

The Strategic Captain: The Current Use and Limitations of Official Representation Funds in the U.S. Army and Ways to Improve the Program

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*War is merely the continuation of politics by other means.*¹

I. Introduction

In late October 2015, Captain (CPT) Carter, the commander for Echo Company, 3d Brigade, 82d Airborne Division, seeks a way to engage with local tribal leaders in Wardak province, Afghanistan. As a key aspect of current operational objectives, the commander of United States Forces Afghanistan (USFOR-A) directed all company-level units to engage with local leaders within their areas of responsibility (AOR) at least once a week, or more, if feasible. The objective is to reduce the violence in the province and undermine the influence of the Taliban within the local population. This type of key leader engagement is recognized as a central aspect of the current counterinsurgency (COIN) tactics used by the U.S. military to boost the faith of the local population in the nascent Afghan central government.²

Captain Carter is eager to prove he is able to handle this task. He meets with the battalion intelligence office to try to develop a list of leaders to focus on for these meetings.³ Next, CPT Carter meets with the battalion civil affairs officer to figure out what type of meetings would result in the greatest impact for the unit and also help reduce future violence within the AOR. The civil affairs officer tells CPT Carter that if he wants to really ingratiate himself with the local leaders he should organize a *shura*, a local assembly of tribal leaders who meet and discuss issues as a form of local governance for the people in the area.⁴ As part of a *shura*, the civil affairs officer tells Captain Carter that a full meal should be provided by the host as a sign of respect for those in attendance and

a way to create a relaxed atmosphere in adherence to local customs and traditions.⁵ As he processes all of this information, CPT Carter returns to his office and searches online for the latest copy of Money as a Weapon System for Afghanistan (MAAWS-A) and starts to read through the possible money sources that would allow him to purchase food for a *shura*.⁶ He considers all of the available sources and determines the most likely sources may include: Operation Maintenance, Army (OMA), Afghan Security Forces Funds (ASFF), and Official Representation Funds (ORF).⁷ Upon further review, it appears that the only source available to purchase food for receptions is ORF.⁸

Captain Carter calls his Brigade Judge Advocate (BJA), Major (MAJ) Morgan, and explains his idea to fund a weekly *shura* with the leaders in his AOR and asks whether this seems like an appropriate expenditure of ORF funds. Not an expert in fiscal law, MAJ Morgan tells CPT Carter that this sounds like a good use of ORF funds, since ORF is the only appropriate fund she can think of that may be used to purchase food for receptions.⁹ The BJA instructs CPT Carter to develop a funding request and assures him that she will forward it to the USFOR-A legal office for expedited review. A week after its submission, CPT Carter receives a phone call from MAJ Morgan who tells him that his ORF request to fund the *shuras* was denied by the USFOR-A Staff Judge Advocate as legally objectionable because he was not in the rank of Colonel (O-6).¹⁰ Dejected, CPT Carter must begin again from square one. In this scenario, if the USFOR-A Commanding General could authorize company-level

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¹ CARL VON CLAUSEWITZ, ON WAR, ch. 1, sec. 24, (Princeton Univ. Press trans. 1976) (1832).

² U.S. DEP'T OF ARMY, FIELD MANUAL 3.24.2, TACTICS IN COUNTERINSURGENCY (21 Apr. 2009) [hereinafter FM 3.24.2].

³ Memorandum for Record from United States Forces-Afghanistan, Office

of the Staff Judge Advocate (USFOR-A SJA), subject: Propriety of Using OCO OMA to Provide Food at Informal Shuras, (4 Nov. 2015) [hereinafter Memorandum for Record]. This vignette is based on the question addressed within this memorandum, and with conversations about the background of this issue with one of the memorandum authors, Major John Dohn. The facts discussed within the vignette are otherwise fictitious.

⁴ *Definition for Shura*, DICTIONARY.COM, <http://dictionary.reference.com/browse/shura> (last visited Aug. 1, 2016).

⁵ Lieutenant Colonel Maurice A. Lescault, Jr., *Official Representation Funds: Fiscally Controlled Funds or "Easy Money"?*, ARMY LAW., Dec. 2003, at 18.

⁶ U.S. FORCES AFG., PUB. 1-06, MONEY AS A WEAPON SYSTEM para. 2.35 (11 Apr. 2015) [hereinafter MAAWS-A].

⁷ *Id.* paras. 2.2, 2.14, 2.35.

⁸ U.S. DEP'T OF THE ARMY, REG. 37-47, OFFICIAL REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY para. 2-1a.(2)(a) (18 Sept. 2012) [hereinafter AR 37-47].

⁹ *Id.*

¹⁰ Memorandum for Record, *supra* note 3; *see also* AR 37-47, *supra* note 8, para. 2-1b.

commanders to host ORF funded receptions and gift exchanges in contingency environments, “strategic captains” like CPT Carter could pursue the type of local community contacts and relationship building required as part of counterinsurgency operations.¹¹

This introductory vignette is a real-world demonstration of how policy restrictions on ORF funds adversely impact the lowest level commanders in their pursuit of non-lethal engagements with local leaders and military counterparts in their AORs. Every Soldier, like CPT Carter, who is deployed in combat is a representative of U.S. values and policy.

Lesser known than the military and diplomatic leaders at the national level, these Soldier-diplomats engage with key leaders on a daily basis in an effort to execute U.S. policy objectives on the frontlines in Afghanistan and Iraq. The “strategic captain” is the “most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well.”¹²

To facilitate military commanders in achieving a baseline of diplomatic courtesies, the Service Secretaries are authorized the use of a subset of Operations and Maintenance funds for “Emergency and Extraordinary Expenses” that may arise during the course of a fiscal year.¹³ Official Representation Funds are derived from this Emergency and Extraordinary Expenses fund authority.¹⁴ These funds are the creation of the Service Secretaries, not a Congressional authorization, and may be used for emergent needs that arise. As a result, ORF funds are intentionally flexible.

Current Army Regulations and policy limitations on the use of ORFs unduly limit commanders from effectively using diplomatic courtesies to advance U.S. policy objectives through strategic engagements and gift exchanges with foreign leaders and military counterparts.¹⁵ In addition, the limitations on the rank of event hosts unnecessarily limit these company-level commanders, or strategic captains, from fully executing the type of local community engagements that are a cornerstone of the counterinsurgency strategy at the forefront of the wars in Iraq and Afghanistan.¹⁶

¹¹ General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES MAGAZINE, Jan. 1999. The “strategic captain” is a modern interpretation of General Krulak’s article in which he describes the importance of the “strategic corporal” in modern warfare. *Id.* at 3. In Krulak’s scenario, Corporal Hernandez represents the rifleman who needs to make quick decisions far from the flagpole “without direct supervision of senior leadership” involvement in his decisions. *Id.* Through his actions, Corporal Hernandez is the symbol of U.S. military power and foreign policy. *Id.*

¹² *Id.* at 3.

¹³ Emergency and Extraordinary Expenses Funds, 10 U.S.C. § 127(a) (2006) [hereinafter EEE Funds].

¹⁴ AR 37-47, *supra* note 8, para. 1-1.

¹⁵ *Id.* para. 2-1a.

Service Secretaries should use the flexibility given them by Congress to adapt ORF funds to more appropriately meet the emerging challenges the Soldier-diplomat at the company level encounters on a daily basis in contingency operations.¹⁷ To accomplish this change, the publication of a new Department of Defense Instruction on the use of ORFs could easily carve out new authority on their use, specifically in contingency environments. As a result, service members in contingency operations would be able to more effectively accomplish their missions and ultimately meet the objectives of the commanders they serve.

This paper will first briefly explore the legal authorities of ORFs and Emergency and Extraordinary Expense funds in the Army with an overview of the appropriations process. The next section will provide an overview on ORF authorities and how ORFs are used as a tool of U.S. diplomacy by commanders in contingency operations. The final section will include recommended changes to the ORF program based, in part, on feedback from judge advocates and comptrollers who use ORFs at Army Service Component Commands (ASCC).

II. ORF Legal Authority and Statutory Fund Limitations

A. Fund Appropriations

In order for the President to wield his or her power as the Commander-in-Chief, Congress must first appropriate funds.¹⁸ “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”¹⁹ Nearly two hundred years after the establishment of the Constitution, the Supreme Court expressed its affirmation in the power of Congress to appropriate when it stated that, “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”²⁰

“Federal funds are made available for obligation and expenditure by means of appropriation acts (or occasionally by other legislation) and the subsequent administrative actions that release appropriations to the spending agencies.”²¹ Congress prepares the Federal budget through three primary means: discretionary spending, mandatory, or

¹⁶ Krulak, *supra* note 11; *see also* AR 37-47, *supra* note 8, paras. 2-1a, 2-1b; *see generally* FM 3.24.4, *supra* note 2.

¹⁷ AR 37-47, *supra* note 8, para. 1-1; *see also* EEE Funds, *supra* note 13.

¹⁸ U.S. CONST., art. I, § 8, cl. 1. “Congress is empowered to pay the Debts and provide for the common Defense and general Welfare of the United States,” and to—“make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” *Id.*

¹⁹ U.S. CONST., art. I, § 9, cl. 7. This section is also known as the “Appropriations Clause.”

²⁰ *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

²¹ U.S. GOV’T ACCOUNTABILITY OFFICE, OFFICE OF THE GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-2 (3d ed.

direct spending, and through an analysis of current or expected Federal revenues.²² *Mandatory* spending is that which is required by laws or other appropriation acts, while *discretionary* spending, to include defense appropriations, stems from the authority provided in annual appropriations acts.²³

“Congress may give the executive branch considerable discretion concerning how to implement the laws and hence how to obligate and expend funds appropriated, but it is ultimately up to Congress to determine how much the executive branch can spend.”²⁴ Appropriations and authorization bills are generally detailed and lengthy, including numerous requirements before funds may be expended. As an example, the National Defense Authorization Act for Fiscal Year 2015 was 698 pages long, with specific details and steps each military service must follow in order to properly expend the funds appropriated.²⁵ In short, Congress rarely leaves discretionary expenditures to the whim of the end-user. It is therefore remarkable when Congress does in fact authorize expenditures at the discretion of the Secretaries of the Services and the Secretary of Defense. Official Representation Funds are an example of appropriated funds with great potential flexibility and discretion in their use.²⁶

B. Emergency and Extraordinary Expense Funds.

Official Representation Funds are apportioned as a part of Operations and Maintenance, Army (OMA) funds, in a further subset known as Emergency and Extraordinary Expenses (EEE) funds.²⁷ These EEE funds do not constitute a separate fund outside of OMA, rather they are subject to the same fiscal limitations and regulations that govern OMA funds.²⁸ The definition of what is characterized as an emergency and extraordinary expense is largely up to the interpretation of the Service Secretaries.²⁹

Subject to the limitations of subsection (c), and

within the limitation of appropriations made for the purpose, the Secretary of Defense, the Inspector General of the Department of Defense, and the Secretary of a military department within his department may provide for any emergency or extraordinary expense which cannot be anticipated or classified. When it is so provided in such an appropriation, the funds may be spent on approval or authority of the Secretary concerned or the Inspector General for any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers of the United States. The Secretary concerned or the Inspector General may certify the amount of any such expenditure authorized by him that he considers advisable not to specify, and his certificate is sufficient voucher for the expenditure of that amount.³⁰

As with most funding authority, Congress inserted a limitation to this flexibility—EEE funds are intentionally limited in supply.³¹

For Army operational expenses, only \$12,478,000 is authorized under the category of EEE funds for exclusive use and approval of the Secretary of the Army.³² It is notable to highlight that the amount of EEE funds authorized for use by the Army Secretary is less than half of the authorization for defense-wide purposes at the disposal of the Secretary of Defense.³³ Clearly, this disparity in the amount appropriated to the Secretary of the Army and Secretary of Defense appears to be an intentional act on the part of Congress. By only appropriating a small amount of money, Congress seems to maintain at least some minimal oversight on the use of ORFs. Congress must also receive annual reports of all ORF expenditures, so “if they are not happy with the expenditures being reported to it, it can simply reduce or eliminate the funds appropriated for that purpose.”³⁴

Provided that the funds are available, any emergent

2010) [hereinafter GAO Red Book].

²² *Frequently Asked Questions About CBO Cost Estimates*, CONGRESSIONAL BUDGET OFFICE, <https://www.cbo.gov/about/products/ce-faq> (last visited Aug. 1, 2016).

²³ *Id.* Mandatory appropriations or spending are generally required for entitlement programs, such as the Medicare and Social Security programs. *Id.*

²⁴ GAO Red Book, *supra* note 21, 6-4.

²⁵ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) [hereinafter FY 15 NDAA]. The Authorization Act is divided into four different parts, with numerous subsections throughout: Department of Defense Authorizations; Military Construction Authorizations; Department of Energy; and, National Security Authorizations and Other Authorizations. *Id.*

²⁶ Matter of HUD gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1986).

²⁷ Consolidated and Further Continuing Appropriations Act, 2015 (FY 15

Appropriations Act), Pub. L. No. 113-235, div. C, tit. II, 128 Stat. 2130, 2236 (2014).

²⁸ AR 37-47, *supra* note 8, para. 1-1.

²⁹ *Lescault*, *supra* note 5, at 20. “The General Accounting Office (GAO) has generally given wide latitude to the Secretaries in the executive branch, at least with some categories of emergency and extraordinary expenses.” *Id.*

³⁰ EEE Funds, *supra* note 13, para. (a).

³¹ FY 15 Appropriations Act. Of Operation and Maintenances, Defense-Wide, \$ 6,211,025,000 is appropriated, and of that, \$15,000,000 may be used for emergency and extraordinary expenses. *Id.* at 128 stat. 2287-88.

³² *Id.*

³³ *Id.*

³⁴ *Lescault*, *supra* note 5, 19; *see also* EEE Funds, *supra* note 13, para. (d).

requirement could be paid for with EEE funds subject to the concurrence of the Secretary of that Service.³⁵ In an era of budget austerity and seemingly daily requirements for military presence throughout the world, EEE funds are a powerful tool. However, Congress ensured that EEE funds could not be used to sustain long-term endeavors by limiting the amount appropriated each year.³⁶ Despite limitations compared to the billions appropriated for greater defense-wide operations, EEE funds may still make an impact.

C. Official Representation Funds

1. Limitations on Commanders

The legal framework of ORF in the military originates from the Secretary of Defense who issued a Department of Defense Directive (DoDD). The DoDD gives the Secretaries of the Services, the Chairman of the Joint Chiefs of Staff, and the Inspector General of the Department of Defense the authority to use appropriated funds for official representation purposes.³⁷ The DoDD provides general guidance as to whom official courtesies should be extended, what types of costs are prohibited, and the requirements necessary for record keeping the use of the funds.³⁸ Additionally, the DoDD directs the Secretaries of the each Service to provide all necessary policy, administration, and approval of ORF expenditures within their respective service components.³⁹ From the DoDD, the Department of Defense issued a Department of Defense Instruction (DoDI). The DoDI provided more detailed and extensive guidelines on the ranks of ORF hosts, authorized guests, and reporting requirements on expenditures.⁴⁰ Army Regulation (AR) 37-47 implements DoDI 7250.13, which is authorized by Title 10, § 127 of the United States Code for EEE funds.⁴¹ With the guidance contained in the DoDI, the Secretary of the Army outlines

how ORFs will be used within the Army, and expands significantly guidance on specific levels of expenses and the nature of the participants at ORF-funded events.⁴² For members of the Army, AR 37-47 is the authoritative guide upon which all of their ORF questions should be analyzed.

The primary purpose of ORF expenditures is to extend official courtesies on behalf of the Department of Defense (DoD) to guests of the United States.⁴³ As discussed above, not all commanders can extend official courtesies.⁴⁴ The type and nature of the courtesy is “dictated by the occasion and conducted on a modest basis to maintain the standing and prestige of the United States at home and abroad.”⁴⁵ Official Representation Fund expenses noted in the regulation are varied, and range from mundane items like disposable flatware for receptions to entertainment and fees for traveler checks.⁴⁶ However, the use of ORF is not intended to be easily delegable.⁴⁷ The regulation dictates that generally only members of the Senior Executive Service (SES) or General Officers (GO) may extend official courtesies and host ORF events.⁴⁸ A general schedule (GS)-15 equivalent or O-6 level of leadership may host an event only by exception and with the written authorization of an SES or GO.⁴⁹ If an event involves a base commander, the level of leadership of the host may be delegated down to an O-5 with no further exceptions authorized.⁵⁰

Official Representation Funds are used to fund “official receptions.”⁵¹ According to the Comptroller General, the term “representation,” as used in the phrase “official reception and representation,” means precisely what it implies—representing the agency or the U.S. in dealings with others in an official context.⁵² As long as it is an official function of the United States that involves representing the United States to others, receptions and events with light refreshments are permitted with the use of ORF funds.⁵³ There is no

³⁵ EEE Funds, *supra* note 13, para. (a).

³⁶ See *supra* note 31 and accompanying text.

³⁷ U.S. DEP’T OF DEF., DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (ORF) para.1.2 (14 Feb. 2004) [hereinafter DODD 7250.13].

³⁸ *Id.* paras. 3.1, 3.3, 3.4, 3.5.

³⁹ *Id.* para. 4.2.1.

⁴⁰ U.S. DEP’T OF DEF., INSTR. 7250.13, USE OF APPROPRIATED FUNDS FOR OFFICIAL REPRESENTATION PURPOSES para. 3a, encls. 2, 3. (30 Jun. 2009) [hereinafter DoDI 7250.13]. Official representation purposes consist of:

official receptions, dinners, and similar events, [the purpose of which is] to otherwise extend official courtesies to guests of the United States and the Department of Defense for the purpose of maintaining the standing and prestige of the United States and the Department of Defense. These events are normally hosted and attended by (not simply sponsored by) members of the Senior Executive Service (SES) or flag officers (FOs).

Id. para 3a.

⁴¹ AR 37-47, *supra* note 8, para. i.

⁴² *Id.* paras. 1-4, 2.4a, 2.4c.

⁴³ *Id.* para. 2-1.

⁴⁴ *Id.* para. 2-1b.

⁴⁵ *Id.* para. 2-1a. Official courtesies and ORF-related expenses include: lodging, meals and refreshments in honor of authorized guests, receptions hosted for local authorized guests in order to maintain civic relations, events co-hosted by non-Army-hosted events to reciprocate the host, receptions to allow a new commander to meet appropriate senior officials and community leaders. *Id.* para. 2-1a (1)-(2)(d).

⁴⁶ *Id.* para. 2-1a(3)-(13).

⁴⁷ *Id.* at para. 2-1b.

⁴⁸ AR 37-47, *supra* note 8, para. 2-1b.

⁴⁹ *Id.* para. 2-1b.

⁵⁰ DoDI 7250.13, *supra* note 40, para. 3a; see also AR 37-47, *supra* note 8, para. 2-1b.

⁵¹ *Lescault*, *supra* note 5, at 23.

⁵² *Id.* (quoting Matter of U.S. Trade Representative—Use of Reception and Representation Funds, B223678, 1989 U.S. Comp. Gen. LEXIS 598 (June 5, 1989)).

⁵³ *Id.* at 24.

congressional limitation on the status an individual representative of the United States must have in order to convey official courtesies through the use of ORFs or EEE funds.⁵⁴ Status limitations are the creation of the Secretary of Defense.⁵⁵ It is this limitation on the rank of the host that makes the use of ORFs so difficult in a contingency environment. Most contacts with local leaders take place at the company, platoon, and squad-level. It is within the discretion of the Secretary of Defense to amend the instruction to allow for the possibility that company-level commanders may extend ORF-funded courtesies on behalf of the United States.

2. Authorized Guests.

The recipients of ORF-funded courtesies are up to the interpretation of “designated officials”.⁵⁶ Designated officials are commanders and heads of organizations who are issued written authority from the Assistant Secretary of the Army (Financial Management and Comptroller) to expend ORF and are also members of the Senior Executive Service (SES) or general officers (GO).⁵⁷ Authorized guests are defined as “civilian or military dignitaries and officials of foreign governments.”⁵⁸ This broad definition leaves the designated officials a unique opportunity to adapt to any situation and environment United States’ forces may find themselves.

According to the regulations, there are few limitations on who a designated official may designate as an authorized guest. Understandably, this wide-ranging discretion could lead to uneven results in terms of which officials are characterized as authorized guests for one event and which ones for other events.⁵⁹ For example, at an event to welcome an incoming task force commander, ambassadors to various partner nations may be invited and expected to attend as authorized guests properly allowed to receive ORF- expended courtesies.⁶⁰ While just down the road, an O-6-level commander is conducting an exercise with the armed forces of a partner nation and is handing out tokens funded with ORF to all members of the foreign military who participated in the exercise.⁶¹ In such circumstances, the commander can properly determine that foreign ambassadors and low ranking

soldiers are each authorized guests of the United States. Whether a commander should equate the two is a matter of discretion, and should properly be evaluated separately in terms of the mission requirements and objectives for each event.

This is the exact type of flexibility Congress gave the Secretary of Defense when they authorized EEE funds.⁶² It was the Service Secretaries, not Congress, who directed restrictions as to the rank of the individual who may host an ORF-funded event or convey a gift purchased with ORFs, while at the same time allowing the designated official the flexibility to determine who qualifies as authorized guest.⁶³ In terms of the attendees of the *shura* vignette, this would mean that CPT Carter, or perhaps his Brigade Commander (O-

6) would be able to determine which Afghan village elder would qualify as a foreign dignitary or authorized guest.⁶⁴ The regulation is very broad and allows the commander to independently make the decision as to whom an authorized guest is within a given situation, and most importantly, who is an appropriate recipient of ORF-funded courtesies.⁶⁵

3. Gifts/Tokens.

Consistent with the general flexibility inherent in the use of ORF funds, designated officials are granted wide discretion to determine what constitutes a gift or memento with ORF funds. The guidance states that:

Gifts and mementos are presented to honor or otherwise recognize an individual or organization or are exchanged with authorized guests and non- DoD hosts during official ORF events. Designated officials should select gifts or mementos that portray unique American, Army, command, organization, or other appropriate themes that may be relevant or significant to the particular event. To a lesser extent, geographic or cultural themes, traditions, and the expectations of the authorized guest may be considered.

Purchasing wrapping paper, ribbon and bows, and professional wrapping services in connection with the item is included in the aggregate cost of the gift

with this paper.

⁵⁴ EEE Funds, *supra* note 13, para. a.

⁵⁵ DoDI 7250.13, *supra* note 40, para. 3a.

⁵⁶ AR 37-47, *supra* note 8, para. 1-4f.

⁵⁷ *Id.* para.1-4f.

⁵⁸ *Id.* The further definition of authorized guest in paragraphs 2-2b through 2e define the various U.S. government officials, distinguished and prominent U.S. citizens, members of the media, and other Department of Defense (DoD) personnel eligible for official courtesies.

⁵⁹ Survey Response from Army Service Component Command (ASCC), to author (Nov. 2015) (on file with author) [hereinafter ASCC Survey]. This survey was sent out in November 2015 to five ASCCs with questions on the use application of ORF funds within their units. The respondents were promised a guarantee of anonymity in their responses and use in association

⁶⁰ ASCC Survey, *supra* note 59. Some events, especially during exercises between U.S. forces and military counterparts, have more low-ranked participants involved in ORF events. In such circumstances, the designated officials must make the determination to whether an authorized guest is simply a member of a foreign Armed Force, or if there is a highly level threshold. *Id.*

⁶¹ *Id.*

⁶² EEE Funds, *supra* note 13, para. (a).

⁶³ AR 37-47, *supra* note 8, para. 2-2a.

⁶⁴ *Id.* para. 2-2a.

⁶⁵ AR 37-47, *supra* note 8, para. 2-2a.

or memento.⁶⁶

In other words, the selection of the gift or memento is up to the designated official, usually a combatant-level commander. This allows the commander an ability to exercise his or her discretion in the manner in which he or she exercises diplomacy or community relations within their area of operations. This is another example of the type of flexibility Congress gave to the Service Secretaries through the appropriation of EEE funds.⁶⁷

The discretion of the designated officials is not, however, without any limitation and is subject to a few key guidelines under Title 22 of the United States Code.⁶⁸ Limitations on the purchase of gifts for foreign individuals are based upon a baseline “minimal value” cost as determined through an adjustment to the consumer price index every three years.⁶⁹ The “minimal value” is the retail value of the gift at the time of acceptance at or below the threshold established by the General Services Administration (GSA).⁷⁰ The current gift threshold in effect under ORF is \$375.00.⁷¹ Notably, any government agency may use their own regulatory discretion to specify a lower value than this government-wide value threshold.⁷²

Interpretations of what constitutes a gift or memento are also wide-ranging and sometimes inconsistent. A review of current practices in various ASCCs is instructive here. Some commands for example, choose gifts with special cultural traits or significance from the area where they are geographically located.⁷³ Others may choose gifts and mementos based upon the preferences of the commander’s spouse or the protocol advisor.⁷⁴ A small number of ASCCs utilize the special knowledge and capabilities of their internal Foreign Area Officers (FAOs) in order to inform their commanders on the cultural significance of a particular gift or event held in honor of a foreign dignitary or military counterpart.⁷⁵ The one consistent practice throughout all of the ASCCs is that the gifts purchased with ORFs are *de minimis* and perfunctory in nature, intentionally meant not to overwhelm the occasion.⁷⁶ While some of the types of gifts

and recipients of gifts varied from command to command, all ASCC respondents agree that the use of ORF funds is not an attempt to encourage foreign leaders or military counterparts to feel required to exceed the courtesies extended by their U.S. hosts.⁷⁷

This examination of current ORF trends regarding gift use in the ASCCs demonstrates that commanders are amply capable of responsibly regulating the use of ORF funds throughout various theaters of operations. Current practice indicates that commanders can be trusted to use ORFs more flexibly in contingency environments. To maximize the use of ORF funds, the DoDI must be amended to delegate the use of ORF to those commanders with the most contact with foreign nationals: company-grade commanders, or strategic captains.⁷⁸

4. Receptions

As with gifts, the use of ORFs for receptions must be conducted on a modest basis.⁷⁹ Unlike gifts, however, there is no statutory dollar threshold to determine what amount of money constitutes a “modest basis.”⁸⁰ Rather, designated officials are instructed to:

Balance policy objectives and the interests of the U.S. taxpayer and the perspectives of the general public and authorized guests. Socially acceptable mores of American society, the rank and position of the authorized guest—not the host—and the number of participants should also influence the level of expenditures for events, gifts, and mementos.⁸¹

Designated officials are encouraged to individually establish reasonable limits on ORF expenditures according to the conditions of their command environment.⁸²

The tenor of the regulation seems to encourage designated officials to be as flexible as necessary to carry out their critical mission requirements by adapting ORF funds to their

⁶⁶ *Id.* para. 2-9a.

⁶⁷ EEE Funds, *supra* note 13, para. (a).

⁶⁸ 22 U.S.C. § 2694(2)(1977) (“[l]imitation on Purchase of Gifts for Foreign Individuals Report to Speaker of the House and Chairman of the Committee on Foreign Relations of the Senate”). This section of Title 22 limited members of the Department of State from using appropriated funds only from “Emergencies in the Diplomatic and Consular Service” account to be used to purchase any gift of more than the “minimal value” for any foreign individual unless such gift has been approved by Congress. *Id.* § (1).

⁶⁹ 22 U.S.C. § 2694(2); *see also*, 41 C.F.R. § 102.42-10 (“Utilization, Donation, and Disposal of Foreign Gifts and Decorations,” and “Minimal Value”).

⁷⁰ 41 C.F.R. § 102.42-10.

⁷¹ *Id.*

⁷² 41 C.F.R. § 102.42-10(2) (GSA Minimal Value).

⁷³ ASCC Survey, *supra* note 59.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ ASCC Survey, *supra* note 59. The gift dollar threshold limitation certainly seems to have the intended effect of severely limiting the extravagance of the gifts presented with ORFs. 41 C.F.R. § 102.42-10(2).

⁷⁷ *Id.*

⁷⁸ *See infra* Appendix A.

⁷⁹ AR 37-47, *supra* note 8, para. 2-4a.

⁸⁰ *Id.* para. 2-4a.

⁸¹ AR 37-47, *supra* note 8, para. 2-4a.

⁸² *Id.*

individual needs. As an example, in more austere contingency environments, commanders may not require full meals at restaurants since mission requirements may call for less formal, more intimate events with local leaders and military counterparts. The omission of a dollar amount to define a “modest basis,” and the ability of the commander to designate recipients of official courtesies would seem to inherently allow a commander to adapt the use of ORFs to the needs of contingency environments.

This type of flexibility would benefit a company commander as a successful COIN operation demands lower-level command empowerment, and the elevation in prestige and esteem of the “strategic captains” or company commanders like CPT Carter.⁸³ While company-level commanders may not be proper stewards of ORF-funded courtesies in a garrison environment, they are the face of the U.S. military and a conduit of foreign policy at their remote outposts in Iraq and Afghanistan. As a sign of recognition of their importance and to legitimize their authority, the Secretary of Defense should amend the DoDI to allow company-level commanders the limited authority to convey ORF-funded courtesies in a contingency theater of operations.

III. The Use of Appropriated Funds as a Foreign Policy Tool

A. Use of ORFs in Afghanistan and Iraq

In general, military departments continue to maintain an aversion to the expenditure of appropriated funds for gifts and food.⁸⁴ However, cultural demands of a country may at times demand small levels of courtesies in the form of food to further U.S. military and policy objectives. Over time, and the military developed an understanding that:

From common experience, however, that in many cultures, certain etiquette obligations are expected to be met in order to meet with officials and obtain decisions necessary to accomplish an objective. Many of these are expensive, involve food, drink or other entertainment expenses, but do not fit within normal congressional appropriations.⁸⁵

The onset of a COIN strategy in Afghanistan and Iraq, and the need for etiquette-oriented obligations of courtesy to local leaders, has never been greater.⁸⁶

⁸³ FM 3.24.2, *supra* note 2, para. 1-91.

⁸⁴ *Lescault*, *supra* note 5, at 18.

⁸⁵ *Id.*

⁸⁶ Gian P. Gentile, *A Strategy of Tactics: Population-centric COIN and the Army*, PARAMETERS, Aug. 2009, at 1.

⁸⁷ *Id.*

⁸⁸ FM 3.24.2, *supra* note 2, para. 1-3.

1. Tactics in the Population-Centric War.⁸⁷

Counterinsurgency is defined as the “comprehensive civilian and military efforts designed to simultaneously defeat and contain insurgency and address its root causes.”⁸⁸ Central to a successful counterinsurgency is the “high confidence in the infallibility of military leadership at all levels of engagement (from privates to generals) with the indigenous population throughout the conflict zone.”⁸⁹ The empowerment of the commander at the lowest levels of command, or those commanders who are living amongst the target population, is key to the success of COIN. Those commanders require flexibility to produce timely intelligence, conduct effective tactical operations, and manage intelligence and civil military operations.⁹⁰

Moreover, “[e]ffective counterinsurgency operations are decentralized, and higher commanders owe it to their subordinates to push as many capabilities as possible down to their levels.”⁹¹ The population of the host-country is the “prize” and key to the success of COIN and the ultimate defeat of the insurgent forces.⁹² Those commanders who are closest to the population wield the most power in terms of persuasion and influence. Therefore, resources and flexibility must be invested in these local commanders in order to achieve the basic goals of COIN.

2. Undue Limitations on Use of ORFs in Contingency Operations.

In the vignette scenario in the introduction, the company commander in Wardak province in Afghanistan is frustrated in his attempt to develop engagements with local political and tribal leaders in an effort to reduce tensions and insurgent activities. While fictitious, this is a common quandary among company-level commanders engaged in COIN operations.

Company-grade commanders must find the means and opportunities to stay engaged with the local population to reduce hostilities. The company commanders are the fulcrum of COIN, yet this philosophy is not supported by the Service Secretaries’ policy regarding ORF. Food is a cultural imperative in some societies. It is not the food itself that is the objective, rather it is the atmosphere required to facilitate discussions that is the goal, in this case through a *shura*. The most appropriate fund source to pay for this type of food-oriented meeting with locals is ORF. Other potential fund sources geared for the Afghans, such as ASFF, are not

⁸⁹ Karl W. Eikenberry, *The Limits of Counterinsurgency Doctrine in Afghanistan, The Other Side of the COIN*, FOREIGN AFFAIRS, Aug. 12, 2013, at 1.

⁹⁰ FM 3.24.2, *supra* note 2, para. 1-91.

⁹¹ *Id.*

⁹² FM 3.24.2 *supra* note 2, paras. 1-1, 1-28, 5-18.

designed to purchase food for the Afghans, and U.S. military personnel are prohibited from benefiting directly from these appropriations.⁹³

Under current ORF limitations, only an O-6 level commander can host in ORF-funded receptions, and such courtesies are not to be of the type of recurring basis as would be required under the CPT Carter *shura* scenario. While national leaders and military commanders continue to advocate for and insist on the importance of the strategic captain in the context of COIN operations in Afghanistan, the Service Secretaries are unwilling to extend to them a simple tool to support the very type of local community engagements needed through the use of ORFs.

IV. Recommendations for Policy Changes to ORFs

The easiest solution to resolve these service imposed limitations on the use of ORFs by a company-level commander would be to revise the Department of Defense Instruction (DoDI) 7250.13 to include exceptions in contingency environments.⁹⁴ The DoDI would be the simplest and quickest way to revise ORF requirements and would have the most wide-ranging impact because it would apply to all the services. Such a revision could include the ability to authorize combatant commanders of a named contingency operation the ability to further delegate, on a case by case basis, the authority to extend ORF courtesies to company Commanders.⁹⁵ Thus, commanders like CPT Carter could host receptions or small-scale meetings, such as *shuras* to achieve operational objectives within specific areas of operation. The restrictions imposed by the combatant commander could be as stringent as deemed sufficient to support the need to adapt to operational requirements.⁹⁶

Additionally, any further delegation to a company commander in the use of ORF courtesies could contain limitations on the cost of such events, and name the specific types of events contemplated for use with such funds, such as *shuras*, cultural celebrations, national holidays, etc. This way, the designated official would be able to easily adapt the use of ORF-funded courtesies to meet the needs of the operational environment as needed, while also empowering that strategic company commander to fully realize the population-centric goals set forth in a COIN environment.⁹⁷

Some survey respondents at the ASCCs argue that allowing company-level commanders the ability to extend

ORF-funded courtesies may lead to misuse of government funds.⁹⁸ However, there are at least two arguments against this view. First, the limited amount of funds allocated to ORF in contingency environments makes abuse unlikely. For Fiscal Year 2015, USFOR-A was allocated \$40,000 in emergency and extraordinary expense funds to be used exclusively for ORF activities.⁹⁹ In the context of misuse of appropriated funds in Afghanistan, the mere potential for misuse of ORF by company commanders pales in comparison to the billions of dollars the Special Inspector General for Afghanistan Reconstruction (SIGAR) identified as wasted in countless fraudulent contracts and misguided projects throughout Afghanistan since 2002.¹⁰⁰ Second, a *de minimis* amount of funds set forth by the combatant commander could sufficiently accommodate the purchase of modest portions of food and refreshments sufficient to allow a company commander to appropriately engage with local leaders and counterparts without exceeding fund limitations.

Most survey respondents were civilian employees of the Department of the Army who worked either as fiscal law attorneys or protocol officers.¹⁰¹ Only two of the respondents were uniformed members of the Armed Services.¹⁰² Additionally, because of the geographic focus of each ASCC, only one respondent was a member of a unit actively engaged in a current named contingency operation.¹⁰³ This combination of civilians coupled with the lack of active involvement in the unique nature of combat operations seemed to create a type of garrison focus in the use of ORF funds from the survey respondents. Perhaps a resolution to this garrison-mentality would be to ensure that ORF actions were reviewed and approved by operational sections and foreign area officers (FAO). That said, each survey respondent was well versed in the cultural dynamics of their geographic areas of focus, some respondents simply were not focused on the nuances attributed to current requirements of COIN operations in Iraq and Afghanistan. Such a view is not dissimilar to the argument most members in a brigade have when they complain that their higher headquarters does not provide them with enough support, or does not understand the complexities of their mission. At the designated official level, there is no empathy for CPT Carter or his plight. A revised DoDI may help overcome this myopic garrison-minded approach to ORF.

A second argument against allowing company commanders to host ORF-funded engagements is that doing so would lower the prestige of the event. However, a counter-argument would be that the purpose of a population-centric

⁹³ MAAWS-A, *supra* note 6, para. 2.14.

⁹⁴ See *infra* Appendix A.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Gentile, *supra* note 86, at 6; see also FM 3.24.2, *supra* note 2, para. 1-91.

⁹⁸ ASCC Survey, *supra* note 59.

⁹⁹ Memorandum for Record, *supra* note 3, at 5.

¹⁰⁰ About SIGAR, THE SPECIAL INSPECTOR GENERAL for AFGHAN RECONSTRUCTION, <https://www.sigar.mil/about/index.aspx?SSR=1> (last visited Aug. 1, 2016) [hereinafter SIGAR]

¹⁰¹ ASCC Survey, *supra* note 59.

¹⁰² *Id.*

¹⁰³ *Id.*

COIN strategy is to immerse military units within communities, with the goal of reducing violence and helping to build societies.¹⁰⁴ The U.S. representative in these small villages is typically a company commander. If company commanders are trusted to carry out complex military objectives within the tribal environments of Iraq and Afghanistan, they should also be trusted to use ORF to host small weekly meetings with tea and finger foods. A weekly *shura* may not be an appropriate engagement in all theaters of operation, but the point is that COIN demands company commanders immerse themselves into the dynamics of the areas under which they operate.¹⁰⁵ If the only way to truly recognize the established tribal leadership and engage the local population is through small-scale *shuras*, the designated official should be allowed to approve such a request if it coincides with mission objectives. While appropriate for engagements within the continental United States, the requirement to delegate the ability to extend ORF courtesies no lower than to a Colonel (O-6) simply does not meet the operational requirements in a contingency environment.¹⁰⁶

V. Conclusion

Through the nature of their position and status as representatives of the U.S. government, all military commanders must equally balance military requirements with diplomatic gestures of goodwill, to achieve United States policy objectives. An untrained observer may assume that such objectives are opposite or contradictory. However, the modern U.S. commander is by necessity a Soldier-diplomat. Although, probably not recognized as such by contemporaries in the foreign services, the military commander is the front-line conduit of U.S. foreign policy and power, particularly during the wars in Afghanistan and Iraq.

By statute, OMA funds are to be used for the support and maintenance of United States forces, not for hosting receptions for Afghans or Iraqis.¹⁰⁷ Congress appropriated emergency and extraordinary expenses as a type of stop-gap to enable the Service Secretaries to meet emergent needs with few limitations. Official Representation Funds are the primary vehicle of EEE funds.¹⁰⁸ The current limitations that do exist on the use of ORFs, were created by the Service Secretaries, and can therefore be easily resolved in favor of a more COIN-centric Army.

Moreover, it is not the general officer at the center of the COIN efforts, but the strategic captain stationed in vast territories usually with few resources. This strategic captain is the linchpin to all community outreach with local leaders, and is usually responsible for identifying foes and friends alike up the chain of command. It is this grassroots-type war strategy that makes the company commander's role and

influence in COIN efforts so critical.

The company commander is with his Soldiers, not under the glare of press lights in Kabul or Baghdad. But, his role in executing policy objectives as the face of U.S. power and diplomacy cannot be underestimated. Combatant commanders should be allowed to make case by case decisions within their areas of authority in contingency environments to authorize company-grade commanders the ability to extend ORF funded courtesies.

Empower strategic captains with the ability to use ORFs to extend small courtesies and receptions on behalf of the United States to fully accomplish the principle of a population-centric war effort.

¹⁰⁴ FM 3.24.2, *supra* note 2, para. 1-91.

¹⁰⁵ Gentile, *supra* note 86, at 6; *see also* FM 3.24.2, *supra* note 2, para. 1-91.

¹⁰⁶ AR 37-47, *supra* note 8, para. 2-1b.

¹⁰⁷ Consolidated and Further Continuing Appropriations Act, 2015 (FY 15 Appropriations Act), Pub. L. No. 113-235, div. C, tit. II, 128 Stat. 2130, 2236 (2014).

¹⁰⁸ AR 37-47, *supra* note 8, para. 2-1.

Recommend Revision

3(d) Contingency Exception. In named combat operations declared by the President of the United States or Secretary of Defense, the Secretary of the Service may authorize the combatant commander, upon written request, to further delegate to company-level commanders the ability to host official receptions, dinners, and similar events, and to otherwise extend official courtesies to guests of the United States and the Department of Defense for the purpose of maintain the standing and prestige of the United States and Department of Defense. Approval of this further delegation authority will be in-writing to the combatant commander and may contain any further limitations on the type and nature of the courtesies authorized under this exception. This further delegation authority should be limited and ORF funded courtesies must approved by the combatant commander on a case by case basis.