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Camaraderie after the Corps: A History of the Retired Army Judge Advocate Association

By Fred L. Borch
Regimental Historian and Archivist

For every lawyer who decides to make a career of The Judge Advocate General's Corps (JAGC), retirement—from the Regular component, Army Reserve, or National Guard—is inevitable. Retirement does not mean, however, that friendships and associations with other Army lawyers are at an end. On the contrary, the desire of judge advocates to continue to foster camaraderie in retirement resulted in the establishment of the Retired Army Judge Advocate Association (or "RAJA" as it is colloquially known) in 1976. What follows is a short history of RAJA, including the impetus for its creation and some details on its activities over the last 40 years.

In early 1976, the Korean embassy in Washington, D.C. contacted Colonel (COL) (retired) Waldemar "Wally" A. Solf,[1] who was then working as a civilian attorney in the International Affairs Division[2] at the Office of The Judge Advocate General. As part of a number of events commemorating the 25th anniversary of the start of the Korean War, the government in Seoul was interested in inviting a select group of judge advocates who had served in Korea during the conflict to make a return visit.[3]

As a result, a small number of judge advocates who had served in Korea in the 1950s received telephone calls from the Korean embassy. Each was asked whether he would be interested in making a trip with his spouse as part of the Korean Service Veterans Revisit Program, and was informed that it would be an all-expense paid six-day trip. This phone call was followed up by a written invitation signed by the president of the Seoul (South Korea) Bar Association.

Brigadier General Clio E. Straight

In July 1976, a small group of retired Army lawyers and their wives met in Los Angeles and flew to Seoul. Some knew each other from prior tours of duty together while others knew each other only from "JAG Conferences."[4] Major General Lawrence "Larry" J. Fuller had served as the SJA at Eighth U.S. Army after the Korean War; his wife Mary accompanied him.[5] Brigadier General Clio "Red" E. Straight (and wife Betty) and Brigadier General Bruce C. Babbitt (and wife Betty) also were in attendance. Straight, who had served as a judge advocate in both World War II and Korea, had retired from the Corps in June 1961.[6]

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[1] Waldemar A. Solf (1913-1987) was an expert in the Law of Armed Conflict (LOAC). A 1937 graduate of the University of Chicago's law school, he served as an Artillery officer in France and Germany in World War II before transferring to the Judge Advocate General's Department in 1946. Solf subsequently had a distinguished career as a judge advocate, including service as a military judge in Korea and as the Staff Judge Advocate, Eighth U.S. Army. After retiring in 1968, Wally Solf served as the Chief, International Affairs Division from 1971 to 1977 and then as Special Assistant to The Judge Advocate General (TJAG) from 1977 to 1979. It was Solf who, in 1974, suggested that a Defense Department-level Law of War program be created. Major General George S. Prugh, then serving as TJAG, concurred with this suggestion, and the result was that the Army became the executive agent for all law of war matters in the Defense Department—and Army lawyers were tasked with ensuring that all U.S. military operations complied with LOAC. Solf's 1974 suggestion was the starting point for the emergence of today's Operational Law framework familiar to all judge advocates. From 1975 to 1977, Solf was a Delegate to the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law in Armed Conflict in Geneva and was heavily involved in the drafting of what became the 1977 Protocols Additional). While the United States did not ratify the Protocols, their impact on the development of LOAC has been immense.

[2] Today's International and Operational Law Division.

[3] JOHN JAY DOUGLASS, A SHORT HISTORY OF RAJA, 1976 TO 2004 (unpublished monograph), at 1-2.

[4] Today this event is known as the World Wide Continuing Legal Education conference.

[5] Born in 1914, Lawrence J. Fuller served in World War II and Korea. His last assignment in the Corps was as The Assistant Judge Advocate General (today's Deputy Judge Advocate General). Fuller retired as a major general in 1971 and died in 1998.

[6] Born in 1904, Clio Edwin Straight graduated from the University of Iowa's law school in 1930 and served in the Corps in World War II. In 1945, he was sent to Europe where he assumed duties as the Deputy Theater Judge Advocate for War Crimes, U.S. Forces European Theater. In this position, he had overall responsibility for the prosecution of German Army personnel for war crimes. When he retired from the Army in June 1961, he was a brigadier general and the Assistant Judge Advocate General for Civil Law. He subsequently joined Champion International Corporation, where he worked as a lawyer until 1972, when he joined the law firm of Frost & Jacobs in Cincinnati, Ohio. Straight retired from the practice of law in 1977. He died in 1991 and is buried in Arlington National Cemetery. U.S.

Babbitt, who had served as an Infantry officer in World War II, had been a judge advocate during the Korea War. While serving in the 2d Infantry Division in the early months of the conflict, then Major (MAJ) Babbitt made history when he became the first (and only) judge advocate to command a rifle battalion; his unit was deployed in defensive positions along the division's main supply route.[7]

Brigadier General Bruce C. Babbitt

The other attendees were no less distinguished. Colonel (retired) Burton "Burt" F. (and Dee) Ellis,[8] COL (retired) Howard (and Blanche) Levie,[9] COL (retired) Leonard "Lenny" (and Ruth) Petkoff,[10] COL (retired) John Jay (and Margaret "Papoose") Douglass,[11] and COL (retired) Thomas "Tom" F. (and Marie) Meagher.

At a breakfast toward the end of this visit to Korea, the Babbitts, Petkoffs, and Douglasses all agreed that this reunion in Korea had been "a great event" and that a group should be formed that "could bring the JAGs together for some kind of annual reunion."[12] According to COL Douglass, the name of this organization—Retired Army Judge Advocate Association—was born high over the Pacific on the return flight from Seoul to the United States.[13]

Bruce Babbitt, who was now in private practice in Florida, incorporated RAJA in Florida, with retired judge advocate COLs Dave Chase and Tom Oldham[14] as incorporators. John Jay Douglass was the president and Bruce Babbitt was the Secretary-Treasurer.

DEP'T OF ARMY, U.S. ARMY REGISTER VOLUME III, RETIRED LISTS 51 (1968).

[7] Bruce C. Babbitt (1920-1999) was a remarkable judge advocate by any measure. He was decorated with the Silver Star in World War II and, after completing his law degree in 1947, joined the Corps. In 1952, Babbitt graduated first in his class at the inaugural Advanced Course (today's Graduate Course). He was the SJA, 3d Infantry Division in the 1950s (when the division was stationed in Germany) and later served as SJA, Military Assistance Command, Vietnam. Babbitt was the Assistant Judge Advocate General for Civil Law when he retired in 1973. For more on Babbitt, *see* JAGCNET, https://www.jagcnet.army.mil/852736A005BF 2E1 /0/10421739EA80CE98525749F00561BD7/$file/Bruce%20Babbitt%20bio. pdf (last visited April 6, 2015).

[8] Born in Idaho in 1903, Burton "Burt" French Ellis graduated from the University of Idaho's law school and entered the Corps late in World War II; then Major Ellis graduated from TJAGSA's eight-week 21st Officer Course in March 1945. George P. Forbes, Jr., *The Judge Advocate General's School*, JUDGE ADVOCATE J., Summer 1945, at 60. Ellis is best known as the prosecutor of SS Lieutenant Colonel Jochen Peiper and other SS personnel for war crimes committed during the Battle of the Bulge. This trial, known today as the "Malmedy Massacre," was one of the most famous trials to come out of World War II. Ellis retired from the regular Army in November 1958. He lived the next 41 years in Merced, California, where he died in 2000 at the age of 97. Ellis left a $6 million bequest to the University of Idaho's law school; at the time, this was the largest individual gift to the school in its history. Ellis is buried in Arlington National Cemetery. DOUGLASS, *supra* note 3, at 15. For more on the Malmedy Massacre prosecution and Ellis' role in it, see DANNY S. PARKER, HITLER'S WARRIOR: THE LIFE AND WARS OF SS COLONEL JOCHEN PEIPER 159-171 (2014).

[9] Born in 1907, Howard S. Levie graduated from Cornell University's law school in 1930. After service in the Coast Artillery in World War II (mostly in the Pacific), he transferred to the JAG Department in 1946. Levie had a successful career until retiring in 1963 and beginning a second career as a law school professor at St. Louis University. An expert in war crimes and prisoner of war matters, Levie is most famous for having authored the words of the armistice agreement that stopped the fighting in Korea in 1953—the agreement that is in effect today. Levie celebrated his 100th birthday in December 2007, and is the only Army judge advocate to reach the century mark. He died in 2009, at the age of 101. For more on Levie, *see* Fred L. Borch, *The Cease-Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafted the Armistice Agreement that Ended the Korean War*, ARMY LAW., Aug. 2013, 1-3.

[10] Born in 1916, Leonard Petkoff graduated from New York University's law school in 1940 and served in World War II, Korea, and Vietnam before retiring from the Corps in 1972. He was the SJA, U.S. Forces, Korea, in the 1950s. After leaving active duty, Petkoff was the Chief Trial Attorney for the Washington Metropolitan Area Transit Authority. He died in Melbourne, Florida in 2008, aged 91 years. He is buried in Arlington National Cemetery. FIND A GRAVE, http://www.findagrave.com/cgi-bin /fg.cgi?page=gr&G Rid=28920156 (last visited April 7, 2015).

[11] Born in 1922, John Jay Douglass had a long and distinguished career as an Army officer and judge advocate. He served as an Infantry officer from 1944 to 1946. Then, after graduating from the University of Nebraska's law school in 1952, he returned to active duty as a judge advocate. Douglass subsequently served in Japan and Korea (1953-1954) and Vietnam (1968-1969). His final assignment was as Commandant, The Judge Advocate General's School, in 1970. Colonel Douglass retired from active duty in 1974. JOHN JAY DOUGLASS, MEMOIRS OF AN ARMY LAWYER (n.d.)

[12] DOUGLASS, *supra* note 3, at 3.

[13] *Id.*

[14] Then Lieutenant Colonel Thomas Oldham served as COL John Jay Douglass' deputy when Douglass was the staff judge advocate, U.S. Army, Vietnam, from 1968 to 1969. Interview with John Jay Douglass, April 7, 2015 (on file with author).

Colonel (retired) John Jay Douglass was the first President of RAJA.

By early 1977, plans were underway for the first RAJA gathering at The Judge Advocate General's School in Charlottesville, Va. With the help of COL Barney L. Brannen, Jr., then serving as Commandant, about 70 retired judge advocates and spouses attended the "first annual RAJA conference" in the summer of 1977.[15]

In what has been called a "democratic" decision, the members of RAJA decided that they would invite only one active duty Army lawyer—TJAG—to address their first gathering, but he would be limited to 25 seconds for any remarks he might wish to make at the RAJA banquet held on Saturday evening. Major General Wilton Persons, then serving as TJAG, apparently used only 20 seconds of his allotted time.[16]

Since this inaugural event, the sitting TJAG has always been invited to RAJA's annual gathering. He or she continues to be restricted to 25 seconds for any banquet speech. But there is no restriction on how long TJAG may address RAJA at the annual business meeting, and TJAG's remarks generally have followed a "State of the Corps" format. Over the years, the TJAGSA (now TJAGLCS) Commandant also has been invited to attend RAJA, and usually makes brief remarks about the "State of the School (or LCS)." But the members of RAJA still pride themselves on having the shortest possible annual "business meetings," with the goal of accomplishing all business in less than ten minutes.[17]

After the 1977 event in Charlottesville, the retired Army lawyers next gathered in San Antonio, Tex. (1978), and San Francisco, Cal. (1979). By the time RAJA met in Williamsburg, Va., in 1980, the organization had grown to over 200 members and had determined that future meetings would "repeat the geographic pattern of East Coast, Mid-America, and West Coast in subsequent years."[18] As a result, RAJA met in the following locations after Williamsburg: Colorado Springs, Colo. (1981); Monterey, Cal. (1982); Atlanta, Ga. (1983); Louisville, Ky. (1984); Las Vegas, Nev. (1985); Savannah, Ga. (1986); Austin, Tex. (1987); San Diego, Cal. (1988); Newport, R.I. (1989); Pensacola, Fla. (1990); Honolulu, Haw. (1991); Charlottesville, Va. (1992); San Antonio, Tex. (1993); Reno, Nev. (1994); and Charleston, S.C. (1995). At the Charleston gathering, RAJA members elected COL (retired) Jim Mundt as president and COL (retired) Don Pierce as Secretary; Douglass and Babbitt (who had both served 20 years) stepped down from their inaugural leadership positions.[19]

In 1996, RAJA met in Colorado Springs and in Palm Springs in 1997. It met in the following locations in succeeding years: Cocoa Beach, Fla. (1998); Kansas City, Mo. (1999); Sacramento, Cal. (2000); Williamsburg, Va. (2001); San Antonio, Tex. (2002); Las Vegas, Nev. (2003); Portsmouth, N.H. (2004); and Columbus, Ga. (2005). At this meeting, COL (ret) Tim Naccarato replaced Jim Mundt as RAJA president; Mundt had served ten years in the position.

The following year, RAJA was in Rapid City, S.D., and then held meetings in the following locations: Scottsdale, Ariz. (2007); Atlanta, Ga. (2008); New Orleans (2009); Indianapolis, Ind. (2010); Charlottesville, Va. (2011); Fort Worth, Tex. (2012); Honolulu, Haw. (2013); and Baltimore, Md. (2014). RAJA is scheduled for Colorado Springs, Colo. in 2015.[20]

Over the years, RAJA has implemented a number of changes affecting its membership. Initially, Babbitt and Douglass wanted to restrict membership to Regular Army retirees. In 1999, however, recognizing the increased contributions of Reserve judge advocates to the Army and the Corps, RAJA members unanimously passed a motion opening RAJA membership to retired Army Reservist and National Guard judge advocates. The first retired reserve judge advocate to attend a RAJA event was COL (retired) Ernest "Ernie" Auerbach; he was at the 2000 event in Sacramento, Cal. In 2007, RAJA opened membership to the Corps' legal administrator community, too. As with the earlier decision to open RAJA to Army Reserve and National Guard judge advocate retirees, extending

[15] DOUGLASS, *supra*, note 3, at 3.

[16] *Id*.

[17] *Id.*, at 10.

[18] *Id*., 4.

[19] *Id*., at 10.

[20] *Id*., at 23.

membership to retired judge advocate warrant officers made sense given their contributions to the Corps over the years.

Colonel (Retired) Ernest Auerbach was the first retired Reserve JA to attend RAJA; this photograph was taken of him in Vietnam in 1966.

Today, RAJA has more than 300 members. Any commissioned or warrant officer who has retired from the regular component of the Army, the Army Reserve or the National Guard is eligible for membership. Associate members are widows and widowers of regular members; today there are about 35 members in this "associate member" category.[21]

A final note: In addition to RAJA, there are other organizations for retired members of our Corps. Similar in purpose to RAJA, the Judge Advocate General's Corps Retired Noncommissioned Officer Association (JAGCRNCOA) began informally in 1999 but did not have its first formal meeting (to draft a constitution and by-laws) until 2003. From the initial 36 "founding members" of JAGCRNCOA, the organization has grown to more than 85 retired regular and reserve non-commissioned officers who served as legal clerks, legal specialists or paralegals in the Corps. It has an annual reunion in various locations throughout the United States.[22] Finally, Army officers who served in Vietnam as judge advocates or who soldiered in any capacity in Vietnam but later served in the Corps are eligible to attend the biannual "JAGs in Vietnam" get-together. The impetus for this reunion of Vietnam veterans came from Chuck Spradling of Anniston, Ala., who served as a judge advocate in Vietnam from 1971-1972. He is assisted in planning the event—which always takes place in northern Virginia—by Major General (retired) William K. Suter and COL (retired) Barry Steinberg. About 75 officers and their spouses attended the last reunion in 2013; the next get together will be in September 2015, in Washington, D.C.[23]

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

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

[21] RETIRED ARMY JUDGE ADVOCATES ASSOCIATION, www.rajaassn.com (last visited April 8, 2015).

[22] Email from Master Sergeant (retired) Rick Cox, to author (April 7, 2015, 3:01PM) (on file with author).

[23] Email from Major General (retired) William K. Suter, to author (April 7, 2015, 3:52 PM) (on file with author).

Fielding Requests for Use of Government Resources: Is the Event Official or Unofficial?

Major Yolanda A. Schillinger[*]

There is something about a sense of entitlement and of having great power that skews people's judgement.[1]

I. Introduction

The new aide to the Deputy Commanding General (DCG) knocks on your office door. The DCG will be promoted to Major General next Friday. The following evening he will host a small gathering at his quarters. Glancing down at his green notebook, the aide reads you the DCG's request list: the band's jazz pieces to play background music; Soldiers to serve food, tend bar, and valet cars; and, Department of Public Works (DPW) to put port-o-johns in the backyard. "Oh, and I almost forgot," the aide exclaims, "he also wants his assistant to send out the invitations through official mail. Do you see any issues?"

Judge advocates (JAs) must frequently review requests to use government resources, often for events appearing unofficial in nature. Recent high-profile investigations regarding the use of government resources for personal benefit[2] highlight the importance of effectively advising senior officials about these requests.[3] The proactive JA should be integrated into the unit or installation planning process to spot potential issues with improper use of government resources and resolve problems before they occur.[4] Often, well-meaning commanders and staffs unintentionally misuse government resources due to lack of awareness rather than malicious intent.

Even when not used for personal gain, government employees may violate rules when they use resources to primarily benefit a private organization[5] or other non-federal entity (NFE).[6] Rules differ depending on the type of resource,[7] the type of function,[8] and even the type of NFE.[9]

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[1] Margaret Collins & Gopal Ratnam, *Robert Gates Says Power Can Skew a General's Judgment*, BLOOMBERG BUSINESSWEEK, Nov. 15, 2012, http://www.bloomberg.com/news/2012-11-15/panetta-asks-for-review-of-officers-ethics-amid-turmoil.html (quoting former U.S. defense secretary Robert Gates's comments at a conference in Chicago where he "cited recent cases of generals criticized for lavish spending of public funds").

[2] *See* Inspector Gen., U.S. Dep't of Def., No. 11-119226-153, Report of Investigation: General William E. Ward, U.S. Army, Commander, U.S. AFRICOM (26 June 2012), *available at* http://www.dodig.mil/fo/foia/ pdfs/wardroi_redacted.pdf [hereinafter DoD IG ROI—Gen. Ward] (finding that General Ward misused Government funds, aircraft, vehicles, personnel, and his position for personal use); Inspector Gen., U.S. Dep't of Def., No. 11H118481105, Report of Investigation: Admiral James G. Stavridis, U.S. Navy, Commander, U.S. EUCOM (3 May 2012), *available at* http://www.dodig.mil/fo/foia/PDFs/ AdmStavridisROI(FINAL)_ Redacted.pdf [hereinafter DoD IG ROI—Adm. Stavridis] (finding that Admiral Stavridis misused Government aircraft and cellular telephones for personal use); *see also* Tom Vanden Brock, *Sense of Entitlement Behind Military Ethics Scandals?* USA TODAY, Nov. 14, 2012, http://www.usa today.com/story/news/nation/ 2012/11/13/generals-behavior-military-petraeus-allen/1702119/ (reporting that General Ward was ordered to repay the government $82,000).

[3] The DoD IG Investigation of General Ward revealed that the AFRICOM Staff Judge Advocate (SJA) often reviewed the Invitational Travel Orders permitting Mrs. Ward to accompany General Ward on official travel. *See* DoD IG ROI—Gen. Ward, *supra* note 2, at 11. While the exact wording of the legal advice was redacted for Freedom of Information Act (FOIA) release, the SJA opined that some trips were unofficial and his advice was not followed. *See id*. at 36, 46. In other instances General Ward slightly altered trips, such as adding a meeting to give the trip legitimacy. *See id*. at 37, 41, 42, 44. The DoD Inspector General (IG) determined that these trips were unofficial and constituted misuse of resources and travel funds. *Id*. at 42, 44; *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY 6-1, 6-24 (18 Mar. 2013) [hereinafter FM 1-04], at vi ("To succeed in today's operational environment, judge advocates are master general practitioners effective in their roles as lawyers, ethics advisors, counselors, and rule of law practitioners.").

[4] *See* FM 1-04 *supra* note 3 (stating that JAs participate in the planning process by providing analysis and contemporaneous legal advice during the plan development phase and should become involved early to resolve issues before they become "mission stoppers" or result in courses of action that are not legally supportable).

[5] *See* U.S. DEP'T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) para. 3-303b. (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER] (prohibiting the use of personnel to support the unofficial activity of another DoD employee in support of non-Federal entities (NFEs)); Inspector Gen., U.S. Dep't of Def., No. H11L120171242, Report of Investigation: Lieutenant General David H. Huntoon, U.S. Army, Superintendant, U.S. Military Academy, at 26 (1 May 2012), *available at* http://www.dodig. mil/foia/ERR/H11L120171242.pdf [hereinafter DoD IG ROI—Lt. Gen. Huntoon] (holding that government personnel were misused to prepare and serve meals for the West Point Women's Club annual charity fundraiser).

[6] *See* JER, *supra* note 5, para. 1-221 (defining non-Federal entity (NFE) as "a self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the Federal Government").

[7] *Compare* U.S. DEP'T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. 2-3 (12 Jun. 2014) [hereinafter AR 58-1] (restricting use of Army-owned or controlled non-tactical vehicles (NTVs) to official purposes and not authorizing any personal use) *with* JER, *supra* note 5, para. 2-301 (authorizing use of federal communications systems, such as telephones and internet systems, for some personal use such as "e-mailing directions to visiting relatives," provided certain conditions are met).

[8] *See* AR 58-1, *supra* note 7, paras. 2-3, 2-4 (permitting transportation by Army-owned vehicle to a retirement ceremony but not to private social functions).

[9] *See* JER, *supra* note 5, at paras. 3-202b, 3-210 (describing certain non-federal entities that are authorized by statute to receive special support). *Compare* U.S. DEP'T OF DEF., INSTR. 5410.19, PUBLIC AFFAIRS

Judge advocates must possess a firm grasp of the rules and a solid understanding of the analytical framework in order to accurately and efficiently process these requests. Official and unofficial events are distinguishable based upon their purpose, funding, and sponsor.[10] Government resources may only be used for official events, unless an exception permits their use for unofficial events.[11] This primer defines official, unofficial events, and government resources, and provides general rules regarding their use. Part II establishes a test to determine whether resources may support an event. Part III examines frequently-encountered events[12] and the resources authorized to support them. Finally, Part IV revisits and analyzes the opening scenario.

II. Framework and Analysis[13]

A. Framework

Properly analyzing requests to use government resources[14] begins with the Principles of Ethical Conduct[15] because statute and regulation cannot foresee and capture the infinite and creative ways commanders and senior officials seek to use resources. These principles guide JAs and commanders where law and regulation are silent or inconclusive.[16] Even where actions could be explained or justified, the ethics principles require employees to guard against the perception of illegality or impropriety.[17]

The ninth principle of ethical conduct states that employees have a responsibility to "protect and conserve Federal property and shall not use it for other than authorized activities."[18] The Standards of Conduct for Executive Branch Employees reiterate this language, prohibiting the use of government property for anything other than "authorized purposes."[19] Authorized purposes are "those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation."[20]

The ability to use government resources depends on whether a specific law or regulation allows the contemplated use.[21] This requirement for affirmative authority contrasts other areas of the law, where conduct is legal, unless prohibited.[22] Analyzing a use of resource request begins with fiscal law and the principle that positive authority must support a decision to spend funds, rather than authorizing expenditures because no law or regulation prohibits it.[23]

Of course, statute and regulation do not list every permissible use of government resources, and often

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COMMUNITY RELATIONS POLICY IMPLEMENTATION enclosure 10 (13 Nov. 2001) [hereinafter DoDI 5410.19] (detailing transportation, communication, medical, administrative and security support authorized for annual conventions of certain designated national military associations), *with* JER, *supra* note 5, para. 3-211 (containing the rules for limited logistical support to NFEs not authorized specialized support as per other guidance).

[10] *See* discussion *infra* Part II.B.

[11] *See id*.

[12] This article does not address government resource support to NFE fundraisers. For a detailed treatment of this topic, *see* Teresa A. Smith, *Everything You Always Wanted to Know About Official Support to Non-Federal Entity Fundraisers*, ARMY LAW., Feb. 2000, at 1.

[13] A table of commonly-used resources is available at Appendix B.

[14] Government resources include all real and personal property the Government owns or leases, such as government-issued cellular phones and government vehicles, and intangible property interests purchased with government funds, such as employee time, use of a subordinate's time, and services of contractor personnel. *See* 5 C.F.R. §§ 2635.704 -705 (2014).

[15] Exec. Order No. 12,731, pt. 1 (Oct. 17, 1990), *reprinted in* 5 C.F.R. § 2635.101(b)(1)—(14) (2014). *See also* Memorandum from Sec'y of Def., to Secretaries of the Military Departments et al., subject: Ethics, Integrity, and Accountability (2 May 2012).

[16] For example, Army regulation does not state whether or not an employee may travel by government vehicle to a NFE event where the employee will act as a guest speaker. *See* AR 58-1, *supra* note 7, paras. 2-3, 2-4. The Office of Government Ethics provided some clarification stating that employees may utilize a government vehicle to travel to a NFE event where the employee will present information on behalf of the agency in an official capacity, on official time. *See* Memorandum from General Counsel, Office of Gov't Ethics, to Designated Agency Ethics Officials, subject: Speaking and Similar Engagements Involving Presentation of Information on Behalf of the Agency (7 Sept. 2012).

[17] 5 C.F.R. § 2635.101(b)(14) (2014).

[18] 5 C.F.R. § 2635.101(b)(9) (2014). Though perhaps overlooked, government employees and their use of 'on-the-clock' or official time are also government resources. The fifth ethics principle reminds employees that government time must be used in an "honest effort to perform official duties." *Id.* § 2635.101(b)(5). There is also an affirmative obligation to disclose "waste and abuse" of government resources. *Id.* § 2635.101(b)(11).

[19] *Id.* § 2635.704(a).

[20] *Id.* § 2635.704(b)(2).

[21] *See id*.

[22] Criminal law contains the most prevalent example of this legal framework, providing that conduct may not be prosecuted or punished absent a specific prohibition applicable at the time of the conduct. *See* U.S. CONST. art. I, § 9, cl. 3 (prohibiting states from enacting ex post facto laws). Ex Post Facto laws are those "done or made after the fact; having retroactive force or effect." BLACK'S LAW DICTIONARY 661 (9th ed. 2009). *See also* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008) ("One of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege, nulla poena sine lege* ('no crime without law, no punishment without law'). In its simplest translation, this Latin maxim asserts the ex post facto prohibition: that conduct must be criminalized and penalties fixed in advance of any criminal prosecution.") (quoting PAUL JOHANN ANSELM RITTER VON FEUERBACH, LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS (1801)).

[23] *See* United States v. MacCollum, 426 U.S. 317, 321 (1976) ("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.").

generally state that government resources must be used for "official purposes."[24] Many regulations charge commanders with deciding whether a function is "official," for the purpose of whether a particular resource can be used.[25] Because the regulations do not universally define "official purposes" or "official use," they create the appearance that the term "official use" is resource-dependent.[26] Several authorities induce additional confusion by using the term "authorized uses" under the same heading as "official uses."[27] In light of the various definitions and usages of 'official,' 'authorized,' and 'unofficial,' a three-part test that examines an event's purpose, funding, and sponsor will help properly determine whether government resources may be used.[28]

B. Analysis

Judge Advocates can determine the official or unofficial nature of an event by examining its purpose, funding, and sponsor.[29]

1. Purpose

First, determining an event's purpose should not occur in a vacuum and often requires active engagement to ascertain the commander's intent.[30] Official events are necessary to perform the Department of Defense (DoD) mission or conduct DoD business.[31] Mission accomplishment includes activities related to morale, welfare, and *esprit de corps* of service members.[32] Commanders have considerable discretion in deciding whether government resources are necessary to execute the mission.[33] This discretionary authority mirrors the necessary expense doctrine of the fiscal law purpose test.[34] General purpose appropriations, such as Operations and Maintenance, Army (OMA), do not list all possible expenditures, but expenditures against that appropriation must bear a logical relationship to the appropriation's language.[35] Similarly, government employees may only use government resources in a manner consistent with the purposes for which they were acquired.[36]

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[24] JER, *supra* note 5, para. 2-301b (stating that "[f]ederal Government resources, including personnel, equipment, and property, shall be used by DoD employees for official purposes only," except for certain authorized uses that are listed therein); AR 58-1, *supra* note 7, para. 2-3 (stating that "[t]he use of Army-owned or controlled nontactical vehicles is restricted to official purposes only," but listing examples of authorized use); U.S. DEP'T OF ARMY, REG. 25-1, ARMY INFORMATION TECHNOLOGY para. 5-3f (25 June 2013) [hereinafter AR 25-1] (restricting multimedia and visual information products and services to official use).

[25] *See* U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 7-2 (25 May 2011) [hereinafter AR 360-1] (delegating authority to local commanders to decide whether resources such as ceremonial troop units may participate in parades, sporting events, or at shopping malls); U.S. DEP'T OF ARMY, REG. 220-90, ARMY BANDS para. 2-2 (14 Dec. 2007) [hereinafter AR 220-90] ("The commanding general responsible for a band will decide in accordance with applicable regulations what events are 'official' and authorized band support before committing the band."); AR 58-1, *supra* note 7, para. 2-3 (referring to public ceremonies, military field demonstrations, and parades in stating that "[a] commander, or his or her principal staff officer, will determine whether the event in question is of significantly high interest as to warrant the use of official Government transportation for general attendance").

[26] *See* U.S. DEP'T OF DEF., 4500.36-R, MANAGEMENT, ACQUISITION AND USE OF MOTOR VEHICLES para. C2.5 (16 Mar. 2007) [hereinafter DoD 4500.36-R] (defining "official purposes only" as those necessary to perform one's agency mission as authorized by that agency) (citing U.S. GEN. SERVICES ADMIN. FINANCIAL MANAGEMENT REGULATION § 102-34.200); DoDI 5410.19, *supra* note 9, enclosure 2, para. E2.1.22.7 (defining "Official DoD Event (Function)" as "[a]n event sponsored by the Department of Defense, a DoD Component, or a command using appropriated funds, conducted in support of an assigned mission, including purposes of esprit de corps, primarily for active duty personnel (including Federalized National Guard members) and civil service personnel, dependants, and guests"); *id.* para. E2.1.22.8 (defining "Official Federal Government Event (Function)" as "[a]n event sponsored solely by an element of the Federal Government and paid for solely with appropriated funds, in which officials of any branch of the Federal Government are involved in the performance of their official duties"); AR 220-90, *supra* note 25, para. 2-2 (14 Dec. 2007) (stating that events promoting morale of an entire military population, supporting recruiting, or improving community relations may be deemed 'official').

[27] *See* AR 220-90, *supra* note 25, para. 2-3b (grouping both official military functions and official civil ceremonies and functions under the same heading of "[a]uthorized participation"); AR 58-1, *supra* note 7, para. 2-3 (listing public ceremonies and official internal ceremonies under the same heading of "official ceremonies").

[28] A graphic explaining official, authorized and unofficial uses of government resources is provided at Appendix 1.

[29] *See* sources cited *supra* note 26 and accompanying text.

[30] *See* FM 1-04, *supra* note 3, para. 6-4 ("Legal advice is based upon an understanding of the commander's intent and is shaped by situational awareness of events occurring in the operational environment.")

[31] *See* DoD 4500.36-R, *supra* note 26, para. C2.5 (defining official purposes to mean "to perform the mission of the DoD components as authorized by the DoD components"); JER, *supra* note 5, para. 2-301 (defining "official use" of communications systems as those "necessary in the interest of the Federal Government").

[32] *See* U.S. DEP'T OF DEF., DIR. 1015.10, MILITARY MORALE, WELFARE AND RECREATION (MWR) PROGRAMS para. 4 (6 Jul. 2009) (C1, 6 May 2011) [hereinafter DoDI 1015.10] (stating that DoD policy requires the military components to establish MWR programs in order to "maintain individual, family, and mission readiness" and recognizing that "[m]ilitary MWR programs…are an integral part of the military and benefits package").

[33] *See* DoD 4500-36-R, *supra* note 26, para. C2.5.1 ("The determination as to whether a particular use is official is a matter of administrative discretion to be exercised within applicable laws and regulations.") *But see* AR 220-90, *supra* note 25, para. 2-2 ("Commanders are not authorized to declare an event, or any portion of it, 'official' if the sole purpose in doing so is to reduce the cost of a social event to participants or to avoid hiring of civilian musicians.").

[34] *See* 1 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 4, pt. B, sec. 1, at 4-19 – 4-20 (3d ed. 2004 & Supp. 2013), *available at* http://www.gao.gov/legal/redbook/redbook.html.

[35] *See id.* at 4-22.

[36] *See* DoD 4500.36-R, *supra* note 26, para. C2.5.1 (listing criteria for deciding whether to use Government vehicles, including whether the use is "essential to the successful completion of a DoD function, activity, or

Unofficial events are not necessary to the DoD mission and serve commercial, political, entertainment, personal, or social purposes.[37] The Government Accountability Office outlined some events that are inappropriate for use of government resources—purely social events where an individual attends in his personal capacity; purely political events, such as fundraisers or party meetings; events people attend because of their ethnic, religious, or educational background, and not to carry out official duties; and private or non-profit fundraisers.[38]

2. Funding Source and Sponsor

After examining an event's purpose, establish the source of the event's funding and its sponsor. Government funds, either appropriated [39] or non-appropriated,[40] cover expenses of official events. A unit, DoD agency, or element of the Federal government sponsors official events.[41] Use of these benchmarks captures official morale, welfare and *esprit de corps* events,[42] officially programmed public affairs activities, [43] and official social events to extend diplomatic courtesies to non-DoD guests.[44]

On the other hand, personal funds,[45] informal funds,[46] or NFE funds,[47] fund unofficial events. Using these types of private funds to pay for an official event violates fiscal law by augmenting a unit's operating budget.[48] A private organization, individual, or NFE sponsors unofficial events.[49] Unless authorized by written agreement, DoD

operation" and "consistent with the purpose for which the motor vehicle was acquired").

[37] *See, e.g.*, DoDI 5410.19, *supra* note 9, enclosure 2, para. E2.1.8 (stating that concerts, dinners and other entertainment performances sponsored by NFEs are not authorized for musical, marching, or other personnel units); AR 58-1, *supra* note 7, para. 2-4b ("Official motor vehicle transportation requirements do not include: transportation to private social functions; personal errands or side trips for unofficial purposes; transportation of dependants or visitors without an accompanying official; or in support of non-DoD activities unless specifically approved under the provisions of Army Regulations."); AR 220-90, *supra* note 25, para. 2-4 (prohibiting Army bands from participating in political meetings, events to stimulate sales or commercial business, or events that would selectively benefit any person, group or corporation); AR 360-1, *supra* note 25, para. 7-3f (prohibiting Army musicians from participating in events for commercial interests).

[38] Letter to the Head of an Agency, Dir., Off. of Gov't Ethics (OGE), No. 85 X 9 (12 July 1985).

[39] *See* DoDI 5410.19, *supra* note 9, enclosure 2, paras. E2.1.22.7—.8 (defining official events as events using appropriated funds); AR 220-90, *supra* note 24, glossary (defining "official military function" as "[a] military sponsored event that uses appropriated funds . . . and which has been designated as 'official' in accordance with paragraph 2-3"). Dividing official events from unofficial events on the basis of an event's funding presumes that appropriated funds (APFs) are properly expended for the official event in the first place. Authorization for Temporary Duty (TDY) entitlements or travel costs should not be used as a gauge of the official nature of an event the traveler attends because TDY funds can be used to pay for official participation in unofficial events. *See* JER, *supra* note 5, para. 3-211a. Instead look to the funds paying for the event the employee will attend. The request to travel in an official capacity to support an unofficial event, such as a speaker at a NFE event, must first go through the legal and ethical analysis of whether or not logistical support can be provided under JER para. 3-211a. Under a separate analysis, TDY travel authorization and entitlements can be authorized only where an employee's travel to attend is "necessary to conduct official Gov't business." *See* U.S. DEP'T OF DEF., JOINT FEDERAL TRAVEL REGULATIONS, UNIFORMED SERVICE MEMBERS, vol. 1, para. U4000 (10 Oct. 2012) (C327, 1 Mar. 2014) [hereinafter JFTR], *available at* http://www. defensetravel.dod.mil/ Docs/ perdiem/ JFTR(Ch1-10).pdf.

[40] *See* U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NON-APPROPRIATED FUND INSTRUMENTALITIES para. 6-1 (24 Sept. 2010) [hereinafter AR 215-1] (describing the criteria for unit funds, which are appropriated or non-appropriated funds used to host recreational events for the collective benefit of all unit members); *id.* para. 8-29 (stating that unit-level programs, such as welcome home celebrations, may be funded with appropriated funds (APFs), as category A mission essential activities, or with non-appropriated funds (NAFs), where APFs are not available).

[41] *See* DoDI 5410.19, *supra* note 9, enclosure 2, paras. E2.1.22.7—.8; U.S. DEP'T OF DEF., DIR. 5410.18, PUBLIC AFFAIRS COMMUNITY RELATIONS POLICY para. 4.8.15 (20 Nov. 2001) (certified current 30 May 2007) [hereinafter DoDD 5410.18] ("To receive DoD support as an Official Federal Government Event, activities hosted by the Congress or other Federal Agency must be sponsored solely by a member of Congress, the Secretary of the U.S. Senate or the Secretary of the U.S. House of Representatives, or by a senior official of another Federal Agency, acting in an official capacity, and be paid for solely with appropriated funds of the requesting Federal Agency.").

[42] *See* AR 215-1, *supra* note 40, para. 1-8 (stating that the Army Morale, Welfare, and Recreation (MWR) program directly supports Soldier and unit readiness); *id.* para. 5-1 (explaining that the basic financial standard for all categories of MWR programs is to use APFs to fund 100 percent of the costs).

[43] *See* DoDD 5410.18, *supra* note 41, para. 4.2.1.

[44] *See* U.S. Dep't of Army, Reg. 37-47, Official Representation Funds of the Secretary of the Army para. 2-1a (28 Sept. 2012) [hereinafter AR 37-47].

[45] For example, personal funds can be used to pay for unofficial social luncheons hosted at one's home. *See* DoD IG ROI—Lt. Gen. Huntoon, *supra* note 5, at 26 (explaining how Lieutenant General Huntoon used his personal funds to pay for the War College Ladies Luncheon, an event the DoD IG determined to be unofficial); *see also* Colonel Malcolm H. Squires, Jr. & Lieutenant Colonel Linda K. Webster, *Business Entertainment Expense Deductions by Service Members*, ARMY LAW., Dec. 1996, at 13, 17 (asserting that individual service members should be able to deduct the "costs of dining-ins or dining-outs, hails and farewells, promotion parties, retirement parties, and similar functions of a 'mandatory' nature" as business expenses).

[46] Informal funds can be used for a host of unofficial activities, such as social activities not authorized APF support. *See* U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE app. J, paras. J-2e, J-7 (13 Mar. 2013) [hereinafter AR 608-1]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-20 (6 Nov. 2014) [hereinafter AR 600-20].

[47] The Association of the United States Army's (AUSA) Annual Meeting provides an example. *See generally* Headquarters, Dep't of the Army, Operations Order for Army Participation in the 2013 Association of the Army's (AUSA) Annual Meeting, Annex W (Legal Guidance) (2013).

[48] *See* Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (2006).

[49] *See* AR 360-1, *supra* note 25, para. 3-2 (providing examples of various types of NFE organizations that sponsor community relations events).

organizations and NFEs may not co-sponsor an event.[50] With few exceptions, government resources can support government-funded, government-sponsored events.[51]

3. Exceptions Authorizing Use

When an event's purpose, funding source, and sponsor lead to a determination that an event is unofficial, the final step of the three-part test requires examining the regulations for an exception authorizing the use. Government resources may support unofficial events, but only where law or regulation affirmatively authorizes the use.[52] The Joint Ethics Regulation (JER) sets out the four basic authorized use exceptions: communications systems,[53] official time,[54] logistical support to NFE events,[55] and other government resources.[56] The JER also lists NFEs who share a special relationship with the DoD, entitling them to receive exceptional levels of official resource support.[57]

The exceptions for authorized use of communications systems and other federal government resources allow minor personal uses of office equipment at no additional cost to the government.[58] The exception for use of official time permits employees to participate in non-profit professional associations and learned societies,[59] and to prepare, present, and publish papers in professional journals.[60] Supervisors can also permit employees to attend NFE meetings and training, on official time, to gather valuable information for the DoD.[61]

The exception for logistical support to NFE events applies to the bulk of requests for support to unofficial events. It authorizes commanders to provide DoD employees as speakers, panel members, or other participants, DoD facilities and equipment, and the services of DoD employees to help make proper use of the equipment.[62] Unofficial public events that showcase DoD's color guards, marching units, and parachute teams may be authorized under this exception.[63] A commander's decision to provide logistical support to a NFE event requires an analysis of the factors listed in JER 3-211a.[64] The service regulations governing the requested resources, such as those covering vehicles,[65] the band,[66] or a public speaker,[67] may further limit use of resources. The regulations provide abundant examples of unofficial uses, restrictions, and unauthorized practices.[68] The following section discusses events that

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[50] *See* JER, *supra* note 5, para. 3-206 (stating the rule and criteria for an exception including a written co-sponsorship agreement); U.S. DEP'T OF ARMY, DIR. 2014-01, ARMY CONFERENCE POLICY 22 (18 Dec. 2013) [hereinafter ARMY DIR. 2014-01] (explaining requirements for co-sponsored conferences).

[51] *See* AR 220-90, *supra* note 25, para. 2-3; AR 58-1, *supra* note 7, para. 2-3a; AR 360-1, *supra* note 25, para. 7-2a. *But see e.g.*, U.S. DEP'T OF ARMY, DIR. 2007-01, POLICY FOR TRAVEL BY DEP'T OF THE ARMY OFFICIALS 4 (25 Jan. 2007) [hereinafter ARMY DIR. 2007-01] (distinguishing retirement and change of command ceremonies as only being considered "official events" for the senior official formally representing the Department of the Army when using government aircraft); AR 360-1, *supra* note 25, para. 7-3a (prohibiting Army musicians on official duty from providing background, dinner, or dance music at events funded solely by NAFs).

[52] *See supra* notes 18-21 and accompanying text.

[53] *See* JER, *supra* note 5, para. 2-301a.

[54] *See id.* para. 3-300.

[55] *See id.* para. 3-211a.

[56] *See id.* para. 2-301b (such as typewriters, calculators, libraries and other similar resources and facilities).

[57] *See id.* para. 3-212. For instance statute authorizes the Secretary of the Army to provide the following support to annual conventions of military associations, such as the AUSA Annual Meeting: limited air and ground transportation; communications; medical assistance; administrative support; and security support. *See* 10 U.S.C. § 2558 (2006). Non-Federal entities operating on DoD installations also enjoy special support. *See* U.S. DEP'T OF DEF., INSTR. 1000.15, PROCEDURES AND SUPPORT FOR NON-FEDERAL ENTITIES AUTHORIZED TO OPERATE ON DOD INSTALLATIONS enclosure 3 (24 Oct. 2008) [hereinafter DoDI 1000.15]; U.S. DEP'T OF ARMY, REG. 210-22, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS (22 Oct. 2001) [hereinafter AR 210-22].

[58] *See* JER, *supra* note 5, para. 2-301.

[59] *See id.* para. 3-300b.

[60] *See id.* (also permitting use of administrative support personnel to assist with papers and presentations).

[61] Employees may attend meetings, conferences, or similar events sponsored by NFEs in an official capacity to receive training or gather information of value to the DoD even if not acting as an official speaker or other participant. *See id.* para. 3-200. *But see* ARMY DIR. 2014-01, *supra* note 50, at 23—26.

[62] *See* JER, *supra* note 5, para. 3-211a(2); DoDI 5410.19, *supra* note 9, enclosure 2, para. E2.1.60; *see also* AR 58-1, *supra* note 7, para. 2-3a (authorizing official participants to travel by government vehicle).

[63] *See* JER, *supra* note 5, para. 3-211a.

[64] *See id.* para. 3-211a(1)—(7) (permitting logistical support of NFE events where the head of the DoD command or organization determines all of the following: (1) support does not interfere with official duties or detract from readiness; (2) the event serves DoD community relations or public affairs; (3) the event is proper for association with the DoD and Military Department concerned; (4) the event benefits the local civilian community, command providing support, or DoD; (5) the command/organization is able and willing to provide support to comparable events; (6) the proposed use of the resources is not restricted by other law or regulation; and, (7) the event will not charge an admission fee above reasonable costs of sponsoring the event).

[65] *See* AR 58-1, *supra* note 7.

[66] *See* AR 220-90, *supra* note 25.

[67] *See* AR 360-1, *supra* note 25.

[68] *See* JER, *supra* note 5, para. 2-301(stating that DoD employees such as secretaries, clerks, and military aides, many not be used to support the unofficial activity of another DoD employee in support of NFEs absent specific exceptions); U.S. DEP'T OF ARMY, REG. 25-2, INFORMATION ASSURANCE para. 4-5r (24 Oct. 2007) (RAR 23 Mar. 2009) [hereinafter AR 25-2] (prohibiting use of government communication systems for

require units to closely walk the line between their official and unofficial nature, thus raising frequent questions regarding use of government resources.

III. Common Events Requesting Use of Resources[69]

Having set forth a test that distinguishes official events from unofficial events, the next portion of this article applies the test to frequently-encountered events that present JAs with challenging questions regarding the use of government resources. Many of these events have both unofficial and official purposes and/or sponsors.[70] Application of the test allows JAs to decide if an event is official or unofficial, or where combined, to carefully segregate each event into its official and unofficial portion(s), determine whether government resources may be authorized, and if authorized, define the portion(s) during which government resources may be used.[71]

A. Official Ceremonies and Receptions

When analyzing a request for government resources, JAs must differentiate official ceremonies from their closely-related social receptions, which are generally conducted afterwards. Ceremonies conducted pursuant to officially-regulated events, such as change of command, change of responsibility, unit activation, deactivation, promotion, and retirement,[72] are official events.[73] Award ceremonies are also official events, as regulation states that the presentation of awards should be conducted with an "appropriate air of formality and fitting ceremony."[74] Appropriated funds pay for these ceremonies because they are necessary to carry out an authorized function, such as the turnover of a unit's commander.[75] Military units execute these ceremonies as part of official internal business.[76] Government resources properly support these official ceremonies because they are government-sponsored, officially-funded, and necessary to execute an authorized mission.[77]

Announcements of official ceremonies, such as a change of command,[78] can be sent through official mail and may state the location and time of a "directly related reception," so long as there are no additional costs, advertisements, or endorsements.[79] The commander's staff can avoid pitfalls when planning an official ceremony by using the magic words, "a reception will be held directly following the ceremony," on the same cardstock or e-mail[80] as the official ceremony announcement.

Judge advocates can use the three-part test to distinguish official ceremonies, which are authorized government resources, from the social receptions that traditionally follow. The purpose, funding source, and sponsor of social receptions show that such events are unofficial functions,

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pornography, copyright infringement, gambling, chain letters, unofficial advertising, or violations of law); AR 220-90, *supra* note 25, para. 2-4 (prohibiting use of the band for political meetings, motion picture premieres, fashion shows, beauty pageants, etc.); ARMY DIR. 2007-01, *supra* note 51, at 4 (limiting use of government aircraft for travel to retirements, change of command ceremonies, and funerals to the senior official formally representing the Department of the Army).

[69] Practice pointers about how to approach these issues are available in Appendix C.

[70] *See* discussion *infra* Part III.A., E., and F.

[71] *See* discussion *infra* Part III.E.

[72] *See* U.S. DEP'T OF ARMY, REG. 600-25, SALUTES, HONORS, AND VISITS OF COURTESY para. 6-4 (24 Sept. 2004) ("Military personnel being retired after long and faithful service will be given appropriate recognition at retirement to include reviews, ceremonies, or other similar functions.").

[73] *See* AR 58-1, *supra* note 7, para. 2-3a(2); AR 220-90, *supra* note 25, paras. 1-5a(4), 2-3(a); AR 360-1, *supra* note 25, para. 7-2a. Army Directive limits use of government aircraft to travel to funerals, retirements, and change of command ceremonies, stating that such travel is only considered "official" for the senior official formally representing the Department of the Army. All other travelers who accompany the official representative must reimburse the government for the equivalent full coach fare. *See* ARMY DIR. 2007-01, *supra* note 51, at 4. Funerals are authorized other official support such as funeral honors details. *See* U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM para. 2-12 (30 Apr. 2007) [hereinafter AR 600-8-1].

[74] U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS para. 1-32 (11 Dec. 2006) (RAR 24 June 2013) [hereinafter AR 600-8-22].

[75] *See* AR 600-20, *supra* note 46, para. 1-5.

[76] *See* AR 58-1, *supra* note 7, para. 2-3a(2); U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.5, DRILL AND CEREMONIES ch. 10 (7 July 2003) (C1, 12 Apr. 2006).

[77] *See supra* note 73 and accompanying text.

[78] *See* U.S. DEP'T OF DEF., 4525.8-M, DOD OFFICIAL MAIL MANUAL para. C.1.3.10 (26 Dec. 2001) [hereinafter DoD 4525.8-M]; U.S. DEP'T OF ARMY, REG. 25-51, OFFICIAL MAIL AND DISTRIBUTION MANAGEMENT para. 2-20e (14 Jan. 2015) [hereinafter AR 25-51]; *see also* Availability of Funds for Printing Invitations to Coast Guard Change of Command Ceremony, Comp. Gen. B-186998, Nov. 9, 1976, 56 Comp. Gen. 81 (permitting use of appropriated funds for printing change of command ceremony invitations).

[79] *See* DoD 4525.8-M, *supra* note 78, para. C.1.3.10; AR 25-51, *supra* note 78, para. 2-20e. *But see id.* para. C.1.4.6 (prohibiting official mail for "invitations to social functions to satisfy personal social obligations, even if they are the result of an official position. For example, Christmas parties and receptions hosted by senior commanders are not official business"); AR 25-51, *supra* note 78, para. 2-21f (mirroring the language of the DoD Manual); *id.* para. 2-21h (listing "retirement announcements" as an unauthorized use of official mail).

[80] Adding reception information to an e-mailed announcement mirrors the official mail use rule, and also meets the requirements for incidental personal use of government communications systems. *See* JER, *supra* note 5, para. 2-301a. A separate email for the reception that is sent to a large group would likely violate the JER prohibition on communications that overburden the system. *See id.* para. 2-301a(e). Upon the occasion of a subordinate's promotion, commanders can also send a congratulatory note through official mail for *esprit de corps*. *See* AR 25-51, *supra* note 78, para. 2-21g (also authorizing letters of condolence).

and, therefore, the host is not authorized to use government resources, absent an exception.[81] The individual promoted, or the incoming commander, typically pays for such receptions with personal funds,[82] and hosts them for customary entertainment purposes[83] unnecessary to the function of his or her position. Official representation funds may not pay for these events.[84]

Commanders should carefully weigh a decision to provide logistical support to social receptions given the personal social nature[85] and frequency of these events. These events rarely satisfy the JER criteria permitting support to a NFE event[86] because they do not serve community relations, public affairs, or military training interests,[87] and do not fit within customary public affairs or community relations activities envisioned by the exception.[88] Additionally, providing support to every individual promotion or retirement party may be too burdensome on limited resources.[89] The rank or position of the party's host should not alter this analysis.[90]

Finally, commanders may not task subordinates to work unofficial social receptions.[91] The JER prohibits use of government time or personnel for other than official duties or authorized uses "because of the potential for significant cost to the Federal Government, and the potential for abuse."[92] The law also proscribes this conduct, stating that "[n]o officer of the Army may use an enlisted member of the Army as a servant."[93]

B. Family Readiness Group (FRG) Events

Like official ceremonies and unofficial receptions, FRG activities require careful distinction between their official and unofficial nature to protect against misuse of government resources. Family Readiness Groups perform an important official mission,[94] but typically sponsor unofficial events as well.[95] In their official capacity, FRGs help the commander maintain Soldier and Family readiness throughout the deployment cycle by facilitating effective communication and assisting Soldiers and Family members.[96] When conducting activities that serve this official mission,[97] FRGs act in their official role, and receive

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[81] *See* AR 58-1, *supra* note 7, para. 2-4b ("Official motor vehicle transportation requirements do not include: transportation to private social functions…."); DoD 4525.8-M, *supra* note 78, para. C.1.4.6 (prohibiting official mail to be used for "invitations to social functions").

[82] Food and refreshments normally form the basis for the cost of such events. Appropriated funds are not generally authorized to purchase food. *See* Department of The Army—Claim of the Hyatt Regency Hotel, Comp. Gen. B-230382, Dec. 22, 1989 (unpub.) (reiterating that APFs cannot pay for "entertainment" expenses such as buffets, refreshments and coffee, unless specifically authorized by statute); *see also* Squires & Webster, *supra* note 45, at 17 (stating that individuals pay for promotion, retirement, and change of command parties with personal funds).

[83] *See* Squires & Webster, *supra* note 45, at 17 (stating that promotion, retirement and change of command parties are functions of a 'mandatory' nature as a result of military customs and courtesies).

[84] *See* AR 37-47, *supra* note 44, para. 2-10b (2) (stating that Official Representation Funds (ORF) will not be used to pay for "receptions and similar expenses in connection with ceremonies for the retirement of DoD personnel, change of command, or activation, deactivation, or disestablishment of a command or agency").

[85] *See supra* note 38 and accompanying text.

[86] *See* JER, *supra* note 5, para. 3-211a (1)—(7).

[87] *See id.* para. 3-211a(2).

[88] *See id.* para. 3-211a(6).

[89] *See id.* para. 3-211a(5) ("[t]he DoD Component command or organization is able and willing to provide the same support to comparable events that meet the criteria of this subsection and are sponsored by other similar non-Federal entities"). A commander's decision to provide logistical support to unofficial events requires that the commander be willing and able to provide the same benefit to all similar personnel and events. It may, for example, be entirely possible to allow promoted Soldiers to use a conference room for social receptions after the ceremonies, but the commander must weigh the possibility of numerous similar requests into the analysis to grant the use to the first Soldier.

[90] Though guidance regarding rank or position preferences is not specifically mentioned in the exception for logistical support, other resource regulations guard against such a practice. *See* AR 58-1, *supra* note 7, para. 2-4a ("Vehicles will not be provided when the justification is based solely on reasons of rank, position, prestige, or personal convenience.").

[91] *See* U.S. DEP'T OF DEF., INSTR. 1315.09, UTILIZATION OF ENLISTED PERSONNEL ON PERSONAL STAFFS OF GENERAL AND FLAG OFFICERS enclosure 3, paras. 1.e., 3 (6 Mar. 2015) [hereinafter DoDI 1315.09] (providing that enlisted aides may not be used for duties that only serve a General Officer's personal benefit or have no substantive connection with the General Officer's official duties and responsibilities). *But see id.* enclosure 3, para. 1.h. (authorizing General Officers to employ enlisted aides in a voluntary, paid, off-duty status).

[92] JER, *supra* note 5, para. 3-303.

[93] 10 USC § 3639 (2006); *see also* DoD IG ROI—Lt. Gen. Huntoon, *supra* note 5, at 25—27 (finding that Lieutenant General Huntoon misused subordinates to prepare and serve food at three unofficial social events and an unofficial charitable fund-raising dinner; to teach driving lessons to a family member; and to care for a friend's cats). The DoD IG concluded that the luncheons were a misuse of official time because they occurred during the duty day. The other events, as they were conducted outside duty hours, were considered a misuse of his official position to induce subordinates to perform services, and—even if they volunteered—an improper acceptance of gifts from subordinates. *See id.* at 28—29. The investigation of General Ward revealed that members of his staff acted as unofficial aides to Mrs. Ward: carrying and loading her groceries, driving her to personal social engagements, and picking-up her dry cleaning. *See* DoD IG ROI—Gen. Ward, *supra* note 2, at 45.

[94] *See* AR 608-1, *supra* note 46, app. J, paras. J-1, J-2.

[95] *See id.* para. J-2e (describing such events as enhancing camaraderie, and reducing stress and family loneliness during deployments).

[96] *See id.* para. J-1b.

[97] *See id.* para. J-2d (listing mission-essential FRG activities, including "FRG member meetings, FRG staff and committee meetings, publication and distribution of FRG newsletters, maintenance of updated Family rosters and Family readiness information, establishment of FRG member telephone trees and e-mail distribution lists, and scheduling educational briefings for FRG members").

appropriated fund (APF) support and full use of government resources, including facilities, vehicles, and office equipment.[98] The purpose, funding, and sponsor of such events—all three prongs of the test—lead one to conclude that the event is official and permitted use of government resources.

Family Readiness Groups also coordinate unofficial activities, such as parties, social outings, and fundraisers—but these functions are not part of their official duties.[99] Family Readiness Group informal funds sponsor and pay for these events.[100] Therefore, the FRG may not use government resources to support these unofficial activities,[101] absent an exception.

C. Training Events

Training events, like official ceremonies and FRG functions, may have closely-related unofficial social or entertainment components. Training events can occur both on and off the military installation; events such as staff rides frequently involve significant travel.[102] While staff rides form part of a professional development program[103] and serve legitimate training requirements, [104] they may misuse travel entitlements and resources for social purposes.

Official training events constitute part of a unit's government-funded operating expenses[105] and may involve government resources when executed for an official purpose.[106] Similarly, staff ride attendees may travel by government vehicle[107] and receive TDY entitlements,[108] where the staff ride will provide robust training. Robust training requires individual study and preparation before the culminating trip to visit the site of a military campaign.[109] Examining the agenda for a staff ride may reveal travel to entertainment venues or social events where use of government vehicles—even where attendees are in a TDY status—[110]constitutes misuse. Judge advocates should highlight these unofficial events to protect commanders from potential violations. [111]

D. Morale, Welfare, Recreation (MWR) and *Esprit de Corps* Events

In contrast to the unofficial social and entertainment events covered thus far, the DoD sponsors official athletic, recreation and entertainment programs it deems essential to sustaining the health and readiness of service members.[112] Commanders may request resources for official MWR programs, such as vehicles to transport Soldiers to "Commander's Cup" competitions.[113] Morale, Welfare and Recreation events are sponsored by a federal government entity; however, as they receive a portion of their funding from NAF activities,[114] regulations restrict the ability to use some resources for MWR events. [115]

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[98] See id. para. J-3; see also Major Laura A. Grace, Good Idea Fairies: How Family Readiness Groups and Related Private Organizations Can Work Together to Execute the Good Ideas, ARMY. LAW., Sept. 2012, at 25, 27, 30.

[99] *See* AR 608-1, *supra* note 46, paras. J-2e, J-7; Grace, *supra* note 98, at 26.

[100] *See* AR 608-1, *supra* note 45, para. J-7.

[101] *See id.* paras. J-2c, J-3. *But see* para. J-3b (authorizing unofficial information in FRG newsletters provided such information does not exceed twenty percent of the print space for official information, increase costs, or contain advertisements).

[102] *See* WILLIAM G. ROBERTSON, THE STAFF RIDE 5 (Ctr. for Mil. Hist. Pub. 70-21, 1987) (1944), *available at* http://www.history.army.mil/html/books/070/70-21/CMH_Pub_70-21.pdf (defining a staff ride as a "systematic preliminary study of a selected campaign, an extensive visit to the actual sites associated with that campaign, and an opportunity to integrate the lessons derived from each").

[103] *See* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 4-8c (19 Aug. 2014) [hereinafter AR 350-1] (directing commanders to conduct professional leader development).

[104] *See id.* para. 2-44f (8) (directing commanders to conduct individual and collective training events throughout the year).

[105] *See* U.S. DEP'T OF DEF., REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION vol. 2A, ch. 1, para. 010201 (last modified Nov. 2012) [hereinafter FMR], *available at* http://comptroller.defense.gov/fmr.aspx.

[106] *See supra* note 24 and accompanying text.

[107] *See id.*

[108] *See* JTR, *supra* note 39, para. 4000.

[109] *See* ROBERTSON, *supra* note 102, at 5.

[110] *See* AR 58-1, *supra* note 7, para. 2-3j(2) (prohibiting travel by government vehicle for entertainment purposes, such as concerts or sporting events). *But see id.* (permitting travel for comfort and health, including travel to eating establishments).

[111] *See* DoD IG—ROI Adm. Stavridis, *supra* note 2, at 17—18. In analyzing whether Admiral Stavridis misused government aircraft, the DoD IG stated that even where a trip may be beneficial to DoD or help to develop a strong relationship with other important individuals who may also be in attendance at an event, the guiding principle was whether the travel was "essential for the furtherance of Government business." *Id.* at 18. Furthering government business may not be merely remote or incidentally associated with a trip. *Id.* The DoD IG used this test to determine that Admiral Stardivis' trip to Burgundy, France, for induction into the Brotherhood, a wine and cuisine enthusiast's club, was unofficial travel in violation of applicable regulations, despite the fact that he conversed with a French government official seated at the same table. *Id.*

[112] *See* DODI 1015.10, *supra* note 32, at para. 4.

[113] *See, e.g.*, Fort Bliss Family and Morale, Welfare & Recreation, http://www.blissmwr.com/intramurals/ (last visited Jan. 23, 2015) (highlighting Fort Bliss Commander's Cup standings).

[114] *See* AR 215-1, *supra* note 40, paras. 3-7 to 3-9 (defining Category A programs are mission-sustaining activities that are funded almost entirely with APF, and Category B and C programs as not directly related to mission but still eligible for APF support where they are unable to generate enough

An exception authorizes bus transportation for Soldiers and dependents to travel to MWR events designed to enhance morale, welfare, and *esprit de corps*.[116] When analyzing whether to commit these resources, the commander must prioritize mission-essential needs for government vehicles above MWR events; he or she may not procure additional vehicles for MWR purposes.[117] In isolated or remote duty locations, government vehicles purchased with APFs can support a wider range of morale activities.[118]

Official MWR activities also include unit organization days and welcome home ceremonies, which qualify for APF support and use of government resources.[119] To meet criteria, unit personnel must plan and host these activities on the installation[120] for the collective benefit of all unit members.[121] In some cases, however, units plan elaborate, personally-funded recreational trips that do not meet regulatory criteria for unit funds and cannot use official resources, such as vehicles.[122]

E. Unit Social Events: Military Balls, Dining-Ins, and Hail and Farewells

In addition to unofficial recreational trips, units also plan elaborate social and entertainment events to promote cohesion and *esprit de corps*; these events also raise many questions as to the use of government resources. Generally, military balls and similarly-designed events are social events, which are not considered official activities.[123] Ticket sales, unit informal funds, or private organization funds pay for the cost of sponsoring these events.[124] As unofficial events, government resources can only support such events where specifically authorized.[125]

Commanders may designate a portion of a unit ball as mandatory unit training or professional leader development.[126] This 'official' portion of the event—usually an introduction comprised of patriotic music, the presentation of colors and an official speech—can utilize such resources as the band and color guard; government equipment to print an official program; and, government vehicles to transport the equipment and official speaker.[127] However, the remaining portions of the event—serving social and entertainment purposes—are unofficial. Relabeling unofficial events as "training," or requiring attendance to secure official resources will create misuse.[128] Commanders may not require Soldiers to purchase a ticket for the official portion of the ball.[129]

Hails and Farewells foster unit cohesion by welcoming

revenue independently); *id.* app. D (outlining funding authorizations for each line item of MWR programs).

[115] *See id.* para. 13-4a (restricting use of government vehicles purchased with APF for MWR programs except buses which may be used); DoD 4525.8-M, *supra* note 78, para. C.1.4.1. (stating that APF postage may not be used to in support of NAF Instrumentalities (NAFIs)); AR 360-1, *supra* note 25, para. 7-3a (prohibiting Army bands from providing background, dinner, or dance music at events funded solely by NAFs); Memorandum from Deputy Commanding Gen., Dep't of Army, U.S. Army IMCOM, to Director, Northeast Region et al., subject: Army 10-Miler (undated) (prohibiting APF from paying travel costs to the Army 10-Miler).

[116] *See* AR 58-1, *supra* note 7, para. 5-5 (including events such as a chaplain's marriage retreat, an installation-sponsored team's competition in an athletic event, and DoD personnel and family members cheering on a command-sponsored team's participation in a local sporting event).

[117] *See id.* para. 2-3e.

[118] See Major Thomas H. Dobbs, The Use of Government-Owned Vehicles for the Comfort or Health and Welfare of Personnel in Deployed or Remote Locations, ARMY LAW., Apr. 2007, at 1.

[119] *See* AR 215-1, *supra* note 40, para. 8-29 (authorizing APF support for unit-level activities as category A mission essential programs that "maintain mission readiness, improve unit teamwork, and create espirit [sic] de corps. Espirit [sic] de corps may include such activities as welcome home celebrations"); AR 220-90, *supra* note 25, para.2-3a(4) (authorizing bands to play at military-sponsored athletic competitions and organization days on the installation).

[120] *See* AR 215-1, *supra* note 40, para. 8-16j (defining unit recreation activities as planned and conducted by unit personnel in the unit area).

[121] *See id.* para. 6-1c (requiring that unit funds collectively benefit all unit members for off-duty recreational purposes; afford an opportunity for all unit members to participate in any planned events; and activities must relate to the morale, welfare, and recreation of the unit).

[122] *See* Military and Civil Law Division, U.S. Army Europe, *Organization Days Versus "Organization Daze,"* ARMY LAW., Aug. 2007, at 60, 61 [hereinafter *Organization Daze*].

[123] *See* AR 25-1, *supra* note 24, para. 5-3f ("As a general rule, social events such as military balls and hails and farewells are unofficial and considered entertainment except where Nationally or historically significant."); *Organization Daze*, *supra* note 122, at 61 ("This office has generally concluded that hails and farewells, dining ins/outs, military balls, holiday office parties, and social events at private or government quarters are not official organization events or functions.").

[124] *See* AR 608-1, *supra* note 46, app. J, para. J-7c(2) (informal funds intended for unofficial FRG social activities can be used to fund welcome and farewell events).

[125] *See* 5 CFR § 2635.704 (2014).

[126] *See* AR 350-1, *supra* note 103, para. 4-8c.

[127] *See* AR 58-1, *supra* note 7, para. 2-3 (stating that vehicles are to be used for official purposes); AR 360-1, *supra* note 25, para. 7-2e (authorizing musical, ceremonial, and troop unit support for traditional military events such as military balls and dining-ins); *id.* para. 6-3a (stating that official public speaking is mission related and may be charged against normal travel and per diem accounts); AR 25-2, *supra* note 68, para. 4-5r(4) (stating that government communications equipment is to be used for official and authorized purposes).

[128] *See* AR 220-90, *supra* note 25, para. 2-2 ("Commanders are not authorized to declare an event, or any portion of it, 'official' if the sole purpose in doing so is to reduce the cost of a social event to participants or to avoid hiring of civilian musicians."); *Organization Daze*, *supra* note 122, at 61.

[129] *See supra* note 48.

incoming unit members and their families and recognizing departing ones.[130] Depending on how the unit or FRG informal fund was established,[131] it can pay for the cost of these events, or attendees may pay out-of-pocket for individual expenses.[132] Where commanders combine these unofficial team-building events with award ceremonies for departing members, the event assumes an 'official' nature.[133] Like unit balls, government resources may only support official portions of the event, such as the award ceremonies. Official portions should be open to all unit members and may not require expenditure of personal or informal funds to attend.[134] Commanders can avoid allegations of misuse of resources by clearly delineating between unofficial and official events.

Despite the general prohibition on the use of government resources for unofficial purposes, the JER permits commanders to provide limited logistical support to unofficial NFE events.[135] The commander can determine that the unit ball or hail and farewell meet the rule's criteria.[136] However, resource-specific service regulations further limit support that may be provided. Regulation restricts multimedia and visual information personnel from providing services such as videography to the unit ball or hail and farewell.[137] Bands cannot play background or dance music.[138] And, government vehicles may not transport attendees to or from the social function,[139] other than those participating in an official portion, such as the band or guest speaker.[140] Finally, with regard to planning these events, staff cannot use the government vehicle, official duty time, or communications resources to conduct unofficial business, such as extensive comparison shopping of entertainment options.[141] A decision to provide logistical support to a unit's social event does not squarely meet the criteria of JER 3-211a because these events are only tenuously related to the military's public affairs and community relations mission.[142] The next section, however, examines the broad authority[143] under JER 3-211a to provide government resources to events in furtherance of community relations.

F. Community Relations Events

Community engagement events are a primary function of the Army's public affairs mission to keep the American public informed and confident in the capabilities and readiness of its armed forces.[144] Public affairs resources include bands, aviation assets, color guards, marching units, casket teams, firing details, salute batteries, and parachute teams.[145] At a NFE conference, seminar, or convention, such resources include exhibits, displays,[146] and DoD personnel to serve as official speakers.[147]

The Army's Office of Public Affairs specifically pre-programs large outreach events involving the Army's elite ceremonial units and funds them with OMA appropriations.[148] Unplanned requests for incidental support to NFE events comprise the remaining community relations support. Event sponsors must bear the costs of participation in such events,[149] even where the unit initially advances

[130] *See* U.S. ARMY WAR COLLEGE, MILITARY FAMILY PROGRAM, BATTLE BOOK FOR THE COMPANY COMMANDER SPOUSE, at 51 (2010), *available at* http://www.carlisle.army.mil/orgs/SLDR/mfpPublications.htm.

[131] *See* AR 608-1, *supra* note 46, app. J, para. J-7c(2); AR 600-20, *supra* note 46, para. 4-20.

[132] *See* BATTLE BOOK FOR THE COMPANY COMMANDER SPOUSE, *supra* note 130, at 51 ("Unit members and guests share the planning and cost of these get-togethers.").

[133] *See* AR 600-8-22, *supra* note 74, para. 1-32.

[134] Personnel may pay out-of-pocket expenses to bring food or for the cost of food and alcohol purchased at such an event, and so long as there are no costs of attend the award ceremony this would not constitute an augmentation violation. *See* Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (2006).

[135] *See* JER, *supra* note 5, para. 3-211a.

[136] *See supra* note 64 and accompanying text.

[137] *See* AR 25-1, *supra* note 24, para. 5-3f.

[138] *See* AR 360-1, *supra* note 25, para. 7-3a.

[139] *See* AR 58-1, *supra* note 7, para. 2-4b; *see also* ARMY DIR. 2007-01, *supra* note 51, at 26 (elevating approval for use of government vehicles to travel to official after-hours functions to the installation commander or his delegate).

[140] *See* AR 58-1, *supra* note 7, para. 2-3.

[141] *See id.* para. 2-4e (prohibiting use of government vehicles to conduct business for unofficial functions); JER, *supra* note 5, paras. 2-301b, 3-305b (prohibiting DoD employees from supporting the unofficial activity of another DoD employee in support of NFEs, or for any other non-Federal purpose); *id.* para. 2-301a (permitting communications resources to be used for official and authorized incidental personal uses only).

[142] *See* JER, *supra* note 5, para. 3-211a(2).

[143] *See* DoDD 5410.18, *supra* note 41, para. 4.1.

[144] *See* AR 360-1, *supra* note 25, para. 1-6; *see also id.* para. 7-2c (noting that these events also serve as an important recruiting tool).

[145] *See* DoDI 5410.19, *supra* note 9, enclosure 2, para. E2.1.8.

[146] *See id.* para. E2.1.6; AR 360-1, *supra* note 25, para. 7-7.

[147] *See* AR 360-1, *supra* note 25, para. 6-2.

[148] *See* DoDD 5410.18, *supra* note 41, para. 4.2.1. Operating budgets allocate funds for pre-programmed community outreach events. For instance, the Secretary of the Army validated the Army's fiscal year fourteen outreach plan, which includes the Golden Knights and Army Command Jump Team's participation in civilian air shows and Division Open Houses, the U.S. Military Academy (USMA) Black Knights Cadet Parachute Team jumps at USMA home games, and premier ceremonial unit tours such as the United States Army Field Band Spring and Fall Tours, just to name a few. *See* E-mail from Major General Gary J. Volesky, Chief, Army Pub. Aff. (CPA), CPA Sends (undated) (on file with author).

[149] *See* AR 360-1, *supra* note 25, para. 4-2.

OMA funds.[150] While pre-programmed community relations events constitute official functions, NFEs sponsor and fund incidental support activities, making them unofficial events. Support to these unofficial events must satisfy the criteria of JER 3-211a,[151] and any limiting criteria contained in regulations governing the requested resource.[152]

Regulations outline overarching rules for public affairs support, which may help quickly spot the unauthorized functions.[153] Support for community events that deny equal opportunity for admission, serve a limited audience of personnel, or serve political or commercial purposes do not qualify for support.[154] Commanders may not endorse or show preferential treatment to particular organizations or events.[155] Public affairs resources cannot compete with local businesses capable of providing the same support.[156] Finally, a decision to provide support may not interfere with the unit's operational mission or readiness.[157]

Government vehicles can transport official participants and their equipment to community relations events, such as public ceremonies, parades, and demonstrations.[158] A commander can also authorize government transportation to high-interest public events for non-participating audience members, where the event warrants use of official government transportation for general attendance.[159] Non-Federal entities may offer to pay the costs of attendance at unofficial events; an employee can accept the gift where an ethics official determines the event meets widely-attended gathering (WAG) criteria.[160] Unless officially speaking or presenting, the restriction on travel in a personal capacity precludes invitees from using a government vehicle to attend WAGs.[161]

In reviewing requests to support community relations events, beware of nuances for events honoring certain holidays[162] and special statutory relationships with NFEs.[163] In addition, in some years fiscal constraints affect the ability to provide community relations support.[164] Legal opinions should outline policy restrictions resulting from continuing resolution authority,[165] sequestration,[166] or operational mission priorities.[167]

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[150] *See* DoDD 5410.18, *supra* note 41, para. 4.2.1; AR 360-1, *supra* note 25, para. 4-2.

[151] *See supra* note 64 and accompanying text.

[152] *See* DoDD 5410.18, *supra* note 41, DoDI 5410.19, *supra* note 9, AR 360-1, *supra* note 25; AR 220-90, *supra* note 25. Provision of support to a local government for community relations should be distinguished from providing equipment to assist local governments with essential functions. *See* U.S. DEP'T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (29 Dec. 2010) (C1, 21 Sept. 2012).

[153] *See generally* DoDI 5410.19, *supra* note 9, enclosure 13 (containing a checklist to assist with evaluating whether community relations support can be provided in accordance with guidelines).

[154] *See* DoDI 5410.19, *supra* note 9, paras. 6.7.2—.5, AR 360-1, *supra* note 25, paras. 3-1c, 3-2.

[155] *See* DoDI 5410.19, *supra* note 9, paras. 6.7.1—.2; AR 360-1, *supra* note 25, paras. 3-1d, 3-2.

[156] *See* DoDI 5410.19, *supra* note 9, enclosure 8, para. E8.3.3; AR 360-1, *supra* note 25, para. 3-2l.

[157] *See* DoDD 5410.18, *supra* note 41, para. 4.2.4.1.1; AR 360-1, *supra* note 25, para. 3-1e.

[158] For example, official participants may be members of bands, a color guard, or an official speaker. Public ceremonies, military field demonstrations, and parades must be "directly related to official activities" in order to permit transportation of participants by Government vehicle. *See* AR 58-1, *supra* note 7, para. 2-3a; ARMY DIR. 2007-01, *supra* note 51, at 26.

[159] *See* AR 58-1, *supra* note 7, para. 2-3a(1) (requiring both senior public affairs and legal review prior to a commander's determination that the event meets criteria).

[160] *See* 5 C.F.R. § 2635.204(g)(2) (2014).

[161] *See id.* § 2635.204(g). While an ethics official finds that attendance at the event serves the agency's interest, the invitee accepts the gift of free attendance and attends in his personal capacity, unless officially presenting information on behalf of the agency. *See* Memorandum from General Counsel, Office of Gov't Ethics, to Designated Agency Ethics Officials, subject: Speaking and Similar Engagements Involving Presentation of Information on Behalf of the Agency (7 Sept. 2012); *see also* Memorandum from Dep. Gen. Counsel, Dep't of Army, to Principal Officials of Headquarters, Dep't of Army et. al., subject: Blanket Determination for Specified Events Sponsored by the Army Association of the United States (7 Aug. 2013). A separate statute authorized transportation support to the AUSA event. *See* 10 U.S.C. § 2558 (2006). A NFE may offer to pay travel expenses where a DoD employee is an official participant. Acceptance is permitted with advance approval and an ethics opinion. *See* 13 U.S.C. § 1353 (2006); JER, *supra* note 5, para. 4-100c(2).

[162] *See* DoDD 5410.18, *supra* note 41, para. 4.7 (Veterans' Day and Armed Forces Day).

[163] *See* 10 U.S.C. § 2558 (2006); DoDD 5410.18, *supra* note 41, paras. 4.10—4.11 (National Military Association Annual Conferences and Veterans' Organization conventions).

[164] *See* Memorandum from Sec'y of Def., to Secretaries of the Military Departments, et al., subject: Department of Defense Fiscal Year 2014 Outreach Activities (30 Sept. 2013) ("It is unfortunate that sequestration restrictions have kept us from connecting with nearly a half billion people worldwide over the last six months, and required us to withdraw support from more than 2,800 outreach events throughout the country.")

[165] *See, e.g.*, All Army Activities Message 253/2013, 030321Z Oct 13, U.S. Dep't of Army, subject: FRAGO 2 to HQDA EXORD 228-13 Continuation of Operations in the Absence of Available Appropriations (restricting conference attendance and participation as a speaker and/or panel member).

[166] *See, e.g.*, Memorandum from Under Sec'y of Def. Comptroller, to Secretaries of the Military Departments, et al., subject: Additional Guidance for Handling Budgetary Uncertainty in Fiscal Year 2013 (23 May 2013) (prohibiting all military support to non-DoD organizations and special events for outreach purposes beyond the local travel area).

[167] *See* U.S. DEP'T OF ARMY, DIR. 2010-08, ARMY AIRCRAFT USE FOR PUBLIC AFFAIRS MISSIONS 1 (2 Nov. 2010) (removing Army aviation support for civilian public affairs missions to focus on operational needs and predeployment training requirements).

IV. Conclusion

You promise the DCG's aide your opinion later today and he departs your office. You initially want to determine whether the promotion party is official or unofficial. The party appears purely social, but the aide mentioned the DCG's plan to invite some people he knows through his official position. You wonder if the event could be considered an official social function—but a cursory search reveals that social receptions to entertain friends and family do not qualify for the use of Official Representation Funds.[168] The aide also told you the DCG will pay out-of-pocket for food and alcohol—another indicator that the function is unofficial.[169] The party will be held a full day after the official promotion ceremony, so it appears distinct and separate from any official event you can see at this point.[170]

Having determined that the party is unofficial, you look to the regulations for exceptions. The Standards of Conduct and JER prohibit employees from influencing subordinates to use official time to perform unofficial duties[171] The DoD's enlisted aide regulation bars officers from using enlisted members as servants for personal benefit, but they can be paid for voluntary off-duty service.[172] You determine that Soldiers, including the DCG's aide, cannot be tasked to valet cars, prepare food, or otherwise work the party, but can be hired on a voluntary basis and paid fair compensation.

The requests for logistical support, including the band and port-o-johns, must be analyzed under the criteria in JER 3-211a—logistical support to NFE events.[173] The DCG, acting in his personal capacity to host an unofficial party, can be viewed as a NFE.[174] However, you find it unlikely that this party meets the criteria because the party is a small gathering, and only a few invitees work with the DCG in any official capacity. This event does not serve the DoD's community interests or military training interests.[175] Additionally, providing this support to the DCG's promotion party starts down a slippery slope that could result in numerous senior officials requesting band and DPW support for social events.[176] Finally, you think it unlikely that this party falls within customary community relations or public affairs activities contemplated under this exception and the underlying statute allowing this support.[177] Army regulation also restricts the band from playing background music,[178] but states that band members can play at the party, using their own equipment, with or without pay.[179]

Given all the recent DoD Inspector General (IG) investigations about senior officials misusing subordinates for personal benefit,[180] you advise the DCG to compensate the band members and enlisted Soldiers who choose to participate at the same rate he would pay if he were to hire an outside company. You also recommend a safer course of action—hiring a quartet unaffiliated with the band, and an independent full-service catering company—to avoid perceptions that band members and enlisted staff were tasked to work at an unofficial event. It is easier to hire an outside company than to explain the payment of the band and enlisted aides to the IG, while he examines the fairness of their compensation.[181]

Finally, you examine the official mail piece. The DoD and Army regulations permit an official ceremony announcement to state the time and location of a "directly related reception,"[182] but later state that receptions hosted by senior officials, even if associated with an official position, are not permissible for appropriated fund postage.[183] You conclude that this party is a separate social event, rather than a directly- related reception, and you advise against any use of official mail, or other government communications channels,[184] to send out invitations. Overall, you determine that this event does not qualify for any authorized uses of government resources. Before you send off your opinion you decide to brief your Staff Judge Advocate on your

[168] *See* AR 37-47, *supra* note 44, para. 2-10a(2)—(3).

[169] *See* discussion *supra* Part II.B.2.

[170] *See* discussion *supra* Part III.A.

[171] *See* 5 C.F.R. § 2635.705 (2014); JER, *supra* note 5, para. 3-303b (punitive provision).

[172] *See* DoDI 1315.09, *supra* note 91, enclosure 3, paras. 1.e., 1.h., 3; *see also* discussion *supra* Part III.A.

[173] *See* JER, *supra* note 5, para. 3-211a; *see also* discussion *supra* Part III.A.

[174] *See* JER, *supra* note 5, para. 1-217.

[175] *See id.* para. 3-211a(2) ("DoD community relations with the immediate community and/or legitimate DoD public affaris or military training interests are served by the support.").

[176] *See id.* para. 3-211a(5) ("The DoD Component command or organization is able and willing to provide the same support to comparable events that meet the criteria of this subsection and are sponsored by other similar non-Federal entities.").

[177] *See id.* para. 3-211a(6) ("[t]he use is not restricted by other statutes (see 10 U.S.C. 2012…which limits support that is not based on customary community relations or public affairs activities) or regulations.").

[178] *See* AR 220-90, *supra* note 25, para. 2-4a.

[179] *See id.* para. 2-3l.

[180] *See supra* note 93 and accompanying text.

[181] *See* DoDI 1315.09, *supra* note 91, enclosure 3, para. 1.h.(2).

[182] DoD 4525.8-M, *supra* note 78, para. C1.3.10; AR 25-51, *supra* note 78, para. 2-20e; *see also* discussion *supra* Part III.A.

[183] *See* DoD 4525.8-M, *supra* note 78, para. C1.4.6; AR 25-51, *supra* note 78, para. 2-21f.

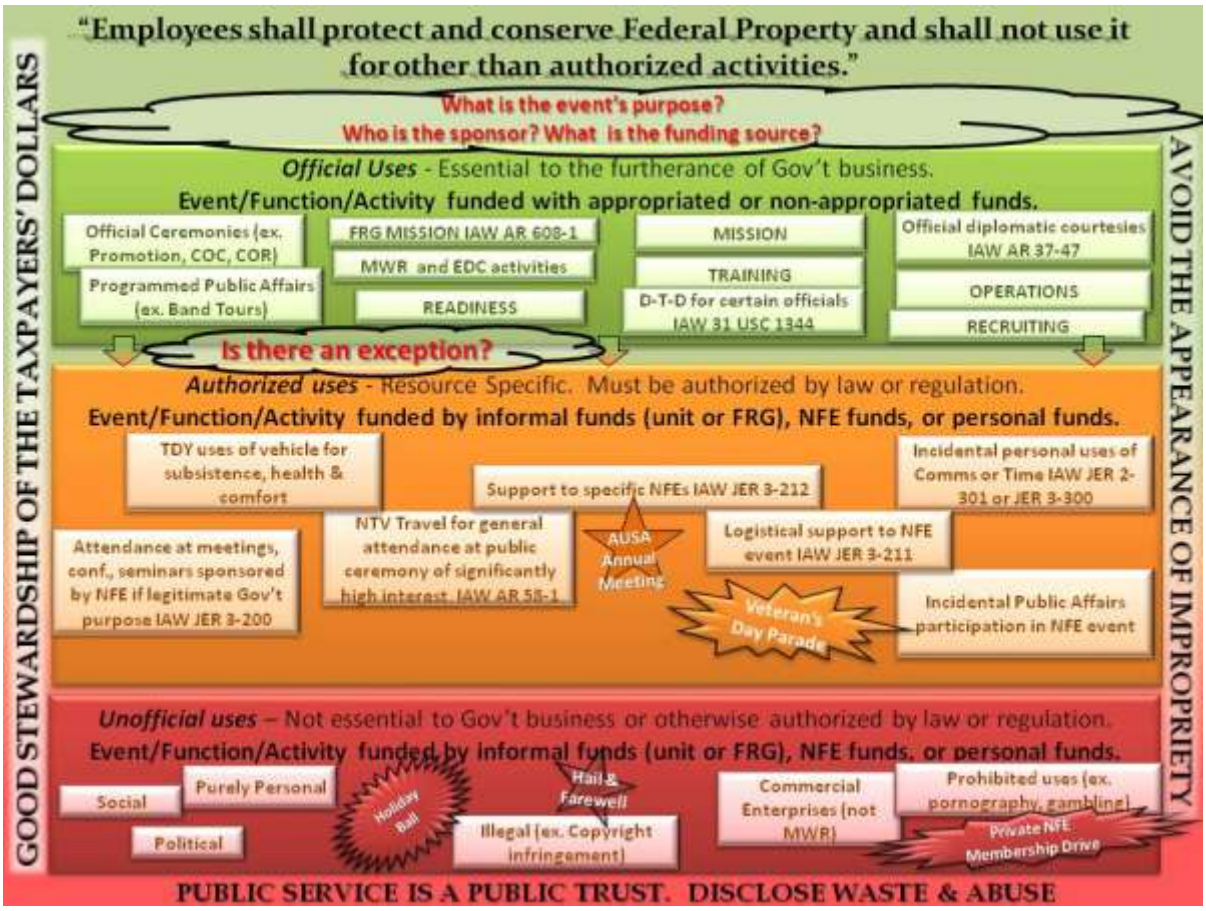
[184] *See* JER, *supra* note 5, para. 2-301a(e) (prohibiting personal communications that overburden the system).

findings and give him a copy of your legal opinion, as the DCG may give him a call.

Completing your analysis in this thorough and analytical fashion should assure the DCG that the legal office has thought through all the legal and ethical issues, protecting him from allegations of misuse, and safeguarding the public trust against perceptions of impropriety.

Appendix A

Use of Government Resources Graphic



KEY:

AR = Army Regulation

COC = Change of Command

COR = Change of Responsibility

D-T-D = Domicile to Duty

EDC = *Esprit de Corps*

IAW = In accordance with

MWR = Morale, Welfare, and Recreation

NFE = Non-Federal Entity

FRG = Family Readiness Group

Appendix B

Table of Commonly-Used Resources

RESOURCE	LAW	REGULATION	OTHER GUIDANCE
Military Aircraft		OMB Circular No. A-126, "Improving the Management and Use of Government Aircraft" (22 May 92) DoDD 4500.56 "DoD Policy on the Use of Government Aircraft and Air Travel" (C3, 24 Jun 14) DoDD 4515.13-R "Air Transportation Eligibility" (C3, 9 Apr 98) DoDI 4500.43 "Operational Support Airlift" (C1, 26 Jun 13) Army Directive (AD) 2007-01 "Sec Army Policy for Travel by DA Officials" (25 Jan 07) AR 95-1 "Flight Regulations" (11 Mar 14)	
Government Vehicles	31 USC 1344, Passenger Carrier Use 10 USC § 2637, Transportation in Certain Areas Outside the United States 39 USC § 1349-1351, Adverse Personnel Actions, Criminal Penalty, & Reports on Violations	DoDD 4500.36-R "Management, Acquisition, and Use of Motor Vehicles" (16 Mar 07) DoDI 4500.36 "Acquisition, Management, and Use of Non-Tactical Vehicles" (C1, 25 Oct 13) Joint Travel Regulations (JTR) AD 2007-01 "Sec Army Policy for Travel by DA Officials" (25 Jan 07) AR 58-1, "Management, Acquisition, and Use of Motor Vehicles" (12 Jun 14) Air Force Instruction (AFI) 24-301, "Vehicle Instruction" (cert. current 17 Aug 12) (contains useful guidance for official use determinations)	U.S. Civilian Board of Contract Appeals, CBCA 2852-TRAV, (28 Aug 12) (rental vehicle fees for personal use) Office of Government Ethics (OGE), No. 85 X 9 (12 Jul. 85) (use of government vehicles) Memorandum from General Counsel, Office of Gov't Ethics, to Designated Agency Ethics Officials, subject: Speaking and Similar Engagements Involving Presentation of Information on Behalf of the Agency (7 Sept. 2012) (use of government vehicles)
Public Affairs Resources	10 USC § 2012, Support and Services for Eligible Organizations Outside Department of Defense	Joint Ethics Regulation, DoD 5500.7-R (C7, 17 Nov. 11), para. 3-211 (logistical support to NFE events) DoDD 5410.18 "Public Affairs Community Policy" (cert. current 30 May 07) DoDI 5410.19 "Public Affairs Community Relations Policy Implementation" (13 Nov 01) AD 2008-01 "Army Aircraft Use for Public Affairs Mission" (02 Nov 10)	

		AR 360-1 "The Public Affairs Program" (25 May 11) AR 220-90 "Army Bands" (14 Dec 07)	
RESOURCE	**LAW**	**REGULATION**	**OTHER GUIDANCE**
Non-Federal Entities	10 USC § 2558, National Military Associations, Assistance at National Conventions	Joint Ethics Regulation, DoD 5500.7-R (C7, 17 Nov 11), para. 3-212 (special relationships) Joint Ethics Regulation, DoD 5500.7-R (C7, 17 Nov 11), para. 3-211 (logistical support to NFE events) DoDD 1000.26E "Support for Non-Federal Entities Authorized to Operate on DoD Installations" (2 Feb 07) DoDI 1000.15 "Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations" (24 Oct 08) AR 210-22 "Private Organizations on Department of the Army Installations" (22 Oct 01)	
Communication Resources		Joint Ethics Regulation, DoD 5500.7-R (C7, 17 Nov 11), para. 2-301a Fed. Prop. Mgmt. Reg. § 101-35.201-2, Authorized Use of Long Distance Telephone Services, Collection for Unauthorized Use AR 25-1 "Army Information Technology" (25 Jun 13) AR 25-2 "Information Assurance" (RAR 23 Mar 09)	
Personnel & Time	5 USC § 4110, Expenses of Attendance at Meetings	Joint Ethics Regulation, DoD 5500.7-R (C7, 17 Nov 11), para. 3-300, 3-303 5 CFR § 251.202, Agency Support to Organizations Representing Federal Employees and Other Organizations 5 CFR § 2635.705, Use of Official Time DoDI 1315.09 "Utilization of Enlisted Personnel on Personal Staffs of General and Flag Officers" (6 Mar 15)	
Official Mail		DoD 4525.8-M "DoD Official Mail Manual" (26 Dec 01) AR 25-51 "Official Mail and Distribution Management" (14 Jan 15)	
Resources Generally		5 CFR § 2635.704, Use of Government Property	

		Joint Ethics Regulation, DoD 5500.7-R (C7, 17 Nov 11), para. 2-301b AR 608-1, App. J "Army Community Service" (13 Mar 13) (FRGs)	

Appendix C

Practice Pointers

A. Intake

A request to use government resources cannot be comprehensively and accurately analyzed without complete information about the nature of the event and the specific support requested. Gathering this information requires a systematic process for request intake. Personnel requesting armed forces participation in public or NFE events should fill out the standard form for support—DD Form 2536.[183] For installations where it is not a standard practice, promoting use of the standard form may require JAs to insist that garrison or unit personnel who initially field such requests require its use when interfacing with NFEs. Use of such a form ensures consideration of JER 3-211a criteria;[184] comparable treatment for similarly-situated NFEs and events;[185] a historical record, especially where the legal review is later attached; and, efficient processing of requests. For these same reasons, JAs are encouraged to develop and use a standardized form for requests to provide support to unit events, such as the military ball or unit's organization day.[186]

B. Research

Thorough research of regulatory resources and advisory opinions, and consultation with the field, will help JAs arrive at the best solution for use of resources. Judge advocates should begin with the overarching rules contained in the law and Code of Federal Regulations and then systematically work through the JER, DoD, and service regulations for a particular resource.[187] Judge advocates should also search the Office of Government Ethics legal advisories[188] and Government Accountability Office legal decisions[189] databases, where regulations are silent or inconclusive.[190] To ensure some degree of uniformity across the field for events that share similar characteristics, JAs should reach out to fellow Brigade JAs within the unit and reach up to administrative law attorneys at the installation or higher headquarters, as they have likely fielded a similar request. The Administrative Law Group on milSuite[191] also serves as a great resource and contains numerous

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[183] U.S. DEP'T OF DEF., FORM 2536, REQUEST FOR ARMED FORCES PARTICIPATION IN PUBLIC EVENTS (Oct. 2010).

[184] *See supra* note 63 and accompanying text.

[185] *See supra* note 174 and accompanying text.

[186] These forms should be standardized across units to the extent possible. For instance, each Brigade Judge Advocate within a Division on the same installation should be utilizing a common form.

[187] *See* discussion *supra* Part II.A.

[188] U.S. OFFICE OF GOV'T ETHICS, LEGAL ADVISORIES, http://www.oge.gov/OGE-Advisories/Legal-Advisories/Legal-Advisories/ (last visited Jan. 23, 2015).

[189] U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/ (last visited Jan. 23, 2015).

[190] *See supra* note 15 and accompanying text.

[191] JAG CONNECT—ADMINISTRATIVE LAW, https://www.milsuite.mil/book/groups/jagconnect-army-administrative-law (last visited Jan. 23, 2015).

discussions regarding the official or unofficial nature of particular events such as military balls[192] or staff rides.[193]

C. The Legal Review

When writing the legal opinion, set out the general rules for using government resources and any applicable ethics principles that apply.[194] With respect to unofficial events, these general rules and principles set a tone for the opinion and inform the reader that he or she is generally working within an *exception* to the general rule.[195] Highlight any guidance in the regulation regarding how questions of interpretation should be viewed, if the proposed use does not squarely fit within an authorized purpose.[196]

Clearly identify the exception that authorizes the use and set out a detailed analysis of how the proposed use meets each factor of any limiting criteria.[197] Provide the commander with courses of action and outline the risks associated with each one. If there are any relevant examples of similar conduct that have come under scrutiny and investigation, point out these examples,[198] even where an investigation was unsubstantiated, but received media coverage.[199] Include the ethics [200]principle regarding the appearance of impropriety, where applicable. Even where a particular use of a resource is technically legal and may fit within an authorized use, will it appear as though there was impropriety or illegality? Does it appear to the average observer that the use was provided because of rank or personal convenience?[201] Lastly, outline any current fiscal restrictions on use of the resource.[202]

D. Prevention

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[192] *See, e.g.*, Peter Grayson, et al, *Military Balls*, JAG CONNECT—ADMINISTRATIVE LAW (Oct. 11, 2012, 8:38 AM), https://www.milsuite.mil/book/thread/25539.

[193] *See*, e.g., Mark Robinson, et al, *Staff Ride Legal Analysis*, JAG CONNECT—ADMINISTRATIVE LAW (Oct. 14, 2014, 6:24 AM), https://www.milsuite.mil/book/thread/131886?sr=stream&ru=148960.

[194] *See supra* notes 17-20.

[195] *See* discussion *supra* Part.II.B.3.

[196] *See generally* DoD 4500.36-R, *supra* note25, para. C2.5 (stating that questions regarding official use of a government vehicle should be decided in favor of "strict compliance" with law and regulation); Army Dir. 2007-01, *supra* note 50 ("Accordingly, the terms of this policy must be complied with strictly and the terms permitting use of departmental transportation resources construed narrowly.").

[197] *See supra* note 63 and accompanying text.

[198] *See* sources cited *supra* note 2 and accompanying text.

[199] Craig Whitlock & Rajiv Chandrasekaran, *Scandal Probe Ensnares Commander of U.S., NATO Troops in Afghanistan*, WASHINGTON POST, Nov. 13, 2012, http://www.washingtonpost.com/world/national-security/scandal-probe-ensnares-commander-of-us-nato-troops-in-afghanistan/2012/11/13/a2a27232-2d7d-11e2-a99d-5c4203af7b7a_story.html (explaining how the Federal Bureau of Investigation uncovered twenty to thirty thousand pages of documents containing government e-mails that showed inappropriate conversations between General Allen and Jill Kelley, a woman whose report of harassment identified General Petraeus's mistress).

[200] *See* source cited *supra* note 16 and accompanying text.

[201] *See supra* note 88 and accompanying text.

[202] *See* sources cited *supra* notes 163-165.

Judge advocates must be proactive in spotting the potential issues for the command through active engagement in the planning process.[203] To achieve this objective, JAs should attend the Interim Progress Reviews (IPRs) and read any Operations Orders (OPORDs) published regarding official events.[204] Coordinate with the aide and the support staff if you support a general officer. Tie in with the S3 at the Brigade and stay abreast of key events. Know when key events will occur, such as changes of command, and disseminate a few pointers to the staff to avoid common pitfalls.[205] Provide desk-side ethics briefings to new entrant financial disclosure filers[206] and emphasize recent ethical hiccups. Judge Advocates need not wait to approach the yearly ethics training deadlines and can get ahead of the issues.

The DoD IG investigation of General Ward also chronicled the failure to follow legal advice and the lack of protection afforded a commander's decision where it ignores legal advice.[207] Judge Advocates must build trust, rapport, and credibility with the commander to foster a relationship where the commander comes to rely upon the advice of his lawyer. Early and frequent interaction to help the commander legally and ethically achieve his or her objectives will cultivate this relationship.

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[203] *See* FM 1-04, *supra* note4, ch. 6.

[204] *See id.*

[205] *See id.*

[206] *See* 5 C.F.R. § 2634.201 (2014) (public financial disclosure requirements); *id.* § 2634.903 (confidential financial disclosure requirements).

[207] *See supra* note 3 and accompanying text.

Sheathing the Jurisdictional Sword: Constraining the Application of Article 2(c), UCMJ, to the Reserve Components

Major T. Scott Randall and Captain Brandon M. O'Malley*

I. Introduction.

On March 16, 2015, the Court of Appeals for the Armed Forces (CAAF) issued its much anticipated opinion in *U.S. v. Morita*.[1] This case explored the limits of applying Article 2(c) of the Uniformed Code of Military Justice (UCMJ) to the reserve components.[2] At issue in *Morita* was whether UCMJ jurisdiction could be applied to an Air Force lieutenant colonel who signed the majority of his fraudulent travel vouchers and requests for orders while not subject to active duty or inactive duty training (IDT) orders.[3] The case allowed CAAF to refine its opinion in *United States v. Phillips* and to establish the parameters for future application of Article 2(c).[4]

II. Background.

Traditionally, reserve component service members have only been subject to the UCMJ under two provisions of the code. Pursuant to Article 2(a)(1), reserve component servicemembers under a call or order for duty or training, are subject to the UCMJ from the dates when they are required by the terms of the order to obey it (active duty provision).[5] Further, under Article 2(a)(3) of the UCMJ, "members of the reserve component while on inactive-duty training" are also subject to the UCMJ (IDT provision).[6] Therefore, reserve component service members are only explicitly subject to UCMJ jurisdiction when performing active duty or IDT.[7]

United States v. Phillips marked the first occasion in which the CAAF exclusively applied Article 2(c) of the UCMJ to the reserve components thereby recognizing a third way to attach UCMJ jurisdiction to reserve service members.[8] In *Phillips*, an Air Force Reserve lieutenant colonel admittedly ingested marijuana-laced brownies while in a travel status the night before her annual training order was to begin.[9] The officer argued that the Air Force lacked jurisdiction over her use of marijuana because her active duty tour was not scheduled to begin until 0730 on 12 July.[10] The officer's orders required her to report for duty on 12 July and to be released from duty on 23 July with an optional one day of travel on 11 July.[11] Instead of applying its traditional analysis under Article 2(a)(1) of the UCMJ, the court found the officer subject to the Code on 11 July (her travel day) under Article 2(c).[12]

With regard to Article 2(c), the UCMJ establishes a specific analytical framework for its application.[13] The first

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[1] *See* U.S. v. Morita, No. 14-5007, 2015 CAAF LEXIS 238 (C.A.A.F. Mar. 16, 2015).

[2] *Id.* at *20-21.

[3] *Id.*

[4] *See* United States v. Phillips, 58 M.J. 217 (C.A.A.F. 2003). Court-martial jurisdiction is dependent upon personal and subject matter jurisdiction, in addition to a properly constituted court martial. *See* United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002). Subject matter jurisdiction is concerned with UCMJ violations committed by persons subject to the Code. *See* United States v. Chodara, 29 M.J. 943, 944 (A.C.M.R. 1990). Thus, a court-martial has subject matter jurisdiction only over those violations of the UCMJ, which are committed by persons who are subject to the Code at the time of the offense. *See id.* Conversely, personal jurisdiction looks at both military control over the individual at the time of trial and at the time of the offense. *See Oliver*, 57 M.J. at 172. Personal jurisdiction (and to a large extent subject matter jurisdiction) is governed by Article 2 of the UCMJ. *See* UCMJ art. 2 (2012); *see also Ali*, 71 M.J. at 265.

[5] *See* UCMJ art. 2(a)(1). The provision reads:

> Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it. *Id.* This means that Reserve component Soldiers ordered to annual training (AT), active duty for training (ADT), or other forms of active duty are subject to the Uniform Code of Military Justice (UCMJ). *See id. See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 202 discussion (2)(A)(i) (2012) [hereinafter MCM].

[6] *See* UCMJ art. 2(a)(3) ("[m]embers of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service."); *see also* MCM, *supra* note 5, R.C.M. 204.

[7] *See* UCMJ arts. 2(a)(1), 2(a)(3).

[8] *See Phillips*, 58 M.J. at 220. *See also* United States v. Ernest, 32 M.J. 135, 138-39 (finding an alternate basis for jurisdiction under Article 2(c) for a Reserve Component service member whose voluntary request for continuation orders during his court martial was not properly processed by the Air Force.)

[9] *See Phillips*, 58 M.J. at 218.

[10] *Id.* at 217.

[11] *Id.* at 217-18.

[12] *Id.* at 219.

[13] *See* UCMJ art. 2(c) (2012). Article 2(c) is known as the "constructive enlistment" provision and was added to the UCMJ in reaction to the "*Russo* Doctrine," which held the Government could be estopped from showing jurisdiction when recruiter misconduct affected the accused's enlistment.

step in the analysis looks at whether the service member is "serving with an armed force."[14] If this can be established, the court then applies a four part test set out in Article 2(c).[15] First, the service member must voluntarily submit to military authority.[16] Second, the service member must meet the mental competence and minimum age qualifications of the service at the time of voluntary submission to military authority.[17] Third, the service member must receive military pay and allowances.[18] Finally, the service member must perform military duties until such service has been properly terminated.[19]

In applying Article 2(c) to the case, the court in *Phillips* reasoned the officer was clearly a member of the force because: (1) on the travel day, she was a member of a reserve component; (2) she traveled to a military base on her travel day pursuant to military orders, and she was reimbursed for her travel expenses; (3) the orders were issued for the purpose of performing active duty; (4) she was assigned to military quarters, she occupied those quarters, and she committed the charged offense in those quarters; (5) she received military service credit in the form of a retirement point for her service on that date; and (6) she received military pay and allowances for that date.[20]

With respect to the four-prong analysis, the officer had submitted to military authority by voluntarily traveling on 11 July and accepting the military conditions of her travel to use government quarters.[21] Further, the officer clearly met age and mental requirements for active service and received pay and allowances for the day of travel.[22] The court also found the officer performed military duties on her travel day.[23] It stated, "Travel is a normal part of military duty. In the discharge of that duty, it was incumbent upon the appellant to adhere to military standards and to the UCMJ."[24] Therefore, the court found jurisdiction over the case pursuant to Article 2(c) of the UCMJ.[25]

Although not at issue in *Phillips*, the court's dicta from an unpublished opinion in 2000, where the court potentially found jurisdiction outside of traditional constraints, is also relevant to the issue of reserve component jurisdiction.[26] In *United States v. Morse*, an Air Force Reserve colonel was convicted of attempted larceny and filing false travel vouchers in conjunction with active duty and IDT.[27] On appeal, Colonel Morse argued that he signed several of his vouchers after he was released from active duty or IDT, and jurisdiction was, therefore, lacking.[28] However, the officer had previously stipulated at trial that he was serving on active duty or IDT when he signed all the vouchers, and, hence, the military judge found jurisdiction over the offenses.[29] Though this could have ended the analysis, the court then went further, adding:

> Finally, even if we were to ignore the overwhelming evidence of subject matter jurisdiction noted above, we would still find jurisdiction based upon the simple and undeniable fact that the appellant signed these forms in his official capacity as a reserve officer in the United States Air Force. It was part of his duty incident to these reserve tours or training to complete these forms with truthful information and that duty was not complete until the forms were signed, regardless of whether or not he completed travel pursuant to his orders. Therefore, it is immaterial if the appellant did not sign these

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See U.S. v. Quintal, 10 M.J. 532, 534 (A.C.M.R. 1980). The Congressional Report on the provision states:

> "The committee strongly believes that [the *Russo* doctrine serves] no useful purpose, and severely undermine[s] discipline and command authority. No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result. That policy makes a mockery of the military justice system in the eyes of those who serve in the military services." *Id.* (quoting S. Rep. No. 96-197, 96th Cong., 1st Sess. 121, 122 *reprinted in* [1979] U.S. Code Cong. & Ad. News 1827, 1828).

[14] United States v. Fry, 70 M.J. 465, 469 (C.A.A.F. 2012). "The phrase 'serving with' an armed force has been used to describe persons who have a close relationship to the armed forces without the formalities of a military enlistment or commission. *Phillips* at 219. "The question of whether a person is 'serving with' the armed forces is dependent upon a case-specific analysis of the facts and circumstances of the individual's particular relationship with the military, and means a relationship that is more direct than simply accompanying the armed forces in the field." *Id.*

[15] *See* U.S. v. Lawanson, No. 201200187, 2012 CCA LEXIS 345, *24 (N-M. Ct. Crim. App. Aug. 31, 2012).

[16] *See Phillips*, 58 M.J. at 219.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 220.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See* United States v. Morse, No. 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000).

[27] *Id.* at 1.

[28] *Id.* at 16.

[29] *Id.*

> forms until after completing his travel. He did so in a duty status.[30]

Thus, with its dicta, the court opened the door to an expanded interpretation of UCMJ jurisdiction over reserve component service members.[31]

III. *U.S. v. Morita*.

Fifteen years after *Morse*, the Air Force Court of Criminal Appeals (AFCCA) re-examined the expansive dicta in that decision, as well as the criteria for determining jurisdiction under Article 2(c).[32] In *United States v. Morita*, Lieutenant Colonel (Lt Col) Steven S. Morita, the appellant, was a member of the Air Force Reserve who frequently traveled to various medical units, assisting in the planning, design, and development of construction projects.[33] As the only reserve service member assigned to his unit, Lt Col Morita used the relative inexperience of, and lack of oversight by, his supervisor to forge signatures on "numerous travel orders and vouchers, reimbursement documents, active duty orders, and IDT records."[34] In all, Lt Col Morita forged 510 signatures or initials on over 100 documents, netting him $124,664.03 in fraudulent funds.[35] As his fraudulent activities covered a long period of time and allegedly took place while he was on active duty orders, on IDT, and serving with the armed forces (though not covered by military orders), the government claimed jurisdiction over Lt Col Morita based on both Article 2(a) and Article 2(c).[36]

At his court-martial, the military judge determined jurisdiction under Article 2(c) existed for Lt Col Morita's fraudulent activities during those periods not explicitly covered by military orders by relying on the *Morse* dicta, which arguably predicated jurisdiction on committing any act merely related to reserve duties.[37] The military judge found that Lt Col Morita's actions took place in his official capacity as a reserve officer, thereby establishing he "served with an armed force," notwithstanding the fact many of the fraudulent acts occurred when the officer was not on active duty or IDT.[38] Further, the military judge determined that Lt Col Morita's status as a reserve officer alone met the four-part test in Article 2(c) without any additional factual showing by the government.[39] Thus, the military judge found jurisdiction over the case.[40]

However, the AFCCA declined to follow the trial court's decision and rejected the expansive language in *Morse*, reasoning that the *Phillips* decision precluded a broad and expansive application of the dicta in the unpublished decision.[41] Further, the court pointed to the legislative history of Articles 2(a) and 2(c) to conclude that reserve members should not "automatically be subject to military jurisdiction at any time he or she commits an act merely related to his reserve duties."[42] In addition, the AFCCA feared that the expansive reasoning used in *Morse* would allow "the floodgates of UCMJ jurisdiction . . . to be opened for reservists for actions long considered outside the scope of court-martial jurisdiction."[43]

Rather than rely on *Morse*, the AFCCA used the fact-specific analysis applied in *Phillips* to determine whether jurisdiction under Article 2(c) was triggered.[44] In so doing, the Court distinguished the numerous facts in *Phillips*, showing the officer "served with" an armed force with the dearth of facts supporting such a conclusion in *Morita*.[45] According to the AFCCA, the only factor showing jurisdiction that existed at the time Lt Col Morita forged his travel documents was the fact that he was "a member of a reserve component on the dates in question."[46] As a result, the court found "this factor alone was insufficient to trigger the Article 2(c), test for jurisdiction."[47]

The court made its finding notwithstanding the fact that Lt Col Morita's offenses were "military specific" and not committed by a reserve member "in a purely civilian capacity with no connection to the military."[48] However, the Court reasoned that Lt Col Morita's use of his "knowledge of military procedures to forge signatures" was a "far cry" from the facts in *Phillips* which showed the reserve service

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[30] *Id*.

[31] *Id*.

[32] *See* United States v. Morita, 73 M.J. 548 (A.F. Ct. Crim. App. 2014).

[33] *Id*. at 551.

[34] *Id*. at 551-52.

[35] *Id*. at 553; *see Morita*, 2015 CAAF LEXIS at *7.

[36] *See Morita*, 73 M.J. at 554.

[37] *Id*. at 554, 561-62.

[38] *Id*. at 554.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 561-62.

[42] *Id*.

[43] *Id*. at 560.

[44] *Id*.

[45] *Id*. at 560-61.

[46] *Id*. at 560.

[47] *Id*.

[48] *Id*.

member "served with" an armed force.[49] Of significance to the court was the government's failure to demonstrate that Lt Col Morita was compensated or received retirement credit for the "mere-act of completing travel-related forms."[50] The court recognized that he may have later received compensation for his fraudulent activity, but found this did not satisfy the third criteria of Article 2(c), which required he receive compensation on the dates the offenses were committed.[51]

The CAAF granted review of the *Morita* decision and, in doing so, firmly answered whether jurisdiction exists under Article 2(c) for reserve servicemembers, based solely on the fact that they are members of a reserve command and acting in a manner related to their duties.[52] The answer is no.[53] Agreeing with the AFCCA, the CAAF found that Lt Col Morita's status as a member of a reserve component was insufficient, by itself, to find that he was "serving with an armed force" under Article 2(c), UCMJ.[54] In examining whether Lt Col Morita "served with an armed force," the CAAF, like the AFCCA, distinguished the numerous facts alleged by the government in *Phillips* with lack of such facts in the record in *Morita*.[55]

The decision solidified the analysis required for finding jurisdiction under Article 2(c), UCMJ. Specifically, the CAAF held the government must prove jurisdiction by showing that, as a threshold issue, a reserve servicemember "served with an armed force."[56] The court also made clear that the government must next prove that Article 2(c)'s four-part test is satisfied.[57] The four-part statutory test is satisfied when the government shows, by a preponderance of the evidence,[58] that each of the four elements described above is met.[59] In *Morita*, CAAF noted that none of the four statutory criteria for jurisdiction were met.[60] Using an example of the government's failure on just one element, the CAAF declared that the "Government did not demonstrate that [Lt Col Morita] received any compensation or retirement credit for days on which he merely initiated the issuance of or completed travel forms…, or established that [he] otherwise performed military duties during these times."[61]

IV. Conclusion.

The *Morita* decision serves as a warning to trial counsel attempting to prove jurisdiction over a reserve servicemember outside of the enumerated boundaries of Articles 2(a)(1) (active duty) and 2(a)(3) (IDT). The UCMJ requires they come armed with sufficient facts to show that each of the statutory factors enumerated under Article 2(c) are met.[62] In fact, following *Morita*, it is difficult to imagine a scenario when jurisdiction could be shown under Article 2(c) for a reserve component servicemember outside of performing a travel day as described in *Phillips*.[63]

A careful reading of *Morita* should give the military justice practitioner pause when faced with a situation where a reserve servicemember commits a potentially criminal act under the UCMJ when not performing active duty or IDT. The expansive language used by the court in *Morse* can no longer be cited as persuasive authority for courts to look outside of the strict parameters of the reserve servicemember's orders to find jurisdiction.[64] As stated by William Shakespeare when contemplating the timing of things: "There is a tide in the affairs of men which, taken at the flood, leads on to fortune; omitted, all the voyage of their life is bound in shallows and in miseries."[65]

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[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *See* United States v. Morita, No. 14-5007, 2015 CAAF LEXIS 238 (C.A.A.F. March 16, 2015).

[53] *Id*. at *19-20.

[54] *Id*.

[55] *Id*.

[56] *Id*. at *3, *19. The Court affirmed that a member has "served with an armed force" when they have "a close relationship to the armed forces without the formalities of a military enlistment or commission." *Phillips*, 58 M.J. at 220.

[57] *Id*. at *4, *19.

[58] *Id*. at *12-13 (citing United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F 2002)).

[59] *Id*. at *5.

[60] *Id*. at *20.

[61] *Id*.

[62] *Id*. at *18-19.

[63] *Id*.

[64] *Id*. at *19.

[65] WILLIAM SHAKESPEARE, JULIUS CAESAR, act 4, sc. 3..

What Do You Mean There Are No Copyrights in My Master's Thesis? Written Works by Government Personnel – A Short Primer*

*Captain Brian A. Pristera***

I. Introduction

Copyrights are intended to help protect authors from having their written works published or distributed without their consent.[1] However, no U.S. copyright exists in written works created by a government employee (civilian employees and uniformed personnel) as part of his/her official duties. This includes papers written pursuant to assignment to a military school, as part of a government funded master's program, or during the normal course of duty. Accordingly, the government is free to reproduce, publish, or otherwise disseminate such written work, with or without the government employee-author's consent.[2] Government employees who have authored works as part of their official duties may, with appropriate government approval, also seek to have their writings published. Government employees, however, must remain mindful of legal restrictions concerning receipt of compensation for their written work and the general ethics guidance outlined below. Government employees may not profit from any written work created as part of their official duties.[3]

This article addresses U.S. copyright law and ethics rules relating to written works by government employees. This article does not address international copyright laws or how any of these laws apply to works of U.S. government contractors.[4] The appendix is a quick reference table designed to help a practitioner quickly answer basic copyright questions regarding a written work of a government employee-author. Many copyright issues are fact specific and all questions should be thoroughly run to ground prior to rendering a legal opinion. Finally, Army Regulation (AR) 27-60, Intellectual Property, is currently under revision. This article references both the current regulation and the current draft revisions to AR 27-60. Substantively, there is little, if any, difference in the portions used herein.

II. What Is a "Work of the United States Government"?

A "work of the United States government" is a work prepared by a government employee as part of that person's official duties.[5] Army Regulation 27-60 provides a framework for determining the rights of both a government employee-author and the government concerning works authored by government employees.[6] Whether a U.S. copyright exists in a written work authored by a government employee depends on whether the work is created as part of that individual's official duties.[7] A written work authored as part of a government employee's official duties *is not* protected by U.S. copyright law.[8] Conversely, a written work authored by a government employee outside and independent of her official duties *is* protected by U.S.

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[1] AR 27-60, Intellectual Property, discusses Intellectual Property and provides an overview of what a "copyright" is. The current Draft AR 27-60, paragraph 4-1, provides the following information on copyrights:

> A copyright is a legal collection of rights that exists in a work of creative expression such as writings, drawings, photographs, graphic designs, architectural plans, motion pictures of every kind or technique, music, and sound recordings. The copyright exists at the moment a work is created and fixed in any medium capable of being perceived and reproducing or communicating the work. Historically, such media have been paper, film, magnetic tape, vinyl records, compact discs, fine art and graphic art media, sculptural materials, and any manner of other digital or analog storage media from which the work might be perceived. Software may be protected by copyright, and in some cases, by patents. Although common, a copyright notice or marking such as "©" or "Copyright" is not required for copyright protection to exist. A copyright is not the physical work itself, but the rights accruing to the copyright owner under the U.S. Copyright Act, Title 17, United States Code.
>
> A copyright owner has the exclusive right to: reproduce (make copies of), distribute, perform publicly, display publicly, or make certain modifications (called "derivative works") to the copyrighted work.

U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY (1 June 1993 [hereinafter AR 27-60]; U.S. DEP'T OF ARMY, REG. 27-60, INTELLECTUAL PROPERTY (Draft) (Dec. 19, 2014) [hereinafter AR 27-60 (Draft)], para. 4-1 (2014).

[2] AR 27-60, paras. 4-3(a) and (e).

[3] 18 U.S.C. § 209; 5 C.F.R. § 2635.807(a) (2015).

[4] DoD contracts involving written work (or any potentially copyrightable work) should include Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.204-7000, Disclosure of Information, clause 252.227-7020, Rights in Special Works, and /or other appropriate language, as the circumstances of the contract will dictate, addressing the handling of written works and copyrights produced under the contract.

[5] 17 U.S.C. § 101 (Dec. 19, 2014).

[6] *See* AR 27-60, *supra* note 1 para. 4-3.

[7] 17 U.S.C. §§ 101, 105 (Dec. 19, 2014). *See also* AR 27-60,para. 4-3(b).

[8] 17 U.S.C. §§ 101, 105 (Dec. 19, 2014).

copyright law.[9] Note, however, that even if a copyright exists in a work authored outside and independent of official duties, if government time or resources were used to create it, the government may automatically retain rights to publish, disseminate, and use the work without penalty for infringement, because government resources were used to create it.[10]

In any case, and with all written works, government employees must remain mindful of Joint Ethics Regulation (JER) guidance, which generally prohibits government employees from profiting or receiving any personal gain for official work.[11] Furthermore, use of official time or resources to complete personal works may constitute misuse of government resources in violation of the JER or other law or regulation.[12]

III. Application of U.S. Copyright Law to Written Works of Government Personnel

a. Works Created as Part of Official Duties

As stated above, there is no U.S. copyright protection in any work created by a government employee as part of her official duties.[13] The fact that no U.S. copyright exists in such works does not mean, necessarily, that the work must be released to the public.[14] Rather, there is simply no legal course of action under U.S. copyright law to protect the work.[15] For example, if a servicemember attends a military or civilian school as part of her official duties (e.g., Command and General Staff College, Army War College, or state university/college as part of an advanced civil schooling program), and part of the curriculum requires writing a thesis, that thesis would be considered a "work of the United States government," and no U.S. copyright would exist. In this scenario, the servicemember-author could seek publication of the thesis, provided she complies with the ethics rules and applicable Department of the Army (DA) and Department of Defense (DoD) policy regarding the release of information.[16] Likewise, since no U.S. copyright exists in a "work of the United States government," the respective military or civilian school could also publish the same thesis without permission from the author or the government.[17]

b. Works Created Using Government Time and/or Resources, But Not as Part of Official Duties

If a government employee uses government time and/or resources to complete personal work (i.e., work not part of official duties), a U.S. copyright in the work may exist and it is possible for the employee to seek registration of the copyright.[18] However, the government would also effectively hold a license to use the work and the employee would not have any legal course of action against the government for infringement.[19] Also note that when government time or resources are used for personal work, the JER and ethics rules may be implicated, as discussed below.

c. Works Created on Personal Time with Personal Resources

Finally, a government employee holds a U.S. copyright in any work created on personal time with personal resources, and is not subject to any U.S. copyright restrictions based on her status as a government employee.[20] Simply put, a

[9] 17 U.S.C. § 102 (Dec. 19, 2014).

[10] 28 U.S.C. § 1498(b) (Oct. 28, 1998). *See also* AR 27-60, para. 4-3(d).

[11] U.S. DEP'T OF DEF., 5500.7 R, JOINT ETHICS REGULATION (JER) para. 3-205 (Nov. 17, 2011) [hereinafter JER]; 18 U.S.C. § 209(a) (Dec.19, 2014).

[12] JER, para. 2-301(b), 3-303; 5 C.F.R. §§ 2635.704 – 705 (Apr. 2, 2015).

[13] 17 U.S.C. § 105 (Dec.19, 2014). Note that even if the work is written or produced using personal time and/or personal resources, it can still be a "Work of the United States Government" if it was completed as part of an official duty.

[14] *See generally*, U.S. DEP'T OF DEF., DIR. 5230.09, CLEARANCE OF DOD INFORMATION FOR PUBLIC RELEASE (22 Aug. 2008) [hereinafter DoDD 5230.09]; U.S. DEP'T OF DEF., DIR. 5230.29 SECURITY AND POLICY REVIEW OF DOD INFORMATION FOR PUBLIC RELEASE (13 Aug. 2014); U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM chs. 5, 6 (25 May 2011) [hereinafter AR 360-1].

[15] 17 U.S.C. § 105 (Dec.19, 2014).

[16] DoDD 5230.09; DoDI 5230.29; AR 360-1, chs. 5, 6.

[17] Certain restrictions may still apply if the work contains non-public information. *See* AR 360-1, ch. 6. *See* 5 C.F.R. § 2635.703(b) for a definition of "non-public information."

[18] 17 U.S.C. §§ 101, 105 (Dec.19, 2014); 28 U.S.C. § 1498(b) (Dec.19, 2014).

[19] 28 U.S.C. § 1498(b) (Dec.19, 2014). *See also* AR 27-60 (Draft), paras. 4-3(c) and (d), which articulate these principles as follows:

> The use of Government time, material, or facilities in creating a work does not necessarily result in that work being a work of the United States Government. Also, unless the work is prepared as part of the employee's official duties, the subject matter of the work does not automatically establish the work as a work of the United States Government. This is true even though the subject matter of the work may be directly related to the author-employee's official duties. Thus, the above factors do not preclude the existence of a copyright belonging to the author-employee. However, the use of Government time, material, or facilities for personal projects may result in a violation of AR 600-50. (We know this is obsolete, and in revisions has been changed to "…may result in a violation of the Joint Ethics Regulation…")
>
> When Government time, material, or facilities are used in the preparation of a work by a Government employee, even if a copyright exists in the work, and is owned by the employee, 28 USC 1498(b) does not confer a right of action by the copyright owner against the Government for infringement. This is interpreted to mean that the Government is entitled to a royalty-free license to duplicate, distribute, and use the copyrighted work, and to have others do so for the Government's benefit.

[20] 17 U.S.C. § 102 (Dec. 19, 2014).

government employee in this scenario would be entitled to the same copyright protection afforded a non-employee. This is true even if the subject matter of the work overlaps with the nature of the author's government employment.

Importantly, the existence of a U.S. copyright in a work about (or relating to) an employee's official duties does not—in and of itself—authorize a government employee to disclose or publish "non-public information."[21] Absolutely nothing in U.S. copyright law or in AR 27-60, should be construed to permit disclosure of government information simply because the author holds a U.S. copyright. Prior to release of any such work, appropriate legal and security reviews must be obtained to ensure compliance with DA and DoD Policy regarding the release of information.[22] There may also be additional restrictions on the government employee-author profiting from work relating to a government employee's job.[23]

d. Use of Copyrighted Works Within Works of the United States Government

Using all or part of a copyrighted work, within a work of the United States government, requires permission from the copyright owner.[24] For example, if a government employee, as part of her official duties, writes an article and includes a copyrighted photo, the U.S. government must have properly documented authority to use the photo from the copyright owner. Additionally, the copyright owner will retain the copyright after the government work is published. Subsequent use by the government may require additional permission from the copyright owner.

e. Publication of Government Information

The specific facts and circumstances associated with any particular writing, and the type of publication sought, will dictate who the appropriate authority is to authorize publication, as well as what additional review/authorization, if any, is needed.[25] In accordance with DoD policy, "a security and policy review shall be performed on all official DoD information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the [DoD]."[26] "Clearance, through security review and PA [public affairs] channels, is required for all official . . . writings that are presented or published in the civilian domain, to include materials placed on the Internet or released via similar electronic media."[27] Writings that pertain to military matters, national security issues, or subjects of significant concern to the DoD, should be "submitted to the appropriate PAO [Public Affairs Office] who will prepare material for release and ensure a security review is conducted."[28] Additionally, the servicing PAO "either will grant clearance or forward the information to the appropriate headquarters for clearance."[29] In any event, if either the government or an employee-author wishes to pursue release of government information (i.e., publish written works), the servicing PAO should be contacted first, prior to publication, to facilitate appropriate legal, policy, and security reviews.

IV. Application of Ethics Rules

Separate and apart from the associated copyright issues in the scenarios outlined above, all government employees must remain mindful of the following ethical rules as they relate to written works.[30]

a. Misuse of Position

The Federal Standards of Conduct prohibit government employees from misusing their official positions.[31] Specifically, government employees may not: (1) use public office for private gain; (2) use non-public information to further a private interest; (3) use government property for unauthorized purposes; or (4) use official time, including a subordinate's time, to perform non-official duties.[32]

b. Compensation for Written Work.

Receipt of non-federal compensation for official writing is restricted by criminal and regulatory law, and supplementation of salary is not authorized.[33] Compensation for writing in a personal capacity may also run contrary to ethics regulations, depending on the circumstances.[34] If a government employee's writing falls within any one of several categories, then the employee may

[21] 5 C.F.R. § 2635.703(b) (Apr. 2, 2015).

[22] *See infra* III.d.

[23] *See infra* IV.b.

[24] 17 U.S.C. § 106 (Dec. 19, 2014).

[25] *See generally*, AR 360-1, ch. 5.

[26] DODI 5230.09 *supra* note 14.

[27] AR 360-1, para. 6-1(b)

[28] AR 360-1, para. 5-3(c)(1)

[29] AR 360-1, para. 5-3(c)(1)

[30] Note that DoDD 5500.07 republishes and specifically makes most provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635) applicable to enlisted personnel. As a practical matter, the ethics rules identified in this information paper should be considered by, and consistently applied to, all DoD personnel, including DA Civilians, military officers, and enlisted personnel.

[31] 5 C.F.R. §§ 2635.702 – 705 (Apr. 2, 2015).

[32] 5 C.F.R. §§ 2635.702 – 705 (Apr. 2, 2015).

[33] 18 U.S.C. § 209; 5 C.F.R. § 2635.807(a) (2015).

[34] *See* 5 C.F.R. §§ 2635.807(a)(2)(i)(A)-(E) (Apr.2, 2015).

not receive compensation for her written work.[35] These categories include instances when: (1) the activities undertaken are part of official duties; (2) the government employee writes on topics concerning her duties or agency; (3) compensation is offered because of the employee's official position rather than expertise in the subject matter; (4) compensation is offered from a person who may be substantially affected by the employee's official duties; or (5) the information conveyed draws substantially on ideas or official data that are nonpublic information.[36]

Whether writing in an official or personal capacity, employees may not circumvent restrictions by having compensation paid to another person, including a charitable organization.[37] In such cases, the compensation is still considered to have been "received" by the employee.[38]

Therefore, current U.S. copyright and ethical laws and regulations do not prohibit a government employee from receiving compensation for work she has authored under the following circumstances: (1) when the work was authored on personal time with personal resources, it was not created as part of official duties, and the content of the work does not invoke 5 C.F.R. 2635.807(a)(2)(i); or (2) when the work was authored, at least in part, on government time and/or with some government resources, but it was not created as part of official duties, and the content of the work does not invoke 5 C.F.R. 2635.807(a)(2)(i).

c. The Appearance of Government Endorsement in Non-Government Writing

Using a government employee's title or position in connection with non-government (or outside) writing can improperly imply government endorsement. Generally, government employees may not use or permit the use of their official titles or positions in a manner suggesting that the government sanctions or endorses their outside writing.[39] There are three exceptions to this general restriction. First, an active duty Soldier or officer may use or permit the use of her rank to identify her as the author of the work.[40] Second, a reference to the government employee's title or position as one of several biographical details is permitted, if that reference is not given more prominence than other significant biographical details.[41] A reference is given more prominence than other significant biographical details when it is on the cover of a book, the book jacket, the title page, or other promotional materials for the written work.[42] Third, if the writing is being published in a scientific or professional journal, the employee may permit the use of her title and position so long as it is accompanied by a disclaimer that the views expressed in the writing do not reflect the views of the U.S. government.[43]

For example, if Colonel John Smith seeks to publish a non-government article, he may identify himself on the title page of the article as "Colonel John Smith." He may not identify himself as "Colonel John Smith, Commander, 100th Transportation Brigade." If there is a biographical footnote or paragraph listing details such as Colonel Smith's educational background, work experience, etc., then his position may be listed among those biographical details.

V. Conclusion

As discussed above, there is no U.S. copyright protection for any work created as part of a government employee's official duty. That said, a U.S. copyright exists in written works created independent of official duties. If government time and resources are used to create such an independent work, the government may have an automatic right to use or publish the work.

Importantly, government ethics rules operate independently of U.S. copyright laws. It is possible to own a U.S. copyright for an original work, but be prohibited from profiting from that work based on the author's employment or the information contained therein. Consequently, government employees need to ensure that they are in compliance with the Joint Ethics Regulation and any other ethics policies applicable to them.

Prior to release or publication of a writing, all government employees should consult with their servicing judge advocate and Public Affairs Office concerning written works, release of information, and associated ethics issues.

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[35] Specifically, two of the categories where compensation is prohibited are 5 C.F.R. § 2635.807(a)(2)(i)(E)*(1)* (an employee may not receive compensation if the subject of the activity deals in significant part with any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period) and 5 C.F.R. § 2635.807(a)(2)(i)(E)*(1)* (an employee may not receive compensation if the subject of the activity deals in significant part with any ongoing or announced policy, program or operation of the employee's agency.)

[36] 5 C.F.R. § 2635.807(a)(2)(i) (Apr.2, 2015).

[37] 5 C.F.R § 2635.807(a)(2)(iv) states that an employee "receives" compensation if it is paid: (1) to another person, including a charitable organization, on the basis of designation, recommendation, or other specification by the employee; or (2) with the employee's knowledge and acquiescence to his parent, sibling, spouse, child or dependent relative.

[38] 5 C.F.R § 2635.807(a)(2)(iv) (Apr.2, 2015).

[39] 5 C.F.R. § 2635.702(b) (Apr.2, 2015); 5 C.F.R. § 2635.807(b) (Apr.2, 2015).

[40] 5 C.F.R. § 2635.807(b)(3) (Apr.2, 2015).

[41] 5 C.F.R. § 2635.807(b)(1) (Apr.2, 2015).

[42] 5 C.F.R. § 2635.807(b)(1) (Apr.2, 2015).

[43] 5 C.F.R. § 2635.807(b)(2) (Apr.2, 2015).

APPNDIX

QUICK REFERENCE TABLE

Written Works by Government Personnel - Copyright and Ethics Rules

<table>
<tr><th>Was the Work Created as Part of Official Duties?</th><th>Was Government Time or Resources Used to Create the Work?</th><th>Does a U.S. Copyright Exist and Who Holds the Copyright?</th><th>Who has Authority to Publish the Work?</th><th>May the Employee / Author Receive Compensation for the Work?</th></tr>
<tr><td>YES

(Authoring the work was part of the employee's official duties)</td><td>YES

(Employee/Author used government time and/or resources to create the work)</td><td>NO

(No U.S. copyright exists)</td><td>GOVERNMENT**

May publish after review and clearance through PAO to the appropriate government official (See AR 360-1, chs. 5 and 6).</td><td>NO

Employee/Author may not realize any financial gain outside of federal salary.</td></tr>
<tr><td rowspan="2">NO

(Authoring the work was not part of the employee's official duties)</td><td>NO

(Employee/Author did not use any government time or resources to create the work. Work was created on personal time with personal resources only.</td><td>YES

(Held exclusively by Employee/Author)</td><td>EMPLOYEE / AUTHOR

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The Right to Use Anticipatory Self Defense Against Terror: The Tomb of Suleyman Shah and Turkey's Challenges

By Major Halil Murat Berberer[*]

I. Introduction

> I can't breathe. My lungs hurt. My skin has become rough and just being outside hurts. I follow news of death from home . . . . There was a funeral for someone who was wounded when he reached the Turkish border and who died as soon as he crossed over, as if it were fated for him to die on foreign soil, but that foreign soil cradled his torments and his deaths while his own country made him homeless and cast him out.[1]

Samar Yazbek, after witnessing many of the disastrous events that have taken place in Syria, wrote a memoir of her experiences from the Syrian civil war.[2] This war began almost six months from the day that a man burned himself in Tunisia, in silent protest to the abuses of his government.[3] This single act of desperation would trigger the protests known as the Arab Spring.[4] Tunisia, Egypt, Bahrain, Libya and Syria are among the countries most affected by the Arab Spring.[5] Unfortunately, for the Syrians, the spring would never come, only a harsh never-ending winter full of suffering and death.

Conflict in Syria triggered by the Arab Spring is now a widespread and brutal civil war resulting in death and displacement of Syrian people.[6] Due to the Syrian civil war, from 2011 to the present, there are 6.4 million people internally displaced, 191,369 people killed, and 4.7 million people in dire need of humanitarian assistance in hard to access areas.[7] However, this is not just Syria's problem. The intensity of the conflict threatens regional stability and, most notably, threatens the national security of Turkey.[8]

One key issue that is unique to Turkey and the situation in Syria is the Tomb of Suleyman Shah (the Tomb). The Tomb is a Turkish exclave[9] that until recently was located in Karakozak Village in Munbic, Syria, 37 km away from the borders of Turkey and Syria.[10] Despite its location inside Syria, the Tomb, a historical heritage and a symbol of national pride, retaining immense emotional value for Turkish people, is considered part of the sovereign territory of Turkey.[11]

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[1] SAMAR YAZBEK, A WOMAN IN THE CROSSFIRE: DIARIES OF THE SYRIAN REVOLUTION 145 (2012).

[2] *Id.*

[3] Thilo Marauhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situation of Armed Conflict—The Case of Syria*, 43 CAL. W. INT'L L. J. 402-03 (2012).

[4] Annyssa Bellal & Louise Doswald Beck, *Evaluating the Use of Force During the Arab Spring*, 14 Y.B. OF INT'L HUMANITARIAN L. 3 (2011).

[5] *Id.*

[6] *See* UN Office for the Coordination of Humanitarian Affairs, *Syria Crisis*, http://syria.unocha.org (last visited Mar. 2, 2014).

[7] *See id. See also* U.N. S.C. Rep. of the Security Council, Implementation of Security Council Resolution 2139 (2014 and 2165) (2014), U.N. Doc. S/2014/756 (2014), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_756.pdf [hereinafter Security Council Report].

[8] *See* MIT Ctr. for Int'l Studies, *Debating U.S. Interests in Syria's Civil War*, MIT CENTER FOR INTERNATIONAL STUDIES, (Sept. 16, 2013), http://web.mit.edu/cis/editorspick_audit_091613_syria.html (stating that use of chemical weapons, international terrorism, spill-over effect of civil war, mass atrocities and humanitarian disasters, refugee outflows, the movement of fighters across borders, the flow of weapons across borders can be counted as an examples of security threats for the neighboring countries and the rest of the world).

[9] The special status of the Tomb of Suleyman Shah was determined by Franco-Turkish Agreement. *See* Fr.-Turk., Oct. 20, 1921, *available at* http://www.turkishweekly.net/columnist/3528/october-1921-1968-2011-the-new-ankara-agreement-and-its-context.html [hereinafter Fr.-Turk. Agreement].

[10] *See* Press Release, Republic of Turkey, Ministry of Foreign Affairs, Regarding the Temporary Relocation of the Tomb of Suleyman Sah and Memorial Outpost (Feb. 22, 2015), *available at* http://www.mfa.gov.tr/no_-70_-22-february-2015_-press-release-regarding-the-temporary-relocation-of-the-tomb-of-s%C3%BCleyman-%C5%9Fah-and-memorial-outpost.en.mfa [hereinafter Press Release Regarding the Relocation].

[11] Fr.-Turk. Agreement, *supra* note 9, art. 9. Article 9 of The French-Turkish Agreement signed on 20 October 1921 in Ankara states that the Tomb of Suleyman Shah, the grandfather of the Sultan Osman, founder of the Ottoman dynasty, situated at Jaber-Kalesi shall remain the

Soon after the outbreak of violence in Syria, Turkey publically announced that it considered an attack or even the threat of attack on the Tomb to be a threat to its national security, and Turkey further declared it would defend the Tomb with all necessary force.[12] On February 21, 2015, Turkey took action as it warned it would do, and conducted an operation into Syria in order to protect the Tomb and its military personnel.[13]

Turkish Armed Forces entered Syria and conducted an operation called "Sah Firat" to evacuate and relocate the Tomb.[14] Sah Firat, which involved armored vehicles, weaponry and troops, lasted less than twenty-four hours.[15] The initial effort involved exfiltrating the garrison troops guarding the original site and destroying the infrastructure of the site to prevent the militants from using the exclave.[16] The mission was completed on February 22, 2015, after the Tomb and the Memorial Outpost[17] were relocated to a new site within Syria, in the north of Syrian Eşmesi village.[18]

The Syrian government issued its objection almost immediately, publically asserting that Turkey conducted this operation without Syrian consent.[19] Specifically, the Syrian government described Turkey's operation, Sah Firat, as an act of flagrant aggression, adding that Ankara would be responsible for the consequences of the operation.[20] The Turkish government countered, asserting its right to anticipatory self-defense and stating that it would act again, to include crossing back into Syria if necessary, to defend its national interests and security.[21]

This article provides support to the position that Turkey has the right under international law of anticipatory self-defense against the emerging threats out of Syria. Considering the threats and the special status of the Tomb, it is specifically argued that Turkey's decision to cross into Syria, to evacuate its military personnel guarding the Tomb, and to relocate the Tomb was legally sound and consistent with the international legal principal of anticipatory self-defense.

This article is divided into four parts, including part I, the Introduction, and part IV, the Conclusion. Part II provides the background of the civil war in Syria and the incidents of armed conflict that have occurred between Turkey and Syria. Part II also discusses the Turkish Parliamentary Resolution[22] in response to the threats arising from Syria under international law and the Turkish Constitution. Additionally, part II covers the threat of terrorism emanating from the Syrian Civil War and, specifically, the threat to the Tomb. Part III justifies, based on the situation in Syria, Turkey's right to exercise anticipatory self-defense in order to protect its national security to include the Tomb. It is this article's position that Turkey's right to anticipatory self-defense is consistent with the United Nations (UN) Charter in general and the customary right of self-defense.

II. Factual Situation in Syria

Long before the current conflict, Turkey and Syria conducted diplomatic relations that included agreements

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property of Turkey, who may appoint guardians for it and may hoist Turkish flag there. *See id. See also Why is Suleyman Shah's Tomb So Important?*, BBC (Feb. 22, 2015), *available at* http://www.bbc.com /news/world-middle-east-31574209.

[12] *See Turkey Ready to Respond Any Attack to Suleyman Shah Tomb in Syria*, HURRIYET DAILY NEWS (Mar. 14, 2014), *available at* http://www.hurriyetdailynews.com/turkey-ready-to-respond-any-attack-to-suleyman-shah-tomb-in-syria-fm-davutoglu-says.aspx?pageID=449&nID=63573&NewsCatID=352 (explaining that according to the statement made by the Foreign Minister of Turkey, any attack against the Tomb either from "the regime, from radical groups of from anybody" would be subjected to retaliation from Turkey, which would take all measures for the protection of that land.); *see Turkey Vows to Respond to Any attack on Suleyman Shah Tomb*, HURRIYET DAILY NEWS (Mar. 23, 2014), *available at* http://www.hurriyetdailynews.com/turkey-vows-to-respond-to-any-attack-on-suleyman-shah-tomb.aspx?pageID=238&nID=63967&NewsCatID=359.

[13] *See* Press Release Regarding the Relocation, *supra* note 10 (emphasizing that "the ongoing conflict and state of chaos in Syria posed serious risks to safety and security of the Tomb").

[14] *Id.*

[15] *Turkish Military Enters Syria to Evacuate Soldiers and Move Tomb's Remains, Reports Say*, N.Y. TIMES (Feb. 21, 2015), http://www .nytimes.com/2015/02/22/world/europe/turkish-military-enters-syria-to-evacuate-soldiers-guarding-tomb-reports-say.html?_r=0.

[16] *Id.*

[17] Designated name of the post for the guards which is a part of the Tomb.

[18] Press Release Regarding the Relocation, *supra* note 10.

[19] *Turkish Military Enters Syria to Evacuate Soldiers, Relocate Tomb*, REUTERS (Sept. 22, 2015), http://www.reuters.com/article/2015/02/22/ us-syria-crisis-turkey-idUSKBN0LQ03U20150222 [hereinafter Syrian Objection].

[20] *Id.*

[21] *Turkish PM: No Change in Syria Policy After Shah Firat Operation*, TURKEY AGENDA (Feb. 24, 2015), http://www.turkeyagenda.com /turkish-pm-no-change-in-syria-policy-after-shah-firat-operation-2034.html [hereinafter Turkish Prime Minister's Statement] (declaring that Turkey had the right of ensuring the safety of its soldiers along with protecting the Tomb under international law, adding that Turkey will never hesitate to take any unilateral step when it comes to its national security).

[22] Republic of Turkey, Resolution No. 1071 (Oct. 2, 2014), http://www .tbmm.gov.tr/tbmn_ kararlari/karar1071.html (last visited Mar. 10, 2015) [hereinafter Resolution].

on security cooperation.[23] These relations were memorialized in the signing of the Adana Agreement on October 20, 1998 and in the Joint Political Declaration on establishing the High Level Strategic Cooperation Council in September 2009.[24] The agreement and declaration represented significant inroads in Turkish-Syrian foreign relations.[25] The Turkish-Syrian relationship flourished in all aspects untill, as described further below, the uprisings started in Syria after the impact of the Arab Spring.[26]

A. Breakdown of Turkish - Syrian Diplomacy

After the beginning of the Arab Spring in 2010, the turmoil of the uprising took little time to reach to the Syrian Arab Republic.[27] The unrest in Syria began as civil discord on March 15, 2011, triggered by the arrest of at least 15 children for painting anti-government graffiti on the walls of a school in the southern city of Daraa.[28] Initially, the Syrian people protested peacefully against the regime,[29] but unfortunately the Syrian regime reacted disproportionately by using military force to stop the protests.[30]

The Syrian regime violently repressed the peaceful protests and between March and the end of November in 2011, killed more than 4,000 of its people.[31] Facing a brutal regime that was unresponsive to democratic requests, the uprising gradually transformed into an armed insurgency.[32] Since then, the escalation in violence has keeps rising in parallel with the regime's excessive use of force.[33]

The Turkish government objected to the regime's use of military force against civilians, and declared that President Bashar al-Assad must step down as president.[34] This marked the official breakdown in Turkish-Syrian diplomacy, and to date Turkey remains adamant that the Syrian administration must reform and attend to the democratic needs of the Syrian people.[35]

B. The Civil War in Syria

Initially, the international community considered Syria's violent reaction to the protestors as constituting human rights violations and repression.[36] However it is now clear that the situation is, at the very least, a non-international armed conflict, as officially classified by the International Committee of the Red Cross (ICRC) in July 2012, marking the start of the civil war in Syria.[37]

> The Syrian civil war has led to the effective fragmentation of Syria into three identifiable enclaves. Of these,

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[23] Republic of Turkey, Ministry of Foreign Affairs, *Relations Between Turkey–Syria*, MFA.GOV.TR, http://www.mfa.gov.tr/relations-between-turkey%E2%80%93syria.en.mfa (last visited Mar. 15, 2015) [hereinafter Relations].

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] Marc Lynch, Deen Freelon & Sean Aday, *Syria in the Arab Spring: The Integration of Syria's Conflict with the Arab Uprisings, 2011–2013*, [I-7] RES. & POL. 3 (2014).

[28] *Daraa: The Spark That Lit the Syrian Flame*, CNN (Mar. 1, 2012, 9:32 AM), http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/.

[29] *Syria Revolution: A Revolt Brews Against Bashar Al-Assad's Regime*, WASH. POST (Mar. 15, 2011, 11:35 AM), http://www.washingtonpost.com/blogs/worldviews/post/syria-revolution-revolt-against-bashar-al--assads-regime/2011/03/15/ABrwNEX_blog.html.

[30] *See* Marauhn, *supra* note 3, at 404. Explaining that,

> The Syrian government, in light of anti-government protests continuing into April 2011, opted for a military response to the political opposition. On April 25, 2011, the Syrian military launched a large operation at Dara'a, ostensibly to target terrorists but in fact trying to end pro-democracy protests. Rather than calming down the situation in Dara'a, these military activities triggered farther anti-government demonstrations all over Syria.

Id.

[31] Bellal & Beck, *supra* note 4, at 7.

[32] Jonathan Spyer, *Fragmented Syria: The Balance of Forces as of Late 2013*, 17 MIDDLE E. REV. OF INT'L AFF. 9 (2013).

[33] *See Syria's Barrel Bombs: An Eyewitness Account*, AL-MONITOR (June 19, 2014), http://www.al-monitor.com/pulse/originals/2014/06/syria-aleppo-barrel-bomb-eyewitness-account.html (stating that for the past six months the explosive barrel campaign against Aleppo has been going on killing dozens of people. According to the statistics from the Aleppo Martyrs site document, "the deaths of 1,606 people, among them 411 children, who died since the beginning of the campaign. Only 23 of them were opposition fighters").

[34] Marauhn, *supra* note 3, at 411.

[35] *See* Relations, *supra* note 23.

[36] Tom Ruys, *The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict*, 50 STAN. J. INT'L L. 253 (2014).

[37] *Id. See also Why and How IHL Applies in Syria*, ICRC INTERCROSS BLOG (July 27, 2012), http://intercrossblog.icrc.org/blog/why-and-how-ihl-applies-syria; *IHL and Humanitarian Principles Are Non-Negotiable–Syria Is No Exception*, ICRC (Feb. 15, 2014), https://www.icrc.org/eng/resources/documents/article/editorial/2014-02-15-syria-maurer-humanitarian-principles.htm.

> two--the regime area and the Kurdish area--are tightly ruled by a central authority. The third, the rebel-held zone, has no central authority but is a kind of conglomerate of various Sunni Islamist forces ruling over different areas. None of these enclaves are strong enough to over-run any of the others. None of them are sufficiently weak as to be in danger of overthrow by any of the others.[38]

As of August 2014, the Islamic State in Iraq and al-Sham (ISIS)[39], Free Syrian Army (FSA), Al Nusra, the Kurdish People's Protection Units (YPG), and a few other armed groups shared control of the rebel held zone.[40] However, irrespective of their territorial control, it is believed that there are more than 1,500 organized opposition groups with widely differing political affiliations in Syria.[41]

Unfortunately, the conflict and violence is still widespread and continues across the entire country.[42] Civilians are stuck in the fire of a fight between the regime and various armed factions and groups.[43] The humanitarian situation has turned out to be a disaster, and it continues to worsen.[44] The death rate continues to rise every day. [45] Torture is widespread, and people are also dying from hunger and infectious diseases.[46] In addition to losing control of the territory, Assad's regime is not providing basic governance required to maintain the health and welfare of the public.[47] Because the situation of this situation it appears that Syria, destroyed by civil war, reflects the main characteristics of a weak or a failed state**.**

C. Syria: A Failed State and the Impact of Spillover From the Syrian Civil War on Turkey

A failed state, as is the case with Syria, creates the perfect operational environment for terrorist organizations to coalesce.[48] In addition to the implications of becoming a safe haven for terrorist organizations, Turkey is effectively unable to negotiate with a legitimate authority in power in Syria in order to ensure its national security or to handle the humanitarian crisis that has culminated at its border, since there is no legitimate authority in power in Syria.

Turkey shares its longest international border with Syria.[49] Accordingly, Turkey is greatly affected from the spillover of the Syrian civil war.[50] There have been numerous incidents of violence from the parties to the non-international armed conflict in Syria that have resulted directly and indirectly in the deaths of Turkish civilians and military personnel.[51] These incidents include the shooting down of a Turkish military aircraft by Syria's regime,[52] bomb explosions in the cities Reyhanli and Akcakale, and cross border artillery and rocket fire.[53] Furthermore, the humanitarian crisis along the border caused by the influx of Syrian refugees fleeing

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[38] Spyer, *supra* note 32, at 16.

[39] Also known as the Islamic State of Iraq and the Levant (ISIL), the Islamic State (IS) or DAESH which is the Arabic acronym.

[40] *Syria Civil War Map: August 2014 (#13)*, POLITICAL GEOGRAPHY NOW (Aug. 18, 2014), http://www.polgeonow.com/2014/08/syria-civil-war-map-august-2014-13.html.

[41] CHRISTOPHER M. BLANCHARD, CARLA E. HUMUD & MARY BETH D. NIKITIN, CONG. RESEARCH SERV. RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE (2014), *available at* http://fas.org/sgp/ crs/mideast/RL33487.pdf (last visited Mar. 6, 2015).

[42] *See* Security Council Report, *supra* note 7 (explaining that conflict and high levels of violence continued throughout the Syrian Arab Republic, including the use of explosive weapons in populated areas, indiscriminate aerial bombings by government forces and indiscriminate shelling and attacks by armed opposition).

[43] *Id.*

[44] Muriel Asseburg, German Inst. for Int'l & Sec. Affairs, *Syria's Civil War: Geopolitical Implications and Scenarios* (2013), IEMED MEDITERRANEAN Y.B. 18 (2013), *available at* http://www.swp-berlin .org/fileadmin/contents/products/fachpublikationen/AsseburgSyriaMedit erraneanYearbook2013.pdf.

[45] Ban Ki-moon, *Crisis in Syria: Civil War, Global Threat*, HUFFINGTON POST (Aug. 25, 2014, 5:59 AM), http://www.huffington post.com/ban-kimoon/crisis-in-syria-civil-war_b_5529973.html.

[46] *Id.*

[47] Security Council Report, *supra* note 7.

[48] Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMP. SECURITY POL'Y 431 (2009).

[49] *Turkey*, NATIONS ENCYCLOPEDIA, http://www.nationsencyclopedia. com/geography/Slovenia-to-Zimbabwe-Cumulative-Index/Turkey.html (last visited Mar. 15, 2015).

[50] *See* WILLIAM YOUNG ET AL., SPILLOVER FROM THE CONFLICT IN SYRIA: AN ASSESSMENT OF THE FACTORS THAT AID AND IMPEDE THE SPREAD OF VIOLENCE 15-23 (RAND 2014), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR 609/RAND_RR609.pdf (explaining details about Spillover of the Syrian Conflict into Turkey).

[51] *Id.*

[52] *Syria 'Shoots Down Turkish Fighter Jet'*, TELEGRAPH.CO.UK (June 22, 2012, 4:16 PM), http://www.telegraph.co.uk/ news/worldnews /middle east/syria/9349777/Syria-shoots-down-Turkish-fighter-jet.html.

[53] *See* YOUNG ET AL., *supra* note 50, at 15-23.

from the violence is further complicating Turkey's ability to ensure its national security.[54]

The current situation in Syria carries enormous risk for the security of Turkey. The violence of the civil war and the humanitarian crisis have destabilized the region, creating vast ungoverned regions which give rise to terrorist groups who act without respect for international law or the fear of reprisal.[55]

D. Turkey's Response to the Civil War in Syria

During the Syrian crisis, Turkey has followed an active humanitarian policy and applied an open-door policy, taking the leading role in assisting and hosting Syrian refugees.[56] In April 2011, the first Syrian refugees entered into Turkey, while the Turkish Government was trying to convince the Syrian Government to take humanitarian precautions against protestors.[57] However, it did not work, and the relations between the two countries deteriorated.[58] Eventually, the high tension between the countries led to incidents, although short in duration, of armed conflict, forcing Turkey to defend itself.

As mentioned previously, on June 22, 2012, an unarmed RF-4 Turkish aircraft, while on a test and training mission in international airspace 13 miles off the coast of Latakia, was shot down by Syria.[59] Immediately after, the Ministry of Foreign Affairs declared that:

> The shooting of the aircraft without any warning is by no means acceptable and that the responsibility of this attack falls completely on the Syrian side. This aggressive act, which runs against all the principles of good faith and good neighborliness, is a flagrant and grave violation of international law and that the Government of Turkey reserves all its rights emanating from international law to take counter measures and steps with regard to its pilots and aircraft that are still missing in action, at a time and basis of its own choosing.[60]

The event triggered a change in Turkey's rules of engagement.[61] Turkey declared publically that it would consider every military element approaching its border from Syria as a security threat and would therefore treat such elements as military targets.[62]

On February 11, 2013, in the southern province of Hatay at the Cilvegözü border gate, a car bomb terror attack killed 14 people.[63] No one claimed responsibility for the attack; however, the Interior Minister of Turkey stated that they had solid information about the link with Syria.[64] Again on May 11, 2013, two car bombs exploded in the town of Reyhanlı, in Turkey.[65] At least 50 people were killed and many others were injured.[66] It was the worst terrorist attack Turkey had ever seen.[67] Turkish officials stated that the Reyhanlı attack was carried out with support from the Syrian regime.[68]

On September 16, 2013, Turkish warplanes shot down a Syrian Mi-17 helicopter crossing into Turkish airspace in accordance with the new scope of the rules of

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[54] KEMAL KIRIŞCI, SYRIAN REFUGEES AND TURKEY'S CHALLANGES: GOING BEYOND HOSPITALITY 30 - 36 (Brookings Inst. 2014), *available at* http://www.brookings.edu/~/media/research/files/reports/2014/05/12%20turkey%20syrian%20refugees%20kirisci/syrian%20refugees%20and%20turkeys%20challenges%20may%2014%202014.pdf.

[55] Security Council Report, *supra* note 7.

[56] Ethan Corbin, *International Response to the Syrian Refugee Crisis*, *in* THE SYRIAN REFUGEE CRISIS AND LESSONS LEARNED FROM THE IRAQI EXPERIENCE 13 (2013), *available at* http://www.bu.edu/iis/files/2013/05/Syrian-Refugee-Report-v-5.1.pdf.

[57] *See* Relations, *supra* note 23.

[58] Marauhn, *supra* note 3, at 411. *See also* Relations, *supra* note 23.

[59] *Syria 'Shoots Down Turkish Fighter Jet'*, *supra* note 52.

[60] *See* Press Release, Republic of Turkey, Ministry of Foreign Affairs, Regarding the Steps Taken by the Ministry of Foreign Affairs of the Republic of Turkey in Respect of the Shooting Down of a Turkish Military Aircraft Off the Coast of Syria (June 24, 2012), *available at* http://www.mfa.gov.tr/no_-173_--24-june-2012_-press-release-regarding-the-steps-taken-by-the-ministry-of-foreign-affairs-of-the-republic-of-turkey-in-respect-of-the-shooting-down-of-a-turkish-military-aircraft-off-the-coast-of-syria.en.mfa.

[61] *See Turkey PM Erdogan Issues Syria Border Warning*, BBC (June 26, 2012), *available at* http://www.bbc.com/news/world-middle-east-18584872.

[62] *Id.*

[63] *See Turkey Blames Syria for Border Gate Attack*, HURRIYET DAILY NEWS (Mar. 11, 2013), *available at* http://www.hurriyetdailynews.com/turkey-blames-syria-for-border-gate-attack.aspx?pageID=238&nid=42749.

[64] *Id.*

[65] *See Syria Absolutely Behind Reyhanli Attack, Says Turkish Ministry*, HURRIYET DAILY NEWS (Apr. 7, 2014), *available at* http://www.hurriyetdailynews.com/syria-absolutely-behind-reyhanli-attack-says-turkish-ministry.aspx?pageID=238&nID=64634&NewsCatID=509.

[66] *Id.*

[67] *Id.*

[68] *Id.*

engagement.[69] Again on March 23, 2014, Turkish fighter jets shot down one of the two Syrian warplanes, one of which did not stop flying into Turkey's airspace for a distance of 1.5km despite several warnings.[70]

E. Threat of Terrorism and the Tomb of Suleyman Shah

The failed or weakened Syria has created a lack of authority and massive advantage for the terrorist organizations to foster and move freely.[71]

> The supposed relationship between weak or failed states and terrorism rests upon a number of assumptions: Terrorist groups will make a decision about operating in an environment of weak or failed states; in a vacuum of public authority – with no functioning or effective institutions of police enforcement or justice – terrorist groups can actively recruit, train and plan attacks which target either local or foreign interests; and terrorist groups can operate in such states – free from detection, interference, or interdiction – more effectively than in functioning states.[72]

The rise of ISIS is the latest and the most important example of how terrorist organizations can take the advantage of a vacuum of power within a state.[73] The latest news from the region paints the reality of how ISIS actively recruits, trains, plans, and executes attacks with near impunity from the ungoverned spaces of Syria.[74]

Flourishing terrorism in Syria carries numerous risks and threats for any state in the world for a number of reasons.[75] However, Turkey's situation is unique due to geopolitical reasons and is arguably more at risk than the rest of the international community; this is due partly to its proximity as a neighbor state. But unlike any other neighbor, Turkey must also protect its national treasure, the Tomb of Suleyman Shah, an exclave inside the territory of Syria. This clearly presents a unique and complex problem faced by no other country.

The Tomb, although recently moved because of Turkish intervention, is closer to the Turkish border, but still physically located inside Syrian territory.[76] Despite the fact that the new location of the Tomb may provide a more secure place, due to the symbolic objective of terrorism and the nature of the Tomb, it remains a ripe target for any terrorist organization operating in Syria, especially ISIS.[77]

F. Turkish Parliamentary Resolution as a (Domestic or Constitutional) Legal Basis for Deploying Armed Forces Abroad

The legal grounds for a potential use of force are provided in Turkey's latest Resolution approved by the Turkish National Assembly on October 2, 2014.[78] Deploying the Turkish Armed Forces abroad as well as accepting foreign armed forces in Turkey requires the Turkish National Assembly's approval according to the Article 92 of the Turkish Constitution. [79] In accordance with Article 92, the Turkish Parliament approved a highly important resolution, which gives the authority to the government to deploy Turkish armed forces to eliminate the threats emanating from Syria and Iraq.[80]

As stated in the previous parts of the article, the spillover effect of the Syrian civil war has resulted in

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[69] *See Turkish Warplanes Shoot Down Syrian Helicopter*, REUTERS (Sep. 16, 2013), *available at* http://www.reuters.com/article/2013/09/16/us-syria-crisis-turkey-idUSBRE98F0K920130916.

[70] *See Turkey Downs Syria Military Jet In Airspace Violation*, BBC (Mar. 23, 2014), *available at* http://www.bbc.com/news/world-middle-east-26706417.

[71] Spyer, *supra* note 32, at 9.

[72] Newman, *supra* note 48, at 431.

[73] Ruys, *supra* note 36, at 253.

[74] *See* S.C. Res. 2178, U.N. SCOR, S/RES/2178 (Sept. 24, 2014), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29 (giving facts about the threat posed by ISIS and other international terrorist organizations).

[75] *Id.* (Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security).

[76] Press Release Regarding the Relocation, *supra* note 10.

[77] Can Kasapoglu & F. Doruk Engin, *Defending the Tomb of Suleyman Shah:Turkey's Options and Challenges*, 8 EDAM Discussion Article Series 3 (2014).

[78] Resolution, *supra* note 22.

[79] *See* TURKISH CONST. art. 92. The power to authorize the declaration of a state of war in cases deemed legitimate by international law and except where required by international treaties to which Turkey is a party or by the rules of international courtesy to send the Turkish Armed Forces to foreign countries and to allow foreign armed forces to be stationed in Turkey, is vested in the Grand National Assembly of Turkey.

[80] *See* Resolution, *supra* note 22.

deaths of Turkish citizens and caused serious security problems. The threats emanating from Syria may be divided into two classes. The first threat is derived from the acts of the Syrian regime against Turkey.[81] The second is derived from the terrorist organizations that have flourished in the ungoverned spaces within Syria.[82] Obviously, geopolitical issues make Turkey highly susceptible to those threats.[83]

The language of the resolution explicitly states that Turkey may use force to eliminate any kind of threat emanating from Syria. This right to use force in self-defense extends to either acts from the Syrian regime, or acts from the terrorist organizations that endanger Turkish national security. The importance of the resolution for purposes of this article is that it explicitly addresses and emphasizes Turkey's domestic authority and sovereign right over the Tomb. It further highlights Turkey's right and willingness under domestic law to protect the Tomb, as it did on February 21, 2015, when its military crossed into Syria and evacuated the Tomb's guards and relocated the Tomb. This leads into the next part of this article, which is a discussion about Turkey's rights under international law to respond with military force in order to protect the Tomb.

III. Turkey's Right to Anticipatory Self-Defense under International Law

As stated above, Turkey satisfied its legal burden under domestic law to responding in self-defense. However, Turkey must also satisfy certain requirements under international law before it can respond anticipatorily to a threat from non-state actors located outside its own territory.[84] In other words, it is a challenge for a nation state such as Turkey to determine under international law when the right to use force against "non-State entities, such as terrorists [that] carry out attacks on [it], but operate from or take sanctuary in another State ('the sanctuary State')."[85]

As mentioned previously, the threat from non-state actors operating in Syria was especially acute with regard to the Tomb prior to its most recent relocation.[86] Despite the difficulties typically associated with identifying when a nation-state has the right to use anticipatory self-defense, Turkey clearly had the right to use force against the imminent attacks of ISIS inside the territory of Syria in order to protect the Tomb.[87] In this respect, and contrary to the Syrian government's view, which called the operation Sah Firat an act of flagrant aggression,[88] Turkey's right to utilize anticipatory self-defense was lawful, pursuant to both the UN Charter and customary international law.

A. UN Charter System in General and Turkey's Right to Use Military Force

Two fundamental principles under the UN Charter appear to "collide" with Turkey's right to use force against the non-state threat from within Syria, they are: "territorial sovereignty and the prohibition on the use of force prescribed in article 2(4) of the UN Charter."[89] Specifically, Article 2(4) of the UN Charter prohibits the use of force by stating that "all member states shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations."[90] However, there are two recognized exceptions.[91] One exception is provided pursuant to Article 51 of the UN Charter.[92] The other exception to these fundamental principles that bar use of military force

[81] *See Syrian Regime Biggest Threat' to Turkey's Stability*, WORLD BULLETIN (Sept. 20, 2014), http://www.worldbulletin.net/news/144783/syrian-regime-biggest-threat-to-turkeys-stability.

[82] *See generally* S.C. Res. 2178, *supra* note 74.

[83] *See generally* YOUNG ET AL., *supra* note 50.

[84] Brent Michael, *Responding to Attacks By Non-State Actors: The Attribution Requirement of Self-Defence*, 16 AUSTRALIAN INT'L L. J. 133 (2009).

[85] *Id.*

[86] *See* Kasapoglu & Engin, *supra* note 77, at 1 (explaining that the Tomb is considered one of the most sensitive places to the threat of terror); *see The ISIS Threat to Turkey*, FOREIGN MILITARY STUDIES OFFICE, http://fmso.leavenworth.army.mil/OEWatch/201405/Turkey_03.html (last visited Mar. 10, 2015) (reporting that on a Youtube video, the ISIS declaring that Turkish soldiers leave the Tomb in three days, otherwise, the Tomb will be destroyed).

[87] *See 300 days at the Tomb of Suleiman Shah*, AL-MONITOR, (Mar. 6, 2015), http://www.al-monitor.com/pulse/originals/2015/03/turkey-syria-suleiman-shah.html (explaining that the coalition air attacks had impeded ISIS but could not eliminate its threat and stating how ISIS threat and harassment increased at the Tomb). *See also* Turkish Prime Minister's Statement, *supra* note 20 (stating that "Sah Firat was conducted due to the rising security concerns over escalating clashes between groups that are fighting inside the country, mainly threats from the Islamic State of Iraq and the Levant").

[88] *See* Syrian Objection, *supra* note 19.

[89] Michael, *supra* note 84, at 133.

[90] UN Charter art. 2, para. 4.

[91] Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-defence*, 16 THE EUR. J. OF INT'L L. 499, 500 (2005).

[92] *Id.*

is Turkey's right to self-defense under international law.[93] This article will explore the scope of these exceptions as it applies to Turkey's case below.

B. Debates over the Scope of a Nation State's Right to Self-Defense

It is generally accepted that "while Article 2(4) outlaws the use of force, Article 51[94] preserves the inherent right of individual or collective self-defence"[95] However, scholars and the international legal community debate the breadth and scope of Article 2(4).[96] There are mainly two groups of international law experts who have opposing views regarding the scope of self-defense.[97] One view is narrowly tailored and posits that "the meaning of Article 51 is clear; the right of self-defense arises only if an armed attack occurs."[98] On the opposing side, the broader view is twofold and posits that the customary international right to self-defense survives concurrently with Article 51 and that customary international law recognizes the right to anticipatory self-defense.[99]

The language of Article 2(4) "may appear straightforward at first glance, but nearly every term of significance" is part of this debate.[100] In addition to this, undefined key concepts such as "armed attack" and "inherent right" have created some ambiguity.[101] This ambiguity, over the years, is the crux of the argument regarding the scope of the right to self-defense.[102] Therefore, it is important to further analyze the development of the right to anticipatory self-defense under customary international law to better understand the significance of this debate and how it applies to Turkey's situation.

C. Anticipatory Self-Defense and Customary International Law

Turkey, like all nation states, has the inherent (i.e., customary) right to act in self-defense, including the right to anticipatory self-dense.[103] Prior to Article 51, anticipatory self-defense historically existed in customary international law.[104] Most notably, the concept emerged as customary after a series of incursions in 1837, now referred to as the Caroline case.[105]

According to the principles established by the Caroline case, a state invoking self-defense must:

> "[S]how a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that...[it] did nothing

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[93] *Id.*

[94] Article 51 reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

UN Charter art. 51.

[95] Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 KING'S L. J. 63 (2007).

[96] *See* YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 87-94 (2011).

[97] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 98 (2004).

[98] *Id.*

[99] *Id.*

[100] Benjamin Zweifach, *Plugging the Gap: A Reconsideration of the U.N. Charter's Approach to Low-Gravity Warfare,* 8 INTERCULTURAL HUM. RTS. L. REV. 385-86 (2012).

[101] Eric A. Heinze, *Nonstate Actors in the International Legal Order: The Israeli-Hezbollah Conflict and the Law of Self=Defense,* 15 GLOBAL GOVERNANCE 87 (2008).

[102] Gray, *supra* note 97, at 98.

[103] Leo Van Den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 105 (2003).

[104] MURRAY COLLIN ALDER, THE INHERENT RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW 68 (2012).

[105] *British-American Diplomacy The Caroline Case*, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Mar. 10, 2015). This famous incident took place

> At midnight about 70 or 80 armed linen boarded the steamer and attacked the persons on board with muskets, swords, and cutlasses. The 'passengers and crew' of whom there were in all 33, merely endeavored to escape. After this attack the assailing force set the steamer on fire, cut her loose, and set her adrift over the Niagara Falls. Only 21 of the persons on board had since been found, and one of these, Amos Durfee, was killed on the dock by a musket ball. Several others were wounded.

> unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it."[106]

From the Caroline case, four cumulative conditions which govern the existence of the right of a State to use force in the territory of another State in self-defense developed, which are:

> "(1) The existence of a grave and pressing danger against the security of a State or its citizens necessitating such action; (2) The absence of means of protection other than the measures taken or to be taken; (3) the illegal nature of this danger; and (4) Proportionality."[107]

It is rather clear that Turkey faces a "grave and pressing danger" from a threat that operates without respect for international laws and customs. It is also clear that these non-state actors who present this "grave and pressing danger" do not respond to anything short of military force. However, the most significant thing about this case is not the conditions-based elements needed to trigger Turkey's inherent right to self-defense under customary international law. What is most significant, with respect to Turkey's current situation, is that the Caroline case represents the principle that a state may exercise its inherent right to self-defense against non-state actors, even if it requires breaching another state's sovereignty.[108]

D. Reconciling the UN Charter and Customary International Law Regarding Turkey's Right of Anticipatory Self-Defense

As mentioned above, the international community debates the breadth and scope of this right as it exists under Article 51 of the UN Charter. However, it is this article's position that the UN Charter does not displace or limit Turkey's right of self-defense that exists in customary international law. This right includes the right to use force in anticipation of an imminent armed attack.[109] Furthermore, it is the position of this article that taking a narrow view of the right of anticipatory self-defense is dangerous because of the threats posed today by regional instability and terrorist organizations. More importantly, the narrow view inaccurately portrays the context of and role that customary international law played during the drafting of Article 51 of the UN Charter.[110]

In support of this article's position, it is necessary to clarify the intentions of the drafters of Article 51 with respect to the concept of anticipatory self-defense. This requires understanding the influence the customs of the time had on the drafting of the UN Charter.[111] When Article 51 was drafted, customary international law was an important field of law, used to inform the drafters and to interpret codified international law.[112] In fact, most eminent scholars agree that the customary rule has survived and continues to be supported through history by state practice and legal opinions from tribunals responsible for interpreting international law.[113]

For instance, the International Court of Justice, in its decision on the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),[114] confirmed that the right to self-defense in response to an imminent threat of an armed attack is available.[115] In addition to the Caroline case,

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[106] Francis Grimal & Graham Melling, *British Action in Libya in 2011: The Lawful Protection of National Abroad?*, 23 DENNING L. J. 171 (2011). *See* Letter from Daniel Webster, to Henry S Fox (Apr. 24, 1841), 29 BRITISH & FOREIGN STATE ARTICLES (1841–42), at 1129–39 (1857). For more detailed discussion, see J A Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense* 14 CARDOZO J. INT'L & COMP. L. 429 (2006).

[107] Bin Cheng, *Pre-emptive or Similar Type of Self-defense in the Territory of Foreign States*, 12 CHINESE J. OF INT'L L. 4-5 (2013).

[108] Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30:1 BERKELEY J. INT'L L. 66, 83 (2012).

[109] Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors*, 106 AM. J. OF INT'L L. 769, 771 (2012).

[110] James Mulcahy & Charles O Mahony, *Anticipatory Self Defense: A Discussion of International Law*, 2 HANSE L. REV. 233-35 (2006).

[111] KINGA TIBORI SZABÓ, ANTICIPATORY ACTION IN SELF-DEFENCE ESSENCE AND LIMITS UNDER INTERNATIONAL LAW 282 (2011).

[112] Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV 89 (2004).

[113] Mulcahy & Mahony, *supra* note 110, at 243.

[114] *See* Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* U.S), Judgment, (June 27, 1986), *available at* http://www.icj-cij.org/docket/files/70/6503.pdf (explaining that Nicaragua requested the Court to adjudge and declare on the basis that the United States was responsible for illegal military and paramilitary activities in and against Nicaragua, and "training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua," the United States breached its obligation under customary international law not to intervene in the affairs of another State).

[115] AWOL K. ALLO, ETHIOPIA'S ARMED INTERVENTION IN SOMALIA 146 (2010). *See* Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* U.S), Judgment, (June 27, 1986).

there are examples of state practice where nations exercised their customary right of self-defense prior to the enactment of the UN Charter.[116] Some of these examples include China's use of defensive military force to assert it's economic rights against imminent threat of The Union of Soviet Socialist Republics in 1929; Albania's use of defensive force against Italy's preparation of using armed force to make Albania protectorate in 1939; and Czechoslovakia's use of force against Hungary due to the border dispute in 1939.[117]

E. Principles that Turkey Must Apply in Exercising its Right to Self-Defense

In a case where a victim nation state, such as Turkey, plans to exercise its right to self-defense under customary international law, three principles must be met. The victim nation state must establish that self-defense is necessary; that its reaction in self-defense is proportional; and that the need to act in self-defense is immediate.[118] These principles are also the preconditions for anticipatory self-defense.[119]

Although necessity and proportionality are not openly expressed in the UN Charter, there is a general acceptance in academics that they are essential characteristics of self-defense.[120] In addition to this, a consensus exists as to the requirements of necessity and proportionality as elements to a response,[121] and in parallel that "justifications for anticipatory self-defense must still comply with necessity and proportionality requirements."[122] Necessity and proportionality are discussed below in detail concerning Turkey's right to exercise anticipatory self-defense against the threat from ISIS within Syria.

1. Necessity

So, how can Turkey determine if it is necessary to act in self-defense? In other words, how can Turkey determine "what is instant and overwhelming" if there is "no empirical formula that helps make an objective determination of what fits into this parameter" to determine imminence?[123] Clearly, a State considering use of self-defense must meet the burden of the objective and reasonable observer standard.[124] Thus, in order to resort to force, it must be objectively clear that a danger of an imminent attack exists.[125] Unfortunately, there is no formula for measuring the signs of the imminent nature of the threat.[126] Furthermore, the responsibility rests with the State taking action in self-defense to apply this standard and establish the legality of their action.[127]

Although an empirical formula does not exist, a state in Turkey's situation can look to a number of factors that support the principal of necessity for acting in self-defense. First, relevant to the scope of a state's right of self-defense is the very threat of an imminent or actual armed attack by a non-state actor.[128] Related to this factor in making a necessity determination is consideration of the host state's ability and willingness to take an action against non-state actors exhibiting threats from within its territory.[129] Of course, as in Syria's case, a host state's ability to put an end to any threat emanating from non-state actors relies on its ability to effectively control its own territory.[130]

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[116] ALDER, *supra* note 104, at 65-66.

[117] *Id. See also* Finucane, *supra* note 108, at 35 (giving examples for the state practice of exercising the inherent right of self-defense such as the US intervention in Spanish Florida, British intervention in New York State, and Russian intervention prior to the enactment of the UN Charter).

[118] ALDER, *supra* note 104, at 93.

[119] Hole, *supra* note 103, at 105.

[120] GRAY, *supra* note 97, at 121.

[121] Kastenberg, *supra* note 112, at 110.

[122] *Id.* at 111.

[123] Allo, *supra* note 115, at 157.

[124] Christoph Muller, *The Right of Self- Defense in the Global Fight Against Terrorism*, 81 U.S NAVAL WAR C. INT'L L. STUD. 355 (2006).

[125] Hole, *supra* note 103, at 99.

[126] Allo, *supra* note 115, at 157.

[127] David Kretzmer, *The Inherent Right to Self- Defence and Proportionality in Jus Ad Bellum*, 24 E.J.I.L. 271 (2013).

[128] Bethlehem, *supra* note 109, at 775.

[129] Finucane, *supra* note 108, at 86.

[130] *Id. See supra* note 84, at 153.

> In October 2008, similar defensive attacks were carried out by US forces in Syria against terrorist groups acting against US forces in Iraq. Four helicopters carrying US troops flew four miles into Syrian territory and killed a leader of a network that channels foreign fighters from Syria into Iraq. The leader, Abu Ghadiya, was the founder of the al-Qaeda insurgent group in Iraq, and Abu Musab al-Zarqawi had named him the organization's commander for Syrian logistics. The raid was justified on similar grounds to 'unwillingness or inability': if the host country fails to deal with the irregular groups, then action is justified in self-defense. In discussing the legal basis of cross-border operations. Administration officials pointed to a speech given by President

On the other hand, if a host nation is able and willing to take action against a terrorist threat from within its territory, then the ability a victim nation to establish the necessity to respond with force would be diminished in scope and geographically limited.[131] "Necessity establishes not only when a defending state may resort to force against a non-state actor, but also where the defending state may act."[132] There are various arguments related to geographic scope of the use of force, however the persuasive one is that the defending state may use force in the territory of a host state from where a non-state actor poses a threat, however force must be limited to the customary norms of necessity and proportionality.[133] For instance, killing of Al Qa'ida fighters inside the territory of host states such as Pakistan, Yemen, Somalia, would be lawful because the authorities have failed to catch them.[134] However, killing Al Qa'ida fighters in the United Kingdom by the United States using targeted killing tools would be unlawful, since the United Kingdom is willing and capable of taking effective measures against them.[135]

Ethiopia's military intervention in Somalia on December 24, 2006 is an example of a state resorting to use of force in self-defense against non-state actors in another state.[136] For the case of Ethiopia's military intervention in Somalia, Ethiopia claimed that the combination of enemy troops, foreign fighters, unrest at the border, and declarations of a jihad made it necessary to use of force and presented a "clear and present danger" against its territorial integrity and political independence.[137]

As with the Caroline case and Ethopia's situation with Somalia, Turkey faces a situation of "necessity that provokes self-defense" and is of a nature that is "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[138] As many of the actions from these non-state actors have proven, Turkey is unable to settle this matter through diplomacy or through the "exhaustion of peaceful means," normally a requirement before acting in self-dense.[139] In other words, "self-defense is permissible. . .when peaceful means of redress have reasonably been exhausted, or when diplomatic enterprises would clearly be futile."[140]

Furthermore, the principle of necessity in this case, until recently, was not just limited to Turkey's sovereign borders. Considering the situation in Syria,[141] ISIS as a

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> Bush to the UN General Assembly a month prior to the Syria raid, in which the President stated, '[Sovereign States] have an obligation to prevent [their] territory from being used as a sanctuary for terrorism.'

Id.

[131] Finucane, *supra* note 108, at 87.

[132] *Id.* at 88.

[133] Heinze, *supra* note 101, at 94-95.

[134] Finucane, *supra* note 108, at 88.

[135] *Id.* at 88-89.

[136] Mark Kielsgard, *National Self-Defense in the Age of Terrorism: Immediacy and State Attribution*, *in* ANICETO MASFERRER (ED), POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 326, 327 (Springer Press, 2012).

[137] Allo, *supra* note 115, at 139, 157 (explaining that leading up to Ethiopia's decision to intervene, destabilization due to the build of up various armed groups such as Union of Islamic Courts (UIC) and foreign terrorist groups threatened the security of Ethiopia, to include the presence of Eritrean troops. Ethiopia's parliament passed a resolution authorizing use of force in self-defense.

> According to the resolution passed by the Ethiopian Parliament, a combination of four major factors triggered Ethiopia's right to lawful self-defense: a) The presence of Eritrean troops in Somalia with the sole purpose of destabilizing the peace and stability of the Ethiopian State; b) the repeated declaration by UIC of a holy war—*jihad*—against Ethiopia and the flow of arms and financial support to the group from several Middle Eastern countries; c) the operation of armed Ethiopian opposition groups from within the areas under the control of the UIC with the view to overthrowing the legally constituted government of Ethiopia; and d) the presence of foreign militant fighters alongside the UIC which constituted a situation of "clear and present danger" against the territorial integrity and political independence of the Ethiopian State).

[138] Allo, *supra* note 115, at 157. *See* CHARLES CHENEY HYDE, INTERNATIONAL LAW 239 (1945), *reprinted in* MARY ELLENO'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 122 (2005); Gabcíkovo-Nagymaros Project, (Hung./Slovk.), Judgment, 1997 I.C.J. 7, at 40–41, 51–52 (Sept. 25); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432 (Dec. 4).

[139] ANDREAS LAURSEN, CHANGING INTERNATIONAL LAW TO MEET NEW CHALLENGES: INTERPRETATION, MODIFICATION AND THE USE OF FORCE 152 (2006).

[140] TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 95 (2010).

[141] Chainoglou, *supra* note 95, at 63.

> Within this context and given the increasing link between international terrorism, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, if a state is unable or unwilling to comply with its international obligations under any of the mandatory provisions of Resolutions 1373 or 1540, it may endanger by its own (in)actions its sovereign status.

non-state actor posed a threat against the Tomb. The Islamic State in Iraq and al-Sham cannot be negotiated with, and it is apparent that the Syrian government could not take effective measures in its territory to abate terrorism and protect the regions surrounding the Tomb. Therefore, due to the threat posed to the Tomb, Turkey's actions clearly meet the objective observer standard for establishing the necessity to act in self-defense within Syria to protect the Tomb.

2. Proportionality

It is important to understand that Turkey's burden to legally execute its right to anticipatory self-defense requires more than establishing that action is necessary. Turkey is also obligated to act proportionately when acting in self-defense against any threat it faces, whether it be from another nation state or a non-state actor.[142] Deriving from historical Caroline case and inextricably tied to the principle of necessity,[143] proportionality is an international requirement of an act of self-defense.[144] However, all though it is inextricably tied to necessity, the proportionality requirement stands alone as a context based standard for which there is no formulaic template for the application to the situations.[145] Because of its abstract nature, the application of this proportionality principle is not easy.[146]

For Turkey, some would argue that this is the more challenging of the two principles because the threat faced is asymmetric and from a non-state terrorist organization that does not follow customary international norms.[147] This is especially true, because as the respected expert and scholar Thomas Franck points out, the doctrine of proportionality requires a State to "calibrate its response" by using the "minimum force necessary to achieve redress," a concept more easily applied to control the military responses of two State actors that otherwise adhere to the Law of Armed Conflict.[148] Although the term "minimum" is constraining in nature, its application must be "sensibl[y] balance[d] between the threat faced and the response aimed at removing that threat."[149] In other words, it is the very complexity of the threat and the level of risk Turkey currently faces, far graver than that any other nation state faces, which actually warrants extending Turkey the broadest application of its legal right to act in self-defense.

Turkey clearly could have responded with military force to any attack from terrorists against the Tomb. In that instance, Turkey's actions should not go beyond that which is necessary to achieve the goal of protecting its military personnel and the Tomb. But the threat Turkey faced prior to moving the Tomb, and the ongoing threat it currently faces is more complicated than simply responding after an armed attack. The risk to Turkey's national security with relation to both the Tomb and the security of its borders certainly justifies an anticipatory military response now or in the near future against the asymmetric threat from within Syria. The author of this article is confident the international community's "second opinion" on Turkey's election to respond with anticipatory self-defense will be that it was "well-founded."[150]

E. Beyond Turkey and the ISIS Threat - Combating Global Terrorism and Application of the Broader View

It is important to acknowledge that the peaceful nations of the world currently face emerging and evolving threats from regional and global terrorist organizations. These threats exist in the physical and virtual world, and these organizations do not align themselves with geopolitical entities and laws that govern nation state behavior. What is more, "[g]lobalization and advances in technology are facilitating the capacities of terrorists to travel, move money and cause damage with modern weapons."[151] The 9/11 attacks on the United States proved that global terrorism is at such a scale states must look to expand their rights to anticipatory self-defense or face massive destruction.[152]

See also E. Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 E.J.I.L. 677, 692 (2000).

[142] Hole, *supra* note 103, at 103; Bethlehem, *supra* note 109, at 772.

[143] Allo, *supra* note 115, at 163.

[144] Michael N. Schmitt, *The Legality of Operation Iraqi Freedom under International Law*, 81 U.S NAVAL WAR C. INT'L L. STUD. 374 (2006).

[145] RUYS, *supra* note 140, at 121.

[146] Allo, *supra* note 115, at 163.

[147] Kretzmer, *supra* note 127, at 271; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 180 (2004).

[148] Allo, *supra* note 115, at 162. *See also* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 719 (2008).

[149] Allo, *supra* note 115, at 163. *See* David DeCosse, *Lost in the 'Logic of War'*, SANTA CLARA UNIV. MARKULA CENTER FOR APPLIED ETHICS (2009) (on file with author).

[150] *Id.*

[151] Mulcahy & Mahony, *supra* note 110, at 237.

[152] *See September 11th Fast Facts*, CNN (Sept. 8, 2014, 12:54 PM), http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/

Considering the level of operational capacity of terrorist organizations, non-state actors and their acts against states, the international community at large must give serious consideration to interpreting and applying codified and customary international law in ways that allow nation states to effectively combat terrorist organizations. A narrow, state-centric approach to the law of self-defense does not meet the new challenges and threats posed by terrorist organizations, nor does it provide the required balance to satisfy security concerns as non-state actors continually come onto the stage with brutal tactics and devastating capabilities.[153]

To achieve this, the application of international law may have to evolve to meet new challenges and provide a legal approach for states in terms of stopping those violent activities of terrorism. The solution is bigger than just a military solution. However, states must be permitted to utilize its military as part of the solution. Consequently, with the rise of various threats such as nuclear proliferation and global terrorism, an expansive interpretation of Article 51 must be applied, so that nation states like Turkey may act in self-defense against these organizations that do not respect international or domestic law.[154]

IV. Conclusion

The Syrian crisis has created various threats and geopolitical implications for the globe. However, for Turkey in particular, the threat it faces from the number of non-state actors acting from within Syria is more complex than just a border security issue. Specifically, the threat against the Tomb of Suleyman Shah is unique to Turkey. Carrying part of Turkey's national heritage, the Tomb is a piece of sovereign Turkish property within Syria. Turkey's decision to defend it with military force as if it was defending something from within its own borders was legally sound. It is wholly unreasonable to expect Turkey to watch from afar as terrorist organizations within Syria get stronger and openly threaten the Tomb. Much like protecting an embassy, or a country's military or nationals abroad trigger the right of self-defense of a state, Turkey's actions are clearly legal even though it responded to non-state actors within the sovereign territory of a foreign state.[155] Much like the Caroline case, Turkey did not need to wait for Syria's consent.[156]

However, despite the position this article has taken regarding Turkey's actions to protect the Tomb along with its current posture towards the failed state of Syria, it is time for the international community to formally agree that international law must evolve to the times. Those that remain skeptical must realize that international law must adjust to current challenges, and must be interpreted and applied in order to respond the threats of global terrorism. This proposal, that international law adapt and evolve with current times, is not contrary to customary international law and UN Charter.[157] The very nature of custom and, at the time, formation of the UN Charter represent the fact that international law is adaptable to the times.[158] Is the UN Charter not a formal agreement codifying the views of the international community to address to threat to global security at that time? In fact, a close study of how the international community has responded to terrorism should serve as a harbinger that we are in midst of another evolution in international law.[159]

Nevertheless, a conclusive remark does not prove the legality of the concept, since the matter does not seem to be resolved among scholars still polarized about the idea. It is time for the United Nations to step in and issue a binding decision specifically addressing the right of anticipatory self-defense against non-state actors.[160]

(explaining that a total of 2,977 people were killed in the worst terrorist attack in U.S. history).

[153] Finucane, *supra* note 108, at 82-83.

[154] Heinze, *supra* note 101, at 87.

[155] Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19.2 J. OF TRANSNAT'L L. & POL'Y 238-39 (2010).

[156] *Id.* at 244.

[157] LAURSEN, *supra* note 139, at 300.

[158] Hole, *supra* note 103, at 75-84.

[159] *Id.* at 298.

[160] *Id.* at 238-39.

Arguably, one of the most gratifying instances as a legal advisor is getting a client to "yes" in a timely fashion. Moreover, rare is the opportunity as a legal advisor that new legislation provides a client with a much needed or desired increase in authority. This year's National Defense Authorization Act (NDAA) proved to be beneficial in both areas. First, it provides significant increases to funding authority and monetary thresholds for military construction projects. These increases are the most significant increases in this area since 2001, the last time many of the authorities for military construction were significantly increased.[1] Second, the expansions of authority and increased thresholds for military construction projects have the potential to result in more projects being approved, funded, and executed outside of the Congressional appropriations cycle. The end result is more authority and increased thresholds for commanders, coupled with the effective removal of potentially time consuming impediments and uncertainty associated with the Congressional appropriations cycle.

On December 19, 2014, the 2015 NDAA was signed by President Barack Obama and became Public Law 113-291.[2] Its terse stated purpose is "to authorize appropriations for fiscal year 2015 for military activities of the Department of Defense, for military construction . . . to prescribe military personnel strengths for such fiscal year, and for other purposes."[3] Despite its rather generic self-description and dauntingly voluminous stature, some of the more impactful changes appear in section 2802, which details significant increases in military construction funding authority and serves to update statutory authority in this area.[4] Most important to Army commanders and their legal advisors is the increase in authority to use Operations and Maintenance (O&M) funding for minor military construction projects costing not more than $1,000,000, a generous increase in spending authority from $750,000.[5] More significant, perhaps, is the increase in the authority to use Unspecified Minor Military Construction (UMMC) funding, a lump sum appropriation provided by Congress to the service secretaries for minor military construction,[6] to fund military construction projects not exceeding $3,000,000, an increase of $1,000,000 from the previous cap of $2,000,000.[7]

So what does this mean for commanders and legal advisors? Quite simply, it means that commanders *may* be able to use their O&M to fund military construction projects up to $1,000,000.[8] It also means that the Army will be able to fund military construction projects not exceeding $3,000,000 without having to wait for the Congressional appropriations cycle, thereby increasing the speed and effectiveness of these relatively "minor" projects.

As a cautionary note, however, the authority for commanders to use their O&M for minor military construction projects not exceeding $1,000,000 is subject to a delegation of authority from the Secretary of the Army.[9] Although this delegation has been historically executed via memorandum, the last delegation of authority for commanders to use their O&M for minor military construction only authorized projects not exceeding $750,000, the cost ceiling for O&M funded construction prior to the 2015 NDAA. So, despite the new legislation and statutory increase in authority to use O&M, legal advisors must ensure their respective commander or client has been delegated the authority to use his O&M prior to obligating funds.

Another significant increase in funding authority in this year's NDAA relates to funding military construction that is designed to address "life, health, or safety" (LHS) concerns. This authority applies to the UMMC funding at the service secretary level only. Therefore, the Secretary of the Army may, after Congressional notification, spend up to $4,000,000 to address a LHS concern without entering into the Congressional appropriations cycle.[10] This is an increase of $1,000,000 from the previous cap of $3,000,000.[11] This

[1] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, § 2801 [hereinafter NDAA 2012] (raising the threshold for using O&M funds for minor military construction from $500,000 to $750,000).

[2] Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 [hereinafter NDAA 2015].

[3] *Id*.

[4] *Id*. at § 2802.

[5] 10 U.S.C. § 2805 (2014). *See also* NDAA 2012 § 2801. (The $750,000 cost ceiling for the use of O&M funds for minor military construction had been in place since 2001, when it was increased from $500,000).

[6] *See*, e.g., NDAA 2015, at Division I, Title I (providing a lump sum appropriation of $528,427,000 for Military Construction, Army).

[7] 10 U.S.C. § 2805 (2014). Note, however, that Congressional notification is still required to comply with 10 U.S.C. § 2805b (2015).

[8] *See* 10 U.S.C. §2805c (2015) (stating "The Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project costing not more than $1,000,000."). Despite the new authority to use O&M for minor military construction not exceeding $1,000,000, the authority for commanders to spend O&M funds is subject to delegations of authority. Therefore, any use of this authority by a subordinate commander must be as a result of a delegation of authority.

[9] *Id*.

[10] *See* NDAA 2015 § 2802.

[11] 10 U.S.C. § 2805a(2) (2014).

authority has changed over time from a broad authority that greatly expanded the use of O&M and UMMC to address LHS concerns, to a very restrictive funding expansion that is reserved solely for projects utilizing the service secretary's UMMC pot of money.[12]

In summary, Section 2802 expands the statutory military construction thresholds found in 10 U.S.C. §2805 as follows:[13]

> (1) increases the amount of O&M funds authorized to be used for military construction projects from $750,000 to $1,000,000;[14]
>
> (2) modifies the authority to carry out unspecified minor military construction projects by increasing the service secretary's authority from $2,000,000 to $3,000,000;[15]
>
> (3) modifies the authority to carry out unspecified minor military construction projects designed to address LHS concerns by increasing the service secretary's authority from $3,000,000 to $4,000,000;[16] and
>
> (4) increases the threshold for application of secretary approval and notification requirements for O&M funded military construction projects from $750,000 to $1,000,000.[17]

After years of relatively stagnant statutory thresholds for military construction, this year's NDAA provided a much desired expansion of authority and potentially increased responsiveness for commanders and leaders desiring to engage in military construction. Although many of the new authorities require delegation and may still require Congressional notification, this year's NDAA represents a welcomed piece of legislation for both legal advisors and clients alike.

—Major Travis W. Elms

[12] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1694, §2802a (The authority to use O&M to address "life, health, or safety" concerns ended in the wake of Congress' perceived abuses of this expanded authority by commanders).

[13] *See* NDAA 2015 § 2802.

[14] *Id.* at § 2802c.

[15] *Id.* at § 2802a(1).

[16] *Id.* at § 2802a(2).

[17] *Id.* at § 2802b.

The Lieutenant Don't Know: One Marine's Story of Warfare and Combat Logistics in Afghanistan[1]

Reviewed by *Major Elisabeth Gilman*[*]

My experience was not supremely unique or extraordinary and to some degree that's what makes my experience important. The stuff in this book is the experience of the average Marine in Afghanistan. Thousands of Marines did these types of things, and more.[2]

I. Introduction

The Lieutenant Don't Know: One Marine's Story of Warfare and Combat Logistics in Afghanistan is Jeff Clement's first book.[3] Jeff Clement set out to write a book about his experience in Helmand Province, Afghanistan, as a platoon leader for Combat Logistics Battalion 6 (CLB-6).[4] In many ways, this memoir reads like a diary; the author tells his story; documents his struggles; examines broader questions about the purpose and mission of the war in Afghanistan; and shows the reader that in today's wars there are no front lines.[5] Through this memoir, Clement details the vital function of logisticians in today's operating environment[6] while also telling a broader, but nonetheless profound, story about the critical role of leadership in the Marine Corps and the military. This book is honest and compelling; it is a must read for members of the military at every level and for Americans who want to better understand what Marines encounter on the battlefield.

Not only does the reader get to witness first-hand how Clement bravely led his troops in combat, the reader also benefits from his astute observations about the effectiveness, and oftentimes ineffectiveness, of other leadership styles he encountered throughout his career as an officer. Clement's memoir exposes how profoundly good leadership can impact military operations and how ruinous poor leadership can be on individual morale and unit cohesion.

II. Summary

Clement's memoir takes the reader on a journey through his decision to join the Marines, his commissioning as an officer, his training, and finally his two combat tours with CLB-6 in Helmand Province emphasizing his first tour as a platoon leader.[7] Unlike many other war memoirs, Clement avoids getting "bogged down in his personal life;" he keeps the story interesting by focusing on what the reader cares about, his experience as a Marine.[8]

After briefly explaining why he chose to join the Marine Corps instead of the Navy,[9] Clement provides a detailed account of the training all Marine Corps officers receive.[10] " The Marine Corps provides its officers with better training than any other branch, and more of it;"[11] this position is hard to refute. According to Clement, a Marine Adjutant[12] actually gets more infantry platoon commander training than an Army Infantry Platoon Leader.[13]

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[1] JEFF CLEMENT, THE LIEUTENANT DON'T KNOW: ONE MARINE'S STORY OF WARFARE AND COMBAT LOGISTICS IN AFGHANISTAN (2014).

[2] *Id.* at 18.

[3] *About the Author*, JEFF CLEMENT, http://clementjd.com/?page_id=2 (last visited Sep. 2, 2014, 9:32 PM).

[4] Combat Logistics Battalion 6, Marines, The Official Website of the United States Marine Corps http://www.clr2.marines.mil/Units/CombatLogisticsBattalion6.aspx (last visited Sep. 2, 2014, 9:41PM). ("Combat Logistics Battalion 6 (CLB-6) will train, rapidly task organize, deploy, employ, fight and redeploy in order to provide logistics combat support to a Regimental Combat Team (RCT) and additional Marine Air Ground Task Force (MAGTF) maneuver elements in the RCT's battle space, beyond their organic capabilities, in order to enable continuity of operations.").

[5] CLEMENT, *supra* note 1, at 72 ("In the war in Afghanistan, the term 'front lines' didn't exist. Units could be attacked anywhere, and large, slow moving logistics convoys were easy targets.").

[6] *Id*. ("A combat logistics battalion provides the lions' share of the heavy lifting to provide logistics support needed in combat zones. We were responsible for actually providing support to the infantry units on the front lines. Everyone is important. But the CLB drives the fuel in tankers to the end users, drops off bottles of water to the grunts who need them, and goes out to where the trucks got blown up the retrieve them.").

[7] *Id*.

[8] *A War Memoir That I Can Actually Recommend*, STANLEY R. MITCHELL, http://stanrmitchell.com/2014/01/31/a-war-memoir-that-i-can-actually-recommend/ (last visited on Sept. 2, 2014, 9:52PM).

[9] CLEMENT, *supra* note 1, at 26-29.

[10] *Id*. at 25-60.

[11] *Id*. at 49.

[12] *Roles in the Corps, Adjutant*, BEING A MARINE, http://www.marines.com/being-a-marine/roles-in-the-corps/logistics-combat-element/ adjutant (last visited on Sept. 2, 2014, 9:52PM) ("Adjutants coordinate administrative matters for Marine Corps staff sections and external agencies at the staff level. They ensure that every Marine in their command has administrative resources both for day-to-day tasks and long-term career progression. Adjutants supervise the execution of administrative policies. They receive and route correspondence, preparing responses to any special correspondence. They also manage their unit's legal matters and monitor fitness reports, among other administrative duties.").

[13] CLEMENT, *supra* note 1, at 50.

Through a lengthy and detailed description of the training Clement received which includes Navy ROTC Indoctrination for Midshipmen (INFORM),[14] Career Orientation Training for Midshipmen (CONTRAMID),[15] Marine Corps Mountain Warfare School[16] Officer Candidate School (OCS) where candidates complete the Leadership Reaction Course (LRC) and the Small Unit Leadership Exercise (SULE),[17] The Basic School (TBS),[18] and finally the Logistics Officer Course,[19] it is clear the Marine Corps makes a major investment in training its officers. Typical of all of these courses is an intense focus on developing leadership skills.[20] For example, fifty percent of the grade in TBS is based on an assessment of leadership skills and includes a peer review.[21] Understanding the details of Clement's training helps the reader understand how Clement and the other Marine officers in CLB-6 were equipped for the challenges they encountered in Helmand Province, Afghanistan.[22]

In some of the most exciting chapters, Clement takes the reader along on many critical missions 2nd Platoon, Alpha Company, CLB-6 conducted while he was a platoon leader in 2010.[23] The painstaking details about mission planning, preparation, and execution make the reader feel like a member of 2nd Platoon. More importantly, these details help the reader understand the labor intensive, oftentimes tedious, and downright dangerous nature of these missions. It is easy to focus on the plight of the war fighter, the infantryman on the front lines of a small outpost.[24] People tend to forget that those infantrymen need supplies: food; water; fuel; and ammunition in order to survive and be mission effective.[25] Clement does a stellar job of detailing how these supplies are actually delivered in a war with no front lines while exposing the dangers these heroes encountered.[26]

III. Trained to Lead

Tactical training is important,[27] but what is equally impressive about the training Marine Officers receive is the emphasis on developing leadership skills throughout every phase of training.[28] When Clement arrived at CLB-6 as a young Lieutenant, he was already armed with many of the tools he would need in order to be a successful leader.[29]

In a particularly powerful excerpt, Clement reflects on the leadership training he received from an instructor at OCS. With purpose and intention, Clement applied three principles of leadership in his new position as a platoon leader:

> Know yourself. Self-awareness and humility combined yield selflessness, . . . Know your Marines. Know who they are, look out for their welfare, and validate them as members of the team, . . . Lastly, know your shit. Be technically and tactically proficient. Bold actions and ownership! Nobody will follow someone who is incompetent.[30]

Clement wrote down this advice and throughout his first deployment as a platoon leader it was clear that he lived by this ethos.[31]

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[14] *Id*. at 25.

[15] *Id*. at 26.

[16] *Id*. at 31.

[17] *Id*. at 41.

[18] *Id*. at 50.

[19] *Id*. at 60.

[20] RP 0103—PRINCIPLES OF MARINE CORPS LEADERSHIP, *available at* http://www.tecom.marines.mil/Portals/120/Docs/Student%20Materials/CREST%20Manual/RP0103.pdf (statement of General C. B. Cates, 19th Commandant of the Marine Corps) ("Leadership is intangible, hard to measure, and difficult to describe. Its quality would seem to stem from many factors. But certainly they must include a measure of inherent ability to control and direct, self-confidence based on expert knowledge, initiative, loyalty, pride and sense of responsibility. Inherent ability cannot be instilled, but that which is latent or dormant can be developed. Other ingredients can be acquired. They are not easily learned. But leaders can be and are made.").

[21] CLEMENT, *supra* note 1, at 50.

[22] *Id*. at 72 ("CLB-6 Deployed to the Helmand Province just as Marine Expeditionary Brigade-Afghanistan (MEB-A) began to push to the north of the province, supporting the offensives for Marjah, Musa Qa'leh, and Sangin in 2010 and, during the second deployment a year later, the push to Kajaki in 2011.").

[23] *Id*. at 91–236.

[24] *Id*. at 253.

[25] *Id*. at 72.

[26] *Id*. at 253 (A Company encountered almost one hundred Improvised Explosive Device (IED) attacks and countless combined arms attacks. Nearly half of the company received a traumatic brain injury (TBI) from IED attacks.).

[27] *Id*. at 50 ("Every Marine is a rifleman, and every Marine officer has to be prepared to be a provisional infantry platoon commander.").

[28] *Id*.

[29] *Id*. at 143 ("TBS teaches lieutenants to always maintain and external focus; one of the harshest criticisms a lieutenant could receive was to be 'internal.' The point is to create a mindset where officers immediately focus on taking care of their Marines and defeating the enemy, instead of focusing 'internally' on fear and self- preservation. The training worked.").

[30] *Id*. at 64.

[31] *Id*.

Throughout this work, Clement was self-reflective, placed his Marines first, and was a proficient combat logistician. It is easy for an author to write a book that is self-congratulatory; the author, after all, gets the final say. But the candor used by Clement lends credibility to his story and gives the impression that he really was striving to be a good leader and for the most part, he succeeded.

Two examples of his effective leadership style resonate. First, is the fact that Clement's biggest fear in Afghanistan was not of his own death; his biggest fear was losing one of his Marines.[32] The second is the great lengths Clement went to in order to provide cold "near beer"[33] to his platoon members after completing their final mission before redeployment.[34] Both examples embody the principle of "[k]now your Marines. Know who they are, look out for their welfare, and validate them as members of the team."[35] The first act illustrates that as a leader, Lieutenant Clement placed his Marine's welfare above all, including his own survival. The second act may seem trivial, but Clement's efforts to reward his troops and acknowledge their sacrifice with a cold beer, even if it was non-alcoholic, speaks volumes about his leadership style and his desire to validate his troops as members of the team.[36]

Throughout this book one thing is clear, all of the time and money that was put into training Lieutenant Clement was well worth it. However, there were also disappointing examples of leadership failures, particularly institutional failures, detailed throughout this book that serve as good teaching points for future leaders.

IV. The Lieutenant Don't Know[37]

Clement highlights leadership failures he encountered and how they impacted him personally and his Marines as a unit. The most glaring leadership failure Clement encountered was the lack of a defined mission in Afghanistan.[38]

Throughout the book, Clement touches upon the impacts fighting a war without a defined mission or purpose has on troops.[39] What's the mission? Why are we here? What are we trying to accomplish?[40] No one ever answered those questions.[41] And when Clement's troops asked, all he could say was "the Lieutenant don't know."[42] Through his own frustration and the frustration of his Marines, Clement effectively illustrates the risk to morale of sending troops to war without a defined mission.

V. Freedom is Outside the Wire[43]

More subtle leadership failures were revealed through Clement's detailed description of some of the major logistics missions he conducted from planning to execution. Most notable were his interactions with the battalion and the battalion staff members. From Clement's perspective, it felt like the battalion was only seeking to further its own interests, often times at the expense of the company.[44] His criticisms of what appeared to be arbitrary staff requirements, general insensitivities to the dangers faced by his Marines outside the wire, and the perception that the battalion was only looking out for itself, are all important critiques worthy of consideration.[45] This memoir skillfully illustrates that military leaders at all levels should be cognizant of how their actions, policies, attitudes, and decisions are perceived by both subordinate units and individual subordinates. Clement does an excellent job of explaining how detrimental it can be for a subordinate unit and individual unit members when it appears the higher

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[32] *Id*. at 109 ("Every time the roster was read off, I was nervous that somebody's name would be followed by silence instead of a voice saying 'here.' That was, no kidding, my biggest fear in Afghanistan.").

[33] Near beer is defined as "any of various malt liquors considered nonalcoholic because they contain less than a specified percentage of alcohol." The definition of near beer can be found at http://www.merriam-webster.com/dictionary/near%20beer.

[34] *Id*. at 235 ("One of my greatest triumphs was designing the improvised refrigerator that I had in my truck . . . I wanted to hand each truck a cold beer to toast our success as we rolled 'through the wire' . . . with our deployment basically done. I needed the beer to be cold. Necessity is the mother of invention.").

[35] *Id*. at 64.

[36] *Id*.

[37] *Id*. at 64, 171.

[38] *Id*. at 253 ("Nobody ever told me why I was going to Afghanistan. Sure, I knew our unit's mission was to go resupply other units, but nobody ever came out and briefed our unit on *why* any of those units were really there in the first place.").

[39] *Id*. at 171 ("'Damn, sir aren't they just fighting us because we're here to fight? If we just left, would they just stop fighting?' The Lieutenant don't know, but it sounds like a damn good question.").

[40] *Id*. at 193 ("Were they fighting us because of jihad, on ideological grounds, or because we were invading their home? Would I act any differently if we switched places?").

[41] *Id*. at 253.

[42] *Id*. at 171.

[43] *Id*. at 195. This phrase "became a refrain for the Marines of Alpha Company. The often times overbearing chain of command gave the Marines no respite from petty requirements while they were aboard Camp Leatherneck."

[44] *Id*. at 131.

[45] *Id*. ("There was a definite feeling in Alpha Company that the rest of the battalion really didn't understand what it was that we did, or how to best support us (or support us at all, as the case was). Marines joked that the real enemy was not outside the wire, but in the Battalion HQ.").

headquarters is only looking out for itself.[46]

One of the most shocking examples of flat-out bad leadership is when Clement was ordered to unload his convoy's emergency fuel reserve at an outlying forward operating base (FOB) before heading back to his home base, Camp Leatherneck.[47] The battalion operations officer ordered Clement to offload his emergency fuel in order to show how quickly the battalion could move fuel. On the trip back to Camp Leatherneck, the convoy ran out of fuel because of delays from weather and Improvised Explosive Device (IED) attacks. Without its emergency reserve, they were nearly stranded outside the wire, all so the battalion staff could brief better statistics about fuel delivery rates. Only through the ingenuity of the Marines on the ground were they able to siphon enough fuel from broken-down vehicles they were towing to make it back to base safely.[48]

The valuable lessons gleaned from the stark contrast between good and bad leadership demonstrated throughout this memoir make it relevant to leaders at all levels and in all institutions.

VI. Conclusion

More than a book about a single officer's experiences in Afghanistan or the struggles CLB-6 endured in Helmand Province, Jeff Clement tells a valuable story about individual and institutional leadership. Although seemingly unintended, this book offers rare insight into the importance of leadership in the armed forces. On the ground, leadership can literally mean the difference between life and death and as Clement illustrates, leadership truly provides the foundation for every aspect of military life particularly in a combat zone.[49]

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[46] *Id*. at 97 ("I felt the battalion forced me as the platoon commander to accept the responsibility of bending and breaking rules, even though many of the leaders knew exactly what they were forcing me to do to complete the mission. If something went wrong, it would be my fault.").

[47] *Id*. at 219.

[48] *Id*. at 220.

[49] *Id*.

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 TJAGLCS 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 servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

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 3172.

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 ATRRS Self-Development Center and click on "Update" your ATRRS Profile (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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

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
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, 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

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade judge advocates (JA). 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 December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, 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 enrollment in Phase I, please go to JAG University at https://jagu.army.mil. At the home page, find JAOAC registration information at the "Enrollment" tab.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have completed and passed all non-writing Phase I modules by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline. Students must have submitted all Phase I writing exercises for grading by 2359 (EST) 1 October in order to be eligible to attend Phase II in the same fiscal year as the 1 October deadline.

d. Phase II includes a mandatory Army Physical Fitness Test (APFT) and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact LTC Andrew McKee at (434) 971-3357 or andrew.m.mckee2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state to remain certified to perform the duties of an Army JA. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. 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.

c. 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.

d. Regardless of how course attendance is documented, it is the personal responsibility of JAs 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 JAs 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.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primarily mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the "Public" side of JAGCNet by using the following link: http://www.jagcnet.army.mil. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the "Legal Center and School" link across the top of the page. The page will drop down.

(2) If you want to view the "Army Lawyer" or "Military Law Review," click on those links as desired.

(3) If you want to view other publications, click on the "Publications" link below the "School" title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the "Law Library" that will provide access to additional resources.

c. If you have access to the "Private" side of JAGCNet, you can get to the TJAGLCS publications by using the following link: http://www.jagcnet2.army.mil. Be advised that to access the "Private" side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the "TJAGLCS" link across the top of the page and click on it. The page will drop down.

(2) Find the "Publications" link under the "School" title and click on it.

(3) There are several other resource links there as well. You can find links the "Army Lawyer," the "Military Law Review," and the "Law Library."

d. Access to the "Private" side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

(1) Active U.S. Army JAG Corps personnel;

(2) Reserve and National Guard U.S. Army JAG Corps personnel;

(3) Civilian employees (U.S. Army) JAG Corps personnel;

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: https://www.jagcnet.army.mil/Register.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

g. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. Contact information for TJAGLCS faculty and staff is available through the JAGCNet webpage at https://www.jagcnet2.army.mil. Under the "TJAGLCS" tab are areas dedicated to the School and the Center which include department and faculty contact information.

b. TJAGLCS resident short courses utilize JAG University in a "blended" learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop or tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO username and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short course operations and JAGU course access are provided in separate correspondence from a Course Manager.

c. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 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 TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Distributed Learning and JAG University (JAGU)

a. *JAGU:* The JAGC's primary Distributed Learning vehicle is JAG University (JAGU), which hosts the Blackboard online learning management system used by a majority of higher education institutions. Find JAGU at https://jagu.army.mil.

b. *Professional Military Education:* JAGU hosts professional military education (PME) courses that serve as prerequisites for mandatory resident courses. Featured PME courses include the Judge Advocate Officer Advanced Course (JAOAC) Phase 1, the Pre-Advanced Leaders Course and Pre-Senior Leaders Course, the Judge Advocate Tactical Staff Officer's Course (JATSOC) and the Legal Administrator Pre-Appointment Course.

c. *Blended Courses:* TJAGLCS is an industry innovator in the 'blended' learning model, where face-to-face resident instruction ('on-ground') is combined with JAGU courses and resources ('on-line'), allowing TJAGLCS short course students to utilize and download materials and resources from personal wireless devices during class and after the course. Personnel attending TJAGLCS courses are encouraged to bring a personal wireless device (e.g. laptop, iPad, tablet) to connect to our free commercial network to access JAGU course information and materials in real-time. Students must have their AKO user name and password to access JAGU unless the wireless device has a Common Access Card (CAC) reader. Additional details on short-course operations and JAGU course access are provided in separate correspondence from a Course Manager.

d. *On-demand self-enrollment courses and training materials:* Self enrollment courses can be found under the 'Enrollment' tab at the top of the JAGU home page by selecting course catalog. Popular topics include the Comptrollers Fiscal Law Course, Criminal Law Skills Course, Estate Planning, Law of the Sea, and more. Other training materials include 19 Standard Training Packages for judge advocates training Soldiers, the Commander's Legal Handbook, and specialty sites such as the SHARP (Sexual Harassment/Assault Response and Prevention) site and the Paralegal Proficiency Training and Resources site.

e. *Streaming media:* Recorded lectures from faculty and visiting guests can be found under the JAGU Resources tab at the top of the JAGU home page. Video topics include Investigations Nuts and Bolts, Advanced Contracting, Professional Responsibility, Chair Lectures and more.

f. *Naval Justice School Online (NJS Online):* JAGU is also the home of the Naval Justice School Online Legal Education Program. Find it by going to the JAGU home page and selecting the 'NJS Online' tab. NJS Online features 'LAWgos,' which are "shot in the arm" self-paced chunks of targeted learning in various topics. NJS Online also features multi-week courses taught over a number of weeks with facilitated instruction. Most courses are open enrollment for servicemembers across the DOD.

g. *Contact information:* For more information about Distributed Learning/JAGU, contact the JAGU help desk at https://jagu.army.mil (go to the help desk tab on the home page), or call (434) 971-3157.

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

PERIODICALS

By Order of the Secretary of the Army:

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