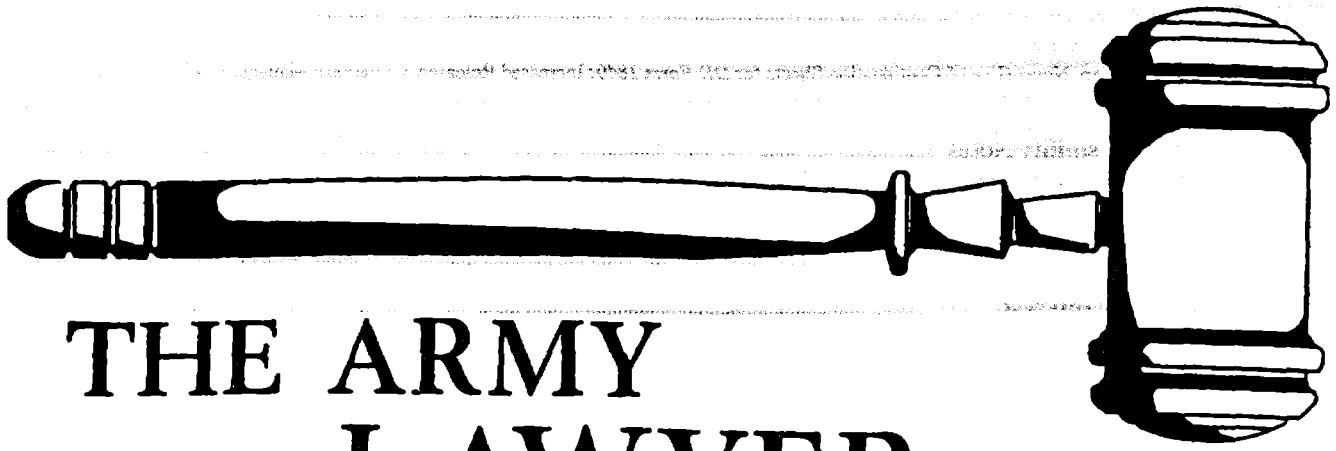

THE ARMY LAWYER

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Editor
Captain John B. Jones, Jr.

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The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-IO (27-1b) 13 April 1993

MEMORANDUM FOR COMMAND AND STAFF JUDGE ADVOCATES

SUBJECT: After Action Reporting Policy - POLICY MEMORANDUM 93-3

1. Recent operations have demonstrated the value of promptly gathering input from participating judge advocates concerning legal and practical issues raised and lessons learned. I believe that it is imperative to establish regular procedures to ensure that we capture this valuable information and retain it for use in future deployments.

2. The Assistant Judge Advocate General for Military Law and Operations [AJAG (ML&O)] will determine whether judge advocate involvement in an operation warrants an After Action Review and an After Action Report in accordance with this memorandum. If a Review is not directed, nothing in this memorandum prohibits judge advocates from preparing After Action Reports at other echelons of command.

3. When the AJAG (ML&O) directs that an After Action Review be held, the following responsibilities apply.

a. The International and Operational Law Division, OTJAG (DAJA-IO) will:

(1) Identify the Lead Judge Advocate (LJA) (normally the senior Army judge advocate involved with the deployment). Work with the LJA to develop the Review's program. See paragraph 3d, below.

(2) With the LJA, determine if a video teleconference is feasible. If it is not feasible, determine a site for the principal participants to meet for an After Action Review. If the meeting cannot economically and conveniently be held at another location, it will normally be held at The Judge Advocate General's School (TJAGSA).

(3) If the Review is held at TJAGSA, coordinate with the Commandant, TJAGSA or the Director, Center for Law and Military Operations (CLAMO), on the dates for the meeting.

(4) Identify and ensure attendance of appropriate participants from the Army, as well as invite representatives from Joint Commands, other Services, and other agencies.

(5) Review draft and final After Action Reports and coordinate approval of such reports with The Judge Advocate General.

(6) Review approved After Action Reports; if changes in JAGC doctrine or policy are suggested by the Report, coordinate with TJAGSA or other appropriate offices to implement recommendations.

b. The Judge Advocate General's School will:

(1) Host and provide incidental administrative support for After Action Reviews when requested to do so by DAJA-IO.

(2) Review and edit draft After Action Reports.

(3) Enter approved After Action Reports into the JAGC Bulletin Board.

(4) Maintain a file copy of approved After Action Reports at TJAGSA with CLAMO.

(5) Incorporate lessons learned into appropriate TJAGSA Programs of Instruction.

(6) Review, coordinate, and publish approved changes to doctrine.

c. SJA, TRADOC, will assist TJAGSA in ensuring that lessons learned are incorporated into appropriate training support packages for use in lesson plans at TRADOC schools.

d. The LJA will normally be the senior Army judge advocate who participated substantially in the deployment or operation. The LJA will:

(1) Develop the Review program and obtain program approval from DAJA-IO.

(2) If the Review is held at TJAGSA, coordinate with the Director, CLAMO for audio visual and other administrative support requirements.

(3) If the meeting is not held at TJAGSA, coordinate with DAJA-IO to secure facilities, lodging, and support for the Review.

(4) Moderate and review discussions at the After Action Review.

(5) Prepare an initial draft After Action Report and coordinate with participating judge advocates and other offices, as necessary. Following coordination, forward the draft Report (including floppy disk) to TJAGSA for editing. Coordinate with the Director, CLAMO for computer software requirements.

4. The Judge Advocate General will approve all After Action Reports prepared pursuant to this memorandum before final publication.

JOHN L. FUGH
Major General, USA
The Judge Advocate General

Effective Installation Compliance with the Endangered Species Act

Major Craig E. Teller
Environmental Law Division, USALSA

Introduction

The Endangered Species Act (ESA)[1] is now twenty years old. In only the last few years, however, ESA requirements have had a significant impact on the Army's training mission. Commanders increasingly are realizing that the ESA has the potential to affect mission readiness adversely. This realization has forced the Army to analyze its compliance problems and to develop policies and a strategy to balance ESA and mission requirements effectively into the twenty-first century. These new initiatives focus on improving the management of threatened and endangered species (listed species) and their habitats at the installation level.

This article provides practical guidance to staff judge advocate (SJA) offices in fulfilling their pivotal roles in developing effective installation ESA compliance programs consistent with the new Army Endangered/Threatened Species Guidance (Chapter 11).[2] Specifically, this article provides an overview of the Army's ESA compliance problems, an explanation of the major provisions of the ESA affecting Army installations, a summary of the new Chapter 11 guidance, and information helpful to installation attorneys—particularly environmental law specialists—in assisting their installations in developing programs that effectively balance ESA and mission requirements.

Overview of Army Compliance Problems

The Call to Arms

The red-cockaded woodpecker (RCW) is a federally listed, endangered species present on six Army installations in the southeastern United States.[3] Fort Bragg, North Carolina, in particular, has a large RCW population deemed crucial to the survival and recovery of the species as a whole.[4] Considering the size of its RCW population and the intensity and density of military training conducted on Fort Bragg, no one was surprised that the Army's first major conflict between ESA and mission requirements arose at Fort Bragg. The conflict reached the crisis point in October 1991, when Fort Bragg was forced to suspend most of its operations on four ranges—including Range sixty-three, a fifteen-million-dollar multipurpose firing range—to avoid risking a violation of the ESA.[5] For the same reason, it temporarily halted construction on eight military construction projects.[6]

Fort Bragg's experience with the RCW has been traumatic. Since August 1991, Fort Bragg has resited approximately forty percent of the military construction projects in its 1986 master plan to accommodate RCW conservation.[7] In fiscal year (FY) 1992, Fort Bragg estimates that it spent two million dollars for RCW management.[8] The installation now has

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[1] Endangered Species Act of 1973 §§ 2-18, 16 U.S.C.A. §§ 1531-44 (West 1985) [hereinafter ESA or Act]. The U.S. Fish and Wildlife Service (FWS) of the Department of the Interior and National Marine Fisheries Service (NMFS) of the Department of Commerce, administer the Act and issue implementing regulations. Joint FWS and NMFS regulations are located at 50 C.F.R. pts. 402, 424, 450-53 (1992). The FWS regulations are located at 50 C.F.R. pt. 17 (1991). The NMFS regulations are located at 50 C.F.R. parts 222, 226, 227-28 (1992). *See* DEP'T OF DEFENSE, DIR. 4700.4, NATURAL RESOURCES MANAGEMENT PROGRAM, encl. 3, para. B.3.b (24 Jan. 1989) [hereinafter DOD DIR. 4700.4]; DEP'T OF ARMY, REG. 420-74, NATURAL RESOURCES—LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 6-2 (25 Feb. 1986) (currently under extensive revision) [hereinafter AR 420-74]; CEHSC-FN Tech. Note No. 420-74-1, Management of Red-cockaded Woodpeckers (RCW) on Army Installations (21 Aug. 1989); CEHSC-FN Tech. Note No. 420-74-2, Endangered Species Management Requirements on Army Installations (17 Nov. 1989).

[2] Memorandum, from the Director, Environmental Programs, subject: Guidance for Management of Endangered/Threatened Species, with enclosed Guidance for Management of Endangered/Threatened Species (26 Jan. 1993) [hereinafter Chapter 11]. The memorandum states that the guidance officially will be published as chapter 11 of *AR 420-74*, *supra* note 1, on completion of the revision of that regulation in late 1993.

[3] *See* Notice of Intent, subject: Army Red-cockaded Woodpecker Management Guidelines Development Process, 58 Fed. Reg. 8588 (1993).

[4] RAND CORP., TWO SHADES OF GREEN—ENVIRONMENTAL PROTECTION AND COMBAT TRAINING 23 (David Rubenson et al. eds. 1992) [hereinafter RAND REPORT]; *See* M. R. Lennartz & V. Gary Henry, U.S. Fish and Wildlife Service, Red-cockaded Woodpecker Recovery Plan (11 Apr. 1985) [hereinafter Recovery Plan]; Biological opinions issued by the U.S. Fish and Wildlife Service to Fort Bragg, NC (2 Feb. 1990, 10 Apr. 1992).

[5] RAND REPORT, *supra* note 4, at 46; DEP'T. OF ARMY, MILITARY INSTALLATIONS ENVIRONMENTAL REPORT—COMPLIANCE WITH THE ENDANGERED SPECIES ACT 3 (1 Apr. 1993) (report to Congress on Army compliance with the ESA) [hereinafter DEP'T OF ARMY REPORT TO CONGRESS]. The *Report to Congress* notes that ranges and impact areas on Fort Bragg were closed during fiscal year (FY) 1992 for a total of approximately 1453 hours because of endangered species management activities.

[6] DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5.

[7] *Id.*

[8] *Id.*

twelve personnel primarily devoted to RCW conservation efforts.[9] Additionally, Fort Bragg has been forced to restrict training activities within RCW nesting habitat to transient foot travel and vehicular traffic on existing roads and firebreaks.[10]

While unfortunate, Fort Bragg's experience with the RCW served as a call to arms for the Army. On 4 February 1992, the Assistant Chief of Engineers formed a task force to make recommendations on how to resolve and prevent future conflicts between military training and ESA requirements.[11] In its final report in February 1992, the task force recommended, in part, that the Army expand and continue the task force to further develop an Army endangered species management strategy.[12] As a result, the Assistant Deputy Chief of Staff for Operations and Plans, the Assistant Chief of Engineers, and the Assistant Judge Advocate General for Civil Law and Litigation jointly established the Army Endangered Species Team in April 1992.[13] The multidisciplinary team included one representative from each of the three contributing organizations. The team, working under the direction of the Director of Training, Office of the Deputy Chief of Staff for Operations and Plans (ODCSOPS), worked full-time until February 1993.[14]

Among its accomplishments, the team prepared an endangered species strategy and action plan for the Army[15] and drafted Chapter 11, which provides comprehensive guidance for the management of listed species on Army installations.[16] Additionally, the team initiated development of Army-wide RCW management guidelines to replace the existing guidelines, which were approved in 1984.[17] Draft RCW management guidelines currently are undergoing biological and environmental assessments.[18] Installations can anticipate that the Directorate of Environmental Programs (ODEP) will send the RCW management guidelines to the field for implementation in late 1993.[19]

The Growing Challenge

Even though the Army has made significant progress over the last year in balancing RCW conservation with mission requirements, other listed species increasingly are presenting similar challenges throughout the Army.[20] Fort Irwin, California, recently abandoned a plan for a major expansion along its southern boundary to avoid impacting the habitat of the threatened desert tortoise.[21] At the Pohakuloa Training Area in Hawaii, the Army has been unable to open a newly constructed twenty-million-dollar multipurpose range complex because of the discovery of several listed plants after the range nearly was completed.[22] Fort Sam Houston, Texas, and the entire San Antonio community now are facing the possibility of drastic water conservation measures to maintain the ground

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[9] *Id.* The number of personnel devoted to RCW management increased from seven in FY 92. *Id.*

[10] *Id.* The *Report to Congress*, commented that similar training restrictions are in place at Fort Stewart, Georgia, and Fort Polk, Louisiana, to protect the RCW.

[11] Memorandum, from the Assistant Chief of Engineers, subject: Task Force on Environmental Impacts to Training, with Task Force Charter enclosed (4 Feb. 1992).

[12] Report of the National-Level Work Group, Army Endangered Species Workshop, Fusion Center, Fort Belvoir, VA (6-7 Feb. 1992).

[13] Memorandum from the Director of Training (DOT), Office of the Deputy Chief of Staff for Operations and Plans, through the Assistant Deputy Chief of Staff for Operations and Plans, Assistant Chief of Engineers, and Assistant Judge Advocate General for Civil Law and Litigation, with return to the DOT, subject: Army Endangered Species Team Charter, with Army Endangered Species Team Charter enclosed (15 May 1992). The charter provided, "The mission of the Army Endangered Species Team is to complement the ARSTAF, MACOMs and installations in the development and implementation of proactive policies and strategies to resolve endangered species issues that have significant impacts on the training readiness of the Army."

[14] Memorandum from the Director of Training (DOT), Office of the Deputy Chief of Staff for Operations and Plans, through the Assistant Deputy Chief of Staff for Operation and Plans, Assistant Chief of Engineers, Assistant Judge Advocate General for Civil Law and Litigation, subject: Transition Plan for the Army Endangered Species Team—Action Memorandum (11 Jan. 1993). The team transferred its ongoing functions and responsibilities to Directorate of Environmental Programs (ODEP), which was established effective January 1, 1993. The Conservation Division, ODEP, has primary responsibility in the Army staff for endangered species issues and is the proponent for *AR 420-74*. The former members of the Endangered Species Team are assisting ODEP through normal Army staff channels.

[15] Dep't of Army, Endangered Species Action Plan (Dec. 1992).

[16] Chapter 11, *supra* note 2.

[17] *See* Memorandum from the Director of Training, *supra* note 14, encl. 2. The new Army red-cockaded woodpecker (RCW) management guidelines will be used by Army installations in preparing and revising their installation RCW management plans, as required by Chapter 11. *See* Chapter 11, *supra* note 2, para. 11-5a(1).

[18] Memorandum from the Director of Training, *supra* note 14, encl. 2. The United States Army Construction Engineering Research Laboratory in Champaign, Illinois, is preparing the biological and environmental assessments in coordination with the Directorate of Environmental Programs.

[19] Notice of Intent, *supra* note 3.

[20] DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 2-5.

[21] *Id.* at 4. The NTC is considering an alternative plan to expand along the eastern boundary into an area where mission activities will not have an adverse impact on the desert tortoise. This area, located to the east of the NTC, however, is less desirable from a training perspective than the original southern expansion area.

[22] United States Army Audit Agency, Report WR 93-5, subject: Pohakuloa Training Area, Hawaii, 31-38 (15 Jan. 1993).

water levels necessary for the survival of five listed species.[23] In February 1993, Fort Hunter-Liggett, California, suspended operations on its multipurpose range pending formal consultation with the United States Fish and Wildlife Service (FWS) on the impact of range activities on the endangered San Jouquin kit fox.[24] Finally, the presence of listed species has threatened to complicate the base realignment and closure process at several installations.[25] These and other ESA problems signal the beginning of an escalating Army struggle to remain trained and ready, while meeting ESA requirements.[26]

Three prevailing trends are making ESA compliance on Army installations increasingly difficult. First, the number of listed species is increasing rapidly. Currently, approximately 750 species are listed in the United States.[27] That number will increase by four to five hundred through 1996.[28] Second, the intensity and density of training activities on Army lands are expanding.[29] The increased range, lethality, and mobility of modern weapons systems require more land area than in the past.[30] Additionally, with base closures and the drawdown in Europe, the land area available for military training is shrinking.[31] Third, natural habitat on private and state lands surrounding Army installations is declining, leaving the relatively undisturbed Army installations as wildlife refuges of last resort.[32] The public and Congress increasingly are realizing that preserving the natural resources on federal lands is crucial to this nation's conservation program.[33] As a result, installations are under increasing pressure to preserve natural habitats. While to date ESA compliance has had a significant impact on mission activities at only a few installations,[34] if current trends continue unabated, ESA compliance will be a major challenge for more Army installations into the twenty-first century.

Adding to ESA challenges is the possibility of applying the ESA section 7(a)(2) formal consultation requirement to federal actions that may affect listed species in foreign countries. Currently, 529 federally listed species are present in foreign countries.[35] While the present implementing regulation limits the formal consultation requirement to actions "in the United States or upon the high seas,"[36] the ESA is silent on this

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[23] Tom Kenworthy, *One-Inch Fish Threatens to Parch San Antonio*, WASH. POST, Feb. 14, 1993, at A3; Hugh Aynesworth, *Critters limit San Antonio's access to aquifer*, WASH. TIMES, Feb. 13, 1993, at A3; Judith E. McKee et al. eds., *Endangered Species*, 8 NAT'L. ENVTL. ENFORCEMENT J. 22 (1993).

[24] DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 5.

[25] In January 1993, Fort Chaffee, Arkansas, entered into formal consultation with the FWS on a transfer of land to the local government for a sanitary landfill. The land to be transferred is the habitat for the endangered American burying beetle. The FWS issued a draft "no jeopardy" biological opinion on 11 March 1993. The draft biological opinion, however, contained an incidental "taking" statement (ITS) that prescribed terms and conditions potentially complicating the transfer action. The draft biological opinion also provided that the reasonable and prudent measures and the terms and conditions specified in the ITS must be conditions of the land transfer. Similarly, Fort Ord, California, may have to engage in formal consultation before any land transfer can occur because of the presence of an endangered plant, the sand gilia. *See* Environmental Impact Statement, Fort Ord Disposal and Reuse, vol. I, 4-100-01 (Dec. 1992).

[26] RAND REPORT, *supra* note 4, at 65-67, "[T]he Endangered Species Act . . . in our judgment is the planning law with the greatest impact on the military mission" *id.* at 78; DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 1-2. During FY 92, the Army spent approximately $8 million on endangered species management. This amount does not include indirect costs resulting from moving training activities. Army installations have identified $17.5 million needed for endangered species management in FY 93. DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 5.

[27] Linda Kanamine, *Stakes are very high for both sides*, USA TODAY, Mar. 4, 1993, at 2A; *see* 50 C.F.R. §§ 17.11-.12 (1991) (cumulative lists of threatened and endangered wildlife and plants).

[28] In The Fund for Animals v. Lujan, Civ. No. 92-800 (D. D.C. 1993), the parties entered into a settlement agreement on 15 Dec. 1992, in which the United States Fish and Wildlife Service agreed to list "category one" and "category two" candidate species on an expedited basis through 1996. These species to be listed include a large percentage of plant species found in California and Hawaii.

[29] GEORGE H. SIEHL, CONGRESSIONAL RESEARCH SERVICE, NATIONAL RESOURCE ISSUES IN NATIONAL DEFENSE PROGRAMS 221-27 (1991).

[30] *Id.*

[31] DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 2.

[32] *Id.* at 1-2. The trend of viewing Army installations as wildlife refuges of last resort applies to the red-cockaded woodpecker in the southeastern United States. The recovery effort currently focuses on conserving habitats located on federal lands because of the rapid destruction of old-growth pine forests on private lands. Recovery Plan, *supra* note 4, at 32-35. Consequently, the habitats on installations such as Fort Bragg, North Carolina; Fort Stewart, Georgia; and Fort Benning, Georgia, have become crucial to recovery efforts.

[33] *See* SIEHL, *supra* note 29, at 46-48; RAND REPORT, *supra* note 4, at 65; STRATEGIC STUDIES INSTITUTE, U.S. ARMY WAR COLLEGE, THE ARMY AND THE ENVIRONMENT 1, 15 (Kent Hughes Butts ed. 1990) (noting increasing congressional and public scrutiny of the Department of Defense on environmental matters).

[34] Army Endangered and Threatened Species Survey, conducted by Dr. Allison Hill, U.S. Army Construction Engineering Research Laboratory, 1992.

[35] DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5.

[36] 50 C.F.R. §§ 402.01-.02 (1992). In 1986, the Secretary of the Interior amended these regulations to their current form. 51 Fed. Reg. 19957 (1986). From 1978 to 1986, the regulations required federal agencies to comply with the formal consultation requirement for federal actions in foreign countries. *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 123-24 (8th Cir. 1990) (affirming *sub nom.* Defenders of Wildlife v. Hodel, 707 F. Supp. 1082 (D. Minn. 1989)), *rev'd* 112 S. Ct. 2130 (1992). In publishing the regulations in 1978, the Secretary specifically rejected arguments that Congress did not intend for Endangered Species Act § 7 to apply abroad. 42 Fed. Reg. 4871 (1978).

issue.[37] In *Defenders of Wildlife v. Lujan*, the Eighth Circuit Court of Appeals upheld a district court decision holding that the ESA requires formal consultation for federal actions, irrespective of location.[38] The Eighth Circuit agreed with the district court decision that the regulation limiting consultation to actions "in the United States or upon the high seas" violates the ESA. The Supreme Court, however, reversed the Eighth Circuit decision on the basis that the plaintiff organization lacked standing.[39] The Court did not address the overseas consultation issue. While the outcome of this issue is presently uncertain, a strong possibility exists that the Army and other federal agencies will have to engage in formal consultation on actions that may affect listed species in foreign countries.[40] Compliance with this requirement will pose an additional challenge for the Army, especially for overseas special and contingency operations.[41] At a minimum, the Army can expect the costs of overseas operations to increase.[42]

An Overview of the ESA

The Backdrop

In 1978, the Supreme Court decided the landmark ESA case of *Tennessee Valley Authority v. Hill* (*TVA v. Hill*).[43] The Court's opinion, written by Chief Justice Burger, held that the ESA required the issuance of an injunction to prevent completion and operation of the nearly completed Tellico dam project on the Little Tennessee River.[44] The Court decided that the ESA required the injunction to prevent the destruction of a population of the endangered snail darter and its critical habitat. Chief Justice Burger succinctly summarized the mandate of the ESA as follows:

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.
>
> . . . .
>
> Furthermore, it is clear Congress foresaw that §7 [of the ESA] would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act. Congressman Dingell's discussion of Air Force practice bombings, for instance, obviously pinpoints a particular activity—intimately related to the national defense—which a major federal department would be obliged to alter in deference to the strictures of §7.[45]

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[37] The Endangered Species Act § 7(a)(2), provides as follows:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that *any* action authorized, funded, or carried out by such agency (hereinafter referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . .

(emphasis added).

[38] *Defenders of Wildlife*, 911 F.2d at 117 (affirming *Defenders of Wildlife*, 707 F. Supp. at 1082).

[39] *Defenders of Wildlife*, 112 S. Ct. at 2146.

[40] On 30 December 1992, the Defenders of Wildlife served a 60-day notice on the Department of the Interior, the Bureau of Reclamation, and the Army Corps of Engineers. The notice stated its intent to seek an injunction if the Corps of Engineers and Bureau of Reclamation did not comply with the § 7(a)(2) consultation requirement in assisting with the design and construction of the Three Gorges Dam project in China. By serving the notice, the Defenders of Wildlife have avoided the standing problem that led to the reversal in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). Additionally, S. 74, 103d Cong., 1st Sess. (1993), would amend the ESA to apply expressly § 7 to federal actions in foreign countries. Finally, the Clinton Administration may decide voluntarily to change 50 C.F.R. 402.02 to its pre-1986 form.

[41] 50 C.F.R. § 402.05 permits expedited informal consultation procedures in "national defense or security emergencies." It requires that federal agencies initiate formal consultation when the emergency subsides. Any benefit this provision provides is limited by the Endangered Species Act § 7(a)(2), which requires that federal agencies still must ensure that their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. In the absence of an emergency, the Army would have to complete formal consultation before engaging in actions that may affect listed species or critical habitat in foreign countries, as required for actions within the United States.

[42] DEP'T OF ARMY, REPORT TO CONGRESS, *supra* note 5, at 8.

[43] 437 U.S. 153 (1978).

[44] *Id.* at 193-95.

[45] *Id.* at 173, 186-87 (footnote omitted).

Understanding the fundamental lesson of *TVA v. Hill* is essential to the development of an effective installation ESA compliance program. Commanders must recognize that if a conflict arises between mission requirements and the survival and recovery of listed species, the species wins, unless the Endangered Species Committee grants an exemption from ESA requirements.[46] With this understanding comes the realization that avoiding conflicts with the ESA is important to preserving an installation's ability to carry out mission activities on Army lands—that is, military training and testing. As noted in the new Chapter 11, "the key to successfully balancing mission requirements and the conservation of listed species is long-term planning and effective management to prevent conflicts . . . ."[47]

The Scope of ESA Protection

The ESA protects federally listed, threatened, and endangered plants and wildlife (listed species) and their designated critical habitats.[48] It does not protect the approximately 3680 species that are candidates for federal listing[49] or species that only the states have listed. The ESA, however, does provide some limited protection for species that formally are proposed for listing (proposed species) and for any habitat that is proposed for designation as a critical habitat (proposed critical habitat).[50]

Endangered and Threatened Species

The National Marine Fisheries Service (NMFS) and the FWS (listing services) determine whether to list species as threatened or endangered. The NMFS is responsible for listing marine species, while the FWS makes listing decisions on terrestrial species.[51] These services base their listing decisions solely on biological criteria and status. They cannot consider the economic and other impacts of listing in their determinations.[52] The listing services list individual species by publishing rules in the *Federal Register*.[53] A compiled listing of all endangered and threatened species appears in the *Code of Federal Regulations*.[54]

The ESA defines endangered species as those determined to be in danger of extinction throughout all or a significant portion of their ranges.[55] Threatened species are those determined as likely to become endangered within the future throughout all or a significant portion of their ranges.[56] Listing may be by species or subspecies for plants and wildlife or by distinct population segments for wildlife species.[57] Additionally, the services may list species that are similar in appearance to endangered or threatened species to avoid law enforcement problems.[58] In practice, threatened species receive substantially the same protections under the ESA and implementing regulations.[59]

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[46] As a result of *TVA v. Hill*, Congress amended the Endangered Species Act to provide for an exemption from ESA requirements by applying to the Endangered Species Committee. ESA § 7(e)-(o). Implementing regulations are located at 50 C.F.R. §§ 450.01-453.06 (1992). The Endangered Species Committee has considered only three applications. It declined to grant an exemption in the first case (the Tellico Dam project), granted an exemption in the second case (the Grayrocks Dam project), and granted a partial exemption in the third case (timber sales in northern spotted owl habitat). *See* M. Lynn Corn & Pamela Baldwin, Congressional Research Service, Report to Congress, Endangered Species Act: The Listing and Exemption Processes (1990).

[47] Chapter 11, *supra* note 2, para. 11-1a.

[48] Throughout this article, the term "wildlife" includes fish species. *See* ESA § 3(8) (defining "fish and wildlife" to include "any member of the animal kingdom"); ESA § 4 (providing detailed rules for the listing of threatened and endangered species and the designation of critical habitat).

[49] Kanamine, *supra* note 27, at 2A.

[50] *See* Enos v. Marsh, 616 F. Supp. 32 (D. Haw. 1984), *aff'd*, 769 F.2d 1363 (9th Cir. 1985). Under ESA § 7(a)(4), federal agencies must confer with the FWS or NMFS "on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." Implementing regulations are located at 50 C.F.R. § 402.10 (1992); *see* Chapter 11, *supra* note 2, para. 11-7a(2); *infra* notes 138-39 and accompanying text. Secondly, if a biological assessment is required under ESA § 7(c), federal agencies must evaluate the potential effects of the action on proposed species and proposed critical habitat. 50 C.F.R. § 402.12(a).

[51] The ESA grants authority to administer the act to the Secretaries of the Interior and Commerce. ESA § 3(15). Under the implementing regulations, the FWS and the NMFS administer the act for the respective Secretaries. 50 C.F.R. § 402.01(b) (1992). The NMFS's jurisdiction is limited to those species listed at 50 C.F.R. §§ 222.23(a), 227.4 (1992). The FWS has jurisdiction over all other species. *Id.* § 402.01(b). For a few species, the services share jurisdiction. *Id.* § 17.2(b).

[52] ESA § 4(a), (b)(1).

[53] *Id.* § 4(b)(6); 50 C.F.R. §§ 424.16-.18 (1992).

[54] 50 C.F.R. § 17.11 (listing endangered and threatened wildlife); *id.* § 17.12 (listing endangered and threatened plants).

[55] ESA § 3(6).

[56] *Id.* § 3(20).

[57] *Id.* § 3(16).

[58] *Id.* § 4(e). Consultation under ESA § 7(a)(2) is not required for species listed based upon similarity of appearance. *See* 50 C.F.R. § 402.02 (defining "listed species"); *id.* § 402.14(a).

[59] The ESA § 4(d) provides that the secretaries may, by regulation, prohibit conduct regarding threatened species which is prohibited for endangered species under ESA § 9. The FWS regulations generally extend the same protections for endangered species to threatened species unless a special rule is adopted for a particular threatened species. *See* 50 C.F.R. §§ 17.21, 17.31, 17.61, 17.71 (1991). If the FWS adopts a special rule for a threatened species, that rule will contain all the applicable prohibitions and exceptions. *Id.* §§ 17.21(c), 17.71(c). The FWS special rules for wildlife are located at §§ 17.40-48. The FWS has not adopted any special rules for plants. *See id.* § 17.71(c). The requirements of ESA § 7 apply equally to threatened and endangered species.

Critical Habitat

A listing service must designate the critical habitat for listed species unless it decides that designation would not benefit conservation.[60] Irrespective, it must designate the critical habitat if the failure to designate would result in extinction.[61] The ESA defines critical habitat as that geographic area within the area occupied by the species at the time of its listing that the service determines to be essential to the conservation of the species and requiring special management consideration or protection.[62] Additionally, the definition includes areas not occupied by the species at the time of listing that the service determines to be essential to conservation. As a result, the listing services may designate critical habitat in areas where a listed species is not present. The services publish maps of designated critical habitat in the *Code of Federal Regulations*.[63]

If determinable and beneficial, a listing service must designate the critical habitat for a species when it lists that species.[64] If the service cannot determine the critical habitat at the time of listing—but designation would be beneficial to conservation—it must make a designation within one year after listing.[65] Thereafter, the service may designate or revise critical habitat at any point according to the designation criteria specified in the ESA.[66]

Unlike listing determinations, the listing services must consider economic and other relevant impacts—such as, military training and testing—in designating critical habitats.[67] Potentially affected installations should work closely with the listing services during the designation process to ensure that the services understand mission requirements and minimize mission impacts.

The listing services have not designated critical habitats for the vast majority of listed species.[68] From their perspective, designation is resource intensive and offers little protection beyond the protection afforded all habitats for listed species under ESA sections 7 and 9. As discussed in more detail below, the designation of a critical habitat restricts federal actions only and has no effect on state and private activities without federal involvement.[69]

The ESA's Protective Matrix

The ESA contains five major protective provisions applicable to Army installations.[70] These substantive and procedural provisions are integrated to afford powerful protection of listed species on federal lands. Nevertheless, they pose a significant compliance challenge for Army installations. In practice, the ESA provides significantly greater protection for listed species on federal lands than for the same species on state and private lands. The five major ESA provisions, discussed in detail below, are:

(1) the section 7(a)(1) requirement affirmatively to carry out conservation programs;

(2) the section 7(a)(2) requirement to avoid actions likely to jeopardize listed species or result in the destruction or adverse modification of a critical habitat;

(3) the section 7(a)(2) requirement to consult formally with the listing services on actions that may affect listed species or critical habitats;

(4) the section 7(c) requirement to conduct a biological assessment for major construction projects and other activities having similar physical impacts on the environment; and

(5) the section 9(a) prohibition against "taking" listed wildlife and removing or destroying listed plants.[71]

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[60] ESA § 4(b)(2).

[61] *Id.*

[62] *Id.* § 3(5)(A).

[63] 50 C.F.R. § 17.95 (1992) (fish and wildlife); *id.* § 17.96 (plants).

[64] ESA § 4(b)(6)(C).

[65] *Id.*

[66] *Id.* § 3(5)(B).

[67] *Id.* § 4(b)(2).

[68] *See* 50 C.F.R. §§ 17.11-.12 (1992).

[69] ESA § 7(a)(2); *see* John G. Sidle & David B. Bowman, *Habitat Protection Under the Endangered Species Act*, 2 CONSERVATION BIOLOGY 116 (1988).

[70] *See* J. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 N.W. SCH. L. ENVTL. L. 499 (1991) (an excellent and thorough discussion of the major provisions of the ESA applicable to federal agencies).

[71] *See infra* text accompanying note 163.

Installation attorneys must consider each of these provisions and their interrelationship in addressing ESA problems and issues. For example, installations scrupulously may avoid jeopardizing listed species, but still may violate the ESA by failing to comply with the formal consultation or biological assessment procedural requirements. Additionally, carrying out conservation programs under section 7(a)(1) may trigger the requirement to consult formally with the services under section 7(a)(2).

Major ESA Provisions Affecting Army Installations

The Conservation Requirement

Section 2(c)(1) of the ESA states that "all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." Additionally, section 7(a)(1) specifically mandates that federal agencies carry out programs for the conservation of listed species. The ESA defines "conserve" and "conservation" to mean "the use of all methods and procedures" necessary to bring listed species to the point that protection under the Act no longer is required.[72] As well as imposing affirmative conservation responsibilities on all federal agencies, these provisions set the tone for judicial review of agency actions under the ESA.[73]

The ESA conservation requirement imposes an affirmative duty on Army installations to assist in efforts to recover listed species.[74] The ESA requires installations to do more than merely avoid harm or jeopardy to listed species. For example, the ESA generally requires installations to carry out programs to increase populations of listed species on installations to genetically viable levels, if feasible, as opposed to merely maintaining existing populations that are not large enough for long-term survival.[75] Additionally, ESA section 7(a)(1) may require Army facilities to support the introduction or reintroduction of listed species on installations to assist in the recovery of the species.[76]

While the ESA obligates federal agencies to carry out conservation programs, the courts so far have allowed agencies some discretion and flexibility in deciding how best to carry out this requirement.[77] The Ninth Circuit Court of Appeals, however, has held that section 7(a)(1)'s mandate is not limited to conservation programs that are consistent with an agency's primary missions and mandated goals.[78] This holding seems consistent with the Supreme Court's broad reading of the ESA in *TVA v. Hill*.[79] Implementing the advisory conservation recommendations in the services' biological opinions is the safest means for installations to meet their section 7(a)(1) obligations.[80]

Installations must view responsibilities under section 7(a)(1) in light of the new Army policy initiatives. The Army Environmental Strategy into the Twenty-first Century provides as its vision statement, "[T]he Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission."[81] Moreover, Chapter 11 provides, "[t]he Army will be a leader in conserving listed species."[82] Chapter 11 specifically directs installations to carry out conservation recommendations in the services' biological opinions unless an installation

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[72] ESA § 3(3).

[73] *See* Tennessee Valley Authority v. Hill, 437 U.S. 153, 182, 185-86 (1978). Judicial review of agency decisions under ESA § 7(a)(2) is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1988). The APA standard of review is whether an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

[74] ESA § 3(3). *See* Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1416-19 (9th Cir. 1990); National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 387 (D. Wyo. 1987); Carson-Truckee Water Conservancy Dist. v. Watt, 549 F. Supp. 704 (D. Nev. 1982), *aff'd in part and vacated in part*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985); Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 169 (D.D.C. 1977) (holding that the Secretary of the Interior had an affirmative duty to increase the population of protected species under § 7(a)(1)).

[75] *See* DOD Dir. 4700.4, *supra* note 1, encl. 3, para. B.3.b(1) (providing that installation management plans for listed species shall include "Appropriate affirmative methods and procedures necessary to enhance the population of endangered species").

[76] *See* Wolf Action Group v. Lujan, No. 90-0390 HB (D.N.M. filed Apr. 3, 1990). Plaintiffs alleged in the complaint that the Department of Defense violated ESA § 7(a)(1) by withdrawing White Sands Missile Range, New Mexico, as a reintroduction site for the endangered Mexican gray wolf. *Id.* at 12.

[77] *See* Kilbourne, *supra* note 70, at 564-72.

[78] *Pyramid Lake Paiute Tribe*, 898 F.2d at 1418.

[79] Tennessee Valley Authority v. Hill, 437 U.S. 153, 185-86, 194 (1978).

[80] Kilbourne, *supra* note 70, at 571-72. Mr. Kilbourne notes that "Federal actions have been deemed consistent with section 7(a)(1) where they do not jeopardize listed species, will aid to some degree the conservation of listed species, and the federal agency has had reasonable grounds for rejecting other alternative plans." *See* Chapter 11, *supra* note 2, para. 11-7(e).

[81] DEP'T OF ARMY, ARMY ENVIRONMENTAL STRATEGY INTO THE TWENTY-FIRST CENTURY, 1 (1992); *see* Memorandum from the Secretary of Defense for the Secretaries of the Military Departments, subject: Environmental Management Policy (10 Dec. 1989) ("The universal recognition of effective DOD environmental compliance and stewardship activities is the surest way to maintain our access to the air, land, and water we need to maintain and improve our mission capability").

[82] Chapter 11, *supra* note 2, para. 11-1a.

decides, in coordination with ODEP, that implementation is not feasible.[83] Additionally, it provides that the Army will support the reintroduction and introduction of federal and state listed and proposed and candidate species on installations unless the Army decides that a significant impact on present or future mission capability will occur.[84] Therefore, Army policy encourages installations to take a leading role in actively developing and carrying out programs promoting the recovery of listed species.

The Jeopardy Provision

Section 7(a)(2) of the ESA requires federal agencies to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of critical habitat. The listing services' joint regulation broadly defines "action" to encompass nearly all federal acts, activities, and programs "in the United States or upon the high seas."[85] The validity of the geographic limitation in this regulation now is uncertain.[86] Finally, the regulation defines "jeopardize the continued existence of" to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[87]

Section 7(a)(2) affords powerful protection of listed species and their habitats on Army installations and is a major constraint on Army actions. It forces installations—in all their activities—to evaluate the direct and indirect effects of their actions and of other "interrelated" and "interdependent" federal, state, and private actions on the survival and recovery of listed species.[88] Section 7(a)(2) is not applicable to purely state and private activities, and the ESA does not provide equivalent protection of listed species and their habitats on state and private lands. Congress presumably intended that federal agencies undertake a disproportionate share of the nation's efforts to conserve listed species. Consequently, federal installations increasingly are becoming sanctuaries for listed species that are in decline on state and private lands because of commercial and agricultural land uses and urbanization unconstrained by the substantive and procedural requirements of section 7(a)(2).[89]

Installations continually must scrutinize all of their actions to ensure that they do not violate section 7(a)(2).[90] As described below, installations must use the formal consultation process to assist in meeting this requirement. Installations, however, remain fully responsible for complying with section 7(a)(2), irrespective of action, inaction, or opinions issued by the listing services.[91] In essence, the services merely provide nonbinding advice to installations in meeting the installations' section 7(a)(2) responsibilities.[92] Therefore, failure of the listing services to give notice of a potential violation generally will not provide a defense to a section 7(a)(2) violation.[93] Additionally, relying on listing service opinions is

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[83] *Id.* para. 11-7e(5).

[84] *Id.* para. 11-14.

[85] 50 C.F.R. § 402.02 (1992).

[86] *See supra* text accompanying notes 33-40.

[87] 50 C.F.R. § 402.02 (1992).

[88] *Id.* (defining "effects of the action"); 51 Fed. Reg. 19932-33 (1986) (discussing the effects analysis required by the regulation). Under ESA § 7(a)(2), installations must consider the direct and indirect effects of their actions together with the effects of "interrelated" or "interdependent" actions. Interrelated and interdependent actions may be federal, state, or private. 50 C.F.R. § 402.02; *see* National Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir.), *reh'g denied,* 532 F.2d 1375, *cert denied,* 429 U.S. 979 (1976). "The test for interrelatedness or interdependentness is 'but for' causation: but for the federal project, these activities would not occur." Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987). All of the combined "effects of the action" are considered in comparison to the "environmental baseline," which includes the following:

> [T]he past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation in progress.

50 C.F.R. § 402.02. Federal projects that have not undergone section consultation are not included in the baseline.

Additionally, in determining whether its actions likely will jeopardize listed species or result in the destruction or adverse modification of critical habitat, installations and the Services must consider "cumulative effects." *Id.* §§ 402.02, 402.12(f)(4), 402.14(g)(3) "'Cumulative effects' are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.* "Cumulative effects" are unrelated to the federal action under consultation. Accordingly, anticipated private development can greatly effect § 7(a)(2) determinations for installation actions.

[89] DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 1-2.

[90] Chapter 11, *supra* note 2, para. 11-7a(1)(b).

[91] *Id.* para. 11-2b.

[92] Kilbourne, *supra* note 70, at 543-44.

[93] *See* ESA § 3(3) (standard of judicial review); Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1414-15 (9th Cir. 1990) ("The relevant inquiry is whether the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made'").

a defense only if that reliance was reasonable and justified under the circumstances.[94]

Formal Consultation Requirement

To help federal agencies in ensuring that their actions do not violate the jeopardy provision discussed above, section 7(a)(2) requires agencies to consult formally with the NMFS for listed marine species and the FWS for listed terrestrial species under the circumstances described below.[95] Section 7(a)(2) consultation does not apply to state or private activities without any federal involvement. This is a major reason why significantly greater protection of listed species' habitats has occurred on federal lands. Nevertheless, state and private activities requiring federal action, such as a federal permit, however, indirectly are subject to section 7(a)(2) requirements because the federal agency involved must consult on the direct and indirect effects of any action it authorizes, funds, or carries out. The listing services' joint regulations prescribe detailed consultation procedures that agencies must follow.[96] If triggered, formal consultation is a required process, regardless of whether the underlying action ultimately jeopardizes any listed species or results in destruction or adverse modification of a critical habitat.[97]

Under the joint regulations, any federal action that "may affect"—beneficially or adversely—a listed species or critical habitat triggers the formal consultation requirement.[98] Therefore, installations continually must monitor and evaluate all of their planned and ongoing activities for "any possible effect" on listed species or critical habitats.[99] "This review must be conducted on a continual basis by all action proponents, commanders, installation engineers, and environmental directorates. The installation commander is ultimately responsible for ensuring that this requirement is met."[100] Environmental law specialists should coordinate closely with their installations' natural resources staffs to make certain that all activities are being evaluated under the "may affect" standard. The burden of complying with section 7 rests squarely with the installation.[101]

Installations should use all of the tools at their disposal to evaluate actions for possible effects upon listed species or critical habitats—such as, informal consultations with the listing services,[102] biological assessments,[103] or biological evaluations.[104] As described below,[105] the ESA requires a biological assessment in certain cases and it is advantageous in many others, even if not legally required.[106] Normally, the presence of a listed species in the action area will lead to a "may affect" determination and will trigger the formal consultation requirement. Chapter 11 provides, "Where a listed species or critical habitat is present in the action area, a 'no affect' determination should only be made if the FWS or NMFS concurs through informal consultation."[107]

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[94] *See Pyramid Lake Paiute Tribe*, 898 F.2d at 1415 ("A federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary and capricious"); Resources LTD., Inc. v. Robertson, 789 F. Supp. 1529 (D. Mont. 1991).

[95] See *supra* note 51 for discussion of the division of jurisdiction between the FWS and NMFS.

[96] 50 C.F.R. §§ 402.01-16 (1992). An informative discussion of the comments made on this regulation during the rulemaking process are found at 51 Fed. Reg. 19926 (1986).

[97] *Id.* § 402.14(a). Failure to consult is subject to criminal and civil sanctions under ESA § 11(a)-(b).

[98] *Id.* § 402.02. Installations must evaluate the "effects of the action."

[99] "Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement. . . ." 51 Fed. Reg. 19949 (1986).

[100] Chapter 11, *supra* note 2, para. 11-7a(1)(b).

[101] *See supra* notes 89-90 and accompanying text.

[102] 50 C.F.R. § 402.13 (1992); Chapter 11, *supra* note 2, para. 11-7c(1). Informal consultation is merely informal discussion with the listing services. "Informal consultation with the FWS or NMFS is always appropriate to clarify the action command's section 7, ESA responsibilities." Chapter 11, *supra* note 2, para. 11-2c(1).

[103] 50 C.F.R. § 402.12 (1992).

[104] Chapter 11, *supra* note 2, glossary (defining "biological evaluation" as "[a] written document setting forth an installations's rationale for determining that an action will have no effect on or may affect a listed species or critical habitat. A biological evaluation is used for actions only if a biological assessment is not required"). As defined in Chapter 11, a biological evaluation would fit the regulatory definition of a "biological assessment." 50 C.F.R. § 402.02 (1992). Chapter 11 distinguishes between the two procedures and documents and clearly indicates that biological evaluations need not meet the formal requirements in 50 C.F.R. § 402.10 applicable to biological assessments.

[105] *Infra* notes 143-47 and accompanying text.

[106] Chapter 11, *supra* note 2, para. 11-7c(3).

[107] *Id.* para. 11-7c(1).

Once an installation decides that an action "may affect" a listed species or critical habitat, it must initiate formal consultation, unless the listing service agrees in writing that the action is "not likely to adversely affect" any listed species or critical habitat.[108] Chapter 11 requires installations to obtain Headquarters, Department of the Army (HQDA) concurrence before initiating formal consultation.[109] Installations initiate formal consultation by a written request to the listing service, which results in the issuance of a biological opinion from the service at the conclusion of the process.[110] While the listing services can request that installations initiate consultation, they cannot initiate it or force installations to do so.[111] Again, the burden of meeting ESA requirements and the responsibility for a violation are on the installation.

Once an installation initiates formal consultation, the ESA prohibits any irretrievable or irreversible commitment of resources that will foreclose the formulation of reasonable and prudent alternatives by the listing service in its biological opinion.[112] Chapter 11 extends this prohibition to preclude an irretrievable or irreversible commitment of resources if an installation anticipates formal consultation on an action.[113]

Installations are responsible for providing the listing services with "the best scientific and commercial data available or which can be obtained" for preparation of biological opinions.[114] The listing services may request that installations obtain additional data or conduct additional studies to assist them in formulating biological opinions.[115] The burden of developing the information needed by these services to assess the effects of actions on listed species and critical habitats and of funding the necessary studies is on installations, not the listing services.[116]

Formal consultation results in the issuance of a biological opinion by the listing service consulted. The biological opinion contains the service's opinion on whether the installation's action is likely to jeopardize listed species or result in the destruction or adverse modification of a critical habitat.[117] If the biological opinion determines that the action will not violate section 7(a)(2) (a "no jeopardy" opinion), the installation's action may go forward as proposed. If the biological opinion determines that the action is likely to jeopardize a listed species or result in the destruction or adverse modification of a critical habitat (a "jeopardy" opinion), it will include reasonable and prudent alternatives to the proposed action, if any exist.[118] If followed, reasonable and prudent alternatives allow the action to go forward—although modified—to avoid violating section 7(a)(2).[119] The vast majority of biological opinions contain reasonable and prudent alternatives.[120] If the listing service provides no reasonable alternatives or if an installation cannot carry out the alternatives provided, the installation should abandon the action, unless it obtains an exemption from the Endangered Species Committee under

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[108] 50 C.F.R. § 402.14(a)-(b) (1992).

[109] Chapter 11, *supra* note 2, para. 11-7b(1).

[110] The request to initiate formal consultation must contain the information listed in 50 C.F.R. § 402.14(c) (1992). Consultation must be concluded 90 days after initiation, unless extended by agreement of the parties. *Id.* § 402.14(e). Within 45 days after formal consultation is concluded, the listing service must issue its biological opinion. *Id.* Consequently, unless the parties agree to an extension of these deadlines, the consultation process should not exceed 135 days from initiation to the issuance of a biological opinion.

[111] *See* Kilbourne, *supra* note 70, at 539 n.188.

[112] ESA § 7(d); 50 C.F.R. § 402.09 (1992); *see* Lane County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992) (finding § 7(d) precludes Bureau of Land Management timber sales pending completion of consultation on programmatic plan for protection of the northern spotted owl); National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 390 (D. Wyo. 1987) (finding § 7(d) inapplicable to ongoing operation of a campground pending completion of an environmental impact statement addressing impact of campground on the threatened grizzly bear); Enos v. Marsh, 616 F. Supp. 32 (D. Haw. 1984), *aff'd*, 769 F.2d 1363 (9th Cir. 1965) (finding § 7(d) does not apply prior to initiation of formal consultation).

[113] Chapter 11, *supra* note 70, para. 11-7a(3).

[114] 50 C.F.R. § 402.14(d) (1992).

[115] *Id.* § 402.14(f).

[116] *Id.*

[117] *Id.* § 402.14(h)(3).

[118] *Id.*

[119] *Id.* § 402.02, provides as follows:

> Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

[120] D. Barry et al., World Wildlife Fund, For Conserving Listed Species, Talk is Cheaper than We Think: The Consultation Process Under the Endangered Species Act (1992) (reporting that from FY 87 through FY 91, only 18 of 2000 formal consultations conducted by the FWS resulted in stopping the proposed action).

ESA section 7.[121] While biological opinions are not legally binding on installations, noncompliance is not a practical alternative.[122] Chapter 11 requires installations to notify HQDA of jeopardy biological opinions within five days of receipt.[123]

In the case of a "no jeopardy" opinion or a "jeopardy" opinion with reasonable and prudent alternatives, the biological opinion will include an incidental take statement (ITS).[124] If the listing service does not anticipate a "taking" to result from the action, the authorized "take" will be "zero."[125] The ITS will contain nondiscretionary reasonable and prudent measures necessary to minimize the impact of the allowed incidental taking.[126] It also will include terms and conditions with which the installation must comply in carrying out the reasonable and prudent measures.[127] In contrast to reasonable and prudent *alternatives*, the reasonable and prudent *measures* and terms and conditions cannot "alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."[128] If the installation complies with the terms of the ITS, the ITS protects the installation from an ESA section 9(a)(1) violation if a "taking" occurs as a result of the action that is the subject of the biological opinion.[129] For mission-related projects and activities, formal consultation is the only means for an installation to obtain an ITS; it therefore is necessary if the installation anticipates a "taking."[130] Any "taking" without the benefit of an ITS violates ESA section 9 and triggers criminal and civil sanctions.[131]

Biological opinions also may include recommended conservation measures that are not binding on the receiving installations.[132] Implementing these recommendations is a good way for an installation to meet its section 7(a)(1) conservation obligation and is encouraged by Army policy.[133]

While the ESA and implementing regulations do not make biological opinions binding on federal agencies, Chapter 11 provides, "[U]nless changed through further consultation with the FWS or NMFS, the installation will comply with the reasonable and prudent alternatives and measures in the biological opinion."[134] Under ESA section 7, an installation could ignore a biological opinion, in whole or part, and proceed with a proposed action if the action does not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of a critical habitat.[135] While section 7 requires installations to consult formally, this section does not require that installations accept the terms of the listing services' biological opinions. An installation's decision to proceed contrary to a biological opinion, however, would have to be based upon the best scientific information available to withstand judicial scrutiny.[136]

For legal, policy, and practical reasons, installations should comply with the terms of biological opinions. First, in proceeding contrary to a biological opinion, the installation loses the benefit of the incidental take statement. Any resulting "taking" would violate ESA section 9(a)(1)(B) and risk civil

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[121] ESA § 7(h), (i); 50 C.F.R. § 402.15 (1992).

[122] *See infra* text accompanying notes 136-39.

[123] Chapter 11, *supra* note 2, para. 11-7e(6).

[124] ESA § 7(b)(4); 50 C.F.R. § 402.14(i).

[125] *See* National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 389-90 (D. Wyo. 1987) (stating that an ITS is required only if incidental take is anticipated).

[126] 50 C.F.R. § 402.14(i)(1)(iii). "'Reasonable and prudent measures' refer to those actions the [listing service] Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take." *Id.* § 402.02.

[127] *Id.* § 402.14 (i)(1)(iii).

[128] *Id.* § 402.14(i)(2).

[129] ESA § 7(b)(4).

[130] The listing services, however, may issue permits for scientific purposes or to enhance the survival of the affected species. ESA § 10(a)(1)(A). Implementing regulations are found at 50 C.F.R. §§ 17.22, .62 (1991).

[131] ESA § 9(a)(1)(B). Criminal and civil penalties are specified in ESA § 11(a)-(b).

[132] 50 C.F.R. § 402.14(j) (1992).

[133] *See supra* text accompanying notes 79, 82.

[134] Chapter 11, *supra* note 2, para. 11-7e(6).

[135] *See, e.g.*, Tribal Village of Akutan v. Hodel, 859 F.2d 651, 660 (9th Cir. 1988) (§ 7(a)(2) violation does not occur if the agency takes reasonable alternative measures to ensure that the action is not likely to jeopardize any listed species).

[136] *See* Roosevelt Campobello Int'l Park v. Environmental Protection Agency, 684 F.2d 1041 (1st Cir. 1982) (overturning an EPA decision to proceed with a project inconsistent with FWS and NMFS biological opinions on basis that EPA did not rely on best available scientific information); Kilbourne, *supra* note 70, at 543-45 ("Thus, if the action agency ultimately decides, contrary to the consulting agency's opinion, that a proposed action is not likely to jeopardize listed species, it must base that decision upon credible scientific evidence").

and criminal sanctions. Secondly, the installation commander and other responsible officials personally are at risk of an ESA violation if the action results in a "taking," jeopardizes the continued existence of a listed species, or results in the destruction or adverse modification of a critical habitat.[137] Third, noncompliance with biological opinions can damage the cooperative relationship with the listing services, which, as discussed below,[138] is important to the long-term effectiveness of an installation's compliance program. Finally, noncompliance poses significant policy and public relations problems for the Army to the extent that the listing services, state agencies, environmental groups, and the public perceive that the Army is not fulfilling the leadership role in conservation that it has assumed.[139] Installations, however, may attempt to obtain a modification of biological opinions or reinitiate consultation as appropriate.[140]

The ESA and implementing regulations do not require formal consultation for species that the listing services have proposed listing as endangered or for habitat that they have proposed designating as critical. Installations, however, must confer with the services on actions "likely to jeopardize the continued existence of any species proposed to be listed or result in the destruction or adverse modification of critical habitat proposed to be designated for such species."[141] A conference consists of informal discussions with the listing services and results in advisory recommendations. A conference does not eliminate the need for formal consultation when the species is listed, if otherwise required. Installations, however, may request that the listing service conduct a conference as a formal consultation, allowing the service to adopt the conference opinion as the biological opinion when it lists the species.[142]

As a final note, the ESA requires the formal consultation process to assist federal agencies in meeting their section 7 responsibilities. Completing formal consultation does not relieve installations of the continuing obligation to monitor plans and activities to ensure that they are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitats. New information and changes in circumstances may require the reinitiation of formal consultation.[143] Installations should not view formal consultation as an end but as a means in an ongoing process to ensure that their activities do not threaten the survival and recovery of listed species or the destruction or adverse modification of critical habitats.

The Biological Assessment

Similar to formal consultation, the biological assessment is a tool mandated by the ESA that installations must use in evaluating the potential effects of major actions on listed species and critical habitats.[144] Moreover, biological assessments help agencies in determining if formal consultation or conference is required.[145] The listing services' joint regulations require biological assessments for major construction and other activities having similar physical impacts on the environment if (1) the impacts significantly will affect the quality of the human environment as referred to in the National Environmental Policy Act of 1969[146] and (2) any listed species or critical habitat is present in the area directly or indirectly affected by the action (action area).[147] If required, installations must complete biological assessments before they enter into any contract for construction, before they begin construction, and before they initiate formal consultation.[148]

As the first step in conducting a biological assessment, installations must request concurrence on a submitted list of proposed and listed species and proposed and designated critical habitats that may be present in the action area.[149] Alter-

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[137] The "take" definition in ESA § 3(19) includes the term "harass." 50 C.F.R. § 17.3 (1991) broadly defines "harass" to mean "an intentional or negligent act and omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns. . . ."

[138] *See infra* text accompanying notes 186-90.

[139] *See supra* notes 80-83 and accompanying text.

[140] Chapter 11, *supra* note 2, para. 11-7e(6), f; *see* American Littoral Soc'y v. Herndon, 720 F. Supp. 942 (S.D. Fla. 1988) (modifying a biological opinion was a permissible part of the interagency cooperation process under § 7).

[141] *See supra* note 50.

[142] 50 C.F.R. § 402.10(d) (1992).

[143] *Id.* at § 402.16 (setting out circumstances requiring reinitiation of formal consultation). The "cumulative effects" need not be considered in deciding whether to reinitiate formal consultation. *See* Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987).

[144] ESA § 7(c); 50 C.F.R. § 402.12.

[145] 50 C.F.R. § 402.12(a).

[146] 42 U.S.C. § 4332(C) (1988).

[147] 50 C.F.R. §§ 402.02, .12(b) (1992).

[148] *Id.* § 402.12(b)(2), (j), (k).

[149] *Id.* § 402.12(c).

nately, the installation may request such a list from the listing service. Either method is equally effective. The service has thirty days to concur with the submitted list or provide the requested list.[150] If listed species or critical habitats may be present in the action area, the installation must complete a biological assessment according to the requirements of the regulation.[151] Even if an installation anticipates a "no effect" determination, a biological assessment still is required and failure to conduct it violates the ESA.[152] If the listing service concurs that no listed species or critical habitat may be present in the action area, a biological assessment is not required. The ESA and implementing regulations do not require biological assessments if only proposed species or proposed critical habitats may be present in the action area. Installations, however, may conduct a biological assessment to determine the need for a conference with the listing services.[153]

Installations should view the biological assessment as a valuable tool in the consultation process. It is the best means for an installation to assess scientifically the effects of a proposed action and to present its scientific case supporting the installation's determination of effect to the listing service. Chapter 11 provides that installations should prepare biological assessments for all actions that may result in formal consultation.[154]

If the ESA and the implementing regulations do not require a biological assessment and one is not voluntarily prepared, Chapter 11 provides that an "installation should prepare a written biological evaluation documenting its determination of the effect or no effect of an action on listed species and critical habitat."[155] The ESA and implementing regulations do not require biological evaluations and they are not subject to any substantive or procedural requirements. Chapter 11 provides only that they "should set forth the biologically supportable rationale for the installation's determination [of effect]."[156] Biological evaluations, as distinguished from biological assessments, provide an informal means for installations to ensure that they properly evaluate lesser activities for effects and to document those evaluations.

After completing a biological assessment, an installation must submit it to the listing service for review.[157] The service has thirty days to concur or nonconcur in writing with the findings contained in a biological assessment. Installations may, and commonly do, initiate formal consultation concurrently with the submission of a biological assessment that concludes that an adverse effect may exist.[158] The regulations do not require formal consultation if the listing service concurs in writing with a finding in a biological assessment that an adverse effect is not likely.[159]

The Section 9 Prohibitions

In addition to ensuring that their actions will not jeopardize the continued existence of listed species under ESA section 7(a)(2), installations must avoid the conduct proscribed in ESA section 9(a). Section 9(a) prohibits any person from committing, attempting to commit, or soliciting another to commit, a variety of listed acts that cause injury to endangered plants and wildlife. In contrast to section 7's focus on the long-term survival and recovery of listed species, section 9(a) focuses on the protection of individual members of the listed species. Section 9(a) applies to private, state, and federal actions, and is the primary means under the ESA of protecting listed species on nonfederal lands.

Sections 9(a)(1) and 9(a)(2) list prohibited acts for wildlife and plants, respectively. The prohibited acts include a violation of any protective regulation promulgated by the listing services under the ESA for either endangered or threatened plants and wildlife.[160] Because the services' regulations generally extend the protections for endangered species to threatened species, in practice, section 9(a) protects both threatened and endangered plants and wildlife.[161]

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[150] *Id.* § 402.12(d).

[151] *Id.* § 402.12(d)(2).

[152] *See* Thomas v. Peterson, 753 F.2d 754, 763-64 (9th Cir. 1985).

[153] *See* text accompanying notes 140, 141. Chapter 11, *supra* note 2, para. 11-7d(4) encourages installations to complete biological assessments for proposed species and proposed critical habitats.

[154] Chapter 11, *supra* note 2, para. 11-7c(3).

[155] *Id. See supra* note 104 for definition of "biological evaluation."

[156] Chapter 11, *supra* note 2, para. 11-7c(3).

[157] 50 C.F.R. § 402.12(j) (1992).

[158] *Id.*

[159] *Id.* § 402.12(k).

[160] ESA § 9(a)(1)(G), (2)(E).

[161] *See supra* note 59 and accompanying text.

Among other prohibited acts, section 9(a)(1)(B) prohibits the "taking" of any endangered wildlife species "within the United States or the territorial sea of the United States."[162] The "taking" prohibition and concept are not applicable to plants. The ESA broadly defines "take" to mean: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct."[163]

The regulation defines "harm"—as used in the definition of "take"—to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[164] Harm may be shown by proof of a general decline in the population of a species resulting from habitat modification or destruction. Proof of the death or injury of identifiable individuals is not required.[165] Consequently, section 9(a)(1)(B) protects listed species' habitats on federal, state, and private lands from some degradation, regardless of whether those habitats are designated as critical.

The protection of a habitat under section 9(a)(1)(B) is similar to, and overlaps the protection afforded by, section 7(a)(2), however, the two provisions are distinctly different.[166] In contrast to section 9(a)(1)(B), section 7(a)(2) precludes the modification of a habitat that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . ."[167] The latter prohibition reaches habitat modifications that may have no short-term impact on a listed species but affect the species' long-term survival and recovery. The focus of section 9 is on immediate or short-term impacts. Moreover, the section 7(a)(2) consultation process provides an effective enforcement mechanism that is lacking under section 9. Under section 9, the listing services are limited to bringing a criminal or civil enforcement action based upon proof of a "taking." Subsequently, the substantive and procedural provisions of section 7(a)(2) generally provide significantly greater protection of a habitat on federal lands than section 9(a)(1)(B) provides to habitats on state and private lands.[168] From an installation's perspective, the destruction of a habitat necessary to the long-term survival and recovery of a listed species may not violate section 9(a)(1)(B), but may be prohibited under section 7(a)(2). Section 9(a)(1)(B), however, will preclude the destruction of a habitat that will have no long-term effect on a listed species, but otherwise would result in injury to specific individual members of the species, such as, cutting down a nesting tree.

Additionally, the regulation broadly defines "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."[169] Unlike "harm," the term "harass" does not include destruction or modification of a habitat.

The protection of plants under section 9(a)(2) is less extensive than the protection of wildlife under section 9(a)(1). Specifically, section 9(a)(2) prohibits in federal jurisdiction areas (1) removing endangered plant species and reducing them to possession, and (2) maliciously damaging or destroying them.[170] Interestingly, the FWS regulations do not extend the malicious damage or destruction prohibition to threatened plant species.[171] Installations, however, must protect threatened plants under section 7(a)(2).

In summary, the thrust of section 9(a) is the protection of individual members of species from injury. While all of the provisions of the ESA, including section 7, potentially are enforceable by civil and criminal sanctions,[172] the listing services naturally focus their criminal enforcement efforts on section 9(a) violations. Installations should anticipate that in cases of an alleged violation of section 9(a), the listing serv-

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[162] Unlike the possible application of ESA § 7 to overseas actions, *supra* notes 35-42 and accompanying text, § 9(a)(1)(B) does not apply to conduct in foreign countries.

[163] ESA § 3(19).

[164] 50 C.F.R. § 17.3 (1991); *see* Sierra Club v. Lyng, 694 F. Supp. 1260, 1270-72 (E.D. Tex. 1988), *aff'd in part and vacated in part sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991); Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); Palila v. Hawaii Dep't of Land and Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988); Sidle & Bowman, *supra* note 69.

[165] *Sierra Club*, 694 F. Supp. at 1270.

[166] *See* Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1420 n.21 (9th Cir. 1990) (finding of no jeopardy under § 7(a)(2) does not overlap perfectly with a finding of no harm under § 9(a)(1)(B)).

[167] 50 C.F.R. § 402.02 (1992).

[168] *Cf.* Morrill v. Lujan, 802 F. Supp. 424 (S.D. Ala. 1992) (finding private development did not violate § 9 when FWS previously had issued a jeopardy biological opinion under § 7).

[169] 50 C.F.R. § 17.3 (1991).

[170] ESA § 9(a)(2)(B). This provision also makes it unlawful for any person subject to United States jurisdiction to "remove, cut, dig up, or damage or destroy any such species on any other areas in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law. . . ."

[171] 50 C.F.R. §§ 17.61, .71 (1991).

[172] ESA § 11(a)-(b).

ices may conduct an investigation that could result in criminal charges against the responsible individuals.[173]

Developing an Effective Installation ESA Compliance Program

Effective installation compliance programs must accomplish more than just meeting ESA requirements. An effective program also must ensure that the installation retains its ability to accomplish present and future military missions. To accomplish this, an installation compliance program should incorporate certain key elements, which Army experience has shown to be important to effectively balance mission and ESA requirements. Compliance with the new Chapter 11 guidance should help installations in successfully meeting these competing objectives. Environmental law specialists, as part of the ESA compliance team, should be aware of these elements and work with key members of the installation staff in fully integrating them into the installation's compliance program.

The Management Model

Chapter 11 embodies a model approach to listed species management. The basic elements of the model are important and worth highlighting. The Army Endangered Species Team specifically developed the model to avoid problems and conflicts that Army installations have experienced in the past.[174] Deviation from the model should alert environmental law specialists to potential compliance problems.

As a first step, an installation should conduct a survey of potential habitats on the installation for listed, proposed, and candidate species.[175] While surveys can be costly, effective planning is difficult if listed species—and those that may be listed in the future—are not located and identified. Very simply, surveys avoid surprises. The failure of an installation to identify and locate listed species before it plans activities and commences projects can increase project costs, disrupt military missions, and result in ESA violations.[176] The Army's experience at the Pohakuloa Training Area demonstrates the real risks associated with a failure to conduct a complete and accurate survey before commencing projects and activities.[177]

Second, an installation should develop conservation goals and objectives in consultation with the listing services. Without definite conservation goals, an installation cannot anticipate future conservation requirements, making effective planning nearly impossible. For example, every installation with the RCW should reach an agreement with the FWS on the ultimate size of the RCW population that the installation should attain and then the installation should resolve to sustain that population. An installation carefully should negotiate conservation goals, considering its current and future military missions, the number and quality of habitats, the long-term recovery potential for species, and the availability of habitats off the installation. No precise formula for establishing goals is possible. An installation should develop goal proposals using a team approach and develop an endangered species management plan (ESMP), as discussed in the next paragraph. Once established, the goal enables an installation to build long-term plans integrating anticipated conservation with other mission requirements.

Third, an installations should develop a comprehensive, long-term ESMP for each listed and proposed species and critical habitat on the installation. The installation should integrate ESMPs into the installation's natural resources management plan,[178] the cooperative plan,[179] and the installation's real property master plan.[180] Chapter 11 provides detailed guidance for the preparation of ESMPs.[181] Installations should not delay preparation of ESMPs pending comple-

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[173] On 28 January 1992, three employees of the Fort Benning Directorate of Engineering and Housing (DEH) were indicted in the United States District Court for the Middle District of Georgia for conspiring to violate the ESA. The indictments alleged that the defendants conspired to facilitate commercial timber cutting of RCW nesting habitats on Fort Benning, Georgia. On 22 March 1993, the United States Attorney for the Middle District of Georgia announced that two of the defendants had entered into pretrial diversion agreements, each agreeing to 12 month's supervision and payment of a $1500 civil penalty. The indictment against the third defendant was dismissed.

[174] *See* RAND REPORT, *supra* note 4, at 68-76 (discussing endangered species management problems at Fort Bragg).

[175] *See* Chapter 11, *supra* note 2, para. 11-11.

[176] *Id.*

[177] *See supra* text accompanying note 22.

[178] AR 420-74, *supra* note 1, ch. 8, requires installations in the continental United States, Alaska, and Hawaii to have natural resources management plans.

[179] Installations with land and water areas suitable for the management of fish and wildlife are required to enter into cooperative plan agreements with the FWS and the state fish and wildlife agency. *Id.* paras. 5-4, 8-1b, 8-2d. The Sikes Act, 16 U.S.C.A. § 670a (West 1992), requires installations to enter into cooperative plan agreements and that such plans become the fish and wildlife management portion (part IV) of natural resources management plans. Under Chapter 11, *supra* note 2, para. 11-5b(2), installation endangered species management plans (ESMPs) will be integrated into cooperative plans and part IV of the natural resources management plan.

[180] DEP'T OF ARMY, REG. 210-20, INSTALLATIONS: MASTER PLANNING FOR ARMY INSTALLATIONS (12 June 1987) (currently undergoing an extensive revision).

[181] Chapter 11, *supra* note 2, para. 11-5.

tion of installation-wide listed species surveys. Rather, they should amend ESMPs as survey information becomes available.

Because ESMPs can impact significantly on military mission, military trainers, testers, and operations personnel should participate in the drafting process.[182] Installation staffs should keep commanders fully informed of the content of ESMPs and the present and potential impacts on military missions.[183] Army experience has shown that installations make mistakes when relegating listed species planning exclusively to their natural resources staffs.[184] The potential for mission impact requires ESA planning receive mainstream command and staff attention.

Fourth, installations should ensure that they comply with approved ESMPs and that ESMPs are effective in accomplishing their conservation goals. Chapter 11 provides detailed procedures for monitoring compliance and effectiveness.[185] An ESMP should be a working plan, updated as often as necessary to achieve conservation objectives. A "bookshelf plan," dusted off for compliance inspections, will not satisfy the requirements of Chapter 11 and, more significantly, will not prevent ESA and mission conflicts.

Finally, an installation should develop procedures to screen, consistently and effectively, installation plans and activities for possible effects on listed species or critical habitats.[186] Endangered species personnel should review every installation plan. Failure to anticipate section 7(a)(2) requirements can result in halting or delaying projects and activities. Installations routinely should consult the listing services early in the planning stages of projects and activities. This approach allows for problems to be anticipated and avoided through the development of work-around solutions.[187] Chapter 11 provides that, "If there is any question whether an Army action may affect a listed species or critical habitat, DA personnel should informally consult with the NMFS or FWS to determine the need for formal consultation."[188]

Cooperation with the Services

Unlike the rule-based environmental statutes—such as the Clean Water Act[189] and the Clean Air Act[190]—ESA section 7(a)(2) and the implementing regulations do not provide objective compliance standards. Compliance with the ESA largely rests on subjective determinations, such as "may affect," "not likely to adversely affect," and "jeopardy." The latter determinations require blends of scientific, legal, and professional judgments. Section 7(a)(2) compliance issues rarely are black and white. Resolving these issues often requires compromise between the installation and the listing services. Moreover, ESA management is an ongoing process that continues as long as the installation has listed species or critical habitats, requiring regular and frequent interaction with the listing services.[191] Under these circumstances, installations will find a cooperative relationship with the listing services, more advantageous than an adversarial one. Chapter 11 provides, "Working closely and cooperatively with the FWS and NMFS through informal consultation to develop mutually satisfactory courses of action is in the Army's best interest."[192]

While the Army policy is to "work closely and cooperatively" with the listing services on conservation matters, installations should not simply invite either the FWS or the NMFS to dictate conservation measures. Installations should seek to become equal and respected partners in the conservation process. Installations should develop the expertise and credibility to prepare and present scientifically valid—but mission sensitive—plans and proposals for listing service approval.[193] An installation must build credibility over time through candor with the services, a record of compliance with biological opinions and ESMPs, and a long-term commitment of personnel and resources to endangered species management. Without credibility, an installation will have a difficult time avoiding conservation measures and training restrictions, imposed by the listing services which may affect adversely the installation's ability to accomplish its military missions.

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[182] *See* RAND REPORT, *supra* note 4, at 71.

[183] *Id.* at 34-35, 61.

[184] *Id.* at 34, 56, 60.

[185] Chapter 11, *supra* note 2, para. 11-6e, g.

[186] *Id.* para. 11-7(a)(1)(b).

[187] *Id.* para. 11-1b.

[188] *Id.* para. 11-1b.

[189] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1992).

[190] 42 U.S.C.A. §§ 7401-642 (West 1992).

[191] Chapter 11, *supra* note 2, 11-1b ("Installations will routinely seek informal FWS or NMFS review of installation plans").

[192] *Id.*

[193] *See* RAND REPORT, *supra* note 4, at 61.

The Army primarily deals with the FWS on ESA matters. The decentralized structure of the FWS increases the need for each installation to establish a good working relationship with the FWS officials exercising jurisdiction over its land area. Because FWS decisions require biological expertise, the field biologists' opinions carry great weight in the FWS's determinations. FWS decisional authority is located in the field offices, which directly service installations, and the seven supervisory regional offices. Each regional office is largely autonomous, having responsibility for decisions on matters arising within the region. Regional directors are influential, career Senior Executive Service (SES) officers. The FWS national headquarters intervenes in endangered species determinations only rarely when the region is unable to resolve an issue. FWS national headquarters intervenes infrequently in jeopardy determinations. As a result, installations generally are unable to reverse unfavorable opinions by local and regional FWS officials by appealing to the national headquarters.

Effective Section 7 Consultation

An installation must consult formally on an action that "may affect" a listed species or critical habitat unless the listing service agrees in writing that the action is "not likely to adversely affect" any listed species or critical habitat.[194] Installations usually benefit by avoiding formal consultation and by developing, through informal consultation, mutually satisfactory ways to avoid adverse effects.[195] Formal consultation provides an opportunity for the listing services unilaterally to impose conservation measures that may not be sensitive to the military mission or allow for the most effective balancing of interests from the installation's perspective. By working with the listing services through informal consultation, an installation retains substantial control over both the process and the result.

If formal consultation becomes necessary, an installation carefully should plan and prepare for it. The installation's goal should be to present a scientifically supportable—but mission sensitive—plan of action for the listing service's approval, affording little reason or opportunity for the listing service to craft its own conservation measures.[196] Installations should avoid inviting or forcing the listing services to craft and prescribe conservation measures. Simply put, installations should attempt to take control of the process by actively proposing solutions, as opposed to asking for them. Installations know their missions and the listed species and critical habitats present on their lands better than the listing services know them. Accordingly, each installation should seek to use this knowledge to its advantage.[197]

Additionally, an installation should avoid piecemeal consultations, on a project-by-project basis. An installation retains more control over the process and its future by preparing and formally consulting on comprehensive, fully integrated plans, such as the installation master plan. This approach reduces the number of formal consultations required and the resulting risk of unanticipated disruption. Additionally, piecemeal consultation exposes an installation to the possibility of shifting listing service approaches and guidance, making coherent, long-term planning difficult.

A biological assessment is the best vehicle for an installation to present its case to the listing services. An installation must base its conclusions in biological assessments on the best scientific information available. It should devote the resources necessary to prepare a scientifically credible biological assessment supporting the proposed action. Additionally, environmental law specialists should work closely with natural resources personnel to ensure that biological assessments persuasively state the installation's views and positions.

While the installation engineer or environmental director usually is responsible for conducting consultation,[198] the environmental law specialist and representatives from the operations community—such as trainers and testers—must be actively involved in the process. Installations should conduct formal consultations as carefully planned and coordinated team efforts. The installation's positions and representations to the listing services should be staffed fully and understood by the command. The installation commander should be apprised continuously of the options, trade-offs, and risks involved.[199]

During formal consultation, an installation should communicate frequently with the listing service officials involved in drafting the biological opinion.[200] The installation should seek to provide its input into the formulation of the biological opinion at every available opportunity. Informal communication should be initiated with the listing service throughout the process and merely responding to service inquiries or the draft

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[194] *See supra* text accompanying note 107.

[195] *See* Chapter 11, *supra* note 2, para. 11-7c(2).

[196] *See* RAND REPORT, *supra* note 4, at 61, 69.

[197] *Id.* at 58.

[198] Chapter 11, *supra* note 2, para. 11-7a(4).

[199] RAND REPORT, *supra* note 4, at 36, 56-57, 60-61.

[200] 50 C.F.R. § 402.14(g)(5) (1992) provides that the FWS will discuss its evaluation of the action and its effects, the basis for any finding in the biological opinion, and the availability of any reasonable and prudent alternatives with the action agency.

biological opinion should be avoided—the more input the installation has into the process the better. In the letter initiating formal consultation, the installation should request the opportunity to review the draft biological opinion.[201] This affords an installation the opportunity to provide detailed comments to the listing service on the terms of the biological opinion before its final issuance. All installations should use these opportunities to propose scientifically supportable, alternative provisions that will have less impact on military missions.

NEPA Compliance

Formal consultation under the ESA does not eliminate the need to comply with the National Environmental Policy Act of 1969 (NEPA).[202] For actions where listed species or critical habitats are present in the area directly or indirectly affected by the action,[203] installations must satisfy the requirements of both the ESA and the NEPA.[204] The presence of a listed species or critical habitat precludes the use of a categorical exclusion and therefore requires an environmental assessment (EA), environmental impact statement (EIS), or both.[205] To avoid duplication and delay, an installation simultaneously should prepare ESA and NEPA documentation and consolidate documentation to the extent feasible.[206] For example, an installation may incorporate a biological assessment into the EA or the EIS for the project or activity.[207]

Generally, an installation should determine the effect of a proposed action on listed species or critical habitat in accordance with ESA section 7 before completing NEPA documentation. Therefore, an installation may have to delay completion of NEPA documentation pending completion of formal consultation and the issuance of a biological opinion. Chapter 11 provides that installations "will not avoid consultation with the FWS or NMFS to facilitate completion of NEPA documentation."[208]

Regional Cooperation

Because natural habitats on private lands surrounding Army installations have become degraded, many installations are becoming sanctuaries of last resort for listed species. Consequently, these installations are under increasing pressure to conserve listed species at levels necessary to sustain long-term survival.

This trend is evident at Fort Bragg. Its RCW population is part of the North Carolina Sandhills population. The Sandhills contains a significant RCW population and preserving this area is essential to the recovery of the species as a whole.[209] The FWS estimates that approximately 500 RCW groups are needed within an area of contiguous, suitable habitat for the long-term survival of the Sandhills population.[210] If the destruction and fragmentation of RCW habitat on surrounding private lands continues unabated, Fort Bragg will have the only contiguous habitat capable of supporting the Sandhills population. As a result, Fort Bragg would have to attempt to increase its RCW population from 260 to 500 groups to ensure the survival of the population.[211] Increasing the RCW population to 500 groups could have a significant impact on Fort Bragg's future ability to meet mission requirements. Fort Bragg actively is considering ways to promote the conservation of RCW habitat on surrounding private lands to counter this ominous trend.[212]

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[201] *Id.* § 402.14(g)(5).

[202] 42 U.S.C.A. §§ 4321-4370b (1988); *see* DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL QUALITY: ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) (the Army regulation implementing NEPA) [hereinafter AR 200-2].

[203] 40 C.F.R. § 1508.8 ("effects" include direct and indirect effects).

[204] DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL QUALITY: ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 1-5d (23 Apr. 1990) [hereinafter AR 200-1]; Chapter 11, *supra* note 2, para. 11-6f.

[205] AR 200-1, *supra* note 204, paras. 5-3q, 6-1f; app. A, A-31i. The presence of state-listed or federally proposed species also may trigger the requirement for an environmental assessment or impact statement.

[206] *See* 50 C.F.R. § 402.06 (1992); 40 C.F.R. §§ 1502.25, 1506.4 (1992) (Council on Environmental Quality Regulations).

[207] The documentation must meet the requirements of both ESA and NEPA statutes and their implementing regulations. 50 C.F.R. § 402.06(a); *see* Council on Environmental Quality, Memorandum: Questions and Answers About the NEPA Regulations, question 21 (17 Mar. 1981), 46 Fed. Reg. 18026 (23 Mar. 1981), *as amended,* 51 Fed. Reg. 15618 (25 Apr. 1986) ("The EIS must stand on its own as an analytical document which fully informs decision makers and the public of the environmental effects of the proposal and those of the reasonable alternatives").

[208] Chapter 11, *supra* note 2, para. 11-6f(2).

[209] Fort Bragg, North Carolina, 1992 Sandhills RCW Conference Summary, at 1-2 (6 Jan. 1993).

[210] Summary Report, Scientific Summit on the Red-cockaded Woodpecker, Live Oak, Florida, at 10 (28-30 Mar. 1990).

[211] *See* U.S. Fish and Wildlife Service biological opinion to Fort Bragg, North Carolina, at 8 (31 Jul. 1992) (noting the continued fragmentation of the RCW habitat and decline of the RCW population on private lands surrounding Fort Bragg).

[212] Summary Report, *supra* note 210, at 2-5. The Environmental Defense Fund (EDF) currently is exploring the possibility of developing a pilot program in the North Carolina Sandhills to use market incentives to conserve habitat for the RCW. Private landowners would receive marketable credits for taking measures to improve the RCW habitat on their lands. The credits could be purchased by landowners desiring to take actions that normally would be precluded by ESA § 9. The EDF proposal is entitled, "Creating Market Incentives for the Conservation of Endangered Species—A proposal for the Sandhills of North Carolina," and was released to the public in April 1993.

If current trends continue,[213] more installations will face Fort Bragg's predicament. Installations should anticipate similar problems and take steps to avoid them. Chapter 11 requires installations to participate in "local, regional, and range-wide cooperative conservation plans and other collective efforts with other federal, state, and private landowners."[214] Additionally, installations must "take the lead in promoting conservation efforts on non-Army lands surrounding the installation to preclude having to sustain and recover a species population entirely on Army land."[215] Fulfilling these responsibilities will require installation creativity and will be a major challenge. In undertaking these responsibilities, installations should consider supporting regional cooperative agreements, obtaining conservation easements through organizations such as The Nature Conservancy,[216] and participating in habitat conservation plans under ESA section 10.[217]

Compliance Checklist

For installations that may have proposed, candidate, or listed species, the following checklist is a tool for environmental law specialists to use in gauging whether their installations have potential ESA compliance problems. Negative answers indicate potential problems that should be considered carefully. While this checklist is not exhaustive, it should help in identifying major problems which, if left unresolved, could lead to conflicts with military missions.

1. Has the installation surveyed potential habitats on the installation to identify and locate listed, proposed, and candidate species? If not, is it conducting 100% surveys of affected areas during the planning of all activities and projects?

2. Has the installation established management and population goals for each listed species in consultation with the listing service?

3. Has the installation established an ESMP for each listed and proposed species and critical habitat? Is the installation complying with its ESMPs and are they effective? Has the installation integrated its ESMPs into the natural resources management plan, cooperative plan, and real property master plan?

4. Is the endangered species or natural resources staff reviewing all plans for activities and projects for possible effects on proposed and listed species? Is the listing service consulted on all actions that "may affect" listed species?

5. Is the installation preparing biological assessments for major construction projects and other activities having a significant impact on the environment? Is it routinely preparing written biological evaluations for other activities?

6. Is the listing service informally being consulted on a regular basis? Is the installation's relationship with the service open and cooperative?

7. Does the installation prepare plans and proposals for listing service approval, as opposed to relying on the service to propose solutions?

8. Has the installation implemented the procedures required by Chapter 11? If not, is the installation preparing to implement them when Chapter 11 officially is published late in 1993?

9. Are the military trainers, testers, and other land users involved in endangered species management planning and decisions?

10. Are endangered species management issues receiving mainstream command and staff attention?

The New Army Endangered/Threatened Species Guidance

On 26 January 1993, the Director, Environmental Programs, issued comprehensive interim policy guidance to the field for the management of listed species and critical habitats on Army installations.[218] The ODEP will publish this new Army guidance as chapter 11, *Army Regulation (AR) 420-74, Natural Resources—Land, Forest, and Wildlife Management,*

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[213] *See supra* notes 27-33 and accompanying text.

[214] Chapter 11, *supra* note 2, para. 11-6d.

[215] *Id.*

[216] Noel Grove, *Quietly Conserving Nature*, NAT'L GEOGRAPHIC, Dec. 1988, at 818.

[217] ESA § 10(a)(2); *see* M.J. Bean et al., World Wildlife Fund, *Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience* (1991) (an excellent reference for installations involved in habitat conservation planning); U.S. Fish and Wildlife Service, Interim Guidance for Habitat Conservation Planning (March 1992); Tom Kenworthy, *Odds May Be Against Novel Effort to Protect Desert Tortoise*, WASH. POST, Mar. 21, 1993, at A20 (describing difficulties in developing a habitat conservation plan for the desert tortoise in Clark County, Nevada).

[218] Chapter 11, *supra* note 2.

upon completing its revision of that regulation in the latter part of 1993.[219] Chapter 11 contains four major parts (1) a clear statement of Army policy on ESA compliance; (2) an explanation of the major ESA provisions affecting Army installations; (3) a detailed planning and management process; and (4) a guide to section 7 consultation procedures.

Army Policy on ESA Compliance

Chapter 11 begins with a statement of Army policy on ESA compliance[220] that meshes with the broader statements of policy in the Army Environmental Strategy into the Twenty-First Century.[221] Both documents call for the Army to be a national leader in the conservation of natural resources and, specifically, the conservation of listed species.[222] Chapter 11 clarifies that "[m]ission requirements cannot justify actions violating the ESA."[223] Moreover, it provides that "the Army will work closely and cooperatively" with the listing services in carrying out its responsibilities under the ESA.[224] The Army policy, as stated in Chapter 11, is that installations should adopt a partnership approach to the services, as opposed to an adversarial one. Specifically it notes, "Working closely and cooperatively with the FWS and NMFS through informal consultation to develop mutually satisfactory courses of action is in the Army's best interest."[225]

While, in practice, the ESA requires installations to focus on single-species management,[226] scientists and policy-makers are advocating an increased emphasis on conserving ecosystems and biodiversity to prevent species from reaching the threatened or endangered point.[227] In line with the Army's leadership role in conservation, Chapter 11 recognizes the importance of these concepts. "It is an Army goal to systematically conserve biological diversity on Army land within the context of its mission. . . . The Army recognizes that healthy ecosystems play a vital role in maintaining a healthy environment."[228] While under the ESA and the current state of scientific knowledge, installations will not be able to fully replace single-species management with ecosystem approaches, Chapter 11 encourages installations to, whenever feasible, develop the management plans focusing on several species and management of the supporting ecosystems.[229]

Planning and Management Process

To achieve the policy goals espoused above, Chapter 11 provides detailed guidance to installations and major commands (MACOMs) on listed species management, which the Army has lacked in the past.[230] The policies and procedures specified in Chapter 11 are designed to institutionalize effective management practices uniformly throughout the Army and to prevent past problems from occurring.[231] The objective is to avoid future mission conflicts through effective, long-term planning and management. While the guidance imposes many requirements on installations, many required management practices already are in place at installations that have developed effective ESA compliance programs on their own.[232]

The centerpiece of Chapter 11 is the establishment of an Army-wide planning process. This planning process requires installations to establish ESMPs for listed species, proposed species, and critical habitats present on installations.[233] An installation may have one ESMP for several species if the ESMP contains the required provisions for each species.[234] Chapter 11 makes the preparation and resourcing of installation ESMPs the focal point of the Army's ESA compliance program.[235] Approved ESMPs become an integral part of the

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[219] *Id.*

[220] *Id.* para. 11-1.

[221] Kilbourne, *supra* note 70.

[222] Chapter 11, *supra* note 2, para. 11-1a; Kilbourne, *supra* note 70, at 1.

[223] Chapter 11, *supra* note 2, para. 11-1a.

[224] *Id.* para. 11-1b.

[225] *Id.*

[226] ESA § 2(b) provides that one of "[t]he purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ."

[227] *See* DEP'T OF ARMY REPORT TO CONGRESS, *supra* note 5, at 8.

[228] Chapter 11, *supra* note 2, para. 11-1c.

[229] *Id.* paras. 11-1c, 11-5b(1).

[230] See *supra* note 1 for guidance existing before Chapter 11.

[231] *See* Memorandum, *supra* note 2.

[232] *See, e.g.*, Fort Stewart, Georgia, Part IV, Fish and Wildlife Management, Integrated Natural Resources Management Plan (30 Sept. 1992).

[233] Chapter 11, *supra* note 2, para. 11-5a.

[234] *Id.* para. 11-5b(1).

[235] *Id.* para. 11-5a(1).

installation's natural resources management plan.[236] Additionally, Chapter 11 provides for the issuance of MACOM guidelines for listed species present on more than one installation within one MACOM and HQDA guidelines for listed species that cross MACOM lines.[237] Chapter 11 allows the MACOMs and HQDA flexibility in deciding the extent of the guidance needed.

Installation ESMPs must prescribe specific management guidelines and actions, consistent with MACOM and HQDA guidelines, necessary to meet the installation's conservation goals for the subject listed species and critical habitats.[238] Additionally, ESMPs must include "objective, measurable criteria which, when met, would meet the installation's conservation goals . . . and milestones for achieving the goals."[239] The establishment of conservation goals, in consultation with the listing services, is an essential step that needs to occur early in the planning process.[240] Finally, ESMPs must contain detailed checklists to assist those conducting compliance and effectiveness reviews.[241]

Chapter 11 makes the installation engineer or environmental director, as appropriate, responsible for the preparation of ESMPs.[242] It requires installations, however, to establish a team to draft each ESMP. This drafting team must comprise, at a minimum, a natural resources professional, a military trainer or tester, and an environmental law specialist.[243] Installation teams are responsible for consulting with the listing service, coordinating with state wildlife agencies, and preparing NEPA documentation. After the installation team prepares an ESMP, the Environmental Quality Control Committee (EQCC) must review it.[244] After its review, the EQCC forwards the ESMP—with its recommendations—to the installation commander for approval. An ESMP is not effective until the installation commander approves it and the supporting NEPA documentation.[245]

Upon approval, an installation must forward ESMPs to its MACOM engineer and HQDA (ODEP) for review.[246] While MACOM and HQDA concurrence are not required prior to approval of ESMPs, Chapter 11 requires these higher headquarters to monitor compliance with *AR 420-74*, identify funding and personnel requirements, and identify problems that significantly could affect future mission requirements.[247]

Under Chapter 11, attorneys at the installation, MACOM, and HQDA levels play important roles in the listed species management process. Specifically, Chapter 11 requires installation environmental law specialists to participate in drafting ESMPs, consult with the listing services, and prepare necessary environmental documentation.[248] Additionally, it requires the SJA to render a legal opinion stating whether a proposed ESMP meets the requirements of the ESA, NEPA, and applicable regulations.[249] Chapter 11 requires similar attorney involvement at the MACOM and HQDA levels.[250]

Once approved, an installation must review its ESMPs annually and update them as necessary.[251] With the annual review, installation engineers or environmental directors, as appropriate, must make a written report to the EQCC on compliance with, the effectiveness of, and progress under each ESMP.[252] Chapter 11 requires the EQCC to make its independent assessment on these issues and prepare a written report of

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[236] *Id.* para. 11-5b(2).

[237] *Id.* para. 11-5a(2).

[238] *Id.* para. 11-5b(3).

[239] *Id.* para. 11-5b(3)(a).

[240] *See supra* text accompanying note 17.

[241] Chapter 11, *supra* note 2, para. 11-5b(3)(f).

[242] *Id.* para. 11-6a(1).

[243] *Id.*

[244] *Id.* para. 11-6a(3).

[245] *Id.* para. 11-6a(4).

[246] *Id.* para. 11-6a(5), a(6).

[247] *Id.*

[248] *Id.* para. 11-6a(1).

[249] *Id.* para. 11-6a(2).

[250] *Id.* para. 11-6b, c.

[251] *Id.* para. 11-6e.

[252] *Id.* para. 11-6g(2)(a).

its findings to the installation commander.[253] The installation commander must approve and sign the EQCC report and forward it through MACOM channels to HQDA (ODEP) for review and filing.[254] The latter office, in coordination with the Environmental Law Division (ELD) Office of The Judge Advocate General and MACOMs, is responsible for developing effective solutions to any problems identified in the compliance reports.[255] Additionally, Chapter 11 requires installations to "ensure that external and internal environmental audits, conducted according to para. 12-8, *AR 200-1*, thoroughly assess compliance with, progress under, and the effectiveness of ESMPs."[256]

Chapter 11 generally provides for more HQDA and MACOM oversight of listed species management than in the past. Increased oversight serves two important ends. First, it ensures that the guidance in Chapter 11 is followed uniformly throughout the Army. In issuing Chapter 11, the Director, Environmental Programs, stressed its importance to the Army's program, noting that "[I]t is crucial that the Army adopt policies and procedures that will provide for more effective endangered species management and reduce the conflict with mission requirements."[257] Second, it identifies problems that the MACOM or HQDA can assist an installation in resolving before reaching a crisis point.

Beyond the MACOM and HQDA role in the ESMP process, installations must obtain the concurrences of the ODEP and ELD before initiating formal consultation.[258] This requirement should preclude an installation from entering into formal consultation without adequate preparation. Additionally, an installation immediately must report telephonically any ESA violation and provide a written report within seven days.[259] "Violations include failure to formally consult or prepare a biological assessment as required by the ESA, taking of listed species, etc."[260] Thereafter, installations must coordinate with the ODEP and ELD "in taking final action to correct any endangered species management problems contributing to the ESA violation(s)."[261]

ESA section 7(f) requires the listing services to develop and implement recovery plans for listed species. These plans are important to installations because they guide the listing services in conducting consultations under section 7(a)(2).[262] Chapter 11 encourages active Army participation in the development process, including representation on the recovery teams formed by the listing services to draft recovery plans.[263] Moreover, Chapter 11 provides for MACOM and HQDA coordination of Army participation throughout the recovery plan development process.[264]

Chapter 11 encourages installations to use the Army's Integrated Training Area Management (ITAM) program to "balance land use for military training and testing with natural resources conservation requirements, including the protection of listed species and critical habitats."[265] The ITAM is a technical program developed by the United States Army Construction and Engineering Research Laboratory for integrating Army land use requirements with the carrying capacity of the land.[266] Installations must integrate the protective and conservation provisions of ESMPs into their ITAM programs.[267]

Finally, Chapter 11 requires installations with listed species or critical habitats to establish mandatory training programs for personnel who may have contact with listed species or their habitats.[268] Chapter 11 specifies that the training include information on identifying listed species, their habitats, and warning markings; ESA requirements; the importance of protecting biodiversity; and Army ESA policy.[269]

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[253] *Id.* para. 11-6g(2)(b).

[254] *Id.* para. 11-6g(2)(c), (d).

[255] *Id.* para. 11-6g(2)(d).

[256] *Id.* para. 11-6g(1).

[257] Chapter 11, *supra* note 2.

[258] *Id.* para. 11-7b(1).

[259] *Id.* para. 11-9.

[260] *Id.* para. 11-9a.

[261] *Id.* para. 11-9b.

[262] *Id.* para. 11-8a.

[263] *Id.*

[264] *Id.*

[265] *Id.* para. 11-12.

[266] Fact Sheet EN 13, U.S. Army Construction Engineering Research Laboratory, Integrated Training Area Management (ITAM) (Nov. 1990).

[267] Chapter 11, *supra* note 2, para. 11-12b.

[268] *Id.* para. 11-10.

[269] *Id.*

Conclusion

The Army has made significant progress over the last year toward improving its ESA compliance posture. Ultimately, its success in balancing ESA and mission requirements depends upon the effectiveness of endangered species management at the installation level. The guidance provided in Chapter 11 should assist installations in developing effective programs. As an essential part of the ESA compliance team, environmental law specialists play an important role in this process. To fulfill their expanded roles effectively under the new Chapter 11 guidance, environmental law specialists need to know more than the legal requirements of the ESA and implementing regulations. They should understand the basic elements of an effective endangered species management program. The information in this article has alerted environmental law specialists to their responsibilities under Chapter 11 and should allow them better to assist their installations in effectively balancing ESA and mission requirements.

Limiting Defense Counsel's Ethical Obligation to Disclose Client Perjury Revealed After Adjournment: When Should the "Conclusion of the Proceedings" Occur?

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Suppose that after a court-martial adjourns the accused informs the trial defense counsel that the accused committed perjury during the trial. What ethical obligation, if any, does the defense counsel have?

Army Rule for Professional Conduct for Lawyers (Army Rule) 3.3(a)(4) requires a lawyer to "take reasonable remedial measures" after learning that material evidence that was admitted at a court-martial was false.[1] Moreover, Army Rule 3.3(b) provides that the duty of candor owed toward the tribunal continues until the conclusion of the proceeding. The comment to Rule 3.3 states, "A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation."[2] Army Rule 3.3(b) and the comment are identical to their counterparts in the Model Rules of Professional Conduct adopted by the American Bar Association.[3]

One of the first scholarly analyses to appear after the Army Rules were adopted gave Rule 3.3(b) its plain meaning and concluded that "if an Army attorney learns a client has committed perjury after trial, he is not required under the Rules to reveal the misconduct."[4] Nevertheless, the author criticized the rule, asserting that it "does not go far enough."[5] Referring to the military practice of trial defense counsel representing the accused until the convening authority's action,[6] the author proposed that "[a] more logical point to terminate the requirement to disclose perjury is when the trial defense counsel is no longer involved in the case as the accused's attorney."[7]

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[1] DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. On 1 June 1992, AR 27-26 superseded the original version of the ARMY RULES OF PROFESSIONAL CONDUCT, DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA PAM. 27-26]. In AR 27-26 and DA PAM. 27-26, Rule 3.3 and its comment virtually are identical.

[2] *Id.*

[3] MODEL RULES OF PROFESSIONAL CONDUCT (1983).

[4] Bernard Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 37 (1989).

[5] *Id.* at 63.

[6] UCMJ art. 60 (1988).

[7] Ingold, *supra* note 4, at 63.

More recently, another commentator[8] quoted United States Court of Military Appeals dicta[9] in support of the argument that the convening authority's actions mark the conclusion of a court-martial. Until then, it can be argued that the defense counsel has an obligation to disclose false evidence to the court-martial because the proceeding has not concluded.

Unfortunately, although several changes to the original Army Rules became effective on 1 June 1992, Rule 3.3(b) was not clarified.[10] Accordingly—with respect to the duration that the obligation of candor to a tribunal exists—Rule 3.3 fails to provide any clear guidance tailored to court-martial practice. Amending the rule, or its comment, to specify that the convening authority's action terminates any obligation to remedy false evidence presented at a court-martial would provide some clarity, but would not solve a variety of practical, policy, and constitutional objections.

If the court-martial results in the acquittal of the accused of all charges and specifications, the convening authority takes no action.[11] Therefore, when the accused testifies at trial on the merits, subsequently is acquitted, and some time afterwards confides in defense counsel that his testimony was untruthful, designating the convening authority's action as the "conclusion of the proceeding"[12] fails to provide "a reasonably definite point for the termination of the obligation."[13]

An acquittal also limits the options available for taking "reasonable remedial measures."[14] Former jeopardy is a bar to retrying the accused for the same offense.[15] Prosecution for perjury also may be foreclosed because of the doctrine variously labeled as "issue preclusion,"[16] "collateral estoppel,"[17] or "res judicata."[18] For example, when an accused's perjured testimony at trial raises the defense of alibi and the accused is acquitted, the accused later may not be prosecuted for perjury based upon this false testimony. A finding of guilty of perjury logically would be inconsistent with the acquittal in the first trial.[19]

Even when the accused *is* convicted of an offense at the first trial, limited remedial measures are available following any posttrial admissions of perjury. Although the military judge may direct a posttrial session before the record of trial is authenticated and even though the convening authority may direct a posttrial session before taking action,[20] posttrial sessions offer little more than a forum for the defense counsel to reveal client perjury. The disclosure of perjury could not be a basis for increasing the severity of the sentence adjudged[21] nor for reconsidering a finding of not guilty to any of the specifications.[22] Similarly, meeting the high standard for declaring a mistrial is unlikely when an accused's perjury is revealed after a trial resulting in a conviction.[23]

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[8] TJAGSA Practice Note, *Ethically Speaking, When Is the Conclusion of a Court-Martial?*, ARMY LAW., Jan. 1992, at 37.

[9] United States v. Allen, 33 M.J. 209, 215 (C.M.A. 1991).

[10] On that date, AR 27-26, *supra* note 1, superseded DA PAM. 27-26, *supra* note 1.

[11] UCMJ art. 60; MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1107; 1106(e) analysis (1984) [hereinafter MCM].

[12] AR 27-26, *supra* note 1, rule 3.3(b).

[13] *Id.* rule 3.3, comment.

[14] *Id.* rule 3.3(a)(4).

[15] U.S. CONST. amend. V; UCMJ art. 44; MCM, *supra* note 11, R.C.M. 907(b)(2)(C)(i). As interpreted by the courts, the double jeopardy clause of the Fifth Amendment "attaches particular significance to an acquittal." United States v. Scott, 437 U.S. 82, 91 (1978). Acquittal bars retrial for the same offense, even if "the acquittal was based upon an egregiously erroneous foundation." Fong Foo v. United States, 369 U.S. 141, 143 (1962).

[16] "The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." C. WRIGHT, LAW OF FEDERAL COURTS § 100A (1983).

[17] "'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It simply means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue again cannot be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970).

[18] United States v. Williams, 341 U.S. 58, 63-65 (1951); United States v. Marks, 45 C.M.R. 55 (C.M.A. 1972); United States v. Smith, 15 C.M.R. 369 (C.M.A. 1954).

[19] United States v. Hooten, 30 C.M.R. 339 (C.M.A. 1961) (court-martial for perjury was barred when at prior court-martial for bad check offenses, accused's testimony raised defense of mistake and accused was acquitted, even though accused confessed after trial that his testimony was false); United States v. Martin, 24 C.M.R. 156 (C.M.A. 1957) (the acquittal of the accused at his court-martial for sodomy in which his testimony raised the defense of alibi precluded his conviction at a subsequent court-martial for perjury based upon his testimony at the prior trial); *see, e.g., Ashe*, 397 U.S. at 443-45; *Williams*, 341 U.S. at 63-65; *cf. Marks*, 45 C.M.R. at 55 (court-martial conviction for housebreaking and larceny of another soldier's property reversed because of res judicata and collateral estoppel when accused previously had been acquitted in United States district court of stealing government property at the same time and place after a trial in which the accused personally testified and raised an alibi defense). *See also* MCM, *supra* note 11, R.C.M. 905(g) discussion, analysis app. 21, at A21-48.

[20] MCM, *supra* note 11, R.C.M. 1102(d).

[21] *Id.* R.C.M. 1009(b), R.C.M. 1102(c)(3).

[22] *Id.* R.C.M. 1102(c)(1)(2).

[23] A judge may declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." *Id.* R.C.M. 915(a). *See generally* Arizona v. Washington, 434 U.S. 497 (1978); United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990) ("Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent a manifest injustice against the accused").

When the accused is convicted, however, the accused may be prosecuted at a second trial for committing perjury at the first trial.[24] Former jeopardy does not bar the perjury prosecution because the offenses differ. Issue preclusion does not apply because the finding of guilty indicates that the issue was decided against the accused.[25] A subsequent prosecution for perjury, however, does not "remedy" the perjury in the same sense that revealing perjury during a trial remedies the taint by enabling the trier of fact to reach a reliable decision untainted by falsehood.

Examining military authorities for a definition of "conclusion of the proceeding" to identify the time required to rectify client perjury, is futile and misguided. Court-martial proceedings conclude at various stages for purposes that have nothing to do with "the basic principles underlying" the Army Rules.[26] The Military Rules of Evidence provide that, for purposes of impeachment by evidence of conviction of a crime, a court-martial conviction occurs when a sentence is adjudged.[27] Findings of guilty may be reconsidered before the sentence is announced.[28] A sentence also may be reconsidered before the record of trial is authenticated,[29] but the sentence normally may not be increased upon reconsideration.[30] A sentence to confinement begins to run when adjudged;[31] other punishments are effective when ordered executed.[32] Several court opinions observe that the results of a court-martial are not final until the convening authority takes action.[33] In contrast, another court has described action by the convening authority as a "first step in an accused's climb up the appellate ladder."[34] When a finding of guilty exists, the Uniform Code of Military Justice provides that, for purposes of former jeopardy, a court-martial is not a trial until the completion of final review of the case.[35]

Terminating a defense counsel's obligation to reveal client perjury should be based on weighing the different interests involved. The right to effective assistance of counsel is fundamental,[36] having constitutional and—for the military accused—statutory foundations.[37] The attorney-client relationship continues after trial until appellate counsel commences representation.[38] In the interim, trial defense counsel are expected to perform a variety of posttrial duties on behalf of their clients.[39] Once established, the attorney-client relationship may be terminated only for "good cause"[40]—a term that the Court of Military Appeals has applied to make the termination of the attorney-client relationship difficult. "Absent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level."[41] Accordingly, replacing a defense counsel that has been discharged from the Army is considered to be good-cause,[42] but

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[24] United States v. Williams, 341 U.S. 58 (1951); United States v. Long, 857 F.2d 436, 446 n.8 (8th Cir. 1988).

[25] *Williams*, 341 U.S. at 64 n.3. The Government may not employ the issue preclusion doctrine to avoid the requirement to prove the perjury by presenting evidence at the trial. Ashe v. Swenson, 397 U.S. 436, 464-65 (1970) (Burger, C.J., dissenting).

[26] AR 27-26, *supra* note 1, para. 6h.

[27] MCM, *supra* note 11, MIL. R. EVID. 609(f).

[28] *Id.* R.C.M. 924.

[29] *Id.* R.C.M. 1009(a).

[30] *Id.* R.C.M. 1009(b). A sentence may be increased on reconsideration, if it was less than the mandatory sentence required for the offense.

[31] UCMJ art. 57(b).

[32] *Id.* art. 57(c).

[33] *See, e.g.*, United States v. Allen, 33 M.J. 209, 215 (C.M.A. 1991); United States v. Dorsey, 30 M.J. 1156, 1159 (A.C.M.R. 1990) ("A court-martial at the trial level is a three-part whole: trial on the merits, presentencing proceedings, and post-trial submissions to the convening authority prior to the latter's action").

[34] United States v. Wilson, 26 C.M.R. 3, 6 (C.M.A. 1958).

[35] UCMJ art. 44(b).

[36] *E.g.*, Strickland v. Washington, 466 U.S. 668 (1984); United States v. Scott, 24 M.J. 186 (C.M.A. 1987).

[37] U.S. CONST. amend. VI; UCMJ arts. 27, 38(b), 38(c).

[38] United States v. Palenius, 2 M.J. 86 (C.M.A. 1977).

[39] MCM, *supra* note 11, R.C.M. 502(d)(6) discussion; *e.g.*, United States v. Stephenson, 33 M.J. 79 (C.M.A. 1991); United States v. Harris, 30 M.J. 580 (A.C.M.R. 1990).

[40] MCM, *supra* note 11, R.C.M. 505(d)(2), 506(c); United States v. Iverson, 5 M.J. 440 (C.M.A. 1978).

[41] *Iverson*, 5 M.J. at 442-43 (footnotes omitted).

[42] *E.g.*, United States v. Edwards, 12 M.J. 781 (A.C.M.R. 1982); United States v. Jones, 4 M.J. 545 (A.C.M.R. 1977).

reassigning a defense counsel to a distant installation is not.[43] Perhaps because of the uncertainty surrounding the good cause standard, some defense counsel who deployed to Southwest Asia during Operation Desert Shield and Storm continued to be responsible for the posttrial representation of clients tried before deployment until the convening authority took action.[44] The court's reluctance in substituting counsel—even if only for posttrial processing leading to action—reflects the significance the courts have placed on a trial defense counsel's continued representation of the accused.[45]

The important posttrial attorney-client relationship would be destroyed by an interpretation of the Army ethical rule that requires disclosure by a defense counsel who learns of client perjury after trial. Any interpretation requiring a defense counsel to disclose the completed crime of perjury would be contrary to the evidentiary[46] and ethical rules[47] that recognize the confidentiality of disclosures of past crimes to lawyers by their clients. The Supreme Court has observed that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[48] A strong case for applying attorney-client confidentiality principles occurs when clients in confidence disclose information to their attorneys about their completed crimes. In determining the limits of this principle—that balances the cost of withholding relevant evidence from fact-finders—the Supreme Court declared, "The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—'ceas[es] to operate at a certain point, namely, when the desired advice refers not to prior wrongdoing, but to future wrongdoing.'"[49] With respect to client perjury, the integrity of an attorney who knowingly offers false evidence is called into question, but the integrity of an attorney who was duped by his or her client and did not learn of the falsity until after trial, is not. This distinction balances the competing interests of past crimes—which are confidential—and ongoing criminal activities or contemplated future criminal activities—which are not. When this balancing is applied to Army Rule 3.3,[50] the rule can be interpreted as not requiring the trial defense counsel to divulge client perjury revealed by the client only after adjournment, because this scenario can be characterized as a past crime. Alternately, an ethical rule that requires defense counsel after adjournment to reveal admissions by their clients to the crime of perjury, but does not require counsel to reveal admissions by their clients to more serious crimes—including violent crimes perpetrated in revenge against the judge or court members—would elevate the principle of candor to the tribunal above all others.

The Supreme Court's decision in *Nix v. Whiteside*[51] fails to support an ethical rule requiring disclosure of perjury discovered after trial. The Court, finding no Sixth Amendment violation to the right of effective assistance of counsel[52] when a defense counsel refused to allow his client to present perjured testimony at trial, repeatedly observed that the defense counsel may have been guilty of the crime of subornation of perjury if he had assisted his client in presenting false testimony.[53] The Court expressly recognized the distinction between disclosure of planned future crimes and past completed crimes: "An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct."[54]

Several constitutional principles[55] support an interpretation of Rule 3.3 that would not require defense counsel to disclose

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[43] *E.g.*, United States v. Miller, 2 M.J. 767 (A.C.M.R. 1976) (reassignment of trial defense counsel from Germany to Georgia after trial, but before action, was not good cause for substitution of counsel); United States v. Murray, 42 C.M.R. 253 (C.M.A. 1970) (reassignment of defense counsel to Hawaii before commencement of trial was not good cause for replacement of counsel).

[44] *E.g.*, United States v. Hawkins, 34 M.J. 991 (A.C.M.R. 1992); United States v. Garner, 34 M.J. 575 (A.C.M.R. 1992).

[45] United States v. Palenius, 2 M.J. 86 (C.M.A. 1977); United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

[46] MCM, *supra* note 11, MIL. R. EVID. 502.

[47] AR 27-26, *supra* note 1, rule 1.6.

[48] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Over a century ago, the Supreme Court stated the purpose of the privilege,

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

[49] United States v. Zolin, 491 U.S. 554, 562-63 (1989) (quoting 8 WIGMORE EVIDENCE § 2298, at 573 (McNaughton Rev. 1969)).

[50] AR 27-26, *supra* note 1, rule 3.3(b).

[51] 475 U.S. 157 (1986).

[52] Strickland v. Washington, 466 U.S. 668 (1984).

[53] *Nix*, 475 U.S. at 162, 169.

[54] *Id.* at 174.

[55] "[T]he Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics." Whiteside v. Scurr, 744 F.2d 1323, 1327 (8th Cir. 1984), *rev'd* on other grounds *sub nom. Nix*, 475 U.S. at 157.

client perjury committed during the trial that is unknown to counsel until after adjournment. As to past completed crimes, clients can assert the attorney-client privilege to prevent their attorneys from disclosing incriminating statements that they have made to their attorneys.[56] An ethical rule requiring a defense counsel to disclose a client's past completed crime of perjury apparently would conflict with the client's Fifth Amendment right against self-incrimination.[57] Furthermore, such disclosure would destroy the relationship of trust and confidence between attorney and client, thereby violating the Sixth Amendment right to effective assistance of counsel.[58]

Concluding that a defense counsel has no ethical obligation to disclose client perjury when the counsel learns of the perjury after adjournment of a court-martial fails to resolve a related, but much easier, question: "What use, if any, may defense counsel make of the false information in any submission made to the convening authority for consideration before taking action?"[59] A defense counsel may not "make a false statement of material fact or law to a third person"[60] or "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[61] Therefore, a defense counsel's submission to the convening authority may make no use of any evidence that the attorney knows to be false. For example, when the accused testifies at trial to providing financial support to a former spouse and admits to counsel after adjournment that no support ever was provided, the defense counsel obviously may not seek mitigation of forfeitures based upon the false testimony the accused made about spousal support.[62] The requirement that counsel make no use of information known to them to be false is analogous to the military practice—prior to adopting the Rules of Professional Conduct for Lawyers—which did not require a defense counsel explicitly to disclose a client's perjury during trial, but forbade a counsel from making any use of the false evidence in argument.[63]

Clarifying the duration of candor obligated from a counsel towards the tribunal easily can be accomplished. Adding the sentence, "For purposes of this Rule, the conclusion of a court-martial proceeding is adjournment," to the comment accompanying Rule 3.3 would provide counsel with a "bright line" and practical timeframe with which to address any perjured testimony committed by the client during the court martial.[64]

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[56] *Supra* notes 46, 49, 54 and accompanying text.

[57] *Cf.* Fisher v. United States, 425 U.S. 391, 404 (1976) (when the client would be privileged from producing a document by the Fifth Amendment, the client's attorney having possession of the document also would not be bound to produce the document).

[58] *Cf.* Lowery v. Cardwell, 575 F.2d 727, 732 (9th Cir. 1978) (Hufstedler, J., concurring) (observing that "counsel's . . . interest in saving himself from potential violation of the canons was adverse to his client. . . ."). *See generally* Jones v. Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) "To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court."

[59] MCM, *supra* note 11, R.C.M. 1105, 1106(f)(4).

[60] AR 27-26, *supra* note 1, rule 4.1(a).

[61] *Id.* rule 8.4(c).

[62] *But cf. id.* rule 3.3 (a)(4) (arguably implying that defense counsel may "offer evidence [to convening authority] that the lawyer knows to be false" by not disclosing such false testimony prior to the Staff Judge Advocate's forwarding to the convening authority for final action); MCM, *supra* note 11, R.C.M. 1107.

[63] United States v. Elzy, 25 M.J. 416 (C.M.A. 1988); United States v. Radford, 14 M.J. 322 (C.M.A. 1982). This approach to client perjury during trial was suggested by the American Bar Association Standards for Criminal Justice, The Defense Function, proposed section 4-7.7 (1971).

[64] AR 27-26, *supra* note 1, rule 3.3, comment. A comment "explains and illustrates the meaning and purpose" of a Rule. *Id.* para. 7j.

Of Sausage and Laws: The Federal Facilities Compliance Act

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"Legislation is like sausage: it's better not to watch it being made."
- Otto von Bismarck

Congress does its work on a two-year cycle which corresponds with biennial elections. Legislation not passed during this two-year cycle cannot be carried over; it must begin anew in the next cycle. Even the casual observer of our legislative system can attest to Congress's propensity for putting nearly everything off until the last possible minute. Therefore, every two years, just before Congress adjourns, dozens of new laws are passed in the final hours of the session to prevent their

demise. To understand fully new legislation, practitioners should examine not only the final written product, but also the law's origin. Knowing the politics of each law puts flesh and bones on cold wording and makes each piece far more understandable. In the case of the Federal Facilities Compliance Act (FFCA), a healthy curiosity about its origin will lead to a better understanding of its content.

Before beginning a chronological examination of the FFCA, the reader should understand some basic facts.

> 1. The Resource Conservation and Recovery Act (RCRA) requires everyone—including federal agencies—to comply with hazardous waste laws and subjects them to enforcement sanctions.[1]
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> 2. Unless explicitly rescinded by law, the federal government is presumed to be immune from some sanctions—such as state and local fines—because of the doctrine of sovereign immunity.[2]
>
> 3. The RCRA outlines the rules and allows the collection of fines of up to $25,000 per day per violation, but does not state clearly that the doctrine of sovereign immunity has been waived.
>
> 4. Some members of Congress—as well as state officials and judges—always have believed that the RCRA expressed an adequate intention by Congress to waive sovereign immunity. From 1976 to late 1992, frustration existed over federal agencies' virtual immunity from enforcement. This frustration was heightened by the Environmental Protection Agency (EPA) and the Department of Justice extracting severe fines under the RCRA for noncompliance by state agencies and municipalities.[3]

Armed with this background and coupled with the FFCA creators' desires to demonstrate clearly a waiver of sovereign immunity, the reader should be prepared to enter the world of lawmaking on Capitol Hill.

The FFCA[4] was passed in the waning hours of the 102d Congress, but it did not appear over night. The bill had an exceptionally well-documented history for a number of reasons; the most significant was that the bill was championed in the Senate by the Majority Leader and junior Senator from the State of Maine, Senator George J. Mitchell.[5] Senator Mitchell had a number of federal installations in his state—to include Loring Air Force Base, Portsmouth Naval Ship Yard, and Brunswick Naval Air Station—and clearly had a vested interest in making the Bush Administration "toe the environmental mark." The FFCA originated in the 100th Congress when Congressman Dennis Eckart from Ohio introduced legislation on the subject. The FFCA began to gain prominence in 1989 when, during the second session of the 101st Congress, Senator Mitchell introduced S. 1140. Studies done by the Government Accounting Office in 1986, and the Comptroller General in 1989, had convinced Senator Mitchell that federal facilities significantly were out of compliance with the RCRA and the Administration was not motivated properly to rectify this situation.[6] Senator Mitchell's bill was a companion to H.R. 1056, which was introduced in the House of Representatives by Congressman Eckart.[7] Two bills, identically worded, often will be introduced in the House and Senate at approximately the same time to accelerate enactment. The desire is for both bills to receive concurrent consideration in the appropriate committees and then for them to be referred to the House and Senate floors for vote. If both bills pass their respective houses without amendment and are still identical, little remains to be done for them to become an enrolled bill. Theoretically, this maneuver could save half the processing time necessary to make a single bill sequentially considered by the House and Senate. The consequences of the concurrent referral and consideration would become obvious in the life of the FFCA as it neared passage in 1992.

House Resolution 1056 first drew fire from the Administration. On July 14, 1989, the Executive Office of the President (EOP) issued a statement of administration policy (SAP) addressing H.R. 1056's perceived shortcomings.[8] Even though the SAP agreed with the principle behind the bill, the EOP felt the bill would be counter-productive.

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[1] Solid Waste Disposal Act, 42 U.S.C. § 6961 (1976).

[2] BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).

[3] Discussion with Laurent R. Hourcle, Attorney, Environmental Law, Office of the General Counsel, Department of Defense.

[4] Solid Waste Disposal Act, 42 U.S.C. § 6961 *as amended by* Federal Facilities Compliance Act of 1992.

[5] Davis, *Senate Panel Renews Battle Against Federal Facilities*, CONG. Q., May 18, 1991, at 1275, col. 1.

[6] S. 1140, 101st Cong., 1st Sess. (1989); 138 CONG. REC. S14,755 (daily ed. Sept. 23, 1992).

[7] H.R. 1056, 101st Cong., 1st Sess. (1989).

[8] Executive Office of the President of the United States, "Statement of Administrative Policy", *H.R. 1056-Federal Facilities Compliance Act* (Eckart (D) Ohio), July 14, 1989 [hereinafter EOP Statement].

While H.R. 1056 was intended to compel federal agencies to comply with management standards for newly generated waste, it also could be used to enforce schedules for the cleanup of "old" contamination. Federal agencies—such as the Department of Defense (DOD) with over 1700 installations that require cleanup actions—expressed concern that states with aggressive enforcement programs would disrupt an orderly risk-based sequencing of cleanup actions.[9] They asserted that, if passed, the FFCA would enable the EPA, states, and municipalities to fine offending federal entities $25,000 per day, per violation, until the infractions could be cleaned up. The SAP asserted that these fines and penalties would drain the funds necessary to clean up sites, thereby defeating the avowed purpose of the FFCA.[10]

The SAP was followed five days later by a letter signed by Deputy Secretary of Defense, Donald J. Atwood, to Representative Robert H. Michel, House Minority leader.[11] This letter reiterated the sentiments of the SAP. Senator Mitchell and Representative Eckart were beginning to hear some strong and specific Administration opposition to their legislation.

Approximately one year later, Pentagon officials commented on S. 1140. On July 11, 1990, Secretary of Defense, Richard Cheney, wrote Senator Sam Nunn, Chairman of the Senate Armed Services Committee, expressing his opinion on the legislation. The Secretary wrote the following:

> It would be fiscally imprudent to expose our budget to the potential unprogrammed liability authorized by S. 1140. Our estimates show the range of the liability to be between $250 million and $25 billion. I want that money to go toward cleaning up the environment and reducing the pollution we generate in our daily operations. . . .[12]

These three pieces of correspondence—the SAP and the two DOD letters—were to be the beginning of a clash between the Administration and Congress that would last over two years and finally would produce the FFCA in a form that could be brought about only through the political art of compromise.

Both S.1140 and H.R. 1056 died in the 101st Congress without becoming law. House Resolution 1056 passed the House of Representatives by a vote of 380-to-39, but S. 1140 never was voted on by the Senate.[13] These bills, however, polarized the two opposing views on the waiver of sovereign immunity and allowed both sides to articulate their rationales. In addition, the House vote served notice that Congress considered this bill a significant piece of environmental legislation with strong backing. Accordingly, the stage was set for a showdown during the 102d Congress.

Before the 102d Congress was a dozen weeks old, Senator Mitchell introduced S. 596, legislation that was almost identical to its predecessor, S. 1140.[14] Twenty-three Senators signed on as cosponsors of the bill.[15] Senator Mitchell stated that, during the 101st Congress, he had "introduced the first Senate legislation to make it clear that Federal facilities are not above the law and must comply with the law governing hazardous waste."[16] Senator Mitchell was well aware that the federal government always had been "under the law" because the RCRA requires federal facilities to comply with its provisions.[17] What the Senator meant was that he had introduced legislation to compel federal facilities to comply by passing a law that threatened to take funds from those installations if they failed to meet the RCRA standards. Senator Mitchell clarified this when he stated that his legislation was designed to waive sovereign immunity in relation to RCRA because, without such a waiver, "there is only voluntary compliance. History demonstrates that voluntary compliance does not work."[18]

The Administration and Congress were not to be left alone to construct this law. Since 1976, the federal district and circuit courts had been at odds over the possible waiver of sovereign immunity by the RCRA.[19] The majority of the courts that had been given the opportunity to rule on the RCRA waiver of sovereign immunity issue appeared to be convinced the waiver had not been sufficient. A strong decision rendered in Maine, however, convinced Senator Mitchell—a former United States district court judge before becoming a Senator—that RCRA's waiver had been adequate.[20] Armed

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[9] H.R. 1056, *supra* note 7.

[10] EOP Statement, *supra* note 8.

[11] Letter from Donald J. Atwood, Deputy Secretary of Defense, to Congressman Robert H. Michel (July 19, 1989) (discussing H.R. 1056).

[12] Letter from Richard Cheney, Secretary of Defense, to Senator Sam Nunn and others (July 11, 1990) (discussing S1140).

[13] 137 CONG. REC., S14,901 (daily ed. Oct. 17, 1991).

[14] S. 596, 102d Cong., 1st Sess. (1991). *See also* 137 CONG. REC. S2947-49 (daily ed. Mar. 7, 1991).

[15] 137 CONG. REC. S2947-49 (daily ed. Mar. 7, 1991), *supra* note 14.

[16] 138 CONG. REC. S14,755 (daily ed. Sept. 23, 1992), *supra* note 6.

[17] Solid Waste Disposal Act, 42 U.S.C. § 6961 (1976).

[18] 138 CONG. REC. S14,755 (daily ed. Sept. 23, 1992), *supra* note 6.

[19] United States Dep't. of Energy v. Ohio, 112 S. Ct. 1627 (1992).

[20] CONG. REC., *supra* note 6.

with a home-state decision, Senator Mitchell firmly believed that the enactment of the RCRA waived sovereign immunity and that the federal government had been subject to fines and penalties since 1976, when the RCRA originally was enacted. On September 23, 1992, Senator Mitchell addressed the Senate, "The legislation will return to the States the enforcement tools we thought we had given them in 1976. A waiver of sovereign immunity moves us from the disorder of Federal noncompliance to the forum in which all entities are subject to the same law and to full enforcement action."[21]

The Administration saw this in an entirely different light. First, as mentioned in Secretary Cheney's letter, the problem of using funds to pay fines, instead of using the monies to clean up the environment, persisted.[22] Second, if S. 596 was intended to clarify an earlier waiver of sovereign immunity, the Administration feared it could be made to apply retroactively and subject agencies to fines and penalties on violations back to 1976, when Congress passed the RCRA.[23] Third, fines and penalties paid to states, the EPA, or other organizations could be spent on anything the recipient desired and would not necessarily go to alleviate environmental distress.[24]

Within a week of S. 596's introduction, the National Conference of State Legislatures and others began writing members of Congress in support of the bill.[25] Not surprisingly, they saw the bill in the same light as did Senator Mitchell.[26] By April 5, 1991, S. 596 had twenty-seven Senators as cosponsors. Many in the Administration were convinced some form of legislation would pass in the 102d Congress. To ensure that any bill passed would require the DOD to receive equal treatment in most areas, plus special consideration in areas where its federal facilities were unique, the DOD began constructing the "Federal Facilities Improvements Bill".[27] The bill was a reworking of ideas previously conceived by the DOD during the 101st Congress, but never was fulfilled because Congress apparently was unwilling to pass an FFCA during the session. The 102d Congress, on the other hand, appeared to be serious about the bills and ready to take action. Furthermore, because 1992 was an election year, "The Environmental President" was not likely to veto any environmental bill, no matter how egregious he may have felt it to be.

On April 16, 1991, the Committee on Environment and Public Works, Subcommittee on Environmental Protection, chaired by Senator Max Baucus of Montana, held a hearing. During that hearing, Mr. Thomas E. Baca, Deputy Assistant Secretary of Defense for Environment, began the task of converting the Federal Facilities Compliance Act into the Federal Facilities Improvements Act.[28] This move was an attempt to shift the emphasis away from punishing federal facilities for noncompliance by fining them, to an emphasis on allowing the Administration to comply with RCRA at a reasonable pace. In addition, the Administration wanted the Act to make exceptions when it was performing unique activities peculiar to its area of responsibility. Mr. Baca listed seven areas with which the Administration took issue and hinted that if these areas could be dealt with appropriately, the Administration might be able to support it.[29]

In his opening remarks at the hearing, Senator John Chafee of Rhode Island made the following statement:

> Last year, the Administration opposed legislation that was virtually identical to the bill before us today. . . . [W]e understood that the Administration had decided to support S. 596, provided that this Committee consider issues that make compliance with RCRA by the Federal agencies difficult or impossible. Such a change in position would have been a significant step forward. However, according to the testimony submitted today, the Administration will continue to oppose S. 596 until certain conditions are met. Mr. Chairman, I am extremely disappointed that the Administration was unable to express its conditional support for S. 596. I urge the Administration to reconsider its position. If that change can be accomplished, the climate for this Committee's consideration of the Administration's proposals to make changes in RCRA will be greatly improved.[30]

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[21] *Id.*

[22] Letter from Richard Cheney, *supra* note 12.

[23] Discussion with Laurent R. Hourcle, *supra* note 3.

[24] Letter from Richard Cheney, *supra* note 12.

[25] Letter from John Martin and Walter Baker to Senator Alan K. Simpson (Mar. 13, 1991) (urging support of S. 596).

[26] *Id.*

[27] Memorandum from the Assistant Secretary of Defense (Production and Logistics) to the Deputy Secretary of Defense (Apr. 3, 1991) (discussing strategy for the Federal Facilities Compliance Act).

[28] *Federal Facilities Compliance Act of 1991: Hearings on S. 596 Before the Senate Environment and Public Works Committee*, 102d Cong., 1st Sess. (Apr. 16, 1991) (testimony by Mr. Thomas E. Baca, Deputy Assistant Secretary of Defense (Environment)).

[29] *Id.*

[30] *Id.*

By May 2, 1991, S. 596 had twenty-nine cosponsors. On the same date, to speed the process, Representative Eckart again introduced a companion bill, H.R. 2194, which carried 140 Representatives as cosponsors.[31] After seven lengthy speeches in support of the bill, it was referred to the House Committee on Energy and Commerce.[32] By May 8, 1991, the Subcommittee on Transportation and Hazardous Materials had held a hearing and marked S. 596 on the same day.[33]

On May 15, the Senate Environment and Public Works Committee marked S. 596 and—despite substantial reservations by some of the Committee's members—voted sixteen-to-zero to approve the bill for submission to the Senate. On 15 May, 1991, Senator John Warner, a Virginian and then senior republican on the Senate Armed Services Committee, made the following statement:

> I believe there are legitimate issues remaining which I raised during the Committee's earlier review of this legislation which have not been fully addressed. . . . My primary concern is that by amending existing law to subject the Federal government to fines and penalties for violations of the hazardous waste laws, S. 596 may actually delay and/or reduce clean-up efforts in some cases. Last month during hearings on this bill we heard from the Department of Defense. . . that the bill did not go far enough in "leveling the playing field."[34]

Senator Warner went on to express some concerns that he shared with the DOD. His remarks clarified that the Administration and congressional staffs had been busy attempting to reconcile differences by formulating amendments to S. 596 that would convince the Administration to back the legislation.[35] Intense coordination between the two branches of government had been the order of the day for some time. Senator Warner's frustration with the slowness of the Administration was evident in that same May 15 statement:

> I am disappointed that at this time, the Administration has no official package of amendments to offer to accomplish these and some of the other issues that have been raised in order to make this bill supportable by the Administration. I am aware that the Administration is working hard though to finalize a package of amendments. While I have nothing to offer the Committee at this time, I want the Committee to know that I reserve my options to introduce amendments on the Floor. Again, I believe these amendments will be constructive and will improve, not detract, from this Bill.[36]

While the report was sent to the Senate on May 30, 1991, the United States Supreme Court took a virtually unnoticed step four days later that was to have significant impact on this legislation. On June 3, 1991, the Supreme Court agreed to hear the case of *United States Department of Energy v. Ohio*.[37] The case would be argued on December 3, 1991, and decided on April 21, 1992. What brought this issue before the highest court in the land was a decision by the United States District Court for the Southern District of Ohio, which stated that the RCRA had waived federal sovereign immunity. The Sixth Circuit Court of Appeals reviewed the district court's holding and reversed it, holding immunity had *not* been waived by the RCRA as it applied to federal facilities.[38] Senator Mitchell's position that the RCRA had produced an effective waiver, when passed in 1976, was about to be tested by the Supreme Court.

The House of Representatives began to act on the legislation to catch up to the Senate. On June 4, 1991, the Energy and Commerce Subcommittee ordered the bill reported out of committee by a vote of forty-two-to-one.[39] Congressman Richard Ray of Georgia had scheduled a hearing of his Environmental Restoration Panel of the House Armed Services Committee for June 6, 1991. While informative, this hearing was to have little effect on the final outcome. The DOD plays a large part in any legislation aimed at federal facilities, but it is only one agency and a single "dog in the fight." Hearings by the Armed Services Committee do not have jurisdiction over agencies such as the Department of Energy and therefore would have only limited impact on the final content of the

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[31] H.R. 2194, 102d Cong., 1st Sess.; 137 CONG. REC. H2767 (daily ed. May 2, 1991).

[32] 137 CONG. REC. H2767-2698; E. 1594; E. 1601-02 (daily ed. May 8, 1991).

[33] 137 CONG. REC. D. 550 (daily ed. May 8, 1991).

[34] *Federal Facilities Compliance Act of 1991: Markup Session on S. 596 By The Senate Environment and Public Works Committee*, 102d Cong., 1st Sess. 1991 (statement by Senator John W. Warner) [hereinafter Markup].

[35] *Id.*

[36] *Id.*

[37] United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992).

[38] *Id.*

[39] 137 CONG. REC. D. 688 (daily ed. June 4, 1991).

FFCA. In addition, referral of the bill to the floor two days prior to the hearing took a great deal of the "punch" out of the panel's efforts. On June 24, 1991, in a substantial display of power, the House passed H.R. 2194 by voice vote. The bill now had 153 cosponsors.[40]

From June through August 1991, the Administration and congressional staffs worked to reach agreements on what should be included in the bill. Early in October of 1991, S. 596 passed the magic number of cosponsors—fifty-one. By October 16, however, amendments had not been finalized and the bill was brought to the floor.[41] After preliminary action, the bill was scheduled for vote on the following day. At 12:30 PM on October 17, a cloture vote was called to end debate on the bill and bring it up for passage. Although a cloture vote requires three-fifths to carry, the final roll call vote ended with eighty-five in favor of consideration of the bill and only fourteen opposed.[42]

Under the rules of the Senate, senators in opposition to taking up the bill can use thirty hours to delay a vote. Senator Malcolm Wallop of Wyoming had voted against the cloture motion earlier, with good reason. He had received the long-awaited Administration amendments but, like the rest of Capitol Hill, had no time to review the content of the proposed amendments. Blocking consideration of the bill would allow members of the Senate and their staffs to review the Administration's proposals. A filibuster of sorts took place on the floor with Senator Wallop controlling thirty hours of debate time.[43] Out of the sight of Senate members, negotiations on the language of the bill's amendments were taking place at a fevered pitch.

Senator Baucus arrived on the floor with Amendment No. 1263 which covered a number of Administration concerns to include provisions on "mixed waste," Federal Wastewater Treatment Works, public vessels, and munitions.[44] These made up the heart of the amendments that the DOE and the DOD had needed to withdraw objection to the bill. A letter dated October 17, 1991, from the Office of Management and Budget was introduced by Senator Pete Domenici of New Mexico. This letter explained how serious the Administration was about getting the amendments it proposed. One paragraph of that letter stated, "The Administration strongly opposed S. 596, as reported by the Environment and Public Works Committee, and will continue to seek its amendments during further congressional consideration of this legislation. If the Administration's amendments are adopted, the Administration would support S. 596."[45]

The Senate then laid the bill aside to be considered again on October 22, 1991,[46] at which time six additional amendments were added.[47] On the October 23, Senator Mitchell obtained unanimous consent to delete the entire text of H.R. 2194 and substitute the wording of S. 596.[48] In other words, the Senate bill's contents simply were inserted into H.R. 2194, which no longer had any text. Once the two bills had met on the Senate floor, only one needed to remain in consideration. The Senate version's content and the House version's number were the only requirements. The surviving bill was set for consideration by the Senate on the following day. The ensuing vote was ninety-four-to-three in favor of passing the bill.[49]

House Resolution 2194 no longer looked like it had when it passed the House, and the Senate would not back down from the amendments it had made. If the bill was to proceed further, the members needed a conference to settle their differences and report back to the House of Representatives and Senate an agreed upon version for their approvals. The Senate appointed its conferees before close of business on the October 24, 1991. The House, on the other hand, waited some three-and-one-half months, until February 4, 1992, to appoint conferees.[50]

To make the Administration's position clear after the congressional dust settled, an agency letter from the DOE, the DOD, and the EPA was composed and signed on February 21, 1992. One paragraph of that letter appropriately summed up the Administration's position as follows:

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[40] 137 CONG. REC. H4878-87 (daily ed. June 24, 1991).

[41] 137 CONG. REC. S14,774 (daily ed. Oct. 16, 1991).

[42] 137 CONG. REC. S14,865 (daily ed. Oct. 17, 1991).

[43] 137 CONG. REC. S14,866-71.

[44] *Id.* S14,883-87.

[45] *Id.* S14894.

[46] 137 CONG. REC. S14,958-15,021 (daily ed. Oct. 22, 1991).

[47] *Id.*

[48] 137 CONG. REC. S15,070 (daily ed. Oct. 23, 1991).

[49] 137 CONG. REC. S15,138 (daily ed. Oct. 24, 1991).

[50] 137 CONG. REC. H256 (daily ed. Feb. 4, 1992).

> We had serious concerns with HR 2194 when it was first introduced and the Administration identified a number of issues where change was critical if we were to be able to recommend that the President sign the bill. We appreciate your careful consideration of our concerns and the addition of amendments to address those issues. If preserved in the final bill, the Administration's amendments, as contained in the Senate-passed bill and certain provisions of the House-passed bill, taken together, offer a compromise that addresses our most vital concerns while still protecting the central theme of the bill. . . . We are prepared to recommend to the President that he sign a final bill if it adequately addresses the Administration's amendments.[51]

The letter was accompanied by three pages of concerns that the three agencies needed to have addressed appropriately in the final bill.

No more formal actions on H.R. 2194 were to occur until June of 1992, but the bill was far from forgotten. Staff members from the House, Senate, and the Administration discussed, debated, and exchanged paper. Meanwhile, the Supreme Court quietly rendered an opinion in *United States Department of Energy v. Ohio*. The Court noted, "We start with a common rule, with which we presume congressional familiarity . . . that any waiver of the National Government's Sovereign immunity must be unequivocal. . . . 'Waivers of immunity must be construed strictly in favor of the Sovereign. . . .'"[52]

The Court then ruled that the RCRA had *not* made a clear and unequivocal waiver of sovereign immunity in the case of federal facilities. This spelled the end of Senator Mitchell's argument that the RCRA had been effective since its inception as a waiver of sovereign immunity and eliminated any chance that fines and penalties for violating the act would be retroactive. The congressional staff struggled during the ensuing months, attempting to rewrite the bill to make it retroactive.[53] The more this was attempted, however, the more problems arose. Retroactivity was a concept that never really had been agreed on by members of Congress in over four years of consideration. Two things appeared clear to the Administration. First, adding a clause that would make H.R. 2194 retroactive greatly would increase the conference's scope on the bill. Second, complex legal issues existed. Ultimately, any amendment that would make the bill retroactive would run the risk of defeating the bill altogether. Accordingly, the wording that had appeared on subsequent drafts of the bill to make the law retroactive suddenly and quietly disappeared.

By mid-September, Congress was looking at a mountain of bills that needed action before it could adjourn, and the new fiscal year was only a matter of weeks away. On September 21, 1992, the conference report on the bill finally was ready for consideration by both houses. Congress requires that at least seventy-two hours elapse between the conferences reporting completion and the bill's submission to the House for floor action. Unwilling to chance a "pocket veto," a request was made to the House Committee on Rules to waive the waiting period. The request was granted the next day.[54] On September 23, 1992, the House approved the report by a vote of 403-to-3[55] and the Senate passed the report by voice vote. House Resolution 2194 was now an enrolled bill awaiting the President's signature, which he rendered on October 6, 1992.

The impact this new law will have on the agencies and the environment remains to be seen. Some in the DOD fear that it will be a crippling drain on funds that were intended by Congress to carry on training, maintenance, community improvements, and a host of operational and maintenance functions. They feel that the work of cleaning up their facilities might have begun slowly, but activity over the past four years has been sincere and is producing substantial results at no greater cost than similar cleanup programs anywhere in the United States. Most environmentalists see the law as the only way to get the agencies to "clean up their acts." Environmentalist groups and states often believe that federal facilities are not in compliance with the RCRA and that agencies are not moving as quickly as they should be to come into compliance. These environmentalists firmly believe that the only way to get agencies to take their violations seriously is to treat them like every one else and make their failing to comply expensive. The Act puts the Administration on notice to either "clean up or cough up." Whatever the results of this legislation, it was produced in the true American legislative fashion, complete with hearings, debates, filibuster, agreements, votes, and threats. No one can say that the Federal Facilities Compliance Act was a surprise. On the other hand, no one really is certain how much this new piece of legislation finally will cost federal taxpayers or how well it will be received.

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[51] Letter from Richard Cheney, Secretary of Defense, Admiral James D. Watkins, Secretary of Energy, and William K. Reilly, Administrator of the Environmental Protection Agency, to 30 members of Congress (Feb. 21, 1992) (discussing H.R. 2194).

[52] United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1633 (1992).

[53] H.R. 2194, 102d Cong., 1st Sess. (1992).

[54] 138 CONG. REC. D.1171; H8860-70; H9135 (daily ed. Sept. 22, 1992).

[55] 138 CONG. REC. H9142 (daily ed. Sept. 22, 1992).

DAD Notes

Battling Chromosomes: Fighting "DNA Fingerprinting" Evidence

In the process known as Deoxyribonucleic acid (DNA) profiling, forensic scientists can use tiny amounts of blood, semen, hair, or anything else that contains human genetic material, and analyze the substance to compare the genetic material with known samples. In criminal cases, those samples may be obtained from a crime scene, victim, or suspect. Using statistical analysis, an expert can testify that the samples match in such a way that only one—in an extremely high number of persons in a given population—can be expected to possess similarly matching genetic material.[1] The intimidating probabilities generated by the statistical analysis, coupled with the aura of scientific reliability, could have an exaggerated impact on the fact-finder.[2] Even though many courts have admitted DNA profiling evidence in criminal prosecutions,[3] many others have excluded the evidence, in whole or in part. This note focuses on those cases that have excluded DNA evidence, especially on potential attacks on the admissibility of this evidence. This note concludes with advice on discovery requests for the defense attorney facing adverse DNA profiling evidence.

Many of the decisions dealing with DNA profiling evidence and other sources describe the testing process.[4] Deoxyribonucleic acid is a molecule found in almost every cell in the body. In a given individual, the DNA found in every cell is identical. The DNA molecule carries coded information for general characteristics, like two arms and two legs, and more individualized characteristics, like blood type or eye color. Each individual's DNA is unique.[5]

A DNA molecule is a double helix—that is, a twisting ladder of sugars and phosphates—with pairs of nucleotide bases (base pairs) forming the rungs of the ladder. The four nucleotide bases can combine only in certain predictable pairs. A gene is a particular sequence of base pairs that codes for a particular purpose. Approximately 3.3 billion base pairs exist in each DNA molecule, helping determine structure, functions, or features in the human body. About three million base pairs vary in sequence between any two individuals. The human DNA molecule is divided into forty-six sections called chromosomes. Each chromosome is an organized bundle of thousands of genes. A human usually receives half of its chromosomes from its mother and half from its father.

The areas of genetic variation (polymorphisms) are packaged in alleles (alternate forms of a gene, such as the gene for green eyes or the gene for brown eyes). An allele with a particular function probably will occupy the same locus in a chromosome even if it contains a different number of base pairs and causes green eyes, for example, instead of brown eyes. Although an individual's DNA is unique, no individual has a unique DNA pattern at a given polymorphic site. For example, two people with the same shade of blond hair may have the same allele that determines hair color, but may have differing alleles for blood type or eye color or some other genetically determined trait. Profiling focuses on sections of the DNA molecule that are highly variable from individual to individual.

The most common technique for DNA profiling,[6] is "restriction fragment length polymorphism analysis" (RFLP analysis). RFLP analysis is accomplished in several basic steps. First, DNA is extracted chemically from the cells to be tested. Next, the DNA is fragmented by restriction enzymes. The length of some of these "cut up" sections will vary among individuals.

The DNA fragments then are separated by gel electrophoresis. The DNA sample is placed on one end of a piece of gel, an

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[1] The lab at which the DNA profiling was conducted in State v. Pennell, 1989 WL 167430 (Del. Super. Ct.), tested blood stains found on a shirt and the carpet of a van belonging to a suspected serial murderer. The lab matched the blood stains with the blood of one of the victims. The lab originally indicated that the chances of such a match were "one in 180 billion," although this estimate was deemed inadmissible.

[2] State v. Schwartz, 447 N.W.2d 422 (Minn. 1989) (population frequency statistics associated with DNA profiling held inadmissible; juries dealing with such complex technology may give undue weight and deference to statistical evidence associated with DNA profiling).

[3] *See, e.g.*, Hopkins v. State, 579 N.E.2d 1279 (Ind. 1991); State v. Williams, 599 A.2d 960 (N.J. Super. Ct. 1991); State v. Wimberly, 467 N.W.2d 499 (S.D. 1991); Mandujano v. State, 799 S.W.2d 318 (Tex. Ct. App. 1990).

[4] *See* Caldwell v. State, 393 S.E.2d 436 (Ga. 1990). *See generally* Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R. FED 313; U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, GENETIC WITNESS: FORENSIC USES OF DNA TESTS (1990); Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465 (review critical of many aspects of DNA profiling).

[5] Identical twins' DNA, however, is an exception to this rule.

[6] This technique is used by Lifecodes Corporation, Cellmark Diagnostics, and the FBI.

electric current is applied, and the fragments, which are negatively charged, migrate toward the positively charged pole at the other end of the gel. The smaller fragments travel faster and farther through the gel than the larger fragments. The current is stopped while the fragments are scattered across the gel. Fragments of the same size tend to reach the same area in the gel, creating "bands" of fragments. Because the gel may vary in consistency, comparisons are best made of different samples in different "lanes" of the same piece of gel.

The DNA then is denatured—meaning that the double strand is separated into single strands by separating the base pairs—and the DNA fragments are transferred from the gel to a nylon membrane in the same positions they occupied in the gel. A manmade radioactive DNA "probe" is used to locate the fragments from some highly polymorphic areas of the DNA. The probe binds to a specific type of single-stranded fragment. Some labs use several probes to get more specific results than can be obtained with a single probe.

The blot on the nylon is then placed in contact with X-ray film. The radioactive probe exposes the film and bands appear on the film indicating where the probe has bound to the DNA. This pattern of bands is known as the DNA profile. The X-ray picture of the bands is called an autoradiograph. The pattern of bands produced by a known sample of the suspect's or victim's DNA is compared to the unknown sample recovered from the crime scene to see if a match exists. The results can be interpreted visually or with the aid of a computer that converts the sometimes fuzzy band positions into numerical codes.

The results then are converted into a statistical probability—the odds of the genetic match occurring at random in the population at issue. Using more probes lessens the probability of a coincidental match. This step requires a data base of results obtained by using the same probe on a pool of known individuals. Larger and more carefully screened pools, generate more accurate statistics.

Although the project is far from complete, scientists have, to some extent, "mapped" the human genome.[7] Scientists are able to determine the position or locus within the DNA molecule of many alleles and know that some alleles appear to be independent and some alleles appear to be linked. Profiling DNA is most effective when testing alleles that are independent. For example, assume that the loci and the linkage or independence of alleles A, B, and C are known. If allele A always is found when allele B is found, perhaps because they are on the same chromosome—and therefore passed from generation to generation in the same genetic "bundle"—they are linked. In this case, testing for *both* allele A and allele B, as opposed to testing only for allele A or allele B, does not help to exclude anyone through DNA profiling—anyone who has allele A also will have allele B. To increase the odds against an accidental match, an allele must be tested that is random in its occurrence relative to allele B. If allele C is completely random in its occurrence relative to allele B, they are independent, and the "product rule" can be employed.

The "product rule" generates the frequency of all the tested bands occurring together by multiplying the frequencies with which each band appears in the data base. For example, if four probes are conducted, and each probe yields a band that represents an allele with a one-in-ten chance of occurrence in the relevant population, the product rule would be applied to show a one-in-ten-thousand chance for all four to occur together.[8] Huge numbers can be generated using the product rule, and the these numbers have an obvious impact on a fact-finder.

The frequency of particular alleles depends, in part, on whether the population is mixing freely, to allow a homogenous distribution of alleles within the population to occur. If the population is mixing freely and no correlation exists between the tested alleles on the maternal and paternal chromosomes, the population is in "Hardy-Weinberg equilibrium." Hardy-Weinberg equilibrium assumes that allele frequencies will remain constant from generation to generation, as long as random mating occurs within the relevant population. If the population is mixing freely and no correlation exists between the alleles at different loci, the population is in "linkage equilibrium" for these alleles. One way scientists seek to achieve linkage equilibrium is to test alleles from different chromosomes.

This scientific method of drastically narrowing down suspects or linking suspects with victims is tremendously attractive. The scientific community does not dispute the general principles behind DNA profiling. A major disagreement, however, concerns the forensic application of DNA profiling. Some of the underlying assumptions of the process used to generate the statistics may be fundamentally flawed and need to be addressed before DNA profiling can be as accurate as its more partisan advocates claim it to be.

A number of courts recently have examined the DNA profiling issue. These courts have refused to admit evidence associated with DNA profiling and, in some cases, have refused to admit DNA profiling all together. After extensive hearings, the New York Supreme Court, Bronx County, in *People v. Castro*,[9] concluded that DNA profiling evidence could be

[7] The human genome is genetic complement passed from one generation to the next by a sperm or an egg.

[8] As a further example, assume that one allele causes auburn hair, one allele causes type "A" blood, one allele causes stubby fingers, and one allele causes green eyes. Assume that the chance of any of these traits occurring singly is one-in-ten and that the alleles are independent. Applying the product rule would mean that the chance of a person having auburn hair and type "A" blood is one-in-100, the chance of a person having auburn hair, type "A" blood, and stubby fingers is one-in-1000, and the chance of a person having auburn hair, type "A" blood, stubby fingers, and green eyes is one-in-10,000.

[9] 545 N.Y.S.2d 985 (Sup. Ct. 1989).

admissible in criminal proceedings. Admissibility, however, would be subject to a showing that the testing laboratory sufficiently performed scientifically accepted tests and techniques, yielding sufficiently reliable results, within a reasonable degree of scientific certainty. The State tried to use DNA profiling to show a match between blood on the suspect's wristwatch and blood from a murder victim. The court deemed admissible evidence of exclusion; the State's expert could opine that the suspect could not be the source of the wristwatch blood.[10] Because of flaws in the testing procedures, however, the court did not deem admissible evidence of inclusion. The expert, therefore, could not testify that the victim was the source of the wristwatch blood.[11]

In *State v. Schwartz*,[12] the Minnesota Supreme Court held that population frequency statistics associated with DNA profiling were inadmissible because of their exaggerated impact on the fact-finder. The court also held DNA profiling evidence as inadmissible because the civilian lab did not meet quality control guidelines developed by the Federal Bureau of Investigation (FBI) and other experts.[13] The commercial lab that conducted the DNA profiling partially refused a defense discovery request. The court noted that trade secrets may be at stake for the lab, but pointed out that protective measures (such as protective orders or *in camera* hearings) could be pursued before denying the discovery would be appropriate. The court held that to ensure a fair trial, DNA test data and methodology must be available for independent review by the opposing party.

In *State v. Pennell*, a Delaware Superior Court excluded DNA profiling evidence.[14] The court held that the fact-finder could be informed that the analyzed samples matched, but problems with the civilian lab's procedures and data base made testimony about population frequency statistics inadmissible.[15]

In *Commonwealth v. Lanigan*,[16] the Massachusetts Supreme Judicial Court upheld the exclusion of DNA profiling evidence. The *Lanigan* decision covered issues in the cases of three defendants. The FBI determined that Thomas Lanigan's DNA matched DNA obtained from semen on the clothing of a rape complainant. Using two different data bases, the FBI calculated the odds of this match to be either four million to one or 2.4 million to one. Leo Breadmore, Sr., and Leo Breadmore, Jr., each were charged with several sex offenses. All of the victims were granddaughters of the elder Breadmore and nieces of the younger Breadmore. One victim became pregnant and had a child. The DNA from blood samples of all involved were tested by a civilian lab. The first round of tests could exclude neither Breadmore as father of the child. A second test indicated exclusion of the younger Breadmore as father, and all the tests together were interpreted by the lab as indicating a high likelihood that the elder Breadmore was the father, by odds of 2500-to-one. In all three cases, disagreement in the scientific community about the significance of "population substructure"[17] caused the appellate court to uphold the trial judge's exclusion of the DNA profiling evidence. The court also determined that the civilian laboratory violated its own internal procedure in one of the tests, providing an additional reason to exclude the evidence.

The same debate over the significance of population substructure caused the California Court of Appeal (First Dis-

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[10] Population genetics is not involved in determining an exclusion. If the bands on the autoradiographs do not match, no statistical analysis is necessary.

[11] One of the autoradiographs using a probe known as "29c-1," or "Cooke's probe" produced three bands in the victim's lane and five bands in the wristwatch blood lane. The DNA that produced the two extra bands might have come from bacteria or plasmids that had contaminated the wristwatch blood, or it might simply have meant that the blood on the wristwatch did not come from the victim. The court found that the lab failed to conduct tests that could have resolved the discrepancy. *Id.* at 997-98.

[12] 447 N.W.2d 422 (Minn. 1989).

[13] Among other problems, the lab had what some experts considered to be too high an error rate during a proficiency test performed by the California Association of Crime Laboratory Directors. The lab also did not meet guidelines for formal methodology validation and did not publish the results of experimental studies in peer review journals. *Id.* at 426-27.

[14] 1989 WL 167430 (Del. Super. Ct.).

[15] The lab originally had failed to use the same parameters to determine the frequency at which an allele occurs in the population as it used to declare a match in an individual test. This produced a low rate of occurrence in the population, inflating the probability statistics. The court noted after hearing further argument at a later date that this flaw was corrected when the lab generated a new data base. The court also determined that the population used to create the original data base did not appear to be in Harvey-Weinberg equilibrium, and therefore could not be trusted to generate reliable results. The lab's creation of a new data base alleviated the problem somewhat, but the expert who testified on the new data base had discarded the calculations showing that the new data base population was close to Hardy-Weinberg equilibrium. Failure to supply those computations to the defense was a factor in the court's decision to exclude the statistical probability evidence.

[16] 596 N.E.2d 311 (Mass. 1992).

[17] Many scientists theorize that significant genetic subgroups (more or less insular communities) exist within the larger populations (such as Caucasian or Negro) typically used in DNA profiling. These subgroups most likely mate along racial or ethnic lines, or somehow were isolated genetically for long periods before coming to America, creating "pockets" of genetic variation in the larger population group. If this theory is true, using the allele frequencies (alleles are the variable genes responsible for hereditary variation) found in larger populations (usually calculated from samples of no more than a few hundred individuals) may produce a widely inaccurate frequency estimate for members of the subgroups. Lanigan and both Breadmores were Caucasians. The opinion did not indicate exactly how the population substructure debate impacted on the three defendants. The defendants might have alleged that the individuals tested to provide the labs' data bases were not representative of the general Caucasian population, or that the defendants belonged to a subgroup that should not be tested by comparison to the general Caucasian population as defined by the labs.

trict), to hold that admission of DNA profiling evidence was error in *People v. Barney*.[18] This decision dealt with issues in the second-degree murder trial of Ralph Barney and the kidnapping and sexual assault trial of Kevin Howard. The court noted a recent scholarly article[19] that found applying the product rule[20] as improper for two reasons. First, members of the large racial groups tested do not mate within their own groups completely at random. Human sexual interaction is affected by religion, ethnicity, and geography. Second, the DNA fragments identified by processing do not necessarily behave independently and are not necessarily in linkage equilibrium. The *Barney* court, however, found the error harmless because of the strength of the other evidence in the two cases.

In *People v. Pizarro*,[21] the California Court of Appeal (Fifth District), held, *inter alia*, that the procedures employed in conducting testing go to the general reliability and admissibility of the test results, rather than merely weight. Noting the debate within the scientific community about the significance of population substructure, the court held that the testimony of one FBI expert was insufficient to establish general acceptance in the scientific community of the DNA testing protocol used by the FBI. The court remanded the case with directions that a hearing be held to determine if sufficient foundation exists to admit the DNA profiling testimony presented.

The New Mexico Court of Appeals, in *State v. Anderson*,[22] in excluding DNA profiling evidence admitted at trial, ruled that a novel scientific technique must be accepted as reliable by a "clear majority" of the pertinent scientific community. The prosecution failed to meet its burden of proving that the current FBI data base and binning methodology—that is, the grouping of persons for DNA profiling purposes without regard to population substructure—is accepted generally among respected scientists. The court noted that differences existed in the data bases used by Cellmark Diagnostics Corporation, Lifecodes Corporation, and the FBI. The FBI's data base is limited, and the FBI derivation of the population frequency statistics generated in this case[23] lacked general scientific acceptance.

United States v. Porter[24] took an approach more favorable to the prosecution. The District of Columbia Court of Appeals decided that—even if critics of the FBI's statistics are correct—the odds against a random match still could be substantial and worthy of consideration by the fact-finder.[25] The majority remanded the case for a new round of hearings. The new hearings would determine whether a scientific consensus could be found for a more conservative, but still significant, statistical calculation that would be accepted as reliable by both sides in the continuing debate on population substructure. A dissenting opinion believed that the trial court correctly had excluded the DNA profiling evidence, and that the population substructure debate had not been resolved sufficiently to allow admission of statistical analysis evidence.

No military appellate court has ruled on the admissibility of DNA profiling evidence.[26] The test for admissibility of new scientific evidence in military practice is based on relevance,

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[18] 10 Cal. Rptr. 731 (Ct. App. 1992).

[19] Richard C. Lewontin & Daniel L. Hartl, *Population Genetics in Forensic DNA Typing*, SCIENCE, Dec. 20, 1991.

[20] The "product rule" assumes that the alleles tested are not linked to each other in frequency of occurrence and are distributed randomly throughout the large population groups tested. Therefore, the frequency result of one probe may be multiplied by the frequency result of each other probe of a different allele to reach a statistical probability that this combination of alleles would occur in the large population tested. The product rule produced match probabilities of one-in-200 million in Howard's case and one-in-7.8 million in Barney's case. *Barney*, 10 Cal. Rptr. at 737.

[21] 12 Cal. Rptr. 436 (Ct. App. 1992). This case is especially useful because the court took judicial notice of—and cited many recent scholarly articles, reports, and other documents dealing with—the forensic uses of DNA profiling.

[22] No. 12,899 (N.M. Ct. App. Dec. 14, 1992).

[23] Following the trial court's decision to admit the DNA profiling evidence, the accused pleaded no contest to charges of criminal sexual conduct, kidnapping, and assault. Government experts testified that DNA taken from the body of the accused matched DNA taken from the body of the victim, and that the odds were 3,000,000-to-one or 7,000,000-to-one against a coincidental match.

[24] No. 91-CO-1277 (DC Ct. App. Dec. 22, 1992) (vacating 50 CrL 1016; *accord* People v. Mohit, 579 N.Y.S.2d 990, 993 (N.Y. Sup. Ct., Westchester County 1992).

[25] The prosecution sought to introduce DNA profiling evidence to corroborate the identification of the accused by a rape victim. The FBI's statistical analysis yielded 30,000,000-to-1 odds for a random match.

[26] While this note focuses on attacking adverse DNA profiling evidence, defense counsel can make a powerful legal argument for forcing the Government to conduct DNA profiling tests when the defense believes that the tests will provide exculpatory evidence. *See* Commonwealth v. Brison, No. 00859 Pa. Phila. Super. Ct. Dec. 10, 1992), 52 CrL 1273 (1992) (forensic use of DNA profiling has reached the point at which the Government now has an obligation to perform such tests when possible and when the defense lacks the money to pay for them; the right to such testing is related to the right to be informed of exculpatory information known to the state under Brady v. Maryland, 373 U.S. 83 (1963)). *Accord* Arizona v. Youngblood, 488 U.S. 51, 58-59 (1988) (dicta states that the Due Process Clause is not violated when police fail to use a particular investigatory tool, such as a newer test, on semen samples); People v. McSherry, No. 9048607 (Cal. Ct. App., 2d Dist. Dec. 17, 1992) (declining to disturb the defendant's conviction for raping a six-year-old girl despite new DNA tests that appeared to eliminate him as the source of sperm on the child's panties; noting, among other factors, that the polymerase chain reaction analysis test performed—despite working with smaller test samples than RFLP analysis—was less reliable and tended to magnify the effects of contaminants in the sample); Sewell v. State, 592 N.E.2d 705, 707-08 (Ind. Ct. App. 1992); *Schwartz*, 447 N.W.2d at 427; State v. Hammond, 604 A.2d 793, 806-08 (N.J. 1992); State v. Thomas, 586 A.2d 250, 254 (N.J. Super. Ct., App. Div., 1991); People v. Callace, 573 N.Y.S.2d 137 (N.Y. Sup. Ct., Suffolk County 1991); Dabbs v. Vergari, 570 N.Y.S.2d 765, 767-79 (N.Y. Sup. Ct., Westchester County 1990).

helpfulness, and reliability under Military Rules of Evidence 401, 402, 403, and 702.[27] This "relevancy test" supersedes an earlier test—still followed in many jurisdictions—and first enunciated in *Frye v. United States*.[28] Under the *Frye* test, the proponent had to establish as a foundation that the evidence was of a type generally accepted in the pertinent scientific community.

As the Court of Military Appeals noted in *United States v. Gipson*,[29] the "relevancy test" is less restrictive than the *Frye* test.[30] More scientific evidence is likely to come before the fact-finder under the new test. Accordingly, the new test will allow evidence that may be sound, but involves processes so new or controversial that no broad-based consensus exists on its reliability in the scientific community. Alternately, the lower standard may cause the fact-finder to be dazzled by new and complex scientific techniques that ultimately may prove to be unreliable once the technique is scrutinized and tested by other scientists.

The courts in *Anderson, Barney, Castro, Lanigan, Pizarro,* and *Schwartz* applied the *Frye* test, or a local variant, in excluding DNA profiling evidence. The Court of Military Appeals indicated in *Gipson* that reliability is an important element of the relevance determination, and that the test still will be useful—and possibly decisive—in judging reliability of new scientific evidence.[31]

Defense counsel seeking to attack DNA profiling evidence should focus on three areas. First, monitor the population substructure debate. This issue currently is causing DNA profiling evidence to be excluded and may take some time to resolve to satisfy the general acceptance test. Second, investigate possible defects in the procedures of the lab conducting the testing. Go to the lab if possible. If the Government has provided a DNA profiling expert to the defense team, take the expert to the lab. Be familiar enough with the DNA profiling process to probe possible sources of experimental error or procedures that may not satisfy evolving standards of reliability. Third, look for new challenges to the theory or practice of DNA profiling.

Before questioning Government experts or drafting a discovery request, read the latest literature and try to consult an expert willing to be candid about the limitations of DNA profiling. Locating an expert willing to be critical of the DNA profiling process may prove difficult. Most of the experts in the field either work or have worked for forensic labs whose economic survival or public funding depend on the perception that DNA profiling evidence is reliable. Other experts in the field may be involved with research rather than forensic applications. Consequently, they might not be familiar with the problems inherent in working with the small, contaminated, or deteriorated samples with which the forensic scientist often must work.[32] The science behind DNA profiling quite literally is on the frontier of what the scientific community knows about human genetics. The forensic applications may raise undreamed of privacy and due process concerns.

A discovery request for a case in which the defense anticipates adverse DNA profiling evidence must be tailored to the client. A civilian lab may be reluctant to reveal trade secrets or information that cannot be patented, even if such evidence is crucial to the fact-finder's understanding how the lab arrived at its conclusions.

The following is a recommended standard discovery request for DNA profiling evidence:[33]

> If DNA profiling or similar testing is, or has been conducted in connection with the incident which underlies Specification ___ of Charge ___, the defense requests that the Government either produce the following or indicate in writing any intent not to comply, indicate if no such matters exist, whether such matters have been previously submitted, that such matter is attached to any written reply, or the status as to future production:
>
> a. Copies of autoradiographs, with the opportunity to examine the originals;

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[27] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 401-03, 702 (1984); *see, e.g.*, United States v. Gipson, 24 M.J. 246 (C.M.A. 1987) (polygraph evidence); United States v. Carter, 26 M.J. 428 (C.M.A. 1988) (rape trauma syndrome evidence).

[28] 293 F. 1013 (D.C. Cir. 1923).

[29] *Gipson*, 24 M.J. at 246.

[30] *Id.* at 250-51.

[31] *Id.* at 251-52; *cf.* United States v. Two Bulls, 918 F.2d 56 (8th Cir. 1990) (finding the *Frye* test and a relevancy test based on the Federal Rules of Evidence to be compatible and not mutually exclusive in holding that admitting DNA profiling evidence without determining whether the FBI's testing procedures were conducted properly was error), *vacated* 925 F.2d 1127 (8th Cir. 1991), *dismissed* 1991 U.S. App. LEXIS 6840 (1991); United States v. Jakobetz, 955 F.2d 786 (2d Cir.) *cert. denied*, 113 S. Ct. 104 (1992) (holding that the rule has been superseded by the Federal Rules of Evidence; DNA profiling evidence passes the present test, as long as the probativeness, materiality, and reliability of the evidence outweighs its tendency to mislead, prejudice, and confuse the jury; specifically rejecting the more restrictive analysis used in *Two Bulls* and *Castro*).

[32] *Castro*, 545 N.Y.S.2d at 993-95 (discussing some of the unique problems faced by forensic scientists in DNA profiling).

[33] *See Schwartz*, 447 N.W.2d at 427; *Castro*, 545 N.Y.S.2d at 999; Polk v. State, 1993 WL 2774 (Miss.) (in addition to providing for "wide open" discovery, the court required the state to fund an independent expert to assist a defendant confronted with DNA profiling evidence).

b. Copies of laboratory books and laboratory procedure manuals;

c. Copies of quality control tests run on material used;

d. Copies of reports by the testing laboratory issued to the proponent;

e. The credentials and licensing, if any, of the lab and the individual personnel conducting the test, proficiency testing results, and proof of continuing education for laboratory personnel;

f. A written report by the testing laboratory setting forth the method used to declare a match or non-match, with actual size measurements, and mean or average size measurement, if applicable, together with the standard deviation used;

g. A statement by the testing lab, setting forth the method used to calculate the allele frequency in the relevant population;

h. A copy of the data pool for each locus examined;

i. A certification by the testing lab that the same rule used to declare a match was used to determine the allele frequency in the population;

j. A statement setting forth observed contaminants and the reasons therefore, and tests performed to determine the origin and the results thereof;

k. If the sample is degraded, a statement setting forth the tests performed and the results thereof;

l. A statement setting forth any other observed defects or laboratory errors, the reasons therefore, and the results thereof;

m. All chain of custody documents;

n. (Insert any requests unique to the client's case).

At trial, argue that the military judge should apply the admissibility test used in *Two Bulls*,[34] *Castro*, and *Pizarro*.[35] Lab procedures should be reviewed by the military judge as part of the reliability determination, rather than letting possibly flawed test results go before the fact-finder. Problems with the test results should go to admissibility rather than weight because the technical nature of the potential flaw may lead to a complex and confusing "battle of the experts." The bewildered panel may simply skip to an extremely seductive bottom line—test results that promise to tie the accused to a crime by astronomical odds.

While DNA profiling evidence can be formidable, experimental error, lack of generally accepted standards in a technique that is still very new and constantly evolving, and possible flaws in the statistical analysis of the data obtained can provide fertile ground for attack for the well-prepared advocate. Captain Huber.

Batson: A New Military Twist

The United States Court of Military Appeals recently released an opinion delineating the proper application of the rule of law when a *Batson* challenge is asserted at trial and the trial counsel responds by giving a race-neutral reason for excluding a panel member.

In *United States v. Greene*,[36] a black accused was charged with rape and attempted sodomy of a white female soldier in her barracks room. During *voir dire*, the defense counsel asked a black Panamanian panel member about that member's attitude toward punishment. The member responded that if the accused was guilty, discharge would be the appropriate punishment. Thereafter, the defense counsel successfully rehabilitated the panel member by eliciting from him an understanding that mitigating circumstances also should play a role in determining punishment.[37] The military judge, in questioning this same panel member, apparently was assured that the member could follow the judge's instructions and that the member would not be locked in to any specific punishment. Neither the defense, nor the Government attempted to challenge this panel member for cause.[38]

The trial counsel, however, peremptorily challenged the panel member. The defense counsel objected under *Batson* and requested that the Government provide the judge with a race-neutral reason for the challenge.[39]

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[34] *Two Bulls* was dismissed because the accused died, not because the reviewing court had second thoughts about its analysis of the DNA profiling issue.

[35] *Accord* People v. Lindsey, No. 90CA0556 (Colo. Ct. App. Jan. 7 1993) (applying the admissibility test in *Castro* to hold that the trial court did not abuse its discretion in admitting DNA profiling evidence).

[36] 36 M.J. 274 (C.M.A. 1993).

[37] *Id.* at 276.

[38] *Id.* at 277.

[39] *Id.*

The Government responded by giving two reasons for its peremptory challenge. First, the Government explained that it was afraid that the member was prejudiced against it because of the way trial counsel had conducted *voir dire*. Second, the Government stated that the member's national origin and culture made him inflexible about his views toward sex and rape. Specifically, trial counsel pointed out that "latin macho type attitudes" about women and sex made this panel member more likely to side with the accused.[40] The military judge correctly found that the second reason was improper, but ruled that the first reason was race-neutral and, as a result, allowed the challenge.[41]

The Court of Military Appeals considered three questions in determining whether a *Batson* issue existed.

> 1. Was trial counsel's second reason—the latino macho type of attitude—race-neutral within the meaning of *Batson*?
>
> 2. Was the trial counsel's first reason—the antagonism of the member toward the Government—race-neutral?
>
> 3. Could the two parts of trial counsel's explanation—the dual reasons—be considered disjunctively so as to establish the race-neutral justification required by *Batson* and its progeny?[42]

The Court of Military Appeals concluded that under *Hernandez v. New York*[43], the Government's second reason was not race-neutral and constituted a "gross racial stereotype" that *Batson* expressly prohibited.[44] The court also suggested that the Government's first reason was "at least facially" race-neutral.[45] In considering the final question, the court looked to *Alexander v. Louisiana*, the initial Supreme Court case mandating the race-neutral inquiry.[46] In *Alexander*, the Supreme Court concentrated not on evidence of absolute discrimination, but instead on the "opportunity to discriminate."[47] The Court of Military Appeals then turned to *Whitus v. Georgia*, in which the Supreme Court held that even though race-neutral reasons were given for excluding jurors, racial identifiers used on the jury rolls sufficiently tainted the entire venire.[48] Based on *Alexander* and *Whitus*, the Court of Military Appeals concluded that the Supreme Court looks to the "totality of the relevant facts when confronted with claims of invidious discriminatory purpose."[49]

The court then analyzed numerous federal court cases that had cited to *Batson* and concluded that a prosecutor's multiple explanations for his or her challenge cannot be viewed separately, but must be considered together.[50]

In *Greene*, the Court of Military Appeals viewed the second improper reason as having tainted the first. Specifically, the court held that the race-neutral justification of the first assertion was "merely a pretext for intentional race-based discrimination" in violation of *Batson*.[51]

The lesson for a defense counsel facing a *Batson* situation is that a prosecutor's race-neutral reason—when that reason is only one of many reasons given—does not end the *Batson* inquiry. Counsel should point out the totality rule established in *Greene* to defeat the discriminatory challenge. Appellate courts will be helped further by a counsel's insistence that the judge make specific findings on the prosecutor's multiple assertions.

On the other hand, the lesson for prosecutors is to think before asserting. The more reasons a prosecutor gives as the basis for his or her challenge, the greater the opportunity that the court will hold one of those reasons as being not race-neutral.

Eliminating discrimination in the United States military is the duty of both trial and defense counsel. The insidious nature of discrimination paralyzes the military justice system and corrupts any notion of justice and fairness within the military community. *Batson* issues are important, not only to the accused and the United States government, but also to the soldiers serving as panel members. Captain Thomas.

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[40] *Id.*

[41] *Id.*

[42] *Id.* at 278-80.

[43] 111 S. Ct. 1859 (1991).

[44] *Greene*, 36 M.J. at 279.

[45] *Id.*

[46] 405 U.S. 625, 632 (1972).

[47] *Greene*, 36 M.J. at 280.

[48] 385 U.S. 545 (1967).

[49] *Greene*, 36 M.J. at 280 (*citing* Washington v. Davis, 426 U.S. 229, 242 (1976)).

[50] *Id.* at 281.

[51] *Id.*

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted 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.

1992 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 1992 Chief of Staff Award for Excellence in Legal Assistance.[1] Of the 126 Army legal assistance offices having one or more attorneys providing legal assistance on a full or part-time basis, thirty-three were selected. Congratulations to the legal assistance offices at the following installations:

AMC:	Fort Monmouth; MSWR Office of the SJA
MDW:	MDW, Fort Myer
TRADOC:	Fort Eustis; Fort Sill; Fort Jackson; Fort Leavenworth; Fort Gordon; Fort Benning; Fort Lee; U.S. Army Engineer Center & Fort Leonard Wood
FORSCOM:	24th Infantry Division & Fort Stewart; Fort Drum; Fort Carson; III Corps; 101st Airborne Division & Fort Campbell; Fort Polk; XVIII Airborne Corps; Fort Sam Houston; Fort Riley; 82d Airborne Division
USAPAC:	USARJ/IX Corps; 25th ID(L) & USARHAW
USAREUR:	Giessen Legal Center; Wiesbaden Legal Center; HQ, 3d Infantry Division; 1st Armored Division; Kaiserslautern Law Center; Pirmasens Legal Services Center; 32d Army Air Defense Command; Berlin Legal Assistance Center; Legal Service Center, The Netherlands
USFK:	2d Infantry Division OSJA Legal Assistance Branch

ABA Legal Assistance Distinguished Services Award

The following were selected as recipients of the ABA Legal Assistance for Military Personnel (LAMP) Distinguished Service Award for their legal support during Hurricane Andrew relief efforts:[2]

a. Office of the Staff Judge Advocate (OSJA), 10th Mountain Division, Fort Drum, NY (also recognized for legal services provided in support of Operation Restore Hope);

b. CPT Kurt D. Schmidt and CPT Julie P. Schrank, both of whom are assigned to OSJA, XVIII Airborne Corps and Fort Bragg, NC;

c. CPT Michael R. McWright, who is assigned to OSJA, 24th Infantry Division (Mech), Fort Stewart, GA;

d. Office of the District Counsel, South Atlantic Division, Army Corps of Engineers, Atlanta, GA;

e. Office of the Coast Guard's Maintenance and Logistics Command, Atlantic, New York, NY;

f. Seventh Coast Guard District, Miami, FL;

g. OSJA, HQ, Air Combat Command, USAF, Langley AFB, VA.

The LAMP Distinguished Service Award recognizes exceptional achievements or service to, or in support of, the military legal assistance effort. By this award, the ABA LAMP Committee recognizes outstanding performance of the recipients.

Commands are encouraged to forward nominations for future awards to the Chief of Legal Assistance for the service involved. The LAMP Award Subcommittee objectively reviews nominations and the Committee votes on each during its quarterly meeting. Colonel Arquilla.

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[1] Message, Dep't of Army, DAJA-LA (090900Z Apr 93).

[2] Message, Dep't of Army, DAJA-LA (261000Z Apr 93).

Reserve Judge Advocates' Authority to Act as Notaries

Active duty judge advocates have notarial authority pursuant to 10 U.S.C. § 1044b; that the statute equally empowers, among others, Reserve judge advocates performing inactive duty for training is not well known.[3] Persons eligible to receive notarial services are listed in § 1044a.[4] Additional information may be found in JA 268, *Notarial Guide*, soon to be updated by TJAGSA. Major Hostetter.

Consumer Law Notes

Check Cashing Companies—Are They Lending Money?

Check cashing businesses solicit customers to tender checks to them which they will cash for less than face value. The difference in the amount they give the customer and the face amount of the check is their "fee." When the check immediately is negotiable, no "loan" seems to be involved. Many businesses, however, target military members who agree to write the checks with insufficient funds in their accounts to cover them. The businesses agree to defer presentment to a bank for payment until some future date, usually military pay day. This transaction appears to be a "loan" because the soldier has entered an agreement to repay the money he or she received at some future time (when the check is presented at the bank for payment) and interest is charged on that loan (the difference in the amount paid to the soldier and the face amount of the check). If the soldier's check fails to clear the bank because of insufficient funds, the business often contacts the soldier's commanding officer, seeking help in collecting the amount owed on the check.

Legal Assistance Attorneys (LAAs) should be aware that these transactions are subject to the federal Truth in Lending Act disclosure requirements[5] and also may be governed by state consumer financing acts.[6] Creditors seeking military assistance in collecting these debts must follow applicable service regulations, all of which require that the lender comply with the Truth in Lending Act.[7] Often, check cashing businesses do not provide Truth in Lending Act disclosures to soldiers, in which case commanding officers should decline to assist them in collecting.[8] Placing a business off limits also should be considered for repeated violations of the law. Major Hostetter.

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[3] Persons with notarial powers are judge advocates on active duty or performing inactive duty for training; civilian attorneys serving as legal assistance officers; all adjutants, assistant adjutants, and personnel adjutants on active duty or performing inactive duty training; and all other persons on active duty or performing inactive duty training who are designated by regulations of the armed forces or by statute to have those powers.

[4] These persons are members of the armed forces; other persons eligible for legal assistance under 10 U.S.C § 1044 or DOD regulations; persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands; and other persons subject to the Uniform Code of Military Justice outside the United States.

[5] 15 U.S.C. § 1601-1667 (1988). The Truth in Lending Act applies to consumer credit transactions involving finance charges. The lender must disclose the annual percentage rate, finance charge, and amount financed. The North Carolina Attorney General agrees that check cashing companies that charge a fee and agree to defer presentment of the check until sufficient funds are in the consumer's account are involved in making loans.

> The customer, by drawing and delivering the check, acknowledges an indebtedness in the amount of the check and unconditionally promises to pay it at the time agreed upon with the company. Thus, there is a delivery of a sum of money by the company to the customer under a contemporaneous contract by the customer to return it at some future time. This is substantially different from the situation in which a check cashing company accepts a valid demand instrument that may be immediately negotiated, an activity not currently regulated under [North Carolina] state law.

Letter from N.C. Att'y Gen. (Jan. 24, 1992) [hereinafter Letter].

[6] *See* North Carolina Consumer Financing Act G.S. § 53-166 (Michie 1992):

> No person shall engage in the business of lending in amounts ten thousand dollars or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by [law]. . . and without first having obtained a license from the Commissioner [of Banks].

The North Carolina Attorney General has stated that such transactions are governed by G.S. § 53-166 and also may violate Truth in Lending requirements regarding disclosure. Letter, *supra* note 5.

[7] *See* 32 C.F.R. § 43a (1990) (Indebtedness of Military Personnel); DEP'T OF DEFENSE, DIRECTIVE 1344.9 (7 May 1979); DEP'T OF ARMY, REG. 600-15, INDEBTEDNESS OF MILITARY PERSONNEL (14 Mar. 1986) [hereinafter AR 600-15]; DEP'T OF NAVY, MCO P5800.8, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, CH. 7 (24 Dec. 1984); DEP'T OF NAVY, BUREAU OF NAVAL PERSONNEL MANUAL 6210140, INDEBTEDNESS AND FINANCIAL RESPONSIBILITY OF MEMBERS (Jan. 1979); UNITED STATES COAST GUARD PERSONNEL MANUAL, COMDTINST M1000, 6A, ch. 8, sec. F (8 Jan. 1988). A creditor subject to the Truth in Lending Act must submit with its request for assistance a copy of disclosures provided the military member as required by the Truth in Lending Act.

[8] The Staff Judge Advocate, Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell, Fort Campbell, Kentucky, dealt with such a case during December 1992. The Master Check Cashing Service (Master) had requested the Commanding General's help in collecting nonnegotiable checks written by soldiers. Soldiers had written checks to Master, received portions of the face amount, and Master agreed to wait before presenting the checks for payment. Even though Master characterized the amounts retained as service charges, the Staff Judge Advocate relied on the definitions of "credit" and "finance charge" found in sections 1602 and 1605 of the Truth in Lending Act. Citing violations of the Truth in Lending Act and *AR 600-15*, *supra* note 7, the Staff Judge Advocate advised Master that military assistance would not be forthcoming.

Fair Debt Collection Practices

Legal Assistance Attorneys (LAAs) routinely counsel clients facing collection efforts by creditors and debt collectors.[9] Occasionally, the client is harassed or threats have been made to contact the client's commanding officer. Legal assistance attorneys should be familiar with state and federal laws that protect their clients from unreasonable debt collection activities.

Designed to eliminate debt collectors' abusive practices, the Fair Debt Collection Practices Act (FDCPA) was passed in 1982.[10] Comparable laws exist in virtually every state and some states apply restrictions to both creditors and debt collectors.[11] Despite extensive litigation in this area—mostly in favor of consumers—debt collectors continue to violate the law.

The FDCPA restricts contacts by debt collectors with third parties and debtors. Debt collectors who seek debt collection assistance[12] may contact third parties only if (1) the debtor has given the debt collector prior consent,[13] (2) a court order that allows contact exists, or (3) making contact is necessary to effectuate a postjudgment judicial remedy.[14] Otherwise, the debt collector may communicate only in a limited manner with others to acquire location information about the debtor.[15] Debt collectors frequently tell military members that they will contact their commanding officers for failure to pay their debts. Unless one of the three aforementioned criteria is present, however, such contact is prohibited.[16]

The FDCPA also restricts a debt collector's ability to contact the debtor. Absent the debtor's consent or a court order, the debt collector may not communicate with the debtor at unusual times and places,[17] if the debtor is represented by an attorney,[18] or at the debtor's place of employment—if the employer prohibits such communications.

If the debtor (or the LAA) notifies the debt collector *in writing* that the debtor refuses to pay a debt, or that the debtor wishes no further communications, the debt collector must then limit his or her communications. The debt collector only may advise the debtor that collection efforts are being terminated or that specified remedies can, or will, be enforced.[19]

The FDCPA also prohibits debt collectors from harassing or abusing anyone when attempting to collect debts. Prohibited activities include the use of threats, violence, or obscene language; publishing a list of debtors who allegedly refuse to pay their debts;[20] or ringing the telephone excessively to harass the person called.[21] Debt collectors are prohibited from using false or misleading representations in trying to collect debts. Debt collectors may not falsely represent the amount or legal status of a debt,[22] falsely state that the communication is

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[9] A "debt collector" is a person or organization in the business of collecting debts for others. Attorneys may meet that definition. 15 U.S.C. § 1692(a)(6)(F) (Supp. V 1987). *See* Crossley v. Lieberman, 868 F.2d 566 (3d Cir. 1989) (attorney who wrote demand letters to debtor on behalf of a lending bank and engaged in debt collection activities for other banks was a debt collector for purposes of the Fair Debt Collection Practices Act (FDCPA)). Not included in the FDCPA definition of "debt collectors" are, among others, officers or employees of a creditor collecting debts for that creditor (for example, the billing section of a department store). Alternately, a "creditor" is the person or organization to whom the debt is owed. 15 U.S.C. § 1692(4) (1988).

[10] 15 U.S.C. § 1692 (1988).

[11] *See* CAL. CIV. CODE §§ 1788-1788.32 (West 1993); FLA. STAT. ANN. §§ 559.55-.78 (West 1993); LA. REV. STAT. ANN. §§ 9:3562 (West 1992); MD. COM. LAW CODE ANN. §§ 14-201-204 (Michie 1992); MASS. GEN. LAWS ANN. ch. 93 § 49 (West 1992); S.C. CODE ANN. § 37-5-108 (Law. Co-op. 1991).

[12] For information about the military's procedures for processing debt complaints, see sources cited *supra* note 7; *see also* DEP'T OF AIR FORCE, AIR FORCE REG. 35-18, PERSONAL FINANCIAL RESPONSIBILITY (17 Apr. 1989).

[13] An LAA should be alert to a debt collector's argument that the client gave permission in the underlying contract with the creditor for third-party contact in the event of default. The FDCPA does not consider this to be adequate "consent." Consent in the contract to allow third-party contact, however, may be adequate under state law for the creditor to contact third parties.

[14] If none of the three third-party contact scenarios exist, debt collector may only communicate with the debtor, the debtor's attorney, a credit reporting agency (if permitted by law), the creditor, the creditor's attorney, and the debt collector's attorney. 15 U.S.C. § 1692(c) (1988).

[15] When getting location information about a debtor pursuant to 15 U.S.C. § 1692(b), the debt collector shall not, among other things, state that the consumer owes a debt, communicate by postcard, or use any language or symbol on the envelope that indicates the debt collector is in the debt collection business or that the communication relates to a debt. Once the debt collector knows that the consumer is represented by an attorney, any future communication must be with that attorney.

[16] States may apply similar criteria to creditors contacting third parties in seeking debt collection assistance. LAAs should research the law in their jurisdictions.

[17] Contacting a debtor before 0800 and after 2100 at the debtor's location is presumed unusual. 15 U.S.C. § 1692(c) (1988).

[18] Legal assistance attorneys are "representing" the client. *See* Graziano v. Harrison, 763 F.Supp. 1269 (D.N.J. 1991) (collector did not violate FDCPA by failing to cease communication with the debtor once notified that the debtor was represented by an attorney when subsequent notices pertained to different debts and the collector was not informed that the attorney represented the debtor on all subsequent debts).

[19] 15 U.S.C. § 1692(c).

[20] Debt collectors, however, may furnish a list of debtors who allegedly fail to pay their debts to credit reporting agencies.

[21] *Id.* § 1692(d).

[22] In the author's opinion, debt collectors frequently imply that the matter has been referred to an attorney for legal process, but that if the debtor pays promptly, the lawsuit will not be filed.

from an attorney, or threaten to take any action that cannot be taken legally or that is not intended to be taken.[23] Unfair practices or unconscionable means to collect debts likewise are prohibited. Examples of unfair practices include soliciting postdated checks from the debtor for the purpose of threatening criminal prosecution or depositing—or threatening to deposit—postdated checks prior to the date on the check.[24]

If a debt collector chooses to sue the debtor, venue restrictions may arise. In all cases *other* than those enforcing an interest in realty, debt collectors shall bring the suit only in the judicial district in which the debtor signed the contract sued upon, or in which the debtor resides at the commencement of the action.[25]

Aggrieved clients need not show actual damages to succeed in an action against a debt collector who violates the FDCPA; they only need to prove that a violation occurred. If the LAA is in an office that has no in-court representation program, he or she should refer the client to a civilian attorney because the FDCPA provides for attorneys' fees and court costs.[26]

The first step a LAA should take when asked to represent a debtor client or when contacted by a person trying to collect the debt is to determine with whom he or she is dealing. If the adverse party is a debt collector, the FDCPA and state law will apply; if the party is a creditor, then only state law will apply. Major Hostetter.

Tax Note

Federal Income Tax Withholding

Now that the 1992 federal income tax season has passed, legal assistance providers may begin thinking about next year. Recall that many military taxpayers were surprised that they received a very small federal income tax refund or had to pay federal income tax this year. In many cases, this occurred because the withholding rates were changed in early 1992.[27] Legal assistance providers can help military taxpayers plan for next year *right now* by advertising the availability of two Internal Revenue Service (IRS) publications: Publication 505, *Tax Withholding and Estimated Tax*,[28] and Publication 919, *Is My Withholding Correct for 1993?*[29] These publications may be ordered from the IRS by calling 1-800-829-3676. This note summarizes some of the information that should be relayed to military taxpayers through the installation's preventive law services.[30]

Employers withhold federal income tax from a taxpayer's pay based on the amount the taxpayer earns and the information the taxpayer provides her employer on the Form W-4, Employer's Withholding Allowance Certificate. Taxpayers should use this form and its worksheets to calculate the number of allowances to claim and whether the taxpayer should have any optional additional amount withheld for 1993. Many taxpayers can guarantee that they are not underwithheld by specifying an additional amount on Form W-4, line 6, for withholding. Taxpayers who do not pay enough tax either through withholding or by making estimated tax payments may have to pay an underpayment penalty.[31]

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[23] In the author's opinion, debt collectors often will threaten a lawsuit when they rarely take such cases to court.

[24] *Id.* § 1692(f).

[25] *Id.* § 1692(i).

[26] *Id.* § 1692(k).

[27] *See* TJAGSA Practice Note, *Change in Federal Income Tax Withholding Rates*, ARMY LAW., Apr. 1992, at 69 (discussing *IRS Notice 92-6, Change in Withholding Tables, 1992-7 I.R.B. 18*).

[28] INTERNAL REVENUE SERV., PUB. 505, TAX WITHHOLDING AND ESTIMATED TAX (Dec. 1992) [hereinafter I.R.S. PUB. 505]. This publication includes a summary of important changes for 1993; information about the underpayment penalty; and the 1993 tax rate schedules, personal exemption, and standard deductions. The personal exemption for 1993 rises $50 to $2350. The standard deduction for most taxpayers is shown in the chart below:

If your filing status is:	*Your standard deduction is:*
Single	$3700
Married filing jointly	$6200
Qualifying widow(er)	$6200
Married filing separately	$3100
Head of household	$5450

Using the tax rate tables provided in this publication, taxpayers may estimate their expected federal income tax liabilities and compare them with their current withheld amounts to determine if they will owe federal income taxes.

[29] INTERNAL REVENUE SERV., PUB. 919, IS MY WITHHOLDING CORRECT FOR 1993? (1992) [hereinafter I.R.S. PUB. 919].

[30] *See* Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 3; DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM paras. 3-3 and 3-4 (30 Sept. 1992); *See also* LEGAL ASSISTANCE BRANCH, ADMIN. AND CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 276 LEGAL ASSISTANCE PREVENTIVE LAW SERIES (Dec.1992) (containing numerous pamphlets on many common consumer and other legal subjects) (available on the Legal Automation Army-Wide System Bulletin Board).

[31] *See* I.R.S. PUB. 505, *supra* note 28, ch. 4 (Underpayment Penalty).

A military taxpayer may take his or her end-of-month pay statement showing federal income tax withheld based on 1993 rates and use the worksheets in Publication 919 to determine if enough (or too much) is being withheld. A military taxpayer may find that he or she is having too little tax withheld if he or she has an off-duty job, if a spouse works, or if he or she has income not subject to withholding (e.g., dividends, royalties, farm income).[32] On the other hand, a taxpayer who received a sizeable federal income tax refund (e.g., more than $500 for 1992) may find that he or she had too much withheld. The taxpayer who does not want to receive such a large refund in 1994, instead preferring to receive more each pay period, should prepare a new Form W-4 for 1993 to reduce the amount withheld.

Military taxpayers should be reminded that, as their circumstances change during the year, they should review their tax situations to see if new Forms W-4 should be filed. Changes in marital status or loss of the ability to claim a dependency exemption for a child are examples of when taxpayers should review Publication 919. A taxpayer *must* prepare a new Form W-4 and file it with his or her employer within ten days if he or she divorces (and has been claiming married status) or experience an event that decreases the withholding allowances that he or she may claim.[33] Major Hancock.

Weight Control

A recent scientific report, *Body Composition and Physical Performance*,[34] raises serious questions about the Army's current weight control program. Legal assistance and trial defense attorneys might find the report useful when working on separation actions, written reprimands, bars to reenlistment, or adverse efficiency reports involving weight control.

The report was prepared—pursuant to a contract awarded by the Department of the Army (DA)—by a committee of the National Academy of Sciences. The committee invited several individuals—chosen for their "specific expertise in the areas of body composition, performance, and obesity"[35]—to conduct research and present papers to the committee. Part I of the report contains the committee's summary of these papers as well as their recommendations to DA, while part II reprints the individual papers.[36]

The report states that "the rationale for current standards for body weight and body composition in the military is that these measures are correlated with performance of military duties, appearance, and overall health." Although the study discusses appearance[37] and overall health[38] rationales, the report focuses on the correlation of current body composition standards with physical performance.[39]

The report criticizes the use of body fat percentage as an indicator of physical performance ability. "Within the range of body composition exhibited by current military personnel, there is no consistent relationship between body fat content and physical performance."[40] In reaching this conclusion, the committee reasoned that load carrying and lifting abilities

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[32] I.R.S. PUB. 919, *supra* note 29, at 2.

[33] I.R.S. PUB. 505, *supra* note 28, at 3-4, lists the following examples:

> a. The taxpayer has been claiming an allowance for a spouse, but is now divorced or the spouse is now claiming his or her own allowance on a separate Form W-4.
>
> b. The taxpayer had been claiming an allowance for a dependent for whom the taxpayer will no longer provide more than half of the dependent's support for the year.
>
> c. The taxpayer had been claiming an allowance for a child, but the child will earn more than $2,350 in 1993 and will be 24 or older by the end of 1993, or 19 or older by the end of 1993, and will not qualify as a student.
>
> d. The taxpayer had been claiming allowances for expected deductions, but finds they will be less than expected. This could occur if the taxpayer has a large mortgage interest payment, sells a home early in the year, and does not incur another mortgage.

[34] INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, Body Composition and Physical Performance (1992) [hereinafter Report]. This 356-page report was prepared by the Committee on Military Nutrition Research, Food and Nutrition Board. Copies of this report can be obtained by writing the National Academy Press, 2101 Constitution Avenue, N.W., Washington, DC 20418.

[35] *Id.* at x.

[36] Friedl, Body Composition and Military Performance: Origins of the Army Standards; Hodgdon, Body Composition in the Military Services: Standards and Methods; Cureton, Effects of Experimental Alterations in Excess Weight on Physiological Responses to Exercise and Physical Performance; Vogel and Friedl, Army Data: Body Composition and Physical Capacity; Harman and Frykman, The Relationship of Body Size and Composition to the Performance of Physically Demanding Military Tasks; Katch, New Approaches to Body Composition Evaluation and Some Relationships to Dynamic Muscular Strength; Jones et al., Associations Among Body Composition, Physical Fitness, and Injury in Men and Women Army Trainees; Chumlea and Baumgartner, Body Composition, Morbidity, and Mortality; Lukaski, Critique of the Military's Approach to Body Composition Assessment and Evaluation; Shephard, Body Composition and Performance in Relation to Environment; Gam, Sex Differences and Ethnic/Racial Differences in Body Size and Composition. Report, *supra* note 34, *passim*.

[37] "A relationship between trim military appearance and military performance could not be identified. If the military determines that a trim military appearance is important, objective criteria should be developed to the extent possible for appearance evaluation." Report, *supra* note 34, at 27.

[38] The report recognizes that a correlation exists between fat deposits in the abdominal area and long-term health risk (e.g., hypertension, diabetes, and heart disease). Measurements of waist and hip circumference, when combined with height and weight measurements, may provide "a better assessment of long term health risk." The report suggests that this would be useful for screening individuals at accession and identifying soldiers already admitted, without regard to obesity, for special medical attention. Report, *supra* note 34, at 7.

[39] The committee specifically was tasked with examining the relationship between body composition and physical performance. Report, *supra* note 34, at ix.

[40] *Id.* at 25.

more accurately gauge combat capability than the current physical fitness test,[41] while measuring total lean body mass (LBM) more accurately predicts load carrying and lifting ability than body fat percentage.[42]

The report also criticizes the methods used to measure body fat percentage, including anthropometric (e.g., height, weight, and body circumference) measures. The report finds that anthropometric measures may involve problems with observer error[43] and, even when the observer takes the measure correctly, "the [body fat] formulas are based on population data, and when such formulas are used to calculate body fat of an individual, a significant error may result."[44]

The report also indicates that the current body composition standards need to be validated for the significant ethnic groups in the military.[45] "There is general agreement that Blacks have relatively greater bone mineral mass [than Caucasians], and there is some evidence that muscle mass may be different in Blacks and Caucasians," yet the Army's anthropometric standards have been developed "predominantly from Caucasian and mixed study groups that may not adequately predict body composition in racial and ethnic subgroups."[46] The report states that "Many investigators have recognized that the methods currently used do not accurately predict body composition in blacks, and their applicability to other racial and ethnic groups, such as Asians, Hispanics, and Native Americans is uncertain."[47] Major Peterson.

Soldiers' and Sailors' Civil Relief Act Update

Section 525 Means What it Says

Section 525 of the Soldiers' and Sailors' Civil Relief Act (SSCRA)[48] tolls statutes of limitations for military members for their periods of military service. Even though that section's language does not explicitly predicate protection on a showing that military service materially has prejudiced a service member from acting in a prescribed period, courts have interpreted the section in different ways.[49]

On March 31, 1993, the Supreme Court decided *Conroy v. Aniskoff*,[50] stating that section 525 means exactly what it says and does not condition its protection on whether a service member can show hardship or prejudice because of military service.

Conroy involved a career Army officer who failed to pay local real estate taxes on property located in Danforth, Maine. After the officer failed to redeem the property within the applicable redemption period, the state sold it.[51] The officer argued that section 525 tolled the redemption period while he was in the military. The lower courts disagreed, however, saying that it would be "absurd and illogical to toll limitations periods for career service personnel who had not been handicapped by their military status."[52] Reversing the lower courts, the Supreme Court read section 525 literally to give absolute protection. Major Hostetter.

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[41] *Id.* The report concludes that the three events used in the Army Physical Fitness Test are not accurate physical indicators of the physical requirements facing soldiers in combat. For more detailed discussion, see Harman and Frykman, *supra* note 36, *in* Report, *supra* note 34, at 111-17.

[42] Lean Body Mass (LBM) is the fat-free mass of the body—muscle, water, and bone mass. Because LBM is expressed as a total weight (e.g., kilograms) and body fat percentage is the ratio of fat to total body weight, a person can have both a high LBM and a high body fat percentage. The report's conclusion reflects what many might understand intuitively, that is, the big guy who has a significant body fat percentage and a high LBM might be able to carry the machine gun and other heavy combat gear farther than the marathon runner who has no fat and little LBM. Report, *supra* note 34, at 25.

[43] One of the studies took 38 Navy personnel and conducted training in circumference measurements. After each trainee conducted 45 circumference measurements, only 68% of the trainees had reached proficiency. Hodgdon, *supra* note 36 *in* Report, *supra* note 34, at 63.

[44] Report, *supra* note 34, at 7. The report also criticizes other techniques designed to measure body fat mass, including densitometry (e.g., immersion testing). *Id.* at 8-9. The report concludes, however, that

> For individuals who face separation from the service for failing to meet body composition standards, it is suggested that the military identify a limited number of military centers that can perform more specific measurements of body composition (for example, dual photon densitometry, underwater weighing, and body water) and to which the individuals concerned could be referred for further evaluation.

Id. at 27.

[45] *Id.* at 27.

[46] *Id.* at 9-10.

[47] *Id.* at 9.

[48] 50 U.S.C. App. § 525 (1990).

[49] In Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977), a career service member failed to pay property taxes on real estate purchased during his period of service. The state subsequently sold the property when the service member failed to redeem it within the state statutory redemption period. The service member argued the redemption period was like a statute of limitation; therefore section 525 should have tolled the running of the redemption period for his time in military service. The court disagreed because he failed to show his military service prejudiced his ability to redeem the property within the prescribed time period. In 1981, the Court of Claims rejected *Pannel* and found that section 525 applies to all service members regardless of whether or not they can show material prejudice. That case involved an officer who sued the United States government several years after the statute of limitations had passed for filing such claims. The court held that the officer's active military service tolled the statute of limitations. Bickford v. United States, 656 F.2d 636 (Ct. Cl. 1981).

[50] 1993 WL 89113 (Mar. 31, 1993), *rev'g* 599 A.2d 426 (Me. 1992).

[51] "Under Maine law, a taxing authority has a lien against real estate until properly assessed taxes are paid. If taxes remain unpaid for 30 days after a notice of lien and demand for payment has been sent to the owner, the tax collector may record a tax lien certificate to create a tax lien mortgage. The taxpayer then has an 18-month period of redemption in which he may recover his property by paying the overdue taxes plus interest and costs." *Id.* at 10.

[52] *Id.*

Contract Law Note

Exercise of Options During Funding Gaps

A common concern of new contract attorneys is whether the government may exercise an option for additional services at the beginning of a fiscal year. For example, when an activity has not received funding for operations during a new fiscal year, may it create a new obligation by exercising an option? Alternatively, when option terms are unfavorable to the contractor, a contractor may contest the exercise of an option as untimely or invalid to avoid further performance under the contract. This note discusses the underlying principles applicable to exercising an option—subject to the availability of funds—at the beginning of a fiscal year.

An option is an offer that is irrevocable for a fixed period of time. It gives the government the unilateral right—for a specified time and at a specified price—to order additional supplies or services or to extend the term of a contract.[53] Frequently, contracting officers use options to acquire additional installation support services following expiration of the base period of a contract. Contracting officers often use options instead of long-term contracts because of the impact of fiscal law.

Two statutes limit the length of long-term services contracts. The *Bona Fide* Needs statute[54] prohibits agencies from acquiring unnecessary services during the availability period of the underlying appropriation. Because most agencies and installations fund operations with annual appropriations, to comply with the *Bona Fide* Needs statute contracting officers often divide services into fiscal year periods. Additionally, contracting officers often compete future fiscal year periods as options for exercise later. The second statute that restricts the length of long-term service contracts is the Anti-deficiency Act.[55] This act prohibits an agency from obligating funds prior to Congress passing an appropriation, unless otherwise authorized by law. Because of the Anti-deficiency Act, an agency may not exercise unconditionally an option for future fiscal year's services until the future year's appropriations are available for obligation.

The result is a "Catch-22" situation—that is, an agency may have an option for needed services; a requirement under the option clause to exercise the option, if at all, by the first day of the fiscal year; no appropriations to obligate when required to decide whether to exercise the option; and a vigilant contractor seeking to renege on its improvident offer.

This was the factual situation in *United Food Services*[56] with one important difference: the contract contained an *Availability of Funds (APR 1984)* clause.[57] This clause permitted the government to hold the contractor to its option price despite the contractor's unwillingness to perform during the fourth option year of the contract. The government was able to enforce the option price because the clause—included in the contract at the time of award—notified the contractor that funds presently were unavailable to support the government's obligations under the contract and conditioned the government's obligation on the availability of funds.

In *United Food Services*, the contracting officer timely exercised—shortly prior to the fourth option year—an option for an additional year's services. The contractor, however, wanted to avoid performing services at the option price and protested. Nevertheless, on the first day of the fiscal year for the fourth option year, the contracting officer incrementally funded one month of services. Forty-five days later, the contracting officer incrementally funded a second month's services. Shortly thereafter, the contracting officer funded the remainder of the option year's services. The contractor performed the option under protest.

At the Armed Services Board of Contract Appeals (ASBCA or Board), the contractor challenged the government's right to exercise the option based on the form of the option exercise, alleged government noncompliance with Federal Acquisition Regulation (FAR) 17.207,[58] and attacked the manner in which the government funded the option. The ASBCA rejected the contractor's challenges and granted summary judgment in favor of the Government. It held that the contracting officer's exercise of the option by letter, rather than by modification, was of no legal consequence. The contract's option clause[59] required only that the contracting officer exercise the option in

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[53] GENERAL SERVICES ADMIN. ET AL., FEDERAL ACQUISITION REG. 17.201 (1 Apr. 1984) [hereinafter FAR].

[54] 31 U.S.C. § 1502(a) provides:

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title [31 U.S.C. § 1501]. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

[55] 31 U.S.C. § 1341(a) provides, "An officer or employee of the United States Government or of the District of Columbia government may not—. . . . (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

[56] ASBCA No. 43711, 93-1 BCA ¶ 25,462.

[57] FAR 52.232-18.

[58] FAR 17.207(c)(1) provides, in part, "The contracting officer may exercise options only after determining that—(1) Funds are available."

[59] FAR 52.217—*Option to Extend the Term of the Contract—Services.*

writing and did not require the use of any particular form. The ASBCA then interpreted FAR 17.207's apparent requirement that the contracting officer must determine the availability of funds at the time of exercise—a legal impossibility in this case—as inapplicable because the contract included an *Availability of Funds* clause. Otherwise, the clause would have been meaningless. Furthermore, the Board found that FAR 17.207 conferred no enforceable rights on the contractor because it merely described an internal government procedure. Lastly, the ASBCA concluded that the incremental funding of the option period did not affect the government's earlier exercise of the option subject to the availability of funds. Consequently, the contractor could not avoid performing services pursuant to the government's valid exercise of the option.

Contract attorneys should ensure that all service contracts with options for future requirements contain the appropriate *Availability of Funds* clause. Furthermore, when planning acquisitions, contract attorneys should advise contracting officers to use the authority given to them by 10 U.S.C. § 2410a,[60] which permits many service contracts to cross fiscal years. Lastly, given an *Availability of Funds* clause, contract attorneys should ensure that contracting officers exercise options in accordance with the terms of the option clauses contained in their contracts. Lieutenant Colonel Jones.

Administrative and Civil Law Note

Standards of Conduct Item

Government Ethics Videotapes Available

The Office of Government Ethics (OGE) has advised The Judge Advocate General's School (TJAGSA) that two of its videotapes are in the public domain and may be reproduced for training purposes. TJAGSA has obtained written permission to copy these videotapes—*Integrity in Public Service* and *Guide to the Standards of Ethical Conduct*—which ethics counselors may find helpful in presenting ethics training.

The first videotape is twenty minutes in length. An on-screen narrator guides the viewer through a series of vignettes on gifts, financial interests, maintaining impartiality, outside interests and activities, and seeking employment and postemployment restrictions. The narrator covers each of the topics while discussing the applicable statutes and rules.

The second videotape is fifty minutes in length and provides a detailed outline of the *Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards)*.[61] The OGE designed this tape for use in training agency ethics practitioners on the new *OGE Standards* and not for use in training other employees.

Army judge advocate offices desiring a copy of either *Integrity in Public Service* or *Guide to the Standards of Ethical Conduct* from TJAGSA should send a blank VHS videotape for each tape desired to The Judge Advocate General's School, U.S. Army, ATTN: JAGS-IM-V, Charlottesville, VA 22903-1781. Major Hancock.

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[60] 10 U.S.C. § 1502(a) provides the following:

> Funds appropriated to the Department of Defense for a fiscal year shall be available for payments under contracts for any of the following purposes for 12 months beginning at any time during the fiscal year:
>
> (1) The maintenance of tools, equipment, and facilities.
> (2) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.
> (3) Depot maintenance.
> (4) The operation of equipment.

[61] 57 Fed. Reg. 35,006-35,067 (to be codified at 5 C.F.R. pt. 2635) (proposed July 23, 1991).

Claims Report

United States Army Claims Service

Personnel Claims Recovery Notes

Use of Continuation Sheets for the *DD Form 1840*

All claims judge advocates and claims attorneys should remind local installation transportation offices (ITO) to counsel soldiers on the proper use of *DD Form 1840* and any subsequent continuation sheets in recording loss or damage on the day of delivery.

The ITO should counsel soldiers that the carrier is to use a separate continuation sheet if insufficient space is available to list all loss or damage discovered at the time of delivery on the *DD Form 1840*.[1] The carrier and service member should complete Block 14a of the *DD Form 1840* if a continuation sheet is necessary. The reverse of *DD Form 1840 (DD Form 1840R)* should not be used to note loss or damage that does not fit on the *DD Form 1840*.[2]

Similarly, ensure that the area claims office is using continuation sheets for *DD Forms 1840R* properly.[3] The soldier should note all subsequently discovered loss or damage either on *DD Form 1840R* or on a continuation sheet to that form.

Using a continuation sheet when no more room exists on the appropriate form is the best method to complete listing of loss or damage. Erroneously noting loss or damage on the wrong side of either *DD Form 1840* or *DD Form 1840R*, however, does not necessarily preclude carrier recovery for those items. The government should argue that any notice provided to the carrier on the form is sufficient to uphold recovery. Captain Boucher.

Increased Released Valuation

On 4 March 1993, the *Federal Register* reported the Military Traffic Management Command proposal to increase carrier liability for Codes 4, 5, 5a, 7, 8, J, and T from the present sixty cents per pound, per item, to one dollar and twenty-five cents per pound, times the net weight of the shipment.[4] The current procedures for processing claims would remain in place and carriers would be required to factor any increased cost into their transportation single factor rates. The proposed start date for overseas increased released valuation would be 1 October 1993 (the beginning of the next rate cycle). Although the notice specified a comment period until 30 March 1993, that period now had been extended until 15 May 1993.

Increased released valuation for overseas moves would bring carrier liability for these modes of shipment into parity with carrier liability for continental United States moves. All military services' claims departments strongly have supported this proposal. Even though the proposal will have significant financial impact on the amount of money the government can recover from carriers, the proposal's primary purpose is to give carriers a strong financial incentive to improve the quality of overseas moves for soldiers and their families by forcing carriers to pay reasonable amounts for items they lose or damage.

Carriers and their trade associations vigorously are opposing the proposal and may seek to use congressional pressure to prevent its adoption. Given the military's claims experiences resulting from the drawdown in Europe, the military services have maintained steadfastly that the government should demand the highest quality moves possible for its service members. The United States Army Claims Service (USARCS) will provide periodic updates on this important proposal as information becomes available. Colonel Bush.

Management Note

Claims Training

The USARCS, with the approval of The Assistant Judge Advocate General, has restructured its annual training courses. Additionally, the USARCS claims training courses will be managed under the Army Training Requirement Resources System (ATRRS). Accordingly, staff judge advocates desiring to send personnel to claims training courses will be able to coordinate attendance through their installation G3 training and ATRRS directorates and offices. The following two courses will be conducted annually:

Annual Claims Training Course

The course will be held the first quarter of each fiscal year and will consist of 100 attendees. Attendees include active Army claims judge advocates and claims attorneys, sister services, Reserve Component (RC) judge advocates in claims

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[1] Dep't of Defense, DD Form 1840, Notice of Loss or Damage (Jan. 1988).

[2] *See* DEP'T OF ARMY PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 2-55b(5)(a) (15 Dec. 1989).

[3] *Id.* para. 2-55b(5)(b).

[4] 58 Fed. Reg. 4 (1993).

detachments or serving as claims officers, civilian attorneys in the Corps of Engineers, claims investigators, and senior civilian and enlisted claims personnel whose primary responsibilities encompass general claims office supervision.

This course will focus equally on torts and personnel claims, stressing a "train the trainer" philosophy. Staff judge advocates are encouraged to send their claims judge advocates or senior adjudicators for claims training and claims management training which will provide them with improved claims management skills and an ability to train others in their offices.

Medical Legal Course

The course will be held the second or third quarter of each fiscal year and will consist of 100 attendees. Attendees include active Army claims judge advocates and claims attorneys, RC judge advocates in claims detachments or serving as claims officers, medical claims judge advocates, investigators and senior civilian and enlisted claims personnel whose primary responsibilities encompass medical tort claims investigation and settlement.

This workshop will provide training through practical exercises and seminars in the various aspects of medical malpractice claims. In addition to training, USARCS action officers and members of the Case Consultation Review Branch, Office of The Surgeon General, will be available for formal case consultation and review.

Properly adjudicating and processing claims throughout the Army is a critical mission. The training provided in these two courses will be crucial to the claims system as the Army downsizes. Although funding for previous courses has been tight at many installations, the USARCS anticipates that our entry into the ATRRS program will give these courses the necessary emphasis and ensure the attendance of those who can benefit most from claims training. Ms. Slusher.

Professional Responsibility Note

OTJAG Standards of Conduct Office

Ethical Awareness

The Standards of Conduct Office normally publishes summaries of ethical inquiries that have been resolved after preliminary screening. These inquiries—which involve isolated instances of professional impropriety, poor communication, lapses in judgment, and similar minor failings—typically are resolved by counseling, admonition, or reprimand. More serious cases, however, are referred to The Judge Advocate General's Professional Responsibility Committee (PRC or Committee).

The following PRC opinion, which applies the Army's Rules of Professional Conduct for Lawyers[1] to a case involving a legal assistance attorney's plagiarism of copyrighted publications, is intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for Army lawyers. To stress education and to protect privacy, neither the identity of the office, nor the name of the subject, will be published.[2] Mr. Eveland.

Editor's Note—Every attorney is well advised to credit his or her sources properly and to avoid even the appearance of claiming another's work as his or her own. Even if an author obtains permission to use another's work—whether copyrighted or not—the author has committed an act of plagiarism if he or she fails to acknowledge that the information being presented is not his or her original work. Plagiarism never is "authorized" merely because the subject materials may be reprinted. Likewise, a party cannot consent to having his or her work "plagiarized." While copyright infringement may be avoided by obtaining the copyright owner's consent or by complying with the law of fair use, plagiarism may be avoided only (1) by citing the source from which the material was taken, or (2) if the source does not want to be acknowledged or the actual source is not known, by clearly indicating that the material is not exclusively the author's original work.

[1] *See* DEP'T OF ARMY, PAMPHLET 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987) [hereinafter DA PAM. 27-26]. When Mr. X's first two articles were published, *DA Pam 27-26* was the controlling version of the Rules of Professional Conduct. On 1 June 1992, *Army Regulation 27-26* superseded *DA Pam. 27-26. See generally* DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (17 May 1992) [hereinafter AR 27-26].

[2] The actual PRC opinion freely was edited to replace real names and specific identifiers with fictional ones.

Professional Responsibility Opinion 93-1

The Judge Advocate General's Professional Responsibility Committee

Facts

Mr. *X* is an attorney employed in the Office of the Staff Judge Advocate, Fort Defense. During the events discussed herein, he worked as a legal assistance attorney.

In conjunction with his legal assistance duties, Mr. *X* authored three articles which he arranged to have published in the *Fort Defense Gazette*, the installation newspaper. When the last of these articles appeared in print, the byline indicated that the article was "By Mr. *X*, Legal Assistance Office." This particular article was based substantially on a syndicated columnist's copyrighted article that had appeared in a major metropolitan newspaper seven months earlier. Despite extensive reliance on the copyrighted article—including verbatim copying of many passages—Mr. *X*'s article did not attribute a source of any kind. Additionally, Mr. *X* failed to obtain prior permission to reprint or to use the copyrighted article.

One month after the article appeared in the *Fort Defense Gazette*, the copyright owner wrote Mr. *X* that his article was taken from its article, inquired whether he had permission to use it, and indicated that the matter was being referred to the syndicated columnist. Within a week, Mr. *X* wrote to the columnist seeking retroactive permission to "publish" the article. Shortly thereafter, the copyright owner wrote directly to the editor of the *Fort Defense Gazette*. The copyright holder described the unauthorized use of the article and lack of attribution as both a violation of copyright protection and plagiarism. It further demanded and received $100 in satisfaction for publication of Mr. *X*'s article. Mr. *X* subsequently reimbursed the United States for the copyright holder's charges.

The *Fort Defense Gazette* previously had published two other articles by Mr. *X*—based extensively on sources that were not credited or recognized. Neither Mr. *X*, nor the *Fort Defense Gazette*, obtained permission to publish the articles from the copyright holders.

Applicable Law

17 U.S.C. §106
Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyright work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.[3]

17 U.S.C. §107
Limitation on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[4]

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[3] 17 U.S.C.A. § 106 (West Supp. 1990).

[4] *Id.* § 107.

Rules of Professional Conduct
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

. . . .

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . .[5]

Discussion

Based on his submissions to the preliminary screening official and to the PRC, Mr. *X* raises two matters worthy of discussion. Mr. *X* considered the use of the source materials to be a "fair use" under copyright law. The PRC does not agree. While arguably the article Mr. *X* authored met most of the "fair use" considerations, the Committee believes that the extent of copying employed went beyond that which an attorney could assume would be "fair use" under 17 U.S.C. § 107's "amount and substantiality" factor.[6] Even the "expert" opinion of a private practitioner in copyright law—submitted by Mr. *X* and carefully considered by the Committee—does not unequivocally declare Mr. *X*'s actions a "fair use." Instead, that opinion views Mr. *X*'s conduct as "trivial in comparison" to what others have done. We also note that the reaction of the copyright holder to Mr. *X*'s last article was not trivial.

Secondly, Mr. *X* forwarded the original source documents along with his articles to the Fort Defense paper, and the staff compounded the error by failing to obtain permission and properly identify authorship. In effect, Mr. *X* claims that he relied on the Fort Defense paper to sort out these issues by comparing the text. Mr. *X* has admitted that, in retrospect, this reliance was an error in judgment. We agree. An attorney, particularly one as experienced as Mr. *X*, has an obligation to the public and to those who will publish his work product to ensure that copyrights are honored. The public rightfully expects attorneys to respect the rights of others; therefore, attorneys have a special standard of care. By failing to, at the least, highlight potential copyright or source attribution issues, Mr. *X* negligently failed to meet this expected standard of care. While the Committee agrees that the *Fort Defense Gazette*'s staff frequently made mistakes and was inexpert, that does not excuse Mr. *X*'s negligence.

We also note that Mr. *X*'s second argument undercuts the first. Forwarding the source articles to the *Fort Defense Gazette* to determine copyright issues implies that he recognized that "fair use" may have been questionable. Mr. *X* had a duty to satisfy himself on the issues, and was negligent for failing to do so.

Even if Mr. *X*'s articles were "fair uses" of the source materials, a case of plagiarism remains. Plagiarism by an attorney is a serious matter considered to violate Rule 8.4 and has been the subject of serious disciplinary proceedings by state courts.[7]

In his articles, Mr. *X* failed either to credit or to cite his sources in any manner, despite extensive reliance on, and wholesale copying of, entire passages. Mr. *X* admitted to this practice and explained it as a shortcut during busy periods. This is unacceptable conduct from an attorney and is the type of negligent misrepresentation that violates Rule 8.4(c).

In considering possible violations of the Rules of Professional Conduct, all relevant circumstances—including aggravating and mitigating matters—must be considered. Accordingly, the Committee notes that Mr. *X*'s conduct is aggravated by several factors. First is Mr. *X*'s persistent pattern of plagiarism—that includes several articles and sources—and his failure, over a lengthy period of time, to use professional care. Mr. *X*'s lengthy experience also makes his subsequent negligence disturbing. We also note the obvious embarrassment his actions have brought to the Army and Fort Defense. Finally, the Committee notes Mr. *X*'s lack of immediate apology to his sources or efforts to see that the *Fort Defense Gazette* retracted or corrected errors.

The Committee, however, does recognize several significant mitigating factors in this case. First, Mr. *X* lacks any apparent improper motive. We can find no intentional personal financial gain or significant professional gain. Rather, we are presented with a case of overzealous desire to provide timely legal assistance-related information to the Fort Defense community. Mr. *X*'s prior extensive effective service and his lack of any prior disciplinary problems also are important. We also consider that little significant harm to the general public or to the copyright holders resulted from Mr. X's actions. In this regard we note that he eventually made restitution.

We also note Mr. *X* raised the Legal Assistance Program's proactive publication emphasis and its frequent encouragements to freely copy, reuse, and "plagiarize" materials that are distributed by the Program. While we do not believe these encouragements constitute an excuse or justification for Mr. *X*'s failure to distinguish between copyrighted and Legal Assistance Program materials—entitled to little or no copyright protection—we do believe these statements by the Program did contribute to the development of Mr. *X*'s negligent lack of care.

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[5] AR 27-26, *supra* note 1, rule 8.4.

[6] 17 U.S.C.A. § 107 (West Supp. 1990).

[7] *See In re* Lamberis, 443 N.E.2d 549 (Ill. 1982); *In re* Zbiegien, 433 N.W.2d 871 (Minn. 1988).

Finally the Committee notes that Mr. *X* is unlikely to repeat this conduct. He has admitted that he was wrong and made a mistake in judgment. He has completed remedial training at his personal expense.

After carefully considering all of the factors, as well as Mr. *X*'s submissions to the preliminary screening official and this Committee, the Committee considers that Mr. X negligently violated Rule 8.4(c).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

12-16 July: 4th Legal Administrators Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19 July-24 September: 131st Officer Basic Course (5-27-C20).

19-30 July: 132d Contract Attorneys Course (5F-F10).

2 August 93-13 May 94: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 11th Federal Litigation Course (5F-F29) (formally conducted in October/November).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officer Legal Orientation Course (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

September 1993

8-10: ESI, Managing Information Systems Projects, Washington, D.C.

8-10: ESI, Contracting for Project Managers, Washington, D.C.

13-14: GWU, Preparing Government Contract Claims, Washington, D.C.

13-17: ESI, Federal Contracting Basics, Washington, D.C.

14-17: ESI, Negotiation Strategies and Techniques, Dallas, TX.

14-17: ESI, Preparing and Analyzing Statement of Work and Specifications, Washington, D.C.

14-18: GWU, Government Contract Law, Washington, D.C.

15: GWU, Government Contract Compliance: Washington, D.C.

15-17: GWU, Schedule Contracting, Washington, D.C.

19-23: NCDA, Trial Advocacy, San Francisco, CA.

20-21: ESI, Incentive Contracting: Motivating and Rewarding Excellence, San Diego, CA.

20-24: GWU, Formation of Government Contracts, Washington, D.C.

21-24: ESI, Contract Pricing, Washington, D.C.

21-24: ESI, Subcontracting, Washington, D.C.

23-24: ESI, Incentive Contracting: Motivating and Rewarding Excellence, Denver, CO.

27-1 Oct: ESI, Operating Practices in Contract Administration, Washington, D.C.

28-1 Oct: ESI, Contract Accounting and Financial Management, Washington, D.C.

30-2 Oct: NCDA, Asset Forfeiture, New Orleans, LA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1993 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
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 annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1993 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 within 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 (202) 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 A239203 Government Contract Law Deskbook Vol 1/ JA-505-1-91 (332 pgs).

AD A239204 Government Contract Law Deskbook, Vol 2/ JA-505-2-91 (276 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 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 A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).

AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).

AD A244032 Family Law Guide/JA 263-91 (711 pgs).

AD A241652 Office Administration Guide/JA 271-91 (222 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).

AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).

AD A259022 Tax Information Series/JA 269(93) (117 pgs).

AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).

AD A260219 Air Force All States Income Tax Guide—January 1993

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).

AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A255064 Government Information Practices/JA-235(92) (326 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

*AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/ JA 310(92) (452 pgs).

*AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

*AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 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 USC 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

a. *Obtaining* Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center 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 (301) 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. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. *Listed below are new publications and changes to existing publications.*

Number	Title	Date
AR 5-14	Management of Contracted Advisory and Assistance Services	15 Jan 93
AR 30-18	Army Troop Issue Subsistence Activity Operating Policies	4 Jan 93
AR 135-156	Military Publications Personnel Management of General Officers, Interim Change 101	1 Feb 93
CIR 11-92-3	Internal Control Review Checklist	31 Oct 92
CIR 608-93-1	The Army Family Action Plan X	15 Jan 93
JFTR	Joint Federal Travel Regulations, Change 75	1 Mar 93
UPDATE 16	Enlisted Ranks Personnel Update Handbook, Change 3	27 Nov 93

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

1) Active-duty Army judge advocates;

2) Civilian attorneys employed by the Department of the Army;

3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;

4) Active duty Army legal administrators, noncommissioned officers, and court reporters;

5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;

6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS);

7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
Attn: LAAWS BBS SYSOPS
Mail Stop 385, Bldg. 257
Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged 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 a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four 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 Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE 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. To download it on to your hard drive, take the following actions 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 ask 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 on to 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
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	*The Army Lawyer/ Military Law Review* Database (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
FSO_201.ZIP	October 1992	Update of FSO Automation Program
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide

FILE NAME	UPLOADED	DESCRIPTION
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA281.ZIP	March 1992	AR 15-6 Investigations
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1/2
JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2/2
JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92
JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92
JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2
JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2
JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92
JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92
V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan 92 Contract Law Symposium
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

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 Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning 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, Sergeant First Class Tim Nugent, commercial (703) 805-2922, DSN 655-2922, or at the address in paragraph a, 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. The Army Law Library System

a. 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, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the libraries directly at the addresses provided below:

1. LTC William Harlan, USA Command, Control, Communications Systems Management Support Office, 5113 Leesburg Pike, Suite 600, Falls Church, VA 22041-3230; DSN 289-2014; commercial (703) 756-2014.

BCA Developments (CCH), 1977-1979 (paper); 1979-1982 (paper)
BCA Decisions, vols. 86-3, 87-1,-2,-3, 99-1; 1986-1988 (hardbound)
CFR, 99 Books 1987-1991 (paper)
CFR Regulations List of CFR Section Affected; 8 books, 6/92-2/93 (softbound)
CGD (Government Contracts), vol. 1, 1966-67 (paper)
Contract Appeals Decisions, Advance Sheets, July 1979 (hardbound)
Contract Appeals Decisions, Main Citator Table 56-2 through 86-1, no. 797, 6/11/86 (paper)
Contract Appeals Decisions, Main Citator Table 56-2 through 87-1, no. 829, 8/28/87 (paper)
Contract Cases Federal Developments, vols. 24-32, 1986 (paper)
Defense Communications Project Monitor's Handbook for the Preparation and Processing of Acquisition Actions, Binder, July 1983
Defense Contract Litigation Reporter, Binders (5) 1990-93
DOD Directives, Binder 1966-68
DOD Federal Acquisition Regulations, 201-235, apps. H-T
Federal Acquisition Regulations (FAR) System (Title 48), Binders (2), 3/1/88
Federal Register (Privacy Act Issuances) (Systems of Records, Agency Rules), vol. III, 1989 (softbound)
FOI Act Guide & Privacy Act Overview, 9/92 (paper)
FOI Caselist 9/87 (paper); 9/92 (paper)
Government Contracts Reporter, vol. 1-10, 11/7/84 (hardbound); no. 857-882, 7/8/87-12/29/87 (paper); no. 883-911, 1/6/88-7/13/88 (paper)
Public Laws 101-241 & 101-248, vol. 1, 5/90 (paper)
101-249 to 101-276, vol. 2, 7/90 (paper)
101-277 to 101-321, vol. 3, 10/90 (paper)
101-322 to 101-384, vol. 4, 12/90 (paper)
102-1 to 102-5, vol. 1, 5/91 (paper)
102-6 to 102-35, vol. 2, 8/91 (paper)
102-36 to 102-71, vol. 3, 10/91 (paper)
102-72 to 102-28, vol. 4, 12/91 (paper)
102-244 to 102-255, vol. 1, 5/92 (paper)
102-256 to 102-284, vol. 2, 7/92 (paper)
102-285 to 102-317, vol. 3, 9/92 (paper)
102-318 to 102-367, part 1, titles 1 to 25, vol. 4, 11/92 (paper)
102-318 to 102-367, part 2, titles 26 to end, vol. 4, 11/92 (paper)
Statutory Supplement, PL 100-488 to 100-623, uncodified, vol. 5, 1/89 (paper)
1989 PL 101-97 to 101-146, uncodified, vol. 5, 1/90 (paper)
1989 PL 101-147 to 101-240, uncodified, vol. 6, 2/90 (paper)
1990 PL 101-385 to 101-493, vol. 5, 1/91 (paper)
1990 PL 101-494 to 101-508 (Title VIII), vol. 6, 2/92 (paper)
1990 PL 101-508 (Title IX) to 101-424, vol. A, 2/92, (paper)
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Note: The above state code sets are one year out of date.

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