

Humanitarian and Civic Assistance: A Primer for the Judge Advocate

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I. Introduction

The 2012 Defense Strategic Guidance places greater emphasis on building security partnerships between the United States and other countries, as exemplified by the excerpt below.

Across the globe we will seek to be the security partner of choice, pursuing new partnerships with a growing number of nations—including those in Africa and Latin America—whose interests and viewpoints are merging into a common vision of freedom, stability, and prosperity. *Whenever possible, we will develop innovative, low-cost, and small-footprint approaches to achieve our security objectives*, relying on exercises, rotational presence, and advisory capabilities.¹

One proven mechanism used to build security partnerships is conducting innovative, low-cost humanitarian and civic assistance (HCA) activities in conjunction with military operations overseas.²

Section 401 of Title 10, U.S. Code and related Department of Defense (DoD) policy guidance govern HCA.³ The geographic combatant commands (GCCs),

acting through their subordinate service component commands, plan and direct the execution of HCA activities throughout their assigned areas of responsibility.⁴ From planning through execution, a judge advocate plays an important role by ensuring that HCA activities comply with the statutory and DoD policy requirements.⁵ Despite the importance of the HCA mission and the judge advocate's role, there is a paucity of legal reference materials available that provide basic explanatory guidance to judge advocates regarding HCA matters.⁶ This primer fills the gap.

Part II of this article begins with an overview of the legal framework for HCA activities and an analysis of the legislative history of 10 U.S.C. § 401. Part III then analyzes § 401's requirements, the DoD HCA implementing policy, and various combatant commands' HCA instructions. Part IV explores the legal bases for funding HCA activities and minimal cost HCA. Finally, the Appendices include a checklist for conducting legal reviews of HCA project proposals and a scenario-based example that applies § 401's requirements. The aim is to equip judge advocates with the foundational level of knowledge required to provide sound legal advice about HCA matters to commanders and their staffs.

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¹ U.S. DEP'T OF DEF., SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE 3 (Jan. 2012) [hereinafter 2012 DEFENSE STRATEGIC GUIDANCE] (emphasis in original) (issuing guidance to the Department of Defense (DoD) from the President of the United States and Secretary of Defense).

² See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-9 to V-11, V-15, V-16 (11 Aug. 2011) (discussing the importance of the Humanitarian and Civic Assistance (HCA) mission, which supports military engagement, security cooperation, and deterrence missions, activities, and tasks).

³ See generally 10 U.S.C. § 401 (2011); U.S. DEP'T OF DEF., INSTR. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (2 Dec. 2008) [hereinafter DoDI 2205.02] (establishing overarching policy guidance and assigning responsibilities for DoD HCA activities); U.S. DEP'T OF DEF., INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROGRAM (27 Jan. 1995)

[hereinafter DoDI 2205.3] (promulgating implementing procedures for the nomination, justification, and approval of annual HCA activity plans and reporting requirements).

⁴ DoDI 2205.02, *supra* note 3, at 7.

⁵ See, e.g., DoDI 2205.3, *supra* note 3, at 2 (requiring the combatant commander's (CCDR) legal staff to review proposed HCA projects to ensure conformance with applicable statutory and DoD policy requirements).

⁶ See W. Darrell Phillips, *Fiscal Law Constraints upon Exercise-Related Activities*, 42 A.F. L. REV. 259 (1997) (providing a thorough, but in some respects outdated, fiscal analysis of HCA conducted pursuant to 10 U.S.C. § 401); Major Sharad A. Samy, *Cry "Humanitarian Assistance," and Let Slip the Dogs of War*, ARMY LAW., Oct. 2007, at 52, 55-56, 58-64 (describing the requirements of 10 U.S.C. § 401 and proposing a statutory amendment that would eliminate restrictive conditions imposed by Congress on DoD HCA activities and clarify the meaning of "military operations"); Major Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008, at 1, 12, 15-16, 23-25 (providing a brief description of 10 U.S.C. § 401 and its limitations as applied to Stability, Security, Transition, and Reconstruction operations outside Iraq and Afghanistan); Lieutenant Colonel John N. Ohlweiler, *Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response*, ARMY LAW., Jan. 2011, at 22-23 (providing a brief discussion of 10 U.S.C. § 401 and its legislative history in the context of funding the DoD response to the January 2010 Haiti earthquake using the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation).

II. The Legal Framework for Conducting HCA

The U.S. Constitution provides the basic framework for the body of law governing the execution and funding of military operations, including HCA conducted by U.S. military forces overseas. Congress possesses the “power of the purse” and can influence the foreign affairs and military activities of the United States by enacting specific appropriations.⁷ The general rule is that the Department of State (DOS) is responsible for conducting the foreign assistance activities of the United States with funding ordinarily provided by Congress via annual security assistance appropriations.⁸ There are two exceptions to the general rule. First, DoD may finance the training of foreign militaries with operations and maintenance (O&M) funds only when the purpose is to enhance interoperability, familiarization, and safety during combined training.⁹ Second, DoD can conduct foreign assistance activities if Congress has enacted a specific funding authorization or appropriation.¹⁰ This second exception applies to DoD HCA activities—10 U.S.C. § 401 is the authorizing legislation that enables DoD to conduct HCA in conjunction with military operations overseas; the annual DoD Appropriations Act contains specific appropriations that fund the HCA activities authorized by § 401.¹¹ The origin of 10 U.S.C. § 401 provides insight into its purpose, substance, and limitations.

A. The Honorable Bill Alexander Opinion

The genesis of today’s statutory HCA authority dates back to the early 1980s when the Reagan Administration expanded foreign assistance in locations such as Afghanistan, Central America, and South America, often by

employing DoD forces to conduct HCA-type activities.¹² In 1983, U.S. military forces executed a broad range of HCA, construction, and training activities in support of the Honduran military during the joint combined exercise *Ahuas Tara II* in the Republic of Honduras.¹³ The DoD financed all activities with service O&M funds, prompting the Honorable William “Bill” Alexander, a congressman from Arkansas, to request a formal legal opinion from the U.S. General Accounting Office (GAO) concerning the propriety of DoD’s expenditures.¹⁴ This GAO opinion laid the foundation for the present-day HCA authority in 10 U.S.C. § 401.

The GAO concluded that the DoD improperly expended O&M funds to finance the HCA.¹⁵ The DoD justified its activities on the following three bases:

- (1) that they were “ancillary” to exercise events,
- (2) that in some cases, they provided training to participating U.S. units, and
- (3) that they contributed to U.S. regional readiness by improving relations with friendly foreign nations and by creating a positive image of the U.S. military among the indigenous population.¹⁶

The GAO, however, stressed that DoD had no separate authority for conducting HCA overseas with two exceptions: (1) an Economy Act transaction (i.e., under an order placed by another federal agency, such as the DOS, with authority to conduct foreign HCA activities) or (2) as an incidental activity to an authorized DoD security assistance program.¹⁷ The GAO concluded that the HCA conducted by the DoD

⁷ U.S. CONST. art I, § 9, cl. 7.

⁸ See The Honorable Bill Alexander, 63 Comp. Gen. 422, 433 (1984) [hereinafter The Honorable Bill Alexander]; see also Foreign Assistance Act of 1961, 22 U.S.C. § 2151 (2011) (containing the general body of statutory authority governing the foreign assistance activities of the Department of State (DOS)).

⁹ See The Honorable Bill Alexander, *supra* note 8, at 441 (discussing the exception known as “little t” training, which involves a few servicemembers, is short in duration, relatively inexpensive, and DoD is the primary beneficiary of the training experience vice the foreign partner).

¹⁰ *Id.* at 445.

¹¹ See generally U.S. DEP’T OF DEF., DOD 7000.14-R, FINANCIAL MGMT. REG., vol. 2A, para. 010107, sec. B (Oct. 2008) (containing budget terminology and definitions). An authorization is legislation enacted by Congress that establishes or continues the legal operation of a federal program either indefinitely or for a specific period of time or permits a specific obligation or expenditure within a program. An authorization is usually a prerequisite for a subsequent appropriation. *Id.* An appropriation is the legal authority provided by an act of Congress (i.e., the DoD Appropriations Act) that permits a federal agency to incur obligations and to make payments out of the Treasury for specified purposes. *Id.* An appropriation is the most common means of providing budget authority and usually follows enactment of an authorization. *Id.*

¹² Captain Jangrumetta D. Shine, The Military Logistics Support of Humanitarian Relief Efforts During Low-Intensity Conflict 37–38 (Sept. 1991) (unpublished M.S. thesis, U.S. Air Force Air University), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA246907> (discussing Reagan Administration efforts to deliver humanitarian assistance (HA) to the mujahedeen and refugees in Afghanistan during the Soviet occupation); Samy, *supra* note 6, at 53–54 (describing the DoD role in overseas HA operations during and after the Cold War).

¹³ See The Honorable Bill Alexander, *supra* note 8, at 444 (noting that activities included the treatment of over 46,000 Honduran civilian medical patients, 7000 dental patients, 100,000 immunizations, and the veterinary treatment of more than 37,000 animals; the transportation of U.S. donated medical supplies, clothing, and food throughout Honduras; and construction of a 1600 square foot school using supplies from the U.S. Agency for International Development (USAID)).

¹⁴ *Id.* at 422. In 2004, Congress changed the name of the U.S. General Accounting Office to the U.S. Government Accountability Office (GAO). The GAO issues legal opinions at the request of Congress, and they effectively bind executive agencies such as DoD. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW vol. I, at 1-46 (3d ed. 2004) [hereinafter GAO REDBOOK] (GAO legal opinions issued at the request of Congress “have the same weight and effect as [Comptroller General] decisions.”).

¹⁵ The Honorable Bill Alexander, *supra* note 8, at 445–46.

¹⁶ *Id.*

¹⁷ *Id.* at 445.

amounted to security assistance that should have been funded with other specific appropriations vice O&M.¹⁸ With the GAO's legal opinion limiting DoD's authority to conduct overseas HCA to the Economy Act and a small number of authorized DoD security assistance programs, the executive branch acted quickly to seek broader legislative authority from Congress.

B. The Legislative History of 10 U.S.C § 401

In the wake of The Honorable Bill Alexander Opinion, Congress enacted the fiscal year 1985 DoD Appropriations Act, which contained an amendment authorizing DoD expenditure of O&M funds "for humanitarian and civic assistance costs incidental to authorized operations."¹⁹ Budget authority, however, was limited to fiscal year 1985.²⁰ Subsequently, the Reagan Administration submitted a legislative proposal to Congress seeking to clarify the authority of U.S. Armed Forces to conduct HCA.²¹ On July 8, 1986, the Senate Armed Services Committee introduced Senate Bill 2638, which included the first comprehensive draft HCA provisions sought by the Reagan Administration.²² When Senate Bill 2638 proceeded to conference in the fall of 1986, members of the conference committee took special interest in the proposed HCA provisions.²³ The committee issued Conference Report 99-

¹⁸ *Id.* at 445-46.

¹⁹ Department of Defense Appropriations Act of 1985 (DoDAA FY85), Pub. L. No. 98-473, § 8103, 98 Stat. 1837, 1942 (1984).

²⁰ *Id.*

²¹ S. REP. NO. 99-331, at 289 (1986); *see also* The Honorable Bill Alexander, *supra* note 8, at 444-45 (noting that a DoD Task Force on Humanitarian Issues was established in January 1984 to explore DoD's authority to conduct HCA, to identify DoD HCA requirements, and to determine necessary legislative changes); Shine, *supra* note 12, at 37-38 (discussing Secretary of Defense Weinberger's approval of the DoD Task Force on Humanitarian Issues report, which responded to a National Security Council request for DoD recommendations to expand HA worldwide).

²² S. 2638, 99th Cong. § 1216 (1986) (proposing *inter alia* the following broad HCA definition:

"§ 405. Definition

In this chapter, the term 'humanitarian and civic assistance' means—

- (1) medical, dental, and veterinary care provided in rural areas of a country;
- (2) construction of rudimentary transportation systems;
- (3) well drilling and construction of basic sanitation facilities;
- (4) rudimentary construction and repair of public facilities; and
- (5) similar or related types of assistance."

²³ 132 CONG. REC. H7079-01 (daily ed. Sept. 18, 1986); 132 CONG. REC. H10118-40, H10136 (daily ed. Oct. 15, 1986) (statement of Hon. Mr. Dante

1001, which underscored congressional concerns about the nature, scope, and intent behind the Senate's proposed HCA provisions.²⁴ The report recommended *inter alia* that both houses agree to the committee's amended HCA provisions.²⁵ Congress ultimately complied with the committee's recommendation.

On November 14, 1986, Congress enacted a permanent statutory HCA authorization in section 333 of the National Defense Authorization Act of Fiscal Year 1987 (FY87 NDAA).²⁶ Section 333 of the FY87 NDAA added six sections to Title 10 that related solely to HCA.²⁷ These six sections were subsequently amended and consolidated into the current HCA authorization, 10 U.S.C. § 401.²⁸ As

Fascell) (emphasizing that monetary caps were added to S. 2638 "to insure that the [HCA] program would remain small scale" and that the HCA definition was "tightened to insure that the program did not escalate in a new form of development and/or military assistance").

²⁴ H.R. REP. NO. 99-1001, at 1, 43-45, 467-68 (1986) (Conf. Rep.). Of particular significance was the following statement issued by the committee regarding concerns about the Senate's proposed HCA provisions:

The conferees were concerned with potential problems at both the low end and the high end of the civic action scale. On the high end, to avoid the possibility of the legislation being interpreted as a major new foreign aid program, the conferees imposed an expenditure cap of \$3 million for fiscal year 1987 and \$16.4 million for the period of fiscal years 1987 through 1991. The conferees also tightened the definitions of acceptable activities under this legislation, for example, clarifying that no funds could be spent on airstrips.

Id. (emphasis added).

²⁵ *Id.*

²⁶ National Defense Authorization Act of 1987 (NDAA FY87), Pub. L. No. 99-661, § 333, 100 Stat. 3816, 3857-59 (1986) (amending Part I of subtitle A of title 10 of the U.S. Code by adding chapter 20, entitled "Humanitarian and Civic Assistance Provided in Conjunction with Military Operations").

²⁷ *Id.*

²⁸ *See* National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 332(B), 101 Stat. 1019 (1987) (amending the HCA authorization in 10 U.S.C. §§ 401-406 by consolidating the text into a single statute, 10 U.S.C. § 401); National Defense Authorization Act for Fiscal Year 1994 (NDAA FY94), Pub. L. No. 103-160, § 1504(b), 107 Stat. 1771, 1839 (1993) (amending § 401(c)(2) by inserting before the period "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"); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1074(a)(2), 110 Stat. 2658, 2704 (1996) (amending the HCA definition in 10 U.S.C. § 401(e) by inserting "any of the following" after "means"); Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (NDAA FY01), Pub. L. No. 106-398, § 1235, 114 Stat. 1654, 1654A-331 (2000) (amending the HCA definition in 10 U.S.C. § 401(e)(1) by striking "rural areas of a country" and inserting "areas of a country that are rural or are underserved by medical, dental, and veterinary professionals, respectively"); National Defense Authorization Act for Fiscal Year 2006 (NDAA FY06), Pub. L. No. 109-163, § 1201(b), 119 Stat. 3136, 3455 (2006) (extending and clarifying the types of healthcare authorized under § 401(e)(1) by inserting "surgical" before "dental," both places it appears, and by inserting "including education, training, and technical assistance related to the care provided" before the period at the end).

discussed *infra*, section 333 of the FY87 NDAA is substantially similar to the current text of § 401.²⁹ Thus, the legislative history of section 333 of the FY87 NDAA is the legislative history for 10 U.S.C. § 401.

III. Section 401 HCA: Applying the Law and DoD Policy

Section 401 of Title 10 of the U.S. Code permanently authorizes the Secretary of Defense to issue regulations governing HCA activities executed by U.S. forces “in conjunction with authorized military operations” overseas.³⁰ When reviewing a proposed HCA project, a judge advocate must ensure that it conforms to § 401’s requirements as well as additional policy requirements imposed by DoD and the respective geographic combatant commander (CCDR) in whose area of responsibility the HCA will be executed. Part III.A outlines the nature and scope of § 401 HCA by analyzing the statutory and DoD definitions of HCA. Part III.B then details seven key requirements of § 401. The aim is to provide judge advocates with a comprehensive knowledge of the legal and policy requirements for HCA.

A. The Nature and Scope of § 401 HCA

Congress enacted a restrictive HCA definition to limit the nature and scope of HCA conducted by U.S. Armed Forces.³¹ The statutory HCA definition is codified in 10 U.S.C § 401(e).³² Two DoD policy documents implement this definition: DoD Instruction (DoDI) 2025.02 and the FY08 DoD HCA Guidance Message.³³ The statutory HCA definition and DoD policy frame the permissible types of HCA authorized by Congress.

1. The Statutory HCA Definition

Section 401(e) of Title 10 contains the current legal definition of HCA:

[T]he term “humanitarian and civic assistance” means any of the following:

(1) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical, surgical, 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 construction and repair of public facilities.³⁴

This definition is identical to the statutory HCA definition first enacted in the FY87 NDAA with the exception of three amendments that clarified the type of healthcare authorized and that limited the type of funds used for minimal cost HCA.³⁵ The plain meaning of this HCA definition suggests that a proposed activity must fit within one of § 401(e)’s four categories to be considered lawful.³⁶ The legislative history supports this interpretation.³⁷ The HCA definition in DoDI 2205.02 and the FY08 DoD HCA Guidance Message closely mirror the statutory HCA definition with one notable exception.

²⁹ Compare 10 U.S.C. § 401 (2011) (current HCA authorization as amended), with NDAA FY87 § 333 (enacting the first HCA authorization at 10 U.S.C. §§ 401–406).

³⁰ 10 U.S.C. § 401(a)(1).

³¹ See discussion *supra* Part II.B.

³² 10 U.S.C. § 401(e).

³³ See DoDI 2025.02, *supra* note 3, at 8 (providing glossary of definitions including HCA); Message, 011802Z May 07, Sec’y of Def./DSCA-PGM, subject: Policy/Programming Guidance for FY 2008 Humanitarian and Civic Assistance (HCA) Projects and Activities, para. B(1)(A) [hereinafter FY08 DoD HCA Guidance Message] (defining HCA activities). The author confirmed with the Office of the Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations (DASD(PS&SO)) that the FY08 DoD HCA Guidance Message is the most recent version in force, that DASD(PS&SO) assumed the lead DoD office responsibilities for HCA originally assigned to the Assistant Secretary of Defense for Global Security Affairs in DoDI 2205.02, and that DoDI 2205.02 is currently under revision (e-mails on file with author).

³⁴ 10 U.S.C. § 401(e).

³⁵ Compare *id.* (current statutory HCA definition), with NDAA FY87, Pub. L. No. 99-661, § 333(a), 100 Stat. 3816, 3857-59 (1986) (enacting the first HCA definition as 10 U.S.C. § 405); see also NDAA FY94, Pub. L. No. 103-160, § 1504(b), 107 Stat. 1771, 1839 (1993); NDAA FY01, Pub. L. No. 106-398, § 1235, 114 Stat. 1654, 1654A-331 (2000); NDAA FY06, Pub. L. No. 109-163, § 1201(b), 119 Stat. 3136, 3455 (2006).

³⁶ *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”)

³⁷ See *supra* Part II.B and notes 20–23 (discussing how the conference committee limited the scope of HCA activities by “tighten[ing] the definitions of acceptable activities under [the proposed] legislation,” in part by deleting the broad category “similar or related types of assistance” from the Senate’s proposed HCA definition).

2. DoD's Implementation of the Statutory HCA Definition

The HCA definition in DoDI 2205.02 is essentially identical to the statutory definition in § 401(e); however, the definition in the FY08 DoD HCA Guidance Message, set forth below, contains one substantive change.³⁸

HCA activities constitute any of the following: medical, surgical, dental, and veterinary care provided in rural or otherwise underserved areas of a country, including education, training, and technical assistance related to the care provided; *engineering services, including construction of rudimentary surface transportation systems; well-drilling and construction of basic sanitation facilities; or rudimentary construction and repair of public facilities.*³⁹

This language mirrors the definitions in § 401(e) and DoDI 2205.02, but inserts “engineering services, including” before “construction of rudimentary surface transportation systems.” It is not clear why this phrase was added; however, the Office of the Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations (DASD(PS&SO)) interprets this phrase as merely describing the three categories of engineering-related HCA activities listed thereafter—construction of rudimentary surface transportation systems, well-drilling and construction of basic sanitation facilities, and rudimentary construction and repair of public facilities—and would consider any project outside the scope of these three statutorily authorized categories of “engineering services” objectionable.⁴⁰ In summary, no practical difference exists between the statutory and DoD policy definitions for HCA. To be lawful, a proposed HCA activity must fall within the scope of the HCA definition and must also comply with other key requirements in § 401.

B. Seven Key Requirements of § 401

Judge advocates must be familiar with the following seven key statutory requirements as amplified by applicable DoD policy. All seven requirements were present in the

³⁸ Compare 10 U.S.C. § 401(e) (current statutory HCA definition), with DoDI 2205.02, *supra* note 3, at 8 (providing glossary of definitions including HCA).

³⁹ FY08 DoD HCA Guidance Message, *supra* note 33, para. B(1)(A) (emphasis added).

⁴⁰ E-mail from Captain William J. Adams, Jr., Med. Serv. Corps, U.S. Navy, Global Health Coordinator, Office of Deputy Assistant Sec’y of Def. for P’ship Strategy & Stability Operations, to author (Feb. 21, 2012, 14:40 EST) (on file with author).

original statutory HCA authorization, section 333 of the FY87 NDAA.⁴¹

1. In Conjunction with Authorized Military Operations

Section 401 requires HCA to be executed “in conjunction with authorized military operations of the armed forces in a country.”⁴² The statute is clear that HCA must be conducted by U.S. Armed Forces in foreign nations; however, it does not define the phrase “in conjunction with authorized military operations.” The DoD HCA implementing policy provides a useful definition of “military operation” and amplifying guidance.

Department of Defense Instruction 2205.02 defines “military operation” as “a military action or a strategic, tactical, service, training, exercise, or administrative military mission.”⁴³ The instruction further mandates that HCA must “create strategic, operational, and/or tactical effects that support CCDR objectives in theater security cooperation or designated contingency plans.”⁴⁴ Likewise, the FY08 DoD HCA Guidance Message states:

*HCA projects should be planned, funded, and conducted as supplementary activities to operations, exercises or deployments-for-training that separately establishes the presence of US forces in the host country. HCA project proposals must specifically delineate the exercise/operation with which the HCA project is associated.*⁴⁵

Thus, the DoD policy guidance is clear that a “military operation” includes a military action (i.e., a contingency operation), exercise, deployment-for-training, or administrative military mission that “separately establishes the presence of U.S. forces in the host country.”⁴⁶ The

⁴¹ See NDAA FY87, Pub. L. No. 99-661, § 333(a), 100 Stat. 3816, 3857–59 (1986).

⁴² 10 U.S.C. § 401(a)(1).

⁴³ DoDI 2205.02, *supra* note 3, at 8.

⁴⁴ *Id.* at 2.

⁴⁵ FY08 DoD HCA Guidance Message, *supra* note 33, para. B(2) (emphasis added).

⁴⁶ *Id.*; DoDI 2205.02, *supra* note 3, at 8. As an example, U.S. Africa Command, U.S. Pacific Command, and U.S. Southern Command routinely conduct Partnership Station deployments on an annual basis in their respective areas of responsibility. These naval deployments involve U.S. Navy warships with embarked staffs that possess unique capabilities such as medical, engineering, and civil affairs teams. The Partnership Stations conduct planned HCA activities as a supplement to the primary deployment objective of increasing maritime security and cooperation with host nations in support of CCDR theater security cooperation objectives. Appendix B provides a scenario-based example of a proposed HCA project to be conducted during the Southern Partnership Station deployment in the U.S. Southern Command’s area of responsibility.

inclusion of exercises and routine deployments-for-training within the definition of “military operations” comports with the legislative history.⁴⁷

Finally, the FY08 DoD HCA Guidance Message permits the submission of HCA-type activities as humanitarian assistance (HA) projects in cases “where training/exercise opportunities requiring a unit deployment are not available nor desired by the host nation, but where projects encompassing HCA-type activities will still yield significant security cooperation benefits.”⁴⁸ This provision is a mechanism to import HCA-type activities into the more flexible DoD HA Program authorized by 10 U.S.C. §§ 402, 2557, and 2561, and funded with the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation.⁴⁹

2. Promote the Security Interests of the United States and the Host Nation

Humanitarian and civic assistance activities must promote “the security interests of both the United States and the country in which the activities are to be carried out” as determined by the Secretary of Defense or the respective secretaries of the military departments.⁵⁰ Ensuring that a particular HCA activity promotes U.S. and host nation security interests is a function of the nomination, justification, and approval process for the geographic CCDR’s annual HCA activity plan as well as the incorporation of HCA into the geographic CCDR’s theater campaign plan.⁵¹ In this regard, judge advocates serving at combatant command level or below must be familiar with the applicable combatant command HCA instruction that outlines the internal responsibilities and procedures for the development, justification, and approval of the command’s

⁴⁷ See H.R. REP. NO. 99-1001, at 467–68 (1986) (Conf. Rep.) (“The conferees did not put a specific dollar ceiling on the definition of diminimus [sic] but wish to make clear they had in mind activities that have been commonplace in foreign exercises for decades.”).

⁴⁸ FY08 DoD HCA Guidance Message, *supra* note 33, para. B(3).

⁴⁹ See 10 U.S.C. §§ 402, 2557, 2561 (2011); Message, (n.d.), Sec’y of Def./USDP/SO/LIC, subject: Policy Guidance for DoD Overseas Humanitarian Assistance Funded by the Overseas Humanitarian, Disaster, and Civic Aid Appropriation (on file with author; obtained the message with no date-time-group from the Office of the DASD(PS&SO), but confirmed the date-time-group as 051431Z Jun 12). Humanitarian assistance activities conducted pursuant to 10 U.S.C. §§ 402, 2557, and 2561 have no requirement to be performed “in conjunction with authorized military operations.” Because HA usually involves an urgent response to a disaster or catastrophe within a host nation, HA is often the primary military operation conducted by DoD forces.

⁵⁰ 10 U.S.C. § 401(a)(1); DoDI 2205.02, *supra* note 3, at 2.

⁵¹ DoDI 2205.3, *supra* note 3, at 2–3 (directing unified CCDRs to comply with annual DoD HCA guidance, which reflects U.S. national security and foreign policy priorities, when developing HCA activity plans); DoDI 2205.02, *supra* note 3, at 2 (mandating that geographic CCDRs incorporate HCA activities into their security cooperation plans).

annual HCA activity plan.⁵² Service component staffs are generally tasked with coordinating the development and planning of HCA activities via country teams, which liaison with the appropriate host nation civil authorities and U.S. Embassy.⁵³ Promoting the security interests of the United States and the host nation is a straightforward requirement that should not present contentious legal issues for judge advocates.

3. Promote Specific Operational Readiness Skills of U.S. Armed Forces

The statutory requirement to promote “specific operational readiness skills” of the U.S. servicemembers “who participate in the [HCA] activities” can be traced directly to The Honorable Bill Alexander Opinion, wherein DoD justified its HCA activities in part on the basis that they provided training to the participating U.S. units.⁵⁴ Department of Defense Instruction 2205.02 defines “operational readiness skills” as “[s]kills possessed by military personnel enabling them to contribute effectively to the capability of their unit and/or formation, ship, weapon system, or equipment to perform the missions or functions for which it was organized or designed.”⁵⁵ The instruction further requires that “U.S. military occupational specialists

⁵² See U.S. AFRICA COMMAND, GUIDANCE FOR PLANNING AND EXECUTION OF HUMANITARIAN ASSISTANCE PROGRAMS IN THE U.S. AFRICA COMMAND AREA OF RESPONSIBILITY (1 Mar. 2008) [hereinafter USAFRICOM HAP/HCA SOP] (issuing U.S. Africa Command standard operating procedures for identifying, categorizing, funding, obtaining authorization for, and nominating HA/HCA projects and activities); U.S. CENTRAL COMMAND, REG. 12-1, SECURITY COOPERATION–HUMANITARIAN ASSISTANCE, DISASTER RELIEF, AND MINE ACTION PROGRAM (18 Nov. 2011) [hereinafter USCENTCOM REG. 12-1] (establishing U. S. Central Command (USCENTCOM) Commander’s policy and procedures for management of USCENTCOM HA, Disaster Relief, and Mine Action programs, including HCA); U.S. PACIFIC COMMAND, INSTR. 0601.11, UNIFIED COMMANDERS’ CONDUCT OF COOPERATIVE PROGRAMS WITH FRIENDLY NATIONS (TITLE 10 PROGRAM) at 3-5, encl. 2 (15 Mar. 2010) [hereinafter USPACOMINST 0601.11] (assigning responsibilities and issuing procedures for the development and approval of annual HCA activity plans that support U.S. Pacific Command’s theater security cooperation objectives); Message, 231526Z Nov 10, Headquarters, U.S. Southern Command, subject: USSOUTHCOM FY11 Humanitarian and Civic Assistance (HCA) Engagement Exercise Directive [hereinafter USSOUTHCOM FY11 HCA Message] (promulgating U.S. Southern Command’s HCA mission, concept of operations, and intent for executing FY11 HCA activities in furtherance of U.S. Southern Command’s theater campaign plan).

⁵³ USAFRICOM HAP/HCA SOP, *supra* note 52, at 6–7; USCENTCOM REG. 12-1, *supra* note 52, at 1-5 to 1-7; USPACOMINST 0601.11, *supra* note 52, at 4; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-359, HUMANITARIAN AND DEVELOPMENT ASSISTANCE: PROJECT EVALUATIONS AND BETTER INFORMATION SHARING NEEDED TO MANAGE THE MILITARY’S EFFORTS 13–15 (2012) [hereinafter 2012 GAO HUMANITARIAN AND DEVELOPMENT ASSISTANCE REPORT] (discussing recent DoD efforts to achieve better interagency coordination for HCA projects with the DOS and USAID).

⁵⁴ 10 U.S.C. § 401(a)(1); see *supra* Part II.A.

⁵⁵ DoDI 2205.02, *supra* note 3, at 8.

shall provide services relevant to their specialty.”⁵⁶ Thus, a HCA activity that provides training to a U.S. servicemember in his occupational specialty would satisfy this requirement because such training enhances the operational readiness of the unit.

4. *Serve Basic Economic and Social Needs of the Host Nation's People*

Section 401's requirement that HCA “shall serve the basic economic and social needs of the people” originates from the congressional concern that DoD's HCA authorization “[not be] interpreted as a new major foreign aid program.”⁵⁷ A judge advocate should apply this provision in conjunction with the restrictive HCA definition in § 401(e), which legislates four narrow categories of “basic” and “rudimentary” HCA activities.⁵⁸ It must also be read in concert with § 401's prohibition against providing HCA to any military or paramilitary unit because such units cannot be recipients of HCA.⁵⁹

The requirement to serve “basic economic and social needs” also furthers DoD's interest in “managing the expectations” of the host nation populace that benefits from the HCA. The FY08 DoD HCA Guidance Message demonstrates this policy concern by issuing the following guidance about medical and dental HCA:

Units undertaking [Medical Civic Action Programs] and [Dental Civic Action Programs] must ensure they do not drastically exceed the standards of care already provided by the host nation. Doing so undermines the local healthcare structure. Providing care, which exceeds local standards, can have a negative effect once the providing unit has departed. These effects can range from high expectations of similar care by the local populace, expected return visits by providing units, lack of sustainability for care provided, and no follow-up. A potential decline in the perception of the [U.S. Government] . . . may occur should any of these effects materialize. Additionally, the procurement of local pharmaceuticals and supplies is highly encouraged. This provides comparable

⁵⁶ *Id.* at 2–3 (providing example that U.S. military medical personnel, such as doctors, dentists, or nurses, should perform medical HCA activities).

⁵⁷ 10 U.S.C. § 401(a)(2); *see supra* Part II.B and notes 24–25 (discussing congressional concerns about the nature, scope, and intent behind the original HCA program proposal in S. 2638).

⁵⁸ *See supra* Part III.A.

⁵⁹ 10 U.S.C. §401(a)(3); *see infra* Part III.B.5.

standards as well as benefits the local economy.⁶⁰

Thus, serving “basic economic and social needs” has a legislative purpose of minimizing the scope of HCA activities so they do not expand into a major new foreign aid program, while also furthering the DoD strategic communications purpose of safeguarding the perception of the U.S. Government in the minds of the host nation populace.⁶¹

5. *Prohibition Against HCA to Foreign Military or Paramilitary Units*

Section 401's legislative history conveys the view that only the civilian, non-combatant population of the host nation should benefit from HCA.⁶² As a result, Congress enacted a provision that prohibits DoD from providing HCA, directly or indirectly, to “any individual, group, or organization engaged in military or paramilitary activity.”⁶³ The Senate Armed Services Committee, however, recognized that U.S. forces would cooperate with host nation military or paramilitary units when planning and conducting HCA activities and endorsed such cooperation in Senate Report 99-331.⁶⁴ Language concerning cooperation between U.S. forces and host nation military or paramilitary forces was not enacted into law, but DoDI 2205.02 properly reflects the legislative history by stating: “HCA may [i]nvolve cooperation with host-nation military or paramilitary elements (to include the participation of third party organizations such as non-governmental or private and/or voluntary groups) to establish trust and enhance relations with those entities.”⁶⁵ Cooperation between the United States and host nation military units is a common occurrence during the planning and execution of HCA projects and is not legally objectionable if it complies with the foregoing DoD policy.⁶⁶

⁶⁰ FY08 DoD HCA Guidance Message, *supra* note 33, para. B(1)(B).

⁶¹ *See* 2012 GAO HUMANITARIAN AND DEVELOPMENT ASSISTANCE REPORT, *supra* note 54, at 20–23, 37–38 (discussing the impact of DoD's inconsistent evaluations of OHDACA and HCA projects and examples of projects that had negative effects on the local populace).

⁶² *See* S. REP. NO. 99-331, at 290 (1986).

⁶³ 10 U.S.C. § 401(a)(3).

⁶⁴ S. REP. NO. 99-331, at 290.

⁶⁵ DoDI 2205.02, *supra* note 3, at 2.

⁶⁶ The author confirmed that cooperation with host nation military units is commonplace by reviewing various Engineering Civic Action Projects and Medical Civic Action Projects provided by the Joint Staff J5 Partnership Strategy Directorate.

The phrase “military or paramilitary activity” is not defined by § 401 or the DoD implementing guidance.⁶⁷ While the definition of “military activity” reasonably includes an activity conducted by the host nation’s regular armed forces, the meaning of “paramilitary activity” is ambiguous and subject to interpretation.⁶⁸ The primary legal issue that judge advocates may face when evaluating compliance with this requirement is the meaning of “paramilitary activity” for purposes of § 401. In close cases, judge advocates should conduct an objective, fact-based analysis relying on information provided by the command’s subject matter experts, DoD country team, U.S. Embassy, and appropriate host nation officials. Appendix B provides a practical example of a HCA project proposal involving potential support to a military or paramilitary organization.

6. Complement But Not Duplicate Any Other U.S. Assistance.

Humanitarian and civic assistance activities “shall complement, and may not duplicate, any other form of social or economic assistance which may be provided” to the host nation by another U.S. department or agency.⁶⁹ Meeting this requirement is served by the transparent planning and approval process for the geographic CCDRs’ HCA plans. Service component staffs direct HCA planning activities through country teams, which interface with the host nation civil authorities and DOS representatives at the U.S. Embassy to ensure that proposed HCA activities complement social or economic assistance already being provided by another U.S. agency, such as the U.S. Agency for International Development (USAID).⁷⁰ Proposed HCA projects are then entered into the Overseas Humanitarian Assistance Shared Information System (OHASIS), an internet-based project nomination and approval system

provided by the Defense Security Cooperation Agency.⁷¹ Using OHASIS, the Joint Staff coordinates the review of proposed HCA activities with relevant DoD offices, the DOS, USAID, and other U.S. government agencies as required.⁷² The OHASIS database provides a transparent mechanism for conducting interagency review of proposed HCA projects to ensure compliance with applicable statutory and policy requirements.

7. Secretary of State Approval

This requirement does not present any legal hurdles for the judge advocate. Coordination with the DOS occurs at various levels during the HCA planning and approval process.⁷³ Because DoD country teams are directed to seek the concurrence of the U.S. ambassador and USAID director prior to nominating a proposed HCA activity for approval in OHASIS, the approval process within the higher echelons of the DOS is generally an affirmation of the U.S. ambassador’s prior approval.⁷⁴

IV. Funding HCA

A judge advocate should not face difficult fiscal law issues during the planning and execution of HCA if such activities comply with the statutory and DoD policy requirements outlined above. Nevertheless, judge advocates should understand the legal bases for funding HCA above and below the minimal cost threshold of \$10,000.⁷⁵ In general terms, a HCA project above minimal cost is a larger-scale, preplanned project approved by the Joint Staff J5 and DASD(PS&SO).⁷⁶ In contrast, minimal cost HCA is a small-scale, modest HCA activity conducted incidental to an authorized military operation costing less than \$10,000, requiring approval by the cognizant geographic CCDR, and funded with O&M funds *other than* those funds specifically appropriated by Congress for HCA.⁷⁷

⁶⁷ See generally 10 U.S.C. § 401 (void of a definition for “military or paramilitary activity”); DoDI 2205.02, *supra* note 3 (“military or paramilitary activity” not defined).

⁶⁸ The word “paramilitary” is not defined in Title 10 or Title 22 of the U.S. Code. Joint Publication 1-02, the *DoD Dictionary of Military and Associated Terms*, defines “paramilitary forces” as “forces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training, or mission.” See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 259 (8 Nov. 2010) [hereinafter JOINT PUB. 1-02] (as amended through 15 Nov. 2011).

⁶⁹ 10 U.S.C. § 401(a)(2).

⁷⁰ See DoDI 2205.02, *supra* note 3, at 7 (assigning CCDRs with the responsibility to ensure that HCA activities are conducted with the approval of the Secretary of State through the appropriate U.S. Chief of Mission); USPACOMINST 0601.11, *supra* note 52, at 4 (directing service component staffs to coordinate proposed HCA projects with appropriate country teams and receive their concurrence before nominating HCA projects for approval); *but see* 2012 GAO HUMANITARIAN AND DEVELOPMENT ASSISTANCE REPORT, *supra* note 53, at 26–41 (discussing information-sharing challenges and potential for overlap among DoD, DOS, and USAID humanitarian and development assistance efforts).

⁷¹ DoDI 2205.02, *supra* note 3, at 5 (indicating responsibility of the Defense Security Cooperation Agency to support the Chairman, Joint Chiefs of Staff by providing the Overseas Humanitarian Assistance Shared Information System (OHASIS) for HCA project nomination and approval).

⁷² *Id.* at 6.

⁷³ See discussion *supra* Parts III.B.2, III.B.5, and III.B.6.

⁷⁴ DoDI 2205.3, *supra* note 3, enclosure 1 (requiring HCA project nominations to include a statement of concurrence from the U.S. ambassador and USAID director).

⁷⁵ See FY08 DoD HCA Guidance Message, *supra* note 33, para. B.(4) (setting the minimal cost HCA threshold at \$10,000).

⁷⁶ See DoDI 2205.02, *supra* note 3, at 5–7; FY08 DoD HCA Guidance Message *supra* note 33.

⁷⁷ See DoDI 2205.02, *supra* note 3, at 8 (defining “minimal cost HCA”).

A. Funding HCA Above Minimal Cost

Section 401(c)(1) of Title 10, U.S. Code states: “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 purposes.*”⁷⁸ Section 401 is therefore a HCA authorization that must be funded by a subsequent appropriation.⁷⁹ For over a decade, Congress has enacted two equally available appropriations to fund HCA activities above the minimal cost HCA threshold: OHDACA and military department O&M.⁸⁰ The existence of two equally available appropriations for the same purpose, when neither can reasonably be called the more specific of the two, triggers application of the GAO’s Election Doctrine.⁸¹ The DoD has elected military department O&M to fund HCA expenses above minimal cost.⁸² Because of this election, DoD must continue to use O&M for these HCA expenses unless it informs Congress at the beginning of the next fiscal year of its intent to use another valid appropriation, i.e., OHDACA.⁸³

Additionally, DoD policy guidance and some combatant command’s HCA instructions contain useful amplifying guidance about funding HCA above minimal cost. The DoDI 2205.02 states that “[a]uthorized expenses include the direct costs of consumable materials, supplies, and services reasonably necessary to provide the HCA.”⁸⁴ Conversely, it delineates unauthorized expenses to “include costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; and repair of equipment),” as well as the salaries of host nation participants and per diem expenses of the U.S. military personnel conducting the HCA.⁸⁵ The combatant command HCA instructions generally emphasize the limitations on

authorized expenditures delineated in DoDI 2205.02 and impose specific limits on funding allocations for various categories of HCA projects.⁸⁶

Overall, the funding requirements for HCA above minimal cost have remained static for more than a decade.⁸⁷ Nonetheless, Congress could alter the specific HCA appropriations, such as by eliminating O&M as an available appropriation for HCA above minimal cost, thereby necessitating the use of OHDACA funds. Judge advocates who handle HCA matters should understand this fiscal law framework, the types of authorized expenses that may be incurred, and should verify that O&M remains available to fund HCA above minimal cost by reviewing the National Defense Authorization Act and DoD Appropriations Act on an annual basis upon enactment by Congress. The legal basis for funding HCA above minimal cost is straightforward, but as discussed in Part IV.B *infra*, the funding regime governing minimal cost HCA can be more confusing.

B. Funding Minimal Cost HCA

Minimal cost HCA, originally called “diminimus HCA,” is governed by § 401(c)(4), the annual DoD Appropriations Act, and DoD policy guidance.⁸⁸ When enacting the original HCA legislation in the FY87 NDAA, Congress did not want modest HCA activities that were “commonplace on foreign exercises for decades” to become administratively burdensome if subject to the same approval, financing, and reporting requirements as the large-scale HCA funded with a specific appropriation.⁸⁹ Minimal cost HCA is more flexible because approval and funding are under the geographic CCDR’s purview, but the legal and policy requirements outlined in Part III *supra* must still be met.

Turning first to the statutory text, § 401(c)(4) states:

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 [§ 401(c)(1)], except that funds appropriated to the Department of Defense for operation

⁷⁸ 10 U.S.C. § 401(c)(1) (2011) (emphasis added).

⁷⁹ See *supra* note 11.

⁸⁰ Compare Department of Defense Appropriations Act, 1999 (DoDAA FY99), Pub. L. No. 105-262, tit. II, § 8009, 112 Stat. 2279, 2286, 2298 (1998) (appropriating OHDACA funds with a two-year period of availability and operations and maintenance (O&M) funds with a one-year period of availability for HCA expenses under 10 U.S.C. § 401), with Consolidated Appropriations Act, 2012 (CAA FY12), Pub. L. No. 112-74, div. A, tit. II, § 8011, 125 Stat. 786 (2011) (appropriating two-year OHDACA funds and one-year O&M funds for HCA expenses under 10 U.S.C. § 401 using language identical to the DoDAA FY99).

⁸¹ See GAO REDBOOK, *supra* note 14, at 2-23 (“Where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditure in question.”).

⁸² See DoDI 2205.02, *supra* note 3, at 3 (“Expenses incurred as a direct result of providing HCA (other than minimal cost HCA) to a foreign country shall be paid for with funds specifically appropriated for such purposes (*included in Military Department operation and maintenance accounts.*)”) (emphasis added).

⁸³ GAO REDBOOK, *supra* note 14, at 2-23.

⁸⁴ DoDI 2205.02, *supra* note 3, at 3.

⁸⁵ *Id.*

⁸⁶ See USAFRICOM HAP/HCA SOP, *supra* note 52, at 7, 10–11; USCENTCOM REG. 12-1, *supra* note 52, at 1-7, 3-9; USSOUTHCOM FY11 HCA Message, *supra* note 52, paras. 3.D.(3)(C), 3.E.(5), 4.A.(1-2).

⁸⁷ See *supra* note 80.

⁸⁸ 10 U.S.C. § 401(c)(4) (2011); CAA FY12, Pub. L. No. 112-74, div. A, tit. II, § 8011, 125 Stat. 786 (2011); DoDI 2205.02, *supra* note 3, at 2–3, 8; see also H.R. REP. 99-1001, at 467–68 (1986) (Conf. Rep.) (providing examples of authorized “diminimus activities”).

⁸⁹ H.R. REP. 99-1001, at 467–68 (1986) (Conf. Rep.).

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*.⁹⁰

This fiscal authorization imposes two constraints. First, DoD may incur “minimal expenditures” for HCA activities out of funds *other than* those authorized for HCA under § 401(c)(1), i.e., OHDACA and military department O&M funds.⁹¹ Second, when funding a “minimal expenditure” using O&M funds that are not specifically appropriated for HCA, the O&M funds may only be obligated for “incidental costs” of carrying out the modest HCA activity. These two constraints work in concert with the HCA O&M appropriation contained in the annual DoD Appropriations Act. The Consolidated Appropriations Act, 2012, contains the following specific HCA appropriation:

Within the funds appropriated for the *operation and maintenance of the Armed Forces*, funds are hereby appropriated pursuant to section 401 of title 10, United States Code, for humanitarian and civic assistance costs under chapter 20 of title 10, United States Code. *Such funds may also be obligated for humanitarian and civic assistance costs incidental to authorized operations* and pursuant to authority granted in section 401 of chapter 20 of title 10, United States Code.⁹²

The second sentence in the appropriation concerns minimal cost HCA and mirrors the authorization in § 401(c)(4) by permitting obligation of one-year O&M funds for the purpose of “[HCA] costs incidental to authorized operations.” The terms “minimal expenditure” and “incidental costs” are not defined by § 401(c)(4) and the annual HCA O&M appropriation. Additional clarity is provided by DoDI 2205.02 and the FY08 HCA Guidance Message.

Department of Defense Instruction 2205.02 implements § 401(c)(4)’s authorization and the HCA O&M appropriation by providing a more concise definition of minimal cost HCA. Minimal cost HCA is defined as “HCA activities provided under [10 U.S.C. § 401] and *incurring only minimal expenditures for incidental costs*.”⁹³ The

definition also includes the following guidance for combatant commands regarding “minimal expenditures”:

The determination that an expenditure is “minimal” shall be made by the Commanders of the Combatant Commands:

For activities within their respective AORs.

In the exercise of the Commander's reasonable judgment.

In light of the overall cost of the military operation in which such expenditure is incurred.

For an activity that is incidental to the military operation.⁹⁴

Thus, DoDI 2205.02 affords CCDRs with some flexibility to determine “minimal expenditures,” but the maximum amount authorized for a minimal cost HCA project is \$10,000.⁹⁵ The instruction also provides two examples of minimal cost HCA projects: a unit doctor's examination of villagers for a few hours with the administration of several shots and the issuance of some medicines, but not the dispatch of a medical team for mass inoculations; and the opening of an access road through trees and underbrush for several hundred yards, but not the asphaltting of a roadway.⁹⁶ The requirement that minimal cost HCA must be “incidental to the military operation” is not defined, but is similar to § 401’s requirement that HCA be executed “in conjunction with authorized military operations.”⁹⁷ The military operation must separately establish the presence of U.S. forces in the host nation, and the minimal cost HCA project must be minor, low scale, and ancillary to the primary operation.

Finally, the FY08 HCA Guidance Message prohibits “project splitting,” which is the unauthorized practice of dividing projects into various segments in order to avoid the \$10,000 minimal cost HCA threshold.⁹⁸ Simplified acquisition procedures may be used to purchase supplies or

⁹⁰ 10 U.S.C. § 401(c)(4) (emphasis added).

⁹¹ See *supra* Part IV.A (discussing how Congress appropriated two equally available appropriations to fund HCA—OHDACA and military department O&M).

⁹² CAA FY12, div. A, tit. II, § 8011.

⁹³ DoDI 2205.02, *supra* note 3, at 8 (emphasis added).

⁹⁴ *Id.*

⁹⁵ FY08 DoD HCA Guidance Message, *supra* note 34, para. B.(4); see also DoDI 2205.02, *supra* note 3, at 8 (“The maximum amount authorized for a minimal cost project is included in the annual HCA guidance message.”).

⁹⁶ DoDI 2205.02, *supra* note 3, at 8; see also H.R. REP. 99-1001, at 467–68 (1986) (Conf. Rep.) (providing the same examples used in DoDI 2205.02 but under the original lexicon of “diminimus activities”).

⁹⁷ See *supra* Part III.B.1.

⁹⁸ FY08 DoD HCA Guidance Message, *supra* note 33, para. B.(4).

services below the \$3,000 micro-purchase threshold.⁹⁹ Because the CCDR is responsible for minimal cost HCA, one would expect each combatant command to have detailed guidance for planning and executing minimal cost HCA projects; however, only U.S. Africa Command has detailed minimal cost HCA guidance in its standard operating procedure, which generally restates the requirements set forth in DoDI 2205.02 and the FY08 HCA Guidance Message.¹⁰⁰

In closing, a judge advocate must ensure that a proposed minimal cost HCA project complies with the legal and policy requirements outlined in Part III and this section. Additionally, examples of past minimal cost HCA projects should be reviewed as a basis for evaluation and comparison because the respective combatant command HCA instructions lack detailed guidance on minimal cost HCA.

V. Conclusion

Judge advocates serving in the operational chain of command of GCCs that routinely conduct HCA should possess a thorough understanding of the foregoing legal, policy, and procedural requirements for § 401 HCA. For a judge advocate undertaking his first legal review of a proposed HCA project with little or no background in fiscal law and HCA, gaining a foundational level of knowledge

can prove challenging. Section 401's numerous legal requirements, its unusual funding scheme, and the patchwork nature of the DoD implementing policy can pose a legal research nightmare for the inexperienced judge advocate who must render an opinion on short notice, whether during a HCA planning team meeting or in response to an urgent out-of-cycle HCA request. This primer is intended to fill the current gap in secondary legal resource materials by providing the requisite foundational level of knowledge about § 401 HCA.

⁹⁹ *Id.*; see also GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 13 (Mar. 2012) (governing simplified acquisition procedures).

¹⁰⁰ See USAFRICOM HAP/HCA SOP, *supra* note 52, at 8.

Appendix A

HCA Legal Review Checklist

HCA Legal Review Checklist				
<u>Instructions</u>				
<ul style="list-style-type: none"> HCA projects above <u>and</u> below the \$10,000 minimal cost threshold must comply with 10 U.S.C. § 401's requirements. If "NO" to questions 1-8, the proposed HCA activity is legally objectionable. Information to support a legal review of an HCA project proposal may be obtained from the appropriate command HCA point of contact, project subject matter expert(s), and the project proposal form submitted via the Overseas Humanitarian Assistance Shared Information System (OHASIS). Purpose and intent are the key factors in determining whether a specific activity is covered by 10 U.S.C. § 401. Source: DoDI 2205.02. Applicable geographic combatant command instructions should be reviewed to ensure compliance with local policy, guidance, and procedures. See References F–I below. Currently, U.S. European Command and U.S. Northern Command do not have local HCA instructions. Historically, U.S. Northern Command has not conducted HCA. 				
<u>References (current as of 12 March 2012)</u>				
<ul style="list-style-type: none"> A. 10 U.S.C. § 401 (2011) B. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. A. tit. II, § 8011 (2011) C. DoDI 2205.02, Humanitarian and Civic Assistance (HCA) Activities (2 Dec. 2008) D. DoDI 2205.3, Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program (27 Jan. 1995) E. SECDEF WASHINGTON DC//DSCA-PGM// 011802Z May 07, Policy/Programming Guidance for FY 2008 Humanitarian and Civic Assistance (HCA) Projects and Activities F. U.S. Africa Command Standard Operating Procedure, Guidance for Planning and Execution of Humanitarian Assistance Programs in the U.S. Africa Command Area of Responsibility (1 Mar. 2008) G. U.S. Central Command Regulation 12-1, Security Cooperation - Humanitarian Assistance, Disaster Relief, and Mine Action Program (18 Nov. 2011) H. U.S. Pacific Command Instruction 0601.11, Unified Commanders' Conduct of Cooperative Programs with Friendly Nations (Title 10 Program) (15 Mar. 2010) I. HQ USSOUTHCOM MIAMI FL 231526Z Nov 10, USSOUTHCOM FY11 Humanitarian and Civic Assistance (HCA) Engagement Exercise Directive 				
10 U.S.C. § 401 Requirements			Yes	No
1	Nature and Type of HCA. Will the proposed HCA activity involve one or more of the following:			
	(a) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical, surgical, dental, and veterinary professionals, respectively, including education, training, and technical assistance related to the care provided.			
	(b) Construction of rudimentary surface transportation systems.			
	(c) Well drilling and construction of basic sanitation facilities.			
	(d) Rudimentary construction and repair of public facilities.			
2	Will the HCA activity be conducted in conjunction with an authorized U.S. military operation? If YES, specify the U.S. military operation: <hr style="width: 30%; margin-left: 0;"/> A "military operation" is a military action or a strategic, operational, tactical, service, training, exercise, or administrative military mission. Reference C: DoDI 2205.02.			

3	<p>Will the HCA activity promote the security interests of both the United States and the host nation?</p> <p>This determination should be made with the assistance of the U.S. country team/military group (Mil-Group), U.S. Embassy officials (i.e., defense attaché), and USAID representatives.</p>		
4	<p>Will the HCA activity promote the specific operational readiness skills of U.S. Armed Forces?</p> <p>“Operational readiness skills” are skills possessed by military personnel enabling them to contribute effectively to the capability of their unit and/or formation, ship, weapon system, or equipment to perform the missions or functions for which it was organized or designed. U.S. military occupational specialists shall provide services relevant to their specialty. Reference C: DoDI 2205.02.</p>		
5	<p>Will the HCA activity serve the basic economic and social needs of the people?</p>		
6	<p>The HCA <u>will not be provided</u> (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity?</p> <p>10 U.S.C. § 401 and the DoD HCA policy do not define “military activity” or “paramilitary activity.”</p> <p>“Military activity” would include an activity conducted by the host nation’s regular armed forces (e.g., Army, Navy).</p> <p>The determination of what is a “paramilitary activity” requires an objective, fact-based analysis using information provided by the appropriate host nation ministry, U.S. Embassy, and U.S. country team/Mil-Group. This information may be included in the OHASIS project proposal. Joint Publication 1-02, the <i>DoD Dictionary of Military and Associated Terms</i>, defines “paramilitary forces” as “forces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training, or mission.”</p>		
7	<p>Will the HCA activity complement, and not duplicate, any other form of social or economic assistance provided to the host nation by another U.S. department or agency?</p>		
8	<p>Has the HCA activity been approved by the Secretary of State?</p> <p>Secretary of State approval is coordinated by the Joint Staff J5 Partnership Strategy Directorate via OHASIS. Judge advocates serving at commands below the Joint Staff level should ensure that approval has been obtained from the U.S. Ambassador and/or appropriate U.S. Embassy official in the host nation where the proposed HCA activity will be conducted. Such approval/coordination is usually reflected in the OHASIS HCA project proposal form.</p>		
Funding		YES	NO
9	<p>Is this a minimal cost HCA project?</p> <p>If YES, go to question 10.</p> <p>If NO, go to question 11.</p> <p>Minimal cost HCA consists of HCA activities provided under 10 U.S.C. § 401 and incurring only minimal expenditures for incidental costs. The determination that an expenditure is “minimal” shall be made by the combatant commander for activities within his AOR, in the exercise of the commander’s reasonable judgment, in light of the overall cost of the military operation in which such expenditure is incurred, and for an activity that is incidental to the military operation. Reference C: DoDI 2205.02</p>		

10	The minimal cost HCA project is incidental to an authorized U.S. military operation, i.e., the U.S. military operation separately establishes the presence of U.S. forces in the host nation, and the minimal cost HCA is minor, low scale, and ancillary to the primary operation.		
	The total projected cost is less than \$10,000.		
	The project will be funded with O&M funds.		
	“Project splitting” is <u>not</u> used. “Project splitting” is the unauthorized practice of dividing projects into various segments in order to avoid the \$10,000 minimal cost threshold.		
	If the aggregate amount of supplies and/or services is less than the micro-purchase threshold (currently \$3,000), will Simplified Acquisition Procedures be used to procure the supplies/services in accordance with Federal Acquisition Regulation Part 13?		
	If an acquisition of services to support the minimal cost HCA project is subject to the McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C. §§ 351–358, 29 C.F.R. Part 4, FAR Subpart 22.10, will the cost of the services be less than \$2,500 in accordance with Federal Acquisition Regulation Part 2.101 (definition of micro-purchase threshold)?		
11	Does the HCA project (above minimal cost) meet the following requirements:		
	<p>Expenses incurred as a direct result of HCA are paid for with funds specifically appropriated for such purpose—military department operations and maintenance (O&M) funds.</p> <p>As of FY12, Congress has authorized and appropriated two funds that are equally available to fund HCA above minimal cost—military department O&M funds and Overseas Humanitarian Disaster and Civic Aid (OHDACA) funds. Per Reference C (DoDI 2205.02), DoD has elected military department O&M funds for HCA above minimal cost. Any changes to this funding scheme would be effected via the annual National Defense Authorization Act and DoD Appropriations Act.</p>		
	<p>All expenses are authorized.</p> <p>Authorized expenses include the direct costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. Reference C: DoDI 2205.02.</p> <p>Unauthorized expenses include salaries of host nation participants, per diem expenses of U.S. Armed Forces conducting the HCA, and costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; repair of equipment). Reference C: DoDI 2205.02.</p>		

Appendix B

Legal Review of a Planned HCA Activity

I. Scenario Fact Pattern

You are the assistant force judge advocate (AFJA) at U.S. Naval Forces South (USNAVSO), the assigned Navy service component command for U.S. Southern Command (USSOUTHCOM). You are a senior lieutenant (O-3) and this is your first job at an operational headquarters. You reported onboard in June, having just attended the Graduate Course at The Judge Advocate General's Army Legal Center and School, Charlottesville, Virginia, where you earned a master of laws in military law (specializing in international and operational law). You've been on the job for one month. Your boss, the force judge advocate (FJA), is currently on travel in Central America as a member of the USNAVSO Mobile Training Team. Your communications connectivity with the FJA is sporadic at best. You're in charge of the legal office during his absence.

You receive an e-mail invitation from a fellow staff officer in USNAVSO N5 requesting your attendance at the first cross-functional planning meeting for next year's *Southern Partnership Station (SPS)* deployment. Before he left on travel, the FJA mentioned that you'd probably receive an invitation and that legal support to *SPS* is "a big deal." Two days later, you attend the meeting. Nearly all N-codes and special staff are represented; you are the most junior officer present. Given the large staff turnover, the lead action officer (AO) from N5 Future Plans starts the meeting with an information brief about *SPS*.

You learn that *SPS* is an annual naval deployment involving various U.S. Navy units that possess unique capabilities such as medical, engineering, and civil affairs teams. The *SPS* mission is to support USSOUTHCOM theater security cooperation objectives by increasing maritime security and cooperation with partner nations in the USSOUTHCOM area of responsibility (AOR). U.S. units participating in *SPS* will make numerous port visits and conduct various engagement activities while in port. The deployment will commence in the Caribbean portion of the USSOUTHCOM AOR and then continue south along the Pacific coast of South America after a Panama Canal transit. Some units will continue operating along the Atlantic coast of South America after transiting through the Chilean fjords and Straits of Magellan. The Secretary of Defense approved the USSOUTHCOM/USNAVSO request for the hospital ship, USNS *Comfort* (T-AH-20), to deploy with *SPS*. The *Comfort* possesses many unique capabilities. The information brief notes that a Navy JAG (O-3) will be embarked on the *Comfort* for the deployment.

The lead N5 AO then briefs the plan of action and milestones. The core *SPS* planning team will be divided into numerous planning cells devoted to specific subject matter areas. The Humanitarian Assistance/Humanitarian Civic Assistance (HA/HCA) cell, among others, requires legal support. The staff lead for the HA/HCA cell is Lieutenant Commander (LCDR) Cables, an O-4 Civil Engineering Corps (CEC) officer assigned to USNAVSO N4. You just happen to be sitting next to LCDR Cables, who whispers in your ear that he has "a legal question" for you at the end of the brief.

The brief concludes with the N5 AO stressing the importance of "project sustainability," which is one of USSOUTHCOM Commander's main priorities for HA and HCA activities. The N5 AO notes that the commander's policy is outlined in the USSOUTHCOM message on HCA. You write down the message date-time-group in your wheelbook.

LCDR Cables asks if you have time to discuss a proposed HCA project to be conducted during *SPS*. You answer in the affirmative. LCDR Cables tells you the following:

"I'm glad you're here. I reported to NAVSO in May and am still getting a handle on what I'm supposed to be doing in the N4 shop. My billet was gapped so I didn't have much of a turnover. I'm an engineer by trade and leading this HA/HCA cell makes my head hurt. There seems to be a lot of legal and funding constraints. The last two weeks, I've been flooded with e-mails and phone calls from our country teams concerning proposed projects for *SPS*. One HCA project raises some legal issues that I want to run by you.

Our military group (Mil-Group) in country Orange is proposing an Engineering Civic Action Project (ENCAP) during the *Comfort's* port visit to Porto Nuevo. The Mil-Group has been working with various Orange Ministries, the U.S. naval attaché, and the in-country USAID representative to identify some worthy HCA projects. Maybe you remember—country Orange was nailed by Hurricane Nicholas last October and suffered lots of damage. Apparently it will take Orange years to recover.

During some prior *SPS* deployments, Navy Seabees from an east-coast Construction Battalion provided HCA project support. The Mil-Group wants to employ the Seabees to do some minor construction and repair projects on some Orange Coast Guard facilities located at Porto Nuevo. Many facilities were destroyed during the hurricane. The Orange Coast Guard needs some repairs to its coastal control station and maintenance facilities. They also need a brand new medical facility, which was wiped out by the hurricane. It would be good training for the Seabees and the Orange Coast Guard really needs the help. The total project cost is \$150,000.

The Mil-Group entered the project proposal into this online database called OHASIS. I reviewed the proposal a couple weeks ago and one of these so-called “compliance questions” asks something about support to military or paramilitary activities. I thought the Orange Coast Guard must be either a military or paramilitary organization, like the U.S. Coast Guard, so I asked the Mil-Group to provide more background. I just got a response today. Here’s the e-mail. Now I’m more confused about the Orange Coast Guard’s status.

Can you tell me if this proposed ENCAP is legal?”

You take the e-mail and inform LCDR Cables that you’ll need some time to research the issues because you’ve never dealt with HCA. LCDR Cables asks for a legal review in “a couple days” because USSOUTHCOM’s deadline for HCA project submissions in support of *SPS* is one week from today. You promise to report back ASAP. You return to the legal office, grab a cup of coffee, and read the e-mail.

-----Original Message-----

From: Jones, John P LCDR, Mil-Group Orange N51
Sent: Thursday, June 28, 2012 9:23
To: Cables, Ted A LCDR COMUSNAVSO/C4F N431
Subject: RE: RE: Orange Coast Guard [U]

Hi Ted,

It took me a while, but here’s what I found out about the Orange Coast Guard. Its official title is the Coast Guard Commission (CGC). The CGC is aligned under the Ministry of Justice and it functions as a unit of the Orange National Police. CGC operates primarily as a law enforcement agency, with secondary responsibilities in search and rescue. Our Ministry of Justice representative told me that it’s one of the few law enforcement organizations in the world to combine water policing and Coast Guard duties while operating as a national policing unit. The Orange National Police provides for the public safety, the Judicial Police and law enforcement throughout the territory of country Orange.

I hope this helps. Let me know what else you need.

Vr/ JPJ

U.S. Mil-Group, Orange, N51
NIPR: john.paul.jones@navy.mil
SIPR: john.paul.jones@smil.navy.mil
Comm: 1-02-3456-78910.

-----Original Message-----

From: Jones, John P LCDR, Mil-Group Orange N51
Sent: Friday, June 22, 2012 16:32
To: Cables, Ted A LCDR COMUSNAVSO/C4F N431
Subject: RE: Orange Coast Guard [U]

Got it, Ted. I’ll look into this. Thanks for your help with this one.

Vr/ JPJ

U.S. Mil-Group, Orange, N51
NIPR: john.paul.jones@navy.mil
SIPR: john.paul.jones@smil.navy.mil
Comm: 1-02-3456-78910.

-----Original Message-----

From: Cables, Ted A LCDR COMUSNAVSO/C4F N431
Sent: Friday, June 22, 2012 15:45
To: Jones, John P LCDR, Mil-Group Orange N51
Subject: Orange Coast Guard [U]

John,

I just reviewed your ENCAP submitted via OHASIS, the one that proposes some construction and repairs to Orange Coast Guard facilities in Porto Nuevo. One of the compliance questions in the OHASIS database asks whether the project will benefit host nation military or paramilitary organizations. Seems like Orange Coast Guard is either a military or paramilitary organization (like U.S. Coast Guard), but not sure. Can you find out more about the Orange Coast Guard's status? Is it a military or paramilitary organization? This seems like a legal hurdle to me so I'll run this by our Judge once I get more background. Thanks.

Vr/ Ted

Ted Cables
LCDR, CEC, USN
NAVSO/C4F N431
NIPR: theodore.a.cables@navy.mil
SIPR: Theodore.a.cables@smil.navy.mil
Comm: 904-123-4567

II. Analysis

This situation presents a planned HCA project that involves construction and repair activities. LCDR Cables's concern about providing HCA, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity is a valid legal issue under 10 U.S.C. § 401; however, the proposed HCA project must meet *all* legal requirements of 10 U.S.C. § 401, as well as other policy requirements imposed by DoD and the cognizant GCC, i.e., USSOUTHCOM. The approach outlined below applies the HCA Legal Review Checklist in Appendix A. In addition, the applicable USSOUTHCOM HCA instruction should be reviewed and applied (Reference I in Appendix A's checklist).

Question 1 - What is the nature and type of the proposed HCA activity?

Question 1 of the checklist refers to the nature and type of HCA. In this case, the project involves repairs to the Orange Coast Guard's coastal control station and maintenance facilities and the construction of a new medical facility. The applicable statutory category is "rudimentary construction and repair of public facilities."¹⁰¹

It is not clear whether the repairs and construction are "rudimentary," i.e., basic and minor in scope. The estimated total project cost of \$150,000 suggests that they could be rudimentary, but more facts about the actual project scope are required to make an informed analysis. The first place to gather more information is the HCA project proposal in the OHASIS database, which contains a section entitled "Detailed Description of Work." Pictures of the site location and engineering schematics would also be useful.

Furthermore, you must determine that the coastal control station, maintenance facility, and medical facility are "public facilities." LCDR Cables stated that the damaged Orange Coast Guard facilities are located in Porto Nuevo. Per LCDR

¹⁰¹ 10 U.S.C. § 401(e)(4) (2011).

Jones's e-mail, the Orange Coast Guard is a law enforcement organization under the Ministry of Justice and a unit of the Orange National Police with a secondary mission of search and rescue. The Orange National Police "provides for the public safety, the Judicial Police and law enforcement throughout the territory of country Orange." Based on these facts, the Orange Coast Guard is a domestic law enforcement organization that serves the public, i.e., the Orange civilian population. Thus, the coastal control station, maintenance facility, and medical facility may be considered "public facilities" because they are owned and operated by the government and serve a public purpose. Moreover, the medical facility is accessible to the Orange civilian population, i.e., those civilians who require emergent medical treatment in the immediate aftermath of a search and rescue mission.

Question 2 - Will the HCA activity be conducted in conjunction with an authorized U.S. military operation?

Based on the facts, there is no dispute that the proposed HCA activity will be conducted in conjunction with the *SPS* deployment, which is an authorized U.S. military operation as defined by DoDI 2205.02. Specifically, the proposed project will occur during USNS *Comfort's* port visit to Porto Nuevo, Orange, and will supplement the primary *SPS* mission of supporting USSOUTHCOM theater security cooperation objectives by increasing maritime security and cooperation with partner nations in the USSOUTHCOM AOR.

Question 3 - Will the HCA activity promote the security interests of both the U.S. and the host nation?

The "Justification" section of the OHASIS HCA project proposal form should contain the factual bases for how the project will promote the security of both the United States and Orange. Moreover, the U.S. country team/Mil-Group, U.S. Embassy officials (i.e., defense attaché), and USAID representatives may provide other factual bases to support this requirement.

With respect to the U.S. security interests, the project will increase partner nation capacity by improving the Orange Coast Guard's command and control, maintenance, and medical facilities and will exemplify the U.S. Government's commitment to aiding Orange. Increasing the Orange Coast Guard's capacity benefits the security interests of Orange because the Coast Guard conducts maritime law enforcement, security, and search and rescue activities for the benefit of the Orange civilian population.

Question 4 - Will the HCA activity promote the specific operational readiness skills of U.S. Armed Forces?

LCDR Cables emphasized that the proposed construction and repair activities will provide good training for the Navy Seabees, and as such this project will benefit the Seabees' operational readiness skills. The DoDI 2205.02 defines "operational readiness skills" as "skills possessed by military personnel enabling them to contribute effectively to the capability of their unit and/or formation, ship, weapon system, or equipment to perform the missions or functions for which it was organized or designed." In this case, the U.S. Navy Seabees' occupational specialty is military construction. The HCA project to provide construction and repair services to the Orange Coast Guard is relevant to the Seabees' occupational specialty.

Question 5 - Will the HCA activity serve the basic economic and social needs of the people?

This proposed HCA project can serve the basic economic and social needs of the people in Orange in various ways. Repairing the Orange Coast Guard's coastal control station and maintenance facility will improve the Coast Guard's capacity to conduct maritime law enforcement, maritime security, and search and rescue activities. Likewise, constructing a new medical facility will increase the Coast Guard's capacity to provide emergent medical care to members of the Orange population who are rescued at sea. The increased capacity to conduct maritime law enforcement and security activities will benefit the people's economic and social needs by deterring maritime crime and ensuring the local sea lines of communication are safe for maritime commerce and tourism. Similarly, increasing the Coast Guard's search and rescue capacity will directly serve the social needs of the people who benefit from their Coast Guard's ability to provide emergent, life-saving maritime search and rescue services and the corresponding medical care.

Question 6 - Will the HCA be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity?

Providing HCA to a military or paramilitary activity was the specific concern raised by LCDR Cables and is a legitimate legal issue in this scenario. Section 401 of Title 10 and the DoD policy guidance do not define the terms “military activity” or “paramilitary activity.” Based on the facts, the Orange Coast Guard is not a “military activity” because it is law enforcement organization under the Orange Ministry of Justice. Whether the Orange Coast Guard is a “paramilitary activity” is a much closer issue that will require a careful factual analysis.

A dispositive factor would be if Orange categorized its Coast Guard as a paramilitary organization. In this regard, it would be useful to obtain confirmation from the U.S. representative to the Orange Ministry of Justice as to whether the Orange Coast Guard is a paramilitary organization under Orange law. In the absence of such confirmation, the information provided by LCDR Jones’s e-mail supports a conclusion that the Orange Coast Guard is a domestic law enforcement activity vice a paramilitary activity. LCDR Jones noted that the Orange Coast Guard “functions as a unit of the Orange National Police” and “operates primarily as a law enforcement agency, with secondary responsibilities in search and rescue.” Because the Orange Coast Guard is a unit of the National Police, it assists the Orange National Police in providing for the public safety and law enforcement in maritime areas subject to Coast Guard jurisdiction. Finally, the Orange Coast Guard appears to be a very unique agency—based on LCDR Jones’s e-mail, it is “one of the few law enforcement organizations in the world to combine water policing and Coast Guard duties while operating as a national policing unit.” Based on these facts, the Orange Coast Guard may be considered a domestic law enforcement activity that serves the Orange civilian population, and would be eligible to receive HCA.

It would also be helpful to determine, with LCDR Cables’s assistance, if USNAVSO or another USSOUTHCOM service component command provided direct HCA to the Orange Coast Guard in the past, and if so, what the findings were concerning the issue of support to a paramilitary activity.

Finally, once all facts have been gathered, you, as the judge advocate reviewing the HCA project proposal, would be wise to consult with your counterpart at higher headquarters, USSOUTHCOM, to discuss these specific issues. Combatant commands have the benefit of being staffed with fiscal law attorneys and HCA subject matter experts who possess a considerable amount of corporate knowledge and a unique perspective from the strategic level of command. Consultation with these experts is necessary when dealing with the challenging or novel issues.

Question 7 - Will the HCA activity complement, and not duplicate, any other form of social or economic assistance provided to the host nation by another U.S. department or agency?

This determination should be based on information provided by appropriate U.S. government officials in the host nation, including members of the DoD country team/Mil-Group, U.S. Embassy officials, and USAID representatives. The information should also be reflected in the OHASIS HCA project proposal form, which receives interagency review during the nomination and approval stages. The U.S. Government Accountability Office (GAO) has focused on the extent to which DoD, DOS, and USAID humanitarian and development assistance efforts overlap.¹⁰² It remains to be seen whether Congress and/or DoD will promulgate more specific guidance in this area.

Question 8 - Has the HCA activity been approved by the Secretary of State?

In this case, Secretary of State’s approval is premature. Because you’re a judge advocate at the service component command level, you should ensure that project approval has been obtained from the U.S. ambassador and/or appropriate U.S. Embassy official in Orange. Record of such approval/coordination is often reflected in the OHASIS HCA project proposal form. If not, you should request assistance from LCDR Cables who can follow up on the issue with his points of contact in the Mil-Group or U.S. Embassy.

¹⁰² See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-359, HUMANITARIAN AND DEVELOPMENT ASSISTANCE: PROJECT EVALUATIONS AND BETTER INFORMATION SHARING NEEDED TO MANAGE THE MILITARY’S EFFORTS 26–41 (2012).

Question 9 - Is this a minimal cost HCA project?

No, this is not a minimal cost HCA project. The estimated total project cost of \$150,000 far exceeds the \$10,000 minimal cost HCA threshold. This project proposal consists of HCA that will be provided directly to the Orange Coast Guard. As a result, military department O&M funds that have been specifically appropriated for the purpose of providing HCA pursuant to 10 U.S.C. § 401 must be used to fund the project, if approved.

For this type of deployment, minimal cost HCA projects could arise on short notice during the actual deployment itself. For example, U.S. medical personnel embarked in USNS *Comfort* may see the need for minor, low-scale HCA projects that benefit the local population (e.g., issue vaccinations to a small group of 12 young children at a local school) while conducting other pre-planned engagement activities in Orange. The minor, low-scale HCA may satisfy minimal cost HCA requirements. In such event, the *Comfort's* medical team must act quickly to nominate the project proposal in OHASIS and receive USSOUTHCOM approval via the chain of command. As the judge advocate at the service component level, you would liaise “down the chain of command” with the Navy judge advocate (O-3) embarked on the *Comfort*, as well as consult “up the chain of command” with the appropriate legal counterpart at USSOUTHCOM.

III. Summary

Normally, reviewing HCA project proposals should present few, if any, challenging or novel legal issues. This example, however, demonstrates that the restrictive conditions imposed by Congress in 10 U.S.C. § 401 could prove challenging in application. In such cases, the judge advocate must have a firm knowledge of § 401's requirements, the applicable DoD HCA policy, and the governing combatant command HCA guidance. The primer and Appendix A's checklist aim to package the requisite information into a single source, thereby enabling the judge advocate to provide competent and informed legal advice to commanders and staffs, and conduct thorough and accurate legal reviews of proposed HCA projects.