# THE ARMY LAWYER

*Headquarters, Department of the Army*

January 2011


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**Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases**
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***Department of the Army Pamphlet 27-50-452***

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

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

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Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

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## New Developments

### U.S. Army Claims Service

*Personnel Claims Note*

### New Personnel Claims Procedure for Catastrophic Losses

On New Year's Eve, 2010, a tornado tore through a Fort Leonard Wood, Missouri, housing area. The tornado destroyed homes,[1] disrupted the base's power supply, shut off water and damaged gas lines.[2] Fortunately, only minor injuries resulted, in large part because many personnel were on holiday leave. Approximately fifty military families lost all of their personal property; many others lost a significant amount.[3]

Shortly after the tornado hit, a team of claims professionals from the Fort Leonard Wood Office of the Staff Judge Advocate and other Army legal offices around the country began providing advice and assistance to those affected by the disaster. They set up a claim center and visited damaged and destroyed homes[4] to advise Soldiers of their right to file claims under the Personnel Claims Act.[5] In response to the disaster, the U.S. Army Claims Service (USARCS) developed an expedited procedure to process these claims, entitled the Catastrophic Loss Accelerated Settlement Procedure (CLASP).[6]

Ordinarily, a claim filed under the Personnel Claims Act must be substantiated[7] with a detailed list of property on a Department of Defense Form 1844 (List of Property and Claims Analysis Chart).[8] This requirement poses a problem for claimants suffering catastrophic losses, such as those resulting from the Fort Leonard Wood tornado. It may be impossible for such claimants to recall everything they owned. Additionally, claimants may have lost the receipts, inventories and other documents that might help them create the detailed list.

The U.S. Army Claims Service developed the CLASP to address the above problems. The CLASP only applies when there has been a total or substantially total loss of a claimant's property, and the nature, extent and circumstances surrounding the loss make it impractical for a claimant to substantiate the ownership, condition and value of property on an item-by-item basis.[9] In such circumstances the Commander, USARCS, may authorize the CLASP as an exception to the Army claims regulation on a case-by-case basis.[10]

If the CLASP is applicable, Army claims personnel will document losses by on-site inspections and photography, detailed oral interviews, and available inbound shipment inventories, to capture the quantity, condition and value of property prior to the loss. Once this information is obtained, the USARCS will provide an estimate of the total value of the lost property based on an analysis of the data gathered in the field.

At the claimant's option, this information may be used to obtain an adjudicated settlement under the Personnel Claims Act.[11] Claimants retain their right to seek reconsideration if dissatisfied with settlement amounts.[12] Additionally, claimants still retain the option to itemize their property losses if they believe this will result in a more favorable settlement.[13]

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[1] Forty-seven homes were destroyed and ninety-seven were damaged. Tiffany Wood, *Fort Leonard Wood Demonstrates Resiliency After Tornado*, ARMY MAG., Mar. 2011, at 52.

[2] Alexandra Browning & Patrick Fallon, *Fort Leonard Wood Begins Recuperation after Tornado Disaster*, COLUM. MISSOURIAN, Dec. 31, 2010, at 1, *available at* http://www.columbiamissiourian.com/stories/2010/12/31/fort-leonard-wood-begins-recuperation-after-tornado-disaster/.

[3] Alex Giddings, *Clean-up Continues at Fort Leonard Wood in Tornado Aftermath*, COLUM. MISSOURIAN, Jan. 2, 2011, at 1, *available at* http://columbiamissiourian.com.

[4] Wood, *supra* note 1, at 53.

[5] 31 U.S.C. § 3721 (2006). The Personnel Claims Act permits payment for losses incurred incident to service, including those due to "unusual occurrences" at quarters that have been provided by the government. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 11-5d (8 Feb. 2008) [hereinafter AR 27-20].

[6] Posting of Colonel Reynold P. Masterton to Claims Discussion Board, subject: New Personnel Claims Procedure for Catastrophic Losses, 10 January 2011, https://www.jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=CCCC080CED3FA585852578140067FD41&Count=30&ExpandSection=0 [hereinafter New Personnel Claims Procedure Posting].

[7] 31 U.S.C. §3721(f)(1).

[8] AR 27-20, *supra* note 5, para. 11-8a.

[9] New Personnel Claims Procedure Posting, *supra* note 6.

[10] AR 27-20, *supra* note 5, para. 1-17e.

[11] 31 U.S.C. § 3721.

[12] AR 27-20, *supra* note 5, para. 11-20.

[13] New Personnel Claims Procedure Posting, *supra*, note 6.

To date, the new CLASP has only been applied to the losses suffered during the tornado at Fort Leonard Wood on December 31, 2010.[14] Claims personnel who conclude that similar catastrophic events justify use of the new procedure should contact the Personnel Claims and Recovery Division at the USARCS for guidance.[15]

—Colonel R. Peter Masterton, USA, Commander, U.S. Army Claims Service, Fort Meade, Maryland

[14] *Id.*

[15] The U.S. Army Claims Service is located at 4411 Llewellyn Avenue, Fort Meade, Maryland 20755. The current telephone number for the Army Claims Service is (301) 677-7009. Additional information may be obtained at the U.S. Army Claims Service Internet site located at https://www.jagcnet.army.mil/8525752700444FBA.

# The "Malmedy Massacre" Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath

*Fred L. Borch III*
*Regimental Historian & Archivist*

On 17 December 1944, at a road intersection near Malmedy, Belgium, German Waffen-SS troops shot and killed more than seventy American prisoners of war (POWs) who laid down their arms. Several weeks after the "Malmedy Massacre," even more American POWs and a smaller number of unarmed Belgian civilians were also shot and killed by German troops during the Ardennes Offensive, commonly known as the "Battle of the Bulge."

Seventy-four Germans were later tried by a U.S. military government court for the murders committed at Malmedy and other locations between 16 December 1944 and 13 January 1945. Seventy-three were eventually found guilty following the trial, which began on 16 May 1946, at Dachau, Germany. Forty-three were sentenced to be hanged; twenty-two received life imprisonment; and the remainder were sentenced to jail terms between ten and twenty years. However, no one was actually put to death, and by Christmas 1956, all the convicted men had been released from prison.

Lieutenant Colonel (LTC) Burton F. Ellis, a member of the Judge Advocate General's Department (JAGD), served as the chief prosecutor at the Malmedy Massacre trial, but despite his success in court, controversy dogged the proceedings for years after the trial. Today, the truth about the Malmedy massacre, and whether justice was served by the military government court that heard the evidence, still provokes disagreement among those who study the episode.

There is no doubt that U.S. POWs and Belgian civilians were shot, machine-gunned, or mistreated at Malmedy and other nearby locations by SS troops in a *Kampfgruppe* (a regimental-sized "battle group") under the command of SS-Colonel (COL) Joachim Peiper. Survivors of the events bore witness to these facts. At Malmedy, for example, then-First Lieutenant (1LT) Virgil P. Lary witnessed American POWs being killed by machine gun fire; Lary survived by falling down face first in the muddy meadow and playing dead until he could escape. Lary later testified that he saw German troops kicking the bodies of the fallen Americans and then "double-tapping" those who flinched.[1]

The exact number of American and allied civilian victims will never be known and the prosecution avoided the issue by charging the seventy-four German SS accused as follows:

> In that _____ did, at or in the vicinity of Malmedy, Honsfeld, Bullingen, Ligneauville, Stoumont, La Gelize, Cheneus, Petit Their, Trois Ponts, Stavelot, Wanne, and Lutre-Bois, all in Belgium, at sundry times between 16 December 1944 and 13 January 1945, willfully, deliberately, and wrongfully permit, encourage, aid, abet and participate in the killings, shooting, ill treatment, abuse, and torture of members of the Armed Forces of the United States of America, then at war with the then German Reich, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, the exact names and numbers of such persons being unknown but aggregating several hundred, and of unarmed allied civilian nationals, the exact names and numbers of such persons being unknown.[2]

In any case, the killings and mistreatment of the POWs violated article 4 of the 1907 Hague Convention[3] (requiring humane treatment of POWs) and article 2 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War[4] (mandating both humane treatment and requiring that POWs be protected "against violence, insults and public curiosity"), both of which governed the conduct of German troops in general and Peiper's *Kampfgruppe* in particular at Malmedy.

On 16 May 1946, some seventeen months after the killings at Malmedy, a "military government court" consisting of eight officers and convened by Headquarters, U.S. Third Army, began hearing evidence against the German accused. While styled as a military government

[1] CHARLES WHITING, MASSACRE AT MALMEDY 52–53 (1971). "Double-tapping" is the practice of shooting wounded or apparently dead soldiers to insure that they are dead. Some also call it a "dead check." Under customary international law and the Geneva Conventions of 1929, however, double tapping was—and remains—a war crime because it is unlawful to kill the wounded. See GARY D. SOLIS, LAW OF ARMED CONFLICT 327–32 (2010).

[2] JAMES J. WEINGARTNER, A PECULIAR CRUSADE: WILLIS M. EVERETT AND THE MALMEDY MASSACRE 53 (2000).

[3] Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[4] Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

court in the convening orders, the tribunal was more akin to a military commission in that it operated with relaxed rules of evidence and procedure (e.g., hearsay was admissible and there was no presumption of innocence) and required only a two-thirds majority for a death sentence. While the senior member of the panel, Brigadier General (BG) Josiah T. Dalbey, wielded considerable power as court president, a law officer, COL Abraham H. Rosenfeld, was responsible for interpreting the law and ruling on procedural and evidentiary matters. Meanwhile, although Rosenfeld was a Yale-educated attorney, he was not a judge advocate. Similarly, the chief defense counsel, COL Willis M. Everett, Jr., was a lawyer[5] but not a judge advocate, and only one of his five assistant defense counsel, 1LT Wilbert J. Wahler, was a member of the JAGD.[6] However, the other four members of the defense team were attorneys. The Trial Judge Advocate who prosecuted the case, LTC Ellis, was apparently the only other attorney who wore the crossed pen and sword insignia of the JAGD on his uniform.[7]

The court proceedings, held in Dachau within sight of the infamous concentration camp of the same name, began with Ellis's opening statement and his assertion that the Government would prove that "538 to 749" American POWs and "over 90" Belgian civilians had been murdered.[8] Over the next three weeks, the prosecution called members of Peiper's *Kampfgruppe*, who had not been charged with crimes, to testify that Peiper and other SS officers and noncommissioned officers had instructed their men to ignore the rules of war governing prisoners. For example, SS-Private First Class Fritz Geiberger stated under oath that his platoon leader had given "a blanket order requiring the shooting of prisoners of war."[9] SS-Corporal Ernst Kohler testified that his platoon was ordered to "show no mercy to Belgian civilians" and to "take no prisoners," as this would avenge German women and children killed in Allied air raids.[10]

Additional testimony came from Malmedy survivors 1LT Lary and an ex-military policeman named Homer Ford, who had heard the American wounded "moaning and crying" and watched the Germans "either shoot them or hit them with the butts of their guns."[11] A number of Belgian civilians also declared under oath that they had witnessed the brutal and unjustified killing of unarmed civilians by SS troops. The testimony, especially of the German witnesses, was designed to prove that the killing of the American POWs and Belgian civilians was premeditated because it had been part of a conspiracy or common design.

The bulk of the prosecution's evidence, however, was not live testimony. Nearly one hundred written sworn statements linked each of the SS accused "with crimes that were described in exhaustive detail."[12] If BG Dalbey and the seven other panel members took these statements at face value, the accused would almost certainly be convicted.

Everett and the defense counsel soon learned, however, that there were problems with some of the sworn statements. Their German clients insisted that many of their statements were the result of trickery, deceit, and in some cases, coercion. Peiper claimed that one of his fellow accused had been beaten for nearly an hour by American investigators seeking a confession—although apparently no incriminating statement was obtained. Two other German accused claimed that ropes had been placed around their necks during questioning. This act, they believed, was preparatory to hanging. However, the most prevalent interrogation technique had been the use of a "mock trial," where the accused was brought before a one-person tribunal. While he sat with his "defense counsel," the "court" rushed through the proceedings before informing the surprised accused that, as he was to be hanged the next day, he "might as well write up a confession and clear some of the other fellows [co-accused] seeing as he would be hanged."[13] Just how many sworn statements were obtained through the use of these fake tribunals, which Army investigators admitted they had used at times, and which they called a "*schnell* (or fast) procedure," will never be known, but no doubt some of the statements introduced at trial resulted from their use. On the other hand, as some statements from the SS accused had been obtained after "one or two brief and straightforward interrogation sessions," it is equally true that subsequent claims of widespread coercive interrogation are false.[14]

Everett was sufficiently alarmed by his clients' claims of abuse to report the alleged prosecutorial misconduct to COL Claude B. Mickelwaite, the Deputy Theater Judge Advocate in Wiesbaden, Germany. Mickelwaite, who had

[5] While he had been an attorney since graduating from Atlanta Law School in 1924, Everett had very little, if any, trial experience. His official military records show that his law practice focused on "titles, estates, investments, corporation and civil law." TJAGLCS Historian's Files, WD AGO Form 66-4, Main Civilian Occupation (1 Dec. 1944). Given the relaxed rules of evidence and procedure in the Malmedy trial, however, Everett's lack of litigation experience did not hurt his effectiveness as a defense counsel.

[6] Wahler graduated from the 13th Officer Candidate Class at The Judge Advocate General's School in late 1945. JUDGE ADVOCATE GENERAL'S SCHOOL, STUDENT AND FACULTY DIRECTORY 79 (1946) [hereinafter DIRECTORY].

[7] Ellis graduated from the 21st Officer Class at the Judge Advocate General's School in 1944. DIRECTORY, *supra* note 6, at 14. Like Everett, he too had little criminal litigation experience: Ellis had been a corporate tax attorney in civilian life. *See* WEINGARTNER, *supra* note 2, at 40.

[8] WEINGARTNER, *supra* note 2, at 54.

[9] *Id*. at 58.

[10] *See* WHITING, *supra* note 1, at 191.

[11] *Id*. at 194.

[12] *See* WEINGARTNER, *supra* note 2, at 71.

[13] *Id*. at 42.

[14] *Id*. at 74.

overall responsibility for the prosecution of war crimes in Germany, sent a subordinate, LTC Edwin Carpenter, to Dachau to investigate. Carpenter concluded that mock courts and other psychological stratagems had, in fact, been used by Army investigators, but Carpenter also concluded that none of the sworn statements obtained from the accused were the product of physical violence.[15]

After the prosecution rested, the defense presented its evidence. Everett argued that the Malmedy massacre was an unfortunate event that had occurred in the midst of fast-moving and very fluid combat operations during the Battle of the Bulge. To support his argument, Everett called a number of German officers to testify that there had been no formal orders to murder POWs. Everett also managed to locate a West Point graduate and regular Army officer, LTC Harold D. McCown, who testified under oath that he had been captured by Peiper's *Kampfgruppe* and had been well-treated while a POW.[16] Everett and his defense team also argued that the nearly one hundred sworn statements introduced into evidence by the prosecution were unreliable products of coercion.

But it was a tough road for the defense, especially when Peiper testified on his own behalf. While denying that he had pre-existing orders from his superiors to kill POWs, or that he had directed troops under his command to kill combat captives, the forty-two-year-old Peiper did admit that it was "obvious" to experienced commanders that POWs sometimes must be shot "when local conditions of combat require it."[17] Under cross-examination by LTC Ellis, Peiper also admitted to misconduct that, while uncharged, was devastating. Peiper, who had served as Reichsfuhrer-SS Heinrich Himmler's adjutant from 1938 to 1941, admitted that he had been with Himmler at a demonstration where human beings had been gassed.[18]

On 11 July 1946, after a two month trial, BG Dalbey and the panel retired to consider the evidence. Two hours and twenty minutes later, they were back with a verdict: All seventy-three accused[19] were found guilty of the "killing, shooting, ill-treatment, abuse and torture of members of the armed forces of the United States of America and of unarmed Allied civilians."

During sentencing, BG Dalbey and his fellow panel members heard oral statements from more than half the convicted men. While one third of those who addressed the court denied the charges against them, a small number admitted their guilt. For example, a nineteen-year-old SS man confessed to killing two civilians but claimed the defense of superior orders. Another accused admitted he had shot and killed an American POW while acting under orders. A sergeant also admitted he had killed a POW but insisted that "the heat of combat, superior orders, and incitement by his comrades" was to blame.[20]

On July 16, 1946, the panel announced that forty-three convicted SS troops, including Peiper, were sentenced to death. Twenty-two received life sentences, and the rest were sentenced to jail terms of ten to twenty years in duration.

While the Army no doubt hoped that the verdict and sentences meant the end of the Malmedy proceedings, that was not to be. On the contrary, after leaving active duty in June 1947 and returning home to Atlanta, Georgia, Willis Everett continued to work tirelessly as a defense counsel for Peiper and his seventy-two co-accused.

Recognizing that there was no formal avenue of appeal from the Malmedy verdict, Everett instead began a vocal and public letter writing campaign. Everett argued that "80 to 90 percent of the confessions had been obtained illegally"[21] and that this prosecutorial misconduct had deprived Peiper and his seventy-two fellow SS-troops of justice. Everett also insisted that it had been impossible for him and his team to mount an effective defense because the court's desire for vengeance made the Malmedy verdict a foregone conclusion.

In the meantime, COL James L. Harbaugh, the European Command (EUCOM) Staff Judge Advocate, was reviewing the Malmedy record of trial and preparing a recommendation for General (GEN) Lucius Clay, then serving as Military Governor of the American Zone of Occupation (Germany). Harbaugh's legal review concluded that the evidence was insufficient to sustain some convictions and that many of the death sentences were inappropriate. As a result, on March 20, 1948, GEN Clay

[15] *Id.* at 44.

[16] *See* WHITING, *supra* note 1, at 195; WEINGARTNER, *supra* note 2, at 84–85.

[17] *See* WEINGARTNER , *supra* note 2, at 91. Joachim Peiper had extensive combat experience and was highly decorated. Born in Berlin in January 1915, he joined the SS in 1934 and was commissioned after completing officer candidate school. After the outbreak of World War II, Peiper fought in Poland and France. He then moved east with Waffen-SS forces as part of Operation Barbarossa. In March 1943, Peiper was awarded the Knight's Cross for heroism near Charkov, Russia, and he was decorated a second time—with the Knight's Cross with Oakleaves—in January 1944 for his bravery on the Eastern Front. On 11 January 1945, shortly after the Malmedy killings, Peiper was decorated a third time—with the Knights Cross with Oakleaves and Swords—for his actions during the defensive withdrawal of German forces in France after the D-Day landings. (While the Knight's Cross was Germany's highest decoration for combat valor in World War II, it is more akin to the Army Distinguished Service Cross than the Medal of Honor.) *See* JOHN R. ANGOLIA, ON THE FIELD OF HONOR 228 (1979).

[18] *Id.* at 92.

[19] The seventy-fourth accused originally arraigned was released to French authorities before the panel retired to reach a verdict. He was a French citizen, and the French exercised jurisdiction in his case. *See* WEINGARTNER, *supra* note 2, at 103.

[20] *Id*. at 105.

[21] FRANK M. BUSCHER, U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955, at 38 (1989).

reduced thirty-one of the forty-three death sentences to life imprisonment, but confirmed the remaining twelve death sentences, including Peiper's. General Clay also disapproved the findings in several cases, which freed thirteen other men.

Everett remained convinced that the remaining accused required a new trial, and on May 14, 1948, he filed a 228-page motion and petition with the U.S. Supreme Court. In that motion, he requested leave to file a petition for a writ of habeas corpus for relief from the sentences of the Malmedy trial. The Supreme Court denied the motion, but it was a close decision: The Court split four to four (with Justice Robert Jackson disqualifying himself because of his work as Chief Prosecutor at Nuremberg).[22]

Undeterred, Everett now looked for other ways to help the German accused. Unfortunately, he began to lie about how the Malmedy accused had been treated prior to trial, insisting that Peiper and the troops of the *Kampfgruppe* had been routinely beaten, starved, and tortured to compel them to confess to crimes. Everett also suggested that mock trials had been "the rule rather than the exception."[23] Everett convinced two Democratic members of Congress from Georgia, Congressman James "Jim" Davis and Senator Walter F. George, to meet with Secretary of Defense James V. Forrestal and Secretary of the Army Kenneth C. Royall on the issue. Secretary Royall was so upset by Everett's allegations of prosecutorial misconduct that he ordered a stay of all executions pending further review.[24] In July 1948, Royall named his own three-person commission, chaired by Texas Supreme Court justice Gordon Simpson, to review not only the Malmedy trial death sentences but also the one hundred and twenty-seven capital sentences imposed in other war crimes trials conducted at Dachau. Everett's allegations of unfairness and foul play at the Malmedy trial "had clearly put the Army on the defense," [25] and his claims threatened to undermine the validity of the Army's entire war crimes trial program in Germany. After all, if coercive interrogation techniques had been used to obtain convictions in other trials at Dachau, the fairness of all German war crimes trials in U.S. Army military courts would be called into question.

With the press in the United States trumpeting Everett's claims of malfeasance, a number of Catholic and Protestant bishops in Germany now joined the dialogue. Cardinal Josef Frings of Cologne and Bishop Johannes Neuhausler both launched vociferous campaigns against the Dachau war crimes trials. Frings "strongly opposed the entire concept of bringing the perpetrators to justice," and insisted that the Allies had followed a "pagan and naïve" optimism for taking it upon themselves to make judgments about Nazi guilt.[26] Neuhausler, encouraged by criticism of the Malmedy trial, "intensively lobbied American authorities on behalf of convicted war criminals."[27] In March 1948, he also wrote to five members of Congress demanding that they investigate the "torture, mistreatment and calculated injustice" committed by Army personnel investigating the Malmedy war crimes.[28]

Fortunately for the Army—and the JAGD—the Simpson commission concluded in September 1948 that the war crimes trials being conducted in Germany were "essentially fair" and that there was no "systematic use of improper methods to secure prosecution evidence."[29] However, the Malmedy trial was different; the use of mock trials had cast "sufficient doubt" on the proceedings to make it "unwise" to carry out the remaining death sentences.[30] Although GEN Clay still had the authority to affirm the death sentences, there was little doubt that the Simpson commission findings meant Peiper and the others would escape the gallows.

Shortly after the Simpson commission delivered its report to Secretary Royall, a Senate Armed Services Committee subcommittee chaired by Senator Raymond Baldwin began hearings on the Malmedy case. Beginning in March 1949, the subcommittee heard from 108 witnesses and examined thousands of pages of documents. Baldwin also invited Senator Joseph McCarthy to participate as a visiting member of the subcommittee. McCarthy's participation was intended to "gain additional credibility and quiet the more radical Army critics,"[31] but inviting McCarthy turned out to be a disaster. He dominated the subcommittee hearings for almost a month and "sharply

[22] Everett v. Truman, 334 U.S. 824 (1948); *see* BUSCHER, *supra* note 21, at 38.

[23] *See* WEINGARTNER, *supra* note 2, at 151.

[24] *See* BUSCHER, *supra* note 21, at 38–39. Royall's actions almost certainly were influenced by his own experience with military commissions. In 1942, then-COL Royall had served as one of three defense counsel for the eight U-boat saboteurs being prosecuted before a military tribunal convened by Franklin D. Roosevelt. (Royall was not a member of the JAGD, but he had received a direct commission as a colonel, Army General Staff, in 1942.) Believing that Roosevelt lacked the constitutional authority to convene a secret military commission to try his clients, Royall aggressively challenged the lawfulness of the tribunal before the U.S. Supreme Court. Although he ultimately did not prevail, Royall insisted that "to preserve our own system of government," it was important that the military commission not trample on the rights of the German defendants. As Royall put it: the United States would have "an empty victory" if it failed to adopt procedures at the military commission that reflected "fair administration of law." The real test of a system of justice "is not when the sun is shining but when the weather is stormy." LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 113–14 (2005).

[25] *See* BUSCHER, *supra* note 21, at 38.

[26] *Id.* at 93.

[27] *Id.*

[28] *Id.*

[29] *See* BUSCHER, *supra* note 21, at 39; WEINGARTNER, *supra* note 2, at177.

[30] *See* BUSCHER, *supra* note 21, at 39.

[31] *Id.*

attacked the Army."[32] McCarthy had a particularly "heated confrontation" with now-COL Ellis, whom McCarthy accused of grave misconduct at the Malmedy trial.[33]

In October 1949, the subcommittee published a 1700-page report. It unanimously concluded that the allegations of physical mistreatment and torture were false and that the claims that violence had been used to obtain confessions were without merit.[34] However, the report did find that Army investigators had employed mock trials "in not more than 12 cases of the several hundred suspects interrogated by the war crimes investigative teams."[35] The subcommittee criticized these mock trials as a "grave mistake" because the use of psychological trickery was unnecessary and had ultimately been exploited by critics of the war crimes trial program. Significantly, the subcommittee found that "American authorities have unquestionably leaned over backward in reviewing any cases affected by the mock trials . . . . [I]t appears many sentences have been commuted that otherwise might not have been changed."[36]

In the end, it was all too much for American military decision-makers in Germany, and on 31 January 1951, GEN Thomas T. Handy, who succeeded Clay, commuted the death sentences of Peiper and the remaining Malmedy accused. Handy followed the advice of COL Damon Gunn, the new Theater Judge Advocate, who had counseled that a major reason to commute the death sentences was "the probable negative congressional reaction to additional executions."[37] By Christmas 1956, all the Malmedy accused had been released from prison.

Measured by today's standards, and with the benefit of hindsight, the Malmedy court proceedings were certainly flawed. First, the prosecution's use of fake judicial proceedings and coercive interrogation techniques to obtain statements from the accused compromised their reliability and consequently tainted the entire prosecution effort. As evidenced by Secretary Royall's decision to have a commission look at *all* the death penalty cases tried at Dachau, flaws in the Malmedy prosecution subsequently spilled over to other war crimes trials, which became subject to Congressional scrutiny.

On the other hand, there is no doubt that American POWs were murdered at Malmedy and that few of the Malmedy survivors could identify the SS troops who had opened fire on them. It is likely that government investigators felt justified in using trickery and deceit to obtain evidence from the German accused because there was no other way to obtain proof; confessions were required if justice was to be obtained for the dead.

Second, the single trial of more than seventy accused, represented by six American defense counsel, smacks of unfairness, especially as each accused faced a death sentence. As there was no presumption of innocence at the trial and the panel members spent less than three hours deliberating before returning with a finding of guilty, it is difficult to conclude that there was a deliberative process instead of a rush to judgment. On the other hand, when the panel members heard about Peiper's activities as Heinrich Himmler's adjutant and heard him admit that "local conditions" sometimes demanded that POWs be executed, it was reasonable for these same panel members to find that Peiper had either ordered the execution of Americans or had condoned the killings. Alternatively, the panel members could have concluded that Peiper was guilty as charged because he had failed to control the members of his *Kampfgruppe*, failed to take action to prevent future killings, and failed to discipline the culpable parties whom he should have known had killed POWs and unarmed civilians. Additionally, as the panel members had access to nearly one hundred sworn statements linking each accused to the charged offenses, there arguably was sufficient evidence to support the court's verdict.

While the killings at Malmedy were homicides, there was no credible evidence that the killings were ordered, deliberate, or pre-planned. Some historians believe that the impetus for the killings occurred when Georg Fleps, a twenty-one-year old SS-trooper, opened fire of his own volition. Once he began shooting, others armed with machine guns joined in.[38] Consequently, although these murders qualify as war crimes, the event preceding the murders could very well have been spontaneous. But the Malmedy court failed to adequately address the *mens rea* of the seventy-three SS troops it convicted; a fairer determination of that criminal intent could have resulted in fewer death sentences, and perhaps some acquittals.

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[32] *See* BUSCHER, *supra* note 21, at 40.

[33] *Id*. at 41. Joseph Raymond McCarthy (1909–1957) served as U.S. Senator from Wisconsin from 1946 to 1957. While McCarthy was relatively unknown at the time of the Malmedy hearings, he soon became a high-profile national figure after claiming in February 1950 that he had a list of Communist Party members who were employed by the U.S. State Department. McCarthy subsequently charged that Communists (and Soviet spies) had infiltrated other parts of the U.S. Government, including the U.S. Army. By December 1954, however, McCarthy's tactics and his inability to prove claims of subversion resulted not only in a loss of popularity but also a vote of censure by his fellow senators. McCarthy died at Bethesda Naval Hospital in May 1957. He was forty-eight years old. However, his impact on America has not been forgotten. The term "McCarthyism" (coined by his opponents) continues to mean the "political practice of publicizing accusations of disloyalty or subversion with insufficient regard to evidence." AMERICAN HERITAGE DICTIONARY 809 (1979).

[34] MALMEDY MASSACRE REPORT, SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES, U.S. SENATE, 81ST CONG., 1ST SESS. 6–7 (1949).

[35] *Id*. at 7.

[36] *Id*. at 8.

[37] *Id*. at 40.

[38] *See* WHITING, *supra* note 1, at 51–52; WEINGARTNER, *supra* note 2, at 62; *see also* Michael Reynolds, *Massacre at Malmedy During the Battle of the Bulge*, WORLD WAR II, Feb. 2003, at 16, 16–21.

As for Everett, he had never spent even a day in combat and had arrived in Europe only after the fighting was over. Despite the lack of first-hand knowledge about military operations, especially against Waffen-SS units, Everett consistently made pro-German statements that showed a marked insensitivity to the suffering that many had experienced under the German Reich. For example, Everett insisted that it was wrong for the United States to prosecute Germans for war crimes when American military personnel had committed similar offenses in the heat of battle.[39] Given the extent of the Holocaust—and the participation of Waffen-SS officers like Peiper in it—such a claim made Everett appear to be either disingenuous, foolish, or both. Additionally, Everett's own prejudices hurt his case. He repeatedly railed against COL Rosenfeld, the "Jew Law Member" at Malmedy and "Jewish pressure . . . demanding blood and death penalties."[40] While studying in New York City in 1945, Everett was upset to see "two black negroes" in the choir at an all white church, as this "spoiled the service." He also wrote to his wife that he could not "stomach" sharing a bathroom with a male African-American student at Columbia University.[41]

But there can be no dispute about one fact: Everett was an effective defense counsel, and his unwavering support of the Malmedy accused and unending agitation on their behalf is the chief reason all were spared the hangman's noose. At least one of the accused, however, could not escape a final reckoning. On 14 July 1976, then sixty-one-year-old Peiper was living in Traves, France, when his home was fire-bombed. He died in the resulting blaze. Because the attack occurred on Bastille Day, historians think it likely that Peiper was assassinated by former members of the French Resistance.

Today, the Malmedy Massacre remains an example of the difficulties involved in prosecuting war crimes. Although American POWs had been murdered by SS troops, the use of trickery and deceit to obtain evidence against the German accused called into question the validity of the trial, allowed critics to paint the accused as victims of American injustice, and cast a shadow on the proceedings that exists to this day.

*More historical information can be found at*

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

[39] *See* WEINGARTNER, *supra* note 2, at 151.

[40] *Id.* at 68, 206.

[41] *Id.* at 30–31.

# Building the Airplane While in Flight[1]: International and Military Law Challenges in Operation Unified Response

*Lieutenant Colonel John N. Ohlweiler*[*]

*We are just now beginning to learn the extent of the devastation, but the reports and images that we've seen of collapsed hospitals, crumbled homes, and men and women carrying their injured neighbors through the streets are truly heart-wrenching . . . . I have directed my administration to respond with a swift, coordinated, and aggressive effort to save lives. The people of Haiti will have the full support of the United States in the urgent effort to rescue those trapped beneath the rubble, and to deliver the humanitarian relief—the food, water, and medicine—that Haitians will need in the coming days. In that effort, our government, especially USAID and the Departments of State and Defense are working closely together and with our partners in Haiti, the region, and around the world*."[2]

At 4:53 PM on 12 January 2010, a 7.0 magnitude earthquake struck Port au Prince, Haiti, centered fifteen miles west-southwest of the city, at a depth of approximately 8.1 miles.[3] Approximately three million people were directly affected by the earthquake—one-third of Haiti's population.[4] The devastation and destruction were "unimaginable."[5] In the early days of the disaster, it was estimated that 150,000 people might have died.[6] Within a month, President Rene Préval estimated the death toll would rise to 300,000 as a direct result of the earthquake.[7]

The day after the earthquake, U.S. Ambassador to Haiti Kenneth H. Merten issued a disaster declaration,[8] a crucial first step for the United States to provide humanitarian assistance and disaster relief to the people of Haiti.[9] Subsequently, on 17 January 2010, Secretary of State Hillary Clinton and President Préval issued a Joint Communiqué which recognized the "long history of friendship between the people of Haiti and the people of the United States," as well as the "urgent need for . . . safe, swift and effective implementation of rescue, relief, recovery, and reconstruction efforts," and agreed that "efforts in Haiti by the Government and people of the United States [were

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[1] "Building the Airplane While in Flight" was a phrase used by the Joint Task Force senior staff to describe the difficulty of the JTF-H mission during its first few weeks. The phrase meant that the JTF was trying to establish its functions and processes as a JTF headquarters while simultaneously providing the humanitarian assistance and disaster relief it was being established to provide.

[2] Press Release, The White House, Office of the Press Sec'y, Remarks by the President on Rescue Efforts in Haiti (Jan. 13, 2010, *available at* http:www.whitehouse.gov/the-press-office/remarks-president-rescue-efforts-haiti.

[3] *Magnitude 7.0—Haiti Region*, U.S. GEOLOGICAL SURV. (Jan. 12, 2010), http://earthquake.usgs.gov/earthquakes/recenteqsww/Quakes/us2010rja6.php (last visited Nov. 17, 2010). This earthquake was followed quickly by two strong aftershocks of 5.9 and 5.5 magnitude.

[4] *Haiti Earthquake Flash Appeal 2010: Executive Summary*, CONSOLIDATED APPEALS PROCESS (15 Jan. 2010), http://ochaonline.un.org/humanitarianappeal/webpage.asp?Page=1841. The summary states,

> [P]lotting the earthquake's zones of intensity against population densities in this part of Haiti shows that 3 million people were in areas of "very strong" to "extreme" shaking, where structures would have suffered moderate to very heavy damage. . . . This response plan and appeal therefore are based on an initial estimate of 3 million people severely affected, in the sense of injury and/or loss of access to essentials such as food, water, health care, shelter, plus livelihoods, education and other basic needs, and on restoring and strengthening state capacities.

[5] *Haiti President Thankful for Incoming Aid*, MIAMI HERALD, Jan. 14, 2010, *available at* http://www.miamiherald.com/2010/01/13/1422279/haitis-president-thankful-for.html.

[6] *Haiti Earthquake of 2010*, N.Y. TIMES, http://www.nytimes.com/info/haiti-earthquake-2010/ (last visited Nov. 17, 2010).

[7] Mica Rosenberg, *Haiti Death Toll Could Reach 300,000*, REUTERS (Feb. 22, 2010, 10:21 AM), http://www.reuters.com/article/idUSTRE61L01P20100222; *see also Haiti Death Toll Up to 230,000*, USA TODAY (Feb. 9, 2010, 6:36 PM), http://www.usatoday.com/news/world/2010-02-09-haiti-death-toll_N.htm. According to the U.N. Office for the Coordination of Humanitarian Affairs, the final statistics from the earthquake were 222,570 dead; 300,572 injured; 188,383 houses collapsed or damaged, of which 105,000 were completely destroyed; sixty percent of government, administrative, and economic infrastructure destroyed including the Presidential Palace, Parliament, and the cathedral; twenty-five percent of remaining houses in Port-au-Prince are so damaged they require demolition; twenty-three percent of all Haitian schools damaged; fifty percent of hospitals in the affected area destroyed or damaged, and twenty million cubic yards of rubble that must be removed. *See Haiti*, U.N. OFF. FOR COORDINATION OF HUMANITARIAN AFF., http://ochaonline.un.org/tabid/6412/language/en-US/Default.aspx (last visited Nov. 22, 2010).

[8] RHODA MARGESSON & MAUREEN TAFT-MORALES, CONG. RESEARCH SERV., R41023, HAITI EARTHQUAKE: CRISIS AND RESPONSE 11 (2010), *available at* http://www.fas.org/sgp/crs/row/R41023.pdf.

[9] A disaster declaration can be made by the Ambassador or Chief of Mission if: (1) the disaster exceeds the host nations ability to respond, (2) the effected country's government either requests or is willing to receive U.S. assistance, and (3) a response to the disaster is in the U.S. national interest. The disaster declaration is transmitted to the Office of U.S. Foreign Disaster Assistance (OFDA) and the Department of State to begin possible U.S. assistance. JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE, at xiii (17 Mar. 2009) [hereinafter JOINT PUB. 3-29]. *See also* HEADQUARTERS, U.S. ARMY SOUTHERN COMMAND, ANNEX V TO CDR USSOUTHCOM/INTERAGENCY COORDINATION TO UNIFIED RESPONSE OPORD 04-10 (18 Jan. 2010). "The UN generally conducts Foreign Humanitarian Assistance under the provisions of a resolution or mandate from the Security Council or the General Assembly." JOINT PUB. 3-29, *supra*, at III-9.

essential] to support the immediate recovery, stability and long-term rebuilding of Haiti."[10] This agreement formed the basis for Operation Unified Response (OUR).

The Department of Defense (DoD) relief effort was assigned to Southern Command (SOUTHCOM) which designated Lieutenant General P.K. Keen, the deputy commander of SOUTHCOM, as the Commander of Joint Task Force–Haiti (JTF-H).[11] The JTF mission was to "conduct[] Foreign Disaster Relief in support of the U.S. Agency for International Development [USAID] to support the GoH [Government of Haiti] and MINUSTAH [United Nations Stabilization Mission in Haiti] by providing localized security, facilitating the distribution and restoration of basic human services, providing medical support, and conducting critical engineering operations in order to alleviate human suffering and provide the foundation for the long term recovery of Haiti."[12] Operation Unified Response was conceived as a five-phase operation: (1) Initial Response/ Emergency Response; (2) Relief; (3) Restoration and DoD Transition; (4) Stabilization; and (5) Recovery.[13]

This article will explore the two main legal issues associated with Phase I and Phase II of OUR[14]: (1) development of rules of engagement, and (2) use of Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA) appropriations for humanitarian assistance and disaster relief.[15] The focus of Phase I was providing "immediate lifesaving actions, situational assessment and crisis action planning . . . [with] priority [being] Search and Rescue, establish[ing] C2 [command and control], FP [Force Protection], humanitarian assistance coordination center (HACC), log hub [logistics hub], water, food, med [medical], shelter, [and] eng (open LOCs) [engineering (open lines of communication)]."[16] In Phase II, the focus of operations shifted to "mitigate near-term human suffering . . . provide immediate disaster relief . . . and provide water, food, medical, shelter, engineering support."[17] In both phases, the success of the humanitarian assistance mission was directly connected to the JTF's ability to appropriately manage the security situation and its ability to develop a legal, supportable mechanism for using ODHACA funds in ways not previously envisioned by the statute, but certainly demanded by the unique nature of the Haiti earthquake.

### *Relevant Brief History of Haiti*

Haiti has long been the poorest country in the western hemisphere. Even before the earthquake, the World Food Programme spent $65 million in 2009 and $50 million in 2008 delivering food and relief supplies throughout Haiti.[18] The persistent poverty, socio-economic issues, and political upheaval of the recent past exacerbated the effects of the disaster and affected how and where JTF-H provided humanitarian assistance and disaster relief. Accordingly, it is important to have at least a passing familiarity with the history of Haiti in order to understand the social context in which the legal issues covered by this article arose.[19]

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[10] Joint Communiqué of the Governments of the United States and Haiti, U.S.–Haiti, Jan. 17, 2010, *available at* http://www.state.gov/r/pa/prs/ps/2010/01/135288.htm. Five days later, the U.N. General Assembly issued a resolution calling on Member States to assist or contribute to Humanitarian Assistance and Disaster Relief Operations in Haiti. G.A. Res. 64-250, agenda item 70(*a*), U.N. Doc. A/RES/64/250 (Jan. 22, 2010).

[11] CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], HAITI EARTHQUAKE HUMANITARIAN RELIEF, MODIFICATION 4 (29 Jan. 2009) [hereinafter CJCS EXORD MOD 4]. Lieutenant General (LTG) P.K. Keen was in Haiti on his way to the Hotel Montana when the earthquake occurred. Hotel Montana was a five-star hotel and was one of the largest expatriate meeting places in Haiti. As a result of the earthquake, the Hotel Montana was completely destroyed. Several U.S. citizens are believed to have died there during the earthquake, as well as numerous U.N. employees and officials. Major Ken Bourland, a member of LTG Keen's staff, was at the Hotel Montana when it collapsed. His was the only military death associated with the earthquake. Jay Newton-Small, *Can America's Top Gun in Haiti Keep the Relief Effort in Order?*, TIME MAG., Jan. 25, 2010, *available at* http://www.time.com/time/specials/packages/article/0,28804,1953379_1953494_1956342,00.html.

[12] HEADQUARTERS, U.S. SOUTHERN COMMAND, OPORD 01-10, CDRUSSOUTHCOM SUPPORT TO HAITI EARTHQUAKE RELIEF EFFORTS para. 2 (22 Jan. 2010) (UNCLAS/FOUO) [hereinafter SOUTHCOM OPORD 01-10]. The U.S. Agency for International Development was the lead federal agency for Haiti humanitarian relief and was responsible for coordination of humanitarian assistance and disaster relief. *Id.* para 1.e.(2)(c)2; *see also* Exec. Order No. 12966, 60 Fed. Reg. 36949 (July 18, 1995) (Foreign Disaster Assistance) (July 14, 1995); NAT'L SEC. PRESIDENTIAL DIR. 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION (Dec. 7, 2005); U.S. DEP'T OF DEF., DIR. 5100.46, FOREIGN DISASTER RELIEF (4 Dec. 1975) [hereinafter DODD 5100.46].

[13] SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.

[14] Phase I ran from 12 January 2010 through 5 February 2010. HEADQUARTERS, U.S. SOUTHERN COMMAND, FRAGMENTARY ORDER 025, TRANSITION TO PHASE 2, TO SOUTHCOM OPORD 01-10 (5 Feb. 2010) (UNCLAS/FOUO) [hereinafter SOUTHCOM FRAGO 025]. Phase II ran from 5 February 2010 through 1 June 2010. HEADQUARTERS, U.S. SOUTHERN COMMAND, FRAGMENTARY ORDER 102, COMPLETION OF OPERATION UNIFIED RESPONSE, TO SOUTHCOM OPORD 01-10 (22 May 2010) [hereinafter FRAGO 102]. According to joint doctrine, a phase can be characterized by the "focus that is placed on it. Phases are distinct in time, space, or purpose from one another, but they must be planned in support of each other and should represent a natural progression and subdivision of the campaign or operation. Transition between operational phases are designed to be distinct shifts in focus by the joint force, often accompanied by changes in command relationships." JOINT PUB. 3-29, *supra* note 9, at I-12.

[15] *See infra* notes 137–231 and accompanying text.

[16] HEADQUARTERS, U.S. SOUTHERN COMMAND, EXECUTE ORDER, HAITI, EARTHQUAKE FOREIGN DISASTER RELIEF para. 3.B.1 (16 Jan. 2010) [hereinafter SOUTHCOM EXORD]; *see also* SOUTHCOM FRAGO 025, *supra* note 14, para. 3.a(2)(a).

[17] SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a.(2)1.b.

[18] WORLD FOOD PROGRAMME, ANNUAL REPORT 2010, at 44 (2010).

[19] The Command Historian for SOUTHCOM, Dr. Bradley Coleman, produced a six-page information memorandum on the U.S. Military Experience in Haiti that was required reading for members of the JTF-H staff. The memorandum offered relevant historical lessons and perspectives intended to inform the Command decision-making process. *See also* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994–1995:

Haiti occupies the western one-third of the island of Hispaniola; the Dominican Republic occupies the eastern two-thirds. Although the Taino Indians had been living and thriving on the island of Hispaniola for hundreds of years, the modern, Western history of the island began with its discovery by Christopher Columbus in 1492.[20] After two hundred years of control and colonization by the Spanish, the western third of the island was ceded to France as part of the Treaty of Ryswick.[21] Under the French, Haiti became one of the richest colonies in the western hemisphere due to sugar, coffee, indigo, and cotton production, but also due to an extremely brutal system of slavery enforced by French Law.[22]

In 1791, following the French Revolution, slaves and runaway slaves, lead by Toussaint l'Ouverture, began what became known as the Haitian Revolution. Over the course of the next thirteen years, the "Haitians" would fight the French, the British, and the French again before achieving recognized independence in 1804.[23] Unfortunately, all those years of fighting reduced the Haitian population by one-half and thoroughly destroyed the local economy.[24] Moreover, a long succession of authoritarian dictatorships, plagued by violence, coups and exploitation, essentially doomed the new nation to perpetual poverty.[25]

In 1915, Haiti's fifth president in two years was assassinated, which prompted President Wilson to send U.S. Marines to protect U.S. citizens, property and interests and to prevent the entry of German forces into the country.[26] Despite several periods of violent unrest, the nineteen-year U.S. occupation of Haiti yielded several positive improvements in the country, to include the construction of roads, bridges, schools, lighthouses, wharves, and hospitals, and the development of the country's communications infrastructure.[27] Unfortunately, the U.S. occupation did nothing to alleviate "the social forces that created [instability] . . . poverty, ignorance, and the lack of a tradition or desire for orderly free government."[28] In fact, some actions during the U.S. occupation exacerbated the negative tendencies of these social forces, including the declaration of martial law,[29] the installation of a figurehead President,[30] the dissolution of the legislature for almost twelve years,[31] the imposition of "Jim Crow"–style laws on the residents, and the assumption of control of the police and all of Haiti's finances.[32] These actions reinforced what

LESSONS LEARNED FOR JUDGE ADVOCATES 7 (11 Dec. 1995) [hereinafter OPERATIONS IN HAITI, 1994–1995] (noting "full appreciation of any legal or practical issue requires some knowledge of the historical setting which gave rise to that issue").

[20] TERRY V. BUSS, HAITI IN THE BALANCE: WHY FOREIGN AID HAS FAILED AND WHAT WE CAN DO ABOUT IT 21 (2008).

[21] The Treaty of Ryswick settled the Nine Years War in which France fought against the Grand Alliance of England, Spain, the Holy Roman Empire and the United Provinces. DEREK MCKAY & H.M. SCOTT, THE RISE OF THE GREAT POWERS 1648–1815, at 43–53 (1983).

[22] The system of French slavery in Haiti was enacted under a system of laws known as Code Noir. Code Noir sanctioned the most brutal treatment of slaves, to include drowning in sacks, crucifixion on planks, buried alive, thrown into boiling cauldrons, or consigned to man-eating dogs. Vincent Browne, *Haiti's Never-ending Tragedy Has American Roots*, SUNDAY BUS. POST ONLINE (Ireland) (17 Jan. 2010), http://www.sbpost.ie/commentand analysis/haitis-neverending-tragedy-has-american-roots-46757.html.

[23] Adam Hochschild, *Birth of a Nation: Has the Bloody 200-Year History of Haiti Doomed It to More Violence?*, SAN FRANCISCO CHRON., May 30, 2004, *in* ADAM HOCHSCHILD, BURY THE CHAINS (2005). Ironically, the only existing copy of the Haitian Declaration of Independence was discovered in the British National Archives in February 2010, shortly following the 12 January 2010 earthquake.

[24] The new country's economy was further suppressed when Haiti agreed to pay France for the loss of profits from confiscated slave plantations. Hochschild, *supra* note 23. HANS SCHMIDT, THE UNITED STATES OCCUPATION OF HAITI, 1915–1934, at 24 (1971) (explaining "the great wealth of Haiti was largely destroyed during the protracted war for independence. What remained gradually deteriorated through years of neglect under independent Haitian rule"). During his second term, President Aristide demanded France repay the reparations, valued at $21 billion. *See* Lydia Polgreen, *200 Years After Napoleon, Haiti Finds Little to Celebrate*, N.Y. TIMES, Jan. 2, 2004.

[25] *See generally* SCHMIDT, *supra* note 24; *see also* MICHAEL DASH, HAITI AND THE UNITED STATES: NATIONAL STEREOTYPES AND THE LITERARY IMAGINATION (2d ed. 1997).

[26] SCHMIDT, *supra* note 24; *see also* Paul H. Douglas, *The American Occupation of Haiti I*, 42 POL. SCI. Q. 229–31 (1927); MICHEL-ROLPH TROUILLOT, HAITI: STATE AGAINST NATION 100 (1990); Raymond Leslie Buell, *The American Occupation of Haiti*, 5 FOREIGN POL'Y ASS'N INFO. SERV., No. 15, at 337–38 (1929). Obviously, there is a great deal of skepticism regarding the real reasons for the U.S. intervention in Haiti with most focusing on the U.S. interest in keeping the Caribbean, and access to the Panama Canal, free from foreign influence.

[27] Although the infrastructure work was greatly beneficial, it often came on the backs of forced labor, which served to increase the general resentment of the U.S. occupation. Stephen Solarz, *Foreword* to SCHMIDT, *supra* note 23, at xii.

[28] U.S. DEP'T OF STATE, REPORT OF THE PRESIDENT'S COMMISSION FOR THE STUDY AND REVIEW OF CONDITIONS IN THE REPUBLIC OF HAITI (1930) [hereinafter THE FORBES COMMISSION]. The Forbes Commission was the result of a joint congressional resolution of 6 February 1930, which authorized President Hoover to conduct an investigation of conditions in Haiti and the effect of U.S. policies during the occupation. The Commission was led by W. Cameron Forbes and examined the political aspects of American intervention, social and economic conditions, and the effectiveness of U.S. Administration of Haitian affairs. Ultimately the Commission found that it was a tragedy for the United States to remain in Haiti and a tragedy for the United States to leave, but that the best course of action was for the United States to withdraw. *See* ROBERT MELVIN SPENCER, W. CAMERON FORBES AND THE HOOVER COMMISSIONS TO HAITI, at ix (1985).

[29] ROBERT DEBS HEINL JR. & NANCY GORDON HEINL, WRITTEN IN BLOOD: THE STORY OF THE HAITIAN PEOPLE, 1492–1971, at 1978 (1978). Martial law would continue in Haiti until 1929.

[30] *See* LOWELL THOMAS, OLD GIMLET EYE: THE ADVENTURES OF SMEDLEY D. BUTLER AS TOLD TO LOWELL THOMAS 182 (1933) (providing an excellent description of the circumstances that lead to the selection of Phillipe Sudré Dartiguenave as the President of Haiti).

[31] BUSS, *supra* note 20, at 24.

[32] *See generally* SCHMIDT, *supra* note 24. These last two actions were accomplished by forcing the Haitian legislature to ratify the Treaty Between the United States and Haiti. Treaty Between the United States and Haiti Regarding the Finances, Economic Development and Tranquility in Haiti, U.S.–Haiti, Sept. 16, 1915, 39 Stat. 1654. In a message of 8 September 1915, Rear Admiral William B. Caperton, Commander of U.S. troops in Haiti, wrote, "Successful negotiation of treaty is prominent part of present mission. After encountering many difficulties treaty situation at present

Haitians had experienced during their hundred years of independence—the right of the powerful to set the rules to their own advantage.[33] When the United States finally left Haiti in 1934, the leadership in Haiti quickly reverted to a dictatorial-style government.[34]

After twenty years of various authoritarian rulers, Dr. Francois "Papa Doc" Duvalier came to power in 1957 and began the most repressive and corrupt government in Haiti's history, characterized by massive institutional graft, political murders, beatings, and widespread cultural intimidation.[35] When his son, Jean-Claude "Baby Doc" Duvalier, took over in 1971, the violence decreased slightly, but the kleptocracy expanded. By the time "Baby Doc" was forced into exile by the military in 1986, it is estimated he stole between $300 and $800 million.[36]

After four years of military rule, Jean-Bertrand Aristide, a Roman Catholic priest, was elected President of Haiti in 1990 on a quasi-socialistic platform that called for large-scale public works programs, agricultural reform, and an end to public corruption.[37] Elected with 66% of the vote,[38] President Aristide was wildly popular with the poor because of his embrace of liberation theology and its effect on his policies.[39] On 29 September 1991, while visiting the United Nations, President Aristide was overthrown in a military coup lead by Lieutenant General Raul Cedras.[40] Though the international community condemned the coup,[41] it took three years of persistent negotiation, and the threat of a UN-sanctioned invasion,[42] to convince the coup leadership to allow President Aristide to resume his office on 15 October 1994.[43] As part of Aristide's return to power, U.S. forces arrived in Haiti on 19 September 1994 on a peace-keeping mission.[44] The dual purpose of the U.S. deployment was to create a secure and stable environment that would allow President Aristide to return, and that would create the conditions necessary for the UN Mission in Haiti (UNMIH) to begin the "professionalization of the Haitian armed forces and creation of a separate police force."[45]

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looks more favorable than usual. This has been effected by exercising military pressure at propitious moments in negotiations." *The Rape of Haiti*, NATION, Nov. 9, 1921, at 346–52.

[33] SCHMIDT, *supra* note 24.

[34] BUSS, *supra* note 20, at 24–25.

[35] It is estimated that 50,000 people were the victims of political murder under the Duvalier regimes. *See* RANDALL ROBINSON, AN UNBROKEN AGONY: FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT 143 (2007).

[36] Press Release, Transparency Int'l, Plundering Politicians and Bribing Multinationals Undermine Economic Development (Mar. 25, 2004). Bella Stumbo, *From Horror to Hope for the First Time in Decades, Haiti Has a Popularly Elected President. Can He Steer His Country Away from Its Bloody Past?*, LOS ANGELES TIMES, Apr. 21, 1991, at 8. For an outstanding insider history of the Duvalier legacy in Haiti, see ELIZABETH ABBOT, HAITI: THE DUVALIERS AND THEIR LEGACY (1991).

[37] *Haiti's Last Chance,* J. OF COM., Dec 14, 1990, at 8A, 1990 WLNR 577389.

[38] Stumbo, *supra* note 36, at 8.

[39] Liberation theology has been described as "an interpretation of Christian faith through the poor's suffering, their struggle and hope, and a critique of society and the Catholic faith and Christianity through the eyes of the poor." PHILLIP BERRYMAN, LIBERATION THEOLOGY: ESSENTIAL FACTS ABOUT THE REVOLUTIONARY MOVEMENT IN LATIN AMERICA AND BEYOND (1987). Aristide was committed to liberation theology when he returned to Haiti in 1982, after years of study abroad for the priesthood. He regularly used his pulpit in a small church in La Saline to blend scripture with Marxist terminology in fiery sermons that preached social justice for the poor and condemnation for the country's military and political elites (i.e., Duvalierists). As a political candidate, Aristide's embrace of liberation theology and its centrality to his political agenda placed him in direct conflict with those same elites who had prospered during the dictatorships of the previous forty years. *See generally* ALEX DUPUY, THE PROPHET AND POWER: JEAN BERTRAND ARISTIDE, THE INTERNATIONAL COMMUNITY, AND HAITI 55–99 (2007).

[40] BUSS, *supra* note 20, at 30–31.

[41] The U.N. General Assembly condemned the coup in a strongly worded resolution on 11 September 1991. G.A. Res. 46/7, U.N. Doc A/RES/46/7 (Oct. 11, 1991). During the course of the next three years, the U.N. imposed increasingly severe sanctions on Haiti as a result of the coup to include oil and arms embargos, travel restrictions, military and police supplies, and ultimately all commerce to and from Haiti except food, medicine, cooking oil, and journalistic supplies. S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993); S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993); S.C. Res. 917, U.N. Doc. S/RES/ 917 (May 6, 1994).

[42] U.N. Security Council Resolution 940 stated, "Acting under Chapter VII of the United Nations Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership." S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

[43] Anthony Lewis, *Abroad at Home: Resolution Matters*, N.Y. TIMES, Sept. 19, 1994, at A17; Larry Rohter, *Showdown in Haiti: On Haiti's Streets, an Eerie Silence*, N.Y. TIMES, Sept. 19, 1994, at A9. When President Aristide returned to power, one of the first things he did was disband that country's armed forces.

[44] While U.S. forces were staging to invade Haiti for Operation Uphold Democracy, the coup leadership was finally convinced to step down and allow the return of President Aristide. In fact, members of the U.S. military were en route for a forcible entry into Haiti on 18 September 1994 when Lieutenant General Raul Cédras, military leader of the coup, agreed to return control of the government to President Aristide. OPERATIONS IN HAITI, 1994–1995, *supra* note 19, and accompanying text.

[45] A U.N. Mission in Haiti was first proposed on 31 August 1993. S.C. Res. 862, U.N. Doc. S/RES 862 (Aug. 31, 1993). Subsequent Security Council resolutions expanded and clarified the proposed mission until S.C. Res. 975, U.N. Doc. S/RES/875 (Jan. 30, 1995), which officially directed the UNMIH to assume responsibility from the U.S.-led Mutinational Force that had restored President Aristide on 31 March 1995. *See* S.C. Res. 867, U.N. Doc S/RES/ 867 (Sept. 23, 1993); S.C. Res. 873, U.N. Doc. S/RES 873 (Oct. 13, 1993); S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993); S.C. Res. 905, U.N. Doc. S/RES/905 (Mar. 23, 1994); S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994); S.C. Res. 933, U.N. Doc. S/RES/933 (June 30, 1994); S.C. Res. 948, U.N. Doc. S/RES/948 (Oct. 15, 1994); S.C. Res. 964, U.N. Doc. S/RES/964 (Nov. 29, 1994); S.C. Res. 975, U.N. Doc. S/RES/975 (Jan 30, 1995). Although President Aristide was ultimately restored to power due in no small part to the persistent efforts of the United States, in recent years President Aristide has claimed that the United States was involved through the Central Intelligence Agency (CIA) in financing and training the original coup plotters in 1991. A *New York Times* investigation into the matter found no evidence of CIA involvement in the 1991 coup. Howard W. French, *C.I.A. Formed Haitian Unit Later Tied to Narcotics Trade*, N.Y. TIMES, Nov. 14, 1993, *available at* http://www.nytimes.com/1993/11/14/world/cia-formed-haitian-unit-later-tied-to-narcotics-trade.html?pagewanted=1.

Because Haiti's Constitution prohibited consecutive presidential terms, President Aristide was succeeded in 1996 by Rene Préval, a close personal friend of Aristide who had served as Prime Minister during the seven months before the coup.[46] Within a year, Aristide formed a new political party,[47] and when the 1997 parliamentary elections failed to garner a working majority, President Préval began to govern by decree, which, in turn, lead the opposition to refuse to participate in the government.[48] New parliamentary elections in May 2000 yielded huge Aristide victories that were denounced as fraudulent and improper by the United Nations, the Organization of American States, the European Union, the United States, Canada, Venezuela, Argentina, and Chile, resulting in the suspension of almost all foreign aid to Haiti.[49] In November 2000, in an election marred by violence and intimidation that was boycotted by virtually all opposition parties, Aristide was once again elected President of Haiti.[50] During the next three years, a coalition of Aristide's political opponents formed the Democratic Convergence, elements of which fomented violence.[51] This, in turn, encouraged Aristide to allow his most radical followers to respond with violence—often armed by the National Police.[52]

As the violence escalated, representatives from the international community proposed a power sharing agreement in February 2004, but the opposition rejected it.[53] On 29 February 2004, President Aristide resigned and fled the country under pressure from Washington and Paris.[54] That same day, the UN Security Council determined that the situation in Haiti constituted a threat to international peace and security and authorized a Multinational Interim Force (MIF) to contribute to security and stability in Haiti.[55] On 30 April, the Security Council established MINUSTAH, which took over from the MIF on 1 June 2004.[56] After two more years of violence during which a U.S.-backed interim administration attempted to lead the government, Rene Préval was once again elected President.[57] President Préval's second term was characterized by slow democratic and economic advances as the international community returned to support Haiti's reconstruction and recovery. Despite this continued slow progress toward a stabilized government, Haiti nevertheless continued to suffer from high crime rates, corruption, drug problems, food riots and chronic human rights problems, "including inhumane prison conditions, police violence, threats against human rights defenders, and impunity for past abuses."[58]

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[46] Larry Rohter, *President-to-Be Of Haiti Faces Tough Agenda*, N.Y. TIMES, Dec. 17, 1995. Many believed that Préval was merely keeping the presidential seat warm until Aristide could run for office again in 2000.

[47] Editorial, *Aristide Is Forming New Political Party in Haiti, Undermining Leader*, N.Y. TIMES, Jan. 10, 1997, at A11.

[48] BUSS, *supra* note 20, at 35–36.

[49] *Id.* at 36. Most observers agreed that Aristide's party would have won easily without the fraud.

[50] Polgreen, *supra* note 24. Because so many international observers believed President Aristide's reelection was the result of flaws and impropriety, they suspended over $500 million in international aide—adding to the country's persistence economic woes. David Gonzales, *8 Years After Invasion, Haiti Squalor Worsens*, N.Y. TIMES, July 30, 2002, at A1.

[51] BUSS, *supra* note 20, at 37–39. Other elements of the Democratic Coalition were in fact legitimate business interests and middle class neoliberals. The Coalition was united around their opposition to Aristide's increasing authoritarianism.

[52] Walt Bogdanich & Jenny Nordberg, *Mixed U.S. Signals Helped Tilt Haiti Toward Chaos*, N.Y. TIMES, Jan. 29, 2006. At the same time, President Aristide's second term as President was, in fact, more corrupt as Aristide encouraged paramilitary groups loyal to him personally to intimidate opponents. Members of his inner circle, including the National Palace security chief, the director of the Haitian National Police, the head of an investigations unit of the National Police, and the President of the Haitian Senate, were also convicted in the United States for narcotics distribution and money-laundering. Ben Fountain, Op-Ed., *Addicted to Haiti*, N.Y. TIMES, Feb. 7, 2010, at 12.

[53] Christopher Marquis, *Powell, Too, Hints Haitian Should Leave*, N.Y. TIMES, Feb. 27, 2004, at A13. There is some evidence that the Bush Administration's tacit support to the opposition motivated them to reject a compromise with Aristide based on the belief that Aristide's ouster was likely. *See generally* DUPUY, *supra* note 39, at 172–73.

[54] *Rene Preval Is Inaugurated as President in Uneasy Haiti*, N.Y. TIMES, May 15, 2006, at A6. President Aristide claimed he was specifically forced from power by the United States, whom he accused of conspiring to keep him from power since his election in 1990. For a detailed, inside perspective of this argument, see RANDALL ROBINSON, AN UNBROKEN AGONY (2007). There is no evidence to support this claim. BUSS, *supra* note 20, at 38.

[55] S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004). The MIF replaced UNMIH which had been in Haiti since Aristide was returned to the presidency in 1994. *See supra* note 41.

[56] S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004). The MINUSTAH was originally set up to support the transitional government in ensuring a secure and stable environment; to assist in monitoring, restructuring and reforming the Haitian National Police; to help with comprehensive and sustainable disarmament, demobilization and reintegration (DDR) programs; to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti; to protect U.N. personnel, facilities, installations and equipment and to protect civilians under imminent threat of physical violence; to support the constitutional and political processes; to assist in organizing, monitoring, and carrying out free and fair municipal, parliamentary and presidential elections; to support the transitional government as well as Haitian human rights institutions and groups in their efforts to promote and protect human rights; and to monitor and report on the human rights situation in the country. The mission was originally authorized to include up to 6700 military personnel and 1622 police. Over the course of the next five years and six additional Security Council resolutions, that number grew to 6940 military personnel and 2211 police officers. *See* S.C. Res. 1608, U.N. Doc. /S/RES/1608 (2005); S.C. Res. 1702 (2006), S.C. Res. 1743, U.N. Doc. /S/RES/1743 (2007); S.C. Res. 17808, U.N. Doc. /S/RES/1780 (2007); S.C. Res. 1840, U.N. Doc. /S/RES/1840 (2008); S.C. Res. 1892, U.N. Doc. /S/RES/1892 (2009); *see also United Nations Stabilization Mission in Haiti*, UNITED NATIONS, http://www.un.org/en/peacekeeping/missions/minustah/index.shtml.

[57] Ginger Thompson, *Haitians Dance for Joy as Preval Is Declared Winner*, N.Y. TIMES, Feb. 17, 2006, at A10.

[58] HUMAN RIGHTS WATCH, WORLD REPORT 2010—HAITI (2010), *available at* http://www.unhcr.org/refworld/docid/4b586cf037.html.

With a democratic government in power, and the MINUSTAH force in place ensuring stability and security, the World Food Programme began a systematic program to provide food and development projects in Haiti in 2005.[59] At that time, Haiti ranked 154 out of 177 countries on the United Nations Development Programme's Human Development index.[60] In almost every measurable way, Haiti was the poorest country in the western hemisphere: 76% of Haitians lived below the poverty line; 56% lived on less than $1 per day;[61] domestic food production covered only 41% of the national need;[62] 97% of the country had been deforested;[63] half the population had no access to potable water; only 10% of the population had access to electrical service; [64] 70% of the government was funded by international donations;[65] and unemployment was between 50-70%.[66] Over the course of five years, the World Food Programme spent almost $2 billion in relief supplies, development and special projects in Haiti.[67] During this same five-year period, Haiti was hit with numerous natural disasters that further hindered economic development and required additional international emergency aid: in 2004, Hurricane Jeanne killed over 3,000 people and destroyed over 200,000 homes;[68] in 2005, Hurricanes Dennis and Emily killed 56, destroyed almost 4,500 homes, and otherwise affected almost 15,000 people;[69] in 2007, Hurricane Noel caused widespread devastation through mudslides and flooding that killed almost 100, displaced almost 8,000, and destroyed 400 homes;[70] and in 2008, four named storms hit Haiti resulting in 793 dead, 310 missing, 593 injured, 22,702 homes destroyed, 84,625 homes damaged, and 70% of Haiti's crops destroyed.[71]

When the earthquake hit in January 2010, Haiti was a country just beginning to develop a system of democratic institutions, as well as, the infrastructure and services necessary to be a modern economy. Unfortunately, it was still the poorest nation in the western hemisphere, was still heavily reliant on the international community for food aid and resources, and was wholly unprepared to respond to the devastation caused on 12 January 2010.

### *Legal Doctrine for the Use of Military Assets in Disaster Relief Operations*

In January 1994, over 180 delegates from forty-five states, to include the United States, and twenty-five non-governmental organizations, met in Oslo, Norway, to finalize the basic framework for using foreign Military and Civil Defense Assets (MCDA) in international disaster relief operations.[72] This framework became known as the *Oslo Guidelines*. Following the unprecedented deployment of military assets in response to natural disasters in 2005, the *Oslo Guidelines* were updated and revalidated in 2007.[73] While the *Oslo Guidelines* are not binding on the participating Member States, they were endorsed by all the parties as the most effective and efficient way to incorporate military assets into disaster relief operations. The U.S. military incorporated these Guidelines into military doctrine in Joint Publication 3-29, *Foreign Humanitarian Assistance.*[74]

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[59] WORLD FOOD PROGRAMME, PROTRACTED RELIEF AND RECOVERY OPERATION APPROVED BY THE EXECUTIVE DIRECTOR (1 JANUARY–30 JUNE 2005)—HAITI, 10382.0 (12 Sept. 2005), *available at* http://one.wfp.org/eb/docs/2005/wfp076561~1.pdf.

[60] WORLD FOOD PROGRAMME, PROJECTS FOR EXECUTIVE BOARD APPROVAL, AGENDA ITEM 9, PROTRACTED RELIEF AND RECOVERY OPERATIONS HAITI, 10674.0 (11 Oct 2007).

[61] *Id.*

[62] *Id.*

[63] This deforestation makes Haiti particularly susceptible to the devastating effects of hurricanes and tropical storms. *See infra* notes 68–71.

[64] BUSS, *supra* note 20, at 11.

[65] INT'L CRISIS GROUP, HAITI: STABILISATION AND RECONSTRUCTION AFTER THE QUAKE 2 (2010), *available at* http://www.unhcr.org/refworld/docid/4bb44Bf72.html.

[66] *Id.*

[67] WORLD FOOD PROGRAMME, ANNUAL REPORT 2010, at 44 (2010); WORLD FOOD PROGRAMME, ANNUAL REPORT 2009, at 49 (2009).

[68] MILES B. LAWRENCE & HUGH D. COBB, TROPICAL CYCLONE REPORT FOR HURRICANE JEANNE (2005), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL112004_Jeanne.pdf.

[69] U.S. Agency for Int'l Dev., *Latin American and the Carribbean—Hurricane Season 2005*, Fact Sheet No. 3, FY 2006, Nov. 23, 2005, *available at* http://www.reliefweb.int/library/documents/2005/usaid-americas-23nov.pdf; Int'l Fed'n Red Cross & Red Crescent Societies, *Caribbean: Hurricanes Dennis & Emily*, Operations Update No. 02, July 25, 2005, *available at* http://www.reliefweb.int/library/documents/2005/IFRC/ifrc-carib-25jul.pdf.

[70] DANIEL P. BROWN, TROPICAL CYCLONE REPORT, HURRICANE NOEL (2007), *available at* http://www.nhc.noaa.gov/pdf/TCR-AL162007_Noel.pdf; U.N. Children's Fund, *Floods Continue to Cause Havoc in Haiti*, RELIEFWEB (01 Nov. 2007), http://www.reliefweb.int/rw/rwb.nsf/db900sid/SHES-78KQ9M?OpenDocument.

[71] The four storms were Fay, Gustav, Hanna and Ike. *See* Jeffrey Masters, *Hurricanes and Haiti: A Tragic History*, WEATHER UNDERGROUND, http://www.wunderground.com/education/haiti.asp (last visited Nov. 19, 2010). The USS *Kearsage* deployed to Haiti for nineteen days following these storms and delivered 3.3 million pounds of internationally-donated relief supplies to Haitians isolated by mudslides and flooding. Donna Miles, *Military Assesses Haiti Disaster, Readies for Response*, AM. FORCES PRESS SERV., Jan. 13, 2010, *available at* http://www.defense.gov/news/newsarticle.aspx?id=57479.

[72] U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), GUIDELINES ON THE USE OF FOREIGN MILITARY AND CIVIL DEFENCE ASSETS IN DISASTER RELIEF—"OSLO GUIDELINES" (2007), *available at* http://www.unhcr.org/refworld/docid/47da87822.html [hereinafter OSLO GUIDELINES].

[73] *Id.* Operation Unified Assistance, in 2005, provided disaster assistance in Indonesia, Thailand, and Sri Lanka following the devastating tsunami of 2004. Operation Unified Assistance involved twenty naval vessels, eighty-five aircraft, and over 15,000 personnel. *See Operation Unified Assistance*, GlobalSecurity.org, http://www.globalsecurity.org/military/ops/unified-assistance.htm (last visited Nov. 19, 2010).

[74] JOINT PUB. 3-29, *supra* note 9; *see also* DODD 5100.46, *supra* note 12.

The basic principle of the *Oslo Guidelines* and Joint Publication 3-29 is that disaster relief and humanitarian assistance operations are the primary responsibility of civilian agencies and that military assets should be used "only where there is no comparable civilian alternative and only when the use of military assets can meet a critical humanitarian need."[75] Moreover, both the *Oslo Guidelines* and the Joint Publication specifically state that military assets should be used for disaster relief only when they are requested by the affected country and only if they are "unique in capability and availability."[76] Furthermore, military forces "should be seen as a tool complementing existing relief mechanisms in order to provide specific support to specific requirements, in response to the acknowledged 'humanitarian gap' between the disaster needs that the relief community is being asked to satisfy and the resources available to meet them."[77] Re-enforcing this universally accepted policy regarding the limited role of military assets in disaster relief operations, both the *Oslo Guidelines* and the Joint Publication further state that "any use of [military assets] should be, at the onset, clearly limited in time and scale and present an exit strategy element that defines clearly how the function it undertakes could, in the future, be undertaken by civilian personnel."[78]

When JTF–H forces began arriving in Haiti, it was clear what "unique capabilities" the U.S. military brought to the disaster: operational reach, security, logistics, command and control, communications, and mobility.[79] Of these unique capabilities, establishing security was the most obvious first priority for the JTF, because without a secure operational environment, relief supplies and aid could not reach the victims of the disaster.

### *Security—Rules of Engagement*

When the JTF first arrived in Haiti, the social and political climate in Haiti was still permeated with violent outbreaks, both criminal and political.[80] Moreover, the JTF was acutely aware that during other, earlier disaster relief efforts in Haiti,[81] in situations where the death and damage was much less than that of the 2010 earthquake, relief trucks and food storage points had been attacked by Haitians.[82] Consequently, even Amnesty International was calling on the foreign military forces in Haiti to take steps to ensure security and stability in the face of increased lawlessness following the 2010 earthquake.[83]

It was in this environment that the JTF began considering appropriate Rules of Engagement (ROE) for the servicemembers arriving in country. The U.S. Standing Rules of Engagement/Standing Rules for the Use of Force[84] were in effect.[85] Southern Command had provided Rules of Engagement in OPORD 01-10 dated 22 January 2010,[86] the basic premise of which was the inherent right to unit self-defense in response to hostile acts or demonstrated hostile intent.[87] However, it was the supplemental measures and admonitions from SOUTHCOM that provided unique challenges for JTF-H in drafting its own ROE; specifically, the development of escalation of force (EOF) procedures and the decision to authorize deadly force to protect certain property while adopting a posture intended to minimize the use of force. [88]

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[75] JOINT PUB. 3-29, *supra* note 9, at xx, III-10; *see also* OSLO GUIDELINES, *supra* note 72, para. 5 (using virtually verbatim language). The *Oslo Guidelines* go further and state that military assets should be used in disaster relief only "as a last resort, *i.e.*, only in the absence of any other available civilian alternative to support urgent humanitarian needs in the time required." OSLO GUIDELINES, *supra*, para. 32.ii.

[76] OSLO GUIDELINES, *supra* note 72, para.5.

[77] *Id.* para. 24.

[78] *Id.* para. 32.v.

[79] These unique capabilities are specifically listed in Joint Pub. 3-29. JOINT PUB. 3-29, *supra* note 9, at ix, I-2.

[80] *See supra* note 58 and accompanying text. Exacerbating this problem was the fact that the main prison in Port-au-Prince was destroyed by the earthquake and more than 4,300 dangerous criminals and gang members had escaped. U.S. DEP'T OF STATE & U.S. AGENCY FOR INT'L DEV., FY 2010 HAITI SUPPLEMENTAL BUDGET JUSTIFICATION 4 (2010).

[81] *See infra* notes 66–69 and accompanying text.

[82] Following flooding in 2004 that left over 1,000 Haitians dead, crowds attacked relief trucks and food storage points as MINUSTAH forces delivered over forty tons of aid. James McKinley Jr., *Floodwaters Recede from Haitian City, but Hunger Does Not*, N.Y. TIMES, Sept. 25, 2004, at A7. When Hurricane Jeanne left 1900 Haitians dead, rioting and violence also hindered the delivery of food and aid throughout Haiti. Deborah Sontag & Lydia Polgreen, *Storm-Battered Haiti's Endless Crises Deepen*, N.Y. TIMES, Oct 16, 2004, at A1.

[83] Amnesty Int'l, *Protection of Human Rights Must Accompany Relief Efforts in Haiti*, Jan. 15, 2010, *available at* http://www.unhcr.org/refworld/docid/4b55783e3e.html ("The current situation of lawlessness in Haiti and the increased vulnerability of women and children creates the perfect environment for human rights abuses and crimes such as rape and sexual abuse to take place undetected and go unpunished.").

[84] CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (13 June 2005) [hereinafter CJCSI 3121.01B].

[85] "Per SECDEF and CDRSOUTHCOM direction in reference p. and q., the standing rules of engagement (SROE) will apply to Title 10 forces in Haiti providing humanitarian assistance/disaster relief." SOUTHCOM OPORD 01-10, *supra* note 12, para 1.f(1).

[86] *Id.*

[87] CJCSI 3121.01B, *supra* note 84; SOUTHCOM OPORD 01-10, *supra* note 12.

[88] SOUTHCOM OPORD 01-10, *supra* note 12. The SOUTHCOM OPORD specifically directed JTF-H to "develop and implement escalation of force procedures" to identify mission-essential property or foreign property that could be defended with deadly force, and, as an overarching principle to "minimize [the] use of force."

After eight years of deployments in Iraq and Afghanistan, most of the Soldiers and Marines in JTF-H had experience implementing and applying ROE in the Global War on Terror. Those conflicts, however, were obviously different than the environment in Haiti, and the first priority of the JTF-H ROE Planning Cell[89] was to ensure the ROE appropriately refocused servicemembers on the humanitarian nature of the mission. While JTF-H was concerned with violence and acted under a specific mission to provide security,[90] the ROE Planning Cell assumed that specific, targeted violence against U.S. forces would be unlikely because the mission was purely humanitarian. Any violence would likely result from civic unrest, localized acts of desperation, or criminal elements taking advantage of the circumstances. Based on this assumption, the ROE Planning Cell focused the planning process first on the development of EOF procedures with a view toward minimizing the use of force as required by the SOUTHCOM OPORD.[91]

The Global War on Terror has had a profound effect on EOF. Prior to the Global War on Terror, EOF was primarily viewed as a series of steps that used incrementally increasing force to deter a threat. In 2005, however, Multi-National Corps–Iraq (MNC-I) drafted and implemented new EOF guidance to reduce civilian casualties and to better integrate ROE into the emerging counterinsurgency fight.[92] At that moment, EOF became a threat identification tool, designed to identify whether a perceived threat evinced hostile intent, rather than as a procedure for using proportional force to deescalate or disperse an already identified threat.[93] This EOF evolution was crucial for the battlefields of Iraq and Afghanistan because both conflicts involved a known enemy who, while "disguised" as civilians, attempted to perpetrate violence against Americans. For U.S. forces, identifying whether a particular action—such as a car speeding toward a checkpoint—was orchestrated by someone with hostile intent, rather than by someone who was innocently careless, was crucial to protecting the force. The MNC–I determined to solve this problem by evolving EOF into a procedure for determining that intent, rather than using it as a procedure to deter that behavior.[94]

For the last five years, the use of EOF to distinguish between enemy conduct and innocent civilian behavior has been so effective that every unit that has deployed to Iraq or Afghanistan has received rigorous training on it as a threat assessment tool.[95] In fact, in 2007, the Center for Army Lessons Learned (CALL) published an *Escalation of Force Handbook* that focused on the use of EOF to assess threats.[96] The essential point of this new EOF training was that EOF steps were not necessary if a hostile act was witnessed or hostile intent was known; in those situations, immediate, deadly force was authorized. In other words, the assumption that there is an enemy who must be assessed underlies the use of EOF as a threat assessment tool. In humanitarian missions like Haiti, however, that is not the case. Therefore, re-educating and refocusing the force about the traditional use of EOF became paramount during the JTF-H mission.

Before EOF evolved into a threat assessment tool and was used as a threat deterrent,[97] "traditional" EOF procedures could be distilled into "The 5 S's": Shout (verbal warnings); Show (your weapon); Shove (use non-lethal physical force); Shoot (warning shot); and Shoot (aimed fire).[98] Under this traditional theory, EOF was ideally suited for riot control and civic disturbance situations

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[89] CJCSI 3121.01B, *supra* note 84. Appendix J discusses the ROE Planning Cell and specifically states that

> the Director for Operations (J-3) and his staff are responsible for developing ROE during crisis action planning. Likewise, the Director for Strategic Plans and Policies (J-5) should play a large role in ROE development for deliberate planning. As an expert in the law of military operations and international law, the staff judge advocate (SJA) plays a significant role, with the J-3 and J-5, in developing and integrating ROE into operational planning.

As nine years of persistent conflict has taught every judge advocate, ROE belong to the commander, and it is the job of the judge advocate to advise and assist the commander in developing and integrating ROE into mission analysis. In practice, ROE is often developed in the Office of the Staff Judge Advocate (OSJA) and then distributed to other members of the staff for comment. In Haiti, this latter approach was followed. *See also* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, THE RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-31 (2000) [hereinafter ROE HANDBOOK].

[90] SOUTHCOM OPORD 01-10, *supra* note 12, para. 2.

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

[92] *See* Lieutenant Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 7. This article offers an outstanding examination of the evolution of Escalation of Force from its "traditional purpose of applying proportional force to deescalate or disperse an already identified threat . . . [to] a method to assess potential threats." *Id*. at 8.

[93] *Id.*

[94] In Iraq and Afghanistan, Soldiers do not want to "deter" the behavior of the enemy when they are executing a hostile action; they want to defeat that action and defeat that enemy. Deterrence would allow the enemy actor to withdraw and execute violence against the force at a later date and time. In humanitarian actions, violent behavior is usually tied to a particular convergence of unique circumstances, and deterring violence in a particular situation usually means that it will not happen again.

[95] *See* Captain Russell E. Norman & Captain Ryan W. Leary, *Making a Molehill Out of a Mountain: The U.S. Army's Counterinsurgency Doctrine Applied to Operational Law in Iraq*, ARMY LAW., May 2010, at 22. During predeployment training in 2007, XVIII Airborne Corps OSJA personnel "attempted to frame EOF as a threat assessment technique as opposed to a gradual and increasing approach to engagements. In other words, instead of looking at EOF as a series of steps a servicemember must go through before engaging the enemy, servicemembers should look at EOF as a tool they can use to clarify an ambiguous threat." *Id.* at 29 n.72.

[96] CTR. FOR ARMY LESSONS LEARNED, PUB. 07-21, ESCALATION OF FORCE HANDBOOK (2007) [hereinafter EOF HANDBOOK]. It should be noted that the *EOF Handbook* does not necessarily represent approved U.S. Army policy or doctrine, but rather is a Center for Army Lessons Learned (CALL) product provided for informational purposes

[97] Bagwell, *supra* note 92, at 5.

[98] ROE HANDBOOK, *supra* note 89, 2-6.

where the focus was on restraint when using force.[99] The exercise of restrained force was meant to deter violent behavior when violence was the result of hunger or desperation, rather than a specific intent to kill. Of course, even generalized violence could cause death or serious injury to civilians or members of the force in these circumstances. Thus, a specific EOF procedure was needed to "de-escalate"[100] and "discourage threatening behavior."[101] The JTF-H ROE acknowledged the right of servicemembers to defend themselves while simultaneously restricting the use of lethal force against Haitians whose primary intent was to obtain food.[102]

The first two steps in the JTF-H "humanitarian" EOF were (1) an evaluation of the situation and (2) disengagement.[103] The first step was an obvious and important reminder of the need to maintain and reassess situational awareness, but it was particularly important in Haiti where members of the force had to constantly remind themselves that violence was likely the result of hunger and desperation rather than a specific intent to kill. The second step, however, was something slightly new. De-escalation, which has long been a part of the Standing Rules of Engagement, is focused on allowing a hostile force the opportunity to withdraw or cease hostilities.[104] In comparison, disengagement focused on U.S. forces and their ability to withdraw or break contact.[105] Including disengagement as a discrete step in the EOF process was meant to reinforce several other principles in the ROE to include, most importantly, the requirement to minimize the use of force. In fact, JTF-H found that disengagement was often the best form of crowd control: What better way to encourage peaceful civility at a food distribution point than to depart, or threaten departure, with all the food and water until the crowd calmed down?[106]

The third step in the JTF-H EOF process was the use of non-lethal measures, to include audible signals, visual signs, and physical manipulation.[107] Again, because the guiding principle of the humanitarian assistance and disaster relief (HA/DR) operation was the minimization of the use of force, the JTF-H ROE described non-lethal measures in great detail, particularly techniques that could be used to attract the attention of rowdy crowds, including the use of horns, sirens, bull horns, vehicle mounted PA systems, sound commanders, and flares.[108] Anything that might cause a mob to stop rioting, even for a moment, was viewed as a potentially effective way to shift focus from violence to orderly behavior. However, if these non-lethal EOF measures failed, U.S. forces were authorized to temporarily detain individuals who violated established perimeters or secured areas, like distribution points, or who otherwise

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[99] Joint Publication 3-0, *Joint Operations* states that the purpose of restraint is to limit collateral damage and prevent the unnecessary use of force. JOINT CHIEFS OF STAFF, JOINT PUB., 3-0, JOINT OPERATIONS (17 Mar. 2009) [hereinafter JOINT PUB. 3-0].

[100] Prior to the publication of the *EOF Handbook*, CALL, the Carr Center for Human Rights Policy at Harvard University, and the U.S. Army Peacekeeping and Stability Operations Institute held a conference to review the proposed draft. In the report that emerged from the conference, participants suggested that procedures be developed to address the de-escalation of force (DOF)—steps designed to reduce tensions and prevent the emergence of a potential threat. TYLER MOSELLE, CARR CENTER FOR HUMAN RIGHTS POLICY, LEARNING AND INTEGRATION: ESCALATION OF FORCE PROCEDURES AND TRAFFIC CONTROL POINT OPERATIONS 12 (2007) [hereinafter CALL EOF CONFERENCE REPORT] (on file with author).

[101] HEADQUARTERS, JOINT TASK FORCE–HAITI, OPORD, ANNEX C (OPERATIONS), APPENDIX 8 (U.S. FORCES RULES OF ENGAGEMENT) para. 3.C.2 [hereinafter JTF-H ROE], *in* HEADQUARTERS, JOINT TASK FORCE–HAITI, FRAGMENTARY ORDER 80, ADDITION OF APPENDIX 8 (US FORCES RULES OF ENGAGEMENT) TO ANNEX C (OPERATIONS), TO JTF-H OPORD (8 Feb. 2010). Following publication of the ROE, the JTF-H OSJA put together a standard training package for subordinate units to use when training ROE and EOF. The package consisted of fifty-eight slides presenting various factual scenarios that leaders could use for discussion in their units. *See* HEADQUARTERS, JOINT TASK FORCE–HAITI, FRAGMENTARY ORDER 111, Enclosure 1, to JTF-H OPORD (16 Feb. 2010) [hereinafter JTF-H ROE TRAINING SCENARIOS].

[102] The big difference between these EOF procedures and those in Iraq and Afghanistan was the underlying assumption that the individuals or groups in Haiti did not intend to cause harm to members of JTF-H. Again, the focus of ROE in humanitarian assistance and disaster relief had to be on changing the mindset of Soldiers from one necessary to combat a cunning enemy in Iraq and Afghanistan to one that recognized that generalized violence did not necessarily mean an immediate threat to the force.

[103] JTF-H ROE, *supra* note 102, para. 3.C.2.B.1–2.

[104] *See* CJCSI 3121.01B, *supra* note 84, app. A, para. 4.a(1) ("De-escalate. When time and circumstances permit, he forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening action.").

[105] *See* JTF-H ROE, *supra* note 102.

[106] This exact scenario was contained in the *JTF-H ROE Training Scenarios*. In fact, many of the scenario solutions began with the admonition to "disengage" if possible. JTF-H ROE TRAINING SCENARIOS, *supra* note 102.

[107] JTF-H ROE, *supra* note 102, para. 3.C.2.B.3. In the *ROE Handbook* mnemonic "the 5 S's," the JTF-H non-lethal measures would fall under the first three S's: shout, show, and shove. The use, effectiveness, and importance of non-lethal measures in crowd control has its origin in the peacekeeping missions of the 1990s, particularly the incident at the city of Brcko, Bosnia, during Operation Joint Guard in the Balkans in August, 1997. During separate incidents at the Brcko Police Station and the Brcko Bridge, U.S. forces showed remarkable restraint dealing with mobs wielding clubs, railroad ties, stones, bricks, nail-studded boards, and Molotav cocktails. Despite several injuries to several Soldiers, some very serious, U.S. forces limited themselves to non-lethal measures and warning shots, thereby preventing riotous situations from devolving further or from becoming the type of international incidents that would undermine the peacekeeping effort. *See generally* ROBERT M. PERITO, WHERE IS THE LONE RANGER WHEN WE NEED HIM?: AMERICA'S SEARCH FOR A POSTCONFLICT STABILITY FORCE 9–32 (2004); Colonel James K. Greer, *The Urban Area During Stability Missions Case Study: Bosnia-Herzegovina, Part 2*, *in* CAPTIAL PRESERVATION: PREPARING FOR URBAN OPERATIONS IN THE TWENTY-FIRST CENTURY—PROCEEDINGS OF THE RAND ARROYO-TRADOC-MCWL-OSD URBAN OPERATIONS CONFERENCE, MARCH 22-23, 2000 (Russell W. Glenn ed., 2000); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (14 June 2001) (revised 27 Feb. 2008).

[108] *Id.*

threatened DoD personnel or non-DoD personnel involved in food and water distribution.[109]

Granting authority to detain was potentially controversial because JTF-H was not operating under a law enforcement mandate or mission.[110] However, because temporary detention was viewed as an effective means of discouraging violent behavior without resorting to lethal measures, contemplating the authority to detain was essential. Ultimately, the JTF-H ROE cell determined that temporary detention was not a tool to assist the Government of Haiti or MINUSTAH with law enforcement, but rather, was a commander's tool derived from the Staff Standing Rules of Engagement inherent right to protect the force (i.e., collective self defense) and necessary in certain circumstances to prevent interference with the mission (e.g., distribution of food and water).[111]

Authorizing temporary detention under a self-defense and mission completion mandate meant detention was limited to very specific situations. For example, temporary detention was not authorized to stop individuals engaged in looting because neither the mission nor DoD personnel would be threatened under these circumstances.[112] Alternatively, individuals agitating violence at a food distribution point could threaten the mission and DoD personnel and were, therefore, subject to temporary detention.[113] However, in keeping with the theory of a limited detention authority, individuals detained by JTF-H forces had to be released or turned over to appropriate law enforcement authorities within twenty-four hours.[114]

The final step in the JTF-H EOF procedures involved lethal measures.[115] Because it was a humanitarian operation, it was particularly important that deadly force be used only as a last resort and in response to hostile acts or demonstrated hostile intent directed at U.S. forces or other persons or designated property specifically identified for defense with lethal force.[116] Two aspects of the JTF-H EOF procedures regarding lethal measures merit explication: first, the decision to categorize warning shots as a lethal measure appropriate for use within certain specific constraints; and second, the decision to identify only very limited property for defense with lethal force.

As with EOF procedures generally, the JTF-H ROE cell had to reeducate the force on the appropriate use of warning shots in the humanitarian context after years of exposure to warning shots in the context of the Global War on Terror. Historically, warning shots were viewed as a form of non-lethal force.[117] In the counterinsurgency fights in Afghanistan and Iraq, however, warning shots were generally authorized only when deadly force was authorized.[118] As these counterinsurgency missions matured, and as EOF evolved into the threat assessment procedure discussed previously,[119] warning shots became

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[109] JTF-H, *supra* note 102, para. 3.F; *see also* SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.q.4.b.

[110] At the time of the earthquake local Haitian police and MINUSTAH had a law enforcement mission in Haiti. *See supra* notes 52–53 and accompanying text.

[111] HEADQUARTERS, JOINT TASK FORCE–HAITI, FRAGMENTARY ORDER 098, JTF-HAITI GUIDANCE FOR TEMPORARY DETENTION (11 Feb. 2010) [hereinafter JTF-H TEMPORARY DETENTION FRAGO 098].

[112] JTF-H ROE TRAINING SCENARIOS, *supra* note 102; JTF-H TEMPORARY DETENTION FRAGO 098, *supra* note 111. The JTF-H ROE training scenarios included numerous examples where detention would not be authorized because there was no mission or force protection issue (e.g., witnessing looters). It should be noted, that temporary detention was also authorized where JTF-H forces witnessed criminal acts that were likely to cause death or grievance bodily harm to civilians. *See* JTF-H ROE, *supra* note 102, para. 3.C.3.A. Forces who observed criminal acts where detention was not authorized were directed to contact their area MINUSTAH force or local police. *Id.* The decision to authorize JTF-H forces to intervene where they witnessed criminal acts likely to cause death or grievous bodily harm was in part a result of incidents which occurred during Operation Uphold Democracy in 1994. During the early days of that operation, police and militia brutally beat demonstrating Aristide supporters, one of whom died, all in full view of U.S. forces who did not intervene because the ROE cards they were carrying included no authorization to act. While the decision to change the ROE to authorize U.S. forces to act in those situations had already been made, the new ROE cards had not been distributed. News reports subsequently, and erroneously, attributed the change in ROE to the incident itself. *See* OPERATIONS IN HAITI, 1994–1995, *supra* note 19, at 20-1, 37-9.

[113] JTF-H ROE TRAINING SCENARIOS, *supra* note 102.

[114] JTF-H TEMPORARY DETENTION FRAGO 098, *supra* note 111, para. 3.C.1.A.5 ("Any detainee remaining in US custody longer than twenty-four hours requires an additional report of the circumstances of detention forwarded through operational and judge advocate channels to Joint Task Force–Haiti. Should a detainee remain in the custody of a unit beyond forty-eight hours, an inquiry initiated at the O-6 Commander's level or above is required.").

[115] JTF-H ROE, *supra* note 102, para. 3.C.2.B.4. Non-lethal weapons, to include riot control means (RCM) and riot control agents (RCA), were authorized where units were properly trained and as directed by an O-6 level commander. Neither RCM nor RCA were ever used in Haiti.

[116] *Id.* paras. 3.A.3, 3.A.4, 3.C.2.B.4 (emphasis added).

[117] During Operation Uphold Democracy in 1995, the ROE specifically categorized warning shots as non-lethal: "When practical and a situation warrants (i.e., controlling disturbances, dispersing crowds), fire warning shots into the air *before* using deadly force" (emphasis added). *See supra* note 41 and accompanying text. *See also* ROE from Operations Plan for Uphold Democracy, Appendix 8 (Rules of Engagement) to Annex C (Operations) to Combined JTF Haiti OPLAN 2380, *reprinted in* OPERATIONS IN HAITI, 1994–1995, *supra* note 19. As recently as 2001, then-Lieutenant Colonel Mark S. Martins wrote that "prohibiting warning shots under such circumstances would deny soldiers a useful, *nonlethal*, option to maintain control and accomplish the mission," (emphasis added). Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, But Also Trained*, ARMY LAW., Sept./Oct., 2001, at 1–16. Most of the Exercise ROE cards printed in the *ROE Handbook* as well as the ROE Card for the Multinational Force Observer Mission (Sinai) include warning shots in the list of non-deadly force methods available to troops. ROE HANDBOOK, *supra* note 89, app. B.

[118] Multinational Corps–Iraq, MNC-I ROE Card (27 Mar. 2005), *reprinted in* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 102 (2010).

[119] *See supra* notes 89–102 and accompanying text.

less favored because ricochets and other unintended effects resulted in frequent injuries to civilians.[120] Ultimately, the commands in each theater prohibited the use of warning shots.

The JTF-H ROE cell approached the use of warning shots through the prism of these counterinsurgency experiences but with a focus on the humanitarian assistance mission and the use of traditional EOF as a threat deterrent rather than as a threat identifier.[121] Given these considerations, warning shots represented an important preparatory step in the use of directed lethal force against individuals engaging in hostile acts or demonstrating hostile intent, to include acts likely to result in death or grievous bodily harm to civilians.[122] It is axiomatic that an action that might result in unintended injury to a civilian was better than an action directed at injuring a civilian. That said, however, because of the recognized potential for warning shots to result in unintended consequences,[123] as well as the direction to minimize the use of force in this humanitarian mission,[124] limiting warning shots to those situations where deadly force would otherwise be authorized was prudent because it further limited the circumstances in which a victim of the earthquake could be unintentionally injured.

For example, pursuant to the JTF-H ROE limitation, warning shots would not be authorized in a situation where a crowd at a food distribution point was getting generally unruly, impatient or antagonistic—even if it appeared likely that the crowd would get out of control. If the crowd's behavior escalated to the point that it directly threatened the force or threatened other civilians in the crowd with death or grievous bodily harm, warning shots would then be authorized because deadly force would then be authorized. While the use of warning shots earlier in that scenario might potentially have prevented matters from escalating in the first place, the possibility of injury from the rounds themselves or from the panic that might have ensued following several loud retorts from an M-4 or M-16, would have been an unnecessary risk in a humanitarian mission when conditions were not yet actually dangerous to anyone.[125]

The final important consideration in the JTF-H ROE, as in every ROE, was the determination of when deadly force was actually authorized—a determination that can vary significantly depending on the mission. As a general matter, the inherent right to unit self defense is not controversial, regardless of the nature of the mission. Similarly, the protection of civilians (noncombatants) from actions likely to cause death or grievous bodily harm is also not particularly controversial, regardless of the mission.[126] However, the designation of specific property for protection with deadly force was more complicated because of the unique circumstances of the humanitarian mission. For JTF-H, choosing to use deadly force to protect mere property from the very people the force was there to help—people who were suffering in a desperate situation—had to be limited to those circumstances where the loss of the property would have repercussions sufficiently serious to justify potentially killing a starving earthquake victim. Property that easily fit into this category included: military weapons,[127] banks, power production and distribution

[120] Thom Shanker, *US Changes Guidelines for Troops to Lessen Everyday Tensions With Iraqi Civilians*, N.Y. TIMES, May 2, 2006, at A10 ("[I]n an effort to avoid confrontations that escalate into use of force, soldiers are told to substitute hand signs or gentle warnings for firing of warning shots, and to use strobe lights to ensure that civilian drivers approaching checkpoints can see Americans clearly."). For an exhaustive listing of EOF incidents that resulted in death or injury to Iraqi civilians in 2005–2006, see ACLU Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request, at http://www.aclu.org/natsec/foia/log.html (last visited Nov. 22, 2010). These accidental deaths and injuries caused by EOF were one of the reasons that CALL and the CALL EOF Conference chose to categorize warning shots (in the EOF Handbook) as a type of deadly force when used in counterinsurgency operations. The EOF Handbook defines EOF as "sequential actions which begin with non-lethal force measures (visual signs that include flags, spotlights, lasers, and pyrotechnics) and graduate to lethal measures (direct action) to include warning, disabling, or deadly shots in order to defeat a threat and protect the force." EOF HANDBOOK, *supra* note 96, at 1. *See also* CALL EOF CONFERENCE REPORT, *supra* note 101, at 5; Ctr. for Army Lessons Learned (CALL), Escalation of Force (EOF) Conference Packet 13 (26–27 Mar. 2007) (Carr Ctr. For Human Rights and PKSOI Workshop) (on file with author). "Warning shots should be used in situations where force, up to and including deadly (lethal) force, would be authorized in accordance with standing ROE/EOF." *Id.* at 16. It should be reiterated here that the EOF Handbook does not necessarily represent approved U.S. Army policy or doctrine, but rather is a CALL product provided for informational, operational and institutional purposes that contribute to the overall success of United States and Allied efforts. *See supra* note 96 and accompanying text.

[121] *See supra* notes 89–102 and accompanying text.

[122] JTF-H ROE, *supra* note 102, para. 3.C.3.A.

[123] *See supra* note 120 and accompanying text.

[124] SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.q.1.

[125] JTF-H ROE TRAINING SCENARIOS, *supra* note 102.

[126] During Operation Uphold Democracy, the initial permissive entry-ROE card did not allow the U.S. military to use force to prevent Haitian on Haitian violence when they arrived in Haiti on 18 September 1994. By 21 September 1994, however, the Joint Chiefs of Staff had approved allowing U.S. forces to prevent Haitian on Haitian violence. *See* OPERATIONS IN HAITI, 1994–1995, *supra* note 19, at 37–39; *see also supra* note 112. The JTF-H ROE specifically noted that the use of force was **not** authorized where the threat to the civilian was purely financial or only mildly physical. In those instances, the JTF forces were directed to report the incident to the appropriate law enforcement authority. *See* JTF-H ROE, *supra* note 102, para. 3.C.3.A.

[127] JTF-H ROE, *supra* note 102, para. 3.C.4.A.1.A.2. The SOUTHCOM Commander had also designated aircraft for protection with up to deadly force, but within two days of the earthquake, the JTF had secured the only airport, and the practical reality was that aircraft were in no danger of being approached, much less threatened, in a way that would necessitate the use of force. *See* SOUTHCOM OPORD 01-10, *supra* note 12, para. 4.d(1)(a); JTF-H ROE, *supra* note 102, para. 3.C.4.A.1.A.1. Moreover, anyone who gained unauthorized access to the airport would have breached a U.S.-controlled perimeter and would have been subject to temporary detention. JTFH–ROE, *supra* note 102, para. 3.F.1.

facilities and equipment, dams, bridges, air and sea port facilities, government buildings, hospitals, and foreign embassies and consulates.[128] The loss of military weapons would have had obvious external consequences insofar as the sole purpose of a military weapon is to cause, or threaten to cause, death or grievous bodily harm. The loss of the other listed critical infrastructure, all of which were fixed point, identifiable structures for which local police were generally responsible and most of which were already seriously damaged or destroyed in the earthquake, would have significantly limited the ability of the Government of Haiti to provide even minimal services and support to the victims of the earthquake. Having identified the obvious types of property for which deadly force should be authorized, the JTF-H turned its attention to a consideration of that category of property that is of most immediate concern in any humanitarian mission: food, water, and medical supplies.

Given the extent of the devastation, as well as the fact that Haitians attacked relief supply storage and distribution points in previous, much smaller, natural disasters,[129] the JTF-H had to consider how it should react if mobs tried to take food, water or medical supplies. Obviously, if a rioting mob directly threatened the safety of Soldiers or other civilians, the use of deadly force would be authorized,[130] but a mob or group of civilians that was clearly just trying to take relief supplies in a manner not consistent with any distribution plan would present a different problem. Maintaining the integrity of the distribution plan every day at each of the sixteen distribution points was crucial because, in most cases, the approximately 1.5 million Haitians in need of direct assistance were visiting their assigned distribution point only once every two weeks to get their allocated supplies.[131] Maintaining a minimum level of survivability for over 1.5 million people required a regular distribution of supplies each day, every day. If distribution points were overrun or supplies were taken from delivery vehicles before they reached the distribution points, thousands of Haitians would very quickly find themselves in even greater dire circumstances. On the other hand, using deadly force to protect relief supplies meant shooting at some of the very people for whom the supplies were intended.

Ultimately, the JTF-H Commander decided that deadly force would not be authorized to defend food, water, medical or other relief supplies.[132] This was purely a policy decision based on the potential negative effects, real and perceived, associated with defending food from the people for whom the food was intended. To mitigate the possibility that relief supplies would be looted from distribution points, the JTF-H instead developed distribution point Training, Tactics and Procedures (TTPs) that were disseminated to the force as part of the JTF-H ROE Training Scenarios.[133] These TTPs emphasized how non-lethal measures[134] would be appropriate to prevent the looting of relief supplies, to include the temporary detention of potential looters for interfering with the military mission of distribution.[135] They also emphasized how proper planning and an affirmative perception of organization and authority could significantly diminish the possibility of a riot directed at obtaining the relief supplies.[136] Ultimately, no instances relating to the defense of relief supplies arose at U.S.-controlled distribution points.

Having established ROE that would allow the force to provide appropriate security throughout the areas of devastation, the JTF-H turned its attention to the mechanism for funding the provision of critical humanitarian assistance in the form of food, water, medical, shelter, and engineering support.

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[128] This list of critical infrastructure was identified by the SOUTHCOM Commander as foreign property for which the use of deadly force was authorized included. SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.q.4.f(1)(a). While the SOUTHCOM Commander retained exclusive authority to designate foreign property for protection with deadly force, he specifically stated that the authorization to use deadly force to protect those critical infrastructure projects was not a requirement to protect them. In fact, the SOUTHCOM Commander specifically delegated to the JTF-H Commander the authority to limit the use of deadly force to protect such property. *Id.* para. 3.q.4.f; JTF-H ROE, *supra* note 102, para. 3.C.4.A.2.

[129] *See supra* notes 80–82 and accompanying text.

[130] *See supra* note 127 and accompanying text.

[131] Posture Statement of General Douglas M. Fraser, U.S. Air Force, Commander, U.S. Southern Command, Before the 111th Congress, Senate Armed Services Committee (Mar. 11, 2010) (on file with author) ("Under the leadership of the Government of Haiti the World Food Program began a targeted and systematic food distribution effort using predetermined distribution locations. In consultation with the Government of Haiti and interested stakeholders, 16 different sites around the capital were identified to serve as fixed distribution points, instead of attempting to deliver to different settlements throughout the city. United States military forces from the 82d Airborne Division and the 22d MEUs (Marine Expeditionary Unit) worked closely with MINUSTAH forces and Haitian National Police personnel to ensure locations, routes and distribution of aid was calm, orderly, and without incident. In total, the program provided humanitarian assistance in quantities of fifteen-day rations to approximately 9000 families per site, per day. The initial operation was a large success in establishing a sustainable and predictable food distribution program that reached over 2.9 million Haitians, exceeding their original goal by almost 1 million people.").

[132] JTF-H ROE, *supra* note 102, para. 3.C.4.B.2.A.

[133] ROE TRAINING SCENARIOS, *supra* note 102.

[134] *See supra* note 105 and accompanying text (discussing non-lethal measures as including physical manipulation).

[135] JTF-H ROE, *supra* note 102, para. 3.F.1.

[136] JTF-H ROE TRAINING SCENARIOS, *supra* note 102. Proper planning included early notice about distribution procedures (to include notice that any acts of disorder will result in cancellation of the distribution), good use of the terrain and other structures to control the crowd, emplacement of security and a cordon line before the arrival of relief supplies, strong point control of entrance and exit to the distribution point, and a good means to communicate with the crowd at the distribution point.

*Overseas Humanitarian, Disaster and Civic Aid (OHDACA)*

The overall purpose of the U.S. Government effort in Haiti was to "provide fast, visible, and effective [humanitarian assistance] and [foreign disaster relief] operations."[137] The JTF-H was supposed to support this effort by leveraging "unique DOD capabilities,"[138] by providing "air and surface transportation of DOD and non-DOD personnel and supplies,"[139] and by providing "food, water, clothing, medicine, beds and bedding, temporary shelter, and housing."[140] In order to provide these types of direct humanitarian assistance and disaster relief, JTF-H had to have access to funds specifically appropriated and authorized for these purposes.[141] Moreover, as the third- and fourth-order effects of the destruction became more apparent, the fiscal authorities that financed the JTF-H efforts had to be flexible enough to cover operations and activities not previously envisioned.[142]

As noted previously, USAID was the lead federal agency for HA/DR operations in Haiti.[143] The U.S. Agency for International Development is an independent federal agency that receives overall foreign policy guidance from the Department of State (DoS) but which is primarily responsible for administering foreign aid.[144] Within USAID, the Office of U.S. Foreign Disaster Assistance (OFDA) is responsible for "providing and coordinating U.S. Government humanitarian assistance in response to [natural] disasters."[145] The OFDA is staffed by approximately 250 employees and is specifically funded to provide humanitarian assistance and disaster relief abroad.[146] In 2009, OFDA's total budget was $1.09 billion which was spent in response to sixty-three disasters in forty-nine countries around the world.[147] While most OFDA funds go to various nongovernmental organizations, U.N. agencies, and other international relief organizations that are positioned to provide immediate, effective relief in disaster stricken areas, OFDA funds are also used to reimburse other agencies of the Federal Government for their expenditures in support of disaster relief efforts.[148]

Following the earthquake in Haiti, however, the extent of the destruction far exceeded the ability of OFDA and other international organizations alone to provide timely assistance.[149] In order to provide immediate emergency response and relief to Haiti, OFDA needed thousands of personnel, hundreds of vehicles, ships, and planes, and an organizational structure to manage the flow of relief supplies into and throughout the devastated areas. Beyond providing security, the U.S. military's unique ability to provide operational reach, command and control, communications, mobility, and logistics made it a crucial component in the

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[137] CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], HAITI EARTHQUAKE HUMANITARIAN RELIEF para. 3 (14 Jan. 2010) [hereinafter CJCS EXORD]. CJCS EXORD MOD 4, *supra* note 11, para. 3.A. *See also* SOUTHCOM EXORD, *supra* note 16, para. 3.A.1 ("provide FHA/DR to mitigate human suffering and accelerate long-term regional recovery"); and SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a.1 ("provide FHA/DR to mitigate human suffering and enable the long-term recovery of Haiti").

[138] SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a.1(b)1. The primary unique DoD capabilities which were being accessed included (1) the exceptional operational reach of military forces that could significantly enhance the initial disaster response, and (2) the unmatched DoD capabilities in logistics, command and control, communications, and mobility. JOINT PUB. 3-29, *supra* note 9, at I-2. See *supra* notes 70–77 and accompanying text for a discussion of how the unique capabilities of DoD are supposed to be integrated into disaster relief and humanitarian assistance operations.

[139] CJCS EXORD MOD 4, *supra* note 137, para. 3.B.1.B.

[140] *Id.* para. 3.B.1.C. While these types of humanitarian assistance were the focus of JTF-H's mission, the JTF-H mission did expand to include the assisted departure of American citizens from Haiti and the recovery of American citizen remains, both of which are normally missions of the Department of State. *See infra* note 200 (discussing operations associated with the recovery of American citizen remains). The former occurred on a reimbursable basis while the latter was funded under the OHDACA appropriation.

[141] *See infra* notes 151–67 and accompanying text. The most basic principle of fiscal law states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301 (2006). In *United States v. MacCollom*, the Supreme Court affirmed the principle that public funds could not be expended without express congressional authorization. 426 U.S. 317 (1976).

[142] *See infra* notes 183–214 and accompanying text

[143] *See supra* note 12 and accompanying text.

[144] *See* USAID, http://www.usaid.gov (last visited Apr. 4, 2010).

[145] USAID OFDA ANNUAL REPORT FOR FISCAL YEAR 2009, at 13 [hereinafter USAID OFDA 2009 ANNUAL REPORT], *available at* http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/fy2009/annual_report_2009.pdf. Other USAID offices, with which OFDA works closely, following large-scale disasters, include the Office of Food for Peace (FFP), the Office of Transition Initiatives (OTI) and the Office of Conflict Management and Mitigation (CMM).

[146] *Id.* at 16.

[147] USAID OFDA 2009 ANNUAL REPORT, *supra* note 145, at 9. In 2008, OFDA responded to eighty disasters in sixty-two countries with a total budget of $739.5 million. USAID OFDA ANNUAL REPORT FOR FISCAL YEAR 2008, at 7, *available at* http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2008.pdf [hereinafter USAID OFDA 2008 ANNUAL REPORT].

[148] USAID OFDA 2009 ANNUAL REPORT, *supra* note 145., at 13–15. Reimbursement between federal agencies is usually accomplished under the authority of the Economy Act, 31 U.S.C. § 1535 (2006). During the first five days after the earthquake, OFDA and FFP provided $58 million to the World Food Program, $5 million to the World Health Organization, and $22 million to the International Organization for Migration. Simultaneously, OFDA provided $23.5 million to FEMA to fund the deployment of U.S. Urban Search and Rescue teams, and $13 million to the U.S. Department of Health and Human Services to deploy Disaster Medical Assistance Teams to augment health care capacity in Haiti. USAID Fact Sheet No. 5, Fiscal Year 2010 (Jan. 17, 2010), *available at* http://www.usaid.gov/helphaiti/documents/01.17.10-USAID-DCHAHaitiEarthquakeFactSheet5.pdf.

[149] *See supra* note 7.

overall relief effort.[150] The order which directed SOUTHCOM to "provide fast, visible, and effective [humanitarian assistance] and [foreign disaster relief] operations" in Haiti also directed that "OHDACA funding [be used] in providing [humanitarian assistance]."[151]

Overseas Humanitarian, Disaster and Civic Aid (OHDACA) funding refers to that portion of Operation and Maintenance funding that is specifically budgeted for DoD to conduct worldwide humanitarian assistance, disaster relief, and demining.[152] The OHDACA appropriation funds several statutorily authorized OHDACA Programs[153] including 10 U.S.C. § 401, Humanitarian and Civic Assistance; 10 U.S.C. § 402, Denton Transportation of Humanitarian Relief Supplies for NGOs; 10 U.S.C. § 404, Foreign Disaster Assistance; 10 U.S.C. § 407, Humanitarian Deming Assistance; 10 U.S.C. § 2557, Excess Nonlethal Supplies for Humanitarian Relief; and 10 U.S.C. § 2561, Humanitarian Assistance.[154] The OHDACA appropriation was first used in 1995 to provide a single source appropriation for funding the OHDACA Programs.[155] The first of these OHDACA Program statutes was enacted in 1986[156] in response to a Comptroller General opinion,[157] *The Honorable Bill Alexander*, which found that DoD could not use Operation and Maintenance funds to conduct humanitarian and civic assistance operations.[158]

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[150] These unique capabilities are specifically listed in Joint Pub. 3-29 as the type that justify the use of military forces in foreign humanitarian assistance operations. JOINT PUB. 3-29, *supra* note 9, at ix & I-2. *See also supra* notes 73–76 and accompanying text.

[151] CJCS EXORD, *supra* note 137, para. 4.A. Subsequent CJCS EXORD modifications added changed the direction to "OHDACA funding [be used] in providing [humanitarian assistance] and [foreign disaster relief]." CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], HAITI EARTHQUAKE HUMANITARIAN RELIEF, MODIFICATION 3, para. 4.A (22 Jan. 2010) [hereinafter CJCS EXORD MOD 3). This modification was the trigger for using 10 U.S.C.§ 404 in addition to 10 U.S.C. § 2561 as an authority for conducting ODHACA funded relief efforts.

[152] The National Defense Authorization Act of 1995 established a single funding account within the Operations and Maintenance funds for funding these OHDACA Programs. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 301 and 1411, 108 Stat. 2663 (1994); H.R. REP. NO. 103-701, 1994 WL 440344, *reprinted in* 1994 U.S.C.C.A.N. 2224 (the bill "contain[s] a provision (sec. 1023) that would establish a single funding account for overseas humanitarian, disaster, and civic aid (OHDACA) programs"). *See also* The National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 11311, 110 Stat. 186.

[153] The National Defense Authorization Act of 1995 designated Humanitarian Assistance Programs authorized by §§ 401, 402, 404, 2547 and 2551 of 10 U.S. Code as "OHDACA Programs." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 301 and 1411, 108 Stat. 2663 (1994); H.R. CONF. REP. 103-701, 1994 WL 440344, 1994 U.S.C.C.A.N. 2224. *See also* The National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 11311, 110 Stat. 186. On 30 October 2000, § 2547 and 2551 were redesignated as § 2557 and 2561 respectively by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 1033(b)(1), 114 Stat. 1654 (2000).

[154] The OHDACA Programs that were used to fund operations in JTF-H were 10 U.S.C. § 404 and 10 U.S.C. § 2561. *See* Department of Defense Budget Amendment to FY 2010 Supplemental Request Operation Unified Response, Justification Material (March 2010); Defense Security Cooperation Agency Budget Amendment to FY 2010 Supplemental Request, Operation Unified Response (March 2010). 10 U.S.C. § 404, Foreign Disaster Assistance, was first enacted in 1995 in the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat 2663 (1994) in order to "provide a statutory basis for foreign disaster relief activities by authorizing the President to conduct such activities." H.R. REP. No. 103-701, *reprinted in* 1994 U.S.C.C.A.N. 2224 (1994). 10 U.S.C. § 2561, Humanitarian Assistance, was first enacted in 1993 (as 10 U.S.C. § 2551) in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

[155] Prior to 1995, each of the OHDACA Programs was funded through individual appropriations for each authorization. In 1996, when Congress continued using the budget account known as OHDACA, it specifically stated that "although DOD is uniquely capable of performing some humanitarian and disaster relief operations, these operations are fundamentally the responsibility of the Department of State and the Agency for International Development and, in general, are more appropriately funded through these agencies." H.R. REP. NO. 104-450, *reprinted in* 1996 U.S.C.C.A.N 238.

[156] 10 U.S.C. § 401. Humanitarian and Civic Assistance Provided in Conjunction with Military Operations, enacted as part of the National Defense Authorization Act of for Fiscal Year 1987, Pub. L. No. 99-661, § 333, 1986 Stat. 2638 (1986). Previously, the Stevens Amendment, which was part of the Department of Defense Appropriations Act of 1985, granted authority to use O&M appropriations for humanitarian and civic assistance operations incidental to authorized operations, the authority was limited to that year. Pub. L. No. 98-473, §§ 101(h), 8103, 98 Stat. 1837, 1942 (1984).

[157] "The General Accounting Office has recommended that this authority (to conduct humanitarian and civic relief operations) be legislatively clarified because of its concern that the scope of current Defense Department activities may exceed the authority that Congress intended to confer in Section 8072 . . . The committee believes that the provision of humanitarian and civic assistance activities to the civilian populace of developing foreign countries potentially confronted with low intensity conflict should be explicitly recognized as a valid military mission." S. REP. NO. 99–331 (July 8, 1986), *reprinted in*1986 U.S.C.C.A.N. 6413, 1986 WL 31982 (Leg.Hist. for National Defense Authorization Act of Fiscal Year 1987, Pub .L. No. 99–661, 100 Stat. 3816, 3967).

[158] *The Honorable Bill Alexander*, 63 Comp. Gen. 422 (1984). This opinion was written in response to a 25 January 1984 request by Congressman Bill Alexander that the Government Accountability Office (GAO) investigate and provide a formal legal opinion regarding the propriety of using DoD O&M appropriations to fund various activities that took place during a military exercise in the Republic of Honduras—at least some of which were humanitarian and civic relief activities. The GAO concluded that the humanitarian and civic relief activities of DoD in Honduras fell "clearly within the scope of other appropriation categories and thus [could] not be funded with O&M funds. The types of civic and humanitarian assistance provided during the exercises are similar to those ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151–*et seq.* administered by the U.S. International Development Cooperation Agency (of which AID is a part)." *Id.* app. Based upon its decision, GAO recommended that DoD seek "specific funding authorization from Congress if it wishes to continue performing such a wide variety of activities." *Id.*

When the earthquake occurred in Haiti, DoD had approximately $109.9 million in OHDACA funds available for use through September 2011,[159] of which $20 million was specifically appropriated for Foreign Disaster Relief.[160] The initial order to SOUTHCOM to provide disaster relief and humanitarian assistance in Haiti included authority to use the entire $20 million for operations in Haiti.[161] At the same time, OFDA transferred $1.5 million to DoD as an Economy Act transfer to further fund immediate assistance, mostly in the form of logistics transportation and supplies.[162] Within days, all available OHDACA funds, totaling an additional $106 million, were released to SOUTHCOM for use in disaster relief and humanitarian operations in Haiti.[163] Given the extent of the devastation, however,[164] it was obvious that an even greater amount of funds was going to be needed. Accordingly, on 25 January 2010, the Undersecretary of Defense (Comptroller) executed a Reprogramming Action that transferred $400 million from the military services' general Operations and Maintenance (O&M) funds into the OHDACA account.[165] A second Reprogramming Action for $255 million was subsequently executed on 15 March 2010.[166] Ultimately, almost $455 million was spent on OHDACA related expenses for DoD operations in Haiti.[167]

The use of OHDACA by JTF-H was specifically limited to the Emergency/Initial Response Phase (Phase One) and Relief Phase (Phase Two) of operations.[168] The rationale for limiting OHDACA funds to Phase One and Phase Two projects was grounded in the Oslo Guidelines and U.S. policy that military involvement in disaster relief should be a short-term, stop-gap measure until HA/DR efforts can be completely assumed by the Department of State and USAID

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[159] 2010 National Defense Authorization Act, Pub. L. No. 111-84, § 303(19), 123 Stat. 2246 (2009).

[160] *See* Office of the Secretary of Defense, Operation and Maintenance Overview, Fiscal Year 2010 Budget Estimates 62 (revised June 2009) (on file with author) ("[T]he $20.0 million requested in FY 2010 is to continue the program first appropriated, as a three year appropriation, in FY 2008. Request that these funds be appropriated specifically for disasters . . . [h]owever, should a large scale disaster occur during this period, it is likely that additional funding could be required."). *See also* Def. Sec. Cooperation Agency, Fiscal Year 2010 Budget Estimates, Overseas Humanitarian, Disaster Assistance, and Civic Aid (May 2009) (on file with author) ("The Department requests $20.0 million in FY 2010 to continue the program that was initially appropriated in FY 2008 as a $40.0 million, three year appropriation. Request that these funds be appropriated specifically for disasters . . . .). Of the remaining $89 million, $84.6 million was programmed to be spent on 703 Humanitarian Assistance Programs and activities and around the world, and $5.2 million for Humanitarian Mine Action programs. *Id.*

[161] CJCS EXORD, *supra* note 137, para 4.A.

[162] USAID Fact Sheet No. 5, *supra* note 148 ("DOD has been supporting the humanitarian response through transportation of emergency relief personnel and commodities into Haiti."). The OSDA/USAID subsequently transferred another $39 million to DoD just before 1 February 2010. USAID Fact Sheet No. 14, Fiscal year 2010 (Jan. 26, 2010), *available at* http://www.usaid.gov/ht/docs/eqdocs/ofda_fact_sheets/01.26.10_haiti_factsheet_14.pdf.

[163] CHAIRMAN JOINT CHIEFS OF STAFF, HAITI EARTHQUAKE HUMANITARIAN RELIEF EXORD (EXECUTE ORDER), MODIFICATION 2, para. 4.A (18 Jan. 2010) [hereinafter CJCS EXORD MOD 2] (adding $14 million to the total OHDACA funds available for DoD relief operations in Haiti); CJCS EXORD MOD 3, *supra* note 151, para. 4.B (adding $92 million to the total OHDACA funds available for DoD relief operations in Haiti) Title 10 U.S.C. § 404(d) allows "amounts appropriated to the Department of Defense for any fiscal year for OHDACA programs of the Department shall be available for organizing general policies and programs for disaster relief programs occurring outside the United States." The first $14 million was obtained by pulling back all unobligated FY 09 funds from other Humanitarian Assistance Programs and directing it into the relief effort. The remaining $92 million was obtained by redirecting all FY 10 OHDACA money into the disaster relief fund. E-mail from SOUTHCOM SCJ7 Office (Jan. 7, 2010) (on file with author).

[164] *See supra* note 7. As points of comparison, following are total expenditures from other foreign disaster assistance operations: (1) Hurricane Mitch Relief Efforts: $223 million. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999: LESSONS LEARNED FOR JUDGE ADVOCATES (15 Sept. 2000); (2) Indian Ocean Tsunami (2004–2005): $175.8 million, Defense Security Cooperation Agency, OHDACA Info Paper (n.d.) [hereinafter DSCA OHDACA Info Paper] (on file with author); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005); S. REP. NO. 109-52 (2005); (3) Pakistan Earthquake: $60.8 million, DSCA OHDACA Info Paper (n.d.); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3419 (2006); (4) Georgia Complex Emergency: $13.51 million. DEPARTMENT OF DEFENSE FISCAL YEAR 2008 REPORT ON HUMANITARIAN ASSISTANCE (required by 10 U.S.C. § 2561), *available at* http://www.dsca.osd.mil/programs/HA/2009/FY08%20HA%20Report%2010%20U%20S%20C%202561.pdf.

[165] U.S. Dep't of Def., DD Form 1415-1, Reprogramming Action—Prior Approval (n.d.) (Haiti Earthquake Effort, DoD Ser. No., FY 10-07 PA (2010) [hereinafter DD Form 1415-1] (on file with author). The DoD Financial Management Regulation (DoD FMR) establishes a procedure by which DoD can reprogram appropriated funds in order to maintain the flexibility necessary for the timely execution of DoD programs. Because of the size of this reprogramming, approval was required by the Office of Management and Budget (OMB), the House Appropriations Committee, the House Armed Services Committee, the Senate Appropriations Committee, and the Senate Armed Services Committee. U.S. DEP'T OF DEF. REG. 7000.14R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 3, ch. 6 (Reprogramming of DOD Appropriated Funds). Specific amounts were taken out of each service's O&M funds by this reprogramming action. The DD 1451-1 requires that these funds be restored to the O&M accounts at some point. Ultimately, all of money that was reprogrammed for OHDACA use in Haiti was restored to the DoD O&M accounts in a supplemental appropriation. *See* Supplemental Appropriation Act, 2010, Pub. L. No. 111-212, 124 Stat. 2302 (July 29, 2010).

[166] U.S. Dep't of Def., DD Form 1415-1, Reprogramming Action–Prior Approval (n.d.) (Haiti Earthquake Effort, DOD Ser. No., FY 10-08 PA (2010) ( on file with author).

[167] QUARTERLY REPORT FROM DFAS-IN, CONTINGENCY COST REPORT AND ANALYSIS TEAM, OPERATION UNIFIED RESPONSE (8 Oct 10) [hereinafter DFAS CONTINGENCY COST REPORT] (5 January 2011) (on file with author). In comparison, when Operation Unified Response ended in June 2010, USAID had spent approximately $633 million. USAID Fact Sheet No. 57, Fiscal Year 2010 (June 4, 2010), *available at* http://www.usaid.gov/ht/docs/eqdocs/ofda_fact_sheets/haiti_eq_fs57_06-04-2010.pdf.

[168] CJCS EXORD, *supra* note 137, para. 4.A.

for long term relief and reconstruction efforts.[169] This limitation on the types of humanitarian projects JTF-H could undertake, however, was counterintuitive to the experience of those who had served overseas in the Global War on Terror where funding sources allowed them to conduct a broad array of humanitarian assistance-type projects within the counterinsurgency missions in Iraq and Afghanistan, to include projects that were clearly reconstruction or restoration.[170] One way the JTF-H Office of the Staff Judge Advocate (OSJA) ensured that HA/DR projects were appropriate for funding with OHDACA was a requirement that all contractual requirements in excess of the micro-purchase threshold be reviewed by the Joint Acquisition Review Board (JARB), which required an independent legal review, "to ensure the Command [was] making sound acquisition and financial decisions based upon existing law and policy."[171]

Generally speaking, most OHDACA expenditures in Haiti were used for one of five categories of expenses: military and civilian personnel pay and subsistence ($64 million);[172] personnel support ($40 million);[173] operational support ($134 million);[174] transportation ($147 million);[175] and humanitarian relief ($68 million).[176] While the first three categories of expenses were indirect HA/DR because they represented the cost of sustaining the task force in Haiti, the latter two categories represented direct military HA/DR expenses intended to address "immediate humanitarian needs . . . (e.g. water, food, shelter, sanitation, medicine, etc)."[177] Most of the direct HA/DR expenses were straightforward and obvious parts of Relief Phase operations: airlift and sealift of relief supplies and relief supplies themselves, including water, medical supplies, and humanitarian daily rations.[178] Where humanitarian projects involved engineering assets, however, the danger of exceeding OHDACA authority by conducting reconstruction (Phase Three) required careful analysis by the JTF-H OSJA.[179] The importance of ensuring OHDACA did not fund reconstruction projects cannot be understated; use of OHDACA to fund Phase Three reconstruction projects would have violated the Anti-Deficiency Act and subjected responsible Command personnel to career-ending

[169] *See supra* notes 72–78 and accompanying text. *See also supra* notes 143–58 and accompanying text. This limitation on the use of OHDACA was based on the OHDACA Programs that were being funded, 10 U.S.C. § 404 (Foreign Disaster Assistance) and 10 U.S.C. § 2561 (Humanitarian Assistance). Other OHDACA programs, such as 10 U.S.C. § 401 (Humanitarian and Civic Assistance), allow expenditures in different circumstances, with different limitations.

[170] It was not uncommon for members of the JTF-H OSJA to hear other staff officers say: "But we did this type of project in Iraq/Afghanistan all the time!" Global War on Terror funding sources that allow commanders to engage in humanitarian and civic relief type projects include: Commander's Emergency Response Program (CERP), Department of Defense Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, § 9007, 118 Stat. 951 (2004) (The primary purpose of the CERP is to "enable[e] military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people, and to fund a similar program to assist the people of Afghanistan"); Iraqi-CERP (I-CERP). The I-CERP is an Iraqi funded CERP program that is based on a memorandum of understanding between the Iraq Supreme Reconstruction Council and Multi-National Force Iraq, dated 3 April 2008, that allowed MNF-I commanders to execute urgent reconstruction projects for the benefit of the Iraqi people. *See* MNF-I FRAGO 08-166 (17 Apr. 2008); MNC-I FRAGO (19 Apr. 2008); Iraq Security Force Fund (ISFF), Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act for 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). The purpose of ISFF was to establish funds that designated commanders in Iraq could use "to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Iraq] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction and funding." *See also* Afghanistan Security Force Fund, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act for 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). The purpose of the Afghanistan Security Force Fund (ASFF) was to establish funds that designated Commanders in Afghanistan could use "to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Iraq] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction and funding." *Id.*

[171] *See* FRAGMENTARY ORDER NO. 55 to JTF-H OPORD enclosure 1, para. 2 (31 Jan. 2010).

[172] This includes incremental pay, allowances and subsistence for military and civilian personnel. Defense Finance and Accounting Service Contingency Cost Report; Defense Security Cooperation Agency Budget Amendment to FY 2010 Supplemental Request, Operation Unified Response (Mar. 2010), *available at* http://comptroller.defense.gov/defbudget/fy2011/Budget_Amendment_to_FY2010_Supplemental_Request.pdf.

[173] *Id*. This includes material and services required to support military and civilian personnel engaged in contingency operations.

[174] *Id*. This covers the incremental cost to operate and support units deployed, to include air and ground OPTEMP, steaming days, maintenance support, fuel and communications.

[175] *Id*. This includes the cost of transporting units as well as humanitarian relief supplies and medical evacuations.

[176] *Id*. This includes all humanitarian relief and humanitarian assistance projects.

[177] SOUTHCOM EXORD, *supra* note 16, para. 3.B.2. *See supra* notes 12 and 13 and accompanying text. The SOUTHCOM OPORD 01-10 further clarified that the during the Relief phase of operations, military forces will "provide water, food, medical, shelter, engineering support (open LOCs [lines of communication])." SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.b. Critical engineering during the Relief Phase included: "i. Help determine communications infrastructure requirements; ii. Conduct critical engineering assessments; iii. Establish Forward Operating Bases; iv. Conduct essential expeditionary lines of communication repairs; v. Indentify [sic] commercial contractors for transition; vi. Reduce military engineer assets." *Id*. para. 3.a(2)1.b(4)(a)(4).

[178] *See supra* notes 172–77 and accompanying text. The vast majority of actual relief supplies distributed in Haiti came from international and non-governmental relief organizations, although in the initial weeks of the operations, almost all of these supplies were transported by JTF-H assets and distributed at Distribution Points secured by JTF-H personnel.

[179] Phase Three focused on reconstruction of key infrastructure. SOUTHCOM EXORD, *supra* note 16, para. 3.B.3 ("facilitate key infrastructure reconstruction"); SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.c ("main effort shifts to reconstruction of key infrastructure (e.g., roads, power, communications, etc.)").

administrative action, at best, and criminal prosecution—although highly unlikely—at worst.[180]

Phase One and Phase Two engineering projects appropriate for OHDACA funding included conducting critical engineering assessments and repairing airports, seaports, and roads to facilitate the delivery of immediate humanitarian relief.[181] Phase Three projects were those that went beyond facilitating immediate humanitarian relief or that focused on reconstruction or restoration of infrastructure that was not part of the delivery of immediate humanitarian relief.[182] During the initial weeks of OUR, repairing airports, seaports, and roads, projects for which OHDACA was clearly appropriate, occupied almost all of the engineering assets in Haiti. Once basic repairs were substantially underway and the method for delivering food, water, and medical aid became systematized, JTF-H began considering other engineering projects that would mitigate the secondary effects of the earthquake.

Joint Task Force–Haiti determined that the most obvious looming catastrophic secondary effect of the earthquake was the twenty million cubic meters of debris, which resulted from damage to buildings and infrastructure, that clogged the roads, neighborhoods, and drainage canals.[183] This disaster-generated debris[184] limited where and how internally displaced person (IDP) camps were settled, managed, and supported; prevented the collection of tens of thousands of decomposing bodies still buried under the rubble; and caused garbage and human waste to accumulate in massive amounts everywhere.[185] The amassing of all of this debris and waste was an ominous and growing indicator of the potential for major outbreaks of disease, particularly when the April rainy season began.[186] The fact that approximately 1.2 million Haitians were packed into 460 overflowing IDP camps would exacerbate the effects of any such outbreaks.[187] While there were other plans underway to mitigate these potential health epidemics,[188] clearance of disaster-generated debris was

[180] The Anti-Deficiency Act (hereinafter ADA) prohibits making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available unless authorized by law, or obligating money for a purpose for which there is not an authorization. 31 U.S.C. § 1341 (2006). Officers who violate the ADA are subject to administrative and punitive action, to include fines up to $5000 and imprisonment up to two years, per violation. The U.S. GAO reviews agency expenditures to ensure compliance with the Anti-Deficiency Act.

[181] SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.a(4)(a)(4) and 3.a(2)1.b(4)(a)(4). Critical engineering during the Relief Phase included: "i. Help determine communications infrastructure requirements; ii. Conduct critical engineering assessments; iii. Establish Forward Operating Bases; iv. Conduct essential expeditionary lines of communication repairs; v. Indentify [sic] commercial contractors for transition; vi. Reduce military engineer assets." *Id.* para. 3.a(2)1.b(4)(a)(4).

[182] *Id.*; *see also* FRAGMENTARY ORDER NO. 21 to JTF-H OPORD para. 3.A.1.A (24 Jan. 2010) ("As a general rule, OHDACA funds may be used for the following activities . . . 4. Modest construction projects . . . and repairs of facilities damaged by the earthquake and necessary to facilitate alleviation of the suffering of the victims of the disaster.") and para. 3.A.1.B ("As a general rule, the following types of activities may not be funded with OHDACA funds . . . 5. Rebuilding or repairing government facilities or infrastructure in need of repair.").

[183] United Nations Development Programme, Programme Outline—Debris Management, *Empowering Haiti to Build a Better Future*, Mar. 2010 *available at* http://www.undp.org/haiti/doc/CN_2_DebrisMgmt-E-s.pdf.

[184] The Debris Management Task Force used the phrase "disaster generated debris" to distinguish earthquake caused rubble from other garbage and waste. *See infra* note 189 and accompanying text.

[185] Simon Romero, *Outbreaks Are Feared as Sanitation Troubles Worsen in Haiti*, N.Y.TIMES, Feb. 20, 2010, at A4 ("As hundreds of thousands of people displaced by last month's earthquake put down stakes in the squalid tent camps of this wrecked city, the authorities are struggling to address the worsening problem of human waste. Public health officials warn that waste accumulation is creating conditions for major disease outbreaks including cholera, which could further stress the ravaged health system."). *Id*.

[186] Haiti has two rainy seasons: April to June and August to October. Rain and hurricane caused flooding was common before the earthquake, but after the earthquake was almost a certainty given the volume of debris. ANALYSIS OF MULTIPLE NATURAL HAZARDS IN HAITI, REPORT PREPARED BY GOVERNMENT OF HAITI, WITH SUPPORT FROM THE WORLD BANK, THE INTER-AMERICAN DEVELOPMENT BANK, AND THE UNITED NATIONS SYSTEM (Mar. 26, 2010), *available at* http://www.iris.edu/hq/haiti_workshop/docs/Report-MULTIHAZARDS-HA-English-SergioMora-Final-Red.pdf. Flooding would disperse human waste throughout the cities and IDP camps. This would lead to diarrheal illnesses, such as cholera, typhoid, and shigellosis, and the massive proliferation of disease carrying mosquitoes who would spread malaria and dengue fever. Romero, *supra* note 185.

[187] U.N. Secretary-General, *United Nations Security Council Report of the Secretary General on the United Nations Stabilization Mission in Haiti*, S/2010/200 (22 Feb. 2010). A huge majority of these internally displaced persons (IDPs) camps were established spontaneously—often in areas that were not ideal for supporting thousands of IDPs. *See also* USAID OFFICE OF TRANSITION INITIATIVES—HAITI, QUARTERLY REPORT, JAN.–MAR. 2010 [hereinafter USAID OFFICE OF TRANSITION INITIATIVES—HAITI, QUARTERLY REPORT, JAN.–MAR. 2010], *available at* http://www.usaid.gov/our_work/cross- cutting_programs/transition_initiatives/country/haiti3/rpt0310.pdf. By April 2010, it was estimated that more than 2.1 million IDPs were living in more than 1300 spontaneous settlement camps throughout Haiti. USAID Fact Sheet, No. 50 (16 Apr. 2010), *available at* http://www.insidengo.org/downloads/Haiti04.16.10USAIDDCHAEarthquakeFactSheet.pdf.

[188] For example, USAID was trying to manage the human waste problem by building or buying 18,000 latrines to meet the sanitation needs of the affected Haitian population, including 9000 latrines in Port-au-Prince. However, because of overcrowding and debris in Port-au-Prince, approximately 4500 of the latrines would have to be portable latrines, rather than trench latrines, which would then require approximately forty-five de-sludging trucks to maintain. The USAID estimated it would take six weeks for the trucks and portable latrines to arrive in Haiti. USAID Fact Sheet No. 34 (Feb. 15, 2010), *available at* http://www.usaid.gov/helphaiti/documents/02.15.10-USAID-DCHAHaitiEarthquakeFactSheet34.pdf. However, since Port-au-Prince did not have a functioning sewage system before the earthquake, and since Haiti did not have any sewage treatment plants, even properly collected waste was simply deposited in open air trash dumps throughout the city. *See* Romero, *supra* note 185. As of 14 February 2010, it was estimated that only 5% of the required latrines were in place in Haiti. Daily SitRep—Component SitRep to Joint Task Force-Haiti (14 Feb. 2010) (HACC, JTF-H) (on file with author). Another plan involved the construction of new IDP camps outside the city and away from areas of flooding. The problems with this plan reflected OFDA's general belief that relocating disaster victims to temporary shelters and IDP camps should be avoided if possible: construction of these camps took time; even newly constructed camps posed health and social risks; camps remove people from

viewed as the most urgent for two reasons: first, clearing drainage canals would minimize the likelihood of flooding throughout the city and IDP camps and, thereby, prevent a disastrous dispersal of waste and garbage; and second, clearing debris from neighborhoods would allow families to return to their communities and reduce congestion and overcrowding in the IDP camps. In an effort to coordinate a debris removal plan, JTF-H hosted the first of several meetings of the Debris Management Task Force (DMTF) on 14 February 2010.[189]

Given the enormity of the debris removal task in Haiti,[190] the DMTF identified five near-term "quick win" projects that would have significant impacts for the Haitian population before the rainy season: (1) establishing debris staging areas in Port-au-Prince,[191] (2) establishing debris staging areas in other regions; (3) clearing the main drainage canals in Port-au-Prince, starting with the Camp Solino area;[192] (4) clearing the Turgeau neighborhood of debris;[193] and (5) conducting habitability assessments, starting with the Turgeau neighborhood.[194] Although JTF-H had engaged in limited debris removal operations previously, all of those operations involved clearing debris from roads to facilitate the delivery of aid or other legitimate uses of OHDACA funding.[195] All of the "quick win" projects, on the other hand, appeared to fit within the general view of debris removal as part of reconstruction and were, therefore, beyond the authority for the use of OHDACA. This view was confirmed on 19 February, 2010 when initial guidance from SOUTHCOM and the Office of the Secretary of Defense (OSD) identified these "quick win" projects as definitely beyond the scope and authority for OHDACA.[196] This brought planned JTF-H debris removal operations to a "dead stop."[197] Unfortunately, neither USAID nor the Government of Haiti was in a position to mobilize assets or contract with sufficient alacrity to address these "quick win" projects in the compressed timeline demanded by the rainy season.[198]

Despite the initial opinion from SOUTHCOM and OSD, the JTF-H Commander believed that completing these five projects was a crucial part of humanitarian relief and a necessary part of Phase Two operations.[199] In order to support the JTF-H Commander's intent,[200] JTF-H OSJA

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important social support structures; camps removed from normal population centers create a community completely dependent on international aid (in the case of the proposed new Haitian IDP camps, their location well outside of Port-au-Prince meant the inhabitants would be unable to work in the city). USAID OFDA 2009 ANNUAL REPORT, *supra* note 145, at 22.

[189] The Debris Management Task Force was comprised of representatives from the Government of Haiti, the United Nations, MINUSTAH, USAID, Canada, the European Union, and JTF-H. Debris Management Task Force, Notes for the Record (14 Feb. 2010) (on file with author). *See also* USAID Fact Sheet No. 34 (Feb. 15, 2010), *available at* http://www.usaid.gov/help haiti/documents/02.15.10-USAID-DCHAHaitiEarthquakeFactSheet34.pdf.

[190] To compare, the seven New York City buildings destroyed as a result of the 9/11 Terror Attack resulted in less than 300,000 cubic meters of debris. United Nations Development Programme, Fact Sheet—Haiti Earthquake Debris Management (n.d.) (on file with author).

[191] Having a place to bring, process and store the debris was a crucial prerequisite to any debris removal plan.

[192] Camp Solino consisted of 1500 families of 7000–10,000 people on a small piece of land immediately adjacent to a drainage canal that was utterly clogged with disaster generated debris, garbage and waste. *Working with Displaced Communities in Port-au-Prince*, CHF-HAITI BLOG (Mar. 8, 2010) *available at* http://www.chfinternational.org/node/3409; Mark Schuller, *Haiti's Resurrection: Promoting Human Rights*, HUFFINGTON POST, Apr. 4, 2010, http://www.huffingtonpost.org/mark-schuller/haitis-resurrection-promo_b_525104.html.

[193] One of the most emblematic, overcrowded, and squalid IDP camps was in the Champ de Mars square, immediately alongside the ruined Haitian presidential palace. Approximately 80% of the 29,000 people living in this forty-two-acre camp came from the Turgeau neighborhood. Decongesting this area was the Government of Haiti's number one priority. Debris Management Task Force Planning Team Update (17 Feb. 2010) (draft) (on file with author); Debris Management Task Force Brief to CSC (2 Mar. 2010) (on file with author).

[194] Conducting these types of general all-purpose habitability assessments was well beyond the "critical engineering assessments" authorized in SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.b(4)(a)(4)(ii). Tens of thousands of Haitians were living in IDP camps even though their houses or apartments were not destroyed in the earthquake because of fear that even minor aftershocks would cause these buildings to collapse. Conducting structural integrity and habitability assessments of these thousands of buildings would allow for immediate decompression in some camps as Haitians were encouraged to return to their still standing homes.

[195] Another example of a clearly legitimate use of OHDACA involved removing rubble or demolishing a building that was damaged and in danger of collapsing on a neighboring hospital. Completely separate from this type of debris removal, JTF-H was also involved in debris removal at the Hotel Montana pursuant to a direct mission to assist the Department of State in the recovery of U.S. citizen remains. *See* HEADQUARTERS, JOINT TASK FORCE–HAITI , FRAGMENTARY ORDER NO. 108, JTF-H SUPPORT TO AMCITZ RECOVERY AND REPATRIATION OPERATIONS (16 Feb. 2010) (citing Memorandum, White House, subject: Department of Defense Response to Conditions Resulting from the Haiti Earthquake, No. 00636 (28 Jan. 2010)).

[196] E-mail from USSOUTHCOM J8, to JTF-H Chief of Staff, subject: Funding v. Authority (Feb. 19, 2010, 1815 EST) (on file with author).

[197] The JTF-H Deputy Commanding General, Major General Daniel B. Allyn, characterized the message from SOUTHCOM as putting the JTF at a "dead stop wrt [with regard to] support to the current 'quick wins' for debris removal." E-mail from JTF-H DCG, to Commanding General, JTF-H, subject: Funding v. Authority (Feb. 19, 2010, 1820 EST) (on file with author).

[198] *See generally* Memorandum for CDRUSSOUTCHCOM, Attn: DCDR, subject: Request for Authorities and Funding Assistance (20 Feb. 2010) [hereinafter Request for Authorities and Funding Memorandum]. "According to Ambassador Luck (USAID Response Coordinator), there is not sufficient time to mobilize Haitian assets or contract sufficiently to fully address this humanitarian emergency." *Id*. para. 3.c. That said, the USAID and GOH were integral partners in identifying the "quick win" projects and ultimately managing project implementation.

[199] E-mail from Commanding General, JTF-H, to SOUTHCOM, subject: Funding v. Authority (Feb. 19, 2010, 1832 EST) (on file with author).

[200] As legal advisors to commanders, judge advocates (JA) must do more than simply advise whether a particular action is illegal or improper. A JA's primary mission as a commander's legal advisor is determining "whether there is a way to legally, morally , and ethically accomplish (the Commander's) goal or to get to 'yes'." Lieutenant Colonel Mike Ryan,

undertook a critical analysis of all authorities guiding the use of OHDACA, as well as all orders directing the HA/DR mission in Haiti generally, to craft an argument that would allow use of OHDACA for the "quick win" projects. Ultimately, this argument was reduced to a memorandum signed by the JTF-H Deputy Commander and submitted to SOUTHCOM, which in turn forwarded it to OSD for consideration and action.[201]

Since U.S. policy generally limits OHDACA funds in foreign disaster operations to immediate humanitarian assistance and relief,[202] and since the CJCS Execute Order (EXORD) explicitly limited OHDACA to Phase One and Phase Two,[203] the only way to use OHDACA for the "quick win" projects was for those projects to fit squarely within Phase Two. The JTF-H OSJA attempted to do this by acknowledging that general debris removal was clearly a part of reconstruction and, therefore, beyond the authority of Phase Two, but then distinguished "quick win" projects from general debris removal by connecting them to the HA/DR objectives and specified tasks of the Relief Phase.[204]

The CJCS EXORD directed that JTF-H provide, among other things "food, water, clothing, medicine, beds and bedding, *temporary shelter*, and *housing*."[205] The SOUTHCOM EXORD clarified these objectives and further defined "immediate humanitarian needs" as including "water, food, *shelter*, *sanitation*, medicine, etc."[206] It stood to reason that if shelter and sanitation were authorized objectives for OHDACA-funded Relief Phase operations, then creating the space and drainage necessary to provide them had to also be authorized.[207] If JTF-H had been able to establish sufficient planned IDP camps before people began settling in flood zones or other overcrowded areas where proper sanitation could not be provided, OHDACA could clearly have funded tarps and building materials for shelter and construction of drainage and latrines for adequate sanitation. Since the magnitude of the disaster far exceeded the ability of JTF-H to prospectively establish such camps, JTF-H had to address the shelter and sanitation issues given the actual camps that had developed.[208]

Moreover, the mission statement from SOUTHCOM specifically directed that JTF-H conduct "critical engineering operations in order to alleviate human suffering."[209] While the flooding had not yet occurred and disease had not yet struck the IDP camps, both were inevitable if conditions were not alleviated.[210] Conducting the engineering operations associated with the "quick win" projects was vital to avert the imminent human suffering that would result from the rain.

Finding ways to tie these individual projects directly to HA/DR activities, as distinct from the general debris removal necessary for reconstruction, was vital to convincing SOUTHCOM and OSD to change their initial guidance that suggested OHDACA was not appropriate for the "quick win" projects. Although every act of debris removal was certainly a precursor to reconstruction, the actual purpose of these specific projects was not reconstruction but rather was to provide shelter, sanitation, and the alleviation of imminent suffering. While there certainly was a slippery slope concern regarding debris removal, that concern was appropriately managed on a project-by-project basis, rather than by a blanket prohibition.[211]

After reviewing the Request for Authorities and Funding Memorandum, OSD reversed its initial opinion and determined that "SOUTHCOM has the existing authority to undertake debris removal operations under both humanitarian assistance and disaster assistance authorities, so long as the activities remain in support of general humanitarian assistance or disaster relief operations, and do

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*Setting Conditions for Success: Seven Simple Rules for New Staff Officers*, ARMY LAW., Oct. 2006, at 33, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/10-2006.pdf.

[201] Request for Authorities and Funding Memorandum, *supra* note 198.

[202] *See supra* note 169 and accompanying text.

[203] *See supra* note 168 and accompanying text.

[204] Request for Authorities and Funding Memorandum, *supra* note 198. As regards conducting habitability assessments, the Request for Authorities and Funding Memorandum argued that the "critical engineering assessments" required in Phase Two by SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.b.ii included habitability assessments, particularly insofar as these assessments would "maximize the use of safe/habitable existing structures to support camp decongestion." Request for Authorities and Funding Memorandum, *supra* note 198, para. 2.c.

[205] CJCS EXORD, *supra* note 137, para. 3.B.1.C (emphasis added).

[206] SOUTHCOM EXORD, *supra* note 16, para. 3.B.2 (emphasis added).

[207] Request for Authorities and Funding Memorandum, *supra* note 198, para. 3.d.

[208] *Id.* All but a few of the approximately 460 IDP camps were established spontaneously by the earthquake victims themselves. The two camps directly affected by the "quick win" projects, Camp Solino and Champs de Mars, were spontaneously established following the earthquake. *Id*.

[209] SOUTHCOM OPORD 01-10, *supra* note 12, para. 2.

[210] Haiti averages approximately eighteen inches of rainfall during the April–June rainy season, and another eighteen inches during the August–October hurricane season. ANALYSIS OF MULTIPLE NATURAL HAZARDS IN HAITI, REPORT PREPARED BY GOVERNMENT OF HAITI, WITH SUPPORT FROM THE WORLD BANK, THE INTER-AMERICAN DEVELOPMENT BANK, AND THE UNITED NATIONS SYSTEM (Mar. 26, 2010), *available at* http://www.iris.edu/hq/haiti_workshop/docs/Report-MULTIHAZARDS-HA-English-Sergio Mora-Final-Red.pdf.

[211] *See generally* Request for Authorities and Funding Memorandum, *supra* note 198; *see also* E-mail from JTF-H SJA (Feb. 17, 2010, 07:50 EST) (Rubble/debris) ("[T]here is a fine line between clearing for drainage and clearing for reconstruction . . . [N]evertheless, I believe this risk can be managed and the JTF should go forward with this mission as part of our ph II HA mission.").

not fall into the category of 'reconstruction.'"[212] The OSD established three criteria for analyzing these specific "quick win" engineering projects or future debris removal projects: (1) what is the ultimate intent of the project (truly HA/DR and not reconstruction); (2) what is the unique military capability that is needed to accomplish the project; and (3) would the HA/DR need addressed by the project go unfilled if military assets did not step forward.[213] While criteria (1) and (3) were directly addressed in JTF-H's Request for Authorities and Funding Memorandum to SOUTHCOM, criterion (2) required additional explanation before debris removal work could begin.

The requirement that use of a unique military capability was required before engineering assets could be used for a particular project was derived from a U.S. policy directing that military assets could be used in foreign disaster relief only when "there is no comparable civilian alternative" and only when the military assets used were "unique in capability and availability."[214] While using military engineering assets would have certainly satisfied these criteria, insufficient military engineering assets were available to perform the "scope and scale" of the "quick win" projects. The JTF-H intended to contract for the debris removal engineering assets through the Global Contingency Services Contract, which was already providing the majority of the engineering assets for the American Citizen recovery operation at the Hotel Montana.[215]

As discussed previously, the obvious "unique capabilities" the military brought to the disaster included operational reach, security, logistics, command and control, communications and mobility.[216] The requirements of disaster relief in Haiti however highlighted a new unique capability that needed to be added to this list: contingency contracting.[217] Contingency contracting is "the process of obtaining goods, services and construction from commercial sources via contracting means in support of contingency operations."[218] Contingency contracting for JTF-H was provided by Expeditionary Contracting Command (ECC), which is a subordinate command of the Army Contracting Command, a part of Army Materiel Command.[219] The ECC was formed in 2008 to provide "skilled, trained, contracting personnel for the support of expeditionary forces."[220] Operation Unified Response represented the first deployment of ECC personnel in response to an actual contingency.[221]

Integrated contract support has been a significant force multiplier for the armed forces in Iraq and Afghanistan. In 2007, over half of the personnel in both theaters were contract personnel.[222] Acquisition, support, administration, and management of these contractors is vitally important, and the ability to do all of these things expeditiously in a contingency environment like Haiti, is unique to the military.[223] For example, in declared humanitarian operations, the simplified acquisition threshold for contracts awarded and performed outside the United States is increased to $1 million for contingency contracting.[224]

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[212] E-mail from Principle Dir., Office of Partnership, Strategy and Stability Operations, Office of the Undersec'y of Def. for Pol'y (Feb. 22, 2010, 1937 EST) (on file with author). The one "quick win" project OSD singled out as probably not appropriate for OHDACA was establishing the debris staging sites. OSD appeared to summarily agree that JTF-H's mandate to conduct "critical engineering operations" included conducting structural assessments of houses. Request for Authorities and Funding Memorandum, *supra* note 198, para. 2.c.

[213] *Id*.

[214] *See* JP 3-29, *supra* note 9, at III-10; *see also supra* notes 71–77 and accompanying text.

[215] *Id*. For a discussion of the American Citizen remains recovery operation at the Hotel Montana, see *supra* notes 11 and 196.

[216] *See supra* note 78 and accompanying text.

[217] Arguably contingency contracting is a component of both operational reach and logistics, but in either case, an explanation of how it is a unique capability was required.

[218] U.S. JOINT PUB. 4-10, OPERATIONAL CONTRACTING SUPPORT, at vi (17 Oct. 2008), *available at* http://www.dtic.mil/doctrine/new_pubs/jp4_10.pdf.

[219] U.S. Army Contracting Command Fact Sheet, *available at* http://www.amc.army.mil/pa/Fact%20sheets/ACC.pdf (last visited Apr. 5, 2011).

[220] The ECC was formed as a result of the REPORT OF THE COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS 52 [hereinafter GANSLER REPORT], *available at* http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf. The Gansler Report also made four other systemic recommendations: (1) Increase the stature, quantity, and career development of military and civilian contracting personnel (especially for expeditionary operations); (2) Restructure organization and restore responsibility to facilitate contracting and contract management in expeditionary and CONUS operations; (3) Provide training and tools for overall contracting activities in expeditionary operations; (4) Obtain legislative, regulatory, and policy assistance to enable contracting effectiveness in expeditionary operations. *Id*. at 5.

[221] Larry D. McCaskill, *ECC Wraps Up Humanitarian Mission in Haiti*, ACC TODAY, Summer 2010, at 15, *available at* http://www.usmilitarycontracting.comuploads/ACC_TodayVol3-July10_1_.pdf. More than a dozen ECC Soldiers and civilians deployed to Haiti as part of the contingency contracting mission with the first contracting officer arriving within twenty-four hours after the earthquake. Lieutenant Colonel Americus Gill, *Unit's First Operational Deployment is Haiti Mission,* ACC TODAY, Summer 2010, at 16. *See also* Larry D. McCaskill, *Expeditionary Contracting Command Continues Support to Haiti Mission*, MIL. NEWS, Mar. 8, 2010), *available at* http://www.army.mil/-news/2010/03/08/35485-expeditionary-contracting-command-continues-support-to-haiti-mission/.

[222] GANSLER REPORT, *supra* note 220, at 3.

[223] It took USAID almost five weeks to sign a $3.5 million contract with a South Florida firm to manage the debris processing site. USAID OFFICE OF TRANSITION INITIATIVES—HAITI, QUARTERLY REPORT, JAN–MAR 2010, *supra* note 187; *see also* Carrie Kahn, *Haiti Seeks a Home for an Endless Sea of Debris*, NPR REPORT, Mar. 25, 2010, *available at* http:www.npr.org/templates/story/story.php?storyID=1251707744.

[224] GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 2.101 (Jan. 2011) [hereinafter FAR]; *see also* The Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-37 § 822, 117 Stat. 832.

Similarly, the limit for the use of simplified acquisition procedures for the purchase of commercial supplies and services is increased to $11 million for contingency contracting in declared humanitarian operations.[225] Moreover, military contingency contracting officers can also access military external support contracts to expedite delivery of the support needed in a contingency operation, which enables almost immediate delivery of crucial equipment, supplies, and expertise.[226] In the case of the actual engineering requirements within the "quick win" projects approved for OHDACA, only the JTF-H's contingency contracting capability was able to acquire, support, administer, and manage the engineering assets required to immediately begin the work—an absolute necessity if the projects were to be completed before the rainy season.

Having satisfied the three criteria for conducting debris removal, JTF-H began work on four of the five "quick win" projects, as well as other weather mitigation projects, in conjunction with USAID.[227] By early April, the Turgeau debris removal and habitability assessments were completed with over 15,125 cubic yards of debris removed and 22,824 buildings evaluated, of which 46% were deemed immediately habitable.[228] In fact, the Turgeau project was so successful JTF-H began another targeted debris removal project on 12 April 2010 in the Delmas neighborhood to relieve the congested conditions in Camp Petionville. After removing 12,724 cubic yards of debris, this project was transitioned to the Government of Haiti on 25 April 2010[229]—exactly as was envisioned by the JTF-H Request for Authorities and Funding Memorandum.

All of these combined weather mitigation efforts, as well as a relatively minor spring rainy season, prevented the feared outbreaks of disease during the Spring rainy season. Unfortunately, the ongoing debris removal process was not aggressive enough to prevent flooding and the spread of cholera following the fall hurricane season.[230] By January 2011, an estimated 3600 Haitians who survived the earthquake had died from cholera.[231]

## Conclusion

Phase Two of OUR ended on 1 June 2010, at which time JTF–H was disestablished and OUR was formally concluded.[232] At its peak, 22,000 U.S. military forces were in the area of operations conducting humanitarian assistance and disaster relief operations—7000 on land and the remainder operating aboard fifty-eight aircraft and fifteen nearby vessels.[233] These military forces established and maintained security throughout the country for the duration of the operation; they delivered more than 2.6 million bottles of water, 2.2 million food rations, seventeen million pounds of bulk food, 149,000 pounds of medical supplies;[234] medical personnel treated and evaluated thousands of Haitian patients, including more than 8600 on the Navy hospital ship USNS *Comfort*; and engineering assets restored and reopened Port-au-Prince airport; rebuilt Port-au-Prince harbor; rebuilt and restored roads critical to the throughput of humanitarian assistance, and "jump started" the debris removal efforts by removing eighty blocks of debris and conducting engineering assessments of over 40,000

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[225] *Id.* subpt. 13.5.

[226] External support contracts are generally issued during peacetime for use to provide significant logistical support during contingencies. JOINT PUB. 4-10, *supra* note 218, at III-9-10. The proposed Debris Removal PR&C specifically proposed using the Naval Facilities Engineering Command's Global Contingency Services Contract to accomplish the 'quick win' debris removal projects. Letter of Justification, Debris Removal PR&C, para. 6 (18 Feb. 2010) (on file with author). Contingency contractors also use theater support contracts with local vendors, executed under expedited contracting authority, to provide supplies, services, and construction from commercial sources available within the operational area. JOINT PUB. 4-10, *supra* note 218, at III-11.

[227] *See generally* USAID Fact Sheet No. 6, FY 2010 (18 Mar. 2010), *available at* http://www.usaid.gov/ht/docs/eqdocs/ofda_fact_sheets/03.18.10_haiti_factsheet_46.pdf; CHF International, One Year Factsheet, January 2011, *available at* http://www.chfinternational.org/files/CHF%20Haiti%20One%20Year%20Factsheet%20Jan%202010_small_0.pdf; Tom Prive, *Haiti Camps Prepare for Rains*, CATHOLIC RELIEF SERVS., *available at* http://crs.org/haiti/rainy-season-prep; Sara Fajardo & Kim Pozniak, *Shoring Up Haiti's Water Resources*, CATHOLIC RELIEF SERVS., *available at* http://crs.org/haiti/water-q-a; *U.S. Response Coordinator for the Haiti Earthquake Visits CHF Project at Grand Canal in Solino*, CHF INT'L, *available at* http://www.chfinternational.org/node/34160. There were numerous other issues associated with debris removal that fell well beyond the scope of JTF-H's efforts to accomplish the "quick wins": ownership of debris; compensation to owners of debris; processing of debris; reuse or recycling of some debris; and the permanent disposal of debris. Proposed Haiti-Earthquake 2010 Draft Debris Management Plan, U.S. Army Corps of Engineers Debris Planning Cell, JTF-H (14 Feb. 2010) (on file with author).

[228] *See* J4/LOG/ENG Input Slide for JTF-H Mission Update Brief (14 Apr. 2010), *available at* https://schqanon.southcom.mil/ DIRANDLNOS/ J3/J33/ Watch/contingencies/haiti_hadr/MUB%20Library/Archived%20Inputs/14%20Apr%200800%2010%20DCO%20MUB%20Inputs/LOG%20(DCO)%20MUB%2014%20Apr%202010%20Inputs.ppt.

[229] *See id.*

[230] "A mountain of debris has been removed from the city, but it represents only 5 percent of the rubble pile . . . . Engineers have made cursory inspections of 380,000 homes in Port-au-Prince. Half of the houses need to be repaired or demolished." William Booth, *After Massive Aid, Haiti Feels Tuck in Poverty*, WASH. POST, Jan. 11, 2011, at A1. Matthew Bigg, *Tomas Soaks Haiti Quake Camps, Triggers Floods,* REUTERS, Nov. 5, 2010.

[231] *Id.*

[232] FRAGO 102, *supra* note 14. FRAGO 102 also amended SOUTHCOM OPORD 01-10 to be a two-phase operation. With the conclusion of Operation Unified Response, JTF-H was disestablished and USSOUTHCOM assumed direct responsibility to maintain HA/DR support to USAID for ongoing relief in Haiti. *Id.*

[233] Lisa Daniel, *SOUTHCOM Completes Haiti Disaster Relief*, AM. FORCES PRESS SERV., June 1, 2010, http://www.defense.gov/news/newsarticle.aspx?id=59423.

[234] *Id.*

buildings.[235] Creative legal thinking regarding the development of ROE and the flexible use of OHDACA were the foundational prerequisites for all of these successes,[236] and illustrate the vital role JAs play in supporting the commander.

[235] *Narrative History of Operation Unified Response*, U.S. Southern Command (as of May 25, 2010), http://www.southcom.mil/appssc/factFiles Large.php?id=138.

[236] While this article focused on these two primary legal issues that supported humanitarian assistance and disaster relief in Haiti, there were numerous unique legal issues that also resulted in significant positive effects, but are beyond the scope of this article: (1) legal assistance to military members who had immediate family in Haiti and who were seeking immigration assistance in getting their families humanitarian paroles (JTF-H legal assistance attorneys obtained the only thirty humanitarian paroles issued in the first thirty days after the disaster.); (2) establishing a joint Foreign Claims Act program to investigate and adjudicate claims; (3) issues associated with the recovery of U.S. citizen remains; (4) General Order Number 1; (5) customs and duties on military supplies and relief supplies entering Haiti; and (6) potential constraints on recovery and relief operations in a UNESCO World Heritage Site.

# Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases

*Lieutenant Colonel Eric Carpenter**

## The Basics

Discovery and production rules are fairly simple—if you can distinguish one from the other, which is not always an easy task. For example, depending on where you are in the discovery rules, the word *material* can have three different meanings: it can mean a thing, matter, or information; it can mean matter that is significant to the preparation of the defense case; or it can describe a test for prejudice on appellate review. The definition of *material* that comes from the *Brady v. Maryland*[1] analysis is different than the definition of *material* as it is used in Rule for Courts-Martial (RCM) 701(a)(2).[2] Next, practitioners may have trouble understanding when to apply *material* as the test for prejudice for a discovery violation instead of *harmless beyond a reasonable doubt*. Last, practitioners may have trouble distinguishing *military* (from RCM 701(a)(2)) and *investigative agency* (from RCM 701(a)(6)[3]/*Brady* analysis).

Some rules within discovery and production appear similar and can lend themselves to confusion. Practitioners might interchange the terms *material* (from discovery) and *relevant* (from production) or they might interchange *military* (from discovery) and *government* (from production). Both the discovery and production rules have different procedures for conducting *in camera* reviews. Additionally, the definition of *necessary* in expert assistant requests (a discovery problem) is different from the definition of *necessary* in expert witness requests (a production problem). The rules often look similar, but the differences that exist are important because each set of rules is designed to solve a certain set of problems. In the simplest terms, discovery rules deal with the *preparation* phase of trial, while production rules deal with the *presentation* phase of trial. For this reason, discovery rules should not be used to resolve production issues, and production rules should not be used to resolve discovery problems.

This article provides legal practitioners with a set of tools for recognizing the differences between discovery and production rules. These tools are then applied to the 2009 term of appellate cases which focused on discovery and production issues in order to illustrate whether the parties, the military judges, and the courts used sound reasoning in dealing with these issues. At the conclusion of this article, practitioners should be able to recognize the difference between discovery and production rules, to include *in camera* reviews; distinguish expert assistants from expert witnesses; and identify the distinctions between specific defense discovery requests and RCM 701(a)(6)/*Brady* obligations. Finally, the objective of this analysis is to emphasize a simple but critical point: precision matters.

## The Basic Differences Between Discovery and Production

Fundamentally, discovery rules govern how the parties will exchange information. The rules for discovery establish how each party must help the *other* party to develop the *other* party's case.[4] Discovery deals with preparation and investigation. Discovery means finding or learning something that was previously unknown and is used to "reveal facts and develop evidence."[5] A party can seek discovery and obtain information that might not be not admitted into evidence at trial. For example, the information might be used to develop other evidence that the party will eventually try to admit.

In contrast, production rules focus on presenting evidence or witnesses at trial. At that point, the party has been through discovery, gathered facts, and chosen which facts will be introduced as evidence at trial. The party now needs the help of compulsory process to bring those facts to the courtroom—typically through a witness or physical evidence.

When we look at the RCMs, we see language that reflects this fundamental difference between discovery and production. For example, look at the rule that deals with specific discovery requests from the defense, RCM 701(a)(2)(A). This rule states that when the defense requests a specific item, then the government must disclose that item if certain conditions are met.[6] One of those potential conditions is that the item must be "material to the *preparation* of the defense."[7] That language deals with

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[1] 373 U.S. 83 (1963).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(2) (2008) [hereinafter MCM].

[3] *Id.* R.C.M. 701(a)(6).

[4] BLACK'S LAW DICTIONARY 466 (6th ed. 1990). Discovery includes "the pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial." *Id.*

[5] BLACK'S LAW DICTIONARY 533 (9th ed. 2009).

[6] MCM, *supra* note 2, R.C.M. 701(a)(2)(A).

[7] *Id* (emphasis added).

preparation and investigation, not with whether that item will ultimately be introduced at trial.

Further, the word *material* in "material to the preparation of the defense" is defined in the language of preparation and investigation. *Material* means "[h]aving some logical connection with the consequential facts . . . Of such a nature that knowledge of the item would affect a person's decision-making process; significant; essential."[8] Look at the first phrase in that definition. The matter does not need to be a consequential fact itself; rather, it only needs to be logically connected to some other fact of consequence. *Material* is not an evidentiary term—it is broader. The requested item does not have to ultimately be admitted at trial, but merely contribute to case preparation. Now look at the second phrase in the definition. Note that the information does not need to be favorable. Unfavorable information may be material.[9] The defense may need to know it in order to make informed decisions like how to plead or what theory of the case has the greatest chance for success.

Look now at the production rules. These rules do deal with evidentiary terms. The parties are entitled to the production of witnesses or evidence that is necessary and relevant.[10] The definition of *necessary* is "not cumulative and . . . would contribute to a party's presentation of the evidence in some positive way on a matter in issue."[11] For the definition of *relevant*, the discussion to RCM 701(b) and (f) points to the definition found in Military Rule of Evidence (MRE) 401.[12] Military Rule of Evidence 401 defines *relevance* as having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] According to Black's Law Dictionary, *relevant* means "logically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact." Unlike the word *material*, the word *relevant* is an evidentiary term.

Another area of confusion between discovery and production rules deals with what agency has control of the item or person at issue. For specific discovery requests under RCM 701(a)(2), the trial counsel only has to disclose those items within the possession, custody, or control of *military* authorities.[14] If the item that the defense requests under RCM 701(a)(2) is not within military possession, custody, or control, the trial counsel does not have an obligation to find it for the accused. This rule is narrower than the production rules. To compare, under RCM 703, if the witness or evidence is necessary and relevant, then the government has to produce the witness or evidence, regardless of what type of person is involved or what agency or person possesses the evidence.[15]

Some of this confusion exists in the appellate cases from the 2009 term. Table 1 in the appendix is based on the discussion above and lays out the basic differences between discovery and production.

### *The Differences Between Discovery and Production* In Camera *Reviews*

Both the discovery and production rules allow the military judge to conduct *in camera* reviews of disputed matter. Under RCM 701(g)(2), the military judge may regulate discovery by granting a party relief from a discovery obligation.[16] If one of the parties believes that complying with a discovery request would be inappropriate, the party may file a motion with the military judge requesting *in camera* review.[17] The standard for the moving party is "a sufficient showing" that "the discovery or inspection be denied, restricted, or deferred."[18]

If the party has made a sufficient showing, the military judge reviews the questionable matter. The military judge then decides whether the matter is protected or confidential. If not, the military judge ends the *in camera* review. If it is protected, the military judge determines whether the matter is material to the preparation of the defense.[19] The military judge may (and probably should) allow the parties to review the documents while still respecting the protected or confidential nature of the documents so that the parties can make informed arguments on whether the matter is material. The military judge can do this by having the parties review the matter in the courtroom.[20] If the matter is not material, then the military judge may deny the party that is seeking discovery from receiving discovery, while ordering any

[8] BLACK'S LAW DICTIONARY 1066 (9th ed. 2009).

[9] United States v. Adens, 56 M.J. 724 (A. Ct. Crim. App. 2002).

[10] MCM, *supra* note 2, R.C.M. 703(b) and (f).

[11] *Id*. R.C.M. 703(b)(1) discussion.

[12] *Id*. R.C.M. 703(b) discussion, 703(f) discussion.

[13] *Id*. MIL. R. EVID. 401.

[14] *Id*. R.C.M. 701(a)(2)(A).

[15] *Id*. R.C.M. 703(e), (f).

[16] *Id*. R.C.M. 701(g)(2).

[17] *Id*.

[18] *Id*.

[19] *See generally* United States v. Abrams, 50 M.J. 361, 364 (C.A.A.F. 1999).

[20] Alderman v. United States, 394 U.S. 165, 182 (1969); *Abrams*, 50 M.J. at 364.

other terms and conditions that are just.[21] If the matter is material, then the military judge may order disclosure with a protective order.

The *in camera* review under the production rules is different. There, the government has already issued a subpoena for the evidence,[22] so the evidence has already been determined to be relevant and necessary. However, the *custodian* of the evidence—not a party to the case—is now contesting the subpoena because she believes the subpoena is unreasonable or oppressive. The military judge may still direct that the custodian provide the evidence for an *in camera* inspection. After reviewing the matter, the military judge has the option to withdraw the subpoena.[23] If the military judge does so, then the party that was denied the evidence can seek a remedy for unavailable evidence under RCM 703(f)(1).[24]

One of the cases in the 2009 term involved an *in camera* review under discovery analysis. Table 2 in the appendix outlines the differences between discovery and production in-camera reviews.

### *The Differences Between Expert Assistants and Expert Witnesses*

When practitioners categorize "expert assistants," they often lump the topic in with the expert witness analysis that is found in RCM 703(d). Look closely, though, because RCM 703(d) does not discuss expert assistants. In reality, the analysis for expert assistance requests is much more similar to the analysis of discovery issues than production issues. Expert assistants are commonly used to help the defense evaluate scientific or technical evidence during the *preparation* phase of trial when the defense is still building its case. Expert witnesses arrive at the *presentation* phase of trial when the defense knows what it wishes to put before the fact finder.

As an illustration of the different purposes served by expert assistants and expert witnesses, the analysis for expert assistance requests differs from that for expert witnesses,[25] particularly in the definition of *necessary*. The defense is entitled to an expert assistant or other investigative help when that assistance is *necessary* for an adequate defense. The test has two parts. The defense must show that there is a reasonable probability that (1) an expert would be of assistance to the defense and (2) the denial of expert assistance would lead to a fundamentally unfair trial.[26] For the first prerequisite, the defense must show why the expert assistance is needed, what the expert would accomplish for the defense, and why the defense cannot do the work themselves.[27]

The test for the production of an expert witness is essentially the same as the test for producing any other witness: the expert's testimony must be relevant and *necessary*.[28] Here, *necessary* takes on the familiar definition found in the production rules: "not cumulative and . . . would contribute to a party's presentation of the evidence in some positive way on a matter in issue."[29] Again, the definition of *necessary* here has to do with presenting evidence at trial. In contrast, the definition of *necessary* under expert assistance analysis has more to do with trial preparation.

Two of the cases in the 2009 term dealt with expert assistance requests. See Table 3 in the appendix for an outline of the differences between expert assistance and expert witnesses.

### *The Differences Between Specific Discovery Requests and RCM 701(a)(6)/*Brady *Obligations*

Within the discovery rules, there are three major topics of confusion: the test for what to disclose; where the government has to look; and the standard of review on appeal. The preceding paragraphs discussed the test for what to disclose after a specific discovery request under RCM 701(a)(2): both favorable and unfavorable matters that are material to defense preparation. This standard reflects the underlying purpose of discovery requests: case investigation and preparation. In contrast, the standard for unsolicited disclosure under RCM 701(a)(6)/*Brady* is much narrower: favorable evidence only.[30] This narrow disclosure requirement reflects the narrower purpose of the RCM 701(a)(6)/*Brady* rules:

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[21] MCM, *supra* note 2, R.C.M. 701(g). If the military judge denies the party that seeks discovery from getting discovery, then the matter needs to be attached to the record. *Id*. R.C.M. 701(g)(2).

[22] *Id*. R.C.M. 703(f)(4)(C).

[23] *Id*.

[24] United States v. Rodriguez, 57 M.J. 765 (N-M. Ct. Crim. App. 2002).

[25] The analysis for adequate substitutes is pretty much the same in both expert assistance and expert witness analysis. *Compare* United States v. Anderson, 68 M.J. 378 (C.A.A.F. 2010) (expert assistance) and United States v. Warner, 62 M.J. 114 (C.A.A.F. 2005) (expert assistance), *with* United States v. Burnette, 29 M.J. 473 (C.M.A. 1990) (expert witness) and United States v. Robinson, 43 M.J. 501 (A.F. Ct. Crim. App. 1995) (expert witness).

[26] United States v. Freeman, 65 M.J. 451 (C.A.A.F. 2006).

[27] United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1991).

[28] MCM, *supra* note 2, R.C.M. 703(d).

[29] *Id*. R.C.M. 703(b)(1) discussion. When conducting "relevant and necessary" analysis, courts can consider the factors found in *United States v. Houser*. 36 M.J. 392 (C.M.A. 1990).

[30] MCM, *supra* note 2, R.C.M. 701(a)(6).

> The purpose of the *Brady* rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in preparation of his defense, but to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him.[31]

For trial counsel who have to decide whether something is favorable, RCM 701(a)(6) states that the benefit of the doubt goes to the defense: the government needs to disclose the evidence if it *reasonably tends* to be favorable.[32]

Next, the rules differ on where the government has to look for such evidence. Under RCM 701(a)(2), while the government only has to search in *military* files, it has to look in *all* military files, and not just investigative files. Under RCM 701(a)(6)/*Brady*, the government has to look beyond military files, but only has to look in the government's *investigative* files, which includes the files of the trial counsel, the files of investigative agencies that were involved with the case or were closely aligned to the case, and files of the investigative agencies of unrelated or tangential investigations (if the defense provides notice of those files).[33] These files also include the personnel files of military and civilian investigators if necessary for impeachment purposes.[34]

A serious point of confusion comes from the term *material*. For example, RCM 701(a)(2) uses this term to explain what types of items require disclosure. Additionally, the term *material* also appears in the RCM 701(a)(6)/*Brady* analysis—but in this context, the term applies to an analysis of error, as to whether the government should have disclosed an item favorable to the defense but did not do so. Under RCM 701(a)(6) and Army Regulation 27-26, the government must disclose evidence that reasonably tends to be favorable to the accused.[35]

If the government fails to disclose favorable evidence, then the first question on review is whether there was a discovery request under RCM 701. If the defense made a discovery request under RCM 701 and the government failed to disclose favorable evidence, then the test on appeal is harmless beyond a reasonable doubt.[36] If the defense did not make a discovery request under RCM 701, then the failure to disclose violates due process under *Brady* if the evidence was *material*, that is, there is a reasonable probability that there would have been a different result at trial had the evidence been disclosed.[37]

Note that in the military, *material* is a retrospective term.[38] At the trial level, the test is not whether the evidence is favorable *and* material. At the trial level, the government must always disclose evidence that reasonably tends to be favorable, whether or not that evidence might later be found to be material.

Some confusion on these issues exists in the cases from the 2009 term. Table 4 in the appendix illustrates the differences between RCM 701(a)(2) specific discovery requests under and RCM 701(a)(6)/Brady obligations.

Comparing these various rules to each other raises an interesting point. Gaps exist between the areas covered by discovery rules and production rules. For example, perhaps a defense counsel believes his client suffered an adverse reaction from a new medication. The defense counsel wants to review reports made to the Food and Drug Administration to see if others have had similar reactions. Can the defense counsel get these reports under RCM 701? Probably not, as RCM 701(a)(2) does not provide a mechanism because the

[31] United States v. Ruggiero, 472 F.2d 599 (2d Cir. 1973).

[32] MCM, *supra* note 2, R.C.M. 701(a)(6).

[33] United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); United States v. Veksler, 62 F.3d 544 (3d Cir. 1995).

[34] United States v. Green, 37 M.J. 88 (C.M.A. 1993).

[35] MCM, *supra* note 2, R.C.M. 701(a)(6); U.S. DEP'T ARMY, AR 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 3.8(d) (1 May 1992).

[36] United States v. Roberts, 59 M.J. 323 (C.A.A.F. 2004). The standard arose during a period when the wake of the 1963 *Brady* decision had not yet settled. In 1976, the Supreme Court described three situations that might each have heightened (but different) levels of materiality analysis (prosecutorial misconduct, specific defense discovery requests, and general discovery requests), but did not explain what level of analysis applied to specific discovery requests. United States v. Agurs, 427 U.S. 97 (1976). In 1985, the Supreme Court decided that general and specific discovery requests *did not* warrant any heighted materiality analysis. United States v. Bagley, 473 U.S. 667 (1985). Military appellate courts noted that the Supreme Court case law only set the constitutional minimums, and that Congress and the President can provide greater protections, and had in fact done so with Article 46 and RCM 701. United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986); United States v. Hart, 29 M.J. 407 (C.M.A. 1990); *Roberts*, 59 M.J. 323. Therefore, the military appellate courts reasoned, a heightened standard should apply to specific discovery requests to help protect "the broad nature of discovery rights granted the military accused under Article 46." *Id.* at 327. Note that this heightened standard is associated with Article 46 and RCM 701 and does not derive from *Brady*.

[37] Kyles v. Whitley, 514 U.S. 419 (1995); Cone v. Bell, 129 S. Ct. 1769 (2009).

[38] In pure *Brady* analysis, the term "material" has migrated from being a retrospective test for prejudice to part of the prospective test on whether a violation has occurred. *Bell*, 129 S. Ct. at 1782-84. However, *Brady* only represents the constitutional floor. Jurisdictions are free to adopt broader discovery obligations. The military, like many jurisdictions, has done so by adopting a "reasonably tends to negate" standard in procedural rules or ethical rules (or in the case of the military, both) that contain this broader standard. MCM, *supra* note 2, R.C.M. 701(a)(6); AR 27-26, *supra* note 35, para. 3.8(d) (1 May 1992); *see Bell*, 129 S. Ct. at 1783 n.15. Military practitioners should first analyze the failure to provide favorable information under R.C.M. 701(a)(6). Constitutional *Brady* analysis is secondary.

reports are not in the possession, custody, or control of *military* authorities. Rule for Court-Martial 701(a)(6)/*Brady* also does not provide a mechanism. Even if there were favorable matter in the reports, the trial counsel is not obligated to disclose them because the reports are not in the investigative files of a law enforcement agency that is somehow related to the case.

The defense counsel would have to rely on the production rules in RCM 703. While the files are subject to production without subpoena because they are under government control, the defense counsel may not be able to make a compelling argument about why the matter is relevant and necessary or be able to say where it is when defense counsel has not seen the matter. At this stage, the defense has no other way to obtain the matter than to request it like any member of the public. A similar issue exists in one of the cases from last term, which will be discussed in the next section.

With these distinctions in mind, we can now look at the discovery and production cases from the 2009 appellate term, review the legal issues raised by the facts of each case, and apply critical thought to the various opinions issued by the Court of Appeals for the Armed Forces (CAAF) and the Army Court of Criminal Appeals (ACCA).

## Application to the 2009 Term of Cases

### *Discovery*

In most cases, parties find out about RCM 701(a)(2) and RCM 701(a)(6)/*Brady* violations either before trial (raising the question of whether a continuance is required) or on appeal (triggering the analysis of whether the newly discovered evidence should have been disclosed and if the accused was prejudiced by nondisclosure). The case of *United States v. Trigueros*[39] is somewhat unique because it involved an analysis of potential discovery violations found during the presentencing proceeding.

Trigueros was charged with the indecent assault of the wife of a Soldier in his unit (Victim 1) and the rape of one of his wife's friends (Victim 2). The defense made a specific discovery request for both victims' mental health records. The trial counsel responded with, "[t]he Government is not aware of the existence of any such documentation."[40] The problem is that the trial counsel did not actually look, and the records did exist.

Trigueros was subsequently convicted at a bench trial. During the presentencing proceeding, Victim 2 stated that she had previously seen mental health professionals. The defense asked for a continuance to review the records. The military judge granted the continuance and ordered the trial counsel to produce the records for *in camera* review under RCM 701(g)(2).[41]

Here is a good place to look at the appendix. Looking at Table 4, two potential discovery violations occurred: a violation of RCM 701(a)(2) because the defense specifically requested this type of matter; and a violation of RCM 701(a)(6)/*Brady* because this information could reasonably tend to be favorable to the defense.

When there is a specific discovery request, note that the government must disclose certain things if those things are in the possession, custody, and control of military authorities. The first question of the analysis should therefore be, "Where were the records located?" If the records were in a civilian clinic, then there would not be a violation of RCM 701(a)(2).

We should ask the same question for a potential RCM 701(a)(6)/*Brady* violation. Looking again at Table 4, the government must disclose certain matters that are found within the prosecutor's files, related law enforcement files, or unrelated law enforcement files if the government was specifically told about those files by the defense. If these records were not in a prosecution or law enforcement file, then they were not subject to RCM 701(a)(6)/*Brady* disclosure.

However, the *Trigueros* opinion never stated where these records were located. If the files were not under military control or in an investigative file, then the analysis should have ended. There would have been no discovery violation. This goes back to a critical point: precision matters.

Now, if the records were in a civilian file, the defense counsel would still have had some options. If the defense counsel had asked Victim 2 during interviews whether she had been to a counselor and had learned that records those existed, then the defense could have sought production of those records under RCM 703. If the defense had questioned the victim on this issue, then the defense would have been able to include a sufficient description of the documents to show that they were relevant and necessary.[42] As defense counsel was surprised at trial by the existence of the victims' mental health records, it appears from the record that the defense never interviewed the victims on this point.

Turning to the military judge's analysis, the military judge reviewed the records *in camera* under RCM 701(g).

[39] 69 M.J. 604 (A. Ct. Crim. App. 2010).

[40] *Id*. at 607.

[41] *Id*. at 607–08.

[42] MCM, *supra* note 2, R.C.M. 703(f)(3).

Looking at Table 2 of the appendix and noting the unique procedural posture of the issue, the military judge generally conducted the *in camera* review consistent with RCM 701(g). The military judge stated that he did not find anything particularly relevant, but also allowed each side to review the records—a method that courts have endorsed.[43] The defense argued that these records were material to the preparation of the defense under RCM 701(a)(2) because had the defense known about this information, the defense might have sought a pretrial agreement. The military judge rejected this argument, stating that the parties were never close to an agreement. However, the military judge appears to have analyzed the problem under the *favorable* test found under RCM 701(a)(6)/*Brady* rather than the *material* test found under RCM 701(a)(2).[44]

The defense then moved for a mistrial based on *Brady*. The military judge recalled Victim 2 as a witness, took more testimony, and then made findings of fact on each issue raised by the defense. Everything that was asked while the victim was on the stand could have been obtained in a defense pretrial interview. Looking at Table 4 and the potential RCM 701(a)(6)/*Brady* violation, note the government must disclose matter that reasonably tends to be favorable and is found in the right files. Here, the military judge applied the RCM 701(a)(6)/*Brady* test and noted three pieces of evidence that might have been favorable.[45]

From that point, the military judge, with the concurrence of the parties, essentially acted as an appellate court.[46] The military judge checked for prejudice by applying the harmless beyond a reasonable doubt standard.[47] Looking at Table 4, we see that this is the correct standard for reviewing potential violations of specific discovery requests under RCM 701. The military judge found that the nondisclosure of each potentially favorable piece of evidence was harmless beyond a reasonable doubt.[48]

After conducting that review, the military judge denied the motion for a mistrial but granted other remedies available under RCM 701(g)(3). Specifically, the military judge prohibited the government from presenting victim impact evidence or any other aggravation evidence in its sentencing case-in-chief.[49]

The ACCA agreed with the military judge's reasoning. The court found that the government violated RCM 701 by not disclosing matter that was specifically requested, but concluded that the nondisclosure was harmless beyond a reasonable doubt. The court went further and found that the records were not favorable under *Brady*.[50] However, the court did not analyze whether these mental health records were in the possession, custody and control of military authorities (for a possible RCM 701(a)(2) violation) or whether the records were in an investigative file (for a possible RCM 701(a)(6)/*Brady* violation).

This case has three main lessons. First, the military judge effectively handled a potential discovery violation that arose in an unusual place: post-merits but pre-appeals. The military judge handled the *in-camera* problem fairly well by allowing the parties to review the matter so that they could refine their arguments. He also recalled the witness to build a complete record; conducted RCM 701(a)(2) and RCM 701(a)(6)/*Brady* analysis; granted a defense continuance; and crafted a meaningful remedy for any potential discovery violations.[51]

Second, this problem might have been easily resolved by an analysis of the files' location. If the files were in a civilian clinic, then the government would have been under no obligation to locate them for the defense under either RCM 701(a)(2) or RCM 701(a)(6)/*Brady*. Precision matters.

Third, when a trial counsel receives a discovery request, the trial counsel needs to act on it with due diligence. The court gave counsel this admonition:

> We take this opportunity to reiterate the government's duty with regard to the disclosure of evidence in response to specific requests by the defense . . . Though the government's response that it was "not aware of the existence" of Mrs. SCR's medical records in this case was technically true, it was only because trial counsel failed to actually ask Mrs. SCR if she had previously attended mental health counseling. Rule for Courts-Martial 701 requires the prosecution "engage in 'good faith efforts' to obtain the [requested] material." *Williams*, 50 M.J. at 441; R.C.M. 701(a)(2) . . . The government cannot intentionally remain ignorant and then claim it exercised due diligence.[52]

[43] Alderman v. United States, 394 U.S. 165, 182 (1969); United States v. Abrams, 50 M.J. 361, 364 (C.A.A.F. 1999).

[44] *Trigueros*, 69 M.J. at 608.

[45] *Id*.

[46] *Id*. at 608 n.4.

[47] *Id*. at 608.

[48] *Id*.

[49] *Id*.

[50] *Id*. at 608–11.

[51] *Id*. at 608.

[52] *Id*. at 611.

In this case, the trial counsel should have asked the victims if these records existed. If the records existed and they were in an investigative file or under the military's control, then the trial counsel should have disclosed them to defense. If the records existed but were not in one of these files, then the trial counsel could have denied the request, and the defense could have then requested production of the files under RCM 703. And, if the trial counsel believed the request was inappropriate, the trial counsel could have sought relief from the military judge under RCM 701(g)(2).

The court took their discovery admonition further, and appeared to place an obligation on the trial counsel to disclose records even if they are not located in a file covered by the rules:

> In this case and others like it where there is no dispute over the relevance of the requested material, due diligence requires trial counsel to ask each victim whether she has attended any mental health counseling sessions, investigate the existence of any medical records, and obtain them, employing a subpoena or other compulsory process where necessary.[53]

That statement is not accurate: the court confused the discovery rules with the production rules. Under the discovery rules, the trial counsel is under no obligation to obtain records that are located in files not covered by those discovery rules. If the matter is in files that are beyond the reach of discovery rules, the defense can submit a proper production request under RCM 703. The government will then have options or obligations that flow from that request.

*Production of Evidence*

Where *Trigueros* dealt with discovery, *United States v. Graner*[54] dealt with production. Graner was one of the Soldiers at the center of the Abu Ghraib scandal. Graner was charged with conspiracy to commit maltreatment, maltreatment of detainees, and dereliction of duty for failing to protect detainees from abuse.[55]

As part of case development, the defense counsel made a discovery request for a particular Department of Defense (DoD) report. The government denied that request.[56] The defense then made a motion to compel production of this report.[57] Note that the defense counsel did not file a motion to compel *discovery*; rather, the defense skipped over that option and filed a motion to compel *production*. Look at Table 1 and note that by doing so, the defense raised their standard from material to the preparation of the defense to the higher standard of necessary and relevant. This perhaps unintentional choice will become important later.

When litigating the production request before the military judge, the defense broadened their request to include memorandums that related to the legal status of the detainees. The defense theory was that Graner was only acting as part of a general command climate that condoned the humiliating treatment of detainees in order to make them more likely to give up intelligence. The defense argued that the documents were needed to establish that the detainees were not protected by the law of war and therefore could not be maltreated; to establish that the appellant lacked the state of mind needed to maltreat because he thought he was just following orders; and to establish that there was unlawful command influence. On appeal, Graner stated that these matters would also support a defense theory that senior government officials had authorized the type of actions that Graner committed.[58]

The military judge denied the production request, stating that the documents were not relevant, but invited the defense to raise the issue again if they could establish relevancy.[59] Looking at Table 1, the military judge applied the correct test for production: necessary and relevant. The defense did not revisit the issue during the remainder of the trial.[60]

On appeal, the CAAF did not analyze the issue with much precision. While the court mentioned RCM 701(a)(6) and *Brady*,[61] the issue of nondisclosure of favorable evidence was not raised by the parties. The court also mentioned RCM 701(a)(2),[62] but this rule was not applicable because the defense never litigated a motion to compel discovery. The defense only litigated a motion to compel production.

The court disposed of the requested memorandums by stating that the defense failed to comply with the requirements under RCM 703(f)(3).[63] The rule states that

[53] *Id*.

[54] 69 M.J. 104 (C.A.A.F. 2010).

[55] *Id.* at 105–06. Graner was also charged with various assaults and an indecent act. *Id*.

[56] *Id.* at 106.

[57] Brief for Appellee at 6–7, United States v. Graner, 69 M.J. 104 (C.A.A.F. 2010) (No. 09-0432).

[58] *Graner*, 69 M.J. at 106–08.

[59] *Id*. at 106–07.

[60] *Id*. at 107.

[61] *Id*.

[62] *Id*.

[63] *Id*.

any defense request for production of evidence shall list the items of evidence, including a description of each item sufficient to show its relevance and necessity, and say where the government can find it.

Regarding the DoD report, the court turned to the production rules and focused on whether the report was relevant under RCM 703. The court found that Graner provided no evidence that he was adversely affected by a report that he had never even seen; that he had a duty to protect detainees under his charge regardless of any views on the detainees' legal status; and that he never produced any evidence of unlawful command influence.[64] It appears that the court did not see any connection between Graner's conduct and whatever command climate may have existed. To the court, the command climate was irrelevant if Graner and the other Soldiers involved did not have actual knowledge about this command climate. Had Graner presented some evidence that he knew about a particular command climate, or was directed to do something by someone who may have been influenced by the command climate, then the matter might have been relevant.

In his concurrence in part and dissent in part, Judge Baker pointed out that the defense fell in the "gap" between the rules that was previously discussed above. Defense counsel are required to state with specificity something that they have not been allowed to see and which might even be classified.[65] However, in this case, this "gap" was of the defense's own making. Note that if the defense had litigated a motion to compel discovery, the defense would not have needed to clear that hurdle. In contrast to RCM 703(f)(3), there is no requirement under RCM 701(a)(2) to give a more precise location other than "within the possession, custody, and control of military authorities." Here, it appears that the DoD had the documents.

Further, had the defense filed a motion to compel discovery, the defense could have argued the *material* standard under RCM 701(a)(2), which is lower than the *relevant* standard under RCM 703. These documents might have met the *material* standard because they could affect the defense's decision-making process. For instance, if the defense knew that there was nothing there worth pursuing, then the defense might have sought a different trial strategy or pursued an offer to plead guilty. Finally, had the defense litigated the denied discovery request, the standard on appeal would have been harmless beyond a reasonable doubt. Precision matters.

Because of the court's lack of precision, this case contains some dicta that practitioners should approach with caution. The lead opinion, the concurring opinion, and the concurrence in part and dissent in part opinions routinely interchanged the terms *production* and *discovery*. In dicta, the court even stated that "these rules [R.C.M. 701(a)(2), R.C.M. 701(a)(6)/*Brady*, and R.C.M. 703] are themselves grounded on the fundamental concept of relevance"[66] and noted that "Professor Wigmore put it over a century ago: 'None but facts having rational probative value are admissible.'"[67] Those statements are true for production analysis and potentially for RCM 701(a)(6)/*Brady* analysis,[68] but not for RCM 701(a)(2) analysis. Recall our discussion above and look at Table 1 again. While *material* and *relevant* may appear to be synonyms, they do not mean the same thing. *Material* is a preparation term and is used to analyze specific discovery requests under RCM 701(a)(2). *Relevant* is an evidentiary term and is *not* used in RCM 701(a)(2) analysis. Precision matters.

*Requests for Expert Assistance*

In 2005, the CAAF decided *United States v. Warner*.[69] There, the government secured a top expert in the field (Expert B), denied the defense request for a similar, specialized expert (a different Expert B), and then appointed a generalist to the defense team (Expert A). The court found that by doing so, the government violated the letter and spirit of Article 46's guarantee of equal opportunity to obtain witnesses and other evidence.[70]

In 2010, the CAAF reviewed another case with similar facts, *United States v. Anderson*.[71] This time, the government denied the defense request for a specialized expert (Expert B), appointed the defense a generalist (Expert A), but then the government called their own specialized expert (Expert B) on rebuttal.

In 2004, Anderson, a member of the Washington State National Guard whose unit was mobilizing to go to Iraq, began exchanging emails with someone he thought was a Muslim extremist but who was actually a private American citizen devoted to gathering intelligence on terrorists. Anderson revealed his unit movements, information on members of his unit, and training information. The concerned citizen eventually notified the Federal Bureau of Investigation (FBI), and FBI agents continued the online

[64] *Id*. at 108.

[65] *Graner*, 69 M.J. at 112 (Baker, J., concurring in part and dissenting in part).

[66] *Id*. at 107.

[67] *Id*.

[68] Rule for Court-Martial 701(a)(6) uses the term "evidence," which is a trial term in the way that "relevance" is a trial term. MCM, *supra* note 2, RCM 701(a)(6).

[69] 62 M.J. 114 (C.A.A.F. 2005).

[70] *Id*. at 118.

[71] 68 M.J. 378 (C.A.A.F. 2010).

dialogue. Anderson forwarded computer disks with, among other things, classified information on the vulnerabilities of American tactical vehicles.[72]

Prior to trial, Anderson was evaluated by a sanity board and diagnosed with attention deficit disorder and an unspecified personality disorder. The defense requested a particular forensic psychologist to serve as an expert assistant (Expert B, a specialist). The convening authority and subsequently the military judge denied the request. After this denial, the defense requested and was granted a *clinical* psychologist (Expert A, a generalist). At trial, this doctor testified that the appellant had Bipolar I Disorder and an unspecified personality disorder. The government's cross-examination was limited and did not call into question the doctor's underlying assertions, but did highlight that he was not forensic psychologist. The appellant also called a psychiatrist who diagnosed the appellant with Bipolar I and Asperger's Syndrome. Both doctors testified that the accused did not satisfy the conditions necessary for a successful lack of mental responsibility defense. On rebuttal, the government called a *forensic* psychiatrist (Expert A, a specialist). This expert did not comment on the first psychologist's assertions, had some minor disagreements with the second expert, noted that the defense witnesses' assessments were reasonable, and did not otherwise attack the credentials of the defense's two doctors.[73]

The court reviewed whether the military judge erred by not appointing the first doctor that the defense requested. The court applied the test found in Table 3 for expert assistants. The court essentially found that the defense did not (and could not) explain why a specialized expert was needed because the nature of the case did not require a *forensic* psychologist or psychiatrist. No issue was raised that would require the application of psychology to law, such as lack of mental responsibility or partial mental responsibility.[74] In sum, the defense did not need a specialized Expert A—a generalist Expert B was good enough. Further, the appellant did not assert that the appointed doctor was inadequate.[75]

The court then turned to the apparent unfairness of the government appointing a generalist (clinical psychologist, Expert A) to the defense but then calling a specialist (a forensic psychiatrist, Expert B) in rebuttal. The court stated, "As a threshold matter we note that Appellant does not argue, and it is not the law, that having expert type A for Appellant and expert type B for the Government on rebuttal is *per se* unfair."[76] The court found that, in this case, nothing was unfair: the government's rebuttal witness (Expert B) only offered limited testimony that hardly prejudiced the accused, let alone beyond a reasonable doubt. Expert B did not cause an unlevel playing field.[77]

Going forward, however, the fundamental holding in *Warner* remains—the government cannot stack the deck by appointing themselves a specialist but only giving the defense a generalist, and then using that government specialist to attack the defense. If the government does this, then the court will find that the trial was unfair. If a trial counsel finds herself working with a limited pool of available assistants from which she needs to find an assistant for each side, the trial counsel should do her best to ensure each side has a specialist (an Expert B). If she only gives the defense a generalist (an Expert A, then the trial counsel should be wary in how she uses her specialist (an Expert B).

In *United States v. Lloyd*,[78] another expert assistant case, two groups of guys got in a fight in a bar. One group consisted of appellant Lloyd and James. James was the one who actually started the fight. The appellant only joined in after the fists started flying. The second group included Jance, Gee, and Soto. The five men were very close together during the fight, and no more than two or three feet apart. The bouncers broke up the fight and when Jance, Gee and Soto took off, each realized that they had been stabbed during the fight. None of the three saw a knife or knew who did the stabbing. The question was who did the stabbing—appellant or James.[79]

After hearing a news report about the fight, James came forward to the police, said that the appellant admitted stabbing the three victims, and gave the police a blood-covered shirt that the appellant wore that night. Subsequent DNA testing showed that a victim's blood was on the shirt. James said he threw out his own blood-soaked shirt. James later testified at trial that his pants were soaked with blood down to his boxer shorts—but that night, he gave a pair of pants to investigators that he said he wore during the fight which only had one spot of blood on them.[80]

The defense requested expert assistance from a blood splatter expert, which the government denied. Looking at Table 3 in the appendix, we see the test for appointing expert assistants is *necessity*—that there must be a reasonable probability that the expert would (1) be of assistance to the defense and (2) denial of expert would result in

[72] *Id*. at 380–81.

[73] *Id*. at 381–83.

[74] *Id*. at 383.

[75] *Id*.

[76] *Id*.

[77] *Id*. at 384.

[78] 69 M.J. 95 (C.A.A.F. 2010).

[79] *Id*. at 97, 101–03 (Effron, C.J., dissenting).

[80] *Id*.

fundamentally unfair trial. For the first prong, the defense needs to show why the expert is needed, what the expert would accomplish, and why the defense cannot do it themselves. In its motion before the military judge, the defense argued:

> 15. A forensic scientist is relevant and necessary because the government intends to present testing results on DNA as evidence of guilt. It is anticipated that the government's expert witness will discuss the location of the blood on the shirt and who matched the DNA contained on the shirt. DNA analysis can only confirm that genetic makeup of physical evidence, not how it came to be on the evidence seized. As a result of that presentation of evidence, the defense is free to explore theories of the case that the government may not be pursuing as it pertains to this relevant physical evidence. That would include *exploring all possibilities* as to how the blood came to be on the shirt that SrA Lloyd was wearing at the time of the altercation. There are no witnesses in this case who can testify to seeing SrA Lloyd stab anyone. The case hinges upon an alleged confession to an interested party and on blood evidence on SrA Lloyd's clothing. The consultant currently provided to the defense is not qualified to provide information or testify as to bloodstain spatters. . . .
> 16. To the extent that SrA Lloyd was apparently in the proximity of the area where the altercation occurred, the defense must understand and potentially present expert testimony on the manner in which blood spatters from a stab wound. Depending on a number of factors which the defense intends to pursue through an expert, blood may spatter a significant distance from a stab wound. For this reason, presence of an alleged victim's blood on the clothing may be far less significant than intuition, or even theories the government intends to explore, suggests. To mount an effective defense, the defense must understand the physics of bloodstain patterns to either rule out or present such a theory. This is crucial to testing the government's theory of the case and for the presentation of evidence on behalf of SrA Lloyd. Neither member of the defense has the requisite training or experience to understand this complex field without the assistance of an expert.[81]

Many practitioners might agree that this was a compelling request. While the request began by stating the wrong test, citing the necessary and relevant test from the rules for producing expert witnesses, the request did generally address the requirements for the appointment of expert assistants. However, the military judge denied the motion. The military judge stated that while the defense might have shown what the expert would accomplish and why the defense could not do it themselves, they failed to show why the expert was needed.[82]

At trial, the government called James to the stand, who testified that appellant did it, and also had victims Jance, Gee and Soto testify about what they saw. The government also introduced the lab results through a stipulation of expected testimony. The stipulation said that the results did not explain how the blood got on the appellant's shirt and that all it showed was that appellant was in proximity to a bleeding victim. The defense introduced a witness who said she saw James make a stabbing motion and introduced witnesses that testified that appellant was a peaceful person, while James was untruthful. The panel found appellant guilty and sentenced him to one year confinement and a bad conduct discharge.[83]

On appeal, the CAAF checked whether the military judge abused her discretion when she applied the tests for appointing expert assistants. Looking at prior case law, we might expect that the CAAF would have reversed. Two recent cases, *United States v. McAllister*[84] and *United States v. Warner*,[85] have suggested that such cases are appropriate for expert assistance because the rapid growth in forensic science techniques at trial may make these cases more complex than general practitioners can handle on their own. Additionally, in *United States v. Lee*,[86] the CAAF noted that the playing field is uneven when the government benefits from scientific evidence and expert testimony and the defense is denied a necessary expert to prepare for and respond to the government's expert. In *Lloyd*, the defense made a similar argument.

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[81] *Id*. at 97–98 (emphasis added).

[82] *Id*. at 98.

[83] *Id*.

[84] 55 M.J. 270, 275 (C.A.A.F. 2001).

[85] 62 M.J. 114, 118 (C.A.A.F. 2005).

[86] 64 M.J. 213 (C.A.A.F. 2006).

However, the court distinguished the *McAllister*/*Warner*/*Lee* line of cases, stating that those cases only require a reciprocal expert if the government expert's testimony is a linchpin of the government's case. Here, the court said, the government expert's testimony was not a linchpin of the case.[87]

Further, the court found that the defense did not provide the military judge with a precise enough theory for the military judge to determine whether expert assistance was needed to further that theory. While appellate defense counsel argued on appeal that the expert's analysis might have shown that James was the stabber or that appellant did not do the stabbing, defense counsel at trial did not make that explicit argument. The court focused on the language in the defense's motion, noting that the assertion "exploring all possibilities" was not good enough, and the defense must also show a reasonable probability that the expert is needed. The court implied that if the defense had made that explicit statement at trial (that James was the stabber, not the appellant), then the judge might have abused her discretion by turning down the request.[88]

In the dissent, Chief Judge Effron, joined by Judge Baker, argued that the blood spatter theory was obviously central to the defense theory of the case; the defense could not have been more explicit about the necessity for an expert assistant; and declared that the defense motion "explained the need for an expert in clear and compelling terms."[89] The DNA was key: there was no meaningful eyewitness testimony and the only other direct evidence came from James, who had a self-interest in the outcome.[90]

Arguably, the government really only had the DNA evidence—and therefore this case falls within the *McAllister*/*Warner*/*Lee* line of cases. While an expert assistant could not directly rebut the government's expert testimony that the victim's DNA was on appellant's shirt, it could help to explain to the factfinder how that blood may have gotten on that shirt. The dissenters argued:

> Who stabbed the three airmen? No one saw any stabbing. No one saw a knife. None of the victims felt any stabbing during the altercation. Was it Stafford Joseph James, the person who started the altercation, fought with two of the victims, destroyed his own blood-soaked shirt before it could be tested, whose pants did not match his previous testimony and had no blood from the altercation on him, did nothing to report the incident until he heard about the police investigation, and then immediately placed the blame on Appellant? Or was it Appellant, who belatedly entered the altercation, was identified as being in a fight with only one victim, and whose admissions were attributable to Stafford Joseph James?[91]

The dissenters concluded, "In a close case, the defense was denied the opportunity to explore the potential for expert testimony on the critical issue of guilt or innocence."[92]

Perhaps the central issue in this case was not how the blood got on the appellant's shirt, but whether the defense could put on its case without the use of an expert assistant. The military judge conceded the second and third *Gonzalez* factors to the defense—namely, what the expert would accomplish for the defense and why the defense could not do the work themselves.[93] This effectively forced the CAAF to resolve the case by looking at the first *Gonzalez* factor (why the expert assistance is necessary),[94] which appears to have been satisfied by the defense in this case. The majority may have upheld appellant's conviction because they believed the defense could argue how the blood got on the appellant's shirt without the use of expert assistance (the second *Gonzalez* factor). To support this theory, the defense counsel appeared to make the same arguments outlined by the dissent above—all without having any expert assistance. The defense did not need an expert to argue common sense: in a close-quarters fight like this, blood is likely to get everywhere. Indeed, the court-martial found that the appellant was the stabber—but James himself was also covered in blood. The defense was able to present its theory, the panel merely rejected it. The lesson learned for defense counsel is to clearly articulate your theory of the case, and to explain how the evidence sought will either advance your theory or rebut the government's theory (or both).

## Conclusion

The discovery and production issues analyzed by the military appellate courts during the 2009 term are similar to the issues military legal practitioners regularly face. The key to solving these problems is to keep the rules straight and apply them with precision.

Recognize whether you are dealing with a discovery issue or a production issue. Understand that a basic

[87] *Lloyd*, 69 M.J. at 100.

[88] *Id*. at 100–01.

[89] *Id*. at 102 (Effron, C.J., dissenting).

[90] *Id*.

[91] *Id*. at 103.

[92] *Id*.

[93] *Id*. at 98; United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1991).

[94] *Id*.

preliminary question in your discovery analysis is, "Where are the requested matters?" Finally, be able to distinguish between the definitions of *material* or *necessary* and understand how these definitions apply to the issues in your case. If you use the tools discussed in this article, you will be well-equipped to apply a precise analysis every time.

## Appendix

**Table 1. Basic Differences between Discovery and Production**

| | RCM 701(a)(2) | RCM 703 |
|---|---|---|
| Timing | Pretrial preparation and investigation | Presentation of witnesses and evidence at trial |
| Test | *Material* to the preparation of the defense; intended for use by trial counsel in case-in-chief; or taken from or belonging to the accused | Necessary (not cumulative, positively contributes to an issue) and *relevant* (MRE 401) |
| Agency or Person | Possession, custody, control of *military* authorities | Military witnesses—by order; civilian witnesses—by subpoena; government-controlled evidence—notify custodian; other evidence—by subpoena |

**Table 2. Differences between Discovery and Production *In Camera* Reviews**

| | RCM 701(g)(2) | RCM 703(f)(4)(C) |
|---|---|---|
| Proponent | A *party* | The *custodian* |
| Test | Sufficient showing that disclosure would be inappropriate | Compliance with the subpoena would be unreasonable or oppressive |
| Timing | *Before* decision on the value of the matter in question (the value of the matter is part of the analysis) | *After* the decision on the value of the matter in question (the value of the matter has already been determined) |
| Relief to party that is denied the matter | The military judge may prescribe such terms and conditions as are just | The military judge can modify or withdraw the subpoena; this may trigger unavailable evidence analysis under RCM 703(f)(2) |

**Table 3. Differences Between Expert Assistance and Expert Witnesses**

| | Expert Assistance | Expert Witnesses (RCM 703(d)) |
|---|---|---|
| Timing | Pretrial preparation and investigation | Trial testimony |
| Test | *Necessary*: reasonable probability that the expert would (1) be of assistance to the defense (why is expert needed, what would expert accomplish, and why the defense cannot do it themselves); and (2) denial of expert would result in fundamentally unfair trial | *Necessary* (not cumulative, positively contributes to an issue) and relevant (MRE 401) |

**Table 4. Differences between Specific Discovery Requests and RCM 701(a)(6)/*Brady* Obligations**

| | RCM 701(a)(2) | RCM 701(a)(6)/*Brady* |
|---|---|---|
| Test | *Material* to the preparation of the defense; intended for use by trial counsel in case-in-chief; or taken from or belonging to the accused | Evidence that reasonably tends to be *favorable* |
| When | Upon request | As soon as practicable |
| Location | Possession, custody, control of *military* authorities | *Investigative* files, including personnel files of investigators (trial counsel, investigative agencies associated with or closely aligned with the case, or unrelated cases if put on notice by the defense) |
| Review | Harmless beyond a reasonable doubt | *Material* (reasonable probability of a different result); if prosecutorial misconduct or a specific discovery request under RCM 701, then harmless beyond a reasonable doubt |

**TJAGLCS Practice Notes**
*Faculty & Staff, The Judge Advocate General's Legal Center & School*

*Tax Law Note*

# 2010-2012 Tax Update

*Lieutenant Colonel Samuel W. Kan*[*]

*Kicking the can down the road. [President] Barrack Obama and the Republican leadership reach a deal on taxes that leaves leftist Democrats and tea-partiers fuming. And the deficit keeps growing.*[1]

## I. Introduction

Astute legal assistance attorneys and estate planners waited for the sunset of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) to see what would become of the federal transfer tax system and the expiring "Bush Tax Cuts."[2] Despite years of waiting, due to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act (i.e., Tax Relief Act) of 2010, they will need to wait for another two years.[3] Fortunately, there will be some degree of tax certainty during that time. With this in mind, legal assistance attorneys and estate planners should stay abreast of the fluid tax landscape by monitoring the constantly changing laws.[4]

## II. Income Tax Update

The Tax Relief Act of 2010, along with other tax legislation and related events, has created numerous income tax changes for the 2010 tax year and beyond.[5] For example, due to Emancipation Day in Washington D.C., the due date to file federal income tax returns has been extended to 18 April 2011, rather than 15 April 2011.[6] In addition, due to the Tax Relief Act of 2010, there will be no personal exemption income phaseouts through 2012.[7] As a result, both lower and higher income taxpayers will be able to benefit from the full personal and dependent exemption amount valued at $3,650 per person in 2010.[8] Further, more taxpayers may be eligible to take advantage of Volunteer Income Tax Assistance (VITA) and get their tax returns prepared for free. Specifically, VITAs can help prepare tax returns of certain taxpayers filing a Schedule C who meet specific requirements.[9] Taxpayers may now also use their

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[1] *Kicking the Can Down the Road*, THE ECONOMIST (Dec. 9, 2010) [hereinafter *Kicking the Can Down the Road*, THE ECONOMIST], *available at* http://www.economist.com/node/17677736.

[2] *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in 26 U.S.C. (2006)) (establishing numerous temporary tax cuts through 31 December 2010, at which time the tax system would revert to what it was like in 2001). *See generally* Major Samuel Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY LAW., Jan. 2010 at 52 (providing background on the unified federal transfer tax system and the impacts of the Economic Growth and Tax Relief Reconciliation Act).

[3] *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (extending the "Bush Tax Cuts" for another two years).

[4] Individuals may sign up on numerous websites to receive e-mail tax updates keeping taxpayers abreast of the changing tax laws. *See, e.g.*, IRS website, *at* https://service.govdelivery.com/service/multi_subscribe.html?code=USIRS (providing free IRS Tax Tips and other tax updates); CCH website at http://tax.cchgroup.com/NewsHeadlines/default.htm?cookie%5Ftest=1 (providing free federal and state tax updates); and BNA website at, http://0-news.bna.com.jag.iii.com/dtln/ (providing extremely useful tax updates, case law updates, and BNA tax publications to paying BNA Daily Tax Report subscribers). In addition, those tax return preparers working at Volunteer Income Tax Assistance (VITA) offices can receive Volunteer Tax Alerts and Quality Site Requirement Alerts through their designated IRS Stakeholder Partnerships, Education, and Communication (SPEC) representative.

[5] *See, e.g.*, U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4491-X, VITA/TCE TRAINING SUPPLEMENT 5 (2011) [hereinafter PUB. 4491-X] (listing numerous tax provisions that were extended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

[6] *See* U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 1 (2010) [hereinafter PUB. 17] (explaining that the due date for filing IRS Form 1040 is 18 April 2011, because of the Emancipation Day holiday in the District of Columbia).

[7] I.R.C. § 151(d)(3) (2006) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (extending the repeal of the personal exemption phaseouts for another two years). *See also* PUB. 17, *supra* note 6, at 24. Phaseouts are specified reductions of benefits that occur once the income (normally adjusted gross income) of taxpayers exceed certain thresholds. Thresholds are certain amounts of income that are normally established based on the filing status of taxpayers. For example, see *infra* notes 17 and 18.

[8] *See* Rev. Proc. 2009-50, 2009-45 § 3.19, I.R.B. 617. *See* PUB. 17, *supra* note 6, at 24. *See* U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4012, VOLUNTEER RESOURCE GUIDE, at C-1 to C-7 (2010) [hereinafter PUB. 4012] (providing a very useful quick resource guide to identify personal and dependent exemption requirements).

[9] *See* U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4491, VITA/TCE TRAINING GUIDE 9-1 to 9-2 (2010) [hereinafter PUB. 4491] (listing the requirements to qualify for VITA assistance, to include having business expenses under $10,000, having no employees, operating only one business as a sole proprietor during the tax year, using the cash method of accounting, not having inventory at any time during the year, not having a net loss from the business, and not deducting expenses for the business use of a home).

tax refunds to purchase up to three U.S. Series I Savings Bonds by filing an IRS Form 8888, Allocation of Refund.[10]

A. Income

In addition to these changes, the individual income tax rates of 10, 15, 25, 28, 33, and 35% have been extended through 2012, as shown in Appendix A.[11] Additionally, through 2012, the maximum capital gain rate for capital assets held longer than one year will continue to be 15%,[12] and qualified dividends will be taxed at a maximum capital gain rate of 15%.[13]

B. Adjustments ("Above the Line Deductions")

Along with these more favorable tax rates, for two more years, qualifying taxpayers are entitled to take numerous adjustments, which will reduce taxpayers' gross income to determine their adjusted gross income (AGI).[14] For example, the Tax Relief Act of 2010 extended the educator expense deduction through 2011.[15] This allows teachers to take an adjustment of up to $250 for qualified expenses, rather than taking a miscellaneous itemized deduction subject to numerous limitations that would constructively reduce or even eliminate the benefit.[16] Through 2012, the Act also increases the modified adjusted gross income (MAGI) phaseout to $75,000 ($150,000 for joint returns) for taxpayers to take the student loan interest deduction, valued at up to $2,500 per tax return.[17] In addition, the Act extends the qualified tuition and fees adjustment, valued at up to $4,000 per tax return, through 2011.[18]

C. Deductions

After accounting for these adjustments, taxpayers can take certain deductions. Specifically, taxpayers can choose to take standard deductions or to itemize their deductions. The standard deductions for 2010 are listed in Appendix B. Taxpayers whose expenses exceed the standard deduction will want to itemize their deductions. Through 2012, there will be no income phaseouts for taxpayers who itemize their deductions.[19] In addition, through 2011, taxpayers will be

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[10] *See id.* at 3.

[11] *See* Rev. Proc. 2009-50, 2009-45 I.R.B. 617. *See also* Rev. Proc 2010-24, 2010-25 I.R.B. 764. *See also* Rev. Proc. 2010-35, 2010-42 I.R.B. 438. *See also* I.R.C. § 1 (as amended by the Tax Relief of 2010, Pub. L. No. 111-312, §101, 124 Stat. 3296). *See generally* TOP FEDERAL TAX ISSUES FOR 2010, CPE COURSE 4.2 (CCH Editorial Staff Publication) (explaining that "EGTRRA [the Economic Growth and Tax Relief Reconciliation Act of 2001] should not be confused with JGTRRA, which is short for the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA). Basically, JGTRRA did for the capital gains tax rates what EGTRRA did for the individual income tax brackets: lower them significantly. JGTRRA reduced the maximum rate on net capital gains and taxed qualifying dividends at that same low rate."). It is important to note that these individual tax rates and the applicable tax brackets reflect a two year extension of marriage penalty relief. "A marriage penalty exists when the tax on the combined income of a married couple exceeds the sum of the taxes that would be imposed if each spouse filed a separate return as a single person. This occurs most often when both spouses have income." *See* 2010 TAX LEGISLATION, TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010, RIC MODERNIZATION ACT OF 2010, AND OTHER RECENT TAX ACTS ¶ 310 (CCH Editorial Staff Publication) [hereinafter "CCH 2010 TAX LEGISLATION"]. In short, not only for 2010, but also for 2011 and 2012, "the size of the 15-percent rate bracket for joint returns will remain twice the size of the corresponding rate bracket for single returns." *See id*. However, unless Congress acts, in 2013, "the 15-percent tax bracket for joint filers will be less than the combined 15-percent tax bracket of two single filers and married taxpayers may have more of their taxable income pushed into a higher marginal tax bracket than their unmarried counterparts." *See id*.

[12] *See* I.R.C. § 55(b)(3) (West 2010). *See* I.R.C. 1(h)(1) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). *See* PUB. 17, *supra* note 6, at 114 tbl.16-1 (explaining that if the regular tax rate is lower than 25%, then the maximum capital gain rate is 0%, while if the regular tax rate is 25% or higher, the maximum capital gain rate is 15%; contrasting that the maximum capital gain rate on collectibles is 28%, while the maximum capital gain rate on an unrecaptured § 1250 gain is 25%; explaining that unrecaptured § 1250 gain can result from selling real property that was previously depreciated).

[13] I.R.C. § 55(b)(3) (West 2010). *See also* I.R.C. 1(h)(1) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). *See* PUB. 17, *supra* note 6, at 63 (explaining that qualified dividends are shown in box 1b of the IRS Form 1099-DIV; explaining that qualified dividends are subject to the 15% rate if the regular tax rate is 25% or higher, and subject to the 0% rate if the regular rate is lower than 25%).

[14] *See* PUB. 4491, *supra* note 9, at 17-1.

[15] I.R.C. § 62(a)(2)(D) (West 2010).

[16] *Id.* § 62(a)(2)(D). *See also* PUB. 4491-X, *supra* note 5 (supplementing IRS Publication 4491 to take account of the tax changes created by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

[17] *See* Rev. Proc. 2009-50, 2009-45 § 3.23 I.R.B. 617. *See also* I.R.C. § 221 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). *See generally* CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 345 (explaining that if not for the Tax Relief Act of 2010, the phaseout increase would have expired after 2010). *See generally* PUB. 4012, *supra* note 8, at E-3 (explaining that taxpayers filing joint returns in 2010 will have their student loan interest deduction reduced once their modified adjusted gross income (MAGI) reaches $120,000 and eliminated once their MAGI reaches $150,000; other taxpayers will experience a reduction once their MAGI reaches $60,000 and an elimination once their MAGI reaches $75,000).

[18] I.R.C. § 222 (West 2010) (establishing that taxpayers with an AGI between $65,001 and $80,000 (between $130,001 and $160,000 for joint returns) will be limited to a $2,000 adjustment; those with an AGI over these amounts will not receive any adjustment). *See also* U.S. Dep't of the Treasury, Internal Revenue Service, Form 1040, U.S. Individual Tax Return (2010) and U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERVICE, FORM 1040, INSTRUCTIONS (2010). *See generally* CCH 2010 TAX LEGISLATION ¶ 350 (describing under what circumstances taking the adjustment might be better than taking the corresponding educational credit such as when a taxpayer has a high marginal tax rate and the adjustment will lower the taxpayer's adjusted gross income).

[19] *See* I.R.C. § 68 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296) (extending 2001 tax relief temporarily until 2012). *See generally* CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 320 (providing tax tips regarding taking itemized deductions as the law limiting deductions changes over time). *See generally* PUB. 17, *supra* note 6, at 201 (explaining that the limit on taking itemized deductions expired in 2010 and would have resumed in 2011, if not for the Tax Relief Act of 2010).

able to continue to deduct state and local general sales taxes in lieu of state and local income taxes.[20] Furthermore, through 2011, taxpayers can also deduct qualified mortgage insurance premiums.[21]

D. Credits

After accounting for these deductions, taxpayers may be able to take numerous credits. The Tax Relief Act of 2010 has extended many of these tax credits. First, the American Opportunity credit, valued at up to $2,500 per student, is extended through 2012.[22] Second, the increased earned income credit, valued at up to $5,666 for taxpayers with three or more qualifying children, and the increased applicable income phaseouts, have been extended through 2012.[23] Third, the child tax credit, valued at up to $1,000 per qualifying child under the age of seventeen, and the earned income refundable component have been extended through 2012.[24] Fourth, the child and dependent care credit dependent care expense limits and increased credit percentages have been extended through 2012.[25] Fifth, the nonbusiness energy property credit, valued at up to $1,500 in 2010 and $500 in 2011, has been extended through 2011.[26]

Servicemembers may also benefit from two recent provisions on purchasing a principal residence. First, most civilians have to repay the government for the first-time homebuyer's credit if they purchased a home after 31 December 2008, and failed to stay in the home for thirty-six months.[27] However, servicemembers do not have to repay the government if they claimed the first-time homebuyer's credit and later sold their home after 31 December 2008, as long as the servicemember is on government orders for qualified extended duty service at least fifty miles away from the home.[28] Second, servicemembers may qualify for a military extension to purchase a home and claim the first time homebuyer's credit on homes purchased as late as 1 July 2011, if the home is placed under a binding contract before 1 May 2011.[29]

In addition, other legislative acts have expanded and increased certain credits. For example, the Patient Protection and Affordable Care Act of 2010 extended and increased the adoption tax credit, making it fully refundable in the year claimed.[30] Although the credit in 2010 begins to phaseout for taxpayers with a modified AGI of more than $182,520, the credit is extremely valuable because expenses of up to $13,170 can be claimed.[31]

E. Other Tax and Related Issues

In addition to these numerous changes to both tax deductions and tax credits, many additional changes affect the 2010, 2011, and 2012 tax years. First, the alternative minimum tax rates (AMT) exemption amounts have been increased through 2011, as shown in Appendix C. This welcome change for the middle class provides some degree of temporary relief. Second, in 2011, employee payroll taxes will be reduced by two percentage points to 4.2%.[32] Third, unemployment benefits have been extended through 2012.[33] Fourth, Coverdale education savings accounts contributions have been increased from $500 to $2,000 through 2012.[34]

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[20] I.R.C. § 164(b)(5)(I) (West 2010).

[21] *Id.* § 163(h)(3)(E) (West 2010).

[22] *Id.* § 25A.

[23] *Id.* § 32(b)(3). *See also* PUB. 4491, *supra* note 9, at 2 and 30-1 (explaining the maximum credits available for those with no qualifying children to those with three or more qualifying children).

[24] I.R.C. § 24(a). *See generally* CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 360 (explaining that by "keeping the earned income threshold at $3,000 for computing the earned income refundable child tax credit, more low-income taxpayers will continue to be eligible for the refundable child tax credit.") Refundable credits are defined as credits that are applied against any tax owed, with the remainder refunded to the taxpayer. *See* PUB. 4491, *supra* note 9, at 29-4. Examples of refundable credits include the making work pay credit and the earned income credit. *See id.* at 29-4 and 30-1. In contrast, a nonrefundable credit is a dollar-for dollar reduction of a taxpayer's tax liability and thus can only reduce the tax liability to zero. *See id.* at 23-1. Examples of nonrefundable credits include the retirement savings contribution credit and the residential energy credit, which includes the nonbusiness energy property credit and the residential energy-efficient property credit. *See id.* at 27-2 and 27-5.

[25] I.R.C. § 21 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296).

[26] *Id.* § 25C (West 2010). *See generally* CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 372 (explaining the limitations of the credit including that the "maximum credit allowable" is measured over the lifetime of the taypayer). *See also* PUB. 4491, *supra* note 9, at 27-6 (explaining that if a taxpayer "claimed a $1,000 credit in 2009, the taxpayer could only claim up to a $500 credit in 2010").

[27] *See* I.R.C. § 36(f)(4)(D) (West 2010).

[28] *See id.* § 36(f)(4)(E)(i). However, servicemembers who purchased a home in 2008 and later sold their homes before 31 December 2008, would not be able to claim the credit. *See id.* § 36(d)(2).

[29] *Id.* § 36(h)(3) (establishing that servicemembers who served on qualified official extended duty outside the United States for at least ninety days during the period beginning after 31 December 2008, and ending before 1 May 2010, may claim the first-time homebuyer credit on a purchase made before 1 May 2011, or on a purchase made before 1 July 2011, if the property was placed under a binding contract before 1 May 2011.)

[30] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10909, 124 Stat. 119. *See also* PUB. 4491, *supra* note 9, at 5.

[31] *See id.*

[32] I.R.C. § 3101(a) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 601(a)(2), 124 Stat. 3296).

[33] *See* Supplemental Appropriations Act of 2008, Pub. L. No. 110-252, § 4007, 122 Stat. 2323, 26 U.S.C. § 3304 (as amended by the Tax Relief Act of 2010, Pub. L. No 111-312, § 501, 124 Stat. 3296) (extending assorted unemployment benefits through assorted dates in 2012).

[34] *See* I.R.C. § 530 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296). *See generally* CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 330.

In addition to these anticipated changes, there are some surprising potential changes on the horizon. Specifically, two tax cases are pending in the Second Circuit that challenge the IRS's position on tax benefits for same-sex marriages.[35] One case challenges the ability "to obtain a refund of the federal marital deduction as a surviving spouse in an estate where two women had a marriage recognized in New York" while the other case challenges "the application of IRS rules to obtaining medical subsidy spousal benefits in a state pension plan for same-sex couples in New Hampshire."[36] More importantly the Department of Justice has stated that it will not defend the constitutionality of Section 3 of the Defense of Marriage Act (DOMA) as applied to same-sex married couples in these cases.[37] This announcement may indicate a significant possible legal change on the horizon, especially in light of the repeal of the military's "Don't Ask, Don't Tell" policy.[38]

## III. Gift Tax Update

There are also significant federal gift tax changes taking place over the next few years. Specifically, in 2010 and 2011, transferors will be able to transfer a total of five million dollars of taxable gifts during their lifetime that is not subject to any federal gift tax.[39] Taxable gifts over five million dollars in 2010 and 2011 will be subject to a 35% tax rate, as shown in Appendices D and E.[40]

Similarly, in 2012, transferors will also be able to transfer a total of five million dollars worth of taxable gifts during their lifetime free of gift tax.[41] However, in 2012, the five million dollar exemption will be subject to an inflation adjustment,[42] and taxable gifts over that amount will be subject to a 35% tax rate.[43] However, on the last day of 2012, the act will sunset.[44] Unless Congress acts prior to the end of 2012, beginning in 2013, transferors will only be able to transfer a total of one million dollars of taxable gifts during their lifetime free of gift tax.[45] In 2013, taxable gifts over that amount will be subject to a 55% tax rate.[46]

Knowing these rules, individuals may consider making large gifts over the next two years even if the value of the gifts exceeds the annual exclusion amount.[47] This would allow them to take full advantage of the larger but temporary unified credit. In this manner, even though the individuals would be making taxable gifts, no federal gift tax would be due as long as the transferor did not transfer gifts worth more than five million dollars during his life (Appendix E). If Congress does not act and the resulting unified credit becomes one million dollars in 2013, the transferor would have saved approximately $2.2 million (i.e., .55 x $4 million) by making the gifts in 2011 and 2012. Despite this advantage, transferors should realize that the assets transferred to young children may generate "kiddie tax"[48] issues if the assets generate unearned income.

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[35] *See* Windsor v. United States. No. 1:10cv-8435, S.D.N.Y. *See* Pederson v. OPM, No. 3:10-cv-1750, D. Conn.

[36] *Justice Department Will No Longer Defend Constitutionality of Law Defining Marriage*, BNA DAILY TAX REP. (BNA) No. 37, at K-4 (Feb. 23, 2011), *available at* http://0- news.bna.com.jag.iii.com/dtln/display/batch _print_display.adp (last visited Mar. 7, 2011).

[37] *See* Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/printf/PrintOut2.jsp. *See also* Letter from Attorney General Eric H. Holder, Jr., to Speaker of the House John A. Boehner, Defense of Marriage Act (Feb. 23, 2011), *available at* http://op.bna.com/gr.nsf/id/llbe-8ecsa5/$File/Holder%20Letter.pdf. *But see* Speaker of the House John Boehner, Statement Regarding the Defense of Marriage Act (Mar. 9, 2011), *available at* http://www.speaker.gov/News/ DocumentSingle.aspx?DocumentID=228539 (last visited Mar. 22, 2011) (announcing that House Speaker John Boehner convened a Bipartisan Legal Advisory Group which directed the House General Counsel to initiate a legal defense of DOMA; under house rules, the advisory group has the authority to instruct the House General Counsel to take legal action on behalf of the House of Representatives).

[38] *See* Memorandum from Sec'y of Def. Robert M. Gates, for Under Sec'y of Def. (Pers. and Readiness) (Jan. 28, 2011) (on file with author). *See also* Memorandum from Under Sec'y of Def. Clifford L. Stanley, for Sec'ys of the Military Dep'ts (Jan. 28, 2011), *available at* http://armypubs.army.mil /epubs/pdf/ad2011_01.pdf.

[39] *See* I.R.C. § 2505 (West 2011). *See also id.* § 2010(c).

[40] *See id.* § 2502 (establishing that the rate of federal gift tax will be the same rate as that against the federal estate tax under IRC § 2001(c)). *See also id.* § 2001(c).

[41] *See id.* § 2505. *See also id.* § 2010(c).

[42] *See id.* § 2505 (establishing that the unified credit against the federal gift tax will be the same as the unified credit against the federal estate tax). *See id.* § 2010(c)(3)(B) (establishing an inflation adjustment for the unified credit against the federal estate tax rounded to the nearest multiple of $10,000).

[43] *See id.* § 2502 (West 2011) (establishing that the rate of federal gift tax will be the same rate as that against the federal estate tax under IRC § 2001(c)). *See also id.* § 2001(c) (West 2010).

[44] *See* Tax Relief Act, Pub. L. No. 111-312 §§ 101, 302, 124 Stat 3296.

[45] *See id.* § 101, 124 Stat 3296. *See generally* CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 715 (explaining the possibility of a return to the 2001 lower exclusion amounts and higher tax rates if Congress does not act before 1 January 2013).

[46] *See* CCH 2010 Tax Legislation, *supra* note 11, ¶ 715.

[47] *See* Rev. Proc. 2010-40, § 3.21, 2010-46, I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is $13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is $136,000). The annual exclusion amount is an amount indexed to inflation.

[48] I.R.C. § 1(g). *See also* 2011 U.S. MASTER TAX GUIDE ¶ 103 (CCH Editorial Staff Publication 2010) (explaining that although ordinarily, "a child's tax liability is computed in the same manner as any other taxpayer after taking into account the limits on the personal exemption and standard deduction, if applicable . . . certain children with investment income may be subject to tax on that income at the parent's top marginal rate if this results in a higher tax than would apply at the child's rate."). In short, the "kiddie tax" helps prevent the shifting of income from higher income taxpayers to lower income taxpayers for the purpose of reducing taxes. *See infra* note 69 and accompanying text (discussing the standard deduction for individuals who can be claimed by other taxpayers).

## IV. Estate Tax Update

### A. Taxpayers Dying in 2010

In addition to these federal gift tax changes, there are numerous federal estate tax changes contingent upon when a taxpayer passes away. If an individual died in 2010, the personal representative administering the estate can either choose the estate tax or elect for a carryover basis regime to apply.[49]

First, if the decedent had left an extremely large gross estate in 2010, the personal representative may want to elect for a carryover basis regime to apply. With this election, no federal estate taxes would be due, even if the decedent's gross estate was worth billions of dollars. However, the beneficiaries would not receive a stepped-up basis (i.e., a basis equal to the asset's fair market value on the day of the transferor's death) in the assets they receive. Instead, the beneficiaries would receive a carryover basis and the personal representative would have the ability to allocate a limited step-up in basis by filing IRS Form 8939.

The amount of assets that could be stepped-up depends on whether the assets pass to a surviving spouse. If there was no surviving spouse, the personal representative could only allocate up to $1.3 million dollars to step up the basis of designated assets.[50] However, if there was a surviving spouse, the personal representative could allocate up to $3 million dollars to step up the basis of assets passing to the spouse, plus an additional $1.3 million dollars to step up the basis of assets passing to anyone else, including additional assets passing to the same surviving spouse.[51] For example, if the decedent devised real estate to his surviving spouse that he previously had acquired for $1 million but had since increased in value to $5.3 million at his death, his surviving spouse could take the asset with a stepped-up basis equal to the asset's date of value of $5.3 million. After receiving the property, she could immediately sell the property for $5.3 million and pay no income taxes on the gain. If the stepped-up basis had not been so allocated (e.g., the basis was allocated to other property) and the surviving spouse had sold the property with a carryover basis of only $1 million, the surviving spouse would be liable for taxes on the $4.3 million of gain.

Second, if the decedent left an estate of approximately $5 million in 2010, the personal representative would probably choose for the estate tax to apply rather than electing for a carryover basis regime, because amounts under $5 million would pass free of federal estate tax due to the $5 million exemption.[52] Sums over that amount would pass free of estate taxes if the unlimited marital deduction, charitable deduction, or other applicable deduction applied (Appendix F).[53] The amount of the gross estate over $5 million and not entitled to a deduction would be subject to a 35% federal estate tax.[54]

### B. Taxpayers Dying After 2010

In comparison to individuals whose deaths occur in 2010, individuals who pass away after 31 December 2010 and leave behind an estate in 2011 or 2012 do not have a choice between an estate tax and a carryover basis regime. Instead, the estate will be subject to the federal estate tax with an exemption amount of $5 million, subject to an inflation adjustment in 2012.[55] If an individual dies after 2010 but before 2013 and does not use his full exemption, his surviving spouse could use the remaining exemption, as well as her own exemption, if she dies after her spouse in 2011 or 2012 (Appendix F).[56] However, unless Congress acts, a person who passes away in 2013 will be subject to the

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[49] *See* Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296. Basis is defined as the "value assigned to a taxpayer's investment in property and used primarily for computing gain or loss from a transfer of the property. Basis is usu. the total cost of acquiring the asset, including the purchase price plus commissions and other related expenses, less depreciation and other adjustments." BLACK'S LAW DICTIONARY 171 (9th ed. 2009). Carryover basis is defined as the "recipient's basis in property transferred by gift or in trust, equaling the transferor's basis." *See id.* at 172. In contrast, stepped-up basis is defined as the "beneficiary's basis in property transferred by inheritance, equaling the fair market value of the property on the date of the decedent's death or on the alternate valuation date." *See id.* at 172. Alternate valuation date is defined as the "date six months after a decedent's death. Generally, the estate can elect to appraise the decedent's property either as of the date of the decedent's death or as of the alternate valuation date." *See id.* at 91.

[50] *See* I.R.C. § 1022 (West 2010). *See* Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296.

[51] *See* I.R.C. § 1022 (West 2010). *See* Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296.

[52] *See* I.R.C. § 2010(c)(3) (West 2010).

[53] *See, e.g.*, I.R.C. §§ 2053 (providing a deduction for funeral and administrative expenses), 2054 (providing a deduction for casualty losses), 2055 (providing a deduction for charitable contributions), 2056 (providing a potential unlimited marital deduction for transfers to surviving spouses who are U.S. citizens), and 2058 (providing a deduction for state death taxes paid).

[54] *See id.* § 2001 (West 2010).

[55] *See id.* 2010(c)(3)(B) (West 2010).

[56] *See id.* § 2010(c)(4). *See* Tax Relief Act, Pub. L. No. 111-312, § 303, 124 Stat. 3296 (establishing that the surviving spouse's exclusion amount will be increased by the unused exclusion amount of the deceased spouse who dies after 2010 but before 2013, if the executor of the estate of the deceased spouse files a timely estate tax return and makes an election). "Thus presumably those who do not file an estate [tax] return because they are below the filing threshold . . . will not benefit from the portability rule [because they will not have made a timely election]." JANE G. GRAVELLE, CONG. RESEARCH SERV., R41203, ESTATE TAX OPTIONS (Dec. 23, 2010) *available at* http://0- news.bna.com.jag.iii.com/dtln/DTLNWB/split_display.adp?fedfid=18905621&vname=dtmot&wsn=499616500&searched=13646497&doctypeid=1&type=date&mode=doc&split=0&scm=DTLNWB&pg=1. It is important to note that at the time this article was published the IRS had neither released the IRS Form 8939 nor established the form's filing due date.

federal estate tax with only a one million dollar exemption.[57] Additionally, any unused exemption will not be able to be used by a surviving spouse.

C. Drafting Testamentary Documents in Light of the Tax Law Changes

Understanding the changing federal transfer tax system, legal assistance attorneys and estate planners should not conclude that estate planning is no longer necessary for smaller estates due to increased exemption amounts and the ease in carrying over unused exemption amounts in the short term. Specifically, estate planners should not rely on the ability to carry over the exemption amount of the first spouse to die, since the ability to do so is currently limited in its applicability. First, how can it be determined if the surviving spouse will pass away in 2011 or 2012? Second, how would one know that the executor of the estate of the first spouse to die would timely file an estate tax return and make the requisite election?[58] Third, if the second spouse dies after 2012, how would one know if the ability to carry over the exemption will be extended by Congress?

Since it is impossible to know the future, estate planners should draft their testamentary instruments to account for the numerous possibilities and to ensure the use of both spouses' exemptions. One way to accomplish this task is to draft testamentary instruments that establish trusts funded with self adjusting formula clauses. Specifically, attorneys can draft wills that set up both credit shelter and marital deduction trusts, such as qualified terminable interest property (QTIP) trusts. Military attorneys can accomplish this task using DL Wills.[59] Military attorneys that use DL Wills should ensure that they keep the software program updated by downloading the latest updates incorporating the latest changes in federal and state law.[60] Furthermore, to ensure that spouses are properly provided for, clients can acquire non-probate assets such as life insurance or pay on death accounts with spouses designated as beneficiaries.

V. Generation Skipping Transfer Tax Update

In addition to these federal estate tax changes, there are numerous Generation Skipping Transfer (GST) tax changes taking place over the next few years. In 2010, although there is a federal GST tax, the tax rate is 0%.[61] As a result, individuals who made large taxable transfers to skip persons such as grandchildren in 2010 successfully avoided the costly tax.

To contrast, in 2011, taxpayers will be able to transfer a total of five million dollars of taxable gifts during their lifetime or bequests at their death to skip persons and avoid the GST tax due to the $5 million GST tax exemption.[62] Sums over that amount and not subject to a deduction will be subject to a 35% tax rate in addition to any applicable federal gift or estate taxes.[63]

Similarly, in 2012, the same rules for 2011 will apply, except that the five million dollar GST tax exemption may be adjusted for inflation.[64] However, unless Congress acts prior to the end of 2012, only a one million dollar GST tax exemption will apply in 2013.[65] Sums over that amount and not eligible for a deduction will be subject to a 55% tax rate in addition to any applicable federal gift and estate taxes.[66]

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[57] *See* Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010).

[58] *See* I.R.C. § 2010(c)(4). *See* Tax Relief Act, Pub. L. No. 111-312, § 303, 124 Stat 3296. *See supra* note 56 and its accompanying text.

[59] *See* Drafting Libraries (Wills Software), *available at* https://www.draftinglib.com/ (last visited Feb. 24, 2011) (providing information on how to acquire the software and internet links to update the software).

[60] *See id*. For example, the most current edition of DL Wills at the time this article was published was DL Wills Version 10, supplemented as of 14 March 2011.

[61] Tax Relief Act, Pub. L. No. 111-312, § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero).

[62] *See* I.R.C. § 2631 (West 2010) (establishing that the GST exemption amount will be the same as the federal estate tax exemption amount under IRC § 2010(c)). A skip person is defined as a "beneficiary who is more than one generation removed from the transferor and to whom assets are conveyed in a generation-skipping transfer." BLACK'S LAW DICTIONARY, *supra* note 49, at 1514.

[63] *See id.* § 2641 (establishing that the federal GST tax rate is equal to the maximum federal estate tax rate imposed by IRC § 2001 multiplied by the inclusion ratio with respect to the transfer). *See id.* § 2642(a) (defining the inclusion ratio as one minus the applicable fraction; defining the applicable fraction as a fraction with the numerator equal to the GST exemption allocated to the trust or property transferred, and the denominator equal to the value of the property transferred reduced by the sum of certain taxes and charitable deductions allowed with respect to such property). *See also id.* § 2001(c) (establishing that the maximum federal estate tax rate for 2010 through 2012 is 35%).

[64] *See id.* § 2631(c) (West 2010) (establishing that the federal GST exclusion amount will be equal to the federal estate tax exclusion amount). *See id.* § 2001(c)(3) (West 2010) (establishing that the federal estate tax exclusion amount will be subject to an inflation adjustment in 2012).

[65] *See* Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010).

[66] *See* Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010). *See also* I.R.C. § 2001(c) (establishing the maximum federal estate tax rate).

## VI. Conclusion

Legal assistance attorneys and estate planners need to understand the tax law changes that occur from year to year so that they can properly advise their clients, prepare tax returns, and draft appropriate testamentary documents. An attorney's failure to understand these tax law changes and properly advise their clients to plan and execute an appropriate estate plan can result in their clients needlessly paying significantly more federal gift, estate, and generation skipping transfer taxes. Similarly, if clients are not properly advised, they may pay more federal income taxes than their legal liability, and not take advantage of the government's intent, to stimulate the economy.[67]

[67] *See Kicking the Can Down the Road*, THE ECONOMIST, *supra* note 1. However, the long-term cost of the short-term stimulus may be significant. *See id*.

## Appendix A

### The Marginal Tax Brackets for the 2010 Tax Year[68]

1. Single Individuals (other than Surviving Spouses and Heads of Households):

| Taxable Income Over | But Not Over | Pay | Marginal Tax Rate |
|---|---|---|---|
| $0 | 8,375 | 0 | + 10% of amount over $0 |
| 8,375 | 34,000 | $838 | + 15% of amount over $8,375 |
| 34,000 | 82,400 | $4,681 | + 25% of amount over $34,000 |
| 82,400 | 171,850 | $16,781 | + 28% of amount over $82,400 |
| 171,850 | 373,650 | $41,827 | + 33% of amount over $171,850 |
| 373,650 | | $108,421 | + 35% of amount over $373,650 |

2. Married Individuals Filing Joint Returns and Surviving Spouses:

| Taxable Income Over | But Not Over | Pay | Marginal Tax Rate |
|---|---|---|---|
| $0 | 16,750 | 0 | + 10% of amount over $0 |
| 16,750 | 68,000 | $1,675 | + 15% of amount over $16,750 |
| 68,000 | 137,300 | $9,363 | + 25% of amount over $68,000 |
| 137,300 | 209,250 | $26,688 | + 28% of amount over $137,300 |
| 209,250 | 373,650 | $46,834 | + 33% of amount over $209,250 |
| 373,650 | | $101,086 | + 35% of amount over $373,650 |

3. Heads of Households:

| Taxable Income Over | But Not Over | Pay | Marginal Tax Rate |
|---|---|---|---|
| $0 | 11,950 | 0 | + 10% of amount over $0 |
| 11,950 | 45,550 | $1,195 | + 15% of amount over $11,950 |
| 45,550 | 117,650 | $6,235 | + 25% of amount over $45,550 |
| 117,650 | 190,550 | $24,260 | + 28% of amount over $117,650 |
| 190,550 | 373,650 | $44,672 | + 33% of amount over $190,550 |
| 373,650 | | $105,095 | + 35% of amount over $373,650 |

4. Married Individuals Filing Separate Returns:

| Taxable Income Over | But Not Over | Pay | Marginal Tax Rate |
|---|---|---|---|
| $0 | 8,375 | 0 | + 10% of amount over $0 |
| 8,375 | 34,000 | $838 | + 15% of amount over $8,375 |
| 34,000 | 68,650 | $4,681 | + 25% of amount over $34,000 |
| 68,650 | 104,625 | $13,344 | + 28% of amount over $68,650 |
| 104,625 | 186,825 | $23,417 | + 33% of amount over $104,625 |
| 186,825 | | $50,543 | + 35% of amount over $186,825 |

[68] *See* Rev. Proc. 2009-50, 2009-45 I.R.B. 617, Rev. Proc 2010-24, 2010-25 I.R.B. 764, and Rev. Proc. 2010-35, 2010-42 I.R.B. 438. *See also* I.R.C. § 1 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 2496).

5. Estates and Trusts:

| Taxable Income | | Pay | Marginal Tax Rate |
|---|---|---|---|
| Over | But Not Over | | |
| $0 | 2,300 | 0 | + 15% of amount over $0 |
| 2,300 | 5,350 | $345 | + 25% of amount over $2,300 |
| 5,350 | 8,200 | $1,108 | + 28% of amount over $5,350 |
| 8,200 | 11,200 | $1,906 | + 33% of amount over $8,200 |
| 11,200 | | $2,896 | + 35% of amount over $11,200 |

## Appendix B

### 2010 Standard Deductions[69]

| Filing Status | Standard Deduction | If Over Age 65 (Add Per Taxpayer) | If Blind (Add Per Taxpayer) |
|---|---|---|---|
| Married Filing Jointly or Qualifying Widow(er) | $11,400 | + $1,100 | + $1,100 |
| Head of Household | $8,400 | + $1,400 | + $1,400 |
| Single | $5,700 | + $1,400 | + $1,400 |
| Married Filing Separately | $5,700 | + $1,100 | + $1,100 |

[69] *See* Rev Proc 2009-50, 2009-45 I.R.B. 617. *See also* I.R.C. § 63(c)(2). *See generally* PUB. 17, *supra* note 6, at 138–39 (providing a worksheet to calculate the 2010 standard deduction; explaining that individuals for whom an exemption can be claimed on another person's tax return is generally limited to the greater of $950, or the individual's earned income + $300 for a total value up to $5,700, the 2010 regular standard deduction amount). *See supra* note 48 and accompanying text (discussing the "kiddie tax").

## Appendix C

### 2010 and 2011 Alternative Minimum Tax Rates[70]

| Filing Status | 2010 AMT Exemption | 2011 AMT Exemption |
|---|---|---|
| Married Filing Jointly and Surviving Spouses | $72,450 | $74,450 |
| Single and Head of Household | $47,450 | $48,450 |
| Married Filing Separately | $36,225 | $37,225 |

[70] I.R.C. 55(d)(1) (West 2010).

## Appendix D

### Exclusions, Exemptions, and Gift / Estate / GST Tax Rates[71]

| Year | Annual Gift Exclusion[72] | Estate / GST Exclusion[73] | Gift Tax Exclusion[74] | Highest Gift, Estate, and GST Tax Rate[75] |
|---|---|---|---|---|
| 2002 | $11,000 | $1 Million | $1 Million | 50% |
| 2003 | $11,000 | $1 Million | $1 Million | 49% |
| 2004 | $11,000 | $1.5 Million | $1 Million | 48% |
| 2005 | $11,000 | $1.5 Million | $1 Million | 47% |
| 2006 | $12,000 | $2 Million | $1 Million | 46% |
| 2007 | $12,000 | $2 Million | $1 Million | 45% |
| 2008 | $12,000 | $2 Million | $1 Million | 45% |
| 2009 | $13,000 | $3.5 Million | $1 Million | 45% |
| 2010 | $13,000 | $5 Million[76] | $5 Million | 35%[77] (but the GST Tax Rate is 0%)[78] |
| 2011 | $13,000 | $5 Million | $5 Million | 35% |
| 2012 | To be Determined | $5 Million +[79] | $5 Million +[80] | 35% |
| 2013 | To be Determined | $1 Million | $1 Million | 55% |

[71] *See* JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-108-07, at 11, 14 (2007) *available at* www.jct.gov/x-108-07.pdf (last visited Mar. 17, 2011) (showing similar tables). *See also* CCH 2010 Tax Legislation, *supra* note 11, ¶705 (providing an in-depth explanation of the gift, estate, and GST taxes, as well as how the Tax Relief Act of 2010 impacts these taxes).

[72] *See* § I.R.C. 2503 (Jan. 1, 1998) (establishing the $10,000 annual exclusion with an inflation adjustment). *See also* Rev. Proc. 2010-40, § 3.21, 2010-46, I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is $13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is $136,000).

[73] *See* I.R.C. §§ 2010 and 2631 (West 2010).

[74] *See id.* § 2505 (West 2011). *See also* I.R.C. § 2010 (West 2010).

[75] *See* I.R.C. §§ 2001 and 2502 (West 2011). *See* I.R.C. §§ 2601 and 2602 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (discussing the taxes imposed by the GST tax).

[76] *See* CCH 2010 Tax Legislation, *supra* note 11, ¶ 705 (explaining that the $5 million GST tax exemption is available in 2010 even if the executor of a decedent in 2010 elects for the estate tax not to apply).

[77] *But see* Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296 (establishing that in 2010, the personal representative may elect a carryover basis regime to apply; if the administrator so elects, the estate tax would not be applicable, but the beneficiaries would only be allowed to take a limited step-up in basis depending on how the administrator chooses to allocate the $1.3 million or up to $4.3 million if the property is allocated to a surviving spouse).

[78] Tax Relief Act, Pub. L. No. 111-312, § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero). *See also* I.R.C. § 2641 (defining the applicable rate (i.e., the tax rate) with respect to the GST tax as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer).

[79] *See* I.R.C. § 2010(c)(3)(B) (West 2010) (establishing that in 2012 the exemption amount will be subject to an inflation adjustment rounded to the nearest $10,000).

[80] *See id.* § 2505(a) (West 2011) (establishing that the federal gift tax exclusion amount will be equal to the federal estate tax exclusion amount). *See id.* § 2001(c)(3) (West 2010) (establishing that the federal estate tax exclusion amount will be subject to an inflation adjustment in 2012).

## Appendix E

### Federal Gift Tax Computation Examples

2009: Mr. Smith, who has previously never made any taxable gifts to anyone, gives his son $688,000. Due to the $13,000 annual exclusion and $1 million federal gift tax exemption, no federal gift tax is due.

2010: Mr. Smith gives his son another $3,338,000. Due to the $13,000 annual exclusion and $5 million federal gift tax exemption, no federal gift tax is due.

2011: Mr. Smith gives his son another $1,113,000. Since the value of his lifetime gifts has exceeded both the $13,000 annual exclusion and $5 million federal gift tax exemption, federal gift tax is due at a 35% tax rate.

| | 2009 | 2010 | 2011 |
|---|---|---|---|
| Gift | $688,000 | $3,338,000 | $1,113,000 |
| - Annual Exclusion | - 13,000 | -$13,000 | -$13,000 |
| = Taxable Gift | = $675,000 | $3,325,000 | $1,100,000 |

| | | | |
|---|---|---|---|
| Taxable Gift | $675,000 | $3,325,000 | $1,100,000 |
| + Prior Taxable Gifts | - 0 | +675,000 | +4,000,000 |
| = Total Taxable Gifts | = $675,000 | =$4,000,000 | =5,100,000 |

| | | | |
|---|---|---|---|
| Tax of Total Gifts under I.R.C. § 2502(a) | $220,550[81] | $1,330,800[82] | $1,765,800[83] |
| - Tax from Gifts made in Prior Years | - 0 | - 0 | - 0 |
| = Gift Tax in Current Year | = $220,550 | = $1,330,800 | = $1,765,800 |

| | | | |
|---|---|---|---|
| Gift Tax in Current Year | $220,550 | $1,330,800 | $1,765,800 |
| - Federal Gift Tax Credit (Unified Credit)[84] | - 220,550 | -1,330,800 | -1,730,800 |
| = Gift Tax Owed | = $0 | = $0 | = $35,000 |

[81] *See id.* § 2502(a) (LEXIS 2009) (applying gift rates under I.R.C. § 2001(c) for gifts made *prior to* 31 December 2009). For example, tax on taxable gifts of $675,000 = 155,800 + .37 x (675,000 – 500,000) = $220,550.

[82] *See id.* § 2502(a)(2) (West 2011) (applying gift rates for gifts made *after* 31 December 2009 *but before* 1 January 2013). For example, tax on taxable gifts of $4,000,000 = 155,800 + .35 x (4,000,000 – 500,000) = $1,330,800.

[83] *See id.* § 2502(a)(2) (West 2011) (applying gift rates for gifts made *after* 31 December 2009 *but before* 1 January 2013). For example, tax on taxable gifts of $5,100,000 = 155,800 + .35 x (5,100,000 – 500,000) = $1,765,800.

[84] *See id.* §§ 2505(a) and 2510(c) (West 2011) (setting the federal gift credit for gift taxes imposed by I.R.C., § 2501). For example, the maximum credit for lifetime taxable gifts = $155,800 + .35 x (5,000,000 – 500,000) = $1,730,800.

## Appendix F

### Outline for Calculating Federal Estate Tax[85]

| IRC Section | Property Covered |
|---|---|
| §2033 | Property Owned at Death |
| + §2035 | Certain Transfers Within Three Years of Death |
| + §2036 | Transfers with Retained Life Estate or Retained Control |
| + §2037 | Transfers Taking Effect at Death |
| + §2038 | Revocable Transfers |
| + §2039 | Annuities and Employee Death Benefits |
| + §2040 | Property Passing by Rights of Survivorship |
| + §2041 | General Powers of Appointment |
| + §2042 | Life Insurance Proceeds (Where Decedent Held Incidents of Ownership) |
| + §2043 | Transfers for Partial Consideration |
| + §2044 | QTIP Transfers for which Marital Deduction was Previously Allowed |

= **Gross Estate (GE)**

| | Type of Deduction |
|---|---|
| - §2053 | Deduction for Administrative and Funeral Expenses, as well as Debts |
| - §2054 | Deduction for Casualty Losses |
| - §2055 | Charitable Deduction |
| - §2056 | Marital Deduction |
| - §2058 | Deduction for State Death Taxes Paid (dying between 1 Jan. 2005– 31 Dec. 2012) |

= **Taxable Estate**

+ Adjusted Taxable Gifts  Taxable Gifts Made After 1976 not Otherwise Includable in GE

= **Tentative Estate Tax Base**

x §2001 Estate Tax Rate Schedule

= **Tentative Estate Tax**

| | Type of Credit |
|---|---|
| - Gift Taxes Paid on Taxable Gifts Made After 1976 | |
| - §2010 | Estate Tax Unified Credit<br>This may include the Deceased Spouse's Unused Exclusion Amount (for surviving spouses dying in 2011 and 2012) |
| - §2011 | Credit for State Death Taxes (decedents dying after 31 Dec. 2012) |
| - §2012 | Credit for pre-1977 Gift Taxes on Property Included in Gross Estate |
| - §2013 | Credit for Taxes on Prior Transfers *to* Decedent (i.e., prior inclusion in *a* GE) |
| - §2014 | Credit for Foreign Death Taxes |

= **Federal Estate Tax**

[85] *See* JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN, AND ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 869-870 (7th ed. 2005) (showing a similar outline). *See also* G. VICTOR HALLMAN & JERRY S. BLOOM, PERSONAL FINANCIAL PLANNING 472 (7th ed. 2003) (showing a more general outline).

## Researching Current and Historical Legislation Using THOMAS

*Heather M. Enderle*
*Electronic Services Librarian*

Keeping track of legislation as it moves through Congress can be a daunting task, but fortunately the Library of Congress's THOMAS makes this challenge easier. Found at http://thomas.loc.gov/, THOMAS is a primary resource for current and past bill information. One can research the status of bills as they move through Congress and find sponsors, actions, committee reports and legislative text in various stages. For example, researchers can find timely information on the Don't Ask, Don't Tell Repeal Act of 2010 and the Veterans' Benefits Act of 2010.

In 1995, the Library of Congress launched THOMAS at the direction of Congress. The goal was to make federal legislation available to the public for free. Currently, THOMAS contains bills and legislation information from 1989 to present.[1]

THOMAS has basic and advanced search features. Both are relatively simple to use. From the main page, users can search the current Congress by word/phrase or bill number. Alternatively, one can browse bills by sponsor using a drop-down menu of representatives and senators. The advanced search feature offers users the ability to search multiple Congresses simultaneously by words, phrases or bill numbers. Researchers can search specific or multiple Congresses by type of legislation, sponsor, House and Senate committee, or stage in Congress.

The Bill Summary & Status page provides a snapshot of the title, sponsor, related bills, latest major action and latest action for the bill. If the bill becomes law, the summary screen displays the public law number and a link to the GPO text and .pdf of the law. A helpful tool is the link to "Major Congressional Actions," so the user can determine the bill's major actions without browsing through every bill action.

Military lawyers might also find the "Appropriations Bills" link from THOMAS' homepage especially useful. A chart for each year from 1998 to present includes committee actions on the Appropriations Bills, House and Senate committee reports and votes, and links to public laws. If the House and Senate votes are by roll call, there is a link to the votes by representative and senator. The charts also indicate whether the President signed a particular bill.

Finally, in addition to bill information, THOMAS has the *Congressional Record* searchable from 1989 to present. The *Congressional Record—Daily Digest* has summaries of the House and Senate day's activities. THOMAS also has presidential nominations from 1987 to present, and basic treaty information such as the short and formal titles, treaty number, and legislative actions from 1967 to present. Complete treaty coverage begins with the 94th Congress.[2]

Stay up to date with THOMAS and legislative activity by subscribing to the Really Simple Syndication (RSS) feed or email updates at http://www.loc.gov/rss/.

For more information contact the Electronic Services Librarian at TJAGLCS-Digital-Librarian@conus.army.mil

[1] About THOMAS, http://thomas.loc.gov/home/abt_thom.html (last visited Dec. 20, 2010).

[2] *See id.*

*Tort Claims Note*

## New National Guard Missions and the Federal Tort Claims Act

*Walter E. Parker, IV**

Since 2001, the Army National Guard has performed an increasing number of non-traditional missions.[68] This has led to confusion as to their coverage under the Federal Tort Claims Act (FTCA)[69] for torts conducted while performing these missions. In the past, it was relatively simple to determine their coverage: National Guard Soldiers performing federal missions were covered by the FTCA, while missions performed in state Active Duty status led to state responsibility for claims.[70] Because the National Guard has recently undertaken a number of non-traditional federal missions that previously would have been performed in State Active Duty status, Army claims offices are seeing an increasing number of claims for activities that may not appear to be federal in nature, but are covered by the FTCA. This note will describe National Guard missions, to include new non-traditional duties, and provide practitioners guidance in handling claims arising from the performance of these missions.

National Guard members performing duties in a Title 32 status[71] are considered federal employees for FTCA purposes even though they are under the control of the State.[72] The following six paragraphs list some typical Title 32 duties performed by the National Guard and describe the documentation needed to establish coverage by Title 32 and the FTCA.

Monthly drills, officially termed "Unit Training Assemblies (UTA),"[73] are scheduled pursuant to the unit training calendars and conducted to meet federal training requirements. Individual orders are not issued for UTA. National Guard members are in a Title 32 status when performing a UTA and are, therefore, covered by the FTCA.[74] Proof of Title 32 status can be derived from a copy of the unit training calendar for the time period in question, a certification by the member's commander that they were present for duty during the UTA or a copy of the pay documents, if available, showing the member was paid for the drill.

Annual training is federally mandated training for National Guard members and usually lasts for two weeks. This training is conducted in a Title 32 status[75] and is, therefore, covered by the FTCA. Individual orders are generally issued for each member performing Annual Training, and serve as the most appropriate proof of a National Guard member's Title 32 status.

Active Guard and Reserve (AGR) duties are performed by full-time National Guard personnel to organize, administer, recruit, instruct, and train the Guard.[76] Many National Guard recruiters fall into this category. Title 32 Active Guard and Reserves are covered by the FTCA. Individual orders issued by the State Adjutant General[77] are needed to prove Title 32 status.

National Guard technicians are full-time employees of the Guard and are considered federal employees for FTCA purposes.[78] They serve as federal civilian employees during the work week even though they wear military uniforms and are required to be members of the military as a condition of their federal employment.[79] Orders are the most appropriate proof of Title 32 status for technicians.

National Guard personnel performing counter-drug missions pursuant to Title 32 are performing full-time National Guard duty.[80] These personnel are covered by the FTCA, as long as the mission is covered by the Drug

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[68] *See* U.S. Army Claims Serv., *Claims Arising from the Performance of Duties by Members of the National Guard*, ARMY LAW., Aug. 2001, at 24; Major Christopher R. Brown, *Been There, Doing That in a Title 32 Status—The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in a Title 32 Status*, ARMY LAW., May 2008, at 23.

[69] 28 U.S.C. §§ 2671–2680 (2006).

[70] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS paras. 2-2b(3), 2-15(e)(2)(a) (8 Feb. 2008) [hereinafter AR 27-20].

[71] 32 U.S.C. §§ 115, 316, 502, 503, 504 or 505 (2006).

[72] 28 U.S.C. § 2671 (2006). This section defines federal employees to include " members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32 . . ." *Id. See also* AR 27-20, *supra* note 3, para. 6-2.

[73] 32 U.S.C. § 502(a)(1).

[74] 28 U.S.C. § 2671.

[75] 32 U.S.C. § 502(a)(2).

[76] *Id.* § 502(f).

[77] 28 U.S.C. § 2671.

[78] 32 U.S.C. § 709(e).

[79] *Id.*

[80] *Id.* § 112(b).

Enforcement Agency (DEA). These claims should be referred to the DEA for appropriate action.[81]

Beginning in 2001, the Army National Guard was authorized by the President or the Secretary of Defense to perform missions in Title 32 status that in the past would have been performed in State Active Duty status. Examples of non-traditional National Guard missions accomplished while on Title 32 status include the airport security mission in the aftermath of the 11 September 2001, natural and manmade disasters (such as Hurricane Katrina), Operation Jump Start on the Southwest Border, and National Special Security Events (such as the 2008 Democratic and Republican National Conventions and the 2009 Presidential Inauguration).[82] The FTCA applies to National Guard members performing these missions when conducted under Title 32.[83] When these operations are a response to a natural disaster or national emergency, National Guard members may have tort immunity under State emergency operations statutes. The unit orders for these missions provide proof of Title 32 status.

Active duty claims offices should accept all claims arising from National Guard activities that purport to file a FTCA claim.[84] Once the claim is accepted, claims personnel should determine if the National Guard Soldier allegedly responsible for the claim was in Title 32 status and, therefore, covered by the FTCA.[85] As described above, orders, training calendars or similar documentation will be necessary to establish this. National Guard judge advocates can assist in providing this documentation. Active duty claims offices should not reject claims solely because Title 32 status or the tortfeasor has not been established without first coordinating with the U.S. Army Claims Service (USARCS) at Fort Meade, Maryland.[86]

Claims personnel must also determine if the National Guard Soldier was acting within the scope of Title 32 employment.[87] Although National Guard Soldiers may have Title 32 orders, if they were actually conducting state duties inconsistent with their Title 32 status, they may not be covered by the FTCA because they have become a "borrowed servant" of the state.[88]

National Guard claims must be coordinated with the full-time National Guard Judge Advocate for the state involved. Normally, this will be the State Claims Officer under National Guard Regulation 27-20.[89] Such claims should also be coordinated with the appropriate Area Action Officer at USARCS.[90]

Once an active duty claims office has confirmed that the alleged tortfeasor was acting in Title 32 status, the claim should be processed and investigated. If the alleged tortfeasor was not acting in a Title 32 status, the FTCA claim may be denied[91] and the claimant may be referred to the appropriate state agency for resolution of the claim. If a National Guard Soldier's Title 32 status cannot be determined, claimants and their counsel should be advised to take appropriate action to protect potential claims against the state or tortfeasor.

Claims offices should contact the USARCS before denying any National Guard claim based upon a determination that the tortfeasor was not acting in Title 32 status and, therefore, not covered by the FTCA. Claims offices that encounter difficulty obtaining needed documentation from the National Guard can obtain assistance from the appropriate National Guard State Claims Officer or Area Action Officer at the USARCS. The USARCS is currently partnering with the National Guard Bureau to ensure expeditious processing of all National Guard claims.

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[81] *Id.*

[82] *Id.* § 502(f).

[83] 28 U.S.C. § 2671.

[84] AR 27-20, *supra* note 3, para. 2-9.

[85] *Id.* para. 2-24d.

[86] The U.S. Army Claims Service may be contacted at (301) 677-7009. Additional information may be obtained at their Internet site at https://www.jagcnet.army.mil/8525752700444FBA.

[87] AR 27-20, *supra* note 3, para. 2-24f.

[88] *See* Himel v. Alaska, 36 P.3d 35 (Alaska 2001). An example of this would be a National Guard Soldier on a proper title 32 mission, such as assisting with a national political convention, who is borrowed by her state to conduct duties that solely benefit the state, such as providing transportation for the state Governor.

[89] U.S. DEP'T OF THE ARMY AND AIR FORCE, NAT'L GUARD, REG. 27-20, CLAIMS AGAINST OR IN FAVOR OF THE UNITED STATES ARISING FROM NATIONAL GUARD ACTIVITIES ch. 2 (10 July 1989), *available at* http://www.ngbpdc.ngb.army.mil/pubs/27/ngr27_20.pdf.

[90] AR 27-20, *supra* note 3, para. 2-15e(2).

[91] *Id.* para. 2-31.

## Book Reviews

# War[1]

Reviewed by *Major Jacob D. Bashore*[*]

*The willingness to die for another person is a form of love that even religions fail to inspire, and the experience of it changes a person profoundly.*[2]

## I. Introduction

As the war in Afghanistan moves into its tenth year and American casualties are at an all time high,[68] few books are of such relevance and interest as Sebastian Junger's[69] *War*. Do not be fooled by the title, this book is about much more than battles that encompass a war. Junger uses his experiences in Afghanistan with 2nd Platoon, B Company, 2nd Battalion, 503rd Infantry Regiment, 173rd Airborne Brigade to paint a vivid picture of an infantryman's life, thoughts, and actions in one of the most volatile areas of Afghanistan—the Korengal Valley.

At first glance, Junger's statement that he wants to see what "it's like to serve in a platoon of combat infantry"[70] suggests that the reader is about to relive the firefights that make up an infantryman's deployment, much akin to a Vietnam "trash novel." However, Junger's purpose was not to just tell another war story. Junger mixes psychological studies and research into the experiences of 2nd Platoon in order to convey what these Soldiers thought, how they felt, how they bonded with their fellow Soldiers, and how the interspersed months of intense periods of combat and boredom affected their psyche. Although Junger spends a great amount of time telling the reader about his own thoughts and focuses little on how the unit operated outside of combat power, Junger did an excellent job relaying the story of 2nd Platoon during this deployment.

## II. Background

Junger embedded with 2nd Platoon shortly after the unit's arrival to Afghanistan in May 2007. Over the next year, Junger, along with photojournalist Tim Hetherington,[71] would spend nearly five months over five trips living the life of Soldiers in combat. During their experiences with the platoon, they shot over 150 hours of video that Junger used to ensure accuracy in his writing of *War*.[72] In addition, they used that video to produce the newly released and critically acclaimed documentary titled *Restrepo*.[73]

While Junger occasionally tells the story of Soldiers outside 2nd Platoon, the majority of this book is spent with the infantrymen of 2nd Platoon at a rustic hilltop outpost called Restrepo in the Korengal Valley, Afghanistan. The Korengal Valley is the site of some of America's most tragic events since the war in Afghanistan began. In June 2005, this valley was the site of the crash of a Special Operations Chinook helicopter which killed sixteen service members, including eight Navy SEALs.[74] In July 2008, the Taliban attack at Wanat killed nine and injured twenty-seven of 2nd Platoon's brothers from C Company just prior to C Company's redeployment.[75] Outpost Restrepo was named after 2nd Platoon's medic who was killed early in the unit's deployment, and Junger vividly describes the sparse outpost that lacked all the creature comforts of home—running water, electricity, hot food, communication with the outside world, and privacy.[76]

## III. Organization and Content

*War* contains three separate sections titled Fear, Killing, and Love. Each section focuses on an emotional phase that

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[1] SEBASTIAN JUNGER, WAR (2010).

[2] *Id.* at 239.

[68] David Nakamura, *U.S. Troop Deaths in Afghan War Up Sharply*, WASH. POST, Sept. 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/31/AR2010083100610.html.

[69] Sebastian Junger is the author of the bestselling books *The Perfect Storm* and *A Death in Belmont*. Junger has reported on conflicts in Afghanistan since 1996 to include being embedded with Tajik fighters against the Taliban in 2000. JUNGER, *supra* note 1, at 25, 217.

[70] *Id.* at 25.

[71] Hetherington published a photo book based on this same deployment. TIM HETHERINGTON, INFIDEL (2010).

[72] *Id.* at xi.

[73] RESTREPO: ONE PLATOON, ONE YEAR, ONE VALLEY (Outpost Films 2009). The movie won the Grand Jury Prize for a documentary at the 2010 Sundance Film Festival. RESTREPO, http://restrepothemovie.com (last visited Feb. 15, 2011). *Restrepo* was also nominated for a 2011 academy award for feature documentary. THE ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, http://www.oscars.org/awards/academyawards/83/nominees.html (last visited Feb. 15, 2011).

[74] JUNGER, *supra* note 1, at 49–52. The crash occurred during an attempt to rescue four Navy SEALs under attack by Taliban forces. John Barry & Michael Hirsh, *Chopper Down Over Kunar: A Special Ops Unit Calls for Help, and a Rescue Goes Awry*, NEWSWEEK, July 11, 2005, at 31, *available at* http://www.newsweek.com/2005/07/10/chopper-down-over-kunar.html.

[75] JUNGER, *supra* note 1, at 253–60.

[76] *Id.* at 62–65.

the combat Soldier experiences, closely following the chronological course of a deployment—overcoming fear by demonstrating courage and bravery; dealing with the necessity and the desire to kill; and the brotherhood bond formed amongst fellow Soldiers. Junger's goal was to convey "what war actually feels like."[77] To accomplish his objective, Junger uses the combat actions of 2nd Platoon to discuss the psychological effects on the Soldiers over time. Where Junger's efforts fall short is that the book often focuses on his personal feelings about combat as an untrained, middle-aged journalist with no military background,[78] and disproportionately focuses on the comments of one Soldier, Sergeant Brendan O'Byrne.

Junger does an outstanding job painting the picture of what it is like to be an infantryman in 2nd Platoon, and accurately captures nearly all of the military terminology and descriptions.[79] *War* is written at a level that requires no prior military experience to understand what Junger is trying to convey, making it easy for the reader to stay interested. However, the book is only a "page-turner" in the first half of the second section—Killing. The book keeps moving by constant insertion of stories demonstrating the courage and bravery shown by the 2nd Platoon Soldiers in combat with Taliban forces, to include the heroics of recent Medal of Honor awardee Specialist (now Staff Sergeant) Salvatore Giunta.[80] The reader can hear their hearts pounding, feel the emotions that course through their bodies, and see the effort exerted by the heavily laden Soldiers in the hot, high altitude climate. However, the book's momentum is consistently halted when these accounts of battle are frequently interrupted with discussion on the psychological studies of Soldiers.[81]

While Junger does a thorough job explaining the battles in plain terms, the book lacks several key features which would help the reader understand the battles and dynamics of the platoon. First, *War* lacks critical diagrams to lay out the terrain and Soldier movements in the book's main firefights. The book only includes one diagram, which is a generic diagram of the valley showing only some of the referenced locations mentioned throughout the book.[82] At times, the reader does not have a full understanding of how the Soldiers were being attacked, how the terrain affected the engagements, and how the Soldiers used that terrain to respond to the attacks.[83] In addition, the *War* reader only obtains a good understanding of the terrain if the reader watches the documentary *Restrepo*.[84] A few additional diagrams and pictures of the terrain would have solved this confusion and made the reading more enjoyable.

Second, Junger never describes the platoon's organization. Last names are often thrown at the reader without ranks or positions. We never learn the first names of some of these Soldiers, such as Rice, Hijar, and Solowski, which makes it difficult to see how they fit into the platoon's dynamic.[85] While some of the Soldiers may have moved around during the deployment, a diagram showing all of the members of each squad would have gone a long way in helping the reader, particularly the military reader who is attempting to analyze the interrelation of the platoon members as it applies to their personal experiences in order to understand how and why they interacted with each other.

## IV. Analysis

As one young Soldier told the author prior to a mission, "It's okay to be scared, you just don't want to *show* it."[86] While often misplaced in the middle of a battle account, Junger's best work is synthesizing psychological studies of Soldiers from past wars to explain to the reader why 2nd Platoon's Soldiers felt and acted the way they did. His most interesting discussions centered on how training helps groups to overcome fear and fight as a unit rather than as individuals,[87] and how the human spirit is the key to Soldiers overcoming perceived exhaustion, noting that "good leaders know that exhaustion is partly a state of mind" and those ". . . who succumb to it have on some level decided to put themselves ahead of everyone else."[88]

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[77] *Id.* inside front cover.

[78] For example, Junger discusses in detail his pre-mission fears and his own emotional struggles after an improvised explosive device attack on a vehicle in which he was riding. *Id*. at 71–74, 143–50.

[79] The military savvy reader is distracted by misstated facts that all officers graduate Officer's Candidate School and that the military occupational specialty (MOS) for a tank mechanic is 67H. *Id.* at 20–21, 13. While an Abrams tank mechanic used to hold the MOS of 63A, the MOS was 91A at the time *War* was published. *Enlisted MOS Changes*, ARMY TIMES, May 16, 2009, http://www.armytimes.com/news/2009/05/army_enlisted_chart_051609w/.

[80] JUNGER, *supra* note 1, at 117–19, 124–25. Taliban forces split Specialist Giunta's patrol in two by using a complex "L" shaped ambush. Specialist Giunta saved a fellow Soldier from capture by assaulting through the kill zone to the cut off forward element, where he killed one enemy fighter and wounded another who were dragging away his wounded comrade. *See also* Michelle Tan, *A Hero Lives to Tell*, ARMY TIMES, Sept. 20, 2010, at 22.

[81] For example, during the ambush of Specialist Guinta's patrol, Junger breaks away from the story to discuss studies on overcoming fear, bravery, and Soldiers fighting as a unit. JUNGER, *supra* note 1, at 117–25.

[82] *Id*. at ix.

[83] Two key sketches that should have been added for Operation Rock Avalanche would have better described the initial mission brief and a major attack on 2nd Platoon during the operation. *Id*. at 92–114.

[84] RESTREPO: ONE PLATOON, ONE YEAR, ONE VALLEY (Outpost Films 2009). While photographs are not essential to a good book, since a photojournalist accompanied Junger, it is strange that there are no photographs of the Soldiers or of the area in which 2nd Platoon operated.

[85] *Id*. at 67–70.

[86] *Id*. at 74 (emphasis in original).

[87] *Id*. at 120–24.

[88] *Id*. at 72–74.

Junger also explains in detail why Soldiers form a brotherhood of love that causes them to put their own safety at risk in order to protect their fellow Soldiers because "courage [is] love."[89] Junger succinctly argues that this phenomenon does not span all ranks of Soldiers, but is particularly strong only at the company level and below.[90] Junger uses scenarios from the war with Mexico, World War I and World War II to demonstrate how humans who "feel valued and loved by others" in their group will continue fighting for the group, even if it means personal death.[91] Sergeant O'Byrne indicates the power of this sentiment when he told Junger while on emergency leave, "I got to get back [to Afghanistan]. Those are my boys. Those are the best friends I'll ever have."[92]

This bond of brotherhood becomes stronger when a unit experiences intense situations, such as combat. However, not all combat experiences result in a positive outcome. Junger reveals some of the negative effects of combat by describing how 2nd Platoon came to literally cheer the death of their enemy in a way that made him feel very uncomfortable.[93] Junger comments, "I got the necessity for it but I didn't get the joy."[94] Junger poses the important question, "Is that [gain of] territory worth the psychological cost of learning to cheer someone's death?"[95] Junger exhibits the breadth of that cost by describing the fear among some troops that they will "never again be satisfied with a 'normal life,'"[96] and by describing the toll that the deployment took on Sergeant O'Byrne, who had a difficult time reintegrating into garrison life upon redeployment.[97] Thus, Junger illustrates important lessons for today's military leaders to grasp in order to proactively help Soldiers during reintegration and to better understand how to deal with the Soldiers who lose that expected level of discipline in garrison life.

Where Junger did a great job in explaining the human psyche as it relates to Soldiers in combat, the reader must be careful to not take every one of his assertions as being applicable to all combat Soldiers. Junger's experiences are primarily based on one isolated platoon during a single deployment where Junger admittedly received the most outspoken thoughts from one troubled Soldier, Sergeant O'Byrne.[98] I will further discuss some discipline issues of the platoon below, but Junger's account makes it clear that 2nd Platoon dealt with various mental issues, illustrated by his photojournalist questioning whether the platoon had "demons."[99]

One specific outlandish assertion that Junger makes is that "the long-term success or failure [of the war in Afghanistan] has a relevance of almost zero [to Soldiers]."[100] If Junger was trying to make the point that the national cause is not why men fight and die for each other, he failed to state that. While Junger correctly states that a cause does not have to be "righteous and . . . winnable" to get men to fight, citing to the German Army's solidarity in the last months of World War II,[101] his assertion is an overly broad one.

Junger's assertion that the greater victory is of no consequence to combat Soldiers is both inaccurate and contradicted in other parts of the book. For example, Junger cites to a study that specifically lists "conviction for their cause" as a reason American troops had the "X-factor" during World War II.[102] Additionally, Junger acknowledges that if the Soldiers he interviewed thought he was trying to write on "dying in a senseless war," they would refuse to talk to him.[103] The refusal to speak to a biased reporter is hardly the apathy that Junger initially describes. Having had several friends die in the current overseas contingency operations, our success is very important to me personally because to quit or fail would mean their lives were lost in vain. Not being the only one to hold this sentiment,[104] if the author derived this attitude from 2nd Platoon, it should not be attributed to Soldiers as a whole.

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[89] *Id.* at 239–46.

[90] *Id.* at 241–42.

[91] *Id.* at 243.

[92] *Id.* at 129.

[93] *Id.* at 153–55.

[94] *Id.*

[95] *Id*. at 155.

[96] *Id*.

[97] *Id*. at 265–68. *See also id*. at 232–35 (Junger's observations of Sergeant O'Byrne "crawling out of his skin" during a lull in operations initiates a discussion on the effects of taking a Soldier out of combat being very "traumatic").

[98] *Id*. at 5–6. Junger consistently cites Sergeant O'Byrne's statements and describes the issues that Sergeant O'Byrne dealt with to include being shot by his own father as a teen, overindulgence of alcohol both before and after deployment, and going absent without leave upon returning from the deployment. *Id*. at 15, 166–68, 265–68.

[99] *Id*. at 159.

[100] *Id*. at 25.

[101] *Id*. at 242–44.

[102] *Id*. at 122. Junger cites to psychiatrist Herbert Spiegel's studies and assertion that the X-factor caused the American Soldiers to be "'influenced greatly by devotion to their group or unit, by regard for their leader and by conviction for their cause. In the average soldier, which most of them were, this factor . . . enabled men to control their fear and combat their fatigue to a degree that they themselves did not believe possible.'" *Id.*

[103] *Id*. at 134.

[104] Sara A. Carter, *Troops Chafe at Restrictive Rules of Engagement, Talks with Taliban*, THE EXAMINER, Oct. 19, 2010, http://www.washingtonexaminer.com/politics/Troops-chafe-at-restrictive-rules-of-engagement_-talks-with-Taliban-1226055-105202284.html (detailing Soldier's opinions that American lives will have been wasted if the Karzai government brokers a peace deal with the Taliban).

## V. What Does *War* Do For Today's Military Leaders?

While *War* is an interesting read, it is not about to supplant professional reading list mainstays such as *Once an Eagle*[105] or *Learning to Eat Soup with a Knife*.[106] For the judge advocate, there is little "meat" in the book to help a judge advocate advise commanders in the current environment. For the inexperienced leader, the book is just as likely to misguide on acceptable standards of conduct as it is to give the leader an idea of how to build a cohesive fighting team.

For the judge advocate, *War* is sparse on key topics of deployment such as the rules of engagement (ROE) and counterinsurgency principles (COIN). Judge advocates must become experts of the ROE and it is important to understand what the infantryman on the ground is experiencing as judge advocates analyze issues such as hostile intent.[107] However, Junger's book only mentions ROE situations on a few occasions, and his writing lacks the depth required to develop many discussion scenarios.[108]

Further, Junger only briefly mentions the COIN concept. Junger describes an operation early in 2nd Platoon's deployment that caused civilian casualties and the local elders to declare jihad. Since Junger was not writing on COIN, there was neither focus on how to rebuild the trust with the local nationals to avoid such catastrophes nor any discussions on how integration of the Afghan security forces could enhance the unit's likelihood of success.[109]

To better understand the complicated counterinsurgency environment at the platoon level, I would recommend reading *The Defense of Jisr al-Doreaa*, written by two former company commanders, rather than *War*.[110] *The Defense of Jisr al-Doreaa* chronicles the story of a platoon leader who applies lessons learned in a COIN environment through six dreams in which his platoon is responsible for defending a bridge in a small town in Iraq.[111] While a work of fiction, the book more accurately illustrates the complex environment young leaders face when attempting to implement and reinforce the fundamental principles of COIN.

The new military leader should read *War* with caution and not presume that 2nd Platoon's dynamic is normal or the standard. Junger describes several irregularities in the platoon such as their ritual beatings of each other. This was not just horseplay caused by boredom, but the beatings became the accepted practice of the members against each other and their own leadership. Within minutes of a new platoon leader arriving during the deployment, he was pounced on and '[e]very man t[ook] a turn."[112] What was the purpose? Sergeant O'Byrne commented that "if [the new platoon leader] doesn't take it, . . . we just won't listen to the [expletive]."[113] This is certainly not the type of leadership that the Army is trying to infuse in our young noncommissioned officer corps even if it was acceptable in this company.[114]

Another example of indiscipline was 2nd Platoon's panache for engaging in firefights in flip-flops and t-shirts.[115] While there are certainly times that this situation cannot be helped, fighting without personal protective equipment not only violates nearly every standard that senior leaders try to instill but also puts the Soldiers at extreme risk of injury or death. In another incident, the platoon chases a cow into concertina wire before spearing and eating it. In response to inquiries by the local elders and their company commander, the platoon lies about how the cow died.[116] As a result, the local nationals were not justly compensated[117] nor were COIN principles properly advanced.[118]

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[105] ANTON MEYRER, ONCE AN EAGLE (1968) (classic novel demonstrating the military's core values and leadership techniques).

[106] JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM (2005) (detailing lessons learned in fighting an insurgency from a historical perspective).

[107] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY ¶¶ 5-20, A-11 (15 Apr. 2009).

[108] For example, Junger briefly describes one situation where the company commander's request for an aerial strike is denied, but Junger does not describe how the commander's impassioned plea provided sufficient facts to meet the ROE standard when the approval authority subsequently orders the bomb drop. *Id.* at 115.

[109] JUNGER, *supra* note 1, at 96–100. 2nd Platoon did have Afghan National Army elements with them throughout the deployment, they were just rarely mentioned as Junger's focus was on the American infantryman's life, thoughts, and actions, and not how to operate in a COIN environment.

[110] *See generally* MICHAEL L. BURGOYNE & ALBERT J. MARCKWARDT, THE DEFENSE OF JISR AL–DOREAA (2009).

[111] *Id.*

[112] JUNGER, *supra* note 1, at 158 (the one noted exception was the platoon sergeant who just watched).

[113] *Id.* at 159. Junger's objectivity has to be questioned when he states that "lesser troops would never have even thought of [beating their platoon leader]," insinuating that only the best infantry platoons engage in this type of behavior. *Id.*

[114] U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP ¶ 3-17 (12 Oct. 2006) ("[Noncommissioned officer] leaders are responsible for setting and maintaining high-quality standards and discipline . . . and setting the example for [Soldiers]."); *id.* ¶ 3-61 ("Part of being a responsible subordinate implies supporting the chain of command.").

[115] *Id.* at 22, 152–53 (describing what appears to be a bunch of "cowboys" as opposed to disciplined Airborne Soldiers).

[116] *Id.* at 199–202.

[117] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶ D-36 (15 Dec. 2006) (stating that claims for wrongful acts of "U.S. forces may be paid to promote and maintain friendly relations with the host nation").

[118] *Id.* ¶ 7-25 ("One of the insurgents' most effective ways to undermine and erode political will is to portray their opposition as untrustworthy . . . ."); Memorandum from General David H. Petraeus, to the Soldiers, Sailors, Airmen, Marines, and Civilians of NATO ISAF and U.S. Forces-Afghanistan, subject: COMISAF's Counterinsurgency Guidance (1 Aug. 2010), *available at* http://www.isaf.nato.int/article/caat-anaysis-

## VI. Conclusion

Junger's *War* vividly describes an infantryman's life, thoughts, and actions while effectively using previous psychological studies and examples to guide the reader in understanding how Soldiers think. However, the story must be viewed in perspective of this one platoon during this one deployment. This book fails to provide many good lessons on leadership or how to be successful in Afghanistan, but the book does provide the reader some interesting points to ponder and gives the layperson a window into the environment of a deployed infantryman. With those caveats in mind, I would definitely encourage someone who is looking to learn about the experiences of Soldiers in Afghanistan to read *War*.

news/comisaf-coin-guidance.html (identifying twenty-four points to success in a counterinsurgency that includes acting with integrity and building the trust of the local populace).

# CLE News

**1. Resident Course Quotas**

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

**2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))**

| ATTRS. No. | Course Title | Dates |
|---|---|---|
| | **GENERAL** | |
| | | |
| 5-27-C20 | 184th JAOBC/BOLC III (Ph 2) | 18 Feb. – 4 May 11 |
| 5-27-C20 | 185th JAOBC/BOLC III (Ph 2) | 15 Jul – 28 Sep 11 |
| | | |
| 5-27-C22 | 59th Judge Advocate Officer Graduate Course | 16 Aug 10 – 26 May 11 |
| 5-27-C22 | 60th Judge Advocate Officer Graduate Course | 15 Aug – 25 May 12 |
| | | |
| 5F-F1 | 217th Senior Officer Legal Orientation Course | 20 – 24 Jun 11 |
| 5F-F1 | 218th Senior Officer Legal Orientation Course | 29 Aug – 2 Sep 11 |
| | | |
| 5F-F3 | 17th RC General Officer Legal Orientation Course | 1 – 3 Jun 11 |
| | | |
| 5F-F52 | 41st Staff Judge Advocate Course | 6 – 10 Jun 11 |
| | | |
| 5F-F52-S | 14th SJA Team Leadership Course | 6 – 8 Jun 11 |
| | | |
| JARC 181 | Judge Advocate Recruiting Conference | 20 – 22 Jul 11 |

| NCO ACADEMY COURSES | | |
|---|---|---|
| | | |
| 512-27D30 | 4th Advanced Leaders Course (Ph 2) | 14 Mar – 19 Apr 11 |
| 512-27D30 | 5th Advanced Leaders Course (Ph 2) | 23 May – 28 Jun 11 |
| 512-27D30 | 6th Advanced Leaders Course (Ph 2) | 1 Aug – 6 Sep 11 |
| | | |
| 512-27D40 | 2d Senior Leaders Course (Ph 2) | 14 Mar – 19 Apr 11 |
| 512-27D40 | 3d Senior Leaders Course (Ph 2) | 23 May – 28 Jun 11 |
| 512-27D40 | 4th Senior Leaders Course (Ph 2) | 1 Aug – 6 Sep 11 |

| WARRANT OFFICER COURSES | | |
|---|---|---|
| | | |
| 7A-270A0 | JA Warrant Officer Basic Course | 23 May – 17 Jun 11 |
| | | |
| 7A-270A1 | 22d Legal Administrators Course | 13 – 17 Jun 11 |
| | | |
| 7A-270A2 | 12th JA Warrant Officer Advanced Course | 28 Mar – 22 Apr 11 |

| ENLISTED COURSES | | |
|---|---|---|
| | | |
| 512-27D-BCT | 13th BCT NCOIC Course | 9 – 13 May 11 |
| | | |
| 512-27D/DCSP | 20th Senior Paralegal Course | 20 – 24 Jun 11 |
| | | |
| 512-27DC5 | 35th Court Reporter Course | 18 Apr – 17 Jun 11 |
| 512-27DC5 | 36th Court Reporter Course | 25 Jul – 23 Sep 11 |
| | | |
| 512-27DC6 | 11th Senior Court Reporter Course | 11 – 15 Jul 11 |

| ADMINISTRATIVE AND CIVIL LAW | | |
|---|---|---|
| | | |
| 5F-F22 | 64th Law of Federal Employment Course | 22 – 26 Aug 11 |
| | | |
| 5F-F24E | 2011USAREUR Administrative Law CLE | 12 – 16 Sep 11 |
| | | |
| 5F-F202 | 9th Ethics Counselors Course | 11 – 15 Apr 11 |

| CONTRACT AND FISCAL LAW | | |
|---|---|---|
| | | |
| 5F-F10 | 164th Contract Attorneys Course | 18 – 29 Jul 11 |
| | | |
| 5F-F103 | 11th Advanced Contract Course | 31 Aug – 2 Sep 11 |

| CRIMINAL LAW | | |
|---|---|---|
| | | |
| 5F-F31 | 17th Military Justice Managers Course | 22 – 26 Aug 11 |
| | | |
| 5F-F33 | 54th Military Judge Course | 18 Apr – 6 May 11 |
| | | |
| 5F-F34 | 38th Criminal Law Advocacy Course | 12 – 16 Sep 11 |
| 5F-F34 | 39th Criminal Law Advocacy Course | 19 – 23 Sep 11 |

| INTERNATIONAL AND OPERATIONAL LAW | | |
|---|---|---|
| | | |
| 5F-F40 | 2011 Brigade Judge Advocate Symposium | 9 – 13 May 11 |
| | | |
| 5F-F47E | 2011 USAREUR Operational Law CLE | 16 – 19 Aug 11 |
| | | |
| 5F-F41 | 7th Intelligence Law Course | 15 – 19 Aug 11 |
| | | |
| 5F-F47 | 56th Operational Law of War Course | 1 – 12 Aug 11 |
| | | |
| 5F-F48 | 4th Rule of Law Course | 11 -15 Jul 11 |

**3. Naval Justice School and FY 2010–2011 Course Schedule**

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

| Naval Justice School<br>Newport, RI | | |
|---|---|---|
| | | |
| **CDP** | **Course Title** | **Dates** |
| | | |
| 0257 | Lawyer Course (030) | 1 Aug – 7 Oct 11 |
| | | |
| 0258 (Newport) | Senior Officer (050)<br>Senior Officer (060)<br>Senior Officer (070)<br>Senior Officer (080) | 25 – 29 Apr 11 (Newport)<br>23 – 27 May 11 (Newport)<br>13 – 17 Jun 11 (Newport)<br>6 – 9 Sep 11 (Newport) |
| | | |
| 2622 (Fleet) | Senior Officer (Fleet) (080)<br>Senior Officer (Fleet) (090)<br>Senior Officer (Fleet) (100)<br>Senior Officer (Fleet) (110)<br>Senior Officer (Fleet) (120)<br>Senior Officer (Fleet) (130) | 9 – 13 May 11 (Pensacola)<br>16 – 20 May 11 (Naples, Italy)<br>27 Jun – 1 Jun 11 (Pensacola)<br>1 – 5 Aug 11 (Pensacola)<br>1 – 5 Aug 11 (Camp Lejeune)<br>8 – 12 Aug 11 (Quantico) |
| | | |
| 03RF | Continuing Legal Education (020)<br>Continuing Legal Education (030) | 7 Mar – 20 May 11<br>13 Jun – 28 Aug 11 |
| | | |

| | | |
|---|---|---|
| 07HN | Legalman Paralegal Core (010)<br>Legalman Paralegal Core (020)<br>Legalman Paralegal Core (030) | 26 Jan – 18 May 11<br>24 May – 9 Aug 11<br>31 Aug – 20 Dec 11 |
| | | |
| NA | Intermediate Trial Advocacy (010) | 16 – 20 May 11 |
| | | |
| 525N | Prosecuting Complex Cases (010) | 11 – 15 Jul 11 |
| | | |
| 627S | Senior Enlisted Leadership Course (Fleet) (090)<br>Senior Enlisted Leadership Course (Fleet) (100)<br>Senior Enlisted Leadership Course (Fleet) (110)<br>Senior Enlisted Leadership Course (Fleet) (120)<br>Senior Enlisted Leadership Course (Fleet) (130)<br>Senior Enlisted Leadership Course (Fleet) (150)<br>Senior Enlisted Leadership Course (Fleet) (160)<br>Senior Enlisted Leadership Course (Fleet) (170) | 25 – 27 Apr 11 (Bremerton)<br>16 – 20 May 11( Naples)<br>1 – 3 Jun 11 (San Diego)<br>1 – 3 Jun 11 (Norfolk)<br>6 – 8 Jul 11 (San Diego)<br>8 – 10 Aug 11 (Millington)<br>20 – 22 Sep ((Pendleton)<br>21 – 23 Sep 11 (Norfolk) |
| | | |
| 748A | Law of Naval Operations (020) | 19 – 23 Sep 11 (Norfolk) |
| | | |
| 748B | Naval Legal Service Command Senior Officer Leadership (010) | 25 Jul – 5 Aug 11 |
| | | |
| 748K | Trial Advocacy CLE (040) | 14 – 15 Apr 11 (San Diego) |
| | | |
| 786R | Advanced SJA/Ethics (010) | 25 – 29 Jul 11 |
| | | |
| 7485 | Classified Information Litigation Course (010) | 2 – 6 May 11 (Andrews AFB) |
| | | |
| 846L | Senior Legalman Leadership Course (010) | 25 – 29 Jul 11 |
| | | |
| 850T | Staff Judge Advocate Course (010)<br>Staff Judge Advocate Course (020) | 25 Apr – 6 May 11 (Norfolk)<br>11 – 22 Jul 11 (San Diego) |
| | | |
| 850V | Law of Military Operations (010) | 6 – 17 Jun 11 |
| | | |
| 900B | Reserve Lawyer Course (010)<br>Reserve Lawyer Course (020) | 20 – 24 Jun 11<br>26 – 30 Sep 11 |
| | | |
| 932V | Coast Guard Legal Technician Course (010) | 8 – 19 Aug 11 |
| | | |
| 961A (PACOM) | Continuing Legal Education (030) | 16 – 20 May 11 (Naples) |
| | | |
| 961G | Military Law Update Workshop (Enlisted) (010)<br>Military Law Update Workshop (Enlisted) (020) | TBD<br>TBD |
| | | |
| 961J | Defending Complex Cases (010) | 18 – 22 Jul 11 |
| | | |
| 3938 | Computer Crimes (010) | 6 – 10 Jun 11 (Newport) |
| | | |
| 3759 | Legal Clerk Course (040)<br>Legal Clerk Course (050)<br>Legal Clerk Course (060)<br>Legal Clerk Course (070)<br>Legal Clerk Course (080) | 4 – 8 Apr 11 (San Diego)<br>25 – 29 Apr 11 (Bremerton)<br>2 – 6 May 11 (San Diego)<br>6 – 10 Jun 11 (San Diego)<br>19 – 23 Sep 11 (Pendleton) |
| | | |
| 4040 | Paralegal Research & Writing (020)<br>Paralegal Research & Writing (030) | 7 – 20 Apr 11<br>18 – 29 Jul 11 |

| | | |
|---|---|---|
| 4044 | Joint Operational Law Training (010) | TBD |
| | | |
| NA | Iraq Pre-Deployment Training (020) | 12 – 14 Jul 11 |
| | | |
| NA | Legal Specialist Course (030) | 29 Apr – 1 Jul 11 |
| | | |
| NA | Paralegal Ethics Course (030) | 13 – 17 Jun 11 |
| | | |
| NA | Legal Service Court Reporter (030) | 22 July – 7 Oct 11 |

| **Naval Justice School Detachment<br>Norfolk, VA** | | |
|---|---|---|
| 0376 | Legal Officer Course (060)<br>Legal Officer Course (070)<br>Legal Officer Course (080)<br>Legal Officer Course (090) | 9 – 27 May 11<br>13 Jun – 1 Jul 11<br>11 – 29 Jul 11<br>15 Aug – 2 Sep 11 |
| | | |
| 0379 | Legal Clerk Course (060)<br>Legal Clerk Course (070)<br>Legal Clerk Course (080) | 16 – 27 May 11<br>18 – 29 Jul 1<br>22 Aug – 2 Sep 11 |
| | | |
| 3760 | Senior Officer Course (050)<br>Senior Officer Course (060)<br>Senior Officer Course (070) | 6 – 10 Jun 11<br>8 – 12 Aug 11 (Millington)<br>12 – 16 Sep 11 |

| **Naval Justice School Detachment<br>San Diego, CA** | | |
|---|---|---|
| | | |
| 947H | Legal Officer Course (050)<br>Legal Officer Course (060)<br>Legal Officer Course (070)<br>Legal Officer Course (080) | 9 – 27 May 11<br>13 Jun – 1 Jul 11<br>25 Jul – 12 Aug 11<br>22 Aug – 9 Sep 11 |

| | | |
|---|---|---|
| 947J | Legal Clerk Course (060)<br>Legal Clerk Course (070)<br>Legal Clerk Course (080)<br>Legal Clerk Course (090) | 9 – 20 May 11<br>13 – 24 Jun 11<br>1 – 12 Aug 11<br>22 Aug – 2 Sep 11 |

**4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule**

For information about attending the following cou Legal Clerk Course (070)rses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

| **Air Force Judge Advocate General School, Maxwell AFB,AL** | |
|---|---|
| | |
| **Course Title** | **Dates** |
| | |
| Paralegal Apprentice Course, Class 11-04 | 25 Apr – 8 Jun 11 |
| | |
| Cyber Law Course, Class 11-A | 26 – 28 Apr 11 |
| | |
| Total Air Force Operations Law Course, Class 11-A | 29 Apr – 1 May 11 |
| | |
| Advanced Trial Advocacy Course, Class 11-A | 9 – 13 May 11 |
| | |
| Operations Law Course, Class 11-A | 16 – 27 May 11 |
| | |
| Negotiation and Appropriate Dispute Resolution Course, 11-A | 23 – 27 May 11 |
| | |
| Reserve Forces Paralegal Course, Class 11-A | 6 – 10 Jun 11 |
| | |
| Staff Judge Advocate Course, Class 11-A | 13 – 24 Jun 11 |
| | |
| Law Office Management Course, Class 11-A | 13 – 24 Jun 11 |
| | |
| Paralegal Apprentice Course, Class 11-05 | 20 Jun – 3 Aug 11 |
| | |
| Judge Advocate Staff Officer Course, Class 11-C | 11 Jul – 9 Sep 11 |
| | |
| Paralegal Craftsman Course, Class 11-03 | 11 Jul – 23 Aug 11 |
| | |
| Paralegal Apprentice Course, Class 11-06 | 15 Aug – 21 Sep 11 |
| Environmental Law Course, Class 11-A | 22 – 26 Aug 11 |
| | |
| Trial & Defense Advocacy Course, Class 11-B | 12 – 23 Sep 11 |
| | |
| Accident Investigation Course, Class 11-A | 12 – 16 Sep 11 |

**5. Civilian-Sponsored CLE Courses**

**For additional information on civilian courses in your area, please contact one of the institutions listed below:**

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

| | |
|---|---|
| AGACL: | Association of Government Attorneys in Capital Litigation<br>Arizona Attorney General's Office<br>ATTN: Jan Dyer<br>1275 West Washington<br>Phoenix, AZ 85007<br>(602) 542-8552 |
| ALIABA: | American Law Institute-American Bar Association<br>Committee on Continuing Professional Education<br>4025 Chestnut Street<br>Philadelphia, PA 19104-3099<br>(800) CLE-NEWS or (215) 243-1600 |
| ASLM: | American Society of Law and Medicine<br>Boston University School of Law<br>765 Commonwealth Avenue<br>Boston, MA 02215<br>(617) 262-4990 |
| CCEB: | Continuing Education of the Bar<br>University of California Extension<br>2300 Shattuck Avenue<br>Berkeley, CA 94704<br>(510) 642-3973 |
| CLA: | Computer Law Association, Inc.<br>3028 Javier Road, Suite 500E<br>Fairfax, VA 22031<br>(703) 560-7747 |
| CLESN: | CLE Satellite Network<br>920 Spring Street<br>Springfield, IL 62704<br>(217) 525-0744<br>(800) 521-8662 |
| ESI: | Educational Services Institute<br>5201 Leesburg Pike, Suite 600<br>Falls Church, VA 22041-3202<br>(703) 379-2900 |
| FBA: | Federal Bar Association<br>1220 North Fillmore Street, Suite 444<br>Arlington, VA 22201<br>(571) 481-9100 |
| FB: | Florida Bar<br>650 Apalachee Parkway<br>Tallahassee, FL 32399-2300<br>(850) 561-5600 |
| GICLE: | The Institute of Continuing Legal Education<br>P.O. Box 1885<br>Athens, GA 30603<br>(706) 369-5664 |
| GII: | Government Institutes, Inc.<br>966 Hungerford Drive, Suite 24<br>Rockville, MD 20850<br>(301) 251-9250 |

| | |
|---|---|
| GWU: | Government Contracts Program<br>The George Washington University Law School<br>2020 K Street, NW, Room 2107<br>Washington, DC 20052<br>(202) 994-5272 |
| IICLE: | Illinois Institute for CLE<br>2395 W. Jefferson Street<br>Springfield, IL 62702<br>(217) 787-2080 |
| LRP: | LRP Publications<br>1555 King Street, Suite 200<br>Alexandria, VA 22314<br>(703) 684-0510<br>(800) 727-1227 |
| LSU: | Louisiana State University<br>Center on Continuing Professional Development<br>Paul M. Herbert Law Center<br>Baton Rouge, LA 70803-1000<br>(504) 388-5837 |
| MLI: | Medi-Legal Institute<br>15301 Ventura Boulevard, Suite 300<br>Sherman Oaks, CA 91403<br>(800) 443-0100 |
| MC Law: | Mississippi College School of Law<br>151 East Griffith Street<br>Jackson, MS 39201<br>(601) 925-7107, fax (601) 925-7115 |
| NAC | National Advocacy Center<br>1620 Pendleton Street<br>Columbia, SC 29201<br>(803) 705-5000 |
| NDAA: | National District Attorneys Association<br>44 Canal Center Plaza, Suite 110<br>Alexandria, VA 22314<br>(703) 549-9222 |
| NDAED: | National District Attorneys Education Division<br>1600 Hampton Street<br>Columbia, SC 29208<br>(803) 705-5095 |
| NITA: | National Institute for Trial Advocacy<br>1507 Energy Park Drive<br>St. Paul, MN 55108<br>(612) 644-0323 (in MN and AK)<br>(800) 225-6482 |
| NJC: | National Judicial College<br>Judicial College Building<br>University of Nevada<br>Reno, NV 89557 |

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|---|---|
| NMTLA: | New Mexico Trial Lawyers' Association<br>P.O. Box 301<br>Albuquerque, NM 87103<br>(505) 243-6003 |
| PBI: | Pennsylvania Bar Institute<br>104 South Street<br>P.O. Box 1027<br>Harrisburg, PA 17108-1027<br>(717) 233-5774<br>(800) 932-4637 |
| PLI: | Practicing Law Institute<br>810 Seventh Avenue<br>New York, NY 10019<br>(212) 765-5700 |
| TBA: | Tennessee Bar Association<br>3622 West End Avenue<br>Nashville, TN 37205<br>(615) 383-7421 |
| TLS: | Tulane Law School<br>Tulane University CLE<br>8200 Hampson Avenue, Suite 300<br>New Orleans, LA 70118<br>(504) 865-5900 |
| UMLC: | University of Miami Law Center<br>P.O. Box 248087<br>Coral Gables, FL 33124<br>(305) 284-4762 |
| UT: | The University of Texas School of Law<br>Office of Continuing Legal Education<br>727 East 26th Street<br>Austin, TX 78705-9968 |
| VCLE: | University of Virginia School of Law<br>Trial Advocacy Institute<br>P.O. Box 4468<br>Charlottesville, VA 22905 |

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

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of 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 enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail donna.pugh@us.army.mil.

**7. Mandatory Continuing Legal Education**

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

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

## Current Materials of Interest

**1. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses**

| Date | Region | Location | Units | ATRRS Number | POCs |
|---|---|---|---|---|---|
| 30 Apr – 6 May 2011 | Trial Defense Service Functional Excercise | San Antonio, TX | 22d LSO<br>154th LSO | NA | CPT DuShane Eubanks<br>d.eubanks@us.army.mil<br>972.343.3143<br>Mr. Anthony McCullough<br>Anthony.mccullough@us.army.mil<br>972.343.4263 |
| 14 – 21 May 2011 | Nationwide | Fort McCoy, WI | 8 Soldiers from each LSO | NA | SSG Keisha Parks<br>keisha.williams@usar.army.mil<br>301.944.3708 |
| 2 – 5 Jun 2011 | Yearly Training Brief and Senior Leadership Course | Gaithersburg, MD | Each LSO Cdr, Sr Paralegal NCO, plus one designated by LSO Cdr | NA | LTC Dave Barrett<br>David.barrett1@us.army.mil<br>SSG Keisha Parks<br>keisha.williams@usar.army.mil<br>301.944.3708 |
| 15 – 17 Jul 2011 | Northeast On-Site<br>FOCUS: Rule of Law | New York City, NY | 4th LSO<br>3d LSO<br>7th LSO<br>153d LSO | 004 | CPT Scott Horton<br>Scott.g.horton@us.army.mil<br>CW2 Deborah Rivera<br>Deborah.rivera1@us.army.mil<br>718.325.7077 |
| 12 – 14 Aug 2011 | Midwest On-Site<br>FOCUS: Rule of Law | Chicago, IL | 91st LSO<br>9th LSO<br>8th LSO<br>214th LSO | 005 | MAJ Brad Olson<br>Bradley.olson@us.army.mil<br>SFC Treva Mazique<br>treva.mazique@usar.army.mil<br>708.209.2600, ext. 229 |

**2. The Legal Automation Army-Wide Systems XXI—JAGCNet**

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

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

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

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

**3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

**4. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.