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Sent: Friday, January 04, 2013 10:33 AM
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Subject: Expert Witness Issue
Attachments: AR 27-40.pdf; AR 27-40 Judicial Notice.pdf

Ma'am,

The Defense wanted to provide the Court and the Government with the benefit of information in advance of our motions hearing. In the Government's response motion, it cites 5 CFR Section 2635.805(a) as a basis to prevent (b) (6) [redacted] and (b) (6) [redacted] from being able to testify.

5 CFR Section 2635.805(a) is codified in AR 27-40, Chapter 7-10, page 16. Under AR 27-40, the approval authority for any DA personnel to testify in a proceeding where the United States has an interest for a party other that the United States is the Litigation Division, OTJAG. However, Chapter 1-1(b) of the regulation does not apply in Department of Army or DOD proceedings such as a court-martial or an administrative board.

Yesterday, I spoke with (b) (6) [redacted], the Deputy Chief of Litigation Division. He informed me that although his office acts upon requests for DA personnel to act as experts in state and federal courts on a frequent basis, he has never seen such a request for a court-martial. COL Robitaille informed me that this is the case since AR 27-40 specifically excludes application of the provision to courts-martial. The Defense has also conducted a Westlaw search for the provision relied upon by the Government and has not found a single military case that cites the provision.

I have attached the entire AR 27-40 for the Court. I have also attached an excerpt of AR 27-40 which the Defense requests that the Court take judicial notice of for purposes of this motion.

v/r

David

David E. Coombs, Esq.

APPELLATE EXHIBIT 459
PAGE REFERENCED: ____
PAGE ___ OF ___ PAGES

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Army Regulation 27–40

Legal Services

Litigation

Headquarters
Department of the Army
Washington, DC
19 September 1994

Unclassified

SUMMARY of CHANGE

AR 27-40
Litigation

This revision--

- o Devotes a separate chapter to service of process (chap 2).
- o Replaces "investigative report" with "litigation report" reflecting current usage (chap 3).
- o Devotes a separate chapter to individual liability (chap 4).
- o Treats environmental litigation (chap 6).
- o Deletes coverage of criminal prosecutions in U.S. Magistrate and District Courts (see AR 27-10).
- o Delegates more authority to the installation level to determine release of information and appearance of witnesses (chap 7).
- o Updates procedures to obtain release from local or State jury duty (chap 10).

Headquarters
Department of the Army
Washington, DC
19 September 1994

*Army Regulation 27–40

Effective 19 October 1994

Legal Services

Litigation

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army

History. This printing publishes a complete revision of this Army regulation. Because the publication has been revised extensively, the changed portions have not been highlighted.

Summary. This regulation prescribes policy and procedures for litigation in civilian court proceedings, including the following: providing representation of the Army and its personnel in Federal and State court proceedings; remedies for procurement fraud; environmental litigation; bankruptcy; release of information and appearance of witnesses in criminal and civil court actions; procedures to follow when soldiers are summoned for jury duty; and, procedures for cooperation with the Office of Special Counsel.

Applicability. This regulation applies to all DA personnel (see glossary), including the Active Army, the Army National Guard, and the U.S. Army Reserve. This regulation applies during partial and full mobilization.

Proponent and exception authority. The proponent of this regulation is The Judge Advocate General. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief under their supervision within the proponent agency who holds the grade of colonel or the civilian equivalent.

Army management control process. This regulation is not subject to the requirements of AR 11–2. It does not contain internal control provisions.

Supplementation. Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval from the Office of The Judge Advocate General, ATTN: Litigation Division (DAJA–LT), 901 North Stuart Street, Arlington, VA 22203–1837.

Interim changes. Interim changes to this regulation are not official unless authenticated by the Administrative Assistant to the Secretary of the Army. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. Users are invited to send comments and suggestions to Office of The Judge Advocate General, ATTN: Litigation Division (DAJA–LT), 901 North Stuart Street, Arlington, VA 22203–1837.

Distribution. Distribution of this publication is made in accordance with DA Form 12–09–E, block number 2040, intended for command levels B,C,D, and E for Active Army, Army National Guard, and U.S. Army Reserve.

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*This regulation supersedes AR 27–40, 2 December 1987, and rescinds DA Form 2135, May 1973.

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Glossary

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Chapter 1
General

1–1. Purpose

a. This regulation prescribes policies and procedures for the following:

(1) Defensive and affirmative litigation in Federal and State civilian courts where the Army or Department of Defense (DOD) has an interest in the matter.

(2) Proceedings before Federal or State administrative bodies, such as utility rate commissions.

(3) Release of official information and testimony by Department of the Army (DA) personnel with regard to litigation.

(4) Remedies for procurement fraud and corruption.

(5) Environmental civil litigation and administrative proceedings.

(6) Proceedings before the Office of Special Counsel.

b. This regulation does not apply to Department of the Army (DA) or DOD proceedings such as courts-martial or administrative boards.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and terms used in the regulation are explained in the glossary.

1–4. Responsibilities

a. United States Department of Justice (DOJ). DOJ will defend litigation in domestic and foreign courts, against the United States, its agencies and instrumentalities, and employees whose official conduct is involved. The various U.S. Attorney Offices, under the oversight of the Attorney General, will conduct much of the representation.

b. The Judge Advocate General (TJAG). Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General Counsel, TJAG is responsible for litigation in which the Army has an interest. Except with respect to proceedings addressed in subparagraph *i* below, only TJAG (or a designee) will communicate to DOJ the Army's position with regard to settlement of a case.

c. Assistant Judge Advocate General For Civil Law and Litigation (AJAG–CL). Responsible to TJAG for litigation issues; supervises Chief, Litigation Division.

d. Chief, Litigation Division. Reports to AJAG–CL and is responsible for the following:

(1) Supervising litigation in which the Army has an interest.

(2) Acting for TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases, subject to the supervision of TJAG and AJAG–CL.

(3) Delegating responsibility for cases if appropriate.

(4) Serving as primary contact with DOJ on litigation.

(5) Accepting service of process for DA and for the Secretary of the Army in his or her official capacity. (See 32 CFR 257.5.)

e. Special Assistant U.S. Attorneys (SAUSAs) and DOJ special attorneys. Army judge advocates and civilian attorneys, when appointed as SAUSAs under 28 USC 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

(1) *Felony and misdemeanor prosecutions in Federal court.* Army attorneys, at the installation level, after being duly appointed (see AR 27–10), will prosecute cases, in which the Army has an interest, in Federal court. Army attorneys who prosecute criminal cases will not represent the United States in civil litigation without authorization from the Chief, Litigation Division.

(2) *SAUSAs for civil litigation.* By assignment of TJAG and upon the approval of the U.S. Attorney, judge advocates will serve within a U.S. Attorney's office to represent the Government in litigation in which the Army or DOD has an interest. These judge advocates have the same general authority and responsibility as an Assistant U.S. Attorney.

(3) *Special Attorneys assigned to DOJ.* By assignment of TJAG and with the concurrence of the appropriate DOJ official, judge advocates will work as Special Attorneys for DOJ. Special Attorneys are authorized to represent the United States in civil litigation in which the Army or DOD has an interest.

f. Attorneys at Army activities or commands. Staff judge advocates (SJAs) or legal advisers, or attorneys assigned to them, will represent the United States in litigation only if authorized by this regulation or delegated authority in individual cases by the Chief, Litigation Division.

g. Commander, U.S. Army Claims Service (USARCS). The Commander, USARCS, and USARCS attorneys, subject to AR 27–20, chapter 4, will maintain direct liaison with DOJ in regard to administrative settlement of claims under the Federal Tort Claims Act.

h. Chief, Contract Law Division, OTJAG. The Chief, Contract Law Division, attorneys assigned to the Contract Law Division, and other attorneys designated by the Chief, Contract Law Division, in litigation involving taxation, will represent DA in negotiation, administrative proceedings, and litigation, and maintain liaison with DOJ and other Governmental authorities.

i. Legal Representatives of the Chief of Engineers. The Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel will maintain direct liaison with DOJ and represent DA in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers (COE).

j. Chief Trial Attorney, Contract Appeals Division,USALSA. The Chief Trial Attorney, attorneys assigned to the Contract Appeals Division, and attorneys designated by the Chief Trial Attorney, will represent the Government before the Armed Services Board of Contract Appeals (ASBCA) and the General Services Board of Contract Appeals (GSBCA). They will maintain direct liaison with DOJ concerning appeals from ASBCA and GSBCA decisions. The Chief Trial Attorney has designated COE attorneys to act as trial attorneys in connection with COE contract appeals.

k. Chief, Regulatory Law Office, USALSA. The Chief, Regulatory Law Office, attorneys assigned to the Regulatory Law Office, and other attorneys designated by the Chief, will represent DA consumer interests in regulatory matters before State and Federal administrative agencies and commissions, including but not limited to proceedings involving rates and conditions for the purchase of services for communications (except long-distance telephone), transportation, and utilities (gas, electric, water and sewer). They will maintain direct liaison with DOJ for communications, transportation, and utilities litigation.

l. Chief, Intellectual Property Law Division, USALSA. The Chief, Intellectual Property Law Division, and the attorneys assigned thereto, will represent DA in matters pertaining to patents, copyrights, and trademarks. They will maintain direct liaison with DOJ and represent the DA in intellectual property issues.

m. Chief, Labor and Employment Law Office,OTJAG. The Chief, Labor and Employment Law Office, attorneys assigned thereto, and attorneys identified as labor counselors will represent DA in matters pertaining to labor relations, civilian personnel, and Federal labor standards enforcement before the following: Federal Labor Relations Authority; Merit Systems Protection Board; Equal Employment Opportunity Commission; Department of Labor; National Labor Relations Board; and, State workmen's compensation commissions. In the event any individual mentioned in this subparagraph intends to make a recommendation to DOJ concerning an appeal of any case to a U.S. Court of Appeals, such recommendation will first be coordinated with Litigation Division.

n. Chief, Procurement Fraud Division, USALSA. The Chief, Procurement Fraud Division, attorneys assigned thereto, and other attorneys designated by the Chief, will represent DA in all procurement fraud and corruption matters before the Army suspension and debarment authority and before any civil fraud recovery administrative

body. They will maintain liaison and coordinate remedies with DOJ and other agencies in matters of procurement fraud and corruption.

o. Chief, Environmental Law Division, USALSA. The Chief, Environmental Law Division (ELD), attorneys assigned thereto, and other attorneys designated by the Chief, ELD, will maintain direct liaison with DOJ and represent DA in all environmental and natural resources civil litigation and administrative proceedings involving missions and functions of DA, its major and subordinate commands, installations presently or previously managed by DA, and other sites or issues in which DA has a substantial interest, except as otherwise specifically provided in this regulation.

p. Chief, Criminal Law Division, OTJAG. The Chief, Criminal Law Division, will have general oversight of felony and magistrate court prosecutions conducted by Army lawyers acting as Special Assistant U.S. Attorneys. (See AR 27–10.) The Chief will coordinate with DOJ and other Governmental agencies concerning the overall conduct of these prosecutions.

1–5. Restriction on contact with DOJ

a. General rule. Except as authorized by TJAG, the General Counsel, the Chief of Litigation Division, or this regulation, no Army personnel will confer or correspond with DOJ concerning legal proceedings in which the Army has an interest.

b. Exceptions. This prohibition does not preclude contact with DOJ required by the Memorandum of Understanding between DOJ and DOD relating to the investigation and prosecution of certain crimes. (See AR 27–10, para 2–7.) In addition, an installation SJA or legal adviser is expected to maintain a working relationship with the U.S. Attorney in each district within his or her geographical area. An SJA or legal adviser should request the U.S. Attorney to advise him or her immediately when litigation involving DA or its personnel is served on the U.S. Attorney.

1–6. Appearance as counsel

a. General. Military personnel on active duty and DA civilian personnel will not appear as counsel before any civilian court or in any preliminary proceeding, for example, deposition, in litigation in which the Army has an interest without the prior written approval of TJAG, except under the following conditions:

(1) The appearance is authorized by this regulation.

(2) The individual is a party to the proceeding.

(3) The appearance is authorized under an expanded legal assistance program (see AR 27–3).

(4) The individual is a judge advocate assigned or detailed by TJAG to DOJ to represent the United States in civil or criminal cases, for example, a Special Assistant U.S. Attorney, or an attorney assigned to Litigation Division.

b. Procedure. All requests for appearance as counsel will be made through Litigation Division to the Personnel, Plans, and Training Office, OTJAG. Requests for DA military or civilian attorneys to appear in any civilian court or proceeding on behalf of a soldier who is also facing Uniform Code of Military Justice (UCMJ) action will be delivered to the SJA, legal adviser, or Regional Defense Counsel, as appropriate. The SJA or legal adviser will forward the request to the Litigation Division with an evaluation of the case and recommendation. Regional Defense Counsel should send requests for U.S. Army Trial Defense Service (USATDS) counsel to Chief, USATDS, who will forward the request to the Litigation Division. Privileged or otherwise sensitive client information should only be submitted through USATDS channels.

1–7. Mailing addresses

Mailing addresses for organizations referenced in this regulation are in appendix B.

Chapter 2
Service of Process

2–1. General

a. Defined. Process is a legal document that compels a defendant in an action to appear in court or to comply with the court's demands, for example, in a civil case a summons or subpoena, or in a criminal case, a warrant for arrest, indictment, contempt order, subpoena, or summons. Service of process is the delivery of the document to a defendant to notify the defendant of a claim or charge against him or her.

b. Policy. DA personnel will follow the guidance of this chapter when civil officials attempt to serve civil or criminal process on individuals on Federal property.

c. Procedures. Provost marshals shall ensure that installation law enforcement personnel are trained adequately to respond to situations that arise with regard to service of civil and criminal process. SJAs or legal advisers shall provide guidance to law enforcement personnel in these matters.

2–2. Service of criminal process within the United States

a. Surrender of personnel. Guidance for surrender of military personnel to civilian law enforcement officials is in chapter 7 of AR 630–10 and AR 190–9. Army officials will cooperate with civilian law enforcement authorities who seek the surrender of a soldier in connection with criminal charges. Special rules apply when a bail bondsman or other surety seeks custody of a soldier.

b. Requests for witnesses or evidence in criminal proceedings. See chapter 7 of this regulation.

2–3. Service of civil process within the United States

a. Policy. DA officials will not prevent or evade the service of process in legal actions brought against the United States or against themselves in their official capacities. If acceptance of service of process would interfere with the performance of military duties, Army officials may designate a representative to accept service. DA personnel sued in their individual capacity should seek legal counsel concerning voluntary acceptance of process.

b. Requests for witnesses or evidence in civil proceedings. See chapter 7 of this regulation.

c. Process of Federal courts. Subject to reasonable restrictions imposed by the commander, civil officials will be permitted to serve Federal process. (See Federal Rules of Civil Procedure 4, 45).

d. Process of State courts.

(1) In areas of exclusive Federal jurisdiction that are not subject to the right to serve State process, the commander or supervisor will determine whether the individual to be served wishes to accept service voluntarily. A JA or other DA attorney will inform the individual of the legal effect of voluntary acceptance. If the individual does not desire to accept service, the party requesting service will be notified that the nature of the exclusive Federal jurisdiction precludes service by State authorities on the military installation.

(2) On Federal property where the right to serve process is reserved by or granted to the State, in areas of concurrent jurisdiction, or where the United States has only a proprietary interest, Army officials asked to facilitate service of process will proceed initially as provided in the preceding subparagraph. If the individual declines to accept service, the requesting party will be allowed to serve the process per applicable State law, subject to reasonable restrictions imposed by the commander.

e. Process of foreign courts. A U.S. District Court may order service upon a person who resides in the judicial district of any document issued in connection with a proceeding in a foreign or international tribunal. (See 28 USC 1696). In addition, the U.S. State Department has the power to receive a letter rogatory issued by a foreign or international tribunal, to transmit it to a tribunal, officer or agency in the United States, and to return it after execution. (See 28 USC 1781). Absent a treaty or agreement to the contrary, these provisions will govern.

f. Seizure of personal property. State and Federal courts issue orders (for example, writ of attachment) authorizing a levy (seizure)

of property to secure satisfaction of a judgment. DA personnel will comply with valid State or Federal court orders commanding or authorizing the seizure of private property to the same extent that State or Federal process is served.

2–4. Service of criminal process outside the United States

Army Regulation 630–10 and international treaties, such as status of forces agreements, govern the service of criminal process of foreign courts and the surrender of soldiers to foreign civilian law enforcement officials.

2–5. Service of civil process outside the United States

a. Process of foreign courts. In foreign countries service of process issued by foreign courts will be made under the law of the place of service, as modified by status of forces agreements, treaties or other agreements. In foreign areas under exclusive U.S. jurisdiction, service of process issued by foreign courts will be made under the law specified by appropriate U.S. authority.

b. Process of Federal courts. Service of process on U.S. citizens or residents may be accomplished under the following provisions: The Hague Convention, reprinted in 28 U.S.C.A. Federal Rules of Civil Procedure, following Rule 4; Federal Rules of Civil Procedure 4(i); 28 USC 1781 and 1783; and, the rules of the Federal court concerned. If a DA official receives a request to serve Federal process on a person overseas, he or she will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned.

c. Process of State courts. If a DA official receives a request to serve State court process on a person overseas, he or she will determine if the individual wishes to accept service voluntarily. Individuals will be permitted to seek counsel. If the person will not accept service voluntarily, the party requesting service will be notified and advised to follow procedures prescribed by the law of the foreign country concerned. (See, for example, The Hague Convention, reprinted in 28 U.S.C.A. Federal Rules of Civil Procedure, following Rule 4.)

d. Suits against the United States. DA personnel served with foreign civil process will notify the appropriate SJA or legal adviser, who will return the document to the issuing authority explaining the lack of authority to accept service for the United States. Service on the United States must be made upon DOJ through established diplomatic channels.

2–6. Assistance in serving process overseas

a. Europe. For information and assistance concerning service of process of persons assigned to or accompanying U.S. Forces in Europe, contact the Foreign Law Branch, International Law Division, Office of The Judge Advocate, Headquarters U.S. Army, Europe, and Seventh Army, Unit 29351, (Heidelberg, Germany) APO AE 09014.

b. Korea. For information and assistance concerning service of process of persons assigned to or accompanying U.S. Forces in Korea, contact Staff Judge Advocate, U.S. Forces Korea (Seoul, Republic of Korea), APO AP 96205.

c. Panama, Central and South America. For information and assistance concerning service of process of persons assigned to or accompanying forces in the U.S. Army Southern Command, contact Staff Judge Advocate, HQ, U.S. Army South, Fort Clayton, Panama, APO AA 34004–5000.

2–7. Service of process on DA or the Secretary of the Army

The Chief, Litigation Division, shall accept service of process for the Department of the Army or for the Secretary of the Army in his or her official capacity.

Chapter 3
Reporting Legal Proceedings to Headquarters, Department of the Army

3–1. General

a. Legal proceedings requiring reporting. Actions must be taken upon commencement of litigation or administrative proceedings in which the United States has an interest. Typically, the Secretary of the Army, DA, the United States, or DA personnel are named as defendant in a lawsuit or as respondent in an administrative proceeding. A nonexclusive listing of cases in which the United States has an interest includes the following:

(1) Suits for damages, injunctive relief, or other action filed against the Government or against DA personnel in their official capacity.

(2) Suits alleging individual liability arising from performance of official duties by DA personnel.

(3) Actions affecting DA operations or activities or which might require official action by DA personnel.

(4) Actions arising out of DA contracts, subcontracts, or purchase orders wherein the Government might be required to reimburse a contractor for litigation expenses.

(5) Bankruptcy proceedings in which the United States or its instrumentalities may have an interest, including bankruptcies involving Government contractors.

b. Command and agency responsibility. Commanders and supervisors of Army units, installations, or organizations will ensure reports required by this section are submitted promptly.

c. Reports to Headquarters, Department of the Army (HQDA). Reports required by this regulation will be made telephonically or mailed to the responsible organization at DA. Appendix B contains mailing addresses for these offices. Except in the situations described below, reports required by this chapter will be made to the Litigation Division:

(1) Actual or potential litigation (or administrative infringement claims) involving patents, copyrights, or trademarks will be made to the Intellectual Property Law Division.

(2) Reports of pending or prospective litigation involving taxation will be made to the Contract Law Division.

(3) Communications, transportation, and utility services reports will be made to the Regulatory Law Office.

(4) Reports involving environmental and natural resource litigation and administrative proceedings will be made to the Environmental Law Division.

(5) Potential civil recovery reports in cases of procurement fraud and corruption will be made to the Procurement Fraud Division.

(6) Reports involving the felony prosecution program and magistrate court prosecutions will be made to the Criminal Law Division, OTJAG.

(7) Cases before the Armed Services Board of Contract Appeals and the General Services Board of Contract Appeals will be made to the Contract Appeals Division.

d. Classified information. Information required by this regulation will be submitted in an unclassified form if possible. If downgrading or declassification is not feasible, the classified material should be separated from the report and forwarded under separate cover.

e. Other reporting requirements. Reports required by this chapter are in addition to and do not satisfy any other reporting requirement, such as, notifying the Federal Bureau of Investigation (FBI) of offenses pursuant to AR 27–10; submitting serious incident reports pursuant to AR 190–40; reporting procurement fraud or other irregularities per Defense Federal Acquisition Regulation Supplement (DFARS), section 9.406–3; reporting the exercise of criminal jurisdiction by foreign tribunals over U.S. personnel pursuant to AR 27–50; or, reporting bankruptcies per AR 37–103.

f. Reports control exemption. The reports required herein are exempt from reports control under AR 335–15, paragraphs 3–3*a*(5) and 5–2*e*(4).

3–2. Individual and supervisory procedures upon commencement of legal proceedings

a. Individual procedures. DA personnel served with civil or criminal process concerning a proceeding in which the United States has an interest (see para 3–1) will inform their supervisor immediately and furnish copies of process and pleadings. There is no requirement to notify supervisors of purely private litigation.

b. Supervisory procedures. When supervisors learn that legal proceedings in which the United States has an interest have commenced, the supervisor will forward a copy of all process and pleadings, along with other readily available information, to the SJA or legal adviser. If no legal officer is available locally, the documents will be forwarded to the SJA or legal adviser of the next higher headquarters.

3–3. SJA or legal adviser procedures

a. Immediate notice to HQDA. When an SJA or legal adviser learns of litigation in which the United States has an interest, and it appears that HQDA is not aware of the action, the SJA or legal adviser will notify telephonically the responsible HQDA office. (See para 3–1*c* above.) Immediate notice is particularly important when litigation involves one of the following: a lawsuit against an employee in his or her individual capacity; a motion for a temporary restraining order or preliminary injunction; a habeas corpus proceeding; a judicial or administrative proceeding involving less than 60 days to file an answer; and, actions with possible Congressional, Secretarial, or Army Staff interest. For legal proceedings instituted in foreign tribunals, the SJA or legal adviser will also notify the major overseas commander concerned and the appropriate U.S. Embassy or Legation. A telephonic report to HQDA should include the following:

(1) Title or style of the proceeding.

(2) Full names and addresses of the parties.

(3) Tribunal in which the action is filed, date filed, docket number, when and on whom service of process was made, and date by which pleading or response is required.

(4) Nature of the action, amount claimed, or relief sought.

(5) Reasons for immediate action.

b. Transmission of process, pleadings, and related papers. Unless instructed otherwise by HQDA, the SJA or legal adviser will FAX or mail HQDA a copy of all process, pleadings, and related papers. Use of express mail or overnight delivery service is authorized.

c. Notice to U.S. Attorney. If the legal proceeding is instituted in the United States, the SJA or legal adviser, unless instructed otherwise by HQDA, will notify the appropriate U.S. Attorney and render assistance as required.

3–4. Litigation alleging individual liability

See chapter 4 of this regulation for procedures to follow when DA personnel, as a result of performance of official duties, are either sued in their individual capacities or face criminal charges.

3–5. Injunctive relief

a. General. Plaintiffs may attempt to force Government action or restraint in important operational matters or pending personnel actions through motions for temporary restraining orders (TRO) or preliminary injunctions (PI). Because these actions can quickly impede military functions, immediate and decisive action must be taken.

b. Notification to HQDA and the U.S.Attorney. The SJA or legal adviser will notify Litigation Division or other appropriate office at HQDA immediately when a motion for TRO or PI has been, or is about to be, filed. The SJA or legal adviser will also notify the responsible U.S. Attorney.

c. Actions by SJA or legal adviser. The SJA or legal adviser will assist the DOJ or DA attorney responsible for the litigation. Installation attorneys or support personnel should begin accumulating relevant documentary evidence and identifying witnesses. If requested, installation attorneys will prepare a legal memorandum concerning the motion, giving particular attention to the following issues relevant to a court granting injunctive relief:

(1) Plaintiff's likelihood of success on the merits.

(2) Whether plaintiff will be harmed irreparably if injunctive relief is not granted.

(3) Harm to defendant and other parties if injunctive relief is granted.

(4) The public interest.

3–6. Habeas Corpus

a. General. A soldier may file a writ of habeas corpus to challenge his continued custody (usually in a post court-martial situation) or retention in the Army. As is the case with injunctive relief in the preceding paragraph, installation SJAs and legal advisers must take immediate action.

b. Notification to the Litigation Division and the U.S. Attorney. The SJA or legal adviser will notify the Litigation Division and the responsible U.S. Attorney's Office immediately upon learning that a petition for writ of habeas corpus has been filed. All relevant documentary evidence supporting the challenged action should be assembled immediately.

c. Procedures in habeas corpus. Upon the filing of a petition for a writ of habeas corpus, the court will dismiss the petition, issue the writ, or order the respondent to show cause why it should not be granted. If a writ or order to show cause is issued, the SJA or legal adviser should be prepared to assist the responsible Litigation Division or DOJ attorney in preparing a return and answer. If so directed, the SJA will also prepare a memorandum of points and authorities to accompany the return and answer. The Government's response should cover the following: whether the Army has custody of petitioner; whether respondent and petitioner are within the judicial district; and, whether appellate or administrative remedies have been exhausted.

d. Writs or orders issued by State courts. No State court, after being informed judicially that a petitioner is in custody under the authority of the United States, should interfere with that custody or require that petitioner be brought before the State court. A deserter, apprehended by any civil officer having authority to apprehend offenders under the laws of the United States or of any State, district, territory, or possession of the United States, is in custody by authority of the United States. If a writ of habeas corpus is issued by a State court, the SJA or legal adviser will seek guidance from Litigation Division.

e. Foreign court orders. A foreign court should not inquire into the legality of restraint of a person held by U.S. military authority. If a foreign court issues any process in the nature of a writ of habeas corpus, the SJA or legal adviser immediately will report the matter to the appropriate U.S. forces commander and to the Litigation Division.

3–7. Litigation against Government contractors

a. General. A contract might require that the Government reimburse a contractor (or subcontractor) for adverse judgments or litigation expenses. Unless a contractor or subcontractor facing a lawsuit requests representation by DOJ, the Army presumes the contractor will obtain private counsel to defend the case. If the contract so allows, however, the contractor may request, and HQDA may recommend, that DOJ represent the contractor if it is in the best interests of the United States.

b. Actions by the SJA or legal adviser. If a contractor or subcontractor faces litigation and the underlying contract with the Government requires reimbursement for adverse judgments or costs of the litigation, the SJA or legal adviser, through the contracting officer, should determine if the contractor desires representation by DOJ. If so, the contractor or authorized agent will sign a request for representation. (See fig 4–3.) The SJA or legal adviser will determine whether, in his or her opinion, representation by DOJ should

be granted. He or she will prepare a memorandum to support his or her recommendation, especially concerning any issue regarding the Government's obligation to reimburse the contractor under the contract. The SJA or legal adviser will forward his or her memorandum, along with the contractor's request, to the Litigation Division.

c. Actions by the Litigation Division. The Chief, Litigation Division, will evaluate the submission and decide if it is in the Army's best interest that the request be granted. He or she will prepare a memorandum supporting his or her decision and send the packet to DOJ. The Chief's decision constitutes the final DA position on the matter. If DOJ grants the contractor's request, the Chief, Litigation Division, will ensure that the contractor is notified through the SJA or legal adviser and the contracting officer.

d. Private Counsel. A contractor represented by DOJ may ask that private counsel assist the DOJ attorney in the litigation. The DOJ attorney will remain in control of the litigation, and the fees for private counsel will not be reimbursable except under unusual circumstances. The contractor must seek both DOJ and DA approval to employ private counsel when DOJ representation has been granted. Even if DOJ and DA grant authority to employ private counsel, the contracting officer will determine whether a contractor will be reimbursed under the contract for private counsel.

e. Settlement. The contractor, unless the contract specifies otherwise, ultimately will decide whether to compromise a suit. The contracting officer determines reimbursement under the contract, with the advice of his or her attorney.

3–8. Miscellaneous reporting requirements

SJAs or legal advisers will comply with the directives cited below concerning actual or prospective litigation involving the following types of cases:

a. Taxation.

(1) Contractor transactions. (See Federal Acquisition Regulation (FAR) and Defense Federal Acquisiton Regulation Supplement (DFARS), part 29.)

(2) Army and Air Force Exchange Service (AAFES) activities. (AR 60–20.)

(3) Purchase or sale of alcoholic beverages. (AR 215–2.)

(4) Nonappropriated fund and related activities.(AR 215–1.)

b. Tort and contract claims, insurance, and litigation involving nonappropriated fund activities. Nonappropriated Fund (NAF) managers and employees must be aware that injury, property damage, or contract disputes can result in claims against the United States or its individual officials. Incidents involving potential government liability must be reported through the NAF manager to the Claims JA as soon as practicable. (AR 215–1.)

c. Annexation of Army lands. Upon receipt of information or official notice that a political subdivision has taken action or is in the process of undertaking an annexation, and also upon receipt of a request by a political subdivision of a State for annexation, the installation commander will ensure an Annexation Assembly and Evaluation Report is prepared and forwarded through the proper officials, to include The Judge Advocate General. In instances involving annexation of Army lands, where time is of the essence, the installation commander shall notify The Judge Advocate General by electrical means. (AR 405–25.)

d. Communications, transportation, and utility services administrative proceedings. Any contracting officer or other Army official responsible for the acquisition of communications, transportation, utilities (gas, electric, water and sewer), or military mail services, who becomes aware of any action or proceeding of interest to the Army, promptly will refer the matter to the SJA or legal adviser, who will take the actions prescribed in paragraph 3–3 above. Examples of actions requiring referral are as follows: New or amended rates, regulations, or conditions of service; applications for authority to discontinue or initiate service; changes in electromagnetic patterns causing adverse communications interference; or, zoning proposals affecting historic or aesthetic preservation. In addition, the SJA or legal adviser will transmit the following to the Regulatory Law Office:

(1) The names and addresses of any parties intervening and the substance of their positions.

(2) Names of Government users affected by any change.

(3) Copy of any proposed rates, rules, or regulations.

(4) A recommendation whether the Army should intervene in the action or proceeding. If intervention is recommended, provide a memorandum to support the recommendation.

e. Legal proceedings overseas. Foreign communications, transportation, and utility service proceedings need not be reported. In other legal proceedings instituted in a foreign country, the SJA or legal adviser will take the actions prescribed in paragraph 3–3 above.

f. Maritime claims. Admiralty and maritime claims within the purview of AR 27–20, chapter 8, that have been investigated and processed under AR 55–19 or other applicable regulations, will be referred to USARCS.

g. Army and Air Force Exchange Service litigation. The SJA or legal adviser will send a copy of all documents relating to litigation against AAFES to: General Counsel, AAFES, P.O. Box 660202, Dallas, TX 75266–0202.

h. Bankruptcy. Reports of bankruptcy or insolvency proceedings shall be made per this regulation and AR 37–103.

3–9. Litigation reports

The SJA or legal adviser will prepare a litigation report when directed by HQDA. The report will contain the following sections:

a. Statement of Facts. Include a complete statement of the facts upon which the action and any defense thereto are based. Where possible, support facts by reference to documents or witness statements. Include details of previous administrative actions, such as the filing and results of an administrative claim. If the action is predicated on the Federal Tort Claims Act, include a description of the plaintiff's relationship to the United States, its instrumentalities, or its contractors. Also include a statement whether an insurance company or other third party has an interest in the plaintiff's claim by subrogation or otherwise and whether there are additional claims related to the same incident.

b. Setoff or Counterclaim. Discuss whether setoff or counterclaim exists. If so, highlight the supportive facts.

c. Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. (See fig 3–1, Sample Answer). Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations.

d. Memorandum of Law. Include a brief statement of the applicable law with citations to legal authority. Discussions of local law, if applicable, should cover relevant issues such as measure of damages, scope of employment, effect of contributory negligence, or limitations upon death and survival actions. Do not unduly delay submission of a litigation report to prepare a comprehensive memorandum of law.

e. Potential witness information. List each person having information relevant to the case and provide an office address and telephone number. If there is no objection, provide the individual's social security account number, home address, and telephone number. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Finally, summarize the information or potential testimony that each person listed could provide.

f. Exhibits.

(1) Attach a copy of all relevant documents. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Unless otherwise directed by HQDA, each exhibit should be tabbed and paginated internally. References to exhibits in the litigation report should be to page numbers of particular exhibits.

(2) Copies of relevant reports of claims officers, investigating officers, boards, or similar data should be attached, although such reports will not obviate the requirement for preparation of a complete litigation report.

(3) Prepare an index of tabs and exhibits.

(4) Where a relevant document has been released pursuant to a Freedom of Information Act (FOIA) request, provide a copy of the

response, or otherwise identify the requestor and the records released.

g. Distribution and number of copies. Unless HQDA directs otherwise, SJAs or legal advisers will mail (first class) an original and one copy of the litigation report to the responsible HQDA office (see para 3–1) and one copy to the U.S. Attorney's Office handling the case. If possible, record the litigation report onto a magnetic diskette, using either WordPerfect, Enable, or ACSII, and send it to the Litigation Division.

3–10. Preservation of evidence

Because documents needed for litigation or administrative proceedings are subject to routine destruction, the SJA or legal adviser will ensure that all relevant documents are preserved.

3–11. DA Form 4

a. General. The DA Form 4 (Department of the Army Certification for Authentication of Records) (See fig 3–2) is used to authenticate Army records or documents. Documents attached to a properly prepared and sealed DA Form 4 are self-authenticating. (See Fed. R. Evid. 902).

b. Preparation at the installation level. A DA Form 4 need not be prepared until the trial attorney presenting the Government's case identifies documents maintained at the installation level that he or she will need at trial. Once documents are identified, the custodian of the documents will execute his or her portion of the DA Form 4. (See fig 3–2). The custodian certifies that the documents attached to the DA Form 4 are true copies of official documents. Documents attached to each form should be identified generally; each document need not be mentioned specifically. Only the upper portion of the form should be executed at the local level.

c. Actions at HQDA. Upon receipt of the DA Form 4 with documents attached thereto, HQDA will affix a ribbon and seal and deliver it to The Office of The Administrative Assistant to The Secretary of the Army. That office will place the official Army seal on the packet.

3–12. Unsworn declarations under penalty of perjury

a. General. Under the provisions of 28 USC 1746, whenever any matter is required or permitted to be established or proven by a sworn statement, oath, or affidavit, such matter may also be established or proven by an unsworn written declaration under penalty of perjury. Because such declaration does not require a notary or other official to administer oaths, individuals preparing statements for use in litigation should consider using this format. (See fig 3–3.)

b. When executed within the United States. Place the following at the end of the witness statement:

I declare under penalty of perjury that the foregoing is true and correct. (28 USC 1746.)

Executed on (date) (Signature)

c. When executed outside the United States. Place the following at the end of the witness statement:

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 USC 1746.)

Executed on (date) (Signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

JOHN DOE
Plaintiff
v.

NO. C–90–100

MICHAEL P. W. STONE,
SECRETARY OF THE ARMY
DEPARTMENT OF THE ARMY

Defendant

First Affirmative Defense.

The Complaint is barred by laches.

Answer

For its answer to the complaint, defendant admits, denies and alleges as follows:
1. Admits.

Figure 3-1. Sample answer to judicial complaint with attached Certificate of Service

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2. Denies.

3. Denies.

4. The allegations contained in paragraph 4 are conclusions of law to which no response is required; to the extent they may be deemed allegations of fact, they are denied.

5. Denies the allegations contained in the first sentence of paragraph 5; admits the allegations contained in the second sentence of paragraph 5; denies the remainder of the allegations in paragraph 5.

6. Denies the allegations in paragraph 6 for lack of knowledge or information sufficient to form a belief as to their truth.

7. Denies each allegation in the complaint not specifically admitted or otherwise qualified.

Prayer for Relief

The remainder of plaintiff's Complaint contains his or her prayer for relief, to which no answer is required. Insofar as an answer is required, denies that plaintiff is entitled to any relief whatsoever.

Defendant respectfully prays that the Court dismiss plaintiff's Complaint and award to defendant costs and such further relief as the Court deems proper.

Respectfully Submitted,
RONALD M. FORD
UNITED STATES ATTORNEY

ROY A. ANDERSEN
Assistant United States Attorney
606 N. Carancua
Corpus Christi, Texas 78476
(512) 884-3454

(Signature)
CAPTAIN CHRISTOPHER N. JONES
Department of the Army
Office of the Judge
Advocate General
901 N. Stuart St., Suite 400
Arlington, Virginia 22203-1837
(703) 696-1666

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant's Answer has been placed in the mail, postage prepaid, this 22 day of January, 1991, addressed to plaintiff's counsel as follows:
Mr. Eugene Henderson
777 Fourth Street
Corpus Christi, TX 78888

(Signature)
ROY A. ANDERSEN
Assistant United States Attorney

Figure 3-1. Sample answer to judicial complaint with attached Certificate of Service - Continued

United States of America

DEPARTMENT OF THE ARMY

El Paso, Texas (PLACE) 15 Apr 94 (DATE)

I HEREBY CERTIFY that the document, attached hereto consisting of 9 pages, is a true and exact copy of the Narrative Summary, Standard Form 502, pertaining to the hospitalization of Jane Doe during the period 3-6 Jan 94, an official document in the custody of the Registrar of William Beaumont Army Medical Center.

JOHN SMITH
Captain, MS
Registrar

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and

that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, _____, Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this _____ day of _____, 19

_____
Secretary of the Army.

By _____
Administrative Assistant.

DA FORM 1 MAR 64 4

REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

*U.S. GPO:1987-0-181-032/60876

Figure 3-2. Sample DA Form 4

DECLARATION UNDER PENALTY OF PERJURY

I am Private Paul Jones, currently assigned to Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina. I have personal knowledge of the following matters.

On the evening of 3 June 1970, I was present at the company party at Lake Popolopen when the accident occurred. I saw a bright, full moon that evening.

I declare under penalty of perjury that the foregoing is true and correct. (28 USC 1746.)

Executed on: *(Date)*

(Signature)
PAUL JONES
PRIVATE, U.S. ARMY

Figure 3-3. Unsworn declaration under penalty of perjury executed within the United States

Chapter 4
Individual Liability

4–1. Scope

This chapter provides guidance when DA personnel, as a result of the performance of their official duties, are either sued in their personal capacity, or are charged in a criminal proceeding. Examples of civil actions alleging individual liability include the following: a medical malpractice lawsuit against health care providers; suits resulting from motor vehicle accidents; constitutional torts; or, common law torts such as assault, libel, or intentional infliction of emotional distress. Likewise, State or Federal criminal charges can arise from the performance of official duties, including environmental crimes or motor vehicle accidents.

4–2. Policy

a. General. Commanders, supervisors, and SJAs or legal advisers will give highest priority to compliance with the requirements of this chapter with regard to current or former DA personnel who face criminal charges or civil litigation in their individual capacity as a result of performance of their official duties.

b. DOJ policy on representation. If in the best interest of the United States, upon request of the individual concerned, and upon certification by his or her agency that he or she was acting within the scope of his or her employment, DOJ may represent present and former DA personnel sued individually as a result of actions taken within the scope of their employment. Representation can be declined for a variety of reasons, including but not limited to the following: the employee was not acting within the scope of his or her office; there is a conflict of interest; or, actions were not taken in a good faith effort to conform to law.

4–3. Federal statutes and regulations

a. Federal Tort Claims Act (FTCA). (28 USC 1346(b), 2671–2680). A waiver of sovereign immunity which, with certain exceptions, makes the United States liable for tort claims in the same manner as a private individual.

b. Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA) or The Westfall Act, P.L. No. 100–694, 102 Stat 4563 (1988) (codified at and amending 28 USC 2671,2674, and 2679). FELRTCA, by amending the Federal Tort Claims Act, makes the FTCA the exclusive remedy for common law tort claims arising from actions taken by Federal employees acting within the scope of employment. The law was passed to eliminate problems caused by *Westfall v. Erwin,* 484 U.S. 292 (1988).

c. 10 USC 1089 (Defense of certain suits arising out of medical malpractice). This provision, commonly referred to as The Gonzales Act, makes the FTCA the exclusive remedy for suits alleging medical malpractice against a military health care provider.

d. 28 CFR 50.15 (Representation of Federal officials and employees by Department of Justice attorneys [...] in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities). These DOJ regulations set out the policy and procedures for requesting representation in individual liability cases. See also 28 CFR part 15 (Defense of Certain Suits Against Federal Employees, etc.).

e. 28 CFR 50.16 (Representation of Federal employees by private counsel at Federal expense).

4–4. Procedures for obtaining certification and DOJ representation

a. SJA or legal adviser procedures. When an SJA or legal adviser learns of a criminal charge or of a lawsuit alleging individual liability against DA personnel as a result of performance of official duties, he will take the following actions:

(1) Immediately notify the Litigation Division and the appropriate U.S. Attorney, and FAX or express deliver copies of process and pleadings to each office. Where time for response is limited, request that the U.S. Attorney either petition the court for an extension of time, or provide temporary counsel and representation pending formal approval.

(2) Investigate whether the employee was acting within the scope of his or her office or employment. Obtain, if possible, statements from the defendant, supervisors, and witnesses.

(3) Advise the individual defendant of the rights and conditions set out in 28 CFR 50.15, which include the following:

(a) His or her right to request representation by a DOJ attorney and, in appropriate cases, certification that he or she was acting within the scope of employment. (See 28 USC 2679 and 28 CFR 50.15.)

(b) The right to request private counsel at Government expense, subject to the availability of funds. (See 28 CFR 50.16.)

(c) That the United States is not obligated to pay or indemnify defendant for any judgment rendered against him or her in his or her individual capacity.

(4) If the defendant desires certification or DOJ representation, have him or her sign a request. (See fig 4–1.) Obtain a signed scope of employment statement from the defendant's supervisor. (Fig 4–2.)

(5) Prepare a report with, at a minimum, the following information: facts surrounding the incident for which defendant is being sued and those relating to scope of employment; the SJA's or legal adviser's conclusions concerning scope of employment; and, a recommendation whether certification by the Attorney General or representation by a DOJ attorney should be granted.

(6) In cases involving National Guard personnel, address also the following: whether the defendant was acting in a State (title 32) or Federal (title 10) capacity during relevant periods (include orders); if the defendant was acting under State authority, is it nevertheless in the interest of the United States to represent the individual; any impact on policies or practices of DA, the National Guard Bureau, or DOD; whether the relief requested can be granted only by a Federal officer or agency; and, whether Federal law or regulation required actions by State officials.

(7) Send the report, request for representation, and scope of employment statements to the Chief, Litigation Division.

b. Chief, Litigation Division, procedures. The Chief, Litigation Division, will review the report and evidence regarding representation and scope of employment and will determine whether certification and representation are appropriate. He or she will send his or her recommendation to the appropriate U.S. Attorney or office within DOJ. The Chief, Litigation Division, will notify the defendant of DOJ's decision.

4–5. Private counsel at Government expense

a. General. DA personnel, sued in their individual capacity or facing criminal charges as a result of performance of official duties, have no right to employ a private sector counsel at Government expense or to expect reimbursement for the same. For proceedings in the United States, a request for employment of counsel at Government expense may be approved by DOJ, contingent among other things upon availability of funds and a determination that employment of private counsel at Government expense is in the best interests of the United States. (See 28 CFR 50.16.) Special rules apply in overseas areas. (See para 4–5e.)

b. Individual request procedures. The individual will prepare a request that private counsel be employed for him or her at Government expense. The request must also contain the following statement: "understand that the United States is not required to employ private counsel on my behalf, and that I may be responsible for expenses incurred prior to proper authorization by the Department of Army or the Department of Justice."

c. Supervisory and legal adviser procedures. The request will be submitted through the individual's supervisors, who will each make a recommendation and forward the packet to the local SJA or legal adviser. The SJA or legal adviser will prepare his or her own recommendation and forward the matter to the Litigation Division.

d. Chief, Litigation Division, procedures. If the Chief, Litigation Division, determines that the request for private counsel is meritorious, he or she will prepare an appropriate recommendation and forward the packet to the Civil Division, DOJ, for final approval.

e. Special actions in foreign countries. Employment of private counsel in foreign proceedings is governed by AR 27–50. Under the authority of 10 USC 1037, soldiers, as well as employees or those accompanying the armed forces overseas, may be granted individual counsel in civil and criminal proceedings, under the criteria of AR 27-50.

4–6. Requests for indemnification

a. Policy. An individual liable for a judgment rendered against him or her in his or her individual capacity has no right to reimbursement from DA. DA will consider, however, a request for indemnification from DA personnel where conduct within the scope of official duties has resulted in personal liability and indemnification is in the best interests of the United States. Indemnification is contigent strictly upon an appropriation to pay the judgment, as well as availability of such funds.

b. Individual request procedures. An individual against whom an adverse judgment has been rendered may request indemnification. The request must include, at a minimum, the following: how the employee was acting within the scope of his or her employment; whether the requestor has insurance or any other source of indemnification; and, how reimbursement is in the best interests of the United States. The request must also contain the following statements: "I understand that acceptance of this request for indemnification for processing by DA does not constitute an acceptance of any obligation to make such a payment. I also understand that payment is contingent on availability of funds and that it will be made only if such is determined to be in the best interests of the United States." The individual should attach a copy of relevant documents, for example, court's opinion, judgment, and other allied papers.

c. Supervisory and SJA procedures. The request for indemnification will be submitted through supervisory channels to the local SJA or legal adviser. Each supervisor will make a recommendation on the propriety of reimbursement.

d. Chief, Litigation Division, procedures. Requests for indemnification will be forwarded to the Chief, Litigation Division. The Chief, Litigation Division, will examine the submission and, after consultation with DOJ or other agencies, forward the packet with his or her recommendation to the Army General Counsel. The General Counsel will obtain a final decision by the Secretary of the Army or his or her designee on the matter. There is no administrative appeal of the Secretary's (or his or her designee's) decision.

REQUEST FOR REPRESENTATION

I request that the Attorney General of the United States, or his or her agent, designate counsel to defend me in my official and individual capacities in the case of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina. I have read the complaint filed in this case and I declare that all my actions were performed in my official capacity, within the scope of my official duties, and

Figure 4-1. Format for a request for representation using an unsworn declaration under penalty of perjury executed within the United States

in a good faith belief that my actions conformed to the law. I am not aware of any pending related criminal investigation.

I understand the following: if my request for representation is approved, I will be represented by a U.S. Department of Justice attorney; that the United States is not required to pay any final adverse money judgment rendered against me personally, although I can request indemnification; that I am entitled to retain private counsel at my own expense; and, that the Army expresses no opinion whether I should or should not retain private counsel.

I declare under penalty of perjury that the foregoing is true and correct. (See 28 USC 1746.)

Executed on: ***(Date)***

(Signature)
PAUL JONES
PRIVATE, U.S. ARMY

Figure 4-1. Format for a request for representation using an unsworn declaration under penalty of perjury executed within the United States - Continued

DECLARATION

I am currently the Commander of HHC, 6th Armored Division, Bad Vilbel, Germany. I have read the allegations concerning Private Paul Jones in the complaint of *John Doe v. Private Paul Jones*, now pending in the U.S. District Court for the Eastern District of North Carolina.

At all times relevant to the complaint, I was Private Jones' company commander. His actions relevant to this case were performed within the scope of his official duties as Assistant Charge of Quarters, Company B, 4th Battalion, 325th Parachute Infantry Regiment, Fort Bragg, North Carolina.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. (28 USC 1746.)

Executed on: ***(Date)***

(Signature)
John Smith
Captain, Infantry

Figure 4-2. Format for scope of employment statement using an unsworn declaration under penalty of perjury executed outside the United States

REQUEST FOR REPRESENTATION

I am the President of the XYZ Corporation. I request the Attorney General of the United

Figure 4-3. Format for contractor request for representation

States designate counsel to defend me and my company in *Doe v. XYZ, Inc.*, now pending in the U.S. District Court for the Eastern District of North Carolina.

I understand that the assumption by the Attorney General of the defense of this case does not alter or increase the obligations of the United States under United States Contract No. WP-70-660415.

I further agree that such representation will not be construed as waiver or estoppel to assert any rights which any interested party may have under said contract.

Executed on: ***(Date)***

(Signature)
D.D. TANGO
PRESIDENT, XYZ, INC.

Figure 4-3. Format for contractor request for representation - Continued

Chapter 5
Legal Proceedings Initiated by the United States

Section I
Medical Care and Property Claims

5–1. General

a. Authorities.

(1) Federal Medical Care Recovery Act (42 USC 2651). The act provides for the recovery of medical care expenses incurred because of a tortfeasor's actions.

(2) Federal Claims Collection Act (31 USC 3711). The act provides for the collection of claims for money or property arising from the activities of Federal agencies.

(3) Third-party Collection Program (10 USC 1095). The statute provides for collection of reasonable costs of health-care services, provided in facilities of the uniformed services to covered beneficiaries, from private insurers or third-party payers. According to DOD Instruction 6010.15, the authority to settle or waive a DOD claim under the act is delegated to TJAG or to a designee.

(4) Executive Order No. 12778, Civil Justice Reform. This order establishes several requirements on Federal agencies involved in litigation or contemplating filing an action on behalf of the United States.

(5) AR 27–20, Claims. Chapter 4 (Affirmative Claims) contains comprehensive guidance for Recovery Judge Advocates (RJAs) in the administrative determination, assertion, collection, settlement, and waiver of claims in favor of the U.S. for property damage and for medical care claims.

b. Duties and Procedures. According to AR 27–20, chapter 14, the Commander, USARCS, has supervisory responsibility over the administrative processing of property and medical care claims by RJAs. The Commander, U.S. Army Health Services Command (HSC), has supervisory responsibility over the Third Party Collection Program (TPCP). The HSC TPCP Implementation Plan effects DOD Instruction 6010.15 and establishes procedures for processing TPC claims. The Litigation Division, in conjunction with DOJ and U.S. Attorneys, is responsible for pursuing, through litigation, claims not resolved administratively. DOJ is responsible ultimately for initiating litigation for the United States. (28 USC 515.)

c. Assertion of claims on behalf of the United States by private attorneys. The Army incurs potentially recoverable expenses when it provides medical care to soldiers or family members injured by tortfeasors (for example, a soldier is hospitalized after an automobile accident). When injured personnel employ a private attorney to sue the tortfeasor, it may be in the Government's best interests to enter into an agreement with the private attorney to include the Army's medical care claim.

d. Statute of limitations. There is a 3 year statute of limitations for actions in favor of the U.S. for money damages founded upon tort. (28 USC 2415(b).) Limitation periods can vary, however, depending upon the theory of liability and the jurisdiction involved. RJAs must be alert to the applicable limitation period. A case referred for litigation should arrive at the Litigation Division at least 6 months before the expiration of the limitation period.

e. Reporting of recoveries. Amounts recovered through litigation will be reported to USARCS by Tort Branch, Litigation Division, or, where referred directly to a U.S. Attorney or the Nationwide Central Intake Facility (NCIF), by the responsible RJA.

5–2. Referral of medical care and property claims for litigation

a. Criteria for referral. The RJA will forward the claims file and a litigation report (see para 5–3) through USARCS to the Litigation Division when the claim has not been resolved administratively and any of the following conditions exist:

(1) The claim exceeds $5,000.

(2) The claim involves collection from the injured party or his or her attorney.

(3) The claim raises an important question of policy.

(4) There is potential for a significant precedent.

b. Alternative methods. When none of the conditions cited in the preceding subparagraph are present, the RJA may refer the claim directly to the U.S. Attorney for the district in which the prospective defendant resides. Similar property claims may be referred through USARCS to DOJ's Nationwide Central Intake Facility (NCIF) rather than directly to the U.S. Attorney. Notice of all such referrals shall be provided through USARCS to Tort Branch, Litigation Division. The RJA should be ready to provide support to the U.S. Attorney if requested.

c. Closing Files. A file referred directly to the U.S. Attorney will be closed if the U.S. Attorney determines further action is unwarranted. If the RJA disagrees, the file should be forwarded with the RJA's recommendation through USARCS to the Litigation Division.

5–3. Preparation of claims for litigation

a. General. In preparing a referral for litigation, the RJA will ensure the file contains at least the following:

(1) A litigation report (see para 3–9) that demonstrates a factual basis for the claim and a theory of recovery under applicable State law. (See Federal Rules of Civil Procedure 11)

(2) Copies of all medical records and bills reflecting the reasonable value of the medical care furnished to the injured party, including DA Form 2631–R (Medical Care-Third Party Liability

Notification), and DA Form 3154 (MSA Invoice and Receipt). These documents should be authenticated as necessary on a DA Form 4.

(3) Copies of all documents necessary to establish the value of lost or damaged property.

b. Transmittal letter. The letter of transmittal referring the claim for litigation should briefly summarize the facts giving rise to the claim and the collection actions previously taken by the Army and the injured party.

Section II
Assertion of Other Claims

5–4. Referral to the Litigation Division

a. General. The majority of cases filed on behalf of the United States will fall under section I of this chapter. All other civil cases that cannot be resolved administratively or by direct referral to DOJ will be forwarded through channels to the Litigation Division with a litigation report. (See para 3–9.)

b. Government contractors. It may be in the Government's best interest to authorize a Government contractor, whose contract provides for the reimbursement of necessary legal expenses, to employ private counsel to initiate legal proceedings against a third party. To obtain authorization to employ private counsel in such instances the contractor should follow the procedures in paragraph 3–7*c* of this regulation.

5–5. Proceedings to repossess Government real property or quarters or to collect delinquent rent

a. General. U.S. Attorneys are authorized to accept a Federal agency's request for the following purposes: to initiate an action to recover possession of real property from tenants, trespassers, and others; to enjoin trespasses on Federal property; and, to collect delinquent rentals or damages for use and occupancy of real property for amounts less than $200,000.

b. Procedures. When eviction or an action to collect delinquent rent is necessary, the SJA or legal adviser will notify General Litigation Branch, Litigation Division, of the situation. If approved by the Litigation Division, the SJA or legal adviser may ask the U.S. Attorney to file suit. A copy of the complaint will be sent to the Litigation Division. DOJ can take action to evict the occupants for violation of the terms of occupancy and collect delinquent rent or other charges. Once the matter has been referred to the U.S. Attorney, payments for rent should be sent to the U.S. Attorney. (See AR 210–50, chap 2.)

Chapter 6
Environmental Litigation

6–1. Scope

This chapter contains guidance, policies, and procedures applicable to all environmental and natural resources civil litigation and administrative proceedings involving missions and functions of DA, its major and subordinate commands, all installations presently or previously managed by DA, and all other sites or issues in which DA has a substantial interest. In this chapter, "litigation" includes civil administrative proceedings.

6–2. Duties and procedures

a. Water Rights. The Environmental Law Division will conduct direct liaison with DOJ and will represent DA in State and Federal litigation relating to availability and allocation of surface and ground water and the establishment and protection of water rights for Army military installations and activities. This will include litigation in State general adjudications of water rights under the McCarran Amendment, 43 USC 666, for Army military installations and activities. Such litigation relating solely to COE civil works projects or activities will be handled by attorneys under the technical supervision of the Chief Counsel, COE. With respect to any general adjudication which could affect the civil works or real property functions of COE, The Judge Advocate General, acting through the Chief, Environmental Law Division, and the Chief Counsel, COE, will determine jointly which office should maintain primary direct liaison with DOJ and will scope and execute appropriate coordination with each other and with the General Counsel with respect to that litigation.

b. Navigable Waters. The Chief Counsel, COE, will conduct direct liaison with DOJ and represent DA in civil litigation involving activities in or across navigable waters of the United States or other activities regulated under the Rivers and Harbors Act of 1899, 33 USC 401 et seq.

c. Waters of the United States. The Chief Counsel, COE, will conduct direct liaison with DOJ and represent DA in civil litigation involving The Clean Water Act 404 (See 33 USC 1344) permit authority of COE over the discharge of dredged or fill material into waters of the United States.

d. Enforcement. Environmental Law Division will conduct direct liaison with DOJ and represent DA in all civil litigation involving citizen or State enforcement of applicable State, Federal, and local requirements respecting the control or abatement of pollution and involving the management of hazardous wastes, with respect to the missions and functions of, and Federal facilities owned or controlled by, DA, except for civil works facilities.

e. Environmental Response.

(1) Except as provided in (2) below, the Environmental Law Division will conduct direct liaison with DOJ and represent DA in all civil litigation seeking declaratory or injunctive relief or involving claims of Army liability for the costs of response at Federal facilities currently owned or controlled by DA and at other sites where the Army potentially is a responsible party.

(2) The Chief Counsel, COE, will conduct direct liaison with DOJ and represent DA in all civil litigation seeking declaratory or injunctive relief or involving claims of Army liability for the costs of response at civil works facilities, at former defense sites or at other sites where the Army potentially is a responsible party due to the response actions of the COE or its contractors.

f. Fish and Wildlife, and Plants. The Environmental Law Division will conduct direct liaison with DOJ and represent DA in civil litigation involving citizen or State enforcement of applicable State, Federal, and local laws governing conservation of plant, fish, and wildlife resources at Federal facilities owned or controlled by DA, except that such litigation relating solely to the real estate, civil works, navigation and Clean Water Act 404 (See 33 USC 1344) permit functions and activities of the COE will be handled by attorneys under the technical supervision of the Chief Counsel, COE.

g. Toxic Torts.

(1) Except as otherwise provided in this regulation, The Environmental Law Division will conduct direct liaison with DOJ and represent DA in all civil litigation involving claims of tort liability for exposure to environmental contamination emanating from Federal facilities owned or controlled by DA.

(2) The Litigation Division will conduct liaison with DOJ and represent DA in civil litigation involving claims of tort liability for singular and discrete incidents of exposure to environmental contamination emanating from any Federal facility owned or controlled by DA.

(3) The Chief Counsel, COE, will conduct direct liaison with DOJ and will represent DA in civil litigation involving claims of tort liability for exposure to environmental contamination (including singular and discrete incidents) emanating from any civil works activities under the jurisdiction of the Secretary of the Army.

(4) The Chief Counsel, COE, and the Chief, Environmental Law

Division, will confer and jointly determine which office will conduct direct liaison with DOJ and represent DA in civil litigation involving all other claims of toxic tort liability.

Chapter 7
Release of Information and Appearance of

Section I
Scope

7–1. General

a. Introduction. This chapter implements DOD Directive 5405.2 (See appendix C and 32 CFR 97.) It governs the release of official information and the appearance of present and former DA personnel as witnesses in response to requests for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings. Requests for records, if not in the nature of legal process, should be processed under AR 25–55 or AR 340–21. This chapter pertains to any request for witnesses, documents, or information for all types of litigation, including requests by private litigants, requests by State or U.S. attorneys, requests by foreign officials or tribunals, subpoenas for records or testimony, notices of depositions, interview requests, civil cases, criminal proceedings, private litigation, or litigation in which the United States has an interest.

b. Definitions. (See glossary.)

7–2. Policy

a. General Rule. Except as authorized by this chapter, present or former DA personnel will not disclose official information (see glossary) in response to subpoenas, court orders, or requests.

b. Exception. Present or former DA personnel may disclose official information if they obtain the written approval of the appropriate SJA or legal adviser or the Litigation Division.

c. Referral to deciding official. If present or former DA personnel receive a subpoena, court order, request for attendance at a judicial or quasi-judicial proceeding, or request for an interview related to actual or potential litigation, and it appears the subpoena, order, or request seeks disclosures described in *a* above, the individual immediately should advise the appropriate SJA or legal adviser. If the SJA or legal adviser informally cannot satisfy the subpoena, order, or request per sections II and III of this chapter, he or she should consult with the Litigation Division.

d. Requester's responsibilities. Individuals seeking official information must submit, at least 14 days before the desired date of production, a specific written request setting forth the nature and relevance of the official information sought. (Requesters can be referred to 32 CFR 516, subpart G, which codifies this regulation). Subject to paragraph 7–8*a* of this regulation, present and former DA personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in writing and properly approved by the SJA or legal adviser or the Litigation Division. (See *United States ex. rel. Touhy v. Ragen,* 340 U.S. 462 (1951).)

e. Litigation in which the United States has an interest. If a subpoena, order, or request relates to litigation in which the United States has an interest and for which litigation responsibility has not been delegated, the SJA or legal adviser will coordinate with the Litigation Division under paragraph 7–3 of this regulation.

f. Motions to stay or quash subpoenas. A subpoena should never be ignored, and an SJA or legal adviser should seek assistance from Litigation Division or the U.S. Attorney's office whenever necessary. If a response to a subpoena or order is required before a release determination can be made or before the Litigation Division or the U.S. Attorney can be contacted, the SJA or legal adviser will do the following:

(1) Furnish the court or tribunal a copy of this regulation (Reprinted in 32 CFR 516, subpart G) and applicable case law (See *United States ex. rel. Touhy v. Ragen,* 340 U.S. 462 (1951).)

(2) Inform the court or tribunal that the requesting individual has not complied with this chapter, as set out in 32 C.F.R. Parts 97 & 516, or that the subpoena or order is being reviewed.

(3) Seek to stay the subpoena or order pending the requestor's compliance with this chapter or final determination by the Litigation Division.

(4) If the court or other tribunal declines to quash or stay the subpoena or order, inform Litigation Division immediately so a decision can be made whether to challenge the subpoena or order. If the Litigation Division decides not to challenge the subpoena or order, the affected personnel will comply with the subpoena or order. If the Litigation Division decides to challenge the subpoena or order, it will direct the affected personnel to respectfully decline to comply with the subpoena or order. (See *United States ex. rel. Touhy v. Ragen,* 340 U.S.462 (1951).)

g. Classified or sensitive information. Only Litigation Division may authorize the release of official information or appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, or intelligence sources and methods.

h. Requests for Inspector General records or testimony. IG records, and information obtained through performance of IG duties, are official information under the exclusive control of the Secretary of the Army. (See AR 20–1, chap 3.) IG records frequently contain sensitive official information that may be classified or obtained under guarantees of confidentiality. When justification exists, DA attorneys will seek court protection from disclosure of IG records and information. DA personnel will not release IG records or disclose information obtained through performance of IG duties without the approval of the Secretary of the Army, The Inspector General, TIG Legal Advisor, or the Chief, Litigation Division. When IG personnel receive a subpoena, court order, request for attendance at a judicial or quasi-judicial proceeding, or a request for an interview that the IG reasonably believes is related to actual or potential litigation concerning IG records or related information, they should immediately notify The Inspector General Legal Adviser or the Chief, Litigation Division. IG personnel will follow the guidance of this chapter concerning actions to be taken regarding disclosure and testimony.

7–3. Referral to HQDA

a. General. If the SJA or legal adviser is unable to resolve the matter, it will be referred for approval or action by the Litigation Division under this chapter, by the most expeditious means, to General Litigation Branch, Litigation Division, with the following exceptions:

(1) Those involving a case assigned to another branch of Litigation Division will be submitted to that branch (appendix B).

(2) Those involving affirmative litigation (for example, medical care recovery or Army property damage or loss cases) under chapter 5 will be submitted to Tort Branch.

(3) Those involving patents, copyrights, privately developed technical information, or trademarks will be submitted to the Intellectual Property Law Division.

(4) Those involving taxation will be submitted to the Contract Law Division.

(5) Those involving communication, transportation, or utility service proceedings will be submitted to the Regulatory Law Office.

(6) Those involving environmental matters will be submitted to the Environmental Law Division.

(7) Those involving contract appeals cases before the ASBCA will be submitted to the Contract Appeals Division.

(8) Those involving procurement fraud, including Qui Tam cases, will be submitted to the Procurement Fraud Division.

b. Information to be submitted. When referring matters pursuant to a above, the following data should be provided:

(1) Parties (named or prospective) to the proceeding, their attorneys, and case number, where appropriate.

(2) Party making the request (if a subpoena, indicate moving party) and his or her attorney.

(3) Name of tribunal in which the proceeding is pending.

(4) Nature of the proceeding.

(5) Date of receipt of request or date and place of service of subpoena.

(6) Name, grade, position, and organization of person receiving request or served with subpoena.

(7) Date, time, and place designated in request or subpoena for production of information or appearance of witness.

(8) Nature of information sought or document requested, and place where document is maintained.

(9) A copy of each document requested. Contact the appropriate office at HQDA if this would be burdensome and unnecessary to a decision whether to release, redact, or withhold a particular document.

(10) Name of requested witness, expected testimony, requested appearance time and date, and whether witness is reasonably available.

(11) Analysis of the problem with recommendations.

Section II
Release of Records in Connection With Litigation

7–4. Release of Army and other agency records

a. Preservation of originals. To preserve the integrity of DA records, DA personnel will submit properly authenticated copies rather than originals of documents or records for use in legal proceedings, unless directed otherwise by the Litigation Division. (See 28 USC 1733.)

b. Authentication of copies. Copies of DA records approved for release can be authenticated for introduction in evidence by use of DA Form 4. (See para 3–11 for instructions.)

(1) Records maintained in U.S. Army Engineer Districts and Divisions will be forwarded to HQDA (CECC–K), WASH DC 20314–1000.

(2) All other records will be forwarded to the appropriate office at HQDA. (See para 7–3 above.)

c. Fees and charges. AR 37–60 prescribes the schedule of fees and charges for searching, copying, and certifying Army records for release in response to litigation-related requests.

d. Release of records of other agencies. Normally, an individual requesting records originating in agencies outside DA (that is, FBI reports, local police reports, civilian hospital records) that are also included in Army records should be advised to direct his or her inquiry to the originating agency.

7–5. Determination of release authorization

a. Policy. DA policy is to make official information reasonably available for use in Federal and State courts and by other Governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

b. Releasability factors. In deciding whether to authorize release of official information, the deciding official should consider the following:

(1) Has the requester complied with DA policy governing the release of official documents in paragraph 7–2*d* above?

(2) Is the request unduly burdensome or otherwise inappropriate under the applicable court rules?

(3) Is the disclosure appropriate under the rules of procedure governing the matter in which the request arose?

(4) Would the disclosure violate a statute, executive order, regulation, or directive?

(5) Is the disclosure appropriate under the relevant substantive law concerning privilege?

(6) Would the disclosure reveal information properly classified pursuant to the DOD Information Security Program under AR 380–5, unclassified technical data withheld from public release pursuant to 32 CFR 250, or other matters exempt from unrestricted disclosure?

(7) Would disclosure interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or confidential, commercial, or financial information, or, otherwise be inappropriate under the circumstances?

(8) Would the disclosure violate any person's expectation of confidentiality or privacy?

7–6. Records determined to be releasable

If the deciding official, after considering the factors set forth in paragraph 7–5 above, determines that all or part of requested official records are releasable, copies of the records should be furnished to the requester.

7–7. Records determined not to be releasable

a. General. If the deciding official, after considering the factors in paragraph 7–5 above, determines that all or part of requested official records should not be released, he or she will communicate promptly and directly with the attorney or individual who caused the issuance of the subpoena, order, or request and seek to resolve the matter informally. If the subpoena or order is invalid, he or she should explain the basis of the invalidity. The deciding official should also explain why the records requested are privileged from release. The deciding official should attempt to obtain the agreement of the requester to withdraw the subpoena, order, or request or to modify the subpoena, order, or request so that it pertains only to records which may be released. (See fig 7–1, Sample *Touhy* letter.)

b. Information protected by the Privacy Act.

(1) A subpoena duces tecum or other legal process signed by an attorney or clerk of court for records protected by the Privacy Act, 5 USC 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Privacy Act precludes disclosure of records in a system of records without the written consent of the subject of the records or "pursuant to the order of a court of competent jurisdiction." (See 5 USC 552a(b)(11).) An "order of the court", for the purpose of subsection 5 USC 552a(b)(11), is an order or writ requiring the production of the records, signed by a judge or magistrate.

(2) Unclassified records otherwise privileged from release under 5 USC 552a may be released to the court under either of the following conditions:

(a) The subpoena is accompanied by an order signed by a judge or magistrate, or such order is served separately, that orders the person to whom the records pertain to release the specific records, or that orders copies of the records be delivered to the clerk of court, and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege.

(b) The clerk of the court is empowered by local statute or practice to receive the records under seal subject to request that they be withheld from the parties until the court determines whether the records are material to the issues and until any question of privilege is resolved.

(3) Subpoenas for alcohol abuse or drug abuse treatment records must be processed under 42 USC 290dd–3 and 290ee–3, and Public Health Service regulations published at 42 CFR 2.1 – 2.67.

(4) Upon request, SJAs and legal advisers may furnish to the attorney for the injured party or the tortfeasor's attorney or insurance company a copy of the narrative summary of medical care that relates to a claim under chapter 5 of this regulation. If additional medical records are requested, only those that directly pertain to the pending action will be furnished. If furnishing copies of medical records would prejudice the cause of action, the matter will be reported to the Litigation Division.

c. Referral to the Litigation Division. If the SJA or legal adviser is not able to resolve a request for Army records informally, he or she should contact the Litigation Division.

(1) The Litigation Division may respond to subpoenas or orders for records privileged from release by informing the local U.S. Attorney about the subpoena and requesting that office file a motion to quash the subpoena or a motion for a protective order. The

records privileged from release should be retained by the custodian pending the court's ruling upon the Government's motion.

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

d. Classified and privileged materials. Requests from DOJ, U.S. Attorneys, or attorneys for other Governmental entities for records that are classified or otherwise privileged from release will be referred to the Litigation Division. (See para 7–2*g*.)

Section III
DA Personnel as Witnesses in Private Litigation

7–8. Response to subpoenas, orders, or requests for witnesses

a. Policy. The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information.(See glossary.)

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will interfere seriously with the accomplishment of a military mission.

b. Former DA personnel. Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (*a*(1) above) or concerning expert testimony prohibited by paragraph 7–10 below. In those instances, the subject of the request or subpoena should take the action specified in paragraphs 7–2*c* and 7–3 of this regulation.

c. Present DA personnel. Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

d. Discretion to testify. Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if any, of refusal. Any individual not authorized to consult with Army counsel should consult with private counsel, at no expense to the Government.

7–9. Official information

a. In instances involving paragraph 7–8*a*(1) above, the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested, or to HQDA pursuant to paragraph 7–3*a* above. The deciding official will determine whether to release the information sought under the principles established in paragraph 7–5 above. If funding by the United States is requested, see paragraph 7–16*d* of this regulation.

b. If the deciding official determines that the information may be released, the individual will be permitted to be interviewed, deposed, or to appear as a witness in court provided such interview or appearance is consistent with the requirements of paragraphs 7–10 and 7–11 below. (See, for example, fig 7–2.) A JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without HQDA approval. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

7–10. Expert witnesses

a. General rule. Present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. Former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See fig 7–3.) An SJA or legal adviser is authorized to deny a request for expert testimony, which decision may be appealed to the Litigation Division.

b. Exception to the general prohibition. If a requester can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, the Litigation Division may grant special written authorization for present or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

c. Exception for AMEDD personnel. Members of the Army medical department or other qualified specialists may testify in private litigation with the following limitations (see fig 7–4):

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions they have taken in the regular course of their duties.

(2) They limit their testimony to factual matters such as the following: their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment.

(3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

d. Court-ordered expert or opinion testimony. If a court or other appropriate authority orders expert or opinion testimony, the witness will notify the Litigation Division immediately. If the Litigation Division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. If directed by the Litigation Division, however, the witness will decline respectfully to comply with the subpoena or order. (See *United States ex. rel. Touhy v. Ragen,* 340 U.S. 462 (1951).)

e. Expert witness fees. All fees tendered to present DA personnel as an expert or opinion witness, to the extent they exceed actual travel, meals, and lodging expenses of the witness, will be remitted to the Treasurer of the United States.

7–11. Interference with mission

If the absence of a witness from duty will interfere seriously with the accomplishment of a military mission, the SJA or legal adviser will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal adviser will refer the matter to the Litigation Division.

Section IV
Litigation in Which the United States Has an Interest

7–12. Response to subpoenas, orders, or requests for witnesses

a. Referral to a deciding official. Requests, subpoenas, or orders for official information, interviews, or testimony of present or former DA personnel in litigation or potential litigation in which the United States has an interest, including requests from DOJ, will be resolved by the SJA or legal adviser pursuant to the principles of this chapter. The Litigation Division will be consulted on issues that cannot be resolved by the SJA or legal adviser.

b. Reassignment of witnesses. When requested by the U.S. Attorney, the SJA or legal adviser will ensure that no witnesses are reassigned from the judicial district without advising the DOJ attorney. If a witness is vital to the Government's case and trial is imminent, the SJA or legal adviser should make informal arrangements to retain the witness in the command until trial. If this is not feasible, or if a satisfactory arrangement cannot be reached with the

DOJ attorney, the SJA or legal adviser should notify the Litigation Division.

7–13. Expert witnesses

Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to the Litigation Division unless the request involves a matter that has been delegated by the Litigation Division to an SJA or legal adviser. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

7–14. News media and other inquiries

News media inquiries regarding litigation or potential litigation will be referred to the appropriate public affairs office. DA personnel will not comment on any matter presently or potentially in litigation without proper clearance. Local public affairs officers will refer press inquiries to HQDA (SAPA), WASH DC 20310–1500, with appropriate recommendations for review and approval by the Office of the Chief of Public Affairs. All releases of information regarding actual or potential litigation will be coordinated with the Litigation Division prior to release.

Section V
Status, Travel, and Expenses of Witnesses

7–15. Witnesses for the United States

a. Status of witness. A soldier authorized to appear as a witness for the United States, including those authorized to appear under paragraph 7–16*d* below, will be placed on temporary duty. If USAR or NG personnel are requested as witnesses for the United States, and if their testimony arises from their active duty service, they should be placed on active duty to testify. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10. DA personnel who appear as necessary witnesses for a party asserting the Government's claim for medical care expenses are witnesses for the United States.

b. Travel arrangements. Travel arrangements for witnesses for the United States normally are made by DOJ through the Litigation Division for other than local travel. The Litigation Division will issue instructions for this travel, including fund citation, to the appropriate commander. A U.S. Attorney, or an attorney asserting the Government's medical care claim under chapter 5 of this regulation, may make arrangements for local travel through the SJA or legal adviser for attendance of a witness who is stationed at an installation within the same judicial district, or not more than 100 miles from the place where testifying. Other requests, including those under paragraph 7–16*d* below, will be referred to the Litigation Division. The instructions from the Litigation Division, or the request from the U.S. Attorney or the attorney asserting the Government's claim, will serve as a basis for the issuance of appropriate travel orders by the local commander.

c. Travel and per diem expenses. The witness' commander or supervisor should ensure that the witness has sufficient funds to defray expenses. The SJA or legal adviser will provide assistance.

(1) Where local travel is performed at the request of a U.S. Attorney and the testimony does not involve information acquired in the performance of duties, transportation arrangements (costs) and any per diem expenses are the responsibility of the U.S. Attorney.

(2) An attorney asserting the Government's medical care or property claim may be required to advance local travel expense money to the witness requested and to include these in recoverable costs where the Government's claim is not large enough to justify expenditures of Government travel funds.

(3) Other local travel and per diem expenses for cases involving Army activities or claims are proper expenses of the command issuing the orders.

(4) Litigation Division will furnish travel expense and per diem funds for other than local travel and will receive reimbursement from DOJ or other Government agencies as appropriate.

7–16. Witnesses for a State or private litigant

a. Status of witness. If authorized to appear as a witness for a State or private litigant, and the testimony to be given relates to information obtained in the performance of official duties, a soldier will attend in a permissive TDY status. If authorized to appear as a witness, but the testimony does not relate to information obtained in the performance of official duties, a soldier may be granted a pass or permissive TDY under AR 630–5, or be required to take ordinary leave. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10.

b. Travel arrangements. The requesting party or State agency will make all travel arrangements for attendance of DA personnel authorized to appear as witnesses for a State or private litigant. The local commander may issue appropriate orders when necessary.

c. Travel expenses. The United States may not pay travel, meals, and lodging expenses of the witness, other than normal allowances for subsistence pursuant to the DOD Military Pay and Allowances Entitlements Manual. These expenses are solely a matter between the witness and the party seeking his or her appearance. Witnesses ordinarily should be advised to require advance payment of such expenses. Soldiers authorized to appear in a pass or permissive TDY status are not entitled to receive witness attendance fees, but may accept travel, meals, and lodging expense money from the requesting litigant. All witness fees tendered the soldier, to the extent they exceed such actual expenses of the member, will be remitted to the Treasurer of the United States. A civilian employee authorized to appear in his or her official capacity will accept the authorized witness fees, in addition to the allowance for travel and subsistence, and make disposition of the witness fees as instructed by his or her personnel office.

d. Funding by the United States. Requests for DA personnel to appear at Government expense as witnesses in State or local proceedings for a party other than the United States, including cases involving domestic violence or child abuse, will be referred to the Litigation Division. The Litigation Division may authorize travel and per diem expenses under paragraph 7–15 above when the case is one in which the United States has a significant interest.

7–17. Witnesses before foreign tribunals

a. Referral to the SJA. Requests or subpoenas from a foreign Government or tribunal for present DA personnel stationed or employed within that country to be interviewed or to appear as witnesses will be forwarded to the SJA of the command exercising general court-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The SJA will determine the following:

(1) Whether a consideration listed in paragraph 7–8*a*(1) through (3) above applies.

(2) Whether the information requested is releasable under the principles established in section II of this chapter.

(3) Whether the approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity may be involved.

b. United States has an interest in the litigation. If the SJA determines that the United States has an interest in the litigation, the commander may authorize the interview or order the individual's attendance in a temporary duty status. The United States will be deemed to have an interest in the litigation if it is bound by treaty or other international agreement to ensure the attendance of such personnel.

c. United States has no interest in the litigation. If the SJA determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness under the principles established in section III of this chapter.

d. Witnesses located outside the requester's country. If the requested witness is stationed in a country other than the requester's, the matter will be referred to the Litigation Division.

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
FORT SMITH, NORTH DAKOTA 84165
15 April 1993

Mr. T. Hudson Taylor
Attorney At Law
105 Hay Street
Whynot, ND 84167

Dear Mr. Taylor:

We have learned that you subpoenaed Captain Roberta Selby to testify at a deposition in the case *Kramer v. Kramer,* currently filed in State court, and that you directed her to bring her legal assistance file concerning her client, SSG Kramer.

Under 32 CFR 97.6(c), 516.35, and 516.40, the Army must authorize the appearance of its personnel or the production of official documents in private litigation. In this case, the Army cannot authorize Captain Selby to appear or produce the requested file absent the following:

You must request in writing her appearance and the production of the file in accordance with Department of Defense directives, 32 CFR 97.6(c), and Army regulations, 32 CFR 516-34 - 516.40. The request must include the nature of the proceeding, 32 CFR 516.34(b), and the nature and relevance of the official information sought. *Id.*516.35(d). We cannot act on your request until we receive the required information. *See, for example, United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951); *Boron Oil Co. v.Downie,* 873 F.2d 67 (4th Cir. 1989); *United States v. Bizzard,* 674 F.2d 1382 (11th Cir. 1982); *United States v. Marino,* 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen,* 554 F.2d 398 (10th Cir. 1977).

To overcome federal statutory restrictions on the disclosure of the requested file imposed by the Privacy Act, 5 USC 552a, you must provide either a written release authorization signed by the individual to whom the file pertains (that is, SSG Kramer) or a court ordered release signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See, for example, Doe v. DiGenova,* 779 F.2d 74 (D.C. Cir. 1985).

In this case, because of the attorney-client relationship between Captain Selby and SSG Kramer, you must produce a written waiver of the attorney-client privilege from SSG Kramer. Because the privilege may protect both documents and testimony, Captain Selby may not divulge such information without SSG Kramer's consent. *See, for example,* Rule of Professional Conduct for Army Lawyers 1.6(a).

In addition to the above requirements, Captain Selby's supervisor must approve her absence from duty. *See* 32 CFR 516.43. In this regard, we suggest you take the deposition at Fort Smith. In any event, however, you or your client must pay all travel expenses, as this is purely private litigation and witness' appearance must be at no expense to the United States. *See id.* 516.48(c).

Finally, if Captain Selby does appear as a witness, she may only give factual testimony. She may not testify as an opinion or expert witness.This limitation is based on Department of Defense and Army policy that generally prohibits Government employees from appearing as expert witnesses in private litigation. *See id.* 97.6(e), 516.42.

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. So that the Army can adequately protect its interests in this matter, I request that you respond to this letter by 27 April 1993. If you have any questions, please call CPT Taylor at 919-882-4500.

Sincerely,

(Signature)
ROBERT V. JACKANSI
MAJOR, JA
Chief, Administrative Law

Copy Furnished:
Litigation Division

Figure 7-1. Sample "Touhy" Compliance Letter

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
FORT SMITH, NORTH DAKOTA 84165
15 April 1993

Mr. T. Hudson Taylor
Attorney At Law
105 Hay Street
Whynot, ND 84167

Dear Mr. Taylor:

This letter responds to your request to interview and depose Captain Buzz Sawyer as a witness in *Morgan v. Jones*. Subject to the following conditions, your request is approved.

This grant of authority is limited to factual testimony only. Captain Sawyer may not testify as an expert witness. This limitation is based on Army policy prohibiting Government employees from appearing as expert witnesses in private litigation. *See* 32 CFR 516.42. Captain Sawyer may not provide official information that is classified, privileged, or otherwise protected from public disclosure.

The decision whether to testify in private litigation is within the discretion of the prospective witness. This authorization is also subject to the approval of the witness' supervisors to be absent during the period involved. Finally, because this is private litigation, the witness' participation must be at no expense to the United States. *See* 32 CFR 516.48.

If you have any questions, please call CPT Taylor at 919-882-4500.

Sincerely,

(Signature)
ROBERT V. JACKANSI
MAJOR, JA
Chief, Administrative Law

Copy Furnished:
Litigation Division

Figure 7-2. Sample Fact Witness Approval Letter

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
FORT SMITH, NORTH DAKOTA 84165
15 April 1993

Mr. T. Hudson Taylor
Attorney At Law
105 Hay Street
Whynot, ND 84167

Dear Mr. Taylor:

Figure 7-3. Sample Expert Witness Denial Letter

This responds to your request for Mr. Charles Montrose to appear as an expert witness in private litigation: *Smithers v. ABC Video*. For the following reasons, the request is denied.

Army Regulation 27-40 forbids Army personnel from providing expert testimony in private litigation, with or without compensation, except under the most extraordinary circumstances. See 32 CFR 97.6(e), 516.42. Several reasons support the exercise of strict control over such witness appearances.

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

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

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

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

If you have any questions, please call me or CPT Taylor at 919-882-4500.

Sincerely,

(Signature)
ROBERT V. JACKANSI
MAJOR, JA
Chief, Administrative Law

Figure 7-3. Sample Expert Witness Denial Letter - Continued

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
FORT SMITH, NORTH DAKOTA 84165
15 April 1993

Mr. T. Hudson Taylor
Attorney At Law
105 Hay Street
Whynot, ND 84167

Dear Mr. Taylor:

This responds to your request to depose Dr. (MAJ) J. McDonald, Fort Smith Medical Treatment Facility. Pursuant to 32 CFR 516.33-516.49, you may depose him subject to the following conditions:

He may testify as to his treatment of his patient, Sergeant Rock, as to related laboratory tests he may have conducted, or other actions he took in the regular course of his duties.

He must limit his testimony to factual matters such as his observations of the patient or other operative facts, the treatment prescribed or corrective action taken, course of recovery or steps required for treatment of injuries suffered, or contemplated future treatment.

His testimony may not extend to hypothetical questions or to a prognosis. He may not testify as an "expert." This limitation is based on Department of Defense and Army policy prohibiting present or former military personnel and Army civilian employees from providing opinion or expert testimony concerning official information, subjects, or activities in private litigation. *See* 32 CFR 97.6(e), 516.42.

The witnesses may not provide official information that is classified, privileged, or otherwise protected from public disclosure. To protect the Army's interests, CPT Taylor or another Army attorney will be present during the depositions.

To overcome restrictions imposed by the Privacy Act, 5 USC 552a, Dr. McDonald may not discuss matters derived from the patient's medical records absent the patient's written consent or a court order signed by a judge. A subpoena issued by someone other than a judge or magistrate is insufficient. *See Doe v. DiGenova,* 779 F.2d 74 (D.C. Cir. 1985); *Stiles v. Atlanta GasLight Co.,* 453 F. Supp. 798 (N.D. Ga. 1978).

The decision whether to testify in private litigation is within the discretion of the witness, subject to the approval of his supervisors to be absent during the period involved.

Finally, because this is private litigation, the witnesses' participation must be at no expense to the United States. See 32 CFR 516.48.

If you have any questions, please call me or CPT Taylor at 919-882-4500.

Sincerely,

(Signature)
ROBERT V. JACKANSI
MAJOR, JA
Chief, Administrative Law

Copy Furnished:
Litigation Division

Figure 7-4. Sample of Doctor Approval Letter

Chapter 8
Remedies in Procurement Fraud and Corruption

8–1. Purpose

This chapter delineates the policies, procedures, and responsibilities for reporting and resolving allegations of procurement fraud or irregularities (PFI) within DA. It implements DOD Directive 7050.5. (See appendix D.)

8–2. Policies

a. Procurement fraud and irregularities will be addressed promptly and thoroughly whenever encountered. Reports will be initiated in a timely manner and will be supplemented as appropriate.

b. Investigations will be monitored to see that interim corrective action is taken and that final action is taken as expeditiously as possible.

c. This regulation establishes the Procurement Fraud Division (PFD), U.S. Army Legal Services Agency, as the single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement.

d. The key elements of the Army's procurement fraud program follow: centralized policy making and program direction; fraud remedies coordination; decentralized responsibility for operational matters, such as reporting and remedial action; continuous case monitorship by PFD from the initial report until final disposition; and, command-wide fraud awareness training.

e. Remedies for PFI will be pursued in a timely manner and properly coordinated with other agencies. Every effort will be made to support criminal investigation and prosecution of fraudulent activity.

f. A specific remedies plan will be formulated for each significant case of fraud or corruption involving procurement.

g. Coordination on the status and disposition of cases will be maintained between PFD, OTJAG, PFI Coordinators at MACOMs, and Procurement Fraud Advisers (PFA) at subordinate commands. Coordination of procurement and personnel actions will be accomplished with investigative agencies as required by those agencies.

h. Training which relates to fraud and corruption in the procurement process is a significant element of this program.

8–3. Duties and Procedures

a. TJAG has overall responsibility for the coordination of remedies in procurement fraud and corruption within the Army. This responsibility has been delegated to PFD. Functions of PFD will include the following:

(1) Serving as the single centralized organization in the Army to monitor the status of, and ensure the coordination of, criminal, civil, contractual, and administrative remedies for each significant case of fraud or corruption.

(2) Receiving reports of procurement fraud and corruption from any source including, but not limited to the following: DOD criminal investigative organizations; audit agencies; contracting officers; inspectors general of the executive branch; correspondence from the public; and, commanders. This provision does not repeal any other reporting requirement, but establishes PFD as a recipient of PFI information at the earliest possible time.

(3) Establishing a monitoring system within OTJAG for all cases of fraud and corruption that relate to Army procurement.

(4) Discussing regularly with the U.S. Army Criminal Investigation Command (USACIDC) or the assigned DOD criminal investigative organization the current status of significant fraud or corruption cases and their coordination with prosecutive authorities.

(5) Ensuring that all criminal, civil, contractual, and administrative remedies are considered in each significant fraud or corruption case and that timely and applicable remedies are undertaken by commanders, contracting officers, and suspension and debarment authorities. For example, consideration of suspension or debarment of a contractor or individual normally should be initiated within 30 days of indictment or conviction.

(6) Coordinating, as appropriate, with other DOD components affected by a significant fraud or corruption case being monitored by the Army.

(7) Developing, with the responsible DOD investigative organization, Procurement Fraud Coordinators and Advisers, and other involved agencies, a specific comprehensive remedies plan for each significant fraud or corruption case.

(8) In the case of ongoing criminal investigations, coordinate remedies through, or with the prior knowledge of, the DOD criminal investigative organization responsible for the case.

(9) In significant fraud or corruption cases, identifying and documenting any known adverse impact on a DOD mission, and including the information in any remedies plan.

(10) Providing the appropriate DOD criminal investigative organization with information concerning final remedies as a result of an investigation by that organization.

(11) Receiving notifications from criminal investigative agencies concerning substituted, defective, and counterfeit hardware in which a serious hazard to health, safety or operational readiness is indicated; ensuring that appropriate safety, procurement and program officials are informed per enclosure 3 of DOD Directive 7050.5. PFD will specifically ensure that contract reviews (DD Form 350 (Individual Contracting Action Report) and adverse impact statements (see para 8–8*c*(2)) are prepared, and that such information is used to determine if further inquiry is warranted to prevent reoccurrence and to detect other possible fraud. Impact statements will not be released to prosecutive agencies until reviewed by PFD. When appropriate, PFD will coordinate with other DOD agencies to establish a lead agency for victim impact statements in multi-DOD agency cases.

b. The Commanding General, USACIDC, will take the following actions:

(1) Notify PFD of any investigations involving fraud or corruption related to procurement activities.

(2) Notify other DOD component criminal investigative organizations when investigations involving fraud or corruption affect that component. This includes evidence of fraud by a contractor, subcontractor, or employee of either, on current or past contracts with, or affecting, that component.

(3) Notify the Defense Investigative Service of any investigations that develop evidence that affects DOD cleared industrial facilities or personnel.

(4) Determine the effect on any ongoing investigations or prosecutions of any criminal, civil, contractual, or administrative actions being considered by a centralized organization and advise of any adverse impact.

(5) Promptly provide commanders, contracting officers, Procurement Fraud Advisers, and suspension and debarment authorities, when needed to allow consideration of applicable remedies, any court records, documents, or other evidence of fraud or corruption from ongoing or completed criminal investigations. In cases of indictment or conviction of a contractor or individual, the information will be provided in time for initiation, if appropriate, of suspension or debarment action within 30 days of the indictment or conviction.

(6) Provide prosecutive authorities and centralized organizations with timely information on the adverse impact on a DOD mission of fraud or corruption that relates to DOD procurement activities. This information will be obtained from individuals such as the head of the contracting agency, appropriate commanders, and staff agencies. Some examples of adverse impact on a DOD mission are endangerment of personnel or property, monetary loss, compromise of the procurement process, or reduction or loss of mission readiness.

(7) Discuss regularly with Procurement Fraud Advisers the status of significant investigations of fraud or corruption and their coordination with prosecutive authorities and provide documents and reports resulting from the investigations.

c. Commanders of service schools conducting procurement or procurement-related training (such as The Judge Advocate General's

School, the U.S. Military Police School, and the U.S. Army Logistics Management Center) will ensure that—

(1) All procurement and procurement-related training includes a period of instruction on fraud and corruption in the procurement process. The length of the period of instruction will be appropriate to the duration and nature of the training.

(2) Training materials are developed to support that training.

(3) Training materials developed will be sent to MACOM PFI Coordinators.

d. MACOM commanders and heads of contracting activities will ensure that—

(1) Substantial indications of fraud or corruption relating to Army contracts or Army administered contracts are reported promptly to the supporting USACIDC element and the Procurement Fraud Division.

(2) Information provided includes reports by contracting officers under DFARS 9.406–3.

8–4. Procurement fraud and irregularities programs at MACOMs

a. Command counsel and SJAs at MACOMs will develop a program and appoint an attorney as PFI Coordinator for their command. Chief counsel and SJAs at commands with procurement advisory responsibility will appoint an attorney as a Procurement Fraud Adviser (PFA) to manage the PFI program at their installations as well.

b. Provision may be made for activities not having sufficient attorney assets to obtain assistance from nearby installations that have a PFA.

c. Reports and recommendations will be transmitted through command channels to the PFI coordinator for the affected MACOM.

d. Command counsel, chief counsel, and SJAs will exercise supervisory authority to ensure effective operation of the fraud program and coordination of remedies within their organizations.

e. The MACOM PFI Coordinator will have overall responsibility for the design and implementation of the MACOM's procurement fraud program.

f. PFAs and PFI Coordinators will coordinate with the appropriate local CID or Defense Criminal Investigative Service (DCIS) activity to assure the prompt notification and coordination of all Procurement Fraud cases.

8–5. Reporting requirements

a. Typical fraud indicators during the procurement cycle are listed in figure 8–1. The mere presence of one or more of these indicators does not, by itself, require reporting under paragraph *b* below. Reports should be submitted if there is a reasonable suspicion of procurement fraud or irregularity or the procuring agency refers the matter for investigation.

b. "Procurement Flash Reports" will be transmitted by FAX directly to PFD whenever a PFI Coordinator or PFA receives notice of a PFI involving the Army. To facilitate filing, a separate sheet should be used for each case reported. These reports will provide a succinct summary of the following available information:

(1) Name and address of contractor.

(2) Known subsidiaries of parent firms.

(3) Contracts involved in potential fraud.

(4) Nature of potential fraud.

(5) Summary of pertinent facts.

(6) Possible damages.

(7) Investigative agencies involved.

(8) Local PFAs (name and phone numbers). Any of the above categories that cannot be completed will be annotated as "unknown at present."

c. When a report is required by DFARS, or is requested by PFD, the provisions of DFARS 9.406–3 will be followed. DFARS 9.406–3 provides the basic content and format for PFI reports.

d. All personnel will cooperate to ensure that investigations and prosecutions of procurement fraud are completed in a timely and thorough manner. Requests for assistance from Federal prosecutors should be processed through the local PFA whenever possible. Requests for Federal investigators will be processed through the supporting USACIDC and the PFA will be notified. When the conduct of criminal investigations and prosecutions conflict with the progress of procurements, reasonable deference will be given to criminal investigators and prosecutors whenever possible. Any serious conflict that cannot be resolved at a local level will be reported immediately to the PFI Coordinator or PFD for action.

e. PFI Coordinators and PFAs may request access to information obtained during criminal investigations that is not protected by Fed. R. Crim. P. 6(e) and use this information to assist them in taking appropriate administrative, contractual, and civil remedies. Requests for this information should be made directly to the appropriate Federal investigative agency. The investigative organization may withhold requested information if release would compromise an investigation. Difficulties in obtaining information that cannot be resolved locally will be referred to PFD for appropriate action.

f. USACIDC will notify, in writing, local PFAs as well as PFD within 30 days, of initiation of a significant investigation of fraud or corruption related to Army procurement activities. Such notification will include the following:

(1) Case title.

(2) USACIDC Report of Investigation number.

(3) Responsible investigative agency or agencies.

(4) Office of primary responsibility.

(5) Date opened.

(6) Summary of facts.

(7) Suspected offense.

g. The transmission of the information in*f* above may be delayed if the Commanding General, USACIDC, or the head of another DOD criminal investigation organization determines the transmission would compromise the success of any case or its prosecution. The prosecutive authorities dealing with the case will be consulted, when appropriate, in making such determinations.

h. USACIDC will obtain the following information at the earliest possible point in an investigation of fraud or corruption that relates to DOD procurement activities, whenever possible without reliance on grand jury subpoenas:

(1) The individuals suspected to be responsible.

(2) The suspected firm's organizational structure.

(3) The firm's financial and contract history.

(4) The firm's organizational documents and records.

(5) Statements of witnesses.

(6) Monetary loss to the Government.

(7) Other relevant information. This information will be provided to PFD or other cognizant DOD centralized organization.

i. PFD will provide written notification to the Defense Investigative Service of all suspension or debarment actions taken by the Army.

8–6. PFD and HQ, USACIDC coordination

PFD and HQ, USACIDC will coordinate as follows:

a. Discuss the status of significant procurement fraud or corruption investigations being conducted by USACIDC and possible remedies. These discussions should take place on a regular basis.

b. Discuss the coordination of possible criminal, civil, contractual, or administrative remedies with prosecutive authorities.

c. PFD will maintain liaison with other DOD centralized organizations and will coordinate remedies with those centralized organizations affected by a significant investigation of fraud or corruption that relates to DOD procurement activities.

d. Ascertain the effect on any ongoing investigation of the initiation of civil, contractual, or administrative remedies as follows:

(1) PFD will maintain liaison with USACIDC and other DOD criminal investigative organizations in order to determine the advisability of initiating any civil, contractual, or administrative actions.

(2) USACIDC will advise PFD of any adverse effect on an investigation or prosecution by the initiation of civil, contractual, or administrative actions.

8–7. Coordination with DOJ

a. PFD will establish and maintain liaison with DOJ and the Defense Procurement Fraud Unit on significant fraud and corruption cases to accomplish the following:

(1) Monitor criminal prosecutions.

(2) Initiate litigation for civil recovery.

(3) Coordinate administrative or contractual actions while criminal or civil proceedings are pending.

(4) Coordinate settlement agreements or proposed settlements of criminal, civil, and administrative actions.

(5) Respond to DOJ requests for information and assistance.

b. In cases where there is an ongoing criminal investigation, coordination with DOJ by any member of the Army normally will be accomplished by or through USACIDC or the cognizant DOD criminal investigative organization, or with the investigative organization's advance knowledge. This does not apply to the routine exchange of information between Government attorneys in the course of civil litigation or the routine referral of cases to DOJ for civil recovery.

c. Initial contact by any attorney associated with the U.S. Army with a U.S. Attorney's office or DOJ, whether initiated by the Army attorney or not, will be reported to PFD. Activity after the initial contact will be reported to PFD only when the Army attorney feels there has been a significant event in the case. If the Army attorney is not a PFI Coordinator or a PFA, the matter should be referred to one of these two attorneys as soon as possible. Routine exchanges between Army attorneys and U.S. Attorney's offices or DOJ do not need to be brought to the attention of PFD.

8–8. Comprehensive remedies plan

a. A specific, comprehensive remedies plan will be developed in each significant investigation involving fraud or corruption that relates to Army procurement activities. When possible, these plans should be forwarded with the DFARS 9.406–3 reports. In no case, however, should the report be delayed an appreciable time pending completion of the plan. The format for a remedies plan is at figure 8–2.

b. The plan will be developed initially by the PFA with the participation of the appropriate criminal investigators and other relevant personnel such as the contracting officer. In significant cases the PFA should also coordinate a remedies plan early with PFD. Defective product/product substitution remedies plans must comply with the requirements of appendix D of this regulation.

c. A comprehensive remedies plan will include at a minimum the following information and considerations:

(1) Summary of allegations and investigative results.

(2) Statement of any adverse impact on a DOD mission. DOD investigative organizations, commanders, or procurement officials will also provide this information to prosecutive authorities to enhance prosecution of offenses or to prepare a victim impact statement pursuant to Fed. R. Crim. P. 32(c)(2).

(3) The impact upon combat readiness and safety.

(4) Consideration of each criminal, civil, contractual, and administrative remedy available, and documentation of those remedies, either planned, in progress, or completed.

(5) Restrictions on the pursuit of any remedies such as grand jury information or possible compromise of the investigation.

d. When PFD receives remedies plans, PFD will coordinate them with the headquarters of the appropriate DOD criminal investigative organization involved.

e. Testing necessary to support the investigation and remedies plan should comply with figure 8–3.

8–9. Litigation reports in civil recovery cases

a. PFAs will evaluate all substantiated PFI cases to determine whether it is appropriate to recommend civil recovery proceedings.

b. Recovery should be considered under both statutory and common law theories, including but not limited to the following:

(1) False Claims Act, 31 USC 3729.

(2) Anti-Kickback Act, 41 USC 51.

(3) Sherman Act, 15 USC 1–7.

(4) Racketeer Influenced and Corrupt Organizations Act, 18 USC 1961–1968.

(5) Common law fraud.

(6) Unjust enrichment.

(7) Constructive trust.

(8) Cases where contracts have been procured in violation of the conflict of interest statute, 18 USC 218. (See *K&R Engineering Co. v. United States,* 616 F.2d 469 (Ct. Cl. 1980).)

c. When civil recovery appears possible, PFD should be consulted to determine if a litigation report is necessary. If requested by PFD, the report should summarize the available evidence and applicable theories of recovery and be prepared under paragraph 3–9 of this regulation. To avoid unnecessary duplication of effort, recovery reports may include and make liberal references to other reports previously prepared on a given case such as the DFARS 9.406–3 report.

d. The MACOM PFI coordinator and PFA will monitor all civil fraud recovery efforts throughout the command and will provide training and technical assistance as required. Status reports of all civil fraud recovery efforts will be provided through channels as required by PFD.

8–10. Administrative and contractual actions

a. The following remedial options should be considered in response to confirmed fraudulent activity:

(1) Contractual.

(a) Termination of contract for default.

(b) Nonaward of contract based upon a finding of contractor nonresponsibility. (If this appears to be a valid option, a DFARS 9.406-3 report must be prepared where contractor nonresponsibility is based on lack of integrity).

(c) Rescission of contract.

(d) Revocation of acceptance.

(e) Use of contract warranties.

(f) Withholding of payments to contractor. In the case of withholding pursuant to DFARS 32.173, the Chief, PFD, is the Army Remedy Coordinating Official.

(g) Offset of payments due to contractor from other contracts.

(h) Revocation of facility security clearances.

(i) Increased level of quality assurance.

(j) Refusal to accept nonconforming goods.

(k) Denial of claims submitted by contractors.

(l) Removal of contract from automated solicitation or payment system.

(2) Administrative.

(a) Change in contracting forms and procedures.

(b) Removal or reassignment of Government personnel.

(c) Review of contract administration and payment controls.

(d) Revocation of warrant of contracting officer.

(e) Suspension of contractor.

(f) Debarment of contractor.

b. In cases which are pending review or action by DOJ, PFAs should coordinate with the DOJ attorney handling the case prior to initiating any contractual or administrative remedy. In the case of ongoing criminal investigations, this coordination will be accomplished through the appropriate DOD criminal investigation organization.

8–11. Overseas cases of fraud or corruption

a. Commanders of overseas major commands will establish procedures, similar to this regulation and consistent with the DFARS, and regulations and directives of their respective unified commands, for reporting and coordination of available remedies in overseas procurement fraud and corruption cases involving foreign firms and individuals. Overseas major commands will also maintain liaison with PFD and provide periodic reports of remedies coordination results.

b. Overseas suspension and debarment actions are governed by DFARS 9.403. The names of all firms and individuals suspended or debarred will be forwarded expeditiously to PFD for inclusion on

the List of Parties Excluded From Federal Procurement or Nonprocurement Programs.

c. Overseas cases of fraud or corruption related to the procurement process that involve U.S. firms or U.S. citizens may be referred to PFD for coordination of remedies under this regulation.

8–12. Program Fraud Civil Remedies Act (PFCRA)

a. PFCRA was enacted on 21 October 1986 (Public Law 99–509) and implemented by DOD on 30 August 1988 (DOD Directive 5505.5). (See appendix E.)

b. PFCRA expands the capability of the Government to deter and recover losses from false, fictitious, or fraudulent claims and statements. It is also applicable to program fraud and provides an administrative remedy in addition to those otherwise available to the Army in procurement fraud or pay and entitlements fraud cases.

c. As part of the Army implementation, the Secretary of the Army's duties and responsibilities under PFCRA as Authority Head are delegated to the Army General Counsel. The Chief, Intellectual Property Law Division, is the Army's Reviewing Official within the meaning of PFCRA. Army implementation also requires DA to follow the policies and procedures prescribed in enclosure 2 of DOD Directive 5505.5. (See appendix E.)

d. The DOD Inspector General (IG) is the Investigating Official within DOD. The duties of this position will be performed by the Assistant IG For Investigations. This individual is vested with the authority to investigate all allegations of liability under PFCRA. That authority includes the power to task subordinate investigative agencies to review and report on allegations that are subject to PFCRA. If the Investigative Official concludes that an action under PFCRA is warranted in an Army case, the official will submit a report containing the findings and conclusions of such investigation through PFD to the Army Reviewing Official.

e. Pursuant to DOD IG guidance, USACIDC will forward appropriate cases that appear to qualify for resolution under PFCRA to the Investigating Official in a timely manner. Additionally, USACIDC will forward current information regarding the status of remedies pending or concluded. USACIDC may obtain remedies information by coordinating with PFD and the cognizant command.

f. In pay and entitlement or transportation operation fraud cases, USACIDC will coordinate with the Office of the Secretary of the Army, Financial Management, Review and Oversight Directorate (SAFM–RO), to determine the status of any pending or proposed action under the Debt Collection Act. This information, in addition to information obtained under paragraph 8–12*e* above, will be forwarded with appropriate cases to the Investigating Official.

g. In those cases where the Investigating Official has submitted a report to the Army Reviewing Official for action under PFCRA, PFD will, at the direction of the Reviewing Official, prepare all legal memoranda as necessary to transmit the Reviewing Official's intention to issue a complaint. As part of this responsibility, PFD will do the following: coordinate with the affected command or agency to ensure that all appropriate remedies have been considered; evaluate the overall potential benefits to the Army; and ensure that action under PFCRA is not duplicative of other remedies already taken. In order to fully supplement the Reviewing Official's file, PFD may request a litigation report.

h. PFD will coordinate all cases involving transportation operations emanating from Military Traffic Management Command (MTMC) activity, under the military transportation exception to the FAR, and all cases involving pay and entitlements fraud with SAFM-RO, for comments and recommendations. These matters will be forwarded with the case file to the Reviewing Official.

i. If the Attorney General approves the issuance of a complaint, PFD, at the direction of the Army Reviewing Official, shall prepare the complaint and all necessary memoranda as required. PFD shall also designate attorneys to represent the Authority in hearings under PFCRA.

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1. During the identification of the Government's need for goods or services.

a. Need determinations for items currently scheduled for disposal or reprocurement, or which have predetermined reorder levels.

b. Excessive purchase of "expendables" such as drugs or auto parts.

c. Inadequate or vague need assessment.

d. Frequent changes in the need assessment or determination.

e. Mandatory stock levels and inventory requirements appear excessive.

f. Items appear to be declared excess unnecessarily or sold as surplus, while same items are being reprocured.

g. It appears that an item or service is being purchased more as a result of aggressive marketing efforts rather than in response to a valid requirement.

h. Need determination appears to be tailored unnecessarily in ways that can only be met by certain contractors.

i. Items and services are continually obtained from the same source due to an unwarranted lack of effort to develop second sources.

2. During the development of the statements of work and specifications.

a. Statements of work and specifications appear to be written intentionally to fit the products or capabilities of a single contractor.

b. Statements of work, specifications, or sole source justifications developed by or in consultation with a preferred contractor.

c. Information concerning requirements and pending contracts is released only to preferred contractors.

Figure 8-1. Procurement Fraud Indicators

d. Allowing companies and industry personnel who participated in the preparation of bid packages to perform on subsequent contracts in either a prime or subcontractor capacity.

e. Release of information by firms or personnel participating in design or engineering to companies competing for prime contract.

f. Prequalification standards or specifications appear designed to exclude otherwise qualified contractors or their products.

g. Requirements appear split up to allow for rotating bids, giving each contractor his or her "fair share."

h. Requirements appear split up to meet small purchase requirements (that is, $25,000) or to avoid higher levels of approval that would be otherwise required.

i. Bid specifications or statement of work appear inconsistent with the items described in the general requirements.

j. Specifications appear so vague that reasonable comparisons of estimate would be difficult.

k. Specifications appear inconsistent with previous procurements of similar items of services.

3. During the presolicitation phase.

a. Sole source justifications appear unnecessary or poorly supported.

b. Statements justifying sole source or negotiated procurements appear inadequate or incredible.

c. Solicitation documents appear to contain unnecessary requirements which tend to restrict competition.

d. Contractors or their representatives appear to have received advance information related to the proposed procurement on a preferential basis

4. During the solicitation phase.

a. Procurement appears to be processed so as to exclude or impede certain contractors.

b. The time for submission of bids appears to be limited unnecessarily so that only those with advance information have adequate time to prepare bids or proposals.

c. It appears that information concerning the procurement has been revealed only to certain contractors, without being revealed to all prospective competitors.

d. Bidders conferences are conducted in a way that apparently invites bid rigging, price fixing, or other improper collusion between contractors.

e. There is an apparent intentional failure to publish notice of the solicitation fairly.

f. Solicitation appears vague as to the details such as time, place, and manner of submitting acceptable bids.

g. There is evidence of improper communications or social contact between contractors and Government personnel.

h. Controls over the number and destination of bid packages sent to interested bidders appear inadequate.

i. Indications that Government personnel or their families may own stock or have some other financial interest in either a contractor or subcontractor.

j. Indications that Government personnel are discussing possible employment for themselves or a family member with a contractor or subcontractor or indications that a proposal for future employment from a contractor or subcontractor to a Government employee or his or her family members has not been rejected firmly.

k. Indications that any contractor has received special assistance in preparation of his or her bid or proposal.

l. It appears that a contractor is given an expressed or implied reference to a specific subcontractor.

m. Failure to amend solicitation to reflect necessary changes or modifications.

5. During the submission of bids and proposals.

a. Improper acceptance of a late bid.

b. Documents, such as receipts, appear falsified to obtain acceptance of a late bid.

c. Improperly attempting to change a bid after other bidders prices are known.

d. Indications that mistakes have been planted deliberately in a bid to support correction after bid opening.

e. Withdrawal by a low bidder who may later become a subcontractor to a higher bidder who gets the contract.

f. Apparent collusion or bid rigging among the bidders.

g. Bidders apparently revealing their prices to each other.

h. Required contractor certifications appear falsified.

i. Information concerning contractor's qualifications, finances, and capabilities appears falsified.

6. During the evaluation of bids and propoosals.

a. Deliberately losing or discarding bids of certain contractors.

b. Improperly disqualifying the bids or proposals of certain contractors.

c. Accepting apparently nonresponsive bids from preferred contractors.

Figure 8-1. Procurement Fraud Indicators—Continued

d. Unusual or unnecessary contacts between government personnel and contractors during solicitation, evaluation, and negotiation.

e. Any apparently unauthorized release of procurement information to a contractor or to non-government personnel.

f. Any apparent favoritism in the evaluation of the bid or proposal of a particular contractor.

g. Apparent bias in the evaluation criteria or in the attitude or actions of the members of the evaluation panel.

7. During contract formation and administration. (For more details on these subjects see DA Pam 27–153, para 23–5.)

a. Defective pricing by the contractor usually associated with submitting false cost and pricing data under the Truth in Negotiation Act.

b. Cost/Labor mischarging.

c. Product substitution.

d. Progress payment fraud.

Figure 8-1. Procurement Fraud Indicators - Continued

(Date of Plan)

Section I (Administrative Data):

A. Subject of allegation.
B. Principal investigative agency.
C. Investigative agency file number.
D. Subject's location.
E. Location where offense took place.
F. Responsible action commander.
G. Responsible MACOM.
H. Contract administrative data (if applicable):
  1. Contract number.
  2. Type of contract.
  3. Dollar amount of contract.
  4. Period of contract.
I. Principal case agent (name and telephone number).
J. Civilian prosecutor (if applicable) (name, address, and telephone number).
K. Is Grand Jury investigating this matter? If so, where is Grand Jury located?
L. Audit agency involved (if applicable).
(Name and telephone number of principal auditor.)
M. Suspense date for update of this plan.

Section II (Summary of Allegations and Investigative Results to Date):

(Provide sufficient detail for reviewers of the plan to evaluate the appropriateness of the planned remedies. If information is "close-hold" or if grand jury secrecy applies, so state.)

Section III (Adverse Impact Statement):

(Describe any adverse impact on the DA/DOD mission. Adverse impact is described in DOD Directive 7050.5, paragraph E.1.g. Identify impact as actual or potential. Describe the impact in terms of monetary loss, endangerment to personnel or property, mission readiness, etc. This information should be considered in formulating your remedies as described below and provided to prosecutors for their use in prosecution of the offenses.)

Section IV (Remedies Taken and/or Being Pursued):

A. Criminal Sanctions. (As a minimum, address the following: Are criminal sanctions appropriate? If so, which ones? If not, why not? Has the local U.S. Attorney or other civilian prosecutor been notified and briefed? What actions have been taken or are intended? If and when action is complete, describe action and final results of the action. Other pertinent comments should be included.)

B. Civil Remedies. (As a minimum address the following: Which civil remedies are appropriate? Has the local U.S. Attorney or other civilian prosecutor been notified and briefed? How, when, where, and by whom are the appropriate civil remedies implemented? If and when action is completed, describe action and final results. Other pertinent comments should be included.)

C. Contractual/Administrative Remedies. (As a minimum, address the following: Are contractual and administrative remedies appropriate? If so, which ones? If not, Why? If contractual or administrative remedies are considered appropriate, describe how, when, and by whom the remedies are implemented. If and when action is completed, describe action and results of the action. Other pertinent comments should be included.)

D. Restrictions on Remedies Action. (Comment as to why obvious remedies are not being pursued. For example, the U.S. Attorney requests that the suspension action be held in abeyance pending criminal action.)

Section V (Miscellaneous Comments/Information):

Section VI (Remedies Plan Participants):

Figure 8-2. Guide for Preparing Remedies Plan

(Record the name, grade, organization, and telephone number of all Remedies Plan participants.)

Section VII (MACOM Coordination Comments):

(Record the name, grade, office symbol, and telephone number of all MACOM officials providing coordination comments; record the date when comments are submitted and append to the Remedies Plan the signed comments provided.)

MACOM Focal Point:

(Record the name, grade, office symbol, and telephone number of the MACOM focal point.)

Section VIII (Coordination/Comments):

(Record the name, grade, organization, office symbol, and telephone number of all officials with whom you have coordinated the Remedies Plan or who have provided comments on your plan; append any comments provided to the Remedies Plan.)

Figure 8-2. Guide for Preparing Remedies Plan - Continued

1. Under no circumstances is testing to proceed unless the command has committed sufficient funding to cover the entire cost of the projected testing.

2. No testing will be initiated unless there has been a written request for the testing to the appropriate Procurement Fraud Advisor from a criminal investigator or Assistant United States Attorney or Department of Justice Attorney (AUSA is used in these procedures to indicate either an AUSA or Department of Justice attorney). If they have not already done so, criminal investigators should be requested to coordinate their testing requests with the AUSA overseeing the investigation.

3. Barring extraordinary circumstances, only one test will be conducted to support the criminal and civil recovery efforts of a procurement fraud/irregularity matter. Early coordination with the Civil Division of the Department of Justice or the local United States Attorney's Office is necessary to ensure that testing funds are not wasted.

4. The request for testing should include a clear, concise statement of the purpose of the testing to include a statement of the allegations made and the contact number(s) involved. *Any test plan which requires destructive testing must be approved by the AUSA.*

5. No testing will be initiated unless a test plan has been developed which states the following:
   a. The contract number(s) involved.
   b. The National Stock Number (NSN) of the item to be tested.
   c. The purpose of the testing.
   d. The alleged defect or the contractual requirement violated.
   e. The CID report of investigation (ROI) number or the DCIS case number.
   f. Cost of the test (a cost proposal should be an attachment to the test plan).
   g. Where the test will be conducted.
   h. How the test will be conducted.
   i. The name and telephone number of the test team leader.
   j. The names of all test team members.
   k. The approximate dates of the testing.
   l. The date that completion of the test is required.
   m. A clear statement of the desired product (that is, test report, raw data, analysis of results, and evaluation of test results).
   n. The PRON to fund the testing.
   o. A retention plan.

6. The test plan shall be coordinated with the concurrence received in advance from the appropriate personnel in the Procurement Directorate, Product Assurance and Test Directorate, the Procurement Fraud Advisor, and

Figure 8-3. Guide for Testing Defective Items Under Criminal or Civil Investigation

the investigator/AUSA requesting the test. No testing will be initiated until the criminal investigator/AUSA who requested the testing has approved the test plan.

7. If the items tested are to be retained as evidence, the criminal investigator should arrange for retention of the evidence. While the Command will support evidence retention, this is primarily the responsibility of the criminal investigators. Agents should be advised that putting items in Code L or similar non-use status is insufficient to protect it from being released to the field. *A decision not to retain the tested items as evidence must have the approval of the AUSA.*

8. All items to be tested should be from a statistically valid random sample. The sample should conform with the inspection requirements of the contract or be in conformance with a random sample specifically developed for the instant test plan. It is recommended that a statistician be consulted to determine the feasibility of a random sample specifically created to support the test plan.

9. Results of testing should be available to Command and DA personnel for appropriate contractual and administrative remedies. Any request for testing results that indicates that dissemination of the testing results will be limited by Rule 6(e) of the Federal Rules of Criminal Procedure is to be forwarded through the MACOM or AMC Procurement Fraud Coordinator to PFD prior to the initiation of any testing.

10. Resolution of problems associated with testing requests should be conducted at the local level. In AMC, the authority to refuse a testing request resides with the Office of Command Counsel. Any disputes that cannot be resolved at the local level will be forwarded to the AMC or MACOM Procurement Fraud Coordinator for resolution. This includes disputes regarding funding or, at any time, sensitive issues.

11. Second requests for testing of the same item due to a change in the investigative plan require coordination by the PFA with the investigator *and* AUSA overseeing the investigation to determine the deficiencies in the earlier test. Disputes that cannot be resolved between the AUSA, PFA, and the investigator regarding testing will be forwarded simultaneously to the MACOM Procurement Fraud Coordinator and PFD for resolution. The procedures established in paragraphs 5 and 6 apply for second requests for testing with the additional requirement that the Assistant United States Attorney must be requested to approve the test plan.

Figure 8-3. Guide for Testing Defective Items Under Criminal or Civil Investigation - Continued

Chapter 9
Cooperation with the Office of Special Counsel

9–1. Introduction

This chapter prescribes procedures for cooperation with the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB), when OSC is investigating alleged prohibited personnel practices or other allegations of improper or illegal conduct within DA activities.

9–2. Policy

a. DA policy follows:

(1) Civilian personnel actions taken by management officials, civilian and military, will conform to laws and regulations implementing established merit system principles and will be free of any prohibited personnel practices.

(2) Management officials will take vigorous corrective action when prohibited personnel practices occur. Disciplinary measures under AR 690–700, chapter 751, may be initiated after consultation and coordination with appropriate civilian personnel office and labor counselor.

b. DA activities will cooperate with OSC by—

(1) Promoting merit system principles in civilian employment programs within DA.

(2) Investigating and reporting allegations of improper or illegal conduct forwarded to the activity by HQDA.

(3) Facilitating orderly investigations by the OSC of alleged prohibited personnel practices and other matters assigned for investigation to the OSC, such as violations of the Whistleblower Protection Act of 1989, the Freedom of Information Act, or the Hatch Act.

9–3. Duties

a. DA General Counsel. The DA General Counsel is responsible for the following:

(1) Provide overall guidance on all issues concerning cooperation with OSC, including the investigation of alleged prohibited personnel practices and allegations of improper or illegal conduct.

(2) Review for adequacy and legal sufficiency each OSC report of investigation that must be reviewed personally by the Secretary of the Army.

(3) Ensure compliance with the Civil Service Reform Act of 1978 by obtaining a suitable investigation of allegations of improper or illegal conduct received from OSC. This includes compliance with time limits for reporting results of the investigation and personal review of the report by the Secretary of the Army when required.

(4) Forward to the DOD Inspector General (DODIG) copies of each allegation of improper or illegal conduct referred to DA by OSC.

(5) Delegate to The Judge Advocate General the authority to act on behalf of the DA General Counsel in all OSC investigations of prohibited personnel practices.

(6) Act upon requests for counsel from "accused" or "suspected" employees.

b. Chief, Labor and Employment Law Office. The Chief, Labor and Employment Law Office, OTJAG (DAJA–LE) is responsible for—

(1) Act for TJAG as the Senior Management Official in cooperating with OSC. As Senior Management Official, the Chief, DAJA–LE, through TJAG, will be responsible to the DA General Counsel for administration of the policies and procedures contained in this chapter.

(2) Promptly inform the DA General Counsel of any OSC investigation and consult with the DA General Counsel on any legal or policy issue arising from an OSC investigation.

(3) Serve as the HQDA point of contact in providing assistance to OSC.

(4) Act as DA attorney-of-record in administrative matters initiated by OSC before the MSPB which arise from an OSC investigation. As DA attorney-of-record, the Chief, DAJA–LE, will file necessary pleadings and make necessary appearances before the MSPB to represent DA interests.

(5) Monitor ongoing OSC investigations within DA.

(6) Ensure that appropriate DA personnel are apprised fully of their rights, duties, and the nature and basis for an OSC investigation.

(7) Review and prepare recommendations to the DA General Counsel concerning any OSC recommended corrective action referred to DA. Such review and recommendations will address whether disciplinary action should be taken against DA civilian employees or soldiers, and whether the information warrants referral to appropriate authorities for corrective and or disciplinary action.

(8) Seek OSC approval of DA proposed disciplinary action against an employee for an alleged prohibited personnel practice or other misconduct that is the subject of or related to any OSC investigation.

(9) Review and prepare recommendations for the DA General Counsel concerning requests for counsel, to include identifying available DA attorneys to act as individual representatives. Upon approval of the DA General Counsel, appoint DA civilian and military attorneys, to include attorneys from the U.S. Army Materiel Command and the U.S. Army Corps of Engineers, to represent individual soldiers or employees.

(10) Determine, to the extent practicable, whether an investigation is being or has been conducted that duplicates, in whole or in part, a proposed or incomplete OSC investigation, and convey that information to the OSC whenever it might avoid redundant investigative efforts.

(11) Provide guidance and assistance to activity Labor Counselors in fulfilling their duties as Liaison Officers.

c. Activity Labor Counselor. The activity Labor Counselor will—

(1) Act as Liaison Officer for OSC investigations arising within the command, activity, or installation serviced by the Labor Counselor's client Employment Office.

(2) Promptly inform the MACOM labor counselor and the Chief, DAJA–LE, of any OSC inquiry or investigation.

(3) Act as the legal representative of the command, activity, or installation.

(4) Assist the OSC investigator with administrative matters related to the investigation, such as requests for witnesses and documents.

(5) Process all OSC requests for documents.

(6) Make appropriate arrangements for OSC requests to interview civilian employees and soldiers.

(7) Ensure that personnel involved are advised of the nature and basis for an OSC investigation, the authority of the OSC, and their rights and duties.

(8) Consult with the Chief, DAJA–LE, on policy and legal issues arising from the OSC investigation.

(9) Keep the Chief, DAJA–LE, informed of the status of the OSC investigation.

(10) Act as agency representative before the MSPB in actions initiated by employees (individual right of action appeals).

9–4. Procedures

a. Witnesses and counsel for consultation.

(1) DA military and civilian managers, supervisors, and employees who are requested by OSC for an interview will be made available per arrangements the Labor Counselor will establish. Requests for the testimony of IGs will be coordinated with the Inspector General Legal Office, SAIG–ZXL.

(2) The Labor Counselor will ensure that witnesses are aware of their obligation to answer OSC questions, their potential to be considered "suspects" in OSC investigations, and their right to the assistance of counsel during interviews with OSC representatives. If the requested witness is not an "accused"or "suspected" individual and the witness asks for assistance of counsel, a DA attorney will be made available for the limited purpose of consultation regarding the witness' rights and obligations. An attorney-client relationship will not be established. (See glossary, Counsel for Consultation.)

(3) The Labor Counselor will arrange for individual counsel for consultation from local assets. If local assets are not sufficient, assistance may be requested from other DOD activities in the area or from DAJA–LE. DA attorneys tasked to consult with one or more witnesses individually will not be tasked to represent the DA activity concerned.

(4) The Labor Counselor, as the legal representative of the activity, is precluded from assisting or representing individual witnesses during OSC interviews.

b. "Accused" or "suspected" DA personnel and counsel for representation.

(1) If the OSC identifies a DA civilian employee or a soldier as an "accused" or "suspected" individual, or if the Labor Counselor concludes that an individual is a "suspect," the Labor Counselor will inform the individual. The Labor Counselor also will advise the individual of the availability of counsel for representation upon approval by DA General Counsel. (See glossary, Counsel for Representation.)

(2) If the "suspected" individual desires legal representation by DA, the individual must request counsel by submitting a written request through DAJA–LE to DA General Counsel.(See fig 9–1.)

(3) During the investigation but prior to DA General Counsel approval of the request for counsel, an "accused" or "suspected" individual will be provided the assistance of counsel for consultation in the same manner as any other OSC requested witness. "Accused" or "suspected" individuals who do not request counsel for representation will be provided counsel for consultation in the same manner as any other OSC requested witness.

(4) If the DA General Counsel approves the request for counsel, the Chief, DAJA–LE, will appoint a DA attorney to represent the individual. This appointment may be made telephonically, but will be confirmed in writing. The Chief, DAJA–LE, will make appropriate coordination with MACOM SJAs and command counsel to confirm availability of the attorney.

(5) An attorney appointed by DA may represent a civilian employee in any proceeding initiated by OSC before the MSPB. However, counsel provided by DA may not represent the employee in any proceeding initiated by DA, in any appeal from a final decision by the MSPB, or in any collateral proceeding before any forum other than the MSPB.

(6) OSC may not bring a disciplinary action before the MSPB against a soldier. Accordingly, DA counsel will not be required to represent the soldier in any MSPB disciplinary proceeding. However, counsel may represent the soldier during the OSC investigation with the understanding that the evidence obtained by OSC may be referred to the soldier's command for possible disciplinary action under the UCMJ or appropriate regulations. If DA initiates action against the soldier for misconduct disclosed in the OSC investigation, the soldier will obtain counsel as provided under the UCMJ or relevant regulations.

c. Records.

(1) OSC requests for records must be in writing. The Labor Counselor will assist OSC representatives in identifying the custodian of specific records sought during the inquiry.

(2) Generally, requested records should be furnished to OSC representatives if such records would be released under AR 25–55 or AR 340–21 to other Government agencies in the normal course of official business. Records constituting attorney work product should not be released without approval of the Chief, DAJA–LE. IG records will not be released without the approval of The Inspector General. (AR 20–1.) The Labor Counselor should seek guidance from the Chief, DAJA–LE, if there is any doubt concerning the release of records.

(3) If, after completion of the OSC investigation, the OSC files a complaint against DA or a DA employee, release of records and

other information will be accomplished pursuant to MSPB rules of discovery (5 CFR 1201, subpart B).

d. Funding. The command, activity, or installation within which the allegations of misconduct arose will provide funding for travel, per diem, and other necessary expenses related to the OSC investigation. These expenses may include appropriate funding for witnesses, counsel for consultation, and DA General Counsel approved counsel for representation.

9–5. Assistance from HQDA

Labor Counselors may seek guidance on questions arising from implementation of this chapter by contacting the Chief, DAJA–LE.

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1. Overview

a. DA employees or soldiers asked to provide information (testimonial or documentary) to OSC may obtain legal advice through the Labor Counselor from DA attorneys concerning their rights and obligations. This includes assistance at any interviews with OSC investigators. However, an attorney-client relationship will not be established unless the employee or soldier—

(1) Is suspected or accused by OSC of committing a prohibited personnel practice or other illegal or improper act.

(2) Has been assigned counsel by the DA General Counsel.

b. Any soldier or employee who reasonably believes that he or she is suspected or has been accused by OSC of committing a prohibited personnel practice or other illegal or improper act may obtain legal representation from DA. The counsel assigned will be from another DOD component whenever a DA attorney is likely to face a conflict between the attorney's ethical obligation to the client and DA, or when the suspected or accused individual has requested representation from another DOD component. Outside legal counsel may be retained by DA on behalf of the soldier or employee under unusual circumstances and only with the personal approval of the DOD General Counsel.

c. The DA General Counsel will determine whether a conflict is likely to occur if a DA attorney is assigned to represent a soldier or civilian. If the DA General Counsel determines a conflict may occur, or if the suspected or accused employee has requested representation from another DOD component, the DA General Counsel will seek the assistance of another General Counsel in obtaining representation outside DA.

2. Requests for representation

a. To obtain legal representation, soldiers or civilian employees must—

(1) Submit a written request for legal representation through the Labor and Employment Law Office, Office of The Judge Advocate General, Department of the Army, to DA General Counsel, explaining the circumstances that justify legal representation. Copies of all process and pleadings served should accompany the request.

(2) Indicate whether private counsel, at personal expense, has been retained.

(3) Obtain written certification from their supervisor that—

(*a*) They were acting within the scope of official duties.

(*b*) DA has not initiated any adverse or disciplinary action against them for the conduct being investigated by the OSC.

b. Requests for DA legal representation must be approved by the DA General Counsel.

c. The conditions of legal representation must be explained and accepted in writing by the soldier or employee.

3. Limitations on representation

a. DA will not provide legal representation with respect to a DA initiated disciplinary action against a civilian employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct. This prohibition applies regardless of whether the participation or conduct is also the basis for the disciplinary action proposed by the OSC.

b. In certain situations, counsel provided by DA may be limited to representing the individual only with respect to some of the pending matters, if other specific matters of concern to OSC or MSPB do not satisfy the requirements contained in this regulation.

4. Attorney-client relationship

Figure 9-1. Guide for seeking legal advice and representation before Office of Special Counsel

a. An attorney-client relationship will be established and continued between the suspected or accused individual and assigned DA counsel.

b. In representing a DA employee or soldier, the DA attorney designated as counsel will act as a vigorous advocate of the individual's legal interests before OSC or MSPB. The attorney's professional responsibility to DA will be satisfied by fulfilling this responsibility to the employee or soldier. Legal representation may be terminated only with the approval of the DA General Counsel and normally only on the basis of information not available at the time the attorney was assigned.

c. The attorney-client relationship may be terminated if the assigned DA counsel determines, with the approval of the DA General Counsel, that—

(1) The soldier or civilian employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge.

(2) Termination is not in violation of the rules of professional conduct applicable to the assigned counsel.

d. The DA attorney designated as counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise confidential communications between the client and the attorney.

5. Funding

This regulation authorizes cognizant DA officials to approve requests from military members or civilian employees for travel, per diem, witness appearances, or other departmental support necessary to ensure effective legal representation by the designated counsel.

6. Status

A soldier's or civilian employee's participation in OSC investigations, MSPB hearings, and other related proceedings will be considered official departmental business for time and attendance requirements and similar purposes.

7. Advice to witnesses

The following advice to soldiers and civilian employees questioned during the course of an OSC investigation may be appropriate in response to these frequent inquiries:

a. A witness may decline to provide a "yes" or "no" answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's question.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verifications of an interview by OSC investigators are appropriate, whether or not the soldier or civilian employee is accompanied by counsel. Tape recorders may only be used for this purpose when—

(1) The recorder is used in full view.

(2) All attendees are informed.

(3) The OSC investigator agrees to record the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the investigator should be corrected before the soldier or employee signs the statement. The soldier or civilian employee is not required to sign any written summary that is not completely accurate. A soldier or civilian employee may receive a copy of the summary as a condition of signing.

Figure 9-1. Guide for seeking legal advice and representation before Office of Special Counsel - Continued

Chapter 10
Soldiers Summoned to Serve on State and Local Juries

10–1. General

a. This chapter implements 10 USC 982 and DOD Directive 5525.8. It establishes Army policy concerning soldiers on active duty who are summoned to serve on State and local juries.

b. This chapter does not apply to Army National Guard soldiers in an annual training or full-time AGR (Active Guard Reserve) status under title 32, United States Code. Soldiers in a title 32 status must refer to their respective State law for relief from State or local jury duty.

10–2. Policy

a. Active duty soldiers should fulfill their civic responsibility by serving on State and local juries, so long as it does not interfere with military duties.

b. The following active duty soldiers are exempt from complying with summons to serve on State and local juries:

(1) General officers.

(2) Commanders.

(3) Active duty soldiers stationed outside the United States, Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, and the Virgin Islands.

(4) Active duty soldiers in a training status.

(5) Active duty soldiers assigned to forces engaged in operations.

c. Other active duty soldiers may be exempted from serving on local juries if compliance with such summons would have either of the following effects:

(1) It would interfere unreasonably with performance of the soldier's military duties.

(2) It would affect adversely the readiness of a summoned soldier's unit, command, or activity.

10–3. Exemption determination authority

a. The commander exercising special court-martial convening authority (SPCMCA) over a unit has the authority to determine whether a soldier of that unit, who has been served with a summons, is exempt from serving on a State or local jury unless that authority has been limited or withheld per subparagraph *b* or *c* below. This

authority may not be delegated to a subordinate commander who does not exercise SPCMCA.

b. A commander superior to the SPCMCA, who also exercises SPCMCA or general court-martial convening authority (GCMCA) over a unit, may limit or withhold the exemption determination authority of subordinate commanders.

c. A GCMCA, who orders a unit or soldier assigned to one command to be attached or detailed to another command for disciplinary purposes (for example, "for administration" or "for administration of military justice "), may reserve exemption determination authority to the commander exercising SPCMCA in the chain-of-command to which the unit or soldier is assigned rather than the chain-of-command to which the unit or soldier is attached or detailed.

10–4. Procedures for exemption

a. Active duty soldiers served with a summons to serve on a State or local jury will advise their commander promptly and provide copies of pertinent documents.

b. Unit commanders will evaluate the summons considering both the individual soldier's duties and the unit mission. Coordination with the servicing judge advocate or legal adviser and with the appropriate State or local official may be necessary to determine any impact on the soldier's duties or on unit readiness.

(1) If the soldier is not exempt under paragraph 10–2*b* or *c* above, the commander will process the soldier for permissive temporary duty (TDY) per AR 630–5.

(2) If the soldier is exempt under paragraph 10–2*b* or *c* above, the commander will forward the summons and any related documentation, with recommendations, through the chain-of-command to the commander with exemption determination authority over the soldier concerned.

c. The commander with exemption determination authority over the soldier concerned will determine whether the soldier is exempt. His or her determination is final.

d. The exemption determination authority will notify responsible State or local officials whenever a soldier summoned for jury duty is exempt. The notification will cite 10 USC 982 as authority.

10–5. Status, fees, and expenses

a. Soldiers who are required to comply with summons to serve on State or local juries will be placed on permissive TDY under the provisions of AR 630–5.

b. Jury fees accruing to soldiers for complying with the summons to serve on State and local juries must be turned over to the appropriate finance office for deposit into the U.S. Treasury. Commands will establish procedures with local authorities and their servicing finance and accounting activity to ensure that such jury fees are so deposited. Soldiers, however, may keep any reimbursement from State or local authority for expenses incurred in the performance of jury duty, including transportation, meals, and parking.

Appendix A
References

Section I
Required Publications

AR 25–55
The Department of the Army Freedom of Information Act Program. (Cited in paras 7–1 and 9–4.)

AR 27–20
Claims. (Cited in paras 1–4, 5–1, and 3–8.)

AR 37–60
Pricing for Materiel and Services. (Cited in para 7–4.)

AR 37–103
Disbursing Operations for Finance and Accounting Offices. (Cited in para 3–8.)

AR 60–20
Army and Air Force Exchange Service Operating Policies. (Cited in para 3–8.)

AR 215–1
Administration of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in para 3–8.)

AR 215–2
The Management and Operation of Army Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities. (Cited in para 3–8.)

AR 340–21
The Army Privacy Program. (Cited in paras 7–1 and 9–4.)

AR 405–25
Annexation. (Cited in para 3–8.)

AR 630–5
Leaves and Passes. (Cited in paras 7–16, 10–4, and 10–5.)

Section II
Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand this publication.

AR 20–1
Inspector General Activities and Procedures.

AR 25–30
The Army Integrated Publishing and Printing Program.

AR 27–1
Judge Advocate Legal Service.

AR 27–3
The Army Legal Assistance Program.

AR 27–10
Military Justice.

AR 27–50
Status of Forces Policies, Procedures, and Information.

AR 27–60
Intellectual Property.

AR 210–47
State and Local Taxation of Leesee's Interest in Wherry Act Housing (Title VIII of the National Housing Act).

AR 37–104–3
Military Pay and Allowances Procedures, Joint Uniform Military Pay System-Army (JUMPS-Army).

AR 37–105
Finance and Accounting for Installations: Civilian Pay Procedures.

AR 55–19
Marine Casualties.

AR 190–29
Misdemeanors and Uniform Violation Notices Referred to U.S. Magistrates or District Courts.

AR 190–40
Serious Incident Report.

AR 210–50
Housing Management.

AR 335–15
Management Information Control System.

AR 600–40
Apprehension, Restraint, and Release to Civil Authorities.

AR 600–50
Standards of Conduct for Department of the Army Personnel.

AR 690–700
Personnel Relations and Services (General).

Section III
Prescribed Forms

DA Form 4
Department of the Army Certification for Authentication of Records. (Prescribed in paras 3–11 and 5–3.)

Section IV
Referenced Forms

DA Form 2631–R
Medical Care-Third Party Liability Notification.

DA Form 3154
MSA Invoice and Receipt.

Appendix B
Mailing Addresses

The following is a list of frequently referred to Department of the Army Services/Divisions/Offices and their mailing addresses:

COMMANDER (JACS–Z)
U.S. ARMY CLAIMS SERVICE, OTJAG
BUILDING 4411, ROOM 206
LLEWELLYN AVENUE
FORT GEORGE G. MEADE, MD 20755–5360

PERSONNEL CLAIMS AND RECOVERY DIVISION (JACS–PC)
U.S. ARMY CLAIMS SERVICE, OTJAG
BUILDING 4411, ROOM 206
LLEWELLYN AVENUE
FORT GEORGE G. MEADE, MD 20755–5360

TORT CLAIMS DIVISION (JACS–TC)
U.S. ARMY CLAIMS SERVICE, OTJAG

BUILDING 4411, ROOM 206
LLEWELLYN AVENUE
FORT GEORGE G. MEADE, MD 20755–5360

CONTRACT APPEALS DIVISION
HQDA(DAJA–CA)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

CONTRACT LAW DIVISION
THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310–2200

CRIMINAL LAW DIVISION
THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310–2200

ENVIRONMENTAL LAW DIVISION
HQDA(DAJA–EL)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

LABOR AND EMPLOYMENT LAW DIVISION
THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310–2200

LITIGATION DIVISION
HQDA(DAJA–LT)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

CIVILIAN PERSONNEL BRANCH
HQDA(DAJA–LTC)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

GENERAL LITIGATION BRANCH
HQDA(DAJA–LTG)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

MILITARY PERSONNEL BRANCH
HQDA(DAJA–LTM)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

TORT BRANCH
HQDA(DAJA–LTT)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

PERSONNEL, PLANS, AND TRAINING OFFICE
THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310–2200

PROCUREMENT FRAUD DIVISION
HQDA(DAJA–PF)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

INTELLECTUAL PROPERTY DIVISION
HQDA(JALS–IP)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

REGULATORY LAW OFFICE
HQDA(JALS–RL)
901 NORTH STUART STREET
ARLINGTON, VA 22203–1837

THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310–2200

THE AJAG FOR CIVIL LAW & LITIGATION
THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310–2200

U.S. ARMY TRIAL DEFENSE SERVICE
HQDA(JALS–TD)
NASSIF BUILDING
FALLS CHURCH, VA 22041–5013

Appendix C
Department of Defense Directive 5405.2

Department of Defense Directive

July 23, 1985
NUMBER 5405.2
GC, DOD

SUBJECT:
Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses

References:
(a) Title 5, United States Code, Sections 301, 552, and 552a
(b) Title 10, United States Code, Section 133
(c) DoD Directive 5220.6, "Industrial Personnel Security Clearance Program," December 20, 1976
(d) DoD 5200.1–R, "Information Security Program Regulation," August 1982, authorized by DoD Directive 5200.1, June 7, 1982
(e) DoD Directive 5230.25, "Withholding of Unclassified Technical Data from Public Disclosure," November 6, 1984
(f) DoD Instruction 7230.7, "User Charges," January 29, 1985
(g) DoD 5400.7–R, "DoD Freedom of Information Act Program," December 1980, authorized by DoD Directive 5400.7, March 24, 1980

A. Purpose
Under Section 301 reference (a) and reference (b), this, Directive establishes policy, assigns responsibilities, and prescribes procedures for the release of official DoD information in litigation and for testimony by DoD personnel as witnesses during litigation.

B. Applicability and Scope
1. This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as "DoD Components"), and to all personnel of such DoD Components.

2. This Directive does not apply to the release of official information or testimony by DoD personnel in the following situations:

(a) Before courts-martial convened by the authority of the Military Departments or in administrative proceedings conducted by or on behalf of a DoD Component;

(b) Pursuant to administrative proceedings conducted by or on behalf of the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), or pursuant to a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(c) In response to requests by Federal Government counsel in litigation conducted on behalf of the United States;

(d) As part of the assistance required in accordance with the Defense Industrial Personnel Security Clearance Program under DoD Directive 5220.6 (reference (c)); or

(e) Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

3. This Directive does not supersede or modify existing laws or DoD programs governing the testimony of DoD personnel or the release of official DoD information during grand jury proceedings, the release of official information not involved in litigation, or the release of official information pursuant to the Freedom of Information Act, 5 U.S.C. Section 552 (reference (a)) or the Privacy Act, 5 U.S.C. Section 552a (reference (a)), nor does this Directive preclude treating any written request for agency records that is not in the nature of legal process as a request under the Freedom of Information or Privacy Acts.

4. This Directive is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases.

5. This Directive does not preclude official comment on matters in litigation in appropriate cases.

6. This Directive is intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law against the United States or the Department of Defense.

C. Definitions

1. Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official DoD information or for the appearance and testimony of DoD personnel as witnesses.

2. DoD Personnel. Present and former U.S. military personnel; Service Academy cadets and midshipmen; and present and former civilian employees of any Component of the Department of Defense, including nonappropriated fund activity employees; non-U.S. nationals who perform services overseas, under the provisions of status of forces agreements, for the United States Armed Forces; and other specific individuals hired through contractual agreements by or on behalf of the Department of Defense.

3. Litigation. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

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

D. Policy

It is DoD policy that official information should generally be made reasonably available for use in federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

E. Responsibilities

1. The *General Counsel, Department of Defense* (GC, DoD), shall provide general policy and procedural guidance by the issuance of supplemental instructions or specific orders concerning the release of official DoD information in litigation and the testimony of DoD personnel as witnesses during litigation.

2. The *Heads of DoD Components* shall issue appropriate regulations to implement this Directive and to identify official information that is involved in litigation.

F. Procedures

1. Authority to Act

(a) In response to a litigation request or demand for official DoD information or the testimony of DoD personnel as witnesses, the General Counsels of DoD, Navy, and the Defense Agencies; the Judge Advocates General of the Military Departments; and the Chief Legal Advisors to the JCS and the Unified and Specified Commands, with regard to their respective Components, are authorized—after consulting and coordinating with the appropriate Department of Justice litigation attorneys, as required—to determine whether official information originated by the Component may be released in litigation; whether DoD personnel assigned to or affiliated with the Component may be interviewed, contacted, or used as witnesses concerning official DoD information or as expert witnesses; and what, if any, conditions will be imposed upon such release, interview, contact, or testimony. Delegation of this authority, to include the authority to invoke appropriate claims of privilege before any tribunal, is permitted.

(b) In the event that a DoD Component receives a litigation request or demand for official information originated by another Component, the receiving Component shall forward the appropriate portions of the request or demand to the originating Component for action in accordance with this Directive. The receiving Component shall also notify the requestor, court, or other authority of its transfer of the request or demand.

(c) Notwithstanding the provisions of paragraphs F.1.a. and b.,the GC, DoD, in litigation involving terrorism, espionage, nuclear weapons, intelligence means or sources, or otherwise as deemed necessary, may notify Components that GC, DoD, will assume primary responsibility for coordinating all litigation requests and demands for official DoD information or the testimony of DoD personnel, or both; consulting with the Department of Justice, as required; and taking final action on such requests and demands.

2. Factors to Consider. In deciding whether to authorize the release of official DoD information or the testimony of DoD personnel concerning official information (hereinafter referred to as "the disclosure") pursuant to paragraph F.1., DoD officials should consider the following types of factors:

(a) Whether the request or demand is unduly burdensome or otherwise inappropriate under the applicable court rules;

(b) Whether the disclosure, including release *in camera*, is appropriate under the rules of procedure governing the case or matter in which the request or demand arose;

(c) Whether the disclosure would violate a statute, executive order, regulation, or directive;

(d) Whether the disclosure, including release *in camera*, is appropriate or necessary under the relevant substantive law concerning privilege;

(e) Whether the disclosure,except when *in camera* and necessary to assert a claim of privilege, would reveal information properly classified pursuant to the DoD Information Security Program under DoD 5200.1–R (reference (d)), unclassified technical data withheld from public release pursuant to DoD Directive 5230.25 (reference (e)), or other matters exempt from unrestricted disclosure; and,

(f) Whether disclosure would interfere with ongoing enforcement

proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

3. Decisions on Litigation Requests and Demands

(a) Subject to paragraph F.3.e., DoD personnel shall not, in response to a litigation request or demand, produce, disclose, release, comment upon, or testify concerning any official DoD information without the prior written approval of the appropriate DoD official designated in paragraph F.1. Oral approval may be granted, but a record of such approval shall be made and retained in accordance with the applicable implementing regulations.

(b) If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph F.3.e., DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph F.1. See United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951).

(c) Whenever a litigation request or demand is made upon DoD personnel for official DoD information or for testimony concerning such information, the personnel upon whom the request or demand was made shall immediately notify the DoD official designated in paragraph F.1. for the Component to which the individual contacted is or, for former personnel, was last assigned. In appropriate cases, the responsible DoD official shall thereupon notify the Department of Justice of the request or demands. After due consultation and coordination with the Department of Justice, as required, the DoD official shall determine whether the individual is required to comply with the request or demand and shall notify the requestor or the court or other authority of the determination reached.

(d) If, after DoD personnel have received a litigation request or demand and have in turn notified the appropriate DoD official in accordance with paragraph F.3.c., a response to the request or demand is required before instructions from the responsible official are received, the responsible official designated in paragraph F.1. shall furnish the requestor or the court or other authority with a copy of this Directive and applicable implementing Regulations, inform the requestor or the court or other authority that the request or demand is being reviewed, and seek a stay of the request or demand pending a final determination by the Component concerned.

(e) If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken pursuant to paragraph F.3.d., or if such court or other authority orders that the request or demand must be complied with notwithstanding the final decision of the appropriate DoD official, the DoD personnel upon whom the request or demand was made shall notify the responsible DoD official of such ruling or order. If the DoD official determines that no further legal review of or challenge to the court's ruling or order will be sought, the affected DoD personnel shall comply with the request, demand, or order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951).

4. Fees. Consistent with the guidelines in DoD Instruction 7230.7 (reference (f)), the appropriate officials designated in paragraph F.1. are authorized to charge reasonable fees, as established by regulation and to the extent not prohibited by law, to parties seeking, by request or demand, official DoD information not otherwise available under the DoD Freedom of Information Act Program (reference (g)). Such fees, in amounts calculated to reimburse the Government for the expense of providing such information, may include the costs of time expended by DoD employees to process and respond to the request or demand; attorney time for reviewing the request or demand and any information located in response thereto and for related legal work in connection with the request or demand; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

5. Expert or Opinion Testimony. DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in paragraph F.1. may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States. If, despite the final determination of the responsible DoD official, a court of competent jurisdiction, or other appropriate authority, orders the appearance and expert or opinion testimony of DoD personnel, the personnel shall notify the responsible DoD official of such order. If the DoD official determines that no further legal review of or challenge to the court's order will be sought, the affected DoD personnel shall comply with the order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. See United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951).

G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the General Counsel, DoD, within 120 days.

Signed by WILLIAM H. TAFT, IV
Deputy Secretary of Defense

Appendix D
Department of Defense Directive 7050.5

Department of Defense Directive

June 7, 1989
NUMBER 7050.5
IG, DOD

SUBJECT:
Coordination of Remedies for Fraud and Corruption Related to Procurement Activities

References:

(a) DoD Directive 7050.5, subject as above, June 28, 1985 (hereby canceled)

(b) Public Law 97–291, "The Victim and Witness Protection Act of 1982," October 12, 1982

(c) Defense FAR Supplement (DFARS), Subpart 4.6, "Contract Reporting"

(d) DoD Instruction 4105.61, "DoD Procurement Coding Manual," May 4, 1973

(e) DoD 4105.61–M, "Procurement Coding Manual" (Volume I), October 1988, authorized by DoD Instruction 4105.61 May 4, 1973

A. Reissuance and Purpose

This Directive reissues reference (a) to update policies, procedures, and responsibilities for the coordination of criminal, civil, administrative, and contractual remedies stemming from investigation of fraud or corruption related to procurement activities. More effective and timely communication of information developed during such

investigations will enable the Department of Defense to take the most appropriate of the available measures.

B. Applicability

This Directive applies to the Office of the Secretary of Defense (OSD); the Inspector General, Department of Defense (IG, DoD); the Military Departments; the Defense Agencies; and the DoD Field Activities (hereafter referred to collectively as "DoD Components").

C. Definitions

1. DoD Criminal Investigative Organizations. Refers to the U.S. Army Criminal Investigation Command; the Naval Investigative Service Command; the U.S. Air Force Office of Special Investigations; and the Defense Criminal Investigative Service, Office of the IG, DoD (OIG, DoD).

2. Significant. Refers to all fraud cases involving an alleged loss of $100,000, or more; all corruption cases related to procurement that involved bribery, gratuities, or conflicts of interest; and any investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated, regardless of loss value.

D. Policy

It is DoD policy that:

1. Each of the DoD Components shall monitor, from its inception, all significant investigations of fraud or corruption related to procurement activities affecting its organizations, for the purpose of ensuring that all possible criminal, civil, administrative, and contractual remedies in such cases are identified to cognizant procurement and command officials and that appropriate remedies are pursued expeditiously. This process shall include appropriate coordination with all other affected DoD Components.

2. All investigations of fraud or corruption related to procurement activities shall be reviewed to determine and implement the appropriate contractual and administrative actions that are necessary to recover funds lost through fraud or corruption and to ensure the integrity of DoD programs and operations.

3. Appropriate civil, contractual, and administrative actions, including those set forth in enclosure 1, shall be taken expeditiously. During an investigation and before prosecution or litigation, and when based in whole or in part on evidence developed during an investigation, such actions shall be taken with the advance knowledge of the responsible DoD criminal investigative organization and, when necessary, the appropriate legal counsel in the Department of Defense and the Department of Justice (DoJ). When appropriate, such actions shall be taken before final resolution of the criminal or civil case.

E. Responsibilities

1. The *Heads of DoD Components*shall:

(a) Establish a centralized organization (hereafter referred to as "the centralized organization") to monitor and ensure the coordination of criminal, civil, administrative, and contractual remedies for each significant investigation of fraud or corruption related to procurement activities affecting the DoD Component.

(b) Establish procedures requiring the centralized organization to discuss regularly with the assigned DoD criminal investigative organization(s) such issues as the current status of significant investigations and their coordination with prosecutive authorities.

(c) Establish procedures requiring that all coordination involving the DoJ, during the pendency of a criminal investigation, is accomplished by or with the advance knowledge of the appropriate DoD criminal investigative organization(s).

(d) Establish procedures to ensure appropriate coordination of actions between the centralized organizations of any DoD Components affected by a significant investigation of fraud or corruption related to procurement activities.

(e) Establish procedures to ensure that all proper and effective civil, administrative, and contractual remedies available to the Department of Defense are, when found applicable and appropriate, considered and undertaken promptly by the necessary DoD officials (e.g., commanders, programs officials, and contracting officers). This includes initiation of any suspension and debarment action within 30 days of an indictment or conviction. The centralized organization shall ensure that all proposed actions are coordinated with appropriate investigative organization.

(f) Establish procedures to ensure that a specific comprehensive remedies plan is developed for each significant investigation involving fraud or corruption related to procurement activities. These procedures shall include the participation of the appropriate DoD criminal investigative organization in the development of the plan.

(g) Establish procedures to ensure that in those significant investigations of fraud or corruption related to procurement activities when adverse impact on a DoD mission can be determined, such adverse impact is identified and documented by the centralized organization. This information is to be used by the centralized organization of the DoD Component concerned in development of the remedies plan required in paragraph E.1.f., above, and shall be furnished to prosecutors as stated in paragraph E.2.e., below. The information shall also be used by the centralized organizations in development and preparation of "Victim Impact Statements" for use in sentencing proceedings, as provided for P.L. 97–291 (reference (b)). Some examples of adverse impact on a DoD mission are as follows:

(1) Endangerment of personnel or property.

(2) Monetary loss.

(3) Denigration of program or personnel integrity.

(4) Compromise of the procurement process.

(5) Reduction or loss of mission readiness.

(h) Ensure training materials are developed on fraud and corruption in the procurement process, and that all procurement and procurement-related training includes a period of such instruction appropriate to the duration and nature of the training.

(i) Establish procedures enabling the centralized organization to ensure that safety and readiness issues are examined and appropriately dealt with for all cases in which a notice is required under paragraph E.2.i., below. The minimum procedures to be followed by the centralized organization are in enclosure 3.

(j) Ensure that appropriate command, procurement, and investigative organizations are provided sufficient information to determine if further inquiry is warranted on their part to prevent reoccurrence and detect other possible fraud within their activity.

2. The Secretaries of the Military Departments and the Inspector General, Department of Defense (IG, DoD), or their designees, shall establish procedures that ensure that their respective criminal investigative organizations will:

(a) Notify, in writing, the centralized organization for the affected DoD Component of the start of all significant investigations involving fraud or corruption that are related to procurement activities. Initial notification shall include the following elements:

(1) Case title.

(2) Case control number.

(3) Investigative agency and office of primary responsibility.

(4) Date opened.

(5) Predication.

(6) Suspected offense(s).

(b) Notify expeditiously the Defense Investigative Service (DIS) of any investigations that develop evidence that would impact on DoD-cleared industrial facilities or personnel.

(c) Discuss regularly with the centralized organization such issues as the current status of significant investigations and their coordination with prosecutive authorities. If the DoD criminal investigative organization has prepared any documents summarizing the current status of the investigation, such documents shall be provided to the centralized organization. Completed reports of significant investigations also should be provided to the centralized organization.

(d) Provide to the appropriate procurement officials, commanders, and suspension and debarment authorities, when needed to allow consideration of applicable remedies, any court records,

documents, or other evidence of fraud or corruption related to procurement activities. Such information shall be provided in a timely manner to enable the suspension and debarment authority to initiate suspension and debarment action within 30 days of an indictment or conviction.

(e) Provide expeditiously to prosecutive authorities the information regarding any adverse impact on a DoD mission, that is gathered under paragraph E.1.g., above, for the purpose of enhancing the prosecutability of a case. Such information also should be used in preparing a victim impact statement for use in sentencing proceedings as provided for in Public Law 97–291 (reference (b)).

(f) Gather, at the earliest practical point in the investigation, without reliance on grand jury subpoenas whenever possible, relevant information concerning responsible individuals, the organizational structure, finances, and contract history of DoD contractors under investigation for fraud or corruption related to procurement activities, to facilitate the criminal investigation as well as any civil, administrative, or contractual actions or remedies that may be taken. Some available sources of such information are listed in enclosure 2.

(g) Provide timely notice to other cognizant DoD criminal investigative organizations of evidence of fraud by a contractor, subcontractor, or employees of either, on current or past contracts with, or affecting, other DoD Components.

(h) Ascertain the impact upon any ongoing investigation or prosecution of civil, contractual, and administrative actions being considered and advise the appropriate centralized organization of any adverse impact.

(i) Obtain a DD 350 report in every investigation into defective products or product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

(j) Obtain a DD 350 report in all significant fraud investigations, as defined in subsection C.2. above, whether or not the case involved defective products or product substitution. Timely notification shall be made to the centralized organization of each DoD Component that is identified as having contract actions with the subject of the investigation.

3. The *Inspector General, Department of Defense* (IG, DoD), shall:

(a) Develop training materials relating to fraud and corruption in procurement related activities which shall be utilized in all procurement related training in conjunction with training materials developed by the DoD Components. (See paragraph E.1.h., above.)

(b) Establish procedures for providing to the DoD criminal investigative organizations, through the Office of the Assistant Inspector General for Auditing (OAIG–AUD), reports of data contained in the Individual Procurement Action Report (DD Form 350) System.

F. Procedures

Transmissions of information by DoD criminal investigative organizations required by subsection E.2., above, shall be made as expeditiously as possible, consistent with efforts not to compromise any ongoing criminal investigation. The transmission of the information may be delayed when, in the judgment of the head of the DoD criminal investigative organization, failure to delay would compromise the success of any investigation or prosecution. The prosecutive authorities dealing with the investigation shall be consulted, when appropriate, in making such determinations.

G. Effective Date and Implementation

This Directive is effective immediately. Forward two copies of implementing documents to the Inspector General, Department of Defense, within 120 days.

Donald J. Atwood
Deputy Secretary of Defense

Enclosures—3

1. Civil Contractual and Administrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud

2. Sources of Information Relating to Government Contractors

3. Actions to be Taken in Product Substitution Investigations

Civil, Contractual, and Aministrative Actions That Can Be Taken in Response to Evidence of Procurement Fraud

A. Civil

1. Statutory

a. False Claims Act (31 U.S.C. 3729 et seq.).

b. Anti-Kickback Act (41 U.S.C. 51 et seq.).

c. Voiding Contracts (18 U.S.C. 218).

d. Truth in Negotiations Act (10 U.S.C. 2306(f)).

e. Fraudulent Claims-Contract Disputes Act (41 U.S.C. 604)

2. Nonstatutory

a. Breach of contract.

b. Breach of warranty.

c. Money paid under mistake of fact.

d. Unjust enrichment.

e. Fraud and/or Deceit.

f. Conversion.

g. Recision and/or Cancellation.

h. Reformation.

i. Enforcement of performance bond/guarantee agreement.

B. Contractual

a. Termination of contract for default.

b. Termination of contract for convenience of Government.

c. Termination for default and exemplary damages under the gratuities clause.

d. Recision of contract.

e. Contract warranties.

f. Withholding of payments to contractor.

g. Offset of payments due to contractor from other contracts.

h. Price reduction.

i. Correction of defects (or cost of correction).

j. Refusal to accept nonconforming goods.

k. Revocation of acceptance.

l. Denial of claims submitted by contractors.

m. Disallowance of contract costs.

n. Removal of the contractor from automated solicitation or payment system.

C. Administrative

a. Change in contracting forms and procedures.

b. Removal or reassignment of Government personnel.

c. Review of contract administration and payment controls.

d. Revocation of warrant contracting officer.

e. Suspension of contractor and contractor employees.

f. Debarment of contractor and contractor employees.

g. Revocation of facility security clearances.

h. Nonaward of contract based upon a finding of contractor nonresponsibility.

i. Voluntary refunds.

Table D–1
Source of Information Relating to Government Contractors

Type of Information: 1. Location, dollar value, type, and number of current contracts with the Department of Defense.
Possible Source: a. DD Form 350 Report.1
b. Defense Logistics Agency's (DLA) "Contract Administration Defense Logistics Agency's (DLA) Contract Administration Report" (CAR Report) on contracts DLA administers.

Type of Information: 2. Financial status of corporation, history of corporation,owners, and officers.
Possible Source: a. Dunn and Bradstreet Reports.
b. Corporate filings with local secretaries of The State, or corporate recorders.
c. Securities and Exchange Commission (public corporations).
d. Small Business Administration (SBA) (small businesses).
e. General Accounting Office (bid protests, and contractors indebted to the Government).
f. Armed Services Board of Contract Appeals (ASBCA) or court litigation.
g. List of Contractors Indebted to the United States (maintained, published and distributed by the U.S. Army Finance and Accounting Center, Indianapolis, Indiana 46249)

Type of Information: 3. Security clearance background information on facility and officers.
Possible Source: a. Defense Investigative Service.

Type of Information: 4. Performance history of contractor.
Possible Source: a. Local contracting officers. b. Defense Contract Administration Service preaward surveys.
c. SBA Certificate of Competency records.

Type of Information: 5. Name, location, offense alleged, and previous investigative efforts involving DLA-awarded or DLA-administered contracts.
Possible Source: DLA Automated Criminal Case Management System. (Available through field offices of the DLA Counsel's office.)

Type of Information: 6. Bid protests, litigation, and bankruptcy involving DLA-awarded or DLA-administered contracts.
Possible Source: Field offices of the DLA Counsel's office.

Notes:
[1] A determination as to the contract history of any DoD contractor with contracts in excess of $25,000 annually can be made through a review of the "Individual Procurement Action Report" (DD Form 350) system, as prescribed by Subpart 4.6 of the DoD FAR Supplement, DoD Instruction 4105.61, and DoD 4105.61–M (references(c), (d), and (e)).

Actions To Be Taken in Product Substitution Investigations

A.
The centralized organization, in all cases involving allegations of product substitution in which a SERIOUS HAZARD to health, safety, or operational readiness is indicated shall:

1. Review the notice of the case immediately after receiving it from the Defense criminal investigative organization. Review the notice to determine any potential safety or readiness issues indicated by the suspected fraud.

2. Notify all appropriate safety, procurement, and program officials of the existence of the case.

3. Obtain a complete assessment from safety, procurement, and program officials of the adverse impact of the fraud on DoD programs and operations.

4. Ensure that the DoD Component provides the Defense criminal investigative organization with full testing support to completely identify the defective nature of the substituted products. Costs associated with the testing shall be assumed by the appropriate procurement program.

5. Prepare a comprehensive impact statement describing the adverse impact of the fraud on DoD programs for use in any criminal, civil, or contractual action related to the case.

B.
In all cases involving allegations of product substitution that affect more than one DoD Component, that centralized organizations of the affected DoD Components shall identify a lead Agency. The lead centralized organization shall ensure that information on the fraud is provided to the centralized organization of all other affected DoD Components. The lead centralized organization shall ensure compliance with the requirements of section A., above. The lead centralized organization shall then be responsible for preparing a comprehensive "Victim Impact Statement" as required by paragraph E.1.g. of this Directive.

C.
In all cases involving allegations of product substitution, the Defense Criminal Investigative Organization shall:

1. Immediately notify the appropriate centralized organization of the beginning of the case.

2. Continue to provide to the centralized organization any information developed during the course of the investigation that indicates substituted products have been, or might be, provided to the Department of Defense.

3. Ensure that any request for testing of substituted products is provided to the centralized organization.

Appendix E
Department of Defense Directive 5505.5

Department of Defense Directive

August 30, 1988
NUMBER 5505.5
GC, DOD

SUBJECT:
Implementation of the Program Fraud Civil Remedies Act

References:
(a) Public Law 99–509, "The Program Fraud Civil Remedies Act of 1986," October 21, 1986
(b) Title 5, United States Code, Chapters 33, 43, 51, 53, Subchapter III
(c) Title 31, United States Code, Sections 3716, 3729, 3730, 3803, 3804, 3805,3806, 3808
(d) Title 18, United States Code, Section 287, Federal Rules of Criminal Procedure, Rule 6(e)
(e) through (h), see enclosure 1.

A. Purpose
This Directive establishes uniform policies, assigns responsibilities, and prescribes procedures for implementation of reference (a).

B. Applicability
This Directive applies to the Office of the Secretary of Defense (OSD) the Military Departments, the Office of the Inspector General, Department of Defense (OIG, DoD); the Defense Agencies; and the DoD Field Activities (hereafter referred to collectively as "DoD Components").

C. Policy
It is DoD policy to redress fraud in DoD programs and operations through the nonexclusive use of reference (a). All DoD Components

shall comply with the requirements of this Directive in using this new remedy. Changes or modifications to this Directive by implementing organizations are prohibited. Implementing regulations are authorized only to the extent necessary to effectively carry out the requirements of this Directive.

D. Responsibilities

1. The *Inspector General, Department of Defense* (IG, DoD), shall establish procedures for carrying out the duties and responsibilities of the "investigating official" as outlined in enclosure 2.

2. The *General Counsel, Department of Defense* (GC, DoD), shall:

(a) Establish procedures for carrying out the duties and responsibilities of the authority head, Department of Defense, which have been delegated to the GC, DoD, as set forth in enclosure 2;

(b) Establish procedures for carrying out the duties and responsibilities for appointment and support of presiding officers, as set forth in enclosure 2; and

(c) Review and approve the regulations and instructions required by this section to be submitted for approval by the GC, DoD.

3. The *Secretaries of the Military Departments* shall:

(a) Establish procedures for carrying out the duties and responsibilities of the "authority head" and of the "reviewing officials" for their respective Departments, and for obtaining and supporting presiding officers from other Agencies as specified in Office of Personnel Management (OPM) regulations; (See enclosure 2.)

(b) Make all regulations or instructions promulgated subject to the approval of the GC, DoD; and

(c) Delegate duties as appropriate.

4. The *General Counsel of the National Security Agency* (GC, NSA) and the *General Counsel of the Defense Logistics Agency* (GC, DLA) shall be responsible for establishing procedures for carrying out the duties and responsibilities of the reviewing officials that have been delegated to them, as stated in enclosure 2. All Regulations or Instructions promulgated pursuant to this Directive shall be submitted to the GC, DoD.

E. Effective Date and Implementation

This Directive is effective immediately. Two copies of DoD Component implementing documents and subsequent amendments shall be forwarded to the General Counsel, Department of Defense, within 90 days. Other DoD Components shall disseminate this Directive to appropriate personnel.

Signed by WILLIAM H. TAFT, IV
Deputy Secretary of Defense

Enclosures—2
1. References
2. Program Fraud Civil Remedies

Aug 30, 88
5505.5 (Encl 1)

References, continued

(e) Title 28, United States Code, Federal Rules of Civil Procedure, Rules 4(d)d and 34.

(f) Title 32, Code of Federal Regulations, Part 97

(g) Title 28, United States Code, Federal Rules of Evidence, Rule 408

(h) Title 32, United States Code, Section 3805

Aug 30, 88
5505.5 (Encl 2)

PROGRAM FRAUD CIVIL REMEDIES

A. Scope and purpose

1. The Department of Defense has the authority to impose civil penalties and assessments against persons who make, submit or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents.

2. This enclosure:

(a) Establishes administrative policies and procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents;

(b) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

3. The uniform policies and procedures established by this enclosure are binding on the authorities and authority heads in the Department of Defense and Military Departments. Additional administrative regulations necessary to carry out the requirements of the PFCRA (reference (a)) and this Directive may be written by the authority heads. Any regulations shall be consistent with the provisions of this enclosure.

B. Definitions

1. Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

2. Authority

(a) The Department of Defense, which includes OSD, Organization of the Joint Chiefs of Staff (OJCS), Unified and Specified Commands, Defense Agencies, and DoD Field Activities.

(b) The Department of the Army.

(c) The Department of the Navy.

(d) The Department of the Air Force.

3. Authority head

(a) For the Department of Defense, the Deputy Secretary of the Department of Defense or an official or employee of the Department of Defense or the Military Departments designated in writing by the Deputy Secretary of Defense.

(b) For the respective Military Departments, the Secretary of the Military Department or an official or employee of the Military Department designated in regulations promulgated by the Secretary to act on behalf of the Secretary.

4. Benefit. In the context of statements, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling status, or loan guarantee.

5. Claim. Any request, demand, or submission made as follows:

(a) To the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) To a recipient of property, services, or money from the authority or to a party to a contract with the authority:

(1) For property or services if the United States:

a. Provided such property or services;

b. Provided any portion of the funds for the purchase of such property or services; or

c. Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States:

a. Provided any portion of the money requested or demanded; or

b. Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the authority that has the effect of decreasing an obligation to pay or account for property, services, or money.

6. Complaint. The administrative complaint served by the reviewing official on the defendant under section G., below.

7. Defendant. Any person alleged in a complaint under section G., below, to be liable for a civil penalty or assessment under section C., below.

8. DoD criminal investigative organizations. The U.S. Army Criminal Investigative Command, Naval Security and Investigative Command, U.S. Air Force Office of Special Investigations, and the Defense Criminal Investigative Service.

9. Government. The U.S. Government.

10. Individual. A natural person.

11. Initial decision. The written decision of the presiding officer required by section J. or KK., below. This includes a revised initial decision issued following a remand or a motion of reconsideration.

12. Investigating official

(a) The IG, DoD; or

(b) An officer or employee of the OIG designated by the IG;

(c) Who, if a member of the Armed Forces of the United States on active duty, is serving in Grade 0–7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for Grade GS–16 under the General Schedule.

13. Knows or has reason to know. A person who, with respect to a claim or statement:

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

14. Makes. Includes the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, making or made shall likewise include the corresponding forms of such terms.

15. Person. Any individual, partnership, corporation,association or private organization, and includes the plural of that term.

16. Preponderance of the evidence. The evidence necessary to support a presiding officer's decision that a violation of the PFCRA (reference (a)) has occurred. Evidence that leads to the belief that what is sought to be proved is more likely true than not true.

17. Presiding officer. An officer or employee of the Department of Defense or an employee detailed to the Department of Defense from another agency who:

(a) Is selected under 5 U.S.C., Chapter 33 (reference (b)), pursuant to the competitive examination process applicable to administrative law judges;

(b) Is appointed by the authority head of DoD to conduct hearings under this Directive for cases arising in the Department of Defense or the Military Departments;

(c) Is assigned to cases in rotation so far as practicable;

(d) May not perform duties inconsistent with the duties and responsibilities of a presiding officer;

(e) Is entitled to pay prescribed by the Office of Personnel Management (OPM) independently of ratings and recommendations made by the authority and in accordance with 5 U.S.C., Chapters 51 and 53, Subchapter III (reference (b));

(f) Is not subject to a performance appraisal pursuant to 5 U.S.C., Chapter 43 (reference (b)); and

(g) May be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing by such Board.

18. Representative. An attorney-at-law duly licensed in any State, commonwealth, territory, the District of Columbia, or foreign country, who enters his or her appearance in writing to represent a party in a proceeding under this part, or an officer, director, or employee of a defendant or of its affiliate.

19. Reviewing official

(a) In all cases arising in the Department of Defense and any of the Military Departments, the reviewing official shall be an officer or employee of an authority as follows:

(1) Who is designated by the authority head to made the determination required under section E., below, of this enclosure;

(2) Who, if a member of the Armed Forces of the United States on active duty, is serving in Grade 0–7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for Grade GS–16 under the General Schedule; and

(3) Who is as follows:

a. Not subject to supervision by, or required to report to, the investigating official;

b. Not employed in the organizational unit of the authority in which the investigating official is employed; and

c. Not an official designated to make suspension or debarment decisions.

(b) The General Counsel, Defense Logistics Agency (GC, DLA), shall be the reviewing official for all cases involving a claim or statement made to the DLA or any other part of the Department of Defense other than a Military Department or the National Security Agency (NSA). The General Counsel, National SecurityAgency (GS, NSA), shall be the reviewing official for all cases involving claims or statements made to that Agency. The General Counsel, Defense Logistics Agency (GS, DLA), and GC, NSA, may redelegate their authority to act as reviewing officials to any individual(s) meeting the criteria set out in subparagraph (1) of this section.

(c) The authority head of each Military Department shall select a reviewing official, who shall review all cases involving a claim or statement that was made to their Department.

20. Statement. Any written representation, certification, affirmation, document, record, accounting, or bookkeeping entry made:

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for):

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from the authority, or any State, political subdivision of a State, or other party; if the U.S. Government provides any portion of the money or property under such contract or for such grant, loan,or benefit, or if the U.S. Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

C. Basis for civil penalties and assessments

1. Claims

(a) Any person who makes a claim that the person knows or has reason to know:

(1) Is false, fictitious, or fraudulent;

(2) Includes or is supported by a written statement that asserts a material fact that is false, fictitious, or fraudulent;

(3) Includes or is supported by any written statement that:

a. Omits a material fact;

b. Is false, fictitious, or fraudulent as a result of such omission; and

c. Is a statement in which the person making such statement has a duty to include such material fact; or

(4) Is for payment for the provision of property or services that the person had not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(b) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(c) A claim shall be considered made to an authority, recipient, or party when such claim is received by an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(d) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, service, or money is actually delivered or paid.

(e) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under subparagraph a.(1) of this section shall also be

subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of subparagraph a.(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

2. Statements

(a) Any person who makes a written statement that:

(1) The person knows or has reason to know the following:

a. Asserts a material fact that is false, fictitious, or fraudulent; or

b. Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement;and

(2) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(b) Each written representation, certification, or affirmation constitutes a separate statement.

(c) A statement shall be considered made to an authority when such statement is received by an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

3. No proof of specific intent to defraud is required to establish liability under this section.

4. In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held jointly and severally liable for a civil penalty with respect to such claims or statements.

5. In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

D. Investigation

1. If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. § 3804(a) (reference (c)) is warranted, then:

(a) The supoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(b) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(c) The person receiving such subpoena shall be required to tender to the investigating official, or to the person designated to receive the documents, a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

2. If the investigating official concludes that an action under the PFCRA may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the appropriate reviewing official(s). In instances where the false claim or false statement involves more than one authority within the Department of Defense, or where the investigating official finds that more than one case has arisen from the same set of facts, the investigating official may, at his or her sole discretion, refer the case(s) to the reviewing official of one of the affected authorities. That reviewing official shall consolidate the claims and statements and act for all. Nothing in this subsection confers any right in any party to the consolidation or severance of any case(s), although presiding officers may, at their sole discretion, entertain motions to consolidate or sever.

3. Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under 18 U.S.C. § 287 (reference (d)) or 31 U.S.C. §§ 3729 and 3730 (reference (c)), False Claims Act, or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

4. Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

5. Nothing in this section shall preclude or limit the investigating official's authority to obtain the assistance of any investigative units of the Department of Defense, including those of the Military Departments. In this regard, appropriate investigation may be conducted by the Defense criminal investigative organizations and other investigative elements of the Military Departments and Defense Agencies.

E. Review by the reviewing official

1. If, based on the report of the investigating official under subsection D.2., above, the reviewing official determines that there is adequate evidence to believe that a person is liable under section C., above, the reviewing official shall transmit to the Attorney General or his or her designated point of coordination within the Department of Justice a written notice of the reviewing official's intention to issue a complaint under section G., below.

2. Such notice shall include the following:

(a) A statement of the reviewing official's reasons for issuing a complaint;

(b) A statement specifying the evidence that supports the allegations of liability;

(c) A description of the claims or statements upon which the allegations of liability are based;

(d) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of section C., above.

(e) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(f) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

F. Prerequisites for issuing a complaint

1. The reviewing official may issue a complaint under section G., below, only if:

(a) The Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in a written statement described in 31 U.S.C. § 3803(b)(1) (reference (c)); and

(b) In the case of allegations of liability under subsection C.1., above,with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in subsection 2. of this section), the amount of money or the value of property or services demanded or requested in violation of subsection C.1., above, does not exceed $150,000.00;

2. For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

3. Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person's claims that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

4. In any case that involves claims or statements made to more than one entity within the Department of Defense or the Military Departments, or the reviewing officials having responsibility for each such entity, as stated in subsection D.2., above, shall have concurrent jurisdiction to make the required determinations under this section. In any such case, the responsible reviewing officials shall coordinate with each other prior to making any determination under this section. Where more than one case arises from the same

set of facts, such cases shall be consolidated to the degree practicable, although the reviewing official shall have absolute discretion to make such determination. The requirements of this paragraph do not confer any procedural or substantive rights upon individuals, associations, corporations, or other persons or entities who might become defendants under the PFCRA (reference (a)).

G. Complaint

1. On or after the date the Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in accordance with 31 U.S.C. §3803(b)(1) (reference (c)), the reviewing official may serve a complaint on the defendant, as provided in section H., below.

2. The complaint shall state the following:

(a) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(b) The maximum amount of penalties and assessments for which the defendant may be held liable;

(c) Instructions for filing an answer to a request, including a specific statement of the defendant's right to request a hearing, by filing an answer and to be represented by a representative; and

(d) That failure to file an answer within 30 days fo service of the complaint shall result in the imposition of penalties and assessments without right to appeal, consistent with the provisions of section J., below.

3. At the same time the reviewing official serves the complaint, he or she shall notify the defendant with a copy of this Directive and any applicable implementing regulations.

H. Service of complaint

1. Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure (reference (e)). Service is complete upon receipt.

2. Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service may be made by the following:

(a) a. Affidavit of the individual serving the complaint by delivery;

(b) A United States Postal Service return receipt card acknowledging receipt; or

(c) Written acknowledgement of receipt by the defendant or his or her representative.

I. Answer

1. The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

2. In the answer, the defendant:

(a) Shall admit or deny each of the allegations of liability made in the complaint;

(b) Shall state any defense on which the defendant intends to rely;

(c) May state any reasons why the defendant contends that the pealties and assessments should be less than the statutory maximum; and

(d) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

3. If the defendant is unable to file an answer meeting the requirements of paragraph 2.b of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of subsection 2. of this section. The reviewing official shall, in such event, file promptly with the presiding officer the complaint, the general answer denying liability, and the request for an extension of time as provided in section K., below. For good cause shown, the presiding officer may grant the defendant additional time within which to file an answer meeting the requirements of subsection 2. of this section.

4. The 30-day limitation for filing an answer may be tolled for a reasonable period of time by written agreement of the parties and approval of the authority head to allow time for settlement.

J. Default upon failure to file an answer

1. If the defendant does not file an answer within the time prescribed in subsection I.1., above, and there is no approved written agreement as in subsection I.4., above, tolling the time prescribed, the reviewing official may then refer the complaint to the presiding officer.

2. Upon referral of the complaint pursuant to this section, the presiding officer shall promptly serve on defendant, in the manner prescribed in section H., above, a notice that an initial decision will be issued under this section.

3. Upon referral of the complaint pursuant to this section, the presiding officer shall assume the facts alleged in the complaint to be true and, if such facts establish liability under section C., above, the presiding officer shall issue an initial decision imposing penalties and assessments under the statute.

4. Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under subsection 3. of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

5. If, before such an initial decision becomes final, the defendant files a motion with the presiding officer seeking to reopen on the grounds that good cause prevented the defendant from filing an answer, the initial decision shall be stayed pending the presiding officer's decision on the motion.

6. If, on a motion brought under subsection J.5., above, the defendant can demonstrate good cause excusing the failure to file a timely answer, the presiding officer shall withdraw the initial decision in subsection 3. of this section if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

7. A decision of the presiding officer denying a defendant's motion under subsections 5. and 6. of this section is not subject to reconsideration under section LL., below.

8. The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the presiding officer denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

9. If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head.

10. The authority head shall decide expeditiously whether good cause excused the defendant's failure to file a timely answer based solely on the record before the presiding officer.

11. If the authority head decides that good cause excused the defendant's failure to file a timely answer, the authority head shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

12. If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall approve the initial decision of the presiding officer, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

K. Referral of complaint and answer to the presiding officer

1. Upon receipt of an answer, the reviewing official shall file the complaint and answer with the presiding officer.

2. To allow time for settlement, referral of complaint and answer to the presiding officer may be delayed for a reasonable period of

time if there is a written agreement of the parties, approved by the authority head, in favor of such delay.

L. Notice of hearing

1. When the presiding officer receives the complaint and answer, the presiding officer shall promptly serve a notice of hearing upon the defendant in the manner prescribed by section H., above. At the same time, the presiding officer shall send a copy of such notice to the representative for the Government.

2. Such notice shall include.

(a) The tentative time and place, and the nature of the hearing;

(b) The legal authority and jurisdiction under which the hearing is to be held;

(c) . The matters of fact and law to be asserted;

(d) A description of the procedures for the conduct of the hearing;

(e) The name, address, and telephone number of the representative of the Government, the defendant, and other parties, if any; and

(f) Such other matters as the presiding officer deems appropriate.

M. Parties to the hearing

The parties to the hearing shall be the defendant and the authority. The reviewing official of each authority shall, with the concurrence of the DoD Component head, designate attorneys within that authority to represent the authority in hearings conducted under this Directive. Attorneys appointed as authority representatives shall remain under the supervision of their DoD Component.

N. Separation of functions

1. The investigating official and the reviewing official, for any particular case or factually related case, may not do the following:

(a) Participate in the hearing as the presiding officer;

(b) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in a public proceeding; or

(c) Make the collecting of penalties and assessments under 31 U.S.C. § 3806 (reference (c)).

2. The presiding officer shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

3. Except as provided in subsection 1. of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

O. Ex parte contacts

No party or person (except employees of the presiding officer's office) shall communicate in any way with the presiding officer on any matter at issue in a case unless on notice and there is an opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

P. Disqualification of presiding officer and reviewing official

1. A reviewing official or presiding officer in a particular case may disqualify himself or herself at any time.

2. A party may file a motion for disqualification of the presiding officer or the reviewing official. Such motion, to be filed with the presiding officer, shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

3. Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification or such objections shall be deemed waived.

4. Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

5. Upon the filing of such a motion and affidavit, the presiding officer shall proceed no further in the case until he or she resolves the matter of disqualification by taking one of the following actions:

(a) If the presiding officer determines that a reviewing official is disqualified, the presiding officer shall dismiss the complaint without prejudice;

(b) If the presiding officer disqualifies himself or herself, the case shall be reassigned promptly to another presiding officer;

(c) The presiding officer may deny a motion to disqualify. In such event, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

Q. Rights of parties

Except as otherwise limited by this enclosure, all parties may:

1. Be accompanied, represented, and advised by a representative;

2. Participate in any conference held by the presiding officer;

3. Conduct discovery.

4. Agree to stipulations of fact or law, which shall be made part of the record;

5. Present evidence relevant to the issues at the hearing;

6. Present and cross-examine witnesses;

7. Present oral arguments at the hearing, as permitted by the presiding officer; and

8. Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

R. Authority of the presiding officer

1. The presiding officer shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

2. The presiding officer has the authority to do the following:

(a) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(b) Continue or recess the hearing in whole or in part for a reasonable period of time;

(c) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(d) Administer oaths and affirmations;

(e) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(f) Rule on motions and other procedural matters;

(g) Regulate the scope and timing of discovery;

(h) Regulate the course of the hearing and the conduct of representatives and parties;

(i) Examine witnesses;

(j) Receive, rule on, exclude, or limit evidence;

(k) Upon motion of a party, take official notice of facts;

(l) Upon motion of a party, decide cases, in whole or in part by summary judgment where there is no disputed issue of material fact;

(m) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(n) Exercise such other authority as is necessary to carry out the responsibilities of the presiding officer under this Directive.

3. The presiding officer does not have the authority to find Federal statutes or regulations invalid.

S. Prehearing conferences

1. The presiding officer may schedule prehearing conferences as appropriate.

2. Upon the motion of any party, the presiding officer shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

3. The presiding officer may use prehearing conferences to discuss the following:

(a) Simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(c) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(d) Whether the parties can agree to submission of the case on a stipulated record;

(e) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objections of other parties) and written argument;

(f) Limitation of the number of witnesses;

(g) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(h) Discovery;

(i) The time and place for the hearing; and

(j) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

4. The presiding officer may issue an order containing all matters agreed upon by the parties or ordered by the presiding officer at a pre-hearing conference.

T. Disclosure of documents

1. Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under subsection D.2., above, are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

2. Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed, except if disclosure would violate Rule 6(e) of the Federal Rules of Criminal Procedure (reference (d)).

3. The notice sent to the Attorney General from the reviewing official as described in section E., above, is not discoverable under any circumstances.

4. The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section at any time after service of the complaint.

U. Discovery

1. The following types of discovery are authorized:

(a) Requests for production of documents for inspection and copying;

(b) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(c) Written interrogatories; and

(d) Depositions.

2. For the purpose of this section and sections V. and W., below, the term "documents" includes information, documents, reports,answers, records, accounts, papers, and other data and documentary evidence contained in a form contemplated by the definition of "document" set forth in the Federal Rules of Civil Procedure, Rule 34 (reference (e)).Nothing contained herein shall be interpreted to require the creation of a document.

3. Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer. The presiding officer shall regulate the timing of discovery.

4. Motions for discovery may be filed with the presiding officer by the party seeking discovery.

(a) Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(b) Within 10 days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in section X., below.

(c) The presiding officer may grant a motion for discovery only if he finds that the discovery sought:

(1) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(2) Is not unduly costly or burdensome;

(3) Will not unduly delay the proceeding; and

(4) Does not seek privileged information.

(d) The burden of showing that discovery should be allowed is on the party seeking discovery.

(e) The presiding officer may grant discovery subject to a protective order under section X., below.

5. Depositions

(a) If a motion for deposition is granted, the presiding officer shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held. The presiding officer may order that parties produce deponents and/or documents without the need for subpoena.

(b) The party seeking to depose shall serve the subpoena in the manner prescribed in section H., above.

(c) The deponent may file with the presiding officer a motion to quash the subpoena or a motion for a protective order within 10 days of service.

(d) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all parties for inspection and copying.

6. Each party shall bear its own costs of discovery.

V. Exchange of witness lists, statements, and exhibits

1. At least 15 days before the hearing or at such other time as may be ordered by the presiding officer, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with subsection GG.2., below. At the time the above documents are exchanged, any party that intends to rely upon the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the presiding officer, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

2. If a party objects, the presiding officer shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the presiding officer finds good cause for the failure or that there is no prejudice to the objecting party.

3. Unless another party objects within the time set by the presiding officer, documents exchanged in accordance with subsection 1. of this section shall be admitted into evidence at the hearing. Later challenges to admissibility at the hearing shall be permitted only upon a showing of good cause for the lateness.

W. Subpoenas for attendance at hearing

1. A party wishing to procure the appearance and testimony of any individual at the hearing may request that the presiding officer issue a subpoena.

2. A subpoena requiring the attendence and testimony of an individual may also require the individual to produce documents at the hearing.

3. A party seeking a subpoena shall file a written request therefor not less then 15 days before the date fixed for the hearing, unless otherwise allowed by the presiding officer for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

4. The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

5. The party seeking the subpoena shall serve it in the manner prescribed in section H., above. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

6. A party or a representative of the individual to whom the subpoena is directed may file with the presiding officer a motion to quash the subpoena within 10 days after service or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

X. Protective order

1. A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

2. In issuing a protective order, the presiding officer many make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following:

(a) That the discovery not be had;

(b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) That the discovery may be had only through a method of discovery other than that requested;

(d) d. That classified information not be released unless prior notice and arrangements reasonably acceptable to the representative of the authority are made in coordination with the Defense Investigative Service, and the presiding officer agrees to the use;

(e) That certain matters not be inquired into or that the scope of discovery be limited to certain matters;

(f) That discovery be conducted with no person except persons designated by the presiding officer;

(g) That the contents of discovery or evidence be sealed;

(h) That the defendant comply with 32 CFR Part 97 (reference (f)) concerning official witnesses;

(i) That a deposition after being sealed be opened only upon order of the presiding officer;

(j) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(k) That the parties simultaneously file specified documents of information enclosed in sealed envelopes to be opened as directed by the presiding officer.

Y. Fees.

The party requesting a subpoena shall pay the cost of the witness fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in the United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority a check for witness fees and mileage need not accompany the subpoena.

Z. Form, filing, and service of papers

1. Form

(a) Documents filed with the presiding officer shall include an original and two copies.

(b) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the presiding officer, and a designation of the paper (e.g., motion to quash subpoena).

(c) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(d) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

2. Service. A party filing a document with the presiding officer shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in section H., above, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

3. Proof of service. A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

AA. Computation of time

1. In computing any period of time under this Directive or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

2. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

3. Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response.

BB. Motions

1. Any application to the presiding officer for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, the facts alleged, and shall be filed with the presiding officer and served on all other parties.

2. Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The presiding officer may require the oral motions be put in writing.

3. Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

4. The presiding officer may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

5. The presiding officer shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

6. Failure by a party to raise defenses or objections or to make requests that must be made prior to the beginning of the hearing shall constitute waiver thereof, but the presiding officer may grant relief from the waiver for good cause shown.

CC. Sanctions

1. The presiding officer may sanction a person, including any party or representative, for the following:

(a) Failing to comply with an order, rule, or procedure governing the proceeding;

(b) Failing to prosecute or defend an action; or

(c) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

2. Any such sanction, including but not limited to those listed in subsections 3., 4., and 5. of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

3. When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the presiding officer may:

(a) Draw an inference in favor of the requesting party with regard to the information sought;

(b) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(c) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(d) Strike any part of the pleadings or other submission of the party failing to comply with such request.

4. If a party fails to prosecute or defend an action under this Directive commenced by service of a notice of hearing, the presiding officer may dismiss the action or may issue an initial decision imposing penalties and assessments.

5. The presiding officer may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

DD. The hearing and burden of proof

1. The presiding officer shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under section C., above, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

2. The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

3. The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

4. The hearing shall be open to the public unless otherwise ordered by the presiding officer for good cause shown.

EE. Determining the amount of penalties and assessments.

In determining an appro riate amount of civil penalties and assessments, the presiding officer and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose.

FF. Location of hearing

1. The hearing may be held as follows:

(a) In any judicial district of the United States in which the defendant resides or transacts business;

(b) In any judicial district of the United States in which the claim or statement at issue was made; or

(c) In such other place, including foreign countries, as may be agreed upon by the defendant and the presiding officer.

2. Each party shall have the opportunity to petition the presiding officer with respect to the location of the hearing.

3. The hearing shall be held at the place and at the time ordered by the presiding officer.

GG. Witnesses

1. Except as provided in subsection 2. of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

2. At the discretion of the presiding officer, testimony may be admitted in the form of a written or videotaped statement or deposition. Any such written or videotaped statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for deposition or cross-examination at the hearing. Prior written or videotaped statements of witnesses proposed to testify at the hearings and deposition transcripts shall be exchanged as provided in subsection V.1., above.

3. The presiding officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(a) Make the interrogation and presentation effective for the ascertainment of the truth;

(b) Avoid needless consumption of time; and

(c) Protect witnesses from harassment or undue embarrassment.

4. The presiding officer shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5. At the discretion of the presiding officer, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

6. Upon motion of any party, the presiding officer shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of the following:

(a) A party who is an individual;

(b) In the case of a party that is not an individual, an officer or employee of the party appearing for the party as its representative, or designated by the party's representative; or

(c) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

HH. Evidence

1. The presiding officer shall determine the admissibility of evidence.

2. Except as provided herein, the presiding officer shall not be bound by the Federal Rules of Evidence (reference (g)). However, the presiding officer may apply the Federal Rules of Evidence where appropriate; e.g., to exclude unreliable evidence.

3. The presiding officer shall exclude irrelevant and immaterial evidence.

4. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by consideration of undue delay or needless presentation of cumulative evidence.

5. Evidence shall be excluded if it is privileged under Federal law and the holder of the privilege asserts it.

6. Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence (reference (g)).

7. The presiding officer shall permit the parties to introduce rebuttal witnesses and evidence.

8. All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to section X., above.

II. The record and finding

1. The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the presiding officer at a cost not to exceed the actual cost of duplication.

2. The transcript of testimony, exhibits, and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the presiding officer and the authority head.

3. The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the presiding officer.

4. Funding for the hearing and record, except for the cost of the presiding officer, shall be the responsibility of the authority in which the case arose.

JJ. Post-hearing briefs

The presiding officer may require or permit the parties to file post-hearing briefs. The presiding officer shall fix the time for filing any such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The presiding officer may permit the parties to file reply briefs.

KK. Initial decision

1. The presiding officer shall issue an initial decision based only on the record that shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

2. The findings of fact shall include a finding on each of the following issues:

(a) Whether the claims or statements identified in the complaint, or any portions thereof, violate section C., above; and

(b) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments.

3. The presiding officer shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The presiding officer shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the presiding officer or a notice of appeal with the authority head. If the presiding officer fails to meet the deadline contained in this subsection, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

4. Unless the initial decision of the presiding officer is timely appealed to the authority head, or a motion for reconsideration of the intitial decision is timely filed, the initial decision of the presiding officer shall be final and binding on the parties 30 days after it is issued by the presiding officer.

LL. Reconsideration of initial decision

1. Except as provided in subsection 4. of this section, any party may file a motion for reconsideration of the initial decision within 20 days of service of the initial decision in the manner set forth in section H., above, for service of the complaint. Service shall be proved in the manner provided in subsection H.2., above.

2. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

3. Responses to such motions shall be allowed only upon request of the presiding officer; however, the presiding officer shall not issue a revised initial determination without affording both parties an opportunity to be heard on the motion for reconsideration.

4. No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

5. The presiding officer may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

6. If the presiding officer denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the presiding officer denies the motion, unless the initial decision is timely appealed to the authority head in accordance with section MM., below.

7. If the presiding officer issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with section MM., below.

MM. Appeal to authority head

1. Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

2. A notice of appeal:

(a) May be filed at any time within 30 days after the presiding officer issues an initial or a revised initial decision. If another party files a motion for reconsideration under section LL., above, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration, until the time period for filing a motion for reconsideration under section LL., above, has expired or the motion is resolved;

(b) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the presiding officer denies the motion or issues a revised initial decision, whichever applies;

(c) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

3. If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head when:

(a) The time for filing a motion for reconsideration expires without the filing of such a motion, or

(b) The motion for reconsideration is denied. Issurance of a revised initial decision upon motion for reconsideration shall require filing of a new notice of appeal.

4. A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

5. The representative for the Government may file a brief in opposition to the exceptions within 30 days of receiving the notice of appeal and accompanying brief.

6. There is no right to appear personally before the authority head, although the authority head may at his or her discretion require the parties to appear for an oral hearing on appeal.

7. There is no right to appeal any interlocutory ruling by the presiding officer.

8. In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the presiding officer, unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

9. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

10. The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer in any initial decision.

11. The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

12. Unless a petition for review is filed as provided in 32 U.S.C. §3805 (reference (h)) after a defendant has exhausted all administrative remedies under this Directive and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under section C., above, is final and is not subject to judicial review.

13. The authority heads (or their designees) may designate an officer or employee of the authority, who is serving in the grade of GS–17 or above under the General Schedule, or in the Senior Executive Service, to carry out these appellate responsibilities; however, the authority to compromise, settle, or otherwise discretionarily dispose of the case on appeal provided pursuant to subsection MM.10, hereof, may not be so redelegated pursuant to this subsection.

NN. Stays ordered by the Department of Justice

If at any time, the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this Directive with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

OO. Stay pending appeal

1. An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

2. No administrative stay is available following a final decision of the authority head.

PP. Judicial review

31 U.S.C. § 3805 (reference (c)) authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessment under this Directive and specifies the procedures for such review.

QQ. Collection of civil penalties and assessments

31 U.S.C. §§ 3806 and 3808(b) (reference (c)) authorize actions for collection of civil penalties and assessments imposed under this Directive and specify the procedures for such actions.

RR. Right to administrative offset

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under section QQ., above, or

any amount agreed upon in a compromise or settlement under section TT., below, may be collected by administrative offset under 31 U.S.C. § 3716 (reference (c)), except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes then or later owing by the United States to the defendant.

SS. Deposit in Treasury of United States

All amounts collected pursuant to this Directive shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. § 3806(g) (reference (c)).

TT. Compromise or settlement

1. Parties may make offers of compromise or settlement at any time.

2. The reviewing official has the exclusive authority to compromise or settle a case under this Directive at any time after the date on which the reviewing officer is permitted to issue a complaint and before the date on which the presiding officer issues an initial decision.

3. The authority head has exclusive authority to compromise or settle a case under this Directive at any time after the date on which the presiding officer issues an initial decision, except during the pendency of any review under section PP., above, or during the pendency of any action to collect penalties as assessments under section QQ., above.

4. The Attorney General has exclusive authority to compromise or settle a case under this Directive during the pendency of any review under section PP., above, of any action to recover penalties and assessments under 31 U.S.C. § 3806 (reference (c)).

5. The investigating official may recommend settlement terms to the reviewing official or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Attorney General, as appropriate.

6. Any compromise or settlement must be in writing.

UU. Limitations

1. The notice of hearing with respect to a claim or settlement must be served in the manner specified in section H., above, within 6 years after the date on which such claim or statement is made.

2. If the defendant fails to file a timely answer, service of a notice under subsection J.2., above, shall be deemed a notice of hearing for purposes of this section.

3. If at any time during the course of proceedings brought pursuant to this section, the authority head receives or discovers any specific information concerning bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General and to the Inspector General, Department of Defense.

VV. Delegations

The General Counsel for the Department of Defense is designated to carry out the responsibilities of the authority head of the Department of Defense for the issuance of additional implementing regulations that are necessary to implement PFCRA (reference (a)) and this Directive to decide cases upon appeal, and to hire or designate employees of the Department of Defense to decide cases on appeal. The General Counsel, Department of Defense, is also designated to appoint presiding officers for the Department of Defense, and may assist in the appointment of presiding officers on detail from other Agencies for all authorities within the Department of Defense.

Glossary

Section I
Abbreviations

AAFES
Army and Air Force Exchange Service

AMEDD
Army Medical Department

AFARS
Army Federal Acquisition Regulation Supplement

ASBCA
Armed Services Board of Contract Appeals

AUSA
Assistant United States Attorney

CFR
Code of Federal Regulations

COE
United States Army Corps of Engineers

DA
Department of the Army

DFARS
Defense Federal Acquisition Regulation Supplement

DOD
Department of Defense

DOJ
Department of Justice. In this regulation, reference to DOJ means either United States Attorneys' Offices or The (main) Department of Justice in Washington, D.C.

DCIS
Defense Criminal Investigative Service

e.g.
An abbreviation for exempli gratia, meaning "for example"

et seq.
An abbreviation for et sequentes, meaning "and the following"

FAR
Federal Acquisition Regulation

FAX
facsimile transmission

FBI
Federal Bureau of Investigation

Fed. R. Civ. P.
Federal Rules of Civil Procedure

Fed. R. Crim. P.
Federal Rules of Criminal Procedure

FOIA
Freedom of Information Act

GAO
General Accounting Office

HQDA
Headquarters, Department of the Army

i.e.
An abbreviation for id est, meaning "that is"

IG
Inspector General

JA
judge advocate

MACOM
major Army command

MSPB
Merit Systems Protection Board

NAF
nonappropriated fund

OTJAG
Office of The Judge Advocate General

OSC
Office of Special Counsel

PFA
Procurement Fraud Advisor

PFCRA
Program Fraud Civil Remedies Act

PFD
Procurement Fraud Division

PFI
Procurement Fraud or Irregularities

RJA
recovery judge advocate

SAUSA
Special Assistant U.S. Attorney

SJA
staff judge advocate

TDY
temporary duty

TJAG
The Judge Advocate General

UCMJ
Uniform Code of Military Justice

USACIDC
U.S. Army Criminal Investigation Command

USALSA
U.S. Army Legal Services Agency

USARCS
U.S. Army Claims Service

USATDS
U.S. Army Trial Defense Service

USMA
United States Military Academy

USC
United States Code

Section II
Terms

Active Duty
Full-time duty in the active military service of the United States. Includes: full-time training duty; annual training duty; active duty for training; attendance, while in the active military service, at a school designated as a Service School by law or by the Secretary of the military department concerned; and, attendance, while in the active military service, at advanced civil schooling and training with industry. It does not include full-time National Guard duty under title 32, United States Code.

Army activities
Activities of or under the control of the Army, one of its instrumentalities, or the Army National Guard, including activities for which the Army has been designated the administrative agency, and those designated activities located in an area in which the Army has been assigned single service claims responsibility by DOD directive.

Army property
Real or personal property of the United States or its instrumentalities and, if the United States is responsible therefore, real or personal property of a foreign government which is in the possession or control of the Army, one of its instrumentalities, or the Army National Guard, including property of an activity for which the Army has been designated the administrative agency, and property located in an area in which the Army has been assigned single service claims responsibility.

Centralized organization
That organization of a DOD component responsible for coordinating and monitoring of criminal, civil, contractual, and administrative remedies relating to contract fraud. For DOD components other than the Army, the Centralized organizations are as follows: the Office of General Counsel, Department of the Air Force; the Office of the Inspector General, Department of the Navy; and the Office of General Counsel, Defense Logistics Agency.

Claim
The Government's right to recover money or property from any individual, partnership, association, corporation, governmental body, or other legal entity (foreign and domestic) except an instrumentality of the United States. A claim against several joint debtors or tortfeasors arising from a single transaction or incident will be considered one claim.

Claims officer
A commissioned officer, warrant officer, or

qualified civilian employee designated by the responsible commander and trained or experienced in the conduct of investigations and the processing of claims.

Corruption
Practices that include, but are not limited to, solicitation, offer, payment, or acceptance of bribes or gratuities; kickbacks; conflicts of interest; or unauthorized disclosure of official information related to procurement matters.

Counsel for consultation
An attorney, provided by DA at no expense to the soldier or civilian employee, who will provide legal advice to the witness concerning the authority of OSC, the nature of an OSC interview and their individual rights and obligations. The counsel may accompany the witness to the interview and advise the witness during the interview. No attorney-client relationship is established in this procedure.

Counsel for representation
An attorney, provided by DA at no expense to the soldier or civilian employee, who will act as the individual's lawyer in all contacts with the MSPB and the OSC during the pendancy of the OSC investigation and any subsequent OSC initiated action before the MSPB. An attorney-client relationship will be established between the individual and counsel for representation.

DA personnel
DA personnel includes the following:

a. Military and civilian personnel of the Active Army and The U.S. Army Reserve.

b. Soldiers of the Army National Guard of the United States (title 10, USC) and, when specified by statute or where a Federal interest is involved, soldiers in the Army National Guard (title 32, USC). It also includes technicians under 32 USC 709(a)(d).

c. USMA cadets.

d. Nonappropriated fund employees.

e. Foreign nationals who perform services for DA overseas.

f. Other individuals hired by or for the Army.

Debarment
Administrative action taken by a debarring authority to exclude a contractor from Government contracting and Government-approved subcontracting for a specified period.

Deciding Official
SJA, legal adviser, or Litigation Division attorney who makes the final determination concerning release of official information.

DOD criminal investigation organizations
Refers to the USACIDC; the Naval Investigative Service; the U.S. Air Force Office of Special Investigations; and the Defense Criminal Investigative Service, Office of the Inspector General, DOD.

Fraud
Any intentional deception of DOD (including attempts and conspiracies to effect such deception) for the purpose of inducing DOD action or reliance on that deception. Such practices include, but are not limited to, the following: bid-rigging; making or submitting false statements; submission of false claims; use of false weights or measures; submission of false testing certificates; adulterating or substituting materials; or conspiring to use any of these devices.

Improper or Illegal Conduct

a. A violation of any law, rule, or regulation in connection with Government misconduct.

b. Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Information exempt from release to the public
Those categories of information that may be withheld from the public under one or more provisions of law.

Judge advocate
An officer so designated (AR 27–1).

Legal adviser
A civilian attorney who is the principal legal adviser to the commander or operating head of any Army command or agency.

Litigation
Legal action or process involving civil proceedings, i.e., non- criminal.

Litigation in which the United States has an interest

a. A suit in which the United States or one of its agencies or instrumentalities has been, or probably will be, named as a party.

b. A suit against DA personnel and arises out of the individual's performance of official duties.

c. A suit concerning an Army contract, subcontract, or purchase order under the terms of which the United States may be required to reimburse the contractor for recoveries, fees, or costs of the litigation.

d. A suit involving administrative proceedings before Federal, State, municipal, or foreign tribunals or regulatory bodies that may have a financial impact upon the Army.

e. A suit affecting Army operations or which might require, limit, or interfere with official action.

f. A suit in which the United States has a financial interest in the plaintiff's recovery.

g. Foreign litigation in which the United States is bound by treaty or agreement to ensure attendance by military personnel or civilian employees.

Medical care
Includes hospitalization, outpatient treatment, dental care, nursing service, drugs, and other adjuncts such as prostheses and medical appliances furnished by or at the expense of the United States.

Misdemeanor
An offense for which the maximum penalty does not exceed imprisonment for 1 year. Misdemeanors include those offenses categorized as petty offenses (18 USC 3559).

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

Operating Forces
Those forces whose primary missions are to participate in combat and the integral supporting elements thereof. Within DA, the operating forces consist of tactical units organized to conform to tables of organization and equipment (TOE).

Personnel Action
These include—

a. Appointment.

b. Promotion.

c. Adverse action under 5 USC 7501 et seq. or other disciplinary or corrective action.

d. Detail, transfer, or reassignment.

e. Reinstatement.

f. Restoration.

g. Reemployment.

h. Performance evaluation under 5 USC 4301 et seq.

i. Decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.

j. Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

Private Litigation
Litigation other than that in which the United States has an interest.

Process
The legal document that compels a defendant in an action to appear in court; e.g., in a civil case a summons or subpoena, or in a criminal case, a warrant for arrest, subpoena, or summons.

Prohibited Personnel Practice
Action taken, or the failure to take action, by a person who has authority to take, direct others to take, recommend, or approve any personnel action—

a. That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital

status, or political affiliation, as prohibited by certain specified laws.

b. To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual.

c. To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

d. To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

e. To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

f. To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

g. To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 USC 3110) of the employee, if the position is in the agency in which the employee is serving as a public official or over which the employee exercises jurisdiction or control as an official.

h. To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower, as defined below.

i. To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation.

j. To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

k. To take or fail to take any other personnel action if the taking of, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 USC 2301.

Prosecutive Authorities
These include—

a. A U.S. Attorney.

b. A prosecuting attorney of a State or other political subdivision when the U.S. Attorney has declined to exercise jurisdiction over a particular case or class of cases.

c. An SJA of a general court-martial convening authority considering taking action against a person subject to the UCMJ.

Recovery JA
A JA or legal adviser responsible for assertion and collection of claims in favor of the United States for property claims and medical expenses.

Significant Case of Fraud and Corruption
A procurement fraud case involving an alleged loss of $100,000 or more; all corruption cases related to procurement that involve bribery, gratuities, or conflicts of interest; any defective products or product substitution in which a serious hazard to health, safety or operational readiness is indicated, regardless of loss value; and, any procurement fraud case that has received or is expected to receive significant media coverage.

Staff judge advocate
An officer so designated (AR 27–1). The SJA of an installation, a command or agency reporting directly to HQDA, or of a major subordinate command of the U.S. Army Materiel Command, and the senior Army JA assigned to a joint or unified command.

Subpoena
A process to cause a witness to appear and give testimony, e.g., at a trial, hearing, or deposition.

Suspension
Administrative action taken by a suspending authority to temporarily exclude a contractor from Government contracting and Government-approved subcontracting.

Suspension and Debarment Authorities
Officials designated in DFARS, section 9. 403, as the authorized representative of the Secretary concerned.

Tortfeasor
A wrongdoer; one who commits a tort.

Section III
Special Abbreviations and Terms
This section contains no entries.

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Army Regulation 27–40

Legal Services

Litigation

Headquarters
Department of the Army
Washington, DC
19 September 1994

Unclassified

SUMMARY of CHANGE

AR 27-40
Litigation

This revision--

- o Devotes a separate chapter to service of process (chap 2).
- o Replaces "investigative report" with "litigation report" reflecting current usage (chap 3).
- o Devotes a separate chapter to individual liability (chap 4).
- o Treats environmental litigation (chap 6).
- o Deletes coverage of criminal prosecutions in U.S. Magistrate and District Courts (see AR 27-10).
- o Delegates more authority to the installation level to determine release of information and appearance of witnesses (chap 7).
- o Updates procedures to obtain release from local or State jury duty (chap 10).

Headquarters
Department of the Army
Washington, DC
19 September 1994

*Army Regulation 27–40

Effective 19 October 1994

Legal Services

Litigation

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the Secretary of the Army

History. This printing publishes a complete revision of this Army regulation. Because the publication has been revised extensively, the changed portions have not been highlighted.

Summary. This regulation prescribes policy and procedures for litigation in civilian court proceedings, including the following: providing representation of the Army and its personnel in Federal and State court proceedings; remedies for procurement fraud; environmental litigation; bankruptcy; release of information and appearance of witnesses in criminal and civil court actions; procedures to follow when soldiers are summoned for jury duty; and, procedures for cooperation with the Office of Special Counsel.

Applicability. This regulation applies to all DA personnel (see glossary), including the Active Army, the Army National Guard, and the U.S. Army Reserve. This regulation applies during partial and full mobilization.

Proponent and exception authority. The proponent of this regulation is The Judge Advocate General. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief under their supervision within the proponent agency who holds the grade of colonel or the civilian equivalent.

Army management control process. This regulation is not subject to the requirements of AR 11–2. It does not contain internal control provisions.

Supplementation. Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval from the Office of The Judge Advocate General, ATTN: Litigation Division (DAJA–LT), 901 North Stuart Street, Arlington, VA 22203–1837.

Interim changes. Interim changes to this regulation are not official unless authenticated by the Administrative Assistant to the Secretary of the Army. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. Users are invited to send comments and suggestions to Office of The Judge Advocate General, ATTN: Litigation Division (DAJA–LT), 901 North Stuart Street, Arlington, VA 22203–1837.

Distribution. Distribution of this publication is made in accordance with DA Form 12–09–E, block number 2040, intended for command levels B,C,D, and E for Active Army, Army National Guard, and U.S. Army Reserve.

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*This regulation supersedes AR 27–40, 2 December 1987, and rescinds DA Form 2135, May 1973.

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Glossary

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Chapter 1
General

1–1. Purpose

a. This regulation prescribes policies and procedures for the following:

(1) Defensive and affirmative litigation in Federal and State civilian courts where the Army or Department of Defense (DOD) has an interest in the matter.

(2) Proceedings before Federal or State administrative bodies, such as utility rate commissions.

(3) Release of official information and testimony by Department of the Army (DA) personnel with regard to litigation.

(4) Remedies for procurement fraud and corruption.

(5) Environmental civil litigation and administrative proceedings.

(6) Proceedings before the Office of Special Counsel.

b. This regulation does not apply to Department of the Army (DA) or DOD proceedings such as courts-martial or administrative boards.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and terms used in the regulation are explained in the glossary.

1–4. Responsibilities

a. United States Department of Justice (DOJ). DOJ will defend litigation in domestic and foreign courts, against the United States, its agencies and instrumentalities, and employees whose official conduct is involved. The various U.S. Attorney Offices, under the oversight of the Attorney General, will conduct much of the representation.

b. The Judge Advocate General (TJAG). Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General Counsel, TJAG is responsible for litigation in which the Army has an interest. Except with respect to proceedings addressed in subparagraph *i* below, only TJAG (or a designee) will communicate to DOJ the Army's position with regard to settlement of a case.

c. Assistant Judge Advocate General For Civil Law and Litigation (AJAG–CL). Responsible to TJAG for litigation issues; supervises Chief, Litigation Division.

d. Chief, Litigation Division. Reports to AJAG–CL and is responsible for the following:

(1) Supervising litigation in which the Army has an interest.

(2) Acting for TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases, subject to the supervision of TJAG and AJAG–CL.

(3) Delegating responsibility for cases if appropriate.

(4) Serving as primary contact with DOJ on litigation.

(5) Accepting service of process for DA and for the Secretary of the Army in his or her official capacity. (See 32 CFR 257.5.)

e. Special Assistant U.S. Attorneys (SAUSAs) and DOJ special attorneys. Army judge advocates and civilian attorneys, when appointed as SAUSAs under 28 USC 543, will represent the Army's interests in either criminal or civil matters in Federal court under the following circumstances:

(1) *Felony and misdemeanor prosecutions in Federal court.* Army attorneys, at the installation level, after being duly appointed (see AR 27–10), will prosecute cases, in which the Army has an interest, in Federal court. Army attorneys who prosecute criminal cases will not represent the United States in civil litigation without authorization from the Chief, Litigation Division.

(2) *SAUSAs for civil litigation.* By assignment of TJAG and upon the approval of the U.S. Attorney, judge advocates will serve within a U.S. Attorney's office to represent the Government in litigation in which the Army or DOD has an interest. These judge advocates have the same general authority and responsibility as an Assistant U.S. Attorney.

(3) *Special Attorneys assigned to DOJ.* By assignment of TJAG and with the concurrence of the appropriate DOJ official, judge advocates will work as Special Attorneys for DOJ. Special Attorneys are authorized to represent the United States in civil litigation in which the Army or DOD has an interest.

f. Attorneys at Army activities or commands. Staff judge advocates (SJAs) or legal advisers, or attorneys assigned to them, will represent the United States in litigation only if authorized by this regulation or delegated authority in individual cases by the Chief, Litigation Division.

g. Commander, U.S. Army Claims Service (USARCS). The Commander, USARCS, and USARCS attorneys, subject to AR 27–20, chapter 4, will maintain direct liaison with DOJ in regard to administrative settlement of claims under the Federal Tort Claims Act.

h. Chief, Contract Law Division, OTJAG. The Chief, Contract Law Division, attorneys assigned to the Contract Law Division, and other attorneys designated by the Chief, Contract Law Division, in litigation involving taxation, will represent DA in negotiation, administrative proceedings, and litigation, and maintain liaison with DOJ and other Governmental authorities.

i. Legal Representatives of the Chief of Engineers. The Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel will maintain direct liaison with DOJ and represent DA in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers (COE).

j. Chief Trial Attorney, Contract Appeals Division, USALSA. The Chief Trial Attorney, attorneys assigned to the Contract Appeals Division, and attorneys designated by the Chief Trial Attorney, will represent the Government before the Armed Services Board of Contract Appeals (ASBCA) and the General Services Board of Contract Appeals (GSBCA). They will maintain direct liaison with DOJ concerning appeals from ASBCA and GSBCA decisions. The Chief Trial Attorney has designated COE attorneys to act as trial attorneys in connection with COE contract appeals.

k. Chief, Regulatory Law Office, USALSA. The Chief, Regulatory Law Office, attorneys assigned to the Regulatory Law Office, and other attorneys designated by the Chief, will represent DA consumer interests in regulatory matters before State and Federal administrative agencies and commissions, including but not limited to proceedings involving rates and conditions for the purchase of services for communications (except long-distance telephone), transportation, and utilities (gas, electric, water and sewer). They will maintain direct liaison with DOJ for communications, transportation, and utilities litigation.

l. Chief, Intellectual Property Law Division, USALSA. The Chief, Intellectual Property Law Division, and the attorneys assigned thereto, will represent DA in matters pertaining to patents, copyrights, and trademarks. They will maintain direct liaison with DOJ and represent the DA in intellectual property issues.

m. Chief, Labor and Employment Law Office, OTJAG. The Chief, Labor and Employment Law Office, attorneys assigned thereto, and attorneys identified as labor counselors will represent DA in matters pertaining to labor relations, civilian personnel, and Federal labor standards enforcement before the following: Federal Labor Relations Authority; Merit Systems Protection Board; Equal Employment Opportunity Commission; Department of Labor; National Labor Relations Board; and, State workmen's compensation commissions. In the event any individual mentioned in this subparagraph intends to make a recommendation to DOJ concerning an appeal of any case to a U.S. Court of Appeals, such recommendation will first be coordinated with Litigation Division.

n. Chief, Procurement Fraud Division, USALSA. The Chief, Procurement Fraud Division, attorneys assigned thereto, and other attorneys designated by the Chief, will represent DA in all procurement fraud and corruption matters before the Army suspension and debarment authority and before any civil fraud recovery administrative

records privileged from release should be retained by the custodian pending the court's ruling upon the Government's motion.

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

d. Classified and privileged materials. Requests from DOJ, U.S. Attorneys, or attorneys for other Governmental entities for records that are classified or otherwise privileged from release will be referred to the Litigation Division. (See para 7–2*g*.)

Section III
DA Personnel as Witnesses in Private Litigation

7–8. Response to subpoenas, orders, or requests for witnesses

a. Policy. The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information.(See glossary.)

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will interfere seriously with the accomplishment of a military mission.

b. Former DA personnel. Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (*a*(1) above) or concerning expert testimony prohibited by paragraph 7–10 below. In those instances, the subject of the request or subpoena should take the action specified in paragraphs 7–2*c* and 7–3 of this regulation.

c. Present DA personnel. Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

d. Discretion to testify. Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if any, of refusal. Any individual not authorized to consult with Army counsel should consult with private counsel, at no expense to the Government.

7–9. Official information

a. In instances involving paragraph 7–8*a*(1) above, the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested, or to HQDA pursuant to paragraph 7–3*a* above. The deciding official will determine whether to release the information sought under the principles established in paragraph 7–5 above. If funding by the United States is requested, see paragraph 7–16*d* of this regulation.

b. If the deciding official determines that the information may be released, the individual will be permitted to be interviewed, deposed, or to appear as a witness in court provided such interview or appearance is consistent with the requirements of paragraphs 7–10 and 7–11 below. (See, for example, fig 7–2.) A JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without HQDA approval. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

7–10. Expert witnesses

a. General rule. Present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. Former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See fig 7–3.) An SJA or legal adviser is authorized to deny a request for expert testimony, which decision may be appealed to the Litigation Division.

b. Exception to the general prohibition. If a requester can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, the Litigation Division may grant special written authorization for present or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

c. Exception for AMEDD personnel. Members of the Army medical department or other qualified specialists may testify in private litigation with the following limitations (see fig 7–4):

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions they have taken in the regular course of their duties.

(2) They limit their testimony to factual matters such as the following: their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment.

(3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

d. Court-ordered expert or opinion testimony. If a court or other appropriate authority orders expert or opinion testimony, the witness will notify the Litigation Division immediately. If the Litigation Division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. If directed by the Litigation Division, however, the witness will decline respectfully to comply with the subpoena or order. (See *United States ex. rel. Touhy v. Ragen.* 340 U.S. 462 (1951).)

e. Expert witness fees. All fees tendered to present DA personnel as an expert or opinion witness, to the extent they exceed actual travel, meals, and lodging expenses of the witness, will be remitted to the Treasurer of the United States.

7–11. Interference with mission

If the absence of a witness from duty will interfere seriously with the accomplishment of a military mission, the SJA or legal adviser will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal adviser will refer the matter to the Litigation Division.

Section IV
Litigation in Which the United States Has an Interest

7–12. Response to subpoenas, orders, or requests for witnesses

a. Referral to a deciding official. Requests, subpoenas, or orders for official information, interviews, or testimony of present or former DA personnel in litigation or potential litigation in which the United States has an interest, including requests from DOJ, will be resolved by the SJA or legal adviser pursuant to the principles of this chapter. The Litigation Division will be consulted on issues that cannot be resolved by the SJA or legal adviser.

b. Reassignment of witnesses. When requested by the U.S. Attorney, the SJA or legal adviser will ensure that no witnesses are reassigned from the judicial district without advising the DOJ attorney. If a witness is vital to the Government's case and trial is imminent, the SJA or legal adviser should make informal arrangements to retain the witness in the command until trial. If this is not feasible, or if a satisfactory arrangement cannot be reached with the

DOJ attorney, the SJA or legal adviser should notify the Litigation Division.

7–13. Expert witnesses

Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to the Litigation Division unless the request involves a matter that has been delegated by the Litigation Division to an SJA or legal adviser. In no event, may present or former DA personnel furnish expert or opinion testimony in a case in which the United States has an interest for a party whose interests are adverse to the interests of the United States.

7–14. News media and other inquiries

News media inquiries regarding litigation or potential litigation will be referred to the appropriate public affairs office. DA personnel will not comment on any matter presently or potentially in litigation without proper clearance. Local public affairs officers will refer press inquiries to HQDA (SAPA), WASH DC 20310-1500, with appropriate recommendations for review and approval by the Office of the Chief of Public Affairs. All releases of information regarding actual or potential litigation will be coordinated with the Litigation Division prior to release.

Section V
Status, Travel, and Expenses of Witnesses

7–15. Witnesses for the United States

a. Status of witness. A soldier authorized to appear as a witness for the United States, including those authorized to appear under paragraph 7-16*d* below, will be placed on temporary duty. If USAR or NG personnel are requested as witnesses for the United States, and if their testimony arises from their active duty service, they should be placed on active duty to testify. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10. DA personnel who appear as necessary witnesses for a party asserting the Government's claim for medical care expenses are witnesses for the United States.

b. Travel arrangements. Travel arrangements for witnesses for the United States normally are made by DOJ through the Litigation Division for other than local travel. The Litigation Division will issue instructions for this travel, including fund citation, to the appropriate commander. A U.S. Attorney, or an attorney asserting the Government's medical care claim under chapter 5 of this regulation, may make arrangements for local travel through the SJA or legal adviser for attendance of a witness who is stationed at an installation within the same judicial district, or not more than 100 miles from the place where testifying. Other requests, including those under paragraph 7–16*d* below, will be referred to the Litigation Division. The instructions from the Litigation Division, or the request from the U.S. Attorney or the attorney asserting the Government's claim, will serve as a basis for the issuance of appropriate travel orders by the local commander.

c. Travel and per diem expenses. The witness' commander or supervisor should ensure that the witness has sufficient funds to defray expenses. The SJA or legal adviser will provide assistance.

(1) Where local travel is performed at the request of a U.S. Attorney and the testimony does not involve information acquired in the performance of duties, transportation arrangements (costs) and any per diem expenses are the responsibility of the U.S. Attorney.

(2) An attorney asserting the Government's medical care or property claim may be required to advance local travel expense money to the witness requested and to include these in recoverable costs where the Government's claim is not large enough to justify expenditures of Government travel funds.

(3) Other local travel and per diem expenses for cases involving Army activities or claims are proper expenses of the command issuing the orders.

(4) Litigation Division will furnish travel expense and per diem funds for other than local travel and will receive reimbursement from DOJ or other Government agencies as appropriate.

7–16. Witnesses for a State or private litigant

a. Status of witness. If authorized to appear as a witness for a State or private litigant, and the testimony to be given relates to information obtained in the performance of official duties, a soldier will attend in a permissive TDY status. If authorized to appear as a witness, but the testimony does not relate to information obtained in the performance of official duties, a soldier may be granted a pass or permissive TDY under AR 630–5, or be required to take ordinary leave. The status of a civilian employee will be determined under Federal Personnel Manual 630, subchapter 10.

b. Travel arrangements. The requesting party or State agency will make all travel arrangements for attendance of DA personnel authorized to appear as witnesses for a State or private litigant. The local commander may issue appropriate orders when necessary.

c. Travel expenses. The United States may not pay travel, meals, and lodging expenses of the witness, other than normal allowances for subsistence pursuant to the DOD Military Pay and Allowances Entitlements Manual. These expenses are solely a matter between the witness and the party seeking his or her appearance. Witnesses ordinarily should be advised to require advance payment of such expenses. Soldiers authorized to appear in a pass or permissive TDY status are not entitled to receive witness attendance fees, but may accept travel, meals, and lodging expense money from the requesting litigant. All witness fees tendered the soldier, to the extent they exceed such actual expenses of the member, will be remitted to the Treasurer of the United States. A civilian employee authorized to appear in his or her official capacity will accept the authorized witness fees, in addition to the allowance for travel and subsistence, and make disposition of the witness fees as instructed by his or her personnel office.

d. Funding by the United States. Requests for DA personnel to appear at Government expense as witnesses in State or local proceedings for a party other than the United States, including cases involving domestic violence or child abuse, will be referred to the Litigation Division. The Litigation Division may authorize travel and per diem expenses under paragraph 7–15 above when the case is one in which the United States has a significant interest.

7–17. Witnesses before foreign tribunals

a. Referral to the SJA. Requests or subpoenas from a foreign Government or tribunal for present DA personnel stationed or employed within that country to be interviewed or to appear as witnesses will be forwarded to the SJA of the command exercising general court-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The SJA will determine the following:

(1) Whether a consideration listed in paragraph 7–8*a*(1) through (3) above applies.

(2) Whether the information requested is releasable under the principles established in section II of this chapter.

(3) Whether the approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity may be involved.

b. United States has an interest in the litigation. If the SJA determines that the United States has an interest in the litigation, the commander may authorize the interview or order the individual's attendance in a temporary duty status. The United States will be deemed to have an interest in the litigation if it is bound by treaty or other international agreement to ensure the attendance of such personnel.

c. United States has no interest in the litigation. If the SJA determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness under the principles established in section III of this chapter.

d. Witnesses located outside the requester's country. If the requested witness is stationed in a country other than the requester's, the matter will be referred to the Litigation Division.