertive stance when litigating FCA cases. He proposed that DOJ could do this by arguing clearly the correct definition of "public disclosure" and "based upon."[105] Con-

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103. 31 U.S.C. § 3730(d)(1). This sections contains the following:

> Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the actions in advancing the case to litigation . . . .

Id. If the suit is not primarily based on disclosed information the relator can receive "at least 15 percent but not more that 25 percent of the proceeds of the action or settlement of the claim." *Id.*

104. 145 CONG. REC. E1540 (daily ed. Jul. 14, 1999) (statement of Rep. Berman) (discussing concern about misapplication of the 1986 Amendments to the FCA), *available at* http://thomas.loc.gov/cgi-bin/query/D?r106:50:./temp/~r106pOPMqA::. In his remarks to the House of Representatives, Congressman Berman stated:

> The biggest payoff however has been in the deterrence of fraud . . . . It is not an overstatement to suggest that there has been a cultural shift within companies that do business with the government. Because of the vigilance of the citizenry and the use of the *qui tam* provisions of the False Claims Act, companies and entities are changing the way they do business with the government. Instead of developing strategies of "revenue enhancement" when dealing with the government, these same entities are developing new compliance programs to ensure that the government is not overcharged. This shift has occurred for one fundamental reason: The risks of getting caught, exposed and subjected to substantial penalties have grown tremendously as a direct result of the reinvigoration of the government's fraud enforcement caused by the 1986 amendments.

Id.

105. *Id*. Congressman Berman and Senator Grassley wrote Attorney General Reno expressing their concerns about the "public disclosure" bar. They asked that the DOJ "be especially vigilant in helping courts correctly implement the Congressional policy that underlies the 'public disclosure' bar." *Id.*

gressman Berman's proposed solution most likely will not have the desired effect. The problem is not DOJ's enforcement of the statute. The problem is the circuit courts' reluctance to read the statute in a manner that would potentially allow a parasitic relator to collect any money. In addition, it seems incongruous to make DOJ responsible for clearing up this confusion when the intent of the 1986 Amendments was to supplement sparse government resources. The circuit courts are giving Congress a *United States ex rel. Marcus v. Hess* type wake-up call. It is up to Congress to address the issue and pass the necessary legislation.

Goldilocks was saddened by her discovery of contractor fraud and Mr. Supervisor's failure to act after she told him about it. She went for a walk in the woods hoping it would maker her feel better. After a while she saw a pretty cottage amid the trees. Tired and hungry from her long walk, Goldilocks decided to stop. Finding no one at home she entered the cottage. In the kitchen she found a table set with three bowls. Hungry, Goldilocks sat down in the first chair. It was hard and hurt Goldilocks' backside. Determined to eat, she picked up the spoon, dipped it into the bowl, and took a bite of porridge. "Ouch," cried Goldilocks. The porridge was so hot that it burned her mouth. Goldilocks' mouth smarted and her backside ached. "I wonder why anyone would make food so hot and a chair so hard if they wanted people to sit down and eat," she wondered. "Why, this is exactly the way the circuit court treated me," she thought. The judge had barred her *qui tam* suit because the fraud she discovered was subsequently disclosed to the townsfolk in the annual report. "Does the circuit court think more people will share their information about fraud when its restrictive interpretation makes it difficult to get into the courthouse," she exclaimed. Looking around she saw a nice, middle-sized chair. On the table in front of it was another bowl of porridge. The chair was soft and inviting when Goldilocks sat down in it. She dipped her spoon in the bowl and took a bite. "Oh, this is the way a chair is supposed to feel and porridge is supposed to taste," sighed Goldilocks. Having a wide enough, comfortable chair and warm porridge encouraged a person to sit down and partake of the food. "Ah ha," exclaimed Goldilocks. "If the circuit court did not interpret 'based upon' and 'public disclosure' in such a restrictive manner, more relators could prosecute bad contractors just like this nice chair and porridge encourages me to sit down and eat," she thought. Then it would be a just right circuit.

The Art of Trial Advocacy

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

Voir Dire: What's the Point?

Introduction

Voir dire is your first opportunity to speak to the panel. It is your introduction to a group who will make a major decision in your case and you should not underestimate their importance or take them for granted in any way.[1] So, what should you say? What should you not say? What is the point of voir dire?

Voir dire should accomplish the following four things:

> (1) Establish credibility and rapport with the panel for you and your client, if you are the defense attorney;
>
> (2) Elicit information from the panel to determine which members are the most and least likely to accept your theory of the case;
>
> (3) Educate and sell members on your theory of the case; and,
>
> (4) Neutralize or highlight problem areas in the case.

Voir dire should never be the same; it should be tailored to each individual case. Panels who sit repeatedly will appreciate the effort you make to customize your voir dire and they will stay attentive if it is not the same old thing again. You should begin jotting down voir dire questions as you work up your case and hopefully, by the time you get to your trial date, most of your voir dire will be complete. Always review your questions, however, with the four points in mind. If a question does not accomplish one of the points of voir dire, take it out.

Establish Credibility and Rapport

The other points of voir dire are dependent upon your ability to connect with your panel. If you have not established this connection, everything else will just miss the mark. How can you make this connection? Well, for one thing, do not talk legalese to the members of the panel. It might sound impressive but it will only distance the members and you may be treading on instructions and the military judge's territory. Ask open-ended, direct questions that elicit their feelings and opinions on the issues about which you have concerns. Talk to the members, making frequent eye contact and listen to their responses. Try to do this without too many notes and without falling into a mechanical and stilted question and answer.[2] Follow up on answers and engage the other members in the conversation. Read the panel member questionnaires before trial and try to incorporate what you learn into your questions.[3] The fact that you are paying attention to detail with respect to individual members will not go unnoticed.

Elicit Information

You want to know who these members are and how they feel about the issues in your case.[4] To obtain this information, again, it is important to ask open-ended, direct questions. Let the members do most of the talking. After all, if you have done most of the talking you probably will not be prepared to decide who you want on the panel and who should be off.[5]

A powerful technique in voir dire is "looping." Looping in voir dire should work as follows. First, ask a panel member a question and let him respond. Then use the member's name and repeat his exact words and ask another member for a reaction to what the first member said. Next, move on to a third member, repeating what the first two said, always using their names. This technique elicits more honest feelings and opinions and gets the members to do most of the talking. If you get an unfavorable answer, thank the member and praise him for being honest. Tell him that the beauty of our system is that everyone is entitled to his opinion and that there are no right or wrong

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1. An excellent source of insight into jury selection is BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION (Bennett & Hirschhorn ed., 1993).

2. Having to record the responses after each question sometimes has this effect. You can avoid this by changing your tone and voice inflection with each new question.

3. You may also want to ask the military judge to allow additional questions in the panel member questionaires. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d) discussion (2000).

4. Only after an informative voir dire will you be prepared to exercise challenges against members. See *United States v. Smith*, 24 M.J. 859, 861 (A.C.M.R. 1987), wherein the court held that the "standard for measuring the legitimacy of voir dire is a question's relevance in the context of laying a foundation for possible challenges."

5. Do not forget the numbers game. Always be conscious of the number of members and how many votes are required for a decision in your case.

answers, just honest ones. Then ask the other members if they agree or disagree with the view expressed by that member. This encourages further candor from the members.

Educate and Sell

An attorney has the right to give a brief overview of the case to the panel members.[6] Remember, though, that you want the members to do most of the talking and so you should keep your overview brief. Tell them enough to inform them of your version of the facts as well as your theory of the case. Do not get into specifics, save this for your opening statement.

Highlight and Neutralize Problem Areas

If you have weaknesses or problems in your case, bring it out in voir dire and try to defuse the issue.[7] Of course, the opposition should try to emphasize these weaknesses or problems to their advantage. For example, a poor Criminal Investigation Division (CID) investigation should be handled by both the prosecution and the defense in voir dire by either neutralizing the problem or highlighting to their advantage. The defense will want to point out that the prosecution does not have all of the facts and "because CID did not do X, we will never know the answers to these important questions." The prosecution, on the other hand, will want to show that an experienced and educated CID agent did a thorough investigation and that all of the evidence points to the accused.

Conclusion

Voir dire is your first opportunity to make an impression on the panel. Make the most of it. If you remember why you are asking the question, keeping in mind the four points, you will be asking effective voir dire questions which ultimately will help you decide who you want to sit on your case. Major Hasdorff, U.S. Army Reserve.[8]

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6. The Supreme Court held in *Powers v. Ohio*, 499 U.S. 400 (1991), that voir dire is "the juror's first introduction to the substantive factual and legal issues in a case."

7. If you hide a problem or the panel perceives that you were not honest with them, it could resurface during deliberations when you will have no input. It is much better to bring out such an issue in voir dire, where you can control the discussion and know the concerns of the members. If the problem is too much for a member to be fair and objective to your theory of the case, you will know he should not sit on the panel and you will be able to do something about it.

8. The author is an individually mobilized augmentee assigned to The Judge Advocate General's School, U.S. Army.

CLAMO Report

Center for Law and Military Operations (CLAMO)
The Judge Advocate General's School
U.S. Army

Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT)

This is the first in a series of CLAMO Notes discussing tactics, techniques, and procedures (TTP) in preparation for the deployment of a Brigade Operational Law Team (BOLT) to the Joint Readiness Training Center (JRTC). These TTPs are based on the observations and experiences of Operational Law (OPLAW) Observer-Controllers (OCs) at the JRTC. The JRTC OPLAW OC team suggests a four-stage "battle-focused training" approach to OPLAW team preparation for a JRTC rotation. This training begins with preparing individual OPLAW team members and transitions to preparing the OPLAW team as a whole. This training will then focus on the operations of the brigade staff, and finally on the operations of the entire brigade task force. These training steps should prove useful in preparing OPLAW teams for success at the JRTC.

Preparation is the key to success for BOLT's during deployment.[1] The JRTC OPLAW Team breaks this preparation down into four broad categories: preparing the individual BOLT team members; preparing the BOLT to work together as a team; preparing the brigade staff to properly utilize the BOLT; and preparing the brigade and attached elements to comply with the laws of war and other legal and ethical constraints. Each member of the BOLT has different preparation responsibilities, with the Chief of the BOLT ultimately responsible for its overall effort. Scheduled years in advance, JRTC rotations provide BOLTs with outstanding opportunities for deployment to the Army's foremost light infantry training center. Just as successful brigades train, BOLTs that succeed at the JRTC build a comprehensive training schedule aimed at ensuring the BOLT is fully mission capable during its JRTC deployment. However, while presenting great training opportunities, a JRTC rotation is not the culmination of a BOLT's training. Instead, a JRTC rotation is an azimuth check, validating the preparation and training conducted by the BOLT. At the conclusion of JRTC rotations, successful BOLTs capture, internalize and use the lessons learned during deployment to rebuild BOLT standard operating procedures. This training with then focus the BOLT's future training efforts. This note, as well as the ones that follow it, offers relevant TTPs for BOLT members in order to focus and maximize BOLT training before deployment. Each article in this series focuses on a different aspect of deployment preparation. This article focuses on preparing the individual BOLT members for a successful deployment.

Preparing Individual BOLT Team Members

Successful BOLTs stress the importance of individual soldier skills in everyday training. Unfortunately, soldiers often overlook these basic, but necessary, skills.[2] A JRTC deployment is often the first real opportunity a BOLT has to work with the brigade staff in an operational setting. Displaying competence at simple soldier tasks goes a long way toward gaining initial credibility. The BOLT that deploys with only one shelter half not only gets wet, but also endures many jokes around the tactical operations center (TOC). Accordingly, below are some of the issues successful BOLTs consider in planning a long-range training calendar for a JRTC rotation.

Weapons

Prepared BOLT members are proficient with their assigned weapons. The BOLT members generally arrive at the JRTC with a variety of weapons: M-16s, M-4s, M-9s, and M-249s (Squad Automatic Weapon-SAW). Availability of weapons within the unit normally determines the weapons with which the BOLT deploys. For safety reasons, blank adapters are used on all weapons at the JRTC. Additionally, weapons are never fired at personnel closer than twenty feet to the muzzle of the weapon as fragments of a closure wad or particles of unburned propellant might cause injuries. The JRTC uses the Multiple Integrated Laser Engagement Systems (MILES). The MILES provides tactical engagement simulation for direct fire force-on-force training using eye-safe laser "bullets." Each individual and vehicle in the training exercise wears a detection system to sense munition strikes. Laser transmitters attach to each individual and vehicle weapon system and accurately replicate actual ranges and lethality of the specific weapon systems to which they are attached. Training with MILES dramatically increases the combat readiness and fighting effectiveness of military forces.[3] Although the M-9 is the smallest and easiest

1. The BOLT includes a judge advocate, who serves as the Chief of the BOLT, and the legal specialists assigned to the supported brigade combat team (BCT). It is a method the staff judge advocate has to task organize OPLAW support to commanders, staffs, and soldiers of the BCT. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, 5-21 (1 Mar. 2000) [hereinafter FM 27-100].

2. *See* FM 27-100, *supra* note 1, para. 4.5.1 ("Training must address both the soldier and the lawyer—tactical skills and legal skills. Soldier training should address common soldier skills, such as use and maintenance of weapons, NBC protections and decontamination, land navigation, first aid, and radio procedure—how to shoot, move, and communicate.").

weapon to carry, no blank adapter or MILES exists for it. This renders the M-9 an ineffective weapon for training at the JRTC.

Night Vision Goggles (NVGs)

Prepared BOLTS bring at least two pair of NVGs to the JRTC. Tactical operations centers (TOCs) operate continuously so BOLT members must be able to "shoot, move and communicate" in limited visibility. Tactical operation centers are also high-payoff targets for the enemy, so attacks, often occurring during limited visibility, are common. The ability to maneuver rapidly in limited visibility significantly enhances the BOLT's ability to provide legal support to the brigade combat team. The BOLT members must be knowledgeable in NVG maintenance and keep a healthy battery supply to ensure the NVGs enhance the BOLT's capabilities.

Communications

Successful BOLTs typically draw a Single Channel Ground and Airborne Radio System (SINCGARS) radio for BOLT vehicles and operations. Although not on the OSJA property book, other sources exist for these radios such as local signal battalions and other units. Obtaining such a radio allows the BOLT to maintain communications during convoy operations. Additionally, it permits the BOLT to monitor brigade operations at all times. BOLT members must be proficient in operating and maintaining SINCGARS to allow the BOLT to benefit.[4]

Prepared BOLT members deploy with a current military driver's license, qualified to drive a High Mobility Multi Purpose Vehicle (HMMWV). For obvious reasons, soldiers not in possession of a current military driver's license do not drive at the JRTC. Consider obtaining a HMMWV for use during the rotation. Bring a HMMWV from home station or draw it from the pre-positioned vehicles at Fort Polk. Drawing from the JRTC requires the BOLT to coordinate the request with the S-4 or the brigade motor officer. Coordination must occur at least twenty days before the rotation to ensure that the JRTC exercise planners receive the request at the D-90 coordination meeting.[5] Having a vehicle not only permits the BOLT to maneuver on the battlefield to investigate claims, fratricides, or serious incidents, it also provides a place to store equipment and to sleep. Many BOLTs have found a cargo HMMWV works best. Even if the BOLT does not plan to have a vehicle, having military driver's licenses allows the BOLT to drive if a vehicle becomes available or if a driver is needed.

Personal Packing List

Each member of the BOLT must bring the things he requires for twelve days in the field. Since space will be limited, do not bring everything within your reach. Instead, carefully plan your personal packing. Packing lists often help with this. Almost all units have packing lists for deployments. Additionally, there are model packing lists available on the CLAMO website.[6] Reviewing these lists ensures members of the BOLT arrive at the right mix of field gear for them. Follow through on these packing lists with pre-combat inspections (PCSs) before deployment.

Professional Packing List

Just as with personal packing lists, carefully plan and coordinate for the necessary office equipment to fulfill your mission. Simply bringing the equipment is not enough though. Again, conduct PCIs on your office equipment before deployment. The BOLTs that fail to conduct such PCIs may discover that they need a printer driver or connecting cable once the rotation has started. Prepare for equipment maintenance in the field. Canned air, power strips, and plastic bags to protect against dust and water often mean the difference between equipment that works and equipment that becomes a paperweight. Electronic pubs are great for saving space but bring hardcopies of critical resources such as the *Manual for Courts-Martial*, *Army Regulation 27-10*, *Army Regulation 15-6* and *Field Manual 27-100*, in case of equipment failure. Review available office packing lists to ensure you deploy with the right equipment and resources. These exist on the CLAMO website as well as in various CLAMO publications.[7] BOLTs should not adopt, whole cloth, such packing lists; packing lists should be mission-specific. Nonetheless, these model packing lists offer BOLT members a good starting point for identifying necessary equipment and resources.

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3. An overview of MILES is available at htpp://www.fas.org/man/dod-101/sys/land/miles.htm (last visited 1 May 2000).

4. On-line training for SINCGARS is found at http://www.gordon.army.mil/stt/31u/radiosets.htm (last visited 1 May 2001).

5. Brigades are limited to deploying with only those systems on their property books. As the brigade does not have a vehicle for the BOLT, the BMO or S-4 may tell the JA that the BOLT is not authorized to have a vehicle at the JRTC. This is not correct since at home station the BOLT can draw a vehicle from the division OSJA. Accordingly, the BOLT HMMWV does not count against the number of vehicles authorized for the brigade as the JA and his equipment are external to brigade systems.

6. A sample predeployment checklist and packing list for JRTC are available at http://www.jagcnet.army.mil/CLAMO-CTCs (Rotation Documents-JRTC/Leader's Training Program, Tab 2).

7. *See also* Center for Law and Military Operations, The Judge Advocate General's School, U.S. Army, Law and Military Operations in Haiti, 1994-1995, Lessons Learned for Judge Advocates 158-67 (1995); Center for Law and Military Operations, The Judge Advocate General's School, U.S. Army, Law and Military Operations in the Balkans, 1995-1998, Lessons Learned for Judge Advocates 195-98 (1998).

Ensure familiarity with other individual soldier skills such as applying camouflage, properly configuring and wearing the Load Bearing Equipment, basic mounted and dismounted land navigation, knowing when and how to don and wear the chemical protective suit and how to conduct personal hygiene in a field environment. Become proficient in these areas and you will be well on your way to survival on the JRTC battlefield. Challenge each other to become proficient in all of the tasks found in the *Soldier's Manual of Common Tasks*.[8]

Although most of the things discussed in this note have little to do with the practice of law, they are the "simple" things the Army expects even the newest private or lieutenant to consider. Thinking about and planning in these areas facilitates the BOLTs success at both the JRTC and future deployments.[9]

The next article in this series discusses methods to ensure the BOLT is battle-focused in its tasks and organization.

The JRTC Observer-Controller Team.

8. U.S. DEP'T OF ARMY, SOLDIER TRAINING PUBLICATION 21-1-SMCT, SOLDIER'S MANUAL OF COMMON TASKS, SKILL LEVEL 1 (Oct. 1994).

9. For more information on JRTC, or to contact the OCs, see www.jagcnet.army.mil/CLAMO-CTCs (Combat Training Centers).

Notes from the Field

Military Legal Practice Maxims
A Potpourri of Random Thoughts

Colonel Richard D. Rosen
Staff Judge Advocate
III Corps and Fort Hood
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Maxim I: To Be Effective, Judge Advocates Must Be Active, Not Passive, and Constantly Insert Themselves into the Planning and Execution Process

In the opening scene of the movie classic Animal House,[1] the two protagonists, Larry Kroger and Kent Dorfman, freshmen at Faber College,[2] visit the Omega house during the college's rush week. Omega is a staid, traditional, and ethnically homogenous fraternity comprised of the campus' most prominent students. Plainly deviating from the mold of Omega pledges,[3] Larry and Kent are politely—but consistently—led to an out-of-the-way corner of the fraternity house occupied by students who, like them, are not "Omega material."

Judge advocates[4] run a similar risk of isolation in their relationships with commanders and staffs, particularly in the operational environment.[5] The natural tendency is to consign judge advocates to "the corner" and to forget about them until legal problems arise. Unless properly conditioned by constant JAG presence and contribution, commanders and staff members naturally tend to ignore judge advocates. They only seek legal advice on issues they normally associate with attorneys (for example, military justice and legal assistance). And many who understand the role of judge advocates in military operations will avoid seeking JAG assistance for fear lawyers will impede their efforts.

Maxim II: The Office of the Staff Judge Advocate Is Not Just Another Staff Section, and a Legal Objection Is Not Simply Another Nonconcurrence or Recommendation

Judge advocates provide professional legal advice about all aspects of military operations.[6] A judge advocate's determination that a particular course of action is *illegal* amounts to much more than a simple nonconcurrence or recommendation that the course of action be avoided. It is usually a "show stopper." A commander should consider such advice seriously and never disregard it without discussing the ramifications and associated risks with the judge advocate.

Maxim III: A Judge Advocate's Role Is To Get the Command to Where It Wants To Go, Even If the Route Is Somewhat Different

It is easy and safe for judge advocates to say "No" whenever faced with a difficult or complex legal question. Judge advocates earn their money, however, by helping their commands accomplish their missions. Often this requires creative solutions reached by cobbling together disparate legal authorities. It may also mean offering commanders additional alternatives.[7]

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1. National Lampoon's Animal House (Universal City Studios 1978).

2. College motto: *"Knowledge Is Good."*

3. Larry and Kent are disparagingly referred to as the "wimp" and the "blimp" by Omega pledge hostess, Babs Jansen.

4. This Note uses the term JAG (Judge Advocate General) as an accepted term of art referring to a member or members of the Judge Advocate General's Corps.

5. Especially in operational settings, judge advocates must be prepared to cite the doctrinal basis for their presence in the planning cells. The recently revised *Field Manual 27-100* places operational law attorneys in command posts "to provide advice regarding [Rules of Engagement], [Law of War], and other [Operational Law] matters." U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations, para. 5.5.3. (1 Mar. 2000) [hereinafter FM 27-100]. They should also be prepared to sell the other unique skills they bring to the warfighting arena.

6. U.S. Dep't of Army, Reg. 27-1, Judge Advocate Legal Services, para. 5-2*a* (3 Feb. 1995) ("The supervisory judge advocate will assist the commander by identifying legal problems and particularly in making legally acceptable decisions."); *see also* FM 27-100, *supra* note 5, para. 1.1 ("The mission of the Judge Advocate General's Corps (JAGC) is to provide professional legal support at all echelons of command throughout the range of military operations.").

For example, during the early stages of U.S. operations in Haiti, the U.S. Ambassador and the Commander in Chief (CinC), Atlantic Command, wanted a physical manifestation of the benefits of American troop presence on the island. They proposed using Humanitarian and Civic Assistance (HCA) funds to reconstruct a major highway running in front of the U.S. Embassy. Unfortunately, the project greatly exceeded the scope of HCA—which is limited to construction of *rudimentary* surface transportation systems.[8] In advising the Ambassador and the CinC that HCA funds were unavailable, judge advocates offered the prospect that U.S. forces could effect the desired construction using other (albeit much different) authorities.

The resulting operation (later exercise), named FAIRWINDS, was based on an agreement with the government of Haiti under § 607 of the Foreign Assistance Act.[9] Under the agreement, Haiti, using funds from international donors, paid the costs of the construction materials; the U.S. paid the other costs associated with the operation, such as transportation, food, and salaries. Thus, U.S. military engineers got invaluable training by performing all types of construction (including the construction of the highway) in an austere environment; Haiti received the free expertise and labor of the engineers; and the Ambassador and CinC were able to point to the physical benefits derived from the American troop presence on the island.

Corollary A: Sometimes the Only Correct Answer Is "No"

Sometimes actions or desired ends are simply illegal. In such cases, judge advocates must have the intestinal fortitude to say "No." When advising the command against a popular proposal, it is often helpful to explain the policy reasons behind the rules and to delineate the ramifications of violating the rules (for example, criminal sanctions).

Corollary B: Sometimes the Only Answer a Command or Staff Wants Is "No"

Commands and staffs occasionally receive a tasking they do not wish to—or cannot—perform. To avoid the tasking, they will occasionally look to judge advocates to "kill" it on legal grounds, rather than articulating to the commanding general or chief of staff their aversion to performing the task. This agenda is rarely stated outright, except in the forlorn looks of commanders or staff officers who discover that their judge advocates will not give them a "legal" way out of the tasker. If judge advocates discern a legal objection, however, the only ones perceived as being obstructionist are the lawyers.

Corollary C: The Fact that a Course of Action Is Legal Does Not Mean It Is Wise—Even Legal Ideas Can Be Dumb.

Judge advocates should provide sound advice on all aspects of a command's actions. Even if they find a particular alternative technically legal, they should not hesitate to counsel caution if the action is inadvisable because it lacks common sense, or is impolitic, unjust, or wasteful.[10] Judge advocates should consider the second and third order effects of an action, such as the public affairs impact, the potential reaction of Congress, or the command's or Army's exposure to future litigation. In providing such counsel, however, judge advocates should be clear about what is legal advice and what is practical or business judgment.

Maxim IV: A Judge Advocate Must Capture All Available Facts Before Rendering Legal Advice

A "no-brainer!" Facts drive the resolution of issues. Advice based on incomplete or incorrect facts can lead to erroneous advice and may potentially force judge advocates to retract and re-issue opinions; an embarrassing predicament. Watch, however, spending too much time gathering facts, resulting in untimely legal advice (see Maxim V).

When rendering a legal opinion, prudence dictates a recitation of controlling facts exactly as the individual seeking legal advice has communicated them. In this way, the judge advocate's advice is appropriately limited to the particular circumstance presented. This helps preclude an overly broad interpretation of a legal opinion and may stimulate a correction if the judge advocate received inaccurate or incomplete information.

Maxim V: Untimely Legal Advice Is Generally as Good as No Legal Advice at All

If advice arrives too late to be of any use, it is worthless (except, perhaps, as a basis for future advice). One of two things will have occurred: (1) the command will have taken action without the advice (in which case the judge advocate and his advice are irrelevant); or (2) the command will have aban-

7. *See generally* FM 27-100, *supra* note 5, para. 1.2.1.

8. 10 U.S.C. § 401(e)(2) (2000). The proposed project would have exceeded the entire HCA budgets of nearly all of the CinCs combined. Of course, any expenditure for construction beyond that authorized by HCA might have violated 41 U.S.C. § 12 (2000), which prohibits construction without explicit congressional authority, and—ultimately—the Anti-Deficiency Act, 31 U.S.C. § 1341 (2000). *See* The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984).

9. 22 U.S.C. § 2357 (2000).

10. *See* FM 27-100, *supra* note 5, para. 1.2.8.

doned the matter and taken no action at all (in which case the judge advocate and his advice are irrelevant).

Fact sheets, newspaper articles, and other local distillations of laws and regulations provide a proactive method of answering frequently asked questions in a timely fashion. Posting these to a webpage or common server can make them readily available to officials who need them.[11]

Corollary A: Unless Confident in an Answer, Do Not "Shoot from the Hip."

If a judge advocate does not know the answer to a question, he should say so, and conduct the research necessary. Blurting out a nonsensical answer is worse than asking for time to study the issue (see Corollary B). The law is complex. Libraries are filled with possible answers. It is generally not unreasonable to ask for time to check out a question.

Corollary B: Incorrect Legal Advice is Often Worse Than No Legal Advice at All

Incorrect advice is probably worse than no legal advice; *it creates precedent* (see Maxims XI and XII). It also leaves the judge advocate with responsibility for cleaning up the consequences of the erroneous advice (see Maxim XVIII).[12]

Maxim VI: A Judge Advocate Should Read Statutes and Regulations with a Dose of Common Sense, but Must Not Stretch Them Beyond Recognition

In interpreting law, judge advocates must avoid what Major General Huffman has termed "the law of unintended consequences." Statutes and regulations should be read with their purpose in mind, but judge advocates should not interpret them out of existence.

When a proposed action violates a regulation or policy but not a statute, judge advocates may have to explain the risks attendant to the proposed course of action. There is a commonly held belief that violation of a "mere" regulation is without consequence. This is expressed in the often repeated phrase, "regulations are only guidance."[13] A judge advocate's analysis should include a determination of whether the regulation implements statute, whether the regulation's proponent might grant a waiver,[14] and whether ignoring the regulation has potential second and third order effects. For example, a proposed action may set an unappealing precedent. It may also lead to complaints to Congress, the Inspector General, or the press. Such complaints may lack immediate ramifications, but may arise during the congressional confirmation of senior officers. General officers and those who hope to become general officers may gain a new appreciation for judge advocates if they view them as staff officers who are looking out for their careers.

Corollary A: Particular Caution is Required When Interpreting Ethical Rules and Statutes or Regulations that are Criminal or Punitive in Character.

Judge advocates must exercise particular caution when dealing with criminal or punitive statutes and regulations. Playing it "cute" could get a command or a judge advocate in serious trouble.

Corollary B: Judge Advocates Do Not Make the Law, They Interpret and Apply It.

Judge advocates are neither legislators nor (usually) policy makers. They take the law as they find it. For this reason, judge advocates should not apologize for advice based on the sound interpretation of statutes, cases, and regulations.

Maxim VII: There Is a Statute, Directive, Regulation, Rule, Policy, Instruction, or Letter Covering Almost Every Issue

This is an exaggeration: there may be exceedingly narrow issues not touched by some law or policy, but there are not many.[15] The point is that, unless they are intimately familiar with the particular question at hand, judge advocates act at their peril when they afford issues only a cursory review and deem the matters "OK to them" or "inoffensive."

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11. The judge advocate mission includes preventive law. Judge advocates must "be aggressive and innovative in disseminating information to soldiers and their families that is responsive to potential legal problems and issues . . . ." *See* AR 27-1, *supra* note 6, para. 5-3.

12. Nevertheless, judge advocates will occasionally find themselves in disagreement with their own prior opinions or the opinions of a predecessor. "Graceful clarification" or "tactful changes" may be necessary.

13. An explanation of the various types of Department of Defense issuances that comprise policy guidance is available at http://web7.whs.osd.mil/general.htm.

14. Regulatory waivers have become easier to secure. The creation of "reinvention centers" and "reinvention laboratories" has lead to many delegations of waiver authority. Information about the reengineering process is available at http://freddie.forscom.army.mil/reeng/Initiatives/forscom_reinvention.htm.

15. *E.g.*, U.S. Dep't of Army, Reg. 360-61, Community Relations, para. 13-7*c* (15 Jan. 1987) (prohibiting the use of Army aviation assets to transport Santa Claus, the Easter Bunny, and witches); U.S. Dep't of Army, Pam. 290-5, Administration, Operation, and Maintenance of Army Cemeteries, para. 2-12 (1 May 1991) (prohibiting the burial of animals and fowl in Army cemeteries).

Maxim VIII: It Is Dangerous To "Pigeon-Hole" Actions

The law is multidisciplinary. A single action may contain a multitude of legal questions. By categorizing an action within one particular area of the law, judge advocates can easily miss issues. They should be especially sensitive to fiscal issues (which are seemingly embedded everywhere) and relatively obscure statutes that appear with disconcerting regularity, such as the Federal Advisory Committee Act (FACA)[16] and various environmental laws.

Corollary: Two Judge-Advocate Brains are Better than One; More are Even Better.

In addressing actions, particularly those that are unfamiliar, judge advocates should (given time constraints; see Maxim V) consult attorneys in their office, in other offices, or in the technical chain, including those with unique specialties, thereby ensuring a wide-ranging review of the action. In short, do not try to be the "Lone Ranger."

Maxim IX: On Questions Concerning the Expenditure of Appropriated Funds, Commanders Must Ask "Show Me Where It Says I Can Do This" Rather Than "Show Me Where It Says I Can't"

Under the Constitution, Congress *alone* has the power to authorize spending the federal government's money.[17] Consequently, commanders must have *affirmative statutory* authority before they may spend public funds. That their actions may not be specifically prohibited by law is irrelevant; if they cannot find authority for their actions in statute, they may not act.[18] In expending government money, commanders should insist that their judge advocates provide a statutory basis for the expenditure.[19]

Expenditures not falling within affirmative statutory authority run afoul of the Purpose Statute,[20] which restricts the use of public funds to the object or objects for which Congress appropriated them. Violation of the Purpose Statute does not necessarily trigger adverse consequences, provided proper funds are available for the expenditure. Where, however, no other funds are authorized for the purpose in question (or those funds have been exhausted[21]), the expenditure violates the Anti-Deficiency Act,[22] which carries criminal penalties.[23]

Corollary: The Maxim that "It's Easier to Get Forgiveness than Permission" Does Not Apply to the Expenditure of Appropriated Funds

If no funds are authorized or available for the purpose for which the funds were spent, no one in the executive branch of the federal government has the power to grant forgiveness.

Maxim X: The Fact a General Officer's Name Is Invoked To Stress the Importance of "Favorable" Legal Advice Does Not Make an Action Legal

Nearly every experienced judge advocate has faced the wrath and frustration of a staff officer who, feeling impeded by legal advice, invokes the name of a general officer (GO) in an

16. Pub. L. No. 92-463, 86 Stat. 770, (1972) (reproduced at 5 U.S.C. app. §§ 1-16 (2000)). The FACA is the statute ignored by the President's Task Force on National Health Care Reform, with embarrassing consequences. *See* Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).

17. U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . .").

18. "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, 321 (1976).

19. For lump sum appropriations, such as the Army's Operation and Maintenance (O&M), discerning statutory intent may be more difficult. *See* Department of Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, tit. II, 113 Stat. 1214 (1999); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 301, 113 Stat. 556 (1999). In determining intent, judge advocates should look to other "organic" legislation. *See, e.g.*, 10 U.S.C. § 404 (2000) (foreign disaster assistance); *id.* § 2805(c) (minor construction). Legislative history and Government Accounting Office (GAO) opinions are also fertile sources of guidance on O&M expenditures. *See, e.g.*, The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984) (construction during military exercises); *see generally* GENERAL ACCOUNTING OFFICE, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 4-5 (2d ed. 1991).

20. 31 U.S.C. § 1301(a) (2000).

21. Official representation funds (ORFs or .0012 funds) are a prime example of funds in exceedingly short supply. The ORFs are O&M funds found in the emergency and extraordinary (E&E) expense appropriation. They are limited by the annual ceiling on E&E expenses and generally subject to additional formal subdivisions. *See* 10 U.S.C. § 127; Department of Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, tit. II, 113 Stat. 1216 (1999); U.S. DEP'T OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY, para. 1.1 (31 May 1996); *see also* 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 19, at 4-110. Because other O&M funds may not be used for representational functions, and ORF amounts are always small, commanders can easily, if not careful, overspend their allotted ORFs, thereby violating the Anti-Deficiency Act. *See* Matter of: HUD Gifts, Meals, and Entertainment Expenses, 68 Comp. Gen. 226 (1989); To The Administrator, Veterans Administration, 43 Comp. Gen. 305 (1963); Comptroller General McCarl to Capt. Carl Halla, United States Army, 5 Comp. Gen. 455 (1925).

22. 31 U.S.C. § 1341.

23. *Id.* § 1350.

effort to secure a "green light." Assuming the advice is correct, invocation of the GO's name does not change the result.

Corollary: What a GO Wants and How His Staff Interprets What He Wants Are Not Necessarily the Same

It is surprising how often a GO's name is invoked in vain and what is attributed—often falsely—to him.

Maxim XI: Precedent ("We've Always Done It This Way") Is Not Legal Authority if the Way It Has Always Been Done Is Unlawful

Particularly when judge advocates are new to a unit, they will hear "we've always done it that way" in response to concerns about the lawfulness of an action. If the way it has always been done is illegal, it remains illegal regardless of the precedent.

Corollary A: Always Take Claims of Precedent with a "Grain of Salt"

Further inquiry into assertions of precedent often reveals that "it's *never* been done that way."

Corollary B: Before Rendering an Opinion, Always Check the Office Files

Judge advocates can often save time by looking at their predecessor's work. He was likely a talented individual. Moreover, if judge advocates disagree with a predecessor's opinions, it is usually better to know that the opinion was issued than to be "blind-sided" by a commander brandishing it.

Maxim XII: The Fact Another Command Does Something ("Fort ____ Does It This Way"), Is Not Legal Authority if The Action Is Unlawful.

This assertion is especially problematic if true. It could mean that either you or the other command is wrong. It could also reflect a difference in the interpretation of an ambiguous statute or regulation or simply a different factual setting. Call the other command to determine the basis of the disagreement. If possible, reconcile the inconsistency. Consult the technical chain if necessary. Ultimately, judge advocates must render their own advice and, if convinced of the correctness of their position, cannot be bound by another command's advice or actions.

Corollary A: There Is No "Fort Bragg Exception" to Statutes and Regulations

And for those at Fort Bragg, there is no "Fort Hood Exception" to statutes and regulations either.

Corollary B: Always Take Assertions of What Another Command or Service Does with a "Grain of Salt"

Further inquiry into assertions that another command does something often reveals: (1) that the command does *not*, in fact, do anything of the sort; or (2) that the circumstances are vastly different (see, for example Maxim IV).

Maxim XIII: A Predecessor's Position Is Not Legal Authority if that Position Is Unlawful

A favorite means used by "old timers" in command or on staffs to deal with newly arrived judge advocates is to assert that their JAG predecessors gave a "favorable" opinion on a particular issue. This tack is popular because: (1) it suggests new judge advocates are out of touch with the true state of the law; (2) it makes new judge advocates feel they are not being team players (unlike their predecessors); and (3) it puts pressure on new judge advocates to render "favorable" legal advice to become trusted members of the team. If the position taken by a predecessor is unlawful, however, it remains unlawful upon his or her departure. Of course, it is much easier to ignore this kind of an appeal if the predecessor was a "bozo" as opposed to a "superstar." (*Assignment Maxim:* It is not the job that is important, but the person whom you replace.)

Corollary: Always Take Assertions of a Predecessor's Position with a "Grain of Salt"

See Corollaries to Maxims X, XI, and XII. It is reassuring to learn that—almost uniformly—a predecessor's position was the same as your own.

Maxim XIV: Threats, Bullying, and Intimidation Do Not Constitute Legal Authority

This is axiomatic. The unlawful does not suddenly become lawful because the recipient of the unwanted legal advice shouts, curses, or threatens.

Maxim XV: Desperation Does Not Constitute Legal Authority

Late or urgent requests for a legal "chop" (usually because a staff officer has failed to seek timely advice) do not turn unlawful actions into lawful ones. Judge advocates should not be pressured into rendering shoddy advice to accommodate a poorly staffed action (see Maxim XVIII).

Maxim XVI: Ignorance Does Not Constitute Legal Authority

The fact the command does not consult a judge advocate is not an excuse for an unlawful action.

Maxim XVII: "X" Number of "No's" Do Not Equal One "Yes."

It is kind of like a multiple choice exam: the fact you have marked five "A's" in a row does not mean the next answer has to be "B," "C," "D," or "E," *if* the correct answer to the next question is, in fact, "A." Judge advocates should not feel compelled to give a legal nod to an action of questionable legal authority simply because they have deemed several prior actions legally objectionable.

Corollary: Practicing Law Is Not a Popularity Contest

Face it: judge advocates are lawyers! People will regard them with disdain no matter what advice they give. Although clients may perceive judge advocates with kindness when receiving a favorable opinion, the perception is both illusory and transitory. Judge advocates are still lawyers. And the next time judge advocates give advice that is not equally favorable, the traditional animosities will reveal themselves again. A judge advocate's goal should be respect, not love.

Maxim XVIII: Staffs Generally Seek JAG Advice Simply to "Check" the Coordination Box; Judge Advocates Ultimately Pay the Price of Deficient Opinions

Staff officers generally seek legal advice because "JAG" constitutes a block or line on the coordination checklist, and they want the actions complete and off their plates. Staff officers usually do not care if the legal advice is correct or incorrect, as long as the block for legal review gets checked. If something goes wrong because the action is unlawful, staff officers have the top-cover they need—the "JAG chop." The judge advocates who render the incorrect advice will confront the consequences alone.

Maxim XIX: Before Giving Advice, Know Who Is in the Room

Not everyone in the room is a "friend" or has the same agenda as the judge advocate and his client. It is sometimes difficult to identify everyone in a meeting. For example, contractors are often indistinguishable from civilian employees. Indeed, contractors who happen to be members of a Reserve Component have been known to attend meetings in uniform, thereby making it easy to mistake them for military personnel. Thus, be cautious before speaking.

Maxim XX: When Providing a Written Legal Opinion, Put the "Bottom Line" Up Front ("BLUF")

Legal opinions are not murder mysteries. If forced to read a long, generally boring opinion all the way to the end before reaching the conclusion, many commanders and staff officers will simply stop reading.

Corollary A: When Providing a Written Legal Opinion, Include Well-Reasoned, Well-Documented Bases for the Conclusions Reached.

This corollary is potentially controversial. Two schools of thought exist about the extent to which judge advocates should spell out the rationale for their opinions. Some opt for the conclusion alone, with a possible reference to the controlling authority. Personally, the authors prefer a comprehensive legal opinion that states, in gory detail, the reasons and authority for the conclusion. Such opinions are more likely to be taken seriously (and less likely to be questioned), particularly if the subject matter is charged with emotion.

Corollary B: Even the Gory Details Should Be Written in Simple Terms and Plain English

In the long run, commanders will appreciate the judge advocate who educates them more than the judge advocate who shows them how smart he is.

Maxim XXI: Do Not Permit Shoddy Staff Work To Go Forward; Offer To Help Rewrite It if Necessary

Written and oral communications are the "weapons platforms" of judge advocates. They have been schooled in writing and practice it everyday. Other staff officers generally do not have the benefit of our training or practice; their focus is on other areas (about which most judge advocates know little). A simple "no legal objection" or "legally objectionable" is sometimes not enough. Judge advocates should assist fellow staff officers in formulating well-written and cogent products. Particularly when judge advocates find legal objections, they should help craft the action to pass legal muster.

Corollary A: If Judge Advocates Do Their Job Well, Commanders and Staffs Will Use Them as "Ghostwriters" and Common-Sense "Checks"

One of the highest compliments commanders and staff can pay judge advocates is to use them to help prepare their written products and to serve as common-sense checks on their actions. If asked to serve in such a capacity, however, judge advocates must always remember their role is to provide support; they are not the decision-makers. Moreover, the adage "it's amazing how much work gets done if no one is concerned about who gets the credit" is especially apropos. While "face time" can be a heady experience (no pun intended), judge advocates work best when they work in the background. Credit is unimportant; getting the job done is.

Corollary B: Beware of Being Overwhelmed by Staff Work

This might also be phrased "no good deed goes unpunished." If judge advocates assume the work of others, they should expect to continue receiving such work. The danger is that they may become overwhelmed. Their role is to assist, not to lead.[24]

Maxim XXII: Staff Judge Advocates Must Always Have Direct Access to Commanders To Discuss Legal Issues Affecting the Command

Article 6(b) of the Uniform Code of Military Justice[25] mandates that, on military justice matters, convening authorities must—at all times—communicate directly with their staff judge advocates (SJA). Neither the chief of staff nor any other officer may act as a "gatekeeper." With regard to matters outside of the military justice arena, SJAs should (in most instances) attempt first to resolve problems at the lowest level possible; however, they must also have the ability to speak directly with their commanding generals about such matters. If, in spite of the SJA's advice, the staff or a subordinate commander is about to take the command down a path fraught with legal perils, the SJA has an obligation to alert the commanding general, laying down his or her concerns (see Maxim II).

Corollary A: While Not Statutorily Based, Trial Counsel Must Have Similar Access to the Commanders Whom They Advise

By its terms, article 6 does not afford judge advocates, other than SJAs, direct access to commanders on military justice matters. To be effective, however, trial counsel must have unimpeded and unfiltered contact with their commanders.

Corollary B: Before Informing the Commanding General of a Legally Objectionable Course of Action Proposed by a Subordinate, Alert the Subordinate

This may not change the subordinate commander's mind, but it will help maintain a working relationship.

Maxim XXIII: No Private Organization—No Matter How Laudable Its Cause—Is Worth Violating the Law to Assist

No issue is more filled with emotion than the treatment of private organizations, particularly those perceived to serve the interests of the Army and its soldiers. These private organizations are not, however, part of the U.S. Army, and the support the Army may provide them, both material and moral, is limited.[26] Particularly problematic is the impulse to endorse certain private organizations or to encourage membership through official channels. Such activities are flatly inconsistent with regulation,[27] and judge advocates are usually the only members of a unit or installation willing to dampen the ardor for these groups, a position that is unlikely to endear them to their commands.[28]

Maxim XXIV: If You Are Not Having Fun Practicing Law in the JAG Corps, You Should Be a Civilian—Where at Least You Can Make More Money

People enter the JAG Corps for all sorts of reasons—the desire to serve one's country, Reserve Officer Training Corps (ROTC) commitments, adventure, travel, love of camouflage—but money is not one of them. Aside from what brought you here, the greatest advantage the Army has over private practice

24. Commanders rarely object to being asked to exercise their authority to delegate work. If judge advocates have mastered the process of solving a particular problem or reaching a certain goal, they should ask the commander to form a process-action team, advise the commander who should be players, and have the commander assign tasks and suspenses. The commander gets credit for successful results, and the judge advocates earn "brownie points" for helping the commander.

25. UCMJ, art. 6(b) (2000) ("Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice . . . .").

26. *See, e.g.*, U.S. DEP'T OF DEFENSE, INSTR. 1000.15, PRIVATE ORGANIZATIONS ON DOD INSTALLATIONS, para. 4 (23 Oct. 1997); U.S. DEP'T OF DEFENSE 5500.7-R, JOINT ETHICS REGULATION, paras. 3-200, 3-201, 3-202, 3-206, 3-209, 3-210, 3-211 (Aug. 1993) [hereinafter JER]; U.S. DEP'T OF ARMY, REG. 1-211, ADMINISTRATION: ATTENDANCE OF MILITARY PERSONNEL AT PRIVATE ORGANIZATION MEETINGS (1 Dec. 1983); U.S. DEP'T OF ARMY, REG. 360-61, COMMUNITY RELATIONS, paras. 2-3, 3-1, 3-4, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6 (15 Jan. 1987).

27. *See* JER, *supra* note 26, paras. 3-209, 3-210.

28. Given the fact endorsement of private organizations, including their membership drives, in an official capacity violates punitive provisions of the Joint Ethics Regulation, judge advocates *must* insist on compliance to protect their commands.

is the Army is fun while private practice generally is not. Judge advocates need not worry about billing hours, collecting fees, finding clients, keeping clients, taking time off, or selecting something different to wear each day. They get paid for keeping physically fit, practicing marksmanship, camping out, traveling to exotic places, and belonging to an organization that is much larger than any one individual. Consequently, if you are not having fun in the JAG Corps, go for the money.

SOFA Claims Initiatives in Korea

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You have just been assigned as a new claims attorney with the claims office in Yongsan, South Korea. Your supervisor walks into your office and tells you that a U.S. service member rear-ended a Korean citizen's private automobile while driving a government vehicle off-post. The Korean National Police cited the service member as being at fault. The Korean citizen experienced both property damage and serious personal injuries. This news does not surprise you, however, because you are aware that driving in the Republic of Korea (ROK) is a unique, challenging, and often dangerous experience for many.

The service member has private liability insurance that covers accidents involving the use of his privately owned vehicle, but his insurance does not cover instances where he is driving a government vehicle. You anticipate that the Korean citizen will file a claim against the U.S. government. What is the claims office's role in this process? Are there any ways to expedite the foreign claims process to ensure a good working relationship with the ROK government and its people? This note helps answer these questions for new claims attorneys and explores how claims are processed in the ROK. It also describes initiatives that are currently being discussed by the United States and the ROK to expedite the processing of foreign claims in South Korea.

Background

In 1966, the U.S. government entered into a Status of Forces Agreement (SOFA) with the ROK.[30] The SOFA provides for the payment of foreign claims against the United States filed by the ROK government or its citizens for property damage and personal injuries that are caused by U.S. service members or Department of Defense (DOD) civilian employees.[31] Article XXIII of the SOFA categorizes claims based on the duty status of the alleged wrongdoer at the time of the incident that gives rise to the claim. Claims that arise from the negligent or wrongful acts or omissions of members or employees of the U.S. armed forces done in the performance of official duties are commonly referred to as SOFA scope claims.[32] The vast majority of all SOFA scope claims result from traffic accidents and maneuver damage.[33]

Claims that arise from negligent or wrongful acts outside of the scope of the performance of official duties are called SOFA non-scope claims, and are governed by paragraphs six and seven of Article XXIII.[34] There are many different types of non-scope claims. For instance, a non-scope claim may arise when a U.S. service member or employee, driving his privately owned vehicle or a U.S. vehicle without authority, causes a traffic accident with a Korean citizen.[35] Other examples of tortious acts or omissions that might give rise to liability include assaults on Korean citizens, failing to pay bills such as telephone bills or rent for off-post quarters, or when a servicemember is responsible for damages to third parties because of environmental destruction due to oil, waste, or other materials.

Under the SOFA, both South Korean citizens and the ROK government must file any claims they have against the United States with the ROK Ministry of Justice (MOJ).[36] These claims are then processed according to South Korean law. The

29. The author served as the Deputy Commander, United States Army Claims Service, Yongsan, Republic of Korea from January 1999 to June 2000.

30. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677 [hereinafter SOFA].

31. *Id.* art. XXIII, para. 2 (claims by the ROK government), para. 5 (claims by third parties). Article XXIII, paragraph 5, applies to all "third parties" present in South Korea, to include aliens. *See* National Compensation Act, Law No. 1899, art. 7 (1967) (as amended) (S. Korea) [hereinafter National Compensation Act] ("This Act shall apply only in cases where a mutual guarantee exists, if an alien is a victim or a damage sufferer."); State Compensation Act, Act No. 1899, art. 7 (1967) (as amended) (S. Korea) (same) [hereinafter State Compensation Act].

32. *See* U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 7 (31 Dec. 1997) [hereinafter AR 27-20] (governing claims arising overseas under status of forces and other international agreements) ; U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS, para. 7 (1 Apr. 1998) [hereinafter DA PAM 27-162] (same). The underlying statutory authority for Chapter 7 of *AR 27-20* and *DA PAM 27-162* is 10 U.S.C. § 2734a (2000).

33. Maneuver damage occurs when a servicemember causes property damage or personal injury, to include death, during a tactical exercise in the air or on the ground.

34. SOFA, *supra* note 30, art. XXIII, paras. 6, 7.

35. The SOFA excludes liability for non-scope claims arising from the acts or omissions of South Korean nationals or residents employed by the United States. *Id.* art. XXIII, para. 6.

National Compensation Act and the State Compensation Act, their implementing decrees, and other related laws provide the mechanism, procedures, and standards for the ROK MOJ to evaluate and adjudicate all SOFA claims. The acts each consist of seventeen articles that establish a Central Compensation Council (CCC) and several District Compensation Councils (DCC) to process and adjudicate claims.[37] The acts also address when lawsuits may be filed for compensation.[38]

SOFA Scope Claims

To receive compensation for injury or property damages that occur from an act or omission by a U.S. service member or DOD civilian employee acting within scope, the claimant must file a claim with one of the DCCs located throughout Korea.[39] The claimant must indicate how his injury or damages occurred and also how much compensation he believes he is entitled to receive.[40] All claims must be submitted on Form 1.[41] The employees at the DCC then prepare Forms 2 and 3[42] and forward them to the Commander,[43] USAFCS-K.[44] From a practical standpoint, the DCC will usually check the box on Form 3 indicating the United States was wholly responsible for the incident in question. The DCC also indicates what percentage of the damages it believes the United States is liable for (for example, 100%, 50%, or 0%), and forwards these two claims forms (within one week) via the MOJ to USAFCS-K for investigation by one of its six foreign claims investigators.[45]

Once the USAFCS-K receives the claim, a claims examiner stamps the receiving date on the corner of Form 2 to track the processing time, and screens the claim for possible duplication. The examiner also translates and prepares a chronology sheet, establishes local cards and files, inputs information into the computer, and locates reports of investigation, such as Military Police reports, reports of investigations from the Criminal Investigation Division, Security Police reports, maneuver damage reports, and other pertinent information.[46] Cases are then distributed to the investigators at the USAFCS-K for investigation.

The investigators at USAFCS-K translate Forms 2 and 3 and review them carefully to see if a proper party claimant[47] filed the claim and to see if the forms have been properly classified as a SOFA scope or non-scope claim. If the investigator finds that the claim was improperly classified, he obtains verbal approval from the Commander to coordinate with the DCC for proper classification of the claim.[48] The Commander will

36. The SOFA states that with regard to non-scope claims, the "authorities of the Republic of Korea shall consider the claim and assess compensation . . . ." *Id.* It is the ROK Ministry of Justice, through its Compensation Council, that is responsible for processing these claims. National Compensation Act, *supra* note 31, art. 10; State Compensation Act, *supra* note 31, art. 10. *See also* CLAIMS SECTION, SOUTH KOREAN MINISTRY OF JUSTICE, HANDBOOK OF CLAIMS AFFAIRS, 1991 [hereinafter HANDBOOK OF CLAIMS AFFAIRS]. Employees of the MOJ and the U.S. Armed Forces Claims Service, Korea (USAFCS-K) refer to this text for procedural guidance when processing SOFA claims. There is no English translation of this manual.

37. National Compensation Act, *supra* note 31, art. 10; State Compensation Act, *supra* note 31, art. 10.

38. Article 9 of the State Compensation Act provides that lawsuits for compensation of damages may be filed after the Compensation Council makes a decision to pay or reject compensation or if no decision is made within three months after the claim is filed. State Compensation Act, *supra* note 31, art. 9. *See* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 804.

39. As of August 1999, the DCC were located at Seoul, Inchon, Suwon, Chunchon, Chonju, Taejon, Taegu, Pusan, Ulsan, Changwon, Kwangju, Jonju, and Cheju, with the CCC at the Ministry of National Defense.

40. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 813, 815.

41. S. Kor. Ministry of Justice, Form 1, Claims for Damage or Injury, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 212. This form requires the claimant to indicate information such as the names of the individuals involved in the incident, a brief description of the incident, the amount of the claim, and the basis for the amount of the claim.

42. S. Kor. Ministry of Justice, Form 2, Claims Notice/Incident Certificate Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 214. Form 2 briefly describes the incident and the amount of compensation the claimant is seeking. Form 3 is used to document the DCC's determination as to whether the incident occurred in the performance of official duty. S. Kor. Ministry of Justice, Form 3, Certificate of Scope of Employment and Degree of Fault Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 216.

43. A U.S. Army judge advocate serves as the Commander of the USAFCS-K. This claims office is responsible for processing all SOFA claims in Korea. Working for the Commander are one claims examiner, who receives the SOFA claims, and six SOFA claims investigators. The office is also authorized a Chief of SOFA claims who would be responsible for overseeing the entire SOFA section. As of the time of the writing of this note, the position was vacant.

44. *See* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 815, 817. The ROK MOJ makes the initial determination of scope of employment and liability. The MOJ or its compensation councils will forward these findings to the Commander, USAFCS-K. If the parties cannot agree on scope and liability, the matter will be brought before a working group of the Civil Jurisdiction Subcommittee for Claims.

45. *Id*. Upon receipt of a claim by the ROK MOJ or one of its receiving councils, the ROK shall immediately advise the Commander, USAFCS-K, of each claim received by utilizing Form 2.

46. UNITED STATES ARMED FORCES CLAIMS SERVICE-KOREA, STANDARD OPERATING PROCEDURE: FOREIGN CLAIMS ADMINISTRATION 1 (1997) [hereinafter ADMINISTRATION SOP].

acknowledge receipt of the claim by completing that portion of Form 2 reserved for his action and shall return a completed Form 2 to the initiating DCC through the MOJ.[49]

The ROK and the United States, either independently or jointly, will investigate the facts and circumstances of the incident that gave rise to the claim, including conducting on-scene investigations.[50] The investigators review investigative reports and make appropriate telephone calls to the concerned jurisdictional Provost Marshal's Office, Criminal Investigative Division, Civil Affairs Office, or concerned unit to verify the name, rank, and organization of the U.S. service member or employee involved. The investigators, upon completing the investigation and making a thorough review and analysis of the various reports, make a final recommendation indicating the percentage of liability of the United States and of the claimant. They determine whether there is any negligence involved on the part of the claimant or victim of the incident.[51] The Commander, based on the results of the investigation, signs the claims forms and either certifies or denies United States involvement.

If the United States determines there was contributory negligence on the part of the victim or claimant, the investigators prepare a draft letter for the Commander indicating the percentage of liability, and forward this letter with Forms 2 and 3 to the appropriate DCC through the MOJ.[52] Upon receipt of the letter and two forms, the DCC determines how much, if any, compensation the claimant is entitled to receive, reducing the potential award by the percentage amount of liability imputed to the claimant. For instance, if the claimant produces receipts totaling 5,000,000 won, and the DCC concludes that the claimant was 30% liable for the accident, the DCC will award only 3,500,000 won.[53] In cases of damaged or destroyed property, the DCC's determination of compensation is based upon the cost to repair or replace the property. In cases of personal injury, compensation is based upon the cost of medical treatment, lost wages, physical handicap, and pain and suffering. In cases of death, compensation includes funeral expenses and bereaved family compensation (the future wages of the victim). Pain and suffering is also paid to the victim's family. The amount of pain and suffering to be paid to each family member is determined by statutory guidelines.[54]

The ROK DCC will advise the Commander, USAFCS-K, of the amount of compensation decided in all official duty cases by utilizing Form 4.[55] The Commander promptly communicates his agreement or disagreement on Form 4, with explanation. In instances where agreement cannot be obtained with respect to an award, the Commander will send Form 4 back to the DCC via the MOJ for reassessment.[56] Once an amount is agreed to, an offer is made to the claimant. The claimant may accept or reject the offer. If the claimant accepts the offer, he receives payment in full and final satisfaction of his claim.[57] Claims will be adjudicated and settled by the ROK DCC and forwarded to USAFCS-K with one copy of Form 8[58] properly executed by the claimant or his authorized representative.[59]

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47. Proper party claimants (called third parties) under the SOFA are anyone other than members of the force, civilian employees of the force (except those ordinarily resident in South Korea), and their dependents. SOFA, *supra* note 30, art. XXIII, para. 5.

48. UNITED STATES ARMED FORCES CLAIMS SERVICE-KOREA, STANDARD OPERATING PROCEDURE: FOREIGN CLAIMS INVESTIGATOR 2 (1997) [hereinafter INVESTIGATOR SOP].

49. ADMINISTRATION SOP, *supra* note 46, at 2.

50. *Id*.

51. *Id*.

52. *Id*.

53. Won is the South Korean currency. The ROK and the United States will use the rate of exchange in effect when a claimant files his claim. At the time that this article was written, the won rate was 1,113 won to the U.S. dollar. Thus a claim for 5,000,000 won was equivalent to approximately $4,492. The 3,500,000 won award is 70% of the amount claimed and the determined amount of U.S. liability.

54. ADMINISTRATION SOP, *supra* note 46, at 3.

55. S. Kor. Ministry of Justice, Form 4, Notice of Decision and Proposed Distribution Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 218.

56. Memorandum, Republic of Korea—United States Civil Jurisdiction (Claims) Subcommittee, to The Joint Committee, subject: Revision of the Procedures and Forms Implementing the Processing of Claims Under Article XXIII of SOFA as Assigned by the 51st Meeting of the Joint Committee on 18 June 1970 (4 May 1971) [hereinafter Subcommittee Memorandum] (containing the official minutes of the subcommittee titled: Procedures for the Implementation of Paragraphs 5, 6, and 7, Article XXIII (Claims), ROK—U.S. Status of Forces Agreement). If the matter cannot be resolved, the case will be placed on an agenda for discussion by a joint working panel of the ROK—U.S. Civil Jurisdiction (Claims) Subcommittee.

57. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 833.

58. S. Kor. Ministry of Justice, Form 8, Receipt, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 225.

59. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 833.

At any time before the claimant has actually been paid for a SOFA scope claim, the claimant may choose to file suit in a South Korean district court to have the claim settled.[60] If that happens, the DCC is no longer involved in adjudicating the claim and will dismiss Form 4.[61] If the court renders a judgment in favor of the claimant the USAFCS-K must honor the court decision. The court will notify the USAFCS-K of the amount paid to the claimant by way of Form 5.[62] The claims investigators translate the entire file, along with Form 5, and the Commander, USAFCS-K, acknowledges receipt and returns the completed form to the ROK MOJ.[63]

Every six months, the ROK sends the United States a request for reimbursement of the amounts paid to all claimants.[64] Upon receipt of the request, a claims examiner reviews every claims file to determine whether the amount paid by the ROK and the amount apportioned to the United States are correct. If correct, the examiner prepares vouchers for payment of the requested amounts and forwards them to the servicing finance and accounting office.[65] According to the cost-sharing provisions of the SOFA, in cases where the United States is solely liable for the claim, it reimburses the Korean government 75% of the amount paid.[66] Where the United States and the ROK are jointly liable, or when it is not possible to ascertain relative liability, the amount awarded is distributed equally.[67] Claims decided by the courts are included in the requests for reimbursement. In accordance with the SOFA, the United States will effect reimbursement with the least practicable delay to the National Treasury of the ROK and notify the MOJ of reimbursement.[68]

SOFA Non-Scope Claims

Claims against employees of the U.S. armed forces arising out of negligent or wrongful acts or omissions not done in the performance of official duties are non-scope claims and are also addressed in Article XXIII of the SOFA.[69] As with SOFA scope claims, non-scope claims are filed with the appropriate DCC. The DCC reviews and generally processes the claim the same way it processes scope claims.[70] Again, the DCC will prepare Forms 2 and 3 and will forward them via the MOJ to the USAFCS-K.[71] Non-scope claims are logged in and investigated just as SOFA scope claims are.[72] Upon determination that a claim is a non-scope claim, the Commander, USAFCS-K, signs and returns Form 3 to the DCC with the box checked indicating the offender was not acting in the performance of official duty. The forms are often returned with a letter explaining why USAFCS-K believes the claim is a non-scope claim. Once Forms 2 and 3 are returned to the DCC, the DCC will finalize its investigation and make an advisory adjudication of the claim on Form 6[73] and forward it to the USAFCS-K through the MOJ.[74] Following adjudication by the USAFCS-K and settlement,[75] the Commander signs and completes that portion of the appropriate form reserved for his action and returns the completed form to the ROK MOJ.

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60. National Compensation Act, *supra* note 31, art. 9; State Compensation Act, *supra* note 31, art. 9.

61. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 831.

62. S. Kor. Ministry of Justice, Form 5, Payment Statement and Proposed Distribution Resulting from Court Order Under Article XXIII, Status of Forces Agreement, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 220.

63. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 831.

64. SOFA, *supra* note 30, art. XXIII, para. 5(e)(iii). Pursuant to the cost sharing provisions of the SOFA, the ROK requests reimbursement of a portion of all money paid, using Forms 9 and 10. S. Kor. Ministry of Justice, Form 9, Reimbursement Request Under Article XXIII, Status of Forces Agreement, and Form 10, Request List of Claims, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 226-27.

65. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 835.

66. SOFA, *supra* note 30, art. XXIII, para. 5(e)(i).

67. *Id*. art. XXIII, para. 5(e)(ii).

68. *Id*. art. XXIII, para. 5(e)(iii).

69. *Id*. art. XXIII, para. 6.

70. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 813, 815.

71. *Id*. at 815, 817.

72. ADMINISTRATION SOP, *supra* note 46, at 1.

73. S. Kor. Ministry of Justice, Form 6, Ex-Gratia Payment Report, *reprinted in* HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 222.

74. INVESTIGATOR SOP, *supra* note 48, at 1.

Pursuant to the Foreign Claims Act (FCA),[76] a Foreign Claims Commission (FCC) adjudicates non-scope claims.[77] Based on its investigation, the FCC may: choose to award the claimant the amount the DCC recommends; award more or less than the DCC recommends; or deny the claim.[78] The amount of compensation to be awarded, if any, is determined in the same manner as compensation for SOFA scope claims. The FCC, without delay, will render an opinion detailing its decision and, for meritorious claims, the claimant will be offered an ex-gratia payment in full satisfaction of the claim.[79]

Timeline for Processing Claims

SOFA Scope Claims

The *Handbook of Claims Affairs* sets forth procedural guidance for the processing of SOFA claims. While there is great flexibility built into the system for processing both scope and non-scope claims,[80] some timelines must be met to ensure that these claims are processed to completion. When a claim is received by one of the DCCs, it must be registered, logged in, and assigned a claim number within one day. Forms 2 and 3 must be forwarded to the USAFCS-K via the MOJ within one week.[81] The DCC sends the forms to the MOJ and the USAFCS-K investigators pick them up weekly. Once the claim is received at the USAFCS-K, it takes approximately three to four days to administratively process the claim, which includes preparing chronology sheets, entering the information into the computer, and logging in the information.[82] The investigation of the case may take one day to several months to complete, depending on the complexity of the case. Some complex cases have taken more than one year to investigate.[83]

Completed Forms 2 and 3 and other necessary documentation are delivered to the MOJ. The MOJ sends information to each DCC throughout South Korea. Form 4 must be forwarded to USAFCS-K via the MOJ within three days.[84] Investigators review the MOJ's determination of scope or non-scope and the assessment of liability, indicating whether they agree with the MOJ's assessment. This takes two or three days for a simple case or months for a more complex case.[85] If there is disagreement, further investigation may be required. This may take several additional months.[86] If the MOJ does not receive Form 4 within two months, it will assume USAFCS-K agrees with the assessment and notify the claimant of the assessment.[87] If the USAFCS-K agrees and the amount is under 4,000,000 won, the SOFA claims investigator is authorized to sign the appropriate documentation. If the amount is 4,000,000 won or more, the Commander, USAFCS-K, will sign the documentation.[88] If the monetary amount is over 50,000,000 won, the DCC will not accept the claim. Instead, it will transfer the claim to the CCC at the MOJ, which makes assessments every three months.[89] The MOJ forwards documentation to USAFCS-K and the claim will be processed as previously discussed.[90] Once the DCC sends the claim assessment to the claimant and obtains agree-

75. There is no cost sharing provision for the payment of non-scope claims. The U.S. encourages the private settlement of claims by U.S. service members. In many instances this does not happen because the service member does not have adequate insurance coverage or is insolvent. The U.S. will pay 100% of the settlement amount for non-scope claims when it is determined to be in the best interest of the United States to pay such claims. In some instances, the United States will attempt to get restitution of the settled amount.

76. 10 U.S.C. § 2734 (2000) (implemented by AR 27-20, *supra* note 4, ch. 10).

77. *See* AR 27-20, *supra* note 32, para. 10-6. A FCC will process SOFA non-scope claims in Korea regardless of the amount claimed. A FCC is composed of one or three members, two of whom are judge advocates or claims attorneys, and it responsible for the investigation of all claims referred to it. The senior judge advocate of a command having a command claims service will appoint necessary FCCs to act on claims arising within his geographical area of jurisdiction.

78. 10 U.S.C. § 2734. When the claim is valued at more than $50,000 or all claims arising out of a single incident are valued at more than $100,000, the file will be transferred to the Commander, United States Army Claims Service (USARCS), Fort Meade, Maryland. The USARCS is responsible for overseeing all of the Army claims offices. Note that the Commander, USARCS, may authorize the FCC to negotiate settlement amounts that exceed the FCC's authority.

79. SOFA, *supra* note 30, art. XXIII, para. 6(b)-(c). Form 6 is then returned to the DCC. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 841.

80. In calendar year 1999, SOFA investigators at the USAFCS-K processed 455 scope claims and thirty non-scope claims.

81. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 817.

82. INVESTIGATOR SOP, *supra* note 48, at 1.

83. Interview with Mrs. Yi, Myo Sang, SOFA Claims Investigator, USAFCS-K (Feb. 11, 2000) [hereinafter Yi Interview].

84. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 825.

85. Yi Interview, *supra* note 83.

86. *Id*.

87. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 827.

88. INVESTIGATOR SOP, *supra* note 48, at 1.

ment on the claimed amount, the DCCs have to report to the MOJ by the fifth day of the following month that they made payment to the claimant, and forward USAFCS-K a copy of Form 8.[91]

SOFA Non-Scope Claims

The process and timelines for handling Forms 2 and 3 in SOFA non-scope claims is the same as for scope claims. If the claim is determined to be a non-scope claim, the ROK DCC will accept and prepare Form 6.[92] Once the USAFCS-K receives this information, the assigned investigator translates all documents, investigates, and recommends assessment.[93] If the claim is less than $50,000, the claim is adjudicated in-house. If the amount is over $50,000, after the investigator obtains a settlement agreement from the claimant and translates the entire file, the claim is forwarded to the U.S. Army Claims Service (USARCS) at Fort Meade.[94]

Current USAFCS-K Initiatives on Streamlining the SOFA Claims Process

The lengthy time period for processing SOFA claims is a source of concern for both the United States and the ROK. The average processing time for SOFA scope claims is presently five to six months. The processing of SOFA non-scope claims may take considerably longer. Both governments want to ensure the speedy compensation of victims as the payment of SOFA claims may directly affect the relations between the two countries.[95] Also, the payment of SOFA claims prior to trial may be a mitigating factor in ROK criminal cases involving U.S. service members. To streamline the SOFA claims process in Korea, both the U.S. and the ROK governments must review the current system and identify weaknesses. The USAFCS-K is presently reviewing the process and is exploring the following initiatives.

Processing delays frequently occur with the DCCs. In the outlying areas of Korea, some DCCs meet once a quarter and others meet on an as-needed basis. To date, no action has been taken to formally change the scheduled meeting times. The USAFCS-K has recommended, however, more frequent meetings of the DCCs to prevent a backlog of SOFA claims requiring action.[96] Claims that are over 50,000,000 won are currently transferred to the CCC at the MOJ. This committee makes assessments every three months. This time schedule creates a significant delay in the processing of the claims. The USAFCS-K has recommended that the Central Compensation Committee responsible for processing claims over 50,000,000 won be required to meet on a monthly basis. Although this would help the U.S. government and the ROK claimant, it is foreseeable that this initiative would increase costs to the ROK government.[97] As a result, this recommendation is not likely to be adopted.

In most instances, Forms 2 and 3 are forwarded from the DCCs located in the outlying areas through the MOJ to the USAFCS-K without supporting documentation. The USAFCS-K SOFA investigators must make specific requests for information. This is usually done on a piecemeal basis as the cases are developed. The USAFCS-K is currently addressing the issue of direct filing with the MOJ. The USAFCS-K would then forward appropriate documentation to the MOJ with recommendations for approval of advance payment to victims if appropriate. The MOJ could then determine whether the case would need to be forwarded to the DCC. If this initiative is not feasible, the U.S. and the ROK should revise the U.S.-ROK Joint Committee minutes to require DCCs to include all necessary supporting documentation for processing claims.[98] At a minimum, the DCC should continuously train SOFA clerks

89. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 666, 668.

90. *See supra* notes 39-68 and accompanying text discussing the processing of SOFA scope claims.

91. HANDBOOK OF CLAIMS AFFAIRS, *supra* note 36, at 835.

92. *Id*. at 841.

93. INVESTIGATOR SOP, *supra* note 48, at 1.

94. *See* AR 27-20, *supra* note 32, para. 10-6f(5). Investigators have to obtain a payment agreement from the claimant before the claim is forwarded to USARCS.

95. Quickly processing SOFA claims shows our desire to maintain an amicable relationship with the ROK and reduces the source of confusion for the claimants. Cases involving excessive property damage or severe personal injury may be closely scrutinized and receive heightened media coverage. Receiving negative media coverage could result in increased anti-American sentiments in the ROK.

96. Interview with Mrs. Pak, Suk Cha, SOFA claims investigator, USAFCS-K (May 8, 2000) [hereinafter Pak Interview]. This matter was recently addressed during a working committee meeting between the USAFCS-K and members of the MOJ. While requiring more frequent meetings of the DCCs would help expedite the process, there appear to be budgetary concerns. The ROK has to pay the Commissioner to attend all meetings. Also, the council members have full-time employment and must be properly compensated by the ROK for their services.

97. The ROK has to pay members of the DCC to attend its meetings. It would increase the ROK's costs to have the members meet more frequently. In addition to increased labor costs, the ROK would have to absorb the increased costs for office operations and management costs.

in the DCCs on Forms 2 and 3 and create standard operating procedures (SOPs) for employees' use.[99]

Another initiative involves persuading the ROK government to devise an expedited claims process through each local DCC for processing claims under 2,000,000 won. In cases involving traffic accidents and maneuver damage (such as crop damage) where the United States admits 100% liability, or in cases where the U.S. government and the ROK agree to the degree of comparative negligence, Forms 2 and 3 may be utilized without using Form 4.[100] This will expedite the processing of these claims. Also, creating a centralized compensation committee for handling only traffic accidents will expedite the claims process.[101]

Presently, the United States only makes advance payments to claimants in SOFA non-scope cases.[102] Another claims initiative includes the United States lobbying for advance payments to claimants in SOFA scope cases involving death or serious bodily injury.[103] As earlier mentioned, the South Korean State Compensation Act allows for such payments.[104] If implemented, this change will promote good relations between the U.S. and ROK governments.

Conclusion

As long as U.S. service members and DOD civilian employees are present in Korea, it is inevitable that their presence will result in property damage and personal injury to local Korean citizens. These incidents may have an adverse impact on U.S.–Korean relations if the U.S. government does not properly handle them. Presently, the SOFA claims system is cumbersome and outdated. While employees of the USAFCS-K and the ROK MOJ both strive to make timely payments to claimants, both need to do a better job of deleting the unnecessary and time-consuming steps involved in the claims process.

The only way to ensure that all claimants are paid as quickly and as efficiently as possible is to continuously review the way that the U.S. and the ROK conduct business and to look for viable ways to streamline the process. In response to the concerns that have been raised by the senior JAGC leadership,[105] the Commander, USAFCS-K, has established a working group with members of the MOJ to discuss ways to expedite the claims process, including some of the streamlining suggestions presented in this note.[106] As of the writing of this note, the Commander, USAFCS-K, and SOFA investigators have held two meetings with members of the MOJ to discuss ways to improve and simplify the SOFA claims process in Korea. It is expected that these meetings will yield positive results that will have a far-reaching impact on the SOFA claims process in Korea.[107] In the meantime, Judge Advocates dealing with the SOFA claims process in Korea should always be mindful of the sensitive nature of these cases as they may directly affect U.S.–Korean relations. Judge advocates should instruct the claims staff to assist the claimants as much as possible by providing appropriate guidance and, if requests are made, updating claimants on the status of their claims to avoid confusion. Finally, judge advocates can greatly assist the Commander, USAFCS–K, by identifying internal procedures that may cause processing delays and providing input on how to enhance these SOFA claims processing procedures.

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98. *See* Subcommittee Memorandum, *supra* note 56. Also, clerks should include all of the claimant's information, such as address, telephone number, and other identifying data, on the Form 1. This will ensure that SOFA investigators are able to contact claimants as quickly as possible.

99. Pak Interview, *supra* note 96. Clerks at the DCCs routinely rotate to new positions every year with little or no overlap of training time. Continuous training of SOFA clerks by the ROK may also have fiscal implications, but developing a standard SOP or training binder and requiring new employees to read it should not.

100. Interview with Lieutenant Colonel Gary D. Hyder, Commander, USAFCS-K (May 10, 2000). Lieutenant Colonel Hyder has been the Commander of the USAFCS-K since August 1998. During his tenure, he has dealt with a cumbersome SOFA claims process. He is presently heading the USAFCS-K joint working group responsible for negotiating with the Korean MOJ to streamline the SOFA claims process. This is the first time since 1971 that any change to the processing of SOFA claims by the MOJ has been proposed.

101. Most of the SOFA scope claims processed involve claims filed for compensation of personal injury or property damage resulting from traffic accidents. Generally, these claims are the more routine ones and the DCCs can expeditiously resolve these cases.

102. Presently, the ROK government bears at least 25% of the entire payment in SOFA scope cases. The ROK does not include advance payments in the entire payment amount. If the U.S. government makes an advance payment, it would lose its share of this portion because it would not be reimbursed by the ROK.

103. These cases are politically sensitive and involve emotionally traumatic events.

104. *See* National Compensation Act, *supra* note 31, art. 13(2); State Compensation Act, *supra* note 31, art. 13(2) (providing for advance payments to claimants).

105. Colonel Uldric L. Fiore, Jr. is the former Judge Advocate for Headquarters, United Nations Command/U.S. Forces Korea/Eighth U.S. Army. He was very concerned about the amount of time that it currently takes to process SOFA claims. On March 10, 2000, he met with key members of the MOJ to discuss ways of expediting the claims process. This historic meeting prompted the formation of the working groups consisting of members of the USAFCS-K and key members of the MOJ.

106. Also, the Commander, USAFCS-K, continuously reviews internal procedures to identify ways to further enhance the way the military claims office conducts business.

107. The author would like to thank Major Holly O. Cook for her helpful comments and patience in the development of this note.

Clerk of Court Notes

Courts-Martial Processing Times

Average processing time for general and bad-conduct (BCD) special courts-martial whose records were received by the Army Judiciary during the Fiscal Year (FY) 1999 are shown below.

General Courts-Martial

	1Q, FY 99	2Q, FY 99	3Q, FY 99	4Q, FY 99	Total FY 1999
Records received by Clerk of Court	173	164	173	148	658
Days from restraint/preferral to 39A	74	75	97	74	80
Days from first 39A to sentence	34	31	32	27	31
Days from sentence to action	118	115	115	113	116
Days from action to dispatch	8	6	13	12	10
Days en route to Clerk of Court	8	9	9	11	9

BCD Special Courts-Martial

	1Q, FY 99	2Q, FY 99	3Q, FY 99	4Q, FY 99	Total FY 1999
Records received by Clerk of Court	46	37	65	43	191
Days from restraint/preferral to 39A	29	44	60	41	45
Days from first 39A to sentence	24	10	12	7	13
Days from sentence to action	79	87	87	101	88
Days from action to dispatch	7	9	6	7	7
Days en route to Clerk of Court	7	8	7	9	8

Average processing time for general and bad-conduct (BCD) special courts-martial whose records were received by the Army Judiciary during the Fiscal Year (FY) 2000 are shown below.

General Courts-Martial

	1Q, FY 00	2Q, FY 00	3Q, FY 00	4Q, FY 00	Total FY 2000
Records received by Clerk of Court	161	191	164	135	651
Days from restraint/preferral to 39A	76	80	84	80	80
Days from first 39A to sentence	29	24	25	25	26
Days from sentence to action	124	110	116	154	124
Days from action to dispatch	12	17	33	34	29
Days en route to Clerk of Court	10	11	9	9	10

BCD Special Courts-Martial

	1Q, FY 00	2Q, FY 00	3Q, FY 00	4Q, FY 00	Total FY 2000
Records received by Clerk of Court	38	53	43	44	178
Days from restraint/preferral to 39A	50	45	42	42	46
Days from first 39A to sentence	11	10	17	7	11
Days from sentence to action	83	108	108	102	101
Days from action to dispatch	9	26	13	52	26
Days en route to Clerk of Court	9	9	8	8	10

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

Integrated Natural Resource Management Plans Are Not Just for the Shelf Anymore

As installations frantically race the clock to complete Integrated Natural Resource Management Plans (INRMPs) by the statutory deadline imposed by Congress, little attention has been given to the equally critical requirement for plan implementation. Many view INRMP completion as the finish line, at which point the plan can be deposited on the shelf to collect dust along with so many others. The purpose of this article is to explain that successful development of an INRMP is only the first step to compliance with the Sikes Act Improvement Act of 1997 (SAIA).[1] It is clear that Congress intended installations to take concrete steps to implement INRMPs to "provide for the conservation and rehabilitation of natural resources on military installations."[2] An installation's failure to implement an INRMP may be reviewed by federal district courts under the Administrative Procedure Act (APA)[3] and result in judicial issuance of injunctive relief that could disrupt mission-related activities. While an installation has a duty to implement an

1. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, Title XXIX, 111 Stat. 2019 (1997) (codified at 16 U.S.C. §§ 670a-670f (2000)).

2. 16 U.S.C. §§ 670(a)(1), (a)(3) (directing the Secretary of Defense to carry out a program for conservation and rehabilitation of natural resources on military installations and describing the purposes of that program).

3. 5 U.S.C. §§ 551-559, 701-706 (2000). The applicable provisions of the APA include §§ 551(1), (13), 704, and 706.

INRMP, the decision on how to implement is largely a matter of agency discretion. While installations should not unnecessarily narrow that discretion by making overly burdensome and precise commitments to implement specific projects in the INRMP, they should be prepared to make annual funding requests to move towards achieving planning goals and objectives.

Prior to 1997, the Sikes Act did not impose an affirmative duty to plan and manage natural resources on military installations. The Sikes Act encouraged and authorized "cooperative" planning for, and management of, fish and wildlife resources, but did not require it. The SAIA marked a sharp departure. The SAIA imposes an affirmative mandatory duty on the secretary of each military department to both prepare and implement an INRMP for every military installation under his jurisdiction unless an installation has been excluded due to a lack of significant natural resources.[4] Installations, therefore, must develop and commence implementation of INRMPs by the statutory deadline—18 November 2001. Installations are scrambling to meet the plan completion deadline, hampered by the requirement that INRMPS be developed in cooperation with and reflect the "mutual agreement" of both the U.S. Fish and Wildlife Service (USFWS) and state fish and game agencies.[5]

After completing development of its INRMP, an installation will immediately face the challenge of implementing the plan.[6] Neither the statute nor its legislative history sheds light on the meaning of the term "implement." In other words there is no express yardstick against which successful INRMP implementation can be measured. But the SAIA, viewed in its entirety, clearly anticipates some level of concrete INRMP implementation. For example, INRMPs must be action-oriented, providing for: enhancement of fish and wildlife habitat, protection and restoration of wetlands, public access for outdoor recreation, and enforcement of natural resource laws.[7] The Secretary of the Army is required to employ sufficient numbers of trained natural resource professionals to perform tasks necessary to implement INRMPs.[8] The Secretaries of Defense and Interior must report annually to Congress on the implementation of INRMPs, including expenditure levels associated with conservation activities conducted pursuant to approved plans.[9] Congress has authorized $3 million annually for each fiscal year through 2003 to carry out functions assigned to the Department of Interior under INRMPs.

Failure to develop or implement an INRMP in accordance with the SAIA and other applicable statutes[10] may place at legal risk ground-disturbing activities that have the potential to impact natural resources. The SAIA, like the NEPA and the National Historic Preservation Act (NHPA),[11] contains no internal mechanism for citizen or regulatory enforcement. That does not mean, however, that the Army's failure to develop or implement an INRMP will be shielded from judicial review. The APA provides the path to citizen enforcement. Initially, the APA makes clear that individuals aggrieved by an agency's failure to act may seek judicial review.[12] It further empowers federal district courts to review final agency action (or inaction),[13] and establishes the scope and standard of judicial review.[14]

An individual that is concerned with an installation's failure to develop or implement an INRMP may, therefore, use the APA as a means of obtaining judicial relief. The reviewing court can: declare the installation's action or failure to act illegal; direct the installation to comply with the law (that is, to pre-

4. 16 U.S.C. § 670a(a)(1)(B).

5. *Id.* § 680a(2).

6. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 2905(c), 111 Stat. 2019 (1997) (reprinted as a statutory note to 16 U.S.C. § 670a) (emphasizing that there is a deadline for installations to "prepare and begin implementing [an INRMP] in accordance with Section 101(a) of [the SAIA]").

7. *See* 16 U.S.C. § 670a(b) (required elements of an INRMP).

8. *Id.* § 670e-2.

9. *Id.* §§ 670a(f)(1)-(2).

10. For example, the INRMP can be set aside for an installations failure to comply adequately with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321- 4370 (2000) or Section 7 of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2000), in development of the plan. *See, e.g.*, Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) (concluding that Forest Service Land and Resource Management Plan, while programmatic in nature, is an action reviewable for compliance with NEPA); Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994) (enjoining the Forest Service from implementing timber sales, cattle grazing, road construction and other ground-disturbing activities for Forest Service failure to conduct Section 7 consultation on the effects of implementing the plan on threatened salmon species).

11. 16 U.S.C. §§ 470-470x-6 (2000).

12. 5 U.S.C. § 702 (2000) (identifying parties entitled to a right of review).

13. *Id.* §§ 551(1), (13) (defining agency action to include an agency's failure to act); *id.* § 704 (defining agency actions that are subject to judicial review).

14. *Id.* § 706 (empowering federal district courts to compel agency action unlawfully withheld and to set aside agency action that is: (i) arbitrary and capricious; (ii) an abuse of an agency's discretion; or (iii) amounts to a failure to comply with a procedure required by law).

pare and implement an INRMP); and, if warranted, issue an injunction precluding or limiting certain ground-disturbing activities (for example, training) until the legal deficiency is remedied.[15]

In summary, installations have an affirmative duty to both develop and implement INRMPs. While installations will be accorded discretion in determining how to develop and implement such plans, federal district courts are empowered to review an installation's compliance with the SAIA and provide injunctive relief, if appropriate. To avoid unnecessary litigation risk, environmental law specialists (ELS) can take action. Initially, they should ensure that a thorough and deliberative administrative record supporting development of the INRMP has been maintained and preserved.[16] In addition, ELSs should review INRMPs to ensure that the installation has not made overly burdensome commitments to implement specific projects given the lack of certainty of out-year funding. By including precise lists of projects and schedules, installations may unwittingly narrow their discretion and increase their legal risks where resource limitations require deviation. The INRMP should include language explaining that such projects are not hard commitments, but are included as targets to allow for rational programming.[17] The INRMP should include subject to availability of funding (SAF) funding language developed by the Office of the Director of Environmental Programs noting that annual funding for implementation is not guaranteed, and commit to revisit planning goals and objectives where implementation does not occur as anticipated (that is, adaptive management language). Finally, ELS's should review INRMP implementation on an annual basis to ensure that natural resource managers have identified project requirements and made best efforts to request necessary funding. Scott Farley.

Migratory Bird Rule Does Not Fly with the Supreme Court

On 9 January 2001, the United States Supreme Court issued its opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.[18] At issue was the scope of the Corps of Engineers' regulatory jurisdiction under § 404 of the Clean Water Act (CWA).[19] Specifically, the Court was asked to decide whether the provisions of §404 could be "fairly extended" to "an abandoned sand and gravel pit" that, over time, had evolved into a habitat for migratory birds, and, if so, "whether Congress could exercise such authority consistent with the Commerce Clause."[20] The Court, in a five to four decision delivered by Chief Justice Rehnquist, in which Justices O'Connor, Scalia, Kennedy and Thomas joined, ruled that the Corps exceeded its statutory authority under the CWA when it issued and applied a rule defining its regulatory authority to include jurisdiction over non-navigable, isolated, intrastate waters that serve as a habitat for migratory birds (commonly referred to as the Migratory Bird Rule).[21]

Section 404(a) of the CWA regulates the discharge of dredged or fill material into "navigable waters" by authorizing the Army Corps of Engineers to issue or deny permits for such discharges.[22] Under the CWA, "navigable waters" are defined as "waters of the United States."[23] Corps regulations, in turn, define the term "waters of the United States" to include intrastate waters "the use, degradation, or destruction of which could affect interstate or foreign commerce."[24] In 1986, the Corps, through issuance of its Migratory Bird Rule, "clarified" these regulations, asserting that its jurisdictional authority under the CWA extended to intrastate waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties or . . . other migratory birds which cross state lines."[25]

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15. *Id*.

16. The administrative record should include all relevant information documenting the decisional path of the installation, coordination with the USFWS and state fish and wildlife agency (including their "mutual agreement), and public involvement. It should also include other relevant legal compliance documentation (for example, NEPA documents, Endangered Species Act, Section 7 consultation; NHPA, Section 106 consultation).

17. The following is suggested language:

> Implementation of this Integrated Natural Resource Management Plan is subject to the availability of annual funding. The installation will make best efforts to request funding through appropriate channels. Where projects identified in the plan are not implemented due to lack of funding, or other compelling circumstances, the installation will review the plan's goals and objectives to determine whether adjustments are necessary.

18. 121 S. Ct. 675 (2001).

19. 33 U.S.C. §§ 1251-1387 (2000).

20. *Id*. at 677-78.

21. *Id*. at 678.

22. 33 U.S.C. § 1344(a).

23. *Id*. § 1362 (7).

24. 33 C.F.R. § 328.3(a)(3) (2000).

The *Cook County* case involved an abandoned sand and gravel pit with excavation trenches that had developed into a series of permanent and seasonal ponds frequented, at various times, by numerous migratory bird species. When the Solid Waste Agency of Northern Cook County decided to purchase the site for conversion into a solid waste disposal facility, it contacted the Corps of Engineers to determine if it needed CWA § 404 permits to fill in some of the ponds. After initially determining that it had no jurisdiction, the Corps later concluded that the site, while not a wetland, was a "water of the United States," because the ponds located at the site were used as habitat by migratory birds.[26]

In reversing the Seventh Circuit's decision upholding the Corps' jurisdiction over intrastate waters based on the presence of migratory birds,[27] the Court did not address the issue of whether the Migratory Bird Rule is unconstitutional under the Commerce Clause.[28] Rather, the Court decided the case on narrower statutory grounds.[29] Specifically, the Court rested its opinion on three bases.

First, the Court held that the text of the CWA does not support extending the Corps' regulatory jurisdiction to ponds that are not adjacent to open water.[30] In so ruling, the Court emphasized that § 404 of the CWA grants the Corps regulatory authority over "navigable waters." Citing its earlier opinion in *United States v. Riverside Bayview Homes*,[31] the Court noted that although Congress may have evidenced an intent to allow Corps regulation of *some* waters that could not be characterized as navigable in the traditional sense, such as the adjacent wetlands at issue in *Riverside Bayview Homes*, the plain language of the CWA did not support a more expansive reading.[32] In distinguishing *Riverside Bayview Homes* from *Cook County*, the Court noted, first, that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [its] reading of the CWA in *Riverside Bayview Homes*," and, second, that in *Riverside Bayview Homes*, the Court "did not 'express any opinion' on the 'question of the authority of the Corps to regulate . . . wetlands that are not adjacent to bodies of open water.'"[33]

Second, the Court rejected the argument that Congress' failure to overturn regulations broadening the Corps' § 404 jurisdiction demonstrated its acquiescence to such regulations or any subsequently issued rules (like the Migratory Bird Rule) intended to clarify or explain them.[34] In 1977, the Corps of Engineers promulgated a regulation that defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[35] In *Cook County*, the Corps of Engineers argued that Congress had "recognized and accepted" this broader definition when it failed, as part of the 1977 amendments to the CWA, to enact a bill restricting the meaning of the term "navigable waters" to "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[36] The majority rejected this argument, pointing out that the Court is extremely careful when it recognizes congressional acquiescence to administrative interpretations of a statute, and "[failed] legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute'" since legislation can be proposed or rejected "for any number of reasons."[37]

Third, the Court stated that even if the CWA were not clear, the Migratory Bird Rule was entitled to no deference under

25. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The U.S. Environmental Protection Agency adopted a similar rule in 1988. *See* Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988).

26. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 121 S. Ct. 675, 677-79 (2001).

27. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999).

28. *Cook County*, 121 S. Ct. at 677.

29. *Id.*

30. *Id.* at 680.

31. 474 U.S. 121 (1985).

32. *Cook County*, 121 S. Ct. at 680.

33. *Id*.

34. *Id*. at 682.

35. 33 C.F.R. § 323.2(a)(5) (2000).

36. *Cook County*, 121 S. Ct. at 681. The Corps also argued that when Congress extended the U.S. Environmental Protection Agency's (EPA) jurisdiction under § 404(g)(1) to waters "other than traditional navigable waters" it broadened the concept for purposes of the CWA as a whole. *Id.* The Court rejected this argument, finding that Congress' use of the term "other waters" in § 404 (g) was ambiguous, and, therefore, of no use in resolving the issue. *Id.* at 682.

Chevron v. National Resources Defense Counsel,[38] since the rule raises significant constitutional questions, and Congress did not clearly state that it intended the Corps' jurisdiction under the CWA to extend to intrastate waters that may be used as habitat by migratory birds.[39] In discussing the issue of *Chevron* deference, the court also noted that the Migratory Bird Rule raised important federalism questions that, given the lack of anything "approaching a clear statement from Congress" should not be resolved in a manner that "would result in a significant impingement of the States' traditional and primary power over land and water use."[40]

Although *Cook County* involved dredge and fill permits under § 404 of the CWA, a 19 January 2001 EPA-Corps of Engineers memorandum explaining the meaning and effect of *Cook County* confirms that the decision applies with equal force in the § 402 National Pollutant Discharge Elimination System (NPDES) arena.[41] Like the regulations implementing CWA § 404, the § 402 regulations define "waters of the United States" to include intrastate waters "the use, degradation, or destruction of which could affect interstate or foreign commerce." [42] Further, before *Cook County*, the EPA had accepted the Corps' view that waters that support significant migratory bird use generally possess the requisite interstate commerce nexus to be considered under this definition.[43] Thus, to the extent that regulators or other stakeholders rely solely on the presence of migratory birds to establish federal CWA jurisdiction over non-navigable, isolated intrastate waterways, installations can now argue that water bodies in question are not "water bodies of the United States" and therefore no permits (either NPDES or dredge and fill) are required for discharges into such water bodies. If *Cook County* were interpreted as being limited to cases arising under § 404 of the CWA, this would lead to the rather odd result that permits are required for pollutant discharges into a designated waterway under § 402 of the CWA, but not dredge and fill discharges into the same waterway under § 404. Such an outcome would hardly comport with Congress' stated purpose for enacting the CWA—that is, "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters."[44]

Despite EPA's and the Corps' concession on the issue of § 402 application, the 19 January memorandum makes clear that both agencies view *Cook County* as a limited decision having minimal impact on their "broad" jurisdictional authority under the CWA. Citing numerous quotes from the Supreme Court's decision in *Riverside Bayview Homes*, the EPA and the Corps conclude that Congress intended to define the waters covered by the CWA broadly, despite explicit language in *Cook County* to the contrary. The EPA-Corps memorandum quotes the Court in *Riverside Bayview Homes* as follows:

> Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a *comprehensive legislative attempt* 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' This objective incorporated a *broad, systemic view* of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word integrity . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained . . . .' Protection of aquatic ecosystems, Congress recognized, demanded *broad federal authority* to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source . . . .' *In keeping with these views, Congress chose to define the waters covered by the Act broadly.*[45]
>
> The *regulation* of activities that cause water pollution *cannot rely on . . . artificial lines . . . but must focus on all waters* that together form the entire aquatic system. Water moves

37. *Id.* at 681.

38. 467 U.S. 837 (1984).

39. *Cook County*, 121 S. Ct. at 684.

40. *Id.* at 683-84.

41. 33 U.S.C. § 402 (2000).

42. 40 C.F.R. § 122.2 (2000).

43. *See* Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988).

44. 33 U.S.C. § 1251.

45. Joint Interagency Memorandum, General Counsel, U.S. Environmental Protection Agency and Chief Counsel, U.S. Army Corps of Engineers, subject: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters (19 Jan. 2001) (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 132-33 (1985) (emphasis added)).

> in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.[46]
>
> In view of the *breath of federal regulatory authority* contemplated by the Act itself . . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.[47]

Lost on the Corps and EPA, however, is the *Cook County* majority's clear statement that the *Riverside Bayview Homes* decision hinged on the "significant nexus" between navigable waters and the wetlands at issue, and an examination of Congress's intent solely with regard to the regulation of wetlands "inseparably bound up with the 'waters' of the United States."[48] Further, it appears that EPA and the Corps have turned a blind eye and deaf ear to the Court's counsel in *Cook County* that "navigable waters," as used in the CWA, be read narrowly, since nothing in the CWA's legislative history "signifies that Congress intended to exert anything more than its commerce power over navigation."[49] Consequently, Army installations are likely to continue to encounter situations where there will be disagreement with EPA or the Corps as to whether "waters of the United States" are affected by installation activities. Lieutenant Colonel Little.

Coordination of Enforcement Actions with ELD

Army Regulation (AR) 200-1, chapter 15, contains two important paragraphs for reporting and coordinating environmental enforcement actions with ELD.[50] Environmental law specialists at many installations do an excellent job of following the letter and the spirit of these provisions. However, some ELSs have indicated uncertainty as to what sort of coordination is expected. The following discussion is intended to assist ELSs in their duty to properly coordinate the enforcement actions that they are handling.

Paragraph 15-8 requires that environmental agreements "will be forwarded through command channels to ELD for review prior to signature." As a practical matter, this means that the ELS should coordinate with ELD's Compliance Branch, generally by phone (703-696-1593), fax (703-696-2940), or e-mail (Elizabeth.Arnold@hqda.army.mil), to forward a draft copy of the agreement prior to signature. For the most part, ELSs do a good job of following this paragraph. Naturally, early coordination allows for a more detailed and meaningful review as compared with rushed coordination in contemplation of a short suspense.

The majority of coordination problems occur at the reporting stage for enforcement actions. Note that paragraph 15-7 is entitled "Reporting Potential Liability of Army Activities and People."[51] The word "potential" is significant here, as it should lead to erring on the side of contacting ELD whenever a regulator has indicated an intention to take any sort of enforcement action. Regarding instances of civil liability, the facts of a given case do not always lend themselves to bright-line determinations. Not all regulators specify a fine, for example. Some regulators specify a fine as the statutory maximum, without stating a specific dollar amount. Other regulators engage in discussions during which the subject of a fine is mentioned but never put in writing. In all of these scenarios, ELSs should at least contact ELD to determine whether more extensive coordination under paragraph 15-7 is required.

The following guidance applies to identifying when federal, state, or local environmental regulators trigger the paragraph 15-7 reporting requirement. At the point when the regulator expresses a serious intent to assert himself in relation to an alleged environmental violation, the ELS should report up the chain per *AR 200-1*, paragraph 15-7(c). For those ELSs who are unclear as to the sort of information that needs to be reported per paragraph 15-7, here are some suggestions:

46. *Id.* (citing *Riverside*, 474 U.S. at 133-34 (in turn citing the Preamble to the Corps' 1977 regulations) (emphasis added)).

47. *Id.* (citing *Riverside*, 474 U.S. at 134 (emphasis added)).

48. *Cook* County, 121 S. Ct. at 680.

49. *Id.* at 680 n.3. The Court also cites the Corps' original interpretation of its authority under § 404 of the CWA, as articulated in its 1974 regulations, emphasizing that the Corps itself defined "navigable waters" in terms of "the water body's capability of use by the public for purposes of transportation or commerce . . . ." *Id.* at 680.

50. U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL QUALITY: ENVIRONMENTAL PROTECTION AND ENHANCEMENT, paras. 15-7, 15-8 (21 Feb. 1997) [hereinafter AR 200-1].

51. *Id.* para. 15-7. This paragraph requires reporting of "[a]ny actual *or likely* [enforcement actions] not involving Civil Works that involves a *fine, penalty, fee, tax, media attention, or has potential or off-post impact.*" *Id.* (emphasis added).

(1) name the installation involved, as well as the state in which it is located;
(2) name the statute(s) that the installation allegedly violated;
(3) specify if the regulator is a federal, state or local entity;
(4) provide a copy of the Notice of Violation to ELD, if it was in writing;
(5) if there is no written Notice of Violation, but the regulator has communicated a dollar amount, share that information with ELD. Again, this information can be shared with ELD using the contact information given above.

Providing this information to ELD within forty-eight hours, per the time frame stated in the regulation, will enable ELD to start working with the ELS to identify and work legal issues at an early stage. In some cases, ELD may know of a similar situation at another installation and can then assist the ELS with sharing relevant information. In other words, early reporting and coordination can avoid the proverbial re-invention of the wheel.

After making a quick report within forty-eight hours, the regulation requires written reporting within seven days and a "report of significant developments thereafter." Examples of what constitutes a "significant development" would be:

(1) discovery of evidence that either inculpates or exculpates the installation;
(2) assignment of an administrative law judge (ALJ) to the case;
(3) a synopsis of any conference calls with the regulator or ALJ;
(4) any offers or counter-offers for penalties of any kind;
(5) any plans to assert affirmative defenses, particularly the defense of sovereign immunity.

Even ELSs who are experienced in environmental law practice can benefit from early and regular coordination of their cases. As new court decisions affect policy at the headquarters level, ELSs can best ensure that their strategy is in line with current policy by following paragraphs 15-7 and 15-8 in a proactive fashion. Enforcement actions receive a high level of visibility at the headquarters level, and regular reports on pending cases are shared with the Chief of Staff and the Secretary of the Army. Thus, early reporting of enforcement issues allows ELD to give timely and accurate responses to inquiries that filter to Army leaders through technical channels. Major Arnold.

The Butterfly Effect: New Coastal Zone Management Act Regulations and Army Operations

An oft-cited illustration from chaos theory involves the potential effect of a butterfly flapping its wings in the Amazon causing, through minute but cascading air disturbances, a tornado in Kansas. A similar event for Army operators may have occurred early in December when the National Oceanic and Atmospheric Administration (NOAA) promulgated the final regulations implementing two rounds of amendments to the Coastal Zone Management Act (CZMA).[52]

The CZMA was enacted in 1972 to protect and, where possible, enhance and restore various resources within the coastal zone of the United States largely through encouraging and assisting coastal states to adopt and implement their own management plans. For purposes of the CZMA, the "coastal zone" is considered to be the coastal waters of the United States with the adjacent shorelands "strongly influenced by each other" and includes islands, transitional and intertidal areas, salt marshes, wetlands and beaches extending along both coasts and the Great Lakes.[53] In regard to federal agencies like the Department of the Army, the CZMA is essentially a planning statute and, like other planning statutes such as the NEPA[54] and the NHPA,[55] the CZMA imposes document-and-consult requirements upon federal agencies prior to undertaking actions that "directly affect" the resource in question.[56] Completion of this requirement is usually documented by the agency's receipt of a concurrence with the agency's consistency determination from the state agency involved.[57]

However, while the relatively benign NEPA and NHPA do not impose substantive standards upon agency behavior, the CZMA requires federal agencies to conduct their actions in a manner "consistent to the maximum extent practicable" with the enforceable policies set forth in coastal zone management programs adopted by states and approved by NOAA. The NOAA regulations further articulate this standard to be one of

52. 16 U.S.C. §§ 1451-1465 (2000). The NOAA regulations are published at Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124 (Dec. 8, 2000) (to be codified at 15 C.F.R. part 930).

53. 16 U.S.C. § 1453(1).

54. 42 U.S.C. §§ 4321-4370 (2000).

55. 16 U.S.C. §§ 470-470x-6.

56. *Id.* § 1456(1).

57. 15 C.F.R. §§ 930.36, 930.41 (2001).

mandatory compliance with those policies unless federal law prohibits such compliance, stating:

> The [CZMA] was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing in such agencies. Accordingly, whenever legally permissible, Federal agencies shall consider the enforceable policies of management programs as requirements to be adhered to in addition to existing Federal agency statutory mandates.
>
> . . . Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in federal budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. The only circumstance where a Federal agency may rely on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption described in section 307(c)(1)(B) of the [CZMA] . . . ."[58]

Although harsh, this proscription's impact was historically mitigated for the Army as it applied only to actions that "directly affected" the coastal zone. The precise geographic reach of these provisions was a point of contention for years after the CZMA's initial enactment. In 1984, the Supreme Court held that the Secretary of Interior's sale of Outer Continental Shelf oil and gas leases was not an activity "directly affecting" the coastal zone and thus the Secretary was not required to obtain a consistency determination prior to approving such sales.[59] The Court found that this language, adopted as a compromise during conference on the original 1972 Act, was intended to apply the CZMA only to those federal activities that took place within the coastal zone itself.[60]

In reaction to this decision, Congress replaced §1456(c)(1)'s "directly affecting" language with "Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone . . . ."[61] As noted in the preamble to the final NOAA CZMA regulations, this amendment applies the federal consistency requirement to "any Federal activity, regardless of location, [when that activity] affects any land or water use or natural resource of the coastal zone."[62] Moreover, the agency's analysis must also include reasonably anticipated indirect and cumulative as well as direct effects.[63] "No federal agency activities are categorically exempt from this requirement."[64] Examples of activities with effects on the coastal zone include a National Maritime Fisheries Service rule limiting the catch of a species of fish, a Corps of Engineers rule authorizing activity in navigable waters and wetland, and the establishment of "exclusionary zones" near military ranges and installations.[65]

The nature of the federal action does not determine the applicability of the consistency requirement, but rather whether that action has reasonably foreseeable effects on coastal areas. "For example, a planning document or regulation prepared by a Federal agency would be subject to the federal consistency requirement if coastal effects from those activities [included within the document or regulation] are reasonably foreseeable."[66] The new regulations and preamble do not further define "reasonably foreseeable," leaving it to a case-by-case determination.[67] The regulations cross-reference the Council on Environmental Quality's NEPA regulations in defining "indirect (cumulative and secondary) effects."[68] Planners must thus consider potential symbiotic effects arising from agency and private activities.

58. *Id.* §§ 930.32(a)(2)-(a)(3).

59. Secretary of the Interior v. California, 464 U.S. 312 (1984).

60. *Id.* at 323-24.

61. Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, § 6208, 104 Stat. 1388 (amending § 1456 of the CZMA).

62. Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124 (Dec. 8, 2000) (to be codified at 15 C.F.R. pt. 930).

63. "[T]he term 'affecting' is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable." H.R. CONF. REP. NO. 101-964, at 968 (1990); *see also* 136 CONG. REC. H12,695 (1990).

64. H.R. CONF. REP. NO. 101-964, at 970.

65. Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. at 77,131.

66. *Id.* at 77,130.

67. *Id*.

68. *Id*.

Given the breadth of these new requirements, Army planners are advised to take advantage of two programmatic aspects of the consistency requirement. First, 15 C.F.R. § 930.33(a)(3) allows federal agencies to identify activities having a de minimis effect on the coastal zone. If the state concurs with such identification, the agency need not again subject those activities to state review.[69] As the regulatory definition of de minimis is couched in terms of "insignificant direct or indirect (cumulative and secondary) coastal effects," planners may be able to look to NEPA environmental assessment (EA), and finding of no significant impact (FONSI) standards for guidance in making such a determination, and consistent with the CZMA procedural requirements, use a NEPA EA "as a vehicle for . . . consistency determination[s] or negative determination[s].[70]

Second, the NOAA regulations provide for federal agency submission of general consistency determinations where the agency "will be performing repeated activity other than a development project ([for example], ongoing maintenance, waste disposal) which cumulatively has an effect upon any coastal use or resource . . . ."[71] Although the agency is required to periodically consult with the state agency regarding the manner in which incremental activities are undertaken,[72] this approach may have value as applied to frequently repeated training activities which may have more than a de minimis effect upon the coastal zone.

As always, consultation with installation or regional ELSs is strongly encouraged. Major Kohns, USAR.

69. 15 C.F.R. § 930.33(a)(3)(i) (2001).

70. *Id.* § 930.37.

71. *Id.* § 930.36c.

72. *Id.*

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

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

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

2. TJAGSA CLE Course Schedule

2001

June 2001

4-7 June	4th Intelligence Law Workshop (5F-F41).
4-8 June	166th Senior Officers Legal Orientation Course (5F-F1).
4 June-13 July	8th JA Warrant Officer Basic Course (7A-550A0).
4-15 June	6th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
5-29 June	155th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
6-8 June	Judge Advocate Recruiting Conference (JARC-181).
11-15 June	31st Staff Judge Advocate Course (5F-F52).
18-22 June	5th Chief Legal NCO Course (512-71D-CLNCO).

July 2001

8-13 July	12th Legal Administrators Course (7A-550A1).
9-10 July	32d Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16 July-31 August	5th Court Reporter Course (512-71DC5).
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
13 August-23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-31 August	36th Operational Law Seminar (5F-F47).

September 2001

10-14 September	2d Court Reporting Symposium (512-71DC6).

10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-12 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
24-25 September	32d Methods of Instruction Course (Phase II) (5F-F70).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October-20 November	6th Court Reporter Course (512-71DC5).
9-26 October-	2d JA Warrant Officer Advanced Course (7A-550A2).
12 October-21 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
22-26 October	55th Federal Labor Relations Course (5F-F22)
23-26 October	FY 2002 USAREUR Legal Assistance CLE (5F-F23E).
29 October-2 November	61st Fiscal Law Course (5F-F12).

November 2001

12-16 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
3-7 December	2001 Government Contract Law Symposium (5F-F11).
10-14 December	5th Tax Law for Attorneys Course (5F-F28)

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7 January-26 February	7th Court Reporter Course (512-71DC5).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
15-18 January	2002 USAREUR Tax CLE (5F-F28E).
16-18 January	8th RC General Officers Legal Orientation Course (5F-F3).
20 January-1 February	2002 JAOAC (Phase II) (5F-F55).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2001 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).

18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	4th Contract Litigation Course (5F-F103).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

1-5 April	26th Admin Law for Military Installations Course (5F-F24).
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Legal NCOs Course (512-71D/20/30).
22-25 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

13-17 May	50th Legal Assistance Course (5F-F23).

June 2002

3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	7th RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC).
3 June-12 July	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-22 June	6th Chief Legal NCO Course 512-71D-CLNCO).
17-28 June	7th RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC).
24-26 June	Career Services Directors Conference.
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-9 July	33d Methods of Instruction Course (Phase I) (5F-F70).
8-12 July	13th Legal Administrators Course (7A-550A1).
15 July-9 August	3d JA Warrant Officer Advanced Course (7A-550A2).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-30 August	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-May 2003	51st Graduate Course (5-27-C22).
19-23 August	8th Military Justice Managers Course (5F-F31).
19-30 August	38th Operational Law Seminar (5F-F47).

September 2002

4-6 September	2002 USAREUR Legal Assistance CLE (5F-F23E).
9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
9-20 September	18th Criminal Law Advocacy Course (5F-F34).
11-13 September	3d Court Reporting Symposium (512-71DC6).

16-20 September	51st Legal Assistance Course (5F-F23).
23-24 September	33d Methods of Instruction Course (Phase II) (5F-F70).

3. Civilian-Sponsored CLE Courses

15-19 Oct	Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	December 31, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2001 issue of *The Army Lawyer.*

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

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2001***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2001 (hereafter "2001 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2001***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2001 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2001 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2001 JAOAC.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil. Lieutenant Colonel Goetzke.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available through DTIC, see the March 2001 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2001 issue of *The Army Lawyer.*

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

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

b. Access to theJAGCNet:

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

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

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

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

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

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

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

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

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

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

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

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

(f) Once granted access to JAGCNet, follow step (b), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2001 issue of *The Army Lawyer.*

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

All students that wish to access their office e-mail, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you

when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal http://ako.us.army.mil and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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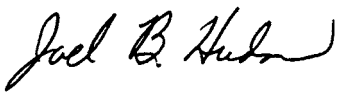

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