THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-413

October 2007

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

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Issues may be cited as ARMY LAW., [date], at [page number].

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Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law

Lieutenant Colonel Timothy C. MacDonnell[1]

A wise Staff Judge Advocate (SJA) once said that "managing the post-trial process of a criminal law office is like tending a garden." This short statement captures the essence of the successful management of the post-trial process. If the chief of criminal law and his office tend to the post-trial process daily, making sure each step is given the appropriate attention, the process will remain manageable. If, however, the post-trial process is attended to sporadically or left unattended for weeks, it will quickly become overwhelming.

As a new chief of criminal law one of the most challenging tasks you will face is managing the post-trial process of your office. For most new chiefs of criminal law, the post-trial process is uncharted territory. If your only criminal law experience is as a trial counsel (TC), virtually all of the post-trial process will be new territory. Even former defense counsel (DC), who are familiar with requesting deferment of punishment, and Rules for Courts-Martial (RCM) 1105 and 1106 submissions, will find the post-trial world of a chief of criminal law much larger and more diverse than that of a DC.

The task of managing an office's post-trial process can also be challenging because it can be difficult to see its significance. The purpose of the pretrial process is obvious—to get a conviction—but after the trial is over, the objective is more elusive. Finally, the post-trial process is challenging because there is so much to it. In a run of the mill post-trial process[2] the criminal law office will have to: create and organize a record of trial (ROT),[3] produce eight documents,[4] ensure that the ROT is reviewed by four individuals,[5] serve the post-trial recommendation and addendum (if it contains new matter) on the accused and his counsel,[6] receive and organize the matters submitted by defense, get the convening authority (CA) to take action,[7] and mail the original ROT and two identical copies to the reviewing or appellate authority.[8]

The purpose of this article is to explain the post-trial process and identify some of the process's common pitfalls and methods of avoiding those pitfalls. This article addresses the post-trial process in four parts. The first part discusses the post-trial process in general, focusing on the purpose of the process and briefly discussing all the stops along the way, including the subject of post-trial delay. The second part reviews the process from the adjournment of the trial to authentication of the record. The third part examines the process from the authentication of the ROT to the SJA addendum. The final part examines the CA action, the promulgating order, the process of placing Soldiers on excess leave, and final action.

Post-Trial Processing in General and Post-Trial Delay

As the chief of criminal law you are responsible for ensuring the execution of all of the necessary steps to complete the post-trial process. One error in the process can cause all subsequent actions taken to have to be repeated.[9] Additionally,

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[1] Currently assigned to the Regime Crimes Liason Office, Baghdad, Iraq. Many individuals assisted in the completion of the current article. Of particular note is Lieutenant Colonel Dan Brookhart, who provided substantial input as the article was being written and Colonel (Retired) Malcolm H. Squires, the Clerk of Court for the United States Army Court of Criminal Appeals, who generously edited the article.

[2] The term "run of the mill post-trial process" contemplates the processing of a record of trial where the accused is convicted and receives a punishment that includes confinement and a punitive discharge. Also, this includes one where the accused has requested deferment of some or all of the adjudged sentence.

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103(b)(1) (2005) [hereinafter MCM].

[4] The DA Form 4430, Department of the Army Report of the Result of Trial, the DD Form 2707, Confinement Order, responses to defense deferment requests, the post-trial recommendation, the addendum to the post-trial recommendation, the action, the promulgating order, excess leave documents. U.S. Dep't of Army, DA Form 4430, Department of the Army Report of Result of Trial (Sept. 2002); U.S. Dep't of Defense, DD Form 2707, Confinement Order (Sept. 2005).

[5] MCM, *supra* note 3, R.C.M. 1103(I)(1)(B) (Trial Counsel), R.C.M. 1103(I)(1)(B) (Defense Counsel), R.C.M. 1104(b)(1)(A) (the Accused), R.C.M. 1104(a)(2)(A) (Military Judge).

[6] *Id.* R.C.M. 1106(f), R.C.M. 1106(f)(7).

[7] *Id.* R.C.M. 1107(a).

[8] *Id.* R.C.M. 1111(a)(1); THE CLERK OF COURT'S POST-TRIAL ADMINISTRATIVE PROCESSING OF GENERAL COURTS-MARTIAL AND BCD SPECIAL COURTS-MARTIAL para. 1-8a(1) (23 Aug. 2004) [hereinafter THE CLERK OF COURT'S HANDBOOK].

[9] If an appellate court rules that the post-trial recommendation was incorrect and prejudiced the accused, the court will most likely order a new post-trial recommendation. If a new post-trial recommendation is ordered, then a new action and promulgating order will also be necessary.

throughout the post-trial phases a processing-time clock constantly ticks. Although the *Dunlap*[10] ninety-day post-trial processing requirement has long been a thing of the past,[11] the *Moreno*[12] 120-day-clock has, at least in some regards, taken its place. The Army Court of Criminal Appeals (ACCA) decisions in *United States v. Collazo*[13] and *United States v. Chisholm*,[14] and the Court of Appeals for the Armed Forces (CAAF) decision in *United States v. Tardif*,[15] have continued to emphasize the need to process records of trial in a speedy fashion.[16]

As you prepare to take responsibility for the post-trial process of your office there are several references you should both read and have available. First, there are five resources that will be invaluable to you: *The Clerk of Court's Handbook for Post-Trial Administration*; the *Manual for Courts-Martial* (*MCM*) (RCM 1101 through RCM 1210); the Uniform Code of Military Justice (UCMJ) (articles 57 through 67; and Appendix 16); Army Regulation (AR) 27-10 *Military Justice* (Chapters 5 and 12); and the Military Justice Manager's Post-Trial outlines and Post-Trial New Developments outline from the Army Judge Advocate General's School. These resources will provide you with detailed information regarding the post-trial process, examples of how to word certain documents, suggestions on improving your office's processes, and updates of the most recent statutory, regulatory, and case-law driven changes to the post-trial process. Second, make use of the human resources in your office. Talk with your court-reporters, post-trial noncommissioned officer (NCO), and enlisted Soldiers. It is important to know the experience level of your post-trial staff, and take advantage of it when possible or make allowances for it when necessary.

Part I: Overview

When examining post-trial processing, it can be helpful to divide it into three phases: adjournment to authentication; receipt of the authenticated ROT to addendum; action to final action. Appendix A of this article is a diagram or road map of the post-trial process.[17] Each event that is necessary for a successful post-trial process is accounted for in the diagram and will be discussed briefly in this section of the article and more in-depth in later sections.

Phase one of the post-trial process is dominated by the TC and the court reporter (CR), but like all phases of post-trial processing, there are plenty of opportunities for the chief of criminal law to get involved. The first event in the post-trial process occurs after the judge announces that the trial is adjourned.[18] As soon as the trial is adjourned, the TC is responsible for producing the Report of the Result of Trial, Department of the Army (DA) Form 4430.[19] A copy of this document must be provided to the CA, the immediate commander of the accused, and (if applicable) the commander of the confinement facility where the accused is sent.[20] Also, a copy of DA Form 4430 must accompany the military prisoner to his place of confinement.[21] The TC is also responsible for producing a confinement order, Department of Defense (DD) Form 2707. According to RCM 1101(b)(2), "A commander of the accused may order the accused into post-trial confinement . . . [and] may delegate this authority to the trial counsel."[22] There is no requirement that the commander delegate his authority to order

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[10] Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974).

[11] United States v. Banks, 7 M.J. 92 (1979); United States v. Jenkins, 38 M.J. 287 (1993); United States v. Bell, 46 M.J. 351 (1997).

[12] United States v. Moreno, 63 M.J. 129 (2006).

[13] 53 M.J. 721 (2000). In addition to the ACCA decision in *Collazo*, the Court of Appeals for the Armed Forces (CAAF) has weighed in on the issue of undue delay in the post-trial process. In *United States v. Tardif*, 57 M.J. 219 (2002), the CAAF held that prejudice was not a prerequisite for relief under Article 66(c).

[14] 58 M.J. 733 (Army Ct. Crim. App. 2003).

[15] *Tardif*, 57 M.J. 219 (holding that prejudice was not a prerequisite for relief under Article 66(c)).

[16] In addition to relief, chiefs of criminal law in the Army still face the Army clerk of court's quarterly processing time report. The quarterly processing time report tracks the pretrial and post-trial processing time for every command Army wide. It is widely understood that being at the bottom of this report will likely draw, at a minimum, unwanted attention from your SJA.

[17] The attached diagram was initially composed by Colonel Michael J. Hargis while instructing at the U.S. Army Judge Advocate General's School in 1997.

[18] MCM, *supra* note 3, R.C.M. 1101.

[19] *Id*. R.C.M. 1101(a), U.S. DEPT. OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-29a (6 Sept. 2005) [hereinafter AR 27-10]. The DA Form 4430 is available through the Electronic Judge Advocate War-fighting System (e-JAWS), http://www.jagcnet.army.mil/ (follow "e-JAWS" hyperlink under "Members Only Areas").

[20] MCM, *supra* note 3, R.C.M. 1101(a).

[21] AR 27-10, *supra* note 19, para. 5-29(a).

[22] *Id.*

confinement in writing, but the TC should verify that the commander wants to delegate this authority. An example of a routine delegation order is enclosed at Appendix B.

The next step during phase one is responding to deferment requests. If the defense requests deferment, the CA must respond in writing to the request.[23] Because deferment only postpones the running of the accused's sentence until action, it only affects those punishments which go into effect before action is taken. Thus, an accused can request deferment of confinement, forfeitures (both adjudged and automatic),[24] or reduction.[25]

As soon as the trial has adjourned, the process of preparing the ROT begins. Although RCM 1103(b)(1)(A) expressly states that "the trial counsel shall under the direction of the military judge cause the record of trial to be prepared," preparation of the ROT is usually the responsibility of the CR and chief of criminal law.[26] The TC is responsible for reviewing the ROT for accuracy (to include reviewing the transcript and the evidence) before it is sent to the military judge (MJ) for authentication.[27]

At the same time the TC is reviewing the ROT, the DC should be given his opportunity to examine the record before authentication.[28] According to RCM 1103(i)(1)(B), the DC "shall be permitted . . . to examine the record before authentication."[29] The requirement to permit DC to review the ROT is not absolute. If an "unreasonable delay will result"[30] this requirement may be bypassed.[31]

Once the TC and DC have reviewed the ROT for correctness and submitted their proposed corrections (errata), the record is sent to the MJ for authentication. The forwarding of the ROT for authentication marks the end of the first phase. Generally, the first phase is the longest in the post-trial process, with most of the time being consumed by the preparation of the ROT.

Phase two of the post-trial process is dynamic and will involve the chief of criminal law, the DC, the MJ, and the SJA. It begins with the return of the ROT from the MJ and ends at the SJA addendum. During this phase the post-trial recommendation is prepared or revised, defense submissions are received, and an addendum is completed.

The first step in phase two really is not a step, but a pause. At the beginning of phase two the criminal law office is waiting to receive the authenticated ROT from the MJ. Although the office is waiting for the ROT to be returned, this should not be an idle time. During this part of phase two (if not sooner), the chief of criminal law should prepare and submit for the SJA's review the proposed Staff Judge Advocate Post-Trial Recommendation (SJAR), addendum, action, and promulgating order. The secret to an efficient post-trial process is being proactive. Your office should prepare and review the documents before they are needed. The time after the ROT has been prepared and has been sent for authentication is often a good time to prepare the SJAR, addendum, action, and promulgating order.[32] The SJA can review the documents with a copy of the

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[23] MCM, *supra* note 3, R.C.M. 1101(c).

[24] Deferment of adjudged forfeitures is governed by UCMJ article 57a, while deferment of automatic forfeitures is governed by UCMJ article 58b. UCMJ arts. 57a, 58b (2005).

[25] *Id.*

[26] *But see* United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003) (discussing in detail the military judge's authority and responsibilities regarding the preparation of the ROT).

[27] MCM, *supra* note 3, R.C.M. 1103(i)(1)(A).

[28] *Id.* R.C.M. 1103(i)(1)(B).

[29] *Id.*

[30] *Id.*

[31] United States v. Maxwell, 56 M.J. 928, 929 (2002). In *Maxwell*, the ACCA stated that the government has an obligation to forward the record of trial to the military judge without defense errata where the DC exceeds the local defense standards for errata. In *Maxwell*, the government waited fifty-one days for defense errata when the local defense standard for errata was five days. In addition to considering *Maxwell* to determine when to forward a record of trial without DC errata, chiefs of criminal law should also consider the standard established in *The Rules of Practice Before Army Courts-Martial*. THE RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 27(d) (1 Jan. 2001) (establishing a minimum standard of 150 pages of review per calendar day).

[32] Pre-positioning the SJAR, addendum, action, and promulgating order is important to an efficient post-trial process. By preparing these documents before they are necessary, the post-trial process is faster and generally contains fewer errors. It is not necessary to wait until after the record of trial has been sent to the military judge to prepare the SJAR, addendum, action, and promulgating order. They can be prepared as soon as the sentence is announced. The advantage to waiting for a complete record of trial is that the record of trial can be used to check the accuracy of the information in the documents. It is also important to remember that pre-positioning the documents does not mean they will not change after they have been prepared. Shell addendums, by their

ROT so that he is comfortable that the SJAR is accurate and the action is appropriate.

If the MJ returns the authenticated ROT, the SJA must sign and date the SJAR. A copy of the authenticated ROT and the SJAR must be served on the accused.[33] The DC is entitled to have access to the authenticated ROT and a copy of the SJAR.[34] Once the accused has received both the authenticated ROT and a copy of the SJAR, he has ten days to submit clemency matters under RCM 1105.[35] The accused may request an additional twenty days to submit clemency matters.[36] The DC has ten days from the service of the authenticated ROT[37] and the SJAR to submit comments on the SJAR under RCM 1106.[38]

Once defense submits RCM 1105 and 1106 matters, the chief of criminal law should review them. The purpose of this review is to determine if the accused or DC have claimed legal error, or if there is any claim in the defense submissions that should be verified. The chief of criminal law should then forward the submissions to the SJA and discuss whether the addendum needs to respond to any matters raised in the defense submissions, or whether it should simply account for all the documents that were a part of the defense matters. Finally, as part of the government's obligation to protect the ROT, the chief of criminal law and SJA should review defense matters for issues of ineffective assistance of counsel.[39]

The addendum should be modified to account for the documents in the defense submissions. More importantly, it must address any legal errors raised by the accused or counsel.[40] If the addendum is used to raise new matter (generally in response to some factual assertion in the defense matters), then the addendum must be served on the accused and counsel, and defense is entitled to ten days (plus an additional twenty days if requested) to respond to the new matter.[41] Phase two ends with the SJA addendum.

Phase three begins with the SJA preparing to bring the SJAR and addendum, the defense's written submissions, the result of trial, and the proposed action to the CA.[42] Once the CA has signed the initial action, the promulgating order can be completed. Next, a copy of the CA's action or promulgating order must be served on the accused or DC.[43] It is important to note that once the action has been served on the accused or the accused's counsel, the CA can no longer make changes to the action that are adverse to the Soldier.[44] It is also at this time that the compilation of the ROT is finalized, to include completing the Court-Martial Data Sheet (DD Form 494)[45] and the Court-Martial Chronology Sheet (DD Form 490, often referred to as the blue coversheet).[46] Next, copies of the promulgating order and ROT are mailed to the Clerk of Court for the ACCA or may be reviewed by a local judge advocate, depending on the level of court-martial and the severity of the punishment approved.[47]

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nature, must be changed to account for or respond to defense submissions. Thus, each shell document must be reviewed initially, and again before it is signed.

[33] MCM, *supra* note 3, R.C.M. 1104(b)(1)(A); R.C.M. 1106(f)(1).

[34] *Id*. R.C.M. 1104(b)(1)(A); R.C.M. 1106(f).

[35] *Id.* R.C.M. 1105(c)(1).

[36] *Id.*

[37] Service of the record of trial means service in accordance with RCM 1104(b). *Id.* R.C.M. 1104(b).

[38] *Id.* R.C.M. 1106(f)(5).

[39] United States v. Gilley, 56 M.J. 113 (2001). In *Gilley*, the DC counsel included three letters in the RCM 1105 clemency matters which were harmful to the accused's clemency petition, causing the record of trial to be returned for a new post-trial clemency petition and SJAR. *Id.* at 125.

[40] MCM, *supra* note 3, R.C.M. 1106(d)(4).

[41] *Id.* R.C.M. 1106(f)(7).

[42] *Id.* R.C.M. 1107(b)(3)(A).

[43] *Id.* R.C.M. 1107(h).

[44] *Id.* R.C.M. 1107(f)(2).

[45] U.S. Dep't of Defense, DD Form 494, Court-Martial Data Sheet (Oct. 1984).

[46] U.S. Dep't of Defense, DD Form 490, Chronology Sheet (May 2000).

[47] General courts-martial cases (even those resulting in acquittals) and special courts-martial which have a punishment that includes a bad conduct discharge (BCD) or confinement of one year must be sent to the ACCA Clerk of Court. MCM, *supra* note 3, R.C.M. 1111(b)(1); AR 27-10, *supra* note 19, para. 5-42a. Special courts-martial (SPCM) cases that do not meet the above threshold must still receive a judge advocate review, but the review can be done locally. An attorney for the command that convened the court-martial may conduct the review. *See* MCM, *supra* note 3, R.C.M. 1112; AR 27-10, *supra* note 19, para. 5-42b.

Although you might think the post-trial process is complete once your office has mailed the ROT, it is not. If the accused receives less than a year of confinement, he may return to the unit after serving his term of confinement while awaiting resolution of his appeal. A convicted Soldier who is pending a punitive discharge can be enormously disruptive to a unit. To resolve this issue, commands can place Soldiers on voluntary excess leave or involuntary excess leave, depending on the circumstances.[48] Also, in those cases where the Soldier does not receive a term of confinement adequate to have him transferred to a regional confinement facility or Fort Leavenworth, you may find your office having to provide the accused appellate notice and execute the final action after appellate review has been completed.

Even the briefest overview of the post-trial process reveals a labyrinth of administrative challenges, replete with opportunities for error. By breaking the process down to its basic components it can be visualized, and thus, more easily executed. After becoming comfortable with the post-trial process, chiefs of criminal law should share this knowledge with their TC and enlisted Soldiers. Many of the post-trial errors that occur in the field, especially excessive delays, do not originate with the chief of criminal law. Despite their best efforts, chiefs of criminal law cannot be everywhere at one time. They must rely on other members of the criminal law section to properly execute the post-trial process. The only way that can happen is if every member of the criminal law section has a working knowledge of the post-trial process.[49]

Post-Trial Delay

Understanding the large-scale order and flow of the post-trial process is the first step to making it accurate, efficient, and timely. This understanding is particularly important to the timeliness of the process. Days, weeks, or months can be lost while a ROT languishes in an in-box waiting for someone to determine where it must go next. Military appellate courts have emphasized the importance of a timely post-trial process for decades,[50] but for Army practitioners, the issue took on new importance on 27 July 2000. On that date, the ACCA decided *United States v. Collazo*.[51]

In *Collazo*, a panel convicted the accused of carnal knowledge and rape.[52] The panel sentenced him to a reduction to Private (PVT) E-1, forfeiture of all pay and allowances, eight years of confinement, and a dishonorable discharge. After trial the government took over ten months to authenticate the ROT and over a year to take initial action.[53]

In *Collazo* the court began its discussion of the post-trial delay in the case with the statement that "[t]en months to prepare and authenticate a 519-page record of trial is too long."[54] The court pointed out that it was the post-trial delays like those in *Collazo* that caused the Court of Military Appeals (COMA) to adopt the *Dunlap* ninety-day rule, a rule which governed military practice from 1974 to 1979.[55] Next, the ACCA held that despite the absence of any prejudice to the accused, "fundamental fairness dictates that the government proceed with due diligence to execute a Soldier's regulatory and statutory post-trial processing rights and to secure the CA's action as expeditiously as possible, given the totality of the circumstances in that Soldier's case."[56] The court concluded that the government failed to meet the fundamental fairness standard and reduced the accused's confinement by four months.

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[48] U.S. DEPT. OF ARMY. REG. 600-8-10, LEAVES AND PASSES paras. 5-19, 5-20 (1 July 1994) [hereinafter AR 600-8-10].

[49] A professional development class on post-trial processing could go a long way toward educating the officers and enlisted personnel in your criminal law section and thus reducing processing time.

[50] Dunlap v. Convening Authority, 48 C.M.R. 751 (C.M.A. 1974); United States v. Banks, 7 M.J. 92 (C.M.A. 1979); United States v. Clevidence, 14 M.J. 17 (C.M.A. 1982); United States v. Hudson, 46 M.J. 226 (1997).

[51] 53 M.J. 721 (Army Ct. Crim. App. 2000).

[52] *Id.* at 723.

[53] *Id.* at 724. In addition to the post-trial delay in *Collazo*, the government committed several other post-trial errors. The government failed to give DC counsel the opportunity to review the record of trial before sending it to the military judge for authentication, and failed to serve DC with a copy of the authenticated record of trial before the convening authority took action. Additionally, the government failed to provide the accused or counsel a copy of the action in a timely manner.

[54] *Id.* at 725.

[55] *Id.* Under the *Dunlap* rule, the government was required to complete the post-trial process within ninety days or face the possibility of the charges being dismissed. *Id.*

[56] *Id.* at 726.

Since *Collazo*, the ACCA has decided over a score of memorandum opinions,[57] and nine published opinions, where it granted "*Collazo* relief."[58] The minimum length of delay necessary to cause *Collazo* relief to be granted is unclear. The ACCA standard is flexible and fact-dependent. Relief has been granted in a case where the post-trial process took as little as five and a half months[59] and has been denied in a case where the process took over nine months.[60] The amount of *Collazo* relief the ACCA has given also varies, ranging from as little as ten days[61] to as much as six months.[62]

Although the ACCA has put pressure on chiefs of criminal law to improve post-trial processing, the court has also created a flexible standard that allows for reasonable delay. In *Collazo* and its progeny, the ACCA set no hard and fast number of days by which a ROT must be completed; all the court requires is that under the totality of the circumstances, the government proceeds with "due diligence." This flexible standard allows chiefs of criminal law the opportunity to explain and document the government's efforts to complete the post-trial process in a timely manner.

It is important to remember that the ACCA's principle resource for determining whether the government was diligent in the post-trial process is the ROT; thus, any efforts to advance the process must be in the record. The court will already know and take into consideration the length of the ROT, the time it took to authenticate it, and the time to action. The court will also be aware of any written requests for delay by the defense that have been included in the record.[63] Other than this information, however, the court will not know the steps your office has taken to ensure it was being diligent unless it has been documented in the record. Documentation can be done by a memorandum for record (MFR) attached to the ROT describing the government's post-trial processing efforts, or by a notation in the comments section of the chronology, DD Form 490. Additionally, the government can document its efforts in the SJAR, or in the addendum responding to RCM 1105/1106 allegations of untimely post-trial processing. When deciding what information to include in a memorandum, it is probably wise to err on the side of detail. Efforts to get an increase in CR support, use of 27D paralegals and attorneys to type sections of the record, and delays caused by mission requirements may all be relevant. The ACCA has described four specific acceptable reasons for lengthy post-trial delay: excessive defense delay in the submission of RCM 1105 matters, post-trial absence or mental illness of the accused, exceptionally heavy military justice post-trial workload, and unavoidable delay due to operational deployments.[64]

Although documenting a criminal law office's post-trial processing efforts in a particular case is relatively easy, capturing that information can be challenging. The government's post-trial processing efforts will involve several members of the criminal law section and, in most cases, will span several months. If a systematic method is not put in place to gather this information as it occurs, much of it will be lost. One method to achieve this objective is to use a log sheet that accounts

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[57] United States v. Sprattley, No. 20010191 (Army Ct. Crim. App. Jan. 22, 2003); United States v. Melendez, No. 9901054 (Army Ct. Crim. App. Feb. 8, 2002); United States v. Goodenough, No. 9900564 (Army Ct. Crim. App. May 7, 2002); United States v. Bundy, No. 20000473 (Army Ct. Crim. App. Nov. 25, 2002); United States v. Conley, No. 9900183 (Army Ct. Crim. App. Nov. 27, 2002); DA form 4917-R, "Advice of Appellate Rights; United States v. Hernandez, No. 9900776 (Army Ct. Crim. App. Feb. 23, 2001); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001); United States v. Acosta-Rondon, No. 9900458 (Army Ct. Crim. App. Apr. 30, 2001); United States v. Bradford, No. 9900366 (Army Ct. Crim. App. May 16, 2001); United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001); United States v. Pershay, No. 9800729 (Army Ct. Crim. App. June 12, 2001); United States v. Brown, No. 9900216 (Army Ct. Crim. App. July 13, 2001); United States v. Sharp, No. 9701883 (Army Ct. Crim. App. Apr. 16, 2001); United States v. Holland, No. 9901168 (Army Ct. Crim. App. Aug. 1, 2001); United States v. Stevens, No. 9900666 (Army Ct. Crim. App. Aug. 1, 2001); United States v. Bass, No. 9801511 (Army Ct. Crim. App. Aug. 3, 2001); United States v. Boult, No. 20000018 (Army Ct. Crim. App. Aug. 16, 2001); United States v. Myers, No. 9900329 (Army Ct. Crim. App. Aug. 16, 2001); United States v. Sharks, No. 9900770 (Army Ct. Crim. App. Aug. 16, 2001); United States v. Tualaulelei, No. 9900795 (Army Ct. Crim. App. Nov. 10, 2001); United States v. Marlow, No. 9800727 (Army Ct. Crim. App. Aug. 31, 2000); United States v. Fussell, No. 9801022 (Army Ct. Crim. App. Oct. 20, 2000).

[58] United States v. Harms, 58 M.J. 515, 516 (Army Ct. Crim. App. 2003); United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003); United States v. Maxwell, 56 M.J. 929 (Army Ct. Crim. App. 2002); United States v. Hutchison, 56 M.J. 756 (Army Ct. Crim. App. 2002); United States v. Paz-Medina, 56 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Devalle, 55 M.J. 648 (Army Ct. Crim. App. 2001); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001).

[59] United States v. Hansen, No. 20000532 (Army Ct. Crim. App. May 10, 2001). The record of trial in *Hansen* was 137 pages long and it took the government a little over five months to complete the post-trial process. The Army court reduced the accused's sentence by one month due to the post-trial delay.

[60] United States v. Scaggs, No. 20000056 (Army Ct. Crim. App. Feb. 12, 2002).

[61] *Acosta-Rondon*, No. 9900458.

[62] *Sharp*, No. 9701883.

[63] Any written requests for delay in the post-trial process should be included in the record of trial and should be accounted for on the Court-Martial Data Sheet.

[64] United States v. Bauerbach, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001); United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002). In *Maxwell*, the Army court included the government's failure to press the defense to complete its errata in a timely fashion in determining whether the government had proceeded with due diligence.

for everything that is done to move the ROT forward. This document should be known to every member of the criminal law section. Any efforts that are made to advance the post-trial process should be listed. This log could then be used to produce the MFR or addendum that explains the delay in a particular case. An example of such a log is at Appendix C.

If, after examining the post-trial process in a particular case, it is determined that the government failed to proceed with due diligence, that error can be corrected. The ACCA has authorized and even encouraged convening authorities to grant preemptive *Collazo* relief. In *United States v. Hudson*,[65] the SJA believed that the government failed to proceed with due diligence during the post-trial process, and so he recommended the CA reduce the accused's three years of confinement by six months. The ACCA applauded this correction and recommended it as a method for handling excessive unexplained post-trial delay.[66] If this technique is to be used, it is important to make it clear in the SJAR or addendum, and in the action, that the CA is granting *Collazo* relief.

Although the ACCA has put greater pressure on criminal law offices to produce timely records of trial, the standard of review is not unduly onerous. The court requires nothing more than due diligence; most criminal law offices meet that standard. By taking steps to document these efforts, chiefs can avoid losing hard-earned sentences to *Collazo* relief.

In addition to accounting to the ACCA for post-trial delay, an Army court decision may make it necessary to account to the MJ as well. In *United States v. Chisholm*,[67] the ACCA directed more vigorous involvement of MJs in the post-trial process than had existed before. In *Chisholm*, the accused was convicted of rape, conspiracy to commit rape, obstruction of justice, and making a false official statement.[68] He was sentenced to four years of confinement, total forfeiture of all pay and allowances, reduction to PVT E-1, and a bad conduct discharge (BCD).[69] The preparation of the ROT took just under one year to complete.[70] During this time the accused's DC made numerous written requests to the government for a "date certain" regarding the completion of the ROT.[71] In one of the requests, the DC asked the CA for a post-trial 39(a) session to resolve the delay issue.[72] The CA denied this request. Defense counsel next sought relief from the MJ. The MJ ordered the government to give daily updates to the DC regarding the completion of the ROT.[73] Prior to the MJ's authentication, the DC submitted clemency matters on behalf of the accused requesting relief due to the post-trial delay.[74] This request was denied, as was a later request for the same relief. The CA took action in the case a year and five months after the sentence was announced.[75]

The ACCA ultimately granted three months sentence relief to the accused based on post-trial delay,[76] but the relief granted in this case is not the most significant part of the decision. In *Chisholm*, the ACCA announced its expectations of MJs during the post-trial process, reaching the conclusion that MJs have the authority to grant an array of relief for post-trial delay to include sentence credit.[77] In reaching its decision the court focused on language in the UCMJ and the RCM that make the TC responsible for the preparation of the ROT "under the direction of"[78] the MJ.[79] The court also referred to earlier opinions from the COMA that confirmed the MJ's authority over a court-martial until that judge authenticates the ROT.[80]

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[65] No. 9801086 (Army Ct. Crim. App. July 5, 2001) (unpublished).

[66] *Id.* at 1.

[67] 58 M.J. 733 (Army Ct. Crim. App. 2003).

[68] *Id.* at 734.

[69] *Id.*

[70] *Id.* at 735.

[71] *Id.* at 734.

[72] *Id.*

[73] *Id.* at 735.

[74] *Id.*

[75] *Id.* at 736.

[76] *Id.* at 739.

[77] *Id.* at 736–37.

[78] UCMJ art. 38(a) (2002); MCM, *supra* note 3, R.C. M. 1103(b)(1)(A).

[79] *Chisholm*, 58 M.J. at 736–37.

[80] *Id.*

Based on its interpretation of the UCMJ, RCMs, and case law, the ACCA concluded that MJs have "a shared responsibility"[81] with SJAs to ensure records of trial are prepared in a timely fashion. To fulfill that responsibility, the ACCA suggested that MJs make sua sponte inquiries regarding the status of records of trial that have not been completed within 90 to 120 days.[82] The court has also tasked MJs with granting relief when the MJ concludes the post-trial process has not met the *Collazo* standard of due diligence. This relief could range from:

> (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing.[83]

In addition to the ACCA putting pressure on chiefs of criminal law and SJAs, the CAAF has also demonstrated concern regarding post-trial processing time. In two decisions, *United States v. Tardif*[84] and *United States v. Moreno*,[85] the CAAF made it clear that untimely post-trial processing will not be tolerated. In *Tardif*, the CAAF upheld the practice established in *Collazo* of courts of criminal appeal reviewing cases involving prolonged post-trial delay to determine if sentence relief is appropriate under Article 66(c) of the UCMJ.[86] Although *Tardif* made *Collazo* relief the standard across the Department of Defense, it appears that the CAAF was unsatisfied by the results. This dissatisfaction is apparent in the *Moreno* decision.

In *Moreno*, the appellant claimed that he had been denied his due process right to a timely review and appeal to his court-martial conviction. The basis of this claim was that the post-trial delay in the case was 1688 days, from sentencing to a decision by the court of criminal appeals.[87] On appeal, the government argued that the delay in the case was not unreasonable.[88] To say that the CAAF disagreed is putting it mildly. The CAAF cited the facts in *Moreno* to illustrate a growing problem in the area of post-trial delay.[89] In its effort to stem the tide of untimely post-trial processing, the CAAF adopted a new standard for evaluating claims of unreasonable post-trial delay as legal error.

Under this new standard appellate courts will first examine whether "a due process analysis is triggered by a facially unreasonable delay."[90] If the delay is facially unreasonable then the court will analyze claims of post-trial delay in accordance with the *Barker v. Wingo*[91] test.[92] The *Barker v. Wingo* test weighs four factors, with no factor having any greater significance than any other. The four factors are: the length of the delay, the reasons for the delay, the appellant's assertion of the right to timely review and appeal, and prejudice. What is perhaps the most significant part of the *Moreno* decision is the time frame that the CAAF placed on the term "facially unreasonable delay." According to the CAAF, "we will apply a presumption of unreasonable delay that will serve to trigger the *Barker* four factor analysis where the action of the CA is not taken within 120 days of the completion of trial."[93]

Moreno and *Tardif* clearly delineate the two post-trial delay hurdles that chiefs of criminal law have to overcome. *Moreno* describes under what circumstances post-trial delay rises to the level of legal error under Article 59(a).[94] *Tardif*, on

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[81] *Id.*

[82] *Id.* at 737.

[83] *Id.* at 738–39.

[84] 57 M.J. 219 (2003).

[85] 63 M.J. 129 (2006).

[86] UCMJ art. 66(c) (2005).

[87] *Moreno*, 63 M.J. at 135.

[88] *Id.*

[89] *Id.* at 142.

[90] *Id.* at 136.

[91] 407 U.S. 514, 530 (1972).

[92] *Moreno*, 63 M.J. at 135.

[93] *Id.* at 142.

[94] UCMJ art. 59(a) (2005).

the other hand, describes when service courts should remedy post-trial delay using their Article 66(c)[95] authority to evaluate the appropriateness of a sentence. Based on *Moreno* and *Tardif*, chiefs of criminal law should understand that the post-trial delay must be taken just as seriously as pretrial delay. To the greatest extent possible, no case should take longer than 120 days to process from sentence to action. Even if a case is processed in less than 120 days, it still may be vulnerable to an attack under *Tardif*, so diligence is necessary even when processing times are below 120 days. If a case is going to take over 120 days to process, then the criminal law office has to document all delays and be prepared to defend its post-trial process.

The ACCA and the CAAF have increased the pressure to create a timely ROT by making relief for an untimely record more immediate.[96] Chiefs of criminal law must take all steps possible to protect their offices' hard-won convictions and sentences. Systems must be in place to document all efforts to progress and accelerate the post-trial process in every case. Additionally, chiefs of criminal law should plan how they will prove to the MJ that the government has acted with due diligence. Ideally, chiefs of criminal law should avoid making themselves—or worse, the SJA—the government's principal witness for explaining the steps taken to ensure a timely post-trial process. A possible method for avoiding this is to make your post-trial NCO the government's principal witness for post-trial issues.

Part II: Sentence Adjudged to Authentication

The first phase of the post-trial process is generally the longest and is marked by heavy involvement of the TC. During this phase, five events usually occur: the DC gives notice to the accused of his post-trial and appellate rights, the TC produces the report of the result of trial, the CA responds to deferment requests by the accused, the CR produces the ROT, and the MJ authenticates the record. Of these five events, four of them usually involve the TC. Thus, it is important that once the chief of criminal law understands the events occurring during phase one, that understanding is passed on to the TC.

Appellate Rights

The first event in phase one is notifying the accused of his post-trial and appellate rights which is the responsibility of the MJ and DC.[97] Thus, the TC's only responsibility in this matter is ensuring it happens. The required content of the appellate rights advisement is described in RCM 1010[98] and DA Pamphlet 27-9, *The Military Judge's Benchbook*.[99] The advice must be delivered both orally and in writing, and the accused and the DC must state on the record that the advice has been given.[100] Both the DC and the accused must sign a copy of the written advice, and the advice must be attached to the ROT as an appellate exhibit. The advice informs the accused of the following three rights: to submit matters to the CA prior to action, to appellate review and the right to withdraw from appellate review, to apply to the Judge Advocate General of his service for relief if he is not entitled to review by the court of criminal appeals or a review under RCM 1201(b)(1), and to the assistance of counsel in the exercise of the foregoing rights.[101]

It could be argued that notice under RCM 1010 does not occur during the post-trial process (because it occurs prior to adjournment), and so a discussion of this requirement has no place in a post-trial primer. The reason for including such a discussion is that failure to ensure proper notice under RCM 1010 could affect the timely and efficient execution of the post-trial process. For example, if an accused has multiple DC on a case, especially if one of those counsel is a civilian, it is critical to establish which DC will be responsible for post-trial matters. Valuable time can be lost trying to determine which counsel has this responsibility.[102] Additionally, the written post-trial and appellate rights advice often contains important information beyond the required advice from RCM 1010, such as whether the accused wants the authenticated ROT he is

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[95] *Id.* art. 66(c).

[96] It seems clear that in *Chisholm*, the ACCA made good on a promise it made in *United States v. Collazo*. United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003). In *Collazo*, the court intimated that if SJAs did not fix the Army's problem with post-trial delay, the court would be forced to consider more drastic (*Dunlap*-like) measures. United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000).

[97] MCM, *supra* note 3, R.C.M. 1010.

[98] *Id.*

[99] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) (incorporating C1 and C2).

[100] MCM, *supra* note 3, R.C.M. 1010.

[101] *Id*.

[102] Determining who is responsible for the accused's post-trial representation is important because that is the individual who must receive the SJAR. If the wrong counsel is served, the ten day RCM 1106 clock will not begin to run, and action cannot be taken. *Id.* R.C.M. 1106.

entitled to under RCM 1104(b)(1)(B) to be served on himself or on his DC.[103] Finally, if the ROT does not reflect that the accused has received his mandated post-trial and appellate advice, it will be an issue on appeal. One of the TC's many responsibilities is to protect the record. Therefore, the TC must ensure that the accused is properly advised.

Report of the Result of Trial

The next event in phase one is the production of the report of the result of trial. The requirement to produce a report of the result of trial comes from RCM 1101(a)[104] and AR 27-10.[105] The format comes from DA Form 4430. Rule for Courts-Martial 1101(a) requires the TC to promptly notify the accused's commander, the CA (or his or her designee), and the commander of the confinement facility of the findings and sentence in a case. Army Regulation 27-10, para. 5-29 expands on RCM 1101(a), requiring the TC to include all pretrial confinement credit and the social security numbers of any co-accused in the report of result of trial. Army Regulation 27-10, para. 5-29 also requires the TC to ensure that a copy of the report of result of trial is provided to finance in a timely manner. Department of the Army Form 4430 establishes the format for the report of result of trial which includes all the information required by RCM 1101(a) and AR 27-10, para. 5-29.

The report of the result of trial is an important document if for no other reason than its potential to affect the rest of the post-trial process. In cases where errors have occurred in the post-trial recommendation, those errors can often be traced back to the report of result of trial. Additionally, the confinement facility relies on the report of result of trial to determine the accused's minimum release date. If the result of trial is incorrect, the accused may be released before serving his full sentence. Alternatively, if the report omits sentence credit, an accused may remain in confinement longer than required.

Fortunately for chiefs of criminal law and TCs, the report of result of trial is easy to produce, and can be created from any computer equipped with PureEdge.[106] To ensure the DA Form 4430 is properly completed, the TC should have a blank form at counsel table. As issues such as the number of days of judge-ordered administrative credit are resolved, the TC can complete the form in writing. After the trial is over, the TC or a 27D paralegal can transfer the hand-written information to a computer. After completing the DA Form 4430, the TC must sign it and serve it on the accused's immediate commander, the CA or his designee (usually the SJA), the commander of the confinement facility (if confinement was adjudged), and the finance and accounting office if there is a reduction in rank or forfeitures (either adjudged or automatic).[107]

Accounting for Evidence

Another important event during phase one, which occurs almost immediately after the sentence is announced, but can have a dramatic effect later in the post-trial process, is accounting for evidence. Although you will not find this step explicitly described in the RCMs or AR 27-10, it is implicit in both and critical to creating a complete ROT. Rule for Courts-Martial 1103(b)(2)(D)(v) states that "[e]xhibits, or with the permission of the MJ, copies, photographs, or descriptions of any exhibit which were received in evidence and any appellate exhibit" are necessary to a complete ROT. The time to account for evidence is not when reviewing the verbatim transcript (although it is necessary to do it at that time as well); rather, it is at the close of the proceedings. The TC must ensure that all the exhibits in a case are accounted for and they have clarified on the record when photos or descriptions of a piece of evidence are being substituted for the actual piece of evidence.

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[103] It is important to recognize that according to RCM 1104(b), the accused and counsel are entitled to only one copy of the authenticated record of trial. *Id.* R.C.M. 1104(b). Rule for Courts-Martial 1104(b) requires that a copy of the authenticated record of trial be served on the accused, but the accused can, and often does, request that the DC in the case receive the authenticated record of trial. *Id.* It is also important to remember that under RCM 1106(f)(3), upon request by counsel for the accused, the government shall provide the DC with a copy of the record of trial to assist in the preparation of RCM 1106 matters. *Id.* R.C.M. 1106(f)(3). Thus, in most cases it makes sense to serve both the accused and counsel with a copy of the authenticated record of trial.

[104] *Id.* R.C.M. 1101(a).

[105] AR 27-10, *supra* note 19, para. 5-29.

[106] The Army is replacing the FormFlow program and forms with e-forms in .xml format using Silanis Technology's PureEdge program. *See* Press Release, Silanis Technology, Inc., Silanis Awarded U.S. Army Enterprise License (Jan. 18, 2005), *available at* http://www.silanis.com/news/press-release/2005/silanis-awarded-us-army-enterprise-license.html.

[107] MCM, *supra* note 3, R.C.M. 1101(a); AR 27-10, *supra* note 19, para. 5-29b.

Deferments

The next likely event in phase one is responding to a deferment request. This event is the most intellectually challenging of all the events in phase one. The other events during phase one require at most an accurate accounting of events. Responding to deferment requests requires the chief of criminal law and the SJA to advise the CA on a number of statutes,[108] which the ACCA has described as "technical and complicated."[109] As a result of these somewhat unclear statutes, there have been a number of service court and CAAF cases on the subject of deferments.[110]

Before getting into the complicated aspects of deferments, it is necessary to discuss the basics. Deferments are a postponement of the running of certain punishments an accused received at court-martial or by operation of law.[111] The CA can defer any punishment that has gone into effect prior to action, including confinement, forfeitures, and reduction in rank.[112] Confinement goes into effect immediately after the sentence is announced,[113] while forfeitures and reductions in rank do not begin until two weeks after the announcement of the sentence.[114] For an accused to get a deferment, he must request it in writing and demonstrate why "the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date."[115] Rule for Courts-Martial 1101(c)(3) lists a number of factors that should be considered when determining whether a deferment request should be granted.[116] The CA must respond to the request in writing, stating the basis for denying the accused's request.[117] Although a denial of a defense deferment request may be conclusory,[118] it should at least list the RCM 1101(c)(3) factors that the CA considered in reaching his or her deferment decision.[119] The deferment request and the CA's response must be attached to the ROT.[120] If the CA grants a request for deferment, it must be included in the action.[121]

Deferment requests must be responded to in a timely fashion. Although neither the MCM nor the UCMJ establishes a specific time frame, the ACCA stated in *United States v. Sebastian*[122] that a deferment request must be acted upon as soon as the CA is available. It is particularly important to act on deferment requests prior to a punishment going into effect (assuming the request is received before the punishment begins to run). A diligent DC will often provide the government with notice of the defense's intent to request deferment of confinement prior to the sentencing hearing. Trial counsel must know to inform the chief of criminal law that the defense will be requesting deferment of confinement, if it is adjudged. The chief of criminal law should then make the necessary arrangements through the SJA to have the CA act on the request the day the sentence is announced. Alternatively, the chief should prepare an MFR to be attached to the ROT explaining why the CA could not act on the request immediately.

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[108] UCMJ arts. 57, 57a, 58b (2005).

[109] United States v. Kolodjay, 53 M.J. 732, 735 (Army Ct. Crim. App. 2000).

[110] *Id.*; United States v. Paz-Medina, 56 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Brown, 54 M.J. 289 (2000); United States v. Emminizer, 56 M.J. 441 (2002); United States v. Zimmer, 56 M.J. 869 (Army Ct. Crim. App. 2002).

[111] MCM, *supra* note 3, R.C.M. 1101(c)(1). An accused may face reductions in grade or forfeitures that are mandated by statute when he or she receives certain punishments at a court-martial.

[112] *Id*.

[113] UCMJ art. 57(b).

[114] *Id.* art. 57(a)(1).

[115] MCM, *supra* note 3, R.C.M. 1101(c)(3).

[116] In accordance with RCM 1101(c)(3), the convening authority must consider the following when deciding whether to grant a deferment:

> [T]he probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged, the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

Id. R.C.M. 1101(c)(3).

[117] *Id.*; United States v. Zimmer, 56 M.J. 869 (Army Ct. Crim. App. 2002); United States v. Sloan, 34 M.J. 4 (C.M.A. 1992).

[118] United States v. Schneider, 38 M.J. 387 (C.M.A. 1993).

[119] *Zimmer*, 56 M.J. 869.

[120] MCM, *supra* note 3, R.C.M. 1103(b)(3)(D).

[121] *Id*. R.C.M. 1107((f)(4)(E); THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 2-5l.

[122] 55 M.J. 661 (Army Ct. Crim. App. 2001).

Deferment requests regarding forfeitures and reductions generally require less intensive coordination because, assuming the DC submits the request the day the sentence is announced, the CA has two weeks to act on the request. Nonetheless, the TC must still inform her chief of criminal law, who will then coordinate for the CA to respond to the defense request. Requests for deferment of forfeitures have become commonplace in most jurisdictions. Criminal law offices should have a standard operating procedure (SOP) in place to ensure a timely response to all deferment requests.

The most challenging aspect of deferments is unraveling the relationship between forfeitures, deferments, and waivers. This issue generally surfaces when the CA wants to provide some financial support to the accused's dependents. Ensuring the accused's dependents receive financial support can be confusing. In many cases, two kinds of forfeitures must be addressed, adjudged, and automatic. In order to overcome both types of forfeitures, the CA will often have to employ a combination of deferments, waiver, and suspension or commutation of the accused's sentence. To aid in understanding the following discussion, a graphic depiction of the process is included at Appendix D.

In any case where an accused has requested deferment or waiver of forfeitures for the benefit of his dependents, it is important to determine what type of forfeitures are involved. The accused could have been sentenced to adjudged forfeitures, automatic forfeitures or both. The type of forfeitures involved affects what must be done to ensure the accused's dependents receive financial support. For example, if the accused's case only involves adjudged forfeitures, the CA cannot use a waiver to provide for the accused's dependents. However, if the accused's case only involves automatic forfeitures, then waiver could be used to benefit the dependents.

The type and amount of forfeitures in a case can be determined by looking at the sentence. Adjudged forfeitures are part of the announced sentence.[123] Thus, the duration and amount of adjudged forfeitures will be stated in the sentence. Although automatic forfeitures are not announced as part of the sentence, they are based on the sentence.[124] If an accused receives a punishment that includes confinement greater than six months, or confinement and a punitive discharge, then automatic forfeitures apply.[125] The automatic forfeitures will last as long as the accused is in confinement, and the amount of forfeitures will depend on the type of court-martial which tried the accused.[126] If the accused was tried by a special court-martial (SPCM), he will forfeit two-thirds pay per month, while at a general court-martial (GCM) he will forfeit all pay and allowances.[127]

After determining what type of forfeitures are involved in a case, the chief of criminal law can chart the actions that must be taken to provide the amount of support deemed appropriate by the CA. As illustrated at Appendix E, chiefs of criminal law should establish two lines of analysis, one for adjudged forfeitures and one for automatic forfeitures. Adjudged forfeitures can be deferred and/or suspended or disapproved.[128] Automatic forfeitures can be deferred and/or waived.[129] Both types of forfeitures can be deferred from fourteen days after a sentence is announced until action. The CA can waive automatic forfeitures anytime from fourteen days after the sentence is announced until action (for a maximum of six months). Waiver can only be used to the benefit of the dependents of the accused; thus, if the accused has no dependents, a waiver cannot be used. A CA can suspend or disapprove adjudged forfeitures (thus commuting the sentence to no forfeitures) in his action. It is important to remember if there are adjudged and automatic forfeitures, both types of forfeitures must be neutralized or the accused's dependents will not receive any money. Another facet that must be considered is the accused's end of time in service (ETS) date. Once the accused is convicted, his pay and allowances will stop upon his ETS date.[130] Finally, if a deferment or waiver is granted, it is absolutely critical that the finance office receive the paperwork necessary to adjust the Soldier's pay. If finance does not get the necessary paperwork from the criminal law section the deferment or waiver will have no effect. Below are three examples of common forfeiture situations and possible solutions. All three examples assume that the accused's ETS date is far enough in the future that it is not a concern.

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[123] MCM, *supra* note 3, R.C.M. 1003(b)(2).

[124] UCMJ art. 58b(a)(1) (2005).

[125] *Id*. art. 58b(a)(2).

[126] *Id*. art. 58b(a)(1).

[127] *Id*.

[128] *Id*. arts. 57(a)(2), 60(c)(2).

[129] *Id*. arts. 58b(a)(1), 58b(b).

[130] DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 3, secs. 030206, 030207 and ch. 48, sec. 480802 (2002).

Scenario One: Assume an individual is sentenced at a GCM to three years of confinement, total forfeiture of all pay and allowances, and a punitive discharge. Also assume the CA wants to provide the maximum amount of support to the dependents of the accused, and the accused has submitted a request for deferment of adjudged and automatic forfeitures.

Based on the above facts the CA must defer the adjudged and automatic forfeitures.[131] This will allow the accused's dependents to receive all the pay and allowances that would be due the accused if he were a PVT E-1. Deferment of adjudged and automatic forfeitures will only partially achieve the CA's objective, however, because the deferment expires at action.[132] The CA must take additional steps to prevent the adjudged and automatic forfeitures from going into effect at action. To remove the adjudged forfeitures, the CA can either suspend or disapprove them. The only method for affecting automatic forfeitures after action is by waiver. So, if a CA wants to maximize the support going to an accused's dependents, the CA should waive automatic forfeitures at action.

Scenario Two: At a GCM an accused's sentence is four years of confinement and a BCD. The CA only wants to give the family three months of pay and allowances. In this fact pattern, the CA can use his waiver power starting fourteen days after the sentence is announced and ending three months after it begins. Deferment, disapproval, and suspension do not apply to this scenario because there were no adjudged forfeitures. Thus, the only forfeitures to be overcome are the automatic forfeitures, and that can be done with a waiver.

Scenario Three: The accused was convicted at a BCD SPCM of assaulting his wife. He is sentenced to four months confinement, reduction to PVT E-1, two-thirds forfeiture of pay per month for four months, and a BCD. The CA wants to provide the support he can, but the accused refuses to submit a deferment request. The post-trial process takes four and a half months, so by the time of action the accused is on voluntary excess leave. Based on the above facts, the accused would face adjudged and automatic forfeitures for four months. This is a troubling fact pattern because the CA cannot provide any support through the forfeitures in this case. In order for a CA to defer any punishment, the accused must request deferment.[133] Without a deferment request, there is no way for the CA to affect the adjudged forfeitures until action. By the time the CA takes action in this case, the accused is out of confinement and thus there are no automatic forfeitures to waive at action. Additionally, the accused is on voluntary excess leave pending his appeal and is not entitled to any pay.[134] If the CA were to suspend or disapprove forfeitures at action that money would go to the accused. If the CA tried to waive the automatic forfeitures before action, that effort would have no effect because the adjudged forfeitures would still be in place. In this scenario the only support the Army will be able to provide is through transitional compensation, since the crime the accused committed was one of domestic violence.[135]

The above discussion amply supports the ACCA's conclusion that the relationship between adjudged and automatic forfeitures, deferments, and waivers is technical and complicated. It is easy to become confused while trying to ensure the CA's forfeiture objectives are achieved. Organization is the key to preventing confusion in this area.

Production of the Record of Trial

The next event in phase one is the production of the ROT. This event generally occupies the greatest amount of time during the post-trial process and can be a significant management challenge for a chief of criminal law. New chiefs of criminal law will likely have read ROTs before, but probably put little thought toward what must go into the record. When addressing the production of the ROT, it makes sense to begin with a discussion of what must go into the record. Rule for Courts-Martial 1103, AR 27-10, paragraph 5-40, and DD Form 490 describe what must go into a ROT.

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[131] It is important to remember that a convening authority can defer an accused's forfeitures, but the only way to constructively direct those deferred forfeitures to the dependents of the accused is to make the deferment itself contingent on the accused's establishing and maintaining an allotment for the benefit of those dependents. Such an allotment requirement should be described in any deferment approval signed by the convening authority. An example of such a deferment approval is at Appendix K.

[132] UCMJ art. (a)(2); MCM, *supra* note 3, R.C.M. 1101(6).

[133] MCM, *supra* note 3, R.C.M. 1101(c)(2).

[134] U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-14 (19 Dec. 1986).

[135] U.S. DEP'T OF DEFENSE, INSTR., TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS 1342.24 (23 May 1995); U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE CENTER (20 Oct. 2003).

Rule for Courts-Martial 1103 breaks down the content of the ROT into three categories: the transcript; other matters; and matters attached to the record.[136] The transcript will be either verbatim or summarized. Verbatim transcripts are required in all cases where the adjudged sentence includes a punitive discharge, any punishment in excess of six months, or forfeiture of pay greater than two-thirds pay per month.[137] Summarized transcripts will be required in all other cases. Although the case law in this area has stated that verbatim only means substantially verbatim,[138] and "insubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript,"[139] military appellate courts appear to have a strict view of what is a substantial omission. Missing side bar conferences with the MJ[140] and arguments concerning court member selection have both been held to be substantial omissions.[141] If the government is unable to provide a verbatim record, there is a presumption of prejudice to the accused,[142] and the maximum sentence the government can approve is one that includes no more than six months of any punishment, no forfeitures greater than two-thirds pay per month, and no punitive discharge.[143]

In addition to a transcript, the record must contain other documents. In order to be complete, the record must include the following: the original charge sheet, a copy of the convening order and amendments, requests for trial by MJ alone or panel, the original dated signed action (of course, to be added after the CA takes action), and exhibits (with the permission of the MJ; this includes copies, photographs, and descriptions of exhibits received into evidence).[144] A failure to include any of the above items requires the Army court or the CAAF to determine if the missing item represents a substantial omission.

The likelihood of accidentally providing an incomplete ROT is greater than that of producing a non-verbatim transcript. A record with a non-verbatim transcript will be apparent when the chief of criminal law or TC reads the transcript. It is more likely that the failure to include a copy of an exhibit will go unnoticed until appeal. Thus, it is important that TC and chiefs of criminal law make a copy or take a picture of every exhibit to be attached to the record. If the Army court or the CAAF determines that a particular missing document or exhibit has rendered the record substantially incomplete,[145] the remedy could be the same as that for a non-verbatim ROT, or if the omission affects the findings, the affected charges will be dismissed.[146]

Finally, the additional documents that should accompany the ROT are the matters attached to the ROT. Such matters include: the Article 32 investigation, the SJA's pretrial advice, the record of a former hearing, written special findings from the MJ, exhibits that were marked but never received into evidence, RCM 1105 matters or a waiver of such matters, any deferment requests and the CA's action on them, explanations of any substituted authentication or failure to serve the ROT on the accused, the SJAR, any RCM 1106 matters, any written recommendations for clemency, any statement of why it was impracticable for the CA to act, conditions on suspended sentences, any waiver or withdrawal of appellate review, and any record of a vacation proceeding.[147] It should be noted that failure to include the above items with the ROT will not render the record incomplete. In such cases, the record may be returned as not ready for appellate review; however, the government will not be prevented from approving punishments in excess of six months or sentences which include a punitive discharge.

Review of the Record of Trial

After the ROT is transcribed and compiled (to the extent possible at this stage of the post-trial process), it must be reviewed by the TC and the DC. This last part of phase one is usually called errata. Rule for Courts-Martial 1103(i)

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[136] MCM, *supra* note 3, R.C.M. 1103(b)(2).

[137] *Id.* R.C.M. 1103(b)(2)(B)(i) and (ii).

[138] United States v. Henry, 53 M.J. 108, 110 (2000); United States v. Gray, 7 M.J. 296, 297 (1979).

[139] *Gray*, 7 M.J. at 297.

[140] *Id*. at 298.

[141] United States v. Sturdivant, 1 M.J. 256 (C.M.A. 1976).

[142] United States v. White, 52 M.J. 713, 715 (Army Ct. Crim. App. 1999).

[143] MCM, *supra* note 3, R.C.M. 1103(f).

[144] *Id*. R.C.M. 1103(b)(2)(D)(v).

[145] *White*, 52 M.J. at 715.

[146] United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981).

[147] MCM, *supra* note 3, R.C.M. 1103(b)(3).

describes the government's obligations regarding errata. The TC must personally examine the ROT prior to authentication and make those changes necessary to ensure an accurate ROT.[148] How a TC accounts for changes to the ROT varies from installation to installation. In some jurisdictions the TC make pen and ink changes to the actual ROT, while in other jurisdictions the TC fills out an "errata sheet"[149] and forwards that sheet with the ROT for the judge's consideration.

In addition to the TC reviewing the ROT, the DC must also be given a reasonable opportunity to review the ROT and make suggested changes.[150] Rule for Courts-Martial 1103(i) does not establish a set amount of time that the DC must be given to review the ROT. The Rule merely requires that the DC be given a reasonable opportunity to review the ROT.[151] Chiefs of criminal law should work out what they believe "reasonable" is with the senior defense counsel (SDC) in their area. In *United States v. Maxwell*,[152] the agreement between the chief of criminal law and the SDC provided five days for the DC to review the ROT. If the chief of criminal law and the SDC cannot agree on what is a reasonable opportunity to review a ROT, then the government must establish its own standard and be prepared to defend it to the MJ and on appeal. At a minimum, DC should be given twenty-four to forty-eight more hours to complete the review of the ROT than is given to the TC. Also, service of the ROT should be made on the DC personally (rather than on support personnel) with documentation. Additionally, a MFR should be made regarding the trial schedule of the DC at the time the record was served.[153]

Authentication

The final step in phase one is the authentication of the ROT. Authentication is required in all cases that include a conviction.[154] This step can be done in one of two ways. The first and most common method is to have the MJ who presided over the court-martial authenticate the record. The second method is called substituted authentication and is used when the MJ is unable to authenticate the ROT. In substituted authentication, the TC authenticates the record.

In the vast majority of cases, the MJ will authenticate the ROT. When preparing a ROT to be authenticated, chiefs of criminal law must ensure that all the MJs involved in the case are authenticating their portion of the ROT.[155] Although many courts-martial have a single MJ presiding over the proceedings from arraignment through any post-trial session, some do not. The most common scenario where two MJs have presided over a case occurs when one judge conducts the arraignment and another presides over the trial. Even though the first judge only conducted the arraignment, he still must authenticate that portion of the ROT over which he presided. Failure to do so may cause the Army court or the CAAF to return the record for authentication.[156]

In addition to ensuring that all the MJs involved in the case authenticate their portion of the ROT, chiefs of criminal law must be concerned with post-trial processing time. Unless otherwise accounted for, time spent getting the ROT authenticated is time against the government. Criminal law offices must keep track of how long it is taking the MJ to authenticate the ROT and include that information in any memorandum, SJAR, or addendum that explains the post-trial delay in the case.

Getting the ROT authenticated can be complicated when dealing with a MJ who is not stationed at your installation. Many of the smaller posts have itinerant judges who are only at that installation when there is a court-martial. These judges often travel a great deal, so it is not acceptable to hold records of trial until these judges are next at your installation (unless the time is very short—under five days is a good rule of thumb). Also, because these judges travel so much, it may not be enough to send the record to the judge's office. Many of these judges will do several trials back-to-back which can cause

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[148] *Id*. R.C.M. 1103(i)(1)(A).

[149] In jurisdictions that use an errata sheet, the TC notes where he believes the record is incorrect and how it should be corrected.

[150] MCM, *supra* note 3, R.C.M. 1103(i)(1)(B).

[151] *Id.*

[152] 56 M.J. 929 (Army Ct. Crim. App. 2002).

[153] The above-mentioned suggestions are necessary only when the chief of criminal law and SDC cannot agree on what a reasonable opportunity is under RCM 1103(i)(1)(B).

[154] *Id*. Rule for Courts-Martial 1104(a) states that authentication by a military judge is required in all general court-martial cases and in all cases in which the sentence includes a bad conduct discharge, confinement for more than six months, or forfeitures for more than six months. MCM, *supra* note 3, R.C.M. 1104(a). Army Regulation 27-10 states that "[t]he record of trial in a SPCM will be authenticated in the same manner as that of a GCM." AR 27-10, *supra* note 19, para. 5-43b. Rule for Courts-Martial 1305 describes the authentication process for summary courts-martial. MCM, *supra* note 3, R.C.M. 1305.

[155] MCM, *supra* note 3, R.C.M. 1104(a)(2)(A).

[156] United States v. Johnson, 58 M.J. 140 (2003).

them to be away from their office for weeks. The best course of action is to verify the location of the judge, call the judge and inform him you are sending the ROT for authentication. After ensuring that the judge has received the record, call every week or so (depending on the length of the record) and document those calls. These steps will help demonstrate the government has done all it can to speed the post-trial process along.

On rare occasions, it may be necessary to do a substituted authentication. This method of authentication is to be used when "the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence."[157] If it becomes necessary to use substituted authentication, the reason should be included in the ROT.[158] Accounting for the reason why substituted authentication is necessary can be done in the TC's authentication document or in an MFR included in the ROT.

The only genuinely controversial aspect of substituted authentication is the question of when a MJ's absence is long enough to necessitate a substituted authentication. Military courts have held that when a MJ leaves active duty[159] or has a permanent change of station,[160] substituted authentication can be used. A harder question arises when the MJ is on leave. The Navy and Army appellate courts have addressed this issue.[161] The Navy court has held that a thirty-day leave is adequate to permit substituted authentication.[162] The Army Court of Military Review (ACMR) has held that a fifteen-day delay due to the MJ's leave is not adequate to permit a substituted authentication.[163]

Counsel should be cautious when using substituted authentication. The Discussion section of RCM 1104(a)(2)(B) states, "substituted authentication is authorized only in emergencies."[164] Additionally, the cases in this area emphasize that one of the purposes of the having the MJ authenticate the ROT is "to preclude perceptions of impropriety in the authentication process."[165] Based on the Discussion to RCM 1104(a)(2)(B) and the cases in this area, substituted authentication should only be used in exceptional circumstances; the MJ should be unable to authenticate the record for at least thirty days.

Part III: Authentication to Addendum

Phase two of the post-trial process begins with the receipt of the authenticated ROT from the MJ, and includes serving the accused and DC with the signed SJAR and authenticated record, receiving and reviewing defense RCM 1105 and 1106 matters, and completing the SJA's addendum.

This phase, unlike phase one, is dominated by the actions of the chief of criminal law and the SJA. The initial part of phase two is a lull, while the government waits for the MJ to return the authenticated ROT. However, rather than simply waiting, the government should spend this time ensuring that the groundwork for the remainder of the post-trial process has been properly laid. The chief of criminal law should review the drafts of the SJA's Post-Trial Recommendation (SJAR), the addendum, the action, and the promulgating order. Doing so will ensure that the process moves forward quickly once the MJ authenticates the ROT.

When the MJ completes his review of the ROT, he forwards the authenticated record to the SJA office.[166] In accordance with RCM 1104(b), when the government receives the authenticated ROT it must be served upon the accused.[167] Ideally, the criminal law office should serve the SJAR on the accused at the same time. The accused has ten days (plus a possible additional twenty days) from the service of the SJAR and authenticated ROT to submit his clemency matters; it is important

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[157] MCM, *supra* note 3, R.C.M. 1104(a)(2)(B).

[158] *Id*. R.C.M. 1103(b)(3)(E).

[159] United States v. Parker, 54 M.J. 700, 710 (Army Ct. Crim. App. 2001).

[160] United States v. Lott, 9 M.J. 70, 71 (C.M.A. 1980); United States v. White, 12 M.J. 643, 645 (A.F.C.M.R. 1981).

[161] United States v. Walker, 20 M.J. 971 (N.M.C.M.R. 1985); United States v. Batiste, 35 M.J. 742 (A.C.M.R. 1992).

[162] *Walk*er, 20 M.J. 971.

[163] *Batiste*, 35 M.J. at 744.

[164] MCM, *supra* note 3, R.C.M. 1104(a)(2)(B) discussion.

[165] *Batiste*, 35 M.J. 742; United States v. Myers, 2 M.J. 979 (A.C.M.R. 1976); United States v. Cruz-Rijos, 1 M.J. 429 (C.M.R. 1976).

[166] MCM, *supra* note 3, R.C.M. 1104(b).

[167] *Id*.

to remember that the ten-day time period does not begin to run until both the SJAR and authenticated ROT have been served.[168] Thus, timely certified service of both the SJAR and the authenticated ROT is of the essence.[169]

The Staff Judge Advocate's Recommendation (SJAR)

One of the most important documents of the post-trial process is the SJAR.[170] The SJAR provides the CA with a summary of the results of the court-martial, the accused's service record, and the SJA's personal recommendation regarding the case.[171] Although at times the SJAR can seem like little more than a summary of events, its importance should not be underestimated. Chiefs of criminal law and the SJA must keep in mind that the SJAR is a congressionally-mandated event that must occur prior to action in any GCM or SPCM where the sentence includes a punitive discharge.[172]

Although the SJAR is signed and served during phase two, the chief of criminal law should prepare the SJAR during phase one. Typically, the information necessary to complete the SJAR is available almost immediately after trial. Therefore, in most cases, the government can have the SJAR prepared and ready to be signed and dated as soon as the authenticated record returns.[173] Once signed and dated, the SJAR and authenticated ROT can be served on the accused.[174]

The required contents of the SJAR are described in RCM 1106(d), and includes the findings and sentence in the case, any recommendations for clemency made by the sentencing authority, a summary of the accused's service record,[175] a statement of the nature and extent of any pretrial restraint, obligations under any pretrial agreements, and a specific recommendation as to the action in the case.[176]

Although it should be easy to execute an accurate and complete SJAR, every year the ACCA or CAAF returns cases due to errors in this document. The errors have included: failing to properly reflect charges of which the accused was acquitted,[177] or charges that were dismissed by the MJ or government;[178] failing to accurately reflect the sentence adjudged; omitting a clemency recommendation made at the time the sentence is announced;[179] and failing to accurately report the accused's prior awards and decorations,[180] prior misconduct,[181] or pretrial restraint.[182] Erroneous information in the SJAR

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[168] *Id*. R.C.M. 1105(c)(1).

[169] *The Clerk of Court Handbook* provides several formats for certificates of service. THE CLERK OF COURT HANDBOOK, *supra* note 8.

[170] It should be remembered that an SJAR is not required in every case. According to RCM 1106(a), an SJAR is required "[b]efore the convening authority takes action under RCM 1107 on a record of trial by general court-martial or a record of trial by special court-martial that includes a sentence to a bad-conduct discharge or confinement for one year." MCM, *supra* note 3, R.C.M. 1106(a).

[171] *Id*.

[172] UCMJ art. 60(d) (2005).

[173] Technically, the SJAR can be prepared immediately after trial; however, if it is done too early, there is a chance that information may change as the process goes on. Further, many SJAs are unwilling to review the document too far in advance.

[174] As you establish the SOP for your office, consider establishing a twenty-four-hour rule for having the SJAR signed and mailed along with the authenticated record of trial after receiving the record of trial from the military judge.

[175] The SJAR summary of the accused's service record must include: length of service, character of service, and any awards or decorations received by the accused. Also, the SJAR must summarize any prior non-judicial punishment and any previous convictions.

[176] MCM, *supra* note 3, R.C.M. 1106(d).

[177] United States v. Lindsey, 56 M.J. 850 (Army Ct. Crim. App. 2002).

[178] United States v. Gunkle, 55 M.J. 26 (2001).

[179] United States v. Paz-Medina, 56 M.J. 501 (Army Ct. Crim. App. 2001).

[180] In *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993), the Court of Military Appeals held that omission of Vietnam awards and decorations from a SJAR was plain error. Omission of awards and decorations however, does not automatically equate to plain error. Since *Demerse*, courts have analyzed prejudice from the omission of awards on a case-by-case basis. For example, the Navy-Marine Court of Criminal Appeals recently distinguished the omission of a Navy Achievement Medal from the omission of combat medals. United States v. Eastman, 2000 CCA LEXIS 167 (N.M. Ct. Crim. App. 2000) ("The award was not for Vietnam service or combat related duties. While we do not intend to demean the award in any sense, we have concluded that it would not have had the potential impact on the convening authority as the awards omitted in *Demerse* or *Barnes* could have had."); *see also* United States v. McKinnon, 38 M.J. 667 (A.C.M.R. 1993) (omission of all awards from PTR not plain error); United States v. Leslie, 49 M.J. 517 (N-M. Ct. Crim. App. 1998) (omission of CIB from prior Army service from SJAR not prejudicial).

[181] United States v. Wellington, 58 M.J. 420 (2003)..

[182] United States v. Wheelus, 49 M.J. 283, 289 (1998) (stating that the SJA's failure to report details of pretrial restraint was not prejudicial where the pretrial restraint issue was not the thrust of clemency request); United States v. Allison, 56 M.J. 606, 607 (C.G. Ct. Crim. App. 2001) (granting appellant sentence

can lead the CA to believe the accused was convicted of more than actually occurred at trial or that the accused's military record is less favorable than it truly is, potentially having an impact on the CA's decision regarding clemency. If an error is found, an appellate court may send the case back for a second SJAR and action.[183] Moreover, in some cases, the appellate court may simply award sentence relief to the accused.[184] To prevent such errors and ensure a complete and accurate SJAR, a systematic approach to the SJAR should be adopted. A common method of ensuring the accuracy of the SJAR begins with reading the record and tabbing the following information: any charge sheets, any passages which involved the consolidation of charges, announcement of the findings, announcement of the sentence, findings worksheet, sentencing worksheet, the accused's enlisted record brief (ERB) or officer enlisted brief (ORB), and any motions that involved pretrial restraint. Once the record has been tabbed, it is an easy matter to review the SJAR against the record. It is important to remember that the courts that will be reviewing your office's post-trial process will be doing so by examining your records of trial. The only way to ensure your SJAR is accurate is by comparing it to the ROT.

Military appellate courts have emphasized importance of the SJAR,[185] and in particular the identity of its author.[186] It might seem unnecessary to emphasize that the SJAR must be done by a qualified SJA,[187] but there are enough cases reported in which the SJA was not the author of the SJAR that it bears mentioning. In situations where it is necessary for the deputy SJA to sign the SJAR (due to the absence or disqualification of the SJA) the deputy should sign as the acting SJA and not as the deputy.

Chiefs of criminal law must be sensitive to the low standard for reversible error with regard to the SJAR. This low standard exists despite what appears to be contrary language in RCM 1106(f)(6). Rule for Courts-Martial 1106(f)(6) states, "Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error."[188] Despite the broad language of RCM 1106(f)(6) and similar language in UCMJ Article 60(c), the normally high standard for plain error is dramatically lower when it comes to matters which might affect the CA's clemency decision. The CAAF has established a standard for prejudice of clemency matters of "some colorable showing of possible prejudice."[189] Further, the CAAF has encouraged service courts to "moot claims of prejudice"[190] by using the service courts' Article 66(c) power to grant relief.[191] This is an important distinction for chiefs of criminal law and the TCs to understand. The appellate courts will not be as forgiving of post-trial errors as they would be of trial errors. The appellate courts understand that trial errors are made in the heat of the moment and are part of the dynamic nature of trial practice. There is no heat of the moment in the post-trial process, and the vast majority of errors during this time—particularly in the SJAR—are attention to detail errors. The court will have little patience for these errors.

Service of the Authenticated Record and SJAR

Rule for Courts-Martial 1104 requires that the government serve the authenticated record upon the accused.[192] However, if the accused cannot be located, his copy shall be forwarded to his DC.[193] Rule for Courts-Martial 1106 requires that the government serve the SJAR upon both the accused and his DC.[194] The accused may request that his copy of the record and

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relief for SJA's failure to include information on pretrial restriction in SJAR); United States v. Holman, 23 M.J, 565 (A.C.M.R. 1986) (stating that it was error for SJA to incorrectly report that appellant served time in pretrial confinement, however appellant suffered no prejudice).

[183] *Wheelus*, 49 M.J. at 289.

[184] *Id.*

[185] United States v. Boatner, 43 C.M.R. 216 (1971); United States v. Cunningham, 44 M.J. 758 (1996); United States v. Finster, 51 M.J. 185 (1999).

[186] *Cunningham*, 44 M.J. at 763.

[187] In addition to being the convening authority's SJA, the SJA must be qualified. Rule for Courts-Martial 1106(b) discusses some of the bases regarding the disqualification of an SJA. In cases where the SJA is required to review his own work or testimony, the SJA is usually disqualified from participating in the SJAR. United States v. Engle, 1 M.J. 387 (C.M.A. 1976); United States v. Gutierrez, 57 M.J. 148 (2002).

[188] MCM, *supra* note 3, R.C.M. 1106(f)(6).

[189] *Wheelus*, 49 M.J. at 288.

[190] *Id.* at 289.

[191] UCMJ art. 66(c) (2005).

[192] MCM, *supra* note 3, R.C.M. 1104b(1)(C).

[193] *Id.*

[194] *Id.* R.C.M. 1106(f).

the SJAR be served upon his DC.[195] Requesting service upon the DC is a common practice in many jurisdictions. Given the likelihood that a copy of the record will be going to the DC anyway, it is usually best, as a matter of practice, to simply serve the authenticated record, and the SJAR, on both the accused and his DC.

Either the TC or a member of the criminal law staff should serve the authenticated record and the SJAR. The government should require the defense representative that receives the authenticated record to sign a notice of receipt (examples of such receipt documents are contained in the Clerk of Court Post-Trial Handbook, figures 2-2 through 2-6).[196] In the event that the authenticated record and the SJAR are mailed to either the accused or his counsel, the material should be mailed first class with return receipt requested. In either case, the CR should make the notice of receipt or the return receipt part of the record.[197] This will serve as proof of receipt in the event of any challenge. Moreover, the notice starts the clock for processing the accused's post-trial submissions.[198]

If either party identifies errors in the authenticated ROT, the following process should be observed. The party raising the issue should forward a statement of the alleged error or inaccuracy and a proposed correction to the MJ.[199] The MJ will give notice of the proposed changes to all parties. The parties will be given an opportunity to review the proposed correction and respond. The MJ will then issue a certificate of correction. The certificate will in turn be authenticated by the parties in the same manner as the original record was authenticated. The certificate of correction and notice of the accused's receipt of the certificate of correction is then attached to the ROT.[200]

As discussed previously, the accused then has ten days from receipt of the SJAR or the authenticated ROT to submit RCM 1105 and 1106 matters. In addition to the initial ten days, a twenty-day extension may be granted for good cause.[201] New chiefs of criminal law should not read the "for good cause" requirement in RCM 1105(c)(1) too literally. Defense counsel routinely request extensions for RCM 1105 and 1106 matters with little more than a form letter. There are three arguments that support liberally granting defense requests for extension. First, only the CA is empowered to deny the defense request.[202] Convening authorities are universally very busy; it is hard to envision a circumstance that would justify taking up the SJA's and the CA's valuable time for the purpose of denying a request for an extension on RCM 1105 and 1106 matters. Second, defense delays do not count against the government's processing time, so why not grant the extension?[203] Third, if the CA denies the request and the accused and counsel do not submit any matters, the appellate courts may conclude that the CA's decision to deny the extension was an abuse of discretion and send the ROT back for a new SJAR and action.

Once the accused and his counsel receive the authenticated ROT and the SJAR, they will typically submit RCM 1105 and 1106 matters. Rule for Courts-Martial 1105 states that after a sentence is adjudged in any courts-martial, the accused may submit matters to the CA that "may reasonably tend to affect the CA's decision whether to disapprove any findings of guilty or to approve the sentence."[204] Rule for Courts-Martial 1106 allows the DC to respond in writing to the SJAR, rebutting "any matter in the recommendation believed to be erroneous, inadequate, or misleading, and [commenting] on any other matter."[205]

In most cases, the defense submissions are served on the government as a single submission, often called the defense RCM 1105 and 1106 matters or clemency packet. It is important for chiefs of criminal law to keep in mind that the defense does not have to submit their RCM 1105 and 1106 matters at the same time. Under RCM 1105 and 1106, the defense is entitled to a period of ten days to submit matters. Thus, the defense may submit RCM 1105 matters five days after receiving the authenticated ROT and the SJAR, and still have five additional days to submit RCM 1106 matters. Because of the

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[195] *Id*.

[196] THE CLERK OF COURT'S HANDBOOK, *supra* note 8, figs. 2-2 to 2-6.

[197] MCM, *supra* note 3, R.C.M. 1104(b)(1)(B).

[198] *Id*. R.C.M. 1105(c)(1).

[199] *Id*. R.C.M. 1104(d).

[200] *Id*. R.C.M. 1104(d)(2), (3).

[201] *Id*. R.C.M. 1105(c)(1).

[202] *Id*. R.C.M. 1105(c)(1).

[203] United States v. Maxwell, 56 M.J. 928 (2002).

[204] MCM, *supra* note 3, R.C.M. 1105.

[205] *Id*. R.C.M. 1106(f)(4).

emphasis on speedy post-trial processing, chiefs of criminal law may receive defense RCM 1105 matters, assume they are RCM 1105 and 1106 matters, and seek CA action prematurely. Thus, it is important to make sure that the defense submissions you receive are the complete RCM 1105 and 1106 submissions, especially when seeking CA action before the ten-day period for defense submissions has expired.

As discussed above, the time frame for submission of clemency matters is triggered by service of the authenticated ROT or the SJAR, whichever is later. If the accused has not submitted a clemency packet by that time, it is technically permissible to go ahead and present the case to the CA for initial action. However, taking action without a clemency packet may have ramifications. Appellate courts have repeatedly described RCM 1105 as "the accused's last best chance for clemency."[206] Therefore, they tend to view with suspicion any action taken when the accused did not submit matters pursuant to RCM 1105 and 1106. In some cases, appellate courts have returned the case to allow the accused to submit matters.[207] As such, it is important to be very careful about taking action without RCM 1105 and 1106 matters, even if the time period for submissions has expired. In some cases, it may be best to allow the accused an additional extension for the submission of matters.[208] However, if you decide to send the case to the CA for initial action after the one extension, be sure the record reflects that the accused and counsel were on notice of the final date that action would be taken if no matters were submitted.

When faced with the above situation, the chief of criminal law should contact the DC (both in writing and by telephone) prior to the thirtieth day, and advise the DC that no matters have been received and inform the DC of the date on which the SJA will take the case to the CA for initial action. Clearly inform the DC that matters will be accepted up to that date, but that no further extensions will be granted. This information should be conveyed in writing and copies should be furnished to the SDC or the regional defense counsel (RDC), if necessary. Additionally, this memorandum should be inserted into the ROT.

SJAR Addendum

After receiving defense submissions (or after the period of time for defense submissions has expired), the SJA has the opportunity to supplement his SJAR with an addendum. It is imperative that the chief of criminal law and the SJA read all of the defense RCM 1105 and 1106 matters. Reading this material is critical to drafting the addendum and is important to ensuring that the DC has not inadvertently included matters which might actually be harmful to the accused.[209] The addendum generally serves three purposes: accounting for defense submissions, responding to allegations of legal error, and providing the CA with new matters that the SJA feels is relevant to the clemency determination. Although an addendum is not necessary in all cases (in fact, it is only required if defense makes an allegation of legal error), the better practice is to create one in every case.

One reason for creating an addendum to the SJAR in every case is to account for all defense submissions and establish that the CA considered them prior to taking action. The government is required to establish in the ROT that the CA considered all the matters submitted by the defense.[210] The ACMR in *United States v. Hallums* stated that it "will not 'guess' as to whether clemency matters prepared by the DC were attached to the recommendation. . . . There must be some tangible proof the CA did, in fact, have these matters presented to him."[211] By executing an addendum that specifically lists the defense matters considered by the CA, and then ensuring defense matters are included in the ROT, chiefs of criminal law can prove that defense matters were considered by the CA.

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[206] United States v. Gilley, 56 M.J. 113, 124 (2001) (citing United States v. MacCulloch, 40 M.J. 236, 239 (C.M.A. 1994)).

[207] United States v. Beckelic, ACM No. 27973, 1990 CMR LEXIS 56 (Jan. 5, 1990) (returning case for new action where SJA denied appellant's request for an extension submitted after the expiration of the ten day period).

[208] *Maxwell*, 56 M.J. 928. In *Maxwell*, the CAAF did not hold the government accountable for post-trial delay that occurred due to the Defense's failure to submit RCM 1105 and 1106 matters in a timely fashion.

[209] *See Gilley*, 56 M.J. 113. In *Gilley* the record of trial was returned for a new RCM 1105 and 1106 submission, SJAR, and action due to ineffective assistance of counsel. The ineffective assistance of counsel was based on DC's submission of letters from the accused's family that undercut the accused's petition for clemency. *Id.* at 125. Although it is not generally the government's responsibility to protect the accused from himself, it is the government's job to protect the record. If there is material in the defense submissions that will likely be harmful to the accused, to prevent a claim of ineffective assistance of counsel, chiefs of criminal law should ensure that the accused wants the questionable material considered by the convening authority.

[210] United States v. Hallums, 26 M.J. 838, 841 (A.C.M.R. 1988).

[211] *Id.*

In addition to accounting for defense submissions, the addendum should be used to respond to allegations of legal error. Allegations of legal error can be raised by any of the material submitted by defense under RCM 1105; regardless of where the defense raises its allegations, the SJA must respond.[212] Because the SJA has an affirmative duty to respond to any defense allegation of legal error, raising and responding to legal error has resulted in considerable appellate litigation. Failure to identify and respond to legal error may prejudice the accused.[213] Therefore, when the government receives RCM 1105 and 1106 submissions, they should be carefully reviewed to determine if legal error has been raised.[214] If the accused's submissions are vague or unclear regarding legal error, clarification should be sought from the DC. If the DC fails to clarify the matter, it is probably best to assume he is raising legal error and respond accordingly.[215] Also, look closely at the accused's submissions to ensure that he is not raising a claim of ineffective assistance of counsel during the post-trial process. Staff judge advocates need to be aware of this issue and be prepared to contact the SDC or RDC to get the accused effective assistance of counsel.

When legal error is raised, the SJA must state whether he believes the CA needs to take corrective action. This response is almost always in an addendum to the SJAR, because legal errors are almost always raised in defense RCM 1105 and 1106 matters.[216] The response need not include any analysis or rationale for the SJA's response.[217] Rather, the response may consist of a short statement of agreement or disagreement. In most cases, the simple response is the best approach.[218] Appendix F contains an example of an addendum which responds to an allegation of legal error.

Finally, the addendum can be used to present the CA with additional information which the SJA believes is relevant to the CA's action. The SJA may believe this additional information is necessary to respond to a claim made by the defense in the RCM 1105 and 1106 matters, or is relevant to clemency. If this new information meets the definition of "new matter" in the Discussion section of RCM 1106(f)(7), then the addendum must be served on the accused and the DC, and they must be allowed an additional ten days (plus a possible twenty days) to respond.[219] New matter is defined as "discussion of the effect of new decisions on issues in the case, matter from outside the ROT, and matters not previously discussed."[220] This definition is vague, and unfortunately the courts have not created a more comprehensive definition.[221] As such, familiarity with the case law is the best means for counsel to learn to identify new matter.[222] The failure to allow the accused to respond

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[212] MCM, *supra* note 3, R.C.M. 1106(d)(4).

[213] *See* United States v. Welker, 44 M.J. 85 (1994) (citing United States v. Hill, 27 M.J. 293, 296-97 (1988)) (stating that in most instances, failure of the SJA to prepare an SJA recommendation and responding to any legal error intimated by the accused will be prejudicial and will require remand of the record to the convening authority for preparation of a new recommendation); United States v. Craig, 28 M.J. 321 (C.M.A. 1989) (SJA failure to respond to post-trial assertion of legal error is tested for prejudice). *See also* United States v. Harris, 52 M.J. 665 (Army Ct. Crim. App. 1999); (United States v. Green, 44 M.J. 93, 95 (1996) (stating that when the SJA fails to comment on legal error, the appellate court may either return the case for a new SJAR and action or where appropriate, the appellate court may determine prejudiced on its own).

[214] United States v. McKinley, 48 M.J. 280 (1998) (holding that the accused failed to raise issue of selective prosecution in MCM, *supra* note 3, R.C.M. 1105 matters, therefore, SJA not required to respond).

[215] United States v. Zimmer, 56 M.J. 869 (Army Ct. Crim. App. 2002).

[216] Counsel should be aware that legal error need not be raised specifically in RCM 1105 submissions as long as it is raised before the deadline for submission of the matters. Chiefs of criminal law need to also remember that an accused and his counsel can submit RCM 1105 matters anytime after the sentence is announced. In most cases, RCM 1105 matters will not be received until after the accused and his counsel have been served with the authenticated record of trial. This is typically true because the DC often uses the authenticated record to support the clemency petition. In some cases however, the accused may submit matters prior to receiving the authenticated record.

[217] *McKinley*, 48 M.J. 280. In accordance with *McKinley* the following passage should be an adequate response to an allegation of legal error, "I have considered the defense allegation of legal error regarding _____. I disagree that there was legal error. In my opinion, no corrective action is necessary."

[218] *Id.*; United States v. Broussard, 35 M.J. 665 (A.C.M.R. 1992).

[219] When an addendum is used which does not contain new matter, it does not have to be served on the accused and the accused's counsel. Thus, if the addendum does no more than state the SJA's agreement or disagreement with the accused's allegations or merely accounts for defense RCM 1105 and 1106 matters, then it need not be served on the accused. The following language is typical of an addendum which does not insert new matter;

> The matters submitted by the defense are attached to this Addendum and are hereby incorporated by reference. Nothing contained in the defense submissions warrants further modification of the opinions and recommendations expressed in the Staff Judge Advocate's Recommendations. Of course, you must consider all written matters submitted before you determine the appropriate action to be taken in this case.

United States v. Catrett, 55 M.J. 400 (2001).

[220] MCM, *supra* note 3, R.C.M. 1106(f)(7), R.C.M. 1107(b)(3)(B)(iii).

[221] United States v. Anderson, 53 M.J. 374, 377 (2001).

[222] *See, e.g.*, United States v. Gilbreath, 57 M.J. 57 (2002) (finding that the SJA's statement that, "After hearing all matters, the jury determined a bad conduct discharge was appropriate and as such I recommend you approve the sentence as adjudge" was new matter); United States v. Catalani, 46 M.J. 325, 327-28 (1997) (holding that the SJA's statement that "all of the matters submitted for your consideration in extenuation and mitigation were offered by the

to new matter may constitute reversible error.[223] Therefore, it is essential that the SJA either avoid new matter or ensure that it is identified and served upon the accused.

It is also important to recognize that new matter is not always raised in the addendum or by the SJA staff. New matter may be injected by members of the accused's chain of command or by those working for the CA.[224] Therefore, the TC and the SJA should educate commanders on new matter so that it will not be injected into the case without the SJA's knowledge. Since new matter does not pose any problem as long as the accused is given an opportunity to respond, it is an issue best identified and dealt with early on in the process.

Part IV: Action to Final Action

Phase three of the post-trial process includes: signing and publishing the action; finalizing and signing the promulgating order; mailing the complete ROT with copies; placing an accused on excess leave (when necessary); notifying the accused of appellate decisions; and signing the final action. Although this is the final phase of the post-trial process, it is as important as the two previous phases and mistakes at this time are just as capable of creating reversible error as mistakes at any other stage of the process.

Phase three begins when the SJA receives the accused's 1105 and 1106 matters and prepares the case for presentation to the CA for initial action.[225] Prior to taking initial action, the CA must consider the result of trial, the recommendation of the SJA, and any matters submitted by the accused pursuant to RCM 1105 and 1106.[226] The CA may also consider the ROT, the personnel records of the accused, and other such matters as the CA deems appropriate.[227] Although the CA is permitted to consider matters outside of the ROT, the CA must be cautious; information from outside the ROT may constitute new matter.[228] If the CA considers new matter when taking initial action, the new matter must be served upon the accused and the accused must be given an opportunity to rebut.[229] It is important to note that the definition of new matter under RCM 1107 is broader than that under RCM 1106. Under RCM 1106, new matter only includes written material, while new matter under RCM 1107 includes any matters the CA considers that are "adverse to the accused from outside the record, with knowledge of which the accused is not chargeable."[230]

The SJA is responsible for packaging and presenting the result of trial, the SJAR, the addendum, and clemency submissions for review by the CA. Care should be taken to ensure that those matters which must be reviewed prior to action, and those matters deemed appropriate for review, are organized so that they can be easily located and reviewed by the CA. Additionally, recall that the CA is not required to review anything other than written submissions.[231] Therefore, if the

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defense at trial; and the senior-most military judge in the Pacific imposed a sentence that, in my opinion, was both fair and proportionate to the offense committed" is new matter); United States v. Chatman, 46 M.J. 321, 323 (1997) (referring to the accused's inadmissible second positive urinalysis is new matter); United States v. Leal, 44 M.J. 235, 236 (1996) (discussing the GOLOR not introduced at trial is new matter); United States v. Norment, 34 M.J. 224 (C.M.A. 1992) (holding that the SJA's statement that he investigated accused's claims of court member misconduct and found no basis in fact for them is new matter); United States v. Young, 26 C.M.R. 232, 233 (C.M.A. 1958) (stating that the SJA's written opinion that the appellant had "forced on society the burden of caring for his illegitimate offspring" constitutes new matter).

[223] *Chatman*, 46 M.J. 321 (stating that an accused who is not served with new matter will be granted relief if he makes a colorable showing of possible prejudice); United States v. Narine, 14 M.J. 55, 57 (C.M.A. 1982) (stating that insertion of misleading or erroneous new matter could be prejudicial).

[224] *Anderson*, 53 M.J. at 377–78 (stating that a note attached to SJAR by chief of staff commenting on the case constitutes new matter).

[225] In accordance with RCM 1107(b)(2), the convening authority may not take action until the accused has been provided the opportunity to present matters pursuant to RCM 1105 and 1106. As discussed above, the accused must submit RCM 1105 matters within ten days of receiving the authenticated record of trial or the SJAR, whichever is later. If the accused has not submitted matters within this time frame and the convening authority or SJA has not granted an extension, then the convening authority may take action as soon as practical. Likewise, if the accused has waived the right to submit post-trial matters in accordance with RCM 1105(d), then the convening authority may take action as soon as practical.

[226] While the convening authority is required to consider the clemency packet, neither the UCMJ nor the case law requires the action to restate the matters considered by the convening authority. Nonetheless, actions often indicate that the convening authority considered the result of trial and the recommendation of the SJA. The action may also indicate that the CA considered the post-trial submissions of the accused. However, this is not required. United States v. Stephens, 56 M.J. 391, 392 (2002).

[227] MCM, *supra* note 3, R.C.M. 1107(b)(3).

[228] *Id.* R.C.M. 1107(b)(3)(B)(iii).

[229] *Id.*

[230] *Id*.

[231] *Id*. R.C.M. 1105(b)(1).

accused's RCM 1105 clemency packet contains other forms of media, such as video or audio tapes, the CA may view them but is not required to do so.[232]

Action

Taking action essentially requires the CA to approve the findings and/or sentence of the court-martial. Rule for Courts-Martial 1107 governs the CA's action and grants him wide latitude to approve or disapprove, in whole or in part, both the findings and sentence.[233] With regard to findings, the CA may approve or disapprove all of the findings.[234] If the CA seeks to approve all the findings, he is not required to expressly comment on the findings in the action. In other words, the CA does not have to specifically state that he has approved the findings; by not commenting on the findings, the CA has approved them in whole.[235] The CA may also dismiss individual findings of guilt. If the CA disapproves a finding of guilt to a particular charge or specification, he may approve a finding of guilty to a lesser-included offense of the disapproved charge or specification.

If the CA disapproves any finding, he or she should also adjust the sentence to negate the impact of the disapproved findings. This standard requires that the new sentence place the accused in the position he would have occupied if no error had occurred.[236] Moreover, to ensure that the record supports the CA's decision, the SJAR should reflect the factors considered by the CA in arriving at a new sentence.[237] If the CA disapproves the findings, the disapproval must be stated in the action.[238] The action should also state that the disapproved charges are dismissed, unless a rehearing is ordered.[239] In the event that a rehearing is ordered, the action must briefly state the reasons why the findings were disapproved.[240]

The CA has similarly wide latitude with regard to the sentence. The CA may either approve or disapprove the sentence as a whole.[241] He may also modify any part of the sentence and approve the sentence as modified.[242] The only limitation on this power is that the CA cannot modify a sentence to increase the accused's punishment as adjudged by the court-martial. If there is a pretrial agreement, the CA must ensure his action is in conformity with that agreement.

In all other cases, a CA should approve the sentence which is warranted by the circumstances of the offense and appropriate for the accused. The CA should consider all relevant factors including the possibility of rehabilitation, the accused's clemency packet, and the potential deterrent effect of the sentence. The action should also account for any credit for legal or illegal pretrial confinement.

Although it is easy to understand the purpose of the action, and the CA's power at this stage of the post-trial process, it is sometimes difficult to envision what the action should look like (especially if it contains something unusual like deferred or suspended punishments). The action must state whether the sentence was approved or disapproved. The action must also indicate that the appropriate parts of the approved sentence are to be executed.[243] If any part of the sentence is to be

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[232] Regardless of the accused's submissions, the convening authority must consider the result of trial and the recommendation of the SJA Advocate prior to taking action. *Id.* R.C.M. 1107(b)(3). As such, the CA will not be able to take action at least until the result of trial and the SJAR are completed.

[233] *Id.* R.C.M. 1107.

[234] The CA may for any reason, or no reason, dismiss a specification and/or charge, change a finding of guilty to a lesser-included offense, or order a rehearing on a charge.

[235] United States v. Diaz, 40 M.J. 335 (C.M.A. 1994). The action need not state that the findings are approved. "A convening authority who does not expressly address findings in the action impliedly acts in reliance on the statutorily required recommendation of the SJA, and thus effectively purports to approve implicitly the findings as reported to the convening authority by the SJA." *Id.* at 337.

[236] United States v. Reed, 33 M.J. 98 (C.M.A. 1991) (citing United States v. Hill, 27 M.J. 293, 296 (C.M.A. 1988)).

[237] *Id*.

[238] MCM, *supra* note 3, R.C.M. 1107(f).

[239] *Id*. R.C.M. 1107(f)(3).

[240] *Id*.

[241] *Id.* R.C.M. 1107(b)(1).

[242] An example of changing one punishment to another without increasing the punishment would be to change a punitive discharge to six months confinement. Additionally, the CA could change a punishment of confinement to a punishment of hard labor without confinement. However, punishment may not be changed to a type of punishment which could not be adjudged by the given level of court-martial. Thus, at a special court-martial, a sentence to six months confinement could not be changed to a dishonorable discharge.

[243] *Id.* R.C.M. 1107(f)(4).

suspended, the suspension should be reflected in the action.[244] The action need not provide any reason for suspending execution of any part of the sentence. Appellate courts often err on the side of caution and return erroneous or ambiguous actions for clarification.[245] Therefore, it is crucial to be clear and accurate in drafting the action. The forms for various types of actions are contained in Appendix 16 of the *MCM*. These formats are accurate and time tested; therefore, they should be used whenever possible. The information in the action should be carefully checked against the ROT, the result of trial, and the SJAR, to ensure that they are all accurate and consistent.[246]

Once the CA has taken action, a copy of the action must be served on the accused or the DC.[247] When an action is served, it is said to be published.[248] The CA may recall and modify the action at any time before it is published.[249] If the action has been published, the CA may still modify the action provided the record has not yet been forwarded to the review authority. However, an action changed or modified after service on the accused may not be modified in any way which is less favorable to the accused.

B. The Promulgating Order

After initial action is taken and while the record is being prepared for shipment, the promulgating order must be signed. The promulgating order publishes the result of trial and the CA's action on the findings and sentence to those individuals and organizations listed at paragraph 12-7b of AR 27-10.[250] It is important to remember that the promulgating order is one of the few post-trial documents that must still be created when the accused is acquitted. It should also be remembered that promulgating orders for acquittals must be distributed to those individuals and organizations listed in paragraphs 12-7b and 12-7c of AR 27-10.[251] The promulgating order must identify the type of court-martial and command by which it was convened and contain a summary of the charges and specifications on which the accused was arraigned.[252] It must also indicate the accused's pleas, and the findings or disposition of each charge and specification. Finally, it must contain the sentence and the CA's action on the sentence. The promulgating order is dated the same day as the initial action, however, it must identify the dates on which the sentence was adjudged.[253] When stating the action taken by the CA, it is best to simply cut and paste the action in its original form. The action may be summarized; however, doing so increases the chances for error. An example of a promulgating order is in AR 27-10, figure 12-1.[254]

After the promulgating order has been signed, copied, and placed in the ROT, the record should be complete and ready for mailing to the reviewing or appellate authority. When mailing the record, it is important to use first class certified mail.[255] If the record gets lost in the mail, the criminal law office must have a means of establishing that it mailed the record in a timely fashion and by a timely method.

C. Disposition of the Record of Trial

When action has been taken and served upon the accused or the DC, the CA must forward the action and the ROT to the

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[244] *Id*.

[245] *See* United States v. Madden, 32 M.J. 17 (C.M.A. 1990) (case returned for new action where the convening authority's intent to approve discharge is unclear); United States v. Johnson, 29 M.J. 288 (C.M.A. 1989) (case returned for new action where the convening authority failed to approve suspension of discharge discussed in SJAR).

[246] For a detailed discussion of the proper disposition of the record of trial, *see* THE CLERK OF COURT'S HANDBOOK, *supra* note 8, paras. 1-7, 1-8, and ch. 3.

[247] MCM, *supra* note 3, R.C.M. 1107(h).

[248] *Id*. R.C.M. 1107(f)(2).

[249] Thus, if after the CA takes action the SJA discovers an error in the action where the convening authority has approved a punishment less severe then was intended, that error can be corrected by a new action provided the action has not been published.

[250] *Id.* R.C.M. 1114(a)(2).

[251] AR 27-10, *supra* note 19, paras. 12-7(b), (c).

[252] *Id*.

[253] *Id*.

[254] *Id.* fig. 12-1.

[255] *Id.* para. 5-44.

reviewing or appellate authority.[256] The appropriate reviewing authority depends upon the level of court-martial and the approved sentence. In a GCM, the ROT, the action, and ten copies of the promulgating order are forwarded to the Judge Advocate General[257] unless the accused has waived appellate review pursuant to RCM 1110.[258] Two additional copies of the ROT must be forwarded, along with the original record, if the sentence includes death, a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than one year.[259] In a GCM where the accused waives appellate review, the ROT is forwarded to the Office of the Judge Advocate pursuant to RCM 1112.[260]

In a SPCM where a bad conduct discharge has been approved, the original and two copies of the ROT, the action, and ten copies of the promulgating order are forwarded to the Judge Advocate General as described above. However, in SPCMs where the sentence does not include a bad-conduct discharge, the ROT, the action, and only four copies of the promulgating order are forwarded to the Office of the Judge Advocate General where a judge advocate will review the record pursuant to RCM 1112.[261]

After the ROT has been mailed, chiefs of criminal law might be tempted to consider the post-trial process complete. This is not correct. It is important to remember that in most cases, additional steps must be taken even after the initial action. In cases that involve a conviction and where the accused has not waived appellate review, there will still be additional steps that may have to be executed by your office. For example, when an accused is convicted at court-martial and receives only a punitive discharge, the criminal law office that prosecuted that individual will be responsible for completing the final steps in the post-trial process. These final steps include placing the accused on excess leave, giving the accused notice of the results of his appeal, and taking final action in the case.

When an accused is punished by a court-martial, it is important to ensure that his military status is properly adjusted. Dishonorable and bad-conduct discharges do not become final until the case has completed the appellate process.[262] Therefore, while the CA may approve a sentence including a discharge, the CA may not order the discharge executed until the appellate review process is complete.[263] Until the review is complete and the accused's discharge is executed, the accused remains on active duty. Unless the accused is in confinement, he is entitled to a minimum of one-third of one month's pay while serving on active duty, even if total forfeitures were adjudged.[264] As such, if a sentence includes a discharge and total forfeitures, but no confinement or a very short period of confinement, then the accused will likely be returned to regular duty pending completion of the appellate review process.

In order to avoid having to pay the accused or return the accused to his unit (where he may very well cause disruption), the government can place the accused on voluntary excess leave (at the accused's request) or involuntary excess leave.[265] This status allows the military to maintain jurisdiction over the accused until the review process is complete and the discharge is executed. To be eligible for voluntary excess leave, the accused must have been sentenced to a punitive discharge or dismissal, have served any adjudged confinement or had it deferred or suspended, and have not yet had his sentence approved.[266] To place an accused on involuntary excess leave, the CA must notify the accused in writing that he or she is being considered for involuntary excess leave.[267] The accused is then allowed seventy-two hours in which to submit a

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[256] MCM, *supra* note 3, R.C.M. 1111.

[257] The only exception applies when the accused has waived appellate review pursuant to RCM 1110. *Id.*

[258] *Id*. R.C.M. 1110(a).

[259] *Id*. R.C.M. 1111(a).

[260] *Id*. R.C.M. 1112(a)(1).

[261] *Id*. R.C.M. 1112(a).

[262] *Id*. R.C.M. 1113(c), R.C.M. 1209(b).

[263] *Id*. R.C.M. 1113(c).

[264] United States v. Smith, 47 M.J. 630 (Army Ct. Crim. App. 1997) (citing United States v. Dewald,39 M.J. 901 (A.C.M.R. 1994); United States v. Hatchell, 33 M.J. 839, 840 (A.C.M.R. 1991) (stating that Soldiers serving on active duty pending appellate review entitled to one third of basic pay)).

[265] AR 600-8-10, *supra* note 48, paras. 5-19 and 20. An accused can be placed on involuntary excess leave anytime after: the accused has received a sentence which includes a dismissal or punitive discharge; the accused is awaiting appellate review; the accused's confinement, which was served as part of an approved sentence, has been served, deferred, or suspended; the accused received a punitive discharge at trial and the convening authority has approved the punishment.

[266] *Id*. para. 5-21c.

[267] *Id*. paras. 5-19, 5-20.

response. If after receiving the accused's response the CA elects to go forward, then a DA Form 31[268] is completed to place the accused on involuntary excess leave. The DA Form 31 is processed in accordance with normal leave procedures by the unit personnel office.[269] Formats for notifying the accused and DA Form 31s should be prepared in advance so that they can be quickly executed following the accused's release from confinement. The accused's excess leave will usually end after the final judgment is issued and the accused's sentence is ordered executed.[270]

The last two steps of phase three are notifying the accused of the results of his appeal and taking final action. These steps may be unfamiliar even to an experienced chief of criminal law because most criminal law offices do not take these final steps. In most cases where the government has secured a conviction and confinement, the accused is sent to a regional confinement facility or Fort Leavenworth. Once the accused is transferred to a confinement facility, the CA for the confinement facility takes charge of the accused's post-trial process. Thus, criminal law offices at confinement facilities generally handle the last two steps in the post-trial process, while other criminal law offices rarely encounter these two steps.[271] The occasions where a criminal law office that is not associated with a confinement facility is likely to encounter these last two steps is when an accused is convicted and sentenced to a discharge and no confinement or very little confinement. In these cases, the accused will likely remain in the same unit he was in when court-martialed. Since the accused has not been transferred to a different GCM jurisdiction, the criminal law office which tried the accused will have to see the post-trial process through to the very end.

The first of these last two steps is notifying the accused of the decision of the ACCA. In accordance with RCM 1203(d)(2), "If the accused has the right to petition the Court of Appeals for the Armed Forces for review, the accused shall be provided with a copy of the decision of the Court of Criminal Appeals."[272] In addition to the notice of the court of criminal appeals decision, the accused must also receive a DA form 4917, Advice of Appellate Rights,[273] five copies of DA Form 4918, Petition for Grant of Review,[274] and a letter-size envelope with the CAAF Clerk of Court's address.[275] There are different procedures that apply when an accused is present in the command or on excess leave; these procedures are discussed in detail in the *Clerk of Court Handbook*.[276]

Proper service of the decision of the ACCA is important in much the same way that proper service of the SJAR and authenticated ROT is important. When the accused is on excess leave he is entitled to sixty days from the date the ACCA decision (and all required documents) was mailed to respond.[277] After the sixty days have passed, final action may be taken.[278] However, if the notice procedures regarding the ACCA decision were somehow faulty, the accused could attack the final action in the case. Thus, properly documenting that the accused was provided notice of the ACCA decision is critical. Army Regulation 27-10, paragraph 13-9[279] and the *Clerk of Court Handbook* section 7-1,[280] do an excellent job describing the procedures that must be taken to ensure the proper documentation of this step.

After the accused has waived or exhausted his appellate review, the case is ready for the last step of the post-trial process—the final action.[281] Final action will be taken by Headquarters, Department of the Army in cases where the death

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[268] U.S. Dep't of Army, DA Form 31, Request and Authority for Leave (Sept. 1993).

[269] AR 600-8-10, *supra* note 48, paras. 12-1, 12-5.

[270] *Id*. para. 5-19d.

[271] It should be noted that even criminal law offices for confinement facilities do not always take the last two steps. In cases involving the death penalty, or the dismissal of an officer or cadet, Headquarters, Department of the Army will issue the final order. THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-4a.

[272] MCM, *supra* note 3, R.C.M. 1203(d)(2).

[273] U.S. Dep't of Army, DA Form 4917, Advice of Appellate Rights (Sept. 2002).

[274] U.S. Dep't of Army, DA Form 4918, Petition for Grant of Review (Sept. 2002).

[275] THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-2 (DA Forms 4917 and 4918 are both available in e-JAWS).

[276] *Id*. para. 7-1e.

[277] MCM, *supra* note 3, R.C.M. 1203(d)(2).

[278] *Id*. R.C.M. 1209(a)(1)(A).

[279] AR 27-10, *supra* note 19, para. 13-9.

[280] THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-1.

[281] MCM, *supra* note 3, R.C.M. 1209(a).

penalty has been imposed or where an officer or cadet has been dismissed.[282] In all other cases, the final action will be taken by a GCMCA. There are two occasions where a final action will be necessary; one, when the appellate courts have modified a sentence, or two, when the accused was sentenced to a punitive discharge.[283] Although a modified sentence after appellate review would certainly necessitate a new action, the principal need for a final action exists because CAs are unable to order executed punitive discharges or dismissals until after appellate review.[284] Once appellate review is complete or waived, the punitive discharge or dismissal still must be ordered executed.

Conclusion

This article has demonstrated that the individual steps of the post trial process are not particularly complicated, once you have a thorough understanding of how the process works. In addition to this article, RCM 1101 through RCM 1210, Articles 57 through 76a of the UCMJ, AR 27-10 paragraphs 5-29 through 5-48, and the *Clerk of Court's Post-Trial Handbook* are important reading in order to gain an understanding of the overall post-trial process. By understanding the post-trial process and tending to it daily, not only should your office's post-trial process be successful, but it will remain manageable and allow you to devote more time to other important aspects of your office's mission.

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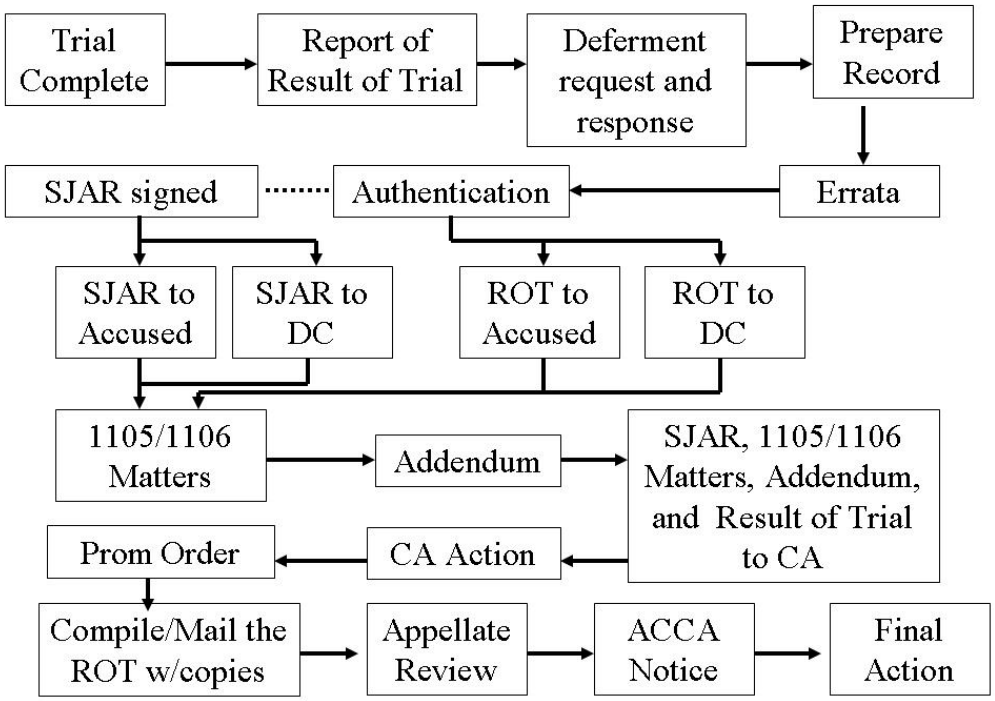
[282] THE CLERK OF COURT HANDBOOK, *supra* note 8, para. 7-4a.

[283] *Id*.

[284] MCM, *supra* note 3, R.C.M. 1113(c).

Appendix A

Diagram of Post-Trial Process[285]



[285] This diagram was initially composed by Colonel Michael J. Hargis while instructing at the U.S. Army Judge Advocate General's School in 1997.

Appendix B

Sample Delegation of Confinement Authority

AAAA-JA (27-10e) 1 January 2007

MEMORANDUM FOR RECORD

SUBJECT: Delegation of Confinement Authority

In accordance with Rule for Court-Martial 1101(b)(2), I delegate the authority to order soldiers from Headquarter and Headquarters Company, 82d Airborne Division in to post-conviction confinement to the HHC Trial Counsel, Captain David Johnston.

ROBERT C. THEODEN
CPT, IN
Commanding

Date:

Appendix C

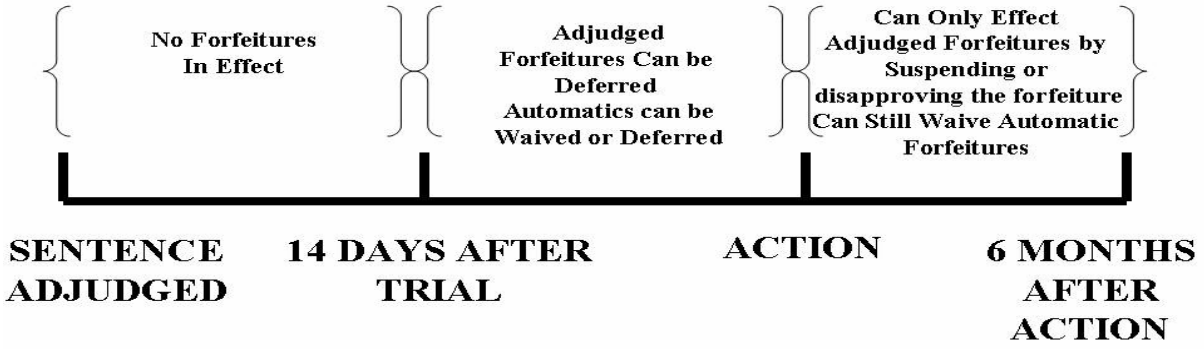
Post-Trial Log

UNITED STATES v. _____

DATE	ACTION	INITIAL

Appendix D

Affecting Forfeitures



Appendix E

Forfeiture Work sheet

1. The first step in achieving the Convening Authority's objectives with regard to an accused's forfeitures is to determine what forfeitures apply and the steps that may be taken to remove those forfeitures if that is what the Convening Authority desires.

2. Determining what forfeitures apply:

a. Adjudged forfeitures.

1. Were there any adjudged forfeitures?

(a) If no, go to the automatic forfeitures Question.

(b) If yes, how much for how long? _____

b. Automatic forfeitures.

1. Did the sentence include confinement in excess of 6 months?

(a) If yes, go to question 3.

(b) If no, go to question 2.

2. Did the sentence include confinement and a punitive discharge?

(a) If yes, go to question 3.

(b) If no, then there are no automatic forfeitures.

3. At what type of court-martial was the accused tried?

(a) If the accused was tried at a special court-martial, he will forfeit two-thirds of his pay for however long he is confined (these forfeitures begin 14 days after the sentence is announced).

(b) If the accused was tried at a general court-martial, he will forfeit all pay and allowances for however long he is confined (these forfeitures begin 14 days after the sentence is announced).

c. What is the accused ETS date? _____ Note: the accused's ETS date will end all pay to the accused. Any steps to remove forfeitures become moot after the accused's ETS date because after ETS there is no pay to forfeit.

3. Charting forfeitures

a. List the type, amount, length of time of forfeitures, and the accused's ETS date in the first four columns and the Convening Authority's intent in the fifth column.

Type	Amount	Length	ETS	CA Intent
Automatic				
Adjudged				

b. If there are adjudged and automatic forfeitures create two columns listing the forfeitures, the length of the columns should represent the relief the convening authority wishes to give. Also note the ETS date of the accused. Listed below are examples of how to chart forfeitures.

Example 1: the CA wants to give the maximum relief available for forfeitures where an accused is sentenced to total forfeiture of all pay and allowances and confinement for 6 years.

	Adjudged	Automatic
14 days after sentence is announced	defer	defer
Action	disapproved	waived for 6 months

ETS—3 years after sentence was announced.

Example 2: there are only automatic forfeitures and the CA only wishes to give 3 months of relief.

	Adjudged	Automatic
14 days after sentence is announced	none	waived for three months

ETS—1 year after sentence was announced.

Example 3: the Convening Authority wishes to give the maximum relief but the accused is to ETS 2 months after the sentence is announced.

	Adjudged	Automatic
14 days after sentence is announced	defer	defer

ETS—2 months after sentence was announced. ETS ends the affect of all deferments or other steps taken to affect forfeitures.

Appendix F

AAAA-JA (27-10e) 19 August 2007

MEMORANDUM FOR Commander, 82d Airborne Division, Fort Bragg, NC 28310-4320

SUBJECT: Addendum to Staff Judge Advocate's Post-Trial Recommendation in the General Court-Martial Case of *United States v. Specialist Paul Smith*

1. This addendum is written to address the post-trial submissions of the accused and his defense counsel in the general court-martial case of Specialist Paul Smith, U.S. Army, 000-00-0000, HHC, Fort Bragg, NC 28310-4325.

2. Specialist Smith and his counsel have submitted a request for clemency asking you to reduce Specialist Smith's confinement so that he can return to his family and begin rehabilitation as soon as possible. You must consider the matters submitted by defense counsel and accused prior to taking action.

3. Specialist Smith's defense counsel has alleged that the military judge admitted evidence in Specialist Smith's Court-Martial in violation of the Military Rules of Evidence. I have considered the defense allegation of legal error regarding the military judge's admission of evidence in violation of the Military Rules of Evidence. I disagree that there was a legal error. In my opinion, no corrective action is necessary.

4. I have considered the enclosed clemency submission and allegation of legal error, and I adhere to my original recommendation.

3 Encls
1. Memorandum from Defense Counsel
2. Memorandum from the Accused
3. Letter from the Accused's Mother

Mark Jones
LTC, JA
Staff Judge Advocate

Responding to National Disasters and Emergencies: A Contract and Fiscal Law Primer

Major Christopher B. Walters[*]

Future Defense Support to Civilian Authorities (DSCA) planning and execution must consider the non-doctrinal use of military forces, yet remain within the constraints of federal law and regulations.[1]

I. Introduction

Since the beginning of our Nation, the U.S. military has been called upon to respond to all manner of domestic disasters and emergencies.[2] Such disasters, natural and man-made, have included hurricanes, typhoons, fires, floods, earthquakes, tornados, massive explosions, and terrorist attacks.[3] Other types of domestic disasters and national emergencies that may require military deployment and support include disease pandemics, major power blackouts, nuclear, biological, or chemical releases, and civil disturbances and insurrections, to name a few.[4] As in all legal areas, including the fiscal and contracting realm, judge advocates deploying in support of a domestic disaster or emergency must be keenly aware of the types of support the military will be asked to provide and the legal factors that will affect the response.[5] Despite the severity or catastrophic nature of a disaster, military support to civilian authorities must always remain within the fiscal and contracting laws and regulations that govern such assistance. While there are emergency acquisition rules to add flexibility in these situations, fiscal and contracting rules remain in effect as in all other military operations.[6] Proactive coordination and close cooperation by judge advocates with all fiscal and contracting offices involved in the mission will ensure that standard procedures and rules are followed and that military funds and resources are not misapplied.

The purpose of this primer is to provide the judge advocate deploying in support of a domestic disaster or emergency a quick overview of the federal response scheme, highlight some lessons learned and unusual issues that arose in the past, and identify a recent addition to the Federal Acquisition Regulation (FAR) resulting from Hurricane Katrina. Note that a detailed discussion of government fiscal and contracting law procedures and regulations is beyond the scope of this primer. Judge advocates should closely review applicable references.

I. Federal Response General Scheme

A. Initial Overview

The Department of Defense (DOD) is expected to support civil authorities in response to national disasters and emergencies; thus, it is critical for the judge advocate to know the applicable legal framework. Some essential references

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[*] Judge Advocate, U.S. Marine Corps. Presently assigned as Deputy Staff Judge Advocate, Pacific Command, Camp Smith, Hi. LL.M., 2007, The Judge Advocate General's Legal Center & School, Charlottesville, Va.; J.D. 2000, Florida State University; B.A., 1992, University of Florida. Previous assignments include Landing Support and Air Delivery Platoon Commander, 3rd Support Battalion, 3rd Force Service Support Group, Okinawa, Japan, 1993–1994; Landing Support Detachment Commander, MEU Service Support Group 31, 31st Marine Expeditionary Unit (Special Operations Capable), Okinawa, Japan, 1994–1996; Logistics Officer (S–4), Marine Corps Tactical Systems Support Activity, Camp Pendleton, Ca., 1996–1998; Platoon Commander and later Assistant Officer-in-Charge, Detachment B, 4th Supply Battalion, 4th Force Service Support Group, Marine Corps Logistics Base Albany, Ga., 1999–2000; Chief Civil Law, Marine Corps Base Camp Pendleton, Ca., 2001–2002; Defense Counsel and later Senior Defense Counsel, Camp Pendleton, Ca., 2003; Staff Judge Advocate, 11th Marine Expeditionary Unit (Special Operations Capable), Camp Pendleton, Ca., 2003–2006. Member of the Florida Bar. This article was submitted in partial completion of the Master of Laws requirements of the 55th Judge Advocate Officer Graduate Course.

[1] Lieutenant General Russell L. Honore & Colonel Barney Barnhill (Retired), *Joint Task Force Katrina: "See First–Understand First–Act First,"* J. DEP'T OPERATIONAL ART & CAMPAIGNING 15 (Spring 2006).

[2] Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3.

[3] *Id.*

[4] *See* U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993) [hereinafter DOD DIR. 3025.1].

[5] *See* GOV'T ACCOUNTABILITY OFF., REP. NO. GAO–06–643, HURRICANE KATRINA: BETTER PLANS AND EXERCISES NEEDED TO GUIDE THE MILITARY'S RESPONSE TO CATASTROPHIC NATURAL DISASTERS (May 15, 2006) [hereinafter GAO–06–643].

[6] *See* Federal Acquisition Regulation; FAR Case 2005–038, Emergency Acquisitions, 71 Fed. Reg. 128, 38247 (July 5, 2006) [hereinafter FAR Part 18, Emergency Acquisitions].

directing military support include the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act),[7] DOD Directive (DOD Dir.) 3025.1, *Military Support to Civil Authorities* (MSCA),[8] DOD Dir. 3025.15, *Military Assistance to Civil Authorities* (MACA),[9] DOD Dir. 3025.12, *Military Assistance for Civil Disturbances* (MACDIS),[10] Army Field Manual (FM) 100-19, *Domestic Support Operations*,[11] and the Department of Homeland Security (DHS) *National Response Plan*[12] (NRP). Note that there is a draft DOD Directive 3025.XX, *Defense Support of Civil Authorities*, pending approval and publication. This directive will update the doctrinal term of such support from MSCA to DSCA and will consolidate and supersede the DOD directives listed above. These main authorities govern DOD support during national disasters and emergencies and specify chains of command, approval authorities for different types of support, and sources of funding.[13] While DOD support to civilian authorities may be the main effort during early stages of a national disaster or emergency, the civil authorities ultimately retain primary responsibility and DOD serves in a supporting capacity.[14]

Army FM 100-19 is the combined Army and Marine Corps manual providing doctrine for domestic support operations, and encompassing a much broader range of support than just disaster and emergency relief.[15] The manual provides direction on the loan and lease of military materiel, but primarily refers to service-specific regulations for detailed guidance.[16] For those operations where there are loans or leases, the traditional policy is that DOD must be reimbursed by the borrowing organization of all costs incident to the use, delivery, return, and repair of the military items.[17] The borrowing agency must also reimburse for the full purchase price of consumables used and for any significant depreciation on nondurable goods.[18] Service secretary level approval is required for loans of "arms, ammunition, combat vehicles, vessels, and aircraft."[19] The manual frequently and notably refers to the Stafford Act,[20] Economy Act,[21] and DOD Operational Plan Garden Plot (Garden Plot)[22] for specific reimbursement procedures.[23]

Contracting is the key logistical component for purchasing, leasing, or renting supplies or services from non-federal entities when responding to a crisis.[24] Contracting is essential to procure "all classes of supplies, labor, mortuary affairs, laundry, showers, food, service, sanitation, billeting, transportation, maintenance and repair, access to communications networks, temporary real property leasing, and limited minor construction, that may be required during the military's relief efforts."[25] Warranted contracting officers must be immediately available in the earliest stages of the military response to ensure the rapid and proper accomplishment of resourcing all goods and services.[26] Initially, decentralized contracting is the

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[7] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000) as amended in the Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109–295, 120 Stat. 1355 (2006), and in Title VI of the Act, which is the Post-Katrina Emergency Management Reform Act of 2006 (notable addition to direct FEMA, to among other things, "coordinate and support precautionary evacuations and recovery efforts.").

[8] DOD DIR. 3025.1, *supra* note 4.

[9] U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (MACA) (18 Feb. 1997) [hereinafter DOD DIR. 3025.15].

[10] U.S. DEP'T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) (4 Feb. 1994) [hereinafter DOD DIR. 3025.12].

[11] U.S. DEP'T OF ARMY, FIELD MANUAL 100–19, DOMESTIC SUPPORT OPERATIONS (1 July 1993) [hereinafter FM 100–19].

[12] U.S. DEP'T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN (May 2006) [hereinafter NRP].

[13] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 451 (2006) [hereinafter JA 422].

[14] *Id.* at 438.

[15] FM 100-19, *supra* note 11.

[16] *Id.* at 3.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

[21] Economy Act, 31 U.S.C. § 1535 (2000).

[22] U.S. DEP'T OF DEFENSE, CIVIL DISTURBANCE PLAN (GARDEN PLOT) (15 Feb. 1991) [hereinafter GARDEN PLOT].

[23] FM 100-19, *supra* note 11.

[24] *Id.* at 4-2.

[25] *Id.*

[26] *Id.*

preferred means to rapidly respond to disaster demands.[27] However, the contracting function should become increasingly more centralized as the crisis stabilizes, permitting the military to shift the resourcing task to civil agencies to allow the eventual military withdrawal and redeployment.[28]

Resource managers must have early and complete involvement in all operational aspects to ensure proper management of costs and project code accounting for tracking all reimbursable and other types of support.[29] Resource managers must plan and account for vast expenditures in support of the military mission and always do so with a mindset that an audit is just around the corner.[30]

The Economy Act provides the "authority for federal agencies to order goods and services from other federal agencies (including other military Departments and Defense agencies) and to pay the actual costs of those goods and services."[31] An agency may place an order with another federal agency for goods or services so long as:

> 1. Funds are available; 2. The head of the requesting agency or unit decides the order is in the best interests of the United States (U.S.) Government; 3. The agency or unit to be asked to fill the order is able to provide the ordered goods and services; and 4. The head of the agency decides that ordered goods or services cannot be provided as conveniently or economically by a commercial enterprise.[32]

Economy Act orders may also be placed under interservice support agreements and interagency agreements.[33] However, even when these types of agreements authorize support and reimbursement, the basic tenets of government fiscal law, such as "purpose, time, and amount," still apply at all times.[34]

B. The Stafford Act

The Stafford Act is the governing authority directing the military to support civil authorities in protecting lives, property, and the public health and safety.[35] The DOD may provide such necessary support, including "personnel, equipment, supplies, facilities, and managerial, technical and advisory services" to local relief efforts, with or without reimbursement.[36] The Stafford Act provides four situations authorizing DOD support for domestic disasters and emergencies.[37] The first situation is when the President declares a "major disaster" in response to a natural catastrophe or emergency, regardless of cause, anywhere in the United States and its territories.[38] This declaration requires the affected state's governor to request federal assistance after being unable to effectively respond with only state resources, and to guarantee that the state will certify compliance with all cost-sharing provisions of the Stafford Act.[39] There is no dollar amount or time limit on such federal assistance.[40] This authority was recently used in 2005 to respond to Hurricane Katrina.[41]

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 4-4.

[30] *Id.*

[31] Economy Act, 31 U.S.C. §§ 1535–1536 (2000); *see* U.S. DEP'T OF DEFENSE, REG. 7000.14–R, FINANCIAL MANAGEMENT REGULATION ch. 3 (Nov. 2007) [hereinafter DOD FMR], *available at* http://www.defenselink.mil/comptroller/fmr.

[32] §§ 1535–1536; *see* DOD FMR, *supra* note 31.

[33] §§ 1535–1536; *see* DOD FMR, *supra* note 31.

[34] JA 422, *supra* note 13, at 247.

[35] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5192 (2000).

[36] *Id.*

[37] JA 422, *supra* note 13, at 452.

[38] § 5122.

[39] *Id.*

[40] *Id.*

[41] GOV'T ACCOUNTABILITY OFF., REP. NO. GAO–06–44T, HURRICANE KATRINA: GAO'S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS, RESPONSE, AND RECOVERY (Mar. 8, 1996) [hereinafter GAO–06–44T]; SELECT BIPARTISAN COMMITTEE, 109TH CONG., A FAILURE OF INITIATIVE, FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006) [hereinafter 109TH CONG. REP.].

The second situation is when the President declares an "emergency," defined as "any occasion or instance for which, in the determination of the President, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lesson or to avert the threat of a catastrophe" in the United States and its territories.[42] The governor of the affected state must meet the same criteria as in a major disaster, but must also define the specific type and amount of federal support required.[43] The Stafford Act limits federal assistance for a single emergency to $5 million unless the President determines that there is a continuing risk and further emergency assistance is immediately required.[44] Other than these differences, there is no operational distinction between an emergency and a major disaster.[45]

The third category is the President's "10-day emergency authority" during which DOD assets may be used on an emergency basis to "preserve life and property."[46] As in the first two situations, the governor for the affected state must request federal assistance. This category differs from the first two in that the emergency work is limited to ten days for clearing and removing debris and wreckage, and temporarily restoring essential public facilities and services.[47]

The fourth category is when an emergency exists in an area for which the Federal Government has "primary responsibility" for response pursuant to the Constitution and federal law.[48] As this authority arises in an area where the Federal Government has "primary responsibility," such as over areas with exclusive, concurrent, or proprietary jurisdiction, the state governor need not request aid.[49] This type of authority was used in response to the Oklahoma City bombing of the Murrah Federal Building in 1995.[50]

While the Stafford Act provides for reimbursement of disaster and emergency relief provided by the military, DOD is only reimbursed for incremental costs incurred in providing requested support to civil authorities, not personnel costs.[51] Incremental costs are "those incurred by the agency providing the military assistance that—but for the request for assistance—would not otherwise have incurred these expenses."[52] Personnel costs of military and DOD civilians are generally not included as reimbursable incremental costs, as these are considered fixed costs incurred by the DOD regardless of any disaster assistance rendered.[53] However, extra costs such as temporary additional duty and federal civilian employee overtime are considered incremental costs instead of fixed costs for reimbursement purposes.[54]

The MSCA is the primary DOD reference for the military when responding to domestic disasters and emergencies under Stafford Act authority.[55] It requires DOD components to comply with all "legal and accounting requirements for the loan, grant, or consumption of DOD resources for MSCA, as necessary, to ensure reimbursement of costs to the DOD components under the Stafford Act . . . or other applicable authority."[56] The DOD policy is that resources should be provided on a reimbursable basis, but provision of resources that will "save lives, prevent human suffering, or mitigate great property damage" should not be precluded if the requesting civil agency is not able to commit to reimbursement.[57]

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[42] § 5122.

[43] *Id.*

[44] *Id.*

[45] JA 422, *supra* note 13, at 452.

[46] § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

[47] § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

[48] § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

[49] § 5170b(c); *see also* JA 422, *supra* note 13, at 452.

[50] JA 422, *supra* note 13, at 453.

[51] GOV'T ACCOUNTABILITY OFF., REP. NO. GAO/NSIAD–93–180, DISASTER ASSISTANCE: DOD'S SUPPORT FOR HURRICANES ANDREW AND INIKI AND TYPHOON OMAR 8 (June 18, 1993) [hereinafter GAO/NSIAD–93–180]; CENTER FOR LAW & MIL. OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES VOL. I, 286 (2006) [hereinafter DOPLAW HANDBOOK].

[52] DOPLAW HANDBOOK, *supra* note 51.

[53] GAO/NSIAD–93–180, *supra* note 51, at 8.

[54] *Id.*

[55] DOD DIR 3025.1, *supra* note 4.

[56] *Id.* at 4.4.8.1.

[57] *Id.* at 4.5.1 and 4.5.2.

One contracting provision worth noting in the Stafford Act is the preference for contracting with local firms and individuals from the affected areas, "to the extent feasible and practical," for "debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities."[58]

C. Immediate Response Authority

The MSCA authorizes local military commanders to respond immediately to sudden and imminently serious emergencies or attacks in order to "save lives, prevent human suffering, or mitigate great property damage" when there is no time for authorization from the requisite approval levels.[59] Authorized types of support under this "Immediate Response Authority" include "rescue, evacuation, and emergency treatment of casualties; emergency restoration of essential public services; emergency removal of debris and explosive ordnance; and recovery and disposal of the dead."[60] Under this authority, military support should be conducted on a cost-reimbursable basis, but recent guidance directs that such support "should not be denied because the requester is unable or unwilling to commit to reimbursement," as may be the case.[61] The military agency providing support under the immediate response authority should explicitly request reimbursement for all support rendered.[62] In most instances, support rendered under a commander's immediate response authority will be conducted using operation and maintenance (O&M) funds.[63]

D. Civil Disturbances and Insurrection

The DOD may also be called upon to provide support to civil disturbances and other types of emergencies requiring military support, such as in response to terrorist attacks and incidents involving weapons of mass destruction (WMD).[64] While the MSCA is primarily focused on supporting the Stafford Act in disaster situations, it does not provide the authority to support civilian law enforcement agencies.[65] Other DOD regulations govern support to civilian law enforcement agencies during domestic disasters and emergencies, including the MACA,[66] the MACDIS,[67] and Garden Plot.[68] These authorities permit multiple types of domestic support to civilian law enforcement agencies in the areas of civil disturbance operations, key asset protection, disaster relief, and responding to acts and operations involving terrorism.[69] Similar to the reimbursement provisions under disaster response, these other types of responses to domestic situations, such as civil disturbances, also require a written request for DOD support. These requests must also contain a fund citation in accordance with the Economy Act,[70] other reimbursement authority, or at least some sort of statement guaranteeing reimbursement by the local or state agency requesting support.[71] Any requests for non-reimbursable support must provide a "legal and factual justification for a waiver of reimbursement."[72]

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[58] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5150 (2000). *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 26.200–26.201 (Nov. 7, 2007) [hereinafter FAR], *available at* http://www.arnet.gov/far/.

[59] DOD DIR 3025.1, *supra* note 4; DOPLAW HANDBOOK, *supra* note 51, at 287.

[60] DOD DIR 3025.1, *supra* note 4, at 4.5; DOPLAW HANDBOOK, *supra* note 51, at 287.

[61] DOD DIR 3025.1, *supra* note 4, at 4.5.2; DOPLAW HANDBOOK, *supra* note 51, at 287. *See* Winthrop, *supra* note 2, at 3 (providing a good discussion of a commander's immediate response authority).

[62] DOPLAW HANDBOOK, *supra* note 51, at 288.

[63] *Id.*

[64] *Id.* at 290; DOD DIR. 3025.15, *supra* note 9.

[65] DOD DIR 3025.1, *supra* note 4.

[66] DOD DIR. 3025.15, *supra* note 9.

[67] DOD DIR. 3025.12, *supra* note 10.

[68] GARDEN PLOT, *supra* note 22.

[69] DOD DIR. 3025.15, *supra* note 9; *see* DOD DIR. 3025.12, *supra* note 10; GARDEN PLOT, *supra* note 22.

[70] Economy Act, 31 U.S.C. § 1535 (2000) (providing a statutory mechanism for reimbursable support between federal agencies).

[71] DOD DIR. 3025.15, *supra* note 9, at 4.10.

[72] *Id.*; *see* GARDEN PLOT, *supra* note 22, at ann. P (detailing guidance on funding, reimbursement, costing, financing, and reporting).

An authorized DOD response or assistance to civil authorities during a civil disturbance is an unplanned or "unprogrammed" emergency fiscal requirement, meaning that it is not budgeted.[73] Therefore, to cover the costs of providing this assistance, DOD policy is that all assistance be provided on a reimbursable or "cost reclaimable basis in accordance with the Economy Act"[74] or any other "reimbursement mechanism."[75] Department of Defense units shall account for these costs using standard procedures.[76] As in requests for disaster assistance, all requests for civil disturbance assistance shall be reimbursable by the supported civil authorities (federal, state, or local) and must be in writing.[77] Any requests for non-reimbursable support must be in writing with a "legal and factual justification" supporting the request for the waiver of reimbursement.[78] Approval levels for waivers of reimbursement are the Secretary of Defense for federal agency requests, and differing levels in accordance with DOD Dir. 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, for state and local authorities.[79] Reimbursement waivers are only appropriate in limited situations where military assistance is incidental to military operations, serves a military purpose and provides training or operational benefits. Furthermore, the reimbursement waiver must not adversely affect military preparedness.[80]

E. The National Response Plan

The Federal Emergency Management Agency (FEMA), under the Department of Homeland Security (DHS), directs the federal response to national disasters and emergencies and prepares and manages the National Response Plan (NRP).[81] The NRP defines twelve emergency support functions (ESFs) and assigns primary and supporting assignments to certain federal agencies based on functional abilities to serve as the primary responder.[82] The DOD (Army Corps of Engineers) has primary responsibility for only one ESF, ESF #3, Public Works and Engineering, and is a supporting agency for all the other ESFs.[83] For example, while the Department of Agriculture has primary responsibility for ESF #4, Firefighting, the DOD occasionally plays an important supporting role, typically in the West.[84]

In response to a disaster or emergency, the DHS, normally through FEMA, will establish a joint field office (JFO) to serve as the local multi-agency coordination center.[85] The JFO is headed by the principal federal official (PFO) who will serve to coordinate the federal response in cooperation with and in support of the state and local officials.[86] A federal coordinating officer (FCO) will be assigned to assist the PFO in coordinating all of the federal response support and will serve as the lead coordinator in case no PFO is assigned to the JFO.[87] Whenever DOD is involved in the federal response, a defense coordinating officer (DCO), in the grade of O-6 or higher, is assigned to the FCO to serve as the single DOD point of contact in the JFO. Some exceptions exist, such as when the National Guard supports in a State Active Duty or Title 32 status, rather than in a Title 10 status.[88]

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[73] GARDEN PLOT, *supra* note 22, at P-1.

[74] *Id.*

[75] DOD DIR. 3025.15, *supra* note 9, at 4.10.

[76] GARDEN PLOT, *supra* note 22, at P-1.

[77] *Id.*

[78] DOD DIR. 3025.15, *supra* note 9, at 4.10–4.12.

[79] DOD DIR. 3025.15, *supra* note 9, at 4.12 (citing U.S. DEP'T OF DEFENSE, DIR. 5525, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986)).

[80] GARDEN PLOT, *supra* note 22, at P-2.

[81] DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

[82] DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

[83] DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12; *see* DOD DIR. 3025.1, *supra* note 4.

[84] *See* Captain Francis A. Delzompo, USMC, *Warriors on the Fire Line: The Deployment of Service Members to Fight Fires in the United States*, ARMY LAW., Apr. 1995, at 51, 53 (citing the Reciprocal Fire Protection Agreements Act of 1955, 42 U.S.C.A. § 1856 (1994)).

[85] NRP, *supra* note 12.

[86] JA 422, *supra* note 13, at 454; *see* NRP, *supra* note 12.

[87] JA 422, *supra* note 13, at 454; *see* NRP, *supra* note 12.

[88] DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

The DCO will coordinate all "Mission Assignments" (MAs) issued by the FCO to the DOD, defining the task issued and the maximum allowable reimbursement amount for such assistance.[89] A recent example of a FEMA MA to DOD was one for $75 million for search and rescue, recovery, evacuation, and collection support during Hurricane Katrina relief operations.[90]

The combatant commanders responsible for developing and executing domestic disaster and emergency response plans are the United States Northern Command (NORTHCOM), the United States Pacific Command (PACOM), and the United States Southern Command for their respective areas of responsibility.[91] These commands will normally establish a joint task force (JTF) to execute a domestic disaster or emergency response.[92] Judge advocates, DOD resource managers, and contracting personnel must be synchronized with and work through their JTF chain of command to ensure that all military support falls within the applicable scope of the MAs. If support rendered is outside the scope, DOD may not be reimbursed by FEMA.

III. FAR Part 18 Addition: Compilation of Emergency Acquisition Authorities

Following Hurricane Katrina, federal agencies sought ways to expedite emergency responses, prompting an addition to the FAR.[93] While there has been of yet no FAR change to the current acquisition rules, all existing rules in the FAR are now consolidated for ease of reference in FAR Part 18, Emergency Acquisitions.[94] Part 18 was revised to "provide a single reference to the acquisition flexibilities already available in the FAR to facilitate and expedite acquisitions of supplies and services during all types of emergencies."[95] These emergency acquisition authorities cover a broader scope of emergencies beyond natural disasters, to include all contingency operations and responses to "nuclear, biological, chemical, or radiological attack against the United States."[96] Part 18 is attached as Appendix A.

IV. Fiscal and Contracting Lessons Learned from Recent Domestic Disasters and Emergencies

A. Hurricane Katrina 2005

While DOD plays a supporting role to civil authorities, the military may be called upon to assume the lead during the initial stages of relief operations. In the White House's report on lessons learned in the aftermath of Hurricane Katrina, there was a recommendation that DOD develop plans to take a leading role, when necessary in logistics response, during an extraordinary catastrophe, such as a "nuclear incident or multiple simultaneous terrorist attacks."[97]

During the initial response to Hurricane Katrina, FEMA became so overwhelmed by the scope of the disaster that DOD effectively took over the massive logistics function for relief efforts.[98] Four days after Katrina's landfall, FEMA gave DOD the lead for "procurement, transportation, and distribution of ice, water, food, fuel, and medical supplies and it authorized DOD to spend up to $1 billion to accomplish this mission."[99] This mission was complicated by FEMA's immediately losing visibility in tracking shipments and supply delivery.[100] When DOD was tasked to assume the lead for logistics support from

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[89] DOPLAW HANDBOOK, *supra* note 51, at 286; NRP, *supra* note 12.

[90] Federal Emergency Management Agency Mission Assignment (MA) No. 1603DR–LA–DOD–29, Hurricane Katrina Response, to Department of Defense (Sept. 6, 2005) [hereinafter MA No. 1603DR–LA–DOD–29] (on file with author).

[91] Execute Order Message from Chairman of the Joint Chiefs of Staff, DOD Support to Civil Authorities (8 June 07) (unclassified) (authorizing CDRUSNORTHCOM, CDRUSSOUTHCOM, and CDRUSPACOM to provide "defense support to civilian authorities (DSCA) in response to actual or potential natural or man-made disasters, incidents of national significance, or other emergencies requiring DOD-augmented support within their Areas Of Responsibility (AOR).").

[92] JA 422, *supra* note 13, at 131.

[93] *See* FAR Part 18, Emergency Acquisitions, *supra* note 6.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] THE WHITE HOUSE, HURRICANE KATRINA LESSONS LEARNED 54 (Feb. 23, 2006), *available at* http://whitehouse.gov/reports/Katrina-lessons-learned.pdf.

[98] 109TH CONG. REP., *supra* note 41, at 204.

[99] GAO–06–643, *supra* note 5, at 7, 30.

[100] *Id.*

FEMA, DOD was not able to regain visibility in tracking these previously ordered supplies and services.[101] The DOD also had initial problems with FEMA regarding unclear MAs which failed to specify what exactly FEMA was tasking DOD to do and what was specifically reimbursable.[102] To resolve this problem, DOD essentially took over the process of drafting FEMA's requests for assistance (RFAs) to DOD, and then sent the DOD drafts to FEMA to copy and direct DOD to comply.[103]

Another problem between DOD and FEMA involved the bungled delivery of a large air shipment of meals-ready-to eat (MREs) from the DOD. Once DOD flew in the requested MREs, DOD mistakenly refused to allow FEMA-provided ground transportation under the incorrect assumption that agency regulations required shipment on only DOD-approved carriers, instead of FEMA approved carriers.[104] This mistake and the resulting confusion led to an unnecessary delay in delivering these critical food supplies.[105] Despite such problems, the overall military response to Hurricane Katrina was very impressive. In Louisiana alone, the DOD provided the following support: "40,000 [military] troops; trailers of water, ice and food; commercial buses; base camps; staging areas; amphibious personnel carriers; deployable morgues; urban search and rescue teams; airlift; temporary housing; and communications systems."[106] The military also provided vast support to FEMA efforts in Mississippi, Alabama, Florida, and Texas.[107]

Some examples of FEMA-directed reimbursable MAs to DOD include: One MA for $75 million for search and rescue, collection and evacuation of the displaced, and the collection and removal of the dead;[108] $7.5 million for amphibious assault personnel carriers,[109] and $3 million for helicopter support to airlift casualties.[110]

The DOD also provided the U.S. Naval Ship the USNS *Comfort*, a hospital ship, to assist with casualties and provide medical support.[111] However, military lawyers were quickly called in to clarify the level of reimbursable support authorized within the scope of medical support under the FEMA MA.[112] This initial uncertainty of what constituted authorized reimbursable support for medical care caused FEMA to issue three amending MAs defining the scope of reimbursable medical care support to adjust to the shifting needs of the response.[113]

While the Stafford Act requires a contracting preference for the use of local firms and individuals from the affected areas, if practical, this was evidently not done during the Hurricane Katrina response.[114] There were reports that debris clearance contracts were largely given to big multi-state firms, resulting in some local companies going out of business.[115] One senior federal contracting official reported some confusion regarding the "geographical preferences allowed and required by the Stafford Act."[116] The Governor of Louisiana even sent a letter to the President requesting that local firms in her state be given a contracting priority to help the local economy recover.[117]

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[101] *Id.* at 30.

[102] 109TH CONG. REP., *supra* note 41, at 204.

[103] *Id.*

[104] *Id.* at 214.

[105] *Id.*

[106] Letter from Kathleen Blanco, Governor of La., to George W. Bush, President of the United States (Sept. 2, 2005), *available at* http://www.gov.state.la.us [hereinafter Blanco Letter].

[107] *See* Honore & Barnhill, *supra* note 1.

[108] MA No. 1603DR-LA-DOD-29, *supra* note 90.

[109] Federal Emergency Management Agency, Mission Assignment (MA) No. 1603DR-LA-DOD-17, Hurricane Katrina Response, to Department of Defense (Sept. 2, 2005) (on file with author).

[110] Federal Emergency Management Agency, Mission Assignment (MA) No. 1603DR-LA-DOD-06, Hurricane Katrina Response, to Department of Defense (Aug. 31, 2005) (on file with author).

[111] E-mail from Colonel Marcia J. Bachman, Joint Operations Ctr. Judge Advoc., USNORTHCOM, to various Judge Advocate staff (Sept. 14, 2005, 16:15 EST) (on file with author).

[112] *Id.*

[113] *Id.*

[114] 109TH CONG. REP., *supra* note 41, at 331.

[115] *Id.*

[116] *Id.* at 333.

[117] Blanco Letter, *supra* note 106.

Just a few weeks into the Hurricane Katrina relief efforts, federal micro-purchase thresholds were raised to $250,000 for the acquisition of property and services supporting the relief and rescue efforts.[118] This increase in the purchasing threshold applied to all types of micro-purchases, but was mainly directed at purchases made with the government wide purchase card.[119] All acquisition laws and regulations continued in effect, especially those geared towards ensuring price value and procurement integrity.[120] The Office of Federal Procurement Policy (OFPP) under the Office of Management and Budget, encouraged federal agencies supporting relief efforts to "avail themselves of the simplified acquisition methods to conduct open market purchases under the simplified acquisition threshold" and to use existing procurement vehicles, including the General Services Administration (GSA) Multiple Award Schedule.[121] However, less than three weeks later, the OFPP sent new guidance requesting agencies not to use the increased limits unless faced with extraordinary circumstances, due to the diminished need for such authority.[122]

The General Accounting Office's (GAO) preliminary review of contracting for Hurricane Katrina's relief effort identified how the federal response during disasters increasingly relies on contractors to accomplish the mission of providing critical supplies and services, such as ice, water, food, and debris clearance.[123] The GAO cautioned against sloppy contracting practices during such catastrophes, despite the chaos and unpredictable nature of what must be supplied and supported.[124] The GAO specifically addressed in this report the need to have a skilled and trained acquisition workforce and sufficient numbers of oversight personnel to "monitor contractor performance and ensure accountability."[125] The GAO addressed how careless contracting practices, notably poor planning and execution, led to failure in procuring "quality goods and services on-time" in a "cost-effective manner."[126] Interagency contracting, under the authority of the Economy Act or other reimbursement mechanism, was another area highlighted as having a "system-wide weakness in key areas of acquisition" in the federal response to Hurricane Katrina.[127] Fortunately for DOD, most of the GAO contracting criticisms were focused on DHS; yet, these criticisms still provide useful lessons learned for the military.[128]

A separate GAO report on the Katrina response noted that federal agencies need to improve intra-agency acquisition capabilities.[129] The GAO specifically recommended that federal agencies "adequately anticipate requirements for needed goods and services, clearly communicate responsibilities across agencies and jurisdictions, and deploy sufficient numbers of personnel to provide contractor oversight."[130]

After action review (AAR) comments from one Marine Corps judge advocate deployed to New Orleans reports that support by his unit was mostly provided on a "reactionary" basis to RFAs from FEMA and local authorities.[131] This judge advocate noted that some of the military support fell outside the permissible parameters of the Stafford Act, in that military troops were inadvertently used to effect repairs and debris clearance to private property that was not incident to preserve life,

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[118] Memorandum, Administrator, Office of Fed. Procurement Policy, Off. of Mgmt. & Budget, Executive Off. of the President, to Chief Acquisition Officers & Chief Fin. Officers, subject: Implementing Management Controls to Support Increased Micro-Purchase Threshold for Hurricane Katrina Rescue and Relief Operations (Sept. 13, 2005) (on file with author).

[119] *Id.*

[120] *Id.*

[121] *Id.* *See* Gov't Accountability Off., http://gsa.gov/portal/gsa/ep/home.do?tabid=0 (last visited Mar. 16, 2007) (under "GSA Contracts and Schedules," GSA has grouped together all disaster relief services and products in one consolidated site for ease of use).

[122] Memorandum, Deputy Director for Management, Office of Management and Budget, Executive Office of the President, to Heads of Executive Departments and Agencies, subject: Limitations on Use of Special Micro-Purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations (Oct. 3, 2005).

[123] GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-246T, HURRICANES KATRINA AND RITA: PRELIMINARY OBSERVATIONS ON CONTRACTING FOR RESPONSE AND RECOVERY EFFORTS (Nov. 8, 2005) [hereinafter GAO-06-246T].

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-442T, HURRICANE KATRINA: GAO'S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS, RESPONSE, AND RECOVERY (Mar. 8, 2006) [hereinafter GAO-06-442T].

[131] Staff Judge Advocate, Marine Corps Special Purpose Marine Air-Ground Task Force Katrina Hurricane Relief Operations, After Action Review (Sept. 2005) [hereinafter Katrina AAR] (unpublished, on file with author).

health, or prevent great property damage.[132] This judge advocate further stressed the importance of legal review to ensure all support provided is within scope of the reimbursable MA from FEMA, and that all expenses are closely tracked and recorded.[133] While much permissible federal military support was initially provided, such as rescuing stranded civilians and delivering food and water to preserve life and health, the mission quickly shifted to one better suited for non-federalized (non-Title 10) forces that are not so constrained by the Stafford Act or Posse Comitatus Act (PCA) limitations.[134] In some areas, the emergent need for federal military forces was for less than a week.[135] The inadvertent provision of supplies among military forces, between those operating in a Title 10 status and those operating in a Title 32 or State Active Duty status, is another problem area requiring close legal attention.[136]

In an article he co-wrote about the military's Katrina response, Lieutenant General Russell L. Honore, JTF Katrina Commander, acknowledged that mission planning and execution were both guided by legal considerations.[137] He recommended eleven "quick fixes" to improve the coordinated federal and state response, including: "Establish[ing] external support (push packages/funding) to fill common resource shortfalls in order to facilitate the delivery of basic humanitarian relief supplies;" and "Pre-arrange[ing] support contracts for required resources in order to quickly back-fill shortfalls in basic humanitarian relief supplies and services in order to facilitate the delivery of supplies to local authorities and citizens."[138]

B. September 11th Terrorist Attacks

Following the terrorist attacks in the United States on September 11, 2001, the President declared a major disaster in New York City, authorizing federal assistance to civil authorities under the NRP.[139] Under the NRP, the military provided "supplies, equipment, and lodging on military installations and transporting people, supplies and equipment."[140] The DOD also provided military health system support to civil authorities under the NRP. For example, upon request of local authorities, DOD provided a "Ruggedized Advance Pathogen Identification team . . . to detect, identify, and confirm suspected anthrax cases."[141] This support was provided on a reimbursable basis.[142] The DOD also received RFAs for the deployment of a hospital ship (the USNS *Comfort*), the provision of body bags, and the set up of a mobilization center for a mortuary team.[143] The RFA for the USNS *Comfort* was eventually revised from having the ship serve as a medical platform to treat casualties to having it serve as a lodging and support platform for the rescue workers.[144]

While the military was extremely responsive following the events of September 11th, the Air Force was later criticized for being a bit *too* responsive.[145] Following the September 11th attacks, the Air Force quickly moved medical personnel and equipment to McGuire Air Force Base near New York City, anticipating the need to provide support to civil authorities.[146] The Air Force initiated this action without having received an RFA by FEMA and without being directed to do so by the

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[132] *Id.*

[133] *Id.*

[134] *Id.*; e-mail from Major Devin Young, Staff Judge Advocate, 24th Marine Expeditionary Unit, U.S. Marine Corps, to author (Sept. 27, 2006, 22:11 EST) [hereinafter Young e-mail] (on file with author). This assertion is based on the author's recent professional experiences as the Staff Judge Advocate, 11th Marine Expeditionary Unit, supporting Special Purpose Marine Air-Ground Task Force Katrina Hurricane Relief Operations, during September 2005 [hereinafter Professional Experience].

[135] Katrina AAR, *supra* note 131; Young e-mail, *supra* note 134; Professional Experience, *supra* note 134.

[136] Katrina AAR, *supra* note 131; Young e-mail, *supra* note 134; Professional Experience, *supra* note 134.

[137] Honore & Barnhill, *supra* note 1, at 13.

[138] *Id.* at 14.

[139] U.S. DEP'T OF DEFENSE INSPECTOR GENERAL REPORT, D-2002–087, HEALTH CARE: DOD MEDICAL SUPPORT TO THE FEDERAL RESPONSE PLAN 1 (10 May 2002).

[140] *Id.* at 4.

[141] *Id.* at 2.

[142] *Id.*

[143] *Id.* at 4.

[144] *Id.*

[145] *Id.*

[146] *Id.*

DOD.[147] These resources were not required and because there was no request for such support, the Air Force's cost of $500,000, was not reimbursed.[148] While the Air Force's authority to move these resources was permissible under the immediate response authority, the Air Force failed to comply with the MSCA directive, leading to critical comments in a DOD IG report about incurring this unnecessary expense.[149]

Following the September 11th attacks, the DOD invoked its authority to declare that a "contingency operation" was ongoing.[150] Under a "contingency," the DOD may use all of the contingency contracting provisions in the FAR and DFARS.[151] A useful authority under the contingency contracting provision is the doubling of the simplified acquisition threshold from $100,000 to $200,000.[152]

One AAR from an Army judge advocate supporting September 11th relief operations noted legal efforts to ensure reimbursements were properly accomplished under the Stafford Act for military support, and noted legal efforts in providing contract review.[153]

C. Oklahoma City Bombing 1995

Following the domestic terrorist bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma in 1995, the military provided critical disaster relief support. As the bombing location was a crime scene and disaster site, military missions were essentially grouped into three different categories, supporting the crime scene, rescue assistance, and disaster support.[154] In supporting the crime scene, DOD "provided bomb dogs, an explosive ordnance disposal detachment and Army Criminal Investigation Command assets [while] [t]he national guard provided site security."[155] Immediately after the bombing, under the immediate response authority, the military provided rescue assistance, including medical evacuation (MEDEVAC) helicopters and vehicle ambulances from nearby Fort Sill and Tinker Air Force Base, a mortuary affairs unit, and other logistics and transportation support.[156] The military provided disaster support supplies, such as thousands of sets of uniforms, boots, rain gear, and body bags.[157] The military also provided portable shower units to the rescuers, cargo aircraft to transport civilian rescue units, and mobile crime labs for the FBI.[158]

As the Murrah Federal Building bomb site was both a disaster and crime scene site, FEMA took the lead agency role for all disaster (non-crime related) relief efforts and the FBI assumed the lead position for the crime scene.[159] This situation led to a legal "bifurcation" between what constituted permissible military support for disaster relief efforts and support to civil law enforcement agencies.[160] A major limitation on the scope of permissible support by federal military forces to civil law enforcement agencies is the PCA.[161] One issue that aroused PCA concerns involved DOD's providing Defense Intelligence

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[147] *Id.* at 7.

[148] *Id.* at i.

[149] *Id.* at ii, 7, 8.

[150] *Deployment and Contingency Contracting Update: Special Authorities Invoked in the Wake of the 11 September Attacks*, ARMY LAW., Jan./Feb. 2002, at 98, 99 (discussing the Presidential authorities invoked under 10 U.S.C. § 12,302 (2000), in the declaration of a "contingency," including the contingency provisions of the FAR and DFARS, the increase in the simplified acquisition threshold, and authorizing the recall of involuntary members of the Ready Reserve).

[151] *Id.*

[152] *Id.* (discussing the "simplified acquisition threshold," referencing 41 U.S.C. § 403 (2000) to define the term and FAR § 2.101 for the actual dollar amounts).

[153] Center for Law and Military Operations, Judge Advocate, New York National Guard, After Action Review of the September 11, 2001 Relief Efforts (n.d.) (unpublished, on file with author).

[154] Lieutenant Colonel Terry R. Youngbluth, Center for Law and Military Operations, *A Post-Hurricane Andrew Review of Trends in Department of Defense Disaster Relief Operations* (Apr. 1996) (unpublished, on file with author); Winthrop, *supra* note 2, at 13.

[155] Youngbluth, *supra* note 154; Winthrop, *supra* note 2, at 13, 14.

[156] Youngbluth, *supra* note 154.

[157] *Id.*; Winthrop, *supra* note 2, at 12.

[158] Winthrop, *supra* note 2, at 12.

[159] *Id.* at 13.

[160] *Id.*

[161] *Id.* at 13, 14 (citing the limitations imposed by the Posse Comitatus Act, 18 U.S.C. § 1385 (2000), on the federal military response).

Agency linguists, deemed as "intelligence personnel," to support the FBI's request for translator assistance on a reimbursable basis under Economy Act authority.[162] Another issue that required a PCA "work-around" involved the United States Marshals Service's request for military bomb sniffing dogs to work security.[163] The request was ultimately granted, but with significant limitations on the use of the dog teams because of the restrictions imposed by the PCA, other statutes, and DOD regulations concerning not just the dogs, but also their military handlers.[164]

D. Other

Domestic disaster and emergency relief efforts under the Stafford Act extend beyond the continental United States to Hawaii, Alaska, and all U.S. Territories, such as during the response to Hurricane Iniki in Hawaii and Typhoon Omar in Guam in 1992.[165] Another such example is the federal military response to Hurricane Marilyn relief efforts in the U.S. Virgin Islands in 1995.[166] During that hurricane response, DOD provided "1,043 sorties carrying over 7,000 passengers and 7,000 tons of cargo" of relief supplies.[167] The military provided medical support, food, water, ice, equipment, and transportation support.[168] The military also provided aerial reconnaissance support to FEMA for current damage assessment reporting.[169]

One last issue frequently arising during disaster and emergency relief efforts involves the permissible use of civilian volunteers directly assisting the military.[170] The issue lies in the Anti-Deficiency Act's general prohibition against the federal Government accepting voluntary services.[171] Permissible ways around this statutory prohibition include waiving compensation through gratuitous service agreements, or having volunteers offer their services to a nongovernmental relief agency, not the military forces.[172] While the Anti-Deficiency Act does allow for an exception to the voluntary services prohibition in an "emergency involving the safety of human life or the protection of property," it is generally recommended that FEMA make these determinations in such instances, as opposed to the military acting in support of FEMA.[173]

V. Conclusion

Judge advocates need to be ready and well-prepared to advise in the areas of fiscal law and contracting during a domestic disaster and emergency, whether in response to a hurricane or other natural disaster, a terrorist incident, or some other catastrophic event like an influenza pandemic. Close legal involvement is critical to ensure military support is only provided when properly requested with clear authority to do so, and that all reimbursement and funding matters are addressed fully and promptly with the supported agency, whether through the authority of the Stafford Act, Economy Act, or other interagency or intra-agency reimbursable agreements.[174] All contracting matters must be handled through a warranted contracting officer under the applicable acquisition authorities (i.e., FAR and DFARS),[175] and government purchase card procurements must

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[162] *Id.* at 14, 15 (noting that because these linguists qualified as "intelligence personnel," there were requirements for special approval by the General Counsel to the DIA, "in addition to the normal approval required by the applicable DoD or service regulation").

[163] *Id.* at 15.

[164] *Id.* (noting that military working dogs are considered "pieces of equipment" under 10 U.S.C. § 372, and the handlers are considered "expert advisors" under 10 U.S.C. § 373).

[165] Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

[166] Youngbluth, *supra* note 154.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] Colonel Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, PARAMETERS 82, 97 (Fall 1997).

[171] *Id.* (citing The Anti-Deficiency Act, 31 U.S.C. § 1342 (2000)).

[172] *Id.*; CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, FISCAL LAW DESKBOOK 6-26, 6-27 (2006–2007).

[173] Lujan, *supra* note 170, at note 14.

[174] *See* NRP, *supra* note 12; *see also* U.S. DEP'T OF HOMELAND SECURITY, QUICK REFERENCE GUIDE FOR THE NATIONAL RESPONSE PLAN 20 (May 22, 2006).

[175] *See* FAR, *supra* note 58; U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. (19 Dec. 2006).

comply with the rules. Simply put, acquisition rules are not waived due to catastrophes and contingencies, though emergency acquisition authorities, listed in FAR Part 18,[176] exist and may be used to facilitate and expedite operations.

[176] FAR PART 18, Emergency Acquisitions, *supra* note 6.

Appendix A

1. FAR Part 18: Compilation of Emergency Acquisition Authorities.

PART 18—EMERGENCY ACQUISITIONS

18.000 Scope of part.18.000 Scope of part.
18.001 Definition.
Subpart 18.1—Available Acquisition Flexibilities
18.101 General.
18.102 Central contractor registration.
18.103 Synopses of proposed contract actions.
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18.105 Federal Supply Schedules (FSSs), multi-agency blanket purchase agreements (BPAs), and multi-agency indefinite delivery contracts.
18.106 Javits-Wagner-O'Day (JWOD) specification changes.
18.107 Qualifications requirements.
18.108 Priorities and allocations.
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18.111 Letter contracts.
18.112 Interagency acquisitions under the Economy Act.
18.113 Contracting with the Small Business Administration (The 8(a) Program).
18.114 HUBZone sole source awards.
18.115 Service-disabled Veteran-owned Small Business (SDVOSB) sole source awards.
18.116 Overtime approvals.
18.117 Use of patented technology under the North American Free Trade Agreement.
18.118 Bid guarantees.
18.119 Advance payments.
18.120 Assignment of claims.
18.121 Electronic funds transfer.
18.122 Protest to GAO.
18.123 Contractor rent-free use of Government property.
18.124 Extraordinary contractual actions.
Subpart 18.2—Emergency Acquisition Flexibilities
18.201 Contingency operation.
18.202 Defense or recovery from certain attacks.
18.203 Incidents of national significance, emergency declaration, or major disaster declaration.
18.204 Resources.

18.000 Scope of part.

(a) This part identifies acquisition flexibilities that are available for emergency acquisitions. These flexibilities are specific techniques or procedures that may be used to streamline the standard acquisition process. This part includes—

(1) Generally available flexibilities; and

(2) Emergency acquisition flexibilities that are available only under prescribed circumstances.

(b) The acquisition flexibilities in this part are not exempt from the requirements and limitations set forth in FAR Part 3, Improper Business Practices and Personal Conflicts of Interest.

18.001 Definition.

"Emergency acquisition flexibilities", as used in this part, means flexibilities provided with respect to any acquisition of supplies or services by or for an executive agency that, as determined by the head of an executive agency, may be used—

(a) In support of a contingency operation as defined in 2.101;

(b) To facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States; or

(c) When the President declares an incident of national significance, emergency declaration, or a major disaster declaration.

Subpart 18.1—Available Acquisition Flexibilities

18.101 General.

The FAR includes many acquisition flexibilities that are available to the contracting officer when certain conditions are met. These acquisition flexibilities do not require an emergency declaration or designation of contingency operation.

18.102 Central contractor registration.

Contracts awarded to support unusual and compelling needs or emergency acquisitions are exempt from the requirements pertaining to Central Contractor Registration. (See 4.1102.)

18.103 Synopses of proposed contract actions.

Contracting officers need not submit a synopsis notice when there is an unusual and compelling urgency and the Government would be seriously injured if the agency complied with the notice time periods. (See 5.202(a)(2).)

18.104 Unusual and compelling urgency.

Agencies may limit the number of sources and full and open competition need not be provided for contracting actions involving urgent requirements. (See 6.302-2.)

18.105 Federal Supply Schedules (FSSs), multi-agency blanket purchase agreements (BPAs), and multi-agency indefinite delivery contracts.

Streamlined procedures and a broad range of goods and services may be available under Federal Supply Schedule contracts (see Subpart 8.4), multi-agency BPAs (See 8.405-3(a)(4)), or multi-agency, indefinite-delivery contracts (see 16.505(a)(7)). These contracting methods may offer agency advance planning, pre-negotiated line items, and special terms and conditions that permit rapid response.

18.106 Javits-Wagner-O'Day (JWOD) specification changes.

Contracting officers are not held to the notification required when changes in JWOD specifications or descriptions are required to meet emergency needs. (See 8.712(d).)

18.107 Qualifications requirements.

Agencies may determine not to enforce qualification requirements when an emergency exists. (See 9.206-1.)

18.108 Priorities and allocations.

The Defense Priorities and Allocations System (DPAS) supports authorized national defense programs and was established to facilitate rapid industrial mobilization in case of a national emergency. (See Subpart 11.6.)

18.109 Soliciting from a single source.

For purchases not exceeding the simplified acquisition threshold, contracting officers may solicit from one source under certain circumstances. (See 13.106-1(b).)

18.110 Oral requests for proposals.

Oral requests for proposals are authorized under certain conditions. (See 15.203(f).)

18.111 Letter contracts.

Letter contracts may be used when contract performance must begin immediately. (See 16.603.)

18.112 Interagency acquisitions under the Economy Act.

Interagency acquisitions are authorized under certain conditions. (See Subpart 17.5.)

18.113 Contracting with the Small Business Administration (The 8(a) Program).

Contracts may be awarded to the Small Business Administration (SBA) for performance by eligible 8(a) firms on either a sole source or competitive basis. (See Subpart 19.8.)

18.114 BZone sole source awards.

Contracts may be awarded to Historically Underutilized Business Zone (HUBZone) small business concerns on a sole source basis. (See 19.1306.)

18.115 Service-disabled Veteran-owned Small Business (SDVOSB) sole source awards.
Contracts may be awarded to Service-disabled Veteran-owned Small Business (SDVOSB) concerns on a sole source basis. (See 19.1406.)

18.116 Overtime approvals.
Overtime approvals may be retroactive if justified by emergency circumstances. (See 22.103-4(i).)

18.117 Use of patented technology under the North American Free Trade Agreement.
Requirement to obtain authorization prior to use of patented technology may be waived in circumstances of extreme urgency or national emergency. (See 27.208.)

18.118 Bid guarantees.
The chief of the contracting office may waive the requirement to obtain a bid guarantee for emergency acquisitions when a performance bond or a performance bond and payment bond is required. (See 28.101-1(c).)

18.119 Advance payments.
Agencies may authorize advance payments to facilitate the national defense for actions taken under Public Law 85-804 (see Part 50, Extraordinary Contractual Actions). These advance payments may be made at or after award of sealed bid contracts, as well as negotiated contracts. (See 32.405.)

18.120 Assignment of claims.
The use of the no-setoff provision may be appropriate to facilitate the national defense in the event of a national emergency or natural disaster. (See 32.803(d).)

18.121 Electronic funds transfer.
Electronic funds transfer payments may be waived for acquisitions to support unusual and compelling needs or emergency acquisitions. (See 32.1103(e).)

18.122 Protest to GAO.
When urgent and compelling circumstances exist, agency protest override procedures allow the head of the contracting activity to determine that the contracting process may continue after GAO has received a protest. (See 33.104(b) and (c).)

18.123 Contractor rent-free use of Government property.
Rental requirements do not apply to items of Government production and research property that are part of a general program approved by the Federal Emergency Management Agency and meet certain criteria. (See 45.404(a)(3) and (4).)

18.124 Extraordinary contractual actions.
Part 50 prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85-804 (50 U.S.C. 1431-1434). This includes—
(a) Amending contracts without consideration (see 50.302-1);
(b) Correcting or mitigating mistakes in a contract (see 50.302-2); and
(c) Formalizing informal commitments (See 50.302-3).

Subpart 18.2—Emergency Acquisition Flexibilities

18.201 Contingency operation.
(a) *Contingency operation* is defined in 2.101.
(b) *Micro-purchase threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to support a contingency operation. (See 2.101 and 13.201(g).)
(c) *Simplified acquisition threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to support a contingency operation. (See 2.101.)
(d) *SF 44, Purchase Order-Invoice-Voucher*. The normal threshold for the use of the SF 44 is at or below the micro-purchase threshold. Agencies may, however, establish higher dollar limitations for purchases made to support a contingency operation. (See 13.306.)
(e) *Test program for certain commercial items*. The threshold limits authorized for use of the test program may be increased for acquisitions to support a contingency operation. (See 13.500(e).)

18.202 Defense or recovery from certain attacks.

(a) *Micro-purchase threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 2.101.)

(b) *Simplified acquisition threshold*. The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 2.101.)

(c) *Commercial items to facilitate defense and recovery*. Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial items if the head of the agency determines the acquisition is to be used to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(e).)

(d) *Test program for certain commercial items*. The threshold limits authorized for use of the test program may be increased when it is determined the acquisition is to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. (See 13.500(e).)

18.203 Incidents of national significance, emergency declaration, or major disaster declaration.

(a) *Authorized or required by statute*. Agencies may limit the use of full and open competition when statutes authorize or require that the acquisition be made through another agency or from a specified source. This includes the Robert T. Stafford Disaster Relief and Emergency Assistance Act. (See 6.302-5 and Subpart 26.2.)

(b) *Disaster or emergency assistance activities*. Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. (See Subpart 26.2 and 6.302-5(b)(5).)

(c) *Ocean transportation by U.S. flag vessels*. The provisions of the Cargo Preference Act of 1954 may be waived in emergency situations. (See 47.502(c).)

18.204 Resources.

(a) *National Response Plan*. The National Response Plan (NRP) provides a single, comprehensive framework for the management of domestic incidents where Federal involvement is necessary as required by the Homeland Security Act of 2002 (Public Law 107-296). The NRP only applies to incidents of national significance, defined as an actual or potential high-impact event that requires a coordinated and effective response by an appropriate combination of Federal, State, local, tribal, nongovernmental, and/or private-sector entities in order to save lives, minimize damage, and provide for long-term community recovery and mitigation activities. The Department of Homeland Security is responsible for the NRP. The NRP is available at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0566.xml.

Cry "Humanitarian Assistance," and Let Slip the Dogs of War

Major Sharad A. Samy[1]

Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting.

—Sun Tzu, The Art of War

It is clear that the ongoing War on Terror is unlike any other war. The very objective of this war—stopping terrorists from preying upon the innocent while winning the hearts and minds of diverse populations throughout the world—requires the U.S. military to consider innovative operations and missions that reach far beyond traditional military objectives.

Indeed, in today's war, each member of the armed forces is a servicemember, a policeman, a diplomat, and an international aid worker. From a historical perspective, this development is to be expected given that today's wars stem from ethnic, religious, cultural, and social strife exacerbated by increasingly disparate economic climates.[2] When planning and executing operations on the modern battlefield, commanders spend significant time considering the impact their missions have on the lives and well-being of local, indigenous populations.[3]

To this end, Congress has seen fit to provide commanders with a powerful and expansive weapon that may prove to be significant in winning the Global War on Terror. Congress empowered the military with the ability to finance and execute humanitarian assistance (HA) projects throughout the world.[4] Through HA operations the armed forces can conduct missions in diverse and challenging environments, providing local populations with the means to establish healthy and robust economies while promoting a positive image of the United States, bolstering international peace efforts, and, as a result, helping to defend the United States from potential attacks. In essence, if traditional military operations display how well the United States fights, HA missions display the causes for which the United States will fight.

Notwithstanding congressional intent to have the military execute HA operations, the framework Congress established[5] fails to address certain practical considerations that military leaders face when conducting HA operations in connection with the War on Terror. Absent improvements to the framework, the military's ability to successfully accomplish HA missions is severely limited and the benefits Congress intended to provide to disadvantaged populations in militarily strategic areas worldwide may never come to fruition.

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[1] The author is a commissioned officer in the U.S. Army Reserve. He was stationed in Djibouti, Africa from July to November 2005 in the Staff Judge Advocate's Office of the Coalition Joint Task Force—Horn of Africa (CJTF-HOA). The author would like to thank Major General Timothy Ghormley (Commander, CJTF-HOA, USMC), Colonel (Col) Kathleen Henderson (Staff Judge Advocate, CJTF-HOA, USMC), Col William Buckley (CMO Director, CJTF-HOA, USMC), Lieutenant Colonel Peggie Murray (HA and HMA Director, U.S. Central Command (USCENTCOM), USAF), Captain (CPT) Joseph V. Moreno (Deputy Staff Judge Advocate, CJTF-HOA, USAR) and CPT Nikiforos Mathews (4th JAG Detachment, USAR) for their kind assistance in the preparation of this article. The author would also like to especially thank Col Henderson for her singular vision of seeing that things that can and should be done—are in fact done. That vision is the inspiration for this article.

[2] *See generally* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA ii (Sept. 2002) [hereinafter NATIONAL SECURITY STRATEGY] ("Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.")

[3] The media generally reports on military operations where such considerations have not been made or have failed, and it is an unfortunate popular misconception that military commanders are indifferent to the impact that a military mission might have regarding a particular location. Indeed, a responsible commander is cognizant of the importance of such considerations because they can, in practical military terms, directly impact the success and/or failure of a particular mission. *See* Colonel (Retired) Maxie McFarland, *Military Cultural Education*, MIL. REV. 62 (Mar.–Apr. 2005). *See generally* First Lieutenant David A. Tosh, *Engaging the Population and Local Leaders*, ARMOR 41 (Sept.–Oct. 2004) (for an honest account of at least one Soldier's command experiences in Iraq).

[4] *See, e.g.*, 10 U.S.C. §§ 401, 402, 2557, 2561 (2000). The military can and should execute HA missions throughout the world, so long as such missions are within the technical capability of military personnel and conducted in connection with strategic military goals and objectives. First, such missions are vital and essential to DOD's responsibility to keep the United States safe from international aggression and are generally conducted in "trouble spot" areas of the world where U.S. foreign policy dictates that a strong U.S. military presence exist. Second, DOD is fully capable of accomplishing HA objectives in an efficient and comprehensive manner if such missions are conducted in a way that appropriately utilizes military assets. The author acknowledges, however, that this premise is not necessarily an accepted one. *See* Jane Barry & Anna Jeffreys, *A Bridge Too Far: Aid Agencies and the Military in Humanitarian Response*, HUMANITARIAN PRACTICE NETWORK PAPER NO. 37 (Jan. 2002).

[5] *See, e.g.*, 10 U.S.C. §§ 401, 402, 2557, 2561 (1988).

This article sets forth: (i) the basis for military involvement in HA activities; (ii) the genesis of HA statutory authorities; (iii) an analysis of the current statutory regime; and (iv) some proposed amendments that should be made to the current statutory regime for the military to effectively achieve the noble goals of HA legislation.

I. The Strategic Basis for Military Involvement in HA Activities

The Department of Defense's (DOD) role in HA activities has steadily increased since the end of World War II (WWII). America's immediate, post-WWII military operations, many of which may be legitimately characterized as HA initiatives, centered largely around rebuilding political and economic infrastructure in war-ravaged Central and Southern Europe and Japan.[6] From an HA planning perspective, the unconditional surrender of Axis forces at the end of WWII was fortuitous because: (i) it enabled lawmakers to clearly divide American post-war rebuilding efforts between DOD,[7] on the one hand, and the Department of State (DOS), on the other; and (ii) allied efforts to rebuild Germany and Japan were comparatively easy to implement as they were both occupied countries after the war.

However, these advantages were of limited significance beyond the initial stages of the Cold War; the armed forces quickly learned that they would need to deal with what could be considered, at the time, "non-military" matters. A largely ideological struggle between Western democracies and the Soviet Union, the Cold War thrust the U.S. military into the position of having to provide a viable defense against the threat of Communist aggression while supporting U.S. political agendas intended to preserve fledgling democracies throughout the world, including in East and Central Asia and Latin America.[8] To a degree, because the military was instrumental in the ideological battle, the armed forces were required to account for geo-political considerations when planning operations. Indeed, winning the hearts and minds of local populations (or the *failure* to do so) was, to some degree, decisive in the outcomes of the U.S. campaigns in Korea, Vietnam and Central America. Clearly, by the end of the Cold War, the U.S. military's role in foreign affairs had shifted.

Since the fall of the Soviet Union, the U.S. military's role as a provider of HA has only increased. The U.S. military has been involved in HA operations all over the world in the past thirty years and the military objectives relating to such operations have become increasingly more complex.[9] For example, we have seen significant military HA operations

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[6] *See, e.g.*, James Reston, *Administration Now Shifts Its Emphasis on Foreign Aid*, N.Y. TIMES, May 9, 1947, at 3. *See also e.g.*, REC. OF THE WK., May 18, 1947, at 991 (statement of Undersecretary Dean Acheson before Delta Council at Cleveland, Miss., on 8 May 1947). "[We] are going to have to concentrate our emergency assistance in areas where it will be most effective in building world political and economic stability, in promoting human freedom and democratic institutions, in fostering liberal trading policies, and in strengthening the authority of the United Nations." *Id.* at 993.

[7] The reference to DOD in this context embraces its predecessor agencies as well (e.g., the War Department and the Navy Department).

[8] President Harry S. Truman, State of the Union Address (7 Jan. 1953).

> Thus, everywhere in the free world, the communists seek to fish in troubled waters, to seize more countries, to enslave more millions of human souls. They were, and are, ready to ally themselves with any group, from the extreme left to the extreme right, that offers them an opportunity to advance their ends.
>
> . . . .
>
> . . . This is the measure of the challenge we have faced since World War II – a challenge partly military and partly economic, partly moral and partly intellectual, confronting us at every level of human endeavor and all around the world.
>
> . . . .
>
> . . . We realized that if we and our allies did not have military strength to meet the growing Soviet military threat, we would never have the opportunity to carry forward our efforts to build a peaceful world of law and order – the only environment in which our free institutions could survive and flourish.
>
> Did this mean we had to drop everything else and concentrate on armies and weapons? Of course it did not: side-by-side with this urgent military requirement, we had to continue to help create conditions of economic and social progress in the world. . . .
>
> These two requirements – military security and human progress – are more closely related in action than we sometimes recognize. Military security depends upon a strong economic underpinning and a stable and hopeful political order; conversely, the confidence that makes for economic and political progress does not thrive in areas that are vulnerable to military conquest.

Id.

[9] *See* NATIONAL SECURITY STRATEGY, *supra* note 2.

> Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. . . . The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror.

conducted in Bosnia-Herzegovina, Bangladesh, Thailand, Afghanistan, Iraq, Yemen, Ethiopia, Somalia, Djibouti, Kenya, Nicaragua, Colombia, Honduras, and the Caribbean. Indeed, the U.S.-led war against religious fundamentalists in the Middle East has even developed an "HA front"; the U.S. military's HA efforts are opposed by HA efforts undertaken by extremist organizations[10] hoping to foster fertile recruiting grounds for terrorists.[11]

Despite these developments, there is still a clear limitation on the type of HA assistance that the military can, and should, provide.[12] Because DOD's mission is to provide for the defense of the United States, the military should only conduct HA operations having a clear, strategic military value. Political leadership and military commanders will generally agree that the military is not in the business of nation-building, and, as such, military activities, including HA activities, are typically limited to operations that yield tangible tactical or military objectives.[13] As such, the HA projects in which the military engages generally: (i) focus on areas traditionally used as recruiting grounds by terrorist organizations to counteract terrorist presence in such areas; (ii) create containment borders around areas of political or economic instability to ensure that such instability does not spread to more stable areas; or (iii) increase U.S. military presence in host nations where the military would like to develop or strengthen military-to-military relationships.

II. The Genesis of HA Statutory Authorities

In 1986, Congress blessed the growing role of the military in humanitarian affairs by establishing a legal framework upon which the military may finance and execute HA projects worldwide.[14] This effort was largely a congressional reaction to a 1984 decision (the Honduras Opinion)[15] by the General Accounting Office (GAO)[16] effectively prohibiting the military from using appropriated operation and maintenance (O&M) funds to pay for costs related to HA projects.

In the early 1980s, a National Guard unit, using O&M funds, financed a humanitarian exercise that was part of a military exercise conducted in Honduras.[17] While National Guard personnel constructed base camps for use by the National Guard, they also upgraded access roads around the base camps, constructed a thirteen-mile section of road in north central Honduras, built a local schoolhouse, provided medical assistance to 50,000 Honduran civilians, and provided veterinary assistance to 40,000 animals.[18] The Honorable William "Bill" Alexander (Rep., D-AR) requested that the GAO provide him with a formal legal decision regarding the propriety of the National Guard's use of O&M funds for these purposes.[19]

Id. at i.

[10] Al-Ittihad al-Islami is an example of such an organization.

[11] Ejara Amante, *Defending the Nation Against Terror*, *available at* http://www.ethioembassy.org.uk/articles/articles/march-00/Ejara%20Amante%20-%201.htm (last visited Dec. 4, 2007).

> The funds [Al-Ittihad] raises locally or outside Somalia partially go into social services, schools and Sharia courts while the larger part of it goes to weaponry. . . . Amazingly, Al-Ittihad's approach appears to be more of a long term in nature, preferring to build a broader support and economic backing which now is openly seen in the booming of investments in telecommunications and money transfers (the existing banking system in Somalia) in all parts of Somalia that of an immediate lucrative. One should also be aware of the fact that some of the transactions of this extremist group have been handled by well known international NGO's that are actively engaged in humanitarian activities inside Somalia.

Id.

[12] In fact, the HA activities discussed in this article are a small, albeit integral component, of the on-going mission to win the War on Terror and are not the dispositive cure for all geo-political issues arising in the world today. *See generally* NATIONAL SECURITY STRATEGY, *supra* note 2, at 6, 9, 10, 29–31. Other extensive HA programs (e.g., those conducted by DOS) will also have an impact on the outcome of the War on Terror.

[13] *See generally* U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).

[14] *See* 10 U.S.C. § 2547 (1988). In 1986, Congress authorized Humanitarian and Refugee Affairs to transport non-lethal excess property, relief supplies and privately donated cargo to meet humanitarian needs worldwide.

[15] The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984).

[16] Now known as the General Accountability Office.

[17] The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422, at *8.

[18] *Id.*

[19] *Id.* at *1.

Prior to the Honduras Opinion, the military financed HA-type projects using O&M funds. Military departments relied upon the authority provided by 10 U.S.C. § 2805(c) to finance minor military construction projects using O&M funds.[20] In addition, they characterized the labor of medical and veterinary personnel in connection with such projects as volunteer "off-duty" work of American servicemembers.[21]

For example, prior to the issuance of the Honduras Opinion, a military service might engage in a road construction project around an airport utilized by the military in connection with an ongoing military operation. The service would charge construction and other related costs to that department's O&M funding. To bolster support with local populations regarding such a project and to engender trust in the military, certain personnel would provide free medical and veterinary services to local populations. To finance these activities, a local commander would take advantage of the relative flexibility provided by the O&M appropriation authority.

The Comptroller General of the United States concluded that the use of O&M funds to finance certain portions of this project was improper.[22] Specifically, the Comptroller General noted "[DOD] has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as [the U.S. Agency for International Development]) through the Economy Act, 31 U.S.C. § 1535, or (for minor projects) as incidental to the provision of security assistance."[23] The GAO also rejected arguments that the civic and humanitarian activities undertaken by National Guard personnel were off-duty services that only happened to benefit personnel operational training readiness.[24]

The GAO established a three-part test to determine if the funding of a particular HA project is proper: (i) the expense must be reasonably related to the purposes for which the appropriation was made; (ii) the expenditure must not be prohibited by law; and (iii) the expenditure must not fall specifically within another category of appropriations provided to the entity.[25] Determining that a number of the activities conducted by the National Guard in this exercise failed this test, the GAO concluded that financing humanitarian projects through O&M funds was unauthorized.[26] The GAO advised DOD to "seek specific funding authorization from Congress."[27]

In response to the GAO's advice, DOD took the battle to Congress. Congress quickly enacted HA-specific legislation for DOD's benefit.[28] Under this framework, DOD was authorized to allocate funds to execute HA projects throughout the world.[29]

III. The Current Statutory Regime

The four core statutes forming the basis for funding DOD-directed HA activities are 10 U.S.C. § 401, 10 U.S.C. § 402, 10 U.S.C. § 2557, and 10 U.S.C. § 2561.

A. Section 401

Section 401 was enacted on 14 November 1986 in direct response to the Honduras Opinion.[30] It is one of the central DOD HA funding statutes, establishing funding for DOD directed humanitarian and civic assistance (HCA) operations.[31]

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[20] *See* 10 U.S.C. § 2805(c). As noted in the Honduras Opinion and as described herein, this statute did not provide sufficient statutory support for these HA operations. *Id.*

[21] The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422, at *42 (1984).

[22] *Id*.

[23] *Id*. at *2.

[24] *Id.* at *42.

[25] *Id.* at *12.

[26] *Id.* at *56.

[27] *Id.* at *7.

[28] 10 U.S.C. § 2547 (1986).

[29] *Id.*

[30] *Id.* § 401.

[31] *See id.* The current statutory framework is derived from § 401.

Generally speaking, HCA operations are HA activities that can be directly traced to mission-oriented objectives of a military command. The statute requires that HCA activities be conducted "in conjunction with authorized military operations"[32] and that they promote "the security interests of both the [U.S.] and the country in which the activities are to be carried out"[33] while supporting the "specific operational readiness skills of the members of the armed forces who participate in the activities."[34] Such activities must: (i) complement, and may not duplicate, any other form of social or economic assistance which may be provided to a country by any other department or agency of the United States;[35] (ii) serve the basic economic and social needs of the people of such country;[36] and (iii) not be provided, directly or indirectly, to any individual, group or organization engaged in military or paramilitary activity.[37] In order to ensure cooperation with the DOS regarding any HCA activity, Congress specifically requires the Secretary of State to authorize any HCA activity undertaken by the DOD in a particular country.[38] Section 401 explicitly states that HCA activities include: (i) medical, dental and veterinary care provided in areas of a country that are rural or underserved by medical, dental and veterinary professionals, respectively;[39] (ii) construction of rudimentary surface transportation systems; (iii) well drilling and construction of basic sanitation facilities; and (iv) rudimentary construction and repair of public facilities.[40]

B. Section 2561

Enacted on 23 October 1992, § 2561 is the second pivotal HA funding statute, establishing DOD funding for broader and more extensive humanitarian assistance projects (HAO).[41] Given the expansive language contained therein, the act serves as an indication of congressional intent that the DOD can and should engage in HA activities as world events may require.

Section 2561 acts as a catch-all funding statute for DOD HA fiscal purposes, providing a legitimate basis for funding HA activities even if specific funding under § 401 or § 402 (described below) is not available or authorized.[42] First, § 2561 authorizes DOD to provide for transportation of humanitarian relief to foreign nations, including for events or conditions that threaten serious harm to the environment (such as oil spills).[43] This provision has been used to finance the transportation of U.S. government donated relief supplies in situations where § 402 funds are not available for such purposes.[44]

Section 2561 also authorizes the DOD to use § 2561 funds "for other humanitarian purposes worldwide."[45] Because this statutory language is open-ended, DOD guidance rightly suggests that HAO can be far more varied than HCA activities.[46] Some approved HAO activities include: (i) projects using host nation contractors for basic building and repairs; (ii) the purchase of end items other than those used in connection with § 401-funded HCA activities; (iii) training or technical assistance for humanitarian purposes; and (iv) certain improvements to infrastructure, which are limited to rudimentary construction and basic repairs.[47]

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[32] 10 U.S.C. § 401(a)(1) (2006).

[33] *Id.* § 401(a)(1)(A).

[34] *Id.* § 401(a)(1)(B).

[35] *Id.* § 401(a)(2).

[36] *Id.* § 401(a)(2).

[37] *Id.* § 401(a)(3).

[38] *Id.* § 401(b)(1).

[39] *Id.* § 401(e)(1). Congress amended this definition on 30 October 2000 to expand DOD capability to serve areas that "are underserved by medical, dental and veterinary professionals." *Id.* § 401, at 167. Prior to such amendment, DOD activities were limited to rural areas only.

[40] *Id.* § 401(e)(5).

[41] *See id.* § 2561(a).

[42] *See id.* § 2561. *See also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 12(B)(2)(c), at 268 (2005) [hereinafter OPLAW HANDBOOK].

[43] 10 U.S.C. § 2561(a)(1).

[44] OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(c), at 268.

[45] 10 U.S.C. § 2561(a)(1).

[46] OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(c), at 268.

[47] Examples of some such infrastructure projects include rudimentary road work, drilling and repairing water wells and repairing buildings used for public purposes (such as schools, clinics or community centers).

In addition, based on the language of § 2561, unlike HCA projects, HAO missions do not have to promote the operational readiness skills of associated Soldiers and do not need to be conducted in conjunction with an on-going military operation or exercise.

C. Section 402

Enacted on 4 December 1987, § 402 enables the DOD to fund HA transportation operations relating to delivery of privately donated goods (i.e., not owned by or donated by the United States government or its agencies).[48] Pursuant to § 402, the DOD may transport to any country supplies which have been furnished by a non-governmental source which are intended to be delivered for humanitarian assistance purposes.[49] Such transportation activities must be consistent with the foreign policy of the United States[50] and the supplies related to such activities must be in suitable condition for humanitarian purposes.[51]

D. Section 2557

On 8 November 1985, Congress enacted § 2557, which establishes the DOD's ability to donate excess non-lethal supplies for use in humanitarian relief efforts.[52] Section 2557 requires that the DOD make available for humanitarian relief any non-lethal excess supplies, which supplies are to be transferred to the Secretary of State, who is responsible for distribution of such supplies.[53] "Non-lethal excess supplies" are defined as excess property not including real property or weapons, ammunition, or other equipment or material designed to inflict serious bodily harm or death.[54] In practice, U.S. Agency for International Development, acting as an agent for DOS, distributes such supplies on DOS's behalf.[55]

IV. Improving the Framework

> *This brings me to my present purpose, which is to request elucidation of my instructions from His Majesty's Government, so that I may better understand why I am dragging an army over these barren plains. I shall pursue one with the best of my ability but I cannot do both. 1. To train an army of uniformed British clerks in Spain for the benefit of the accountants and copy-boys in London, or, perchance, 2. To see to it that the forces of Napoleon are driven out of Spain.*
>
> *— Purported Letter of the Earl of Wellington to the British Foreign Office, August 1812*

The existing statutory regime can be improved to address practical considerations military leaders face while engaging in HA activities to wage the War on Terror. In particular, three major improvements can be made to substantially increase the efficacy of the military's HA efforts: (i) enhance execution of HA projects; (ii) clarify funding authorization provisions to avoid unnecessary confusion regarding types of HA projects that have been authorized; and (iii) ensure continuity of an American presence regarding completed HA projects.

The following sections set forth some of the conceptual underpinnings behind the specific legislative changes proposed in this article. Actual amendments to the statutory language (marked to show changes from the current statutory language) are appended at the end of this article.

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[48] 10 U.S.C. § 402.

[49] *Id.* § 402(b)(1)(D).

[50] *Id.* § 402(b)(1)(A).

[51] *Id.* § 402(b)(1)(B).

[52] *Id.* § 2557.

[53] *Id.* § 2557(b).

[54] *Id.* § 2557(d)(1). The supplies that can be distributed under this statute (e.g., tents, shovels, vehicles and sleeping bags) can be life-saving equipment regarding HA operations relating to natural or man-made disasters (e.g., the earthquake in Pakistan). *See U.S. Assistance for Earthquake in Pakistan*, INTERNET BUS. NEWS, Oct. 11, 2005.

[55] OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(e), at 268, 269.

A. Enhanced Execution

Take time to deliberate, but when time for action has arrived, stop thinking and go on in.

— Napoleon Bonaparte

Under the current statutory framework, military commanders are empowered with the ability to execute or finance "rudimentary" or "basic" construction and repairs to public facilities, surface transportation systems or sanitary systems.[56] Without outside assistance, military personnel are unable to deliver more advanced work product to local communities (e.g., a fully furnished school house or medical clinic) and must therefore obtain resources from DOS, the host nation or non-governmental organizations (NGOs). If such coordination fails to occur or such resources are not provided in a timely and efficient manner, military personnel are limited to providing rudimentary or basic work product to local communities.

The restrictive words of rudimentary or basic contained in the applicable statutes are intended to address two significant and valid concerns. First, the military is, by its very nature, an organization that prepares for and fights wars, and its HA activities must necessarily be restricted to activities that the military is equipped to handle (e.g., building a clinic is possible but building a strip mall is not). Second, DOD activities should not subsume initiatives undertaken by DOS, which is primarily responsible for foreign affairs issues, including representing the United States abroad and helping develop stable economic and political environments in foreign nations.

However, as drafted, the restrictive language inadvertently: (i) limits the intrinsic quality of the work product the military can provide (rather than limiting the *scope* of what the military should provide) and (ii) forces HA project planners to overcome unnecessary, and sometimes insurmountable, governmental inefficiencies in order to avoid DOD/DOS entanglement.

The statutory language clearly fails to address the first objective of ensuring that the military engage in activities it is equipped to handle. By using subjective quality standards like rudimentary or basic, the statutory language inadvertently places an emphasis on the quality of work rather than the scope of work that should be allowed. In practice, many commands approving projects believe the language establishes a bar on the quality of work product that the military can deliver, even if the military could provide far better work product without having to undertake expensive, extravagant or exceptional measures in connection therewith. Because the language does not require military planners to only execute HA projects that they reasonably believe the military can execute within their technical expertise and ability, or that are self-sustaining after completion, under the current regime, the military can engage in projects outside their expertise or requiring constant follow-up support with the understanding that, in each case, they have delivered a rudimentary or basic product.[57] Finally, because the statutory language does not require the military to use its best efforts in executing an HA project, the military may from time to time deliver sub-standard work product or work product of little utility.

While the statutory framework rightly supports the tradition of separating DOD and DOS responsibilities by requiring that military personnel ensure that their HA projects in a region do not encroach upon or duplicate DOS efforts in such region, the statutory language also takes the unfortunate additional step of hampering DOD's ability to execute HA missions by "forcing" DOS involvement in HA projects. Even though DOD and DOS may desire to see HA projects successfully and meaningfully executed, substantive and efficient cooperation between DOD and DOS in foreign, and sometimes hostile, lands is often unrealistic.

In practice, the political or social climate in a host nation may put the military in a better position than DOS to offer HA. Clearly, military forces may have extensive involvement in hostile territories where DOS personnel cannot or will not participate due to appreciable security concerns (including, for example, high-likelihood of terrorist and/or other armed attacks). In addition, foreign nations may be ready to accept military-to-military training with the United States and obtain HA benefits "on the side" rather than receiving outright, direct, U.S. government sponsored aid, which may be considered by local populations as a "hand-out." If such circumstances exist, the statutory language effectively prohibits the military from delivering advanced HA work product, as DOS, NGO or host nation involvement, as the case may be, is impractical.

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[56] *Id.* § 401(e)(2)-(4).

[57] *Id.*

The military may also be in a better position than DOS to assess issues relating to HA projects, including transportation, supply, and logistics concerns. Given that military personnel are on the ground from inception, they have strong local contacts and a fuller understanding of how to tailor the HA projects to local needs. Under the current framework, however, military personnel are required to maneuver through numerous U.S. administrative channels and to obtain DOS, NGO or host nation resources and support to advance an HA project beyond the rudimentary or basic stage. In addition, DOS may have to divert personnel and resources to meet the military's needs with no legal or other obligation on the part of DOS to do so. In essence, the forward momentum of an HA project unfortunately may end upon completion of a rudimentary or basic level of work, and the U.S. government will only provide additional improvements that might benefit a local community if the U.S. bureaucracy is able to address it.

The unnecessary restriction on the quality of work that the military can provide runs counter to the message that HA projects are intended to convey—that the U.S. government is interested in seeing local, impoverished communities in foreign countries develop. A casual observer in a rural community might consider U.S. HA efforts as half-hearted, at best, if the final result of extensive U.S. activity is a school house without books and furniture or a medical clinic without instruments, medicine and supplies. As most HA operations are high visibility projects in remote and impoverished communities, the framework should put the military in the position of being able to deliver quality HA work product to capitalize on the goodwill that is earned with local populations.

The DOS does not appreciably benefit from restricting the quality of work that the military can provide. Because the military is obligated to notify DOS of HA projects taking place in foreign countries,[58] DOS is already able to use such information to foster better and stronger relations with the related host nation. A poorly executed HA project, however, reflects badly upon DOD, DOS, and the United States as a whole.

Against this backdrop, the following amendments to the statutory framework are warranted:

1. Remove references to "rudimentary" and "basic" in Section 401; add a requirement that all HA projects (including Section 401 and Section 2561 funded projects) be "immediately usable" and "self-sustaining" and be within the "technical expertise and ability" of the military; expand DOD authority to spend HA funds to the extent necessary to make HA projects "immediately usable" and "self-sustaining"; and add a requirement to Section 401 and Section 2561 that the military use its "best efforts" when executing an HA construction project.

This proposed amendment to the statutory framework will effect four fundamental changes.

First, it will remove the rudimentary and basic limitations relating to § 401 HCA activities.[59] Without this restriction, military forces can provide better quality work product to local populations.

Second, it will require that military commanders consider whether an HA project is something the military can accomplish given the expertise and ability of military personnel. Project funding will therefore not be wasted on extravagant projects or projects the military cannot handle.

Third, it will allow military forces to spend authorized funds to ensure that good work product is delivered. This amendment would give military planners the flexibility they need to find other sources for labor and materials (e.g., local contractors or coalition forces) in connection with an HA project even if DOS, host nation or NGO support is unavailable. To ensure that expenses in this regard are regulated, it may be warranted to require military commanders to make a good faith effort to try to obtain such labor and/or materials from DOS, the host nation or an NGO and limit the total amount of funds that may be expended in respect of a structure to make it immediately usable.

Finally, it will make clear to military commanders that if they do engage in an HA construction project, the military will use its best efforts to deliver at least good work product to local populations. This will also ensure appropriate use of funds.

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[58] *See id.* § 401(b).

[59] *Id.* § 401.

2. Amend Section 2557(b) to Allow Military Personnel to Directly Distribute Non-lethal Excess Supplies in Connection with HA Projects, If Warranted

As currently drafted, § 2557(b) does not permit local military commanders to directly distribute non-lethal excess supplies to local populations in connection with ongoing HA activities.[60] Rather, military commanders are required to release non-lethal excess supplies to higher commands, which, in turn, release such supplies to subordinate commanders or send such supplies to DOS for eventual distribution worldwide.[61] This method of distribution is highly inefficient in that it does not allow local military commanders to tie the distribution of their own excess non-lethal supplies to projects they are conducting and thereby reinforce the good-will they are already earning. In addition, given that distribution of supplies are sometimes required in time-sensitive emergency situations, this provision could effectively prevent the distribution of such supplies in a timely manner.

The statute should be amended to allow local military commanders to either distribute non-lethal excess supplies to local populations in connection with any ongoing HA operation, if such distribution can be considered reasonably related to such HA operation, or transfer such items to DOD for redistribution.[62] The DOD, in turn, should have the ability to distribute such supplies as currently contemplated to DOS for distribution by DOS or to subordinate DOD commands worldwide to enable them to coordinate and integrate DOD HA project initiatives and to distribute such supplies in connection with such projects.

3. Amend Section 402(a) to Remove the "Space Available" Limitation

Section 402(a) requires that goods not donated by the government be transported for humanitarian purposes only on a "space available" basis.[63] If the intent of the statute is to provide for the transportation of donated goods to less accessible areas or areas where the United States is trying to establish positive goodwill, it may be more beneficial to enable the military to transport such goods on separate, independent military missions, if practicable. Given today's geo-political environment, the military should make the most of every opportunity it has to foster positive relations with local populations in distressed or impoverished areas.

Expanding the scope of § 402(a) in this manner will not result in unnecessary and increased governmental expense. Although DOD will have greater flexibility in executing missions, DOD will remain incentivized to limit unwarranted transportation activities as its budget will not necessarily increase. Further, given that most humanitarian missions of this type would fall within the purview of DOS responsibility, it is reasonable to conclude that DOD would only undertake a mission if it directly benefits DOD or is otherwise warranted under the circumstances.

B. Clarification of Funding Authorization

I would rather fight with my hands than my tongue.

— Dolley Madison

Congress should clarify certain terms used in the statutory language to ensure that military commanders have clear guidance on the appropriateness of certain projects. In addition to improving the operational efficiency of military commands, additional clarity will help military commanders determine how to most efficiently use HA projects in waging the War on Terror.

1. Clarify the Meaning of "Military Operations" in § 401(a)(1)

Section 401(a)(1) requires that HCA activities be executed in conjunction with "authorized military operation[s]."[64]

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[60] *Id.* § 2557(b).

[61] *Id.*

[62] To ensure that excess supplies that other military units might need are not distributed by local commanders to local populations, local commanders should be required to first obtain DOD approval for such distributions.

[63] 10 U.S.C. § 402(a).

[64] *Id.* § 401(a)(1).

However, the statute does not define or provide any guidance about what the term "authorized military operation" means. As a result, there is some debate in the military community as to whether the term references a specific military operation taking place in a country or a more general military operation (e.g., Operation Enduring Freedom or Operation Joint Endeavor) applicable to a number of countries within an area of responsibility (AOR). The generally accepted position is that the term means a specific military operation taking place in a country.[65]

However, if congressional intent regarding HCA projects is to increase the scope and impact of the military in hostile environments to effectively combat terrorism in and around specified AORs, it is vital that a military commander has the discretion to determine where to allocate HCA resources in an assigned AOR. Because the authorized military operation element requires military commanders to attach an HCA project in one country to a non-HA military mission in that country, even if a country invites the military to conduct an HCA operation in its jurisdiction, the military generally cannot do so unless that country also invites the military to conduct other operations in its jurisdiction.

This disconnect can be addressed by specifying that authorized military operations means "direct, incidental or ancillary operations (including, without limitation, humanitarian and civic assistance projects or other humanitarian projects) conducted by U.S. military personnel in and around an area of responsibility designated to a related military command." This type of amendment will allow commanders to justify executing HCA projects using an AOR-based test as opposed to a specific military operation focus, enabling military planners to open more doors to more countries for HA purposes.

2. Clarify That Section 2561 Funds Can Be Used to Finance Medical, Dental and Veterinary Projects If Section 401 Funds Are Not Available for Such Purposes

The current statutory authority provides that § 2561 funds may be used to finance "other humanitarian purposes worldwide."[66] With the exception of medical, dental and veterinary projects (MDV Projects), the generally accepted interpretation of this phrase is that if a project cannot be funded through other sources, including § 401, the military might be able to fund that project using § 2561 funds. However, regarding MDV Projects, the commonly accepted practice (which, in the author's opinion, is without legal support) is not to utilize § 2561 funds to finance any type of MDV Project (including MDV Projects in which U.S. personnel do not provide actual medical, dental or veterinary treatment and act in a consultative capacity only).[67]

Given the scope and intent of § 2561, § 401 should be amended so that it is clearly not the exclusive funding statute for MDV Projects. Section 2561 should also be amended to explicitly allow the military to fund MDV Projects if funding under the authority of § 401 is somehow unavailable (e.g., because of a lack of an authorized military operation in an area).

C. Continuing the American Presence

It is fatal to enter any war without the will to win it.

— Douglas MacArthur

To ensure that the United States continues to capitalize on the goodwill earned from executed HA missions, the current framework needs to ensure at least some continued American presence in areas where HA projects have been conducted, even if at a minimal level. Under the current structure, the military can execute an HA project, and, upon completion, American representatives may never again return to such a location.

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[65] This analysis has been confirmed by the author through various discussions with personnel at USCENTCOM and CJTF-HOA during the period from July to November 2005.

[66] 10 U.S.C. § 2561(a)(1).

[67] Some practitioners with whom I have worked in deployed environments rely on a lone sentence in the *OPLaw Handbook* as authority for this premise. "Generally, if the contemplated activity falls within the parameters of [Section 401], then [Section 401] should be used." OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(c), at 268. Judge Advocates should be careful to note that the use of Section 2561 funding is not specifically prohibited.

Amend Section 401 and Section 2561 to Require and Fund Follow-Up Visits by Military Personnel, DOS Personnel or Other Government Officials

A well-executed HA project reinforces a positive image of the United States in the minds of the local populations benefiting from such a project. This positive reinforcement may very well be the greatest weapon in our arsenal for waging the War on Terror.

Given the breadth of operations in which the military is involved and demands on the military for personnel and resources, however, the military, out of necessity, will move from one HA project site to another and may not maintain contact with local communities to continue to foster the goodwill of the locals.

Section 401 and § 2561 should require the military to continue to have a local presence for a short period of time immediately after completion of an HA project and DOS or another agency to allocate resources after completion of a military HA project to ensure continued U.S. presence in the region. Having a mandatory follow-up requirement will enable the U.S. government to capitalize on the forward momentum gained with completion of the HA project and to hopefully establish an ongoing positive U.S. image in remote and strategic locations. As this will require personnel and resources from the military, DOS or another agency, the statutory language should also authorize the funding necessary to carry out these missions.

IV. Conclusion

Thus it is that in war the victorious strategist only seeks battle after the victory has been won, whereas he who is destined to defeat first fights and afterwards looks for victory.

— Sun Tzu, The Art of War

The military's ability to provide infrastructure support to indigenous populations in resource poor and economically and politically unstable environments is perhaps one of the greatest tools for winning the hearts and minds of local populations. Congressional action supporting the military's efforts in this regard have been commendable, but as a generous and prosperous nation, the United States can go one step further in promoting HA operations.

With each completed HA project, the United States comes one step closer to reinforcing a strong, positive image of the Soldiers, Sailors, Marines, and Airmen of the armed forces who make efforts at great personal risk to serve people in troubled foreign lands. With each such effort, local communities have a slightly better understanding of the vision of the U.S. people. Finally, with each such step, the terrorists, the demagogues, the tyrants, and the fanatics of the world have greater difficulty convincing innocents to join their cause against the United States. While this may not, in and of itself, win the War on Terror, the United States will be one step closer to being able to do so.

Appendix

ANNEX I
PROPOSED STATUTORY AMENDMENTS

§ 401. Humanitarian and civic assistance provided in conjunction with military operations

(a)

(1) Under regulations prescribed by the Secretary of Defense, the Secretary of a military department may carry out humanitarian and civic assistance activities in conjunction with authorized military operations of the armed forces in a country if the Secretary concerned determines that the activities will promote –

(A) the security interests of both the United States and the country in which the activities are to be carried out; and

(B) the specific operational readiness skills of the members of the armed forces who participate in the activities.

(2) Humanitarian and civic assistance activities carried out under this section shall complement, and may not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the United States. Such activities shall serve the basic economic and social needs of the people of the country concerned.

(3) Humanitarian and civic assistance may not be provided under this section (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity.

(4) In respect of any humanitarian and civic assistance activity provided under subsection (a)(1) relating to any construction or repair of any building, dwelling or other infrastructure, the Secretary of Defense shall ensure that: (i) members of the armed forces participating in such activities perform such construction or repair activities to the best of such members' ability; and (ii) upon completion of such construction or repair activities, such building, dwelling or other infrastructure shall be immediately usable and self-sustaining. The Secretary of Defense shall make a good faith effort to obtain funds and resources from the Secretary of State for any expenses over $5,000 required to make such building, dwelling or other infrastructure immediately usable and self-sustaining in accordance with this subsection (a)(4), and, to the extent such funds are not reasonably available in connection with the execution of such project, expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.

(5) The Secretary of Defense and the Secretary of State shall ensure that members of the armed forces or members of the Department of State shall, to the extent reasonably practicable and in the best interests of the United States, visit any location where any humanitarian and civic assistance activity has been provided under subsection (a)(4) at least once every six months after completion of such activity for a period of two years. Expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.

(6) The Secretary of Defense shall ensure that any humanitarian and civic assistance activity provided under subsection (a)(1) shall be within the reasonable technical expertise and ability of the members of the armed forces who participate in the activities.

(b) Humanitarian and civic assistance may not be provided under this section to any foreign country unless the Secretary of State specifically approves the provision of such assistance.

(c)

(1) Expenses incurred as a direct result of providing humanitarian and civic assistance under this section to a foreign country shall be paid for out of funds specifically appropriated for such purpose.

(1) Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated pursuant to paragraph (1), except that funds appropriated to the Department of Defense for operation and maintenance (other than

funds appropriated pursuant to such paragraph) may be obligated for humanitarian and civic assistance under this section only for incidental costs of carrying out such assistance.

(d) The Secretary of Defense shall submit to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed Services and the Committee on International Relations of the House of Representatives a report, not later than March 1 of each year, on activities carried out under this section during the preceding fiscal year. The Secretary shall include in each such report-

(1) a list of the countries in which humanitarian and civic assistance activities were carried out during the preceding fiscal year;

(2) the type and description of such activities carried out in each country during the preceding fiscal year; and

(3) the amount expended in carrying out each such activity in each such country during the preceding year.

(e) In this section, the term "humanitarian and civic assistance" means any of the following:

(1) Medical, dental, and veterinary care provide in areas of a country that are rural or are underserved by medical, dental, and veterinary professionals, respectively, including education, training and technical assistance related to the care provided.

(2) Construction of ~~**rudimentary**~~ surface transportation systems.

(3) Well drilling and construction of ~~**basic**~~ sanitation facilities.

(4) ~~**Rudimentary c**~~**C**onstruction and repair of public facilities.

(f) As used in this section, the term "authorized military operation" means any direct, incidental or ancillary operation (including, without limitation, humanitarian and civic assistance projects or other humanitarian projects) conducted by U.S. military personnel in and around any area of responsibility designated to a related military command.

§ 402. Transportation of humanitarian relief supplies to foreign countries

(a) Notwithstanding any other provision of law, and subject to subsection (b), the Secretary of Defense may transport to any country, without charge, supplies which have been furnished by a nongovernmental source and which are intended for humanitarian assistance. Such supplies may be transported ~~**only**~~ on a space available basis *or as otherwise directed by the Secretary of Defense if such transportation is reasonably practicable and in the best interests of the United States.*

(b)

(1) The Secretary may not transport supplies under subsection (a) unless the Secretary determines that –

(A) the transportation of such supplies is consistent with the foreign policy of the United States;

(B) the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

(C) there is a legitimate humanitarian need for such supplies by the people or entity for whom they are intended;

(D) the supplies will in fact be used for humanitarian purposes; and

(E) adequate arrangements have been made for the distribution or use of supplies in the destination country.

(2) The President shall establish procedures for making the determinations required under paragraph (1). Such procedures shall include inspection of supplies before acceptance for transport.

(3) It shall be the responsibility of the entity requesting the transport of supplies under this section to ensure that the supplies are suitable for transport.

(c)

(1) Supplies transported under this section may be distributed by an agency of the United States Government, a foreign government, an international organization, or a private nonprofit relief organization.

(2) Supplies transported under this section may not be distributed, directly or indirectly, to any individual, group, or organization engaged in a military or paramilitary activity.

(d)

(1) The Secretary of Defense may use the authority provided by subsection (a) to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition, such as an oil spill, that threatens serious harm to the environment, but only if other sources to provide such transportation are not readily available.

(2) Notwithstanding subsection (a), the Secretary of Defense may require reimbursement for costs incurred by the Department of Defense to transport supplies under this subsection.

(e) Not later than July 31 each year, the Secretary of State shall submit to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed Services and the Committee on International Relations of the House of Representatives a report identifying the origin, contents, destination, and disposition of all supplies transported under this section during the 12-month period ending on the preceding June 30.

§ 2557. Excess nonlethal supplies: availability for homeless veteran initiatives and humanitarian relief

(a)

(1) The Secretary of Defense may make available for humanitarian relief purposes any nonlethal excess supplies of the Department of Defense.

(2) The Secretary of Defense may make excess clothing, shoes, sleeping bags, and related nonlethal excess supplies available to the Secretary of Veterans Affairs for distribution to homeless veterans and programs assisting homeless veterans. The transfer of nonlethal excess supplies to the Secretary of Veterans Affairs under this paragraph shall be without reimbursement.

(b) Excess supplies made available for humanitarian relief purposes under this section shall *be distributed by the Secretary of Defense as the Secretary of Defense may prescribe by regulation or* be transferred to the Secretary of State, who shall be responsible for the distribution of such supplies.

(c) This section does not constitute authority to conduct any activity which, if carried out as an intelligence activity by the Department of Defense, would require a notice to the intelligence committees under title V of the National Security Act of 1947 (50 U.S.C. 413 et seq.).

(d) In this section:

(1) The term "nonlethal excess supplies" means property, other than real property, of the Department of Defense-

(A) that is excess property, as defined in regulations of the Department of Defense; and

(B) that is not a weapon, ammunition, and other equipment or material that is designed to inflict serious bodily harm or death.

(2) The term "intelligence committees" means the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

§ 2561. Humanitarian assistance

(a) Authorized Assistance.-

(1) To the extent provided in defense authorization Acts, funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide.

(2) The Secretary of Defense may use the authority provided by paragraph (1) to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition, such as an oil spill, that threatens serious harm to the environment, but only if other sources to provide such transportation are not readily available. The Secretary may require reimbursement for costs incurred by the Department of Defense to transport supplies under this paragraph.

(3) Humanitarian assistance provided under paragraph (1) may include any humanitarian and civic assistance activity covered by 10 U.S.C. § 401(e)(1) to the extent such humanitarian and civic assistance activity is not funded through funds appropriated therefor under 10 U.S.C. § 401(e)(1).

(4) In respect of any humanitarian assistance provided under subsection (a)(1) relating to any construction or repair of any building, dwelling or other infrastructure, the Secretary of Defense shall ensure that: (i) members of the armed forces participating in such activities perform such construction or repair activities to the best of such members' ability; and (ii) upon completion of such construction or repair activities, such building, dwelling or other infrastructure shall be immediately usable and self-sustaining. The Secretary of Defense shall make a good faith effort to obtain funds and resources from the Secretary of State for any expenses over $5,000 required to make such building, dwelling or other infrastructure immediately usable and self-sustaining in accordance with this subsection (a)(4), and, to the extent such funds are not reasonably available in connection with the execution of such project, expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.

(5) The Secretary of Defense and the Secretary of State shall ensure that members of the armed forces or members of the Department of State shall, to the extent reasonably practicable and in the best interests of the United States, visit any location where any humanitarian assistance has been provided under subsection (a)(4) at least once every six months after completion of such activity for a period of two years. Expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.

(6) The Secretary of Defense shall ensure that any humanitarian and civic assistance activity provided under subsection (a)(4) shall be within the reasonable technical expertise and ability of the members of the armed forces who participate in the activities.

(b) Availability of Funds.- To the extent provided in appropriation Acts, funds appropriated for humanitarian assistance for the purposes of this section shall remain available until expended.

(**c**) **Status Reports.-**

(1) The Secretary of Defense shall submit to the congressional committees specified in subsection (f) an annual report on the provision of humanitarian assistance pursuant to this section for the prior fiscal year. The report shall be submitted each year at the time of the budget submission by the President for the next fiscal year.

(2) Each report required by paragraph (1) shall cover all provisions of law that authorize appropriations for humanitarian assistance to be available from the Department of Defense for the purposes of this section.

(3) Each report under this subsection shall set forth the following information regarding activities during the previous fiscal year:

(A) The total amount of funds obligated for humanitarian relief under this section.

(B) The number of scheduled and completed transportation missions for purposes of providing humanitarian assistance under this section.

(C) A description of any transfer of excess nonlethal supplies of the Department of Defense made available for humanitarian relief purposes under section 2557 of this title. The description shall include the date of the transfer, the entity to whom the transfer is made, and the quantity of items transferred.

(d) Report Regarding Relief for Unauthorized Countries.- In any case in which the Secretary of Defense provides for the transportation of humanitarian relief to a country to which the transportation of humanitarian relief has not been

specifically authorized by law, the Secretary shall notify the congressional committees specified in subsection (f) and the Committees on Appropriations of the Senate and House of Representatives of the Secretary's intention to provide such transportation. The notification shall be submitted not less than 15 days before the commencement of such transportation.

(e) Definition.- In this section, the term "defense authorization Act" means an Act that authorizes appropriations for one or more fiscal years for military activities of the Department of Defense, including authorizations of appropriations for the activities described in paragraph (7) of section 114 (a) of this title.

(f) Congressional Committees.- The congressional committees referred to in subsections (c)(1) and (d) are the following:

(1) The Committee on Armed Services and the Committee on Foreign Relations of the Senate.

(2) The Committee on Armed Services and the Committee on International Relations of the House of Representatives.

Notes from the Field

The Posse Comitatus Act: Does It Impact the Department of Defense during Consequence Management Operations?

Lieutenant Colonel Mary J. Bradley, Lieutenant Colonel Stephanie Stephens,
Mr. Michael Shaw
Joint Task Force Civil Support
Fort Monroe, Virginia

Introduction

In the wake of the Department of Defense (DOD) response to Hurricane Katrina, many have questioned whether the DOD can conduct its domestic response mission while faced with the law enforcement restrictions of the Posse Comitatus Act (PCA).[1] Television clips showing looters in New Orleans left the American public questioning why the military did not act and why the military could not perform law enforcement activities.[2] Discussions and questions continued regarding the role of the military in other national emergencies, such as a terrorist act involving chemical, biological, nuclear, or high-yield explosives (CBRNE). If a terrorist act of the magnitude that requires a DOD response were to occur, it is likely that Joint Task Force Civil Support (JTF-CS) would be directed to command and control DOD forces responding to the incident.[3] The PCA restrictions raise the question as to whether the PCA has a significant negative impact on the JTF-CS consequence management mission. Further, does the PCA prevent DOD from fulfilling its Defense Support to Civil Authorities (DSCA) mission?

To answer this question, this article begins by describing the JTF-CS mission, as well as the larger DOD DSCA mission. The article then discusses the PCA, its historical foundation, and its current status. Next, the article discusses the PCA's impact on the JTF-CS mission, using JTF-CS anticipated requests for support as a basis for analysis. When discussing likely JTF-CS missions, this article reviews the potential for law enforcement tasks within the support requirements. Finally, the article concludes with an assessment that the PCA does not unduly impact JTF-CS's ability to accomplish its mission; further, this article concludes that the PCA in its current status does not unduly hinder any DOD support to civil authorities during consequence management.

Joint Task Force Civil Support Overview

Joint Task Force Civil Support is a standing joint task force headquarters of approximately 185 military and civilian personnel at Fort Monroe, Virginia.[4] It is a deployable command and control headquarters for DOD units and personnel executing consequence management operations in response to a CBRNE incident.[5] Further, the JTF-CS is a center of knowledge for developing response plans for essential DOD support to the lead federal agency.[6]

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[1] 18 U.S.C. § 1385 (2000) (Use of Army and Air Force as Posse Comitatus).

[2] Net television coverage following Hurricane Katrina showed footage of looters. *See* MSNBC, *New Orleans Mayor Orders Looting Crackdown*, Sept. 1, 2005, http://www.msnbc.msn.com/id/9063708/ (linking the news article to multi-media coverage); CNN Videos, *Chaos in Louisiana*, Aug. 30, 2005, http://search.cnn.com/search.jsp?query=Hurricane%20Katrina,%20looting&type=news&sortBy=date&intl=false (follow "Chaos in Louisiana" hyperlink) (providing an example of the media reports concerning looting in New Orleans).

[3] U.S. Northern Command, *About USNORTHCOM: Joint Task Force Civil Support*, http://www.northcom.mil/About/index.html (last visited Nov. 28, 2007) [hereinafter *About: JTF-CS*] (stating that "JTF-CS deploys to the incident site and executes timely and effective command and control of designated DoD forces, providing support to civil authorities. . . .").

[4] Fort Monroe will close as part of the 2005 Base Realignment and Closure and JTF-CS will relocate to Fort Eustis, Virginia, by 2011. *See* BASE CLOSURE AND REALIGNMENT COMMISSION, 2005 BASE CLOSURE AND REALIGNMENT COMMISSION REPORT 14 (Sept. 8, 2005), *available at* http://www.brac.gov/finalreport.html.

[5] *See About: JTF-CS*, *supra* note 3.

[6] Information about Joint Task Force Civil Support is available on its webpage. *See generally* Joint Task Force Civil Support, http://www.jtfcs.northcom.mil (last visited Nov. 28, 2007) [hereinafter *JTF-CS Webpage*]; *see also About: JTF-CS*, *supra* note 3.

An Army National Guard major general serving on Title 10[7] orders commands the JTF-CS.[8] The staff consists of active and reserve component military from all five services, government service personnel, and civilian contractors.[9] Collectively, the command possesses expertise in a wide range of functional areas to include operations, logistics, intelligence, planning, communications, medical and legal services.[10] Created by the Unified Command Plan for 1999,[11] the JTF-CS provides both an operational capability and an oversight mechanism that can anticipate support requirements for responding to a catastrophic CBRNE incident, undertake detailed analysis, conduct exercises, and ultimately respond in support of civil authorities.[12]

Often the terms CBRNE and weapons of mass destruction (WMD) are used interchangeably, but there is a distinct difference between the two. A CBRNE incident could be an accident, an act of nature, or an act terrorism.[13] The term WMD refers to a CBRNE weapon, device, or material that is specifically designed to produce casualties or terror.[14] While the nation is focused on terrorism and those who seek to employ weapons of mass destruction to create casualties or terror, the JTF-CS consequence management mission is much the same regardless of the cause of the incident.[15] The command's principle focus is to plan for and integrate DOD support to the federal agency that has responsibility to manage the consequences of a domestic CBRNE incident.[16]

Consequence management focuses on the effects of an incident and involves undertaking measures to save lives, prevent further injury, and provide temporary critical life support.[17] Conversely, crisis management focuses on the causes of terrorism. Crisis management includes the law enforcement functions of identifying, acquiring, and planning for the use of resources needed to anticipate, prevent, deter, or resolve a threat or act of terrorism.[18] The JTF-CS mission is CBRNE consequence management, not crisis management.[19]

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[7] 10 U.S.C. § 12,301 (2000) (Reserve Components Generally) (allowing the President to order National Guard troops to federal service with the consent of the governor); *id.* § 12,304 (Selected Reserve and Certain Individual Ready Reserve Members; Order to Active Duty Other Than During War or National Emergency) (allowing the President to order National Guard troops to federal service without the request of the governor).

[8] *JTF-CS Webpage*, *supra* note 6 (follow "FAQ" hyperlink).

[9] *Id.*

[10] *Id. See also id.* (follow "Unit Fact Sheet" hyperlink).

[11] The Unified Command Plan (UCP) establishes the missions and geographic areas of responsibilities of the unified combatant commands. The President, with the recommendation of the Chairman of the Joint Chiefs of Staff through the Secretary of Defense, periodically reviews the UCP. The UCP establishing JTF-CS was approved by President Clinton in September 1999.

[12] *JTF-CS Webpage*, *supra* note 6 (follow "Operational Focus of JTF-CS" hyperlink).

[13] CBRNE is defined as a:

> **chemical, biological, radiological, nuclear, or high-yield explosives incident** — An emergency resulting from the deliberate or unintentional release of nuclear, biological, radiological, or toxic or poisonous chemical materials, or the detonation of a high-yield explosive. Also called **CBRNE incident**.

DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUB. 1-02, at 85 (12 Apr. 2001).

[14] *Id.* at 584. WMD is defined as:

> **weapons of mass destruction —** Weapons that are capable of a high order of destruction and/or of being used in such a manner as to destroy large numbers of people. Weapons of mass destruction can be high-yield explosives or nuclear, biological, chemical, or radiological weapons, but exclude the means of transporting or propelling the weapon where such means is a separable and divisible part of the weapon. Also called **WMD.** See also **destruction; special operations.** (JP 3-28)

Id. See Seth W. Carus, *Defining "Weapons of Mass Destruction,"* CENTER FOR THE STUDY OF WEAPONS OF MASS DESTRUCTION, OCCASIONAL PAPER 4 (Jan. 2006).

[15] JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, CIVIL SUPPORT II–9 (14 Sept. 2007) [hereinafter JOINT PUB. 3-28] (emphasizing that JTF-CS responds to CBRNE events, whether they incidents or accidents).

[16] *JTF-CS Webpage*, *supra* note 6 (follow "Core Principles of JTF-CS" hyperlink).

[17] JOINT PUB. 3-28, *supra* note 15, at I–9.

[18] *Id. Terrorism Incident Law Enforcement and Investigation*, U.S. DEPARTMENT OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN, Dec. 2004, [hereinafter NAT'L RESPONSE PLAN], *available at* http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf (follow "Incident Annexes" hyperlink; then follow "Terrorism" hyperlink).

[19] *JTF-CS Webpage*, *supra* note 6 (follow "Mission" hyperlink). *See also About: JTF-CS*, *supra* note 3 (follow "About" hyperlink).

In a consequence management mission, whether the JTF-CS responds to a CBRNE event or another joint task force responds to a natural disaster, the *effects* of the incident are the enemy, not the *cause* of the effects. Viewing the effects of the incident as the enemy is a significant shift in mindset for military personnel. Instead of focusing on finding and stopping what caused the CBRNE incident, consequence management focuses on determining and managing the potential effects, such as death, injuries, sickness, physical damage, and chemical, biological, nuclear, or radiological contamination.[20] For the JTF-CS, the concept of operations begins with gaining early situational awareness and planning. The command's ability to plan in advance of a CBRNE incident drives its ability to respond in the most timely manner, as it allows the JTF-CS to anticipate what types of DOD capabilities might be required to provide a tailored response to a CBRNE incident in a particular community depending on the type of incident. A timely and effective consequence management response requires anticipating the shortfalls in local, state, and federal response capabilities, predicting the requests for assistance to cover the shortfalls that may be directed to the DOD, and executing the missions assigned to the JTF-CS.

The JTF-CS mission can be seen as a subset of the larger DOD DSCA mission. The DSCA mission includes the broader scope of support that the DOD provides to states upon request, to include support to hurricane, wildland fire, earthquakes, and other natural disasters, through the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).[21] The Stafford Act is the primary statutory authority for both the DOD DSCA mission and the JTF-CS CBRNE consequence management mission.[22] In accordance with the principles of federalism embodied in the Stafford Act, DOD supports civil authorities during consequence management operations at the direction of the Secretary of Defense to support the lead federal agency (LFA).[23] The LFA responds to state governor requests to fill the shortfalls and gaps in state and local response capabilities.[24] The DOD can employ equipment, logistical support, and planning capabilities and has supported state and local communities for many years during natural disasters.[25]

Posse Comitatus Act (PCA) Overview

Congress enacted the PCA[26] in 1878 to end the routine use of federal soldiers to enforce civil laws. Before the Civil War, the U.S. Attorney General affirmed the common law right of a sheriff or other ministerial official to the use federal military troops in a *posse comitatus* to enforce the Fugitive Slave Act, thereby subordinating federal military troops to local law enforcement officials.[27] During Reconstruction, federal soldiers were used to enforce the new voting laws in the South.[28] Concerned about the repeated routine use of federal military to enforce civil laws in contravention of the Founding Fathers' concern for restrains on a standing army, Congress restricted the routine use of federal military troops in the PCA.[29]

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[20] JOINT PUB. 3-28, *supra* note 15, at I-9.

[21] 42 U.S.C. §§ 5121–5206 (2000).

[22] U.S. DEP'T OF DEFENSE DIR., 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) para. 1.4 (15 Jan. 1993); *see also JTF-CS Webpage*, *supra* note 6 (follow "Legal Basis for Military Support to Civilian Authorities" hyperlink).

[23] JOINT PUB. 3-28, *supra* note 15, ch.1, para. 3.

[24] *Id.*

[25] A review of the Federal Emergency Management Agency (FEMA)'s website yields countless examples of DOD response to national disastors. One of the most recent being the California wildfires in fall 2007. *See, e.g.*, FEMA, *Federal Emergency Management Agency Coordinating National Response to California Wildfires*, Oct. 23, 2007, http://www.fema.gov/news/newsrelease.fema?id=41428 ("DoD personnel in the affected area include nearly 300,000 servicemen and women, government employees and their families. The DoD can bring additional capabilities as part of a larger federal response when requested by the state and approved by the Secretary of Defense.").

[26] 18 U.S.C. § 1385 (2000). The Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Id.

[27] 6 Op. Att'y Gen. 466, 473 (1854).

[28] Bonnie Baker, *Origins of the Posse Comitatus Act*, AIR & SPACE J. 1 (1 Nov. 1999).

[29] *Id.*

Even though the express language of the PCA only prohibits use of the Army and the Air Force, the DOD policy has extended the general prohibition of non-use to Navy and Marine Corps personnel.[30] The Secretaries of Defense and the Navy may grant exceptions to this policy on a case-by-case basis.[31]

The PCA's prohibitions do not apply to members of the National Guard when not in federal status.[32] When National Guard members are acting under the control of their state governors, either pursuant to Title 32 or in state active duty, they are not subject to the PCA's restrictions.[33] The PCA does not apply to members of the Coast Guard since law enforcement is a primary function of the Coast Guard mission.[34]

The PCA expressly provides for both constitutional and statutory exceptions to the general non-use prohibition. Article II, Section 2, the Commander-in-Chief Clause,[35] and Article IV, Section 4, Invasion and Republican Form of Government Clauses,[36] are both constitutional exceptions. When national security is at stake, the president may invoke these constitutional authorities to use the federal military to enforce civil laws.

Congress has also enacted several statutory exceptions to the PCA. The broadest exception is the Insurrection Act statutes,[37] which authorize the president to order the use of federal military forces to suppress domestic violence that hinders execution of state or federal law, or otherwise deprives citizens of their constitutional rights. This includes situations when a state governor requests assistance in quelling an insurrection against the state government,[38] or when the President determines that either unlawful obstructions or assemblages prevent the enforcement of federal law[39] or domestic violence interferes with individual civil rights.[40]

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[30] U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (20 Dec. 1989) [hereinafter DOD DIR. 5525.5].

[31] U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. 8b(6) (26 Jan. 2006).

[32] 18 U.S.C. § 1385 (2000). The statutory language of the PCA only includes Army and Air Force.

[33] National Guard in Title 10 status become members of the Army, and thus, fall under the restrictions of the PCA. Cong. Research Serv., Pub. No. 95-964 S, The Posse Comitatus Act & Related Matters: The Use of Military to Execute Civilian Law 42 (2000) (citing numerous cases). *See also* DOD DIR. 5525.5, *supra* note 30.

[34] 14 U.S.C. § 2 (2000). Title 14 of the United States Code details the duties of the U.S. Coast Guard, starting with "the Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States." *Id.*

[35] U.S. CONST. art. II, § 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

[36] *Id.* art. IV, § 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

[37] 10 U.S.C. §§ 331–334 (2000).

[38] *Id.* § 331. Provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Id.

[39] *See id.* § 332.

[40] *See id.* § 333. Provides:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it –
>
> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
>
> In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Id.

Other statutory exceptions to the PCA allow for the federal military to be used in direct law enforcement in matters involving nuclear terrorism;[41] in *limited* situations involving the use of chemical or biological agents;[42] in the execution of certain, primarily maritime, quarantine, and health laws;[43] and in crimes involving members of Congress[44] or in protecting the President.[45]

In construing the PCA, federal courts have articulated two common law exceptions: the military purpose doctrine and the indirect assistance doctrine. Under the military purpose doctrine, federal military personnel involved in law enforcement operations do *not* violate the PCA if the operations have a *specific military purpose*.[46] The military purpose doctrine permits federal military personnel to engage in the following types of activities without violating the PCA: force protection and law enforcement on military installations, traffic control points on main supply routes, and security at supply depots.[47]

Federal courts have also construed the PCA to find that federal military personnel engaged in passive roles that may *indirectly* aid law enforcement do *not* violate the PCA.[48] Direct law enforcement includes searches for evidence for use in a criminal proceeding and seizures of suspected criminals; interdiction of vehicles, vessels, or aircraft; and pursuit, investigation, or interrogation of civilians.[49]

Congress has authorized certain indirect law enforcement assistance for specific missions.[50] Indirect law enforcement includes the use of federal military facilities or equipment by law enforcement officials, training law enforcement officials on the use of proffered equipment, and equipment maintenance by federal military personnel. Additionally, in certain circumstances, active duty federal military personnel or DOD civilian employees may be provided to operate the equipment in support of civilian law enforcement.

Posse Comitatus Act Impact on the JTF-CS Mission

The question then arises, what impact do the restrictions of the PCA have on the mission of JTF-CS, or another unit in a DSCA mission? The question is best answered by analyzing potential JTF-CS missions. To gauge the impact of the PCA on a CBRNE consequence management mission, this article will examine whether the PCA prevents JTF-CS from conducting a required response to a biological incident or a naturally occurring pandemic.

After a biological incident, the JTF-CS may anticipate requests for strategic national stockpile (SNS) support, medical augmentation support, disease/bio-contamination support, and mortuary affairs support.[51] The SNS support may encompass subtasks such as transporting the SNS to distribution sites and assisting with storage, and distributing medicine and supplies to trained medical personnel. Medical augmentation support includes providing tailored packages of medical personnel to augment existing care facilities and establishing additional assessment, treatment, or care capacity. Disease/bio-contamination support involves assisting the Department of Homeland Security and the Centers for Disease Control with

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[41] 18 U.S.C. § 831(d), (e) (2000).

[42] 10 U.S.C. § 382(d).

[43] 42 U.S.C. §§ 97–98 (2000).

[44] 18 U.S.C. § 351(g).

[45] *Id.* § 3056.

[46] *See* United States v. Hitchcock, U.S. App. LEXIS 15726, 13 (9th Cir. 2002) (noting that military involvement in civil law enforcement activities is permissible if undertaken "for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities." (quoting DOD DIR. 5525.5, *supra* note 30, § E4.1.2.1)); United States v. Chon, 210 F.3d 990, 994 (9th Cir. 2000) (holding that "NCIS agents' activities were permissible because there was an independent military purpose for their investigation - the protection of military equipment."); Applewhite v. United States Air Force, 995 F.2d 997, 1001 (10th Cir. 1993) ("Since there was an independent military purpose to OSI's conduct, there was necessarily no willful use of any part of the Air Force as a posse to execute civilian laws . . . . [t]he agents went off base to 'sting' military personnel, not civilians.").

[47] The military purpose exception to the PCA has been incorporated into DOD Dir. 5525.5. DOD DIR. 5525.5, *supra* note 30, at enclosure 4.

[48] *See, e.g.*, United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975).

[49] DOD DIR. 5525.5, *supra* note 30, para. 4 (incorporating enclosures 2–7).

[50] 10 U.S.C. §§ 371–382 (2000) (discussing detection and monitoring, loan of equipment, maintenance, sharing information, training, and also cooperation on counter-drug missions).

[51] NAT'L RESPONSE PLAN, *supra* note 18, Emergency Support Function (ESF) #8–4.

disease containment, conducting contact tracing, supporting isolation or quarantine efforts within DOD authority, and assisting with the administration of vaccination or other prophylaxis programs. Finally, mortuary affairs support involves collecting and transporting remains to temporary collection sites and designated storage facilities, identifying and cataloging remains, and mortuary affairs materiel resupply.

During response to a biological incident, quarantine and isolation support may be construed as requiring the military to perform direct law enforcement. State and local officials generally have the primary authority to declare and enforce a quarantine as an exercise of their public health and police powers.[52] Some states have enacted criminal penalties for violating quarantine and isolation orders, thereby making enforcement of quarantine orders a law enforcement matter. Federal authority to declare a quarantine only exists in limited circumstances; namely entry to the sovereign territory of the U.S. and interstate movement of people and goods.[53] Support of a quarantine may be provided by JTF-CS forces within certain guidelines.

If asked by the LFA, JTF-CS forces may not enforce the quarantine by patrolling and enforcing a *cordon sanitaire*, as this is a direct law enforcement function and would violate the PCA.[54] However, federal troops may support the quarantine by working *within* the quarantined areas to provide critical life support functions such as dispersal of food, medication, and supplies, or essential transportation services. The presence of uniformed military members performing these functions within the quarantine areas might lead to the perception that Title 10 forces are enforcing the quarantine; however, that is not the case. Uniformed members enforcing the quarantine will very likely be members of the National Guard in a non-federal status under the command and control of their Governor.

Within the realm of providing medical services, there may be an additional need to protect the SNS and other medical assets from looting during consequence management operations. If the JTF-CS establishes a voluntary immunization and prophylaxis center within an affected area, there is sometimes a risk that individuals waiting for medication may riot or cause a civil disturbance in an effort to get medications more quickly. Normally, direct law enforcement functions necessary to protect the medical centers and the SNS supplies would fall to local and state authorities, including the National Guard in a non-federal status if the governor so orders. It would be an inefficient use of specialized medical resources, as well as a violation of the PCA, for JTF-CS personnel to provide the type of law enforcement that would be necessary to contain such incidents.

Next, reviewing potential missions and support requirements in response to a nuclear, radiological, chemical, or high yield explosive attack, the JTF-CS anticipates requests to perform search and rescue missions to extract injured citizens, then to triage, treat, and transport them to medical facilities.[55] Department of Defense assets might also be required to provide medical augmentation to increase treatment capacity, and extended care facilities.[56] Further, DOD assets might be tasked to survey, mark, and monitor the incident site, and decontaminate people and facilities.[57] The DOD might also be tasked to provide various forms of evacuee support, to include providing food, transportation, and temporary shelter.[58]

Additionally, depending upon the type of attack, explosive ordinance disposal might be required to disable any lingering explosives. Some law enforcement functions that might arise out of providing this support might include securing buildings and sites to ensure curious bystanders and thrill-seekers do not enter contaminated or dangerous areas or weakened buildings. Normally, the LFA will look to local or state law enforcement that would already have this responsibility. Further, if the building is turned over to the federal military for decontamination or infrastructure protection, an argument may be made that securing the area has a military purpose and is, therefore, an exception to the PCA.

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[52] *See generally* 42 C.F.R. pts. 70, 71 (2006) (providing Department of Health and Human Services and Centers for Disease Control and Protection regulations for federal authority for quarantine).

[53] *See generally id.* pt. 70 (Interstate quarantine), pt. 71 (Foreign quarantine) (2006).

[54] DOD DIR. 5525.5, *supra* note 30.

[55] NAT'L RESPONSE PLAN, *supra* note 18, ESF #8–4.

[56] *Id.*

[57] *Id.* ESF #8–5.

[58] *Id.* ESF #10–5, ESF #14–2.

Finally, regardless of whether the consequence management operation is for a CBRNE incident or a DSCA mission, force protection is a command responsibility.[59] However, there is a presumption that the JTF-CS forces deployed to CBRNE incident sites will not carry arms.[60] Since Hurricane Katrina, the same is true for all DSCA missions.[61] Therefore, in consequence management operations, the responsibility for providing security for DOD members and equipment rests *primarily* with state and local law enforcement authorities. As an exception, military members can generally act in self-defense if a commander has not restricted an individual's right of self-defense.[62] Additionally, if a commander determines that there is a need to arm forces during consequence management operations, he can request arming authority from the Secretary of Defense through the Commander, U.S. Northern Command.[63] However, DOD forces are still restricted by the PCA from engaging in direct law enforcement even when such arming is required for force protection. A final caveat is when the need to arm DOD forces is based on widespread civil unrest, in which case the President can invoke the Insurrection Act as a statutory exception to the PCA.[64]

Another issue raised concerning the restrictions of the PCA on the DOD was why the military could not enforce the law during the looting and apparent lawlessness in New Orleans in the aftermath of Hurricane Katrina. Television reports left the American public questioning why the military did not act.[65] This, however, is not the correct question. The question is whether the PCA prevented the DOD forces from conducting the mission requested by the Governor through the LFA.[66] The answer to this question is a resounding, "No." During Hurricane Katrina the Governor, through the LFA, asked the DOD to conduct various missions in support of disaster response, to include search and rescue, distributing supplies, and providing medical services.[67] The DOD accomplished those tasks within the bounds of the PCA and its exceptions. The DOD was not asked to stop the looting or enforce the law. The security mission was retained by the governor and was conducted by local law enforcement and state National Guard.[68] If the DOD had been asked to perform these missions it could only have done so if the state of lawlessness were such that it would have caused the President invoke the Insurrection Act.[69]

Conclusion

The PCA, as currently enacted and construed, does not prevent the JTF-CS from performing its CBRNE consequence management mission. The JTF-CS mission is to provide support to civil authorities, not to engage in law enforcement. If JTF-CS personnel were asked to engage in law enforcement activities during a CBRNE consequence management operation mission, the Commander, JTF-CS must defer to state and local law enforcement authorities or advise the Commander, U.S. Northern Command to assign the law enforcement mission to another command in accordance with a recognized constitutional or statutory exception(s) to the PCA.[70]

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[59] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para 2-5b (7 June 2006) (providing details of force protection responsibility for senior mission commanders, installation commanders, and garrison commanders).

[60] Message, 281832Z Apr 06, PTC Washington, D.C., subject: Defense Support to Civil Authorities Standing (DSCA) EXORD para. 9.O [hereinafter DSCA EXORD].

[61] *Id.*

[62] JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (S)/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (U) app. L-3 (13 June 2005).

[63] DSCA EXORD, *supra* note 60, at 17.

[64] 10 U.S.C. §331–335 (2000).

[65] William M. Arkin, *Rumsfeld to Katrina: "Thanks,"* WASH. POST, Sept. 20, 2005, http://blog.washingtonpost.com/earlywarning/2005/09/rumsfeld_to_katrina_thanks.html

[66] Letter from Governor Kathleen Babineaux Blanco, to President Bush (Sept. 2, 2005), *available at* http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=792&printer=1.

[67] *Id.*

[68] Press Release, Office of the Governor, Kathleen Babineaux Blanco, Task Force Pelican (Sept. 28, 2005), http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&articleID=492 ("National Guard troops are working diligently to respond to the needs of citizens affected by Hurricane Katrina and those affected by Hurricane Rita").

[69] 10 U.S.C. § 331–335.

[70] 18 U.S.C. § 1385 (2000).

As outlined above, no change to the Posse Comitatus Act is necessary for JTF-CS to perform its CBRNE consequence management mission. Assuming that other DOD forces will have similar missions during DSCA operations, by analogy, the PCA does not unduly restrict any DOD force from conducting a DSCA mission. Even though the PCA may restrict DOD forces from performing routine law enforcement functions the PCA does not unduly restrict JTF-CS from performing its CBRNE consequence management mission. In the case of a CBRNE incident, JTF-CS is specifically directed and authorized to perform CBRNE consequence management in support of the LFA. Consequence management CBRNE missions are unique and JTF-CS is the only DOD unit tasked exclusively to provide support. It would be detrimental to divert JFT-CS's limited and specialized resources to law enforcement functions. The governor has the option and the flexibility to perform law enforcement functions by using the National Guard in a state active duty or Title 32 status. Maintaining this distinction between the federal and state roles for military forces is consistent with the republican form of government that was so important to America's Founding Fathers. Furthermore, if the situation deteriorates to chaos or civil unrest, the existing constitutional and statutory exceptions give the President adequate authority to use the DOD to perform law enforcement functions under Title 10 status. The PCA does not have a significant negative impact on the defense support of civil authority missions.

Cross-Examination by the Numbers

Lieutenant Colonel Bradley J. Huestis[1]
Chief, United States Army Claims Service, Europe
Mannheim, Germany

Introduction

This article affirms the critical role of cross-examination, but refutes the claim that it is a mysterious art form reserved only to those who have acquired some mystical sixth sense for divining human deceit.[2] Instead of glorifying a skill expertly wielded by a select few, it lays out a step-by-step approach to prepare and execute effective cross-examination.

Oversold as the advocate's one big chance to unmask a liar, cross-examination is simply another way to communicate with the jury. At its core, cross-examination is a marvelous opportunity to communicate a portion of counsel's closing argument during the opposition's case-in-chief. Superior cross-examination is the result of hard work, but this work can be broken down into manageable pretrial tasks. When facts are uncovered, evaluated, organized, and selectively presented, using a streamlined presentation technique that enhances credibility, the results are amazing.

The best cross-examinations successfully bring together three elements: control, content, and tone.[3] Control is achieved through the use of tightly worded leading questions that place the advocate at center stage.[4] Short, single idea statements intended to provoke "yes" answers from the witness, ensure maximum control.[5] Content, always tied to the counsel's theme and theory of the case, has some flexibility but never wanders off into uncharted territory.[6] The key is to organize the cross-examination into "attack points" which are "concise statements that characterize a significant element of the argument" to be made about the witness during closing argument.[7] Finally, the tone of the examination should be confident, polite and non-threatening.[8]

"S+S=C" and Cross-Examination

To be able to deliver a portion of closing argument during cross-examination, an advocate must exercise extraordinary control over the witness. The proven way to accomplish this is by using leading questions. Leading questions should always be short, single idea statements designed to elicit a "yes" response. Mr. Terrance MacCarthy, a federal public defender from Chicago who lectured at the Judge Advocate General's School, used the mathematical formula of S+S=C to communicate this idea.[9] This formula represents, "short statements equal control."[10] Using Mr. MacCarthy's system, counsel should not use any excess words that dilute meaning or surrender control.[11]

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[1] Judge Advocate, U.S. Army. LL.M., 2001, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1995, *Cum Laude*, University of Arizona, Tucson, Arizona; B.S., 1989, *Distinguished Military Graduate*, Arizona State University, Tempe, Arizona.

[2] Young lawyers often stand in awe before the sacred alter of cross-examination. New counsel are instructed, "no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions." FRANCES L. WELLMAN, THE ART OF CROSS EXAMINATION 7 (Collier Books 4th ed. 1936). According to one legal dictionary cross-examination is "[t]he most effective art of the skilled trial lawyer; the interrogation of a witness for the opposing party by questions framed to test the accuracy and truthfulness of his testimony." BALLENTINE'S LAW DICTIONARY (Lexis Law Publishing 1969).

[3] In additional to some direct citations in this article, I would like to acknowledge all of the advocacy lessons that I have repeatedly learned from all of my supervisors, colleagues and opponents in the courtroom. With regard to my control, content and tone trilogy, I have primarily relied on three sources: for control, Mr. Terrance MacCarthy's lecture to the 14th Criminal Law Advocacy Course (Sept. 12, 2000) (on file with The Judge Advocate General's Legal Center and School, U.S. Army, Audio Visual Department) [hereinafter MacCarthy Lecture]; for organization, Major Martin Sitler, USMC, *The Art of Trial Advocacy, An Approach to Cross-Examination "It's a Commando Raid, not the Invasion of Europe"*, ARMY LAW., July 1998, at 80; and for tone, GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME (St. Martin's Griffin 1995).

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611 (2005) [hereinafter MCM].

[5] MacCarthy Lecture, *supra* note 3.

[6] Sitler, *supra* note 3, at 80.

[7] *Id.*

[8] SPENCE, *supra* note 3, at 44.

[9] MacCarthy Lecture, *supra* note 3.

Below is an example of a cross-examination of a duck. The duck is a hostile witness, so it will never admit that it is a duck, but in closing argument the case will turn on the fact that the duck is indeed a duck. To set the stage for closing argument, the examination proceeds:

Q: I want to ask you some questions about how you get around, you understand?
A: Yes.
Q: On land you walk?
A: Yes.
Q: In water you swim?
A: Yes.
Q: You also fly?
A: Yes.
Q: I want to ask you about your feet, you understand?
A: Yes.
Q: They are orange in color?
A: Yes.
Q: They have three toes?
A: Yes.
Q: They are webbed?
A: Yes.
Q: You are a good swimmer?
A: Yes.
Q: You swim in all weather?
A: Yes.
Q: You swim in the rain?
A: Yes.
Q: When it rains, the water just rolls off of your back?
A: Yes.
Q: You have feathers?
A: Yes.
Q: But your mouth, or bill, is featherless?
A: Yes.
Q: It is orange in color, just like your webbed feet?
A: Yes.

The disconnect between Mr. MacCarthy's mandate to use short statements versus the question mark at the end of each of counsel's questions demands attention. How can counsel make statements when using leading questions to conduct a cross-examination? First, notice that there was no use of *isn't it true*, *isn't it fair to say*, or *isn't that correct*? Using the S+S=C system, there simply is no need or room for excess language. The key, however, is the proper use of inflection and modulation to communicate the need for only a yes or no answer. Inflection is the change in pitch or loudness of the voice.[12] Modulation is the use of inflection to communicate meaning.[13] When asking leading questions, inflection must fall at the end of each question. If inflection rises, it appears that the questioner does not know the answer and is inviting an open ended answer or explanation. By using inflection and modulation, counsel can clearly present each single idea statement as a leading question. This approach guarantees control.[14]

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[10] *Id.*

[11] *Id.*

[12] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 620 (1990).

[13] *Id.* at 762.

[14] Professor Rose spells out:

> Two "styles" of phraseology are normally used when performing cross examination. The first is a leading question with a 'tag' on the end of it. An example would be, "You own a baseball bat, don't you?" The "tag" is "don't you?" and takes many forms (e.g., didn't you?, isn't it true?, etc.). The other style is to drop the tag entirely. A leading question can still be asked with identical language without the tag. When you do this properly, there is a much greater emphasis on voice inflection. For example, "You own a baseball bat." Make this a declarative sentence a leading question by placing the inflection on the word "bat." Because leading questions are not truly inquisitive, voice inflection makes the critical difference. This is especially true with non-tag, leading questions. If the

While counsel can effectively control the questioning by using short statements, the jury will need a framework in order to best understand the importance of the testimony. This framework is built upon the foundation of a well organized cross-examination.

Organizing Cross-Examination

Before working on the content of any individual cross-examination, the counsel must first master the relevant facts of the case. At a minimum:

- read the entire case file
- visit the alleged crime scene
- interview all relevant witnesses
- know each witness's reputation and duty performance

At this point, counsel should have begun to develop a theory of the case.[15] The theory of the case, "is the basic underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a credible whole."[16] The theory of the case helps decide which witnesses to call. The order witnesses are called, and the order questions are asked, should help explain the theory of the case. This is true both on direct and cross-examination. Through the lens of a credible theory of the case, counsel can begin to visualize individual cross-examinations. Counsel must keep in mind some of the basic goals of cross-examination:

- elicit favorable testimony[17]
- elicit foundation
- develop conflicting testimony
- attack the credibility of direct testimony[18]
- attack the credibility of testifying witnesses[19]

Counsel must now go back and review the file on each individual witness who appears on the opposition's witness list. In his article, *An Approach to Cross-Examination*, Major Sitler, USMC, outlines three important steps:

- conceptualize the entire case and ask yourself what argument you will make about a specific witness[20]
- determine specific factors, or "attack points" that support each argument[21]
- draft leading questions that support each attack point[22]

> inflection drops when saying "bat," it is leading. . . . If, however, your inflection rises on "bat," it demonstrates the questioner is uncertain or at least inviting an explanation. … The absence of taglines allows you to state the issue as though it is a fact that merely requires agreement or disagreement. . . . Finally, the choice of whether or not to use taglines is one of style and demeanor. Make certain you experiment with both and then choose one that works for you.

CHARLES H. ROSE III, FUNDAMENTAL TRIAL ADVOCACY ch. 6, at 122-23 (Thompson-West American Casebook Series (2007)).

[15] As Professor Charlie Rose observes, "If you don't take the time to properly analyze the legal issues and facts that support them in light of your case theme and theory you are guaranteeing an ineffective and possibly self-destructive cross examination. You cannot arrive at a destination if you have not chosen one." *Id.* ch. 6, at 117.

[16] JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 78 (ABA 3d ed. 1994).

[17] *See, e.g.*, Lieutenant Colonel Kenneth H. Clevenger, *Cross-Examination for Trial Defense Counsel*, ARMY LAW., Jan. 1992, at 3, 5.

[18] *See, e.g.*, Major Christopher W. Behan, *The Art of Trial Advocacy: The Thrill and Excitement of Impeachment by Contradiction*, ARMY LAW., Oct. 2004, at 10.

[19] *See, e.g.*, Lieutenant Colonel Stephen R. Henley, *The Art of Trial Advocacy: Impeachment by Prior Inconsistent Statement*, ARMY LAW., Feb. 1998, at 35.

[20] Sitler, *supra* note 3, at 80.

[21] *Id.* at 81.

[22] *Id.*

Appendix A of this article depicts Major Sitler's approach in a simple, one page format.[23] Due to the worksheet's utility in helping counsel tie each examination to the theme and theory of the case, this sample page can be a useful aid for drafting both direct and cross-examinations.[24] In meeting MRE 401, 402, and 403 (logical and legal relevance) objections, Major Sitler's worksheet is extremely helpful. At the top it explicitly lists what counsel intends to argue about that particular witness.[25] Each attack point and each question should be designed to further that argument.

If the counsel plans to refer to a witness during closing argument, then the first step is to draft a one or two sentence theme or argument for that witness.[26] The next step is to brainstorm for factors or "attack points" that support this specific witness argument.[27] These attack points are analogous to the single sheet of standard typing paper with an indented introductory paragraph followed by italicized, centered sub-titles. For example, let's look at Little Red Riding Hood and the Big Bad Wolf who allegedly murdered Grandma. The prosecutor might argue that, "Mr. Wolf killed and ate Grandma to feed his hunger, and then he fled." To support this conclusion, attack points could include, "Mr. Wolf had the means to kill," "Mr. Wolf had the opportunity to kill," "Mr. Wolf had the motive to kill," and "Mr. Wolf's guilt is proven by his flight from Grandma's house." For means, the prosecutor would focus the jury's attention on Mr. Wolf's ability to kill. For opportunity, the prosecutor would focus on the Mr. Wolf's access to Grandma in her home. For motive, the prosecutor would drive home Mr. Wolf's need to eat meat. Finally for flight, the prosecutor would highlight Mr. Wolf's flight from Little Red Riding Hood and the Woodsman.[28]

In the same case, the defense might argue that, "Ms. Hood doesn't even know if her Grandmother is dead, and Mr. Wolf's flight was innocent." To support this conclusion, attack points could include, "Mr. Wolf is Grandma's friend not her killer," "Ms. Hood doesn't have facts, she only assumes the worst," "there is no proof of a murder, let alone proof about who did it," "Mr. Wolf was Grandma's house sitter," and "Mr. Wolf ran because Mr. Woodcutter had an ax."[29]

After coming up with attack points, craft leading, single fact questions that advance each attack point.[30] As far as organizing the attack points, watch for internal consistency. For example, counsel should not attack a witness's memory of some events if there is a need to rely on the same witness's memory of other events. Counsel should also bear in mind that the plan must be flexible enough to pursue occasional flashes of insight. Counsel is free to go "off the page" as long as the new line of questions falls within the specific argument listed for that particular witness. Some stock orders for attack points include:

- begin and end with the most important topics (primacy/recency)
- elicit favorable information before impeaching unfavorable information
- chronologically cover the main points as "snap shots" while avoiding a complete review of the direct testimony
- organize by senses

After drafting each cross-examination, the counsel should re-interview each witness. This re-interview should not be a practice cross-examination. It should be a polite, professional session where the counsel confirms the answers to the cross-examination questions by using non-leading, open ended questions.

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[23] *Id.* at 82.

[24] *Id.*

[25] It is beyond the scope of this article to discuss the relevant evidentiary and professional responsibility rules that govern cross-examination. In his book *Fundamental Trial Advocacy*, Professor Rose of Stetson University College of Law, presents an excellent overview of cross-examination and the relevant evidentiary and professional responsibility rules. *See* ROSE, *supra* note 14, ch. 6.

[26] If counsel does not plan to mention the witness in closing, counsel should consider waiving a cross-examination of that witness. Sitler, *supra* note 3, at 80.

[27] *Id.* at 81.

[28] *See* example at App. B.

[29] *See* example at App. C.

[30] *Id.*

If the counsel does not plan to refer to a witness during closing argument, the counsel should forgo cross-examination. Rising to conduct cross-examination acknowledges that the witness's testimony was important, and by initiating cross-examination, counsel has implicitly promised to dramatically reveal some weakness or hidden truth in the opponent's case. When there is no weakness or hidden truth to expose, the best choice is to waive cross-examination.

The Tone of Cross-Examination at Trial

Communication with the jury begins before counsel presents the first leading question to the witness. Before speaking, counsel should take center stage in the middle of the courtroom. Ideally, the advocate should move to a comfortable position in front of the jury that forces the witness to turn and face away from the jury to answer the leading questions. Counsel should avoid the temptation of repeating portions of the direct examination, because the opposing counsel has just finished asking questions favorable to their case. Since cross-examination should avoid reinforcing the opponent's case, it is best for counsel to stick to their "attack points" and cross-examine with a goal of setting the stage for closing argument.

Major Sitler's "attack point" approach ties in perfectly with the chapter method of presenting cross-examination at trial. The best way to think about the chapter method is visually. Imagine a single sheet of standard typing paper with a solid block of text starting at the top left and going all the way to the bottom right corner. Now imagine the same sheet of paper with a bold type title centered at the top of the page. Below is an indented introductory paragraph followed by italicized, centered chapter titles. Each of counsel's attack points is a chapter title in this visual example. Which paper would you prefer to read? Which paper would you be more likely to understand? By properly organizing cross-examination, and using verbal transitions to signal the next chapter, the counsel can explicitly communicate the narrative as the examination progresses.[31] For example, with the earlier examination of the Duck, counsel transitioned to a new attack point by simply asking, "I want to ask you about your feet, you understand?"

Cross-examination should very rarely be cross. Newcomers to cross-examination "frequently misapprehend *leading question* as referring to a question showing hostility or posed for the purpose of embarrassing or taking unfair advantage. Actually, as litigators well know, a *leading question* is one that suggests the answer to the person being interrogated."[32] Famous trial attorney and author Gerry Spence advises, "Power is like a pistol with barrels that point in both directions. When one with power pulls the trigger against someone with lesser power, one barrel fires in the direction of the intended victim while the other fires into the person who pulled the trigger."[33] Mr. Spence describes how, as a young advocate, his overly aggressive cross-examinations were self defeating:

> When I was a young lawyer feeling my power, my strategy in a certain case was to attack and destroy every witness the other side put against me. I took on the witnesses, old men with watery eyes who I knew were but company sycophants trying to keep their jobs. I took on the experts, scholarly actors who I knew were but paid witnesses attempting to earn their fees rather than reveal the truth. Cut them up, shredded them, pulverized them. The jury was out only fifteen minutes before it returned a verdict against my client. I was devastated. Hadn't I won every battle? Hadn't I destroyed the witnesses? Hadn't my power on cross-examination been overwhelming? . . . Then one day I realized that not only had I destroyed the witnesses, I had mocked them, held them up to the jury in scorn and derision. I had been angry with the sweet old company men who had spent their lives smiling – smiling at their bosses and their customers all the while knowing the machine they sold was defective. I hated the hypocrisy. I hated the injustice. And I had attacked. I attacked everyone in sight. . . . In the merciless barrage that I leveled in the courtroom, I inadvertently attacked even the jury, for my cruelty forced them to the side of the defense. I had unleashed all of my power, and in doing so I had defeated myself.[34]

As Mr. Spence's example vividly describes, counsel should treat almost all witnesses with respect. Counsel should never argue with a witness; not only is it objectionable, but the jury members will identify with the witness and hold it against the counsel. Further, counsel must remember that cross-examination is really an opportunity to communicate to the

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[31] Sitler, *supra* note 3.

[32] A DICTIONARY OF MODERN LEGAL USAGE (Bryan A. Garner, Oxford University Press, 1990) (emphasis added).

[33] SPENCE, *supra* note 3, at 44.

[34] *Id.* at 44-45.

jury. The use of technical language or trick questions will backfire. The use of simple, direct language communicated in a conversational tone, will minimize witness confusion, but more importantly, will assist the jury in understanding the testimony.

Conclusion

Cross-examination is a critical skill for all advocates. Like other areas of trial work, it can be mastered. Getting past the mystique and focusing on simple, solid pretrial preparation is the first step.

As champion of the case, counsel should take full advantage of the opportunity to present argument during the adversary's case in chief. The only catch is that a witness, called to the stand by opposing counsel, must affirm each statement of fact. When done well, this can change the outcome of a case. The best technique to gain maximum control is to use short, single-idea statements intended to provoke a "yes" from the witness.[35] The content should never go into uncharted territory, and should always be tied to the counsel's theme and theory of the case.[36]

What appears to be magic flows from streamlined technique, systematic preparation, and confident delivery of questions designed to communicate a portion of closing argument to the jury. Thoroughly prepared and persuasively presented, effective cross-examination is much more than high drama. Effective cross-examination wins cases.

[35] MacCarthy Lecture, *supra* note 3.

[36] Sitler**,** *supra* note 3, at 80.

Appendix A

Witness _____

Argument _____

Attack Points:

1. _____

2. _____

3. _____

4. _____

5. _____

Appendix B

Witness *Mr. Big B. Wolf (prosecution cross-examination)*

Argument *Mr. Wolf killed and ate Grandma to feed his hunger; then he fled.*

Attack Points:

1. *Means . . . "I want to talk about you, you understand?"*

- you have big eyes	*- you have big muscles*	*- you have big teeth*
- the better to see	*- the better to run*	*- the better to eat*
- you have big ears	*- you have big paws*	
- the better to hear	*- the better to catch*	

2. *Opportunity . . . "I want to talk about Grandma, you understand?"*

- you knew Grandma	*- Grandma had a bad leg*	*- Grandma was nearly deaf*
- Grandma was old	*- She walked with a cane*	*- She wore a hearing aid*
- She's was about 70	*- Grandma had bad eyes*	
- She wasn't 5 feet tall	*- She worn glasses*	

3. *Location . . . "I want to talk about you going in to Grandma's house, you understand?"*

- you live next door to Grandma	*- you watered her plants*	*- you knew she lived alone*
- you are her neighbor	*- you had a key*	*- you also live alone*
- you've been neighbors10 years	*- the key under her door mat*	
- you've house sat for Grandma	*- Grandma lived alone*	

4. *Motive . . . "I want to talk about your hunger for meat, you understand?"*

- everyone needs to eat	*- you don't have a job*	*- you hunt for meat*
- you need to eat	*- you don't have money*	*- another word for meat is muscle*
- you are a carnivore	*- you can't buy meat*	*- everyone has muscle*
- you eat meat	*- you hunt*	*- Grandma had muscle*

5. *Flight . . . "I want to talk about your arrest, you understand?"*

- you know Ms. Hood	*- they were bloody*	*- you didn't go home*
- she found you at Grandma's	*- a woodsman came in*	*- you went to Chicago*
- in Grandma's bed	*- he tried to stop you*	*- you were living on the street*
- in Grandma's clothing	*- you ran away*	*- you were arrested there*

Appendix C

Witness *Ms. Red R. Hood (defense cross-examination)*

Argument *Hood doesn't know if her Grandmother is dead, and Wolf's flight was innocent.*

Attack Points:

1. *Mr. Wolf an unlikely killer . . . "I want to talk about Mr. Wolf, you understand?"*

- you know Mr. Wolf
- he is Grandma's neighbor
- he's been her neighbor for years
- you've had dinner with him
- at Grandma's house
- they're friends
- they have never had problems
- your Grandma took vacations
- she would ask Mr. Wolf to house sit
- she never asked you to house sit
- Mr. Wolf was her house sitter

2. *Red only assumes the worst . . . "I want to ask you about Grandma's trips, you understand?"*

- Grandma likes to travel
- she travels every few months
- she takes short trips
- she takes long trips
- she has been to Hawaii
- she's been to France
- she has been hot air ballooning
- last year she went scuba diving
- you've traveled with her
- but, she also travels alone

3. *Wolf in Grandma's OK . . . "I want to go back to Mr. Wolf's house sitting, you understand?"*

- Grandma had Wolf house sit
- when she took her vacations
- Mr. Wolf was her house sitter
- To get in, you need a key
- Mr. Wolf watered plants
- To water, he had to get in
- He had to have a key
- Grandma's key
- you knew he had a key
- a key to Grandma's house
- Grandma gave him the key

4. *Of course Wolf ran . . . "I want to turn to Mr. Woodsman, you understand?"*

- you went to Grandma's
- you were looking for her
- you found Mr. Wolf instead
- you didn't expect him
- you were surprised
- you shouted out
- he shouted too
- Mr. Woodsman heard
- Mr. Woodsman came in with an ax
- He ran at Mr. Wolf
- Mr. Wolf ran away
- He ran from the Woodsman with an ax

5. *Red doesn't know much . . . "I want to ask you about facts in this case, you understand?"*

- facts are certain
- facts are beyond dispute
- facts are important
- it is a fact that Wolf house sat
- it is a fact that Grandma traveled
- she could be hurt on a trip
- she might even be lost
-she might have died
- you can't be certain
- you just don't know for sure

USALSA Report
U.S. Army Legal Services Agency

Trial Judiciary Note

A View from the Bench
Instructions: A Primer for Counsel

Colonel R. Peter Masterton
Chief Circuit Judge, Fifth Judicial Circuit
U.S. Army Trial Judiciary, Wuerzburg, Germany

Military Judge: Counsel, let's discuss instructions. What instructions do you want me to give the members?
Trial Counsel: [Pause] Uh - I really hadn't thought about that, Your Honor.
Defense Counsel: [Longer Pause] Whatever you decide is fine with us, Judge.

Introduction

In the rush to prepare for a big court-martial, some counsel do not think about instructions for the panel members until the end of trial. At that point it is usually too late to draft instructions that will be either relevant or helpful to their case. This can be a huge mistake, since instructions are one of the most important parts of any trial.

Although the military judge is ultimately responsible for providing instructions to the panel members, he will always ask counsel for input.[1] Counsel should take full advantage of this opportunity and assist the judge in giving instructions, ensuring the members receive proper guidance on the law. Counsel can also help the judge explain the elements of the charged offenses, relevant defenses, and evidentiary issues, making it easier for counsel to argue their theory of the case.

Most instructions have been standardized and are either contained in the *Military Judge's Benchbook* (*Benchbook*) or posted as interim updates on the Trial Judiciary homepage.[2] However, the instructions must be tailored to the facts of each individual case and some cases raise unique issues that are not dealt with in the *Benchbook*. In a case with unique circumstances it is especially important for counsel to propose appropriate instructions.

This article discusses the major areas where counsel can assist the judge in drafting instructions.

Elements of the Offenses

It is critical for the panel members to be properly instructed on the elements of the charged offenses.[3] Although the military judge ultimately prepares the instructions, he often seeks input from counsel. There are also a number of definitions in the *Benchbook* that may be tailored to fit the facts of each case. Counsel should review these definitions to help the judge identify which are appropriate.

If the accused is charged with an offense under Article 133 or 134 of the Uniform Code of Military Justice (UCMJ)[4] that is not enumerated in the *Manual for Courts-Martial* (*MCM*),[5] counsel should assist the judge in determining the elements. One example is a disorder prejudicial to good order and discipline charged as a violation of Clause 1 of Article 134, or

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[1] United States v. Poole, 47 M.J. 17 (1997) (stating that the military judge must give instructions requested by counsel if the proposed instruction is correct, the issue is not covered elsewhere in the instructions, and the instruction involves a vital point in the case).

[2] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK], *available at* U.S. Army Trial Judiciary Internet site, https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/(JAGCNetDocID)/D+A+PAM+27-9+AND+APPROVED+UPDATES?OpenDocument.

[3] The military judge has a sua sponte duty to instruct on the elements of the offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(1) (2005) [hereinafter MCM]; United States v. Mance, 26 M.J. 244, 254 (C.M.A. 1988).

[4] UCMJ arts. 133, 134 (2005).

[5] MCM, *supra* note 3.

service discrediting conduct charged as a violation of Clause 2 of Article 134.[6] Counsel should research similar offenses under state and federal law and propose tailored instructions on the elements and appropriate definitions. Another example is a violation of a federal criminal statute that is punishable under Clause 3 of Article 134.[7] Here counsel should provide the judge with a copy of the appropriate statute along with any accompanying definitions.

Counsel should also provide the judge with input on lesser included offenses reasonably raised by the evidence.[8] Although the *MCM* catalogs a number of potential lesser included offenses,[9] this list is not exhaustive. The defense may affirmatively waive an instruction on a lesser included offense.[10]

Defenses

The military judge is required to instruct the members on all affirmative defenses reasonably raised by the evidence.[11] An accused does not waive his right to the instruction by failure to request it or by failure to object to its omission.[12] Determining which defenses have been raised can be difficult. Counsel are more familiar with the evidence and are often in a better position than the judge to identify them. Therefore, it is imperative that counsel notify the judge of all potential defenses.

In assault and homicide cases, self-defense and defense of others are often raised.[13] There are a number of instructions on these issues in the *Benchbook*.[14] Some are given only when deadly force or grievous bodily harm is involved;[15] others are given only in the absence of deadly force and grievous bodily harm;[16] and in some cases both types of instructions must be given, one for a charged offense involving deadly force or grievous bodily harm and the other for a lesser included offense not involving such force or harm.[17] If the accused is trying to prevent trespass or theft when the assault or homicide occurs, defense of property may be raised.[18] There is a separate instruction on this issue.[19]

In assault cases involving children, the defense of parental discipline may be raised.[20] A parent or guardian may lawfully use corporal punishment to safeguard or promote the welfare of a child, as long as the force used is not unreasonable or excessive.[21]

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[6] Article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces." UCMJ art. 134. Many of these offenses have been enumerated by the President in the *MCM*. MCM *supra* note 3, pt. IV, ¶¶ 61-113.

[7] Article 134 also prohibits "crimes and offenses not capital." UCMJ art. 134. This includes offenses that violate federal criminal statutes, including state criminal laws assimilated into federal law under the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2000). MCM, *supra* note 3, pt. IV, ¶ 60(c)(4).

[8] The military judge has a sua sponte duty to instruct on all lesser included offenses reasonably raised by the evidence. MCM *supra* note 3, R.C.M. 920(e)(2); United States v. Griffin, 50 M.J. 480 (1999); United States v. Wells, 52 M.J. 126 (1999).

[9] These lesser included offenses are listed under each of the punitive articles. MCM, *supra* note 3, pt. IV.

[10] United States v. Strachan, 35 M.J. 362 (C.M.A. 1992).

[11] MCM, *supra* note 3, R.C.M. 920(e)(3); United States v. Gillenwater, 43 M.J. 10 (1995).

[12] United States v. Taylor, 26 M.J. 127 (C.M.A. 1988).

[13] MCM, *supra* note 3, R.C.M. 916(e).

[14] BENCHBOOK, *supra* note 2, instrs. 5-2 to 5-3-3.

[15] *Id.* instrs. 5-2-1, 5-3-1. It is a defense to homicide or assault involving deadly force that the accused reasonably apprehended death or grievous bodily harm and subjectively believed the force used was necessary. MCM, *supra* note 3, R.C.M. 916(e)(1), R.C.M. 916(e)(5).

[16] BENCHBOOK, *supra* note 2, instrs. 5-2-2, 5-3-2. It is a defense to an assault not involving death or grievous bodily harm that the accused reasonably apprehended bodily harm and subjectively believed the force used was necessary. MCM, *supra* note 3, R.C.M. 916(e)(3), R.C.M. 916(e)(5). In addition, an accused may threaten death or grievous bodily harm if the accused reasonably apprehended bodily harm and offered, but did not apply or attempt to use, force likely to cause death or grievous bodily harm. *Id.* R.C.M. 916(e)(2), R.C.M. 916(e)(5); United States v. Acosta-Vargas, 32 C.M.R. 388 (C.M.A. 1962). *See* BENCHBOOK, *supra* note 2, instr. 5-2-6.

[17] BENCHBOOK, *supra* note 2, instrs. 5-2-3, 5-3-3.

[18] United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963).

[19] BENCHBOOK, *supra* note 2, instr. 5-7.

[20] *Id.* instr. 5-16.

[21] United States v. Robertson, 36 M.J. 190 (C.M.A. 1992).

In sexual assault and rape cases, the defense of mistake of fact as to consent is often at issue. This defense is raised where the evidence suggests that the accused had a mistaken belief which would make his actions lawful.[22] The affirmative defense of mistake of fact is a required instruction when it is reasonably raised by the evidence, unless it is affirmatively waived by the defense.[23] There are two types of mistake instructions in the *Benchbook*: one for general intent crimes[24] and one for crimes requiring specific intent or knowledge.[25] Counsel should determine whether the mistake relates to a general intent or a specific intent element before deciding which instruction to request. There are special instructions for mistakes relating to check offenses[26] and drug offenses.[27] There is also a separate instruction for carnal knowledge cases when the mistake relates to the age of the victim.[28]

In drug distribution cases and whenever the accused's alleged misconduct was detected through undercover police operations, entrapment may be an issue[29] This defense is raised when there is some evidence that the suggestion for an offense originated with a government agent and the accused was not predisposed to commit the crime.[30] Counsel should consider an entrapment instruction whenever the accused's alleged misconduct was detected through undercover police operations.[31]

In larceny and wrongful appropriation cases, the defense of self-help under a claim of right should be considered.[32] This defense is raised when the evidence suggests the accused took property under a claim of right in satisfaction of a debt or when the accused took property under an honest belief that the property belonged to him.[33]

When the accused is charged with disobeying an order, the defenses of physical impossibility, physical inability, and financial or other inability may be raised.[34] Physical impossibility means the accused was unable to perform because of a physical injury or disability.[35] Physical inability means it was possible for the accused to perform, but he chose not to because of the belief that he was physically unable to do so.[36] Financial inability means the accused was unable to perform because of lack of funds.[37] Other types of inability may also be raised; in these cases the instruction on financial inability should be tailored to describe the situation.[38] Counsel should review the instructions and inform the judge which ones are appropriate.

If the evidence suggests the accused's criminal conduct was unintentional, an accident instruction may be appropriate.[39] An accused is not criminally responsible if he was doing a lawful act in a lawful manner, and an unexpected death, bodily harm, or other wrong occurs.[40] However, the defense is not available if the injury or wrong resulted from the accused's negligence.[41]

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[22] MCM, *supra* note 3, R.C.M. 916(j).

[23] United States v. Gutierrez, 64 M.J. 374 (2007).

[24] BENCHBOOK, *supra* note 2, instr. 5-11-2; United States v. Jones, 49 M.J. 85 (1998).

[25] BENCHBOOK, *supra* note 2, instr. 5-11-1; United States v. Binegar, 55 M.J. 1 (2001).

[26] BENCHBOOK, *supra* note 2, instr. 5-11-3.

[27] *Id.* instr. 5-11-4.

[28] *Id.* instr. 3-45-2, note 2. This defense is unusual because the accused has the burden of proof. UCMJ, art. 120 (2005).

[29] BENCHBOOK, *supra* note 2, instr. 5-6.

[30] MCM, *supra* note 3, R.C.M. 916(g); United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Eason, 21 M.J. 79 (C.M.A. 1985).

[31] BENCHBOOK, *supra* note 2, instr. 5-6.

[32] *Id.* instr. 5-18.

[33] United States v. Gunter, 42 M.J. 292 (1995).

[34] MCM, *supra* note 3, R.C.M. 916(i).

[35] BENCHBOOK, *supra* note 2, instr. 5-9-1; United States v. Cooley, 36 C.M.R. 180 (C.M.A. 1966).

[36] BENCHBOOK, *supra* note 2, instr. 5-9-2; United States v. Heims, 12 C.M.R. 174 (C.M.A. 1953).

[37] BENCHBOOK, *supra* note 2, instr. 5-10; United States v. Pinkston, 21 C.M.R. 22 (C.M.A. 1956); Unites States v. Hilton, 39 M.J. 97 (C.M.A. 1994).

[38] *See* BENCHBOOK, *supra* note 2, instr. 5-10.

[39] *Id.* instr. 5-4.

[40] MCM, *supra* note 3, R.C.M. 916(f); United States v. Curry, 38 M.J. 77 (C.M.A. 1993).

[41] MCM, *supra* note 3, R.C.M. 916(f) discussion.

If an offense requires a causal nexus between the accused's conduct and the harm involved, counsel should consider requesting instructions on lack of causation, intervening cause or contributory negligence.[42] These defenses are typically raised in cases involving loss of military property and homicide. Instructions on these defenses are already included in the *Benchbook* instructions on the elements of several offenses, such as negligent homicide.[43]

If the accused consumed alcohol or drugs prior to committing an offense, counsel should consider requesting a voluntary intoxication instruction.[44] Although voluntary intoxication is generally not a defense to a general intent crime, it may cause the accused to be incapable of entertaining the premeditated design to kill, having certain knowledge, forming a specific intent or acting willfully, as required for certain offenses.[45]

If the accused is charged with attempt under Article 80, UCMJ, counsel should consider the defense of voluntary abandonment.[46] This instruction should be given if the evidence suggests the accused abandoned his effort to commit a crime under circumstances manifesting a complete and voluntary renunciation of the criminal purpose.[47]

If the evidence suggests the accused was ordered to commit a crime, counsel should consider the defense of obedience to orders.[48] This may constitute a defense even if the order was illegal, unless the accused actually knew the order was illegal or a person of ordinary sense would know it was illegal.[49]

A duress instruction may be appropriate if the accused was subjected to physical force or psychological coercion.[50] Generally, this defense applies only if the accused reasonably feared immediate death or serious bodily harm to him or another.[51]

If the accused's mental condition is in issue, counsel should consider the instructions on the defense of lack of mental responsibility.[52] This should be identified well before trial, since the defense is required to provide notice of this issue.[53] Even if lack of mental responsibility is not raised, the accused's mental condition may negate elements involving premeditation, specific intent, willfulness or knowledge (in the same way that voluntary intoxication can negate these elements). There is a separate *Benchbook* instruction on this issue.[54]

If the evidence suggests the accused was not at the scene of the crime, an alibi instruction may be appropriate.[55] The accused is required to provide notice on this issue before trial.[56] If the defense does not request an alibi instruction, the judge is not required to give it.[57]

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[42] BENCHBOOK, *supra* note 2, instr. 5-19.

[43] *Id.* instr. 3-85-1.

[44] *Id.* instr. 5-12.

[45] MCM, *supra* note 3, R.C.M. 916(l)(2). *See* United States v. Morgan, 37 M.J. 407 (C.M.A. 1993).

[46] United States v. Byrd, 24 M.J. 286 (C.M.A. 1987); MCM, *supra* note 3, pt. IV, ¶ 4(c)(4).

[47] BENCHBOOK, *supra* note 2, instr. 5-15.

[48] *Id.* instr. 5-8.

[49] MCM, *supra* note 3, R.C.M. 916(d). A related defense is the defense of justification. *Id.* R.C.M. 916(c). *Cf.* United States v. Rockwood, 52 M.J. 98, 112 (1999) (neither international nor domestic law gave accused a duty to inspect Haitian penitentiary for possible human rights abuses).

[50] BENCHBOOK, *supra* note 2, instr. 5-5.

[51] MCM, *supra* note 3, R.C.M. 916(h). United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

[52] BENCHBOOK, *supra* note 2, instrs. 6-1 to 6-6. There are also separate procedural instructions and sentencing instructions for cases involving mental responsibility. *Id.* instrs. 6-7 to 6-9.

[53] MCM, *supra* note 3, R.C.M. 701(b)(2).

[54] BENCHBOOK, *supra* note 2, instr. 5-17.

[55] *Id.* instr. 5-13.

[56] MCM, *supra* note 3, R.C.M. 701(b)(2).

[57] United States v. Bigger, 8 C.M.R. 97 (C.M.A. 1953). *Cf.* United States v. Jones, 7 M.J. 441 (C.M.A. 1979) (where alibi is raised by evidence and defense requests instruction, military judge is required to give alibi instruction).

Evidentiary Instructions

The military judge is generally not required to give evidentiary instructions, but will often do so when asked.[58] This is an area where it is particularly important for counsel to request appropriate instructions, because such instructions help explain how the evidence supports the theory of the case.

An instruction on circumstantial evidence is almost always appropriate.[59] The *Benchbook* has special instructions on circumstantial evidence for charged offenses that involve specific intent or a specific knowledge.[60] An instruction on credibility of witnesses is also usually appropriate.[61] The *Benchbook* instruction informs panel members to evaluate credibility based on factors such as the ability to observe and remember, sincerity, and bias.[62] If character for untruthfulness or truthfulness has been introduced,[63] there is a separate instruction on this issue.[64] The issue of eyewitness identification is discussed in a separate *Benchbook* instruction [65] with a subpart on interracial identification issues.[66]

Many cases involve prior inconsistent statements by witnesses.[67] If such statements are introduced at trial, counsel should request the *Benchbook* instruction on this issue.[68] Counsel should tell the judge which witnesses are involved and what the prior statements were. A similar instruction[69] may be appropriate if prior consistent statements are introduced in rebuttal.[70]

Character witnesses may be asked if they have heard about prior misconduct by the person they are vouching for.[71] When this happens, counsel may request the *Benchbook* instruction on "have you heard" impeachment questions.[72] This instruction lets the members know that they may only consider the question for impeachment purposes.

When the defense introduces evidence of the accused's good character, [73] the judge can instruct the members that this may cause a reasonable doubt as to the accused's guilt.[74] If evidence of the victim's character for violence or peacefulness has been introduced, [75] the judge can instruct the members on the use of this evidence as well.[76]

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[58] United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993).

[59] BENCHBOOK, *supra* note 2, instr. 7-3. *See* MCM, *supra* note 3, R.C.M. 918(c) discussion.

[60] BENCHBOOK, *supra* note 2, instr. 7-3 notes 2, 3.

[61] *Id.* instr. 7-7-1. *See* MCM, *supra* note 3, R.C.M. 918(c) discussion.

[62] BENCHBOOK, *supra* note 2, instr. 7-7-1.

[63] MCM, *supra* note 3, MIL. R. EVID. 608(a); United States v. Average, 19 M.J. 189 (C.M.A. 1985) (evidence of truthfulness permitted if witnesses' truthful character attacked).

[64] BENCHBOOK, *supra* note 2, instr. 7-8-3.

[65] *Id.* instr. 7-7-2.

[66] *Id.* instr. 7-7-2 note 2. *See* United States v. Thompson, 31 M.J. 125 (C.M.A. 1990) (cross-racial identification instruction required only if this is primary issue in case).

[67] Prior statements may be used to impeach a witnesses' credibility. Extrinsic evidence of a prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement. MCM, *supra* note 3, MIL. R. EVID. 613. A prior inconsistent statement is admissible as substantive evidence if it was given under oath at a prior hearing or deposition. *Id.* MIL. R. EVID. 801(d)(1)(A). *See* United States v. Taylor, 44 M.J. 475 (1996) (court described interplay between use of prior statements as impeachment and as substantive evidence).

[68] BENCHBOOK, *supra* note 2, instr. 7-11-1 (Interim Update available on Trial Judiciary Internet site, https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/USArmyTJ.nsf/(JAGCNetDocID)/D+A+PAM+27-9+AND+APPROVED+INTERIM+UPDATES?OpenDocument).

[69] *Id.* instr. 7-11-2.

[70] A prior consistent statement is admissible as substantive evidence if offered to rebut a charge of recent fabrication, improper influence or motive. MCM, *supra* note 3, MIL. R. EVID. 801(d)(1)(B); United States v. Faison, 49 M.J. 59 (1998); United States v. Allison, 49 M.J. 54 (1998).

[71] When character evidence is introduced, inquiry is permitted into specific instances of conduct on cross-examination. MCM, *supra* note 3, MIL. R. EVID. 405(a). When evidence of a witnesses' character for truthfulness has been introduced, inquiry is permitted into specific instances of conduct if they are probative of truthfulness or untruthfulness. *Id.* MIL. R. EVID. 608(b). *See* United States v. Pearce, 27 M.J. 121 (C.M.A. 1988). *Cf.* United States v. Toohey, 63 M.J. 353 (2006) (military judge erred by permitting "have you heard" questions on accused child pornography charges in rebuttal to testimony of the accused's peacefulness).

[72] BENCHBOOK, *supra* note 2, instr. 7-18.

[73] MCM, *supra* note 3, MIL. R. EVID. 404(a)(1); United States v. Court, 24 M.J. 11 (C.M.A. 1987) (accused's good military character admissible); United States v. Brown, 41 M.J. 1 (C.M.A. 1994) (accused's religious opposition to drug use admissible).

[74] BENCHBOOK, *supra* note 2, instr. 7-8-1.

When a witness is culpably involved in a crime the accused is charged with, the defense should consider the accomplice testimony instruction.[77] If a witness was granted immunity, counsel should consider requesting an instruction on this issue as well.[78] The *Benchbook* instructions explain that these issues may be considered in evaluating the witness' credibility.[79]

When judicial notice,[80] expert witnesses,[81] stipulations of fact or expected testimony[82] or depositions[83] are involved in a case, the military judge will usually provide the *Benchbook* instructions on these issues.[84] Counsel can assist the judge by providing a list of the items judicially noticed, the names of the expert witnesses, and a list of the stipulations and depositions.

The instruction on uncharged misconduct[85] will inform the members of the limited use for which the uncharged misconduct was admitted and caution them not to consider it for any other purpose.[86] Both the trial counsel and defense counsel should let the judge know their positions on the use of uncharged misconduct.

If the accused is charged with unrelated offenses, an instruction on "spillover" may be appropriate.[87] This instruction informs the members that a finding of guilty on one offense cannot be used to infer the accused is guilty of another offense. If evidence of one offense is relevant to another offense, however, a second portion of the "spillover" instruction explains that the members may consider this evidence for both offenses.[88] This portion of the instruction is similar to the uncharged misconduct instruction.[89] If this issue is raised, trial and defense counsel should let the judge know their positions.

If the evidence suggests that the accused is guilty as an aider, abettor[90] or co-conspirator, [91] an instruction on vicarious or co-conspirator liability may be appropriate.[92]

Often the evidence suggests that a crime occurred in a manner that varies slightly from the manner alleged in the specification. In this situation a variance instruction is appropriate.[93] Counsel should inform the judge of potential variances and request an instruction if this issue is raised.

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[75] MCM, *supra* note 3, MIL. R. EVID. 404(a)(2).

[76] BENCHBOOK, *supra* note 2, instr. 7-8-2.

[77] *Id.* United States v. Gillette, 35 M.J. 468 (C.M.A. 1992); United States v. Bigelow, 57 M.J. 64 (2002).

[78] BENCHBOOK, *supra* note 2, instr. 7-19. *See generally* MCM, *supra* note 3, R.C.M. 704 (procedures for granting immunity), MIL. R. EVID. 301(c)(2) (prosecution required to notify defense of grant of immunity).

[79] BENCHBOOK, *supra* note 2, instr. 7-19.

[80] MCM, *supra* note 3, MIL. R. EVID. 201, 201A. Military Rule of Evidence 201(g) requires the military judge to instruct members that they may, but are not required to, accept as conclusive any matter judicially noticed. *Id.* MIL. R. EVID. 201(a).

[81] *Id.* MIL. R. EVID. 702. *See generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

[82] MCM, *supra* note 3, R.C.M. 811.

[83] *Id.* R.C.M. 702.

[84] BENCHBOOK, *supra* note 2, instrs. 7-6 (judicial notice), 7-9-1 (expert testimony), 7-4-1 (stipulations of fact), 7-4-2 (stipulations of expected testimony), 7-5 (depositions).

[85] MCM, *supra* note 3, MIL. R. EVID. 404(b), 413, 414; BENCHBOOK, *supra* note 2, instr. 7-13-1.

[86] *Id.*; United States v. DiCupe, 21 M.J. 440 (C.M.A. 1986).

[87] BENCHBOOK, *supra* note 2, instr. 7-17; Unites States v. Haye, 29 M.J. 213 (C.M.A. 1989).

[88] BENCHBOOK, *supra* note 2, instr. 7-17.

[89] *Id.* instr. 7-13-1.

[90] UCMJ art. 77 (2005); MCM, *supra* note 3, pt. IV, ¶ 1.

[91] UCMJ art. 81; MCM, *supra* note 3, pt. IV, ¶ 5.

[92] BENCHBOOK, *supra* note 2, instr. 7-1.

[93] *Id.* instrs. 7-15, 7-16. *See* MCM, *supra* note 3, R.C.M. 918(a)(1) discussion. *Cf.* United States v. Evans, 37 M.J. 468 (C.M.A. 1993) (findings may not substantially differ from offense charged).

If the accused is charged with committing an offense on "divers" occasions, counsel should ensure that this term is properly defined.[94] If the members subsequently find that the accused committed the offense, but on only one occasion, their finding must specify which occasion.[95] There is a special instruction for this situation.[96]

If the accused does not testify, the defense should consider an instruction on the accused's failure to testify.[97] Many defense counsel ask the judge not to give this instruction, since it may highlight the issue to the members to the accused's detriment. The judge is bound by the defense's request to omit this instruction unless the judge determines it is necessary in the interests of justice.[98]

Sentencing Instructions

The *Benchbook* contains a number of standard sentencing instructions[99] and the judge will usually ask counsel for their input on tailoring these instructions.[100]

If the accused is convicted of several offenses arising from a single event, the military judge may instruct the members to treat them as one for sentencing purposes.[101] Defense counsel should be alert to these situations and request such an instruction, if appropriate.[102] If the defense has unsuccessfully litigated a motion based on multiplicity[103] or unreasonable multiplication of charges,[104] the defense should raise this issue again during the discussion of sentencing instructions.

The military judge can inform the members of a number of factors about the accused that they may consider, such as the accused's good character traits, education, family difficulties and military record.[105] If the defense desires such an instruction, defense counsel should submit a summary of these factors to make it easier for the judge to give the instruction. A standard instruction on these factors is contained in the *Benchbook*.[106]

If the accused is eligible for retirement or close to retirement, the defense should consider requesting an instruction on the effect of a discharge on retirement.[107] Such an instruction will reinforce any defense evidence offered on this subject. There are standard instructions on this issue in the *Benchbook*.[108]

If the accused did not testify during sentencing, the defense can ask the judge to give an instruction on this issue.[109] There is a separate instruction if the accused provides an unsworn statement.[110] If the accused provides otherwise

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[94] BENCHBOOK, *supra* note 2, instr. 7-25 (Interim Update available on Trial Judiciary Internet site, https://www.jagcnet.army.mil/JAGCNETInternet/Home pages/AC/USArmyTJ.nsf/(JAGCNetDocID)/D+A+PAM+27-9+AND+APPROVED+INTERIM+UPDATES?OpenDocument).

[95] United States v. Walters, 58 M.J. 391 (2003); United States v. Augspurger, 61 M.J. 189 (2005).

[96] BENCHBOOK, *supra* note 2, instr. 7-25 (Interim Update).

[97] *Id.* instr. 7-12.

[98] MCM, *supra* note 3, MIL. R. EVID. 301(g); United States v. Forbes, 61 M.J. 354 (2005).

[99] BENCHBOOK, *supra* note 2, instrs. 2-5-21 to 2-5-24; 2-6-9 to 2-6-12.

[100] MCM, *supra* note 3, R.C.M. 1005(c).

[101] *Id.* R.C.M. 906(b)(12); United States v. Traxler, 39 M.J. 476, 480 (C.M.A. 1994).

[102] BENCHBOOK, *supra* note 2, instrs. 2-5-21, 2-6-9.

[103] *See* United States v. Teters, 37 M.J. 370 (C.M.A. 1993).

[104] *See* United States v. Quiros, 55 M.J. 334, 339 (2001) (court compared unreasonable multiplication of charges and multiplicity for sentencing purposes).

[105] United States v. Wheeler, 38 C.M.R. 72 (C.M.A. 1967).

[106] BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

[107] United States v. Boyd, 55 M.J. 217 (2001).

[108] BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

[109] *Id.* instrs. 2-5-23, 2-6-11.

[110] *Id.*

inadmissible evidence in an unsworn statement (such as the sentence of a co-accused), the prosecution should consider requesting a limiting instruction.[111]

If the accused pled guilty, the judge must instruct the members that such a plea is a matter in mitigation.[112] The defense should request such an instruction, if appropriate.[113] If the accused testified on the merits and was subsequently convicted, a mendacity instruction may be appropriate.[114] The prosecution should request this instruction if the issue is raised.[115]

Practice Tips

Several weeks before trial, counsel should review the *Benchbook* and decide which instructions they will ask the judge to give. This will help them focus their trial preparation and provide a better understanding of the applicable law. Counsel should use the instructions checklist in the back of the *Benchbook* to make a list of the applicable instructions.[116] During trial, counsel should be alert to instructional issues raised by the evidence and counsel should update their instructions checklist so they can ask the judge for appropriate instructions after all the evidence has been received.

The *Benchbook* is a critical resource. Not only does it contain most of the instructions the judge will give, it also contains summaries of the law and useful forms, including sample findings and sentencing worksheets. Counsel should always bring a copy of the *Benchbook* with them to trial.

Although the *Benchbook* instructions are relatively up-to-date, there are situations where a recent appellate decision will require changes.[117] Counsel should keep abreast of changes in the law by reading new cases as they come out.[118] Counsel should also review the annual articles on instructions published by the trial judges in *The Army Lawyer*.[119] When changes in the law affect the instructions in a case, counsel must bring this to the attention of the military judge.

If counsel intend to ask the judge to give a novel instruction, they should submit their proposal well before trial. The judge needs time to research the proposal to determine if it is accurate and necessary. Military judges are less likely to give such instructions when they are submitted on the eve of trial.

Most military judges prepare written instructions for the members.[120] Counsel should request a copy of these before they are read to the panel members. If counsel believe the instructions are erroneous or that required instructions have been omitted, this will give them an opportunity to bring this to the attention of the military judge before deliberations. In addition, if counsel wish to mention instructions during their arguments, this will help ensure their descriptions of the instructions are accurate.

Counsel should pay attention while the judge is instructing the members. Despite belief to the contrary, judges are not infallible and may misread critical portions of the instructions. Such an error is easily remedied if counsel identifies it before deliberations begin.

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[111] *Id.*; United States v. Grill, 48 M.J. 131 (1998); Unites States v. Friedmann, 53 M.J. 800 (A.F. Ct. Crim. App. 2000); United States v. Barrier, 61 M.J. 482 (2005).

[112] United States v. Prater, 43 C.M.R. 179 (C.M.A. 1971).

[113] BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

[114] United States v. Warren, 13 M.J. 278 (C.M.A. 1982).

[115] BENCHBOOK, *supra* note 2, instrs. 2-5-23, 2-6-11.

[116] *Id.* app. J.

[117] *E.g.*, United States v. Dearing, 63 M.J. 478 (2006) (military judge erred by using *Benchbook* instruction on mutual combatant's right to self defense; instruction did not adequately explain issue of escalation).

[118] Decisions of the Court of Appeals of the Armed Forces can be obtained on the Internet at http://www.armfor.uscourts.gov/index.html. Decisions of the service courts are also available on the Internet. Army Court of Criminal Appeals decisions can be found at http://www.jagcnet.army.mil/acca. Air Force Court of Criminal Appeals decisions are available at https://afcca.law.af.mil/index.php. Decisions of the Navy-Marine Corps Court of Criminal Appeals are available at http://www.jag.navy.mil/FieldOffices/NMCCA.htm. Coast Guard Court of Criminal Appeals decisions can be found at http://www.uscg.mil/legal/cca/.

[119] *See, e.g.*, Colonel Michael J. Hargis & Lieutenant Colonel Timothy Grammel, *Annual Review of Developments in Instructions—2005*, ARMY LAW., Apr. 2006, at 80.

[120] MCM, *supra* note 3, R.C.M. 920(d), R.C.M. 1005(d).

Conclusion

Counsel have an important role to play in proposing instructions and objecting if required instructions are not given. Counsel should consider what instructions may be appropriate well in advance of trial by starting with the instructions checklist in the back of the *Benchbook*. Counsel should also review recent case law to determine if the standard *Benchbook* instructions need to be changed. When the case involves a novel evidentiary issue or an offense under Article 133 or 134 of the UCMJ that does not have enumerated elements, counsel should submit proposed instructions on these issues to the military judge at their earliest opportunity.

During trial, counsel should be alert to instructional issues raised by the evidence, update their instructions checklist, and be ready to respond intelligently when the judge asks what instructions should be given. Counsel should also stay alert while the judge is reading the instructions to ensure they are given properly.

Instructions are a critical part of the trial. Counsel can help shape the instructions by reviewing the *Benchbook* prior to trial and being alert to instructional issues during trial.

Book Review

CHARLIE WILSON'S WAR: THE EXTRAORDINARY STORY OF THE LARGEST COVERT OPERATION IN HISTORY[1]

REVIEWED BY MAJOR ERIC D. MAGNELL[2]

If there is a single man who has played a part [in the Soviet defeat in Afghanistan] that shall be recorded in history in golden letters, it is that right honorable congressman, Charles Wilson.[3]

The U.S. media has largely overlooked the extent to which the unlikely partnership of U.S. Congressman Charlie Wilson and CIA agent Gust Avrakotos forced a reluctant U.S. administration to support the Afghan insurgency against the Soviet Union in the 1980s. In *Charlie Wilson's War*, George Crile provides an overdue and exciting narrative history of that support and attempts to explain how the largest CIA operation in history unwittingly led to the attacks of September 11, 2001.[4]

The Soviet Union invaded Afghanistan on Christmas Eve, 1979.[5] The Soviets had decided that the communist government in Kabul was incapable of overcoming the mounting Afghan tribal insurgency, and that direct intervention was required to secure the Soviet Union's southern border.[6] Over the next ten years, the Soviet Red Army would lose almost 28,000 soldiers while fighting the Muslim "holy warriors," known as mujahideen.[7] By 1988 the Soviets recognized the futility of their efforts to subdue the Afghan tribal insurgency and withdrew from Afghanistan in disgrace and despair.[8]

Crile proclaims this book to be "the missing chapter in the politics of our time, a rousing good story that is also a cautionary tale" of unintended consequences.[9] Throughout the book the author presents and supports three arguments: (1) without massive U.S. aid, the Afghan mujahideen would have been defeated by the Soviet Red Army; (2) this substantial U.S. assistance would not have been possible without the extraordinary efforts of Charlie Wilson and his friend Gust Avrakotos; and (3) after the Soviet threat ended, the U.S. government ignored the now heavily-armed and largely fundamentalist Muslim mujahideen while the Afghans provided support and sanctuary for the growing Al Qaeda organization directly responsible for the 9/11 attacks.

The author's extensive first-hand sources and engaging prose successfully entertain and inform the reader. Crile's depiction of Wilson and Avrakotos's adventures in Afghanistan seems ready made for a movie script and could be mistaken for a spy thriller if the reader was not reminded so often that it was a true story. Unfortunately, however, the narrative lacks substantial analysis that could provide real lessons learned on how to prevent or respond to similar situations in the future. This absence of useful criticism and analysis diminishes the book's impact as a "cautionary tale."

A Rousing Good Story

George Crile is particularly well qualified to provide this missing chapter of American history. While a producer for the *CBS* news show *60 Minutes*, Crile covered the Afghan conflict and made multiple trips to the Middle East with Wilson

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[1] GEORGE CRILE, CHARLIE WILSON'S WAR: THE EXTRAORDINARY STORY OF THE LARGEST COVERT OPERATION IN HISTORY (2003).

[2] U.S. Army. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Va.

[3] CRILE, *supra* note 1, at 498 (quoting Pakistani president Zia ul-Haq's statement to Harry Reasoner during an interview for *60 Minutes. 60 Minutes: Charlie Did It* (CBS television broadcast July 30, 1991)).

[4] CRILE, *supra* note 1.

[5] JOSEPH J. COLLINS, THE SOVIET INVASION OF AFGHANISTAN: A STUDY IN THE USE OF FORCE IN SOVIET FOREIGN POLICY 77 (1986).

[6] *Id.*

[7] CRILE, *supra* note 1, at iv.

[8] *Id.*. at ix.

[9] *Id.* at x.

and Avrakotos.[10] He accompanied Wilson into Afghanistan in 1988 and produced a *60 Minutes* story about Wilson's involvement and responsibility for the Soviet defeat.[11] Rather than slowing the narrative down by including large amounts of historical research and analysis, the author based the book almost entirely on interviews with the individuals involved in the events. In his source notes, Crile recognizes over 150 people who provided information for the book, but references no documents or papers.[12] His relationships with the key players in the story provide him with an intimate perspective that allows him to tie the unique characters and disparate events into a narrative whole. The result is a compelling story that flows easily and is incredibly entertaining.

The book's anti-hero is Charlie Wilson, a congressman who would probably not survive more than one term in the current polarized political environment. A Democrat from a Bible-belt district in eastern Texas, Wilson staunchly supported liberal social causes[13] while at the same time advocating a hard-line anti-communist foreign policy.[14] Apart from his political beliefs, Wilson was well-known in Congress as a womanizing alcoholic whose playboy lifestyle and partying habits earned him the nickname, "Good-Time Charlie" from Washington gossip columnists.[15]

As a member of the House Appropriations Committee, Wilson wielded influence over the budgets of all of the executive agencies.[16] As a member of the Defense Appropriations sub-committee, Wilson traveled all over the world at the government's expense on "fact-finding" visits to countries receiving U.S. defense aid.[17] Wilson became a supporter of the Afghan mujahideen after visiting Pakistan on one of these official trips in the fall of 1982.[18] The Pakistanis took Wilson to Peshawar in northwest Pakistan, which served as the staging area and base for the Afghan mujahideen leadership.[19] Wilson met the mujahideen leaders and was so impressed with their strength of will and conviction to defeat the Soviets that he immediately promised them that he would provide as much assistance as he could.[20] Wilson was also driven by an intense hatred of the Soviets for what he perceived as their role in the U.S. defeat in Vietnam.[21] He returned from Pakistan and immediately set out to determine what the administration was doing to support the mujahideen and what he could do to increase that support.[22] As a member of the House Appropriations Committee, Wilson was able to ensure that the mujahideen received enough support from other legislators so long as he was willing to support their own pet projects.[23] Wilson also appealed to his fellow Congressmen's sense of honor and morality by repeatedly referring to Afghanistan as the one morally unambiguous cause that the United States had supported since World War II.[24] Congress appropriated increasing amounts of money for the CIA to use specifically for the mujahideen[25] pursuant to Wilson's requests. These

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[10] *Id.* at 525.

[11] *Id.* at 509.

[12] *Id.* at 525–31.

[13] *Id.* at 28 (including abortion rights, the Equal Rights Amendment, Medicaid, and a minimum-wage bill).

[14] *Id.* at 34.

[15] *Id.* at 12.

[16] *Id.* at 77 (stating that the House Appropriations Committee had fifty members and that "[t]he committee's power is so great that its twelve subcommittee chairmen are known collectively as the 'College of Cardinals'").

[17] *Id.* at 97, 188–93 (stating that these so called fact-finding missions were often referred to as "junkets" and Crile explains that Wilson considered them one of the best perquisites for a member of the House of Representatives because they involved, in Crile's words, "first-class, all-expenses-paid trips to exotic places, where the American embassy and the host government treated him like visiting royalty.").

[18] CRILE, *supra* note 1, at 114. *See also* DIEGO CORDOVEZ & SELIG S. HARRISON, OUT OF AFGHANISTAN: THE INSIDE STORY OF SOVIET WITHDRAWAL 156 (1995).

[19] CRILE, *supra* note 1, at 110.

[20] *Id.* at 111.

[21] MOHAMMAD YOUSAF & MARK ADKIN, THE BEAR TRAP: AFGHANISTAN'S UNTOLD STORY 63 (1992).

[22] CRILE, *supra* note 1, at 133–35.

[23] *Id.* at 214–15.

[24] *Id.* at 513.

[25] CORDOVEZ & HARRISON, *supra* note 18, at 157 ("Wilson literally forced the CIA to expand the Afghan program . . . . The $30 million that had initially been requested by the CIA shot up to $120 million [in 1984] . . . $250 million in 1985, $470 million in 1986, and $630 million in 1987.").

appropriations were granted despite the fact that the CIA did not ask for, or want, the money and the administration was openly hostile to supporting the mujahideen.[26] Wilson's desire to exact revenge from the Soviets for Vietnam drove him to become the primary advocate for the Afghans in Congress, but to be effective, Wilson needed an ally within the executive branch. Wilson needed strong relationships with Afghan supporters within the CIA to effectively use the monies he continued to appropriate.

Gust Avrakotos was a "blue collar" CIA agent who, through hard work and a tough attitude, had worked his way into the upper echelons of the CIA despite lacking the Ivy League pedigree usually considered essential for advancement within the Agency.[27] Crile's admiration for Avrakotos is clear throughout the book, and it is apparent that Avrakotos is the kind of agent Crile believes the CIA should have more of. As Chief of the CIA's South Asia Operations Group,[28] which included Afghanistan, Wilson needed Avrakotos's help to make Congress' monetary support for the mujahideen translate into real progress; and Avrakotos needed Wilson to keep the money flowing.[29] It was Wilson's rough demeanor that immediately attracted Avrakotos and Crile explains that it was Wilson's "James Bond Syndrome" that drew the two together..[30] Avrakotos was a strong anti-communist who believed the Soviet presence had to be challenged on the ground wherever they were active, especially in Afghanistan.[31] In the early 1980s, the CIA leadership focused the agency's efforts on providing assistance to the anti-communist rebels who were fighting the communist government in Nicaragua.[32] The general consensus within the CIA was that the Afghan mujahideen were incapable of defeating the Soviets and that their insurgency would fail in the face of brutal Soviet air attacks. [33] Despite this analysis, when Avrakotos was put in charge of the CIA's Afghan program he became determined to do everything possible to ensure the mujahideen had what they needed to end the Soviet occupation of Afghanistan.[34] Although the CIA had discouraged funding increases for the Afghan insurgency,[35] Avrakotos eagerly accepted all the money Wilson was able to appropriate and Wilson relied on Avrakotos to tell him exactly what the Afghans needed to defeat the Soviets. [36]

Avrakotos' close relationship with Charlie Wilson violated CIA rules against direct contact with congressmen,[37] as well as federal statues against direct lobbying by government agencies.[38] This illicit cooperation between a legislator and an executive agent enabled Wilson to dramatically increase congressional support for the mujahideen.[39] As Crile describes the unlikely series of events that led to full U.S. involvement with the mujahideen, it becomes apparent that what was most important to the success of the Wilson and Avrakotos' conspiracy was their willingness to "buck" the system by circumventing, ignoring, or simply running roughshod over bureaucratic and legal obstacles.[40] For Avrakotos, the law, and

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[26] CRILE, *supra* note 1, at 216.

[27] *Id.* at 49.

[28] *Id.* at 157.

[29] *Id.* at 256–60.

[30] *Id.* at 32. Crile quotes Avrakotos as explaining the crude but strong bond he shared with Wilson, "As I saw it, the tie that bound us together was chasing pussy and killing Communists." *Id.*

[31] *Id.* at 58.

[32] CORDOVEZ & HARRISON, *supra* note 18, at 158 (quoting Wilson during an interview with the author, "Casey was not against [funding the Afghanistan program]. . . . He liked the Afghan program, and he hated the Russians, but he didn't believe at that stage that the Afghans could win. His heart was in Nicaragua, and he was preoccupied with the mining of the harbors and the contras.").

[33] CRILE, *supra* note 1, at 123.

[34] *Id.* at 256–60.

[35] *Id.* at 135.

[36] *Id.* at 261.

[37] *Id.* at 259.

[38] *Id.*

[39] *Id.* at 271.

[40] *Id.* at 167.

the CIA lawyers who intended to enforce it, were part of the problem.[41] Without this close relationship between two maverick spirits, the institutional inertia and bureaucracy of the executive branch would have successfully stifled support for the mujahideen.

Crile depicts both Wilson and Avrakotos as courageous anti-heroes who ensure the Soviet defeat in Afghanistan by personally overcoming bureaucratic obstacles and accomplishing the tasks they perceive as necessary regardless of legal or moral consequences.[42] However, the somewhat distorted sense of honor and integrity displayed by Wilson and Avrakotos should serve as a warning to judge advocates about the risks of ignoring laws and regulations in order to achieve a "greater good." Wilson and Avrakotos used whatever means possible to achieve their goal of defeating the Soviets in Afghanistan and Crile seeks to explain how these actions inadvertently lead to the rise of the Taliban and Al Qaeda and, eventually, to the September 11 attacks.[43]

While the author provides an exceptionally rich and exciting narrative, his approach does not elicit lessons learned because he fails to incorporate a critical analysis of events. First-hand accounts of events rarely depict the storyteller in a bad light. Charlie Wilson readily told Crile about the bad decisions he made in his personal life,[44] but not once does Crile criticize, or even question, Wilson's willingness to violate regulations and break federal law to support the mujahideen.[45] The author explains that "the core interviews [for this book] were conducted in the enchanted light of a Cold War fairy tale come true during the early 1990s."[46] Perhaps it is this "enchanted light" that causes Crile to ignore the legal and moral issues of Wilson's and Avrakotos' excesses, but, blinded in this way, he becomes an apologist for those who believe that the ends justify the means.

A Missing Chapter in the Politics of Our Time

Charlie Wilson's War raises relevant and timely questions about the system of checks and balances within the U.S. government, as well as the professional ethics of elected officials and the role of the media in political debates.[47] Crile exposes a world of power politics that may appear alien to idealists who believe, or hope, that elected politicians will pursue the best interests of their country and constituents while adhering to ethical and legal standards.

Although conduct of foreign affairs has traditionally belonged to the executive branch of the U.S. government, the Constitution gives Congress very specific foreign affairs authority.[48] Disputes between Congress and the President concerning the extent and balance of their relative foreign affairs powers have generally concerned executive encroachment on what Congress considers its areas of authority.[49] The Constitution gives Congress several foreign affairs roles, most directly in authority to declare war and issue letters of marque and reprisal, but also in the Senate's treaty-making powers.[50] The House of Representatives has no direct role in the day-to-day conduct of foreign affairs. Alexander Hamilton, in *The Federalist Number 75*, explained that the Constitution intentionally gives the House no direct foreign affairs role.[51] Despite

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[41] *Id*. at 166–68.

[42] CRILE, *supra* note 1.

[43] *Id.* at 519–23.

[44] *Id.* at 136 (describing the events in a Las Vegas hotel room that would lead to his investigation for cocaine use); *id.* at 184 (describing Wilson's hit and run accident).

[45] *Id.* at 6 (noting that both Wilson and Avrakotos acknowledge they eagerly broke the rules to achieve their goal of defeating the Soviets).

[46] *Id.* at 525.

[47] CRILE, *supra* note 1.

[48] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-2 (1988); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 24 (1972).

[49] *See* United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936); *see also* PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION (2005), LOUIS FISHER, PRESIDENTIAL WAR POWER (2004).

[50] U.S. CONST. art. 2, § 2, cl. 2; *see also* THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD): THE FOREIGN RELATIONS LAW OF THE UNITED STATES vol. 1, ch. 2, § 312, cmt. j, at 175 (1986).

[51] THE FEDERALIST NO. 75 (Alexander Hamilton) (Gary Wills ed., 1982) (Hamilton writes, "Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, SECRECY, and despatch[sic], are incompatible with the genius of a body so variable and so numerous.").

this lack of constitutional authority, Charlie Wilson used his position on the House Appropriations Committee not only to dictate to the CIA how they should provide support to the Afghan mujahideen,[52] but also to conduct secret negotiations with Egypt,[53] Israel,[54] and Pakistan.[55] As a congressman, Wilson used the "power of the purse" to set U.S. foreign policy with respect to Afghanistan, violating the spirit, if not the letter, of the law.[56]

The House of Representatives' only constitutional role in foreign affairs is to appropriate or withhold funds and to provide oversight of executive branch activities.[57] However, in *Charlie Wilson's War*, Crile poses the question of when does congressional oversight become congressional interference in an executive branch function. Should the executive branch always have the primary role in determining U.S. foreign policy even if it is sometimes inefficient and mired in bureaucracy? Or should U.S. foreign policy be dictated by the maxim "[t]hem that has the gold makes the rules" that hung prominently in the House Appropriations Committee room?[58] The appropriations to support the Afghan mujahideen marked the first time in the U.S. Foreign Policy arena that Congress did more than simply approve or dispute the amount of money the government requested for a foreign policy agenda. It was unprecedented for Charlie Wilson to actually throw money at a reluctant CIA in order to expand a covert operation.[59] Likewise, the extent to which the U.S. media allowed the CIA to operate unquestioned in Afghanistan was unheard of at a time when the CIA was under intense scrutiny for its activities in Central America.

In describing the media at the time, Crile states, "one of the great mysteries of this entire history [is] that virtually no one in the press . . . seemed to care that the CIA was running the biggest operation in its history . . . ."[60] Crile is correct that the true story of the massive U.S. involvement in the Afghan war went largely unnoticed in the American press. However, the entire story was reported at different times by various sources, and the complete picture could have been pieced together if an enterprising journalist ever decided to do so. A 1985 Washington Post article by Bob Woodward sets forth Wilson's role in repeatedly increasing military assistance to the mujahideen, as well as his efforts to purchase expensive Swiss anti-aircraft weapons to help them defend against Soviet helicopters.[61] But, in contrast to stories about the CIA involvement in arming the Nicaraguan Contras,[62] the individual news reports did not generate any media fervor about the secret deals, and the story died. Crile cannot explain why the press failed to investigate the secret dealings behind the Afghan war the same way they delved into the U.S. role with the Nicaraguan Contras, but he suggests that Wilson's and Avrakotos's relative obscurity, as well as the media's preoccupation with the Iran-Contra scandal, played a large part.[63]

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[52] CRILE, *supra* note 1, at 127, 207, 217.

[53] *Id.* at 146.

[54] *Id.* at 142.

[55] *Id.* at 132.

[56] 18 U.S.C. § 953 (2000).

[57] U. S. CONST. art. I, § 7, cl. 1.

[58] CRILE, *supra* note 1, at 175.

[59] *Id.* at 214.

[60] *Id.* at 423.

[61] *See* Bob Woodward & Charles R. Babcock, *U.S. Covert Aid to Afghans on the Rise: Rep. Wilson Spurs Drive for New Funds, Antiaircraft Cannon for the Insurgents*, WASH. POST, Jan. 13, 1985, at A1.

[62] *See, e.g.*, Hedrick Smith Washington, *Reagan Takes a Break from the Furor over Central America*, N.Y. TIMES, Apr. 22, 1984, at sec. 4, 1; Margaret Shapiro, *House Votes to Aid Contras: Turnabout Gives Major Boost to Reagan's Nicaragua Policy*, WASH. POST, June 13, 1985, at A1; Richard Harwood, *Contras' Private Pipeline Pumps at U.S. Behest: That Reagan Backs Shipments Is No Secret*, WASH. POST, Oct. 19, 1986, at A1; Dan Morgan & Walter Pincus, *CIA Tied to Contra Aid After Ban: Owen, North's Latin Contact, Says Agency Gave Military Assistance*, WASH. POST, May 20, 1987, at A1.

[63] CRILE, *supra* note 1, at x ("If the campaign had different authors, men more associated with shaping foreign policy or waging wars, it might have surfaced earlier or been the subject of debate."); *id.* at 467 ("Rarely can the government and the press handle more than one great scandal at a time.").

A Cautionary Tale

While Crile introduces the book as a cautionary tale, it isn't until the epilogue that he attempts to draw lessons from Wilson's actions.[64] Here, Crile suggests that there were many early opportunities for the United States to recognize and stop the growing threat from militant Islam.[65] While he does not say it directly, throughout the epilogue Crile implies that the U.S. government erroneously remained focused on the threat from the Soviet Union and naively supported radical mujahideen under the theory that "the enemy of my enemy is my friend."[66] After the Soviet withdrawal, the mujahideen credited Allah for their victory and promptly forgot about the billions of dollars in assistance that the infidels in the United States had sent them.[67] Crile suggests that U.S. support "set in motion the *spirit* of jihad and the belief in our surrogate soldiers that, having brought down one superpower, they could just as easily take on another."[68] The result, according to Crile, is the current Global War on Terror.[69]

Perhaps no one in the U.S. government in the mid-1980s considered the mujahideen a genuine threat to U.S. interests. The CIA certainly did not,[70] even though the Agency had been warned as early as 1985 that they were supporting dangerously fundamental mujahideen leaders.[71] Even if the CIA considered the mujahideen a credible threat to the United States, the Soviet Union posed a more pressing and immediate threat and the radical mujahideen were expedient and effective allies. The U.S. government could not foresee the rapid advances in globalization and technology that would allow an isolated group based in remote Afghanistan to spread a radical message around the world and then attack the very heart of the world's only remaining superpower.

Conclusion

Charlie Wilson's War fills a gap in our nation's recent history, but the reader should not expect more than an engaging narrative of action and drama. It is told from the point of view of the protagonist "anti-heroes" and as such implies approval of Wilson's and Avrakotos' actions. Crile assumes, just as Wilson and Avrakotos did, that supporting the mujahideen was the best course of action for the U.S. government to take. By refusing to criticize Wilson and Avrakotos, the author implicitly endorses their conduct, even turning them into unrecognized heroes.[72] He seems to suggest that the country needs more rogue congressmen and maverick government agents who are willing to step outside the law to accomplish what they perceive to be the best interests of the country.

Unfortunately, any analysis seems somewhat disconnected from the narrative. Crile initially states that *Charlie Wilson's War* is a cautionary tale,[73] but he fails to explicitly caution against anything. If anything, his lesson is that U.S. decision-makers should be more careful about whom they choose as allies. He refuses to pass judgment on the events and the characters; this lessens the impact of his cautionary epilogue. The focus of the book is the narrative of Wilson and Avrakotos and readers are left to perform their own analysis on how the U.S. government should behave towards erstwhile allies and potential enemies.

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[64] *Id.* at 507–23.

[65] *Id.* at 212, 520–21.

[66] *Id.* at 507–23.

[67] *Id.* at 521.

[68] *Id.* at 522.

[69] *Id.* at 507-23.

[70] *Id.* at 521.

[71] *Id.* at 212.

[72] *Id.* at 498 (quoting Pakistani President Zia ul-Haq's statement to Harry Reasoner during an interview for *60 Minutes. 60 Minutes: Charley Did It* (CBS television broadcast July 30, 1991)).

[73] *Id.* at x.

Fifteen years in the making, by the time the 9/11 attacks occurred, Crile had completed the majority of the book and then, after the terrorist attacks, apparently decided to make the narrative more relevant to current events by drawing connections between U.S. support for the mujahideen and the growth of Al Qaeda.[74] This is obviously a last-minute change, reflected only in the introduction and the epilogue, and the book lacks the critical analysis suggesting what the United States could, or should, have done differently to prevent the September 11 attacks. Overall, this addition distracts the reader into looking for a message that is not present in the text, but does not detract excessively from the enjoyable main story.

If you are looking for a detailed history of the growth of Islamic terrorism, there are many other books that will provide more detailed analysis.[75] But for the reader that is interested in an enjoyable, thoroughly documented, and insightful history, and who waits to read the book before the movie is released, *Charlie Wilson's War* is difficult to pass up.[76]

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[74] *Id.* at 509–23.

[75] *See, e.g.*, CHARLES W. KEGLEY, THE NEW GLOBAL TERRORISM: CHARACTERISTICS, CAUSES, CONTROLS (2002); LORETTA NAPOLEONI, MODERN JIHAD: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS (2003); MARK A. GABRIEL, ISLAM AND TERRORISM: WHAT THE QURAN REALLY TEACHES ABOUT CHRISTIANITY, VIOLENCE AND THE GOALS OF THE ISLAMIC JIHAD (2002); RAY TAKEYH & NIKOLAS K. GVOSDEV, THE RECEDING SHADOW OF THE PROPHET: THE RISE AND FALL OF RADICAL POLITICAL ISLAM (2004). An Amazon.com search on 4 Oct. 2007 listed over 1600 books specifically dealing with the causes of terrorism.

[76] It is a story that lends itself to dramatization and Hollywood has seen fit to turn it into a motion picture. The movie, starring Tom Hanks and Julia Roberts, is scheduled for release on 25 December 2007.

CLE News

1. Resident Course Quotas

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

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

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

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	174th JAOBC/BOLC III	9-Nov 07 – 6-Feb 08
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	200th Senior Officers Legal Orientation Course	28 Jan – 1 Feb 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F3	14th RC General Officer Legal Orientation Course	13 – 15 Feb 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08

5F-F55	2008 JAOAC (Phase II)	7 – 18 Jan 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	2d BNCOC Common Core	4 – 25 Jan 08
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	1st Paralegal Specialist BNCOC	2 Nov – 7 Dec 07
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	1st Paralegal Specialist ANCOC	2 Nov – 7 Dec 07
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
7A270A3	2008 Senior Warrant Officer Symposium	4 – 8 Feb 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC7	8th Redictation Course	7 – 18 Jan 08
512-27DC7	9th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th Chief Paralegal BCT NCO Course	16 – 20 Jun 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08
5F-F58	2008 27D Command Paralegal Course	4 – 8 Feb 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08

5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F24	32d Administrative Law for Military Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F28	2007 Income Tax Law Course	10 – 14 Dec 07
5F-F28E	2007 USAREUR Income Tax CLE	3 – 7 Dec 07
5F-28H	2008 Hawaii Income Tax CLE	14 – 18 Jan 08
5F-F28P	2008 PACOM Income Tax CLE	7 – 11 Jan 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	23 Jul – 1 Aug 08
5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F103	2008 Advanced Contract Law Course	7 – 11 Apr 08
5F-F11	2007 Contract & Fiscal Law Symposium	4 – 7 Dec 07
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
5F-F14	26th Comptrollers Fiscal Law Accreditation Course	15 – 18 Jan 08
5F-F15E	USAREUR Contract Law/Fiscal Law Course	12 – 15 Feb 08
8F-DL12	2d Distance Learning Fiscal Law Course	4 – 8 Feb 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	29th Criminal Law Advocacy Course	4 – 15 Feb 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08
5F-F35E	2008 USAREUR Criminal Law CLE	15 – 18 Jan 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	89th Law of War Course	11 – 15 Feb 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08

5F-F45	7th Domestic Operations Law Course	26 – 30 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	15 Oct – 14 Dec 07 22 Jan – 21 Mar 08 2 Jun – 1 Aug 08 4 Aug – 3 Oct 08
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	10 – 14 Mar 08 22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)
850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
961M	Effective Courtroom Communications (020)	28 Jan – 1 Feb 08 (Bremerton)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)

748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	14 – 18 Jan 08 (Pensacola) 14 Jan – 18 Feb 08 (Bahrain) 3 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	4 – 5 Feb 08 (Yokosuka) 1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	1 Oct – 14 Dec 07 22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
Pending	Prosecution Trial Enhancement (010)	4 – 8 Feb 08

7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	6 – 8 Nov 08 (San Diego) 7 – 9 Jan 08 (Jacksonville) 14 – 16 Jan 08 (Bahrain) 4 – 6 Feb 08 (Yokosuka 11 – 13 Feb 08 (Okinawa 20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	26 Nov – 14 Dec 07 28 Jan – 15 Feb 08 10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
0379	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	26 Nov – 7 Dec 07 4 – 15 Feb 08 10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	7 – 11 Jan 08 (Jacksonville) 25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	26 Nov – 14 Dec 07 7 – 25 Jan 08 25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	7 Jan – 18 Jan 08 31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	4 – 8 Feb 08 (Yokosuka) 11 – 15 Feb 08 (Okinawa) 31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
2205	CA Legal Assistance Course (010)	TBD
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 08-A	9 Oct – 13 Dec 07
Federal Employee Labor Law Course, Class 08-A	10 – 14 Dec 07
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 08
Trial & Defense Advocacy Course, Class 08-A	7 – 18 Jan 08
Air National Guard Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 08
Air Force Reserve Annual Survey of the Law, Class 08-A & B (Off-Site)	25 – 26 Jan 08
Military Justice Administration Course, Class 08-A	28 Jan – 1 Feb 08
Legal & Administrative Investigations Course, Class 08-A	4 – 8 Feb 08
Total Air Force Operations Law Course, Class 08-A	8 – 10 Feb 08
Homeland Defense/Homeland Security Course, Class 08-A	11 – 13 Feb 08
Legal Aspects of Information Operations Law Course, Class 08-A	14 – 15 Feb 08
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 08
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 08
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 08
Pacific Trial Advocacy Course, Class 08-A (Off-site, Yokota AB, Japan)	10 – 14 Mar 08

Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 08
CONUS Trial Advocacy Course, Class 08-A	7 – 11 Apr 08
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08
Reserve Forces Judge Advocate Course, Class 08-B	19 – 20 Apr 08
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 08
Environmental Law Course, Class 08-A	28 Apr – 2 May 08
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 08
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 08
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08
Law Office Management Course, Class 08-A	16 – 27 Jun 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2007 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2008***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the

notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year

New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
26-27 Jan 2008	6th LSO/70th RRC Seattle, WA	004	Administrative & Civil Law, Contract & Fiscal Law	LTC Marianne Jones 206-550-0346 Marianne.Jones@us.army.mil Bryan Carnes 206 301-2347 Brian.H.Carnes@us.army.mil
1-2 Mar 2008	75th LSO Burlingame (San Francisco, CA)	005	Lessons Learned International & Operational Law	CPT Steven Wang 916-642-2102 steven.wang1@us.army.mil COL Roger Matzkind Roger.Matzkind@us.army.mil LTC Ronald Rallis
1-2 Mar 2008	151st LSO Fort Belvoir, VA	006	International & Operational Law, Criminal Law	LTC Anthony Ricci, 151st LSO, 508-982-1628, tpricci@hotmail.com MAJ Jen Connelly 571-272-7003 Jennifer.Santiago@us.army.mil
29-30 Mar 2008	WIA&ARNG Fort McCoy, WI	NA	Air Force JAG School	Lt Col Julio R. Barron 608-242-3077 / DSN 724-3077 julio.barron2@us.army.mil
18-20 Apr 2008	1st LSO/90th RRC Oklahoma City, OK	008	International & Operational Law, Contract & Fiscal Law	LTC Randy Fluke, 409-981-7950; randall.fluke@us.army.mil
26-27 Apr 2008	91st LSO/9th LSO Oak Brook, IL	009	Administrative & Civil Law, Contract & Fiscal Law	SFC Eric Dahl eric.dahl@usar.army.mil 847.266.2523
25-27 Apr 2008	8th LSO/89th RRC Kansas City, MO	010	Administrative & Civil Law, Contract & Fiscal Law	LTC Tracy Diel & SFC Larry Barker tracy.t.diel@us.army.mil SFC Larry Barker Larry.R.Barker@us.army.mil 816-836-0005 ext 2155/2156
26-27 Apr 2008	Indiana ARNG Indianapolis, IN	011	Administrative & Civil Law, International & Operational Law	1LT Kevin Leslie, (317) 247-3491, kevin.leslie@us.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

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AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
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3. The Legal Automation Army-Wide Systems XXI—JAGCNet

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

b. Access to the JAGCNet:

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(2) Requests for exceptions to the access policy should be e-mailed to:

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c. How to log on to JAGCNet:

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

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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

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

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

6. The Army Law Library Service

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

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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