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Lore of the Corps

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Lore of the Corps

War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943

Fred L. Borch
Regimental Historian and Archivist

Q: “Do you know anything about some prisoners shot on July 14, near the Biscari Airfield?”

A (Captain Compton): Yes, sir.

....

Q: What order did you give concerning the shooting of these prisoners?”

A (Captain Compton): I told my [lieutenant (Lt.)] to take care of it.

....

Q: What did you tell him?”

A (Captain Compton): I told the Lt. to tell the [sergeant (Sgt)] to execute the prisoners.”¹

On 14 July 1943, about 1300, near the Biscari airport in Sicily, Captain (CPT) John T. Compton, a company commander serving in the 180th Infantry Regiment, 45th Infantry Division, ordered his men to execute thirty-six prisoners of war (POWs). Only three hours earlier, Sergeant (SGT) Horace T. West, also serving in the 180th, committed a similar war crime when he murdered thirty-seven Italian and German POWs by shooting them with a Thompson submachine gun. This is the story of those two events, the courts-martial of West and Compton for murder, and the very different outcomes of those trials.

Operation Husky, the Allied invasion of Sicily, kicked off on 10 July 1943, when British and Canadian forces landed on the southeastern corner of the island. The following day, Soldiers belonging to Lieutenant General (LTG) George S. Patton’s Seventh Army and LTG Omar N. Bradley’s II Corps waded ashore, some miles to the west, at Licata and Gela, respectively. Driving northward, the Americans, British, and Canadians ran into ten Italian and two German panzer divisions but, after fierce fighting, had seized the southern quarter of Sicily on 15 July.²

¹ Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation, subj: Shooting of Prisoners of War under direction of Captain John T. Compton 5 (5 Aug. 1943) [hereinafter Compton Report of Investigation].

² ALBERT N. GARLAND & HOWARD MCGRAW, U.S. ARMY IN WORLD WAR II, THE MEDITERRANEAN THEATER OF OPERATIONS, SICILY AND THE SURRENDER OF ITALY 141–42 (1965).

While this was good news for the invaders, the murder of German and Italian POWs the previous day cast a dark cloud over the sunny skies of Sicily. No one doubted that the killings had occurred or that they had happened during “a sharp struggle for control of the airfield north of Biscari.”³ Rather, the question was why it had occurred, who was responsible, and what should be done.

The facts were that, on 14 July 1943, troopers serving in the 180th Infantry Regiment overcame enemy resistance and, by about 1000, had gathered together a group forty-eight prisoners. Forty-five were Italian and three were German. Major Roger Denman, the Executive Officer in the 1st Battalion, 180th Infantry, ordered a noncommissioned officer (NCO), thirty-three year old SGT Horace T. West, to take the POWs “to the rear, off the road, where they would not be conspicuous, and hold them for questioning.”⁴

After SGT West, several other U.S. Soldiers assisting him, and the forty-eight POWs had marched a mile, West halted the group. He then directed that “eight or nine” POWs be separated from the larger group and that these men be taken to the regimental intelligence officer (S-2) for interrogation.

As the official investigation conducted by Lieutenant Colonel (LTC) William O. Perry, the division inspector general (IG), revealed, West then took the remaining POWs “off the road, lined them up, and borrowed a Thompson Sub-Machine Gun” from the company first sergeant (1SG). When that NCO asked West what he intended to do, “SGT West replied that he was going to kill the ‘sons of bitches.’” After telling the Soldiers guarding the POWs to “turn around if you don’t want to see it,” SGT West then singlehandedly murdered the disarmed men by shooting them. The bodies of the dead were discovered about thirty minutes later by the division chaplain, LTC William E. King. King later told the division IG that every dead POW had been “without shoes or shirts.” This was expected, because it was common practice to remove a captured soldier’s shoes and shirt to discourage escape. But King also told the IG that each POW “had been shot through the heart,” which was unexpected but indicated that they had been killed at close range. Investigators subsequently learned that, after emptying his

³ James J. Weingartner, *Massacre at Biscari: Patton and an American War Crime*, HISTORIAN, Nov. 1989, at 24, 25.

⁴ Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation of Shooting of Prisoners of War by Sgt. Horace T. West 1 (5 Aug. 1943) [hereinafter West Report of Investigation].

submachine gun into the POWs, West had “stopped to reload, then walked among the men in their pooling blood and fired a single round into the hearts of those still moving.”⁵

Three hours later, twenty-five year old CPT John T. Compton, then in command of Company A, 180th Infantry, was with his unit in the vicinity of the same Biscari airfield. After the Americans encountered “sniping . . . from fox holes and dugouts occupied by the enemy,”⁶ a Soldier managed to capture thirty-six enemy soldiers. When CPT Compton learned of the surrender, he “immediately had a detail selected” from his company to execute the POWs. According to LTC Perry, who investigated both shootings, Compton gave the following answers to Perry’s questions:

- Q. How did you select the men to do the firing?
A. I wished to get it done fast and very thoroughly, so I told them to get automatic weapons, the BAR [Browning Automatic Rifle] and Tommy Gun.
Q. How did you get the men? Did you ask for volunteers?
A. No, sir. I told the [SGT] to get the men.
Q. Do you remember exactly what you told him?
A. I don’t remember exactly.
Q. What formation did you get them in before they were shot?
A. Single file on the edge of a ridge.
Q. Were they facing the weapons or the other side?
A. They were in single file, in a column, rifle fire from the right.
Q. Were the prisoners facing the weapons or the other side?
A. They were facing right angle of fire.
Q. What formation did you have the firing squad (sic)?
A. Lined 6 foot away, about 2 yards apart, on a line.
Q. Did you give any kind of a firing order?
A. I gave a firing order.
Q. What was your firing order?
A. Men, I am going to give ready fire and you will commence firing on the order of fire.⁷

Since Compton had lined his firing squad up so that the POWs presented a target in enfilade, there was little doubt that he intended to kill the POWs.

The following day, after knowledge of Compton’s execution of the enemy travelled up the chain of command, LTG Bradley personally questioned the junior officer about his actions. As CPT Compton told Bradley, he “had been raised fair and square as anybody else and I don’t believe in shooting down a man who has put up a fair fight.” But, said

⁵ RICK ATKINSON, *THE DAY OF BATTLE* 118 (2007).

⁶ Compton Report of Investigation, *supra* note 1, at 1.

⁷ *Id.* at 3 (statement by Captain John T. Compton (July 1943)).

Compton, these enemy soldiers “had used pretty low sniping tactics against my men and I didn’t consider them as prisoners.” Perhaps most importantly, CPT Compton added the following to his official statement:

During the Camberwell operation in North Africa, [LTG] George S. Patton, in a speech to assembled officers, stated that in the case where the enemy was shooting to kill our troops and then that we came close enough on him to get him, decided to quit fighting, he must die. Those men had been shooting at us to kill and had not marched up to us to surrender. They had been surprised and routed, putting them, in my belief, in the category of the General’s statement.⁸

What was to be done about these two massacres at Biscari? According to Carlo D’Este’s *Bitter Victory: The Battle for Sicily 1943*, General Bradley “was horrified” when he learned what West and Compton had done, and “promptly reported them to Patton,” his superior commander. Patton not only “cavalierly dismissed the matter as ‘probably an exaggeration,’” but told Bradley “to tell the officer responsible for the shootings to certify that the dead men were snipers or had attempted to escape or something, as it would make a stink in the press, so nothing can be done about it.”⁹

But Bradley was a man of principle, and refused to follow Patton’s suggestion.¹⁰ On the contrary, Bradley directed that West and Compton be tried for murder. As a result, Major General (MG) Troy H. Middleton, the 45th Infantry Division commander, convened a general court-martial to try SGT West for “willfully, deliberately, feloniously, unlawfully” killing “thirty-seven prisoners of war, none of whose names are known, each of them a human being, by shooting them and each of them with a Thompson Sub-Machine gun.”¹¹ As for CPT Compton, he also faced a general court-martial convened by Middleton. The charge was the same, except that Compton was alleged to have killed “with premeditation . . . thirty-six prisoners of war . . .

⁸ *Id.*

⁹ CARLO D’ESTE, *BITTER VICTORY: THE BATTLE FOR SICILY* 318 (1988).

¹⁰ While Patton initially was not interested in a trial for West and Compton, D’Este notes that he later changed his mind. *Id.* at 319. Atkinson writes that this change of heart occurred after the 45th Division’s IG found “no provocation on the part of the prisoners . . . They had been slaughtered.” Patton then said: “Try the bastards.” ATKINSON, *supra* note 5, at 119.

¹¹ *United States v. West*, No. 250833 (45th Inf. Div., 2–3 Sept. 1943), at 4 [hereinafter *West Record of Trial*].

by ordering them and each of them shot with Browning Automatic Rifles and Thompson Sub-Machine Guns.”¹²

Sergeant West was the first to be tried. His court-martial began on 2 September 1943 and concluded the next day. West pleaded not guilty, and his counsel (none of whom were lawyers) portrayed him as “fatigued and under extreme emotional distress” at the time of the killings. This “temporary insanity defense,” in fact, had been suggested by the division IG, who found that “in light of the combat experience of the sergeant and the unsettled mental condition that he was probably suffering from, a very good question arises as to his sanity at the time of the commission of the acts.”¹³ West also testified that he had seen the enemy murder two American Soldiers who had been taken prisoners, an experience which filled him with rage and made him want “to kill and watch them [the enemy] die, see their blood run.”¹⁴ The problem with this defense was that the killings had not occurred in the heat of battle, or near in time to the alleged murder of the two Americans, but rather long after the fighting had ceased and SGT West was escorting the POWs to the rear for interrogation.

Sergeant West also advanced a second rationale for what he had done at Biscari: he had been following the orders of General Patton who, insisted West, had announced prior to the invasion of Sicily that prisoners should be taken only under limited circumstances. Colonel Forest E. Cookson, the 180th Infantry’s regimental commander, testified for the defense and confirmed that Patton had proclaimed he wanted the 45th Infantry Division to be a “division of killers,” and that if the enemy continued to resist after U.S. troops had come within two hundred yards of their defensive positions, then the surrender of these enemy soldiers need not be accepted.¹⁵ While Cookson testified further that he had repeated Patton’s words “verbatim” (sic) to the Soldiers of his regiment, West’s problem with claiming a defense based on following Patton’s order was that the POWs he had killed had already surrendered and were in custody. Consequently, while West raised Patton’s order in his trial, he did not really offer it as a defense.

The panel members clearly gave more weight to the testimony of 1SG Haskell Y. Brown, who testified that West had “borrowed” his Thompson “plus one clip of thirty rounds” and then had killed the Italians and Germans in cold blood.¹⁶ The panel did not believe West was temporarily

insane, and found him guilty of premeditated murder under Article 92 of the Articles of War.

In an unusual twist, however, the panel of seven officers sentenced West to “life imprisonment” only. They did not adjudge forfeitures or a dishonorable discharge. Perhaps this was because SGT West’s good military character. West had served almost continuously with Company A, 180th Infantry Regiment since his induction in September 1940, was “exceptionally dependable,” and had “fought bravely and courageously since the invasion of Sicily.”¹⁷ But a life sentence nevertheless sent the message that such a war crime would not be condoned, and the convening authority directed that West be confined in the “Eastern Branch, United States Disciplinary Barracks, Beekman, New York.”¹⁸

The general court-martial of CPT Compton was a very different affair. While it was true that a number of Soldiers had carried out the executions, only Compton was being tried for murder. This was almost certainly because Field Manual (FM) 27-10, *Rules of Land Warfare*, which had been published in October 1940—more than a year before the United States entered World War II—provided that a Soldier charged with committing a war crime had a valid defense if he was acting pursuant to a superior’s orders. In discussing the “Penalties for Violations of the Laws of War,” paragraph 347 stated, in part:

Offenses by armed forces. The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; . . . *ill-treatment of prisoners of war. Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders.* The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.¹⁹

This language meant that the Soldiers who had been ordered by Compton to shoot the POWs had a complete defense to murder. But Compton’s defense was that he, too, had been acting pursuant to orders—orders from General Patton. Compton claimed that he remembered, almost word for word, a speech given by Patton in North Africa to the

¹² Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 84, (13 Nov. 1943), in *United States v. Compton*, No. 250835 (45th Inf. Div., 23 Oct. 1943).

¹³ Compton Report of Investigation, *supra* note 1, at 2.

¹⁴ *West Record of Trial*, *supra* note 11, at 101.

¹⁵ *Id.* at 58–59; Weingartner, *supra* note 3, at 28.

¹⁶ *West Record of Trial*, *supra* note 11, at 8.

¹⁷ West Report of Investigation, *supra* note 4, at 2.

¹⁸ Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 86 (4 Nov. 1943).

¹⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 347 (1 Oct. 1940) (emphasis added).

officers of the 45th Infantry Division. According to Compton, Patton had said:

When we land against the enemy, don't forget to hit him and hit him hard. We will bring the fight home to him. We will show him no mercy. He has killed thousands of your comrades, and he must die. If you company officers in leading your men against the enemy find him shooting at you and, when you get within two hundred yards of him and he wishes to surrender, oh no! That bastard will die! You will kill him. Stick him between the third and fourth ribs. You will tell your men that. They must have the killer instinct. Tell them to stick him. He can do no good then. Stick them in the liver. We will get the name of killers and killers are immortal. When word reaches him that he is being faced by a killer battalion, a killer outfit, he will fight less. Particularly, we must build up that name as killers and you will get that down to your troops in time for the invasion.²⁰

A Soldier in Compton's company testified that he was "told that General Patton said that if they don't surrender until you get up close to them, then look for their third and fourth ribs and stick it in there. Fuck them, no prisoners!"²¹ An officer testified that Patton had said that the "more prisoners we took, the more we'd have to feed, and not to fool with prisoners."²²

Compton did not waver in insisting that he had been following orders. The POWs he had ordered shot had resisted at close quarters and had forfeited their right to surrender. Additionally, Compton claimed that the executed men had been snipers (and that some were dressed in civilian clothes) and that this was yet another reason that they deserved to be shot—because sniping is dishonorable and treacherous. As Compton put it: "I ordered them shot because I thought it came directly under the General's instructions. Right or wrong a three star general's advice, who has had combat experience, is good enough for me and I took him at his word."²³

On 23 October 1943, after the prosecution declined to make a closing argument in Compton's trial, the court closed

to deliberate. When the members returned, the president of the panel announced that the court had found CPT Compton not guilty of the charge of murder and its specification.

When LTC William R. Cook, the 45th Infantry's Staff Judge Advocate, reviewed the *West* and *Compton* records of trial in November 1943, he immediately recognized that he had two problems. The first was that, when charged with very similar war crimes, an NCO had been convicted while an officer had been acquitted and, since that NCO had been sentenced to life imprisonment, this might be perceived as unfair.

But perhaps more troubling was that Compton had been acquitted because he claimed that his execution of POWs had been sanctioned by General Patton's orders. Cook did not want to criticize the court members directly, and he acknowledged that Patton's speech to the 45th's officers provided both a moral and a legal basis for the panel's conclusion that Compton had acted pursuant to superior orders. Lieutenant Colonel Cook also conceded that the 1928 *Manual for Courts-Martial* provided that the "general rule is that the acts of a subordinate officer or soldier, done in good faith . . . in compliance with . . . superior orders, are justifiable, unless such acts are . . . such that a man of ordinary sense and understanding would know to be illegal."²⁴ But, focusing on this last phrase, Cook wrote that he believed that an order to execute POWs was illegal. As he wrote in the "Staff Judge Advocate's Review" of Compton's trial:

My own opinion on the matter is . . . the execution of unarmed individuals without the sanction of some tribunal is so foreign to the American sense of justice, that an order of that nature would be illegal on its face, and being illegal on its face could not be complied with under a claim of good faith. However, that opinion is my personal interpretation of the law, and being without adequate means of research, I am not prepared to state that it is an opinion founded on good authority.²⁵

Lieutenant Colonel Cook did not address the language contained in paragraph 347 of FM 27-10, discussed above, which provided yet another legal basis for the panel to have acquitted CPT Compton.

As James J. Weingartner shows in his study of the *West* and *Compton* trials, the "Biscari cases made the U.S. Army and the War Department acutely uncomfortable. Both feared the impact on U.S. public opinion and the possibility of

²⁰ United States v. Compton, No. 250835 (45th Inf. Div., 23 Oct. 1943), at 58–59.

²¹ *Id.* at 55.

²² *Id.* at 48.

²³ *Id.* at 63.

²⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 148a (1928).

²⁵ Staff Judge Advocate's Review, in *West* Record of Trial, *supra* note 11, at 3.

enemy reprisals should details of the incidents become common knowledge.”²⁶ To keep what had happened from public view, both records of trial were classified “Secret” and the media was kept in the dark about the two episodes.

Captain Compton, who had been reassigned to another unit after his acquittal, was killed in combat on 8 November 1943. Like it or not, his death solved the problem of keeping his case confidential.

Not so with West. He was alive and, instead of being returned to the United States, where his presence in a federal penitentiary would likely bring unwanted publicity to him and his crime, West was shipped to a confinement facility in North Africa. Keeping West under Army control no doubt made it less likely that the Germans and Italians would learn of the Biscari killings.

In any event, after reviewing West’s record of trial, Eisenhower decided to “give the man a chance” after he had served enough of his life sentence to demonstrate that he could be returned to duty.²⁷ After West’s brother wrote to both the Army and to his local member of Congress asking about the case—raising the possibility again that the public would learn about what had happened at Biscari—the Army moved to resolve the worrisome matter.

In February 1944, the War Department’s Bureau of Public Relations recommended that West be given some clemency, but “that no publicity be given to this case because to do so would give aid and comfort to the enemy and would arouse a segment of our own citizens who are so distant from combat that they do not understand the savagery that is war.”²⁸ Six months later, on 23 November 1944, LTG Joseph McNarney, the deputy commander of Allied Forces Headquarters, then located in Caserta, Italy, signed an order remitting the unexecuted portion of West’s sentence. Private West was restored to active duty and continued to serve as a Soldier until the end of the war, when he was honorably discharged.

But secrecy remained paramount in the *West* and *Compton* cases. A 1950 memorandum for MG Ernest M. “Mike” Brannon, The Judge Advocate General of the Army, advised that all copies of the records of trial were under lock and key in the Pentagon; the records apparently were not declassified until the late 1950s.²⁹

²⁶ Weingartner, *supra* note 3, at 38.

²⁷ ATKINSON, *supra* note 5, at 20.

²⁸ *Id.* at 39.

²⁹ Memorandum from Lieutenant Colonel W. H. Johnson, Judge Advocate Gen.’s Corps Exec., for Gen. Brannon, subj: Records of Trial [Compton & West] (26 May 1950).

Three final points about the courts-martial of SGT West and CPT Compton. First, the War Department Inspector General’s Office launched an investigation into the Biscari killings, and General Patton was questioned about the speech that Compton and others had insisted was an order to kill POWs. Patton told the investigator that his comments had been misinterpreted and that nothing he had said “by the wildest stretch of the imagination” could have been considered to have been an order to murder POWs. The investigation ultimately cleared Patton of any wrong-doing.

Second, on 15 November 1944, slightly more than five months after Allied landings in Normandy, and more than a year after the *West* and *Compton* trials, the War Department published Change 1 to FM 27-10. That change added this new paragraph:

Liability of offending individual.— Individuals and organization who violate the accepted laws and customs of war may be punished therefor. However, the fact that *the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment.* The person giving such orders may also be punished.³⁰

Would the result in the Compton trial have been different if Change 1 had been in effect in October 1943?³¹

Finally, in *Hitler’s Last General*, two British historians argued that if the legal principles used to convict SS-troops for the massacre of American POWs at Malmedy had been applied to the Biscari killings, then Patton³² would have been sentenced to life imprisonment and Bradley to ten years. As for Colonel Cookson, who had commanded the 180th

³⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 345.1 (1 Oct. 1940) (C1, 15 Nov. 1944) (emphasis added).

³¹ For more on the Army’s decision to remove superior orders as an absolute defense to a war crime, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT 354–55 (2009). Today, paragraph 509a of Field Manual 27-10 provides that “the fact that the law of war has been violated pursuant to an order of a superior authority . . . does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 509a (July 1956).

³² As for George S. Patton, widely regarded as one of the best combat commanders of all time, General Eisenhower said it best: “His emotional range was very great and he lived at either one end or the other of it.” SOLIS, *supra* note 31, at 386. Assuming that Eisenhower was correct, what does this say about Patton’s responsibility for West’s and Compton’s actions in Sicily?

Infantry Regiment, he would have been sentenced to death.³³ Whether one agrees with this assessment or not, it is arguable that, in light of the principle of command responsibility for war crimes, some culpability may well have attached to senior American commanders in Sicily.

Remembering that military criminal law and the law of armed conflict today are much different than they were in World War II, what are the lessons to be learned from the events at Biscari? One might conclude that an officer serving in 1943 could expect different treatment at a court-martial

from an enlisted Soldier being prosecuted for a similar offense. Another lesson might be that culpability for war crimes very much depends on who wins the war (so-called “victor’s justice”). But perhaps the most important lesson is that commanders must be careful when giving a speech designed to instill aggressiveness and a “warrior” spirit in their subordinates. Word choice does matter, and Soldiers do listen to what commanders say to them.

More historical information can be found at

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³³ IAN SAYER & DOUGLAS BOTTING, *HITLER’S LAST GENERAL* (1989). For more on the Malmedy murders, see CHARLES WHITING, *MASSACRE AT MALMEDY* (1971). *See also* DANNY S. PARKER, *FATAL CROSSROADS* (2012); JAMES J. WEINGARTNER, *A PECULIAR CRUSADE* (2000). For a short legal analysis of the Malmedy trial, see Fred L. Borch, *The ‘Malmedy Massacre’ Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath*, *ARMY LAW.*, Jan. 2011, at 3.

Traditional Economy Act Transactions—A Hidden Opportunity for On-the-Job Training

Major John R. Longley*

I. Introduction

The U.S. military finds itself near the end of a decade-plus of war in Iraq and Afghanistan.¹ With the end of combat operations in sight, the nation's focus has shifted to domestic issues, to include the challenge of closing an over one trillion dollar annual budget deficit.² Given the United States's budgetary challenges, and the resulting "do more with less" environment likely to define the military's near future, military commanders must find and exploit innovative and cost-efficient ways to train American servicemembers.

One cost-efficient tool available for military commanders to provide continued training for special-skilled servicemembers is the Economy Act.³ Originally passed in 1932,⁴ the Economy Act enables a federal agency to receive supplies or services from another agency through the use of interagency support agreements.⁵ As this article will demonstrate, these interagency support agreements can provide special-skilled servicemembers with real world

opportunities to practice their trade, while saving money for the agency receiving the benefit of those skills.⁶

To help commanders use the Economy Act to generate potential on-the-job training opportunities, this article will offer a user's guide approach to executing a traditional Economy Act transaction, whereby the military uses its organic assets to satisfy another agency's support requirements.⁷ The guide begins by discussing the history and evolution of the Economy Act, from its origins during the Great Depression to its potential present-day applications. This article then outlines the statutory and regulatory requirements that must be satisfied prior to completing an Economy Act transaction, as well as discusses some common formation and execution pitfalls. Finally, the guide demonstrates that, when successfully executed, Economy Act transactions can provide a great opportunity for special-skilled servicemembers to practice their trade in a way that satisfies the demands of other federal agencies while saving taxpayer dollars.

II. History

Prior to the passage of the Economy Act, constitutional restrictions on redelegation and interagency fund transfers prohibited federal agencies from turning to brethren agencies for assistance, except in the rare circumstance where Congress specifically authorized interagency support.⁸ The first of these constitutional restrictions, the restriction on redelegation, arises from Congress's power to legislate the responsibilities and authorities assigned to each federal agency.⁹ Once Congress assigns certain authorities to an agency, that agency cannot violate this assignment by attempting to reassign these authorities to another agency.¹⁰

* Judge Advocate, U.S. Army. Presently assigned as Trial Attorney, Contract and Fiscal Law Division, U.S. Army Legal Services Agency, Fort Belvoir, Virginia. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

¹ See Katelyn Sabochik, *President Obama on the Way Forward in Afghanistan*, WHITE HOUSE BLOG (June 22, 2011, 9:40 PM), <http://www.whitehouse.gov/blog/2011/06/22/president-obama-way-forward-afghanistan> (reporting that President Obama announced his plan to complete the transition of security to the Afghan people by 2014).

² CONG. BUDGET OFFICE, MONTHLY BUDGET REVIEW FISCAL YEAR 2012 (2012).

³ 31 U.S.C. §§ 1535–1536 (2011).

⁴ 3 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 12, at 22–23 (3d ed. 2008) [hereinafter GAO REDBOOK].

⁵ The Economy Act states that:

The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods and services if—(1) amounts are available; (2) the head of the ordering agency or unit decides the order is in the best interest of the United States government; (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

31 U.S.C. § 1535.

⁶ A list of the various specialty skills possessed by Soldiers can be found by visiting <http://www.goarmy.com>.

⁷ Throughout this article, the author will refer to this type of interagency agreement as a "traditional" Economy Act transaction, in order to distinguish it from Economy Act transactions involving third party commercial support contracts, whereby one agency contracts with a commercial enterprise in order to satisfy the requirements of another agency. See *infra* note 23 and accompanying text.

⁸ Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 902 (2012) (arguing that the "interagency marketplace" of the early twentieth century was "barren" as a result of there being "few statutes that authorized agencies to pay other agencies for their services").

⁹ See *United States v. Tower & Sons*, 14 Cust. App. 421, 426 (1927) (explaining the restriction on redelegation under the maxim *delegate potestas non potest delegari*—an authority delegated cannot be redelegated).

¹⁰ *Id.*

This does not mean that an agency cannot seek help, but that help is limited to areas that will invade neither a requesting agency's decision-making responsibilities nor its core purpose.¹¹

But even when interagency support does not create a redelegation violation, the U.S. Constitution's appropriation clause¹² prevents interagency support absent specific congressional authority for interagency fund transfers.¹³ Without congressional authority for interagency fund transfers, any support provided by one agency to another would create an unauthorized expense against the supporting agency's appropriation¹⁴ and an unauthorized augmentation to the receiving agency's appropriation.¹⁵

The Economy Act, originally passed in 1932 as part of a government initiative to reduce spending, was intended to encourage interagency support agreements by providing a general statutory authority for interagency fund transfers to pay for support provided by one agency to another.¹⁶ Proponents of the act argued that allowing agencies to enter into agreements to utilize each other's facilities and personnel would create government efficiencies by "mak[ing] it unnecessary for departments to set up duplicating and overlapping activities."¹⁷ Though the Economy Act does not provide a general authorization for redelegation, it does provide general statutory authority for interagency fund transfers, provided all the statute's enumerated requirements are met.¹⁸

¹¹ See GAO REDBOOK, *supra* note 4, ch. 12, at 72 ("[F]or purposes of applying the administrative function rule, the allocation of ultimate responsibility is more important than becoming immersed in a semantic morass over what does or does not constitute an administrative function. An agency can acquire services under the Economy Act, but cannot turn over the ultimate responsibility for administering its programs or activities.").

¹² The appropriation clause states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9.

¹³ Marisam, *supra* note 8, at 898; Air Force Office of Scientific Research, B-301561, 2004 WL 1853465, at *2 (Comp. Gen. June 14, 2004) (stating that "[u]nless otherwise authorized by law, transfers of funds between federal agencies and instrumentalities are prohibited by law").

¹⁴ An appropriation act is a statute that "provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes." U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 13 (2005) [hereinafter GAO GLOSSARY].

¹⁵ *In re Wash. Nat'l Airport*, 57 Comp. Gen. 674, 678 (1978). Congress appropriates money to federal agencies via Appropriation Acts.

¹⁶ GAO REDBOOK, *supra* note 4, ch. 12, at 22–23.

¹⁷ *In re Wash. Nat'l Airport*, 57 Comp. Gen. at 680 (citing H.R. REP. NO. 71-2201, at 2–3 (1931)).

¹⁸ See Marisam, *supra* note 8, at 906 (stating that "it is impossible under this bill . . . for one department to delegate its functions to another") (quoting *Hearing on H.R. 10199 Before the H. Comm. on Expenditures in the Exec. Dep'ts*, 71st Cong. 6 (1930)).

When initially passed, the Economy Act required supporting agencies to use their organic assets when satisfying an interagency support request.¹⁹ Examples provided in the House Report included using Navy inspectors to inspect materials and supplies ordered by other federal agencies, or the interagency sharing of engineering staff.²⁰ Yet over time, the Economy Act evolved to allow supporting agencies to contract for the goods or services needed to satisfy an interagency support request.²¹

This evolution started with a 1942 amendment to the Economy Act that authorized the Departments of the Army, Navy, and Treasury, as well as Federal Aviation Administration and Maritime Administration, to provide interagency support via private contract in lieu of using the supporting agency's organic assets.²² This authority was expanded to all federal agencies with a 1982 amendment that "authorize[d] all agencies to obtain goods and services by contract when fulfilling Economy Act orders."²³ Proponents believed that the amendment would enable federal agencies to leverage subject-matter expertise contained within other departments when contracting with a private company.²⁴

Since the 1982 amendment, weak acquisition practices, including poor contract management resulting from ill-defined agency responsibilities, as well as the general lack of coordination in the creation of government-wide contracting vehicles, has led to the proliferation of policies and regulations governing the use of interagency acquisitions via third party commercial support contracts.²⁵ Concern over the waste in taxpayer dollars resulting from poorly implemented interagency acquisition tools led Congress, in the Fiscal Year 2009 National Defense Authorization Act (NDAA), to

¹⁹ See Sec'y of Commerce, 20 Comp. Gen. 264, 266 (1940) (advising that the "only services which may be requisitioned under [the Economy Act] are . . . services or works rendered or performed by the personnel of the requisitioned agency").

²⁰ H.R. REP. NO. 72-1126, at 15–16 (1932).

²¹ 31 U.S.C. § 1535 (2011).

²² The Economy Act, ch. 507, 56 Stat. 661 (1942).

²³ GAO REDBOOK, *supra* note 4, ch. 12, at 73 (citing Pub. L. No. 97-332, 96 Stat. 1622 (1982)). Specifically, the language of the Economy Act was amended to allow Economy Act transactions when either an agency could itself "provide or get by contract the ordered goods or services." 31 U.S.C. § 1535(a)(3).

²⁴ An example given in the House Report was if the then-Immigration and Naturalization Services required night vision sensors, the amended Economy Act would allow the Department of Defense (DoD), as a subject-matter expert, to assist with contracting for the sensors. H.R. REP. NO. 97-456, at 4 (1982).

²⁵ Memorandum from the Office of Mgmt. and Budget, to the Honorable Joseph I. Lieberman, Chairman, Committee on Homeland Security and Gov't Affairs, U.S. Senate encl., at 1–2 (Aug. 26, 2010) [hereinafter OMB Memorandum], available at http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/IA_Report_2010-08-24.pdf.

direct the Office of the Management and Budget (OMB) to provide a report on how to improve interagency acquisition practices.²⁶ The 2009 NDAA directed the OMB to cover all “interagency acquisitions,” which it defined as any “procedure by which an executive agency needing supplies or services . . . obtains them from another executive agency”²⁷ Nonetheless, given the limited scope of the OMB’s response, it is clear that Congress did not intend the OMB to investigate traditional Economy Act transactions, but to only investigate interagency contracting with commercial enterprises, including those Economy Act transactions using third party commercial support contracts.²⁸ As a result of the OMB’s report, a series of requirements were adopted by the federal government involving interagency contracting that do not necessarily apply to traditional Economy Act transactions.

III. Rules Governing Traditional Economy Act Transactions

As explained in Part II, there are two methods by which an agency can satisfy an interagency support request under the Economy Act—the performing agency²⁹ can use its organic assets, which this article refers to as a traditional Economy Act transaction or it can contract with a commercial enterprise for the required goods or services.³⁰ Though interagency assistance using the performing agency’s organic assets is the traditional and older form of Economy Act transactions, they are less regulated than Economy Act transactions using third party commercial support contracts.³¹ Therefore, many of the commonly referenced policies and regulations for interagency transactions, including the Federal Acquisition Regulation (FAR)³² and the Department of Defense (DoD) Federal Acquisition Regulation Supplement (DFARS),³³ do not

generally apply when entering into a traditional Economy Act transaction.³⁴ Instead, commanders and their legal advisors should look to DoD guidance and published Government Accountability Office (GAO) decisions for guidance on how to enter into and perform a traditional Economy Act transaction.³⁵

From these sources, one can identify eight requirements that must be met for a successful traditional Economy Act transaction, with the first five coming directly from the statutory language of the Economy Act itself.³⁶ These requirements are: (1) the Economy Act transaction is between authorized parties; (2) the ordering agency has available funds to pay for the project; (3) the ordering agency determines that the order is in the best interest of the government; (4) the performing agency is able to support the project using its organic assets;³⁷ (5) the order cannot be satisfied “as conveniently or cheaply by a commercial enterprise”; (6) the requested work is not an unauthorized redelegation;³⁸ (7) there is no other statutory authority allowing the performing agency to perform the work;³⁹ and (8) a written agreement is signed by authorized officials from all party-agencies.⁴⁰

OF DEF., DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT pt. 217.5 (2011) [hereinafter DFARS].

³⁴ Some specific provisions of the FAR or DFARS will apply to traditional Economy Act transactions by virtue of their incorporation by DoD guidance for traditional economy act transactions. For example, both the FAR and the DoD Financial Management Regulation require the ordering agency to provide a written determinations and findings certifying that “funding is available to pay for the support, it is in the best interest of the U.S. Government, the supplying activity is able to provide the support, the support cannot be provided as conveniently or economically by a commercial enterprise, and it does not conflict with any other agency’s authority.” Compare FAR 17.502-2(c) (2005), with 11A U.S. DEP’T OF DEF., FIN. MGMT. REG. 7000.14R para. 030304 (2012) [hereinafter DoD FMR].

³⁵ Requirements for performing a traditional economy act transaction can be determined primarily by looking at the statutory language of the Economy Act itself, as well as guidance provided by the DoD within the DoD Financial Management Regulation, DoD FMR, *supra* note 34, and DoD Instruction 4000.19. U.S. DEP’T OF DEF., INSTR. 4000.19, INTERSERVICE AND INTERGOVERNMENTAL SUPPORT (9 Aug. 1995) [hereinafter DoDI 4000.19]. Additional guidance relating to the interpretation of the Economy Act’s statutory language can be found by looking at GAO opinions, which can be found online at <http://www.gao.gov/legal/index.html>. The GAO summarizes these opinions in its Redbook. GAO REDBOOK, *supra* note 4.

³⁶ 31 U.S.C. § 1535 (2011).

³⁷ Since this article is focused on traditional Economy Act transactions, it only addresses only those scenarios in which an agency can support an Economy Act transaction with its organic assets. Nonetheless, third party support contracts with commercial enterprises can also be performed under the Economy Act. See *supra* notes 23–24 and accompanying text.

³⁸ See *supra* note 18 and accompanying text.

³⁹ DoD FMR, *supra* note 34, para. 180102.

⁴⁰ DoDI 4000.19, *supra* note 35, para. 4.5.

²⁶ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 865(a), 122 Stat. 4356 (2008).

²⁷ *Id.* § 865(d)(3).

²⁸ OMB Memorandum, *supra* note 25, at 1 (focusing on interagency contracting, which it defines as “an agency buy[ing] goods and services using a contract established by another agency or with its assistance”).

²⁹ When describing the two parties to an Economy Act transaction, the Government Accountability Office refers to the agency requesting support as the “ordering agency” and to the agency providing support as the “performing agency.” GAO REDBOOK, *supra* note 4, ch. 12, at 31; Marisam, *supra* note 8, at 900.

³⁰ See *supra* notes 23–24 and accompanying text.

³¹ See *infra* notes 32–33 and accompanying text.

³² Part 17.5 of the FAR states that it does not apply to “[i]nteragency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction” FAR 17.500(c) (2005) (emphasis added).

³³ The Defense Federal Acquisition Regulation Supplement (DFARS) applies to “all purchases . . . made for DoD by another agency.” U.S. DEP’T

A. Authorized Parties—Who Can Enter into and Approve Economy Act Transactions

The first sentence of the Economy Act states that “[t]he head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another.”⁴¹ This statutory language has been uniformly interpreted to limit the use of the Economy Act to transactions between “agenc[ies] or instrumentalit[ies] of the United States government.”⁴² Therefore, a federal agency can only enter into Economy Act transactions with other federal agencies.⁴³

The statutory language of the Economy Act also requires that an Economy Act order be approved by either the “head of [the] agency” or the head of a “major organizational unit within an agency.”⁴⁴ Though this authority may be delegated, military commanders should verify with the ordering agency that their request has been approved by an individual authorized by the agency to place Economy Act orders.⁴⁵

B. Available Funds—Ensuring the Ordering Agency Can Pay for the Work Performed

Under 31 U.S.C. § 1535, known as the “Purpose Statute,” an agency can only use its appropriated funds for “objects for which the [appropriation was] made” unless “otherwise provided by law.”⁴⁶ The Economy Act is not an exception to the Purpose Statute. Therefore, for a valid Economy Act order, the ordering agency must have available funds that are authorized to use for the goods or

⁴¹ 31 U.S.C. § 1535.

⁴² GAO REDBOOK, *supra* note 4, ch. 12, at 32.

⁴³ *Id.* The Redbook also identifies some groups, like the Postal Service, whose exclusion from the Economy Act is less intuitive. *Id.* For some of these groups, there is a separate authority for providing assistance, such as the Innovative Readiness Training program, which allows the DoD to use military personnel to assist federal, regional, state, or local government entities under certain limited circumstances. 10 U.S.C. § 2012 (2012). Commercial contractors are not principals of an Economy Act Transaction, but can be contracted with by the performing agency to provide the specific service or good required by the ordering agency. *See supra* note 23 and accompanying text.

⁴⁴ 31 U.S.C. § 1535.

⁴⁵ Within the DoD, the authority to place an interagency Economy Act order with a non-DoD activity cannot be delegated lower than “Senior Executive Service, Flag, or General Officer level[.]” DoD FMR, *supra* note 34, para. 030304. But neither the Economy Act nor the DoD requires a military commander to seek approval from the General Officer or Senior Executive Service-level official to support an Economy Act order properly received from another agency. *See* DoDI 4000.19, *supra* note 35, para. E.2.1.1.1 (requiring General Officer or Senior Executive Service official approval for “[o]rders placed with non-DoD Federal activities”) (emphasis added).

⁴⁶ 31 U.S.C. § 1301(a).

services being ordered. Since the performing agency will usually have no way of knowing whether the ordering agency has funds available to pay for the requested project, the requesting official must provide the performing agency a “Certification of Availability for Purpose.” In the Certification of Availability for Purpose, the ordering agency certifies that “the funds cited on the Economy Act order are properly chargeable for the purposes cited in the order.”⁴⁷

C. Best Interest of the Government—The Ordering Agency Decides

In addition to determining that funds are available for the project, the ordering agency must also certify that the “order is in the best interest of the United States government.”⁴⁸ The view of the GAO is that the best interest determination is largely a matter of “internal debate” within the ordering agency itself.⁴⁹ Since this is an internal decision made by the ordering agency, military commanders may reasonably rely upon the ordering agency’s “best interest” determination.

D. Performing Agency in a Position to Perform Work—The Performing Agency Decides

Since the 1982 amendment to the Economy Act, any federal agency can support an Economy Act order with either organic or contracted goods or services.⁵⁰ If the performing agency determines that it will use commercially contracted goods or services, the performing agency must ensure that all additional requirements relating to commercially contracted procurements, including those found in the FAR, are satisfied.⁵¹

Yet, just because the performing agency is capable of supporting the ordering agency’s request does not mean that it is in a position to support the agency. An agency may not provide support under the Economy Act when there are “statutory prohibitions or restrictions which would obstruct performance.”⁵² In short, the Economy Act does not provide a performing agency authority to do something it is otherwise prohibited from doing. The Posse Comitatus Act,

⁴⁷ DoD FMR, *supra* note 34, para. 030402.

⁴⁸ 31 U.S.C. § 1535.

⁴⁹ GAO REDBOOK, *supra* note 4, ch. 12, at 27 n.7.

⁵⁰ *See supra* note 23 and accompanying text.

⁵¹ *See supra* notes 31–38 and accompanying text. These types of Economy Act transactions are beyond the scope of this article.

⁵² GAO REDBOOK, *supra* note 4, ch. 12, at 28 (citing Sec’y of Commerce, 23 Comp. Gen. 935, 937–38 (1944)).

which prohibits the military from performing domestic civilian law enforcement functions absent specific authorization, would be an example of a statutory prohibition that obstructs performance of certain Economy Act orders.⁵³ Provided no prohibition or restriction exists, whether an agency is in a position to support a request under the Economy Act is “primarily the agency’s own determination.”⁵⁴

Within the DoD, unit commanders determine whether their units are in a position to support an Economy Act request.⁵⁵ The unit commander must indicate this determination in block 8.c on a DD Form 1144 “Support Agreement.”⁵⁶

E. Lower Cost Rule—Making Sure a Commercial Provider Cannot Do It for Less

In order to meet the Economy Act’s dual purpose of increasing government efficiency and reducing costs, the ordering agency must determine that the “goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.”⁵⁷ A technique noted by the GAO for making a low cost determination is to “solicit bids and then reject all bids if they exceed the cost of dealing with another agency.”⁵⁸

The ordering agency’s low cost finding must be included in a Determinations and Findings (D&F) Memorandum generated by the ordering agency and signed by the “head of a major organizational unit” or their authorized designee.⁵⁹ The D&F must state that “funding is available to pay for the support, it is in the best interest of the U.S. Government, the supplying activity is able to provide the support, the support cannot be provided as conveniently or economically by a commercial enterprise, and it does not conflict with any other agency’s authority.”⁶⁰

⁵³ 18 U.S.C. § 1385 (2011).

⁵⁴ GAO REDBOOK, *supra* note 4, ch. 12, at 28 (citing Sec’y of Commerce, 23 Comp. Gen. 935, 937–38 (1944)).

⁵⁵ DODI 4000.19, *supra* note 35, para. E.2.1.1 (defining approval authority as “[t]he activity commander, director, or chief who has authority over the personnel and material utilized in providing the specific support”).

⁵⁶ *Id.* The DD Form 1144 Support Agreement is used to document a description of support to be provided, estimated costs, time frame, and other necessary terms relating to the interagency support transaction. *Id.* para. 6.2.

⁵⁷ 31 U.S.C. § 1535(a).

⁵⁸ GAO REDBOOK, *supra* note 4, ch. 12, at 29.

⁵⁹ DOD FMR, *supra* note 34, para. 030304. The DoD FMR incorporates the determinations and findings requirement of the FAR. Compare FAR 17.502-2(c), *supra* note 32, with DoD FMR, *supra* note 34, para. 030304.

⁶⁰ DoD FMR, *supra* note 34, para. 030304. Though an ordering agency may consider both convenience and cost in its Determinations and Findings,

Though it is the ordering agency’s responsibility to provide the D&F, the military unit or activity performing the work must provide the ordering agency a reasonable cost estimate to enable the ordering agency to make its lower cost determination. Part IV of this article will cover how the performing agency determines the “actual cost” of an Economy Act order.⁶¹

F. Redelegation Restriction—Ensuring the Ordering Agency Maintains Decision-Making Authority

As discussed in Part II of this article, the Constitution prohibits agencies from redelegating congressionally provided authorities that involve the exercise of discretion or the agency’s core purpose. The Economy Act is not an exception to the Constitution’s redelegation restriction.⁶² Therefore, military commanders and their legal advisors must ensure that Economy Act support agreements provide adequate safeguards to ensure their Soldiers are not placed in a situation where they are exercising the discretionary or decision-making authority of the ordering agency.⁶³

According to the GAO, the question of redelegation ultimately comes down to whether the ordering agency maintains “ultimate responsibility for administering its programs or activities.”⁶⁴ By following the DoD Financial Management Regulation (FMR) requirement that all Economy Act orders be “specific, definite, and certain as to the work encompassed by the order and the terms of the order itself,” military commanders can limit the discretion provided their Soldiers during an Economy Act transaction and ensure that the ordering agency maintains ultimate responsibility for the project.⁶⁵

GAO opinions regarding this requirement have largely focused on cost rather than convenience. See GAO REDBOOK, *supra* note 4, at 12–29 (discussing the “conveniently or cheaply” language of the Economy Act under a subsection entitled “[l]ower cost”). Therefore, agencies should use caution when entering into an Economy Act transaction when the supporting agency is not the lowest cost provider. *Id.* (stating that “[t]he Economy Act was never intended to foster an incestuous relationship in lieu of normal contracting with private business concerns”). This does not mean that the Economy Act cannot be used when the proposed supporting agency is not the lowest cost provider, but rather highlights the importance for the ordering agency to clearly identifying the cost-convenience tradeoff when a cheaper commercial enterprise can provide the required goods or services.

⁶¹ See *infra* Part IV.

⁶² See *supra* note 18 and accompanying text.

⁶³ See *supra* notes 8–11 and accompanying text.

⁶⁴ GAO REDBOOK, *supra* note 4, ch. 12, at 72.

⁶⁵ DOD FMR, *supra* note 34, para. 030401.

G. Act of Last Resort—Ensuring No Other Statute Authorizes the Interagency Work

The Economy Act is the only general authority for interagency fund transfers.⁶⁶ Since originally passing the Economy Act in 1932, Congress has subsequently passed numerous statutes providing specific authority for interagency fund transfers.⁶⁷ Each of these specific interagency fund transfer authorities is limited to the specific circumstances outlined within its respective implementing statute.⁶⁸ The Economy Act may not be used when a more specific statutory authority for interagency fund transfers covers the contemplated project or order.⁶⁹ In such situations, the ordering and performing agencies must comply with the requirements of the more specific statute. A non-exhaustive list of commonly used non-Economy Act authorities can be found both within the Contract Attorney Deskbook, published by The Judge Advocate General's School and within the DoD FMR.⁷⁰

H. Written Agreement—Putting Everything in Writing

Though not statutorily required, written agreements outlining and memorializing Economy Act transactions are recommended by the GAO⁷¹ and are mandated by the DoD.⁷² Economy Act orders should generally be recorded on

a DD Form 1144 Support Agreement,⁷³ though other ordering formats may be used so long as all documentation requirements outlined in the DoD FMR are satisfied.⁷⁴ For more complex orders, military commanders may also elect to supplement the DD Form 1144 with a memorandum of agreement that clearly outlines the project and responsibilities of both parties.⁷⁵ An example memorandum of agreement can be found in Volume 11A, Chapter 1 of the DoD FMR.⁷⁶

Should both parties elect to use a DD Form 1144 to memorialize the Economy Act order, military commanders should ensure that the form identifies all bases for reimbursement and provides a clear statement of work and performance standards.⁷⁷ The agreement should also incorporate the ordering agency's D&F,⁷⁸ as well as establish reporting and oversight requirements necessary to identify and resolve problems, including disputes over performance requirements, as they arise.⁷⁹

All responsibilities and requirements assigned to the ordering agency necessary to facilitate completion of the project should be included within the agreement.⁸⁰ The support agreement should also specify whether payment will be in advance or on a reimbursement basis.⁸¹ Finally, the

agencies involved based upon the documentation standards [outlined in Chapter 1 of the DoD FMR]”).

⁶⁶ See *id.* para 180102 (identifying only one “default” authority for interagency fund transfers when specific authorization for the interagency fund transfer does not exist).

⁶⁷ *E.g.*, The Project Orders Statute, 41 U.S.C.A. § 6307 (West 2013) (Westlaw through Pub. L. No. 112-207, 127 Stat. 448 (2013)); Government Employees Training Act (GETA), 5 U.S.C. § 4104 (2012); The Clinger-Cohen Act, 40 U.S.C. § 11302 (2011).

⁶⁸ For example, Government Employees Training Act (GETA) allows for interagency reimbursement when an agency provides training attended by employees from other federal agencies. 5 U.S.C. § 4104.

⁶⁹ See DoD FMR, *supra* note 34, para. 180102 (stating that “[s]pecific statutory authority is required to place an order with a Non-DoD agency for goods or services If specific statutory authority does not exist, the default will be the Economy Act . . .”).

⁷⁰ CONT. & FISCAL L. DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CENTER & SCH., U.S. ARMY, 165TH CONTRACT ATTORNEY’S COURSE DESKBOOK 11–19 to –26 (July 2012); see also DoD FMR, *supra* note 34, ch. 18 (providing the DoD guidance for Non-Economy Act orders).

⁷¹ GAO REDBOOK, *supra* note 4, ch. 12, at 30 (stating that “[a] written agreement is important because, as in any contract situation, the terms to which the parties agree, as reflected in the writing, establish the scope of the undertaking and the rights and obligations of the parties. Also, the written agreement can establish a ceiling on the ordering agency’s financial obligation.”).

⁷² DoDI 4000.19, *supra* note 35, para. 4.5 (“[I]ntragovernmental support that requires reimbursement shall be documented on a DD Form 1144, ‘Support Agreement’ . . . or similar format that contains all the information required on DD Form 1144.”); see also DoD FMR, *supra* note 34, para. 030501 (stating that “[a]n Economy Act order may be placed on DD Form 1144 or any form that is acceptable to both requesting and servicing

⁷³ DoDI 4000.19, *supra* note 35, para. 4.5.

⁷⁴ DoD FMR, *supra* note 34, para. 010204 (listing the provisions that must be included in an interagency support agreement).

⁷⁵ *Id.* para. 010204(B)(1) (stating that memorandums of agreement are “normally used when a certain unquantifiable type of support is required over a period of time”).

⁷⁶ *Id.* ch. 1, add. 3.

⁷⁷ DoDI 4000.19, *supra* note 35, encl. 2.1.12 (Support agreements must “define the support to be provided . . . , specify the basis for calculating reimbursement charges (if any) for each service, establish the billing and reimbursement process, and specify other terms and conditions of the agreement.”).

⁷⁸ See *supra* note 59 and accompanying text.

⁷⁹ Unresolved disputes must be elevated through a DoD activity’s chain-of-command to the Office of the Assistant Secretary of Defense (Economic Security), who will mediate the dispute for the DoD. DoDI 4000.19, *supra* note 35, para. 4.8. If the Office of the Assistant Secretary of Defense (Economic Security) is unable to successfully mediate the dispute, the dispute will be sent to Department of the Treasury’s Financial Management Services-Government Wide Acquisitions for resolution. U.S. DEP’T OF THE TREASURY, TREASURY FINANCIAL MANUAL, BULL. NO. 2011-04, INTRAGOVERNMENTAL BUSINESS RULES 10 (1998).

⁸⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, POLICY AND PROCEDURES MANUAL FOR GUIDANCE ON FEDERAL AGENCIES, FISCAL GUIDANCE 7.2–11 (1993) (requiring interagency agreements to include the “terms and conditions of performance”).

⁸¹ GAO REDBOOK, *supra* note 4, ch. 12, at 34. The DoD FMR generally prohibits DoD activities from making advanced payment to non-DoD entities for support received under an interagency agreement. DoD FMR,

support agreement should discuss how costs will be allocated if the agreement is terminated prior to completion of the project.⁸² Such a provision is particularly important for projects performed by military servicemembers, where military necessity may prevent servicemembers from completing a project.

I. Project Cost—Identifying Reimbursable Costs

To avoid an unauthorized expense against a unit's appropriated funds, and an impermissible augmentation of the ordering agency's appropriated funds, it is critical that military leaders ensure that all reimbursable costs associated with an interagency project are identified and properly charged to the ordering agency.⁸³ Though the Economy Act itself does not define actual cost, the GAO and DoD have provided detailed guidance on how to calculate the reimbursable actual costs associated with an Economy Act transaction.⁸⁴

i. The Government Accountability Office Approach

The GAO, recognizing that the purpose of the Economy Act was to facilitate, rather than impede, the use of interagency transactions,⁸⁵ has held that the determination of actual costs need not be an "exact science."⁸⁶ Rather, the reimbursement requirements of 31 U.S.C. § 1535(b) are satisfied so long as the actual costs charged to the ordering agency "reasonably approximate the actual costs" of the project.⁸⁷ In determining reimbursable costs, the GAO has

supra 34, para. 030502. Though this rule does not prohibit a non-DoD entity from making advance payments for support they receive from a DoD entity, other agencies may have a similar restriction that would prohibit the use of advance payments.

⁸² *Id.* at 42–43 (stating that agencies can structure interagency agreements to address the performing agency's incurred expenses in the event of a termination for convenience).

⁸³ See *supra* note 15 and accompanying text.

⁸⁴ Marisam, *supra* note 8, at 911–12 (stating that, though Congress never defined actual cost, the "precise contours have been outlined piecemeal by the Comptroller General"); DOD FMR, *supra* note 34 ch. 1, add. 1 (outlining types of costs DoD activities must include in "actual cost" calculation).

⁸⁵ The Comptroller General stated that one of Congress's goals when passing the Economy Act was to "diminish[] the reluctance of other Government agencies to accept [interagency] orders by removing . . . limitations upon reimbursements." *In re Wash. Nat'l Airport*, 57 Comp. Gen. 674, 681 (1978). Further, Congress did not intend to make the reimbursement requirement overly burdensome or a source of "interagency bickering," as demonstrated by the Economy Act's lack of any statutory requirements for audits, certifications in advance of payment, or detailed breakdowns of reimbursable costs. GAO REDBOOK, *supra* note 4, ch. 12, at 41.

⁸⁶ GAO REDBOOK, *supra* note 4, ch. 12, at 42.

⁸⁷ *Id.*

identified two categories of costs associated with an Economy Act transaction—required costs and situational costs.⁸⁸

Under the Economy Act, the ordering agency must reimburse a performing agency for its required costs.⁸⁹ Required costs consist largely of those direct costs incurred by the performing agency as a result of an Economy Act transaction.⁹⁰ Direct costs include the salaries, materials, and equipment furnished for the project, as well as any associated transportation costs.⁹¹ Indirect costs are also treated as a reimbursable required cost when they are "funded out of the performing agency's currently available appropriations and . . . bear a significant relationship to the performing of the service or work or the furnishing of materials."⁹² Reimbursement of small amounts may be waived when processing the payment would be uneconomical.⁹³

All remaining costs associated with an Economy Act transaction are classified as situational costs.⁹⁴ Though the Economy Act provides a performing agency significant discretion in determining whether it will require reimbursement for situational costs,⁹⁵ the use of this discretion is often limited by agency-wide reimbursement policies.⁹⁶

Though employee salaries are typically considered a reimbursable cost, the GAO has recognized two reimbursement exceptions.⁹⁷ The first exception involves

⁸⁸ *Id.* at 39.

⁸⁹ *Id.* at 39–40.

⁹⁰ *Id.* at 39.

⁹¹ *Id.*

⁹² *In re Wash. Nat'l Airport*, 57 Comp. Gen. 674, 682 (1978).

⁹³ Before using this exception, "a study [should be] made to determine what limiting figure should be set and whether any other criteria should be established." To Chairman, Incentive Award Committee, B-156022 (Comp. Gen. Apr. 28, 1966), available at <http://www.gao.gov/assets/400/400392823.pdf>, cited with approval in GAO REDBOOK, *supra* note 4, ch. 12, at 42.

⁹⁴ GAO REDBOOK, *supra* note 4, ch. 12, at 40.

⁹⁵ *Id.* ch. 4, at 41 (stating that "[w]hile particular circumstances might authorize some indirect costs beyond what the Economy Act requires, their inclusion in the performing agency's charges is not required, but is discretionary).

⁹⁶ Within the DoD FMR, the DoD has provided its subordinate activities with detailed guidance on all costs that must be reimbursed for services provided by the DoD to other DoD or non-DoD entities. DoD FMR, *supra* note 34, para. 030601.

⁹⁷ A nonreimbursable detail of servicemembers to perform work for another agency will typically "create an unauthorized augmentation of the receiving agency's appropriation [and] . . . violate[] the purpose limitations of 31 U.S.C. § 1301(a)." GAO REDBOOK, *supra* note 4, ch. 12, at 56.

situations where the performing agency's employee is performing interagency work "similar or related to those ordinarily handled by the loaning agency, and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided."⁹⁸ This scenario could arise in situations where the work performed by an agency employee for another agency provides substantial training benefits directly related to the employees regular responsibilities.⁹⁹ The second exception to the salary reimbursement requirement applies to scenarios where an agency provides a small number of employees over a brief period of time, and therefore incurs a negligible impact to its appropriations as a result of the interagency work.¹⁰⁰

ii. The Department of Defense Approach

The DoD has provided its own guidance on calculating the reimbursable costs associated with an Economy Act transaction. The DoD FMR states that:

Reimbursement under the Economy Act is to be made on the basis of actual costs as determined by the [performing] agency Actual costs include all direct costs attributable to providing goods or services, regardless of whether the servicing agency's expenditures are increased. Actual costs also include indirect costs (overhead) to the extent they have a significant relationship to providing the goods or services and benefit the requesting agency. Indirect costs (overhead) shall be computed in accordance with Chapter 1 of this Volume.¹⁰¹

⁹⁸ Dep't of Health & Human Servs. Detail of Office of Cmty. Svcs. Emps., 64 Comp. Gen. 370, 380 (1985), cited with approval in GAO REDBOOK, *supra* note 4, ch. 12, at 56.

⁹⁹ Cf. Reimbursement for Detail of Judge Advocate General's Corps Pers., 13 Op. O.L.C. 188, 191 (1989) (finding that the Economy Act required salary reimbursement where experienced JAG Corps attorneys were detailed to work on specialized civilian narcotics prosecutions in civilian courts that "did not appear to be directly related to more than a small fraction of the work customarily done by JAGC attorneys for their military departments"), cited with approval in GAO REDBOOK, *supra* note 4, ch. 12, at 56.

¹⁰⁰ Dep't of Health and Human Servs. Detail of Office of Cmty. Svcs. Emps., 64 Comp. Gen. at 380. This exception to salary reimbursement is an application of the general "small amounts" rule applicable to all Economy Act costs. See *supra* note 93 and accompanying text.

¹⁰¹ DoD FMR, *supra* note 34, para. 030601. Though the DoD FMR uses the term "requesting agency" to identify the party seeking interagency support, the statutory language of the Economy Act, and this article, refers to this party as the "ordering agency." 31 U.S.C. § 1535 (2006).

Chapter 1 of the DoD FMR contains a table listing all costs that will be charged by DoD activities when providing support under the Economy Act.¹⁰² Many situational costs, including depreciation, are listed on the table as reimbursable costs.¹⁰³

With regard to agency employee salaries, the DoD FMR does not allow DoD activities to use either salary reimbursement exception identified by the GAO.¹⁰⁴ Therefore, should military commanders seek to use a salary reimbursement exception to facilitate training opportunities for their special-skilled servicemembers, they must first obtain a policy exception from the Office of the Under Secretary of Defense (Comptroller).¹⁰⁵

IV. Pitfalls to an Economy Act Transaction

Three overarching categories of mistakes that may arise during an Economy Act transaction include failures in oversight, funding, and rule application. As demonstrated below, all of these mistakes can be prevented by developing a clear and thorough interagency agreement that ensures communication by all parties throughout the Economy Act project.

A. Failure in Oversight

At the constitutional level, failures in oversight can lead to an improper redelegation of an agency's congressionally provided authority.¹⁰⁶ At a more basic level, failures in oversight can also lead to interagency disputes and unsatisfied requirements. Problems created by the ordering agency's failure to maintain project oversight can lead to protracted disputes involving high level agency leadership, and ultimately, the Department of the Treasury's Financial Management Services—Government-Wide Acquisition Assistant Commissioner.¹⁰⁷ Therefore, ensuring consistent communication by both agencies throughout a project is critical for a successful Economy Act transactions.

¹⁰² DoD FMR, *supra* note 34, ch. 1, add. 1.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., *id.* para. 010203.B.2 (stating that "[m]ilitary labor shall be charged to non-DoD organizations on the basis of the actual hours worked or assigned (detailed)") (emphasis added).

¹⁰⁵ *Id.* at I-4. Requests for exceptions should be sent to:

Office of the Under Secretary of Defense (Comptroller)
Accounting and Finance Policy (A&FP)
1100 Defense Pentagon
Washington, D.C. 20301-1100

¹⁰⁶ See *supra* Part III.F (discussing improper redelegation).

¹⁰⁷ See *supra* note 73 and accompanying text (discussing dispute resolutions involving interagency acquisitions).

Failures in oversight can also result in wasteful spending arising from general mismanagement in the acquisition process.¹⁰⁸ The ordering agency is in the best position to understand their requirements. It is therefore critical that the ordering agency remains engaged throughout the interagency support process to ensure that the completed project satisfies their requirements. A best practice would include incorporating progress reports into the interagency agreement.¹⁰⁹

B. Failure in Funding

A failure to properly fund an interagency Economy Act transaction will usually arise under one of two scenarios: (1) actual projects costs exceed estimated costs; or (2) funds obligated by the ordering agency for the project must be deobligated by operation of 31 U.S.C. § 1535(b). Each scenario is discussed below.

As discussed in Subpart I of Part III, 31 U.S.C. § 1535(b) requires ordering agencies to pay all actual costs associated with an Economy Act transaction. Should the ordering agency have insufficient funds to cover project costs, the performing agency cannot absorb unpaid costs without violating the purpose requirements of 31 U.S.C. § 1301(a).¹¹⁰ Therefore, it is important that the performing agency provide a detailed cost estimate prior to beginning work on an Economy Act order¹¹¹ and that the ordering agency certifies that the necessary funds are available.¹¹² As soon as it becomes apparent to the performing agency that a project may exceed estimated costs, work on the project should stop and the ordering agency must be informed of the cost increase. Failing to notify the ordering agency of unanticipated costs could result in an anti-deficiency violation.¹¹³

¹⁰⁸ The OMB noted that a high risk of mismanagement within interagency acquisitions results in part from an “unclear line of responsibility between agencies with requirements and agencies providing acquisition support.” OMB Memorandum, *supra* note 25, at 1. Though the OMB was specifically addressing interagency assisted acquisitions, the same concern is relevant for traditional Economy Act transactions. Effective oversight mechanisms can ensure each agency understands and performs its areas of responsibility.

¹⁰⁹ Issues relating to project costs are one area that should be included in such reports. *See* GAO REDBOOK, *supra* note 4, ch. 12, at 31 (stating that “it is extremely useful for the [interagency] agreement to set forth a requirement and procedures for the performing agency to notify the ordering agency if it appears that performance will exceed estimated costs”).

¹¹⁰ “Appropriations shall be applied only to the objects for which the appropriations were made. . . .” 31 U.S.C. § 1301(a) (2011).

¹¹¹ *See supra* note 109 and accompanying text.

¹¹² *See supra* note 47 and accompanying text.

¹¹³ U.S. GOV'T ACCOUNTABILITY OFFICE, POLICY AND PROCEDURES MANUAL FOR GUIDANCE ON FEDERAL AGENCIES, FISCAL GUIDANCE 7.2–12 (1993). The Antideficiency Act prohibits a Federal Employee from making or incurring an expenditure or obligation in advance of or exceeding

Even when an ordering agency identifies sufficient funds to pay for all actual costs associated with an Economy Act order, a funding issue may still arise if those funds are not in turn obligated by the performing agency prior to expiring.¹¹⁴ Under 31 U.S.C. § 1502(a), appropriated funds can only be used for “expenses properly incurred during [their] period of availability.” For the typical commercial contract, an expense is considered to have been incurred at the time of contract.¹¹⁵ But under the Economy Act, a more nuanced examination of the performing agency’s expenses is required to determine if and when expenses are incurred under 31 U.S.C. § 1502(a).

Though the Economy Act considers funds obligated upon formation of an interagency support agreement, the Economy Act imposes an additional deobligation requirement whereby funds that the performing agency “has not incurred obligations [against], before the end of the period of availability of the appropriation, in—(1) providing goods or services; or (2) making an authorized contract with another person to provide the requested goods or services,” must be deobligated.¹¹⁶ In short, all funds obligated by the ordering agency for which the performing agency has neither incurred an actual expense nor a contractual obligation, prior to the end of the fund’s period of availability, become unavailable for purposes of reimbursing the performing agency.¹¹⁷ If additional funds are thereafter required to complete the project, “current appropriations available for the same purpose should be used to reimburse the performing agency.”¹¹⁸ Given the potential funding problems that may arise from the Economy Act’s deobligation rule, commanders and their legal advisors should generally avoid Economy Act transactions with support requirements that will likely extend into the next fiscal year. Large or complex projects, as well as projects beginning near the end of the fiscal year, are particularly susceptible to the funding issues created by the deobligation rule.

“an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a).

¹¹⁴ *See* DOD FMR, *supra* note 34, para. 030404B (stating that “[t]he amount obligated by the ordering agency or unit must be deobligated to the extent that the servicing agency has not incurred obligations before the end of the period of availability of the ordering appropriation”).

¹¹⁵ *See* GAO GLOSSARY, *supra* note 14, at 70 (“An agency incurs an obligation, for example, when it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another”).

¹¹⁶ 31 U.S.C. § 1535(d).

¹¹⁷ *See supra* note 114 and accompanying text.

¹¹⁸ GAO REDBOOK, *supra* note 4, ch. 12, at 45–46.

C. Failure in Rule Application

When entering into an Economy Act transaction with another federal agency, it is important that commanders and their legal advisors remember that different federal agencies have different requirements for Economy Act transactions. Though all agencies must comply with the Economy Act's statutory requirements, DoD activities must also ensure their Economy Act support agreements comply with DoD-specific policies.¹¹⁹

Though this article has largely focused on interagency Economy Act transactions, Economy Act transactions may also occur interservice, meaning between two separate services within the DoD.¹²⁰ For example, the Department of the Army can enter into an Economy Act transaction with the Department of the Air Force for goods or services to be rendered.¹²¹ Department of Defense guidance on interservice and interagency support agreements differs in many ways.¹²² For example, the DoD FMR guidance for determining reimbursement costs differs depending on whether the transaction is for interagency or interservice support.¹²³ Military commanders and their advisors must be aware of these different agency rules when entering into an interservice Economy Act transaction.

V. Finding On-The-Job Training Opportunities Using the Economy Act

In the legislative history accompanying the original 1932 Economy Act, Congress noted that “[t]he War and Navy Departments are especially well equipped to furnish materials, work, and services for other departments.”¹²⁴ Since 1932, the types of skills possessed by American servicemembers have significantly expanded,¹²⁵ making

¹¹⁹ See, e.g., DODI 4000.19, *supra* note 35, para. 2.2 (stating that the interservice and intragovernmental support policies within the instruction apply to all Defense Support Activities).

¹²⁰ DoD FMR, *supra* note 34, para. 030101.

¹²¹ See *id.* para. 030103(D) (defining intra-agency or interservice support as “[t]ransactions for goods or services within and between DoD and other DoD Components”).

¹²² See, e.g., *id.* paras. 030303–030304 (providing DoD activities different guidance regarding when they will support Economy Act requests, based upon whether the request is for intra-agency or interagency support).

¹²³ *Id.* ch. 1. The DoD can require lower reimbursement requirements for interservice support due to a congressional created reimbursement exception that authorized military departments to provide supplies or services from “one armed force to another” without reimbursement. 10 U.S.C. § 2571 (2012).

¹²⁴ H.R. REP. NO. 72-1126, at 15–16 (1932).

¹²⁵ United States Army, *Careers & Jobs*, GOARMY.COM, <http://www.goarmy.com/careers-and-jobs.html> (last visited June 11, 2013).

Congress’s 1932 observation about the military’s unique ability to assist other federal agencies even more true today.

Today, American servicemembers possess specialized skills in numerous areas with direct civilian application, including engineering, construction, communications, maintenance, transportation, and health services.¹²⁶ These skills enable servicemembers to build roads, repair buildings, fix plumbing, perform surveys, create maps, install advance communication systems, service generators, manufacture parts, create multimedia illustrations, and inspect for health hazards.¹²⁷ These services, as well as others, can be used to meet any number of agency requirements arising from the federal government’s management of its vast land, building, and infrastructure assets.¹²⁸

In a February 2012 report from the Congressional Research Service (CRS), the CRS found that the National Park Service, Forest Service, Fish and Wildlife Service, and the Bureau of Land Management had over \$18 billion dollars in backlogged maintenance requirements as of Fiscal Year 2010.¹²⁹ Most of these costs related to maintenance requirements on roads, bridges, trails, buildings, and other structures.¹³⁰ Through use of the Economy Act, military engineers, communication specialists, and others can provide these agencies with an economical means to satisfy some of these backlogged maintenance requirements.

Once a military unit determines that it both has specialized capabilities that can be beneficially utilized by another agency, and that use of these capabilities by other agencies will provide Soldiers with valuable real world experience in their craft, the unit can notify other agencies of these capabilities by contacting local federal agency offices. When doing so, the goal will not be to turn the military into a permanent supplier of services for other agencies, but rather to help identify a limited number of projects that can be performed by special-skilled servicemembers, where performing the project will provided the servicemember with valuable real world experience, while simultaneously providing another federal agency with a cheaper service than can be obtained from a commercial enterprise.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ The federal government “owns and manages roughly 635–640 million acres of land.” CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2012). The agencies primarily responsible for managing federal lands include the National Park Service, the Bureau of Land Management, the Fish and Wildlife Service, and the United States Forest Service. *Id.*

¹²⁹ *Id.* at 19–20.

¹³⁰ *Id.*

Currently, the U.S. Army Corps of Engineers (USACE) maintains an active interagency support program. Through its Interagency and International Service (IIS) program, USACE provides “engineering and construction services, environmental restoration and management services, research and development assistance, management of water and land related natural resources, relief and recovery work, and other management and technical services” to non-DoD federal agencies.¹³¹ Though the USACE IIS program provide some services that are authorized by specific congressional statutes other than the Economy Act,¹³² military units interested in providing interagency support can nonetheless use the USACE IIS program as a starting point for developing their own interagency support program.

VI. Conclusion

The near term reality for the military is that budgets will get smaller. With smaller budgets and fewer deployments, maintaining a special-skilled servicemember’s expertise in his craft will become increasingly difficult. But by using the Economy Act, military commanders can provide these servicemembers an opportunity to maintain their expertise through work on real-world projects. Ultimately, these projects will not only benefit the servicemember and the military, but will satisfy other agency needs and save taxpayer dollars.

¹³¹ U.S. Army Corps of Engineers, *Interagency & International Support*, HEADQUARTERS: UNITED STATES ARMY CORPS OF ENGINEERS, <http://www.usace.army.mil/Missions/MilitaryMissons/InteragencyInternationalSupport.aspx> (last visited June 11, 2013).

¹³² Through its Interagency and International Service program, U.S. Corps of Engineers (USACE) also provides technical assistance to “state and local governments, tribal nations, private U.S. firms, international organizations, and foreign governments.” *Id.* Since the Economy Act can only be used for interagency support projects between federal agencies, USACE must rely on non-Economy Act authorities to obtain reimbursement for these services.

How the Brigade Judge Advocate Can Improve the Personnel Readiness Reporting Process for Flagged Soldiers

Major Tom Hynes*

I. Introduction

It used to be that the expression “close enough for government work” meant that the work was precise and could meet the highest standards. Over time, this phrase has become a punchline to describe work that is not up to exacting standards.¹ Some aspects of routine brigade legal office operations only require adherence to the lower standard. For example, Army Regulation (AR) 25-50 states the lower standard by noting that it is not necessary to rewrite a memorandum to correct simple nonsubstantive errors.² However, failure to adhere to the higher standard in other brigade legal functions can negatively impact information the brigade commander and other leaders rely on to make decisions.

In an ideal world, where the work that needs to be done is equal to the time and other resources available to complete it, the brigade judge advocate (BJA) could simply demand that the legal office complete all work to the highest standard. In the real world, the BJA must balance a considerable number of competing requirements that are important, but have little to do with the office’s core functions.³ As a lawyer and a leader, the BJA must distinguish between those tasks that can be completed to a “good enough” standard, and those that require completion to more exacting standards.

A recent Department of the Army Inspector General report confirms that personnel readiness reporting—including the reporting of which Soldiers are not deployable because they are flagged for legal actions—is one of those areas in which adherence to the standards has slipped dramatically over the last ten years.⁴ This is due to the

necessary focus on tasks related to deployment, at the expense of more garrison-focused tasks such as personnel administration.⁵ This decline in standards is particularly relevant now, because the Army is facing significant personnel reductions.⁶

Personnel readiness reporting is not the BJA’s primary duty.⁷ However, the brigade legal office prepares many routine legal actions that are tracked by the personnel readiness reporting system.⁸ A BJA who understands the importance of adhering to the right processes is uniquely positioned on the brigade staff to assist the brigade’s command teams and personnel sections.⁹ A BJA who merely supervises the preparation of legal actions meets the “close enough” standard. The BJA who makes sure that the Army’s personnel reporting system accurately reflects those legal actions meets the higher standard. By aspiring to this higher standard, the BJA becomes a force multiplier, easing the “crush of requirements from higher headquarters” on commanders so that they can spend more time leading their Soldiers.¹⁰ This is not an insignificant consideration. While the pen may in fact be mightier than the sword, a BJA’s job is to support those who wield the swords by lifting some of the administrative burdens experienced by these leaders.¹¹

⁵ *Id.*

⁶ FORSCOM VTC on Improving the Percentage of Deployable Soldiers, ARMY PROFESSIONAL FORUMS, <https://forums.army.mil/SECURE/CommunityBrowser.aspx?id=1898724&lang=en-US> (last visited Feb. 22, 2013) [hereinafter FORSCOM VTC]. Two of the six top challenges identified during the VTC, which involved ten Forces Command (FORSCOM) units, were data accuracy in eMILPO and a growing number of legal cases, not all of which make the Soldier nondeployable.

⁷ See U.S. DEP’T OF ARMY, FIELD MANUAL 1-0, HUMAN RESOURCES SUPPORT para. 3-17 (6 Apr. 2010) (listing the brigade S1’s duties vis-à-vis personnel readiness reporting).

⁸ These include, but are not limited to, administrative separations, investigations, and nonjudicial punishment.

⁹ Message, 181732Z Oct 12, Dep’t. of the Army, subject: ALARACT 293/2012, HQDA EXORD 10-13 ISO the HQDA FY13-15 Active Component Manning Guidance [hereinafter ALARACT 293/2012]. Increasing precision in personnel reporting is a “key task” in the Army’s most recent manning guidance. *Id.* para. 3.B.5.

¹⁰ *The Crush of Requirements from Higher Headquarters*, ARMY MAG., Aug. 2012, available at [http://cc.army.mil/pubs/armymagazine/docs/2012/CC_ARMY_\(Aug2012\)_Crush-from-Higher.pdf](http://cc.army.mil/pubs/armymagazine/docs/2012/CC_ARMY_(Aug2012)_Crush-from-Higher.pdf) [hereinafter *Crush of Requirements*]. The number one challenge facing company commanders is “managing the overwhelming onslaught of [training and administrative] requirements posed by higher headquarters.” *Id.* Brigade judge advocates are responsible for advising as many as two dozen company commanders in a typical brigade.

¹¹ As one company commander put it, “During my first command, I felt like I was drowning in the tidal wave of on-the-job training that comes in the wake of things like congressional letters, DUIs, testing hot on a urinalysis, arrests, suicide ideation, etc.” *Id.* at 55.

* Judge Advocate, U.S. Army. Presently assigned as Officer-in-Charge, Stuttgart Law Center, Stuttgart, Germany. Member of the South Dakota state bar.

¹ James F. Nagle, *The Twenty-Second Major Frank B. Creekmore, Jr. Lecture*, 213 MIL. L. R. 165, 172 (2012). This expression is sometimes rendered as “good enough for government work.” See *Close Enough for Government Work*, WIKTIONARY, http://en.wiktionary.org/wiki/close_enough_for_government_work (last visited Feb. 24, 2013).

² U.S. DEP’T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE para. 1-11b (3 June 2002).

³ Some of these other requirements are as follows: the required training from Army Regulation (AR) 350-1; the requirements to support the headquarters company or battery with various taskings; sergeant’s time training; Office of the Staff Judge Advocate requirements; and many others that are not directly related to producing work in the legal office.

⁴ Memorandum from the Inspector Gen., U.S. Army, to the Sec’y of the Army, subject: Report of the Disciplined Leadership and Company Administrative Requirements Inspection (n.d.) [hereinafter IG Report Memo].

For nearly every administrative problem a company commander faces, the BJA can be the commander's lifeline.¹²

The purpose of this article is two-fold: to increase the awareness of a problem every BJA will face, and to offer suggestions to solve it. Part II contains an overview of the Army's personnel reporting system. It will impress upon the reader the significance of certain routine legal actions and how they affect a unit's personnel readiness reporting. Part II will also explain in detail the personnel codes that must be placed on a Soldier's record when a Soldier faces certain legal actions. Part III describes the problems that result when this is not done correctly, and offers suggestions the BJA can use to ensure it is.

Accuracy in personnel readiness reporting is a key concern of any commander.¹³ The commander's staff, including the BJA, should make every effort to provide the commander with the most accurate personnel data possible.

II. Personnel Reporting

The Army's Electronic Military Personnel Office, commonly called "eMILPO," "provides the U.S. Army with a reliable, timely, and efficient mechanism for performing Army personnel actions and managing strength accountability."¹⁴ This article will focus on the strength accountability reporting features of eMILPO, in particular that relatively narrow category of personnel status in eMILPO known as legal processing.¹⁵

The data fed into eMILPO—the data that commanders rely on to make personnel and other decisions—is too often untimely, inaccurate, or both.¹⁶ This is a significant issue for brigades within combat divisions, where the goal is to maintain a high state of readiness (deployability).¹⁷ Often the data in eMILPO will erroneously indicate that a unit is over the nondeployability threshold. This is due to a failure to keep the data current.¹⁸ This failure results in time-consuming scrutiny of the data on a by-name basis by the brigade commander. A BJA can help avoid this problem by knowing how legal actions affect eMILPO personnel readiness data, and by intervening where necessary to make sure the processes are working properly.

A. Legal Processing in eMILPO

eMILPO uses the term "legal processing" to describe those certain legal situations that make a Soldier nondeployable.¹⁹ Nondeployable Soldiers reduce a unit's readiness rating, which must be reported monthly in a commander's unit status report.²⁰ If enough Soldiers are categorized as nonavailable for deployment, the unit may be declared combat ineffective.²¹ Soldiers undergoing legal processing make up the third largest category of nondeployable Soldiers.²²

There are four administrative subcategories of legal processing in eMILPO, each described by a unique two-letter code: "LI" for Soldiers who are under investigation by military or civilian authorities; "LR" for Soldiers who are

¹² Burdensome administrative regulations are as old as the Army itself. Immediately after the Second Continental Congress appointed George Washington "Commander in Chief of the American armies," he "devoted the evening to a committee impaneled to draw up army regulations." RON CHERNOW, *WASHINGTON: A LIFE* 187 (2010). For the purposes of this article, the relevant regulations are cited throughout.

¹³ Message, 011411Z Nov 11, U.S. Army, subject: ALARACT 396/2011, Automated Rear Detachment Report and Reporting Requirements para. 2.B [hereinafter ALARACT 396/2011]. "Commanders are responsible to establish procedures to ensure authoritative systems of record, i.e., eMILPO and MEDPROS, are an accurate reflection of unit readiness . . ." *Id.*

¹⁴ U.S. DEP'T OF ARMY, *EMILPO USER'S MANUAL* (14 July 2011) [hereinafter *EMILPO MANUAL*].

¹⁵ U.S. DEP'T OF ARMY, *REG. AR 220-1, ARMY UNIT STATUS REPORTING AND FORCE REGISTRATION—CONSOLIDATED POLICIES* para. 5-2 (15 Apr. 2010) [hereinafter *AR 220-1*]. This regulation describes personnel reporting concepts generally. For legal processing specifically, see U.S. DEP'T OF ARMY, *PAM. 220-1, DEFENSE READINESS REPORTING SYSTEM—ARMY PROCEDURES* tbl. 5-1 (16 Nov. 2011) [hereinafter *DA PAM. 220-1*].

¹⁶ FORSCOM VTC, *supra* note 6.

¹⁷ ALARACT 293/2012, *supra* note 9, para. 3.E.3.D.6, "The goal is no more than 10% of a unit's population is non-available [for deployment]." The Army does not use a standard term to refer to a Soldier who is not able to deploy with a unit for some reason. Throughout this article the terms nonavailable and nondeployable are used interchangeably to refer to Soldiers who are not available for deployment with their assigned unit.

¹⁸ See FORSCOM VTC, *supra* note 6.

¹⁹ *EMILPO MANUAL*, *supra* note 14, at 598. There are many different reasons why a Soldier might be declared nondeployable. This article covers only those Soldiers who are nondeployable due to some legal action.

²⁰ See *AR 220-1*, *supra* note 15, tbl.4-1. This reference contains frequency of reporting requirements for most units.

²¹ Memorandum from Deputy Chief of Staff G1, U.S. Army to Principal Officials of Headquarters et al., subject: HQDA Active Component (AC) Manning Guidance for Fiscal Year (FY) 2011, para. 3.c.(2) (17 Dec. 2010) [hereinafter *Manning Guidance Memo*]. The Army has defined combat effectiveness as a minimum deployed strength of 95% of authorized personnel.

²² U.S. ARMY WAR COLLEGE, *STRATEGIC RESEARCH PROJECT, NON-DEPLOYABLE SOLDIERS: UNDERSTANDING THE ARMY'S CHALLENGE* 22 (7 May 2011) [hereinafter *USAWC REPORT*]. Soldiers with medical conditions make up the largest category of nondeployers. Soldiers who have not completed theater-specific individual readiness training make up the second largest number of nondeployers. *Id.* at 3.

under arrest or in confinement; “LZ” for Soldiers who are pending military or civilian criminal court action; and “LD” for Soldiers who are pending administrative separation.²³ Significantly, Soldiers assigned one or more of these four eMILPO codes are reported in eMILPO as temporarily nonavailable for deployment.²⁴ In other words, many administrative separations and all Article 15s, pre-trial confinements, and courts-martial create nondeployable Soldiers.

Personnel readiness information captured by these eMILPO codes is usually the subject of bi-weekly command and staff meetings at the brigade level. Higher headquarters often request related information from eMILPO for purposes other than personnel readiness reporting. For example, the division commander may want to know how many Soldiers are being involuntarily separated, or how many are AWOL.²⁵ While maintaining such data is an S1 staff function, the BJA must be ready to explain any discrepancies in the legal processing portions of this data.

B. Suspension of Favorable Personnel Actions

When a Soldier’s status changes from favorable to unfavorable, the Army flags that Soldier’s personnel record.²⁶ The term “flagged” is Army shorthand to indicate that a Soldier’s commander has suspended favorable personnel actions for that Soldier for some authorized reason.²⁷

The two categories of flags, determined by the specific action or investigation on the Soldier, are nontransferable and transferable.²⁸ A nontransferable flag on a Soldier’s record prevents that Soldier from being transferred to another unit except in limited circumstances.²⁹ Nontransferable flags are the type the BJA will deal with most often. They include flags for investigation, confinement, adverse action, and involuntary separation or discharge.³⁰ Transferable flags include flags for Soldiers in the punishment phase (ordered by a military or civil criminal court or from nonjudicial punishment), flags for Soldiers who fail the Army Physical Fitness Test, and flags for those Soldiers who are not in compliance with the Army Weight Control Program.³¹ A unit may transfer a Soldier with a transferable flag to another unit by following the procedures in AR 600-8-2.³²

Commanders are responsible for flagging Soldiers whose status is unfavorable for some reason.³³ Commanders are likewise responsible for making sure that their subordinate commanders comply with the provisions of the regulation governing flags.³⁴

Placing a flag on a Soldier’s personnel record is a simple process. The Soldier’s commander completes and signs a one-page form and forwards it to the battalion personnel section to note the flag in eMILPO.³⁵ The time limit is three days from the Soldier’s change of status from favorable to unfavorable.³⁶ A commander uses the same form to remove the flag within three days after the Soldier’s status changes back to favorable.³⁷ The process sounds simple, and it is.

²³ DA PAM. 220-1, *supra* note 15, at 34.

²⁴ See EMILPO MANUAL, *supra* note 14, at 122.

²⁵ During the spring and early summer of 2012, the brigades of the 82d Airborne Division were required to report the status of pending administrative separations, by name, on a weekly basis. The XVIII Airborne Corps placed a similar, monthly briefing requirement on these brigades. Without accurate information in eMILPO, this required preparing PowerPoint slides by hand, in two different (division and corps) formats. This effort consumed a considerable amount of additional time. If those charged with doing so were properly feeding accurate data into eMILPO, the Division and Corps staffs could have simply queried the eMILPO system for the information their commanders required at any time. This assertion is based on the author’s recent professional experiences as a BJA from 1 August 2010 to 8 July 2012.

²⁶ U.S. DEP’T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) para. 2-1e (23 Oct. 2012) [hereinafter AR 600-8-2] (note: the most recent edition of this regulation involved a considerable rewrite, and older versions will not match up with the citations in this article). An unfavorable status generally refers to an investigation of the Soldier by military or civilian criminal authorities for some offense that may result in disciplinary action or loss of pay or privileges.

²⁷ *Id.* para. 2-1. Some of these favorable personnel actions are: reenlistment, reassignment, promotion, recommendation and receipt of awards, attendance at military and civilian schools, unqualified resignation, retirement or discharge, and advance or excess leave. Importantly, ordinary leave is not prohibited by a flag.

²⁸ *Id.* para. 2-1g.

²⁹ *Id.* para. 2-1g(1). Human Resources Command (HRC) may direct the transfer of a Soldier with a nontransferable flag, but the Soldier’s unit may not.

³⁰ *Id.* para. 2-2. The adverse action category is very broad. It covers initiation of proceedings under Article 15 of the Uniform Code of Military Justice (UCMJ), court-martial proceedings (preferral or pretrial confinement), civilian criminal charges, restraint or confinement, initiation of administrative reduction proceedings, initiation of memorandum of reprimand, and absent without leave. A flag for nonjudicial punishment remains in effect throughout any period of suspension, so a Soldier whose punishment is suspended for six months will be flagged for six months.

³¹ *Id.* para. 2-3.

³² *Id.* para. 2-8.

³³ *Id.* para. 1-4j.

³⁴ *Id.*

³⁵ U.S. Dep’t of Army, DA Form 268, Report to Suspend Favorable Personnel Actions (FLAG) (Oct. 2012).

³⁶ AR 600-8-2, *supra* note 26, para. 1-9.

³⁷ *Id.* para. 1-9c. The three-day standard applies to placing and removing flags. Note that for initiation of a flag, the regulation also requires human resources (eMILPO) system input within the same three-day standard. *Id.* para. 1-9a.

The problem is that the simple process is often not followed, or is not completed in a timely fashion. This is the main reason why legal processing data in eMILPO is almost invariably inaccurate and unreliable.³⁸

As a judge advocate might guess, there is a counseling requirement associated with flagging. Here also the BJA can assist the commander, and thereby avoid problems associated with the failure to comply with a regulation. The commander or first-line supervisor must counsel the flagged Soldier, in writing, within two working days of the initiation of the flag, unless notification would compromise an ongoing investigation.³⁹ Failure to counsel a Soldier regarding a flag often leads to a misunderstanding by the Soldier as to the reason for the flag, and what the requirements are to have the flag removed. This failure in communication can cause morale problems and be the subject of inspector general complaints.⁴⁰

Appreciating the nature of the problem and the impact that routine legal actions have on personnel readiness reporting is a large step toward solving the problem. The next few paragraphs describe the more common types of flag and the issues a BJA may face with each.

1. Legal Processing Flags

For the BJA, legal processing flags are the most common types of flags imposed on Soldiers. This section describes the four types of legal processing flag.

Different regulations refer to the same flag in different ways.⁴¹ For example, under AR 600-8-2, a Soldier being

investigated by a commander receives a flag code of “L.”⁴² Department of the Army Pamphlet 220-1 refers to this same flag as “LI.”⁴³ This article will reference the “reason codes” from DA PAM 220-1 (LI, LR, LZ and LD) because that is how the commanders and staff will see them in unit status reports or when viewing accountability reports from eMILPO.⁴⁴

a. Under Investigation by a Military/Civil/Criminal Investigation Activity (LI)

The nondeployability code LI is the most common legal processing code in eMILPO. This code covers Soldiers facing nonjudicial punishment as well as those under investigation.⁴⁵ Within eMILPO, this means that a Soldier may be flagged once for being the subject of an investigation under AR 15-6 (a relatively rare occurrence), and a second time when the Soldier receives an Article 15 (a relatively common occurrence).

A typical brigade of over 3,000 Soldiers may show well over 100 of these Soldiers as “nondeployable” due to processing code LI. Just 100 Soldiers with this one legal processing code (LI) would put a brigade’s nondeployable percentage over three percent. The Army’s goal for nondeployables due to legal processing is no more than one percent of a unit’s total nondeployables.⁴⁶

Fortunately, the commander has discretion to determine which Soldiers with an LI code are in fact deployable, after consulting with the servicing judge advocate.⁴⁷ However, the situation would be simpler if there was a fifth legal processing code for Soldiers facing nonjudicial punishment, who are in almost every case deployable.⁴⁸ Part III of this article contains suggestions for addressing this issue.

³⁸ See Message, 201345Z Jun 11, Dep’t. of the Army, subject: Suspension of Favorable Personnel Actions (FLAGS) [hereinafter FLAGS Message I] and Message, 191831Z Oct 11, Dep’t. of the Army, subject: Suspension of Favorable Personnel Actions (FLAGS) [hereinafter FLAGS Message II]. Both of these messages direct commanders to immediately initiate or remove flags when a Soldier’s status changes, actions that are already required by regulation. While the process for placing and removing a flag is simple, these messages and the IG Report Memo, *supra* note 4, indicate that the failure to follow this simple process is widespread in the Army. This failure is causing serious problems with the legal processing data in eMILPO.

³⁹ AR 600-8-2, *supra* note 26, para. 2-6.

⁴⁰ In two relatively recent messages on this topic the Army reinforced the point that “[p]oor flag management is detrimental to the Army’s morale and negatively impacts our collective ability to manage the force by making timely and informed decisions.” See FLAGS Message I, *supra* note 38; FLAGS Message II, *supra* note 38.

⁴¹ For example, AR 600-8-2 refers to adverse action flags that include Soldiers under investigation and in confinement, both under flag code “A.” AR 600-8-2, *supra* note 26, para. 2-2c. Department of the Army, Pamphlet (DA Pam.) 220-1 refers to a nonavailability code of arrest and confinement as LR, and a Soldier under investigation is noted by a code of LI. DA PAM. 220-1, *supra* note 15, tbl.5-1. Soldiers who are flagged with code LI are not necessarily nondeployable. This is an eMILPO issue that the HRC must fix in order to improve the data accuracy in that system. Perhaps the LI code

should be divided into two separate codes, one for Soldiers under investigation who will not deploy (pending serious charges, for example), and one for Soldiers under investigation for minor offenses that do not make them nondeployable. Until the HRC addresses this problem, the BJA must assist company commanders and S1s with the coding of those Soldiers in category LI based on the facts of each particular case. See also *infra* note 48.

⁴² AR 600-8-2, *supra* note 26, para. 2-2a.

⁴³ DA PAM. 220-1, *supra* note 15, tbl.5-1, pt. II, at 35.

⁴⁴ A “reason code” refers to the reason a Soldier is not deployable, though the term is not specifically defined. See AR 600-8-2, *supra* note 26, tbl. 2-1; DA PAM 220-1, *supra* note 18, tbl. 5-1 and *passim*.

⁴⁵ AR 600-8-2, *supra* note 26, para. 2-2c.

⁴⁶ The overall goal is a ten percent nondeployable rate just before deployment. Medical (four percent) and legal processing (one percent) make up half of this number. *Id.*

⁴⁷ See DA PAM. 220-1, *supra* note 15, tbl. 5-1 n.5, at 35.

⁴⁸ “Future enhancements in eMILPO will allow commanders the flexibility to remove non-availability reason “LI” . . . for situations in which a Soldier

b. Arrest and Confinement (LR)

If a Soldier has committed some misconduct that warrants immediate confinement, the initial focus is on what happened, and who needs to know about it.⁴⁹ If military pretrial confinement is warranted, the offender's commander and the trial counsel are focused on meeting the requirements of Rule for Court-Martial 305, not on flagging the Soldier. Yet the commander must flag a Soldier placed in pretrial confinement.⁵⁰ The three-day standard for placing and removing the flag is particularly important here because pretrial confinement often happens very quickly and may be very short.⁵¹ It is also important to note that the effective date of the flag is the date of the circumstances that prompted the flag, not the date the flag was initiated (unless they are the same date).⁵² The flag date may be used by commanders for other reasons, such as a measure of the time required to process an administrative separation. Accurate flag data will provide the commander with a reliable snapshot of legal action processing times.

The flag for confinement is in addition to any other flag on the Soldier, such as the flag for investigation.⁵³ The regulation specifically calls for multiple flags in this common situation.⁵⁴

will deploy while a SFPA 'AA' is open." ALARACT 396/2011, *supra* note 13, para. 3.D. This single modification to eMILPO would solve one of the top challenges identified during the FORSCOM VTC referenced in note 6, "a growing number of legal cases, not all of which make the Soldier nondeployable."

⁴⁹ As an important aside, the first administrative task a commander must complete after learning of Soldier misconduct, whether that misconduct is an assault in the barracks or driving while impaired, or any number of less common ways Soldiers get into trouble, is a report of the misconduct through the chain of command, usually in the form of a serious incident report (SIR). Some brigade executive officers, who are usually responsible for forwarding the SIR to division headquarters, will ask for assistance in drafting the SIR, particularly if it involves a complex case. It is important to fully understand the facts associated with the misconduct, because the brigade commander will likely ask the BJA about it at physical training on Monday morning, or at the dining facility, or at some other time when the BJA may not otherwise expect it. The BJA should plan to follow up with the offending Soldier's commander or first sergeant soon after being notified of the misconduct.

⁵⁰ AR 600-8-2, *supra* note 26, para 2-2c.

⁵¹ *Id.* para. 1-9.

⁵² *Id.* para. 2-4.

⁵³ *Id.* paras. 2-2a and 2-2b. Adverse action refers both to actions taken against a Soldier generally, and a specific type of flag code under AR 600-8-2.

⁵⁴ *Id.* para. 2-2c(1).

*c. Pending Military or Civil Court Action (LZ)*⁵⁵

Soldiers facing military or civilian criminal charges receive the non-deployable legal processing code LZ. The trigger for "pending military court action" is preferral of charges.⁵⁶ The BJA should consider having the trial counsel or a paralegal add this adverse action flag requirement to the preferral checklist, and then follow up with the brigade S1 to make sure that the flag is processed properly.⁵⁷ A similar rule applies for Soldiers charged or confined by civilian authorities.⁵⁸

By the time a Soldier is flagged for a pending military court action, that Soldier may have as many as three flag codes in eMILPO: one for the investigation of the misconduct (LI), another for being placed in pretrial confinement (LR), and a third for being formally accused (LZ).

d. Pending Administrative/Legal Discharge or Separation (LD)

The second most common legal processing code is for those Soldiers pending involuntary administrative separation or discharge. The effective date of this flag is the date the Soldier's commander signs the intent to separate memorandum.⁵⁹

As with the LI legal processing code, a commander has discretion to determine which Soldiers flagged for separation are nevertheless available for deployment.⁶⁰ However, it is not advisable to use this "loophole" to reduce the number of nondeployables. If a brigade commander indicates that a

⁵⁵ This is how DA Pam. 220-1 describes the LZ code. The more accurate description is from the flag regulation (AR 600-8-2), which refers to civilian *criminal* charges rather than civil court action.

⁵⁶ *Id.* para. 2-2c(1). Preferral of court-martial charges in the military justice system initiates the court-martial process. Preferral refers to the formal notification to the accused that he has been accused of a crime under the UCMJ.

⁵⁷ For the purposes of this article, and for the BJA running a legal office, it is sufficient to spot-check these flags to make sure that after the commanders fill out the forms, the commanders take the next step and have the battalion S1s properly input the flags in eMILPO. The eMILPO Manual suggests coordination with the legal office on flags, "The S1/Unit eMILPO clerk should check different sources such as the training NCO, legal clerk/section, ISG, etc. to advise Commander of SFPAs [suspension of favorable personnel actions] requiring updates that they may not know." EMILPO MANUAL, *supra* note 14, at page 22.

⁵⁸ See AR 600-8-2, *supra* note 26, para. 2-2c(1) (commander must flag the Soldier for adverse actions for "civilian criminal charges, restraint, or confinement").

⁵⁹ *Id.* para. 2-2d. There is an example of this memorandum in U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS 32, fig. 2-1 (6 Jun. 2005) [hereinafter AR 635-200].

⁶⁰ See DA PAM. 220-1, *supra* note 15, at 35, tbl. 5-1, note 5.

Soldier flagged for separation is fit for deployment, that considerably weakens the case for separation. The number of Soldiers in a brigade pending separation is usually small when compared to the number of Soldiers facing nonjudicial punishment. A commander should use the grant of discretion sparingly for this code, and only for Soldiers with low-density military occupational specialties.

2. Other Flags

The BJA may see briefings and reports from division and corps staff that contain other less common nonavailability codes along with the four legal processing codes. For example, briefing slides may include the number of Soldiers who are absent without leave (AWOL). The legal processing category of nondeployables should include only Soldiers with nondeployability codes LI, LD, LR or LZ. The BJA must recognize that AWOL is not a legal processing category of nonavailable Soldiers (this rule is designed to avoid double-counting of those AWOL Soldiers who also have been assigned legal processing nonavailability codes). The BJA will also want to make sure that the brigade does not compare unfavorably with other brigades in the division due to confusion over how many Soldiers are properly reported as nondeployable in the “legal processing” category.

III. Improving the Process

Most BJAs have more than enough to do without taking on new obligations that may not even be “in their lane.”⁶¹ This article is not advocating new duties for the BJA, or the assumption of the duties of the personnel section. However, BJAs should always attempt to identify areas where some additional training or assistance rendered up front can pay big dividends later, in the forms of time saved, much less confusion, and a greater impression that the legal office can be counted on for reliable data. The rest of this section contains simple suggestions on how the BJA can improve the personnel reporting process, essentially by becoming a better, more process-oriented staff officer.

⁶¹ “The Flag function is the responsibility of commanding officers at all levels and the functional responsibility of the brigade (BDE) adjutant (S1), battalion (BN) S1, and MPD.” AR 600-8-2, *supra* note 26, para. 1-6. Though the functional responsibility for flags is with the unit S1s, the majority of the administrative flags are associated with legal actions. The battalion S1 section will not necessarily know when a Soldier is under investigation, or when a Soldier is placed in pretrial confinement. The BJA is the advisor to the “commanding officers at all levels” of the brigade who have primary responsibility for properly flagging Soldiers. The BJA must be actively involved in the flagging process to make sure it is done properly.

A. Creating Awareness

It may be enough to informally and tactfully raise the issue of proper flagging of legal actions with the brigade S-1 to make sure the personnel section is following the appropriate procedures. The problem with improper flagging is widespread and serious.⁶² At the very least, the BJA should make it a priority to assess the level of compliance with proper flagging procedures as soon as possible after assuming the duties as brigade legal advisor. If time permits, this issue should be high on the list of any discussion topics during the incoming BJA’s transition with the outgoing BJA. Even if flag processing in a brigade looks good at first, it is still necessary to remain vigilant. Personnel turnover in the brigade’s command teams and personnel sections can lead to inconsistent compliance with proper flagging procedures.

B. Training

Lack of knowledge of the proper procedures is one of the main causes of inaccurate personnel reporting information.⁶³ The Army requires training on proper flagging procedures for new commanders and first sergeants as part of the standardized Company Commander/First Sergeant Courses (CCFSC).⁶⁴ The CCFSC “will train/educate company level commanders and first sergeants on their administrative, property accountability . . . and Army regulatory (program/policy) responsibilities to enable them to be effective leaders in garrison.”⁶⁵ The Judge Advocate General has been tasked with supporting the development of portions of the CCFSC.⁶⁶ Thus, there are plenty of opportunities to

⁶² *See, e.g.*, IG Report Memo, *supra* note 4.

⁶³ *Id.*

⁶⁴ Message, 281934Z Feb 12, subject: ALARACT 041-2012, HQDA EXORD 093-12 Standardized Company Commander/First Sergeant Course (CCFSC) [hereinafter ALARACT 041-2012]. This message seems to suggest, by referencing the U.S. ARMY HEALTH PROMOTION, RISK REDUCTION, SUICIDE PREVENTION REPORT 2010 [hereinafter HP/RR/SP REPORT 2010] that failure to enforce good order and discipline, by, among other things, flagging and separating Soldiers who need to be separated, is having a negative impact on rates of attempted suicide and suicide. A quote from that report suggests as much, “Leaders are consciously and admittedly taking risk by not enforcing good order and discipline. Systems established to ensure a healthy force are not being used to their full extent.” HP/RR/SP REPORT 2010, *supra* at 4.

⁶⁵ ALARACT 041-2012, *supra* note 64, para 3.a.1. Though this article addresses proper flagging procedures and the consequences of failing to follow them, any current BJA will likely recognize that a similar problem exists with property accountability procedures. The BJA will recognize this issue during financial liability investigations before and after changes of command, and during 15-6 investigations into the more egregious violations of AR 710-2 and other property accountability regulations.

⁶⁶ *Id.* para. 3.c.4. This block of instruction is Task 2 of the CCFSC, which includes, among other things, training on administrative separations. The message also tasks the JAG School to work with The Adjutant General School on Task 10, which includes more training on administrative separations as well as flags and other administrative topics. *Id.* para. 3.c.7.A.1.

present training on flagging and other processes, preferably in concert with the brigade personnel section.

It may be worthwhile to coordinate focused training on flags with the noncommissioned officers in charge (NCOICs) of the battalion and brigade personnel sections and the brigade legal section. The Army recently created an exportable training package for just this purpose.⁶⁷ The primary target audience is all S1s at the battalion and brigade levels, and every company commander and first sergeant.⁶⁸ In practice, it is most efficient to have an initial training session with the section chiefs from each personnel section and the legal section. This creates an opportunity for the personnel and legal sections to become subject matter experts in this area and to iron out any problems with internal brigade reporting processes before training the command teams. The battalion S1s can, in turn, work with each of their battalions' company command teams on an as-needed basis to train them on the specific procedures for processing flags. This is much easier on the command teams, for whom flagging procedures are just one of a nearly inexhaustible list of required administrative tasks.⁶⁹ The exportable training package could also be used to present a focused, relevant class to the rest of the paralegals in the legal office during sergeant's time training. The instructor should emphasize how paralegals can help improve the flagging process in the brigade, and highlight the issues related to flags that are unique to the legal office. Those issues are discussed below.

Leadership professional development (LPD) sessions are good forums for joint presentations by the BJA and S1 on the impact flags have on readiness reporting, and the best practices to improve the flagging processes within the brigade.⁷⁰ Engaging the command teams on this subject as a group can help ensure consistent enforcement of existing

flagging and personnel readiness reporting standards within the brigade.⁷¹ These opportunities come up regularly, particularly in Forces Command units, and the BJA would be wise to take advantage of these opportunities to speak to a captive audience.⁷²

Brigade commanders usually hold command and staff meetings at least once per month to review the brigade's status in a number of administrative areas, including awards, evaluation reports, and reenlistments. Command and staff meetings are an excellent opportunity, after coordination with the brigade executive officer and S1, to explain or highlight the importance of proper flagging and the impact improper flagging can have on unit readiness reporting. It takes only a minute or two to tactfully make the point, and a courteous reminder goes a long way with the brigade commander at the head of the table. After a full presentation on this topic at an LPD, command and staff meetings are good forums in which to reinforce the importance of the flagging process until the BJA and S1 see progress in this area.

C. Screening and Periodic Checks

The BJA should designate a member of the brigade legal team to work with the brigade S1 section to screen eMILPO for erroneous legal processing flags. This is an effective threshold measure to determine compliance with the flagging process. Take, for example, the LI flag, for Soldiers who are under investigation or who have received Article 15s. A simple screen of eMILPO for every LI flag older than six months will reveal many names of Soldiers with completed investigations, or who have completed their punishment after an Article 15, or both. It is good practice for commanders, after consultation with the brigade legal office, to override the LI nonavailable reason code in eMILPO for all Soldiers with no pending investigation who are only facing nonjudicial punishment.⁷³ The legal office can confirm this information and recommend that the Soldiers' commanders remove the adverse action flags and replace them with punishment phase flags where necessary. The punishment phase flag (flag code H) is also an adverse

⁶⁷ Message, 281721Z Mar 12, Dep't. of Army, subject: ALARACT 082/2012, Suspension of Favorable Actions (Flags)—Exportable Training Package para. 4. The training package can be found at this link: http://www.ssi.army.mil/courses/flags_final.pptx. As an indication of how relevant this package is for the legal office, and the overlap between the S1 and legal sections, consider this example from the speaker notes on slide 1 of this 25-slide presentation: "Motivator: You over heard [sic] one of your former Soldier's [sic] talking to another Soldier about his promotion party that took place on Saturday. It suddenly dawned on you that the Soldier should have been flagged, pending charges for DUI."

⁶⁸ *Id.* para. 5.

⁶⁹ See *Crush of Requirements*, *supra* note 10.

⁷⁰ The exportable training package described in ALARACT 082/2012 refers to S1/legal office staff coordination on the Unit Flag Management slide. Slideshow: Adjutant General School, Administer Suspension of Favorable Personnel Actions (2012), available at http://www.ssi.army.mil/COURSES/FLAGS_FINAL.PPTX. Many brigade commanders hold monthly leadership professional development (LPD) sessions with their subordinate command teams. The brigade commander or brigade executive officer often ask the BJA for subjects that need additional emphasis in the brigade. An LPD presentation on the flagging process would be an appropriate and relevant topic for an LPD session.

⁷¹ "[I]nconsistent enforcement of existing standards [has] been [one of] the most significant" factors contributing to an increase in non-deployable Soldiers. Message, 221734Z Apr 11, U.S. Dep't of Army, subject: HQDA EXORD 185-11: Reduction of Non-Deployables, para. 1.A.1 [hereinafter EXORD 185-55].

⁷² The BJA should actively seek out these teaching opportunities, on this or any other relevant subject. When the brigade's command teams know that the BJA's priorities are the brigade commander's priorities, the BJA's job becomes a lot easier, and the whole brigade benefits from better adherence to the regulations.

⁷³ See EMILPO MANUAL, *supra* note 14, at 439. Recall that DA Pam. 220-1, gives a commander the discretion to not report a Soldier with a legal processing code of LI as unavailable for readiness reporting purposes. DA PAM. 220-1, *supra* note 18, tbl. 5-1 n.5.

action flag.⁷⁴ But unlike a Soldier with the common adverse action flag (flag code A), a Soldier with a punishment flag may be transferred, and, more important, is not automatically reported as nonavailable for deployment.

Most legal offices require a completed adverse action flag before processing an Article 15 for a commander.⁷⁵ For personnel reporting purposes, it is more important that the commander remove the adverse action flag and replace it with a punishment phase flag upon imposition of punishment.⁷⁶ The punishment phase flag prohibits all of the same favorable actions the adverse action flag does, but the Soldier's status in eMILPO will now be shown as available, rather than nonavailable. If a BJA does nothing more than work with the brigade S1 to ensure accuracy in reporting on legal processing code LI, that BJA will have solved the most common problem with Soldiers reported as nonavailable due to legal processing.⁷⁷

Similar scrutiny is necessary for the less common flag code LD for Soldiers pending administrative separation from the Army. Nearly all separations are completed within fifty working days (the processing goal set by AR 635-200 when board procedures are used⁷⁸), so a simple screen for all LD flags older than the fifty days may reveal erroneous separation flags. Screening eMILPO in this way will be most useful as a starting point in units that have not taken any steps to address problems with personnel readiness reporting. The flag regulation requires that this staff work be done; battalion-level commanders are responsible for reviewing and validating all flags over six months old at least monthly.⁷⁹

To further improve the quality of personnel reporting data in eMILPO, the BJA (or more likely a paralegal) can assist the brigade S1 with a name-by-name reconciliation of the AAA-095 Suspension of Favorable Personnel Actions

⁷⁴ See AR 600-8-2, *supra* note 26, para. 2-3a.

⁷⁵ A valid adverse action flag is a required allied document when filing an Article 15. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-37a (3 Oct. 2011) [hereinafter AR 27-10].

⁷⁶ AR 600-8-2, *supra* note 26, para. 2-3a. "Commanders will initiate a 'Punishment Phase' Flag when the punishment period is 1 month or longer and will remove the 'Adverse Action' Flag the same day unless additional adverse action is pending. Remove Flag upon completion of punishment." It is good practice for the battalion paralegal to check for the punishment flag when completing the Article 15-Reconciliation Log, DA Form 5110. See AR 27-10 *supra* note 75, para. 3-39.

⁷⁷ This issue was raised in the FORSCOM VTC referenced earlier in note 6.

⁷⁸ AR 635-200, *supra* note 59, para. 1-7. The administrative separation processing goals are fifteen working days if the Soldier is not entitled to or waives an administrative separation board hearing, and fifty working days with a board. Most separations are completed without a board, so it may be worthwhile to conduct an additional screen for separations pending for more than 15 working days to identify potential problem areas.

⁷⁹ AR 600-8-2, *supra* note 26, para. 1-9b.

(SFPA) Management Report.⁸⁰ Company-level commanders are responsible for reviewing and validating this SFPA report on a monthly basis.⁸¹ The problem, however, is that this report is only one of dozens of other reports like it, and many commanders simply assume the risk of not validating this report because, at least until recently, nobody was checking it.⁸² The legal office staff should compare the information in its own internal legal action trackers against the SFPA Report. The paralegals and personnel clerks conducting this reconciliation should agree on a plan of action to correct any erroneous information, including identification of who will conduct any follow-up investigation to resolve erroneous information in eMILPO. Once the paralegals and personnel clerks have completed these steps, the commanders will be able to review and validate the SFPA reports very easily.

D. Flags and the Legal Office

Brigade legal offices require units to submit valid flags with routine legal actions, such as Article 15s and administrative separations. However, just checking for the presence of a flag in an Article 15 or administrative separation packet is not enough. It is good practice to also check the flag date in block 10 of DA Form 268 against the date shown on the Enlisted Record Brief (ERB). The flag code section is in the lower left-hand corner of the ERB. When checking the date of the flag, the paralegal should check the supporting documentation with the Article 15 to make sure that the effective date of the flag is the date that the circumstances requiring the flag (e.g., the misconduct) occurred.⁸³ Flag dates on the ERB that match the flag dates on the DA Form 268 are a good indication that the commanders and battalion S1 sections are following the proper flagging procedures. The BJA should have the paralegal NCOIC make sure that the paralegals promptly report any perceived problems with flagging, such as failure to flag Soldiers in a timely fashion, so that the problems can be addressed.

Checking for the presence of a valid flag at the initiation of a legal action is important, but the bigger benefits come from making sure that flags are removed in a timely fashion.⁸⁴ One common problem is the failure to remove a

⁸⁰ For more on this particular report, see the EMILPO MANUAL, *supra* note 14, at 230. There are many other personnel reports, including the commonly used AAA-162, Unit Personnel Accountability Report, but the AAA-095 is more specific for the task of reviewing flags.

⁸¹ AR 600-8-2, *supra* note 26, para. 1-9b.

⁸² See *Crush of Requirements*, *supra* note 10 (providing more discussion on how company commanders will accept the risk of not completing certain actions under the crush of requirements from higher headquarters).

⁸³ AR 600-8-2, *supra* note 26, para. 2-4.

⁸⁴ Checking for a flag at the initiation of an administrative separation is always good practice.

flag for a separating Soldier after that Soldier reports to the transition office.⁸⁵ It is good practice to request a copy of the separating Soldier's transition orders from the unit so that the responsible paralegal can close the administrative separation file. The paralegal can then check with the battalion personnel section to make sure that the flag has been removed from eMILPO. Checking for a copy of the transition orders within ten days after the separation authority directs the discharge may also prevent Soldiers from remaining at the unit too long after separation, and committing additional misconduct.⁸⁶

When the legal office is processing an action involving senior servicemember misconduct, the BJA should be particularly careful to ensure that the senior person is properly flagged. There is a tendency to avoid flagging senior noncommissioned officers and officers, but the regulation applies equally to all Soldiers. It is also important to coordinate closely with the S1 section on senior servicemember misconduct investigations and actions so that the flags can be transmitted to Human Resources Command when necessary.⁸⁷

IV. Conclusion

Routine legal actions can negatively impact personnel readiness reporting if the actions are not processed properly. A good BJA recognizes which processes are important and ensures compliance with them. By doing so, the BJA will significantly improve the quality of data commanders rely on to make personnel readiness decisions. This is true even if the particular process is not uniquely the province of the legal office. Though this article is focused on personnel readiness reporting, its simple recommendations—understand the process, know why it is important, train key personnel, screen for compliance, reinforce the process—can be applied to nearly any key task.⁸⁸ These simple recommendations, applied with healthy doses of tact and persuasion, will significantly improve the personnel readiness reporting process in a brigade, resulting in more reliable data for the brigade commander. In a nutshell, a good BJA will know when “close enough for government work” is just not close enough.

⁸⁵ AR 600-8-2, *supra* note 26, para. 2-9b(5).

⁸⁶ Most units move as quickly as possible to get orders for a separated Soldier, but this process regularly takes up to ten working days. Soldiers remaining at the unit after the separation authority has directed discharge can be a problem, particularly in rear detachments. This often happens when the discharged Soldiers are waiting for organizational clothing and equipment that was not shipped back to the rear detachment with them when they were redeployed for separation purposes. If the rear detachment is not familiar with proper clearing procedures at the Central Issue Facility, this can delay separation for two months or more. This assertion is based on the author's recent professional experiences as a BJA from 1 August 2010 to 8 July 2012.

⁸⁷ For example, if a first lieutenant is flagged for driving while impaired and receives a memorandum of reprimand while that officer was on a promotion list to captain, the flag may only be removed by Commander, HRC, so the unit must notify HRC when the memorandum is filed or rescinded. See AR 600-8-2, *supra* note 26, para. 2-9b(4).

⁸⁸ For example, the BJA can (and should) apply the same principles that improve readiness reporting to the Commander's Report of Disciplinary or Administrative Action, DA Form 4833. As with personnel readiness reporting, failure to follow simple processes for reporting disciplinary actions can cause outsized problems for the legal office, the brigade commander, and the Army in general. For a surprising look at the impact of delinquent DA Form 4833s on the force, which is not unlike the impact of poor personnel reporting data on the commander's ability to make informed decisions, see HP/RR/SP REPORT 2010, *supra* note 64.

Foreign Consequence Management: Humanitarian Assistance from a Bubble Suit

Major T. Scott Randall*

I. Introduction

On 11 March 2011, at 2:46 p.m., a 9.0 magnitude earthquake struck off the northeast coast of Japan's Honshu Island.¹ This was one of the five largest earthquakes ever recorded.² The earthquake precipitated a 128-foot tsunami that ravaged up to six miles inland of Northern Japan, which left an estimated 4.4 million citizens without electricity and 1.4 million without water.³ It also caused the death of approximately 20,000 people.⁴ The earthquake damaged the Fukushima Daiichi nuclear power plant located on the east coast of Honshu Island.⁵ The tsunami crippled the power plant's primary and secondary electrical systems and severely damaged the plant's cooling capacity.⁶ This caused a release of radioactive material into the surrounding region.⁷ Immediately following the disaster, the Government of Japan formally requested assistance from the United Nations and the Government of the United States.⁸ This request triggered the U.S. Government's (USG's) first ever Foreign Consequence Management (FCM) mission.⁹

Foreign Consequence Management is the assistance provided by the USG to an impacted nation in order to mitigate the effects of a deliberate or inadvertent chemical, biological, radiological, or nuclear (CBRN) incident.¹⁰ The key elements of FCM consist of the USG's efforts to assist partner nations to respond to CBRN incidents and the interagency coordination of the USG's response.¹¹ Foreign Consequence Management specifically does not include: (1) acts of nature or man that do not involve CBRN materials, (2) domestic CBRN incidents, (3) CBRN incidents on U.S. facilities overseas where the United States maintains primary responsibility over the incident, and (4) CBRN incidents resulting from U.S. military operations in a foreign country where the Department of State (DoS) does not maintain an established presence.¹² The National Strategy to Combat Weapons of Mass Destruction (WMD) identifies FCM as an integral component of the three pillars to combat WMD.¹³ The USG must be prepared to respond to overseas incidents involving CBRN to protect U.S. citizens and its armed forces, as well as its friends and allies.¹⁴ As a consequence, the Department of Defense (DoD) must be fully prepared to support USG FCM operations.¹⁵

* Judge Advocate, U.S. Army Reserve (AGR). Presently assigned as Associate Professor, Administrative and Civil Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

¹ See Commander Jonathan G. Odom, *Doing Our Utmost to Help a Friend in Need*, JAG MAG., vol. 14, no. 2 (2011), http://www.jag.navy.mil/news/jag_mag/archive/2011_VOL2/2011%20JAGMAG_II_Doing%20our%20utmost%20to.pdf.

² *Id.*

³ See Captain Craig Goodman, Captain Carlene Wilson, Commander Jeffery Buss & Lieutenant Ryan Tashma, *Navy Information Professional Support Operation Tomodachi* (July 2011), <http://www.doncio.navy.mil/CHIPS/ArticleDetails.aspx?ID=2490>.

⁴ See THE AM. NUCLEAR SOC. SPECIAL COMMITTEE ON FUKUSHIMA, FUKUSHIMA DAIICHI: ANS COMMITTEE REPORT 1 (2012).

⁵ *Id.*

⁶ See Odom, *supra* note 1, at 6.

⁷ *Id.*

⁸ See Dana M. Herbert, James A. Prosser & Rachele A. Wharton, *A Cost Analysis of the Department of the Navy Humanitarian Assistance and Disaster Response to the 2011 Tohoku Earthquake and Tsunami* 8 (June 2012) (unpublished MPA Professional Report, Naval Postgraduate Sch.) (on file with Dudley Knox Library, Naval Postgraduate Sch.), available at http://calhoun.nps.edu/public/bitstream/handle/10945/7356/12Jun_Herbert_Prosser_Wharton_MBA.pdf?sequence=1.

⁹ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-41, CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR CONSEQUENCE MANAGEMENT, at III-5 (21 June 2012) [hereinafter JOINT PUB. 3-41].

Broadly speaking, the DoD's responsibilities for FCM events are to mitigate human casualties and to provide (and restore) associated essential services.¹⁶ This is typically accomplished by the provision of specialized personnel and equipment required by CBRN incidents.¹⁷ Military

¹⁰ *Id.* at III-1. *But see* U.S. DEP'T OF DEF, INSTR. 2000.21, FOREIGN CONSEQUENCE MANAGEMENT para. 1 (10 Mar. 2006) [hereinafter DoDI 2000.21] (including "high yield explosive incidents" as an additional category of incidents to which Foreign Consequence Management (FCM) applies).

¹¹ *Id.*

¹² See DoDI 2000.21, *supra* note 10, para. 2; JOINT PUB. 3-41, *supra* note 9, at III-3. The U.S. military will lead chemical, biological, radiological, or nuclear (CBRN) consequence management operations that are conducted concurrently with military operations in hostile environments where the Department of State (DoS) has no established presence. *See id.* at IV-1.

¹³ THE WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (Dec. 2002), available at <http://www.fas.org/irp/offdocs/nspd/nspd-17.html> [hereinafter NATIONAL STRATEGY TO COMBAT WMD]. The three pillars of the National Strategy are to combat WMD, strengthened nonproliferation to combat WMD proliferation, and consequence management regarding the effects of a WMD incident. *Id.*

¹⁴ *See id.*; *see also* DoDI 2000.21, *supra* note 10, para. 4.

¹⁵ *See* DoDI 2000.21, *supra* note 10, para. 1.

¹⁶ *See* JOINT PUB. 3-41, *supra* note 9, at III-1; DoDI 2000.21, *supra* note 10, encl. 2.

¹⁷ *See* JOINT CHIEFS OF STAFF, INSTR. 3214.01D, DEFENSE SUPPORT FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR INCIDENTS ON FOREIGN TERRITORY para. A-2 (31 Dec. 2011) [hereinafter CJCSI

commanders may also be obliged to respond as necessary to save human lives when imminently serious conditions result from a foreign emergency or attack.¹⁸ By function, FCM operations and foreign disaster relief missions are closely related.¹⁹ Therefore, commanders must coordinate all FCM efforts with “other USG overseas response operations including but not limited to noncombatant evacuations, foreign disaster relief, [and] humanitarian assistance” operations.²⁰

Because the DoD has significant responsibilities regarding FCM events, judge advocates should be cognizant of this mission and its implications for future operations.²¹ In addition, the fast-moving, exigent nature of FCM missions necessitates that judge advocates contribute in every aspect of FCM planning and execution. Therefore, the purpose of this article is to present the gestalt of FCM operations and explain the DoD’s role therein. In doing so, it will first survey the legislative and executive authorities calling for DoD involvement in FCM operations. It will then review the process by which host nations request assistance from the USG and the phases of FCM operations. Finally, it will survey the basic funding mechanisms likely to be used in FCM operations. From a review of these issues, the judge advocate will quickly surmise the importance of the DoD’s FCM mission and the complex legal environment associated with its operations.

II. FCM Authorities

If a CBRN event occurs in a foreign country, there are a number of authorities that govern the USG’s response.²² The two major legislative authorizations, which sanction the DoD’s response to an FCM incident, are the International Disaster Assistance section of the Foreign Assistance Act (FAA) and the humanitarian assistance authorities found in

3214.01D]. See also JOINT PUB. 3-41, *supra* note 9, at III-9-11 (describing specialized units in the Department of Defense (DoD) available to respond to FCM incidents).

¹⁸ See DoDI 2000.21, *supra* note 10, at 3.

¹⁹ See CJCSI 3214.01D, *supra* note 18, at 3. See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE, at x (17 Mar. 2009) [hereinafter JOINT PUB. 3-29]. Relief missions include the prompt aid provided by the U.S. Government (USG) in response to natural disasters in order to alleviate the suffering of disaster victims. *Id.* Potential support provided by the DoD could include immediate response to prevent loss of life and destruction of property, construction of basic sanitation facilities and shelters, and provision of food and medical care. *Id.*

²⁰ CJCSI 3214.01D, *supra* note 17, at 3.

²¹ See *id.*

²² See 22 U.S.C. §§ 2151–2443 (2011); 10 U.S.C. §§ 401, 402, 404, 2547, and 2561 (2012).

Title 10 of U.S. Code.²³ In addition, there are several executive orders directing the Departments of State and Defense to take a lead role in FCM operations.²⁴ These legislative and executive authorities provide the basis by which the DoD conducts FCM operations.²⁵

A. Foreign Assistance Act

The Foreign Assistance Act of 1961 provides authorization for USG foreign aid programs.²⁶ Section 2292 of the FAA authorizes the President “to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms as he may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad.”²⁷ Additionally, it states, “In carrying out the provisions of this section the President shall insure that the assistance provided by the United States shall, to the greatest extent possible, reach those most in need of relief and rehabilitation as a result of natural and man-made disasters.”²⁸ The types of assistance that may be provided under § 2292 are not enumerated; however, under § 2318, the President may drawdown equipment and services from any USG agency when such actions are in the best interests of the United States and support international disaster relief and rehabilitation efforts.²⁹ Further, in the event of an

²³ See 22 U.S.C. §§ 2151–2443; 10 U.S.C. §§ 401, 402, 404, 2547, and 2561. Section 401 programs are classified as humanitarian assistance (HA), but are funded via Combatant Commander operations and maintenance (O&M) funds due to the training benefit provided to U.S. military personnel. See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 223 (2012) [hereinafter JA 422].

²⁴ See, e.g., PRESIDENTIAL DECISION DIRECTIVE (PDD)/NSC 39, U.S. POLICY ON COUNTER TERRORISM (21 June 1995) [hereinafter PPD/NSC 39].

²⁵ See DEF. THREAT REDUCTION AGENCY, FOREIGN CONSEQUENCE MANAGEMENT LEGAL DESKBOOK 1–2 (Jan. 2007) [hereinafter FCM LEGAL DESKBOOK].

²⁶ 22 U.S.C. §§ 2151–2443.

²⁷ *Id.* § 2292.

²⁸ *Id.* Treaty obligations may also affect the USG response to an FCM event. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency creates an international framework for co-operation among State Parties and the International Atomic Energy Agency to facilitate prompt assistance and support in the event of a nuclear accident or radiological emergency. See Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency art. 1, Sept. 26, 1986, T.I.A.S. (entered into force Feb. 26, 1987, for the United States Oct. 20, 1988). See also Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 657. As its name suggests, this convention establishes a protocol regarding how nations proceed when the need to move hazardous waste across borders arises. *Id.*

²⁹ See 22 U.S.C. § 2318(a)(2). The aggregate value of drawdown articles and services cannot exceed \$200 million, of which not more than \$75

unforeseen emergency, the President may drawdown equipment and services from the DoD in particular in an amount not to exceed \$100 million.³⁰

From a legal perspective, a drawdown is the execution of statutory authority that permits the donation of U.S. property or services to the affected foreign country.³¹ However, there is normally no budget authority associated with drawdowns.³² Thus, the USG agency providing goods and services under a drawdown must absorb the fiscal impact associated with the drawdown within its budget.³³ When exercising the drawdown authority under 22 U.S.C. § 2318(1)(a), the President is limited to \$75 million from the inventory and resources of DoD per fiscal year (FY), plus \$75 million from other agencies/departments.³⁴ Because the drawdown authority is restricted to the use of existing articles, no new procurement is authorized and no new funds may be placed on existing contracts unless otherwise provided by law.³⁵

B. 10 U.S.C. Authorities

Pursuant to 10 U.S.C. § 402, which is popularly referred to as the “Denton Amendment,” the DoD may transport, free of charge, humanitarian supplies provided by non-governmental sources on a space available basis.³⁶ This means that the DoD is only authorized to move humanitarian cargo on flights that are already scheduled for military

million can be from the DoD. *Id.* Drawdowns allow the President to respond to unforeseen emergencies and other requirements without having to first seek additional legislative authority or budgetary appropriations. *See* DEF. SECURITY COOPERATION AGENCY, HANDBOOK FOR FOREIGN ASSISTANCE ACT DRAWDOWN OF DEFENSE ARTICLES AND SERVICES sec. C1.1 (June 2004) [hereinafter DRAWDOWN HANDBOOK].

³⁰ *See* 22 U.S.C. § 2318(a)(1). In order to invoke this “emergency drawdown authority,” the President must determine that the need cannot be met by either the Arms Export Act (22 U.S.C. §§ 2715–2733) or any other provision of law. *Id.*

³¹ *See* DRAWDOWN HANDBOOK, *supra* note 29, sec. C1.1.

³² *Id.* sec. C1.2.4.

³³ *Id.*

³⁴ *See* 22 U.S.C. § 2318(a)(1). Potential contributing agencies furnish valuation and availability (V&A) data to the DoS indicating the estimated value of the articles and services proposed for the drawdown. *See* JOINT PUB. 3-29, *supra* note 19, at B-4. The V&A data and the scope of support form the basis for the Presidential determination that authorizes a specific maximum dollar value authority for the drawdown. *Id.*

³⁵ *See* DRAWDOWN HANDBOOK, *supra* note 29, sec. C1.2.4.

³⁶ *See* 10 U.S.C. § 402 (2012). Under 10 U.S.C. § 401, the DoD may also carry out humanitarian and civic assistance (HCA) activities in host nations in conjunction with military operations. *See id.* § 401. These activities are designed to provide longer-term humanitarian assistance and are not normally useful in fast moving emergencies. *See* JA 422, *supra* note 23, at 224–25. *See also* Lieutenant Colonel John N. Ohlweiler, *Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response*, ARMY LAW., Jan. 2011, 9, at 22.

purposes.³⁷ In order to qualify for space available transportation, a shipment of supplies must be: (1) consistent with the foreign policy of the United States, (2) suitable for humanitarian purposes and are in stable condition, (3) legitimately needed by the people for whom they are intended, and (4) adequately arranged for distribution in the destination country.³⁸ Under the Denton Amendment, the DoD annually transports millions of pounds of privately donated humanitarian cargo on a space available basis.³⁹

Pursuant to 10 U.S.C. § 404, the President may direct the Secretary of Defense (SecDef) to provide international disaster assistance in response to manmade or natural disasters when necessary to prevent the loss of life or serious harm to the environment.⁴⁰ This provision calls on the President to notify Congress within forty-eight hours of commencing relief operations.⁴¹ The types of assistance provided under § 404 include transportation, supplies, services, and equipment.⁴²

The DoD Security Assistance Management Manual (SAMM) defines operations under § 404 as Foreign Disaster Relief (FDR).⁴³ These operations typically include unique DoD capabilities pertaining to logistics support, transportation, airfield management, communications, distribution of relief commodities, and/or security.⁴⁴ The SAMM places FCM under the rubric of FDR, acknowledging that “DoD activities following overseas disasters may include conducting FCM operations concurrently with FDR.”⁴⁵

³⁷ *See* 10 U.S.C. § 402. The Defense Security Cooperation Office (DSCA) approves movement of the cargo; Transportation Command schedules the movement. *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999, at 79 (15 Sept. 2000) [hereinafter HURRICANE MITCH LESSONS LEARNED].

³⁸ *See* JOINT PUB. 3-29, *supra* note 19, at B-5.

³⁹ *Id.*

⁴⁰ *See* 10 U.S.C. § 404.

⁴¹ *Id.* The President has delegated to the SecDef the authority to provide disaster relief under 10 U.S.C. § 404 with the concurrency of the Secretary of State. *See* Exec. Order No. 12,966, 60 Fed. Reg. 36,949 sec. 2.14 (18 July 1995) [hereinafter EO 12,966].

⁴² *See* JA 422, *supra* note 23, at 224.

⁴³ *See* DEF. SEC. COOPERATION AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL sec. C12.9 (30 Apr. 2012) [hereinafter SAMM]. *See also* U.S. DEP’T OF DEF, DIR. 5100.46, FOREIGN DISASTER RELIEF 1 (June 2012) [hereinafter DoDD 5100.46] (citing 10 U.S.C. §§ 404, 2561 as authorities for the DoD Foreign Disaster Relief mission). *Id.* at 4.

⁴⁴ *See* SAMM, *supra* note 43, sec. C12.9.

⁴⁵ *Id.* sec. C12.9.4.4. *But see* DoDD 5100.46, *supra* note 43, at 1 (excluding FCM from the applicability of the instruction regarding foreign disaster relief).

Under 10 U.S.C. § 2557, the DoD makes excess nonlethal property (property that is not a weapon, ammunition, or other equipment or materiel designed to inflict serious bodily harm or death) available to foreign recipients for humanitarian relief.⁴⁶ The property must be transferred to the DoS, which is responsible for its distribution within the recipient country.⁴⁷ Items such as clothing, tents, medical equipment and supplies, heavy equipment, and vehicles are available through this program.⁴⁸

Finally, 10 U.S.C. § 2561 provides for the use of appropriated funds for: (1) the purpose of providing transportation of humanitarian relief, and (2) “other humanitarian purposes worldwide.”⁴⁹ Under the transportation prong of § 2561, the DoD may transport USG-donated humanitarian relief supplies on a fully funded basis.⁵⁰ The DoD may accomplish this through dedicated convoys/flights or contracted transportation.⁵¹ Thus, 10 U.S.C. § 2561 is a much broader authority than 10 U.S.C. § 402 because goods may be transported on a fully funded basis.⁵² However, 10 U.S.C. § 2561 only provides for the transportation of USG-donated goods, not privately donated humanitarian supplies.⁵³ This central distinction means that both §§ 402 and 2561 remain important authorities for use during DoD humanitarian operations.⁵⁴

Under the “other humanitarian purposes” prong of § 2561, the statute does not define the parameters of its

applicability.⁵⁵ However, the DoD generally limits its disaster relief and emergency response activities under this prong to those intended to stabilize emergency situations, such as the repair of roads or bridges, but not activities considered to be rebuilding.⁵⁶ As a consequence of the broad nature of the “other humanitarian assistance” language found of § 2561, the DoD heavily relies on this provision for the majority of its humanitarian activities.⁵⁷

C. Executive Orders

The genesis of USG policy regarding FCM relates to international terrorism.⁵⁸ Under the National Strategy to Combat Weapons of Mass Destruction, the President identified WMD in the possession of hostile states and terrorists as one of the greatest security challenges facing the United States.⁵⁹ In order to meet this challenge, the President designated the DoS and DoD as key players in mitigating the effects of terrorist events on foreign soil.⁶⁰ The President further directed planning be carried out in order to prepare for international disaster events to prevent unnecessary suffering and loss of life.⁶¹

Under Executive Order (EO) 12,656, the President tasked the DoD, in consultation with the DoS and Department of Energy, to “develop plans and capabilities for identifying, analyzing, mitigating, and responding to hazards related to nuclear weapons, materials, and devices”⁶² The DoD is called upon to support the DoS in its efforts to protect U.S. citizens and their property abroad.⁶³ The DoD is also directed to assist the State Department in its negotiations of contingency and post-emergency plans,

⁴⁶ See 10 U.S.C. § 2557 (2012).

⁴⁷ See JOINT PUB. 3-29, *supra* note 19, at B-3.

⁴⁸ *Id.* Title 10 U.S.C. § 2557 is less extensive than the drawdown authority under 22 U.S.C. § 2318. See HURRICANE MITCH LESSONS LEARNED, *supra* note 37, at 78. Section § 2557 requires that items be declared excess under applicable regulations. *Id.* While this authority can be used to transfer a variety of items, it requires coordination in advance with the Defense Reutilization and Management Office (DRMO) and higher headquarters. *Id.* The Defense Security Cooperation Agency administers DoD Humanitarian Assistance (HA) excess property warehouse operations. See SAMM, *supra* note 43, sec. C12.6.3.

⁴⁹ 10 U.S.C. § 2561. Humanitarian assistance activities include rudimentary construction and renovation of public facilities (such as schools, hospitals, clinics, and orphanages), digging or improving water wells and other sanitation and drinking water projects, and repairing/building rudimentary infrastructure such as roads and bridges. See DEF. SECURITY COOPERATION AGENCY, DEPARTMENT OF DEFENSE FISCAL YEAR 2011 REPORT ON HUMANITARIAN ASSISTANCE 3 (Jan. 2012) [hereinafter DSCA 2011 REP.], available at [http://www.dscamilitary.com/programs/HA/2011/Fiscal%20Year%202011%20Report%20on%20Humanitarian%20Assistance%20\(HA\).pdf](http://www.dscamilitary.com/programs/HA/2011/Fiscal%20Year%202011%20Report%20on%20Humanitarian%20Assistance%20(HA).pdf).

⁵⁰ See JA 422, *supra* note 23, at 224.

⁵¹ *Id.*

⁵² See *id.* See also 10 U.S.C. § 404.

⁵³ See JA 422, *supra* note 23, at 224.

⁵⁴ *Id.*

⁵⁵ See 10 U.S.C. § 2561. See also JA 422, *supra* note 23, at 224.

⁵⁶ See RHODA MARGESSON, CONG. RESEARCH SERV., RL 32714, INTERNATIONAL DISASTERS AND HUMANITARIAN ASSISTANCE: A U.S. GOVERNMENT RESPONSE 5–6 (2005). Under the SAMM, Title 10 U.S.C. § 2561 provides the authority for the DoD’s HA program. See SAMM, *supra* note 43, sec. C12. The HA program is intended to relieve or reduce the results of natural or manmade disasters or other endemic conditions such as human pain, disease, hunger, or privation that might present a serious threat to life or that can result in great damage to or loss of property. *Id.*

⁵⁷ See MARGESSON, *supra* note 56, at 5–6. Although not germane to FCM, the DoD also conducts humanitarian assistance operations in the form of humanitarian demining assistance. See 10 U.S.C. § 407 (2006).

⁵⁸ See Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (18 Nov. 1988) [hereinafter EO 12,656].

⁵⁹ See NATIONAL STRATEGY TO COMBAT WMD, *supra* note 13, at 1. WMD is defined as nuclear, biological, and chemical weapons. *Id.*

⁶⁰ See PRESIDENTIAL DECISION DIRECTIVE (PDD)/NSC 39, *supra* note 24.

⁶¹ See EO 12,966, *supra* note 41.

⁶² See EO 12,656, *supra* note 58, para. 501(7).

⁶³ *Id.* para. 1301.

intergovernmental agreements, and arrangements with allies and friendly nations that affect USG national security.⁶⁴

Pursuant to Presidential Decision Directive (National Security) 39, the DoS is designated the lead agency for international terrorist incidents that take place outside of U.S. territory.⁶⁵ Additionally, the DoS is directed to develop plans with the DoD to provide assistance to foreign populations affected by a terrorist-initiated FCM event.⁶⁶ To ensure the full range of necessary expertise and capabilities are available to on-scene coordinators, the directive calls for the development of a rapidly deployable interagency Foreign Emergency Support Team (FEST).⁶⁷ The State Department is responsible for leading the FEST as an initial response to an FCM incident.⁶⁸

Most importantly for FCM purposes, on 15 July 1995, President Clinton issued EO 12,966.⁶⁹ This order specifically authorizes the DoD to provide foreign disaster assistance under 10 U.S.C. § 404 in response to any manmade or natural disaster.⁷⁰ The SecDef may respond to a foreign disaster (which includes a CBRN incident) when: (1) directed by the President; (2) with the concurrence of the Secretary of State; or (3) on his/her own initiative to save human lives in emergency situations where there is insufficient time to consult with the Secretary of State.⁷¹ Executive Order 12,966 recognizes an immediate response authority for foreign emergencies, which is analogous to the military's immediate response authority to domestic disasters.⁷² Hence, when conditions resulting from any emergency or attack in a foreign country require immediate

action, local military commanders may take such actions as necessary to save lives.⁷³

With the exception of commanders exercising their immediate response authority, FCM operations begin with a request for assistance by the affected nation.⁷⁴ Once this request is received, the USG completes a series of steps to determine an appropriate response.⁷⁵ During this process, the DoD is an essential agency for planning and supporting the FCM mission.⁷⁶ The judge advocate's role in delineating the authorities under which the DoD is authorized to assist the host nation (HN) is paramount regarding the conduct of its FCM operations.

III. FCM Operations

Foreign Consequence Management operations are characterized by both the USG's efforts to assist partner nations and the interagency coordination of the USG's response.⁷⁷ The U.S. ambassador in the affected country is typically the first USG official contacted for assistance, and consequently, the U.S. embassy is in the best position to begin immediate planning and liaison operations.⁷⁸ Because of the DoD's unique capabilities, it will be called upon to assist the DoS in carrying out FCM operations.⁷⁹

A. Requests for Assistance

It is USG policy that the primary responsibility for responding to, managing, and mitigating the effects of a foreign CBRN incident resides with the HN.⁸⁰ When overwhelmed, the impacted nation is responsible for requesting foreign assistance.⁸¹ From a U.S. perspective, this is typically done when the HN submits a request for assistance to the U.S. embassy.⁸² The U.S. chief of mission

⁶⁴ *Id.* para. 502(6).

⁶⁵ See PPD/NSC 39, *supra* note 24, para. 3. The DoS is called upon to act through U.S. ambassadors as the on-scene coordinators for the USG. *Id.*

⁶⁶ *Id.* para. 3(h).

⁶⁷ *Id.* The Foreign Emergency Support Team (FEST) is a DoS-led interagency support team that can be deployed immediately in support of the U.S. embassy in response to actual or suspected terrorist incidents. See JOINT PUB. 3-41, *supra* note 9, at III-9. The Office of the Coordinator for Counterterrorism exercises responsibility for the management of the FEST. *Id.* The FEST is task-organized depending on the incident and may include DoD elements that provide support to the U.S. embassy, consulate, or mission for foreign emergency operations. *Id.* The appropriate combatant command provides liaison, and, as required, technical support to the FEST. *Id.*

⁶⁸ See PPD/NSC 39, *supra* note 23, para. 3(h).

⁶⁹ See EO 12,966, *supra* note 41. In providing assistance covered by this order, the Secretary of Defense is required to consult with the Administrator of the Agency for International Development as the President's Special Coordinator for International Disaster Assistance. *Id.* para. 3.

⁷⁰ *Id.* para. 1.

⁷¹ *Id.* para. 2.

⁷² See U.S. DEP'T OF DEF, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4g (21 Sept. 2012).

⁷³ See DoDI 2000.21, *supra* note 10, para. 4.4. Following their immediate response, commanders must report up the chain of command to the combatant command (COCOM) that assistance has been provided by the most expeditious means available and seek approval or additional authorizations as needed. *Id.* para. 5.7.2. The COCOM will then notify higher headquarters of the assistance provided and the affected State Department Chief of Mission. *Id.*

⁷⁴ See JOINT PUB. 3-41, *supra* note 9, at III-1.

⁷⁵ *Id.* at III-3.

⁷⁶ See DoDI 2000.21, *supra* note 10, para. 4.

⁷⁷ See JOINT PUB. 3-41, *supra* note 9, at III-1.

⁷⁸ *Id.*

⁷⁹ See DoDI 2000.21, *supra* note 10, para. 4.

⁸⁰ *Id.*

⁸¹ See JOINT PUB. 3-41, *supra* note 9, at III-1.

⁸² *Id.* at III-3.

for the affected nation, frequently the ambassador, notifies the DoS of the request.⁸³ The DoS will then make internal DoS and National Security Council notifications and dispatch a FEST and/or a Consequence Management Support Team (CMST) to the U.S. embassy in the affected nation.⁸⁴ Additionally, DoS will begin logistics, transportation, and other support coordination with the country team in the impacted nation.⁸⁵

The U.S. embassy country team is expected to notify the relevant DoD Geographic Combatant Commander (GCC), who will dispatch a liaison element to work with the country team to assess the incident, identify potential support requirements, and begin the flow of information through the combatant command to the National Military Command Center (NMCC).⁸⁶ Specific requests for DoD support are submitted by the DoS to the Office of the Secretary of Defense Executive Secretary.⁸⁷ Upon receipt of a request, the SecDef assesses it against specific request criteria, issues appropriate orders, and coordinates for the movement of tasked resources.⁸⁸ The SecDef will also identify specific command relationships and task the relevant GCC to support the FCM operation.⁸⁹ This affected GCC will then develop a task force organization, issue C2 guidance, and coordinate resources for deployment with the country team as part of

⁸³ *Id.*

⁸⁴ *Id.* The Consequence Management Support Team (CMST) is a DoS-led interagency support team that provides CBRN consequence management advice, assistance, and support to a U.S. embassy, consulate, or mission in country. *Id.* at III-10. It can be deployed in lieu of or as a subordinate element to the FEST. *Id.* It is comprised of subject matter experts from DoS and other USG departments and agencies as required. *Id.* The CMST provides FCM situation assessments to the USG and affected nation and coordinates the USG response for DoS. *Id.*

⁸⁵ *Id.* Country teams in embassies are made up of key figures from the DoS and other agencies who work under the direction of the ambassador and meet regularly to share information and coordinate agency actions. U.S. Diplomacy, <http://www.usdiplomacy.org/state/abroad/countryteam.php> (last viewed 20 Oct. 2012 at 9:47 a.m.),

⁸⁶ JOINT PUB. 3-41, *supra* note 9, at 9. The National Security Council coordinates an interagency assessment of the request for assistance and determines whether the USG will fulfill the request. *Id.* The U.S. embassy in the affected nation will coordinate with the impacted nation regarding the specific support the USG will provide and finalize logistics, transportation, and legal negotiations. *Id.*

⁸⁷ *Id.* The Chairman of the Joint Chiefs of Staff (CJCS) serves as the principal military advisor to SecDef in preparing for and responding to an FCM incident. *Id.* The CJCS reviews all requests and provides recommendations for DoD support to USG FCM operations, and ensures military planning is accomplished to support DoS in preparing for and responding to a foreign CBRN incident. *Id.*

⁸⁸ *Id.* Of particular relevance to FCM operations is the support provided by the Defense Threat Reduction Agency (DTRA). *Id.* at III-10. The DTRA affords operational and technical advice and support to DoD components and other USG departments and agencies regarding FCM events. *Id.*

⁸⁹ *Id.*

the USG's overall response to the foreign CBRN incident.⁹⁰ In order to assist planners in understanding the operational environment and in developing an appropriate response, the DoD views FCM as a six-phase process.⁹¹ The judge advocate will be involved in all aspects of the planning process and be expected to identify legal issues associated with the FCM operation.

B. Phases of FCM

The initial phase of FCM is Phase 0, the shaping phase.⁹² This is an ongoing and continuous phase.⁹³ The intent of Phase 0 is to ensure the DoD has organized, trained, equipped, and prepared personnel to support USG efforts to minimize the effects of CBRN incidents on foreign soil.⁹⁴ Some of the key tasks of this phase include partner engagement, interagency coordination, plans development, training, exercise, and constant monitoring for a developing crisis.⁹⁵ Phase 0 will continue until notification of a foreign CBRN incident.⁹⁶

The next phase of FCM is Phase I, the deterrence phase (situation assessment and preparation).⁹⁷ The transition to Phase I occurs upon the receipt of information that an FCM incident has occurred.⁹⁸ Phase I focuses on those actions

⁹⁰ *Id.* Potential assets available for operation use during FCM operations include the U.S. Armed Forces Radiobiology Research Institute (AFRRI). *Id.* at III-9 to III-11. This agency can provide DoD technical support capability for nuclear and radiological incidents or accidents. *Id.* The U.S. Air Force Radiation Assessment Team (AFRAT) is a globally responsive, specialty asset team that provides health physics and radiological support in response to radiation incidents and accidents. *Id.* The U.S. Marine Corps Chemical-Biological Incident Response Force (CBIRF) is a unit that was created to deploy on short notice in response to CBRN incidents. *Id.* The U.S. Army 20th Support Command (CBRNE) is the operational headquarters for Army CBRN specialized units. *Id.* The Army Reserve's 7th Civil Service Support Command in Kaiserslautern, Germany provides European Command with FCM capabilities. 7th Civil Support Command, *available at* <http://www.usar.army.mil/ourstory/commands/7CSC/Pages/Overview.aspx> (last visited June 18, 2013).

⁹¹ See CJCSI 3214.01D, *supra* note 17, at A-5 to A-6.

⁹² *Id.* at A-5.

⁹³ See JOINT PUB 3-41, *supra* note 9, at III-18.

⁹⁴ *Id.*

⁹⁵ *Id.* The DoD will assist the DoS in shaping the environment through theater security cooperation, information operations, partner capacity-building and other engagement activities in an effort to prevent a CBRN incident and to enhance partner capabilities to manage the effects of an unpreventable CBRN incident. *Id.* Additionally, combatant commands are called upon to coordinate response, support, and situational awareness processes with U.S. embassies within their area of responsibility. *Id.*

⁹⁶ *Id.*

⁹⁷ See CJCSI 3214.01D, *supra* note 17, at A-5.

⁹⁸ See JOINT PUB 3-41, *supra* note 9, at III-18.

required to conduct situation assessment and preparation.⁹⁹ This includes the timely and accurate assessment of the CBRN situation, preparation for deployment, and deployment of selected advance elements.¹⁰⁰ Phase I ends when the nature and scope of the CBRN incident are defined and the initial response force requirements are ascertained.¹⁰¹ Once all assessments have been made and operational planning is complete, a formal execution order is developed for the deployment of forces.¹⁰²

Phase II of FCM occurs when U.S. forces are deployed to the incident site.¹⁰³ This phase begins with a SecDef-approved deployment and/or execution order.¹⁰⁴ This order designates the intermediate and/or forward staging bases and establishes command relationships.¹⁰⁵ Phase II is complete when sufficient forces are deployed to safely and effectively begin relief operations.¹⁰⁶ The next phase of FCM is Phase III, the dominance phase (assistance to affected nation authorities).¹⁰⁷ Phase III proceeds once operations by U.S. forces have begun at the incident site and supporting locations and ends with the determination that DoD support is no longer required.¹⁰⁸ Phase III contains both CBRN and humanitarian/disaster relief mitigation efforts.¹⁰⁹

United States forces move into to Phase IV of FCM with the implementation of a plan to transition all relief activities to the HN and non-governmental entities.¹¹⁰ Phase IV begins as soon as practicable following the initial response of U.S. Forces and is characterized by the stabilization of the situation.¹¹¹ The safe and expeditions exit of all DoD forces is one of the primary goals of FCM operations.¹¹² Phase IV is complete when a full transition of responsibilities has occurred.¹¹³ The final phase of FCM is Phase V, the

redeployment phase. This phase of operations begins with the redeployment of DoD forces involved in FCM operations or the formal transition of those forces to a purely humanitarian/disaster relief mission.¹¹⁴ Phase V is complete when all forces have completed transition to other missions.¹¹⁵

As one can readily conclude, the phases of FCM are important for planning and executing FCM missions.¹¹⁶ However, the conduct of FCM operations is also heavily influenced by the fiscal restraints inherent with humanitarian operations.¹¹⁷ These fiscal restraints reflect that humanitarian assistance is not a traditional DoD mission.¹¹⁸ Understandably, the funding of FCM missions is done through very specific fiscal authorities.¹¹⁹ The application of these authorities both direct and restrict DoD FCM efforts.¹²⁰ The judge advocate will be looked upon for guidance regarding the purpose and utilization of fiscal authorities and their impact on FCM operations.

IV. Funding of FCM

It is a basic tenet of fiscal law that all expenditures in an operation must be for an authorized purpose, made within applicable time periods, and authorized in appropriate amounts.¹²¹ As discussed above, there are both legislative and executive authorities for the DoD to conduct FCM operations.¹²² These authorities provide a valid purpose toward which USG funds may be expended by the DoD.¹²³ With respect to the available funding mechanisms for FCM missions, the DoD may use unit Operations and Maintenance (O&M) funds, Overseas Humanitarian Disaster and Civic Aid (OHDACA) funds, funds from other agencies (Economy Act transfers), Acquisition and Cross Servicing Agreements (ACSA), or a combination of these depending on the nature of the operation.¹²⁴ However, the majority of

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See CJCSI 3214.01D, *supra* note 17, at A-5.

¹⁰⁴ See JOINT PUB 3-41, *supra* note 9, at III-19.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* In many cases, the deployed forces may decide to move into phase III operations before all phase II objectives are complete and continue to work on phase II objectives while in phase III. *Id.*

¹⁰⁷ See CJCSI 3214.01D, *supra* note 17, at A-5.

¹⁰⁸ See JOINT PUB. 3-41, *supra* note 9, at III-19.

¹⁰⁹ *Id.*

¹¹⁰ See CJCSI 3214.01D, *supra* note 17, at A-6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See JOINT PUB. 3-41, *supra* note 9, at III-19.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.* at III-19.

¹¹⁷ See JA 422, *supra* note 23, at 223–25.

¹¹⁸ See, e.g., EO 12,966, *supra* note 41, para. 2.

¹¹⁹ See JA 422, *supra* note 23, at 223-25.

¹²⁰ See FCM LEGAL DESKBOOK, *supra* note 25, at 4-1.

¹²¹ See 10 U.S.C. §§ 1301, 1341, and 1502(a) (2012) (addressing purpose, amount and time, respectively).

¹²² See 22 U.S.C. §§ 2151–2443 (2011); 10 U.S.C. §§ 401, 402, 2547, and 2561; EO 12,966, *supra* note 41.

¹²³ See 10 U.S.C. § 1301.

¹²⁴ See JA 422, *supra* note 23, ch. 14.

costs for all DoD humanitarian assistance missions are funded through the OHDACA account in annual DoD appropriations.¹²⁵

A. Unit O&M Funds

A commander in the immediate vicinity of a foreign disaster may undertake immediate relief operations when time is of the essence to prevent human suffering and loss of life.¹²⁶ Funds expended under these circumstances will be from the responding unit's O&M funds.¹²⁷ Commanders are generally allotted up to seventy-two hours to expend O&M funds under their immediate response authority.¹²⁸ Once any actions are taken, the commander should promptly report the unit's activities up the chain of command and begin accounting for all incremental costs associated with the response.¹²⁹ However, the reimbursement of funds expended under these circumstances is not guaranteed.¹³⁰

B. OHDACA Funds

Overseas Humanitarian, Disaster and Civic Aid funds are the funds most likely to be used for FCM operations of any duration.¹³¹ The OHDACA appropriation has a two-year period of availability and is used to fund a number of DoD humanitarian activities, including the Humanitarian Assistance (HA) Program (10 U.S.C. § 2561), Excess

Property Program (10 U.S.C. § 2557), Humanitarian Mine Action (10 U.S.C. § 407), Denton Program (Space Available Transportation – 10 U.S.C. § 402), Funded Transportation Program (10 U.S.C. § 2561), and Foreign Disaster Relief (FDR—10 U.S.C. § 404), as directed by the SecDef.¹³²

The Defense Security Cooperation Agency (DSCA) provides program management and execution oversight of the OHDACA appropriation and its funded activities.¹³³ The DSCA works closely with combatant commands (COCOMs) and USG agencies to capture costs, facilitate reimbursement, and resource DoD personnel for their missions.¹³⁴ When faced with disaster relief missions, the DSCA assists COCOMs in identifying the incremental costs incurred as a direct result of supporting contingency operations in order to fund and/or reimburse such costs with OHDACA funds.¹³⁵ Therefore, any OHDACA funds transferred to a service's baseline appropriation may not be used to finance activities and programs that are not directly related to the incremental cost of the contingency.¹³⁶

Despite specific authority provided in 10 U.S.C. § 404, the primary authorization used to fund the DoD's disaster response activities is 10 U.S.C. § 2561.¹³⁷ According to the DSCA's FY 11 Report to Congress, "the DoD conducts

¹²⁵ See MARGESSON, *supra* note 56, at 9. The primary purpose of the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation is to fund the DoD humanitarian assistance, disaster relief, and demining under 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561. See JA 422, *supra* note 23, at 223. The availability for obligation regarding OHDACA funds is two years. See SAMM, *supra* note 43, sec. C12.3.1.

¹²⁶ See EO 12,966, *supra* note 41. Operations and maintenance funds are for expenses, not otherwise provided for, necessary for the operation and maintenance of the force and are available for obligation for one FY. See JA 422, *supra* note 23, at 206.

¹²⁷ See JOINT PUB. 3-29, *supra* note 19, at B-3. Operations and maintenance funds are also used to fund HCA activities. See JA 422, *supra* note 23, at 225. Pre-planned or budgeted HCA activities are funded via O&M funds at the COCOM level. *Id.* Each COCOM commander must ensure that Pre-planned HCA activities are approved by the DoS, do not duplicate other forms of U.S. economic assistance, and are not provided to any individual, group, or organization engaged in military or paramilitary activities. *Id.* In contrast, minimal cost HCA activities may be funded via the participating unit's O&M funds. *Id.*

¹²⁸ See JOINT PUB. 3-29, *supra* note 19, at B-3.

¹²⁹ *Id.*

¹³⁰ *Id.* This is the case because the commander has not coordinated with the DoS or DSCA prior to conducting the relief activities. See Herbert, Prosser & Wharton, *supra* note 8, at 37. Further, when an FCM mission is conducted at the request of another federal agency, typically the DoS, the reimbursement of funds will not likely be available if DoD forces act prior to receiving the request. *Id.*

¹³¹ See FCM LEGAL DESKBOOK, *supra* note 25, at 2-11.

¹³² See U.S. DEP'T OF DEF, SUPPORT TO FOREIGN DISASTER RELIEF: HANDBOOK FOR JTF COMMANDERS AND BELOW 10-10 to 10-11 (13 July 2011) [hereinafter JTF COMMANDER'S HANDBOOK].

¹³³ *Id.* The DSCA is part of the OSD Policy office. See Herbert, Prosser & Wharton, *supra* note 8, at 14. Within DSCA, the Programs Office of Humanitarian Assistance, Disaster Relief, and Mine Action manages the OHDACA account. *Id.* The DSCA's OHDACA funding is a multi-year appropriation, which is open for obligations for a period of two years. *Id.* Once the appropriation has expired, the appropriation remains open for an additional five years for the liquidation of any outstanding expenditure. *Id.*

¹³⁴ *Id.* at 10-11.

¹³⁵ See U.S. DEP'T OF DEF, REG. 7000.14-R, vol. 12, ch. 23, para. 230107 (Sept. 2007) [hereinafter DoDFMR].

¹³⁶ *Id.* Incremental costs are "additional costs to the DoD Component appropriations that would not have been incurred had the contingency operation not been supported." *Id.* para. 230107. The costs of investment items, construction costs, and costs incurred to fix existing shortcomings can be categorized as incremental expenses only if the expenditures were necessary to support a contingency operation and would not have been incurred in that FY in the absence of the contingency requirement. See *id.* Costs incurred beyond what was reasonably necessary to support a contingency operation cannot be deemed incremental expenses, since such costs are not directly attributable to support of the operation. *Id.* Examples of incremental costs include transportation costs of moving personnel, material, equipment, and supplies to the contingency or contingency staging area; cost of material, equipment, and supplies from regular stocks used in providing directed assistance; increases in military entitlements and allowances due to changes in geographic assignment area due to a contingency. *Id.*

¹³⁷ See RHODA MARGESSON, CONG. RESEARCH SERV., RL 33769, INTERNATIONAL CRISES AND DISASTERS: U.S. HUMANITARIAN ASSISTANCE, BUDGET TRENDS, AND ISSUES FOR CONGRESS 10 (2007); MARGESSON, *supra* note 56, at 5.

humanitarian assistance, disaster relief/emergency response, and funded transportation programs pursuant to Title 10 U.S. Code Sections 2557 and 2561 . . . disaster relief and emergency response includes . . . immediate assistance in the wake of natural and manmade disasters.”¹³⁸ However, most importantly, the SAMM defines the parameters under which FCM operations may be resourced with OHDACA funds as those activities falling within the definition of FDR, e.g., those involving prompt aid used to alleviate the suffering of foreign disaster victims.¹³⁹ The SAMM states, “OHDACA funds may be used only to the extent such use can be defined as foreign disaster relief. The support and reimbursement processes follow the same guidelines as other foreign disaster relief missions DoD supports.”¹⁴⁰ Therefore, the DSCA utilizes the regulatory framework associated with 10 U.S.C. § 404 to fund FCM operations with OHDACA funds even though the use of such funds are typically authorized under 10 U.S.C. § 2561.¹⁴¹

C. Economy Act Transfers

The Economy Act provides agencies the authority to furnish services to, or secure the services of, another agency for in-house performance or performance by contract of those activities the acquiring agency has the authority to perform.¹⁴² An agency of the USG may place an order with another agency for goods or services if: (1) the ordering agency has available funds, (2) the order is in the best interests of the USG, (3) the agency filling the order can provide, or acquire by contract, the ordered goods or services, and (4) the ordered goods or services cannot be provided by a separate contract as conveniently or cheaply.¹⁴³

¹³⁸ DSCA 2011 REP., *supra* note 49, at 3. Non-lethal excess property may include such items as medical, school, or office equipment and supplies, construction and disaster-related equipment/tools, and vehicles. *See id.*

¹³⁹ *See SAMM, supra* note 43, sec. C12.9.4.4.

¹⁴⁰ *Id.* sec. C12.9.4.4.

¹⁴¹ *See id.* Joint Publication 3-41 recognizes FCM missions as efforts to “mitigate human casualties and to provide (and restore) associated essential services.” JOINT PUB. 3-41, *supra* note 9, at xv. Viewed from this perspective, FCM contains all of the essential elements of a Foreign Disaster Relief operation. *See* JOINT PUB. 3-29, *supra* note 19, at B-3. *See also* FCM LEGAL DESKBOOK, *supra* note 25, at 4–6 (stating FCM operations under the authority of 10 U.S.C §§ 402, 404, and 2557 are supported by OHDACA funds made available under 10 U.S.C. § 2561).

¹⁴² *See* JOINT PUB. 3-29, *supra* note 19, at B-2.

¹⁴³ *See* 31 U.S.C. § 1535a (2011). The Federal Acquisition Regulation (FAR) subpart 17.5 and the Defense Federal Acquisition Regulation Supplement (DFARS) subpart 217.5 govern use of the Economy Act. *See* FEDERAL ACQUISITION REG. subpt. 17.5 (July 2009) [hereinafter FAR]; DEFENSE FEDERAL ACQUISITION REG. SUPP. subpt. 217.5 (15 Oct. 2009) [hereinafter DFARS].

Economy Act transactions are frequently used during disaster relief operations.¹⁴⁴ As the Comptroller General noted, the Economy Act allows the DoD to conduct humanitarian assistance activities on behalf of other agencies when it lacks the resources and/or separate authority to do the same.¹⁴⁵ During *Operation Unified Response* in 2010, Economy Act transfers were a very efficient means by which the DoS funded humanitarian transportation operations carried out by the DoD when there was limited availability of OHDACA funding.¹⁴⁶ The DoS was able to fund activities authorized under title 22 of U.S. Code through Economy Act transfers to the DoD.¹⁴⁷

D. ACSA Transactions

Acquisition and Cross Servicing Agreements are agreements between the DoD and defense departments of foreign nations for the reimbursable mutual exchange of logistical supplies, services, and support.¹⁴⁸ Transactions under ACSAs may be funded via (1) payment in kind, (2) replacement in kind, or (3) equal value exchanges.¹⁴⁹ Notably, ACSAs are regularly utilized by the DoD to provide goods and services to foreign military partners who may be unable to fund cash transactions.¹⁵⁰ Further, ACSAs allow the DoD to acquire logistical support without having to follow many of the acquisition procedures found in the Federal Acquisition Regulation (FAR).¹⁵¹

Under DoD Directive 2010.01, ACSA authority should be used during “contingency operations, humanitarian or foreign disaster relief operations . . . or for unforeseen or exigent circumstances.”¹⁵² During *Operation Tomodachi*, an

¹⁴⁴ *See* Ohlweiler, *supra* note 36, at 23.

¹⁴⁵ *See* The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422, at 2 (1984).

¹⁴⁶ *See* Ohlweiler, *supra* note 36, at 23.

¹⁴⁷ *Id.*

¹⁴⁸ *See* 10 U.S.C. §§ 2341–2350 (2012). Examples of logistics, supplies, services, and support include food, fuel, transportation, ammunition, equipment, and technical assistance. *See id.* § 2350.

¹⁴⁹ *See* U.S. DEP’T OF DEF, DIR. 2010.9, ACQUISITION AND CROSS SERVICING AGREEMENTS 5.5.5 (28 Apr. 2003) [hereinafter DoDD 2010.9]; JOINT CHIEFS OF STAFF, INSTR. 2120.01, ACQUISITION AND CROSS SERVICING AGREEMENTS para. 3e (20 Sept. 2010) [hereinafter CJCSI 2120.01].

¹⁵⁰ *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, AFTER ACTION REPORT, *OPERATION TOMODACHI, U.S. ARMY JAPAN / I CORPS FWD/10TH AREA SUPPORT GROUP/JLTF-10, MAR. 2011 TO MAY 2011*, at 7 (24 May 2011) [hereinafter U.S. ARMY JAPAN AAR].

¹⁵¹ *See* DoDD 2010.9, *supra* note 149, para. 4; CJCSI 2120.01, *supra* note 149, encl. A.

¹⁵² DoDD 2010.9, *supra* note 150, para. 4.3.5. After consulting with the DoS, the DoD (i.e., COCOMs) may negotiate and enter into Acquisition

in-kind ACSA transaction was used to provide mobile shower units to the Tohoku Defense Bureau for use by displaced survivors of the 2011 earthquake, tsunami, and nuclear disaster.¹⁵³ Additionally, ACSAs were used to provide fuel and Meals Ready to Eat (MREs) to Japanese and New Zealand Soldiers assisting in the disaster response.¹⁵⁴

The funding mechanisms available to the DoD for foreign disaster relief operations restrict a commander's ability to provide adequate and timely relief.¹⁵⁵ However, commanders must learn how to operate under these limitations in order to accomplish their mission.¹⁵⁶ Judge advocates are uniquely situated to provide training and insight into these issues. The DoD views humanitarian assistance foremost as a tool for achieving U.S. security objectives.¹⁵⁷ Therefore, FCM operations are a very important means by which commanders can support this policy.¹⁵⁸

V. Conclusion

Foreign Consequence Management is the USG's response to a manmade or inadvertent CBRN incident on foreign soil.¹⁵⁹ Because FCM raises issues of sovereignty and diplomacy, the DoS is the lead federal agency for FCM incidents.¹⁶⁰ Due to its unique capabilities, the DoD is called upon to be ready to support the DoS when requested and at

and Cross Servicing Agreements (ACSAs). *See* JA 422, *supra* note 23, at 217. For transactions carried out under ACSAs, the approval authorities are the ACSA Warranted Officers within the COCOMs. *Id.*

¹⁵³ *See* U.S. ARMY JAPAN AAR, *supra* note 150, at 7. Additional funding sources may be available for FCM operations. For example, the Combatant Commander Initiative Fund (CCIF) supports unforeseen contingency requirements critical to COCOMs joint warfighting readiness and national security interests. *See id.* § 166a. Further, Emergency & Extraordinary Expenses (EEE) Funds allow the SecDef to fund any emergency or extraordinary expenses that cannot be anticipated or classified. *See id.* § 127.

¹⁵⁴ *See* E-mail from Major Mark E. Peterson, Legal Advisor, Joint Task Force Japan, to Colonel Tonya Hagmaier, J-4, Joint Task Force Japan (17 Mar. 2011, 0430 JST) (on file with author); e-mail from Mr. Edmund S. Bloom, Legal Advisor, U.S. Forces Japan, to Lieutenant Colonel Miki Huntington, J-4, U.S. Forces Japan (18 Mar. 2011, 1849 JST) (on file with author).

¹⁵⁵ *See* FCM LEGAL DESKBOOK, *supra* note 25, at 4-1.

¹⁵⁶ *Id.*

¹⁵⁷ *See* NINA M. SERAFINO ET AL., CONG. RESEARCH SERV., RL 34639, THE DEPARTMENT OF DEFENSE'S ROLE IN FOREIGN ASSISTANCE: BACKGROUND, MAJOR ISSUES AND OPTIONS FOR CONGRESS 10 (25 Aug. 2008).

¹⁵⁸ *See generally* JOINT PUB. 3-41, *supra* note 9.

¹⁵⁹ *See* DoDI 2000.21, *supra* note 10, para. 4.

¹⁶⁰ *Id.*

the direction of the SecDef.¹⁶¹ Therefore, the continued need for the DoD to provide specialized units and equipment in response to an FCM event will be a requirement for the foreseeable future, and, consequently, judge advocates must be aware of the attributes and capabilities associated with FCM as well as its funding mechanisms and restrictions.¹⁶²

The purpose of this article was to explain the DoD's role in FCM operations. In doing so, it surveyed the legislative and executive authorities calling for DoD involvement in FCM operations focusing primarily on the Foreign Assistance Act, 10 U.S.C. humanitarian assistance authorities, and key executive orders.¹⁶³ The article then presented the process of responding to host nation requests for assistance and the phases of FCM operations, which inform the judge advocate of the planning structure associated with FCM.¹⁶⁴ Finally, it surveyed the basic funding mechanisms likely to be used in FCM operations concentrating on unit O&M funds, OHDACA funds, Economy Act transfers, and ACSA transactions.¹⁶⁵ The DoD possesses the statutory and executive authorities to plan, support, fund, and execute FCM operations, and judge advocates well versed in these authorities would be assets to commands engaged in these missions.

Based upon these operational and funding authorities, FCM can best be viewed as a specialized subset of FDR.¹⁶⁶ In addition to the logistics-based operations that are indicative of FDR missions, FCM calls upon the DoD to provide specialized personnel and equipment to mitigate the effects of CBRN contaminates.¹⁶⁷ Consequently, FCM missions have the potential to include all of the elements of

¹⁶¹ *See* Ohlweiler, *supra* note 36, at 23.

¹⁶² *Id.*

¹⁶³ *See* 22 U.S.C. §§ 2151-2443 (2011); 10 U.S.C. §§ 401, 402, 404, 2547, and 2561 (2012); EO 12,966, *supra* note 41; PPD/NSC 39, *supra* note 24; EO 12,656, *supra* note 59.

¹⁶⁴ *See* JOINT PUB. 3-41, *supra* note 9; DoDI 2000.21, *supra* note 10; CJCSI 3214.01D, *supra* note 17.

¹⁶⁵ *See* JA 422, *supra* note 23, ch. 14.

¹⁶⁶ *See* DEF. SECURITY COOPERATION AGENCY, FISCAL YEAR 2013 BUDGET ESTIMATES OVERSEAS HUMANITARIAN DISASTER AND CIVIC AID 117 (Feb. 2012), available at: http://comptroller.defense.gov/defbudget/fy2013/budget_justification/pdfs/01_Operation_and_Maintenance/O_M_VOL_1_PAR_TSPARTS/O_M_VOL_1_BASE_PARTS/OHDACA_OP-5.pdf (stating "in times of natural and man-made disasters such as the Pacific Tsunami (2004), Pakistan Earthquake (2005), Georgia conflict (2008), Haiti Earthquake (2010), Pakistan Flooding (2010), and Japan Earthquake (2011) the U.S. military has and will continue to be called upon to provide aid and assistance because of our unique assets and capabilities"). *Id.*

¹⁶⁷ *See* CJCSI 3214.01D, *supra* note 17, at A-6.

FDR with the added complexity of operating in a CBRN environment.¹⁶⁸ Therefore, judge advocates must be aware of the nuances associated with FCM missions in order to

provide clear and concise legal advice to commanders operating in this complex environment.¹⁶⁹

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

Predators: Pedophiles, Rapists, & Other Sex Offenders: Who They Are, How They Operate, and How We Can Protect Ourselves and Our Children¹

Reviewed by Major Alexander Farsaad*

[O]ver and over we confuse likability with trustworthiness, familiarity with safety, warmth with caring. Niceness is a decision . . . Predators, we think, should at least have the decency to be rude.²

I. Introduction

Every day, as we read newspapers, watch television, or scan the Internet, sexual assault cases catch our attention. Coaches, priests, and other respected people are accused of sexually assaulting numerous children over several years. The conviction of Jerry Sandusky, a former assistant football coach at Penn State, on forty-five counts of sexually assaulting ten boys over a fifteen-year period is just one recent example.³ Over the past twenty years, clergy in the Roman Catholic Church have faced multiple allegations of sexual abuse.⁴ These are just the predators who are caught. The reality is that “one in three girls and one in six boys will have sexual contact with an adult,”⁵ and “the average child molester victimizes between 50 and 150 children before he is ever arrested (and many more after he is arrested).”⁶ That is where *Predators* steps in—to explain these numbers and help us get inside the heads of the men⁷ who abuse children. Although written almost ten years ago, *Predators* continues its relevance today, offering valuable insights into how and why predators commit their crimes and how they escape prosecution.

Child sexual abuse grabs the headlines, but *Predators* goes beyond just child molesters; Anna Salter discusses the behavior of rapists, sadists, and psychopaths as well.⁸ She is able to cover such an expansive topic in detail because of her extensive background and experience. Having received a Master’s Degree in 1973 and a Ph.D. in 1977, she began work as a therapist and has been treating victims ever since.⁹ She has conducted training in forty-six states and ten countries, has evaluated sex offenders for court proceedings, and has testified as an expert witness in trials.¹⁰ She has made several educational films in which she has taped predators in prison describing how and why they committed their crimes.¹¹

Salter sets herself an ambitious goal in writing this book. Her ultimate aim is to “make it harder for sex offenders to get access to you or your children. . . . because knowing how they think and act and operate is the best protection that we have.”¹² She achieves this goal by meticulously examining the various psychological studies that others have done and detailing her own experiences. Her extensive quotations taken directly from the mouths of the predators she has interviewed are particularly valuable. She explores the world of these men, looking at the double lives they live and how they deceive people into giving them access to their children. She also outlines practical advice on how to stay safe.¹³ Although countless psychologists have studied the subject matter of *Predators*, Salter brings the material together in one easily read volume, masterfully weaving in her own wide-ranging experiences.

* U.S. Marine Corps. Presently assigned to the Judge Advocate Division, Headquarters, Marine Corps.

¹ ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, & OTHER SEX OFFENDERS (2003).

² *Id.* at 189 (internal quotation marks omitted).

³ Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES, June 23, 2012, at A1.

⁴ See generally *Roman Catholic Church Sex Abuse Cases*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/r/roman_catholic_church_sex_abuse_cases/index.html (last updated June 1, 2013).

⁵ Gavin de Becker, *Foreword* to ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, & OTHER SEX OFFENDERS, at ix, ix (2003); cf. SALTER, *supra* note 1, at 10, 241 (describing studies and statistics on child victims in greater detail); REBECCA M. BOLEN, CHILD SEXUAL ABUSE 4 (2002) (citing two studies finding between 38% and 44% of females “were victims of contact sexual abuse by the time they were 18”).

⁶ de Becker, *supra* note 5, at x (italics omitted); cf. SALTER, *supra* note 1, at 11–14, 26 (describing studies, statistics, and the author’s own experiences).

⁷ When necessary, the author will use the masculine to refer to predators, as Salter does throughout the book, “[b]ecause the vast majority of offenders are male,” SALTER, *supra* note 1, at 243 n.1. Salter does spend several pages in the book discussing female child molesters. *Id.* at 76–78.

⁸ The title of the book uses the term “sex offenders” following pedophiles, rapists, and predators. Not all sex offenders are necessarily predators and some States have recognized this. Compare FLA. STAT. § 775.21 (2011) (sexual predators), with FLA. STAT. § 943.0435 (2011) (sexual offenders).

⁹ *Biography*, ANNASALTER.COM, <http://www.annasalter.com/annasalter/BIOGRAPHY.html> (last visited June 4, 2013); SALTER, *supra* note 1, at 1–2, 7, 13.

¹⁰ *Biography*, *supra* note 9.

¹¹ *Id.*; SALTER, *supra* note 1, at 5–6 & 243 nn.2–3.

¹² SALTER, *supra* note 1, at 4.

¹³ *Id.* at 223–42.

Given her impressive background, it is no surprise that there is a discrepancy between her target audience, the general public, and parts of the book that are written more for those involved in investigating, interrogating, or professionally studying sexual predators.¹⁴ She devotes an entire chapter to how predators seduce the staff in prisons.¹⁵ Portions of the book go into detail about analyzing facial expressions, ones that are visible for “as little as 1/25 of a second,”¹⁶ using a coding scheme that no “ordinary mortal[] can make use of in the real world.”¹⁷ She discusses the value of using polygraphs¹⁸ and how to analyze statements for falsehoods.¹⁹ This information may be interesting to the general public, but it is most useful to professionals in the field. Most parents would not find themselves in a position to be seduced by an incarcerated predator, to use a polygraph, or to try to decipher fleeting facial expressions or analyze word choice in daily conversations.²⁰ Nevertheless, these forays into more nuanced areas help all categories of readers know the skills of predators and understand how difficult it is to detect the use of those skills. Thus, we must deflect predators instead of trying to detect them.²¹

¹⁴ Others have made similar arguments. See Margery E. Capone, Book Review, 35 J. PHENOMENOLOGICAL PSYCHOL. 131, 131–32 (2004) (“Although the book’s intended audience seems to be the general public, much of the information shared is more likely to be helpful to the criminal justice system in its attempt to determine profiles for sexual predators and to detect deception in the course of interrogation or litigation.”); Book Review, PUBLISHERS WKLY., Feb. 17, 2003, at 67 (“[T]he subject matter is likely to appeal more to police or psychology professionals.”). At least one reviewer disagrees on the intended audience. See Anne-Marie McAlinden, Book Review, 44 BRIT. J. CRIMINOLOGY 986, 987 (2004) (stating that the “usual reader” will be “policy makers, practitioners, academics, and students,” but that the book is also useful to “parents and educators more generally”).

¹⁵ SALTER, *supra* note 1, at 139–56.

¹⁶ *Id.* at 209.

¹⁷ *Id.* at 216. The coding scheme “involves coding forty-four muscle groups in the face for contraction in every frame of film, and it can take up to ten hours to code a single minute of behavior.” *Id.* (footnote omitted).

¹⁸ *Id.* at 17, 73, 205.

¹⁹ *Id.* at 217–22.

²⁰ See Capone, *supra* note 14, at 131–32 (“Parents and potential targets would not be likely to either learn such tactics or have the time and space to utilize them *in vivo*.”). A portion of the book relates the story of an ancient Athenian general, Alcibiades, and his relationship with Socrates, under the premise of describing the historical existence of psychopathy. SALTER, *supra* note 1, at 128–35. While interesting, this section is especially detached from the purpose or target audience of the book. See Wendy A. Walsh, Book Review, 11 VIOLENCE AGAINST WOMEN 139, 140 (2005).

²¹ SALTER, *supra* note 1, at 222.

II. The Difficulties of Detection: How We Are Deceived

The primary lesson for the reader is that predators have an uncanny ability to deceive by manipulating how we perceive the world and ourselves. Salter discusses and applies this theme throughout the entire book, ensuring that we never forget the deceptive skills of these predators. From the beginning, Salter warns that predators are not the monsters or strangers one would expect; they are the polite and likeable friends, coaches, and priests people willingly include in their lives.²² She details case after case where the evidence pointed to the predator, but someone—an evaluator, a psychiatrist, or frequently the family—refused to believe the allegation because the offender was forthright and kind or interacted well with the victim.²³ What is even more frightening is that molestations are often well-planned,²⁴ and most molesters are not caught.²⁵

The problem is that when people observe behavior, they assume that the observed person always acts in accordance with that behavior.²⁶ Predators often lead double lives, maintaining “socially responsible behavior in public.”²⁷ From that, people infer that predators are moral, upstanding men in all aspects of life. When they then commit a crime, we refuse to see beyond their public persona.²⁸ Predators prey on this

²² *Id.* at 4–5 (“Sex offenders only very rarely sneak into a house in the middle of the night. More often they come through the front door in the day, as friends and neighbors, as Boy Scout leaders, priests, principals, teachers, doctors, and coaches. They are invited into our homes . . .”).

²³ See, e.g., *id.* at 16–17 (describing psychiatrists who watched the alleged perpetrator interact with the child and found the perpetrator credible); *id.* at 20–21 (describing a case where the child specifically identified the perpetrator, but since the perpetrator denied the allegations and was “forthright,” “the examiner concluded that she could not determine the identity of the perpetrator”).

²⁴ See *id.* at 42 (“Such careful planning is not unusual with sex offenders.”).

²⁵ See, e.g., Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 TRAUMA, VIOLENCE, & ABUSE 323, 324 (2003) (finding on average only 26 of 100 hypothetical perpetrators would be incarcerated); Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 17–19 (1987) (estimating three percent chance of being caught). After repeatedly escaping arrest, predators begin to feel “invincible.” SALTER, *supra* note 1, at 27 (quoting athletic director who molested over 1,250 children over twenty years, despite “several outcries by children”).

²⁶ Psychologists call this the fundamental attribution error or correspondence bias. See, e.g., MALCOLM GLADWELL, *THE TIPPING POINT* 160–63 (2000); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 22 (1995) (“When people observe behavior, they often conclude that the person who performed the behavior was predisposed to do so—that the person’s behavior corresponds to the person’s unique dispositions—and they draw such conclusions even when a logical analysis suggests they should not.”).

²⁷ SALTER, *supra* note 1, at 38.

²⁸ Salter relays the story of a well-liked, nice adolescent who abused a child at his mother’s home day care. Neither the local police, nor an independent psychologist, thought he was guilty. The medical examiner said that he “did

error by presenting themselves as extremely charming. They are practiced liars, maintaining good eye contact and not fidgeting,²⁹ further feeding our attribution of good character. Ultimately, predators not only take advantage of our weaknesses, but they also “turn our strengths against us.”³⁰

Most ordinary people alter reality to minimize negative facts and emphasize positive facts, a process referred to as “positive illusions.”³¹ These positive illusions are an important source of psychological strength for individuals, allowing us to be happier, healthier, and better able to endure illness.³² The positive illusions we hold include overly positive views about the strength of our abilities, how well we control our lives, and how rosy our future will be.³³ For example, although plenty of research shows that people cannot reliably spot liars, most believe that they can.³⁴ Predators take advantage of our positive illusions, one of our strengths, by playing upon our dangerously optimistic view of the world to evade recognition as a threat.

Additionally, our positive view of the world also explains why some people blame victims. We have a strong desire to believe that we live in a “just world” that is predictable and rational.³⁵ Thus, we blame victims for the way they dress, where they go, and with whom they interact.³⁶ However, Salter herself fails to distinguish between blame and practical advice. She devotes an entire chapter to describing how to deflect predators with advice on avoiding high-risk situations.³⁷ By her own terms, she is blaming victims for their choices on how to live their lives, though that is not her intent. Nevertheless, one might argue that advising someone to avoid risky situations—even if the advice comes after the person has become a victim—is not blaming the victim, but offering that victim practical advice on reducing the likelihood of future crimes.

not fit the profile of a child molester.” *Id.* at 24. However, the teen confessed. *Id.*

²⁹ *Id.* at 38–41.

³⁰ *Id.* at 177.

³¹ *Id.* at 160, 176–77.

³² *Id.* at 176.

³³ *Id.* at 160. *But see* Justin Kruger et al., *(Not So) Positive Illusions*, 32 *BEHAV. & BRAIN SCI.* 526, 526 (2009) (arguing that the evidence for positive illusions is mixed).

³⁴ *SALTER, supra* note 1, at 20, 40, 161–62.

³⁵ *Id.* at 173–74. *See generally* MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD* (1980).

³⁶ *SALTER, supra* note 1, at 174–75.

³⁷ *Id.* at 223–42.

Further, Salter’s harsh treatment of opposing arguments also detracts away from her otherwise excellent analysis. She lays out in detail what the current research and her own experience show about child molesters.³⁸ She shatters some common myths about why men molest children, including alcohol, stress, and abuse as a child.³⁹ However, she precedes her analysis with an extensive discussion on how those who hold different views are wrong and biased.⁴⁰ From the beginning, she argues that her opponents’ theories lack research and are mere “rationalizations for child molestation.”⁴¹ Later, she accuses her opponents of deliberately twisting or ignoring facts,⁴² or she simply calls their claims “absurd,”⁴³ “shameful,”⁴⁴ or “foam-at-the-mouth” hostile.⁴⁵ Ultimately, Salter successfully details the faults in the arguments of those who claim that the child seduces the offender.⁴⁶ Throughout most of the book, her lifetime of direct exposure to both victims and predators reinforces her credibility and gives more meaning to her words than just the dry studies. However, this personal experience can undermine her objectivity. While most of her criticisms are accurate and well-supported, her excessive criticism often makes her arguments appear personally motivated and not scientifically objective. The author could increase her persuasiveness by pointing to the flaws in other studies and the reasoning behind those studies without the invective and inflammatory language.

³⁸ *Id.* at 68–76.

³⁹ *Id.* at 71–74.

⁴⁰ *Id.* at 51–68. At eighteen pages, this section is longer than six of the eleven chapters in the book, and even longer than her analysis of the accepted literature of why some men molest children.

⁴¹ *Id.* at 51. *See generally* BOLEN, *supra* note 5, at 28–35 (providing a summary of the history of child abuse theories, including some discredited in *Predators*).

⁴² *SALTER, supra* note 1, at 54 (“A basic tenet of science is that if the facts don’t support the theory, the theory should give way. It often simply does not happen. Sometimes the facts are twisted to fit the theory or if that fails, they are simply ignored.”). She calls one author’s views “bewildering,” “puzzling,” “astonishing,” and “surprising,” all within three paragraphs on the same page. *Id.* at 52.

⁴³ *Id.* at 56 (“This line of reasoning sometimes went to absurd lengths (if you don’t think it was there already).”); *see also id.* at 54 (“Putting aside for a moment the absurdity of such claims . . .”).

⁴⁴ *Id.* at 57 (characterizing some theories as part of “a sorry chapter,” “shameful,” and “puzzling”).

⁴⁵ *Id.* (“Hostility toward child victims and adult women leaks through this literature like poison. What accounts for the kind of foam-at-the-mouth hostility expressed by [one] Professor . . .”).

⁴⁶ *See id.* at 51–68. Psychologists call the theory that the child seduces the offender “seduction theory,” which originated with Sigmund Freud. *E.g.*, BOLEN, *supra* note 5, at 13–35 (describing history of seduction theory).

Predators is not an easy book to read. Salter's extremely vivid and dramatic approach purposefully invokes fear and panic in the reader. She repeatedly details sick and disturbing offenses, describing them in graphic detail.⁴⁷ One wonders whether she "intended to educate or incite the reader."⁴⁸ However, as you read these terrible stories, you begin to wonder if the predators are lying to her, or at least exaggerating their stories. After all, they are practiced liars⁴⁹ who can adapt to the person to whom they are talking.⁵⁰ Salter eloquently explains how good these men are at lying,⁵¹ how their reports are "dubious,"⁵² and how they try to traumatize vicariously,⁵³ brag, or get a reaction.⁵⁴ When it is convenient for her argument, she even admits that they lie to her.⁵⁵ Besides, Salter only quotes those predators who have been convicted and are serving time,⁵⁶ whereas most do not go to prison.⁵⁷

Nevertheless, their stories, even if exaggerated, are valuable. These stories are necessary to accomplish her goal of making it harder for predators to get access to children. Quoting directly from these men, even if they are only a subset, builds Salter's credibility because she possesses firsthand interview knowledge about what they actually think, instead of some detached academic's interpretation. The descriptions may shock the conscience, but they give a taste of what these men are capable of and make the reader think twice before leaving a child with that "nice coach." After recounting these horrors, she assures the reader that "the answer is not terminal pessimism, suspiciousness, and

⁴⁷ See, e.g., SALTER, *supra* note 1, at 98–99 (quoting a predator who would tape a Ziploc bag over his son's head and molest him until he turned blue and passed out).

⁴⁸ Fabian M. Saleh, Book Review, 55 *PSYCHIATRIC SERV.* 727, 727 (2004). Salter invites the reader to skip the chapter on sadists because the material "has the power to traumatize." SALTER, *supra* note 1, at 98.

⁴⁹ See *supra* note 28 and accompanying text.

⁵⁰ See SALTER, *supra* note 1, at 35 ("The persona will often shift . . . depending on what the person in front of him wants to see.").

⁵¹ *Id.* at 40–41, 202.

⁵² *Id.* at 73 ("[O]ffender self-reports have dubious validity . . .").

⁵³ *Id.* at 100 ("[S]ome of them see interviews as an opportunity to traumatize the interviewer vicariously.").

⁵⁴ *Id.* at 144 ("I know he will feed off almost any reaction I have. Alarm, disgust, anything of the sort will make him feel powerful and likely give him a high. After all, did he not agree to this interview just to brag about his cleverness?").

⁵⁵ See *id.* at 111 ("Despite his statement, do not be tempted to think he is telling the truth . . .").

⁵⁶ *Id.* at 5.

⁵⁷ See sources cited *supra* note 25.

fear."⁵⁸ The answer is to deflect predators.

III. Putting It All Together: Deflecting Predators

Predators are frightening, causing many people, especially parents, to recoil with discomfort. Our positive illusions give predators an opening, but we can help close that opening by learning how to deflect predators. Unfortunately, much of Salter's advice is impractical. Her avoidance strategy, combined with the graphic nature of the book, can make the reader become overly cautious. Salter admits that one cannot be everywhere.⁵⁹ Ultimately, one has to find a balance in life between living in fear and living in peace.

Salter provides suggestions that illustrate a level of detachment from society. She recommends accompanying children on overnight trips or refusing to drop them off at activities. This assumes that parents have the time or ability to do so. In particular, a single parent would find it difficult to be at all activities and overnight events, especially if she has more than one child. Who is going to be at work or watch the other children? As Salter informs the reader that child molesters are more likely to target single parents, they are the ones who most need useful and practical advice.⁶⁰ Salter also cautions the reader us on several occasions to avoid men who work with children, focus their lives on children, and have no adult love interests.⁶¹ The only way one can know this information is to ask. Imagine asking your son's coach about his outside life or adult love interests upon your first meeting. But even if you do ask, Salter tells us not to believe his answer if all the information that you have is what he tells you.⁶² Due to this somewhat circular reasoning—ask the question, but don't believe the answer—the reader is left wondering what to do with this advice.

IV. Conclusion

In writing this book, Salter contributes to our understanding of predators and helps to shift the debate from "the legal, policy or conceptual frameworks[] towards the day-to-day operational context."⁶³ The detailed psychological analysis of predators is especially valuable to the military reader, who works in that day-to-day operational context.

⁵⁸ SALTER, *supra* note 1, at 189.

⁵⁹ *Id.* at 226.

⁶⁰ *Id.*

⁶¹ *Id.* at 223, 227.

⁶² *Id.* at 231.

⁶³ McAlinden, *supra* note 14, at 988.

Understanding that most of us cannot spot liars, and that we often have a stake in believing a liar,⁶⁴ will help the military reader, particularly those in the legal or law enforcement professions, to have a natural suspicion regarding what people say. This knowledge can help drive the analysis in sexual assault cases and other crimes, and guide interactions with the accused, the victim, and witnesses. Eventually, this knowledge can help the military improve its handling of

sexual assaults cases and respond to the congressional scrutiny of the military justice system that has resulted from a series of sexual assault scandals.⁶⁵ Reading *Predators* will help leaders at all levels manage sexual assault cases. Beyond that, knowing who predators are and how they operate can help everyone learn how to protect themselves and their children.

⁶⁴ SALTER, *supra* note 1, at 203.

⁶⁵ See generally Donna Cassata & Richard Lardner, *Sexual Assaults Force Changes to Military Justice*, STARS & STRIPES (June 4, 2013), <http://www.stripes.com/news/sexual-assaults-force-changes-to-military-justice-1.224212> (discussing congressional scrutiny of the military justice system in sexual assault cases and pending bills); Jennifer Hlad, *Military Leaders Argue for Commanders' Discretion in Sexual Assault Cases*, STARS & STRIPES (June 4, 2013), <http://www.stripes.com/news/military-leaders-argue-for-commanders-discretion-in-sexual-assault-cases-1.224307> (describing statement from Senator Claire McCaskill that the military has a problem with sexual predators).

In Search of Jefferson's Moose: Notes on the State of Cyberspace¹

Reviewed by Major Frank E. Kostik Jr.*

*Not long ago—fifteen years or so—a very large number of intelligent and well-informed people had never heard of the Internet, and many others regarded it as some kind of bastard offspring of CB radio, the pet rock, and Pong, an interesting but ultimately rather silly and ignorable fad that would have its day and fade ingloriously away.*²

I. Introduction

In a seemingly impossible manner, David Post uses Thomas Jefferson's analytical approach to writing *Notes on the State of Virginia* and Jeffersonian history as a backdrop to explain the Internet, cyberspace and governance.³ *Notes on the State of Virginia* contains detailed facts about eighteenth-century America and is the published expansion of a response drafted by Thomas Jefferson to Françoise Marbois.⁴ Marbois submitted twenty-two questions "to officials in the newly independent states."⁵ The questions ranged from inquiries concerning plants and animals to commercial productions and population in Virginia.⁶ A few months later, Jefferson responded with over 200 pages of detailed answers to Marbois's questions.⁷

David Post is a Professor of Law at Temple University School of Law and a long time scholar of the Internet and cyberspace.⁸ He draws on this experience to discuss the technical make-up of the Internet and the place it creates. In doing so, he identifies, rather than solves, the issues of governance created by the Internet and cyberspace.⁹ While

Post sticks to his thesis and uses a novel and entertaining way to address complex subjects, the overuse of in-depth historical forays is disorienting and disrupts the logical flow of information. The book is of little value to the average practicing judge advocates, but should not be dismissed, as Post presents unique governance questions, whose answers could impact states' sovereignty and national security policy.¹⁰

II. Just Because You Can Doesn't Mean You Should

At times, Post's approach to explaining the Internet with Jeffersonian history is masterful and on the mark. Two illustrations stand out as exceptional. The first is Jefferson's moose. Post uses the story of Jefferson's moose as a metaphor to explain the scale of the Internet and a need for a moose-like object to jump-start the Internet governance dialogue.¹¹ Between 1786 and 1787, Jefferson sent correspondence from France asking Governor John Sullivan of New Hampshire to send him a moose. In the spring of 1787, "the complete carcass and skeleton of an American moose, seven feet tall at the shoulders and with skin and antlers attached" arrived at Jefferson's residence in Paris, France, where he had it erected in his entrance hall.¹² This was done in part to prove a theoretical point during Jefferson's ongoing debate with eighteenth-century naturalist George Louis Leclerc Buffon: that animals in the New World were not smaller than those in Europe.¹³

For Post, the size or scale of the Internet is what makes the Transmission Communication Protocol/Internet Protocol (TCP/IP) network the one that became the Internet and is a major theme of his book.¹⁴ Interestingly, Jefferson's study of animal size, although not accurate, served up the right questions to explain the Internet's own scale problems.¹⁵ Using this backdrop and a few excellent diagrams,¹⁶ Post

* Judge Advocate, U.S. Army. Senior Defense Counsel, Trial Defense Service, Great Plains Region, Fort Leavenworth, Kansas.

¹ DAVID G. POST, *IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBER SPACE* (2009).

² *Id.* at 127.

³ While Post explains the Internet and cyberspace over the course of his book, how he uses the terms at different times can be confusing to a non-tech savvy reader. *See, e.g., id.* at 24–25, 187 (First defining cyberspace as a network, then using cyberspace to describe a place). It is useful and consistent with Post's uses to consider the Supreme Court's definitions in *Reno v. American Civil Liberties Union*, "[t]he Internet is an international network of interconnected computers" and cyberspace is the "medium" created by the network and all of its tools such as "newsgroups," "chat rooms," and the "World Wide Web." 521 U.S. 844, 850–51 (1997). For purposes of this book review each concept will be discussed separately.

⁴ POST, *supra* note 1, at 9 (Françoise Marbois was the "First Secretary to the French legation to the United States," which is equivalent to the modern-day Assistant to the French Ambassador).

⁵ *Id.*

⁶ *Id.* at 9–10 n.3.

⁷ *Id.* at 9–11.

⁸ *See* Faculty, David Post, http://www.law.temple.edu/Pages/Faculty/N_Faculty_Post_Main.aspx (last visited June 2, 2013) (providing a detailed biographical and educational background of David Post).

⁹ POST, *supra* note 1, at 209.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 68 (discussing scale); *id.* at 209–10 (discussing Wikipedia as an Internet moose).

¹² *Id.* at 16, 66.

¹³ *Id.* at 63–65, 67, 210.

¹⁴ *Id.* at 47–48.

¹⁵ *Id.* at 68 ("[A]nimals in the New World are neither systematically larger or smaller, more numerous or less, than those in the Old.").

expertly negotiates the interaction among the seemingly dry topics of “geometric growth,”¹⁷ the Internet, and the TCP/IP network’s “distributed routing”/ “end to end”¹⁸ solution.¹⁹

After completing the book, Post determined that he, too, needed a moose to make his theoretical point tangible and therefore reveals it in the epilogue.²⁰ Like Jefferson’s moose certainly illustrated to Buffon, the reader knows at once that the scale of the problem concerning Internet governance is immense. Post identifies Wikipedia as his “moose,” and in doing so, aptly complements this particular theme presented in the book.²¹ Post identifies Wikipedia as his moose because it is “the world’s single most consulted source of information, available in forty-odd languages, accessible (virtually instantaneously) to over a billion people, compiled by thousands of people working anonymously for no pay.”²² To Post, Wikipedia provides the same “wow” factor to those who question the importance and uniqueness of the Internet as the moose did for those who questioned the size of the animal in the New World.

The second masterful use of Jeffersonian history comes as the book shifts gears from the technical workings of the Internet to the more relevant and interesting issue of governing this scaling behemoth—allowing an entire world to communicate and share information with ease. To set up his discussion on governance, Post outlines the two political philosophies and the long-standing debate between Thomas Jefferson and Alexander Hamilton.²³ To establish the primary differences between the two, Post quotes Merrill Peterson:

One despised, the other idolized, rulership. One located the strength of the republic in the diffuse energies of a free society, the other in the consolidation of authority Hamilton feared most the ignorance and tumult of the people, Jefferson feared the irresponsibility of rulers independent of them. Hamilton labeled his rival a visionary

and a demagogue, while Jefferson named his a corrupter, a monarchist, and an Angloman.²⁴

Post uses this primary difference between Jefferson’s decentralized and Hamilton’s centralized governance models to weave his way through Jefferson’s plan to settle the American west: an area that Jefferson believed could be “held together by consensual bonds and adherence to republican principles, not coercive power, an ever-expanding union of self-governing commonwealths joined together as peers.”²⁵ Post asserts that this idea of governance “was so out-of-the-box that it is difficult even to see the outlines of the box anymore.”²⁶ This builds on an observation made by Post earlier in the book—that Jefferson was not afraid to create a system that ran contrary to the prevailing norms of the day such as Montesquieu’s “Law.”²⁷ Post then uses Jefferson’s trust in self-governance, his ability to think “out-of-the-box,” and willingness to challenge existing norms to nudge the reader to think differently about Internet governance.²⁸

As it turns out, Post takes his own advice and offers up a new vision of Internet governance that takes place wholly in cyberspace: a new place made up of avatars that has its own law to deal with the transactions that take place there.²⁹ While certainly this amounts to the type of “outside-the-box” thinking that allowed Jefferson to expand America’s West, it comes across as incomplete because it leaves unresolved the impact such a system would have on current institutions.

Unfortunately, not all of the historical examples made the author’s points clear. In this aspect, Post’s unique application of Jeffersonian history falters. He spends page after page discussing Jefferson’s understanding of rivers and population growth to explain relatively simple points about networks and “geometric growth.”³⁰ As an example, to explain that the Internet grew quickly to a large size, Post takes the reader on a fourteen-page journey into the population growth of Virginia.³¹ To make the text even more tedious, Post included a multi-page footnote explaining that

¹⁶ See, e.g., *id.* at 73–78, 89 (using diagrams to explain “distributed routing” and “end to end” networking).

¹⁷ *Id.* at 36–45 (explaining the concept of “geometric growth.”).

¹⁸ See *id.* at 72–79, 81–89 (explaining the concepts of “distributed routing” and “end to end” networking).

¹⁹ *Id.* at 89.

²⁰ *Id.* at 209; see also David Post, *Jefferson’s Moose*, YOUTUBE, <http://www.youtube.com/watch?v=FskCRZC6U8Y&feature=related> (last visited June 2, 2013) (Post discussing his book at the University of Virginia School of Law, 14 October 2009).

²¹ POST, *supra* note 1, 108–10.

²² *Id.* at 209–10.

²³ *Id.* at 108–10.

²⁴ *Id.* at 107–08 (quoting MERRILL PETERSON, *ELECTION OF 1800: CONTEXT AND IMPLICATIONS* (1998)).

²⁵ *Id.* at 177.

²⁶ *Id.* at 172.

²⁷ *Id.* at 112, 114. Montesquieu’s Law stands for the proposition “that republican government could *only* survive in small communities.” *Id.* at 111.

²⁸ See *id.* at 116–17, 172, 177–78.

²⁹ *Id.* at 179–86.

³⁰ *Id.* at 29–44 (addressing population growth in Virginia); *id.* at 49–59 (addressing the river structure of the United States).

³¹ *Id.* at 31–44.

Benjamin Franklin essentially guessed the growth of America in 1751 and was proven accurate in the 1890 census.³²

When advancing his points, Post does not seem to know when to turn off history and continue developing his points. Another example occurs in Chapter 6 of the book, a largely unnecessary chapter about “power law” that not only exceeds the scope of the author’s thesis but also assumes too much knowledge on behalf of the average reader.³³ Here, Post included a footnote that spans two pages identifying things that Jefferson admits not understanding: specifically, finding seashells in the mountains.³⁴ Post makes a weak attempt to tie this in to the subject matter of the chapter in order to illustrate shock at a particular mathematical result, but simply fails.³⁵ In the end, the reader is left guessing whether “power law”³⁶ is so important that it requires a whole chapter, or if Post just wanted to tell a story about Jefferson’s seashells. Because of these examples, the reader quickly questions whether the book is about the Internet and cyberspace or Jefferson. The long-winded example obscures the illustrative Jeffersonian approach used by the author to explain Internet and cyberspace challenges.³⁷

III. So What is the Problem with the Internet?

Stylistic criticisms aside, Post does have solid organization and takes the reader from how the technology works to how that technology should be governed.³⁸ Concerning governance, he provides a clear discussion establishing two areas requiring law on the Internet.³⁹ The first is the law dealing with the nuts and bolts of how the Internet operates and the second is the law about how the space or the content on the Internet (cyberspace) should be governed. Post posits that the legal system to govern the nuts and bolts of the Internet is “nothing short of astonishing. . .” and works, but that the current governance of what happens in cyberspace needs serious work.⁴⁰

³² *Id.* at 38 n.5.

³³ *Id.* at 90–91.

³⁴ *Id.* at 90 n.1.

³⁵ *Id.* at 93.

³⁶ “Power Law,” simply stated, is a way the TCP/IP network deals with information allowing this particular network to move information quickly and therefore grow. *Id.* at 97–98.

³⁷ *Id.* at 17–18. Post makes this very point himself in the Epilogue. *Id.* at 209.

³⁸ *But see* Review of *In Search of Jefferson’s Moose: Notes on the State of Cyberspace*, <http://www.taugh.com/moose.pdf> (last visited June 2, 2013) (arguing that factual errors concerning Post’s explanation of technology, such as using imprecise examples, affect the book’s credibility).

³⁹ POST, *supra* note 1, at 142–62, 163–86.

Post moves through the governing of the nuts and bolts of the Internet in a somewhat adroit fashion, presumably because it is a system of Internet code-making left to the people to control and apparently consistent with his preferred Jeffersonian vision.⁴¹ Post admits that the power to make code or “set the TCP/IP rules, at the very bottom of the stack is immense,” yet he fails to meaningfully address the fact that power to do so is held by a relatively small number of people in this hyper-technical area. This concentration of power seems to be an obvious shortcoming, particularly if applying Jeffersonian philosophy.⁴²

Conversely, in the area of cyberspace governance, Post presents the most interesting and useful information to the average reader.⁴³ Unfortunately, the section is only a mere forty-four pages long. Here Post deftly explains two primary competing camps of Internet governance, using “The Yahoo! Problem”⁴⁴ as the backdrop. He labels the two camps the “Unexceptionalist,” and the “Exceptionalist.”⁴⁵ The “Unexceptionalist” view is that current law in each country accounts for the harms created by the Internet.⁴⁶ Post argues that this approach amounts to a game of “jurisdictional Whack-a-Mole,” subjecting a people to jurisdiction wherever their cyberspace content may be displayed and resulting in a chaotic *ex post facto* application of the law.⁴⁷

The second approach is the “Exceptionalist” view. The “Exceptionalist” believes that “applying jurisdictional principles that were developed to deal with real space border-crossing transactions to network transactions leads to a troubling and perhaps even absurd result.”⁴⁸ As an “Exceptionalist,” Post uses futuristic examples in which governance is triggered by the area in cyberspace where a

⁴⁰ *Id.* at 141 (approving of “the idea that [code-making] can be exercised only when there is a broad global consensus . . .”); *id.* at 169 (explaining the “Unexceptionalist” law cannot “guide the behavior of those subject to it in any meaningful way”).

⁴¹ *See generally id.* at 127–41 (outlining the Internet code-making process by the Internet Engineering Task Force and Post argument that they have no real authority, but satisfactorily creates internet operating standards by “consensus”).

⁴² *See id.* at 171–77 (outlining Jefferson’s rules for governance of the West).

⁴³ *See supra* p. 39.

⁴⁴ “The Yahoo! Problem” is a case in which Yahoo!, a California corporation, hosted an auction website that sold items world-wide. On a particular day it was selling “Nazi-related memorabilia.” Yet, “French law prohibits the display or sale of Nazi-related memorabilia.” “A group of French Plaintiffs . . . brought an action in the civil court in Paris, seeking an injunction against Yahoo!’s continuing display of these items to French users.” The French applied French law, and Yahoo! lost the suit. POST, *supra* note 1, at 164–65, 167 n.1.

⁴⁵ *Id.* at 166–67.

⁴⁶ *Id.* at 166.

⁴⁷ *Id.* at 168–69, 186.

⁴⁸ *Id.* at 167.

transaction takes place rather than by the physical boundaries of the sovereign states.⁴⁹ Even if only presented as an example of Jeffersonian “outside-the box thinking,” Post fails to take the reader to the next level with his example. Although he addresses some law that might be needed in this community such as freedom of speech and intellectual property rights, he does not consider how this type of thinking might affect current institutions.⁵⁰

A more complete analysis would include a chapter explaining how his example might impact state sovereignty.⁵¹ Even though Post’s example posits an entire legal structure within a cyber community to deal with issues where the transaction takes place, the fact still remains that people in countries with values and laws make these transactions. The author’s example leaves lingering questions: If a cyber community is its own place, who controls what happens there? If users control what happens, what jurisdictional law should govern them? Can individuals operating an avatar in cyberspace violate the law of the country the individual is in because the transaction happens in cyberspace? How does this impact national security if a user is simply moving secret documents in cyberspace? Who is the violator: the person, the avatar, or both? These are just a few of the questions that come to mind, which Post could have more fully developed with an additional chapter.⁵²

IV. Lesson for Judge Advocates and Conclusion

While Post offers little in the way of guidance for the average practicing judge advocate, those with an interest in international law, conflicts of law, and cyber law will likely find his work thought-provoking. The book will be most useful as a springboard for further research by academics in the field, rather than answer any pressing questions about how to govern. Strangely, this Internet book may also appeal to Jefferson scholars. The book talks about current and relevant areas of Internet technology and cyberspace governance. Unlike the once popular CB Radio, the Internet continues to grow and hold the world’s attention. In this regard, Post is on target, and hopefully his moose analogy illustrates to the average person that the Internet is here to stay. Overall, Post succeeds in presenting all the right theoretical questions about the Internet, but leaves the reader with no real answers.

⁴⁹ *Id.* at 185; *see also id.* at 186 (stating “I just wish the Unexceptionalist would stop telling us that we don’t [have the right to make decisions for themselves]”) (emphasis added).

⁵⁰ *Id.* at 187; *see id.* at 185–86 (only addressing the right to make law and not the impact of law).

⁵¹ *See, e.g.,* Henry H.Perritt Jr., *The Internet as a Threat to Sovereignty?: Thought’s on the Internet’s Role in Strengthening National and Global Governance*, 5 *IND. J. GLOBAL LEGAL STUD.* 423 (1998) (arguing the internet strengthens sovereignty).

⁵² *See, e.g.,* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 *U. PA. L. REV.* 311 (2002) (For a more complete argument concerning internet governance and sovereignty, including a more in depth look at David Post’s views on the issues of internet governance.). Post states that these omissions are intentional as discussion of these types of topics were outside the scope of the book; however, such omissions leave the reader feeling like the work is incomplete. *See POST, supra* 1, at 209.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail Thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil.

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:
<http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

a. The Judge Advocate General’s School, U.S. Army (TJAGSA), Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Vista™ Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

d. Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

a. Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

b. Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering.mil@mail.mil.

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