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Lore of the Corps

TJAG for a Day and TJAG for Two Days: Brigadier Generals Thomas F. Barr and John W. Clous

Fred L. Borch
Regimental Historian & Archivist

The large poster of drawings and photographs of The Judge Advocate Generals (TJAG) past and present—updated every four years and a ubiquitous presence in virtually all SJA offices—contains the portraits of two Army lawyers who served as TJAG for truly brief periods: Brigadier General (BG) Thomas F. Barr was TJAG for a day and BG John W. Clous for two days. This is the story of these two Soldiers, both of whom finished their military careers with amazingly short tenures as the top uniformed lawyer in the Army.

Born in West Cambridge, Massachusetts, in November 1837, Thomas Francis Barr studied law in Lowell, Massachusetts, and was admitted to the bar of that state in October 1859. Although one might have expected him to have enlisted in the Union Army at the outbreak of the Civil War—as did many men of his generation—Barr instead moved to Washington City (as Washington, D.C. was then called) in 1861 to join the Federal Government as a civil servant.

In October 1864, he resigned his civilian position and briefly engaged in the practice of law as a civilian. In February 1865, however, Barr donned an Army blue uniform for the first time when he accepted a direct appointment as a major and judge advocate.¹

During the next thirty-six years, Barr served in a variety of important assignments. For example, he served as a judge advocate at the court of inquiry that investigated whether Major (MAJ) Marcus A. Reno had been guilty of cowardice at Little Big Horn in June 1876. Assigned as Judge Advocate, Department of Dakota, with duty in St. Paul, Minnesota,² then-MAJ Barr arranged for the appearance of witnesses and otherwise assisted court members at the inquiry, which was held in Chicago, Illinois, in early 1879. The members ultimately concluded that although MAJ Reno had had little respect for Lieutenant Colonel George A. Custer's ability as a Soldier, Reno was no coward. In fact, the court of inquiry cleared MAJ Reno of all wrongdoing at Little Big Horn.³

Although he was a judge advocate and did do legal work (like the Reno inquiry), Barr served over twenty-one years—from 1873 to 1894—in a non-lawyer job as Commissioner of the U.S. Disciplinary Barracks at Ft. Leavenworth, Kansas. Additionally, from 1879 until 1891, then-LTC Barr also served as “Military Secretary” to four different Secretaries of War: Alexander Ramsey, Robert Todd Lincoln (the son of the murdered president), William C. Endicott, and Redfield Proctor. In this capacity, he acted as personal advisor to these men on military matters.⁴

When LTC Barr returned to Washington permanently in 1895, he was promoted to colonel and appointed Assistant Judge Advocate General. On 21 May 1901, Colonel (COL) Barr traded his silver eagles for the stars of a BG and assumed duties as TJAG. The following day, 22 May, he retired. That same day, COL John W. Clous was promoted to BG and assumed duties as TJAG. While COL Clous lasted twice as long as Barr—he served two days as TJAG—he quickly retired as well, on 24 May 1901.

Born in Wurttemberg, Germany in June 1837, John Walter Clous immigrated to the United States as a teenager in 1855. Two years later, then 19-year-old Clous enlisted as a private and musician in Company K, 9th Infantry. He remained with this Regular Army unit until 1860, when then-Sergeant (SGT) Clous transferred to the 6th Infantry. After the Civil War broke out in April 1861, SGT Clous saw considerable combat and received a commission as a second lieutenant in November 1862. He was twice cited for gallant and meritorious service at the Battle of Gettysburg in July 1863 and finished the war as a first lieutenant.⁵

Sometimes called “The Dutchman” by his contemporaries (an epithet often used for those of German descent), Clous remained in the Regular Army after the war ended in 1865. In 1867, he obtained a promotion to captain by transferring to the 38th Infantry, one of the original all-African-American regiments created by Congress in 1866.⁶ Two years later, Clous transferred again, this time to the all-black 24th Infantry. Major Clous subsequently served on the Frontier with that regiment and, during an 1872

¹ JOHN W. LEONARD & ALBERT N. MARQUIS, *WHO'S WHO IN AMERICA*, 1908–1909, at 98 (1908).

² BUREAU OF MILITARY JUSTICE, WAR DEPARTMENT, *A SKETCH OF THE HISTORY AND DUTIES OF THE JUDGE ADVOCATE GENERAL'S DEPARTMENT* 19 (1878).

³ For more on the Reno court of inquiry, see RONALD H. NICHOLS, *IN CUSTER'S SHADOW: MAJOR MARCUS RENO* (1999).

⁴ U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975*, at 92 (1975) [hereinafter *THE ARMY LAWYER*].

⁵ LEONARD & MARQUIS, *supra* note 1, at 366.

⁶ LOUISE BARNETT, *UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL* 70 (2000).

engagement with Native American tribes, Clous was again cited for gallantry in combat.⁷

In 1881, while serving in the Department of Texas, Clous, who had previously studied law, was detailed as the judge advocate in the infamous court-martial of Lieutenant Henry O. Flipper, the first African-American graduate of the U.S. Military Academy. Flipper, who had been the acting commissary officer at Fort Davis, Texas, had been charged with embezzlement and conduct unbecoming an officer and gentlemen arising from a shortage of funds at Fort Davis. Major Clous prosecuted the case but failed to convince the court that Flipper was guilty of the first charge. However, the panel did find that Flipper had committed a crime by concealing the shortage of monies, and this conviction required that he be dismissed from the service. Secretary of War Lincoln and President Chester Arthur subsequently approved the verdict and sentence of the court.⁸

Amazingly, it was not until after the Flipper court-martial, when Clous had twenty-four years of service as a line officer, that he obtained an appointment as a major and judge advocate in 1886.

From 1890 to 1895, Clous served as a professor and the Head of the Law Department at the U.S. Military Academy at West Point. After the Spanish-American War began in 1898, then-COL Clous received an appointment as a brigadier general of Volunteers. He subsequently served on the staff of Major General Nelson A. Miles and as Secretary and Recorder of the Commission for the Evacuation of Cuba.⁹ In 1899, COL Clous was back in Washington, D.C.—he had relinquished his appointment as a volunteer general officer—and was serving as Deputy Judge Advocate General when he was promoted to TJAG.

What explains the amazingly short tenures of Barr and Clous as TJAG? It all resulted from Secretary of War Elihu Root's decision to give old Civil War veterans a "farewell present of the next higher rank," provided they promised to retire the next day.¹⁰ Barr and Clous were selected for this honor. This explains why Barr served a day as TJAG, and, while it does not explain why Clous managed to serve twice as long, both men did honor their promises to retire shortly after reaching general officer rank.

The practice of allowing Civil War veterans to be promoted to the next higher rank was not restricted to the Judge Advocate General Department. Various other departments of the Army General Staff also implemented Root's idea. Consequently, the list of retired generals became so long that Congress passed legislation in 1906 prohibiting the practice.¹¹

The extraordinarily brief service of BG Barr and BG Clous as TJAG has earned them a unique place in our Regimental history as two individuals who were almost literally "king-for-a-day."

*More historical information can be found at
The Judge Advocate General's Corps
Regimental History Website*

*Dedicated to the brave men and women who have served
our Corps with honor, dedication, and distinction.*

<https://www.jagcnet.army.mil/8525736A005BE1BE>

⁷ THE ARMY LAWYER, *supra* note 4, at 92.

⁸ For more on the Flipper court-martial, see CHARLES M. ROBINSON, THE COURT MARTIAL OF LIEUTENANT HENRY FLIPPER (1994).

⁹ LEONARD & MARQUIS, *supra* note 1, at 366.

¹⁰ THE ARMY LAWYER, *supra* note 4, at 92.

¹¹ *Id.*

An Introduction to the Disposal of DoD Property

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In the 2010 State of the Union Address, President Obama stated that “[the Department of Defense] will have all of our combat troops *out of Iraq by the end of August [2010].*”¹ The mission to retrograde, or redeploy, Department of Defense (DoD) combat units from Iraq² by August 2010 led to a flurry of planning at all levels of command. One of the most challenging implied tasks generated from the President’s retrograde order is the proper disposal of DoD property located in Iraq.³ The DoD property that requires disposal includes not only property that is currently owned and managed by DoD units in theater, but also property that is owned by DoD but managed by DoD contractors in theater, like the Logistics Civil Augmentation Program (LOGCAP).⁴ Under LOGCAP, for example, DoD must dispose of 3.1 million pieces of equipment worth over \$3.3 billion in Iraq alone.⁵ As a result, the disposal of DoD property presents a monumental task for all units retrograding from Iraq, and their advising judge advocates (JA), in a constrained timeline. The fact that most JAs have a limited understanding of the legal framework for the disposal of DoD property complicates this monumental task further.

The two articles that follow—*Herding Cats I: Disposal of DoD Real Property and Contractor Inventory in Contingency Operations*, by Captain Lyndsey Olson,⁶ and *Herding Cats II: Disposal of DoD Personal Property*, by Major Kathryn Navin⁷—seek to provide JAs with the legal framework related to the disposal of all DoD property overseas. Captain Olson created, and Major Navin adopted, the metaphor of “herding cats” to describe the legal

framework of property disposal. In effect, each disposal mechanism is like an “unruly cat” that JAs must fully understand, and simultaneously employ, in order to successfully execute the disposal of property mission in Iraq. To fully understand the disposal of property legal framework, JAs must read and understand both of the articles, since each focuses on different aspects of the disposal of property and their respective disposal mechanisms.

The availability of a property disposal mechanism ultimately depends on the classification of property. Department of Defense property overseas may be classified in one of three ways: (1) DoD real property, (2) DoD personal property, and (3) DoD contractor inventory (property owned by DoD but used by a contractor to execute its contract).⁸ The chart on the following page summarizes the major property classifications and their sub-classifications.⁹

Ultimately, the classification of property determines the proper disposal mechanism. The different property disposal mechanisms include Foreign Excess Real Property (FERP) disposal,¹⁰ or Contractor Inventory disposal,¹¹ which Captain Olson addresses in *Herding Cats I*. They also include Defense Reutilization and Marketing Service (DRMS) disposal,¹² Foreign Excess Personal Property (FEPP) disposal,¹³ and the disposal of military-type property by transfer to the Government of Iraq (GoI) or the Government of the Islamic Republic of Afghanistan (GIROA),¹⁴ which Major Navin addresses in *Herding Cats II*.

Together, the two articles provide a full understanding of the law and policy related to disposal of property in one location, providing an invaluable tool for deployed JAs advising their units and commanders on disposal of property matters. The Department hopes that they assist deployed JAs to provide technically competent legal advice to units retrograding—and disposing of property—in Iraq and Afghanistan.

¹ President Barack Obama, State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (emphasis added); see also Captain Lyndsey MD Olson, *Herding Cats I: Disposal of DoD Real Property and Contractor Inventory in Contingency Operations*, ARMY LAW., Apr. 2010, at 5.

² For a full discussion of retrograde, see Olson, *supra* note 1, at 5; see also Kathryn M. Navin, *Herding Cats II: Disposal of DoD Personal Property*, ARMY LAW., Apr. 2010, at 27.

³ Although the current focus of retrograde operations is Iraq, DoD will also retrograde from Afghanistan at a future point in time. The law governing the disposal of property is currently the same in Iraq and Afghanistan, and will apply in a similar manner in Afghanistan when we begin to retrograde from Afghanistan.

⁴ See Olson, *supra* note 1, at 13.

⁵ *Id.* at 1, 13.

⁶ *Id.*

⁷ Navin, *supra* note 2, at 26.

⁸ Olson, *supra* note 1, at 8.

⁹ See Olson, *supra* note 1, app. B; see also Navin, *supra* note 2, app. A.

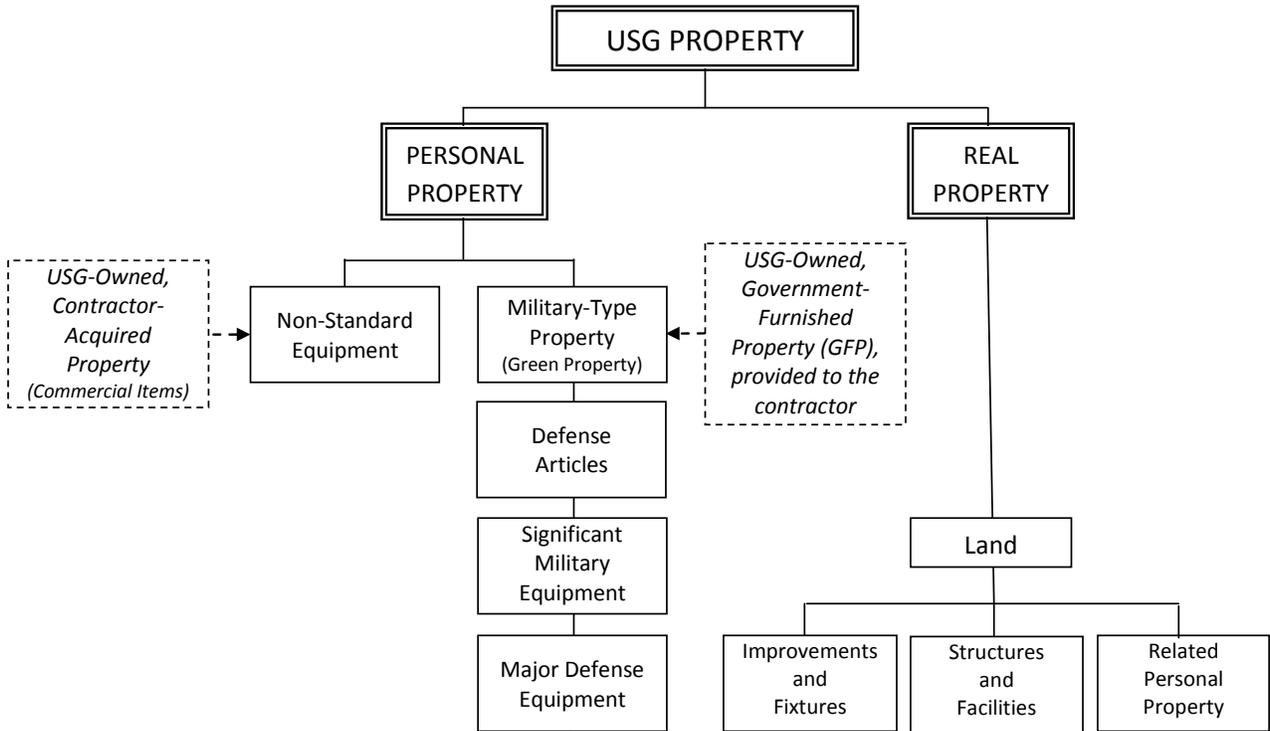
¹⁰ Olson, *supra* note 1, at 8–12.

¹¹ *Id.* at 12–15.

¹² Navin, *supra* note 2, at 21–29.

¹³ *Id.* at 33–37.

¹⁴ *Id.* at 37–38.



Herding Cats I: Disposal of DoD Real Property and Contractor Inventory in Contingency Operations

Captain Lyndsey MD Olson*

“The drawdown of U.S. forces in Iraq risks enormous waste, which could range from completion of work that may not need to be done, to poorly controlled handling and disposition of U.S. government property.”¹

I. Introduction

During his 2010 State of the Union address, President Obama stated, “I promised that I would end this war, and that is what I am doing as President. We will have all of our combat troops out of Iraq by the end of August [2010].”² Additionally, all U.S. forces³ will be completely withdrawn from Iraq by 31 December 2011.⁴ The drawdown of forces includes retrograde⁵ of over 3.3 million pieces of equipment

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¹ COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN 46 (June 2009) [hereinafter AT WHAT COST?].

² President Barack Obama, State of the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

³ United States forces includes “the entity comprising the members of the United States Armed Forces, their associated civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Iraq.” Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.–Iraq, Nov. 17, 2008, available at http://www.usf-iraq.com/images/CGs_Messages/security_agreement.pdf [hereinafter Iraq Security Agreement].

⁴ *Id.* at 24.

⁵ Under Field Manual 3.0, retrograde is a defensive maneuver involving moving away from the enemy. U.S. DEP’T OF THE ARMY, FIELD MANUAL 3.0, OPERATIONS para. 3-59 (Feb. 2008) [hereinafter FM 3.0]. The DoD has used this term in concert with “reposture operations” which is a non-doctrinal term defined by MNF–I as “the realignment of forces, basing and resources to adjust to changes in the operating environment”. MNF–I FRAGO 08-22, ANNEX E, LOGISTICS REPOSTURE GUIDANCE (28 May 2008). Part of the DoD’s reposturing plan is redeployment. A related term to redeployment is retrograde. The terms for retrograde personnel, movement, and operation are not being used in the doctrinal sense.

As of May 2008 there was no agreed upon definition for retrograde as it applies to reposture planning. However, according to some of the proposed definitions, the term generally refers to the evacuation of materiel and equipment from Iraq. Moreover, [GAO] analysis of DoD documents indicates that the terms “retrograde” and “redeployment” are often used interchangeably.”

U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-930, REPORT OPERATION IRAQI FREEDOM 7 (2008) [hereinafter GAO-08-930].

and the transfer of 378 bases.⁶ One of several tangible signs that drawdown, or retrograding, in Iraq had begun was the transfer of Forward Operating Base (FOB) Rustamiyah on 31 March 2009. At the FOB Rustamiyah transfer ceremony, Major General Daniel Bolger, commander of Multi-National Division–Baghdad (MND–B), stated, “All this today was made possible by American, Coalition and Iraqi Soldiers and Police who fought for and protected this ground so it would be ready to transition today. We should never forget that.”⁷ Behind the scenes, a property disposal team and its legal advisors accomplished the transition. Working on the cusp of the base closure movement in Iraq, the team struggled to understand multiple sets of guidance on property disposition.⁸ For example, several window-mounted air conditioners, removed from housing units and sent to different bases, were later recalled and reinstalled into the original housing units for transfer to the Government of Iraq (GOI), due to lack of consistent guidance.⁹ The Rustamiyah closure highlighted several challenges facing U.S. Forces–Iraq (USF–I)¹⁰ in its disposal and base closure efforts.¹¹

In response to the challenges highlighted by the Rustamiyah closure, USF–I took steps to unify effort, clarify guidance, coordinate, and monitor the retrograde of property from Iraq.¹² In conjunction with increased coordination and communication, these efforts resulted in the closure of eighty-three bases Iraq-wide.¹³ Nonetheless, due to the complexity of issues surrounding property disposal,¹⁴ USF–I

⁶ WILLIAM M. SOLIS, PRELIMINARY OBSERVATIONS ON DOD PLANNING FOR THE DRAWDOWN OF U.S. FORCES FROM IRAQ, STATEMENT BEFORE COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN 5–6 (2009).

⁷ Staff Sergeant Mark Burell, *Coalition Forces Transfer FOB Rustamiyah Back to Iraqis*, Apr. 2, 2009, <http://www.army.mil/-news/2009/04/02/19173-coalition-forces-transfer-fob-rustamiyah-back-to-iraqis>.

⁸ AT WHAT COST, *supra* note 1, at 50.

⁹ *Id.*

¹⁰ Multi-National Force–Iraq became U.S. Forces–Iraq on 1 January 2010. See <http://www.usf-iraq.com> (last visited Mar. 5, 2010).

¹¹ *Id.*

¹² SOLIS, *supra* note 6, at 5–6. The Lean Six Sigma office of the Office of the Secretary of Defense conducted projects on logistics optimization. *Id.* In addition, the DoD created the U.S. Army Central Support Element–Iraq (USARCENTSE–I), with a mission to integrate initiatives and guidance from MNF–I, MNC–I, U.S. Army Central (ARCENT), Headquarters, Department of the Army (HQDA), and Army Materiel Command (AMC). *Id.* at 6. The DA also created a Responsible Reset Task Force (RRTF), lead by AMC, to provide disposition instructions for retrograde of Army equipment. *Id.* at 7.

¹³ SOLIS, *supra* note 6, at 8. This number is as of September 2009. *Id.*

¹⁴ Disposal is “the process of redistributing, transferring, donating, selling, demilitarizing, destroying or other “end of life cycle” activities, and is the final stage before the property leaves DoD’s control.” VALERIE BAILEY

faces significant obstacles and challenges for the remaining 295 base closures in Iraq scheduled through 31 December 2011.¹⁵

Property disposal issues persist despite DoD's endeavors to unify its effort and clarify guidance and communication.¹⁶ For example, in May 2009, USF-I sought to transfer the Ibn Sina Hospital to the GOI. The MNF-I's intent was to transfer the hospital as a fully functional medical facility, including various items of existing, essential equipment. Unfortunately, the Army was unable to identify a legal transfer authority for one hundred critical items.¹⁷ In a Government Accountability Office (GAO) study that included examination of the Ibn Sina Hospital transfer, the GAO found that "clarification of authorities to be used for transferring [property] to the GOI will help facilitate decisions on which [property] will be transferred, and will assist in ensuring that DOD will meet its stated timelines [for drawdown]."¹⁸ The failure of the Ibn Sina Hospital transfer indicates that USF-I is still determining the proper disposal authorities and how to apply them in specific circumstances.

The purpose of this primer is to provide judge advocates with the statutory authority, policies, and implementing guidance on real property and "contractor inventory¹⁹ disposal" in contingency operations. This primer focuses on Iraq as a current example to give context to the legal concepts, but the legal authorities discussed in this primer are applicable to future property disposal in Afghanistan and other contingency operations. Section II will classify property found in contingency operations, and then review the legal authorities, policy, instructions, and guidance on disposal of excess²⁰ real property and "contractor inventory disposal."²¹ Part III will address general legal authorities for real property disposal in contingency operations, as well as theater-specific real property disposal authority in Iraq and methods for real property disposal in Afghanistan. Section

GRASSO, CONG. RESEARCH SERV. REPORT, DEFENSE SURPLUS EQUIPMENT DISPOSAL: BACKGROUND INFORMATION, RS20549, at CRS-2 (2007).

¹⁵SOLIS, *supra* note 6, at 8.

¹⁶*Id.* at 18.

¹⁷*Id.*

¹⁸*Id.*

¹⁹ Contractor inventory is contractor-managed government-owned property that is excess to the contract. GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 45.101 (Jan. 2010) [hereinafter FAR]. See also discussion *infra* Part IV.

²⁰ Property becomes excess when the head of the agency controlling the property determines it is not required to meet the agency's needs or responsibilities. This term is not interchangeable with surplus property. 40 U.S.C. § 102(3) (2006).

²¹ This article will only address disposal of DoD personal property in the context of "contractor inventory disposal." For a detailed discussion on disposal of DoD personal property, see Major Kathryn M. Navin, *Herding Cats II: Disposal of DoD Personal Property*, ARMY LAW., Apr. 2010, at 25.

IV will discuss contractor-managed, government-owned property and how to identify, classify, and dispose of contractor inventory.

II. Classification of Property and Legal Authorities for Property Disposal in Contingency Operations

The U.S. Constitution provides Congress with the power to determine the disposal of all U.S. Government (USG) property.²² Article IV, Section 3, Clause 2 of the Constitution states that Congress shall, "dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States."²³ Congress subsequently codified the process for USG property disposal in title 40, subtitle I, Public Buildings, Property and Works, of the U.S. Code (U.S.C.).²⁴

A. General Disposal Authorities for DoD Foreign Property

The controlling statutory authority for disposal of DoD property is subtitle I of title 40.²⁵ Title 40 codifies the authority of the USG to procure property and services, use available property, dispose of surplus property,²⁶ and establish record keeping requirements for government property.²⁷ Title 40 broadly defines property as any government interest in property, with a few enumerated exclusions.²⁸

Title 40 also establishes the General Services Administration (GSA) as the basic property acquisition and disposal agency for the USG.²⁹ In 1972, GSA delegated its authority for disposal of DoD property worldwide (both real and personal) to the Secretary of Defense.³⁰ The Secretary of Defense re-delegated the disposal authority for personal

²² U.S. CONST. art IV, § 3, cl. 2.

²³ *Id.*

²⁴ See generally 40 U.S.C. §§ 101–1308 (2006).

²⁵ *Id.*

²⁶ *Id.* § 102 (title 40 defines surplus property as property that is not needed by any branch of the USG).

²⁷ See generally 40 U.S.C. §§ 101–1308 (2006). The Federal Property and Administrative Services Act of 1949 is substantially recodified by subtitle I of title 40, with the exception of title III of the Act, which remains codified at 41 U.S.C. §§ 251–266. See 40 U.S.C. § 111. See also H.R. REP. NO. 107-479, Pub. L. No. 107-217 (codified as amended at 40 U.S.C. §§ 101–1308 (2006)) (discussing the recodification of existing law to consolidate related provisions).

²⁸ 40 U.S.C. § 102(9). Exceptions to the term "property" include public domain, national forests and parks, minerals in land or land reserved for disposition under land mining laws, land withdrawn or reserved from the public domain, naval battleships, cruisers, aircraft carriers, destroyers, or submarines, and records of the Government. *Id.*

²⁹ *Id.* § 301.

³⁰ GRASSO, *supra* note 14, at 2.

property to the Defense Logistics Agency (DLA), which subsequently re-delegated the disposal authority to one of its subordinate elements, the Defense Reutilization and Marketing Service (DRMS).³¹ Title 40 requires that executive agencies dispose of property in accordance with delegated authority.³² Further, agencies will reassign property to another need within the agency, transfer excess to other federal agencies, and obtain excess from other federal agencies when possible.³³

Normally, government property must be surplus for disposal outside of the USG.³⁴ Chapter 7 of title 40, however, allows disposal of “foreign excess property” (excess to an agency, but not surplus to the government).³⁵

Excess property located in foreign countries has far less potential for general Government use than property physically located within the borders of the United States. In our government, the armed services are the only substantial users of property in foreign countries. Further, the costs of transporting foreign excess property back to the United States and rehabilitating it would, in most cases, equal or exceed its value for use by civilian agency here, and, most importantly, the disposal of foreign excess property to foreign governments has proved in the past, and should continue to prove in the future, an effective instrument for aiding our foreign policy.³⁶

“Foreign excess property” is excess property (both real and personal) located in foreign countries, including property that is part of contingency operations.³⁷ Chapter 7 specifically authorizes disposal of “foreign excess property”

using authority distinct and separate from DRMS property disposal authority.³⁸

Chapter 7 grants “foreign excess property” disposal authority to the head of each executive agency.³⁹ Thus, title 40, chapter 7 grants the authority to dispose of “foreign excess property” belonging to the DoD, to the Secretary of Defense.⁴⁰ The Secretary of Defense may dispose of “foreign excess property” “in a manner that conforms to the foreign policy of the United States”⁴¹ and following policy guidance prescribed by the President.⁴²

Section 7 authorizes several means of disposal. When return of foreign excess property to the United States is in the interest of the USG, the property may also be returned to the United States for handling as “excess”⁴³ or “surplus”⁴⁴ property.⁴⁵ Authorized methods of disposal for “foreign excess property” also include sale, exchange, lease, or transfer.⁴⁶ Further, the Secretary of Defense may exchange foreign property for foreign currency or credit, or substantial benefits.⁴⁷ Additionally, DoD may donate medical materials to foreign countries without cost to the donee under certain

³⁸ 40 U.S.C. §§ 701–705; *see also supra* note 29. *See generally* Navin, *supra* note 21.

³⁹ *Id.* §701(b).

⁴⁰ *Id.* § 701. The Secretary of Defense may delegate and re-delegate this authority. *Id.* § 701(b)(3).

⁴¹ *Id.* § 701(b)(2)(B).

⁴² *Id.* § 701(b)(2)(A). The President has issued one Executive Order prescribing USG real property policy, which states in relevant part,

It is the policy of the United States to promote the efficient and economical use of America’s real property assets and to assure management accountability for implementing Federal real property management reforms. Based on this policy, executive branch departments and agencies shall recognize the importance of real property resources through increased management attention, the establishment of clear goals and objectives, improved policies and levels of accountability, and other appropriate action.

Exec. Order No. 13,325, 3 C.F.R. 5897, sec. 1 (2004). This policy does not supersede any existing authority under law. *Id.* sec. 2.b.

⁴³ 40 U.S.C. § 102(3). Excess property is property in the control of a federal agency that no longer meets the needs of the agency. *Id.*

⁴⁴ *Id.* § 102(10). Surplus property is property determined by GSA not to meet requirements of any federal agencies. *Id.*

⁴⁵ *Id.* § 702 (a). *See also* GENERAL SERVICES ADMINISTRATION FEDERAL MANAGEMENT REGULATION—FOREIGN EXCESS PROPERTY § 102-36.380–400 (Aug. 18, 1997).

⁴⁶ 40 U.S.C. § 704(b)(1). Disposal under this section is for cash, credit, or other property as determined by the Secretary of Defense. *Id.*

⁴⁷ *Id.* § 704(b)(2). *See, e.g.,* Memorandum from Deputy Under Secretary of Defense for Logistics and Materiel Readiness, to Chairman of the Joint Chiefs of Staff and Commanding General, Multi-National Forces–Iraq, subject: Authority to Transfer U.S. Property in Iraq (6 June 2008) (interpreting substantial benefits as intangible mission benefits).

³¹ 40 U.S.C. § 121(d); *see also id.* § 501(a)(2).

³² *Id.* § 524(a)(5).

³³ *Id.* § 524(b).

³⁴ *See* 40 U.S.C. §§ 545, 524; *see also* U.S. DEP’T OF DEF., INSTR. 4160.14, DEFENSE REUTILIZATION AND MARKETING SERVICE (11 Sept. 2009) [hereinafter DoDI 4160.114]. The four priority levels for disposal, in order are (1) Reutilization: property is requisitioned through DRMS to another DoD component; (2) Transfer: property turned in to DRMS that is no longer needed by DoD, but can be used by another USG agency and thus, transferred to that agency; (3) Donation: property that is not needed by any part of the USG, DRMS may donate the property to approved state governments and organizations; (4) Sales: if no Federal or State government need for the property exists, DRMS may sell property through government auction to U.S. persons or entities. *Id.* at S2C5-4. *See generally* Navin, *supra* note 21;

³⁵ *See* 40 U.S.C. §§ 701–05.

³⁶ To The Secretary of the Navy, B-13826442, 42 Comp. Gen. 21 (1962).

³⁷ 40 U.S.C. § 102(6).

conditions.⁴⁸ The Department of Defense may abandon or destroy property it is unable to dispose of by any other authorized method.⁴⁹

The authorities to dispose of property under title 40 are generally in addition to other affirmative legal authorities.⁵⁰ Furthermore, nothing in subtitle I affects the authority of an executive agency to conduct other authorized programs for resale, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation.⁵¹ Nonetheless, any agency conducting these programs must endeavor to conduct its operations with the requirements in subtitle I to the maximum extent practicable.⁵² Ensuring compliance to authorized statutory “foreign excess property” disposal methods begins with classification of property.

B. Classification of DoD Property in Contingency Operations

Classifying property is the first step in determining how to dispose of property, because the property classification determines the disposal process.⁵³ Incorrectly identifying or imprecisely defining property quickly leads to confusion and the use of erroneous disposal processes.

In general, two broad classifications of DoD property exist: “real property”⁵⁴ and “personal property.”⁵⁵ Real property includes land, structures and facilities, “improvements,”⁵⁶ “fixtures,”⁵⁷ and “related personal

⁴⁸ 40 U.S.C. § 703. The USG medical material donation must be for use in a foreign country but otherwise eligible for transfer under title 40, chapter 5. Donation must be made to a non-profit or health organization that is qualified to receive such supplies under section 214(b) or 607 of the Foreign Assistance Act of 1961, and without cost to donee. *Id.* § 703(c).

⁴⁹ *Id.* § 52; *see also id.* § 701(b)(3).

⁵⁰ *Id.* § 113(a).

⁵¹ *Id.* § 113(e)(2).

⁵² *Id.*

⁵³ *See* Navin, *supra* note 21 (discussing disposal of USG personal property).

⁵⁴ *See* real property definition *infra* Part II.D.

⁵⁵ Personal property is “property of any kind or any interest except real property and records of the Federal Government” U.S. DEP’T OF DEF., DoD 4160.21-M, DEFENSE MATERIEL DISPOSITION MANUAL, at xxix (19 Aug. 1997) [hereinafter DoD 4160.21-M]. Title 40 does not define the term “personal property.” *See generally* 40 U.S.C. § 102. It is a regulatory term from U.S. General Services Administration (GSA), used by DoD to distinguish real property from personal property. DoD 4160.21-M, *supra*, at xxiii, xxx.

⁵⁶ An improvement is an addition or betterment to land amounting to more than repair or replacement and costing labor or capital. U.S. DEP’T OF THE ARMY, REG. 408-80, MANAGEMENT OF TITLE AND GRANTING USE OF REAL PROPERTY glossary (10 Oct. 1997).

⁵⁷ A fixture is an item that was personal property affixed to, or is otherwise adapted to, real property, which loses its character as personal property and becomes a part of the real property. 35A AM. JUR. 2D *Fixtures* § 1 (2010).

property.”⁵⁸ Personal property is either “military-type property”⁵⁹ or “non-standard equipment.”⁶⁰ Contractor-managed, government-owned property is a subcategory of both military-type property and non-standard equipment managed pursuant to a contract.⁶¹ Contractor-managed, government-owned property includes both contractor-acquired property and government-furnished property.⁶² The property classification matrix at appendix B provides an overview of the various property categories and describes how each category relates to a broader picture of government property disposal.⁶³

III. Disposal of Real Property in Overseas Contingency Operations

Generally, the DoD does not purchase foreign land for its use.⁶⁴ “No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law.”⁶⁵ Real property is any interest in land, together with the improvements, structures, and fixtures on the land.⁶⁶ Real property also includes U.S.-owned structures and facilities affixed to the land, even when the United States does not own the land itself.⁶⁷ Additionally, until separated, plants and other natural

⁵⁸ Related personal property is an integral part of real property specially adapted to the real property, the removal of which would significantly diminish the economic value of the real property. 41 C.F.R. § 102.71-20 (2005).

⁵⁹ Personal property of the types that are unique and peculiar to DoD and that have limited commercial application. DoD 4160.21-M-1, *supra* note 55, app. 2.

⁶⁰ Non-standard equipment are commercially procured items requiring property book accounting. Chief Warrant Officer David A. Dickson, *Centralization of Cataloging Procedures for Non-Standard Material*, 38 ARMY LOGISTICIAN, Issue No. 1, Jan./Feb. 2006.

⁶¹ *See* discussion *infra* Part III.

⁶² *See id.*

⁶³ *See infra* app. B (Property Classification Matrix).

⁶⁴ Title 10 U.S.C. § 2675 (2006).

⁶⁵ U.S. DEP’T OF ARMY, REG. 405-10, ACQUISITION OF REAL PROPERTY AND INTERESTS THEREIN para. 1-3 (17 May 1970) [hereinafter AR 405-10]. Because AR 405-10 has not been updated since 1970, it does not correctly cite the DoD directives that it implements. *Id.* para. 1-1. DoD Directives 4165.12 and 4165.16 are no longer in effect. DoD Directive 4165.6 was superceded by DoD Directive 4165.06 in 2004. U.S. DEP’T OF DEF., DIR. 4165.06, REAL PROPERTY (13 Oct. 2004) [hereinafter DoDD 4165.06], available at <http://www.dtic.mil/whs/directives/corres/dir.html>.

⁶⁶ 41 C.F.R. § 102.71-20 (2005); *see also* DoD 4160.21-M, *supra* note 55, at xxx. Real property is also included by negative definition. 40 U.S.C. § 102(9) (2006). The exclusions from the general property definition in title 40 match the real property exclusions in 41 C.F.R. § 102.71-20. 41 C.F.R. § 102.71-20(1)(i-iv). Crops are also excluded from the definition of real property if designated by a government agency for severance or removal from the land. 41 C.F.R. § 102.71-2(1)(v). *See infra* app. A.

⁶⁷ *Id.* § 102.71-20(2)

resources remain a part of the land.⁶⁸ Thus, real property acquired overseas during contingency operations usually includes installed building equipment,⁶⁹ improvements to the land, fixtures, and related personal property. Department of Defense foreign real property that is no longer required for current or planned defense requirements is disposed of.⁷⁰ Any foreign excess real property (FERP) of the DoD in a contingency operation is disposed of under the title 40 authority for FERP.⁷¹ Authorities under this title generally require sale, exchange, lease, or transfer of the property for monetary or other substantial benefit.⁷²

Authority for use of foreign land for military purposes may be through lease or consent of a foreign government, which normally takes the form of an international agreement.⁷³ Principal authority for use of real property in contingency operations resides in the lease authority of title 10, section 2675.⁷⁴ This succinct statute allows the secretary of a military department to lease real property in foreign countries needed for military purposes;⁷⁵ such leases may be for a period of up to ten years.⁷⁶ No matter what the authority for use of foreign land, the disposal authority for FERP remains the same.⁷⁷

The Secretary of Defense's title 40 authority to dispose of foreign excess property also applies to all FERP.⁷⁸ When

⁶⁸ See *id.* § 102.71-20(1)(v)(2) and (3). Examples include crops, timber, gravel, sand, and stone. *Id.*

⁶⁹ Installed building equipment is "equipment and furnishings required to make the facility usable and attached as a permanent part of the structure." U.S. DEP'T OF ARMY, REG. 405-90, DISPOSAL OF REAL ESTATE glossary, sec. II (10 May 1985) [hereinafter AR 405-90].

⁷⁰ DoDD 4165.06, *supra* note 65, para. 4.5.

⁷¹ See *supra* Part II.

⁷² 40 U.S.C. 704(b) (2006).

⁷³ See 10 U.S.C. § 2675 (2006). See generally R. CHUCK MASON, CONG. RESEARCH SERV. REPORT, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED?, RL34531, at 1 (June 18, 2009).

⁷⁴ Telephone Interview with Mr. Dominic Frinzi, Attorney, Headquarters, U.S. Army Corps of Eng'rs (USACE), Office of the Chief Counsel, to author (Nov. 15, 2009) [hereinafter Telephone Interview USACE].

⁷⁵ 10 U.S.C. § 2675(a).

⁷⁶ *Id.* § 2675(b). Note that a reading of AR 405-10, para. 3-3, should not be read as a limitation on the statutory ten-year limit since this regulation predates the addition of the ten-year limit to 10 U.S.C. § 2675(b). Phone Interview USACE, *supra* note 74.

⁷⁷ See *supra* Part II. With the exception of contractor inventory installed into structures not owned by the USG and, in certain circumstances, relocatable buildings, real property is not disposed of using disposal mechanisms for personal property. See *infra* Part IV.

⁷⁸ 40 U.S.C. §121(d). This primer addresses only real property disposal in contingency operations. Base closure law for permanent basing is beyond the scope of this primer. Permanent basing is "associated with long-term strategic force stationing . . . [and] is dictated by the guidance published by the Secretary of Defense in the Global Defense Posture (GDP). U.S. CENTRAL COMMAND, REG. 415-1, CONSTRUCTION AND BASE CAMP DEVELOPMENT IN THE USCENTCOM AREA OF RESPONSIBILITY (AOR)

DoD ceases contingency operations in the area and no longer needs the property for use, the property becomes excess by definition.⁷⁹ The Secretary of Defense delegated responsibility for DoD excess real property disposal to the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L)).⁸⁰ Department of Defense policy states that "acquisition, management, and disposal of real property within DoD is a function of the Military Departments acting on behalf of the Department of Defense, subject to such specific exceptions established by law or direction of the [Secretary of Defense]."⁸¹ Foreign excess real property is one of these specific exceptions. The Secretary of Defense specifically delegates real property disposal authority vested in DoD under federal statutes, national defense authorization acts, DoD appropriation acts, and executive orders to the USD (AT&L).⁸² No further re-delegation from the USD (AT&L) exists.⁸³ The administrative function of FERP disposal, which belongs to the military departments, should not be confused with the legal authority to authorize FERP disposal, which belongs to the USD (AT&L).

Army Regulation (AR) 405-90 discusses disposal of foreign real estate under the control of the Department of the Army.⁸⁴ The Department of the Army, Office of the Chief of Engineers, approves recommendations to declare Army real property excess.⁸⁵ However, the USD (AT&L) retains authority to dispose of property, absent specific further delegation.⁸⁶ The Army Chief of Engineers supervises disposal of real estate in foreign countries, issues instructions, and approves major command (ACOM) regulations.⁸⁷ Methods of disposal authorized under AR 405-90 by the ACOM include transfer to another military department, transfer to other federal agencies, sale,

"THE SAND BOOK" paras. 3-1, 3-2 (17 Dec. 2007) [hereinafter USCENTCOM REG. 415-1].

⁷⁹ See *supra* note 19. Property becomes excess when the head of the agency controlling the property determines it is not required to meet the agency's needs or responsibilities. This term is not interchangeable with surplus property. 40 U.S.C. § 102(3).

⁸⁰ DoDD 4165.06, *supra* note 65, para. 5.1.

⁸¹ *Id.* para. 4.1.

⁸² *Id.* para. 5.1.3

⁸³ Telephone Interview with Mr. Robert K. Uhrich, Assoc. Dir. for Real Estate, Basing Directorate, Office of the Deputy Under Sec'y of Def. (Installations and Env't), and Ms. Nicole Bayert, DoD Assoc. Gen. Counsel (Installations and Env't) (Mar. 2, 2010) [hereinafter Uhrich & Bayert Telephone Interview].

⁸⁴ U.S. DEP'T OF ARMY, REG. 405-90, DISPOSAL OF REAL PROPERTY ch. 7 (10 May 1985) [hereinafter AR 405-90].

⁸⁵ *Id.* para. 2-1.

⁸⁶ *Id.* The Department of the Army Chief of Engineers is responsible for the developing installations' structures for mobilization and contingency missions. *Id.*

⁸⁷ *Id.* para. 7-2.

abandonment, or donation to non-profit organizations.⁸⁸ The military requires a specific delegation of authority from the USD (AT&L) to dispose of FERP on foreign land, similar to the foreign excess personal property (FEPP) authority.⁸⁹

A. Disposal of FERP in Iraq: The Security Agreement and FERP Disposal Authority in Iraq

The Department of Defense views the bilateral security agreement (SA) between the United States and the Republic of Iraq, which took effect 1 January 2009, as the governing authority for the disposal of real property.⁹⁰ The SA provides that “Iraq owns all buildings, non-relocatable structures, and assemblies connected to the soil that exist on agreed facilities and areas,⁹¹ including those that are used, constructed, altered, or improved by the United States Forces.”⁹² The Office of Installations and Environment (I&E) states that FERP delegation of authority is not needed for Iraq because the SA vests ownership of the real property located in Iraq to the GOL.⁹³

The DoD approach to foreign real property disposal is a novel interpretation of status of forces agreement (SOFA) authority.⁹⁴ Under the U.S. Constitution, the Constitution

⁸⁸ *Id.* para. 7-5.

⁸⁹ DoDD 4165.06, *supra* note 65, para. 5.1.3.3. *See also* Navin, *supra* note 21, at 33 (providing detailed FEPP process and authority).

⁹⁰ Uhrich & Bayert Telephone Interview, *supra* note 83.

⁹¹ Iraq Security Agreement, *supra* note 3. Mr. Ryan Crocker, U.S. Ambassador to Iraq, signed this agreement under the authority of the President of the United States. *Id.* at 18. The SA defines “agreed facilities and areas” as “Iraqi facilities and areas owned by the Government of Iraq that are in use by the United States Forces during the period in which this Agreement is in force.” *Id.*

⁹² *Id.* at 4.

⁹³ E-mail from Robert K. Uhrich, Assoc. Dir. for Real Estate, Basing Directorate, Office of the Deputy Under Sec’y of Def. (Installations and Env’t), to Major Jose Cora, Professor of Contract and Fiscal Law, The Judge Advocate Gen.’s Legal Ctr & Sch., U.S. Army (Feb. 19, 2010 09:12 EST) (on file with author). “Accordingly, the real property is already owned by Iraq. There is no U.S. real property interest to dispose.” *Id.* Further, the USD (AT&L) notes that DoD’s policy on realignment of DoD sites overseas does not apply to foreign real property held in a contingency operation. *Id.* *See also* U.S. DEP’T OF DEF., INSTR. 4165.69, REALIGNMENT OF DOD SITES Overseas (6 Apr. 2005) [hereinafter DoDI 4165.69]. Instead, disposal of FERP “shall be accomplished in accordance with relevant U.S. law, regulations, and international law, including relevant international agreements, applicable property leases, DoD policy, and specific annexes (e.g. Environmental) incorporated into operations plans, operations orders, or similar operational directives.” *Id.* para. 2.3. Counsel for DoD (E&I) reiterates this, stating, “Status of Forces Agreements (SOFA) and leases dictate disposal of foreign real property under the control of the DoD. Under Secretary of Defense (AT&L) does not have discretion to dispose of this property since its disposal is governed by SOFAs.” *Supra* note 93. So, although delegated authority to dispose of FERP by the Secretary of Defense, the USD (AT&L) has not been using this authority for real property disposal in Iraq due to a misunderstanding of the SA’s authority.

⁹⁴ MASON, *supra* note 73, at 1..

itself, U.S. statutes, and treaties are considered the “supreme law of the land.”⁹⁵ The President of the United States has enumerated authority to make treaties, with the consent of two-thirds of the U.S. Senate.⁹⁶ Conversely, Congress has the enumerated authority to dispose of U.S. property.⁹⁷ Under Constitutional authority, Congress delegated the authority to dispose of foreign excess property to the Secretary of Defense.⁹⁸ The Secretary of Defense delegated the authority for disposal of FERP to the USD (AT&L).⁹⁹ A SOFA is an executive agreement generally establishing a framework for the presence of U.S. armed forces in a foreign country.¹⁰⁰ Although, the SA with Iraq contains some provisions common in SOFAs, it is not a SOFA.¹⁰¹ The only SOFA that is also a treaty is the NATO SOFA,¹⁰² and Iraq is not a NATO country.¹⁰³

There appears to be confusion between the legality of an international agreement, and a legal international agreement’s authority as U.S. law in relation to Constitutional and statutory authority. Under the U.S. Constitution, the United States may become a party to an international agreement by two procedures.¹⁰⁴ The first is by treaty; the second is by an international agreement other than a treaty.¹⁰⁵ “[T]he Administration did not submit the [SA] to the Senate for its advice and consent as a treaty, or request statutory authorization for the agreements by Congress.”¹⁰⁶ Thus, the SA is clearly not a treaty. The Administration’s argument for not submitting the SA to Congress seems to have been that “because Congress authorized the President to engage in military operations in Iraq pursuant to appropriations measures, it impliedly authorized the President to enter [into] short-term agreements with Iraq which facilitate these operations.”¹⁰⁷ This implied authorization, if valid, would allow the President to enter into a legal international agreement pursuant to that authority.¹⁰⁸ The President may also enter into international agreements on subjects within his Constitutional authority,

⁹⁵ U.S. CONST. art. VI.

⁹⁶ *Id.* art. II, § 2.

⁹⁷ *Id.* art. IV, § 3.

⁹⁸ 40 U.S.C. §701(a) (2006).

⁹⁹ DoDD 4165.06, *supra* note 65, para. 5.1.3.3.

¹⁰⁰ MASON, *supra* note 73, at 1.

¹⁰¹ *Id.* at 16. *See generally* Trevor A. Rush, *Don’t Call It a SOFA! An Overview of the U.S.-Iraq Security Agreement*, ARMY LAW., May 2009, at 34, 34.

¹⁰² *See* MASON, *supra* note 73, at 2.

¹⁰³ *Id.* at 21.

¹⁰⁴ U.S. DEP’T OF STATE, 11 FOREIGN AFFAIRS MANUAL 2, pt. 720 (2006).

¹⁰⁵ *Id.*

¹⁰⁶ *See* MASON, *supra* note 73, at 16.

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* at 3.

“so long as the agreement is not inconsistent with legislation enacted by Congress in the exercise of its Constitutional authority.”¹⁰⁹ Therefore, the SA is a legal international agreement, but it does not have the authority of U.S. law.¹¹⁰ Further, because property disposal is a constitutionally enumerated congressional authority, an executive agreement concluded by the President cannot delegate disposal authority directly to USF–I, bypassing statutory disposal authority.¹¹¹

Fortunately, disposal of FERP can be easily accomplished through a FERP delegation memo signed by the USD (AT&L), similar to the FEPP delegation memos stemming from the same statutory authority.¹¹² A sample memo is included at appendix D. Taking the simple step of authorizing FERP delegation legitimizes the DoD’s FERP disposal process.

B. Disposal of FERP in Afghanistan: The Future

Eventually, as in Iraq, DoD will face drawdown and base closure in Afghanistan. Currently, the Chief of Real Estate, Afghanistan Engineer District (AED), executes leases in Afghanistan subject to the availability of funds for the leases.¹¹³ The authority to acquire property is derived from the 10 U.S.C. § 2675 lease authority.¹¹⁴ Within this authority are lesser interests, such as licenses and other land use agreements.¹¹⁵ The three means AED is using to acquire property in the Islamic Republic of Afghanistan (IRoA) are leases directly with the IRoA; permits (or licenses) with the forces of the NATO country in control of land made available to ISAF, through an agreement between ISAF and the IRoA; and direct leases with private land owners.¹¹⁶ A fraction of the land occupied by U.S. bases has been leased from the IRoA; however, a larger share of the land used by U.S. bases has been leased from private individuals.¹¹⁷

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See 40 U.S.C. 701(b) (2006) (stating that the head of an executive agency having excess property will dispose of foreign excess property, using Presidential policy and foreign policy as guidance). See also Todd F. Gaziano, *The Use and Abuse of Presidential Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 272 (2001) (discussing the constitutional separation of powers).

¹¹² See *supra* Part II.

¹¹³ Telephone Interview with Mr. Dominic Frinzi, Attorney, Headquarters U.S. Army Corps of Eng’rs Office of Chief Counsel to author (Jan. 29, 2010) [hereinafter Frinzi Interview].

¹¹⁴ E-mail from Mr. Dominic Frinzi, Attorney, Headquarters U.S. Army Corps of Eng’rs Office of Chief Counsel to author (Apr. 15, 2010 09:44 EST) (on file with author) [hereinafter Frinzi e-mail].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Frinzi Interview, *supra* note 113.

Complicating the tracking of leases is the lack of a centralized accountability system for property ownership.¹¹⁸

In anticipation of the eventual withdrawal of U.S. forces from the country, the Chief of Real Estate for AED should begin working with the USD (AT&L) now to coordinate USG property disposal authority that may be implicated in the language of these leases. Some of these leases state that the United States may abandon improvements, structures, or fixtures on the land; or the United States may make monetary arrangements¹¹⁹ with private landowners for disposition of USG real property on leased land.¹²⁰ The section 2675 lease authority of title 10 does not provide an authority to direct disposal of FERP. Lease provisions directing disposal to foreign governments or individuals still require a FERP delegation from the USD (AT&L) to validate the method of disposal pursuant to title 40 statutory authority.¹²¹

The delegation for disposal of FERP must also supplement any international agreement made with IRoA regarding real property disposal. The United States currently has a SOFA with IRoA; however, this SOFA is not a treaty, and neither it nor any supplementary agreement short of a treaty can supplant the title 40 statutory disposal authority.¹²² The draft memo at appendix D serves as an example for delegation.

IV. Contractor Inventory—“White Property”

By 2008, there was approximately \$3.5 billion in “contractor-managed, government-owned” property in Iraq.¹²³ Based on Army reports, the Government

¹¹⁸ *Id.* The AED has been split into two districts—Afghanistan Engineer District North or South (AEN or AES) whose Chief of Real Estate is authorized to execute leases (as well as other land use agreements) pursuant to 10 U.S.C. § 2675, which are necessary to support military contingency operations in the AEN/AES and Central Command Area of Responsibility. The AED accounts for property ownership by private individuals in several ways in accordance with local tribal custom which may use the IRoA court system to adjudicate land ownership, or local councils of elders known as *jirga* or *shura*. *Id.* Valid ownership documents may include documents indicating, gift, sale or transfer that is validated by the IRoA or shura; official purchase documents from an authorized government department; officially registered tax documents; water rights documents; or customary documents prepared before 1975 that are properly witnessed and submitted to a government department before 1978. Frinzi Interview, *supra* note 113.

¹¹⁹ Monetary arrangements are used to compensate for damage done to the property by U.S. Forces. Frinzi E-mail, *supra* note 114. For example, payment to a farmer for lost crops due to grading the land and constructing improvements. *Id.* The improvements would still need to be disposed of as foreign excess property. *Id.*

¹²⁰ Frinzi Interview, *supra* note 113.

¹²¹ See *supra* Part II.

¹²² See *supra* Part II.A.

¹²³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-930, REPORT OPERATION IRAQI FREEDOM 22 (2008) [hereinafter GAO-08-930].

Accountability Office (GAO) estimates that eighty-five percent of contractor inventory will be transferred, sold, or destroyed in Iraq.¹²⁴ “Contractor-managed government-owned property” “incorporate[s] all items which the contractor manages expressly to perform under the contract,”¹²⁵ including “government-furnished property”¹²⁶ and “contractor-acquired property.”¹²⁷ This property is also frequently referred to as “white property.”¹²⁸ “Contractor inventory” is contractor-managed, government-owned property that is excess to the full performance of the contract.¹²⁹ Contractor inventory requires the contractor to identify,¹³⁰ classify,¹³¹ and return the excess property to the Government.¹³² Upon return, the USG may dispose of the

¹²⁴ *Id.* at 27.

¹²⁵ *Id.* at 25.

¹²⁶ Government-furnished property is USG-purchased property that is furnished to a contractor for the performance of the contract. FAR 45.101. Government-furnished property also includes property leased by the USG that is furnished to the contractor for use. *Id.*

¹²⁷ Contractor-acquired property is property to which the USG has title that is purchased, fabricated, or otherwise provided by the contractor for performing a contract. *Id.*

¹²⁸ The term “white property” is non-doctrinal and there is no standard definition. For example, The Report to Congress for the National Defense Authorization Act 2010, section 1234 defined “white property” as all commercial items. See REPORT ON THE TRANSFER OF DEFENSE ARTICLES AND THE PROVISION OF DEFENSE SERVICES TO THE MILITARIES AND SECURITY FORCES OF IRAQ AND AFGHANISTAN, REPORT TO CONGRESS 7 (Apr. 2010). In contrast, the Commission on Wartime Contracting has used the term to reference contractor-managed government-owned property. See AT WHAT COST?, *supra* note 1, at 46. Consequently, only doctrinal terms will be used for clarity.

¹²⁹ *Id.* As defined by the FAR, contractor inventory means

(1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract; (2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g. as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work for the convenience, or at the option of the Government; and (3) Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.

Id.

¹³⁰ *Id.* 52.245-1(f)(iii) requires the contractor to create and maintain records of all Government property under the contract. The SF 1424 Inventory Disposal Report identifies property excess to the contract. *Id.* 45.605. This report also identifies lost, stolen, damaged destroyed or otherwise unaccounted for property. *Id.*

¹³¹ See discussion *infra* Part III.A.

¹³² FAR, *supra* note 19, 52.245-1(j) (“Except as otherwise provided for in [the] contract, the Contractor shall not dispose of Contractor inventory until authorized to do so by the Plant Clearance Officer.”). The Plant Clearance Officer is the Contract Officer’s representative appointed in accordance with agency procedure to manage the screening, redistribution and disposal of contractor inventory for a particular contract. *Id.* 2.101. The term disposal as used in the FAR is not congruent with statutory disposal

property under one of the statutory disposal processes, based on the property classification.

A. Identifying and Classifying Contractor Inventory

Disposal of contractor inventory must begin with an examination of the contract for which the property was furnished or acquired. The Performance Work Statement¹³³ should list the specific, government-furnished property needed for the contract, as well as specific categories of contractor-acquired property reimbursed by the Government.¹³⁴ Next, the contract should be identified as either a firm, fixed-price contract¹³⁵ or a cost-reimbursement contract.¹³⁶ Identification is important because title to contractor-acquired property may vest differently, or not at all, depending on the contract type.¹³⁷

Under firm fixed-price contracts, title to contractor-acquired property only passes to the Government “if the contract contains a provision directing the contractor to purchase material for which the Government will reimburse the contractor as a direct item cost under the contract.”¹³⁸ In cost-reimbursement contracts, “title to all property purchased by the contractor, for which the contractor is entitled to be reimbursed under the contract, passes to the Government.”¹³⁹ In all types of contracts, the Government retains title to government-furnished property until it is “properly disposed of under law or regulation.”¹⁴⁰ Incorporation or attachment of government-furnished property to any property not owned by the Government does not affect government title.¹⁴¹ Generally, personal property affixed to real property loses its identity as personal property, becoming part of the real property.¹⁴² However, government-furnished property attached to real property does not lose its identity as personal property, nor can it

authority. Contractor disposal discussed in the FAR merely means, return of contractor inventory to the USG. See *id.* 45.603, 45.604.

¹³³ See *id.* 37.602. As an alternative, a contract may contain a Statement of Work instead of a Performance Work Statement.

¹³⁴ PowerPoint Presentation, Bridget Stengel, Logistics Civil Augmentation Program (LOGCAP), Feb. 25, 2010 [hereinafter LOGCAP Presentation]. In certain contracts, specific property may be listed by type, location, and even serial number. *Id.*

¹³⁵ See generally FAR, *supra* note 19, subpt. 16.2 (providing detailed information on firm-fixed price contracts).

¹³⁶ See *supra* note 84.

¹³⁷ FAR, *supra* note 19, 52.245-1(e)(2).

¹³⁸ *Id.* 52.245-1(e)(2)(iii). See *id.* 52.245-1(e)(2) (discussing when title vests for Government property under a firm-fixed price contract).

¹³⁹ *Id.* 52.245-1(e)(3)(i). See *id.* 52.245-1(e)(3) (discussing when title vests for Government property under const-reimbursement contracts).

¹⁴⁰ *Id.* 45.401

¹⁴¹ *Id.* 52.245-1(e)(1).

¹⁴² See *supra* note 71.

become a fixture.¹⁴³ This distinction is critical for properly categorizing contractor inventory and identifying legal authority for disposal.

Contractor inventory of the Logistics Civilian Augmentation Program (LOGCAP) accounts for ninety-six percent of the contract inventory in Iraq and Afghanistan.¹⁴⁴ The LOGCAP—an Indefinite Delivery Indefinite Quantity (ID/IQ),¹⁴⁵ cost-reimbursement¹⁴⁶ contract—provides selected services¹⁴⁷ performed by contractors that augment Army forces during wartime or contingency operations.¹⁴⁸ Historically, LOGCAP has supported contingency operations in Somalia, Bosnia, Haiti, East Timor, and Panama, among others.¹⁴⁹ As of 2008, contracts in Iraq comprised seventy-nine percent of LOGCAP, totaling over \$6 billion dollars.¹⁵⁰ \$3.37 billion of the \$3.5 billion in contractor-managed government-owned property in Iraq is property under LOGCAP III and IV task orders.¹⁵¹ As with other government property, proper disposal of contractor inventory depends first on proper classification of the property.¹⁵²

¹⁴³ FAR, *supra* note 19, 52.245-1(e)(1).

¹⁴⁴ LOGCAP Presentation, *supra* note 133.

¹⁴⁵ The ID/IQ contracts allow the Government to order supplies or services on an “as needed” basis during a specific timeframe, without stating a specific quantities or times for delivery in the contract. FAR, *supra* note 19, pt. 16, 16.504 (a). The ID/IQs are used when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services required during the contract period, when a reoccurring need is identified. *Id.* pt. 16, 16.504 (b).

¹⁴⁶ Cost-reimbursement contracts are discussed in FAR 16.3. “Cost-reimbursement contracts provide for payment of allowable incurred costs,” as provided for by contract. *Id.* 16.301-1. The LOGCAP frequently uses cost plus award fee task and delivery orders, 16.305, and cost plus fixed-fee task and delivery orders, *id.* 16.306, for LOGCAP task orders. See LOGCAP Presentation, *supra* note 133.

¹⁴⁷ Examples of service categories generally provided include engineering services, sustainment services, CLASS I-V operations, maintenance, HAZMAT, and air field services. LOGCAP Presentation, *supra* note 133.

¹⁴⁸ *Id.* The first LOGCAP contract ran from 1992–1996. The LOGCAP II ran from 1997–2001. The LOGCAP III, awarded to Kellogg, Brown and Root (KBR), was in effect from 2001–2007. In 2007, the Army moved to LOGCAP IV, which was awarded to three contractors—KBR, DynCorp and Fluor—with requirements competed as task orders. *Id.* Planning and support for LOGCAP III and IV was awarded in a single ID/IQ to Serco, Inc. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ GAO-08-930, *supra* note 123, at 22. Task orders are used to place an order for specific services from the existing ID/IQ contract. FAR, *supra* note 19, 2-101. Under LOGCAP III, 160 task orders were awarded for contingency operations worldwide. Under LOGCAP IV, there are eleven active task orders in Iraq and three pending. LOGCAP Presentation, *supra* note 129. A small percentage of contractor inventory in Iraq is from sources other than LOGCAP. This inventory falls under contracts in four main categories: Air Force Contract Augmentation Program, programs under DoD’s Joint Contracting Command-Iraq/Afghanistan, programs run by the Gulf Region Division of the Army Corps of Engineers, and programs run by other government agencies. GAO-08-930, *supra* note 123, at 26.

¹⁵² See *supra* Part II.A.

A contractor must account for all government property in its possession¹⁵³ and must determine what items are contractor inventory.¹⁵⁴ The contractor must prepare a Contractor Inventory Disposal Schedule on Standard Form (SF) 1428, which is attached with instructions at appendix G.¹⁵⁵ This schedule lists the contractor-acquired property and government-furnished property that is no longer required for performance of the contract.¹⁵⁶ The contractor must also conduct a joint inventory with the Government to ensure the accuracy of the report.¹⁵⁷ The contracting officer’s government representative, whom the Federal Acquisition Regulation (FAR) refers to as the “Plant Clearance Officer,”¹⁵⁸ must review and accept the SF 1428 or must return it for correction within ten days of receipt from the contractor.¹⁵⁹ The contractor must investigate missing or damaged property and report those losses to the Government.¹⁶⁰ If the SF 1428 is accepted, the Government must complete an Inventory Verification Survey on SF 1423 to verify and document the results of the Government’s inspection of the contractor inventory.¹⁶¹ The SF 1423 is located at appendix E. Once properly accounted for, all contractor inventory under the contract must be properly classified for disposal.

Contractor inventory can be classified using appendix B, the Property Classification Matrix, in conjunction with appendix A’s definitions.¹⁶² Classification of contractor inventory in conjunction with its identification is important for three main reasons. First, the contracting officer may require the contractor to demilitarize property prior to shipment or disposal.¹⁶³ Second, early classification of items available for disposal under applicable FEPP authority can avoid needless transportation costs and duplicated efforts. Third, to avoid improper disposal, any government-furnished property attached to real property must be classified as personal property.¹⁶⁴ Upon proper identification and classification of contractor inventory, the Government may consider methods for disposal.

¹⁵³ FAR, *supra* note 19, 52.245-1(f).

¹⁵⁴ *Id.* 52.245-1(f)(x).

¹⁵⁵ *Id.* 52.245-1(j)(3); see also *id.* 45.602-1.

¹⁵⁶ *Id.* 52.245-1(j)(3).

¹⁵⁷ *Id.* 52.245-1(f)(iv).

¹⁵⁸ The plant clearance officer is the contract officer’s representative appointed in accordance with agency procedure to manage the screening, redistribution, and disposal of contractor inventory for a particular contract. *Id.* 2.101.

¹⁵⁹ *Id.* 45.602-1(a).

¹⁶⁰ *Id.* 52.245-1(f)(vi) and (x).

¹⁶¹ *Id.* 45.602-1(b)(1).

¹⁶² See *infra* apps. A, B.

¹⁶³ FAR, *supra* note 19, 52.245-1(j)(8).

¹⁶⁴ *Id.* 52.245-1(e)(1).

B. Methods of Disposal for Contractor Inventory

Upon return of contractor inventory to the management of the Government, several options exist for its disposal or transfer.¹⁶⁵ Contractors may not direct disposal of contractor inventory.¹⁶⁶ “Except as otherwise provided for in [the] contract, the Contractor shall not dispose of Contractor inventory until authorized to do so by the Plant Clearance Officer.”¹⁶⁷ The term “disposal” as used in the FAR is not congruent with title 40 statutory disposal authority. Contractor disposal discussed in the FAR merely means return of contractor inventory to the USG.¹⁶⁸

In general, contractor inventory is disposed of using DRMS,¹⁶⁹ delegated FEPP authority,¹⁷⁰ or other specific authority.¹⁷¹ Under both DRMS and the FAR, reuse within the agency and transfer to another USG agency are DoD’s highest priorities for property.¹⁷² Reuse and transfer are normally limited to a localized area due to transportation cost for property located outside the continental United States (OCONUS).¹⁷³ A primary consideration for contractor inventory is whether another contract in theater needs the property.¹⁷⁴ The Government may authorize

¹⁶⁵ See generally Navin, *supra* note 21.

¹⁶⁶ FAR, *supra* note 19, 52.245-1(j).

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* 45.603, 45.604.

¹⁶⁹ See *supra* Part II.B.

¹⁷⁰ See *supra* Part II.C.

¹⁷¹ See *supra* Part II.

¹⁷² See *supra* Part II. B. See also DoDI 4160.14, *supra* note 34.

Plant clearance officers shall initiate reutilization actions using the highest priority method appropriate for the property. Authorized methods, listed in descending order from highest to lowest priority, are—

(a) Reuse within the agency (see 45.603 for circumstances under which excess personal property may be abandoned, destroyed, or donated);

(b) Transfer of educationally useful equipment, with GSA approval, to other Federal agencies that have expressed a need for the property;

(c) Transfer of educationally useful equipment to schools and nonprofit organizations (see Executive Order 12999, Educational Technology: Ensuring Opportunity For All Children In The Next Century, April 17, 1996), and 15 U.S.C. 3710(i);

(d) Reuse within the Federal Government; and

(e) Donation to an eligible donee designated by GSA.

FAR, *supra* note 19, 45.602-2

¹⁷³ GAO-08-930, *supra* note 123, at 27

¹⁷⁴ LOGCAP Presentation, *supra* note 133. Specifically for LOGCAP contracts, which have very broad performance work statements, it is likely that the same property is needed for performance of a LOGCAP contract. *Id.* Under FAR contract provisions, the contractor may also request to

contractor use of the property on another government contract or direct movement of the property to other contractors in theater.¹⁷⁵ Upon disposal of property identified on the SF 1428 Inventory Disposal Schedule, the Government must prepare an SF 1424 Inventory Disposal Report, located at appendix F, which “must identify any lost, stolen, damaged, destroyed, or otherwise unaccounted for property, and any changes in quantity or value of the property made by the contractor after submission of the initial inventory disposal schedule.”¹⁷⁶ Even though contractor inventory begins as property subject to contract, disposal requires adherence to specific statutory authority, as does disposal of real property.

V. Conclusion

Adequate law and policy exist to facilitate foreign property disposal in contingency operations. Despite this, challenges still exist within USF-I’s condensed property disposal timeline. This primer has identified the controlling legal authorities for proper identification and disposal of FERP and contractor inventory. Identifying the proper legal authorities for disposal provides a framework for the classification of real property and contractor inventory for disposal. The DoD should use the statutory authority delegated to the USD (AT&L) to legalize implementation of the SA’s foreign property disposal provisions. Doing so would involve the drafting of a delegation memo to USF-I for the disposal of FERP as part of FOB closure. Using existing legal authorities for foreign property disposal, and establishing appropriate disposal processes and accountability, conserves U.S. property resources and assists in conducting future operations.

purchase contractor inventory or attempt to return it to the vendor for fair market value. FAR, *supra* note 19, 52.245-1(j)(2). Use of these options results in removal of the property from the inventory disposal schedule. *Id.* 45.602-1.

¹⁷⁵ FAR, *supra* note 19, 34.601-1(c)(1)(iii).

¹⁷⁶ *Id.* 45.605. The report shall be addressed to the administrative contracting officer or, for termination inventory, to the termination contracting officer, with a copy furnished to the property administrator. *Id.*

Appendix A

Definitions

Contingency Operation: A military operation that

(1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10, chapter 15 of Title 10, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Contractor Acquired Property: Property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title.

(FAR Part 45.101)

Contractor Inventory:

- (1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;
- (2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereafter or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option for the Government; and
- (3) Government furnished property that exceeds the amounts needed to complete full performance under the entire contract. (FAR Part 45.101).

Contractor Managed Government Owned Property: A non-doctrinal term used to incorporate all items which the contractor manages expressly to perform under the contract, including items given to the contractor by the Government (government-furnished property), or acquired or fabricated by the contractor to which the Government holds title. (U.S. Government Accountability Office, GAO-08-930, Operation Iraqi Freedom: Actions Needed to Enhance DOD Planning for Reposturing of U.S. Forces from Iraq (2008)).

Defense Article: Generally includes, (1) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war; (2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance; (3) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, re-pair, servicing storage, construction, transportation, operation, or use of any article listed in this subsection; or (4) any component or part of any article listed in this sub-section. (Section 644(d) of the Foreign Assistance Act of 1961).

Excess Defense Article: The quantity of defense articles—other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors—owned by the USG and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations. (Section 644(g) of the Foreign Assistance Act of 1961).

Excess Property: Property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities. This term is not interchangeable with surplus property. (40 U.S.C. § 102(3)).

Foreign Excess Property: Excess property that is not located in the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, or the Virgin Islands.

(40 U.S.C. § 102(6)).

Foreign Excess Personal Property (FEPP): Any U.S.-owned excess personal property located outside the United States, American Samoa, Guam, Puerto Rico, Trust Territory of the Pacific Islands, and the Virgin Islands. (DoD 4160.21-M-1, xxi).

Foreign Excess Real Property (FERP): Any U.S.-owned excess real property located outside the United States, American Samoa, Guam, Puerto Rico, Trust Territory of the Pacific Islands, and the Virgin Islands.

Government-Furnished Property: Property in the possession of, or directly acquired by, the Government and subsequently furnished to a contractor for performance of a contract. (FAR Part 45.101). There are two types of government-furnished property: equipment and material.

- (1) Government-Furnished Equipment: Consists of equipment, special tooling, or special test equipment that is provided to a contractor for use on a government contract that does not lose its identity or become a component part of another article when put into use. (FAR Part 45.101).
- (2) Government-Furnished Material: Property provided by the Government for the performance of a contract that is consumed or expended by the contractor during the performance of a contract, such as component parts of a higher assembly or items that lose their individual identity through incorporation into an end item.

Government Property: All property owned or leased by the Government, including both government-furnished property and contractor-acquired property. (FAR Part 45.101).

Fixture: An item that was personal property affixed to or is otherwise adapted to real property that loses its character as personal property and becomes a part of the real property. (35A Am. Jur. 2d Fixtures § 1(2010)).

Major Defense Equipment: Any item of significant military equipment on the United States Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000. (22 U.S.C. 2794(6). *See also infra* Appendix F).

Military-Type Property (also referred to as "Green Property"): Personal property of the types that are unique and peculiar to DoD and that have limited commercial application. (DoD 4160.21-M-1, Appendix 2)

Non-Standard Equipment: A commercially procured item requiring property book accounting. (Chief Warrant Officer (W-5) David A. Dickson, Centralization of Cataloging Procedures for Non-Standard Material, PB 700-06-01, Army Logician, Vol. 38, Issue 1, Jan./Feb. 2006).

Property: Any Government interest in property, except the public domain; national forest or park lands; land for public land mining or mineral leasing; land withdrawn from public domain not suitable for return to public domain due to changes in character; records of the government; naval battleships, cruisers, aircraft carriers, destroyers, or submarines.

Personal Property: Property of any kind or any interest except real property and records of the Federal Government (DoD 4160.21-M, at xxix).

Real Property:

- (1) Any interest in land, together with the improvements, structures, and fixtures located thereon (including prefabricated movable structures, such as Butler-type storage warehouses and Quonset huts, and house trailers with or without undercarriages), and appurtenances thereto, under the control of any Federal agency, except (i) The public domain; (ii) Lands reserved or dedicated for national forest or national park purposes; (iii) Minerals in lands or portions of lands withdrawn or reserved from the public domain that the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; (iv) Lands withdrawn or reserved from the public domain but not including lands or portions of lands so withdrawn or reserved that the Secretary of the Interior, with the concurrence of the Administrator of General Services, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; and (v) Crops when designated by such agency for disposition by severance and removal from the land.
- (2) Improvements of any kind, structures, and fixtures under the control of any Federal agency when designated by such agency for disposition without the underlying land (including such as may be located on the public domain, on lands withdrawn or reserved from the public domain, on lands reserved or dedicated for national forest or national park

purposes, or on lands that are not owned by the United States) excluding, however, prefabricated movable structures, such as Butler-type storage warehouses and Quonset huts, and house trailers (with or without undercarriages).

- (3) Standing timber and embedded gravel, sand, or stone under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition. (Public Contracts and Property Management, 41 C.F.R. § 102-71-20).

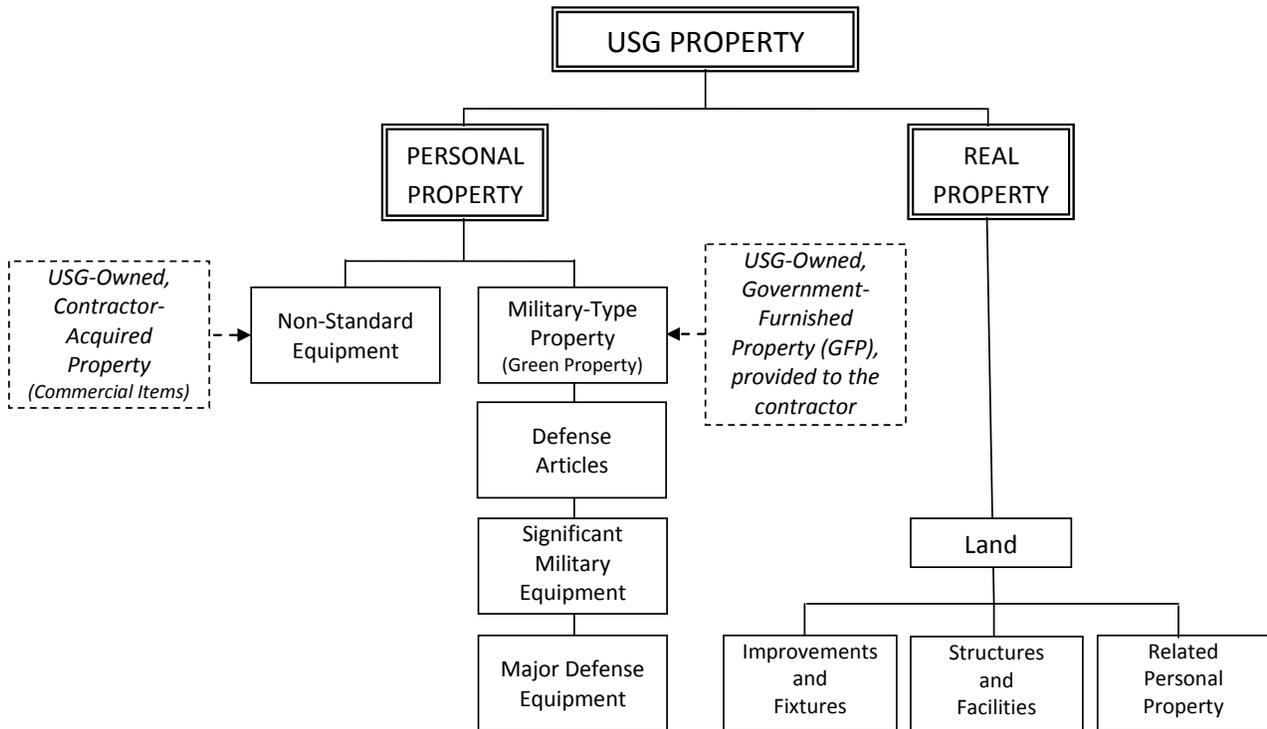
Related Personal Property: Any personal property that is an integral part of real property or is related to, designed for, or specially adapted to the functional or productive capacity of the real property and the removal of which would significantly diminish the economic value of the real property (normally common use items, including but not limited to general-purpose furniture, utensils, office machines, office supplies, or general-purpose vehicles, are not considered to be related personal property). (Public Contracts and Property Management, 41 C.F.R. § 102-71-20).

Significant Military Equipment (SME): Those articles for which special export controls are warranted because of their capacity for substantial military utility or capability. Significant military equipment are those items preceded by an asterisk on the United States Munitions List. (ITAR § 120.7).

Surplus Property: Excess property that the Administrator of General Services determines is not required to meet the needs or responsibilities of all federal agencies. 40 U.S.C. § 102(10).

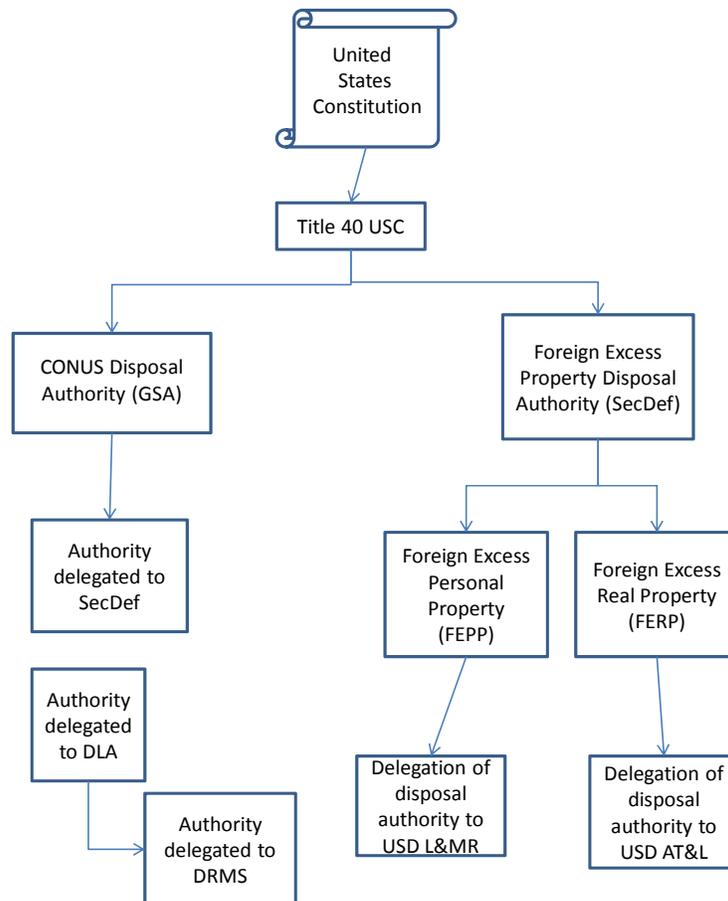
Appendix B

Property Classification Framework



Appendix C

Property Disposal Authority Framework



Appendix D

FERP Delegation Example Memorandum

OFFICE SYMBOL

Date

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF
COMMANDING GENERAL, U.S. FORCES-IRAQ

SUBJECT: Authority to Transfer U.S. Real Property in Iraq

I hereby approve transfers of foreign excess real property (FERP) with an acquisition value of up to \$_____ to any Iraqi Government entity approved by the Department of State in exchange for substantial benefits. Specifically, the USD (AT&L) has found that authorizing the transfers described herein will streamline the retrograde process through coordinating transfer of FERP authority with existing personal property transfer authorities during FOB closures. Authorizing such transfers implements the real property transfer provisions of the Iraqi Security Agreement per 40 U.S.C. § 701(b)(2)(B). Further, authorizing these transfers will substantially benefit the Government's interest in fostering favorable relations between the United States and Iraq at the federal, provincial, and local levels by enhancing institutional development at all levels of the Iraqi government.

Any transfer under this memorandum must be accomplished through a memorandum of understanding or similar document that identifies, at a minimum, the structures and facilities, improvements, fixtures, and related personal property to be transferred, and their estimated acquisition value, as well as ultimate use and disposition.

Use of the authority granted in this memorandum is subject to the conditions specified:

USF-I shall retain a list of items and recipients for property transferred under this authority and a copy shall be provided to _____.

Government-furnished equipment which is attached to real property cannot transfer as part of the transfer of real property. Any such property must be identified prior to transfer and included as part of any contractor inventory in accordance with the requirements of FAR 52-245-1. Coordination with appropriate personal property disposal authorities is required to maximize efficiency of all real property transfers.

I hereby determine, for the reasons set out above, that it is in the interest of the United States that FERP identified in this memorandum be exchanged for substantial benefits, in accordance with 40 U.S.C. § 704(b)(2)(B).

If the acquisition value of the property recommended to be transferred exceeds \$_____, but is otherwise qualified for transfer, a formal request for exception to policy can be submitted separately to the the USD (AT&L) for approval. The request must include the date, quantity, item description, original acquisition value, property value at the time of proposed transfer, transferring unit and recipient.

The POC for this memorandum is _____.

[Insert Signature Block for the USD (AT&L)]

Appendix E

SF 1423 Inventory Verification Survey

INVENTORY VERIFICATION SURVEY (See NARS 49.602-1(D)(1)(B))				DATE			
SECTION I - GENERAL							
1. TRUMP (Include ZIP Code)			2. TO: (Include ZIP Code)				
3. CONTRACT NUMBER AND TYPE			4. CONTRACTOR(S) OR CONTROLLER				
5A. SCHEDULES OF INVENTORY TO BE INSPECTED AND VERIFIED			5B. PLANT CLEARANCE CASE NUMBER/DOWNTIME NUMBER				
REFERENCE NUMBER	PAGE						
	START NO.	END NO.	AMOUNT (\$)				
SECTION II - TECHNICAL VERIFICATION							
6. IS PROPERTY LISTED ON THE INVENTORY DISPOSAL SCHEDULES ON HAND AND IN THE QUANTITIES INDICATED?		YES	NO	7. ARE THE WEIGHTS OF THE ITEMS APPROXIMATELY CORRECT? <small>IF WEIGHTS ARE NOT GIVEN, GIVE ESTIMATE OF WEIGHT BY BASIC MATERIAL CONTENT.</small>		YES	NO
7. IS THE PROPERTY CORRECTLY DESCRIBED ON THE INVENTORY RESPONSE SHEETS?				8. DO THE ITEMS APPEAR TO HAVE COMMERCIAL VALUE OTHER THAN SCRAP?			
8. IS THE PROPERTY SEGREGATED OR ADEQUATELY PROTECTED?				9. DID CONTRACTOR MAKE REASONABLE EFFORTS TO RETURN THE PROPERTY?			
9. IS THE PROPERTY PROPERLY TAGGED?				10. DO ANY ITEMS REQUIRE DEMILITARIZATION OR SPECIAL PACKAGING (explosive items)?			
10. ARE THE CONDITION CODES ACCURATE?				11. ARE COMMON ITEMS INCLUDED ON THE INVENTORY DISPOSAL SCHEDULES?			
11. IS THE PROPERTY CLASSIFICATION CORRECTLY IDENTIFIED?							
SECTION III - TERMINATION INVENTORY							
COMPLETION OF THIS SECTION <input type="checkbox"/> IS <input type="checkbox"/> IS NOT REQUIRED (If requester, check one)							
12. DID WORK STOP PROMPTLY UPON RECEIPT OF THE TERMINATION ORDER?		YES	NO	13a. DOES THE INVENTORY INCLUDE ALL ITEMS AS LISTED IN THE ORDER AND SPECIFIC LINE ITEM ENTRIES. OBTAIN FROM CONTRACTOR ESTIMATE OF COST OF BLUING, REPAIRS OR SPECIFIC LINE ITEM BASIS.		YES	NO
13a. MAKE UP MISSING: _____				13b. HAVE COMPLETED ARTICLES BEEN INSPECTED AS TO QUALITY AND CONFORMANCE TO SPECIFICATIONS?			
13b. DO THE QUANTITIES OF MATERIAL EXCEED THE AMOUNTS THAT WOULD HAVE BEEN REQUIRED TO COMPLETE THE TERMINATION PORTION OF THE CONTRACT?				13c. DO THE COMPLETED ITEMS APPEARED CONFORM TO CONTRACT SPECIFICATIONS?			
13c. CAN THE ITEMS OF TERMINATION INVENTORY BE USED ON THE CONTINUING PORTION OF THE CONTRACT?				13d. DO OTHER THAN COMPLETED ITEMS CONFORM WITH TECHNICAL REQUIREMENTS OF THE CONTRACT OR ORDER?			
14. ARE ALL ITEMS AND AMOUNTS ALLOCABLE TO THE TERMINATION PORTION OF THIS CONTRACT OR ORDER?				14. DID WORK IN PROCESS, IS THE PERCENTAGE OF COMPLETION ACCURATE?			
15. REQUESTING OFFICE REMARKS: <i>(When the answer to any question is placed in a block containing an asterisk (*) detailed comments of the verifier shall be included on the reverse of this form and identified by section and item number.)</i>							
16. SIGNATURE OF REQUESTER							
INVENTORY VERIFICATION							
The above information is based on a physical verification of inventory listed under item 5.							
17. NAME AND TITLE			18. SIGNATURE OF VERIFIER			19. DATE	
APPROVED FOR PUBLIC REPRODUCTION <small>Revisions (edition not available)</small>				STANDARD FORM 1423 REV. 5/2004 <small>Prescribed by GSA FPMR (41 CFR) 101-11.6</small>			

Appendix G

SF 1428 Inventory Disposal Schedule

INSTRUCTIONS

The Contractor shall submit all schedules to the Plant Clearance Officer.

Manual submissions. Prepare a separate schedule for items in each property classification (block 17) and a separate schedule for scrap. Submit an original and 2 copies of each scrap schedule and continuation sheet (SF 1429). For other schedules, an original and 7 copies are required.

Electronic submissions. Group all items of the same property classification. Submit separate schedules for scrap.

General instructions.

BLOCKS 1, 2 & 4. Self-explanatory.

BLOCK 3 - PRIME CONTRACT NO. (For contract modifications and BOAs). If the property applies solely to one contract modification indicate the modification number after the contract number. For task orders and orders under basic ordering agreements, enter the contract number or BOA number followed by the order number under which the property is accountable.

BLOCK 5 - CONTRACT TYPE. Use one of the following codes:

J - Fixed-Price
O - Other
S - Cost-Reimbursement
Y - Time-and-Material
Z - Labor-Hour
9 - Task Order Contracts and Orders under Basic Ordering Agreements (BOAs)

BLOCKS 6 - 8. Self-explanatory.

BLOCKS 9a and 10a - GAGE CODE. Enter the Commercial and Government Entity code when applicable.

BLOCKS 9b-d, 10b-d, and 11a-13. Self-explanatory.

BLOCK 14 - ITEM DESCRIPTION. Describe each item in sufficient detail to permit the Government to determine its appropriate disposition. Scrap may be described as a lot including metal content, estimated weight and estimated acquisition cost. For all other property, provide the information required by FAR 52.245-1 (f)(1)(iii). List the national stock number (NSN) first. For the following, also provide:

Special tooling and special test equipment. Identify each part number with which the item is used.
Computers, components thereof, peripheral and related equipment. The manufacturer's name, model and serial number, and date manufactured.
Work in process. The estimated percentage of completion.
Precious metals. The metal type and estimated weight.
Hazardous material or property contaminated with hazardous material. The type of hazardous material.

Metals in mill product form. The form, shape, treatments, hardness, temper, specification (commercial or Government), and dimensions (thickness, width, and length).

BLOCK 15 - GOVERNMENT FURNISHED/CONTRACTOR ACQUIRED. Per line item, enter one of the following:

GF - Government furnished
CA - Contractor acquired

BLOCK 16 - DML CODE. (Demilitarization code). If applicable, enter the code specified in DoD 4160.21-M-1.

BLOCK 17 - PROPERTY CLASSIFICATION. Use one of the following classifications for each line item:

EQ - Equipment
M - Material
STE - Special test equipment
ST - Special tooling

In addition, when applicable, list one of the following sub classifications for each line item below the property classification:

COM - Computers, peripherals, etc.
AAE - Arms, ammunition and explosives
PM - Precious metals
HAZ - Hazardous materials
ME - Metals in mill product form
WIP - Work in process
CL - Classified

BLOCK 18. Self-explanatory.

BLOCK 19 - CONDITION CODE. Assign one of the following codes to each item:

Code 1. Property which is in new condition or unused condition and can be used immediately without modifications or repairs.
Code 4. Property which shows some wear, but can be used without significant repair.
Code 7. Property which is unusable in its current condition but can be economically repaired.
Code X. Property which has value in excess of its basic material content, but repair or rehabilitation is impractical and/or uneconomical.
Code 9. Property has no value except for its basic material content.

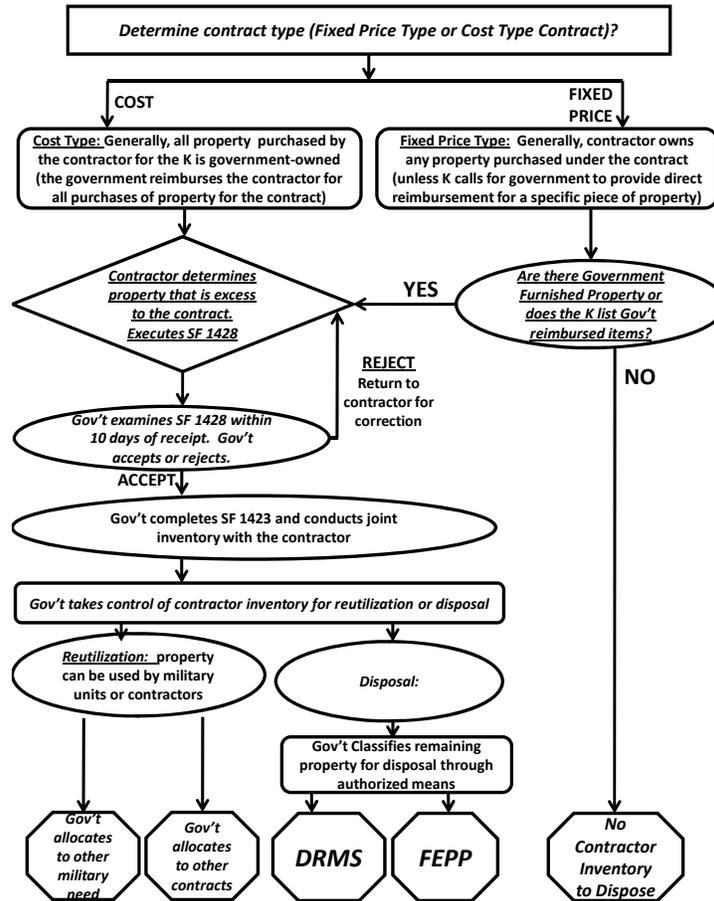
BLOCKS 20 - 22. Self-explanatory.

BLOCK 23 - CONTRACTOR'S OFFER. The Contractor's offer to purchase the item if it survives screening.

STANDARD FORM 1428 (REV. 6/2007) BACK

Appendix H

Contractor Inventory Disposal Framework



Herding Cats II: Disposal of DoD Personal Property

Major Kathryn M. Navin*

The game dramatically changed Dec. 1 when President Barack Obama announced his plan to send 30,000 additional troops to Afghanistan. Now, the priority for the next few months will be to pull serviceable engineer equipment, mine-resistant vehicles and communications equipment out of Iraq and ship it to Afghanistan. "Equipment has already started moving to Afghanistan," Third Army spokesman Col. Jerry O'Hara told Army Times. "Frankly, Third Army had anticipated the increase of forces to Operation Enduring Freedom. I'm not going to say it's not going to be a challenge."¹

I. Introduction

Since 2003, U.S. forces have maintained a continued presence in Iraq, which has resulted in millions of items of Department of Defense (DoD)-owned personal property in Iraq.² The United States and the Government of Iraq (GOI) signed a Bilateral Security Agreement (SA) that took effect on 1 January 2009 and included a provision for the complete withdrawal of U.S. forces from Iraq by 31 December 2011.³ The U.S. military headquarters in Iraq, at the time the Multi-National Force–Iraq (MNF–I), which has since reflagged as United States Forces–Iraq (USF–I),⁴ subsequently increased its focus on enhancing the capabilities of the Iraqi Security Forces (ISF) and drawing down U.S. forces to meet the December 2011 deadline.⁵ As of 21 April 2010, however, approximately 97 bases remain with millions of pieces of

personal property yet to retrograde⁶ to the United States, to be redistributed to U.S. military units in Afghanistan, to be transferred to the GOI, or to be otherwise disposed of.⁷

The purpose of this primer is to provide a comprehensive guide on the statutory authorities and regulatory procedures for the disposal of personal property to foreign governments. Although Iraq is currently the focus of the disposal⁸ of DoD property, the disposal of property also occurs in the continental United States (CONUS) and outside the continental United States (OCONUS). The key to understanding how to dispose of U.S. Government property is to first classify the type of property—real property⁹ or personal property.¹⁰ Second, if property is personal property, determine the type of personal property. Not all types of personal property can be disposed of in the same manner. Once the type of personal property has been identified, determine the correct statutory authorities, regulatory guidance, and DoD policies applicable to that type of personal property.

The first type of DoD personal property discussed in this primer is military-type property, or “green property,” which consists of personal property purchased by the services for a particular military use, such as mine resistant ambush protected (MRAP) vehicles, weapons, and even military-issue canteens. This type of property is generally listed on a unit’s table of organization and equipment (TOE),¹¹ and is normally disposed of through the Defense

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¹ Matthew Cox, *Afghan Surge, Iraq Exit Post Logistic Challenge*, ARMY TIMES, Dec. 21, 2009, available at http://www.armytimes.com/news/2009/12/army_moving_gear_121909w/.

² REPORT ON THE TRANSFER OF DEFENSE ARTICLES AND THE PROVISIONS OF DEFENSE SERVICES TO THE MILITARIES AND SECURITY FORCES OF IRAQ AND AFGHANISTAN 3 (n.d.) [hereinafter TRANSFER REPORT].

³ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.–Iraq, art. 24, Nov. 17, 2008 [hereinafter Security Agreement].

⁴ On 1 January 2010, Multi-National Force–Iraq and its subordinate headquarters were disestablished. These headquarters were merged to form the new military headquarters in Iraq, U.S. Forces–Iraq.

⁵ U.S. GOV. ACCOUNTABILITY OFF., OPERATION IRAQI FREEDOM: PRELIMINARY OBSERVATIONS ON DoD PLANNING FOR THE DRAWDOWN OF U.S. FORCES FROM IRAQ AND AFGHANISTAN, REPORT TO COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN 1 (Nov. 2, 2009).

⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (July 1991) (defining “retrograde” as a defense task involving movement away from the enemy). This term, however, is often used to refer to the property disposition process and sending property located in Iraq back to the United States.

⁷ E-mail from Major Patrick Wiesner, Deputy Chief, Contract and Fiscal Law, Office of the Staff Judge Advocate, to author (21 Apr. 2010, 08:27 EST) (on file with author) [hereinafter Wiesner e-mail].

⁸ DEFENSE REUTILIZATION AND MARKETING SERVICE., INSTR. 4160.14, OPERATING INSTRUCTIONS FOR DISPOSITION MANAGEMENT, at S4S1-15 (May 12, 2008) [hereinafter DRMS INSTRUCTIONS] (defining disposal as the process of reutilizing, transferring, donating, selling, destroying or other ultimate disposition of personal property).

⁹ GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 45.101 (Jan. 10, 2010) [hereinafter FAR] (defining real property as land and rights in land, ground improvements, utility distribution systems and buildings and other structures). Real property is outside the scope of this article. For information regarding the disposal of real property, see Captain Lyndsey M. D. Olson, *Herding Cats I: Disposal of DoD Real Property and Contractor Inventory in Contingency Operations*, ARMY. LAW., Apr. 2010, at 5.

¹⁰ U.S. DEP’T OF DEF., 4160.21-M, DEFENSE MATERIEL DISPOSITION MANUAL, at xxix (Aug. 1997) [hereinafter DoD MANUAL 4160.21-M] (defining personal property as property of any kind, or any interest therein, except real property and records of the U.S. Government).

¹¹ U.S. DEP’T OF ARMY, REG. 71-32, FORCE DEVELOPMENT AND DOCUMENTATION—CONSOLIDATED POLICIES 99 (3 Mar. 1997) (defining a

Reutilization and Marketing Service (DRMS). The second type of personal property discussed in this primer is non-standard equipment. Non-standard equipment is non-military type property that is available commercially. Non-standard equipment may include air conditioners, generators, furniture, and commercial vehicles. The DoD is currently disposing of non-standard equipment in Iraq through the Foreign Excess Personal Property (FEPP)¹² disposal process.¹³ Government-furnished property (GFP)¹⁴ and contractor acquired property (CAP)¹⁵ both refer to government-owned personal property in the possession of a contractor for performance of a U.S. contract. Regardless of the type of personal property, contractors must return GFP and CAP to the U.S. Government for disposal.

First, this article discusses the overarching disposal authority of the DRMS and its policies and procedures for disposing of personal property. Second, this primer focuses on the disposal of two types of personal property: the disposal of excess defense articles (EDA) by providing them to foreign governments, in particular Iraq; and the disposal of non-standard equipment through FEPP, as authorized by title 40, chapter 7, of the U.S. Code. Lastly, this article discusses the disposal authority that Congress provided to DoD in section 1234 of the 2010 National Defense Authorization Act. Section 1234 authorizes the transfer of up to \$750 million of defense articles to Iraq and Afghanistan without reimbursement.¹⁶

In the current operational environment, judge advocates play an increasingly vital role advising commanders on the applicable authorities for the disposal of DoD property. Therefore, it is essential that judge advocates understand the

various disposal procedures, the estimated timelines to dispose of property, and the required approval authorities for each disposal process.

II. Defense Reutilization and Marketing Service (DRMS)

The DRMS disposes of all types of personal property, worldwide, and is the overarching disposal authority for all DoD personal property. The DRMS disposes of the majority of military-type and non-standard equipment. In Fiscal Year 2008 alone, over 56,000 military units and organizations turned in over 3.5 million items to DRMS for disposal.¹⁷ Generally, DRMS disposes of all personal property, unless an exception, such as FEPP, applies.

The U.S. Constitution expressly provides Congress the power to dispose of U.S. property and prescribe all necessary rules and regulations to do so.¹⁸ Congress provided the U.S. Government the statutory authority to dispose of property in the Federal Property and Administrative Services Act of 1949.¹⁹ Section 101 of title 40 authorizes the General Services Administration (GSA) to dispose of surplus real and personal federal government property.²⁰ In accordance with its statutory authority, GSA delegated disposal authority to DRMS,²¹ a subordinate agency of the Defense Logistics Agency (DLA).²²

Defense Reutilization and Marketing Service is responsible for disposal of all DoD excess personal property,²³ surplus personal property,²⁴ and any other personal property that is unserviceable or no longer needed to execute a unit's mission.²⁵ In order to dispose of DoD

Table of Organization and Equipment (TOE) as a document that prescribes the wartime mission, capabilities, organizational structure, and mission-essential personnel and equipment requirements for military units). See generally U.S. DEP'T OF ARMY, REG. 71-9, WARFIGHTING CAPABILITIES DETERMINATION para. 6-1 (28 Dec. 2009) (explaining that units may also obtain new equipment which is added to their property book through an Operational Needs Statement, which is an urgent request by an operational commander to obtain equipment not currently on their TOE in order to increase capability to accomplish a mission).

¹² The acronym "FEPP" will be used throughout this primer to refer to the FEPP disposal authority. The term "foreign excess personal property" will be used throughout this primer to refer to the classification of excess property that is located in a foreign country.

¹³ Memorandum from P. Jackson Bell, Deputy Under Sec'y of Def. for Logistics and Materiel Readiness, to Commanding General, Multi-National Force-Iraq, subject: Authority to Transfer U.S. Property in Iraq (6 June 2008) [hereinafter Bell Memo June 2008].

¹⁴ FAR, *supra* note 9, at 1051 (defining government-furnished property as property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract).

¹⁵ *Id.* (defining contractor-acquired property as property acquired, fabricated, or otherwise provided by the contractor in performance of a contract and to which the government has title); see Olson, *supra* note 9 (discussing contractor-acquired property).

¹⁶ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1234, 123 Stat. 2190.

¹⁷ Defense Reutilization and Marketing Service, <http://www.drms.dla.mil/about.shtml> (last visited Feb. 15, 2010).

¹⁸ U.S. CONST. art. IV, § 3, cl. 2.

¹⁹ 40 U.S.C. ch. 7 (West 2010). In 2002, Pub. L. No. 107-217 revised and codified sections of the Federal Property and Administrative Services Act pertaining to public buildings, property, and works at title 40 of the U.S. Code. The statutory authorities for the disposal of property are now located at title 40, chapter 7, of the U.S. Code.

²⁰ 40 U.S.C. § 101 (Westlaw 2010).

²¹ Defense Reutilization and Marketing Service, Defense Reutilization Marketing Offices, <http://www.drms.dla.mil/drmo/drmo-locations.shtml> (last visited Feb. 22, 2010) (providing that the Defense Reutilization and Marketing Service's primary mission is to reutilize and dispose of excess military equipment and materiel).

²² VALERIE BAILEY GRASS, CONG. RESEARCH SERV. REPORT, DEFENSE SURPLUS EQUIPMENT DISPOSAL: BACKGROUND INFORMATION, RS20549, at CRS-2 (2007).

²³ DRMS INSTRUCTIONS, *supra* note 8, at S4S1-17 (defining excess personal property as property in the possession of, or owned by, the DoD or U.S. Government that is no longer needed by that agency).

²⁴ *Id.* at S4S1-33 (defining surplus personal property as property that is no longer needed by any agency of the U.S. Government).

²⁵ Defense Reutilization and Marketing Service, About DRMS, <http://www.drms.dla.mil/about.shtml> (last visited Feb. 15, 2010).

personal property, the owning military unit must transfer the property to DRMS. Generally, military units physically turn in DoD property, along with a Disposal Turn-In Document (DTID),²⁶ to a Defense Reutilization and Marketing Office (DRMO).²⁷ Defense Reutilization and Marketing Service operates DRMOs worldwide and maintains offices in Iraq, Afghanistan, Qatar, Bahrain, United Arab Emirates, Oman, and Kuwait within the U.S. Central Command (CENTCOM) area of responsibility.²⁸ When regulations restrict DRMS from physically accepting property, DRMOs process property as “receipt in place.”²⁹ Upon receipt of property, DRMOs must ensure that the DTID contains all required information,³⁰ including the proper demilitarization (DEMIL)³¹ code³² or an appropriate accompanying statement.³³ If the property was demilitarized prior to turn-in, it must be accompanied by a DEMIL certificate³⁴ if usable components remain.³⁵ The DRMO must ensure that property with inherent military characteristics is demilitarized prior to donation or sale to the public.³⁶

Additionally, DRMOs must verify the description of property, the quantity of property turned in, and the assignment of a valid Supply Condition Code (SCC) by the owning unit at turn-in.³⁷ The DRMO assigns a Disposal

Condition Code,³⁸ which combined with the SCC, forms the Federal Condition Code (FCC).³⁹ The FCC, which potential recipients view during the screening process, describes the property’s physical condition.⁴⁰ After verifying the property and ensuring proper documentation, the DRMO becomes accountable for the property and processes it in accordance with disposal procedures.⁴¹

Generally, DRMS disposes of DoD property through reutilization, transfer, donation, sale, abandonment, or destruction, in that order of priority.⁴² Reutilization refers to the redistribution and continued use of DRMS property within DoD. Department of Defense components and Special Programs,⁴³ like Foreign Military Sales (FMS), have fourteen days to screen⁴⁴ and claim eligible property.⁴⁵ Defense Reutilization and Marketing Offices allocate property on a first come, first serve basis.⁴⁶ If DoD or Special Programs do not claim the property during the fourteen-day period, the property becomes excess to DoD. Excess property then becomes available for transfer outside DoD. Transfer, the second priority, is the redistribution of excess DoD property to Federal Civil Agencies (FCA).⁴⁷ Federal Civil Agencies have a twenty-one-day screening period to claim the property.⁴⁸ During this period, components of DoD and Special Programs may still requisition property, but they generally do not have priority over FCAs at this stage. If DoD, Special Programs, or FCAs do not claim the excess property, the property becomes surplus to the U.S. Government.⁴⁹ Surplus property is available for donation to eligible non-federal organizations, such as state government agencies and certain charitable and civic organizations.⁵⁰ Donation, the third priority, is limited

²⁶ See app. B (providing U.S. Dep’t of Def., DD Form 1348-1A/2, Disposal Turn-In Document (July 1991)).

²⁷ DRMS INSTRUCTIONS, *supra* note 8, at S2C1-10.

²⁸ Defense Reutilization and Marketing Service, Defense Reutilization Marketing Offices, <http://www.drms.dla.mil/drmo/drmo-locations.shtml> (last visited Feb. 20, 2010).

²⁹ See DOD MANUAL 4160.21-M, *supra* note 10, at 3-3 (detailing the types of property that may not be physically accepted by a DRMO).

³⁰ DRMS INSTRUCTIONS, *supra* note 8, at S2S1-33.

³¹ U.S. DEP’T OF DEF., 4160.21-M-1, DEFENSE DEMILITARIZATION MANUAL, at A2-3 (Oct. 1991) (C1, 14 Feb. 1995) [hereinafter DoD MANUAL 4160.21-M-1] (defining demilitarization as the act of destroying the military offensive and defensive advantages inherent in certain types of equipment or materiel. Demilitarization processes prevent further use of the equipment or materiel for its original intended military or lethal purpose).

³² *Id.* (defining a DEMIL code as a single character letter code assigned by the owning military unit identifying the degree of DEMIL necessary prior to final disposition of the item). See *id.* app. 3, at A3-1 to A3-2 (providing the list of DEMIL codes).

³³ DOD MANUAL 4160.21-M, *supra* note 10, at 3-5.

³⁴ DoD MANUAL 4160.21-M-1, *supra* note 31 (defining a DEMIL certificate as a certificate signed by a technically qualified U.S. Government representative (U.S. citizen) and countersigned by another technically qualified U.S. Government representative who actually witnessed the DEMIL of the material and/or inspected the residue).

³⁵ DRMS INSTRUCTIONS, *supra* note 8, at S2C1-31.

³⁶ Federal Management Regulation, 41 C.F.R. § 102-38 (2009).

³⁷ DRMS INSTRUCTIONS, *supra* note 8, at S4S1-33 (defining a Supply Condition Code as a code that the owning military unit assigns to property to describe the physical condition of the property).

³⁸ *Id.* at S4S1-15 (defining a Disposal Condition Code as a code that DRMO assigns to property to describe the physical condition of the property).

³⁹ *Id.* at S4S1-18 (stating that the Federal Condition Code most accurately describes the materiel’s physical condition. The code is used throughout the screening process to denote the condition of the property); see app. C (providing a list of FCCs and their corresponding fair market value).

⁴⁰ *Id.*

⁴¹ DOD MANUAL 4160.21-M, *supra* note 10, at 3-8.

⁴² DRMS INSTRUCTIONS, *supra* note 8, at S2C5-4, S2C6-5.

⁴³ DOD MANUAL 4160.21-M, *supra* note 10, at 5.1-1 (providing a list of Special Programs).

⁴⁴ DRMS INSTRUCTIONS, *supra* note 8 (providing that screening may be done physically at a DRMO location or electronically at www.drms.dla.mil).

⁴⁵ *Id.* at S2C5-11.

⁴⁶ *Id.*

⁴⁷ *Id.* at S2C5-45 (stating that Federal Civil Agencies are also often referred to as Other Federal Agencies).

⁴⁸ *Id.*

⁴⁹ See *id.* at S2C5-12.

⁵⁰ *Id.* at S2C5-12, S2C5-48.

to a five-day allocation period.⁵¹ Surplus property that remains unclaimed is then eligible for sale to the public, the fourth priority.⁵²

III. Excess Defense Articles (EDA)

Congress has expressly authorized the U.S. Government to transfer EDA to eligible foreign governments.⁵³ Military units may retain physical possession, or physically turn in, EDA to DRMS for disposal in accordance with the procedures described earlier in section II. The following sections will detail the statutory authorities, the regulatory implementation, and the process required to transfer EDA to foreign governments.⁵⁴

A. Statutory Authorities and Regulatory Implementation for EDA Transfers

The Foreign Assistance Act (FAA) of 1961 and the Arms Export Control Act (AECA) of 1976 provide the statutory framework for security assistance programs, including FMS and EDA.⁵⁵ Annual or biennial security assistance authorization acts have amended both the FAA and the AECA since their enactment.⁵⁶ The annual Foreign Operations, Export Financing, and Related Programs Appropriations Act not only funds security assistance programs, but also amends the FAA and AECA in accordance with national policies.⁵⁷

Section 38, AECA, authorizes the President to control the export and import of defense articles and services and provides the statutory authority to promulgate regulations.⁵⁸ The International Traffic in Arms Regulations (ITAR) implements the provisions of the AECA and regulates the import and export of defense articles and services.⁵⁹ In

⁵¹ *Id.* at S2C5-47 (providing that donation screening takes place throughout the screening cycle, although property is only available for donees to claim during the five-day allocation period, after priority one and two).

⁵² *Id.* at S2C6-5 (providing that surplus property may generally be sold to anyone of legal age. However, certain persons or entities are debarred or suspended from purchasing U.S. Government surplus property and, thus, are prohibited from purchasing surplus property through the DRMS process).

⁵³ Arms Export Control Act, 22 U.S.C. § 2761 (Westlaw 2010).

⁵⁴ *See* app. D (providing a flowchart for Excess Defense Article Transfers).

⁵⁵ U.S. DEP'T OF DEF., 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL 36 (3 Oct. 2003) [hereinafter SAMM].

⁵⁶ ANTHONY J. PERFILIO, FOREIGN MILITARY SALES HANDBOOK 20-21 (2009).

⁵⁷ *Id.* at 21.

⁵⁸ Exec. Order No. 11,958, 42 Fed. Reg. 4311 (Nov. 24, 2009) (providing that the President delegated to the Secretary of State the authority to promulgate regulations with respect to defense articles and services).

⁵⁹ International Traffic and Arms Regulations, 22 U.S.C. § 120.1 (WestLaw 2010).

addition to the ITAR, the the Defense Security Cooperation Agency (DSCA),⁶⁰ which promulgates the Security Assistance Management Manual (SAMM), serves as a main source of regulatory guidance.⁶¹ The SAMM delineates the procedures for the transfer of defense articles and the administration of FMS cases, and provides guidance for other security assistance-related activities.⁶²

Congress broadly defined defense articles in section 644 of the FAA. The U.S. Munitions List (USML)⁶³ contains the list of designated⁶⁴ defense articles, which generally include weapons, weapon systems, munitions, aircraft, vessels, boats, and other implements of war, to include any component or part thereof.⁶⁵ Additionally, the USML designates some defense articles as Significant Military Equipment (SME), which is governed by special export and security controls because of its substantial utility or capability for military use.⁶⁶ Examples of SME include M-16 rifles, MRAP vehicles, and High Mobility Multipurpose Wheeled Vehicles (HMMWV).⁶⁷

Furthermore, items of SME that have a nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million are considered Major Defense Equipment (MDE).⁶⁸ Some MDE is subject to even greater export restrictions than SME.⁶⁹ The DSCA must notify Congress prior to any proposed EDA grant or sale to a foreign country that contains SME, including MDE.⁷⁰

B. "Sales from Stock" and Grant Transfers of EDA

Two main authorities allow for the transfer of EDA to foreign countries.⁷¹ The first authority is the FMS authority

⁶⁰ *See* app. E (providing a description of DSCA's responsibilities in the transfer of defense articles).

⁶¹ PERFILIO, *supra* note 56, at 23.

⁶² SAMM, *supra* note 55, at 2.

⁶³ 22 U.S.C. § 121.1 (providing the U.S. Munitions List).

⁶⁴ *Id.* §§ 2778(a), 2794 (providing that Congress authorized the President to designate articles as defense articles. Designations are made by the Department of State with concurrence of the Department of Defense).

⁶⁵ Foreign Assistance Act of 1961, 22 U.S.C. § 2384(a) (Westlaw 2010).

⁶⁶ *Id.* § 121.1

⁶⁷ *Id.*

⁶⁸ SAMM, *supra* note 55, at 109.

⁶⁹ *Id.* at 129, 357.

⁷⁰ *Id.* at 493.

⁷¹ DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT, THE MANAGEMENT OF SECURITY ASSISTANCE 2-27 (27th ed. 2007), available at <http://www.disam.dscamilitary.com/pubs/DR/27th%20Greenbook.pdf> [hereinafter DISAM GREEN BOOK]. (The term EDA program is loosely used to refer to transfers under the FMS program, in accordance with section 21, AECA, and EDA transfers under section 516, FAA. Generally, the EDA program

of section 21(a), AECA, Sales from Stocks.⁷² This section authorizes the sale of defense articles to eligible countries or international organizations from existing DoD or Coast Guard stocks.⁷³ Although FMS is a Department of State (DoS) security assistance program, DoD operates FMS via DSCA.⁷⁴ The owning military department is not required to declare defense articles excess⁷⁵ under section 21(a), since this section authorizes the sale of both excess and non-excess defense articles.⁷⁶ This article, however, focuses on EDA and will not address sales of non-excess defense articles. In accordance with section 21(a), countries are required to pay for EDA in U.S. dollars.⁷⁷ The U.S. Government depreciates EDA in accordance with the DoD Financial Management Regulation, section 070304, and after depreciation, the prices of EDA range from five to fifty percent of the original acquisition value, depending on the condition and age of the article.⁷⁸ Excess Defense Article sales use FMS procedures identified in the SAMM and are processed using formal contracts or agreements between the U.S. Government and the authorized purchaser.⁷⁹

The second EDA transfer authority is section 516, FAA, which provides for grant EDA transfers to eligible⁸⁰ recipients on a no-cost basis.⁸¹ Congress also authorized sales of EDA under section 516; however, EDA rarely

loosely refers to any transfer of EDA, whether through FMS or grant or sale under section 516, FAA).

⁷² E-mail from Lieutenant Colonel Ricou (John) Heaton, Deputy Gen. Counsel, Def. Sec. Cooperation Agency, to author (16 Feb. 2010, 05:11 EST) (on file with author) (explaining “sales from stock” is not defined in the Arms Export Control Act or Foreign Assistance Act; however, sales from stock is typically read broadly to include property owned by the DoD that has not been issued to military units for use and property that has been issued and is on the property books of a military unit).

⁷³ Arms Export Control Act, 22 U.S.C. § 2761 (Westlaw 2010).

⁷⁴ SAMM, *supra* note 55, at 95.

⁷⁵ See app. A (defining the definition of excess defense articles).

⁷⁶ 22 U.S.C. § 2761.

⁷⁷ *Id.*

⁷⁸ U.S. DEP’T OF DEF., FINANCIAL MANAGEMENT REG. 7000.14-R, at 070304 (2002).

⁷⁹ DISAM GREEN BOOK, *supra* note 71, at 1-7.

⁸⁰ E-mail from Joanne B. Hawkins, Assoc. Professor, Logistics Instructor Team Lead, Def. Inst. for Sec. Assistance Mgmt., to author (23 Feb. 2010, 08:22 EST) (on file with author) [hereinafter Hawkins e-mail Feb. 23, 2010] (providing that DoS determines the list of eligible countries to receive grant EDA based on foreign policy needs and notifies Congress for concurrence. Authorizations are per fiscal year; however, since Fiscal Year 2008, the list of eligible countries is no longer published in the annual Congressional Budget Justification. *Id.* Defense Security Cooperation Agency (DSCA) receives the annual list of eligible countries, which is no longer publicly available. Contact DSCA for the list of current grant eligible countries). *Id.*

⁸¹ Foreign Assistance Act of 1961, 22 U.S.C. § 2321j (Westlaw 2010).

executes sales under this authority.⁸² Consequently, this primer will focus on section 516 grant EDA transfers, rather than sales.

In order to qualify as a grant, an EDA transfer must meet the following criteria: defense articles must be drawn from existing DoD or Coast Guard stocks; no DoD funds can be expended in connection with the transfer; the transfer must not have an adverse impact on military readiness; a transfer on a grant basis is preferable to a sale;⁸³ the transfer must not have an adverse impact on the national technology or industrial base and must not reduce the opportunities of these types of entities to sell new or used equipment to the country to which the article is being transferred; and, for EDA grants to Greece or Turkey, the transfer must be consistent with the policy framework for the Eastern Mediterranean.⁸⁴

Unlike section 21, AECA, Sales from Stock, military departments must declare defense articles excess prior to grant transfers under the FAA.⁸⁵ Furthermore, not all countries are eligible to receive grant EDA; DSCA justifies the eligibility of foreign countries annually to Congress.⁸⁶ However, even after Congress has approved a country’s eligibility, the U.S. Government still cannot automatically transfer all EDA in a fiscal year through a grant. Grant EDA transfers must be determined on a case-by-case basis, and the aggregate market value of all grant EDA in a fiscal year is limited to \$425 million.⁸⁷

C. Processing a Request for EDA via a Sale or Grant

Generally, the EDA process entails five basic steps: initiating a request; processing the Letter of Request (LOR); providing Congressional Notification (CN); issuing the Letter of Offer and Acceptance (LOA); and executing the EDA transfer. United States policies and unique circumstances in the region in which an EDA transfer occurs, however, may result in small differences in procedures. Consequently, judge advocates should consult the policies and procedures applicable in their specific

⁸² E-mail from Lieutenant Colonel Paul S. Capes, Chief, Dir.’s Action Group, Iraq Security Assistance Mission, to author (21 Feb. 2010, 05:11 EST) [hereinafter Capes e-mail] (on file with author).

⁸³ 22 U.S.C. § 2321j (providing that a transfer on a grant basis may be preferable to a sale after considering the potential proceeds from, and the likelihood of a sale, and the foreign policy benefits as a result of a grant or sale basis).

⁸⁴ *Id.* § 2347 (providing that defense articles transferred to Greece or Turkey cannot be transferred to Cyprus or used to further the division of Cyprus. The ratio of grant EDA offered to Greece and Turkey must be on a 7 to 10 ratio for a four-year period).

⁸⁵ 22 U.S.C. § 2321j(e).

⁸⁶ SAMM, *supra* note 55, at 492.

⁸⁷ 22 U.S.C. § 2321j(g)(1).

theater of operation before processing a request for EDA. The general procedures described below provide a broad overview of the EDA process.

1. Initiating a Request for EDA

The EDA process formally begins when a foreign country requests information about a defense article it wishes to obtain.⁸⁸ This request is called a Letter of Request (LOR). Although there is no specific format for an LOR, the letter must sufficiently identify the desired defense article; describe the method of financing;⁸⁹ and justify why, and for what purpose, the prospective purchaser wants the defense article.⁹⁰ The interested foreign country must send the LOR to the Security Assistance Organization (SAO), also called the Security Cooperation Organization (SCO),⁹¹ located in its territory.⁹² Only certain U.S. Government organizations, called Implementing Agencies (IA),⁹³ are authorized to respond to LORs.⁹⁴ Accordingly, the SCO must send the LOR to the IA and DSCA for processing.

In Iraq, a typical EDA case is initiated when a GOI ministry identifies a particular defense article located in the country and inquires about its availability. Alternatively, the Iraq Security Assistance Mission (ISAM)⁹⁵ might contact a ministry, inform its officials of EDA in Iraq, and determine whether the GOI might be interested in acquiring the property. However, regardless of who initiates contact, the GOI must submit an LOR identifying the specific asset in order to formally initiate the process.

⁸⁸ *Id.* at 123.

⁸⁹ E-mail from Joanne B. Hawkins, Assoc. Professor, Logistics Instructor Team Lead, Def. Inst. for Sec. Assistance Mgmt., to author (21 Apr. 2010, 09:38 EST) (on file with author) [hereinafter Hawkins e-mail Apr. 2010] (explaining that if a foreign recipient does not have the financing to pay for the defense article and they want to obtain grant EDA, DoS has to approve that country for grant EDA eligibility before a LOR for grant material will be honored. If the eligibility is approved, the recipient must indicate in the LOR that they want to acquire the material under the grant for which they have been approved).

⁹⁰ SAMP, *supra* note 55, at 123.

⁹¹ *See* app. E (providing information on the responsibilities of the Security Cooperation Organization).

⁹² Capes e-mail, *supra* note 82.

⁹³ SAMP, *supra* note 55, at 125–27 (providing a list of authorized Implementing Agencies (IA)). For example, the IA authorized to receive Letters of Request (LOR) for the U.S. Army (other than LORs for training or construction) is the U.S. Army Security Assistance Command (USASAC).

⁹⁴ *Id.* at 125.

⁹⁵ DISAM GREEN BOOK, *supra* note 71, at 4-2 (providing that the Iraq Security Assistance Mission (ISAM), formerly part of Multi-National Security and Transition Command–Iraq, is a “Pseudo Security Cooperation Office” that handles FMS and EDA transfers in Iraq). The ISAM does not fall under the Ambassador, as SCO/SAOs traditionally do. ISAM operates under title 10 of the U.S. Code and reports to the Combatant Commander. *Id.*

2. Processing the Letter of Request (LOR)

The processing of an LOR involves numerous governmental agencies, both in the foreign country and in the United States. Review of the LOR can vary significantly, depending on the type of defense article requested: non-SME, SME, MDE, classified item, or missile-related technology.⁹⁶ Meanwhile, the various agency reviews should occur concurrently to minimize the overall response time.⁹⁷

Upon receipt of the LOR, the IA validates the LOR to ensure that a potential purchaser is an eligible recipient;⁹⁸ the U.S. Government can transfer the requested defense article; and all applicable government agencies have reviewed the LOR.⁹⁹ When the SCO sends the LOR to the IA and DSCA, the SCO also sends notification of the request to the owning military department.¹⁰⁰ Military departments advise on price (if applicable), source, and availability.¹⁰¹ If the EDA transfer will occur via a grant, the military department must also determine whether the article is excess¹⁰² to its own requirements and the requirements of DoD.¹⁰³ Additionally, the military department or DSCA must coordinate with DoS to ensure the transfer is in accordance with foreign policy.¹⁰⁴

In addition to forwarding the LOR to the IA and DSCA, the SCO also reviews the LOR. The SCO traditionally falls under the U.S. Ambassador, who also functions as the chief of mission.¹⁰⁵ The U.S. Ambassador must verify that the foreign country has the ability to operate and sustain the

⁹⁶ *Id.* at 5-5.

⁹⁷ *Id.*

⁹⁸ SAMP, *supra* note 55, at 97 (providing a list of eligible countries for section 21, AECA, sales from stock); Hawkins e-mail Feb. 23, 2010, *supra* note 80 (providing that eligible countries for grant transfers are no longer published and can be found by contacting DSCA).

⁹⁹ *Id.* at 127.

¹⁰⁰ Telephone Interview with Joanne B. Hawkins, Assoc. Professor, Logistics Instructor Team Lead, Def. Inst. for Sec. Assistance Mgmt. (Jan. 29, 2010) [hereinafter Hawkins Interview].

¹⁰¹ DISAM GREEN BOOK, *supra* note 71, at 3-15.

¹⁰² Hawkins e-mail Apr. 2010, *supra* note 89 (providing that the military department that owns the defense article must declare the defense article excess to the needs of the service and determine, based on transportation costs and the condition of the material, that it is more cost effective to leave it in its current location rather than to retrograde it back to the United States. From an FMS perspective, it may be more beneficial to retrograde the defense article back to the United States if other countries are interested in the items. An interested country can buy the item at a reduced cost, thus recouping some of DoD's retrograde expenses).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ DISAM GREEN BOOK, *supra* note 71, at 5-5.

defense article.¹⁰⁶ The SCO provides an assessment for this verification.¹⁰⁷

Excess defense article transfers in Iraq generally follow the process described above. The requesting Iraqi ministry must send an LOR to ISAM, which acts as the pseudo-SCO in Iraq.¹⁰⁸ The ISAM must then forward the LOR to DSCA and the IA, with a notification to the owning military department. Although not officially required, the Commander, USF-I, and the Commander, CENTCOM, normally submit assessments to the IA with a recommendation for transfer.¹⁰⁹

3. Congressional Notification Is Required for Certain EDA Transfers

Prior to any EDA transfer by sale or grant, DSCA must provide a 30-calendar-day CN for all SME transfers and any non-SME transfer with an original acquisition value of \$7 million or more.¹¹⁰ The military department and IA must submit the data¹¹¹ required for CN to DSCA within ten days of receipt of a valid LOR. Upon receipt of the information, DSCA prepares the required notification documents and coordinates with DoS.¹¹² The DoS must provide clearance to DSCA before DSCA forwards the notification to Congress.¹¹³ If Congress objects to the transfer, it must adopt a joint resolution objecting to it.¹¹⁴ Otherwise, once the thirty-day period expires and Congress has not objected, the defense article can be transferred.¹¹⁵

¹⁰⁶ *Id.* For non-SME/MDE defense articles, the U.S. Ambassador verification is generally referred to as an SCO or SAO assessment. *Id.* If defense articles are SME or MDE, the U.S. Embassy must do a country team assessment (CTA), which is more extensive than the SCO assessment and is usually classified. *Id.* The country team consists of those who work for the Ambassador and includes the SCO. *Id.* Ideally, the CTA could be the SCO assessment that is staffed within the country team and signed off on by the Ambassador. *Id.* The CTA must be signed or otherwise approved by the Ambassador. *Id.* See SAMM, *supra* note 55, at 124 (providing the list of criteria included in a CTA).

¹⁰⁷ DISAM GREEN BOOK, *supra* note 71, at 5-5.

¹⁰⁸ Capes e-mail, *supra* note 82.

¹⁰⁹ See DISAM GREEN BOOK, *supra* note 71, at 5-5.

¹¹⁰ SAMM, *supra* note 55, at 493.

¹¹¹ *Id.* at 242–46 (providing required information that is included in the CN).

¹¹² *Id.* at 249.

¹¹³ *Id.* at 235.

¹¹⁴ *Id.* at 249.

¹¹⁵ *Id.*

4. Issuing the Letter of Offer and Acceptance to a Foreign Government

The U.S. Government responds to an LOR with a document called a Letter of Offer and Acceptance (LOA).¹¹⁶ The DSCA drafts the LOA while applicable agencies staff and coordinate the LOR as discussed above.¹¹⁷ If Congress does not object to the proposed transfer, or notification is not required, DSCA will coordinate the LOA with relevant U.S. Government agencies and will send it to the IA for approval.¹¹⁸ Once the IA approves and DSCA countersigns the LOA, it becomes the U.S. Government's official offer to transfer the defense article to the foreign country.¹¹⁹ The IA will then send the LOA to the recipient, via the SCO, for review and acceptance.¹²⁰ Acceptance occurs when an official of the authorized purchaser signs the LOA and, in the case of a sale, provides any required initial deposit to the Defense Finance Accounting Service.¹²¹

5. Executing the EDA Transfer

Foreign countries must agree to certain restrictions prior to physical transfer of defense articles. In accordance with the FAA and AECA, purchasers must agree to use defense articles only for their furnished purpose.¹²² The DSCA includes this restriction in all LOAs. In addition to the LOA, all grant EDA recipients must sign a blanket end-use, security, and retransfer assurances document.¹²³ Once the EDA is transferred, the U.S. Government will scrutinize the recipient's use of the defense articles through an end-use monitoring program.¹²⁴

Additionally, unlike FMS purchases, where new defense articles are sold under a total package approach,¹²⁵ EDA are transferred at reduced or no cost to the recipient and are offered to the foreign country on an "as is, where is" basis.¹²⁶ Once foreign countries accept EDA, the United States is no longer responsible for any maintenance, training,

¹¹⁶ *Id.* at 137. For a sample LOA, see figure C5.F2 in chapter 5 of the SAMM, *supra* note 55.

¹¹⁷ Hawkins Interview, *supra* note 100.

¹¹⁸ *Id.*

¹¹⁹ SAMM, *supra* note 55, at 249.

¹²⁰ *Id.* at 231.

¹²¹ *Id.* at 233.

¹²² *Id.* at 327.

¹²³ *Id.* at 492.

¹²⁴ *Id.* at 327.

¹²⁵ *Id.* at 114 (explaining that the total package approach (TPA) refers to the policy of the United States to sell defense articles with a sustainability package, which includes spare parts, training, maintenance, and other support).

¹²⁶ *Id.* at 490.

or service associated with the defense article.¹²⁷ If a recipient wants to purchase training or other sustainment packages associated with a defense article, they must submit a separate LOR, which is processed as an FMS case.¹²⁸

Furthermore, Congress prohibited the use of DoD funds for the logistics—crating, packing, handling and transportation—of all EDA transfers.¹²⁹ The President, however, may grant an exception in accordance with section 516(e)(2).¹³⁰ Additionally, recipients can pay the United States to arrange the logistics of a transfer.¹³¹ As a result, expenses incurred transporting defense articles can be a limiting factor affecting a country's ability—and decision—to purchase a defense article. In Iraq, the logistics burden is less of a concern because most eligible defense articles are already physically located in Iraq and the majority of EDA transfers are in-place transfers.¹³²

D. Pseudo-Foreign Military Sales (FMS) in Iraq and Afghanistan

Pseudo-FMS cases refer to the purchase of defense articles from existing DoD stocks under the authority of section 21, AECA, Sales from Stock, as discussed in Subsection C above. These purchases are called pseudo-FMS because the defense articles at issue are purchased from Afghanistan Security Forces Fund (ASFF) or Iraqi Security Forces Fund (ISFF). The ASFF and ISFF are U.S. appropriated funds used to train, equip, and maintain the Afghanistan Security Forces and ISF, respectively.¹³³ Defense articles are sold in accordance with their fair market value,¹³⁴ and even though the defense articles are ultimately paid for with U.S. appropriated funds, the EDA transfer approval process remains substantially the same as a grant or sale EDA purchase.

¹²⁷ Hawkins Interview, *supra* note 100.

¹²⁸ *Id.*

¹²⁹ Foreign Assistance Act of 1961, 22 U.S.C. § 2321j(e) (Westlaw 2010).

¹³⁰ *Id.* (providing that the President may grant an exception if he determines that it is in the national interest of the United States to do so; the recipient is a developing country receiving less than \$10 million of international military education and training assistance or Foreign Military Financing in the fiscal year in which the transportation is provided; the total weight of the transfer does not exceed 50,000 pounds; and such transportation is accomplished on a space available basis).

¹³¹ SAMM, *supra* note 55 at 368.

¹³² Hawkins Interview, *supra* note 100.

¹³³ MULTI-NATIONAL CORPS—IRAQ, MONEY AS A WEAPON SYSTEM, at E-1 (Jan. 26, 2009).

¹³⁴ The Security Assistance Act of 2000 states that it is the sense of the Congress that the president should make expanded use of section 21, AECA, to sell EDA by using the flexibility to ascertain the market value of the EDA in accordance with section 47, AECA.

IV. Foreign Excess Personal Property (FEPP)

Foreign Excess Personal Property disposal derives its authority from the Federal Property and Administrative Services Act of 1949.¹³⁵ Congress subsequently amended this Act in 2002, codifying FEPP disposal authorities at title 40, chapter 7, of the U.S. Code. Section 701(b) of title 40 authorizes the head of an executive agency¹³⁶ to dispose of foreign excess property¹³⁷ in a manner that conforms to U.S. foreign policy.¹³⁸ The DoD, as the agency head, has assigned FEPP disposal authority to the Deputy Under Secretary of Defense for Logistics and Materiel Readiness (DUSD (L&MR)).¹³⁹ Ultimate FEPP disposal authority in a particular country, however, rests with the DoS to ensure that all property disposed of conforms to U.S. foreign policy and existing U.S. regulations and international agreements.¹⁴⁰

In accordance with title 40, chapter 7, DoD may return foreign excess property to the United States for disposal as excess or surplus property when DoD or GSA, in consultation with DoD, determines return of the property is in the best interest of the United States.¹⁴¹ Once received in the United States, DRMS screens returned property in the same manner as excess and surplus property within the United States and its territories.¹⁴² If foreign excess property is not returned to the United States for disposal, DoD may dispose of it abroad by sale, lease, exchange, or transfer.¹⁴³ Alternatively, if the property has no commercial value, and care and handling costs exceed estimated proceeds from sale of the property, DoD may authorize abandonment, destruction, or donation.¹⁴⁴ In Iraq, however, U.S. policy regulations prohibit disposal by abandonment.¹⁴⁵

An executive agency head, in accordance with his authority in 40 U.S.C. § 704, must issue further policy

¹³⁵ Federal Services and Property Administrative Act of 1949, 40 U.S.C. ch. 7 (Westlaw 2010).

¹³⁶ 40 U.S.C. § 102(4) (defining executive agency as an executive department or independent establishment in the executive branch of the Government or a wholly-owned Government corporation). For example, the Department of Defense is an executive agency.

¹³⁷ *Id.* § 102(6) (defining foreign excess property as excess property that is not located in the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands).

¹³⁸ *Id.* § 701(b).

¹³⁹ See U.S. DEP'T OF DEF., REG. 4140.1-R, DOD SUPPLY CHAIN MATERIEL MANAGEMENT REGULATION para. C5.10.1.5.4 (May 23, 2003).

¹⁴⁰ DOD MANUAL 4160.21-M, *supra* note 10, at 9-2.

¹⁴¹ 40 U.S.C. § 702.

¹⁴² DOD MANUAL 4160.21-M, *supra* note 10, at 9-2.

¹⁴³ 40 U.S.C. § 704(b)(1) & (2).

¹⁴⁴ *Id.* § 704(b)(3).

¹⁴⁵ Bell Memo June 2008, *supra* note 13.

guidance to implement FEPP in a particular location. Currently, DoD has not authorized disposal of foreign excess property in Afghanistan, but has implemented FEPP procedures in Iraq through several policy memoranda issued by the DUSD (L&MR), which limited disposal to personal property.¹⁴⁶ The DUSD (L&MR) further restricted personal property transfers to fourteen designated non-standard equipment categories.¹⁴⁷ Authorized categories¹⁴⁸ include air conditioning units, furniture, food service equipment, living containers, ablution units, commercial vehicles, and generators.¹⁴⁹ Categories restricted from transfer under FEPP include computers, defense articles on the USML,¹⁵⁰ and items on the Commerce Control List.¹⁵¹

Initially, DoD authorized *donation* of foreign excess personal property to the GOI in accordance with 40 U.S.C. § 704(b)(3), which does not require the U.S. Government receive anything in return.¹⁵² In June 2008, however, in accordance with 40 U.S.C. § 704(b)(2)(B), DUSD (L&MR) determined that it was in the best interest of the United States to *exchange* authorized foreign excess personal property for substantial benefit.¹⁵³ In accordance with DoD policy, USF-I established two separate processes to dispose of foreign excess personal property: transfers in conjunction with a base closure or return; and transfers not in conjunction with base closure or return, commonly referred to as tiered transfer authority (TTA).¹⁵⁴

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* attachment 1, at 1.

¹⁴⁸ See app. F (providing the list of authorized non-standard equipment categories that are eligible for transfer under FEPP procedures).

¹⁴⁹ Bell Memo June 2008, *supra* note 13, attachment 1 at 1.

¹⁵⁰ The U.S. Munitions List is available at <http://www.fas.org/spp/starwars/offdocs/itar/p121.htm> (providing a list of designated defense articles and services in accordance with the Arms Export Control Act).

¹⁵¹ Bureau of Industry and Security, <http://www.bis.doc.gov/licensing/exportingbasics.htm> (last visited Mar. 1, 2010) (providing that the Commerce Control List is a list of commercial and “dual-use” (both commercial and military application) items that are subject to the Bureau of Industry and Security’s export license requirements based on the item’s technical characteristic). For example, categories on the list include electronics, computers, sensors, and lasers.

¹⁵² See Memorandum from P. Jackson Bell, Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Chairman of the Joint Chiefs of Staff et al., subject: Increase in Donation Threshold for Foreign Excess Personal Property (FEPP) in Iraq 1 (Oct. 10, 2007) [hereinafter Bell Memo Oct. 2007].

¹⁵³ Bell Memo June 2008, *supra* note 13, at 1 (providing that in June 2008, DUSD (L&MR) determined that substantial benefits to DoD existed to allow for transfer of foreign excess personal property, vice donation). Specifically, substantial benefits to DoD include a streamlined retrograde process, which allows military units to focus on higher priority aspects of their mission; mitigates the risks of improper dispositions; fosters favorable relations between the United States and Iraq; and alleviates undue burden on DoD transportation assets. *Id.*

¹⁵⁴ *Id.*

A. Foreign Excess Personal Property Transfer in Conjunction with a Base Closure or Return to the Government of Iraq

Under this type of transfer, the transfer of U.S. Government property takes place in conjunction with a base¹⁵⁵ closure or the return of a base to the GOI. However, not all bases slated for return to the GOI automatically qualify for foreign excess personal property transfer in conjunction with a base closure or return. The DoD has limited the number of bases that qualify for foreign excess personal property transfers in Iraq to 417.¹⁵⁶ Because USF-I is the approval authority for base transfers in Iraq, USF-I determines if a particular base return will count against the 417 authorized.¹⁵⁷ If USF-I does not approve a base foreign excess personal property transfer request, military units can only transfer foreign excess personal property under a tiered transfer authority, as discussed in Part III, Section B, of this primer.

The total value of personal property that military units may transfer in conjunction with the closure or return of a single base is limited to \$30 million.¹⁵⁸ Owning units must calculate the value of each piece of personal property based on its depreciated value; units no longer determine property value based on acquisition cost, as was the policy prior to July 2009.¹⁵⁹ Units may determine the fair market value (FMV) of items by using the FMV factors based upon the Supply Condition Code.¹⁶⁰ United States Forces-Iraq must forward all transfer requests for property exceeding \$30 million to DUSD (L&MR) for approval.¹⁶¹

¹⁵⁵ Memorandum from P. Jackson Bell, Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Chairman of the Joint Chiefs of Staff et al., subject: Authority to Transfer Property in Iraq (Nov. 19, 2008) [hereinafter Bell Memo Nov. 2008] (stating that the term “base” includes all forward operating bases (FOB), contingency operating bases (COB), contingency operating sites (COS), contingency operating locations (COL), and all other sites, locations, and training facilities where U.S. forces were physically present, and were formally identified to GOI in accordance with the Security Agreement of 17 November 2008. In all DUSD (L&MR) policy memoranda, the term “FOB” is synonymous with “base”).

¹⁵⁶ *Id.* (increasing the number of base transfers from 79 to 417).

¹⁵⁷ See *id.*

¹⁵⁸ Memorandum from Alan F. Estevez, Acting Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Commanding General, Multi-National Force-Iraq, subject: Authority to Transfer Foreign Excess Personal Property in Iraq 1 (Oct. 9, 2009) [hereinafter Estevez Memo Oct. 9, 2009] (increasing the value of personal property allowed in a base transfer from \$15 million to \$30 million, and providing that real property, barrier and other construction material are excluded from the \$30 million limit).

¹⁵⁹ Memorandum from Alan F. Estevez, Acting Deputy Under Sec’y of Def. for Logistics and Materiel Readiness, to Commanding General, Multi-National Force-Iraq, subject: Authority to Transfer Property in Iraq 1 (July 7, 2009) [hereinafter Estevez Memo July 2009].

¹⁶⁰ HEADQUARTERS, UNITED STATES FORCES-IRAQ, APP. 8 (FEPP) TO ANNEX D (LOGISTICS) TO OPERATIONS ORDER 10-01 (1 Jan. 2010) [hereinafter USF-I OPOD 10-01].

¹⁶¹ See Estevez Memo Oct. 9, 2009, *supra* note 158, at 1.

Once USF-I authorizes FEPP disposal in conjunction with a closure, the tenant unit must conduct a 100% inventory of all property located on the base.¹⁶² Additionally, contractors must return all contractor inventory property¹⁶³ that is no longer needed for the performance of U.S. contracts to the tenant unit.¹⁶⁴ The tenant unit must then forward a complete property inventory list of all government-owned property to the applicable U.S. division, which must either reallocate property within the division or determine that the division no longer needs the property.¹⁶⁵

1. Screening Property as Excess

Approximately forty-five days from the base closure or transfer date, the U.S. division must forward the inventory spreadsheet of foreign excess personal property to the USF-I J4.¹⁶⁶ United States Forces-Iraq will screen the property to determine whether there is an existing need for the property.¹⁶⁷ United States Forces-Iraq will then distribute the property spreadsheet electronically to the owning military department, military units in Iraq, contractors, CENTCOM, and the U.S. Embassy for review via the theater's classified computer network.¹⁶⁸

As a result of congressional interests, USF-I implemented an additional screening layer in October 2009.¹⁶⁹ In addition to the various recipients listed above, USF-I must now send the foreign excess personal property listing¹⁷⁰ to GSA and the National Association of State Agencies for Surplus Property (NASASP) as well.¹⁷¹ All recipients have fourteen days to screen and claim property

before USF-I offers it to the GOI.¹⁷² Recipients in theater have priority over state and local agencies¹⁷³ in claiming property from the listings. If the aforementioned entities do not claim the property within fourteen days, the owning military department will declare it excess, and, if not restricted,¹⁷⁴ the property will be eligible for transfer to the GOI.

2. "FOB in a Box" Property Pre-Approved as Excess

United States Forces-Iraq's policy is to transfer facilities to the GOI in full operating condition to the maximum extent possible.¹⁷⁵ "An effective transfer of functional facilities is critical to enabling our Iraqi partners to assume increased security responsibility."¹⁷⁶ In furtherance of this policy, in July 2009, then-MNF-I requested that Headquarters, Department of the Army (HQDA), pre-approve certain non-standard equipment as excess.¹⁷⁷ Based on a study of previously transferred bases, MNF-I requested basic life support and force protection items that military departments consistently declared excess in the past.¹⁷⁸ On 20 August 2009, HQDA approved the request and pre-approved designated items¹⁷⁹ as excess.¹⁸⁰ Therefore, military units do not have to screen the approved items in conjunction with other personal property items prior to a base closure or return. This HQDA pre-approval is limited to foreign excess personal property transfers in conjunction with a base closure or return; units must screen all property prior to a tiered authority transfer.¹⁸¹

¹⁷² *Id.*

¹⁷³ Wiesner e-mail, *supra* note 7 (providing that state and local agencies are responsible for the cost of transporting the equipment to their location. To date, state and local agencies have made one claim for generators).

¹⁷⁴ Bell Memo June 2008, *supra* note 13 (detailing personal property that is prohibited from transfer to the GOI).

¹⁷⁵ Base Closure Memo, *supra* note 165, at 1.

¹⁷⁶ *Id.* (quoting General Raymond T. Odierno).

¹⁷⁷ Memorandum from Dir., CJ 1/4/8, to ARCENT G-4, subject: Pre-Approval of Excess Declaration of Non Standard Equipment (16 July 2009) [hereinafter FOB in a Box Memo].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (listing the approved equipment categories as Containerized Housing Units (CHU); force protection equipment (including barrier material); bulk plastic water tanks; bulk plastic and metal fuel tanks; camouflage nets; air conditioner units; generators; porta johns; refrigerators; freezers; beds and mattresses; office equipment; wall lockers; tents; guard shacks; dining facility equipment; washing machines; and dryers).

¹⁸⁰ *Id.* approval endorsement of 20 Aug. 2009.

¹⁸¹ *Id.* (providing that Army Central Command (ARCENT) endorsed MNF-I's request prior to forwarding to HQDA and DUSD (L&MR). The ARCENT recommended denial because operational concerns are not recognized as a basis for declaring items excess. For example, although generators are required in order to transfer bases that are fully functional, U.S. Forces Afghanistan has requested generators of all types and sizes. Therefore, in accordance with HQDA executive order, it was ARCENT's position that the requested items were prohibited from being declared excess).

¹⁶² Memorandum from Debra S. Bennett, Acting Assistant Deputy Under Sec'y of Def. for Supply Chain Integration to Alan F. Estevez, Acting Deputy Under Sec'y of Def. for Logistics and Material Readiness, subject: Foreign Excess Personal Property (FEPP) Screening Procedures in Iraq 2 (Oct. 16, 2009) [hereinafter Estevez Memo Oct. 16, 2009]. See app. A (defining contractor inventory).

¹⁶³ FAR, *supra* note 9, at 1051 (defining contractor inventory as all excess contractor-acquired property and government-furnished property that the contractor no longer needs in performance of a contract). See app. A (defining contractor-acquired property and government-furnished property).

¹⁶⁴ See Olson, *supra* note 9 (providing information on contractor responsibilities with contractor-managed, government-owned property).

¹⁶⁵ Memorandum from Commanding General, Multi-National Force-Iraq, to Distribution List, subject: Return or Closure of Bases and Facilities (20 Apr. 2009) [hereinafter Base Closure Memo].

¹⁶⁶ Estevez Memo Oct. 16, 2009, *supra* note 162, at 2.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1.

¹⁷⁰ *Id.* at 2 (providing that prior to sending the list to NASASP all sensitive information is removed; additionally, the list is scrubbed in theater to remove property that is not suitable for state and local agencies). For example, some property may not meet U.S. specification standards.

¹⁷¹ *Id.*

Upon completion of the screening process, USF-I must issue an authorization memorandum¹⁸² for transfer of property in conjunction with a base closure or return. This memorandum includes the USF-I J-4-approved inventory spreadsheet. The tenant unit may only transfer property on the approved inventory spreadsheet, and may only transfer it to the ISF or other Iraqi ministries.¹⁸³

B. Foreign Excess Personal Property Tiered Transfer Authority (TTA)

The TTA is a means for the transfer of foreign excess personal property that is not accomplished in conjunction with the transfer of one of the 417 authorized bases.¹⁸⁴ The DoD delegated the authority to the commanding general, MNF-I (USF-I), to implement a TTA for the disposal of certain designated equipment categories.¹⁸⁵ This TTA gives O-6-level commanders the authority to transfer foreign excess personal property valued at less than \$10,000; the first general officer in the chain of command authority to transfer foreign excess personal property less than \$50,000; and the USF-I J4 authority to transfer foreign excess personal property less than \$1 million.¹⁸⁶ The DUSD (L&MR) is the approval authority for transfers of foreign excess personal property requested by USF-I under the TTA valued at \$1 million or higher.¹⁸⁷

The TTA procedures for transfer are similar to base closure procedures. The DUSD (L&MR), however, delegated the approval authority to lower levels of command rather than withholding the authority at the USF-I headquarters level, as is the case with FEPP in conjunction with a base.¹⁸⁸ Although an O-6 commander has the authority to transfer property under \$10,000, he does not have the authority to declare property excess.¹⁸⁹ This authority remains with the military department that owns the equipment.¹⁹⁰ Therefore, units must submit an inventory spreadsheet, containing personal property and corresponding depreciated value,¹⁹¹ to their chain of command. U.S.

¹⁸² USF-I OPOD 10-01, *supra* note 160, at 3.M.5. See app. G (providing a sample MNF-I authorization memorandum for transfer of foreign excess personal property in conjunction with a base closure or return).

¹⁸³ Bell Memo June 2008, *supra* note 13, at 2.

¹⁸⁴ *Id.*

¹⁸⁵ Estevez Memo Oct. 9, 2009, *supra* note 158, at 1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Bell Memo June 2008, *supra* note 13.

¹⁸⁹ *Id.* attachment 2, at 3.

¹⁹⁰ *Id.*

¹⁹¹ See Estevez Memo July 2009, *supra* note 159, at 1 (providing that the owning military unit calculates the value of property under a Tiered Transfer Authority in the same manner as property transferred in

Forces-Iraq follows the same screening procedures for TTA transfers as base closure transfers.

Once the screening process is complete, USF-I will issue a validation memorandum¹⁹² declaring items excess and eligible for transfer to the GOI.¹⁹³ In a single transaction, the TTA approval authority can only transfer the value of property within his tiered dollar threshold.¹⁹⁴ The dollar threshold applies to individual line items, regardless of whether multiple items are on one list (which may add up to a large FMV in the aggregate).¹⁹⁵ Prior to transfer, the tiered approval authority must sign the inventory spreadsheet, verifying USF-I has screened the property and declared it excess; none of the items are restricted from transfer; and the DoS has approved the recipient.¹⁹⁶ Units may transfer TTA foreign excess personal property to the ISF, other GOI ministries, or any other governmental entity at the federal, provincial, or local level.¹⁹⁷

C. Execution of a Base Transfer or Tiered Authority Transfer

The U.S. military unit that is accountable for the foreign excess personal property must conduct a joint inventory with the gaining ISF unit commander, GOI representative, or other approved entity no later than the date of the return of the base or on the date of a TTA transfer.¹⁹⁸ Units execute transfers via joint memoranda that record the presence and receipt of the foreign excess personal property at the time of the transfer.¹⁹⁹ Personal property is transferred in an "as is" condition, and the United States is not responsible for maintenance, repair, or replacement.²⁰⁰

D. Personal Property Requiring Special Consideration

conjunction with a base closure). The Supply Condition Code, assigned by the unit, establishes the fair market value of the item.

¹⁹² See app. H (providing a sample USF-I validation memorandum for a Tiered Approval Authority transfer).

¹⁹³ USF-I OPOD 10-01, *supra* note 160, at 3.P.

¹⁹⁴ Bell Memo June 2008, *supra* note 13.

¹⁹⁵ *Id.* For example, a 2004 Ford Explorer has a particular line item number assigned to it and a 2005 Ford Explorer has a different line item number assigned to it. An O-6 commander has the authority to transfer up to \$9,999.99 worth of 2004 Explorers and \$9,999.99 of 2005 Explorers in one transfer. All property with the same line item number must be under \$9,999.99 in a single transaction.

¹⁹⁶ USF-I OPOD 10-01, *supra* note 160, at 3.N (providing that military units should coordinate with the Provincial Reconstruction Team or regional embassy office to ensure DoS approves of the recipient prior to transfer).

¹⁹⁷ Bell Memo June 2008, *supra* note 13, at 1.

¹⁹⁸ USF-I OPOD 10-01, *supra* note 160, at 3.R.1.

¹⁹⁹ Bell Memo June 2008, *supra* note 13, at 1.

²⁰⁰ Estevez Memo July 2009, *supra* note 159, attachment 2, at 1.

In July 2009, DUSD (L&MR) authorized the transfer of barrier material (e.g., concertina wire, T-walls, Jersey barriers, HESCO barriers) and other construction material located off a base to any Iraqi government organization or private entity, approved by the DoS.²⁰¹ Prior to transferring such material, USF-I must determine that the property cannot reasonably or cost effectively be moved for use by U.S. forces elsewhere in Iraq.²⁰² USF-I must screen construction and barrier material²⁰³ and designate it as excess prior to transfer.²⁰⁴ Additionally, prior to transferring material located on private property to a private entity, DoS must approve the private entity and the private entity must waive all claims against the U.S. Government related to the property.²⁰⁵ Tiered Transfer Authority thresholds do not apply to barrier and other construction material; therefore, the amount that U.S. forces can leave in place for the GOI or a private entity is unlimited.²⁰⁶

Additionally, DUSD (L&MR) has authorized the transfer of bridges located off a base if the owning military department declares them excess and USF-I concludes that they cannot reasonably or cost effectively move the bridge for use by U.S. forces elsewhere in Iraq.²⁰⁷ The DUSD (L&MR) authorized USF-I to transfer bridges up to a depreciated value of \$5 million per bridge.²⁰⁸

V. Authority to Transfer Defense Articles and Provide Defense Services to the Military and Security Forces of Iraq and Afghanistan (Fiscal Year 2010 National Defense Authorization Act)

When the president confirmed that U.S. forces will withdraw from Iraq by the end of 2011, the Multi-National Security Transition Command-Iraq (MNSTC-I) (now USF-I Advisory and Training) immediately began exploring the minimum essential capabilities the ISF would need to maintain an acceptable level of security after the withdrawal of U.S. forces.²⁰⁹ It identified approximately 53,000 pieces of U.S. Government personal property in Iraq needed for the

maintenance of security and stability after the withdrawal of U.S. forces.²¹⁰

In response, Congress passed section 1234 of the National Defense Authorization Act (NDAA) for Fiscal Year 2010. It provides an additional authority to transfer defense articles to the GOI and the Government of the Islamic Republic of Afghanistan (GIROA).²¹¹ Section 1234 authorizes the Secretary of Defense, with the concurrence of the Secretary of State, to transfer defense articles from the existing stocks of the DoD and provide defense services in connection with these transfers without reimbursement from the GOI or GIROA.²¹² This authority, however, is not as expansive as transfers pursuant to AECA and the FAA.

Defense articles eligible for transfer must be located in Iraq or Kuwait as of 7 October 2009; must be in use to support operations in Iraq immediately before the transfer; and must no longer be needed by U.S. forces in Iraq or Kuwait.²¹³ Unlike grant transfers pursuant to section 516 of the FAA, section 1234 authorizes the transfer of excess and non-excess defense articles, only requiring they are no longer needed in Iraq or Kuwait.²¹⁴ Transfers require a fifteen-day CN prior to transfer, and the aggregate replacement value of non-excess defense articles transferred and services provided is limited to \$750 million.²¹⁵

At the time of this primer, the procedures for implementing this authority were still being drafted.²¹⁶ However, the report to Congress indicates that requests for transfer of excess defense articles will be processed in accordance with section 516 of the FAA.²¹⁷

Additionally, for non-excess transfers, USF-I Advisory and Training in Iraq, or Combined Security Transition Command-Afghanistan (CSTC-A) in Afghanistan, may initiate an excess transfer by first verifying the requirement in theater. Second, the Joint Staff, CENTCOM, and the Office of the Secretary of Defense (OSD) must validate the requirement.²¹⁸ Third, the Defense Technology Security Agency, DSCA, and the military departments must review the requirement.²¹⁹ Defense Security Cooperation Agency will then prepare and staff the CN for Secretary of Defense

²⁰¹ *Id.* at 1–2.

²⁰² *Id.*

²⁰³ Wiesner e-mail, *supra* note 7 (providing that barrier material that is in service must be screened as excess prior to a transfer under a Tiered Transfer Authority. However, barrier material was pre-approved as excess for transfers in conjunction with a base return to GOI and does not require screening as excess). *Supra* note 179.

²⁰⁴ Telephone Interview with Major Patrick Wiesner, Deputy Chief, Contract and Fiscal Law, Office of the Staff Judge Advocate, U.S. Forces-Iraq (Jan. 16, 2010).

²⁰⁵ Estevez Memo July 2009, *supra* note 159, at 2.

²⁰⁶ Bell Memo Nov. 2008, *supra* note 155, at 1.

²⁰⁷ Estevez Memo July 2009, *supra* note 159, at 2.

²⁰⁸ *Id.*

²⁰⁹ TRANSFER REPORT, *supra* note 2, at 3.

²¹⁰ *Id.*

²¹¹ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1234, 123 Stat. 2190.

²¹² *Id.*

²¹³ *Id.* § 1234(b)(2).

²¹⁴ *Id.* § 1234(a).

²¹⁵ *Id.* § 1234(b)(1), (d)(1)–(e)(1).

²¹⁶ TRANSFER REPORT, *supra* note 2, at 7.

²¹⁷ *Id.*

²¹⁸ *Id.* at 7.

²¹⁹ *Id.*

and Secretary of State approval. The OSD will deliver the section 1234 notification to Congress.²²⁰ Once approved, USF-I or CSTC-A will present the defense article to the host nation, which then signs the transfer documents.²²¹

VI. Conclusion

This primer consolidates the statutory authorities, implementing regulations, and DoD policies that authorize the disposal of personal property to Iraq and other foreign governments. In order to determine if DoD can transfer property, the property must first be classified as personal property or real property. Congress has authorized statutory authority to dispose of personal property; however, authorities differ depending on the type of personal property.

The U.S. Government may transfer excess defense articles to eligible foreign governments in accordance with two statutory authorities. First, the U.S. Government can sell EDA from existing stocks pursuant to section 21, AECA, using FMS procedures. Second, foreign countries, approved by Congress, can receive grant EDA in accordance with section 516, FAA. The rules governing the transfer of defense articles are complex and require extensive coordination between several governmental agencies, possible CN, and DoS approval to ensure transfers are consistent with U.S. foreign policy. As a result, EDA transfers can take significantly more time than other personal property disposal authorities such as FEPP.

In accordance with its authority in title 40, DoD authorized transfers of foreign excess personal property to the ISF, other Iraqi ministries, and in some cases, other federal, provincial, and local entities. Specifically, DoD implemented two separate processes in Iraq for FEPP: (1) transfers of foreign excess personal property in conjunction with a base closure or the return of a base to GOI up to \$30 million per base, and (2) a TTA based on the value of property items. Prior to transfer, both procedures require an accounting of property, coordination with USF-I, and a declaration by the owning military department of property as excess.

Disposal authorities are particularly important in Iraq as the U.S. Government focuses on withdrawal while seeking to ensure the ISF have the capability to maintain security once U.S. forces withdraw. Transferring foreign excess personal property and defense articles to Iraq furthers both of these policy goals.

²²⁰ *Id.* at 8.

²²¹ *Id.*

Appendix A

Property Classification Matrix and Definitions

Contingency Operation: A military operation that

- (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
- (2) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of title 10, chapter 15, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Contractor Acquired Property: Property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title.

(FAR Part 45.101)

Contractor Inventory:

- (1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;
- (2) Any property that the Government is obligated or has the option to take over under any type of contract, e.g., as a result either of any changes in the specifications or plans thereafter or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option for the Government; and
- (3) Government furnished property that exceeds the amounts needed to complete full performance under the entire contract. (FAR Part 45.101).

Contractor Managed Government Owned Property: A non-doctrinal term used to incorporate all items which the contractor manages expressly to perform under the contract, including items given to the contractor by the Government (government-furnished property), or acquired or fabricated by the contractor to which the Government holds title. (U.S. Government Accountability Office, GAO-08-930, Operation Iraqi Freedom: Actions Needed to Enhance DOD Planning for Reposturing of U.S. Forces from Iraq (2008)).

Defense Article: Generally includes, (1) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war; (2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance; (3) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, re-pair, servicing storage, construction, transportation, operation, or use of any article listed in this subsection; or (4) any component or part of any article listed in this sub-section. (section 644(d) of the Foreign Assistance Act of 1961).

Excess Defense Article: The quantity of defense articles—other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors—owned by the USG and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all Department of Defense Components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations. (section 644(g) of the Foreign Assistance Act of 1961).

Excess Property: Property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities. This term is not interchangeable with surplus property. (40 U.S.C. § 102(3)).

Foreign Excess Property: Excess property that is not located in the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, or the Virgin Islands. (40 U.S.C. § 102(6)).

Foreign Excess Personal Property (FEPP): Any U.S.-owned excess personal property located outside the United States, American Samoa, Guam, Puerto Rico, Trust Territory of the Pacific Islands, and the Virgin Islands. (DoD 4160.21-M-1, xxi).

Foreign Excess Real Property (FERP): Any U.S.-owned excess real property located outside the United States, American Samoa, Guam, Puerto Rico, Trust Territory of the Pacific Islands, and the Virgin Islands.

Government-Furnished Property: Property in the possession of, or directly acquired by, the Government and subsequently furnished to a contractor for performance of a contract. (FAR Part 45.101). There are two types of government-furnished property: equipment and material.

- (1) Government-Furnished Equipment: Consists of equipment, special tooling, or special test equipment that is provided to a contractor for use on a government contract that does not lose its identity or become a component part of another article when put into use. (FAR Part 45.101).
- (2) Government-Furnished Material: Property provided by the Government for the performance of a contract that is consumed or expended by the contractor during the performance of a contract, such as component parts of a higher assembly or items that lose their individual identity through incorporation into an end item.

Government Property: All property owned or leased by the Government, including both government-furnished property and contractor-acquired property. (FAR Part 45.101).

Fixture: An item that was personal property affixed to or is otherwise adapted to real property that loses its character as personal property and becomes a part of the real property. (35A Am. Jur. 2d Fixtures § 1(2010)).

Major Defense Equipment: Any item of significant military equipment on the United States Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000. (22 U.S.C. 2794(6). *See also infra* app. F).

Military-Type Property (also referred to as “Green Property”): Personal property of the types that are unique and peculiar to DoD and that have limited commercial application. (DoD 4160.21-M-1, app. 2)

Non-Standard Equipment: A commercially procured item requiring property book accounting. (Chief Warrant Officer (W-5) David A. Dickson, Centralization of Cataloging Procedures for Non-Standard Material, PB 700-06-01, Army Logistician, Vol. 38, Issue 1, Jan./Feb. 2006).

Property: Any Government interest in property, except the public domain; national forest or park lands; land for public land mining or mineral leasing; land withdrawn from public domain not suitable for return to public domain due to changes in character; records of the government; naval battleships, cruisers, aircraft carriers, destroyers, or submarines.

Personal Property: Property of any kind or any interest except real property and records of the Federal Government (DoD 4160.21-M, at xxix).

Real Property:

- (1) Any interest in land, together with the improvements, structures, and fixtures located thereon (including prefabricated movable structures, such as Butler-type storage warehouses and Quonset huts, and house trailers with or without undercarriages), and appurtenances thereto, under the control of any Federal agency, except (i) The public domain; (ii) Lands reserved or dedicated for national forest or national park purposes; (iii) Minerals in lands or portions of lands withdrawn or reserved from the public domain that the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; (iv) Lands withdrawn or reserved from the public domain but not including lands or portions of lands so withdrawn or reserved that the Secretary of the Interior, with the concurrence of the Administrator of General Services, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; and (v) Crops when designated by such agency for disposition by severance and removal from the land.
- (2) Improvements of any kind, structures, and fixtures under the control of any Federal agency when designated by such agency for disposition without the underlying land (including such as may be located on the public domain, on lands withdrawn or reserved from the public domain, on lands reserved or dedicated for national forest or national park purposes, or on lands that are not owned by the United States) excluding, however, prefabricated movable

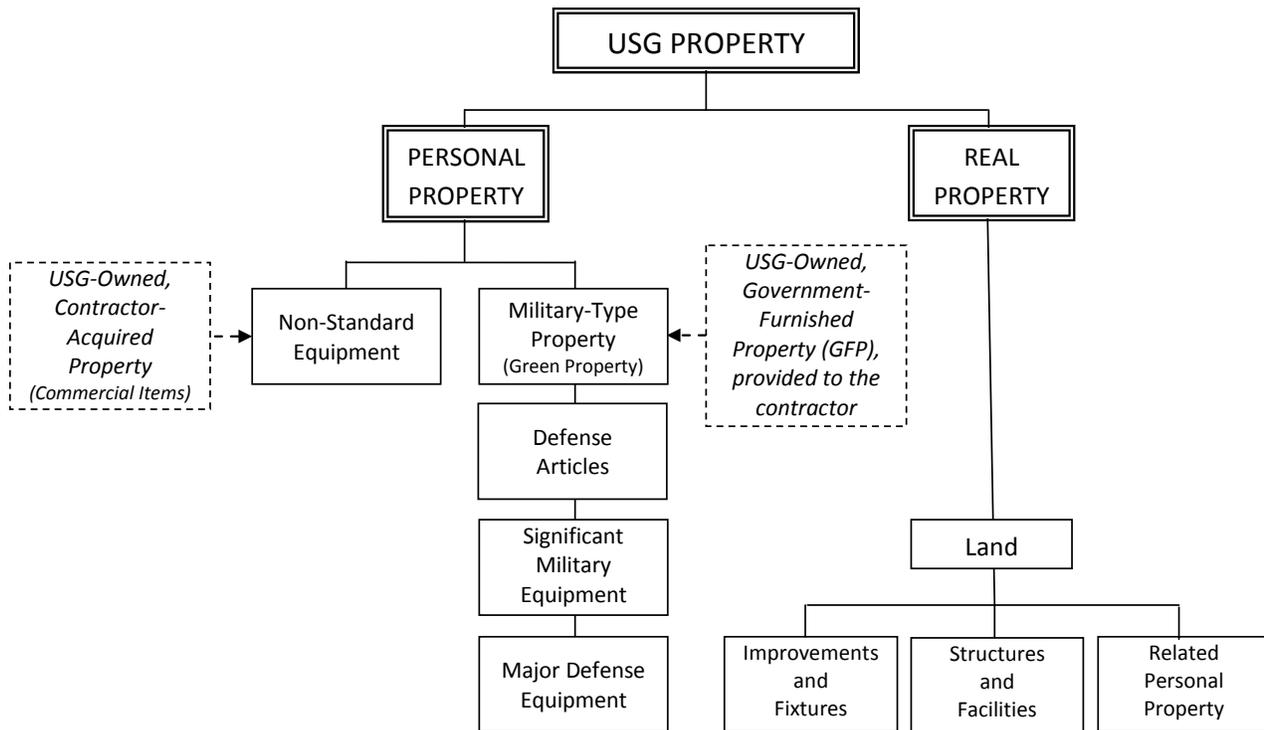
structures, such as Butler-type storage warehouses and Quonset huts, and house trailers (with or without undercarriages).

- (3) Standing timber and embedded gravel, sand, or stone under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition. (Public Contracts and Property Management, 41 C.F.R. § 102-71-20).

Related Personal Property: Any personal property that is an integral part of real property or is related to, designed for, or specially adapted to the functional or productive capacity of the real property and the removal of which would significantly diminish the economic value of the real property (normally common use items, including but not limited to general-purpose furniture, utensils, office machines, office supplies, or general-purpose vehicles, are not considered to be related personal property). (Public Contracts and Property Management, 41 C.F.R. § 102-71-20).

Significant Military Equipment (SME): Those articles for which special export controls are warranted because of their capacity for substantial military utility or capability. Significant military equipment are those items preceded by an asterisk on the United States Munitions List. (ITAR § 120.7).

Surplus Property: Excess property that the Administrator of General Services determines is not required to meet the needs or responsibilities of all federal agencies. 40 U.S.C. § 102(10).



Appendix C

Federal Condition Codes and Fair Market Value Rates

(DRMS-I 4160.14 section 4, Supplement 3 Codes and Terms)
(DoD 4160.21-M, Defense Materiel Disposition Manual, Ch. 9)
(DoD 7000.14-R, Federal Management Regulation, Vol 15, Ch. 7, Sect. 070304)

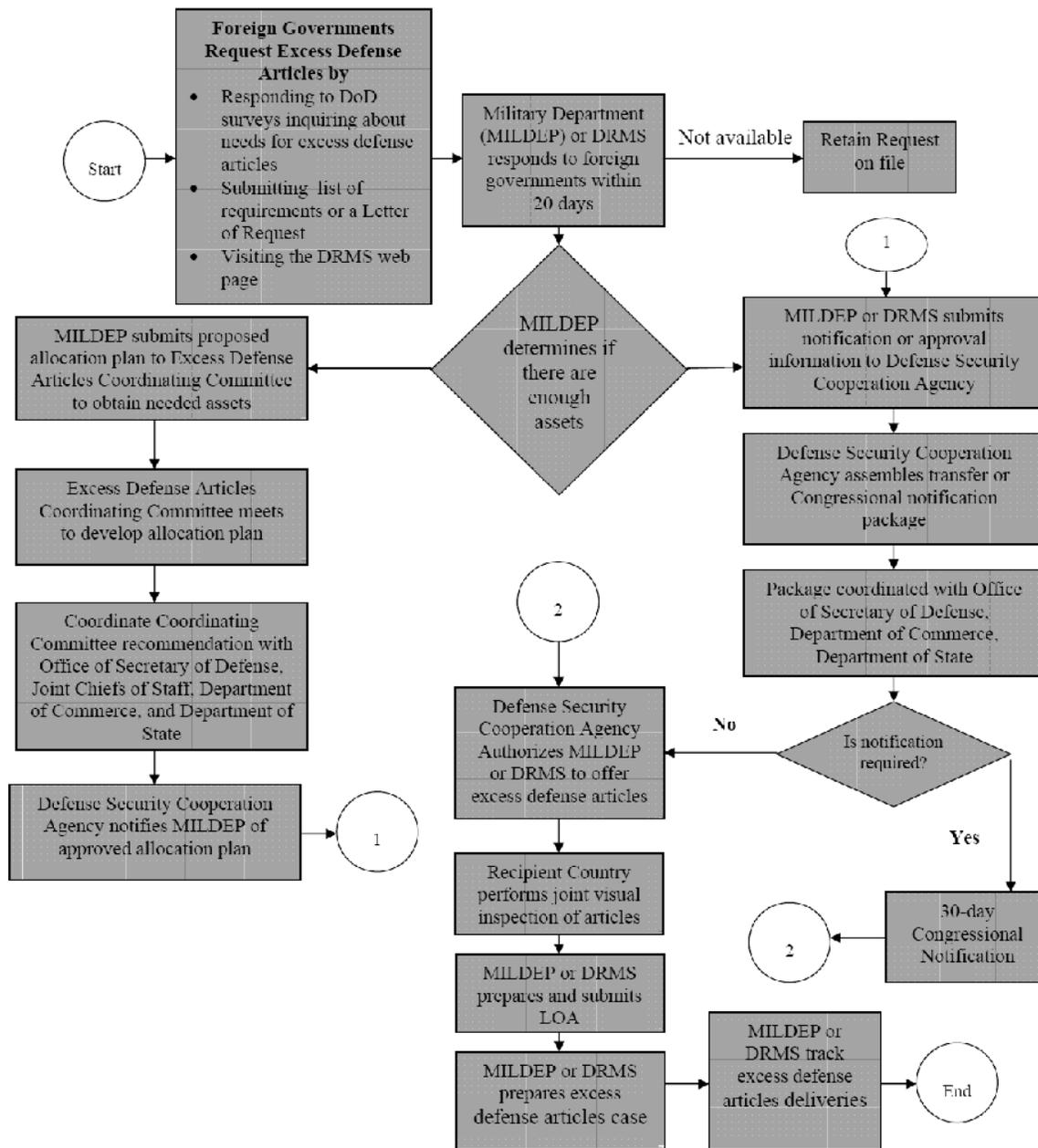
Definition: A Federal Condition Code consists of a two-digit code comprised of an alpha Supply Condition Code and a numeric or alpha Disposal Condition Code. The Federal Condition Code is used for reutilization program screening and review purposes.

CODE	DESCRIPTION	FAIR VALUE RATES
A1	Serviceable – unused-good	50
A4	Serviceable – used-good	40
A2, A5, B1, C1 D1, B4, C4, D4	Serviceable, with qualifications; materiel is either unused in fair condition or used in good condition	30
B2, C2, D2, B5 C5, D5, D7, E7 F7, G7	Serviceable with qualifications; if unused in fair condition; if used in good condition. Also includes unserviceable items, which are in good condition but Require minor repairs	20
A3, B3, C3, D3 A6, B6, C6, H7 F8	Serviceable, in poor condition; unserviceable, in poor condition; or, unserviceable because item requires minor repairs	10
D8, H8, D9, F9 FX, FX, HX	Unserviceable, requiring major repairs	5

Appendix D

Excess Defense Articles (EDA) Matrix

(DoD Inspector General Report, Controls Over Excess Defense Articles Provided to Foreign Governments, of February 13, 2009)



Appendix E

Key Agencies and Organizations for the Transfer of EDA

Combined Security Transition Command–Afghanistan (CSTC–A). CSTC–A reports to the Commander, U.S. Forces–Afghanistan (USFOR–A), which is under the command and control of CENTCOM. “CSTC–A can loosely be termed a “pseudo-SCO” for a variety of reasons. First, its mission, including operational advice and training, exceeds that of a normal SAO under U.S. law. Secondly, the organization is an operational command, rather than an administrative office. As such, it does not officially report to the U.S. ambassador, but only to the combatant command through channels. Finally, CSTC–A has authority to train and equip the local police forces which, while permitted by the Arms Export Control Act, is severely constrained under normal circumstances.” *Defense Institute of Security Assistance Management (DISAM) Online Green Book, page 4-2.*

Defense Logistics Agency (DLA). DLA assists the Defense Reutilization and Marketing Service (DRMS) with processing Foreign Military Sales cases and Excess Defense Articles (EDA) for defense articles at a Defense Reutilization and Marketing Office. *Security Assistance Management Manual (SAMM), page 47.*

Defense Reutilization and Marketing Service (DRMS). The DRMS is a component of DLA. DRMS maintains an inventory of excess defense articles received from the military services that are available to eligible foreign governments via Foreign Military Sales or Excess Defense Articles. DRMS is an Implementing Agency and is authorized to respond to Letters of Request (LOR) from foreign governments. The DRMS assigns case managers to process LORs and coordinate with applicable governmental agencies. *Security Assistance Management Manual.*

Defense Security Cooperation Agency (DSCA). DSCA is an agency of DoD that directs, administers, and supervises the execution of all Security Assistance programs for DoD. “DSCA conducts international logistics and sales negotiations with foreign countries, provides financial management, develops and implements Security Assistance policies, and assists U.S. industry in exporting military equipment and services. All authorities conferred on the Secretary of Defense by the FAA and AECA pertaining to Security Assistance and all authorities under those acts delegated by the President to the Secretary of Defense are redelegated to the Director, DSCA.” *See DoD Directive 5105.65 and SAMM, page 46.*

Department of State (DoS). Under Executive Order 1195, the Secretary of State is responsible for continuous supervision and general direction of the Security Assistance program. This includes determining whether (and when) there will be a program or sale for a particular country or activity and, if so, its size and scope. The DoS also reviews and approves third party transfers. The DoS ensures Foreign Assistance Act (FAA), section 503, eligibility and obtains FAA, section 505, assurances from recipient countries and organizations. The DoS prepares the SCO Mission Program Plan and reviews and submits FMS projections (the Javits report) required under the Arms Export Control Act (AECA), section 25, to Congress and the Congressional Budget Justification. *SAMM, page 45.*

Implementing Agency (IA). IAs prepare and execute FMS and EDA cases to provide defense articles and services to meet Security Assistance requirements. IAs ensure that all applicable agencies review the LOR and LOA prior to approval. Every military department has at least one designated IA. For example, the primary IA for the Army is the commander, U.S. Army Security Assistance Command (USASAC). However, the Army has decentralized the preparation of LOAs. Cases involving material or services are prepared by the applicable life-cycle management command vice USASAC. Even though the preparation of LOAs is decentralized for the Army, USASAC maintains overall control in that all cases are forwarded to USASAC for review and signature before going to DSCA and the purchaser. *SAMM, pages 46, 125 and DISAM Online Green Book, pages 3-16.*

Iraq Security Assistance Mission (ISAM). ISAM is a "Pseudo-Security Cooperation Office." ISAM does not fall under the Ambassador, as SCOs generally do. ISAM operates under title 10 of the U.S. Code and reports to the combatant commander. ISAM does handle the three core duties of a traditional Security Assistance Office: facilitating Iraqi FMS; administering Iraq's International Military Education and Training program (funded by DoS); and End-Use Monitoring of sensitive articles transferred to Iraq. *DISAM Online Green Book, page 4-2 and e-mail from Lieutenant Colonel Paul Capes, Chief, Director's Action Group, Iraq Security Assistance Mission (22 Feb. 2010, 05:11 EST).*

Military Departments. The military departments and other IAs prepare and execute FMS and EDA cases to provide defense articles and services to meet approved security assistance requirements. They provide data to IAs and DSCA pertaining to price, source, and availability for use in processing FMS and EDA cases. *SAMM, page 46 and DISAM Online Green Book, page 3-15.*

Security Cooperation Organization (SCO). The term “SCO” is the general name for the DoD organization overseas with the primary responsibility for interfacing with the host nation on security assistance and security cooperation programs. The SCO, also referred to as the SAO, is normally co-located with the U.S. Embassy in the country and is a part of the ambassador’s country team. The chief of the SCO is responsible to three authorities: the ambassador, the commander of the Combatant Command (COCOM), and the director of DSCA. The pseudo-SCO in Iraq is ISAM and in Afghanistan is CSTC–A. *DISAM Online Green Book, page 3-12.*

Appendix F

Non-Standard Equipment Categories Eligible for FEPP in Iraq

Memorandum from DUSD (L&MR) to CG, MNF-I, subject: Authority to Transfer U.S. Property in Iraq (June 6, 2008).

Equipment Categories Authorized for Transfer:

1. Hand Shop and Industrial Tools
2. Air Conditioning Units
3. Personal Protective Equipment, Fire, Safety, Medical (except Psycho diagnostic test sets) and Spill Response Items and Equipment (restrictions apply)
4. Communication Equipment (restrictions apply)
5. Furniture
6. Food Service Equipment
7. Morale, Welfare, and Recreational Equipment not purchased with non-appropriated funds.
8. Base Support Equipment, Incinerators, Tanks, Pumps, Fuel Bladders, Washers/Dryers, Dumpsters (Water Purification Units are *not* authorized under Tiered Transfer Authority)
9. Containers, Shipping Storage, Refrigeration Units, and Material Handling Equipment
10. Power Distribution Equipment, Light Sets, Transformers, Substations, Distribution Panels
11. Vehicles and Trailers (restrictions apply)
12. Structures, Living Containers, Ablution Units, Chain Shelters, Building Modules, and Other Building Equipment
13. Generators (restrictions apply)
14. Construction, Material Handling, and Excavating Equipment, and Sweepers

Appendix G

Sample Authorization Base Transfer

USF-I J4

11 January 2010

MEMORANDUM FOR USF-W G4

SUBJECT: Authorization to Transfer Foreign Excess Personal Property (FEPP) to the Government of Iraq with POE WALEED (USF-W)

1. References:

a. TAB I to APPENDIX 2 to ANNEX D to MNF-I FRAMEWORK OPORD, 19 AUG 06

b. Memorandum, Deputy Under Secretary of Defense, Logistics & Materiel Readiness (DUSD L&MR), Subject: Authority to Transfer U.S. Property to Iraqi Ministries, dated 15 JUN 05 and amended 2 DEC 05, 14 MAR 06, 22 DEC 06, 6 JUN 08, 19 NOV 08, 7 JUL 09, 9 OCT 09.

2. USF-I J4 reviewed your inventory request to transfer non-mission essential equipment on POE WALEED. The equipment on the attached list is excess to USF-I units in the Iraq Theater of Operations. The items identified in the enclosed Property Inventory (enclosure 1) meet the criteria for the transfer of FEPP to an approved entity of the Government of Iraq (GoI) in exchange for substantial benefits in accordance with the references and 40 U.S.C. § 704. Per reference (a), provide copies of the transfer memorandum and a final inventory of FEPP transferred to the Office of the Prime Minister with POE WALEED following completion of the transaction.

3. FEPP not transferred with POE WALEED is eligible for transfer to another approved entity of the GoI using the tiered approval authority outlined in the references. Department of State approval of items and recipients must be obtained through U.S. Mission Iraq (USM-I) or Regional Embassy Offices (REOs) prior to executing a transfer using the tiered approval authority. Per reference (a), provide copies of USM-I/REO item/recipient approval transfer memorandum and a final inventory of any FEPP transferred using the tiered approval authority to USF-I J4 following completion of the transaction(s).

4. Points of Contract at USF-I J4 is MAJ _____ at 318 _____ .

1 Encl
1. Property Inventory

BG, USA
USF-I J4

Appendix H

Sample Validation Memorandum for Tiered Transfer Authority

USF-I J4

11 December 2009

MEMORANDUM FOR Multi-National Corps-Iraq , Chief of Staff

SUBJECT: Disposition of Excess Personal Property Located at [Location Name (USD)] Tiered Authority

1. References:

a. TAB I to APPENDIX 2 to ANNEX D to MNF-I FRAMEWORK OPORD, 19 AUG 06

b. Memorandum, Deputy Under Secretary of Defense, Logistics & Materiel Readiness (DUSD L&MR), Subject: Authority to Transfer U.S. Property to Iraqi Ministries, dated 6 JUN 08, 19 NOV 08, 7 JUL 09, and 9 OCT 09.

2. Per request of [USD], USF-I reviewed an inventory of excess personal property (enclosure 1) for potential classification as Foreign Excess Personal Property (FEPP). The equipment on the attached list is excess to USF-I units in the Iraq Theater of Operations.

3. The items identified in enclosure 1 meet the criteria for transfer of FEPP to an approved entity of the GoI using the tiered approval authority outlined in the references in exchange for substantial benefits in accordance with the references and in exchange for substantial benefits in accordance with the references and 40 U.S.C. § 704. Per reference (a), provide copies of the transfer memorandum and a final inventory of FEPP transferred to the OFFICE OF THE PRIME MINISTER from [USD] following the completion of the transaction.

4. Points of Contract at USF-I J4 is MAJ _____ at 318 _____ .

1 Encl

1. Property Inventory

BG, USA

USF-I J4

Appendix I

Disposal of Personal Property Resources

1. Title 40 United States Code, chapter 7 (Public Buildings, Property, and Works)
2. Arms Export Control Act (AECA) of 1976, as amended, 22 U.S.C. § 2761, et al.
3. Foreign Assistance Act (FAA) of 1961, as amended
4. Security Assistance Acts of 2000 and 2002 (amended AECA and FAA)
5. National Defense Authorization Act for Fiscal Year 2010 (section 1234)
6. Security Assistance Management Manual (SAMM), DoD 5105.38-M
7. Defense Institute of Security Assistance Management
Online Green Book (<http://www.disam.dsca.mil/pubs/DR/greenbook.htm>)
8. International Traffic in Arms Regulations (ITAR), 22 U.S.C. § 120, et al.
9. Defense Reutilization and Marketing Service Instruction, DRMS-I 4160.14
10. Defense Materiel Disposition Manual, DoD 4160.21-M
11. Defense Demilitarization Manual, DoD 4160.21-M-1
12. Federal Acquisition Regulation, Part 45, Government Property
13. DoD Financial Management Regulation, DoD 7000.14R
14. Army Regulation 735-5, Policies and Procedures for Property Accountability
15. Deputy Under Secretary of Defense, Logistics and Materiel Readiness (DUSD L&MR), MNF-I Foreign Excess Personal Property Delegation Memoranda (Jun 08; Nov 08; Jul 09; and Oct 09)

(This is not intended to be an exhaustive list)

Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq¹

Captain Charles Bronowski² & Captain Chad Fisher³

I. Introduction

After the successful military surge of 2007 and 2008 improved the security situation on the ground in Iraq,⁴ the mission of U.S. Forces shifted to political engagement and economic revitalization.⁵ The U.S. Department of Defense (DoD) reconstruction projects are a vital component to supplement the efforts made by the Government of Iraq (GOI) and other U.S. agencies to rebuild civil capacity and provide assistance to needy populations and formerly-oppressed persons. The DoD reconstruction programs center on the provision of essential goods and services,⁶ encourage Iraqi workers and businesses to engage in self-sustaining market-based economic activities, and allow for the development of mechanisms to transition reconstruction responsibilities to the GOI.⁷

Non-kinetic reconstruction efforts play an important role in exploiting and sustaining security gains by denying avenues for the resurgence of extremist activities. Commanders use U.S. reconstruction-funded programs to win the hearts and minds of the local populace by promoting economic growth, improving infrastructure, and strengthening local and provincial institutions. To permit the widest distribution of benefits, the vast majority of DoD reconstruction projects are for small dollar amounts and focus on those individual Iraqis most in need. Micro-grants

and the distribution of medical supplies are common examples that serve these purposes.⁸

From the beginning of the Iraq operation through the middle of fiscal year (FY) 2009, U.S. agencies contributed approximately \$49 billion to promote reconstruction in Iraq.⁹ Although the majority of reconstruction spending has generally been undertaken by entities other than the U.S. military,¹⁰ the DoD engages in essential reconstruction and rebuilding efforts to supplement the work of agencies like the Department of State and the U.S. Agency for International Development (USAID). The Commander's Emergency Response Program (CERP) has been the primary tool used by the DoD, and provides urgent, humanitarian assistance to the Iraqi people.¹¹ In addition to CERP, in April 2008, the GOI provided the United States with \$270 million in Iraqi Commander's Emergency Response Program (I-CERP) funds for brick and mortar reconstruction for the Iraqi people.¹² The I-CERP program seeks to capitalize on the success and speed of execution of the CERP program.¹³ The Disarmament, Demobilization, and Reintegration (DDR) Program, which was financed using Iraqi Security Forces Funds (ISFF), was also established in FY 2008¹⁴ and was used to teach military-aged Iraqi males marketable skills to increase their value in the labor pool.¹⁵ Additionally, the United States is leveraging opportunities to use Iraqi businesses and laborers through Coalition Forces supply and service contracts financed with Operations and Maintenance-Army (OMA) funds.

Multi-National Corps-Iraq (MNC-I) C8 publishes updated versions of the Money as a Weapon System (MAAWS), MNC-I CJ8 standard operating procedures (SOP), which addresses financial resource operations in

¹ This article is the third in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps-Iraq, Headquarters, 2008-2009. Each article in the series discusses one significant legal issue that arose in each of The Judge Advocate General's Corps' functional legal areas during the deployment. Articles in the series will cover Administrative Law, Rule of Law, Contract and Fiscal Law, Operational Law, Criminal Law, and Foreign Claims.

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⁴ See, e.g., MICHAEL E. O'HANLON & IAN LIVINGSTON, IRAQ INDEX: TRACKING VARIABLES OF RECONSTRUCTION & SECURITY IN POST-SADDAM IRAQ 5 (Feb. 26, 2010) (showing weekly attacks against the coalition and its partners falling by almost 80% from May 2007 to December 2009).

⁵ See, e.g., Thom Shanker & Stephen Farrell, *Odierno Succeeds Petraeus in Iraq*, NY TIMES, Sept. 17, 2008 (comments from General Odierno).

⁶ This U.S. focus coincided with the GOI's goal to make 2008 the year that Iraq focused its reconstruction efforts on the provision of essential services to its citizens.

⁷ See *supra* note 5.

⁸ See HEADQUARTERS, MULTI-NATIONAL FORCE-IRAQ, MNC-I C8 OPERATION IRAQI FREEDOM (OIF) AFTER ACTION REPORT (AAR), MNC-I C8, at 15 (Mar. 2009) [hereinafter MNC-I C8 AAR] (covering deployment of XVIII Airborne Corps).

⁹ CURT TARNOFF, IRAQ: RECONSTRUCTION ASSISTANCE, CONGRESSIONAL RESEARCH SERVICE, at summary (Aug. 7, 2009).

¹⁰ See, e.g., Michael Waterhouse & Carolyn C. Smith, *Iraq Reconstruction Resources: Fact Sheet*, CDS Report for Congress, September 24, 2003, at CR-2.

¹¹ See *supra* note 8, at 3 (comparing reconstruction funding streams).

¹² *Id.* at 18.

¹³ These funds were wired from the Iraqi Treasury to a bank account in New York to be spent by U.S. units for the benefit of the Iraqi people.

¹⁴ The DDR program was funded with certain reprogrammed two-fiscal year FY 2007 ISFF appropriated funds.

¹⁵ See *infra* note 50.

Iraq.¹⁶ Revisions to the MAAWS capture the latest changes in law, regulation, and FRAGO guidance. The MNC-I Commanding General and C8 may place additional restrictions on the use of appropriated funds, but MAAWS policies cannot be less restrictive than those contained in law, regulation, and FRAGO guidance.

This article explores the evolution of DoD reconstruction programs and the resulting legal issues faced during the post-surge phase, especially issues faced during XVIII Airborne Corps' deployment from January 2008 to April 2009. Most of these same legal issues will be faced by judge advocates who are currently and will be deployed to Iraq. Many of the programs described in this article will continue as they are or in an altered form and continue to generate enduring fiscal law issues, even after the termination of the programs. In addition, many of the basic fiscal law lessons learned in Iraq are applicable to fiscal law practiced in Afghanistan. This article focuses particularly on the CERP, I-CERP, and DDR programs. We also discuss the manner in which OMA funds are utilized to encourage the Iraqi economy. Finally, we discuss legal issues that arise across the various DoD programs.

Judge advocates deployed to Iraq and practicing in the fiscal law area should be familiar with each of the CERP, I-CERP, and DDR programs. CERP is likely to remain the primary funding stream for DoD reconstruction efforts. Although nearly all initial I-CERP funds have been committed, judge advocates must be familiar with the I-CERP program in the event that the Iraqis disperse additional I-CERP funds. Initial funding for the DDR program expired at the end of FY 2008. Nevertheless, it is essential to understand the nature of the DDR program in order to appreciate how CERP can be used to replicate aspects of the DDR program and meet commanders' intent.

In early 2010, as part of the drawdown of forces, MNC-I and its higher headquarters Multi-National Force-Iraq (MNF-I) merged to form U.S. Forces-Iraq (USF-I). Although the merger of the two headquarters elements affects certain project approval levels and submission procedures, the authors' observations covering their deployment period from January 2008 to April 2009 and basic fiscal law principles contained in this article remain fundamentally unchanged for judge advocates practicing on the ground in divisions and brigades in Iraq.

¹⁶ The latest version of the MAAWS published during the tour of the XVIII Airborne Corps as MNC-I was dated 26 January 2009. MONEY AS A WEAPON SYSTEM (MAAWS), MNC-I CJ8 SOP (26 Jan. 2009) [hereinafter MAAWS MNC-I CJ8 SOP].

II. The Commander's Emergency Response Program

A. Use of CERP in Iraq

The CERP was originally established with funds from seized Ba'ath party assets.¹⁷ The program is now funded through a specific authority¹⁸ in the annual Defense Authorization and Appropriation Acts to use OMA on projects that address the urgent, humanitarian needs of the Iraqi people.¹⁹ The DoD Financial Guidance published in June 2008, and updated in January 2009, defines "urgent" as "any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action."²⁰ Prior to the June 2008 guidance, the concept of "urgent and humanitarian" had not been formally defined by the DoD or Congress, and was instead left up to command discretion.²¹ In addition, the June 2008 guidance contains the requirement that projects must be "small-scale," meaning generally less than \$500,000 per project.²²

In response to these program requirements, in FY 2008, MNC-I spent approximately \$1.2 billion in CERP, up from \$882 million in FY 2007.²³ As of the end of February 2009, MNC-I committed approximately \$146 million (and obligated \$138 million) of FY 2009 CERP throughout the theater of operation.²⁴ Because of the large amount of congressionally-appropriated funds spent through the duration of the CERP, auditors generally cast a close eye on CERP projects. In addition, Congress has sought to place various limits on the use of CERP to ensure that funds are being spent within the intent of the program. These factors,

¹⁷ *Id.*

¹⁸ The fact that CERP is an authority to use Operations and Maintenance-Army funds rather than a separate appropriation means that every dollar that commanders use for CERP is one less dollar that can be used for the U.S. military's own OMA-funded operations.

¹⁹ *See, e.g.*, Defense Supplemental Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-252, § 9104, 122 Stat. 2323.

²⁰ DoD Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 27, subject: Commander's Emergency Response Program (CERP) Guidance § 270102 (June 2008) [hereinafter June 2008 DoD CERP Guidance].

²¹ That there were no formal definitions for the terms "small-scale" and "urgent and humanitarian" until that time was highlighted by the GAO CERP oversight team. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, MILITARY OPERATIONS: ACTIONS NEEDED TO BETTER GUIDE PROJECT SELECTION FOR COMMANDER'S EMERGENCY RESPONSE PROGRAM AND IMPROVE OVERSIGHT IN IRAQ, GAO-08-736R, at 6 (23 June 2008) [hereinafter the CERP GAO REPORT]. In anticipation of and in response to this GAO report, the DoD inserted definitions for these concepts beginning in its mid-2008 CERP guidance.

²² June 2008 DoD CERP Guidance, *supra* note 20. However, at no point in the CERP program's existence has the term "small-scale" been defined by a specific dollar amount.

²³ MNC-I C8 AAR, *supra* note 8, at 15.

²⁴ MNC-I C7 WEEKLY CERP UPDATE TO MNC-I CHIEF OF STAFF (27 Feb. 2009).

explained below, serve to multiply the importance of judge advocate legal reviews of CERP projects.

B. Restrictions on the Use of CERP

In evaluating proposed CERP projects, the MNC-I staff goes to extensive lengths to verify that each project is in fact small-scale, urgent, and permissible under one of the CERP categories.²⁵ Corps staffers now make a concerted effort to refocus division and brigade CERP projects towards smaller projects that target individual Iraqis most in need, such as medicine for clinics, micro-grants and school supplies. In the first quarter of FY 2009, MNC-I saw the average cost per project drop to \$20,000 (from \$83,000 in FY 2008), despite an increase in the average number of projects by fifty percent.²⁶ Over time, MNC-I has shifted the burden for building larger infrastructure projects worth over \$500,000 to the Iraqi government, with emphasis on using I-CERP funding or the Iraqi budget process.

Both the June 2008 and January 2009 DoD Financial Guidance²⁷ place additional restrictions on CERP that did not previously exist during the surge period. Many of these new DoD restrictions are reactions to media and congressional scrutiny and recent Government Accountability Office (GAO) reports.²⁸ An example of a new restriction is the elevation of approval authority for CERP projects exceeding certain dollar amounts. The June 2008 DoD guidance states that, among other things, projects greater than \$500,000 are expected to be few in number, and projects greater than \$2 million need approval by Central command (which, in turn, delegated this authority to the MNF-I Commander).²⁹ Previously, the MNC-I Commander was the final approval for all CERP projects regardless of the dollar amount; however, projects are always constrained by the “small-scale” requirement.³⁰ This emphasis on reducing the number of larger projects stems from the GAO’s concern about defining the term “small-scale.”³¹ In response to provisions contained in the FY 2009

Defense Authorization Act,³² the January 2009 DoD Financial Guidance further tightened approval level authority. Projects over \$1 million need a certification from the Secretary of Defense or the Deputy Secretary of Defense (if delegated) stating that the CERP project is intended to address an urgent humanitarian need that immediately assists the Iraqi people.³³ Projects are also limited to \$2 million.³⁴ Only the Secretary of Defense can waive the \$2 million funding limit and only if he “(a) determines that the project is required to meet urgent humanitarian relief and reconstruction requirements and that it immediately assists the Iraqi people, and (b) submits a notification of his waiver in writing to the defense committees within 15 days of his waiver.”³⁵ This focus on project size came shortly after statements from members of Congress who were concerned about the large size of previous projects.³⁶ Notably, the January 2009 DoD Guidance contains a more lenient set of approval authority levels for CERP projects in Afghanistan than in Iraq.³⁷ This is likely a reflection of certain perceived abuses of the CERP program in Iraq in previous fiscal years, the desire to have greater oversight of Iraqi projects, and the shifting DoD emphasis away from Iraq toward Afghanistan.

In addition to DoD Guidance, the terms of the Security Agreement affect reconstruction projects. Under Article 5, the United States must seek approval from the GOI for “major construction and alteration projects.”³⁸ The MNC-I interprets this requirement as applying to CERP and I-CERP projects. The term “major” is not defined in the Security Agreement.³⁹ However, under MNC-I policy, all CERP and I-CERP construction projects exceeding \$50,000 are required to contain a Letter of Sustainment from the local

²⁵ In addition, the MAAWS contains the requirement that every CERP packet must have a legal review from an attorney working for the DoD as either a uniformed service member or civilian. MAAWS MNC-I CJ8 SOP, *supra* note 16, at B-1-6.

²⁶ MNC-I C8 AAR, *supra* note 8, at 15.

²⁷ June 2008 DoD CERP Guidance, *supra* note 20, § 270102.

²⁸ See, e.g., CERP GAO REPORT, *supra* note 21, at 6–7 (recommendations); June 2008 DoD CERP Guidance, *supra* note 20.

²⁹ June 2008 DoD CERP Guidance, *supra* note 20, §§ 270203, 270204.

³⁰ By “small-scale requirement”, we mean that all CERP projects must be within the overarching intent of the CERP program to fund smaller projects, while leaving the larger redevelopment programs to other funding streams, and in particular the Department of State.

³¹ See CERP GAO REPORT, *supra* note 21, at 6.

³² Duncan Hunter National Defense Authorization Act of 2009, Pub. L. No. 110-417, 122 Stat. 4356–4771 [hereinafter 2009 NDAA].

³³ DoD Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 27, subject: Commander’s Emergency Response Program (CERP) Guidance §§ 270102, 270103 (Jan. 2009) [hereinafter January 2009 DoD CERP Guidance].

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., Dana Hedgepath & Sarah Cohen, *Money as a Weapon: A Modest Program to Put Cash in Iraqis’ Hands Stretches Its Mandate with Big Projects*, WASH. POST, Aug. 11, 2008 (highlighting Senator John Warner’s concerns that approximately \$33 million in CERP was used for the hotel, office, and retail complex at the Baghdad Airport before and during the surge period).

³⁷ January 2009 DoD CERP Guidance, *supra* note 33. See also June 2008 DoD CERP Guidance, *supra* note 20, §§ 270203, 270204 (comparing approval thresholds between Iraq theater and Afghanistan theater).

³⁸ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq art. 5 (17 Nov. 2008) [hereinafter Security Agreement].

³⁹ Ultimately, the definition of “major construction” must be worked out by the various security agreement joint U.S.–Iraq subcommittees. In the meantime, MNC-I adopted the \$750,000 Military Construction Threshold as its guidepost for “major” projects.

government stating that the local government approves of and agrees to accept and maintain the project.⁴⁰ The MNC-I takes the position that the Letter of Sustainment can also serve as an endorsement of the project itself that satisfies the U.S.'s obligation to the GOI under the Security Agreement for that particular construction project. Additionally, for larger and more complicated projects, the U.S. conducts more advanced coordination with the relevant GOI entity to ensure that the project meets with Iraqi approval.

In executing CERP projects under the restraints discussed above, one particularly helpful tool is the Deputy Secretary of Defense's grant of a specific waiver of the competition provisions in the Federal Acquisition Regulation (FAR).⁴¹ While the FAR would normally require various degrees of competitive bidding depending on project type and size, the waiver permits units to avoid occasionally burdensome bidding requirements. Relaxed competition requirements provide MNC-I units with an invaluable tool to expeditiously execute CERP projects and quickly employ the use of reconstruction funds in the most needed areas.

C. CERP Project-Splitting

The implementation of the tiered project approval authority structure occasionally provided units with an incentive to split requirements into separate projects. Project-splitting is an attempt to decrease the price of each project and avoid having the project sent to higher approval levels, where it might be denied and/or delayed. Project-splitting is prohibited because improperly carving up a project into smaller pieces violates the congressional intent of giving larger scale projects direct visibility at higher command levels. The issue of project-splitting in the CERP program is analogous to OMA-funded projects where units split projects to avoid the \$750,000 OMA/Military Construction threshold; both types of splitting are an attempt to avoid project approval by higher authorities.

Multinational Corps-Iraq staff educates subordinate judge advocates about the potential for CERP project-splitting and advises that it is improper to split projects for the purpose of avoiding the appropriate approval threshold imposed by DoD regulation. The MNC-I has undertaken extensive efforts during the project evaluation phase to ensure that projects are properly aggregated for purposes of determining the appropriate approval authority. Judge advocates at division and brigade levels, over time, have

become diligent at spotting and correcting potential projects splits.

For example, units looking to pave one long, continuous road with a total projected cost of \$800,000 might submit a request to pave the north side of the road for \$400,000 and the south side of the same road for the same amount. One could argue that the two submissions are separate "projects" for funding approval purposes, because one project is for the north side of the road and the other one is for the south side. However, the north side construction and south side construction are both part of the same project, particularly if conducted simultaneously, because both submissions are necessary to produce a complete and usable contiguous roadway.⁴²

As with OMA-funded construction, determining the scope of a project for project-splitting purposes is an art more than a science. The methodology is subject to constant revisions and interpretation. The MNC-I weighs a number of factors in determining project definition, to include: gaps in time between phases, geographic proximity or distances, functional purposes, ultimate end-users, and barriers or landmarks separating areas. The MNC-I believes that consistency in legal determinations about projects is necessary to enhance confidence in CERP program execution among the auditor community and to keep faith with Congress and its staff.

D. Sons of Iraq (SOI) Program

The SOI consists of mostly autonomous groups of military-aged males, usually organized by a community leader or tribal elder, who have banded together in a form of community solidarity in an effort to improve the security situation in their area. The organization owes its name to several iterations of the Sunni Awakening tribal council movements that started in western Iraq. Sons of Iraq are best known for forming patrols and manning security checkpoints in their neighborhoods in an attempt to enhance the existing apparatus.

Before transition to the GOI began in the fall of 2008, the SOI program was financed by MNC-I with CERP funds. Specifically, individual SOI members were organized under short-duration contracts by an SOI leader, who would, in turn, deal with U.S. representatives. Although the SOI program is being phased out of CERP funding, it is important for practicing judge advocates to understand how the program was funded. Many of the current CERP issues in Iraq today (such as retraining military-aged males) are legacy issues that derive from the SOI transition process. In

⁴⁰ HEADQUARTERS MULTI-NATIONAL FORCE-IRAQ, FRAGMENTARY ORDER 08-248, MAXIMIZE THE SUCCESS AND BENEFITS DERIVED FROM CERP (27 Mar. 2008) [hereinafter MNF-I FRAGO 08-248].

⁴¹ Memorandum, Deputy Secretary of Defense, for Secretaries of the Military Departments, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for Fiscal Years 2008 and 2009 (24 Mar. 2008) [hereinafter FAR Waiver].

⁴² The "complete and usable" analogy comes from the project splitting analysis performed on OMA-funded construction projects. Although there is no formal guidance to use the OMA-funded analogy for CERP projects, this is likely the most appropriate set of principles to apply.

addition, a similar program has, at times, been contemplated for Afghanistan.

The DoD posited that SOI groups were private security contractors, and that the DoD hired them under services contracts similar to other CERP-funded services contracts.⁴³ Department of Defense contracting officers would task an SOI contractor with guarding a particular area of critical infrastructure (like a neighborhood or roadway), for a certain length of time. An area could be deemed critical infrastructure by a U.S. commander if it contained important and at-risk population centers, roadways, public utility structures, buildings or the like. The SOI leader would then take a portion of this fee and distribute it to the SOI members as a salary in return for their labor as guards.⁴⁴

The protection of critical infrastructure provided the legal basis to fund the SOI program with CERP.⁴⁵ However, the SOI groups were not deemed “security forces,” such that they would fall under one of the prohibited categories of CERP,⁴⁶ since the group members did not report to a unified command structure outside of the particular SOI contract, and did not have police, arrest or detention powers as a security officer would if such officer was an agent of the GOI. Rather, the SOI groups were private security contractors, who were being paid to guard a particular geographic area that qualified as critical infrastructure.

The SOI contract typically spanned a three month period and was not intended to exceed six months in duration. Contracting officers kept periods of performance short to ensure that at each renewal a truly urgent, humanitarian need was being addressed. If the SOI contractor was performing effective work and continued to remedy an urgent, humanitarian need, then the contracting officers would renew the CERP contract for another short-term duration.⁴⁷

As the transition of the SOI to the GOI began in October 2008, the United States continued to renew the SOI contracts and make payments on those contracts until the GOI was able to assume responsibility for groups of SOI.⁴⁸

⁴³ Written agreements with the SOI leaders generally have standard (though simplified) contract terms including terms, pricing, performance metrics, scopes of work, and rudimentary default provisions.

⁴⁴ The SOI members’ pay varied by province and was tied to the general price level in that area. The SOIs in the Baghdad area were typically the highest paid, and received as much as \$300 per month.

⁴⁵ June 2008 DoD CERP Guidance, *supra* note 20, § 270102(R), and January 2009 DoD CERP Guidance, *supra* note 33.

⁴⁶ See June 2008 DoD CERP Guidance, *supra* note 20, § 270301(B).

⁴⁷ Units historically had an incentive to enter into shorter duration contracts and use upcoming renewals as leverage over the SOI leaders to ensure continued performance under the terms of the existing contracts.

⁴⁸ The GOI was planning on taking former SOI and turning them into members of the Iraqi Army and Iraqi Police. Generally, that transition

This was done in order to prevent a gap in wages and income and prevent unrest among SOI group members during the transition stage. After the transition, when various SOI groups reported solely to the GOI, the GOI frequently fell behind on or refused to make payment to certain SOI groups, or simply terminated employment of the SOIs. This failure to make payment caused extensive tension between the SOI community and the GOI. These tensions remain a high priority issue for MNC–I, because of the concern that former SOIs might rejoin any remaining insurgency.

The United States has committed CERP funds in other ways to gainfully employ or train former SOIs. First, the United States has sought to hire former SOIs as laborers under otherwise permissible CERP-funded projects. Where the United States believes that a certain number of manual laborers are necessary to build, for example, a CERP-funded school, the contracting officer or project purchasing officer can mandate that a certain percentage of the workers be former SOIs. This contractual effort is based on the concept that manual laborers might as well be the individuals most likely to destabilize security gains in the event that they are not fully integrated into the workforce (provided of course that they are qualified and trustworthy enough to perform the job). The MNC–I has deemed these SOI employment clauses to be legal because the FAR competition requirements are generally inapplicable to CERP contracts.⁴⁹ Unfortunately, many SOIs are not skilled laborers. Thus, projects that require skilled craftsmen and engineers are often ill-suited as employment opportunities for these individuals.

Second, the United States is seeking to create training and literacy programs for military-aged males. Using CERP for this purpose is particularly important and challenging given that DDR funds expired at the end of FY 2008. Unfortunately, unlike the DDR Program, there is no specific authority under CERP rules to pay stipends to former SOIs who are enrolled in CERP-funded education programs.⁵⁰ The MNC–I currently considers providing sufficient income to SOIs and former SOIs as an essential security mission, because provision of adequate pay lessens the likelihood that they might turn to the potentially lucrative insurgent tasks such as placing improvised explosive devices or providing information on troop movements.

process and integration into the Iraqi Army and Police has happened at a much slower rate than MNC–I had hoped.

⁴⁹ FAR WAIVER, *supra* note 41.

⁵⁰ MNF–I SPEND PLAN FOR IRAQI SECURITY FORCES FUNDS (ISFF) ALLOCATED FOR DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION (DDR) 1 (20 Nov. 2007) (submitted to Congress by the Under Secretary of Defense per Memorandum on 11 December 2007) [hereinafter DDR SPEND PLAN] (The accompanying memorandum, the DDR Submission Memorandum, contains specific request to use a portion of DDR funds for stipends for trainees).

The inability to pay stipends (due to the lack of specific authority to do so in any statutes or regulations) means it is more difficult to convince former SOIs to enroll in these CERP education programs than it was to convince them to become trainees under a DDR program. After receiving relatively generous pay as SOIs, former SOIs are less likely to enroll in training programs without some sort of monetary compensation that is sufficient to provide for their families. The MNC-I hoped that another allocation of DDR would be provided by the DoD in 2009 to address this and other concerns, but no such new allocation was provided.

The SOI program represented a unique use of CERP that both created jobs and promoted security on the ground. The following section discusses a program with a similar goal of easing at-risk groups into civil society.

E. Employment Assistance Manager Programs for Released Detainees

By early 2009, MNF-I was executing a large detainee release program. Under the terms of the Security Agreement, all detainees in U.S. facilities and under U.S. custody who did not have a detention order issued against them by a competent Iraqi court were required to be released in a safe and orderly fashion.⁵¹ The United States no longer has the authority to hold security detainees unless they are properly arrested and processed under Iraqi law.⁵² As a result of the Security Agreement, the United States was scheduled to release as many as 20,000 detainees from its detention facilities in 2009.

The MNC-I has developed contingency plans to deal with security destabilization in the event that these detainees are not properly reintegrated. However, in order to minimize the risk of any such destabilization, MNC-I has created programs to encourage gainful employment for released detainees. Providing released detainees with a stable means of income is intended to lessen the likelihood that they turn to the insurgency for support. Iraq's chronically high unemployment means that the organic domestic economy alone is not able to absorb that many workers from the released detainee population.

In 2009, DDR funds were no longer available for commitment on new projects.⁵³ As such, MNC-I has turned to CERP as a funding source for detainee reintegration efforts. The MNC-I and subordinate units have developed programs with various titles, including the Employment Assistance Manager Program, the Transition Assistance

Program, and the Rehabilitation Manager Program (collectively referred to as "EAMP"). Although these programs have different titles, individually tailored by battlespace owners, the purpose of such programs is to ease the reintegration of released detainees (and in some cases, former SOI) into sustainable employment.

Under these programs, units enter into a CERP-funded contract with an employment manager whose functions include, among other things, job placement. This manager is an influential member of the community (e.g., a sheik, former SOI leader, or leading businessman), who possesses local knowledge of employment conditions that non-community members, like U.S. servicemembers, lack. The power and connections of a community leader often contributes to the employment of at-risk individuals. The influential member uses his community contacts to match the targeted laborers with employers in need of workers. These jobs commonly include positions as blacksmiths, carpenters, engineers, accountants, and manual construction laborers. This program has the additional advantage of contributing to the growth of organic free market activities.

The MNC-I justified the EAMP initiative as a valid use of CERP funding based upon a compelling, urgent, humanitarian need. The programs contribute to economic stability (and ultimately security) by facilitating a source of income for disadvantaged, at-risk segments of society that are usually the primary family bread-winners.⁵⁴ The MNC-I and subordinate units have sought to develop performance metrics to ensure that the influential community members are successful at linking a certain percentage of their target laborers with gainful employment.⁵⁵ As is the case with most CERP contracts, the performance of these influential members requires extensive monitoring to ensure compliance with the terms of their contract. Influential members who did not meet the performance standards are not eligible for payment. Contracting officers generally keep the periods of performance for these contracts to less than three months to ensure that CERP is being used to address only the truly urgent conditions caused by these detainee releases.

⁵¹ Security Agreement, *supra* note 38, art. 22.

⁵² *Id.*

⁵³ DDR SPEND PLAN, *supra* note 50, at 1. See Department of Defense Supplemental Appropriations Act of 2007, Pub. L. No. 110-28, § 1312, 121 Stat. 194 (May 25, 2007) 121 Stat. 194.

⁵⁴ Note that upon their release, detainees typically receive six U.S. Dollars in CERP funds per day for each day they are held in a non-theater level detention facility (e.g., battalion and brigade level holding facilities), unless the commander determines that he has a valid reason not to make payment (such as that the funds might end up supporting insurgent groups).

⁵⁵ See, e.g., CERP GAO REPORT, *supra* note 21, at 6. A key focus of auditors and the media has been that CERP projects, even if they seem effective at the conception stage, generally are not effectively monitored to ensure that contractors are performing sufficiently under the terms of their contracts. Unit redeployment schedules and personnel turnover present a constant challenge to project monitoring. The MNC-I has been sensitive to these concerns and has attempted to mitigate them in the EAMP programs. The DoD understands the importance of project monitoring and has instituted monitoring requirements. See January 2009 DoD CERP Guidance, *supra* note 33, § 270314.

F. The Micro-Grant Program

In addition to the SOI program, the micro-grant program continues to be one of the most successful components of the CERP. The micro-grant program provides financial assistance to disadvantaged entrepreneurs engaged in small and micro-business activities.⁵⁶ The GOI itself recognized the importance of the micro-grant program when it made micro-grants one of the authorized categories of I-CERP. The ultimate purpose is to stimulate sustainable economic activity, create jobs, and encourage the entrepreneurial spirit of nascent business people. Micro-grants are a particularly effective counterinsurgency tool, because the dollars can be quickly distributed to high-value areas and the benefits flow directly to targeted individuals.

In reviewing micro-grants, judge advocates are required to analyze a number of factors before giving a favorable legal opinion. First, the micro-grant applicant needs to show that he is a disadvantaged entrepreneur who is lacking in wealth or available credit. If an entrepreneur is negatively impacted by combat activity or the insurgency, the DoD takes this factor into consideration and it improves the chances of the micro-grant being approved. Second, judge advocates need to see evidence that the proceeds of the micro-grant will be used for the intended purpose stated in the business proposal. Generally, it is easier to obtain this assurance if the micro-grant is an in-kind distribution (like physical tools), rather than a cash payment that can be more easily converted to an inappropriate use. Third, the applicant needs to provide some version of a business concept in the application (even if rudimentary), with evidence of the number of jobs and impact on the community that might be created as a result of the grant. Additionally, the applicant needs to provide some evidence of his character, education, and/or trustworthiness.⁵⁷

More than other types of CERP programs, it is crucial for judge advocates to pay careful attention to their micro-grant legal reviews. The large volume of micro-grants distributed in small increments in the battlespace makes the program susceptible to abuse and scrutiny. Judge advocates usually act as the final check to ensure that micro-grant funds are being used within the intent of the program.

G. Execution and Cash Management

In addition to project selection, MNC-I and subordinate units face extensive legal issues for CERP projects during the execution and management stages. Accordingly, MNC-I has traditionally encouraged judge advocates to remain involved in the CERP program even after project selection.

⁵⁶ See MAAWS MNC-I CJ8 SOP, *supra* note 16, at B-2-1.

⁵⁷ See *id.* at B-2-1 to -5 (providing a list of items that judge advocates need to review in a micro-grant application).

In reviewing past mistakes with the CERP, MNC-I has recognized the importance of establishing a rigorous set of standard operating procedures for project execution and cash management. Such oversight is particularly important in the case of CERP projects. The sheer number of individual CERP projects (for example, each micro-grant is itself a separate CERP project for certain tracking purposes) necessitates enhanced reporting and oversight. In addition, the fact that personnel often carry large amounts of cash around the country for payment raises concerns of theft and the physical safety of personnel tasked with carrying the currency.

As part of the oversight process, units are required to input each individual project into the CERP Project Tracking System⁵⁸ using one of the OSD-Comptroller designated CERP categories. This policy ensures that each project meets one of the authorized categories of CERP. Units are also required to retain detailed individual project expense receipts and documentation in the project folder for compliance review and auditing purposes per MNC-I policy. The MNC-I periodically compiles and aggregates reports and documentation for reporting up the chain to Congress.

The MNC-I has sought to foster the growth of electronic funds transfers (EFTs) as a substitute for cash payments. The EFTs are advantageous for four main reasons. First, EFTs improve force protection because fewer Soldiers are circulating around the battlefield with large amounts of cash. Second, transaction costs are smaller in the long run using EFTs rather than printing and transporting large amounts of paper currency. Third, the use of EFTs helps foster the Iraqi banking sector by increasing the flow of funds through their financial institutions. Fourth, EFTs reduce the risk of theft or embezzlement. The EFTs produce paper trails, making it much easier to trace funds in the event that a paying agent or project purchasing officer attempts to skim off the top.

Additionally, the United States has made a concerted effort to ensure that CERP projects are paid in Iraqi Dinar rather than U.S. Dollars. The goal of making Dinar payments is to stimulate the Iraqi economy by using its domestic currency. The Iraqi Dinar is more likely to remain in the country and its financial institutions than the U.S. Dollar, which can more easily be wired to bank accounts in foreign countries. By keeping the proceeds of CERP projects within Iraq, downstream investment and demand are stimulated, leading to a multiplier effect from the original project funding.

⁵⁸ The MNC-I utilizes the Iraq Resource Management System (IRMS), among other tools. The IRMS is a repository and archive for storing reconstruction and non-reconstruction project data for comptrollers throughout Iraq. Comptrollers enter individual projects into the system at around the time that funds are committed to a project.

Although CERP has been the primary DoD reconstruction program, the advent of the I-CERP program was a welcome addition to the selection available to commanders. As discussed in the next section, I-CERP became an essential complement to the CERP. However, the availability of I-CERP does not eliminate the need for the CERP. There may not be future commitments of I-CERP coming from the GOI and CERP has a more extensive list of authorized categories, which gives commanders greater flexibility in project selection.

III. I-CERP

A. Development of I-CERP

In April 2008, MNF-I and the GOI Supreme Reconstruction Council (SRC) entered into a memorandum of understanding (MOU)⁵⁹ under which the GOI agreed to transfer \$270 million in funds from the Iraqi Treasury to the Federal Reserve Bank in New York.⁶⁰ Under the MOU, MNF-I is tasked to spend I-CERP funds for the benefit of the Iraqi people. An additional \$30 million of I-CERP was not transferred to the United States, but was held by the Iraqis and controlled by the SRC to target projects that the SRC selected. The GOI assisted in the joint creation of the I-CERP program, because it believed that the accumulated U.S. expertise would enhance the efficient channeling of Iraqi budget surplus funds into the reconstruction effort.

The transfer of I-CERP money to the United States was a courageous political act on the part of Iraqi officials. The I-CERP transfer could have created an opportunity for U.S. detractors in Iraqi opposition groups to rally against Iraqi officials for having furnished over \$270 million of Iraq's budget surplus to U.S. control. However, from MNC-I's perspective, the fact that the Iraqis funded the program is evidence of the strength of the Iraqi-U.S. partnership and of an Iraqi endorsement of the success of the CERP program to date. By the time of this article, the initial allotment of I-CERP funds has been committed to projects. However, there remains the possibility that additional I-CERP tranches could be dispersed by the GOI, and that certain funds already allocated to I-CERP projects will be de-committed and used for other I-CERP projects.

Because I-CERP funds originate from the Iraqi budget, there are no legal fiscal year limitations and funds can cross U.S. fiscal years. However, the GOI expressed its firm hope to the United States that MNC-I would identify valid projects and spend the I-CERP funds as quickly as possible in order to maximize the effective impact.⁶¹ The I-CERP has demonstrated that the GOI is beginning to assume responsibility for reconstruction in Iraq. From 2003 until the time that the I-CERP MOU was signed, the United States already committed more than \$3 billion in CERP.⁶² Commanders in Iraq realize that it is unlikely that the U.S. Congress will sustain such a large expenditure of U.S. taxpayer funds for reconstruction in future fiscal years, making it all the more crucial that the Iraqis assume an increasing funding burden. The I-CERP became particularly important for funding large infrastructure improvement projects in light of the increased limitations placed by Congress and the DoD on reconstruction projects costing over \$500,000.⁶³

Although I-CERP funds come from the GOI, the U.S. personnel who execute the program still have fiduciary responsibility for the funds. All U.S. personnel administering the program remain accountable for managing, accounting for, and executing the program.⁶⁴

B. Administration of the I-CERP Program

The administration of I-CERP uses the existing MNF-I and MNC-I CERP procedures, controls, and disbursement mechanisms. In keeping with the intent of the I-CERP MOU, I-CERP rules and procedures mirror CERP guidance unless otherwise stated. However, commingling of CERP and I-CERP funds is strictly prohibited. In accordance with an April 2008 FRAGO, MNC-I has structured its I-CERP program in a manner that would create effective stewardship of the program and be consistent with the MOU. Wherever the MOU prescribes more restrictive measures, reporting requirements or project coordination and documentation, the MOU takes precedence over any CERP policy or procedures.⁶⁵ As with CERP, the FAR competition requirements generally do not apply to I-CERP contracts. In addition, the DoD CERP guidance is not legally

⁵⁹ Memorandum of Understanding Between Iraq Supreme Reconstruction Council of the Secretariat of the Council of Ministers and the Multi-National Force-Iraq Concerning Implementation of the Government of Iraq Commander's Emergency Response Program annex B to MNF-I FRAGO 08-166 (3 Apr. 2008) [hereinafter I-CERP MOU].

⁶⁰ The MNF-I and higher commands addressed the issue of whether these funds were miscellaneous receipts under 31 U.S.C. § 3302(b) (2006). Miscellaneous receipts must generally be deposited in the accounts of the U.S. Treasury. The MNF-I and higher commands determined that these funds need not be deposited into the Treasury's general accounts.

⁶¹ This is one of many issues that arise at the regular meetings between the SRC and MNF-I concerning the I-CERP program. At the beginning of the program, these meetings took place approximately every month. The meetings are less frequent now that the initial I-CERP tranche has been committed.

⁶² CERP GAO REPORT, *supra* note 21, at 1.

⁶³ See January 2009 DoD CERP Guidance, *supra* note 33, § 270103 (institution of more restrictive approval levels).

⁶⁴ HEADQUARTERS MULTI-NATIONAL FORCE-IRAQ, FRAGMENTARY ORDER 08-322, I-CERP IMPLEMENTATION (19 Apr. 2008).

⁶⁵ *Id.*

controlling over the I-CERP program, because I-CERP is not funded by congressionally-appropriated money.⁶⁶

Under the terms of the MOU, I-CERP funds could only be spent in the fifteen non-Kurdish regional government (KRG) provinces.⁶⁷ Money was distributed in proportion to the population of each non-KRG province.⁶⁸ The United States found that it was easier to identify and spend I-CERP in certain areas (such as Baghdad), than in other provinces (like Karbala). This was a function of easily identifiable, “shovel-ready” projects in certain areas and better assistance from local and provincial authorities in identifying projects. Although commanders frequently requested that MNC-I reallocate I-CERP funds among the provinces during the initial stage of the program (namely, away from provinces where the United States was not quickly spending I-CERP and toward those provinces where the funds were rapidly deployed), such unilateral U.S. reallocation is not permissible under the terms of the MOU. The GOI has never expressed a desire to adjust the initial provincial distribution methodology. The MOU lists the categories of eligible I-CERP projects, which are more restrictive than the CERP categories.⁶⁹ The impermissible CERP categories are also impermissible under I-CERP.

At the request of the GOI, I-CERP is primarily a brick and mortar reconstruction program rather than a program to purchase services or personal property items.⁷⁰ According to the MNF-I personnel who deal with the SRC, GOI officials believe that because brick and mortar projects are more perceptible to the public, they more effectively convey to a wider Iraqi audience that the government is working for them. In instances where units propose using I-CERP projects that will solely purchase services or personal property, MNC-I usually denies those I-CERP requests (micro-grants excepted), because the proposals do not meet the program’s primary purpose of brick and mortar projects. However, personal property purchases in connection with or to outfit an otherwise permissible brick and mortar reconstruction program are authorized under the MOU. For example, I-CERP could be used to pay for desks and computers in cases where I-CERP is generally used to build or refurbish a school.

At times, commanders expressed frustration at the fact that the I-CERP project categories are not as permissive as the CERP categories.⁷¹ However, the types of permissible projects are dictated by the MOU with the GOI, and MNC-I does not have the authority to unilaterally broaden the approved categories of I-CERP. In cases where units still seek to fund a project with I-CERP even though it is not in one of the permissible categories under the MOU, there is an informal mechanism by which MNF-I can submit project proposals to the SRC at its periodic I-CERP roundtable meetings.⁷² If the SRC endorses the project, then MNF-I can obtain an informal exception to the MOU, and MNC-I can fund the project with I-CERP. To the extent that the SRC endorses a project that would otherwise not fit into a category in the MOU, the MNC-I Commander himself can grant an exception to his I-CERP policy without being constrained by DoD guidance or congressional legislation, because I-CERP is not congressionally appropriated.

Both the Coalition Forces and the GOI have sought to use I-CERP projects as noteworthy public affairs stories, and as evidence that the GOI is effectively delivering reconstruction efforts/projects to its citizens. In all I-CERP projects, MNC-I units make an attempt to associate projects with the GOI by making signs and other forms of advertisement to let the Iraqi people see that their government is working for them.⁷³ In addition, all I-CERP payments are made in Dinar. The United States uses existing processes at the provincial level as much as possible to obtain local Iraqi participation in planning, coordination, and prioritization of projects, with an eye toward transitioning projects to the GOI upon their completion.

The CERP and I-CERP programs combine to form the bulk of DoD reconstruction efforts. However, a crucial gap in the reconstruction effort needed to be filled during late 2008 and 2009. Namely, MNC-I needed a large-scale training program for otherwise unemployed military-aged males to teach them marketable skills, while creating a productive outlet to divert their attention from insurgent groups. The DDR program provided a valuable tool to commanders during the post-surge Iraq for this purpose.

⁶⁶ See January 2009 DoD CERP Guidance, *supra* note 33, §§ 270101, 270105.

⁶⁷ The GOI made a conscious political decision to exclude the KRG provinces from the benefits of the I-CERP program.

⁶⁸ I-CERP MOU, *supra* note 59.

⁶⁹ *Id.* Permissible I-CERP categories are schools, water purification plants, health clinics, city planning facilities, roads, sewers, irrigation projects, and reconstruction projects that promote small business development in the form of micro-grants.

⁷⁰ *Id.*

⁷¹ There are only eight authorized categories of I-CERP, which is a much shorter list than that allowed under CERP. See I-CERP, *supra* note 59.

⁷² The MNC-I and MNF-I have submitted only a limited number of I-CERP MOU exception requests.

⁷³ Additionally, MNF-I and the SRC agreed to allow I-CERP funds to be used for supervisory fees paid to provincial governments who administer and execute I-CERP projects, so long as the amount of the fees does not to exceed three percent of total project costs.

IV. Disarmament, Demobilization, and Reintegration (DDR) Program

In December 2007, the DoD notified Congress of its desire to use \$155.5 million in ISFF for the DDR Program.⁷⁴ The primary intent of the approved program was to target training and reintegration of former SOIs and released detainees, many of whom previously had relationships with criminal elements and militia groups. The DDR Program provided former SOIs the opportunity to find alternative employment by providing them with the training needed to actively seek civilian employment and become productive members of the community.

Although there is not currently funding available from Congress for the DDR program, judge advocates in Iraq need to be aware of how the program was run and structured. First, there is a chance that a similar program will receive appropriated funding in the future. Second, the GOI may continue to establish its own Iraqi-funded DDR follow-on training projects for programs originally funded by the United States. Finally, MNC-I units are proposing programs similar to DDR for CERP funding, and judge advocates must be aware of the different restrictions between the DDR and CERP funding streams.

The ISFF funds allocated for DDR were combined with GOI funding through the Joint Technical Education and Reintegration Program (JTERP) and the Civil Service Corps (CSC) programs. JTERP provided technical skill training to worthy applicants, but gave priority selection for educational and training services to released detainees and former SOIs. The JTERP was managed by the GOI Prime Minister's Office along with the Ministry of Labor and Social Affairs (MoLSA), Ministry of Higher Education (MoHE), and Ministry of Education (MoE). In contrast, CSC was an MNC-I-led program designed to provide on the job training to former SOIs, released detainees, and other military-aged males in technical applications that lead to employment in the public and private sectors. For FY 2008, the United States provided approximately \$21.5 million in DDR funds to JTERP. The MNF-I expected the GOI to ultimately contribute approximately \$200 million to JTERP projects throughout the duration of the program.⁷⁵ For the CSC Program, the United States anticipated that it would fund the program with approximately \$134 million.⁷⁶

The MNC-I used DDR funds for a variety of training-related purposes. For JTERP projects in particular, MNC-I used DDR funds for facility refurbishment for education facilities, technical education centers and reintegration

centers. In addition, the program purchased resources and training materials for the construction, renovation and rehabilitation of buildings, facilities, infrastructure, and equipment. Under MNC-I's direction and within the purpose of the DDR program, units could give away small equipment to students on completion of DDR training programs, like tools for carpenters or small digging equipment for farmers. So long as DDR funds were ultimately contributing to the training of students, MNC-I concluded that the expenditures listed above fit within the intent of the DDR budget submission to Congress if they were reasonably proportionate to the value of the total project. For the CSC Program, MNC-I used DDR funds to pay for operation and maintenance costs associated with running CSC organizations and classes. The program also funded the procurement of training equipment and raw materials.

One of the most significant aspects of DDR (which remains a crucial issue for understanding the limitations on CERP-funded education programs) was that MNC-I could use DDR funds to pay for modest life support stipends for students participating in the program.⁷⁷ The stipends encouraged students to enroll in the program by ensuring that they received sufficient resources for their families while learning a new skill set.⁷⁸ Without the provision of a stipend, many students would not have been able to attend the training programs; they would instead spend their days seeking alternative methods of income to sustain their families. In many cases, the amount of the stipend was comparable to the daily salary that the individuals would have received in SOI employment. Without the provision of stipends that provided a basic standard of living, it was unlikely that many of the students would have participated in the program.

Although stipends were a legally permissible use of DDR funds, the MNC-I fiscal law team took the position that stipends are an impermissible use of CERP in CERP-funded education programs. The difference between the two programs is that MNF-I gave specific congressional notification of its intent to use DDR funds to pay stipends.⁷⁹ Regarding CERP, however, no such notification or intent has been conveyed to Congress, nor has Congress or the DoD ever granted such specific authority. In the absence of specific authority to use CERP to pay stipends in CERP-funded education programs, stipends would amount to an unlawful benefit to a private individual that is unnecessary to effectuate the intent of any such CERP training program.

⁷⁴ DDR Submission Memorandum, *supra* note 50, at 1. The DDR was not a separate budgetary appropriation. Rather, the program was created by the DoD reprogramming ISFF funds.

⁷⁵ MNC-I C8 AAR, *supra* note 8, at 20.

⁷⁶ *Id.*

⁷⁷ DDR SPEND PLAN, *supra* note 50, at 1.

⁷⁸ A typical DDR training program lasted about six months.

⁷⁹ See DDR SPEND PLAN, *supra* note 50.

Existing DDR funds expired at the end of FY 2008. The DDR programs were ultimately slated to pass to the Iraqis for their continued maintenance and funding.

V. Using Iraqi Businesses and Laborers for OMA-funded Purchases

The OMA program's funds are the lifeblood of the operations and maintenance of the Army and may not be used if the primary intended purpose of any given expenditure is reconstruction for the benefit of Iraqis. However, in limited cases, certain expenditures can satisfy both the purpose of the OMA appropriation and also create derivative reconstruction effects as a secondary benefit.

In circumstances where Iraqi businesses and laborers are capable of providing quality goods and services at competitive prices to Coalition Forces, the United States has sought to contract with Iraqis as a means of stimulating the local economy. In particular, the MNF-I Commander has instituted the Iraqi First initiative, which emphasizes purchases through local Iraqi vendors rather than a Logistics Civilian Augmentation Program (LOGCAP) task order, private contractor, or Army and Air Force Exchange Service concessionaire.⁸⁰ The MNF-I Commander has directed that commanders make an effort at all levels, within legal and regulatory limits and operational requirements, to use available Iraqi services and products. In addition, MNF-I places an emphasis on writing contracts in a manner that encourages contractors to devise and employ training programs to increase the skills of the Iraqi workforce.⁸¹ Unlike the CERP program, the FAR competition requirements do apply to OMA-funded Iraqi First procurement. The MNC-I does not have a waiver of the provisions of the FAR for the Iraqi First Program.

Under the Iraqi First Program, commanders are expected to make periodic reviews of their existing contracts to determine which contracts can appropriately be handled by Iraqi vendors.⁸² The MNF-I expects the Iraqi First Program to contribute to stability operations by infusing money into the Iraqi economy. In addition, directing contracts to Iraqi vendors is an important tool to convince Iraqis that they are partners with U.S. Forces. This program is intended to make at least a small contribution to ending some of the root causes of the insurgency, which include poverty and a lack of economic support.⁸³

Certain services can, by their nature, be more cheaply and efficiently delivered to U.S. personnel by the Iraqis.

⁸⁰ Memorandum for Distribution, from General Raymond T. Odierno, Headquarters Multi-National Force-Iraq, to Subordinate Commanders, subject: Increased Employment of Iraqi Citizens Through Command Contracts (31 Jan. 2009).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Specifically, the United States utilizes extensive Iraqi transportation services, such as trucking and railroad services, to transport supplies through the theater of operations. Iraqi businesses have a comparative advantage in the shipping industry because of their knowledge of the transportation infrastructure and their ability to hire locals.

Unfortunately, one consequence of hiring Iraqis to perform services on U.S. installations is the increased Iraqi traffic into and out of bases on a daily basis, which raises force protection issues. In general, commanders have determined that the force protection concerns caused by additional traffic from Iraqi pedestrians coming through the bases is outweighed by the positive effects on the Iraqi economy and the relationship between Iraqis and the Coalition Forces. Garrison commanders have instituted additional safeguards to ensure that Iraqis are properly vetted before being allowed on forward operating bases.⁸⁴

VI. Common Fiscal Law Issues Faced by Judge Advocates Across DoD Reconstruction Programs

Certain trends and legal issues in reconstruction funding cut across the various DoD funding programs. These common themes often require unified responses from MNC-I and subordinate unit judge advocates that are applicable throughout its various programs.

One such example stems from a common argument that U.S. taxpayer dollars should be spent at home rather than in a foreign country that has at times seen its coffers swell from oil production. Through the post-surge period, as the violence in Iraq diminished and headlines of the war receded from the front pages of U.S. newspapers, Congress became increasingly concerned with the amount of DoD reconstruction funds being spent in Iraq. This sentiment grew when oil was about \$125 per barrel and the GOI projected a \$50 billion national surplus for 2008.⁸⁵ The GAO estimates the cumulative GOI surplus for 2005–2007 was approximately \$29 billion.⁸⁶ High oil prices coincided with a weakening domestic U.S. economy and a worsening U.S. federal budget deficit. In light of these developments, U.S. Forces have been keen to highlight to Congress and the American public attempts to wean the Iraqis off any reliance on DoD reconstruction dollars.

As a result of this concern, the United States has explored GOI funding sources for projects wherever practical, especially for large-scale projects such as roads

⁸⁴ An example is the tightening of badging requirements and security background checks.

⁸⁵ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, STABILIZING AND REBUILDING IRAQ: IRAQI REVENUES, EXPENDITURES, AND SURPLUS 3 (Aug. 2008).

⁸⁶ *Id.*

and bridges. A primary example of this effort is the use of I-CERP instead of CERP in cases where either of the two funding sources is legally permissible (for example, road reconstruction could be legally funded with CERP or I-CERP). Commanders have engaged in a concerted effort (especially for projects over \$500,000) to use GOI-funded I-CERP instead of congressionally-appropriated CERP when I-CERP is available. Additionally, since the June 2008 DoD Financial Guidance, MNC-I has required that for CERP projects over \$500,000, brigade commanders or certain other permitted officers attest that reasonable measures have been taken to ensure that no other sources of aid (such as GOI and NGO sources) are available before CERP is used.⁸⁷ Also, in March 2008, MNC-I instituted a requirement that for all CERP and I-CERP reconstruction or equipment purchases over \$50,000, units obtain an MOU or other agreement in which the local or provincial government agrees to assume any ongoing operations and maintenance costs and maintain the project once completed.⁸⁸ This MOU requirement ultimately decreases Iraqi reliance on U.S. funds for project upkeep, forces the Iraqis to learn valuable lessons on project management, and empowers them with a sense of ownership over their community development efforts.

As a second example of a common concern applicable across reconstruction programs, various units are afraid that CERP and I-CERP MOUs might be treated as international agreements and construed in ways that are unfavorable to U.S. Forces. As a result, MNC-I mandates that the following clauses be inserted into the MOUs to ensure that they are not treated as international agreements:

NOTHING IN THIS MEMORANDUM OF AGREEMENT AUTHORIZES THE COMMITMENT OR OBLIGATION OF APPROPRIATED FUNDS OF THE UNITED STATES OF AMERICA PRIOR TO THEIR AVAILABILITY, OR IN VIOLATION OF ANY APPLICABLE STATUTE, REGULATION OR POLICY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA. THIS DOCUMENT EXPRESSES THE PARTICIPANTS' INTENT TO ACHIEVE THE GOALS OF THIS PROJECT. THE PARTICIPANTS INTEND FOR THIS PROJECT TO BENEFIT THE NEIGHBORHOOD AND ITS PEOPLE FOR YEARS TO COME. IT IS NOT, HOWEVER, A LEGAL INSTRUMENT THAT BINDS THE PARTICIPANTS UNDER INTERNATIONAL LAW. RATHER, IT

⁸⁷ HEADQUARTERS, MNC-I FRAGO 08-023, DISTRIBUTE REVISED USD—COMPTROLLER/USARCENT CERP GUIDANCE (11 Aug. 2008).

⁸⁸ MNF-I FRAGO 08-248, *supra* note 40.

EMBODIES THE ASPIRATIONS
TOWARDS WHICH THE
PARTICIPANTS STRIVE.⁸⁹

As a third example, the United States has concerns that Iraqis are becoming too reliant on U.S. expertise in executing reconstruction programs rather than developing organic Iraqi capabilities. Therefore to a greater extent than in previous years, the United States has made it a priority to include local and provincial leaders in the planning and development process. Wherever feasible, units invite local and provincial leaders to project planning and execution sessions. For example, U.S. units might allow GOI engineers to participate in project development. One of the goals of this approach is to vest the local governments in these programs, which should make it more likely that they sustain the projects when they are completed.

As a final example of a common issue that arises across programs, MNC-I fields concerns that there are duplicative (and therefore wasteful) efforts among the various U.S. agencies (like the Department of State) operating in the battlespace. In response, for CERP and I-CERP projects of \$50,000 or greater, per the MAAWS, MNC-I requires that units coordinate with the Department of State Provincial Reconstruction Teams (PRT) to ensure interagency cooperation and visibility.⁹⁰ Coordination with the Department of State is intended to reduce duplication of effort⁹¹ and preserve precious reconstruction dollars across agencies.

VII. Predictions for Future Reconstruction Efforts

In many respects, the future of DoD-funded reconstruction programs in Iraq is tied to the broader strategic effort in the country. Congress's desire to continue funding reconstruction programs will depend on its tolerance for continued military presence in the country generally. If recent experience is any indication, congressionally-appropriated DoD reconstruction funds are likely to be used only for small dollar projects that truly have a demonstrable humanitarian impact on the Iraqi people. Congress and the DoD exhibited clear intentions during the second half of FY 2008 and the beginning of FY 2009 to discourage the use of CERP for large-scale projects.⁹² Accordingly, the United

⁸⁹ *Id.*

⁹⁰ The PRTs are the lead entities on the ground in the battlespace that identify and organize the Department of State reconstruction program. Provincial reconstruction teams typically have close relationships with local Iraqi government officials and have parochial knowledge of development conditions.

⁹¹ Provincial reconstruction teams generally use Department of State funds, rather than DoD funds, for projects that they themselves conceive and execute.

⁹² *See, e.g.*, January 2009 DoD CERP Guidance, *supra* note 33 (approving thresholds for projects over \$500,000).

States is likely to focus its reconstruction efforts towards the micro-level projects that will directly and immediately impact the lives of Iraqis.

Reconstruction funding will continue to be used to create employment opportunities and training programs for those individuals who are most likely to return to violence in the event that they do not find alternative stable and productive employment prospects. Because of the operational needs of commanders on the ground, the U.S. mission will likely continue to fund projects that directly and immediately improve the lives of those military-aged males and former SOIs who are most at risk of rejoining insurgent or criminal groups (like micro-grants).

The United States will continue efforts to use its reconstruction planning and execution efforts as a mentoring tool to empower the Iraqis to develop technical expertise. Ideally, Iraqis will take the lead in the project selection and execution stages. The ultimate end-state is to make the Iraqis proficient enough to manage a project from selection to execution to completion to sustainment.

Despite the funding challenges faced and the additional restrictions on reconstruction expenditures originating from Congress and the DoD, reconstruction funding remains an invaluable tool to U.S. forces in Iraq. By employing money as a counterinsurgency tool, commanders capitalize on opportunities to quell violence by helping to restore a sustainable society for the Iraqi people. The reconstruction efforts in post-surge Iraq have opened a window of opportunity and stability which is conducive to political reconciliation and have allowed the United States to pursue troop drawdown options.

Human Terrain Teams: An Enabler for Judge Advocates and Paralegals

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*There can be no government without an army, no army without money, no money without prosperity, and no prosperity without justice and good administration.*²

—Abu Muhammad Abdullaah Ibn Qutaybah
Ad-Dinawaree

Introduction

The Army has introduced a new capability into its arsenal. Led by an Active or Reserve component officer, possibly even a retired military officer, the mission of this new team is to ensure the integration of human terrain analysis with the military decision-making process (MDMP).³ The team has at least two social scientists, one with a specialty in ethnographic and social science research and analysis, and the other with fluency in the indigenous language.⁴ Other team members are military human terrain analysts, trained in debriefings and data research, and military terrain researchers responsible for integrating the human terrain research plan with the intelligence collection plan.⁵ The tool is a Human Terrain Team (HTT).

The recent experience of special operations forces deployed to Iraq to conduct foreign internal defense (FID) suggests that navigating the socio-cultural landmines between the Iraqi security force apparatus and the Iraqi judiciary is time- and resource-intensive. For judge advocates engaged in operational law issues, successfully navigating the finer aspects of social science armed only with a law degree was probably more a function of luck than of deliberate planning. The support of HTTs and associated Operational Detachment Alphas (ODA) undoubtedly improved the odds of success of many

initiatives that would otherwise have been very low.⁶ The majority of deployed judge advocates and paralegals, however, will not have the support of ODAs to accomplish their legal support missions. Consequently, the Future Concepts Directorate (FCD) offers this practice note to identify and describe an additional enabler judge advocates and paralegals can leverage to accomplish their complex missions when deployed.

Background

This practice note is neither doctrine nor “rocket science”; rather, it was inspired by a presentation entitled “Judicial Practices and Rhetoric of Memory in Gaza Strip” by an anthropologist at an interdisciplinary conference in 2009.⁷ The presentation provided an in-depth, comparative analysis of the formal judicial system of the Palestinian Authority and the informal tribal judicial systems in Gaza.⁸ The speaker concluded that the informal judicial system was actually undermining the formal judicial system rather than complementing it.⁹ A detailed examination of the speaker’s analysis is beyond the scope of this note, but a brief description of the methodology used is necessary to place the work of HTTs in context.

The speaker initially established the historical context of the region by describing factors in Gaza, like migration, physical relocation, and social and political disruptions.¹⁰ Data collected across generational lines on topics concerning individual values and national identity, as well as data on case adjudications for similar types of

¹ The author wishes to thank the following individuals for their assistance during the preparation of this article: Lieutenant Colonel Chuck Poche, Lieutenant Colonel Jay McKee, Mr. Patrick O’Hare, and Major Joe Orenstein.

² This quotation is historically attributed to this ninth century Islamic scholar. See, e.g., Malik Qasim Mustafa, *The Responsibility to Protect a Fragile State: A Case Study of Post-Intervention Afghanistan*, available at http://www.issi.org.pk/journal/2008_files/no_1/article/a6.htm (last visited Apr. 21, 2010).

³ Briefing to the Brigade Judge Advocate Mission Primer, Human Terrain System Information Briefing (Dec. 16, 2009).

⁴ *Id.*

⁵ *Id.*

⁶ See Lieutenant Colonel Dan Tanabe and Major Joe Orenstein, *Integrating the Rule of Law with FID in Iraq*, SPECIAL WARFARE MAGAZINE, Nov.–Dec. 2009, at 7–11. Since 2003, ODAs deploy more frequently, on shorter deployments than conventional units, but usually return to the same deployed location with the same, enduring partnered FID force, creating a practical equivalent for that specific location to the academic expertise of a social scientist.

⁷ Christine Pirinoli, Université de Lausanne—Institute d’Anthropologie et Sociologie, Presentation at the Franklin College Intersections of Law and Culture Conference: Judicial Practices and Rhetoric of Memory in Gaza Strip (Oct. 4, 2009) [hereinafter Pirinoli Presentation]. Ms. Pirinoli has also published a book on the topic. See CHRISTINE PIRINOLI, *JEUX ET ENJEUX DE MÉMOIRE À GAZA* (2009); see also Le Comptoir des Presses d’Universités, *Jeux et enjeux de mémoire à Gaza*, [http://www/cd\[i\]/fr/livre/?GCOI=27000100250790](http://www/cd[i]/fr/livre/?GCOI=27000100250790) (last visited Apr. 23, 2010) (providing a description of Pirinoli’s book in French).

⁸ Pirinoli Presentation, *supra* note 7.

⁹ *Id.*

¹⁰ *Id.*

cases in both the formal and informal judicial systems, was then analyzed within this historical context. Analysis of the data revealed that the tribal values associated with the informal judicial system, which was expected to have complemented the formal judicial system, had changed significantly and had become politicized over time.¹¹ In effect, the informal judicial system had become a façade to circumvent the formal judicial system.¹² The norms and values associated with tribal social construct of the pre-1948 Gaza generation were strikingly different from those of the post-1948 Gaza generation.¹³ Polling data and the case adjudication analysis showed that the pre-1948 norms and values that were assumed to have persisted in the informal judicial system had since been replaced by politicized norms and values after 1948.¹⁴ The faulty assumption regarding the tribal informal judicial system allowed the legitimization of a means to circumvent the formal judicial system and, today, undermines the public trust in the formal judicial system and, ultimately, the Palestinian Authority.¹⁵

This interesting narrative suggests that an anthropological approach could be useful in legal support mission sets because U.S. forces often attempt to work “by, with, and through” the native system. Human Terrain Teams can provide this anthropological expertise. The Human Terrain System (HTS), the program that oversees the effort to apply socio-cultural knowledge to military operations, was established in 2006, and its first HTT was deployed to Afghanistan in 2007.¹⁶ A review of various Lessons Learned (LL) and After Action Reports (AAR) collected by the Center for Law and Military Operations (CLAMO) and submitted in 2009 revealed that only one AAR mentioned an HTT (only cited because members of the HTT had expressed concern over changes to criminal jurisdiction with the implementation of the U.S.-Iraq Security Agreement in January 2009).¹⁷ The silence concerning HTTs in the AARs may reflect a knowledge gap between HTTs and BCT judge advocates and paralegals.¹⁸ The Future Concepts Directorate hopes

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Human Terrain System, *available at* <http://humanterrainsystem.army.mil/default.htm> (follow “HTS Overview” hyperlink; then follows “HTS Timeline” hyperlink) (last visited Mar. 30, 2010).

¹⁷ E-mail from Lieutenant Colonel Poche, Dir., Ctr. for Law and Military Operations, to Lieutenant Colonel Tanabe, Deputy Dir., Future Concepts (Oct. 28, 2009, 09:10 EST) (on file with author).

¹⁸

Brigade and regimental combat teams currently deployed to Iraq and Afghanistan often lack the operationally relevant socio-cultural knowledge and expert staff necessary to optimize their

this practice note will motivate judge advocates and paralegals to take advantage of the many capabilities of the HTT.

What Is and Is Not an HTT?

In a broad sense, HTTs are a fundamental component to “anthropologizing the military.”¹⁹ Human Terrain Teams “are composed of military personnel, linguists, area studies specialists, and civilian social scientists”²⁰ that are “recruited and trained as a team for a specific region, then embedded with their supported unit,” normally a brigade combat team (BCT).²¹ Once embedded, the BCT commander “determines the extent of the HTT’s interaction and relationships with the rest of the BCT staff and subordinate units.”²² The HTT can organize into smaller teams to support subordinate units based on mission requirements.²³

A few words of caution on what they are not. Human Terrain Teams are not covert or clandestine intelligence enablers and do not conduct human intelligence operations or close target reconnaissance.²⁴ They are also not civil affairs or civil military operations enablers and do not conduct infrastructure project management.²⁵ Lastly, HTTs are not mobile cultural training teams like the enablers at the Defense Language Institute, so they do

military decision-making process. . . . While processes and organizations exist to assist commanders in visualizing friendly and enemy forces, no similar system exists for providing understanding of the local civilian population. This deficiency is felt most by the battalions, companies, platoons, and squads that are closest to the local population in their daily tactical actions.

Human Terrain System, *available at* <http://humanterrainsystem.army.mil/overview.html> (last visited Mar. 31, 2010; Sec’y of Def. Robert M. Gates, Landon Lecture Address at Kansas State University (Nov. 26, 2007) (transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1199>).

¹⁹ Secretary of Defense Robert M. Gates, Landon Lecture Address at Kansas State University (Nov. 26, 2007) (transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1199>).

²⁰ Human Terrain System, *available at* <http://humanterrainsystem.army.mil/default.htm> (follow “HTS Overview” hyperlink; then follow “HTSComponents” hyperlink) (last visited Mar. 31, 2010).

²¹ *Id.*

²² *Id.*

²³ Afghan Commander AAR 30 (Currahee ed. 2009), *available at* <http://cc.army.mil> [hereinafter Afghan Commander AAR].

²⁴ Human Terrain System, <http://humanterrainsystem.army.mil/default.htm> (last visited Mar. 31, 2010).

²⁵ *Id.*

not “provide schoolhouse pre-deployment cultural training.”²⁶

Instead, HTTs provide social science advice “on economic development, political systems, tribal structures,” conduct research on relevant topics requested by the brigade commander and staff, and can reach back to the socio-cultural human terrain mapping database.²⁷ Recently, an HTT was able to provide a company commander with tribal mapping and market flow information for the specific area of operation, which gave the commander a valuable overview of the interrelationship between different tribes.²⁸ Human Terrain Teams, as part of the HTS, also have direct links to the Department of State (DoS) via the HTT liaison officer embedded in the DoS Humanitarian Information Unit.²⁹ With forethought, creativity, and good staff work, judge advocates can tap into the tremendous resources provided by the HTTs.

Why Use an HTT?

Training and Doctrine Command (TRADOC) recently published *Operational Environment 2009–2025*, which seeks to identify and describe trends to the operational environment (OE).³⁰ Although some identified trends are new, most are largely restatements of a reality with which judge advocates and paralegals are all too familiar. For example, *Operational Environment 2009–2025*, identifies “cultural standoff” as a trend in current and future operations. Cultural standoff involves the use of asymmetric tactics by an adversary in order to alienate the local population by creating the perception that U.S. forces have violated cultural norms.³¹ “Culture and ideology may be the center of gravity in future conflict.”³² This suggests that “human terrain” and “cultures, civilizations, and associated ideologies” may be of equal, if not greater, importance to mission accomplishment than physical terrain.³³

The Australian Army’s *Army’s Future Land Operating Concept* has similarly identified the importance of cultural sensitivity.³⁴ In a chapter on “Indigenous Capacity Building,” the study notes the significance of cultural sensitivity and describes how cultural awareness can help identify indigenous leaders and traditional structures that may help serve local populations.³⁵ At the other end of the spectrum, closer to lethal effects, the study discusses the concept of “Discrimination Threshold.”³⁶ This concept relies heavily on human terrain to culturally define the boundary between acceptable and undesirable outcomes when pursuing targets.³⁷

The *Army Capstone Concept*³⁸ (ACC) broadly describes the capabilities the U.S. Army will need to overcome the threats and adversaries envisioned in *Operational Environment*. The ACC proposes a methodology that strives for operational adaptability and that seeks to “develop the situation through action.”³⁹ To accomplish this, operators must have enough familiarity of their OE to set conditions, shape conditions if necessary, and then assess conditions for further adaptation. While executing these tasks, adversaries may continue to employ “cultural standoff,” causing judge advocates to reach deep into their operational law kit bag to help commanders disrupt an adversary’s decision-making cycle and overwhelm its operational tempo.

Human Terrain Teams provide the command with the perfect tool to leverage social and anthropological knowledge of the OE, especially when the local population is the center of gravity. Just as commanders and other members of the battlestaff generally defer legal issues to judge advocates as the legal subject matter experts (SME), cultural issues should be deferred to HTTs as the relevant SME. When employed, HTTs can help defend against cultural standoff tactics, counter misleading and malicious cultural information, and turn cultural standoff practices against an adversary, isolating it from the population. Human Terrain Teams can also assist a unit to keep targeting below the “Discrimination Threshold” when conducting lethal and non-lethal operations against targets.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Afghan Commander AAR, *supra* note 24.

²⁹ Humanitarian Information Unit, <http://hiu.state.gov> (last visited Mar. 31, 2010).

³⁰ TRAINING AND DOCTRINE COMMAND, OPERATIONAL ENVIRONMENT 2009–2025, at 11 (Aug. 2009) (version 6) [hereinafter TRADOC OE].

³¹ *Id.* at 8.

³² *Id.* at 19.

³³ *Id.*

³⁴ HEAD MODERNISATION AND STRATEGIC PLANNING—ARMY, AUSTRALIAN ARMY HEADQUARTERS, ARMY’S FUTURE LAND OPERATING CONCEPT (Sept. 2009).

³⁵ *Id.* at 54.

³⁶ *Id.* at 8.

³⁷ *Id.* at 19–20.

³⁸ U.S. ARMY TRAINING AND DOCTRINE COMMAND, PAM. 525-3-0, THE ARMY CAPSTONE CONCEPT (21 Dec. 2009).

³⁹ *Id.* at 8.

Human Terrain Teams can also safeguard against an overreliance by U.S. forces on misplaced notions of cultural savvy. As a British military report observed, “[a] little knowledge can be dangerous, masking important nuances and subtleties . . . Frequent reference to subject matter experts may be necessary.”⁴⁰ For instance, current reporting from Afghanistan, as with the Palestinian judicial system study mentioned earlier, has exposed possible false assumptions that may be guiding current operations. In particular, the emerging orientation towards tribal engagement has raised warnings from the HTS. Social scientists familiar with Afghanistan caution that aligning a new strategy with tribal affiliations “is deceptive” because even though tribal “groups were once tightly-knit . . . decades of war with the Soviets and with the Taliban has changed all that.”⁴¹ Units must sometimes pause to assess their assumptions, particularly when a truth in one region or tribe may be false in another.

How an HTT Might Be Employed

After the evening commander’s update brief, the battle captain hands you a FRAGO. It tasks your BCT to develop a plan to integrate the informal tribal court system in your province with the formal court system. The battle captain says he wanted to give you a heads up because he is fairly certain the S-3 will “pin the rose” on you and expect you to brief the commander on the BCT’s plan to accomplish the specified task.

You begin to consider all the possible implied tasks and you recall numerous reports identifying the lack of communication between informal court leaders and formal court judges in the province, which is similar to the communication problem you witnessed on your last deployment between police and investigative judges. You wonder at the lack of communication and your figurative light bulb flickers as you work towards a viable course of action. As you begin to conceptualize how to set conditions for a planning meeting, the data you pull from your legal database, information left by your predecessors, show an interesting picture. Neither the tribal judges nor the formal judges have ever been extensively targeted by insurgents, so fear has not been a factor. Even more troubling, the tribal judges and formal judges appear to reside close to one another, so logistics has not been a factor. Perhaps something else has prevented these groups from communicating.

⁴⁰ THE DEVELOPMENT, CONCEPTS, AND DOCTRINE CENTRE, MINISTRY OF DEFENSE (U.K.), JOINT DOCTRINE NOTE 1-09, THE SIGNIFICANCE OF CULTURE TO THE MILITARY, at I-7 (Jan. 2009).

⁴¹ Noah Shachtman, *Army Researchers Warn Against Tribal War in Afghanistan*, DANGER ROOM, Nov. 30, 2009, <http://www.wired.com/dangerroom/2009/11/army-researchers-warn-against-tribal-war-in-afghanistan/#more-19988>.

While dwelling on this thought, you run into Ms. Preston, one of the anthropologists on the BCT HTT. You make small talk and ask Ms. Preston how her trip to conduct focused polling turned out earlier in the day. She tells you the polling went well and the HTT was able to determine that future CERP⁴² projects given “in the name of the mosque” would be acceptable to the tribal elders because such “gifts” are considered “gifts to God” and would not put the village at risk from the insurgents. Her response triggers a synaptic event, and you quickly tell her about your recent tasking and your plan for a meeting. After a pause, Ms. Preston suggests something along tribal lines might be causing tension between the two sets of judges.

You exchange your best regards and then immediately visit the BCT commander. You tell him that in order to accomplish the tasking, you need the assistance of the HTT. After the commander blesses off on your request, you set the wheels in motion.

As you reach out to the HTT, you also work with the brigade S-2 to see if the operational management team that runs the BCT’s human intelligence teams has any background information on the host nation individuals involved. You take the unclassified information provided to you by your S-2 and give it to the HTT, which analyzes the information along with the tribal mapping. Based on the team’s initial analysis, the HTT establishes focus areas for local population polling, to be conducted in the near future, to assess and backstop the team’s initial thesis.

Over the next week, the HTT travels to towns, where tribal judges and formal judges either reside or work, and conducts focused polling. After analyzing the local polling data, the HTT reveals that key members of the informal and formal court systems belong to tribes currently engaged in tribal mediation over a lucrative patch of land, currently being used to canalize water to multiple towns. Armed with this information, you begin to conceptualize how you might leverage this information to set the conditions for your mission’s success. Maybe you can meet separately with each group and offer them the BCT’s assistance with the land and water dispute in exchange for discussions between the two groups. Alternatively, you could bring the two groups together with the tribal mediators and, in the presence of all the stakeholders, offer them the BCT’s assistance with their dispute if they agree to discuss the court system issues. It dawns on you that one course of action may be more culturally acceptable than the other, so you find Ms. Preston and seek out more HHT expertise.

⁴² Commander’s Emergency Response Program.

Although the preceding scenario was just a hypothetical example, it demonstrates how HTTs can enable success or help avoid disaster when executing an operational law mission. An anthropological approach to MDMP and operational planning, using the expertise of HTTs, can help units overcome the tendency towards egocentric thinking and help prepare the Army for conflicts in the OEs of tomorrow.

Claims Report
U.S. Army Claims Service

Personnel Claims Note

An Open Letter to Staff Judge Advocates, Area Claims Officers, Claims Attorneys, and Claims Professionals
*Henry Nolan*¹

In lieu of a formal Claims note, I would like to introduce myself and take the opportunity to publish my view of the Army Personnel Claims Program and its role supporting Soldiers, employees, and family members.

In early December 2009, I was sworn in as the new Chief, Personnel Claims and Recovery Division, U.S. Army Claims Service, to succeed the late Joseph Goetzke. Joe had served at the Army Claims Service since 1988 and as the chief of the Personnel Claims and Recovery Division since 2005. He was a consummate professional and was recognized as an expert in personnel claims, bankruptcy, insurance, and transportation law by other military claims professionals and members of industry alike. I knew Joe well, having previously served in this same position and as Commander, Army Claims Service, while on active duty. Joe was a friend, and I fully appreciate what he meant to the Army Claims Service, the JAG Corps, and the Army. He is missed by all of us.

Although saddened by the circumstances of how the position became available, I am delighted to return to the Army Claims Service and the JAG Corps after working for a number of years in the Federal Judiciary and at the Department of Veterans Affairs. It is a special honor to be selected to follow Joe and fill the position that is responsible for personnel claims—what a former Judge Advocate General stated “has the greatest impact on Soldier morale of all that SJA offices do. It can make it, or it can break it.”²

The Personnel Claims Act³ is unique among the claims statutes administered by the Army Claims Service. The Personnel Claims Act is specifically intended to improve morale among Soldiers and civilian employees. It does so by authorizing reimbursement for incident-to-service damage to, loss of, or destruction of their personal property.

In view of its singular purpose, administering or implementing the Personnel Claims Act, whether at the Army Claims Service or in the field, requires an approach different from that used with other claims statutes. We, as claims attorneys, should not look to provide claimants the absolute minimum in reimbursement that we can “get away with,” nor should we require unreasonable or unnecessarily high levels of substantiation before we authorize payment.

During a time when our Soldiers and their families are under extreme stress, we should not impose unnecessary hurdles when they seek reimbursement for meritorious incident-to-service damage to, loss of, or destruction of their property. Equally important, we must ensure that our interactions do not create the perception that we believe claimants are out to cheat or game the system. If that belief becomes prevalent, any good that might come from even a very generous reimbursement will be destroyed.

Accordingly, with the support of the Commander, Army Claims Service, and JAG Corps senior leadership, the Personnel Claims and Recovery Division will adjudicate claims and act on requests for reconsideration using the following approach. We will look for ways to pay fair amounts on meritorious claims—not for ways to deny or reduce them—and we will resolve doubts in favor of claimants. I ask your support in ensuring that your claims offices approach and adjudicate claims following the same philosophy.

To help in that endeavor, the Personnel Claims and Recovery Division will provide outreach, training, and other support to claims professionals in the field. As a part of our review of Army claims publications—particularly Army Regulation 27-20⁴ and Army Pamphlet 27-162⁵—we have made efforts to remove, amend, or ameliorate provisions that unnecessarily impose unreasonable burdens on potential claimants. That effort will continue unabated and with renewed fervor.

¹ Chief, Personnel Claims and Recovery Division, U.S. Army Claims Service.

² Major General Walter B. Huffman, The Judge Advocate General, U.S. Army, Address as the U.S. Army Claims Training Conference (Oct. 27, 1997). The conference was held in Linthicum, Maryland.

³ 10 U.S.C. § 3721 (2006). *See generally* U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS ch. 11 (8 Feb. 2008) [hereinafter AR 27-20].

⁴ AR 27-20, *supra* note 2.

⁵ U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES ch. 11 (21 Mar. 2008).

We will also continue to look for ways to assist the ever-increasing number of claimants who have shipped their household goods via programs entitling them to full replacement value reimbursement, but who must first file claims with their carrier to obtain reimbursement.⁶ Furthermore, we will continue to conduct regional Claims Training Conferences to provide convenient, cost-effective continuing education and training to field claims professionals. Finally, we are re-instituting the practice of conducting Claims Assistance Visits to help train and educate field claims professionals and generally improve field claims office management.

Unfortunately, we do not have the resources to visit every field claims office annually as part of an official Claims Assistance Visit. Accordingly, we must prioritize our visits based on the size of the office, the claims workload, and our perceived need for such assistance.

Claims offices that believe a Claims Assistance Visit would provide meaningful assistance to the office's claims practice are encouraged to contact the Personnel Claims and Recovery Division at (301) 677-7009. Our office will endeavor to arrange a visit as soon as we can reasonably do so. I also hope to hear from you if you have questions about, recommendations for or complaints regarding personnel claims-related matters.

In closing, I reiterate my pleasure in having the honor and privilege of being entrusted to administer a program designed to help the Soldiers, civilian employees, and family members of the U.S. Army. Thank you for helping me carryout those responsibilities.

⁶ For information on these programs, including the Full Replacement Value Program and the Defense Personal Property Program, visit the Surface Deployment and Distribution Command's personal property webpage at <http://www.sddc.army.mil/public/Personal+Property/>.

Book Reviews

The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008¹

Major Joshua F. Berry²

*The situation in Iraq is unacceptable to the American people, and it is unacceptable to me. Our troops in Iraq have fought bravely. They have done everything we have asked them to do. Where mistakes have been made, the responsibility rests with me. It is clear that we need to change our strategy in Iraq.*³

I. Introduction

Americans may have already forgotten that in late 2006 and early 2007, Iraq was on the verge of collapse into a civil war. Following a mid-term election in which Democrats, spurred to victory in part by an anti-war movement, seized control of Congress from the Republicans, many in America, even in Iraq, were expecting a withdrawal of troops from Iraq.⁴ Instead, on the night of 10 January 2007, President George W. Bush addressed the world and stated that America would take a new course in the war: “a surge of more than 20,000 additional American troops to Iraq.”⁵ President Bush stated that this effort would have “a well-defined mission: to help Iraqis clear and secure neighborhoods, to help them protect the local population, and to help ensure that the Iraqi forces left behind are capable of providing the security that Baghdad needs.”⁶

In *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008*, Thomas Ricks follows up his acclaimed novel, *Fiasco*,⁷ with a comprehensive examination of the “surge” of U.S. military forces into Iraq in 2007–2008. Ricks takes a mostly

complimentary stance in *The Gamble*, stating that the surge “was the right step to take, or more precisely, the least wrong move in a misconceived war”⁸ and that “the U.S. military had regained the strategic initiative.”⁹ However, Ricks concludes that the surge “fell short strategically” because Iraqi officials did not seize the opportunity to move the country forward.¹⁰ Thomas Ricks succeeds in providing a wealth of information and analysis on the successes and failures of the surge strategy, but his analysis falls short of perfection by manipulating chronologies and failing to adequately investigate the political failures of the Iraqi Government.

II. Background

Thomas Ricks has spent his career as a journalist covering the U.S. military. Ricks graduated from Yale University in 1977 and began covering the U.S. military as a reporter for the *Wall Street Journal* in 1982.¹¹ Ricks reported for the *Wall Street Journal* until the end of 1999, moving to the same “beat” with the *Washington Post* from 2000 until 2008.¹² Ricks has authored several other books on the U.S. military, including *Making the Corps, A Soldier’s Duty*, and the aforementioned *Fiasco*.¹³ Ricks currently is a senior fellow with the Center for a New American Security, a contributing editor to *Foreign Policy* magazine, and special military correspondent for the *Washington Post*.¹⁴

III. Analysis

General David Petraeus’s contributions to the surge are widely documented,¹⁵ but one of the most interesting

¹ THOMAS E. RICKS, *THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006–2008* (2009).

² Judge Advocate, U.S. Army. Presently assigned as Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia.

³ President George W. Bush, Address to the Nation (Jan. 10, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-7.html> [hereinafter Address to the Nation].

⁴ See, e.g., RICKS, *supra* note 1, at 74–77, 78–79, 111.

⁵ Address to the Nation, *supra* note 3.

⁶ *Id.*

⁷ THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006). For those who have not read *Fiasco*, Michiko Kakutani’s book review notes that Ricks passes his judgment on the Bush Administration by serving up a “portrait of that war as a misguided exercise in hubris, incompetence and folly with a wealth of detail and evidence that is both staggeringly vivid and persuasive.” Michiko Kakutani, *From Planning to Warfare to Occupation, How Iraq Went Wrong*, N.Y. TIMES, July 25, 2006, available at <http://www.nytimes.com/2006/07/25/books/25kaku.html>.

⁸ RICKS, *supra* note 1, at 295.

⁹ *Id.* at 294.

¹⁰ *Id.* at 296.

¹¹ The Best Defense, About Thomas E. Ricks, http://ricks.foreignpolicy.com/About_Ricks (last visited Sept. 5, 2009) [hereinafter About Thomas E. Ricks].

¹² *Id.*

¹³ THOMAS E. RICKS, *MAKING THE CORPS* (1997); THOMAS E. RICKS, *A SOLDIER’S DUTY: A NOVEL* (2001); *FIASCO*, *supra* note 7.

¹⁴ About Thomas E. Ricks, *supra* note 11.

¹⁵ See, e.g., RICKS, *supra* note 1, at 15–34, 121, 127–66, 237–54 (discussing General Petraeus’s involvement in developing Army counterinsurgency doctrine and his leadership of coalition forces in Iraq from 2007–2008).

subjects of *The Gamble* is the prominent role retired General Jack Keane played in the development and implementation of the surge strategy. Ricks's glowing portrayal of General Keane seems almost preposterous, but Ricks offers ample insider support for his contention that "[i]n the fall of 2006, Jack Keane effectively became Chairman of the Joint Chiefs of Staff," helping to orchestrate a new strategy for the war in Iraq.¹⁶ This change in strategy, opposed by a majority of Americans,¹⁷ was a risk for President Bush as he "effectively had turned over the fate of his presidency"¹⁸ to a war strategy largely opposed by the leadership of the "U.S. military in both Baghdad and Washington"¹⁹ and "implemented by a group of dissidents, skeptics, and outsiders, some of them foreigners."²⁰

Ricks's later accounts of General Keane underscores a consistent weakness in *The Gamble*: jumbled timelines and the intermingling of unrelated events to support a conclusion. For example, Ricks claims that "[b]etween Keane and [General] Odierno, a kind of guerrilla campaign was launched inside the U.S. military establishment."²¹ Ricks believes General Odierno made one of the "most audacious moves of the entire war [by] . . . bypassing two levels of command above him to talk to officials at the White House and aides to the Joint Chiefs of Staff."²² Ricks provides no support for this "epic end run around [General] Casey"²³ and, as is common in *The Gamble*, Ricks manipulates facts to support his assertions.

Ricks implies that beginning in November 2006, General Odierno began working covertly behind General Casey's back in the United States to change strategy in Iraq.²⁴ There are two weaknesses in this conclusion: It glosses over the ongoing movement to shift the strategy in Iraq,²⁵ and it blurs dates, twisting facts to support Ricks's positive views of General Odierno. As to the first, Ricks

inexplicably overlooks the dozens of pages he devotes to the growing support in 2006 for a surge in troops and change in strategy. For example, in June 2006, national security experts met with President Bush to discuss troop levels and strategy;²⁶ in September 2006, General Keane met with Defense Secretary Rumsfeld to recommend changing strategy in Iraq to focus on counterinsurgency.²⁷ Ricks never claims that General Odierno was a part of any of these discussions with the White House or the Pentagon.

As to timelines, General Odierno and his staff left Texas on 28 November 2006,²⁸ and General Odierno assumed command of Multi-National Corps–Iraq (MNC-I) on 14 December 2006.²⁹ For Ricks's assertion to be valid, one would have to believe that General Odierno's "guerilla campaign" occurred between 30 November 2006 (approximately when General Odierno would have arrived in Iraq) and 11 December 2006 when Keane lobbied President Bush for a troop increase during a meeting at the White House.³⁰

Ricks's own writing demonstrates the fallacy of his conclusion. The first time General Odierno discusses any change in operations is during III Corps's flight to the Middle East on 28 November 2006.³¹ Ricks's quotes General Odierno as saying: "When I got here, the situation was fairly desperate, frankly . . . [T]he only thing I thought would decisively change it was doing something in Baghdad, and the only way to do that was to increase forces."³² On 4 December 2006, General Odierno was briefed on the "Transition Bridging Strategy," the Multi-National Force–Iraq (MNF–I) and MNC–I plan to continue pulling the U.S. military back to large bases and transition control to the Iraqi Security Forces (ISF).³³ General Odierno was "very nervous" about this strategy and "decided he would formally oppose any additional troop cuts He wasn't even thinking about a surge, because '[h]e didn't think he could get more [troops].'"³⁴

Ricks goes on to note that "after taking command"—14 December 2006—Odierno and his staff met constantly to try

¹⁶ *Id.* at 79. For support on General Keane's active role in planning the surge, see *id.* at 79–85, 88–104.

¹⁷ Jon Cohen & Dan Balz, *Poll: Most Americans Opposed to Bush's Iraq Plan*, WASH. POST, Jan. 11, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/11/AR2007011100282.html>.

¹⁸ RICKS, *supra* note 1, at 123.

¹⁹ *Id.* at 107.

²⁰ *Id.* at 134.

²¹ *Id.* at 91.

²² *Id.*

²³ RICKS, *supra* note 1, at 92. The only evidence Ricks provides is a quote from General Keane: "'Odierno and I are having a continuous dialogue' at this time, Keane recalled. 'He knows he needs more troops, he knows the strategy has got to change. His problem is General Casey.'" *Id.*

²⁴ *Id.* Interestingly enough, Ricks notes that General Casey "seemed puzzled" when told of General Odierno's actions. *Id.* General Casey said, "Ray [Odierno] never came to me and said, 'Look, I think you've got to do something fundamentally different here.'" *Id.*

²⁵ See, e.g., *id.* at 91–94.

²⁶ *Id.* at 42–45.

²⁷ *Id.* at 88–89.

²⁸ *Id.* at 106.

²⁹ Frederick W. Kagan & Kimberly Kagan, *The Patton of Counterinsurgency*, WKLY. STANDARD, Mar. 10, 2008, available at <http://www.weeklystandard.com/Content/Public/Articles/000%5C000%5C014%5C822vfpsz.asp>.

³⁰ RICKS, *supra* note 1, at 98–101.

³¹ *Id.* at 106–07. Ricks writes that during the flight from Fort Hood, Texas, to Iraq, General Odierno gave his key staff officers an order to "[c]ome up with a plan to retake Baghdad." *Id.*

³² *Id.* at 111–12.

³³ *Id.* at 111. See also *id.* at 337–41.

³⁴ *Id.* at 111.

to develop a different plan.³⁵ By the time General Odierno assumed command of MNC-I, President Bush had already received two briefings on implementing a surge: one on 11 December at the White House and one on 13 December at the Pentagon.³⁶ Furthermore, Ricks overlooks the fact that on 20 November 2006, just days before deploying to Iraq, General Odierno gave an interview to the *New York Times* and mentioned nothing about changing strategy or surging troops.³⁷

While Ricks's factual disparity seems nuanced and trivial, it has the effect of mixing General Odierno's landmark development of a new strategy—and his moral courage to implement it—with a sense of duplicity and backstabbing. The facts support a conclusion that General Odierno consulted with Keane and others *after* deciding to shift the operational planning in Iraq. Unfortunately, Ricks's version of events does disservice to the favorable image of Odierno that Ricks wants to create, a pattern repeated several times throughout *The Gamble*.

Later in *The Gamble*, Ricks describes the “foundation for strategy” and notes that the “biggest single strategic change in Iraq in 2007 . . . [was] a new sobriety in the mind-set of the U.S. military Finally it was ready to try something new.”³⁸ Ricks declares the mind-set changed from brute force and killing to “conducting slow, ambiguous operations that were built . . . around human interactions” and “began to rely on Iraq's more communitarian values, which often revolve around showing and receiving respect.”³⁹

To support this notion of a changed mind-set, Ricks provides examples of these new operations and a good deal of information on the various tactics employed and problems faced: moving into combat outposts (COP) and joint security stations (JSS); focusing the surge forces on the Baghdad “belts”; increased foot patrols; using cement barriers to divide neighborhoods; increased aerial surveillance assets; increased synchronization of intercepted signals intelligence; revised detention operations; removing corrupt commanders from the ISF; and growing the ISF.⁴⁰ Despite these useful illustrations, Ricks's analysis is incomplete because it fails to even mention other critical operations during that time, including counter-Iranian operations;⁴¹ the formation of “Economic Development

Zones” throughout Iraq;⁴² and Operations Phantom Thunder, Phantom Strike, and Phantom Phoenix.⁴³

At the end of *The Gamble*, Thomas Ricks concludes that “[t]he surge campaign was effective in many ways, but the best grade it can be given is a solid incomplete. It succeeded tactically, but fell short strategically.”⁴⁴ Ricks notes that the strategic purpose of the surge was “to create breathing space that would then enable Iraqi politicians to find a way forward and that hadn't happened.”⁴⁵

President Bush, in his speech announcing the surge, outlined several areas in which he expected the Government of Iraq (GOI) to make progress: reconciliation, transition to provincial control, the passage of oil revenue sharing laws, increased spending on reconstruction, the holding of provincial elections in 2007, and reformation of de-Baathification laws.⁴⁶ However, Ricks's analysis lacks any material discussion of these political goals or the American plan to support the GOI's political efforts.

In the last few chapters of *The Gamble*, Ricks quotes several sources as saying that the GOI made no political progress in 2007,⁴⁷ but he does not examine any of the major areas in which America had hoped to see progress. The only area Ricks gives any attention to is the failure of the GOI to reconcile at the national level, indicating that the tactical success of the surge actually reduced the necessity for national reconciliation,⁴⁸ but he fails to provide any real study of why reconciliation failed.

Ricks's failure to substantively evaluate the GOI's political failures during 2007–2008 is disappointing, especially given his view that the surge fell short strategically. Who is to blame for this shortcoming, the GOI or America? For example, President Bush said that America would double the number of Provincial Reconstruction

<http://www.understandingwar.org/files/reports/IraqReport06.pdf> (summarizing Iranian involvement in Iraq and discussing increased American efforts in 2007 to counter such involvement).

⁴² See, e.g., Rajiv Chandrasekaran, *Defense Skirts State in Reviving Iraqi Industry*, WASH. POST, May 14, 2007, at A1 (discussing Department of Defense efforts to revitalize Iraqi industries).

⁴³ See, e.g., Institute for the Study of War, Operations, <http://www.understandingwar.org/iraq-project/operations> (last visited Sept. 6, 2009) (providing an overview of major named operations in Iraq and noting that Operation Phantom Thunder was the largest coordinated military operation since the 2003 invasion of Iraq).

⁴⁴ RICKS, *supra* note 1, at 296.

⁴⁵ *Id.*

⁴⁶ See, e.g., Address to the Nation, *supra* note 3.

⁴⁷ See, e.g., RICKS, *supra* note 1, at 261–67, 296–97.

⁴⁸ *Id.* at 296 (quoting General Odierno in 2008 as saying “[s]ecurity is good enough where I worry about them going back They're not going back to solve the old problems which we've pushed . . . [.] like the problem with the land up in the north with the Kurds, the problems with the Peshmerga, oil, Kirkuk”).

³⁵ *Id.* at 111–12.

³⁶ *Id.* at 98–104.

³⁷ Thom Shanker, *General Discusses Goals of His Return to Iraq*, N.Y. TIMES, Nov. 20, 2006, at A15.

³⁸ RICKS, *supra* note 1, at 160.

³⁹ *Id.* at 162–64.

⁴⁰ See *id.* at 162–74, 192–99.

⁴¹ See, e.g., KIMBERLY KAGAN, IRAQ REPORT #6: IRAN'S PROXY WAR AGAINST THE UNITED STATES AND THE IRAQI GOVERNMENT (Aug. 29, 2007), [available at](#)

Teams in Iraq,⁴⁹ but did this happen? What efforts did the State Department or other civilian agencies make to help the GOI succeed? This lack of inquiry leaves the reader feeling that somehow the U.S. military is to blame for the GOI's failures, which inappropriately shifts blame for these letdowns to the military.

IV. Conclusion

The Gamble effectively summarizes the confluence of events that led to the development and implementation of new tactics and strategy in Iraq in 2007. Ricks's access to multiple levels of leadership, from Administration officials, defense experts, and military brass at the Pentagon, to generals and staff in Baghdad, to Soldiers fighting at the tactical level, provides well-rounded insight that will be valuable to most readers. Readers who were part of the surge will notice the weaknesses in some of Ricks's chronologies and conclusions. Readers looking for profound scholarly analysis will notice that *The Gamble* is largely a compilation of Ricks's *Washington Post* articles from 2006–2008, strung together by Ricks's observations and conclusions. However, in the absence of any other comprehensive books on the surge, *The Gamble* successfully captures the general—and most important—reasons for the failures of the Iraqi war until 2007 and the successes thereafter.

For judge advocates, there is a notable lack of discussion of legal issues in *The Gamble*. Ricks does not discuss the controversies surrounding the rules of engagement (ROE) at the beginning of the surge,⁵⁰ nor does he mention the important efforts in strengthening Iraq's rule of law.⁵¹ *The Gamble* does discuss the rise of "Concerned Local Citizens" groups, but there is no mention of the possible legal implications associated with the U.S. military financing, arming, and conducting offensive operations with these civilian groups.

Judge advocates, like all readers, can pull several valuable leadership lessons from *The Gamble*. One of the most important is from Generals Odierno and Petraeus: the need to have the moral courage to implement essential change despite overwhelming institutional resistance. It is common in the military for succeeding leaders to believe they can accomplish the mission better than their predecessor, but it is truly exceptional for those leaders to gamble their careers, and more importantly, lives, on such unpopular and risky strategic change. During 2006–2008, that is exactly what Generals Odierno and Petraeus did in Iraq, and *The Gamble* does succeed in driving that leadership lesson home.

⁴⁹ See Address to the Nation, *supra* note 3.

⁵⁰ See James Lyons, *Untie Military Hands*, WASH. TIMES, Jan. 26, 2007, at A18 (stating that the current ROE in Iraq were too restrictive); Bill Gertz & Rowan Scarborough, *Inside the Ring*, WASH. TIMES, Jan. 26, 2007, at A5 (arguing that the ROE are ambiguous and confusing); Lieutenant Colonel James Hutton, *Rules of Engagement*, WASH. TIMES, Feb. 3, 2007, at A12 (responding that Admiral Lyons inaccurately described the ROE in Iraq); Major General William B. Caldwell, IV, *Not at All Vague: Rules of Engagement Strike Balance*, WASH. TIMES, Feb. 9, 2007, at A21 (asserting that the ROE in Iraq allow the use of necessary force in self-defense).

⁵¹ See Michael R. Gordon, *Justice From Behind the Barricades in Baghdad*, N.Y. TIMES, July 30, 2007, at A1 (discussing the establishment of protected legal zones in Iraq).

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 (800) 552-3978, extension 3307.

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

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

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

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

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F70	Methods of Instruction	22 – 23 Jul 10

NCO ACADEMY COURSES		
512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	6th Advanced Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
WARRANT OFFICER COURSES		
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
ENLISTED COURSES		
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
ADMINISTRATIVE AND CIVIL LAW		
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
CONTRACT AND FISCAL LAW		
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10

INTERNATIONAL AND OPERATIONAL LAW		
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10

3. Naval Justice School and FY 2009–2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (030)	2 Aug – 9 Oct 10
0258	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (030)	10 May – 23 Jul 10
03TP	Trial Refresher Enhancement Training (020)	2 – 6 Aug 10
4046	Mid Level Legalman Course (020)	14 – 25 Jun 10 (Norfolk)
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	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)	1 – 3 Jun 10 (San Diego) 2 – 4 Jun 10 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10

786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
850T	Staff Judge Advocate Course (020)	5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961J	Defending Complex Cases (010)	12 – 16 Jul 10
NA	Iraq Pre-Deployment Training (040)	6 – 9 Jul 10

**Naval Justice School Detachment
Norfolk, VA**

0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (060) Legal Clerk Course (070)	19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	24 – 28 May 10 9 – 13 Aug 10 13 – 17 Sep 10

**Naval Justice School Detachment
San Diego, CA**

947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (080) Senior Officer Course (090)	24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, 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.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

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

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

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

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

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

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

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

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

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

MSU: Mississippi College of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7100, fax (601) 925-7115

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

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

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

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

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

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

PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

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

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

d. Regarding the January 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. The Judge Advocate General’s Fiscal Year 2010 On-Site Continuing Legal Education Training

Date	Region	Location	Units	ATRRS Number	POCs
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

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

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

b. Access to the JAGCNet:

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

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

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

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

c. How to log on to JAGCNet:

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

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

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next

menu, then enter your “User Name” and “Password” in the appropriate fields.

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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

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

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

4. The Army Law Library Service

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

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