

## **SERVING LEGAL PROCESS ON MILITARY PERSONNEL**

by Mark E. Sullivan\*

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**Q. Help! I just got my first “military case” and I’m baffled! My client left her husband, Major John Smith, two years ago and she hears he’s been reassigned to another military base recently. I want to serve him and I need some guidance on how to do it. Can I simply mail the “divorce papers” to his commanding officer at his base here in the U.S. and request service on Major Smith?**

**A.** Whoa! Let’s make sure you serve Major Smith the *right way*, which means “the legal way.” Does your state statute allow a commanding officer to serve a servicemember (SM)? Does it allow service on an individual by serving his or her commander? Perhaps not. Let’s try the following steps in serving the husband.

First of all, make sure you have a valid basis for jurisdiction over Major Smith. Start your analysis here, lest you start a lawsuit that’ll just be dismissed later for lack of subject matter jurisdiction. Check your statutes to see whether you need *in personam* jurisdiction (as with a child support case) or merely *in rem* jurisdiction (as where you’re suing to change the *status* of the parties by obtaining only a divorce). Take a close look at your state’s “long-arm statutes.” SMs generally retain the domicile they initially had when they entered military service. You can usually file suit against a military member under the same rules you’d use when suing any other person located outside your state. Long-arm jurisdiction is often available if you can prove, for example, that the marriage was performed within your state, a child was born there or lived in the state with the defendant, or the married couple lived in the state at some point.

**Q. Are these specific federal rules for service of process?**

**A.** You can obtain service on SMs by looking at the rules for service on military bases and on ships in U.S. waters set out in: 32 C.F.R. § 516 for the Army or 32 C.F.R. § 720.20 for the Navy and Marine Corps.

When a support claim is involved, some attorneys use the Federal Parent Locator Service to find the individual. To start the process, contact your local Child Support Enforcement Agency.

You should also review the specific rules of civil procedure in your jurisdiction. Often the easiest method is service by certified mail, return receipt requested.

Practice pointer: The best publication describing service of civil process on military personnel, with especially detailed information on service on a military base, is the North Carolina School of Government's *Service of Process and the Military*, authored by W. Mark C. Weidemaier and published in December 2004. You can find it posted at <http://www.nclamp.gov>. Click on "Resources," and go to "Administration of Justice—Service of Process and the Military."

**Q. Doesn't the commanding officer of Major Smith have to serve him?**

A. Military officials have no responsibility for serving process on or off the military installation, but upon reasonable request they will often give the SM the opportunity to *accept service*. The best tip is to send your documents to the unit commander and request that they be given to the military member with a form to execute for acceptance of service. He or she will usually be given the chance to talk to a legal assistance attorney before deciding whether to accept service of the documents.

Practice pointer: Legal assistance attorneys on base may be unfamiliar with the law of your particular state. In your letter to the commander or the member, mention the adverse effects that can result from delays (i.e., increased legal fees, which may be assessed against the member in the end, the possibility of a retroactive support order and the resulting arrearage when a support is finally issued, etc.). This may reduce the use of delaying tactics.

Just because Major John Smith is stationed at, and maybe living on, a military installation in the U.S. doesn't mean you cannot use the sheriff or a process-server to accomplish service. In such cases, military authorities will make the member available for service of process, assuming he is actually at the base (as opposed to being on a "field exercise" for a week or absent for some other reason and thus unavailable).

**Q. What if Major Smith is stationed overseas? How do I serve him?**

A. You can sometimes serve him by registered or certified U.S. mail if the host nation doesn't object (see below). You'll be using "APO" and "FPO" addresses, but remember, these are U.S. mail addresses.

Serving military personnel overseas isn't easy. Occasionally military postal clerks will not send the return receipt back or send a receipt signed by someone else. If you don't receive a response then try the following: First prepare a second set of the documents to be served and place them in an envelope addressed to the member (return receipt affixed and postage paid). Then place this packet inside a larger envelope and address the outside one to the military postal officer for the APO or FPO where the member is located (e.g., Officer-in-Charge, Military Post Office, APO New York 01234). Include a note explaining your unsuccessful attempts to get a return receipt and ask that proper postal procedures be followed to deliver the enclosed correspondence and to send you the properly executed receipt. For more information on how to serve overseas registered and return receipt requested mail, consult the USPS manual at <http://pe.usps.com/text/imm/welcome.htm>.

**Q. This sounds awfully complex. Isn't there a treaty which addresses these issues?**

A. For difficult cases, you may have to resort to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361, 15 Nov 65. The text can be found in Martindale-Hubbell Law Directory Vol. VIII, or at 28 U.S.C. Appendix, Annotation to Rule 4, Fed. R. Civ. Procedure (U.S.C.A.). Very briefly, the procedure to serve people located in signatory nations is as follows: The plaintiff's attorney fills out a request form and mails it with the documents to the foreign nation's "Central Authority" (except for Israel and Great Britain -- for these countries, the *court clerk* must mail the documents). The address and other information are available at the U.S. Code cite above and at the nearest U.S. Marshal's Office, which has a copy of DOJ Memo #386. For some countries, the documents will have to be translated -- see the Appendix in 28 U.S.C. for further information. To get a translation, try the nearest high school, college or university for foreign language help. In the alternative, contact the nearest consulate for the country involved. For problems and information on nonsignatory nations, consult the U.S. State Department's Office of Citizens'

Consular Services, (202) 647-3675, or go to <http://travel.state.gov/travel/>. If you use the Hague Convention, be forewarned that you may be in for a long wait; sometimes it may take several months for the papers to be served on the individual. The U.S. State Department publishes information about service of legal process abroad. Go to: [http://travel.state.gov/law/judicial/judicial\\_680.html](http://travel.state.gov/law/judicial/judicial_680.html).

For service on personnel aboard ships outside U.S. waters, serve by mail (FPO) or request voluntary acceptance of service through the commander. As a last resort, arrange for service through foreign-nation authorities when the ship reaches port. In the meantime, consider using Attorney's Process Service International at 7800 Glenroy Rd., Bloomington, MN 55439, (800) 328-7171. For a list of other process servers see: <http://www.processnet1.com/>.

**Q. The trial's coming up. How can I get Major Smith back to the U.S. for the hearing?**

A. First of all, find out how much leave he has available. Major Smith, and every other member of the armed forces, accumulates 30 days of paid leave every year (at the rate of 2 ½ days per month). Get a copy of his Leave-and-Earnings Statement (LES).

Next, consider whether there's a regulation that allows, authorizes or compels the return of the servicemember. For example, if it's a paternity/nonsupport case, the applicable reference is DoD [Department of Defense] Directive 1327.5, Section 6, "Specific Policies," Paragraph 6.25, which states:

When a servicemember requests leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, leave shall be granted unless a. the member is serving in or with a unit deployed in a contingency operation, or b. exigencies of military service require a denial of such request. The leave taken shall be charged as ordinary leave.

Another way of helping get the servicemember back for trial is to ask the court for a peremptory setting for the hearing. If you move for this before the member departs from his duty station and the court grants it, you can assure your client that his case will be heard and resolved before he has to return to duty, rather than costing him a wasted airline ticket because his case wasn't reached.

**Q. Are there specific rules about joining the federal government in the lawsuit?**

A. In 1975, Congress passed 42 U.S.C. § 659, which waived the government's sovereign immunity, so as to permit garnishment of wages, attachment, and income withholding pursuant to state laws which had been passed pursuant to 42 U.S.C. § 666, dealing with the enforcement of alimony and child support obligations, in regard to funds payable to an individual by the United States as remuneration for employment. Before the statute's passage, the pay of a federal worker was not subject to legal process to enforce legal obligations because the federal government was immune from legal process without its consent. To overcome this obstacle, as part of Title IV-D of the Social Security Act, Congress provided in § 459 of the Act (found in the statute at 42 U.S.C. § 659) for statutory consent for any legal entity of the United States to accept garnishment process specifically for purposes of enforcing the obligations of federal employees for child support and alimony. The statute says that the garnishment authority is equally applicable to military members and to military pensions pursuant to the provisions of § 659(h)(1)(A). The federal regulations which implement this, found at 5 CFR Part 581, provide the specifics as to procedures and requirements for perfecting a garnishment action against a federal employee.

There are certain rules which apply when the case involves support payments from a federal worker or military member. Before the garnishment of a federal employee's pay for support (which includes military pensions), the one who is entitled to support (i.e., the support obligee) has to obtain an underlying support order from the appropriate state court. That order needs to state that the employee or military member must pay a specified amount as either child support or alimony or both.

**Q. Is that all I have to do for a support garnishment?**

A. No. The underlying support order is not enough. This is because that order is not self-executing. To get the garnishment going, the support obligee must obtain an income withholding order (IWO), or some other denominated order in accordance with applicable state law, that specifically requires the government to withhold a specified monthly amount for current support. It may, if applicable, also provide for the payment of arrearages.

**Q. Where can I go if I need help in serving the government or assistance with serving a member of the armed forces?**

A. Appendix A of 5 CFR, Part 581, designates the Defense Finance and Accounting Service (DFAS) as the agent to receive service of legal process for IWO's issued pursuant to 42 U.S.C. § 659 and 5 CFR Part 581 against all employees of the Defense Department, both civilian and military (including Guard, Reserve and retired members). The address for service of process is: DFAS-CL/HGA, Garnishment Operations, P.O. Box 998002, Cleveland, OH 44199-8002.

When it's difficult to effect service of process on someone in the military, go to Appendix B of 5 CFR, Part 581. There you'll find a list of the offices which can assist with service of process.

**Q. What about using the “military locator” to find an individual? What are the addresses to use?**

A. Here are the addresses, current as of September 2012:

**Army:**

US Army Human Resources Command  
Freedom of Information and Privacy Act Office  
(502) 613-4400  
Email: [usarmy.knox.hrc.mbx.foia@mail.mil](mailto:usarmy.knox.hrc.mbx.foia@mail.mil)

**Navy:**

Navy Personnel Command (PERS 312)  
5720 Integrity Drive  
Millington, TN 38055-3120  
(901) 874-3388  
Fax: (901) 874-2000

**Marine Corps:**

HQMC – MMSB – 17  
2008 Elliot Road, Room 203  
Quantico, VA 22134-5030  
(703) 784-3941  
[www.mmsb.usmc.mil](http://www.mmsb.usmc.mil)

**Coast Guard:**

US Coast Guard  
Personnel Command  
2100 2<sup>nd</sup> Street, SW  
Washington, DC 20593  
(202) 493-1200  
Fax: (202) 267-4985

**Air Force:**

HQ/AFPC/DPDXIDL  
550 C. St. West, Suite 50  
Randolph AFB, TX 78150-4752  
(210) 565-2660  
(210) 565-1675

**Q. Are there special rules about serving military members on the installation?**

A. Service of civil process is available on most military installations. Note that military officials have no responsibility for serving process on or off the military installation, but upon reasonable request they often will give the SM the opportunity to accept service. If Major Smith has refused to cooperate in the above method of service, you might write a letter

explaining this to his unit commander along with the documents to be served, requesting that they be given to the major with an attached form to execute for acceptance of service. The commander likely will ask Major Smith if he is willing to accept service of process. If so, Major Smith usually will be given the chance to talk to a legal assistance attorney before deciding whether to accept service of the documents. If Major Smith declines service of process, the appropriate commander or supervisor will advise the person requesting service of process that other means must be pursued.

**Q. Do I have to serve Major Smith on base?**

A. You also can serve Major Smith at his military address or his residence (on or off base) by registered or certified mail, return receipt requested, depending on your state statute for service of process. If you want to be sure that only Major Smith is served and that no one else signs the card for the registered or certified mail, then specify “Restricted Delivery,” and *star* or *highlight* this on the card to remind postal service personnel of its importance. All too often, unfortunately, a letter that was supposed to be served only on the SM comes back to the office signed by someone else with no indication as to why that person was allowed to sign for the restricted delivery packet.

There are also instances of the return receipt for certified or registered mail “going missing.” If you have tried a second time to serve Major Smith at his base or on board ship, and the return receipt still fails to appear, try writing to the unit commander with a demand that proper postal procedures be followed in delivering mail to Major Smith (or accepting his refusal) through a return receipt, or else a formal complaint will be sent to the United States Postal Service, with a copy to the appropriate Inspector General’s office.

**Q. Can you provide some pointers about serving individuals on base?**

A. Just because Major Smith is stationed at, and maybe living on, a military installation in the United States does not mean you cannot use a deputy sheriff or a process server to accomplish service. In such cases, military authorities will make the SM available for service of process, assuming he or she is actually at the base (as opposed to being on a “field exercise” for a week or otherwise unavailable). Use the SM’s military unit address (e.g., MAJ Jake Smith, SSN 111-22-3333, 3rd Combat Support Battalion, Ft. Swampy, East Virginia 29876) or his or

her military residential address on post (e.g., MAJ Jake Smith, SSN 111-22-3333, 124 Bugle Blvd., Bastogne Hills, Ft. Swampy, East Virginia 29876) to designate the address for service to the person who is serving the civil papers on the SM.

This procedure may not work, however, when the documents are issued by a court outside the county or state in which the installation is located. If the request for service of a state court's civil process originates from a state other than where the military base is located, a commander will determine whether the SM is willing to accept service pursuant to the laws of the jurisdiction issuing the process. When this is not the case, then the commander will notify the person requesting service of this refusal and state that other alternatives must be used.

**Q. Are there specific rules within the Army for service of legal process on soldiers?**

A. Army policy is to assist civil officials in the service of civil process as provided in AR (Army Regulation) 27-40, Chapter 2. There is no single Army liaison office for accepting the service of court papers (civil process) on soldiers and family members. However, the provost marshal's office (PMO) at Army installations, and the military police who serve there, generally serve as the point of contact for answering questions about service of civil process on soldiers and family members residing, stationed, or employed on that Army installation. Procedures vary from installation to installation depending on applicable state or foreign laws. The regulation for serving Army -personnel on base is set forth in 32 C.F.R. § 516. At many Army bases the local sheriff has a liaison with the base PMO, and a deputy takes all of the documents to be served to the PMO several times a week. Military police then call each SM's unit and have the SM appear at the PMO for service.

**Q. What about the Navy and Marine Corps?**

A. The regulations for serving Navy and Marine Corps personnel at Navy and Marine Corps bases and on ships in U.S. waters are set out in 32 C.F.R. § 720.20.<sup>1</sup> The Chief of Legal Assistance for Marine Corps Base, Camp Lejeune, North Carolina, describes the procedures

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<sup>1</sup> The regulations are also at JAGINST 5800.7E, Chapter 6, which can be found by using a search engine on the Internet.

for serving Marines on that base as follows:

1. Civilian service of process within the Department of the Navy is implemented through the Manual of the Judge Advocate General (JAGMAN). A Google search for “JAGMAN” will get you to the text of the order. Chapter 6 Part A deals with the delivery of DoN [Department of the Navy] personnel and Part B deals with the service of process on DoN personnel.
2. It would unduly disrupt military operations and disrupt good order for the sheriff to try to personally track down service members aboard the Base for service of process. It would also be a time-consuming and inefficient means of accomplishing that task. Accordingly, we have a memorandum of understanding with the Onslow County Sheriff’s Department that is similar to that which I have seen at every base where I have ever been stationed. The essence of the agreement is that the Sheriff will notify the military Civil Process Officer that he desires to serve process on a service member. The Civil Process Officer, who works for the Staff Judge Advocate (the Base General’s principal legal advisor) will contact the Marine’s command. That command is responsible for ensuring the Marine’s presence at the Base law office on the designated day and time. On occasion, of course, the Marine will not be present due to deployment or other out of area assignment, and we will so inform the sheriff. (We also have a similar memorandum of agreement with the Jacksonville Police Department, but we deal with the County Sheriff more often and it is they who serve most of the process on Base.)
3. We also assist local law enforcement to serve arrest warrants on active duty service members, in essentially the same manner. The Marine suspect will be brought to the law office for service of the arrest warrant. If the Marine suspect is deemed a flight risk, we will take appropriate steps to ensure that he does not flee. However, we are not authorized to keep the Marine in our brig solely for the purpose of holding him for some other jurisdiction. After-hours arrest can be effected by calling the Base Command Duty Officer. The CDO is the designated point of contact for all items of import that occur after hours. A new officer is assigned daily. The CDO should have a procedures manual for after-hours arrest that will also provide the names and phone numbers of military officers and employees involved in civil process.
4. The local Magistrate comes out to the Base every Tuesday and Wednesday, which is

when most of the arrest warrants are served. That way, the Marine can be arrested and pay his bond without going to jail. If the offense is sufficiently serious, however, we will assist the Sheriff to effect arrest on any day, in which case the Marine will be taken into custody pending initial appearance.

5. In some cases, a state other than North Carolina wants delivery (arrest) of the service member. Again, the process begins with the requesting state contacting the local Sheriff. The Sheriff will advise the Civil Process Officer of the need to have a Marine present for arrest. The Marine will be advised by a judge advocate of his right to waive or not to waive extradition. The function of the judge advocate is NOT to form an attorney-client relationship with the suspect, but merely to advise him of procedural rights. The JAGMAN prohibits the release of a service member to out-of-state authorities unless those authorities execute a delivery agreement. The text of the agreement can be found at Appendix B to Chapter 6 of the -JAGMAN. Typically, the requesting state will sign the agreement and fax it to us. Our regulation says that the Commanding General is authorized to release the Marine to out-of-state authorities. In practice, however, the CG does not get involved in the process. Typically, the CG delegates this release authority to the SJA, the Civil Process Officer, and others working on his behalf. There are very limited exceptions where we will not deliver the Marine to pursuant to an out-of-state arrest warrant—we want to keep him for our own prosecution, or “extraordinary circumstances” exist, as determined by the Marine’s commander. I have NEVER seen a case wherein delivery was denied based on extraordinary circumstances.
6. Our regulations appear to treat out-of-state process differently than in-state process. That is, the JAGMAN says that the Marine need not accept out-of-state process. As a practical matter, however, we never have an out-of-state authority come to serve process at Camp Lejeune. The out-of-state authority will work through the Onslow County sheriff’s office, and we will follow the same procedure as for in-state process. That is, he sheriff will deliver the foreign process to the law office and we will contact the service member to be served.
7. You inquired concerning the service of process on civilians aboard the Base. A limited amount of on-base housing is provided for military personnel and their families. There is usually a waiting list to get into base housing. The family members are most often

civilians. As a result, we do in fact have civilians residing on Base. The procedure for serving civilians is radically different than for serving service members. The civilians may be served at their on-base residence. In accordance with local procedures, the civilian authorities will be escorted to the Base residence for this purpose.

8. When a service member is subpoenaed to testify on issues arising from his/her official duties, complex additional regulations apply, most notably Secretary of the Navy Instruction 5820.8A. This same instruction applies when Department of the Navy records are sought in connection with litigation. SECNAVINST 5820.8A can be found at the Navy Electronic Directives Site. (Use a Google search for “Navy Directives.” That will get you to the electronic directives. Then click on the index. Go to table 54. Click on SecNavInst 5820.8A.) Most often the request for records comes up in the context of divorce cases: a request for some dirt on the opposing party that may be in the military service record or in some spouse abuse counseling or medical record. The subpoena of Navy personnel in their official capacity does not come up too often. However, when it does it is usually an extremely serious case and/or for expert testimony. For example, expert testimony was requested concerning the contours of Base jurisdiction relating to a capital murder appellant who killed someone on waters adjacent to the Base. These matters may be beyond the purview of your project; however, I mention them because most requestors get it wrong.<sup>2</sup>

**Q. Where is the regulation dealing with the Air Force and service of process?**

- A. There is no specific Air Force instruction that deals with service of process on USAF personnel at an Air Force base. The best source of information is the Talking Paper found at Appendix 1-A at the end of this paper.<sup>3</sup> Appendix 1-A also includes the 1985 legal opinion of the Judge Advocate General of the Air Force on enforcement of state court orders at overseas installations.

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<sup>2</sup> E-mail from Michael S. Archer, Chief of Legal Assistance, Marine Corps Base, Camp Lejeune, North Carolina, to Mark E. Sullivan (Nov. 17, 2004) (on file with author) (Subject: Service of Process on -Military Personnel).

<sup>3</sup> Attachment to e-mail from Lt. Col. Ferah Ozbek, Chief, Legal Assistance and Preventive Law Division, Office of the Judge Advocate General, U.S. Air Force, to Mark E. Sullivan (Mar. 2006) (on file with author) (Subject: Talking Paper on Service of Process on USAF Installations). Reprinted with permission. *See also Service of Process, Enforcement of State Court Orders at Overseas Installations*, Op. JAG, Air Force Civil Law, No. 3, at

**Q. Finally, what about the Coast Guard?**

**A.** The Coast Guard handles service of civil process under Chapter 7 of the Coast Guard Military Justice Manual (MJM), which is found in Commandant Instruction M5810.1D. The Coast Guard's policy is as follows:

The Commanding Officer of an installation is authorized to deliver a military member when requested by local civil authorities of a state for the alleged commission of an offense within that state. The Commanding Officer has such authorization when a proper warrant has been presented and the military member is present within the territorial limits of the state, including the territorial waters of the state. Paragraph 7.B.4, MJM.

Further, it is Coast Guard policy to cooperate with civil authorities to the maximum extent possible consistent with the needs of the service and the individual rights of the Coast Guard members concerned. Paragraph 7.B.3, MJM. This paragraph applies in cases where a summons but not a warrant has been issued for a military member.<sup>4</sup>

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<sup>4</sup> 241 (1985).  
E-mail from Lieutenant Commander Charles Dahill, Legal Assistance Attorney, Headquarters, U.S. Coast Guard, Washington, D.C., to Mark E. Sullivan (Dec. 14, 2004) (on file with author) (Subject: -Service of Process on Base).

## **APPENDIX 1-A AIR FORCE INFORMATION AS TO SERVICE ON BASE AND ABROAD: TALKING PAPER ON SERVICE OF PROCESS ON AIR FORCE INSTALLATIONS**

### **SERVICE OF PROCESS ON AIR FORCE INSTALLATIONS<sup>5</sup>**

- No member of the Air Force may serve process in his or her official capacity, or otherwise direct a member of the armed forces to accept service of process. However, Air Force officials will cooperate with civilian process servers (typically a local law enforcement official or private process server) in providing reasonable access to military members living and working on military installations. OpJAGAF 1969/48
- Except for service of process for child support, service of process upon a military member is no different than service of process on any other American citizen
  - o The rules of the court that has jurisdiction over the litigation determine the type of service required for a particular legal action
  - o In some cases, service or process can be accomplished through registered mail; in others, personal service upon the member may be required
- Each base legal office within the United States and overseas has established procedures for accommodating personal service of process in accordance with local law
  - o Process servers usually gain access to the military member by contacting the installation security forces or office of the staff judge advocate, which will then make arrangements for the member to be available to accept the legal documents
  - o A military member's commander is normally not involved in the service of process action other than to make the member available
- Appendix B to 5 CFR Part 581 lists the agents designated to assist in the service of legal process in civil actions pursuant to orders of State courts to establish paternity and to establish or to enforce support obligations by making Federal employees and members of the Uniformed Services available for service of process, regardless of the location of the employee's workplace or of the member's duty station. For the Department of the Air Force, AFLSA/JACA is the designated agent.
- The Department of Defense officials identified to assist in the service of process shall facilitate an employee's or member's availability for service of process. Additionally, these officials shall be responsible for answering inquiries about their respective organization's service of process rules. Such officials are not responsible for actual service of process and will not accept requests to make such service.
- Service of process overseas is complicated by the fact that the laws of the country in which the person resides control how service of process is accomplished on any American citizen, and not just military members. (See U.S. Dep't of State Fact Sheet, "Service of Legal Documents Abroad," at [http://travel.state.gov/law/info/judicial/judicial\\_680.html](http://travel.state.gov/law/info/judicial/judicial_680.html) for further information)
- For Active Duty, Reserve, ANG and retired military members garnishment notices are handled by Garnishment Operations, Defense Finance and Accounting Service, Cleveland

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<sup>5</sup> Attachment to e-mail from Lt. Col. Ferah Ozbek, Chief Legal Assistance and Preventive Law Division, Office of the Judge Advocate General, U.S. Air Force, to Mark E. Sullivan (Mar. 2006) (on file with author). (Subject: Talking Paper of Service of Process on USAF Installations). Reprinted with permission.

Center - Code L (DFAS-CL/L), P.O. Box 998002, Cleveland, OH 44199-8002, (216) 522--5301. (See DODI 1344.12, AFI 36-2906, and AFI 51-301 for further information)

- To determine the duty status and/or location of a military member (who is not assigned to a sensitive, deployable unit or overseas), a written request may be sent to the Air Force Personnel Center at HQ AFPC/MSIMD, 550 C Street West, Suite 50, Randolph AFB TX 78150-4752, (210) 565-2660.
- Service of process for child support differs and is governed by 5 CFR Part 581. Appendix A to that part specifies:
  - o All military members and DoD civilians can be served at the following: Assistant General Counsel for Garnishment Operations, Defense Finance and Accounting Service, Cleveland Center—Code L (DFAS-CL/L), P.O. Box 998002, Cleveland, OH 44199–8002, (216) 522–5301.
  - o Nonappropriated fund civilian employees of base exchanges can be served at: Army and Air Force Exchange Service, Attention: FA-F/R, PO Box 650038, Dallas, TX 75265–0038, (214) 312–2119.
  - o Nonappropriated fund civilian employees of all other Air Force nonappropriated fund activities can be served at: Office of Legal Counsel, Air Force Services Agency, 10100 Reunion Place, Suite 503, San Antonio, TX 78216–4138, (210) 652–7051.

## ***TOPIC***

### ENFORCEMENT OF STATE COURT ORDERS AT OVERSEAS INSTALLATIONS

#### ***Text of the Decision***

#### **SERVICE OF PROCESS**

This is in response to your request for our opinion concerning the limits of U.S. military jurisdiction and its application in regard to state jurisdiction. Our response is keyed to the specific questions you have raised.

A. Are there any civil legal matters in which the Air Force can cooperate in the service of a state court orders on military personnel assigned overseas?

ANSWER: There are no federal statutes providing for service by military personnel of process issued by state court authorities. Military authorities ordinarily will assist in facilitating **service of process** (i.e., locating and identifying military personnel, permitting process servers to enter military installations upon proper application). However, the **service of process** is a state responsibility and not a function of the military establishment or its personnel. As such, no member of the Air Force, in his official capacity, may act as a state court official for the purpose of enforcing state law which would include the service of state court process.

Our federal system of government was founded on the principle that United States military forces were established to defend against external threats and were not to be used to enforce internal domestic laws. Short of a formal declaration of martial law, federal troops are to be used in a limited backup role where state police forces are in temporary need of assistance. Clearly, the protection of life and property and the maintenance of law and order within any state are the primary responsibilities of the state and local authorities. During the reconstruction period after the civil war these constitutional distinctions were not strictly adhered to and, as a result, there were a number of abuses. In response, congress in 1878 passed the so called Posse Comitatus act (18 U.S.C. 1385) to prevent the unauthorized use of federal troops to execute the domestic laws of the United States. This act remains valid today and confirms the longstanding policy that federal forces are not to be used in a state police enforcement role unless expressly authorized by the constitution or act of Congress.

Because of the restrictions which are based on both law and policy discussed above, the Air Force role in the enforcement and service of state court matters is limited. Thus, a civilian attorney attempting to serve process on an airman stationed overseas should forward the process to the staff judge advocate (SJA) of the base where the airman is stationed and attach a request to the SJA to advise the respondent as to voluntary acceptance of service. The SJA will make it clear to the airman that he is acting only as a conduit and not as a process server. If the airman agrees to accept service, his acknowledgement of the receipt of process may thereafter be returned to the attorney. If the airman is unwilling to accept service voluntarily, the attorney will be advised that it may be possible to effect service through a U.S. civilian official in the foreign

country, such as a U.S. consul. This latter procedure must be handled through the department of state.

B. Is there a role the Air Force would play if the principle of comity was agreed to in this case?

ANSWER: In general the principle of "comity" is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. In other words, should the Air Force as a matter of policy agree to enforce state law? First, it should be noted that the situation in which the rules of comity apply are not present in the case where a state court asks the Air Force to enforce its orders or serve its process. Normally, a court in one jurisdiction will, as a matter of comity, enforce court orders of another jurisdiction where both have similar subject matter jurisdiction. For example, a domestic relations court of one jurisdiction may as a matter of comity accept the decision of a domestic relations court of another jurisdiction and issue appropriate court orders to its own enforcement authorities. However, the rules of comity would not authorize the enforcement authorities of one state to enforce the court orders of another jurisdiction without first complying with the due process and judicial procedures of its own jurisdiction. Simply stated, comity does not authorize a policeman in state x to enforce a court order of state y. Likewise, the Air Force cannot directly enforce state court orders nor can a court-martial with limited criminal jurisdiction issue court orders enforcing state law especially concerning civil law matters such as domestic relation issues.

Secondly, even without the technical legal problems associated with the Air Force attempting to enforce a state court order under the principles of comity, it must be understood that the decision to grant "comity" is a policy one and not a legal decision. In the United States with our federal system, the customs and traditions that tend to mold policy all mitigate against using federal troops to enforce state rights. Our constitutional background and the policy considerations behind the Posse Comitatus act discussed in "a" above all indicate that military enforcement of state law would not be in conformance with united states policy and, indeed, would be a step in the opposite direction.

C. Under the existing comity agreement, what type cases may be tried in military courts?

ANSWER: Courts-martial jurisdiction is not based on any rules of comity nor are we aware of any "comity agreement." a court-martial has limited jurisdiction over persons subject to the uniform code of military justice (UCMJ) (10 U.S.C.. 801 et seq). With a few limited exceptions, this means active duty military personnel only. Its jurisdiction is entirely penal or disciplinary and it has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property or order a criminal forfeiture of seized property.

The purpose of a separate military justice system is to enforce unique military laws and promote discipline in the armed forces. All misconduct, even of military troops, is not proscribed by the ucmj. In 1969, the supreme court further limited military jurisdiction and held that an offense under the code may not be tried by court-martial unless it is "service-connected." for example, an off-base burglary committed by an active duty military member would not normally have

sufficient "service connection" to establish court martial jurisdiction. The point being that court-martial jurisdiction is quite limited in both purpose and scope and is certainly not aimed at the enforcement of state civil laws.

In overseas areas, court-martial jurisdiction is further limited in that for the most part, us forces are subject to the laws of the foreign government as well as the UCMJ. Generally, the details as to the exercise of this concurrent jurisdiction and the few exceptions thereto are set out in Status of Forces Agreements (SOFA). These SOFA arrangements do not establish independent jurisdiction over specific offenses but establish priorities as to who will exercise their existing jurisdiction in a given case. There is no longer any U.S. military court jurisdiction over U.S. civilians accompanying the armed forces abroad in peacetime. With few exceptions, U.S. civil courts have no jurisdiction over them either and they are, therefore, subject to the exclusive jurisdiction of the foreign government.

D. What are the legal prohibitions and restraints on the Air Force in our agreement with Japan?

ANSWER: Our SOFA with Japan is patterned after the NATO/SOFA and particularly, the jurisdictional arrangements are almost identical. The SOFA provides that the U.S. military authorities shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the united states and it recognizes that Japanese authorities have jurisdiction over U.S. armed forces, civilian component and dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan. The U.S. has exclusive jurisdiction over those offenses punishable by the U.S. law and not by Japanese law. An example would be a purely military offense such as AWOL. The Japanese government has exclusive jurisdiction over security offenses against the state, i.e., treason, sabotage, espionage. In cases where the right to exercise jurisdiction is concurrent, the U.S. military authorities have the right to exercise the primary right of jurisdiction in official duty cases and in inter se cases - offenses solely against person or property of the U.S. or another service member (i.e., simple assault between two U.S. soldiers). In all other cases, the Japanese authorities have the primary right to exercise jurisdiction. They may exercise their sovereign right to waive jurisdiction on a case by case basis and frequently do permit the military to exercise jurisdiction in routine criminal offenses.

E. What is the legal position of the Air Force if a state were to issue a warrant for the arrest of a non-military (sic) person who is residing on a U.S. base overseas?

ANSWER: The Air Force authorities cannot enforce state law and we have no authority to execute arrest warrants against civilian personnel even though they may be U.S. citizens residing on a U.S. installation overseas. In our view, the state authorities must comply with the appropriate extradition procedures and request the foreign government who has jurisdiction over the nonmilitary member in their territory to execute the warrant. The Air Force authorities have absolutely no criminal or civil jurisdiction over nonmilitary personnel during peacetime.

F. What responsibility does the Air Force incur if evidence were provided that a military transfer to an overseas base was requested and granted on what appears to be a normal basis but in actuality was requested to avoid enforcement of a state court order?

ANSWER: Air Force-personnel assignments are based primarily on the operational needs of the Air Force. The Air Force does not transfer its members for the purpose of avoiding enforcement of state court orders. On the other hand, a military personnel assignment will not be delayed pending the enforcement or completion of a state court action. While the needs of the service are the primary considerations, the Air Force attempts to maintain a neutral role in this area. We do not transfer military personnel to avoid state court action nor do we transfer personnel in order to make them amenable to a particular jurisdiction.

In our view, the state has no greater rights to proceed against an Air Force member than it does other members of the public in general. If a civilian employee of a private corporation is transferred to an overseas location under similar circumstances, no one would suggest that the private corporation had a duty to maintain its employees within the jurisdiction of the state. The civilian employee can leave the state anytime he wishes. There may be economic or social consequences (i.e., loss of job, separation from family) but there are no legal restrictions. This is not the case with the Air Force member who cannot walk out the door so to speak anytime he chooses. The Air Force member has given up these freedoms for the purpose of assisting in the defense of our country. Under these circumstances, we find it difficult to argue that a military member should have fewer rights under state law than a civilian member of the public in which the military member is sworn to defend.

It should be noted that once a member is transferred out of the state's jurisdiction, all state enforcement action need not terminate. All of the remedies available to the state that would exist if the service member were a private citizen remain. For example, extradition procedures are available in criminal cases and service of process may be perfected through civil authorities such as the U.S. consul, within the Department of State.

Editor's Note: Also see OpJAGAF 1977/15, 18 February 1977 and OpJAGAF 1969/148, 15 August 1969 for an additional discussion of service of process matters.