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SERVICE OF PROCESS AND THE MILITARY

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This bulletin addresses service of process on members of the United States Armed Forces and civilians located on military property. Absent service of process, of course, or a statutory exemption to service, the court lacks jurisdiction to enter a judgment against the defendant.[1] But while fairly routine in most cases, service may be complicated by a defendant's presence on a U.S. military installation, on a military ship in U.S. or foreign waters, or on a base in a foreign country.

Consider a lawsuit against a servicemember who recently has been mobilized for duty and who is currently undergoing in-processing at Fort Bragg before deployment overseas. May the sheriff leave a copy of the summons and complaint with the defendant's spouse or partner at the defendant's former civilian address? If not, and the plaintiff must serve the defendant at Fort Bragg or, worse, at a duty station overseas, what methods of service are available?

This dilemma is not an uncommon one, as members of the Armed Forces may become involved in litigation to the same extent as civilians. In 2001, for example, the Army Legal Assistance Offices reportedly assisted more than 29,000 servicemembers with divorce-related issues.[2] Litigation involving servicemembers, of course, is not limited to domestic law

1. *See, e.g.*, G.S. § 1-75.3; *Freeman v. Freeman*, 155 N.C. App. 603, 606, 573 S.E.2d 708, 711 (2002) (noting need to obtain jurisdiction by service or by method prescribed by statute); *First Union Nat'l Bank v. Rolfe*, 83 N.C. App. 625, 628, 351 S.E.2d 117, 119 (1986) (noting constitutional "mandate[] that a party be given notice and an opportunity to be heard before he can be deprived of a legal claim or defense").

2. *See* Maj. Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 Mil. L. Rev. 49, 62 n.75 (2003); *see also* Maj. Alan L. Cook, *The Armed Forces as a Model Employer in Child Support Enforcement: A Proposal to Improve Service of Process on Military Members*, 155 Mil. L. Rev. 153, 153-54 & nn. 4-6 (1998) (noting varying estimates that the federal government, and primarily the Department of Defense, employed up to 100,000 parents who were in arrears on child support obligations).

matters.[3] Moreover, servicemembers' family members and dependents, as well as civilian employees, may work or live on military installations and become involved with the court system. This bulletin will refer to all such persons as "servicemembers" or "members of the Armed Forces," except where there is reason to distinguish between servicemembers and civilians.

The methods a plaintiff may use to serve a member of the Armed Forces vary depending on a number of factors. These factors include, among others, the location of the relevant military installation; the location of the court that issued the service papers; the nature of federal jurisdiction over the installation; any unique policies implemented by the relevant branch of service; and, if the servicemember is stationed overseas, the effect of any applicable international law and agreements, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, also known as the Hague Convention.[4]

This bulletin provides an overview of service of state court process on members of the Armed Forces. It focuses on litigation involving servicemembers in their individual capacities, rather than litigation resulting from the exercise of official duties or lawsuits purporting to name the United States or a specific branch of the military as a defendant.[5] Nor does the bulletin address the separate, and often complex, question of whether a state may enforce its laws with respect to conduct occurring on a military installation.[6] Moreover, although the bulletin discusses service of process on members of the Armed Forces located outside the United States, readers interested in a more thorough discussion of international service should review Administration of Justice Bulletin No. 2004/07, *International Service of Process Under the Hague Convention* (2004).[7]

General rules governing service of process on members of the Armed Forces

The rules governing service of process on civilian litigants apply to members of the Armed Forces as well.[8] Any difficulty in accomplishing service, therefore, arises not from the fact that the defendant is a servicemember but from the control exercised by the federal government over military installations. So, for example, an off-base servicemember is subject to personal service to the same extent as any other litigant.[9]

3. *See, e.g., Stonewall Ins. Co. v. Horak*, 325 N.W.2d 134 (Minn. 1982) (suit against servicemember located in West Germany based on alleged illegal purchase and supply of liquor to minor involved in accident).

4. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Done at the Hague November 15, 1965 (entered into force for the United States February 10, 1969), 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163; 28 U.S.C. (Appendix following Fed. R. Civ. P. 4).

5. *See, e.g.*, 32 C.F.R. § 516.10(a) (establishing policy that Department of the Army "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"); 32 C.F.R. § 516.14 ("The Chief, Litigation Division, shall accept service of process for Department of the Army or for the Secretary of the Army in his official capacity.").

6. That issue is beyond the scope of this bulletin but generally depends on the nature of the federal government's legislative jurisdiction over the land in question. *See, e.g., State v. Smith*, 328 N.C. 161, 400 S.E.2d 405 (1991) (holding that Superior Court lacked jurisdiction to try defendant as an adult for crimes allegedly committed as a juvenile on the Camp Lejeune military installation). For a brief discussion of federal jurisdiction over property acquired from states, see note 36, *infra*.

7. This bulletin also does not address the effect of the Servicemembers' Civil Relief Act, 50 U.S.C. App. §§ 501 et seq., which provides, among other things, for temporary stays of judicial and administrative proceedings against servicemembers on active duty. The Act does not affect the manner in which members of the Armed Forces must be served with process. *See, e.g., Greco v. Renegades, Inc.*, 761 N.Y.S.2d 426, 428 (N.Y. App. Div. 2003); *McFadden v. Shore*, 60 F. Supp. 8, 9 (E.D. Pa. 1945).

8. No provision of N.C.R.C.P. 4 distinguishes between service on civilian litigants and members of the Armed Forces.

9. *See* G.S. § 1A-1, Rule 4(j)(1)a; *see also In re Custody of Nugent*, 955 P.2d 584, 586-87 (Colo. Ct. App. 1997) (holding that defendant had been properly served in dissolution of marriage/custody action in Colorado when, after repeated, failed attempts at service on military base in Connecticut, defendant was personally served on visit to Colorado). Likewise, in some, limited circumstances, a

Because members of the Armed Forces must be served in the same manner as any other party, the question arises whether they are subject to substituted personal service at a former civilian residence. This bulletin first addresses this question before turning to the mechanics of serving process on military property.

Substituted personal service on members of the Armed Forces

North Carolina Rule of Civil Procedure 4(j)(1)a authorizes service by "leaving copies [of the summons and complaint] at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."[10] Does this rule authorize the sheriff to leave service papers with someone at the servicemember's civilian residence, even though the servicemember now resides on a military installation in the U.S. or abroad?[11]

The answer depends on whether the terms "dwelling house" and "usual place of abode" in Rule 4(j)(1) refer to the servicemember's domicile or, more broadly, to his or her residence. The term "[r]esidence simply indicates a person's actual place of abode, whether permanent or temporary."[12] "Domicile," by contrast, refers to "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."[13] An adult establishes a domicile by being physically present in a place he or she intends to remain,[14] and may retain that domicile even when residing elsewhere:

> To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last-acquired residence a permanent home.[15]

A number of courts have interpreted "usual place of abode," "dwelling house," or similar terms to mean something akin to "domicile."[16] Under such an interpretation, after a servicemember establishes a domicile at a civilian residence, he or she may be served there after being called to duty unless the evidence shows a change of domicile – i.e., that the servicemember did not intend to return and intended to make a permanent home in his or her new place of residence.

A greater number of courts, however, interpret the terms "usual place of abode" and "dwelling house" by engaging in "a practical inquiry as to where the defendant is actually living."[17] These courts construe

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member of the Armed Forces might be subject to service by publication. *See* G.S. §1A-1, Rule 4(j1) (authorizing such service when a party "cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service").

10. G.S. § 1A-1, Rule 4(j)(1)a. The "person of suitable age and discretion" must reside at the defendant's "dwelling house" or "usual place of abode" at the time the summons and complaint are delivered. *See Guthrie v. Ray*, 293 N.C. 67, 70, 235 S.E.2d 146, 148 (1977).

11. If Rule 4(j)(1)a authorizes this manner of service, and if it is consistent with due process (a topic discussed briefly below), substituted personal service might be available even if the servicemember was stationed overseas. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (holding that forum law determines whether service on a party located overseas requires the "transmittal" of documents abroad and is thus subject to the Hague Convention).

12. *Hall v. Wake County Bd. of Elections*, 280 N.C. 600, 606, 187 S.E.2d 52, 55 (1972); *see also* BLACK'S LAW DICTIONARY 1310 (8th ed. 2004) (listing, among definitions of residence, "[t]he place where one actually lives" and "[a] house or other fixed abode; a dwelling").

13. BLACK'S LAW DICTIONARY 501 (8th ed. 2004).

14. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *Hall*, 280 N.C. at 605-06, 187 S.E.2d at 55 ("Two things must concur to constitute a domicile: First, residence; second, the intent to make the place of residence a home.").

15. *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 99 S.E. 240, 245 (1919).

16. *See, e.g., McFadden v Shore*, 60 F Supp 8, 9 (E.D. Pa. 1945*); Ruth & Clark, Inc. v Emery*, 11 N.W.2d 397, 401 (Iowa 1943) (interpreting term "usual place of residence").

17. *Hysell v Murray*, 28 F.R.D. 584, 588 (S.D. Iowa, 1961). These courts recognize that "[s]ervice with our armed forces frequently results in a somewhat nomadic existence . . . . Assignment to a station, camp or ship compels the physical presence of military personnel at spots all over the country, even the world, for fixed periods but does not necessarily result in a change of their domicile." *King v. Fisher*, 117 A.2d 76, 77 (Del. Super. 1955).

"usual place of abode" to mean "the place where a person is physically residing for other than the narrow, limited purpose of a vacation or other short, temporary absence. . . . [I]t must be the place where the defendant is usually to be found."[18] Accordingly, a servicemember's usual place of abode is "the military installation where he is stationed, regardless of whether he is married or intends to return to his former residence at the conclusion of military service."[19] Unless it appears that the servicemember is only temporarily absent from the civilian residence and is actually likely to receive papers delivered there, these courts require service to be made where the servicemember actually resides.[20]

Rather than attempt precise definition, North Carolina courts have analyzed whether a place is a party's dwelling house or usual place of abode "on the facts of the particular case."[21] Their analysis has yielded a definition that is "probably broad enough to embrace any location inhabited by [the] defendant with such frequency that his absence therefrom is only temporary."[22] But the cases do not support the view that a defendant's "dwelling house" or "usual place of abode" will always include the defendant's domicile. The fact that a servicemember remains domiciled at his or her civilian residence, therefore, does not mean that substituted service may always be made at that address. Rather, as the following cases suggest, substituted service will likely be valid only when made on a suitable person at a place from which the servicemember is only temporarily absent, and therefore under circumstances where it is reasonably likely that the defendant will receive actual notice of the action.

- In *Gibbey v. Lindsey*, 149 N.C. App. 470, 560 S.E.2d 589 (2002), the Court of Appeals affirmed the Superior Court's refusal to set aside a default judgment entered against a defendant in a wrongful death case. The sheriff had left a copy of the summons and complaint at the residence of defendant's mother, with whom defendant had formerly lived. The defendant had left his mother's home several weeks previously to stay with relatives in South Carolina. Nevertheless the Court of Appeals held that the defendant failed to present clear and unequivocal evidence of improper service, noting that the defendant left without telling his mother where he was going, left most of his possessions behind, considered his mother's residence his "home," and had no intention of staying in South Carolina "for any length of time." *Id.* at 473, 560 S.E.2d at 592. The defendant's mother also testified that, at the time of service, "her home was Defendant's primary residence." *Id.* at 473, 560 S.E.2d at 592.

- In *Van Buren v. Glasco*, 27 N.C. App. 1, 217 S.E.2d 579 (1975),[23] the Court of Appeals again affirmed a Superior Court's refusal to set aside a default judgment. The sheriff had left a copy of the summons and complaint with the defendant's fifteen year old son at a house in North Carolina owned jointly by the defendant and his wife. Although the defendant had been working and living in South Carolina for more than a year – residing in another house owned jointly with his wife – the defendant's wife and son lived at the North Carolina home, and defendant returned home from South Carolina on the "frequently recurring basis" of at least twice a month. The Court of Appeals held that "when all of the circumstances are considered, [defendant's] relationship and connection with the North Carolina dwelling were such *that there was a reasonable probability that substitute service of process at that dwelling would, as it in fact here did, inform him of the*

18. *Whetsel v. Gosnell*, 181 A.2d 91, 94 (Del. 1962).

19. *Id.*

20. *See, e.g., Neher v District Court for Fourth Judicial Dist*., 422 P.2d 627, 628 (Colo. 1967); *Whetsel v Gosnell*, 181 A.2d 91, 94 (Del. 1962); *Hysell*, 28 F.R.D. at 588; *James v Russell F. Davis, Inc.*, 163 F Supp 253, 256-57 (N.D. Ind. 1958); *Booth v Crockett*, 173 P.2d 647, 648-50 (Utah 1946); *Kurilla v Roth*, 38 A.2d 862, 863 (N.J. 1944).

21. *Van Buren v. Glasco*, 27 N.C. App. 1, 5, 217 S.E.2d 579, 582 (1975) (quotation omitted), *overruled on other grounds by Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

22. *See* G. Gray Wilson, *North Carolina Civil Procedure* § 4-13 (Michie, 2d ed. 1995). Note, too, that a defendant may have more than one place of abode. *See Glasco*, 27 N.C. App. at 6, 217 S.E.2d at 582.

23. *Van Buren* was overruled on other grounds by *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

proceedings against him in apt time to permit him to assert in timely fashion such defenses as he might have." *Id.* at 6, 217 S.E.2d at 582 (emphasis added). In addition, the Court noted, but did not decide, that the defendant's South Carolina residence might also qualify as a "dwelling house or usual place of abode."

- In *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974), the North Carolina Supreme Court held that a defendant who was temporarily out of the country was not subject to service of process by publication, because the plaintiff could have effected substituted service at the defendant's North Carolina residence. The sheriff had attempted to serve the defendant at his residence in Guilford County, but had returned the summons and complaint unserved with a notation indicating that the defendant was in Amsterdam at an unknown address. The plaintiff's attorney also submitted an affidavit stating that he had contacted someone at the defendant's residence, who had not known how long the defendant would remain in Europe. The defendant returned from Europe approximately one month later. Without extensive discussion, the Court concluded that "plaintiff could have and therefore should have effected" substituted personal service. *See id.* at 141, 202 S.E.2d at 558. There appeared to be no dispute, however, that the defendant in fact resided in North Carolina at the time of service and intended to return.[24]

None of these cases involves service on a member of the Armed Forces residing on a military installation, much less one deployed overseas. They suggest, however, that substituted service at a civilian residence will be valid only if there is a reasonable probability that the defendant will receive actual and timely notice of the action.[25] Such a rule is consistent with the purpose of the service requirement, which is "to provide the party with notice and allow him an opportunity to answer or plead otherwise."[26]

Returning, then, to the example used at the beginning of this bulletin – in which a recently-mobilized defendant is stationed at Fort Bragg and awaiting deployment overseas – may the process server leave service papers with the defendant's spouse or partner at the defendant's former civilian residence? The North Carolina case law suggests that the answer is "no," unless the defendant is only temporarily absent and is likely to receive actual notice of the action.

Moreover, constitutional due process may also require the plaintiff to utilize another means of service. Due process entitles defendants to "notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections."[27] "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[28] It is likely that substituted personal service at a civilian residence would fall short of this standard in at least some cases, particularly if the servicemember is deployed overseas or has minimal contact with the person to whom the summons and complaint are delivered.

Whether a plaintiff's chosen service method satisfies due process may also depend on whether the plaintiff neglected to use other methods that would have been more likely to provide actual and timely

24. *See also Guthrie v. Ray*, 293 N.C. 67, 71-73, 235 S.E.2d 146, 149-50 (1977) (holding that trial court properly refused to set aside default judgment entered against defendant where sheriff's return indicated that service had been made by leaving copy of summons and complaint with defendant's mother at defendant's and her dwelling house. Although defendant submitted affidavit stating that he had resided in another state for almost thirty years, Court applied the rule that a single affidavit is insufficient to overcome presumption of proper service afforded sheriff's return.); *Ryals v. Hall-Lane Moving and Storage Co., Inc.*, 122 N.C. App. 242, 246-47, 468 S.E.2d 600, 603-04 (1996) (affirming dismissal for lack of service where evidence showed that defendants "resided" at address other than that at which sheriff had left copy of summons and complaint).

25. *See Glasco*, 27 N.C. App. at 6, 217 S.E.2d at 582.

26. *State ex rel. Desselberg v. Peele*, 136 N.C. App. 206, 208, 523 S.E.2d 125, 127 (1999).

27 . *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding also that "[t]he notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance"); *see also McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994) (noting same requirement under N.C. Constitution).

28. *See Mullane*, 339 U.S. at 315.

notice.[29] And with respect to members of the Armed Forces, substituted personal service will rarely be the only available service method. Indeed, when compared to alternative service methods, substituted service will sometimes be a decidedly inferior method of providing notice. The remainder of this bulletin discusses these alternative methods, under which plaintiffs may serve members of the Armed Forces on or off military reservations, including those outside the United States.

Service of process on military installations

Military authorities are not responsible for serving process on members of the armed forces or civilians working or residing on military installations.[30] But authorities can sometimes facilitate service, for example by determining whether a servicemember will voluntarily accept service or, in some cases, by providing a location for the process server to wait and ordering the servicemember to that location.[31] In fact, members of the Armed Forces may agree to accept service with some frequency, especially in cases involving child support or other family obligations. Military policy requires servicemembers to provide financial support to family members and to abide by court orders governing such matters.[32]

If the plaintiff must formally serve a defendant on military property, military regulations and policies affect how, and whether, the plaintiff may do so.[33] The following sections discuss the impact of those policies on the service provisions of the North Carolina Rules of Civil Procedure.

Service on military installations within the United States

Rule 4(j)(1) authorizes litigants to use a number of service methods "within or without" North Carolina.[34] For purposes of this bulletin, the most relevant service methods are personal service (or substituted personal service as discussed above) and service by registered or certified mail, return receipt requested.[35]

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29. *See id.* ("The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.") (citations omitted); *Greene v. Lindsey*, 456 U.S. 444, 454 (1982) ("Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen.").

30. The military has been unwilling to serve process, in part due to a concern that providing such assistance to civil litigants would violate the Posse Comitatus Act, 18 U.S.C. § 1385, which criminalizes "willfully us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws." *See* Cook, *supra* note 2 at 173 (noting historic concern of military that directly serving process for state courts would violate Act).

31. *See, e.g.*, 32 C.F.R. § 516.10 (providing that Army officials asked to facilitate service of state process will determine whether the defendant wishes to accept service); 32 C.F.R. § 720.20(a) (permitting Navy commanding officers to order servicemembers to accept service from courts located in the same state as the military installation).

32. *See, e.g.*, 32 C.F.R. § 584.2 (Army regulation requiring soldiers to provide financial support to family members and to obey court orders regarding child custody); 32 C.F.R. § 733.3 ("All members of the naval service are expected to conduct their personal affairs satisfactorily. This includes the requirement that they provide adequate and continuous support for their lawful dependents and comply with the terms of separation agreements and court orders. Failure to do so which tends to bring discredit on the naval service is a proper subject of command consideration for initiation of court-martial proceedings or other administrative or disciplinary action.").

33. Service of process on U.S. military bases and ships is governed by regulation. *See* 32 C.F.R. § 516 (Army regulations); 32 C.F.R. § 720.20 (Navy and Marine Corps. regulations).

34. *See* G.S. § 1A-1, Rule 4(j)(1). The rule governs service upon natural persons.

35. *See id.*, Rule 4(j)(1)a & c. Rule 4(j)(1)b allows delivery of the summons and complaint to an agent authorized to accept service on behalf of the defendant. In the past, the Armed Forces have considered designating agents to receive service in child support cases on behalf of servicemembers stationed overseas. *See* Exec. Order No. 12,953, 60 Fed. Reg. 11,013 § 402(a)(iv) (1995); *see also* Cook, *supra* note 2 at 166-67 n. 94 & 205-211 (noting that the Department of Defense recommended against the designated agent proposal and evaluating due process implications of proposal). To date, however, the Department

Personal service on military installations

Litigants may be able to have members of the Armed Forces personally served while on military property, although the procedures are somewhat more complicated than is the case off-base. Whether the process server may gain access to the installation depends in part on the nature of federal jurisdiction over the property. On occasion, federal jurisdiction may be exclusive to the point that state process may not be served on the installation.[36] In such cases, military commanders will determine whether the defendant will accept service, but if he or she refuses to do so, the commander may deny the process server access to the installation.[37]

In most cases, however, states reserve the right to serve civil and criminal process on land acquired by the federal government, and often reserve the right to exercise some degree of legislative jurisdiction.[38] This is true for most, if not all, military installations in North Carolina.[39] On such property, Army regulations require commanders first to determine whether the servicemember wishes to accept service.[40] If the servicemember declines, "the requesting party [is] allowed to serve the process in accordance with applicable state law, subject to reasonable restrictions imposed by the commander."[41]

Service on Navy installations proceeds in much the same way. Navy and Marine Corps. regulations require the commanding officer's consent for service on the installation but provide that "the command ordinarily should not prevent service of process so long as delivery is made in accordance with reasonable command regulations and is consistent with good order and discipline."[42] Commanders may designate a location for service to occur and may order servicemembers to that location.[43] Civilians may be invited to the designated location and, if they refuse, the process server may be escorted to the civilian.[44]

The procedures are different, however, if the military installation and the court that issued the process are located in different states. In such cases, military policy does not require servicemembers to

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of Defense has declined to adopt this designated agent approach.

36. Article I, § 8, cl. 17 of the United States Constitution, permits Congress to "acquire derivative legislative power from a State . . . by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land." *Kleppe v. New Mexico,* 426 U.S. 529, 542, (1976). Federal jurisdiction over such property ranges from exclusive (with no state legislative power, and possibly no right to serve state process), to "concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority," *id.*, to mere proprietorial interests in the land. *See also* G. Coggins & C. Wilkinson, FEDERAL PUBLIC LAND AND RESOURCES LAW 172 (1987). In most cases, however, states reserve the right to serve process even in areas over which federal legislative jurisdiction is exclusive. *See, e.g., Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 533 (1885) (noting that such a reservation does not "interfere[e] . . . with the supremacy of the United States over [acquired lands], but . . . prevent[s] them from becoming an asylum for fugitives from justice").

37. *See, e.g.,* 32 C.F.R. § 516.10(d)(1) (Army regulation providing that, where servicemember will not accept service, "the party requesting service will be notified that the nature of the exclusive Federal jurisdiction precludes service by state authorities"); 32 C.F.R. § 720.20(a)(1) (Navy regulation applicable to process of state courts within the state in which the base is located: "Withholding service may be justified only in the rare case when the individual sought is located in an area under exclusive Federal jurisdiction not subject to any reservation by the State of the right to serve process.").

38. *See* Army Judge Advocate General Pub. AL JA 221, *Law of Military Installations: Deskbook* at 2-164 (Sept. 1, 1996) ("Virtually all State consent or cession laws transferring exclusive or partial jurisdiction to the United States reserve a right for State authorities to serve civil and criminal process on the area covered.").

39. *See* G.S. § 104-1 (authorizing United States to acquire land, for specified purposes and in specified amounts, but reserving right to serve process and to punish violations of N.C. criminal law occurring on land); G.S. § 104-7 (consenting to acquisition of land for certain purposes subject to exclusive federal jurisdiction but reserving right to serve civil and criminal process of N.C. courts); *State v. Smith*, 328 N.C. 161, 168, 400 S.E.2d 405, 409 (1991) ("It appears that the State ceded all jurisdiction that it could except for the service of process [on Camp Lejeune] and this is what the United States accepted.").

40. *See* 32 C.F.R. § 516.10(d)(2).

41. *See id.*

42. 32 C.F.R. § 720.20(a)(1).

43. *See id.*

44. *See id.* (also permitting civilians to be ordered to leave classified areas to permit service).

accept service. If the servicemember declines to accept service, military authorities may notify the process server of the refusal and deny access to the installation. This appears to be true for all branches of the Armed Forces, with the possible exception of the Air Force.[45]

Service by registered or certified mail.

Because it can be difficult or time consuming to gain access to military facilities, plaintiffs sometimes attempt to serve members of the Armed Forces by mail. Rule 4(j)(1)c authorizes service by "registered or certified mail, return receipt requested, addressed to the party to be served and deliver[ed] to the addressee."[46] Proof that the summons and complaint were properly mailed and delivered to the addressee establishes proper service.[47] (Note that slightly different requirements, discussed below, may apply to service by international mail on members of the Armed Forces stationed overseas.)

If a servicemember refuses to accept documents served by mail, military or postal authorities should make a notation of the refusal and return the documents to the sender.[48] Rule 4(j)(1)c requires only that a copy of the summons and complaint be delivered to the defendant.[49] A defendant's refusal to accept properly mailed documents, therefore, does not necessarily invalidate service, particularly if the defendant is aware that the documents are service papers.[50]

Service on military installations outside the United States

Plaintiffs may have more difficulty serving members of the Armed Forces who are stationed overseas. The following sections address procedures for serving defendants located outside the United States and how these procedures are affected by military policies governing service of process.

45. Navy and Marine Corps. regulations specifically allow servicemembers to refuse to accept process from out-of-state courts. *See* 32 C.F.R. § 720.20(a)(2). Likewise, Army regulations permit access to Army property only when the state has reserved the right to serve process, in areas of concurrent jurisdiction, and in areas where the federal government has only a proprietary interest. *See* 32 C.F.R. § 516.10(d)(2). These criteria would presumably not be satisfied in most cases involving process from an out-of-state court. Air Force authorities may in some circumstances allow access to military installations for the purpose of serving out of state process. *See* Cook, *supra* note 2 at 172 n.123 (reporting that the "Air Force policy is more liberal" with respect to process of out-of-state courts).

46. G.S. § 1A-1, Rule 4(j)(1)c. Rule 4(j)(1)d also allows service by certain designated delivery services authorized pursuant to 26 U.S.C. § 7502(f)(2).

47. *See* G.S. § 1A-1, Rule 4(j2)(2); G.S. § 1-75.10(4), (5).

48. *See* 32 C.F.R. § 720.20(a)(2) (Navy regulation requiring notation of refusal where servicemember or civilian refuses to accept out-of-state process; Navy policy arguably requires servicemembers to accept in-state process sent by mail); *see also* United States Postal Service, *Domestic Mail Manual* F010.4.6 at 409 (updated Sept. 2, 2004) (providing that where addressee refuses to accept mail, document should be endorsed "refused" and returned).

49. *See* G.S. § 1A-1, Rule 4(j)(1)c (referring to registered or certified mail service "by delivering to the addressee"); G.S. § 1-75.10(4) (requiring proof that service by registered or certified mail "was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee").

50. This bulletin does not discuss in detail whether a defendant who refuses to accept service is nevertheless subject to the jurisdiction of the court. Some courts, however, deem service to be proper over a defendant who refuses to accept documents he or she knows to be service papers. *See, e.g., Miltland Raleigh-Durham v. Mudie*, 122 N.C. App. 168, 172, 468 S.E.2d 275, 277 (1996) (rejecting due process challenge based on alleged failure to provide pre-attachment notice and hearing where defendant refused to accept service by mail at address he had given plaintiff); *see also Tataragasi v. Tataragasi*, 124 N.C. App. 255, 263, 477 S.E.2d 239, 243 (1996) (affirming service on defendant in Turkey, although plaintiff had not complied with formal service requirements, in part because "[t]here is also some evidence in the record to suggest that defendant refused to accept service"); *Midlantic Nat'l Bank v. Ridgedale Farms*, Civ. A. No. 87-1802, 1989 WL 12724 at *2 (D.N.J. Feb. 8, 1989) ("It is generally held that one who is informed that service of process is being attempted cannot avoid service by physically refusing to accept a summons when it is offered to him."); *Western Farmers Elec. Co-Op v. Stephenson*, 873 P.2d 311, 313 (Okla. Ct. App. 1994) (making same point). Of course, the fact that mail is returned as unclaimed (as opposed to refused) does not necessarily demonstrate that it was delivered to, and refused by, the addressee.

Military policies governing service outside the United States

Military policies governing service of process abroad are generally similar to those that apply within the United States in areas of exclusive federal jurisdiction where the state has not reserved the right to serve process. Military authorities determine whether a servicemember will accept service and will convey documents to the servicemember if he or she agrees to accept them. Absent voluntary acceptance, however, military authorities generally play no further role. Instead, they instruct the serving party to comply with whatever procedures are established by the law of the pertinent foreign country.[51]

Methods of service of process abroad

Rule 4(j3) authorizes a number of methods for effecting service "in a place not within the United States."[52] These methods apply equally to all defendants, regardless whether they are civilians living overseas in private residences or members of the Armed Forces residing on a military installation.

Rule 4(j3) establishes three basic categories of international service mechanisms. First, Rule 4(j3)(1) directs litigants to use any "internationally agreed means" of service, such as those authorized by the Hague Convention. Second, if there is no internationally agreed means of service, or if the "applicable international agreement" allows other service methods, Rule 4(j3)(2) authorizes service to be made:

- in a manner prescribed by the law of the foreign country in an action in any of its courts of general jurisdiction;
- in a manner directed by the foreign authority in response to a letter rogatory; or
- unless prohibited by the law of the foreign country, by personal delivery or any form of mail requiring a signed receipt, if the mail is addressed and dispatched by the clerk of court to the party to be served.

Finally, Rule 4(j3)(3) allows the court to order service by another method, provided no international agreement prohibits the chosen method. In each case, the manner of service must be reasonably calculated to give notice to the defendant of the lawsuit.

Of these service mechanisms, service pursuant to the Hague Convention and service by international mail are by far the most common. The remainder of this bulletin therefore focuses briefly on those methods. Readers interested in a more detailed treatment of these topics, and international service in general, should review Administration of Justice Bulletin No. 2004/07, *International Service of Process Under the Hague Convention* (2004).

Service of process under the Hague Convention

The Hague Convention is the primary "internationally agreed means" of service. It applies in "civil and commercial matters"[53] whenever forum law requires service documents to be transmitted abroad.[54] Numerous countries ("Contracting States") have ratified or acceded to the Convention., including many of the countries in which U.S. servicemembers are likely to be stationed.[55]

The Convention identifies several methods of service that may be used in Contracting States. Foremost among these methods is the Central Authority mechanism, which obliges each Contracting State to establish a Central Authority to receive and execute requests for service originating from other

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51. *See* 32 C.F.R. 516.12(c) (Army regulation establishing policies for service of state court process outside United States); 32 C.F.R. 516.13 (listing contact information for those seeking assistance or information concerning service of process overseas); 32 C.F.R. § 720.20(a)(2) (Navy policies governing service of out-of-state process).

52. G.S. § 1A-1, Rule 4(j3).

53. United States practice has traditionally viewed all non-criminal cases, including administrative proceedings, as "civil or commercial matters." *See* 17 I.L.M. 319 (1978) (report to Secretary of State by U.S. delegate to the 1977 Special Commission); *Tataragasi v. Tataragasi*, 124 N.C. App. 255, 263, 477 S.E.2d 239, 243 (1996) (looking to Convention to determine validity of service in custody action); *Warzynski v. Empire Comfort Sys., Inc.*, 102 N.C. App. 222, 401 S.E.2d 801 (1991) (product liability action).

54. Because the Convention applies only when documents are transmitted abroad, it is inapplicable if forum law permits service to be made in the United States (for example by personal service made during a servicemember's visit to the state). *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). Any method of service, of course, must be consistent with due process. *See Mullane*, 339 U.S. at 314.

55. A list of these countries is attached as Table A.

Contracting States.[56] Upon receiving a request for service, the receiving State's Central Authority may serve the documents in several ways. First, it may serve the documents "by a method prescribed by [the receiving State's] internal law for the service of documents in domestic actions upon persons who are within its territory."[57] Second, it may serve the documents by any method requested by the serving party and compatible with the receiving State's law.[58] Finally, it may informally deliver the documents to a defendant willing to accept service.[59] The receiving State's Central Authority will also return to the applicant a certificate describing the method, time, and place of service and identifying the person to whom the document was delivered.[60]

Members of the Armed Forces, like any party located in a Contracting State, may be served via the Central Authority mechanism. This method of service, however, can be complex and time consuming even in cases involving civilians with no ties to the military. These problems can be compounded if service requires access to U.S. military installations. For example, depending on the Status of Forces agreement between the United States and the country in which the military installation is located, the foreign Central Authority may not be entitled to enter the installation. In such cases, the Central Authority may attempt service outside the installation, but there is of course no guarantee that it will succeed. Moreover, depending on the applicable Status of Forces agreement, some Central Authorities may decline to serve process altogether on members of the Armed Forces.[61]

Because of these difficulties, many litigants attempt to serve members of the Armed Forces via international mail. The following section briefly discusses the procedures governing this manner of service, which arguably differ somewhat from those applicable to cases involving litigants located in the United States.

Service via international mail

Article 10(a) of the Convention states: "Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad."[62] This language has provoked a disagreement among U.S courts. Some have interpreted Article 10(a) narrowly to permit litigants to send documents by international mail only *after* serving process by another means.[63] Others have rejected this narrow interpretation and held that Article 10(a) permits service of process by international mail.[64]

The North Carolina Court of Appeals has approved international mail service on several occasions and thus appears to follow the broader

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56. *See* Convention Art. 2 & 5.

57. *See id.* Art. 5(a). For this manner of service, the Central Authority may require the document to be translated into an official language of the receiving State.

58. *See id.* Art. 5(b).

59. *See id.* Art. 5.

60. *See* Convention Art. 6 (also requiring Central Authority to explain why documents were not served, if applicable). Other service methods identified by the Convention include the following:

- In certain cases, the Convention authorizes consular or diplomatic officials to effect service, although U.S. law generally prohibits foreign service officers from acting in this capacity. *See* Convention Art. 8 & 9; 22 C.F.R. § 92.85.
- The Convention also permits certain persons in the originating State to effect service "directly through the judicial officers, officials, or other competent persons" of the receiving State. Each Contracting State may object to this manner of service. *See* Convention Art. 10(b), (c) & Art. 21.
- Contracting States may also enter into separate agreements establishing additional service mechanisms, *see* Convention Art. 11, although the United States does not appear to be a party to any such agreements.

61. *See* U.S. Dep't of State Flyer, *Service of Legal Documents Abroad* ¶ N (Sept. 2000) <http://travel.state.gov/law/service_general.html> (last visited Nov. 30, 2004).

62. Convention Art. 10(a).

63. *See, e.g., Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 229 (N.Y. App. Div. 2001); *Knapp v. Yamaha Motor Corp. U.S.A.*, 60 F. Supp. 2d 566, 573 (S.D. W.Va. 1999).

64. *See Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004); *Ackermann v. Levine*, 788 F.2d 830, 839-40 (2d Cir. 1986); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 470-74 (D.N.J. 1998).

interpretation of Article 10(a).[65] Servicemembers stationed overseas may therefore be served by mail in most cases. The Convention, however, permits each Contracting State to object to service by "postal channels,"[66] and a number of States have done so.[67] Service by mail will generally be improper in countries that have objected to Article 10(a).[68]

There remains the question of what procedures govern mail service on a defendant located overseas. Rule 4(j3)(2)c.2 authorizes mail service "in a place not within the United States."[69] Unlike Rule 4(j)(1)c, however, which makes litigants responsible for mail service "within or without" North Carolina, Rule 4(j3)(2)c.2 requires service by "any form of mail requiring a signed receipt, *to be addressed and dispatched by the clerk of court to the party to be served*."[70] These procedures should be followed whenever the defendant is located in a country that has not ratified or acceded to the Hague Convention.[71]

If the defendant is located in a Contracting State, however, there is an argument that mail service may take any form that satisfies due process. A detailed treatment of this argument is beyond the scope of this bulletin, but interested readers should refer to Administration of Justice Bulletin No. 2004/07, *International Service of Process Under the Hague Convention* (2004). The validity of this argument is questionable, and, until the appellate courts provide definitive guidance, a litigant who wishes to use the mails to serve a party located in a Contracting State would be prudent to comply with Rule 4(j3)(2)c.2.[72]

In most cases, litigants should be able to prove that service documents were delivered to the defendant. The Department of Defense operates Military Post Offices (MPOs) for military personnel overseas or on ships where the U.S. Postal Service does not operate.[73] Military policy appears to require MPO personnel to obtain the addressee's signature

65. *See Hayes v. Evergo Telephone Co.*, 100 N.C. App. 474, 479, 397 S.E.2d 325, 327 (1980); *Warzynski*, 102 N.C. App. at 228, 401 S.E.2d at 805.

66. *See* Convention Art. 10 & 21.

67. These States include Argentina, Bulgaria, China, Czech Republic, Egypt, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Norway, Poland, Republic of San Marino, Republic of South Korea, Slovak Republic, Sri Lanka, Switzerland, Turkey, Ukraine, and Venezuela. *See* Administration of Justice Bulletin No. 2004/07, *International Service of Process Under the Hague Convention* (2004).

68. *See, e.g., Shenouda v. Mehanna*, 203 F.R.D. 166, 171 (D.N.J. 2001); *Davies v. Jobs & Adverts Online, Gmbh*, 94 F. Supp. 2d 719, 721 n.6 (E.D. Va. 2000); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 399-400 (N.D. Ohio 1990); *Dr. Ing. H.C.F. Porsche A.G. v. Superior Court*, 123 Cal.App.3d 755, 761-62 (Cal. Ct. App. 1981). *But see Tataragasi v. Tataragasi*, 124 N.C. App. 255, 264, 477 S.E.2d 239, 244 (1996) (apparently upholding service by mail in Turkey, which has objected to Article 10(a), but limiting its holding to child custody cases in which the defendant has actual notice of the action and the plaintiff attempts in good faith to comply with the Convention).

69. *See* G.S. § 1A-1, Rule 4(j3) (first paragraph).

70. G.S. § 1A-1, Rule 4(j3)(2)c.2 (emphasis added). Presumably, Rule 4(j)(1)c does not authorize international mail service in a manner inconsistent with the more specific provisions contained in Rule 4(j3)(2)c.2. *Cf. Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) ("Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability."). Note, too, that Rule 4(j3) requires proof of service by mail to include "an affidavit or certificate of addressing and mailing by the clerk of court."

71. Rule 4(j3)(3) permits the court to order service by any method "not prohibited by international agreement." This rule presumably authorizes the court to order service by mail in a manner that does not comply with Rule 4(j3)(2)c.2. *See, e.g., Brockmeyer*, 383 F.3d at 805-06; *Levin v. Rush Trading Co.*, 248 F. Supp. 537, 540 (S.D.N.Y. 1965).

72. The few North Carolina cases addressing international mail service in Contracting States do not make clear whether litigants must comply with Rule 4(j3)(2)c.2. *Compare Warzynski* 102 N.C. App. at 228, 401 S.E.2d at 805 (evaluating service made under Rule 4(j3)(2)c.2) and *Hocke v. Hanyane*, 118 N.C. App. 630, 632-34, 456 S.E.2d 858, 859-60 (1995) (same) *with Hayes*, 100 N.C. App. at 476, 397 S.E.2d at 327 (approving mail service as conforming to Convention even though plaintiff, rather than clerk, apparently mailed service papers). Proof of service under Rule 4(j3) must include an affidavit or certificate of mailing from the clerk of court, which arguably suggests that the procedures of Rule 4(j3)(2)c.2 are mandatory in all cases.

73. *See* U.S. Dep't of Defense, Dir. 4525.6-M, DEPARTMENT OF DEFENSE POSTAL MANUAL at 17 (Aug. 15, 2002). Servicemembers in the Army or Air Force have Army Post Office (APO) addresses, and members of the Coast Guard, Navy, and Marine Corps. have Fleet Post Office (FPO) addresses. *See id.*

prior to delivering mail for which a return receipt has been requested and to "return the receipt(s) promptly to the source."[74] If a servicemember refuses to accept certified or registered mail, MPO personnel should endorse the document "refused" and return it to the sender.[75]

Conclusion

Members of the Armed Forces, and civilians living or working on military installations, are subject to the same rules governing service of process as any other litigant. Military policy and the extent of federal control over military bases, however, affects the method and availability of service in individual cases. On some occasions, substituted personal service at the servicemember's former civilian residence may be appropriate. More often, a plaintiff will have to resort to personal service on military property. This manner of service is often feasible if the court and the military installation are located in the same state. The plaintiff may also use an appropriate form of mail service, whether the servicemember is stationed in the U.S. or abroad. If a defendant is stationed abroad in a country that does not permit service by mail, however, the plaintiff may be required to use the Central Authority mechanism established by the Hague Convention.[76] In each case, of course, the manner of service must be reasonably calculated to inform the defendant of the existence and nature of the action.

74. *Id.* ¶ C3.2.7.1.10, at 73.

75. *See id.* ¶ C3.2.5.8.1, at 71.

76. Other provisions of Rule 4(j3) may also authorize service, such as Rule 4(j3)(3), which permits the Court to order alternative service methods. Again, readers interested in a fuller treatment of international service should review Administration of Justice Bulletin No. 2004/07, *International Service of Process Under the Hague Convention* (2004).

Table A

States that have ratified or acceded to the Hague Convention[77]

- Anguilla
- Antigua and Barbuda
- Argentina
- Aruba
- Bahamas
- Barbados
- Belarus
- Belgium
- Belize†
- Bermuda
- Botswana
- British Virgin Islands
- Bulgaria
- Canada
- Cayman Islands
- China
- Cyprus
- Czech Republic
- Denmark
- Djibouti (formerly Afars and Issas)†
- Egypt
- Estonia
- Falklands Islands
- Fiji†
- Finland
- France (incl. French Overseas Depts.)
- French Polynesia†
- Germany
- Gibraltar†
- Greece
- Guernsey
- Hong Kong Special Administrative Region
- Hungary‡
- Ireland
- Isle of Man
- Israel
- Italy
- Japan
- Jersey
- Korea, Republic of (South Korea)
- Kuwait
- Kiribati (formerly Gilbert Islands and Central and Southern Line Islands) †
- Latvia
- Lithuania
- Luxembourg
- Macau Special Administrative Region
- Malawi
- Mexico
- Montserrat
- Netherlands
- Nevis†
- Norway
- Pakistan
- Pitcairn
- Poland
- Portugal
- Romania‡
- Russian Federation
- St. Christopher (Kitts)
- St. Helena and Dependencies
- St. Lucia
- St. Vincent and the Grenadines†
- San Marino
- Seychelles
- Slovak Republic
- Slovenia
- Solomon Islands†
- Spain
- Sri Lanka
- Sweden
- Switzerland
- Turkey
- Turks and Caicos Islands
- Tuvalu (formerly Ellice Islands) †
- Ukraine
- United Kingdom of Great Britain and Northern Ireland
- United States (incl. Guam, Puerto Rico, and the Virgin Islands)
- Venezuela

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77. *See* Fed. R. Civ. P. 4, accompanying materials (listing parties to Convention and declarations of Contracting States).

† *See* U.S. Dep't of State flyer, *Hague Convention on the Serv. Abroad of Judicial and Extra-Judicial Documents in Civil and Comm. Matters* <http://travel.state.gov/law/hague_service.html> (last visited Nov. 30, 2004). The list assumes the Convention remains in force in countries that have achieved independence after it was extended to them, including Belize, Djibouti, Fiji, Kiribati, Nevis, St. Christopher, St. Lucia, St. Vincent and the Grenadines, Solomon Islands, and Tuvalu. *See id.*

‡ *See* Hague Conference on Private International Law, *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* <http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17#nonmem> (last visited Nov. 30, 2004) (noting recent accession of Hungary and Romania; Convention enters into force in Hungary April 1, 2005).