

**TRADITIONAL COMBATANT COMMANDER ACTIVITIES:
ACKNOWLEDGING AND ANALYZING COMBATANT
COMMANDERS' AUTHORITY TO INTERACT WITH
FOREIGN MILITARIES**

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[P]lanning staffs lack a fundamental understanding of security cooperation concepts and programs. This knowledge deficit limits their ability to develop efficient and effective ways to employ military means during steady-state operations in pursuit of theater strategic end states.¹

I. Introduction

Imagine you are an operational law attorney at an Army Service Component Command (ASCC). You attend an operational planning team² (OPT) meeting as a member of the Future Operations Cell.³ You

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¹ TERRY L. BAGGETT, JOINT ADVANCED WARFIGHTING SCHOOL, SECURITY COOPERATION AND PROFESSIONAL MILITARY EDUCATION: DEVELOPING BETTER THEATER CAMPAIGN PLANNERS 3 (2012).

² DEPLOYABLE TRAINING DIVISION JOINT STAFF J7, DESIGN AND PLANNING INSIGHTS AND BEST PRACTICES FOCUS PAPER 21 (2013), http://www.dtic.mil/doctrine/fp/fp_design_planning.pdf (an operational planning team (OPT) utilizes members from various working groups, as well as members from the future operations planning cell).

³ See *id.* at 28 (spreading plans across three event horizons: current operations, future operations, and future plans). See U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 1-42 (C1, 11 May 2015) (“The future operations cell is responsible for planning operations in the mid-range planning horizon.”).

learn from the OPT that your multi-star commander recently acquired four mobile battlefield command centers from the Defense Logistics Agency.⁴ These mobile command centers, known as “JOC-in-a-Box” or JIABs, provide a wide range of cutting edge communication features necessary for providing commanders a real-time understanding of current operations.⁵ The JIABs also have the ability to organically generate a secure wireless internet signal that connects to a set of accompanying laptops and cell phones. Most importantly, each JIAB can be stored in a space no larger than the bed of a pick-up truck and assembled in a matter of hours without any technical expertise. The OPT lead informs the group that the commander is set on displaying this new “JOC-in-a-Box” for as many partner militaries from developing countries as possible.⁶ He believes our partners will require at least a week’s worth of system familiarization in order to understand its true operational value. As a benefit to our command, demonstrating the features of the JIAB will require U.S. personnel to be familiar enough with the system to operate it in a foreign country. Familiarity in operating this new technology in an austere environment is a command priority.⁷

The OPT understands that the new Section 312 authority⁸ enables the

⁴ The Defense Logistics Agency (DLA) is a Department of Defense (DoD) combat support agency that provides the DoD with a full spectrum of logistics, acquisition and technical services. DEFENSE LOGISTICS AGENCY, <http://www.dla.mil/AtaGlance.aspx> (last visited Nov. 28, 2017). The DLA “sources and provides nearly all of the consumable items America’s military forces need to operate – from food, fuel and energy to uniforms, medical supplies and construction material.” *Id.*

⁵ The mobile battlefield command centers employ a Joint Operational Center (JOC) for the fictional “JOC-in-a-box” concept. A JOC is “an enduring functional organization, with supporting staff, designed to perform a joint function” within a joint force headquarters. JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS II-5(b)(1) (30 July 2012).

⁶ Information exchange interactions are common within the Army’s Operating Concept. U.S. DEP’T OF ARMY, PAM. 525-3-1, THE U.S. ARMY OPERATING CONCEPT para. 3-3(a) (31 Oct. 2014) (“Conventional and Special Forces contribute to a global land network of relationships resulting in early warning, indigenous solutions, and informed campaigns. Regional engagement sets favorable conditions for a commitment of forces if diplomacy and deterrence fail.”).

⁷ “The Army Service Component Commands (ASCC) exercise mission command under the authority and direction of combatant commanders to whom they are assigned and in accordance with the policies and procedures established by the SECDEF.” U.S. DEP’T OF ARMY, REG. 10-87, ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS para. 1-1(f)(2) (11 Dec. 17).

⁸ National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2943 (2016) (authorizes the payment of personnel expenses for defense personnel of foreign militaries for security cooperation under Section 312 of Chapter 16, title 10

Secretary of Defense (SECDEF) to pay for friendly foreign military personnel to travel to U.S. installations for theater security cooperation. However, the authority to fund the travel of friendly foreign military personnel is not relevant because the OPT wants to bring the JIABs directly to the foreign military partners. The OPT believes that moving the JIABs to secure locations within the area of responsibility (AOR) is a more efficient and effective way of displaying them. Coincidentally, the command operates four cooperative security locations (CSL)⁹ within the AOR that have the capacity for JIAB demonstrations. Each CSL is also located near a major metropolitan area that makes travel convenient and cost-effective for foreign militaries. Demonstrating the incredible utility of a JIAB in an austere location will benefit not only U.S. personnel, but it will also display the JIAB's ability to operate in real-world conditions where low electricity levels, inclement weather, and lack of internet communications all persist.

You learn that the Air Force component command has already approved the shipment of JIABs to the CSLs on a space-available basis.¹⁰ The OPT believes that each demonstration requires at least ten U.S. Army personnel and is best suited for groups of 20-30 foreign military officers at a time. Through the planning process, you come to realize that a JIAB demonstration will convey no training benefit to the foreign military audiences since only U.S. personnel will operate the equipment. As you scramble to jot down notes, you hear one OPT member sneer that two-star commanders can do whatever they want with Operations and Maintenance (O&M) money.¹¹ Then a second OPT member chimes in that it is all legal

United States Code). Section 312 consolidates the authorities previously provided under 10 U.S.C. §§ 1050, 1050a, 1051, and 1051a. *Id.*

⁹ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP'T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 52 (1 Aug. 2017) [hereinafter JOINT PUB. 1-02] (Defining a cooperative security location as a "facility located outside the United States and US territories with little or no permanent US presence, maintained with periodic service, contractor, or host-nation support."). Cooperative security locations provide contingency access, logistic support, and rotational use by operating forces and are a focal point for security cooperation activities." *Id.*

¹⁰ See generally ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS (2013). Each geographic combatant command within the DoD contains an Air Force service component command. *Id.*

¹¹ The DoD normally finances expenses with Operations and Maintenance (O&M) money. See U.S. DEP'T OF DEF. 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 01, para. 010201 (Oct. 2008).

as long as it is not “Big T”¹² stuff. The OPT lead—a seasoned security cooperation planner—poses a pointed question to you: Do our military-to-military contact authorities allow the command to provide week-long JIAB demonstrations to a series of foreign military partners?

Analyzing military-to-military contacts is a difficult task for judge advocates and lawyers across the Department of Defense (DoD).¹³ In general, military-to-military contacts are interactions with foreign militaries that promote national security goals and strengthen relationships with foreign partners.¹⁴ The DoD’s geographic combatant commands (COCOMs)¹⁵ use military-to-military contacts in pursuit of their theater campaign plans.¹⁶ Despite the COCOMs’ widespread use of military-to-military contacts, understanding what actually constitutes one of these

¹² The Army colloquially refers to training foreign security forces as “Big T” training. CONTRACT & FISCAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK 10-7 (2016) [hereinafter FISCAL LAW DESKBOOK].

¹³ DEF. INST. OF SEC. COOPERATION STUD., THE MANAGEMENT OF SECURITY COOPERATION GREENBOOK 1-25 (37.0 ed. 2017) [hereinafter GREENBOOK] (“There can be some confusion about the definition of military-to-military contacts programs because there is no single doctrinal definition . . . it is not a clearly defined program.”).

¹⁴ *Id.* at 1-25 (Military-to-military contacts are “designed to encourage a democratic orientation of defense establishments and military forces of other countries.”); *see also* U.S. DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW 16 (2014) (“The U.S. military forward and rotationally deploys forces – which . . . conduct training, exercises, and other forms of military-to-military [contacts] – to build security globally in support of our national security interests.”). *Cf.* U.S. DEP’T. OF DEF., Implementation of Section 8057, DoD Appropriations Act of 2014 at Tab A (14 Aug. 2014) [hereinafter DOD LEAHY LAW] (defining military-to-military contacts as an individual and collective interface activity where the primary focus is not training foreign security forces).

¹⁵ For the purposes of this paper, the author uses the terms geographic combatant command (COCOM) and combatant commanders interchangeably. Though these terms are not synonymous, they are relatively indistinct when discussing mission intent and authority. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-0, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (25 Mar. 2013) (“[combatant command] provides full authority for a [combatant commander] to perform those functions of command over assigned forces . . .”).

¹⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-22, ARMY SUPPORT TO SECURITY COOPERATION para. 1-21 (22 Jan. 2013) [hereinafter FM 3-22] (“The Army . . . conduct[s] military engagements with partners, fostering mutual understanding through military-to-military contacts, and helping partners build the capacity to defend themselves.”). Each geographic COCOM publishes a theater campaign plan specific to its area of responsibility. JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING II-5(d)(1) (11 Aug. 2011) [hereinafter JOINT PUB. 5-0] (stating theater campaign plans are a COCOM’s centerpiece for its planning construct and functional strategies).

activities can be vexing.¹⁷

A number of issues hinder a judge advocate's ability to conceptualize and analyze the proper legal bounds of military-to-military contacts. At the outset, the authority for COCOMs to conduct military-to-military contacts is not readily apparent. Created in 1986,¹⁸ the COCOMs' powers and duties are set forth in 10 U.S.C. §164.¹⁹ These authorities include command and control of all U.S. missions and forces within the respective AOR.²⁰ But a specific authority for COCOMs to employ forces to interact with foreign militaries is not found in this statute.²¹ So in 1994, Congress passed 10 U.S.C. §168 with the intent of authorizing military-to-military contacts. However, this statute went unfunded²² and still did not provide the COCOMs with specific authorities.²³ This led the Joint Staff to issue specific mission authority to the COCOMs for military-to-military contacts.²⁴

¹⁷ See generally 10 U.S.C. § 168, *repealed* by National Defense Authorization Act of 2017 § 1253, S. 2943 (2016). Section 168 defined military-to-military contacts as “contacts between members of the armed forces and members of foreign armed forces through [traveling contact teams, military liaison teams, exchanges of civilian or military personnel, seminars and conferences]” and other similar activities. *Id.* However, this statute did not provide any details beyond listing examples of military-to-military contacts. *Id.*

¹⁸ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992, 1012 (1986).

¹⁹ The authority of combatant commanders includes six command functions, including “organizing commands and forces, and employing forces . . . to carry out missions *assigned* to the command.” 10 U.S.C. § 164(c)(1)(C)-(D) (2017) (emphasis added).

²⁰ *Id.*

²¹ *Id.* The authority to employ forces to interact with foreign militaries is not an inherent authority for combatant commanders. *Id.* Instead, combatant commanders require an assigned mission to employ and organize forces against. *Id.*

²² Congress never appropriated funds for 10 U.S.C. § 168. DoD Appropriations Act of 1995, Pub. L. No. 103-355, 108 Stat. 2599 (1994). Without a specific appropriation, no activities under 10 U.S.C. § 168 could be funded due to its limiting clause. 10 U.S.C. § 168(e)(B) (1994). The House conference report accompanying the Appropriations Act of 1995 directed a reduction of \$46,300,000 in the Military-to-Military Contact Program. H. R. REP. No. 103-747, at 63 (1994). See also Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV., 11 n.52 (1998).

²³ See 10 U.S.C. § 168(a) (2016) (providing program authority for Section 168 to the Secretary of Defense (SECDEF), not the combatant commanders).

²⁴ E-mail from William Moxley (Deputy General Counsel, DoD) to Timothy Pendolino (19 July 2012, 03:33:00 EST) [hereinafter Moxley E-mail] (on file with author) (“Thereafter, the Department decided to no longer request funds for [S]ection 168. Instead, the decision was made to fund what is now known as [traditional combatant commander activities][.]”).

Published in 1995, the Joint Staff established Traditional Combatant Commander Activities (TCA) to empower COCOMs to execute military-to-military contacts within their respective AOR.²⁵ Through a series of three Joint Staff orders, TCA permits COCOMs to interact with foreign militaries and to promote regional and national security goals.²⁶ These orders establish foreign military interactions as a COCOM responsibility²⁷ and provide a funding mechanism²⁸ for military-to-military contacts across the DoD. Despite a recent overhaul to security cooperation authorities,²⁹ TCA is still the primary and exclusive means for a number of military-to-military contact events³⁰—namely, traveling contact teams,³¹ information exchanges,³² and familiarization visits.³³

²⁵ VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (2 May 1995) [hereinafter TCA ORDER 1] (stating that Traditional Combatant Commander Activities (TCA) funding fulfills a COCOM's long-standing requirement to interact with foreign militaries).

²⁶ *See id.* *See also* VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (18 Oct. 1996) [hereinafter TCA ORDER 2]; *see also* VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (19 Aug. 1996) [hereinafter TCA ORDER 3].

²⁷ TCA ORDER 1, *supra* note 25, para. 2 (“The [COCOMs] will be responsible for direct oversight and execution of [TCA] within established policy and legal guidelines.”). A combatant commander’s mission authority stems from appropriate orders and other directives. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS xii (11 Aug. 2011) [hereinafter JOINT PUB. 3-0].

²⁸ *See, e.g.*, HEADQUARTERS, U.S. EUROPEAN COMMAND OFFICE OF STRATEGY IMPLEMENTATION, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 106 (21 Oct. 2016) [hereinafter EUCOM TSC HANDBOOK] (showing an average of five million dollars in TCA funds have been allocated to the U.S. European Command for TCA on an annual basis since 2010).

²⁹ U.S. DEP’T OF DEF., OFFICE OF THE UNDER SEC. OF DEF., EXECUTION OF FISCAL YEAR 2017 SECURITY COOPERATION ACTIVITIES 1 (3 Feb. 2016) [hereinafter FY17 INTERIM IMPLEMENTATION FOR SC ACTIVITIES] (“The [2017 NDAA] includes a number of changes to existing security cooperation authorities, mandates changes to the oversight and management of security cooperation, and directs improvements to the [DoD] workforce.”).

³⁰ With the repeal of 10 U.S.C. §168, express authority for traveling contact teams, information exchanges, and familiarization visits exists only within TCA. *Cf.* GREENBOOK, *supra* note 13, at 1-25 (equating 10 U.S.C. §168 as TCA).

³¹ A traveling contact team is listed as a military-to-military contact activity within both 10 U.S.C. §168 and TCA. *See* 10 U.S.C. § 168 (2016); *see also* TCA ORDER 2, *supra* note 26.

³² An information exchange is listed as a military-to-military contact activity only within TCA. *See* TCA ORDER 2, *supra* note 26. Implicitly, an information exchange event occurs in a host nation as TCA authorizes COCOMs to interact with foreign militaries in their respective area of responsibility. *See* TCA Order 1, *supra* note 25, para. 5.

³³ JOINT STAFF MESSAGE, HUMAN RIGHTS VERIFICATION FOR DoD-FUNDED TRAINING WITH FOREIGN PERSONNEL para. 3(c) (21 Dec. 1998); *see also* TCA ORDER 2, *supra* note 26.

Recently, Congress reformed security cooperation authorities in the 2017 National Defense Authorization Act (NDAA).³⁴ The reforms consolidated a number of authorities and repealed others, including 10 U.S.C §168.³⁵ As a part of the new reforms, the 2017 NDAA provides new sections specific to funding events listed within TCA such as conferences, personnel exchanges, and the travel of foreign defense personnel.³⁶ But these reforms did not address all the military-to-military contact activities organic to TCA.³⁷ As such, the military-to-military contacts that are organic to TCA are unchanged by the 2017 NDAA's reforms.³⁸ By excluding these events from the new provisions created in the 2017 NDAA, Congress indirectly created a subset of military-to-military contacts that are now "TCA-exclusive."³⁹

Congress's decision not to include what are now TCA-exclusive activities within the new reforms is significant because these TCA-exclusive activities are commonly used by COCOMs to interact with foreign forces.⁴⁰ In 2015 alone, U.S. Africa Command directed its components to execute over 500 traveling contact team missions and over 100 familiarization visits.⁴¹ By not including these TCA-exclusive activities in the recent security cooperation reforms, Congress essentially magnified TCA's importance to the COCOMs.

Yet, TCA is peculiarly absent from most DoD or service doctrine.⁴²

26. Familiarization visits are activities similar to the individual and collective interface activities contemplated under TCA. *See id.* They are distinct from familiarization *training* events because familiarization visits do not increase the capabilities of a foreign force. *See infra* note 187 (emphasis added) (for a discussion of the origin of familiarization training).

³⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 1253, 130 Stat. 2943 (2016).

³⁵ *Id.* § 1253.

³⁶ *Id.*

³⁷ *See id.* §§ 311-12 (addressing only the payment of personnel exchanges and the payment of foreign defense personnel expenses for travel related to security cooperation). These sections do not address TCA events such as traveling contact teams, information exchanges, or familiarization visits. *Id.*

³⁸ *Id.*

³⁹ This paper introduces the term "TCA-exclusive."

⁴⁰ *See, e.g.,* HEADQUARTERS, U.S. AFRICA COMMAND, FY-15 MILITARY TO MILITARY TASKING ORDER, Annex A (28 Aug. 2014).

⁴¹ *Id.*

⁴² Doctrine does not provide any definitions for military-to-military contacts and doctrine generally does not discuss TCA. *See generally* JOINT PUB. 1-02, *supra* note 9 (providing no definition for TCA); *see generally* U.S. DEP'T OF ARMY, REG. 11-31, ARMY SECURITY COOPERATION POLICY (21 Mar. 13) [hereinafter ARMY REG. 11-31] (providing no references to TCA); *see* U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 4950.4B, JOINT

Moreover, DoD doctrine does not define the events that constitute military-to-military contacts.⁴³ Even the TCA Orders do not provide definitions; the orders merely provide a non-exhaustive list of authorized activities.⁴⁴ With this, a number of misconceptions related to military-to-military contacts persist, ranging from mistaking 10 U.S.C. §168 as a valid authority⁴⁵ to associating military-to-military contact events with training foreign forces.⁴⁶

The lack of definitions and common doctrine for TCA-exclusive military-to-military contacts is counter-productive to efficient and effective theater security cooperation. The theater decision makers—combatant commanders—demand clear guidance and counsel in executing their theater campaign plans. Without a true understanding of these TCA-exclusive activities, planning staffs cannot fully appreciate the limits of COCOM authority. Meanwhile, funding interactions with foreign militaries are ripe for Congressional scrutiny.⁴⁷ At a time when each dollar spent overseas can wind up under a magnifying glass, the DoD is still struggling to understand its military-to-military contact

SECURITY COOPERATION EDUCATION AND TRAINING para. 4-46 (3 Jan. 2011) [hereinafter NAVY INSTR. 4950.4B] (mentioning TCA briefly and only with regard to Marine Corps teams). However, a meager discussion of TCA can be found buried in an Army field manual for security cooperation. See FM 3-22, *supra* note 16, at 2-28 (reiterating text found in the TCA Orders and limiting—without explanation—the list of activities that may be funded with TCA to only military liaison teams, exchanges of military and civilian personnel, seminars, and conferences). Other DoD publications may mention TCA but without referencing the orders or providing any context. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-06, FINANCIAL MANAGEMENT SUPPORT TO JOINT OPERATIONS at E-2 (11 January 2016) (parroting back the text of the TCA Orders without any commentary or practical guidance).

⁴³ See, e.g., FM 3-22, *supra* note 16, at 2-18.

⁴⁴ See TCA ORDER 1, *supra* note 25; see TCA ORDER 2, *supra* note 26, see TCA ORDER 3, *supra* note 26.

⁴⁵ Often, 10 U.S.C. §168 was mistakenly cited as a valid authority. See BOLKO J. SKORUPSKI AND NINA M. SERAFINO, CONG. RESEARCH SERV., R44602, DO D SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES *passim* (2016) [hereinafter CRS-R44602]; see CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, THE OPERATIONAL LAW QUARTERLY at 12 (25 Feb. 2016) (“The authority to conduct a [subject matter expert exchange] is derived from 10 U.S.C. §168, military-to-military contacts and comparable activities.”).

⁴⁶ U.S. ARMY COMBINED ARMS CTR, CTR FOR ARMY LESSONS LEARNED BULLETIN at 14 (Mar. 2016) (“Military-to-[m]ilitary funds . . . allow the [ASCC] to send small teams for familiarization training with partner nation armies.”).

⁴⁷ See CRS-R44602, *supra* note 45, at 17.

authorities.⁴⁸

The sparse guidance underlying military-to-military contacts does not match their strategic importance. To this end, this paper will argue that the DoD's ability to conduct TCA-exclusive military-to-military contacts still rests in TCA and that commanders charged with planning and executing these events possess the requisite authority to decide their associated limitations. It is the obligation of the actors within the planning process to fully grasp the content and objectives of a military-to-military contact event and, with the help of judge advocates, apply the proper corresponding legal principles.

Part I of this paper will provide a brief overview of security cooperation and then highlight the strategic objectives of post-Cold War military-to-military contacts in an evolving security landscape. Part II of this paper will flesh out the authority to conduct military-to-military contacts and delve into the distinct legal differences between a training event (such as those discussed by the Government Accountability Office (GAO) in the Honorable Bill Alexander Opinion) and a mere interaction with a foreign force. This section will explore the use of O&M money for TCA and shed light on the fact that TCA-exclusive events are within the discretion of the COCOM. Returning to the hypothetical question raised in the introduction, Part III will apply TCA to the series of proposed military-to-military contacts. This paper will conclude by arguing that combatant commanders and their planning staffs hold the requisite authority and are best situated to determine the scope of a military-to-military contact. Further, the DoD should clearly articulate COCOM authority to conduct TCA-exclusive events by updating its guidance for this vital area of security cooperation.

II. Background

Over the past decade, Congress has increased the DoD's role in

⁴⁸ See DAVID E. THALER ET AL., RAND NAT'L DEF. RESEARCH INST., FROM PATCHWORK TO FRAMEWORK: A REVIEW OF TITLE 10 AUTHORITIES FOR SECURITY COOPERATION 17-18 (2016) [hereinafter PATCHWORK] ("Prior to 2012, SC personnel in the [COCOMs] had used [10 U.S.C. §168] to apply TCA O&M funds to mil-mil events In mid-2012[] . . . the Office of the General Counsel interpreted the statute as requiring a yearly appropriation that is not delegated to the [COCOMs], but to the SECDEF. The U.S. European Command (EUCOM) and other [COCOMs] stopped using the authority and had to cancel events or quickly revise mil-mil event funding plans in mid-stream. This has led some to ask, 'Is 168 a valid authority?'").

engaging with foreign forces through security cooperation.⁴⁹ Today, the DoD conducts security cooperation events in more than 130 countries each year, totaling between 3000 and 4000 events.⁵⁰ The aims of security cooperation are vast, from building defense relationships with allies to promoting specific U.S. security interests.⁵¹ Some of the methods used for security cooperation include various types of training, exercises, and military-to-military contacts that are executed in accordance with each combatant command's theater campaign plan.⁵² The military-to-military contacts help create international partnerships by fostering mutual understanding and building positive relations toward security.⁵³

The COCOMs tailor military-to-military contacts to their respective theater campaign plans.⁵⁴ The U.S. Africa Command uses military-to-

⁴⁹ NINA M. SERAFINO, CONG. RESEARCH SERV., R44444, SECURITY ASSISTANCE AND COOPERATION: SHARED RESPONSIBILITY OF THE DEPARTMENTS OF STATE AND DEFENSE 1 (2016) [hereinafter CRS-R44444]. See generally U.S. DEP'T OF ARMY, PAM. 11-31, ARMY SECURITY COOPERATION HANDBOOK para. 2-3 (6 Feb. 2015) [hereinafter DA PAM. 11-31] (“[security cooperation] activities conducted across all phases of military operations . . . promote overall U.S. security interests . . .”); Captain Robert J. Kasper, Jr., *Direct Training and Military-to-Military Contact Programs: The CINC's Peacetime Enablers*, 42 Naval L. Rev. 189, 192 (1995).

⁵⁰ *Dep't of Def. and Security Cooperation: Improving Prioritization, Authorities, and Evaluations: Hearing Before the Subcomm. on Emerging Threats of the S. Comm. on Armed Services*, 114th Cong. 1 (2016) (statement of Michael J. McNerney).

⁵¹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-20, SECURITY COOPERATION at I-1 (23 May 2017) (“[Security Cooperation] strengthens and expands the existing network of US allies and partners, which improves the overall warfighting effectiveness of the joint force and enables more effective multinational operations.”). See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE (12 July 2010) [hereinafter JOINT PUB. 3-22]. Security cooperation also includes “develop[ing] allied and friendly military capabilities for self-defense and multinational operations, and provid[ing] U.S. forces with peacetime and contingency access to a host nation.” *Id.*

⁵² U.S. DEP'T OF DEF., DIR. 5132.03, DoD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION 3 (29 Dec. 2016) [hereinafter DODD 5132.03] (“Geographic combatant command theater campaign plans . . . serve as the primary vehicle for the development and articulation of integrated DoD security cooperation plans.”). See also DEFENSE SECURITY COOPERATION AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL para. C1.3.2.13. (30 Apr. 2012) [hereinafter SAMM] (“The combatant commanders develop campaign plans to conduct [security cooperation] programs and activities[.]”).

⁵³ General Raymond T. Odierno, CSA Editorial: Prevent, Shape, Win, U.S. Army (Oct. 16, 2011), https://www.army.mil/article/71030/CSA_Editorial_Prevent_shape_win [hereinafter GEN Odierno Speech] (“We do that by engaging with our partners, fostering mutual understanding through military-to-military contacts, and helping partners build the capacity to defend themselves. This is an investment in the future, and an investment we cannot afford to forego.”).

⁵⁴ DODD 5132.03, *supra* note 52; see SAMM, *supra* note 52, at C11.8.6.

military contacts mostly in the form of traveling contact teams of one to two U.S. personnel.⁵⁵ The U.S. European Command uses military-to-military contacts to promote interoperability between North Atlantic Treaty Organization allies.⁵⁶ The U.S. Pacific Command refers to its military-to-military contacts as subject matter expert exchanges⁵⁷ for its Asia Pacific Regional Initiative.⁵⁸ The use of military-to-military contacts within security cooperation is not a new concept.⁵⁹ Military-to-military contacts have consistently been a part of national security strategies since the end of the Cold War.⁶⁰

A. The Strategic Importance of Military-to-Military Contacts

The years following the collapse of the Soviet Union began a momentous transition for the United States and the DoD. On the one hand, old adversaries dissolved away, bringing hope for new relationships and

⁵⁵ HEADQUARTERS, U.S. AFRICA COMMAND, FY-16 MILITARY TO MILITARY TASKING ORDER (29 Sept. 2015); HEADQUARTERS, U.S. AFRICA COMMAND, COMMAND INSTRUCTION 3900.12, MILITARY TO MILITARY CONTACT PROGRAM (1 Aug. 2016) [hereinafter ACI 3900.12].

⁵⁶ See SAMM, *supra* note 52, at C11.10.

⁵⁷ U.S. DEP'T OF ARMY, REG. app. B-7(d) 34-1, MULTINATIONAL FORCE INTEROPERABILITY (10 Jul. 15) (stating that subject matter expert exchanges (SMEEs) enhance Army-to-Army contacts and mutual understanding with partner militaries). This regulation, does not define military-to-military contacts nor discuss TCA. *Id.* Moreover, its description of SMEEs limits the duration of such an interaction to a single day. *Id.* The regulation does not reconcile the difficulty in building relationships and fostering mutual understanding in only one meeting and infers that multi-day SMEEs evolve into impermissible training events. *See id.*

⁵⁸ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 8082, 129 Stat. 2242 (2015). See E-mail from Pamela Harms (Attorney Advisor, U.S. Army Pacific) to Anthony Lenze (13 December 2017, 19:45:00 EST) (on file with author) (stating U.S. Army Pacific's SMEEs for the Asia Pacific Regional Initiative are funded through the Department of the Army, not the COCOM). Ms. Harms' e-mail highlights that not all military-to-military contacts are funded through TCA. Due to the lack of DoD guidance, a service-funded military-to-military contact event is just as troublesome to define as a TCA funded event.

⁵⁹ Carol Atkinson, *Constructivist Implications of Material Power: Military Engagement and the Socialization of States, 1972-2000*, 50 *International Studies Quarterly* 509, 509-510 (2006) [hereinafter Atkinson] (discussing the United States' consistent practice of using military-to-military contacts as a national strategy).

⁶⁰ *Id.* See generally ROBERT T. COSSABOOM, *THE JOINT CONTACT TEAM PROGRAM, CONTACTS WITH FORMER SOVIET REPUBLICS AND WARSAW PACT NATIONS 1992-1994* (1997) (providing a detailed account of military-to-military contacts early in their development).

free markets.⁶¹ However, new foes emerged around the same time to agitate U.S. national security interests in the Middle East.⁶² In response, U.S. military leaders poised themselves for a new approach to the nation's defense strategy.

Starting in 1990, the DoD began regular use of military-to-military contacts as peacetime engagements.⁶³ Through a series of military-to-military contacts, the DoD engaged the Soviets and Chinese at the defense minister levels.⁶⁴ The contacts with the Soviets opened a dialogue to promote understanding between the two nations; with the Chinese, the contacts balanced a series of diplomatic and political ups and downs.⁶⁵

The United States employed the use of military-to-military contacts with other nations too. In its annual report to Congress, the SECDEF noted the strategic importance of the U.S. military-to-military relations in Latin and South America as well as in the Middle East.⁶⁶ These contacts and the development of military relationships marked a new method to deter threats and promote regional peace and security. This approach was particularly successful in building relationships that encouraged the

⁶¹ President George H.W. Bush, Televised Address (Dec. 25, 1991) *in* N.Y. TIMES, Dec. 26, 1991 ("We stand tonight before a new world of hope and possibilities . . . based on commitments and assurances given to us by some of these states, concerning nuclear safety, democracy, and free markets, I am announcing some important steps designed to begin this process.").

⁶² *National Security Directive 54*, THE WHITE HOUSE, Responding to Iraqi Aggression in the Gulf (Jan. 15, 1991), <https://nsarchive.gwu.edu/NSAEBB/NSAEBB39/document4.pdf>.

⁶³ U.S. DEP'T OF DEF., ANNUAL REPORT TO THE CONGRESS 45-46 (1990), http://history.defense.gov/Portals/70/Documents/annual_reports/1990b_DoD_AR.pdf?ver=2014-06-24-151718-437. For example, there were three meetings between the United States and Soviet Union at the defense minister level. Additionally, the Secretary of the Air Force visited the Soviet Union and the Chief of the Soviet General Staff visited the United States. *Id.* The report does not explain how the contacts were funded. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW sec. III (1997) <http://www.dod.gov/pubs/qdr/>.

[T]he [DoD] has an essential role to play in shaping the international security environment in ways that promote and protect U.S. national interests . . . the [DoD] employs a wide variety of means including: forces permanently, stationed abroad; . . . combined training, or military-to-military interactions; and programs such as defense cooperation, security assistance cooperation.

Id.

development of democratic institutions and deterrence of nuclear threats.⁶⁷

B. Post-Cold War Opportunities for Military-to-Military Contacts

As sovereign countries materialized from what was once the former Soviet Union, Congress found new opportunities to promote regional and national security. One such program was the Cooperative Threat Reduction (CTR) program.⁶⁸ Senators Samuel Nunn and Richard Lugar proposed the CTR program to aid former Soviet Union states with dismantling weapons of mass destruction and their associated infrastructure.⁶⁹ Paired with a non-proliferation agenda, Congress set aside 15 million dollars for military-to-military contacts with the newly formed nations previously under the control of the Soviet Union.⁷⁰ By 1995, the United States was engaging with Russian and other former Soviet-states in over 100 military-to-military contacts.⁷¹ Increasing in number over time, the contacts helped integrate the Ukraine into western security structures.⁷² In 1999, Vice President Gore praised the program as the best example of the Clinton administration's military strategy of "Shape, Prepare, and Respond."⁷³

Along these same lines, President Clinton also engaged with China to promote greater military-to-military contacts between the two countries.⁷⁴ U.S. military attachés posted to China found that the military-to-military

⁶⁷ Atkinson, *supra* note 59, at 515-16 (discussing the positive effect of military-to-military contacts on Soviet and former Soviets states).

⁶⁸ Soviet Nuclear Threat Reduction Act of 1991, Pub. L. No. 102-228, 105 Stat. 1693 (1991). Congress renamed this act in 1993 when it established the Cooperative Threat Reduction Program. Cooperative Threat Reduction Act of 1993, Pub. L. No. 103-160, 107 Stat. 1777 (1993).

⁶⁹ AMERICAN SECURITY PROJECT, FACT SHEET: THE NUNN-LUGAR COOPERATIVE THREAT REDUCTION PROGRAM (undated) <https://americansecurityproject.org/ASP%20Reports/Ref%200068%20-%20The%20Nunn-ugar%20Cooperative%20Threat%20Reduction%20Program.pdf>.

⁷⁰ DoD Appropriations Act of 1993, Pub. L. No. 102-396 § 9110(b)(5), 106 Stat. 1876 (1992).

⁷¹ BELFER CENTER STUDIES IN INTERNATIONAL SECURITY, DISMANTLING THE COLD WAR 26-27 (John M. Shields & William C. Potter eds., 1997).

⁷² Lieutenant Colonel Frank Morgese, U.S.-Ukraine Security Cooperation 1993-2001 A Case Study 6 (2002) (unpublished, U.S. Army War College) (on file with author). The U.S. European Command executed over 300 military-to-military contacts with Ukraine between 1997-2001. *Id.* at 2.

⁷³ *Id.*

⁷⁴ SHIRLEY KAN, CONG. RESEARCH SERV., RL32496, US-CHINA MILITARY CONTACTS: ISSUES FOR CONGRESS 13 (2005).

contacts promoted mutual trust and friendship between the two countries.⁷⁵ Chinese showcase units conducted demonstrations for the attachés to display developments in China's military and defense policies.⁷⁶ While the U.S.-Chinese relations were mixed throughout the end of the 1990s and early 2000s,⁷⁷ the military-to-military relations between the two countries communicated a willingness toward transparency and a greater understanding of each other's nation.⁷⁸

The origins of peacetime engagements show that DoD strategists of the 1990s began to realize the ever-evolving potential in utilizing tailorable, focused military-to-military contacts. Indeed, including these contacts in the DoD's peacetime engagements strategy was vital to strengthening regional security and promoting defense diplomacy. Through the post-Cold War activities of the 1990s, it became clear that the U.S. Army would be the lead executive agency in international activities for the DoD.⁷⁹ And in 2001, the DoD scrapped its doctrinal phrase "peacetime engagements" in favor of "security cooperation."⁸⁰ But bringing the Army to the forefront of security cooperation was not the only change to U.S. defense strategy. The years following the Cold-War brought a sprawling web of authorities in furtherance of security cooperation, ever increasing the confusion for planning staffs and commands across the DoD.⁸¹

C. Evolving Terminology for Peacetime Engagements

Military operations of any scale require precise language to communicate information efficiently.⁸² Common sense dictates that terms

⁷⁵ *Id.*

⁷⁶ *Id.* "Improvements and deteriorations in overall bilateral relations have affected military contacts, which were close in 1997-1998 and 2000, but marred by the 1995-1996 Taiwan Strait crisis, mistaken North Atlantic Treaty Organization (NATO) bombing of the People's Republic of China Embassy in 1999, and the EP-3 aircraft collision incident in 2001." *Id.* at 2.

⁷⁷ *Id.*

⁷⁸ *Id.* at 11.

⁷⁹ THOMAS S. SZAYNA ET. AL., RAND NAT'L DEF. RESEARCH INST., US ARMY SECURITY COOPERATION: TOWARD IMPROVED PLANNING AND MANAGEMENT 20 (2004) [hereinafter RAND SC].

⁸⁰ See U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW 11 (2001).

⁸¹ PATCHWORK, *supra* note 48, at 7-18.

⁸² U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS para. 2-73 (26 Mar. 2010) [hereinafter FM 5-0] ("Staffs prepare clear, concise orders to ensure thorough

and concepts applicable to a joint environment are standard and well-known between the services in order to foster efficient communication. Confusion and general misunderstandings result when military terms are used improperly or when their evolving definitions outpace doctrine. The DoD recognizes the importance of standardizing its terminology by instructing the military departments to identify, delete, modify, and incorporate standard definitions.⁸³ Nonetheless, the misuse and misunderstanding of key terms within security cooperation is pervasive.⁸⁴

Security cooperation is now a term that encompasses “any program, activity (including an exercise), or interaction of the [DoD] with the security establishment of a foreign country to achieve a [strategic] purpose . . . [.]”⁸⁵ The DoD assigns such strategic importance to security cooperation that, with the help of Congress, it created the Defense Security Cooperation Agency (DSCA) to direct and guide the execution of all DoD security cooperation programs.⁸⁶ The DSCA helps administer security cooperation, now a multi-billion dollar industry within the annual Defense appropriation.⁸⁷ With all the money and strategic brainpower pouring into security cooperation, newcomers to the field may presume fully-vetted, standardized terms and definitions. However, this could not be further

understanding. They use doctrinally correct operational terms . . . [d]oing this minimizes chances of misunderstanding.”).

⁸³ U.S. DEP’T OF DEF., INSTR. 5025.12, STANDARDIZATION OF MILITARY AND ASSOCIATED TERMINOLOGY (12 Aug. 2009).

⁸⁴ See CRS-R44444, *supra* note 49, at 4 (“The discussion of U.S. assistance to foreign military and other security forces is complicated by the lack of a standard and adequate terminology.”).

⁸⁵ 10 U.S.C. § 301(7) (2017). Congress articulates three purposes for security cooperation: “to build and develop allied and friendly security capabilities for self-defense and multinational operations; to provide the armed forces with access to the foreign country during peacetime or a contingency operation; to build relationships that promote specific United States security interests. *Id.*”

⁸⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-84, SECURITY ASSISTANCE: DoD’S ONGOING REFORMS ADDRESS SOME CHALLENGES, BUT ADDITIONAL INFORMATION IS NEEDED TO FURTHER ENHANCE PROGRAM MANAGEMENT 4 (2012) (The “[Defense Security Cooperation Agency (DSCA)] oversees program administration for both traditional programs and newer [building partner capacity] programs. [The] DSCA establishes security assistance procedures and systems, provides training, and guides the activities of implementing agencies.”).

⁸⁷ See 2016 Appropriations Act §§ 2385-86. The Iraqi Train and Equip Fund, the Counterterrorism Partnership Fund, and the European Reassurance Initiative total over two billion dollars of defense spending. *Id.* Some estimate the DoD has spent an average of \$15 billion annually since 9/11. Joe Gould, *US Security Cooperation Knotted in Bureaucracy*, DEFENSENEWS (Jan. 5, 2016), <http://www.defensenews.com/articles/report-us-security-cooperation-knotted-in-bureaucracy>.

from reality.

Members of the DoD frequently mischaracterize security cooperation or outright disagree with respect to its doctrinal definition.⁸⁸ For example, the 2010 National Security Strategy (NSS) used the term security cooperation to include rebuilding damaged infrastructure and establishing conditions necessary to end military operations in Afghanistan.⁸⁹ With the exception of combat operations, it would seem that almost any military action could fit under the 2010 NSS's version of security cooperation.⁹⁰ Nevertheless, if security cooperation is in fact an evolving term in the DoD, making sense of the authorities under which the military executes security cooperation events is even more troublesome.⁹¹ This is especially true when authorities are based upon a set of specific terms. Hence, with doctrine lagging behind and accompanied by undefined terminology, no authority in the realm of security cooperation is more ambiguous than the authority for military-to-military contacts.⁹² With ambiguity surrounding military-to-military contacts, planners and lawyers should defer to commanders to decide the best way to employ these strategic interaction events. The fate of 10 U.S.C. §168 and its ultimate repeal is illustrative of this point.

⁸⁸ Nathan L. Fenell, *Security Cooperation Poorly Defined* (Dec. 12, 2011) (unpublished Master's thesis, University of San Francisco) (on file with author).

⁸⁹ *Id.*

⁹⁰ *Contra* JOINT PUB. 3-0, *supra* note 27, at V-4(c).

Security cooperation involves all DOD interactions with foreign defense and security establishments to build defense relationships that promote specific US security interests, develop allied and friendly military and security capabilities for internal and external defense for and multinational operations Ideally, security cooperation activities lessen the causes of a potential crisis *before* a situation deteriorates and requires coercive US military intervention.

Id. (emphasis added).

⁹¹ See CRS-R44602, *supra* note 45, at 3 (citing the 2010 Quadrennial Defense Review, "security cooperation efforts, however, remained 'constrained by a complex patchwork of authorities, persistent shortfalls in resources, unwieldy process, and a limited ability to sustain such undertakings beyond a short period.'"); see also *id.* at 4 ("[G]eneral agreement has emerged that the statutory framework has evolved into a cumbersome system.").

⁹² PATCHWORK, *supra* note 48, at 18 ("The lack of clarity in congressional intent in authority language has created uncertainty as to how [military-to-military contact] authorities can be legally used."); see also GREENBOOK, *supra* note 13, at 1-25.

D. The Ill-Fated 10 U.S.C §168

In the early 1990s, the days when peacetime engagements with Russia, the former Soviet States, and China were commonplace, military-to-military contacts comprised a broad range of activities.⁹³ To some, the term military-to-military contacts meant anything from senior level talks to bilateral joint training.⁹⁴ However, in 1994, Congress changed this expansive view of military-to-military contacts by codifying an authority to execute military-to-military contacts.⁹⁵

Building on the momentum gained through the post-Cold War military-to-military contacts, Congress enacted Section 1316 of Pub. L. 103-337 section 168 into law.⁹⁶ This statute provided authority for the SECDEF to carry out military-to-military contacts and “comparable activities that are designed to encourage a democratic orientation of defense establishments and military forces of other countries.”⁹⁷ Without describing the interactions, it defined military-to-military contacts using key terms such as traveling contact teams, military liaison teams, exchanges of personnel, and other similar activities.⁹⁸

⁹³ See CARL H. GROTH & DIANE T., LOGISTICS MGMT INST., LMI-IR317RI, PEACETIME MILITARY ENGAGEMENT: A FRAMEWORK FOR POLICY CRITERIA 3-14 (1993).

⁹⁴ *Id.*

⁹⁵ 10 U.S.C. § 168 (2016).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

10 U.S.C. §168 defines military-to-military contacts as “contacts between members of the armed forces and members of foreign armed forces” through the following activities: (1) traveling contact teams, including any transportation expense, translation services expense, or administrative expense that is related to such activities; (2) The activities of military liaison teams; (3) Exchanges of civilian or military personnel between the Department of Defense and defense ministries of foreign governments; (4) Exchanges of military personnel between units of the armed forces and units of foreign armed forces; (5) Seminars and conferences held primarily in a theater of operations; (6) Distribution of publications primarily in a theater of operations; (7) Personnel expenses for Department of Defense civilian and military personnel to the extent that those expenses relate to participation in an activity described in paragraph (3), (4), (5), or (6); (8) Reimbursement of military personnel appropriations accounts for the pay and allowances paid to

Since 1995, 10 U.S.C. §168 has been the oft-cited legal authority for military-to-military contacts.⁹⁹ The problem, however, is that Congress withdrew its financial pledge for military contacts and Section 168 in the 1995 DoD Appropriations Act.¹⁰⁰ Essentially, what the authorizers gave to the military-to-military contacts program in 10 U.S.C. §168 was denied by the appropriators.¹⁰¹ But because Section 168 remained on the books as statutory authority,¹⁰² it was assumed to represent the legal authority for conducting military-to-military contacts.¹⁰³ Effectively, from 1995-2016, Section 168 was dead letter. The security cooperation reforms of 2017 finally repealed Section 168 and took it off the books.¹⁰⁴

However, Section 168 is no relic of small import. It represents Congress's attempt to authorize a wide swath of interactions with foreign militaries.¹⁰⁵ Although Section 168 essentially contains a list of undefined terms (e.g., traveling contact team), its codification did acknowledge the importance of military-to-military contacts within the security cooperation enterprise. Had Congress funded Section 168, it is reasonable to assume commanders would have been able to properly employ its authority—chock full of undefined terms—within their respective theater campaign plans.¹⁰⁶ This assumption is reasonable as the Joint Staff's substitute for Section 168 provided similar means to these commanders, which they continue to utilize today.

III. Traditional Combatant Commander Activities

Responding to the lack of funding appropriated against 10 U.S.C.

reserve component personnel for service while engaged in any activity referred to in another paragraph of this subsection.”

Id.

⁹⁹ DA PAM. 11-31, *supra* note 49, at table 6-18; GREENBOOK, *supra* note 13, at 41.

¹⁰⁰ See H. R. REP. NO. 103-747, at 63 (1994) (Conf. Rep.) (directing a reduction of \$46,300,000 in the Military-to-Military Contact Program).

¹⁰¹ *Id.*; see also Moxley E-mail, *supra* note 24.

¹⁰² 10 U.S.C. § 168 (2016). Section 168 was codified in U.S. Code from 1995 to 2017. After 1995, the DoD never requested funds for Section 168 even though it was a statutory authority. Moxley E-mail, *supra* note 24.

¹⁰³ DA PAM. 11-31, *supra* note 49; GREENBOOK, *supra* note 13.

¹⁰⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1253, 130 Stat. 2943 (2016).

¹⁰⁵ 10 U.S.C. § 168 (2016).

¹⁰⁶ This assertion presumes that had Congress funded Section 168, the SECDEF, in turn, would have delegated Section 168's authority to the COCOMs. See 10 U.S.C. § 168 (2016) (providing authority to the SECDEF).

§168, the Joint Staff published a series of orders (TCA Orders) between May 1995 and August 1996 to revive and sustain military-to-military contacts.¹⁰⁷ The TCA Orders provide funding, invoke COCOM operational authority,¹⁰⁸ and are in effect across the DoD for military-to-military contacts.¹⁰⁹ The orders permit interactions similar to those identified in 10 U.S.C. §168, but also go further in authorizing staff assistance and assessment visits, ship rider programs, and joint/combined exercise observers.¹¹⁰

The TCA program funds military-to-military contacts.¹¹¹ This funding is exclusive to COCOMs expressly directs the types of military-to-military contact events.¹¹² Even as Congress institutes new security cooperation reforms, TCA remains a viable mechanism for promoting regional and national security interests via interactions with foreign militaries.¹¹³ Looking to the text, the TCA Orders provide the COCOMs with the purpose of military-to-military contacts, examples of specific events, and the funds that are to be utilized in exercising COCOM authority.¹¹⁴

The TCA Orders give combatant commanders discretion in employing military-to-military contacts. According to the TCA Orders, TCA provides “one of the pillars of [DoD’s] foreign military interaction initiatives.”¹¹⁵ The Joint Staff published the TCA Orders not to authorize and fund combatant commanders’ efforts to train foreign militaries, but

¹⁰⁷ TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

¹⁰⁸ See 10 U.S.C. § 164(c)(1)(D) (providing combatant commanders authority to employ their forces to assigned missions). The TCA Orders affirm the COCOMs’ responsibility to interact with foreign militaries. TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

¹⁰⁹ Telephone Interview with Lieutenant Colonel Laura M. Calese, Deputy Counsel, Joint Chiefs of Staff (Jan. 13, 2017) (stating the Joint Staff rarely takes measures to rescind previous orders); see also EUCOM TSC HANDBOOK, *supra* note 28, at 106 (showing TCA’s use as a funding source over the last five years).

¹¹⁰ TCA ORDER 2, *supra* note 26, para. 3.

¹¹¹ TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

¹¹² See *supra* note 8 (discussing the 2017 NDAA reforms and the events that are still only permitted through TCA).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

instead to *interact* with foreign militaries.¹¹⁶ Today, TCA is used across the DoD by almost every COCOM.¹¹⁷ Because each COCOM pursues regional security objectives specific to its AOR,¹¹⁸ the TCA Orders provide commanders the flexibility in determining how to utilize these interactions.¹¹⁹ Despite the wide use of TCA funds for interactions with foreign forces, there is no DoD guidance regarding the use of these funds or TCA itself.¹²⁰

The DoD should update its doctrine to reflect TCA. Currently, neither TCA nor the TCA Orders garner even a reference in the Army's Security Cooperation Policy,¹²¹ the Joint Security Cooperation Manual,¹²² or the Army's Security Cooperation Handbook.¹²³ Gaping holes exist where guidance for military-to-military contacts should be. Presumably, the 2017 reforms to security cooperation will likely take priority in doctrinal updates over established programs such as TCA. Meanwhile, the scarce mention of TCA in DoD-wide and service-wide publications compounds what is an already nebulous understanding related to engagements with foreign forces.¹²⁴ All the while, TCA remains a current funding source for a number of military-to-military contact events.¹²⁵ It also represents the sole source for events exclusive to the TCA orders.¹²⁶ Although the TCA Orders represent the current written guidance for TCA-exclusive interactions with foreign forces, the TCA Orders are not free from rebuke.

Similar to 10 U.S.C. §168, the TCA Orders do not provide key

¹¹⁶ *Id.* "TCA funding fulfills the [] long-standing requirement to interact with the militaries of nations within their areas of responsibility/area of interest." *Id.*

¹¹⁷ See ACI 3900.12, *supra* note 55 (references TCA); see also HEADQUARTERS, U.S. CENT. COMMAND, CENT. COMMAND REG. 12-4, TRADITIONAL COMMANDER ACTIVITIES PROGRAM (5 Jan. 2015) [hereinafter CCR 12-4]; see HEADQUARTERS, U.S. EUROPEAN COMMAND OFFICE OF STRATEGY IMPLEMENTATION, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 105-106 (21 Oct. 2016) (describing TCA and providing EUCOM's funding history of TCA).

¹¹⁸ JOINT PUB. 5-0, *supra* note 16, at II-5(d)(1).

¹¹⁹ TCA ORDER 3, *supra* note 26, para. 5.

¹²⁰ See DA PAM. 11-31, *supra* note 49 (omitting references to TCA).

¹²¹ See ARMY REG. 11-31, *supra* note 42 (omitting references to TCA).

¹²² See NAVY INSTR. 4950.B, *supra* note 42 (confusing TCA as title 10 programs for U.S. Marines).

¹²³ See DA PAM. 11-31, *supra* note 49 (omitting references to TCA).

¹²⁴ PATCHWORK, *supra* note 48, at 7-18. See FM 3-22, *supra* note 16, at 2-28.

¹²⁵ TCA ORDER 1, *supra* note 25.

¹²⁶ TCA ORDER 2, *supra* note 26.

definitions.¹²⁷ As discussed above, the DoD should publish guidance that addresses these security cooperation authorities and supports COCOM discretion in executing these events.¹²⁸ The lack of definitions impedes clarity for both TCA and Section 168. What is clear, however, is that the TCA Orders instruct the combatant commanders, not the SECDEF as in Section 168.¹²⁹ This demonstrates that combatant commanders not only have the authority to conduct TCA-type events, but that they can also determine *how* to conduct such activities. For example, TCA provides a non-exhaustive list of activities that a combatant command can fund.¹³⁰ Within this non-exhaustive list is a traveling contact team.¹³¹ Implicitly, the TCA Orders, as published by the Joint Staff to the combatant commanders, convey that what a traveling contact team can be or do is at the discretion of the COCOM.¹³² After all, the COCOM is responsible for executing TCA events such as traveling contact teams that pursue theater campaign goals in support of over-arching national security objectives.¹³³ In addition, neither the TCA Orders nor any other publication across the DoD definitively contemplate how to conduct a traveling contact team. The result is that COCOMs are not all marching in cadence when it comes to traveling contact teams.¹³⁴ This is potentially problematic for planners, judge advocates, and commanders who attempt to utilize a traveling contact team for a TCA mission.

Even with the lack of proper guidance, military lawyers can address interaction proposals and properly analyze military-to-military contacts. One way is by understanding the purpose of TCA and the manner in which its events are funded. Analyzing the purpose of the TCA events and the way they are funded permits well-reasoned counsel to planners and commanders. This is true for commands at all echelons with a security cooperation mission.¹³⁵ However, in order to properly analyze a TCA event, judge advocates must understand the funding, applicable

¹²⁷ TCA ORDER 1, *supra* note 25; TCA ORDER 2, *supra* note 26; TCA ORDER 3, *supra* note 26.

¹²⁸ PATCHWORK, *supra* note 48.

¹²⁹ TCA ORDER 1, *supra* note 25, para. 1; 10 U.S.C. § 168 (2016).

¹³⁰ TCA ORDER 2, *supra* note 26, para. 3.

¹³¹ *Id.*

¹³² *Id.* Traveling contact team events remain undefined by doctrine.

¹³³ *Id.*

¹³⁴ ACI 3900.12, *supra* note 55; CCR 12-4, *supra* note 117.

¹³⁵ Lieutenant Colonel Mark B. Parker and John A. Bonin, *RAF and Mission Command*, CARLISLE COMPENDIA OF COLLABORATIVE RESEARCH 19 (2015) (discussing the Regionally Aligned Forces' (RAF) requirement to engage with foreign forces under a myriad of authorities) (on file with author).

engagement law, and the new developments in security cooperation from the 2017 NDAA.

A. Funding and Programming TCA

Examining the way the DoD funds TCA events is one of the keys to understanding the intent behind interacting with foreign forces. Combatant commanders receive a specific funding source for TCA events within the annual appropriations provided to the DoD.¹³⁶ The manner in which combatant commanders receive and expend these funds demonstrates that combatant commanders have significant discretion to execute TCA events within their respective theater security cooperation plans.

Each year, the President signs an appropriations bill for the Federal Government.¹³⁷ This Presidential Act provides the DoD with the funds necessary to carry out its mission in promoting national defense.¹³⁸ The DoD Appropriations Act provides the services with O&M funds.¹³⁹ For the Army—as the executive agent for security cooperation—a brief description of TCA funding is pertinent.¹⁴⁰

The Army's O&M appropriations pay for the current operations of the force, and for the maintenance of all of its equipment, including base maintenance services, vehicle maintenance services, civilian salaries, and all expenses required to operate the force.¹⁴¹ In order for the Army to properly spend its O&M funds, its obligations must satisfy the necessary expense test.¹⁴² The necessary expense test requires expenditures to do three things: (1) bear a logical relationship to its appropriation, (2) not be prohibited by law, and (3) not be otherwise provided for in another appropriation.¹⁴³

In 2015, through the DoD Appropriations bill, the active duty

¹³⁶ See TCA ORDER 2, *supra* note 26, at para. 2(a) (stating that TCA funding is included in the service O&M appropriation).

¹³⁷ See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. C, 129 Stat. 2242 (2015).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ RAND SC, *supra* note 79.

¹⁴¹ See Consolidated Appropriations Act, 2016, Div. C., Title II.

¹⁴² Hon. Bill Alexander, 63 Comp. Gen. 422, App. A (1984) [hereinafter HBA Opinion].

¹⁴³ *Id.*

component of the Army received over \$51 billion for its O&M budget.¹⁴⁴ In order to manage this mammoth budget, the Army uses the military decision package (MDEP) construct.¹⁴⁵ The MDEP construct groups the Army's functions and capabilities, defined by program element, appropriation, and organizational codes, into high level packages.¹⁴⁶ This grouping allows the Army to simplify and organize its fiscal resources; it also helps enable the Army leadership defend its resource decisions to challenges external to the Army.¹⁴⁷

The Army is using over 500 MDEPs to organize its resources.¹⁴⁸ All together, these MDEPs comprise the entirety of Army resources for a given year.¹⁴⁹ The combatant commands account for their prospective TCA missions through a specific MDEP named Joint/Defense Activities (JDJT).¹⁵⁰ The combatant commands submit their funding requests for future TCA events in their program objective memorandum (POM) to the Office of the Secretary of Defense (OSD) via the Army or its Combatant Command Support Agent (CCSA).¹⁵¹ After discussions with OSD, the Army Justification Book is compiled for the coming fiscal year.¹⁵² The Army Justification Book a detailed budget justification based upon the President's budget for the Army.¹⁵³ Before going to the President, it goes to Congress for decisions to modify it (add or subtract funding from it).¹⁵⁴ Funds for TCA missions are not represented in the Army Justification Book.¹⁵⁵ Instead, the funding request for TCA is incorporated into the

¹⁴⁴ OFFICE OF THE UNDER SECRETARY OF DEFENSE, OPERATIONS AND MAINTENANCE OVERVIEW FOR 2017 1 (2016). Even though the President signs the DoD Appropriations Act, Congress is the true keeper of the nation's purse. U.S. CONST. Art. I, § 9 ("No money shall be drawn from the Treasury, but in consequence of appropriations made by law.").

¹⁴⁵ DEF. FIN. ACCT. SERV., THE ARMY MANAGEMENT STRUCTURE FOR FISCAL YEAR 2017 2C-MDEP1-1 (Aug. 2016) [hereinafter DFAS-IN MANUAL 37-100-17].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Lieutenant Colonel Jeffrey C. Powell, The Impact of Strategic Guidance on Army Budget Submissions 3 (Mar. 22, 2010) (unpublished paper submitted in partial fulfillment of Master of Strategic Studies Degree, U.S. Army War College) (on file with author).

¹⁴⁹ DFAS-IN MANUAL 37-100-17, *supra* note 145, at 11-125.

¹⁵⁰ Telephone Interview with James M. Martin, Program Analyst, U.S. European Command (EUCOM) (Dec. 7, 2016) [hereinafter Jim Martin Interview] (stating TCA funds are in EUCOM's budget request for 2018).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ U.S. ARMY WAR COLLEGE, HOW THE ARMY RUNS: A SENIOR LEADER REFERENCE HANDBOOK 8-41 (2015) [hereinafter HTAR].

¹⁵⁴ *Id.*

¹⁵⁵ See generally DEP'T OF THE ARMY, JUSTIFICATION OF ESTIMATES, vol. I, OPERATION AND MAINTENANCE, ARMY (2017) (omitting references to TCA).

COCOM's POM for the president's budget.¹⁵⁶ After the appropriations act is signed, funds are apportioned by the Office of Management and Budget to OSD, to the CCSA and finally to the COCOMs for TCA missions through their sub-activity groups (SAG).¹⁵⁷ For TCA events, the SAG contains funds for headquarters day-to-day operations and mission activities that promote regional stability and shape the international security environment in ways that favor U.S. National Security.¹⁵⁸ The funds sent to the COCOMs for TCA activities are referred to in the TCA Orders as TCA Funds. Although referred to as TCA Funds, these funds remain O&M and therefore beholden to the requirements of the necessary expense test under U.S. fiscal law.

The manner in which further TCA Funds are requested and transmitted to combatant commands is instructive. Essentially, combatant commanders request TCA Funds to pursue their theater campaign goals, and through the multi-layered budgeting processes, involving the CCSA, OSD, the President, and Congress, are provided with the resources to carry out these missions. At no time in the planning, budgeting, or allocation of funds process is TCA discussed in a manner that limits the combatant commander's authority to execute military-to-military contacts.¹⁵⁹ Year after year, the combatant commanders have come to rely on TCA funding and use it as an integral part of their theater strategy.¹⁶⁰ From a policy standpoint, the national leadership provides our combatant commanders with the means to carry out military-to-military contacts with very few restrictions.¹⁶¹ As such, a COCOM has the authority to determine the way military-to-military contacts should operate in its AOR.

The funding process for TCA events is surprisingly straightforward for a program that is mostly missing from security cooperation doctrine.¹⁶²

¹⁵⁶ *Id.*

¹⁵⁷ HTAR, *supra* note 153, at 8-16. An O&M budget is generally arranged in three levels (1) budget activity, (2) budget activity group, and (3) sub-activity group (SAG). U.S. DEP'T OF DEF., FIN. MGMT. REG 7000.14R vol. 2A, ch. 3-25 (2010). A SAG is a budgeting term that denotes a grouping of resources. *Id.* Two SAGs within Army's O&M appropriation exist for mission funding (e.g., TCA) and headquarters funding. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Jim Martin Interview, *supra* note 150.

¹⁶⁰ GEN Odierno Speech, *supra* note 53.

¹⁶¹ *See, e.g.,* DoD LEAHY LAW, *supra* note 14, at tab A (requiring no Leahy Vetting for military-to-military contacts).

¹⁶² *See generally* JOINT PUB. 1-02, *supra* note 9 (omitting a definition for TCA); *see generally* ARMY REG. 11-31, *supra* note 42 (omitting any references to TCA); *see also* NAVY INSTR. 4950.4B, *supra* note 42, at 4-46 (mentioning TCA briefly and only in regards to Marine Corps teams).

The joint service publications' and the security cooperation handbooks' guidance on TCA is scant at best,¹⁶³ leaving planning staffs with little to no information regarding the methods to use TCA.

Lacking TCA guidance, planners assume an overly conservative planning posture for military-to-military contacts.¹⁶⁴ This risk-averse posture sacrifices what otherwise may be meaningful content in fear of mission creep. Instead of taking a restrictive, blanket approach to TCA, planning staffs should build their TCA events and tailor their outcomes toward the COCOM's strategic objectives. Planning staffs should then manage the execution of the military-to-military contact events by effectively communicating the mission (and its limits).¹⁶⁵

In order to effectively plan TCA events, planning staffs and judge advocates must understand the relevant legal considerations. These legal considerations require judge advocates to distinguish between interaction events and training¹⁶⁶ foreign forces.¹⁶⁷ Generally speaking, the service O&M appropriations may not be used for training foreign forces.¹⁶⁸ This was the explicit message from the GAO in its legal opinion to Congress in

¹⁶³ See generally JOINT PUB. 1-02, *supra* note 9 (omitting a definition for TCA); see generally ARMY REG. 11-31, *supra* note 42 (omitting any references to TCA).

¹⁶⁴ See ACI 3900.12, *supra* note 55, at Encl. A (limiting traveling contact teams to only two U.S. personnel for only one week).

¹⁶⁵ See FM 5-0, *supra* note 82.

¹⁶⁶ CRS-R44444, *supra* note 49. Training is defined by the Foreign Assistance Act (FAA) as "formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aids, orientation, and military advice to foreign military units and forces." 22 U.S.C. A. § 2403(n). DoD defines training as "instruction of foreign security force personnel that may result in the improvement of their capabilities." See DOD LEAHY LAW, *supra* note 14, at Tab A.

¹⁶⁷ In 2014, Congress provided the DoD with specific authority to train *with* friendly foreign forces. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1203 (2014) (emphasis added) *repealed* by National Defense Authorization Act 2017 § 1244, S. 2943 (2016). Although the 2017 NDAA repealed § 1203 authority, it codified this same authority anew in 10 U.S.C. § 321, stating "general purpose forces of the United States Armed Forces may train with the military forces or other security forces of a friendly foreign country if the Secretary of Defense determines that it is in the national security interests of the United States to do so." National Defense Authorization Act 2017 § 1244, S. 2943 (2016).

¹⁶⁸ See Foreign Assistance Act of 1961 Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C.A § 2151 (2015)) (creating authority for the executive branch to provide foreign assistance for the United States); see Exec. Order No. 10,973, 26 C.F.R. 639, (1961) [hereinafter Exec. Order No. 10,973] (providing the Department of State with the authority to conduct foreign assistance); see also SAMM, *supra* note 52, para. C1.1.2.2.

the 1980s.¹⁶⁹ Exploring that GAO opinion and its relation to interactions with foreign forces will help bolster an understanding as to what is and what is not a military-to-military contact.

B. The Proper Legal Considerations for Military-to-Military Contacts

The fiscal law governing military-to-military contacts is simple to comprehend. Like all Army expenditures, military-to-military contact events must meet the necessary expense doctrine and have a proper purpose to be fiscally sound.¹⁷⁰ Typically, the purpose of a military-to-military contact event is conceived at command echelons far above those which task the service members actually executing the event.¹⁷¹ As long as military-to-military contact events follow a proper mission, there is little risk for fiscal impropriety. However, imprecise operational orders or misperceptions related to the event can skew the intended purpose or outcome of the event.

The difficulty in understanding the purpose of a military-to-military contact event is only partially related to fiscal law. Instead, the legal trappings for military-to-military contacts are inherent: the Army places training, not interacting, as one of its central priorities.¹⁷² From a fire team's hip-pocket training time to a rotation at a combat training center, it is difficult to imagine any unit not conducting some type of training on any given day. Additionally, many of the DoD's security cooperation activities with foreign forces include permissible training.¹⁷³ The constant

¹⁶⁹ See HBA Opinion, *supra* note 142, at 3 (“Regarding your further questions as to possible violations of purpose funding restrictions . . . it is our conclusion that expenses for training . . . have been charged to DOD’s O&M funds in violation of 31 U.S.C. § 1301(a).”).

¹⁷⁰ 31 U.S.C. § 1301 (2016).

¹⁷¹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-568, REGIONALLY ALIGNED FORCES: DoD COULD ENHANCE ARMY BRIGADES’ EFFORTS IN AFRICA BY IMPROVING ACTIVITY COORDINATION AND MISSION-SPECIFIC PREPARATION 8 (2015) [hereinafter GAO-15-568] (“The majority of brigade security cooperation activities are planned and supported by [U.S. Africa Command] in Stuttgart, Germany and [U.S. Army Africa] in Vicenza, Italy”).

¹⁷² David Vergun, *Milley Names Top 3 Focal Points*, U.S. ARMY (Apr. 7, 2016) <https://www.army.mil/article/165671>. General Milley’s top priority for the Army is readiness. *Id.* Within readiness, his focal points are increased aviation flight hours (i.e., training), home-station training, and realistic training for National Guard soldiers at training centers. *Id.*

¹⁷³ CRS-R44444, *supra* note 49, at 2 (“Congress has increasingly provided DoD with the means to offer security assistance under authorities in either Title 10 . . . or the annual National Defense Authorization Act . . .”).

focus on training across the Army and even within security cooperation is problematic in analyzing military-to-military contacts. When training is the sole focus in so many events, a mere interaction becomes almost a foreign concept. However, training within a military-to-military contact is prohibited.¹⁷⁴ This is because military-to-military contacts pursue objectives wholly outside of training a foreign force. Therefore, in order to comprehend the legal analyses for interactions, it is imperative to first understand how training and foreign assistance exist independently from military-to-military contacts.

1. Security Assistance and Training

In 1961, Congress doled out the responsibilities for assisting foreign nations in the Foreign Assistance Act of 1961 (FAA).¹⁷⁵ Security assistance, understood as providing supplies, training, and equipment to friendly foreign militaries, is one of the twin pillars of foreign assistance.¹⁷⁶ Generally, the U.S. military is prohibited from providing security assistance to foreign militaries absent congressional authority.¹⁷⁷ The responsibility to provide security assistance belongs primarily to the Department of State (DoS).¹⁷⁸ In order for the DoD to provide security assistance to a foreign military it must first receive specific funding and authority from the DoS. Until recently, the DoD was prohibited from expending its O&M appropriations to provide security assistance except for two specific circumstances: (1) interoperability training; or (2) narrowly tailored training.¹⁷⁹ In 2014, Congress expanded the DoD's

¹⁷⁴ TCA ORDER 2, *supra* note 26, para. 2 (“TCA funding cannot be used to fund training of foreign militaries normally funded with IMET or FMS or direct support to foreign countries . . . including . . . any provision of the Foreign Assistance Act (FAA).”).

¹⁷⁵ The Foreign Assistance Act.

¹⁷⁶ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 251 (2016).

¹⁷⁷ See JOINT PUB. 3-22, *supra* note 51, at App. A para. 9.

¹⁷⁸ *Id.*

¹⁷⁹ Major Ryan W. O’Leary, *A Big Change to Limitations on “Big T” Training: The New Authority to Conduct Security Assistance Training with Allied Forces*, ARMY LAW., Feb. 2014 at 23 [hereinafter O’Leary]. Prior to 2014, Congress established an authority to train foreign forces; however, it was not funded with O&M dollars. See National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364 § 1206, 120 Stat. 2083, 2418 (2006); also see Major Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008 at 24 (discussing a specific fund for building capacity).

authority to provide security assistance, albeit on a limited basis.¹⁸⁰

The guarded approach Congress takes toward limiting the DoD in the area of security assistance is not accidental. After all, diplomacy is a mission of the DoS.¹⁸¹ Each event the DoD undertakes to provide security assistance is congressionally approved and with concurrence of the DoS.¹⁸² One area in security assistance that this is most apparent is in the DoD's surrogate, diplomatic role of training foreign militaries. Today, this authority is found in the newly minted Section 333 of the 2017 NDAA.¹⁸³ Section 333 establishes the DoD's general authority for building the capacities of foreign security forces.¹⁸⁴

Training foreign militaries consumes a large portion of a combatant command's theater security cooperation plan.¹⁸⁵ From building partner capacity programs to joint combined exchange training, the mission to increase our allies' capabilities is vast. Congress defines training broadly and is careful to ensure that training foreign forces only occurs through specific authorizations.¹⁸⁶ At the same time, the DoD conducts numerous annual exercises with foreign forces for strategic purposes and evaluation, not training.¹⁸⁷ Sometimes, however, when the DoD conducts combined

¹⁸⁰ *Id.*

¹⁸¹ The mission statement of the Department of State is to "shape and sustain a peaceful, prosperous, just, and democratic world and foster conditions for stability and progress for the benefit of the American people and people everywhere." *Mission Statement*, U.S. DEP'T OF STATE, <https://www.state.gov/s/d/rm/index.htm#mission> (last visited Nov. 28, 2017).

¹⁸² O'Leary, *supra* note 179, at 26.

¹⁸³ 2017 National Defense Authorization Act § 333.

¹⁸⁴ FY17 INTERIM IMPLEMENTATION FOR SC ACTIVITIES, *supra* note 29, at 2.

¹⁸⁵ See Jim Garamone, *Africom Campaign Plan Targets Terror Groups*, DOD NEWS (Jan. 5, 2016), <https://www.defense.gov/News/Article/Article/639919/africom-campaign-plan-targets-terror-groups> (displaying two of the U.S. Africa Command's five lines of effort include training foreign forces.); see also Colonel James O. Robinson Jr. and Lieutenant Colonel John C. Lee, *Partnering in the Pacific Theater* 1 (2012) www.usarpac.army.mil/pdfs/Partnering%20in%20the%20Pacific%20Theater.pdf ("Engaging the theater and working alongside partners is [U.S. Army Pacific]'s first line of effort in a theater campaign support plan designed to enable the command—by, with, or through allies and partners—to deter aggression, *build capacity*, and assure [U.S. Pacific Command] success.") (emphasis added).

¹⁸⁶ 10 U.S.C. § 301 (2017); see also O'Leary, *supra* note 179, at 26.

¹⁸⁷ An exercise's participants determine whether its focus is training or whether its focus is planning, execution, and evaluation. See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3500.01H, JOINT TRAINING POLICY AND GUIDANCE FOR THE ARMED FORCES (25 Apr. 2014). The definition of an exercise is "[a] military maneuver or simulated wartime operation involving planning, preparation, and execution that is carried out for the purpose of *training* and evaluation." *Id.* (emphasis added). The definition of a joint exercise—or combined

exercises with foreign forces the lines between permissible exercising and statute-directed capacity building tend to blur.

Published over thirty-three years ago, the Honorable Bill Alexander (HBA) Opinion provides substantial analyses into building foreign forces' capacity.¹⁸⁸ The HBA Opinion is still highly relevant to today's practice of fiscal law.¹⁸⁹ In fact, the HBA Opinion still is the single most important fiscal law opinion for combatant commands engaged in training foreign forces.¹⁹⁰ The irony is that the HBA Opinion's ripple effects impose unintended restraints upon military-to-military contacts, activities that are entirely devoid of training.¹⁹¹ The gravitational pull from the HBA Opinion leads military lawyers to often misapply its concepts to all COCOM security cooperation events, whether they include training forces or not.¹⁹²

2. *The Honorable Bill Alexander Opinion of 1984*

The U.S. military's engagements with the Republic of Honduras began as benevolent peacetime engagements but became a defense-wide example of fiscal law promiscuity.¹⁹³ Bending the rules of fiscal law, the DoD engaged in impermissible, unauthorized training (i.e., security

exercise—is “[a] joint military maneuver, simulated wartime operation, or other Chairman—or CCDR-designated—event involving joint planning, preparation, execution, and evaluation. *Id.* Additionally, COCOMs participate in the Chairman, Joint Chiefs of Staff exercise program which pursues strategic engagement objectives, not training foreign forces. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-98-189, JOINT TRAINING: OBSERVATIONS ON THE CHAIRMAN, JOINT CHIEFS OF STAFF EXERCISE PROGRAM 8 (1998).

¹⁸⁸ *See* HBA Opinion, *supra* note 142, at 12-14.

¹⁸⁹ HBA Opinion, *supra* note 142; *see generally* FISCAL LAW DESKBOOK, *supra* note 12, at 10-5 (citing the HBA Opinion in four different chapters).

¹⁹⁰ *Id.* The HBA Opinion created “little t” training for the DoD. FISCAL LAW DESKBOOK, *supra* note 12, at 10-6; *see also* Major Matthew T. Miller, *The Large Utility of “Little T”*: *Conducting Interoperability, Safety, and Familiarization Training*, ARMY LAW., Aug. 2016 at 2 [hereinafter Miller]. Moreover, at the time of this writing, the HBA Opinion is referenced 85 times in WestLaw and its principles are still taught in fiscal law courses within the U.S. Army. Citing references for the HBA Opinion, WESTLAW, <https://1.next.westlaw.com/Search> (search 63 Comp. Gen. 422); Major John Doyle, Operational Funding, at slides 22-26 (Sept. 27, 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter Doyle].

¹⁹¹ TCA ORDER 2, *supra* note 26, para. 2 (stating TCA funding cannot fund training).

¹⁹² HBA Opinion, *supra* note 142.

¹⁹³ *See* HBA Opinion, *supra* note 142, at 17 (stating that the DoD engaged in three instances of impermissible funding of security assistance).

assistance) with the Honduran security forces.¹⁹⁴ As a byproduct, the lessons resulting from impermissible training in the Republic of Honduras continues to shape the DoD's analysis of security cooperation with all foreign forces today.¹⁹⁵ Despite the HBA Opinion's importance to security cooperation and engagements with foreign forces, its findings are only tangentially related to the proper legal analysis for military-to-military contacts.¹⁹⁶ A close review of the HBA opinion demonstrates that it stands to limit unauthorized training of foreign forces, not to limit a combatant commander's authority to interact with those forces for national and theater strategic goals.¹⁹⁷

In 1983, the DoD partnered with the Honduran military to conduct a six-month joint exercise in Honduras called Ahuas Tara (Big Pine) II.¹⁹⁸ During Ahuas Tara II, the DoD spent hundreds of thousands of dollars for airstrips, training camps, and medical supplies. A Congressman by the name of William "Bill" Alexander requested that the GAO provide a legal decision into the fiscal propriety of the exercise.¹⁹⁹ The GAO responded with a formal opinion that found the DoD improperly charged its O&M appropriation with construction projects, training events, and humanitarian assistance.²⁰⁰

The perceived significance of the HBA opinion to military-to-military contacts arises from the unauthorized funding of training Honduran troops.²⁰¹ During Ahuas Tara II, U.S. personnel provided five weeks of medical training to 100 Hondurans, three-to-four weeks of 105 mm

¹⁹⁴ See *id.* at 12-13.

¹⁹⁵ Doyle, *supra* note 190.

¹⁹⁶ See generally HBA Opinion, *supra* note 142 (refraining from any discussion of military-to-military contacts or similar activities). The HBA Opinion discusses the transfer of skills that occurs between militaries prior to and during an exercise; however, proficiency gains between militaries are not contemplated during military-to-military contacts. *Id.* at 13. Cf. E-mail from Assoc. Counsel, U.S. Africa Command to Captain (CPT) Neville F. Dastoor (4 Apr. 2014, 08:52:00 CET) (on file with author) (recommending the verbiage of familiarization, safety, and interoperability be included in the legal analysis of military-to-military contacts). In this context, the terms familiarization, safety, and interoperability are likely drawn from the HBA Opinion and misapplied to the analysis of military-to-military contacts. Memorandum from CPT Neville F. Dastoor to Colonel Louis P. Yob, Staff Judge Advocate, U.S. Army Africa 2 (Jun. 7, 2016) (on file with author).

¹⁹⁷ HBA Opinion, *supra* note 142, at 13.

¹⁹⁸ *Id.* at 3. Joint exercises with foreign militaries are common across the DoD as a security cooperation activity. JOINT PUB. 3-22, *supra* note 51, at I-8.

¹⁹⁹ HBA Opinion, *supra* note 142, at 1.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 12-13.

artillery training, and Special Forces training for four battalions on mortars, fire direction, and counterinsurgency tactics. At the time, the value of just the 105 mm artillery training, normally purchased through foreign military sales, was estimated at over \$250,000.

In its opinion, the GAO determined that the DoD improperly funded these training activities with O&M funds.²⁰² The proper funds for such training endeavors were those congressionally approved and provided to the DoD for security assistance.²⁰³ But within the HBA Opinion, the GAO carved out a permissible subset of training that the DoD can fund with O&M.²⁰⁴ This training, however, is limited only to achieve interoperability between forces through safety and familiarization training “before combined forces activities are undertaken.”²⁰⁵ This language serves as the basis for what is colloquially known as “little t” type training within the DoD.²⁰⁶ Additionally, “little t” training—a product of the HBA Opinion—is subject to limits on cost, duration, and number of personnel in order to prevent the misuse of O&M funds seen during Ahuas Tara II.

Understanding “little t” training is important in analyzing TCA events in only one respect: To inform planning staffs of the bright line legal differences between training foreign forces and mere interactions. Whether the DoD is providing formal training via security assistance or interoperability training prior to a joint airborne exercise, both instances of training increase the capacity and capability of foreign forces.²⁰⁷ Military-to-military contacts, on the other hand, serve no such purpose.²⁰⁸ There is no transfer of a training benefit between forces in a military-to-military contact event.²⁰⁹ While military-to-military contact events fall within the realm of security cooperation and are a key components of a theater campaign plan, they do not serve to increase the capacity of a foreign force.²¹⁰ Thus, planning staffs and combatant commanders should not fear that a mere military-to-military contact constitutes impermissible training. Moreover, the legal limits applied to “little t” events are

²⁰² *Id.* at 13.

²⁰³ *Id.* at 14.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 13.

²⁰⁶ Miller, *supra* note 190, at 2-3.

²⁰⁷ *See id.* at 6; *see* O’Leary, *supra* note 179, at 1.

²⁰⁸ TCA ORDER 1, *supra* note 25, para. 5 (“Traditional [Combatant Commander] Activities funding fulfills the long-standing requirement to *interact* with the militaries within their area of responsibility”) (emphasis added).

²⁰⁹ TCA ORDER 2, *supra* note 26, para. 2(A).

²¹⁰ *Id.*

inapplicable to military-to-military contacts. For example, limits on cost, duration and number of personnel for a “little t” event is necessary to ensure its scope does not balloon into a security assistance event.²¹¹ Such restrictions are sensible because both “little t” and security assistance events involve training (i.e., building capacity).²¹² Applying these same limits to a traveling contact team, however, is incongruent with the purpose of the event. In other words, there is no risk that a traveling contact team will cross into the realm of security assistance because its mission is to interact with—not train—foreign forces. The key for judge advocates and planners is to analyze the *content* of the military-to-military contact and ensure that the content does not evolve into training. It is imperative to focus on the specific content of a military-to-military contact event to ensure it fits within TCA.

3. *Defining a TCA-Exclusive Military-to-Military Contact Event Through its Content*

Each COCOM controls the definition of a military-to-military contact by developing and planning its content within its theater campaign plan. Until doctrine adequately reflects this practice, many judge advocates and lawyers will look to historical examples of these interactions. The TCA Orders and the recently repealed Section 168 authority provide the commonly-known examples of military-to-military contact events.²¹³ These events include, but are not limited to, traveling contact teams, personnel and information exchanges, seminars and conferences, and military liaison teams.²¹⁴

Recently, Congress narrowed the definition of a TCA-exclusive military-to-military contact event by reforming the security cooperation authorities.²¹⁵ Some of the traditional military-to-military contacts that were once tied solely to the TCA Orders or Section 168, are now consolidated within Chapter 16 of Title 10.²¹⁶ For example, new sections

²¹¹ Miller, *supra* note 190, at 6.

²¹² *See id.*, at 6; *see* O’Leary, *supra* note 179, at 1.

²¹³ TCA ORDER 2, *supra* note 26; 10 U.S.C. § 168 (2016).

²¹⁴ TCA ORDER 2, *supra* note 26; 10 U.S.C. § 168 (2016). The TCA Orders also lists events such as the State Partnership Program, training program review and assessments, etcetera. TCA ORDER 2, *supra* note 26. Section 168 lists other examples authorized for funding: distribution of publications in the theater of operations, civilian exchanges reimbursement of personnel expenses. 10 U.S.C. § 168 (2016).

²¹⁵ 2017 National Defense Authorization Act § 1253.

²¹⁶ *Id.* § 1241.

authorize the funding of military-to-military *exchanges*²¹⁷ and personnel expenses of foreign nations that are necessary for theater security cooperation.²¹⁸ Although the new sections of Title 10 seemingly encompass some of the activities contemplated under the TCA, Congress's new reforms to security cooperation do not abrogate TCA.²¹⁹ The activities of TCA-exclusive events are still funded through TCA; no other program within a combatant command exists to fund these specific activities.²²⁰ In spite of the new reforms, the 2017 NDAA does not include language to broadly fund U.S. personnel expenses for security cooperation. As an example, the new Section 312 authority only authorizes the SECDEF to fund "(A) defense personnel of friendly foreign governments; and (B) with the concurrence of the Secretary of State, other personnel of friendly foreign governments and nongovernmental personnel."²²¹ It does not fund U.S. personnel expenses for traveling contact teams or familiarization visits (i.e., TCA-exclusive events).²²² So, while adding a new authority to fund military exchanges into the 2017 NDAA certainly overlaps with existing exchange authorities under TCA, the new authority in Section 312 has no impact on TCA-exclusive events.

Even with the new reforms to security cooperation, the definitions of certain TCA events are no clearer. Events like traveling contact teams, military liaison teams, and familiarization visits are not defined by the 2017 NDAA²²³ nor the DoD at large. Although the lack of definitions for military-to-military contact events, such as a traveling contact team, persists, this in no way inhibits a COCOM from executing military-to-

²¹⁷ *Id.* § 1242 (emphasis added). Section 1242 adds Section 311 at the beginning of subchapter II titled "Exchange of defense personnel between the United States and Foreign Countries." *Id.* Section 311 inserts language from the 1997 NDAA authorizing SECDEF to enter into international defense personnel exchange agreements. *Id.*

²¹⁸ *Id.* § 1243. Section 1243 adds Section 312 after Section 311 and is titled "Payment of personnel expenses necessary for theater security cooperation." *Id.* These personnel expenses include travel, subsistence, similar personnel expenses, and special compensation. *Id.*

²¹⁹ Although, the 2017 NDAA does repeal Section 168. 2017 National Defense Authorization Act § 1253. However, the effect of this repeal is negligible as Section 168 was dead letter. See Moxley E-mail, *supra* note 24, at 1.

²²⁰ *Cf.* 10 U.S.C.A. § 164 (2017) and 10 U.S.C.A. § 166(a) (2017) (showing these combatant commander authorities do not contemplate TCA-exclusive activities such as traveling contact teams).

²²¹ 2017 National Defense Authorization Act § 1243.

²²² TCA ORDER 2, *supra* note 26. No funding of foreign defense personnel is contemplated by the TCA Orders because TCA activity expenses are incurred by U.S. personnel, not foreign military personnel. *Id.*

²²³ 2017 National Defense Authorization Act § 1253.

military contacts in accordance with its theater campaign plan. It does, however, require that military lawyers analyze whether a particular event with a foreign military fits within the definition of TCA. Ultimately, this is a question of reviewing the event's content.²²⁴ With the new reforms to the 2017 NDAA, it is imperative that legal planners understand how to analyze an event that can be funded by TCA.

4. *How to Analyze a TCA-Exclusive Event*

Whether a proposed military-to-military contact may be funded by TCA depends upon its content. Because DoD guidance is lacking with regard to military-to-military contacts, a legal review of a proposed event's content is of heightened importance. To understand the content of a military-to-military contact, the first question to address is whether the event will increase a foreign force's capability in any manner. This includes not only capacity building, as in security assistance, but also interoperability, safety, and familiarization training.²²⁵

A common issue with military-to-military contacts is that the U.S. personnel sometimes misinterpret their role in the interaction. This can lead to the U.S. personnel providing an instructional benefit or increased capability to a foreign force.²²⁶ Typically, the risk of unintentional training arises when a team conducting the contact does not understand the permissible methods of interacting versus impermissible training. If a proposed event contemplates classroom presentations, the reviewer must understand the purpose of those presentations and the desired outcome.²²⁷ A fiscal law violation arises when an event provides information to a foreign force that increases its capability to conduct military operations.²²⁸ It is essential that those conducting the event understand the permissible limits to classroom presentations.²²⁹ If the interaction contemplated by the

²²⁴ Combatant commands have the responsibility for oversight of TCA activities within established policy and fiscal law. TCA ORDER 1, *supra* note 25.

²²⁵ FISCAL LAW DESKBOOK, *supra* note 12, at 10-7; Miller, *supra* note 190.

²²⁶ E-mail from Noreen A. Mallory (G8 Support Agreements, U.S. Army Africa) to Major Anthony Lenze (14 Nov. 2016, 06:05:00 EST) (on file with author).

²²⁷ For example, a presentation on the United States' position regarding International Humanitarian Law topics or a discussion of best practices for vehicle maintenance is permitted under TCA; however, presentations should not be so one-sided to create the appearance of instruction.

²²⁸ HBA Opinion, *supra* note 142.

²²⁹ A reviewing attorney for a military-to-military contact can ensure those conducting the event understand the permissible limits of a classroom presentation by understanding the

command does not increase the capacity of the foreign force, it is deemed non-instructional. Whether a classroom activity lasts thirty minutes or three hours, what is important is to examine what is taking place during the interaction. Once the event is understood as non-instructional, the next question turns on intent.

Events funded as TCA promote regional security and other national security goals.²³⁰ The regional security objectives for combatant commands are found within their theater campaign plans.²³¹ Military-to-military contacts under TCA must nest within a COCOM's theater campaign plan.²³² The easiest way to ascertain whether the event fits within the theater campaign plan is by reading the operation order associated with the event.²³³ The operation order should include verbiage within its execution paragraph to convey the commander's intent.²³⁴ Many times, this information will provide the nexus to the theater campaign. If the operation order does not contain such information, or the order is not yet published, a call over to the combatant or component command's security cooperation office should be helpful.²³⁵ The desk officer at the security cooperation office should have knowledge of the event and be able to provide information that helps fit this piece into the overall puzzle.²³⁶ Once it is understood how this event helps promote regional security objectives or other national security interests, the next question goes to operational authority. Put simply, has the COCOM specifically directed this event?

The final prong of analyzing a TCA event may seem like a formality but it is essential to ensure the event's proper sponsorship. Before executing the event, the COCOM should publish a written order directing

nature of the presentation and recommending that the staff include language in the operation order that clearly articulates such limits.

²³⁰ TCA ORDER 1, *supra* note 25.

²³¹ JOINT PUB. 5-0, *supra* note 16, at II-5. Theater campaign plans "operationalize" combatant command's theater or functional strategies. The campaign plans link steady-state shaping activities to the desired strategic and military end states. *Id.*

²³² TCA ORDER 1, *supra* note 25.

²³³ JOINT PUB. 5-0, *supra* note 16, at II-35.

²³⁴ *Id.* at IV-46.

²³⁵ The combatant or component command's security cooperation offices are well-suited to liaise with the security cooperation organization within the country of the proposed TCA event. JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERORGANIZATIONAL COOPERATION IV-4 (12 Oct. 2016).

²³⁶ *Id.*

the interaction.²³⁷ Since the authority and funding for TCA events reside at the COCOM level, it is essential that the COCOM directs the event's execution.²³⁸ Executing a TCA event without publishing an order is bad practice since it prevents the proper documentation of the event for tracking and assessment of strategic data.²³⁹ It is also a problematic practice because it prevents those personnel on the mission from having a detailed written understanding of the event. Most importantly, the content of a proposed TCA event cannot be analyzed by military lawyers unless the event is reduced to a written order by the planning staff.²⁴⁰

The proper analysis for reviewing a military-to-military contact requires an understanding of TCA and the combatant commander's intent. Furthermore, the content of the interaction drives the analysis. Without an understanding of the content within the proposed event, there can be no analysis. This holds true in simple one to two day interactions with foreign forces or in a more robust, complex contact as in the hypothetical problem presented in the introduction.

C. A Call for an Increased Understanding of TCA at the COCOMs

Accepting the status-quo and current construct for analyzing military-to-military contacts is a disservice to commanders and judge advocates who work in conjunction with COCOMs. The practice of fiscal law demands measured, well-reasoned counsel in expending appropriated funds. Military lawyers jeopardize their value as staff officers when they are unable to articulate a proper legal basis or the left and right limits of a security cooperation activity such as military-to-military contact.²⁴¹ Worse yet are cavalier legal theories amounting to an "I know it when I

²³⁷ JOINT PUB. 3-0, *supra* note 27, at I-7 ("All [combatant commanders] provide strategic direction; assign missions, tasks, forces, and resources; designate objectives; establish operational limitations such as . . . operation orders[.]").

²³⁸ TCA has not been delegated. The service components of a combatant command do not have the authority to operate under TCA without the combatant command's approval. TCA ORDER 1, *supra* note 25.

²³⁹ JOINT CHIEFS OF STAFF, COMMANDER'S HANDBOOK FOR ASSESSMENT PLANNING AND EXECUTION VI-2 (11 Sep. 2011).

²⁴⁰ Additionally, when U.S. personnel are conducting a mission in theater a written order will provide basic information. Should questions arise to the intent or scope of the mission, the written order is the best method of memorializing and documenting the event.

²⁴¹ Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW., Sept. 2014 at 21 (emphasizing the importance of a judge advocate's counsel to commanders regarding authorities).

see it”²⁴² approach.²⁴³ Like all lawyers, military lawyers pride themselves on their ability to provide sound legal advice from a complex set of facts. The approach to analyzing military-to-military contacts should be no different.

A COCOM’s understanding and approach to military-to-military contacts is particularly important to its subordinate commands.²⁴⁴ This is because the COCOMs use subordinate commands to exercise authority and plan interactions within the AOR.²⁴⁵ Typically, the subordinate commands planning the interactions are not the commands actually executing the interactions with the foreign militaries.²⁴⁶

Today, the U.S. military relies upon Regionally Aligned Forces (RAF) to be on the ground in the AOR and execute most of its military-to-military contacts.²⁴⁷ The RAF is composed of a U.S.-assigned Army brigade outside the technical chain of command of the ASCC or COCOM with which it serves.²⁴⁸ The RAF must receive clear direction from the COCOM or ASCC when engaging with foreign forces.²⁴⁹ Because of the misconceptions related to military-to-military contacts, few at the RAF brigade or its higher division-level command understand the nuances associated with such interactions.²⁵⁰ Making matters worse, sometimes higher Army echelons misadvise the RAF on the scope of its mission.²⁵¹ Neglecting to inform RAF members or misinforming them of their role in

²⁴² *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²⁴³ Interview with Brent E. Fitch, Chief, International and Operational Law, U.S. Army Africa (Dec. 8, 2015) (stating a combatant commander’s staff judge advocate once quipped that he knows military-to-military contacts when he sees them).

²⁴⁴ The COCOMs have a strategic role in DoD missions. JOINT PUB. 3-0, *supra* note 27, at I-7 (stating COCOMs develop their theater strategies in order to set conditions for achieving strategic end states).

²⁴⁵ *Id.* at III-4.

²⁴⁶ *See, e.g.*, GAO-15-568, *supra* note 171, at 16 (stating the ASCC is charged with preparing the event but not actually with executing it).

²⁴⁷ Colonels Robert J. DeSousa and Scott J. Bertinetti, *RAF and Authorities*, CARLISLE COMPENDIA OF COLLABORATIVE RESEARCH 142 (2015) (discussing the RAF role in military-to-military contacts) (on file with author).

²⁴⁸ *Id.* at 139.

²⁴⁹ GAO-15-568, *supra* note 171, at 17. The RAF brigades are tasked to complete many activities for service-component commands but do not receive timely and complete information, which compromises effectiveness. *Id.* at 2.

²⁵⁰ JENNIFER D. P. MORONEY, ET. AL., RAND NAT’L DEF. RESEARCH INST., REVIEW OF SECURITY COOPERATION MECHANISMS COMBATANT COMMANDS UTILIZE TO BUILD PARTNER CAPACITY xv (2013) [hereinafter RAND BPC]. Depending upon the authority, some engagements with foreign forces will allow for training while others will not. *Id.*

²⁵¹ GAO-15-568, *supra* note 171.

a military-to-military contact event can lead to fiscal law violations such as training foreign forces with an inappropriate funding source.²⁵²

There is no better time than the present to address the legal parameters of funding military-to-military contacts. In an era of regional instability there is also an undeniable national security interest to build and strengthen relationships through interacting, training, and exercising with foreign forces.²⁵³ Funding military-to-military contacts and understanding the legal parameters' associated limitations are of incredible importance to COCOMs.²⁵⁴

IV. Applying TCA

The hypothetical problem at the beginning of this paper is not uncommon. Planning staffs are often looking to pursue command objectives as efficiently and as effectively as possible. The mantra, "do more with less" is back in vogue. Creativity in operational planning is valued by commanders as long as it is effective and within the legal limits of command authority. To determine the question of legal authority, the problem set in the introduction requires an analysis into TCA.

First, it is important to ascertain from the proposed facts which activity the event most likely resembles. It is apparent from the hypothetical that the OPT is not seeking a personnel exchange, a conference, or an assessment. Nor is the OPT seeking to fund the defense personnel expenses to attend the proposed interaction. Instead, the OPT is proposing a team of ten personnel travel to a foreign nation for an event with a foreign force. The costs to the command for this event will largely be the costs of travel and per diem. While the proposition of this event most likely lends itself to that of a traveling contact team, the devil is in the details (i.e., the event's content).

The second step in the analysis may be the most important. It is a question for TCA events and military-to-military contacts alike: What content will the event contain? This is a fact-driven analysis that starts

²⁵² RAND BPC, *supra* note 250.

²⁵³ *The National Military Strategy of the United States of America for 2015*, THE JOINT CHIEFS OF STAFF 9 (2015). http://www.jcs.mil/Portals/36/Documents/Publications/2015_National_Military_Strategy.pdf.

²⁵⁴ *Id.* (discussing the importance of military-to-military relationships as a part of the national military strategy).

with basic information regarding the participants conducting the event, the flow of information throughout, and the nexus to the objectives in the theater campaign plan. In the hypothetical problem, the OPT seeks to display the JIABs to the friendly forces to promote this new technology as a way of building trust and fostering relationships.²⁵⁵ The foreign force participants will rotate through the week-long demonstration as the U.S. personnel remain at the CSL. Because the U.S. personnel are tasked to operate the JIABs as demonstrators and not as instructors, no training benefits will transfer to foreign forces. Although the information flowing from the proposed event will be largely in the direction of the foreign force, the U.S. personnel will benefit from operating the JIABs in austere locations. Additionally, a strategic benefit to the COCOM is likely to transpire from this partnership opportunity with a foreign military. Since the proposed JIAB demonstrations do not increase the capability of the foreign forces, the risk of this TCA event crossing into the realm of security assistance is minimal.

Once the content of a TCA event is determined to be within the bounds of a non-instructive interaction, the next question turns to the theater campaign plan. Here, the JIABs are assets of the theater Army and the OPT is encouraged to utilize the JIABs by the ASCC Commander. While a theater Army commander wields significant clout within his or her organization, the authority to conduct a demonstration event by a traveling contact is not held at the ASCC level. Instead, operational authority and TCA funding is held by the combatant commands.²⁵⁶ The implication here is that once a planning staff determines the plan, it will need to be validated by the combatant command and supported with TCA funds. In the hypothetical problem set, the regional security cooperation at each of the CSLs may fit nicely into the theater campaign plan—but this is a question of the specific combatant command's objectives and whether the plan will be sponsored by the combatant command. Close coordination between the operations cells at both levels of these commands will aid this determination. Until the combatant command directs the component command to conduct the event, there is no authority to engage under TCA.

The OPT's ability to conduct JIAB demonstrations rests on whether the COCOM is willing to direct the interaction. However, the stage is set for a TCA-exclusive military-to-military contact in the form of a traveling

²⁵⁵ A display or demonstration such as this is similar to the showcase events the DoD participated in during the early 1990s in China.

²⁵⁶ TCA ORDER 1, *supra* note 25.

contact team. Thus, the OPT is likely within the bounds of the authorities set forth in TCA; however, sponsorship and direction from the combatant command is required.

V. Conclusion

Congress's new reforms to security cooperation altered many of the statutory authorities in play for a combatant command. Presently, combatant commanders can conduct military-to-military exchanges and fund the expenses of foreign military personnel through new sections of the 2017 NDAA. Despite these new reforms, the manner with which a combatant command interacts with a foreign military through a team of U.S. personnel remains unchanged.

A combatant command's TCA funding provides specific funds to interact with foreign militaries via traveling contact teams and familiarization visits. Though TCA has been whittled down from its heyday of the mid-to-late 1990s, it articulates the only written understanding for TCA-exclusive activities. These interactions with foreign forces are valuable within a theater campaign because they promote trust and partnerships—keys to success within any theater of operations.

The lack of information and guidance from DoD concerning TCA is an easy fix. Yet, an update in security cooperation guidance related to TCA will likely take a backseat to the current need to address the reforms in the 2017 NDAA. Therefore, in the short-term, understanding TCA falls squarely on the planners and commanders tasked with executing events in furtherance of a theater campaign plan.

For the DoD to more effectively interact with foreign militaries within the limits of the law (and provide a proper long-term understanding), the DoD should publish guidance that clearly articulates that combatant commanders have discretion to conduct such activities under TCA as they see fit. The sheer volume of interactions that the COCOMs pursue demonstrate that these activities demand the DoD's attention. Guidance from the DoD will aid planners at COCOM and component-level commands in developing and proposing interactions that meet COCOM objectives in accordance with TCA.²⁵⁷

²⁵⁷ See CRS-R44602, *supra* note 45.

Judge advocates act as both legal planners and reviewers for military plans that execute military-to-military contacts. This necessitates that judge advocates identify the line between permissible interactions under TCA and impermissible security assistance when advising planning teams and commanders. Updating DoD doctrine with regard to military-to-military contacts will help clarify that TCA-exclusive events, though not contemplated in the 2017 NDAA reforms, are viable means of interacting with foreign forces in furtherance of the theater campaign plan.

In order to correctly apply TCA at present day, the 2017 NDAA reforms must be read in conjunction with the current TCA Orders. A side-by-side reading of these two documents shows that the reforms do not cover specific activities listed within the TCA Orders; additionally, with the exception of military and personnel exchanges, the 2017 NDAA reforms do not address the types of activities listed within the TCA Orders. Thus, military-to-military contacts exclusive to TCA can only be executed by COCOMs through the guidance provided by the Joint Staff in TCA.

The DoD should address the TCA-exclusive activities that are not within the 2017 NDAA in order to bring its doctrine into the 21st century of security cooperation. Until then, planning staffs and judge advocates should not deny otherwise lawful engagements due to concerns of crossing into areas of security assistance. The legal analysis should begin with an understanding of the interaction's specific content and objectives. Military lawyers can aid planning staffs and combatant commanders in developing military-to-military contacts according to the broad discretion given to COCOMs under TCA. Blanket limits to duration, cost, and number of personnel for military-to-military contacts misapply the proper legal analysis, unnecessarily restrict the COCOM's ability to conduct interactions under TCA, and undermine the discretion given to combatant commanders. A well-reasoned approach that is rooted in TCA will enable COCOMs to fully realize their ability to interact with foreign forces.