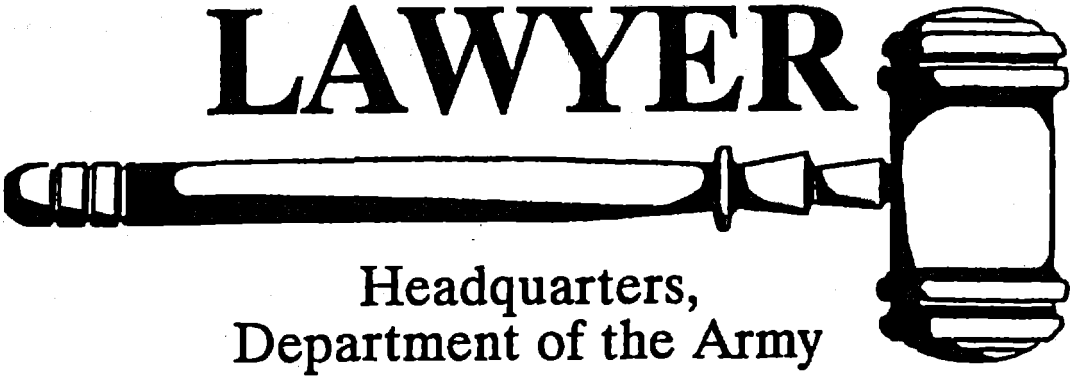
THE ARMY LAWYER



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When the Military Judge Is No Longer Impartial: A Survey of the Law and Suggestions for Counsel

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Introduction

> *During the course of the trial, I saw a distinct difference between the way the military judge treated the prosecutors and the way he treated the defense counsel. . . . I noted a number of occasions when the military judge appeared to treat the defense counsel with scorn. . . . [A]t one point during the course of the trial, I commented on this treatment to the other two members of the court-martial. . . . On a number of these occasions, when the judge disagreed with defense counsel and ruled against him, the judge scowled at the defense counsel.*[1]
>
> —*Affidavit of Senior Member, case of* United States v. Lance Corporal Anthony A. Chambers, U.S.M.C.

The military judge occupies a central place in a court-martial. From the bench, the military judge surveys the ebb and flow of the trial, bound by his mandate to see justice done. Yet the judge is no "mere referee."[2] Not only must the military judge supervise the interplay among counsel, witnesses, and the members, the judge also must ensure that "the jury is provided the information it needs"[3] to arrive at a just decision. In so doing, the judge may at times question witnesses called by counsel,[4] call other witnesses to present testimony,[5] and assist counsel in their presentation.[6]

Providing this assistance carries a risk. While a judge has the authority, and in some cases the duty, to intervene during the course of a trial, the judge must at the same time "scrupulously avoid . . . even the slightest appearance of partiality."[7] The COMA has compared the judge's performance of these dual roles to walking a "tightrope."[8]

Court members invariably will attempt to uncover the judge's opinion in a case.[9] If, through the manner of the judge's questions, the tone of voice, or the tenor of his responses to counsel, the judge abandons his impartiality and becomes a de facto advocate for the government, the members will sense this. In these cases, the accused no longer receives the fair trial envisioned by the drafters of the Uniform Code of Military Justice (UCMJ), and the judge commits reversible error.[10]

This article explores the proper role of the military judge. First, it recounts the evolution of the judge's role, from law member, to law officer, to military judge. Second, it describes the authority of, and limitations on, military judges as they attempt to walk the "tightrope" at courts-martial today. Third, it examines the case law in this area, highlighting cases where

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[1] Excerpts from the posttrial affidavit of the senior member in *United States v. Lance Corporal A.A. Chambers, U.S. Marine Corps* (tried December 1993 at Marine Corps Air Station, El Toro, California). I served as trial defense counsel in the case and I used the affidavit to support a claim in my Rule for Courts-Martial (R.C.M.) 1105 matters that the judge abandoned his impartial role at the trial.

[2] United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975). *See also* Norman G. Cooper, *The Military Judge: More Than a Mere Referee*, ARMY LAW., Aug. 1976, at 1 (discussing the Court of Military Appeals' (COMA) expansion of the judge's role during the previous year. The military judge "not only must spot the foul and blow the whistle, but at times he must take the foul shot himself to offset the government's supposed home court advantage."). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2633 (1994), changed the name of the COMA to the Court of Appeals for the Armed Forces (CAAF) and changed the names of the various Courts of Military Review to the Courts of Criminal Appeals. This article will use the title of the court that was in place at the time that the decision was published.

[3] United States v. Shackleford, 2 M.J. 17, 19 (C.M.A. 1976).

[4] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 614(b) (1994 ed.) [hereinafter MCM].

[5] *Id.* MIL. R. EVID. 614(a); *see also id.* R.C.M. 801(c).

[6] United States v. Payne, 31 C.M.R. 41, 48 (C.M.A. 1961) ("Occasional suggestions and recommendations by the law officer to counsel who appear unsure or uncertain of the proper procedure to follow, like the occasional questioning of witnesses, are not unusual in the trial of a case."); *see also* United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990) (finding no error where the military judge helped trial counsel to lay the foundation for expert testimony).

[7] *Shackleford*, 2 M.J. at 19.

[8] *Id.*

[9] United States v. Clower, 48 C.M.R. 307, 310 (C.M.A. 1974).

[10] United States v. Jordan, 45 C.M.R. 719, 724 (A.C.M.R. 1972).

judges have abandoned their impartial roles to the detriment of the accused. Finally, it suggests ways for counsel to protect the accused and the record from the overzealous judge.

Evolution of the Military Judge

The military judge is the most dominant figure in a trial by court-martial.[11]

From the time Congress enacted the 1916 Articles of War[12] to the present, the power and authority of the military judge have expanded exponentially.[13]

The 1916 Articles neither provided for a military judge nor required that the "legal advisor" (*i.e.*, the prosecutor) be an attorney.[14] Following World War I, and in response to complaints that the 1916 Articles did not adequately protect the rights of the accused,[15] Congress enacted the 1920 Articles of War.[16]

The 1920 Articles created the position of "law member," who was to come—"whenever possible"—from the Army's Judge Advocate Department.[17] The law member ruled on interlocutory matters,[18] deliberated with the court,[19] and voted on the findings and the sentence.[20] Following World War II, again in response to complaints from the civilian sector and veterans groups,[21] Congress drafted the 1948 Articles of War.[22]

The 1948 Articles strengthened the position of the law member. First, they *required* that the law member be an attorney on active duty or a member of the Judge Advocate Department.[23] Next, they prohibited the court from meeting outside the presence of the law member.[24] Finally, they directed the law member to instruct the court prior to deliberations.[25]

"A law member under the 1948 Articles, however, still was not the independent arbiter for which society clamored."[26] Consequently, in 1950, Congress enacted the UCMJ.[27] With the UCMJ, Congress created the position of "law officer"—the precursor to today's military judge—and vested considerably more power than the law member had enjoyed previously.[28] Debate in the House Armed Services Committee indicates that Congress intended the law officer to be analogous to a judge in a civilian court,[29] and subsequent decisions from the COMA solidified this view.[30]

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[11] United States v. Hardy, 30 M.J. 757, 760 (A.C.M.R. 1990), *pet. denied*, 32 M.J. 486 (C.M.A. 1991).

[12] Act of August 29, 1916, Pub. L. No. 242, 39 Stat. 619 [hereinafter 1916 Articles].

[13] *See generally* Criminal Law Div. Note, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 23 [hereinafter Criminal Law Div. Note] (discussing how Congress and the COMA have, over the years, increasingly expanded and "civilianized" the office of the military judge).

[14] *Id.*

[15] *Id.*

[16] Act of June 4, 1920, Pub. L. No. 242, 41 Stat. 759 (codified at 10 U.S.C. §§ 1471-1953 (1922) (repealed)) [hereinafter 1920 Articles].

[17] *Id.* art. 8.

[18] *Id.* art. 31.

[19] *Id.* art. 8.

[20] *Id.*

[21] Criminal Law Div. Note, *supra* note 13, at 23-24.

[22] Act of June 24, 1948, Pub. L. No. 758, 62 Stat. 604 [hereinafter 1948 Articles].

[23] *Id.* art. 8.

[24] *Id.*

[25] *Id.* art. 31.

[26] Criminal Law Div. Note, *supra* note 13, at 24.

[27] Pub. L. No. 81-506, 64 Stat. 127 (1950).

[28] Criminal Law Div. Note, *supra* note 13, at 24.

[29] *See id.* at 24 nn.22-23 and accompanying text.

[30] *See, e.g.*, United States v. Berry, 2 C.M.R. 141, 147 (C.M.A. 1952) ("legislative background of the Uniform Code makes clear beyond question Congress' conception of the law officer as [a] judge"); United States v. Keith, 4 C.M.R. 85 (C.M.A. 1952) (reversing a conviction where the law officer consulted with the members while the accused and counsel were not present. The court noted that the law officer did not act in the manner expected of a civilian judge under similar circumstances.).

In the Military Justice Act of 1968,[31] Congress again responded to wartime criticisms of the military justice system, this time by amending certain provisions of the UCMJ. "The amendments to Articles 26, 39 and 66 . . . marked the dramatic shift in the stature of the Military Judge."[32] The resultant system conformed in large measure to the procedures that applied in federal district courts.[33]

> The Military Justice Act of 1968 established an independent trial judiciary, provided for the detailing of a military judge to preside over each court-martial, and adopted a procedural provision . . . that permitted an accused to request a trial by judge alone. The Act also enumerated specific powers of the military judge, although this list by no means was exhaustive.[34]

In addition to transforming the "law officer" into a "military judge," the 1968 Act adopted Article 39(a)[35] which gave the military judge authority to hold sessions of the court outside the presence of the members[36]—a significant power. Later rulings from the COMA indicated that the judge's authority at these sessions is broad and wide ranging.[37]

In the Military Justice Act of 1983,[38] and in the 1984 *Manual for Courts-Martial*,[39] (*Manual*) the Congress and the President confirmed the COMA's expansive reading of Article 39(a). For example, the 1984 *Manual* authorized the military judge to hold *posttrial* sessions under Article 39(a).[40] This power extends up to the time of authentication of the record of trial.[41]

The Military Judge Today—Authority and Limitations

> *It is well settled in military law that the trial judge is not a mere umpire in the contest between the Government and the accused. . . . [H]owever, he cannot lay aside impartiality, and become an advocate for one side or the other. If he does he commits reversible error.*[42]

Authority of the Military Judge

"The military judge is the presiding officer in a court-martial"[43] and, accordingly, wields immense power. During the course of any particular court, the military judge may:

1. Regulate discovery;[44]
2. Set the time and uniform for each session;[45]
3. Hold sessions outside the presence of the members;[46]
4. Determine the order for litigating motions;[47]
5. Control the manner of conducting voir dire;[48]

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[31] Pub. L. No. 90-632, 82 Stat. 1335 (1968).

[32] General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code Of Military Justice In Combat*, 3 HARV. J.L. & PUB. POL'Y 1, 15 n.52 (1980).

[33] Criminal Law Div. Note, *supra* note 13, at 25.

[34] *Id.* (citations omitted).

[35] UCMJ art. 39(a) (1968) (amended 1983).

[36] *Id.*

[37] *See generally* Criminal Law Div. Note, *supra* note 13, at 26-29 (discussing various cases in which the COMA has addressed a trial court's Article 39(a) authority).

[38] Pub. L. No. 98-209, 97 Stat. 1393 (1983) (amending UCMJ articles 1-140).

[39] MANUAL FOR COURTS-MARTIAL, United States (1984) [hereinafter 1984 MANUAL].

[40] *Id.* R.C.M. 1102.

[41] *Id.*

[42] United States v. Jordan, 45 C.M.R. 719, 724 (A.C.M.R. 1972).

[43] MCM, *supra* note 4, R.C.M. 801(a).

[44] *Id.* R.C.M. 701(g).

[45] *Id.* R.C.M. 801(a)(1).

[46] *Id.* R.C.M. 803.

[47] *Id.* R.C.M. 801(a)(3) discussion.

[48] *Id.* R.C.M. 912(d).

6. Rule on admissibility of evidence;[49]

7. Permit the court to view premises or places;[50]

8. Regulate the mode and order of witness testimony;[51]

9. Call and question witnesses;[52]

10. Rule on interlocutory questions and questions of law;[53]

11. Control the order and manner of arguments;[54]

12. Instruct the members on the law and on procedure;[55] and

13. Exercise contempt power.[56]

Further, a court-martial may not meet, except when closed for deliberations, without the military judge.[57]

Until the convening authority acts on the case, the judge's authority extends even after adjournment.[58] In *United States v. Griffith*,[59] the COMA held that a military judge may "take remedial action" if, before authenticating the record, the judge discovers an "error which has prejudiced the rights of the accused."[60] According to the COMA, these errors may involve "jury misconduct, misleading instructions, or insufficient evidence."[61] *Griffith* allows a judge—when faced with the members' finding of guilty which the evidence does not support—to enter a finding of not guilty.

Similarly, when a court discovers new evidence after entering findings of guilty, *United States v. Scaff*[62] authorizes the judge to reopen the case and, if the evidence warrants, to set aside the findings. *Scaff* involved a conviction for wrongful use of cocaine. Following the trial, the accused requested a 39(a) session for the judge to consider an affidavit. The affiant stated that she put the drug in the accused's drink without his knowledge.[63] The judge empathized with the accused but stated that he did not have the power to dismiss the charge.[64] The COMA disagreed and returned the record for further proceedings.[65]

Limitations on the Military Judge

The UCMJ and the *Manual*

Both the UCMJ and the *Manual* recognize the necessity for an impartial, unbiased trial judiciary.

Article 26, UCMJ, discusses the role of the military judge.[66] To maintain the judge's independence, Article 26 requires the convening authority and members of the convening authori-

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[49] *Id.* MIL. R. EVID. 104(a).

[50] *Id.* R.C.M. 913(c)(3).

[51] *Id.* MIL. R. EVID. 611(a).

[52] *Id.* MIL. R. EVID. 614.

[53] *Id.* R.C.M. 801(a)(4).

[54] *Id.* R.C.M. 801(a)(3) discussion.

[55] *Id.* R.C.M. 801(a)(5).

[56] *Id.* R.C.M. 809.

[57] *Id.* R.C.M. 805(a). This assumes that a military judge has been detailed to the court. Article 26(a), UCMJ, and R.C.M. 501(a) permit convening authorities to create special courts-martial without military judges. A discussion of such courts is beyond the scope of this article.

[58] *Id.* R.C.M. 803. For a complete discussion of the military judge's posttrial authority, *see* Randy L. Woolf, *The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan. 1991, at 27 (addressing the three types of posttrial hearings—39(a) sessions, proceedings in revision, and *DuBay* hearings—through which a defense counsel may remedy prejudicial trial defects).

[59] 27 M.J. 42 (C.M.A. 1988).

[60] *Id.* at 47.

[61] *Id.*

[62] 29 M.J. 60 (C.M.A. 1989).

[63] *Id.* at 62.

[64] *Id.* at 64.

[65] *Id.* at 67.

[66] *See generally* UCMJ art. 26 (1994).

ty's staff to be detached from the judge's performance evaluation.[67] Furthermore, Article 26 states that the military judge may not preside in a case if he or she is the accuser,[68] a witness for the prosecution,[69] or has served as investigating officer or counsel on the case.[70] The judge may not consult with the members outside the presence of counsel and the accused,[71] nor vote with the members.[72] These standards, although limited, insulate the military judge from external, potentially biasing influences.

In those cases where allegations of unfitness arise concerning a judge's performance, Article 6a, UCMJ, requires investigation and, if warranted, discipline of the offending judge.[73]

Likewise, the *Manual* stresses the importance of an unbiased trial judiciary. Rule for Courts-Martial (RCM) 801(a)(3) mandates that the military judge "must avoid undue interference with the parties' presentations or the appearance of partiality."[74]

Rule for Courts-Martial 902 goes further, requiring military judges to disqualify themselves "in any proceeding in which [their] impartiality might reasonably be questioned."[75] In addition to this general requirement, the rule lists various specific grounds which will disqualify a judge from a particular case.[76] Most of these disqualifiers—such as whether the judge is a witness in the case,[77] related to a party,[78] or not properly detailed[79]—are self evident and seldom subject to dispute.

The more difficult cases involve the general requirement of impartiality,[80] questions of personal bias,[81] or expressions of opinion regarding the guilt or innocence of the accused.[82] When the courts address such cases, they generally engage in a fact-specific, subjective balancing to determine whether military judges have abandoned their neutral and impartial roles to the detriment of the accused.[83]

When a military judge exhibits either "judicial misconduct or unfitness," RCM 109(c) requires investigation and disci-

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[67] *Id.* art. 26(c).

[68] *Id.* art. 26(d).

[69] *Id.* By its terms, Article 26(c) does not disqualify a judge if he or she is a witness for the *defense*. Whether or not the drafters intended this is interesting only from an academic point of view. Rule for Courts-Martial 902(b)(3), which implements Article 26(c), requires the military judge to disqualify himself "Where the military judge has been or will be a witness *in the same case*. . . ." (emphasis added). Accordingly, whether the judge testifies for the prosecution or for the defense, the same result occurs—disqualification.

[70] UCMJ art. 26(d) (1994).

[71] *Id.* art. 26(e).

[72] *Id.*

[73] *Id.* art. 6a.

[74] MCM, *supra* note 4, R.C.M. 801(a)(3) discussion. This provision traces its roots to both the 1951 and the 1969 *Manuals*. The 1951 *Manual* provided:

> [The law officer] should bear in mind that his undue interference or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, may tend to prevent the proper presentation of the case, or hinder the ascertainment of the truth. . . . In addressing counsel, the accused, witnesses, or the court, he should avoid a controversial manner or tone. He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgement.

MANUAL FOR COURTS-MARTIAL, United States, ¶ 39(b)(2) (1951).

The 1969 *Manual*, substituting "military judge" for "law officer," adopts this provision nearly verbatim. MANUAL FOR COURTS-MARTIAL, United States, ¶ 39(b)(4) (rev. ed. 1969).

[75] MCM, *supra* note 4, R.C.M. 902(a).

[76] *Id.* R.C.M. 902(b).

[77] *Id.* R.C.M. 902(b)(3).

[78] *Id.* R.C.M. 902(b)(5).

[79] *Id.* R.C.M. 902(b)(4).

[80] *Id.* R.C.M. 902(a).

[81] *Id.* R.C.M. 902(b)(1).

[82] *Id.* R.C.M. 902(b)(3).

[83] *See generally infra* notes 121-242 and accompanying text.

pline of the offending party.[84] The term "unfitness" includes demonstrated partiality on the part of the judge.[85]

Rules of Professional Conduct

Various professional rules govern the conduct of military judges.

In August 1990, the House of Delegates of the American Bar Association (ABA) adopted the *ABA Code of Judicial Conduct (ABA Code)*.[86] The *ABA Code* replaced a previous edition, which the ABA had last amended in 1984.[87] It contains five Canons—broad, authoritative rules of conduct—followed by sections, also authoritative, which amplify the Canons.[88] Commentary, which further explains the Canons and sections, follows each section.[89]

To the extent that the *ABA Code* is consistent with the UCMJ, the *Manual*, and service regulations, it governs the conduct of military judges. Regulations in the Army,[90] the Navy,[91] and the Coast Guard[92] apply the *ABA Code*, as written, to military judges. The Air Force has modified the *ABA Code* into a separate regulation.[93] The COMA considers the *Code* to be controlling at courts-martial.[94]

The concern over a judge's impartiality permeates the *ABA Code*. In the sections and commentary following Canon 3,[95] the drafters target the judge's responsibility in this regard. The military judge must do the following:

1. "Be patient, dignified and courteous to litigants;"[96]

2. "Perform judicial duties without bias or prejudice;"[97]

3. "[Avoid] facial expression and body language . . . [which] can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias;"[98]

4. "Be alert to avoid behavior that may be perceived as prejudicial;"[99] and,

5. "Disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[100]

A violation of these rules, like a violation of those contained in the UCMJ and the *Manual*, ultimately could result in

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[84] MCM, *supra* note 4, R.C.M. 109(c)(2).

[85] *Id.* R.C.M. 109(c)(2) discussion. "The term 'unfitness' should be construed broadly, including, for example, matters relating to the incompetence, *impartiality*, and misconduct of the judge. Erroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process." *Id.* (emphasis added).

[86] ABA CODE OF JUDICIAL CONDUCT (1990) [hereinafter ABA CODE].

[87] *Id.*

[88] *Id.* Preamble.

[89] *Id.*

[90] DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICE, para. 7-4 (15 Oct. 1989) [hereinafter AR 27-1]; DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 5-8 (8 Sept. 1994) [hereinafter AR 27-10].

[91] DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5803.1A, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE SUPERVISION OF THE JUDGE ADVOCATE GENERAL, para. 7 (13 July 1992) [hereinafter JAG INSTR. 5803.1A].

[92] DEP'T OF TRANSPORTATION, COAST GUARD MILITARY JUSTICE MANUAL, §§ A-1, A-2, ch. 6 (1987) [hereinafter COAST GUARD MANUAL]. *See also* United States v. Whidbee, 28 M.J. 823 (C.G.C.M.R. 1989).

[93] DEP'T OF AIR FORCE, AF/JA OPERATING INSTRUCTION NO. 4, UNIFORM CODE OF JUDICIAL CONDUCT FOR MILITARY TRIAL AND APPELLATE JUDGES AND UNIFORM REGULATIONS AND PROCEDURES RELATING TO JUDICIAL DISCIPLINE (15 Feb. 1991) [hereinafter AF/JA 4].

[94] *See, e.g.*, United States v. Hamilton, 41 M.J. 32 (C.M.A. 1994); United States v. Martinez, 40 M.J. 82 (C.M.A. 1994); United States v. Mitchell, 39 M.J. 131 (C.M.A. 1994); (applying provisions of the *ABA Code* to decisions from the Army, Air Force, and Navy-Marine Corps Courts of Military Review, respectively).

[95] Canon 3 provides, "A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY." ABA CODE, *supra* note 86, Canon 3.

[96] *Id.* § B(4).

[97] *Id.* § B(5).

[98] *Id.* § B(5) commentary.

[99] *Id.*

[100] *Id.* § E. The language of this provision mirrors that of R.C.M. 902(a), Disqualification of Military Judge. The analysis to R.C.M. 902 states, in relevant part, "This rule is based on 28 U.S.C. § 455, which is itself based on Canon III of the *ABA Code of Judicial Conduct*. . . ." MCM, *supra* note 4, R.C.M. 902 analysis, app. 21 at A21-48.

disciplinary proceedings against the military judge involved.[101]

In 1963, the ABA Standards Committee began work on the *ABA Standards for Criminal Justice* (*ABA Standards*).[102] The current (second) edition of the *ABA Standards*—published in 1980 and supplemented in 1986—is a four-volume set including: *The Prosecution Function*, *The Defense Function*, and *Special Functions of the Trial Judge* (*ABA Standards: Special Functions of the Trial Judge*).[103] These black-letter standards cover a wide range of criminal procedure matters.[104] Commentary, which provides updated discussion of the relevant case law, follows each standard.[105]

To the extent they do not conflict with the UCMJ, the *Manual*, or other military regulations, the *ABA Standards: Special Functions of the Trial Judge*, apply to military judges. The Army[106] and the Coast Guard[107] have incorporated the *ABA Standards* by reference in service regulations. The Air Force has edited the *ABA Standards* into a specific military regulation.[108] Although Navy regulations do not discuss the *ABA Standards*, the Navy-Marine Corps Court of Military Review (NMCMR) and the COMA (along with the other service appellate courts) have cited the *Standards* as controlling authority.[109]

Like the *ABA Code*, the *ABA Standards: Special Functions of the Trial Judge* stress the importance of the judge's impartiality. These standards recognize the broad authority which trial judges possess,[110] but also require them to:

1. "Manifest professional respect, courtesy, and fairness toward counsel;"[111]

2. "Be particularly careful by his or her demeanor not to convey unintended messages to the jury or to the participants in the trial process. Even the matter of facial expression may be misinterpreted;"[112]

3. "Maintain impartiality;"[113]

4. "Recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned;"[114]

5. "Respect the obligation of counsel to present objections to procedures and to admissibility of evidence, to request rulings on motions, to make

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[101] *See generally* MCM, *supra* note 4, R.C.M. 109(c) (regarding investigation and discipline of military judges); *see also* discussion of the *ABA Code's* applicability to military judges, *supra* notes 90-94 and accompanying text.

[102] ABA STANDARDS FOR CRIMINAL JUSTICE, Preface (2d ed. Supp. 1986) [hereinafter ABA STANDARDS].

[103] *Id.* In 1993, the ABA published a separate (third) edition to *The Prosecution Function* and *The Defense Function*. The current, complete edition of the *ABA Standards*, however, remains the second edition, as updated by the 1986 supplement. *See generally* LEXIS, American Bar Association Library, BIBLIO file.

[104] *See generally* ABA STANDARDS, *supra* note 102.

[105] *Id.*

[106] AR 27-10, *supra* note 90, para. 5-8.

[107] COAST GUARD MANUAL, *supra* note 92, §§ A-1, A-2, ch. 6. *See also* United States v. Whidbee, 28 M.J. 823 (C.G.C.M.R. 1989).

[108] DEP'T OF AIR FORCE, AF/JA TJAG POLICY NO. 26, RULES OF PROFESSIONAL RESPONSIBILITY AND USAF STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE (1 July 1994) [hereinafter AF/JA 26].

[109] United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993); United States v. Loving, 41 M.J. 213, 327 (C.A.A.F. 1994). *See also* United States v. Gray, 32 M.J. 730, 733 (A.C.M.R. 1991); United States v. Jeffries, 33 M.J. 826, 830 (A.F.C.M.R. 1991); United States v. Courts, 4 M.J. 518, 524 (C.G.C.M.R. 1977).

[110] *See generally*, ABA STANDARDS, *supra* note 102, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.1 commentary (2d ed. 1980).

> [I]t is the proper role and function of a trial judge to exercise his or her judicial powers in such a manner as to give a jury the opportunity to decide a case free from irrelevant issues and appeals to passion and prejudice. In addition, it is appropriate for the trial judge from time to time to intervene in the conduct of a case. Thus, when it clearly appears to the judge that for one reason or another the case is not being presented intelligibly to the jury, the judge is not required to remain silent. On the contrary, the judge may, by questions to a witness, elicit relevant and important facts. The judge may interrogate a witness after a cross-examination that appears to be misleading to the jury. The judge may also give interim explanations to the jury of the procedure of the trial, advise as to the applicability of the evidence to the issues, and state applicable principles of law.

Id. (citations omitted).

[111] *Id.* Standard 6-1.1(c).

[112] *Id.* Standard 6-1.3 commentary.

[113] *Id.* Standard 6-1.5.

[114] *Id.* Standard 6-1.7.

offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial;"[115]

6. "Exercise self-restraint and fairness in permitting counsel for the prosecution and for the defense to perform their duties. . . . Improper judicial obstruction or refusal can only diminish confidence in the impartiality of the court;"[116] and

7. "Suppress personal predilections, and control his or her temper and emotions."[117]

These standards, like the previously discussed provisions from the *ABA Code*, the UCMJ, and the *Manual*, limit the considerable power a military judge possesses at a court-martial.

In addition to the rules addressing the conduct of judges, each of the military services has rules of professional conduct mirroring the *Model Rules of Professional Conduct* (*Rules*).[118] One provision of these *Rules* is worth noting. Rule 8.3(b), Reporting Professional Misconduct, states:

> A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office *shall* inform the appropriate authority.[119]

This provision is not discretionary. When trial counsel become aware of this violation, they must report it. Failure to do so violates the *Rules*.[120]

When Judges Abandon Their Impartiality

> *Applying these judicial precedents and principles to the facts of record in the instant case, we find that the appellant was denied a fair hearing in the trial forum as a result of the above-described rulings, comments, and actions by the military judge which, in toto, materially strengthened the prosecution case before the triers of fact and, at the same time, improperly limited that of the defense.*[121]

Ours is an adversarial system of justice.[122] From the clash of two well-met adversaries—battling within the arena of the courtroom—emerge the facts which frame the dispute. Notwithstanding the criticisms of this system,[123] when the contest occurs before an unbiased and competent judge, it usually produces the truth.

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[115] *Id.* Standard 6-2.4.

[116] *Id.* Standard 6-2.4 commentary (citations omitted).

[117] *Id.* Standard 6-3.4.

> The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom. When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Id. Almost one hundred years ago a court remarked:

> [I]t is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness's testimony or the merits of the case, they almost invariably follow them.

State v. Philpot, 66 N.W. 730, 732 (Iowa 1896). These sentiments apply with equal force today.

[118] ABA Model RULES OF PROFESSIONAL CONDUCT (1989) [hereinafter MODEL RULES]. *See generally* DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, (1 May 1992) [hereinafter AR 27-26]; JAG INSTR. 5803.1A, *supra* note 91; AF/JA 26, *supra* note 108. The Coast Guard has adopted the ABA standards by reference in departmental regulation. *See* COAST GUARD MANUAL, *supra* note 92, §§ A-1, A-2, ch. 6. *See also* United States v. Whidbee, 28 M.J. 823 (C.G.C.M.R. 1989). Additionally, the COMA considers the *Rules* to be authoritative. United States v. Meeks, 41 M.J. 150, 158 (C.M.A. 1994); United States v. Hamilton, 41 M.J. 22, 26 (C.M.A. 1994).

[119] AR 27-26, *supra* note 118, Rule 8.3(b); AF/JA 26, *supra* note 108, Rule 8.3(b). The Navy rule modifies this language slightly: "shall *report such violation pursuant to regulations promulgated by the Judge Advocate General.*" JAG INSTR. 5803.1A, *supra* note 91, Rule 8.3(b) (emphasis added).

[120] AR 27-26, *supra* note 118, Rule 8.4(a); AF/JA 26, *supra* note 108, Rule 8.4(a) ("It is unprofessional conduct for a lawyer to violate or attempt to violate these Rules. . . ."). JAG INSTR. 5803.1A, *supra* note 91, Rule 8.4a(1) ("It is professional misconduct for a judge advocate to violate or attempt to violate these Rules. . . .").

[121] United States v. Thomas, 18 M.J. 545, 559 (A.C.M.R. 1984).

[122] *See* Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE, Oct.-Nov. 1992, at 109.

[123] *See, e.g.*, Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992); Paul L. Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J., Spring 1990, at 445.

However, in those cases in which trial judges abandon their impartiality, they deny the accused the fair trial envisioned by the Fifth Amendment,[124] and commit reversible error.[125]

This article will now examine several areas of trial practice where judges may tend to abandon, and have abandoned, their impartiality. In addition to military cases, the article will address examples from federal appellate courts. Although federal precedent may not always control in a court-martial,[126] it provides both persuasive authority[127] and a longer historical time frame[128] with which to analyze trial judges' actions.

Restricting Defense Voir Dire

Voir dire marks the first opportunity for defense counsel to address the members of the court. Through a well-crafted voir dire, not only can counsel "obtain information for the intelligent exercise of challenges,"[129] but counsel also can endear themselves to the members and introduce the members to the defense theory of the case.[130] Counsel should embrace this opportunity with enthusiasm.

The military judge controls voir dire.[131] If the military judge deems it proper, he or she may preclude counsel from asking certain questions or from questioning the members altogether.[132] Yet the *Manual* limits the judge in this regard: "Ordinarily, the military judge should permit counsel to personally question the members."[133]

Likewise, the appellate courts have stressed the importance of allowing wide latitude to the defense. In *United States v. Parker*,[134] the COMA stated, "While materiality and relevancy must always be considered to keep the examination within bounds, they should be interpreted in a light favorable to the accused."[135] *United States v. Huntsman*[136] relied on *Parker* for the proposition that judges should allow the defense to inquire even into areas of questionable propriety.[137] "[C]los-

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[124] U.S. CONST. amend. V.

[125] *See, e.g., Thomas*, 18 M.J. at 545 (holding that certain rulings, comments, and actions of the judge, which materially strengthened the government's case and weakened that of the defense, denied the accused a fair trial).

[126] MCM, *supra* note 4, analysis, app. 21, at A21-3.

> The Analysis frequently refers to judicial decisions and statutes from the civilian sector that are not applicable directly to courts-martial. Subsequent modification of such sources of law may provide useful guidance in interpreting rules, and the drafters do not intend that citation of a source in this Analysis should preclude reference to subsequent developments for purposes of interpretation. At the same time, the user is reminded that the amendment of the Manual is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law.

Id.

[127] Military appellate decisions, especially earlier decisions and those addressing issues that span military/civilian borders, often cite federal cases. *See, e.g.*, United States v. Berry, 20 C.M.R. 354, 364 (C.M.A. 1956) (citing Adler v. United States, 182 F. 464 (5th Cir. 1910) and Frantz v. United States, 62 F.2d 737 (6th Cir. 1933)); United States v. Bouie, 18 M.J. 529, 530 (A.F.C.M.R. 1984) (citing United States v. Hauck, 586 F.2d 1296 (8th Cir. 1974)).

[128] Military appellate decisions only date from 1951, the year after Congress enacted the UCMJ and created the COMA. *See supra* notes 27-30 and accompanying text.

[129] MCM, *supra* note 4, R.C.M. 912(d) discussion. This is the only purpose for voir dire that the RCM recognizes as legitimate. The discussion to R.C.M. 912(d) goes on to state, "counsel should not purposely use voir dire [sic] to present factual matter which will not be admissible or to argue the case." Yet counsel receive only one peremptory challenge. *Id.* R.C.M. 912(g). Accordingly, a searching voir dire is necessary to discover whether grounds exist to challenge a member for cause and to exercise that single peremptory challenge intelligently.

[130] *See* Kevin T. Lonergan, *Voir Dire and Challenges: Law and Practice*, ARMY LAW., Oct. 1987, at 38.

> The right to voir dire prospective court members in the military system has three main purposes. The first purpose is to disclose disqualifications or actual bias. The second is to aid counsel in wisely exercising the single peremptory challenge. Both of these reasons have been recognized by military appellate courts. The third reason for voir dire is its use as a tactical device to indoctrinate the jury.

Id. (citations omitted).

[131] MCM, *supra* note 4, R.C.M. 912(d).

[132] *Id.*

[133] *Id.* R.C.M. 912(d) discussion.

[134] 19 C.M.R. 400 (C.M.A. 1955).

[135] *Id.* at 405.

[136] 46 C.M.R. 410 (A.C.M.R. 1972).

[137] *Id. See also* United States v. Tippit, 9 M.J. 106, 107 (C.M.A. 1980) ("The limited number of peremptory challenges available in courts-martial gives special importance to the challenge for cause. Furthermore, it is appropriate to allow considerable leeway to counsel in the *voir dire* as they seek to ascertain whether a challenge for cause should be asserted.").

ing off an entire area of questioning during voir dire is normally reversible error."[138]

The issue of a judge's handling of voir dire occasionally arises in the context of an allegation of judicial partiality. In *United States v. Thomas*,[139] the Army Court of Military Review (ACMR) reversed, because throughout the trial, the military judge strengthened the prosecution's case and weakened that of the defense. During voir dire, for example, the judge snapped at defense counsel and sua sponte precluded him from inquiring into a legitimate area of concern.[140]

United States v. George[141] represents another case of the judge becoming an advocate for the government. In response to a defense voir dire question, "the military judge improperly imposed his own objection and required the trial defense counsel to move on to other questions."[142] The majority reversed on other grounds, but Judge Johnston wrote separately to chide the military judge for his improper conduct throughout the trial.[143]

Thomas and *George* represent extreme examples of a judge abandoning his impartial role. Without additional impropriety by the military judge, a judge's restrictive approach to voir dire, alone, will not support an allegation of judicial partiality.[144]

Assisting the Prosecution in Its Presentation

The trial counsel, and not the military judge, is responsible for prosecuting cases on behalf of the United States.[145] Yet the courts frequently have held that a military judge who intercedes during a trial to assist the prosecution does not automatically commit error.

In *United States v. Payne*,[146] the law officer twice assisted the trial counsel in establishing the foundation for evidence. In upholding the conviction, the COMA stated:

> Occasional suggestions and recommendations by the law officer. . . like the occasional questioning of witnesses, are not unusual. . . . The mere fact that such assistance or questioning is undertaken does not make the law officer a partisan advocate.[147]

Particularly when a judge is sitting as a factfinder, the judge does not err when calling for witnesses to supply missing elements of proof. *United States v. Blackburn*[148] and *United States v. Masseria*[149] each involved a military judge instructing trial counsel to present additional testimony, after the government had rested. In both cases, the COMA found no error.

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[138] Lonergan, *supra* note 130, at 39.

[139] 18 M.J. 545 (A.C.M.R. 1984).

[140] *Id.* at 549.

[141] No. ACMR 9201664, slip op. (A.C.M.R. July 15, 1994).

[142] *Id.* at 6 (Johnston, J., concurring).

[143] *Id.*

[144] *See, e.g.*, United States v. Loving, 41 M.J. 213, 255-59 (C.A.A.F. 1994) (finding clashes between defense counsel and the military judge regarding the scope of voir dire insufficient to disqualify the military judge); United States v. Louketis, No. ACM S28428, 1992 WL 396238 (A.C.M.R. Oct. 22, 1992) (holding no abuse of discretion in limiting defense voir dire).

[145] MCM, *supra* note 4, R.C.M. 502(d)(5).

[146] 31 C.M.R. 41 (C.M.A. 1961).

[147] *Id.* at 48. The COMA later affirmed this position in United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987) (holding that the judge did not abandon his impartiality when, among other things, he laid the foundation for admission of a prosecution exhibit).

[148] 2 M.J. 929 (A.C.M.R. 1976), *pet. denied*, 2 M.J. 166 (C.M.A. 1976).

[149] 13 M.J. 868 (N.M.C.M.R. 1982), *pet. denied*, 14 M.J. 171 (C.M.A. 1982).

Likewise, military judges do not abandon their impartiality when they: require defense counsel to submit *all* of an accused's efficiency reports (not just the favorable ones) for consideration on sentencing;[150] advise trial counsel that a specification is defective and permit an amendment;[151] or assist trial counsel in laying the foundation for expert testimony.[152]

But when a military judge goes beyond "elucidation of the facts, a search for the truth, or development of evidence for the jury,"[153] and actively assists the prosecution, he commits error. In *United States v. Taylor*,[154] the ACMR set aside the findings and dismissed the charges because the military judge "rose to the rescue" whenever the prosecutor was having difficulty.[155] The ACMR further stated that the prosecutor's relative inexperience did not justify the judge's actions.[156]

United States v. Wilson[157] is a particularly egregious example of judicial assistance to a prosecutor. In this general court-martial for possession and conspiracy to sell various illegal drugs, "the military judge affirmatively assisted the prosecution"[158] throughout the case. The judge "queried every significant prosecution and defense witness;"[159] "establish[ed] a link in the chain of custody of the drugs which the trial counsel had overlooked;"[160] "elicited responses that authenticated one prosecution exhibit as a business entry;"[161] "assisted the trial counsel by changing the course of his questions in midstream through prompting and other interruptions;"[162] and "rehabilitated shaky prosecution witnesses."[163] The *Wilson* court set aside the findings of guilty and the sentence.

Other reported cases demonstrate the sort of judicial overintervention which *Wilson* and *Taylor* criticized.[164] They confirm that when judges repeatedly inject themselves into the government's case, they risk reversal.

Similarly, courts have reversed convictions where the trial judge: sua sponte addressed the propriety of defense counsel's sentencing argument and permitted trial counsel to reopen his case in response;[165] elicited during providence, over objection, that the accused had failed to make restitution,

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[150] United States v. Oakes, 3 M.J. 1053 (A.F.C.M.R. 1977), *pet. denied*, 4 M.J. 242 (C.M.A. 1978).

[151] United States v. Corpac, 11 M.J. 861 (N.M.C.M.R. 1981), *pet. denied*, 12 M.J. 301 (C.M.A. 1981). Defense counsel did not object to the amendment and the accused pleaded guilty to the specification and charge as amended. *Id.* at 863. Although the court found that the military judge did not depart from his impartial role, it also stated that "the failure of the defense to object to the amendment and indeed, to acquiesce to it, waives any objection to this perceived error." *Id.*

[152] United States v. Zaccheus, 31 M.J. 766, 768 (A.C.M.R. 1990).

> In the case before us we find that the military judge did not become a partisan advocate. Throughout the prosecution case the military judge held the trial counsel to the requirements of the law. When he finally intervened, it was to prevent further fumbling and waste of the court's time on a procedural matter involving obviously relevant and admissible evidence.

Id. See also United States v. Corgain, 5 F.3d 5, 9 (1st Cir. 1993) (finding no error in a trial judge suggesting to the prosecutor the proper method of presenting eyewitness testimony in a bank robbery trial).

[153] United States v. Taylor, 47 C.M.R. 445, 452 (A.C.M.R. 1973).

[154] 47 C.M.R. 445 (A.C.M.R. 1973).

[155] *Id.* at 452. The judge used leading questions to supply missing items of proof, laid the foundation for admission of evidence, directed trial counsel's attention to missing items of proof, participated in obtaining a stipulation from the defense, and elicited further evidence from the accused during his testimony. The combined effect of these actions "clearly indicated his prosecutorial bent." *Id.*

[156] *Id.*

[157] 2 M.J. 548 (A.C.M.R. 1976).

[158] *Id.* at 549.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

> In one of these instances he dispelled an inference raised by defense cross-examination that a co-conspirator was testifying in order to obtain leniency from the Government. In the other his questioning effectively insured that the court members were not left with the impression that another suspect was tricked by the CID into implicating the appellant.

Id. at 549-50.

[164] *See, e.g.*, United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984); United States v. George, No. ACMR 9201664, slip op. (A.C.M.R. July 15, 1994).

[165] United States v. Hardy, 30 M.J. 757 (A.C.M.R. 1990), *pet. denied*, 32 M.J. 486 (C.M.A. 1991).

and then permitted trial counsel to argue that fact to the members;[166] and called essential witnesses whom the government declined to call, but failed to instruct the jury as to why he had called them.[167]

Hindering the Defense in Its Presentation

Like the judge who assists the prosecution, the judge who hinders the defense risks reversal. In *United States v. Thomas*,[168] the ACMR set aside the findings and sentence because the judge's "unwarranted and prejudicial departure from the requisite standard of even-handedness and impartiality"[169] prejudiced the accused. "Bad blood" apparently existed between the defense counsel and the judge in that case, and the judge let it impact his performance throughout. He improperly limited the defense voir dire;[170] inexplicably precluded the defense from presenting relevant character evidence;[171] and repeatedly interrupted and chastised the defense counsel during cross-examination.[172] In so doing, the judge erred.

Not surprisingly, the judge who improperly assists the prosecution is often the same judge who improperly hinders the defense.[173] Two cases from the federal appellate courts offer some extreme examples.

In *United States v. Bursten*,[174] the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) held that the trial judge denied the accused "the right to a fair trial guaranteed to him by the Constitution."[175] During that trial for income tax evasion, the judge "overstepped the bounds of judicial propriety"[176] through partisan interrogation of witnesses, untoward remarks to the defense, and improper comments on the evidence.[177] The Fifth Circuit stated that when a trial judge intervenes in a case, he "must be most careful that his interventions are proper, timely, made in a fair effort to clear unanswered issues, and are not prejudicial to [the] defendant."[178] The sheer number and tenor of judicial interventions in *Bursten*, averaging at least one per three pages of transcript,[179] prejudiced the accused and mandated reversal.

Likewise, in *United States v. Hickman*,[180] the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) criticized a judge's conduct. The Sixth Circuit held that by interjecting himself into the proceedings over 250 times, the trial judge committed reversible error.[181] These interjections involved assistance to the government, limitations on defense cross-examination, and an "anti-defendant tone."[182]

Questioning Witnesses and the Accused

Both the *Manual*[183] and the *ABA Standards*[184] give the trial judge the authority to question witnesses at trial. An impressive body of case law—interpreting the extent of this authority—has developed in both the military and the federal courts.

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[166] United States v. Newton, No. ACM S28573, 1993 WL 522206 (A.F.C.M.R. Dec. 9, 1993).

[167] United States v. Karnes, 531 F.2d 214, 217-18 (4th Cir. 1976) ("[I]mpartiality is destroyed when the court assumes the role of prosecutor and undertakes to produce evidence, essential to overcome the defendant's presumption of innocence, which the government has declined to present."). *Karnes* held that the trial judge should have told the jury why he called the witnesses, and that those witnesses did not deserve greater credibility simply because the judge, and not the prosecutor, called them to testify. *Id.*

[168] 18 M.J. 545 (A.C.M.R. 1984).

[169] *Id.* at 547.

[170] *Id.* at 549-50.

[171] *Id.* at 548-49.

[172] *Id.* at 551-53.

[173] *See, e.g.*, United States v. Wilson, 2 M.J. 548 (A.C.M.R. 1976); United States v. George, No. ACMR 9201664, slip op. (A.C.M.R. July 15, 1994).

[174] 395 F.2d 976 (5th Cir. 1968), *cert. denied*, 409 U.S. 843 (1972).

[175] *Id.* at 982.

[176] *Id.* at 983.

[177] *Id.*

[178] *Id.* at 982.

[179] *Id.*

[180] 592 F.2d 931 (6th Cir. 1979).

[181] *Id.*

[182] *Id.* at 936. *See also* United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970), *cert. denied*, 397 U.S. 1044 (1970) (holding that the trial judge erred in a jury trial for disorderly conduct by interrupting the direct examination of the defendant, chiding the defendant in the presence of the jury, and criticizing the defense counsel repeatedly during his summation).

[183] MCM, *supra* note 4, R.C.M. 801(c); MIL. R. EVID. 614(b).

[184] ABA STANDARDS, *supra* note 102, Standard 6-1.1(a) commentary.

These cases generally hold that when judges avoid partisan tones and intend for questions neither to assist the prosecution nor hinder the defense, no error has been committed.

Military Cases

In *United States v. Beach*,[185] the NMCMR found no error when the military judge extensively examined several witnesses. The NMCMR held that the judge did not "depart from his role of impartiality,"[186] because his questioning, though "lengthy and thorough . . . was necessary to 'clarify and develop' the testimony of the witnesses involved and to 'aid the understanding of the court members.'"[187] In *United States v. Hobbs*,[188] the COMA affirmed this position, by holding that "[q]uestions to clarify or amplify matters to which a witness has testified under examination by counsel for either party are allowable."[189]

In *United States v. Johnson*,[190] the ACMR stated that the test in such cases is "a subjective one,"[191] requiring the court to review the "totality of circumstances"[192] to determine whether or not the trial judge abandoned his impartial role. *Johnson* held that even though the number of questions was "unusually large," there was "nothing in their tenor to indicate that the military judge had abandoned his impartial role."[193]

When judges lay aside impartiality in their questioning, they commit prejudicial error.[194] In *United States v. Jordan*,[195] the ACMR held that the judge erred in a general court-martial for possession and sale of LSD. After both the government and the defense had rested, the military judge called Jordan's coconspirator to testify.[196] Although the judge had few questions, the answers provided powerful evidence for the trial counsel to argue in his summation.[197]

In *United States v. Eckert*,[198] the military judge committed prejudicial error when he vigorously cross-examined a defense character witness. The accused, "a very hard working, proficient legal clerk,"[199] had pleaded guilty to unlawful destruction of a public record. The character witness testified that he would still be willing to work with the accused in the future.[200] This apparently disturbed the military judge, who impeached this testimony and, in so doing, "became an advocate" for the government.[201] The ACMR set aside the sentence.

Federal Cases

Like the military judge, federal district court judges may ask questions at trial "to clarify testimony and elicit necessary

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[185] 49 C.M.R. 124 (N.M.C.M.R. 1974), *rev'd on other grounds*, 1 M.J. 118 (C.M.A. 1975).

[186] *Id.* at 128.

[187] *Id.* at 129 (citations omitted).

[188] 8 M.J. 71 (C.M.A. 1979).

[189] *Id.* at 73.

[190] 36 M.J. 862 (A.C.M.R. 1993), *pet. denied*, 39 M.J. 355 (C.M.A. 1993).

[191] *Id.* at 867.

[192] *Id.*

[193] *Id. See also* United States v. Madey, 14 M.J. 651 (A.C.M.R. 1982), *pet. denied*, 15 M.J. 183 (C.M.A. 1983) (judge may ask questions to clear up uncertainties in the evidence or to develop the facts further); United States v. Cephas, 25 M.J. 832 (A.C.M.R. 1988) (judge may ask questions to resolve ambiguities in testimony); United States v. Dudding, 34 M.J. 975 (A.C.M.R. 1992), *aff'd*, 37 M.J. 429 (C.M.A. 1993) (no error in question to social worker to clarify meaning of "narcissistic personality"); United States v. Dock, 40 M.J. 112 (C.M.A. 1994) (proper for judge to ask various hypothetical questions to government and defense expert witnesses to clarify accused's state of mind).

[194] *See, e.g.*, United States v. Massa, 49 C.M.R. 586 (A.C.M.R. 1974) (error for judge, during questioning of defense character witness, to compare accused's drug conviction to robbery and murder); United States v. Snipes, 19 M.J. 913 (A.C.M.R. 1985) (inappropriate for judge to question character witness on matter solely outside the scope of defense counsel's direct examination and to solicit witness's opinion regarding an appropriate sentence); United States v. George, No. ACMR 9201664, slip op. at 7 (A.C.M.R. July 15, 1994) (Johnston, J., concurring) (error for judge to play the role of the prosecutor and question a defense witness, where he was not seeking merely to clarify issues for the factfinder).

[195] 45 C.M.R. 719 (A.C.M.R. 1972).

[196] *Id.* at 723.

[197] *Id.* at 724.

[198] 8 M.J. 835 (A.C.M.R. 1980).

[199] *Id.* at 837.

[200] *Id.*

[201] *Id.* at 838.

facts."[202] Judges commit error, however, when their questions indicate partiality.

In *United States v. Carmel*,[203] the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) reversed the appellant's conviction, because the judge questioned witnesses in a biased manner. The Seventh Circuit noted, "'The influence of the trial judge on the jury is necessarily . . . of great weight.'"[204] Further, the trial judge "would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the . . . jurors."[205] Other federal cases repeat and amplify this admonition.[206]

The Accused

The rules discussed above also apply when the accused testifies. In *United States v. Clower*,[207] the COMA held that the military judge erred when he questioned the accused in a manner that was "akin to impeachment."[208] The judge's later instruction for the members to "disregard any comment or statement made by him . . . which may have indicated an opinion as to the guilt or innocence of the accused," did not cure this error.[209]

In *United States v. Shackleford*,[210] the judge committed prejudicial error during his questioning of the accused. The judge refused to accept the accused's plea of guilty.[211] During the subsequent trial, the accused's testimony differed from what he had earlier told the judge.[212] The judge then adopted a "prosecutorial tone"[213] and used information obtained during the providence inquiry to question the accused in the presence of the members.[214] The COMA held this to be error.

However, when military judges maintain impartial tones in their questioning, particularly in cases without members, the appellate courts are more likely not to reverse.[215] Ultimately, the test is "a subjective one to be gauged by the conduct and the questions posed."[216]

Commenting Inappropriately During the Trial

Occasionally, judges will make intemperate comments in the presence of the members. In these cases, military courts

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[202] United States v. Gleason, 766 F.2d 1239, 1243 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). *See also* United States v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986) ("It is entirely proper for [the trial judge] to participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony.").

[203] 267 F.2d 345 (7th Cir. 1959).

[204] *Id.* at 350 (quoting Starr v. United States, 153 U.S. 614, 626 (1894)).

[205] *Id.* at 350.

[206] *See, e.g.*, United States v. Allsup, 566 F.2d 68, 72 (9th Cir. 1977) ("[T]he court must also be mindful that in the eyes of a jury, the court occupies a position of 'preeminence and special persuasiveness'. . . and, accordingly, the court must avoid the appearance of giving aid to one party or another.") (citations omitted); United States v. Wilensky, 757 F.2d 594, 598 (3d Cir. 1985) ("'A judge best serves the administration of justice by remaining detached from the conflict between the parties.'") (citation omitted); United States v. Norris, 873 F.2d 1519, 1526 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 835 (1989) ("'Particularly when the questioning is designed to elicit answers favorable to the prosecution, it is far better for the trial judge to err on the side of [a]bstention from intervention in the case.'") (citations omitted).

[207] 48 C.M.R. 307 (C.M.A. 1974).

[208] *Id.* at 310.

[209] *Id.*

[210] 2 M.J. 17 (C.M.A. 1976).

[211] *Id.* at 18.

[212] *Id.* at 19.

[213] *Id.* at 19 n.3.

[214] *Id.* at 20.

[215] *See, e.g.*, United States v. Bouie, 18 M.J. 529 (A.F.C.M.R. 1984) (holding that the judge did not abandon his impartiality when he asked the accused approximately 370 questions in a case without members. The questions did not indicate a prosecutorial bent, and the defense neither objected nor asked the judge to recuse himself).

[216] *Id.* at 530. *See also* United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987) (holding that judge's question to the accused, "Are we playing with the words, or are you changing your testimony, or what," did not raise a substantial doubt as to the fairness of the trial); United States v. Wood, 29 M.J. 1075 (A.C.M.R.), *pet. denied*, 31 M.J. 492 (C.M.A. 1990) (finding no error in the judge's examination of the accused, which sought only to reconcile inconsistencies and clarify factual ambiguity); *but cf.* United States v. Thomas, 18 M.J. 545 (A.C.M.R. 1984) (reversing the accused's conviction, because, among other things, the military judge examined the accused based on information learned earlier during litigation of a motion to suppress); United States v. Morgan, 22 M.J. 959 (C.G.C.M.R. 1986) (holding that the judge committed error when he posed questions to the accused to obtain identification and admission of a knife, which the prosecutor had been unable to get admitted into evidence).

will apply a subjective, fact-specific analysis, similar to that involving a judge's questions, to determine whether or not the comment has prejudiced the accused.[217]

In *United States v. Holmes*,[218] where the military judge accused a defense witness of lying and implied that the defense counsel had a hand in the perjury, the COMA found a fair risk of prejudice and reversed.[219] In *United States v. Thomas*,[220] the ACMR reversed, in part, because the judge implied that the defense counsel wanted a recess to coach the accused to lie.[221] In considering the request, the judge asked the defense counsel, "*Will it change your accused's testimony?*"[222] The ACMR called this comment "[p]erhaps the most glaring and conspicuous negative signal from the military judge."[223]

Not every immoderate phrase that comes from the judge's lips, however, will warrant reversal.[224]

Reprimanding Counsel in Front of the Members

Although military judges have broad discretion in controlling counsel who appear before them, they must exercise self restraint and avoid unnecessary disparagement of counsel.[225] When judges fail to do so, the appellate courts may reverse.

United States v. Thomas[226] and *United States v. George*,[227] both discussed above, provide several examples of judges making the type of disparaging comments which the rules for-

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[217] United States v. Chavez, 27 M.J. 870, 871 (A.F.C.M.R. 1989) ("We perceive the legal issue to remain the same whether the alleged bias arises through aggressive judicial questioning or untoward comments from the bench.").

[218] 1 M.J. 128 (C.M.A. 1975).

[219] *Id.* The military judge made the following comment, in the presence of the members, when the defense counsel started redirect examination:

> [T]his witness has gotten himself in enough trouble already listening to other people telling him what, and suggesting what the answers should be. And, I would appreciate it if you would confine yourself to the appropriate questions with respect to this witness, and assist him in staying out of further trouble.

Id.

[220] 18 M.J. 545 (A.C.M.R. 1984).

[221] *Id.* at 554. Following the government's evidence in rebuttal, the defense counsel faced the tactical decision of whether or not to offer evidence in surrebuttal. He requested a "brief recess" to consider his options. That provoked the following exchange:

> MJ: Do you have surrebuttal?
> DC: I do. I would like to request a brief recess, though.
> MJ: Why?
> DC: I would just like to.
> MJ: Are you surprised by anything you've heard?
> DC: Well—somewhat, your Honor.
> MJ: Do you wish to interview those witnesses?
> DC: No, there is no witness I want to interview.
> MJ: *Will it change your accused's testimony?*

Id.

[222] *Id.*

[223] *Id.* at 553. *Accord* United States v. Yates, 553 F.2d 518 (6th Cir. 1977) (reversing the defendant's bank robbery conviction and holding that the judge committed prejudicial error by stating, in regard to a government exhibit, that it was clear the defendant had admitted his participation in the bank robbery. The judge's statement went to the heart of the defense.).

[224] *See generally* United States v. Loving, 41 M.J. 213, 264 (C.A.A.F. 1994) (holding that judge's reference to the defense theory as "ridiculous," in front of the members, though intemperate, was not disqualifying).

[225] ABA STANDARDS, *supra* note 102, Standard 6-3.4; ABA CODE, *supra* note 86, Canon 3, § B(4).

[226] 18 M.J. 545 (A.C.M.R. 1984).

[227] No. ACMR 9201664, slip op. (A.C.M.R. July 15, 1994).

bid.[228] In both cases, the ACMR used those comments, in part, to reverse.

Gesturing, Facial Expressions, and Demeanor

Judges' demeanor, gestures, and facial expressions may say more about their thoughts in the case than any number of questions that they pose to witnesses. Yet because counsel forget—or are reluctant—to note these items in the record, case law in this regard is silent.

Both the *ABA Code*[229] and the *ABA Standards*[230] require the judge to refrain from such conduct. A military judge who, through his demeanor, injects his opinion into the trial, violates these rules.

Commenting on the Evidence During Instructions

During the course of a trial, the military judge must instruct the members on the law,[231] on procedure,[232] and on the limited purpose for which certain evidence may be considered.[233] When charging the court, military judges may "assist the [members] . . . by explaining and commenting upon the evidence."[234] In so doing, judges may not abandon their impartial roles, and must clearly direct the members that it is they, and not the judges, who "are the sole judges of the facts."[235]

In *United States v. Felton*,[236] during his instructions to the court on sentencing, the military judge told the members that the accused lacked integrity.[237] The judge also contradicted the defense counsel's argument regarding the victim's demeanor.[238] The ACMR held that "the[se] erroneous sentencing instructions . . . raise a reasonable likelihood of prejudice," and reversed.[239]

Similarly, in *United States v. Stephens*,[240] the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) reversed. The judge commented to the jury that he "would conclude from what [he had] heard here that [the defendant]

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[228] *See, e.g., Thomas*, 18 M.J. at 545. Some of the judge's disparaging comments to defense counsel in that case included the following:

(1) "Captain O'Boyle, please don't repeat yourself. I realize that your tendency is not to listen to me, but you're going to have to try as the case goes on." *Id.* at 550.

(2) "I also have problems with your standing to complain in view of some of the tactics I've seen in previous cases." *Id.*

(3) "I have to see that the issue is justly decided and when one of the parties to the proceedings isn't living up to his duties as an officer of the court, that's awfully hard to do. I get testy." *Id.* at 551.

(4) "[Y]ou're an officer of the court. . . . Start acting like one." *Id.*

(5) "I know that a lot of people at TDS think some of these things are close calls, I don't know close to what." *Id.*

(6) "Let him finish the response he was giving there, Captain O'Boyle and I'd rather not say that too many more times." *Id.* at 552.

[229] ABA CODE, *supra* note 86, Canon 3, § B(4).

[230] ABA STANDARDS, *supra* note 102, Standard 6-1.3, commentary.

> The judge should be particularly careful by his or her demeanor not to convey unintended messages to the jury or to the participants in the trial process. Even the matter of facial expression may be misinterpreted. Jurors may read in the judge's face either belief or disbelief as the judge listens to witnesses' testimony or to arguments of counsel.
>
> Facial expressions and gestures by the judge do not appear on the transcribed record of the proceedings; and the damage that these signals may do to the trial process cannot usually be corrected on appeal. This heightens the responsibility of the trial judge to control demeanor.

Id.

[231] MCM, *supra* note 4, R.C.M. 801(a)(5); 913.

[232] *Id.*

[233] *Id.* MIL. R. EVID. 105.

[234] Quercia v. United States, 289 U.S. 466, 469 (1933). *Accord* United States v. Felton, 31 M.J. 526, 534 (A.C.M.R. 1990).

[235] Bursten v. United States 395 F.2d 976, 983 (5th Cir. 1968), *cert. denied*, 409 U.S. 843 (1972).

[236] 31 M.J. 526 (A.C.M.R. 1990).

[237] *Id.* at 533.

[238] *Id.* at 534.

[239] *Id.*

[240] 486 F.2d 915 (9th Cir. 1973).

must have, or that he did rob [the bank]."[241] The Ninth Circuit held that "[i]n light of the absence of overwhelming evidence of guilt, the judge's comments to the jury may well have tipped the scales against [the] defendant."[242]

Some Suggestions for Counsel

Defense counsel must guard the interests of the accused zealously within the bounds of the law.[243]

Before Trial

As early as possible before trial, counsel should ascertain which military judge will preside over the court-martial. If unfamiliar with this judge, counsel should ask other defense counsel in the region about him. If counsel either has not practiced before the judge or is aware of the judge's pro-government bent, counsel should prepare to voir dire the judge. In preparing the voir dire, counsel should draft questions which explore any pro-government bias and, if possible, address specific instances where the judge displayed that bias in the past.

Additionally, counsel should insert the relevant provisions of the *ABA Code* and the *ABA Standards* into the trial notebook and be ready to refer to them at trial.

During Trial

Voir Dire the Judge

To discover whether grounds for disqualification exist, counsel may voir dire the military judge.[244] At least one commentator has argued that the law permits "a full and broad voir dire."[245] If counsel then uncovers a ground for challenge, counsel may move the judge to disqualify himself.[246] "The military judge should broadly construe grounds for challenge."[247] Where a specifically enumerated ground for challenge exists, the parties may not waive it.[248]

Voir Dire the Members

Voir dire is an essential, although often neglected, part of trial practice. Counsel should review the members' questionnaires,[249] prepare appropriate questions, and submit copies of the questions to the court well within time limits established by local rules. When submitting challenges, counsel should remind the judge of the COMA's guidance "to grant challenges for cause liberally."[250] If the court denies a challenge for cause, to preserve the issue counsel must exercise his or her peremptory and must adhere to the procedure contained in RCM 912(f)(4).[251]

Know the Law (or Have It Handy)

Counsel should maintain a copy of the relevant provisions of the *ABA Code* and the *ABA Standards* in their trial notebooks. Additionally, counsel should have working knowledge of the points of law addressed in this article.

Object!

Out of fear of angering the trial judge or conveying the impression to the members that the defense is hiding something, many defense counsel are reluctant to object to a

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[241] *Id.* at 916.

[242] *Id.* at 917. The Ninth Circuit also held that the judge's instruction to the jury, "advising them that they were not bound by his opinion," did not cure the error. *Id.*

[243] MCM, *supra* note 4, R.C.M. 502(d)(6) discussion.

[244] *Id.* R.C.M. 902(d)(2).

[245] Ludolf R. Kuhnell III, *Challenging the Military Judge for Cause*, 17 A.F. L. REV. 50, 61 (1975). *Cf.* United States v. Parker, 19 C.M.R. 400, 405 (C.M.A. 1955) (allowing defense counsel "considerable latitude in examining members"—and, by analogy, the law officer/military judge—with a view toward the intelligent exercise of challenges).

[246] MCM, *supra* note 4, R.C.M. 902(d)(1). Additionally, the judge may sua sponte disqualify himself. *Id.*

[247] *Id.* R.C.M. 902(d)(1) discussion.

[248] *Id.* R.C.M. 902(e). The parties may, however, waive disqualification which rests solely on whether or not the judge's "impartiality might reasonably be questioned." The military judge may only accept such waiver if it is "preceded by a full disclosure on the record of the basis for disqualification." *Id.*

[249] *Id.* R.C.M. 912 (a)(1).

[250] Criminal Law Div. Note, *A Reminder from the Court of Military Appeals: Grant Challenges for Cause Liberally*, ARMY LAW., May 1992, at 34 (discussing United States v. Berry, 34 M.J. 83 (C.M.A. 1992)).

[251] MCM, *supra* note 4, R.C.M. 912(f)(4).

judge's improper conduct.[252] However, if defense counsel fails to object, in the absence of plain error, counsel waives the issue.[253] Accordingly, when the military judge appears to abandon his impartial role, counsel should ask for a 39(a) session and make the objection a matter of record. If the judge then disparages or mistreats counsel, counsel should respectfully remind the judge of his obligations, under the *ABA Standards*, to avoid "mistreatment of counsel."[254]

Ensure That the Record Reflects the Judge's Demeanor

When judges scowl, frown, roll their eyes, or gesture in ways that reflect adversely on the defense, and they do so in front of the members, the chance exists that they have poisoned the defense case.[255] Especially if the gestures are part of a larger pattern, defense counsel must ensure that the record so reflects. If a judge refuses to allow counsel to make a matter part of the record, counsel should, again, respectfully remind the judge of the obligation to do so under *ABA Standard* 6-2.4.[256]

Use the Accused

If the judge's conduct distresses the accused, counsel should, on the record and with the accused's consent, inform the judge of that fact. This has the benefit of tactfully calling the judge's attention to his or her conduct, of making that conduct a part of the record, and of lessening the potential for judicial recrimination toward counsel.

Move the Judge Toward Disqualification

Counsel may move military judges to disqualify themselves under RCM 902.[257] Counsel should respectfully state the reasons for the request and ask the judge to make essential findings on the motion.[258]

Move for a Mistrial

Counsel also may move for a mistrial.[259] Just as in the motion to disqualify, counsel should request essential findings on the motion.[260]

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[252] United States v. Hickman, 592 F.2d 931 (6th Cir. 1979), recognizes this concern, and is one of the few reported cases not to require plain error to reverse in the absence of a defense objection.

> Nor do we hold the failure to object against defense counsel. . . . Counsel for defendant in a criminal case, is indeed in a difficult and hazardous predicament in finding it necessary to make frequent objections in the presence of a jury to questions propounded by the trial judge. The jury is almost certain to get the idea that the judge is on the side of the Government.

Id. at 936.

[253] MCM, *supra* note 4, MIL. R. EVID. 103. Several cases appear to turn on this issue. *See, e.g.*, United States v. Kimble, 49 C.M.R. 384, 387 (C.M.A. 1974) ("Finally and worthy of note, is the fact that counsel for accused at trial did not object or complain to the total questioning or any part thereof."); United States v. Hobbs, 8 M.J. 71 (C.M.A. 1979) ("No question asked by the judge was challenged by defense counsel; nor did counsel move to recuse the judge."); United States v. Corpac, 11 M.J. 861, 863 (N.M.C.M.R. 1981), *pet. denied*, 12 M.J. 301 (C.M.A. 1981) ("The record reveals that counsel for appellant had no objections to the amendment of the specification by the trial counsel. . . . Thus the failure of the defense to object to the amendment and indeed, to acquiesce to it, waives any objection to this perceived error."); United States v. Madey, 14 M.J. 651, 653-54 (A.C.M.R. 1982), *pet. denied*, 15 M.J. 183 (C.M.A. 1983) ("At trial the appellant raised no objection to the military judge's questioning of witnesses.").

[254] *See generally* ABA STANDARDS, *supra* note 102, Standard 6-1.1 commentary.

> While the trial judge has a duty to all persons encountered in his or her official capacity to treat them with courtesy and fairness, a special caution is given concerning the judge's treatment of counsel. Mistreatment of counsel can entail a serious potential for miscarriage of justice. It does not derogate from the duties and powers of the judge as the impartial presiding officer, nor from the judge's powers of discipline for misconduct, to insist that the judge owes professional respect to the attorneys who appear before him or her, whether for the defense or for the prosecution. They... should not be harassed, demeaned, or subjected to rude or capricious conduct.

Id.

[255] *See id.* Standard 6-1.3 commentary.

[256] *See generally id.* Standard 6-2.4. ("The trial judge should respect the obligation of counsel to present objections to procedures and to admissibility of evidence, to request rulings on motions, to make offers of proof, and *to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial.*") (emphasis added).

[257] MCM, *supra* note 4, R.C.M. 902.

[258] *Id.* R.C.M. 905(d).

[259] *Id.* R.C.M. 915.

[260] *Id.* R.C.M. 905(d).

Be Respectful

A court-martial has the power to punish, by fine or confinement, contempts which occur in its presence.[261] Although reported cases of contempt proceedings are few, they are not unheard of.[262] Counsel should proceed cautiously.

After Trial

Trial defense counsel's duties continue well after sentence is announced.[263] Counsel should document the judge's conduct and submit the matter to the convening authority for corrective action.[264] Counsel also should collect affidavits from persons who witnessed the judge's behavior and either include them in the submission to the convening authority or deliver them to appellate defense counsel.[265]

Finally, in an egregious case, counsel may submit a complaint against the judge in accordance with the procedures in RCM 109.[266]

Conclusion

> *For with what judgment you judge, you will be judged; and with the same measure you use, it will be measured back to you.*[267]

The military judge owns a place of central importance within our system of justice. A judge's authority provides considerable discretion to interject during a court-martial. However, when judges do so, they must remember the mandate to remain neutral and impartial. If they do not, the military justice system will eventually collapse.

Counsel should respect both the position and the person of military judge; but counsel also should recognize that judges—being human—are fallible. When judges fail to exercise the duties of their office in a manner that ensures a fair trial for the accused, the trial attorneys represent the last best hope for justice. They should act accordingly.

Although cases of judicial overzealousness are (hopefully) rare, the discussion in the preceding pages shows that they occur. Both trial and defense counsel must know the law in this area, must recognize when the military judge crosses the line between arbiter and advocate, and must take the steps necessary to protect the accused and the record. Failure to do so is an abdication of the role of officer of the court.

When the participants do their part, our system of justice is every bit as fair, sophisticated, and "just" as any other in the world. This article should assist attorneys in recognizing the pivotal roles that they play in our system of justice, and to play those roles correctly.

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[261] UCMJ art. 48 (1994); MCM, *supra* note 4, R.C.M. 809.

[262] *See generally* David L. Hennessey, *Court-Martial Contempt—An Overview*, ARMY LAW., June 1988, at 38; USALSA Report, *Military Contempt Procedures: An Overdue Proposed Change*, ARMY LAW., Jan. 1994, at 21.

[263] MCM, *supra* note 4, R.C.M. 502(d)(6) discussion.

[264] *Id.* R.C.M. 1105.

[265] Counsel may obtain affidavits from the members, provided the affidavits address "extraneous prejudicial information," "outside influence," or "unlawful command influence" that occurred during the trial. *Id.* MIL. R. EVID. 606; R.C.M. 923.

[266] *Id.* R.C.M. 109.

[267] *Matthew* 7:2.

Overriding a Competition in Contracting Act Stay: A Trap for the Wary

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Introduction

There is nothing more frustrating to procurement officials than to have an ongoing acquisition completely halted by the filing of a bid protest. Under the Competition in Contracting Act (CICA),[1] an agency must stay award or suspend performance of a newly awarded contract after the timely filing of a bid protest at the General Accounting Office (GAO).[2]

However, agencies can override this stay on a finding of urgent and compelling circumstances or, in the case of postaward protests, if the override is in the government's best interests.[3] Statistics compiled by the GAO reveal that agencies override CICA stays in a significant number of cases each year.[4]

Equally frustrating to procurement officials is to have a federal district court enjoin the agency for improperly overriding a CICA stay. In recent years, there has been a significant amount of litigation in the federal district courts concerning an agency's attempt to override CICA stay provisions. Unfortunately, many of the injunctions issued against these agencies—such as the Army, Navy, and Air Force—could have been avoided.

This article will first discuss Congress's purpose in enacting the CICA. It will examine in depth the cases that have interpreted the CICA override provisions. Finally, this article will discuss the "lessons learned" from these cases, so that procurement officials can be better prepared to (1) determine whether an agency should seek a CICA override, and (2) withstand judicial review in the event that they decide to override a CICA stay.

The Competition in Contracting Act

Congress enacted the CICA "as part of the Deficit Reduction Act of 1984 to stem the persistent and costly use of 'sole-source' or noncompetitive contract awards made by federal agencies, particularly in the defense area."[5] The CICA compels greater use of the competitive bidding procedures to ensure prudent expenditure of taxpayer money.[6]

Moreover, in enacting the CICA, Congress made sweeping changes in the bid protest system. First, Congress formalized the role of the Comptroller General to review all bid protests.[7] Congress also established specific rules on the timing of protest decisions[8] and gave the Comptroller General broad authority on the types of relief that he may recommend to the agency involved.[9]

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[1] 31 U.S.C.A. §§ 3551-3556 (West Supp. 1994).

[2] *See id.* § 3551(c)(1), (d)(1).

[3] *See id.* § 3551(c)(2), (d)(2).

[4] According to the GAO's annual reports on bid protest activity, in fiscal year (FY) 1993, federal agencies overrode CICA stays 96 times (61 based on urgency and 35 based on best interest); in FY 1992, there were 186 overrides (110 based on urgency and 76 based on best interest); and in FY 1991, there were 175 overrides (127 based on urgency and 48 based on best interest). *See* 61 Fed. Con. Rep. (BNA) 185 (1994); 59 Fed. Con. Rep. (BNA) 153 (1993).

[5] Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1104 (9th Cir. 1988).

[6] *See generally* 10 U.S.C.A. § 2304; 41 U.S.C.A. § 253. Congress noted that only $54 billion, out of $168 billion in government contracts awarded in FY 1983, were awarded on a competitive basis. Competition and Contracting Act of 1984: H.R. REP. No. 1157, 98th Cong., 2d Sess. 12 (1984).

[7] *See* 31 U.S.C.A. § 3552 (West Supp. 1994) (mandating that the Comptroller General shall decide a protest concerning an alleged violation of a procurement statute or regulation). As part of the CICA, Congress also gave bid protest jurisdiction to the General Services Board of Contract Appeals (GSBCA) for protests concerning acquisitions of automatic data processing equipment. *See* 40 U.S.C.A. § 759.

[8] *See* 31 U.S.C.A. § 3554(a)(1) (West Supp. 1994) (providing in pertinent part that "the Comptroller General shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General"). The Federal Acquisition Streamlining Act of 1994, however, amended § 3554 by requiring the Comptroller General to issue a final decision within 125 calendar days rather than 90 working days. *See* Pub. L. No. 103-355, § 1403, 108 Stat. 3243 (1994) (citations to sections refer to the Public Law section designations) [hereinafter FASA].

[9] *See* 31 U.S.C.A. § 3554(b)(1) (West Supp. 1994). For example, if the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General can recommend that the agency recompete the contract, issue a new solicitation, or even terminate the contract. *Id.*

Of particular importance to this article, and one of the most important provisions of the CICA, are the automatic stay provisions enacted by Congress.[10] In a preaward situation, the CICA mandates that while a protest is pending, "a contract may not be awarded in any procurement after the Federal agency has received notice of the protest" from the Comptroller General.[11]

In a postaward situation, the CICA mandates that while a protest is pending, the federal agency shall, on receipt of notice of the protest from the Comptroller General, "immediately direct the contractor to cease performance under the contract."[12] For the postaward stay provision to become effective, however, the agency must have received notice of the protest within ten days of contract award.[13]

With these provisions, Congress sought to provide an effective review of bid protest challenges where meaningful relief could be obtained. Congress's concern in this matter was adequately stated by the Third Circuit in *Ameron, Inc., v. United States Army Corps of Engineers*:

> [The] CICA was enacted to remedy a major loophole in the long-standing GAO review procedure: by the time the GAO reviewed most bid protests, the protests had become moot because either the contract had been let or the contractor was engaged in performing under the contract. While GAO regulations provided for a stay of either the granting or performance of the contract in some circumstances, this stay was easily overridden by

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[10] *See id.* § 3553(c)(1), (d)(1). When President Reagan signed the CICA into law, "[H]e declared the automatic stay provision unconstitutional upon the advice of the Attorney General and ordered the executive department not to observe it." Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875, 879 (3d Cir. 1986), *on reh'g* 809 F.2d 979, *cert. dismissed*, 488 U.S. 918 (1988). The Executive Branch contended that the CICA stay provisions were an unconstitutional attempt to delegate to the Comptroller General, an officer of Congress, duties (ability to determine the length of stays or suspensions of government contracts when protests are pending) that only may be performed by executive officials. However, the CICA's constitutionality was upheld in Lear Siegler, Inc., Energy Products Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988); *see also Ameron*, 787 F.2d at 875.

[11] 31 U.S.C.A. § 3553(c)(1) (West Supp. 1994) (the FASA did not amend § 3553(c)(1)). In its entirety, § 3553(c)(1) provides:

> Except as provided in paragraph (2) of this subsection [override provision], a contract may not be awarded in any procurement after the Federal agency has received notice of the protest with respect to such procurement from the Comptroller General and while the protest is pending.

See also 4 C.F.R. pt. 21 (1994) on who may file a bid protest at the GAO, (*i.e.*, an interested party), the issues that may be protested, and the timing requirements for protests.

[12] 31 U.S.C.A. § 3553(d)(1) (West Supp. 1994) (this language was retained by the FASA amendments to § 3553(d)). In its entirety, § 3553(d)(1) provides:

> If a Federal agency receives notice of a protest under this section [from the Comptroller General] after the contract has been awarded but within 10 days of the date of contract award, the Federal agency (except as provided under paragraph (2) [override provision]) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

Under the FASA, § 3553(d) was substantially amended. *See* FASA, *supra* note 8, § 1402. In particular, the FASA authorizes an extension of the time for requesting a postaward CICA stay beyond the tenth calendar day after award. *See infra* note 13. Additionally, the FASA expressly authorizes the contracting officer to suspend contract performance if he or she determines in writing that a GAO protest is likely to be filed and immediate performance is not in the best interests of the United States. The FASA retains the original CICA requirements of immediate suspension of contractor performance on receipt of notice from the Comptroller General of a protest.

[13] 31 U.S.C.A. § 3553(d)(1) (West Supp. 1994). Under the FASA, the § 3553(d)(1) 10-day time requirement for a postaward stay to come into effect was amended. *See* FASA, *supra* note 8, § 1402. The amendment provides that the period in which notice of the protest to the agency requires a suspension of contract performance begins "on the date of contract award and ends on the later of—(A) the date that is 10 days after the date of the contract award; or (B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required." *Id.* Thus, an agency must suspend contract performance if it receives notice of a protest by the tenth calendar day following contract award or the fifth calendar day following a timely requested debriefing, whichever is later. *Id. See also id.* § 1014 (amending 10 U.S.C.A. § 2305(b)) (in negotiated procurements, if losing offeror requests debriefing within three days of receipt of the award decision, agency must debrief the vendor within five days of the request).

Several important points concerning the timing requirements of § 3553(d) need to be highlighted. Under § 3553(d), an agency is only required to suspend performance of a contract if the agency receives notice *from the Comptroller General* within 10 days of contract award. The GAO is required to notify the agency of a protest within one working day of the receipt of the protest. 31 U.S.C.A. § 3553(b)(1) (West Supp. 1994) (the FASA amended this to require notification within one *calendar* day). Thus, even if a protest is filed within 10 days of contract award, and the protester notified the agency, the agency still is not required under the CICA to suspend contract performance. The agency's duty to suspend is triggered *only* if the agency receives notice from the Comptroller General within 10 calendar days of contract award. *See* Technology For Communications Intern. v. Garrett, 783 F. Supp. 1446, 1453 (D.D.C. 1992) (postaward stay provision not triggered although protester filed protest within 10 days of contract award, because GAO timely notified agency on the fourteenth day after contract award); Survival Technology, Inc. v. Marsh, 719 F. Supp. 18, 19 (D.D.C. 1989); Information Resources, Inc. v. United States, 676 F. Supp. 293, 296 (D.D.C. 1987); BDM Management Services Co., B-228287, 88-1 CPD ¶ 93 (1988); McDonald Welding v. Webb, 829 F.2d 593, 595-96 (6th Cir. 1987).

As these cases demonstrate, although a postaward protest is timely filed within 10 calendar days of contract award, the agency may not be required to stay contract performance. Therefore, count the calendar days from contract award to GAO notification to the agency to determine if a CICA stay is required. These court interpretations of the timing requirements of activating a postaward CICA stay should still be valid even though the FASA amended § 3553(d).

Additionally, with respect to determining the day of contract award, the D.C. District Court concluded that, for purposes of activating the CICA stay, award is made when the awardee is notified of the award by the agency. Foundation Health Federal Services v. United States, 39 Cont. Cas. Fed. (CCH) ¶ 76,681 (D.D.C. 1993). Indeed, the FASA requires prompt notification of award to the losing offerors. FASA, *supra* note 8, § 1013 (amending 10 U.S.C.A. § 2305(b)(3)).

the contracting agency involved. The result was that most procurements became *faits accomplis* before they could be reviewed. This situation was identified by Congress as a contributing factor to the crisis of waste in federal procurement.[14]

Congress designed the CICA stay provisions "to preserve the status quo until the Comptroller General issued his recommendation, to ensure that the recommendation would be considered."[15] Nevertheless, Congress understood that there would be circumstances when staying the procurement or contract would be detrimental to the agency involved. Therefore, Congress created exceptions to the stay provisions.

In the preaward situation, a procuring agency can override a stay at any time "upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General."[16] This override provision has caused a considerable amount of litigation. In particular, courts have struggled with the "urgent and compelling circumstances" standard. As a result, two distinct views have emerged on the proper focus of the urgent and compelling circumstance analysis.

In the postaward scenario, the CICA override provision contains the same urgent and compelling standard but adds a "best interests" standard as well. Specifically, the postaward override provision codified at 31 U.S.C.A. § 3553(d)(2) provides as follows:

> The head of the procuring activity responsible for award of a contract may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—
>
> (A) upon a written finding—
>
> (i) that performance of the contract is in the best interests of the United States; or
>
> (ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest.[17]

Significantly, there has been less litigation in the postaward override area when an agency bases its override decision on this best interests standard. Furthermore, some courts hold that the best interests standard is not subject to judicial review.[18]

CICA Override Provisions as Interpreted by the Courts

Before examining the cases that have analyzed the CICA override provisions, it is important to understand how these cases end up in federal district court. Typically, a disappoint-

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[14] 787 F.2d 875, 878-79 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988) (citations omitted).

[15] Lear Siegler, Inc., Energy Products Div. v. Lehman, 842 F.2d 1102, 1105 (9th Cir. 1988). Congress noted that "agencies in the past have resisted such recommendations (as termination, recompetition, or reaward of the contract) on the grounds that the government's best interest would not be served by relief measures of this sort because of the added expenses involved." *Ameron*, 809 F.2d at 985 n.4. The CICA is designed to preclude that argument from agencies.

The CICA requires that if an agency decides not to implement the Comptroller General's recommendation, it must report this to the Comptroller General. *See* 31 U.S.C.A. § 3554(e)(1) (West Supp. 1994). The Comptroller General, in turn, must report to Congress all instances when agencies decide not to implement Comptroller General recommendations. *See id.* § 3554(e)(2). FASA § 1403 amended § 3554(e) by placing a time requirement on the agency's notification to the Comptroller General concerning a failure to implement the recommendation and requires the Comptroller General to make a detailed report to Congress with recommendations for corrective action against the agency.

[16] 31 U.S.C.A. § 3553(c)(2)(A) (West Supp. 1994) (the FASA did not amend § 3553(c) (2)(A)); *see also* 4 C.F.R. § 21.4(a) (1994); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 33.104(b) (1 Apr. 1984) [hereinafter FAR]. In its entirety, 31 U.S.C.A. § 3553(c) provides:

> (c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.
>
> (2) The head of the procuring activity responsible for award of the contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—
>
> (A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and
>
> (B) after the Comptroller General is advised of that finding.
>
> (3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days thereafter.

[17] *See also* 4 C.F.R. § 21.4(b) (1994); FAR, *supra* note 16, 33.104(c). Although FASA § 1402 substantially amended 31 U.S.C.A. § 3553, the postaward override provisions (best interests or urgent and compelling circumstances) remain unaltered.

[18] *See* Topgallant Group, Inc. v. United States, 704 F. Supp. 265 (D.D.C. 1988); Foundation Health Fed. Servs. v. United States, 39 Cont. Cas. Fed. (CCH) ¶ 76,681 (D.D.C. 1993). These cases will be discussed later in the article; *see infra* notes 98-130 and accompanying text.

ed bidder has filed a protest with the GAO alleging a violation of a procurement statute or regulation. If timely filed, to obtain meaningful relief at the GAO, the protester relies on the CICA automatic stay provisions to either suspend award of the contract (preaward protest situation) or performance of the newly awarded contract (postaward protest situation).

Faced with an automatic stay, the agency involved invokes the appropriate CICA override provision to continue the procurement process despite the protest.[19] The protester then files suit in a federal district court seeking injunctive relief against the agency alleging an improper override of the CICA stay.[20] In these cases, the protester wants the district court judge to enjoin the agency from proceeding with the procurement process until the GAO renders its final decision.

The district court reviews alleged CICA violations under the framework of the Administrative Procedures Act (APA).[21] Under the APA, the district court will determine whether the agency's override of the CICA stay was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[22] The district court's review under the APA is limited to the administrative record.[23]

Additionally, in these types of cases, the protester has the burden of proof in establishing the requirements for injunctive relief.[24] In general, the protester must show: (1) a substantial likelihood of success on the merits, and (2) that it will suffer irreparable injury if the injunction is denied.[25] Of the two elements, the likelihood of success on the merits is the most important. When examining this element, the court's analysis does not focus on whether the protester will succeed before GAO on its protest.[26] Instead, under the APA, the court will focus on whether the protester can establish that the agency overrode the CICA stay improperly.

With this background, this article will discuss the cases that have analyzed the CICA override provisions. Most of the cases in this area address the "urgent and compelling circumstances" standard for overriding a CICA stay. Although these cases usually involve preaward protests, the same urgent and compelling circumstances standard exists in postaward protest situations.[27]

The Urgent and Compelling Circumstances Standard

There are two principle views among the district courts as to the proper focus of inquiry for applying the urgent and compelling circumstances standard. In the minority view, espoused by several D.C. District Court decisions, the focus is on whether the type of work or item being procured is urgently needed. In the majority view, the focus of the inquiry is on whether performance by the particular awardee is urgent and compelling. The courts that follow the minority view all have ruled in favor of the agency, whereas the courts that follow the majority view tend to rule in favor of the protester.

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[19] While a significant number of CICA stays are overridden each year, *see supra* note 4, this number is rather small compared to the total number of protests filed each year. For example, in FY 1993, 3109 protests were filed at GAO and 2696 protests were filed in FY 1992. *See* 61 Fed. Con. Rpt. (BNA) 185 (1994); 59 Fed. Con. Rpt. (BNA) 153 (1993). However, not all protests result in CICA stays.

[20] The GAO does not review agency override decisions. *See* Ace-Federal Reporters, Inc., B-241309, Dec. 14, 1990, 91-2 CPD ¶ 438. However, the CICA requires an agency to notify the GAO of its decision to override a CICA stay. *See* 5 U.S.C.A. § 3553(c)(2)(B), (d)(2)(B); Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53. The FASA § 1402 amendments to 31 U.S.C.A. § 3553 did not alter the agency's duty to notify GAO of the override decision.

[21] *See* 5 U.S.C.A. §§ 701-706.

[22] *Id.* § 706(2)(A). In government procurement actions, to prevail under § 706(2)(A), "'a disappointed bidder must show either (1) that the decision of the procurement official had no rational basis, or (2) that the decision involved a clear and prejudicial violation of the applicable statutes or regulations.'" Shoals Am. Ind., Inc. v. United States, 877 F.2d 883, 887 (11th Cir. 1989) (citing Choctaw Mfg. Co., Inc. v. United States, 761 F.2d 609, 616 (11th Cir. 1985)).

[23] *See* Camps v. Pitts, 411 U.S. 138, 142 (1973); 5 U.S.C.A. § 706. The most important document in the administrative record is the Determination and Findings (D&F) which details the reasons for the agency's decision to override the CICA stay. *See supra* note 63.

[24] *See* Granny Goose Foods, Inc., v. Brotherhood of Teamsters and Auto Truck Drivers, 415 U.S. 423 (1974).

[25] There is typically a four-prong test for injunctive relief: (1) substantial likelihood of success; (2) irreparable injury; (3) balance of harms; and (4) public interest. *See generally* DTH Management Group v. Kelso, 844 F. Supp. 251, 254 (E.D.N.C. 1993). Although many of the cases examined in this article discuss all four elements for injunctive relief, this article will focus on the "likelihood of success on the merits" element. For an excellent discussion on how the courts have analyzed the elements for injunctive relief in protest override litigation, *see* Rapoport & Carpenter, *Litigating Protest Overrides in the District Courts*, 61 Fed. Con. Rpt. (BNA) 196 (1994).

[26] Usually, the GAO protest that was filed by the protester continues through the GAO process. The district court is only called on to examine the agency override. However, the protester can ask the district court to examine the bid protest issues originally raised before the GAO. The district court has jurisdiction to review those matters by virtue of Scanwell Laboratories Corp. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). Once the GAO is notified that the district court is reviewing the bid protest issues, the GAO will dismiss the protest. 4 C.F.R. § 21.3(m) (11) (1994).

However, a split exists in the federal circuits on whether "*Scanwell*" suits may be brought *prior to award* of the contract. The disagreement is based on the statutory language of the Federal Improvements Act of 1982 which grants the Court of Federal Claims *exclusive* equitable jurisdiction over contract claims *before award*. *See* 28 U.S.C.A. § 1491(a)(3). The First and Third Circuits recognize concurrent jurisdiction with the Court of Federal Claims over preaward claims. *See* In re Smith & Wesson, Inc., 757 F.2d 431 (1st Cir. 1985); Coco Bro. v. Pierce, 741 F.2d 675 (3d Cir. 1984). The Ninth, Fourth, and Second Circuits hold that the district courts have no preaward jurisdiction. *See* J.P. Francis & Assoc. v. United States, 902 F.2d 740 (9th Cir. 1990); Rex Sys., Inc. v. Holiday, 814 F.2d 994 (4th Cir. 1987); B.K. Instr., Inc. v. United States, 715 F.2d 713 (2d Cir. 1983).

[27] *Compare* 31 U.S.C.A. § 3553(c)(2)(A) *with* § 3553(d)(2)(A)(ii).

The Minority View

Burnside-Ott Aviation Training Center, Inc. v. Department of the Navy[28] provides an excellent example of the minority view. Burnside-Ott, the incumbent contractor on a Navy pilot flight simulator services contract, lost award of a follow-on contract to Ford Aerospace.[29] Consequently, Burnside-Ott filed a postaward GAO protest, staying the contract performance by Ford Aerospace.

The Navy overrode the CICA stay based on a determination of urgent and compelling circumstances.[30] Burnside-Ott challenged the Navy's decision to override the stay in the district court, arguing that the determination: (1) violated the intent of the CICA stay provision; (2) lacked a rational basis; and (3) contained procedural defects.[31]

Moreover, Burnside-Ott argued that there were no urgent and compelling circumstances sufficient to override the CICA stay because its contract could be extended to provide pilot training services during the pendency of the GAO protest. In examining this matter, the district court determined that the "finding required by CICA to override the automatic stay was that performance of the contract by *any* contractor was urgent and compelling."[32] The district court focused on the item being procured to determine whether it was urgent and compelling. If pilot training was urgent and compelling, it would be a sufficient reason for the Navy to override the CICA stay.

The district court then noted that Burnside-Ott had admitted that the pilot training "is a critical portal through which every Navy, Marine Corps and Coast Guard pilot passes" and that "[t]he technical quality of such training is crucial and affects Naval flight safety, pilot proficiency and force readiness."[33] Thus, the court found that Burnside-Ott had conceded the urgent and compelling nature of the procurement. Accordingly, the court held that:

> [T]he Navy's decision to lift the stay had a rational basis and was in accordance with CICA and the applicable FAR provisions. The Navy found, and Burnside-Ott admits, that it was urgent and compelling that the pilot training services at issue continue during the pendency of the bid protest. *That is all the law requires.*[34]

The district court specifically rejected Burnside-Ott's argument that its contract should have been merely extended to avoid any adverse impact on pilot training due to the CICA stay.[35] Because the focus of the urgent and compelling inquiry is not on the incumbent contractor's ability to perform during the pendency of the GAO protest, but rather on the

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[28] 35 Cont. Cas. Fed. (CCH) ¶ 75,586 (D.D.C. 1988).

[29] *Id.* at 82,186.

[30] *Id.*

[31] *Id.* at 82,187.

[32] *Id.* at 82,188 (emphasis added).

[33] *Id.*

[34] *Id.* at 82,189 (emphasis added).

[35] Burnside-Ott urged the court to apply the standard of review adopted by the GSBCA interpreting the similar stay provisions of the Brooks Act. *Id.* at 82,187. The GSBCA has repeatedly held that to establish urgent and compelling circumstances under the Brooks Act, the government (1) must demonstrate that the negative impact of the suspension cannot be avoided by alternative methods, and (2) cannot make such a showing when an existing contract can be extended to cover the statutory period for deciding the protest. *See* RGI, Inc., GSBCA No. 11348-P, 1991 BPD ¶ 176; Computer Data Systems, Inc., GSBCA No. 9217-P, 88-1 BCA ¶ 20,257, at 102,513.

Regarding the GSBCA requirements for urgent and compelling circumstances under the Brooks Act, the court stated:

> This may be an appropriate standard in the context of the Brooks Act, which calls for a *de novo* hearing before the GSBCA and places the burden on the federal agency concerned to [establish urgent and compelling circumstances]. It is not, however, the standard that will be applied in an extraordinary action in federal court under CICA, which does not contemplate such a *de novo* hearing and places the burden on plaintiff to show the invalidity of the [agency's override].

Burnside-Ott, 35 Cont. Cas. Fed. at 82,187-88.

nature of the work being procured, the court stated that Burnside-Ott's argument was misplaced.[36] The court further remarked that "if the Navy could have lived without those services pending GAO's disposition of the bid protest, it would have been arbitrary and capricious to allow *either* Ford or Burnside-Ott to perform."[37]

A similar analysis took place in *Northern Management Services, Inc. v. United States*.[38] Northern Management, the incumbent contractor on a Navy maintenance contract for fuel recovery systems, filed a GAO bid protest just prior to bid opening.[39] The Navy overrode the CICA preaward stay based on a determination of urgent and compelling circumstances.[40]

In examining whether urgent and compelling circumstances existed to warrant the Navy's action in overriding the stay, the district court focused on the item being procured—the fuel recovery system. The court held that the Navy's "first reason alone, the necessity of continued operation of the fuel recovery system, provides a rational basis for the decision to issue the Determination to lift the CICA stay."[41] The court further held that because a failure to operate the system could subject the agency to penalties under the Clean Water Act, the Navy's determination of urgent and compelling circumstances was rationally based.[42]

The court was unpersuaded by Northern Management's argument that no urgent and compelling circumstances existed because, as the incumbent contractor, it would be able to maintain the fuel recovery system pending the GAO protest.[43] In response to this argument, the court stated that "if the Navy has determined that urgent and compelling circumstances justify overriding the CICA stay, 'the clear presumption is that the awardee of the disputed contract, not the bid protester, will perform.'"[44]

Another case which applied the minority view is *DOD Contracts, Inc.*[45] In *DOD Contracts*, the Navy focused on the procurement—the necessity for continued maintenance operations—in its determination to override a CICA stay. At

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[36] A similar argument was rejected in Superior Engineering and Elecs. Co., Inc. v. United States, No. 86-860-N, 1987 U.S. Dist. LEXIS 7940 (E.D. Va. Aug. 31, 1987). In *Superior Engineering*, the incumbent protester challenged an override decision based on regulations under both the Small Business Act and the Walsh-Healey Public Contracts Act (which are analogous to the CICA urgent and compelling circumstances standard). The protester argued that it could provide the urgently required goods under a noncompetitive extension of the existing contract, thus eliminating the need to award the follow-on contract to the low bidder. *Id.* at *16. In essence, the protester contended that because a protest existed, it was in the Army's best interest to extend its contract rather than award a new contract to the low bidder. *Id.* at *19.

The district court disagreed. After noting that neither the protester nor the low bidder had a right to the contract, and that it was necessary for the government to have a contractor available to supply the goods, the court aptly characterized the dilemma that the Army faced as follows:

> The contracting officer is faced with a dilemma. He either had to award the contract to Jonathan Corporation, which was the low bidder, or to extend the Superior [protester] contract. In either instance, he would have to find that there were urgent and compelling reasons for the government to enter into such an agreement.

Id. at *20. Thus, the court rejected the argument that the focus of the analysis should be on whether the incumbent's contract should be extended.

[37] *Burnside-Ott*, 35 Cont. Cas. Fed. at 82,188. The court noted, however, that if the Navy needed the services during the interim period while the GAO decides the protest, Burnside-Ott, as the incumbent, would have no special, or vested right to perform during this period. The court determined that the CICA presumes that the awardee of the disputed contract, not the bid protester, will perform when the government overrides the automatic stay:

> To the contrary, under CICA the clear presumption is that the awardee of the disputed contract, not the bid protester, will perform when the automatic stay is overridden. This presumption is most evident in CICA's direction to GAO, once the stay has been lifted, to make its recommendation on the merits of the bid protest "without regard to any cost disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C.A. § 3554(b)(2). This reflects Congress's judgement that, while the federal agency concerned should not have to bear the cost of foregoing the goods or services during the pendency of the bid protest if there is an urgent and compelling need for them, it should have to bear the cost of extracting the awardee to make the bid protester whole in the event the protest is ultimately sustained.

Id.

[38] No. 92-2104, 1992 WL 294993 (D.D.C. Sept. 30, 1992).

[39] *Id.* at *3.

[40] *Id.* The Navy's D&F stated that it was necessary to override the stay because the operation and maintenance of the fuel recovery system was a new and highly critical work requirement not included in the current contract. Additionally, the Navy noted that the failure to operate and maintain the system may have subjected it to penalties under the Clean Water Act or the Safe Drinking Water Act and would severely jeopardize clean-up efforts.

[41] *Id.* at *5.

[42] *Id.* The court stated that "the Navy's determination that preventing violations of federal law is urgent and compelling was a reasonable and rational conclusion." *Id.*

[43] *Id.* at *4 n.6. The court stated that "the fact that [Northern Management], the incumbent, might be able to maintain the fuel recovery system pending the GAO protest does not bolster [Northern Management's] argument that no urgent and compelling circumstances exist." *Id.*

[44] *Id.* (citing TGS Technology, Inc. v. United States, No. 92-0062, 1992 WL 19058, *4 (D.D.C. Jan. 14, 1992) (quoting Burnside-Ott, 35 Cont. Cas. Fed. (CCH) ¶ 82,188 (D.D.C. 1988)). *See supra* note 37.

[45] 34 Cont. Cas. Fed. (CCH) ¶ 75,406 (D.D.C. 1987).

trial, the incumbent contractor argued that its contract, if extended, could have covered all services, including the new services, while the GAO decided the protest.

In analyzing the Navy's override determination, the court noted that in an APA case, its review was limited to the administrative record. The court, therefore, concluded that it was inappropriate for the incumbent contractor to attempt to undermine the Navy's determination by arguing that the Navy should have extended its contract rather than override the CICA stay.[46] As a result, the court determined that the Navy's reasons to override the CICA stay, as reflected in the administrative record, satisfied the CICA's requirements.[47]

In *Litton Systems, Inc. v. Carlucci*,[48] the protester challenged the United States Army Communications-Electronics Command's (CECOM) use of urgent and compelling circumstances in support of its postaward override decision. At issue was a contract for the manufacture of night vision goggles (NVG). In overriding the CICA stay, the CECOM determined that "any further delays in this procurement contract will significantly delay the manufacture and delivery of critically needed, mission safe [NVG]."[49]

With little discussion and analysis, the court determined that it could not hold that the CECOM's "finding of urgent circumstances was irrational or even arbitrary."[50] The critical need for NVG persuaded the court to allow the override. By its holding, the court implicitly agreed with the CECOM that the focus of the urgent and compelling circumstances standard is on the item or service being procured. However, *Litton* did not involve an incumbent contractor.[51]

As demonstrated, the minority view focuses on the item or service being procured when reviewing an agency's override decision. However, a "red flag" needs to be raised cautioning against relying on the minority cases to support an override decision, particularly when an incumbent contractor is involved.

Because the minority cases are unreported decisions and thus, of little precedential value, procurement officials should not rely on them. Additionally, the cases in the majority, many of which are reported, have rejected the minority view of focusing *solely* on the procurement in reviewing the agency's finding of urgent and compelling circumstances.

The Majority View

When defending an override decision before a district court, an agency runs a substantial risk of being enjoined if it focuses *solely* on the item or service being procured under the urgent and compelling circumstances standard. *Dairy Maid Dairy, Inc. v. United States*[52] and *DTH Management Group v. Kelso*[53] demonstrates this view.

Both *Dairy Maid* and *DTH Management* represent the "majority view" (*i.e.*, the focal point of the override analysis is on whether or not performance *by the awardee* is urgent and compelling). In this analysis, whether the incumbent's contract could have been extended is of critical importance. Succinctly stated, if an incumbent contractor exists at the time of protest, the agency's failure to consider extending the incumbent's contract is fatal to the override decision.

In *Dairy Maid*, the incumbent contractor, Dairy Maid, challenged the Army's decision to award a follow-on contract to the successful offeror, Contact International. The contract was for operating the government-owned contractor-operated milk plant in the Republic of Korea.[54] Before award of the contract, Dairy Maid filed a GAO bid protest alleging numerous improprieties and defects in the solicitation.[55] Because Dairy Maid timely filed its protest, the Army initially was pre-

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[46] *Id.* at 81,165. DOD Contracts' president testified at trial and presented numerous factual claims as to how the Navy could have avoided the conditions it determined as "urgent and compelling." The court held that "any factual challenge to an administrative finding of "urgent and compelling circumstances" must be presented to the deciding official and come before the court only as part of the record to be reviewed under standards set by the APA." *Id.*

[47] *Id.*

[48] No. 88-0652, 1988 WL 26078 (D.D.C. Mar. 14, 1988).

[49] *Id.* at *1.

[50] *Id.*

[51] From the decision, it appears that the CECOM's solicitation was a new requirement for NVG and as such, there was no incumbent contractor. Litton Systems merely was one of several companies that submitted a proposal for the NVG contract. Litton challenged the postaward override because it feared that the awardee was using the award of the NVG contract to obtain similar contracts with foreign governments. Thus, Litton felt it would lose more contracts unless the awardee's performance was stayed until the protest was resolved. *Id.* at *1-2.

[52] 837 F. Supp. 1370 (E.D. Va. 1993). While assigned to the United States Army Litigation Division, the author represented the Army's interest in *Dairy Maid*.

[53] 844 F. Supp. 251 (E.D.N.C. 1993).

[54] *Dairy Maid*, 837 F. Supp. at 1374.

[55] *Id.* at 1375.

cluded from awarding the contract to Contact International because of the CICA preaward stay provision.

In response, the Army overrode the CICA stay based on a determination of urgent and compelling circumstances and awarded the contract to Contact International.[56] Dairy Maid reacted by promptly filing yet another GAO bid protest that challenged the award of the contract to Contact International. In light of their postaward bid protest, Dairy Maid again properly requested that the performance of the contract be stayed pursuant to the CICA. Additionally, Dairy Maid offered to continue to operate the milk plant under the terms of its existing contract with the Army until the GAO resolved its two protests.[57]

Before discussing the court's view on what is necessary for an override based on urgent and compelling circumstances, the Army's response, or lack thereof, to Dairy Maid's request for a postaward CICA stay needs to be examined. Immediately following the override of the preaward stay based on urgent and compelling circumstances, the Army was faced with Dairy Maid's postaward bid protest.

As previously noted, if a postaward bid protest is filed within ten days of contract award, the CICA requires that the agency suspend contract performance.[58] However, in Dairy Maid, the Army had just completed the steps to award the contract despite Dairy Maid's preaward protest. Therefore, the Army reasoned that it was unnecessary and redundant to repeat the exact same steps to override Dairy Maid's postaward protest stay based on the same urgent and compelling circumstances standard.[59]

The District Court for the Eastern District of Virginia disagreed with the Army's reasoning.[60] The court stated that the postaward stay provisions—31 U.S.C.A. § 3553(d)—"are mandatory and hence the Army was required to direct [Contact International] to cease performance under the contract unless and until a finding was made pursuant to 31 U.S.C.A. § 3553(d)(2) [override provisions]."[61] The district court characterized the Army's failure to comply with § 3553(d) as "a clear and prejudicial violation of the applicable statutes."[62]

Dairy Maid focused primarily on the Army's determination that urgent and compelling circumstances justified overriding the preaward stay. In its D&F, the Army focused on the item being procured—milk products.[63] For example, the Army "noted a number of reasons why the continued production of milk at the facility was of critical importance, and carefully explained that there were no means of supplying the

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[56] *Id.* at 1375-76. *See infra* note 64 (detailing the reasons why the Army believed that urgent and compelling circumstances existed to warrant a CICA override).

[57] *Id.* at 1376.

[58] *See supra* note 13.

[59] *Dairy Maid*, 837 F. Supp. at 1380.

[60] The Army's position was based on Southern California Roofing Co., B-236631, Dec. 26, 1989, 89-2 CPD ¶ 594. In that case, as a result of a preaward protest filed by Southern California, the General Services Administration (GSA) made a written determination that urgent and compelling circumstances warranted award of the contract. *Id.* at 13,938. After the award of the contract to the low bidder, Southern California filed a postaward protest with the GAO demanding that the GAO notify the GSA to suspend performance of the awardee's contract.

In examining Southern California's protest, the GAO noted:

> Through its submission of what it terms a "post award protest," which as explained below includes no new timely protestable issues, Southern California seeks to nullify the effect of the agency's determination to go forward with the award. Since the agency has already made the required determination to go forward with award in the face of Southern California's pre-award protest it need not go through the same process to continue performance in the face of Southern California's post-award "protest."

Id. at 13,939. *Dairy Maid* failed to find *Southern California* persuasive for two reasons. First, unlike Southern California's postaward protest, Dairy Maid's postaward protest contained new protestable issues. More important, however, the court felt that *Southern California* impermissibly negated the mandatory language of 31 U.S.C.A. § 3553(d). *Dairy Maid*, 837 F. Supp. at 1380.

[61] *Dairy Maid*, 837 F. Supp. at 1380.

[62] *Id.* As a result of the Army's failure to take any action on Dairy Maid's postaward bid protest, the Army was required to pay Dairy Maid's attorney's fees arising under this litigation. *Id.* at 1384.

[63] A D&F is a written approval by an authorized official that is required by statute or regulation as a prerequisite to certain contracting actions. FAR, *supra* note 16, 1.701. For example, DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 33.104(b) & (c) (1 Dec. 1984), requires the Army to prepare a written finding in the D&F format justifying its decision to override a CICA stay. The determination is a conclusion or decision supported by the findings. The findings, which are statements of fact or rationale essential to support the determination, must cover each requirement of the statute or regulation. *See* RALPH C. NASH, JR. & STEVEN L. SCHOONER, THE GOVERNMENT CONTRACTS REFERENCE BOOK (1992).

Army's requirements for dairy products if the plant was not operating."[64]

Dairy Maid did not dispute the Army's findings that milk products were urgently needed in Korea.[65] Dairy Maid argued, however, that the reasons alone were insufficient to override a CICA stay because the Army failed to consider extending Dairy Maid's contract rather than proceeding with the new contract.[66] The court agreed with Dairy Maid's arguments.

In examining this matter, the court stated that the Army's findings "completely ignored the availability of Dairy Maid to continue production under the terms of the contract while its protest was pending before the GAO."[67] Moreover, the court noted that the Army failed to explain in its findings why it considered performance by Contact International, rather than Dairy Maid, to have been essential.[68]

The court disagreed with the Army that the focus of the court's analysis should be solely on the procurement.[69] Instead, the court remarked that the "CICA requires the agency to make findings that performance of the contract *by the particular proposed contractor is urgent and compelling.*"[70] Because the Army failed to make these findings, the court held that the Army's "decision to override the pre-award stay was arbitrary, capricious and otherwise not in accordance with law."[71]

The court was particularly troubled by the Army's failure to consider extending Dairy Maid's contract during the pendency of the GAO protest.[72] However, the court recognized that there may be sufficient reasons to justify not extending the incumbent's contract—which the Army should explain in the D&F.[73] A key point of emphasis is that under the prevailing view in the federal district courts, failure by the agency to consider extending the incumbent's contract during the pendency of the GAO protest will be fatal to any override decision.

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[64] *Dairy Maid*, 837 F. Supp. at 1378. The administrative record in *Dairy Maid* reflects the following reasons that the Army believed that urgent and compelling circumstances existed to warrant an override:

> (1) The milk plant is the only source for dairy products to support 61 dining facilities, Army and Air Force hospitals, DOD school cafeterias, club systems, and Army and Air Force Exchange Service outlets.
>
> (2) There are no veterinary-approved local dairies in Korea that could be used to provide milk and milk products. Local dairies pose risks of tuberculosis and other diseases.
>
> (3) Extended shelf life (ESL) milk from the United States is only available in limited quantities, would take approximately six months to procure sufficient quantities and ship to Korea, and the Army does not have sufficient storage space in Korea for ESL milk.
>
> (4) Lack of milk and milk products will result in dietary requirements at the hospitals and schools not being met, nutritional requirements established by Army directives not being met, and would seriously affect troop morale.

[65] *Id.*

[66] In its brief and at trial, Dairy Maid cited to Unified Industries, Inc., B-241010, Dec. 19, 1990, 70 Comp. Gen. 142, 91-1 CPD ¶ 11, where the GAO had recognized the practice of extending an incumbent's contract in these circumstances. In *Unified Industries*, the GAO stated that

> agencies have typically satisfied their continuing need for the goods or services in question by executing short-term modifications to the predecessor contract. In our view, such action on the part of a contracting agency is consistent with the overall purpose of CICA, since it preserves for the protester an opportunity to obtain meaningful relief in the event that we sustain the protest.

Id. at 8538.

[67] *Dairy Maid*, 837 F. Supp. at 1378.

[68] *Id.*

[69] *Id.* The court remarked that adopting the Army's interpretation of the urgent and compelling standard (which, in effect, reflected the minority view) would allow the override exception to swallow the general rule of imposing a stay. *Id.*

[70] *Id.* at 1378-79 (emphasis added). In reaching this conclusion, the court relied on the following cases: DTH Management, 844 F. Supp. 251 (E.D.N.C. 1993); Ace Fed. Rep. v. Federal Energy Reg. Comm'n, No. 90-2396, 1990 U.S. Dist. LEXIS 13823 (D.D.C. Oct. 16, 1990); Samson Tug & Barge Co. v. United States, 695 F. Supp. 25 (D.D.C. 1988); Universal Shipping Co. v. United States, 652 F. Supp. 668 (D.D.C. 1987). This article will discuss each of these cases.

[71] *Dairy Maid*, 837 F. Supp. at 1379.

[72] The court's concern was well founded given the Army's past practices regarding the milk plant. Before Dairy Maid became the incumbent contractor, Contact International had operated the milk plant. At that time, Contact International's contract was extended when it filed a protest challenging the award to Dairy Maid. *Id.* at 1374. Now that their roles were reversed, Dairy Maid could not understand the Army's reluctance to extend its contract as it had done for Contact International.

[73] *Id.* at 1379. At trial, the contracting officer alleged that Dairy Maid had threatened, in a letter, not to perform the contract during the interim period unless an investigation into Dairy Maid's business practices was terminated. However, this particular letter could not be found. The court remarked that had the Army been able to prove its allegation that Dairy Maid threatened not to perform the contract during the interim period, then this "might have been sufficient to support a finding that performance by Contact International was necessary." *Id.*

In *DTH Management*, the District Court for the Eastern District of North Carolina echoed this view.[74] *DTH Management* involved a Navy contract for housing maintenance and repair services. The incumbent contractor, DTH, filed a GAO protest after learning of the Navy's intent to award the follow-on contract to Ameriko.[75] The Navy subsequently overrode the CICA stay contending the existence of urgent and compelling circumstances.[76] DTH then filed for injunctive relief, asserting that the Navy acted arbitrarily and capriciously and contrary to law in overriding the CICA stay.

In examining this matter, the district court carefully examined the findings that the Navy relied on to support the override. As in *Dairy Maid*, the district court rejected the agency's findings because they focused on the procurement rather than the choice of contractor. In this regard, the district court stated:

> the defendant's findings contain merely a conclusory allegation that "[t]he services provided under this contract are essential to the health, safety, and morale of military personnel and their dependents," and "[a]ny lapse in these services would have a detrimental effect on the health and safety of the individuals residing in these [military family housing] units.
>
> Defendant's findings raise serious questions because they completely ignore the availability of plaintiff to continue the services in the interim while plaintiff's protest is pending before the GAO. The findings give no explanation about why performance of the contract by Ameriko presents urging and compelling circumstances, but merely that the performance of the contract by some entity is allegedly urgent and compelling."[77]

The district court noted that the services at issue in the case were janitorial in nature which required no particular expertise. Consequently, because the Navy failed to explain why it could not continue to use DTH's services during the pendency of the GAO protest, the court concluded that the Navy's action in overriding the stay was "contrary to law and not rational or reasonable."[78]

DTH Management, like *Dairy Maid*, determined that a CICA override decision "requires the agency to make findings that performance of the contract by the particular proposed contractor is urgent and compelling."[79] Thus, according to the *DTH Management* court, the proper focus of the urgent and compelling circumstances inquiry is on the choice of contractor.

In rejecting the minority view that the focus should be on the item or service being procured, *DTH Management* stated that such a "view would eviscerate the purpose and effect of the stay provision of the CICA because performance of almost any government contract would conceivably be deemed 'urgent and compelling circumstances.'"[80] Accordingly, the court reasoned that the override exception would consume the underlying purpose of an automatic stay—to maintain the status quo in the interests of enhancing full and open competition.

Ace-Federal Reporter v. Federal Energy Regulatory Commission is another case applying the majority view.[81] Ace-Federal, the incumbent contractor, challenged the Federal Energy Regulatory Commission's (FERC) override of a CICA stay and subsequent award of a contract for stenographic services. The FERC contended that its current contract with Ace-Federal was due to expire—which would leave FERC without stenographic services—constituted urgent and compelling circumstances.[82]

The D.C. District Court had little difficulty deciding that the CICA override provisions require more than the mere expiration of the incumbent's contract. The court remarked that the "FERC ignores the fact that the purpose of the stay is to preserve the status quo pending the resolution of the protest, and the status quo would have meant that Ace-Federal would have continued to provide FERC with stenographic services" until the GAO renders a decision on the protest.[83]

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[74] 844 F. Supp. 251 (E.D.N.C. 1993).

[75] *Id.* at 253.

[76] *Id.*

[77] *Id.* at 256.

[78] *Id.* at 257.

[79] *Id. See supra* note 70 for the cases that *DTH Management* relied on in reaching this conclusion. Additionally, the court also distinguished the cases that form the minority view (*Northern Management*; *Burnside-Ott*; and *Litton Systems*). *See id.* at 256-57.

[80] *Id.* at 256.

[81] No. 90-2396, 1990 U.S. Dist. LEXIS 13823 (D.D.C. Oct. 16, 1990).

[82] *Id.* at *5.

[83] *Id.*

Thus, to maintain the status quo, the district court enjoined the FERC from proceeding with the contract during the pendency of the GAO protest. *Ace-Federal* is another example of a federal district court reversing an override decision because of the agency's failure to consider extending the incumbent protester's contract while the GAO decides the protest.

Superior Services, Inc. v. Dalton is the most recent reported case in this area.[84] This case provides a prime example of an agency considering the extension of an incumbent's contract and rejecting it in its findings to justify an override decision based on urgent and compelling circumstances.

The contract at issue in *Superior Services* was for the maintenance and operation of approximately 2300 Naval housing units. Superior Services, the second-ranked bidder, filed a GAO bid protest after the Navy awarded the contract to Cabaco, Inc.[85] The incumbent's contract and the follow-on contract were awarded pursuant to the Small Business Administration's (SBA) 8(a) minority set-aside program.[86]

The Navy overrode the postaward CICA stay based on a determination of urgent and compelling circumstances and authorized Cabaco to proceed with performance of the contract.[87] Superior Services and LEG, the incumbent contractor, filed for an injunction alleging that the Navy's override was improper.[88]

In examining this matter, the District Court for the Southern District of California was satisfied that the Navy's D&F set forth sufficient justification for the override. The court noted that the findings specifically addressed why the incumbent's contract could not have been extended during the pendency of the GAO protest. The findings explained that LEG could not continue to provide the maintenance services under this contract because it no longer qualified as a small and disadvantaged business under the SBA's 8(a) program.[89]

Moreover, the findings described the urgent need for the maintenance services for the health and safety of the individuals residing in the housing units. While this reason *alone* would not satisfy most courts,[90] that the agency considered and rejected the extension of LEG's contract proved to be the winning point. The court concluded that the findings adequately explained why the Navy had to allow the successful bidder to perform the contract rather than extend the incumbent's contract.[91] Thus, the court held that the Navy has sufficiently set forth compelling reasons to override the CICA stay.

In *Commercial Energies, Inc. v. Cheney*,[92] the Defense Fuel Supply Center (DFSC)[93] overrode a preaward CICA stay based on urgent and compelling circumstances that it would save over $400,000. Commercial Energies, the incumbent contractor, filed for injunctive relief alleging that the override was improper because the DFSC could have extended its contract.

The contract at issue concerned the supply of natural gas to eighteen government installations.[94] As part of its determination to override the CICA stay and award the contract to the low bidder, the DFSC specifically considered extending Commercial Energies's contract. The DFSC concluded, however, that it would save an estimated $463,000 by overriding the stay and awarding the contract to the low bidder rather than extending the incumbent's contract.[95]

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[84] 851 F. Supp. 381 (S.D. Cal. 1994).

[85] *Id.* at 383.

[86] *Id.*

[87] *Id.* at 384.

[88] *Id.* Superior Services and LEG had entered into an teaming agreement for the purpose of competing for and performing the new maintenance contract. *Id.* at 383.

[89] *Id.* at 386. Due to delays in the preaward process and a protest filed by Superior Services, the Navy had extended LEG's contract three times beyond its original expiration date. These extensions occurred even though LEG no longer qualified as a small and disadvantaged business under the 8(a) program. It was at this point that the SBA advised the Navy that it would not agree to any further extensions of the LEG contract. *Id.* at 383.

[90] Without any analysis, the district court simply accepted the Navy's determination that maintenance services were essential to the health and safety of housing residents. *But see* DTH Management Group v. Kelso, 844 F. Supp. 251, 256 (E.D.N.C. 1993). The Navy used identical language in its D&F describing the health and safety concerns resulting from a lapse in maintenance services in both *DTH Management* and *Superior Services*. However, in *DTH Management*, the court rejected the Navy's findings, calling them mere "conclusory allegations." *Id.* at 256. The different result between these cases appears to be that in *Superior Services* the Navy considered the possibility of extending the incumbent's contract. Apparently, the Navy had learned a lesson from the *DTH Management* result.

[91] *Superior Service*, 851 F. Supp. at 386.

[92] 745 F. Supp. 647 (D. Colo. 1990).

[93] The DFSC is a component of the Defense Logistics Agency. *Id.* at 648.

[94] *Id.*

[95] *Id.* at 649.

In examining this matter, the District Court for the District of Colorado held that it was not irrational for the DFSC to call savings of this magnitude an urgent and compelling circumstance sufficient to override the CICA stay.[96] Thus, the court denied Commercial Energies's request for injunctive relief.

Commercial Energies demonstrates, once again, that when an agency cannot do without a particular item while the GAO considers the protest—in this case, natural gas—the agency must evaluate whether it is urgent and compelling for the awardee to perform the contract to justify overriding the CICA stay. In this analysis, it is critical that the agency consider extending the incumbent's contract.[97]

This theme continues in the next section concerning the best interests standard. The focal point of the court's analysis under the best interests standard is whether performance by the awardee is in the best interests of the United States.

The Best Interests Standard

The best interests standard only applies in a postaward situation. When confronted with a postaward CICA stay, an agency can choose to override the stay based either on the urgent and compelling circumstances standard or the best interests standard.[98] Under the best interests standard, the CICA requires that the agency make a finding that "performance of the contract is in the best interests of the United States" to override the stay.[99]

Protesters have had a difficult time challenging an agency's override decision based on the best interests standard. The most notable reason is that some courts have determined that an agency's decision to override a CICA stay based on the best interests of the United States is not subject to judicial review.[100]

In *Topgallant Group, Inc. v. United States*,[101] the D.C. District Court reviewed the Military Sealift Command's (MSC) decision to override a CICA stay. The contract required shipping household goods to military personnel stationed in Western Europe. The MSC determined that it would be in the best interests of the United States to continue performance of the awarded contract to meet the military's transportation needs despite the protest.[102] For example, the MSC found that using alternative shippers "would create a severe traffic management problem" which would "affect the timely processing and movement of all DOD cargo," thereby increasing costs.[103] Thus, the MSC concluded that it was an "operational necessity" to override the CICA stay.[104]

In examining the best interests standard, the district court noted that the APA specifically bars judicial review of an agency action which is "committed to agency discretion by law."[105] The court concluded that it could not even review MSC's decision because "there would be 'no law to apply' to determine what constitutes the 'best interest of the United States.'"[106] Thus, the court held that MSC's decision was

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[96] *Id.* at 650.

[97] By requiring that an agency consider extending the incumbent's contract as part of the override determination, the majority view has, in effect, adopted the GSBCA standard for review of urgent and compelling circumstances under the Brooks Act. As indicated in *Burnside-Ott*, however, under the Brooks Act, the GSBCA conducts a de novo hearing where the agency has the burden of proof in establishing urgent and compelling circumstances. However, in federal district court the protestor has the burden to establish that the override decision was not rational. *See supra* note 35. Nevertheless, the case law is now quite clear: under the CICA, an agency must consider extending an incumbent protester's contract before overriding a stay.

[98] *See* 31 U.S.C.A. § 3553(d)(2)(A) (West Supp. 1994).

[99] *Id.* § 3553(d)(2)(A)(i).

[100] However, if the agency has conducted a review, the courts recognize that an agency has broad discretion under the best interests standard and give the agency's decision substantial deference. *See* Universal Shipping Co., Inc. v. United States, 652 F. Supp. 668, 673-74 (D.D.C. 1987) (citing Doe v. Casey, 796 F.2d 1508, 1518 (D.C. Cir. 1986)); Ingram Barge Co. v. United States, 34 Cont. Cas. Fed. (CCH) ¶ 75,486 (D.D.C. 1988).

[101] 704 F. Supp. 265 (D.D.C. 1988).

[102] *Id.* It appears that the MSC relied solely on the best interests standard in overriding the CICA stay. The court fails to mention the urgent and compelling circumstances standard.

[103] *Id.* at 266. Although unclear from the decision, it appears that the plaintiff, Topgallant Group, was not the incumbent contractor.

[104] *Id.*

[105] *Id.* at 266 (citing 5 U.S.C.A. § 701(a)(2)).

[106] *Id.* In this regard, the court also found that

> the CICA statute under which the MSC made its determination requires the kind of deference shown by the Supreme Court in *Webster v. Doe* [108 S. Ct. 2047 (1988)] for statutory provisions which leave the determination of what is in the best interest of the United States to the discretion and expertise of the military and national security agencies.

based on a discretionary determination, and, therefore, was not reviewable.[107]

In *Foundation Health*, the D.C District Court was provided with yet another opportunity to address whether judicial review of the best interests standard was appropriate. In this case, the district court followed *Topgallant Group*. Because there is "no law to apply"[108] to determine what constitutes the best interests of the United States, the court stated that "Congress rightfully concluded that this determination should be committed to agency discretion by law."[109]

However, in several decisions before *Topgallant Group* and *Foundation Health*, the D.C. Circuit held that the best interests standard *was* subject to judicial review. These cases are important because they illustrate the focal point of the court's analysis under the best interests standard if judicial review should occur. One of these cases is *Universal Shipping Co., Inc. v. United States*.[110]

In *Universal Shipping*, the court examined its authority to review an override based on both urgent and compelling circumstances and the best interests of the United States in light of the APA's standard of review.[111] The court determined that only if the CICA statute provided "'absolutely no guidance as to how administrative discretion is to be exercised' is review foreclosed."[112]

The court noted that both the urgent and compelling and best interests override provisions specifically required a "finding" before a stay could be lifted.[113] The court stated that this finding "need not be a lengthy discourse on every reason behind the decision, but it must notify the reader of the bases upon which the decision to proceed with the particular contract rests."[114] Thus, the court concluded that the CICA postaward override statute "provides a court with sufficient guidance against which to judge the agency's exercise of discretion."[115]

After holding that review was possible, the court examined the Agency for International Development's (AID) determination to override the CICA stay. The AID is responsible for administering the nation's program for famine relief and had awarded a new contract to Young Inc., to arrange for the transportation of food relief shipments to countries in need.[116] Universal Shipping, the incumbent contractor, filed a postaward bid protest at the GAO and, subsequently filed for injunctive relief when the AID overrode the CICA stay based on the urgent need for famine relief. The AID's override determination was based on both postaward override standards.

With respect to the AID's determination to override the CICA stay, the court stated:

> That letter speaks of the importance of and urgent need for famine relief. The Court has no doubt that famine relief is in the best interests of the United States and that circumstances are sufficiently "urgent and compelling" to merit an uninterrupted flow of relief to the hungry. But to say that it is in the best interest of the United States to ship food is *not* to give a reasoned analysis of why suspension of *this particular contract* would adversely affect the interest of the United States. And that alone is the statement required under the Competition in Contracting Act.

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[107] *Id.* The court noted, however, that if there were evidence of gross impropriety, bad faith, or fraud, then the court could review the agency's decision to override a CICA stay based on the best interests standard. *Id. See also* Hondros v. United States Civil Service Comm'n, 720 F.2d 278, 293 (3d Cir. 1983) ("even those actions 'committed to agency discretion by law' are reviewable on grounds that the agency lacked jurisdiction, that the agency's decision was occasioned by 'impermissible influences,' or that the decision violates any constitutional, statutory, or regulatory command"). The rationale for the nonreviewability of the best interests override decision does not apply under the urgent and compelling circumstances standard. Courts are not at all hesitant to examine the agency's determination to override a CICA stay based on urgent and compelling circumstances.

[108] *See* 39 Cont. Cas. Fed (CCH) ¶ 76,681 (D.D.C. 1993). Under the APA, the court noted that judicial review of an agency action is limited to situations in which agency action is not "committed to agency discretion by law." *Id.* at *3 (citing 5 U.S.C.A. § 701(a)(2)). The court further noted that § 701(a)(2) "applies in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)). The court concluded that the CICA best interests standard is such a statute. *Id.* at *4.

[109] *Id.* at *4. *See* TGS Technology, Inc. v. United States, 37 Cont. Cas. Fed. (CCH) ¶ 76,259 (D.D.C. 1992) (The court questioned whether it had the authority to review the Air Force's determination to override a CICA stay based on the best interests standard. Nevertheless, the court concluded that injunctive relief was inappropriate where a stay of the contract would prevent several scheduled manned and unmanned space launches.). *See also* Oak Street Distribution Center, Inc. v. United States, No. 91-1357-LFO, 1991 WL 125998 (D.D.C. Jun. 25, 1991) (The court stated that the "likelihood that the agency's [best interests override] decision is unreviewable, when added to the difficulty of determining when and whether swift provision of space for storage of files might be in the best interests of the United States, calls into question plaintiff's chances of success on the merits.").

[110] 652 F. Supp. 668 (D.D.C. 1987). *Universal Shipping* is the first reported case that concerns a best interests override of a CICA stay.

[111] *Id.* at 672 (citing 5 U.S.C.A. § 701(a)(2)).

[112] *Id.* at 673 (citing Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

[113] *Id.*

[114] *Id.*

[115] *Id.* at 674.

[116] *Id.* at 670.

> Thus, the Court cannot conclude that AID has examined the legally relevant factors, for it is apparent that AID has not investigated whether a stay of the *Young Contract* would harm the interests of the United States.[117]

In light of this reasoning, the court held that the AID's action in overriding the CICA stay was contrary to law. The court issued an injunction against the AID requiring it to stay performance of the Young contract.[118]

In the author's opinion, the court's holding in *Universal Shipping*, with respect to the reviewability of the best interests standard, was in error. The court appeared to blur the distinction between the best interests standard and the urgent and compelling standard.

Furthermore, because this was a case of first impression, there was no guidance available to the court. When examining the legislative history on the purpose of the stay provisions, it is not surprising that the court reasoned that Congress would desire judicial review of an agency's override.[119] Yet, in light of *Topgallant Group* and *Foundation Health* it is now likely that the D.C. District Court will give *Universal Shipping* little weight concerning the reviewability of the best interests standard.

Nevertheless, if a court chooses to review an agency's decision to override a CICA stay under the best interests standard, *Universal Shipping* provides guidance as to the proper focus of the court's analysis. The court will concentrate its analysis on whether the suspension of the awardee's contract is in the best interests of the United States. Once again, agency consideration of extending the incumbent's contract is of critical importance.

Samson Tug & Barge Co. v. United States aptly demonstrated the focal point of the court's analysis under the best interests standard.[120] In *Samson Tug*, the MSC overrode a CICA stay to allow the awardee to continue a shipping contract despite a postaward protest filed by Samson Tug, the incumbent contractor.

The MSC based its determination to override the CICA stay on a finding that it was in the best interests of the United States to have continued shipping service.[121] The MSC's determination emphasized that if the awardee's contract was suspended, "there would be a break in the resupply of the Naval Air Station at Adak [Alaska] which would adversely impact the ability of the base to perform its mission and the quality of life for military personnel and their dependents."[122]

In examining this matter, the court focused solely on the MSC's choice of contractor. The court noted that the determination contained "no meaningful statement about the availability of continued service by Samson."[123] The court held that "MSC's failure to consider the availability of continuing Samson's" contract to allow GAO sufficient time to address the protests "was arbitrary, capricious, and contrary to law."[124]

Ingram Barge Co. v. United States is the final case that warrants discussion under the best interests standard.[125] This case demonstrates the broad discretion that an agency enjoys under the best interests standard. In *Ingram Barge*, the Military Traffic Management Command (MTMC) awarded a contract to PATCO for the transportation of aviation fuel.[126] Ingram, the incumbent contractor, filed a GAO protest challenging the contract award to PATCO.

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[117] *Id.* at 675.

[118] *Id.* at 675-76. The court also ordered that the contract between the AID and Universal Shipping, although expired, be extended until the GAO protest is resolved.

[119] *See supra* text accompanying notes 14-15 (concerning the legislative history on the purpose of the stay provisions). In determining that judicial review of an agency's determination under the best interests standard is permissible, the court reasoned that to not permit review would allow agency action that is "vindictive, or even blatantly unconstitutional [to] proceed unchecked." *Id.* at 674. However, courts have determined uniformly that even if an agency action is committed to agency discretion by law, review is still possible if there is evidence of gross impropriety, bad faith, fraud, or constitutional violations. *See supra* note 107.

[120] 695 F. Supp. 25 (D.D.C. 1988).

[121] *Id.* at 27.

[122] *Id.*

[123] *Id.* The MSC incorrectly believed, however, that it lacked the authority to extend Samson Tug's contract. As the court noted, a contract provision specifically permitted Samson Tug to perform beyond the expiration date. *Id.* at 26-27. The court was not impressed with the MSC's handling of this matter and remarked that the MSC's concern about the immediate necessity of a new procurement was "completely without foundation." *Id.* Moreover, the MSC could have extended Samson Tug's contract under FAR 6.302-1.

[124] *Id.* at 28. The court also ordered the MSC to extend the Samson Tug contract to preserve the status quo. *Id.* at 30. Moreover, the court never reached the MSC's argument that its decision to override the CICA stay under the best interests standard was unreviewable under the APA. *See* 5 U.S.C.A. § 701(a)(2)). However, *Samson Tug* was decided before *Topgallant Group*.

[125] 34 Cont. Cas. Fed. (CCH) ¶ 75,486 (D.D.C. 1988). *Ingram Barge* was decided before *Topgallant Group*. Without any analysis or discussion, the court stated that it could review a best interests determination under the APA. *Id.* at 81,618.

[126] *Id.* at 81,617.

The MTMC determined that it was in the United States best interests to override the CICA stay and allow PATCO to start performance under the new contract. Ingram filed for injunctive relief challenging the MTCM's determination to override the stay, noting that its contract could have been extended to cover the period that the GAO takes to resolve the protest.[127]

The court was troubled by the MTMC's reasons for overriding the stay.[128] Nevertheless, the court noted that substituting its judgment for that of MTMC would be inappropriate. The court determined that the term "best interests" was very "broad," and gave the MTMC broad discretion in overriding the CICA stay.[129] The court concluded that "while it has serious doubts as to the validity of defendants' [MTMC's] conclusions, it cannot conclude that defendants' conclusions were so lacking in reason as to have been arbitrary and capricious."[130]

The difference between the result in *Ingram Barge* and *Samson Tug* hinges on the agency's consideration of extending the incumbent's contract. In *Samson Tug*, the agency did not meaningfully consider extending the incumbent's contract. As a result, the court enjoined the agency. On the other hand, in *Ingram Barge*, the agency fully considered extending the incumbent's contract but determined it would be too costly. While the court was dissatisfied with the agency's reasons for not extending Ingram's contract, the court, nevertheless, gave great deference to the agency because of the best interests standard.

There are some crucial lessons that can be learned from these cases. In the next section, this article will briefly discuss these lessons.

Lessons Learned

This section assumes the worst case scenario—that is, the agency's override decision will be challenged in a federal district court. This does not mean to suggest that, when addressing a potential override, procurement officials should take one path when litigation is likely and another path when it is not. On the contrary, procurement officials always should strive to prepare an override packet that is in accordance with law and regulation. Thus, in the unhappy event that the override decision goes to federal district court, the agency stands a good chance of not being enjoined.

Selection of a Postaward Override Standard

With this in mind, the first lesson from the cases concerns an agency's selection of an override standard in a postaward situation. Undoubtedly, as the cases demonstrate, an agency *always* should rely on the best interests standard when overriding a postaward CICA stay. The reasons are obvious.

First, the likelihood is great that the district court will determine that the agency's decision is nonreviewable. This is particularly true in the D.C. District Court. Moreover, even if the court decides to review the agency's determination, the court usually will recognize that the agency has broad discretion under the best interests standard.[131] As the cases demonstrate, because of an agency's broad discretion under the best interests standard, courts rarely have found an abuse of this discretion sufficient to warrant injunctive relief. In most situations, the agency will succeed in defending its best interests determination in the district court.

Consideration of the Incumbent

Next, the agency *must* consider extending the incumbent's contract when determining whether to override a CICA stay. This is true whether the agency relies on the urgent and compelling standard or the best interests standard. The courts have made it abundantly clear that the focal point of its analysis is on whether the particular awardee's contract is urgent and compelling or in the best interests of the United States. Critical to this review is whether the incumbent's contract could have been extended while the GAO resolves the protest.

That the agency *considers* extending the incumbent's contract does not mean that the agency *must* extend the incumbent's contract. The key point is that the agency must ensure that its findings adequately explain (1) that it considered extending the incumbent's contract, and (2) the reasons why the agency rejected extending the incumbent's contract.

Reasons that have proven successful in litigation concerning an urgent and compelling circumstances override are: (1)

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[127] *Id.* at 81,618.

[128] For example, the MTMC concluded that PATCO should be allowed to perform the contract because "the system of competitive procurement would be turned 'on its head' if incumbent firms were unilaterally allowed to extend their own performance by filing a protest." *Id.* at 81,619. In response to this conclusion, the court stated that "[i]f defendants are dissatisfied with the applicability of the statute in a situation such as this, they should seek relief from the Congress," rather than use this to rationalize awarding a contract to PATCO. *Id.* However, the MTMC had considered the cost savings of using PATCO over Ingram as another reason to go with PATCO. The court also questioned the MTMC's conclusions concerning costs savings. *Id.*

[129] *Id.* at 81,619. *See also* Harvard Interiors Mfr. Co. v. United States, 798 F. Supp. 565, 572 (E.D. Mo. 1992) (without any analysis or discussion on the reviewability of the best interests standard or the requirements for a best interests override, the court simply concluded that "the pendency of orders for 6100 chairs was a rational basis for the finding that the government's best interests would be served by the lifting of the stay").

[130] *Ingram Barge*, 34 Cont. Cas. Fed. at 81,619.

[131] *See supra* note 100.

a substantial monetary savings with the awardee over the incumbent;[132] (2) an incumbent's inability to perform the new services required under the new contract;[133] and (3) the incumbent no longer qualified as a small and disadvantaged business under the SBA's 8(a) program.[134] The court must be convinced that the agency seriously considered extending the incumbent's contract. As long as there is some rational reason, documented in the agency's findings, the court should allow the override.

Practical Considerations

There are some additional points concerning an agency's "duty" to consider extending the incumbent's contract that need to be raised. This article attempted to break down the cases that examined the urgent and compelling circumstances standard into a minority and majority view. As demonstrated, an agency should not focus primarily on the item or service being procured when determining whether to override a CICA stay.

The distinction between focusing on the procurement or the contractor, however, is not as clear. In all override decisions, the agency will examine the item being procured to ascertain whether it is something absolutely needed during the pendency of the GAO protest. Consequently, the agency first must focus on the item or service being procured. When the agency determines that the item or service is absolutely needed, the focus of the analysis then shifts to the contractor. At this point the majority view enters. The courts require the agency to consider extending the incumbent's contract rather than proceeding with the awardee. This would ensure that the agency has considered everything before disturbing the status quo which the CICA stay attempted to preserve.

In the absence of an incumbent contractor, the item being procured becomes much more important. As *Litton* demonstrated, the need for NVG—an item directly affecting military readiness—convinced the court to allow the override.[135] Although *Litton* is the minority view, the courts in the majority undoubtedly would reach the same conclusion. The agency still would need to focus on the particular awardee, but because of the item being procured, it would be urgent and compelling or in the best interests of the United States to override the CICA stay and proceed with the procurement.[136]

In virtually every override case discussed in this article, the incumbent contractor litigating the override decision was the motivating factor behind most litigation challenging CICA stay overrides.[137] As these cases illustrate, by filing for injunctive relief, the incumbent contractor is attempting to preserve the status quo while its protest is pending before the GAO. The result is that if the agency truly needs the item being procured, then the agency will extend the incumbent's contract during the pendency of the GAO protest. As we have seen, some courts have ordered the agency to extend the incumbent's contract.[138] The motivation behind litigating an override decision is money.

When the agency overrides a CICA stay, it either awards the contract to the successful offeror or continues performance of a newly awarded contract. In either event, the incumbent is not the contractor performing the contract. Faced with this potential loss of income while the GAO decides the protest, many incumbent contractors will vigorously challenge an agency's override.

Therefore, an agency has a much greater chance of landing in a federal district court concerning an override decision when an incumbent contractor is involved. Accordingly, the time for an agency to thoroughly document the reasons for an override decision should occur when an incumbent contractor is a protester.

Handling Back-to-Back Protests

Finally, as demonstrated by *Dairy Maid*, when overriding a CICA stay, an agency always should treat the preaward and postaward stay provisions as separate and distinct. After overriding a preaward stay, and then confronted with a postaward stay from the same protester, the agency must be prepared to suspend contract performance and prepare another override packet.[139] This is true even if the postaward and preaward override packets are virtually identical. However,

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[132] *See* Commercial Energies, Inc. v. Cheney, 745 F. Supp. 647 (D. Colo. 1990).

[133] *See* DOD Contracts, 34 Cont. Cas. Fed. (CCH) ¶ 75, 406 (D.D.C. 1987).

[134] *See* Superior Services, Inc. v. Dalton, 851 F. Supp. 381 (S.D. Cal. 1994).

[135] *See* Litton Sys. Inc. v. Carlucci, No. 88-0652, 1988 WL 26078 (D.D.C. 1988).

[136] *See also* TGS Technology, Inc. v. United States, 37 Cont. Cas. Fed. (CCH) ¶ 76,259 (D.D.C. 1992).

[137] With the exception of *Litton*, and possibly *Topgallant Group*, the cases discussed in this article involved the incumbent contractor challenging the override decision.

[138] *See supra* notes 119, 125.

[139] *See* Dairy Maid, Inc. v. United States, 837 F. Supp. 1370, 1380 (E.D. Va. 1993).

the agency now should rely on the best interests standard rather than the urgent and compelling circumstances standard.

Conclusion

Procurement officials must carefully weigh the litigation risks of overriding a CICA stay. Courts are not hesitant to enjoin an agency for improperly overriding a CICA stay. In most cases, continuing with the incumbent contractor during the pendency of the GAO decision is the right decision.[140]

However, sometimes an agency determines that it must override a CICA stay. In these situations, the agency must sufficiently develop an administrative record, particularly the D&F, that adequately explains the agency's reasons for overriding the CICA stay. These reasons should be consistent with the case law as explained in this article. The goal is to make the judge's job easier which should result in a decision in favor of the agency.

Procurement officials can significantly increase their agency's chance of success before a district court judge who is reviewing the override decision. Although undoubtedly frustrating for procurement officials to have their ongoing acquisition suspended as the result of a bid protest, it will be extremely rewarding to have a district court judge find that the agency's override decision was rational, in accordance with law, and not an abuse of discretion.

[140] *See supra* notes 4, 19 (concerning the total number of protests filed each year compared to the number of CICA stays that are overridden).

Simplified Acquisitions and Electronic Commerce: Where Do We Go from Here?

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Introduction

The new Federal Acquisition Streamlining Act of 1994[1] (FASA, or Act) made several changes in the world of government contracting. Two of the Act's major provisions involve the restructuring of "simplified acquisitions" (formerly known as small purchases)[2] and requiring federal agencies to develop an interconnected computer system that eventually will allow agencies to perform many contracting procedures electronically.[3]

This article will analyze the changes made by the FASA with regard to simplified acquisitions and electronic commerce. Additionally, this article will analyze the interim rules concerning "micropurchases"[4] and their impact on simplified acquisitions. Finally, this article will analyze the proposed rules concerning simplified acquisitions and electronic contracting[5] to determine their impact on the federal contracting process.

The FASA's Impact

Pre-FASA Small Purchases

Prior to the FASA, the *Federal Acquisition Regulation* (*FAR*) allowed agencies to contract for goods and services with a value of $25,000 or less using "small purchase procedures."[6] These procedures allowed agencies to contract for

[1] Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA].

[2] *Id.* tit. IV, §§ 4001-4404.

[3] *Id.* tit. IX, §§ 9001-9004.

[4] 59 Fed. Reg. 64,786 (1994) (amending GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pts. 1, 3, 4, 13, 25 (1 Apr. 1984) [hereinafter FAR]. The FASA defines "micropurchases" as purchases of supplies and services of $2500 or less. FASA, *supra* note 1, § 4301, 108 Stat. 3346-47 (1994).

[5] 60 Fed. Reg. 12,366 (1995).

[6] FAR, *supra* note 4, pt. 13.

small orders of goods and services without complying with the competition requirements of the Competition in Contracting Act[7] (CICA).

Although many of the statutory competition rules were relaxed in this area, many constraints still existed. Under the Small Business Act,[8] small purchases had to be reserved or "set-aside" for "small businesses" as defined by the Small Business Administration, except under very limited circumstances.[9] Furthermore, the Small Business Act required agencies to post notices of proposed small purchases in a public place.[10] Additionally, small purchases still were subject to the Buy American Act,[11] which generally requires agencies to purchase items made in the United States.

Against this background, the Section 800 Panel[12] studied the small purchase process and concluded that "[t]oday, there is probably no single area of acquisition law where there is a greater potential to reduce costs than in small-dollar contracts while retaining the management controls needed for the accountability of public funds."[13] Based largely on the Section 800 Panel's suggestions, the FASA made numerous changes to the methods the government uses to make small-dollar contracts.

The FASA's Simplified Acquisition Changes

A New Name—A New Threshold

The initial change that the FASA made in this area was to introduce the term "simplified acquisition threshold" to replace "small purchase threshold" and to establish the new threshold at $100,000.[14] For support of contingency contracting situations,[15] the FASA correspondingly amended the DOD's increased simplified acquisition authority in overseas areas[16] from $100,000 to $200,000.[17] The FASA also made conforming amendments to several other statutes that formerly used the old "small purchase threshold" term.[18]

Small Business "Set-Aside" Rule Modified

The FASA, consistent with its treatment of the new concept of "micropurchases,"[19] also amended the Small Business Act[20] by removing the requirement for contracting officers to

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[7] 10 U.S.C. § 2304 (1988 & Supp. IV 1992). Under the pre-FASA version of the statute, acquisitions made under small purchase procedures were specifically excepted. *Id.* § 2304(g).

[8] 15 U.S.C. § 644(j) (1988 & Supp. V 1993).

[9] FAR, *supra* note 4, 13.105. These exceptions include when a contracting officer determines that there is no reasonable expectation of receiving two reasonable quotes from small businesses, when purchases are made outside the United States, and when the agency must purchase from a required source under *FAR* part 8.

[10] 15 U.S.C. § 637 (1988 & Supp. V 1993). For the Department of Defense (DOD), the statute requires posting notice of all acquisitions between $5000 and $25,000, while civilian agencies must post notice of all acquisitions between $10,000 and $25,000.

[11] 41 U.S.C. § 10a (1988 & Supp. V. 1993).

[12] This panel was established by Section 800 of the National Defense Authorization Act for Fiscal Year 1991 and also is known as the "Acquisition Law Advisory Panel." The Section 800 Panel—consisting of civilian and government contracting experts—made a comprehensive study of the federal procurement process and recommended numerous changes to promote efficiency in the contracting process.

[13] Acquisition Law Advisory Panel, *Report of the Acquisition Law Advisory Panel to the United States Congress* 4-1 (Jan. 1993).

[14] FASA, *supra* note 1, §§ 4001-4003. Section 4001 amended the Office of Federal Procurement Policy Act (41 U.S.C. § 403) to include the new term, while sections 4002 and 4003 incorporated the new term into the Armed Services Procurement Act of 1947 (10 U.S.C. §§ 2301-2316) (for military agencies) and the Federal Property and Administrative Services Act of 1949 (41 U.S.C. §§ 251-260) (for civilian agencies).

[15] 10 U.S.C. § 101(a)(13) defines contingency operations as military operations designated by the Secretary of Defense as operations in which military members are or may become involved in operations against enemy forces or operations that result in calling Reserve Component soldiers to active duty during war or national emergency.

[16] Under 10 U.S.C. § 2302(7), the DOD's increased simplified acquisition authority in contingency contracting situations only applies to contracts awarded and performed, or purchases made, *outside* the United States. Legislative efforts are underway to expand this authority to include contracts awarded in the United States to support overseas contingency operations.

[17] Although the FASA provides that the threshold increase from $25,000 to $100,000 is not effective until final implementing regulations take effect (FASA § 10001), the Army's position is that the contingency contracting authority increase became effective on the FASA's enactment (October 13, 1994). *See* Memorandum, J. Bruce King, Acting Director, Department of the Army Office of the Assistant Secretary, United States Army Contracting Support Agency, subject: Acquisition Letter (AL) 94-9 (31 Oct. 1994).

[18] FASA, *supra* note 1, §§ 4401-4404. These amendments were made to the Competition in Contracting Act, the Small Business Act, and to several other statutes. Additionally, § 4102(e) made a similar amendment to the prohibition against doing business with debarred contractors (10 U.S.C. § 2393(d)). Finally, § 4104 (d) made a similar amendment to the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 (a)(1)).

[19] *See infra* notes 52-64 and accompanying text.

[20] *See supra* note 9 and accompanying text.

set aside simplified acquisitions of $2500 or less for small businesses.[21] Contracting officers now are free to make purchases of supplies or services of $2500 or less from any source.[22]

Statutes Not Applicable to Simplified Acquisitions

Sections 4101 to 4104 of the FASA specifically made certain statutes inapplicable to simplified acquisitions. These statutes include prohibiting use of contingent fee arrangements,[23] allowing agencies to examine contractor books and records,[24] requiring contractors to provide certain markings on delivered supplies,[25] prohibiting contractors from restricting subcontractor sales directly to the United States,[26] prohibiting persons convicted of contract-related felonies from being connected with DOD contracts,[27] requiring contractors to follow certain inventory accounting standards,[28] and restricting the use of certain types of supplies.[29]

Additionally, the FASA also changed the impact of four major statutes on the procurement process. The Copeland Anti-Kickback Act[30] was amended to remove contractual requirements in simplified acquisition contracts that contractors had to establish programs to prevent kickbacks and that contractors must cooperate fully with federal investigations.[31] The Miller Act[32] was amended to remove the requirement that contractors must provide performance and payment bonds on construction contracts between $25,000 and $100,000.[33] The Contract Work Hours and Safety Standards Act[34] was amended to render it inapplicable to simplified acquisitions.[35] Finally, the FASA amended the Solid Waste Disposal Act[36] to remove the contractor's obligation to estimate the amount of recycled materials used to perform simplified acquisitions.[37]

Finally, the FASA directed that the *FAR* implementing regulations contain a list of statutes that do not apply to simplified acquisitions. Additionally, the FASA mandated that any law enacted after the FASA's date of enactment[38] would not be applicable unless the Federal Acquisition Regulatory Council made a written determination that it would not be in the best interests of the government to exempt simplified acquisitions from the law's coverage.[39]

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[21] FASA, *supra* note 1, § 4004.

[22] A common anecdotal example of the new authority used by the media is the ability of contracting officers to now make simplified acquisitions of supplies from large retail department stores, such as Sears, J.C. Penney, K-Mart, and Wal-Mart.

[23] 10 U.S.C. § 2306(b); 41 U.S.C. § 254a (1988 & Supp. V 1993).

[24] 10 U.S.C. § 2313; 41 U.S.C. § 254(d) (1988 & Supp. V 1993).

[25] 10 U.S.C. § 2384(b) (1988 & Supp. V 1993).

[26] 10 U.S.C. § 2402; 41 U.S.C. § 253g (1988 & Supp. V 1993).

[27] 10 U.S.C. § 2408(a) (1988 & Supp. V 1993).

[28] *Id.* § 2410(b) (1988 & Supp. V 1993).

[29] *Id.* § 2534 (1988 & Supp. V 1993). This section requires that the DOD, with certain exceptions, to purchase specified items (such as buses, chemical weapons antidote, air circuit breakers, and certain valves and machine tools) from manufacturers designated as part of the national technology and industrial base.

[30] 41 U.S.C. § 57 (1988 & Supp. V 1993).

[31] FASA, *supra* note 1, § 4104(a). Although no longer an express contractual requirement, the FASA still requires simplified acquisition contractors to cooperate with federal investigation of Copeland Act violations.

[32] 40 U.S.C. § 270a (1988 & Supp. V 1993).

[33] FASA, *supra* note 1, § 4004(b). Although the formal bonding requirement was removed, the FASA will require, on enactment of implementing regulations, contractors to provide alternative methods to protect laborers and materiel suppliers. The contracting officer must state to offerors the alternative method(s) that the contractor must use.

[34] 40 U.S.C. § 329 (1988 & Supp. V 1993).

[35] FASA, *supra* note 1, § 4004 (c).

[36] 42 U.S.C. § 6962(c) (1988 & Supp. V 1993).

[37] FASA, *supra* note 1, § 4104 (e).

[38] The President signed the FASA on October 13, 1994.

[39] FASA, *supra* note 1, §§ 4101-4102. However, statutes that provide for criminal or civil penalties, or specifically state that they apply to simplified acquisitions, are not subject to this rule. *Id.* § 4101.

The "New" Simplified Acquisition Procedures[40]

The FASA required that the *FAR* contain new "simplified acquisition procedures" to "promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors."[41] Although the requirement appears new, a close examination of the statute reveals that the new requirements make little substantive change in previous regulatory and decisional law.

The new statutory requirements continue the prohibition against dividing purchases into smaller units so that agencies may use simplified acquisition procedures.[42] Additionally, the new statute continues the requirement that agencies should compete simplified acquisitions "to the maximum extent practicable."[43] Finally, contracting officers must continue to consider each responsible offer timely received from an eligible offeror, even if the contracting officer did not initially solicit the offeror.[44]

However, the FASA contains some new requirements. Arguably the most significant new requirement concerns an agency's ability to take advantage of the new higher acquisition threshold. Under the FASA, although the simplified acquisition threshold is $100,000, agencies may not use the new threshold until final *FAR* implementing regulations take effect.[45] Even when these regulations take effect, agencies cannot use the procedures to make purchases between $50,000 and $100,000 until an appropriate agency official certifies that the agency has achieved at least an "interim" ability to perform certain contracting functions electronically.[46] Finally, even if an agency achieves an "interim" capability to perform contracting functions electronically, the agency will lose its ability to use simplified acquisition procedures for purchases between $50,000 and $100,000 if it has not achieved "full" ability to contract electronically by January 1, 2000.[47]

Another significant change concerns procedures that agencies must use to publicize simplified acquisitions. The FASA maintained the current requirements that agencies must synopsize all proposed acquisitions greater than $25,000 in the *Commerce Business Daily*[48] and that agencies must post notice of certain acquisitions less than $25,000.[49] However, the FASA deleted the statutory requirements that agencies must afford offerors for simplified acquisitions between $25,000 and $100,000 a minimum of thirty days to submit offers, so long as the contracting officer establishes a deadline for submitting offers and communicates that information through public notice of the solicitation.[50] Additionally, once an agency obtains "interim" electronic contracting capability, the requirement to publicize simplified acquisitions in the *Commerce Business Daily* ends.[51]

The New Concept of "Micropurchases"

The FASA created a new subspecies of simplified acquisition known as "micropurchases,"[52] which the statute defines as a purchase of $2500 or less.[53] Although a new concept statutorily, a close examination once again reveals that many concepts used in this area come from prior regulatory or decisional law.

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[40] For purposes of this subsection, the author will discuss procedures used for acquisitions greater than $2500 but less than the simplified acquisition threshold. *See infra* notes 52-64 and accompanying text.

[41] FASA, *supra* note 1, § 4201.

[42] *Id.* § 4201 (a). *See* 10 U.S.C. § 2304(g)(3) (1988 & Supp. V 1993); FAR, *supra* note 4, 13.103(b); Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 72 Comp. Gen. ____, 92-2 CPD ¶ 259.

[43] FASA, *supra* note 1, § 4201(a). *See* 10 U.S.C. § 2304(g)(4) (1988 & Supp. V 1993); 41 U.S.C. § 253(a)(1)(A) (1988 & Supp. V 1993); FAR, *supra* note 4, 13.103(a); Cardiometrix, B-241344, Jan. 31, 1991, 91-1 CPD ¶ 108; Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248.

[44] FASA, *supra* note 1, § 4201; *See* Gateway Cable Co., B-223157, Sept. 22, 1986, 65 Comp. Gen. 854, 86-2 CPD ¶ 333; California Properties, Inc., B-232323, Dec. 12, 1988, 68 Comp. Gen. 146, 88-2 CPD ¶ 581.

[45] FASA, *supra* note 1, § 10001(b). This means, in effect, that agencies still are bound by the old $25,000 "small purchase limitation" until the *FAR* is amended to conform to the FASA.

[46] *Id.* § 4201(a). *See infra* notes 70-73 and accompanying text (concerning the FASA's requirements for interim and full capability to perform electronic contracting).

[47] FASA, *supra* note 1, § 4201(a).

[48] *Id.* § 4202(a). *See also* 41 U.S.C. § 416(a) (1988 & Supp. V 1993).

[49] *See supra* note 10 and accompanying text.

[50] FASA, *supra* note 1, §§ 4101(c), 4202(a) (amending the Office of Federal Procurement Policy Act (41 U.S.C. § 416 (1988 & Supp. V 1993)), 4202(d) (amending the Small Business Act (15 U.S.C. § 637)).

[51] *Id.* §§ 4202(c), 4202(d)(3). Once "full" electronic contracting capability exists government wide, only acquisitions greater than $250,000 will require synopsis in the *Commerce Business Daily*.

[52] *Id.* § 4301.

[53] *Id.* § 4301(g).

Under the micropurchase provisions, as was the case under the pre-FASA version of the *FAR*, contracting officers may make purchases of $2500 or less without obtaining competitive quotations, so long as the contracting officer determines that the price is reasonable.[54] The statute also codifies the prior regulatory requirement that contracting officers should distribute micropurchases among qualified suppliers.[55]

Two significant changes in this area merit attention. The most significant change that has generated public interest is that the FASA amended both the Small Business Act[56] and the Buy American Act[57] to exclude micropurchases from the coverage of both acts. As a result, contracting officers may make micropurchases without regard to the small business status of the vendor or the country of origin of the supply purchased.[58]

The other change concerns the applicability of the Procurement Integrity Act[59] to persons making micropurchases. Previously, all contracting officers were considered "procurement officials" subject to the Procurement Integrity Act.[60] However, under the FASA, if a contracting officer's authority is no greater than $2500 and a determination is made that the officer is unlikely to make more than $20,000 of procurements in a twelve-month period, the officer will not be considered a "procurement official."[61]

One important difference in the micropurchase provisions from much of the remainder of the FASA is that the FASA made the micropurchase provisions effective on the FASA's enactment and required implementing regulations within sixty days.[62] As a result, the Administrator of the Office of Federal Procurement Policy, on the date of the FASA's enactment, issued a memorandum to senior acquisition executives encouraging immediate use of the new authority.[63] On December 15, 1994, the Federal Acquisition Regulation Counsel published in the *Federal Register* interim micropurchase rules.[64]

The Advent of Electronic Contracting

On October 22, 1993, President Clinton issued Executive Order 12,873, titled "Federal Acquisition, Recycling, and Waste Prevention."[65] To "reduce waste by eliminating unnecessary paper transactions in the acquisition process,"[66] the President directed federal agencies to "implement an electronic commerce system consistent with the recommendations adopted as a result of the National Performance Review."[67] This order, plus the work of the Section 800 Panel, formed the genesis for the FASA's creation of the Federal Acquisition Computer Network (FACNET).[68] This section will examine the agency requirements for establishing the FACNET.

The "Big Picture" of FACNET

Section 9001 of the FASA requires the Office of Federal Procurement Policy to establish a computer network system allowing agencies, no later than January 1, 2000, to perform the following functions:

(1) Provide notice of contract solicitations;

(2) Receive responses to and inquiries about solicitations;

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[54] *Id.* § 4301(a). Under the pre-FASA version of the *FAR*, the contracting officer had no obligation to compete acquisitions with a value of 10% of the former small purchase threshold (which was $2500 ($25,000 x 10%)). FAR, *supra* note 4, 13.106(a) (1993). *See also* Northern Va. Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120 (no requirement to compete when purchase was less than 10% of small purchase threshold).

[55] FASA, *supra* note 1, § 4301(a). This requirement came from both the pre-FASA version of the *FAR* and from General Accounting Office (GAO) decisional law. FAR, *supra* note 4, 13.106(a) (1993); Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258.

[56] 15 U.S.C. § 644j (1988 & Supp. V 1993).

[57] 41 U.S.C. § 10a (1988 & Supp. V 1993).

[58] For example, a contracting officer may make micropurchases from a large department store (*i.e.*, K-Mart, Wal-Mart) of foreign-made supplies.

[59] 41 U.S.C. § 423 (1988 & Supp. V 1993).

[60] *Id.* § 423(p)(3) (1988 and Supp. V 1993).

[61] FASA, *supra* note 1, § 4301(a).

[62] *Id.* § 4301(c).

[63] Memorandum, Adm'r, Office of Federal Procurement Policy, to Senior Procurement Executives and the Deputy Under Secretary of Defense for Acquisition Reform, subject: Authority for Micropurchases (Oct. 13, 1994).

[64] 59 Fed. Reg. 64,786 (1994).

[65] 58 Fed. Reg. 54,911 (1993).

[66] *Id.* at 54,915 (§ 404).

[67] *Id.*

[68] FASA, *supra* note 1, § 9001.

(3) Provide notice of contract awards;

(4) Issue orders to vendors;

(5) Make payment to vendors through electronic fund transfers; and

(6) Provide archival data concerning each procurement action processed through the system.

Additionally, the system must allow private users to:

(1) Access notice of solicitations issued by a contracting activity;

(2) Access and review agency solicitations electronically;

(3) Respond to agency solicitations;

(4) Receive orders from agencies;

(5) Access information concerning contract awards (including price information); and

(6) Receive payment through electronic means.

Finally, the FASA requires that the system: allow interchange of information between agencies and the private sector as well as among different agencies; use data formats to encourage broad access; and provide for universal user access.[69]

What Is "Interim" Versus "Full" FACNET Capability?

An agency's ability to take full advantage of the new simplified acquisition procedures hinges on whether it has obtained "interim" versus "full" FACNET capability. Fortunately for the agencies, agencies only must obtain "interim" FACNET capability (in the short term) to take full advantage of simplified acquisition procedures.

Under the FASA, a procuring activity may certify that it has obtained "interim" FACNET capability when it demonstrates that for simplified acquisitions (except micropurchases) it can comply with the following three-part test:

(1) The agency has the capability to provide public notice of solicitations and receive responses to and requests for information about solicitations using the system;

(2) Private users may access public notice of agency solicitations, access and review the solicitations, and respond to solicitations using the system; and

(3) The agency actually uses the system to issue solicitation notices and to receive responses to solicitations.

For agencies other than the DOD, the senior procurement executive is the certifying official. For the DOD, the Under Secretary of Defense for Acquisition and Technology must certify whether a DOD agency has attained "interim" or "full" FACNET capability.[70]

To maintain its authority to use simplified acquisition procedures to their full extent, an agency must obtain "full" FACNET capability no later than December 31, 1999. To qualify for "full" FACNET capability, the agency must demonstrate that:

(1) The system performs *all* the functions required by FASA (as described in FASA section 9001); *and*

(2) During the preceding fiscal year, the agency used the system to make more than seventy-five percent of its simplified acquisitions (except micropurchases).

Before an agency can certify that it has "full" capability, the agency head must obtain the concurrence of the Administrator of the Office of Federal Procurement Policy and must certify the capability to Congress.[71] The Under Secretary of Defense for Acquisition and Technology must certify for the DOD.[72]

Finally, the FASA exempts certain contracts from being counted for purposes of determining FACNET compliance. The provision allows the Federal Acquisition Regulatory Council, after preliminary examination by the GAO, to exclude by regulation certain simplified acquisitions from FACNET compliance.[73]

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[69] *Id.*

[70] *Id.* § 9001(a).

[71] *Id.*

[72] *Id.* § 9002. For purposes of defining "agency," the "agency" is not the various military departments, but the DOD as a whole.

[73] *Id.* §§ 9001(a), 9004.

The Regulatory Results of the FASA

The Micropurchase Interim Rules

On December 15, 1994, the Federal Acquisition Regulatory Counsel published interim rules concerning micropurchases.[74] Although many of the new rules (found at new *FAR* subpart 13.6) simply restate statutory guidance, the rules also clarify issues that the FASA did not address.

The new rules clarify the definition of "micropurchase." Although the FASA merely stated that the micropurchase threshold was $2500,[75] new *FAR* sections 13.101 and 13.601 state that although the micropurchase threshold for supply and service contracts is $2500, the micropurchase threshold for construction contracts is $2000.[76] This difference is due to the Davis-Bacon Act,[77] which requires government contractors to pay "prevailing wages" on government construction contracts greater than $2000.

Additionally, the new rules strongly emphasize that government agencies should encourage use of government-wide commercial purchase cards.[78] The rules specifically state that purchase cards, subject to agency restrictions, should be used not only for micropurchases, but for other simplified acquisitions as well.[79]

On a related note, the new rules address the status of persons who hold micropurchase authority. Under new *FAR* 13.601(d), persons with authority to make micropurchases (such as cardholders) are considered "contracting officers" for *FAR* purposes. However, these contracting officers do not require a formal contracting officer warrant, but may be appointed in accordance with internal agency procedures.[80] Additionally, these contracting officers are not "procurement officials" if the head of the contracting activity determines that it is unlikely that the official will conduct procurements aggregating more than $20,000 in a twelve-month period.[81]

The Proposed Simplified Acquisition/FACNET Rules

On March 6, 1995, the FAR Council issued proposed rules concerning the new simplified acquisition procedures and the use of FACNET.[82] Although much of the proposal can be described as conforming changes to *FAR* part 13,[83] as was the case in the micropurchase rules, substantive additions exist.

One of the major additions under the proposal is clarification of FACNET's technical standards. The proposal adds a new *FAR* subpart 4.5 which makes the following clarifications:

> (1) Designates the ANSI X12 standard, created by the American National Standards Institute, as the standard agencies use to create their FACNET systems.[84]
>
> (2) Makes FACNET the preferred method for conducting simplified acquisitions greater than the micropurchase threshold.[85]
>
> (3) Requires the interim FACNET certification to be published in the *Commerce Business Daily* and requires the notice to set the date when responses must come through FACNET.[86]

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[74] 59 Fed. Reg. 64,786 (1994). The FAR Council made these interim rules initially to comply with the FASA's 60-day time limit for promulgating implementing regulations.

[75] FASA, *supra* note 1, § 4301.

[76] 59 Fed. Reg. 64,787 (1994).

[77] 40 U.S.C. §§ 276a-276a-7 (1988 & Supp. V 1993).

[78] 59 Fed. Reg. 64,787 (1994). The current purchase card system is based on a schedule contract between the General Services Administration and Rocky Mountain National Bank, Denver, Colorado, in which the bank issues special VISA cards for official government use.

[79] *Id.* *See* Memorandum, J. Bruce King, Acting Director, Department of the Army Office of the Assistant Secretary, United States Army Contracting Support Agency, subject: Acquisition Letter (AL) 94-10 (Nov. 1994), for the Army's latest guidance on purchase card use.

[80] 59 Fed. Reg. 64,787 (1994) (creating new *FAR* 13.601(d) and amending *FAR* 1.603-3).

[81] *Id.* (amending *FAR* 3.104-4).

[82] 60 Fed. Reg. 12,366 (1995). On the same date, the FAR Council issued another set of proposed rules dealing with FACNET use in regard to other procurements, such as sealed bid procurements and negotiated procurements. *Id.* at 12,384. Because this article focuses primarily on simplified acquisitions, the author will limit this discussion to the FACNET/simplified acquisition proposal.

[83] The author uses "conforming changes" to describe mere procedural or technical changes, such as changing references from "small purchase" to "simplified acquisition" or such as changing dollar limits from $25,000 to $100,000.

[84] 60 Fed. Reg. 12,368 (1995) (creating new *FAR* 4.501).

[85] *Id.* (creating new *FAR* 4.502(b)).

[86] *Id.* (creating new *FAR* 4.505-1).

(4) Specifies that contracting actions based on existing contracts (such as delivery orders and modifications), contracts not requiring public notice under *FAR* part 5, and contracts excepted by the head of the contracting activity are not counted for purposes of determining interim FACNET capability.[87]

Another significant proposed change is found in the proposed amendment to *FAR* 13.106-1.[88] Under the proposed rule, agencies now may specifically use other factors—such as past performance and quality—in addition to price, so long as offerors are advised that other factors will be used.[89] The proposal also restates that FACNET is the preferred method of soliciting and awarding simplified acquisitions.[90] Furthermore, the proposed rule implies that soliciting three sources constitutes competition to the "maximum extent practicable" only for acquisitions of $25,000 or less.[91] Last, the proposal ends the requirement for contracting offices to maintain a simplified acquisition source list if the contracting office uses FACNET to make purchases.[92]

The proposal contains two significant changes concerning use of purchase orders. First, the proposal would amend the authority to use Standard Form 44 to provide that Standard Form 44 could be used only for micropurchases unless the purchase was made under an unusual and compelling urgency situation or the purchase was made in support of a military contingency operation.[93] The proposal also would create a new type of purchase order called the "unsigned electronic purchase order (EPO)," which agencies would use when:

(1) Its use would be advantageous to the government;

(2) The government and the contractor agree to its use;

(3) Written contractor acceptance is not required; and

(4) The government retains contract administration.

Agencies using the new unsigned EPO would incorporate clauses by reference, but would not use any required purchase order form.[94]

Finally, the proposed rule clarifies that simplified acquisitions may use option clauses, so long as the option requirements of *FAR* part 17 are met and the aggregate value of the acquisition plus all options does not exceed the simplified acquisition threshold.[95]

Conclusion

As intended, the FASA has made changes in simplified acquisitions. Although the scope of change is not as dramatic as some have stated, once the FASA is fully implemented, over ninety percent of federal procurement actions will be treated as simplified acquisitions. The prudent contract attorney will be well served by keeping track of this fast moving area as these new guidelines and procedures develop.[96]

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[87] *Id.* (creating new *FAR* 4.505-4 and 4.506).

[88] 60 Fed. Reg 12,372-73 (1995).

[89] The current version of *FAR* 13.106-1 references "price and other factors," but does not specifically list other factors that contracting officers may use. As a practical matter, small purchases have used strictly price and price-related factors to evaluate quotations. The proposal also states that contracting officers may use informal methods to evaluate offers. *See id.* at 12,373 (amending *FAR* 13.601(b)).

[90] *See id.* at 12,372.

[91] *See id.* at 12,373. The rule implies that for acquisitions between $25,000 and $100,000, merely soliciting three sources may not be sufficient. The proposed rule has a list of factors that contracting officers must use to determine whether proper competition is met.

[92] *Id.*

[93] *See id.* at 12,378 (amending *FAR* 13.505-3(b)).

[94] *Id.* (creating new *FAR* 13.506).

[95] *Id.* (creating new *FAR* 13.508).

[96] For example, legislative proposals currently before Congress would abolish the Davis-Bacon Act or raise its applicability threshold from $2000 to $100,000. If Congress adopts the proposals, it could have an impact on what constitutes "micropurchases" in construction contracts.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Court-Martial Processing Times

Average processing times for the following military actions whose records were received by the Army Judiciary during the fourth quarter of Fiscal Year 1994 are indicated below.

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES
RATES PER THOUSAND

	Fourth Quarter Fiscal Year 1994; July-September 1994									
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.35	(1.39)	0.35	(1.40)	0.41	(1.66)	0.37	(1.49)	0.44	(1.76)
BCDSPCM	0.18	(0.71)	0.15	(0.61)	0.36	(1.43)	0.14	(0.58)	0.59	(2.34)
SPCM	0.01	(0.03)	0.01	(0.02)	0.03	(0.11)	0.00	(0.00)	0.00	(0.00)
SCM	0.14	(0.56)	0.15	(0.62)	0.13	(0.51)	0.12	(0.50)	0.00	(0.00)
NJP	19.87	(79.50)	21.00	(84.00)	20.09	(80.38)	19.68	(78.73)	21.08	(84.33)

Note: Based on average strength of 544,562
Figures in parenthesis are the annualized rates per thousand

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automation Army-Wide Systems Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 2, number 7) is reproduced below:

Environmental Audits

The law regarding protection of environmental self-audits from enforcement actions continues to evolve rapidly. Seven states now have enacted laws providing protection for entities from enforcement based on information uncovered during environmental self-audits, with several other states merely awaiting gubernatorial approval of similar legislation. Environmental audit protection legislation also is pending in the United States House of Representatives. The House bill has two major components: the first section addresses the admissibility of self-audits in legal proceedings; the second addresses the voluntary disclosure of violations. With regards to admissibility of an environmental audit, the legislation declares that a voluntary audit made in good faith will not be admissible evidence in any legal action pursued under federal law. As drafted, it does not appear that the bill includes federal entities within the scope of protected parties. Applicability of state self-audit statutes to federal entities will vary from state to state.

Amid all of the legislative activity regarding environmental audits, the Environmental Protection Agency (EPA) recently released its revised environmental audit policy for public comment. The policy reiterates the EPA's opposition to state laws that provide protection from enforcement for violations discovered during self-audits. The EPA has made it clear that it will increase enforcement efforts in states with audit protection laws when it determines that the operation of these laws results in inadequate enforcement. While the EPA opposes audit protection laws, it believes its audit policy should encourage self-auditing and disclosure. The EPA's draft policy sets out criteria under which the EPA could reduce or eliminate the gravity-based portion of the penalty for a given violation. The draft also states that the EPA will not seek criminal charges against violators who voluntarily disclose and correct violations, and otherwise act in good faith. There is no known case of the EPA ever filing a criminal case based on a voluntary audit.

Environmental self-auditing is a critical tool in ensuring compliance with environmental laws. The EPA's policy indi-

cates that an effective self-auditing program will be a positive factor in resolving enforcement actions. Environmental law specialists (ELSs) should be familiar with the status of self-audits under state law. Because this is a rapidly evolving area of the law, ELSs should contact their major commands and the ELD if the EPA or a state requests Environmental Compliance Assessment System (ECAS) or other self-audit information. Captain Kraus.

Reinventing Environmental Regulation

On 16 March 1995, the Clinton Administration released a new environmental policy entitled Reinventing Environmental Regulation. This new policy outlines twenty-five initiatives that the EPA will take to streamline its regulatory system. Highlights of the plan include creating incentives for auditing, disclosure and correction, paperwork reduction, and consensus rulemaking. Additionally, two-to-four Department of Defense facilities will participate in a pilot program designed to achieve environmental goals in a cost-effective manner, through pollution prevention, innovative compliance, and technology research projects. Ms. Fedel.

Clean Air Act (CAA)

Title V Certification

Under the new Title V Operating Permit program, the "responsible official" for an installation—normally the installation commander—must certify the truth, accuracy, and completeness of the Title V application and all reports submitted under Title V. Additionally, the responsible official must periodically certify compliance with all applicable CAA requirements, which for many installations will be complex and voluminous. The certification language contained in Virginia's Title V application form—which is not atypical—underscores the burden and consequences for the certifying commander:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering and evaluating the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Consequently, it is critical that installations build and adequately staff effective CAA compliance programs so that when the certifying commander asks: "Judge, should I sign this thing?" the SJA can confidently respond, "Sir, I would sign it myself, if I could."

The EPA's Technology Transfer Network

Environmental law practitioners cannot escape the deluge of regulatory materials currently being published by the EPA relating to CAA compliance. Even finding the applicable regulatory materials can be difficult. To make matters worse, increasingly, CAA regulations frequently are not published in the *Federal Register*. Instead, the EPA is placing preambles to regulations in the *Federal Register*, while making the full regulatory text and background materials available on its Technology Transfer Network (TTN). Additionally, the TTN contains a wide variety of useful CAA technical information and guidance documents. Consequently, ELSs must become familiar with the TTN.

Anyone with a computer and modem can access the TTN by dialing (919) 541-5742 with a communications software package, such as PROCOMM. Your software should be set as follows: data bits, 8; parity, N; stop bits, 1; terminal emulation, VT100 or VT/ANSI; duplex, full. The TTN is operational twenty-four hours, except on Monday mornings. There are eighteen bulletin boards on the TTN. Most information of interest to ELSs can be found on the Clean Air Act Amendments (CAAA) bulletin board. For assistance in using the TTN, call the EPA at (919) 541-5384 from 1 to 5 Eastern Standard Time.

§ 112(r) Risk Management Program

On 20 October 1993, the EPA proposed a Risk Management Program rule implementing CAA § 112(r).[1] The rule would apply to all facilities that have the hazardous chemicals—including explosives and flammables—in threshold quantities specified by the EPA.[2] The program is designed to reduce the risk and severity of chemical accidents, such as the 1984 disaster in Bhopal, India. The rule would require covered sources to register with the EPA; develop and implement a risk management program (including a hazard assessment, a prevention program, and an emergency response program); and develop a Risk Management Plan (RMP) for submission to federal, state, and local authorities and release to the public.

In response to criticism from the regulated community, on 13 March 1995, the EPA proposed major changes to the proposed rule, softening the impact on covered facilities.[3] The comment period on the reproposal expired on 12 May 1995. Even with these changes, however, the Risk Management Program will impose significant new requirements for many

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[1] 58 Fed. Reg. 54,190 (1995).

[2] *See* 59 Fed. Reg. 4478 (1994).

[3] 60 Fed. Reg. 13,526 (1995).

installations. Covered facilities will have three years from the date the final § 112(r) regulation is published to comply.

Why worry about § 112(r) today? Many installations are preparing to submit an application for a Title V operating permit. The Title V application must identify those activities that will be subject to § 112(r) requirements. Additionally, to avoid having to reopen and revise a Title V permit issued before the § 112(r) rule is finalized, installations subject to § 112(r) requirements should ensure that permitting authorities place general § 112(r) conditions in the permit, which will take effect on finalization of the 112(r) rule.[4] Major Teller.

Water Resources Management Course

The Center for Public Works has created a Water Resources Management course that is scheduled to be held from 12 to 16 June 1995 at Edwards Air Force Base, San Antonio, Texas. There is no registration fee, although installations are responsible for travel and per diem. The course, which is technical in nature, provides instruction on forecasting water usage and evaluating existing and potential water sources. This course is excellent for anyone who is, or may become, involved in water rights litigation. Contact Major Saye for further information: DSN 226-1230. Major Saye.

National Environmental Policy Act (NEPA) Litigation

On 31 March 1995, the United States District Court for the Western District of Michigan decided in favor of the Army in *AMAC v. Stump*.[5] In *AMAC*, local environmental groups challenged the adequacy of the Army's Environmental Impact Statement (EIS) for a proposed multipurpose range complex (MPRC) at Camp Grayling, Michigan. The proposal involved replacing an outdated tank range with a state-of-the-art training range that could be used by both armor and light infantry, using the latest equipment.

The environmental groups alleged that the EIS failed to do the following:

(1) discuss relevant scientific studies;

(2) discuss a proposed study of contamination and planned ordnance use at the MPRC site;

(3) adequately address mitigation measures;

(4) adequately consider cumulative environmental impacts;

(5) adequately consider the consequences of irretrievable commitment of resources and costs of remediation;

(6) adequately consider the impact on endangered and threatened species;

(7) address a "likely" increase in intensity of training; and

(8) consider reasonable alternatives.

At the onset, the district court stated that the NEPA has a dual purpose: "consideration by the agency of significant aspects of the environmental impact of a proposed action, and assurance to the public that the agency 'has indeed considered environmental concerns in its decisionmaking process.'"[6] The district court emphasized that the NEPA only requires an agency to consider the environmental consequences of major actions in the decisionmaking process, and does not mandate any particular result. The role of the court is merely to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and the decision is not arbitrary and capricious.

The district court found that the Army had satisfied the NEPA's requirements for the proposed MPRC. In a strongly worded opinion, the district court found that the plaintiffs' allegations of inadequacy came "dangerously close to being frivolous under the standard established by NEPA." Rather, the court found the plaintiffs' complaint a mere "disagreement with the [Army's] decision, rather than a plausible claim that defendants failed to comply with the procedural requirements of NEPA."

Practice Point for ELSs

An exhaustive administrative record was critical to the success of this case. The administrative record—consisting of the many studies, reports, and other documents relied on in preparing the EIS—comprised approximately 26,000 pages. The district court relied heavily on this record in ruling that the EIS was adequate.

We advise environmental attorneys in the field to ensure that the preparer of a NEPA document, whether the command or a contractor, compiles a thorough and accurate administrative record as an integral part of the NEPA process. Most importantly, the record must support the conclusions reached in the NEPA documents. If the administrative record is inadequate at the time the Army makes a final decision on the project, the command could easily be sued successfully under the NEPA. As a result, the Army could be required to start over and follow the proper NEPA procedures. At the very least, this will result in considerable delay and expense. Captain Stanton.

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[4] *Id.* 13,545.

[5] No. 1:94-CV-500 (W.D. Mich. Mar. 31, 1995).

[6] *Id.* (quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983)).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Administrative Law Notes

Army Relationships with Private Organizations

Introduction

A variety of laws and regulations govern how the Army and its military and civilian employees relate to private organizations (POs). This note focuses on nonprofit professional, scientific, technical, and benevolent POs, especially those with the purpose of directly supporting the Army, or some part of the Army, and its ideals, goals, and needs. Examples of these POs are the Association of the United States Army (AUSA), Armed Forces Communications and Electronics Association (AFCEA), Society of American Military Engineers (SAME), Field Artillery Association (FAA), Judge Advocates Association (JAA), the American Society of Military Comptrollers (ASMC), and the Army-Air Force Mutual Aid Association (AAFMAA).

The Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch[1] (Standards of Ethical Conduct) became effective on 3 February 1993, and the Department of Defense (DOD) Joint Ethics Regulation, DOD 5500.7-R,[2] (JER) became effective on 30 August 1993. The result is that over 400 pages of regulations now replace the fifty-page *Army Regulation 600-50, Standards of Conduct.*[3] The ethical rules that apply to Army personnel now are very detailed, specific, and complex. However, the underlying statutes and principles remain the same, although there might be some differences in specific details (*e.g.*, the gift rules are generally more liberal than before).

Extensive mandatory training concerning these new rules has occurred, and as a result, commanders and supervisors find themselves more involved with matters such as approvals and reports. Additionally, the Inspector General and others have highlighted important systemic issues related to how the Army does business with POs.

Consequently, there is a new and heightened awareness in which Army personnel are scrutinizing conduct that has not been examined for a long time because "that's just the way we have always done it." While the rules have not changed much, many issues are being raised for the first time and, in some cases, examples of conduct are being found that should *not* have been "just the way we have always done it."

The first step in addressing a PO issue is to ask whether the relationship is either personal or official. The nature of the relationship will determine the analysis and generate the answer. More often than not, the results will be different depending on whether the relationship is personal or official.

Personal Relationships with POs

Soldiers and Army civilian personnel are not precluded from joining, participating in, or holding office in POs. On the contrary, they are encouraged to do so, especially when the activity will enhance their professional or personal development or make them an active part of the local military or civilian community.

Conflicts of Interest

By becoming an officer, director, or employee of a PO, an individual has established a relationship with that organization which restricts what he or she can do as an Army official. Specifically, a criminal statute,[4] as implemented in subpart D of the Standards of Ethical Conduct,[5] prohibits participation in official matters, even though someone else might make the final decision, affecting the financial interests of that organization. The same restriction also probably would apply if the Army official's spouse or dependent child held a similar position with the organization.

Even if the Army official is not an officer, director, or employee of a PO, but rather is only an "active participant," he or she has a "covered relationship" with the PO. The Standards of Ethical Conduct require that Army officials consider appearances and, as such, they probably should not participate

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[1] 5 C.F.R. pt. 2635 (1992).

[2] DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993) [hereinafter JER].

[3] DEP'T OF ARMY, REG. 600-50, PERSONNEL-GENERAL: STANDARDS OF CONDUCT FOR DEPARTMENT OF ARMY PERSONNEL (28 Jan. 1988).

[4] 18 U.S.C. § 208 (1988).

[5] 5 C.F.R. pt. 2635 (1992).

in official matters when the PO is a party to, or represents a party to, the matter.

Acting as Agent of PO

Another criminal statute[6] prohibits any officer or employee from acting as an agent for anyone (including a PO) before the Army, or any other part of the federal government, concerning any particular matter in which the United States is a party or has an interest. This law is directed at *any* federal officer or employee acting on behalf of *any* nonfederal organization, even the nonprofit, benevolent, and military-related organizations. An Army officer or employee does not have to be an officer, director, employee, active participant, or even a member of the PO, to violate the law.

Therefore, PO dealings with the Army generally must be accomplished by someone other than a military officer or government civilian employee. The only contacts that an officer or employee may have on behalf of a PO with the federal government are those that are purely "ministerial" in nature, such as: (1) conveying purely factual information; (2) delivering or receiving materials or documents; (3) answering (without advocating for a particular position) direct requests for information; or (4) signing documents that attest to the existence or nonexistence of a given fact (such as a PO's secretary's attestation that a given signature is valid).

Other Ethical Issues

Military personnel and civilian employees *may not:*

(1) accept positions as officers, directors or similar positions in a PO offered because of their official duty position[7] (*e.g.*, a chief of staff may not accept appointment to the Board of Directors of the local Chamber of Commerce traditionally offered because of that duty position);

(2) accept honorary memberships in POs that have Department of Defense (DOD) contractors as members[8] (*e.g.*, an "honorary membership" in a local Rotary Club, if DOD contractors also are members);

(3) use their offices, titles, or positions in connection with their personal participation in POs[9] (*e.g.*, name, rank, and duty position shown on PO's letterhead listing organization officers);

(4) personally solicit subordinates or prohibited sources (generally, DOD contractors), or permit the use of their names in a solicitation that targets subordinates or prohibited sources in PO membership drives or fund raising campaigns.[10]

Can Do's

After all the negatives, we, as ethics counselors, often ask, "Well, what *can* we do?" In addition to the basic rule that Army personnel are free to join POs and, if it will not interfere with their official duties because of a conflict of interest, actively participate or even accept an office, other permissible activities include the following:

(1) military members may use their rank and component designation in connection with their private association activities (*e.g.*, General, U.S. Army);[11]

(2) under some circumstances, employees may be given time off and may use government resources in their personal participation with POs when they meet the criteria and have the approvals set out in JER section 3-300b (writing papers for professional associations and learned societies) and JER section 3-300c (certain community support activities);

(3) if approved by the "agency designee" (usually, one's supervisor), occasional use of the telephone (no toll calls), computer, library, and similar resources during off-duty time (*but no* use of copiers or other Army personnel);[12]

(4) if the "agency designee" determines that it is in the Army's interest, Army personnel may accept free attendance at a "widely attended gathering" sponsored by a PO, on their own time or

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[6] 18 U.S.C. § 205 (1988).

[7] JER, *supra* note 2, § 3-301.

[8] DEP'T OF ARMY, REG. 210-1, INSTALLATIONS: PRIVATE ORGANIZATIONS, DEPARTMENT OF THE ARMY, AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS, para. 5-36 (14 Sept. 1990) [hereinafter AR 210-1].

[9] 5 C.F.R. § 2625.702(b) (1988).

[10] *Id.* § 2635.808.

[11] *Id.* § 2635.702(e).

[12] JER, *supra* note 2, § 3-305.

during an excused absence[13] (if the value of the free attendance exceeds $250, the Army employee must report this gift on his or her Financial Disclosure Report). For example, after consulting with the ethics counselor (EC), a supervisor might conclude that it is in the Army's interest for a subordinate to attend a free technical symposium, including a cocktail party and dinner, attended by industry and government representatives and sponsored by a professional or technical association.

These "permissions" to use government time and resources or to accept gifts of free attendance are not rights or entitlements. They are exceptions to the general rule and should be granted judiciously and only when they are in the Army's direct interest (not simply because a supportive PO needs assistance) and when the investment of time and resources is proportionate to the benefit enjoyed by the Army.

Official Relationships with POs

There is much that is permissible regarding official Army relationships with private organizations. If the applicable criteria are met and the necessary approvals obtained, there are many situations in which Army personnel can officially attend, accept free attendance at, participate in, support, and cosponsor events with POs.

Liaisons

It is permissible to appoint Army officials to act as official liaisons with POs when a significant and continuing Army interest exists. But they are *liaisons*; when they participate they do so as Army employees and their loyalty remains with the Army. Liaisons are not directors or board members of the PO. If they are officers, directors, or even active participants in the PO in their personal capacities, then they may not be Army *liaisons* because of the conflict of interest in loyalties. While as liaisons they do not participate in the management of the organization *per se*; they may participate, however, in matters of mutual interest to the PO and the Army and vote on those issues.[14]

For example, a commander permissibly may appoint an officer as a liaison to the local AUSA chapter. Among this officer's legitimate duties would be to inform the chapter of the command's concerns with respect to its prospective activities, and to inform the commander of options, plans, and needs being explored by the AUSA chapter. However, it would be inappropriate for the liaison to use government resources to assist the local chapter maintain its mailing list, visit local merchants to encourage them to join, or to help with the annual membership drive at the installation.

An Army official may be permissibly sent on TDY to perform liaison duties. It also is appropriate to send personnel on Army time and orders to participate in or attend a PO event, if there is a legitimate governmental interest and purpose in the Army's participation.[15]

Participation in Events

Army organizations may cosponsor an event, such as a technical symposium, with a PO if certain criteria and conditions are met.[16] Often, however, cosponsorship is inappropriate because it is the Army that is really sponsoring the event with the assistance of a PO. In this case, the Army official responsible for the event must make it clear that the Army, *not* the PO, is sponsoring the event.[17] Furthermore, the Army may support PO events by providing space, speakers, public address systems, and the like, if all the criteria in JER section 3-211(a) are met. The Army also can provide speakers at PO events in accordance with the Public Affairs program and regulations.[18] The manner and degree of Army participation in an event determines what kind of event it is (*i.e.*, Army sponsored, cosponsored, or Army supported). If the Army is cosponsoring with a PO or supporting a PO's event, it also must be made clear that the Army is not endorsing the organization.

This permission to participate in, support, or cosponsor events by and with POs is not a license for the Army to expend time and resources in support of a PO beyond that permitted, or to help the PO conduct its business. The Army must ensure that the expenditure of time and resources is of direct benefit and interest to the Army, and commensurate with that benefit and interest. The conclusion that a PO is "friendly" to the Army and supports its goals and objectives is insufficient justification to direct employees, on Army time, to do the following: assist the PO with a membership or fund raising campaign; assist the PO with a PO seminar beyond providing speakers and other limited support; help the PO fix its computer system; assist the PO with auditing its books.

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[13] 5 C.F.R. § 2635.204(g)(2) (1988).

[14] JER, *supra* note 2, § 3-302.

[15] *Id.* para. 3-200; DEP'T OF ARMY, REG. 1-211, ADMINISTRATION: ATTENDANCE OF MILITARY AND CIVILIAN PERSONNEL AT PRIVATE ORGANIZATION MEETINGS, para. 4, tbl. 1 (1 Dec. 1983).

[16] JER, *supra* note 2, § 3-208b.

[17] *Id.* § 3-208c.

[18] *Id.* § 3-209.

Endorsement

The Standards of Ethical Conduct prohibits a government employee from using his or her title, office, or position to officially endorse a PO or its activities beyond that permitted in *JER* section 3-210 (*e.g.*, fund raising for the Combined Federal Campaign and Army Emergency Relief). However, there is some permissible activity to encourage professional, community, and other involvement that will not violate the rules because it does not amount to official bias, endorsement, favoritism, or unlawful support.

Specifically, commanders and supervisors may encourage Army personnel to take an active part in their military and civilian communities, to include joining, supporting, and participating in service and benevolent organizations. They may publicize and describe organizations that seem to share and support national defense, Army, and community goals and ideals, or that help promote excellence in military or other skills. Finally, commanders and supervisors may publicize events sponsored by such organizations.[19]

As for personal relationships with POs, specific "do's and don'ts" also exist for official relationships.

Some Specific Don'ts

(1) Do not appoint a point of contact in a unit for a PO's membership drive or offer a pass or other benefit to the unit with the highest membership or participation rate in the PO.

(2) Commanders may not address their subordinates in formation or on Army letterhead to extol the virtues of a particular PO.

(3) Commanders or supervisors may not require their subordinates to attend a PO meeting so that they can learn about the organization and join.

(4) Do not engage in coercive tactics such as requiring a soldier to explain a decision not to participate in or join a PO.

Some Specific Do's

(1) As a general matter, it is permissible to use government resources to provide information on a general basis concerning a PO's activities in which Army personnel might be interested—either in an official capcity (*e.g.*, training courses, symposia, seminars) or unofficial and personal capacity (*e.g.*, picnics, car washes, luncheons, entertainment, membership drives, widely attended gatherings). For the "unofficial" activities, however, use of resources is more limited; for example, government postage cannot be used, but it would be permissible to let a PO representative post membership information explaining the benefits of membership on a nonofficial bulletin board or leave brochures in common areas. One caveat: What you permit one PO to do, you must be prepared to allow other POs to do.

(2) Commanders may encourage soldiers to become active in and join professional, technical, community, or other types of organizations. Within this context, it would be permissible and not a prohibited endorsement of any one organization to identify and describe various organizations that support professional development or the military community, or that are part of the civilian community, and worthy of consideration. Briefly informing Army personnel concerning the goals, objectives, and activities of some of the organizations also is permissible. Informing, in a neutral manner, of an ongoing membership drive likewise is acceptable.

(3) Commanders and supervisors may require subordinates to attend a professional development training session sponsored by a PO. For example, commanders may require soldiers to attend a seminar concerning financial responsibility hosted by the AAFMAA. However, the PO may not try to gain members or to market any of its products during the seminar.

(4) After an Officers' Call at the Officers' Club, the commander may announce that a PO is sponsoring a "happy hour" which anyone is free to attend or not. At this event, PO representatives may solicit memberships (but this may not be done senior to subordinate).

Conclusion

The laws and regulations regarding official and personal relationships with private organizations are complex. This note is not all inclusive. The permutations on the relationships between POs and the Army and Army personnel seem infinite. To assist Army personnel, the Director of the Army Staff directed the publication of a *Private Organizations Reference Guide*[20] which contains the information addressed in this note along with additional guidance. This guide was provided to all general officers, members of the Senior Executive Services, installation commanders, as well as all major command ethics counselors. The entire reference guide is available on the Legal Automation Army-Wide Systems electronic bulletin board.

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[19] AR 210-1, *supra* note 8; JER, *supra* note 2, § 3-206.

[20] DEP'T OF ARMY, PRIVATE ORGANIZATIONS REFERENCE GUIDE (Jan. 1995).

Additionally, officials acting in their official or personal capacities in matters involving private organizations should actively seek legal advice from their ethics counselors to ensure they are acting properly. Mr. Michael J. Wentink, Chief, Standards of Conduct Branch, Standards of Conduct Office, OTJAG.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

1994 Chief of Staff Award for Excellence in Legal Assistance

The Legal Assistance Division of the Judge Advocate General's Corps recently announced the winners of the 1994 Chief of Staff Award for Excellence in Legal Assistance. Of the sixty-five Army legal assistance office nominees, thirty-eight were selected. This year reflected a slight decrease in nominations over the number received last year, but nominations were received from a Reserve unit and a joint command for the first time. Last year, forty-one of seventy-three nominations received awards and, in 1992, thirty-three of sixty-two nominations won. Congratulations to the following legal assistance offices:

Aberdeen Proving Ground
Redstone Arsenal
Fort Monmouth
Yuma Proving Ground
Fort Huachuca
Fort Leavenworth
Fort Lee
Fort Leonard Wood
Fort McClellan
Fort Sill
Fort Benning
Fort Jackson
Fort McPherson
Fort Sam Houston
Fort Stewart
Fort Riley
2d Armored Division
Fort Carson
Fort Drum
Fort Campbell
XVIII Airborne Corps
25th Infantry Division and USARHAW
USARJ/IX Corps/9th TAACOM
Legal Service Center—Brussels
Kaiserslautern Law Center
Legal Service Center—The Netherlands
Southern Law Center—Mannheim
Stuttgart Legal Service Center
32d Army Air Defense Command
1st Armored Division
1st Bde, Kirch Goens Legal Center
3d Infantry Division
V Corps, Wiesbaden
2d Infantry Division
19th TAACOM
Yongsan Law Center
Kwajalein Atoll
311th COSCOM Legal Assistance Office

Family Law Note

USFSPA Update—Using Formula Clauses to Define the Former Spouse's Share of Disposable Retired Pay

Since consolidation of retired pay operations at its Cleveland Center, the Defense Finance and Accounting Service (DFAS) has accepted and processed orders dividing military retired pay as property only when the former spouse's share is stated in terms of a lump sum or a percentage of disposable retired pay. Prior to consolidation at Cleveland, DFAS operations in Denver, Colorado, and Indianapolis, Indiana, had processed orders which stated the former spouse's share in formula terms. One common formula approach stated the former spouse's share as a percentage determined by the ratio of the time that marriage overlapped with service, and the period of total service.

On 6 April 1995, the DFAS published a new proposed rule in the *Federal Register* which will again allow a former spouse's share of retired pay to be stated in terms of a formula *for orders served on the DFAS after 1 April 1995.*[21] Under the proposed rule, open formula terms are limited to the member's years of total service, or a hypothetical retired pay amount. The rule also provides guidance on dividing retired pay, and updates addresses the DFAS and the Coast Guard. Pertinent extracts of the proposed rule follow:

FEDERAL REGISTER
Vol. 60, No. 66
Proposed Rules
DEPARTMENT OF DEFENSE (DOD)
Office of the Secretary
32 CFR Part 63
Former Spouse Payments From Retired Pay
60 FR 17507

[21] 60 Fed. Reg. 17,509 (1995).

DATE: Thursday, April 6, 1995
ACTION: Proposed rule; amendment.
SUMMARY: This proposed rule amends part 63 of title 32 of the Code of Federal Regulations to reflect amendments to the Uniformed Services Former Spouses' Protection Act and to clarify the language in section 63.6(c)(8) concerning court orders that provide for a division of retired pay by means of a formula. Guidance implementing the amendments have been incorporated into Volume 7, Part B of the DOD Financial Management Regulation, DOD 7000.14-R, but has not been previously published in the Federal Register.
DATES: Comments must be received June 6, 1995.
ADDRESSES: Interested parties should submit written comments to: Deputy Director for Finance, Defense Finance and Accounting Service, 1931 Jefferson Davis Highway, Arlington, VA 22240-5291, Attention: Military Pay Directorate.
FOR FURTHER INFORMATION CONTACT: Mr. Fiti Malufau, (703) 602-5279.
SUPPLEMENTARY INFORMATION: Because of the large number of comments anticipated, we do not plan to acknowledge or respond to individual comments but will address the comments, as appropriate, in the preamble of the final rule.

To avoid undue hardship on those seeking to enforce support orders providing for a division of retired pay, the Department of Defense will continue to follow its current implementing guidance with regard to the amendments to the Uniformed Services Former Spouses' Protection Act and, effective April 1, 1995, will accept court orders containing formulas that are consistent with the proposed rule until a final rule is issued.

. . . .

List of Subjects in 32 CFR Part 63: Alimony, Child support, Retirement, Uniformed Services, Payments to former spouses, Military retired pay.

Accordingly, 32 CFR part 63 is proposed to be amended as follows:

PART 63—FORMER SPOUSE PAYMENTS FROM RETIRED PAY

1. The authority citation for part 63 continues to read as follows: Authority: 10 USC 1408.

2. Section 63.6 is proposed to be amended by adding the word "certified" after the word "A" in paragraph (b)(1)(ii), by revising paragraphs (b)(5), (c)(8) and (e), and by adding a new paragraph (h)(13) to read as follows:

Section 63.6—Procedures.

. . . .

(b) . . .

(5) The designated agent for each uniformed service is:

(i) Army, Navy, Air Force and Marine Corps: Defense Finance and Accounting Service, Cleveland Center (Code LF), PO Box 998002, Cleveland, OH 44199-8002.

(ii) Coast Guard: United States Coast Guard, Commanding Officer (L), Pay and Personnel Center, 444 Quincy Street, Topeka, KS 66683-3591.

(iii) Public Health Service: Office of General Counsel, Department of Health and Human Service, Room 5362, 330 Independence Avenue, SW, Washington, DC 20201.

. . . .

(c)

(8) The court order shall require payment of child support or alimony or, in the case of a division of property, provide for the payment of an amount of disposable retired or retainer pay, expressed as a dollar amount or as a percentage. Court orders specifying a percentage or fraction of disposable retired pay shall be construed as a percentage or a fraction of disposable retired pay. A court order that provides for a division of retired pay by means of a formula wherein the elements of the formula are not specifically set forth or readily apparent on the face of the court order will not be honored unless clarified by the court. For orders served on or after April 1, 1995, an exception to requiring such a clarifying order will be made only if in accordance with (c)(8) (i), (ii) and (iii) of this section:

(i) The order otherwise qualifies for direct payment but the parties are divorced when the member is on active duty. In that situation, where the pertinent court order is expressed in terms of a formula and the element missing from that formula is the member's years of service, then the designated agent will supply the member's years of service in terms of whole months to arrive at a percentage of disposable pay due the former spouse. Partial months of service will be dropped. The member's service that is creditable for retirement percentage multiplier purposes (See Chapter 1, Section C of DoD Financial Management Regulation, DoD 7000.14-R, Volume 7, Part B) will be used in all formulas. In the case of reserve members, points earned during the member's marriage must be contained in the court order. The designated agent will supply total retirement points earned by a reservist if that element is missing from the formula. The formula will be computed based on the member's service for retirement multiplier or points and carried out to four decimal places.

(ii) The order otherwise qualifies for direct payment but the parties are divorced when the member is on active duty and the pertinent court order awarding the former spouse a portion of the member's retired/retainer pay is expressed in terms of a hypothetical retired pay amount—one that is conditional or based upon the occurrence of certain facts and/or events. No application will be processed by the designated agent in the absence of a clarifying order where the hypothetical retired pay amount is to be based upon retired/retainer pay due the member at the time of divorce and the divorce occurs prior to the member's retirement eligibility (at least 15 or 20 years of service) unless the hypothetical retired pay amount is contained in the order or is based on 15 or 20 years of service. All hypothetical awards will be computed on the basis of the member's retired pay at the time of retirement (as explained in paragraph (c)(8)(iii) of this section) and, if the order also provides for the same percentage of cost-of-living adjustments, will be converted to a percentage of current disposable pay. If the hypothetical contained in the court order does not provide for the same percentage of cost-of-living adjustments, then payments will be made in a fixed dollar amount only. As noted in this section, the formula will be carried out to four decimal places.

(iii) Example. A court order awards the former spouse 25% of the member's monthly retired/retainer pay of a retired rank of Captain with 20 years of service to include the same percentage of cost-of-living increases. The member later retires after 25 years of service as a Major. The monthly retired pay of a Captain with 20 years of service equals $ 1000 and the monthly retired pay of a Major with 25 years of service is $ 1100; $ 1000 divided by $ 1100 equals .909091. This amount (.909091) multiplied by 25% (amount of former spouse award) is .2272. This 22.72% award is proportionately the same share as the 25% award in the court order except it is expressed in terms of the member's actual rather than hypothetical retirement pension.

(iv) Except for years of service or date of retirement, as well as hypothetical retired pay amounts mentioned in paragraphs (c)(8) (i) and (ii) of this section, in order to be honored without the necessity of obtaining a subsequent clarifying order from the court, pertinent court orders must contain a fixed dollar amount or a percentage of disposable pay that can be computed using the qualifying court order alone without reference to any facts or values external to the court order dividing the member's retired/retainer pay.[22]

Practitioners working with USFSPA issues will appreciate the significance of the new DFAS rule. Attorneys who are working with this issue for the first time should clearly understand that this change is not a license to use formulas of unlimited flexibility. If a member is retired when divorced, all formula terms must continue to be defined in the order or a separation agreement that will become part of an order. Only if the member is not yet retired can years of service (or retirement points in the case of a reserve member) or a hypothetical retired pay amount be left open as a variable which the DFAS will determine at time of retirement. Major Block.

Consumer Law Note

Fair Debt Collection Practices

The United States Supreme Court recently ended one of the ongoing debates regarding the Fair Debt Collection Practices Act (FDCPA, or Act).[23] In *Heintz v. Jenkins*,[24] the Court ended the debate over whether attorneys engaged in "purely legal actions" were outside the coverage of the Act's restrictions on debt collectors.

The original version of the FDCPA excluded attorneys from the definition of "debt collector."[25] In 1986, Congress amended the FDCPA to eliminate the exemption for attorneys.[26] Since that time, however, attorneys have argued that the Act only applied to them when they performed acts like debt collectors, and not when they engaged in "purely legal actions."[27]

The Supreme Court granted certiorari to resolve the issue of the "purely legal actions."[28] In its holding, the Court declared

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[22] *Id.*

[23] 15 U.S.C. § 1692 (1988).

[24] 1995 WL 224607 (1995).

[25] 15 U.S.C.A. § 1692a(6)(F) (West 1982).

[26] The amendment occurred in Pub. L. No. 99-361, 100 Stat. 768 (codified at 15 U.S.C. § 1692a (1988)).

[27] *See, e.g.*, Fox v. Citicorp, 15 F.3d 1507 (9th Cir. 1994).

[28] 115 S. Ct. 416 (1994).

that attorneys who regularly practice collections law are debt collectors subject to the regulation of the FDCPA.[29]

In *Heintz*, Darlene Jenkins defaulted on an automobile loan. George Heintz represented the creditor bank. In a letter to Jenkins, Heintz demanded $4173 for insurance. The insurance covered both damage to the car and against the creditor's failure to repay the loan. However, the loan contract apparently only provided that the bank could secure insurance against loss or damage to the vehicle and not for failure to repay the loan. Consequently, Jenkins asserted that the demand by Heintz constituted a false representation about the amount owing to the bank. A false representation of this sort would violate the FDCPA.[30]

Jenkins brought suit under the FDCPA. The trial court dismissed her suit, holding that the FDCPA did not apply to attorneys in litigation. The United States Court of Appeals for the Seventh Circuit reversed, holding that the FDCPA applied to lawyers.[31]

The Supreme Court held that the unambiguous intent of Congress in 1986 was to include attorneys within the scope of the Act.[32] Writing for the Court, Justice Breyer noted that if Congress had intended to exclude litigation or "purely legal actions" from the FDCPA, it could have carved out such a narrow exemption when it amended the act in 1986. Finding no such exemption, the Court applied the plain meaning of the statute to the attorney.[33] The Court also rejected the attorney's attempt to use a postlegislation statement by a Congressman to display congressional intent.[34] Finally, the Court rejected the Federal Trade Commission's Informal Staff Commentary which also had carved out a "purely legal actions" exemption.[35]

Legal assistance attorneys (LAAs) regularly counsel soldiers facing debt collection efforts by attorneys. Legal assistance attorneys must ensure that the creditor attorney does not make any false claim or misrepresent any fact in any of their dunning letters. This misrepresentation may be the genesis of a cause of action against the attorney under the FDCPA.[36] Legal assistance attorneys may be able to assert a cause of action for damages against creditor attorneys violating the Act. This may be particularly helpful in the automobile repossession area. Major McGillin.

SGLI Note

Case Law Developments

Legal assistance attorney are required to provide counseling on Servicemen's Group Life Insurance (SGLI) beneficiary designations as part of our Estate Planning services.[37] Given the sizeable amount of possible coverage ($200,000), proper designations are extremely important. Some recent cases illustrate some of the issues that LAAs should be aware of.

Pursuant to the SGLI Act (SGLIA),[38] service members may change their SGLI beneficiary designations at any time prior to death. These changes are not effective, however, until the appropriate personnel office "receives" them. In *Prudential Insurance Company v. Perez*,[39] Airman Perez, a newlywed, changed his beneficiary designation to provide for his wife. However, two months later he executed a new beneficiary designation form (SGLV 8286) naming his father as beneficiary. Airman Perez took this SGLV 8286 to the personnel office, where the appropriate sergeant apparently signed the form as "witnessed and received." For some unexplained reason, Airman Perez left the personnel office with all three copies of the new SGLV 8286. Airman Perez committed suicide a month later. The "new" SGLV 8286 forms (naming Airman Perez's father as beneficiary) were discovered in Perez's personal possessions while the "old" SGLV 8286 form (naming the wife as beneficiary) was still in his personnel records.

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[29] Heintz v. Jenkins, 1995 WL 224607 *2 (1995).

[30] *Id.* According to the Court, she proceeded under 15 U.S.C. §§ 1692f(1) and 1692e(2)(A).

[31] Jenkins v. Heintz, 25 F.3d 536 (7th Cir. 1994).

[32] *Heintz*, 1995 WL 224607, at *3.

[33] *Id.*

[34] Heintz attempted to argue that a statement made by one of the act's sponsors, *after* the enactment of the act, displayed Congressional intent. *Id.* at *4. The Court rejected this notion, holding that Congress cannot be held to have considered this statement in its deliberations because it came after the enactment of the legislation. *Id.*

[35] *Id.* at *5.

[36] Legal assistance attorneys are not covered by the FDCPA. Government personnel collecting debts in the scope of their official duties are excluded from FDCPA's coverage. 15 U.S.C. § 1992a(6)(C).

[37] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6(b) (30 Sept. 1992).

[38] 38 U.S.C. §§ 1965-1976 (1994).

[39] 1995 WL 126636 (9th Cir. 1995).

Airman Perez's widow contended that the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) should determine whether Perez, by departing the personnel office with all copies of the new SGLV 8286, changed his mind about his father as beneficiary. The Ninth Circuit, in granting summary judgment for the father, concluded that Airman Perez's intent, when he departed the personnel office with all the copies of the SGLV form, was irrelevant.[40]

Once the personnel sergeant signed the form as "received," the beneficiary designation change was effected; that the new SGLV was not placed in the personnel records, or that Airman Perez may have taken the SGLV copies with him as a change of heart, was irrelevant. The statute is clear about how designations are made and changed, and the Ninth Circuit was unwilling to provide an equity analysis. The Ninth Circuit noted that one of the purposes for strict construction of the SGLIA was to provide clarity for the insurance companies and thus avoid excessive litigation.[41]

The *Perez* holding and rationale are consistent with other cases that strictly construe the SGLI statute and refuse to apply equity or state law insurance concepts that might effect SGLIA beneficiary designations.[42] However, some recent cases indicate that, in certain situations, the courts will apply equitable concepts that impact SGLIA beneficiary designations.

In *Prudential Insurance Co. v. Mehlbrech*,[43] a district court considered a claim that an SGLI insured was incompetent to execute a beneficiary change, and, in the alternative, that the new beneficiaries had exerted undue influence on the insured so that the designation should be considered ineffective. Although the SGLIA does not mention "incompetence" or "undue influence" as factors affecting an SGLI beneficiary designation, *Mehlbrech* analyzed both of these claims as if these concepts were part of the SGLIA.

In *Mehlbrech*, Carl Mehlbrech, while on active duty with the Army, made a "by law" designation on his SGLV 8286. Pursuant to this designation, Mrs. Mehlbrech would have been the primary beneficiary of the SGLI proceeds. Shortly after he made the "by law" designation, Carl suffered a series of heart attacks which left him with an "organic brain disorder." After a series of operations, he was placed on temporary disability leave because of his physical and mental condition. Coincident with the onset of Carl's medical problems, the Mehlbrech's began to suffer from marital problems. Divorce papers were filed, but the divorce was never finalized. Just prior to Carl's death, and while living apart from his wife, Carl changed the SGLI beneficiary designation to name his son and sister as coprimary takers.

In challenging Carl's final beneficiary designation, Mrs. Mehlbrech claimed that he did not have the mental capacity to make an SGLI beneficiary change. To support her claim, she relied on his diagnosed "organic brain disorder" and the illogical (to her) fact that Carl had left her the remainder of his estate and other life insurance but gave away the SGLI proceeds. In analyzing the capacity challenge, the district court noted that federal law of capacity, not state law, controlled. The court provided the following "federal" test of SGLI capacity:

> To be capable of effecting a valid change of beneficiary a person should have clearness of mind and memory sufficient to know the nature of the property for which he is about to name a beneficiary, the nature of the act he is about to perform, the names and identities of those who are the natural objects of his bounty; his relationship towards them, and the consequences of his act, uninfluenced by any material delusions.[44]

The court held that Carl satisfied this capacity test. The organic brain disorder made it difficult for him to control his emotions and to work with others, but there were copies of coherent letters that he had written to his relatives and other extensive evidence that he was capable of managing his own affairs. Additionally, Carl had discussed his proposed change

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[40] *Id.* at *1.

[41] *Id.* at *2 (citations omitted).

[42] *See, e.g.*, Ridgway v. Ridgway, 102 S. Ct. 49 (1981). In *Ridgway*, a state divorce decree required that a serviceman keep all his life insurance policies, including his SGLI, in effect for the benefit of his ex-wife and children by that marriage. The serviceman ultimately remarried, and changed his beneficiary to "by law." When the service member died, his second wife asked for the proceeds pursuant to the SGLIA, and the first wife asked for the proceeds pursuant to the state court order (or a designation of a constructive trust on the second wife). Citing the plain language of the SGLIA on designation of beneficiaries, the SGLIA prohibitions on creditor attachment of proceeds, and the federal supremacy clause, the Supreme Court held for the second spouse. State law, in the form of a "constructive trust" or otherwise, was simply ineffective to override the service member's SGLI designation. *Id.* at 60. *See also* Zawrotny v. Brewer, 978 F.2d 1204 (10th Cir. 1992), *cert. denied* ___ U.S. ___ (1993) (Oklahoma statute stated that, by operation of law, divorce causes ex-spouse to lose all entitlement to life insurance proceeds on life of previous spouse; Tenth Circuit held Oklahoma statute ineffective to change by name designation of ex-spouse).

[43] 1995 WL 102816 (D. Or. 1995).

[44] *Id.* at *3 (citing Taylor v. United States, 113 F. Supp. 143 (W.D.Ark. 1953)). *Taylor* involved the mental capacity of an individual to change a beneficiary designation made for National Service Life Insurance (NSLI), another government insurance program. *Taylor* concluded that there was a federal law of mental competence governing insurance designations. In support of its conclusion, *Taylor* first cites other federal insurance cases that were admittedly "not factually in point with the instant case." *Id.* at 147. *Taylor* then cites *American Jurisprudence* for the "general, if not universal" rule that lack of mental capacity at the time of attempted beneficiary change renders the attempted change ineffective. *Id.* at 148. The actual test applied by *Taylor* (and *Mehlbrech*) also is lifted from *American Jurisprudence*. *Id.*

in SGLI beneficiary in a coherent manner just prior to the election.[45]

Although "federal" law applied to the analysis of capacity, *Mehlbrech* states that "[t]he parties agree that *state* law applies to the issues of undue influence, duress, and fraud."[46] The court concluded that the plaintiffs had not carried their burden of proof on the issue of undue influence.[47]

Mehlbrech is of particular interest to those LAAs who may be involved in deathbed estate planning where the attorney is helping execute a change in SGLI beneficiary designations. If there is an issue of capacity or undue influence, the LAA should document his or her conclusions that the insured was mentally capable and was not subject to undue influence.

In *Metropolitan Life Insurance v. Pritchett*,[48] a district court considered the "Slayer's rule," another equitable concept not found in government insurance statutes. In *Pritchett*, a federal employee insured under the Federal Employees Government Life Insurance Act (FEGLIA)[49] was killed by her husband, who was subsequently convicted of second degree murder. The deceased spouse had failed to make a beneficiary designation and the FEGLIA, like the SGLIA, provides that the surviving spouse is the primary beneficiary in these cases. Additionally, neither the FEGLIA nor the SGLIA contain any mention of a bar to collection of proceeds if the beneficiary is at fault in the insured's death. Nevertheless, *Metropolitan* concluded that the "Slayer's rule" (*i.e.*, no person should be permitted to profit from his or her own wrong) was an "equitable principle" recognized by "federal law." The *Metropolitan* court ordered that the FEGLIA proceeds be paid to the insured's children.[50]

The Judge Advocate General's School now emphasizes SGLI counseling during Basic Course instruction and has a new class focused on this issue at the semiannual Legal Assistance Course. Legal assistance attorneys can offer invaluable assistance to soldiers in this area, and should share their knowledge of this subject with all legal office personnel in local CLEs whenever possible. Major Peterson.

Casualty Assistance Note

Legal Aspects of Mass Casualty Operations: Lessons Learned in Support of the Pope Air Force Base Disaster

On the afternoon of March 23, 1994, paratroopers from the 82d Airborne Division and other Fort Bragg, North Carolina, units assembled at Pope Air Force Base (AFB), North Carolina, for sustained airborne training prior to a scheduled parachute jump. This normally routine training soon turned tragic when two Air Force aircraft collided in midair near the paratroopers' prejump training site.

One of the aircraft crashed onto a Pope AFB runway, impacting with a C-141 transport plane a few hundred yards from the area where the paratroopers were assembled for training. The fully fueled transport exploded in seconds, killing twenty-three of the paratroopers, and wounding eighty others. Of the paratroopers injured, forty-three sustained severe burns from exploding fuel. These soldiers were transported by air to the Army Burn Care Facility located in Brooke Army Medical Center (BAMC), Fort Sam Houston, Texas.

As the wounded soldiers were enroute to Fort Sam Houston, Fort Sam Houston's Emergency Operations Center was activated and the on-call judge advocate was notified. In the months following the accident, attorneys from the Office of the Staff Judge Advocate, United States Army Garrison, Fort Sam Houston, provided legal assistance to the wounded Fort Bragg soldiers and their families.

This note discusses some of the major lessons learned from that experience. The following information should assist judge advocates in preparing for, or responding to, the legal aspects of future mass casualty operations.

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[45] For example, he had discussed with his mother the concept of selecting the 36-month benefit payment option, in the hopes that his son would not blow the SGLI benefits on a "fancy automobile." *Mehlbrech*, 1995 WL 102816 at *3.

[46] *Id.* at *5 (emphasis added). The court cites no authority for the application of state law (instead of federal law) to the question of undue influence. The court applied the Oregon law on undue influence in wills cases. In Oregon, the following factors are used to analyze undue influence in wills cases: (1) the procurement or participation of the beneficiary in the preparation of the document; (2) the availability of independent advice; (3) secrecy and haste; (4) a change of attitude towards others; (5) a change in the plan for disposition of property; (6) an unnatural or unjust gift; and (7) susceptibility to influence. Troyer v. Plackett, 617 P.2d 305 (Or. App. 1980).

[47] The court concluded that there was no secrecy or haste in the decision to change beneficiaries and the beneficiaries did not play any role in the decision to change. The court also concluded that the final beneficiaries (Mehlbrech's son and sister) were the "natural objects" of some life insurance proceeds. *Mehlbrech*, 1995 WL 102816 at *7.

[48] 843 F. Supp. 1006 (D. Md. 1994).

[49] 5 U.S.C. §§ 8701-8716. The SGLIA mirrors, in both language and legislative history, many of the provisions of the older FEGLIA. Therefore, court decisions interpreting the FEGLIA are persuasive as to the meaning of the SGLIA. *See, e.g.*, Mounts v. United States, 838 F. Supp. 1187, 1192 (E.D. Ky. 1993) (stating that SGLIA was "modeled" after FEGLIA).

[50] *Accord*, Mounts v. United States (E.D. Ky. 1993) (FEGLIA); Prudential Ins. Co. v. Tull, 690 F.2d 848, 849 (4th Cir. 1982) (SGLIA).

The Fort Sam Houston Mass Casualty Plan

As the home to the United States Army Medical Command, Brooke Army Medical Center, and the Army Burn Care Facility, Fort Sam Houston, has long been the key receiving point for military casualties.[51] Accordingly, a detailed mass casualty plan has been in place at Fort Sam Houston for some time.

This plan proved invaluable during Fort Sam Houston's support of the Pope AFB accident. Judge advocates must recognize the importance of a well developed mass casualty plan for installations with major medical facilities.

This experience illustrates that a post's mass casualty plan must do more than exist; it must be reviewed and tested on a regular basis to ensure its effectiveness. Finally, because judge advocates play an important role during mass casualty operations, they should be actively involved in drafting the plan, not just reviewing the legal annex.

The Family Assistance Center

On notification that the Pope AFB casualties were enroute to Fort Sam Houston, a Family Assistance Center was organized, with representatives from various on-post agencies, including the Staff Judge Advocate. A Family Support Team (FST) was formed and the members of the FST, in conjunction with representatives from Fort Bragg units, staffed the Family Assistance Center on a full time basis.

As a member of the FST, a judge advocate was either on site at the Family Assistance Center, or available on call twenty-four hours, to provide legal advice and assistance to the Fort Bragg soldiers and their family members. Because of the large number of casualties and the correspondingly large number of family members, one judge advocate was designated as the full time action officer for the operation.

The services of the FST judge advocate provided peace of mind for the soldiers and their families during a difficult and stressful time. A discussion of the major legal assistance services performed is outlined below.

Powers of Attorney

During the initial phases of the operation, the preparation and execution of powers of attorney was the most requested service. Because their injuries were so severe, most of the soldiers in the Burn Care Facility were unable to address their most basic personal affairs. Consequently, they required an authorized agent to pay their bills, ship and receive their personal property, and transact general business on their behalf.

In response, the FST judge advocate prepared and executed general powers of attorney (POA) for most of the wounded soldiers. Soldiers generally named their spouses or parents as attorneys-in-fact, and where necessary, authorized members of their units at Fort Bragg to ship their personal property to Fort Sam Houston or place it in storage in North Carolina.[52]

The FST judge advocate also prepared general POAs for some family members who traveled to Fort Sam Houston. Many of these individuals had been forced to leave their affairs in the hands of friends or relatives, who found that they required legal authority to transact business.

On the advice of the FST judge advocate, durable powers of attorney for health care were prepared and executed for many of the seriously ill soldiers. These POAs authorized a soldier's agent to make health care decisions on the soldier's behalf, and were designed to remain in effect in case the soldier became unconscious or mentally incompetent.

Where applicable, specialized POAs were prepared for the wounded soldiers or their family members. These included POAs for temporary guardianship of children; POAs for the sale of land, and POAs for the receipt and shipment of household goods.

Soldiers, especially those in high risk units, should consider a power of attorney for a family member or trusted friend. Judge advocates should stress the importance of powers of attorney to soldiers during predeployment briefings and soldier readiness checks. As this accident proved, disaster can strike at any time and the burden on a soldier's family is significantly eased when the soldier's personal affairs are in order.

Wills

Because of their condition, some of the soldiers in the Burn Care Facility asked that a last will and testament be prepared for them. Others, who already had wills, requested that their current wills be updated or revised. The FST judge advocate interviewed the hospitalized soldiers and prepared new or revised wills as necessary. Soldiers reviewed their wills in the presence of the judge advocate, who, because of the soldiers' injuries, conducted will execution on the hospital ward.

The lessons learned here resemble those stressed with powers of attorney. As cliched as it may sound, a soldier's personal legal affairs, including his or her will, must not be put off or ignored. Disasters cannot be predicted, and when they strike it is typically too late to start considering a power of attorney or a will.

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[51] Soldiers injured in the aborted raid on the United States Embassy in Iran were medically evacuated to the BAMC Burn Care Facility, as were soldiers who sustained burn injuries in Grenada, Panama, and Operation Desert Storm.

[52] Powers of attorney executed for nonfamily members generally contained a termination clause invalidating the POA on a specified date. Surprisingly, very few of the married soldiers had given their spouse a power of attorney prior to the accident.

Taxes

Because the Pope AFB accident occurred in March of 1994, many of the injured soldiers had yet to file their state or federal income taxes for 1993. A cooperative effort between the various unit finance offices at Fort Bragg and the FST judge advocate resolved this problem.

Where possible, W-2 forms for the injured soldiers were faxed from Fort Bragg to Fort Sam Houston. The soldiers' taxes were then prepared by the FST judge advocate, and electronically filed at the Fort Sam Houston Tax Assistance Center.

The FST judge advocate submitted extensions of time to file federal and state taxes for most of the critically ill soldiers. The FST judge advocate also assisted the family members of the injured soldiers with tax advice and, where necessary, tax preparation.

The lesson learned here is that one never can completely anticipate every legal issue associated with mass casualty scenarios. Accordingly, judge advocates must expect the unexpected and be flexible enough to ensure that problems encountered by the wounded and their family members are solved as quickly and efficiently as possible.

Nonsignature Affidavits

Because many of the injured soldiers were unable to use their hands, they were unable to sign legal documents. Nonsignature and "X" affidavits helped to overcome this problem.

A nonsignature affidavit attests that an individual who is physically unable to sign his or her name has assented to the terms of a legal document. Assent is given verbally in the presence of witnesses and a notary public, who then acknowledges the document. An X affidavit is used when an individual is able to make an "X" but not a complete signature.

These two documents were used extensively for the Fort Bragg soldiers, and were attached to powers of attorney, income tax returns, letters to creditors. At times, the FST judge advocate "drafted" doctors, nurses, and hospital personnel to serve as witnesses while the judge advocate notarized the documents.

Bedside Assistance

Perhaps the most challenging aspect of the legal support provided during this operation was the environment in which the FST judge advocate had to work. Because of the severity of their injuries, many of the Fort Bragg soldiers were initially kept alive by respirators or other artificial means. None of the patients were ambulatory, and because many were in critical condition and heavily medicated, visitation was allowed on a limited basis.

Visitors to the Burn Care Facility were required to dress entirely in surgical garb, including surgical masks and rubber gloves. During the initial phases of the operation, the FST judge advocate visited the Burn Care Center twice a day to provide legal assistance. Despite the unusual conditions, legal services were successfully delivered throughout the duration of the Fort Bragg soldiers' stay at Fort Sam Houston.

This experience yielded perhaps the most lasting and profound lesson. Put simply, judge advocates must never forget that they are soldiers first, and lawyers second. They must be prepared to come to the assistance of their fellow soldiers, whenever and wherever our assistance is required, no matter how difficult or unpleasant the conditions.

Casualty Assistance

All of the forty-three Fort Bragg soldiers treated at Fort Sam Houston eventually were released from the Burn Care Facility. While some sustained lifelong injuries and were medically retired from the Army, others overcame tremendous odds and returned to active duty. Unfortunately, one of the Fort Bragg soldiers remained hospitalized in San Antonio until his death in January of 1995. Judge advocates from Fort Sam Houston assisted his family with a variety of casualty assistance issues including military death benefits, Veterans Affairs benefits, and information pertaining to life insurance and the Survivor Benefit Plan annuity.

Judge advocates must be familiar with *Army Regulation 600-8-1* (*Army Casualty Operations, Assistance, and Insurance*), *Department of the Army Pamphlet 608-33* (*Casualty Assistance Handbook*), as well as *Department of Veteran's Affairs Pamphlet 80-94-1* (*Federal Benefits for Veterans and Dependents*).[53]

While a casualty assistance officer will be assigned to assist the family, he or she will not be an attorney. Accordingly, a well informed judge advocate is invaluable during an extremely difficult time.

Conclusion

The profession of arms is difficult and often dangerous, and casualties are an inevitable fact of military life. When soldiers are killed or injured, judge advocates must be prepared to act as an integral part of the casualty assistance team.

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[53] *Department of Veteran's Affairs Pamphlet 80-94-1* provides an excellent synopsis of Veterans benefits available from the Veteran's Affairs (VA). Judge advocates, especially those assigned to legal assistance sections, should develop a working relationship with both the local VA representative and the Casualty Assistance branch of their servicing Adjutant General office.

The Judge Advocate General of the Army, Major General Michael J. Nardotti, Jr., has described judge advocates as being both soldiers and lawyers. The legal support provided to the soldiers and families affected by the Pope AFB disaster is another illustration that when disaster strikes, the soldier/lawyers of the Judge Advocate General's Corps provide excellent legal assistance. Captain Mike Ryan, Chief, Operational Law, Fort Sam Houston, Texas.

Criminal Law Notes

Corrected Date for Military Justice Managers' Course

The First Military Justice Managers' Course will be held at The Judge Advocate General's School from 1 to 4 August 1995, not 8 to 11 August 1995, as reported in the April edition of *The Army Lawyer*. Although the course is primarily designed for new chiefs of military justice, it is open to all active duty judge advocates currently serving or scheduled to serve in military justice management positions, including senior defense counsel, officers-in-charge of branch offices, and deputy staff judge advocates. Reserve and National Guard judge advocates may attend on a space available basis. Those interested in attending should contact their automation officer, who can apply for a reservation in the course through ATTRS (5F-F31). Major Masterton.

Claims Report

United States Army Claims Service

Personnel Claims Note

Unearned Freight Packets: The Need to Substantiate the Loss or Destruction

This claims policy note amends the guidance found in *Army Regulation* (*AR*) 27-20,[1] paragraph 11-24a(7) and *Army Pamphlet* (*DA Pam*) 27-162,[2] paragraph 3-27. Under *AR 27-20*, paragraph 1-9f, this guidance is binding on all Army claims offices.

Informal discussions with carrier claims representatives on the subject of carrier appeals to unearned freight charges have raised the issue of substantiation. *Army Regulation 27-20*, paragraph 11-24a(7) and *DA Pam 27-162* hold that "[w]hen the loss or destruction of an item in shipment is attributable to a GBL [government bill of lading] carrier, the carrier is not entitled to transportation charges for *that* item."[3] The freight packet forwarded to DFAS must "provide. . .a basis to collect such unearned transportation charges. . . ."[4] *Department of the Army Pamphlet 27-162* requires an unearned freight packet to contain a memorandum requesting that the DFAS deduct unearned freight charges,[5] as well as a copy of Department of Defense (DD) Forms 1843 and 1844, and a copy of the GBL. There is no requirement to provide further substantiation that an item is lost or nonrepairable.

Destroyed items present substantiation problems. In *Aalmode Transportation Corporation*,[6] the Comptroller General pointed out that freight charges due carriers for transporting household goods do not have to be paid if the goods are "destroyed" in transit.[7] In explaining when an item is "destroyed," rather than merely damaged (in which case the freight charges would have to be paid), the Interstate Commerce Commission has stated:

> The term "destruction" as we have used it in this report and as we intend it in our regulations,

[1] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS (1 June 1995) [hereinafter AR 27-20].

[2] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989) [hereinafter DA Pam. 27-162].

[3] *Id.* para. 3-27 (emphasis added).

[4] *Id.*

[5] *Id.* fig. 3-20.

[6] B-231357, Jan. 15, 1991 (unpub.).

[7] *See* 49 C.F.R. pt. 1056.15 (1989).

> implies that goods are beyond repair or renewal, that they no longer exist in the form in which they were tendered to the carrier, or that they are useless for the purpose for which they were intended. . . . Loss of value will not automatically qualify as destruction of the object in question. On the other hand, the shipper need not demonstrate that the tendered goods have been destroyed for the purpose of these regulations."[8]

The DFAS reviews the DD Form 1844 to identify items where replacement cost has been awarded to the claimant and successful recovery (or offset) has been completed against the carrier. Be sure that local recovery is completed and appropriate corrections made to the DD Forms 1844 in claims where compromise was reached on certain items before you mail unearned freight packets to DFAS-IN. Unearned freight packets are not required on every claim. For files marked "IMPASSE," do not mail the unearned freight packets to the DFAS; keep them in the file forwarded to the USARCS, USACSEUR, or USAFCS-K.

Starting 1 July 1995, field claims offices and command claims services will revise procedures for requesting deduction of unearned freight charges. The memorandum to DFAS-IN that accompanies copies of DD Forms 1843 and 1844 and a copy of the GBL, will identify the line items on the DD Form 1844 that should have unearned freight charges deducted.[9] Further, copies of repair estimates will be added to the unearned freight packet if the items are not repairable. The estimate must clearly state that the item in question is either beyond repair, no longer exists in its original form, or is useless for its intended purpose. If there is no estimate of repair to substantiate one of the above conditions, then the field claims office must conduct an inspection to verify the unearned freight charge for the item. A copy of the inspection report also will be included in the unearned freight packet. If there is no indication of substantiation (*i.e.*, no estimate of repair or equivalent statement, or no inspection could be made) claims personnel should note this information in the chronology sheet and not assert an unearned freight charge for the item(s) in question.

I recommend that claims examiners identify items that qualify for unearned freight charges at the same time that they adjudicate the claim and calculate carrier recovery. A claims examiner could place an asterisk beside the line item or use a highlighter to mark the line item subject to unearned freight charge. If a claims office waits until recovery is completed before identifying unearned freight items, an inspection or call to a repair firm to inquire about such an item maybe too late (*e.g.*, the item may not be available or the claimant reassigned).

The DD Form 1844 is extremely important because it is the document that DFAS-IN reviews to determine if the item is destroyed or missing. Ensure that claimants provide sufficient descriptive information in block 7 to determine whether the item is destroyed. Stating that the item is "destroyed" without further descriptive language creates problems for DFAS-IN in determining if the item is really destroyed. Additionally, claims examiners must ensure that the adjudication codes used in block 26 are consistent with a destroyed item. "RC" (replacement cost) is consistent with settlement for a destroyed item, and on rare occasions "F & R" (fair and reasonable) might be used if the claimant could not establish the value claimed for the destroyed item. The chronology sheet should contain an explanation of why F & R was used. "LOV" (loss of value) and "AGC" (agreed cost of repair) are consistent with a destroyed item. Their use for a destroyed item would require further explanation on the chronology sheet. "AC" (amount claimed) is ambiguous and needs further explanation as well. Take care in using salvage codes. "SV/R" (salvage value/retain) and "SV/T" (salvage value/turn in) imply that the item may not be destroyed because it has salvage value, while "SV/N" (salvage value/no turn in) implies that the item was damaged beyond economic repair, had no salvage value, and turn in of the item was not required. This, too, may not be sufficient, and further explanation of its use would be required on the chronology sheet. The "bottom line"—claims personnel must exercise caution in identifying destroyed items for deduction of unearned freight charges on the memorandum and on the DD Form 1844.

Implementing this policy may require field claims offices to change or add to their written instructions so that a claimant knows to ask the repair firm to declare on the estimate that an item fits one of the above categories of destruction. Be careful—a statement that an item is not economically repairable may not mean that it is destroyed, and further inquiry by the field claims offices may be necessary.

Substantiation for unearned freight charges may affect how claims personnel adjudicate claims. This is a separate procedure and, to the extent that it sheds additional evidence on adjudication and/or recovery, all the better. Lieutenant Colonel Kennerly.

SAMPLE UNEARNED FREIGHT LETTER TO DFAS-IN

(Letterhead)

(Office Symbol, Claim Number) (MARKS Number) (Date)

MEMORANDUM: DEFENSE FINANCE AND ACCOUNTING SERVICE
INDIANAPOLIS CENTER, ATTN: DFAS-IN-FTFB,
INDIANAPOLIS, INDIANA 46249-0621

[8] *Aalmode*, B-231357, at *2 (citation omitted).

[9] See sample memorandum following this note.

SUBJECT: Request for Deduction of Unearned Freight Charges

1. Enclosed is a copy of DD Form 1843, DD Form 1844, and GBL showing the loss and/or damage beyond repaid to the personal property of *(Name of claimant)*. Liability for unearned freight charge is pursued against *(Name of GBL carrier)*. Copies of estimates/inspections have been included for destroyed items.

2. The claimant's personal property loss and damage claim has been resolved/settled between the Government and the carrier. Unearned freight should be recovered for the following items from DD Form 1844:

End Table, line 4: Stool, line 7: Dresser mirror, line 24: Laundry basket, line 39; Glass table top, line 56; and Floor lamp, line 80.

___Encls (list them)

(Signature Block)
Claims Judge Advocate

Claims Notes

Claims Fraud

I believe that Army claims offices have the philosophy that all soldiers filing claims are presumed to be honest. However, credibility questions sometimes arise when there is no substantiation available to show ownership or purchase. Claims personnel often rely on their experience in working with claimants in these situations to reach a practical and equitable resolution of the claims.

However, sometimes a severe lack of substantiation or the presence of other factors cause claims personnel to question the accuracy or honesty of a claimant's representations. Claims officials have the authority to deny a claim in its totality if the claim was "substantially tainted by fraud"[10] even though some legitimate items are part of the claim.

Some cases of fraud are clear and unmistakable (changing numbers on repaid estimates). Refer these cases for appropriate criminal investigation. Because the criminal proceeding and the administrative claims proceeding are governed by different standards, the result of the criminal investigation or criminal proceeding is not binding on the claims adjudication process. The claims examiner must assess the available evidence independently.

The more difficult claims are those involving questions of ownership, value, purchase price, replacement cost, extent of damage or preexisting damage, and quality of the item. Prematurely referring these claims for criminal investigation—based on the claim as submitted—may be nonproductive from both a criminal and a claims point of view; the investigation often is inconclusive from a criminal perspective and not helpful from a claims perspective.

One approach is to seek clarifying information. Write the claimant and provide a clear explanation of the standards (e.g., what is required to substantiate ownership or replacement costs). Ask the claimant to review appropriate portions of the claim submitted in light of this information to ensure that it is complete, accurate, and representative of the property claimed.

This approach affords the claimant an opportunity to resolve any misunderstanding, to clarify questionable entries, and to reaffirm the accuracy of information. Often a claimant may not fully understand what is required in the way of supporting evidence for replacement costs or ownership.

When requesting additional information, members of the claims office are not acting as criminal investigators. They have an independent responsibility to ascertain the facts necessary to make proper payment of valid claims. When requesting clarifying information to substantiate a pending claim—and not for purposes of disciplinary action or criminal prosecution—claims personnel need not issue Article 31 warnings, provided they are not acting as agents of a law enforcement agency or disciplinary official.

By ensuring that the claimant understands what is expected and by giving the claimant the opportunity to further substantiate the claim, the claims adjudicator usually can secure a more complete picture of the claim. Colonel Rosenblatt.

Disaster Claims—Advance and Emergency Partial Payments

Introduction

Disasters, by the nature of their suddenness and the extraordinary pervasiveness of the calamity—whether caused by nature or by man—can be expected to result in extensive civilian property damage or personal injuries and to create a large number of potential claims. Disasters typically leave many people in immediate need of funds. In the aftermath of a disaster, a common claims-related request is for *advance* or *emergency partial payments*. This note summarizes the statutory and regulatory provisions governing the making of advance or emergency partial payments for disaster claims.

Emergency Partial Payment of Personnel Claims

Natural and man-made disasters that affect Army installations can give rise to claims under the Military Personnel and

[10] *See* Claims Policy Note, *Payment of Claims Tainted by Fraud*, ARMY LAW., Aug. 1992, at 36.

Civilian Employees Claims Act (Personnel Claims Act),[11] for damage to or loss of personal property incident to service caused by fire, flood, hurricane, or other unusual occurrence. Natural disasters can cause compensable personal property losses occurring at on-post quarters in the continental United States (CONUS), and on-post and off-post quarters overseas. Disasters also can destroy household goods in temporary or nontemporary storage. Storage sites, located throughout the United States and around the world, are vulnerable to disasters affecting military and civilian personnel, even though a military installation is not touched by the disaster. The statutory maximum payment for a Personnel Claims Act Claim is $40,000.[12]

The Personnel Claims Act does not discuss partial payments. However, the implementing regulation[13] authorizes emergency partial payments for personnel claims when a hardship situation exists that can be alleviated by providing immediate funds for the repair or replacement of certain property lost or damaged. Before authorizing the advance payment, the approval or settlement authority must determine that a presented personnel claim is payable in an amount exceeding the amount of the proposed emergency payment.[14]

To request an emergency partial payment, the claimant must complete and submit a DD Form 1848, Claim for Loss of or Damage to Personal Property Incident to Service, explaining in part I, block 10, or on an additional sheet, the hardship circumstances for which emergency payment is needed. The accompanying DD Form 1844, List of Property and Claims Analysis Chart, also must list those items for which immediate compensation is needed.[15] A local claims office can make an emergency partial payment in an amount up to $2000 if it determines:

(1) The claim is clearly payable.

(2) A hardship exists.

(3) The claim is payable in an amount equal or exceeding the proposed emergency partial payment.[16]

The Chief, Personnel Claims and Recovery Division, USARCS, can authorize emergency partial payments above $2000.[17]

Before making an emergency payment, the processing claims office should obtain an executed *partial acceptance agreement* from either the claimant or the claimant's representative.[18] Although preprinted forms are unavailable for this purpose, the following language is recommended:

> I, [name of claimant], agree to accept the sum of $_____ as a partial payment in order to relieve immediate hardship. I understand that this sum will be deducted from any award made in final settlement of my claim. I understand that if I do not produce the documentation needed to complete my claim within *three* months, my claim will be processed for final settlement.[19]

There is no set time period in which the claimant should submit the completed claim after an emergency partial payment. The example in the agreement above states three months, but this time period can be extended or shortened depending on the circumstances. Usually, in an emergency/hardship situation the claimant is very anxious to resolve the matter. Although efficient office administration dictates completing the processing of the claim as soon as possible after a partial payment is made, claims personnel should remember that maintaining morale and avoiding financial hardship are underlying policies of the personnel claims process. Accordingly, flexibility is the watchword.

Advance Partial Payments of Tort Claims

Man-made disasters—such as military aircraft crashes and chemical, nuclear, and conventional munitions accidents—when caused by United States government military or civilian personnel (acting in the scope of their employment, or arising incident to the noncombat activities of the Army), could generate a substantial number of claims "outside" the military installation. Extensive civilian property damage or personal injuries are likely to cause a sympathetic reaction, and to cre-

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[11] 31 U.S.C. § 3721; implemented by AR 27-20, *supra* note 1, ch. 11.

[12] 31 U.S.C. § 3721(b)(1).

[13] AR 27-20, *supra* note 1, para. 11-18.

[14] *Id.* para. 11-18a.

[15] DA PAM. 27-162, *supra* note 2, para. 2-55d(1)(a).

[16] *Id.*

[17] AR 27-20, *supra* note 1, para. 11-18c.

[18] *Id.*.

[19] DA PAM. 27-162, *supra* note 2, para. 2-55d(1)(b).

ate public relations pressures on Army claims offices to use the claims system to make whole quickly those off-post neighbors who have suffered losses. While claims office personnel should strive to fairly and quickly resolve such claims, they must not succumb to pressures to ignore the law. Senior judge advocates must support their claims personnel when they follow law and regulations in settling meritorious claims in a disaster situation, even if to do so may result in slight delays in the payments of claims.

Advance Partial Payments Are Not Authorized Under the Federal Tort Claims Act

The Federal Tort Claims Act (FTCA)[20] expressly excludes advance partial payments of claims arising from the "same subject matter."[21] For many years, the General Accounting Office (GAO) strictly enforced the rule that a claimant under the FTCA could be paid only once.[22] The Department of Justice and GAO now recognize that *a property damage* claim may be paid to an injured claimant or insurer, and then a subsequent *personal injury* claim may be paid to the same claimant.[23] However, this procedure is expected to be used primarily in resolving motor vehicle accident claims, rather than in disaster relief. The procedures to be followed to split a property damage claim from a personal injury claim and to expeditiously pay the property damage claim are set forth in the latest update of *AR 27-20*.[24] There still is no authority for a claims office to make an advance partial personal injury claim payment under the FTCA, nor to pay an additional amount for property damage once a property damage claim settlement has been made under the FTCA.[25]

Advance Partial Payments Are Authorized Under the Military Claims Act

Claims arising in the United States seldom will be paid under the Military Claims Act (MCA).[26] When the MCA does apply, however, there is statutory authority [27] to make advance partial payments of meritorious claims to alleviate immediate hardship. *Army Regulation 27-20* sets forth the procedures for advance payments.[28] The claim must be cognizable and meritorious under the MCA; the injured party or his or her family must have an immediate need for food, clothing, shelter, medical, burial expenses, or other necessities, or other resources for such expenses that are not available; and the total damage sustained must exceed the amount of the advance payment.[29]

To receive an advance payment under the MCA, the claimant must execute an advance payment acceptance agreement.[30] Army regulations do not specify a format or content for an advance payment acceptance agreement. As a minimum, an advance payment acceptance agreement should specify:

> (1) The agreement is being made between the United States of America, as Offeror, and named claimants.
>
> (2) The date and place of the incident that gives rise to the advance payment, and how the advance will be paid (cash or advance trust).
>
> (3) The claimants agree to accept the advance payment in accordance with Title 10, United States Code, Section 2736.
>
> (4) The claimants agree that the advance payments will be deducted from any award in final settlement of the claim.
>
> (5) The advance payment is subject to approval by the proper settlement authority.[31]

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[20] 28 U.S.C. §§ 2671-2680.

[21] The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Id. § 2672. *See also* 28 C.F.R. § 14.10(b) (Attorney General's regulations).

[22] Tort Claims Note, *Erroneous Supplemental Payments of Tort Claims*, ARMY LAW., May 1994, at 62.

[23] Tort Claims Note, *Erroneous Supplemental Payments of Tort Claims*, ARMY LAW., Mar. 1995, at 59.

[24] AR 27-20, *supra* note 1, para. 2-18f. *See also* Tort Claims Note, *Erroneous Supplemental Payments of Tort Claims*, ARMY LAW., Mar. 1995, at 59.

[25] *Id.*

[26] 10 U.S.C. § 2733. AR 27-20, *supra* note 1, para. 3-5(a), requires application of the FTCA before consideration of a claim under the MCA. This effectively eliminates most CONUS claims from the scope of the MCA.

[27] 10 U.S.C. § 2736.

[28] AR 27-20, *supra* note 1, ch. 2, sec. VI.

[29] *Id.* para. 2-33a.

[30] *Id.* para. 2-33a(5).

[31] *Id.* para. 3-10.

A claims processing office, including a special claims processing office created to deal with a disaster, normally has no authority to approve advance payments under the MCA. The head of an area claims office may approve advance payments not exceeding $10,000. The Commander, USARCS, may make advance payments not exceeding $25,000. The Judge Advocate General and The Assistant Judge Advocate General may make advance payments in amounts not exceeding $100,000.[32] The amount of an advance payment is limited by statute to $100,000 or less.[33] When an advance payment has been approved, the following will be transmitted to the appropriate disbursing officer for payment: three copies of the SF 1034, Public Voucher for Purchases and Services other than Personal; and the original and one copy of the action approving the advance payment and the advance payment acceptance agreement.[34] Lieutenant Colonel Millard.

Claim Video Teleconference Schedule

The next Claims Video Teleconference (VTC) will be held on 27 June 1995 between 1230 and 1430 Eastern time. The focus of this VTC will be on personnel claims analysis. The target audience will be personnel claims adjudicators, claims judge advocates, and claims attorneys. Claims offices whose personnel will not be able to attend a claims VTC video broadcast may join in through audio hookup, or may request a videotape of the broadcast by sending a standard 120-minute VHS videotape to the USARCS Administrative Officer. The next Claims VTC—which will focus on tort claims—will be presented on 11 August 1995 between 1300 and 1500 Eastern time. Live broadcast sites for all Claims VTC's are: Fort Benning, Fort Bliss, Fort Gordon, Fort Huachuca, Fort Jackson, Fort Knox, Fort Leavenworth, Fort Leonard Wood, Fort McClellan, Fort Rucker, Fort Sill, Fort Eustis, Fort Lewis, Fort Hood, Fort Bragg, Fort Riley, Fort Carson, Fort Drum, Fort Stewart, Fort Campbell, Fort Irwin, Fort Polk, Fort McPherson, and Fort Sam Houston. Lieutenant Colonel Millard.

[32] *Id.* para. 2-34.

[33] 10 U.S.C. § 2736.

[34] AR 27-20, *supra* note 1, para 2-33d.

Professional Responsibility Notes

DA Standards of Conduct Office

Ethical Awareness

Army Rule 4.1
(Truthfulness in Statements to Others)

Regimental trial counsel (TC) displayed poor judgment by ordering junior enlisted victim in sexual misconduct case to answer questions over her protestations and requests for counsel. Although the TC had no actual authority to investigate allegations of sexual misconduct lodged against a battalion commander, he told the victim that he was conducting an official investigation.

Army Rule 1.7
(Conflict of Interest)

Army Rule 1.13
(Army as Client)

Because the TC represented the Army, he could not interview witnesses for battalion commander charged with sexual misconduct.

Specialist *Y* wrote a member of Congress and complained about Captain *C*'s conduct when Captain *C* interviewed her concerning her allegation that a battalion commander, Lieutenant Colonel *F*, had made improper sexual advances toward her.

Generally, the allegations were that Captain *C* had violated several of the *Rules of Professional Conduct for Lawyers*[1] (*Army Rules*) and Articles 31 (warnings), 98 (noncompliance with procedural rules), and 134 (general article) of the Uni-

[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

form Code of Military Justice (UCMJ)[2] by: improperly conducting an investigation; conducting an unwarned, intimidating interview of Specialist *Y*; threatening her with UCMJ action; ignoring her request for a lawyer or for the presence of a third party; and giving her an order not to communicate with anyone about the interview. Additionally, Captain *C* was alleged to have violated several *Army Rules* by improperly acquiring or revealing information about Specialist *Y*, and by improperly providing legal services or undertaking to represent Lieutenant Colonel *F*.

The preliminary screening official (PSO) found that Specialist *Y* attended a formal military ball at a hotel near Ft. *B*. She was escorted by a lieutenant (not in her unit or chain of command) with whom she shared an apartment. During the evening, Lieutenant Colonel *F* repeatedly introduced himself to Specialist *Y*, kissing her each time. Lieutenant Colonel *F* was the escort's senior rater. At some point during the evening, Lieutenant Colonel *F* placed his hand on Specialist *Y*'s buttocks. The lieutenant and Specialist *Y* informally spoke to the Deputy Inspector General (IG) and decided not to go forward with a complaint.

Lieutenant Colonel *F* called Captain *C*, his regimental trial counsel (TC), and informed him that a female was making allegations that he had improperly touched her. Captain *C* told him that he could not represent him but that he would look into the matter.

Without seeking supervisory guidance or approval from anyone authorized to appoint him to investigate this matter, Captain *C* obtained the identity of Specialist *Y* and had her report to his office. Captain *C* told her that he was formally investigating the matter involving Lieutenant Colonel *F* and that he was not representing Lieutenant Colonel *F*.

Captain *C* did not consider Specialist *Y* the suspect of any offense that would require informing her of Article 31, UCMJ, rights. He directed that she tell him what happened, and told her that it was not necessary for her to have legal representation or a witness. She told him what happened and provided the names of other women who said that Lieutenant Colonel *F* had improperly touched them at a different party. Captain *C* pointed out that it was important to tell the truth, and that it was her word against that of Lieutenant Colonel *F*. Captain *C* told her not to discuss their interview with anyone other than her chain of command or the IG.

Two days later, Specialist *Y* made a complaint to the IG about Lieutenant Colonel *F* and Captain *C*'s conduct.

After interviewing Specialist *Y*, Captain *C* interviewed the two lieutenants who were the dates of the two women that Specialist *Y* had said Lieutenant Colonel *F* had improperly touched at a party.

Finally, Captain *C* told his immediate supervisor about what he was doing and what he had learned. They both then reported his actions to their deputy staff judge advocate who told Captain *C* to stop his investigation, not to further involve himself in the matter, and not to represent Lieutenant Colonel *F*.

The Staff Judge Advocate (SJA) talked to Captain *C* about his poor judgment, but concluded that Captain *C* did not have a conflict of interest because he had not represented Lieutenant Colonel *F*.

The PSO found that Captain *C* did not violate the UCMJ, but that he committed one violation of the *Army Rules*. The PSO found that Captain *C*, in his role as TC, misled Specialist *Y* into believing that he was appointed to conduct a formal investigation. This he found to be a violation of *Army Rule 4.1* (Truthfulness in Statements to Others). The SJA concluded that this conduct constituted a minor violation, given the circumstances, particularly for a relatively new judge advocate without career status who was functioning as a TC.

The PSO proposed to counsel Captain *C* in writing and to close the inquiry because with this one exception, Captain *C* was a superb officer, hardworking, and dedicated with career potential.

Captain *C* asserted that the evidence did not support the PSO's finding that he violated *Army Rule 4.1*. Captain *C* claimed that he had informed Specialist *Y* that he was doing an "investigation" and was "conducting a possible criminal investigation," but he did not "knowingly" misrepresent to Specialist *Y* that he had been "appointed to conduct an investigation." He believed at the time that he had authority. He conceded, however, that he exercised poor judgment in conducting an investigation, and that he did not have proper authority to do so.

The Supervisory Judge Advocate (Supervisory JA) agreed with the PSO's findings. In the Supervisory JA's opinion, Captain *C* conducted an ill-advised inquiry into a sensitive matter, and misled Specialist *Y* into believing that he was conducting a formal investigation. He agreed that the violation was minor, and that written counseling would be appropriate, even if the evidence were insufficient to establish a violation of *Army Rule 4.1*, because Captain *C* displayed such poor judgment.

The SOCO analysis of the evidence concluded:

> (1) Captain C displayed poor judgment when, on his own authority, he conducted an investigation into rumors of sexual harassment or assault involving Lieutenant Colonel *F*. He also displayed a lack of judgment in failing to inform, or

[2] UCMJ arts. 31, 98, 34 (1988).

discuss his actions with his superiors regarding his interview of Specialist *Y*.

(2) At the time that he conducted his investigation, Captain *C* erroneously believed that he had authority to do so. His rationale was that he was a TC whose duties included investigation of possible criminal offenses by Lieutenant Colonel *F* (*i.e.*, sexual assault on one or more females, and conduct unbecoming an officer).

(3) Captain *C* asserted that he did not mislead Specialist *Y* into believing that he was conducting a "formal" investigation. Specialist *Y* asserted that he did. Captain *C* was using the phrase "formal investigation" in the *Army Regulation 15-6*, chapter 5 (*Formal* Boards of Officers) sense.[3] Specialist *Y* was using the phrase as a layperson would. Given the circumstances, Specialist *Y*'s perception that Captain *C* was conducting a "formal investigation," in a layperson's sense, would be a more reasonable interpretation.

Captain *C* was counseled in writing for conducting his own investigation without seeking supervisory guidance and without being appointed. Captain *C* displayed poor judgment by conducting an inquiry into rumors of sexual harassment or assault *at the request of the subject of the allegations*. Captain *C* also was counseled for displaying a lack of judgment in the manner in which he interviewed the complaining junior enlisted female soldier. He should not have subjected her, a possible victim of sexual assault, to unwarranted additional embarrassment. Finally, his conduct gave the strong impression that he was acting on behalf, and representing the personal interests, of the battalion commander, whom he knew was the subject of the allegations, instead of the interests of the true client, the Army. Lieutenant Colonel Neveu.

When Counsel Disobey at Their Peril

Article 48, UCMJ
(Contempts)

Article 98, UCMJ
(Noncompliance with Procedural Rules)

Army Rule 3.2
(Expediting Litigation)

Army Rule 3.5
(Decorum of the Tribunal)

ABA Standards for Criminal Justice 3-5.2 and 4-7.1
(Courtroom Decorum)

Counsel disobey the judge at their peril when the judge says that discussion is closed and the parties must move forward.

Professor James W. Jeans reports the story of an autocratic judge who bellowed, "Are you trying to show this court contempt?" The lawyer responded, "No, I'm trying to conceal it."[4]

Professor Jeans counsels:

> The trial lawyer must possess a combativeness, a bellicosity which responds to the challenge of impending conflict. . . . There must be no agonizing uncertainty, no hesitation of the thrill to the exhilaration of the coming conflict. It is not enough to merely tolerate the tooth and nail-you must yearn for it. You must relish the thwack of a well landed left hook, tingle with the thump of a crushing block. The physical crudities will not be there but the verbal jousting, the tactical thrusts, the legal clouts will be. It's heady stuff this advocacy and you'll have to have a spirit of combativeness to play the game.[5]

However, these verbal "thwacks" and "thumps" must land on the opponent's case—not on a fellow lawyer—and above all, not on the judge.

Advocacy should not be stifled. Judges and bar disciplinary authorities acknowledge that trial lawyers need great forensic latitude. However, at some point, after the record has been protected properly, further persuasive attempts by counsel become disruptive and serve no purpose. Even when the judge is wrong, the case must move on. Judges clearly enjoy great discretion in managing cases and litigants.

The Case of United States v. Warnock

Lawyers who continue to argue after judicial admonitions to cease, do so *at their own peril*.[6] *United States v. Warnock* was an appeal from a conviction on charges of adultery and service-discrediting conduct. Warnock was an Army first sergeant who had photographed his officer companion in the nude. After their affair ended, Warnock displayed the negative to the officer's new junior enlisted paramour.

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[3] DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988).

[4] JAMES W. JEANS, TRIAL ADVOCACY 35 (1975).

[5] *Id.* at 6.

[6] U.S. v. Warnock, 34 M.J. 567, 570-72 (A.C.M.R. 1991), *reh'g denied* 36 M.J. 375 (A.C.M.R. 1992); *following* U.S. v. Clark, 31 M.J. 721, 725 (A.F.C.M.R. 1990), *reh'g denied* 32 M.J. 250 (A.F.C.M.R. 1990); *accord* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 629 (1986).

Warnock's defense counsel strongly objected to the relevancy of proposed testimony that the officer had contracted herpes from Warnock. Additionally, the trial counsel objected to proposed defense evidence that the command condoned sexual promiscuity.

Three of the nine "clashes"[7] between counsel and the military judge in *Warnock* illustrate the unnecessary verbal "swinging and pounding" process.

Clash I

MJ: I've told you what the ruling is.

DC: Yes, Sir.

MJ: Sit down on it. I'm telling you right now that I won't allow any additional evidence pertaining to it by the government, unless I have a chance to—until such time as I've had a chance to weigh that evidence.

Clash II

DC: I'm through, your Honor.

MJ: Oh, okay. Well, normally the way this works is when you finish, you sit down.

DC: Yes, your Honor.

MJ: Then the opposing counsel knows you're through.

Clash III

MJ: I said now—I won't tell you again. I have told you time and time again, when I overrule on your motion, that's the end of that motion.

DC: Well, your Honor, we have a new objection to your attitude in front of this panel.

MJ: Well, all right, object to my attitude.

DC: We will, Your Honor. We—

MJ: It's recorded for posterity.

. . . .

DC: We would like to take the panel on voir dire to determine whether you have affected their opinion in this case as to the defense case.

MJ: All right. Has anyone on the panel perceived—

DC: Individual voir dire, your Honor.

MJ: I understand what you're saying, sit down. . . . [After asking panel members whether they had been prejudiced by judge's attitude.] Negative responses from all members. Now you've done it and you've asked for it. You caused me to do it. And the next time I tell you that your objection is overruled and you still continue to argue on it, I will hold you in contempt.

The Army Court of Military Review (ACMR) noted in passing that the judge could have moved the trial along in a more civil and temperate manner, and that the judge was only one step away from prejudice which occurs when jurors know that a defense attorney has been cited for contempt. However, the ACMR ruled that the military judge was well within his authority and responsibility to control the proceedings when he insisted that counsel desist and move on after a ruling has been made. The military judge did not prejudice the court members against the accused.[8]

ABA Model Rule 3.4(c)

(Knowingly Disobeying Obligation under Rules of a Tribunal)

ABA Model Rule 8.4(d)
(Conduct Prejudicial to the Administration of Justice)

Criminal defense attorney, who refused judicial orders to appear for hearings, violated attorney's ethical duty to obey court's orders, even though trial judge had scheduled one hearing on prosecutor's ex parte, oral application without notice and knew of attorney's conflicting hearing in another court.

ABA Model Rule 8.2
(False and Reckless Statements Concerning Judicial and Legal Officials)

Criminal defense attorney who commented to American Civil Liberties Union (ACLU) newsletter editor that trial judge was an ignorant, insecure racist was properly suspended for thirty days for his recklessness.

The Case of In re Atanga

In re Atanga, a 1994 Indiana decision, depicts a worst case scenario for defying a judge. In that case, Jacob A. Atanga,

[7] *Warnock*, 34 M.J. at 570-72.

[8] *Id.* at 573.

President-elect of the Marion County, Indianapolis, Bar Association, was suspended for thirty days.[9]

Atanga illustrates the proposition enunciated in *Warnock*—lawyers who violate a judge's order *do so at their peril.* In a series of bizarre events, Atanga caught the full fury of a trial judge and state ethics officials. First, he openly defied a questionably issued order to appear for a client's hearing. Next, he compounded his mistake by not appearing to defend his own alleged contempt. Finally, he aggravated the judge and ethics officials by commenting to an ACLU newsletter editor that the judge was an ignorant, insecure racist.

The Supreme Court of Indiana found that Atanga violated the following three of the Rules of Professional Conduct (R.P.C.):[10]

> (1) R.P.C. 3.4(c). A "lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."[11]
>
> (2) R.P.C. 8.4(d). "[E]ngaging in conduct that is prejudicial to the administration of justice."[12]
>
> (3) R.P.C. 8.2. A "lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."[13]

Atanga immigrated to the United States from Ghana, West Africa, when he was seventeen and graduated from law school when he was thirty-six. He had been in practice in Indianapolis for two years when he appeared in a geographically distant county's Superior Court. There, he took a client's case pro bono and entered his appearance to represent an indigent, troubled young woman for whom no local representation was available.[14] Atanga's client was charged with dealing in cocaine and with being a habitual offender. The prosecution also sought to revoke her probation under a prior robbery conviction. During a scheduling conference, Atanga told the Superior Court judge that he had a conflict with a previously scheduled hearing in Indianapolis. The judge set a date to accommodate Atanga's schedule. Later, the prosecutor made an ex parte application (without notice) to reschedule, and the judge reset the hearing for the originally suggested date, which he knew conflicted with Atanga's court appearance in Indianapolis.

One day before the hearing, Atanga sought a continuance because of the conflicting hearing in Indianapolis. The Superior Court judge telephoned Atanga, who again stated that he could not attend the hearing. The Superior Court judge told Atanga that if he did not appear, he would be held in contempt.

When Atanga failed to appear for his client's hearing, the judge ordered him to appear and defend himself against contempt. Although the show cause order on contempt was delivered to Atanga's office by certified mail, he did not appear to defend himself. The Superior Court judge issued a writ of attachment to the Marion County Sheriff.

Atanga was arrested and held in the Marion County, Indianapolis, jail overnight. The next morning he was transported to the county where the Superior Court was located. Atanga was fingerprinted, photographed, and provided prisoner attire. His attorney advised that if he offered an apology, everything would be all right, but that the Superior Court judge wanted Atanga's client present.

Atanga's contempt hearing was conducted in an auxiliary courtroom at the jail. The Superior Court judge, deputy prosecutor, Atanga's client, the court reporter, onlookers from the prosecuting attorney's office, and several reporters were present. Atanga apologized through his attorney and promised to faithfully attend all future hearings. The court accepted the apology and purged Atanga of contempt.

Following the contempt proceeding, while Atanga was still wearing prisoner's clothing, the Superior Court judge heard the pending motion for Atanga's client.

Several days later, Atanga was contacted by the volunteer editor of the *Graffiti Times*, a monthly publication of the local chapter for the ACLU. An interview was conducted, and the following matter appeared in the January 1992 issue of the *Graffiti Times*: "Atanga made no effort to hide his feelings about [the judge]. He said, 'I think he is ignorant, insecure, and a racist. He is motivated by political ambition.'"

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[9] In re Atanga, 636 N.E.2d 1253 (Ind. 1994). The accompanying text has been freely condensed and paraphrased from the published decision of the Supreme Court of Indiana.

[10] The state of Indiana and the United States Army generally have adopted the *ABA Model Rules of Professional Conduct* (*ABA Model Rules*). The Army slightly modified *ABA Model Rules* 3.4(c) and 8.2, however. *See generally infra* notes 11, 13.

[11] *Cf.* AR 27-26, *supra* note 1, rule 3.4(c) (specifying that lawyers must not "knowingly disobey an obligation *to an opposing party and counsel* under the rules of a tribunal). The Army narrowed *ABA Model Rule* 3.4(c) by adding italicized words.

[12] *Accord* WOLFRAM, *supra* note 6, at 628 (lawyers sanctionable for willful refusal to obey orders directed specifically to them).

[13] *Cf.* AR 27-26, *supra* note 1, rule 8.2 (broadening scope of ABA Model Rule 8.2 to include investigating officers and hearing officers).

[14] In re Atanga, 636 N.E.2d 1253, 1258 (Ind. 1994).

The Supreme Court of Indiana wrote:

> The conduct of the other participants is troubling. The procedure employed by the [Superior] Court . . . does not represent contemporary jurisprudence in this state. There was good reason for Respondent to view with alarm the sequence of events leading to the rescheduling of the hearing for a date known by the court to be unacceptable for defense counsel. Clearly, Respondent was forced to represent his client in a very difficult environment.
>
> When confronted with situations of this nature, a lawyer is forced to make decisions and weigh alternatives. The primary concern, of course, must always be the faithful representation of his client. But an attorney must also understand that the administration of justice dictates that the court must ultimately have the final word on the scheduling of events in that tribunal. No matter how difficult the situation may be for the individual practitioner, the option to knowingly disobey the directive and not attend the proceeding does not belong to the attorney. Accordingly, we conclude that Respondent violated Prof. Cond. R. 3.4(c).
>
> . . . .
>
> Lastly, Respondent is charged with violating Prof. Cond. R. 8.2(a) by making a statement that he knew to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . . . During the course of the hearing of this matter, the Commission narrowed their focus of this alleged violation to the "reckless disregard" prohibition. The Commission did not attempt to demonstrate that the Respondent intentionally made a statement known to be false. As noted above, the Hearing Officer concluded that Respondent's statements to the *Graffiti Times* were made with reckless disregard as to their truth or falsity. . . .
>
> The record presented in this case indicates that Respondent had reason to complain about the trial court's administration. . . . The . . . Superior Court engaged in procedures that were unusual, at best. Ex parte communication between the prosecution and the court, without notice to opposing counsel of record, should not be done as matter of course. Jailing an attorney for failure to appear due to a conflict of schedule is also a questionable practice, albeit within the sound discretion of the trial court. And having an attorney appear in jail attire with his client creates a definite suggestion of partiality.
>
> . . . .
>
> Respondent's professional misconduct is directed toward the administration of justice. Courts cannot function if trial attorneys believe they have the right to deny their authority. Equally, the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions. This court must preserve the integrity of the process and impose discipline on those who cannot adhere to professional standards in this regard.[15]

The Chief Justice dissented from the thirty-day suspension, and another Justice dissented from what he perceived to be a Kafkaesque series of events, complaining that ethical violations were factually unsubstantiated, that a thirty-day suspen-

[15] *Id.* at 1256-58.

sion was disproportionate to the alleged misconduct, and that significant mitigating factors were not taken into account.[16]

What advice is there for the lawyer whose case has been assigned to a capricious or tyrannical judge? Make sure to provide competent representation. Do not breach your own professional ethics by obsequious deference to demeaning judicial behavior.[17] Maintain good manners, be courteous, and protect the record. Lawyers go to court to persuade the judge—never to avenge bruised feelings at a client's expense. Mr. Eveland.

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[16] Justice Sullivan dissented:

> Assuming Mr. Atanga did violate Professional Conduct Rule 8.2(a), that violation was clearly no more than an isolated instance that caused little or no actual or potential injury. The statements made by Mr. Atanga that are the subject of this proceeding appear at the very end of a long story covering parts of three pages in an obscure newsletter. For these statements of Mr. Atanga even to be read, an individual would first have to secure a copy of the Graffiti Times and read through 81 column inches of text, making two page jumps along the way, before getting to Mr. Atanga's comments. Publication of these statements in such an obscure place cannot possibly cause injury. Publication of the majority's opinion will, in all likelihood, get far more attention.
>
> . . . .
>
> Yet despite the presence of significant mitigating factors in this case, the majority ignores them altogether. A mitigating factor of some weight is the indignity to which Mr. Atanga was subjected in being required to represent his client in court while wearing prison garb. It is of greater weight that Mr. Atanga was respectful and deferential to the court in every way throughout the contempt proceeding and that he made no comments whatsoever to the news media which had been rounded up to cover the event. His comments came only some time later, after they had been solicited by the editor of an extraordinarily obscure newsletter. It should also not be left out of the balance that Mr. Atanga is a relatively new lawyer, and that he has, moreover, no prior record of disciplinary action.
>
> Entitled to much greater weight still is Mr. Atanga's considerable record of service to both bar and community. In the very best tradition of our profession, Mr. Atanga devotes considerable time and effort to the representation of indigent clients. Indeed, it was his highly commendable response to a request to represent an indigent, troubled young woman . . . that gave rise to the unfortunate events in this case. Corollary to this is the fact that suspending Mr. Atanga from the practice of law for any period of time will deprive many Hoosiers who are financially unable to secure counsel of the benefit of Mr. Atanga's representation. Furthermore, Mr. Atanga has been actively involved in service to the bar and currently serves as the president-elect of the Marion County Bar Association, an organization that makes a significant contribution to the legal profession not just in Indianapolis, but throughout the state.

Id. at 1260-61 (Sullivan, J., dissenting) (citations omitted).

[17] JEANS, *supra* note 4, at 35.

CLE News

1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel 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 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

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

2. TJAGSA CLE Course Schedule

1995

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

1-4 August: Military Justice Managers Course (5F-F31).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-Fl4).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

September 1995

5-8 ESI: Subcontracting, Washington, D.C.

8 ESI: Sole-Source Contracting, Washington, D.C.

11-15, GWU: Government Contract Law, Seattle, WA.

11-15, ESI: Federal Contracting Basics, Washinton, D.C.

18, GWU: Government Contract Compliance: Practical Strategies for Success, Washington, D.C.

18-22, GWU: Formation og Government Contracts, Washington, D.C.

19-22 ESI: Source Selection: The Competitive Proposals Contracting Process, Washington, D.C.

26-29 ESI: Procurement Management, Washington, D.C.

27-28, GWU: Government Contract Claims, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July 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	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
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**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer.*

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.* The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A282033 Preventive Law/JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).

*AD A289411 Tax Information Series/JA 269(95) (134 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235(94) (321 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

*AD A291106 The Law of Federal Labor-Management Relations/JA-211(94) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) Active Army.

(a) Units organized under a PAC. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms

through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic bulletin board service (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in Word Perfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation--Part A, August 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA200B.ZIP	August 1994	Defensive Federal Litigation--Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA422.ZIP	May 1995	Op Law Handbook, June 1995
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.

FILE NAME	*UPLOADED*	*DESCRIPTION*
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.

FILE NAME	*UPLOADED*	*DESCRIPTION*
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

Louise Rene Beres, *The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View*, 12 DICK. J. INT'L L. 327 (1994).

Mark L. Wapple, *Is There Adequate Due Process for Military Personnel?*, 22 FED. LAW. 42 (1995).

Jeffrey Rosinek, *Juror Discriminiation: Death of the Peremptory Challenge*, 32 CT. REV. 6 (1995).

Erick J. Konecke, *The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office*, 5 CONST. L.J. 489 (1995).

Christine M. D'Elia, *The Exclusionary Rule: Who Does It Punish?*, 5 CONST. L.J. 563 (1995).

Daubert v. Merrell Dow Pharmaceuticals, Inc.: *Method or Madness?*, 27 CONN L. REV. 237 (1994).

6. The Army Law Library Service

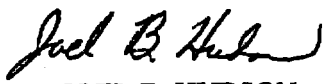
With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

*U.S. Government Printing Office: 1995 — 386-699/20002

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



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Acting Administrative Assistant to the
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20002

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